THE INTERNATIONAL CRIMINAL TRIBUNAL
FOR THE FORMER YUGOSLAVIA

Case No. **IT-06-90-PT**
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BEFORE THE TRIAL CHAMBER
Judge Alphonse Orie, Presiding
Judge Christine Van den Wyngaert
Judge Bakone Justice Moloto

Registrar: Mr. Hans Holthius

Date filed: 5 April 2007.

THE PROSECUTOR
v.
ANTE GOTOVINA, IVAN ČERMAK & MLADEN MARKAČ

MLADEN MARKAČ'S PRE-TRIAL BRIEF PURSUANT TO RULE 65 ter (F)

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1. Introduction

1. Pursuant to Trial Chamber's 17 January 2007 Scheduling Order, the Defence for Mr. Mladen Markač ("Markač") is obliged to file its Pre-Trial Brief by 5 April 2007. Accordingly, Markač (the Accused), by and through his Counsel, files this brief in keeping with his rights afforded to him under the ICTY Statute (Statute) and Rules of Procedure and Evidence (RPE) and within the time-limit established by the said Scheduling Order.

2. In accordance with Rule 65ter(F) of the RPE this brief consists of argument regarding the nature of the Accused's defence, in general terms, as well as discussion regarding argument provided by the Prosecutor's Pre-Trial Brief.

3. The Accused plead not guilty to all charges in the Indictment and denies all allegations levied against him in the Prosecutor's Pre-Trial Brief. The Prosecutor has charged the Accused with all possible forms of liability authorized by the Statute and her Pre-Trial Brief, other than the annexes attached, sheds no new light on this case. The brief itself essentially parrots the Reduced Joinder Indictment from 6 March 2007.

4. The Accused is charged together with other co-Accused with:

- 5 counts of Crimes Against Humanity; and
- 4 counts of Violations of the Laws or Customs of War

The Accused is also charged together with other co-Accused for having participated in a joint criminal enterprise ("JCE") from at least July 1995 to about 30 September 1995. The Prosecution alleges in its Pre-Trial Brief two alternative legal characterisations of the JCE. The first one is the "vertical" JCE limited to the three Accused and the following high ranking officials:

- Franjo Tuđman, the former President of the Republic of Croatia,
- Gojko Šušak, the former Minister of Defence of the Republic of Croatia,
- Janko Bobetko, the former Chief of the Main Staff of the Croatian Army ("HV") until retired on 17 July 1995; and
- Zvonimir Červenko, the former Chief of the Main Staff of the HV from his appointment on 17 July 1995

The second legal form of the JCE is alternative ("horizontal"), broader characterization which includes the core participants as well as the physical perpetrators and others who facilitated the crimes or who otherwise acted in furtherance of the JCE.

5. The Accused and other co-Accused are also charged for planning, instigation, ordering and/or committing the crimes charged in the Indictment pursuant to Article 7(1) of the Statute, and in addition or in alternative they are criminally responsible for substantially aiding and abetting one or more members or perpetrators of the JCE. Furthermore, the accused and other co-Accused are also charged under the principles of Superior Responsibility prescribed by Article 7(3) of the Statute. Structuring the Indictment in such manner, the Prosecution covers all forms of individual criminal responsibility.

2. Joinder

6. The Accused reserves right to file a joinder with respect to any such matter at a later time, *mutatis mutandis*, herein as it regards the comprehensive legal, political and historical analysis set out in the Pre-Trial Brief of the Accused Ante Gotovina and Ivan Čermak pleading that way for *beneficium cohesionis* as it regards to the aforementioned issues.

3. Argument – The General Context

7. The general context of the Prosecution's Pre-Trial Brief is generally inaccurate and contradictory *vis-à-vis* the historical facts and at odds with the statements of the Prosecution made in other cases, particularly those against the Accused Milan Martić .

The Accused disputes all of the assertions made in the Indictment and in the Pre-Trial Brief, with the exception of those explicitly listed bellow:

- Mladen Markač was born on 8 May 1955 in Djurdjevac, in the Municipality of Djurdjevac in Croatia. In 1981 Mladen Markač graduated from the University of Zagreb, and in 1982 he completed his compulsory military service. He then joined the police force of the SFRY Ministry of the Interior. "MUP")
- In 1990, Mladen Markač and others were involved in the development of the police unit for special tasks in RH MUP. He was appointed Deputy Commander, and in late 1990, this unit became the Lučko Anti-Terorist Unit. In 1991 Mladen Markač was appointed the head of the Lučko Anti-terorist Unit. In 1992, he was promoted to the rank of Colonel General (reserve).

- On 18 February 1994, Mladen Markač, was appointed Assistant Minister of the Interior by President Tuđman. following Operation Storm, Mladen Markač held the rank of Colonel General.

- The Republic of Croatia declared its independence on 25 June 1991, by whick time an armed conflict had erupted in certain areas of Croatia between the Yugoslav People's Army (JNA) and other Serb forces and the Croat armed forces. By the end of 1991, the JNA and various Serb forces controlled approximately one-third of the territory of the Republic of Croatia.

- On 21 December 1990, the Croatian Serbs announced the creation of a Serbian Autonomous District ("SAO") of Krajina. On 19 December 1991, the SAO Krajina proclaimed itself the Republic of Serbian (Srpska) Krajina ("RSK") and appointed its own President. The RSK military force was later known as the Srpska Vojska Krajine (Serbian Army of Krajina or "SVK").

- In February 1992, in accordance with the Vance Plan, the United Nations Security Council established a United Nations Protection Force ("UNPROFOR"), parts of which were deployed in United Nations Protected Areas in Croatia.

- The United Nations Protected Areas ("UNPAs") were areas in Croatia where Serbs constituted a majority or a substantial minority of the population and where inter-ethnic tensions had already led to armed conflict. There were four UNPAs, known as Sector North, South, East and West.

8. The Indictment and the Pre-Trial Brief violate international law and the relevant United Nations resolutions concerning the former Yugoslavia, because they confer equal status to an internationally recognized state and a self-proclaimed entity, thus asserting that it was a matter of a de facto armed conflict between two states with the only difference between them being that one was not internationally recognized. Even the liberation of Croatian territory is mentioned with reserve – is this meant to imply that these territories were not liberated but rather conquered or occupied?

9. What follows hereinafter are the basic historical and legal facts which the Defence will prove:

- On 8 October 1991, the Republic of Croatia became, in the sense of international law, a sovereign state, which was affirmed by Opinion no. 11 of 16 July 1993 of the Arbitration Commission of the Peace Conference on the former Yugoslavia;

- After the Republic of Croatia had already been recognized by individual states, on 15 1992 this was also done by the Council of Ministers of the European Communities, and by other, individual states;

- On 22 May 1992, the Republic of Croatia became a member of the United Nations based on Resolution A7RES/46/238 of the United Nations General Assembly;

- From the summer of 1991 to the summer of 1995, parts of the territory of the Republic of Croatia were under occupation, which jeopardized the sovereignty and territorial integrity of the Republic of Croatia, which is confirmed by the content of the ordinances adopted by the self-proclaimed authorities in the occupied parts of the territory of the Republic of Croatia, and also in the third section of United Nations General Assembly Resolution A/RES/49/43 of 9 December 1994;

- The occupation of parts of the territory of the Republic of Croatia had been systematically prepared since June 1990, during the period when the Socialist Republic of Croatia (SRC) was a federal unit within the Socialist Federal Republic of Yugoslavia (SFRY) and when the Constitution of the SFRY and the Constitution of the SRC of 1974 were still in force, which is confirmed by the content of the ordinances whereby the internal administrative/territorial boundaries within the Socialist Republic of Croatia were unconstitutionally altered to comply with the planned borders of the subsequently occupied territories;

