

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

Case No. IT-09-92-PT

IN THE PRE-TRIAL CHAMBER

Before: Judge Alphons Orie, Presiding
Judge Bakone Justice Moloto
Judge Christoph Flügge

Registrar: Mr. John Hocking

Date Filed: 3 April 2012

THE PROSECUTOR

v.

RATKO MLADIC

Public

DEFENSE PRE-TRIAL BRIEF

The Office of the Prosecutor:

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Ratko Mladic (“Accused”), by and through Counsel, respectfully submits the following Pre-Trial Brief pursuant to Rule 65*ter*(F) of the Rules of Procedure and Evidence, and states as follows:

I. INTRODUCTION AND PROCEDURAL HISTORY

1. The operative Indictment in the instant case is the “Fourth Amended Indictment” filed by the Office of the Prosecutor on 16 December 2011. The previous version of the Indictment’s Victim List has been incorporated by reference into the Fourth Amended Indictment and no new Victim List was produced for the current Indictment.

2. On 13 January 2012 the Prosecution sought an enlargement of the word limit for its Pre-Trial Brief, from 15,000 to 45,000 words.¹ The Defense did not object, and the Prosecution request was granted by the Chamber.²

3. On 24 February 2012 the Prosecution filed its Pre-Trial Brief, pursuant to 65*ter* (E), consisting of 43,974 words, and several additional annexes, including maps and charts. On that same date the Prosecution also filed its witness and exhibit lists.

¹ See, “Prosecution’s Motion to Exceed the Word Limit for its Pre-Trial Brief” (13 January 2012)

² See, Status Conference of 19 January 2012, TR.154

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4. On 9 March 2012 the defense filed a motion seeking to enlarge the time period for filing its Pre-Trial Brief, and to increase the word limit to 20,000 words. The Prosecution did not object to this enlargement of the time or word count sought by the Defense. On 14 March 2012, by way of e-mail to the parties, the Pre-Trial Chamber granted said motion, establishing that the Defense Pre-Trial Brief should be filed on or before 3 April 2012. At the Status Conference of 29 March 2012 the Chamber put this decision on the record.

5. Rule 65ter(F) of the Rules of Procedure and Evidence (the “Rules”) stipulates: “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 defense, (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”. The pre-trial brief will not exceed 15,000 words.³ The Defense sought and received leave to file a pre-trial of up to 20,000 words.⁴

6. The Accused is not obliged to present the defense case in its pre-trial brief. Rather the purpose of the defense pre-trial brief is primarily to respond to the Prosecution pre-trial brief.⁵ Per the relevant jurisprudence, Rule 65ter(F) “does not compel a defendant to include any information about his or her intended exhibits in the pre-trial brief.”⁶ It should also be noted at this time that the Accused, Ratko Mladic, has entered a plea of “not guilty” on all charges and counts presented in the Fourth Amended Indictment against him. The defense thus contests all factual allegations lodged in the Prosecution Pre-Trial Brief, and the legal conclusions the Prosecution seeks to derive therefrom.

7. The instant filing by the Defense of Ratko Mladic is made in conformity with Rule 65ter(F) and the relevant jurisprudence requirements of the same. The Defense takes issue with the entirety of the Prosecution’s Pre-Trial Brief, with specific examples highlighted

³ Practice Direction on the length of Briefs and Motions

⁴ See, Status Conference of 29 March 2012, TR. 217

⁵ *Prosecutor v. Brdjanin* No. IT-99-36-PT “*Decision on Prosecution Response to Defendant Brdjanin’s Pre-Trial Brief*” 14 January 2002.

⁶ *Prosecutor v. Brdjanin* No. IT-99-36-PT “*Decision on Prosecution Response to Defendant Brdjanin’s Pre-Trial Brief*” 14 January 2002.

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herein below. Where an assertion by the Prosecution is not expressly agreed or denied in this brief, it should be presumed to be denied by the Defense.

8. The Defense of Ratko Mladic finds the materials in the Prosecution Pre-Trial Brief to be deficient and lacking, and objects to the absolute adherence to the same for purposes of the trial proceedings. As set forth in greater detail below, the Defense believes that the Trial Chamber should consider additional factual materials and the applicable legal standards set forth herein in preparation for the trial of this matter. Additionally, the Defense presents a brief outline of the defenses, to be expounded upon further and supplemented, pursuant to the Rules of Procedure and Evidence, at the conclusion of the prosecution case in chief. As a further preliminary point, it has to be stated that the efforts of the Defense to analyze the Prosecution Pre-Trial Brief have been greatly hampered by the inability to locate documents cited as support for the assertions therein. In addition to the various disclosure problems that have been raised repeatedly by the Defense, and relating to the manner of the disclosures in this case, the Prosecution Pre-Trial Brief does not use identifying ERN, but rather the 65^{ter} numbers of documents. The Defense does not have access to these documents according to their 65^{ter} number, as the E-Court system has not been set up nor have the same been completely loaded therein in time for the Defense to make efficient use of the same.

II. SIGNIFICANT APPLICABLE LEGAL STANDARDS AND PRINCIPLES

A. BURDEN AND STANDARD OF PROOF

8. It is the Prosecution that is bringing this case, and thus it is the Prosecution that will have to prove every element that is alleged against Mr. Mladic beyond a reasonable doubt, in accordance with Rule 87(A) of the Rules and the fundamental principle of the presumption of innocence. The Defense notes that nowhere in the Prosecution Pre-Trial Brief is this most sacrosanct principle of criminal law and justice even mentioned, let alone recognized.

9. “The standard of proof at trial requires that a Trial Chamber may only find an accused guilty of a crime if the Prosecution has proved each element of that crime and of the mode of liability, and any fact which is indispensable for the conviction, beyond reasonable

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doubt.”⁷ “At the conclusion of the case the accused is entitled to the benefit of the doubt as to whether the offence has been proved.”⁸

10. The principle of *in dubio pro reo*, as a corollary to the presumption of innocence, and the burden of proof beyond a reasonable doubt, applies to findings required for conviction, such as those which make up the elements of the crime charged.⁹ Under this principle, the Trial Chamber considers whether there is any reasonable interpretation of the evidence other than the guilt of the accused. Any ambiguity or doubt is resolved in favor of the accused under the principle of *in dubio pro reo*.¹⁰ If there is another conclusion which is reasonably open from the evidence, the accused must be acquitted.¹¹

11. Insofar as the Defense has given notice under Rule 67(B) of a partial alibi defense, the Chamber must also keep in mind that, with respect to the Alibi, the Prosecution once again is the party bearing the burden, namely Prosecution has the burden of eliminate any reasonable possibility that the evidence of alibi is true.¹²

12. Respectfully the Defense does not have the burden to prove either the alibi, or anything else in this trial, and the Defense would respectfully request that the Chamber keep this in mind throughout these proceedings.

13. The Office of the Prosecutor bears the burden of proof and thereby must establish each and every element and factor of each count of the Indictment for culpability on each charge. Only after the full evidence against Mr. Mladic is presented by the Prosecution and time allotted for the Defence to respond to the allegations, will the Trial Chamber be able to rule on any responsibility of the Accused. If the Trial Chamber, at that time, has any doubt in the case presented against the Accused, the benefit of doubt goes to the Accused and he must be acquitted.

⁷ *Prosecutor v. Blagojevic*, IT-02-60, *Appeals Judgement*, (9 May 2007), para. 226.

⁸ *Prosecutor v. Delalic et al.*, IT-96-21, *Trial Judgement*, (16 November 1998), para. 601.

⁹ *Prosecutor v. Limaj et al.*, No. IT-03-66-A, *Judgement* (27 September 2007) at para. 21

¹⁰ *Prosecutor v Blagojevic & Jokic*, No. IT-02-60-T, *Judgement* (17 January 2005) at para. 18; *Prosecutor v Halilovic*, No. IT-01-48-T, *Judgement* (16 November 2005) at para. 12

¹¹ *Prosecutor v Blagojevic & Jokic*, No. IT-02-60-T, *Judgement* (17 January 2005) at para. 21; *Prosecutor v Halilovic*, No. IT-01-48-T, *Judgement* (16 November 2005) at para.15

¹² *Prosecutor v Limaj et al*, No. IT-03-66-T, *Judgement* (30 November 2005) at para. 11; *Prosecutor v. Limaj et al.*, No. IT-03-66-A, *Judgement* (27 September 2007) at para. 63

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B. ARTICLES 21 AND 22 OF THE ICTY STATUTE

14. It is submitted that these proceedings, like all before the Tribunal, must be held in consonance with the rights of the Accused that are enumerated in the ICTY Statute, specifically Articles 20 and 21. These rights must be kept in the forefront by the Chamber, including at this stage, when considering the Prosecution Pre-Trial Brief and the commencement of the Trial.

15. The right to a fair trial and expeditious trial are considered the cornerstone of the rights granted to an Accused, and include the right to be “immediately informed of the charges against him” and to be “informed promptly and in detail in a language which he understands of the nature and cause of the charge against him.”¹³ Further, an Accused has the right “to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his choosing.”¹⁴

16. Where multiple Accused are tried together, the case against each Accused must be considered separately and on each count.¹⁵ In the case of Mr. Mladic, multiple co-Accused for various of the charges/counts have been tried jointly and also individually before this instant case, including some that have been convicted of some of the same acts of conduct alleged against Mr. Mladic. In no way can this determine the alleged culpability of Mr. Mladic before he is even allowed an opportunity to present his defence. To do so would constitute trial *in absentia* which goes against the fundamental rights of the Accused and a presumption of innocence. Similarly, Article 21 of the Statute enshrines the right of all Accused at the Tribunal to be equal before it. Mr. Mladic’s rights should not be abridged simply because he is the last in line to start trial, and he should have the full opportunity to challenge the Prosecution case, just as enjoyed by the other accused who preceded him to the dock. Thus we would stress that to ensure the fairness of the proceedings the Chamber should disregard the results of prior trials against other accused involving the same crime-bases as

¹³ Article 21(4)(a)

¹⁴ Article 21(4)(b)

¹⁵ *Prosecutor v. Kordic et al., Trial Judgement, IT-95-14/2, (26 February 2001), para. 17*

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the instant Indictment, including: a) Srebrenica¹⁶; b) Sarajevo¹⁷; and c) Municipalities of BiH.¹⁸

17. Additionally, due to these cases that came prior and which are substantially related to the crimes charged in the instant Indictment and case, the Defense wishes to raise and comment on some preliminary points on matters that are already foreseen.

1. THE USE OF RULE 92 BIS AND THE NECESSITY OF CONFRONTATION BY WAY OF CROSS-EXAMINATION.

18. As provided in Rule 90 (A), *viva voce* testimony is the normal mode of testimony before the ICTY. The right of confrontation is recognized both by the Rules and ICTY jurisprudence. Any deviation from this standard, through over-extensive application of Rule 92 *bis*, seriously infringes upon the rights of the Accused as enshrined in Article 21 of the ICTY Statute, to fairness of trial and due process. In such circumstances, the Accused would be deprived of his right to confront the statements incriminating him. While written testimony is permissible as evidence under ICTY Rule 89(F), it must comply with all other provisions of Rule 89; in particular, it must be relevant and probative pursuant to Rule 89(C) and can be denied by a Chamber if its probative value is “substantially outweighed by the need to ensure a fair trial.”¹⁹ In all cases, “a Chamber shall apply the rules of evidence which will best favour a fair determination of the matter before it and are consonant with the spirit of the Statute and the general principles of law.”²⁰ Respectfully, the need to ensure a fair trial should be a paramount consideration of this Trial Chamber when determining the issue of Rule 92*bis*.

19. The Prosecution’s Rule 65 *ter* filings made in conjunction with their Pre-Trial brief identify that only a total of seven (7) witnesses will be presented *viva voce* and that the

¹⁶ *i.e.*, *Krstic* case; *Obrenovic* case; *M. Nikolic* case; *Erdemovic* case; *Blagojevic & Jokic* case; *Karadzic* case; *Krajisnik* case; *S. Milosevic* case; *Perisic* case; *Popovic et al.* case; *Stanisic & Simatovic* case; *Stankovic & Jankovic* case; *Tolimir* case; *Trbic* case

¹⁷ *i.e.*, *D. Milosevic* case; *S. Galic* case

¹⁸ *i.e.* *Kvočka et al.* case; *Sikirica* case; *Dusko Tadic* case; *Banovic* case; *Brdanin* case; *Krajisnik* case; *Mejakic et al.* case; *Mrda* case; *Plavsic* case; *Stakic* case; *Zupljanin and Stanisic* case; *Kunarac et al.* case; *Krnojelac* case; *Todovic & Rasevic* case; *Zelenovic* case; *Kovacevic* case

¹⁹ Rule 89(D).

²⁰ Rule 89(B).

