UNITED NATIONS

International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991

Case No.: IT-95-14/1-T

Date: 25 June 1999

Original: English

IN THE TRIAL CHAMBER

Before: **Judge Almiro Simões Rodrigues, Presiding**
Judge Lal Chand Vohrah
Judge Rafael Nieto-Navia

Registrar: **Mrs. Dorothee de Sampayo Garrido-Nijgh**

Judgement of: **25 June 1999**

THE PROSECUTOR

v.

ZLATKO ALEKSOVSKI

JOINT OPINION OF THE MAJORITY, JUDGE VOHRAH AND JUDGE NIETO-NAVIA, ON THE APPLICABILITY OF ARTICLE 2 OF THE STATUTE PURSUANT TO PARAGRAPH 46 OF THE JUDGEMENT

The Office of the Prosecutor:
Mr. Grant Niemann
Mr. Anura Meddegoda

Counsel for the Accused:
Mr. Srdan Joka

Applicability of Article 2 of the Statute

1. In the "Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction" in the *Tadi}* case ("the *Tadi} Interlocutory Decision*"),[1] the Appeals Chamber interpreted the explicit reference in Article 2 of the Statute to "persons or property protected under the provisions of the relevant Geneva Convention" to mean that the strict conditions set out by the relevant Convention must be followed to determine whether the victims or property qualify for protection. In other words, the offences enumerated under that Article are subject to prosecution to the extent that they were perpetrated against persons or property regarded as protected by the relevant Geneva Convention. Concluding that under the current state of customary international law, the provisions protecting persons or objects in the four Geneva Conventions apply only in the midst of an international armed conflict, the Appeals Chamber held, *ergo*, that the applicability of Article 2 of the Statute is limited to the same extent.

2. To determine whether Article 2 of the Statute can be applied in this case, we, constituting the majority of the Trial Chamber, must consider whether the alleged treatment of Bosnian Muslim civilians occurred during an international armed conflict and, consequently, whether these civilians qualify as "protected persons" under Article 4 of IV Geneva Convention Relative to the Protection of Civilian Persons in time of War ("Geneva Convention IV"). This question must be answered in the affirmative for Article 2 of the Statute to be operative. Thus the Bosnian Muslim civilian detainees must be found to be "protected persons" under Article 4 of Geneva Convention IV, quite apart from the fact that the alleged mistreatment and unlawful detention occurred during an international armed conflict. The dictates of logic entail that a negative answer to the above question would render Article 2 of the Statute inapplicable.

[1] Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction*, Prosecutor v. Du{koTadi} aka Dule,* Case No.: IT-94-1-AR72, para. 70.

1. Existence of an International Armed Conflict

3. The Appeals Chamber in the *Tadi} Interlocutory Decision* left it to the Trial Chambers, as the finders of fact, to determine the character of an armed conflict. In its *Decision on the Defence Motion to Dismiss the Indictment based upon Defects in the Form thereof (Vagueness/Lack of Adequate Notice of Charges* in the *Bla{ki}* case of 4 April 1997, Trial Chamber I stated that the internationality of the armed conflict was "an issue involving questions of both law and fact … [to be] discussed at trial.[2]

4. The majority of the Trial Chamber has before it the task of determining whether it has been proved that there existed at the time of the indictment, from January to May 1993, an international armed conflict in Bosnia and Herzegovina, specifically in central Bosnia.

(a) Submissions of the Parties

(i) The Prosecution

5. The Prosecution submits that during the period of the indictment from January to May 1993, the armed conflict between the government forces of Bosnia and Herzegovina ("ABiH"), and the military units of the Croatian Community of Herceg-Bosna ("HVO"), was internationalised due to the intervention of the forces of the Croatian government ("HV").

