

**THE INTERNATIONAL CRIMINAL TRIBUNAL
FOR THE FORMER YUGOSLAVIA**

CASE NO: IT-04-83-PT

IN TRIAL CHAMBER III

Before: Judge Patrick Robinson, Presiding
Judge Krister Thelin
Judge Frank Höpfel

Registrar: Mr. Hans Holthuis

Date filed: 19 January 2007

THE PROSECUTOR

v.

RASIM DELIĆ

PRE-TRIAL BRIEF OF RASIM DELIĆ PURSUANT TO RULE 65*ter* (F)

The Office of the Prosecutor

Mr. Daryl Mundis

Counsel for the Accused

Mrs. Vasvija Vidović

I. INTRODUCTION

1. At the 15 November 2006 status conference, the pre-trial judge ordered the filing of the Defence's pre-trial brief by 19 January 2007. Pursuant to that decision, and in response to the Prosecution's Pre-Trial Brief ("PPTB"), Counsel for Mr. Rasim Delić hereby files the Defence Pre-Trial Brief (the "Defence Brief") pursuant to Rule 65*ter*(F) of the Rules of Procedure and Evidence (the "Rules") of the International Criminal Tribunal for the former Yugoslavia (the "Tribunal"). As required by this Rule, the Defence hereinafter sets out in general terms the nature of the defence of General Delić, addresses the factual and legal issues, and outlines the matters with which the Defence takes issue in the Prosecution Brief and the reasons for taking issue.

2. As the Defence understands the purpose of the Prosecution's pleadings, Article 21(4)(a) of the Statute (that the accused shall be entitled to be informed in detail of the nature and cause of the charge against him) translates into an obligation on the Prosecution to plead the material facts underpinning the charges in an indictment.¹ The pleadings will therefore be sufficiently particular to provide the Defence with "enough detail to inform a defendant clearly of the nature and cause of the charges against him/her to enable them to prepare a defence".² Also, the Prosecution cannot cure a defective indictment by its supporting material and pre-trial brief", and the Prosecution is "expected to inform the accused of the nature and cause of the case ... before it goes to trial".³

3. Save where a fact, allegation or other suggestion asserted in the Prosecution's Indictment⁴ or PPTB is expressly agreed in the facts agreed between the parties ("Agreed Facts")⁵ or this Defence Brief, such facts, allegations or other suggestions are not admitted by the Defence, and the Prosecution is put to strict proof of the same. The Defence does however

¹ *Hadžihasanović and Kubura*, Decision on the Form of the Indictment, 7 Dec 2001, para.8.

² *Ibid.*

³ *Ibid.*, para.12.

⁴ The Amended Indictment filed on 14 July 2006 (the "Indictment").

⁵ See Agreed Facts in Annex B of the Prosecution Brief.

remain open to the possibility of further issues being agreed between the parties following the filing of this document.

II. THE BURDEN AND STANDARD OF PROOF

4. The Prosecution brings this case and it is for the Prosecution to prove every element of the crimes alleged against General Delić (also referred to as the “Accused”) beyond reasonable doubt, in accordance with Rule 87(a) of the Rules and the fundamental principle of the presumption of innocence. Nowhere in its PPTB, does the Prosecution refer to this most sacrosanct principle of criminal justice.

III. GENERAL NATURE OF THE DEFENCE OF THE ACCUSED

5. The Accused pleaded not guilty to all charges in the Indictment.
6. The Prosecution is put to strict proof that the criminal acts that the Accused is alleged to have committed, as charged in the Indictment, were committed. (Maline/Bikoši, Counts 1 and 2, and Ozren-Vozuća, Counts 1, 2, 3 and 4, with the exception of Agreed Facts in Annex B of PPTB)
7. Save for the facts admitted in the Agreed Facts that individuals were murdered at Bikoši, the Defence does not accept that the offences underlying the charges against the Accused in the Indictment, alleged to have been committed by subordinates of the Accused, have been committed. (Counts 1, 2, 3 and 4)
8. In the event that the Prosecution is able to establish that the underlying offences, alleged to have been committed by subordinates of the Accused, were committed (which is not accepted), as to Maline (June 1993), the Accused does not incur individual criminal responsibility because on 8 June 1993 no superior- subordinate relationship existed between the Accused and the alleged perpetrators of the underlying offences. The Appeals Chamber has held that “crimes committed in the past, prior to his superior’s assumption of

command, are clearly excluded” from individual criminal responsibility, and “an accused cannot be charged under Article 7(3) of the Statute for crimes committed by a subordinate *before* the said accused assumed command over the subordinate”.⁶ (Counts 1 and 2)

9. In relation to the crimes charged in the Indictment subsequent to the events in Maline, there was no superior to subordinate relationship between the Accused and the alleged perpetrators of the underlying offences. (Counts 1, 2, 3 and 4)
10. The Accused does not incur individual criminal responsibility because he did not know and did not have reason to know that his subordinates (within a superior-subordinate relationship) had committed or were about to commit crimes. (Counts 1, 2, 3, and 4)
11. Whenever the Accused knew or had reason to know that a crime might have been committed, he took the necessary and reasonable measures within his authority to have the matter investigated by the responsible commands.
12. Although the foreign Mujahedin fighters were not under his effective control at any time relevant to the Indictment, the Accused took reasonable and proper steps within his authority to try and place these groups under the control of the Army of the Republic of Bosnia and Herzegovina (ARBiH).
13. At all times relevant to the Indictment, the Accused acted as a responsible commander and took proper steps within his authority as Commander of the Main Staff of the ARBiH to implement the relevant provisions of international humanitarian law (IHL) and its corresponding domestic regulations. The steps included, but were not limited to, issuing orders and instructions concerning the application of IHL provisions, and arranging training for officers of the

⁶ *Prosecutor v. Enver Hadžihasanović, Mehmed Alagić and Amir Kubura*, Case No. IT-01-47-AR72, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility in *Prosecutor v. Delić*, 16 July 2003, paras.49 and 51.

ARBiH. Also, on occasions when he learned that a criminal act may have been committed, he demanded the responsible command conduct an investigation.

14. In determining the issues before the Trial Chamber, account must be taken of the authority and competence of the Accused as Commander of the Main Staff of the ARBiH.
15. In determining the charges, the Trial Chamber must also take account of the overall context and the specific circumstances which were present during the period relevant to the Indictment, and in which the Accused acted.

IV. THE POLITICAL AND MILITARY CONTEXT OF THIS CASE

16. A full understanding of the political and military context of this case, which is not provided in the PPTB, is crucial to the assessment of the relevant events and the alleged responsibility of General Rasim Delić.
17. In both the Indictment and its PPTB, the Prosecution takes a very selective view of the events and the context in which violations were allegedly committed by forces under the effective control of the Accused. This context, well known to the Prosecution, has been described in detail in various judgments rendered by the ICTY.⁷
18. It is against the circumstances of this complex and extremely challenging situation that the responsibility of the Accused must be assessed. These circumstances, including the fact that the Accused's command was based in besieged Sarajevo at a time when thousands of civilians were killed by sniping and shelling, with the ARBiH scattered in various enclaves, and facing internal conflict, placed the Accused in one of the most difficult military scenarios of all time.

⁷ See the Trial Judgments in: *Prosecutor v. Tihomir Blaškić* (IT-95-14), *Prosecutor v. Dario Kordić & Mario Čerkez* (IT-95-14/2), *Prosecutor v. Stanislav Galić* (IT-98-29), *Prosecutor v. Radoslav Brđanin* (IT-99-36), *Prosecutor v. Radislav Krstić* (IT-98-33), *Prosecutor v. Momčilo Krajišnik* (IT-00-39 & 40), *Prosecutor v. Biljana Plavšić* (IT-00-39 & 40/1), *Prosecutor v. Miroslav Deronjić* (IT-02-61), *Prosecutor v. Ivica Rajić, a.k.a. Viktor Andrić* (IT-95-12), *Prosecutor v. Momir Nikolić* (IT-02-60/1).

General Political Situation

19. The fall of the Socialist Federal Republic of Yugoslavia (SFRY), caused by Serbia's nationalistic policy, represents the backdrop to the war in Bosnia and Herzegovina. The primary focus for the leadership in Belgrade was the creation of a "Greater Serbia" on the territory of former Yugoslavia. Similarly, the government of Croatia had its own plans for territorial expansion, in particular towards Bosnia and Herzegovina.
20. By the beginning of 1990s the SFRY had begun its disintegration, and indications of the armed conflict to follow could be seen. In Resolution 713 of 25 September 1991, the UN Security Council imposed a complete embargo on all deliveries of arms and military equipment to the territory of former Yugoslavia.
21. In light of the Serbian actions, the Republic of Bosnia and Herzegovina (RBiH) declared its independence on 3 March 1992. It was recognized as a sovereign State by the European Community on 6 April 1992, and it became a member of the UN on 22 May 1992. The ARBiH became the only lawful army on the territory of the RBiH.
22. Together with the Yugoslav People's Army (JNA), the Bosnian Serbs began the aggression against the Bosnian Muslims in early 1992. Already by April 1992 the ethnic cleansing of the Bosnian Muslims had begun in eastern Bosnia (municipalities of Zvornik, Bijeljina, Srebrenica, Bratunac, Foča, Višegrad etc). At that time the Security Council passed Resolution 749 (7 April 1992) authorizing "the earliest possible full deployment of the United Nations Protection Force" (UNPROFOR). This peace-keeping, rather than a peace-making, force had a limited mandate which did not include the use of force in defence of the civilian population.
23. On 28 April 1992 the Federal Republic of Yugoslavia (FRY) was formed. Subsequently, during the summer of 1992, the ethnic cleansing was continued in north-west Bosnia, Bosanska Krajina.

