A. Rule 61 Decision

[**Source**: 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, The Prosecutor v. Ivica Raji?, Case No. IT-95-12-R61, September 13, 1996; available at http://www.icty.org [1]]

PROSECUTOR
v.
IVICA RAJI? (a/k/a VIKTOR ANDRI?)

REVIEW OF THE INDICTMENT PURSUANT TO RULE 61 OF THE RULES OF PROCEDURE AND EVIDENCE

[...]

A. The Charges

1. Ivica Raji? is accused of ordering the October 23, 1993 attack against the village of Stupni Do, which was located in the Republic of Bosnia-Herzegovina. The attack was allegedly carried out by the Croatian Defence Council ("HVO"), which are identified as the armed forces of the self-proclaimed Croatian Community of Herceg-Bosna ("HB"), acting under Ivica Raji?'s control. Ivica Raji? is charged under six counts: Count I – a grave breach of the Geneva Conventions of 1949, as recognised by Article 2(a) (wilful killing) of the Statute of the International Tribunal ("Statute"); Count II –

a grave breach of the Geneva Conventions of 1949, as recognised by Article 2(d) (destruction of property) of the Statute; and Count III – violations of the laws and customs of war, as recognised by Article 3 (deliberate attack on a civilian population and wanton destruction of a village) of the Statute. [...]

B. Preliminary Matters

2. [...] Rule 61 proceedings [...] give the Prosecutor the opportunity to present in open court the indictment against an accused and the evidence supporting such indictment. Rule 61 proceedings therefore are a public reminder that an accused is wanted for serious violations of international humanitarian law. They also offer the victims of atrocities the opportunity to be heard and create a historical record of the manner in which they were treated. If the Trial Chamber determines that there are reasonable grounds for believing that the accused committed any or all of the crimes charged in the indictment, it shall issue an international arrest warrant. The issuance of such a warrant, with which all States that are Members of the United Nations are obliged to comply, enables the arrest of the accused if he crosses international borders. After a Rule 61 proceeding the President of the International Tribunal may notify the Security Council of the failure of a State to cooperate with the International Tribunal. The Prosecutor has submitted material in which it is asserted that failure to effect personal service of the indictment on Ivica Raji? is due in whole or in part to the failure of the Republic of Croatia and the Croatian Community of Herzeg-Bosna to cooperate with the International Tribunal.
3. A Rule 61 proceeding is not a trial *in absentia*. There is no finding of guilt in this proceeding. The only determination the Trial Chamber makes is whether there are reasonable grounds for believing that the accused committed the crimes charged in the indictment. [...]

C. Subject-Matter Jurisdiction

[...]

1. Article 2 of the Statute – Grave Breaches

[...]

8. Because the crimes alleged by the Prosecutor were directed against civilian persons and property, the Geneva Convention relevant to this case is [...] Geneva Convention IV [...]. Based on the provisions of this Convention, the Trial Chamber first considers whether the Prosecutor has shown sufficiently that the alleged attack on Stupni Do took place during an international armed conflict and then addresses the issue of whether the attack involved persons and/or property protected under Geneva Convention IV.

a. International Armed Conflict

9. The evidence submitted by the Prosecutor indicates that the attack on the village of Stupni Do was part of the clashes occurring in central and southern Bosnia between the HVO [...] on the one hand, and the forces of the Bosnian Government on the other. [...]

11. [...] The conflict between the HVO and Bosnian Government forces [...] should be treated as internal unless the direct involvement of a State is proven. Thus, the issue of whether the alleged attack on the civilian population of Stupni Do was part of an international armed conflict turns on the existence and extent of outside involvement in the clashes between the Bosnian Government forces and the HVO in central and southern Bosnia.

[...]

i. Direct Military Intervention by Croatia

13. The Chamber finds that, for purposes of the application of the grave breaches provisions of Geneva Convention IV, the significant and continuous military action by the armed forces of Croatia in support of the Bosnian Croats against the forces of the Bosnian Government on the territory of the latter was sufficient to convert the domestic conflict between the Bosnian Croats and the Bosnian Government into an

international one. The evidence submitted by the Prosecutor provides reasonable grounds to believe that between 5000 to 7000 members of the Croatian Army [HV], as well as some members of the Croatian Armed Forces ("HOS"), were present in the territory of Bosnia and were involved, both directly and through their relations with HB and the HVO, in clashes with Bosnian Government forces in central and southern Bosnia. [...]