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bulk of the proposed witnesses will be presented under Rules 92*bis*.²¹ At the present time, none of the proposed Rule 92*bis* witnesses listed by the Prosecution in their filings are scheduled for any cross-examination under the Prosecution's time estimates.²² In fact 221 out of 411 Prosecution witnesses are proposed under Rule 92*bis* without any cross-examination.²³ The Prosecution claims that "many of these witnesses provide evidence of matters related to the authenticity of other evidence, evidence establishing the identity and cause of death of victims and matters although relevant, *do not directly concern the acts or conduct of the Accused*."²⁴ The Defense categorically rejects this position and refutes that these witnesses do not concern the acts or conduct of the accused as well as the position that they need not attend for cross-examination purposes. Cross-examination will be required for many of these proposed witnesses.

20. Under Rule 92*bis*(A) "[a] Trial Chamber may dispense with the attendance of a witness in person, and instead admit, in whole or in part, the evidence of a witness in the form of a written statement or a transcript of evidence, which was given by a witness in proceedings before the Tribunal, in lieu of oral testimony which goes to proof of a matter other than the acts and conduct of the accused as charged in the indictment." Cross-examination is contemplated in correlation under Rule 92*bis*(C) as a matter for the Trial Chamber's determination after hearing the parties regarding whether to require the witness to appear for cross-examination.

21. It is the basic tenant of international law that an Accused has the right to confront his accusers and the test the evidence against him, and cross-examination is a fundamental component of this right. Cross-examination is instrumental in achieving the full truth of a witness's testimony in regard to the present case.

22. The calculation of time presented by the Prosecution's Rule 65 *ter* filings is inadequate and unfair, in that it serves to shorten the Defense case, by cutting out the time for cross-examination while cutting no Prosecution evidence. The Defense is likewise concerned

²¹ See, "Prosecution Witness List" filed 10 February 2012 and "Corrigendum to Prosecution Rule 65 *ter* (E) Filings" filed 2 March 2012

²² See, "Prosecution Witness List" filed 10 February 2012 and "Corrigendum to Prosecution Rule 65 *ter* (E) Filings" filed 2 March 2012

²³ See, "Prosecution Witness List" filed 10 February 2012 and "Corrigendum to Prosecution Rule 65 *ter* (E) Filings" filed 2 March 2012

²⁴ "Corrigendum to Prosecution Rule 65 *ter* (E) Filings" filed 2 March 2012, para. 6

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about the apparent indications that the Chamber is encouraging the Prosecution to increase the number of Rule 92bis witnesses by converting 26 Rule 92ter witnesses to Rule 92bis,²⁵ presumably as a means of eliminating cross-examination, without first hearing the defense position on these witnesses and the necessity of cross-examination.

23. It is incredible to the Defense that so many witnesses have been proposed by the Prosecution under Rule 92bis and it is shocking that no cross-examination would be envisaged by either the Prosecution or the Chamber for the bulk of the Prosecution's case in a proceeding of such magnitude and importance. The Defense is all the more in disbelief, given that not one of the witnesses proposed under Rule 92bis properly and fully meets the requirements of the Rule, as they will all testify about the acts and conduct of the Accused as charged in the Indictment, particularly regarding the so-called "crime base" and the acts allegedly committed by forces or persons alleged to be subordinates of or otherwise under the authority and control of the Accused. In this regard, the ICTY Appeals Chamber has found that acts and conduct of subordinates can be proximal to acts and conduct of the Accused and can be inappropriate for admission pursuant to Rule 92bis, especially when there are charges of command responsibility. Specifically, the Appeals Chamber in *Prosecutor v. Galić* held that:

*The exercise of the discretion as to whether the evidence should be admitted in written form at all becomes more difficult in the special and sensitive situation posed by a charge of command responsibility under Article 7.3 of the Tribunal's Statute. That is because, as the jurisprudence demonstrates in cases where the crimes charged involve widespread criminal conduct by the subordinates of the accused (or those alleged to be his subordinates), there is often but a short step from a finding that the acts constituting the crimes charged were committed by such subordinates to a finding that the accused knew or had reason to know that those crimes were about to be or had been committed by them.*²⁶

24. At least one Trial Chamber has stated that it would "exercise extreme caution before admitting written statements going to the acts and conduct of the subordinates for which the accused is allegedly responsible."²⁷ This is especially pertinent in the present case as "the fact that a statement relates to the acts and conduct of an alleged subordinate of the

²⁵ See, Email of Legal Officer of 19 March 2012.

²⁶ *Prosecutor v. Galić*, IT-98-29-AR73.2, *Decision on Interlocutory Appeal Concerning Rule 92bis(C)*, (7 June 2002), para.14.

²⁷ *Id.*, para.8.

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accused is relevant to the exercise of the Chamber's discretionary power under Rule 92bis, either to exclude the statement altogether, or to require the witness to appear for cross-examination."²⁸

25. The Defense respectfully submits that cross-examination is appropriate and necessary to ensure the fairness of these proceedings, and should the Prosecution persist in its position of presenting most of its case by way of Rule 92bis and without the opportunity for the Defense to confront the same, the Defense will be filing separate submissions and applications to permit cross-examination on areas essential to uphold the fairness of trial. Just because Mr. Mladic is the among the last accused at the dock does not mean that his rights should be abridged or that he should not have at least the same fair chance that prior Accused had to confront the evidence against them.

2. THE MILITARY AND POLITICAL CONTEXT OF THIS CASE

26. The Prosecution Pre-Trial Brief presents a very myopic and one-sided presentation of the factual backdrop that was surrounding events in the Former Yugoslavia during the relevant time period of the Indictment. The Defense takes issue with the factual averments in the Prosecution Pre-Trial Brief relating to the military and political context, and respectfully submits that the factual backdrop as presented is incomplete, and at odds with that presented in other cases by this same Office of the Prosecutor.

27. The Defense submits that the Prosecution Pre-Trial Brief presents overly simplified, distorted and disjointed factual averments on which it relies to try and convict Mr. Mladic in the arena of public perception even before a fair trial can be commenced. In doing so the Prosecution conveniently ignores findings from prior cases, including its own confirmed indictments in other cases where it has proceeded and prosecuted persons based upon a completely different factual backdrop and picture than that being presented for purposes of the instant proceedings.

²⁸ *Prosecutor v. D.Milosevic*, IT-98-29/1-T, Decision on Prosecution Motion for Admission of Written Statements Pursuant to Rules 92bis and *ter* of the Rules of Procedure and Evidence with Confidential Annex A, (27 February 2007), para.9.

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28. The Prosecution Pre-Trial Brief would seek to ignore the very complex, and chaotic state of affairs and various political and military debates and conflicts that had already erupted in parts of the Former Yugoslavia, including Bosnia-Herzegovina, prior to and during the time frame selected by the Prosecution as its starting point.

29. The failure of the Prosecution to present and include a full and fair picture of all events and circumstances occurring in the relevant time period mis-represents the unfortunate events that occurred in Bosnia-Herzegovina, which were precipitated and exacerbated by intervention and collaboration of outside powers with parties in the region²⁹ intent on violating the constitutional order of Bosnia-Herzegovina and imposing a civil war for their own illicit gains and at the expense of all peace loving citizens of the area, irrespective of their nationality or ethnic allegiance.

30. A clear and unbiased understanding of the factual background is key to understanding the events in Bosnia-Herzegovina leading up to and during the time period of the Indictment.

31. As is well known to the Prosecution from its own prior cases and indictments in other proceedings, armed paramilitary organizations were formed by Bosnian Muslims well in advance of the formation of the VRS or the outbreak of hostilities in Bosnia-Herzegovina, and the presence and activities of those paramilitary forces caused fears and insecurity among not only Serbs of Bosnia, but Croats of Bosnia as well.³⁰

32. Indeed as early as June of 1991, Bosnian Muslim Presidency member Alija Izetbegovic's party (the SDA) began forming armed groups such as the "Patriotic League" and "Green Berets" which were made up in part of Bosnian Muslim officers who had left or deserted from the Yugoslav Peoples Army (JNA).³¹ There were also elements of foreign Mujahedin and Jihadist elements (including members of the *Al-Qaeda* terrorist

²⁹ Including, but not limited to those in the SDA leadership and those in the HDZ leadership

³⁰ *Prosecutor vs. Kupreskic* IT-95-16-T *Trial Judgment*, (14 January 2000), at para. 138

³¹ See, Indictments in the matter of *Prosecutor v. Halilovic, IT-01-48-T* [establishing that Major Halilovic left the JNA for the Patriotic League], and the testimony of the Prosecution's retained witness, Robert Donia, in *Prosecutor v. Stakic* IT-97-24-T, Tr.2134-2135.

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organization), “ready to conduct a *Jihad* or “Holy War, with a propensity for violence and to commit crimes” later incorporated within the SDA ranks.³²

33. What the Prosecution intentionally omits to even mention in its own superficial and one-sided presentation of the contextual background preceding the hostilities which arose in BiH (as one of former SFRY republics), particularly while addressing existence of “common plan”, is that Serbs, were considered as equal constitutional nationality, side-by-side with Muslims and Croats, which was a constitutional category.

34. The essence of such political concept was a safe-guard of peace and balance between three ethnic groups in BiH. It basically meant equal representation and participation of all three ethnicities in the most important segments of political life of both BiH (as a Republic) and SFRY (as a federal state), without any domination amongst them.

35. Despite the fact that any referendum which could result in separation of BiH from SFRY was unconstitutional, the SDA and HDZ deputies of the BiH Assembly illegally reached a decision on organisation of a referendum on the status of BiH – without representatives of Serbs in BiH, and after the BiH Assembly had been lawfully adjourned. Only after this decision, and enforcement of referendum which was organized and implemented - without participation of Serbian people, the SDS and other parties in BiH organised a plebiscite for citizens to express their will to remain in Yugoslavia. The one-sided approach by Muslim and Croat political leaders followed with rushed recognition of BiH by countries from the international community, created ideal conditions for hostilities to escalate and began in BiH.

36. Armed skirmishes began breaking out in portions of Bosnia-Herzegovina in March of 1992. By 6 April 1992, the European Community recognized the independence of Bosnia-Herzegovina, and these paramilitary organizations were already well established and on 8 April 1992, Alija Izetbegovic abolished the Territorial Defense Force (TO) that was envisioned under the Yugoslavian and Bosnian constitutional defense structure and instituted a new force, under the command of a Staff appointed by Izetbegovic and his so-called “presidency” (a mobilization call-up for the TO had already been initiated on 4 April 1992 by

³² *Prosecutor vs. Rasim Delic IT-04-83 Trial Judgment*, (15 September 2008), at paras. 168, 513

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Izetbegovic's so-called "presidency"). By 20 May 1992 the Izetbegovic "presidency" had established formally the so-called "Armija Bosne i Hercegovine" (Army of Bosnia-Herzegovina). In addition to the steady stream of desertions of Bosnian Muslim officers and soldiers from the JNA, the new "Bosnian" army was also supplemented by a stream of jihadist, Mujahedin fighters from other Islamic countries, who began arriving in the Middle of 1992.³³

37. By the end of April 1992 the Izetbegovic "presidency" was calling upon the TO units to attack JNA garrisons and convoys in Bosnia-Herzegovina. The United Nations, informally from the beginning of May and formally on 15 May 1992, demanded that the JNA withdraw from its garrisons and positions in Bosnia-Herzegovina.³⁴ The withdrawal of the JNA resulted in armed attacks by elements of the new Bosnian TO, adding to the volatile mix in Bosnia.³⁵

38. Given the foregoing factual context that existed, it was entirely justified and legitimate for those opposed to the tyranny of the SDA and HDZ and opposed to the influx of mujahedin and jihadists to organize themselves to defend against this planned *jihad* and defend their homes and lives from those in the SDA and HDZ who sought to forcibly and illegally abolish the constitutional order and assert their control over the whole of Bosnia-Herzegovina.

39. It was only after all of this chaos was well underway, that Mr. Mladic was appointed to his position within the VRS hierarchy, on 12 May 1992, such that he did not have the luxury of peacetime, those on the other side having already taken the option of peace off the table.

40. Another critical factual matter that is not accurately reflected in the Prosecution Pre-Trial Brief is the participation of the Serb side, (including the personal efforts of Mr. Mladic after his appointment to the VRS), at internationally sponsored peace negotiations. It should be recalled that all the parties had provisionally agreed to the Carrington-Cutileiro peace plan, named for its authors Lord Carrington and Portuguese

³³See, *Prosecutor vs. Alagic, et al* No. IT-01-47-PT *Amended Indictment*, para 25

³⁴ UN Security Council Resolution 752 (15 May 1992)

³⁵ See, for instance, Maj. General Lewis MacKenzie's accounts of the 3 May 1992 ambush of the JNA at *Dobrovoljacka Street* in Sarajevo, resulting in several casualties and strained relations ("*Peacekeeper, the Road to Sarajevo*", Harper Collins Publishers, 1993)

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ambassador Jorge Cutileiro, which resulted from the EC Peace Conference held in February 1992. This plan proposed ethnic power-sharing on all administrative levels and the devolution of central government to local ethnic communities. However, all Bosnia-Herzegovina's districts would be classified as Muslim, Serb or Croat under the plan, even where no ethnic majority was evident.

