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12 July 2006

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

Case No. IT-05-88-PT

IN TRIAL CHAMBER II

Before: Judge Carmel A. Agius, Presiding
Judge O-Gon Kwon
Judge Kimberly Prost

Registrar: Mr. Hans Holthuis

Date filed: 12 July 2006

**THE PROSECUTOR
v.
ZDRAVKO TOLIMIR
RADIOVOJE MILETIĆ
MILAN GVERO
VINKO PANDUREVIĆ
LJUBIĆA BEARA
VUJADIN POPOVIĆ
DRAGO NIKOLIĆ
LJUBOMIR BOROVCANIN**

**PRE-TRIAL BRIEF ON BEHALF OF DRAGO NIKOLIĆ
PURSUANT TO RULE 65 *ter* (F)**

The Office of the Prosecutor

Mr. Peter Mc Closkey

Counsel for the Accused

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

Case No IT-05-88-PT

12 July 2006

Further to the *Prosecution's Filing of Pre-Trial Brief pursuant to Rule 65ter and List of Exhibits pursuant to Rule 65ter (E) (v)* on 28 April 2006 (the "Prosecution PTBrief"), Counsel for Drago Nikolić (the "Defence" or the "Accused") hereby file this *Pre-Trial Brief on behalf of Drago Nikolić* (the "Nikolić PTBrief") pursuant to Rule 65ter (F).

INTRODUCTION

1. Pursuant to Rule 65ter (F), the Defence is to file a Pre-trial brief addressing the factual and legal issues, including a written statement setting out:
 - a. In general terms, the nature of the defence of the Accused;
 - b. The matters with which the Accused takes issue in the Prosecution Brief; and
 - c. In the case of each such matter, the reason why the accused takes issue with it.
2. This Nikolić PTBrief sets out in general terms the defence of the Accused and provides his point of view regarding (1) certain assertions and submissions in the Prosecution's PTBrief; and (2) various allegations contained in the Second Amended Indictment (the "Indictment").
3. As for the Prosecution's PTBrief, this Nikolić PTBrief does not address the issue of admissions *nor* that of statement of facts not in dispute.

THE PARTICULAR CONTEXT OF THIS CASE

4. The events which took place in the Srebrenica area in 1995 have been the subject of world wide media reports. These events have also been addressed in at least two previous trials before the International Criminal Tribunal for the former Yugoslavia (the "International Tribunal" or the "ICTY"), namely *The Prosecutor v. Krstić* Case No. IT-98-33-A and *The Prosecutor v. Blagojević and Jokić* Case No. IT-02-60-T.
5. The Prosecution has gone as far as labelling these events as '*the largest killing operation in Europe since World War II*' which begs the question whether in these circumstances it will be possible to afford the Accused a fair trial.

6. Even if it cannot be denied that many persons died during these events, the seven co-accused in this case must not become the scapegoat of the international community's wish to make 'an example' of 'Srebrenica'.
7. Drago Nikolić, the Accused, must be tried and his alleged individual criminal responsibility assessed on the basis of his own personal acts and conduct during this period, including the fact that he was low ranking military officer, *not* on the basis of an alleged national strategic objective, policy or plan, *nor* on the alleged scope of the violations committed or the number of victims.
8. On the one hand, it is obvious from the Prosecution's PTBrief that 'sensationalism' will be one of its preferred trial tactics. Attempts to raise the profile of each single event will constantly be on the menu. The Defence takes this opportunity to reiterate the importance for this trial to focus on the personal acts and conduct of Accused, leaving aside any attempt by the Prosecution to have recourse to sensationalism - including the horrible manner in which certain killings may have been committed - to establish a link between the Accused and the alleged violations committed against the victims.
9. It stems from the pleadings of the Prosecution that its case will be presented in accordance with the SALT principle (same as last trial) with the aim of convincing the Trial Chamber that the guilt of the Accused has already been established in the previous Srebrenica trials. Not only does the Prosecution's approach violate the presumption of innocence enshrined in the Statute of the International Tribunal (the "Statute"), it is misleading in that the alleged responsibility of the Accused was neither addressed nor assessed in the previous Srebrenica trials.
10. It also appears evident that the Prosecution intends to proceed with the presentation of its case in exactly the same manner as it did for the previous Srebrenica trials. Needless to say, the Prosecution is free to present its case as it wants, subject of course to the control of the Trial Chamber. However, the Defence intends to challenge the procedure used by the Prosecution to present portions of its case and respectfully invites the Trial Chamber to assess the Prosecution's *modus operandi de novo*, and *not* on the basis of whether the Prosecution was

