

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

Case No. IT-04-82-PT

BEFORE THE TRIAL CHAMBER

**Before: Judge Carmel Agius, Presiding
Judge Hans Henrik Brydenscholt
Judge Albin Eser, Pre-Trial Judge**

Registrar: Mr. Hans Holthuis

Date Filed: 4 April 2006

THE PROSECUTOR

v.

**LJUBE BOŠKOSKI
JOHAN TARČULOVSKI**

CONFIDENTIAL

PROSECUTION'S SUBMISSION OF AMENDED PRE-TRIAL BRIEF

The Office of the Prosecutor:
Dan Saxon
William Smith
Anees Ahmed

Counsel for Ljube Boškosi:
Dragan Godžo

Counsel for Johan Tarčulovski:
Antonio Apostolski

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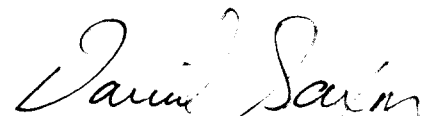
1. Pursuant to Rule 65 ter of the Rules of Procedure and Evidence ("Rules"), and the instructions of the Pre-Trial Judge,¹ the Prosecution submits its Amended Pre-Trial Brief. The amendments reflect the results of the discussion between the Pre-Trial Judge and the parties at the Rule 65 ter Conference on 23 March 23. Attached hereto as "Annex A" is a final copy of the Amended Pre-Trial Brief as well as a copy of the Pre-Trial Brief in "track changes" mode so that the Trial Chamber and the Defence may observe each and every change made to the original Pre-Trial Brief.

Relief Requested

- (i) That the Trial Chamber accept the Amended Pre-Trial Brief; and
- (ii) replace the Pre-Trial Brief, dated 7 November 2005, with the Amended Pre-Trial Brief dated 4 April 2006.

Respectfully submitted,

Word Count: 308


Dan Saxon/
Trial Attorney

Dated This Fourth Day of April 2006
The Hague
The Netherlands

¹ Rule 65 ter Conference, 23 March 2006, Trans. 182 – 183.

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ANNEX A

THE PROSECUTION'S AMENDED PRE-TRIAL BRIEF

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ANNEX A

PROSECUTION'S AMENDED PRE-TRIAL BRIEF

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Counsel for the Accused

**Dragan Godžo for Ljube Boškosi
Antonio Apostolski for Johan Tarčulovski**

I. INTRODUCTION

1. This case concerns war crimes committed during and following an unlawful attack on the village of Ljuboten in the Former Yugoslav Republic of Macedonia (hereinafter "Macedonia"). The unlawful attack occurred between Friday, 10 August 2001 and up to and including Sunday, 12 August 2001. While units of both the Macedonian Police and the Macedonian Army were involved in the unlawful attack, the Second Amended Indictment (hereinafter the "Indictment") charges only members of the Macedonian Police with individual criminal responsibility for the crimes alleged. All of the charged crimes in the proposed Second Amended Indictment dated 4 April 2006¹ (hereinafter "the Indictment") were committed between 12 and 21 August 2001, in the midst of the armed conflict between the ethnic-Albanian National Liberation Army (hereinafter "NLA") and the Macedonian Security Forces (army and police units) of the government of Macedonia (hereinafter "MSF").

2. The first Accused in this case is **Ljube BOŠKOSKI**, the Minister of the Interior at the time of the unlawful attack on Ljuboten. He was directly responsible for the functioning of the police forces within Macedonia. The second Accused is **Johan TARČULOVSKI**, a police officer in the Ministry of the Interior (hereinafter "MOI") at the time of the unlawful attack. He led regular and reserve police officers in the attack and directly participated in the crimes charged in the Indictment. The purpose of this case is to establish the criminal responsibility of both Accused for these crimes.

3. On 12 August 2001, **Johan TARČULOVSKI** led a police unit which, during their unlawful attack on Ljuboten, murdered six civilian ethnic Albanian residents from Ljuboten as well as substantially contributing to the murder of a seventh resident. As part of this unlawful attack, this police unit also wantonly destroyed the homes and properties of residents in the village, making at least 14 of them uninhabitable. During and following this unlawful attack, **Johan TARČULOVSKI's** unit and other regular and reserve police officers together subjected about 100 Ljuboten civilian residents to cruel treatment in Ljuboten and its environs, and in police stations and other locations in and outside Skopje, the capital of Macedonia.

4. At trial, the Prosecution will submit evidence that will establish beyond a reasonable doubt that these two Accused are individually criminally responsible for the crimes of Murder,

¹ The amendments to this Brief are based upon the proposed Second Amended Indictment dated 4 April 2006 and the directions provided by the Pre-Trial Judge in the Rule 65 ter Conference held on 23 March 2006.

Wanton Destruction and Cruel Treatment as charged in the Indictment. Section II of this brief summarizes the evidence that will substantiate these charges and Section III addresses the applicable law.

5. Before filing this Brief, the Prosecution had an obligation to seek agreement with the Defence on individual facts or points of law pursuant to Rule 65ter (E) (i) and (H) of the Rules of Procedure and Evidence of the International Tribunal (hereinafter, "the Rules"). Consequently, on 19 August 2005, the Prosecution sent letters to the respective counsel of the Accused (hereinafter, collectively referred to as "Defence") identifying 276 factual and legal assertions, asking them to state their positions. The Defence was reminded of this request by the Prosecution during the Rule 65ter Conference with the Senior Legal Officer of the Trial Chamber on 29 September 2005. Thereafter, on 2 November 2005, the Prosecution sent to the Defence its amended agreed facts proposal in terms of the Amended Indictment dated 2 November 2005. To date, the Defence has not responded substantially to the Prosecution's requests. A letter was received by the Prosecution on 27 October 2005 from the counsel of **Ljube BOŠKOSKI** indicating that the Defence of that Accused disputes all facts relating to the crime base and the alleged criminal responsibility of that Accused.² On 12 December 2005, the Prosecution received a letter from the Counsel for the Accused Boškoski indicating that the Defence of that Accused would agree to the admissibility, but not the veracity, of exhibits 10 – 21, 61 – 77 and 82 - 102 on the Prosecution's Rule 65 ter Exhibit List. Accordingly, the Prosecution files this Brief with the assumption that the Defence does not agree with any of the substantive legal or factual assertions in the Indictment.

II. THE FACTS

A. Background

6. The crimes charged in the Indictment occurred in the context of an armed conflict waged in 2001 between the ethnic Albanian National Liberation Army (hereinafter, "the NLA") and the MSF on the territory of Macedonia. The following paragraphs provide an overview of this conflict, the nature and composition of the parties to the conflict and the

² In that letter, which is being filed along with the other Rule 65ter filings today, the Defence for **Ljube BOŠKOSKI** has agreed to the Prosecution's assertions relating to the identity of that Accused and some aspects of the geography of Macedonia.

events that occurred in and around the village of Ljuboten between 10 and 12 August 2001 and the days thereafter, which led to the commission of the crimes charged.

7. Macedonia was constituted as a Yugoslav Republic in 1944 and remained one of the six constituent republics of the Socialist Federal Republic of Yugoslavia (hereinafter, "the SFRY") together with Bosnia-Herzegovina, Croatia, Montenegro, Serbia and Slovenia until the SFRY's dissolution in 1991-1992. On 17 September 1991, the Macedonian Parliament adopted a Declaration of Independence. On 8 April 1993, the country was admitted to the United Nations.

8. Macedonia is a land-locked country bordered by Albania, Bulgaria, Greece and Serbia and Montenegro. According to the 1994 population census, ethnic Macedonians constituted 66.6% and ethnic Albanians 22.7% of the country's population. The areas with a considerable distribution of ethnic Albanians are in the north and northwest of the country, bordering on Serbia and Montenegro (including Kosovo) and Albania respectively. At the time of the conflict in 2001, Macedonia was divided into 123 municipalities. Čair municipality encompassed parts of Skopje as well as a number of nearby villages, including the village of Ljuboten. According to the 1994 population census, the municipality of Čair had a population of 63,375 persons, of whom approximately 57% were Macedonians, 29% were Albanians and 14% were "other."

9. Relations between ethnic Albanians and Macedonians have dominated the politico-economic discourse of the Macedonian state during most of its existence as an independent entity. Ethnic Albanian dissatisfaction with their group status, language and educational rights as well as alleged discriminatory practices, contributed to political tensions between the ethnic Albanian and ethnic Macedonian communities. Ethnic Albanians boycotted the Referendum on Macedonian Independence in 1991 and held their own Referendum on Territorial Autonomy in January 1992, in which approximately 99.9% of them voted in favour of autonomy. This Referendum was subsequently declared illegal by the Macedonian government.

10. The war in Kosovo and the subsequent influx of ethnic Albanian refugees into Macedonia in 1999 exacerbated the simmering political tensions between the country's ethnic Macedonian and ethnic Albanian communities. In 2001, these tensions culminated in an internal ethnic Albanian-ethnic Macedonian armed conflict within the Macedonian borders.

