

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

Case No. IT-08-91-PT

IN THE TRIAL CHAMBER

**Before: Judge Iain Bonomy, Presiding
Judge Ole Bjørn Støle
Judge Fredrick Harhoff**

Registrar: Mr. John Hocking, Acting

Date Filed: 29 June 2009

THE PROSECUTOR

v.

**MIĆO STANIŠIĆ
STOJAN ŽUPLJANIN**

PUBLIC

PRE-TRIAL BRIEF OF THE DEFENCE OF MICO STANISIC

The Office of the Prosecutor

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PRE-TRIAL BRIEF OF THE DEFENCE OF MICO STANIŠIĆ

INTRODUCTION

1. On 8 June 2009, the Prosecution filed the *Prosecution's Pre-Trial Brief Pursuant to Rule 65ter (E)(i)* ("Prosecution Pre-Trial Brief").
2. Pursuant to Rule 65ter (F) of the Rules of Procedure and Evidence ("Rules"), Mr. Stanišić files his Defence Pre-Trial Brief.

THE PRESUMPTION OF INNOCENCE AND PROOF OF GUILT BEYOND A REASONABLE DOUBT

3. Mr. Stanišić pleaded not guilty to all charges alleged against him, in the Amended Consolidated Indictment (the "Indictment").
4. The provisions of Article 21(3) of the Statute presume the innocence of the accused until he is proven guilty.
5. Pursuant to Rule 87(A), the Prosecution is bound in law to prove the case alleged against the accused beyond reasonable doubt. The Trial Chamber in the *Čelebići* case quoted with approval from English case law, *Miller v. Minister of Pensions*, in which Lord Denning explained that the expression "proof beyond reasonable doubt" should be understood as follows:

It need not reach certainty but it must carry a high degree of probability. Proof beyond a reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour, which can be dismissed with the sentence, 'of course it is possible, but not in the least probable', the case is proved beyond reasonable doubt, but nothing short of that will suffice.¹

The Trial Chamber must determine in respect of each of the counts charged against Mr. Stanišić in the indictment, whether it is satisfied beyond reasonable

¹ *Prosecutor v. Delalić, et. al.*, Judgement, IT-96-21-T, 16 November 1998, ("*Čelebići* Trial Judgement") para. 600.

doubt, on the basis of the whole of the evidence, that every element of that crime and the forms of liability charged in the indictment has been established.²

6. If, at the conclusion of the proceedings, there is any doubt that the Prosecution has established the case against Mr. Stanišić, he is entitled to the benefit of doubt and he must be acquitted.³
7. In a joint trial, it is the duty of the Trial Chamber to consider the case against each accused separately and to consider each count in the indictment separately.⁴

STATEMENT OF THE NATURE OF THE MR. STANIŠIĆ'S DEFENCE

8. Mr. Stanišić is charged in the Indictment under Articles 3, 5 and 7(1) and 7(3) of the Statute. Mr. Stanišić asserts that he has no individual criminal responsibility of the crimes alleged against him in the Indictment. As a matter of fact and law, Mr. Stanišić asserts that he is not guilty of the following allegations, as set out in the Indictment:
 - a. Under Article 3, Mr. Stanišić is charged with Murder, a violation of the Laws and Customs of War, as recognised by Common Article 3 of Geneva Conventions of 1949, punishable under Article 3 of the Statute of the Tribunal [Count 4], Torture, a violation of the Laws and Customs of War, as recognised by Common Article 3 of Geneva Conventions of 1949, punishable under Article 3 of the Statute of the Tribunal [Count 6], Cruel Treatment, a violation of the Laws and Customs of War, as recognised by Common Article 3 of Geneva Conventions of 1949, punishable under Article 3 of the Statute of the Tribunal [Count 7]

² *Prosecutor v. Limaj et al.*, Judgement, IT-03-66-T, 30 November 2005, para. 10.

³ See, *Prosecutor v. Kupreškić, et al.*, Judgement, IT-95-16-T, 14 January 2000, (“*Kupreškić* Trial Judgement”) para. 339(a) and *Čelebići* Trial Judgement, para. 601-603.

⁴ *Prosecutor v. Kordić et al.*, Judgement, IT-95-14/2-T, 26 February 2001 (“*Kordić* Trial Judgement”), para. 16.