authorized to proceed in a certain way in previous trials. This applies specifically to expert testimony and the leading of evidence *via* Prosecution investigators or other staff members.

11. In this regard, it must be noted yet again that the Prosecution has been investigating the 'Srebrenica events' for more than ten years and that it is not possible for the Defence to even come close to matching the level of factual knowledge of the Prosecution. Consequently, as previously mentioned, the commencement of this trial at this time may have repercussions on the conduct of the proceedings as the Defence will have to continue its investigation and preparation of the case for the Defence throughout the presentation of the Prosecution's case.
12. Finally, the number of co-accused in this case is another important factor which contributes to the particular context of this trial. Even though most of the charges have been laid against all of the co-accused, the role and functions of each co-accused at the relevant times were very different and the defence put forward by each is likely to also be different. Consequently, one of the difficulties likely to be encountered will be the assessment and weighing of the same evidence against various accused.
13. For this reason, it will be very important for each co-accused to have the opportunity to effectively cross-examine all of the witnesses called by the Prosecution or by one of the co-accused.
14. The Defence respectfully submits that all of the above considerations contribute *inter alia* in making this trial unique and that it will be of the utmost importance to keep them in mind throughout the proceedings.

NATURE OF THE DEFENCE OF THE ACCUSED

15. The Accused pleaded "not guilty" to all charges laid against him in the Indictment, a plea he has maintained throughout the pre-trial proceedings.
16. The Indictment comprises the following eight counts: Conspiracy to commit genocide (Count 2), Genocide (Count 1), Extermination as a crime against humanity (Count 3), Murder as a crime against humanity (Count 4), Murder as a violation of the laws or customs of war (Count

5), Persecution as a crime against humanity (Count 6), Forcible transfer as a crime against humanity (Count 7) and Deportation as a crime against humanity (Count 8).

17. The Accused is charged with all eight counts.
18. The alleged individually criminal responsibility of the Accused rests on: (1) the Prosecution's contention that he planned, instigated, ordered, committed or otherwise aided and abetted the crimes in Counts one to eight; as well as (2) the Prosecution's Joint Criminal Enterprise theory composed of two such enterprises, namely (a) the operation to forcibly transfer or deport the Muslim populations of Srebrenica and Žepa; and (b) the operation to murder the able-bodied Muslim men of Srebrenica.
19. Although the Accused was a member of the Zvornik Brigade and that he was present in the general Zvornik area when these crimes were allegedly committed, the Accused asserts that there is no basis for charging him with Counts 1, 2, 5, 6, 7 and 8.
20. The Accused did not conspire to commit genocide *nor* did he have anything to do with any such conspiracy.
21. The Accused did not commit the alleged genocide *nor* did he possess the required *mens rea* to commit the alleged genocide.
22. The Accused did not commit the alleged crime of persecution *nor* did he possess the required discriminatory intent to commit the alleged crime of persecution.
23. The Accused did not commit *nor* participate in the alleged crime of forcible transfer.
24. The Accused did not commit *nor* participate in the alleged crime of deportation.
25. As for the alleged crimes of extermination and murder, even though the Accused may have been present in the general Zvornik area at the time these crimes would have been committed, the allegations in the Indictment and the submissions in the Prosecution's PTBrief will be shown to be false as they do not correspond to the reality of the situation of the Accused during this period.

26. Consequently, the Accused respectively submits that he does not incur individual criminal responsibility for any of the charges laid against him.

