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

Case No. IT-01-48-PT

IN TRIAL CHAMBER III

**Before: Judge Patrick Lipton Robinson, Presiding
Judge O-Gon Kwon
Judge Iain Bonomy**

Registrar: Mr. Hans Holthuis

Date filed: 13 October 2004

THE PROSECUTOR

v.

SEFER HALILOVIĆ

PROSECUTOR'S PRE-TRIAL BRIEF PURSUANT TO RULE 65 *ter* (E)(i)

The Office of the Prosecutor:
Mr. Vladimir Tochilovsky

Counsel for the Accused:

Mr. Peter Morrissey
Mr. Guénaél Mettraux

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I. INTRODUCTION

1. The Prosecution respectfully submits its Final Pre-Trial Brief {hereinafter "the Brief"} pursuant to the Scheduling Order of the Pre-Trial Judge dated 29 September 2004¹. As required by Rule 65~~ter~~(E)(i) of the Rules of Procedure and Evidence, the Brief sets forth the Prosecution's case and addresses the pertinent and contested, factual and legal issues. It thus replaces the pre-trial brief originally filed on 17 June 2002 pursuant to a scheduling order of 29 May 2002.



Vladimir Tochilovsky
Trial Attorney

Dated this 13th Day of October 2004
At The Hague
The Netherlands

¹ Scheduling Order for Filing of Final Pre-Trial Briefs, 29 September 2004.

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The Office of the Prosecutor:

Mr. Vladimir Tochilovsky
Mr. Manoj Sachdeva

Counsel for the Accused:

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INTRODUCTION

1. Pursuant to the Scheduling Order of the Pre-Trial Judge dated 29 September 2004¹, the Prosecution submits its Final Pre-Trial Brief {hereinafter “the Brief”}. As required by Rule 65ter(E)(i) of the Rules of Procedure and Evidence {hereinafter “the Rules”}, the Brief sets forth the Prosecution’s case and addresses the pertinent and contested, factual and legal issues. It thus replaces the pre-trial brief originally filed on 17 June 2002 pursuant to a scheduling order of 29 May 2002. In addition, the Prosecutor dutifully informs the Trial Chamber, also required by Rule 65terE(i), that no mutual agreement exists between the Defence and the Prosecution in relation to admissions by the parties or a statement of matters not in dispute.

INDICTMENT AND FACTUAL BACKGROUND

2. Sefer HALILOVIĆ {hereinafter “the Accused”} is charged with one count of murder, punishable under Article 3 of the Statute of the Tribunal and recognised by Article 3(1)(a) of the Geneva Conventions of 1949. The Prosecution alleges that the Accused is criminally liable for the count of murder by way of superior responsibility as enshrined in Article 7(3) of the Statute².
3. The charge of murder concerns the killing of some sixty-two civilians and one Croatian Defence Council {hereinafter “HVO”} prisoner of war committed by units of the Army of Bosnia and Herzegovina (hereinafter ABiH) in the villages of Grabovica and Uzdol located in South-Western Bosnia and Herzegovina along the Neretva Valley. Thirty-three civilians were killed in Grabovica on 8 and 9 September 1993; twenty-nine civilians and one HVO prisoner of war were killed in Uzdol on 14 September 1993. The Prosecution

¹ Scheduling Order for Filing of Final Pre-Trial Briefs, 29 September 2004.

alleges that the ABiH 1st Corps Unit - 9th Motorised Brigade - murdered the 33 civilians in Grabovica, and a unit called the Prozor Independent Battalion murdered the 29 civilians and the prisoner of war in Uzdol.

4. The Accused had effective control over both these units by virtue of being the commander of an operation called "Neretva-93" (the Operation). On 30 August 1993, the commander of the ABiH Supreme Command Staff, Rasim Delić, appointed the Accused commander of the Operation and team leader of an expert inspection team (Team) formed by Commander Delić to assist the Accused in the execution of the Operation. Commander Delić tasked the Accused and the Team with co-ordinating and commanding combat activities during the Operation.³ The Accused commanded the Operation from a forward command post (IKM) he established in the administration building of the Jablanica Hydroelectric Power Station (HE).⁴ Further, the Accused ensured that he was placed in areas where he could easily influence the preparation and execution of operations. He also saw to it that he could be reached by his subordinates through radio or telephone communications.
5. Further, as the most senior commander in charge in the theatre of operation, the Accused had effective control over the troops and was considered by them to be the supreme commander in the field. Consequently, the Accused had the ability to issue orders and ensure their compliance and significantly, he had the authority to prevent the crimes being committed once put on notice and to initiate investigations against the alleged perpetrators or to punish them.
6. The objective of the Operation was to push forward on different fronts from the Jablanica, Gornji Vakuf and Prozor areas. One of the main objectives was to deblockade Mostar in order to provide assistance to Bosnian Muslims under siege in Mostar by the HVO troops.⁵

² Page 9 of the Indictment.

³ ERN: 0055-4735.

⁴ ERN: 0041-9286-9289, p. 1 & ERN: 0041-9277-9285, p. 2.

⁵ ERN: L011-4071-4975 and L011-5000-5217, Tape 5(2) p. 12.

7. On 6 September 1993, the Accused detached and re-subordinated units of the 9th Motorised Brigade, the 10th Mountain Brigade and the 2nd Independent Battalion from the ABiH 1st Corps units in Sarajevo to the Zulfikar Brigade in preparation for the Operation in Herzegovina.⁶
8. In May 1993, the ABiH had captured Grabovica, a predominately Bosnian Croat village. The residents therefore were on territory under the control of the ABiH. In preparation for the Operation, troops from the 9th Motorised Brigade and 10th Mountain Brigade of the ABiH 1st Corps billeted themselves in the village of Grabovica amongst the Bosnian Croat civilians. The Prosecution alleges that the Accused ordered the redeployment of the said brigades to participate in the Operation, notwithstanding his knowledge of their negative reputation (see *infra*).
9. On 8 and 9 September 1993, soldiers from the ABiH 1st Corps 9th Motorised Brigade murdered 33 civilian Bosnian Croat residents of Grabovica. The majority of the murders took place after soldiers from the 9th Motorised Brigade had complained to the direct subordinate of the Accused Vehibja Karić that they were experiencing difficulties in securing accommodation in the village. In response to this complaint, and in front of the Accused, Karić gestured by drawing his hand across his throat and indicated that they should try summarily and throw into the Neretva river any Bosnian Croat who refused to accommodate the soldiers.
10. On 13 September 1993, the Accused, as commander of the Operation and with full knowledge of the murders at Grabovica, ordered the ABiH Prozor Independent Battalion to attack an HVO military base located in a school in the Bosnian Croat village of Uzdol.⁷
11. On 14 September 1993, as the soldiers entered the village, they deliberately and systematically shot and killed the 29 residents as they made their way to the school. None of the killings were the result of combat between the two

⁶ ERN: 0214-1683.

⁷ ERN: 0209-8431.

parties; and none of the persons who were killed were combatants or involved in hostilities. The members of the Prozor Independent Battalion also murdered an HVO soldier who they had captured.

I. THE ACCUSED

12. The Accused was born in Prijepolje, Sandžak, Serbia on 6 January 1952.⁸
13. The Accused entered the military and graduated from the Military Academy of the Yugoslav National Army (JNA) in 1974.⁹
14. In 1974 he attended the military school in Zadar and in 1975 received a commission as an officer in the JNA.¹⁰ From 1975 to 1980 he served the JNA as an artillery officer on an artillery regiment in Mostar. He was then assigned from 1980 to 1985 in Vinkovici in Croatia as a battery platoon commander and later as a deputy to the commander of the unit in that city. From 1985 to 1990 he was assigned in Đakovo as a battalion commander of an artillery regiment where he was promoted to the rank of major.
15. On 31 August 1990, he returned to Belgrade for training in the School for Officers.¹¹ The training was to last for two years but on 13 September 1991 he secretly left the school and returned to Sarajevo. He later joined the Patriotic League, established to prepare the organisation of the Republic of Bosnia and Herzegovina defence structure in case of military aggression.¹²
16. On 25 May 1992, the Presidency of the Republic of Bosnia and Herzegovina (RBiH) appointed the Accused commander of the Territorial Defence (TO)

⁸ ERN: L011-4071-4975 and L011-5000-5217, Tape 1 p. 4 & ERN: 0041-7779-7806 p. 1.

⁹ ERN: 0041-7779-7806 p. 1.

¹⁰ ERN: 0041-7779-7806 p. 1.

¹¹ *Id.*

¹² *Id.*

Staff of the RBiH, replacing Hasan Efendić.¹³ Consequently the Accused became the most senior military commander.

17. From 25 May 1992 until early July 1992, the Accused functioned as commander of the TO Staff of the RBiH.¹⁴ During this period the TO evolved into the ABiH, in accordance with the law of the ABiH dated 20 May 1992.¹⁵
18. As commander of the TO Staff, the Accused was a member of the War Presidency *ex officio*. After July 1992, the Accused signed documents as "Chief of the Supreme Command Staff of the ABiH."¹⁶
19. On 18 August 1992, the Presidency formed five corps to be the basis of the ABiH.¹⁷ The Accused continued as chief of the Supreme Command Staff/ chief of the Main Staff.
20. On 8 June 1993 the Presidency appointed Commander Delić to a new position, commander of the Main Staff of the Armed Forces of the Republic of Bosnia and Herzegovina.¹⁸ Thereafter Commander Delić was referred to as "Commander of the Supreme Command Staff." Commander Delić replaced the Accused as the most senior ABiH military commander.¹⁹
21. On 18 July 1993 the Presidency appointed the Accused to the post of deputy commander of the Supreme Command Staff.²⁰ There were three such ABiH deputy commanders. The Accused also retained the post of chief of the Supreme Command Staff. He held both positions until November 1993.²¹
22. After a meeting in Zenica on 20-21 August 1993, HALILOVIĆ was appointed head of an Inspection Team with the authority to direct Operation Neretva-93.

¹³ *Id.* at p. 9, ERN: 0342-8986 & ERN: L011-4071-4975 and L011-5000-5217, Tape 1 p. 5.

¹⁴ ERN: 0041-7779-7806, p. 9.

¹⁵ ERN: 0052-0744 & ERN: 0041-7779-7806, p. 9.

¹⁶ ERN: 0181-7249 & ERN: 0180-5697-5698.

¹⁷ ERN: 0052-0764-0765.

¹⁸ ERN: 0052-0767-0768, pp. 1-2.

¹⁹ ERN: 0041-7779-7806, p. 9.

²⁰ ERN: 0183-7116-7119, p. 3.

²¹ ERN: 0180-0784.