(ii) The Defence

6. The Defence disputes the Prosecution's characterisation of the conflict as being international in nature. The Defence argues that the conflict between the HVO and the ABiH in 1993 in central Bosnia was a local one in which the HV never took part. The Defence contends that no witness testified to seeing an HV soldier in Bu{ova}a and its vicinity from January to May 1993. The Defence cites exhibit D13, a letter dated 21 April 1993 addressed to the Security Council by the permanent representative of Bosnia and

[2] *Prosecutor v. Tihomir Bla{ki}*, Case No.: IT-95-14-PT, para. 28.

Herzegovina, which characterised the conflict as one involving local leaders in central Bosnia over the arms embargo and shortages in humanitarian supplies.

(b) Discussion

7. In the instant case, both parties agreed that there was an armed conflict between the HVO and the Government of Bosnia and Herzegovina.[3] They disagreed on whether this conflict was international (Prosecution) or internal (Defence).[4] The burden is on the Prosecution to prove the internationality of the armed conflict.

8. The question before the majority of the Trial Chamber is whether "there [was] a resort to armed force between States or only protracted armed violence between governmental authorities and organized armed groups or between such groups within a State".[5] While an international armed conflict requires the involvement of two States, there need not be a formal declaration of war. The Appeals Chamber in the *Tadi} Interlocutory Decision* did not specify the requisite degree of intervention by a foreign State in the territory of another State to internationalise an armed conflict. However, it did provide some guidance on the matter by indicating that the clashes between the Government of Bosnia and Herzegovina and the Bosnian Serb forces should be considered as internal, unless a "direct involvement" of the JNA could be proved, in which case the conflict should be considered to be an international one.

9. A State can act in international law directly through governmental authorities and officials, or indirectly through individuals or organisations who, while not being official agents of the government, receive from it some power or assignment to perform acts on its behalf such that they become *de facto* agents.[6] The acts of *de facto* agents are attributable to the State. Since there was no declaration of war between Bosnia and Herzegovina and Croatia, we must determine on the facts whether the acts of the HVO can be imputed to the Government of Croatia.

[3] The Prosecutor's Closing Brief, 9 Nov. 1998 ("the Prosecution's Closing Brief"), para. 6; Final Trial Brief Submissions by the Defence, 9 Nov. 1998 ("the Defence's Closing Brief"), p.53.
[4] Prosecution Closing Brief, paras. 7 to 13; Defence's Closing Brief, pp. 39 to 40.
[5] *Tadi} Interlocutory Decision*, para. 70.

10. There is no uniform test in international law to determine when an individual or a group of individuals can be considered as *de facto* agents whose acts either entail the responsibility of, or involve or are attributable to a foreign State. To do this, we need to consider whether a military group, the HVO, was acting on behalf of a foreign State, Croatia, to render the armed conflict taking place in Bosnia and Herzegovina international.

11. According to the International Court of Justice ("the ICJ")[7], where the relationship of a rebel force[8] to a foreign State[9] is one of such dependence on the one side and control on the other that it would be appropriate to equate the rebel force, for legal purposes, with an organ of that State, or as acting on behalf of that State, then in such a case the conflict can be seen to be an international one, even if it is *prima facie* internal and there is no direct involvement of the armed forces of the State.[10]

12. The majority Judgement of Judge Stephen and Judge Vohrah of the Trial Chamber in the *Tadi}* case[11] relied on the high standard expounded by the ICJ in the *Nicaragua* case in the sense that the international responsibility of a State can arise only if control is exercised ("directed and enforced") with respect to specific military or paramilitary operations.[12] If that level of control does not exist, the acts of the rebel forces cannot be attributed to a State and, hence, the armed conflict cannot be construed to be international in nature.