THE ACCUSED TAKES ISSUE WITH THE FOLLOWING MATTERS OF FORM

27. Pursuant to Rule 65ter (E), the Prosecution PTBrief should be filed after disposition of Rule 72 motions. In this case, the Prosecution PTBrief was filed out of sequence, even before the filing of the Second Amended Indictment. As a preliminary matter it must be said that for this reason, many submissions in the Prosecution PTBrief do not match the Indictment.

28. More importantly, the Defence respectfully submits, as highlighted below, that the Prosecution PTBrief does not fulfil the requirements of Rule 65ter (E).

29. Description of intended evidence. Firstly, the Prosecution PTBrief does not provide as required by Rule 65ter (F), a description of the evidence which the Prosecution intends to lead at trial. The Prosecution sure tells a nice and sensational story which corresponds to the Indictment but the narrative is very often silent as to what evidence it intends to adduce at trial in support of the same.

30. Furthermore, where footnotes are provided, the Defence has encountered significant difficulties in trying to identify the evidence referred to and linking it with the information (1) provided by a witness who will be called by the Prosecution in this case; or (2) contained in one of the proposed exhibits in this case.

31. More specifically, the Defence refers to the following defects and difficulties encountered:

- a. In a number of footnotes (FN) references to witnesses are not accompanied by their 'Number' on the Prosecution List of Witnesses;
- b. In many FN references to exhibits are not accompanied by the corresponding number on the Prosecution List of Proposed Exhibits;
- c. In FN 1, The Prosecution states that he relies on the adjudicated facts from the *Krstić* Judgement to prove the background facts relating to Srebrenica. Considering that the Trial Chamber has yet to adjudicate on the Prosecution motion requesting it to take judicial

notice of adjudicated facts in other cases, the Prosecution's approach confuses the all exercise;

- d. In a number of FN references are made to protect witnesses who testify in the *Krstić* and the *Blagojević and Jokić* trials without mentioning their corresponding number on the Prosecution List of Witnesses in this case. Some of these Witnesses could not be identified;
- e. In some FN, references are made to Witnesses using pseudonyms which do not correspond to pseudonyms used in the *Krstić* and the *Blagojević and Jokić* trials, this case or in the Prosecution motion for protection measures.
- f. FN 478 refers to a witness Čedo Jović who does not appear to have testified in any previous case and who is not in the Prosecution List of Witnesses.
- g. FN 217 and 226 refer to a Witness Ademović who does not appear to have testified in any previous case and who is not in the Prosecution List of Witnesses.
- h. In more than FN, references are made to intercepts which are not accompanied by ERN numbers and which could not be located in the Prosecution List of Proposed Exhibits. One such example FN 487.
- i. Some FN refer to video exhibits for which no ERN are provided or for which the ERN provided does not allow to locate it on the Prosecution List of Proposed Exhibits.
- j. Some FN refer to a Duty Officer's notebook which could not be located using the ERN provided. Moreover no dates or page number are given.
- k. Many FN refer to Judgements in support of both factual and legal assertions, without providing a paragraph number or a transcript page number.
- l. In many FN the ERN provided did not allow to locate the exhibit on Prosecution List of Proposed Exhibits.
- m. In some FN references are made to exhibits admitted in the *Krstić* trial using the exhibit number in that case for which there is no corresponding number in Prosecution List of Proposed Exhibits in this case; and
- n. References in one FN are made to witness Simić who does not appear in the Prosecution List of Witnesses.