11. The armed conflict began in January 2001 and continued until at least late September 2001. The two major warring parties in the conflict were the NLA and the MSF. On 13 August 2001, the Ohrid Peace Agreement was signed between the two parties. However, clashes continued until at least late September of that year. At least 60 members of the MSF were killed and about 300 were wounded in the conflict. Additionally, approximately 67 NLA members were killed. During this period, an estimated 170,000 persons fled their homes and approximately 6,500 houses were damaged. As of August 2002, approximately 7,400 persons remained displaced within the country, with some 3,000 refugees residing in Kosovo.
12. The NLA waged the conflict in the form of guerrilla warfare which included a number of hit and run operations. It attacked Macedonian police stations and police patrols, planted mines and engaged units of the Macedonian Army. As the conflict spread from the areas bordering on Kosovo towards Tetovo and Skopje, the NLA established control over a number of villages. Almost daily skirmishes between the NLA and the MSF culminated in full-scale battles in the area of Tetovo in March and in the Skopje suburb of Aračinovo in June 2001. In the course of the conflict, the MSF used tanks, artillery, helicopter gun-ships and combat aircraft. The attack on Ljuboten was the last joint operation of the MSF before the signing of the Ohrid Peace Agreement on 13 August 2001. Documentary and oral evidence will be presented by the Prosecution at trial to establish that this armed conflict was protracted and spread over a substantial part of the Macedonian territory.
13. Ljuboten was a predominately ethnic Albanian village about 12 kilometres by air from the closest section of the Kosovo-Macedonia border and 10 kilometres by air from the centre of Skopje. The village is situated in the Čair municipality and sits at the southwestern foot of the Skopska Crna Gora mountain ridge in the northern part of Macedonia. It is surrounded by the predominantly ethnic Macedonian villages of Raštak, Radišani and Ljubanci, the latter's centre being about 1.5 kilometres from Ljuboten. According to the 1994 population census, Ljuboten had a population of 2,010 persons of whom 93% were ethnic Albanians.
14. In August 2001, Macedonian Army positions were located in the vicinity of Ljuboten. The village was in the operational area of the 1st Guardist Brigade of the Macedonian Army. Units of the 1st Guardist Brigade held the front line at Ečmenište, Kula, Vukova Glava, St. Nikita Monastery, Bel Kamen and Čaršija. The positions of the 3rd Battalion of the 1st Guardist Brigade were very close to Ljuboten. The headquarters of the 3rd Battalion was

located in Ljubanci, less than 1 kilometre away from Ljuboten. The total strength of the 3rd Battalion was about 500 men.

15. The 1st Company of the 3rd Battalion held positions in the village of Brodec, about 6 kilometers from Ljuboten. The 2nd Company of the 3rd Battalion held positions on the mountain ridge north of Ljuboten, directly above the village. The nearest Macedonian Army position, "Smok," manned by the 2nd Company of the 3rd Battalion, was about 300 meters from Ljuboten. The 2nd Company also had two 82-mm mortars and two B-1 76-mm artillery pieces. The 3rd Company of the Battalion held positions in the village of Raštak, about 5 kilometers from Ljuboten by road. The Battalion's heavy mortar battery of six 120-mm mortars was located about 2 kilometers above Ljuboten. During 10-13 August 2001, the period of the unlawful attack alleged in the Indictment, while there were NLA sympathizers present in Ljuboten, there was no armed NLA presence in the village of Ljuboten.

16. In August 2001, the nearest positions of the NLA to Ljuboten were those of its 114th Brigade. These positions were based in the area of Matejče Monastery, on the other side of the Skopska Crna Gora ridge, about 8 kilometers by air northeast of Ljuboten, and were manned by the 2nd Battalion of the NLA's 114th Brigade. The strength of the 2nd Battalion was between 400 - 500 men. The 2nd Battalion had several 60-mm and 82-mm mortars.

17. At about 8 a.m. on Friday, 10 August 2001, about 5 kilometers north of Ljuboten, in the Skopska Crna Gora mountain ridge area, a Macedonian military vehicle belonging to the 3rd Battalion of the 1st Guardist Brigade of the Macedonian Army was destroyed by a remote-controlled explosive device in an ambush at a place called Ljubotenski Bačila, about 200 meters from the positions of the Army's 3rd Battalion. The vehicle was carrying an outgoing shift of soldiers of the 2nd Company to Ljubanci. Eight Macedonian soldiers were killed in the incident, two of whom were residents of Ljubanci.

18. Immediately following the explosion, members of the NLA opened fire on the Macedonian military vehicle, causing the Macedonian Army's 2nd Company to respond. An exchange of fire between the two groups lasted for several hours. Mi-24 helicopters of the Macedonian Air Force also attacked the NLA elements in the area of Ljubotenski Bačila that morning.

19. The same day, following the exchange of fire between the NLA and the Macedonian 3rd Battalion, the latter opened small arms fire on the village of Ljuboten and launched at least

two mortar/cannon rounds into Ljuboten, presumably in retaliation for the death of the 8 soldiers that morning. These rounds killed two civilians, one a 5-year-old child. At this time, there were no legitimate military targets in the village other than possibly a group of 3 armed persons. No hostile or defensive acts were committed by these men or any residents of Ljuboten. Later that day, the police unit commanded by **Johan TARČULOVSKI** arrived in the neighboring village of Ljubanci. During the night of 10-11 August 2001, this unit made a reconnaissance of Ljuboten.

20. The following day, 11 August 2001, between 8 and 10 a.m., the Macedonian Army's 3rd Battalion opened small arms fire on Ljuboten. Between 5.30 and 6 p.m., members of **Johan TARČULOVSKI's** police unit fired several 64-mm rockets into the village. At this time there were no legitimate military targets in the village nor were any hostile or defensive acts committed by residents of Ljuboten.

21. On Sunday, 12 August 2001, as part of the ongoing unlawful attack by Macedonian police and military forces, Ljuboten came under an intense, combined attack by the police unit commanded by **Johan TARČULOVSKI** and from the Macedonian Army. At approximately 8 a.m., **Johan TARČULOVSKI's** police unit, comprised of about 100 men, entered the northwestern end of Ljuboten from Ljubanci. The unit's ground attack proceeded along the main road of the village. The attack focused mainly on the northern and eastern parts of the village, as the unit moved down Fifth Street (Ulica Pet), before turning east towards Raštak. The police unit burned houses and left a trail of destruction as it progressed through the village.

22. The 3rd Battalion of the Macedonian Army's 1st Guardist Brigade provided fire support for the police ground attack and fired about 40-60 120-mm, 82-mm and 76-mm rounds into and around the village between 6 and 10 a.m. The shelling was calculated to dissolve any possible resistance to **Johan TARČULOVSKI's** advancing police unit.

23. During the course of the combined police and army attack on Ljuboten on Sunday, 12 August 2001, 6 Albanian civilian residents were shot dead by **Johan TARČULOVSKI's** police unit and one Albanian civilian resident was killed by the Macedonian Army's shelling. During and after the killings, **Johan TARČULOVSKI's** police unit systematically set fire to, shot at and damaged with hand grenades and other explosive devices at least 14 houses in the village. A total of 21 houses were destroyed or damaged by torching, shooting and/or shelling

during the attack. Residents were detained and severely beaten by **Johan TARČULOVSKI's** police unit, ten of whom were taken to Mirkovci Police Station. One of these men died due to the cruel treatment he received. Most of the residents were forced to flee the village to avoid death and injury at the hands of **Johan TARČULOVSKI's** police unit.

24. After the ground attack, between the early afternoon and 6 p.m. on 12 August 2001, some of the fleeing residents were stopped and harassed at Buzalak Checkpoint, where police arrested about 90 of the male civilian residents. At this checkpoint many of these men were seriously beaten. The police then transported these male civilians to various detention centres in and around Skopje where they were held and cruelly treated for up to 48 hours. These residents were cruelly treated within Ljuboten, at the two police checkpoints nearby and outside the village, five police stations in Čair municipality and Skopje as well as at a Skopje Court and Hospital. At all of these locations, the beatings were committed by police officers, reservists or civilians who were permitted and/or encouraged by the police to carry out the beatings. The detention and beatings of these men were organised, systematic and pervasive.

25. During the police ground attack on Sunday, 12 August 2001, the presence of armed Albanian combatants in Ljuboten was assessed to be limited to a maximum of 10-15 persons armed with automatic weapons and at least one machine-gun. These individuals acted both alone and in small groups to oppose the advance of **Johan TARČULOVSKI's** police unit.

26. In addition, on 12 August 2001, a contingent of about 60 NLA combatants arrived outside Ljuboten from Nikuštak, a village about 12 kilometres from Ljuboten. The NLA group attempted to outflank the 2nd Company of the Macedonian Army's 3rd Battalion and sought to enter Ljuboten. However, this group was spotted by the Army in the area of Bel Kamen and Raštanski Potok, about 4 kilometres from Ljuboten and the 2nd Company of the 3rd Battalion opened fire on them. It was reported that the NLA suffered casualties.

27. Between 10 and 11 a.m. on 12 August 2001, the NLA opened fire with 82-mm mortars from the area of Bel Kamen Hill located approximately 4 kilometres from Ljuboten, at the positions of the 2nd Company of the 3rd Battalion, in an attempt to cover the withdrawal of the NLA unit. All weapon exchanges on 12 August 2001 around the village of Ljuboten ceased between 4 and 5 p.m.

B. Count 1 - Murder

28. The first person who was killed by the police unit commanded by **Johan TARČULOVSKI** on Sunday, 12 August 2001 was Rami JUSUFI, a 33 year old ethnic Albanian male, who lived in the northern part of Ljuboten. At approximately 8.20 a.m., members of this police unit forcibly entered his yard. Rami JUSUFI was asleep in his bed when his mother called him to the front door. He got up and went to the door, unarmed and in his pyjamas. On arrival he was immediately shot at close range in his stomach through the open door by at least one of the police officers in the yard. Rami JUSUFI then fell in agony and died two hours later.

29. Following the death of Rami JUSUFI, this police unit moved to the upper eastern part of Ljuboten where they arrived at the houses of Adem AMETOVSKI and Zija ADEMI at about 11 a.m. on 12 August 2001. Men, women and children, all unarmed, sought cover in the two basements from the police ground attack and the shelling by the Army. On arrival, the police ordered the men out from the basements and detained 13 of them near the main gate of Adem AMETOVSKI's house. These men were forced by the police to lie on the ground where they were beaten, repeatedly and severely.

30. During these beatings, Sulejman BAJRAMI, a 23 year-old ethnic Albanian, attempted to escape. He was immediately shot and killed by at least one of the police officers. The remaining 12 men were then forced to walk under armed escort to the adjoining village of Ljubanci. Two men from the group, apparently due to their elderly age, were ordered to leave. As they walked away, members of this police unit fired at them, killing Muharem RAMADANI, a 65 year-old ethnic Albanian resident.

