

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

**Case No. IT-01-42-PT**

**IN TRIAL CHAMBER I**

**Before:** Judge Liu Daqun, Presiding  
Judge Amin El Mahdi  
Judge Alphons Orie

**Registrar:** Mr. Hans Holthuis

**Date Filed:** 27 August 2003

**THE PROSECUTOR**

**v.**

**Pavle STRUGAR**

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

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**PROSECUTION'S PRE-TRIAL BRIEF**

1. Pursuant to Rule 65~~ter~~(E)(i) of the Rules of Procedure and Evidence ("Rules") the Prosecution submits this Pre-trial Brief outlining the Prosecution's case and addressing the relevant factual and legal issues.

**I. INTRODUCTION**

2. The Prosecution will prove beyond a reasonable doubt the criminal culpability of Pavle Strugar and Miodrag Jokić (hereinafter "the Accused") for the unlawful shelling of the Old Town of Dubrovnik on 6 December 1991 as set out in the second amended indictment (hereinafter "the Indictment").<sup>1</sup> The Prosecution submits that all shells landing in the Old Town of Dubrovnik were part of an unlawful attack because they were willfully directed against civilians and/or civilian objects. The Prosecution does not concede there were any military objectives in the Old Town on 6 December. If it is determined there were military objectives in or near the Old Town, the Prosecution submits that in any event, any shells hitting civilians and/or civilian objects in the Old Town must, nevertheless, be regarded as being willfully directed against civilians and/or civilian objects because they were the result of indiscriminate shelling or because the shelling caused excessive losses to civilians and/or civilian objects. The Accused ordered or otherwise aided and abetted the unlawful attack by condoning its commission and bear 7(1) responsibility and, in any event, they bear 7(3) responsibility because they had reason to know of the unlawful attack and they failed to take all necessary and reasonable measures to prevent it, terminate it and punish the perpetrators.

<sup>1</sup> This Pre-trial Brief refers to arguments with respect to the Accused Vladimir Kovačević who continues to be at large. The Prosecution respectfully reserves the right to file a separate brief should Kovačević be brought before this Tribunal.

### A. The Conflict in Croatia

3. The events in this Indictment took place against the backdrop of armed Yugoslav People's Army (hereinafter "JNA") opposition to Croatian moves towards independence from the then Socialist Federal Republic of Yugoslavia (hereinafter "SFRY") following the latter's dissolution.<sup>2</sup> By late 1991, this clash between two rival visions – namely, the survival of a Yugoslav federation on the one hand and the secessionist ambitions of Croatia on the other – had evolved into armed conflict in several parts of Croatia, including the Dubrovnik region.<sup>3</sup>

4. By March 1991, the collective Federal Presidency of Yugoslavia was virtually deadlocked and the Yugoslav federation had begun to unravel.<sup>4</sup> The European Commission sought to establish a framework for the anticipated break-up of Yugoslavia and agreed, in principle, to the recognition of the secessionist republics.<sup>5</sup>

5. In May 1991, Croatia held a referendum in which the electorate voted overwhelmingly for independence from the SFRY.<sup>6</sup> Croatia subsequently issued a conditional declaration of independence<sup>7</sup> and on 7 July 1991, by an agreement signed at Brioni, suspended the declaration of independence for three months.<sup>8</sup> This declaration was renewed on 8 October 1991 following the expiration of the agreed three-month moratorium.<sup>9</sup> As of 8 October 1991, therefore, Croatia clearly regarded itself as independent<sup>10</sup>; a fact expressly recognised by the Conference on Yugoslavia Arbitration Commission (the so-called Badinter Commission).<sup>11</sup>

<sup>2</sup> This Tribunal has already noted several background features of the emergence of the Republic of Croatia. (See *Prosecutor v. Dario Kordić and Mario Čerkez*, Case No. IT-95-14/2-T, Judgement, 26 February 2001 (hereinafter *Kordić Trial Judgement*), para. 460). By late 1991, the Croatian legislature and executive had commenced to function and the emergent State of Croatia could thus be said to exercise a wide range of sovereign functions and powers. (*Prosecution Document Nos. 81-5, 87-94; Prosecution Witness No. 1*).

<sup>3</sup> See *inter alia* *Kordić Trial Judgement*, paras. 462-463.

<sup>4</sup> *Ibid.*, para. 462.

<sup>5</sup> *Idem.* See also *Prosecution Document No. 95*.

<sup>6</sup> *Prosecution Document Nos. 83 & 84*.

<sup>7</sup> *Prosecution Document No. 85*.

<sup>8</sup> *Prosecution Document No. 86*.

<sup>9</sup> *Prosecution Document No. 87*.

<sup>10</sup> *Prosecution Witness No. 1*.

<sup>11</sup> Conference on Yugoslavia Arbitration Commission: Opinions on Questions Arising from the Dissolution of Yugoslavia, Opinion Nos. 1, 3, 5, 8 and 11, *International Legal Materials*, 31 (1992), p.

6. The Serbian population within the republican borders of Croatia ensured that Croatian secession was fiercely resisted by the JNA. Throughout the summer of 1991, tensions between Croat and Serb forces increased and, in August of that year, full-scale conflict broke out in the territory of Croatia.<sup>12</sup> In the Dubrovnik municipality, however, the Serbian population was under 5% of the total population.<sup>13</sup>

#### **B. The Military Campaign in the Dubrovnik Region**

7. A naval blockade of Dubrovnik Harbour preceded the start of the land campaign. This blockade was initiated in mid-September 1991 and its continuation was confirmed in the operational order issued by the Commander of the Military-Naval District on 21 September.<sup>14</sup> The land campaign started in earnest on 01 October with attacks, co-ordinated by the Second Operational Group (hereinafter "2.OG") in the wide-ranging area between the border of Montenegro and the Neretva River Valley. In Dubrovnik Municipality, JNA forces under the 2.OG and the Ninth Naval Military District (hereinafter "9. VPS") sought to cut off Dubrovnik city from the rest of Croatia. One battalion advanced on and captured Slano to the west. A second battalion took the high ground above Rijeka Dubrovačka. To the east, a third motorised battalion moved south from Ivanica. Finally, additional JNA units crossed the Montenegro border to the east and moved westward to Dubrovnik city.

8. By 27 October 1991, JNA troops had encircled the city. JNA artillery could shell the city at will. By this stage, shells had even impacted within the confines of the Old Town of Dubrovnik. On or about 26 October, the JNA forces took control of Žarkovica. From the end of October 1991, therefore, JNA commanders and observers enjoyed an unobstructed view of the Old Town from Žarkovica.<sup>15</sup> The City of Dubrovnik was effectively under siege, being surrounded on land and subject to a blockade by sea which could be circumvented only with extreme difficulty.

1488, *et seq* (hereinafter Badinter Commission); Opinion No. 11; *ibid.* at p. 1588; "The Republics of Croatia and Slovenia ... declared their independence on 25 June 1991 and suspended their declarations of independence for three months on 7 July 1991, as provided by the Brioni declaration. In accordance with the declaration, the suspension ceased to have effect on 8 October 1991. Only then did these two Republics ... become sovereign States in international law. For them, then, 8 October 1991 is the date of State succession" (part of Prosecution Document No. 95).

<sup>12</sup> See *inter alia* Kordić Trial Judgment, paras. 462-463.

<sup>13</sup> Prosecution Witness No. 2.

<sup>14</sup> Prosecution Document No. 150.

<sup>15</sup> Transcript of Jokić's interview (Prosecution Document No. 178).

### C. The Old Town of Dubrovnik

9. The city of Dubrovnik is located in the far south-eastern extremity of Croatia on the coast of the Adriatic Sea. The walled part of Dubrovnik known as the "Old Town" is situated on a peninsula on the Adriatic. Dubrovnik, established in antiquity, contains a significant number of historic monuments, works of art and places of worship. Dubrovnik and the immediately adjoining coastal regions (Primorje to the north west of the city and Konavle to the south east) contain historic towns and villages that are important to the Croatian economy and its tourist sector.<sup>16</sup>

10. In 1979, the government of the SFRY petitioned UNESCO for a declaration that the walled Old Town of Dubrovnik, because of its historic and cultural value be designated a World Cultural Heritage Site in its entirety.<sup>17</sup> In compliance with UNESCO requirements, the area of Dubrovnik had been completely de-militarised with major military installations in the municipality being relocated and the Territorial Defence armoury being transferred to Eastern Herzegovina.

11. Because of its special status, the Old Town should have enjoyed special protection. Indeed, many of its ancient buildings and towers were clearly marked with the symbols mandated by the Hague Convention on the Protection of Cultural Property in the Event of Armed Conflict (1954).

12. The special status of the Old Town, and the obligation to avoid damaging it when carrying out military operations, were discussed at *inter alia* the highest federal level and at meetings. JNA orders and directives emphasising the requirement to avoid damaging the Old Town were disseminated to all military commanders operating in the Dubrovnik region.<sup>18</sup> Indeed, such was the cautious attitude adopted with respect to the Old Town of

<sup>16</sup> Prosecution Witness No. 2.

<sup>17</sup> WHC Nomination Documentation (Prosecution Document No. 300); 3 April 1979 petition from Yugoslavia for designation of the Old Town of Dubrovnik as World Cultural Heritage Site (Prosecution Document No. 301).

<sup>18</sup> In a meeting between UNESCO executives and Borislav Jović of the Federal Presidency in autumn 1991 Jović stated: "... no matter what happened the Federal Army has the order not to shoot on the Dubrovnik in order to preserve the cultural heritage". These discussions also included a reminder by UNESCO that any military activity around Dubrovnik has to take into account the legal obligations regarding the Old Town and that all steps are to be taken to avoid causing damage: 11 November 1991 combat order signed by Vice-Admiral Jokić (Prosecution Document No. 239); Directive dated 14 October 1991 by Adžić, JNA Chief of Staff (Prosecution Document No. 167); SSNO information signed by Vidak Vuković (Prosecution Document No. 232).

Dubrovnik, that the JNA purported to exercise restraint even in the face of what they deemed military provocation emanating therefrom.<sup>19</sup>

**D. The Events Leading up to 6 December 1991 Shelling of the Old Town**

13. The criminal culpability of the Accused for the shelling of the Old Town on 6 December 1991 becomes more apparent when previous incidents of JNA shelling of the Old Town are examined.

14. On 23 and 24 October 1991, mortar rounds fell within the Old Town of Dubrovnik. The Museum Rupe was struck as well as the Old Town grain silo.<sup>20</sup>

15. The Prosecution submits that this shelling was carried out by the 3<sup>rd</sup> Battalion of the 472<sup>nd</sup> Motorised Brigade (hereinafter "3./472 mbtr"). This unit was, at all relevant times, subordinated to the 2.OG and on December this unit was directly subordinated to the 9 VPS.<sup>21</sup> The 9. VPS at all relevant times was subordinated to the Second Operational Group.<sup>22</sup>

16. On 9 November, a co-ordinated land, sea and air attack was launched against Croatian objectives above the city.<sup>23</sup> From 10 through 13 November, a variety of ordnance fell on the Old Town, including at least fifty mortar rounds.<sup>24</sup> The fire which struck the Old Town came from land- and sea-based weapon systems.<sup>25</sup> The rounds which fell within the Old Town damaged a number of structures of considerable architectural and historical merit, amongst them the Jesuit Church, the Dominican Monastery, St Luka Church and a handful of private residences.<sup>26</sup> The Prosecution submits that the unit responsible for the aforementioned damage to structures within the Old Town during the

<sup>19</sup> *Prosecution Witness No. 8. See also video interview of Milan Zec (Prosecution Document No. 36) and a newspaper interview of the Accused Strugar (Prosecution Document No. 117).*

<sup>20</sup> *Općina Dubrovnik, Centar za Obavjestavanje, dated 23 October 1991: Prosecution Document No. 28. On 23 October 1991 a shell fell on Boskovicева Street, in the Old Town. A witness was in the kitchen of her house, located in that street, when she was injured by a piece of shrapnel: Prosecution Witness No. 20.*

<sup>21</sup> *Transcript of Jokic's interview: Prosecution Document No. 178.*

<sup>22</sup> *Idem.*

<sup>23</sup> *Prosecution Witness No. 9.*

<sup>24</sup> *Općina Dubrovnik, Centar za Obavjesćivanje, dated 11 November 1991 (part of Prosecution Document No. 324).*

<sup>25</sup> *For an overview of the attack on Dubrovnik city more generally, including the Old Town, during the period 09-13 November 1991, see Općina Dubrovnik, Centar za Obavjesćivanje, diary entries 09-13 November 1991 (part of Prosecution Document No. 324).*

<sup>26</sup> *Preliminary Report of War Destruction of Old Town Nucleus of Dubrovnik, October-November-December 1991, Prosecution Document No. 35.*



period 10-13 November was 3./472.mtbr. which was then commanded by Captain First Class Vladimir Kovačević.<sup>27</sup> During the period 10-13 November, 3./472.mtbr was under the command of the Accused Miodrag Jokić and Accused Pavle Strugar. The chain of command is evidenced in orders issued during the aforementioned period by 9.VPS to 472.mtbr. These orders were concerned, *inter alia*, with the deployment of 3./472.mtbr and were forwarded to 2.OG.<sup>28</sup>

17. On 5 December 1991, in Cavtat, following approximately three (3) months of hostilities in the Dubrovnik region, the parties sought to bring an end to the fighting through a negotiated comprehensive cease-fire. The JNA was represented by Miodrag Jokić personally. The Croats were represented by high level officials at the ministerial level: Davorin Rudolf, Petar Krste and Ivan Cifrić.

18. The cease-fire was of great significance to both sides. Its importance to the JNA was highlighted by the fact that Miodrag Jokić indicated that he would consult with Belgrade first and set the signing for the next day, 6 December, at Cavtat.<sup>29</sup>

19. The Prosecution submits that the importance assigned to this cease-fire by the JNA, evidenced by the foregoing, emphasises the heightened necessity to take all measures to ensure timely, effective and unobstructed implementation of its provisions. The Accused Jokić and the Accused Strugar were under an affirmative duty to remove all impediments or potential impediments to implementation of the cease-fire. The Prosecution submits that a reasonable commander should have taken maximal measures to ensure that notice of the fact and the importance of the impending cease-fire were adequately and clearly communicated to all subordinate units. A commander must anticipate, under all the circumstances prevailing at the time, the range of foreseeable problems which could interfere with the realisation of the cease-fire. Given the history of incidents involving shelling of the Old Town by JNA units, particularly the 3./472 mtbr in October and November 1991, notwithstanding orders or communications prohibiting the same, the Accused should have issued specific orders on the eve of the cease-fire to the

<sup>27</sup> Transcript of Jokić's interview: *Prosecution Document No. 178*.

