

IT-05-88-PT  
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12 July 2006

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**THE INTERNATIONAL CRIMINAL TRIBUNAL  
FOR FORMER YUGOSLAVIA**

**Case: IT-05-88-PT**

**IN TRIAL CHAMBER II**

**Before: Judge Carmel Agius, Presiding  
Judge Kimberley Prost  
Judge O-Gon Kwon**

**Registrar: Mr. Hans Holthius**

**Date: 12 July 2006**

**THE PROSECUTOR  
v.  
VUJADIN POPOVIĆ  
LJUBIŠA BEARA  
DRAGO NIKOLIĆ  
LJUBOMIR BOROVČANIN  
ZDRAVKO TOLIMIR  
RADIVOJE MILETIĆ  
MILAN GVERO  
VINKO PANDUREVIĆ**

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**PRE-TRIAL BRIEF OF THE DEFENCE OF VUJADIN POPOVIC**

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The Office of the Prosecutor:

Peter McCloskey

Counsel for the Accused:

Zoran Živanović and Julie Condon for Vujadin Popović  
John Ostojić and Christopher Meek for Ljubiša Beara  
Jelena Nikolić and Stephane Bourgon for Drago Nikolić  
Aleksandar Lazarević and Miodrag Stojanović for Ljubomir Borovčanin  
Natacha Fauveau Ivanović for Radivoje Miletić  
Dragan Krgović for Milan Gvero  
Peter Haynes and Đorđe Sarapa for Vinko Pandurević

**I. INTRODUCTION:**

1. On 28 April 2006 the Prosecution filed its Pre-Trial Brief.
2. On 6 July 2006, at the Status Conference, the Trial Chamber ordered all Defence teams to file their Pre-Trial Briefs not later than 12 July 2006.
3. Complying with this order the Defence of Vujadin Popovic filed its Pre-Trial Brief.

**II. RELEVANT LAW:**

4. The Rule 65-ter(F) provides:

(F) After the submission by the Prosecutor of the items mentioned in paragraph (E), the pre-trial Judge shall order the defence, within a time-limit set by the pre-trial Judge, and not later than three weeks before the Pre-Trial Conference, to file a pre-trial brief addressing the factual and legal issues, and including a written statement setting out:

(i) in general terms, the nature of the accused defence;

(ii) the matters with which the accused takes issue in the Prosecutor's pre-trial brief; and

(iii) in the case of each such matter, the reason why the accused takes issue with it.

**III. PROCEDURAL HISTORY:**

5. The Prosecution filed the Initial Indictment against Mr. Vujadin Popovic on 26. March 2002.
6. On 28 June 2005, the Prosecution filed Consolidated Amended Indictment.

7. On 28 April 2006, pursuant to the Order of Pre-Trial Judge, the Prosecution filed its Pre-Trial Brief.
8. On 31 May 2006, the Trial-Chamber ordered the Prosecution to file the Second Consolidated Amended Indictment. ("SCAI")
9. On 14 June 2006 the Prosecution filed SCAI.
10. Whence the some allegations from the SCAI, in respect of Mr. Vujadin Popovic were not included in the Prosecution Pre-Trial Brief, the Defence of Vujadin Popovic will set forth its position both in respect of the Pre-Trial Brief of the Prosecution and the Second Amended Indictment ("SCAI").

#### **IV. PRELIMINARY REMARKS:**

11. The Defence of Vujadin Popovic is substantially hindered in its ability to effectively respond due to the frequent changes of allegations in SCAI against the accused Vujadin Popovic. On the 10<sup>th</sup> July 2006 the Prosecution filed a Motion providing supporting materials concerning the proposed Amendments to the SCAI. These materials are substantial and contain witness statements not previously disclosed to the defence pursuant to Rule 65 ter. The Defence has had no opportunity to neither digest these materials nor obtain any instructions from Mr Popovic in relation to the material.
12. As a consequence of the Prosecution raising new allegations as against Mr Popovic and the provision of considerable material six weeks prior to the commencement of trial, Mr Popovic reserves the right to file further submissions, once having had the opportunity to analyse the material, obtain instructions from Mr Popovic and conduct any further investigations necessary for the proper preparation of Mr Popovic's Defence.