31. Atulla QAILI, a 35 year-old ethnic Albanian, was one of the remaining ten men who were forced to walk to Ljubanci on 12 August 2001. En route, he and the other men were continually beaten until they arrived at Braca's House, situated at the edge of Ljuboten and Ljubanci, where a Macedonian police checkpoint was located. On arrival, Atulla QAILI was in a seriously injured state. However, he was again kicked repeatedly at the checkpoint before being thrown into the back of an open police truck with the other men and taken to Mirkovci Police Station, where the beatings continued. The cumulative effect of all these beatings left Atulla QAILI unconscious, unable to speak, his body bruised, battered and bloody. He was

then transported to Skopje City Hospital, where he died on 13 August 2001 as a result of his injuries.

32. Following the murders of Sulejman BAJRAMI and Muharem RAMADANI and whilst the 10 men were being marched to and detained at Braca's House on 12 August 2001, the police unit under the command of **Johan TARČULOVSKI** moved further east across the village to the house of Qani JASHARI, where 5 unarmed men had taken refuge from the advancing police unit. When the police arrived they called out for the owner of the house and then proceeded to open fire on it before using petrol to set both the house and barn on fire.

33. The men inside the house jumped out of a back window and hid a short distance away under a tobacco-drying stall. On seeing these men, the police opened fire causing the men to flee through an open field towards the mountains. As they ran, 3 of them, Xhelal BAJRAMI, Bajram JASHARI and Kadri JASHARI, all ethnic Albanians, were shot and killed within 150 metres of the house. The other 2 men escaped, one injured by a bullet and the other unharmed.

34. The Prosecution will tender autopsy reports that will confirm the witnesses' accounts as to the manner and cause of the seven deaths.

C. Count 2 – Wanton Destruction

35. On the way through Ljuboten on Sunday, 12 August 2001, between, during and after the killings of the civilian residents, the police unit led by **Johan TARČULOVSKI** intentionally set fire to and damaged at least 14 houses using hand grenades and small arms. This intentional attack on the property of the civilian residents left the houses either seriously damaged or, in most cases, completely destroyed.

36. In the northern part of the village on Sunday, 12 August 2001, police set fire to a line of neighbouring houses with petrol, leaving 6 of them heavily damaged. In the upper eastern part of the village, they further set alight 5 houses with petrol while they opened fire at others with small arms. In the lower eastern part of the village, the police ignited at least 3 houses with petrol, after which they opened fire on the burning houses with small arms.

37. The method and extent of the damage will be confirmed at trial by an independent assessment conducted by an international housing reconstruction group which recorded its findings shortly after the attack in respect of the rehabilitation of the destroyed and damaged properties in the village. This assessment will confirm that there were approximately 78

houses damaged in Ljuboten as a result of the attack on the village. None of these houses were occupied by combatants nor were they used as a point of resistance in the village by its residents. The evidence presented by the Prosecution at trial will show that the destruction was completely wanton, intended and committed without any military justification.

D. Count 3 - Cruel Treatment

38. The malicious and criminal intent towards the ethnic Albanian residents in Ljuboten by **Johan TARČULOVSKI** and his police unit as well as other police, both regular and reserve, is evidenced by the detention and cruel treatment of approximately 100 men during and following the attack.

39. During the attack between 11 a.m. and noon on 12 August 2001, the Ljuboten residents ordered out of Adem AMETOVSKI's and Zija ADEMI's houses by **Johan TARČULOVSKI** and members of his police unit were forced to lie face down on the ground. The police then punched, kicked, jumped on and hit these men with rifle butts and wooden sticks. One police officer shot the father of Sulejman BAJRAMI in the hand; another carved a large cross with a knife into the back of another detainee. These men sustained injuries to their heads, ribs, shoulders, and hands. Sulejman BAJRAMI was kicked in the head before being shot and killed. Following this, the remaining men detained by this police unit were further beaten as they were marched to the police checkpoint at Braca's House. At Braca's House, the beatings continued for about half an hour. The men were kicked, jumped on and hit with pieces of burning wood. This mistreatment resulted in injuries to their heads, ribs, backs, shoulders, hands and noses. The men were then thrown forcibly onto a police truck and taken to Mirkovci Police Station where they were detained.

40. Between 12-14 August 2001, regular and reserve police officers in and outside of Mirkovci Police Station physically and mentally abused the men from Ljuboten. On arrival at the station, some of the men were thrown off the truck while still unconscious from earlier beatings. The detainees were punched, kicked and hit with various implements such as rifle butts, shovels and truncheons. The beatings were executed with such force that some detainees were rendered immobile due to the pain. They suffered injuries such as broken teeth, open wounds and bruising.

41. Aside from these men who were cruelly treated by **Johan TARČULOVSKI** and members of his police unit and regular and reserve police from Mirkovci Police Station, up to

90 other men from Ljuboten were cruelly treated at Buzalak Checkpoint and other locations both in and outside Skopje. Between the early afternoon and 6 p.m. on 12 August 2001, these men were arrested at gunpoint as they fled the village with their families. They were beaten by regular and reserve police as well as some civilians who acted at the encouragement of the police. They were kicked, punched and stepped on whilst they were forced to lie face down on the ground. They were hit repeatedly with rifle butts, truncheons, tree branches, wooden sticks and other objects. One man was shot in the head as he ran away from the Checkpoint in fear. Another was beaten while carrying a 2-month-old baby. A mentally disabled man was beaten. The injuries inflicted included lacerations to the head, broken ribs, bloody noses and ears, heavy bruising, and swollen eyes. Permanent disabilities resulted from some of the injuries received by the detainees from the beatings such as a damaged shoulder, recurring headaches and permanent back pains.

42. During the afternoon of 12 August 2001, at least 76 of the detainees from Buzalak Checkpoint arrived at Čair Police Station in separate groups and were detained. At least 30 of them were beaten by regular and reserve police officers in and outside of the station during their detention and upon their arrival and departure. They were hit with rifle butts, fists, boots, wooden sticks, baseball bats and metal pipes on the neck, back and head. One detainee's face was smashed against the floor. Another detainee received a broken rib. Others fainted from the beatings. The men were kept in cramped cells for 2-3 hours with 15-50 other men. These cells had no fresh air, water or proper sanitation facilities.

43. At Kisela Voda Police Station, during 12-14 August 2001, at least 32 Ljuboten villagers were detained. Of these, at least 27 were beaten by regular and reserve police officers in front of and inside the station. The men were punched, kicked *etc* in the face and neck and hit over their entire bodies. They were stepped on and hit with rifle butts, truncheons, sticks and cables. One detainee had a gun barrel placed in his mouth while another had his hand cut with scissors. The beatings were accompanied by verbal threats and curses. At Bit Pazar Police Station, from 12-14 August 2001, at least a quarter of the 24 detainees were beaten in the station yard by regular or reserve police. Detainees were again punched and hit with rifle butts. Conditions of detention were extremely poor. At Karpoš Police Station, from 12-14 August 2001, at least 53 detainees were brought in different groups and detained. At least 19 of these men were beaten by regular, reserve and special police.

They were punched, kicked, and hit with rifles and baseball bats by the police both en route to and inside the station.

44. At Skopje Court II, on 14 August 2001, in the late afternoon and evening, 22 detainees were brought for trial, where at least 19 of them were beaten. The beatings occurred in the hallways and corridors of the court. The detainees were beaten by regular and reserve police, prison guards and some civilians with the permission and encouragement of the police and guards. They were beaten with truncheons and rifle butts and were stepped on and burned with cigarettes.

45. Between 12-21 August 2001, 14 badly injured detainees were brought from various locations to Skopje City Hospital. At least 11 of them were beaten in front of the hospital or in their rooms by regular and reserve police and hospital personnel. Victims were punched, jumped on and hit with truncheons.

46. The detention and beatings of these men were organised, systematic and pervasive. Most of the detainees were beaten repetitively at successive locations. For example, over this period, the same seven men were beaten at five different locations, the same twenty-five men were beaten at four different locations, the same forty-four men were beaten at three different locations and the same twelve men were beaten at two locations.

E. Responsibility of the Accused

47. The evidence submitted at trial will establish beyond reasonable doubt that **Johan TARČULOVSKI** and **Ljube BOŠKOSKI** are responsible for the crimes described in the Indictment. Below is a summary of the acts and omissions upon which each of the Accused's criminal liability is based.

Johan TARČULOVSKI

48. At the time of the attack on Ljuboten, **Johan TARČULOVSKI** was a 27 year old police officer employed by the MOI as a bodyguard in the President's Security Unit. At the time he was also a member of Internal Macedonian Revolutionary Organization – Democratic Party for Macedonian National Unity ("VMRO-DPMNE") the same party of which **Ljube BOŠKOSKI** was a member. **Johan TARČULOVSKI** served in the Macedonian Army in 1993 at the age of 19 for one year. Six years later he joined the MOI as a police officer,

...serving as an Escort Inspector for public officials and later served in the personal security of Prime Minister Ljubčo GEORGIEVSKI.

49. About two weeks before the attack on Ljuboten, in July 2001, **Ljube BOŠKOSKI** ordered **Johan TARČULOVSKI** to select a group of individuals who would be under **Johan TARČULOVSKI**'s leadership to participate in a police security operation. Consequently, **Johan TARČULOVSKI** personally selected individuals from the regular and reservist police force to participate in these operations. **Johan TARČULOVSKI** organised the arming of these individuals with semi-automatic weapons and pistols. These individuals included members of KOMETA, a private security agency. The arming of these men was approved by **Ljube BOŠKOSKI** and undertaken at PSOLO Police Station.