<sup>28</sup> See, for instance, Komanda 9.VPS, Str. pov. br. 27-64/80-181, dated 10 November 1991 (*Prosecution Document 234*).

<sup>29</sup> *Prosecution Witness No. 21*.

Accused Kovačević, that battalion's commander, prohibiting any combat activity, including any attacks on the Old Town.<sup>30</sup>

20. The protection of the Old Town as a cultural heritage site was at all times relevant to the indictment period one of the foremost legal obligations on the JNA. Despite this, units which were at all times during the indictment period under the Accused Strugar and at varying times under the Accused Jokić shelled the Old Town. Prior to their arrival in Dubrovnik on or about 28 November 1991, representatives of an official UNESCO mission met with federal officials in Belgrade where they had been informed that there was a prohibition on attacking the Old Town. UNESCO representatives were present in Dubrovnik on 6 December 1991.<sup>31</sup>

## II. 6 DECEMBER SHELLING

21. The Prosecution emphasises that circumstances prevailing at the time dictated that the Accused Strugar and Jokić had reason to know in advance of the events of 6 December that Kovačević's unit had engaged in shelling the Old Town on prior occasions despite the existence of directives to the contrary. On 6 December, Kovačević was the commander of the battalion which the Accused Jokić claimed had undertaken an unauthorised attack on Mount Srd, which subsequently evolved into an unlawful attack on the Old Town. The likelihood of shelling the Old Town in the course of any subsequent combat action in light of the October and November shelling incidents was foreseeable, and extra measures with respect to Kovačević should have been taken by Strugar and Jokić, particularly in the face of the signing and implementing of a comprehensive cease-fire.

22. Once hostilities commenced preventing an all-important cease-fire from taking place, Strugar and Jokić should have taken all measures to assure the cessation of hostilities. Further, once Strugar and Jokić learned that the hostilities had commenced they should have been taking all practical measures to ensure that the Old Town was not being attacked. They had reason to know that there was a high risk of such an attack

<sup>30</sup> Moreover, even without a cease-fire, extra precautionary measures by the Accused were mandated in light of the battalion's history of shelling with respect to the Old Town.

<sup>31</sup> Prosecution Witness No. 19.

occurring and a duty to act immediately to prevent or to put to an end to such an unlawful act.

23. The Prosecution alleges that the evidence points to the Accused being fully cognisant of the unlawful shelling of the Old Town of Dubrovnik committed on 6 December and wilfully ignoring their obligations as commanders to take all measures available to them to stop and/or mitigate the unlawful shelling or to punish the perpetrators.

24. Mt. Srd was tactically and operationally important for a number of reasons. It was a relatively isolated outpost of Croatian resistance and had been a constant impediment to JNA military operations throughout the hostilities in the Dubrovnik municipality. In addition, Mt Srd overlooked the city of Dubrovnik including the Old Town. Irrespective of the reasons for taking Mt. Srd, this operation, carried out by the forces under the command of Vladimir Kovačević, was initiated in the early hours of the morning of 6 December 1991. The observation posts of the 3./472 mbtr was located at Žarkovica and had an unobstructed view of the Old Town. The JNA units did not succeed in taking Mt. Srd and were forced to retreat. During this attack and a smaller scale attack on Nuncijata a number of casualties were incurred (4 dead and 14 wounded).<sup>32</sup>

25. As the shelling progressed throughout the day, it became increasingly apparent that the Old Town was being shelled in a deliberate and/or indiscriminate manner and was clearly unlawful.

26. The Prosecution notes certain significant events of 6 December in chronological order:

- a) JNA opened fire at approximately 0550 hours and commenced attack on Mt. Srd.<sup>33</sup>
- b) At 0630 hours, the Accused Jokic was notified of the JNA attack by an officer on his staff.<sup>34</sup> The Accused Strugar would have been on notice shortly thereafter.

- c) The shelling of the Old Town commenced at approximately 0645 hours.<sup>35</sup>

<sup>32</sup> Transcript of Jokic interview: *Prosecution Document No. 178*.

<sup>33</sup> *Prosecution Document No. 47*.

<sup>34</sup> Transcript of Jokic interview: *Prosecution Document No. 178*.

- d) An ECMM representative sent the Accused Jokić a telefax of protest about 0714 hours.<sup>36</sup>
- e) Another protest, referring to "artillery on Dubrovnik", was sent to the 9.VPS Boka by the Dubrovnik Crisis Staff at approximately the same time<sup>37</sup> and receipt of these transmissions was acknowledged by the 9.VPS Boka at 0822 hours.<sup>38</sup>
- f) By approximately 0900 hours Davorin Rudolf protested to the Accused Jokić that the Old Town was being shelled.
- g) Sometime before 1100 hours, in a phone conversation with Croat officials in Dubrovnik, the Accused Jokić expressed regret for the situation which had ensued and, further, claimed that the shelling had been a mistake and that JNA forces had gotten out of hand.<sup>39</sup>
- h) At 1205 hours, the Dubrovnik Crisis Staff sent a message to the Accused Jokić complaining that mortar and machine-gun fire was falling upon "all parts of the town", including the headquarters of the Crisis Staff. The latter was located in the Old Town. The message further advised that the Old Town had been and was still being shelled intensely.<sup>40</sup>
- i) At 1228 hours, the Croatian cabinet minister Rudolf indicated in a note transmitted by radio that the "old part of the town has been heavily bombarded." He added that "reports of destruction on the Stradun near the old town hall are coming in. Two shells apparently hit St. Blaise's Church, a building in the Old Town is burning."<sup>41</sup>
- j) At 1245 hours, the 9.VPS Boka confirmed receipt of this transmission: a message was sent by radio to the Croat Minister Davorin Rudolf, through the Harbour Master's office, in which the Accused expressed his regret "over this

<sup>35</sup> *Prosecution Witness No. 38.*

<sup>36</sup> ECMM Dubrovnik to Admiral Jokić, dated 6 December 1991: *Prosecution Document No. 289*. *Prosecution Witness No. 16* will give evidence as to the telefax of protest. See also Radio-Dnevnik, entry dated 060612 December 1991 (*part of Prosecution Document No. 45*). The fact that the Harbour Master's log puts the time at 0612 hours reflects the fact that the entries were made in accordance with Zulu (i.e. Greenwich Mean Time), rather than local time.

<sup>37</sup> Krizni štab Dubrovnik to Komanda VPS Boka, dated 6 December 1991: *Prosecution Document No. 293*; see also Radio-Dnevnik, entry dated 060612 December 1991 (*part of Prosecution Document No. 45*).

<sup>38</sup> Radio-Dnevnik, entry dated 060722Z December 1991: *part of Prosecution Document No. 45*.

<sup>39</sup> *Prosecution Witness No. 21.*

<sup>40</sup> Radio-Dnevnik, entry dated 061105Z December 1991, *part of Prosecution Document No. 45*. See also *Prosecution Witness No. 21*. The Accused Jokić also admitted that he was informed on the phone by the people of Dubrovnik that the Old City was being shelled (Transcript of Jokić's interview: *Prosecution Document No. 178*).

<sup>41</sup> Radio-Dnevnik, entry dated 061128Z December 1991 (*part of Prosecution Document No. 45*).

incident". The said message indicated that General Kadijević was aware of the situation.<sup>42</sup>

27. The Accused had effective communications throughout 6 December 1991. The Accused Strugar called Jokić at about 0900 hours to inform him that he (Jokić) had to travel to Podgorica and from Podgorica to Belgrade to report to the JNA General Staff.<sup>43</sup> General Kadijević, the Federal Secretary of National Defence, upon becoming aware of the situation in Dubrovnik on 6 December, ordered the Accused to meet with him at 1400 hours in Belgrade.<sup>44</sup> The Accused flew to Belgrade and reported to General Kadijević on the shelling of Dubrovnik as requested<sup>45</sup>

#### A. Civilian casualties

28. In addition to counts of unlawful attacks against civilians and civilian objects, the Indictment further contains counts of murder and cruel treatment against both Accused.

29. Two civilians were killed and three civilians were wounded as a result the unlawful shelling of the Old Town of Dubrovnik on 06 December. The particulars of those civilians killed and wounded in the course of these attacks are as follows.

30. Pavo Urban, a 23 year old civilian journalist and photographer, was taking pictures in order to document the shelling of the Old Town. He was hit by shrapnel from a shell and died from these injuries.

31. Tonči Skočko, an 18 year old civilian was at a grocery store managed by his father in the Old Town near the Music School in the morning of 6 December 1991 along with civilian Nikola Jović, one of his father's employees. At approximately 1000 hours, they both went outside the store to see where one of the shells had landed, and were struck by shrapnel from another shell which had landed about ten metres from the store and hit the top of a nearby wall. One of the pieces of shrapnel from this shell hit Tonči Skočko in the

<sup>42</sup> Radio-Dnevnik, entry dated 061145Z December 1991 (part of Prosecution Document No. 45). The Accused Jokić also sent a telefax to the Croat Minister Davorin Rudolf, expressing regret regarding the shelling of Dubrovnik. The telefax was received at 15:31 hours: Prosecution Document No. 292.

<sup>43</sup> Transcript of Jokić's interview: Prosecution Document No. 178.

<sup>44</sup> Radio-Dnevnik, entry dated 061145Z December 1991 (part of Prosecution Document No. 45).

<sup>45</sup> Transcript of Jokić's interview: Prosecution Document No. 178.

chest. He was taken to the hospital, where he was pronounced dead on arrival.<sup>46</sup> Nikola Jović was injured by another piece of shrapnel from the same shell, which hit his leg.<sup>47</sup>

32. Mato Valjalo was walking along the Stradun, the main street in the Old Town of Dubrovnik, on 6 December 1991, when a shell landed right behind him. He suffered severe injuries to his head. Pieces of shrapnel also penetrated his right leg and right arm.<sup>48</sup>

33. Ivo Vlašica at the time worked for a bread-distribution shop, which was located in the Old Town. In the early hours of 6 December 1991, he was standing in the doorway of the shop when a shell exploded about seven metres away. The shell detonated on the terrace of a restaurant situated at an angle from the shop. A large piece of shrapnel went through his upper right leg. Many smaller pieces hit his feet and arms.<sup>49</sup>

#### **B. Destruction of cultural property and other civilian objects**

34. The Accused are further charged with responsibility for the devastation which was caused to cultural and historical heritage of the Old Town of Dubrovnik. There were a significant number of impacts registered on the Old Town on 06 December 1991. While rounds detonated in all parts of the city, maps of the Old Town prepared in the aftermath of the shelling demonstrate a concentration of fire along the length of the east-west axis of the town and approximately one-hundred metres on either side of the central thoroughfare, the Stradun.<sup>50</sup> Hundreds of buildings within the confines of the Old Town were hit by shells during this attack. At least six buildings were destroyed in their entirety and numerous others were damaged.<sup>51</sup> Many locations within the Old Town were burning and smoke could be seen coming out of many buildings.<sup>52</sup>

35. The Festival Palace at Od Sigurate 1 was built in the Renaissance style and was typical of Dubrovnik architecture of the 15<sup>th</sup> and 16<sup>th</sup> centuries. The hallway, the walls and the ceiling of the building contained numerous frescoes and arches. The Palace was hit during the shelling and caught fire: as a result, the first floor, the second floor and the

<sup>46</sup> Prosecution Witness No. 33. See also the autopsy report establishing that the son of Prosecution Witness No. 33 was killed by an explosive device (part of Prosecution Document No. 308).

<sup>47</sup> Prosecution Witness No. 33.

<sup>48</sup> Prosecution Witness No. 36.

<sup>49</sup> Prosecution Witness No. 38.

<sup>50</sup> Prosecution Document Nos. 42 and 43.

<sup>51</sup> Prosecution Witness No. 19 and 5.

attic were completely destroyed and only the walls remained standing. One part of the ground floor was burned down.<sup>53</sup>

36. The palace at Od Sigurate 2 was right across from the Festival Palace and was at least three hundred years old. Shells hit it and the palace caught fire instantly. The palace was gutted and only the walls were left standing.<sup>54</sup>

37. The palace at Od Puča 16 was near to Rupe Museum and was about four to five hundred years old.<sup>55</sup> When shells started falling, the palace caught fire and ended up completely gutted.<sup>56</sup>

38. Palace Sorkočević at Miha Pracata 6 was about three hundred years old and had four rooms in it. The interior was Baroque. Two shells hit the roof of the palace with the first impact at at 0720 hours. Since the roof was wooden, the fire spread immediately throughout the building and continued to burn unextinguished until only the walls remained standing.<sup>57</sup>

39. Palace Martinušić at Sv. Josipa 1 and the palace on Od Puča 11 were also completely destroyed on 6 December as a result of the JNA shelling.<sup>58</sup>

40. In addition to the above-mentioned buildings, many more suffered damage, including Catholic churches, the Jewish Synagogue, the Mosque, Sponza Palace, the Clock Tower, and many private structures of historic value.<sup>59</sup>

41. The destruction and damage that occurred in the Old Town on 6 December 1991 also included structures and objects referred to in Article 3(d) of the Statute of the Tribunal, which are listed in Schedule II of the Indictment.<sup>60</sup>

<sup>52</sup> Prosecution Witness Nos. 22, 18 and 14.

<sup>53</sup> Prosecution Witness Nos. 29 and 18.

<sup>54</sup> Prosecution Witness No. 29.

<sup>55</sup> Prosecution Witness No. 23.

<sup>56</sup> Prosecution Witness No. 23.

<sup>57</sup> Prosecution Witness No. 25.

<sup>58</sup> Prosecution Witness No. 19.

<sup>59</sup> Prosecution Witness Nos. 12, 14, 18, 23, 25 and 26.

<sup>60</sup> Prosecution Witness Nos. 5 and 19.

### III. RESPONSIBILITY OF THE ACCUSED

42. During all periods relevant to the Indictment, the Accused bear individual criminal responsibility for the conduct charged therein, pursuant to Article 7(1) of the Statute, for ordering and aiding and abetting in the commission of the crimes alleged in the Indictment.

