A. Trial Chamber - Paras 66 to 187

N.B. As per the disclaimer, neither the ICRC nor the authors can be identified with the opinions expressed in the Cases and Documents. Some cases even come to solutions that clearly violate IHL. They are nevertheless worthy of discussion, if only to raise a challenge to display more humanity in armed conflicts. **Similarly, in some of the texts used in the case studies, the facts may not always be proven;** nevertheless, they have been selected because they highlight interesting IHL issues and are thus published for didactic purposes.

[**Source**: ICTY, The Prosecutor v. Tihomir Blaskic, IT-95-14, Trial Chamber, Decision of 3 March 2000; available on http://www.un.org/icty; footnotes partially reproduced.]

IN THE TRIAL CHAMBER [...] Decision of: 3 March 2000

THE PROSECUTOR v. TIHOMIR BLASKIC

JUDGEMENT [...]

Abbreviations: ABiH Muslim Army of Bosnia-Herzegovina

BH Republic of Bosnia-Herzegovina [...]

ECMM European Commission Monitoring Mission

UNPROFOR United Nations Protection Force [...]

HVO Croatian Defence Council [...]

CBOZ Central Bosnia Operative Zone [...]

II. APPLICABLE LAW [...]

A. The requirement that there be an armed conflict [...]

2. Role [...]

b) A condition for jurisdiction under Article 5 of the Statute

1. An armed conflict is not a condition for a crime against humanity but is for its punishment by the Tribunal. Based on an analysis of the international instruments in force the Appeals Chamber affirmed the autonomy of that charge in relation to the conflict since it considered that the condition of belligerence had “no logical or legal basis” and ran contrary to customary international law.
2. Neither Articles 3 or 7 of the Statutes of the ICTR and the International Criminal Court nor *a fortiori* the case law of the Tribunal for Rwanda require the existence of an armed conflict as an element of the definition of a crime against humanity. In his Report to the Security Council on the adoption of the Statute of the future Court, the Secretary-General also explicitly refused to make this condition an ingredient of the crime: [C]rimes against humanity are aimed at any civilian population and are *prohibited regardless of whether they are committed in an armed conflict*, international or internal in character.

1. Nonetheless, the Appeals Chamber stated that whether internal or international, the existence of an armed conflict was a condition which gave the Tribunal jurisdiction over the offence. In its analysis of Article 5 of the Statute in the *Tadic* Appeal Decision, the Appeals Chamber concluded that: [...] Article 5 may be invoked as *a basis of jurisdiction* over crimes committed in either internal or international armed conflicts This position was reasserted in the *Tadic* Appeal Judgement: [T]he Prosecution is, moreover, correct in asserting that the armed conflict requirement is a *jurisdictional* element, not “a substantive element of the *mens rea* of crimes against humanity” (i.e. not a legal ingredient of the subjective element of the crime).

3. Nexus between the crimes imputed to the accused and the armed conflict

1. In addition to the existence of an armed conflict, it is imperative to find an evident *nexus* between the alleged crimes and the armed conflict as a whole. This does not mean that the crimes must all be committed in the precise geographical region where an armed conflict is taking place at a given moment. To show that a link exists, it is sufficient that: the alleged crimes were closely related to the hostilities occurring in other parts of the territories controlled by the parties to the conflict.

1. The foregoing observations demonstrate that a given municipality need not be prey to armed confrontation for the standards of international humanitarian law to apply there. It is also appropriate to note, as did the *Tadic* and *Celebici* Judgements, that a crime need not: be part of a policy or practice officially endorsed or tolerated by one of the parties to the conflict, or that the act be in actual furtherance of a policy associated with the conduct of the war or in the actual interest of a party to the conflict.

1. With particular regard to Article 5 of the Statute, the terms of that Article, the *Tadic* Appeal Judgement, the Decision of the Trial Chamber hearing the *Tadic* case and the statements of the representatives of the United States, France, Great Britain and the Russian Federation to the United Nations Security Council all point out that crimes against humanity must be perpetrated during an armed conflict. Thus,

provided that the perpetrator's act fits into the geographical and temporal context of the conflict, he need not have the intent to participate actively in the armed conflict.

2. In addition, the Defence does not challenge that crimes were committed during the armed conflict in question but rather that the conflict was international and that the crimes are ascribable to the accused. [...]

B. Article 2 of the Statute: Grave breaches of the Geneva Conventions

[...]

b) Protected persons and property [...]

i) The "nationality" of the victims [...]

1. [...] In an inter-ethnic armed conflict, a person's ethnic background may be regarded as a decisive factor in determining to which nation he owes his allegiance and may thus serve to establish the status of the victims as protected persons. The Trial Chamber considers that this is so in this instance.
2. [...] The disintegration of Yugoslavia occurred along "ethnic" lines. Ethnicity became more important than nationality in determining loyalties or commitments. [...]

ii) Co-belligerent States

1. The Prosecution considered that the Bosnian Muslim civilians were persons protected within the meaning of the Fourth Geneva Convention because Croatia and BH were not co-belligerent States and did not have normal diplomatic relations when the grave breaches were committed.
2. 135. The Defence contended that even if the conflict had been international, the Bosnian Muslim victims of acts imputed to the HVO still would not have had the status of "protected" persons since Croatia and Bosnia-Herzegovina were co-belligerent States united against the aggression of the Bosnian Serbs. It draws its argument from Article 4(2) of the Fourth Geneva Convention, which provides *inter alia* that:

nationals of a co-belligerent State shall not be regarded as protected persons while the State of which they are nationals has normal diplomatic representation in the State in whose hands they are.

1. The Defence argument may be tested from three perspectives: co-belligerence, normal diplomatic relations and the reasoning underlying Article 4 of the Fourth Geneva Convention.

a. Co-belligerence

1. Firstly, the reasoning of the Defence may be upheld only if Croatia and Bosnia-Herzegovina were co-belligerent States or allies within the meaning of Article 4. [...]
2. Granted, Croatia and Bosnia-Herzegovina did enter into agreements over the course of the conflict. One of these, dated 14 April 1992, stipulated that the diplomatic and consular missions of Croatia and Bosnia-Herzegovina abroad would be responsible for defending the interests of the nationals of the other State when there was only a mission of one of the two party-States in the territory of a given country. On 21 July 1992, an agreement on friendship and co-operation was signed and on 25 July the

two States entered into an agreement establishing diplomatic relations.

3. However, the true situation was very different from that which these agreements might suggest. Bosnia-Herzegovina perceived Croatia as a co-belligerent to the extent that they were fighting alongside each other against the Serbs. Nonetheless, it is evident that Bosnia did not see Croatia as a co-belligerent insofar as Croatia was lending assistance to the HVO in its fight against the ABiH over the period at issue. [...]
4. In any case, it seems obvious if only from the number of casualties they inflicted on each other that the ABiH and the HVO did not act towards each other within the CBOZ in the manner that co-belligerent States should.
5. In summary, the Trial Chamber deems it established that, in the conflict in central Bosnia, Croatia and Bosnia-Herzegovina were not co-belligerent States within the meaning of the Fourth Geneva Convention.

b. Reasoning of Article 4 of the Fourth Geneva Convention

1. The Trial Chamber adjudges a final observation appropriate. The Commentary of the Fourth Geneva Convention reaffirms that the nationals of co-belligerent States are not regarded as protected persons so long as the State of which they are nationals has normal diplomatic representation in the other co-belligerent State. The reasoning which underlies this exception is revealing: “It is assumed in this provision that the nationals of co-belligerent States, that is to say, of allies, do not need protection under the Convention”. [291]
2. In those cases where this reasoning does not apply, one might reflect on whether the exception must nevertheless be strictly heeded. In this respect, it may be useful to refer to the analysis of the status of “protected person” which appears in the *Tadic* Appeal Judgement. The Appeals Chamber noted that in the instances contemplated by Article 4(2) of the Convention:

those nationals are not “protected persons” as long as they benefit from the normal diplomatic protection of their State; when they lose it or in any event do not enjoy it, the Convention automatically grants them the status of “protected persons”. [292]

Consequently, in those situations where civilians do not enjoy the normal diplomatic protection of their State, they should be accorded the status of protected person.

1. The legal approach taken in the *Tadic* Appeal Judgement to the matter of nationality hinges more on actual relations than formal ties. If one bears in mind the purpose and goal of the Convention, the Bosnian Muslims must be regarded as protected persons within the meaning of Article 4 of the Convention since, in practice, they did not enjoy any diplomatic protection. [...]

c) The elements of the grave breaches

1. Once it has been established that Article 2 of the Statute is applicable in general, it becomes necessary to prove the ingredients of the various crimes alleged. The indictment contains six counts of grave breaches of the Geneva Conventions which refer to five sub-headings of Article 2 of the Statute.

2. The Defence claimed that it is not sufficient to prove that an offence was the result of reckless acts. However, according to the Trial Chamber, the *mens rea* constituting all the violations of Article 2 of the Statute includes both guilty intent and recklessness which may be likened to serious criminal negligence. The elements of the offences are set out below.

i) Article 2(a) – wilful killing (count 5)

1. The Trial Chamber hearing the *Celebici* case defined the offence of wilful killing in its Judgement. For the material element of the offence, it must be proved that the death of the victim was the result of the actions of the accused as a commander. The intent, or *mens rea*, needed to establish the offence of wilful killing exists once it has been demonstrated that the accused intended to cause death or serious bodily injury which, as it is reasonable to assume, he had to understand was likely to lead to death.

ii) Article 2(b) – inhuman treatment (counts 15 and 19)

1. Article 27 of the Fourth Geneva Convention states that protected persons "shall at all times be humanely treated". The *Celebici* Judgement analysed in great detail the offence of "inhuman treatment" [300]. The Trial Chamber hearing the case summarised its conclusions in the following manner:

inhuman treatment is an intentional act or omission, that is an act which, judged objectively, is deliberate and not accidental, which causes serious mental harm or physical suffering or injury or constitutes a serious attack on human dignity [...]. Thus, inhuman treatment is intentional treatment which does not conform with the fundamental principle of humanity, and forms the umbrella under which the remainder of the listed "grave breaches" in the Conventions fall. Hence, acts characterised in the Conventions and Commentaries as inhuman, or which are inconsistent with the principle of humanity, constitute examples of actions that can be characterised as inhuman treatment. [301]

1. The Trial Chamber further concluded that the category "inhuman treatment" included not only acts such as torture and intentionally causing great suffering or inflicting serious injury to body, mind or health but also extended to other acts contravening the fundamental principle of humane treatment, in particular those which constitute an attack on human dignity. In the final analysis, deciding whether an act constitutes inhuman treatment is a question of fact to be ruled on with all the circumstances of the case in mind. [302]

iii) Article 2(c) – wilfully causing great suffering or serious injury to body or health (count 8)

1. This offence is an intentional act or omission consisting of causing great suffering or serious injury to body or health, including mental health. This category of offences includes those acts which do not fulfil the conditions set for the characterisation of torture, even though acts of torture may also fit the definition given [303]. An analysis of the expression "wilfully causing great suffering or serious injury to body or health" indicates that it is a single offence whose elements are set out as alternative options. [304]

iv) Article 2(d) – extensive destruction of property (count 11)

1. An occupying Power is prohibited from destroying movable and non-movable property except where such destruction is made absolutely necessary by military operations. To constitute a grave breach, the destruction unjustified by military necessity must be extensive, unlawful and wanton. The notion of "extensive" is evaluated according to the facts of the case – a single act, such as the destruction of a hospital, may suffice to characterise an offence under this count. [305]

v) Article 2(h) – taking civilians as hostages (count 17)

1. Within the meaning of Article 2 of the Statute, civilian hostages are persons unlawfully deprived of their freedom, often arbitrarily and sometimes under threat of death. [306] However, as asserted by the Defence, detention may be lawful in some circumstances, *inter alia* to protect civilians or when security reasons so impel. The Prosecution must establish that, at the time of the supposed detention, the allegedly censurable act was perpetrated in order to obtain a concession or gain an advantage. The elements of the offence are similar to those of Article 3(b) of the Geneva Conventions covered under Article 3 of the Statute. [...]