24. On 4 May 1992, RBiH proclaimed FRY an aggressor. This was followed by Resolution 752 of the UN Security Council on 15 May 1992, which demanded that the units of the JNA and the Croatian Army present in RBiH either withdraw or be disarmed and placed under international monitoring.
25. Unlike the unlawful Croatian Community of Herceg-Bosna (HZHB) and the Serb Republic BiH, both of whom pursued a policy of aggression and ethnic exclusiveness, RBiH's main goal was to achieve a cessation of hostilities and ensure a peaceful future for all of its citizens. To this end, in June 1992 the Presidency of RBiH adopted its "Platform", whose basic principle was the preservation of a multi-ethnic, multi-religious, parliamentary democracy, under which the military was subordinated to the civilian authorities.⁸
26. As a result of its aggression, in 1992 the Serb army was in control of 70% of the territory of RBiH, and the Muslim population was forced into five enclaves: Sarajevo, Tuzla, Žepa and Srebrenica, Goražde, and Bihać. These areas were declared safe zones by the UN Security Council in Resolution 819 (Srebrenica)⁹ and Resolution 824 (other zones).¹⁰
27. It was against this background that the ARBiH was created. In April 1992, the Presidency of RBiH formed the Territorial Defence (TO) of the RBiH. By the Presidency Order of 23 June 1992, it was announced that the armed forces would be called the ARBiH, although in reality not all units under the control of the TO became subordinate to the ARBiH.
28. On 20 June 1992, President Alija Izetbegović proclaimed a state of war in Bosnia and Herzegovina.
29. By May 1993 large numbers of Muslims had been killed and raped. This drastic situation was condemned by the UN Security Council who, in May 1993, expressed grave alarm in light of "reports of mass killings, massive, organised and systematic detention and rape of women and the continuance of the practice of ethnic cleansing".¹¹

⁸ The Platform for the Functioning of the Presidency in War Time, adopted by the Presidency on 26 June 1992.

⁹ UN Security Council Resolution 819 (16 April 1993).

¹⁰ UN Security Council Resolution 824 (6 May 1993).

¹¹ UN Security Council Resolution 827(25 May 1993).

30. The Croat leadership also sought to undermine the sovereignty of RBiH. Its goal was to carve out a separate Croat entity on the territory of RBiH. To this end, in 1993 the Croatian Defence Council (HVO) initiated a conflict with the ARBiH, which lasted until the Washington Agreement was signed on 18 March 1994.
31. Throughout the armed conflict in the former Yugoslavia, the primary aim of ARBiH was the defence of RBiH's sovereignty and territorial integrity from attacks by the Army of Republika Srpska (VRS) and the HVO. The fact that these two armies were aided logistically and militarily by neighbouring Serbia and Croatia rendered the struggle for the survival of RBiH extremely difficult.
32. In the period relevant to this case (June 1993 to September 1995), RBiH remained completely surrounded by Serb forces and the increasingly hostile Republic of Croatia, which caused a humanitarian crisis and further undermined the defence of the RBiH territory.
33. A number of subsequent UNSC resolutions extended the duration of UNPROFOR's mandate,¹² but it was only in June 1993, in Resolution 836,¹³ that the Security Council allowed the peace-keeping force the limited authority to "deter attacks against the safe areas."

Military Situation: Formation of the ARBiH

34. Prior to the formation of the ARBiH and its predecessor, the TO, the armed force with responsibility for the whole territory of the SFRY was the JNA. It consisted of an active and reserve federal army, navy and air force, and a separate system of TO. Each republic of SFRY had its own TO. In the 1990s the predominance of Serb officers in the JNA increased, and JNA units in BiH became progressively all-Serb units. The JNA finally formally withdrew from BiH on 19-20 May 1992.¹⁴

¹² UN Security Council Resolutions 758 (8 June 1992), 769 (7 August 1992), 776 (14 September 1992), 807 (19 February 1993), 815 (30 March 1993), 836 (4 June 1993), and 870 (1 October 1993).

¹³ UN Security Council Resolution 836 (4 June 1993).

¹⁴ For more details on the JNA and its partial transformation into the VRS see *Prosecution v. Momčilo Krajišnik*, Trial Judgment, paras.18, 188-224.

35. On 3 September 1992, the Presidency issued a decision to form five corps of the ARBiH. Some of the problems involved were outlined in *Prosecutor v. Sefer Halilović*, where the Trial Chamber held that “what was later to become the ABiH initially consisted of more or less organised units as well as spontaneously created units, which were not part of any military structure. Under the leadership of Sefer Halilović, the supreme military commander, an attempt was made to transform the various units into a functioning organised army. The result was the Territorial Defence (TO), which was formally established on 8 April 1992 and which turned into the ABiH on [23 June] 1992. In the beginning of its existence, including during the Indictment period, the ABiH was multi-ethnic in character. During this time, the ABiH was inadequately funded. A system of ranks was only introduced in late 1993 or 1994”.¹⁵
36. Although the ARBiH was formed early on in the war, it was not until much later that it became anything close to being a functional force, and in some parts of RBiH this was never achieved at all. It took a long time following their creation for the corps of the ARBiH to be formed; for example, during the whole of 1993 the 5th Corps still existed only on paper, despite its formation being ordered in September 1992. Moreover, there was no Corps Command in place which would have allowed the newly appointed corps commanders to benefit from the experience of Assistant-Commanders and staff officers.
37. During the entire conflict, the ARBiH failed to function properly and experienced a whole range of organisational problems, which included the following:

Lack of Professional Experience

38. One significant problem was the lack of professional personnel. Only 2.5% of the officers in the ARBiH had previous military training; they came from the JNA. Due to the lack of experienced officers, the political and military leadership of RBiH decided not to introduce a formal system of ranks until late 1993 or early 1994. On this issue the *Halilović* Trial Chamber held, “The ABiH

¹⁵ *Prosecutor v. Sefer Halilović*, Trial Judgement, para.101. In the judgment the date is stated as 12 April 1992, which is incorrect, it is unclear to us whether this is a typographical error.

gradually became more organised, although in September 1993 it was still not a fully-functional army. There were a number of persons commanding units who did not have any formal military training and the intention was therefore to appoint as commanders those who had military training or a background in the JNA. The evidence shows that there was distrust and even animosity between the commanders with a military background and those who lacked such a background”.¹⁶

39. The general situation whereby most ARBiH officers possessed minimal or only limited experience is aptly demonstrated by the situation pertaining to the 3rd Corps (which is of relevance to this case). When General Hadžihasanović was appointed as Commander of the 3rd Corps in 1993, he had neither the training nor experience necessary for such a high position. Similarly, General Mahmuljin, who was Commander of the 3rd Corps from April 1994, lacked any formal military education. Even the Accused himself lacked the experience that would have normally been expected of someone holding the position of Commander of the Main Staff of the ARBiH.

Lack of Resources

40. Another immense problem was the lack of resources, in particular the lack of weapons and basic equipment, available to the ARBiH. Whereas the VRS and the HVO were aided by the JNA and the Croatian Army (and Serbian and Croatian authorities), the ARBiH had to be organized from scratch with the little that was left after the withdrawal of the JNA. The Presidency and the Supreme Command were not able to provide any material assistance to the corps, and there were no war reserves left from which the corps could draw material and technical supplies. All this had been taken or destroyed by the JNA; the corps were therefore left to obtain resources in whatever manner they could. It was also necessary to design a new system of combat re-supply. The arms embargo made the situation worse.
41. By the time that General Delić was appointed Commander of the Main Staff in June 1993, the ARBiH was still far from organized and was severely under-

¹⁶ *Prosecutor v. Sefer Halilović*, Trial Judgement, para.102.

equipped. Even by 1995, only every other soldier was armed. The ARBiH often did not have maps, as they too had been taken by the JNA and the HVO.

Lack of contingency and mobilisation plans

42. Contingency plans, which would have been available to any other professional army in a time of conflict, did not exist. The consequence was that it was not immediately possible to conduct a planned mobilisation of military and police forces, nor could the defence institutions act in a planned and organised way. The war industry, even where it existed, could not be reoriented in a planned way to aid war production. The same was true of all institutions of strategic importance (railways, the postal service, transportation companies).
43. No mobilization mechanism was in place in most municipalities of RBiH. The organizational tables (which were maintained by the pre-conflict Secretariats of Defence within the municipalities) were in almost all cases taken away. Within these tables a list of conscripts, to be drafted up in times of conflict had been prepared, and also war tasks were specified in advance for all those persons; without them, the result was that the mobilisation process had to start from the beginning.
44. Pursuant to the Decree with the Force of Law on Defence,¹⁷ the responsibility for mobilization rested with the Municipal Secretariats of Defence (which were the civilian authorities), rather than with the Corps Commands. The consequence of this was that the number of persons to be mobilised in each municipality and the manner in which this was done, depended upon the civilian authorities alone, in the absence of any influence by the corps command. Thus, mobilisation depended upon the will and organisation of each municipality, which led to constant understaffing within military units.

¹⁷ Official Gazette of RBiH No.4, 14 May 1992

Communications

45. The fact that the VRS controlled most of the territory of RBiH made communications between the corps of the ARBiH and the Main Staff extremely difficult and, in case of some corps, impossible. When the JNA withdrew from RBiH, radio relays which enabled radio communication were destroyed. Consequently, means of communication were extremely poor, and were often limited to physical delivery of communications by couriers. Some radio communication was possible over short distances within the ARBiH, but it was often blocked or intercepted. The VRS and HVO actively sought to block communication between the different parts of the ARBiH, which made it extremely difficult to pass information during most of the conflict.

Break-up of Heavily Centralised Socialist System

46. Another problem related to the great upheaval that resulted from the break-up of the SFRY. Under the previous federal government system, political control and all aspects of government within the territory of the RBiH had been under a heavily centralised socialist political system. With the collapse of that system, those individuals holding positions at the highest levels of the RBiH, particularly within the Ministry of Interior and other government authorities, were faced with an entirely new and different situation whereby they were no longer receiving centralised directions.

Dissemination of Information

47. As to dissemination of information concerning ARBiH officers' responsibilities under IHL – regulations and laws were passed, although it took a long time before they were published. Sometimes new regulations never reached parts of RBiH, such as Srebrenica, Žepa, Goražde and the Bihać pocket. In centres such as Sarajevo, Zenica and Tuzla, only a limited number of copies of these regulations were available, although efforts were made to distribute them. The Accused took steps to arrange the training of officers and, at times, consultations were held for officers where former JNA officers gave lectures.