43. In addition to their direct responsibility for the above-described acts, each Accused held a position of superior authority with respect to the JNA units and formations that perpetrated the unlawful shelling of the Old Town of Dubrovnik. They are accordingly responsible for their failure to take necessary and reasonable measures to prevent unlawful acts which they knew, or had reason to know, that their subordinates were about to commit, or to punish those offences which had been committed.

#### A. The Accused and their chain of command

44. The Accused Strugar was born on 13 July 1933 in Peć, in present-day Kosovo. After being assigned to various posts within the JNA, in 1989 he was appointed Commander of the Territorial Defence forces in the Socialist Republic of Montenegro. In December 1989, he was promoted to Lieutenant General. In October 1991, he was appointed Commander of the Second Operational Group of the Yugoslav People's Army and in November of that same year he was promoted to the rank of Colonel-General.<sup>61</sup>

45. The Accused Jokić was born in 1935 in Valjevo municipality, in present-day Serbia. He served as an officer in various postings with the Yugoslav Navy. In December 1986, he was promoted to the rank of Rear Admiral and in 1990, he was promoted to Vice Admiral. In 1991 he was appointed Commander of the 9.VPS.<sup>62</sup>

46. At all times relevant to the Indictment, the Accused Strugar was commander of the 2.OG. The 2.OG was an *ad hoc* formation which did not fit into the normal peacetime Commander of the Territorial Defence forces in the Socialist Republic of Montenegro. In order of battle of the JNA, having been formed by the JNA to conduct the military campaign against the Dubrovnik region. The commander of the 2.OG was directly subordinate to the JNA Main Staff.

<sup>61</sup> See Ko Ne Poštujte Mir, Imaće Rat, Narodna Armija, 22 December 1991 (Prosecution Document Number 135).

<sup>62</sup> Transcript of Jokić's interview: Prosecution Document No. 178.



47. During the indictment period, the 2.OG consisted of various formations and units of the JNA, including the 9.VPS and the 472 mtbr. The 9.VPS was directly subordinated to the 2.OG for operational purposes in late September 1991.<sup>63</sup> During much if not all of the time relevant to the Indictment, the Accused Jokić commanded *inter alia* the 3./472 mtbr and the 3<sup>rd</sup> battalion of the 5 Partisan Motorised Brigade (hereinafter "3./5 ptbr"). As previously indicated units of the 9.VPS were subordinated to the Accused Strugar.<sup>64</sup>

48. The 6 December shelling of the Old Town of Dubrovnik was primarily carried out by the 3./472 mbtr commanded by Captain Vladimir Kovačević.<sup>65</sup>

## **B. The Command Responsibility Of The Accused (Article 7(3))**

49. In addition to their direct criminal responsibility under Article 7(1) of the Statute, the Prosecution submits that the Accused knew or had reason to know of the unlawful attacks against civilians and civilian objects in the Old Town of Dubrovnik. This, in conjunction with their failure to do all that was reasonably practicable under the prevailing circumstances to effectively prevent and punish this unlawful conduct, establishes their responsibility under Article 7(3) of the Statute, as set forth in the section entitled "applicable legal principles," below.

### **1. Effective Control**

50. The Prosecution submits that both Accused possessed *de jure* and *de facto* authority over the above-mentioned units and formations that shelled the Old Town of Dubrovnik on 6 December 1991. Both Accused possessed extensive formal authority over these units by virtue of their command appointments within the JNA military hierarchy. This ensured that each Accused had the ability to exercise high levels of control over the above-mentioned military units and formations relevant to this Indictment.

51. For doctrinal purposes, both Accused were equivalent to corps commanders. As Commander of the 2.OG and 9.VPS respectively, both Accused were responsible, *inter alia*, for the planning, directing, and monitoring of the activities of subordinate units in their areas of responsibility, and for ensuring that these orders were implemented. This

<sup>63</sup> *Idem.*

<sup>64</sup> *Idem.*

<sup>65</sup> *Idem.*

authority is evidenced, first and foremost, by the formal scope of the authority that accompanied the senior rank of the Accused within the JNA military hierarchy.

a. *Scope of Responsibilities and Authorities of the Commanders of 2.OG and 9.VPS*

52. To facilitate the successful operation of all military units in both peace and war, the former JNA depended on an extensive body of rules and regulations to which units, commands, staffs, branch bodies and individual soldiers were to adhere. These detailed instructions were institutionalised throughout the entire Armed Forces of the SFRY. Through this body of regulatory material, the armed forces of the SFRY, including those of the JNA, operated within the overall Yugoslav military doctrine known as "All People's Defense."

53. Within this framework, there are two primary references which defined the roles and operations of the JNA Corps (the 2.OG being an *ad hoc* formation equivalent to a Corps).<sup>66</sup> The first document ("Rules for Land Forces Corps (Provisional)", published in 1990)<sup>67</sup> is the most comprehensive document, designed to completely delineate the operating procedures for all aspects of the JNA Corps commands. The second document (entitled "Regulations on the Authority of the Ground Forces Corps Commander in Peacetime") was also published in 1990.<sup>68</sup> These two documents set out the framework for the roles and responsibilities of the Corps Commander, the Corps staff and other Corps branches, as well as delineating how the Corps was to function in a variety of military situations. As such, these documents represent the foundations for the JNA Corps organisation and their operating procedures.

54. The single most important position within the structure of a JNA Corps in terms of responsibility, authority and accountability was that of Corps Commander. As defined in the Rules for Land Forces Corps (Provisional), the Corps Commander:

...bears the responsibility for the accomplishment of a mission. He takes decisions, gives assignments to his subordinates, organises coordination and cooperation, and controls the implementation of decisions. He is responsible for harmonizing the activities of his command, subordinated commands and headquarters and appropriate socio-political communities and organizations in

<sup>66</sup> Accordingly, reference to a "JNA Corps" herein incorporates by reference both the 2.OG and 9.VPS.

<sup>67</sup> Prosecution Document No. 313.

<sup>68</sup> Prosecution Document No. 314.

integrating combat actions and all other forms of struggle and popular resistance in the assigned zone.<sup>69</sup>

55. As such, the Corps Commander was personally, directly, and legally empowered to lead the operations of the Corps command, assign tasks to his subordinate officers, organise joint operations and co-operation in the zone of the Corps, ensure operations were carried out, and bore full responsibility for their completion. The Corps Commander accomplished these tasks by exercising military command and control, either directly, or through a body of subordinates, assistants and branch specialists referred to as the Corps staff.

56. As a fundamental component of the former JNA regulations, the roles and responsibilities of officers within the structure were clearly delineated. Paramount within that structure was the role of the commander. The overall concept of military command and control, to be exercised by the Corps Commander, was detailed in the Rules for Land Forces Corps (Provisional) as follows:

Command and control are exercised through planning, concerted action, organization, preparation and execution of operations and other combat actions; they are based on unified, continuous, secure, flexible, efficient, operative and secret information flows among commands, units and institutions.<sup>70</sup>

57. Further defining the aspects of JNA command and control were the Regulations on the Authority of the Ground Forces Corps Commander in Peacetime,<sup>71</sup> dated 1990. These instructions clearly articulated the roles of JNA Corps Commander relevant to the exercise of command.<sup>72</sup> Specific to the individual responsibility of Corps command, the following definition applied:

<sup>69</sup> Prosecution Document No. 313.

<sup>70</sup> The JNA Rules further mandate the "... conscious and organised activities of the Commander of the Corps and the bodies of command, aimed at engaging and unifying the actions and activities of all units, commands, headquarters and other entities of All Peoples Defense and social self-protection in the zone of operation, as well as the equipment used in combat, for the purpose of achieving the set goals in the optimal way." (Prosecution Document No. 313).

<sup>71</sup> It should be noted that despite the designation of "peacetime," a Corps is a military entity organized and designed to operate in war. As such, the peacetime designation does not imply that in war the Corps would operate on a completely different basis, particularly with respect to command relationships. Peacetime designates one of three designated states under the SFRY law which the Corps will operate. The other states included "State of Imminent Threat of War", and a "State of War."

<sup>72</sup> Prosecution Document No. 314. They stated *inter alia* that: "The commander shall command and control subordinate units and institutions within the scope of the responsibility received. He shall be responsible to his superior for the work and the situation in subordinate units and institutions and for the proper and timely execution of work and tasks in the competence of the command organ. The

The right to command units and institutions of the organic compound of ... Corps (hereinafter: Corps) is under the exclusive responsibility of the commander. Units and institutions outside the Corps' organic compound, those temporarily subordinated, are commanded and controlled by the commander only within the limits of the stipulated authorities.

The commander may authorise certain officers from the command to command units and institutions of branches services, but the commander continues to bear responsibility for the situation in those units, and for the work of the officers to whom he has transferred some of his rights.<sup>73</sup>

58. These base definitions, establishing the overall concept of command and control as defined in the JNA, bestowed upon the designated commanders the authority to command their staff, subordinate units, institutions, and the personnel comprising those bodies.

59. In addition to directly issuing commands to subordinate individuals and units, the Corps Commander was also required by JNA doctrine to monitor constantly the situation in the zone of combat operations, and report to the Superior Commander. To this end, the Accused required subordinates to keep them informed via frequent and regular reports of all activity and developments relevant to the Corps. Similarly, the Accused was obliged to follow established JNA procedures by filing reports with his superior command. These reports were required to contain information regarding all activity within the Corps' area of responsibility.

60. Despite the Commander's ability to delegate management tasks or other supervisory authorities to his deputy, his assistants, and various staff functionaries, as recognised in SFRY military doctrine, responsibility remained individually and fully vested in the commander. The principle of individual accountability of the commander for the success or failure of his subordinates even where authority was delegated was thus

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commander shall undertake the command and control of units and institutions through command organs and the commands of subordinate units and institutions through orders, commands, instructions, guidelines and advice, as well as other forms of command and control. The commander shall undertake the formulation, development and implementation of plans, tasks and measures personally and through corps command organs and subordinate commands. The commander shall give subordinate officers tasks in the spirit of the regulations and powers, influence the execution of the tasks, and ensure that corps command organs and subordinate commands, units and institutions work within the law.

<sup>73</sup> Prosecution Document No. 314.

codified under the relevant JNA regulations as a fundamental component of the overall SFRY concept of command.<sup>74</sup>

i. Control in fact exercised by the Accused Strugar: the Accused's conduct in light of his above-described formal authority

61. The Prosecution submits that the Accused Strugar's extensive formal authority as commander of the 2.OG was reflected within the high degree of *de facto* control he exercised over the forces under his command.

62. The extent of the Accused Strugar's control over the forces under his command – or at least his capacity for control – is evidenced by numerous *indicia*. For example, it is apparent that Strugar commanded a professional army containing a full complement of Corps and other key staff. As a component of the functioning chain of command at his disposal, the evidence will also demonstrate that at all times material to the Indictment, the Accused had effective means of communication with all units and formations relevant to this Indictment.<sup>75</sup> Further, these military units under the Accused's command in general possessed a demonstrated capacity to carry out sustained and co-ordinated combat operations. When viewed in totality, the Prosecution submits that the evidence of Strugar's effective control, both *de jure* and *de facto*, over the forces under his command is incontrovertible.

63. Furthermore, Strugar was evidently regarded by the JNA General Staff in Belgrade as the officer ultimately responsible for the military campaign against Dubrovnik. This is evidenced by the fact that he was summoned to Belgrade by the Federal Secretary of National Defence, General Kadijević, on 6 December to account for the shelling of the Old Town on that day.<sup>76</sup>

64. The Prosecution notes that in accordance with both JNA doctrine and applicable international law, any purported delegation of responsibilities to the Accused Jokić inoperable. The evidence does not serve to negate the Accused Strugar's own personal responsibility as the commander of the forces under his command.

<sup>74</sup> Prosecution Document No. 322: "Commanding, whereas the commander has the individual (or unique) right to take decisions concerning the use and activities of the unit, to give orders and to organize controls."

<sup>75</sup> The two Accused were, for instance, communicating to each other in the morning of the 6 December 1991. The Accused Strugar called Jokić about 9:00 hours in the morning to inform him that he (Jokić) had to travel to Podgorica and from Podgorica to Belgrade, to report to the JNA General Staff. (Prosecution Document No. 178).

<sup>76</sup> Prosecution Document No. 178.

commander ultimately responsible for the effective and lawful conduct of military operations within his area of responsibility.

ii. Control in fact exercised by the Accused Jokić: the Accused's conduct in the light of his above-described formal authority

65. The Prosecution submits that the Accused Jokić also possessed both *de jure* and *de facto* authority over the units and formations that shelled the Old Town of Dubrovnik on 6 December 1991.

66. Jokić was regarded by the JNA General Staff in Belgrade as an officer with key responsibility for the execution of the military campaign against Dubrovnik, second only to General Strugar in the chain of command.<sup>77</sup> Indeed, on 6 December, while the attack against the Old Town of Dubrovnik was still ongoing, the Accused Jokić was called to Belgrade along with the Accused Strugar to report to General Kadijević on the incident.<sup>78</sup>

67. Jokić's role in the JNA Dubrovnik military campaign is also evidence of his authority. Throughout the campaign he was a crucial interlocutor for the ECMM representatives and the Croat representatives in negotiations aimed at halting the JNA offensive against Dubrovnik.<sup>79</sup> On 7 December 1991, Jokić, as the representative of the JNA Supreme Command, signed the agreement reached on 5 December 1991 for a cease-fire in Dubrovnik, committing the JNA to ease the naval blockade of Dubrovnik and to restore electrical and water service to the city.<sup>80</sup>

68. Further, Jokić regularly issued orders, including combat orders<sup>81</sup> and ultimatums.<sup>82</sup> After taking over as Commander of the 9.VPS, Jokić issued an order on 10 or 11 October

<sup>77</sup> In fact, the Accused Jokić was appointed Commander of the 9.VPS by the JNA General Staff in Belgrade in view of his evident military experience, capability and as Admiral Kandić "thought that I was the only one who could respond to the challenges of such chaos and such a complex time." The fact that after being called to Belgrade and being informed about his appointment on 6 October 1991, the same day he flew from Belgrade to Podgorica along with Momir Bulatović, the President of Montenegro, and General Kadijević, demonstrates the extent of his influence within the overall military structure of the JNA. (Prosecution Document No. 178).