**V. CHARGES FROM SCAI:**

13. The SCAI charges Vujadin Popovic with eight counts: Genocide punishable under Article 4(3)(a) and 7(1) of the Statute, Conspiracy to Commit Genocide punishable under Article 4(3)(b) and 7(1) of the Statute, Extermination as the Crime against Humanity punishable under Article 5(b) and 7(1) of the Statute, Murder as A Crime against Humanity punishable under Article 5(a) and 7(1) of the Statute, Murder as A Violation of Laws and Customs of War punishable under Article 3 and 7(1) of the Statute, Persecutions on political, racial and religious grounds as A Crime Against Humanity including Murder, Cruel and Inhumane Treatment, Terrorising of Civilian Population, Destruction of Personal Property and Forcible Transfer punishable under Article 5(h) and 7(1) of the Statute, Inhuman Acts (Forcible Transfer) as A Crime Against Humanity punishable under Article 5(i) and 7(1) of the Statute and Deportation as A Crime Against Humanity punishable under Articles 5(d) and 7(1) of the Statute.
  
14. The SCAI submits that Mr. Vujadin Popovic was a member of JCE to murder the able-bodied Muslim men from Srebrenica and in destruction of women and children from Srebrenica and Zepa. Additionally, he is charged with Conspiracy and JCE to murder all able-bodied Muslim men from Srebrenica. The SCAI see the role of Mr. Vujadin Popovic in the assisting Ljubiša Beara in organizing, co-ordinating and facilitating the detention, transportation, summary execution and burial of the Muslim victims, and for supervising, facilitating and overseeing alongside Ljubiša Beara the executions at the sites described in paragraphs 30.2-30.12, 30.15, 31.2e, 31.3, 31.4, 32 and 34-37 of the Indictment
  
15. The SCAI further alleges that, by the acts from paragraphs 30 and 31, Mr. Vujadin Popovic committed the crimes of Extermination - A Crime Against Humanity punishable under Article 5(b) and 7(1) of the Statute, Murder - A Crime Against Humanity punishable under Article 5(a) and 7(1) of the Statute

and Murder A Violation of Laws and Customs of War, punishable under Article 3 and 7(1) of the Statute.

16. The SCAI further alleges that by the acts from paragraphs 27 to 31 and 50 -71 Mr. Vujadin Popovic committed the crime of Persecution on political, racial and religious ground including Murder, Inhumane Treatment, Terrorising the Civilian Population, Destruction of Personal Property and Forcible Transfer punishable under Articles 5(h) and 7(1) of the Statute.
17. Also, Mr. Vujadin Popovic is accused as a member of and knowingly participant in a JCE, the common purpose of which was to force the Muslim population out of Srebrenica and Zepa enclaves to the areas outside of control of the RS, from 8 March 1995 to the end of August 1995. The Prosecution see the role of Mr. Vujadin Popovic in the acts described in the paragraphs 30.2-30.12, 30.15, 31.2e, 31.3, 31.4, 32 and 34-37, 55, 59, 61 and 63 of the Indictment as Inhumane Acts (Forcible Transfer) - Crime against Humanity punishable under Article 5(i) and 7(1) of the Statute.
18. Finally, the same acts mentioned in previous paragraphs, including those described in the paragraph 71, the Prosecution sees as a Deportation - Crime against Humanity punishable under Article 5(d) and 7(1) of the Statute.
19. Unlike the previous Indictment, SCAI, in its Count 1, charges Vujadin Popović with new allegations from the paragraphs 30.2 to 30.5, 30.8 and 30.15. These acts consist of the assisting Ljubiša Beara in organizing, coordinating and facilitating the detention, transportation, summary execution and burial of the Muslim victims, and for supervising, facilitating and overseeing alongside Ljubiša Beara the executions at Jadar River<sup>1</sup>, Cerska Valley<sup>2</sup>, Nova Kasaba<sup>3</sup>, Kravica Warehouse<sup>4</sup>, Sandići Meadow<sup>5</sup>, Luke

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<sup>1</sup> Paragraph 30.2

<sup>2</sup> Paragraph 30.3.

