

Press Release . Communiqué de presse

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TADIĆ CASE: THE VERDICT

- . Charges in 11 counts declared inapplicable
- . Accused not guilty on 9 counts of murder
- . Accused guilty on 11 counts of persecution and beatings

Today, one year to the day after the beginning of the trial of the Accused Dusko TADIĆ, Trial Chamber II (composed of Judge Gabrielle Kirk McDonald, Presiding, Judge Ninian Stephen and Judge Lal Chand Vohrah) has handed down its "*Opinion and Judgment*".

Out of 31 counts, the Accused has been found:

- **not guilty on 20 counts** (9 murder counts because of insufficient evidence and 11 counts declared inapplicable) **and**
- **guilty on 11 counts** (persecution and beatings).

As pointed out by the Chamber itself, this judgement is "*the first determination of individual guilt or innocence in connection with serious violations of international humanitarian law by an international tribunal (...). The international military tribunals at Nürnberg and Tokyo, ..., were multinational in nature, representing only part of the world community*".

More broadly, and in particular for the victims of the armed conflict in the Prijedor area, the verdict represents the first ever judicial condemnation of the "ethnic cleansing" policy.

It is the result of a thorough and meticulous consideration of a voluminous quantity of testimonial and written evidence: during the six month-long trial of the Accused, 125 witnesses were called and 473 exhibits were tendered by the Prosecution and the Defence. It also reflects a detailed exploration of legal issues raised for the first time before a Trial Chamber of the International Tribunal.

The written Opinion and Judgment is a sizable document, amounting to 301 pages, with one Separate and Dissenting Opinion of 19 pages and a further 30 pages or so of annexes (the indictment; a map of Bosnia and Herzegovina; photos of the model of Omarska camp; photos of Keraterm and Trnopolje camps; photos of a hangar, of an inscription on a wall and of the model of the "white house" at Omarska camp). .../...

This press release can by no means be a summary of an Opinion and Judgment which has been carefully worded and which covers a variety of issues (historical background, evidentiary issues, applicable law) other than the Judgment itself. This press-release is merely intended as a “reader’s guide” of the verdict.

THE VERDICT READS AS FOLLOWS:

The Accused is *“a citizen of the former Yugoslavia, of Serb ethnic descent, and a resident of the Republic of Bosnia and Herzegovina at the time of the alleged crimes”*.

The Accused was charged with 31 individual counts of persecution, murder, beatings and other offences alleged to have been committed in 1992 in the Prijedor district (northwestern part of the Republic of Bosnia and Herzegovina) and more specifically at the Omarska, Keraterm and Trnopolje camps, in Kozarac and in the area of Jaskici and Sivci.

In all cases the Accused was charged with individual criminal responsibility.

The Accused pleaded not guilty and *“raised a defence of alibi”* saying *“that he was elsewhere when each of those acts [referred to in the counts] is said to have occurred..”*

The Chamber finds:

1. By a majority, the Presiding-Judge dissenting, that the accusations of “Grave breaches of the 1949 Geneva Conventions” were NOT APPLICABLE and that the Accused is NOT GUILTY on the 11 relevant counts (being 5, 8, 9, 12, 15, 18, 21, 24, 27, 29, 32) running throughout all the charges in the indictment.
2. Unanimously, that the Accused is NOT GUILTY on 11 counts, (6, 7, 19, 20, 25, 26, 28, 30, 31, and in part 33 and 34) charging him with 13 murders, 5 beatings, 2 inhumane acts and one case of abuse of prisoners. The Prosecutor has failed either to establish beyond reasonable doubt the elements of the offences, or to present conclusive evidence linking the accused to the related acts or to satisfy the Judges beyond reasonable doubt that victims named were murdered.
3. Unanimously, that the Accused IS GUILTY on 11 counts, (1,10, 11, 13, 14, 16, 17, 22, 23 and in part 33 and 34) charging him with persecution and 14 beatings. The Chamber has found the Accused *“untruthful”* as to his whereabouts at the time of the alleged offences and has been satisfied beyond reasonable doubt by the Prosecution’s evidence that the accused either was present at the scene of, or did participate into, the alleged offences.