23. The Accused is now a retired general of the ABiH.²² Prior to his arrest, the Accused was a serving minister in the Government of the Federation of Bosnia and Herzegovina.²³

II. EFFECTIVE CONTROL OF THE ACCUSED

24. The evidence will show that the Accused had effective control over the troops that perpetrated the killings in Grabovica and Uzdol thereby incurring Article 7(3) criminal liability. The Prosecution avers that the evidence will demonstrate that he was commander both in law and in fact and as such had effective control to prevent the killings in Grabovica and Uzdol, initiate investigations to identify the perpetrators and thereafter punish them.
25. On 21 to 22 August 1993, most of the senior ABiH commanders convened a strategy meeting in Zenica in central Bosnia. The Accused actively participated in the meeting, submitting proposals for future ABiH combat actions and solutions to current problems.²⁴ Neither of the other two ABiH deputy commanders attended the Zenica meeting.²⁵
26. On 30 August 1993 Commander Delić appointed the Accused to be *de jure* commander of Operation Neretav-93.²⁶ Commander Delić will testify that he delegated command of the Operation to the Accused in the 30 August 1993 order.
27. Commander Delić's order dated 30 August 1993 gave the Team, under the command of the Accused, the authority to, *inter alia*, co-ordinate and

²² ERN: 0041-7779-7806, p. 27 & ERN: 0183-6867.

²³ ERN: L011-4071-4975 and L011-5000-5217, Tape 1(1) p. 5.

²⁴ ERN: 0214-7508-7518 and 0214-6263-6268 & ERN: L011-4071-4975 and L011-5000-5217, Tape 4(1) pp. 1 & 9.

²⁵ ERN: 0185-8834-8839 & ERN: 0183-1684-1689.

²⁶ ERN: 0055-4735.

command combat activities in the area. Commander Delić specifically delegated to the Accused the authority to issue orders on the spot to solve problems. Commander Delić also ordered the Accused to regularly report back to him on issued orders and to consult with him prior to implementing any drastic proposals.²⁷ Although the team was called an Inspection Team, it had authority that exceeded mere preparation and conduct of the operation. It had a commanding role and function and the Accused was its commander.

28. On 1 September 1993, the Accused and the Team established a Forward Command Post (IKM) at Jablanica "with the aim of co-ordinating and executing combat operations" in support of the Operation.²⁸ An IKM is a center established to command an operation.²⁹
29. Correspondence was addressed to and from the IKM, and the soldiers participating in the operation referred to the center in Jablanica as an IKM.³⁰
30. In his book *Lukava Strategija* (Cunning Strategy) published in 1997, in correspondence and in an interview in 1996 with the Office of the Prosecutor (OTP), the Accused stated that the Team established an IKM in the Jablanica hydro-electric plant.³¹
31. Upon the appointment as commander of the operation by Delić and demonstrative of the Accused's command responsibilities related to Operation-93 in the Neretva Valley, HALILOVIĆ deployed in the area of operations and began to organise the redeployment of units required for the task. On 2 September 1993 he ordered the ABiH 1st Corps commander, Vahid Karavelić, to send troops from the 2nd Independent Battalion, 9th and 10th Brigades from Sarajevo to Herzegovina to participate in the Operation³². The Accused sent a reminder in the form of another order to the ABiH 1st

²⁷ ERN: 0055-4735.

²⁸ ERN: 0041-9286-9289, p. 1.

²⁹ ERN: L011-4071-4975 and L011-5000-5217, Tape 5(1) p. 3.

³⁰ ERN: 0055-4674; 0058-5512; 0185-3829 and 0185-3828.

³¹ ERN: 0041-9286-9289, ERN: 0041-9277-9285 & ERN: 0342-9698, see p. 114 with ERN: 0342-9809-9815 (1997 edition).

³² ERN: 0180-5261 and 0183-1484.

Corps Commander on 3 September 1993. This order was eventually executed through an order from Karavelić on 4 September 1993 to deploy the requested units pursuant to the order from the Accused³³. To ensure that these units arrived in the theatre in Herzegovina, the Accused personally supervised their deployment on 06 September 1993. On 6 September 1993 the Accused re-subordinated these units to the command of Zulfikar's unit. Zulfikar's unit had been added to the structure of the 4th Corps on 1 September 1993 by order of Commander Delić and later re-organised by the 4th Corps commander on 07 September 1993 as part of an Operations Group directly under the command of the Accused³⁴.

32. On 7 September 1993 the commander of the ABiH 4th Corps assigned Zulfikar's unit, which included the 9th Motorised Brigade and 10th Mountain Brigade of the ABiH 1st Corps, to the Jablanica IKM for its tasking.³⁵
33. The staff of the Accused prepared the map for the Operation at Zulfikar's base in Donja Jablanica.
34. On 4 September 1993, at Zulfikar Ališpago's base in Donja Jablanica, Commander Delić signed the map for the Operation³⁶ in the top left-hand corner and the Accused signed it in the bottom right-hand corner.
35. On 12 September 1993, after Commander Delić learned of the murders of civilians in Grabovica, he ordered the Accused to reconsider the scope and scale of the Operation, to investigate the "genocide" and to "order the Deputy Commander of the ABiH 1st Corps 9th Motorised Brigade to return to Sarajevo immediately."³⁷

³³ 0058-5512

³⁴ ERN: 0185-0315.

³⁵ 0180-5261, 0183-1484; ERN: 0214-1683 and 0212-2414.

³⁶ ERN: 0342-8987.

³⁷ ERN:0180-5265.

36. On 12 September 1993, the commander of the ABiH 1st Corps requested the Accused to return soldiers from the 9th Motorised and 10th Mountain Brigades back to Sarajevo to his control.³⁸
37. On 13 September 1993, the Accused issued and signed the combat order for the Prozor Independent Battalion to attack Uzdol.³⁹ The Accused also ordered Zicero Suljević, a member of the Team, to accompany the commander of the Prozor Independent Battalion to ensure that the unit went into battle.⁴⁰ The soldiers complied with the Accused's orders.
38. In statements made and taken in 1993 and 1996, the Accused stated that he commanded the Operation.⁴¹ In his interview subsequent to his arrest, the Accused denies commanding the Operation.⁴²
39. During the course of the Operation, on or about 19 September 1993, the journalist Šefko Hodžić recorded an interview and live radio communications with the Accused and others. These were publicly broadcast from Radio Bosnia-Herzegovina. During one such broadcast interview, Hodžić described the Accused as the commander of a long front from Bugojno through Gornji Vakuf, Prozor, Jablanica and towards the north part of the Mostar municipality. In addition, Hodžić described the Accused as being the co-ordinator and commander of this big operation. In his response, the Accused praised the units from Sarajevo and never denied that he was the commander of the Operation.⁴³
40. In addition, ABiH commanders of the 1st and 6th Corps, the commander of the ~~Prozor~~ Independent Battalion, the commander of Operational Group West (which was from the ABiH 3rd Corps), correspondence from the commander

³⁸ ERN: 0183-1486.

³⁹ ERN: 0209-8431. It is clear that the date on the order is a typographical error, as the attack occurred on 14 September 1993.

⁴⁰ ERN: 0041-7779-7806, p. 19.

⁴¹ ERN: 0041-7779-7806, p. 18.

⁴² ERN: L011-4071-4975 and L011-5000-5217, Tape 9(2) p. 16.

⁴³ ERN: T000-0585, pp. 17-20 (BCS transcript).

of the 4th Corps, several Team members and others confirm that the Accused commanded the Operation.⁴⁴

41. During the Operation, none of the orders issued by the Accused were signed on behalf of Commander Delić.
42. In fact, the Accused was the most senior member of the ABiH in the area. He had been its supreme commander up until July 1993. The members of the Team that were with him regarded him as commander of the Operation, as did the troops and their commanders in the area in which the Team operated. Even the military commander of the 6th Corps who ordinarily was the *de jure* commander in the territory that included Grabovica stated that once the Operation commenced the area fell under the command and control of the commander of the operation, that being the Accused. The civilian authorities also regarded him as commander of the Operation.
43. The Accused issued written and verbal orders, which included the subordination and re-subordination of troops to the Operation,⁴⁵ combat orders⁴⁶ and other orders that are consistent with those a commander of an operation would normally issue. These orders were complied with and acted upon by those to whom they were addressed.
44. Very few of the orders were copied to Commander Delić and none were signed by the Accused on behalf of Commander Delić.
45. Between 18 and 20 September 1993, after the Team had returned to Sarajevo,⁴⁷ the Accused returned on his own to Jablanica to continue with the Operation.⁴⁸

⁴⁴ ERN: 0212-2414.

⁴⁵ ERN: 0180-5262 and 0183-1484 & ERN: 0214-1683.

⁴⁶ ERN: 0209-8431.

⁴⁷ ERN; 0041-7779-7806,p. 25.

⁴⁸ ERN; 0041-7779-7806,p. 25.

III. CRIMES COMMITTED

a. Background

46. The village of Grabovica is located within the Mostar Municipality and the village of Uzdol is located within the Prozor Municipality.⁴⁹
47. At all times relevant to this indictment, the Accused was required to abide by the laws and customs governing the conduct of war, including Common Article 3 of the Geneva Conventions of 1949. These laws were ratified domestically by a Republic of Bosnia and Herzegovina Presidential Decree on 23 August 1992.

b. Grabovica

48. In May 1993 the ABiH captured Grabovica. Many of the women, children, elderly and infirm residents remained in the village.
49. The Accused ordered units from the ABiH 1st Corps in Sarajevo, the 2nd Independent Battalion (the unit commanded by Adnan Solaković) and parts of the 9th Motorised and 10th Mountain Brigades to participate in the Operation.⁵⁰
50. On 6 September 1993 the Accused ordered these troops to be subordinated to the command of Zulfikar Ališpago (Zulfikar's unit).⁵¹ The Accused commanded the IKM in Jablanica to which Zulfikar's unit was directly subordinated.⁵²
51. The Accused ordered Vehbija Karić, who was chief of branches in the General Staff and as such the Accused's direct subordinate, as well as other

⁴⁹ ERN: 0342-898. Survey Nos. 8 & 19.

⁵⁰ ERN; 0180-5261 & ERN; 0058-5512.

⁵¹ ERN: 0214-1683.

⁵² ERN; 0212-2414.

members of the Team to organise accommodation for the ABiH 1st Corps units.⁵³

52. On 7 or 8 September 1993, the 2nd Independent Battalion arrived earlier than the other ABiH 1st Corps units and secured lodging in Grabovica without incident.
53. Soldiers from the 9th Motorised Brigade and some from the 2nd Independent Battalion found accommodation in vacant houses that were abandoned when the ABiH attacked Grabovica in May 1993. The rest of the soldiers were to find accommodation in Grabovica with local Bosnian Croats.
54. Most of the soldiers of the 10th Mountain Brigade found lodging in Jablanica after one of their commanders told the Accused that he refused to be accommodated in Grabovica.
55. A small group of the 10th Brigade, including its commander, Mušan Topalović (Caco), was accommodated in the same part of Grabovica as the 9th Motorised Brigade.
56. On the arrival of the 9th Motorised Brigade in Donja Jablanica, soldiers from Zulfikar's unit took them to Grabovica to secure accommodation. Some Bosnian Croat residents refused to give soldiers of the 9th Motorised Brigade access to their homes.
57. The evidence will show that sometime from 8 to 9 September 1993 the Accused visited Grabovica along with other members of the Inspection Team, namely Vehiba Karić and Ramiz Delalić and commander of the Zulfikar's unit, "Zuka". All arrived together in a dark red jeep and parked in front of a house near a big meadow. Scores of soldiers had congregated in the area in front of the house. The Accused and the other commanders sat on small stools and Vehibja Karić began to address the soldiers and asked about problems encountered with the accommodation. At this point soldiers from the 9th

⁵³ ERN; 0041-7779-7806,p. 23.
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Motorised Brigade complained to Vehbija Karić that the local Bosnian Croat civilians would not give them access to their homes. In response Karić drew his hand across his throat in gesture, and in words indicated that the soldiers should try summarily and throw into the Neretva River any Bosnian Croats who refused the soldiers access to their homes. Some of the soldiers replied “dobro” literally translated as “ok”. The Accused responded that the remark was inappropriate. Vehbija Karić replied that it was the only way to deal with those Bosnian Croats. The Accused did not say anything in response or otherwise reacted to Vehbija Karić’s second statement.