<sup>3</sup> Paragraph 30.3.1

School<sup>6</sup>, Dam near Petkovci<sup>7</sup> and Ročević School.<sup>8</sup> Besides, it contains the new allegations in respect of the act of the accused at the other places: Orahovac<sup>9</sup>, The Petkovci School<sup>10</sup>, Kula School near Pilica<sup>11</sup>, Kozluk,<sup>12</sup> Branjevo Military Farm,<sup>13</sup> Pilica Cultural Centre,<sup>14</sup> Execution of injured Muslims from Milići Hospital,<sup>15</sup> supervising and co-ordinating detention of the prisoners in Vuk Karadžić school and various trucks and buses in Bratunac,<sup>16</sup> Kravica Market<sup>17</sup> and Petkovci School.<sup>18</sup>

20. The Pre-Trial Brief of the Prosecution did not particularise these acts (outlined in para 19 above) of Mr. Vujadin Popovic.

21. Despite the fact that SCAI is neither confirmed nor the leave is granted, for the sake of efficiency, this Pre-Trial Brief will be based on the assumption that it will be done.

22. However, if the new decision of the Trial Chamber or new amended indictment so require, the Defence reserve the right to make the suitable changes in its Pre-Trial Brief.

## VI. STATEMENT OF NATURE OF THE DEFENCE:

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<sup>4</sup> Paragraph 30.4  
<sup>5</sup> Paragraph 30.4.1  
<sup>6</sup> Paragraph 30.5  
<sup>7</sup> Paragraph 30.8  
<sup>8</sup> Paragraph 30.8.1  
<sup>9</sup> Paragraph 30.6  
<sup>10</sup> Paragraph 30.7  
<sup>11</sup> Paragraph 30.9.  
<sup>12</sup> Paragraph 30.10  
<sup>13</sup> Paragraph 30.11  
<sup>14</sup> Paragraph 30.12  
<sup>15</sup> Paragraph 30.15  
<sup>16</sup> Paragraph 31.2-e  
<sup>17</sup> Paragraph 31.3  
<sup>18</sup> Paragraph 31.4

23. So far, Mr. Vujadin Popovic pleaded not guilty of all the charges from the Indictment.
24. Mr. Vujadin Popovic denies that he committed, planned, instigated, ordered and otherwise aided and abetted in the planning, preparation and execution of the charged crimes including membership and participation in any JCE.
25. Mr. Vujadin Popovic also denies the truth and accuracy of all factual allegations including assessment of these allegations, made by the Prosecution in its Pre-Trial Brief and SCAI, except the admissions in next paragraph.

#### **VII. STATEMENT OF MATTERS NOT IN DISPUTE:**

26. The following matters are not in dispute:
  - a. Mr. Vujadin Popovic was born on March 1957 in Municipality Sekovici. The name of his father is Vicentije.
  - b. From July to November 1995 he was Lieutenant-Colonel and Assistant Commander of Security of the Drina Corps.
  - c. He reported to Commandant of the Drina Corps.
  - d. Prior the war approximately 73% of Muslims and 25% of Serbs lived in Srebrenica.
  - e. On 16 April 1993 Security Counsel of United Nations adopted the Resolution 819 and on 6 May 1993 the Resolution 824 declaring Srebrenica and Zepa as "safe areas".
  - f. VRS offensive on Srebrenica began in earnest of 6 July 1995.
  - g. VRS main Staff directed the operations of the subordinate Corps.
  - h. The Drina Corps, one of the six corps units making up the VRS, was formed in 1992, establishing its main headquarters at Vlasenica, 28.5 km northwest of Srebrenica.

27. Generally, the facts in the SCAI and the Prosecution Pre-Trial Brief are selectively singled out, resulting in incorrect presentation of the events. Some true facts are joined with the vague, untrue or ambiguity, resulting in incorrect assertions, so the Defence cannot but denies them.
28. For example: The Decision on Strategic Objectives of Serbian People in Bosnia and Herzegovina was passed by the Parliament of Republika Srpska on 12 May 1992, and signed by its President Mr. Momcilo Krajisnik<sup>19</sup>. It followed the decision of the Government of Bosnia and Herzegovina, passed on 3 March 1992 to proclaim the independence<sup>20</sup> of this federal unit from SFR Yugoslavia against the will of the Serbian people living in Bosnia and Herzegovina. However, the Prosecution presented the Decision of RS Parliament not mentioning the previously passed decision of the Government of Bosnia and Herzegovina. In this way the incorrect impression could be made that the Parliament of Republika Srpska without any reason passed the Decision to establish state borders separating the Serbian people from the other two ethnic groups.
29. The other illustration: The Prosecution submitted that the enclave “was never completely demilitarized”<sup>21</sup>. It makes another incorrect notion that the enclave was demilitarized but that demilitarization was not completely finished. However, the demilitarization of the Srebrenica enclave was not executed at all. On contrary, Bosnian Muslims successfully armed themselves precisely while the enclave was “safe area”.
30. Or, the submission that 28<sup>th</sup> division of ABiH, led by Naser Oric, regularly led raids on the outlined Bosnian Serb villages surrounding the enclave<sup>22</sup> is partially correct only. This submission fails to inform about three issues: first,