Internal conflicts

48. Internal conflict existed within the highest levels of the ARBiH, which led to significant problems which could have undermined the entire ARBiH (this is outlined in paras.82-86 below). An internal conflict of a different nature concerned Fikret Abdić, a Muslim who had been a member of the Presidency at the start of the conflict, and who rejected the legitimacy of the RBiH government, and led his supporters into violent confrontations with the ARBiH (see paras.87-89 below).

V. CIRCUMSTANCES OF GENERAL RASIM DELIĆ

Relevant biographical facts

49. Rasim Delić, son of Rašid, was born on 4 February 1949 in Čelić, Republic of Bosnia and Herzegovina.
50. General Delić is a former professional military officer of the JNA. He studied at the Military Academy for Land Forces from 1 October 1967 until 31 July 1971, at which time he commenced service with the JNA.
51. From 21 September 1984 until 27 August 1985 General Delić was the Chief of Staff and Assistant Commander of the Joint Artillery Regiment.
52. From 28 August 1985 until 31 August 1988 and from 1 August 1989 until 15th July 1990 General Delić was Commander of the Joint Artillery Regiment.
53. On 22 December 1987 General Delić was promoted to Lieutenant-Colonel.
54. Between 1 September 1988 and 31 July 1989 General Delić attended the Command Staff School.
55. From 16 July 1990 until 13 April 1992 General Delić was Assistant Chief of the Department for Operational and Training Services in the Command of JNA 4th Corps in Sarajevo.
56. General Delić officially requested to leave the JNA on 13 April 1992.

57. Shortly after 13 April 1992 General Delić was appointed Head of the Training and Operations Organ of the TO of Bosnia and Herzegovina.
58. On 16 April 1992, General Delić was ordered to leave Sarajevo and on 19 April 1992 he arrived in Visoko, where he worked with a group of TO officers on the formation of TO units in Central Bosnia. Eventually, the Visoko Tactical Group was formed with General Delić at its head.
59. By 12 May 1992, General Delić was also a member of the Main Staff of the TO, and on that date he was officially tasked with organizing and commanding armed combat activities in the territory of the municipalities of Fojnica, Kreševo, Kiseljak, Visoko, Ilijaš, Vogošća, Breza, Vareš and Olovo.
60. On 23 June 1992, the forces of the TO were renamed the ARBiH (although not all units under the control of the TO became subordinate to the ARBiH) and on 17 October 1992 Sefer Halilović, the then Chief of the Main Staff of the ARBiH, ordered the appointment of General Delić as Acting Head of the Department for Operations Planning and Training of the ARBiH, within the Main Staff.
61. On 27 April 1993, Sefer Halilović appointed the ARBiH members of the Joint Command of the ARBiH and HVO, including Rasim Delić, Mustafa Hajrulahović, Stjepan Šiber and Vehbija Karić representing the ARBiH.
62. On 8 June 1993, the Presidency of Bosnia and Herzegovina issued a decision on the restructuring of the ARBiH Supreme Command Headquarters to include establishing the post of Commander of Main Staff of ARBiH.
63. In the same decision, it was announced that Rasim Delić “shall be appointed Commander of the Main Staff of the Armed Forces of the Republic of Bosnia and Herzegovina.”

The prevailing circumstances in the period when General Delić was Commander of the Main Staff

64. When General Delić assumed his role as Commander of the Main Staff, old rules and regulations from the JNA period had been abandoned, and the

organization of the ARBiH differed significantly from that of the JNA. The Decree with the Force of Law on The Armed Forces of RBiH¹⁸ was much more limited in scope than that which pertained to the JNA. Under this Decree, the authority of the armed forces was limited to the command and control of the units, while the army had no authority over the elements of logistics, civilian protection staff, civilian police (MUP) as well as over other civilian elements of defence.

65. Pursuant to the Decree with the Force of Law on Defence¹⁹ and the Decree with the Force of Law on The Armed Forces of RBiH, military commands had no authority over civilian bodies located in their area of responsibility.
66. The Decree with the Force of Law on the Formation and Work of Districts²⁰ transferred important competencies from the area of defence to the district authorities (district presidencies, executive boards of the districts, and district secretariats of defence).
67. The changes in the regulations governing the organization and the functioning of the army allowed for the appearance of informal lines of command and control throughout the ARBiH. This occurred because a number of persons were still not familiar with the new regulations, while others were reluctant to accept them and continued to hold on to old lines of command and control.

Two fronts

68. General Delić came to the Main Staff at the moment when the ARBiH was struggling to defend against attacks by two separate enemies. On the one side, it was faced with the much stronger VRS, which had already gained control of most of the territory of RBiH. On the other, it had to protect against the increasingly frequent advances of the HVO, especially in the area of Central Bosnia.

¹⁸ Official Gazette of RBiH No.4, 20 May 1992.

¹⁹ Official Gazette of RBiH No.4, 14 May 1992.

²⁰ Official Gazette of RBiH No.12, 13 August 1992.

69. The defence of the RBiH territory and the civilian population in the areas attacked by the VRS and the HVO was rendered even more difficult by the lack of communications between the Main Staff and the corps of ARBiH engaged in combat. It was part of the VRS and the HVO strategy to block communications between different parts of the ARBiH in order to weaken and finally defeat it.
70. The plight of the civilian population of RBiH and the humanitarian crisis which ensued prompted a strong response from the international community. The following are excerpts from the most relevant UN resolutions issued during this period.
71. In Resolution 819 (16 April 1993), the UN Security Council expressed concern regarding the “pattern of hostilities by Bosnian Serb paramilitary units against towns and villages in eastern Bosnia” and reaffirmed that “any taking or acquisition of territory by the threat or use of force, including through the practice of ‘ethnic cleansing,’ is unlawful and unacceptable.”
72. One day later, the Security Council issued Resolution 820 in which it reaffirmed the “sovereignty, territorial integrity and political independence of the Republic of Bosnia and Herzegovina” and condemned “the refusal...of the Bosnian Serb party to accept the Agreement on Interim Arrangements...[and] all violations of international humanitarian law, including in particular the practice of ‘ethnic cleansing’ and the massive, organized and systematic detention and rape of women...”.
73. In Resolution 824 (6 May 1993), the Security Council reiterated the concerns expressed in previous resolutions and declared that “The capital city of the Republic of Bosnia and Herzegovina, Sarajevo, and other such threatened areas, in particular the towns of Tuzla, Žepa, Goražde, Bihać, as well as Srebrenica, and their surroundings should be treated as safe areas by all the parties concerned and should be free from armed attacks and from any other hostile act”.
74. In Resolution 838 (10 June 1993), the Security Council reaffirmed the sovereignty of RBiH and further condemned the attacks on its civilians. In

Resolution 859 (24 August 1993) the Security Council specifically condemned “the disruption of public utilities (including water, electricity, fuel and communications), in particular by the Bosnian Serb party...”.

Situation in Sarajevo

75. In June 1993, when General Delić became Commander of the Main Staff of ARBiH, Sarajevo, which had been declared a safe zone by the UN,²¹ was under the worst attacks from VRS positions since the beginning of the armed conflict in RBiH. Aside from constant shelling, the citizens of Sarajevo were also deprived of water, electricity, and basic humanitarian aid.
76. In Resolution 836 (4 June 1993), the UNSC expressed alarm at “the plight of the civilian population in the territory of the Republic of Bosnia and Herzegovina in particular in Sarajevo...”. Several months later, in Resolution 859 (24 August 1993), the Security Council reiterated its concern “about the continuing siege of Sarajevo...”.
77. This desperate situation persisted long after General Delić became Commander of the Main Staff. As a result of Bosnian Serbs’ sniping and shelling campaigns, thousand were killed and injured in the ARBiH controlled areas in and around Sarajevo. Civilians were specifically targeted, and many lost their lives on buses and trams, while attending funerals, and in their own homes.²²
78. In July and August 1993 the VRS launched an offensive with the goal of taking over Mount Igman and thus placing Sarajevo, the political and military centre of the RBiH, under complete blockade. Because of its great strategic importance, this operation was commanded by Ratko Mladić, the Commander of the VRS. With Sarajevo completely sealed off, the ARBiH was forced to dig a tunnel under the airport in order to connect Sarajevo with the free territories and bring in the desperately needed food and other necessities.

²¹Security Council Resolution 824 (6 May 1993).

²² See the Trial Judgment in *Prosecutor v. Stanislav Galić*, paras.581-584.

79. Due to the extremely difficult situation in Sarajevo, General Delić could not leave the city until late August and was thus not able to direct his efforts toward other areas of RBiH.
80. General Delić became Commander of the Main Staff at a time of serious internal conflicts in the ARBiH. The fact that, upon his appointment to this position, Sefer Halilović, who had been the Chief of the Main Staff until that point, took second place in the command of the Main Staff, caused serious divisions within the ARBiH.
81. These problems brought into question the functioning and the very survival of that part of the ARBiH which supported Sefer Halilović. The divisions in the ARBiH persisted until Mr. Halilović was relieved of duties as Chief of the Main Staff on 1 November 1993.
82. The situation in the Sarajevo 9th and 10th Brigades illustrates the gravity of this problem and its damaging effects. Commanders of the 9th and 10th Brigades, as well as certain other units, often acted outside of their authority and refused to obey orders from their superiors. They frequently arrested citizens in the streets of Sarajevo and took them to dig trenches, without prior authorization to do so. On one such occasion, members of the 10th Brigade even arrested the son of General Delić and it was only after President Alija Izetbegović intervened that he was released.²³
83. This serious situation required General Delić's full attention, as the survival of this part of the ARBiH depended on the finding of a swift solution to this problem.
84. The measures General Delić took in order to solve the problems within the ARBiH sparked a revolt among the members of the 9th and 10th Brigades and certain other units. During the night of 2 to 3 July 1993, they blocked the building where General Delić's office was located, as well the Public Security Service (SJB) and a part of the Main Staff which was housed in the building of

²³ In *Prosecutor v. Halilović*, p. 62, para.140, the Trial Chamber analyzed this problem:

“According to several witnesses, the 9th and the 10th Brigades were not completely integrated into the system of military subordination as demonstrated by the lack of discipline of the brigades and the particular attitude of their commanders, who often had to be “persuaded” instead of “ordered”.”

the Faculty of Science. Such problems, which fully preoccupied General Delić, persisted for months.

