THE INTERNATIONAL CRIMINAL TRIBUNAL
FOR THE FORMER YUGOSLAVIA

Case No. IT-08-91-PT

IN TRIAL CHAMBER III

Before: Judge **Iain Bonomy, Presiding**
Judge **Frederik Harhoff, Pre-Trial Judge**
Judge **Ole Bjørn Støle**

Registrar: Mr. John Hocking

Date Filed: **29 June 2009**

THE PROSECUTOR

V.

MIĆO STANIŠIĆ
STOJAN ŽUPLJANIN

Public with Confidential Annex

DEFENCE PRE-TRIAL BRIEF ON BEHALF OF MR. STOJAN ŽUPLJANIN PURSUANT TO RULE 65TER (F)

The Office of the Prosecutor:
Mr. Thomas Hannis
Ms. Joanna Korner

Counsel for the Accused:
Mr. Slobodan Zečević and Mr. Slobodan Cvijetić for Mićo Stanišić
Mr. Igor Pantelić and for Stojan Župljanin

TABLE OF CONTENTS

I. INTRODUCTION

1. On 9 June 2009, the Prosecution filed the *Prosecution's Pre-Trial Brief* (hereinafter, "OTP PTB") pursuant to Rule 65*ter* (E) of the Rules of Procedure and Evidence.

2. Pursuant to Rule 65*ter* (F), Mr. Župljanin files his Defence Pre-Trial Brief. Rule 65*ter* (F) provides as follows:

> After the submission by the Prosecutor of the items mentioned in paragraph (E), the pre-trial Judge shall order the defence, within a time-limit set by the pre-trial Judge, and not later than three weeks before the Pre-Trial Conference, to file a pre-trial brief addressing the factual and legal issues, and including a written statement setting out:
> (i) in general terms, the nature of the accused's defence;
> (ii) the matters with which the accused takes issue in the Prosecutor's pre-trial brief; and
> (iii) in the case of each such matter, the reason why the accused takes issue with it.

II. VIOLATIONS OF FAIR TRIAL PROVISIONS OF THE STATUTE

3. Article 20 of the Statute of the Tribunal is titled, "Commencement and conduct of trial proceedings" and provides:

> The Trial Chambers shall ensure that a trial is fair and expeditious and that proceedings are conducted in accordance with the rules of procedure and evidence, with full respect for the rights of the accused [...].

4. Article 21 of the Statute of the Tribunal is titled, "Rights of the accused" and provides:

> 1. All persons shall be equal before the International Tribunal.
> 2. In the determination of charges against him, the accused shall be entitled to a fair and public hearing, subject to article 22 of the Statute [...].
> 4. In the determination of any charge against the accused pursuant to the present Statute, the accused shall be entitled to the following minimum guarantees, in full equality:
> (a) to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
> (b) to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;
> (c) to be tried without undue delay [...].

5. The ongoing circumstances described below amount to a violation of the right of an accused before this Tribunal to be treated in full equality. They deny Mr. Župljanin the right to be informed promptly of the case against him, they deny his right to have adequate time and facilities to prepare his defence, and they deny his right to be tried fairly, expeditiously, and without undue delay.

(i) Prejudicial Disclosure Practice

6. Mr. Župljanin takes strong issue with the addition of 39 new witnesses and 689 documents in the OTP PTB.[1] He was initially indicted on 14 March 1999.[2] Then, his

[1] Joint Motion by Defence of Mićo Stanišić & Stojan Župljanin Requesting the Trial Chamber to Preclude

case was joined with that of co-accused, Mićo Stanišić, on 23 September 2008.[3] The consolidated indictment was then filed approximately nine months ago on 29 September 2008.[4] We are now only two months before trial proceedings will begin and disclosure is still forthcoming. This practice is highly prejudicial to the defence of Mr. Župljanin, and the arguments of the joint defence motion of 18 June 2009 to preclude the new witnesses and exhibits are hereby incorporated into this pre-trial defence brief.[5]

7. [See Confidential Annex A.]

(ii) Lack of Access to Confidential Material

8. The Župljanin defence requested access to confidential materials in the concluded cases of *Mrđa, Krajišnik, Stakić,* and *Brđanin* on 3 February 2009.[6] This access was granted on 24 April 2009 by the Pre-Trial Chamber.[7] Since this decision the Župljanin defence has diligently corresponded with the Registry continually seeking information as to the status of the material concerned.[8] However, in spite of the fact that a notice of compliance was filed by the Prosecution in regard to all four cases,[9] no delivery of any material has in fact been made. While it is conceded that Rule 70 providers and their associated responses are beyond the control of the parties, the Župljanin defence submits that these materials (i.e., specifically Rule 70 materials) constitute a *de minimis* portion compared to the rest of the outstanding confidential materials.

9. Indeed, the decision granted access to all closed and private session transcripts, all *inter partes* confidential and under seal filings, and all confidential and under seal exhibits.[10] Further, the Decision on Access expressly requested the Registry "[t]o provide the Župljanin defence with the confidential material to which access is granted ..., except the

---

Prosecution's New Witnesses and New Exhibits, 18 June 2009 ("Joint Motion to Preclude"), para. 1. [These figures were confirmed by the Prosecution in e-mail correspondence of 12 June 2009.]

[2] *Prosecutor v. Župljanin,* Case No. IT-99-36/2-T, Indictment, 14 March 1999.

[3] Decision on Prosecution's Motion for Joinder and For Leave to Consilidate and Amend Indictments, 23 September 2008.

[4] *Prosecutor v. Stanišić & Župljanin*, Case No. IT-08-91-PT, Consolidated Indictment, 29 September 2008.

[5] *See* Joint Motion to Preclude.

[6] Motion by Stojan Župljanin for Access to All Confidential Materials in Milomir Stakić Case, 3 February 2009. Motion by Stojan Župljanin for Access to All Confidential Materials in Krajišnik Case, 3 February 2009. Motion by Stojan Župljanin for Access to All Confidential Materials in Darko Mrđa Case, 3 February 2009. Motion by Stojan Župljanin for Access to All Confidential Materials in Radoslav Brđanin Case, 3 February 2009.

[7] Decision on Stojan Župljanin's Access to Confidential Material in the *Krajišnik, Mrđa, Stakić,* and *Brđanin* Cases, 24 April 2009 ("Decision on Access").

[8] Said correspondence between the Župljanin defence team and the Registry via e-mail occurred on 27 April 2009, 21/22 May 2009, 4/5 June 2009, and 23 June 2009.