17. [...] Documents suggest that HV soldiers serving in the HVO were not volunteers, but rather were mobilized by Croatia and were serving in their capacity as HV soldiers with a special status within the HVO.

18. The above conclusion is supported by witness statements reported sightings of entire brigades of Croatian Army troops in Bosnia. [...] It is unlikely that units of this size would of their own accord volunteer for service in a foreign country. Moreover, witnesses testified to seeing military equipment such as tanks, helicopters and artillery bearing Croatian Army insignia in central and southern Bosnia. [...] It does not seem probable that such equipment could have been transported to Bosnia by volunteers without the cooperation of the Croatian Government. [...]

21. [...] There is therefore enough evidence to establish for the purpose of the present proceedings that, as a result of the significant and continuous military intervention of the Croatian Army in support of the Bosnian Croats, the domestic conflict between the Bosnian Croats and their Government in central Bosnia became an international armed conflict, and that this conflict was ongoing at the time of the attack on Stupni Do in October 1993.

ii. Croatia's Control of the Bosnian Croats

22. The Chamber's finding regarding the nature of the conflict stated above is all that is necessary to meet the international armed conflict requirement of Geneva Convention IV. Nonetheless, for purposes of the Prosecutor's arguments regarding persons protected under Geneva Convention IV, which are discussed below, the Chamber believes it appropriate to consider the Prosecutor's additional argument that the conflict between the Bosnian Government and HB may be regarded as international because of the relationship between Croatia and HB. The Prosecutor has asserted that

Croatia exerted such political and military control over the Bosnian Croats that the latter may be regarded as an agent or extension of Croatia.

23. The Trial Chamber believes that an agency relationship between Croatia and the Bosnian Croats – if proven at trial – would also be sufficient to establish that the conflict between the Bosnian Croats and the Bosnian Government was international in character.

24. The issue of when a group of persons may be regarded as the agent of a State has been considered frequently in the context of imposing responsibility on States for the actions of their agents. The International Law Commission considered the issue in its 1980 Draft Articles on State Responsibility. Draft Article 8 provides in relevant part that the conduct of a person or a group of persons shall "be considered as an act of the State under international law" if "it is established that such person or group of persons was in fact acting on behalf of that State". 1980 II (Part Two) Y.B. Int'l L. Commission at p. 31. The matter was also addressed by the International Court of Justice in the *Nicaragua* case. There, the Court considered whether the *contras*, who were irregular forces fighting against the Government of *Nicaragua*, were agents of the United States of America in order to decide whether the United States was liable for violations of international humanitarian law allegedly committed by the *contras*. The Court held that the relevant standard was whether the relationship 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 United States Government, or as acting on behalf of that Government.
Nicaragua, 1986 I.C.J. Rep. 109. It found that the United States had financed, organised, trained, supplied and equipped the *contras* and had assisted them in selecting military and paramilitary targets. These activities were not, however, sufficient to hold the United States liable for any violations of international humanitarian law committed by the *contras*.

25. The Trial Chamber deems it necessary to emphasise that the International Court of Justice in the *Nicaragua* case considered the issue of agency in a very different context from the one before the Trial Chamber in this case. First, the Court's decision in the *Nicaragua* case was a final determination of the United States' responsibility

for the acts of the *contras*. In contrast, the instant proceedings are preliminary in nature and may be revised at trial. Second, in the *Nicaragua* case the Court was charged with determining State responsibility for violations of international humanitarian law. It therefore rightly focused on the United States' operational control over the contras, holding that the "general control by the [United States] over a force with a high degree of dependency on [the United States]" was not sufficient to establish liability for violations by that force. *Nicaragua*, 1986 I.C.J. Rep. 115. In contrast, this Chamber is not called upon to determine Croatia's liability for the acts of the Bosnian Croats. Rather, it is required to decide whether the Bosnian Croats can be regarded as agents of Croatia for establishing subject-matter jurisdiction over [...] acts which are alleged to be violations of the grave breaches provisions of the Geneva Convention. Specific operational control is therefore not critical to the inquiry. Rather, the Trial Chamber focuses on the general political and military control exercised by Croatia over the Bosnian Croats.