58. Further, the evidence will show that the Deputy Commander of 9th Motorised Brigade (Ćelo), in the presence of the other participants of the meeting, stated: “By the time I return from Jablanica I do not want to see civilians any more.” There was no reaction from any of the soldiers at the meeting. After this exchange, the commanders left.
59. The first killing was that of Pero Marić. He was an elderly man and was one of the Bosnian Croat civilians who refused permission for the soldiers to enter his house. Some of the soldiers, including Enes Šakrak, Sead Karagić and Haris Rajkić eventually persuaded him to give them a couple of rooms. At some point in the evening the soldiers were sitting with Pero Marić around a table outside the house and began to verbally insult Bosnian Croat civilian. It was then that another 9th Motorised Brigade soldier, Mustafa Hota, who had been billeted in another house, joined the others. As the talk continued Hota took out his automatic rifle and, unprovoked, shot Mr. Marić who was sitting at the other side of the table. The old man fell back and died immediately.
60. That evening soldiers from the 9th Motorised Brigade began to murder other Bosnian Croat civilians. The murders continued on 9 September 1993. On that same morning, a soldier called Nihad Vlahovljak who was a platoon commander from 9th Motorised Brigade, ordered the soldiers who had been billeted in the Marić house to effectively search the village for survivors and liquidate them stating to the soldiers: “either you or they”.

61. The evidence will show that the soldiers, Karagić, Šakrak and Rajkić, went up the hill towards the railway station where they saw several civilians corpses from Grabovica. They came across a small house and saw the Zadro family sitting outside on a makeshift outdoor kitchen. The family consisted of an elderly couple (grandparents), a younger married couple and their three children, two boys and a girl all less than ten years of age. The soldiers ordered the married man to show them the stable which he did but also taking the grandparents with him. Once they arrived at the stable two of the soldiers immediately shot and killed the elderly couple. The other soldier, Šakrak followed the younger man to the spot where the couple had been killed. Once there, the two other soldiers started to shoot the younger man and killed him.
62. After these murders, the soldiers went back to the house to find the other members. The young boys had heard the shots and their mother told them to run into the woods. The soldiers found the woman and her daughter and took them to the stable of the house. At that point, Šakrak opened fire and killed the woman and her small daughter at point blank range.
63. In all the soldiers murdered 33 Bosnian Croat civilians.⁵⁴ The murdered victims included women, elderly people and a child.⁵⁵
64. Soldiers from the 9th Motorised Brigade and 2nd Independent Battalion will give eyewitness and circumstantial evidence of some of these and other murders committed by soldiers of the 9th Motorised Brigade. Bosnian Croat residents of Grabovica will testify about some of the murders committed by soldiers from the 9th Motorised Brigade. The guards from the Grabovica HE station will describe the scene, including the shootings they heard and the bodies of civilians.
65. After the murders, soldiers from the 9th Motorised Brigade and 2nd Independent Battalion set up checkpoints to control access to Grabovica.

⁵⁴ ERN: 0214-1683.

⁵⁵ ERN: 0105-7280-7353.

Soldiers from Zulfikar's unit reinforced the checkpoint on the Alexin Han Bridge, about 4 kilometres from the entrance to Grabovica. For several days the bodies of the murdered Bosnian Croat civilians remained clearly visible in Grabovica and in the Neretva River.

66. Beginning on 9 September 1993, soldiers from the 9th Motorised Brigade, 10th Mountain Brigade and Zulfikar's unit hid, buried, burnt or removed in two small trucks the bodies of the murdered civilians.
67. ABiH soldiers prevented members of the local Jablanica Police, the military police battalion commander from the ABiH 6th Corps and others from entering the village to conduct preliminary investigations.
68. The Accused has stated that accommodating those soldiers in Grabovica with Bosnian Croat civilians was a monumental mistake and that the result was foreseeable.⁵⁶
69. The members of the Team, a member of the local War Presidency, the journalist Šefko Hodžić and Zulfikar Ališpago will testify about the events described above.
70. Between 21 to 31 May 1994, pathologists in Split performed autopsies on some of the bodies from the murders in Grabovica.⁵⁷ The autopsies are more useful for identity purposes, as in most instances the bodies were too decayed to establish either the exact nature of the injuries sustained or the cause of death.

c. Uzdol

71. Uzdol consists of a number of small hamlets, many of which were inhabited at the time of the attack on 14 September 1993 by Bosnian Croat civilians.⁵⁸

⁵⁶ ERN: 0342-3170-3174 & ERN: L011-4071-4975 and L011-5000-5217, Tape 8(2) pp. 14 & 19.

⁵⁷ ERN: 0105-7280-7353.

⁵⁸ ERN: 0342-898.

72. On 13 September 1993, the Accused signed the combat order for the Battalion to attack and destroy the HVO forces in, *inter alia*, the village of Uzdol.⁵⁹
73. The Accused closely planned, co-ordinated and directed the operations of the Prozor Independent Battalion during his visits to their headquarters in Dobre Polje. He first visited the headquarters on 5 September and then on 10 September 1993. He further made two visits on 13 September 1993.
74. On 14 September 1993 in the early morning, the Prozor Independent Battalion and the troops attached to it, under the command of Enver Buza, launched an attack on an HVO military base in a school in Uzdol.
75. During the course of the attack, soldiers from the Prozor Independent Battalion forces murdered Bosnian Croat civilians as they lay in their beds, hid or attempted to flee from Uzdol.⁶⁰
76. During the Operation in Uzdol, the Prozor Independent Battalion murdered 29 Bosnian Croat civilians, including 18 women, 3 children, elderly people and 1 HVO prisoner of war.⁶¹
77. A Bosnian Croat eyewitness who survived the attack will give testimony that soldiers from the Prozor Independent Battalion murdered Bosnian Croat civilians in Uzdol.
78. HVO soldiers who were present at the school during the attack or who liberated the village will provide testimony and videotape evidence about the attack and murder of Bosnian Croat civilians in Uzdol.⁶²

⁵⁹ ERN; 0209-8431. The date on the order is a typographical error and should read 13, not 15, September 1993.

⁶⁰ ERN: V000-2718; V000-2724; V000-2725 and V000-2632.

⁶¹ ERN: 0342-8985.

⁶² ERN: V000-2718 and V000-2724..

79. Journalists from the British Broadcasting Company (BBC) and Reuters news service arrived in Uzdol within 24 hours of the murders and began investigating.
80. A BBC cameraman shot video footage of Uzdol after the murders. The Prosecutor will present the BBC video footage and transcript to prove the murder of Bosnian Croat civilians.⁶³ In addition, a BBC journalist will testify about her investigation of the murders in Uzdol.
81. The Prosecution will provide forensic reports and photographs to prove that the victims in Uzdol were murdered.⁶⁴ Most of the deceased were immediately taken to Split where Croatian authorities conducted autopsies.⁶⁵

IV. KNOWLEDGE AND NOTICE OF CRIMES

a. Grabovica

82. Both documents and witness statements prove that the Accused knew about the murders in Grabovica shortly after they happened.⁶⁶ The interview he gave to the Tribunal,⁶⁷ his statement before the local judicial authorities in Sarajevo⁶⁸ and several press reports⁶⁹ show his immediate awareness of the murders.
83. The Accused learned about the murders in Grabovica on the evening of 8 September 1993 and on the morning of 9 September 1993 from members of the Team. One Team member, Namik Džanković, informed the Accused about the murders in Grabovica during the night of 8 September 1993. Two

⁶³ ERN: V000-2725; V000-2632 and 0040-6730-6734.

⁶⁴ ERN: 0105-7135-7279.

⁶⁵ ERN: 0105-7135-7279.

⁶⁶ ERN: 0041-7779-7806, p. 23.

⁶⁷ ERN: L011-4071-4975 and L011-5000-5217, Tape 21(1) p. 2 & ERN: 0041-7779-7806, p. 23

⁶⁸ ERN: 0099-7363-7374, p. 9.

⁶⁹ ERN: 0342-3170-3174, p. 2. ERN: 0099-6755, p. 2 & ERN: 0342-3184, pp. 2-3.

others, Zicro Suljević and Rifat Bilajac, spoke to the Accused about the murders in Grabovica on the morning of 9 September 1993.

84. On 10 September 1993, the then Minister of the Interior, Bakir Alispahić, who was in the area at the time, twice spoke to the Accused about the murders in Grabovica. He repeatedly suggested that the Operation be postponed and insisted that an investigation be carried out.⁷⁰ On 10 September 1993, the Accused accepted the responsibility for a military investigation and at the same time prohibited the local civilian police from interfering with the military during the proposed investigation.
85. On 10 September 1993 the Accused visited Grabovica.⁷¹ At that time some bodies of the murder victims floated in the river or lay on the riverbank and did not escape his attention.
86. Šefko Hodžić, a journalist, spoke to the Accused about the murders in Grabovica sometime in the evening of 9 September and on 12 September 1993.
87. On 12 September 1993 the Accused received an order from Commander Delić to reconsider the scope and scale of the Operation, to investigate the “genocide” of civilians, to isolate the perpetrators and to take “energetic measures.”⁷² In addition, Commander Delić ordered the Accused to “do everything to prevent such actions,” to send the deputy commander of the 9th Motorised Brigade back to Sarajevo and to report on the measures he had taken and the carrying out of the tasks.

b. Uzdol

88. During the course of the attack, the Accused was in the Prozor Independent Battalion’s communications room. The Accused learned from the soldiers

⁷⁰ ERN: 0041-7779-7806, pp. 24-25.

⁷¹ ERN: RR27-1453.

there that the Battalion had surprised the enemy in their pyjamas, had killed the enemy and had liberated Uzdol. This information put the Accused on inquiry notice that civilians may have been murdered.