[9] Prosecution's Notification of Compliance with Decision Re Access by Župljanin to *Stakić,* 15 May 2009. Prosecution's Notification of Compliance with Decision Re Access by Župljanin to *Krajišnik,* 15 May 2009. Prosecution's Notification of Compliance with Decision Re Access by Župljanin to *Mrđa,* 15 May 2009. Prosecution's Notification of Compliance with Decision Re Access by Župljanin to *Brđanin,* 15 May 2009. *See also* Prosecution's Supplement to its Notification of Compliance with Decision Re Access by Župljanin to *Krajišnik* (Public with Confidential Ex-Parte Annex), 25 May 2009.

[10] Decision on Access, para. 20(1).

material identified by the Prosecution pursuant to Rule 70".[11]

10. The fact that the defence does not have access to this material, at a moment more than two months after the Decision on Access and only two months before the start of the trial, impedes the preparation of an effective defence. This circumstance, in conjunction with the Prosecution's prejudicial disclosure practice, violates Mr. Župljanin's rights under Articles 20 and 21 of the Statute.

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

11. Mr. Župljanin pleaded not guilty to all charges alleged against him in the Amended Consolidated Indictment (hereinafter "Indictment").[12]

12. According to the provisions of Article 21(3) of the Statute, the innocence of the accused shall be presumed until he is proven guilty.

13. Pursuant to Rule 87(A), the Prosecution is bound in law to prove the case alleged against the accused beyond a 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.[13]

14. The Trial Chamber must determine in respect of each of the counts charged against Mr. Župljanin in the Indictment, whether it is satisfied beyond reasonable 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 have been established.[14] If, at the conclusion of the proceedings, there is any doubt that the Prosecution has established the case against Mr. Župljanin, he is entitled to the benefit of doubt and he must be acquitted.[15]

15. 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.[16]

---

[11] Decision on Access, para. 20(5). (emphasis added).
[12] Further Initial Appearance, 21 July 2008, T. 22-25.
[13] *Prosecutor v. Mucić, et al.*, Case No. IT-96-21-T, Judgement, 16 November 1998, ("*Čelebići* Trial Judgement") para. 600.
[14] *Prosecutor v. Limaj, et al.*, Case No. IT-03-66-T, Judgement, 30 November 2005, para. 10.
[15] See, *Prosecutor v. Kupreškić, et al.*, Case No. IT-95-16-T, Judgement, 14 January 2000 ("*Kupreškić, et al.* Trial Judgement"), para. 339(a); *Čelebići* Trial Judgement, paras. 601-603.
[16] *Prosecutor v. Kordić, et al.*, Case No. IT-95-14/2-T, Judgement, 26 February 2001, para. 16.

IV. STATEMENT OF THE NATURE OF MR. ŽUPLJANIN'S DEFENCE

16. Mr. Župljanin is charged in the Indictment under Articles 3, 5, 7(1), and 7(3) of the Statute. Mr. Župljanin 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. Župljanin asserts that he is not guilty of the following allegations, as set out in the Indictment:

a. Article 3 – Mr. Župljanin is charged with murder [count 4], torture [count 6], and cruel treatment [count 7], all violations of the Laws or Customs of War, punishable by Article 3 of the Statute of the Tribunal and recognized by Common Article 3 of the Geneva Conventions of 1949.

b. Article 5 – Mr. Župljanin is charged with persecutions on political, racial, and religious grounds [count 1] punishable under Article 5(h), extermination [count 2] punishable under Article 5(b), murder [count 3] punishable under Article 5(a), torture [count 5] punishable under Article 5(f), inhumane acts [count 8] punishable under Article 5(i), deportation [count 9] punishable under Article 5(d), and inhumane acts (forcible transfer) [count 10] punishable under Article 5(i), all Crimes Against Humanity.

c. Article 7(1) – Mr. Župljanin is alleged to have committed, ordered, planned, and instigated (paragraphs 12 (d)-(g) of the Indictment), or otherwise aided and abetted (paragraphs 12 (a)-(g) of the Indictment) in the planning, preparation, or execution of the crimes alleged under Article 3 and Article 5 of the Statute. In particular, by using the word "committed" in the Indictment, the Prosecution does not allege that the Accused personally committed any of the crimes charged. "Committed" in the Indictment, in the context of Article 7(1), means participation in a joint criminal enterprise ("JCE") as a co-perpetrator.[17] The objective of the alleged JCE was to permanently remove Bosnian Muslims, Bosnian Croats, and other non-Serbs from the territory of the planned Serbian state by means which included the commission of the crimes alleged in Counts 1-10.[18] Numerous individuals allegedly participated as members in the JCE. Each member, by acts or omissions, allegedly contributed to achieving the overall objective of the enterprise.[19]

d. Article 7(3) – Mr. Župljanin is alleged to have held a position of superior authority and would therefore be also individually criminally responsible for the acts or omissions of his subordinates. "Committed" in the Indictment, in the context of Article 7(3), includes all modes by which a crime may be carried out, including but not limited to planning, instigating, committing or aiding and abetting.[20] 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,

[17] Indictment, para. 6.
[18] Indictment, para. 7.
[19] Indictment, para. 8.
[20] Indictment, para. 23.

and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators. The alleged scope of this superior responsibility includes the commission of crimes alleged in Counts 1-10.

17. Save and except, the matters not in dispute contained in paragraph 18 of this Defence Pre-Trial Brief, Mr. Župljanin contests the truth and accuracy of all factual allegations made by the Prosecution in the Indictment and the OTP PTB and he rejects the legal assessment of those factual allegations made by the Prosecution. Mr. Župljanin asserts that he has no individual criminal responsibility for the crimes alleged against him in the Indictment in that he did not plan, instigate, order, commit – as a participant in a JCE – or otherwise aid and abet in the planning, preparation, or execution of any crimes, nor did he have any superior authority over any alleged perpetrators of any crimes.

V. STATEMENT OF MATTERS NOT IN DISPUTE

18. At the request of the Pre-Trial Chamber, Mr. Župljanin has reviewed the Indictment and the OTP PTB and is prepared to agree to the following matters:

    a. Mr. Župljanin was born on 22 September 1951, in Maslovare, Kotor Varoš Municipality, in BiH. He graduated from the law faculty of the University of Sarajevo and in 1975 began a long career with the Banja Luka Secretariat of Internal Affairs ("SUP").

    b. In 1978 Mr. Župljanin was appointed Chief of the police station in Mejdan in Banja Luka, and in 1981 he was appointed Chief of the *Centar* police station in Banja Luka. In 1985 he became the Chief of the Department for Prevention of General Crime in the municipal SUP in Banja Luka.

    c. From 1991 onwards, Mr. Župljanin was Chief of the Regional Security Services Centre ("CSB") of Banja Luka. From at least 5 May 1992 until July 1992 he was also a member of the Autonomous Region of Krajina ("ARK") Crisis Staff, and in 1994 he became an advisor for internal affairs to the President of Republika Srpska.

    d. Mr. Župljanin has agreed to ninety facts which have previously been agreed to by the Prosecution and the Stanišić defence,[21] as well as seventy-one facts which have not been previously stipulated to by the parties.[22]

19. 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 Chart contained in Annex 6 of the Prosecution Pre-Trial Brief.[23]

---

[21] Defence Request for Leave to Exceed the Word Limit and Response to Prosecution Request and Notice Regarding Application of Adjudicated Facts to Stojan Župljanin, 31 March 2009 ("Župljanin Adjudicated Facts Response"), para. 30 (e)(i).
[22] Župljanin Adjudicated Facts Response, para. 30 (e)(ii).
[23] 65*ter* Meeting, 22 June 2009, T. 180–184, 190.