50. On 10 August 2001, with tensions extremely high following the killing of the 8 Macedonian soldiers by an explosive device near Ljuboten, **Ljube BOŠKOSKI** (according to a subsequent statement by **Johan TARČULOVSKI**) ordered **Johan TARČULOVSKI** to conduct a search of Ljuboten village for Xhavid ASANI, whom **Ljube BOŠKOSKI** believed to have been responsible for the killing of the 8 soldiers and who he believed was hiding in Ljuboten. **Johan TARČULOVSKI** was selected because he knew the area of Ljuboten well as he had a family home in the adjoining village of Ljubanci. **Ljube BOŠKOSKI** also ordered **Johan TARČULOVSKI** to collect semi-automatic rifles and pistols at COKOB for the operation.

51. As a result of this order, **Johan TARČULOVSKI** selected around 100 men from the active and reserve police as well as employees from the security company KOMETA. **Johan TARČULOVSKI** then commenced planning the logistics for the unlawful attack on the village of Ljuboten during the afternoon of 10 August 2001. He arrived at Čair Police Station with 50 men dressed in police camouflage uniforms and armed with weapons, including grenades and "Zoljas," used to launch rocket propelled grenades. Here, **Johan TARČULOVSKI** requested these 50 men to be transported to the school building in his native village of Ljubanci, home to two of the soldiers killed by the explosive device the previous day. In addition, **Johan TARČULOVSKI** informed the commander of the Čair Police Station that the Minister of Interior, **Ljube BOŠKOSKI**, had ordered *an attack* - rather than a search - on the village of Ljuboten.

52. Later that evening, a MOI truck, driven by police, arrived at **Johan TARČULOVSKI's** family home to deliver ammunition, bombs and grenade launchers. Then at approximately 9.30 p.m., **Johan TARČULOVSKI** distributed weapons to 60-70 persons who had come to his family home in Ljubanci to receive arms in readiness for the unlawful attack. Some of these weapons were used to attack Ljuboten during the night of 10-11 August 2001.

53. On Saturday, 11 August 2001, between 5.30 and 6 p.m., **Johan TARČULOVSKI's** police unit used 64-mm grenade launchers to set houses in Ljuboten on fire. The same day, **Johan TARČULOVSKI** attempted to further his efforts by twice urging an Army Major to support him with 120-mm mortar fire. That same evening, **Johan TARČULOVSKI** organised a planning meeting with high ranking government, military and police personnel responsible for the police and army security for the area. **Johan TARČULOVSKI** advised these officials that he would be leading the unlawful attack against Ljuboten which would commence on 12 August 2001 at 4.30 a.m. regardless of the support from the Macedonian Army. At this meeting, **Johan TARČULOVSKI** demanded more weapons and logistical support and requested that the checkpoints around Ljuboten be reinforced because of the attack being planned.

54. On the morning of Sunday, 12 August 2001, **Johan TARČULOVSKI** led the unlawful ground attack on Ljuboten. At this time, many of the residents in Ljuboten, including men, women and children, were hiding in the basements of their houses, taking refuge from the previous attacks on the village. The unlawful ground attack began with a 120-mm round fired between 5.30 and 6.30 a.m. at the request of **Johan TARČULOVSKI**. There were a total of 16 rounds fired, 13 of which were fired directly into Ljuboten.

55. Following this shelling, **Johan TARČULOVSKI** contacted **Ljube BOŠKOSKI** to ask his approval to use a MOI Hermelin armoured vehicle to assist in the attack by providing cover to his unit. **Ljube BOŠKOSKI** ordered that this request be implemented, which it duly was. During the unlawful ground attack, **Johan TARČULOVSKI** and his police unit deliberately killed unarmed civilians, wantonly burned and destroyed many homes without justification and cruelly treated a group of residents, 3 of whom were killed. By late afternoon on Sunday, 12 August 2001, this retaliatory unlawful attack of the police unit led by

Johan TARČULOVSKI left the villagers of Ljuboten grieving for their murdered, beaten, homeless and imprisoned relatives and neighbours.

56. The Prosecution does not allege that **Johan TARČULOVSKI** physically committed the criminal acts charged. However, the evidence will prove that his acts and intentions were directed to furthering the criminal nature of the attack. The actions of **Johan TARČULOVSKI** and the police unit he led in the village clearly had a criminal design, as demonstrated by the manner, method and the results of their attack. The illegal objective of this joint criminal enterprise (hereinafter, "JCE") was to direct an unlawful attack on civilians and civilian objects in the village of Ljuboten, which was not justified by military necessity, a crime under Article 3 of the Statute of the Tribunal (hereinafter, "the Statute"). The crimes charged in the Indictment were within the objective of the joint criminal enterprise.

57. From the first moment when the police unit entered the village on Sunday, 12 August 2001, and Rami JUSUFI, unarmed, was summarily executed, the illegal nature of the attack was obvious. The criminal attack continued with the further executions of two unarmed residents, Sulejman BAJRAMI and Muharem RAMADANI. The final execution of Ljuboten residents, Xhelal BAJRAMI, Bajram JASHARI and Kadri JASHARI on 12 August 2001, occurred when the police unit shot them dead as they fled through the fields after running from a burning house set alight by **Johan TARČULOVSKI's** police unit, further confirming the criminal nature of the attack.

58. The destruction of houses along the path followed by the police provides additional evidence of the criminal intent that members of the unit possessed as they moved through the village. Indicative of the criminal nature of the joint enterprise was the police unit's cruel treatment of the detained men from Adem AMETOVSKI's house, which led to the death of one of the detainees, Atulla QAILI.

59. This unlawful ground attack on civilians by the police was formulated at or after the time that **Ljube BOŠKOSKI** ordered **Johan TARČULOVSKI** and the police unit to go to Ljuboten to search for Xhavid ASANI. From the distinctively criminal nature of the entire operation, the plan would have had to be in place before the police entered the village, or, at the very least, developed extremely rapidly after the first crimes were committed.

60. **Johan TARČULOVSKI** clearly participated in this JCE as a co-perpetrator. He was the central figure responsible for the attack, drawing on resources, personnel and logistics as he required them. He was the leader of, and present with, the police unit as it moved and committed crimes throughout the village. His acts determined when and how the village would be attacked. In particular, between Friday, 10 August 2001 up to and including Sunday, 12 August 2001, he participated in the JCE in the following ways :

- (a) He personally selected individuals to form his regular and reserve police unit that took part in the attack.
- (b) He co-ordinated the arming of the members of his regular and reserve police unit that took part in the attack.
- (c) With the assistance of high level government and police officials, he persuaded the most senior police and army commanders responsible for security in the Ljuboten area to support the attack on Ljuboten.
- (d) He sought and gained logistical, material and fire support for the attack on Ljuboten from the most senior police and army commanders based in the area of Ljuboten.
- (e) He prompted the regular and reserve police in his unit to participate in the attack on Ljuboten.
- (f) He decided on the weaponry, manpower, logistical and other material support that would be used in the attack.
- (g) He determined the timing, method, manner, goals and targets of the attack.
- (h) He ordered, by using his position of authority, the regular and reserve police in his unit to attack Ljuboten.
- (i) He was present and provided leadership and personal guidance in the ground attack and was present at the scenes of individual crimes charged in this Indictment.

61. **Johan TARČULOVSKI** and other members of the JCE, including but not limited to, Zoran JOVANOVSKI, a.k.a. "Bučuk," owner of the KOMETA Security Company, two brothers: Aleksander and Vlado JANEVSKI, Petre STOJANOVSKI, Ljubčo BLIZNAKOVSKI, and other unidentified employees of the KOMETA Security Company who formed part of the police unit lead by **Johan TARČULOVSKI**, acted on the basis of the

common criminal purpose to unlawfully attack civilians within the village, with shared intent. Alternatively, the crimes enumerated in Counts 1 to 3 of the Indictment were the natural and foreseeable consequences of the execution of the objective of the JCE, to direct an unlawful attack on civilians and civilian objects in the village of Ljuboten, and **Johan TARČULOVSKI** was aware that such crimes were a possible consequence of the execution of the JCE, and with that awareness decided to participate in that enterprise.

62. In addition to his participation in the JCE as described above, **Johan TARČULOVSKI** is also individually criminally responsible for ordering, planning, instigating and aiding and abetting the crimes charged in the Indictment. By virtue of the authority vested in **Johan TARČULOVSKI** by **Ljube BOŠKOSKI**, and by virtue of the central role **Johan TARČULOVSKI** played in the planning, preparations and execution of the attack on the village, **Johan TARČULOVSKI** had the authority to issue orders to carry out the attack. The circumstantial evidence relating to the nature, method, timing and results of the attack as described above prove that **Johan TARČULOVSKI** ordered the crimes in the attack or at least **Johan TARČULOVSKI** acted with the awareness of the substantial likelihood that the crimes would be committed in the execution of his orders.

63. The facts described above also demonstrate that **Johan TARČULOVSKI** planned the crimes charged in the Indictment. **Johan TARČULOVSKI**'s selection and arming of personnel, his receipt of logistical support and his communications with others who participated in or supported the attack before and after its commencement, proves the existence of a plan to execute an unlawful attack on the village of Ljuboten. The circumstantial evidence relating to the nature, method, timing and results of the attack as described above demonstrate that one of the objectives of this plan was to perpetrate the crimes charged in the Indictment. This evidence proves that the crimes perpetrated during the attack were directly planned by **Johan TARČULOVSKI**, or at least he acted with the awareness of the substantial likelihood that the crimes would be committed in the execution of that plan.

64. The same facts also prove that **Johan TARČULOVSKI** instigated the crimes charged in the Indictment. Given his position as the commander of the policemen who carried out the unlawful attack on Ljuboten, **Johan TARČULOVSKI** had a duty to prevent such crimes by the policemen in his unit, or to punish those policemen in the unit who committed such crimes.