II. FACTUAL AND LEGAL FINDINGS COUNT BY COUNT

11 counts inapplicable

As previously stated, 11 counts charging Grave Breaches of the Geneva Convention of 1949 have been declared inapplicable by a majority of Judges. These counts are counts 5, 8, 9, 12, 15, 18, 21, 24, 27, 29 and 32. For further details, see page 8 of this Press Release.

Count 1 : Persecution

Accused guilty of persecution

1. As to the events alleged to have taken place during and subsequent to the attack on Kozarac and its outlying villages, the Trial Chamber is satisfied beyond reasonable doubt that the Accused:

- *“participated in the attack on Kozarac and the surroundings areas and in the collection and forced transfer of civilians to detention camp;*
- *participated in the calling-out of four Muslim men from a column of civilians (...) and the beatings, calling-out, separation and forced transfer of non-Serb civilians;*
- *participated in the beating of a Muslim policeman in Kozarac;*
- *kicked one Muslim prisoner and beat another while they were held at the Prijedor military barracks;*
- *and killed two Muslim policemen in Kozarac.*

2. As to the events alleged to have taken place at the Omarska and Keraterm camps, the Trial Chamber has found that the Accused:

- *“took part in the beating of Edin Mrkalj and Senad Muslimovic in the administration building and the hangar building respectively (Omarska camp);*
- *took part in the beatings of the prisoners and took part in one mass-beating of prisoners from room 2 (Keraterm).*

3. As to the events alleged to have taken place in the Trnopolje camp:

- the Trial Chamber notes that most of the allegations were supported only by the testimony of Dragan Opacic, whom testimony under the pseudonym of Witness L was later withdrawn.
- The only remaining portion of the initial charge deals with alleged incidents of transfer and unlawful confinement in the Trnopolje camp. The Trial Chamber *“finds beyond reasonable doubt that the accused participated in the transfer to and in the initial confinement of non-Serbs in camps generally, and in the Trnopolje camp in particular. However, the Trial Chamber finds that the accused did not take an active role in the continued confinement of non-Serbs in the Trnopolje camp”.*

4. As to the alleged participation of the accused in the seizure, selection and transportation of individuals for detention, the Trial Chamber *“is satisfied beyond reasonable doubt that the accused participated (...) and was aware that the majority of surviving prisoners would be deported from Bosnia and Herzegovina”.*

.../...

5. As to the allegations of plunder and destruction of personal and real property of non-Serbs, the Trial Chamber states that *"evidence regarding the accused's role in the destruction, plunder and looting is non-existent"*.

6. "The acts of the accused constitute persecution".

The Trial Chamber notes *"the horrendous treatment inflicted on the non-Serb population of opstina Prijedor on the basis of religion and politics(...) A policy to terrorize the non-Serb civilian population of opstina Prijedor on discriminatory grounds is evident and that its implementation was widespread and systematic throughout, at the minimum, opstina Prijedor is apparent. The events described in paragraph 4 of the indictment [Count 1] occurred within this context of discrimination."*

With regard to the accused, the Trial Chamber notes that *"he was one of the first SDS member in opstina Prijedor and, in his own estimation, a trusted SDS member who was asked to run a crucial plebiscite in the Kozarac area...As organizer of the plebiscite in Kozarac and President of the local SDS, the accused had knowledge and supported the plan for a Greater Serbia ...He himself admits this knowledge and support for the plan when he describes himself as an enthusiastic supporter of the creation of Republika Srpska."*

The Trial Chamber concludes: *"The accused's role in, inter alia, the attack on Kozarac and the surrounding areas, as well as the seizure, collection, segregation and forced transfer of civilians to camps, calling-out of civilians, beatings and killings described above clearly constituted an infringement of the victims' enjoyment of their fundamental rights and these acts were taken against non-Serbs on the basis of religious and political discrimination. Further, these acts occurred during an armed conflict, were taken against civilian as part of a widespread or systematic attack on the civilian population in furtherance of a policy to commit these acts, and the accused had knowledge of the wider context in which his acts occurred"*.

The accused is thus guilty of a Crime against Humanity.

Counts 2 to 4: Forcible sexual intercourse with "F"
Counts withdrawn at the Prosecutor's request.