32. In light of the above observations, the Defence takes the view with all due respect that it will be very difficult for the Trial Chamber to make the best use of the Prosecution PTBrief. Prosecution List of Witnesses

33. Even though the Prosecution has been ordered to file a Proofing Chart which could have assisted the Trial Chamber in overcoming the defects of the Prosecution PTBrief, the document filed by the Prosecution-which only address part of its case further to the authorization of the Trial Chamber-is of no help in this regard. This will be addressed by the Defence in more details during the Pre Trial Conference.
34. Accordingly, the Defence invites the Trial Chamber to order the Prosecution to provide an updated Prosecution PTBrief making specific references to evidence, witnesses and exhibits, which it intends to present in this case.
35. List of Witnesses. Regarding the Prosecution list of witnesses, it must be noted that it has already become obsolete, considering that a revised list has been provided to the Defence as an annex to the Prosecution Rule 92bis Motion¹. Bearing in mind the problems already encountered with this revised list, it can be expected that a further list will have to be provided by the Prosecution.
36. The Defence takes this opportunity, yet again, to underscore that it requires a definitive list with a view to being trial ready without delay. Consequently, the Defence submits that no further substantive change should be brought to the revised list of witnesses without the Prosecution first seeking leave to do so by motion, justifying the requested change.
37. Witness summaries. As for the summaries of the proposed testimony of witnesses, the Defence asserts that in many instances, these summaries do not represent the content of the material disclosed whether in the form of statements or past testimony.
38. For this reason, the Defence takes this opportunity to underscore the potential pitfalls associated with the use of these summaries for any purpose other than providing a general description of what can be expected from a witness with a view to facilitating the work of the Trial Chamber.
39. In this regard, the Defence wishes to draw the attention of the Trial Chamber to the fact that in many instances it is likely that the *viva voce* testimony of witnesses will not correspond to

¹ "Prosecution's Motion for Admission of Written Evidence *in lieu* of *viva voce* Testimony pursuant to Rule 92bis and Attached Annexes A-D", 12 May 2006, Annex D.

the contents of the summaries provided by the Prosecution. The Defence respectfully submits that this may potentially become a critical consideration as it proceeds to assessing the credibility of witnesses during their testimony.

40. List of Exhibits. Concerning the list of proposed exhibits provided in the Prosecution PTBrief, even though there remains many exhibits which have yet to be translated, the Defence is satisfied that this list meets the requirements of Rule 65ter (E). Nonetheless, the Defence stresses the fact that a definite list of proposed exhibits is an absolute must and that no changes should be brought to this list without the Prosecution seeking and obtaining leave to do so, justifying the changes requested.

41. It must also be said at this time that it appears from a review of the proposed exhibits that many do not have the necessary probative value. This applies specifically to intercepts. Unless the Prosecution's Proofing Chart allows establishing the necessary link between the exhibits and the allegations in the Indictment, the Defence will object to their admissibility.

THE ACCUSED TAKES ISSUE WITH THE FOLLOWING FACTUAL MATTERS

42. Considering the number of co-accused in this case as well their personal interest in taking issue with factual matters in the Prosecution PTBrief, and for reasons of judicial economy, the Accused herewith takes issue only with the facts directly to his alleged individual criminal responsibility.

43. No agreement or admission of any kind should be read or understood from the fact that the Accused did not take issue with one or more factual matters in the Prosecution PTBrief.

44. The Accused takes issue with the following 'general' factual matters:

- a. The Accused takes issue with the Prosecution statement at para. 3 that he *was amongst the most powerful individuals responsible for these crimes*. Contrary to the Prosecution's assertions and as the evidence will show, the Accused in his capacity as Security Officer within the Zvornik Brigade was not a major player in the events which unfolded and certainly did not yield the type of 'power' referred to by the Prosecution.