- b. Under Article 5, Mr. Stanišić is charged with Persecutions on political, racial, and religious grounds, a crime against humanity, punishable under Article 5(h) [Count 1], Extermination, a crime against humanity, punishable under Article 5(b) [Count 2], Murder, a crime against humanity, punishable under Article 5(a) [Count 3], Torture, a crime against humanity, punishable under Article 5(f) [Count 5], Inhumane Acts, a crime against humanity, punishable under Article 5(i) [Count 8], Deportation, a crime against humanity, punishable under Article 5(d) [Count 9], Inhumane Acts (forcible transfer), a crime against humanity, punishable under Article 5(i) [Count 10]
- c. Under Article 7(1), Mr. Stanišić is alleged to have instigated, committed, or otherwise aided and abetted the crimes set out in the Indictment. In particular, by using the word "committed" in the Indictment, the Prosecutor does not intend to suggest that any of the accused physically perpetrated any of the crimes charged, personally. "Committing" in the Indictment refers to participation in a joint criminal enterprise as a co-perpetrator. The objective of the JCE was to permanently remove Bosnian Muslim, Bosnian Croats, and other non-Serbs from the territory of the planned Serbian state by means which included the commission of the crimes alleges in Count 1-10 of the Indictment.
- d. Under Article 7(3), Mr. Stanišić is alleged to have held a position of superior authority and is therefore also individually criminally responsible for the acts or omissions of his subordinates. Pursuant to Article 7(3), a superior is responsible for the criminal acts of his subordinates if he knew or had reason to know that his subordinates were about to commit such acts or had done so, and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators.

9. Save and except, the admissions contained in paragraph 10 of this Defence Pre-Trial Brief, Mr. Stanišić contests the truth and accuracy of all factual allegations made by the Prosecution in the Indictment and the Prosecution Pre-Trial Brief and he rejects the legal assessment of those factual allegations made by the Prosecution. Mr. Stanišić asserts that he has no individual criminal responsibility for the crimes alleged against him in the Indictment in that he did not instigate, commit – as a participant in a joint criminal enterprise – or otherwise aid and abet the crimes set out in the Indictment, nor did he have any superior authority over any alleged perpetrators of any crimes.

STATEMENT OF MATTERS NOT IN DISPUTE

10. Mr. Stanišić has agreed to the following matters:
- a. The Prosecution and Mr. Stanišić have agreed to 84 facts proposed by the Prosecution and 18 facts proposed by the defence set out the Decision on Judicial Notice dated 14 December 2007.⁵
11. The Parties continue to use their best efforts to reach agreement on legal and factual matters. In particular, the parties are attempting to stipulate to laws and regulations which are relevant to the indictment period and the Confidential Charts contained in Annex 6 of the Prosecution Pre-Trial Brief.⁶

MATTERS WITH WHICH MR. STANIŠIĆ TAKES ISSUE IN THE PROSECUTION PRE-TRIAL BRIEF

12. Other than the factual matters agree upon by the parties set out in paragraph 10 of this Defence Pre-Trial Brief, no admissions are made as to the truth or accuracy of the factual allegations made in the Indictment or the Prosecution Pre-trial Brief,

⁵ *Prosecutor v. Mićo Stanišić*, Case No. IT-04-79-PT, Decision on Judicial Notice, 14 December 2007, para. 50.

⁶ 65ter Meeting, 22 June 2009, T. 180-184, 190.

including adjudicated facts previously admitted by the Pre-Trial Chamber⁷ as well as the pending motions for adjudicated facts filed by the Prosecution⁸. Mr. Stanišić challenges all these matters and allegations and other outstanding matters in this case. He contests the truth and accuracy of all factual allegations made by the Prosecution in the Indictment and the Prosecution Pre-Trial Brief, including the admissibility, authenticity, probative value or any weight which may be attached to any of the exhibits the Prosecution intends to proffer, and he rejects the legal assessment of those factual allegations made by the Prosecution. Consequently, the Prosecution is put to strict proof of each and every element of fact relied upon by the Prosecution as against Mr. Stanišić.