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

(i) General considerations

20. Other than the factual matters agreed upon by the defence as set out in paragraph 18 of this Defence Pre-Trial Brief, no admissions are made as to the admissibility, authenticity, probative value or any weight which may be attached to any of the exhibits the Prosecution intends to offer. Mr. Župljanin takes issue with all outstanding matters in this case, including proposed facts of common knowledge and proposed adjudicated facts,[24] because he contests the truth and accuracy of all factual allegations made by the Prosecution in the Indictment and the OTP PTB 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. Župljanin.

21. In relation to legal issues, as a preliminary matter, Mr. Župljanin notes the findings in the *Aleksovski* case, 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 forces on each other (i.e., they are therefore, merely persuasive).[25] It is submitted that in relation to the legal matters arising out of the OTP PTB, 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. Župljanin reserves the right to make further submissions concerning these matters.

22. Mr. Župljanin reserves the right to make further submissions on the other aspects of the law, including but not limited to the definition of crimes and modes of liability. Subject to this *proviso*, he does not take issue with the submissions contained in the OTP PTB in relation to the legal definition of ordering,[26] planning,[27] or instigating[28] pursuant to Article 7(1). Mr. Župljanin notes that the OTP PTB does not contain any reference to the legal definition of the crimes charged in the Indictment.

23. Mr. Župljanin does wish to draw the Chamber's attention to certain legal issues which are lacking or misrepresented in the OTP PTB. These issues will be outlined below and include the lacking identification of principle perpetrators, the definition of the crimes under Article 3 and Article 5 of the Statute charged in the Indictment, the correct definition of the aiding and abetting mode of liability, as well as certain considerations

---

[24] Župljanin Adjudicated Facts Response, para. 30 (a)–(d), (f).
[25] *Prosecutor v. Aleksovski*, Case No. IT-95-14/1-A, Judgement, 24 March 2000 ("*Aleksovski* Appeal Judgement"), para. 114.
[26] *Blaškić* Appeal Judgement, paras.42, 166, 345, 347, 466; *Prosecutor v. Kordić, et al.*, Case No. IT-95-14/2-A, Judgement, 17 December 2004 ("*Kordić et al.* Appeal Judgement"), paras. 28,30; *Prosecutor v. Krajišnik*, Case No. IT-00-39-A, Judgement, 17 March 2009 ("*Krajišnik* Appeal Judgement"), para. 662. *See* OTP PTB, para. 328.
[27] *Kordić et al.* Appeal Judgement, paras. 26, 31; *Krajišnik* Appeal Judgement, para. 662. *See* OTP PTB, para. 327.
[28] *Kordić et al.* Appeal Judgement, paras. 27, 32, 112. *See* OTP PTB, para. 323.

relating to the legal standards for liability as a member of the alleged JCE and as a superior.

(ii) Insufficient notice of charges

24. Mr. Župljanin remains concerned that he is not sufficiently notified of the charges against him, in particular in so far as crimes are concerned that were allegedly carried out by unidentified "local Bosnian Serbs".[29] Although the Trial Chamber considered this broad category as "very general", it did not require the Prosecution to provide further identification of the persons within this category for the purposes of the Indictment.[30] However, further details concerning the identity of principal perpetrators are relevant for the preparation of an effective defence and the Prosecution's pre-trial brief is an appropriate vehicle in which to set out these details.[31] While for the puposes of the Indictment a reference to a broad category of perpetrators might have been sufficient, Mr. Župljanin is entitled to receive specific information via the OTP PTB of who exactly were these "local Bosnian Serbs".

25. Unfortunately, the OTP PTB does not assist in this regard. It contains allegations that local Serbs were armed and had a role in the takeovers of various municipalities[32] or in the ill-treatment of detainees,[33] yet there is nothing to assist in the identification of said local Serbs. At a moment so close to the start of the trial, it is unjustifiable that the Prosecution leaves Mr. Župljanin and his defence in the dark about the identity of a potentially large number of people who are alleged to have perpetrated serious offences that are allegedly imputable to Mr. Župljanin.

26. However, it should be noted that following a renewed request on 22 June 2009 for additional particulars in regard to "local Bosnian Serbs", the Prosecution has agreed to make a good faith effort to deliver said material. This delivery is set to take place by 3 July 2009.

(iii) Allegations relating to Article 3 of the Statute

27. Mr. Župljanin asserts that he is not guilty of any of the violations of the laws or customs of war, which are charged pursuant to Article 3 of the Statute under counts 4, 6, and 7 in the Indictment and he contests all factual allegations and legal assessments of those factual allegations made by the Prosecution in relation to these charges, namely murder, torture, and cruel treatment.

---

[29] Indictment, para. 9.
[30] Decision on Mićo *Stanišić's and Stojan* Župljanin's Motions on Form of the Indictment, 19 March 2009, para. 35.
[31] *Prosecutor v. Karadžić*, Case No. IT-95-5/18-PT, Decision on Two Preliminary Motions Alleging Defects in the Form of the Indictment, 12 May 2009, para. 32. *See also Prosecutor v. Gotovina et al,* Case No. IT-06-90-AR73.3, Decision on Joint Defence Interlocutory Appeal Against Trial Chamber's Decision on Joint Defence Motion to Strike the Prosecution's Further Clarification of Identity of Victims, 26 January 2009, para. 18 (although the Appeals Chamber was dealing with the identification of victims, its reasoning must also be applicable to the identification of perpetrators).
[32] OTP PTB, paras. 254, 292
[33] OTP PTB, paras. 219

28. Mr. Župljanin is charged with murder [count 4], torture [count 6], and cruel treatment [count 7] as violations of the laws or customs of war under Article 3 of the Statute. 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.[34]