89. The evidence will show that shortly after the murders, the local radio station, Radio Rama and Croatian television reported extensively on the murders of Bosnian Croat civilians in Uzdol.⁷³ Further, the day after the attack, international journalists came to the village to report on the killings. The Prosecution submits that the extensive media coverage on the attack on Uzdol did put the Accused on notice about killings of civilians in the village.
90. Most of the HVO and ABiH soldiers who were interviewed by the OTP about the incident say that they heard about the murders from the media, at times varying from shortly after the murders to two months later.
91. The Accused says that he heard about the murders of Bosnian Croat civilians in Uzdol on or before 17 or 18 September 1993.⁷⁴

V. FAILURE TO PREVENT THE MURDERS

92. The Prosecutor submits that in both the Grabovica and Uzdol incidents, the Accused failed to take necessary and reasonable measures to prevent the murders.

a. Grabovica

93. The Accused knew that the units and commanders of both the 9th Motorised and 10th Mountain Brigades, who were being used for the Operation, had a reputation for being criminal in behaviour to the extent that they committed

⁷² ERN: 0180-5265.

⁷³ ERN: V000-2718, ERN: V000-2725, ERN: V000-2632 and 0040-6730-6734 & ERN: L011-4071-4975 and L011-5000-5217, Tape 24(1) pp. 18-19 and Tape 11(2) p. 16.

⁷⁴ ERN: L011-4071-4975 and L011-5000-5217, Tape 24(1) pp. 18-19.

robberies, mistreated civilians and took civilians to dig trenches on the front line. Not only was he aware of their adverse reputation, the Accused personally saw to it that they were involved in Operation-93 and brought them to theatre in the Neretva valley.

94. The Accused was aware on 8 September 1993 that the troops from the 1st Corps in Sarajevo were being accommodated in the village of Grabovica.
95. The Accused himself stated publicly that accommodating Bosnian Muslim troops with Bosnian Croat civilians was illogical and that the consequences were foreseeable.⁷⁵ At the time that the Accused was in Grabovica on 8 September 1993, the accommodation problem would have been obvious to him.
96. The Accused's presence in Grabovic when Vehbija Karić made the comment and gesture⁷⁶ in front of scores of soldiers further alerted him to the likelihood of the ensuing murders.
97. Cognisant of the reputation of the troops in Grabovica, the Accused was duty bound to countermand the illegal order that his subordinate Vehbija Karić issued. The Accused should have ordered the troops and/or their commanders not to carry out Vehbija Karić's order, as it was contrary to the laws or customs of war, and to warn them that any murders or other prohibited acts resulting therefrom were punishable. The Accused should not have left Grabovica until he was satisfied that the Bosnian Croat civilians were safe. The Accused was also duty bound to find an alternative solution to the accommodation problem.
98. The Accused first heard about the murders in Grabovica on the evening of 8 September 1993 at 2330hrs at the latest. The Accused failed to take any immediate actions to stop the soldiers from the 9th Motorised Brigade from continuing to murder the Bosnian Croat civilians in Grabovica.

⁷⁵ ERN: 0342-3170-3174.

⁷⁶ See footnotes 37 & 39 *supra*.

99. Members of the Team also apprised the Accused of the murders on the morning of 9 September 1993.
100. The prosecution's evidence will establish that the murders continued on 9 September 1993.
101. At no stage after the first or subsequent notifications did the Accused issue any instruction, order, advice or suggestion to anyone to try and stop the murders.
102. The Accused had the possibility of calling in the commander of the units housed in Grabovica and ordering them to take control of their troops.
103. The Accused did not call in any military police units or local police to intervene to ensure the safety of the surviving civilians and if need be to remove them from Grabovica.
104. The Accused himself has publicly stated, "Even if I had a commanding post, I would have been responsible for not doing three things: not preventing a possible crime, not conducting an investigation after it had happened and not punishing the perpetrators."⁷⁷
105. The Prosecutor submits that the Accused's failure to take urgent and necessary steps to stop the murders and to protect any surviving civilians once he was first informed about the murders renders him criminally responsible under Article 7(3) of the Statute for failing to prevent the murders.

⁷⁷ ERN: 0342-3170-3174.

b. Uzdol⁷⁸

106. On 12 September 1993 Commander Delić had warned the Accused to “do everything to prevent such actions” as in Grabovica.⁷⁹
107. The murders in Uzdol were committed during the same Operation within 5 days of the Grabovica murders.
108. During the course of the planning of the attack, basic reconnaissance would have revealed to all, including the Accused, that there were Bosnian Croat civilians living in the hamlets of Uzdol.
109. The Accused addressed the commander and the troops of the Prozor Independent Battalion and those attached to it on many occasions before their attack on Uzdol.⁸⁰ Instead of utilising the address to troops and their field commander to ensure to compliance with international rules of warfare and domestic regulations, the Accused recited the following words: “we are we are not pleading for mercy, and we are not offering mercy.”
110. The Accused was aware that the troops of the Prozor Independent Battalion had feelings of strong hatred for the Bosnian Croats. The troops had experienced a disaster when the HVO had pushed them out of Prozor and many had lost a family member in that conflict.⁸¹ In this regard, the Accused should not have the ignored the danger of acts of revenge against the Bosnian Croats⁸².

⁷⁸ The Prosecution notes that this section is largely a replication from the 17 June 2002 Pre-trial Brief and, as submitted in its request for leave to amend the indictment (filed 29 September 2004), the Accused remains on notice that he is charged with failure to prevent the crimes in Uzdol, not least because of the Defence Pre-trial Brief – paras.108-113 - filed on 22 March 2003. The current brief reflects a more precise version of the allegation.

⁷⁹ ERN: 0180-5265.

⁸⁰ ERN: L011-4071-4975 and L011-5000-5217, Tape 11(2) p. 16.

⁸¹ ERN: L011-4071-4975 and L011-5000-5217, Tape 11(2) pp. 16-17.

⁸² See, for example, *Report of the Commission of Inquiry into the Events at the Refugee Camps in Beirut (The Kahan Commission)* 8 February 1983. The Kahan Commission held the Minister of Defense of Israel failed his responsibility by allowing the Phalangists entry into the camps (Sabra and Shatilla) which were in territory held by Israel Defense Forces (I.D.F) without taking into the refugees in the camps. The Minister of Defense had knowledge regarding the Phalangists' combat ethics and their feelings of hatred toward the Palestinians.

111. The Prosecutor submits that the Accused's failure to caution the troops and their commander to observe the international rules of warfare, especially in the wake of the Grabovica incident and Commander Delić's order of 12 September 1993,⁸³ renders him criminally responsible under Article 7(3) of the Statute for failing to prevent the murders.

VI. FAILURE TO PUNISH

112. The Prosecutor contends the Accused failed to fulfil his obligation to investigate and punish the perpetrators of the murders in Grabovica.
113. Despite the Accused's effective control over the units that participated in the Operation and the Accused's knowledge of the murders in Grabovica and Uzdol, the Accused failed to punish those who had committed criminal violations of international humanitarian law.
114. The Accused had detailed knowledge of the relevant reporting procedures⁸⁴ and had experience in ordering criminal investigations for crimes committed by ABiH soldiers.⁸⁵
115. The Prosecutor submits that in order to punish or secure punishment the Accused was obliged to ensure that competent authorities investigated the murders in Grabovica and Uzdol.

By giving the Phalangists entry into the refugee camps without taking measures for continuous and concrete supervision of their actions would and did create a grave danger for the civilian population. "Responsibility is to be imputed to the Minister of Defense for not ordering appropriate measures for preventing or reducing the danger of massacre as a condition for the Phalangists' entry into the camps."

⁸³

ERN: 0180-5265.

⁸⁴

ERN: 0180-5369-5370, ERN: 0090-0238 & ERN: 0052-0821-0827; 0013-7881-7883; 0049-8463 and 0052-0807-0812.

⁸⁵

ERN: 0181-6601.

116. The Accused had the opportunity to investigate the murders and identify the perpetrators of each incident during the course of the Operation.
117. After both sets of murders, the Accused told Hodžić that neither incident should be reported in the press.
118. During the Operation, on 20 September 1993, the Accused returned to ABiH Headquarters in Sarajevo.⁸⁶ The Accused failed to take any steps in Sarajevo to facilitate the investigation of the murders in Grabovica and Uzdol.
119. On or about 23 September until 5 October 1993, the Accused returned to Herzegovina to continue with the Operation and took no steps while there to ensure that competent authorities investigated the murders.
120. As a result of the Accused's failure to investigate the murders in Grabovica and Uzdol, the murderers escaped punishment.

a. Grabovica

121. Shortly after the murders, the Minister of the Interior, Bakir Ališpahić, informed the Accused of his duty to investigate the murders in Grabovica.
122. The Accused publicly stated that he did not properly ensure that an investigation was carried out, adding that he was scared of the troops⁸⁷ whom he described as "dogs of war."⁸⁸
123. Despite his knowledge of the murders in Grabovica, the Accused failed to issue orders or request the assistance of the military or civilian police to secure the crime scene, to have the bodies properly examined or to conduct an investigation. ABiH soldiers established roadblocks to prevent the local military and civilian police from entering Grabovica. The soldiers at the

⁸⁶ ERN: 0041-7779-7806, p. 25.

⁸⁷ ERN: 0342-3170-3174.

checkpoint told the military police that they were acting on the orders of the Staff of the Supreme Command.

124. The Accused assigned Namik Džanković, a member of the Team who was in charge of counter intelligence for the Operation, to gather further information about the murders in Grabovica. Namik Džanković never initiated an investigation into the murders in Grabovica, and the Accused failed to take any other steps, including to follow up on his assignment to Namik Džanković, to investigate the murders or punish the perpetrators.
125. The Accused stated during the recorded interview with the OTP that after the deputy commander of the 9th Brigade had threatened to use force to prevent an investigation into the murders, he had managed to persuade the deputy commander of the 9th Brigade to accept the inevitability of an investigation.⁸⁹
126. Taking into account the criminal reputation of the units involved, the counter intelligence role assigned to Namik Džanković in the Operation and Džanković's lack of any command function, the Accused would have known that Džanković was unable to carry out a proper investigation on his own under those circumstances. If necessary, the Accused himself should have gone to Grabovica to ascertain what had happened.
127. The Accused knew that the murder investigation in Grabovica should have been carried out at once. The Accused failed to issue an order authorising the use of force to conduct the investigation if necessary.
128. Despite there being a military prosecutor in the area, there is no evidence that the Accused referred the matter to the prosecutor for investigation.⁹⁰
129. On 12 September 1993, Commander Delić sent the Accused and the commander of the ABiH 6th Corps an order to, *inter alia*, check on the

⁸⁸ ERN: L011-4071-4975 and L011-5000-5217, Tape 21(1) p. 18.

⁸⁹ ERNS: 0342-3184 and 0342-319-3192 & ERN: L011-4071-4975 and L011-5000-5217, Tape 21(1) pp. 12-13.

⁹⁰ ERN: L011-4071-4975 and L011-5000-5217, Tape 24(1) pp. 6-7.

accuracy of the “information about the committed genocide committed against the civilian population” and if accurate to “isolate the perpetrators and take energetic measures.”⁹¹ The Accused failed to obey the order.