- b. Section II – A. Background to the Conflict and B. Attack on Srebrenica Enclave (paras. 5 – 27): The Accused takes issue with the Prosecution's interpretation of and meaning given to certain events which took place including *inter alia* the adoption of strategic objectives and the issuing of operational directives. The Accused also challenges the Prosecution's interpretation at para. 13 of the purpose of the order to reduce the enclave to its urban area;
- c. The Accused takes issue with the Prosecution's use of the contents of the Secretary General's Report as evidence. The Secretary General's Report is not a judicial document. It is the aim of *this trial* to determine what happened and where at the relevant time;
- d. For similar reasons, the Accused takes issue with the use of the Krstić trial judgement as evidence of the background facts relating to the Srebrenica events. As demonstrated by the Defence response to the Prosecution Motion seeking the Trial Chamber to take judicial notice of adjudicated facts in previous cases², it simply cannot be taken for granted that a fact adjudicated in the Krstić trial will be adjudicated in the same way and attributed the same weight in these proceedings;
- e. The Accused takes issue with the Prosecution's classification of the events in this case under two main joint criminal enterprises, namely (1) the forcible transfer of the Muslim population from the Srebrenica and Žepa enclaves; and (2) the killing of some 7000 able bodied men and boys from Srebrenica (para. 27). The Defence maintains that the Prosecution's classification does not correspond to the reality of the situation as it unfolded and as it will be revealed by the evidence at trial. To use but one example, while the Trial Chamber in the Blagojević case held that the 'reburial operation' was not a natural and foreseeable consequence of the 'execution' joint criminal enterprise³, the Prosecution persists with its allegation to the contrary;

² "Defence Response on Behalf of Drago Nikolić to Prosecution Motion for Judicial Notice of Adjudicated Facts", 22 June 2006, para. 13 (d).

³ *Prosecutor v. Vidoje Blagojević and Dragan Jokić*, Case No. IT-02-60 T, Judgement, 17 January 2005, para. 730.

- f. In particular, the Accused takes issue with the Prosecution's description of the killings and so-called opportunistic killings in the Bratunac and Zvornik areas as being part of the same 'operation';
- g. Section II E (paras.33 – 35): The Accused takes issue with the Prosecution's overview of the Zvornik Brigade. More specifically, the Accused challenges the command and control relationships within the Brigade as described by the Prosecution;
- h. Section II F (paras. 36 – 41): The Accused takes issue with the Prosecution's theory of the existing relationship between the command and the 'security' structure within the Drina Corps and each of its brigades. The Accused challenges in particular the Prosecution's theory at para.36 that "(...) *officers of the Security Organ oversaw the transfer, detention, execution, burial and reburial of the Muslim prisoners*";
- i. Section III A (paras. 47 – 142): The Accused takes issue with the Prosecution's description of the 'operation to murder'. More specifically, the Accused challenges the *modus operandi* of the executions as depicted by the Prosecution as well as the scope and dimensions of the unlawful killings which took place. Moreover, the Prosecution's sensationalist approach and often unsupported 'story line' is not warranted and of no assistance to the Trial Chamber;
- j. Examples of unsupported sensationalist descriptions include *inter alia* the alleged execution of two muslim prisoners removed by the Zvornik military police from the Grbavci elementary school (compare paras. 69 and 332) as well as the overly broad Prosecution approach in describing the so-called opportunistic killings (paras. 117 – 130); and
- k. Section III B (paras. 143 – 189): The Accused takes issue with the Prosecution's pleading that the 'operation' to forcibly transfer the Muslim population from Srebrenica and the 'operation' to forcibly transfer or deport the Muslim population from Žepa are part of the same joint criminal enterprise. As a matter of fact, the Accused contends on the basis of the information disclosed to this day by the Prosecution that the situation in Žepa does not even amount to a joint criminal enterprise.

45. The Accused further takes issue *inter alia* with the following factual submissions found in Section IV (G) of the ĉ which addresses the alleged liability of the Accused Drago Nikolić:

- a. Para 326: The Accused takes issue with the Prosecution submission that he reported directly to the Commander of the Zvornik Brigade;
- b. Para 327: The Accused takes issue with the allegations found in this para. More specifically the Accused challenges the Prosecution submissions that he (1) exercised his power and authority to ensure that prisoners within his control were efficiently detained, transported and executed; (2) was responsible, at the Brigade level, for logistic and security issues relating to the detention and murder of prisoners; and (3) worked – like his colleague Vujadin Popović – to cover up the crimes through the reburial of the victims;
- c. Para 329: The Accused takes issue with the Prosecution submission that he was relieved from the Zvornik Brigade Forward Command Post on 13 July 1995 in order to secure his participation in the murder ‘operation’;
- d. Para 330: The Accused takes issue with the allegations found in this para. More specifically the Accused challenges the Prosecution submissions that he (1) informed Obrenović of the incoming prisoners and the fact that they would be killed; and (2) he planned and organized the detention of Muslim prisoners at the school in Orahovać;
- e. Para 332: The Accused takes issue with the Prosecution submission that he was the officer in charge of the ‘operation’ in Orahovać and that he was giving orders and directions to the Brigade MP commander and others;
- f. Para 334: The Accused takes issue with the Prosecution submission that he “*accompanied these convoys to the killing site on several trips, and that he was present at the killing site*”;
- g. Paras. 335 – 336: The Accused takes issue with the Prosecution allegations that he was in some way involved in the killings which took place in Petkovci and Ročević;

- h. Para 337: The Accused takes issue *inter alia* with the Prosecution submission that he managed the murder operation in co-ordination and cooperation with the regular command structures;
- i. Para 340: The Accused takes issue with the Prosecution submission that he 'managed' the Brigade's Military Police Company;
- j. Para 304 [which refers specifically to Beara- Section IV (E)]: The Accused takes issue with the Prosecution submission that Beara, in playing a prominent role in all phases of the killing 'operation' would have, at each stage, "*worked in coordination with the Zvornik and Bratunac Brigade Commanders, the security organs of the Drina Corps and the MUP*"; and
- k. Para 311 [which refers specifically to Popović-Section IV (F)]: The Accused takes issue with the Prosecution submission that he was in control along with Popović of the guarding, killing and burial of the prisoners in Orahovac.

46. With regard to all of the above issues challenged by the Accused, Drago Nikolić respectfully submits that the evidence adduced at trial, by the Prosecution and Defence alike, will demonstrate their lack of foundation.

THE ACCUSED TAKES ISSUE WITH THE FOLLOWING LEGAL MATTERS

47. Jus ad bellum v. jus in bello: It appears from the Prosecution PTBrief that the Prosecution is willingly confusing the *jus in bello* aspects of this case with its *jus ad bellum* features. The Defence takes issue with this approach. Even though the VRS attack on the Srebrenica and Žepa enclaves may be considered to be in breach of the related Security Council Resolutions and thus in violation of the applicable *jus ad bellum*, such attack does not imply a violation of the applicable *jus in bello*. Accordingly, such attack cannot in itself be the basis of a joint criminal enterprise.
48. Character of the armed conflict: At para. 85 of the Indictment, the Prosecution pleads that at all times relevant to the Indictment, a state of armed conflict existed in the Republic of Bosnia

and Herzegovina. The Prosecution did not specify whether such armed conflict was international or non-international in character.

49. Considering that seven of the Counts in the Indictment have been laid pursuant to Article 5 of the Statute - crimes against humanity - and that Count 5 was laid pursuant to Article 3 of the Statute, the Defence acknowledges that the Trial may proceed on the basis of this pleading.
50. However, considering that the law which applies specifically to international armed conflicts does not apply to non international armed conflicts, the Defence takes this opportunity to underscore that the body of international humanitarian law which applies to this case is limited to that which applies in the context of non-international armed conflicts. Consequently, the Defence will object to any reference made by the Prosecution to provisions drawn from the body of International Humanitarian Law which applies specifically to International Armed Conflicts. To give but one example, a 'prisoner of war' along with the protection regime which applies to such person pursuant to Geneva Convention III does not exist in the body of Humanitarian Law which applies to Non-International Armed Conflicts.
51. Genocide (Para. 351): The Accused takes issue with the Appeals Chamber finding in the Krstić case that the Srebrenica events amount to genocide. The Accused does not dispute the law applicable to genocide as held by the Appeals Chamber. Rather, the Accused disputes the application of the law to the facts of this case.
52. JCE Category III and Genocide (para. 369): The Accused takes issue with the holding of the Appeals Chamber in the Brdjanin case⁴ that the third category of joint criminal enterprise (the natural and foreseeable consequences category) and the crime of genocide are compatible.
53. Joint Criminal Enterprise (paras. 447 – 453): The Accused also takes issue with the Prosecution submissions in relation to the JCE mode of individual criminal responsibility. The Prosecution persists in stretching this mode of criminal responsibility beyond the holdings of the Appeals Chamber in the Tadić case, recently confirmed by the Appeals Chamber decision in the Stakić appeal proceedings.