- The occupation of parts of the territory of the Republic of Croatia was coordinated and conducted simultaneously:

a) by means of external armed aggression against the Republic of Croatia, wherein the political leadership of the Republic of Serbia utilized the Yugoslav

People's Army for armed attacks against the Republic of Croatia and the violent seizure of parts of its territory, and

b) by means of internal armed rebellion of a portion of the local Serbian population of the Republic of Croatia, referred to as a "revolt of the Serbian people", whose political leadership was an exponent of the political leadership of the Republic of Serbia, while their local armed units (so-called Territorial Defence) were an adjunct of the Yugoslav People's Army (JNA), which is apparent from the content of the ordinances adopted by the self-proclaimed authorities in the occupied parts of the territory of the Republic of Croatia;

c) The occupation of parts of the territory of the Republic of Croatia was conducted with the intention of their secession from the Republic of Croatia, which is confirmed by the content of the ordinances adopted by the self-proclaimed authorities in the occupied parts of the Republic of Croatia and specified in point 2 of the United Nations General Assembly Resolution A/RES/49/43 of 9 December 1994;

d) The objective of the attempt to implement secession of the occupied parts of the territory of the Republic of Croatia was to integrate these territories into the Republic of Serbia, subsequently the Federal Republic of Yugoslavia (Serbia and Montenegro), which is confirmed by the content of the ordinances adopted by the self-proclaimed authorities in the occupied parts of the territory of the Republic of Croatia, and also confirmed in point 2 of the United Nations General Assembly Resolution A/RES/49/43 of 9 December 1994;

10. The intention was to execute secession of the occupied parts of the territory of the Republic of Croatia by creating an unconstitutional entity in that territory, called a "republic" (the so-called "Republic of Serbian Krajina" or "RSK"), which was supposed to acquire all of the qualities of a sovereign state in the sense of international law and international legal subjectivity, and that is apparent from the content of the ordinances adopted by the self-proclaimed authorities in the occupied parts of the territory of the Republic of Croatia;

11. Concepts on the status of the so-called "Republic of Serbian Krajina" and its predecessors, the "Serbian autonomous districts" and "Serbian districts", created in the occupied territory of the Republic of Croatia, changed with time:

a) beginning with "unification with the Republic of Serbia",

b) self-proclamation of the "Serbian autonomous districts" and "Serbian districts" as federal units within the SFRY in which only Serbia and Montenegro remained,

c) through the integral concept of the creation of a "common state of the Serbian people",

d) to the concept of a complex state, meaning the creation of a "Serbian federation of all Serbian states",

e) which is apparent from the content of the ordinances adopted by the self-proclaimed authorities in the occupied parts of the territory of the Republic of Croatia;

12. The essential feature of the so-called "Republic of Serbian Krajina", unconstitutionally created in the occupied parts of the territory of the Republic of Croatia, were:

– the lack of democratic legitimacy and non-existence of any continuity with any state,

– ethnic cleansing of the occupied parts of the territory of the Republic of Croatia of all non-Serbian populations, as a permanent threat to its internal stability, and the simultaneous creation of an ethnically homogenous Serbian state in which each individual of Serbian ethnicity in the territory of the Republic of Croatia entered in the records as a citizen of the SFRY, was also its citizen, while every citizen "who participated in the resistance against the enemy by arms or other means" was simultaneously a member of the Serbian Army of the Republic of Serbian Krajina,

– systematic and constant use of armed force against the Republic of Croatia through the military operation of the occupying JNA and paramilitaries and para-police and the terrorist activities of local armed units (so-called Territorial Defence) that were merged with the JNA in 1991;

– the direct financing of the self-proclaimed authorities in the occupied territory of the Republic of Croatia by the Republic of Serbia, and

– the constant financial, material, military and staff support, and the deployment of so-called Serbian volunteers and their squads, and the overall logistical support to the self-proclaimed authorities in the occupied territory of the Republic of Croatia constantly rendered by the political leadership of the Republic of Serbia,

– which is confirmed by the content of the ordinances adopted by the self-proclaimed authorities in the occupied parts of the territory of the Republic of Croatia, and also confirmed by the United Nations General Assembly Resolution A/RES/49/43 of 9 December 1994;

13. The so-called "Republic of Serbian Krajina", unconstitutionally created in the occupied parts of the territory of the Republic of Croatia, was never recognized by any state, nor were the qualities of a sovereign state in the sense of international law nor international legal subjectivity ever acknowledged in its case, which is a more than generally known fact.

14. The armed forces of the Republic of Croatia had the constitutional obligation to protect the sovereignty and independence of the Republic of Croatia and defend its territorial integrity, which is stipulated by Article 7(1) of the Constitution of the Republic of Croatia and in accordance with the international law.

15. The operation of the armed forces of the Republic of Croatia (the military actions known as Operations Miljavac Plateau, Maslenica, Medak Pocket, Flash, Storm and others) were undertaken with the objective of liberating the occupied parts of the territory of the Republic of Croatia, including the elimination of immediate threats to the lives of inhabitants and prevention of the destruction of property, caused by the armed (military and paramilitary, para-police and/or terrorist) attacks of occupation units launched from the occupied territories – and this action complied with the constitutional duty of the armed forces of the Republic of Croatia to protect

the sovereignty and independence of the Republic of Croatia and the defence of its territorial integrity.

16. During the liberation of the occupied territories of the Republic of Croatia, the armed forces of the Republic of Croatia operated on behalf and under authorization of a sovereign state with international subjectivity. By liberating the territories of the Republic of Croatia – in which an unconstitutional entity with neither democratic legitimacy nor international subjectivity had been formed – the armed forces of the Republic of Croatia suppressed an armed rebellion and eliminated the consequences of external armed aggression. They simultaneously brought to those territories the national (constitutional) and thus international legal order as a component thereof, with all of the rights, obligations and duties ensuing terefromh according to the Constitution and laws of the Republic of Croatia and the international instruments enacted and ratified by the Republic of Croatia. Thus, it was the right of the Republic of Croatia, in compliance with its Constitution and international law, to undertake military action at the moment when it assessed that overall geopolitical circumstances (taking into consideration the connection with the crisis in Bosnia-Herzegovina) were most conducive.

17. According to the Croatian official statistics, the total sum of all damages caused by the war and occupation was US$ 37.119.679.000.

According to official statistics, in July 1995, there were 384,938 displaced persons and refugees accommodated in the Republic of Croatia, who were cared for by the state, which allocated US$ 528.000.000 annually for the care of displaced persons and refugees. According to data released in April 1997, in Croatia's Homeland War, 10.668 persons were slain, 2.367 persons were forcibly seized, detained and listed as missing, 37.180 persons were wounded, 19.224 persons are registered as disabled, and 4.273 children were orphaned.

18. The Republic of Croatia initiated the military action called Operation Storm after it had exhausted all possibilities to peacefully settle the matter of restoration of

the occupied territories to its constitutional order by means of negotiations with the local Serbs, with mediation by the international community. Given all previous experiences in negotiations, there were no guarantees that the leadership of the local Serbs would accept the peaceful solution that was proposed by the international community during negotiations in Geneva. Through its Constitution and laws, the Republic of Croatia guaranteed cultural and territorial autonomy to the Serbian ethnic minority, albeit without the attributes of statehood, and guaranteed protection and exercise of minority rights, as well as amnesty from criminal prosecution.

19. The political leadership of the Serbs in Croatia, under the influence of the policies conducted by Slobodan Milošević, like the majority of the Serbian minority in the territories under the protection of the United Nations, would accept nothing other than their self-proclaimed state in Croatia's territory, as a component of the concept of "Greater Serbia", and they refused to even "touch" the Z-4 Plan, which proposed the concession of a "state within a state" to them. The ineffectiveness of the international community in the resolution of the crisis in the territory of the former Yugoslavia was one of the reasons for implementation of the military action known as Operation Storm, because Croatia was threatened with the prospects of the so-called "Cyprus syndrome".

