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

Case No. IT-00-41-PT

IN THE TRIAL CHAMBER I

Original: English

**Before: Judge Liu Daqun, Presiding
Judge El Abbassi Elmahdi
Judge Alphons Orié**

Registrar: Mr. Hans Holthuis

Filed: 7th July 2003

THE PROSECUTOR

v.

PAŠKO LJUBIČIĆ

DEFENCE PRE-TRIAL BRIEF

**The Office of the Prosecutor:
Mr. Mark Harmon**

**Counsel for the Accused
Mr. Tomislav Jonjić**

**Attorney-at-law
10000 Zagreb, Croatia
Taborska 25
Telephone: ++385-1- 30-10-321
30-14-290
30-14-291
Facsimile: ++385-1- 30-12-052**

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I. INTRODUCTION

1. Pursuant to Rule 65 ter (F) of the Rules of Procedure and Evidence (hereinafter: "Rules") and a scheduling order of Judge Amin El Mahdi dated 13th May 2003, the Defence submits its Pre-Trial Brief. In the Brief, the Defence presents in general the concept of the defence case, and speak its mind on the factual and legal issues presented in the Prosecutor's Pre-Trial Motion, dated 10th June 2003.¹
2. The Defence accepted some parts of the Amended Indictment as adjudicated facts.² All other parts of the Amended Indictment are considered to be contestable. In her Pre-Trial Brief, the Prosecutor recalls the adjudicated facts several times. The decision on the facts, which are decided to be adjudicated, does not deny the Defence's right to prove the opposite or different.³ The Defence intends to do so, and expects to be given the opportunity for that during the trial.
3. In her Pre-Trial Brief the Prosecutor has announced her intention to request admission of the transcripts of some witnesses and related exhibits. In order to protect rights of the Accused, the Defence is going to oppose such requests.
4. Pursuant to the Rules, the purpose of Pre-Trial Brief is not only to present a summary of the evidence, which the Prosecutor intends to bring regarding the commission of the alleged crime and the form of responsibility incurred by the accused or to name any admissions by the parties and a statement of matters which are not in dispute as well as a statement of contested matters of fact and law,⁴ but the additional task of Pre-Trial Brief is to assist the defence in the preparation of its case.⁵ In the jurisprudence of the Tribunal, it is considered that Pre-Trial Brief must not be "extremely general in nature".⁶

¹ The Prosecutor states: "The material facts that form the basis of the charges against Paško Ljubičić are set out (...) in the Corrected Amended Indictment dated 8th April 2002" (*Prosecutor's Pre-Trial Brief*, para. 2.). Considering that the Accused was deprived of fair notice of the charges against him, on 22nd October 2002, the Defence submitted the Motion on the Form of the Amended Indictment. The Motion was denied by the Decision of the Trial Chamber, dated 13th December 2002.

² Rule 65ter Conference, Transcript, p. 50.

³ *Decision on Prosecution's Motion for Judicial Notice of the Adjudicated Facts* of 23rd January 2003, p. 6.

⁴ Rule 65ter (E) (i).

⁵ IT-95-16-A, *Prosecutor v. Zoran Kupreškić et al.*, Appeal Judgement of 23rd October 2001, para. 117.

⁶ IT-95-16-A, *Prosecutor v. Zoran Kupreškić et al.*, Appeal Judgement of 23rd October 2001, paras. 117, 319.

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5. In the concrete case is the Prosecutor's Pre-Trial Brief "extremely general in nature": in the factual sense it is even narrower than the Amended Indictment; and in terms of legal submissions either, it does not give the statements, which have not already been presented during the proceedings. The Defence insists on claiming that the Pre-Trial Brief has not annulled the Defences objection concerning the vagueness of the Amended Indictment.⁷ In order to give the Accused the chance to have a fair trial, the Prosecutor should have, in her Pre-Trial Brief "stated the material facts underpinning the charges in the indictment", where "the materiality of a particular fact cannot be decided in abstract. It is dependent on the nature of the Prosecution case".⁸ At the moment of the filing of the Pre-Trial Brief, the Prosecutor has to be quite clear about her case.⁹ For example, "since the identity of the victim is information that is valuable to the preparation of the defence case, if the Prosecution is in a position to name the victims, it should do so".¹⁰ Unfortunately, the Pre-Trial Brief does not name the victims from the villages mentioned in the Amended Indictment.¹¹ This makes the preparation of the Accused's defence case much more difficult.
6. The Prosecutor's Pre-Trial Brief and the Prosecutor's List of Witnesses attached with it, as well as the Prosecutor's List of Exhibits, contain some claims and statements, which make them incomprehensible. For example, in pages 47-48 of the Prosecutor's List of Witnesses there is a mix-up between the name of witness in the title and the name of the witness mentioned in the text. In that place (pp. 47-48) the text mentions, at least three times, the witness, whose testimony's summary is presented in pages 52-53. But, the circumstances, on which that witness testified, are different, so that it is not clear to the Defence what it is about. The Prosecutor's List of Exhibits is also vague in some parts. For example, in relation to the exhibit no. 592, the first name is stated, but not the surname of the owner of the house. The Defence is left to speculate what it is about. Such faults of the Prosecutor's Pre-Trial Brief represent the violation of the Accused's right to a fair trial.

⁷ The Defence gave that objection in the Preliminary Motion on the Form of the Corrected Amended Indictment of 22. October 2002. The Trial Chamber dismissed the objection, but the Defence insists on the position, and incorporates its Motion here by reference.

⁸ IT-95-16-A, *Prosecutor v. Zoran Kupreškić et al.*, Appeal Judgement of 23rd October 2001, paras. 88-89.

⁹ This especially applies in case of the problem, with which the Prosecutor has been dealing before this high Tribunal for almost ten years.

¹⁰ IT-95-16-A, *Prosecutor v. Zoran Kupreškić et al.*, Appeal Judgement of 23rd October 2001, para. 90.

¹¹ The Accused therefore does not know who were the victims of his alleged crimes in Vitez, Gačice, Donja Večeriska, Busovača, Lončari, etc.

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7. Rule 65ter (F) of the Rules stipulates that the Defence, “after the submission by the Prosecutor of the items mentioned in paragraph (E)”,¹² shall be ordered to file its pre-trial brief. Therefore, it is clear that the term for filing of the Defence Pre-Trial Brief should start on the day of issuance of the order, but never before the Prosecutor submits the items mentioned in paragraph (E). Judge Amin El Mahdi has issued a scheduling order on 13th May 2003. At the status conference held on 23rd May 2003, the Defence confirmed that it would comply with the term determined by the scheduling order and that it did not request any prolongation.¹³ Therefore, since 13th May 2003, the Prosecutor has been aware of the date by which the Defence must file its Pre-Trial Brief. At the status conference, the Pre-Trial Judge reminded the Prosecution of the term. But, by 26th June 2003, which is sixteen days after filing of the Prosecution Pre-Trial Brief, the Prosecutor has not contacted the Defence concerning the “submission of the items mentioned in paragraph (E)”. Those items have not been delivered to the Defence until 7. July 2003.
8. Everything stated in paragraph 7. applies even more to further Prosecutor’s supplements to the Prosecutor’s List of Exhibits and the Prosecutor’s List of Witnesses.¹⁴ The Defence really does not want to split hairs, but it must underline that, due to that, it found itself in a time crunch, which limits its right to thoroughly prepare its Pre-Trial Brief. The Defence also recalls that the delayed revealing of exhibits and the disclosure of material significantly affect the Accused’s right to defend himself.¹⁵
9. At the time of the events described in the Amended Indictment, the Accused was a low-rank officer.¹⁶ As such, he did not and could not have any influence on the general political and military developments in the territory of Central Bosnia. But, as the Prosecutor included the political and military background in her Pre-Trial Brief,¹⁷ and proposed the presenting of

¹² Rule 65ter (F). Emphasis added.

¹³ Status Conference of 23rd May 2003. Transcript, pp. 87-88.

¹⁴ The Prosecutor’s *First Supplement to Prosecutor’s List of Witnesses and Prosecutor’s List of Exhibits* was submitted on 11th June 2003, and the Prosecutor’s *Second Supplement to Prosecutor’s List of Exhibits* was submitted on 26th June 2003.

¹⁵ See IT-95-16-A, *Prosecutor v. Zoran Kupreškić et al.*, Appeal Judgement of 23rd October 2001, para. 120.

¹⁶ Until the second half of January 1993, the Accused was the commander of the 1st active company, of the 1st active Battalion of the Croatian Defence Council (hereinafter: HVO) Military Police, and afterwards, until 1st July 1993, he was the commander of the 4th Military Police Battalion of HVO.

¹⁷ *Prosecutor’s Pre-Trial Brief*, paras. 7-14. ff.

exhibits for that circumstance,¹⁸ considering it imprecise and tendentious, the Defence is going to give a short comment on that part of the Prosecutor's Pre-Trial Brief.

II. FACTUAL FRAMEWORK

Background

10. During 1980's, the aspirations of the Serb political circles to turn the Socialist Federal Republic of Yugoslavia (SFRY) into Greater Serbia became stronger.¹⁹ The communist leaderships of other Yugoslav republics and provinces resisted such policy. The communist breakdown at the global level resulted in the democratic elections in the Yugoslav republics, after which the communists remained ruling only in Serbia and Montenegro. The so-called Yugoslav National Army (JNA) openly took the side of that communist leadership, which in terms of structure and personnel did not change since the communist period.²⁰ Serbia, Montenegro and JNA did not want to accept the disintegration of SFRY, in which they had a dominant position.
11. The 1974 Constitution of SFRY guaranteed the republics the right to self-determination and separation. Faced with the aggressive Greater Serbia policy, the other SFRY republics initiated the separation procedure, proposing at the same time that the SFRY should be restructured as a confederation. The political leadership of Serbia and Montenegro, together with the JNA leadership rejected such proposals, and responded to the democratic efforts with the armed aggression, first on Slovenia, and afterwards on Croatia and Bosnia and Herzegovina.²¹

¹⁸ *Prosecutor's List of Witnesses* of 10th June 2003, pp. 63-64. Confidential. *Prosecutor's List of Exhibits* of 10th June 2003, *passim*. Confidential.

¹⁹ The aim of the Greater Serbia policy is expressed in the simplified manner in the syntagm: "All Serbs in one state". This implies the intention to achieve, unconditionally, and even by means of war, that all regions, where Serb population lives only as a small minority, are annexed to the Serb state. There is a very extensive literature explaining the roots, upholding and the plans of that policy. Comp. Božo Čović (Ed.), *Roots of Serbian Aggression. Debates. Documents. Cartographic Reviews*, Zagreb, 1993; Ante Beljo (Ed.), *Greater Serbia: From Ideology to Aggression*, Zagreb, 1993; Mirko Grmek-Marc Gjidara-Neven Šimac (Ed.), *Le nettoyage ethnique. Documents historiques sur une idéologie serbe*, Paris, 1993, etc.

²⁰ The political leadership of the SR Montenegro was in fact installed after the coup ordered from Belgrade, and was totally devoted the policy of Greater Serbia.

²¹ Serbia and Montenegro were those, who seriously violated the SFRY Constitution by abolishing the rights of the so-called socialist autonomous provinces and by hindering the democratic development in other republics. This makes even more inappropriate the Prosecutor's claim that "the declarations of independence by the Republics of

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12. In the Greater Serbian aggression on the Republic of Croatia, 13.967 Croatian citizens, most of them Croats, were killed. 7.183 of the killed were civilians; 345 children were killed and 1.184 wounded. According to the Croatian data, on the Serb side, 224 civilians were killed.²² Aware of the aggression on Croatia and the policy of the Serb political leadership in Bosnia and Herzegovina, Croats in Bosnia and Herzegovina were not taken by surprise when the aggression spread on the Republic of Bosnia and Herzegovina.
13. Analogously with the strategy of destabilising the Republic of Croatia, the Serbs in Bosnia and Herzegovina declared, on 12th September 1991, the Serb Autonomous Region (SAO) Eastern Herzegovina, and on 16th September 1991, SAO Bosanska Krajina. Based on the referendum held on 9th and 10th October 1991, the BiH Serbs founded, on 24th October 1991, the Assembly of the Serb People in Bosnia and Herzegovina. The Assembly verified the declared Serb Autonomous Regions. The decision on the establishment of the Republic of Serbian Bosnia and Herzegovina (Republika Srpska) was made on 21st December 1991, and declared already on 9th January 1992.
14. Unlike the BiH Croats, the BiH Muslims were late in their defence preparations, although Croats were warning them of the need of having it organised.²³ Muslims to a large extent did not believe that "their neighbours, colleagues, best men and acquaintances of Serb nationality" would attack them.²⁴ Alija Izetbegović's military counsellor ("military counsellor of the Presidency of RBiH"), General Fikret Muslimović, admitted: "We all know very well that Bosniacs-Muslims loved Yugoslavia and that they were in favour of brotherhood and unity".²⁵ Had there been aggression on BiH in mid 1991, Bosniacs (Muslims) would have been totally disoriented: some of them would have been on the JNA side, some against it, the

Slovenia and Croatia marked the beginning of the disintegration of the SFRY. These actions provoked (sic!) armed conflict in the respective republics..." (Prosecutor's Pre-Trial Brief, para. 7.)

²² *Agresor i žrtva su izjednačeni (The Aggressor and the Victim are Made Equal)*. The interview with Prof. Andrija Hebrang, Ph.D., *Fokus*, no. 158, Zagreb, 23rd May 2003, pp. 16-17. The data do not include the victims in the territory of Bosnia and Herzegovina.

²³ In the period referred to in the Amended Indictment, the word "Muslims" was the official name of one of the three constituent nations of BiH. For practical reasons, this name is also used in this text, but the Defence keeps in mind that the name has been replaced by the name "Bosniacs". This name implies the persons who, in the *national* sense, declare themselves as Bosnian Muslims.