26. The evidence submitted in this case establishes reasonable grounds for believing that the Bosnian Croats were agents of Croatia in clashes with the Bosnian Government in central and southern Bosnia from the autumn of 1992 to the spring of 1993. It appears that Croatia, in addition to assisting the Bosnian Croats in much the same manner in which the United States backed the *contras* in *Nicaragua*, inserted its own armed forces into the conflict on the territory of Bosnia and exercised a high degree of control over both the military and political institutions of the Bosnian Croats. [...]

29. In addition to the evidence of Croatian domination of the military institutions of the Bosnian Croats described above, the Prosecutor has also provided the Trial Chamber with material that suggests that the Bosnian Croat political institutions were influenced by Croatia. [...]

30. In its 7 April 1992 decision recognising the existence of the Republic of Bosnia and Herzegovina, Croatia explicitly stated that recognition of Bosnia implied that "the Croatian people, as one of the three constituent nations in Bosnia and Herzegovina, shall be guaranteed their sovereign rights "and granted Bosnian Croats the right to Croatian citizenship. [...]

31. [...] Perhaps most tellingly, at the time of the conclusion of the Dayton Peace

Agreement, the Foreign Minister of the Republic of Croatia, Mate Granic, wrote to the foreign ministers of several States assuring them that the Republic of Croatia would take all necessary steps "to ensure that personnel or organisations in Bosnia and Herzegovina which are under its control or with which it has influence fully respects [*sic*] and comply with the provisions of [certain portions of the Dayton Peace Agreement]". *Letter dated 29 November 1995 from the Permanent Representative of the United States of America to the United Nations addressed to the Secretary-General* , U.N. GAOR, 50th Sess., U.N. SCOR, 50th Sess., at 126-130, U.N. Doc. A/50/790 & S/1995/999 (30 Nov. 1995) ("Dayton Peace Agreement").

[....]

b. Protected Persons and Property

33. Having concluded that the attack on Stupni Do was part of an international armed conflict, the Trial Chamber now turns to the second requirement for the application of Article 2 of the International Tribunal's Statute: whether the alleged crimes were "against persons or property protected under the provisions of the relevant Geneva Convention". [...]

i. Protected Persons

34. Article 4 of Geneva Convention IV, which addresses the protection of civilian persons in time of war, reads in pertinent part:
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.
Under this definition, Bosnian civilian victims qualify as "protected persons" if they are "in any manner whatsoever ... in the hands of a Party to the conflict... of which they are not nationals". The Prosecutor asserts that the HVO forces under the command of Ivica Raji? were under the control of Croatia to such an extent that Bosnian persons who were the object of the attack by Ivica Raji?'s forces may be

regarded as being in the hands of Croatia.

35. The Trial Chamber has found that HB and the HVO may be regarded as agents of Croatia so that the conflict between the HVO and the Bosnian Government may be regarded as international in character for purposes of the application of the grave breaches regime. The question now is whether this level of control is also sufficient to meet the protected person requirement of Article 4 of Geneva Convention IV.

36. The International Committee of the Red Cross's Commentary on Geneva Convention IV suggests that the protected person requirement should be interpreted to provide broad coverage. The Commentary states that the words "at a given moment and in any manner whatsoever" were "intended to ensure that all situations and all cases were covered".

    [...] *Commentary on Geneva Convention IV* [...] [a]t page 47 [...] notes that the expression "in the hands of " is used in an extremely general sense.

    [...] In other words, the expression "in the hands of" need not necessarily be understood in the physical sense; it simply means that the person is in territory under the control of the Power in question.

37. The Chamber has been presented with considerable evidence that the Bosnian Croats controlled the territory surrounding the village of Stupni Do. [...] Because the Trial Chamber has already held that there are reasonable grounds for believing that Croatia controlled the Bosnian Croats, Croatia may be regarded as being in control of this area. Thus, although the residents of Stupni Do were not directly or physically "in the hands of" Croatia, they can be treated as being constructively "in the hands of" Croatia, a country of which they were not nationals. The Trial Chamber therefore finds that the civilian residents of the village of Stupni Do were – for the purposes of the grave breaches provisions of Geneva Convention IV – protected persons vis à vis the Bosnian Croats because the latter were controlled by Croatia. The Trial Chamber notes this holding is solely for the purpose of establishing subject-matter jurisdiction over the offences allegedly committed by the accused.

ii. Protected Property

38. Geneva Convention IV also contains several provisions that set out the types of

property that are protected under the Convention. The Prosecutor has suggested that Article 53 of the Convention is the appropriate definition in this case. Article 53 provides as follows:

Any destruction by the Occupying Power of real or personal property belonging individually or collectively to private persons, or to the State, or to other public authorities, or to social or co-operative organizations, is prohibited, except where such destruction is rendered absolutely necessary by military operations.

