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THE INTERNATIONAL CRIMINAL TRIBUNAL
FOR THE FORMER YUGOSLAVIA

CASE No. IT-05-88-PT

IN TRIAL CHAMBER II

Before: Judge Carmel Agius, Presiding
Judge O Gok Kwon
Judge Kimberly Prost

Registrar: Mr. Hans Holthuis

Date Filed: 12 July 2006

THE PROSECUTOR

v.

VUJADIN POPOVIC
LJUBISA BEARA
DRAGO NIKOLIC
LJUBOMIR BOROVCANIN
ZDRAVKO TOLIMIR
RADIVOJE MILETIC
MILAN GVERO
VINKO PANDUREVIC

GENERAL GVERO'S
PRE-TRIAL BRIEF

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Introduction

1. General Milan Gvero respectfully submits this pre-trial brief pursuant to Rule 65 *ter* (F), which provides that:

After 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 pretrial Judge, and not later than three weeks before the Pre-Trial Conference, to file a pre-trial brief addressing the factual and legal issues, including a written statement setting out:

(i) in general terms, the nature of the accused's defence;

(ii) the matters with which the accused takes issue in the Prosecutor's pre-trial brief; and

(iii) in the case of each such matter, the reason why the accused takes issue with it.

Procedural History

2. General Gvero was initially indicted on 10 February 2005 with Generals Militec and Tolimir. Upon motion from the Prosecution, his case was joined with the other accused in this case on 21 September 2005.¹ A Consolidated Amended Indictment was filed on 11 November 2005. The Trial Chamber ordered the Prosecution to amend the Indictment² and to file a Second Consolidated Amended Indictment ("Indictment"), filed on 14 June 2006, upon which the case will be tried.

3. On 24 February 2005, General Gvero voluntarily appeared in The Hague. He has pled not guilty. He was provisionally released on 22 July 2005 and has obeyed all of the conditions of provisional his release.

4. General Gvero filed preliminary motions challenging the concepts of "indirect co-perpetration" and "joint criminal enterprise without agreement". The Prosecution abandoned its allegations of "indirect co-perpetration" after the Appeals Chamber

¹ *Decision on Motion for Joinder* (21 September 2005)

² *Decision on Motions Challenging the Indictment Pursuant to Rule 72 of the Rules* (31 May 2006)

decision in the *Stakic* case.³ The Trial Chamber later ordered the “joint criminal enterprise without agreement” allegations struck from the Indictment.⁴

The Charges

5. General Gvero is charged in the following counts of the Indictment:

Count Four:	Murder as a Crime Against Humanity
Count Five:	Murder as a War Crime
Count Six:	Persecution—a Crime Against Humanity consisting of: Murder Cruel and Inhumane Treatment Terrorising the Civilian Population Destruction of Personal Property Forcible Transfer
Count Seven	Forcible Transfer—a Crime Against Humanity
Count Eight	Deportation—a Crime Against Humanity

War Crimes

6. Article 3 of the Statute provides that:

The International Tribunal shall have the power to prosecute persons violating the laws or customs of war. Such violations shall include, but not be limited to:

- (a) employment of poisonous weapons or other weapons calculated to cause unnecessary suffering;
- (b) wanton destruction of cities, towns or villages, or devastation not justified by military necessity;
- (c) attack, or bombardment, by whatever means, of undefended towns, villages, dwellings, or buildings;
- (d) seizure of, destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science;
- (e) plunder of public or private property.

7. For the applicability of Article 3 of the Statute, two preliminary requirements must be satisfied. First, there must have been an armed conflict at the time the offences were allegedly committed. Second, there must be a close nexus between the armed conflict and the alleged offence; in other words, the acts of the accused must be “closely related” to the hostilities. The existence of an armed conflict must, at a minimum, have played a substantial part in the perpetrator’s ability to commit the crime, his decision to

³ *Prosecutor v Stakic*, No. IT-97-24-A, *Judgement* (22 March 2006) at para. 62; *Motion to Amend the Indictment* (29 March 2006)

⁴ *Decision on Motions Challenging the Indictment Pursuant to Rule 72 of the Rules* (31 May 2006)

commit it, the manner in which it was committed or the purpose for which it was committed.⁵

8. For the application of any Article 3 charge based on Common Article 3 to the Geneva Conventions, the prosecution must establish that the victim was a person taking no active part in the hostilities.⁶ In determining protection under Common Article 3, the specific situation of the victim at the moment the crime was committed must be taken into account. Factors to be considered include whether the victim was carrying weapons, clothing, age and gender.⁷

9. With regards to the *mens rea*, it must be proved that the perpetrator was aware or should have been aware that the victim was a person not taking an active part in the hostilities. The prosecution must show that no reasonable person could have believed the victim was a combatant.⁸

10. The armed conflict need not have been causal to the commission of the crime, but the existence of the armed conflict must, at a minimum, have played a substantial part in the perpetrator's ability to commit it, the manner in which it was committed, or the purpose for which it was committed.⁹

11. Article 3 crimes need not be committed in the area of the armed conflict, but must at least be "substantially related" to said area, which at least includes the entire territory under control of the warring parties. However, it is essential that a Trial Chamber establish the existence of a geographical and temporal linkage between the crimes ascribed to the accused and the armed conflict.¹⁰

⁵ *Prosecutor v Stakic*, No. IT-97-24-A, *Judgement* (22 March 2006) at para. 342; *Prosecutor v Strugar*, No. IT-01-42-T, *Judgement* (31 January 2005) at para. 215; *Prosecutor v Halilovic*, No. IT-01-48-T, *Judgement* (16 November 2005) at para. 29

⁶ *Prosecutor v Limaj et al.*, No. IT-03-66-T, *Judgement* (30 November 2005) at para. 176; *Prosecutor v Halilovic*, No. IT-01-48-T, *Judgement* (16 November 2005) at paras 32, 34

⁷ *Prosecutor v Halilovic*, No. IT-01-48-T, *Judgement* (16 November 2005) at para. 34