The Overall Situation in 1994 and 1995

85. In 1994, the ARBiH was faced with the escalation of another internal conflict. This conflict began on 4 October 1993 when Fikret Abdić, a Muslim who rejected the authority of the legitimate RBiH government, formed the AP “Zapadna Bosna” (Autonomous Region of Western Bosnia). Abdić, who regularly collaborated with the Serb authorities, did everything to obstruct the functioning of the ARBiH and the Presidency, and thus further endangered the survival of the RBiH.
86. Starting in May 1993, Abdić’s followers prevented the transport of humanitarian aid over the territory of AP “Zapadna Bosna.” In May 1994, the conflict between the 5th Corps and the army of Fikret Abdić intensified. In July 1994, the 5th Corps engaged in the decisive action against the army of AP “Zapadna Bosna” (action “Tigar Slobode”).
87. These problems, as well as the problems to which the Security Council reacted in its numerous resolutions, completely preoccupied General Delić during this period.
88. Throughout 1994 and 1995, the ARBiH and the civilian population in all parts of RBiH were faced with devastating attacks by Serb forces. The most difficult situations were noted in a number of Security Council resolutions issued during this period.
89. In Resolution 900 (4 March 1994), the UNSC expressed deep concern regarding the “deteriorating situation in Maglaj...(and) the situation of the civilian population in other parts of the territory of the Republic of Bosnia and Herzegovina, including in and around Mostar and Vitez”. Maglaj is situated in Central Bosnia, not far from Vozuća, with which the Indictment is concerned. In addition, the Security Council appealed to all sides to cooperate with UNPROFOR in order to secure a cease-fire in and around Sarajevo, and to

allow complete freedom of movement for all citizens and humanitarian aid from, to and within Sarajevo.

90. Due to the deteriorating situation in and around Maglaj, in Resolution 908 (31 March 1994), the Security Council considered the possibility of declaring Maglaj a safe zone.
91. In its Resolution 913 (22 April 1994) the Security Council expressed further concern regarding the ongoing hostilities in and around Goražde and condemned “in the strongest possible terms the Bosnian Serb forces for their continued offensive against the safe area of Goražde, which has resulted in the death of numerous civilians and tremendous human suffering.” The resolution specifically condemned the shelling and attacks by the Bosnian Serb forces on the safe area of Goražde and demanded the withdrawal of “those forces and their weapons to a distance to be agreed by UNPROFOR wherefrom they cease to constitute a threat to the status of Goražde as a safe area.”
92. In Resolution 941 (23 September 1994), the Security Council expressed grave concern at the “persistent and systematic campaign of terror perpetrated by the Bosnian Serb forces in Banja Luka, Bijeljina and other areas of the Republic of Bosnia and Herzegovina under the control of Bosnian Serb forces...”. Furthermore, this resolution strongly condemned “all violations of international humanitarian law, including in particular the unacceptable practice of ‘ethnic cleansing’ perpetrated in Banja Luka, Bijeljina and other areas of the Republic of Bosnia and Herzegovina under the control of the Bosnian Serb forces...”. The Security Council thereby demanded that “the Bosnian Serb authorities immediately cease their campaign of ‘ethnic cleansing.’”
93. Throughout 1994, the Serb forces continued to violate the Agreement on the Demilitarization and the status of the safe zone of Srebrenica.
94. On 23 December 1994, the political representatives of the RBiH and the Serb forces signed a four-month cease-fire on the territory of RBiH. The military representatives signed the same agreement on 31 December 1994.

This cease-fire was repeatedly violated by the Serb forces, especially in the area of Bihać.

95. In light of the extremely difficult situation in the area of Bihać, the ARBiH decided to launch the two Vlašić operations, in February and March 1995, with the goal of diverting part of the Serb forces from Bihać and thus lessening the attacks on this city.
96. On 26 May 1995, the Serb forces completely cut off the water, electricity and gas supplies to Sarajevo, due to which the situation in this city worsened considerably. In addition, in June 1995 the Serb forces intensified the artillery attacks on Sarajevo.
97. Due to the humanitarian catastrophe in which Sarajevo found itself in mid-1995, and the unwillingness of the international community to sanction the Bosnian Serbs for constant violations of UN resolutions, ultimatums and agreements regarding Sarajevo, on 18 May 1995 the President of the Presidency, Alija Izetbegović, issued an order to the ARBiH for the immediate lifting of the siege of Sarajevo. This action was the only one which the Main Staff commanded, and it did so pursuant to the authority given to it by the President of the RBiH Presidency.
98. During the execution of the Sarajevo operation, the situation in Eastern Bosnia progressively worsened, especially in the areas of Srebrenica and Žepa. The continued violations of the Agreement on the Demilitarization of Srebrenica and Žepa, signed on 8 May 1993 by the Bosnian Serbs, led to an escalation of conflict in this area.
99. The UNPROFOR, whose duty it was to protect the population within the safe zones in Eastern Bosnia, failed to react to the repeated attacks by Bosnian Serbs on these areas, and in particular on Srebrenica. When the Serb forces finally entered Srebrenica on 11 July 1995, around 20 000 civilians, many of them women and children, sought refuge at the UNPROFOR base in Potočari expecting that they would protect them from the Serb forces. However, the UNPROFOR failed to react again. As a result, between 7 000 and 10 000

thousand Bosniaks were slaughtered in a short period of time in Potočari and the wider area of Srebrenica.

100. During this period, General Delić was fully preoccupied with efforts to prevent the tragedies in Srebrenica and Žepa, as well as with the difficult situation among the ARBiH troops from this area.
101. The situation in other parts of the RBiH was also very serious. Between July and October 1995, the Serb forces attacked with heavy artillery Mostar, Tuzla, Bihać, Maglaj, Zavidovići, and Zenica.

Central Bosnia

102. At the time of General Delić's appointment, the situation in Central Bosnia was equally alarming, as the fighting on both fronts, and particularly between ARBiH and the HVO, intensified. The following facts, which occurred before General Delić's appointment, led to the escalation of the conflict:
 103. On 25 October 1992, the HVO attacked ARBiH units in Prozor and expelled all Bosniaks from town, killing many.
 104. On 29 October 1992, the VRS occupied Jajce and approximately 25 000 Bosniaks and Bosnian Croats were displaced in the direction of Travnik.
 105. On 18 October 1992, in the areas under its control, the HVO abolished legal municipal assemblies, removed members of local administrations who were opposed to the conflict with the Bosniaks, and disarmed Bosniak soldiers with the exception of Posavina. The result was the creation of a parallel system of government in several municipalities.
 106. As a result of negotiations on the political level, the Vance Owen Plan was adopted in early 1993. The plan, which identified certain territories as "Bosnian Croat majority provinces," provided an incentive for the HVO to take these territories by force and thus contributed to the conflict between the ARBiH and the HVO. The interest of the international community in seeing the implementation of the Vance Owen Plan had significant impact on the situation in Central Bosnia.

107. In June 1993, the situation in Žepče, which was of strategic importance for the RBiH, significantly worsened. Due to this Žepče became a priority for the ARBiH.
108. In 1993, more than 200 000 persons expelled from their homes found refuge in the municipalities in the zone of responsibility of the 3rd Corps. Consequently, the already difficult situation became catastrophic.
109. Military police units in all parts of RBiH, and particularly in Central Bosnia, were poorly equipped and there were very few qualified professional police officers available.
110. During the entire armed conflict, the 3rd Corps was completely cut off from the Supreme Command in Sarajevo, as all channels of communication were blocked by the VRS. Moreover, brigades were often unable to communicate with the Corps Command, either directly or through their respective Operational Groups. Communications at the battalion, company and platoon level, which are of utmost importance for the defence of the territory, were practically non-existent.
111. The area of responsibility of the 3rd Corps overlapped with two of the HVO operative zones, OZ S/H (Operative Zone North-West Herzegovina) under the command of Colonel Željko Šiljeg and OZ S/B (Operative Zone Central Bosnia) commanded by Tihomir Blaškić.
112. In this area, the ARBiH also dealt with the forces of two VRS corps, the 1st Krajina Corps and the East Bosnia Corps, over a front line of nearly 300 kilometres. The available data shows that the 1st Krajina Corps had over 50 000 soldiers, 270 tanks, 210 armoured vehicles and 360 pieces of artillery. The East Bosnia Corps had approximately 25 000 soldiers, 153 tanks, 210 armoured personal carriers and other combat vehicles as well as 310 pieces of artillery.
113. The conflict between the ARBiH and the HVO was confirmed in January 1993, and the front line was extended for an additional 100-150 kilometres towards the HVO.

114. Throughout 1993, the HVO and the VRS cooperated to various degrees, depending on the location.
115. The cooperation between the HVO and the VRS, as well as the increased confrontations between the ARBiH and these two armies, put a strain on the forces of the ARBiH which were now fighting on two fronts.
116. The numerous checkpoints put in place by the HVO significantly restricted the freedom of movement of ARBiH units, preventing them from reaching their exhausted troops on the frontline against the VRS.
117. The HVO constantly issued ultimatums to ARBiH units in all municipalities to lay down their weapons and subordinate themselves to the HVO. This was a source of extreme pressure on the ARBiH commanders in the area and it seriously affected the morale of the ARBiH soldiers whose families were located in these municipalities.
118. Throughout 1993, the HVO propaganda proved to be another extremely effective weapon against the ARBiH. ARBiH commanders in the area had to take this into consideration when planning their activities, as it was necessary to reconcile the political discourse of the HVO at the State level with the true *de facto* actions of the HVO in their area of responsibility. The frequent use of propaganda by the HVO resulted in distrust toward all information coming from Croat sources, even if true.
119. During this period, the situation in Zenica and its surroundings was catastrophic and it required a prompt response from the ARBiH.