13. Mr. Stanišić asserts that he did not instigate, commit – as a participant in a joint criminal enterprise – or otherwise aid and abet the crimes set out in the Indictment, as charged under Article 7(1) of the Statute, nor did he have any superior authority over any alleged perpetrators of any crimes, as charged under Article 7(3) of the Statute.
14. In relation to legal issues, as a preliminary matter, Mr. Stanišić notes the findings in the *Aleksovski* case,⁹ where the Appeals Chamber held that a proper construction of the Statute requires that the *ratio decidendi* of its decisions is binding on Trial Chambers and that decisions of Trial Chambers, which are bodies of coordinate jurisdiction, have no binding force on each other.¹⁰ It is

⁷ *Prosecutor v. Mićo Stanišić*, Case No. IT-04-79-PT, Decision on Judicial Notice, 14 December 2007, para. 50.

⁸ *Prosecutor v. Mićo Stanišić*, Defence Response to Prosecution's Third Motion for Judicial Notice of Adjudicated Facts, IT-04-79-PT, 8 February 2008 and *Prosecutor v. Mićo Stanišić*, Defence Response to Prosecution's Fourth Motion for Judicial Notice of Adjudicated Facts, IT-04-79-PT, 5 May 2008.

⁹ *Prosecutor v. Aleksovski*, Judgement, IT-95-14/1-A, 24 March 2000 ("*Aleksovski* Appeal Judgement").

¹⁰ *Aleksovski* Appeal Judgement, para. 114. However, a Trial Chamber is free to follow the decision of another Trial Chamber if it finds that decision persuasive, *Ibid.* Furthermore, In the *Delalić* case, *Prosecutor v. Delalić et. al.*, Decision on the Motion to Allow Witness K, L and M to give their Testimony by Means of Video-link Conference, IT-96-21-T, 28 May 1997 the Trial Chamber held that prior decisions of a Trial Chamber in another case have no binding force *per se*:

The International Tribunal meets the tasks assigned to it with a spirit of innovation and awareness that each case and situation which it is called to assess presents a unique set of circumstances with its own considerations. It is, however, the case that, where a decision has been rendered on a request, a Trial Chamber called to examine a similar request may look to

submitted that in relation to the legal matters arising out of the Prosecution Pre-Trial Brief, there are issues currently pending before the Appeals Chamber or likely to be litigated before the Appeals Chamber and other Trial Chambers in the near future. Mr. Stanišić reserves the right to make further submissions concerning these matters.

15. Mr. Stanišić is charged with murder, torture, and cruel treatment under Article 3. This provision has been interpreted as a general and residual clause covering all violations of humanitarian law not falling under Articles 2, 4 or 5 of the Statute, and more specifically:
- a. violations of the Hague law on international conflicts;
 - b. infringements of provisions of the Geneva Conventions other than those classified as “grave breaches” by those Conventions;
 - c. violations of common Article 3 of the Geneva Conventions and other customary rules on internal conflicts, and
 - d. violations of agreements binding upon the parties to the conflict, considered *qua* treaty law, *i.e.*, agreements which have not turned into customary international law.¹¹
16. For a crime to be adjudicated under Article 3, two preliminary requirements must be satisfied. First, there must have been an armed conflict,¹² whether internal or international in character,¹³ at the time the offences were allegedly committed.¹⁴ Secondly, there must be a close nexus between the armed conflict and the alleged

that previous decision for guidance. If there are reasons to support departures from a previous decision in whole or in part, then the Trial Chamber will do so. If, however, no such reasons exist, the Trial Chamber may find it useful to take the same approach as in the prior decision.

¹¹ *Prosecutor v. Tadić*, IT -94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995 (“*Tadić* Jurisdiction Decision”), para 89.

¹² An armed conflict is deemed to exist “whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organised armed groups or between such groups within a State... whether or not actual combat takes place there”. *Tadić* Jurisdiction Decision, para 70.

¹³ *Tadić* Jurisdiction Decision, para. 137: “under Article 3, the International Tribunal has jurisdiction over the acts alleged in the indictment, regardless of whether they occurred within an internal or an international armed conflict”.