Johan TARČULOVSKI's conduct, including his failure to prevent and punish crimes committed by the other policemen participating in the unlawful attack on Ljuboten, substantially contributed to the criminal behaviour of the other perpetrators of crimes. The same facts prove that **Johan TARČULOVSKI** prompted others to commit crimes in Ljuboten with the direct intent that such crimes occur, or that he acted with the awareness of the substantial likelihood that crimes would be committed in Ljuboten in the execution of his instigation.

65. **Johan TARČULOVSKI** also aided and abetted the crimes charged in the Indictment by providing practical assistance, encouragement and moral support to the other members of the police unit who committed crimes. His role in the unlawful attack had a substantial effect on the commission of the crimes. This aiding and abetting occurred before, during and after the crimes were committed. Given his position as the commander of the policemen who carried out the unlawful attack on Ljuboten, **Johan TARČULOVSKI's** presence during the attack, and his failure to exercise his duty by stopping any of the crimes from being committed, or by punishing any of the policemen who committed the crimes, encouraged the perpetrators. Given the tensions in the Ljuboten area following the killing of 8 Macedonian soldiers on 10 August 2001, **Johan TARČULOVSKI** was aware that one of a number of crimes were likely to be committed during the unlawful attack on the village on 12 August.

66. On the basis of the evidence summarized above, and as set forth in the Indictment, the Prosecution contends that **Johan TARČULOVSKI** is liable pursuant to Article 7(1) of the Statute for having committed, ordered, planned, instigated or otherwise aided and abetted the crimes charged.

Ljube BOŠKOSKI

67. At the time of the unlawful attack on Ljuboten, **Ljube BOŠKOSKI** was the Minister of the Interior of Macedonia and a prominent member of the governing political party, VMRO-DPMNE. **Ljube BOŠKOSKI** held this position from May 2001 until November 2002. In his capacity as the Minister of the Interior, **Ljube BOŠKOSKI** had the overall authority and responsibility for the functioning of the regular, reserve and special police forces within the MOI. He exercised *de jure* and *de facto* command and control over these police forces, which included **Johan TARČULOVSKI** and the police unit that directly participated in the crimes

charged in the Indictment. **Ljube BOŠKOSKI** held the highest position of authority in the MOI. His official responsibility included public and state security.

68. **Ljube BOŠKOSKI**'s subordinates were under an obligation to carry out every order given by him. He had the authority to appoint, punish, discipline, suspend and dismiss police personnel from duty for crimes they may have committed. Other powers included powers to establish police units, execute police operations and determine police rules and regulations. Often, **Ljube BOŠKOSKI** would exercise his command in uniform at major police tactical operations. **Ljube BOŠKOSKI** also exercised his authority over special police units such as the "TIGERS" and the "LIONS." **Ljube BOŠKOSKI** supervised and was actively present during many of the special unit operations during the conflict. Throughout the conflict, **Ljube BOŠKOSKI** issued many orders as to the appointment and dismissal of staff within the MOI.

69. **Ljube BOŠKOSKI** knew or had reason to know that the crimes alleged in the Indictment had been committed by his subordinates. **Ljube BOŠKOSKI**'s knowledge as to the commission of the crimes was obtained in many ways, including, *inter alia*:

- (a) his personal observations near the scene of some of the crimes alleged in the Indictment such as the destruction of houses in Ljuboten and his observations of injured ethnic Albanian men who were detained at the Braca House, where **Ljube BOŠKOSKI** was observing the attack from its staging post for about 3 hours near the end of the attack on Sunday, 12 August 2001.
- (b) his personal meetings with **Johan TARČULOVSKI** and Zoran JOVANOVSKI aka "Bučuk" and other participants near the end of the attack at Braca's House.
- (c) his personal meetings with high level police officials on 12 August 2001 at the checkpoints leading to Ljuboten.
- (d) internal police reports addressed to him as to the results of the operation.
- (e) newspaper and other media reports commencing on 12 August 2001 that continued through to the remainder of that year.
- (f) his contemporaneous personal meetings with international representatives and journalists; and

(g) reports of international organisations such as Human Rights Watch and the Committee for the Prevention of Torture which were produced shortly after the crimes occurred. | |

70. **Ljube BOŠKOSKI's** knowledge of the perpetrators of the crimes was obtained by the following means:

- (a) he personally ordered **Johan TARČULOVSKI** to carry out an operation in Ljuboten shortly before the unlawful attack occurred.
- (b) he personally participated in the unlawful attack on Ljuboten by providing logistical support to assist its completion.
- (c) he personally spoke to **Johan TARČULOVSKI**, Zoran JOVANOVSKI aka "Bučuk" and other members of the regular and reserve police, just outside Ljuboten, about the results of the unlawful attack shortly after its completion.
- (d) On the evening of 12 August 2001, in Skopje, he personally spoke to Zoran JOVANOVSKI aka "Bučuk" and other persons who participated in the unlawful attack; , and
- (e) through the means indicated in the preceding paragraph.

71. As a person with superior responsibility and with the knowledge of the occurrence of the crimes charged in the Indictment, **Ljube BOŠKOSKI** had an obligation to investigate and establish the facts of the crimes and to impose appropriate punitive and disciplinary measures on the perpetrators. Such an obligation was a continuing one, at least, till such time as in May 2002, when the Prosecutor of this Tribunal informed the Macedonian authorities that she was exercising primacy over the crimes arising out of and following the Ljuboten attack in August 2001.

72. A responsible and reasonable superior with **Ljube BOŠKOSKI's** obligations should have ensured that members of the MOI undertook a genuine enquiry in respect of the allegations of crimes committed by his subordinates. **Ljube BOŠKOSKI** had a duty to ensure that relevant officials of the MOI undertook a professional and comprehensive enquiry into allegations of murder, wanton destruction and cruel treatment arising out of the unlawful attack on Ljuboten by his subordinates. At a minimum, this duty would have included the tasking of a responsible person to oversee the enquiry and to put in place formal lines of responsibility for it.

73. In relation to these crimes, **Ljube BOŠKOSKI**, as Minister of Interior, should have ensured the collection of evidence from all potential sources. This would potentially have included, but not be limited to the following activities: (1) interviewing eye-witnesses, the perpetrators and victims of the crimes including (a) members of the police (b) members of the army (c) residents of Ljuboten including those detained in custody and (d) international witnesses ; (2) securing the crime scene and (3) initiating forensic investigations.. **Ljube BOŠKOSKI** should have also ensured that the perpetrators were detained.
74. **Ljube BOŠKOSKI** should have ensured that the evidence gathered, together with a comprehensive report concerning each of the criminal allegations, were submitted to the Public Prosecutor. As Minister of Interior and especially in the concrete circumstances of this case, **Ljube BOŠKOSKI** should have played an active role, and done everything within his *de jure* and *de facto* powers, to ensure that all allegations of crimes in Ljuboten were properly resolved within the criminal justice system.
75. Concurrently, **Ljube BOŠKOSKI** had an obligation to initiate within the MOI a genuine and comprehensive internal investigation into these serious criminal allegations to ensure that any employee of the MOI who committed acts of misconduct at Ljuboten or in detention centres outside of Ljuboten were subject to disciplinary measures or dismissal.
76. Neither a genuine investigation, nor even a genuine request for one, was initiated by **Ljube BOŠKOSKI** or by members of the MOI in respect of the murders, cruel treatment and wanton destruction charged in the Indictment. Despite such an obligation and **Ljube BOŠKOSKI's** knowledge about the crimes, neither **Johan TARČULOVSKI**, nor the police unit that he led in the unlawful attack on Ljuboten, nor any member of the police force that was involved in the murder, cruel treatment and wanton destruction of properties of the ethnic-Albanian residents was ever punished, disciplined or reprimanded in any way by **Ljube BOŠKOSKI** or any other member of the MOI for their criminal actions. **Johan TARČULOVSKI** continued in his employment with the MOI throughout **Ljube BOŠKOSKI's** term of office.
77. Instead, on 13 August 2001, **Ljube BOŠKOSKI** created a so-called Commission for the "review of the circumstances and to analyze the activities undertaken by the Security Forces of the MOI in order to repulse the armed attack of the terrorist groups on 12 August 2001 in the village of Ljuboten." The Commission was comprised of three high level police

officers who were subordinate to **Ljube BOŠKOSKI**. On 4 September 2001, the Commission gave its report, thereby holding that “the activities undertaken by the Security Forces...to repulse the armed attack of the terrorist groups...(were)... justified and lawfully undertaken.” The Chairman of the Commission, Goran MITEVSKI, was the Head of Public Security in the MOI and a direct subordinate and a long-term political associate of **Ljube BOŠKOSKI**.

78. This Commission, in fact, did not carry out any investigation into the events of Ljuboten as claimed in the report. The three members of the Commission: (1) never met, (2) never interviewed witnesses or suspects, whether police, army or ethnic Albanian victims identified in connection with the Ljuboten operation, (3) never collected any oral and/or documentary evidence relating to the murders, cruel treatment and destruction of property committed during or after the attack, (4) did not follow any rules of evidence and procedure, and (5) issued a vague and perfunctory 5 page “Opinion,” written by one member, “justifying” the actions of the police without addressing the issues related to the crimes charged in the Indictment.

79. It is clear from the report of the so-called Commission that it was not meant to investigate the crimes committed by the MSF, as charged in the Indictment. It is patent that **Ljube BOŠKOSKI** had no intention to undertake a genuine investigation into the crimes committed by the MSF nor to punish and discipline the perpetrators of those crimes who clearly were under his command and effective control. The Prosecution submits that by appointing a sham Commission, comprised of only his immediate subordinates, to investigate the “activities” of the MSF and subsequently absolving them through that Commission, **Ljube BOŠKOSKI** sought to shield the perpetrators from accountability for their actions. Thus, **Ljube BOŠKOSKI** criminally circumvented his responsibility to punish his subordinates who perpetrated the crimes charged in the Indictment.