13. Judge McDonald in her dissenting opinion in the *Tadic Judgement* stated that "the appropriate test of agency from *Nicaragua* is one of 'dependency and control' and a showing of effective control is not required".[13] Therefore, the difference between the

---

[6] Those agents who, not being of the nationality of the State, are paid by it and perform activities or operations under its supervision. See *Case Concerning Military and Paramilitary Activities in and against Nicaragua,* Nicaragua v. U.S.A (Merits) ("*Nicaragua"*), 1986 I.C.J. Reports, paras. 75 and 80.
[7] The conflict in Nicaragua between the *contras* and the Nicaragua Government was not, in the view of the ICJ, international because it was not proved that the United States of America had exercised enough control "in all fields as to justify treating the *contras* as acting on its behalf", *Nicaragua*, para. 109.
[8] The Court mentioned explicitly the *contras*.
[9] The Court mentioned explicitly the Government of the United States of America.
[10] Along with this line of thinking, Article 4 of Geneva Convention III considers as prisoners of war those "[m]embers of other militias and members of other volunteer corps, including those of organised resistance movements belonging to the Party in conflict".
[11] Prosecutor v. Du{ko Tadi} aka "Dule", Case No:. IT-94-1, Opinion and Judgement, 7 May 1997 (*Tadic Judgement*).
[12] *Nicaragua*, para. 115.
[13] Separate and Dissenting Opinion of Judge McDonald in *Tadi} Judgement*, para. 4.

majority and the dissenting opinion in the *Tadic* Case is on the "effectiveness" of the control.[14]

(c) Factual Findings

14. It is necessary to determine the requisite degree of "control" of a State over a "dependent" rebel force to convert the latter into an organ of that State or as acting on behalf of it. In the view of the majority of the Trial Chamber, there must be some evidence of the control, direction or command of the State that is sufficiently strong to impute the rebel force's acts to it. The requisite degree of control depends on the circumstances of each case. In this case, we must determine whether the Prosecution proved during trial that Croatia, in the time and place covered by the indictment, had exercised at least that degree of control over the HVO so that it could be construed as acting on Croatia's behalf to create an international conflict between Bosnia and Herzegovina and Croatia.

15. Croatia sent forces to fight side by side with Bosnia and Herzegovina against the Bosnian Serbs in the territory of Bosnia and Herzegovina. On 22 May 1992, a formal agreement was signed between the States involved in the conflict, and FRY formally withdrew its forces from Bosnia and Herzegovina.

16. According to the Appeals Chamber in the *Tadi} Interlocutory Decision*,[15]

> the agreement reached on 22 May 1992 between the various factions[16] of the conflict within the Republic of Bosnia and Herzegovina reflects the internal aspects of the conflicts. The agreement was based on common Article 3 of the Geneva Conventions which, in addition to setting forth rules governing internal conflicts, provides in paragraph 3 that the parties to such conflicts may agree to bring into force provisions of the Geneva Conventions that are generally applicable only in international armed conflicts. In the Agreement, the representatives of Mr. Alija Izetbegovi} (President of the Republic of Bosnia and Herzegovina and the Party of Democratic Action), Mr. Radovan Karadzji} (President of the Serbian Democratic Party), and Mr. Miljenko Brki} (President of the Croatian Democratic Community) committed the parties to abide by the substantive rules of internal armed conflict contained in common Article 3 and in addition agreed, on the strength of common Article 3, paragraph 3, to apply certain provisions of the Geneva Conventions concerning international conflicts. (Agreement

[14] "I would conclude that the effective control standard was never intended to describe the degree of proof necessary for the determination of agency founded on dependency and control articulated in paragraph 109 of *Nicaragua*", *Ibid.*, para. 16.
[15] *Tadi} Interlocutory Decision*, para. 73.
[16] The agreement was reached between the representatives of the government of Bosnia and Herzegovina, the Party of Democratic Action, the Serbian Democratic Party and the Croatian Democratic Community.