29. For a crime to be adjudicated under Article 3, two preliminary requirements must be satisfied. First, there must have been an armed conflict, whether internal or international in character, at the time the offences were allegedly committed.[35] Secondly, there must be a close nexus between the armed conflict and the alleged offence, meaning that the acts of the accused must be "closely related" to the hostilities.[36] Furthermore, four additional requirements must be satisfied pursuant to Article 3: i) the violation must constitute an infringement of a rule of international humanitarian law; ii) the rule must be customary in nature, or, if it belongs to treaty law, the required conditions proscribed by the treaty, must be met; iii) 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; and iv) the violation of the rule must entail, under customary or treaty law, the individual criminal responsibility of the person breaching the rule.[37]

30. Mr. Župljanin is charged with murder [count 4] under Article 3 of the Statute. The definition of murder as a violation of the laws or customs of war requires the Prosecution to prove beyond reasonable doubt:

    a. The death of a victim taking no active part in the hostilities;

    b. that the death was the result of an act or omission of the accused or of one or more persons for whom the accused is criminally responsible; and

---

[34] *Prosecutor v. Tadić*, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995 ("*Tadić* Jurisdiction Decision"), para. 89.
[35] *Tadić* Jurisdiction Decision, paras. 67, 137.
[36] *Tadić* Jurisdiction Decision, para. 170.
[37] *Tadić* Jurisdiction Decision, para. 94.

c. the intent of the accused or of the person or persons for whom he is criminally responsible to: i) kill the victim; or ii) wilfully cause serious bodily harm which the perpetrator should reasonably have known might lead to death.[38]

31. Mr. Župljanin is charged with torture [count 6] under Article 3 of the Statute. The definition of torture will be discussed below, as it is the same whether torture is charged as a violation of the laws or customs of war under Article 3 or as an underlying offence of crimes against humanity under Article 5 of the Statute.[39]

32. Mr. Župljanin is charged with cruel treatment [count 7] under Article 3 of the Statute. Cruel treatment as a violation of the laws or customs of war is defined as an intentional act or omission causing serious mental or physical suffering or injury, or constituting a serious attack on human dignity, to a person taking no active part in the hostilities.[40] As regards *mens rea*, the perpetrator must have acted with direct intent to commit cruel treatment or with indirect intent, i.e. in the knowledge that cruel treatment was a probable consequence of his act or omission.[41]

(iv) Allegations relating to Article 5 of the Statute

33. Mr. Župljanin asserts that he is not guilty of any of the underlying offences of crimes against humanity, which are charged under counts 1, 2, 3, 5, 8, 9, and 10 in the Indictment, pursuant to Article 5(a), (b), (d), (f), (h), and (i) of the Statute. He contests all factual allegations and legal assessments of those factual allegations made by the Prosecution in relation to these charges, namely murder, extermination, deportation, torture, persecutions, forcible transfer, and other inhumane acts.

34. Mr. Župljanin is charged with persecutions on political, racial, and religious grounds [count 1], extermination [count 2], murder [count 3], torture [count 5], inhumane acts [count 8], deportation [count 9], and inhumane acts (forcible transfer) [count 10], all underlying offences of crimes against humanity punishable under Article 5 of the Statute. 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;

---

[38] *Prosecutor v. Kvočka, et al.*, Case No. IT-98-30/1-A, Judgement, 28 February 2005 ("*Kvočka* Appeal Judgement"), para. 261; *Prosecutor v. Delalić, et al.*, Case No. IT-96-21-A, Judgement, 20 February 2001, ("*Čelebići* Appeal Judgement"), para. 423; *Kordić et al.* Appeal Judgement, para. 37.

[39] *See Prosecutor v. Limaj et al.*, Case No. IT-03-66-T, Judgement, 30 November 2005, para. 235 footnote 723; *Prosecutor v. Brđanin*, Case No. IT-99-36-T, Judgement, 1 September 2004 ("*Brđanin* Trial Judgement"), para 482; *Prosecutor v. Krnojelac*, Case No. IT-97-25-T, Judgement, 15 March 2002 ("*Krnojelac* Trial Judgement"), para 178; *Prosecutor v. Furundžija*, Case No. IT-95-17-1-T, Judgement, 10 December 2008, para 139; *Prosecutor v. Kunarac et al.*, Case Nos. IT-96-23 & IT-96-23-1, Judgement, 22 February 2001 ("*Kunarac* Trial Judgement"), para. 497; *Prosecutor v. Kvočka, et al.*, Case No. IT-98-30/1-T, Judgement, 20 November 2001, para. 158.

[40] *Čelebići* Appeal Judgement, para. 424; *Prosecutor v. Blaškić*, Case No. IT-94-15-A, Judgement, 29 July 2004 ("*Blaškić* Appeal Judgement"), para. 595.

[41] *See Prosecutor v. Boškoski et al.*, Case No. IT-04-82-T, Judgement, 10 July 2008, para. 382; *Prosecutor v. Limaj et al.*, Case No. IT-03-66-T, Judgement, 30 November 2005, para. 231; *Prosecutor v. Strugar*, Case No. IT-01-42-T, Judgement, 28 January 2005, para 261.

b. the acts of the accused must be part of the attack;

c. the attack must be directed against any civilian population;

d. the attack must be widespread or systematic; and

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.[42]

35. 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.[43] 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.[44]

36. Mr. Župljanin is charged with persecutions on political, racial, and religious grounds [count 1] as an underlying offence of crimes against humanity under Article 5(h). For a charge of persecutions pursuant to Article 5(h), the general requirements for crimes against humanity must be satisfied. In addition, the underlying offence 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*).[45]

37. Persecution often refers to a series of acts, however a single act or omission 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.[46] The acts underlying persecutions as an underlying offence of crimes against humanity, whether considered in isolation or in conjunction with other acts, must constitute an underlying offence of gravity equal to the underlying offences listed in Article 5.[47] The *mens rea* of the perpetrator carrying out the underlying physical acts of persecution as a crime against humanity requires evidence of a specific intent to discriminate on political, racial, or

---

[42] *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.
[43] *Prosecutor v. Tadić*, Case No. T-94-1-A, Judgement, 15 July 1999 ("*Tadić* Appeal Judgement"), paras. 248, 251, 271; *Kunarac* Appeal Judgement, para. 99.
[44] *Kunarac* Appeal Judgement, paras. 102-103.
[45] *Kvočka* Appeal Judgement, para. 320; *Prosecutor v. Krnojelac*, Case No. IT-97-25-A, Judgement, 17 September 2003 ("*Krnojelac* Appeal Judgement"), para. 185; *Blaškić* Appeal Judgement, para. 131, *Prosecutor v. Vasiljević*, Case No. IT-98-32-A, Judgement, 25 February 2004 ("*Vasiljević* Appeal Judgement"), para. 113.
[46] *Blaškić* Appeal Judgement, para. 135; *Vasiljević* Appeal Judgement, para. 113.
[47] *Blaškić* Appeal Judgement, para. 135; *Krnojelac* Appeal Judgement, paras. 119, 221.