¹⁴ *Tadić* Jurisdiction Decision, para. 67.

offence, meaning that the acts of the accused must be “closely related” to the hostilities.¹⁵ Furthermore, four additional requirements must be satisfied pursuant to Article 3:¹⁶ the violation must constitute an infringement of a rule of international humanitarian law; the rule must be customary in nature, or, if it belongs to treaty law, the required conditions proscribed by treaty must be met;¹⁷ the violation must be serious, that is to say, it must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim;¹⁸ the violation of the rule must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule.

17. Subject to the *proviso* that Mr. Stanišić reserves the right to make further submissions on the law, he does not take issue with the submissions contained in the Prosecution Pre-Trial Brief in relation to the legal definition of murder, torture, and cruel treatment as a violation of the Laws and Customs of War pursuant to Article 3. Mr. Stanišić asserts that he is not guilty of murder as alleged in the Indictment pursuant to Article 3 and he contests all factual allegations and legal assessments of those factual allegations made by the Prosecution in relation to the charge of murder pursuant to Article 3.

18. Mr. Stanišić is charged with persecutions, extermination, murder, deportation, forcible transfer, torture, and inhumane acts, under Article 5. The following elements must be fulfilled in order to classify an act under Article 5 (a) to (i) of the Statute as a crime against humanity:
 - a. there must be an attack;
 - b. the acts of the accused must be part of the attack;
 - c. the attack must be directed against any civilian population;

¹⁵ *Tadić* Jurisdiction Decision, para. 170.

¹⁶ *Tadić* Jurisdiction Decision, para. 94.

¹⁷ In this respect, the Appeals Chamber added that a charge based on treaty law would necessitate that two additional requirements be met, namely, that the agreements (i) were unquestionably binding on the parties at the time of the alleged offence and (ii) are not in conflict with or derogate from peremptory norms of international law. *Tadić* Jurisdiction Decision, para. 143.

¹⁸ See Article 1 of the Statute, which gives the Tribunal jurisdiction over “serious violations of international humanitarian law”.

- d. the attack must be widespread or systematic;
- e. the perpetrator must know that his acts constitute part of a pattern of widespread or systematic crimes directed against a civilian population and know that his acts fit into such a pattern.¹⁹

The acts of the accused must not be isolated but form part of the attack, which means that the act, by its nature or consequence, must objectively be a part of the attack.²⁰ The accused must have the intent to commit the underlying offence with which he is charged, and he must have knowledge that there is an attack against the civilian population and that his act comprises part of that attack.²¹

19. Mr. Stanišić asserts that he is not guilty of crimes against humanity as alleged in the Indictment pursuant to Article 5 and he contests all factual allegations and legal assessments of those factual allegations made by the Prosecution in relation to the charge of crimes against humanity pursuant to Article 5.
20. Subject to the *proviso* that Mr. Stanišić reserves the right to make further submissions on the law, he does not take issue with the submissions contained in the Prosecution Pre-Trial Brief in relation to the legal definition of murder as a crime against humanity pursuant to Article 5(a). Mr. Stanišić asserts that he is not guilty of murder as alleged in the Indictment pursuant to Article 5(a) and he contests all factual allegations and legal assessments of those factual allegations made by the Prosecution in relation to the charge of murder pursuant to Article 5(a).
21. Mr. Stanišić is charged with deportation as a crime against humanity under Article 5(d). The *actus reus* of deportation is the forced displacement of persons by expulsion or other forms of coercion from the area in which they are lawfully

¹⁹ *Prosecutor v. Kunarac et al.*, Case No.: IT-96-23-A & IT-96-23/1-A, Judgement, 12 June 2002 (“*Kunarac Appeal Judgement*”), para 85.

²⁰ *Prosecutor v. Tadić*, T-94- 1-A, Judgement, 15 July 1999 (“*Tadić Appeal Judgement*”), paras. 248, 251, 271, *Kunarac Appeal Judgement*, para. 99.

²¹ *Kunarac Appeal Judgement*, para. 102-103.

present, across a *de jure* state border or, in certain circumstances, a *de facto* border, without grounds permitted under international law. The *mens rea* of the offence does not require that the perpetrator intend to displace the individual across the border on a permanent basis. The legal standard is an intent to transfer persons on a non-provisional basis.²² Mr. Stanišić asserts that he is not guilty of deportation under Article 5(d), as alleged in the Indictment and he contests all factual allegations and legal assessments of those factual allegations made by the Prosecution in relation to the charge of deportation pursuant to Article 5(d).