<sup>78</sup> *Idem*.

<sup>79</sup> Prosecution Witness No. 21.

<sup>80</sup> Prosecution Document No. 130; Prosecution Witness No. 21.

<sup>81</sup> See, for instance, Prosecution Documents No. 234, 240, 241 and 247.

<sup>82</sup> On 16 October 1991 he signed and addressed a document titled "Demands by the Operations Group Command for the Dubrovnik region" to the Mayor of Dubrovnik, in which he summoned, among other things, the return of military equipment, the surrender and disarming of paramilitary units, and unconditional surrender of Dubrovnik Crisis Staff. (Prosecution Document No. 163).

1991 that the naval blockade of Dubrovnik be relaxed and that it involve only the blockade of ships sailing from Otranto into the port of Dubrovnik.<sup>83</sup>

69. Finally, the Prosecution notes that even if evidence did exist to suggest an apparent lack of control on the part of the Accused over units or formations under his command – a fact which the Prosecution does not concede – such information must be viewed in context. Where any such lack of control stemmed from a failure to exercise the functions and powers the Accused undoubtedly possessed, this cannot exculpate him in circumstances where such failures amount to a dereliction of duty.<sup>84</sup>

## 2. Notice

70. The evidence will show that the Accused knew or had reason to know that the Old Town of Dubrovnik was being, or had been, unlawfully shelled on 6 December 1991. Accordingly, their responsibilities of prevention or punishment, commensurate with the scope of their respective authorities, were activated.

71. The Prosecution submits that their manifest failure to do all that was reasonably within their powers to arrest the unlawful shelling or to punish its perpetrators in the aftermath triggers their responsibility under Article 7(3) of the Statute.

### a. Actual knowledge

72. The Prosecution submits that the two Accused possessed actual knowledge of the unlawful shelling of the Old Town of Dubrovnik on 6 December 1991. The nature and notoriety of this incident, the reaction it provoked within the international community and the military-strategic circumstances prevailing at the time render it inevitable that the two Accused would have had knowledge of this shelling, if not instantaneously, then at a minimum within an extremely short time after its commencement.

<sup>83</sup> Prosecution Document No. 178.

<sup>84</sup> Depending upon the circumstances, the commander's "material ability" may entail a variety of options and ultimately and as a last resort, to request his superiors that he be relieved of his command. See e.g. *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: "The choices which he has for opposition in this case (in response to criminal orders passed down independently of the Accused) are few: (1) he can issue an order countermanning the order; (2) he can resign; (3) he can sabotage the enforcement of the order within a somewhat limited sphere. ..." See also the case of *Mamoru Shigemitsu*, The International Military Tribunal for the Far East, Japanese War Crimes Trials, (29 April 1946- 12 November 1948) (University Press Amsterdam, 1977), Judgement annex A-6, p. 458, which states: "he, as a member of the government, bore overhead responsibility for the welfare of the



73. The Prosecution notes that the Accused demonstrated their knowledge of the shelling in its immediate aftermath. On 7 December 1991, a meeting was held in Cavtat, attended, *inter alia*, by ECMM monitors and the Accused Jokić, whereupon the Accused indicated that the JNA would send a film crew to Dubrovnik to record the damage suffered by the Old Town. The next day, two JNA officers were escorted by ECMM members on a tour of the Old Town.<sup>85</sup>

*b. Reason to know*

74. Additionally and in the alternative, the Prosecution submits that the Accused had reason to know of the shelling of the Old Town of Dubrovnik on 6 December 1991. This is on the basis, *inter alia*, of the knowledge of the Accused of the special significance of Old Town and the heightened obligations resting upon them to ensure its protection and the proven vulnerability of the Old Town as evidenced by the previous damage it had suffered as a result of shelling carried out by JNA forces. Finally, the strategic-political imperatives then prevailing ensured that the Accused would have been particularly mindful to have suppressed – and certainly to have monitored – any combat activities taking place in the environs of Dubrovnik especially in the Old Town on or around this date.

75. As noted above, the Old Town's protected status and the consequent need to ensure its protection from the effects of combat had been the subject of both standing orders from the JNA Main Staff in Belgrade and combat orders, issued by the Accused themselves, to all units and formations under their command. The protection of the Old Town as a cultural heritage site was thus at all times relevant to the indictment period one of the foremost legal obligations on the JNA. Such was the importance of the attack of 6 December that General Kadijević, the Federal Secretary of National Defence, upon becoming aware of the situation in Dubrovnik on 6 December, demanded an explanation and ordered the Accused to meet with him at 1400 hours in Belgrade.

76. Despite this, shelling by JNA forces under the command of the Accused had previously caused damage to the Old Town. The Accused were therefore aware of the potential for damage to the Old Town in consequence of shelling by their troops and thus,

prisoners. He should have pressed the matter, if necessary to the point of resigning, in order to quit himself of a responsibility which he suspected was not being charged" (emphasis added).

<sup>85</sup> Prosecution Witnesses Nos. 8 and 16. See also Prosecution Document No. 131.



once conflict erupted in the vicinity of the Old Town on 6 December 1991, the Old Town's heightened significance and its proven particular vulnerability should have adverted a reasonable commander to the risks of further damage to civilian and civilian objects and thus prompted particular vigilance on the part of the Accused.

77. It is accordingly submitted that the Accused should have been placed on enquiry upon first receipt of information that hostilities had erupted in the vicinity of the Old Town, irrespective of whether such notice specifically adverted to damage to the Old Town or not.

78. The Prosecution further submits that given the circumstances prevailing at the time, this legally obligated protective duty *vis-à-vis* the Old Town should have been among the obligations foremost in the minds of the Accused. On 5 December 1991, in Cavtat, following approximately three months of hostilities in the Dubrovnik region, the parties sought to bring an end to the fighting through a negotiated comprehensive cease-fire. The JNA was represented in this regard by the Accused Jokić.

79. The cease-fire was of great significance to both sides. The Prosecution submits that the importance assigned to this cease-fire to the JNA, evidenced by the foregoing, emphasises the heightened necessity to take all measures to ensure timely, effective and unobstructed implementation of its provisions. Miodrag Jokić and, *a fortiori*, Pavle Strugar were thus under an affirmative duty to remove all impediments or potential impediments to the implementation of this cease-fire.

### **3. Failure to Prevent**

80. The Prosecution submits that a reasonable commander would, in such circumstances, have taken additional measures to ensure that notice of the fact and the importance of the impending cease-fire were adequately and clearly communicated to all subordinate units. It was reasonable to anticipate, under all the circumstances prevailing at the time, the range of foreseeable problems which could interfere with the realisation of the cease-fire. In particular, given the history of incidents involving shelling of the Old Town by the 3./472 mbtr in October and November 1991, notwithstanding orders or communications prohibiting the same, specific orders on the eve of the cease-fire to Vladimir Kovačević, that battalion's commander, prohibiting any combat activity, including any attacks on the Old Town, should have been specifically issued and compliance should have been insured. Furthermore, once hostilities commenced, thus

preventing an all-important cease fire from taking effect, Strugar and Jokić should have taken all practicable measures to have brought about the immediate cessation of hostilities and in particular to terminate any attacks against the Old Town. It is submitted that their failure to do all that was reasonably practicable under the circumstances cements their responsibility under Article 7(3) of the Statute for failure to prevent the unlawful shelling.

#### 4. Failure to punish

81. In addition to the obligation to prevent, the Accused had a duty to refer for investigation and report on alleged breaches of the laws of war and, commensurate with the scope of their authority, to punish the perpetrators thereof.

82. The Prosecution submits that the failure of the Accused to exercise their full investigative and disciplinary powers in the wake of the shelling of the Old Town ensures their responsibility, at a minimum, for failure to punish pursuant to Article 7(3) of the Statute.

##### a. *Disciplinary Authority of the Commander of the 2.OG and 9.VPS*

83. Military discipline and order were recognised by the JNA as basic requirements for the achievement of military objectives.<sup>86</sup>

(1) Relevant SFRY laws and JNA regulations relating to the duty to ensure compliance with international law and to investigate potentially unlawful acts

84. Beyond the above-mentioned power to discipline subordinates in order maintain good order and discipline, the Corps Commander was specifically made individually responsible to ensure compliance of his units with the laws of armed conflict and other core prohibitions of international humanitarian law, and was obliged to refer for investigation allegations of violations of both international and domestic law.

85. As Corps Commander, each Accused was expressly tasked with ensuring that the Corps Command organs and subordinate commands, units and institutions are working within the law. This and other applicable sections of the regulations are unambiguous and

<sup>86</sup> These powers were codified in a number of JNA and other regulations including the SFRY Criminal Code. In the broadest sense, the legal mandates of superior authority and subordinate compliance are found in the SFRY Criminal Code. Articles 201 (failure and refusal to execute an order) and Article 203 (resisting a superior) were both applicable. These provisions clearly delineated the legal obligations for both individual and collective compliance by military personnel and held military superiors accountable for the failure to enforce such compliance when required. (See Prosecution Document No. 323).

leave no room for a Corps Commander to doubt his personal responsibility and liability for violations of the laws of war committed by himself or by units under his control.

86. The JNA Corps Commander was required proactively and positively to ensure the prevention of criminal acts by units under their command and control. Further, they were obligated to refer for investigation and report to superior authorities the perpetrators of such acts.

87. The applicable paragraphs of the SFRY Regulations on the Application of the International Laws of War on the Armed Forces with respect to Individual and Command Responsibility (hereinafter "the Regulations") defined individual responsibility as follows:

Every individual (military or civilian) shall be personally accountable for breaches of the rules of the law of war if he/she commits a violation him/herself, or orders one to be committed. Ignorance of the provisions of the rules of the law of war does not exonerate the transgressors of responsibility.<sup>87</sup>

88. Additionally, these regulations expressly refer to the accomplice liability of a commander in circumstances where subordinates carry out criminal acts. Paragraph 21 of the Regulations states in this regard that:

An officer shall be answerable as an accomplice or instigator if, by failure to take action against subordinates violating the rules of the law of war, he has contributed to the repeated commission of such acts by units or individuals subordinate to him.<sup>88</sup>

<sup>87</sup> *Prosecution Document No. 316.* It is interesting to note that paragraph 20 of these regulations also states that "the perpetrators of such criminal acts may also answer before an international court, if such a court has been established." Command responsibility is also defined therein at paragraph 21: "An officer shall be personally liable for breaches of the rules of the law of war if he knew or should have known that units subordinate to him or other units or individuals were planning the commission of such breaches, and, at the time when it had still been possible to prevent their commission, failed to take measures to prevent such breaches. The officer will also be held personally liable who, aware that breaches of the rules of the law of war have been committed, fails to institute disciplinary or criminal proceedings against the offender, or if instituting of proceedings does not fall within his purview, fails to report the breach to the superior officer in charge."

<sup>88</sup> *Prosecution Document No. 316.*

(2) JNA Regulations specifically pertaining to attacks against civilians and protected objects

89. Chapter 16 of the SFRY Criminal Code articulated a variety of criminal offences against humanity and international law.<sup>89</sup> These included War Crimes against the Civilian Population (Article 142) and the Destruction of Cultural and Historical Monuments (Article 151).<sup>90</sup>

90. These provisions enshrine in substance the prohibitions of the Additional Protocols to the Geneva Conventions against attacks against civilians and civilian objects, in accordance with the SFRY's obligations as parties to these instruments. In particular, and in specifying the concept of the civilian population,<sup>91</sup> and the general protections of that population, the Regulations stated the following:

*General Protection of the Civilian Population.* The civilian population and its property may not be the direct object of combat operations. All civilians who are in the territory of the parties to the conflict shall, irrespective of their nationality, be entitled to this protection.<sup>92</sup>

91. Amplifying this, the regulations contained restrictions and prohibitions relating to attacks on persons<sup>93</sup> and cultural property.<sup>94</sup>

<sup>89</sup> *Prosecution Document No. 315.*

<sup>90</sup> *Prosecution Document No. 315.* The remaining two articles in Chapter 16 refer to racism (Article 154) and slavery, terrorism, attacks upon protected persons, and the taking of hostages. (Article 155 inclusive).

<sup>91</sup> As defined in paragraph 52 of the SFRY Regulations on the Application of the Rules of International Law of War in the Armed Forces, dated 1988, a civilian (or civilian population) is anyone who "does not belong to the categories of the Armed Forces as described in Paragraphs 48 and 50". (See *Prosecution Document No. 316*).

<sup>92</sup> *Idem.* Paragraph 54 provides as follows: Combat operations which may entail casualties among the civilian population shall not constitute a violation of the provisions of the general protection of the civilian population referred to in item 53 of these instructions in the following cases: 1) If the civilian population is in a military facility; 2) If the person who falls within the category of civilian population is with a military unit; 3) If the civilian population is in any way in the immediate vicinity of a military facility during combat operations against such a facility-however in such cases, the military advantage to be gained by such combat operations and the consequences of such operations on the civilian population must be considered.

<sup>93</sup> *Ibid.*, paragraph 67: "Persons who are direct objects of attack and protected persons. A direct attack is allowed only on members of the armed forces, and on other persons only if they are directly involved in war operations. Civilians may not be the direct object of combat operations. Attacking civilians for the purpose of terrorising them is especially prohibited. ...In the case of doubt, the person in question shall be considered a civilian until the contrary is established. The presence of non-civilians among the civilian population shall not deprive that population of its civilian status."

<sup>94</sup> *Ibid.*, paragraph 79: "Protection of cultural property. During the bombardment of defended places, all measures necessary for the protection of buildings for religious services (churches and temples) should be undertaken if these are not used for military purposes. The parties to the conflict shall be

92. In consequence of their training, rank and experience, both Accused were cognisant with the relevant JNA doctrine.

(3) The exercise of these investigative and disciplinary powers by the Accused

93. The evidence will show that investigation into the shelling of the Old Town by the Accused was either perfunctory or non-existent. Nor were any of the perpetrators of this attack ever subject to any meaningful reprimand or penalty.

94. Tellingly, it is apparent that the disciplinary authority of the Accused remained intact throughout the indictment period and its immediate aftermath. The evidence will show that despite the exigencies of conflict, the Accused were nevertheless able to punish minor infractions of military discipline and insubordination during this period.