> No. 1, 22 May 1992, art. 2, paras. 1-6) Clearly, this Agreement shows that the parties concerned regarded the armed conflicts in which they were involved as internal but, in view of their magnitude, they agreed to extend to them the application of some provisions of the Geneva Conventions that are normally applicable in international armed conflicts only. The same position was implicitly taken by the International Committee of the Red Cross ("ICRC"), at whose invitation and under whose auspices the agreement was reached. In this connection it should be noted that, had the ICRC not believed that the conflicts governed by the agreement at issue were internal, it would have acted blatantly contrary to a common provision of the four Geneva Conventions (Article 6/6/6/7). This is a provision formally banning any agreement designed to restrict the application of the Geneva Conventions in case of international armed conflicts. ("No special agreement shall adversely affect the situation of [the protected persons] as defined by the present Convention, nor restrict the rights which it confers upon them." (Geneva Convention I, art. 6; Geneva Convention II, art. 6; Geneva Convention III, art. 6; Geneva Convention IV, art. 7.) If the conflicts were, in fact, viewed as international, for the ICRC to accept that they would be governed only by common Article 3, plus the provisions contained in Article 2, paragraphs 1 to 6, of Agreement No. 1, would have constituted clear disregard of the aforementioned Geneva provisions. On account of the unanimously recognised authority, competence and impartiality of the ICRC, as well as its statutory mission to promote and supervise respect for international humanitarian law, it is inconceivable that, even if there were some doubt as to the nature of the conflict, the ICRC would promote and endorse an agreement contrary to a basic provision of the Geneva Conventions. The conclusion is therefore warranted that the ICRC regarded the conflicts governed by the agreement in question as internal.[17]

17. The Prosecutor's expert witness, Professor Bianchini, clearly explained to the Chamber the reasons and origins of the war in the former Yugoslavia, including the ethnic distribution of the population in the various areas especially in Bosnia and Herzegovina, the independence of Slovenia and Croatia on 8 October 1991,[18] the desire and ambition of both Croatia and FRY to control parts of Bosnia and Herzegovina,[19] the starting of the armed conflict of ethnic Serbs against Croatia and Slovenia, and the war in Bosnia and Herzegovina.

---

[17] The ^e*lebi}i* Trial Chamber considered it to be "evident that there was no general cessation of hostilities in Bosnia and Herzegovina until the signing of the Dayton Peace Agreement in November 1995". (^e*lebi}i* Judgement, para. 215). The ^e*libi}i* Chamber analysed the findings in the *Tadi} Judgement* to conclude that "In light of the above discussion, the Trial Chamber is in no doubt that the international armed conflict occurring in Bosnia and Herzegovina, at least from April 1992, continued throughout that year and did not alter fundamentally in its nature" and that "[i]t would be wholly artificial to sever the period before 19 May 1992 from the period thereafter in considering the nature of the conflict and applying international humanitarian law" (^e*lebi}i* Judgement, para. 234). The ^e*lebi}i* Trial Chamber correctly stated that "[t]he principle of *res judicata* only applies *inter partes* in a case where a matter has been judicially determined within the case itself" (^e*lebi}i* Judgement, para. 228).

[18] The independence was declared in 5 June 1991 but suspended under pressure of the European Community until 8 October 1991 (Witness Bianchini, T. 1937-8).

[19] According to Witness X, "The Croatian public policy always proceeded from the position that Bosnia was a State, that it was unified and that Croatia was the first to have recognized Bosnia and Herzegovina. When Milosevi} created a Serbian (sic) republic within the territory of Bosnia and Herzegovina, the Croats formed the Croatian Community of Herceg-Bosna" (referring to the Tudjman-Milo{evi} meeting in Karadordevo in 1991). Exhibit P 139 (T. 7137).

18. Professor Bianchini referred extensively to documents according to which the Bosnian Croats had the dream, supported by Zagreb, of an independent republic, Herceg-Bosna[20] within a Confederation of Bosnia and Herzegovina. In this sense, Articles 1 and 10 of the Croatian Constitution are committed to support people of Croatian ethnicity.