The Prosecutor argues that when Stupni Do was overrun by HVO forces under the command of Ivic Raji? a and came under their control, "the property of Stupni Do became protected property in terms of Article 53... [because] it was [Bosnian] property under the control of HVO forces, who are to be regarded as part of the opposite side, namely Croatia, in an international conflict". [...]

39. Article 53 describes the property that is protected under the Convention in terms of the prohibitions applicable in the case of an occupation. Accordingly, an occupation is necessary in order for civilian property to be protected against destruction under Geneva Convention IV. The only provisions of Geneva Convention IV which assist with any definition of occupation are Articles 2 and 6. Article 2 states: "The Convention shall also apply to all cases of partial or total occupation ... even if the said occupation meets with no armed resistance" while Article 6 provides that Geneva Convention IV "shall apply from the outset of any conflict or occupation mentioned in Article 2". [...]

42. The Trial Chamber has held that the Bosnian Croats controlled the territory surrounding the village of Stupni Do and that Croatia may be regarded as being in control of this area. Thus, when Stupni Do was overrun by HVO forces, the property of the Bosnian village came under the control of Croatia, in an international conflict. The Trial Chamber therefore finds that the property of Stupni Do became protected property for the purposes of the grave breaches provisions of Geneva Convention IV. The Trial Chamber notes this holding is for the sole purpose of establishing subject-matter jurisdiction over the offences allegedly committed by the accused. [...]

2. Article 3 – Violations of the Laws or Customs of War

[...]

48. In the *Tadic* case the Appeals Chamber established the principle that civilians are protected during internal armed conflicts. *Tadic Appeal Decision on Jurisdiction* at 119, 127. The specific issue of whether an attack on a civilian population constitutes a violation of the laws or customs of war was addressed by Trial Chamber I of the International Tribunal in the *Martic Rule 61 Decision*. Trial Chamber I held that attacks on civilian populations were prohibited under conventional and customary law in both international and internal armed conflicts. With respect to conventional law, the Chamber relied on the provisions of Additional Protocols I and II. It also found a customary prohibition on such conduct based on the Appeals Chamber Decision, resolutions of the United Nations General Assembly, Article 3 Common to the Geneva Conventions and the provisions of Additional Protocols I and II as reflective of customary law. Trial Chamber I further found that the other conditions identified in the Appeals Chamber Decision for the International Tribunal's jurisdiction under Article 3 had been met, i.e., that the violation was serious because it undermined important values and had serious consequences for the victims and involved the individual criminal responsibility of the perpetrator of the violation. *See Martic Rule 61 Decision*, 8, 10, 19, 20. [**See** ICTY, The Prosecutor v. Martic [Part A.] [2]] This Trial Chamber agrees with the analysis conducted by Trial Chamber I in the Martic Rule 61 Decision and holds that the International Tribunal has jurisdiction under Article 3 of its Statute to entertain the charge of attack against a civilian population.
[...]

D. Reasonable Grounds

[...]

51. The evidence submitted by the Prosecutor indicates that Stupni Do was a small village approximately four kilometres south-east of Vares in central Bosnia. In contrast to nearby Vares, Stupni Do had a mostly Muslim population of approximately two hundred and fifty people. Witnesses testified that at approximately eight o'clock on the morning of 23 October 1993, HVO soldiers under the command of Ivica Raji?

attacked Stupni Do. On hearing the gunfire which signalled the beginning of the attack, villagers took to shelters, cellars, and other hiding places. Approximately forty lightly armed local villagers, constituting the local defence forces, attempted to defend and protect their families and property. The shooting continued for approximately three hours, but because the villagers were the HVO's only opposition, they were soon overrun. The village defenders then withdrew to a main shelter to try to protect and warn the people located there. [...]