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<sup>19</sup> SCAI paragraph 12

<sup>20</sup> *Oric* Trial Judgment paragraph 81

<sup>21</sup> Prosecution PTB paragraph 9

<sup>22</sup> *Ibid*



that 28-th division was not only armed force in the Srebrenica enclave<sup>23</sup> prior the Serbian offensive. Precisely, 28<sup>th</sup> division was formed no sooner then in January 1995<sup>24</sup> and it led raids at the Serbian villages, but the other Muslim military and paramilitary forces attacked them too not only before the 28<sup>th</sup> was formed but after that too.<sup>25</sup> They did not attack the villages but civilian population in these villages plundering their property<sup>26</sup>. However, they did not take away the food from the villages but they robbed the Serbian peasants living in these villages. Thirdly, Naser Oric led 28<sup>th</sup> division just until the spring of 1995.<sup>27</sup> So, he was not only one who led the raids by this unit at the Serbian villages. Finally, it was not the raids but terrorist attacks illegally executed from the officially demilitarized territory under UN control. Therefore, in opinion of Mr. Vujadin Popovic, such presentation of the Muslim side is untrue and disfigured, so he cannot take issue with it.

31. The Defence may indicate at many similar examples, but it would be beyond the scope of this motion.

#### **VIII. MATTERS WITH WHICH VUJADIN POPOVIC TAKES ISSUE IN THE SCAI:**

32. The Defence of Mr. Vujadin Popovic challenges the true and accuracy of the factual allegations made in the SCAI including authenticity of any of the exhibits the Prosecution intends to offer.

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<sup>23</sup> *Oric* Trial Judgment paragraph 2 (TO Potocari, TO Srebrenica, Srebrenica Armed Forces, Joint Armed forces of the sub-region of Srebrenica and 8<sup>th</sup> Operative Group)

<sup>24</sup> *Oric* Trial Judgment paragraph 173

<sup>25</sup> *Ibid.* paragraph 2 (TO Potocari, TO Srebrenica, Srebrenica Armed Forces, Joint Armed forces of the sub-region of Srebrenica and 8<sup>th</sup> Operative Group)

<sup>26</sup> *Oric* Trial Judgment paragraph 112 reads: "almost everyone from Srebrenica participated in searches for food in nearby villages and hamlets under Bosnian Serb control. These searches were very dangerous; many stepped on mines or were wounded or killed by Serbs. Because of the bags in which the searchers carried the food, they were known as "torbari". These *torbari* also entered the Serbian villages, alongside Bosnian Muslim fighters during actions, in order to search for food and other items.

<sup>27</sup> *Oric* Trial Judgment paragraph 120

33. The Defence of Mr. Vujadin Popovic especially challenges the true and accuracy of the new factual allegations made in the SCAI including authenticity of any of the exhibits the Prosecution intends to offer.
34. The Defence of Mr. Vujadin Popovic contests the truth and accuracy of all factual allegations in the SCAI, except if the Defence expressly agreed with them, and rejects legal assessment of all factual allegations made by the Prosecution.
35. Mr. Vujadin Popovic denied that he committed, planned, instigated, ordered and otherwise aided and abetted in the planning, preparation and execution of any of charged crimes.
36. Mr. Vujadin Popovic especially denies that he assisted in organizing, coordinating and facilitating the detention, transportation, summary execution and burial of Muslim victims or supervised, facilitated or oversaw their execution.
37. Mr. Vujadin Popovic contests the existence of either JCE as alleged in the SCAI. In the event of a finding beyond reasonable doubt that either JCE is said to exist, Mr Popovic denies his membership or participation in either JCE. .

**IX. MATTERS WITH WHICH VUJADIN POPOVIC TAKES ISSUE PROSECUTION PRE-TRIAL BRIEF:**

38. The Defence of Mr. Vujadin Popovic challenges the true and accuracy of the factual allegations made in Prosecution Pre-Trial Brief including authenticity of any of the exhibits the Prosecution intends to offer.
39. The Defence of Mr. Vujadin Popovic contests the truth and accuracy of all factual allegations made by the Prosecution, except if the Defence expressly

agreed with them, and rejects legal assessment of all factual allegations made by the Prosecution.