130. Apart from the soldiers of the ABiH 1st Corps, there were local soldiers, refugees, security guards from the HE power plant in Grabovica, and two survivors of the incident who could have been interviewed and have quickly provided information about the murders and the identity of the perpetrators.
131. In the “final” report submitted by the Team on 20 September 1993, there is no reference to either of the two incidents. There is no suggestion that an investigation should be launched or had been launched, and there is no reference to the outcome of the order sent to the Accused by Commander Delić on 12 September 1993. The report does, however, refer to a variety of measures to be taken against a number of people, including disciplinary action and criminal investigations.⁹²
132. The Accused returned to Sarajevo on 20 September 1993.⁹³ The 9th Motorised Brigade also returned to Sarajevo on 20 September 1993.
133. On 23 September 1993, the Accused ordered the ABiH 1st Corps commander to send troops to Herzegovina to continue with the Operation.⁹⁴ The ABiH 1st Corps commander ordered members of the 9th Motorised and 10th Mountain Brigade to comply with the order. The Accused knew that no investigation had taken place and did not object to the use of members of the 9th Motorised Brigade in the same Operation,⁹⁵ despite his knowledge of their involvement in the murders in Grabovica.

b. Uzdol

⁹¹ ERN: 0180-5265.

⁹² 0041-9286-9289, paras. 3 & 16-20.

⁹³ ERN:, L011-4071-4975 and L011-5000-5217 Tape 11(2) p. 15.

⁹⁴ ERN: RR27-1562.

134. The Accused accepts that he heard about the incident through the media on or before 17 or 18 September 1993.
135. In his interview with the OTP, the Accused said that he believed at the time of the incident and at the time of the interview that something had happened in Uzdol that warranted investigation.⁹⁶
136. The ABiH 4th Corps Military Police battalion commander stated that “at that time the conditions existed to investigate the crime in the village of Uzdol properly.”
137. In his interview with the OTP, the Accused said he did not believe the obviously untruthful denials by the people he questioned who were involved in the attack.⁹⁷ The Prosecutor submits that despite this knowledge the Accused failed to launch a proper investigation into the Uzdol incident to ensure that the perpetrators were identified and punished.

LEGAL ISSUES

VII. APPLICABLE LEGAL PRINCIPLES

a. Article 3 of the Statute

138. The Accused is charged with one count of murder as a violation of Article 3(1)(a) common to the 1949 Geneva Conventions, prosecutable under Article 3 of the Statute.

⁹⁵

Id.

⁹⁶

ERN: L011-4071-4975 and L011-5000-5217, Tape 11(2) p. 18.

⁹⁷

ERN: L011-4071-4975 and L011-5000-5217, Tape 11(2) pp. 15-19.

139. Article 3 of the Statute is a residual provision, which, in addition to those offences expressly listed thereunder, enables the prosecution of *all* other serious violations of the laws or customs of war.⁹⁸
140. In order to come within the purview of Article 3, a given violation of the laws or customs of war must meet the requirements set forth in the *Tadić* Jurisdiction Decision.⁹⁹ In that decision, the Appeals Chamber applied these requirements to violations of the rules contained in common Article 3 and found that "customary international law imposes criminal liability for serious violations of common Article 3."¹⁰⁰
141. As such, these violations, whether committed in internal or international armed conflict, are prosecutable under Article 3 of the Statute.¹⁰¹
142. In this case the Prosecutor asserts that the murder of the victims in both Grabovica and Uzdol was "serious" within the meaning of Article 1.

⁹⁸ Article 3 of the Statute reads: "The International Tribunal shall have the power to prosecute persons violating the laws or customs of war. Such violations shall include, *but not be limited to* ..." (emphasis added). In this connection, see *Tadić* Jurisdiction Decision, Case No. IT-94-1-AR72, 2 October 1995, paras. 87, 89, 91; *Furundžija* Trial Judgement, Case No. IT-95-17-1, 10 December 1998, paras. 132-133.

⁹⁹ See *Tadić* Jurisdiction Decision, Case No. IT-94-1-AR72, 2 October 1995, paras. 94, 143. Thus, (1) the violation must constitute an infringement of a rule of international humanitarian law; (2) the rule must be customary in nature or, if it belongs to treaty law, (a) the treaty must be unquestionably binding on the parties at the time of the alleged offence, and (b) the treaty must not conflict with or derogate from peremptory norms of international law; (3) the violation must be "serious," namely (a) it must constitute a breach of a rule protecting important values, and (b) the breach must involve grave consequences for the victim; and (4) the violation of the rule must entail, under customary or conventional law, individual criminal responsibility for the person breaching the rule.

¹⁰⁰ *Tadić* Jurisdiction Decision, Case No. IT-94-1-AR72, 2 October 1995, para. 134. The Chamber found that: (1) As pronounced by the International Court of Justice in the *Nicaragua* case, these rules reflect "elementary considerations of humanity" applicable under customary international law to any armed conflict, be it international or non-international in character (*id.*, para. 102); (2) no one can doubt the gravity of these rules being violated (*id.*, para. 129); and (3) such violations do entail individual criminal responsibility (*id.*).

¹⁰¹ This ruling has since been upheld in later cases, (see *Tadić* Trial Judgement, Case No. IT-94-1-T, 7 May 1997, paras. 559, 609, 611-613; *Čelebići* Trial Judgement, Case No. IT-96-21-T, 16 Nov. 1998, paras. 295-318; *Jelisić* Trial Judgement, Case No. IT-95-10-T, 14 December 1999, paras. 33-34; *Blaškić* Trial Judgement, Case No. IT-95-14-T, 3 March 2000, paras. 166-170, 176; *Kordić* Trial Judgement, Case No. IT-95-14/2-T, 26 February 2001, paras. 165-169) and was confirmed by the *Čelebići* Appeals Chamber (see *Prosecutor v. Zejnil Delalić et al. (Čelebići Case)*, Judgement, Case No. IT-96-21-A, 20 February 2001 (hereinafter cited as *Čelebići* Appeals Judgement), paras. 150-152, 160-174.)

**b. Contextual Elements of Murder as a Violation of Article 3(1)(a)
Common to the 1949 Geneva Conventions**

143. The Prosecution submits that the contextual elements of murder as a violation of Article 3(1)(a) common to the 1949 Geneva Conventions are: (a) existence of an armed conflict, (b) a nexus between the conduct and an armed conflict; and (c) victim or victims who were persons taking no active part in hostilities, including members of the armed forces who have laid down their arms and those placed *hors de combat*.¹⁰²

c. Armed Conflict

144. A state of armed conflict existed in the Mostar and Prozor-Rama Municipalities of the RBiH.¹⁰³
145. The Appeals Chamber has stated that an armed conflict occurs “whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organised armed groups or between such groups within a State.”¹⁰⁴
146. Provided the relevant conditions are met, it is immaterial to the application of Article 3 whether the violations occurred within the context of an international or internal armed conflict.¹⁰⁵

¹⁰² See *Prosecutor v. Milorad Krnojelac*, Trial Judgement, Case No. IT-97-25-T, 15 March 2002, paras. 51-52.

¹⁰³ ERN: 0180-5261.

¹⁰⁴ *Tadić* Jurisdiction Decision, IT-94-1-AR72, 2 October 1995, paras. 70, 67-69. With regard to its geographical and temporal scope, the Appeals Chamber further noted that “international humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved. Until that moment, international humanitarian law continues to apply in the whole territory of the warring States or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there” (*idem*). In *Kordić* it was confirmed that “localised areas of conflict” may constitute an armed conflict. See *Prosecutor v. Dario Kordić and Mario Čerkez*, Judgement, Case No. IT-95-14/2-T, 26 February 2001 (*Kordić* Trial Judgement), para. 31.

¹⁰⁵ *Tadić* Jurisdiction Decision, IT-94-1-AR72, 2 October 1995, para. 137; *Kordić* Trial Judgement, Case No. IT-95-14/2-T, 26 February 2001, paras. 162-64; *Blaskić* Trial Judgement, Case No. IT-95-14-T, 3 March 2000, para. 161. This ruling has been upheld in later cases, (see *Opinion and Judgement*, Case No. IT-94-1-T, 7 May 1997 (*Tadić* Trial

147. In this case, the incidents charged in the Indictment occurred between 8 and 14 September 1993, some time before the end of the HVO-ABiH conflict which was marked by the signing of the Washington Agreement in February and March 1994. The existence of armed conflict during that period of time in Central Bosnia has already been recognised by the Appeals Chamber in one case¹⁰⁶ and by several trial chambers.¹⁰⁷

d. Nexus Between the Offence and the Armed Conflict

148. In order for the conduct to come within the purview of Article 3 of the Statute, there must exist a nexus between the conduct and an armed conflict. Such a nexus exists when, for example, a crime was committed in the course of fighting or during the take-over of a town during armed conflict. Such a direct connection to actual hostilities is not, however, required in every situation.¹⁰⁸ It is sufficient that the alleged crimes were closely related to the hostilities occurring in other parts of the territories controlled by the parties to the conflict.¹⁰⁹

Judgement), paras. 559, 609, 611-613; *Judgement*, Case No. IT-96-21-T, 16 November 1998 (*Čelebići* Trial Judgement), paras. 295-318; *Judgement*, Case No. IT-95-10-T, 14 December 1999 (*Jelić* Trial Judgement), paras. 33-34; *Judgement*, Case No. IT-95-14-T, 3 March 2000 (*Blaskić* Trial Judgement), paras. 166-170, 176; *Judgement*, Case No. IT-95-14/2-T, 26 February 2001 (*Kordić* Trial Judgement), paras. 165-169; (*Krnjelac* Trial Judgement), Case No. IT-97-25-T, 15 March 2002, para. 52) and was confirmed by the *Čelebići* Appeals Chamber (see *Judgement*, *Čelebići* Appeals Judgement, Case No. IT-96-21-A, 20 February 2001, paras. 150-152, 160-174).

¹⁰⁶ See *Aleksovski* Appeal Judgement, Case No. IT-95-14/1-A, 24 March 2000, para. 154; see *id.* at paras. 150-151 (where the Appeals Chamber agrees with the Prosecutor's submission that the conflict in Bosnia was international by virtue of Croatia's participation).

¹⁰⁷ *Blaskić* Trial Judgement, Case No. IT-95-14-T, 3 March 2000, para. 370 ("The Croats, and in particular the Bosnian Croats, provoked an open conflict between Croats and Muslims in Central Bosnia by anticipating the implementation of the Vance-Owen Plan then by wanting to implement it unilaterally."); see *Prosecutor v. Zoran Kupreškić, et al.*, *Judgement*, Case No. IT-95-16-T, 14 January 2000, para. 54 (finding of the Chamber about the increase of Croat nationalism and discrimination against Muslims in central Bosnia in 1992-1993).
¹⁰⁸ *Čelebići* Trial Chamber, Case No. IT-96-21-T, 16 Nov. 1998, para. 193.