Counts 6, 7, 10, and 11: Killings, beatings and sexual mutilation in Omarska
Accused not guilty of murder
Accused guilty of cruel treatment and inhumane acts

1. As to the beating of Emir Beganovic and Senad Muslimovic, the Trial Chamber *"is satisfied beyond reasonable doubt that the accused was one of the men who severely beat them."*

2. As to the beatings of the Emir Karabasic, Jasmin Hrnica and Enver Alic, the Trial Chamber is *"further so satisfied that the accused was present on the hangar floor when the three victims were called out and attacked..., that the accused attacked Jasmin Hrnica with a knife..., took part in the attack upon and the beating of Emir Karabasic...and took part in the beating of Jasmin Hrnica"*.

.../ ...

3. As to the assault upon and the sexual mutilation of Fikret Harambasic, the Trial Chamber *“is satisfied beyond reasonable doubt that the accused was on the hangar floor on this occasion...but is not satisfied that he took any active part in the assault and the mutilation”*. However, regarding the totality of the acts charged in this paragraph of the Indictment, the Trial Chamber finds that *“ the Accused in some instances was himself the perpetrator and in others intentionally assisted directly and substantially in the common purpose of inflicting physical suffering upon them and thereby aided and abetted in the commission of the crimes and is therefore individually responsible for each of them...”* The Trial Chamber thus finds beyond reasonable doubt that the Accused is guilty as charged in Count 10 (cruel treatment) and Count 11 (inhumane acts).

4. As to the alleged deaths of Fikret Harambasic, Emir Karabasic, Jasmin Hrnica and Enver Alic *“which it is said resulted from the assaults upon them”*, the Trial Chamber notes that *“the Prosecutor failed to elicit clear and definitive evidence from witnesses about the condition of the four prisoners after they had been assaulted (...) and to establish beyond reasonable doubt that any of these four prisoners died from injuries received in the assaults made on them in the hangar...”*.

5. The Trial Chamber finds the accused guilty of a violation of the laws and customs of war for his participation in the beatings and other grievous acts of violence inflicted on Enver Alic, Emir Karabasic, Jasko Hrnica, Senad Muslimovic, Fikret Harambasic and Ermir Beganovic, none of whom were taking part in the hostilities. Further, it finds the accused guilty of a crime against humanity: the beatings and other acts of violence which were suffered by the six victims were committed during an armed conflict as part of a widespread or systematic attack on a civilian population. “The accused intended for discriminatory reasons to inflict severe damage to the victims’ physical and human dignity”.

Counts 13 and 14: Beating of Sefik Sivac in Omarska
Accused guilty

1. The Chamber finds beyond reasonable doubt that *“Sefik Sivac was beaten and that the accused was part of the group that threw Sefik Sivac onto the floor...after he had been beaten and that Sefik Sivac later died from these injuries”*.

2. However, *“there is no direct testimony that the accused was present during the beating of Sefik Sivac”*. But the Trial Chamber finds that there is evidence that *“the accused intentionally assisted directly and substantially in the common purpose of the group to inflict severe suffering upon Sefik Sivac”*.

3. The Trial Chamber finds the accused guilty of a violation of the laws and customs of war (cruel treatment on a prisoner who did not take active part in the hostilities) and of a crime against humanity (inhumane act committed during an armed conflict as part of a widespread and systematic attack on a civilian population and intended for discriminatory reasons to inflict severe damage to the victim’s physical integrity and human dignity).

Counts 16 and 17: Beatings at Omarska*Accused guilty*

1. The Trial Chamber is satisfied beyond reasonable doubt that the accused *"severely beat and kicked Hakija Elezovic and severely beat Salih Elezovic."*
2. **The Trial Chamber finds the accused guilty of a violation of the laws and customs of war (cruel treatment of two Muslims neither of whom were taking active part in the hostilities) and of a crime against humanity (inhumane act committed during an armed conflict as part of a widespread...etc, see above).**

Counts 19 and 20: Abuse of prisoners in Omarska*Accused not guilty*

1. As to the allegations that the accused was a member of a group of Serbs beating prisoners and forcing them to drink water from the ground like animals, the accused was not named by the Prosecution's witness as part of the group.
2. As to the allegation that the accused discharged the contents of a fire extinguisher into the mouth of a man in a barrow, *"two factual deficiencies in the Prosecution case have been exposed: ...no evidence has been furnished of such discharge, and....the Prosecution has failed to establish that the man [in the barrow] was alive."*
3. **The Trial Chamber finds the accused not guilty: "no conclusive evidence has been presented linking the accused with the related acts."**