40. Mr. Vujadin Popovic denies that he committed, planned, instigated, ordered and otherwise aided and abetted in the planning, preparation and execution of any of charged crimes.

41. Mr. Vujadin Popovic denies the existence of JCE alleged in the Prosecution Pre-Trial Brief, and if it existed, his membership or participation.

**Genocide:**

42. Mr. Vujadin Popovic asserts that he is not guilty of Genocide from the Article 4 and he contests all factual allegations and legal assessments of those factual allegations made by the Prosecution in this respect.

43. The Article 4 of the Statute provides:

Article 4  
Genocide

1. The International Tribunal shall have the power to prosecute persons committing genocide as defined in paragraph 2 of this article or of committing any of the other acts enumerated in paragraph 3 of this article.

2. Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) killing members of the group;
- (b) causing serious bodily or mental harm to members of the group;
- (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

- (d) imposing measures intended to prevent births within the group;
- (e) forcibly transferring children of the group to another group.

3. The following acts shall be punishable:

- (a) genocide;
- (b) conspiracy to commit genocide;
- (c) direct and public incitement to commit genocide;
- (d) attempt to commit genocide;
- (e) complicity in genocide.

44. The *actus reus* of Genocide has five alternatively given forms:

- (a) killing members of the group;
- (b) causing serious bodily or mental harm to members of the group;
- (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) imposing measures intended to prevent births within the group;
- (e) forcibly transferring children of the group to another group.

Each of these acts, solely committed, may result in the conviction for Genocide.

45. The *mens rea* requires *dolus specialis*. The one of above mentioned acts must be undertaken with intent to destroy, in whole or in part, a protected group as such.

46. The protected group is a national, racial, ethnic or religious group.

47. Mr. Vujadin Popovic denies that he undertook any of the acts from the Article 4(2)(a-e) of the Statute.

48. In addition he has never had the intent to destroy, in whole or in part, any national, ethnical, racial or religious group as such, including the Bosnian Muslims from Srebrenica and Zepa.
49. The intent to destroy in whole or in part a national, ethnical, racial or religious group as such is *condition sine qua non* for committing Genocide. Without this element just another crime might exist, but not Genocide.
50. This position was supported in jurisprudence. ‘Genocide is distinct from other crimes inasmuch as it embodies a special intent or *dolus specialis*. Special intent of a crime is the specific intention, required as a constitutive element of the crime, which demands that the perpetrator clearly seeks to produce the act charged. Thus, the special intent in the crime of genocide lies in "the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such".<sup>28</sup>
51. In the *Jelisić* the Trial Chamber found that it “must evaluate whether the intent of the accused was such that his acts must be characterized as genocide.”<sup>29</sup> Stated otherwise, “[t]he prohibited act must be committed against an individual because of his membership in a particular group and as an incremental step in the overall objective of destroying the group”<sup>30</sup>
52. In addition, for responsibility of the accused according to Article 7(1) it is necessary to prove that his acts substantially contributed to the crimes. So, in *Kamuhanda* Trial Judgment the Trial Chamber found: “Jurisprudence has established that for an accused to incur criminal responsibility, pursuant to Article 6(1), it must be shown that his or her participation has substantially

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<sup>28</sup> *Akayeshu*, Case No. ICTR-96-4-T paragraph 498

<sup>29</sup> Case No. ICTY-95-10 paragraph 65

<sup>30</sup> *Ibid.* paragraph 66

contributed to, or has had a substantial effect on, the completion of a crime under the Statute”<sup>31</sup>.

53. Besides, the person who aids or abets someone else in planning, preparation or execution of Genocide must have intent, to destroy in whole or in part a national, ethnical, racial or religious group as such. Jurisprudence on this issue supports this position. “Chamber is consequently of the opinion that when dealing with a person accused of having aided and abetted in the planning, preparation and execution of genocide, it must be proven that such a person did have the specific intent to commit genocide, namely that, he or she acted with the intent to destroy in whole or in part, a national, ethnical, racial or religious group, as such;”<sup>32</sup>

54. The Defence cannot accept the position of the Prosecution referring to the part of the *Krstic’s Appeal Judgment*<sup>33</sup> (KAJ). This part reads:

“By seeking to eliminate a part of the Bosnian Muslims, *the Bosnian Serbs (emphasis added)* committed genocide. *They (emphasis added)* targeted for extinction the forty thousands Bosnian Muslims living in Srebrenica, a group which was emblematic of the Bosnian Muslims in general. *They (emphasis added)* stripped all the male Muslim prisoners, military and civilian, elderly and young, of their personal belongings and identification, and deliberately and methodically killed them solely on the basis of their identity.”