¹⁰⁹ *Tadić* Jurisdiction Decision, Case No. IT-94-1-AR72, 2 October 1995, para. 70. In particular, it need *not* be shown: (1) That there have been actual armed hostilities in the municipality where the wilful killing was allegedly committed; (2) that combat was in progress at the exact moment when the wilful killing was committed; or (3) that the wilful killing was (a) part of a policy or a practice officially endorsed or tolerated by one of the parties to the conflict, (b) in actual furtherance of a policy associated with the conduct of war, or (c) in the actual interest

149. In this case, the Prosecutor submits that the incidents charged occurred during the military operation Neretva-93, which was part of the wider ongoing conflict between the ABiH and the HVO.

e. Persons Not Taking Active Part in the Hostilities

150. The provisions of common Article 3 of the Geneva Conventions prohibit particular acts when committed “at any time and in any place whatsoever” against persons taking no active part in hostilities, including members of the armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause. These persons shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion, faith, sex, birth, wealth or any other similar criteria.¹¹⁰
151. Article 3 common to the 1949 Geneva Conventions extends its protection to *all* those taking no active part or no longer taking active part in the hostilities,¹¹¹ whether or not they are “in the power of the enemy”¹¹² or “in the

of a party to the conflict (*see Tadić* Trial Judgement, Case No. IT-94-1-T, 7 May 1997 para. 573; *Čelebići* Trial Judgement, Case No. IT-96-21-T, 16 Nov. 1998, paras. 194-195; *Blaškić* Trial Judgement, Case No. IT-95-14-T, 3 March 2000, paras. 69-70). Thus, in *Furundžija*, Case No. IT-95-17-1, 10 December 1998, the Trial Chamber found a sufficient link between the armed conflict and the criminal act insofar as the victim was in the hands of a special unit of the military police being questioned by the accused, a commander of that unit and an active combatant (*see Furundžija* Trial Judgement, Case No. IT-95-17-1, 10 December 1998, para. 65). The *Čelebići* Trial Chamber (Case No. IT-96-21-T, 16 Nov. 1998) concluded that a nexus existed where, in the course of an armed conflict, prisoners were detained in a camp by one of the parties to that conflict, and the criminal acts were committed by the accused in the performance of their official duties as members of the armed forces (*see Čelebići* Trial Judgement, Case No. IT-96-21-T, 16 Nov. 1998, para. 196).

¹¹⁰ Thus, for instance, the *Tadić* Trial Chamber (Case No. IT-94-1-T, 7 May 1997) found that persons captured or detained by Bosnian Serb forces had not been taking active part in hostilities (*see Tadić* Trial Judgement, Case No. IT-94-1-T, 7 May 1997, para. 616.). In *Čelebići* (Case No. IT-96-21-T, 16 Nov. 1998), the Trial Chamber applied common Article 3 to the alleged victims as detainees in the prison camp (*see Čelebići* Trial Judgement, Case No. IT-96-21-T, 16 Nov. 1998, para. 295). The same is true of the *Aleksovski* and *Furundžija* cases, in which common Article 3 was applied to victims under arrest or in detention (*see Aleksovski* Trial Judgement, para. 212 *et seq*; *Judgement*, Case No. IT-95-14/1-T, 25 June 1999 (*Aleksovski* Trial Judgement) para. 262; *Furundžija* Trial Judgment, Case No. IT-95-17-1, 10 December 1998).

¹¹¹ *See* Article 3(1) common to the 1949 Geneva Conventions; *Tadić* Jurisdiction Decision, IT-94-1-AR72, 2 October 1995, para. 69.

hands of a Party to the conflict of which they are not nationals.”¹¹³
Accordingly, the coverage of protection under common Article 3 is broader than that of the grave breaches of the Geneva Conventions incorporated into Article 2 of the Statute.¹¹⁴

152. The criterion applied in the *Tadić* Judgement frames the inquiry: “Whether, at the time of the alleged offence, the alleged victim of the proscribed acts was directly taking part in hostilities, being those hostilities in the context of which the alleged offences are said to have been committed. If the answer to that question is negative, the victim will enjoy the protection of the proscriptions contained in Common Article 3.”¹¹⁵
153. The application of these criteria is a question of fact rather than of law.¹¹⁶
154. With respect to both the Grabovica and Uzdol incidents, the Prosecutor will prove that all of the victims were persons not taking part in the hostilities. Evidence will prove that all save one were civilians, most elderly, infirm, women and young children.¹¹⁷
155. Regarding the murder of the prisoner of war during the Uzdol incident, the Prosecutor submits that evidence will establish that before his death, he had been captured by the ABiH forces and had ceased to be a combatant.

f. Elements Specific to Murder as a Violation of Article 3(1)(a) Common to the 1949 Geneva Conventions of the Statute Charged in the Indictment

156. The ICTY jurisprudence has established that there are common elements for murder under Article 3 and 5 and that for wilful killing under Article 2(a) of

¹¹² Article 4, Geneva Convention III.

¹¹³ Article 4, Geneva Convention IV.

¹¹⁴ See *Čelebići Appeals Judgement*, Case No. IT-96-21-A, 20 February 2001, para. 420.

¹¹⁵ *Tadić Trial Judgment*, Case No. IT-94-I-T, 7 May 1997, para. 615.

¹¹⁶ *Id.*

¹¹⁷ ERNS: 0214-1683 and 0342-8985.

the Statute.¹¹⁸ The *Akayesu* Trial Judgement defined murder (wilful killing) as the unlawful and intentional killing of a human being, requiring the following elements to be proved:

- i) the victim is dead¹¹⁹
- ii) the death (of the victim) resulted from an unlawful act or omission of the accused or a subordinate;
- iii) at the time of the killing the accused or a subordinate had the intention to kill or inflict grievous bodily harm on the deceased having known that such bodily harm is likely to cause the victim's death, and is reckless as to whether or not death ensues.

This definition has been adopted in substantial part by *inter alia* the *Jelisić*¹²⁰ and *Kupreškić*¹²¹ Trial Judgements.

157. Omissions as well as concrete acts can satisfy the *actus reus*.¹²² Causation requires only that "the conduct of the accused was a substantial cause of the

¹¹⁸ See *Čelebići* Trial Judgement: "There can be no line drawn between "wilful killing" and "murder" which affects their content" (para. 422). See also *Krnojelac* Trial Judgement, para. 323: "It is clear from the jurisprudence of the Tribunal that the elements of the offence of murder are the same under both Article 3 and Article 5 of the Statute. These elements have been expressed slightly differently, but those slight variations in expression have not changed the essential elements of the offence." With regard to Article 4(2)(a) (killing in relation to genocide), however, see the *Akayesu* Trial Judgement, which held that "killing" under the equivalent of Article 4(2)(a) of the Statute is much broader than "murder" and includes all forms of intentional killing. Similarly, the ILC opines that "killing" is broader than "murder" and was "selected to correspond to the French word *"meurtre"*, which implies more than *"assassinat."* (ILC Draft Code, p. 91, n. 122). Accordingly, all forms of voluntary killings, whether premeditated or not, are encompassed under Article 4(2)(a) (*Akayesu* Trial Judgement, para. 500).

¹¹⁹ *Krnojelac* Trial Judgement, para. 324: "the victim named in the indictment is dead". In circumstances where the victims' full names are unknown, the initials FNU ("first name unknown") or LNU ("last name unknown") are used in indictment schedules. See also *Kvočka et al*, where the Trial Chamber appeared to characterise as murder both killings committed against named individuals and those of unidentified persons within the context of specified incidents. (See e.g. paras. 97, 135: "The Trial Chamber finds that the Petrovdan and Hambarine incidents occurred as recounted, resulting in the death of an unknown number of detainees. Many individual victims were identified by name and witnesses also testified about killings of unidentified men, seeing piles of dead bodies left near the white house and the red house, and about the murder of detainees on Petrovdan day or after the Hambarine incident.")

¹²⁰ See *Jelisić* Trial Judgement, para. 35 where it was stated that the elements of murder are that the victim is dead as a result of an act of the accused and the act was committed with the intention to cause death.

¹²¹ *Kupreškić* Trial Judgement, paras. 560-61.

death of the victim".¹²³ In cases involving multiple accused or high level perpetrators, if each accused carried out complementary and distinct parts of a common criminal plan, the *actus reus* of the murder may be attributed to each individual accused.¹²⁴ The victim's death may be proved either directly or circumstantially.¹²⁵

158. Though the *mens rea* for murder includes the specific intent to kill, it also includes knowledge (i.e. awareness of a certainty that death will occur) as well as deliberately committing an act in the reasonable knowledge that it would possibly or likely result in death. The Prosecution submits that "intent" in the definition for murder in this Tribunal does not require a conscious object. It is settled in ICTY jurisprudence, that wilful killing in Art. 2, murder under Art. 3 and Art. 5 have the same meaning.¹²⁶ Trial Chambers of the ICTY and the ICTR have provided a number of different formulations for the *mens rea* for murder. All Trial Chambers include within *mens rea* for murder "intent to kill";¹²⁷ other forms of *mens rea* are however included as well.¹²⁸
159. According to certain judgements in the ICTY and the ICTR, knowledge, i.e. being virtually certain that the criminal result is going to occur, is sufficient to establish "intent to kill".¹²⁹
160. Similarly knowledge is included in the civil law concept of intention. As pointed out by the Trial Chamber, intention in civil law comprises *dolus*

¹²² Čelebići Trial Judgement, para. 424.

¹²³ Kupreškić Trial Judgement, para. 560; Čelebići Trial Judgement, para. 424.

¹²⁴ Tadić Appeals Judgement, paras. 190 - 229.

¹²⁵ The ICTY jurisprudence has taken into consideration the impossibility of providing death certificates or even bodies to prove death. See Krnojelac Trial Judgement, para 326-27; see also Tadić Trial Judgement, paras. 240.

¹²⁶ Naletilić and Martinović Trial Judgement, para. 248; Blaškić Trial Judgement, para. 181, Kordić and Čerkez Trial Judgement, para. 233 and 236; Delalić et al. Trial Judgement, para. 433; Jelisić Trial Judgement, para. 51.

¹²⁷ Jelisić Trial Judgement, para. 35

¹²⁸ Kristić Trial Judgement, para. 485; Kvočka et al. Trial Judgement, para. 132; Dragan Nikolić, Sentencing Judgement, para. 112; Trial Judgement, para. 324; Kupreškić et al. Trial Judgement, para. 561; Naletilić and Martinović Trial Judgement, para. 248; Rutaganda, Trial Judgement, para. 80.

¹²⁹ Kupreškić et al. Trial Judgment, para. 820. See also the definition of intent in Kayishema and Ruzindana Trial Judgement, para. 139 and Kupreškić et al., Trial Judgement para. 561 "The result is intended when it is the actor's purpose, or the actor is aware that it will occur in the ordinary course of events."

directus and *dolus eventualis*. The concept *dolus eventualis* in addition to purpose also includes the situation where the defendant, although it is not his purpose to cause the criminal result, is aware that it is virtually certain that the criminal result is going to occur (knowledge). This level of intention is sufficient in civil law to constitute the *mens rea* for intentional killing.¹³⁰

161. Common Law also recognises that knowledge is sufficient to establish the *mens rea* for murder. Some countries consider knowledge as included in a broad definition of intent to kill.¹³¹ Other common law countries, although distinguishing between intent to kill and knowledge that the conduct will cause death, treat them equally with regard to the *mens rea* for murder.¹³² Some common law countries or those using mixed systems require malice aforethought as the *mens rea* for murder, which is fulfilled when acting with the knowledge that the act or omission will probably/likely cause the death.¹³³
162. The Prosecution therefore asserts that at least knowledge, i.e. awareness that it is virtually certain that death will occur, as a consequence of the defendant's behaviour, is sufficient to establish the *mens rea* for murder.