Ozren-Vozuća

120. As to the events generally that occurred at Ozren-Vozuća, in the campaign of ethnic cleansing, at the end of May and the beginning of June 1992, Serb forces attacked and took over the villages of Svinjašnica, Adžići, Delići, Bukvići, Hadžići, Polje, Vozuća, Gare and Sljivići, in the Zavidovići municipality, and forced around 2 000 Bosniaks out of their homes.

121. The Serb forces also took over all the main elevation points in the area of the Zavidovići municipality, including Blizna, Podsjelovo, Paljenik, Stolić, Velež, and Verigovac.
122. Around 40 000 Muslims, found themselves under siege in the municipality of Zavidovići. The crisis culminated in June 1993 when the Serb forces and the HVO from Žepče jointly attacked.
123. Consequently, the life of the local population became paralyzed. The water supply in Zavidovići was stopped because the Serb forces controlled the spring 'Suha,' and the HVO had cut off all the power lines.
124. Due to the harsh winter of 1993-1994, the road between Zavidovići and Kakanj was closed, and the convoy with humanitarian aid for the population of Zavidovići was forced to turn back.
125. Throughout the armed conflict in the RBiH, the town of Zavidovići and the surrounding villages were under constant fire from artillery, tanks, and rocket systems from Ozren and Vozuća. Besides fire from howitzers, tanks, cannons, and anti-aircraft artillery, the population in this area was also exposed to attacks from multiple launcher rocket systems, grenades, snipers, and highly destructive improvised explosive devices. As a result, a large part of the town of Zavidovići was completely destroyed and many civilians in Zavidovići and Maglaj were killed.
126. Because of the constant attacks from heavy artillery and personal weapons the population in the neighboring villages, including Kazići, Luke, Rujnica, Omar, Imamovići, Garići, Livade, Šadići, Smajlbašići, Mahoje, Bajvati, Borovnica and Lovnica, were also living in catastrophic conditions.
127. On 25 May 1995, one shell fired from the area of Ozren killed 78 people, mostly children, at the town gate in Tuzla.
128. During 1995, the situation in the Ozren-Vozuća area rapidly worsened.

129. The foregoing paragraphs set out the overall circumstances in which General Delić acted. Any consideration of the matters alleged in the Indictment must be viewed within this context.

VI. THE ACCUSED TAKES ISSUE WITH THE FOLLOWING FACTUAL MATTERS

The Mujahedin

130. The Defence takes issue with the allegations in paras.12-51.4 of PPTB, in which the Prosecution suggests that a superior-subordinate relationship existed between General Delić and the alleged perpetrators of the underlying crimes (referred to as the “Mujahedin” and “Holy Warriors”) and denies that he had “effective control” over them at any point in the period relevant to the Indictment, or at all. (paras.12-51.4 of PPTB)
131. The idea of the Mujahedin as “Holy Warriors,” described in para.12 of PPTB, itself indicates that the Mujahedin’s arrival in the RBiH had been planned and organised outside of the RBiH. Their approach to war and the way they conducted their combat activities was very different from that of the ARBiH. The Mujahedin had their own agenda, determined by foreign centres of power to whose control and command they were subordinated.
132. There is very little information about the Mujahedin in Central Bosnia in the periods relevant to this case. It is known that most of them entered Bosnia through Croatia, and that they came as humanitarian workers. What they did after their arrival remains largely unknown, as they kept their activities hidden from the local authorities and the ARBiH, to which they refused to be subordinated.
133. The foreign Mujahedin soldiers spoke Arabic which was not understood by the local population and local soldiers. In some instances they communicated through interpreters.

134. The Mujahedin's interaction with the local population was limited. A number of Bosnian men decided to join their units because they had more food and supplies than the ARBiH. They also managed to gain support among some local inhabitants, particularly refugees, by giving them food and money. However, most people in the area did not have much contact with the Mujahedin, since they restricted access to their premises. This is why the estimates as to their number vary significantly.
135. The structure of the Mujahedin units was very different from that of the ARBiH. They had separate commanders for military, religious and other matters, and it was not clear who was in charge of the units. They did not accept the laws of ARBiH, and rejected attempts to subordinate them. In this regard, they refused to wear the insignia of the ARBiH, including the flag and the crest of the ARBiH. Their internal structure was incompatible with the organization of the ARBiH, which is one of the reasons why they were never integrated in the ARBiH.
136. The Mujahedin rejected the authority of the ARBiH and refused to adapt to the local customs. Their presence in the area held by the ARBiH created problems for the local population, and the ARBiH regarded them as a burden rather than as allies.
137. The Muslim Armed Forces (Muslimanske Oružane Snage or MOS) was never part of the ARBiH (paras.12.2-12.4 of PPTB). The HVO propaganda, which deliberately referred to both the ARBiH troops and the Mujahedin as the MOS contributed to the confusion between these three separate forces.
138. The Mujahedin were never part of the 7th Muslim Mountain Brigade (MMB) of the ARBiH (paras.13-13.4 of PPTB).
139. Since they were not part of the ARBiH, the Mujahedin never received monthly salaries from the ARBiH (para.13.11 of PPTB).

140. Because of their attitude toward the RBiH authorities, all efforts to subordinate the Mujahedin to the ARBiH ultimately failed. Pursuant to the Decision of the Presidency of RBiH, General Delić approved the creation of the “El Mujahed” Detachment (EMD). However, the Main Staff never received a report from the 3rd Corps regarding the formation of this unit; thus General Delić’s order was never properly executed. The EMD never effectively became part of the ARBiH. (para.14 of PPTB).
141. Although the EMD was in existence, it refused to be placed under the command and control of the ARBiH. The attempts by the Command of the 3rd Corps to communicate with the Mujahedin through orders did not result in the placement of this unit under the command and control of the ARBiH. The Mujahedin mostly refused to have contact with the members of the ARBiH, and they continued to act on their own until the end of the war.
142. Not all of the Mujahedin joined the EMD. Many of them were present on the territory of RBiH in the capacity of humanitarian workers who took part in combat activities without the knowledge and approval of the ARBiH. In addition, there were other self-organized groups of Mujahedin which acted in the field independently of the ‘El Mujahed.’ As the Defence understands the Prosecution case set out in para.14 and onwards of PPTB, it is alleging that all Mujahedin within the area of responsibility of the 3rd Corps became members of the EMD.
143. Moreover, as the Defence understands the Prosecution case, from the language of PPTB, the Prosecution cannot establish that the EMD was part of the ARBiH chain of command, and it operated independently outside of that chain, see para.14.1: “In May and June 1993 there was *coordination and consultation* between the SVK and Mujahedin in Poljanice”; para.24.11: nine Mujahedin “stopped the ARBiH commander of the group and held him at gunpoint”; para.33.1: “Abu Maali and Muatez [the alleged commander and deputy commander of the EMD] *liaised* with the 35th Division and the 3K”; para.33.2: the 5th Manoeuvre Battalion and the 329MB *had linked up with* the EMD...”; para.33.8: “the 35th Division command *requested* a meeting with the

EMD”; para..39.3 “Abu Maali arrived “for final *coordination* of the forthcoming combat operations”.

144. General Delić did not on 23 July 1993 issue authorisation to Sakib Mahmuljin to carry out negotiations and arrangements with the representatives of the Mujahedin from Zenica, nor was Mr. Mahmuljin a member of the Command of the 3rd Corps at that time (para.14.2 of PPTB).
145. The Prosecution has incorrectly asserted the goal of the Operative Action ‘Vranduk’ (para.38.3 of PPTB). In the organizational plan for the Operative Action ‘Vranduk,’ the purpose of this action is described as “*taking measures and actions to document and cut off subversive and other counter-constitutional and illegal activities of a number of members of the ‘El Mujahed’ and their ties*” (emphasis added).

Maline/Bikoši: June 1993

146. Save where agreed in the Agreed Facts, the Defence takes issue with the allegations in paras.24-27.11 of PPTB.
147. Again, the incident in Maline/Bikoši must be analyzed in the wider context of events that were taking place in Central Bosnia at the relevant time, and which are described in paras.102-119 of the Defence Brief.
148. First of all, the Defence challenges the Prosecution’s claim that Rasim Delić was the Commander of the Main Staff at the time the alleged crimes in Maline and Bikoši were committed.
149. On 8 June 1993, the day on which the incident in Maline/Bikoši took place, the Presidency of the RBiH established the new post of “Commander of the Main Staff” and decided that General Delić “shall be appointed” as the first incumbent to this post.

150. Hence, it is clear that a superior to subordinate relationship did not exist between General Delić and the alleged perpetrators of the crimes in Maline/Bikoši at the time of the crimes. This is so because it was not possible for the new position of Commander of the Main Staff to have been created and for General Delić to have assumed his new function and established the exercise of effective control over the units of the ARBiH – let alone the Mujahedin – before the alleged violations in Maline/Bikoši on 8 June 1993.
151. The ARBiH did not launch an attack on the village of Maline (para 24 of PPTB). On the contrary, the HVO attacked the civilian population in the villages of Velika Bukovica, Bandol, Ričice and Radojčići. The 306th Mountain Brigade (MB) came to defend the Bosniak population in these villages.
152. The Mujahedin did not fight together with the members of the 306th MB and the 7th MMB against the HVO (para.24 of PPTB).
153. The Commander of the 3rd Corps did not order subordinate units to “immediately raise combat readiness to the highest level in all formations” as a result of the exchange of Živko Totić, nor did the Commander of the 306th MB develop the variants for military engagement in connection with the exchange of Živko Totić (para.24.2 of PPTB).
154. The Mujahedin had no contact with the 306th MB when they undertook the alleged reconnaissance activities (para.24.3 of PPTB).
155. On 5 June 1993, the 306th MB was not part of the Operative Group (OG) “Bosanska Krajina,” and the communication between the two was cut off (para.24.4 of PTTB).
156. The units of the 306th MB did not attack the village of Postinje, but only the HVO lines in front of this village. Any attacks that may have been perpetrated by the Mujahedin had nothing to do with the activities of the ARBiH (para.24.6 of PPTB).