22. Mr. Stanišić is charged with Other Inhumane Acts (Forcible Transfer) as a crime against humanity under Article 5(i). Forcible transfer is the forcible displacement of persons which may take place within national boundaries. The *mens rea* does not require the intent to transfer permanently. The legal standard is an intent to transfer persons on a non-provisional basis.²³ Mr. Stanišić asserts that he is not guilty of forcible transfer under Article 5(i), as alleged in the Indictment and he contests all factual allegations and legal assessments of those factual allegations made by the Prosecution in relation to the charge of forcible transfer pursuant to Article 5(i).
23. Mr. Stanišić is charged with persecutions under Article 5. For a charge of persecutions pursuant to Article 5(h), the general requirements for crimes against humanity must be satisfied. In addition, the crime of persecution consists of an act or omission which:
- a. discriminates in fact and which denies or infringes upon a fundamental right laid down in international customary or treaty law (the *actus reus*); and
 - b. was carried out deliberately with the intention to discriminate on one of the listed grounds, specifically race, religion or politics (the *mens rea*).

²² *Prosecutor v. Stakić*, Judgement, IT-97-24-A, 22 March 2006 (*Stakić Appeal Judgement*"), paras. 278 and 319.

²³ *Stakić Appeal Judgement*, paras. 317 and 319

24. Persecution often refers to a series of acts, however a single act may be sufficient, as long as this act or omission discriminates in fact and was carried out deliberately with the intention to discriminate on one of the listed grounds.²⁴ The acts underlying persecutions as a crime against humanity, whether considered in isolation or in conjunction with other acts, must constitute a crime of persecutions of gravity equal to the crimes listed in Article 5.²⁵ The *mens rea* of the perpetrator carrying out the underlying physical acts of persecutions as a crime against humanity requires evidence of a specific intent to discriminate on political, racial, or religious grounds.²⁶
25. Mr. Stanišić asserts that he is not guilty of persecutions as alleged in the Indictment pursuant to Article 5(h) and he contests all factual allegations and legal assessments of those factual allegations made by the Prosecution in relation to the charge of persecutions pursuant to Article 5(h).
26. Mr. Stanišić is charged with instigating pursuant to Article 7(1). Subject to the *proviso* that Mr. Stanišić reserves the right to make further submissions on the law, he does not take issue with the submissions contained in the Prosecution Pre-Trial Brief in relation to the legal definition of instigating pursuant to Article 7(1). Mr. Stanišić asserts that he is not guilty of instigating as alleged in the Indictment pursuant to Article 7(1) and he contests all factual allegations and legal assessments of those factual allegations made by the Prosecution in relation to the charge of instigating pursuant to Article 7(1).
27. Mr. Stanišić is charged with committing pursuant to Article 7(1). "Committing" in the Indictment refers to participation in a joint criminal enterprise ("JCE") as a co-perpetrator. He is charged under the first and third categories of JCE.²⁷ It

²⁴ *Blaškić* Appeal Judgement, para. 135, *Vasiljević* Appeal Judgement, para. 113.

²⁵ *Blaškić* Appeal Judgement, para. 135, *Krnjelac* Appeal Judgement, paras. 199, 221.

²⁶ *Blaškić* Appeal Judgement, para. 164, *Krnjelac* Appeal Judgement, para. 184; *Vasiljević* Appeal Judgement, para. 113.

²⁷ *Stakić* Appeal Judgement, para. 64, *Vasiljević* Appeal Judgement, paras 96-99, *Tadić* Appeal Judgement, paras 195-225, *Krnjelac* Appeal Judgement, paras 83-84.

must be proven that a plurality of persons shared the common criminal purpose; that the accused made at least a significant contribution to this common criminal purpose; and that the commonly intended crime (or foreseeable crimes under the third category) did in fact take place.²⁸ Furthermore, it must be proven that the accused possessed the requisite criminal intent and this criminal intent must be the only reasonable inference on the evidence. For the first category of JCE, it must be proven that the accused both intended the commission of the crime and intended to participate in a common plan aimed at its commission. For the third category of JCE, the accused can only be held responsible for a crime outside the common purpose if, under the circumstances of the case: (i) it was foreseeable that such a crime might be perpetrated by one or other members of the group and (ii) the accused willingly took that risk (*dolus eventualis*). The crime must be shown to have been foreseeable to the accused in particular.²⁹ The Prosecution must prove that the accused had sufficient knowledge that the additional crimes were a natural and foreseeable consequence.³⁰