19. Professor Bianchini explained how Croatia sent troops to support the Government in Sarajevo when Bosnia and Herzegovina was attacked by the Bosnian Serb army supported by the JNA. Croatia had a real interest in the course of the war, especially in defending the southern part of Dalmatia after the bombardment of Dubrovnik by "Serbs".[21]

20. Professor Bianchini brought a document[22] which "is connected with a peculiar phase, a phase before the beginning of the war. We are in November 1991". In the document, both communities – Croats and Bosnians - "jointly and unanimously decided that the Croatian People in Bosnia and Herzegovina must finally start conducting… a policy… about the realisation of our eternal dream, a joint Croatian State". Professor Bianchini also presented a document[23] dated 7 April 1992, in which Croatia recognised the independence of Bosnia and Herzegovina. On cross-examination, the expert witness admitted that during this period until 1994 (at least), Croatia and Bosnia and Herzegovina sustained diplomatic relations[24] and related how Croatia was a bridge for humanitarian aid and the movement of arms for Bosnia and Herzegovina[25] through Croatia.

---

[20] The constitutive text of the Community of Herceg-Bosna (proclaimed in November 1991) entitled "Decision on Founding the Croatian Community of Herceg-Bosna" is dated 3 July 1992. According to Article 5, "[t]he community shall respect the democratically elected government of the Republic of Bosnia and Herzegovina so long as Bosnia and Herzegovina remains independent from the former or any future Yugoslavia." (Exhibit P 126A).

[21] Witness Bianchini, T. 1876. Asked about the presence of Croatian troops or police in Bosnia between 1992 and 1994, Witness X answered: "[T]he Croatian army could not legally go to Bosnia and Herzegovina for the very reason that… a decision of the Croatian SABOR [or Parliament] was required. Not such decision existed… There was an agreement between President Tudjman and Alija Izetbegovi} [President of Bosnia and Herzegovina] during the Serbian (sic) attack on parts of Dubrovnik and surrounding area. An agreement was reached where a part of Croatian army defended the hinterland of Dubrovnik and entered the territory of Bosnia and Herzegovina, but that was in agreement with the Bosnian president". Exhibit P 139 (T. 7169).

[22] Exhibit P 118.

[23] Exhibit P 126B.

[24] See the debates on diplomatic relations in time of war in ILC Yearbook I (1957) paras. 40 to 83 and (1958) paras. 30 to 34. However, the Vienna Convention on Diplomatic Relations (1961) does not mention explicitly a state of war as one of the cases in which the diplomatic agent functions can end (Articles 43 and 45**).** On 29 September 1992, Dr. Sancevic was appointed Bosnian ambassador to Croatia.

[25] Witness Bianchini, T. 2091-92. According to Witness X, weapons and humanitarian aid reached Bosnia and Herzegovina via Croatia "and through those parts under the control of the HVO", the refugees from Bosnia and Herzegovina (Muslims) were accommodated and fed in Croatia, and hospitals in Split, Croatia treated simultaneously wounded soldiers whether members of the HVO or the ABiH . Exhibit 139 (T. 7240-1).

21. Most of the witnesses presented by both parties testified that in the last week of January 1993, an armed conflict started in central Bosnia between the HVO and the ABiH.[26] The conflict, therefore, started more or less at the same time that the accused was appointed as warden of the Kaonik prison by the Ministry of Justice of Herceg-Bosna.[27]

22. We now turn to analyze the relationship between the HV and the HVO. During the trial, Professor Bianchini referred to the nexus between the HV and the HVO and presented an exhibit[28] on the "Integrated Command Structure for Wartime Combat Operations", showing relations between both armies. When asked about the period referred to in the exhibit, Professor Bianchini answered: "As for Bobetko[29] is the period between April 1992 and fall 1992, but then, then this relations -- and we have documents on this continued in the months to come, in 1993, so -- and in 1994 [sic] … ".[30]

23. Other documents, such as Exhibit P 121B, indicated that many of the soldiers of the HV enrolled themselves in the HVO as "volunteer defenders of their homeland";[31] another referred to the acceptance of a colonel from the HVO into the HV with the same rank.[32] They relate to 1992, before the period of the indictment when there was a close link between Croatia and Bosnia and Herzegovina. The expert witness presented an order from the HVO[33] (not the HV) - this distinction is very important - to their soldiers to remove the HV insignias (November-December 1992) because of potential problems to Croatia. While there is a document dated May 1993[34] which allowed the transfer/promotion of soldiers from the HVO to the HV, this does not in itself prove the dependency of the HVO on the HV.