²⁴ Commander of 505th ABiH Brigade, Izet Nanić, *Život za slobodu dat sa osmijehom na usnama (To Give My Life for Freedom with a Smile on My Lips)*, Ljiljan, p. 5 of ABiH Corp, issue of 29th April 1995. (Published also in: *Armija Bosne i Hercegovine 1992-1995 (Army of Bosnia and Herzegovina 1992-1995)*, Sarajevo, 1997, pp. 104-105)

²⁵ Fikret Muslimović, *Ustanovio sam "Upravu za moral" (I Have Established "the Administration for Morality"*, Ljiljan, 4th October 1995. (Published also in: *Armija Bosne i Hercegovine 1992-1995 (Army of Bosnia and Herzegovina 1992-1995)*, o. c., pp. 110-113).

third would have acted neutrally.²⁶ Croats were encouraging Muslims to prepare themselves for the defence. Such encouraging was obvious also in Mostar, the capital city of Herzegovina.²⁷

15. Prominent Bosniac-Muslim politicians accused the President of the Presidency of BiH, Alija Izetbegović, who was also the President of SDA,²⁸ of having secret meetings with the representatives of the co-called JNA in 1991, and of getting certain guarantees as a compensation for political solutions at the convenience of Serbia and Montenegro.²⁹ The Muslim political leadership, personified in the Party of Democratic Action (SDA) and its President Izetbegović, was completely passive while observing the Greater Serbian aggression on Croatia. The aggression was being carried out mostly from the territory of BiH, but the Muslim political leadership did not take any steps to prevent such misuse of the BiH territory.³⁰
16. On 15th October 1991, the Assembly of BiH passed the Decision on Sovereignty, which said, among other, that BiH would be developing as a civic republic, which is a sovereign and inseparable state. It would be neutral in the conflicts between Serbia and Croatia, and could remain in the Yugoslav community only if Serbia and Croatia remained. In his address to the public on TV Sarajevo on that occasion, Izetbegović said "The war in Croatia is not our war". With that statement, on behalf of the Muslim leadership, he renamed a clear aggression into just a "war", and thus distanced himself from BiH Croats, who sympathised with the defence of the Republic of Croatia, and who were also attacked in September 1991 (the village of Ravno in Herzegovina). Izetbegović gave such statement despite the fact that 20.000 members of the so-called JNA were deployed in Mostar and its surroundings in mid

²⁶ Fikret Muslimović, *Održana Republike (Defence of the Republic)*, Sarajevo-Ljubljana, 1995, pp. 58-59.

²⁷ Mithat Hujdur Hujka, *Nikad se ne vraćam nazad! (I'll Never Come Back)*, *Mostarsko jutro*, spring 1993, (Published also in: *Armija Bosne i Hercegovine 1992-1995 (Army of Bosnia and Herzegovina 1992-1995)*, o. c., pp. 37-39).

²⁸ Party of Democratic Action was the strongest, and even dominant, political organisation of BiH Muslims. Namely, on 6th August 1990, the Assembly of the Socialist Republic of Bosnia and Herzegovina decided to call elections for 18th November 1990. 2.333.827 (or 77,5 per cent) of the registered voters went to the polls. Croatian Democratic Union (HDZ BiH) got 15,51 per cent, SDA 30,41 per cent, and Serbian Democratic Party (SDS BiH) 25,23 per cent. HDZ BiH won in total 84,38 per cent of Croat votes, SDS 78,79 per cent of Serb, and SDA 76,94 per cent of Muslim votes. SDA was led by Alija Izetbegović, who was soon elected the President of the Presidency of Bosnia and Herzegovina. This happened thanks to Croat votes, as the Serb representatives opposed the election of Izetbegović.

²⁹ *Oslobođenje*, Sarajevo, 3rd July 2001, p. 22.

³⁰ One should bear in mind that, due to the geo-political position of Croatia and BiH, such misuse of the BiH territory could have seriously jeopardised the existence of the Republic of Croatia.

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September 1991; that was the military force which was carrying out the brutal aggression on the Republic of Croatia at that time.

17. Despite the passive attitude towards the Great Serbian aggression on Croatia, the top-people of the Party of Democratic Action (SDA) started considering the possible military defence of the Muslim people, already in February 1991.³¹ In early March 1991, Izetbegović gave the green light for the beginning of creation of a military organisation, and in late March, there was the first meeting of SDA representatives from all BiH regions, held in Jarčedoli on the foot of Trebević. At that meeting, chaired by Rusmir Mahmutćehajić and Hasan Čengić, it was decided that the military organisation of BiH Muslims would be created through the SDA structure.³² On 10th June 1991, in the Sarajevo Home of Militia, there was a meeting with the participation of about 380 Muslims from the territory of the whole Yugoslavia of that time. On that occasion, the *Council of the National Defence of the Muslim People* was founded, and at the same time, its military wing was established and called the *Patriotic League*.³³ It was directly under the SDA patronage.³⁴ The Muslim political leadership thus clearly showed that it was taking care primarily of the interests of the Muslims.
18. Those military officers, who participated in organising of the Patriotic League, presented their first (secret) report to Izetbegović in October 1991 in Hrasnica.³⁵ Already in August 1991, precise plans were developed for the capture of JNA barracks in some parts of BiH.³⁶ Before the official beginning of the war in BiH,³⁷ the Patriotic League organisation was covering the

³¹ Hasan Čengić, *Krizu Dejtonskog sporazuma neće razriješiti moja smjena (My Dismissal Won't Solve the Dayton Agreement Crisis)*, *Ljiljan*, 13th November 1996. (Published also in: *Armija Bosne i Hercegovine 1992-1995 (Army of Bosnia and Herzegovina 1992-1995)*, o. c., pp. 124-127).

³² H. Čengić, the interview of 13th November 1996

³³ F. Muslimović, *Obrana Republike (Defence of the Republic)*, o. c., pp. 206-207 Alija Izetbegović: *Velikim Bogom se kunemo da robovi biti nećemo! (We Swear to the Great God That We Won't be Slaves)* (It was Izetbegović's interview in the weekly journal *Ljiljan* of 12th January 1994, published also in: *Army of Bosnia and Herzegovina 1992-1995, Ljiljan*, Sarajevo, 1995, p. 9. In that collection of interviews, "the Muslim nation" was being systematically replaced by the new name: "Bosniac nation".)

³⁴ *Izetbegović '96*, o. c., p. 207; F. Muslimović, *Obrana Republike (Defence of the Republic)*, o. c., pp. 188, 200, 218-219.

³⁵ A. Izetbegović, the above mentioned interview

³⁶ Murat Šabanović, *Murate, Šabane...!*, *Ljiljan*, 15th April 1993. Published also in: *Army of Bosnia and Herzegovina 1992-1995*, o. c., p. 29.

³⁷ 6th April 1992 is usually taken as the date of the beginning of the war in BiH. But, before that date, in September 1991, the Serb-Montenegrin forces and JNA demolished to rubble the village of Ravno in Herzegovina, inhabited only by Croats. The Muslim political leadership ignored that attack on a part of BiH, which caused confusion and anxiety among the Croats in BiH.

whole territory of BiH. There were the general and nine regional headquarters, municipality headquarters and manoeuvre territorial units.³⁸

19. The preparations of the Muslim population for the war were being carried out outside the Patriotic League as well, but always under the political surveillance of SDA. Such organising and armament of people was running also within the Civil Protection.³⁹ At the Patriotic League military consultations, held in Mehurići near Travnik, on 7th and 8th February 1992, there was the conclusion that the Patriotic League had at its disposal 60 to 70 thousand armed members.⁴⁰ The participants of the meeting were Hasan Čengić, Sefer Halilović, Rifat Bilajac, Džemal Merdan, Meho Karišik, Vahid Karavelić and many others.⁴¹
20. Realising that the policy of SDS BiH and the establishment of the so-called Serb Autonomous Regions, which in fact did not recognise the constitutional and legal system of the Republic of BiH, would lead to the total disintegration of the system, the other two constituent nations of BiH undertook the steps to parry the SDS policy. The Muslims of Bosnia and Herzegovina were leading the way. On 6th June 1991, the SDA Regional Committee in Mostar decided to "launch the initiative for the joining up of the Muslim people into separate municipalities".⁴² The operation was running in secret and without any agreements with the political representatives of the BiH Croats, together with whom the BiH Muslims formally acted to prevent the Greater Serbian aggression. The Croats in Bosnia and Herzegovina applied a similar model not sooner than five and a half months later, but they did it openly. Such step was provoked by the further military and political developments in Croatia and BiH.
21. The last session of the Assembly of the Social Republic of Bosnia and Herzegovina was held between 12th and 15th October 1991.⁴³ Having in mind the provisions of the Constitution of SR BiH concerning the Council of Nations and the protection of interests of the constituent nations in that state, leaving of the Assembly by the Serb representatives jeopardised the

³⁸ Sefer Halilović, *Ubrzan tempo vojnih pobjeda (Accelerated Pace of Military Victories)*, Ljiljan, 4th January 1993. Published also in: *Army of Bosnia and Herzegovina 1992-1995*, o.c., p. 26.

³⁹ Hamid Bahto, *Sa Bjelašnice do Goražda pješačili smo pet dana i pet noći (We Walked Five Days and Nights from Bjelašnica to Goražde)*, Ljiljan, 13th December 1995 (Published also in: *Army of Bosnia and Herzegovina 1992-1995*, o. c., pp. 120.-123.)

⁴⁰ Davor Marijan, *Rat u Bosni i Hercegovini ili: nepodnošljiva lakoća "povjesničarenja" (The War in Bosnia and Herzegovina or: the Unacceptable Lightness of "Historicism")*, Nacionalna sigurnost i budućnost, Collected Papers I, Zagreb, 2001, p. 144

⁴¹ Partial list of participants given by Muslimović, in: F. Muslimović, *Obrana Republike (Defence of the Republic)*, o. c., pp. 207-208

⁴² The Defence is going to present the documents at the trial.

⁴³ Karlo Rotim, *Obrana Herceg-Bosne (Defence of Herceg-Bosna)*, I., Široki Brijeg, 1997, pp. 300-301

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validity of deciding in that highest representative and legislative body. As the last of the three constituent nations of BiH, the Croat political representatives undertook the measures by which they tried to parry the disintegration of the BiH political system, and thus, on 18th November 1991, they founded the Croatian Community Herceg-Bosna (HZ HB).⁴⁴ The decision on its founding underlined that the founding of the Croatian Community Herceg-Bosna was the consequence of the brutal Greater Serbian aggression on BiH and Croatia.⁴⁵ It also underlined that its purpose was to defend the population in its territory, and that HZ HB would "respect the democratically elected government of the Republic of Bosnia and Herzegovina as long as the independence of Bosnia and Herzegovina exists in relation to the former and any future Yugoslavia".⁴⁶ Therefore, HZ HB was a component of the sovereign state of Bosnia and Herzegovina.

22. The international community made the diplomatic recognition of BiH conditional on a referendum. Serbs boycotted the referendum, while Croats and Muslims voted for the independence of BiH. The referendum was held on 29th February and 1st March 1992. The Croat voters went to the referendum in larger numbers than the Muslim.⁴⁷ The Declaration of Independence of the Republic of BiH was passed on 3rd March 1992, without the participation of the representatives of the two parliamentary parties of the BiH Serbs, SDS BiH and the Serb Renewal Movement (Srpski pokret obnove, SPO). The European Community recognised BiH on 6th April 1992, and the USA on 7th April 1992.⁴⁸ The Republic of Croatia recognised BiH on 7th April 1992, and on 8th April 1992, the Croatian Government condemned the aggression, with a special statement, and expressed its "support for the territorial wholeness, independence and sovereignty of Bosnia and Herzegovina".⁴⁹
23. Although Serbia, Montenegro and JNA have carried out the aggression on Bosnia and Herzegovina on 6th April 1992,⁵⁰ the Presidency of BiH proclaimed, on 8th April 1992, only

⁴⁴ The Constitution of the Republic of Bosnia and Herzegovina allows the establishing of municipality communities, who were authorised for numerous functions within the executive power. (Constitution of SR BiH, Art. 274-281.)

⁴⁵ *Narodni list, Official Journal of Croatian Community Herceg-Bosna*, issue 1, Mostar, September 1992, pp. 2-3.

⁴⁶ *Idem*. The decision on the establishment of HZ HB does not say, as the Prosecutor claims, that "the purpose of the HZ H-B was to defend Croatian ethnic space and interests in the territory of Bosnia and Herzegovina". (*Prosecutor's Pre-Trial Brief*, para. 9.)

⁴⁷ Franjo Boras, *Kako je umirala Socijalistička Republika Bosna i Hercegovina 1990-1996 (The Dying of the Socialist Republic of Bosnia and Herzegovina)*, Mostar, 2002, p.23.

⁴⁸ F. Boras, o. c., p. 90.

⁴⁹ K. Rotim, o. c., pp. 306-307.

⁵⁰ As already mentioned in paragraph 12, that date is usually taken as the beginning of the war, although it is not completely incontestable.

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the immediate threat of war, and the state of war was proclaimed only on 20th June 1992.⁵¹ The reluctance of the Muslim political leadership, which lasted for two and a half months, disturbed Croats. Namely, despite the previous experience and the obvious facts, the war-time presidency of BiH identified the aggressor; Serbia and Montenegro, in alliance with JNA and SDS BiH, as late as 22nd June 1992.⁵²

24. On 8th April 1992, the Presidency of BiH passed the Decree on the abolition of the then Republic Territorial Defence (TO) HQ and on the establishment of a new TO HQ of the Republic of BiH, which was founded on 15th April; and on that day, it took on the command over the existing units, which were based on the political platform of the Patriotic League. The Patriotic League HQ, which until that day was illegal, became the backbone of the new TO Headquarters.⁵³ For that reason, TO BiH, which is understood as the core of the BiH Army to be, was founded on 15th April.⁵⁴ That day was proclaimed to be the Day of the BiH Army, by the Presidency's Decree dated 20th May 1992.⁵⁵ On 20th May 1992, the organisation was even formally renamed into the Army of Bosnia and Herzegovina (ABiH).⁵⁶ Thus, it was formally based on the "political platform of the Patriotic League", which means "under the SDA patronage" and with the task "to defend the Muslim people".
25. In May 1992, the BiH Presidency decided that the reserve task force of the Ministry of the Interior would be subjected to the BiH Army in carrying out the armed combat.⁵⁷ During the whole war, the influence of SDA was strongly felt in the BiH Army.⁵⁸ Alija Izetbegović claimed that in late 1992 the BiH Army consisted of 50.000 armed combatants, in late 1993 already 100.000, and in late 1994 - 200.000 armed men.⁵⁹

⁵¹ A. Izetbegović, Report on the work of the Presidency of RBiH for the period between 20th December 1990 and 10th September 1996 to the Assembly of the Republic of Bosnia and Herzegovina, in: *Izetbegović '96*, o.c., p. 218. The reported period thus covers the period after the first session of the Presidency, held on 20th December 1990.

⁵² F. Boras, o. c., p. 95.

⁵³ F. Muslimović, *Odbrana Republike*, o. c., p. 209.

⁵⁴ In fact, a major part of the infrastructure of the earlier TO was taken on.

⁵⁵ F. Muslimović, *Odbrana Republike*, o. c., p. 209.

⁵⁶ F. Muslimović, *Odbrana Republike*, o. c., p. 210.

⁵⁷ *Commander of BiH Army, Rasim Delić: Pravedan mir ovdje je teško ostvariti (A Righteous Peace Is Difficult to Achieve Here)*, Ljiljan, 22nd September 1993. (Published also in: *Army of Bosnia and Herzegovina 1992-1995*, o. c., pp., 41-43)

⁵⁸ Moreover, the commander of the ABiH Second Corps S. Delić stated in late 1994 that "SDA is the party which organised this people and managed to defend it. I consider it necessary that in this period we are the only party, which would make us stronger". (Sead Delić, *Osudeni na pobjedu (Doomed to Win)*, Ljiljan, 21st December 1994. Published also in: *Army of Bosnia and Herzegovina 1992-1995*, o. c., pp. 91-93)

⁵⁹ *Izetbegović '96*, o. c., pp. 186.