C. Article 3 of the Statute – Violations of the Laws or Customs of War [...]

b) The elements of the offences

1. [...] The indictment alleges nine offences under Article 3 in ten counts. The Prosecutor maintained that the *mens rea* which characterises all the violations of Article 3 of the Statute, as well as the violations of Article 2, is the intentionality of the acts or omissions, a concept containing both guilty intent and recklessness likeable to serious criminal negligence. The elements of the offences which must be proved are set forth below.

i) Unlawful attack against civilians (count 3); attack upon civilian property (count 4)

1. As proposed by the Prosecution, the Trial Chamber deems that the attack must have caused deaths and/or serious bodily injury within the civilian population or damage to civilian property. The parties to the conflict are obliged to attempt to distinguish between military targets and civilian persons or property. Targeting civilians or civilian property is an offence when not justified by military necessity. Civilians within the meaning of Article 3 are persons who are not, or no longer, members of the armed forces. Civilian property covers any property that could not be legitimately considered a military objective. Such an attack must have been conducted intentionally in the knowledge, or when it was impossible not to know, that civilians or civilian property were being targeted not through military necessity.

ii) Murder (count 6)

1. The content of the offence of murder under Article 3 is the same as for wilful killing under Article 2.

iii) Violence to life and person (count 9)

1. This offence appears in Article 3(1)(a) common to the Geneva Conventions. It is a broad offence which,

at first glance, encompasses murder, mutilation, cruel treatment and torture and which is accordingly defined by the cumulation of the elements of these specific offences. The offence is to be linked to those of Article 2(a) (wilful killing), Article 2(b) (inhuman treatment) and Article 2(c) (causing serious injury to body) of the Statute. The Defence contended that the specific intent to commit violence to life and person must be demonstrated. The Trial Chamber considers that the mens rea is characterised once it has been established that the accused intended to commit violence to the life or person of the victims deliberately or through recklessness.

iv) Devastation of property (count 12)

1. Similar to the grave breach constituting part of Article 2(d) of the Statute, the devastation of property is prohibited except where it may be justified by military necessity. So as to be punishable, the devastation must have been perpetrated intentionally or have been the foreseeable consequence of the acts of the accused.

v) Plunder of public or private property (count 13)

1. The prohibition on the wanton appropriation of enemy public or private property extends to both isolated acts of plunder for private interest and to the "organized seizure of property undertaken within the framework of a systematic economic exploitation of occupied territory". Plunder "should be understood to embrace all forms of unlawful appropriation of property in armed conflict for which individual criminal responsibility attaches under international law, including those acts traditionally described as 'pillage'". [343]

vi) Destruction or wilful damage to institutions dedicated to religion or education (count 14)

1. The damage or destruction must have been committed intentionally to institutions which may clearly be identified as dedicated to religion or education and which were not being used for military purposes at the time of the acts. In addition, the institutions must not have been in the immediate vicinity of military objectives.

vii) Cruel treatment (count 16 and 20)

1. The Defence asserted *inter alia* that using human shields and trench digging constituted cruel treatment only if the victims were foreigners in enemy territory, inhabitants of an occupied territory or detainees. The Trial Chamber is of the view that treatment may be cruel whatever the status of the person concerned. The Trial Chamber entirely concurs with the *Celebici* Trial Chamber which arrived at the conclusion that cruel treatment constitutes an intentional act or omission "which causes serious mental or physical suffering or injury or constitutes a serious attack on human dignity. As such, it carries an equivalent meaning and therefore the same residual function for the purposes of Common article 3 of the Statute, as inhuman treatment does in relation to grave breaches of the Geneva Convention". [345]

viii) Taking of hostages (count 18)

1. The taking of hostages is prohibited by Article 3(b) common to the Geneva Conventions which is covered by Article 3 of the Statute. The commentary defines hostages as follows:

hostages are nationals of a belligerent State who of their own free will or through compulsion are in the hands of the enemy and are answerable with their freedom or their life for the execution of his orders and the security of his armed forces. [346]

Consonant with the spirit of the Fourth Convention, the Commentary sets out that the term “hostage” must be understood in the broadest sense. [347]The definition of hostages must be understood as being similar to that of civilians taken as hostages within the meaning of grave breaches under Article 2 of the Statute, that is – persons unlawfully deprived of their freedom, often wantonly and sometimes under threat of death. The parties did not contest that to be characterised as hostages the detainees must have been used to obtain some advantage or to ensure that a belligerent, other person or other group of persons enter into some undertaking. In this respect, the Trial Chamber will examine the evidence as to whether the victims were detained or otherwise deprived of their freedom by the Croatian forces (HVO or others). [...]

Footnotes

- 291: Commentary [published by the ICRC, **available on** http://www.icrc.org/ihl], p. 49 ↑
- 292: [...] [**See** ICTY, The Prosecutor v. Tadic [Part C., para. 165] ↑
- 300**:** Celebici Judgement, [**available on** http://www.un.org/icty/judgements.htm], paras 512 to 544 ↑
- 301: Celebici Judgement, para. 543 ↑
- 302: Celebici Judgement, para. 544 ↑
- 303: Celebici Judgement, para. 511 ↑
- 304: Celebici Judgement, para. 506 ↑
- 305: [ICRC] Commentary, p. 601 ↑
- 306: Commentary, pp. 600-601 ↑
- 343: Celebici Judgement, paras 590-591 ↑
- 345: Celebici Judgement, para. 552 ↑
- 346: [ICRC] Commentary, p. 229 ↑
- 347: Commentary, p. 230 ↑

Paras 384 to 754

III. FACTS AND DISCUSSION [...]

B. The municipality of Vitez

1. Ahmici, Santici, Pirici, Nadioci

1. The villages of Ahmici, Santici, Pirici, Nadioci, situated about 4 to 5 kilometres from the town of Vitez, belong to the municipality of Vitez. According to the last official census taken in 1991, the municipality

had 27 859 inhabitants, made up of 45.5% Croats, 5.4% Serbs, 41.3% Muslims and 2.8% other nationalities. These villages are about 1000 meters away from each other and their total population was about 2 000 inhabitants. Santici, the biggest of the villages, had a population of about 1 000 inhabitants, the majority of whom were Croats, whereas Pirici, the smallest of the villages, was a mere hamlet with a mixed population. Nadioci was also a village with a substantial majority of Croats. Ahmici had about 500 inhabitants, of whom about 90% were Muslims, which meant 200 Muslim houses and fifteen or so Croat ones.

2. On Friday 16 April 1993 at 05:30 hours, Croatian forces simultaneously attacked Vitez, Stari Vitez, Ahmici, Nadioci, Santici, Pirici, Novaci, Putis and Donja Veceriska. General Blaskic spoke of 20 to 22 sites of simultaneous combat all along the road linking Travnik, Vitez and Busovaca. The Trial Chamber found that this was a planned attack against the Muslim civilian population.

a) A planned attack with substantial assets

i) An organised attack

1. Several factors proved, beyond a doubt, that the 16 April attack was planned and organised.
2. The Trial Chamber notes, first of all, that the attack was preceded by several political declarations announcing that a conflict between Croatian forces and Muslim forces was imminent. [...]
3. The declarations were made together with orders issued by the political authorities to the Croatian population in Herceg-Bosna. In particular, on 14 April, Anto Valenta ordered the Croatian officials in the of municipalities in central Bosnia to impose a curfew from 21:00 hours to 06:00 hours and to close the schools until 19 April.
4. The evidence showed moreover that the Croatian inhabitants of those villages were warned of the attack and that some of them were involved in preparing it. Several witnesses, who lived in Ahmici at the material time, testified that Croatian women and children had been evacuated on the eve of the fighting. The witness Fatima Ahmic furthermore stated that a Croatian neighbour had informed her that the Croatian men were holding regular meetings and preparing to “cleanse Muslim people from Ahmici”. Witness S testified that the same thing happened in Nadioci: several Croatian families were said to have left the village several days before the attack and a Croatian neighbour is alleged to have advised the witness to hide. [...]
5. The method of attack also displayed a high level of preparation. Colonel Stewart stated that he had received many reports indicating an increased presence of HVO troops shortly before the events. The witness Sefik Pezer also said that on the evening of 15 April he had noticed unusual HVO troop movements. On the morning of 16 April, the main roads were blocked by HVO troops. According to several international observers, the attack occurred from three sides and was designed to force the fleeing population towards the south where elite marksmen, with particularly sophisticated weapons, shot those escaping. Other troops, organised in small groups of about five to ten soldiers, went from house to house setting fire and killing. It would seem that a hundred or so soldiers took part in the operation. [...] The attack was carried out in a [sic] morning.
6. All the international observers, military experts for the most part, who went to the site after the attack had occurred, stated without hesitation that such an operation could only be planned at a high level of the military hierarchy.
7. The accused himself also consistently expressed that view. Both in the statements he made shortly after

the attack in April 1993 and before the Trial Chamber, General Blaskic expressed his conviction that this was “an organised, systematic and planned crime”.