157. Similarly, the 1st and 2nd Battalions of the 306th MB did not attack in the area of Maline together with the Mujahedin. Whatever the Mujahedin may have done, they had nothing to do with the activities of the ARBiH.
158. At the time when the incident which is alleged to have occurred in Maline/Bikoši took place, the Mujahedin were not under the control of the Main Staff, and were not members of the ARBiH (paras.24.7-26.3 of PPTB).
159. Nonetheless, reacting to the letter he received from President Izetbegović, which concerned the incident in Maline, General Delić ordered the 3rd Corps Commander to investigate the alleged incident. Based on the report received from the 3rd Corps regarding this incident, he sent a letter to the Presidency and the Ministry of Foreign Affairs informing them of the information resulting from that investigation (paras.27.6-9 of PPTB).
160. The order from General Delić to the 3rd Corps Commander, issued on 16 June 1993, is not an order to re-subordinate the Mujahedin, but an attempt to put them under the control of the ARBiH. Since the Mujahedin were not part of ARBiH, General Delić was in no position to punish the Mujahedin for their alleged criminal acts. (para.27.3 of PPTB)
161. The report of the 3rd Corps was not based solely on the report from the 306th MB, but also on other information available to the 3rd Corps. (para.27.10 of PPTB)

Mount Ozren-Vozuća Pocket: 1995

162. The Defence takes issue with the allegations in paras.28-51.4 and Annexes C and D of PPTB.
163. The Defence challenges the Prosecution's assertion that the underlying offences described in these paragraphs, suggested to have been committed by subordinates of the Accused, occurred as alleged or at all.

164. Moreover, even if the underlying offences were committed (which is not accepted) which are the subject of the Indictment, the claim that they were committed by subordinates of General Delić is unfounded, particularly in light of the fact that the alleged perpetrators of those underlying offences have not been identified by the Prosecution.
165. As the Defence understands the Prosecution's case with regard to the underlying offences alleged to have occurred in the Mount Ozren-Vozuća pocket during the relevant period of the Indictment, there is significant unclarity as to the alleged victims. For example, para.40.2 of PPTB refers to "approximately 60 VRS soldiers", of which two were murdered on the road and four others were taken away, i.e. 54 remained; whereas para.46 refers to "approximately 52 VRS soldiers captured on 11 September 1995". Similarly, para.44 speaks of 7 VRS soldiers being taken out and shots being heard, whereas para.44.1 refers to 7-8.
166. Moreover, para.45 refers to Nenad Jović, an elderly Bosnian Serb, but there is no explanation as to what his status is and when he arrived at the camp. Annex C, which refers to the "known identities of the VRS soldiers captured on or about 11 September 1995 and murdered in the Kamenica Camp", specifies "Neno Jović" as number one on the list, but he would not have been an old man. There is also a lack of clarity as to the identity of the victims in Annex C in that, of the 52, the identities of 30 of them are unclear.
167. It is a matter for the Prosecution as to how it chooses to plead its case. However, without certainty as to the facts of the alleged offences underlying the charges that the Accused faces, the Chamber will not be able to even begin to properly consider the Accused's culpability for command responsibility.
168. The Defence puts the Prosecution to strict proof of establishing the status of the alleged victims, the number of them, and the locations where the crimes are alleged to have been committed.

169. In its Brief the Prosecution has failed to outline the overall context in which the incidents in Vozuća relevant to the charges in the Indictment occurred. (See paras.16-48 and 120-129 of this Defence Brief).
170. The Directive issued by General Delić for 1995, which concerns, *inter alia*, the wider area of Vozuća cannot be properly assessed outside of this context. Moreover, an analysis of the relevant context shows that the liberation of Vozuća and Ozren was justifiably included in the Directive issued by General Delić, as the local Muslim population in this area was being decimated.
171. The prime objective of the ARBiH in 1994-1995 was the lifting of the blockades of Sarajevo, Tešanj, Maglaj and the defence of Srebrenica, Gorazde and Žepa, rather than the liberation of the Mount Ozren-Vozuća pocket as the Prosecution claims. (para.28 of PPTB)
172. In light of the situation described in paras.120-129 of this Brief, the only solution for the ARBiH was to repel the enemy forces in order to end the killing of innocent civilians and allow for the delivery of humanitarian and medical aid.
173. It was in this context that General Delić issued the Directive for 1995, which concerned, *inter alia*, the wider area of Vozuća. On 16 and 17 July 1995, Rasim Delić did not order the 2nd and 3rd Corps of the ARBiH to conduct combat operations in Mount Ozren-Vozuća pocket. On 16 and 17 July Rasim Delić ordered active operations within the area of Srebrenica and Žepa. (para.30 of PPTB)
174. However, General Delić did not direct the combat action in the Ozren-Vozuća pocket. The action was planned and commanded by the commands of the 2nd and 3rd Corps. (para.28 of PPTB)
175. General Delić was not informed that the EMD was “the main unit in charge of the coming assignment,” as the Prosecution claims in para.30 of its brief. This information was sent to the command post of the Main Staff of the ARBiH in

Kakanj (the free territory of the Zenica municipality), established in November 1993 with the goal of monitoring the situation in the field. This command post functioned as a re-located Main Staff of the ARBiH until the end of the period relevant to the Indictment. (para.30.3 of PPTB)

176. During the combat actions in the Ozren-Vozuća pocket in July 1995, General Delić was completely preoccupied with the lifting of the blockade of Sarajevo, the only action which the Main Staff commanded, pursuant to the decision of the Presidency of RBiH, and with the tragic events in Srebrenica and Žepa.
177. The Accused, as Commander of the Main Staff, did not know about the existence of a camp at Kamenica, or similar at Livade and Kesten. (para.33 of PPTB)
178. The authority and the responsibilities of General Delić and the Command of the Main Staff did not include the handling and “transfer” of prisoners. This fell within the competence of lower commands (corps, brigades, and battalions). (para.33 onwards)
179. General Delić did not have actual knowledge or possession of information which would have at least put him on notice that persons within a superior-subordinate relationship with him had committed or were about to commit violations of international humanitarian law.
180. General Delić did not receive information about the crimes allegedly committed by the EMD in Livade-Krčevine in July 1995. (para.38 of PPTB)
181. General Delić did not order on 26 August 1995 the 2nd and 3rd Corps to liberate the Mount Ozren-Vozuća pocket (para.31 of PPTB).
182. General Delić did not receive any information concerning the alleged incidents in Kamenica and Kesten in September 1995. He was out of the country at the time of the action in Vozuća and up until 15 September, during

which period these incidents allegedly occurred. He actually never received such information. (paras.39–51.4 of PPTB)

183. Contrary to the Prosecution case, there is a report which states that prisoners in the area of Vozuća were treated in accordance with the relevant Geneva Conventions.

Individual Criminal Responsibility

184. The Defence takes issue with the allegations in paras.15-20.11 of PPTB.
185. General Delić did not have the overall authority and responsibility for the functioning of the ARBiH, nor did he exercise command and control of the ARBiH through the Main Staff.
186. The overall authority and responsibility for the functioning of the ARBiH were exclusively within the power of the Presidency, as the Supreme Command of the ARBiH, and the Ministry of Defence of R BiH. (para.15 of PPTB)
187. General Delić was not responsible for planning and directing all ARBiH operations and for monitoring the activities of all subordinates and units of the ARBiH. (para.15 of PPTB)
188. Under the principle of single command, General Delić could issue orders to corps commanders, who were subordinated to the Commander of the Main Staff, but he could not directly command the units of the corps.
189. General Delić was too remote, in the hierarchical, temporal and geographic sense, from the incidents with which he is charged in the Indictment.
190. General Delić did not have the authority to decide on most issues related to status of persons within the ARBiH, and he certainly could not decide on the status in the ARBiH of persons who were not R BiH citizens. These decisions were made by the Presidency and the Ministry of Defence. (para.18.3 of PPTB)

191. General Delić did not have effective control over the Mujahedin (paragraphs.130-145 of the Defence Brief) (paras.19.1-2 of PPTB). The Defence does not accept that a court may presume the possession of *de jure* power prima facie results in effective control unless proof to the contrary is produced, which would amount to a reversal of the burden of proof, as suggested in paras.19.2 of PPTB.
192. As Commander of the Main Staff, General Delić did not exercise command and control, and did not have effective control, over the individuals that are alleged to have perpetrated the underlying offences for which the Accused has been charged in the Indictment.
193. Under the laws and regulations of the ARBiH, referred to in paras.20-20.11 of PPTB, it was not within the competency of General Delić to initiate legal proceedings against individuals who violated international humanitarian law.
194. The laws and regulations of the ARBiH clearly placed such authority with unit commanders and their respective security services. Moreover, the Criminal Procedure Code clearly defined the responsibilities and the authority of the chiefs of the military security services and the military police in this respect.
195. The Prosecution tries to suggest that due to his position as Commander of the Main Staff, General Delić was automatically responsible for failures of lower commanders (of corps, divisions, brigades, battalions and detachments) to abide by the relevant laws and regulations. There is absolutely no support for such a conclusion in any of the regulations of the ARBiH.

General Allegations

196. The Defence takes issue with the allegations in paras.21-23.5 of PPTB, with the exception of agreed facts.

197. In accordance with his authority, General Delić took a number of measures to ensure that the laws and customs governing the conduct of armed conflicts, including the Geneva Conventions of 1949 and the Additional Protocols thereto, were implemented and respected by members of the ARBiH at all times.

VII. THE ACCUSED RAISES AND TAKES ISSUE WITH THE FOLLOWING LEGAL MATTERS

Command Responsibility Doctrine

198. The primary duty of a commander is to command and lead. The doctrine of responsible command requires a commander to ensure that forces under their command are properly organised and capable of complying with humanitarian standards.²⁴ In situations where there is a culpable failure on the part of a superior to take remedial action in circumstances where his subordinate is about to commit or has committed an offence, the linked, but entirely distinct, concept of command responsibility may be engaged.