95. In summary, both Accused possessed extensive *de jure* and *de facto* control over the JNA forces responsible for the unlawful acts described above and were placed on sufficient notice that these acts had occurred, were occurring or were about to occur during the tenure of their command. They were accordingly obliged, *inter alia*, to make further enquiries regarding the activities of their troops, to take measures to prevent the occurrence or continuance of any unlawful acts which may have emanated from their area of responsibility and to investigate or refer for prosecution allegations of unlawful conduct which may have previously occurred. Their failure to take the necessary and reasonable preventive or punitive measures at their disposal renders them criminally responsible under Article 7(3) of the Statute.

### **C. The Individual Criminal Responsibility Of The Accused (Article 7(1))**

96. In addition to the incontrovertible superior responsibility of both Accused, the Prosecution further submits that both Accused are also responsible, in addition or in the alternative, under Article 7(1) of the Statute for ordering or aiding and abetting.

responsible for undertaking the measures referred to in part 1 of this item. The commander of the unit bombarding a defended place shall take all necessary measures to prevent facilities from part 1 of this paragraph from being a direct target and to protect them as much as possible from the indirect effects of the attack. The authorities of the place in which such facilities are shall mark them by internationally recognised signs and refrain from putting such facilities to military use, or placing military facilities in their vicinity" and paragraph 88: "Prohibition of acts against cultural property. Exposing cultural property to war operations or undertaking hostile acts against such property which could destroy or damage is prohibited. In particular, the armed forces are prohibited from directly or indirectly using such property, the means for its protection, or its surroundings for purposes which

97. In this regard, the Prosecution recalls and re-incorporates by reference the above-mentioned paragraphs which set forth the considerable breadth and scope of the Accused's formal powers as Corps Commanders within the JNA military hierarchy, and consequently, the ultimate personal responsibility of the Accused for the conduct of all military operations in-theatre.

98. While the Prosecution case with regard to Article 7(1) of the Statute is circumstantial, it is submitted that the totality of evidence will demonstrate that it is inconceivable that the attacks of 06 December, emanating as they did from within a tightly-controlled and formal military chain of command, could have been the result of the spontaneous initiative of a single battalion commander. Further, the firepower and *materiel* subsequently brought to bear by the JNA in support of the initial assault render it inconceivable that such attacks could commence without the direct authorisation of the Accused – or at least their open acquiescence. Further, these attacks entailed a co-ordinated artillery and mortar barrage involving at least two motorised battalions. Military logic alone (such as, for instance, the need to minimise the risk of friendly fire) dictates that attacks of this intensity, duration and lethality be subject, if not to the oversight and co-ordination of high-level commanders, then at least to their tacit authorisation and approval.

99. Further, there is evidence to suggest that the Accused Strugar opened fire on the Old Town in retaliation for losses he had suffered earlier in the morning of 06 December 1991.<sup>95</sup> As set forth below, the Prosecution submits that such actions are unlawful in accordance with the settled jurisprudence of this Tribunal.<sup>96</sup>

100. The Prosecution submits that the continued and knowing implicit support by the Accused for the unlawful shelling establishes under all the circumstances, the individual responsibility of the Accused for ordering and/or aiding and abetting. The condoning of the acts of shelling of the Old Town is further evidence of ordering and aiding and abetting the violations that occurred on 6 December. Further, the consequent failure of both Accused to punish these crimes in their aftermath may be equated with moral

might expose it to attack.” See also paragraphs 86, 89 and 90 for further details concerning the concept of cultural property and the prohibition of attacks thereon.

95 **Prosecution Witness No. 11**

<sup>96</sup> See *infra* (legal submissions concerning reprisals).

encouragement or succour of such conduct: a further variant of accomplice liability expressly recognised within the case law of this Tribunal.<sup>97</sup>

#### IV. LEGAL ANALYSIS

##### A. Modes of Criminal Responsibility under Article 7 of the Statute

101. Cumulative charging under Articles 7(1) and 7(3) is permissible,<sup>98</sup> and conviction under both articles is possible.<sup>99</sup> For any charge of 7(1) responsibility, the Trial Chamber has the discretion to find that the evidence supports any of the modes of liability whether or not they were expressly charged.<sup>100</sup>

##### 1. Individual Criminal Responsibility under Article 7 (1)

102. The Indictment charges, under Article 7(1) of the Statute, each Accused with ordering or aiding and abetting in the planning, preparation or execution of the crimes in relation to all counts of the Indictment. By using the word "committed" in the Indictment, the Prosecutor does not intend to suggest that the Accused Jokić and Strugar physically perpetrated any of the crimes charged personally, in contrast to the Accused Kovačević.

103. Cumulative charging under Articles 7(1) and 7(3) is permissible,<sup>98</sup> and conviction under both articles is possible.<sup>99</sup> For any charge of 7(1) responsibility, the Trial Chamber has the discretion to find that the evidence supports any of the modes of liability whether or not they were expressly charged.<sup>100</sup>

103. "Ordering" entails a person in a position of authority using that position to convince another to commit an offence.<sup>101</sup> It is not necessary to prove that the subordinate

<sup>97</sup> See *infra*, legal analysis of 7(1) (aiding and abetting).

<sup>98</sup> *Prosecutor v. Blaškić*, Decision on the Defence Motion to Dismiss the Indictment Based upon Defects in the Form Thereof (Vagueness/Lack of Adequate Notice of Charges), Case No. IT-95-14-PT, 4 April 1997, para. 32.

<sup>99</sup> *Prosecutor v. Zejnil Delalić et al.*, Judgement, Case No. IT-96-21-T, 16 November 1998 (hereinafter *Čelebići Trial Judgement*), paras. 1221-23. See also *Prosecutor v. Delalić, et al.*, Decision on Motion by the Accused Hazim Delić on Defects in the Form of the Indictment, Case No. IT-96-21-T, 5 Nov. 1996, paras. 16-18. But see *Prosecutor v. Radislav Krstić*, Judgement, Case No. IT-98-33-T, 02 August 2001 (hereinafter *Krstić Trial Judgement*), para. 652; *Prosecutor v. Milorad Krnojelac*, Judgement, Case No. IT-97-225-T, 15 March 2002 (hereinafter *Krnojelac Trial Judgement*), paras. 173, 316, 496.

<sup>100</sup> *Prosecutor v. Zoran Kupreskić, et al.*, Judgement, Case No. IT-95-16-T, 14 January 2000 (hereinafter *Kupreskić Trial Judgement*), para. 746; see also *Prosecutor v. Anto Furundžija*, Judgement, Case No. IT-95-17/1-T, 10 December 1998 (hereinafter *Furundžija Trial Judgement*), para. 189; *Krstić Trial Judgement*, para. 602. Cf. *Prosecutor v. Zejnil Delalić et al.*, Judgement, Case No. IT-96-21-A, 20 February 2001 (hereinafter *Čelebići Appeals Judgement*), paras. 350-51.

<sup>101</sup> *Krstić Trial Judgement*, para. 601; *Akayesu Trial Judgement*, para. 483. No formal superior-subordinate relationship is required for a finding of "ordering" as long as the Accused possessed the authority to order. (*Kordić Trial Judgement*, para. 388; *Akayesu Trial Judgement*, para. 483; *Blaskić Trial Judgement* para. 281).



who executed the order shared the *mens rea* of the Accused; it is therefore irrelevant whether the order was illegal on its face.<sup>102</sup> The giving of an order may be proven circumstantially and the order need not be in writing,<sup>103</sup> need not be given by the superior directly to the person who commits the crime,<sup>104</sup> and may be express or implied.<sup>105</sup>

*b. "Aiding and Abetting"*

104. The *actus reus* of aiding and abetting consists of practical assistance, encouragement or moral support to another person perpetrating a crime.<sup>106</sup> Aiding and abetting may assume different forms of assistance, including omissions.<sup>107</sup>

105. Proof that the conduct of the aider and abettor had a causal effect on the act of the principal perpetrator is not required,<sup>108</sup> but the Accused's act must have had a substantial effect on the commission of the crime.<sup>109</sup> There is no requirement of a pre-existing plan.<sup>110</sup> Aiding and abetting can take place before, during or after the event.<sup>111</sup> The Accused's knowing presence when a crime is committed can constitute the act of aiding and abetting if it encourages the perpetrators.<sup>112</sup> An omission by a superior can contribute to the commission of a subordinate's crime, for example by encouraging the perpetrator.<sup>113</sup>

<sup>102</sup> *Blaškić* Trial Judgement, para. 282; *Kordić* Trial Judgement, para. 388.

<sup>103</sup> *Kordić* Trial Judgement, para. 388; *Blaškić* Trial Judgement, para. 281.

<sup>104</sup> *Kordić* Trial Judgement, para. 388; *Blaškić* Trial Judgement, para. 282.

<sup>105</sup> *Blaškić* Trial Judgement, para. 281.

<sup>106</sup> *Prosecutor v. Zlatko Aleksovski*, Judgement, Case No. IT-95-14/1-A, 24 March 2000 (hereinafter *Aleksovski* Appeals Judgement), para. 162; *Krnjelac* Trial Judgement, para. 88; *Kunarac* Trial Judgement, para. 391; *Blaškić* Trial Judgement, para. 283; *Furundžija* Trial Judgement at 249. See also *Tadić* Appeals Judgement, para. 229.

<sup>107</sup> *Krnjelac* Trial Judgement, para. 88; *Kunarac* Trial Judgement, para. 391; *Čelebići* Trial Judgement, para. 327 (assistance in different forms); *Blaškić* Trial Judgement, para. 284.

<sup>108</sup> *Krnjelac* Trial Judgement, para. 88; *Kunarac* Trial Judgement, para. 391; *Blaškić* Trial Judgement, para. 285; *Furundžija* Trial Judgement at 233.

<sup>109</sup> *Krnjelac* Trial Judgement, para. 88; *Aleksovski* Appeals Judgement, para. 162. See also *Kunarac* Trial Judgement, para. 391; *Blaškić* Trial Judgement, para. 284 ("decisive effect"); *Furundžija* Trial Judgement at 234.

<sup>110</sup> *Aleksovski* Appeals Judgement, para. 163; *Tadić* Appeals Judgement, para. 229.

<sup>111</sup> *Krnjelac* Trial Judgement, para. 88; *Kunarac* Trial Judgement, para. 391; *Čelebići* Trial Judgement, para. 327; *Blaškić* Trial Judgement, para. 285.

<sup>112</sup> *Prosecutor v. Dusho Tadić*, Judgement, Case No. IT-94-1-T, 7 May 1997 (hereinafter *Tadić* Trial Judgement), paras. 689-90; see also *Blaškić* Trial Judgement, para. 284; *Akayesu* Trial Judgement, para. 693.

<sup>113</sup> *Kordić* Trial Judgement, para. 371.



106. For the required *mens rea*, the Accused must make a conscious decision to act, either knowing that his conduct will contribute to the commission of a crime committed by another,<sup>114</sup> or being aware of the substantial likelihood that it will do so.<sup>115</sup> The Accused must also have knowledge of the essential elements of the crime; this includes knowing - but not necessarily sharing - the perpetrator's *mens rea*.<sup>116</sup> It is not necessary that the aider or abettor knew the precise crime that was intended or which was actually committed.<sup>117</sup>

## 2. Criminal Responsibility as a Superior Under Article 7(3)

107. Each Accused is charged in all counts of the Indictment with responsibility as a superior under Article 7(3).<sup>118</sup> The essential elements for superior or command responsibility are:

- a) the existence of a superior-subordinate relationship between the Accused and the perpetrator of the offence;
- b) the Accused knew or had reason to know that the perpetrator was about to commit the offence or had done so; and
- c) the Accused failed to take the necessary and reasonable measures to prevent the offence or to punish the perpetrator thereof.<sup>119</sup>

### a. *Superior-Subordinate Relationship*

108. The applicable test for whether the Accused had superior responsibility for acts of the perpetrator is one of effective control.<sup>120</sup> Although the notion of a superior-

<sup>114</sup> *Aleksovski* Appeals Judgement, para. 162; *Tadić* Appeals Judgement, para. 229; *Furundžija* Trial Judgement, paras. 243-46, 249.

<sup>115</sup> *Blaškić* Trial Judgement, paras. 286-87; *Kvočka* Trial Chamber judgement, para. 255. See also *Krnjelac* Trial Judgement, para. 90; *Kunarac* Trial Judgement, para. 392.

<sup>116</sup> *Aleksovski* Appeals Judgement, para. 162; *Krnjelac* Trial Judgement, para. 90; *Kvočka* Trial Judgement, paras. 255, 262; *Kunarac* Trial Judgement, para. 392; *Furundžija* Trial Judgement, para. 245.

<sup>117</sup> *Kvočka* Trial Judgement, para. 255; *Blaškić* Trial Judgement, para. 287; *Furundžija* Trial Judgement, para. 246.

<sup>118</sup> Command responsibility is a mode of participation chargeable during armed conflicts that are both international and non-international in character (*Prosecutor v. Enver Hadžihasanović et al.* Judgement, Case No. IT-01-47-AR72, 16 July 2003 (hereinafter *Hadžihasanović* Appeals Judgement)).

<sup>119</sup> *Aleksovski* Appeals Judgement, paras. 71-72; *Krnjelac* Trial Judgement, para. 92; *Kvočka* Trial Judgement, para. 314; *Krstić* Trial Judgement, para. 604; *Kordić* Trial Judgement, para. 401; *Kunarac* Trial Judgement, para. 395; *Blaškić* Trial Judgement, para. 294.

<sup>120</sup> *Čelebići* Appeals Judgement, paras. 196-98.

subordinate relationship is not limited to military commanders,<sup>121</sup> in the instant case, each Accused is a military superior.

109. An Accused's superior authority can be either *de jure* or *de facto*.<sup>122</sup> Formal designation as a commander is not a necessary prerequisite for command responsibility to attach, as such responsibility may be imposed by virtue of a person's *de facto* position.<sup>123</sup> Evidence that the Accused possessed *de jure* authority, however, raises a presumption of effective control unless proof to the contrary is produced.<sup>124</sup> The existence of the superior-subordinate relationship, whether *de facto* or *de jure*, need not be evidenced by an official appointment or formal documentation.<sup>125</sup> The effective control test implies that more than one superior may be held responsible for the same crimes.<sup>126</sup>

110. The status of subordinates may also be *de facto*.<sup>127</sup> The relationship of subordination may be direct, or may be indirect, particularly in situations where previously existing formal structures have broken down and where, during an interim period, the new, possibly improvised, control and command structures may be ambiguous and ill-defined.<sup>128</sup> A tacit or implicit understanding between the commander and his subordinate as to their positioning *vis-à-vis* one another would, for example, be sufficient.<sup>129</sup>

111. A commander need not have exclusive legal authority to prevent or punish acts of his subordinates.<sup>130</sup> Factors relevant to a finding of effective control by a superior over subordinates may include, but are not limited to:

a) the capacity to sign orders;<sup>131</sup>

<sup>121</sup> Čelebići Appeals Judgement, para. 196; Kordić Trial Judgement, paras. 405-06.