41. On 18 March 1992, all three sides signed the agreement. On 28 March 1992, however, Alija Izetbegovic withdrew his signature and declared his opposition to any type of division of Bosnia, after meeting with then US ambassador to Yugoslavia, Warren Zimmermann, in Sarajevo. It is asserted that Zimmermann promised Izetbegovic American recognition of his government and support for withdrawing from the plan. From this we see that the Serb side was in favor of a peaceful resolution of the issues, and we see that the SDA insisted on a hostile option of all-out war, supported by the interference of an outside power, the United States.

42. Thus Mr. Mladic did not choose war, it was thrust upon him and within his position at the VRS he and other officers of the VRS had a professional obligation to defend their country and peoples from a war chosen and started by others, which he did to the best of his abilities under very difficult circumstances.

42. There are many more important factual and contextual matters that need to be fully considered in order to evaluate the events that occurred during the Indictment period. However the time and space limitations of this filing prevent a comprehensive review of the same. The foregoing has been merely an observation and summary highlighting some of the same. In order to fully and fairly evaluate the Indictment, the Defense must be given a full and fair opportunity to present the factual evidence at trial, through evidence and witness testimony, and fully expects to do so.

III. MATTERS IN THE PROSECUTION BRIEF WITH WHICH THE DEFENSE TAKES ISSUE

A. GENERAL SUBMISSIONS

43. The Accused has entered a plea of not guilty on all the charges presented in the allegations of the Indictment. The Defense of Mr. Mladic contests all the factual allegations lodged in the Prosecution Pre-Trial brief and the legal conclusions they derive therefrom.

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44. Pursuant to Rule 65*ter* (F)(ii) and (iii) the Defense in the following sections identifies the matters from the Prosecution Pre-Trial Brief with which it takes issue as well as the reasons (to the extent possible) Mr. Mladic takes issue with the same. These obligations under rule 65*ter* cannot be interpreted to over-rule the plea of “not guilty” or to abridge the rights afforded to the Accused under Article 21 of the Statute of the Tribunal.

45. Due to the time and space limitations for this filing, as well as the voluminous nature of the Prosecution Pre-Trial Brief, and the limited time and ability the Defense has had to review the voluminous disclosures of the Prosecution, the Defense is not in a position to individually and specifically address every point in the Prosecution Pre-Trial Brief that is either erroneous, mis-represented, or with which it takes issue for other reasons. However, we have endeavoured to present representative samples to excerpt and highlight some of the most serious issues with which the Defense takes issue.

46. In no way should any part of the Defense Pre-Trial Brief be considered to constitute a waiver of the presumption of innocence. The Prosecution must still prove every element of each allegation. Mr. Mladic did not plan, instigate, order, commit, or otherwise aid and abet in the planning, or execution of any crimes, nor did he have any superior authority over any alleged perpetrators of any such crimes with adequate notice of the same.

47. While the Defense has attempted to fully explain each of the highlighted objections/issues it has chosen to represent its arguments against the Prosecution Pre-Trial Brief, this should not be interpreted as meaning that the Defense has no issue with remaining parts of the Brief, or that items it has not devoted much words to are objected to less than those to which it has devoted more words.

B. PROSECUTION PRE-TRIAL BRIEF IMPROPERLY EXPANDS THE SCOPE OF THE INDICTMENT.

48. As an initial matter to be raised in regard to the Prosecution Pre-Trial Brief, the Defense would like to point out that the same makes inappropriate references to matters that are outside temporal, geographic, and/or subject-matter scope of the Indictment. These matters even include allegations of criminal conduct by Mr. Mladic that are outside of the

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scope of the Indictment. This practice by the Prosecution is wholly improper, and the Defense takes objection to the same, and requests that the passages be stricken and dismissed as inappropriate. This Defense objection is described and further detailed as follows, and relates to paragraphs 11, 12, 13, 14, 18, 19, 20, 22, 25, 32, 34, and 41, either in whole or in part. In the alternative, the Defense seeks postponement of the trial and additional time to prepare for these new charges, once properly alleged with specificity, pursuant to the existing ICTY jurisprudence.

49. The Indictment is very explicit and addresses with specifics details particularity stated as to the overall time period, the geographic locations claimed, and the subject matter of the crimes alleged. The only thing that is not specifically addressed with particularity in the Indictment is the identity of perpetrators, the dates and subject matter of specific incidents, and the identity of victims. It is thus incomprehensible why the Prosecution Pre-Trial Brief attempts to improperly expand the scope of the Indictment. The Indictment states in pertinent part as follows regarding the scope of the Indictment in terms of time, geography, and subject matter.

- a) *Ratko MLADIC committed each of the charged crimes in concert with others through his participation in several related joint criminal enterprises, **each of which is described below**. Radovan KARADZIC and, as of **12 May 1992**, Ratko MLADIC, were key members of an overarching joint criminal enterprise **which lasted from at least October 1991 until 30 November 1995**. Their objective was the permanent removal of Bosnian Muslims and Bosnian Croats **from Bosnian Serb-claimed territory in BiH** through crimes charged in this indictment.³⁶*
- b) *In particular, at various times **during the existence of the overarching joint criminal enterprise**, Ratko MLADIC and Radovan KARADZIC participated in three additional joint criminal enterprises, the objectives of which were (1) to spread terror among the civilian population **of Sarajevo** through a campaign of sniping and shelling, (2) to eliminate the Bosnian Muslims **in Srebrenica**, and (3) to take **United Nations personnel as hostages**. The pursuit of each of these objectives was related to the objective of the overarching joint criminal enterprise to permanently remove Bosnian Muslims and Bosnian Croats from **Bosnian Serb-claimed territory in BiH**.³⁷*
- c) *From **12 May 1992 until 30 November 1995**, Ratko MLADIC participated in an overarching joint criminal enterprise to permanently remove Bosnian Muslim and Bosnian Croat inhabitants **from the territories of BiH** claimed as Bosnian Serb*

³⁶ Indictment, para.5

³⁷ Indictment, para.7

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territory by means which included the commission of the following crimes charged in this indictment:[...]³⁸

- d) *Between **12 May 1992 and November 1995**, Ratko MLADIC participated in a joint criminal enterprise to establish and carry out a campaign of sniping and shelling against the civilian population **of Sarajevo**, the primary purpose of which was to spread terror among the civilian population. **This joint criminal enterprise existed between April 1992 and November 1995**. The objective of this criminal enterprise involved the commission of the crimes of terror, unlawful attacks on civilians, and murder **charged in this indictment**.³⁹*
- e) ***Commencing in the days immediately preceding the 11 July 1995** implementation of the plan to eliminate the Bosnian Muslims in Srebrenica **and continuing until 1 November 1995**, Ratko MLADIC participated in a joint criminal enterprise to eliminate the Bosnian Muslims **in Srebrenica** [...]charged in this indictment.⁴⁰*
- f) ***During May and June 1995**, Ratko MLADIC participated in a joint criminal enterprise to take **United Nations (“UN”) personnel hostage** in order to compel the North Atlantic Treaty Organization (“NATO”) to abstain from conducting air strikes against Bosnian Serb military targets. This objective involved the commission of the crime of the **taking of hostages charged in this indictment**.⁴¹*
- g) *Between **12 May 1992 and 8 November 1996**, Ratko MLADIC was the most senior officer **of the VRS**. In this capacity, Ratko MLADIC **was the superior of, and had effective control over, members of the VRS and elements of Serb Forces integrated into, or subordinated to, the VRS** that participated in the crimes alleged in this indictment.⁴²*
- h) *As alleged in paragraphs 8 to 13, between **12 May 1992 and 30 November 1995** **Ratko MLADIC participated in a joint criminal enterprise** to permanently remove Bosnian Muslims and Bosnian Croats **from the territories of BiH** claimed as Bosnian Serb territory.⁴³*
- i) *The objective of this joint criminal enterprise was primarily achieved through a campaign of persecutions as alleged in this indictment. In some municipalities, **between 31 March 1992 and 31 December 1992** this campaign of persecutions included or escalated to include conduct that manifested an intent to destroy in part the national, ethnical and/or religious groups of Bosnian Muslims and/or Bosnian Croats as such⁴⁴.*

³⁸ Indictment, para.8

³⁹ Indictment, para. 14

⁴⁰ Indictment, para. 19

⁴¹ Indictment, para. 24

⁴² Indictment, para. 32

⁴³ Indictment, para. 36

⁴⁴ Indictment, para. 37

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- j) *Between 12 May 1992 and 31 December 1992, Bosnian Serb Political and Governmental Organs and Serb Forces carried out the following acts against Bosnian Muslims and Bosnian Croats ...*⁴⁵
- k) *In March 1995, Ratko MLADIC, in concert with others, implemented, and/or used others to implement, a plan to take over the Srebrenica enclave and forcibly transfer and/or deport its Bosnian Muslim population ...*⁴⁶
- l) *On about 6 July 1995, Bosnian Serb Forces attacked the Srebrenica enclave. [...] By 11 July 1995, Ratko MLADIC and others began to implement and/or use others to implement their shared objective: to eliminate the Bosnian Muslims in Srebrenica by killing the men and boys and forcibly removing the women, young children and some elderly men from the enclave.*⁴⁷
- m) *Between 11 and 13 July 1995, Srebrenica Forces terrorised and abused the Bosnian Muslims present in Potocari. On 12 July 1995, Srebrenica Forces began to separate the men and boys of Srebrenica from the women and young children*⁴⁸.
- n) *Between 11 July 1995 and 1 November 1995, Srebrenica Forces carried out the following acts:*⁴⁹
- o) *Ratko MLADIC committed in concert with others, planned, instigated, ordered, and/or aided and abetted persecutions on political and/or religious grounds against Bosnian Muslims and/or Bosnian Croats. Ratko MLADIC is specifically charged for persecutions in the following municipalities: Banja Luka; Bijeljina; ~~Bosanska Krupa~~; ~~Bosanski Novi~~; ~~Bratunac~~; ~~Breko~~; Foca; ~~Hadziei~~; ~~Ilidza~~; ~~Kalinovik~~; ~~Kljuc~~; ~~Kotor Varos~~; ~~Novi Grad~~; ~~Novo Sarajevo~~; ~~Pale~~; ~~Prijedor~~; ~~Rogatica~~; ~~Sanski Most~~; ~~Sokolac~~; ~~Trnovo~~; and ~~Vlasenica~~; ~~Vogosea and Zvornik~~ (“Municipalities”), as well as persecutions of the Bosnian Muslims of Srebrenica.*⁵⁰
- p) *As alleged in paragraphs 8 to 13, between 12 May 1992 and 30 November 1995 Ratko MLADIC participated in a joint criminal enterprise to permanently remove Bosnian Muslims and Bosnian Croats from the territories of BiH claimed as Bosnian Serb territory through the commission of crimes, including persecution.*⁵¹
- q) *Pursuant to this objective, beginning in March 1992, Serb Forces and Bosnian Serb Political and Governmental Organs attacked and/or took control of towns and villages in the Municipalities. Most of these takeovers were carried out during 1992, but they continued thereafter. The enclave of Srebrenica was taken over in July 1995.*⁵²