28. Mr. Stanišić asserts that he is not guilty of participating in a joint criminal enterprise as alleged in the Indictment pursuant to Article 7(1) and he contests all factual allegations and legal assessments of those factual allegations made by the Prosecution in relation to being a participant of a joint criminal enterprise pursuant to Article 7(1).
29. Mr. Stanišić is charged with aiding and abetting pursuant to Article 7(1). The *actus reus* and *mens rea* of aiding and abetting are the following:
- a. The aider and abettor carries out acts specifically directed to assist, encourage or lend moral support to the perpetration of a certain specific crime (murder, extermination, rape, torture, wanton destruction of civilian property, etc.), and this support has a substantial effect upon the perpetration of the crime. [...]

²⁸ *Brdjanin* Appeal Judgement, para.427-430.

²⁹ *Brdjanin* Appeal Judgement, para.365,411,427-430.

³⁰ *Kvočka* Appeal Judgement, para.86.

- b. In the case of aiding and abetting, the requisite mental element is knowledge that the acts performed by the aider and abettor assist [in] the commission of the specific crime of the principal. [...] ³¹

Mr. Stanišić asserts that he is not guilty of aiding and abetting as alleged in the Indictment pursuant to Article 7(1) and he contests all factual allegations and legal assessments of those factual allegations made by the Prosecution in relation to the charge of aiding and abetting pursuant to Article 7(1).

30. Mr. Stanišić is charged with superior authority pursuant to Article 7(3). The elements of individual criminal responsibility under Article 7(3) have been firmly established by the jurisprudence of the Tribunal. Three conditions must be met before a superior can be held responsible for the acts of his or her subordinates:
- a. The existence of a superior-subordinate relationship;
 - b. The superior knew or had reason to know that the subordinate was about to commit such acts or had done so; and
 - c. The superior failed to take the necessary and reasonable measures to prevent such acts or to punish the principal offenders thereof. ³²
31. The existence of a superior-subordinate relationship requires a hierarchical relationship between the superior and subordinate. The relationship need not have been formalised and it is not necessarily determined by formal status alone. ³³ A hierarchical relationship may exist by virtue of an accused's *de facto*, as well as *de jure*, position of superiority. ³⁴ The threshold to be reached in establishing a superior-subordinate relationship for the purpose of Article 7(3) is the effective control over a subordinate in the sense of material ability to prevent or punish criminal conduct. ³⁵

³¹ *Blaškić* Appeal Judgement, paras. 45-47, *Vasiljević* Appeal Judgement, para. 102.

³² *Čelebići* Appeal Judgment, paras. 189-198, 225-226, 238-239, 256, 263; *Aleksovski* Appeal Judgment, par 72.

³³ *Čelebići* Appeal Judgment, paras. 205-206.

³⁴ *Čelebići* Appeal Judgment, paras. 192-194, 266.

³⁵ *Blaškić* Appeal Judgement, para. 375. *Čelebići* Appeal Judgement, para. 256.

32. It must be proven that the superior had “effective control” over the persons committing the alleged offences. Effective control means the material ability to prevent offences or punish the principal offenders. To establish that effective control existed at the time of the commission of subordinates’ crimes, proof is required that the accused was not only able to issue orders but that the orders were actually followed. The indicators of effective control are more a matter of evidence than of substantive law,³⁶ and those indicators are limited to showing that the accused had the power to prevent, punish, or initiate measures leading to proceedings against the alleged perpetrators where appropriate.³⁷ Where a superior has effective control and fails to exercise that power he will be responsible for the crimes committed by his subordinates.³⁸
33. In relation to the issue of knowledge, Article 7(3) provided that it must be demonstrated that the superior knew or had reason to know that his subordinate was about to commit or had committed a crime. It must be proved that:
- a. The superior had actual knowledge, established through either direct or circumstantial evidence, that his subordinates were committing or about to commit crimes within the jurisdiction of the Tribunal, or
 - b. He had in his possession information which would at least put him on notice of the risk of such offences, such information alerting him to the need for additional investigation to determine whether such crimes were or were about to be committed by his subordinates.³⁹