<sup>122</sup> Kunarac Trial Judgement, para. 396; Kordić Trial Judgement, paras. 405-06.

<sup>123</sup> Čelebići Appeals Judgement, para. 188 (quoting the trial judgement); *id.* para. 193; see also ICRC Commentary (Additional Protocol I, Art. 86), para. 3544; Čelebići Appeals Judgement, para. 193.

<sup>124</sup> See Čelebići Appeals Judgement, para. 197; Blaškić Trial Judgement, para. 308; Prosecutor v. Aleksovski, Judgement, Case No. IT-95-14/1-T, 25 June 1999 (hereinafter Aleksovski Trial Judgement), para. 80.

<sup>125</sup> Čelebići Appeals Judgement, para. 193.

<sup>126</sup> Krnojelac Trial Judgement, para. 93; Blaškić Trial Judgement, para. 303; Aleksovski Trial Judgement, para. 106.

<sup>127</sup> Article 87 of the 1977 Additional Protocol I; See Blaškić Trial Judgement, paras. 300-01.

<sup>128</sup> Čelebići Appeals Judgement, para. 254 (quoting the trial judgement para. 354).

<sup>129</sup> Kunarac Trial Judgement, para. 397.

<sup>130</sup> Blaškić Trial Judgement, para. 302.

- b) the substance of orders;<sup>132</sup>
- c) whether orders were acted upon;<sup>133</sup>
- d) formal procedures for appointment to office;<sup>134</sup>
- e) the position of the Accused in the overall institutional, political and military organisation;<sup>135</sup>
- f) the actual tasks performed;<sup>136</sup>
- g) evidence that the Accused has a high public profile;<sup>137</sup>
- h) the Accused's overall behaviour towards subordinates and his duties;<sup>138</sup>
- i) the Accused's use of his extant authority to prevent crimes and mistreatment;<sup>139</sup>
- j) the exercise of powers generally attached to a military command;<sup>140</sup>
- k) the submitting of reports to competent authorities in order for proper measures to be taken,<sup>141</sup> and
- l) sanctioning power.<sup>142</sup>

**b. Notice**

112. The Prosecution must show that a superior knew or had reason to know that a subordinate was about to commit a prohibited act or had done so.<sup>143</sup> This mental state requirement can be satisfied either by actual knowledge, *i.e.*, actual notice, or by notice of the risk of such offences,<sup>144</sup> *i.e.* inquiry notice.

113. Actual knowledge is defined as the awareness that the relevant crimes were committed or were about to be committed,<sup>145</sup> and can be established through either direct

<sup>131</sup> *Kordić Trial Judgement*, para. 421; *Kunarac Trial Judgement*, para. 397.

<sup>132</sup> *Kordić Trial Judgement*, para. 421.

<sup>133</sup> *Idem.*

<sup>134</sup> *Ibid.*, para. 422.

<sup>135</sup> *Ibid.*, para. 423.

<sup>136</sup> *Ibid.*, para. 424.

<sup>137</sup> *Idem.*

<sup>138</sup> *Idem.*

<sup>139</sup> *Čelebići Appeals Judgement*, para. 206.

<sup>140</sup> *Kunarac Trial Judgement*, para. 397.

<sup>141</sup> *Blaškić Trial Judgement*, para. 302.

<sup>142</sup> *Aleksovski Trial Judgement*, para. 78.

<sup>143</sup> *Čelebići Appeals Judgement*, para. 222; *Čelebići Trial Judgement*, para. 383.

<sup>144</sup> *Čelebići Appeals Judgement*, para. 222.

<sup>145</sup> See *Kordić Trial Judgement*, para. 427-8; *Čelebići Trial Judgement*, paras. 383, 386.

or circumstantial evidence.<sup>146</sup> This Tribunal has used the United Nations Commission of Experts' non-exclusive list of factors to prove actual knowledge circumstantially:

- a) the number, type and scope of the illegal acts;
- b) the time during which the acts occurred;
- c) the number and type of troops involved;
- d) the logistics involved, if any;
- e) the geographical location of the acts;
- f) the widespread occurrence of the acts;
- g) the speed of the operations;
- h) the *modus operandi* of similar illegal acts;
- i) the officers and staff involved; and
- j) the location of the commander at the time.<sup>147</sup>

114. An individual's command position and his level of responsibility in the chain of command will be *per se* a significant indicium that he knew about the crimes committed by his subordinates.<sup>148</sup> In such circumstances, the actual knowledge of a military commander may be easier to prove on the grounds that he will presumably be part of an organised structure with established reporting and monitoring systems.<sup>149</sup>

115. With regard to the "had reason to know" standard, a superior can be held criminally responsible only if some information was in fact available to him which would provide notice of offences committed by his subordinates. This information need not, however, be such that it was by itself sufficient to compel the conclusion of the existence of such crimes. It is sufficient that the superior was put on further inquiry by the information; or, in other words, that it indicated the need for additional investigation in order to ascertain whether offences were being committed or about to be committed by his subordinates.<sup>150</sup> An Accused may thus be regarded as having "reason to know" if he or she, under any circumstances, may be able to prove on the grounds that he will presumably be part of an organised structure with established reporting and monitoring systems.

<sup>146</sup> Kordić Trial Judgement, para. 427-8;

<sup>147</sup> Kordić Trial Judgement, para. 427; Blaškić Trial Judgement, para. 307; Čelebići Trial Judgement, para. 386.

<sup>148</sup> Blaškić Trial Judgement, para. 308; Aleksovski Trial Judgement, para. 80.

<sup>149</sup> Kordić Trial Judgement, para. 427-8.

<sup>150</sup> Čelebići Trial Judgement, para. 393; Čelebići Appeal Judgement, para. 226. This information "need not be such that it by itself was sufficient to compel the conclusion of the existence of such crimes. It is sufficient that the superior was put on further inquiry by the information; or, in other words, that it indicated the need for additional investigation in order to ascertain whether offences were being committed or about to be committed by his subordinates" (ibid, para. 236). Further, it is necessary to

she is in possession of sufficient information to be on notice of the likelihood of illegal acts by subordinates, *i.e.*, if the information available is sufficient to justify further inquiry.<sup>151</sup>

116. The general information putting a superior on notice needs only to have been provided or available to the superior, or in the possession of the commander.<sup>152</sup> It is not required that he actually acquainted himself with the information.<sup>153</sup> Therefore, although Article 7(3) is not a form of strict liability,<sup>154</sup> a superior is criminally responsible if he deliberately ignores available information that would put him on notice.<sup>155</sup>

*c. Necessary and Reasonable Measures*

117. A superior must take necessary and reasonable measures to satisfy his or her obligation to prevent offences or punish offenders under Article 7(3).<sup>156</sup> The adequacy of these measures is commensurate with the material ability of a superior to prevent or punish.<sup>157</sup> Insofar as a superior is in effective control, therefore, he or she must exercise whatever ability he or she has to prevent crimes or punish their perpetrators.

118. The Trial Chamber should consider the Accused's actual ability or effective capacity to take action, rather than his legal or formal authority.<sup>158</sup> Although a superior is not obliged to perform the impossible, the superior nevertheless has a duty to exercise the

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prove only that "information of a general nature was available to the superior that would have put him on notice of offences committed by subordinates" (*ibid.*, para. 241).

<sup>151</sup> As regards the factors that could be held to constitute sufficient information putting a superior on notice, the *indicia* listed in the United Nations Commission of Experts Report can also be used in this context to determine whether knowledge of the underlying offences alleged could be imputed to an Accused (*Kordić Trial Judgement*, para. 437).

<sup>152</sup> *Čelebići Appeals Judgement*, para. 239; *see also Krnojelac Trial Judgement*, para. 94 ("in his possession"); *Kvočka Trial Judgement*, para. 318 ("information was available").

<sup>153</sup> *Čelebići Appeals Judgement*, para. 239.

<sup>154</sup> *Čelebići Appeals Judgement*, para. 239; *Kordić Trial Judgement*, para. 437; *Kvočka Trial Judgement*, para. 318.

<sup>155</sup> *Čelebići Appeals Judgement*, para. 238. 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 troops (*Čelebići Appeals Judgement*, para. 238, quoting the ICRC Commentary on Additional Protocol I, para. 3545; *Kordić Trial Judgement*, para. 437), as well as "past behavior of subordinates or a history of mistreatment" (*Kvočka Trial Judgement*, para. 318).

<sup>156</sup> *Krnojelac Trial Judgement*, para. 95; *Čelebići Trial Judgement*, para. 394.

<sup>157</sup> *Blaškić Trial Judgement*, para. 335; *Čelebići Trial Judgement*, para. 395.

<sup>158</sup> *Kordić Trial Judgement*, para. 443; *see also Blaškić Trial Judgement*, para. 335; *Čelebići Trial Judgement*, para. 395.

powers he has within the confines of those limitations.<sup>159</sup> The duty to prevent or to punish includes at least an obligation to investigate the crimes to establish the facts and to report them to the competent authorities, if the superior does not have the power to sanction himself.<sup>160</sup> Whether the Accused's effort to prevent or punish the crimes committed by subordinates rises to the level of "necessary and reasonable measures" is for the Trial Chamber to evaluate under the facts of the particular case.<sup>161</sup>

119. The obligation to prevent *or* to punish does not provide the Accused with two alternative and equally satisfying options.<sup>162</sup> If the Accused failed to prevent crimes he knew or had reason to know were about to happen, he cannot make up for the failure to act by punishing the subordinates afterwards.<sup>163</sup>

## **B. Substantive Offences**

### **1. General Requirements of Article 3 of the Statute & of Common Article 3**

120. Each Accused has been charged with violations of Articles 3(b) and 3(d) of the Statute, as well as with murder and cruel treatment as violations of Article 3(1)(a) common to the 1949 Geneva Conventions<sup>164</sup> chargeable under Article 3 of the Statute.

121. They are further charged under Article 3 with the offences of unlawful attacks against civilians and civilian objects; offences recognised in Articles 51 and 52 of Additional Protocol I and Article 13 of Additional Protocol II to the 1949 Geneva Conventions and customary international law.<sup>165</sup> At all times relevant to the Indictment,

<sup>159</sup> *Krnjelac* Trial Judgement, para. 95.

<sup>160</sup> *Kordić* Trial Judgement, para. 446 (emphasis added); *see also*, *Blaškić* Trial Judgement, para. 335.

<sup>161</sup> *Čelebići* Trial Judgement, para. 394. *See also* *Kvočka* Trial Judgement, para. 316.

<sup>162</sup> *Blaškić* Trial Judgement, para. 336. The Trial Chamber in *Kvočka* also refers to the superior's failure "to halt or suppress crimes". *See* *Kvočka* Trial Judgement, para. 313; *see also* *ibid*, paras. 314, 315, 396, 409, 465, 501.

<sup>163</sup> *Blaškić* Trial Judgement, para. 336; *see also* *Kvočka* Trial Judgement, para. 313; *Kordić* Trial Judgement, para. 446.

<sup>164</sup> Hereinafter "common Article 3".

<sup>165</sup> *See* *Prosecutor v. Pavle Strugar et al*, Decision on Interlocutory Appeal, Case No. IT-01-42-AR72, 22 November 2002 (hereinafter *Strugar* Interlocutory Appeal Decision).

the 1949 Geneva Conventions and the 1977 Protocols additional to those Conventions applied to the territories of Croatia and the FRY in their entirety.<sup>166</sup>

122. Article 3 of the Statute is a residual provision that enables prosecution of all serious violations of the laws or customs of war not punishable under another Article of the Statute.<sup>167</sup> The general requirements for the application of Article 3 of the Statute are (a) the existence of an armed conflict, and (b) a nexus between the conduct and that armed conflict.

123. An armed conflict exists whenever there is a resort to armed force between States or protracted violence between governmental authorities and organized armed groups or between such groups within a State.<sup>168</sup> This Tribunal has previously ruled that during the indictment period, an armed conflict existed in the territory of the Republic of Croatia, including the region of Dubrovnik.<sup>169</sup>

124. The armed conflict can consist of localised areas of conflict<sup>170</sup> and may be international or internal in character.<sup>171</sup> An armed conflict is international in character where, *inter alia*, the conflict takes place between two or more States.<sup>172</sup>

<sup>166</sup> On May 11 1992, Croatia deposited a declaration of succession to the 1949 Geneva Conventions and 1977 Additional Protocols. (Swiss Federal Department of Foreign Affairs, Notification to the Governments of the States Parties to the Geneva Conventions of 12 August 1949 for the Protection of War Victims, Succession of Croatia, Berne, 7 July 1992). This declaration of succession declared the Geneva Conventions and Additional Protocols effective for Croatia retrospectively, as from 8 October 1991, the date at which its independence became effective. The Geneva Conventions, and by parity of reasoning their Additional Protocols, exemplify "treaties of universal character which express fundamental human rights" to which there is automatic State succession. (*Čelebići* Appeal Decision, para. 111). Prior to 8 October 1991, Croatia was a constituent republic of the Socialist Federal Republic of Yugoslavia (SFRY), a State Party to the Conventions since 21 April 1950 and of the Additional Protocols since 11 June 1979. (Roberts and Guelff (eds.), *Documents on the Laws of War*, 3rd ed. (Oxford University Press, 2000), pp. 361, 498). The *Strugar* Interlocutory Appeal Decision has, in any case, found the prohibitions derived from the Additional Protocols charged in the Indictment to be binding *qua* customary international law in all types of armed conflicts (*see supra*).

<sup>167</sup> In order to come within the purview of Article 3, a violation of the laws or customs of war must meet the requirements set forth in the *Tadić* Jurisdiction Decision. (*See Tadić* Jurisdiction Decision, paras. 87, 89, 91, 94 and 143; *Furundžija* Trial Judgement, paras. 132-133).