⁴⁵ Indictment, para. 39

⁴⁶ Indictment, para. 43

⁴⁷ Indictment, para. 44

⁴⁸ Indictment, para. 45

⁴⁹ Indictment, para. 46

⁵⁰ Indictment, para. 47

⁵¹ Indictment, para. 49

⁵² Indictment, para. 51

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- r) *During and after these takeovers and continuing until 30 November 1995 ...*⁵³
- s) ***In March 1995**, Ratko MLADIC and those he acted in concert with to permanently remove Bosnian Muslims and Bosnian Croats from Bosnian Serb-claimed territory implemented, and/or used others to implement, a plan to take over **the Srebrenica enclave** ...*⁵⁴
- t) *As described in paragraphs 44 to 45, in the days **immediately preceding 11 July 1995**, Ratko MLADIC and others formed the shared objective to eliminate the Bosnian Muslims in Srebrenica ...*⁵⁵
- u) *Acts of persecution carried out by members of the Serb Forces and Bosnian Serb Political and Governmental Organs pursuant to one or more of the joint criminal enterprises **between 12 May 1992 and 30 November 1995** included:*⁵⁶
- v) *Ratko MLADIC committed in concert with others, planned, instigated, ordered, and/or aided and abetted the extermination and murder of Bosnian Muslims and Bosnian Croats **in the Municipalities**, the extermination and murder of Bosnian Muslims **from Srebrenica**, and the murder of members of the civilian population **of Sarajevo** and/or persons not taking active part in the hostilities.*⁵⁷
- w) *As alleged in paragraphs 8 to 23, **between 12 May 1992 and 30 November 1995** Ratko MLADIC participated in a joint criminal enterprise to permanently remove Bosnian Muslims and Bosnian Croats **from territories of BiH claimed as Bosnian Serb territory**; **between 12 May 1992 and November 1995** he participated in a joint criminal enterprise to spread terror among the civilian population **of Sarajevo** through a campaign of sniping and shelling; and he participated in a joint criminal enterprise to eliminate the Bosnian Muslims **in Srebrenica** by killing the men and boys and forcibly removing the women, children and some elderly men. The crimes of extermination and/or murder formed part of the objectives of all three of these criminal enterprises.*⁵⁸
- x) *Acts of extermination and murder that formed part of the objective to permanently remove Bosnian Muslims and Bosnian Croats from Bosnian Serb-claimed territory carried out **between 12 May 1992 and 30 November 1995** ...*⁵⁹
- y) *Acts of murder that formed part of the objective to spread terror among the civilian population **of Sarajevo** through a campaign of sniping and shelling carried out **between 12 May 1992 and November 1995**[...]*⁶⁰

⁵³ Indictment, para. 52

⁵⁴ Indictment, para. 56

⁵⁵ Indictment, para. 57

⁵⁶ Indictment, para. 59

⁵⁷ Indictment, para. 60

⁵⁸ Indictment, para. 61

⁵⁹ Indictment, para. 62

⁶⁰ Indictment, para. 64

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- z) *The acts of extermination and murder that formed part of the objective to eliminate the Bosnian Muslims in Srebrenica were carried out between 11 July 1995 and 1 November 1995 [...]⁶¹*
- aa) *Ratko MLADIC committed in concert with others, planned, instigated, ordered, and/or aided and abetted the forcible transfer and deportation of Bosnian Muslims and Bosnian Croats from the Municipalities and from Srebrenica.*⁶²
- bb) *[...]Ratko MLADIC is criminally responsible for these acts of forcible displacement carried out between 12 May 1992 and 30 November 1995.*⁶³
- cc) *[...]between 12 May 1992 and 30 November 1995 Ratko MLADIC participated in a joint criminal enterprise to permanently remove Bosnian Muslims and Bosnian Croats from the territories of BiH claimed as Bosnian Serb territory [...]*⁶⁴
- dd) *Beginning in March 1992, [...]*⁶⁵
- ee) *[...] by the end of 1992. However, acts of forcible displacement continued thereafter, including between January and March 1993 when Serb Forces attacked the Cerska (Vlasenica municipality) and Konjevic Polje (Bratunac municipality) areas in eastern BiH.*⁶⁶
- ff) *Many Bosnian Muslims who were forcibly displaced from their homes in Eastern Bosnia both during and after 1992 [...]*⁶⁷
- gg) *Beginning in March 1995, [...] the Srebrenica enclave [...]*⁶⁸
- hh) *[...]in the days immediately preceding 11 July 1995, Ratko MLADIC and others formed the shared objective to eliminate the Bosnian Muslims in Srebrenica [...]*⁶⁹
- ii) *[...] between 12 May 1992 and November 1995 Ratko MLADIC participated in a joint criminal enterprise to establish and carry out a campaign of sniping and shelling against the civilian population of Sarajevo, [...]*⁷⁰
- jj) *Between April 1992 and November 1995, members of this joint criminal enterprise [...]*⁷¹

⁶¹ Indictment, para. 65

⁶² Indictment, para. 67

⁶³ Indictment, para. 68

⁶⁴ Indictment, para. 69

⁶⁵ Indictment, para. 70

⁶⁶ Indictment, para. 71

⁶⁷ Indictment, para. 72

⁶⁸ Indictment, para. 73

⁶⁹ Indictment, para. 74

⁷⁰ Indictment, para. 76

⁷¹ Indictment, para. 78

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*kk) Between approximately 26 May 1995 and 19 June 1995, Bosnian Serb Forces detained over two hundred UN peacekeepers and military observers [...]*⁷²

50. From the foregoing it is abundantly clear that the Indictment clearly does not encompass or properly put the Accused on notice that it he will have to answer for alleged criminal acts in Croatia, while a member of the JNA and for acts of JNA subordinate forces, or for some separate JCE focusing on Croatia, let alone any criminal acts from 1990 or prior. None of the foregoing references from the Indictment offer any room for inclusion of these new charges within the existing allegations of the Indictment and its scope.

51. The Prosecution pre-trial brief impermissibly includes and makes reference to alleged criminal activity and matters that are very clearly outside the temporal, geographic, and subject matter scope, as established by the above comprehensive review of the indictment. Specifically, a summary review of the Prosecution Pre-Trial Brief reveals an expansion of all three factors of scope beyond the Indictment, as follows;

- a) Multiple paragraphs extending the temporal scope of the Indictment⁷³ including, among other things, events from 1990 and prior, improper references to the time period before the alleged JCE, improper references to the time period before Mr. Mladic was appointed to the VRS, and alleging criminal conduct by him while a member of the JNA;
- b) Multiple paragraphs extending the geographic scope of the Indictment by including alleged crimes by Mladic and others in Croatia⁷⁴; and
- c) Multiple paragraphs extending the subject matter scope of the Indictment and the very specific JCE's contained therein to include other alleged criminal enterprises or objectives.⁷⁵

52. These additions of material outside the scope of the Indictment constitute an improper attempt by the Prosecution to try and add new charges without following the

⁷² Indictment, para. 85

⁷³ Para. 11, 12, 13, 14, 18, 19, 20, 22, 25, 32, 34, 41

⁷⁴ Para. 11, 12, 13, 14, 20, 22

⁷⁵ Para. 11, 12, 13, 14, 18, 19, 20, 22, 24, 32, 34, 41

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procedure for the same. An amendment includes “new charges” if it introduces a new basis for conviction not previously reflected in the indictment that is factually or legally distinct from any already alleged.⁷⁶ Expanding the dates of an incident in the indictment and adding an allegation of destruction of cultural and religious institutions constituted new charges for which a new initial appearance was required.⁷⁷ Adding new groups of persons for whose conduct the accused can be liable constitutes new charges.⁷⁸

53. The basic principle in relation to whether to grant leave to amend an indictment is whether the amendments result in unfair prejudice to the accused.⁷⁹ Two factors are primarily considered when evaluating prejudice: (1) whether the accused is given an adequate opportunity to prepare an effective defence; and (2) whether granting the amendment will result in undue delay.⁸⁰

54. In the instant case at this stage after having the Indictment to work off of in preparing for trial, the Accused is unfairly prejudiced by the improper inclusion of new charges in the Prosecution Pre-Trial Brief, especially at this late stage just before the commencement of the trial. There is also a considerable risk of delay from allowing this form of amendment by way of the Prosecution Pre-Trial Brief, in that when a proposed amendment involves new charges as it requires a new arraignment and an opportunity for additional

⁷⁶ *Prosecutor v Stanasic & Simatovic*, No. IT-03-69-PT, *Decision on Prosecution Motion for Leave to Amend the Amended Indictment* (16 December 2005) at p. 4; *Prosecutor v Beara*, No. IT-02-58-PT, *Decision on Prosecution Motion to Amend the Indictment* (24 March 2005) at page 3; *Prosecutor v Marijadic & Rebic*, No. IT-95-14-R77.2, *Decision on Prosecution’s Motions to Amend the Indictment* (7 October 2005) at para. 29; *Prosecutor v Popovic et al.*, No. IT-05-88-PT, *Decision on Further Amendments and Challenges to the Indictment* (13 July 2006) at para. 11; *Prosecutor v Seselj et al.*, No. IT-95-14-R77.5, *Decision on Prosecution Motion to Amend the Indictments* (8 June 2006) at para. 12; *Prosecutor v Haradinaj et al.*, No. IT-04-84-PT, *Decision on Motion to Amend the Indictment and on Challenges to the Form of the Amended Indictment* (25 October 2006) at para. 13

⁷⁷ *Prosecutor v Seselj*, No. IT-03-67-PT, *Decision on Prosecution’s Motion for Leave to Amend the Indictment* (27 May 2005) at para. 17

⁷⁸ *Prosecutor v Boskoski & Tarculovski*, No. IT-04-82-PT, *Decision on Prosecution Motion for Leave to Amend the Original Indictment and Defence Motions Challenging the Form of the Amended Indictment* (1 November 2005) at para. 36

⁷⁹ *Prosecutor v Boskoski & Tarculovski*, No. IT-04-82-PT, *Decision on Prosecution Motion for Leave to Amend the Original Indictment and Defence Motions Challenging the Form of the Amended Indictment* (1 November 2005) at para. 7

⁸⁰ *Prosecutor v Boskoski & Tarculovski*, No. IT-04-82-PT, *Decision on Prosecution Motion for Leave to Amend the Original Indictment and Defence Motions Challenging the Form of the Amended Indictment* (1 November 2005) at para. 7

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preliminary motions.⁸¹ Likewise, respectfully the new charges would require new investigation which would prejudice the accused given that the trial was imminent.⁸²

55. Permitting these new additions without amending the indictment also violates the right of proper Notice to the Defense of the case that it is challenged to confront. Insofar as the additions include allegations of prior criminal conduct by Mr. Mladic himself (with the attempt to draw the analogy to this being the “same”⁸³ as in Bosnia-Herzegovina) is improper as it disparages the Accused and taints the proceedings, producing damning allegations, which although untrue, that the Accused cannot respond to and address because of the time limitations of the trial and the need to address the existing points that are already in the Indictment and which are properly within the scope of the trial. The Defense reminds the Chamber of the position of the Appeals Chamber, that the goal of expediency should never be allowed to over-ride the fundamental rights of the accused to a fair trial.⁸⁴

56. The jurisprudence makes clear that exclusion of these new charges contained in the Prosecution Pre-Trial Brief is an appropriate remedy, as is adjournment and postponement of the proceedings.⁸⁵

57. In prior instances where the Prosecution was permitted to add new charges on the eve of trial, the trial had to be continued -- *Adding of new charges on eve of trial permitted. Fact that trial would have to be postponed for two months or more was outweighed by need to ensure a full consideration of the relevant issues in the case.*⁸⁶

58. Thus, in the event that the Chamber determines that the additions by the Prosecution Pre-Trial Brief are appropriate and that the Indictment should be amended, then the existing trial date must be vacated, and the start of trial postponed at least several months.

⁸¹ *Prosecutor v Haradinaj et al*, No. IT-04-84-PT, *Decision on Motion to Amend the Amended Indictment* (12 January 2007) at para. 15

⁸² *Prosecutor v Stanisic & Zupljanin*, No. IT-08-91PT, *Decision on Motion and Supplementary Motion for Leave to Amend the Indictment* (28 April 2009) at para. 41

⁸³ Prosecution Pre-Trial Brief, para. 11, 12, 13, 14, 20, 22

⁸⁴ *Prosecutor v Kupreskic et al*, No. IT-95-16-A, *Judgement* (23 October 2001) at para 100

⁸⁵ *Prosecutor v Furundzija*, No.IT-95-17/1-T, *Judgement* (21 July 2000) at para. 61 [Holding: Where evidence is presented at trial which, in the view of the accused, falls outside the scope of the indictment, an objection as to lack of fair notice may be raised and an appropriate remedy may be provided by the Trial Chamber, either by way of an adjournment of the proceedings, allowing the Defense adequate time to respond to the additional allegations, or by excluding the challenged evidence.]

⁸⁶ *Prosecutor v Tolimir*, No. IT-05-88/2-PT, *Written Reasons for Decision on Prosecution Motion to Amend the Second Amended Indictment* (17 December 2009) at para. 29

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Further, under those circumstances, it would be appropriate for the Chamber to order the Prosecution to further amend its Pre-Trial brief⁸⁷ - so as to include more details about these new charges to properly provide the Defense the details of the new case that it must now be called to meet.

C. PROSECUTION PRE-TRIAL BRIEF IS TOO VAGUE AND FAILS TO SUPPLEMENT THE INDICTMENT AS TO SPECIFIC DETAILS AS TO MATERIAL FACTS.