---

[26] Witnesses Bili}, T. 2291; Percinli}, T. 2565; Jerkovic, T. 2690; Kristo, T. 2782; Raji}, T. 3192; Maric, T. 3285; V., T. 3500; Blazevi}, T. 3619; Novali}, T.432; B, T. 563-65; C, T. 610-11; L, T. 1371; and N, T. 1499.
[27] Witness Vujica, T. 2994; Witness Percinli}, T. 2674 to 2675.
[28] Exhibit P 117.
[29] General Janko Bobetko was appointed by President Tudjman as "Commander of all units of the Croatian army in the southern front from Split to Dubrovnik" on 10 April 1992, before the withdrawal of the Serbs on 12 May 1992. See Exhibit P 121A. As Commander, the orders were issued by General Bobetko or under his authority (see Exhibits P 121B to O). His function was explained by Admiral Domazet, in answering a direct question on General Bobetko and command of the HVO forces, in the following words: "He coordinated and guided those forces in the command to organise themselves. Through this command post he channelled the forces for defence, for defence from this advance command post. In that sense he had a command function, not in the classical sense of command over units below him, but just to distribute those forces and improve their organisation. That was his role". Exhibit D 35B/2 (T. 11 585).
[30] Witness Bianchini, T. 1881.
[31] Witness Bianchini, T. 1897.
[32] Witness Bianchini, T. 1898.

24. Following a declaration by President Franjo Tudjman of 22 April 1993 appealing for a cessation of conflicts in Bosnia and Herzegovina between Croats and Muslims to preserve the alliance between them, Mr. Mate Boban and Mr. Alija Izetbegovi}, with President Tudjman acting as witness, delivered a "Joint Statement" signed on 25 April 1993 in which

> [t]he signatories of the Joint Statement reaffirm that the conflicts between units of the HVO and of the Army of Bosnia and Herzegovina in the Republic of Bosnia and Herzegovina are contrary to the policy of the representatives of the two peoples, and that the continuation of such conflicts would seriously jeopardize (sic) the achievement of their political goals, i.e., the independence and territorial integrity of the Republic of Bosnia and Herzegovina within the framework of the Vance-Owen plan accepted and signed by the signatories of this Statement, and success in the fight against the aggressor who wants to break the State apart, occupy its territory and annex the occupied territories to 'Greater Serbia'.[35]

On the same day, they agreed that "[t]he BiH army and the HVO will retain their separate identities and command structures … [but] … will form a Joint Command which will be responsible for the operational control of military districts."[36] This exhibit is attached to the Report of the Security Council Mission Established Pursuant to Resolution 819 (1993) of 30 April 1993 which mentioned the role of President Tudjman as mediator with the HVO.[37] On 10 May 1993, the President of the Security Council made a statement on "the major military offensive launched by *Bosnian Croat* paramilitary units"[38] (emphasis added).

25. The expert presented three documents on the relations between the HVO and the HV in Bosnia and Herzegovina:

- One is dated 6 October 1992 in which the "North-West Herzegovina Operative Zone Command" of the HVO requested information from the different units operating in Bosnia and Herzegovina about officers of the HV serving in those units. It stated that

---

[33] Exhibit P 131B.
[34] Exhibit P 132, Witness Bianchini, T. 1952-57.
[35] Exhibit P 126F. See also Exhibit D 35B/2.
[36] Exhibit P 126G.
[37] Mate Boban was President of the Croatian Community of Herceg-Bosna, HZB-H, and signed in Mostar on 18 November 1991 the constituent act of the Croatian Community of Herceg-Bosna. He was considered "the hard-line nationalist of the Bosnian Croats". On June 1996, he was removed as representative of the Bosnian Croat community in the peace talks. According to President Tudjman, he was removed "to satisfy the Muslim-led Bosnian Government as well as international opinion". See Exhibit P 126T.
[38] Exhibit P 126H.