26. Although the awareness of the threat of aggression was stronger among the BiH Croats than among Muslims, so that they were getting armed spontaneously, they did not establish their military *organisation* until 6th April 1992, not even after the destruction of the Croat inhabited village of Ravno. In that sense, they were far behind the *organised* military preparations of the Muslims, and especially Serbs. Pursuant to the 1974 Constitution of the Socialist Republic of Bosnia and Herzegovina, Croats, Serbs and Muslims were equal and constituent peoples of the Republic. That means that they had the constitutional right to organise the so-called total national defence and social self-protection.⁶⁰
27. But, Croats started *organising* their defence only after the open aggression started and after the total disintegration of the political and security system of Bosnia and Herzegovina. The civil authorities in the whole BiH divided according to the ethnic criterion. The disintegration of the system can be clearly demonstrated by the case of the commander of the Territorial Defence of BiH, who paid the reserve personnel who fought against Croatia from the budget of the Bosnia and Herzegovina Republic TO HQ. He did that without the approval of the SR BiH Presidency.⁶¹ When the so-called JNA arrested him and held him as a hostage, Alija Izetbegović transferred all his powers of the President of the Presidency of BiH to another Muslim representative Ejup Ganić, instead of his Deputy, Stjepan Kljuić, a Croat representative in the Presidency of BiH.⁶² The civil authorities practically ceased to exist at the beginning of the war, and their tasks (police, financial, customs, inspection, etc.) were left to the military authorities, which were the only ones to prevent total anarchy.⁶³ At that time already, a large part of the country was occupied, the roads were impassable, the justice system collapsed, as well as the banking and monetary system, etc.
28. In such circumstances, on 8th April 1992, the Croats of Bosnia and Herzegovina founded the Croatian Defence Council (HVO). The task of HVO was to defend the Croatian and other people in the territory of HZ HB.⁶⁴ The second phase of the HVO *temporary* organisation started with the escalation of the war, when the circumstances required organising of a sort of

⁶⁰ The Constitution of SFRY of 1974, Art. 239; the Constitution of SR BiH of 1974, čl. 252, 256. ff.
⁶¹ D. Marijan, o. c., p. 142.
⁶² The evidence for this statement will be presented at the trial.
⁶³ Radoslav Lavrić, *Preteča gardijskih brigada (Predecessor of the Guard Brigades)*, in: *Tri godine Vojne policije (Three Years of the Military Police)*, Ljubuški, 1995, p. 40.
⁶⁴ *Decision on the Establishment of the Croatian Defence Council, Narodni list. Official Journal of Croatian Community Herceg-Bosna*, issue 1, Mostar, September 1992, p. 4.

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the wartime government (3rd July 1992).⁶⁵ But, already between 10th and 15th April 1992, HVO addressed the Wartime Presidency of BiH with the proposal to establish the joint military headquarters for the defence of BiH. Nevertheless, Izetbegović never put the proposal on the agenda of the Presidency.⁶⁶ Namely, at the very beginning of the war, the Muslim side had certain reservations towards Croats. For instance, the Police Station (the so-called Public Security Station) in Bugojno, according to a JNA report dated 2nd April 1992, immediately before the outbreak of the war, distributed ammunition among the Muslim members of the military militia, with the warning to hide that from the Croat members of the same unit, because of the tensions between Croats and Muslims in Gornji Vakuf.⁶⁷

29. The Greater Serbian aggression gave an impetus to Croats and Muslims to reach an agreement and to organise joint military forces. Thus, for example, the Muslims from Mostar, knowing that the joint command was the only precondition of a successful defence, accepted in 1992 that the role of the joint command would be taken on by the HVO Municipality HQ in Mostar.⁶⁸ As a witness in the *Furundžija* case, Muhamed Mujezinović confirmed that in autumn 1991 in Vitez there had been the co-operation between SDA and HDZ (he was, in fact speaking of HVO, which had not been in existence at that time yet!).⁶⁹ He said that the crisis HQ had been founded in March 1992, and "the nations had been equally represented in it".⁷⁰ But at the same time, the Muslims in the territory of Central Bosnia⁷¹ also organised the Patriotic League, whose leadership, as already mentioned, held in April 1992 the big and important military consultations in Mehurići near Travnik, several kilometres from the villages mentioned in the Amended Indictment.
30. The Prosecutor's statement that TO and later ABiH represent "military forces of the government of Bosnia and Herzegovina" is a mere fabrication.⁷² Its purpose is obviously to suggest the illegality of HVO. The Prosecutor's Pre-Trial Brief clearly implies that the BiH

⁶⁵ *Statutory Decision on the Temporary Structure of the Executive Power and Administration in the Territory of Croatian Community Herceg-Bosna, Narodni list. Official Journal of Croatian Community Herceg-Bosna*, issue 1, Mostar, September 1992, pp. 5-8.

⁶⁶ F. Boras, o. c., pp. 23, 94-95.

⁶⁷ D. Marijan, o. c., p. 149.

⁶⁸ *Arif Pašalić, commander of the Independent Mostar Battalion*, Ljiljan, 31st August 1992, Published also in: *Army of Bosnia and Herzegovina 1992-1995*, o. c., p. 15.

⁶⁹ IT-95-17/1-T, *The Prosecutor v. Anto Furundžija*, Judgement of 10th December 1998, para. 52.

⁷⁰ IT-95-17/1-T, *The Prosecutor v. Anto Furundžija*, Judgement of 10th December 1998, para. 52.

⁷¹ Which means, in the territory referred to in the Amended Indictment.

⁷² *Prosecutor's Pre-Trial Brief*, footnote 6.

Army is to be considered the only lawful military force loyal to the lawful authorities of the Republic of Bosnia and Herzegovina.⁷³ If the Prosecutor insists on the statement that the authorities in Sarajevo in the period referred to by the Amended Indictment were the legitimate authorities of the Republic of Bosnia and Herzegovina as a whole, and that legal consequences may result from that, then such claim has to be evidenced. On 21st July 1992, in Zagreb, Tudman and Izetbegović signed the Agreement on Friendship and Co-operation, which stated, among other, that HVO was a constituent part of the BiH Armed Forces.⁷⁴ Izetbegović expressed his gratitude, on RTV BiH, to HVO for the defence of BiH against aggression,⁷⁵ and his military counsellor, ABiH General F. Muslimović noted in early October 1992 that the Croatian people gave a decisive contribution to the defence of BiH: had Croats not opposed the aggression, “the concept of Greater Serbia would have already been achieved to a large extent, and the non-Serbian nations in this area would have been enslaved”.⁷⁶ Stjepan Šiber, a Croat, a General of the BiH Army says on 15th April 1993⁷⁷ that “Bosnia is defended by its patriots – combatants of the BiH Army and HVO”.⁷⁸ Only several days after the outbreak of the conflict in Central Bosnia, Milivoj Petković, a HVO General, and Sefer Halilović, a ABiH General, concluded an agreement in Zenica, on 20th April 1993, in the presence of Gen. Morillon and Ambassador Jean-Pierre Thebault; the first article of the agreement says: “BiH Army and HVO are the lawful military forces of the Republic of Bosnia and Herzegovina, and are to be treated equally.”⁷⁹ The Washington Agreement of 18th March 1994⁸⁰, the Split Declaration of 22nd July 1995⁸¹ and the constituent documents of the Dayton Agreement of 21st November 1995 considered HVO to be a constituent and equal part

⁷³ *Prosecutor's Pre-Trial Brief*, footnote 6. In the same document, the Bosniac-Muslim member of the Presidency of the Republic of Bosnia and Herzegovina is referred to, with out any reservation or comment, as the “President” (*Idem*, para. 13.)

⁷⁴ K. Rotim, o. c., pp. 316-317 Several weeks before that, the President of the Republic of Croatia, Dr. Franjo Tudman, in his letter to Alija Izetbegović dated 6th July 1992, expressed his belief that “the differences between the constitutive nations of Bosnia and Herzegovina need to be solved by political means. We interpret the organising of Croatian Community Herceg-Bosna and HVO as an initiative within the Republic of Bosnia and Herzegovina, and we support them only as such”. (*Idem*, pp. 315-316.)

⁷⁵ The Defence is going to present the video-clip at the trial.

⁷⁶ F. Muslimović, *Obrana Republike*, o. c., p. 103.

⁷⁷ Which is the day before the outbreak of the conflict between the BiH Army and HVO in Central Bosnia.

⁷⁸ Stjepan Šiber, *Bosna brane njeni patrioti (Bosnia Is Defended by Its Patriots)*, Ljiljan, 15th April 1993. Published also in: *Army of Bosnia and Herzegovina 1992-1995*, o. c., pp. 27-29.

⁷⁹ The Defence is going to present the text of the agreement at the trial.

⁸⁰ K. Rotim, o. c., pp. 370-378. ff.

⁸¹ K. Rotim, o. c., pp. 423-425.

of the armed forces of BiH. HVO is treated in the same manner by the post-war official publications, such as the Encyclopaedic Dictionary of BiH Army.⁸²

31. The internationalisation of the conflicts in BiH led to numerous peace conferences and other activities of the international community. Recent researches have shown that the actions of the international community were not always contributing to the achievement of peace and a just solution.⁸³ One of the plans for the internal reorganisation of BiH on the ethnic basis was the Vance-Owen Peace Plan (VOPP), presented on 2nd January 1993. The Croatian side was the first to accept the Plan, because it made the end of the war and the stabilisation of the situation possible. The request of 15th January 1993, which the Prosecutor calls an unilateral ultimatum,⁸⁴ was signed by the Minister of Defence of the Republic of BiH.⁸⁵ The Commander of the 4th ABiH Corps says that the "ultimatum" was never sent to ABiH, neither was it understood as a serious document.⁸⁶ This means that it could not contribute to the outbreak of the conflict. On 25th March 1993, Alija Izetbegović signed the VOPP on behalf of the Bosniacs-Muslims. Contrary to the Prosecutor's claims regarding the alleged "ultimatum" of 15. April 1993,⁸⁷ the Trial Chamber in *Naletilić* found: "The evidence does not allow the conclusion that a deadline was set for 15 April 1993".⁸⁸

Ahmići – October 1992

32. In the territory of Central Bosnia as well, already during 1991, the BiH Muslims secretly organised the Patriotic League, as a military wing of the Council of the National Defence of the Muslim People. A special role in that was played by Džemal Merdan, commander of the District Defence HQ Zenica.⁸⁹

⁸² Ahmed Kasumović – Čamil Huseinbašić, *Encyclopaedic Dictionary of BiH Army*, Sarajevo, 2000, p. 145.

⁸³ See Brendan Simms, *Unfinest Hour. Britain and the Destruction of Bosnia*, Bosnian Edition, Sarajevo – Belgrade, 2003.

⁸⁴ *Prosecutor's Pre-Trial Brief*, para. 13.

⁸⁵ This needs to be emphasised because the Prosecutor wants to assert that ABiH was the only military force of the BiH government.

⁸⁶ Arif Pašalić, *Armija Bosne i Hercegovine 1992-1995*, p. 15.

⁸⁷ *Prosecutor's Pre-Trial Brief*, para. 13.

⁸⁸ *IT-98-34-T, Prosecutor v. Mladen Naletilić et al.*, Judgement of 31. March 2003, para. 24.

⁸⁹ Džemal Merdan, *Korak po korak ka slobodi (Step by Step towards Freedom)*, Ljiljan, 12th October 1992. Published also in: *Army of Bosnia and Herzegovina 1992-1995*, o. c., p. 19.

33. At the same time, the incidents involving Croats were being provoked. The first incident of that kind occurred on 3rd May 1992 on the occasion of seizure of the former JNA's barracks in Slimena near Travnik, when HVO seized the barracks and Muslims entered afterwards and took away large quantities of weapons and equipment. The barracks of the so-called JNA in Zenica were seized in 18th May 1992, and due to constant pressures, in October 1992 Croats left their positions in the city and municipality administration.⁹⁰ Some parts of Central Bosnia and the areas in the vicinity, where the main role in the organisation of the defence was played by Muslims, were left to Serbs without any serious defence. When Serbs seized Doboj on 2nd May 1992, the political leadership of the Muslims in Maglaj, without any consultations with Croats, sent their delegates to Doboj to negotiate the surrender of Maglaj.⁹¹ Only after the failure of the negotiations, the Maglaj Muslim political leadership made the decision, on 2nd June 1992, that the defence of the municipality of Maglaj would be entrusted with the IIVO of the municipalities of Žepče, Zavidovići, Maglaj and Teslić, with the headquarters in Žepče. TO was placed under the HVO command, and HVO had BiH emblems on together with their own.⁹² A similar development occurred in the municipalities of Busovača and Vitez.⁹³ Therefore, the Prosecutor's statement that the founding of HVO resulted in the "usurpation of the political power by the Bosnian Croat authorities"⁹⁴ is totally unfounded.
34. Moreover, a number of Muslim units were coming to the territory of Central Bosnia through the HZ HB area (ABiH units) formed in the territory of the Republic of Croatia, in Rijeka and Zagreb. ABiH General, Fikret Muslimović, a BiH Muslim, confirms that already in February 1993 in some HVO units there were up to 70 per cent of Muslims.⁹⁵ Several months earlier, the commander of BiH Army, Sefer Halilović, estimated that HVO in some of its units had more than 50 percent of Muslims.⁹⁶
35. The Prosecutor claims that, on 20th October 1992, the Muslims in the village of Ahmići "erected a roadblock on the main road", which was afterwards removed by HVO.⁹⁷ The

⁹⁰ Anto Marinčić, *Općina Žepče ili ključ za funkcioniranje Federacije Bosne i Hercegovine (Municipality of Žepče or the Key to the Functioning of the Federation of Bosnia and Herzegovina)*, Zagreb, 2000, p. 33.

⁹¹ A. Marinčić, o. c., p. 29.

⁹² A. Marinčić, o. c., pp. 29-30.

⁹³ Comp. para. 29.

⁹⁴ *Prosecutor's Pre-Trial Brief*, para. 11.

⁹⁵ F. Muslimović, *Obrana Republike*, o. c., p. 117. According to Muslimović, the same percentage of Muslims in some HVO units was still present in October 1992. (Also, 242.)

⁹⁶ S. Halilović, interview on 28th August 1992. *Armija Bosne i Hercegovine*, o. c., p. 14.

⁹⁷ *Prosecutor's Pre-Trial Brief*, para. 16.

finding of the Trial Chamber in Kupreškić case is rather different. The Trial Chamber established that that very act “was the act that sparked the armed conflict of 20th October”.⁹⁸ Moreover, the Trial Chamber found that the armed conflict involved “HVO armed forces from outside Ahmići and Muslim soldiers belonging to the BiH Army”.⁹⁹ Neither does the Prosecutor’s statement, that the Muslim residents of the village of Ahmići surrendered their weapons¹⁰⁰ on the demand of the HVO¹⁰¹, correspond to the facts. The weapons were surrendered based on a written agreement.