59. In contrast to the right of the Defense, the Prosecution has clear obligations it must meet in this phase of the proceedings. Pursuant to the Rules, the purpose of the Prosecution's Pre-Trial Brief is not only to present a summary of the evidence, which the Prosecution intends to bring regarding the commission of the alleged crime and the form of responsibility incurred by the Accused or to name any admissions by the parties, and a statement of matters which are not in dispute as well as a statement of contested matters of fact and law, but the additional task of the Prosecution Pre-Trial Brief is to assist the Defense in the preparation of its case.⁸⁸ In that sense, the Prosecution Pre-Trial Brief should supplement the Indictment and thus enable the Accused to prepare the defense case properly. Rather than clearing up vagueness remaining in the Indictment, the Prosecution Pre-Trial Brief has compounded the same.

60. The Prosecution failure to properly identify specifics regarding particular crimes in terms of perpetrators, time-frame or victims, seriously affects the ability of the Accused in his Defence to draw distinctive lines between those forces which may have been under his effective control, and those who did not, as well as to properly respond to allegations for his participation in questionable form of liability as JCE is. As an example, Mr. Mladic, according to Prosecution, should be held responsible for "*Bosnian Serb Political and Governmental Organs and Serb Forces*"⁸⁹. Incredibly this has been extended to the most absurd level to include "Local Bosnian Serbs."⁹⁰ Meanwhile the ICTY jurisprudence says the

⁸⁷ *Prosecutor v Tolimir*, No. IT-05-88/2-PT, *Decision on Accused's Preliminary Motion Pursuant to Rule 72(A)(ii)*(10 February 2010) at para. 17

⁸⁸ *Prosecutor vs. Kupreskic* No. IT-95-16-A *Appeal Judgment*, (22 October 2001), at para. 117

⁸⁹ Indictment, para. 39

⁹⁰ Indictment para. 12

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Prosecution is required to plead “subordinates sufficiently identified,”⁹¹ except that it is sufficient to identify the persons who committed the alleged crimes “by means of the category or group to which they belong.”⁹² As per the Trial Chamber in Delalic “The law does not know of a universal superior without a corresponding subordinate.”⁹³ Per the Trial Chamber in Hadzihanovic the bare minimum requirement for Article 7(3) is at least identification of the group to which the perpetrators belong.⁹⁴ Where the prosecution is in a position to identify perpetrators by name, it is obliged to do so.⁹⁵ The Prosecution Pre-Trial Brief does not identify with sufficient clarity the alleged perpetrators of any of the crimes alleged, or the alleged subordinates over whom Mladic is alleged to have exercised effective control so as to incur Article 7(3) Superior Liability for the same.

61. As an example of the foregoing, it should be noted that, despite the Indictment’s references to formations other than the VRS for which it is alleged Mr. Mladic bears responsibility, the Prosecution Pre-Trial Brief does not adequately identify the same with any degree of particularity so as to permit Mr. Mladic and his defense team to begin challenging the assertions. Per the indictment:

[...]

*11. Other members of this joint criminal enterprise included: members of the Bosnian Serb leadership; members of the Serbian Democratic Party (“SDS”) and Bosnian Serb government bodies at the republic, regional, municipal, and local levels, including Crisis Staffs, War Presidencies, and War Commissions (“Bosnian Serb Political and Governmental Organs”); commanders, assistant commanders, senior officers, and chiefs of units of the Serbian Ministry of Internal Affairs (“Serbian MUP”), the JNA, the Yugoslav Army (“VJ”), the VRS, the Bosnian Serb Ministry of Internal Affairs (“MUP”) and the Bosnian Serb Territorial Defence (“TO”) at the republic, regional, municipal and local level; **and leaders of Serbian and Bosnian Serb paramilitary forces and volunteer units. Alternatively, some or all of these individuals were not members of the joint criminal enterprise, but were used by members of the joint criminal enterprise to carry out crimes committed in furtherance of its objective as described below.***

*12. Members of this criminal enterprise implemented their objective by personally committing crimes, and/or through and **by using others to carry out crimes** committed in furtherance of their objective. Those used to carry out these crimes were members of the Bosnian Serb Political and Governmental Organs; and*

⁹¹ *Prosecutor v Boskoski & Tarculovski*, No. IT-04-82-T, “Decision on Prosecution Motion for Leave to Amend the Original Indictment and Defense Motions Challenging the Form of the Proposed amended Indictment” (1 November 2005), para. 26; *Prosecutor v Blaskic*, No. IT-95-14-A, *Judgement* (29 July 2004) at para. 218

⁹² *Prosecutor v Rajic*, No. IT-95-12-T, “Decision on the Defense Motion on the Form of the Amended Indictment” (27 April 2004), para. 13.

⁹³ *Prosecutor v. Delalic*, No. IT-96-21-T *Judgement* (16 November 1998) para. 647

⁹⁴ *Prosecutor v Hadzihanovic & Kubura*, No. IT-01-47-T, *Judgement* (15 March 2006) at para. 90

⁹⁵ *Prosecutor v Popovic et al*, No. IT-05-88-PT, *Decision on Motions Challenging the Indictment Pursuant to Rule 72 of the Rules* (31 May 2006) at para. 40

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members of the MUP, VRS, JNA, VJ, TO, the Serbian MUP, Serbian and Bosnian Serb paramilitary forces and volunteer units, and local Bosnian Serbs (“Serb Forces”).⁹⁶

62. Under the prevailing jurisprudence of the Tribunal, the forces committing the crimes must be specified for each municipality in which crimes are alleged to have occurred.⁹⁷ Further, where the Indictment fails to specify the non-members of the JCE alleged to have perpetrated the crimes, the pre-trial brief may cure this defect by naming same.⁹⁸

63. As is clear from the foregoing excerpt of the Indictment, the Prosecution case includes Serbian and Bosnian Serb paramilitaries that may **not** have been members of the alleged JCE, as well as local Bosnian Serbs who were **not** listed as members of the JCE. Both of the foregoing groups are nonetheless listed as having participated in and perpetrated crimes for which Mladic’s responsibility is alleged.

64. The Prosecution Pre-Trial brief fails to identify with any specificity, let alone that required under the jurisprudence, the identities of the foregoing non JCE members alleged to be perpetrators of crimes. The only reference in the Pre-Trial Brief is under the sub-heading “Paramilitaries/Volunteers/Serbian MUP”⁹⁹ where the following paragraphs do nothing to differentiate or attempt to explain this general description, (instead just using the generic term “paramilitary units”) which itself is not in conformity with the allegations of the Indictment itself on this matter. Apart from this vague and unspecified reference to paramilitaries, the allegations as to specific charged incidents and crimes fails to add any specificity to which paramilitary units are alleged to have participated in which municipalities, let alone which crimes it is alleged that they perpetrated that Mr. Mladic should bear responsibility for as an alleged command superior or as an alleged member of the JCE. Rather, the Prosecution Pre-Trial Brief throughout uses the generic umbrella term “Bosnian Serb Forces” or “BSF” to identify the perpetrators which is not specific and does not meet the obligatory burden placed on the Prosecution to identify its case against the Accused. Where the prosecution is in a position to identify perpetrators by name, it is obliged

⁹⁶ Indictment, para. 11-12 (emphasis added)

⁹⁷ *Prosecutor v Milutinovic et al*, No. IT-05-88-PT, *Decision on Defence Motions Alleging Defects in the Form of the Proposed Amended Joinder Indictment* (22 March 2006) at para. 10

⁹⁸ *Prosecutor v Haradinaj*, No. IT-04-84-T, *Decision on Idriz Balaj’s Preliminary Motion Concerning Paragraph 29 of the Indictment* (31 May 2007) at para. 9

⁹⁹ Prosecution Pre-Trial Brief, Para. 98-100

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to do so.¹⁰⁰ It should be noted that in another proceeding, the use of a similar generic phrase “forces of the FRY and Serbia” is not sufficiently specific. There it was deemed that the prosecution must specify which forces and units were involved in the events in each municipality.¹⁰¹ Further other cases have held that the forces committing the crimes must be specified for each municipality in which crimes are alleged to have occurred;¹⁰² and the Prosecution has been ordered to specify subordinates who participated in the alleged crimes and to specify whether accused is sought to be held liable as a superior for acts of civilians, special police, prison guards, and hospital personnel.¹⁰³

65. At the moment of the filing of its Pre-Trial Brief, the Prosecution must be in a position, after so many years of investigating the case, and prosecuting cases against other persons for the same events, to be quite clear about their case. Generally, an indictment is the primary accusatory instrument and must set forth and plead with sufficient particularity the material aspects of the Prosecution case, failing which it suffers a material defect.¹⁰⁴

66. While it has been established standard that the Prosecution bear the burden of proving the case it alleges against the Accused, without abovementioned specifics, burden of proof is shifted upon Accused. As enshrined in Rule 87, the standard of proof is that the Prosecution must prove the case "beyond reasonable doubt". If Prosecution do not succeed to do so, no other verdict, but acquittal cannot be reached. Each and every accused, including Mr. Mladic "is entitled to the benefit of the doubt as to whether the offence has been proved".¹⁰⁵

67. Mr. Mladic, throughout his career, was recognized as serious and professional soldier, presenting law-abiding example for troops under his command. Mr. Mladic was neither aware, nor participated in any of the crimes allegedly occurred, as set forth in the Indictment, nor did have the effective control over those who may have committed crimes charged.

¹⁰⁰ *Prosecutor v Popovic et al*, No. IT-05-88-PT, *Decision on Motions Challenging the Indictment Pursuant to Rule 72 of the Rules* (31 May 2006) at para. 40

¹⁰¹ *Prosecutor v Pavkovic et al*, No. IT-03-70-PT, *Decision on Vladimir Lazarevic's Preliminary Motion on the Form of the Indictment* (8 July 2005) at para. 34

¹⁰² *Prosecutor v Milutinovic et al*, No. IT-05-88-PT, *Decision on Defence Motions Alleging Defects in the Form of the Proposed Amended Joinder Indictment* (22 March 2006) at para. 10

¹⁰³ *Prosecutor v Boskoski & Tarclovski*, No. IT-04-82-PT, *Decision on Ljube Boskoski's Motion Challenging the Form of the Indictment* (22 August 2005)

¹⁰⁴ *Prosecutor vs. Kupreskic* No. IT-95-16-A *Appeal Judgment*, (22 October 2001), para. 114

¹⁰⁵ *Prosecutor v. Delalic et al.*, No. IT-96-21-T *Judgement*, (16 November 1998), para. 601.

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68. During the extensive time-frame set in the Indictment, throughout former Bosnia and Herzegovina, besides VRS, bulk of various armed individuals, troops or units, TO, police, military or paramilitary, which were outside of the official VRS formation or control, were active and took part in hostilities. Mr. Mladic's responsibility could stretch only regarding those units or troops under his control.

69. For every crime charged in the Indictment, Prosecution fails to reveal identity of the perpetrators or at least unit of formation he belonged to, or status and details regarding victims. In such circumstances, the Prosecution case must fail.

70. Respectfully, as to the identities and even participation of Bosnian and Serbian Paramilitaries or Local Bosnian Serbs alleged in the Indictment, the Prosecution Pre-Trial Brief has failed to adhere to the jurisprudence and has not sufficiently identified the same, such that the Chamber must take action to strike these allegations from the Prosecution case and bar the introduction of any evidence that could be used to convict Mladic for actions of any paramilitaries or "local Bosnian Serbs." In the Alternative the Chamber must order the Prosecution to amend its filings to specify in detail these claimed perpetrators who were not members of the JCE, to sufficiently put Mr. Mladic on notice of the same, and then adjourn and continue the trial to allow sufficient time for the Defense to investigate such new information.

D. THE PROSECUTION PRE-TRIAL BRIEF ERRONEOUSLY CONCLUDES THAT MR. MLADIC PARTICIPATED IN CRIMES AND A JCE

1. GENERAL CONSIDERATIONS

71. At the outset, Mr. Mladic categorically and unequivocally rejects the allegations and again states that he is not criminally liable for the charges of the Fourth Amended Indictment under either form of liability pursuant to Article 7(1) or 7(3) of the Statute. Mr. Mladic did not personally participate in any criminal activity nor did he participate in any events that may have lead to the crimes asserted by the Office of the Prosecutor. Mr. Mladic neither planned, ordered, instigated, nor aided and abetted the commission of crimes. In no way was he a member of a joint criminal enterprise nor an aider

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and an abettor of any joint criminal enterprise. The fact that a joint criminal enterprise even existed is a matter of dispute for which the Prosecution will produce evidence. Regardless of if it did, Mr. Mladic did not participate in any manner or form of a joint criminal enterprise to permanently remove Bosnian Croats and Bosnian Muslims through crimes; nor to spread terror among the civilian population of Sarajevo; nor to eliminate the Bosnian Muslims of Srebrenica, nor to take United Nations Personnel hostage; and thus he bears no individual criminal responsibility for the crimes alleged.