the officers of the HVO could not leave their units without an order of the Croatian Ministry of Defence, and that every HV officer assigned to an HVO unit must have written consent. While it is not specified whose written consent, the implication is that it should be that of the Croatian Ministry of Defence 's.[39]

- The second one is the transmission of this order by the "Herceg-Bosna Croatian Defence Council" to a specific brigade.[40] According to Professor Bianchini, these two documents show "that every contact between the two army [41] [sic] was first under the control of the Ministry of Defence of the Croatian republic."[42]

- The last one is dated 12 April 1993[43] and in it the "REPUBLIC OF BOSNIA AND HERZEGOVINA, CROATIAN COMMUNITY OF HERCEG-BOSNA" (emphasis added) requested that a list of all HV officers in the HVO units be submitted to HVO Headquarters.[44]

These documents attest to a very close link between the HV and the HVO. In the view of the majority of the Trial Chamber, none of the documents indicate a conflict between the ABiH and the HVO supported by the HV.

26. In the present case, the Prosecutor proved that there were some links between the HVO and the Croatian authorities, in particular the HV. But the command, at least during the period covered by the indictment, was in the hands of the ABiH. At the beginning of the conflict, after the creation of Croatia and Bosnia and Herzegovina as independent States, not only the HVO, but also the HV fought together against the JNA. After 22 May 1992, when the JNA formally withdrew from Bosnia and Herzegovina, some Croatian troops remained in Mostar and the southern part of Bosnia and Herzegovina to protect Dubrovnik from JNA attacks. The presence of the HVO continued in central Bosnia but under the

[39] Exhibit P 129.
[40] Exhibit P 129B
[41] HV and HVO.
[42] Witness Bianchini, T. 1946-1947 (error in numbering) 7 May 1998, morning.
[43] Exhibit P 130B.
[44] Referring to General Slobodan Praljak, a former general of the HV and General of the HVO, Admiral Domazet said: "I know that he just left the Croatian army and then he went to Bosnia and Herzegovina and was a General of the Croatian Defence Council… and [after returning to the HV] he was promoted to the rank of retired general". Exhibit D 32B/2 (T. 11 581).

control of the ABiH. Some clashes arose in the last months of 1992 and persisted in early 1993. According to Professor Bianchini's testimony, an international armed conflict started in April 1993.[45] The direct or indirect participation of the HV in that armed conflict is not relevant to the instant case because it falls outside the period of the indictment.

27. Considering the evidence discussed above, we find that the Prosecution failed to discharge its burden of proving that, during the time-period and in the place of the indictment, the HVO was in fact acting under the overall control of the HV in carrying out the armed conflict against Bosnia and Herzegovina. The majority of the Trial Chamber finds that the HVO was not a *de facto* agent of Croatia, and that there was no indirect involvement of that country in the armed conflict in Bosnia and Herzegovina. Therefore, the Prosecution has failed to establish the internationality of the conflict to the satisfaction of a majority of the Trial Chamber for Article 2 of the Statute to apply.

28. As to the status of "protected persons", Article 2 of the Statute explicitly refers to "persons or property protected under the provisions of the relevant Geneva Convention". The majority of the Trial Chamber finds that the offences enumerated under that Article are subject to prosecution to the extent that they were perpetrated against persons or property regarded as protected by the relevant Geneva Convention.

29. Article 4 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War of August 12, 1949 ("Geneva Convention IV") distinguishes those civilians who are protected by the grave breaches regime from others who fall outside its purview. It stipulates that

> Persons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals.
>
> Nationals of a State which is not bound by the Convention are not protected by it. Nationals of a neutral State who find themselves in the territory of a belligerent State, and 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.

[45] Witness Bianchini, T. 1941-43. However, the Defence accepted that there was an armed conflict during the period of the indictment.