80. As the Minister of the Interior in charge of the police forces under that Ministry’s command and control, **Ljube BOŠKOSKI** clearly had the knowledge of the commission of the crimes charged in the Indictment. He received further public notice of these crimes when the matter was widely reported in print and electronic media and when he visited the MSF checkpoints near Ljuboten and his visit was televised on the Macedonian TV on 13 August 2001. **Ljube BOŠKOSKI**’s lack of will to genuinely investigate the crimes committed became more apparent once explicit and comprehensive allegations were brought to his

attention on 5 September 2001 in the Human Rights Watch report on the crimes committed in and arising out of Ljuboten.

81. It is thus clear that all measures taken by **Ljube BOŠKOSKI** after the attack on Ljuboten were designed solely to cover up his involvement in the unlawful attack and the crimes committed by his subordinates in and around Ljuboten and in the detention centres described in the Indictment, from 12-21 August 2001. . For example, contemporaneous media statements made by **Ljube BOŠKOSKI** sought only to justify the unlawful MSF attack on Ljuboten without any reference to the nature and number of ethnic Albanian casualties, the unlawful nature of the Ljuboten attack and the manner in which civilians met their deaths.

82. **Ljube BOŠKOSKI** is charged with superior responsibility for the crimes of regular and reserve police, including special police units, both for the commission of crimes by those police, as well as for the acts or omissions of those police which aided and abetted prison guards, hospital personnel and civilians to commit those crimes as described in the Second Amended Indictment counts. Although **Ljube BOŠKOSKI** was not the superior of prison guards, hospital personnel and civilians within the meaning of Article 7 (3) of the Statute, his criminal responsibility for those crimes arises as a result of his failure to punish the regular, reserve or special police for their acts or omissions which aided and abetted those prison guards, hospital personnel and other civilians to commit those crimes. It is not the Prosecution's position that **Ljube BOŠKOSKI** had a superior responsibility, within the scope of Article 7(3), to punish those prison guards, hospital personnel or civilians for their mistreatment of detainees.³

83. On the basis of the evidence summarized above, and as set forth in the Indictment, the Prosecution contends that the Accused **Ljube BOŠKOSKI** is liable, pursuant to Article 7(3) of the Statute, for his failure to take necessary and reasonable measures to punish the crimes of his subordinates if he knew or had reasons to have known that his subordinates committed those crimes.

³ This clarification is provided in accordance with the Trial Chamber's Decision on 1 November 2005. *Prosecutor v. Ljube Bošković and Johan Tarčulovski*, IT-04-82-PT, "Decision on Prosecution's Motion for Leave to Amend the Original Indictment and Defence Motions Challenging the Form of the Proposed Amended Indictment" 1 November 2005, Disposition at page 21.

III. THE LAW

A. General

84. The Indictment charges **Johan TARČULOVSKI** with individual criminal responsibility, pursuant to Article 7(1) of the Statute, for crimes referred to in Article 3 which he committed, ordered, planned, instigated and otherwise aided and abetted. By using the word “committed” in the Indictment, it is not alleged that he physically committed any of the crimes charged. However, “committed” refers to his participation in the JCE.⁴

85. The Accused **Ljube BOŠKOSKI** is charged with individual criminal responsibility, pursuant to Article 7(3) of the Statute, for crimes referred to in Article 3 of the Statute as alleged in the Indictment. He, in his capacity as the Macedonian Minister of the Interior, exercised *de jure* and *de facto* control over the active and reserve police forces that participated in the crimes alleged in the Indictment. **Ljube BOŠKOSKI**, thus, is charged under Article 7(3), as a superior responsible for the criminal acts of his subordinates, as he knew or had reason to know that his subordinates had committed such acts and yet failed to take necessary and reasonable measures to punish them.⁵

B. Article 7(1) of the Statute

86. For any charge of Article 7(1) responsibility, the Trial Chamber has the discretion to find that the evidence supports any of the modes of liability whether or not expressly charged.⁶ The Indictment charges **Johan TARČULOVSKI** with all forms of criminal participation enumerated in Article 7(1) in relation to all counts: that he planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of the crimes. He is also charged with participating, with members of Macedonian regular and reserve police under his command within the MOI in a JCE with the objective of directing an unlawful attack on civilians and civilian objects, not justified by military necessity. The crimes occurring in Ljuboten and charged in Counts 1, 2 and 3 of the Indictment were within

⁴ Indictment, para 3.

⁵ Indictment, paras 11-17.

⁶ *Prosecutor v. Zoran Kupreškić, et al.*, Judgement, Case No. IT-95-16-T, 14 January 2000 (hereinafter *Kupreškić Trial Judgement*), para. 746; see also *Prosecutor v. Anto Furundžija*, Judgement, Case No. IT-95-17/1-T, 10 December 1998 (hereinafter *Furundžija Trial Judgement*), para. 189; *Prosecutor v. Zejnil Delalić et al.*, Judgement, Case No. IT-96-21-A, 20 February 2001 (hereinafter *Čelebići Appeals Judgement*), paras. 350-51.

the object of this JCE.⁷ Alternatively, the crimes enumerated in Counts 1, 2 and 3 of the Indictment were the natural and foreseeable consequences of the execution of the object of the JCE to direct an unlawful attack on civilian and civilian objects in the village of Ljuboten.⁸

1. Committing Through Participation in a JCE

87. Because the Accused **Johan TARČULOVSKI** is not charged in this case with direct physical perpetration of the criminal acts charged in the Indictment, the term “committed” refers to his participation, together with others known and unknown, in a JCE.⁹ The principles of a common criminal plan, design or purpose, such as JCE, articulate a mode of individual criminal responsibility encompassed by Article 7(1),¹⁰ in which one person can be criminally responsible for the acts of another where both participate in a common criminal purpose.¹¹

88. The *actus reus* of a JCE requires 3 elements. First, there must be 2 or more persons, though they need not be organised in a military, political or administrative structure.¹²

89. Second, there must be a common plan, design, or purpose that amounts to or involves the commission of a crime. The plan need not be previously arranged or formulated, but may “materialise extemporaneously and be inferred from the fact that a plurality of persons act in unison to put into effect a JCE.”¹³

90. Third, the Accused must participate in the enterprise. This participation need not involve the commission of a crime, but may take the form of assistance in or contribution to

⁷ Indictment, paras 4-8.

⁸ Indictment, para 8.

⁹ *Prosecutor v. Vasiljević*, Judgement, Case No. IT-98-32-A, App. Ch., 25 February 2004 (hereinafter *Vasiljević* Appeal Judgement), para. 102. See *Prosecutor v. Radislav Krstić*, Judgement, Case No. IT-98-33-T, 2 August 2001, (hereinafter *Krstić* Trial Judgement), para. 601 and note 1346. The Appeals Chamber has used the term “co-perpetrator” to refer to participants in a joint criminal enterprise. *Prosecutor v. Duško Tadić*, “Judgement,” Case No. IT-94-1-A, 15 July 1999, paras. 196 and 228; *Prosecutor v. Anto Furundžija*, Case No. IT-95-17/1-A, 21 July 2000, para. 118. The use of this term should not be interpreted to exclude the other modes of individual criminal responsibility described in Article 7(1) of the Statute.

¹⁰ *Prosecutor v. Vidoje Blagojević and Dragan Jokić*, Judgement, Case No. IT-02-60-T, T. Ch. I, Sec. A, 17 January 2005 (hereinafter *Blagojević* Trial Judgement), para. 695; *Prosecutor v. Duško Tadić*, Judgement, Case No. IT-94-1-A, 15 July 1999 (hereinafter *Tadić* Appeals Judgement), para. 220; *Prosecutor v. Anto Furundžija*, Judgement, Case No. IT-95-17/1-A, 21 July 2000 (hereinafter *Furundžija* Appeals Judgement), para. 119; *Prosecutor v. Kvočka, et. al*, Judgement, Case No. IT-98-30/1-T, 2 November 2001 (hereinafter *Kvočka* Trial Judgement), para. 244.

¹¹ *Prosecutor v. Radoslav Brdanin*, Judgement, Case No. IT-99-36-T, T. Ch. II, 1 September 2004 (hereinafter *Brdanin* Trial Judgement), para. 258; *Tadić* Appeals Judgement, para. 185, 196, 222-23, 228; *Furundžija* Appeals Judgement, para. 117-19.

¹² *Vasiljević* Appeal Judgement, para. 100; *Tadić* Appeals Judgement, para. 227.

¹³ *Brdanin* Trial Judgement, para. 264.; *Tadić* Appeals Judgement, para. 227, quoted also in *Furundžija* Appeals Judgement, para. 119.

the execution of the common plan or purpose.¹⁴ It is sufficient for the participant to perform acts that in some way are *directed to* the furthering of the plan or purpose.¹⁵

91. Tribunal case law regarding JCE has identified three different situations in which JCE arises, for which the mental state differs.¹⁶ The Indictment charges the first and third form of JCE. In the first situation, the Accused intends to commit a certain crime, this intent being shared by all members of the JCE.¹⁷ All participants, acting pursuant to a common design need to share the intent, although their roles in the enterprise may differ. To prove criminal liability, the Prosecution must show that the Accused “voluntarily participate[d] in one aspect of the common design” and the Accused, “even if not personally effecting the [criminal result], must nevertheless [have] intended this result.”¹⁸ Where this is the case, the Accused will be considered to have jointly “committed” the crime as a co-perpetrator.¹⁹

92. In the third situation, one of the participants in the JCE commits a crime “other than the one agreed upon in the common plan.”²⁰ The Accused may be held responsible for that crime if, under the circumstances, it was foreseeable that such crime might be perpetrated by some member of the group and the Accused willingly took that risk – that is, being aware that such crime was a possible consequence of the execution of that enterprise, and with that awareness, the Accused decided to participate in the enterprise.²¹

2. Planning

93. “Planning” requires that one or more persons design the criminal conduct constituting one or more statutory crimes that are later perpetrated.²² It is sufficient to demonstrate that the planning was a factor substantially contributing to such criminal conduct.²³ The *mens rea* is established if the perpetrator acted with direct intent in relation to his own planning, or when

¹⁴ *Blagojević* Trial Judgement, para. 703.