72. As affirmed in the aforementioned section, the Defence rejects all assertions of the Prosecution Pre-Trial Brief, and, as such, would have to present a voluminous work, well over the word limits, to iterate and reject each allegation of the 43,974 word Prosecution Pre-Trial Brief. Therefore, while denying all allegations of the Pre-Trial Brief, the Defence finds no value in a mere narration of the Prosecution arguments for which to simply deny them in total, and so, in the interests of streamlining this brief, asserts that all allegations will be challenged and the Prosecution put to their burden of proof in its implication of Mr. Mladic in these matters.

73. As a preliminary note, in assessing the evidence, the Trial Chamber will necessarily take account of the overall context and the specific circumstances which were present during the period relevant to the Indictment. In sum, the Prosecution case will fail to show how the history and hierarchy of the contextual background could have taken place in the manner asserted by the Prosecution. The evidence – when presented in total by both sides – will show a much clearer picture of the overarching political and cultural panorama that will lend to Mr. Mladic's averment that he is exempt from any legal responsibility on the counts of the Indictment.

74. In order to hold Mr. Mladic liable for any of these specific counts, the Prosecution will need to prove not only the elements of the charged counts and the mode of liability, as follows below, but also that these charges are within the context proper for charging under Article 3, 4 and 5 of the ICTY Statute. For the charges under Article 3 (Counts 6, 9, 10 & 11), in addition to being satisfied the crimes charged fall under this provision, there are two precursory requirements to be satisfied: 1) it must be established that there was an armed conflict, whether international or internal, at the time material to the

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Indictment; and, 2) that the acts of the Accused are closely related to this armed conflict.¹⁰⁶ Likewise, for those charged under Article 5 (Counts 3, 4, 5, 7, & 8), the Prosecutor must show:

- there must be an attack;
- the acts of the accused must be part of the attack;
- the attack must be directed against any civilian population;
- the attack must be widespread and systematic;
- 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.¹⁰⁷

75. In order to rise to a level of culpability under Article 5, the attacks must be on a civilian population. This is of paramount importance in the present matter given the relation of the impetus of charges against groups and members of the so-called Armija BiH and HVO. The Prosecution's assertions that measures of the Bosnian Serb forces were taken against a civilian population is erroneous, as any combatant action was taken against terrorist groups, and armed formations of an opposing force, namely, the Armija BiH, and/or soldiers from a UN Force that at the time was engaging in an air-war against the VRS.

76. In addition, the crimes must constitute part of a pattern of widespread or systematic crimes:

“Crimes which are unrelated to widespread or systematic attacks on a civilian population should not be prosecuted as crimes against humanity. Thus, to convict an accused of crimes against humanity, it must be proved that the crimes were related to the attack on a civilian population (occurring during an armed conflict) and that the accused knew that his crimes were so related.”¹⁰⁸

77. If committed by perpetrators acting for personal reasons which were not sufficiently connected to an attack on the civilian population, the underlying charges themselves may not rise to a violation under Article 5.

¹⁰⁶ *Prosecutor v. Boskoski & Tarculovski*, No. IT-04-82, *Trial Judgement*, (10 July 2008), para. 173

¹⁰⁷ *Prosecutor v. Kunarac et al.*, No. IT-96-23 & IT-96-23/1, *Appeal Judgement*, (12 June 2002), para. 85.

¹⁰⁸ *Prosecutor v. Tadic*, No. IT-94-1, *Appeals Judgement*, (15 July 1999), para. 271

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2. GENOCIDE

78. It is well established that the crime of Genocide requires specific intent.¹⁰⁹ For those genocide charges¹¹⁰ brought in the Indictment it must be established that the perpetrator by one of the prohibited acts enumerated in Article 4 of the Statute, seeks to achieve the destruction, in whole or part, of a national, ethnical, racial, or religious group, as such.¹¹¹

79. The issue of whether genocide requires the Prosecution to prove the existence of a plan or policy remains a contentious issue within the ICTY.

80. Initially the Appeals Chamber in Jelusic has determined that “the existence of a plan or policy is not a legal ingredient of the crime” but at the same time also stated “in the context of proving specific intent, the existence of a plan or policy may become an important factor in most cases. The evidence may be consistent with the existence of a plan or policy, or may even show such existence, and the existence of plan or policy may facilitate proof of the crime.”¹¹²

81. When the Krstic Trial Chamber required the existence of a plan or policy as a central element to the crime of genocide¹¹³, the Appeals Chamber reversed this holding, stating “the requirement that the prohibited conduct be part of a widespread or systematic attack does not appear in the Genocide Convention and was not mandated by customary international law.”¹¹⁴ However, in Blagojevic the Appeals Chamber itself required the existence of a plan as an element of genocide, in overturning a conviction for complicity in genocide on the ground that the accused had no knowledge of the mass executions and thus could not have possibly known of the overall plan to commit them.¹¹⁵

82. At the level of Trial Chambers, several early decisions have seemed to imply the necessity of proving a plan. In review of the Karadzic/Mladic Indictment, the Judge

¹⁰⁹ *Prosecutor v. Krstic* No. IT-98-33-T, *Trial Judgment*, 2 August 2001, at para. 528

¹¹⁰ Indictment, Counts 1-2

¹¹¹ *Prosecutor v. Jelusic* No. IT-95-10-A, *Appeals Judgment*, (5 July 2001), para. 45

¹¹² *Prosecutor v. Jelusic* No. IT-95-10-A, *Appeals Judgment*, (5 July 2001), para. 48

¹¹³ *Prosecutor v. Krstic* No. IT-98-33-T, *Trial Judgment*, (2 August 2001), para. 85-87; 238

¹¹⁴ *Prosecutor v. Krstic* No. IT-98-33-A, *Appeals Judgment*, (19 April 2004), para. 224

¹¹⁵ *Prosecutor v. Blagojevic* No. IT-02-60-A, *Appeals Judgment*, 99 May 2007), para. 122-124

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referred to “project” or “plan” and “pattern of conduct” in relation to genocide.¹¹⁶ In the Tadic case, it was decided genocide cannot be a spontaneous crime, and that “a policy must exist to commit these acts.”¹¹⁷

83. Looking outside the ICTY, the ICC has required that any of the five acts of genocide enumerated in Article 6 of the Rome Statute must be committed with a plan, specifically a “manifest pattern of similar conduct”¹¹⁸ The practice of the ICC in applying their Statute has likewise recognized that a genocidal plan or policy is a formal required element of the crime.¹¹⁹

84. Lastly, the ICJ, albeit reviewing state rather than criminal activity, likewise paid particular attention in analyzing if there was evidence of the existence of a state plan or policy to commit genocide, in determining the defendant did not commit genocide against Bosnia-Herzegovina.¹²⁰

85. Based upon the foregoing, it is respectfully submitted that the approach of this Chamber should be to require proof of the existence of a plan as an element of the crime of genocide.

86. Mr. Mladic asserts that the evidence will show he did not participate in any plan in place to commit genocide, that he did not know of any such plan being in place, and that there was no such plan. Mr. Mladic asserts again that he categorically and unequivocally rejects the allegations and again states that he is not criminally liable for genocide under any of the theories presented by the Prosecution in its Pre-Trial Brief. Mr. Mladic asserts that he is not guilty of genocide 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 charges of genocide pursuant to Article 4 of the Statute of the Tribunal.

¹¹⁶ *Prosecutor v. Karadzic* IT-95-5-R61 Review of the Indictments pursuant to Rule 61 of the Rules of Procedure and Evidence, 11 July 1996, para. 94

¹¹⁷ *Prosecutor v. Tadic* IT-94-1-T, *Opinion and Judgment*, (7 May 1997), para. 655.

¹¹⁸ Rome Statute, Elements of Crime, Article 6a(4), b(4), c(5), d(5), and e(7)

¹¹⁹ *Prosecutor v. Omar Hassan Ahmad Al Bashir*, Case No. ICC-02/05-01/09, Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir (4 March 2009), para. 121; footnote 142

¹²⁰ *Application of the convention on the Prevention of the Crime of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro), 2007 I.C.J. 70 (26 February 2007), para. 190

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3. DEPORTATION AND OTHER INHUMANE ACTS (FORCIBLE TRANSFER)

87. Counts 3, 7, and 8 contain Charges of Deportation and Forcible Transfer, having similar elements, and thus require an examination of facts related to:

- a. the movement of individuals from a place where they are lawfully present,
- b. forcible action in the movement,
- c. without grounds permitted under international law.¹²¹

88. “The Appeals Chamber has previously stated, albeit in the context of forcible displacement, that ‘it is the absence of genuine choice that makes displacement unlawful’, a statement which is equally applicable to deportation.”¹²² The Prosecution must prove that the reason for movement of any individuals was not from reasons outside of force or coercion which would not rise to a level of culpability under international law. Voluntariness will be assessed in context of the surrounding circumstances.¹²³

89. Furthermore, forced displacement is only illegal “when it occurs without grounds permitted by international law.”¹²⁴ In fact, under the Geneva Conventions there are permissible situations for the forced removal of persons including Article 49 of the Fourth Geneva Convention, which states: “the Occupying Power may undertake total or partial evacuation of a given area if the security of the population or imperative military reasons so demand...” and the Additional Protocol, Article 17, citing security of the population and imperative military reasons as legitimate justifications for forcible transfer of civilians.¹²⁵

90. Mr. Mladic asserts that he is not guilty of deportation or forcible transfer 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 charges of deportation and forcible transfer pursuant to Article 5 of the Statute of the Tribunal.

¹²¹ *Prosecutor v. Stakic*, No. IT-97-24, *Appeals Judgement*, (22 March 2006), paras. 278, 284-285.

¹²² *Prosecutor v. Stakic*, No. IT-97-24, *Appeals Judgement*, (22 March 2006), para.279.

¹²³ *Prosecutor v. Stakic*, No. IT-97-24, *Appeals Judgement*, (22 March 2006), para. 279

¹²⁴ *Prosecutor v. Krnojelac*, IT-97-25, *Trial Judgement*, (15 March 2002), para. 475.

¹²⁵ *Prosecutor v. Stakic*, No. IT-97-24, *Appeals Judgement*, (22 March 2006), paras. 284-285.

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4. MURDER AND EXTERMINATION

91. Counts 5 and 6 are based on the crime Murder, under Articles 5 and 3, respectively. The elements of murder, under both Article 3 and 5 are as follows:

- a. the victim is dead,
- b. the death was caused by an act or omission of the perpetrator, and
- c. the act or omission was done with intention to kill, or to inflict grievous bodily harm, or to inflict serious injury, in the reasonable knowledge that such act or omission was likely to cause death.¹²⁶

92. The Prosecution will be held to a burden of proof for the murders alleged and attributed liability put onto Mr. Mladic. The Prosecution Pre-Trial Brief, as previously mentioned, fails to adequately identify the identities of perpetrators, nor victims of the alleged murders and killings upon which it relies. In particular the Prosecution Pre-Trial Brief fails to adequately address nor set forth the Prosecution's case as to "proof of death" at all.

93. Mr. Mladic asserts that he is not guilty of murder 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 charges of murder pursuant to Articles 3 and 5 of the Statute of the Tribunal.

5. PERSECUTIONS

94. Count 3 is based on the crime of Persecutions, including killings, torture, rape, forced labour, plunder, and destruction of property, among other alleged acts.

95. The elements of persecution are an act or omission that:
- 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*).¹²⁷

¹²⁶ *Prosecutor v. Vasiljevic*, No. IT-98-32, *Trial Judgment*, (29 Nov 2002), para 205.

¹²⁷ *Prosecutor v. Stakic*, Case No. IT-97-24, *Appeals Judgement*, (22 March 2006), para. 327.

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96. In contrast to other crimes against humanity, the *mens rea* must be one of intent to commit the underlying act and that the perpetrator had the special intent to discriminate on racial, religious, or political ground.¹²⁸ “It is not sufficient for the accused to be aware that he is in fact acting in a way that is discriminatory; he must consciously intend to discriminate.”¹²⁹ Further, the result of the act must, in fact, be discriminatory; intent alone is not enough.¹³⁰

97. Mr. Mladic asserts that he is not guilty of persecutions 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 charges of persecutions pursuant to Article 5 of the Statute of the Tribunal.

6. EXTERMINATION

98. Count 4 is based upon the crime of extermination. The elements of extermination are: a) act or omission that results in the death of persons on a massive scale, and b) the intent to kill persons on a massive scale, or to inflict serious bodily injury or create conditions of life that lead to the death in the reasonable knowledge that such act or omission is likely to cause the death of a large number of persons.¹³¹

99. The elements of extermination consume the elements of murder plus the fact that the killings take place on a large scale and the perpetrator intended this result by his acts.¹³² As previously discussed in regards to Murder, the Prosecution Pre-Trial Brief fails to adequately establish its “Proof of Death” case, so as to put the defense on notice of the same.