Counts 22 and 23: Beating and abuse of Hase Icic in Omarska*Accused guilty*

1. The Trial Chamber finds beyond reasonable doubt that the accused *"was part of a group of Serbs who beat and kicked Hase Icic until he was unconscious."*
2. **For these acts committed in the context of the armed conflict, the Trial Chamber finds the accused guilty of a violation of the laws and customs of war (cruel treatment of a Muslim not taking active part in the hostilities) and of a crime against humanity (inhumane act committed during an armed conflict as part of a widespread...etc, see above).**

Counts 25, 26, and 28: 4 killings in Kozarac*Accused not guilty*

1. The Trial Chamber is not satisfied beyond reasonable doubt that the shooting and killing by the accused of the individuals at a kiosk at the corner of Marsala Tita Street and the road to Kalate in Kozarac occurred as alleged, or in fact that the shooting did take place.

2. The Trial Chamber however is satisfied that the accused participated in the calling-out of people from the moving column.

3. The Trial Chamber finds the accused not guilty of murder (violation of the laws and customs of war) : “the Chamber is not satisfied beyond reasonable doubt that the four persons named were murdered”. Further it finds the accused not guilty of an inhumane act (crime against humanity): “although this Trial Chamber is convinced of the accused’s participation in the calling-out of people, such participation per se, in the Trial Chamber’s view, cannot patently constitute an inhumane act within the meaning of Article 5 of the Statute [Crimes against humanity]”.

Counts 30, 31, 33 and 34: 5 killings and 8 beatings in Jaskici and Sivci

Accused not guilty of killing

Accused not guilty of 4 beatings

Accused guilty of 4 beatings

1. As to the alleged killing of 5 men taken from their homes, the Trial Chamber is satisfied beyond reasonable doubt that the accused was part of the group of Serbs who rounded up the men in the village. But “it cannot be satisfied beyond reasonable doubt that the accused had any part in the killing of the five men or any of them...Nothing is known as to who shot them or in what circumstances.”

2. As to the beatings of Beido Balic, Sefik Balic, Ismet Jaskic and Salko Jaskic, the Trial Chamber is satisfied beyond reasonable doubt that the accused “took part in the brutal and violent beating.”

3. As to the beating of Ilijas Elkasovic, Nijas Elkasovic, Meho Kenjar and Adam Jakupovic “there is no evidence”.

4. The Trial Chamber then concludes that the accused is not guilty of murder and not guilty of some of the beatings. Where the accused is found guilty of part of the beatings he is guilty of a violation of the laws and customs of war (cruel treatment committed in the context of an armed conflict) and of a crime against humanity (inhumane acts committed during an armed conflict as part of a widespread, etc, see above).

III. THE ACCUSED’S DEFENCE OF ALIBI

Dusko Tadic raised a defence of alibi to each of the counts charged, claiming he was somewhere else at the time of the alleged acts. He testified under solemn declaration that he had never been to the Omarska or Keraterm camps nor had he participated in ethnic cleansing in Kozarac. He testified that he had been to Trnopolje on five occasions but was never inside the camp.

According to the Accused, between 23 May and 15 June 1992, he lived with his family in Banja Luka, and visited opstina Prijedor only four times.

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Between 15 June and 1 August 1992, he said he worked as a reserve traffic policeman at a traffic checkpoint at Orlovci, close to Prijedor.

From 15 August until 1 November 1992, he said worked in Kozarac as a traffic policeman.

On 15 August 1992, he was elected President of the Local Board of the SDS in Kozarac and appointed as Acting Secretary of the Local Commune of Kozarac. On 9 September 1992, he was elected Secretary of the Local Commune, a decision which became effective on 9 November 1992.