36. Erecting of a roadblock on the main road near Ahmići, on 19th and 20th October 1992, implies the military-strategic importance of the village, from which one can control the key road in the region, and also one of the most important roads in the territory of the whole BiH. One should also have in mind that, *on the same day*, 20th October 1992, the Muslims residents in the municipality of Vitez left the joint civil police and formed a separate police station in Stari Vitez.¹⁰² This act and the cutting off of communications in Ahmići did not coincide only in terms of time.¹⁰³

Busovača – January 2003

37. The Prosecutor’s statement that HVO forces attacked the city of Busovača on 25th January 1993 does not correspond the facts either.¹⁰⁴ On the contrary, there are a number of documents showing that, in January 1993, BiH Muslims started leaving the municipalities of Busovača and Vitez in an organised manner. Already on 9th January 1993, the command of the Nikola Šubić Zrinski Brigade in Busovača had the information that the combat level in ABiH units had been lifted to the maximum. Several days later, the ABiH forces from Zenica started moving towards Busovača.¹⁰⁵ Those movements were some of the attempts to join

⁹⁸ IT-95-16-T, *Prosecutor v. Zoran Kupreškić et al.*, Judgement of 14th January 2000, para. 162.

⁹⁹ IT-95-16-T, *Prosecutor v. Zoran Kupreškić et al.*, Judgement of 14th January 2000, para. 162.

¹⁰⁰ The Muslim inhabitants of the village of Ahmići were armed then before 20th October 1992, which is, at the time when in the Lašva Valley there were no serious conflicts. It is a suspicious reasoning, which would argue the claim that they did not have weapons later, at the time of real armed conflicts.

¹⁰¹ *Prosecutor's Pre-Trial Brief*, para. 16.

¹⁰² Witness Mujcinović, IT-95-17/1-T, *Prosecutor v. Furundžija*, Transcript of 8th June 1998

¹⁰³ In other Lašva cases, the exhibits have been presented, which show that in those days, among the BiH Muslims (also in Ahmići!), those who were in favour of co-operation with BiH Croats were relieved of their posts.

¹⁰⁴ *Prosecutor's Pre-Trial Brief*, para. 17.

¹⁰⁵ The evidence for this statement will be presented at the trial.

together the Third and the Fourth Corpses of ABiH, and resulted in the ethnic cleansing of the village of Lašva and Dusina, inhabited by Croats. The incidents in Kaćuni and Sebešić on 19th and 20th January 1993 show that the conflict in Busovača was the consequence of the ABiH attack operations.

38. The Defence does not deny that, during the conflict in Busovača, a number of BiH Muslims were killed, that a number of shops were damaged and destroyed, and that a large number of Muslims were taken to the detention centre Kaonik.¹⁰⁶ But, the Defence does deny that the military actions of HVO forces, in any period but especially in the period referred to in the Amended Indictment, were directed at civilians.
39. The Defence especially denies that the Accused had any, and especially command role, in the events in Busovača, and in particular, that he issued an unlawful order described in the Prosecutor's Pre-Trial Brief (para. 18.). There is no evidence of such circumstance.¹⁰⁷ There is no evidence either that the Accused had any role or power in relation to the functioning of the military prison Kaonik.¹⁰⁸ Moreover, the Defence states that the Amended Indictment and the Pre-Trial Brief imply that there are vagueness and imprecision concerning the structure and the role of the Military Police and especially of the 4th MP Battalion of HVO.¹⁰⁹

Lašva Valley – Conflict in April 1993

40. For the Prosecutor, there is no doubt that in April 1993 HVO attacked a number of targets in the Lašva Valley.¹¹⁰ And here she tacitly starts from the presumption that those were undefended, civilian targets. But, the reality is rather different. Due to its traffic importance and its military potentials (a number of military factories) for the BiH Army, the Lašva Valley area was extremely important. That was the reason for constant military operations aimed at the seizure of the area, ethnic cleansing of Croats and joining of the areas under the control of the Third and the Fourth Corpses of ABiH. The Lašva Valley, or the territory of the Province 10 according to the VOPP, had a significant political and symbolic importance.

¹⁰⁶ *Prosecutor's Pre-Trial Brief*, para. 17.

¹⁰⁷ The evidence for this statement will be presented at the trial.

¹⁰⁸ The Defence notes that there is a mix-up between the military prison Kaonik and a part of the military facilities Kaonik, where the interned Muslim conscripts were held.

¹⁰⁹ The evidence for this statement will be presented at the trial.

¹¹⁰ *Prosecutor's Pre-Trial Brief*, p. 7.

Mehmed Alagić, a BiH Army general, says in his memoirs that he openly told Ambassador Jean-Pierre Thebault in Travnik that “here [in the Lašva Valley, note] the Vance – Owen Plan will fail”.¹¹¹ BiH Army colonel Vebija Karić publicly stated for the Slovenian monthly magazine *Mladina*, in February 1993, that “there will be fierce conflicts between the BiH Army and HVO”.¹¹² President Izetbegović’s military counsellor, BiH Army general Fikret Muslimović said in September 1993 – which was after all the events described in the Amended Indictment – that there were “many respectable Bosniacs-Muslims who consider us to be guilty for the conflicts with Croats”.¹¹³ Therefore it seems that those “respectable Bosniacs-Muslims” are not strongly convinced in the aggressive HVO plans.¹¹⁴

41. An additional factor was the arrival of the great refugee wave to the Lašva Valley. As a result of the Greater Serbia aggression and the policy of ethnic cleansing, a great refugee flow, consisting mostly of Muslims from Bosanska Krajina and Eastern Bosnia, came to the area, which was already relatively densely populated. The vice president of the Islamic charity society Merhamet says that already in the first half of 1992 in Vitez, there were 4.000 Muslims refugees.¹¹⁵ Later, and especially after the fall of Jajce, in October 1992, the number increased significantly. Many of those unfortunate people disrupted the demographic and military balance, and often, although unintentionally, contributed to the creation of new tensions.
42. Great tensions in the Lašva Valley were caused and intensified by the strong and fanatic Mujahedin units. According to Rasim Delić, commander of the BiH Army, those forces were “the regular BiH Army units, with the structure and obligations as any other unit, and they also differ among themselves in details”. Mujahedins are “also a part of in the subordination and co-ordination system, and thus cannot act independently”.¹¹⁶ Alija Izetbegović also confirmed that Mujahedins were not a separate force as “their unit was an integral part of the BiH Army”.¹¹⁷ The best-known unit of them in the territory of Central Bosnia was the

¹¹¹ Nedžad Latić – Zehrudin Isaković, *Ratna sjećanja Mehmeda Alagića. Rat u Srednjoj Bosni (War Memoirs of Mehmed Alagić. The War in Central Bosnia)*, Zenica, 1997, p. 15.

¹¹² *Mladina*, issue 2/1993, Ljubljana, February 1993, pp. 28-29.

¹¹³ F. Muslimović, *Odbrana Republike*, o. c., p. 151.

¹¹⁴ This belief is not even shared by the independent British analysts of the war in. (See B. Simms, o. c., passim.)

¹¹⁵ Witness Mujezinović, *IT-95-17/1-T, Prosecutor v. Furundžija*, Transcript, 8th June 1998

¹¹⁶ Rasim Delić, *Sedma muslimanska i Prva podrinjska muslimanska brigada dale su veliki doprinos borbi Armije BiH (The Seventh Muslim and the First Podrinjska Muslim Brigades Greatly Contributed to the BiH Army Combats)*, *Ljiljan*, 2nd March 1994. Published also in: *Army of Bosnia and Herzegovina 1992-1995*, o. c., 63.-64.

¹¹⁷ *Izetbegović '96*, o. c., pp. 52, 59.

Seventh Muslim brigade. It developed in October 1992¹¹⁸ from the unit, which was earlier called "the Muslim forces".¹¹⁹ Its aim was "to defend the faith, the nation and the state".¹²⁰ Faith is, therefore, in the first place. This had to cause caution and worries among the Croats of Bosnia and Herzegovina, most of them being Catholics. The ritual manner, in which the BiH Croats were killed in the period before April 1993,¹²¹ added to the increase of tensions and fear. The defence is aware that *to quoque* principle is not applicable here, but it has to stress that the events, which occurred before 16th April 1993, eliminate the Prosecutor's claim that the BiH Croats started a persecution campaign in April 1993. Without that context, one cannot understand the events which occurred in April 1993, and thus, cannot lawfully and justly decide on the responsibility of the persons who took part in those events. One should also take into consideration the numerous events,¹²² incidents and various data, which were in the possession of HVO, and which shaped the decisions and the behaviour of various units.¹²³

43. Neither in the pre-trial stage of this case, nor in any other cases before this high Tribunal, is there a proof that the Accused took part in an alleged "series of meetings", as stated by the Prosecutor.¹²⁴ The Accused did not participate in the planning of military operations. The claim that "HVO Military Police were assigned principal responsibility of attacking Ahmići and adjacent villages"¹²⁵ is incorrect and imprecise. Due to its role and structure, the Military Police could not and did not act independently.¹²⁶ The Military Police could only act according to the orders coming from its superiors, and that's what it was doing.

44. The Prosecutor claims that "over 100 Bosnian Muslim civilians, including women and children, were murdered during these attacks, with the majority of the victims murdered in Ahmići on 16th April 1993".¹²⁷ The Defence does not contest that in the conflict from 16th till 20th April 1993 in the Lašva Valley numerous civilians were killed. Nevertheless, there is no

¹¹⁸ Which was at the time when the Muslims provoked the conflict in Ahmići and formed a separate police station in Vitez.

¹¹⁹ As stated by one of the founders and subsequently the commander of the Seventh Muslim brigade, Halil Brzina, in his interview for *Ljiljan* of 1st June 1994. Published also in: *Army of Bosnia and Herzegovina 1992-1995, o.c.*, 66-67.

¹²⁰ *Idem*.

¹²¹ The Defence is going to present the video-clips on those crimes at the trial.

¹²² Immediately before 16th April 1993, there occurred brutal attacks on the commanders of HVO units and the cruel murders of a large number of HVO members. The Defence is going to present the evidence of that at the trial.

¹²³ The evidence for this will be presented at the trial.

¹²⁴ *Prosecutor's Pre-Trial Brief*, para. 22.

¹²⁵ *Prosecutor's Pre-Trial Brief*, para. 22.

¹²⁶ The evidence for this will be presented at the trial.

evidence that the HVO forces started the operation against civilians with the aim of ethnic cleansing. The Defence has a large number of exhibits evidencing the presence of BiH Army in Ahmići and the adjacent hamlets,¹²⁸ and the Prosecution also has these exhibits at its disposal.¹²⁹ It was because of the BiH Army's resistance that the military operation in Ahmići lasted long; during the operation, the houses belonging to Croat villagers were damaged as well,¹³⁰ and the battle line was established just above the village, where it remained until the end of the war. Due to the large presence of the BiH Army, the HVO forces did not manage to seize the high ground above the village and thus secure the Vitez – Busovača communication.

45. Contrary to the Prosecutor's claims,¹³¹ a large number of the killed cannot possibly be considered civilians.¹³² There is no evidence either that the killed in Ahmići were the victims of the actions of the group of soldiers, who were members of the unit under the Accused's command.
46. The Prosecutor in its Pre-Trial Brief lists the names of units and individuals, claiming that they were direct subordinates of the Accused.¹³³ Those data are not precise, and they are also the confirmation of the fact that neither the Amended Indictment nor the Pre-Trial Brief clearly define the structure and the hierarchy within the HVO 4th Military Police Battalion. Those data are not coming from any credible evidence. The same applies to some individuals, who are identified as members of the unit under the Accused's command.
47. The Prosecutor claims that the Accused issued "operational orders for the attack" on Ahmići, which "included orders to kill all Muslims of military age, expel Muslim residents from

¹²⁷ *Prosecutor's Pre-Trial Brief*, para. 23.

¹²⁸ The evidence will be presented at the trial.

¹²⁹ Pursuant to Rule 68 of the Rules of Procedure and Evidence, on 12th June 2001, the Prosecution submitted to Gen. Blaškić's defence an important report of the Service of Military Security of the Seventh Muslim Brigade dated 16th April 1993. (See *The Prosecutor v. Tihomir Blaškić*, IT-95-14-A, Redacted Version of Appellant's Second Motion to Admit Additional Evidence on Appeal Pursuant to Rule 115, 7th March 2002, pp. 5-6, 16-19.) Unfortunately, the Prosecution has not yet submitted that document to the Defence although it falls within the category of documents, to which Rule 68 of the Rules on Procedure and Evidence (the "Rules") applies. The same applies to a number of other documents on the presence and structure of BiH Army in Ahmići, whose existence was established by the defence in other Lašva Valley cases.

¹³⁰ Therefore, the Prosecutor's claim that "none of the Croat homes were damaged" is not correct. (*Prosecutor's Pre-Trial Brief*, para. 29.)

¹³¹ *Prosecutor's Pre-Trial Brief*, para. 27.

¹³² The evidence for this will be presented at the trial.

¹³³ *Prosecutor's Pre-Trial Brief*, para. 25.

Ahmići, and burn all Muslim homes".¹³⁴ Furthermore, the Prosecutor claims that the Accused said "that civilians were not to be killed", but that he subsequently instructed his subordinates "that there were to be 'no living witnesses'".¹³⁵ Therefore, according to the Prosecutor's words, the last order of the Accused was "that there were to be 'no living witnesses'". At the same time, the Prosecutor states that many Muslims from Ahmići "were detained at the Dubravica School".¹³⁶ The Defence regretfully notes that there is not logical link between the claims that the Accused was giving operational orders for the attack, that he ordered that there were not to be living witnesses and that many villagers (i. e. witnesses) were detained at the Dubravica Elementary School.¹³⁷

48. Neither in the pre-trial stage of this case, nor in any other cases before this high Tribunal, is there a single evidence implying that the Accused or the unit under his command took part in any manner in the events which occurred in Donja Večeriska, Lončari, Gačice or Očehnići. He could not even have done that physically.¹³⁸ In addition, due to its function, structure and equipment, the Military Police was not the unit, which was holding the battle line.

Detention Facilities

49. In her Pre-Trial Brief, the Prosecutor describes in short the responsibility of the Accused in relation to the detention facilities, which existed in the territories of the municipalities of Vitez and Busovača.¹³⁹ The description clearly shows that there is confusion as concerns the functioning of the Military Prison in Kaonik (municipality of Busovača), which was in one part a military prison, and in another, a detention centre for the interned enemy conscripts. The commander of the HVO 4th Military Police Battalion is in no way related to the establishing and functioning of any part of the Military Prison Kaonik.¹⁴⁰

¹³⁴ *Prosecutor's Pre-Trial Brief*, para. 26.