⁸ *Prosecutor v Halilovic*, No. IT-01-48-T, *Judgement* (16 November 2005) at para. 36

⁹ *Prosecutor v Halilovic*, No. IT-01-48-T, *Judgement* (16 November 2005) at para. 29

¹⁰ *Prosecutor v Stakic*, No. IT-97-24-A, *Judgement* (22 March 2006) at para. 342

12. The following factors are considered when evaluating whether the alleged offence is sufficiently connected to the armed conflict:

- (1) whether the perpetrator is a combatant;
- (2) whether the victim is a non-combatant;
- (3) whether the victim is a member of the opposing party;
- (4) whether the act may be said to serve the ultimate goal of a military campaign;
- (5) whether the crime is committed as part of or in the context of the perpetrator's official duties.¹¹

13. The evidence in this case may show that one or more of the alleged crimes in the Indictment were committed against persons who were, in fact, taking an active part in the hostilities, and thus do not constitute a violation of Article 3.

14. The specific violation of Article 3 alleged in this case is murder. For the crime of murder under Article 3 of the Statute to be established, the prosecution bears the onus of proving the following: the death of a victim taking no active part in the hostilities; that the death was the result of an act or omission of the accused or of one or more persons for whom the accused is criminally responsible; and the intent of the accused or of the person or persons for whom he is criminally responsible a) to kill the victim; or b) to wilfully cause serious bodily harm that the perpetrator should reasonably have known might lead to death.¹²

15. Knowledge by the perpetrator that his act or omission might *possibly* cause death is not sufficient to establish the necessary *mens rea*. The necessary mental state exists when the accused knows that it is *probable* that his act or omission will cause death.¹³ Ordinary negligence does not suffice as the *mens rea* for murder.¹⁴

¹¹ *Kunarac, supra*, at para. 59; *Prosecutor v Limaj et al*, No. IT-03-66-T, *Judgement* (30 November 2005) at para. 91

¹² *Prosecutor v Kvočka et al*, No. IT-98-30/1-A, *Judgement* (28 February 2005) at para. 261; *Prosecutor v Halilovic*, No. IT-01-48-T, *Judgement* (16 November 2005) at para. 35; *Prosecutor v Limaj et al*, No. IT-03-66-T, *Judgement* (30 November 2005) at para. 241

¹³ *Prosecutor v Strugar*, No. IT-01-42-T, *Judgement* (31 January 2005) at para. 236

¹⁴ *Prosecutor v Perisic*, No. IT-04-81-PT, *Decision on Preliminary Motions* (29 August 2005) at para. 21

16. The body of the victim need not have been recovered, but where death is proved by circumstantial evidence, it must be the only reasonable inference from the evidence.¹⁵ Relevant factors include the coincident or near-coincident time of death of other victims; the fact that the victims were present in an area where an armed attack was carried out; where, when and the circumstances under which the victim was last seen; and the behavior of soldiers in the vicinity at the time of the incident.¹⁶

Crimes Against Humanity

17. Article 5 of the Statute provides that:

The International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population:

- (a) murder;
- (b) extermination;
- (c) enslavement;
- (d) deportation;
- (e) imprisonment;
- (f) torture;
- (g) rape;
- (h) persecutions on political, racial and religious grounds;
- (i) other inhumane acts.

18. The threshold elements of a violation of Article 5 of the Statute are as follows:

- (1) there must be an attack;
- (2) the acts of the perpetrator must be part of the attack;
- (3) the attack must be directed against any civilian population;
- (4) the attack must be widespread or systematic
- (5) 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.¹⁷

19. The concept of an attack requires that there be an armed conflict¹⁸, though there need not be a nexus between the crime and the armed conflict.¹⁹ There must,

¹⁵ *Prosecutor v Halilovic*, No. IT-01-48-T, *Judgement* (16 November 2005) at para. 37

¹⁶ *Prosecutor v Halilovic*, No. IT-01-48-T, *Judgement* (16 November 2005) at para. 37

¹⁷ *Prosecutor v Blagojevic & Jokic*, No. IT-02-60-T, *Judgement* (17 January 2005) at para.541; *Prosecutor v Limaj et al*, No. IT-03-66-T, *Judgement* (30 November 2005) at para. 181

¹⁸ *Prosecutor v Tadic*, No. IT-94-1-AR 72, *Decision on Defence Motion for Interlocutory Appeal on Jurisdiction* (2 October 1995) at para 142; *Prosecutor v Blagojevic & Jokic*, No. IT-02-60-T, *Judgement* (17 January 2005) at para.542

however, be a nexus between the crime and the attack. Although the crime need not be committed at the same time and place as the attack, it must by its characteristics, aims, nature or consequence objectively form part of the attack.²⁰

20. Crimes that are unrelated to widespread or systematic attacks on a civilian population should not be prosecuted as crimes against humanity. 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.²¹

21 “Widespread” refers to the large-scale nature of the attack and the number of targeted persons.²² “Systematic” refers to the organised nature of the acts of violence and the improbability of their random occurrence.²³

22. The act or acts must not be isolated or random; they may not be so far removed from the attack that, having considered the context and circumstances in which it occurred, the act or acts cannot reasonably be said to have been part of the attack. The nexus between the crime and the attack must demonstrate that objectively, it was part of the attack, and that the accused knew that there is an attack on the civilian population and that his act is part thereof.²⁴

23. The evidence in this case may show that one or more of the alleged crimes in the Indictment were committed by perpetrators acting for personal reasons that were not

¹⁹ *Prosecutor v Tadic*, No. IT-94-1-A, *Judgement*, (15 July 1999) at para. 251

²⁰ *Prosecutor v Natelic & Martinovic*, No. IT-98-34-T, *Judgement* (31 March 2003) at para. 234; *Prosecutor v Semanza*, No. ICTR-97-20-T, *Judgement* (15 May 2003) at para. 326