⁴ *Prosecutor v Radoslav Brdjanin, Case No. IT-99-36-A, Interlocutory Appeal, 19 March 2004, paras 9-10.*

54. Furthermore, despite the fact that the Defence request for certification of the Trial Chamber's decision on the Rule 72 motions has been denied⁵, the Defence respectfully submits that JCE category III liability requires that the perpetrators of crimes which were a natural and foreseeable consequence of the common plan, be participants to the JCE.
55. As for the forms of participation included in Article 7(1) of the Statute, the Accused takes issue with the following submissions in the Prosecution PTBrief:
- a. Aiding and abetting: The Accused recognises that there is no requirement that the accused shared the *mens rea* of the perpetrator. However, even though it is sufficient for the Accused to have knowledge that his actions will assist the perpetrators in the commission of a crime, the Defence takes this opportunity to underscore the need for a restrictive approach in assessing to notion of 'a crime'. This notion does not mean 'any crime'; it must be related to the context with a view to avoiding the imposition of strict liability;
 - b. Dolus eventualis (para 434): The Accused takes issue with the Prosecution's take on the notion of *dolus eventualis* which appears contrary to the jurisprudence of the International Tribunal; and more importantly,
 - c. Lack of precision: The Defence takes issue with the Prosecution's pleading of *all modes* of liability included in Article 7(1) of the Statute to charge the Accused (para. 430). Even though the Trial Chamber's discretion is not limited by the modes of liability pleaded by the Prosecution, the shot gun approach and the Prosecution's inability to state its case with any degree of precision can only result in longer proceedings, which will not be of assistance to the Trial Chamber.
56. Deportation (paras. 412 – 415): The Accused takes issue with the Prosecution's submissions regarding the law applicable the crime of deportation. The Defence respectfully submits that the crime of deportation requires the intent on the part the perpetrator to move the victims

⁵ "Decision on Motions Challenging the Indictment pursuant to Rule 72 of the Rules", 31 May 2006; "Defence Motion on behalf of Drago Nikolić Seeking Certification of the Trial Chamber Decision on Motions Challenging the Indictment pursuant to Rule 72 of Rules", 6 June 2006; "Decision on Request to Certification to Appeal Decision on Motion Challenging the Indictment pursuant to Rule 72 of the Rules", 26 June 2006.

across a national border. Accordingly, the Accused takes the view, in light of the information disclosed by the Prosecution, that there was no basis for the laying of deportation charges.

57. OTP Witnesses: Lastly, concerning the trial proceedings *per se*, the Accused takes issue with the fact that the Prosecution will be calling investigators and other staff members from the Office of the Prosecutor to testify in this case.
58. The Prosecution's practice to call OTP staff members as witnesses was challenged in previous trials and the Defence intends to challenge it again in this trial on the basis of the nature of the evidence which can be offered by such witnesses without compromising the right of the Accused to a fair trial.

RELIEF SOUGHT

59. In light of the arguments, submissions and information found herein, the Defence respectfully requests the Trial Chamber to:
- a. NOTE of the nature of the defence of the Accused;
 - b. CONSIDER of the factual matters, legal matters and matters of form in the Prosecution PTBrief which are contested by the Accused; and
 - c. ORDER the Prosecution to file a new PTBrief which refers specifically to evidence the Prosecution intends to offer in this trial.

RESPECTFULLY SUBMITTED ON THIS 12TH DAY OF JULY 2006

COUNSEL FOR THE ACCUSED



Jelena Nikolić and Stéphane Bourgon
Counsel for Drago Nikolić

Word count: 5119