20. Vance's peace plan had not been carried out because the Serbs refused to implement those portions thereof that clashed with their concept of state creation, while the UPROFOR, and later UNCRO, troops had no mechanisms to compel the Serbs to the provisions of the peace plan. Thus, the complete demilitarisation of the territory was never implemented, for Serbian paramilitary formations were never disarmed, and the Serbs had their own military forces, the "Serbian Army of Krajina" (known as the "SVK"), throughout this period. This army constituted a clear threat to the development and survival of the Republic of Croatia, and the fundamental form of this threat was formally expressed through the so-called "secured threat strategy" or "reprisal strategy", which implied artillery and missile attacks on cities in the free territory of the Republic of Croatia, to keep Croatia from resorting to military means to liberate the then occupied parts of its national territory.

That is, *inter alia*, clairvoyant from the fact that during Operation Flash, the artillery units of the "SVK" fired cluster bombs (known as "Orkan" projectiles) exclusively and indiscriminately on civilian targets in the territory of the city of Zagreb.

The "SVK" did not just have the function of "defending the RSK", i.e. maintaining the state of occupation of a portion of the territory of the Republic of Croatia, rather, with the comprehensive assistance and support of the JNA, it also underwent trained for further offensive operations.

That becomes apparent from the fact that in June 1995 the Special Units Corps was formed as an assault and manoeuvre force and strategic reserve of the General Staff of the "SVK", which was supposed to be deployed for the first time in the final phase of the attack launched by the forces of the "SVK" and the "Army of the Republika Srpska" ("VRS") during June and July 1995 against the forces of the Army of Bosnia-Herzegovina and the Croatian Defence Council (HVO) in the territory of Western Bosnia, and its deployment was in fact prevented by Operation Storm.

The execution of the plan to occupy Western Bosnia not only would have led to genocide, probably of greater proportions than that which had already occurred in Srebrenica, but it would have also considerably improved the operative and strategic position of the "RSK", which would have in turn rendered even more difficult, if not prevented outright, the resolution of the problem of reintegration of the then occupied territories of the Republic of Croatia into its state administrative and legal system.

21. According to the Vance plane, police forces that would have corresponded to the ethnic composition of the population prior to the war were never introduced. Not one Croatian displaced person returned to the territory under UN protection, while the Croats that had remained were expelled, or killed (approximately 600 during the UN's mandate). Croatian authority over the so-called "pink zones" was never restored, even though this was specified by the Vance Plan. The peaceful reintegration of Eastern Slavonia is a divergent example, but the Serbs, in contrast those in the territory under UN protection, accepted reintegration and signed the Erdut Agreement, while the UNTAES had a mandate from the United Nations to execute this Agreement, and Eastern Slavonia was peacefully reintegrated into Croatia's constitutional order.

22. It is not accurate that the evacuation of the Serbian population from the territory under UN protection was prompted by "excessive shelling". The shelling was directed solely against military targets, entirely in line with military standards. The departure of the Serbs had already been planned in advance and organized by their own political and military leadership, based on previously formulated contingency plans in case their forces suffered military defeat, because they did not wish, under any circumstances, to live in the Republic of Croatia as an ethnic minority. Additionally, they feared retaliations due to the crimes committed against the Croatian population in the so-called "RSK", while some of them departed, despite a call by President Tuđman that they remain, due to propaganda about the "genocidal" nature of the Croatian people and the Croatian authorities, deemed 'Ustasha-like', an image systematically fomented by Serbian political discourse and the Serbian media.

There are no grounds to back the assertion made in Pre-Trial Brief that the leadership of the "RSK" ordered the evacuation of the civilian population to, *inter alia*, alleviate the concern of members of the "SVK" over the fate of their families, because it was precisely this dictated evacuation of the civilian population that accelerated the departure of members of units from defensive positions.

The fact that individual components of the so-called "Krajina" military formations were evacuated even before the population, also testifies to the fact that this was not a matter of concern for the civilian population.

This assertion is apparent from the documentation (AFS from pilotless aircraft) indicating that during withdrawal of "SVK" units in the direction of Bosnia-Herzegovina, a military column halted an already formed column of refugees, passed it and set off toward the border of Bosnia-Herzegovina before the civilians.

23. President Tuđman was aware of the plans for the departure of the Serbs and did not prevent them by force; rather, he left exit routes for withdrawal, but had he "shut off these routes", there would have been far more casualties among Serbian civilians and soldiers. He was also aware of already-initiated process of movement of the Serbian population from the occupied territories of the Republic of Croatia, which became more intense after Operation Flash, and particularly after the successfully completed operations in the Livno and Kupres combat zones. In this regard, President Tuđman clearly perceived the danger of cutting off all

communication routes leading from the Republic of Croatia toward Bosnia-Herzegovina, for the army of the "RSK" would have been forced to organize a stiff and fateful defence, which certainly would have led to a much higher number of casualties, both among the "defenders" and among the civilian population. This is why the withdrawal (evacuation) routes were left open.

24. The defence shall demonstrate that a part of the Serbs left prior to the commencement of Operation Storm, a part while the Operation was still ongoing, and a part after Operation Storm, with the assistance of the international community and under the protection of the Croatian Police.

25. The Indictment and the Pre-Trial Brief contradict the statements of the Prosecution made in other cases, particularly in the case against Martić. It would appear that the Indictment in the ongoing case has assumed the defence position from the Martić case in its entirety, in which the "RSK" is treated as self-organization of the Serbs against the new Ustasha-like authorities which deleted the Serbs from the Constitution, and with the sole intent of conducting genocide against the endangered Serbian people. Furthermore, the Indictment transcribes the false reports of the alleged non-governmental organization Veritas, which was established and associated with the Serbian intelligence services. Thus, in Martić case, the Prosecution stated, *inter alia*:

- that as a part of its campaign activities during the elections in 1990, the Croatian Democratic Union (HDZ) guaranteed all minority rights to the Serbs in Croatia, and the Prosecution even referred to the Charter of the HDZ and campaign fliers to back this statement;
- that the new Constitution of 1990 guarantees minority rights for the Serbs;
- that Croatia had constitutional grounds for secession from the SFRY, while the Serbs had neither constitutional grounds nor international legal grounds to form their state in Croatia;

- that the municipalities with Serbian majorities illegally seceded from the existing territorial organization and created joint municipalities with a Serbian majority, and finally a separate Serbian state;

- that the JNA took the side of the Serbs and armed them

- that the Serbs in their official documents referred to Croats as Ustasha and in this manner demonized them, and that propaganda was created with the objective of proclaiming the Croats fascists;

- that the "chessboard" symbol which allegedly aroused fears among the Serbs is the historical Croatian coat of arms used in both the Kingdom of Yugoslavia and the SFRY;

- that there were a large number of Chetnik extremists among the Serbs;

- that the Serbs thwarted the Vance Plan, and that Croats were killed and expelled from territories under UN protection;

- that the political and military leadership of the Serbs did not accept negotiations for a peaceful settlement, including the Z-4 Plan, rather they worked toward unification with the Republika Srpska in Bosnia and eventual unification with Serbia;

- that the political leadership of the Serbs announced on a number of occasions that the "Serbian people do not wish to live in Croatia" rather their objective was for "Krajina" to be a part of Serbia;

The Accused is fully prepared to accept above mentioned Prosecution's assertions as accurate and consistent.