8. Like Trial Chamber II in the Kupreskic case, the Trial Chamber therefore finds, and this finding is not open to challenge and was indeed unchallenged, that the attack carried out on Ahmici, Nadioci, Santici and Pirici was planned at a high level of the military hierarchy. [...]

b) An attack against the Muslim civilian population

i) The absence of military objectives

1. The Defence put forward different arguments in order to explain the fighting. First of all, it pointed to the strategic nature of the road linking Busovaca and Travnik. That road was controlled by the HVO at the material time, but the HVO intelligence services are said to have noted a movement of Muslim troops on 15 April from Travnik towards Ahmici and the neighbouring villages, which led them to believe that the Muslims were seeking to regain control of the road. That submission could not however be deemed to have been sufficient justification for the attack on the villages which with the exception of Antici, were not directly on the main road. [...]
2. The Defence also explained that “authorised CBOZ military activity at times included a legitimate military tactic known as fighting in built-up areas (FIBUA)” defined by the witness Thomas as “clearing of a built-up area on a house-by-house area”, usually with automatic weapons and grenades. The Defence recognised that such a tactic often results in many victims, the number of which may even exceed that of the hostile soldiers. The Defence submitted however that those civilian victims should be considered “collateral casualties” and that such an attack could be legal in certain circumstances. That is an incorrect interpretation of Witness Baggesen’s statements to the Trial Chamber. He said that on the contrary there could be no justification for the death of so many civilians. Furthermore, General Blaskic himself acknowledged in his oral evidence that the tactic normally used by professionals avoided all combat operations inside villages. The witness Landry, who was an ECMM monitor from February to August 1993, also explained that in “this kind of cleansing operation, especially for an area of tactical significance [...], you would destroy certain buildings or houses, [...] those areas which contained some sort of military munitions but it was quite usual [...] to actually go ahead and burn a village”. He went to Ahmici on 16 April and noted however that there was no longer any military presence there in the evening of 16 April whereas that morning he had noticed a high concentration of HVO troops on the main roads linking Vitez and Zenica. According to that witness: “if this village did have some tactical importance, perhaps it would have been for the HVO to be able to consolidate their position and to maintain some sort of observation post or stop post for the military operations”. And he added: “it is very difficult for me to say from a military perspective, to say what was the military reason to carry out such a carnage”. [...]
3. Lieutenant-Colonel Thomas, UNPROFOR commander at the material time, went to Ahmici on 17 April 1993 and stated that he saw no evidence suggesting that there had been a conflict between two separate military entities, nor any evidence of resistance such as trenches, sandbags or barbed wire indicating the presence in the village of an armed force ready for combat. Furthermore, the bodies he saw were not in uniform and not a single weapon was found in the destroyed buildings. On the contrary, there were women and children amongst the bodies strewn on the ground. [...] In its second periodical

report on the human rights situation on the territory of the former Yugoslavia, the Commission on Human Rights even found that “by all accounts, *including those of the local Croat HVO commander and international observers*, this village contained no legitimate military targets and there was no organised resistance to the attack”. The accused himself admitted before the Trial Chamber that the “villagers of Ahmici, that is Bosniak Muslims,” had been the victims of the attack without there having been any attempt to distinguish between the civilian population and combatants.

4. The Trial Chamber is therefore convinced beyond any reasonable doubt that no military objective justified these attacks.

ii) The discriminatory nature of the attack

1. Although the village of Ahmici had no strategic importance which justified the fighting, it was however of particular significance for the Muslim community in Bosnia. Many imams and mullahs came from there. For that reason, Muslims in Bosnia considered Ahmici to be a holy place. In that way, the village of Ahmici symbolised Muslim culture in Bosnia. The witness Watters was certain that Ahmici had been chosen as a target for that reason.
2. The eyewitnesses who saw the attack all describe the same method of attack. [...] Some time after the artillery shots, soldiers organised in groups of between five and ten went into each Muslim house shouting insults against the Muslims, referring to them as “balijas”. The groups of soldiers sometimes forced the inhabitants out of their houses, without however allowing them the time to dress. Most of them were still in their night-clothes, some not even having had time to put anything on their feet before fleeing. The soldiers killed the men of fighting age at point blank range and set fire to the Muslims’ houses and stables with incendiary bullets, grenades and petrol. Some houses were torched before their inhabitants even had a chance to get out. [...]

iv) Murders of civilians

1. Most of the men were shot at point blank range. Several witnesses described how the men of their families had been rounded up and then killed by Croatian soldiers. [...] The international observers also saw bodies lying in the road, many of whom had been killed by a bullet to the head fired at short range.
2. Twenty or so civilians were also killed in Donji Ahmici as they tried to flee the village. The fleeing inhabitants had to cross an open field before getting to the main road. About twenty bodies of people killed by very precise shots were found in the field. Military experts concluded that they had been shot by marksmen.
3. Other bodies were found in the houses so badly charred they could not be identified and in positions suggesting that they had been burned alive. The victims included many women and children. The British UNPROFOR battalion reported that: “[o]f the 89 bodies which have been recovered from the village, most are those of elderly people, women, children and infants”. An ECMM observer said he had seen the bodies of children who, from their position, seemed to have died in agony in the flames: “some of the houses were absolute scenes of horror, because not only were the people dead, but there were those who were burned and obviously some had been – according to what the monitors said, they had been burned with flame launchers, which had charred the bodies and this was the case of several of the bodies”.
4. According to the ECMM report, at least 103 people were killed during the attack on Ahmici.

v) Destruction of dwellings

1. According to the Centre for Human Rights in Zenica, 180 of the existing 200 Muslim houses in Ahmici were burned during the attack. The Commission on Human Rights made the same finding in its report dated 19 May 1993. Prosecution exhibit P117 also showed that nearly all the Muslim houses had been torched, whereas all the Croat houses had been spared. [...]

vi) Destruction of institutions dedicated to religion

1. Several religious edifices were destroyed. The Defence did not deny the destruction of the mosque at Donji Ahmici or of the matif mesjid at Gornji Ahmici. However, it did maintain that the reason for this destruction was that “the school and church in Ahmici became locations of fighting following the attack by the Fourth Military Police Battalion”.
2. Conversely, the Prosecutor contended that “both mosques were deliberately mined and given the careful placement of the explosives inside the buildings, they must have been mined after HVO soldiers had control of the buildings”.
3. The Trial Chamber notes at the outset that according to the witness Stewart, it was barely plausible that soldiers would have taken refuge in the mosque since it was impossible to defend. Furthermore, the mosque in Donji Ahmici was destroyed by explosives laid around the base of its minaret. [...] The destruction of the minaret was therefore premeditated and could not be justified by any military purpose whatsoever. The only reasons to explain such an act were reasons of discrimination. [...]

vii) Plunder

1. The soldiers also set fire to the stables and slaughtered the livestock as the accused noted himself when he visited the site on 27 April. [...] The victims of these thefts were always Muslim. [...]

c) Conclusion

1. The methods of attack and the scale of the crimes committed against the Muslim population or the edifices symbolising their culture sufficed to establish beyond reasonable doubt that the attack was aimed at the Muslim civilian population. [...]
2. Witness Baggesen said of the attack on Ahmici: “We think that this operation, military operation against the civilian population was to scare them and to show what would happen to other villages and the Muslim inhabitants in other villages if they did not move out. So I think this was an example to show”, especially given what Ahmici symbolised for the Muslim community.
3. The Commission on Human Rights noted that all the Muslims had fled from Ahmici. Only a few Croats had remained. According to the witness Kajmovic, the Ahmici Muslim population had completely disappeared in 1995. According to the Centre for Human Rights in Zenica, the four Muslim families living in Nadioci had been exterminated. [...]
4. All that evidence enables the Trial Chamber to conclude without any doubt that the villages of Ahmici, Pirici, Santici and Nadioci had been the object of a planned attack on the Muslim population on 16 April 1993. [...]

IV. FINAL CONCLUSIONS

1. The Trial Chamber concludes that the acts ascribed to Tihomir Blaskic occurred as part of an international armed conflict because the Republic of Croatia exercised total control over the Croatian Community of Herceg-Bosna and the HVO and exercised general control over the Croatian political and military authorities in central Bosnia.
2. The accused was appointed by the Croatian military authorities. Following his arrival in Kiseljak in April 1992, he was designated chief of the Central Bosnia Operative Zone on 27 June 1992 and remained there until the end of the period covered by the indictment. From the outset, he shared the policy of the local Croatian authorities. For example, he outlawed the Muslim Territorial Defence forces in the municipality of Kiseljak.
3. From May 1992 to January 1993, tensions between Croats and Muslims continued to rise. At the same time, General Blaskic reinforced the structure of the HVO armed forces with the agreement of the Croatian political authorities.
4. In January 1993, the Croatian political authorities sent an ultimatum to the Muslims, *inter alia*, so as to force them to surrender their weapons. They sought to gain control of all the territories considered historically Croatian, in particular the Lasva Valley. Serious incidents then broke out in Busovaca and Muslim houses were destroyed. After being detained, many Muslim civilians were forced to leave the territory of the municipality.
5. Despite the efforts of international organisations, especially the ECMM and UNPROFOR, the atmosphere between the communities remained extremely tense.
6. On 15 April 1993, the Croatian military and political authorities, including the accused, issued a fresh ultimatum. General Blaskic met with the HVO, military police and Vitezovi commanders and gave them orders which the Trial Chamber considers to be genuine attack orders. On 16 April 1993, the Croatian forces, commanded by General Blaskic, attacked in the municipalities of Vitez and Busovaca.
7. The Croatian forces, both the HVO and independent units, plundered and burned to the ground the houses and stables, killed the civilians regardless of age or gender, slaughtered the livestock and destroyed or damaged the mosques. Furthermore, they arrested some civilians and transferred them to detention centres where the living conditions were appalling and forced them to dig trenches, sometimes also using them as hostages or human shields. The accused himself stated that twenty or so villages were attacked according to a pattern which never changed. The village was firstly “sealed off”. Artillery fire opened the attack and assault and search forces organised into groups of five to ten soldiers then “cleansed” the village. The same scenario was repeated in the municipality of Kiseljak several days later. The Croatian forces acted in perfect co-ordination. The scale and uniformity of the crimes committed against the Muslim population over such a short period of time has enabled the conclusion that the operation was, beyond all reasonable doubt, planned and that its objective was to make the Muslim population take flight.
8. The attacks were thus widespread, systematic and violent and formed part of a policy to persecute the Muslim populations.
9. To achieve the political objectives to which he subscribed, General Blaskic used all the military forces on which he could rely, whatever the legal nexus subordinating them to him.
10. He issued the orders sometimes employing national discourse and with no concern for their possible consequences. In addition, despite knowing that some of the forces had committed crimes, he redeployed them for other attacks.

11. [...] The end result of such an attitude was not only the scale of the crimes, which the Trial Chamber has explained, but also the realisation of the Croatian nationalists' goals – the forced departure of the majority of the Muslim population in the Lasva Valley after the death and wounding of its members, the destruction of its dwellings, the plunder of its property and the cruel and inhuman treatment meted out to many. [...]