¹³⁵ *Prosecutor's Pre-Trial Brief*, para. 26.

¹³⁶ *Prosecutor's Pre-Trial Brief*, para. 29.

¹³⁷ It is completely another question how many inhabitants were there in Ahmići in April 1993. According to the well-informed Bifi Muslims from the municipality of Vitez, at that time there were about 4.000 people in the village, most of whom were refugees (Witness Mujezinović, *IT-95-17/1-T, Prosecutor v. Furundžija*, Transcript, 9th June 1998).

¹³⁸ The evidence for this will be presented at the trial.

¹³⁹ The Defence is going to speak of the legal aspects of the opening of the detention facilities in the part of the Pre-Trial Brief on legal submissions.

¹⁴⁰ The evidence for this will be presented at the trial.

50. The Military Police was in no way related to the temporary detention centres, which were developed at the time of the outbreak of the conflict in Vitez, in April 1993. The Accused cannot be responsible in any way for their establishing and functioning.¹⁴¹ As already emphasised, the Military Police was not holding the battle lines, neither was it responsible for their engineer arrangement. Therefore, the Military Police and thus the Accused himself, had nothing to do with the digging of trenches and possible other forms of abuse of the interned persons.

III. LEGAL SUBMISSIONS

Modes of criminal responsibility under Article 7 of the Statute

51. The basic assumption of criminal responsibility is founded upon the principle of personal culpability. No one may be held criminally responsible for acts or transactions in which he has not personally engaged or in some other way participated (*nullum crimen nulla poena sine culpa*).¹⁴² Generally, this principle (the principle of legality) aims at preventing the prosecution and punishment of an individual for the acts, which he reasonably believed to be lawful at the time of their commission.¹⁴³ Inherent in this principle are the requirement of specificity and the prohibition of ambiguity in criminal law, its retroactive application, or its application by analogy.¹⁴⁴ This principle is expressed also in the international documents on human rights, such as the Universal Declaration of Human Rights, which says:

“No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed”.¹⁴⁵

Also, the Article 15 of the International Covenant on Civil and Political Rights stipulates:

¹⁴¹ The evidence for this will be presented at the trial.

¹⁴² IT-94-1-A, *Prosecutor v. Duško Tadić*, Appeal Judgement of 15th July 1999, para. 186

¹⁴³ IT-96-11-T, *Prosecutor v. Zejnil Delalić et al.*, Judgement of 16th November 1998, para. 313

¹⁴⁴ *Idem*, paras. 402, 408-413

¹⁴⁵ *Universal Declaration of Human Rights*, Art. 11 (2) Adopted 10th Dec. 1948

“No one shall be held guilty of any criminal offence of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed”.¹⁴⁶

This principle is a constituent part of the international law, and as such is incorporated in the legal systems of all civilised countries.

52. The Amended Indictment charges Paško Ljubičić under Article 7(1) and 7(3) in all counts of the indictment. During the Initial Appearance, the Accused pleaded not guilty. This means that he does not feel guilty under either Article 7(1) or Article 7(3) of the Statute. The Prosecutor in her Pre Trial Brief stated that cumulative charging under Statute Articles 7(1) and 7(3) is permissible and that a conviction under both articles is possible.¹⁴⁷ Such manner of charging is today, and especially *tempore crimins*, non-existent in the legal system the Accused comes from. Therefore the question arises if it is contrary to the principle of legality. The Defence considers that in this issue, as in any other, either in material and legal terms, or in the procedural and legal terms, where occurs a doubt in the interpretation and application of regulations, the legal principles need to be applied, which *tempore criminis* applied in the Republic of Bosnia and Herzegovina, or the ones which are more favourable for the Accused.¹⁴⁸

53. “The Prosecution is expected to know its case before it goes to trial”.¹⁴⁹ The Defence’s position is that the accused can be held responsible for only one form of participation in the same criminal offence. The judgements referred to by the Prosecutor in paragraph 40 of her Pre-Trial Brief, mostly do not support the expressed Prosecutor’s view. The issue of cumulative charging was dealt at length by the Trial Chamber II in *Prosecutor v. Zoran Kupreškić et al.*¹⁵⁰ Neither the indictment nor the sentence can contain different counts, penalising the same unlawful conduct, if every criminal act thus committed has the same essential elements, so that giving of evidence of relevant facts for one act makes it unnecessary to offer evidence for relevant facts of another criminal act. The Trial Chamber in the *Kupreškić* case characterised such an approach of the Prosecutor, concurring the charges,

¹⁴⁶ *International Covenant on Civil and Political Rights*, Art. 15 Adopted 16th Dec. 1966

¹⁴⁷ *Prosecutor’s Pre-Trial Brief*, para. 40

¹⁴⁸ In accordance to these generally accepted rules are also Articles 21-23 of the *Statute of the International Criminal Court*.

¹⁴⁹ IT-95-16-A, *Prosecutor v. Zoran Kupreškić et al.*, Appeal Judgement of 23rd October 2001, para. 92

¹⁵⁰ IT-95-16-T, *Prosecutor v. Zoran Kupreškić et al.*, Judgement of 14th January 2000, paras. 637-748

as burdening for the defence.¹⁵¹ The Defence is also aware that different interpretations of the problem appeared in different cases.¹⁵² Having this in mind, the Defence holds that, in consideration of murder as a crime against humanity and murder as a war crime, the view of the Trial Chamber in the *Kupreškić* case should be applied: "However, while murder as a crime against humanity requires proof of elements that murder as a war crime does not require (the offence must be part of a systematic or widespread attack on the civilian population), this is not reciprocated. As a result, the two offences are not in a relationship of reciprocal speciality. The prohibition of murder as a crime against humanity is *lex specialis* in relation to the prohibition of murder as a war crime and must therefore prevail".¹⁵³

54. The Defence bears in mind that the Tribunal's recent jurisprudence allows cumulative charging in relation to Article 7 of the Statute of the Tribunal. Nevertheless, the Defence does not agree that the cumulative conviction is legally permissible under Article 7(1) and 7(3) of the Statute, as the conviction may only be the result of the Trial Chamber's *selection* between Article 7(1) and 7(3) of the Statute as the more appropriate form of responsibility. In the *Krnjelac* case, the Trial Chamber finds: "The Trial Chamber has established the criminal responsibility of the Accused pursuant to both Article 7(1) and Article 7(3). However, the Trial Chamber is of the view that it is inappropriate to convict under both heads of responsibility for the same count based on the same acts. Where the Prosecutor alleges both heads of responsibility within the one count, and the facts support a finding of responsibility under both heads of responsibility, the Trial Chamber has a discretion to choose which is the most appropriate head of responsibility under which to attach criminal responsibility to the Accused. This discretion has not been affected by the law as to cumulative convictions as stated by the majority of the Appeals Chamber in *Delalić*.¹⁵⁴ Judicial practice relates to cumulative convictions only with regard to the legal qualification of a criminal offence under Articles 2, 3 and 5 of the Statute, and not to the cumulative conviction for the modes of criminal responsibility under Article 7 of the Statute.

¹⁵¹ IT-95-16-T, *Prosecutor v. Zoran Kupreškić et al.*, Judgement of 14th January 2000, para. 721

¹⁵² For example, ICTR-96-4-T, *Prosecutor v. Jean-Paul Akayesu*, Judgement of 2nd September 1998, para. 468; IT-94-1-T, *Prosecutor v. Duško Tadić*, Decision of 14th November 1995, para. 17.; IT-95-16-T, *Prosecutor v. Zoran Kupreškić et al.*, Decision of 15th May 1998, p. 3, etc.

¹⁵³ IT-95-16-T, *Prosecutor v. Zoran Kupreškić et al.*, Judgement of 14th January 2000, para. 823

¹⁵⁴ IT-97-25-T, *Prosecutor v. Milorad Krnjelac*, Judgement of 15th March 2002, para. 173

55. The ICTR held in *Akayesu* that, on the basis of national and international law and jurisprudence, the accused may be convicted of two or more offences in relation to the same set of facts and against the same victim only: (a) where the offences have different elements, (b) where the provisions creating the offences protect different interests, and (c) where it is necessary to record a conviction for both offences in order to fully describe what crimes the accused committed.¹⁵⁵ It is not justifiable to convict an accused of two offences in relation to the same set of facts where (a) on offence is a lesser offence included in the greater offence (...) or (b) where one offence charges liability as an accomplice and the other offence charges liability as a principal.¹⁵⁶
56. In *Naletilić* Judgement the Trial Chamber follows the finding of the *Krnjelac* Trial Chamber by choosing between Article 7(1) and Article 7(3) of the Statute as the most appropriate form of responsibility.¹⁵⁷ The *Kordić & Čerkez* Trial Chamber found that superior responsibility is an *indirect* form of responsibility as it does not stem from direct involvement by a superior in the commission of a crime but rather from his failure to prevent or punish such crime. When a superior not only knew or had reason to know about the crimes of his subordinates, but also planned, instigated, ordered or otherwise aided and abetted in the planning, preparation or execution of these crimes, the application of Article 7(1) of the Statute is more appropriate to characterise his responsibility.¹⁵⁸
57. The Defence disagrees with the Prosecutor's standpoint that the Trial Chamber has the discretion to find that the evidence supports any of the modes of liability whether or not they were expressly charged.¹⁵⁹ The Prosecutor in her indictment must clearly and specifically describe the Accused's acts, criminal offences thus committed, as well as the form of responsibility. The Accused may not be left to speculate what his charges are. Court always has the discretion to find the appropriate form of the accused's responsibility, but it cannot

¹⁵⁵ ICTR-96-4-T, *Prosecutor v. Jean-Paul Akayesu*, Judgement of 2nd September 1998, para. 468

¹⁵⁶ *Idem*.

¹⁵⁷ IT-98-34-T, *Prosecutor v. Mladen Naletilić et al.*, para. 81

¹⁵⁸ IT-95-14/2-T, *Prosecutor v. Dario Kordić et al.*, Judgement of 26th February 2001, Para 369, 371. The *Blaskić* Trial Chamber was in favour of a concurrent application of Articles 7(1) and 7(3) of the Statute in cases where *subsequent crimes* have been committed. The Chamber was of the view that the failure to punish past crimes can not only be subject of superior's responsibility under Article 7(3) of the Statute but can also be the basis for a liability under Article 7 (1) of the Statute for either "aiding and abetting" or "instigating" the commission of further crimes. (IT-95-14-T, *Prosecutor v. Tihomir Blaškić*, Judgement of 3rd March 2000, paras. 337-339) In that case, the Prosecutor has to prove that further crimes were direct consequence of the failure to punish the past crimes. In any case, there will be two forms of responsibility for different forms of unlawful conduct.

¹⁵⁹ *Prosecutor's Pre-Trial Brief*, para. 40

chose the one which is not incriminated, because the accused cannot prepare the defence in relation to the form which is not incriminated. It is the Prosecutor's obligation and duties to determine for which counts of the indictment will the accused be prosecuted pursuant to Article 7(1) and for which according to Article 7(3) of the Statute.¹⁶⁰ Neither in the Amended Indictment nor in her Pre-Trial Brief, did the Prosecutor set out clearly how she would prove that Paško Ljubičić at the same time had committed, planned, ordered, instigated and aided and abetted each of alleged crimes, and failed to properly sort these categories into their proper relationship as to indirect *versus* direct liability.

58. The Prosecutor has to present evidence, which can pass the objective analysis and can be considered indisputable, that the Accused has acted deliberately and intentionally and that the Accused has before, during or after the incident in any way supported or assisted in the actual commission of the act. One must not mix concepts of indirect liability by allegations of planning, ordering or instigating the crime by others into the elements of direct liability by joint execution. If a person were held liable for failure to prevent a crime under Article 7(3), that person *could not* be held liable for aiding and abetting a crime under Article 7(1) because of the failure to prevent a crime if his legal duty derives from the fact that he is a commander or superior.¹⁶¹
59. When assessing the behaviour of the accused and the act he has allegedly committed, one cannot neglect the basic rule of the criminal procedure, namely that the accused is primarily assessed *by the reason of his intent*. The Prosecution must prove beyond a reasonable doubt that the accused had the intent to commit the crime, namely that, at the time the offence was committed, the accused was aware of the act and made a conscious decision to participate in it. In addition, the Prosecutor's failure to select and elect which alternative theory of responsibility it is relying upon is, needless to say, an indication of its apparent admission that it does not have confidence in its own evidence. As already mentioned, "the Prosecution is expected to know its case before it goes to trial".¹⁶²
60. The joining of two or more separate and distinct offences into a single count of an indictment constitutes duplicity. Duplicity is universally condemned in jurisprudence – not for its technical requirements – but for destroying one of the most basic and fundamental rights of

¹⁶⁰ See *IT-97-25-T, Prosecutor v. Milorad Krnojelac*, Judgement of 15th March 2002, para. 173

¹⁶¹ *IT-95-14-T, Prosecutor v. Tihomir Blaškić*, Judgement of 3rd March 2000, para. 337

¹⁶² *IT-95-16-A, Prosecutor v. Zoran Kupreškić et al.*, Appeal Judgement of 23rd October 2001, para. 92

an accused. First, it seriously compromises the right of an accused to know the precise charge against him, and prevents him from understanding what burden must be met in preparing any defences to the charge. Prejudice results from the uncertainty of the accused regarding the charges against him. Second, duplicity destroys the protection of the accused against double jeopardy by removing a clear definition of any conviction. (It in essence, creates a risk that the Accused may be punished for more than one offence to be charged and proven.) Third, duplicity prejudices an accused by multiplying or aggravating the charges and by making the accused appear worse than warranted by the evidence offered against him. Fourth, duplicity departs from the statutory scheme and purpose of legislative or other authority in proscribing specific conduct and setting appropriate sanctions for violations of those standards.¹⁶³

61. Because of the foregoing, duplicity has been permitted only in limited and temporary situations where the prosecution has found such charges to be necessary to meet "exigencies of proof". If such a situation exists with regard to particular charges, then the prosecution bears a heavy burden of proving it, and is permitted to retain the duplicitous charges only until its evidence (proof) establishes whatever case it may have against the accused.
62. The repeated charging of a single offence (one based on a single set of operative or integrated facts) in two or more counts of an indictment constitutes multiplicity. Multiplicity creates a possibility that the accused will receive more than one sentence for a single crime, in violation of his basic right against double jeopardy. Like duplicity, it creates other resulting prejudices to an accused and to the criminal justice system, such as: multiplication of charges; confusion or lack of definition of charges; wasted and misspent efforts by the accused and his legal/investigative representatives to investigate and meet charges, which are not properly defined and stated separately; distortion of the statutory or other scheme of offences and range of appropriate sanctions; and obstacles to the court in evaluating evidence, determining punishments, and in the administration of justice in the particular case.

Individual criminal responsibility under Article 7(1) of the Statute

63. Article 7(1) of the Statute provides that:

¹⁶³ See supra. 52.