52. It appears that HVO soldiers went from house to house, searching for village residents. On finding the villagers, the evidence indicates, the HVO forced them out of the shelters and terrorised them. Witnesses' statements indicate that the HVO forcibly took money and possessions from the villagers and that they stabbed, shot, raped, and threatened to kill the unarmed civilians they encountered. The HVO soldiers apparently had no regard for the defencelessness of the villagers. For example, four women who were hiding in a cellar were shot at from above. Three of the four died. The one that survived reported that she escaped from the house only to be shot at by the HVO as she ran away towards the woods. Witnesses indicated that they saw the bodies of at least sixteen unarmed residents who appeared to have been murdered in this or a similar manner. In addition, HVO soldiers attempted to burn approximately twelve civilians alive by locking them in a house and setting the house on fire. The civilians eventually managed to escape by breaking the door with an axe. Throughout the attack, HVO soldiers fired exploding phosphorus munitions into the houses, causing them to burst into flames. The HVO soldiers dragged many of the corpses into burning houses. [...]

53. According to the Registrar's Office of the Vares municipality, which was responsible for maintaining Stupni Do's death records, by the time the attack ended, thirty-seven Stupni Do residents were dead. Nearly all of the sixty homes in the village were virtually destroyed. [...]

54. Several witness statements report that Stupni Do had no military significance. The village had no militia to speak of; the "defence force" was made up almost entirely of village residents who came together to defend themselves. [...]

56. [...] There is no evidence that there was a military installation or any other legitimate

target in the village. [...]

59. There is proof Ivica Raji? knew about the attack and actually ordered it. [...] Sergeant Ekenheim stated that Ivica Raji? planned the attack and noted that Ivica Raji? had explicitly stated that he took over Stupni Do "because he thought the Bosnian Army would launch an attack against Vares through Stupni Do so they had to neutralise Stupni Do. It was a Bosnian stronghold filled with soldiers and traitors". [...] At one of several meetings with UNPROFOR representatives, Ivica Raji? informed Sergeant Ekenheim and Colonel Henricsson that he would not hurt the civilians, that the troops in Stupni Do were his, and, because he was in charge, he could guarantee that the civilians would not get hurt. [...]

60. It is also evident that HVO troops in the area recognised Ivica Raji?'s authority. For example, on the way to Vares, Sergeant Ekenheim and Colonel Henricsson passed a HVO checkpoint at which HVO soldiers said they could not pass without permission from Ivica Raji?, their commanding officer. [...]

61. Finally, a witness who had been a member of the HVO and the Croatian Armed Forces stated that prior to the attack, most of the local HVO troops were deployed to the front line areas by Ivica Raji? [...] This witness believes that Ivica Raji? was in charge of the troops because Ivica h Raji? had given him a hand-written note authorising him to retain his weapons while going in and out of checkpoints around Stupni Do. When they were meeting for this purpose, Ivica Raji? indicated that he was proud of his men's actions and that the casualties were normal for this type of action. [...] This witness also claims that he saw Ivica Raji? slap an HVO soldier who supposedly released a girl during the Stupni Do attack. [...]

E. Failure to cooperate with the International Tribunal

[...]

66. The Trial Chamber believes that Ivica Raji? has been present in Croatia and in the territory of the Federation of Bosnia and Herzegovina on several occasions since his release. The prosecutor has produced reliable information indicating that Ivica Raji? resides or has been residing in Split in the Republic of Croatia and that he visits

Kiseljak, in the Federation of Bosnia and Herzegovina for short periods. [...] In addition, the Trial Chamber has received a power of attorney, signed by Ivica Raji? while in Kiseljak, appointing a Croatian lawyer, Mr. Hodak, as his representative in the proceedings in this case.

67. The Republic of Croatia is bound to cooperate with the International Tribunal pursuant to Article 29 of the Statute. Despite the presence of Ivica Raji? on its territory, the Republic of Croatia has neither served the indictment nor executed the warrant of arrest addressed to it.

68. The Federation of Bosnia and Herzegovina is also bound to cooperate with the International Tribunal, following the signing of the Dayton Peace Agreement. Pursuant to Article X of annex 1-A of the Dayton Peace Agreement, the Federation of Bosnia and Herzegovina has undertaken to "cooperate fully with all entities involved in implementation of this peace agreement ... including the International Tribunal for the Former Yugoslavia". Again, despite the presence of Ivica Raji? on its territory, the Federation of Bosnia and Herzegovina has neither served the indictment nor executed the warrant of arrest addressed to it.