199. The command responsibility doctrine, which is reflected in Article 7(3) of the Statute, was not supposed to trigger the criminal responsibility of military commanders in situations where violations taking place during their tenure are limited in number and committed during isolated incidents. Moreover, the command responsibility doctrine - or the failure of a superior to prevent crimes from being committed by subordinates or to punish the perpetrators thereof - was rarely applied by itself, in war crime trials which took place following World War II.²⁵ In most cases, command responsibility was used in conjunction

²⁴ *Hadžihasanović*, Decision on Joint Challenge to Indictment, 12 Nov 2002, para.66.

²⁵ Only in the leading Japanese cases - *Yamashita* (*In re Yamashita*, 327 U.S. 1; 66 S. Ct.340, 90 L., Ed. 499, 1946 U.S. LEXIS) and *Toyoda* (United States v. Soemu Toyoda, War Crimes Tribunal Court house, 06 September 1949) - was the command responsibility doctrine applied in relation to incidents for which there was no direct evidence that the accused was involved in the commission of the offences. In the leading German cases - *The High Command Case* (United States Military Tribunal, Nuremberg, 30th December 1947-28th October 1948, Law Reports of Trials of War Crimes, 1949) and the *Hostages Trial* (United States Military Tribunal, Nuremberg, 8th July 1947 to 19th February 1948, Law Reports of Trials of War Crimes, 1949)-it was understood that orders had been given at the highest level and these trials focused on the implementation of these orders. It should also be noted that the *Yamashita* trial was the object of much criticism on the ground that there was no legal basis to support a guilty finding.

with or as a complement to the individual criminal responsibility of superiors for having *personally committed* or having been *personally involved* in one way or another in violations of international humanitarian law. This has also been the practise in the large majority of cases before this Tribunal and the ICTR where articles 7(1) and 7(3) charges have laid concurrently against most accused.

200. The command responsibility doctrine, as applied in WWII war crime trials, particularly in the *Yamashita* case, was warranted by the personal involvement of the accused in the crimes committed. In that case, it could not be proved that the Japanese Army acted under his orders despite the commission of massive and widespread violations.²⁶

201. However, this is not the case that General Delić faces. The number of violations allegedly committed by Mujahedin, allegedly under the command of the Accused, is in no way comparable with the *Yamashita* case. The Defence suggests that the Trial Chamber must be extremely cautious before relying on Article 7(3) of the Statute as a stand-alone form of criminal responsibility as in the present case.

202. It should be noted that the command responsibility doctrine is based on a failure by the superior to comply with an obligation imposed upon him in international law, though the duties and obligations that are relevant to the discharge of that duty are usually specified in domestic law.

Elements to be established

203. In order for General Delić to incur individual criminal responsibility, three elements must be proven:

²⁶ “Clearly, assignment to command military troops is accompanied by broad authority and heavy responsibility...It is absurd, however, to consider a commander a murderer or rapist because one of his soldiers commits a murder or rape. Nevertheless, where murder and rape and vicious, revengeful actions are widespread offences, and there is no effective attempt by a commander to discover and control the criminal acts, such a commander may be held responsible, even criminally liable, for the lawless acts of his troops, depending upon their nature and the circumstances surrounding them”, *In re Yamashita*, Law Reports of Trials of War Criminals, Vol IV, p.35.

- (1) the existence of a superior-subordinate relationship between General Delić and the alleged perpetrators of the underlying offences, which are proven to have been committed;
- (2) that General Delić knew or had reason to know that his subordinates had committed or were about to commit such crimes; and
- (3) that General Delić failed to take necessary and reasonable measures to prevent such crimes or to punish perpetrators thereof.

204. The standard of proof that the Prosecution is required to meet to establish all three elements is “beyond reasonable doubt”, and it is not accepted that the burden can reverse so that the Defence is required to rebut any presumption at any stage, as suggested by the Prosecution in para.19.2 of PPTB

205. As a precondition, before the Chamber considers the culpability of the Accused for the charges against him, the Prosecution must establish beyond reasonable doubt that the underlying offences, in this case alleged to have been carried out by Mujahedin, were indeed committed. Save where facts have been agreed, the Prosecution is put to strict proof of those underlying offences. It should be noted that the Accused is not being charged with the alleged crimes of his alleged subordinates, but with a failure to carry out his duty as a superior to exercise the necessary control over his subordinates.

206. In turning to the three elements (superior-subordinate relationship, the Accused knew or had reason to know, and necessary and reasonable measures), it should be noted that in analysing these elements, the conduct of the Accused must be shown to be closely linked to the offences alleged to have been committed by his subordinates:

Superior – subordinate relationship

207. The superior-subordinate relationship lies at the very heart of the doctrine of a commander’s liability for the crimes committed by his subordinates.²⁷ It is the position of command over and the power to control the acts of the perpetrator

²⁷ *Prosecutor v. Fatmir Limaj et al.*, Case No. IT-03-66-T, Judgement, 30 November 2005, para.521.

which forms the legal basis for the superior's duty to act, and for his corollary liability for a failure to do so.²⁸

208. For liability to exist under Article 7(3) of the Statute it must be shown that the Accused was the superior of the alleged perpetrators of the underlying offences at the time they were committed, i.e. that a superior-subordinate relationship existed.²⁹ In that regard, the Appeals Chamber in *Čelebići* underscored the need to demonstrate that the Accused, by virtue of his position in the formal or informal hierarchy, is senior to the perpetrator of the crime.³⁰ In the absence of such authority, there is no duty to act in accordance with the command responsibility doctrine, and no liability can be incurred by the Accused.
209. In relation to the existence of a superior to subordinate relationship between the Accused and the alleged perpetrators, the governing criterion is the proof of control over the alleged perpetrators. It was noted in the *Čelebići* case that this requirement poses particular problems in situations such as that of the former Yugoslavia, at the time period relevant to this Indictment, where previously existing formal structures had broken down and “where, during an interim period, the new, possibly improvised, control and command structures may be ambiguous and ill-defined”.³¹
210. A superior-subordinate relationship exists under Article 7(3) of the Statute when a superior exercises effective control over his subordinates, that is, when he has the material ability to prevent or punish their acts.³² As the Trial Chamber held in *Čelebići*: “it is the Chamber’s view that, in order for the principle of superior responsibility to be applicable, it is necessary that the superior have effective control over the persons committing the underlying

²⁸ *Aleksovski* Appeals Judgement, para.76; *Strugar* Trial Judgement, para.359.

²⁹ *Prosecutor v. Enver Hadžihasanović et al.*, Case No. IT-01-47-T, Judgement, 15 March 2006, para.76.

³⁰ *Čelebići* Appeal Judgement, para.303; see also *Čelebići* Trial Judgement, para.647, which noted: “The law does not know of a universal superior without a corresponding subordinate. The doctrine of command responsibility is clearly articulated and anchored on the relationship between superior and subordinate, and the responsibility of the commander for actions of members of his troops. It is a species of vicarious responsibility through which military discipline is regulated and ensured. This is why a subordinate unit of the superior or commander is a sine qua non for superior responsibility.”

³¹ *Prosecutor v. Delalić and others (Čelebići Trial Judgement)*, IT-96-21-T, 16 November 1998, para.254.

³² *Čelebići* Trial Judgement, paras.377 and 378, see also *Čelebići* Appeal Judgement, paras.197 and 256; *Blaškić* Appeal Judgement, para.67; *Halilović* Trial Judgement, para.58.

violations of international humanitarian law, in the sense of having the material ability to prevent and punish the commission of these offences.”³³

Indicia of effective control

211. According to Tribunal case law, “the indicators of effective control are more a matter of evidence than of substantive law, and those indicators are limited to showing that the accused had the power to prevent, punish, or initiate measures leading to proceedings against the alleged perpetrators where appropriate”.³⁴
212. Tribunal case law has identified several elements which make it possible to establish whether there is effective control, including: the official position of an accused, even if “actual authority, however, will not be determined by looking at formal positions only”,³⁵ the power to give orders and have them executed by the superior’s subordinates;³⁶ the conduct of combat operations involving the forces in question;³⁷ the authority to apply disciplinary measures effectively;³⁸ the authority to promote or remove soldiers.³⁹
213. In the *Hadžihasanović* case the Trial Chamber held that “mere participation in joint combat operations is not sufficient to find that commanders of different units exercise effective control over all participants in a battle. Although such cooperation might be an indicator of effective control, it is appropriate to determine on a case-by-case basis what authority an accused commander actually had over the troops in question”.⁴⁰

³³ *Čelebići* Trial Judgement, para.378.

³⁴ *Blaškić* Appeal Judgement, para.69.

³⁵ *Kordić and Čerkez* Trial Judgement, para.418.

³⁶ *Kordić and Čerkez* Trial Judgement, para.421; *Strugar* Trial Judgement, paras. 394-396, 406 and 408.

³⁷ *Strugar* Trial Judgement, para.394.

³⁸ *Čelebići* Trial Judgement, para.767; *Strugar* Trial Judgement, paras. 406 and 408.

³⁹ *Čelebići* Trial Judgement, para.767; *Strugar* Trial Judgement, paras. 404, 411 and 413.

⁴⁰ *Prosecutor v. Enver Hadžihasanović et al.*, Case No. IT-01-47-T, Judgement, 15 March 2006, para.84.