100. Mr. Mladic asserts that he is not guilty of extermination 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 charges of extermination pursuant to Article 5 of the Statute of the Tribunal.

¹²⁸ *Prosecutor v. Stakic*, No. IT-97-24, *Appeals Judgement*, (22 March 2006), para. 328.

¹²⁹ *Prosecutor v. Krnojelac*, No. IT-97-25, *Trial Judgement*, (15 March 2002), para. 435; *Prosecutor v. Vasiljevic*, No. IT-98-32, *Trial Judgment*, (29 Nov 2002), para 248.

¹³⁰ *Prosecutor v. Krnojelac*, No. IT-97-25, *Trial Judgement*, (15 March 2002), para. 432; *Prosecutor v. Vasiljevic*, No. IT-98-32, *Trial Judgment*, (29 Nov 2002), para 245.

¹³¹ *Prosecutor v Blagojevic & Jokic*, No. IT-02-60-T, *Judgement* (17 January 2005) at para.572

¹³² *Prosecutor v Krajisnik*, No. IT-00-39-T, *Judgement and Sentence* (27 September 2006) at para. 716; *Prosecutor v Martić*, No. IT-95-11-T, *Judgement* (12 June 2007) at para. 62

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7. **TERROR**

101. Count 9 of the Indictment is based on Terror. The elements of “terror” are: (1) Acts or threats of violence directed against the civilian population or individual civilians not taking direct part in hostilities causing death or serious injury to body or health within the civilian population; (2) The offender wilfully made the civilian population or individual civilians not taking direct part in hostilities the object of those acts of violence; (3) The above offence was committed with the primary purpose of spreading terror among the civilian population.¹³³

102. The crime of terror is a “specific intent crime”. The *mens rea* of the crime of terror consists of a general intent and a specific intent. The general intent is that the offender must have wilfully made the civilian population or an individual civilian the object of acts or threats of violence. The specific intent is “spreading terror among the civilian population.”¹³⁴

103. It must be established that the terror goes beyond the fear that is only the accompanying effect of the activities of armed forces in armed conflict. The prohibition of spreading terror among a civilian population must therefore always be distinguished from the effects that acts of legitimate warfare can have on a civilian population. Therefore, the circumstances of a particular armed conflict must be taken into account in determining whether the crime of terror has been committed, or whether the perpetrators intended to “spread terror among a civilian population.”¹³⁵ Respectfully the Prosecution Pre-Trial Brief does not adequately analyze this charge, or the law underlying it.

104. Mr. Mladic asserts that he is not guilty of terror 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 charges of terror pursuant to Article 3 of the Statute of the Tribunal.

¹³³ *Prosecutor v. Milosevic*, No. IT-98-29/1-T, *Judgment* (12 December 2007) at para. 875

¹³⁴ *Prosecutor v. Milosevic*, No. IT-98-29/1-T, *Judgment* (12 December 2007) at para. 878

¹³⁵ *Prosecutor v. Milosevic*, No. IT-98-29/1-T, *Judgment* (12 December 2007) at para. 878

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8. UNLAWFUL ATTACK

105. Count 10 of the Indictment is predicated on the theory of Unlawful Attack. Attacks which are not directed against military objectives (particularly attacks directed against the civilian population) and attacks which cause disproportionate civilian casualties or civilian property damage may constitute the *actus reus* for the offence of unlawful attack under Article 3 of the ICTY Statute. The *mens rea* for the offence is intention or recklessness, not simple negligence. In determining whether or not the *mens rea* requirement has been met, it should be borne in mind that commanders deciding on an attack have duties: (1) to do everything practicable to verify that the objectives to be attacked are military objectives; (2) to take all practicable precautions in the choice of methods and means of warfare with a view to avoiding or, in any event to minimizing incidental civilian casualties or civilian property damage; and (3) to refrain from launching attacks which may be expected to cause disproportionate civilian casualties or civilian property damage.¹³⁶

106. Mr. Mladic asserts that he is not guilty of unlawful attack 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 charges of unlawful attack pursuant to Article 3 of the Statute of the Tribunal.

9. HOSTAGE TAKING

107. The 11th count of the Indictment alleges hostage taking. The elements of the offense of hostage taking are:

- a. The Accused must have unlawfully seized or detained;
- b. Threatened to kill, injure or detain another person or group of people in order to
- c. Compel a third party to do or abstain from doing something as a condition for the safe release of the person or group.¹³⁷

¹³⁶ Report by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia at para. 28.

¹³⁷ Prosecutor vs. Blaskic No. IT-95-14-A Judgment (29 July 2004), at para. 639; see also Prosecutor v. Sesay, Case No. SCSL-04-15-T, SCSL, Judgment, (2 March 2009), at paras. 1962-1964

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108. This crime is a specific intent crime, as set forth by the Appeals Chamber in Blaskic, “the essential element in the crime of hostage-taking is the use of a threat concerning detainees so as to obtain a concession or gain an advantage.”¹³⁸ Therefore hostage taking is a specific intent crime and must be proven as such. The Prosecution must prove that the Accused not only intended to commit the act that caused the detention, but also that he intended to detain the hostages in order to obtain a concession or gain advantage.

109. Further, the threat must be communicated to a third party with the intent that the third party is compelled to act in a particular way as a condition for the safety or release of the detainees.¹³⁹ This intent must be present either before or at the moment of the original detention. Even if a concession or advantage is eventually sought, the accused cannot be held liable if there is no proof that he performed the original act of detention for this purpose. In other words, if the intent is formed only once the detainees have already been detained, the *mens rea* elements of the crime are not met.¹⁴⁰

110. While ICTY jurisprudence on this crime is sparse, other jurisdictions, in particular the Sierra Leone Special Court, have held that “consistent with the general requirements for a war crime... it is the law that the person or persons held hostage must not be taking a direct part in the hostilities at the time of the alleged violation.”¹⁴¹ In that case, the Special Court for Sierra Leone noted that in order for a UN or other peacekeeping force to be afforded extra protection because of their special status, said peacekeeping force has to act more like civilians than like an armed force, and it cannot be or become a party to the conflict. In order to determine whether peacekeepers are entitled to the same protections as civilians, it is thus necessary to consider the totality of circumstances surrounding the establishment, deployment, and operation of their mission, as well as their interactions with the parties in order to determine whether or not they were taking a direct part in the hostilities.¹⁴² This involves an examination of the mandate, the rules of engagement, and the manner in which the peacekeepers acted while in the field.

¹³⁸ *Prosecutor vs. Blaskic* No. IT-95-14-A Judgment (29 July 2004), at para. 639

¹³⁹ *Prosecutor v. Sesay*, Case No. SCSL-04-15-T, SCSL, Judgment, 2 March 2009, at para. 1964

¹⁴⁰ *Prosecutor v. Sesay*, Case No. SCSL-04-15-T, SCSL, Judgment, 2 March 2009, at para. 1967

¹⁴¹ *Prosecutor v. Sesay*, Case No. SCSL-04-15-T, SCSL, Judgment, 2 March 2009, at para. 299

¹⁴² *Prosecutor v. Sesay*, Case No. SCSL-04-15-T, SCSL, Judgment, 2 March 2009, at para. 1906

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111. Mr. Mladic asserts that he is not guilty of hostage taking 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 charges of hostage taking pursuant to Article 3 of the Statute of the Tribunal.

10. ARTICLE 7(1): JOINT CRIMINAL ENTERPRISE

112. The Defence asserts that in order to find liability for under an alleged Joint Criminal Enterprise, the Trial Chamber must establish the following elements of the *actus reus*:

- a. a plurality of persons;
- b. the existence of a common plan, design or purpose which amounts to or involves the commission of a crime provided for in the Statute;
- c. Significant participation of the Accused in the common plan.¹⁴³

113. In addition, the Prosecution must show the *mens rea* based on the type of JCE alleged. In the present charges there are two types alleged: “JCE I”: where all participants share the same intent to perpetrate a certain crime; and “JCE III”: which attributes liability for crimes committed outside the common plan if the consequences were a natural and foreseeable consequence *and* the participant willingly took the risk.¹⁴⁴

114. If the principal perpetrator is not a member of the JCE, the Chamber must further establish that the crime can be imputed to at least one of the members of the JCE and that the member of the JCE, while using the principal perpetrator, acted in accordance with the common criminal plan.¹⁴⁵

115. Mr. Mladic denies all assertions regarding involvement in a joint criminal enterprise – as asserted by the Prosecution – specifically, that he did not command and control any Bosnian or Serbian paramilitary or volunteer groups operating in Bosnia-Herzegovina

¹⁴³ *Prosecutor v. Brdanin*, No. IT-99-36, Appeal Judgement, (3 April 2007), para. 430; see also *Prosecutor v. Tadic*, No. IT-94-1, Appeals Judgement, (15 July 1999), para. 227.

¹⁴⁴ *Prosecutor v. Brdanin*, No. IT-99-36, Appeal Judgement, (3 April 2007), para. 430.; see also *Prosecutor v. Tadic*, No. IT-94-1, Appeals Judgement, (15 July 1999), para. 228.

¹⁴⁵ *Prosecutor v. Brdanin*, No. IT-99-36, Appeal Judgement, *3 April 2007), para. 430.; see also *Prosecutor v. Tadic*, No. IT-94-1, Appeals Judgement,(15 July 1999), para. 228.

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during the indictment period; he did not command and control any rogue units of the VRS or RS MUP that departed from their duties and performed criminal acts out of their own personal reasons operating in Bosnia-Herzegovina during the indictment period; he did not command and control any local civilians who engaged in criminal acts out of their own personal reasons that operating in Bosnia-Herzegovina during the indictment period; he did not command and control any Bosnian Serb Civilian officials who performed criminal acts out of their own personal reasons operating in Bosnia-Herzegovina during the indictment period; he did not command and control any persons that performed criminal acts out of their own personal reasons operating in Bosnia-Herzegovina during the indictment. In short he did not condone or support the commission of crimes by any persons subordinated under him and did his best under difficult and chaotic war-time conditions using the limited resources and personnel available to him to insure that troops subordinate to him fought honourably against the enemy, protecting citizens of all ethnicity that supported the constitutional order of Bosnia-Herzegovina against the Armija BiH, HVO, Croatian Army and the Mujahedin and mercenary extremists that threatened to over-run Bosnia-Herzegovina.

116. Mr. Mladic contests joint criminal liability as a form of liability and any denies any association with any such group as alleged in the Indictment. Mr. Mladic did not participate or contribute in any manner to any joint criminal enterprise. As such, he contests all factual allegations and legal assessments of those factual allegations made by the Prosecution in relation to the charges flowing out of Article 7(1) liability of the Statute of the Tribunal.

11. ARTICLE 7(3): COMMAND RESPONSIBILITY

117. To hold a superior responsible under Article 7(3) of the Statute, the jurisprudence of the Tribunal has enumerated three elements which must be satisfied:

- a. the existence of a superior-subordinate relationship;
- b. the superior knew or had reason to know that the criminal act was about to be or had been committed; and
- c. the superior failed to take the necessary and reasonable measures to prevent the criminal act or punish the perpetrator thereof.¹⁴⁶

¹⁴⁶ *Prosecutor v. Boskoski & Tarculovski*, No. IT-04-82, *Trial Judgement*, (10 July 2008), para. 406.

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118. In any analysis of responsibility an ‘effective control’ test must be employed to determine the subordinate under either *de facto* or *de jure* command:

“The possession of *de jure* power may not in itself suffice for the finding of effective control. While the possession of *de jure* powers may certainly suggest a material ability to prevent or punish criminal acts of subordinates, the Prosecution still bears the burden of proving beyond reasonable doubt that the accused had effective control over his subordinates.”¹⁴⁷

119. “In determining whether a superior “had reason to know” that his subordinates were committing or about to commit a crime, it must be shown that specific information was in fact available to him which would have provided notice of offences committed or about to be committed by his subordinates.”¹⁴⁸

120. “With regard to the scope of a superior’s duty to punish, the Appeals Chamber held recently that whether the measures taken by a superior were solely of a disciplinary nature, criminal nature, or a combination of both, cannot in and of itself be determinative of whether a superior has discharged his duty. What is relevant is whether the superior took measures to punish which were ‘necessary and reasonable’ in the circumstances, and not whether those measures were of a disciplinary or criminal nature. A superior need not dispense punishment personally and may discharge his duty to punish by reporting the matter to the competent authorities.”¹⁴⁹ A person is not required to perform the impossible.¹⁵⁰

121. The Defence does not accept that any of the crimes charged were committed by individuals who were under the effective control of Mr. Mladic at the time, as charged. Furthermore, any criminal actions by any actual subordinates was punished accordingly, as Mr. Mladic faithfully acted in a responsible manner in all posts held. The evidence will show that despite a chaotic and tumultuous situation set forth by an armed conflict, Mr. Mladic acted with all compliance and due care and within the bounds of legality. Mr. Mladic cannot be held responsible for crimes committed by persons who departed from their official duties

¹⁴⁷ *Prosecutor v. Boskoski & Tarculovski*, No. IT-04-82, *Trial Judgement*, (10 July 2008), para. 411; citing *Prosecutor v. Oric*, IT-03-68, *Appeals Judgement*, paras 91-92.