²¹ *Prosecutor v Tadic*, No. IT-94-1-A, *Judgement* (15 July 1999) at para. 271; *Prosecutor v Blaskic*, No. IT-95-14-A, *Judgement* (29 July 2004) at para 126

²² *Prosecutor v Kordic & Cerkez*, No. IT-65-14/2-A, *Judgement* (17 December 2004) at para. 94; *Prosecutor v Limaj et al*, No. IT-03-66-T, *Judgement* (30 November 2005) at para. 183

²³ *Prosecutor v Kordic & Cerkez*, No. IT-65-14/2-A, *Judgement* (17 December 2004) at para. 94; *Prosecutor v Limaj et al*, No. IT-03-66-T, *Judgement* (30 November 2005) at para. 183

²⁴ *Prosecutor v Blagojevic & Jokic*, No. IT-02-60-T, *Judgement* (17 January 2005) at para.547; *Prosecutor v Limaj et al*, No. IT-03-66-T, *Judgement* (30 November 2005) at para. 190

sufficiently connected to an attack on the civilian population such as to constitute a violation of Article 5 of the Statute.

24. In addition, the evidence may show that some attacks were not directed against the civilian population, but were instead directed against the Bosnian Muslim Army. The Appeals Chamber in *Blaskic* recently observed that:

Read together, Article 50 of Additional Protocol I and Article 4A of the Third Geneva Convention establish that members of the armed forces, and members of militias or volunteer corps forming part of such armed forces, cannot claim civilian status. Neither can members of organized resistance groups, provided that they are commanded by a person responsible for his subordinates, that they have a fixed distinctive sign recognizable at a distance, that they carry arms openly, and that they conduct their operations in accordance with the laws and customs of war.²⁵

In order to determine whether the presence of soldiers within a civilian population deprives the population of its civilian character, the number of soldiers, as well as whether they are on leave, must be examined.²⁶

25. An attack may be found not to have been directed against a civilian population even though some civilians are killed in the attack.²⁷

26. The *mens rea* for crimes against humanity requires proof of the accused's intent to commit the underlying offence or offences with which he is charged; knowledge that there is an attack against the civilian population and knowledge that his acts comprise part of that attack.²⁸

27. The *mens rea* for attacks on civilians incorporates the concept of recklessness, but not mere negligence.²⁹

²⁵ *Prosecutor v Blaskic*, No. IT-95-14-A, *Judgement* (29 July 2004) at para 113

²⁶ *Prosecutor v Blaskic*, No. IT-95-14-A, *Judgement* (29 July 2004) at para 115

²⁷ *Prosecutor v Limaj et al.*, No. IT-03-66-T, *Judgement* (30 November 2005) at para. 228

²⁸ *Prosecutor v Blagojevic & Jokic*, No. IT-02-60-T, *Judgement* (17 January 2005) at para.548; *Prosecutor v Kordic & Cerkez*, No. IT-65-14/2-A, *Judgement* (17 December 2004) at para. 100

²⁹ *Prosecutor v Perisic*, No. IT-04-81-PT, *Decision on Preliminary Motions* (29 August 2005) at para. 22

28. The specific crimes alleged as crimes against humanity in this case are murder (Count Four), persecution (Count Six), forcible transfer (Count Seven) and deportation (Count Eight).

Murder

29. The underlying elements of murder as a crime against humanity are the same as those for murder as a violation of the customs of war.³⁰

Persecution

30. Count Six of the Indictment charges General Gvero with persecution as a crime against humanity. The elements of persecution consists of an act or omission that discriminates in fact and that denies or infringes upon a fundamental right laid down in international customary or treaty law and is carried out deliberately with the intention to discriminate on one of the listed grounds, specifically race, religion or politics.³¹

31. The mental state required for persecution is higher than that for other crimes against humanity. In addition to the chapeau requirement of knowledge of a widespread or systematic attack against a civilian population, the *mens rea* for persecutions consists of the intent to commit the underlying act and the special intent to discriminate on political, racial or religious grounds.³² This discriminatory intent requirement amounts to a *dolus specialis*.³³

32. 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.³⁴

³⁰ *Prosecutor v Krnojelac*, No. IT-97-25-T, *Judgement* (15 March 2002) at para 323-24; *Prosecutor v Kordic & Cerkez*, No. IT-95-14/2 (26 February 2001) at para. 236; *Prosecutor v Blagojevic & Jokic*, No. IT-02-60-T, *Judgement* (17 January 2005) at para. 556

³¹ *Prosecutor v Blagojevic & Jokic*, No. IT-02-60-T, *Judgement* (17 January 2005) at para. 579; *Prosecutor v Kvočka et al*, No. IT-98-30/1-A, *Judgement* (28 February 2005) at para. 320; *Prosecutor v Kordic & Cerkez*, No. IT-65-14/2-A, *Judgement* (17 December 2004) at para. 101, 671

³² *Prosecutor v Kupreskic*, No. IT-95-16 –T, *Judgement* (14 January 2000) at para 636

³³ *Prosecutor v Stakic*, No. IT-97-24-A, *Judgement* (22 March 2006) at para. 328

³⁴ *Prosecutor v Krnojelac*, No. IT-97-25-T, *Judgement* (15 March 2002) at para 435; *Prosecutor v Vasiljevic*, No. IT-98-32-T, *Judgement* (29 November 2002) at para 248

33. The discriminatory intent must exist for the act itself, and not for the general attack.³⁵ In addition, the result of the act must in fact be discriminatory—having discriminatory intent is not enough.³⁶

34. The Indictment charges five separate acts of persecution: murder, cruel and inhumane treatment, terrorising the civilian population, destruction of personal property and forcible transfer.

Murder

35. Murder is an act that may constitute persecution.³⁷ The elements of the underlying act of murder as an act of persecution are the same as those for murder as a war crime and crime against humanity, however, persecution requires the additional chapeau element of discriminatory intent.