Disposition

VI. DISPOSITION

FOR THE FOREGOING REASONS, THE TRIAL CHAMBER, in a unanimous ruling of its members,

FINDS Tihomir Blaskic GUILTY:

of having ordered a crime against humanity, namely persecutions against the Muslim civilians of Bosnia, in the municipalities of Vitez, Busovaca and Kiseljak [...] between 1 May 1992 and 31 January 1994 (count 1) for the following acts:

- attacks on towns and villages;
- murder and serious bodily injury;
- the destruction and plunder of property and, in particular, of institutions dedicated to religion or education;
- inhuman or cruel treatment of civilians and, in particular, their being taken hostage and used as human shields;
- the forcible transfer of civilians; and by these same acts, in particular, as regards an international armed conflict, General Blaskic committed:

- a violation of the laws or customs of war under Article 3 of the Statute and recognised by Article 51(2) of Additional Protocol I: unlawful attacks on civilians (count 3);
- a violation of the laws or customs of war under Article 3 of the Statute and recognised by Article 52(1) of Additional Protocol I: unlawful attacks on civilian objects (count 4);
- a grave breach, under Article 2(a) of the Statute: wilful killing (count 5);
- a violation of the laws or customs of war under Article 3 and recognised by Article 3(1)(a) of the Geneva Conventions: murder (count 6);
- a crime against humanity, under Article 5(a) of the Statute: murder (count 7);
- a grave breach under Article 2(c) of the Statute: wilfully causing great suffering or serious injury to body or health (count 8);
- a violation of the laws or customs of war under Article 3 and recognised by Article 3(1)(a) of the Geneva Conventions: violence to life and person (count 9);
- a crime against humanity under Article 5(i) of the Statute: inhumane acts (count 10);
- a grave breach under Article 2(d) of the Statute: extensive destruction of property (count 11);
- a violation of the laws or customs of war under Article 3(b) of the Statute: devastation not justified by military necessity (count 12);
- a violation of the laws or customs of war under Article 3(e) of the Statute: plunder of public or private

property (count 13);
- a violation of the laws or customs of war under Article 3(d) of the Statute: destruction or wilful damage done to institutions dedicated to religion or education (count 14);
- a grave breach under Article 2(b) of the Statute: inhuman treatmet (count 15);
- a violation of the laws or customs of war under Article 3 of the Statute and recognised by Article 3(1)(a) of the Geneva Conventions: cruel treatment (count 16);
- a grave breach under Article 2(h) of the Statute: taking civilians as hostages (count 17);
- a violation of the laws or customs of war under Article 3 of the Statute and recognised by Article 3(1)(b) of the Geneva Conventions: taking of hostages (count 18);
- a grave breach, under Article 2(b) of the Statute: inhuman treatment (count 19);
- a violation of the laws or customs of war under Article 3 of the Statute and recognised by Article 3(1)(a) of the Geneva Conventions: cruel treatment (count 20),

In any event, as a commander, he failed to take the necessary and reasonable measures which would have allowed these crimes to be prevented or the perpetrators thereof to be punished. [...] and therefore,

SENTENCES Tihomir Blaskic to forty-five years in prison; [...].

B. Appeals Chamber - Paras 41 to 128

[**Source**: ICTY, The Prosecutor v. Tihomir Blaskic, IT-95-14-A; Appeals Chamber, Decision of 29 July 2004; available on http://www.un.org/icty; footnotes omitted]

IN THE APPEALS CHAMBER

PROSECUTOR v. TIHOMIR BLASKIC

JUDGEMENT

[...]

III. ALLEGED ERRORS OF LAW CONCERNING ARTICLE 7 OF THE STATUTE [...]

A. Individual Criminal Responsibility under Article 7(1) of the Statute [...]

1. Having examined the approaches of national systems as well as International Tribunal precedents, the Appeals Chamber considers that none of the Trial Chamber's [...] articulations of the *mens rea* for ordering under Article 7(1) of the Statute, in relation to a culpable mental state that is lower than direct intent, is correct. The knowledge of any kind of risk, however low, does not suffice for the imposition of criminal responsibility for serious violations of international humanitarian law. The Trial Chamber does not specify what degree of risk must be proven. Indeed, it appears that under the Trial Chamber's standard, any military commander who issues an order would be criminally responsible, because there is always a possibility that violations could occur. The Appeals Chamber considers that an awareness of

a higher likelihood of risk and a volitional element must be incorporated in the legal standard.

2. The Appeals Chamber therefore holds that a person who orders an act or omission with the awareness of the substantial likelihood that a crime will be committed in the execution of that order, has the requisite *mens rea* for establishing liability under Article 7(1) pursuant to ordering. Ordering with such awareness has to be regarded as accepting that crime. [...]

B. Command Responsibility under Article 7(3) of the Statute

1. In this section, the Appeals Chamber will only address alleged legal errors concerning Article 7(3) of the Statute, and will leave contentions raised by the Appellant in his second ground of appeal, concerning whether the facts of the case support a finding that the Appellant had effective control in the Central Bosnia Operative Zone (CBOZ), to the parts of the Judgement where the factual grounds of appeal are considered. [...]

2. The standard of "had reason to know" [...]

1. The Appeals Chamber notes that the Trial Chamber concluded that: if a commander has exercised due diligence in the fulfilment of his duties yet lacks knowledge that crimes are about to be or have been committed, such lack of knowledge cannot be held against him. However, taking into account his particular position of command and the circumstances prevailing at the time, such ignorance cannot be a defence where the absence of knowledge is the result of negligence in the discharge of his duties: this commander had reason to know within the meaning of the Statute. At another place in the Trial Judgement, the Trial Chamber "holds, again in the words of the Commentary, that '[t]heir role obliges them to be constantly informed of the way in which their subordinates carry out the tasks entrusted them, and to take the necessary measures for this purpose.'" One of the duties of a commander is therefore to be informed of the behaviour of his subordinates.

1. The Appeals Chamber considers that the *Celebici* Appeal Judgement has settled the issue of the interpretation of the standard of "had reason to know." In that judgement, the Appeals Chamber stated that "a superior will be criminally responsible through the principles of superior responsibility only *if information was available to him* which would have put him on notice of offences committed by subordinates." Further, the Appeals Chamber stated that "[n]eglect of a duty to acquire such knowledge, however, does not feature in the provision (Article 7(3)) as a separate offence, and a superior is not therefore liable under the provision for such failures but only for failing to take necessary and reasonable measures to prevent or to punish." There is no reason for the Appeals Chamber to depart from that position. The Trial Judgement's interpretation of the standard is not consistent with the jurisprudence of the Appeals Chamber in this regard and must be corrected accordingly.
2. As to the argument of the Appellant that the Trial Chamber based command responsibility on a theory of negligence, the Appeals Chamber recalls that the ICTR Appeals Chamber has on a previous occasion rejected criminal negligence as a basis of liability in the context of command responsibility, and that it stated that "it would be both unnecessary and unfair to hold an accused responsible under a head of responsibility which has not clearly been defined in international criminal law." It expressed that "[r]eferences to 'negligence' in the context of superior responsibility are likely to lead to confusion of thought...." The Appeals Chamber expressly endorses this view.
3. The appeal in this respect is allowed, and the authoritative interpretation of the standard of "had reason

to know" shall remain the one given in the *Celebici* Appeal Judgement, as referred to above. [...]

IV. ALLEGED ERRORS OF LAW CONCERNING ARTICLE 5 OF THE STATUTE

A. Common Statutory Elements of Crimes against Humanity

1. The Appellant submits that the Trial Chamber "erred in several significant respects in construing and applying the substantive legal standards of Article 5." Generally, he claims that: [the] Trial Chamber deviated from established principles of Tribunal and/or customary law by: (1) failing to require that [the] Appellant possessed the requisite knowledge of the broader criminal attack necessary to establish a crime against humanity; (2) failing to define the *actus reus* of the crime of persecution in a sufficiently narrow fashion in accordance with the principles of legality and specificity; and (3) failing to require that [the] Appellant possessed the requisite specific discriminatory intent necessary to establish the crime of persecution.

1. Requirement that the acts of the accused must take place in the context of a widespread or systematic attack [...]

1. It is well established in the jurisprudence of the International Tribunal that in order to constitute a crime against humanity, the acts of an accused must be part of a widespread or systematic attack directed against any civilian population. This was recognized by the Trial Chamber, which stated: "there can be no doubt that inhumane acts constituting a crime against humanity must be part of a systematic or widespread attack against civilians."
2. The Trial Chamber then stated that the "systematic" character: refers to four elements which for the purposes of this case may be expressed as follows:

- ◦ the existence of a political objective, a plan pursuant to which the attack is perpetrated or an ideology, in the broad sense of the word, that is, to destroy, persecute or weaken a community;
  ◦ the perpetration of a criminal act on a very large scale against a group of civilians or the repeated and continuous commission of inhumane acts linked to one another;
  ◦ the preparation and use of significant public or private resources, whether military or other;
  ◦ the implication of high-level political and/or military authorities in the definition and establishment of the methodical plan.

The Trial Chamber went on to state that the plan "need not necessarily be declared expressly or even stated clearly and precisely" and that it could be surmised from a series of various events, examples of which it listed.

1. The Appeals Chamber considers that it is unclear whether the Trial Chamber deemed the existence of a plan to be a legal element of a crime against humanity. In the view of the Appeals Chamber, the existence of a plan or policy may be evidentially relevant, but is not a legal element of the crime. [...]

2. Requirement that the attack be directed against a civilian population [...]

1. [...] The legal requirement under Article 5 of the Statute that the attack in question be directed against a

civilian population was elaborated upon in the *Kunarac* Appeal Judgement, wherein the Appeals Chamber stated that: the use of the word "population" does not mean that the entire population of the geographical entity in which the attack is taking place must have been subjected to that attack. It is sufficient to show that enough individuals were targeted in the course of the attack, or that they were targeted in such a way as to satisfy the Chamber that the attack was in fact directed against a civilian "population", rather than against a limited and randomly selected number of individuals.

1. The Appeals Chamber in *Kunarac* further stated: the expression "directed against" is an expression which "specifies that in the context of a crime against humanity the civilian population is the primary object of the attack". In order to determine whether the attack may be said to have been so directed, the Trial Chamber will consider, *inter alia*, the means and method used in the course of the attack, the status of the victims, their number, the discriminatory nature of the attack, the nature of the crimes committed in its course, the resistance to the assailants at the time and the extent to which the attacking force may be said to have complied or attempted to comply with the precautionary requirements of the laws of war. To the extent that the alleged crimes against humanity were committed in the course of an armed conflict, the laws of war provide a benchmark against which the Chamber may assess the nature of the attack and the legality of the acts committed in its midst.

1. In this case, the Trial Chamber correctly recognized that a crime against humanity applies to acts directed against any civilian population. However, it stated that "the specificity of a crime against humanity results not from the status of the victim but the scale and organisation in which it must be committed." The Appeals Chamber considers that both the status of the victim as a civilian and the scale on which it is committed or the level of organization involved characterize a crime against humanity.
2. The Trial Chamber concluded: Crimes against humanity therefore do not mean only acts committed against civilians in the strict sense of the term but include also crimes against two categories of people: those who were members of a resistance movement and former combatants – regardless of whether they wore wear [*sic*] uniform or not – but who were no longer taking part in hostilities when the crimes were perpetrated because they had either left the army or were no longer bearing arms or, ultimately, had been placed *hors de combat*, in particular, due to their wounds or their being detained. It also follows that the specific situation of the victim at the moment the crimes were committed, rather than his status, must be taken into account in determining his standing as a civilian. Finally, it can be concluded that the presence of soldiers within an intentionally targeted civilian population does not alter the civilian nature of that population.