¹⁵ *Brdanin*, Trial Judgement, para 259-260; *Tadić* Appeals Judgement, para. 229 (iii); *Furundžija* Appeals Judgement (para. 118-120), *Čelebići* Appeals Judgement (para. 265-266).

¹⁶ *Tadić* Appeals Judgement, para. 227-228.

¹⁷ *Tadić* Appeals Judgement, paras. 220 and 228.

¹⁸ *Tadić* Appeals Judgement, para. 196.

¹⁹ *Brdanin*, Trial Judgement, para. 260-5.

²⁰ *Tadić* Appeals Judgement, para. 228.

²¹ *Krstić* Trial Judgement, para. 613; *Vasiljević* Appeal Judgement, para. 101, *Prosecutor v. Tihomir Blaškić*, Judgement, Case No. IT-95-14-A, 29 July 2004, (hereinafter *Blaškić* Appeal Judgement), para. 33.

²² *Prosecutor v. Dario Kordić and Mario Čerkez*, Judgement, Case No. IT-95-14/2-A, 17 December 2004 (hereinafter *Kordić and Čerkez* Appeal Judgement), para. 26.

²³ *Ibid*, para. 26.

he plans an act or omission with the awareness of the substantial likelihood that a crime will be committed in the execution of that plan.²⁴

3. Ordering

94. The *actus reus* of ordering means that a person in a position of authority instructs another person to commit an offence.²⁵ No *formal* superior-subordinate relationship is required for a finding of “ordering” as long as the Accused possessed the authority to order.²⁶ The *mens rea* for ordering is established if the perpetrator acted with direct intent in relation to his own ordering, or when the person orders an act or omission with the awareness of the substantial likelihood that a crime will be committed in the execution of that order.²⁷ The giving of an order may be proven circumstantially, and the order need not be in writing,²⁸ need not be given by the superior directly to the person who commits the crime,²⁹ and may be express or implied.³⁰

4. Instigating

95. The *actus reus* of “instigating” means to prompt another person to commit an offence.³¹ While it is not necessary to prove that the crime would not have been perpetrated without the involvement of the Accused, it is sufficient to demonstrate that the instigation was a factor substantially contributing to the conduct of another person committing the crime.³² In addition, there is no requirement that instigation be direct or public.³³ The *mens rea* is established if the perpetrator either acts with direct intent in relation to his own orders or instigates another person to commit an act or omission with the awareness of the substantial likelihood that a crime will be committed in the execution of that instigation.³⁴

²⁴ *Ibid*, paras. 29, 31.

²⁵ *Blaškić* Appeal Judgement, para. 28.

²⁶ *Prosecutor v. Dario Kordić & Mario Čerkez*, Judgement, 26 February 2001, Case No. IT-95-14/2-T (hereinafter *Kordić and Čerkez* Trial Judgement), para. 388; *Prosecutor v. Jean-Paul Akayesu*, Judgement, Case No. ICTR-96-4-T, 2 September 1998 (hereinafter *Akayesu* Trial Judgement), para. 483; *Blaškić* Trial Judgement para. 281.

²⁷ *Prosecutor v. Tihomir Blaškić*, Judgement, Case No. IT-95-14-A, 29 July 2004, (hereinafter *Blaškić* Appeal Judgement), para. 42, *Kordić and Čerkez* Appeal Judgement, paras. 29, 30

²⁸ *Kordić and Čerkez* Trial Judgement, para. 388.

²⁹ *Ibid*.

³⁰ *Blaškić* Trial Judgement, para. 281.

³¹ *Kordić and Čerkez* Appeal Judgement, para. 27.

³² *Ibid*.

³³ *Akayesu* Trial Judgement, para. 478.

³⁴ *Kordić and Čerkez* Appeal Judgement, para. 29 and 31.

96. Instigation does not require any relationship of authority between the Accused and the physical perpetrator. The Accused's acts or statements directed at those over whom he had no authority to order may also be considered instigation. A superior's failure to punish past crimes may constitute instigation of future crimes.³⁵

5. Aiding and Abetting

97. "Aiding and abetting" consists of "practical assistance, encouragement or moral support" to another person perpetrating a crime.³⁶ Aiding and abetting may assume different forms of assistance, including omissions.³⁷ The use of inflammatory, threatening and/or discriminatory statements may constitute aiding and abetting.³⁸ "Proof that the conduct of the aider and abettor had a causal effect on the act of the principal perpetrator is not required,"³⁹ but the Accused's act "must have had a substantial effect on the commission of the crime."⁴⁰ Aiding and abetting can take place before, during or after the event.⁴¹ The Accused's knowing presence when a crime is committed may constitute the act of aiding and abetting if it encourages the perpetrators.⁴² An omission by a superior can contribute to the commission of a subordinate's crime, "for example by encouraging the perpetrator."⁴³

98. For the required *mens rea*, the Accused must act in the knowledge that his act will assist the commission of the offence by the perpetrator or is aware of the substantial likelihood that it will do so.⁴⁴ The Accused need not share the *mens rea* of the principal but needs to be

³⁵ *Blaškić* Trial Judgement, para. 337.

³⁶ *Prosecutor v. Zlatko Aleksovski*, Judgement, Case No. IT-95-14/1-A, 24 March 2000 (hereinafter the *Aleksovski* Appeals Judgement), para. 162; *Prosecutor v. Milorad Krnojelac*, Judgement, Case No. IT-97-25-T, 15 March 2002 (hereinafter *Krnojelac* Trial Judgement), para. 88; *Prosecutor v. Dragoljub Kunarac, et. al.*, Judgement, Case No. IT-96-23-T & IT-96-23/1-T, 22 February 2001 (hereinafter *Kunarac* Trial Judgment), para. 391; *Blaškić* Trial Judgement, para. 283; *Furundžija* Trial Judgement at 249. See also *Tadić* Appeals Judgement, para. 229.

³⁷ *Brdanin* Trial Judgement, para. 271-4. *Krnojelac* Trial Judgement, para. 88; *Kunarac* Trial Judgement, para. 391; *Prosecutor v. Zejnil Delalić, et. al.*, Judgement, Case No. IT-96-21-T, 16 November 1998, (hereinafter *Čelebići* Trial Judgement), para. 327 (assistance in different forms); *Blaškić* Trial Judgement, para. 284.

³⁸ *Prosecutor v. Duško Tadić, a/k/a "Dule"*, "Sentencing Judgement," Case No. IT-94-1-T, 14 July 1997, para. 72, affirmed on Appeal, 26 January 2000; *Brdanin* Trial Judgement, para. 368.

³⁹ *Krnojelac* Trial Judgement, para. 88; *Kunarac* Trial Judgement, para. 391; *Blaškić* Trial Judgement, para. 285; *Furundžija* Trial Judgement at 233.

⁴⁰ *Krnojelac* Trial Judgement, para. 88; *Aleksovski* Appeals Judgement, para. 162. See also *Kunarac* Trial Judgement, para. 391; *Blaškić* Trial Judgement, para. 284 ("decisive effect"); *Furundžija* Trial Judgement at 234.

⁴¹ *Krnojelac* Trial Judgement, para. 88; *Kunarac* Trial Judgement, para. 391; *Čelebići* Trial Judgement, para. 327; *Blaškić* Trial Judgement, para. 285; *Blaškić* Appeal Judgment, para. 48.

⁴² *Prosecutor v. Duško Tadić*, Judgement, Case No. IT-94-1-T, 7 May 1997 (hereinafter *Tadić* Trial Judgement), paras. 689-90; see also *Blaškić* Trial Judgement, para. 284; *Akayesu* Trial Judgement, para. 693.

⁴³ *Kordić and Čerkez* Trial Judgement, para. 371.

⁴⁴ *Kvočka* Trial Judgement para. 251; *Blaškić* Appeals Judgement, para. 46.

aware of the essential elements of the crime, including the *mens rea* of the principal.⁴⁵ It is not necessary that the aider or abettor “know the precise crime that was intended or which was actually committed.”⁴⁶ If he is aware that one of a number of crimes will likely be committed and one of those is in fact committed, he has intended to facilitate the commission of that crime and is guilty as an aider and abettor.⁴⁷

C. Article 7(3) of the Statute

1. General

99. It has been held that “[t]he principle that military and other superiors may be held criminally responsible for the acts of their subordinates is well-established in conventional and customary law.”⁴⁸ This applies both in the context of international as well as internal armed conflicts.⁴⁹ The jurisprudence of the Tribunal has established the following three-pronged test for criminal liability pursuant to Article 7(3) of the Statute:

- (a) the existence of a superior-subordinate relationship between the superior (the Accused) and the perpetrator of the crime;
- (b) the Accused knew or had reason to know that the crime was about to be or had been committed; and
- (c) the Accused failed to take the necessary and reasonable measures to prevent the crime or punish the perpetrator thereof.⁵⁰

⁴⁵ *Aleksovski* Appeals Judgement, para. 162; *Krnjelac* Trial Judgement, para. 90; *Kvočka* Trial Judgement, paras. 255, 262; *Kunarac* Trial Judgement, para. 392; *Furundžija* Trial Judgement, para. 245.

⁴⁶ *Kvočka* Trial Judgement, para. 255; *Blaškić* Trial Judgement, para. 287; *Furundžija* Trial Judgement, para. 246.

⁴⁷ *Blaškić* Appeal Judgement para. 50.

⁴⁸ *Čelebići* Appeal Judgement, para. 195.