¹³⁰ For Austria, Egmont Foregger/Gerhard Kodek, *Strafgesetzbuch Kurzkommentar*, 6th ed. (1997), § 75 I; for Germany, Albin Eser in: Adolf Schönke/Horst Schröder, *Strafgesetzbuch, Kommentar*, 26th ed., 2001, § 212 No. 5; for Spain, STS 13/2002 14 January 2002; Francisco Muñoz Conde/Mercedes García Arán, *Derecho Penal. Parte General*, 2nd ed. (1996) p. 290-291; for South Africa, C R Snyman, *Criminal Law*, 3rd ed. (1995), p. 169; for Switzerland Christian Schwarzenegger in: Marcel Alexander Niggli/ Hans Wiprächtiger (ed.), *Basler Kommentar, Strafgesetzbuch II, Art. 111-401 StGB* (2003), Art. 111 No. 7.

¹³¹ Australia, Brent Fisse, *Howard's Criminal Law*, 5th ed. (1990), p. 47; England, Andrew Ashworth, *Principles of Criminal Law*, 3rd ed. (1995), p. 268-269, (the court is entitled to find intention in this case); The Bahamas, Section 11 Penal Code (1987) and Ghana Section 47 Criminal Code (1960), consider even awareness of a probability as a form of intent.

¹³² E.g. North Dakota: "A person is guilty of murder, ..., if the person: a. intentionally or knowingly causes the death of another human being;" Chapter 12.1-16-01 Criminal Code, see also Hawaii § 707-701 Penal Code; Texas § 19.02 Penal Code.

Other countries consider knowledge as sufficient to establish second degree murder, e.g. Tennessee § 39-13-210 Tennessee Code.

¹³³ Botswana, Sections 202 and 204(b) Penal Code; Kenya Section 203 and 206(b) Penal Code (1985); Malawi Section 209 and 212(b) Penal Code; Sierra Leone, Bankole Thompson, *The Criminal Law of Sierra Leone* (1999), p. 61; Zambia Sections 200 and 204(b) Penal Code Act.

Other common law countries consider the *mens rea* for murder fulfilled if the person committing the act knows that it is so imminently dangerous that it must, in all probability cause death or such bodily injury as is likely to cause death, Pakistan see Section 300 Penal Code (1982); Singapore, Section 300 Penal Code (1985); Canada (Section 229 (c) Criminal Code) and New Zealand (Section 167 (d) Crimes Act) however, require in addition (any) unlawful object.

g. Article 7(3) of the Statute

163. The Accused is charged in the Indictment with responsibility as a superior under Article 7(3) of the Statute. This article is applicable where a superior failed to exercise his or her powers to prevent subordinates from committing offences or failed to punish them afterwards.
164. The requirements under Article 7(3) are:
- (a) the Accused exercised superior authority over the perpetrator(s) of the crime;
 - (b) the Accused knew or had reason to know that the perpetrator was about to commit the criminal act or had done so; and
 - (c) the Accused failed to take the necessary and reasonable measures to prevent the criminal act or punish the perpetrators thereof.

h. Superior–Subordinate Relationship

165. For the Accused to be found criminally responsible under Article 7(3), the Prosecutor must prove that the Accused possessed superior authority over the perpetrator at the relevant time. There must exist a “superior-subordinate” relationship. The applicable test for whether the Accused held such authority over the perpetrator is one of “effective control.”¹³⁴
166. “A hierarchical relationship may exist by virtue of an accused’s *de facto*, as well as *de jure*, position.”¹³⁵ However, the existence of the superior-subordinate relationship, whether *de facto* or *de jure*, need not be evidenced

¹³⁴ *Čelebići* Trial Judgement, Case No. IT-96-21-T, 16 Nov. 1998, para. 378. *See also* *Čelebići* Appeals Judgement, Case No. IT-96-21-A, 20 February 2001, paras. 196, 256; *Kunarac* Trial Judgement, Case No. IT-96-23, 22 February 2001, para. 396; *Kordić* Trial Judgement, Case No. IT-95-14/2-T, 26 February 2001, paras. 405-406.

¹³⁵ *Krnjelac* Trial Judgement, Case No. IT-97-25-T, 15 March 2002, para. 93.

by an official appointment or formal documentation.¹³⁶ It may also be demonstrated “that the superior had ‘effective control’ over the persons committing the alleged offences.”¹³⁷

167. “Effective control means the material ability to prevent offences or punish the principal offenders.”¹³⁸
168. The term “superior” is not limited to commanders who are above the perpetrators in the regular chain of command. Article 7(3) and Article 86 of Additional Protocol I refer to “superiors” in general who, as individuals exercise control over subordinates. The ICRC Commentary also states that Article 86 is not limited only to superiors “under whose direct orders the subordinate is placed” but instead “should be seen in terms of a hierarchy encompassing the concept of control.”¹³⁹ The effective control test implies that more than one superior may be held responsible for the same crimes.¹⁴⁰
169. It is unnecessary for the commander to be the *only one* capable of taking all the necessary measures to punish the subordinates in question.¹⁴¹
170. The *Blaškić* Trial Chamber found it unnecessary for the purposes of Article 7(3) liability that the commander have had *de jure* authority to take *all* the necessary measures to prevent or punish the subordinates in question. Rather, it suffices that he or she “could have taken some measures” but failed to take those measures which were reasonably available to him under the circumstances.¹⁴²
171. Factors relevant to a finding of effective control by a superior over *de facto* subordinates may include, but are not limited to:

¹³⁶ *Čelebići* Appeals Judgement, Case No. IT-96-21-A, 20 February 2001, para. 193.

¹³⁷ *Krnjelac* Trial Judgement, Case No. IT-97-25-T, 15 March 2002, para. 93.

¹³⁸ *Id.*

¹³⁹ See ICRC Commentary to Additional Protocol I, para. 3544, p. 1013.

¹⁴⁰ *Krnjelac* Trial Judgement, Case No. IT-97-25-T, 15 March 2002, para. 93; *Blaškić* Trial Judgement, Case No. IT-95-14-T, 3 March 2000, para. 303; *Aleksovski* Trial Judgement, Case No. IT-95-14/1-T, 25 June 1999, para. 106.

¹⁴¹ *Blaškić* Trial Judgement, Case No. IT-95-14-T, 3 March 2000, paras. 303, 296; *Krnjelac* Trial Judgement Case No. IT-97-25-T, 15 March 2002, para. 93.

- the capacity to sign orders;¹⁴³
- the substance of orders;¹⁴⁴
- action upon orders;¹⁴⁵
- the position of the accused in the overall military organisation;¹⁴⁶
- the actual tasks he performed;¹⁴⁷
- the accused's overall behaviour towards subordinates and his duties;¹⁴⁸
- the accused's use of his extant authority to prevent crimes and mistreatment;¹⁴⁹
- the exercise of powers generally attached to a military command;¹⁵⁰ and
- the ability to sanction.¹⁵¹

172. The Prosecutor contends the Accused had effective control over the troops subordinated to him for the Operation, as evidenced both by his *de jure* authority and the cumulative effect of the facts, which establish that he was a *de facto* commander who was able to exercise effective control over the troops who committed the crimes referred to in the indictment.

i. Notice

173. An accused possesses the requisite mental state under Article 7(3) if he or she “knew” or, alternatively, “had reason to know” that a subordinate committed an offence or was about to do so.¹⁵²

174. In *Krnjelac*, the Appeals Chamber held that “the information available to the superior need not contain specific details on the unlawful acts which have been or are about to be committed [. . .] it suffices that the superior has alarming information...”¹⁵³ In the *Galić* Judgement, the Trial Chamber held

¹⁴² *Blaškić* Trial Judgement, Case No. IT-95-14-T, 3 March 2000, para. 296.
¹⁴³ *Kordić* Trial Judgement, Case No. IT-95-14/2-T, 26 February 2001, para. 421; *Kunarac* Trial Judgement, Case No. IT-96-23, 22 February 2001, para. 397.
¹⁴⁴ *Kordić* Trial Judgement, Case No. IT-95-14/2-T, 26 February 2001, para. 421.
¹⁴⁵ *Id.*
¹⁴⁶ *Id.* at para. 423.
¹⁴⁷ *Id.* at para. 424.
¹⁴⁸ *Id.*
¹⁴⁹ *Čelebići* Appeals Judgement, Case No. IT-96-21-A, 20 February 2001, para. 206.
¹⁵⁰ *Kunarac* Trial Judgement, Case No. IT-96-23, 22 February 2001, para. 397.
¹⁵¹ *Aleksovski* Trial Judgement, Case No. IT-95-14/1-T, 25 June 1999, para. 78.
¹⁵² *Čelebići* Trial Judgement, Case No. IT-96-21-T, 16 Nov. 1998, para. 383.
¹⁵³ *Krnjelac* Appeals Chamber, 17 September 2003, Para. 155

that “[i]n relation to the superior’s having reason to know” [...] past behaviour of subordinates or a history of abuses might suggest the need to inquire further.”¹⁵⁴

175. 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.¹⁵⁵
176. Such notice can be of two kinds: “actual notice” (*i.e.*, the accused had actual knowledge) or, alternatively, “inquiry notice” (*i.e.*, the accused had reason to know or was put on notice of the need for further investigation or inquiry).¹⁵⁶
177. The term “knew” implies “actual knowledge.” Actual knowledge is defined as “the awareness that the relevant crimes were committed or were about to be committed.”¹⁵⁷
178. Actual knowledge can be established through direct or circumstantial evidence.¹⁵⁸
179. Actual knowledge can be inferred from such circumstantial evidence as the type of illegal acts, the time during which the illegal acts occurred, the type of troops involved, the geographical location of the acts, the officers and staff involved and the location of the commander at the time.¹⁵⁹
180. Two possible factors that indicate that the superior had the requisite notice are: (a) character traits of subordinates and (b) the lack of instruction of subordinates.¹⁶⁰

¹⁵⁴ *Galić* Trial Judgement, 05 December 2003, Para. 175

¹⁵⁵ *Id.* at para. 393.

¹⁵⁶ *Id.* at para. 383.

¹⁵⁷ *Kordić* Trial Judgement, Case No. IT-95-14/2-T, 26 February 2001, paras. 427-8. *See also* *Čelebići* Trial Judgement, Case No. IT-96-21-T, 16 Nov. 1998, paras. 383, 386.

¹⁵⁸ *Čelebići* Trial Judgement, Case No. IT-96-21-T, 16 Nov. 1998, para. 383.

¹⁵⁹ *Čelebići* Trial Judgement, Case No. IT-96-21-T, 16 Nov. 1998, para. 386; *Blaškić* Trial Judgement, Case No. IT-95-14-T, 3 March 2000, para. 307; *Kordić* Trial Judgement, Case No. IT-95-14/2-T, 26 February 2001, para. 427.