1. Before determining the scope of the term "civilian population", the Appeals Chamber deems it necessary to rectify the Trial Chamber's statement, contained in paragraph 180 of the Trial Judgement, according to which "[t]argeting civilians or civilian property is an offence when not justified by military necessity." The Appeals Chamber underscores that there is an absolute prohibition on the targeting of civilians in customary international law.
2. In determining the scope of the term "civilian population," the Appeals Chamber recalls its obligation to ascertain the state of customary law in force at the time the crimes were committed. In this regard, it notes that the Report of the Secretary General states that the Geneva Conventions "constitute rules of international humanitarian law and provide the core of the customary law applicable in international

armed conflicts." Article 50 of Additional Protocol I to the Geneva Conventions contains a definition of civilians and civilian populations, and the provisions in this article may largely be viewed as reflecting customary law. As a result, they are relevant to the consideration at issue under Article 5 of the Statute, concerning crimes against humanity.

3. Article 50, paragraph 1, of Additional Protocol I states that a civilian is "any person who does not belong to one of the categories of persons referred to in Article 4A(1), (2), (3) and (6) of the Third Convention and in Article 43 of this Protocol. In case of doubt whether a person is a civilian, that person shall be considered to be a civilian." The Appeals Chamber notes that the imperative "in case of doubt" is limited to the expected conduct of a member of the military. However, when the latter's criminal responsibility is at issue, the burden of proof as to whether a person is a civilian rests on the Prosecution. [...]
4. Read together, Article 50 of Additional Protocol I and Article 4A of the Third Geneva Convention establish that members of the armed forces, and members of militias or volunteer corps forming part of such armed forces, cannot claim civilian status. Neither can members of organized resistance groups, provided that they are commanded by a person responsible for his subordinates, that they have a fixed distinctive sign recognizable at a distance, that they carry arms openly, and that they conduct their operations in accordance with the laws and customs of war. However, the Appeals Chamber considers that the presence within a population of members of resistance groups, or former combatants, who have laid down their arms, does not alter its civilian characteristic. The Trial Chamber was correct in this regard.
5. However, the Trial Chamber's view that the specific situation of the victim at the time the crimes were committed must be taken into account in determining his standing as a civilian may be misleading. The ICRC Commentary is instructive on this point and states: All members of the armed forces are combatants, and only members of the armed forces are combatants. This should therefore dispense with the concept of quasi-combatants, which has sometimes been used on the basis of activities related more or less directly with the war effort. Similarly, any concept of a part-time status, a semi-civilian, semi-military status, soldier by night and peaceful citizen by day, also disappears. A civilian who is incorporated in an armed organization such as that mentioned in paragraph 1, becomes a member of the military and a combatant throughout the duration of the hostilities (or in any case, until he is permanently demobilized by the responsible command referred to in paragraph 1), whether or not he is in combat, or for the time being armed. If he is wounded, sick or shipwrecked, he is entitled to the protection of the First and Second Conventions (Article 44, paragraph 8), and, if he is captured, he is entitled to the protection of the Third Convention (Article 44, paragraph 1). As a result, the specific situation of the victim at the time the crimes are committed may not be determinative of his civilian or non-civilian status. If he is indeed a member of an armed organization, the fact that he is not armed or in combat at the time of the commission of crimes, does not accord him civilian status.

1. The Trial Chamber also stated that the "presence of soldiers within an intentionally targeted civilian population does not alter the civilian nature of that population." The ICRC Commentary on this point states:

... in wartime conditions it is inevitable that individuals belonging to the category of combatants become intermingled with the civilian population, for example, soldiers on leave visiting their families. However, provided that these are not regular units with fairly large numbers, this does not in any way change the civilian character of a population.

Thus, in order to determine whether the presence of soldiers within a civilian population deprives the population of its civilian character, the number of soldiers, as well as whether they are on leave, must be examined.

1. In light of the foregoing, the Appeals Chamber concludes that the Trial Chamber erred in part in its characterization of the civilian population and of civilians under Article 5 of the Statute. [...]

4. Requirement that the accused has knowledge that his acts formed part of the broader criminal attack

1. The Appellant submits that the Prosecution must establish that the accused knew of the existence of a widespread or systematic attack against a civilian population and that his acts form part of the attack. According to the Appellant, the Trial Chamber failed to determine whether and to what extent he may have known of the attack and the fact that his acts were a part thereof. Instead, he claims, the Trial Chamber applied a standard of recklessness which is not supported in law, and limited its consideration to the extent to which the Appellant may have been aware of the political context in which his acts fit, a standard below that required by the definition of crimes against humanity. [...]
2. The Appeals Chamber considers that the *mens rea* of crimes against humanity is satisfied when the accused has the requisite intent to commit the underlying offence(s) with which he is charged, and when he knows that there is an attack on the civilian population and also knows that his acts comprise part of that attack. Moreover, the Appeals Chamber further considers that:

[f]or criminal liability pursuant to Article 5 of the Statute [to attach], “the motives of the accused for taking part in the attack are irrelevant and a crime against humanity may be committed for purely personal reasons.” Furthermore, the accused need not share the purpose or goal behind the attack. It is also irrelevant whether the accused intended his acts to be directed against the targeted population or merely against his victim. It is the attack, not the acts of the accused, which must be directed against the target population and the accused need only know that his acts are part thereof. At most, evidence that he committed the acts for purely personal reasons could be indicative of a rebuttable assumption that he was not aware that his acts were part of that attack.

1. In this case, the Trial Chamber referred to the *Tadic* Appeal Judgement, according to which “the acts of the accused must comprise part of a pattern of widespread or systematic crimes directed against a civilian population and that the accused must have known that his acts fit into such a pattern.” It then stated the following:

The accused need not have sought all the elements of the context in which his acts were perpetrated; it suffices that, through the functions he willingly accepted, he knowingly took the risk of participating in the implementation of that context.

Moreover, the nexus with the institutional or *de facto* regime, on the basis of which the perpetrator acted, and the knowledge of this link, as required by the case-law of the Tribunal and the ICTR and restated above, in

no manner require proof that the agent had the intent to support the regime or the full and absolute intent to act as its intermediary so long as proof of the existence of direct or indirect malicious intent or recklessness is provided. Indeed, the Trial Chambers of this Tribunal and the ICTR as well as the Appeals Chamber required only that the accused "knew" of the criminal policy or plan, which in itself does not necessarily require intent on his part or direct malicious intent ("... the agent *seeks* to commit the sanctioned act which is either his *objective* or at least the method of achieving his objective"). There may also be indirect malicious intent (the agent did not deliberately seek the outcome but knew that it would be the result) or recklessness, ("the outcome is foreseen by the perpetrator as only a probable or possible consequence"). In other words, knowledge also includes the conduct "of a person taking a deliberate risk in the hope that the risk does not cause injury".

It follows that the *mens rea* specific to a crime against humanity does not require that the agent be identified with the ideology, policy or plan in whose name mass crimes were perpetrated nor even that he supported it. It suffices that he knowingly took the risk of participating in the implementation of the ideology, policy or plan. This specifically means that it must, for example, be proved that:

- the accused willingly agreed to carry out the functions he was performing;
- that these functions resulted in his collaboration with the political, military or civilian authorities defining the ideology, policy or plan at the root of the crimes;
- that he received orders relating to the ideology, policy or plan; and lastly
- that he contributed to its commission through intentional acts or by simply refusing of his own accord to take the measures necessary to prevent their perpetration.

1. In relation to the *mens rea* applicable to crimes against humanity, the Appeals Chamber reiterates its case-law pursuant to which knowledge on the part of the accused that there is an attack on the civilian population, as well as knowledge that his act is part thereof, is required. The Trial Chamber, in stating that it "suffices that he knowingly took the risk of participating in the implementation of the ideology, policy or plan," did not correctly articulate the *mens rea* applicable to crimes against humanity. Moreover, as stated above, there is no legal requirement of a plan or policy, and the Trial Chamber's statement is misleading in this regard. Furthermore, the Appeals Chamber considers that evidence of knowledge on the part of the accused depends on the facts of a particular case; as a result, the manner in which this legal element may be proved may vary from case to case. Therefore, the Appeals Chamber declines to set out a list of evidentiary elements which, if proved, would establish the requisite knowledge on the part of the accused. [...]
2. For the foregoing reasons, the Appeals Chamber finds that the Trial Chamber erred in part in its articulation of the *mens rea* applicable to crimes against humanity. [...]

Paras 304 to 422

VII. ALLEGED ERRORS CONCERNING THE APPELLANT'S RESPONSIBILITY FOR CRIMES COMMITTED IN THE AHMICI AREA

1. The Trial Chamber found the Appellant responsible for having ordered a military attack on Ahmici and

the neighbouring villages of Santici, Pirici, and Nadioci, which resulted in the following crimes being committed against the Muslim civilian population: (i) persecution (count 1); (ii) unlawful attacks upon civilians and civilian objects (counts 3 to 4); (iii) wilful killing (counts 5 to 10); (iv) destruction and plunder of property of Bosnian Muslim dwellings, buildings, businesses, private property and livestock (counts 11 to 13); and (v) destruction of institutions dedicated to religion or education (count 14). [...]

A. The Appellant's responsibility under Article 7(1) of the Statute [...]

2. The Appeals Chamber's findings

1. The Trial Chamber convicted the Appellant pursuant to Article 7(1) of the Statute for crimes that targeted the Muslim civilian population and were perpetrated as a result of his *ordering* the Viteska Brigade, the Nikola Subic Zrinski Brigade, the 4th MP Battalion, the Dzokeri (Jokers), the Vitezovi, and the Domobrani to offensively attack Ahmici and the neighbouring villages. The Appeals Chamber considers that the Appellant's conviction under Article 7(1) of the Statute is based upon the following findings reached by the Trial Chamber: (i) that the attack was organised, planned at the highest level of the military hierarchy and targeted the Muslim civilian population in Ahmici and the neighbouring villages; (ii) that the Military Police, the Jokers, the Domobrani, and regular HVO (including the Viteska Brigade) took part in the fighting, and no military objective justified the attacks; and (iii) that the Appellant had "command authority" over the Viteska Brigade, the Domobrani, the 4th MP Battalion, and the Jokers during the period in question.

(a) The orders issued by the Appellant

1. The Prosecution's case was that the Appellant ordered the Viteska Brigade, the Nikola Subic Zrinski Brigade, the 4th MP Battalion, the Jokers, the Vitezovi, and the Domobrani to offensively attack the area of Ahmici, destroy and burn the Muslims' houses, kill Muslim civilians, and destroy their religious institutions. As part of his defence at trial, the Appellant put forward three orders issued by him following a military intelligence report dated 14 March 1993, which indicated the possibility of an attack by the ABiH on Ahmici in order to cut off Busovaca and Vitez.
2. With respect to D267, addressed to the 4th MP Battalion, the Vitezovi, and the HVO Operative Zone Brigades, the Trial Chamber concluded that "[t]he reasons relied upon in this order were: combat operations to prevent terrorism aimed at the HVO, and ethnic cleansing of the region's Croats by extremist Muslim forces." [...]
3. The Trial Chamber found that D269 was "very clearly" an order to attack, and that it was addressed to the Viteska Brigade, the 4th MP Battalion, the forces of the Nikola Subic Zrinski Brigade and the forces of the civilian police which "were recognised on the ground as being those which had carried out the attack." The Trial Chamber also found that the time set out in the order to commence hostilities corresponded to the start of fighting on the ground.
4. The Appeals Chamber considers that the Trial Chamber interpreted the instructions contained in D269 in a manner contrary to the meaning of the order. Even though the order was presented as a combat command to prevent an attack, the Trial Chamber concluded that it was part of an offensive strategy because "no military objective justified the attack" and in any event it was an "order to attack." The order defines the type of military activity as a blockade in the territory of Kruscica, Vranjska, and D. Vecerska

(Ahmici and the neighbouring villages are not specifically mentioned), and it addresses the Viteska Brigade and the Tvrtko special unit, but not the Jokers or the Military Police which are only mentioned in item 3 of the order in the following terms:

[i]n front of you are the forces of the IV Battalion VP, behind you are your forces, to the right of you are the forces of the unit N.S. Zrinski, and to the left of you are the forces of the civilian police.