69. In a side letter to the Dayton Peace Agreement, on 21 November 1995, the Republic of Croatia undertook to ensure that personnel or organisations in Bosnia and Herzegovina which are under its control or with which it has influence fully respects [sic] and comply with the provisions of the aforementioned Annexes [i.e. annexes 1-A and 2 of the Dayton Peace Agreement]
Dayton Peace Agreement at 126-30. Both the Security Council of the United Nations and the Presidency of the European Union have recently called upon the Republic of Croatia to use its influence on the Bosnian Croat leadership to ensure full compliance by the Federation of Bosnia and Herzegovina with its international obligations. The failure of the Federation of Bosnia and Herzegovina to comply also implies the failure of the Republic of Croatia.

70. In light of the above, the Trial Chamber considers that the failure to effect personal service of the indictment and to execute the warrants of arrest against Ivica Rajic may be ascribed to the refusal of the Republic of Croatia and the Federation of Bosnia and Herzegovina to cooperate with the International Tribunal. Accordingly, the Trial

Chamber so certifies for the purpose of notifying the Security Council. [...]

III. DISPOSITION

FOR THE FOREGOING REASONS, THE TRIAL CHAMBER, PURSUANT TO RULE 61, UNANIMOUSLY

RULES that it has subject-matter jurisdiction over all counts of the indictment against Ivica Raji?;

FURTHER RULES that it is satisfied that there are reasonable grounds for believing that Ivica Raji? committed the crimes charged in all counts of the indictment against him;

HEREBY CONFIRMS all counts of the indictment;

ISSUES an international arrest warrant for Ivica Raji?; and

ORDERS that the arrest warrant shall be transmitted to all States and to the multinational military Implementation Force (IFOR).

NOTES that the failure to effect personal service of the indictment can be ascribed to the refusal to cooperate with the International Tribunal by the Republic of Croatia and by the Federation of Bosnia and Herzegovina and entrusts the responsibility of so informing the Security Council to the President of the International Tribunal, pursuant to Sub-rule 61 (E). [...]

B. Sentencing Judgement

[**Source**: International Tribunal for the Prosecution of Persons Responsible for Serious

Violations of International Humanitarian Law Committed in the Territory of former Yugoslavia since 1991, The Prosecutor v. Ivica Raji?, Case No. IT-95-12-S, 8 May 2006; available at http://www.icty.org [1]. Footnotes omitted.]

IN THE TRIAL CHAMBER I

PROSECUTOR
v.
IVICA RAJI?, a.k.a. VIKTOR ANDRI?

SENTENCING JUDGEMENT

[…]

B. Plea Agreement

13. Ivica Raji? agreed to plead guilty to the following four counts contained in the Plea Agreement:
Count 1: wilful killing (Article 2(a) of the Statute);
Count 3: inhuman treatment (Article 2(b) of the Statute);
Count 7: appropriation of property (Article 2(d) of the Statute);
Count 9: extensive destruction not justified by military necessity and carried out unlawfully and wantonly (Article 2(d) of the Statute).

[…]

17. Ivica Raji? also accepted that, by entering into the Plea Agreement, he had given up the rights related to the presumption of innocence and to a full trial.
18. In exchange for Ivica Raji?'s guilty plea, his complete cooperation with the Prosecution, and the fulfillment of all of his obligations under the Plea Agreement, the Prosecution agreed to recommend to the Trial Chamber the imposition of a "single combined sentence in the range of twelve to fifteen years, with the Accused able to argue for a sentence at the bottom of this range (twelve years) and the Prosecutor able to argue for a sentence at the top of this range (fifteen years)." Both Parties also

understood that the Trial Chamber was not bound by any agreement reached between them on the preferred sentence.

[…]

VI. DISPOSITION

184. For the foregoing reasons, having considered the arguments and the evidence presented by the Parties, the **TRIAL CHAMBER**

PURSUANT TO the Statute and the Rules,

SENTENCES Ivica Raji? to 12 (twelve) years of imprisonment;

[…]

Discussion

The questions relate to Part A, Rule 61 Decision.