<sup>168</sup> *See Tadić* Jurisdiction Decision, para. 70 (temporal and geographic scope of armed conflict in international humanitarian law).

<sup>169</sup> *See Tadić* Trial Judgement, para. 112: "Croatia, unlike Slovenia, had a large Serb population and what were regarded as Serb lands, which were not to be allowed to remain unchallenged within the boundaries of the now independent Republic of Croatia. War ensued between the JNA and the Croatian Serbs on the one hand and, on the other, the forces that the Croatian government could rally. The outcome of the initial phase of that conflict was substantial success for the Serbs. By the end of 1991 those portions of the old Republic of Croatia in which large numbers of Serbs lived had been occupied by the JNA." *See also Kordić* Trial Judgement, para. 463.

<sup>170</sup> *See Kordić* Trial Judgement, para. 31: "The conflict between the JNA and the Croatian government and the forces that the Croatian government could rally, was a conflict between two or more States."



125. *Stricto sensu*, the Prosecution is not required to establish the international character of the armed conflict in the instant case. This has been the subject of conclusive determination by the Appeals Chamber in relation to the offences of attacks against civilians and civilian objects, chargeable under Article 3 of the Statute.<sup>173</sup> Similarly, customary international law imposes criminal liability for serious violations of common Article 3 of the 1949 Geneva Conventions,<sup>174</sup> which are also prosecutable under Article 3 whether committed in international or internal armed conflicts.<sup>175</sup> In any event, the Prosecution submits that as of 8 October 1991 – the effective date of Croatian independence – the armed conflict in question was of an international character.<sup>176</sup> Prior to that date, the armed conflict was non-international in nature.

126. To establish the required nexus between the crimes and the armed conflict, it is sufficient that the alleged crimes were closely related to the hostilities occurring in parts of territories controlled by the parties to the conflict as a whole.<sup>177</sup> It need not be shown that the crime was part of a policy or practice officially endorsed or tolerated by one of the parties, in furtherance of a policy associated with the conduct of war, in the interest of a belligerent party or that these crimes occurred "in the heat of battle."<sup>178</sup> In the instant case, the crimes alleged in the Indictment occurred in the course of armed hostilities; i.e. as a direct consequence of the shelling carried out by the JNA during the military campaign aimed at the Dubrovnik region, culminating in the 6 December 1991 shelling of the Old Town of Dubrovnik.

127. There is an additional general requirement under common Article 3; namely, that the victims were persons taking no part in hostilities, including members of the armed

<sup>171</sup> *Tadić* Jurisdiction Decision, para. 137; *Kordić* Trial Judgement, paras. 162-64; *Blaskić* Trial Judgement, para. 161.

<sup>172</sup> *Tadić* Appeals Judgement, paras. 84, 137. See also *Čelebići* Appeals Judgement, para. 26; *Aleksovski* Appeals Judgement, para. 134.

<sup>173</sup> See *Strugar* Interlocutory Appeal Decision.

<sup>174</sup> *Tadić* Jurisdiction Decision, para. 134.

<sup>175</sup> *Čelebići* Appeals Judgement, paras. 150-52; 160-74. With regard to the offences described in Articles 3(b) and (d) of the Statute, it is submitted that these prohibitions fall within the scope of the rules which can be said to apply also in internal strife (see *Tadić* Jurisdiction Decision, para. 127).

<sup>176</sup> See *inter alia* Badinter Commission, Opinion No. 11 (part of Prosecution Document No. 95) and *supra*.

<sup>177</sup> *Tadić* Jurisdiction Decision, para. 70; see also *Čelebići* Trial Judgement, para. 193.

<sup>178</sup> See *Blaskić* Trial Judgement, para. 70; *Čelebići* Trial Judgement, para. 199; *Tadić* Trial Judgement, para. 573. See generally *Kordić* Trial Judgement, para. 32.



forces who have laid down their arms and those placed *hors de combat*.<sup>179</sup> All victims of the crimes described in of the Indictment were non-combatants who were not taking part in the hostilities.

## 2. Elements of Specific Crimes

128. Counts 1 and 2 of the Indictment charge each Accused with deaths and injuries resulting from the unlawful acts committed by JNA units under their command during military operations conducted by the JNA, including: murders committed and serious injuries inflicted by members of the JNA during the actual conduct of hostilities or fighting when the JNA was conducting military operations in various urban areas.

129. Counts 1 and 2 have been laid as violations of common article 3 of the Geneva Conventions. Although the Geneva Conventions were not designed to regulate the conduct of hostilities, the Prosecutor submits that under the following circumstances, an Accused may be found guilty for both types of crime committed during an attack: (a) the attack must be unlawful; and (b) the status of the victim(s) included in the applicable victim group must be established (for violations of common article 3, persons taking no active part in the hostilities).

130. Unfortunately, civilians killed during a lawful attack may fall into the category of legitimate collateral casualties. This is why the determination of the unlawful character of an attack is so important as making the legitimate collateral casualties of a lawful attack the victims of violations of the Geneva Conventions would otherwise amount to making lawful combat impossible.

131. For murder under common Article 3(1)(a), the Prosecution must establish: (a) that the Accused's conduct caused the death of one or more persons, and (b) that the Accused thereby intended to kill or to inflict serious injury in reckless disregard for human life.

132. Omissions as well as concrete acts can satisfy the *actus reus* of murder.<sup>181</sup> Causation requires only that the conduct of the Accused was a substantial cause of the death. It is so important as making the legitimate collateral casualties of a lawful attack

<sup>179</sup> See Article 3(1) common to the 1949 Geneva Conventions; *Tadić Jurisdiction Decision*, para. 69.

<sup>180</sup> Count 1 of the Indictment.

<sup>181</sup> *Čelebići Trial Judgement*, para. 424.

death of the victim.<sup>182</sup> The victim's death may be proved either directly or circumstantially.<sup>183</sup>

133. The *mens rea* for murder is that the Accused either intended to kill or, alternatively, inflicted serious bodily harm in reckless disregard for human life. An Accused intended to kill if he consciously desired the death of the victim or was aware (*i.e.*, had knowledge) that his acts or omission were likely to result in the death of the victim.<sup>184</sup>

#### b. Cruel Treatment<sup>185</sup>

134. Cruel treatment under common Article 3(1)(a) requires proof that the Accused or a subordinate participated in an act or omission causing serious mental or physical suffering or injury, or constituting a serious attack on human dignity.<sup>186</sup>

135. This is a generic charge that encompasses criminal acts not explicitly enumerated, which are of a "serious" nature.<sup>187</sup> The required seriousness of the suffering, injury or attack on human dignity is evaluated on a case by case basis.<sup>188</sup> The Prosecution in the

<sup>182</sup> *Kupreskić* Trial Judgement, para. 560; *Čelebići* Trial Judgement, para. 424.

<sup>183</sup> See *Krnjelac* Trial Judgement, para 326-27; see also *Tadić* Trial Judgement, paras. 240.

<sup>184</sup> See *Krnjelac* Trial Judgement, para. 324; *Blaškić* Trial Judgement, para. 217; *Čelebići* Trial Judgement, para. 439; *Akayesu* Trial Judgement, para. 589; ICRC Commentary (Additional Protocols), para. 3474.

<sup>185</sup> Count 2 of the Indictment.

<sup>186</sup> Cruel treatment under common Article 3, inhuman treatment under Article 2(b) and inhumane acts under Article 5(i) of the Statute are equivalent crimes. (*Krnjelac* Trial Judgement, para. 130; *Kupreskić* Trial Judgement, para. 711; *Čelebići* Trial Judgement, paras. 543-44, 551-52, 533; *Jelisić* Trial Judgement, para 52; *Blaškić* Trial Judgement, paras. 154-5, 186; *Čelebići* Trial Judgement, para. 544. See also *Čelebići* Appeals Judgement, para. 426; *Aleksovski* Appeals Judgement, para. 26).

<sup>187</sup> *Blaškić* Trial Judgement, para. 237; *Krnjelac* Trial Judgement, para. 130-31; *Tadić* Trial Judgement, para. 728. This crime encompasses all acts which violate the basic principle of humane treatment, particularly the respect for human dignity. There is no closed list of acts which might make up this crime. Acts which have previously been held to constitute cruel treatment or its equivalent before this Tribunal include; "mutilation and other types of severe bodily harm", "beatings and other acts of violence" (*Tadić* Trial Judgement, para. 729-30); "serious physical and mental injury", (*Blaškić* Trial Judgement, para. 239); severe beatings, forced drinking of urine, infliction of burns and acts of sexual violence, (*Čelebići* Trial Judgement, paras. 1018, 1058-59, 1066); the use of human shields, (*Blaškić* Trial Judgement, paras. 742-43); beatings and trench-digging, (*Kordić* Trial Judgement, paras. 777-78, 836) sexual mutilations, forced eating of grass and solitary confinement for a year (*Krnjelac* Trial Judgement, para. 183; para. 236).

<sup>188</sup> See *Čelebići* Trial Judgement, para. 544; *Blaškić* Trial Judgement, para. 155. It nevertheless need not rise to the level of severity required for the crime of torture. (See *Čelebići* Trial Judgement, para. 468; *Krnjelac* Trial Judgement, para. 181). Similarly, it is not necessary that there be any specific purpose motivating the cruel treatment (*Čelebići* Trial Judgement, para. 552). The requisite *mens rea* is that the conduct be deliberate and not accidental. (See *Čelebići* Trial Judgement, paras. 543, 552; *Blaškić* Trial Judgement, paras. 154-155, 186; *Kordić* Trial Judgement, paras. 256, 265).

instant case charges cruel treatment in relation to victims who were wounded by the crimes alleged in the Indictment.

c. *Devastation not justified by military necessity*<sup>189</sup>

136. Article 3(b) covers wanton destruction of cities, town and villages or devastation not justified by military necessity.<sup>190</sup> This offence essentially concerns large-scale property destruction not justified by military necessity. Extensive or wanton destruction of property thus requires: (a) that property is damaged or destroyed, and (b) the damage or destruction is unlawful, that is, not justified by military necessity. "Extensive destruction", chargeable under Article 2 of the Statute, and "devastation" are in substance synonymous.

137. "Extensive" requires proof that the quantity or value of the property was sufficiently large,<sup>191</sup> but this must be evaluated according to the facts of the case. Thus, a single act, such as the destruction of a hospital, may suffice.<sup>192</sup> Rendering houses or communal structures uninhabitable or useless would be covered by this prohibition.<sup>193</sup>

138. "Wanton" destruction in Article 3 simply means unlawful or without military necessity.<sup>194</sup> Destruction is therefore only justified if rendered necessary by military operations. Military necessity is understood to be the application of force or measures, to the extent necessary and in conformity with international law, in pursuit of specific military goal(s) or objective(s).<sup>195</sup> The requirement for "military necessity" to be evaluated in terms of the requirements of international law is so as to prevent a *reductio ad absurdum* in which the ends (the perceived "military necessity" for a course of action) could always be posited as justifying the means, even in circumstances where the methods

<sup>189</sup> Count 4 of the Indictment.

<sup>190</sup> Despite the different language used, the essential requirements as to property damage in this offence and that described in Article 2(d) of the Statute are the same. (See *Blaškić* Trial Judgement, para. 183).

<sup>191</sup> *Kordić* Trial Judgement, para. 341.

<sup>192</sup> *Blaškić* Trial Judgement, para. 157.

<sup>193</sup> See e.g. *Prosecutor v. Rajić*, Review of the Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence, Case No. IT-95-12-R61, 13 September 1996, paras. 52-53, 56.

<sup>194</sup> This is consistent with the terms used in the French version of Article 3(b): *sans motif*, i.e. without good reason.

<sup>195</sup> Canadian Military Manual B-GG-005-027/AF-020, the Laws of Armed Conflict at the Tactical and Operational Level, 20 Oct 1999. Chapter 2, p. 2-1 and Glossary p. GL-13. The Law of War Workshop Deskbook, published by the International and Operational Law Department, The U.S. Army Judge General's School, published June 2000. Chapter 7, pp 152-153.

employed to accomplish a particular objective were unlawful. Thus, for example, "military necessity" would never justify the destruction of property to drive owners of a particular nationality or ethnicity out of the area.<sup>196</sup>

139. The Accused must have acted with the intent to destroy the property in question or in reckless disregard of the likelihood of its destruction.<sup>197</sup> Wilfulness can be inferred from evidence, for example, of the selective targeting of non-Serb residences, lack of evidence indicating that the damage was collateral resulting from an attack on a military objective, evidence of prior planning and the indiscriminate nature of the attack.

*d. Destruction or Wilful Damage to, inter alia, Historical, Religious, Educational or Charitable Institutions*<sup>198</sup>

140. Article 3(d) includes as a war crime the "seizure of, destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science".

141. For this crime, the Prosecution must establish that: (a) an institution, monument or work of religious, educational, cultural or historical value was destroyed or damaged; and (b) the property destroyed or damaged was protected under international humanitarian law.

142. Institutions, monuments or works protected under international humanitarian law (in territories not under occupation) include those which, at the moment of destruction or damage, were dedicated to religion, charity, education, arts and science or were of artistic, scientific or historical value.<sup>199</sup> To date, this offence has encompassed damage to or destruction of the following types of property: Muslim mosques,<sup>200</sup> Roman Catholic churches,<sup>201</sup> synagogues,<sup>202</sup> monasteries<sup>203</sup> and cemeteries.<sup>204</sup> Protection would also cover

<sup>196</sup> See *Krstić Trial Judgement* at para. 527 (no military necessity justified the purpose of expelling Bosnian Muslim population).

<sup>197</sup> *Kordić Trial Judgement*, para. 341; *Blaskić Trial Judgement*, para. 183.

<sup>198</sup> Count 6 of the Indictment.

<sup>199</sup> *Blaskić Trial Judgement*, para. 185; Article 27 of Regulations annexed to Hague Cultural Property Convention IV (Respecting the Laws and Customs of War on Land) of 1907.

<sup>200</sup> See *Blaskić Trial Judgement*, disposition; *Kordić Trial Judgement*, paras. 804-809; *Prosecutor v. Radevan Karadžić and Ratko Mladić, Review of the Indictment pursuant to Rule 61 of the Rules of Procedure and Evidence*, Case No. IT-95-5&18-PT, 11 July 1996 (hereinafter *Karadžić and Mladić Rule 61 Decision*), paras. 15-16.