In its findings of fact, the Trial Chamber made the following observations on the Accused's alibi for the crimes alleged in the various paragraphs of the indictment:

Count 1 (Paragraph 4 of the Indictment): The events alleged in this paragraph are said to have occurred at various locations in opstina Prijedor between 23 May and 31 December 1992, approximately. According to the Chamber, *"the Defence assertion that the accused was not in Kozarac at this time cannot be accepted. The evidence of the Defence witnesses who happened to be in Kozarac during the attack (. . .) attests only to their not having seen the accused in Kozarac while they were there."*

Counts 5-11 (paragraph 6): For the events alleged, the accused relies exclusively on his defence of alibi. He says that on 18 June 1992, when the three events alleged occurred, he was living in Prijedor and working as a traffic policeman. *"[T]he Trial Chamber does not accept the accused's account of his whereabouts from 15 June to 17 June 1992. (. . .) Accordingly, for the incidents alleged in paragraph 6, the accused's checkpoint duty affords no alibi."*

Counts 12-14 (paragraph 7): For the events alleged in paragraph 7, which occurred on 8, 9 or 10 July 1992, *"the accused has no specific alibi for the late evening and night of 8 or 10 June 1992. (. . .) the Defence evidence as to off-duty days does no more than establish that the accused was generally resident in Prijedor."*

"(. . .) the Trial Chamber rejects the Defence contention that the accused was somehow rendered largely immobile because of the fact that he did not own a car."

Even if the events alleged took place on the night of 9 July 1992, a night when the records of Orlovci checkpoint show him to have been on duty, and *"[e]ven if these records are accepted as accurately reflecting the shifts to which the accused was assigned, they can only establish the hours when the accused was meant to be on duty at the checkpoint; they do not of themselves establish his presence there throughout those hours."*

Counts 15-18 (paragraph 8): The Chamber finds that if the events alleged in this paragraph *"occurred in the afternoon of 27 July 1992, as the evidence of Ermin Strikovic states, the accused has no specific alibi. His checkpoint duty at Orlovci on that date began at 7 p.m. and if the accused had transport available to him he would*

have had ample time during that day to travel to Omarska from Prijedor, carry out the acts alleged and return in time to take up his checkpoint duties."

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Counts 18-20 (paragraph 9): The events alleged are said to have occurred at the Omarska camp, in late June or early July.

"The Defence contention that the accused was never at the Omarska camp and that, in any event, at the relevant time, his duties with the traffic police precluded him from having committed the acts alleged (. . .) is rejected by the Trial Chamber. Numerous credible witnesses have testified that they saw the accused at the camp and (. . .) the accused's assignment to the Orlovci checkpoint would not preclude him from carrying out what the Prosecution described as his "higher duty" as a traffic policeman to implement ethnic cleansing to achieve a Greater Serbia. Accordingly, the Trial Chamber rejects the accused's alibi and his assertion that he was never at the Omarska camp."

Counts 21-23 (paragraph 10): The events charged in this paragraph appear to have occurred on 7 or 8 July 1992. *"The Trial Chamber finds that the assignment records for the Orlovci checkpoint do not provide the accused with an alibi (. . .) The assignment records reflect that on those nights, the accused was off duty. On 7 July 1992, the accused was off duty after 7 a.m. and offered no testimony regarding his whereabouts. On 8 July 1992 the records reflect that he completed his assignment at 7 p.m. and he likewise offered no testimony regarding his whereabouts at the time these events occurred. Prijedor is about 20 kilometres from the Omarska camp. The travel time is 30-35 minutes by car."*

Counts 24-28 (paragraph 11): This paragraph charges the accused with events occurring around 27 May 1992 in Kozarac. Three witnesses were called by the Prosecution to give evidence about the accused's role, and additional Prosecution witness testimony sought to establish the accused's presence in Kozarac on this day.

While noting inconsistencies between the evidence of these witnesses, the Trial Chamber found that the *"evidence of all or any (. . .) of four Defence witnesses, who had passed through Marsala Tita Street, does not afford an alibi to the accused except to indicate that they did not happen to see the accused in Kozarac on that day while they were there."*

Counts 29-34 (paragraph 12): The events are alleged to have happened around 14 June 1992 in Jaskici and Sivci. The Trial Chamber found that the accused's alibi *"does not deal specifically with 14 June 1992 and (. . .) is generally unspecific as to date in respect of this period"*.