[a] person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 of the present Statute, shall be individually responsible for the crime.

64. Article 7(1), assigns the individual criminal responsibility to those who occupy various positions in relation to crimes within the meaning of Articles 2-5 of the Statute. Under Article 7(1) culpable parties consist of perpetrators ("principals or co-principals" – "direct" responsibility) and those who, while they did not commit a crime, planned, instigated, ordered or otherwise aided and abetted in the planning, preparation or execution of the crime – accomplices ("indirect responsibility").
65. A perpetrator is one whose acts fall within the legal definition of the crime and who has control over its commission. In other words, a person has caused the consequence if, but for his act or omission, that consequence would not have occurred.¹⁶⁴ The requisite *mens rea* for direct responsibility under 7(1) is to be satisfied if the accused meant (i) to engage in the conduct that gives rise to alleged criminal responsibility and (ii) to cause the consequence that give rise to such responsibility, or was aware that this consequence was practically certain to follow from the conduct in the ordinary course of events.¹⁶⁵
66. Accomplice culpability implies a decision to support the commission of the principal's crime. Such crime most likely would not have occurred in the same way without someone acting as accomplice did. The requisite *mens rea*: intention to assist another; awareness that principal intent to commit a particular crime; knowledge that his assistance would contribute to the commission of such crime in significant way; decision to assist the principal in commission of such crime. The liability of the accomplice derives from that of the principal. But, accomplices are liable only *to the limits of their own intent*, regardless of the guilt of the principal. If the intent of the perpetrator and accomplice do not correspond, the accomplice cannot be held liable for what was not covered by his intent.¹⁶⁶
67. One cannot draw conclusions on a person's the participation in the commission of a crime merely from the presence of that person at the scene of the crime, nor can it be presumed

¹⁶⁴ In the case of the ICTY Statute, as well as in the case of the ICTR statute, a perpetrator incurs individual criminal responsibility in an offence other than genocide only if the offence is completed. (ICTR-96-4-T, *Prosecutor v. Jean-Paul Akayesu*, Judgement of 2nd September 1998, paras. 473-475.)

¹⁶⁵ See *Statute of the International Criminal Court (ICC)*, Article 30(2)

from a person's quality. The *Naletilić* Judgement says: "An individual's position of superior authority does not suffice to conclude from his mere presence on the scene of the crime, that he encouraged or supported the crime. However the presence of a superior can be perceived as an important indicium for encouragement or support".¹⁶⁷ And further on: "Concerning the *mens rea* it is required that the aider and abettor must have known, in the sense of being aware, that he was assisting in the commission of the crime. It has to be shown that he was aware of the essential elements of the crime, which also means the necessary *mens rea* on the part of the principal."¹⁶⁸

68. In the ICTR in the case of *Akayesu*, the standpoint has been taken that it is necessary to recall that criminal intent is the moral element required for any crime and that, where the objective is to ascertain the individual criminal responsibility of a person accused of crimes falling within the jurisdiction of the Chamber, such as genocide, crimes against humanity and violations of Article 3 Common to the Geneva Conventions and of Additional Protocol II thereto, it is certainly proper to ensure that there has been malicious intent, or, at least, ensure that negligence was so serious as to be tantamount to acquiescence or even malicious intent.¹⁶⁹ To claim that, in addition to direct involvement, namely the physical participation in the act, assistance by words or acts of encouragement or support, when this significantly affects the commission of the crime, or the mere presence at the scene of the crime is considered participation, has no substantial support. To this effect, the Defence juxtaposes the ruling of the Trial Chamber in the *Tadić* Judgement. According to the Judgement in the *Tadić* case, aiding and participation "in a different way" includes all acts of assistance by words or acts of encouragement or support, as long as the intent is present.¹⁷⁰ The mere presence at the scene of the crime is not sufficient to convict someone if it is an ignorant or unwilling presence. However, if the presence can be shown or inferred, by circumstantial or other evidence, to be knowing and to have a *direct* and *substantial* effect on the commission of the illegal act, then this is sufficient evidence on which to base a finding of participation and assign the criminal culpability that accompanies it.

¹⁶⁶ S. Frank, *Teorija kaznenog prava* (Theory of Criminal Law), 1955, p. 182

¹⁶⁷ *IT-98-34-T, Prosecutor v. Mladen Naletilić et al.*, para. 63; *IT-95-14/1-T, Prosecutor v. Zlatko Aleksovski*, Judgement of 25th June 1999, para. 65; *IT-95-14-T, Prosecutor v. Tihomir Blaškić*, Judgement of 3rd March 2000, para. 284

¹⁶⁸ *IT-98-34-T, Prosecutor v. Mladen Naletilić et al.*, para. 63

¹⁶⁹ *ICTR-96-4-T, Prosecutor v. Jean-Paul Akayesu*, Judgement of 2nd September 1998

69. According to paragraph 692 of the same Judgement, the accused will be found criminally culpable for any conduct where it is determined that he knowingly participated in the commission of an offence that violates international humanitarian law and his participation *directly* and *substantially* affected the commission of that offence through supporting the actual commission before, during, or after the incident. The accused will also be responsible for all that naturally results from the commission of the act in question. But, the Accused cannot be held criminally responsible for persuading or encouraging an individual (aiding and abetting) who has already decided, of his own will, to commit a crime.¹⁷¹
70. It has been noted in the legal theory that Art. 7 (1) of the Statute “does not classify different form of contribution to crime in terms of their severity: it subjects them all to the same general framework of punishment and places them in the same stigmatising category. (...) Much larger group of national legal systems requires that perpetration be sharply differentiated from complicity, and that the forms of complicity so identified be ranked in terms of their seriousness. Under the widely influential German law, for example, “aiding” (rendering assistance to) a perpetrator is regarded as deserving a categorically milder punishment than “instigating” (or soliciting) the commission of crime. This particular scheme was also traditional in the law of former Yugoslavia and is currently followed by all of its successor states”.¹⁷² The need has already been expressed that such legal solution from the former Yugoslavia and the states established in that area should be borne in mind while deciding on an accused’s responsibility; and this is referred to not only by the Statute and the Rules, but also but the principle of legality (*nullum crimen nulla poena sine lege praevia*), as one of the fundamental principles of the civilised criminal law.
71. But, for the sake of legal argument and clarity, it is necessary to exactly define various types of participation in an offence: perpetrator, co-perpetrator, aider and/or abettor.

“Committing”

means physically and personally perpetrating a crime or engendering a culpable omission in violation of a rule of criminal law. There can be several perpetrators regarding the same crime as long as each of them fulfils the requisite elements of the crime. The person who “commits”

¹⁷⁰ IT-94-I-T, *Prosecutor v. Duško Tadić*, Judgement of 7th May 1997, para. 689

¹⁷¹ IT-94-I-T, *Prosecutor v. Duško Tadić*, Judgement of 7th May 1997, para. 692

¹⁷² Mirjan Damaška, *The Shadow Side of Command Responsibility*, *The American Journal of Comparative Law*, Vol. XLIX, No. 3/2001, p. 459 (footnotes omitted). M. Damaška is Sterling Professor of Law, Yale University, USA.

a crime shall be directly liable as a "principal or co-principal perpetrator." The concepts "planning", "ordering", "instigating" and "aiding and abetting" are not identical to "committing", and do not result in the same form of responsibility.¹⁷³ The Defence submits that to establish that a person is criminally responsible as a principal or co-principal perpetrator, the Prosecutor must prove, beyond any reasonable doubt, the following: a) *actus reus* (i) that the person has (individually or jointly with others) committed an act that constitutes a crime under ICTY Statute Articles 2 through 5; (ii) that the person has caused (individually or jointly with others) the consequences, if any, specified by customary international law (applicable at the time of the act in question) for the particular crime incorporated under ICTY Statute Articles 2 through 5; and (iii) that the person did so in the circumstances, if any, specified by customary international law (applicable at the time of the act in question) for the particular crime incorporated under ICTY Statute Articles 2 through 5.; b) *mens rea* (i) that the person committed an act constituting a crime under ICTY Statute Articles 2 through 5 with the mental element required for the particular crime by customary international law (applicable at the time of the act in question); and (ii) unless otherwise provided by customary international law (applicable at the time of the act in question), the person is liable only if the *actus reus* of a specific crime is committed with the intent.

"Planning"^{cc}

as an offence, can only be interpreted as a form of complicity - aiding and abetting. This is implied also by the wording of Article 7(1). The language of Article 7(1) suggests that "planning" is simply a form of complicity and, more specifically, of "aiding and abetting": "A person who planned (...) or *otherwise aided and abetted* in the planning, preparation or execution of the crime (...) shall be individually responsible for the crime". A person responsible for "planning" is indirectly responsible. The Trial Chamber's decision in the Kordić case went in the same direction: An accused held responsible for having committed a crime will not be found responsible for planning such crime.¹⁷⁴ Thus, to assign the criminal liability to the Accused for planning the crimes described in the Amended Indictment, the Prosecutor must prove the same elements as in the case of aiding and abetting.

¹⁷³ The *Akayesu* Trial Chamber has concurred, "on the bases of national and international law and jurisprudence" saying that "it is not justifiable to convict an accused of two offenses in relation to the same set of facts where . . . (b) one offense charges accomplice liability and the other offense charges liability as a principal." (*Akayesu Judgment*, at part. 6.1., at 87.)

"Instigating"

has been defined as "prompting another to commit an offence"¹⁷⁵ either through an act or an omission and is a form of complicity. The instigator is an accessory; it is only the party that carries out the solicited crime, that is, the perpetrator. If the perpetrator never goes so far to commit the instigated act, the instigator is not liable. The accused acted with the requisite *actus reus* if an alleged instigated crime was committed and if the accused: (i) committed an act intended to directly provoke a particular perpetrator or identifiable group to which perpetrator belongs to commit a specific crime; (ii) there is a causal link between the act of instigation and specific offence. The requisite *mens rea* is that the accused directly intended to provoke or induce the commission of a particular perpetrator or identifiable group to commit a specific crime desired by the accused himself. If the intent of the perpetrator and accomplice do not correspond, the instigator cannot be held liable for what was not covered by his own intent. The instigator is liable only to the limits of his own intent, regardless of the guilt of the principal. Thus, the instigator should not be liable for excesses on the part of the principle (*excessus auctoris*). This is a rule accepted by most legal systems.

"Ordering"

is very similar to the instigation, but implies a superior-subordinate relationship between the person giving the order and the one executing it. It must be established that the accused possessed the authority to order. The order has to be explicit, to a particular subordinate person to commit a specific crime; there must be a causal link between the order and a specific committed offence. The superior acted with the requisite *actus reus* in that: (i) he ordered a particular subordinate person to commit a specific crime, and (ii) there is a causal link between the order and a specific offence — the criterion is the "but for" standard of causation. The superior acted with the requisite *mens rea* if: (i) he was aware of the content of his order, (ii) he intended to issue the order, (iii) he was aware of the constitutive elements of the crime ordered, (iv) he desired a crime to be committed by his subordinate — one issuing the order must possess the very same intent as that required for the guilty subordinate in order for the superior to be held liable for ordering a crime.

¹⁷⁴ IT-95-14/2-T, *Prosecutor v. Dario Kordic et al.*, Judgement of 26th February 2001, para. 386

¹⁷⁵ IT-95-14/2-T, *Prosecutor v. Dario Kordic et al.*, Judgement of 26th February 2001, para. 387. According to *Black's Law Dictionary*, "to instigate" means "to stimulate or goad into an action", and "instigation" also means "solicitation". (*Black's Law Dictionary*, 6th ed., West Publishing, 1990, p. 799

“Aiding and abetting”

means the practical assistance, encouragement, or moral support which has a *substantial* effect on the perpetration of the crime.¹⁷⁶ The Appeals Chamber in the *Aleksovski* case also judged: “It must be shown that the aider and abettor carried out acts which consisted of practical assistance, encouragement or moral support which has a *substantial* effect upon the commission by the principal of the crime for which the aider and abettor is sought to be made responsible. It must be shown that the aider and abettor knew (in the sense of was aware) that his own acts assisted in the commission of that crime by the principal”.¹⁷⁷ The aiding and abetting is distinguishable from acting pursuant to a common purpose or design to commit a crime.¹⁷⁸

Criminal responsibility as a superior under Article 7(3)

72. A too wide interpretation of the criminal responsibility as a superior under Article 7(3), i.e. of the command (“imputed command”) responsibility is one of the most common criticism of the Statute and the Tribunal’s jurisprudence.¹⁷⁹ The Additional Protocol I to the 1949 Geneva Conventions introduces responsibility of the commander, but “its provisions only stipulated that superiors who fail to prevent or repress the crimes of their subordinates shall not be absolved from responsibility for these crimes. The more specific determination of this responsibility – penal or disciplinary, primary or vicarious – was left to the domestic law of the ratifying states”.¹⁸⁰ The Additional Protocol II to the 1949 Geneva Conventions says nothing about that.¹⁸¹ Additional confusion is created by the differences, which exist, in terms of responsibility of the superior, between the Statute of the ICC and Statute of the ICTY and ICTR. These difference imply that the concept of command responsibility, which abandons the standard of strict liability as one of the cornerstones of the criminal law, does not meet

¹⁷⁶ *IT-95-17/1-T, Prosecutor v. Anto Furundžija*, Judgement of 10th December 1998, para. 235. Emphasis added.

¹⁷⁷ *IT-95-14/1-A, Prosecutor v. Zlatko Aleksovski*, Appeal Judgement of 24th March 2000, paras. 163-164. See also: *IT-95-16-A, Prosecutor v. Zoran Kupreškić et al.*, Appeal Judgement of 23rd October 2001, para. 277

¹⁷⁸ See *IT-94-1-A Prosecutor v. Duško Tadić*, Appeal Judgement of 5th July 1997, para. 229

¹⁷⁹ See M. Damaška, o. c. (2001)

¹⁸⁰ M. Damaška, o. c., pp. 485-486. See also: *Protocol Additional to the Geneva Conventions of 12th August 1949, and Relating to the Protection of Victims of International Armed Conflicts*. Adopted on 8th June 1977, Art. 86(2).

general acceptance and approval. For that very reason, it should be approached with an increased caution.¹⁸²

73. The basis of the superior-subordinate relationship is the power of the superior to control the actions of his subordinates. Article 7(3) of the ICTY Statute is set to establish imputed criminal liability for superior/commanders for failure to prevent or to punish the commission of crimes defined in Articles 2 through 5 of the Statute, i.e. by omission. It is usually considered that three cumulative elements must be proved to find command responsibility. Firstly, there must be a superior-subordinate relationship. Secondly, the superior knew or had reason to know that the subordinate was about to commit a crime or had committed a crime. Finally, the superior failed to take necessary and reasonable measures to prevent the crime or to punish the perpetrator thereof.¹⁸³ Reasonably, even if these presumptions are fulfilled cumulatively, i.e. if they are one proven beyond the reasonable doubt, the superior can be held responsible only if he was empowered to take measures and if on his part there are no grounds for excluding criminal responsibility.
74. Thus, mere existence of a commanding authority is not sufficient to hold a superior responsible for such a criminal acts. Since the superior-subordinate relationship lies at the heart of the principle of command responsibility, this principle is "ultimately predicated upon the power of the superior to control the acts of his subordinates".¹⁸⁴ Pursuant to Article 7(3) of the Statute, a superior can be responsible for the crimes charged against him only if there is a proof that he failed to take measures to prevent or repress the unlawful conduct of subordinates and that he had *effective authority or control* over the actual perpetrators of the crime. It is submitted that the extent of control, knowledge and reasonable steps to be taken must depend on the facts of each case and may vary in situations that vary from the normal military paradigm. The Trial Chamber may look beyond *de iure* powers wielded by the

¹⁸¹ Protocol Additional to the Geneva Conventions of 12th August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts. Adopted on 8th June 1977

¹⁸² See Commentary on the Additional Protocols of 8th June 1977 to the Geneva Conventions of 12th August 1949, Geneva, 1987, pp. 1011-1016 ff.