1. *(Paras 2, 66-70, Disposition)* What are the advantages and inconveniences of the "Article 61 Procedure" compared with an in absentia trial or with a simple indictment by the prosecutor? What purpose does the "Article 61 Procedure" fulfil? What are the consequences of the Tribunal's ruling for Raji?, for Croatia, and for Bosnia and Herzegovina? How could the Tribunal rule against the Federation of Bosnia and Herzegovina (which is one of the two constituent entities of Bosnia and Herzegovina)? Is not Bosnia and Herzegovina now internationally responsible for the Federation of Bosnia and Herzegovina? Could the UN Security Council now impose sanctions against Bosnia and Herzegovina? Against the Federation of Bosnia and Herzegovina? Against the latter's inhabitants of Croat nationality? Or (under the decision discussed here) also against those of Bosnian Muslim nationality?
2. *(Paras 8, 33 and 34)* Is every wilful killing of a civilian in an armed conflict a grave breach of IHL? At least if it is committed in an international armed conflict? (GC IV, Arts 1

[3], 4 [4] and 147 [5])

3. a. *(Paras 13-31)* Did the Tribunal decide that an armed conflict existed between Bosnia and Herzegovina, and Croatia? How did it establish its existence? Was it sufficient that Croatia financed, organized, supplied and equipped the Croatian Defence Council (HVO)? Did the HVO have to be an organ of the Croat government? Does the Tribunal apply the same criteria as the ICJ applied in the Nicaragua Case? [**See** ICJ, Nicaragua v. United States [6]]

   b. (Paras 13-31) Was the presence of Croatian troops on the territory of Bosnia and Herzegovina sufficient to make it an international armed conflict? Did the Tribunal consider that troops from Croatia were present in Stupni Do? If not, how could it consider that the laws of international armed conflict nevertheless applied? Was it necessary to apply the law of international armed conflict to punish the behaviour of Rajic? (GC IV [7], Arts 1 [8] and 3 [9]; P II [10], Arts 4 [11] and 13 [12]) [**See** Former Yugoslavia, Special Agreements Between the Parties to the Conflicts [13] [Part B.] [14]]

   c. *(Paras 31 and 69)* Was Croatia's undertaking "to ensure that" HVO personnel respect the Dayton Peace Agreement sufficient to prove that the HVO was acting on its behalf? (*See*, by analogy, GC I [15]-IV [7], Art. 1)

   d. *(Paras 34-37)* Does the Tribunal not apply the reasoning of the Prosecutor, which was qualified as absurd and fallacious by the Appeals Chamber in paragraph 76 of the *Tadi? case*? [**See** ICTY, The Prosecutor v. Tadic [16] [Part A.] [17]] If a "defender" of Stupni Do had tortured a passing Bosnian Croat inhabitant of nearby Vares, would that have been a grave breach of IHL? How could the latter have been qualified as a "protected person" in relation to that "defender"? (GC IV [7], Arts 4 [18], 27 [19], 31 [20] and 147 [21])

   e. *(Paras 37 and 42)* Is the question whether, under Art. 2 of the Statute, the Tribunal has subject-matter jurisdiction over acts committed by the HVO distinct from the question of Croatia's liability for acts of the HVO?

   f. (Part B.) Could Raji? have been sentenced for the same acts if the conflict had been qualified as not of an international character?

4. *(Paras 34-37)* How can someone be in the hands of Croatia who has never been under its jurisdiction (nor under the control of its troops)?

5. *(Paras 39 and 42)* After the HVO attack was Stupni Do a territory occupied by Croatia?
6. *(Para. 48)* Why is an attack on a civilian population in a non-international armed conflict a violation of IHL? (GC I-IV, Art. 3 [22]; P II, Art. 13 [23])
7. *(Paras 51-56)* Were there any military objectives in Stupni Do? Were members of the "'defence force' [that] was made up almost entirely of village residents who came together to defend themselves" civilians or combatants? Were they military objectives? If they were, did that make their wives or their houses legitimate targets? (P I, Arts 48 [24], 50 [25] and 52 [26])
8. *(Para. 59)* Was the plan of Raji? to "neutralise Stupni Do" "because he thought the Bosnian Army would launch an attack against Vares through Stupni Do" a violation of IHL? Would it have violated IHL if he did not fear an attack against Vares? (P I, Arts 48 [24], 50 [25] and 52 [26])

Links

[1] http://www.icty.org

[2] https://casebook.icrc.org/case-study/icty-prosecutor-v-martic

[3] https://www.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=FD45570C37B1C517C12563CD0

[4] https://www.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=78EB50EAD6EE7AA1C12563CD

[5] https://www.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=F8D322BF3C0216B2C12563CD0

[6] https://casebook.icrc.org/case-study/icj-nicaragua-v-united-states

[7] https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?documentId=AE2D398352C5B028C12563CD002D6B5C&action=openDo

[8] https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=FD45570C37B1C517C12563CD005

[9] https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=A4E145A2A7A68875C12563CD005

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