26. In the Indictment, it is particularly incomprehensible to refer to the insignia worn by Croatian forces, which consisted of the historical Croatian coat of arms, and which allegedly reminded Serbs of the negative experiences of the Second World War. Since the Prosecution has opted to engage in historical interpretation, then it has neglected to specify in the Indictment that it was precisely in so-called Sector South, i.e. in Knin and its surroundings, that during World War II the notorious Chetnik division led by the priest Momčilo Đujić was active, and that it collaborated

with the Italian fascists to commit a large number of crimes against Croats in that region. Therefore, it is unacceptable for the Prosecution to factually and legally qualify the exact same events in the exact territory at the same time in entirely different ways in this and other cases.

27. The existence of a criminal plan in the manner described in the Indictment is contested in its entirety. The evidence offered in this vein is unreliable and generally based on transcripts of alleged conversations conducted by the late President of the Republic of Croatia. The Prosecution must prove the authenticity of these transcripts disputed by the Defence, and even in case they are partially authentic, the Prosecution has selectively excerpted individual sentences, taken out of context, which it believes sustain its thesis of a so-called criminal enterprise, while deliberately passing over statements that do not back its thesis. Thus, for example, in the transcript of 31 July 1995 meeting in Brijuni, which Prosecution holds as key evidence of the existence of a JCE, it cites only a part of the alleged statement made by late President Tuđman: "*that we impose such strikes against the Serbs that they practically disappear*". However, it leaves out the continuation which reads: "*or that what we do not take immediately, to capitulate within several days. (...) imposition of such strikes from several directions so that Serbian forces cannot recover, rather they are forced to capitulate."*

Thus, provided that this transcript is in fact authentic, it makes abundantly clear that it refers to the creation of a military plan aimed at imposing a military defeat on Serbian military forces which was undoubtedly legitimate military operation.

28. The alleged statement about exchanges of populations is similarly taken out of context, because Tuđman, as a historian, had diverse ideas, but he never planned, nor initiated any activity that would have been aimed at the violent expulsion of populations. Tuđman was committed to a negotiated settlement of Croatian-Serbian relations, so his alleged statements about population removal must be interpreted in this sense. Since the Prosecution is engaged in citing the transcripts of President Tuđman's alleged conversations with his associates, then it "forgot to cite" the words which he uttered from the beginning, that "*crimes against Serbian civilians and their*

property must be prevented", that the liberated territories must be entered "*by the military police immediately, and then followed by the civilian police*", and a series of other statements and decisions made by the Croatian leadership of the time.

29. The objective of Operation Storm was to liberate the temporarily occupied territories by military means, and in no manner whatsoever "ethnic cleansing". The objective of the strike by Croatian armed forces was not Serbian civilians nor their property, but rather exclusively military targets, while what civilian casualties there were can be classified as collateral victims. The Croatian armed forces, including the Special Police, were specially trained and warned that they were obliged to adhere to the international laws of war.

30. The Accused did not command all units of the Special Police nor the HV units, rather only the joint forces of Special Police. The Special Police units were specific-purpose units that, during Operation Storm and in the course of legal post-Storm field inspection operations, were subordinated to the General Staff of the Croatian Army and commanded by the General Staff of the Croatian Army. The Accused did not plan Operation Storm nor the post-Storm inspection operations, not even his own deployment route, which was altered by the General Staff of the Croatian Army during the course of the operation itself.

31. The Accused did not participate in any criminal plans, nor was he aware of the alleged existence of any such plan and he had nothing to do with the planning of Operation Storm, the attack and shelling of Knin, nor in so-called psychological operations. The Accused neither planned, initiated, ordered nor committed any crimes.

On the contrary, the Accused took all necessary and reasonable measures to prevent potential crimes by his subordinates, by means of training and education, special written and verbal orders calling for observance of international laws of war and redeployment of units during and after Operation Storm, largely from other regions of Croatia, to avoid retaliations.

32. The Accused was not informed of the alleged crimes committed by his subordinates, so in this regard all events cited in the Indictment and Pre-Trial Brief pertaining to crimes allegedly committed by members of the Special Police are contested. He was informed that the incident in village of Grubori was an armed conflict, and both the Croatian and UN police arrived on the scene, while the Accused in no way whatsoever hindered the investigation, nor was he informed by anyone that a crime had been committed. Furthermore, up to date not one of the alleged "direct perpetrators" has been identified nor prosecuted, nor has any connection between any of them and the Accused ever been established.

33. The Accused was accountable solely for the joint forces of Special Police, and he had no authority over the basic and criminal investigations police, intelligence services, Interior Ministry disciplinary tribunals, the prosecution, nor the courts, nor did he receive reports from any of them. The Accused, and the Interior Ministry special units, had exclusively military assignments during and after Operation Storm in field inspection activities, and they were not charged with establishing public peace and order, engaging in criminal investigations, processing the perpetrators of crimes, etc. Thus, the definition of the authority and jurisdiction of the Special Police's Internal Oversight Department contained in the Pre-Trial Brief is entirely incorrect.

34. The Accused reported on his activities up the chain of command exclusively to the General Staff, and not to the alleged participants in the joint criminal enterprise. It is unfounded and inaccurate to charge the Accused with the Medak Pocket Operation, because no members of the special units were charged either by the International Criminal Tribunal in the Hague nor before domestic courts for this operation.

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35. After completing of the Operation Storm, individual crimes were committed, which the Accused severely condemns, but these were not a component of any alleged plan, rather these were the illegal acts of individuals. These crimes were generally committed by members of the local population and various "uniformed individuals",

primarily motivated either by retribution or material gain, which the military and civilian police and other authorized agencies were unable to prevent in total, due to the vast size of the recently liberated territory on one side, and on the other, due to the lack of police personnel.

36. Hence, under the overriding circumstances, the military and civilian police filed criminal charges for individual cases of violations of law, the relevant prosecutors filed requests for investigations and raised indictments, and the courts rendered the appropriate judgements, of which the Defence shall provide evidence. Larger towns such as Knin, Gračac, Obrovac and Benkovac were generally preserved, while the damage that did occur was generally a consequence of combat operations. Villages and hamlets were devastated, as they could not be wholly protected from irresponsible individuals, but the damage caused as a result of the four-year war and the damage caused by crimes committed after Operation Storm must be ascertained and clearly demarcated.

37. The property abandoned by the Serbs were placed under temporary state administration by a special law to protect such property and prevent any further damage, and it is true that abandoned Serbian homes were temporarily occupied by Bosnian Croats who were forcibly expelled from their own homes in Bosnia and Herzegovina. However, it is also the truth that such Serbian houses were generally preserved intact tank's to the temporarily housing. Immediately after Operation Storm, the Croatian authorities began to allow individual returns by Serbian refugees on humanitarian grounds, in the so-called humanitarian reunification of families.

38. The Serbs did not massively file requests for return, as they sought the restoration of the “RSK” as a condition for their return. The Croatian authorities adopted regulations facilitating the return of Serbs, specifying a legal procedure for the return of Serbs to their homes and the departure of Croats from these homes temporarily occupied, which required enormous amounts of funds. Here it must be emphasized that the “refugee question” is much more complex than portrayed in the

Indictment and Pre-Trial Brief by the Prosecution, given that the return of displaced persons and refugees had to be voluntary and proceed in both directions. The Prosecution omits that Croats were expelled from their homes not only in Croatia but also in Bosnia and Herzegovina, in Serbia and Montenegro, and that the Croatian state had to secure conditions for their accommodation, and sometimes this entailed temporary accommodation in abandoned Serbian houses. Since the self-proclaimed authorities in Croatia, and the authorities in Bosnia and Herzegovina and in Serbia and Montenegro, did not allow the return of Croats to their homes, the return of Serbs to their homes temporarily occupied by Croats was similarly rendered difficult.