¹⁸³ Commentary on the Additional Protocols of 8th June 1977 to the Geneva Conventions of 12th August 1949, pp. 1012-1013; See also: IT-96-11-T, *Prosecutor v. Zejnir Delalić et al.*, Judgement of 16th November 1998, para. 346; IT-95-14/1-A, *Prosecutor v. Zlatko Aleksovski*, Appeal Judgement of 24th March 2000, paras. 69, 72.; IT-98-34-T, *Prosecutor v. Mladen Naletilić et al.*, para. 65

¹⁸⁴ IT-96-11-T, *Prosecutor v. Zejnir Delalić et al.*, Judgement of 16th November 1998, para. 377.; IT-98-34-T, *Prosecutor v. Mladen Naletilić et al.*, para. 66

accused and consider *de facto* power or influence he actually exercises.¹⁸⁵ This is a *questio facti* to be decided on a case-by-case basis.¹⁸⁶ The ICTY in *Čelebići* and the ICTR in *Kayishema and Ruzindina* use the test of effective control in their consideration of the command responsibility of the accused, although the relevant provision of the ICTY Statute and ICTR Statute is silent as to the test to be used.¹⁸⁷

75. The superior responsibility level must be proportionate to the unit's organisation level, because it would be inappropriate to expect the same organisation level (and thus the effective control level) from both the trained and developed army, and the group, which is spontaneously organised for the purpose of defence against aggression.¹⁸⁸ In the *Čelebići* case, the Appeal Chamber observed in relation to the mental element that it should be assessed "in the specific circumstances of each case, taking into account the specific situation of the superior concerned at the time in question".¹⁸⁹
76. "Knew or Had Reason to Know".¹⁹⁰ Superior responsibility under Article 7(3) of the Statute does not impose strict liability for superiors. It requires that the superior "knew or had reason to know that the subordinate was about to commit [crimes] or had done so". In the *Čelebići* case the Trial Chamber concluded that actual knowledge can be proven either through direct evidence or through circumstantial evidence, but cannot be presumed.¹⁹¹
77. The superior's actual knowledge can be established by direct or circumstantial evidence but the superior's actual knowledge can not be presumed.¹⁹² In the *Aleksovski* case Trial Chamber stated that an individual's command position *per se* is at least an important indicium that he knew about the crimes committed by his subordinates.¹⁹³ The fact that a military commander will most probably be part of an organised structure with reporting and monitoring systems

¹⁸⁵ *IT-96-11-T, Prosecutor v. Zejnil Delalić et al.*, Judgement of 16th November 1998, para. 370-371, *IT-95-14-T, Prosecutor v. Tihomir Blaškić*, Judgement of 3rd March 2000, paras. 300-301

¹⁸⁶ *ICTR-96-4-T, Prosecutor v. Jean-Paul Akayesu*, Judgement of 2nd September 1998, para. 483

¹⁸⁷ *IT-96-11-T, Prosecutor v. Zejnil Delalić et al.*, Judgement of 16th November 1998, para. 378

¹⁸⁸ Of course, that lower level of organisation must be the result of objective circumstances, and not of the gross negligence of the commander.

¹⁸⁹ See *IT-96-11-A, Prosecutor v. Zejnil Delalić et al.*, Appeal Judgement of 20th February 2001, para. 239

¹⁹⁰ There are differences between the English and the French versions of the text of the Art. 86 of the Additional Protocol I, which cannot be neglected (*Commentary on the Additional Protocols of 8th June 1977 to the Geneva Conventions of 12th August 1949*, pp. 1013-1014.)

¹⁹¹ *IT-96-11-T, Prosecutor v. Zejnil Delalić et al.*, Judgement of 16th November 1998, para. 386

¹⁹² *IT-96-11-T, Prosecutor v. Zejnil Delalić et al.*, Judgement of 16th November 1998, para. 386

¹⁹³ *IT-95-14/1-T, Prosecutor v. Zlatko Aleksovski*, Judgement of 25th June 1999, para. 80

can facilitate the showing of actual knowledge. For *de facto* commanders in more informal military structures and for civilian superiors the standard of proof is higher.¹⁹⁴

78. As stated by the Trial Chamber in the *Čelebići* case, concerning command responsibility: a superior can be held criminally responsible only if some specific information was in fact available to him which would provide notice of offences committed by his subordinates. This information need not be such that it by itself was sufficient to compel the conclusion of the existence of such crimes. It is sufficient that the superior was put on further inquiry by the information, or, in other words, that it indicated the need for additional investigation in order to ascertain whether offences were being committed or about to be committed by his subordinates.¹⁹⁵ Under Art. 86 of the Protocol I Additional to the 1949 Geneva Conventions, which is customary law, command responsibility cannot be imposed based solely on the theory that the commander should have done more to inform himself about what his troops were doing. Such responsibility can be imposed only if the commander possessed specific information that should have alerted him that his unit was committing crimes.
79. "Failure to prevent or punish" represents legally and especially factually a very extensible syntagm. In principle, we can say that the superior is obliged to punish persons who committed crimes, if they are subordinate to him, if he had effective control over them and if he knew or had reason to believe that they committed crimes. With respect to all other units, not under his command, he had no obligations at all. In order to declare the Accused guilty and to convict him, the Prosecutor must prove all these elements. She also must prove that the Accused was *de iure* empowered to take measures and that *de facto* he was in the position to take them.
80. In the well-known *Hostage case*, US Military Tribunal treated failure to punish as a necessary but not sufficient element of failure to prevent.¹⁹⁶ In the trial of Lieutenant General *Ernst Dehner*, the Nuremberg Tribunal faulted the accused for failing to prevent his subordinates' criminal acts, or in the alternative, failing to prevent the recurrence of such acts, without ever mentioning failure to punish.¹⁹⁷ In the *Tokyo trial*, failure to punish was also placed in the

¹⁹⁴ IT-98-34-T, *Prosecutor v. Mladen Naletilić et al.*, para. 73

¹⁹⁵ IT-96-11-T, *Prosecutor v. Zejnil Delalić et al.*, Judgement of 16th November 1998, para. 393

¹⁹⁶ United States War Crimes Commission, *Law Reports of Trials of War Crimes*, 1948, p. 1272

¹⁹⁷ *Trial of War Criminals Before the Nuremberg Military Control Council Law No. 10, 1949*, p. 1298

context of failure to prevent.¹⁹⁸ It is also emphasised that “in a rare case in which post-World War II military judges attempted to enumerate the elements of imputed responsibility in an abstract fashion, they listed failure to prevent and failure to punish as jointly required for conviction”.¹⁹⁹

81. A large majority of the war manuals acknowledge that commanders are responsible for failing to prevent or punish, but they leave the nature of this responsibility unspecified.²⁰⁰ In that sense, and especially with regard to the principle of legality (*nullum crimen sine lege*) which includes the prohibition of retroactive application of law, the provisions must be borne in mind of the Regulation Concerning the Application of International Law of War, issued by the Defence Ministry of former Yugoslavia in 1988: “It is true that article 21(1) of the Regulation provides that a commander is ‘personally’ responsible for failure to prevent and failure to punish. But article 32, dealing with responsibility for war crimes, obligates (ovlašćuje) state authorities to hold only those military persons criminally accountable who ‘ordered and perpetrated’ war crimes. Failure to prevent and to punish are conspicuously absent from this latter provision”.²⁰¹
82. Before an accused can be convicted of a crime, it is also necessary to prove beyond a reasonable doubt, that there is a causative relationship (proximate causa) between the act the perpetrator undertook and the consequences this act produced. Namely, that a certain consequence is the direct result of the perpetrator’s act(s)/or omission(s). The Defence is aware that the accused may also be responsible for omission, namely for an act of tacitness. In order for the omission to be *causa in fact*, positive answers to the following questions are necessary/needed: (a) was the accused compelled to act, (b) could the accused have acted without danger to himself, and (c) if so, could he have really prevented the consequences produced? Namely, the accused can only be found guilty of a crime and can be sentenced for a crime committed with appropriate intent, or a guilty mind. That means that the accused directs his actions toward a specific object, namely that his aim is to bring about a particular consequence. He is liable only if the *actus reus* of a specific crime is committed with the intent.

¹⁹⁸ *Official Transcript of the International Japanese War Crimes Trials in the International Military Tribunal for the Far East* 29th April 1946 – 12th November 1948, 1977, pp. 49, 845

¹⁹⁹ M. Damaška, o. c., p. 491

²⁰⁰ *Idem*, p. 492

General requirements of Article 3 and 5 of the Statute and of Common Article 3

83. The Appeal Chamber in *Tadić* case specified the conditions to be fulfilled for Article 3 of the Statute to become applicable. The following requirements must be met for an offence to be subject to prosecution before the International Tribunal under Article 3: (i) the violation must constitute an infringement of a rule of international humanitarian law; (ii) the rule must be customary in nature or, if it belongs to treaty law, the required conditions must be met; (iii) the violation must be "serious", that is to say, it must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim; (iv) the violation of the rule must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule.²⁰²
84. The Defence is aware that the Tribunal's jurisprudence considers, without exception, that the Common Article 3 of the Geneva Convention, as well as Protocol I and Protocol II, at the time referred to by the Amended Indictment, were beyond the reasonable doubt part of customary international law. But, out of precaution, the Defence recalls that in 1994 the International Law Commission issued a proposed statute of the International Criminal Court, which did not include Articles 51-52 of Additional Protocol I.²⁰³
85. For the purposes of Article 3 of the Statute, the crime must be committed against a person taking no active part in the hostilities.²⁰⁴ The determination of who is a non-combatant does not depend on formal distinctions,²⁰⁵ but rather on whether the victim actually took part in the

²⁰¹ *Idem*, p. 492, footnote 74

²⁰² *IT-94-I-A, Prosecutor v. Duško Tadić, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction*, of 2nd October 1995, para. 94

²⁰³ Here appears the question of the legal range of the agreement reached on 22nd May 1992 between the various factions of the conflict within the Republic of Bosnia and Herzegovina. The agreement was based on common Article 3 of the Geneva Conventions which, in addition to setting forth rules governing internal conflicts, provides in paragraph 3 that the parties to such conflicts may agree to bring into force provisions of the Geneva Conventions that are generally applicable only in international armed conflicts. In the Agreement, the representatives of Mr. Alija Izetbegović (President of the Party of Democratic Action), Mr. Radovan Karadžić (President of the Serbian Democratic Party), and Mr. Miljenko Brkić (President of the Croatian Democratic Union) committed the parties to abide by the substantive rules of internal armed conflict contained in common Article 3 and in addition agreed, on the strength of common Article 3, paragraph 3, to apply certain provisions of the Geneva Conventions concerning international conflicts. (Agreement of 22nd May 1992, Art. 2, paras. 1-6).

²⁰⁴ *IT-96-II-A, Prosecutor v. Zejnil Delalić et al., Appeal Judgement of 20th February 2001*, para. 463

²⁰⁵ Numerous witnesses in other Lašva Valley cases stated that the war circumstances made "practically all adult men become soldiers". The witnesses also stated that the lack of military uniforms had been a commonly spread problem.

applicable hostilities.²⁰⁶ Private individuals who spontaneously take up arms to resist an attacker directly take part in hostilities, and therefore are not covered by this definition of "non-combatant." As such, they are not protected by Article 3 of the Statute. To establish "non-combatant" status, which is part of her burden, the Prosecutor must prove that the alleged victim took no part in the relevant hostilities. This character cannot be presumed.²⁰⁷

86. An attack is directed against a civilian population only if it is the objective of the attack. If objective is to attack military target, the attack is not directed at a civilian population even if it results in civilian being attacked. According to Article 50 of the Additional Protocol I, "the presence within the civilian population of *individuals* who do not come within the definition of civilians does not deprive the population of its civilian character."²⁰⁸ This means that, *vice versa*, the presence of military units (during wartime!) inside an area can change the civilian character of a population. A military unit is by definition a military objective. The Accused cannot be responsible for the sufferings of the persons used by their friendly military forces as a living shield or deprived of their civilian character by the mere presence of those military forces.
87. In the Defences opinion, in establishing and qualifying of certain behaviour as a crime against humanity, the key question is whether the objective of the attack were civilians or non-civilians. If the attack was aimed at a military objective, civilians were not the objective of his attack, and despite their sufferings during the attack, the act does not have the character of the crime from Article 5 of the Statute. This is because at the time of the attack on a military objective, the attacker cannot know the proportion of civilians to enemy combatants on the battlefield.
88. The elements of Article 5 are: (i) existence of an armed conflict, (ii) commission by the accused of one of violation of Article 5 in an attack, (iii) nexus between the act or omission and the armed conflict, (iv) direction of the act against a civilian population in the sense that the objective of acts was to attack civilians, (v) commission of the act on discriminatory grounds, (vi) commission of the act in a widespread or systematic fashion, (vii) the

²⁰⁶ See *International Committee of the Red Cross, Commentary: IV Geneva Convention* 40 (Jean S. Pictet, ed. 1960)

²⁰⁷ The members of Civil Protection lose their protection when they commit or are used to commit, outside their proper tasks, acts harmful to the enemy. (*Additional Protocol I*, Art. 65.)

²⁰⁸ *Additional Protocol I*, Art. 50. Emphasis added.

perpetrator must know that his acts constitute part of a pattern of widespread or systematic crimes directed against a civilian population and know that his acts fit into a pattern.²⁰⁹

89. The Defence is also going to refer shortly to the elements of specific crimes. The fact that, for practical reasons, here follows a line from the Prosecutor's Pre-Trial Brief, does not that the Prosecutor's standpoint in view of the cumulative charging is accepted.