55. The Article 4(1) of the Statute provides that the International Tribunal shall have the power to prosecute *persons (emphasis added)* committing genocide. It implies that just the persons can commit genocide. Contrary to this provision, the quoted part of judgment put the blame for genocide on Bosnian Serbs as a national group.

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<sup>31</sup> Case No. ICTR-95-54 A-T paragraph 590

<sup>32</sup> Case No. ICTR-96-4-T paragraph 485

<sup>33</sup> Paragraphs 36-37

56. Moreover, this part of KAJ explicitly says that *Bosnian Serbs (emphasis added)* committed genocide, repeating that *they (emphasis added)* targeted for extinction of the forty thousands Bosnian Muslims living in Srebrenica, and that Bosnian Serbs were those who stripped all the male Muslim prisoners, military and civilian, elderly and young, of their personal belongings and identification and deliberately and methodically killed them solely on the basis of their identity.
57. The Defence believes that this part of KAJ is just unskilfully phrased. But anyway the Defence of Vujadin Popovic, in spite of high respect for the Appeal Chamber and its Judgments, cannot take issue with these findings.
58. The Defence cannot accept the submission of the Prosecution that all forms of killings<sup>34</sup> are included in the terms of Genocide. The reference by the Prosecution to the *Akayeshu* Judgment is incorrect. The interpretation of the term of killing was made referring, *inter alia*, to the Criminal Code of Rwanda. However it is not suitable to the Bosnian war. The domestic law as the law of almost all countries permitted the killings of the enemy armed forces during the war. In the relevant period of time there was the heavy fighting between Bosnian Muslim and Bosnian Serb armed forces. The members of armed forces who fired at the enemy armed forces cannot be responsible for killings in terms of Genocide. Stated otherwise, the armed enemy unit is not protected during the armed operations under Genocide Convention. Therefore, the column of 28-th division trying to breakthrough the Serbian line by force of arm was not protected from the armed attack of Serbian forces and the victims in this fighting cannot be taken as the victims of genocide.

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<sup>34</sup> Prosecution PTB paragraph 355

59. The Defence asks the further clarification of the assertion of the Prosecution that killing includes the burial and reburial operation that followed the killings<sup>35</sup>. Precisely, the Prosecution should clarify if the word “includes” in the context means that the burial and reburial is the same criminal conduct as the killing. The Defence asserts that a burial is the normal consequence of death. It is always done and the reason for that is unnecessary to explain. So, while the killing is executed on the live person, a burial is performed on a dead one. A person who just burry a dead man cannot be convicted for killing but a person, who killed him, can. In addition, despite the fact that the reburial is not normal implication of death it cannot be same as the killings.

60. The Defence cannot accept also the definition of the serious mental harm submitted by the Prosecution. The definition in *Krstic Trial Judgment* and *Akayesu Judgement*<sup>36</sup> was not appealed. The Defence of Vujadin Popovic will challenge the findings in respect of serious mental harm, as the mental suffering given in *Krstic Trial Judgment*,<sup>37</sup> because the harm and sufferings are distinct mental states.

61. The killing of the members of the group because of their national, ethnic or religious, membership is not enough for Genocide conviction. The perpetrator must have intention to destroy a group or a part of the group as such.<sup>38</sup> In opinion of the Defence this element must be proved beyond reasonable doubt. In this light the Defence finds unclear the position given in *Niyitegaka* that proscribed acts were committed against the victims because of their membership in the protected group, but not solely, because of such membership. In opinion of the Defence, from the point of Genocide, the membership in a protected group is not relevant if the criminal act is not performed with the intent to destroy the group, in whole or in part, as such. So, the membership of protected group cannot have any advantage when the various intentions of the perpetrator are assessed. For Genocide it is only

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<sup>35</sup> Prosecution PTB 357

<sup>36</sup> *Akayeshu concedes that genocide occurred in Ruwanda. Akayeshu Trial Judgment paragraph 30*

<sup>37</sup> Paragraph 513

<sup>38</sup> *Stakic Appeal Judgment paragraph 56*



relevant to establish whether the prohibited act was perpetrated with intent to destroy a protected group, in whole or in part as such, or not.