¹⁶⁰ ICRC Commentary on Art. 86 of Additional Protocol 1, para. 3545, pp. 1013-1014.

181. The nature of information sufficient to put the accused on inquiry notice need not be such that it, by itself, compels the conclusion that a crime occurred.¹⁶¹
182. “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.”¹⁶²
183. Once he is “in some way put on notice that criminal activity is afoot,”¹⁶³ then Article 7(3) imposes a duty on the superior “to obtain information about crimes committed by subordinates.”¹⁶⁴
184. “The relevant information only needs to have been provided or *available* to the superior . . . or in the possession of” the superior.¹⁶⁵ He is not required to have actually acquainted himself with the information.¹⁶⁶ For example, the “widespread nature of large-scale atrocities over a long period of time” should put an accused in a position of superior authority “on notice that crimes were being or had been committed by his subordinates.”¹⁶⁷
185. Therefore, although Article 7(3) is not a form of strict liability,¹⁶⁸ a superior is criminally responsible if he deliberately ignores available information that would put him on notice.¹⁶⁹

¹⁶¹ *Čelebići* Trial Judgement, Case No. IT-96-21-T, 16 Nov. 1998, para. 393.

¹⁶² *Id.*

¹⁶³ *Kvočka* Trial Judgement, Case No. IT-98-30-1, 2 November 2001, para. 317. *See also* *Krnjelac* Trial Judgement, Case No. IT-97-25-T, 15 March 2002, para. 94.

¹⁶⁴ *Id.*

¹⁶⁵ *Čelebići* Appeals Judgement, Case No. IT-96-21-A, 20 February 2001, para. 239. *See also* *Krnjelac* Trial Judgement, Case No. IT-97-25-T, 15 March 2002, para. 94; *Kvočka* Trial Judgement, Case No. IT-98-30-1, 2 November 2001, para. 318.

¹⁶⁶ *Čelebići* Appeals Judgement, Case No. IT-96-21-A, 20 February 2001, para. 239.

¹⁶⁷ *Id.* at para. 228; *Čelebići* Trial Judgement, Case No. IT-96-21-T, 16 Nov. 1998, para. 770.

¹⁶⁸ *Čelebići* Appeals Judgement, Case No. IT-96-21-A, 20 February 2001, para. 239; *Kordić* Trial Judgement, Case No. IT-95-14/2-T, 26 February 2001, para. 437; *Kvočka* Trial Judgement, Case No. IT-98-30-1, 2 November 2001, para. 318.

¹⁶⁹ The information “does not need to provide specific information about unlawful acts committed or about to be committed.” It “may be written or oral and does not need to have the form of specific reports submitted pursuant to a monitoring system.” (*Čelebići* Appeals Judgement, Case No. IT-96-21-A, 20 February 2001, para. 238.) The type of information available to the superior which can provide the requisite notice includes, for example, reports addressed to the superior, the tactical situation, and the training, instruction and character traits of subordinate officers and troops¹⁶⁹ (*Id.* (quoting the ICRC Commentary on Art. 86 of

186. An assessment of the mental element required by Article 7(3) of the Statute should consider the specific circumstances of each case, taking into account the specific situation of the superior concerned at the time in question.¹⁷⁰
187. The Prosecutor submits that the Accused knew the nature of the troops that were involved in both incidents, was aware of the geographical locations and the tensions in each area and had sufficient information available to him to warrant him to take effective measures to ensure that the civilian population in each area was safe and that the troops subordinated to him complied with the laws or customs of war.
188. The Prosecutor submits that the Accused was put on notice about the murders in Grabovica on the night of 8 September 1993 and at many other times in the ensuing days.
189. The Prosecutor submits that the Accused was put on notice about the murders in Uzdol through the media on or before 17 or 18 September 1993.¹⁷¹
190. The Prosecutor contends that this information, combined with the Accused's subsequent questioning of the commander of the attack and other soldiers involved in the attack, provided sufficient notice to oblige the Accused to investigate the allegation of the murders and to punish the perpetrators.

j. Prevent and Punish

Additional Protocol 1, para. 3545); *Kordić* Trial Judgement, Case No. IT-95-14/2-T, 26 February 2001, para. 437) as well as "past behavior of subordinates or a history of mistreatment"¹⁶⁹ (*Kvočka* Trial Judgement, Case No IT-98-30-1, 2 November 2001, para. 318).

¹⁷⁰ *Čelebići* Appeal Judgement, Case No. IT-96-21-A, 20 February 2001, paras. 238-39 (footnote omitted).

¹⁷¹ See footnote 134 *supra*.

191. The final element for criminal liability under Article 7(3) is that the Accused “failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.”¹⁷²
192. ICTY judgements have refrained from articulating a general standard *in abstracto* for the interpretation of the phrase “necessary and reasonable measures.”¹⁷³
193. Rather, the question is “inextricably linked to the facts of each particular situation.”¹⁷⁴ The adequacy of these measures is commensurate with the material ability of a superior to prevent or punish.¹⁷⁵
194. The *Čelebići* Trial Chamber expressly rejected the position taken by the International Law Commission and found that “lack of formal legal competence” to take the necessary measures does not preclude a finding of criminal liability against a superior.¹⁷⁶
195. Insofar as a superior is in effective control of subordinates he must take all measures within his material possibility to prevent or repress the crimes in question, regardless of whether he is formally vested with legal competence to do so.

¹⁷² *Čelebići* Trial Judgement, Case No. IT-96-21-T, 16 Nov. 1998, para. 346; *Aleksovski* Appeals Judgement, Case No. IT-95-14/1-A, 24 March 2000, paras. 69-71.

¹⁷³ *Aleksovski* Appeals Judgement, Case No. IT-95-14/1-A, 24 March 2000, para. 81; *Čelebići* Trial Judgement, Case No. IT-96-21-T, 16 Nov. 1998, para. 394.

¹⁷⁴ *Čelebići* Appeals Judgement, Case No. IT-96-21-A, 20 February 2001, para. 394.

¹⁷⁵ *Blaškić* Trial Judgement, Case No. IT-95-14-T, 3 March 2000, para. 335; *Čelebići* Trial Judgement, Case No. IT-96-21-T, 16 Nov. 1998, para. 395.

¹⁷⁶ *Čelebići* Trial Judgement, Case No. IT-96-21-T, 16 Nov. 1998, para. 395. This finding was endorsed in subsequent cases; see *Blaskić* Trial Judgement, Case No. IT-95-14-T, 3 March 2000, para. 335; *Kordić* Trial Judgement, Case No. IT-95-14/2-T, 26 February 2001, para. 443. The I.L.C. Draft Code stated that “for a superior to incur responsibility, he *must* have had the legal competence to take measures to prevent or repress the crime” (I.L.C. Draft Code cited in *Čelebići* Trial Judgement, Case No. IT-96-21-T, 16 Nov. 1998, para. 395 (emphasis added)).

196. However, a “superior is not obliged to perform the impossible. . . . [T]he superior has a duty to exercise the powers he has within the confines of those limitations.”¹⁷⁷
197. Depending upon the circumstances, the commander’s “material ability” may entail other options in addition to or instead of issuing orders or taking disciplinary action. These options include investigating the crimes in order to establish the facts, reporting them to the competent authorities so that proper measures may be taken and, as a last resort, requesting that his superiors relieve him of his command.¹⁷⁸
198. The Prosecutor submits that the Accused, whether as *de jure* or *de facto* commander, had the knowledge and ability to issue appropriate orders, to secure the assistance of the local civilian and military authorities, to request reinforcements from Sarajevo if necessary, to have the incidents properly investigated by competent officers and to ensure that the perpetrators were appropriately punished by the authorities.
199. The Prosecutor submits that the Accused failed to take those measures that were reasonably available to him under the circumstances to prevent the murders and to punish the perpetrators.

k. The Chief of Staff Situation

200. The superior must have “effective control” over the perpetrators, that is, have “the material ability to prevent and punish the commission of these offences.”

¹⁷⁷

Krnjelac Trial Judgement, Case No. IT-97-25-T, 15 March 2002, para. 95.

¹⁷⁸

See the similar list of factors set forth in the ICRC Commentary to Additional Protocol I, Art. 87, pp. 1018-22. *See also Trial of Wilhelm von Leeb and Thirteen Others*, United States Military Tribunal (1948) (The German High Command Trial), Law Reports of Trials of War Criminals, Volume XII, pp. 74-75; *Kordić* Trial Judgement, Case No. IT-95-14/2-T, 26 February 2001, para 446; *Blaskić* Trial Judgement, Case No. IT-95-14-T, 3 March 2000, para. 335.

Someone with *only* administrative powers generally would not have superior responsibility.¹⁷⁹

201. As noted above, a position of command is indeed a necessary precondition for the imposition of command responsibility. The Tribunal has made no finding of law or fact that chiefs of staff cannot on a factual basis be held responsible under Article 7(3) theory of command responsibility. "This statement must be qualified by the recognition that the existence of such a position cannot be determined by reference to formal status alone. Instead, the factor that determines liability for this type of criminal responsibility is the actual possession, or non-possession, of powers of control over the actions of subordinates. Accordingly, formal designation as a commander should not be considered to be a necessary prerequisite for command responsibility to attach, as such responsibility may be imposed by a virtue of a person's *de facto*, as well as *de jure*, position as commander."¹⁸⁰
202. In summary, it can be said that the question of whether a chief of staff may be considered to be a superior for the purposes of Article 7(3) liability is a question not simply of formal status but one of possession of actual control over subordinates.
203. The Prosecutor does not contend that the Accused had any *de jure* command authority over the units used during the Operation by virtue of his position as chief of the Supreme Command Staff.¹⁸¹

I. The Deputy Commander Situation


204. A deputy commander is a person in the ordinary chain of command who replaces the commander when he is absent.

¹⁷⁹ *Čelebići* Trial Judgement, Case No. IT-96-21-T, 16 Nov. 1998, para. 378.

¹⁸⁰ *Id.* at para. 370.

¹⁸¹ *Id.* at para. 378.

205. The deputy commander is therefore liable to the extent of his or her authority when he replaces the actual commander factually or legally.
206. The determining factor for imposition of command responsibility over a person is whether or not a person acting as deputy commander in fact exercised actual "powers of control over the actions of subordinates" at the time of the relevant events.
207. The Prosecutor submits that as ABiH deputy commander, the Accused effectively temporally exercised actual powers of control under his *de facto* and *de jure* assigned command over subordinates who were responsible for the crimes committed in both Grabovica and Uzdol.
208. The Prosecutor does not contend that the Accused had any *de jure* command authority of the units used during the Operation by virtue of the position he held as ABiH deputy commander.¹⁸²



Vladimir Tochilovsky
Trial Attorney

Dated this 13th Day of October 2004
At The Hague
The Netherlands

¹⁸² *Čelebići* Trial Judgement, Case No. IT-96-21-T, 16 Nov. 1998, paras. 796, 800; *Kvočka* Trial Judgement, Case No IT-98-30-1, 2 November 2001, para. 344.