Cruel and Inhumane Treatment

36. Persecution by cruel and inhumane treatment is an intentional act or omission that causes serious mental harm, physical suffering or injury, or that constitutes a serious attack on human dignity. The harm inflicted need not be permanent and irremediable, but must have more than a short-term or temporary effect on the victim.³⁸

Terrorising the Civilian Population

37. The elements of persecution by terrorising the civilian population are as follows: acts or threats of violence; the offender wilfully made the civilian population or individual civilians not taking part in hostilities the object of those acts or threats of

³⁵ *Prosecutor v Krnojelac*, No. IT-97-25-T, *Judgement* (15 March 2002) at para 436; *Prosecutor v Vasiljevic*, No. IT-98-32-T, *Judgement* (29 November 2002) at para 249

³⁶ *Prosecutor v Krnojelac*, No. IT-97-25-T, *Judgement* (15 March 2002) at para 432; *Prosecutor v Vasiljevic*, No. IT-98-32-T, *Judgement* (29 November 2002) at para 245; *Prosecutor v Blagojevic & Jokic*, No. IT-02-60-T, *Judgement* (17 January 2005) at para. 583

³⁷ *Prosecutor v Kordic & Cerkez*, No. IT-65-14/2-A, *Judgement* (17 December 2004) at para. 106

³⁸ *Prosecutor v Blagojevic & Jokic*, No. IT-02-60-T, *Judgement* (17 January 2005) at para. 586

violence; and the acts or threats of violence were carried out with the primary purpose of spreading terror among the civilian population.³⁹

38. The offender must have intended to terrorise the civilian population. The infliction of terror need not be the only objective of the acts or threats of violence, but it must be the principal aim.⁴⁰

Destruction of Personal Property

39. Destruction of personal property can also be a crime against humanity, depending on the nature and extent of the destruction.⁴¹ The crime requires that the destruction is not justified by military necessity.⁴²

40. The acts of destruction must be of equal gravity to the crimes listed in Article 5 of the Statute.⁴³

Forcible Transfer

41. The elements of forcible transfer as an act of persecution are the same as those of forcible transfer as a crime against humanity, except that the additional chapeau element of discriminatory intent must be proved.⁴⁴

Forcible Transfer

42. General Gvero recognizes that the crime of forcible transfer forms part of the category of other inhumane acts under Article 5(i) of the Statute.⁴⁵

³⁹ *Prosecutor v Blagojevic & Jokic*, No. IT-02-60-T, *Judgement* (17 January 2005) at para. 589

⁴⁰ *Prosecutor v Blagojevic & Jokic*, No. IT-02-60-T, *Judgement* (17 January 2005) at para. 591

⁴¹ *Prosecutor v Blagojevic & Jokic*, No. IT-02-60-T, *Judgement* (17 January 2005) at para. 593-94; *Prosecutor v Kordic & Cerkez*, No. IT-65-14/2-A, *Judgement* (17 December 2004) at para. 108

⁴² *Prosecutor v Blagojevic & Jokic*, No. IT-02-60-T, *Judgement* (17 January 2005) at para. 593-94

⁴³ *Prosecutor v Kordic & Cerkez*, No. IT-65-14/2-A, *Judgement* (17 December 2004) at para. 102,671

⁴⁴ *Prosecutor v Blagojevic & Jokic*, No. IT-02-60-T, *Judgement* (17 January 2005) at para. 602

⁴⁵ *Prosecutor v Blagojevic & Jokic*, No. IT-02-60-T, *Judgement* (17 January 2005) at para. 629

43. Forcible transfer is the forced displacement of individuals within state borders from the area in which they are lawfully present without grounds permitted under international law.⁴⁶

Deportation

44. The *actus reus* of deportation is the forced displacement of persons by expulsion or other forms of coercion from the area in which they are lawfully present across a *de jure* state border or, in certain circumstances, a *de facto* border, without grounds permitted under international law.⁴⁷

45. Deportation as a crime against humanity under Article 5(d) of the Statute requires that individuals be transferred across a state border or, in certain circumstances, a *de facto* border.⁴⁸ The question whether a particular *de facto* border is sufficient for the purposes of the crime of deportation should be examined on a case by case basis in light of customary international law.⁴⁹

46. The definition of deportation requires that the displacement of persons be forced, carried out by expulsion or other forms of coercion such that the displacement is involuntary in nature, and the relevant persons had no genuine choice in their displacement.⁵⁰

47. The following constitute the elements of deportation:

- (1) the movement of individuals from a place in which they are lawfully present
- (2) that is forced
- (3) a cross-border transfer
- (4) an intent to transfer persons on a non-provisional basis
- (4) without grounds permitted under international law.⁵¹

⁴⁶ *Prosecutor v Blagojevic & Jokic*, No. IT-02-60-T, *Judgement* (17 January 2005) at para. 595

⁴⁷ *Prosecutor v Stakic*, No. IT-97-24-A, *Judgement* (22 March 2006) at para. 278

⁴⁸ *Prosecutor v Stakic*, No. IT-97-24-A, *Judgement* (22 March 2006) at para. 289

⁴⁹ *Prosecutor v Stakic*, No. IT-97-24-A, *Judgement* (22 March 2006) at para. 300

⁵⁰ *Prosecutor v Stakic*, No. IT-97-24-A, *Judgement* (22 March 2006) at para. 279

⁵¹ *Prosecutor v Blaskic*, No. IT-95-14/1-T, *Judgement* (3 March 2000) at para 234, adopted by the Prosecution in *Prosecutor v Krstic*, No. 98-33-T, *Judgement* (2 August 2001) at para. 520; *Prosecutor v Natelic & Martinovic*, No. IT-98-34-T, *Judgement* (31 March 2003) at para 514; *Prosecutor v Stakic*, No. IT-97-24-A, *Judgement* (22 March 2006) at paras 279, 289 and 319.