62. The Defence accepts the submission of the Prosecution that the motive is not constitutive element of the Genocide. But, given the fact that the criminal responsibility is individual, the intent of each person must be established. Therefore, the motive of an individual is significant as the mean for establishing his intent.
63. The Defence finds necessary the clarification of the assertion about “the physical disappearance of the Bosnian Muslim population at Srebrenica”<sup>39</sup>. The physical disappearance of a group from some village is not equal to the destroying of the group. It is also necessary to clarify the terms “sociological leadership”.<sup>40</sup>

### **Conspiracy to Commit Genocide**

64. Mr. Vujadin Popovic asserts that he is not guilty of the Conspiracy to Commit Genocide from the Article 4(3)(b) of the Statute as alleged in the SCAI and he contests all factual allegations and legal assessments of those factual allegations made by the Prosecution in this regard.
65. The conspiracy in Genocide is charged as substantive crime according to the Article 4(3)(b) of the Statute. In the light of cumulative charges and jurisprudence of the ICTY and ICTR the Defence thinks that cumulative charging in this case is not permitted if the conspired crime was perpetrated. As the Conspiracy to Commit Genocide was not charged yet before this

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<sup>39</sup> PTB of the Prosecution paragraph 379

<sup>40</sup> PTB 380

Tribunal, the jurisprudence related to cumulative charges cannot be fully implemented in this case. It is due to the fact that these two crimes (Genocide and Conspiracy to Commit Genocide) protect the same values, while in the previous cases of cumulative charges, the different values were involved.

66. In opinion of the Defence, the referring to the Charter of International Military Tribunal<sup>41</sup> (“Charter”) is not adequate in this case. In the Charter the Conspiracy was implemented as the mode of liability, but not as the substantial crime. It provided the responsibility of the conspirators for all crimes committed in execution of such plan. In this case, the Conspiracy is substantial crime, explicitly provided by the Article 4(3)(b) of the Statute.

67. Finally, the Defence consider that the jurisprudence of ICTR in respect of Genocide and Conspiracy to Commit Genocide is valuable material for international criminal law. However, in opinion of the Defence this jurisprudence should be carefully implemented in the ICTY cases. This jurisprudence followed the tragic events in Rwanda, similar but concurrently and significantly different from the tragic events in former Yugoslavia. For example, the estimated total number of victims in the Ruanda varies from 500,000 to 1,000,000 or more.<sup>42</sup> Therefore, the jurisprudence of ICTR concerning Genocide and Conspiracy to Commit Genocide was built on these facts and should be carefully implemented at the other countries.

#### **Crimes Against humanity:**

68. Mr. Vujadin Popovic asserts that he is not guilty of crimes against humanity as alleged in the Indictment pursuant to Article 5 and he contests all factual allegations and legal assessments of those factual allegations made by the Prosecution in this regard.

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<sup>41</sup> Paragraph 391

<sup>42</sup> Akayeshu Trial Judgment paragraph 111

69. The Defence of Vujadin Popovic accepts the legal elements of the Crimes against Humanity common to all charges under Article 5 of the Statute given in the PTB of the Prosecution. However, the Defence denies any attack directed at the civil population. The attack of the VRS was directed against the 28<sup>th</sup> division and the other Bosnian Muslim armed forces, illegally concentrated in the Srebrenica enclave, but not against the civil population. Anyway Mr. Vujadin Popovic denies its participation in any such attack.

**Extermination:**

70. Mr. Vujadin Popovic asserts that he is not guilty of Extermination from the Article 5(b) of the Statute, as alleged in the Count 3 of SCAI and he contests all factual allegations and legal assessments of those factual allegations made by the Prosecution in this regard. Mr. Vujadin Popovic contests his responsibility for the acts alleged in paragraphs 30 and 31.

71. One of the elements of Extermination is the participation of the accused or his subordinates in the killing of the person on the massive scale.