religious grounds.[48]

38. Mr. Župljanin is charged with extermination [count 2] as an underlying offence of crimes against humanity under Article 5(b). Extermination is any act, omission, or combination thereof which contributes directly or indirectly[49] to the killing on a large scale[50] and differs from murder in that it requires an element of mass destruction but not a numerical minimum.[51] The *actus reus* of the crime of extermination also includes subjecting a widespread number of people or systematically subjecting a number of people to conditions of living that would inevitably lead to death.[52] The *mens rea* required is an intent to bring about the *actus reus*.[53]

39. Mr. Župljanin is charged with other murder [count 3] as an underlying offence of crimes against humanity under Article 5(a). The elements of murder as a violation of the laws or customs of war pursuant to Article 3 of the Statute, outlined above, are equally applicable where murder is charged under Article 5(a).[54] However, for each charge pursuant to Article 5, the general requirements for crimes against humanity must be satisfied.

40. Mr. Župljanin is charged with torture [count 5] as an underlying offence of crimes against humanity under Article 5 (f). While customary international law does not require that a person responsible for torture as a crime against humanity be a public official,[55] it includes the following requirements:

    a. The infliction, by act or omission, of severe pain or suffering, whether physical or mental; what exactly amounts to severe physical or mental pain or suffering must be assessed on a case-by-case basis in light of the acts committed and their context;[56]

    b. the act or omission must be intentional;

    c. the act or omission must aim at obtaining information or a confession, or at punishing, intimidating or coercing the victim or a third person, or at discriminating, on any ground, against the victim or a third person.[57]

---

[48] *Blaškić* Appeal Judgement, para. 164; *Krnojelac* Appeal Judgement, para. 184; *Vasiljević* Appeal Judgement, para. 113.
[49] *Prosecutor v. Ndindabahizi*, Case No. ICTR-01-71-A, Judgement, 16 January 2007, para. 123 and footnote 268.
[50] *See Prosecutor v. Ntakirutimana*, Cases Nos. ICTR-96-10-A and ICTR-96-17-A, Judgement, 13 December 2004 ("*Ntakirutimana* Appeal Judgement"), para. 516. See also *Prosecutor v. Vasiljević*, Case No. IT-98-32-T, Judgement, 29 November 2002, para. 229; *Brđanin* Trial Judgement, para. 389; *Prosecutor v. Blagojević et al.*, Case No. IT-02-60-T, Judgement, 17 January 2005, para. 573; *Prosecutor v. Ndindabahizi*, Case No. ICTR-01-71-I, Judgement, 15 July 2004, para. 479.
[51] *Ntakirutimana* Appeal Judgement, para. 516.
[52] *Prosecutor v. Stakić*, Case No. IT-97-24-A, Judgement, 22 March 2006 ("*Stakić* Appeal Judgement"), para. 259; *Ntakirutimana* Appeal Judgement, para. 522.
[53] *Stakić* Appeal Judgement, para. 259; *Ntakirutimana* Appeal Judgement, para. 522.
[54] *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-T, Judgement, Volume 1 of 4, 26 February 2009, para. 136, 173. *See also Prosecutor v. Blaškić*, Case No. IT-94-15-T, Judgement, 3 March 2000, para. 217.
[55] *Kvočka* Appeal Judgement, para. 284; *Kunarac* Appeal Judgement, para. 148.
[56] *Prosecutor v. Brđanin*, Case No. IT-99-36-A, Judgement, 3 April 2007 ("*Brđanin* Appeal Judgement"), para. 251; *Prosecutor v. Naletilić et al.*, Case No. IT-98-34-A, Judgement, 3 May 2006, Judgement, para. 299.
[57] *Kunarac* Appeal Judgement, para. 142 confirming *Kunarac* Trial Judgement, para. 497. *See also Brđanin* Trial

41. Mr. Župljanin is charged with inhumane acts [count 8] as an underlying offence of crimes against humanity under Article 5 (i). As a residual category, "other inhumane acts" potentially encompass an excessively broad range of acts, which would violate the *nullum crimen sine lege* principle.[58] Inhumane acts as an underlying offence of crimes against humanity is comprised of acts which fulfill the following conditions:

    a. The victim must have suffered serious bodily or mental harm (the degree of severity must be assessed on a case-by-case basis with due regard for the individual circumstances);

    b. the suffering must be the result of an act or omission of the accused or his subordinate; and

    c. when the offence was committed, the accused or his subordinate must have been motivated by the intent to inflict serious bodily or mental harm upon the victim.[59]

42. Mr. Župljanin is charged with deportation [count 9] as an underlying offence of crimes 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 present, across a *de jure* state border or, in certain circumstances, a *de facto* border, without ground 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.[60]

43. Mr. Župljanin is charged with other Inhuman Acts (forcible transfer) [count 10] as an underlying offence of crimes 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.[61]

(v) Alleged modes of liability

44. Article 7 of the Statute explicitly states the modes of "individual criminal responsibility" over which the Tribunal may exercise jurisdiction. Article 7(1) provides that:

> [a] person who planned, instigated, ordered, committed, or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 of the present Statute, shall be individually responsible for the crime.

Judgement, para. 481, *Krnojelac* Trial Judgement, para. 179.

[58] *See Kordić et al.* Appeal Judgement, paras. 116–117. *See also Kupreškić, et al.* Trial Judgement, paras. 563–566.

[59] *Kordić et al.* Appeal Judgement, para. 117.

[60] *Stakić* Appeal Judgement, paras. 278, 319.

[61] *Stakić* Appeal Judgement, paras. 317, 319.

45. Article 7(3) provides as follows:

> [t]he fact that any of the acts referred to in articles 2 to 5 of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was 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 thereof.

(a) Joint Criminal Enterprise

(1) Lack of statutory basis

46. There is no statutory description of individual criminal liability through JCE or membership in a JCE. None of the five distinct modes of liability established in Article 7(1) which can expose individuals to criminal liability is JCE. Rather, JCE in practice combines and expands the five defined modes, allowing an illegitimate aggregation of cumulative evidence against an accused to find him guilty of some generalized crime, without proof that the accused did "plan", "instigate", "order", "commit" or otherwise "aid and abet" any specific criminal act.