Elements of Specific Crimes

Persecutions on Political, Racial or Religious Grounds

90. The *Tadić* Trial Chamber admits: "Although often used, the term has never been clearly defined in international criminal law nor is persecution known as such in the world's major criminal justice systems".²¹⁰ This leaves space for the risk that the Accused is charged with persecution even when it is not possible to describe it by means of material facts. In other words, as expressed by the Appeals Chamber in *Kupreškić* case, "the fact that the offence of persecution is a so-called "umbrella" crime does not mean that an indictment need not specifically plead the material aspects of the Prosecution case with the same detail as other crimes. Persecution cannot, because of its nebulous character, be used as a catch-all charge. Pursuant to elementary principles of criminal pleading, it is not sufficient for an indictment to charge a crime in generic terms. An indictment must delve into particulars".²¹¹ The illegal conduct of the Accused must be precisely described.²¹² The essential elements of the crime of persecution (in addition to those general to crimes against humanity) are: (i) occurrence of the persecutory act; (ii) the persecutory act is committed in the execution of, or in connection with, a crime within the jurisdiction of the Tribunal; (iii) the persecutory act is undertaken on discriminatory grounds (political, racial, or religious) that are universally recognised as impermissible under international law; (iv) the persecutory act is directed against a specific group or collectivity; (v) the persecutory act is committed with specific intent to severely deprive the victim of fundamental rights by reason of the identity of the group or collectivity;

²⁰⁹ IT-96-23-A, *Prosecutor v. Dragoljub Kunarac et al.*, Appeal Judgement of 12th June 2002, para. 85

²¹⁰ IT-94-I-T, *Prosecutor v. Duško Tadić*, Judgement of 7th May 1997, para. 694

²¹¹ IT-95-16-A, *Prosecutor v. Zoran Kupreškić et al.*, Appeal Judgement of 23rd October 2001, para. 98

²¹² IT-95-16-A, *Prosecutor v. Zoran Kupreškić et al.*, Appeal Judgement of 23rd October 2001, para. 243

and (vi) the persecutory act actually results in severe deprivation of fundamental rights contrary to international law. When there are positive findings in relation to both persecution and another crime against humanity, the conviction that is upheld is that of persecution.²¹³

Unlawful Attack on Civilians.

91. The Defence submits that the elements of unlawful attacks on civilians or civilian objects are:
- (i) a wilful and deliberate attack is launched against civilians or protected civilian objects,
 - (ii) the attack is indiscriminate (i.e., not directed at a specific military objective) and in violation of international humanitarian law, (iii) the attack causes civilians death, serious injury to civilians or combination thereof, (iv) the accused intended (*dolus directus*) to launch the attack against civilians, (v) the accused launched the attack with the knowledge that such attack will cause excessive loss of life or injury to civilians or damage to civilian objects.²¹⁴
- Each of these elements must be proven by the Prosecutor beyond the reasonable doubt.

Murder.

92. This incrimination (Counts 3, 4, 7, 8) the Prosecutor places under common Articles 3(1)(a), Statute Article 3 and Statute Article 5(a).²¹⁵ U *Kupreškić* case the Trial Chamber concluded: "The prohibition of murder as a crime against the humanity is *lex specialis* in relation to the prohibition of murder as a war crime. (...) The Trial Chamber may convict the accused of violating the prohibition of a murder as a crime against the humanity only if it finds that the requirements of murder under both Article 3 and Article 5 is proven."²¹⁶ "The Prosecution is expected to know its case before it goes to trial",²¹⁷ and the Defence recalls that the impermissibility of cumulative charging and the fact that it is burdening for the defence are dealt with in another part of this Brief. The *actus reus* of murder is the taking of the lives of persons taking no active part in hostilities in an internal armed conflict. The requisite *mens*

²¹³ IT-98-34-T, *Prosecutor v. Mladen Naletilić et al.*, para. 724

²¹⁴ See *Additional Protocol I*, Art. 13(2), 51(4), 85(3)

²¹⁵ *Prosecutor's Pre-Trial Brief*, para. 98

²¹⁶ IT-95-16-T, *Prosecutor v. Zoran Kupreškić et al.*, Judgement of 14th January 2000, para. 701-704

²¹⁷ IT-95-16-A, *Prosecutor v. Zoran Kupreškić et al.*, Appeal Judgement of 23rd October 2001, para. 92

rea is the intention to kill or inflict the serious injury, in reckless disregard of human life. Recklessness means the taking of an excessive risk.²¹⁸

Violence to Life and Person

93. In relation to *Violence to Life and Person*, the Prosecutor in its Pre-Trial Brief specified that the type of the violence to life and person to which counts 5 and 9 of the Amended Indictment refer is "cruel treatment" of the civilians "during and after the attack on the villages of Ahmići, Nadioci, Pirići and Šantić on 16th April 1993 and during and after the attack on Oče[h]nići on 19th April 1993".²¹⁹ There is no satisfying definition of cruel treatment. The Defence considers that between cruel treatment and inhumane acts there is complete equality. The elements proposed by the Prosecutor in her Pre-Trial Brief are not sufficient to make a difference between cruel treatment and inhumane acts.

Inhumane Acts (Counts 6,10, 15) and Cruel Treatment (count 14).

94. The statements from the Prosecutor's Pre-Trial Brief show that it is unacceptable to charge the Accused with cruel treatment (counts 5 and 9), inhumane acts (Counts 6,10, 15) and cruel treatment (count 14) separately. The only purpose of such charging can be burdening of defence, while it has nothing to do with the effective establishing of the Accused's criminal liability.

Devastation Not Justified by Military Necessity (Count 11).

95. The Defence submits that the Prosecutor must prove: (i) the destruction or devastation occurred on a large scale, involving whole areas, (ii) the accused wantonly committed an act that caused the destruction or devastation, (iii) the accused intended thereby to cause the destruction or devastation, (iv) the destruction or devastation is not justified by military

²¹⁸ *IT-96-11-T, Prosecutor v. Zejnil Delalić et al.*, Judgement of 16th November 1998, para. 431; *IT-95-10-T, Prosecutor v. Goran Jelisić*, Judgement of 14th December 1999, para. 35

²¹⁹ *Prosecutor's Pre-Trial Brief*, para. 106

necessity, (v) there is a nexus between the destruction or devastation and an armed conflict in which the accused participated. In the professional literature, the “military objective” element is defined very broadly. A military objective is “any object which, by its nature or location, purpose, or use makes a contribution to a nation’s war effort and whose total or partial destruction, capture, or neutralisation would offer a military advantage to the attacker...”²²⁰ Moreover, “lawful targets are not limited to military facilities and equipment but may include economic targets, geographic targets, transportation, power, communications systems, and political targets”.²²¹ However, a deliberate attack directed exclusively at civilians cannot satisfy the military objective element of the military necessity defence.²²² But, as already said, the Prosecutor bears also the burden of proof on the military necessity issue.

***Destruction or Wilful Damage to Institutions Dedicated to Religion
or Education (Count 12).***

96. According to the Defence understanding, the elements of this offence are: (i) institutions dedicated to religion or education were destroyed or wilfully damaged, (ii) the institutions in question or their surroundings were not used for a military purpose, (iii) the institutions in question were protected under international humanitarian law, (iv) the accused caused the destruction or damage, (v) the accused intended (*dolus directus*) to commit the action that caused the destruction or damage, (vi) the accused intended thereby to cause the destruction or damage of specified religious which constitute the cultural or spiritual heritage of peoples. The destruction or wilful damage to religious institutions does not constitute a violation of Article 3 if the institution in question was used by the defenders for a military purpose. In the context of internal conflicts, the special protections in the Conventions for the Protection of Cultural Property in the Event of Armed Conflict (“Cultural Property Convention”) only apply if such cultural property is not used for military purposes or placed near the vicinity of military objectives.²²³

²²⁰ W. Hays Parks, *Rolling Thunder and the Law of War*, 22 AIR. U. REV. 2, 16 (1982)

²²¹ *Idem*.

²²² Frits Kalshoven, *The Law of Warfare* 62 (1973)

²²³ See Cultural Property Convention, Art. 8 (1954)

Plunder of Public or Private Property (Count 13).

97. The Prosecutor must prove (i) that the accused unlawfully appropriated private or public property, (ii) that the accused did so against the will and consent of the owner, (iii) that the appropriation was of sufficient monetary value to involve grave consequences for the victims, (iv) that the accused appropriated the property with the intent unlawfully to deprive the owner its use and benefit, (v) that the accused intended to appropriate the property permanently, (vi) that the appropriation was not justified, and (vii) that there was a nexus between the appropriation and an armed conflict in which the accused participated.

Detention Crimes.

98. In order to prove the claims that the Accused is responsible for actual or alleged detention crimes,²²⁴ the Prosecutor must prove (i) that civilians were put in detention, (ii) that the detention was unlawful, (iii) that the accused committed an unlawful act that caused the detention, (iv) that the accused intended to commit the act that directly caused the unlawful detention, and (v) that the accused intended that the victims be unlawfully detained. Here, one must be aware that displacement of the civil population can be ordered if the security of civilians or imperative military reasons so demand.²²⁵ On the other hand, as regards the detention of captured soldiers, it must be stressed that the detention cannot be considered as unlawful confinement of civilians or as an underlying act of persecution.²²⁶

Cumulative Charging

99. The Accused is charged for multiple violations of Articles 3 and 5 for the same alleged conduct, which is fundamentally unfair. The Prosecutor considers such manner of charging to be permissible.²²⁷ The Prosecutor accuses the Accused of violating Articles 3 and 5 of the Statute for the same (single) conduct without specifying the acts and this is quite contrary to the principles generally accepted in criminal jurisprudence. Already in the Preliminary

²²⁴ *Prosecutor's Pre-Trial Brief*, paras. 35-39

²²⁵ Additional Protocol II, Art. 17(1)

²²⁶ *IT-98-34-T, Prosecutor v. Mladen Naletilić et al.*, para. 643

²²⁷ The Defence is aware that such charging is generally accepted at the Tribunal. (See *IT-96-23-A, Prosecutor v. Dragoljub Kunarac et al.*, Appeal Judgement of 12th June 2002, para. 167.)

Motion on the Form of the Indictment the Defence presented in short its different opinion.²²⁸ In that part, the Trial Chamber dismissed the Motion,²²⁹ but the Defence insists on its standpoints on this matter, pa its Motion incorporates by reference here.

100. The Statute of the Tribunal says nothing on whether the charging must be alternative or it may be cumulative (cumulation of offences, *concursum delictorum*). The Amended Indictment charges the accused with multiple charging for a single transaction, where the notion of a single transaction means the commission of a single wilful act. Legal standards in Croatia and Bosnia and Herzegovina, the states where the accused resided and worked, and in the state where the events described in the Amended Indictment occurred, in principle do not allow multiple charging for a single unlawful act.²³⁰ An exception is so called ideal concurrence (*idealni stjecaj*, *Idealkonkurrenz*, *le concours idéal*), when a perpetrator commits a crime, thus violating two protected values or breaching two norms at the same time.²³¹ With the ideal concurrence, there are two forms of guilt (*dolus*) of the perpetrator, so that a court has to establish every single crime, and for each such crime, mete out a separate punishment and subsequently pronounce a unique punishment.

101. Multiple charging could be permissible in case of: (a) *merger of acts – ideal concurrence* – when more than one criminal provision is violated by a criminal act which is based on an act of will. Every provision has a different protective object and they do not overlap. Every act is encompassed by the intent of an accused, (b) *plurality of acts* – when several criminal acts were committed of which each can be subsumed under a criminal act and there is no relation of speciality, subsidiarity or consumption. According to the Defence's opinion, the Prosecution, without adequate support of the facts which are crucial for making a decision, is charging the Accused for violations of Articles 3 and 5 based on the same acts and omissions

²²⁸ *Preliminary Motion on the Form of the Indictment*, of 16th January 2002, paras. 23-25

²²⁹ *Decision on the Defence Motion on the Form of the Indictment*, p. 3

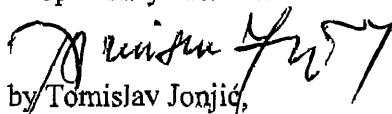
²³⁰ The Defence holds that the Trial Chamber, bound by the Statute to apply *legis lata*, in absence of binding regulations and developed practice, should analogously apply the regulations, which were or are in force in the state of origin of the accused or in the state, where the crimes were committed. Such understanding is supported by Article 24 (1) of the Statute saying that the Trial Chamber shall, in meting the punishment, take into consideration the judicial practice in the territory of the former Yugoslavia, in accordance with the principle of legality. (See Bassiouni, *Crimes Against Humanity in International Criminal Law*, 1992, 337)

²³¹ Apart from ideal concurrence, there is so-called real concurrence, where the accused, by a number of actions, commits a number of criminal acts, for which he is tried simultaneously. Real concurrence, in fact, represents two or more (same or different) criminal acts, for which a person is tried simultaneously and unique punishment is determined. (See Franjo Bačić, *Kazneno pravo: opći dio* (Criminal Law: General Part), 5th revised and extended

(by the same act) where the conditions for the "merger of acts" have not been fulfilled. Article 3 is a fundamental provision laying down that any "serious violation of international humanitarian law" must be prosecuted by the International Tribunal. In other words Art. 3 functions as a residual clause designed to ensure that no serious violation of international humanitarian law is taken away from the jurisdiction of the International Tribunal.²³² Because Article 3 confers residual jurisdiction only, no charges can be laid under Article 3 that can be laid under Article 5. For example, murder cannot be charged under Article 3, but must be charged under Article 5(a) or 5(h). *Tadić* Appeal Judgement at 41, para. 87 finds: "In light of the above remarks, it can be held that Article 3 is a general clause covering all violations of humanitarian law not falling under Article 2 or covered by Article 4 or 5".²³³

102. Situation is essentially different with the so-called apparent concurrence (*prividni stjecaj*, *le concours imparfait*, *Scheinkonkurrenz – unechte Konkurrenz – Gesetzeskonkurrenz*). In this case, an accused has, having had committed one or more acts, realised a number of constituent elements of the criminal acts, which are in such a relation that the application of one of them necessarily excludes all the others. This means that one or more criminal acts may be subsumed under a number of legal definitions, but due to the competitiveness of legal provisions, only the one, which excludes the application of others, may be applied.²³⁴ Basic forms of imperfect concurrence are speciality (*lex specialis derogat legi generali*), subsidiarity (*lex primaria derogat legi secundariae*) and consumption (*lex consumens derogat legi consumptae*).

Respectfully submitted



by Tomislav Jonjic,

Defence Counsel for Paško Ljubičić

edition, Zagreb, 1998, pp. 352-354) In other words, real concurrence has importance only in the sense of judicial procedure, and a discussion about it is, in this context, irrelevant.

²³² See *IT-94-1-A, Prosecutor v. Duško Tadić*, Appeals Chamber Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, of 2nd October 1995, para. 91

²³³ *IT-94-1-A Prosecutor v. Duško Tadić*, Appeals Chamber Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, of 2nd October 1995, para 87

²³⁴ F. Bačić, o. c., 346-349