¹⁴⁸ *Prosecutor v. Boskoski & Tarculovski*, No. IT-04-82, *Trial Judgement*, (10 July 2008), para.. 414.

¹⁴⁹ *Prosecutor v. Boskoski & Tarculovski*, No. IT-04-82, *Trial Judgement*, (10 July 2008), para.. 417; citing *Prosecutor v. Hadzihanovic & Kubara*, No. IT-01-47, *Appeals Judgement*, 22 April 2008, paras. 33, 142, 154.

¹⁵⁰ *Prosecutor v. Stakic*, No. IT-97-24, *Trial Judgement*, 31 July 2003, para. 461.

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and committed crimes for personal reasons, of which he did not have sufficient notice and the ability to punish.

122. Mr. Mladic submits that he has no criminal responsibility under a superior-subordinate relationship for the charges of the Indictment. As such, he contests all factual allegations and legal assessments of those factual allegations made by the Prosecution in relation to the charges flowing out of Article 7(3) liability of the Statute of the Tribunal.

IV. BRIEF STATEMENT AS TO THE NATURE OF THE DEFENSE CLAIMED BY MR. MLADIC

123. Pursuant to Rule 65ter (F)(i) Mr. Mladic has an obligation to set forth, in general terms, the nature of his defense to the Prosecution's case against him.

124. The Defense notes that, due to the fact that the start of trial in this case has been accelerated much sooner than in any prior proceedings of this magnitude, the amount of time available to the Defense to prepare its Defense prior to trial has been drastically curtailed and shortened. Further, due to continuing delays and problems in the manner and method of the disclosures made by the Prosecution to the Defense, the ability of the defense to analyze the case of the Prosecution and prepare a Defense against it has been severely hampered and limited. Further, delays and difficulties in having defense personnel assigned to the team have further exacerbated the difficulties encountered by the defense. As such, the defense is not in a position to spell out the entirety of its defense with uniform amount of detail, and thus highlights some factors of it while reserving the right to expand its defense to meet the case as presented by the Prosecution, and to present its Defense at the appropriate time.

125. Notwithstanding the foregoing, the Defense of Mr. Mladic presents the following submission as to the general nature of his defense(s).

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A. ALIBI DEFENSE UNDER RULE 67(B)

126. The Defense of Mr. Mladic has timely filed several notices¹⁵¹ pursuant to Rule 67(B) identifying a special defense of Alibi being asserted as to a portion of the charged crimes that have been alleged under the Indictment against him.

127. The Defense stands by that Defense of Alibi and reincorporates by reference the submissions it has made in respect to Mr. Mladic's alibi in the referenced Rule 67(B) notices previously filed.

128. As a general summary of the same, the Defense asserts that Mr. Mladic was left the territory of Bosnia-Herzegovina on 14 July 1995 and did not return to the territory of Bosnia-Herzegovina until sometime during 17 July 1995.

129. The Prosecution has filed a notice of alleged rebuttal evidence as to the Alibi.¹⁵² Although the Defense has still not fully and thoroughly reviewed and analyzed the same, it's cursory review reveals that the Prosecution's assertions are mischaracterizations of the facts, and misplaced, and that they do not neither rebut nor refute the alibi that has been presented.

130. The Defense looks forward to the opportunity of fully presenting its Alibi evidence during trial.

B. THEORY OF DEFENSE

131. The Indictment in the present case presents a multitude of very generally pled charges that has been compiled against Mr. Mladic, resting primarily upon assertions of his involvement in two alleged joint criminal enterprises and by nature of both command superior authority and individual liability stemming from his professional military position and function within the VRS hierarchy in Bosnia-Herzegovina during the indictment period.

¹⁵¹ See, "Defence urgent Motion to enlarge time for filing of Notice of Alibi and special Defences" (12 January 2012); "Defence initial Submission pursuant to Rule 67 (B) (23 January 2012); "Defence second submission pursuant to Rule 67(B) (16 February 2012)

¹⁵² See, "Prosecution's Submission pursuant to Rule 67 (B) (ii) with Confidential Annexes" (16 March 2012)

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However, the Accused again asserts no wrongdoing or criminal culpability on his part as alleged in the Indictment.

132. The Indictment is spread out among charges of involvement in an alleged Joint Criminal Enterprise as ‘commission’ under Article 7(1) individual criminal responsibility and for Command Responsibility as formulated under Article 7(3). Mr. Mladic has been charged with eleven (11) counts under this Fourth Amended Indictment under Articles 3 and 5 of the ICTY Statute. Mr. Mladic asserts that he has no individual responsibility for the alleged following as asserted in the Indictment and repeated in the Prosecution Pre-Trial Brief:

- COUNT 1-2: Genocide. *These counts are punishable as charged under Article 4 of the ICTY Statute.*
- COUNT 3: Persecutions. *This count is punishable as charged under Article 5 of the ICTY Statute.*
- COUNT 4: Extermination. *This count is punishable as charged under Article 5 of the ICTY Statute.*
- COUNTS 5-6: Murder. *These counts are punishable as charged under Articles 3 and 5 of the ICTY Statute.*
- COUNT 7: Deportation. *This count is punishable as charged under Article 5 of the ICTY Statute.*
- COUNT 8: Forcible Transfer. *This count is punishable as charged under Article 5 of the ICTY Statute.*
- COUNT 9: Terror. *This count is punishable as charged under Article 3 of the ICTY Statute.*
- COUNT 10: Unlawful Attack. *This count is punishable as charged under Article 3 of the ICTY Statute.*
- COUNT 11: Hostage Taking. *This count is punishable as charged under Article 3 of the ICTY Statute.*

133. As to the modes of liability, the Indictment and Prosecution Pre-Trial Brief spell out the following averments:

- Article 7(1): Under Article 7(1), Mr. Mladic is alleged to have planned, instigated, ordered, committed, or otherwise aided and abetted in the planning, preparation, or execution of the crimes alleged under Article 3 and Article 5. In

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particular, by using the word ‘committed’ in the Indictment, the Prosecutor does not suggest direct commission of any of the crimes. “Committing” in this Indictment refers to alleged participation in a joint criminal enterprise as a co-perpetrator. As alleged, the purpose of this joint criminal enterprise was, to permanently remove Bosnian Croats and Bosnian Muslims through crimes; to spread terror among the civilian population of Sarajevo; to eliminate the Bosnian Muslims of Srebrenica; and to take United Nations Personnel hostage. As a part of the alleged Joint Criminal Enterprises (“JCE”), Mr. Mladic, acting individually or in concert with others is said to have significantly contributed to the joint criminal enterprises using the *de jure* and *de facto* powers available to him.

- **Article 7(3)**: Under Article 7(3), Mr. Mladic 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. Mr. Mladic respectfully submits that the Prosecution’s proposed evidence fails to establish the liability of the Accused for this form of criminal liability. Further, Mr. Mladic declares he is not guilty of the same.

134. As stated repeatedly throughout this Defense Pre-Trial Brief, the Accused has entered a plea of not guilty on all the charges presented in the allegations of the Indictment. The Defense of Mr. Mladic contests all the factual allegations lodged in the Prosecution Pre-Trial brief and the legal conclusions they derive therefrom. Specifically the defense has taken issue with and rejected the Prosecution Pre-Trial Brief as to each crime alleged. Thus for purposes of this section as well it must again be emphasized that Mr. Mladic categorically and unequivocally rejects the allegations and again states that he is not criminally liable for the charges of the Fourth Amended Indictment under either form of liability pursuant to Article 7(1) or 7(3) of the Statute. Mr. Mladic did not personally participate in any criminal activity nor did he participate in any events that may have lead to the crimes asserted by the Office of

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the Prosecutor. Mr. Mladic neither planned, ordered, instigated, nor aided and abetted the commission of crimes. In no way was he a member of a joint criminal enterprise nor an aider and an abettor of any joint criminal enterprise. The fact that a joint criminal enterprise even existed is a matter of dispute for which the Prosecution will be called upon to produce evidence. Regardless of if it did, Mr. Mladic did not participate in any manner or form of a joint criminal enterprise to permanently remove Bosnian Croats and Bosnian Muslims through crimes; nor to spread terror among the civilian population of Sarajevo; nor to eliminate the Bosnian Muslims of Srebrenica, nor to take United Nations Personnel hostage; and thus he bears no individual criminal responsibility for the crimes alleged.

135. The Defence does not accept that any of the crimes charged were committed by individuals who were under the effective control of Mr. Mladic at the time, as charged. Furthermore, any criminal actions by any actual subordinates was punished accordingly, as Mr. Mladic faithfully acted in a responsible manner in all posts held. The evidence will show that despite a chaotic and tumultuous situation set forth by an armed conflict, Mr. Mladic acted with all compliance and due care and within the bounds of legality. Mr. Mladic cannot be held responsible for crimes committed by persons who departed from their official duties and committed crimes for personal reasons, of which he did not have sufficient notice and the ability to punish.

136. Mr. Mladic submits that he has no criminal responsibility under a superior-subordinate relationship for the charges of the Indictment. As such, he contests all factual allegations and legal assessments of those factual allegations made by the Prosecution in relation to the charges flowing out of Article 7(3) liability of the Statute of the Tribunal.

V. STATEMENT OF MATTERS NOT IN DISPUTE

137. At this time, the Defense cannot find a single portion of the Prosecution Pre-Trial Brief that is not subject to dispute with the Defense. The manner of presentation of material in the Prosecution Pre-Trial Brief takes matters out of context, misrepresents them, misinterprets them, and generally alters or interprets them in such a way that the Defense cannot agree or adopt any without compromising the presumption of innocence or the right of the Accused to a fair trial. The Defense rejects all charges as unfounded and will put the Prosecution to their burden in proving the case set out in the allegations. Mr. Mladic contests

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the truth and veracity of all factual assertions made by the Prosecution and any conclusions derived therefrom.

138. Thus, apart from those items that have been separately identified as agreed to by the Defense, as contained in the filings as to agreed facts made jointly by the prosecution and the defense from time to time with the Chamber, the Defense cannot agree to anything further, and anything not contained therein should be considered in dispute and disputed.

139. The Defense will continue to work in consultation with the Prosecution for the pendency of the proceedings to see what additional agreed facts and/or self-authenticating documents could be introduced to increase the efficiency of the trial. However, such decisions can only be taken by the Defense after a careful period of review and consideration. Insofar as the Prosecution's Rule 65*ter* filings are voluminous, and the proposed exhibits are not yet viewable in E-Court, it will take some considerable time for the Defense to make such determinations as to what evidence may not be in dispute. Further given the large scope of the case, the limited resources and time available to the defense, and the acceleration of the trial by the Chamber, any undertakings of this nature will have to take second place to those undertakings and preparations that are necessary for the Defense to fulfill its obligations to the client to prepare for the imminent start of trial.

140. Notwithstanding the foregoing, the Defense takes note for the record its understanding that it is under no legal obligation to enter agreements with the Prosecution to reduce the time and scope of trial to the detriment of its own client. Mr. Mladic is entitled to have trial on the time honored principle that the Prosecution is the party with the burden and obligation to prove the entirety of its case beyond any reasonable doubt on its own. As the ICTY Manual on Developed Practices states, in pertinent part:

*It should be noted that, since the burden is on the Prosecution to prove its case, the Accused is under no obligation to agree to the narrowing of issues in dispute, and may simply refuse to agree to any facts.*¹⁵³

¹⁵³ ICTY Manual on Developed Practices (2009), Section B3, para. 19, page 58
(http://www.icty.org/x/file/About/Reports%20and%20Publications/ICTY_Manual_on_Developed_Practices.pdf)

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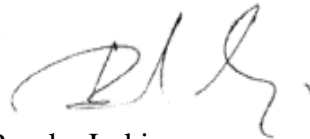
VI. CONCLUSION

141. Mr. Ratko Mladic reiterates his plea of not guilty to all counts of the Fourth Amended Indictment and puts the Prosecution to the proof of its case in the trial proceedings to come.

WHEREFORE, for the foregoing reasons, the Defense respectfully requests that the Trial Chamber accept the foregoing as fulfilling its obligations under Rule 65*ter* (F) of the Rules of Procedure and Evidence of the Tribunal.

Word Count: 17,864 words

RESPECTFULLY SUBMITTED BY:



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Dated this 3rd of April 2012
Belgrade, Republic of Serbia