1. As noted above, the Trial Chamber had concluded that since the Ahmici area had no strategic importance, no military objective justified the attack, and determined that it was unnecessary to analyze the reasons given by the Appellant for issuing D269. The Trial Chamber concluded that nothing had been adduced to support the claim that an imminent attack justified the issuing of D269. The Appeals Chamber notes that the Trial Chamber gave no weight to the argument that the road linking Busovaca and Travnik had a strategic significance, and with respect to the fact that ABiH soldiers were reported travelling towards Vitez, it concluded that "the fact that these soldiers were drinking highlighted the fact that the soldiers were on leave and were not preparing to fight in the municipality of Vitez".
2. The Appeals Chamber considers that the Trial Chamber's assessment of D269, as reflected in the Trial Judgement, diverges significantly from that of the Appeals Chamber following its review. The Appeals Chamber considers that the Trial Chamber's assessment was "wholly erroneous".
3. The Appeals Chamber considers that the trial evidence does not support the Trial Chamber's conclusion that the ABiH forces were not preparing for combat in the Ahmici area. In addition, the Appeals Chamber notes that additional evidence admitted on appeal shows that there was a Muslim military presence in Ahmici and the neighbouring villages, and that the Appellant had reason to believe that the ABiH intended to launch an attack along the Ahmici-Santici-Dubravica axis. Consequently, the Appeals Chamber considers that there was a military justification for the Appellant to issue D269.
4. The Appeals Chamber further notes that in light of the planned nature, scale, and manner in which crimes were committed in the Vitez municipality on 16 April 1993, the Trial Chamber concluded that D269 corresponded to the start of fighting in the Ahmici area, and that it instructed all the troops mentioned therein to coordinate an offensive attack and commit the crimes in question. The Appeals Chamber has failed to find evidence in the record which shows that the Appellant issued D269 with the "clear intention that the massacre would be committed" during its implementation, or evidence that the crimes against the Muslim civilian population in the Ahmici area were committed in response to D269.
5. In light of the analysis of the Trial Chamber's interpretation of D269 and on the basis of the relevant evidence before the Trial Chamber, the Appeals Chamber concludes that no reasonable trier of fact could have reached the conclusion beyond reasonable doubt that D269 was issued "with the clear intention that the massacre would be committed," or that it gave rise to the crimes committed in the Ahmici area on 16 April 1993. The Appeals Chamber stresses that the additional evidence heard on appeal confirms that there was a military justification for issuing D269. The additional evidence shows that D269 was a lawful order, a command to prevent an attack, and did not instruct the troops mentioned therein to launch an offensive attack or commit crimes. [...]

(c) New evidence suggests that individuals other than the Appellant planned and ordered the commission of crimes in the Ahmici area [...]

(d) Whether the Appellant was aware of the substantial likelihood that civilians would be harmed [...]

1. The Trial Chamber concluded that since the Appellant knew that some of the troops engaged in the attack on Ahmici and the neighbouring villages had previously participated in criminal acts against the Muslim population of Bosnia or had criminals within their ranks, when ordering those troops to launch an attack on 16 April 1993 pursuant to D269, the Appellant deliberately took the risk that crimes would be committed against the Muslim civilian population in the Ahmici area and their property. The Trial Chamber held that:

[e]ven if doubt were still cast in spite of everything on whether the accused ordered the attack with the clear intention that the massacre would be committed, he would still be liable under Article 7(1) of the Statute for ordering the crimes... [A]ny person who, in ordering an act, knows that there is a risk of crimes being committed and accepts that risk, shows the degree of intention necessary (recklessness) [le dol éventuel in the original French text] so as to incur responsibility for having ordered, planned or incited the commitment of the crimes. In this case, the accused knew that the troops which he had used to carry out the order of attack of 16 April had previously been guilty of many crimes against the Muslim population of Bosnia.

1. The Appeals Chamber has articulated the mens rea applicable to ordering a crime under Article 7(1) of the Statute, in the absence of direct intent. It has stated that a person who orders an act or omission with the awareness of the substantial likelihood that a crime will be committed in the execution of that order, has the requisite mens rea for establishing responsibility under Article 7(1) pursuant to ordering. Ordering with such awareness has to be regarded as accepting that crime. The Trial Chamber did not apply this standard in relation to the finding outlined above. Therefore, the Appeals Chamber will apply the correct legal standard to determine whether the Appellant is responsible under Article 7(1) of the Statute for ordering the crimes which occurred in the Ahmici area on 16 April 1993.
2. The evidence underlying the finding in paragraph 474 of the Trial Judgement consists of orders issued by the Appellant with the aim of deterring criminal conduct, i.e., orders prohibiting looting, the burning of Muslim houses, and instructing the identification of soldiers prone to criminal conduct. The analysis of the evidence relied upon by the Trial Chamber supports the conclusion that concrete measures had been taken to deter the occurrence of criminal activities, and for the removal of criminal elements once they had been identified. For instance, approximately a month before the attack of 16 April 1993 took place, the Appellant had ordered the commanders of HVO brigades and independent units to identify the causes of disruptive conduct, and to remove, arrest and disarm conscripts prone to criminal conduct.
3. The Appeals Chamber considers that the orders and reports outlined above, may be regarded at most, as sufficient to demonstrate the Appellant’s knowledge of the mere possibility that crimes could be committed by some elements. However, they do not constitute sufficient evidence to prove, under the legal standard articulated by the Appeals Chamber, awareness on the part of the Appellant of a substantial likelihood that crimes would be committed in the execution of D269.
4. Therefore, the Appeals Chamber is not satisfied that the relevant trial evidence and the additional evidence admitted on appeal prove beyond reasonable doubt that the Appellant is responsible under Article 7(1) of the Statute for ordering the crimes committed in the Ahmici area on 16 April 1993.

B. The Appellant’s responsibility under Article 7(3) of the Statute [...]

2. The Appeals Chamber’s findings

1. The Appeals Chamber notes that besides finding the Appellant guilty under Article 7(1) of the Statute, the Trial Chamber also entered a conviction against the Appellant for his superior criminal responsibility under Article 7(3) of the Statute. The Trial Chamber stated:

[i]n the final analysis, the Trial Chamber is convinced that General Blaskic ordered the attacks that gave rise to these crimes. *In any event, it is clear that he never took any reasonable measure to prevent the crimes being committed or to punish those responsible for them*. [...]

1. It is settled in the jurisprudence of the International Tribunal that the ability to exercise effective control is necessary for the establishment of superior responsibility. The threshold to be reached in establishing a superior-subordinate relationship for the purpose of Article 7(3) of the Statute is the effective control over a subordinate in the sense of material ability to prevent or punish criminal conduct. The Appeals Chamber will discuss whether the Appellant wielded effective control over the troops that perpetrated the crimes in the Ahmici area.
2. The Trial Chamber found that the Appellant had "command authority" over the 4th MP Battalion and the Jokers during the period in question.

[...]

1. The Appeals Chamber has admitted as additional evidence on appeal documents that contain information on those allegedly responsible for the crimes committed in the Ahmici area; this evidence supports the conclusion that the Appellant was not informed of the results of the investigation, and that the names of the perpetrators were not disclosed to him. [...]
2. The Appeals Chamber considers that the trial evidence assessed together with the additional evidence admitted on appeal shows that the Appellant took the measures that were reasonable within his material ability to denounce the crimes committed, and supports the conclusion that the Appellant requested that an investigation into the crimes committed in Ahmici be carried out, that the investigation was taken over by the SIS Mostar, that he was not informed of the results of the investigation, and that the names of the perpetrators were not disclosed to him.
3. For the foregoing reasons, and having examined the legal requirements for responsibility under Article 7(3) of the Statute, the Appeals Chamber concludes that the Appellant lacked effective control over the military units responsible for the commission of crimes in the Ahmici area on 16 April 1993, in the sense of a material ability to prevent or punish criminal conduct, and therefore the constituent elements of command responsibility have not been satisfied.
4. In light of the foregoing, the Appeals Chamber is not satisfied that the trial evidence, assessed together with the additional evidence admitted on appeal, proves beyond reasonable doubt that the Appellant is responsible under Article 7(3) of the Statute for having failed to prevent the commission of crimes in Ahmici, Santici, Pirici, and Nadioci on 16 April 1993 or to punish the perpetrators.

[...]

Paras 574 to 671 and Disposition

XI. ALLEGED ERRORS CONCERNING THE APPELLANT'S

RESPONSIBILITY FOR DETENTION-RELATED CRIMES

1. The Trial Judgement addressed Counts 15 to 20 of the Second Amended Indictment in a section entitled “detention-related crimes”, as they all entail a deprivation of freedom. During the course of the conflict in Central Bosnia, HVO forces detained Bosnian Muslims – both civilians and prisoners of war – in various facilities. The Trial Chamber found that non-combatant Bosnian Muslims, both civilians and prisoners of war, were detained during the conflict in the Lasva Valley region of Central Bosnia, and in Vitez in particular. The Trial Chamber concluded that the Appellant knew of the circumstances and conditions under which the Bosnian Muslims were being detained and the treatment they received, and was “persuaded beyond all reasonable doubt that [the Appellant] had reason to know that violations of international humanitarian law were being perpetrated.” The Trial Chamber found the Appellant guilty on all counts relating to detention-related crimes pursuant to Articles 2 and 3 of the Statute, either pursuant to Article 7(1) or to Article 7(3) of the Statute, or pursuant to both.

[...]

B. Counts 17 and 18: Hostage-taking

1. The Trial Chamber convicted the Appellant of taking hostages, first for use in prisoner exchanges, and second in order to deter ABiH military operations against the HVO. It is unclear whether the Trial Chamber made this conviction pursuant to Article 7(1) or Article 7(3) of the Statute.
2. The Appellant does not deny that hostages were taken and does not appeal against this finding as a separate ground of appeal *per se*. Rather, the Appellant argues in respect of the hostage-taking convictions that the Trial Judgement is “extremely vague,” that there was no finding that he ordered the taking of hostages, and that he presumes that he was convicted of the charges on the basis of Article 7(3) of the Statute. The position of the Prosecution is that the Appellant was in fact convicted of hostage-taking under Article 7(1) of the Statute, even though the Trial Chamber found that the Appellant did not expressly order that hostages be taken.
3. The Appeals Chamber however emphasises that the Trial Chamber itself found that the Appellant did not order that hostages be taken or used. Instead, the Trial Judgement stated that the Appellant ordered the defence of Vitez and thereby “deliberately ran the risk that many detainees might be taken hostage for this purpose.” The Appeals Chamber considers that the Appellant was convicted for hostage-taking pursuant to Article 7(1) of the Statute, and that no finding was made under Article 7(3) of the Statute in relation to these counts. As a result, the Appeals Chamber declines to consider Article 7(3) responsibility any further.
4. Hostage-taking as a grave breach of the Geneva Conventions and as a violation of the laws or customs of war was considered by the Trial Chamber in this case, and in the *Kordic* and *Cerkez* Trial Judgement. In the latter case, the following was stated:

It would, thus, appear that the crime of taking civilians as hostages consists of the unlawful deprivation of liberty, including the crime of unlawful confinement ...