48. The prosecution bears the burden of proving that the deportations were both involuntary and unlawful.⁵²

49. Whilst the Defence accepts that “forcible” deportation also includes coercive measures short of physical violence, departures motivated by fear of discrimination or persecution, or by a preference to avoid areas of armed conflict, are not necessarily in violation of the law.⁵³

50. International law recognises certain grounds permitting forced removals: if an act of forced removal is carried out on such a basis, said act cannot constitute the *actus reus* of the crime of deportation.⁵⁴

51. Moreover, not all transfers are prohibited. Article 49 of the Fourth Geneva Convention provides in this regard, that:

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...

52. Deportation requires proof of an intent to transfer persons on a non-provisional basis.⁵⁵ Intent to transfer people temporarily does not satisfy the *mens rea* requirement for deportation.

Forms of Liability

53. Criminal responsibility for crimes other than genocide requires that the offence actually be consummated.⁵⁶ In order for an individual to be held responsible for a crime under Articles 2 to 4 of the Statute, he must have participated in such a way so as

see also Article 7(1)(d) of Rome Statute of International Criminal Court

⁵² *Prosecutor v Krstic*, No. 98-33-T, *Judgement* (2 August 2001) at para. 521

⁵³ *Prosecutor v Krstic*, No. 98-33-T, *Judgement* (2 August 2001) at para. 528; Commentary to Geneva Convention IV (pp 219-220) cited in *Prosecutor v Natelic & Martinovic*, No. IT-98-34-T, *Judgement* (31 March 2003) at fn 1357

⁵⁴ *Prosecutor v Stakic*, No. IT-97-24-A, *Judgement* (22 March 2006) at para. 284

⁵⁵ *Prosecutor v Stakic*, No. IT-97-24-A, *Judgement* (22 March 2006) at para. 319

⁵⁶ *Prosecutor v Rutaganda*, No. ICTR-96-3-T, *Judgement* (6 December 1999) at para. 34

to substantially contribute to the completion of the crime.⁵⁷ There must also exist a clear awareness on the part of the accused that his participation will lead to the commission of a crime.⁵⁸

54. The Prosecution has charged General Gvero with all possible forms of liability authorized by the Statute of the Tribunal. Such “shotgun” pleading was condemned in the recent Appeals Chamber decision in the *Blaskic* case⁵⁹ and in the case of *Prosecutor v Semanza* at the ICTR.⁶⁰ In the *Kupreskic* case,⁶¹ the Appeals Chamber vacated convictions, in part because “the Prosecution should have articulated the specific acts of the accused that went into the three different categories of conduct pled in the indictment.”

55. In fact, there is no evidence whatsoever from the Prosecution’s disclosure in this case that even remotely suggests that General Gvero “planned”, “instigated” or “ordered” any of the crimes alleged in the Indictment.

Individual Responsibility

56. General Gvero is charged with individual responsibility pursuant to Article 7(1) of the Statute, which provides that:

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

57. To satisfy Article 7(1), an individual’s participation must have *substantially* contributed to, or have had a *substantial* effect on, the completion of a crime.⁶²

⁵⁷ *Prosecutor v Semanza*, No. ICTR 97-20-T, *Judgement* (15 May 2003) at para. 379

⁵⁸ *Prosecutor v Kayishema & Ruzindana*, No. ICTR-95-1-A, *Judgement* (1 June 2001) at para 198.

⁵⁹ *Prosecutor v Blaskic*, No. IT-95-14-A, *Judgement* (29 July 2004) at para 215. See also *Prosecutor v Kvočka et al*, No. IT-98-30/1-A, *Judgement* (28 February 2005) at para. 29

⁶⁰ *Prosecutor v Semanza*, No. ICTR-97-20-T, *Judgement* (15 May 2003) at para. 59

⁶¹ No. IT-95-16-A, *Judgement* (23 October 2001) at para 95

⁶² *Prosecutor v. Semanza* ,No. ICTR-97-20-T, *Judgement* (15 May 2003) at para.379; *Prosecutor v Kajelijeli*, No. ICTR-98-44A-T, *Judgment and Sentence* (1 December 2003) at para. 759

58. “Planning” envisions one or more persons formulating a method of design or action, procedure or arrangement for the accomplishment of a particular crime. The level of participation in the planning must be substantial, such as actually formulating the criminal plan or endorsing a plan proposed by another.⁶³ It must be proved beyond a reasonable doubt that the accused was involved in the immediate preparation of the *concrete crimes*.⁶⁴

59. “Instigating” refers to urging, encouraging or prompting another person to commit a crime. Proof is required of a causal connection between the instigation and the commission of the crime.⁶⁵ The prosecution must demonstrate that the instigation was a factor substantially contributing to the conduct of another person committing the crime.⁶⁶

60. “Ordering” refers to a situation where an individual has a position of authority to order and thus compel another individual who is subject to said authority to commit a crime. Individual criminal responsibility for “ordering” requires the existence of a superior-subordinate relationship between the individual who gives the order and the one who executes it.⁶⁷

61. A causal link between the act of ordering and the physical perpetration of a crime must also be demonstrated.⁶⁸

62. It is not sufficient that a person giving an order know that there is a risk that a crime will be committed. A person who orders an act or omission must, at a minimum,

⁶³ *Prosecutor v Kajelijeli*, No. ICTR-98-44A-T, *Judgment and Sentence* (1 December 2003) at para. 761; *Prosecutor v Semanza*, No. ICTR 97-20-T, *Judgement* (15 May 2003) at para. 380.