30. To be a protected person within the meaning of Geneva Convention IV, the victim must be a civilian who holds a nationality different from that of his captors. In this respect, the Prosecutor argues in its closing brief that

> [f]urthermore, the government of Croatia formally granted citizenship to all Bosnian Croats on 7 April 1992. Thus, for the purposes of the application of Geneva Convention IV, the Bosnian Croats should not automatically be regarded as nationals of Bosnia and Herzegovina. International law recognises a right of option to choose nationality when persons qualify for the nationality of two or more successor States … Therefore, when the armed conflict at the heart of this matter began, the Bosnian Croat population was entitled to opt for the nationality of the newly independent Republic of Croatia. In fact, many Bosnian Croats apparently did just that … Thus, under international law, Muslim civilians detained in the Kaonik prison by Bosnian Croat forces were *per se* in the hands of a captor with a different nationality than their own.[46]

31. On 7 April 1992, Croatia recognised the independence of Bosnia and Herzegovina. In the same decree, Croatia granted "the right to dual citizenship to the members of the Croatian nation (emphasis added) who wish such citizenship" and proposed that the question of nationality "be regulated by a bilateral agreement".[47] Dual nationality is a well-known phenomenon in international law. Nationality is granted to individuals according to domestic legislation, and international law has very little to do with it,[48] apart from recognising as a general rule of customary international law that "[i]t is for each State to determine under its own law who are its nationals. This law shall be recognised by other States in so far as it is consistent with international conventions, international custom, and the principles of law generally recognised with regard to nationality".[49]

32. As the Prosecutor rightly affirms, "international law recognises a right of option to choose nationality when persons qualify for the nationality of two or more successor States".[50] In our view, the Croatian Decree permitted dual nationality to Bosnian Croats who opted for Croatian nationality because of their ethnic origin while retaining their

---

[46] Prosecution's Closing Brief, para.19.
[47] See Exhibit P 126B. According to the note of recognition "[i]nternational recognition of Bosnia and Herzegovina shall imply that the Croatian people, as one of the three constituents nations of Bosnia and Herzegovina, shall be guaranteed their sovereign rights".
[48] See the *Convention on Certain Questions Relating to the Conflict of Nationality Laws* signed at The Hague on April 12, 1930; United Nations *Convention on the Reduction of Statelessness* of August 30, 1961; Council of Europe, *Convention on the Reduction of Cases of Multiple Nationality and on Military Obligations in Cases of Multiple Nationality* of May 6, 1963; *Protocol Relating to Military Obligations in Certain Cases of Double Nationality* of April 12, 1930, all of them with a limited number of State parties.
[49] Article 1 of the *Convention on Certain Questions Relating to the Conflict of Nationality Laws*.
[50] Prosecutor's Closing Brief, para.19.

Bosnian nationality. This is not against any international convention, international custom or the principles of law recognised with regard to nationality.

33. However, it was not proven during the trial that the Bosnian Croats in charge of Kaonik, or contributing to the perpetration of the crimes with which the accused was charged, exercised their right conferred by Croatia to acquire Croatian nationality, nor was it proven that they renounced their Bosnian nationality.

34. Therefore, the majority of the Trial Chamber finds that the Bosnian Muslim civilian detainees were not protected persons within the meaning of Article 4 of Geneva Convention IV because they hold the same nationality as their captors.

(d) Legal Finding

35. In conclusion, the majority of the Trial Chamber finds that the Muslims detained in the Kaonik prison between January and May 1993 were not "protected persons" within the meaning of Article 4 of Geneva Convention IV. Therefore, we consider it unnecessary to analyse whether the factual allegations made by the Prosecution amount to grave breaches under Geneva Convention IV. The legal consequence of the foregoing is that the accused shall be found not guilty of the two charges brought against him under Article 2 of the Statute.

Done in English and French, the English version being authoritative.

_____	_____
Lal Chand Vohrah	Rafael Nieto-Navia
Judge	Judge

Dated this 25th day of June 1999
At The Hague
The Netherlands

[Seal of the Tribunal]