39. The Croatian authorities have invested enormous funds in the reconstruction of damaged Serbian property, generally budgetary funds, with minimum assistance provided by the international community.

JOINT CRIMINAL ENTERPRISE

40. Even though the Prosecution is extensively discussing existence of JCE in its Brief, as well as late President Tuđman alleged historical ideas and political aspirations, there is no specific explanation about where and when the plan regarding JCE was created. The Accused submits that the Prosecution has not yet disclosed any specific document that would contain any kind of formal decision of the President of Republic of Croatia, or the Government, or of the Ministry of Defence or any other governmental institution that would unequivocally show that the JCE was established and organized. The Prosecution's claim regarding existence of the JCE is based on:

- misinterpretations of several discussions or speeches of the late President Tuđman that are entirely out of the context, or could be either interpreted in a quite different way
- alleged plan of ethnic cleansing of the Krajina region of the Serb population;
- alleged Tuđman's political and/or historical ideas

- misinterpretation of Croatian policy regarding the persons of Croatian nationality living outside of the Republic of Croatia

41. It is impossible or at least highly improbable that there wouldn't be at least one official document that would confirm (directly or indirectly) the Prosecution's thesis that JCE was *de iure or de facto* established with the intention to expel the Croatian citizens of Serb nationality out of the territory of the Republic of Croatia. If the Prosecution's claim is truthful, there must have been some formal decision of the President, Parliament, Executive Government, Prime Minister or some other state's institution. However, there is none. Thus, the Prosecution is building its case concerning the existence of the JCE as an alleged consequence of criminal plan, on insinuations, rumours and erroneous interpretations of events.
On the other side, in due time, the Accused will present evidence that would show that there was no JCE whatsoever..

42. In its Pre-Trial Brief, the Prosecution is developing a theory of establishment and operational functioning of the JCE which allegedly consisted of a number of individuals, out of which in the Indictment only few were named in addition to the Accused and other co-Accused. Such alternatively alleged members of the JCE are only described as: "*various officers, officials and members of the Croatian government and political structures, at all levels (including those in municipal governments and local organisations); various leaders and members of the HDZ; various officers and members of the HV, special Police, civil police, and other Republic of Croatia security and/or intelligence services ("Croatian forces"); and other persons,* ***both known and unknown****."*[1] (sic!)
Such broad definition and inclusion, in reality, of an enormous and almost unlimited number of individuals, must raise the question of the nature and origin of such enterprise. Within these circumstances, what possibly could be the nature of the defence strategy when the Accused should contest the membership of an organization composed of known and unknown persons?

[1] emphasis added

43. The Accused contests all factual allegation and do not accept legal assessment thereof made by the Prosecution regarding the alleged existence of the JCE. It is the view of the Accused that such allegations are simply not accurate. The way the Prosecution presented the whole idea of the JCE is limited and selective. Complexity of the political, social and economic environment which existed in the time preceded the time in which the JCE allegedly came into existence, requires much broader approach and deeper analysis. Geopolitical situation determined both by unprecedented involvement of various international political and military organisations and domestic players from different political, ethnic, and/or national interest, prior, during and after the time relevant to the Indictment, cannot only be explained by existence of such vague concept of the JCE.

44. Furthermore, the Prosecution in the section of its Pre-Trial Brief dedicated to alleged JCE, noticeably underlines the role of late Franjo Tuđman. Among other things it points for example to his publications and various statements from the period long before the time relevant to the Indictment. The Defence sees this example as one which proves the selective approach from the Prosecution in explaining the historical background to events that are subject to these proceedings. Without being put in proper context and assessed from all angels, any particular point of view cannot be judged properly, especially considering that the proceedings before this Tribunal, are about individual criminal responsibility of individuals who are charged for committing serious violations of the international humanitarian law. Supporting its allegations, the Prosecution is also extensively quoting from other proceedings before this Tribunal both from cases in which appellate proceedings are completed and those where Appeal is pending or some other form of proceedings is still ongoing. While not contesting the right of the Prosecution to structure its Pre-Trial Brief in a way it sees fit, the Accused notes that no decision on adjudicated facts has been tendered to date, and therefore the Accused contests all this factual allegations from other cases.

45. The Accused notes that the issue related to (non)existence of armed conflict is not the only issue which has to be determined during the trial. Very often quoted Appeals Chamber's ruling from Tadić case clearly recognised that conflicts in the

former Yugoslavia at the time relevant to the Indictment could be characterized in very different ways.[2]

46. The Accused submission is that every alleged JCE and existence thereof must be assessed on the basis of the particular proven facts in each different case considering the political and military context in which the JCE is alleged. The current jurisprudence, with several ongoing trial and appeals on this point still to be decided, recognizes three forms of the JCE: basic, systematic and extended form. The Prosecution is pointed out on basic and (alternatively) extended form asserting that:

> "*…it is impossible to list exact identities of all members of this broader JCE with precision, but the additional members have been identified in the Indictment by group or class…*"

The Accused rejects such a characterization asserting that this is not in accordance with the fair trial principle while by this manner *he is not informed in detail of the nature and cause of the charge against him.*[3]

47. Article 21(4)(a) of the Statute provides that the Accused has a right to be *"informed promptly and in detail"* of the *"nature and cause of the charge against him"*. Similarly, Article 18(4) requires that the indictment contains *"a concise statement of the facts and the crimes with which the accused is charged"*. Correspondingly, Rule 47(C) of the RPE requires that the indictment should contain *"concise statement of the facts of the case and of the crime with which the suspect is charged"*.

Article 14 of the International Covenant on Civil and Political Rights as well as Article 6 of the European Convention of Human Rights contain a similar standard. The comments to the Articles of the International Covenant state that the *"nature and cause"* of the charge means *"not only the exact legal description of the offence* ***but***

[2] See, Prosecutor v. Tadić, Appeals Chamber Judgement, 15 July 1999
[3] Statue, Article 21 (4)(a)

also the facts underlying it"[4] The comments further state that the information must be sufficient to allow the Accused to prepare a proper defense against the charges. Thus, the Accused must be informed **in detail** of the factual allegations upon which the charges are predicated.

48. This requirement is in accord with the standard employed by the majority of national systems of justice. For example, Article 262 of the former, relevant *tempore criminis*, Yugoslav Criminal Code (1976) provides that an indictment shall contain a description of those aspects of the act that fall within the statutory definition of the offense, the time and place of commission, and "other circumstances necessary to determine the offense as accurately as possible". The Croatian Law on Criminal Proceedings, relevant *tempore criminis*, (Narodne Novine No. 110, October 21,1997) contain almost identical provision (Art. 268). Similarly, Paragraph 200 of the German Code of Criminal Procedure mandates that the indictment must identify both legally and factually the crimes charged. Thus, the German Supreme Court has held that the factual description must be *"so precise and clear that no uncertainty remains with regard to acts with which the accused is charged."*[5]

49. At a bare minimum, the Indictment must therefore specifically state for each offense alleged, the time, location, victim, and relevant conduct of the accused. The Indictment must further allege facts that support each material element of the offense charged[6]. The current Indictment fails to comply with these minimal safeguards. The Indictment alleges only in the most cursory fashion some facts supporting the charges. The Indictment spans over 3 months time frame, fails to identify actors, victims, dates, locations, conduct of the Accused, the specific mental state alleged, and other necessary elements. The failure to properly allege in detail facts regarding each of these elements renders the charges defective, therefore neither Prosecution's Pre-Trial Brief is even more decisive.

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[4] emphasis added

[5] Neue Juristische Wochenschrift, 1954, p. 361.

[6] See e.g., U.S. v. Lopez, 2 F.3d 1342, 1368 (5th Cir. 1993), aff'd 115 S.Ct. 1624 (1995) (indictment which fails to allege each element of a criminal charge is fatally defective).