⁶⁴ *Prosecutor v Brdjanin*, No. IT-99-36-T, *Judgement* (1 September 2004) at para 358

⁶⁵ *Prosecutor v Semanza*, No. ICTR 97-20-T, *Judgement* (15 May 2003) at para. 381

⁶⁶ *Prosecutor v Kordic & Cerkez*, No. IT-65-14/2-A, *Judgement* (17 December 2004) at para. 27; *Prosecutor v Limaj et al*, No. IT-03-66-T, *Judgement* (30 November 2005) at para. 514

⁶⁷ *Prosecutor v Semanza*, No. ICTR 97-20-T, *Judgement* (15 May 2003) at para 382; but see *Prosecutor v Kordic & Cerkez*, No. IT-95-14/2-T, *Judgement* (26 February 2001) at para. 388

⁶⁸ *Prosecutor v Strugar*, No. IT-01-42-T, *Judgement* (31 January 2005) at para. 332

act with the awareness of the substantial likelihood that a crime will be committed in the execution of that order.⁶⁹

63. Leading military operations does not equate with involvement in crimes. The fact that the accused participated in and was associated with the giving of orders does not mean that he had the requisite *mens rea* for the crimes.⁷⁰

Joint Criminal Enterprise

64. “Committing” in this case involves the form of liability of joint criminal enterprise.⁷¹ There are three forms of joint criminal enterprise liability: basic, systemic and extended.⁷² Only the basic and extended forms are alleged in this case.

65. The following elements constitute the basic form of joint criminal enterprise:

- (1) a plurality of persons, not necessarily organized;
- (2) a common plan, design, or purpose involving the commission of a crime proscribed in the statute;
- (3) the significant participation of the accused in the common plan or design to perpetrate a crime under the statute;
- (4) a shared intent between all the participants to further the common plan or design involving the commission of a crime⁷³;
- (5) that the accused, even if not personally effecting the crime, intended the result.⁷⁴

⁶⁹ *Prosecutor v Blaskic*, No. IT-95-14-A, *Judgement* (29 July 2004) at para 41-42; *Prosecutor v Strugar*, No. IT-01-42-T, *Judgement* (31 January 2005) at para. 333 *Prosecutor v Kordic & Cerkez*, No. IT-65-14/2-A, *Judgement* (17 December 2004) at para. 30; *Prosecutor v Limaj et al*, No. IT-03-66-T, *Judgement* (30 November 2005) at para. 515

⁷⁰ *Prosecutor v Kordic & Cerkez*, No. IT-65-14/2-A, *Judgement* (17 December 2004) at para. 957

⁷¹ *Prosecutor v Milutinovic et al*, No. IT-99-37-AR72, *Decision on Dragoljub Ojdanic's Motion Challenging Jurisdiction—Joint Criminal Enterprise* (21 May 2003) at para. 19-20

⁷² *Prosecutor v Kvocka et al*, No. IT-98-30/1-A, *Judgement* (28 February 2005) at para. 82; *Prosecutor v Stakic*, No. IT-97-24-A, *Judgement* (22 March 2006) at para. 65

⁷³ This shared intent must be accompanied by a close connection between the accused and the actual perpetrators of the crimes. Simply because the perpetrators carry out acts that advance shared goals is insufficient for joint criminal enterprise liability. *Prosecutor v Brdjanin*, No. IT-99-36-T, *Judgement* (1 September 2004) at para. 353

⁷⁴ *Prosecutor v Simic*, No. IT-95-9-T, *Judgement* (17 October 2003) at para. 156, 159; *Prosecutor v Kvocka*, No. IT- 98-30/1-T, *Judgement* (2 November 2001) at para 309

66. The third, “extended” form of joint criminal enterprise entails responsibility for crimes committed beyond the common purpose, but that are nevertheless a natural and foreseeable consequence of the common purpose. The requisite *mens rea* for the extended form is twofold. First, the accused must have the intention to participate in and contribute to the common criminal purpose. Second, in order to be held responsible for crimes that were not part of the common criminal purpose, but that were nevertheless a natural and foreseeable consequence of it, the accused must also know that such a crime might be perpetrated by a member of the group, and willingly take the risk that the crime might occur by joining or continuing to participate in the enterprise.⁷⁵

67. The crime must be shown to have been foreseeable to the accused in particular.⁷⁶

68. When the prosecution relies upon proof of the state of mind of an accused by inference, that inference must be the only reasonable inference available on the evidence. It is settled in the jurisprudence of the Tribunal that the benefit of the doubt must always go to the accused.⁷⁷

69. An issue that has arisen in this case, as well as in the jurisprudence of the Tribunal, is whether an accused can be liable for acts of a perpetrator who was not a member of the joint criminal enterprise. The Trial Chamber, by majority, deferred consideration of this issue until the end of the trial.⁷⁸ However, as the matter is likely to be definitively settled by the Appeals Chamber before the trial of this case is concluded, General Gvero does not address this issue here.⁷⁹

⁷⁵ *Prosecutor v Kvočka et al*, No. IT-98-30/1-A, *Judgement* (28 February 2005) at para. 83; *Prosecutor v Stakic*, No. IT-97-24-A, *Judgement* (22 March 2006) at para. 65

⁷⁶ *Prosecutor v Stakic*, No. IT-97-24-A, *Judgement* (22 March 2006) at para. 65

⁷⁷ *Prosecutor v Kvočka et al*, No. IT-98-30/1-A, *Judgement* (28 February 2005) at para. 237

⁷⁸ *Decision on Motions Challenging the Indictment Pursuant to Rule 72 of the Rules* (31 May 2006)

⁷⁹ *Prosecutor v Brdjanin*, No. IT-98-36-A

Aiding and Abetting

70. “Otherwise aiding and abetting” consists of assisting or encouraging another to commit a crime.⁸⁰ In order to be found guilty of aiding and abetting, one must act intentionally and with the awareness that he is influencing the principal perpetrator to commit the crime.⁸¹ The act of aiding and abetting must contribute substantially to the commission of the crime.⁸² It remains unsettled whether aiding and abetting can be committed by omission.⁸³

71. The aider and abettor must also be aware of the “essential elements” of the crime committed by the principal offender, including the state of mind of the principal offender.⁸⁴

Superior Responsibility

72. General Gvero is not charged with superior responsibility pursuant to Article 7(3) of the Statute.

Liability for Allegedly False Statements

73. The centerpiece of the Prosecution’s case against General Gvero is that he “released false statements to the media and international bodies concerning the attacks on the enclaves.”⁸⁵ Even if true, such conduct is not prohibited by any of the rules of war.