Superior – subordinate relationship must exist at the time the events with which the Accused is charged occurred

214. The Appeals Chamber has held that “an accused cannot be charged under Article 7(3) of the Statute for crimes committed by a subordinate before the said accused assumed command over that subordinate”.⁴¹
215. The Appeals Chamber’s conclusion was based on its examination of a number of authorities including *inter alia* Article 86(2) of the 1977 Additional Protocol I to the Geneva Conventions of 1949, the Report of the International Law Commission on the work of its forty-eighth session (6 May-26 July 1996)⁴², its own decision in the *Čelebići* Appeal Judgement⁴³, Article 6 of the Draft Code of Crimes Against the Peace and Security of Mankind adopted by the International Law Commission at its forty-eighth session⁴⁴, the *Kuntze* case before the Nuremberg Military Tribunals⁴⁵, the Canadian Defence Ministry’s Manual on the Law of Naval Operations⁴⁶ and, more particularly, Article 28 of the Rome Statute of the International Criminal Court.
216. It is evident from the above examination of the authorities by the Appeals Chamber that for Article 7(3) of the Statute to apply, a superior to subordinate relationship must exist between a military commander and the alleged perpetrators of a violation within the jurisdiction of the International Tribunal, *at the time* the alleged violation was committed.

⁴¹ *Prosecutor v. Enver Hadžihasanović, Mehmed Alagić and Amir Kubura*, Case No. IT-01-47-AR72, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, 16 July 2003, para.51.

⁴² Yearbook of the International Law Commission (1996), Vol. II, Part Two, Report of the Commission to the General Assembly on the work of its forty-eight session (A/51/10), p.25.

⁴³ *Prosecutor v. Delalić et al.*, Case No. IT-96-21-A, Judgement, 20 February 2001.

⁴⁴ Yearbook of the International Law Commission, *supra* note 2, p.25.

⁴⁵ In the matter of *United States v. Wilhelm List et al.*, Trials of War Criminals before the Nuernberg Military Tribunals Under Control Council Law No. 10, Vol. XI, p.1230.

⁴⁶ The Commander’s Handbook on the Law of Naval Operations, NWP I-14M (United States 1995).

Knew or had reason to know

217. For liability under Article 7(3) of the Statute, to satisfy the requisite mental element the Prosecution must establish that the superior knew or had reasons to know that his subordinates were about to commit a crime or had done so.⁴⁷
218. The doctrine of command responsibility does not impose strict liability on a superior who failed to take the necessary steps. The Prosecution must instead demonstrate that the superior either (i) actually *knew* that his subordinates had committed a crime or were about to do so, or (ii) that he had in his possession information of a nature which *would at least put him on notice of the risk of such offences* by indicating the need for additional investigation in order to ascertain whether such crimes were committed or were about to be committed.⁴⁸ These are alternative mental states, both of which require a high standard of awareness.
219. In addition to either form of awareness, the Prosecution must establish that he had awareness of the facts that made his conduct criminal.⁴⁹ This means the superior must have knowledge of the underlying offences and acquiesce or criminally neglect to interfere in their commission and, also, knowledge that the offences are patently criminal.⁵⁰
220. Actual knowledge may be established through direct or circumstantial evidence but cannot be presumed.⁵¹
221. In relation to the determination that the Accused knew or had reason to know that the perpetrator was about to commit a crime or had done so, the Defence takes issue with the Prosecutor's *lato sensu* concept of "notice" which goes far beyond the prevailing ICTY case law. (paras.19.4-19.9 of PPTB)

⁴⁷ *Prosecutor v. Enver Hadzihasanovic et al.*, Case No. IT-01-47-T, Judgement, 15 March 2006, para.91.

⁴⁸ *Čelebići* Appeal Judgement para.223, citing para.383 of the *Čelebići* Trial Judgement, and 241.

⁴⁹ *Naletić* Appeals Judgement, para 114.

⁵⁰ *High Command Case*, Vol XI, p.545.

⁵¹ *Čelebići* Trial Judgement, para.386. see also *Krnjelac* Trial Judgement, para.94; *Kordić and Čerkez* Trial Judgement, para.427; *Brđanin* Trial Judgement, para.278; *Strugar* Trial Judgement, para.368.

222. The Prosecution confuses the issue of notice with that of knowledge. Pursuant to Article 7(3), a commander possesses the requisite mens rea if he “knew” or “had reason to know” that a subordinate committed an offence or was about to do so. Actual knowledge cannot be presumed⁵² but can be established by way of circumstantial evidence. Hence, the purpose of the circumstantial evidence examples provided by the Prosecution at para.19.6 is to infer actual knowledge, not notice.
223. As for the second type of mens rea requiring that a commander “had reason to know”, the Defence takes issue with the Prosecution’s assertion in para.19.8 that once the superior is put on notice that criminal activity is afoot, there is a duty to obtain information. This is akin to the “should have known” standard set forth in Article 28 of the Statute of the International Criminal Court relating to the responsibility of commanders. This is not the standard applicable before this Tribunal, and it is not admitted that it reflects customary law. As stated by the Appeals Chamber, “Article 7(3) of the Statute is concerned with superior liability arising from failure to act in spite of knowledge. Neglect of a duty to acquire such knowledge however does not feature in the provision as a separate offence, and a superior is not therefore liable under the provision for such failures...”⁵³ The Appeals Chamber further ruled that “the then customary law did not impose in a criminal context a general duty to know upon commanders or superiors, breach of which would be sufficient to render him responsible for subordinates’ crimes”.⁵⁴ It is in this light that the notion of “notice” must be understood.
224. Accordingly, a superior can only be held criminally responsible under this second type of mental awareness if specific information was in fact available to him which *would* put him on notice of offences about to be committed or committed by his subordinates. While the Defence concurs with the Appeals Chamber’s ruling that “it is sufficient that the superior was put on further inquiry by the information, or, in other words, that it indicated the need for

⁵² Čelebići Trial Judgement, para.386.

⁵³ Čelebići Appeals Judgement, para.226.

⁵⁴ Ibid., para.230.

additional investigation in order to ascertain whether offences were being committed or about to be committed by his subordinates”,⁵⁵ it is evident that such notice must be assessed in concreto; it cannot be evaluated in the abstract.

225. Moreover, whether the commander was put on notice must be considered in the “specific” circumstances of each case taking into account the specific situation of the superior concerned at the time in question.⁵⁶

Necessary and reasonable measures

226. Although the Defence does not accept that any duty for General Delić to act was triggered, as there was no effective control over the alleged perpetrators, in the event the Trial Chamber is required to consider this element, whether the measures taken were ‘necessary and reasonable’ would need to be determined in light of the prevailing circumstances at the time that the Prosecution alleges the duty of the superior to take measures applied.

227. Moreover, in deciding whether it would have been reasonable for a superior to conclude that he had complied with his duties in a particular situation, the Trial Chamber must place itself in the circumstances that the superior found himself at the time. This will require a subjective assessment, which must take on board all the applicable circumstances and situation as it appeared to the Accused at the time.⁵⁷

228. In deciding whether there has been a culpable failure on the part of the superior to take necessary and reasonable measures, a mere failure to prevent or punish subordinate perpetrators will not suffice – the Prosecution must show that the failure was grossly inadequate and beyond mere negligence. This is a demanding threshold. Only a very serious breach of duty will suffice.

⁵⁵ Supra note 13, para.393.

⁵⁶ Supra note 15, para.239.

⁵⁷ *Hostage Case*, Vol VIII, p.58.

229. The failure on the part of the superior must be shown to be a personal failure on the part of the superior to act.
230. Jurisprudence does not supply much assistance in determining what would have been the “necessary and reasonable measures” to take in a particular situation. However, the duties and obligations that were applicable to the superior in domestic law is a major determinant in ascertaining what he or she was required to do. There should be no expectation or liability for failure on the part of a superior to adopt a course of action from he was prevented from taking or not required to take under the applicable domestic law.
231. Similarly, where a superior is under a duty either to prevent or punish crimes of subordinates, there can be no requirement on the Accused to personally investigate or direct the investigation. A military commander will almost certainly lack the skills to carry out such a task. Moreover, where a commander has directed that an investigation be carried out into allegations that crimes have been committed by subordinates, unless there appears to be some form of cover-up or improper activity during the investigation, it would be reasonable for the superior to take any resulting report at face value, whatever the result of the investigation may be. In the *High Command Case* it was held “Modern war entails a large measure of decentralisation. A high commander cannot keep completely informed of the details of military operations of subordinates and most assuredly not of every administrative measure. He has the right to assume that details entrusted to responsible subordinates will be legally executed”.⁵⁸
232. It is not accepted that a superior must take “all materially possible measures to prevent or punish the crimes in question” as suggested by the Prosecution in para.19.11 of their brief; that would be much too high a standard.
233. Regarding the obligation to prevent or punish, the case law of the Tribunals first notes that a superior cannot be obliged to perform the impossible.⁵⁹ To determine whether a superior has discharged his duty, the case law has sought

⁵⁸ *High Command Case*, Vol II, p.1450.

⁵⁹ *Čelebići Trial Judgement*, para.395.

to assess whether the superior took the measures in his powers and to define which measures must be considered to be within the superior's powers in that sense.⁶⁰ In *Čelebići*, the Chamber concluded that a superior should be held responsible for failing to take the measures within the material possibility.⁶¹

234. The case law of the International Tribunals has consistently held that the assessment of measures taken, in view of the material ability of the superior, must be evaluated on a case-by-case basis. In *Aleksovski* for example, the Trial Chamber applied the concept of a superior's "material possibility" to act and held that "such a material possibility must not be considered abstractly but must be evaluated on a case-by-case basis depending on the circumstances."⁶²

235. The Trial Chamber in *Čelebići* also noted that the evaluation of the measures taken by a superior to determine whether he has met his duty is inextricably linked to the facts of each particular situation: any general standard would not be meaningful.⁶³ Accordingly, the evaluation of measures taken is more a matter of evidence than of substantive law.⁶⁴

VIII. CONCLUSION

236. In light of the information herein, the Defence submits that the Accused bears no individual criminal liability for any of the Charge / Counts in the Indictment.

Dated 19 January 2007



Vasvija Vidović
Counsel for Rasim Delić
Word Count: 14 878

⁶⁰ Ibid., para.395.

⁶¹ Ibid., para.395.

⁶² *Aleksovski* Trial Judgement, para.81, See also *Krstić* Appeal Judgement, footnote 250.

⁶³ *Čelebići* Trial Judgement, para.394.

⁶⁴ *Strugar* Trial Judgement, para.73 citing *Blaškić* Appeal Judgement, para.72.