IV. THE INAPPLICABILITY OF THE COUNTS CHARGING THE ACCUSED WITH GRAVE BREACHES

The Trial Chamber, by a majority of two to one (Judge McDonald, dissenting), finds that the accused could not be charged with grave breaches under Article 2 because the alleged victims were not protected persons under Article 4 of the Fourth Geneva Convention of 1949.

“For that reason, Article 2 is inapplicable (except in respect of citizens of the Republic of Bosnia and Herzegovina who actually found themselves in the hands of the

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JNA [Yugoslavia People’s Army] before 19 May 1992 or the VJ [Army of the Federal Republic of Yugoslavia] and FRY [Federal Republic of Yugoslavia], after 19 May)”. In consequence of this finding, Counts 5, 8, 9, 12, 15, 18, 21, 24, 27, 29 and 32 have been dismissed.

In order for Article 2 to be applicable, the victims must be protected persons, and the conflict must be international in character.

The majority finds that while *“from the beginning of 1992 until 19 May 1992, a state of international armed conflict existed in at least part of the territory of Bosnia and Herzegovina (. . .) between the forces of the Republic of Bosnia and Herzegovina on the one hand and those of the Federal Republic of Yugoslavia (Serbia and Montenegro), being the JNA (later the VJ), working with sundry paramilitary and Bosnian Serb forces, on the other”, after 19 May 1992, this armed conflict was not of a character to justify the imposition of Article 2 (grave breaches) of the Statute, because the victims were not protected persons, that is, they were not in the hands of a party to the conflict or occupying power of which they were not nationals.*

On 19 May 1992, the JNA officially withdrew from the Republic of Bosnia and Herzegovina. *“(. . .) the question for this Trial Chamber is whether, after 19 May 1992, the Federal Republic of Yugoslavia (. . .) by its withdrawal from the territory of the Republic of Bosnia and Herzegovina and notwithstanding its continuing support for the VRS [Army of Republika Srpska], had sufficiently distanced itself from the VRS so that those forces could not be regarded as de facto organs or agents or the VJ and hence of the FRY (. . .)”* If a agency relationship could be proven, then acts committed by the VRS against nationals of the Republic of Bosnia and Herzegovina could be considered to be acts against non-nationals.

In deciding what constitutes agency for the purposes of the applicability of Article 2, the Chamber considered the *Case Concerning Military and Paramilitary Activities in and Against Nicaragua [Nicaragua]*, which was decided by the International Court of Justice.

While noting that that case was concerned with the responsibility of a State and the extant case is concerned with the responsibility of individuals, and that the facts of each case are substantially different, the majority applied the essence of the test which they considered to be laid down in *Nicaragua*. There, the International Court of Justice asked: *“whether or not the relationship of the contras to the US Government was so much one of dependence on the one side and control on the other that it would be right to equate the contras, for legal purposes, with an organ of the US Government, or as acting on behalf of that Government”*.

In the context of the extant case, the test would be whether *“the requisite degree of command and control by the VJ, and hence the FRY (. . .) over the VRS is*

established for the purpose of imputing the acts of those forces operating in opstina Prijedor or the VRS as a whole to the FRY (. . .)."

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According to the Chamber, the Prosecutor must prove that *"the nature of the relationship between the VRS and the government of the FRY, and between the VRS and VJ in particular, was of such a character. In doing so it is neither necessary or sufficient merely to show that the VRS was dependent, even completely dependent, on the VJ and the FRY (. . .) for the necessities of war. It must also be shown that the VJ and the FRY exercised the potential for control inherent in that relationship of dependency or that the VRS has otherwise placed itself under the control of the Government of the FRY."* In other words, the test is one of effective control.

The Trial Chamber found that there were two relationships of especial importance to the determination: (1) that between the General Mladic and the VRS Main Staff and Belgrade; and (2) that between the SDS (and hence RS) and the Government of FRY.

While finding that there was co-ordination between the VRS Main Staff and the VJ Main Staff in Belgrade, the majority held that *"co-ordination is not the same as command and control. The only other evidence submitted by the Prosecution was that, in addition to routing all high-level VRS communications through secure links in Belgrade, a communications link for everyday use was established and maintained between VRS Main Staff Headquarters and the VJ Main Staff in Belgrade. No further evidence was led by the Prosecution on the nature of this relationship."*

Regarding (2), the majority noted that the political leaders of RS were popularly elected by the Bosnian Serbs of the Republic of Bosnia and Herzegovina, and the independence of RS was declared by a vote of the Bosnian Serb Assembly, and asked whether, in spite of this, it could infer that the necessary degree of effective control was exercised by the FRY over the military operations of the RS armed forces, and find that the VRS was nothing more than a *de facto* organ or agent of the FRY.