47. JCE liability is thus without any textual basis, but a theory created and developed at the urging of the Prosecution, to expand the scope of criminal liability under the Statute. This was improper, since the forms of liability set forth in Article 7(1) are specific and exhaustive. Moreover, the Statute's drafters expressly considered the problem of liability of "heads of State" and other actors, who might be removed from the actual crime, and explicitly addressed it in Articles 7(2) and 7(3) *without* creating any JCE or common plan liability. As the Secretary-General's Report clearly indicates, the Statute's drafters carefully considered the specific issue of liability for government officials, and their solution was twofold: they eliminated any notion of official immunity, and provided that superiors would be liable for actions *of their subordinates* in certain circumstances [62]

(2) Lack of legal basis under customary international law

48. The *Tadić* Appeals Chamber's finding that JCE existed as a theory of liability under customary international law is unfounded and has exhaustively been shown to be historically erroneous.[63] The *Tadić* Appeals Chamber insisted that JCE was based upon customary international law, embodied by the World War II tribunals.[64] It claimed to have examined several relevant precedents, from which it elucidated the theory of JCE, including its three separate forms each with distinct *actus reus* and *mens rea*. However, a review of these precedents reveals that the *Tadić* Appeals Chamber's reading of the relevant cases was flawed and provides no support for the JCE doctrine as employed at this Tribunal.[65] Especially the third form of JCE cannot under any circumstances be

---

[62] UNDOC S/25704, paras. 55–56.
[63] Martinez & Danner, *Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law*, 93 Cal. L. Rev. 75 (2005).
[64] *Tadić* Appeal Judgement, para. 194ff.
[65] Martinez, *supra*, p. 110.

regarded as customary international law at the time when the crimes charged in the Indictment were allegedly committed.[66]

49. Moreover, the *Tadić* Appeals Chamber took wide latitude in its interpretation, repeatedly – and unsoundly – inferring the bases for liability from isolated statements by the prosecutors and the accompanying guilty verdict, when a clear judicial statement was unavailable. The case summaries relied upon by the *Tadić* Chambers often provided no statement of the legal bases for the convictions. Judges of this Tribunal have characterised this approach as "nothing but an unsupported dictum"[67] which is of "dubious precedential value".[68] This is yet another reason why the World War II cases cited by the *Tadić* Appeals Chamber "do not ...provide any legal basis for the sweeping JCEs, many of which span several years and extend throughout entire regions and even countries, used in later cases at the ICTY."[69] Instead, the *Tadić* Appeals Chamber essentially restated the facts of the case and did not develop the theory of JCE through a disinterested examination of applicable precedent, but rather molded those precedents to fit a theory that would permit the conviction of Tadić.[70]

50. Thus, the scope of JCE liability as currently applied by the Tribunal extends far beyond what is provided in customary international law.

(3) Violation of fundamental principles of international criminal law

51. The doctrine of JCE and its application by this Tribunal violates the principle of non-retroactivity of criminal laws and the principle of specificity, which are essential components of the *nullum crimen sine lege* principle under international criminal law.[71] Given the lacking legal basis in the Statute or international customary law for JCE liability, the imposition of such liability clearly violates this principle,[72] emphasised in the Secretary-General's Report:

> In the view of the Secretary-General, the application of the principle *nullum crimen sine lege* requires that the international tribunal should apply rules of international humanitarian law which are beyond any doubt part of customary law so that the problem of adherence of some but not all States to specific conventions does not arise. This would appear to be particularly important in the context of an international tribunal prosecuting persons responsible for serious violations of international humanitarian law.[73]

52. The way in which JCE is applied by this Tribunal also violates the principle of specificity, which requires that the provisions of international criminal law should be as

[66] Ambos, *Amicus Curiae concerning Criminal Case File No. 001/18-07-2007-ECCC/OCIJ (PTC 02)*, 27 October 2008, pp. 28–29.
[67] *Martić* Appeal Judgement, Separate Opinion of Judge Schomburg, para. 4.
[68] Ambos, *supra*, p. 23 (quoting Ohlin, *Three Conceptual Problems with the Doctrine of Joint Criminal Enterprise*, 5 Journal of International Criminal Justice (2007), p. 75).
[69] Martinez, *supra*, p. 114.
[70] Martinez, *supra*, p. 106.
[71] Damgaard, *Individual Criminal Responsibility for Core International Crimes*, Springer, 2008, p. 373. *See also* Ashworth, *Principles of Criminal Law*, 2006, p. 68.
[72] *Martić* Appeal Judgement, Separate Opinion of Judge Schomburg, para. 4.
[73] UNDOC S/25704, para. 34.

specific as possible to ensure that potential perpetrators are aware of the different elements of international crimes.[74] By contrast, the description of JCE in the Indictment is vague, amorphous, and confusing. It is stated that "[t]he objective of the JCE was to permanently remove Bosnian Muslims, Bosnian Croats and other non-Serbs from the territory of the planned Serbian state".[75]

(4) International judges & legal scholars oppose the expansive doctrine of JCE

53. The expansive doctrine of JCE is not recognizable to the legal profession as a whole and even some prosecutors of this Tribunal have resisted reliance on this doctrine:

> (a) ICTY prosecutors trained in the civil law tradition expressed concern about conspiracy and its surreptitious cognates; and (b) only one ICTY prosecution team, led by Canadian William Fenrick, resisted an over reliance on the doctrine of joint criminal enterprise. "When he retired in 2003, the restraint he had long exercised on others in the Office of the Prosecutor disappeared, and its members began to employ the doctrine more aggressively before the Tribunal."[76]

54. Further, JCE doctrine indiscriminately combines both civil law concepts and common law categories. Former Judge and President Cassese has acknowledged that the confusion resulting from combining analytically distinct concepts "may have contributed to misgivings or misinterpretation."[77] He has further emphasized that JCE liability should not apply where no common plan existed between the actual perpetrators and those who participated in the common plan, praising the *Brđanin* Trial Judgement for reaching this result.[78]

55. Professor Ambos, in his capacity as *amicus curiae* for the Extraordinary Chambers in the Courts of Cambodia, has recently and persuasively explained that JCE category II and III cannot be considered as co-perpetration and are, therefore, excluded from the "committing" mode of liability.[79] Ambos has also pointed out that JCE category III violates the principle of culpability by introducing an unreliable foreseeability standard, which gives rise to a form of strict liability.[80] This results in an unjustifiable advantage