74. Additional Protocol I to the Geneva Conventions of 1949 contains the following provision in Article 37 (2):

⁸⁰ *Prosecutor v Semanza*, No. ICTR 97-20-T, *Judgement* (15 May 2003) at paras 384-85

⁸¹ *Prosecutor v Semanza*, No. ICTR 97-20-T, *Judgement* (15 May 2003) at para 388

⁸² *Prosecutor v Blaskic*, No. IT-95-14-A, *Judgement* (29 July 2004) at para 48; *Prosecutor v Ntakirutimana*, No. ICTR-96-10-T, *Judgement* (21 February 2003) at para 787

⁸³ *Prosecutor v Strugar*, No. IT-01-42-T, *Judgement* (31 January 2005) at para. 355

⁸⁴ *Prosecutor v Blagojevic & Jokic*, No. IT-02-60-T, *Judgement* (17 January 2005) at para. 727; *Prosecutor v Limaj et al*, No. IT-03-66-T, *Judgement* (30 November 2005) at para. 518

⁸⁵ *Prosecution Pre-Trial Brief* at para. 278

Ruses of war are not prohibited. Such ruses are acts which are intended to mislead an adversary or to induce him to act recklessly but which infringe no rule of international law applicable in armed conflict and which are not perfidious because they do not invite the confidence of an adversary with respect to protection under that law. The following are examples of such ruses: the use of camouflage, decoys, mock operations and **misinformation**. (emphasis added)

75. Domestic military codes of conduct further reinforce the permissibility of misinformation listed in Additional Protocol I. For example, the U.S. Army Field Manual lists “transmitting false or misleading radio or telephone messages” under section 51, Legitimate Ruses.⁸⁶ Similar provisions are contained within the guides of other branches of the U.S. armed forces, including the Navy and the Air Force.

76. In the Nuremberg trial of the Nazi leaders, one of the accused, Hans Fritzche, head of the Wireless News Service for the Third Reich, was alleged to have committed war crimes and crimes against humanity by distributing misinformation. The Military Tribunal acquitted him of all charges.⁸⁷ It reasoned that “Fritzsche had no control of the formulation of these propaganda policies. He was merely a conduit to the press of the instructions handed [to] him.”⁸⁸

77. Indeed, false information in modern wars is commonplace. For example, a legal ruse committed by the U.S. forces during the first Persian Gulf War was the gathering of forces at sea to insinuate a marine attack when the real offense was coming from land.⁸⁹ The Washington Post reported that during the recent Gulf War, “Saddam Hussein refused to order a counterattack against U.S. troops when war erupted in March because he misjudged the initial ground thrust as a ruse.”⁹⁰ The United States and NATO

⁸⁶ U.S. Army Field Manual 27-10. Chapter 2, section 51.

⁸⁷ Judgment of the Nuremberg Trials. 127.

⁸⁸ *Id.*

⁸⁹ Rohde, David. “Perfidy and Treachery.” Crimes of War Project. *available* <http://www.crimesofwar.org>. 21 June 21, 2006.

⁹⁰ Coll Steve, “Hussein Was Sure Of Own Survival: Aide Says Confusion Reigned on Eve of War,” Wash. Post, 3 Nov. 2003, A01.

have in public statements issued by spokespersons frequently overstated their successes on the battlefields of Kosovo and Iraq in order to marshal public support for their wars.

78. Thus, alleged false statements made by General Gvero, even if proven, are not acts that can form the basis of individual criminal liability for war crimes or crimes against humanity.

The Trial

Credibility of Witnesses

79. A witness' credibility can be impeached or called into question in a number of different ways, including differences between trial testimony and prior statements or testimony; contradiction with the testimony of other witnesses; and evidence of a motive or bias to testify falsely, such as the receipt of benefits from authorities. The Appeals Chamber has held that:

When assessing credibility, it is proper for the Trial Chamber to seek corroboration from other evidence, other testimonies, or comparing the witness' prior statement with his oral testimony.⁹¹

80. The Appeals Chamber and various Trial Chambers have been confronted in previous trials with witnesses whose trial testimony has differed from previous statements they had given to prosecution investigators. The Chambers have recognized that these differences may be explained by the lapse of time, the language used, the accuracy of the interpretation and the impact of trauma on the witness. However, where the inconsistencies cannot be so explained to the satisfaction of the Trial Chamber, the reliability of the witness' testimony may be questioned.⁹²

81. Inconsistencies may raise doubts in relation to the particular piece of evidence in question or, where such inconsistencies are found to be material, to the witness'

⁹¹ *Prosecutor v Bagilishema*, No. ICTR-95-1A-A, *Judgement* (2 July 2002) at para. 78

⁹² *Prosecutor v Bagilishema*, No. 95-1A-A, *Judgement* (2 July 2002) at para. 99

evidence as a whole.⁹³ As a result, previous statements are an important tool for assessing the credibility of a witness.⁹⁴

82. The underlying assumption is that a person who truly observed an event will recount the event the same way whenever that person testifies or makes a statement about the event. Whilst minor inconsistencies are a natural product of human memory, a person who fabricates testimony will often be exposed by a detailed examination of the events and comparison of the testimony with what the witness has said in the past. In short, a person who is lying has more trouble keeping his story straight than a person who is telling the truth.