**Murder:**

72. Mr. Vujadin Popovic does not take issue with the submissions contained in the Prosecution Pre-Trial Brief in relation to the legal definition of Murder as a crime against humanity from the Article 5(a) of the Statute. Mr. Popovic asserts that he is not guilty of murder as alleged in the SCAI and he contests all factual allegations and legal assessments of those factual allegations made by the Prosecution in this regard.

73. Mr. Vujadin Popovic considers that the Prosecution must prove beyond reasonable doubt his acts or omission that substantially contributed to the death of one or more persons. He also, did not possess the intent to kill or inflict the serious bodily harm to anyone.

**Deportation:**

74. Mr. Vujadin Popovic is charged with Deportation under Article 5(d) of the Statute and he contests all factual allegations and legal assessments of those factual allegations made by the Prosecution in this regard.
75. Mr. Vujadin Popovic did not take any act directed to deportation of the population outside the state borders of Bosnia and Herzegovina.
76. From the Prosecution Pre-Trial Brief it is not clear whether the transfer of the civil population from the enclaves to the territory held by Bosnian Muslims is considered as Deportation, Forcible transfer or both.
77. Mr. Vujadin Popovic also denies unlawful or forcible character of the movement of the civil population from Srebrenica and Zepa enclaves to the territory under control of Bosnian Muslims or FRY.

**Persecution:**

78. Mr. Vujadin Popovic is charged with Persecutions under Article 5(h) of the Statute and he contests all factual allegations and legal assessments of those factual allegations made by the Prosecution in this regard.

**Other Inhumane acts (Forcible Transfer):**

79. Mr. Vujadin Popovic is charged with Other Inhumane Acts (Forcible Transfer) under Article 5(i) of the Statute and he contests all factual allegations and legal assessments of those factual allegations made by the Prosecution in this regard.

80. There is a lack of all three elements mentioned in the Prosecution Pre-Trial Brief on the side of Mr. Vujadin Popovic. Vujadin Popovic denies the use of force or other coercive measures by him resulting in forcible transfer of the Bosnian Muslim population.

**Violation of Laws and Customs of War:**

81. Mr. Vujadin Popovic is also charged with Murder as Violations of Laws and Customs of War from the Article 3 of the Statute and he contests all factual allegations and legal assessments of those factual allegations made by the Prosecution in this regard..

**Mode of individual criminal responsibility:**

82. Mr. Vujadin Popovic is charged with all five forms of direct responsibility, provided by the Article 7(1) of the Statute.

83. Mr. Vujadin Popovic is charged with “committing”, pursuant to Article 7(1) of the Statute. Mr. Vujadin Popovic denies his commission of any of the acts from the SCAI.

84. By “committing” SCAI refers also to his membership and participation in JCE. Mr. Vujadin Popovic contests the existence of either JCE. However, in the event of a finding beyond reasonable doubt as to the existence of either JCE, Mr Popovic denies his membership in it.

85. Mr. Vujadin Popovic submits that the extended (third) category of JSE did not exist in international and customary law at the relevant time.

86. Mr. Vujadin Popovic is charged with “planning” pursuant to Article 7(1) of the Statute. Mr. Popovic asserts that he is not guilty of “planning” and he

contests all factual allegations and legal assessments of those factual allegations made by the Prosecution in this regard.

87. Mr. Vujadin Popovic is charged with “instigating” pursuant to Article 7(1). Mr. Vujadin Popovic asserts that he is not guilty of instigating as alleged in the Indictment pursuant to Article 7(1) and he contests all factual allegations and legal assessments of those factual allegations made by the Prosecution in this regard.

88. Mr. Vujadin Popovic is charged with “ordering” pursuant to Article 7(1). Mr. Vujadin Popovic asserts that he is not guilty of ordering as alleged in the Indictment pursuant to Article 7(1) and he contests all factual allegations and legal assessments of those factual allegations made by the Prosecution in this regard.

89. Mr. Vujadin Popovic is charged with “aiding” and “abetting” pursuant to Article 7(1). Mr. Popovic asserts that he is not guilty of aiding and abetting as alleged in the Indictment pursuant to Article 7(1) and he contests all factual allegations and legal assessments of those factual allegations made by the Prosecution in this regard.

90. Mr. Vujadin Popovic has pleaded not guilty and asserts that he is not guilty as alleged in SCAI, and he puts the Prosecution to proof of its case.

Respectfully submitted,

Zoran Zivanovic,

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Co-Counsel of Vujadin Popovic