---

[74] *See* Damgaard, *supra*, p. 373.
[75] Indictment, para. 7.
[76] Meierhenrich, *Conspiracy in International Law*, 2 Annu. Rev. Law Soc. Sci. (2006), p. 352.
[77] Cassese, *The Proper Limits of Individual Responsibility Under the Doctrine of Joint Criminal Enterprise*, 5 J. Int'l Crim. Just., p. 115.
[78] "The Chamber, therefore, dismissed the applicability of the notion of JCE to the crimes at issue. Although the Chamber did not provide detailed reasons for its conclusion, it would seem to be correct. To extend criminal liability to instances where there was no agreement or common plan between the perpetrators and those who participated in the common plan would seem to excessively broaden the notion, which is always premised on the *sharing of a criminal intent by all* those who take part in the common enterprise (and this premise is the *sine qua non* condition for the possible additional liability arising in the third category of JCE, where the 'primary offender' commits a further crime, not envisaged in the common plan)" (Cassese, *supra*, p. 125–126, emphasis added).
[79] Ambos, *supra*, pp. 13–14.
[80] "... the current shifting definition of the third category of JCE has all the potential of leading to a system, which would impute guilt solely by association." (*See Martić* Appeal Judgement, Separate Opinion of Judge Schomburg, para. 7).

for the Prosecution and the impossibility for the defence to rebut the vague and indirect evidence that is sufficient to meet this low standard.[81]

56. In the words of former Judge Lindholm, even "[t]he so-called basic form of joint criminal enterprise does not...have any substance of its own."[82] He continued, "[t]he concept or 'doctrine' has caused confusion and a waste of time, and is in my opinion no benefit to the work of the Tribunal or the development of international criminal law."[83] In fact, as stated by former Judge Schomburg, "[t]he Statute does not criminalize the membership in any association or organization. The purpose of this International Tribunal is to punish individuals and not to decide on the responsibility of states, organizations or associations."[84]

(5) The law on JCE as applied before this Tribunal

57. For the reasons outlined above, Mr. Župljanin challenges the jurisprudence on JCE liability developed since the *Tadić* Appeal Judgement. Further, he submits that the appropriate presentation of charges in a case such as this would be derived from the Continental European (i.e., Civil Law) legal framework. Mr. Župljanin respectfully contends that this would be more in line with the fundamental principles of international criminal law than a doctrine entirely created by unfounded judicial activism. Without prejudice to his challenge to the concept of JCE itself, Mr. Župljanin is aware of the Appeals Chamber's interpretation of the law on JCE, which will be briefly outlined below.

58. There are three categories of JCE liability. Mr. Župljanin is charged with the 1st and 3rd categories of JCE liability. A conviction requires a finding that the accused participated in a JCE. There are three requirements for such a finding.[85] First, a plurality of persons is required. Second, the existence of a common purpose which amounts to or involves the commission of a crime provided for in the Statute is required. Third, the accused must be shown to have participated in the common purpose by making a significant contribution to the crimes.[86] Furthermore, it must be proven that the accused possessed the requisite criminal intent, and that this intent is the only reasonable inference available based on the evidence.

59. The *mens rea* required for a finding of guilt differs according to the category of JCE liability under consideration. For the first category, or "basic" JCE liability, it must be shown that the accused and the other participants in the JCE intended that the crimes at issue be committed.[87] It must be established that there was a common, shared intention

---

[81] Ambos, *supra*, pp. 16–18.
[82] *Prosecutor v. Simić, et al.*, Case No. IT-95-9-T, Judgement, Dissenting Opinion of Judge Lindholm, 17 October 2003 ("Lindholm Dissenting Opinion"), para. 2.
[83] Lindholm Dissenting Opinion, para. 5.
[84] *Martić* Appeal Judgement, Separate Opinion of Judge Schomburg, para. 5.
[85] *Stakić* Appeal Judgement, para. 64; *Tadić* Appeal Judgement, para. 227.
[86] *Prosecutor v. Krajišnik*, Case No. IT-00-39-A, Judgement, para. 215.
[87] *Stakić* Appeal Judgement, para. 65; *Tadić* Appeal Judgement, para. 228.

on the part of the group to commit the alleged offence.[88] The third or "extended" category of JCE liability allows conviction of a participant in a JCE for certain crimes committed by other participants in the JCE even though those crimes were outside the common purpose of the JCE. The accused can be found to have third category JCE liability if he or she intended to further the common purpose of the JCE and the crime was a natural and foreseeable consequence of that common purpose.[89] Liability attaches 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*.[90] The crime must be shown to have been foreseeable to the accused in particular.[91]

(6) Relevant legal issues to be developed by this Tribunal: Principle perpetrators[92] "used" by JCE members

60. In the Indictment, the Prosecution does not allege that Mr. Župljanin or any other member of the JCE personally committed any of the crimes charged, but that they were using principle perpetrators, who were not members of the JCE, to carry out the crimes in furtherance of the common criminal purpose.[93] While it is possible to hold an accused responsible as a member of a JCE if another member "used" a person outside the JCE to carry out the *actus reus* of a crime, it remains an essential requirement that the crime in question forms part of the common purpose. In this respect, the Chamber will need to consider various circumstances, including whether the principal perpetrator knew of the existence of the JCE and whether the accused closely cooperated with the principal perpetrator.[94]

61. The Prosecution must prove exactly how a member of the alleged JCE was "using" a principal perpetrator. This is essential because no different mode of liability than that which would be applicable to the member that was using the principal perpetrator should be applied to the accused or the other members of the alleged JCE.[95] For example, if that member was only aiding and abetting the crimes committed by the principal perpetrators, the other members of the JCE should not incur a higher degree of responsibility. In this case their participation cannot be bluntly qualified as "committing" by virtue of their membership in a JCE.[96]

---

[88] *Tadić* Appeal Judgement, paras 196-204; *Prosecutor v. Milutinović, et al.*, Case No. IT-99-37-PT, Decision on Ojdanić's Motion Challenging Jurisdiction – Joint Criminal Enterprise, 21 May 2003; *Brđanin* Trial Judgement, para. 335.

[89] *Stakić* Appeal Judgement, para. 65; *Tadić* Appeal Judgement, para. 204.

[90] *Prosecutor v. Martić*, Case No. IT-95-11-A, Judgement, 8 October 2008 ("*Martić* Appeal Judgement"), para. 168; *Stakić* Appeal Judgement, para. 65; *Brđanin* Appeal Judgement, para. 365; *Vasiljević* Appeal Judgement, 101; *Krnojelac* Appeal Judgement, para. 32; *Kvočka* Appeal Judgement, para. 83; *Tadić* Appeal Judgement, para. 228.

[91] *Stakić* Appeal Judgement, para. 65; *Tadić* Appeal Judgement, para. 220.

[92] Although in the jurisprudence of the Tribunal the term "physical perpetrators" is also used, the Župljanin defence adopts the terminology of the Appeals Chamber in *Brđanin* defining persons who carry out the *actus reus* of a crime as "principle perpetrators" (*Brđanin* Appeal Judgement, para. 362).

[93] *See* Indictment, paras. 8–9.

[94] *Brđanin* Appeal Judgement, para. 410.

[95] *Brđanin* Appeal Judgement, Separate Opinion of Judge Meron, paras. 6–7.