83. A witness' testimony can also be evaluated by examining whether it is corroborated or contradicted by other evidence. For example, in the *Bagilishema* case⁹⁵, the Appeals Chamber held that it was reasonable to reject evidence that the accused was present at a stadium when there was scant corroboration for such evidence, and where the evidence was contradicted by the testimony of two other witnesses.⁹⁶

84. It is the duty of the prosecution to corroborate the testimony of its witnesses. The alleged difficulty in obtaining evidence cannot be used as an excuse to reduce the prosecution's burden of proving the guilt of the accused to below "beyond a reasonable doubt."⁹⁷

85. Similarly, although an accused does not have the burden of presenting any evidence or proving his innocence, evidence that contradicts the testimony of a prosecution witness is highly probative of the credibility of that witness. For example, if a witness is shown to be untruthful about his own role in the crimes, it follows that he is

⁹³ *Prosecutor v Akayesu*, No. ICTR 96-4-A, *Judgement* (1 June 2001) at para 142

⁹⁴ *Prosecutor v Akayesu*, No. ICTR 96-4-A, *Judgement* (1 June 2001) at para 169

⁹⁵ *Prosecutor v. Bagilishema*, No. ICTR-95-1A-A (2 July 2002)

⁹⁶ *Prosecutor v. Bagilishema*, No. ICTR-95-1A-A (2 July 2002), para 108

⁹⁷ *Prosecutor v Kupreskic*, No. IT-95-16-A, *Judgement* (23 October 2001) at para 190

not a sufficiently reliable witness as to the involvement or non-involvement of other individuals.⁹⁸

86. Another important factor in evaluating the credibility of a witness is evidence of the bias or motive of the witness in testifying. A witness can be found to be untruthful when his testimony between direct and cross-examination shifts in such a way that it appears that the witness is trying to incriminate the accused more decisively.⁹⁹ In addition, evidence of benefits received or hoped for by the witness is important when assessing the truthfulness of the witness' testimony.

87. A witness who has or hopes to receive benefits for himself or his family for testifying must be viewed with great caution. The authorities, and not the defence, are in a position to provide rewards for testimony, ranging from monetary payments to reduction in sentences or improvement of conditions. The incentive for witnesses to fabricate testimony to obtain these benefits is great, and the injustice that can result from a Trial Chamber relying on such false testimony is irreparable.

88. The application of these general principles to specific witnesses in this case will have to await the closing submissions after all of the witnesses have testified.

Rebuttal Evidence

89. General Gvero wishes to point out that Trial Chambers at both the ICTR and at the ICTY have been loathe to extend a trial by allowing rebuttal evidence after the defence has presented its case. Rebuttal evidence is reserved for that rare case where the defence case raises a new issue that could not have reasonably been foreseen by the prosecution.¹⁰⁰

⁹⁸ *Prosecutor v Kupreskic*, No. IT-95-16-A, *Judgement* (23 October 2001) at para 346

⁹⁹ *Prosecutor v Bagilishema*, No. ICTR-95-1A-A, *Judgement* (2 July 2002) at para 87

¹⁰⁰ *Prosecutor v Delalic et al*, No. IT-98-21-A, *Judgement* (20 February 2001) at para 273-76; *Prosecutor v Krstic*, No. IT-98-33-T, *Judgement* (4 May 2001) *Prosecutor v Kamuhanda*, No. ICTR-98-54A-T, *Judgement* (13 May 2003) at para 18; *Prosecutor v Kajelijeli*, No. ICTR-98-44A-T, *Judgement* (12 May 2003) at para 25; *Prosecutor v Ntagerura et al*, No. ICTR-99-46-T, *Judgement* (21 May 2003) at para 32-34; *Prosecutor v Limaj et al*, No. IT-03-66-T, *Decision on Prosecution's Motion to Admit Rebuttal Statements Via Rule 92 bis* (7 July 2005) at para. 6

90. Only highly probative evidence on a significant issue in response to defence evidence that could not reasonably have been foreseen, and not mere reinforcement of the prosecution's case-in-chief, will be permitted in rebuttal.¹⁰¹ Rebuttal evidence may not be called by the prosecution merely because its case has been met by contradicting evidence.¹⁰²

91. General Gvero wishes to put the Prosecution on notice that he contests every element of each offence with which he is charged. The Prosecution should not be surprised by any Defence evidence that pertains to these matters and should bring all of its evidence in its case-in-chief. General Gvero will object to any effort to fill the holes in the Prosecution's case by so-called rebuttal evidence.

Written Statement Pursuant to Rule 65 ter (F)

(1) Nature of the Defence

92. General Gvero never planned, instigated, ordered, committed or otherwise aided and abetted any of the crimes with which he is charged; nor was he was ever a member of any joint criminal enterprise.

(2) Matters in Issue

93. General Gvero declines to recognise any portions of the Prosecution's pre-trial brief and insists upon putting the Prosecution to its burden of proving all essential elements of the offenses and all facts that it has alleged.

¹⁰¹ *Prosecutor v Kordic & Cerkez*, No. IT-65-14/2-A, *Judgement* (17 December 2004) at para. 220; *Prosecutor v Limaj et al*, No. IT-03-66-T, *Decision on Prosecution's Motion to Admit Rebuttal Statements Via Rule 92 bis* (7 July 2005) at para. 6; *Prosecutor v. Oric*, No. IT-03-68-T, *Decision on the Prosecution Motion With Addendum and Urgent Addendum to Present Rebuttal Evidence Pursuant to Rule 85(A)(iii)* (9 February 2006); *Prosecutor v Natelic & Martinovic*, No. IT-98-34-A, *Judgement* (3 May 2006) at para. 258

¹⁰² *Prosecutor v Limaj et al*, No. IT-03-66-T, *Decision on Prosecution's Motion to Admit Rebuttal Statements Via Rule 92 bis* (7 July 2005) at para. 6; *Prosecutor v. Oric*, No. IT-03-68-T, *Decision on the Prosecution Motion With Addendum and Urgent Addendum to Present Rebuttal Evidence Pursuant to Rule 85(A)(iii)* (9 February 2006)

(3) Reasons Why the Matters are in Issue

94. The reason why General Gvero takes issue with the Prosecution's entire pre-trial brief is that he does not wish to facilitate his own conviction. Rather, he wishes to have a trial based on time honored principles that require the Prosecution to prove its case beyond a reasonable doubt. Any deviation from such principles are neither in his interest nor in the interest of those accused who will come after him in forums of international justice such as this Tribunal.

Respectfully submitted,



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