<sup>201</sup> See *Karadžić and Mladić Rule 61 Decision*, paras. 15-16.

<sup>202</sup> *Ibid.*, para. 15.

property such as places of worship and sacred sites (of whatever faith), schools, conservatories, theatres, archaeological sites, paintings, sculptures and ancient scripts.<sup>205</sup>

The structures and objects mentioned in paragraphs 23 and 24 of the Indictment in relation to Article 3(d) have been clearly recognised as historic monuments or were dedicated to religious, charitable or educational purposes.

143. In addition, the protected institutions or monuments must not have been used for military purposes at the time of the acts in question or in the immediate vicinity of military objectives.<sup>206</sup> The structures and objects mentioned in the Indictment in relation to Article 3(d) were not during the material times used for any military purpose. If, *arguendo*, specially protected property were to be used for military purposes which the Prosecution asserts was not the case, the Hague Cultural Property Convention of 1954 obligates parties to request cessation of violations within a reasonable time whenever possible before immunity is lifted and the party withdrawing immunity is obligated to inform the Commissioner-General for cultural property in writing of the withdrawal and the reasons therefore (Article 11). Yugoslavia did not purport to formally withdraw immunity.

144. "Damage" requires a lesser degree of impairment or loss of value or significance than "destruction".<sup>207</sup> The Prosecution evidence will show that significant harm was occasioned to the structures described in paragraphs 23 and 24 of the Indictment.

*e. Unlawful Attacks Against Civilians*<sup>208</sup>

145. The crime of unlawfully attacking civilians, derived from Article 51 and Article 13 of Additional Protocols I and II respectively, is an unenumerated violation of the laws and customs of war chargeable under Article 3 of the Statute.

<sup>205</sup> *Ibid.*, para. 17.

<sup>206</sup> *Idem.*

<sup>207</sup> Property constituting or being of great importance to the cultural and/or spiritual heritage of peoples (to which the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict pertains) would also, *ipso facto*, fall within the purview of "institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science" for the purposes of Article 3(b). Despite the plural used in Article 3(d), it is submitted that individual criminal liability would result in situations where a single institution, monument or work protected under this provision was destroyed or damaged.

<sup>208</sup> *Blaskić Trial Judgement*, para. 185.

<sup>207</sup> See Article 4(1) and (3), 1954 Hague Cultural Property Convention. Acts causing damage to protected property include desecration and vandalism.

146. The offence of unlawful attacks on civilians requires proof that: (a) an attack resulted in civilian deaths, serious injury to civilians, or a combination thereof; (b) the perpetrator knew or should have known the civilian status of the persons killed or seriously injured; and (c) the attack was wilfully directed against civilians.<sup>209</sup> Although the offence of unlawful attacks on civilians entails proof that an attack resulted in civilian deaths or injuries, it is submitted that where the means and modus operandi of attacks exhibit an indiscriminate or other unlawful character, such acts may be probative of the intent of the Accused even when no civilian death or injury in fact resulted. International humanitarian law stipulates that civilians must not be the object of attack.<sup>210</sup> "Civilians" are defined residually within the law of armed conflict as comprising anyone not forming part of the armed forces of a party to the conflict.<sup>211</sup> In case of doubt whether a person is a civilian, that person shall be considered to be a civilian.<sup>212</sup>

147. It is the obligation of those who order an attack to properly assess the target, and if unsure, to seek additional information regarding its character. A perpetrator's knowledge of the civilian status of a population or of individual victims can be established through direct or circumstantial evidence and may be inferred.

148. The Prosecution submits that an inference may be drawn that attacks were in substance wilfully directed against civilians in the following three circumstances; humanitarian law stipulates that civilians must not be the object of attack.<sup>213</sup> "Civilians" are defined residually within the law of armed conflict as comprising anyone not forming

- a) Where civilians were directly targeted as such;<sup>213</sup>
- b) Where the attacks in question fail to distinguish between military and civilian objects (i.e. were indiscriminate)<sup>214</sup>; or
- c) Where the civilian casualties incurred were excessive in relation to the direct and concrete military advantage anticipated (i.e. were disproportionate).<sup>215</sup>

<sup>208</sup> Count 3 of the Indictment.

<sup>209</sup> *Blaskić* Trial Judgement, paras. 179-180; *Kordić* Trial Judgement, paras. 326-328.

<sup>210</sup> See Article 57(2)(a) of Additional Protocol I (reflecting the principle of distinction which obligates military commanders to distinguish between military objectives and civilian persons or objects).

<sup>211</sup> See Article 50(1) of Additional Protocol I: "an inference may be drawn that attacks were in

<sup>212</sup> *Idem*.

<sup>213</sup> See *inter alia* Article 51(2)) of Additional Protocol I and Article 13(2) of Additional Protocol II: "The civilian population as such, as well as individual civilians, shall not be the object of attack"

<sup>214</sup> See Article 51(4) of Additional Protocol I: "Indiscriminate attacks are prohibited. Indiscriminate attacks are: (a) those which are not directed at a specific military objective; (b) those which employ a method or means of combat which cannot be directed at a specific military objective; or (c) those which employ a method or means of combat the effects of which cannot be limited as required by this Protocol." An indiscriminate attack could substantiate an allegation that the attack was in reality and directed at civilians (*Blaskić* Trial Judgement, paras. 501, 512).

149. The latter category – the so-called principle of proportionality – never permits a deliberate attack on civilians. Proportionality instead countenances attacks on military objectives even where incidental civilian losses are inevitable, but only where such losses are not disproportionate. It is thus a principle that balances military necessity and humanity.<sup>216</sup>

150. Proportionality entails the weighing and balancing of two unlike values: the anticipated military advantage of an attack as against excessive civilian losses.

151. The assessment of the military advantage of an attack is logically linked to the concept of a “military objective”. Persons are military objectives if they are combatants or if they are civilians taking a direct part in hostilities. An object is a legitimate military objective for the purposes of international humanitarian law if: (a) its nature, location, purpose or use makes an effective contribution to military action; and (b) the total or partial destruction, capture or neutralisation of an objective, in the circumstances ruling at the time, offers a definite military advantage.<sup>217</sup> These twin concepts of *effective* contribution to military action and *definite* military advantage imply that the advantage offered by a military objectives destruction, capture or neutralisation must be “concrete and direct”.<sup>218</sup> Further, the temporal frame of reference in this regard is the extent of a commander’s knowledge prior to the launching of an attack: the civilian losses *expected*<sup>219</sup> from an attack must be weighed against the *anticipated* concrete and direct military advantage offered by it.

152. The notion of “excessive” in relation to anticipated civilian losses is not amenable to a precise or mathematical tabulation. The calculation of what would amount to

<sup>215</sup> See Article 57(2)(a)(iii) of Additional Protocol I (pertaining to precautions in attack): “Those who plan or decide upon an attack shall refrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.”

<sup>216</sup> A.P.V. Rogers, *Law on the Battlefield* (Manchester, 1996), at p. 28.

<sup>217</sup> A “military objective” may encompass tangible and visible things as well as combatants or members of the armed forces. (Article 52(2) of Additional Protocol I; ICRC Commentary (Additional Protocol I) para. 2017).

<sup>218</sup> Article 57(2), Additional Protocol I.

<sup>219</sup> International humanitarian law nevertheless imposes a duty upon commanders deciding upon attacks to do everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects and to cancel or suspend attacks if it becomes apparent the objective is not a military one or that the attack may be expected to cause excessive civilian losses (Articles 57(2)(a)(1) and 57(2)(b) respectively). Thus, ignorance of the true nature of a target will not excuse a commander where civilian losses result from a wilful or negligent dereliction of these obligations.



"excessive" civilian losses is thus difficult to determine *in abstracto* and must instead be evaluated with regard to all the circumstances prevailing at the time. International humanitarian law obliges reasonable commanders to, *inter alia*, make good faith decisions to limit or refrain from attacks in circumstances where heavy civilian losses can be expected and to choose from among the available and practicable means of attack those which may be expected to minimise civilian losses.

f. *Unlawful Attacks Against Civilian Objects*<sup>220</sup>

153. The crime of unlawfully attacking civilian objects, recognised in Article 52 of Additional Protocol I and customary international law, is an unenumerated offence chargeable under Article 3. It has been established by proving: (a) an attack resulted in damage to civilian objects; (b) the perpetrator knew or should have known the civilian character of the objects; and (c) the attack was wilfully directed at civilian objects.<sup>221</sup>

154. The notion of a "civilian object"<sup>222</sup> and proof of the requirements of knowledge on the part of a commander as to the civilian status of that object are, *mutatis mutandis*, identical to those set forth in relation to attacks on civilians, above. Similarly, and while the crime of unlawfully attacking civilian objects has usually been established *via* proof that an attack resulted in damage to civilian objects, it is submitted that where the means and *modus operandi* of attacks exhibit an indiscriminate or other unlawful character, such acts may be probative of the intent of the Accused even where no destruction or damage to civilian objects in fact resulted.

155. It is submitted that an inference that an attack against civilian objects was "wilful" may be drawn in the same three categories of cases identified in relation to attacks against civilians. It is submitted, however, that where the civilian object(s) in the vicinity of the attack(s) are of an internationally protected character, it would be permissible to infer that a commander knew (or ought to have been able to verify) that severe damage to civilian objects was foreseeable as a result of such attacks. Further, it is submitted that resultant

<sup>220</sup> Count 5 of the Indictment.

<sup>221</sup> *Blaskić* Trial Judgement, paras. 179-180; *Kordić* Trial Judgement, paras. 326-328.

<sup>222</sup> Article 52(1) of Additional Protocol I stipulates that "civilian objects are all objects which are not military objectives"; Article 52(3) provides that "in case of doubt whether an object which by its nature is normally dedicated to civilian purposes has become, by virtue of its use, a military objective, it shall be presumed to be a civilian object".



damage to objects of such enhanced significance or value may also justify the conclusion that such damage was "excessive" in all the circumstances.<sup>223</sup>

### 3. Reprisals

156. The jurisprudence of this Tribunal supports the position that crimes within the jurisdiction of this Tribunal cannot be justified as reprisal measures.<sup>224</sup> This reflects the sacrosanct nature of the prohibition of attacks against civilians and the general notion that individual criminal responsibility for serious violations of international humanitarian law may not be thwarted by recourse to arguments such as reciprocity.<sup>225</sup> Accordingly, any attempt by the Accused to justify conduct such as that impugned in the Indictment on the

<sup>223</sup> During the Viet Nam conflict, the United States Air Force took special steps to protect cultural property from damage, even when it was being used as shelter for enemy forces and equipment. The relevant Rules of Engagement stated:

"Angkor Wat Park: This area will not be attacked for any reason. Under no circumstances will (forward air controllers) control or assist air strikes of any nation within the Angkor Wat area. Should a (forward air controller) observe such a strike being made, he will advise the (Forces Armee National Khmer) ground commander and depart the area immediately.

Other Areas of Cultural Value: Except during (combat search and rescue) operations, no U.S. air strikes will be made within 1000 metres of the areas of cultural value (nearly 100 other sites specifically listed in the directive). U.S. (forward air controllers) will not control or assist air strikes of any nation within 1000 metres of these areas regardless of (Forces Armee National Khmer) request or validation." (See 7<sup>th</sup> Air Forces Operations Order 71-17, Subject: Rules of Engagement 91971), as published in *Congressional Record*, Vol. 121, Pt14 at 17555 (16 June 1975)).

<sup>224</sup> Belligerent reprisals against either the civilian population as a whole or individual civilians *per se* are prohibited pursuant to Article 51(6) of Additional Protocol I, which bound all parties to the conflict at all material times. Reprisals are defined as "the intentional violation of a given rule of the law of armed conflict, committed by a party to the conflict with the aim of inducing the authorities of the adverse party to discontinue a policy of violation of the same or another rule of that body of law" (see Frits Kalshoven, *Constraints on the Waging of War*, (ICRC, 1<sup>st</sup> ed., 1987), at p. 65). The Prosecution notes that even States and authors who claim that reprisals may still be compatible with modern international humanitarian law concede that at an absolute minimum, reprisals must be subjected to an cumulative and extremely restrictive list of criteria, the practical application of which is to rule out their legitimate application in virtually all circumstances. (See for example the reservations and declarations made by the UK in its instrument of ratification of Additional Protocol I to Articles 51-33, set out in the schedule to the UK *Geneva Conventions Act (First Protocol)*, Order 1998 (Statutory Instruments 1998 No. 1754, Geneva Conventions)). The Prosecution notes the exceptionally limited scope of the notion of reprisals in the light of contemporary international humanitarian law. (See *Kupreskic Judgement*, paras. 527-536 and 765: "in international law, there is no justification for attacks on civilians carried out either by virtue of the *tu quoque* principle or on the strength of the principle of reprisals.") Moreover, several international humanitarian law treaties, including the four Geneva Conventions of 1949, Additional Protocol I, Article 52(1) (Civilian objects shall not be the object of attack or of reprisals) and Article 51(6) ("Attacks against the civilian population ... by way of reprisals are prohibited") and the 1954 Hague Convention on the Protection of Cultural Property specifically prohibit reprisals.

<sup>225</sup> International humanitarian law does not lay down synallagmatic obligations, but obligations *erga omnes* (or, in the case of treaty obligations, obligations *erga omnes contractantes*) which are designed to safeguard fundamental human values and therefore must be complied with regardless of the conduct of the other party or parties. See *ibid.* para. 519, citing to *Barcelona Traction, Light and Power Co. Ltd. (Belgium v. Spain)*, ICJ Reports, 1970, p. 3 at p. 32 and *inter alia* Art. 51(8) of Additional Protocol I ("Any violation of these prohibitions shall not release the Parties to the conflict from their legal obligations with respect to the civilian population")

grounds of revenge for losses suffered in combat or other forms of retaliatory measure has no basis in law.

**V. ADMISSIONS BY THE PARTIES / MATTERS NOT IN DISPUTE/ CONTESTED MATTERS OF FACT AND LAW**

157. There have been no admissions or other stipulations between the Parties.

Respectfully submitted,



Susan L. Somers  
Senior Trial Attorney

Dated this 27<sup>th</sup> day of August 2003

The Hague

The Netherlands

Respectfully submitted,

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Prosecutor v. Strugar