The majority found that there was no evidence that non-Bosnian Serb members of the VRS were specifically charged by Belgrade with the carrying out of certain acts of its behalf.

Secondly, while *"it is clear from the evidence presented that the pay of all 1st Krajina Corps Officers, and presumably of all Senior VRS Commanders as former JNA officers, continued to be received from Belgrade after 19 May 1992, (. . .) such evidence, without more (. . .) establishes nothing more than the potential for control inherent in the relationship of dependency which such financing produced."*

The Trial Chamber noted that *"the military and political objectives of the RS and of the FRY (. . .) were largely complementary"* and dedicated to the creation of a Greater Serbia. Therefore, *"there was little need for the VJ and the Government of the FRY (. . .) to attempt to exercise any real degree of control over, as distinct from co-ordination with, the VRS. (. . .)*

"Thus, while it can be said that the FRY (. . .) through the dependence of the VRS on the supply of matériel by the VJ, had the capability to exercise great influence and perhaps even control over the VRS, there is no evidence on which this Trial

Chamber can conclude that the FRY (. . .) and the VJ ever directed or, for that matter, ever felt the need to attempt to direct, the actual military operations of the VRS, or to influence those operations beyond that which would have flowed naturally from the co-ordination of military objectives and activities by the VRS and VJ at the highest levels.

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In sum, while (. . .) the evidence available to this Trial Chamber clearly shows that the "various forms of assistance provided" to the armed forces of the RS by the Government of the FRY (. . .) was "crucial to the pursuit of their activities", and (. . .) those forces were almost completely dependent on the supplies of the VJ to carry out offensive operations, evidence that the FRY (. . .) through the VJ "made use of the potential for control inherent in that dependence", or was otherwise given effective control over those forces and which it exercised, is similarly insufficient.

"It is of course possible, on or in spite of the evidence presented, to view the acts of the JNA and the Government of the FRY (. . .) on or about 19 May 1992 as nothing more than a cynical and intentional creation of the objective factors necessary to distance themselves from direct legal responsibility for the acts of the armed forces of the RS, while doing everything to ensure that the material factors necessary to ensure the successful continuation of the armed conflict to achieve the same military and political goals were kept in place. Even if the legal effect of creating such objective factors, which caused no small amount of difficulty to the JNA and the Government of the FRY (. . .) could be vitiated by reason of some fraudulent intention, which this Trial Chamber doubts, that is not the only nor the most reasonable conclusion open on the evidence presented. There is, in short, no evidence on which this Trial Chamber may confidently conclude that the armed forces of the RS and the RS as a whole, were anything more than allies, albeit highly dependent allies, of the Government of the FRY."

Thus, the "Trial Chamber is, by majority with the Presiding Judge dissenting, of the view that, on the evidence presented to it, after 19 May 1992 the armed forces of the RS could not be considered as de facto organs or agents of the FRY (. . .), either in opstina Prijedor or more generally."

Separate and Dissenting Opinion of Judge McDonald

The Presiding Judge, Gabrielle Kirk McDonald, found, however, to the contrary. She concluded that at all times relevant to the Indictment, the armed conflict in opstina Prijedor was international in character, that the victims were protected persons and that Article 2 was applicable.

In her separate and dissenting opinion, Judge McDonald notes that the majority purports to apply the essence of the test in the *Nicaragua* case. *"The standard crafted by the majority, however, departs from Nicaragua (. . .). the standard the majority has created is even more demanding."*

According to the Judge: *"(. . .) there are two bases on which the acts of the VRS could be attributed to the FRY (. . .): where the VRS acted as an agent of the FRY (. . .), which could be established by a finding of dependency on the one side and control*

on the other; or where the VRS was specifically charged by the FRY (. . .) to carry out a particular act on behalf of FRY (. . .) thereby making the act itself attributable to the FRY (. . .) In Nicaragua, the court required a showing of effective control for this latter determination.