50. However, there are still some notable deficiencies in the Prosecution's argument. The first of this deficiencies is, of course, proof of the well-known common design. The common design notion simplifies the argument of the Prosecution since it claims that it allows a person to be considered a co-perpetrator merely because he intellectually subscribed to plan adjudged criminal, or because alleged crime happened *in the vicinity of the Accused's subordinates.* It nonetheless remains that the role played by a person in conceiving the design and its criminality must be established. We are very far from that point despite the extremely clear case-law of the Tribunal on the matter.

51. Accordingly, the Trial Chamber in Krnojelac case, paragraph 16 of its Decision of 11 May 2000, determined what type of information must be provided to the Accused if the Prosecution is predicating the Indictment on the Accused's participation in a criminal enterprise:

" In order to know the nature of the case he must meet, the Accused must be informed by the indictment of:

a) the nature or purpose of the joint criminal enterprise

b) *the time at which or the period over which the enterprise is said to have existed*

c) *the identity of those engaged in the enterprise – so far as their identity is known, but at least by reference to their category as a group*

d) the nature of the participation by the Accused in that enterprise"

Failing a clear definition of the nature or purpose of the supposed criminal enterprise and the subscription of the Accused to the supposed goals, the Prosecution must establish the Accused's particular criminal intent for each crime.

52. There are two possibilities: either, the purpose of the criminal enterprise was crime against humanity and conspiracy includes discriminatory intent to participate in the crime of persecution, or the supposed criminal enterprise has another purpose, which should be defined in detail, in which case the Accused's intent to commit the crimes must be established. Hence, other than broad and sweeping generalizations, the

indictment is vague as to the Accused's alleged exact involvement in the joint criminal enterprise and the status that should be accorded based on his alleged involvement. The Indictment does not specify all the alleged participants, co-participants, and co-conspirators and those to have aided and abetted.

54. Paragraph 49 of the Prosecution's Pre-Trial Brief lists some but not all of the alleged members of the alleged joint criminal enterprise, and does not specify which other persons, both known and unknown, were involved.

The Prosecution must specify who are this known/unknown participants of the JCE and lists all the members of the alleged joint criminal enterprise and identify the specific units or elements within the various outfits referred to in the Indictment. The Accused is clearly entitled to know exactly with whom he is alleged to conspire with.[7]

55. In alleging individual responsibility, the Indictment uses the conjunctive "and" instead of the disjunctive "or" (or both of them) as is stated in Article 7(1) of the Statute. Thus, it may be inferred that Markač is accused of being a participant, i.e. sharing the intent of the principal offenders, and being an aider and abettor, i.e. merely being aware of the intent of the principal offenders.[8]

56. Another ruling of the Tribunal in respect of the Prosecutor's obligation to state the role of the Accused or his/her course of conduct more precise in order to determine his/her personal responsibility, is The Prosecutor v. Krnojelac[9] where stated:

"Even if par…. Is considered without the allegation that the Accused

[7] See, Prosecution v. Ntagerura, case No. ICTR-96-10A, Decision on the Preliminary Motion filed by Defence Based on Defects in the Form of Indictment, 28 November 1997, Para. 19
Prosecutor v. Kvočka, et.al., case No. IT-98-30 PT, Para. 22 Decision on Defence Preliminary Motions on the Form of the Indictment, 12 April 1999. The prosecution is directed to provide information that would allow for the identification of the other participants in the crimes alleged against Accused
[8] See, Prosecutor v. Brđanin and Talić, Decision on form on Further Amended Indictment and Prosecution Application to Amend, case No. IT-99-36-PT, 26 June 2001, Para. 27, note 108, Prosecution v. Krnojelac, case No. IT-97-25-T, Trial Judgment, 15 March 2002, Para 75
[9] See, Prosecutor v. Krnojelac, Decision on Preliminary Motion of Form of Amended Indictment, case No. IT-97-25-PT, 11 February 2000, Para. 22, so called Second Krnojelac Decision

personally committed the offences, so that he remains charged with an aiding and abetting responsibility, greater precision is required than has been given. The Prosecution does not have to identify precise conversation or actions taken by accused, but the Accused is entitled to know the manner in which he is to be held responsible – for example whether it is alleged that he ordered the persecutions, countless killings….or whether he merely assisted in some other identified way. The Accused is entitled to a specific, albeit concise, statement in the indictment of the nature and extent of his participation in the several courses of conduct alleged."

The Prosecution must prove common state of mind for co-perpetrator, like in Krstić case: "*If the crime charged fell within the object of the JCE, the prosecution must establish the accused shared with the person who personally perpetrated the crime the state of mind required for that crime*"[10]

"*A co-perpetrator of a JCE shares the intent to carry out the JCE and performs an act or omission in furtherance of the enterprise.*"[11] The shared intent may, and often will, be interfered from knowledge of the plan and participation in its advancement. Acting with such intent – express or inferred – is usually referred to as acting n pursuance of the common criminal design.

Further on, the Prosecution must prove knowing assistance for an aider or abettor:

"*Liability on the basis of a JCE requires a knowing assistance or encouragement for an aider or abettor..*"[12]

If the crime went beyond the enterprise, the Prosecution need to prove that the Accused was aware that the future crime was a possible consequence and that, with that awareness, he participated in that enterprise:

"*If the crime charged went beyond the object of the JCE, the Prosecution needs to establish only that the accused was aware that the further crime was a possible consequence in the execution of that enterprise and that, with that awareness, he participated in that enterprise*"[13]

Where crime requires special intent, the Prosecution must prove such intent.

"*Where the crime requires special intent, such as the crime of persecution…. the accused must also satisfy the additional requirements imposed by this crime, such as the intent to discriminate on political, racial, or religious grounds if he is a co-*

[10] See, Prosecutor v. Krstić, Trial Chamber Judgement, 2 August 2001, para. 613
[11] See, Prosaecutor v. Kvočka et al., Trial Chamber, 2 November 2001, para 284,271
[12] See, Prosecutor v. Kvočka et al., Trial Chamber, 2 November 2001, para 271
[13] See, Prosecutor v. Krstić, Trial Chamber, 2 August 2001, para. 613

perpetrator."[14]

The Accused remarks that nothing of the quoted jurisprudential standard hasn't been met in the Indictment nor hasn't been characterized in Prosecution's Pre-Trial Brief.

ARMED CONFLICT

57. The Accused is charged with allegations of murder, inhumane acts and cruel treatment – crime against humanity and violation of the laws or customs of war.

The time-frame of these accusations is from at least July to about 30 September 1995, i.e. prior, during and after the launching of Operation Storm which was launched on 4 August 1995 and lasted only for several days, to be precise for 82 hours. The alleged crime theater is in the sector South, part of the area of Republic of Croatia that was self-proclaimed as the "Republika Srpska Krajina" (RSK) by local Serbs.[15] Alleged killing incidents took place in Knin, Orlić, Kistanje, Ervenik and Donji Lapac municipality.

The alleged crimes were committed in participation in the JCE by planning, preparation, and/or execution of the murder and infliction of inhumane acts and cruel treatment of Krajina Serb civilians and persons taking no part in hostilities by shooting, burning and/or stabbing them, including their humiliation and/or degradation, by firing upon, assaulting, beating, stabbing, threatening and burning them.