[96] The Appeals Chamber has explicitly refrained from making any findings on this issue in *Brđanin* and any other case so far: "The jurisprudence of the Tribunal traditionally equates a conviction for JCE with the mode of liability

(b) Modes of liability under Article 7(1)

62. Mr. Župljanin asserts that he did not plan, instigate, order, commit – as a participant in a JCE – or otherwise aid and abet in the planning, preparation, or execution of any crimes, as charged under Article 7(1) of the Statute, nor did he have any superior authority over any alleged perpetrators of any crime, as charged under Article 7(3) of the Statute. In particular, Mr. Župljanin asserts that he is not guilty of participating in a JCE, nor of planning, instigating, ordering, or aiding and abetting any crime 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 these charges.

63. Mr. Župljanin is charged with aiding and abetting pursuant to Article 7(1). The *actus reus* of aiding and abetting consists of acts specifically directed to assist, encourage, or lend moral support to the perpetration of a certain specific crime (murder, extermination, rape, torture, etc.), and this support has a substantial effect upon the perpetration of the crime.[97] The *actus reus* of aiding and abetting by omission will only be fulfilled when it is established that a legal duty to act existed[98] and when the failure to discharge a legal duty assisted, encouraged, or lent moral support to the perpetration of the crime and had a substantial effect on the realisation of that crime.[99]

64. The requisite mental element is knowledge that the acts or omissions of the aider and abettor assist in the commission of the specific crime of the principal,[100] as well as awareness of the crime committed by the principal. As far as this second element is concerned, the Appeals Chamber has repeatedly affirmed that if a person is "aware that one of a number of crimes will probably be committed, and one of those crimes is in fact committed, he has intended to facilitate the commission of that crime, and is guilty as an aider and abetter".[101] Thus, a probability standard applies only to the awareness regarding the commission of the crime and not also to the awareness regarding the furthering effect of the accused's contribution, as alleged in the OTP PTB.[102] The few examples of domestic norms cited by the Prosecution are not binding upon the Tribunal, nor are they even close to providing sufficient evidence of a general principle of law or uniform state practice.

---

of "committing" under Article 7(1). The Appeals Chamber declines at this time to address whether this equating is still appropriate where the accused is convicted via JCE for crimes committed by a principal perpetrator who was not part of the JCE, but was used by a member of the JCE" (*Brđanin* Appeal Judgement, para. 413, footnote 891).

[97] *Blaškić* Appeal Judgement, paras. 45-47; *Vasiljević* Appeal Judgement, para. 102.

[98] *Prosecutor v. Orić*, Case No. IT-03-68-A, Judgement, 3 July 2008, para. 43.

[99] *Prosecutor v. Mrkšić et al.*, Case No. IT-95-13/1-A, Judgement, 5 May 2009 ("*Mrkšić et al.* Appeal Judgement"), para. 49.

[100] *Blaškić* Appeal Judgement, paras. 45–46; *Vasiljević* Appeal Judgement, para. 102.

[101] *Mrkšić et al.* Appeal Judgement, para. 49; *Simić* Appeal Judgement, para. 86, *Blaškić* Appeal Judgement, para. 50. *See also Prosecutor v Ndindabahizi*, Case No. ICTR-01-71-A, Judgement, 16 January 2007, para. 122.

[102] OTP PTB, para. 326 footnote 837.

(c) Modes of liability under Article 7(3)

65. Mr. Župljanin is charged with superior responsibility pursuant to Article 7(3). Mr. Župljanin 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).

66. 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.[103]

67. 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.[104] A hierarchical relationship may exist by virtue of an accused's *de facto*, as well as *de jure*, position of superiority.[105] 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.[106]

68. 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, 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.[107] Where a superior has effective control and fails to exercise that power he will be responsible for the crimes committed by his subordinates.

---

[103] *Blaškić* Appeal Judgement, para. 484; *Čelebići* Appeal Judgement, paras. 189-198, 225-226, 238-239, 256, 263; *Aleksovski* Appeal Judgement, para. 72.
[104] *Čelebići* Appeal Judgement, paras. 205-206.
[105] *Čelebići* Appeal Judgement, paras. 192-194, 266.
[106] *Prosecutor v. Juvénal Kajeljeli,* Case No. ICTR-98-44A-A, Appeal Judgement, 23 May 2005, para. 86; *Blaškić* Appeal Judgement, para. 375; *Čelebići* Appeal Judgement, para. 256.
[107] *Blaškić* Appeal Judgement, para. 69; *Čelebići* Appeal Judgement, paras. 169-198; *Aleksovski* Appeal Judgement, para. 76.

69. In relation to the issue of knowledge, Article 7(3) provides 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 though 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.[108]

70. This knowledge requirement applies to both civilian and military commanders.[109] In relation to the issue of the interpretation of the *had reason to know* standard, "a superior will be criminally responsible through the principles of superior responsibility *only if information was available to him* which would have put him on notice of offences committed by subordinates."[110] A "neglect 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."[111]

71. However, for a non-military superior, under customary international law, the *mens rea* standard is "knew or consciously disregarded information which 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, and expresses the legal position, i.e., *opinion juris* 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. Furthermore, before the ICTR, the *Kayishema and Ruzindana* Trial Judgement, following the Rome Statute, applied the *mens rea* standard set out in Article 28(b)(i).[112]

72. 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.[113] What constitutes such measures is not a

[108] *Čelebići* Appeal Judgement, paras. 223-226.
[109] *Čelebići* Appeal Judgement, paras. 196-197.
[110] *Čelebići* Appeal Judgement, para. 241; *Blaškić* Appeal Judgement, para. 62; *Krnojelac* Appeal Judgement 151.
[111] *Čelebići* Appeal Judgement, para. 226; *Blaškić* Appeal Judgement, para. 62.
[112] *Prosecutor v. Kayishema and Ruzindana,* Case No. ICTR-95-1-T, Judgment and Sentence, 1 July 2001, paras. 227-228.
[113] *Čelebići* Appeal Judgement, para. 226.

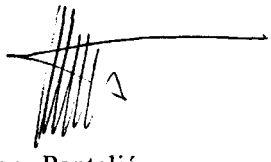
matter of substantive law but of evidence.[114]

VI. CONCLUSION

73. Mr. Župljanin 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: 10,340

Respectfully Submitted,



Igor Pantelić
Counsel for Stojan Župljanin

Dated this 29th day of June 2009
At The Hague, Netherlands

[114] *Prosecutor v. Hadžihasanović*, Case No. IT-01-47-A, Judgement, 22 April 2008, para. 152; *Čelebići* Appeal Judgement, para. 198; *Blaškić* Appeal Judgement, para. 72.