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While finding that the “evidence presented to the Trial Chamber supports a finding of effective control of the VRS by the FRY (. . .) in opstina Prijedor at all times relevant to the charges in the Indictment,” Judge McDonald states that “the appropriate test of agency from Nicaragua is one of ‘dependency and control’ and a showing of effective control is not required”.

According to Judge McDonald: “the evidence supports a finding beyond reasonable doubt that the VRS acted as an agent of the FRY (. . .) in regard to the attack and occupation of opstina Prijedor during the times relevant to the charges in the Indictment and the victims are thus protected persons. The dependency of the VRS on and the exercise of control by the FRY (. . .) support this finding of agency under either the majority’s standard of effective control or under the more general test of dependency and control.

(. . .)

“The evidence proves that the creation of the VRS was a legal fiction. The only changes made after the 15 May 1992 Security Council resolution were the transfer of troops, the establishment of a Main Staff of the VRS, and a change in the insignia. There remained the same weapons, the same equipment, the same officers, the same commanders, largely the same troops, the same logistics centres, the same infrastructure, the same source of payments, the same goals and mission, the same tactics, and the same operations. Importantly, the objectives remained the same: to create an ethnically pure Serb State by uniting Serbs in Bosnia and Herzegovina and extending that State from the FRY (. . .) to the Croatian Krajina along the important logistics and supply line that went through opstina Prijedor, thereby necessitating the expulsion of the non-Serb population of the opstina.”

“Although there is little evidence that the VRS was formally under the command of Belgrade after 19 May 1992, the VRS clearly continued to operated as an integrated and instrumental part of the Serbian war effort. This finding is supported by evidence that every VRS unit had been a unit in the JNA, the command and staffs remained virtually the same after the re-designation.

(. . .)

“In addition, the evidence establishes that the VRS, in continuing the JNA operation to take over opstina Prijedor, executed the military operation for the benefit of the FRY (. . .)”

According to Judge McDonald, the evidence supports a finding that “despite the purported JNA withdrawal from Bosnia and Herzegovina on 19 May

1992, active elements of what had been the JNA and was now rechristened as the VJ operated in tandem with the VRS in Bosnia and Herzegovina. In particular, VJ air crews and aircraft remained in Bosnia and Herzegovina after the purported May withdrawal and worked with the VRS throughout 1992 and 1993. This and other evidence (. . .) provides that there was no material change in the armed forces in opstina Prijedor, and that the conflict remained international after 19 May 1992, with the FRY (. . .) exercising effective control of the operations of the VRS in opstina Prijedor.”

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Regarding the relationship between the VRS Commander General Ratko Mladic and the VJ Main Staff in Belgrade, Judge McDonald finds that: “It is enough that General Mladic, who had been a commander in the JNA, continued to carry out his orders which were issued by the FRY before 19 May 1992, considering the evidence that establishes that there was direct communication between his office and Belgrade.”

Regarding the Majority’s finding that the FRY and the VRS were allies, and thus, that “there was no effective control”, Judge McDonald finds that “this supports, rather than vitiates, the status of the VRS as an agent.”

The Judge concludes: “I question why there should be a requirement that effective control was in fact exercised when the FRY (. . .) was assured that, having transferred officers and enlisted men and provided the matériel, thereby depleting its forces, its plan would be executed. (. . .) The occupation of opstina Prijedor could be accomplished only after the JNA, on behalf of the FRY, set it in motion and gave the VRS the wherewithal to accomplish it. Under such circumstances, there was no need for effective control, however, because the very establishment and continued existence of the VRS is evidence of such control. (. . .) The key issue here is whether the VRS was indeed dependent on and controlled by the FRY (. . .).

“In summary, the evidence supports a finding beyond reasonable doubt that the VRS acted as an agent of the FRY (. . .) in regard to the attack and occupation of opstina Prijedor during the times relevant to the charges in the Indictment and the victims are thus protected persons. The dependency of the VRS on and the exercise of control by the FRY (. . .) support this finding of agency under either the majority’s standard of effective control or under the more general test of dependency and control. However, a close reading of Nicaragua leads me to conclude that the effective control standard supports a distinct and separate basis for the attribution of the conduct of non-agents to a State, and that it is not a necessary element for a finding of an agency relationship.”