Indictment claims that at all relevant times, a state of armed conflict existed in the Krajina region of the Republic of Croatia in or on the territory of the former Yugoslavia and each of the accused was required to abide the laws and customs governing the conduct of war, including the Geneva Conventions of 1949 (including Common Article 3) and the additional protocols thereto. [16]

[14] See, Prosecutor v. Kvočka et al., Trial Chamber, 2 November 2001, para. 288
[15] Reduced Indictment, para 13
[16] Reduced Indictment, paras. 56 and 58

58. The Report of the Secretary-General[17], makes it perfectly clear that the law applicable in armed conflict has become part of international customary law and therefore the jurisdiction of the International Tribunal is founded upon the existence of an armed conflict. Otherwise, in absence of an armed conflict, whether internal or international, the jurisdiction of the Tribunal could not be founded. Therefore, the alleged crimes must be committed in the course of an armed conflict. There are numerous examples of that practice[18]

Armed conflict/ Internal disturbances and tensions – definition and differences

59. In the practice of the Tribunal, since the Trial Chamber's decision in *Tadic* case No. IT-94-1, the Decision on the Defence Motion from 2 October, 1995, followed by the Appeals Chamber's decision, an armed conflict was defined as follows:

" We find that an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a Sate."

One could find an example and definition also in the practice of ICTR, as it refers to the armed conflict matter and distinction to the internal disturbances and tensions:

- *Akayesu, (Trial Chamber), 2 September, 1998, para. 619-621, 625: "An armed conflict is distinguished from internal disturbances by the level of intensity of the conflict and the degree of organization of the parties to the conflict"*

In dealing with this issue, the A*kayesui Judgment* suggested an "*evaluation test"*, whereby it is necessary to evaluate **the intensity and the organization[19]** of the parties involved in an conflict to make a finding on the existence of an armed conflict. Further on, the Chamber stated: " *The term "armed conflict" suggests the*

[17] U.N. Doc. S/25704 (3 May 1993), para. 34
[18] *Tadic, (Appeals Chamber), Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October , 1995, para. 137: "Under Article 3, the International Tribunal has jurisdiction over the acts alleged in the indictment, regardless of whether they occurred within an internal or an international armed conflict"*
Kordic and Cerkez, (Trial Chamber), 26 February , 2001, para. 23: "Article 5 vests the International Tribunal with the competence to prosecute crimes against humanity when committed in armed conflict, whether international or internal in character
[19] emphasis added

existence of hostilities between armed forces organized to a greater or lesser extent, which necessarily rules out situations of internal disturbances and tensions. "

Bagilishema, (Trial Chamber), 7 June, 2001, para. 357: "Whether a conflict meets the material requirements of Common Article 3 and Additional Protocol II, is a matter of objective evaluation of the organization and intensity of the conflict and of the forces opposing one another."

60. It is obvious that, out of these examples, for the existence of an armed conflict and application of the relevant law, two basic elements are required; (i) the intensity of the conflict and (ii) the level of organization of the armed groups.

Again:

Akayesu, (Trial Chamber), 2 September, 1998, para. 626: "Responsible command entails a degree of organization within the armed group or dissident armed forces. This degree of organization should be such so as to enable the armed group or dissident forces to plan and carry out concentrated military operations, and to impose discipline in the name of a de facto authority…. . The armed forces must be able to dominate a sufficient part of the territory so as to maintain sustained and concentrated military operations and to apply Additional Protocol II. In essence, the operations must be continuous and planned."

Therefore, it is evident that an internal disturbances must rise to the level of "*protracted armed violence*" to render international humanitarian law applicable – the jurisdiction of the Tribunal.

Delalic et al. Trial Judgement from 16 November, 1998, para. 182, : " In the latter situation, in order to distinguish from cases of civil unrest or terrorists activities, the emphasis is on the protracted extent of the armed violence and the extent of organization of the parties involved

61. To define the term of *internal disturbances and tensions* and its difference as it regards to the armed conflict, it is of outmost help the ICRC Commentary which resulted from various amendments discussed during 1949 Diplomatic conference in Geneva, Switzerland.

"Internal disturbances characterized by isolated or sporadic acts of violence do not therefore constitute armed conflict in a legal sense, even if the government is

forced to resort to police forces or even to armed units for the purpose of restoring law and order."[20]

This position is also clearly expressed in an article published in the International Review of the Red Cross, May-June 1993, No. 294, as follows:

"Internal disturbances are marked by serious disruption of domestic order resulting from acts of violence which do not, however, have the characteristics of an armed conflict…..For a situation to be qualified as one of internal disturbances, it is of no consequence whether State repression is involved or not, whether the disturbances are lasting, brief with durable effects, or intermittent, whether only a part or all national territory is affected or whether the disturbances are of religious, ethnic, political or any other origin…. The Diplomatic conference on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts, held in Geneva from 24 May to 12 June 1971, explicitly excluded from the scope of application of the Protocol situations of internal tensions and disturbances, which it did not define, but of which it gave examples. These are presented as follows in the Commentary to Protocol II: "riots, such as demonstrations without a concealed plan from out by armed forces or armed groups; other acts of similar nature, including, in particular, large scale arrests of people for their activities or opinions."[21]

Further on, in 1971 at the Conference of Government Experts the Working and sub-working Group was established to consider the drafting of the new instruments to supplement the Geneva Conventions. The Group adopted three criteria that had to be met on the side of the insurgents for the recognition of the existence of an internal armed conflict, and which was indeed incorporated into the text of article 1 of Protocol II, and, according the ICRC Commentary, that were:

- a responsible command
- such control over the part of territory as to enable to carry out sustained and concentrated military operation
- the ability to implement the Protocol

[20] Jean Pictet, General Introduction to the Commentary on Protocol II, ICRC, Geneva, pp 1319 - 1320

[21] *Commentary on paragraph 2 of Article I of Protocol II in the Commentary on the Additional Protocols of 8 June 1997 to the Geneva Conventions of 12 August 1949, International Committee of the Red Cross, Martinus Nijhoff Publishers, Geneva, 1986, paras. 4471 – 4479, pp.1354 – 1356.*

The Commentary on the Protocol takes up the 1971 definitions, specifying that they form part of ICRC doctrine and that they are designed for practical use, therefore are undoubtedly part of international humanitarian customary law.

62. The Accused is of firm opinion that the Reduced Indictment, nor the Pre-Trial Brief, does not offer specific facts to support the assertion that an armed conflict existed on the theater of accusations from at least July through 30 September 1995. The Prosecution itself claims that resistance to Operation Storm was "minimal and in many instances, non-existent" By arguing that, the Prosecutor implicitly suggests that the conflict between Croatian armed forces and the forces of RSK was of low intensity from the very beginning , therefore insufficient to establish the element of an armed conflict, during the launching of Operation Storm, and especially **after** completing the military operation. The sole fact that Croatian governmental (military and police) forces were deployed during the legal operation *eo ipso* does not establish the existence of an armed conflict and make Common Article 3 of Geneva Conventions applicable, as it was emphasized before. Accordingly, the military/police forces have been used in order to establish law and order within the territory of the sovereign Republic of Croatia and thus the employment of force and governmental authority do not necessarily rise to the level of an armed conflict. Furthermore, the Prosecution explicitly claims in its Response to Defendant Ante Gotovina's Motion to Dismiss the Proposed Joinder Indictment that. "*..nowhere in the previous indictments or the Joinder Indictment has the Prosecution alleged that Operation Storm itself was illegal."* Such a statement clearly expresses that Operation Storm was launched in order to establish internal law and order and therefore its character could hardly be defined as an armed conflict.

63. The Operation "Storm" was launched on 4 August 1995. Knin, as the "capital" of the self-proclaimed RSK, was liberated on 5 August and the whole operation was completed within 82 hours. In the very beginning of the operation, the political and military leadership of RSK collapsed and departed the territory of self-proclaimed RSK. Therefore nothing and nobody of the political or military

organization remains, the intensity of military and police actions were significantly diminished and the incidents were reduced to sporadic, individual violence and terrorist activities.