The additional element ... is the issuance of a conditional threat in respect of the physical and mental well-being of civilians who are unlawfully detained. The ICRC Commentary identifies this additional element as a

"threat either to prolong the hostage's detention or to put him to death". In the Chamber's view, such a threat must be intended as a coercive measure to achieve the fulfilment of a condition.

1. The Appeals Chamber agrees that the essential element in the crime of hostage-taking is the use of a threat concerning detainees so as to obtain a concession or gain an advantage; a situation of hostage-taking exists when a person seizes or detains and threatens to kill, injure or continue to detain another person in order to compel a third party to do or to abstain from doing something as a condition for the release of that person. The crime of hostage-taking is prohibited by Common Article 3 of the Geneva Conventions, Articles 34 and 147 of Geneva Convention IV, and Article 75(2)(c) of Additional Protocol I. [...]

2. Hostage-taking in the defence of Vitez

1. In convicting the Appellant of hostage-taking, the Trial Chamber relied on the testimony of Witness Mujezinovic. Witness Mujezinovic testified at trial that, on 19 April 1993, he was taken to a meeting with Cerkez, the Commander of the Vitez Brigade. At that meeting, Witness Mujezinovic was instructed by Cerkez to contact ABiH commanders and Bosnian leaders, and to tell them that the ABiH was to halt its offensive combat operations on the town of Vitez, failing which the 2,223 Muslims detainees in Vitez (expressly including women and children) would all be killed. Witness Mujezinovic was further instructed to appear in a television broadcast to repeat that threat, and to tell the Muslims of Stari Vitez to surrender their weapons. The threats were repeated the following morning.
2. The Trial Chamber concluded that the detainees were "threatened with death" in order to prevent the ABiH advance on Vitez. The Appeallant has not contended that these events did not occur. However, the Trial Chamber further concluded the following, since Cerkez was the commander of the Vitez Brigade, and since he was under the direct command of the Appellant:

The Trial Chamber concludes that although General Blaskic did not order that hostages be taken, it is inconceivable that as commander he did not order the defence of the town where his headquarters were located. In so doing, Blaskic deliberately ran the risk that many detainees might be taken hostage for this purpose. [...]

1. The Trial Chamber itself found that the Appellant did not order that hostages be used to repel the attack on Vitez, only that he ordered the defence of Vitez. However, the Trial Chamber's further finding that the Appellant can accordingly be held accountable for the crime of hostage-taking is problematic for two reasons. First, the Appeals Chamber disagrees that the Appellant's order to defend Vitez necessarily resulted in his subordinate's illegal threat. It does not follow, by virtue of his legitimate order to defend an installation of military value, that the Appellant incurred criminal responsibility for his subordinate's unlawful choice of how to execute the order. There is no necessary causal nexus between an order to defend a position and the taking of hostages.
2. Second, the Trial Chamber based its conclusion that the Appellant was responsible for the hostage-taking on its finding that he "deliberately ran the risk that many detainees might be taken hostage for this purpose." As stated above, the Appeals Chamber has articulated the *mens rea* applicable to ordering a crime under Article 7(1) of the Statute, in the absence of direct intent: a person who orders an act or

omission with the awareness of the substantial likelihood that a crime will be committed in the execution of that order has the requisite *mens rea* for establishing liability for ordering the crime under Article 7(1) of the Statute. Ordering with such awareness has to be regarded as accepting that crime. The Trial Chamber did not apply this standard in relation to its findings concerning the taking of hostages.

3. The Appeals Chamber finds that there was insufficient evidence for the Trial Chamber to conclude that the Appellant ordered the defence of Vitez with the awareness of the substantial likelihood that hostages would be taken. The Trial Chamber's finding that the Appellant was on notice that HVO troops were likely to take hostages in order to defend Vitez, or that the Appellant was aware of the threats made by others in that regard, is not supported by the trial evidence. The Appeals Chamber finds that this evidence does not prove beyond reasonable doubt that he was aware of a substantial likelihood that crimes would be committed in the execution of his orders. The findings of the Trial Chamber with respect to hostage-taking are overturned. In light of these conclusions, the Appeals Chamber declines to consider the argument as to the credibility of the single witness, and grants this ground of appeal. The Appellant's convictions for Counts 17 and 18 are reversed.

C. Counts 19 and 20: Human Shields

1. The Trial Chamber found that the Appellant ordered the use of detainees as human shields to protect the headquarters of the Appellant at the Hotel Vitez on 20 April 1993. The Appeals Chamber notes that no finding was made under Article 7(3) of the Statute in relation to this count, and it will not consider this mode of responsibility in that respect.
2. The Trial Chamber also found that detainees were used as human shields in January or February 1993 to prevent the ABiH from firing on HVO positions. As regards the use of detainees as human shields in January or February 1993, however, the Trial Chamber did not make a finding establishing the Appellant's criminal responsibility, and the Appeals Chamber therefore does not consider it any further. As regards the use of human shields on 19 and 20 April 1993, on the other hand, the Trial Chamber found that the Prosecution did not prove beyond reasonable doubt that the detainees at Dubravica school and the Vitez Cultural Centre (excluding the Hotel Vitez) were used as protection against attack. The Trial Judgement entered no conviction for crimes committed against detainees in those particular locations, and the Appeals Chamber is barred from considering these allegations any further in the absence of an appeal from the Prosecution.
3. The Trial Chamber did, however, find that on 20 April 1993, the villagers of Gacice were used as human shields to protect the HVO headquarters in the Hotel Vitez, which "inflicted considerable mental suffering upon the persons involved." In convicting the Appellant on Counts 19 and 20, the Trial Chamber's reasoning was the following: first, the detainees (numbering 247) were detained in front of the Appellant's headquarters for two and a half to three hours. Second, the Appellant was present in the building for a large part of the afternoon. Third, the ABiH on 20 April 1993 began an offensive of which the Appellant was aware. The Trial Chamber was "therefore convinced beyond all reasonable doubt that on 20 April 1993 General Blaskic ordered civilians from Gacice village to be used as human shields in order to protect his headquarters." [...]
4. The Appeals Chamber notes that Article 23 of Geneva Convention III provides as follows:

No prisoner of war may at any time be sent to, or detained in areas where he may be exposed to the fire of the combat zone, nor may his presence be used to render certain points or areas immune from military operations.

It also considers that Article 28 of Geneva Convention IV provides that “[t]he presence of a protected person may not be used to render certain points or areas immune from military operations.” Article 83 of the same Convention provides that the ‘Detaining Power’ “shall not set up places of internment in areas particularly exposed to the dangers of war.” Furthermore, Article 51 of Additional Protocol I, relating to the protection of the civilian population in international armed conflicts, provides as follows:

[T]he presence or movements of the civilian population or individual civilians shall not be used to render certain points or areas immune from military operations, in particular in attempts to shield military objectives from attacks or to shield, favour or impede military operations. The Parties to the conflict shall not direct the movement of the civilian population or individual civilians in order to attempt to shield military objectives from attacks or to shield military operations.

1. The use of prisoners of war or civilian detainees as human shields is therefore prohibited by the provisions of the Geneva Conventions, and it may constitute inhuman or cruel treatment under Articles 2 and 3 of the Statute respectively where the other elements of these crimes are met.
2. The Trial Chamber convicted the Appellant for ordering the use of detainees as human shields. This finding is partly premised upon the alleged shelling of the Hotel Vitez and the need to protect the HVO headquarters from that shelling. There is also evidence of ABiH shelling of that location in the days before as well as on 20 April 1993. While there is evidence to suggest that the shelling on 20 April was not as heavy as it had been over the preceding days, a factual finding that the Hotel Vitez was actually being shelled at all on 20 April is not required in order to establish that detainees were unlawfully being used as human shields in anticipation of such shelling, contrary to the submission of the Appellant. Using protected detainees as human shields constitutes a violation of the provisions of the Geneva Conventions regardless of whether those human shields were actually attacked or harmed. Indeed, the prohibition is designed to protect detainees from being exposed to the risk of harm, and not only to the harm itself. To the extent that the Trial Chamber considered the intensity of the shelling of Vitez on 20 April 1993, that consideration was superfluous to an analysis of a breach of the provisions of the Geneva Conventions, but may be relevant to whether the use of the protected detainees as human shields amounts to inhuman treatment for the purposes of Article 2 of the Statute. [...]
3. [...] Witness Hrustic testified [...] in response to the question as to whether her conclusion that she was used as a human shield was based on the statement made by the soldier, that she believed that she and the other detainees were gathered around the Hotel Vitez to be used as human shields:

Let me tell you, the moment that we were brought there with the children and with the men, knowing that there were people dead in the village, knowing a little of what had happened to the other villages, and seeing the fires, the shelling and everything, and what the soldier said, ‘you sit there for a time and let your people shell you now, because they have been shelling us so far’, and knowing that the hotel was a military base for a long time before that day, we could have expected shelling. At this point in time, I believe that we were brought there as a human shield because there were not many Croatian soldiers in the hotel, and then we were taken back. At that moment, at that time, I did not care whether I would die there or somewhere else. [...]