This knowledge requirement applies to both civilian and military commanders.⁴⁰ In relation to the issue of the interpretation of the standard of had reason to know “a superior will be criminally responsible through the principles of superior responsibility *only if information was available to him* which would have put him

³⁶ *Blaškić* Appeal Judgement, para. 69, *Aleksovski* Appeal Judgement, paras. 73-74; *Čelebići* Appeal Judgement, para. 206.

³⁷ *Blaškić* Appeal Judgement, para. 69; *Aleksovski* Appeal Judgement, para. 76.

³⁸ *Čelebići* Appeal Judgment, paras 196-198.

³⁹ *Čelebići* Appeal Judgment, paras 223-226.

⁴⁰ *Čelebići* Appeal Judgment, paras. 196-197.

on notice of offences committed by subordinates.”⁴¹ A “[n]eglect of a duty to acquire such knowledge, however, does not feature in the provision [Article 7(3)] as a separate offence, and a superior is not therefore liable under the provision for such failures but only for failing to take necessary and reasonable measures to prevent or to punish.”⁴²

34. However, for a non-military superior, under customary international law, the *mens rea* standard is “knew or consciously disregarded information clearly indicated or put on notice” that subordinates had committed or were about to commit offences. This formulation of *mens rea* is contained in Article 28(b)(i) of the Rome Statute 1998,⁴³ and expresses the legal position, i.e. *opinio juris*⁴⁴ of the States attending the Rome Diplomatic Conference, the Sixth Committee of the United Nations General Assembly, and the States which ratified the Rome Statute.⁴⁵ Furthermore, before the ICTR, the *Kayishema and Ruzindana Trial Judgement*,⁴⁶ following the Rome Statute, applied the *mens rea* standard set out in Article 28(b)(i).
35. In relation to the issue of acquiescence, it must be shown that the superior failed to take the necessary and reasonable measures to prevent or punish the crimes of his subordinates. The measures required of the superior are limited to those which are feasible in all the circumstances and are “within his power”. A superior is not obliged to perform the impossible. However, the superior has a duty to exercise the powers he has within the confines of those limitations.⁴⁷ What

⁴¹ *Blaškić* Appeal Judgement, para. 62. *Čelebići* Appeal Judgement, para. 241; *Krnjelac* Appeal Judgement, para. 151.

⁴² *Blaškić* Appeal Judgement, para. 62. *Čelebići* Appeal Judgement, para. 226.

⁴³ Rome Statute of the International Criminal Court, <http://www.un.org/law/icc/>

⁴⁴ *Tadić* Appeal Judgement, para. 223.

⁴⁵ *Tadić* Appeal Judgement, para. 223, *Prosecutor v Furundžija*, Judgement, IT-95-17/1-T, 10 December 1998, paras. 223-227.

⁴⁶ *Prosecutor v. Clément Kayishema and Obed Ruzindana*, Case No. ICTR-95-1-T, Trial Chamber, Judgement and Sentence, 1 July 2001, paras. 227-228.

⁴⁷ *Čelebići* Appeal Judgment, par 226.

constitutes such measures is not a matter of substantive law but of evidence, whereas the effect of such measures can be defined by law.⁴⁸

36. Mr. Stanišić asserts that he is not guilty as a superior authority as alleged in the Indictment pursuant to Article 7(3) and he contests all factual allegations and legal assessments of those factual allegations made by the Prosecution in relation to the charges against him pursuant to Article 7(3).

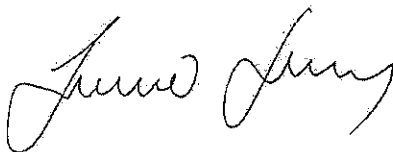
Mr. Stanišić has pleaded not guilty, he asserts that he is not guilty as alleged in the Indictment, and he puts the Prosecution to proof of its case.

Word count: 4,933

Respectfully submitted:

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⁴⁸ *Blaškić* Appeal Judgement, para. 72. *Čelebići* Appeal Judgement, para. 198.