Those events are very well illustrated in the Report of the Secretary – General submitted pursuant to Security Council Resolution 1009 (1995) from 23 August, 1995:

- *The present report reflects events up to 20 August 1995.*

- *As the situation in sector South began to stabilize, Croatian civilian authorities began to assert their control over the area and Croatian displaced people started returning to identify their homes. On 12 August, the Knin-Split railway began operating…*

- *UNCRO's ability to move throughout Sectors North and South was greatly reduced during the Croatian offensive. It is thus difficult in many cases to determine if incidents were attributable to advancing Croatian forces, or to the actions of departing Serbs. It is also difficult to determine the extent to which the mass exodus of the Krajina Serb population was brought about by fear of Croatian forces, as opposed to a desire not to live under Croatian authority or encouragement by local leaders to depart.*

- *Representatives of the International Committee of the Red Cross have reported favorably on the access they have been given to all persons detained by Croatian authorities in connection with the recent conflict.*

- *Events in Sectors North and South have had a major impact on UNCRO.* ***With the collapse and departure of the political leadership and the armed forces of the Krajina Serbs, there is no longer a requirement, except in Sector East[22],*** *to monitor or control the confrontation line, zone of separation, weapons storage sites and areas of limitation established by the cease-fire agreement of 29 March 1994.. ... Finally, again with the exception of the Sector East, the Croatian Government has now established full control over its territory, as well as access to its international borders. The remaining aspects of th, UNCRO mandate, including confidence-building, assisting in humanitarian activities, and the protection of refugees and displaced persons are now primarily the responsibility of the Croatian Government, and can in any case be performed without the presence of UNCRO infantry battalions.*

- *In view of the situation described in paragraph 22 above, the former Sectors North, South and West no longer require infantry battalions, and UNCRO is therefore taking immediate action to reduce the operation's strength to within the currently authorized ceiling of 8,750 troops.*

[22] Emphasis added

64. The subject and the whole context of Secretary-General's Report as cited above, beyond any doubt, offers the following conclusions:

- In the period stated in the Indictment, i.e. from July to about 30 September 1995, in the territory of the Republic of Croatia, illegally occupied by so called RSK, there has not occurred an armed conflict, at least not before 4 August 1995 and after completing the Operation Storm

- If the events during the Operation Storm possibly could be legally defined as an armed conflict, it is obviously that before the launching and after completing the Operation, the conflict could not be legally defined as such.

- The incidents after completing the Operation Storm should be defined as internal disturbances and tensions in context of non-existence of the organizational structure and leadership of the RSK and intensity level of the incidents and thus not under the jurisdiction of the Tribunal.

INDIVIDUAL AND COMMAND RESPONSIBILITY UNDER ARTICLE 7(1) and 7(3)

65. In addition to charges related to alleged JCE, the Accused is also charged under Article 7(1) for allegedly planned, instigated, ordered and/or committed the crimes under Article 3 and 5 of the Statute. The Accused is also charged as a co-perpetrator and/or perpetrator or indirect co-perpetrator. The Prosecution also alleges that the Accused together with the co-Accused is responsible for the acts or omissions which they accomplished, effected or caused through or by means of other persons, such as subordinates or other persons (including persons they controlled or over whom they exercised substantial influence). Furthermore, the Prosecution alleges in addition or in alternative that the Accused and other co-Accused are criminally responsible for each crime which substantially aided or abetted, in its planning, preparation or execution.

66. Moreover in addition or in alternative, the Prosecution alleges that the Accused is criminally responsible under Article 7(3) as a superior officer for the criminal acts or omissions of subordinates or other persons about or over whom he had effective *de jure* and/or *de facto* control, and he knew or had reason to know that such persons were about to commit or had committed such acts or omissions and failed to take necessary and reasonable measures to prevent such acts or omissions or punish such persons.

As it regards to factual allegations related to JCE, the Accuse contests the Prosecution's factual allegations regarding its alleged criminal responsibility under Article 7(1) and 7(3), as emphasized before under paragraphs 40 – 56.

67. Notwithstanding, that the Prosecution did not identify the perpetrators of the vast majority of the crimes charged, although the *onus probandi* beyond the reasonable doubt the identity of the perpetrators is clearly on the Prosecution, the Accused notes that the cornerstone of the principle of command responsibility is precisely the effective control over the perpetrators which has been defined as the "*material ability to prevent or punish criminal conduct*"[23] The Accused did not posses this ability, *de jure* or *de facto,* in respect of the alleged perpetrators among the military persons, civil police or members of the local population and other various "uniformed individuals" primarily motivated by retaliation and/or plunder. Therefore, the Accused was not under any legal duty to act in order to prevent or punish crimes alleged in the Indictment. What is obviously missing in the Indictment is the connection between the Accused and the alleged crimes/perpetrators, except if one could take for granted that the sole "*vicinity"* of the Special Police forces as it regards to the crime scene, was sufficient to prove beyond the reasonable doubt that the Accused is responsible under the provisions of command responsibility.[24] It is the Accused's position that such characterization of his command responsibility is both vague and legally unfounded. No explanation is given on how a member of a commission could be instrumental, high-level officials with powers to issue orders

[23] Prosecutor v. Delalić er al., Judgement, Appeals Chamber, 20 February 2001, para. 256
[24] Pre-Trial Brief, para. 45

and decisions, and be at the same time a leader of ever so influential and powerful JCE. By doing so, the Prosecution is constructing an artificial relationship between the Accused and unknown individuals as a basis for criminal responsibility. There is no evidence which could prove Prosecution's allegations that alleged perpetrators were ever under effective control of the Accused.

68. Also, the Prosecution did not identify that the Accused had knowledge that his subordinates is about to commit or has committed a crime and thus the Accused's failure to prevent or punish the commission of the crime.[25] Actual knowledge may be established through direct or circumstantial evidence, **but may not be presumed**.[26] Further more, the indicators of effective control are more a matter of evidence than of substantive law. The Accused states that he did not see such kind of evidence consisting in the supporting material to the Indictment, neither the Indictment itself points out to any of such evidence. Above that, the Prosecution has to prove that an information on committed crimes was passed to the Accused, otherwise he was not knowing of the alleged subordinate's illegal behavior.

"*The superior will be criminally responsible through the principles of superior responsibility only if information was available to him which would have put him on notice of offences committed by his subordinates."*[27]

69. Considering flaws in the Indictment, the Accused notes the Rule 87 of the RPE, which clearly put the burden of proof in proceedings before this Tribunal on the Prosecution. It is the Prosecution who bears the burden of proving the case it alleges against any accused, including Mr. Markač. As provided in Rule 87, the standard of proof is that the Prosecution must prove the case "*beyond reasonable doubt*"[28], anything less obliges the triers of fact to acquit.

[25] See, Prosecutor v. Kordić and Čerkez, Judgement, Trial Chamber, 26 February 2001, para. 401
[26] See, Prosecutor v. Blaškić, Judgement, Trial Chamber, 3 May 2000, para. 307, emphasis added
[27] See, Prosecutor v. Blaškić, Judgement, Appeals Chamber, 29 July 2004, para. 62
[28] Prosecutor v. Simić et al., Judgement in the Matter of Contempt Allegations Against an Accused and his Counsel, 30 June 2000; Prosecutor v. Delalić et al. Judgement, 16 November 1998, para. 601

4. Conclusion

70. The Accused respectfully submits that the pre-trial disclosure material supports neither the Prosecuiton's version of the events, not its purported suggested legal conclusions. The Accused respectfully submits that as the Prosecution's case is scrutinized through the confrontation process pursuant to the Tribunal's Statute and RPE, the facts will attest to a lack of any legal wrongdoing or responsibility on his part regarding the events alleged in the Reduced Indictment and as it was re-counted in the Prosecution's Pre-Trial Brief.

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Respectfully submitted

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