1. In determining whether the Appellant ordered the use of human shields, the Appeals Chamber has accepted the detainees were detained in front of the Hotel Vitez (which had been shelled in the preceding days) for up to three hours. However, the presence of the Appellant in the Hotel Vitez for a large part of the afternoon is of limited value as circumstantial evidence. It remains for the Appeals Chamber to consider whether or not the findings of the Trial Chamber were such that they could have been made by a reasonable trier of fact.
2. The Appeals Chamber holds that the reasoning of the Trial Chamber in finding the Appellant responsible for ordering the use of civilian detainees as human shields is flawed, although it does not undermine the conviction. The Trial Chamber had no evidence before it suggesting that the Appellant ordered that detainees be used as human shields. Instead, the Trial Chamber inferred that the Appellant had actually ordered that civilians from Gacice village be used as human shields because the installations allegedly being protected by the detainees' presence contained his headquarters, and because of his proximity to that location. A factual conclusion that detainees were used as human shields on a particular occasion (which is one that a reasonable trier of fact could have made) does not lead to the inference that the Appellant positively ordered that to be done.
3. A conviction under Article 7(1) is not, however, limited to the positive act of ordering. The Appeals Chamber notes that the Appellant was indicted by the Second Amended Indictment for having planned, instigated, ordered or otherwise aided and abetted in the planning, preparation or execution of the unlawful and inhumane treatment of Bosnian Muslims. The Second Amended Indictment therefore fairly charges the Appellant with other forms of participation under Article 7(1) of the Statute in addition to the positive act of ordering. In particular, criminal responsibility for an omission pursuant to Article 7(1) of the Statute is expressly envisaged by the Second Amended Indictment. [...]
4. In the absence of evidence that the Appellant positively ordered the use of detainees as human shields to protect the Hotel Vitez, and in light of the foregoing analysis of the Second Amended Indictment, the Appeals Chamber will now consider whether the Appellant's criminal responsibility for endorsing the use of human shields is better expressed as an omission.
5. Although criminal responsibility generally requires the commission of a positive act, this is not an absolute requirement, as is demonstrated by the responsibility of a commander who fails to punish a subordinate even though the commander himself did not act positively (i.e. under the doctrine of command responsibility). There is a further exception to the general rule requiring a positive act: perpetration of a crime by omission pursuant to Article 7(1), whereby a legal duty is imposed, *inter alia* as a commander, to care for the persons under the control of one's subordinates. Wilful failure to discharge such a duty may incur criminal responsibility pursuant to Article 7(1) of the Statute in the absence of a positive act.
6. The distinguishing factor between the modes of responsibility expressed in Articles 7(1) and 7(3) of the Statute may be seen, *inter alia*, in the degree of concrete influence of the superior over the crime in which his subordinates participate: if the superior's intentional omission to prevent a crime takes place at a time when the crime has already become more concrete or currently occurs, his responsibility would also fall under Article 7(1) of the Statute. [...]
7. In order to be responsible for the omission under Article 2, the Appellant must have been aware of the use of the detainees as human shields. The Trial Chamber concluded that the Appellant knew that the detainees were outside his headquarters, and were being used as human shields. In arriving at this

conclusion, the Trial Chamber relied on evidence that Vitez and the Hotel Vitez were shelled around 20 April 1993; that on 20 April 1993, 247 Muslim men, women and children from the village of Gacice were directed to a place in front of the Hotel Vitez following an HVO attack on their village, that the men were led off elsewhere, that one of the soldiers said to some of them that they were to sit and be shelled by ABiH forces, that the detainees were surveilled [*sic*] by soldiers inside the Hotel Vitez and that whoever moved would be shot, and that the detainees (excluding the men) were returned to the village after about two and a half to three hours. The Trial Chamber also accepted evidence that that there were many HVO soldiers in and around the Hotel Vitez, which had a glass façade, and that one of the HVO soldiers told one of the detainees in front of the Hotel Vitez that he would go and tell the 'commander'; and that the officer responsible for operations under the Appellant implicitly admitted that the detainees were put in danger. Despite his presence in his headquarters in the Hotel Vitez for a large part of the afternoon, the Appellant claimed that he knew nothing of it. The Appeals Chamber concludes that the Trial Chamber's finding that the Appellant knew of the use of the detainees as human shields is one that a reasonable trier of fact could have made. [...]

8. The Appeals Chamber concludes that the Appellant's conviction for the use of human shields under Counts 19 and 20 was correct in substance. However, in the absence of proof that he positively ordered the use of human shields, the Appellant's criminal responsibility is properly expressed as an omission pursuant to Article 7(1) as charged in the Second Amended Indictment. The Appeals Chamber accordingly finds that the elements constituting the crime of inhuman treatment have been met: there was an omission to care for protected persons which was deliberate and not accidental, caused serious mental harm, and constituted a serious attack on human dignity. The Appellant is accordingly guilty under Article 7(1) for the inhuman treatment of detainees occasioned by their use as human shields.
9. The Appeals Chamber has above considered the sole distinguishing element between Article 2 (inhuman treatment) and Article 3 (cruel treatment): that the former contains the protected person status of the victim as an element not present in the latter. Also considered above is the definition of "protected person" provided by Article 4 of Geneva Convention IV and how it has been extended to the apply to bonds of ethnicity. The Appeals Chamber considers that the Bosnian Muslim detainees used as human shields were protected persons for the purposes of this distinction. A conviction for cruel treatment under Article 3 does not require proof of a fact not required by Article 2; hence the Article 3 conviction under Count 20 must be dismissed. [...]

XIII. DISPOSITION

For the foregoing reasons, THE APPEALS CHAMBER [...]

SENTENCES the Appellant to 9 (nine) years imprisonment to run as of this day

[...].

Discussion

I. Grave breaches of the Geneva Conventions

(Trial Chamber, paras 127-158)

1. a. Who is a “protected person” under Convention IV? Which civilians are not “protected civilians” (GC IV, Arts 4 and 147)
   b. Does the Chamber respect the terms of Art. 4 of Convention IV when it replaces the nationality criterion with that of ethnicity for “determining loyalties or commitments” (*Trial Chamber, para. 128*), thereby determining the status of protected persons?
   c. (*Trial Chamber, paras 134-146*) In the specific context of the former Yugoslavia, is it preferable to look for the “purpose and goal of the Convention” instead of applying it literally, and is this in the interest of the victims? Would it have been in line with the purpose and goal of Art. 4 to consider Bosnian Muslims as not having the status of protected persons during attacks led by the HVO, since Bosnia-Herzegovina and Croatia were fighting against a common enemy? Is the ICTY’s interpretation compatible with the principle of *nullum crimen sine lege*?
   d. Does the allegiance criterion, taken as the determining factor, apply only to the former Yugoslavia? Only to inter-ethnic conflicts? To all international conflicts?
   e. For the belligerents and humanitarian actors who need to apply international humanitarian law (IHL), is it easier and more practical to apply the criterion of allegiance or that of nationality? If you were a civilian detainee, would you state to the detaining power your lack of allegiance to it in order to obtain the treatment prescribed for protected persons?
2. What are the laws and customs of war? What is the difference between violations of these (ICTY Statute, Art. 3) and grave breaches (ICTY Statute, Art. 2)?
3. a. (*Trial Chamber, para. 152*) Must an act be intentional for it to be a grave breach, or is negligence sufficient? According to the Conventions and Protocol I? (GC I-IV, Arts 50/51/130/147 respectively; P I, Art. 85(1)) According to the Statute of the ICTY [**See** UN, Statute of the ICTY [Part C.]]? According to the Statute of the ICC? (ICC Statute, Art. 30 [**See** The International Criminal Court])
   b. Is recklessness or serious criminal negligence sufficient for the commission of all the breaches set out in paras 151 to 158 of the Trial Chamber judgement? Even for wilful killing?

II. Violations of the laws and customs of war

(*Trial Chamber, paras 179-187*)

1. a. (*Trial Chamber, para. 179*) Must an act be intentional to constitute a violation of the laws or customs of war within the meaning of Art. 3 of the ICTY Statute? A war crime under Art. 8(2)(b) of the ICC Statute? (ICC Statute, Art. 30 [**See** The International Criminal Court])
   b. Is recklessness or serious criminal negligence sufficient for the commission of all the breaches set out in paras 180 to 187 of the Trial Chamber judgement? Even for murder?
2. (*Trial Chamber, paras 152 and 179*) Is “recklessness” a form of intent or negligence within the meaning of civil law (Romano-Germanic) legal systems

III. Crimes against humanity

1. a. (Trial Chamber, paras 66-72) Which elements constitute a crime against humanity? In customary international law? According to the terms of the ICTY Statute?
   b. Is the existence of an armed conflict an element of the definition of a crime against humanity? Only in the case of the ICTY prosecuting the perpetrators of that crime? If a crime against humanity can be committed outside the context of an armed conflict, is it a violation of IHL? Of international

human rights law?

c. (Appeals Chamber, paras 105-116) Is the concept of “civilian population” the same as an element of crimes against humanity and under IHL? Under IHL, is a member of armed forces or resistance movements a legitimate target while he or she is not directly participating in hostilities? If yes, when does the presence of such persons make a population lose its civilian character? Is the presumption of civilian status applicable in criminal trials?

d. (Appeals Chamber, paras 121-128) In which ways do the views of the Trial Chamber and the Appeals Chamber differ with regard to the *mens rea* necessary for a crime against humanity?

2. Classify the facts described in paragraphs 384 to 428 of the Trial Chamber judgement and paragraphs 574 to 671 of the Appeals Chamber judgement as either a grave breach (ICTY Statute, Art. 2), a violation of the laws and customs of war (ICTY Statute, Art. 3) or a crime against humanity (ICTY Statute Art. 5). Are all the described acts criminalized by the Statute? Could certain acts simultaneously constitute, for example, a grave breach and a crime against humanity?

IV. Attacks against the civilian population

1. If an attack causes civilian victims “the number of which may even exceed that of the hostile soldiers” (*Trial Chamber, para. 406*), would these victims be admissible “collateral casualties” or would the principles of proportionality and distinction be violated?
2. (*Trial Chamber, paras 402-410*) According to IHL, if no military objective justified the attack on the village of Ahmici, was it lawful to attack it? To occupy it? (P I, Art. 52(2))
3. (*Trial Chamber, para. 416*) Are attacks by flame launchers lawful under IHL? Are they incendiary weapons in the sense of Protocol III to the 1980 Conventional Weapons Convention? Were the States engaged in this conflict bound by that Protocol? If yes, would the use of flame launchers have been authorized against combatants? If, hypothetically, the use of this weapon was prohibited by IHL, would the ICTY have been able to punish the accused for using it? [**See** Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons **and** Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (Protocol III to the 1980 Convention)] Does it matter, in this case, whether flame launchers as such are prohibited, restricted or lawful?
4. If only the Muslims were massacred in the municipality of Vitez, and only the Muslim houses and mosques were destroyed, could it be a case of genocide? Even if “only” “twenty or so villages” were thus attacked (*Trial Chamber, para. 750*)? Is it possible to consider the “Muslim population” (*Trial Chamber, para. 425*) of Ahmici as a “national, ethnical, racial or religious group” (ICTY Statute, Art. 4)? May the Chamber’s discussion on the “ethnic background” (*Trial Chamber, para. 127*) of the victims, in the context of the definitions of protected persons, lead us to the conclusion that the victims all belong to the same “ethnic group”? What element is missing for there to be a crime of persecution?

V. Criminal responsibility

1. a. (*Appeals Chamber, paras 42-64*) What is necessary for a commander to be held responsible for acts committed by others? According to the Appeals Chamber, how should the mental element “had reason to know” be interpreted? May a standard of *mens rea* that is lower than direct intent apply in relation to ordering under Art. 7(1) of the ICTY Statute? To command responsibility under Art. 7(3) of the ICTY Statute?

b. (*Appeals Chamber, paras 324-670*) When is a commander who orders forces to carry out a lawful

operation, and who knows they may possibly be committing war crimes during that operation, responsible for those crimes: under Art. 7(1) of the ICTY Statute? Under Art. 7(3) of the ICTY Statute?

c. (*Appeals Chamber, paras 647-670*) When may a commander, under Art. 7(1) of the ICTY Statute, be responsible by omission for a crime committed by subordinates? Where is the difference between responsibility in that case and under Art. 7(3) of the ICTY Statute?