⁴⁹ *Prosecutor v. Enver Hadžihasanović, Mehmed Alagić and Amir Kubura*, Case No. IT-01-47-AR72, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, 16 July 2003 (hereinafter “*Hadžihasanović et al.* Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility”), paras 13 and 31; see also, *Prosecutor v. Enver Hadžihasanović, Mehmed Alagić and Amir Kubura*, Case No. IT-01-47-PT, Decision on Joint Challenge to Jurisdiction, 12 November 2002 (hereinafter “*Hadžihasanović et al.* Decision on Joint Challenge to Jurisdiction”), paras 178-179.

⁵⁰ *Brdanin* Trial Judgement, para 275; *Čelebići* Trial Judgement, para. 346; *Čelebići* Appeal Judgement, paras 189-198, 225-226, 238-239, 256, 263. The Trial Chamber’s conclusions as to the first two elements of the test were upheld by the Appeals Chamber. The third element of the test did not form part of the appeal. See also *Aleksovski* Trial Judgement, para. 69; *Blaškić* Trial Judgement, para. 294; *Kordić and Čerkez* Trial Judgement, para. 401; *Kunarac* Trial Judgement, para. 395; *Krstić* Trial Judgement, para. 604, *Kvočka* Trial Judgement, para. 314; *Prosecutor v. Stanislav Galić*, Judgement, Case No. IT-98-29-T, 5 December 2003 (hereinafter *Galić* Trial Judgement), para. 173.

100. The existence of a superior-subordinate relationship is characterised by a formal or informal hierarchical relationship between the superior and subordinate.⁵¹ The hierarchical relationship may exist by virtue of a person's *de jure* or *de facto* position of authority.⁵² The superior-subordinate relationship need not have been formalised or necessarily determined by formal status alone.⁵³ Both direct and indirect relationships of subordination within the hierarchy are possible⁵⁴ whilst the superior's effective control over the persons committing the offence must be established.⁵⁵ Effective control is defined as the material ability to prevent or punish the commission of the offence.⁵⁶

101. Substantial influence over subordinates which does not meet the threshold of effective control is not sufficient under customary international law to serve as a means of exercising superior criminal responsibility.⁵⁷ A superior vested with *de jure* authority who does not actually have effective control over his subordinates will not incur criminal responsibility pursuant to the doctrine of superior responsibility, whereas a *de facto* superior who lacks formal letters of appointment or commission but does, in reality, have effective control over the perpetrators of offences may incur criminal responsibility.⁵⁸

102. In all circumstances, and especially when an Accused is alleged to have been a member of collective bodies with authority shared among various members, "it is appropriate to assess on a case-by-case basis the power or authority actually devolved to an Accused,"⁵⁹ taking into account the cumulative effect of the Accused's various functions.⁶⁰

103. To prove the mental element of superior responsibility, it must be established that the superior knew or had reason to know that his subordinate was about to commit or had committed a crime. Superior responsibility is not a form of strict liability.⁶¹ It must be proven

⁵¹ *Čelebići* Appeal Judgement, para. 303.

⁵² According to the *Čelebići* Appeal Judgement, para. 193, a formal letter of commission or appointment is not necessary. A *de facto* superior must "wield substantially similar powers of control over subordinates" as a *de jure* superior: *Ibid*, para. 197. See also *Aleksovski* Appeal Judgement, para. 76.

⁵³ *Čelebići* Trial Judgement, para. 370.

⁵⁴ *Čelebići* Appeal Judgement, para. 252.

⁵⁵ *Čelebići* Appeal Judgement, para. 197.

⁵⁶ *Čelebići* Trial Judgement, para. 378, affirmed in *Čelebići* Appeal Judgement, para. 256.

⁵⁷ *Čelebići* Appeal Judgement, para. 266.

⁵⁸ *Brdanin* Trial Judgement, para 276; *Čelebići* Appeal Judgement, para. 197.

⁵⁹ *Prosecutor v. Ignace Bagilishema*, Case No. ICTR-95-1A-A, Judgement, 3 July 2003 (hereinafter "*Bagilishema* Appeal Judgement"), para. 51, endorsing the finding in the *Musema* Trial Judgement, para. 135.

⁶⁰ *Brdanin* Trial Judgement, para 277; *Prosecutor v. Milomir Stakić*, Judgement, Case No. IT-97-24-T, 31 July 2003 (hereinafter *Stakić* Trial Judgement), para. 494.

⁶¹ *Čelebići* Appeal Judgement, para. 239.

that the superior had: (i) actual knowledge, established through either direct or circumstantial evidence, that his subordinates were about to commit or had committed crimes within the jurisdiction of the Tribunal; *or* (ii) constructive knowledge, meaning that the superior had in his possession information that would at least put him on notice of the present and real risk of such offences, such information alerting him to the need for additional investigation to determine whether such crimes were about to be committed or had been committed by his subordinates.⁶² Knowledge may be presumed if a superior had the means to obtain the relevant information of a crime and deliberately refrained from doing so.⁶³

104. It must be established that the superior failed to take the necessary and reasonable measures to punish the crimes of his subordinates. The measures required of the superior are limited to those within his power; that is, those measures that are within his material possibility.⁶⁴ The superiors' duty to prevent and punish their subordinates' crimes includes at least an obligation to investigate the crimes to establish the facts and to report them to the competent authorities, if the superior does not have the power to sanction himself.⁶⁵ A superior is not obliged to perform the impossible.⁶⁶ However, he has a duty to exercise the measures reasonably possible under the circumstances,⁶⁷ including those that may be beyond his formal powers.⁶⁸ What constitutes such measures is not a matter of substantive law but of evidence.⁶⁹

105. The question of whether a superior has failed to take all necessary and reasonable measures to prevent the commission of an offence or to punish the perpetrators is intrinsically connected to the question of that superior's position of power. As the Tribunal's definition of a "superior" requires the existence of effective control, whether *de jure* or *de facto*, a superior will be held responsible for failing to take such measures that are within his material possibility. Therefore the question of whether a superior had explicit legal capacity to take such measures will be immaterial if he had the material ability to act.⁷⁰

⁶² *Brdanin* Trial Judgement, para. 278.

⁶³ *Brdanin* Trial Judgement, para 278; *Čelebići* Appeal Judgement, para. 226.

⁶⁴ *Čelebići* Trial Judgement, para. 395.

⁶⁵ *Kordić and Čerkez* Trial Judgement, para. 446.

⁶⁶ *Čelebići* Trial Judgement, para. 395.

⁶⁷ *Krnjelac* Trial Judgement, para. 95.

⁶⁸ *Čelebići* Trial Judgement, para. 395.

⁶⁹ *Brdanin* Trial Judgement, para 279; *Blaškić* Appeal Judgement, para. 72.

⁷⁰ *Prosecutor v. Pavle Strugar*, Judgement, Case No. IT-01-42-T, T Ch II, 31 January 2005 (hereinafter *Strugar* Trial Judgement), para. 372-377.

106. A superior's duty to punish the perpetrators of a crime includes at least an obligation to investigate possible crimes, to establish the facts, and if the superior has no power to sanction, to report them to the competent authorities. Courts have interpreted the superiors' duty to punish as implying an obligation for the superiors to conduct an effective investigation and to take active steps to secure that the perpetrators will be brought to justice. Relevant in this respect could also be whether the superior has called for a report on the incident and the thoroughness of the investigation.⁷¹

2. Responsibility of Civilian Superiors

107. Article 7(3) is applicable both to military and civilian leaders, be they elected or self-proclaimed, once it is established that they had the requisite effective control over their subordinates.⁷² As in the case of military superiors, civilian superiors will only be held liable under the doctrine of superior criminal responsibility if they were part of a superior-subordinate relationship, even if that relationship is an indirect one.⁷³ A showing that the superior *merely* was an influential person will not be sufficient; however, it will be taken into consideration, together with other relevant facts, when assessing the civilian superior's position of authority.⁷⁴ Nevertheless, the concept of effective control for civilian superiors is different in that a civilian superior's sanctioning power must be interpreted broadly.⁷⁵

108. For a finding that civilian superiors have effective control over their subordinates, it suffices that civilian superiors, through their position in the hierarchy, have the duty to report whenever crimes are committed, and that, in light of their position, the likelihood that those reports will trigger an investigation or initiate disciplinary or criminal measures is extant.⁷⁶ In situations of armed conflict, it is often the case that civilian superiors assume more power than that with which they are officially vested. In such circumstances, *de facto* authority may exist alongside, and may turn out to be more significant than, *de jure* authority.⁷⁷ The capacity to

⁷¹ *Ibid.*

⁷² *Čelebići Appeal Judgement*, paras 195-196, 240; *Aleksovski Appeal Judgement*, para. 76.

⁷³ *Kordić and Čerkez Trial Judgement*, para. 415.

⁷⁴ *Ibid.*

⁷⁵ *Aleksovski Trial Judgement*, para. 78.

⁷⁶ *Ibid.*

⁷⁷ *Kordić and Čerkez Trial Judgement*, para. 422.

sign orders will be indicative of some authority; it is necessary to look to the substance of the documents signed and whether there is evidence of them being acted upon.⁷⁸

109. The *mens rea* requirement for liability pursuant to Article 7(3) has been applied uniformly in cases before this Tribunal and the ICTR to both civilian and military superiors, in the sense that the same state of knowledge to establish superior criminal responsibility pursuant to Article 7(3) of the Statute is required for both civilian and military superiors.⁷⁹

110. *Civilian* superiors are under similar obligations to prevent their subordinates' crimes and to punish the perpetrators thereof as military superiors. Depending on the effective *de jure* or *de facto* powers enjoyed, one would need to consider whether these include an ability to require the competent authorities to take action.⁸⁰

D. Article 3 of the Statute

1. General Requirements of Article 3 of the Statute and Common Article 3

111. *The Accused* have been charged in the Indictment with violations of Articles 3(b) of the Statute, as well as with murder and cruel treatment as violations of Article 3(1)(a) common to the 1949 Geneva Conventions ("common Article 3") chargeable under Article 3 of the Statute.⁸¹

112. Article 3 of the Statute refers to a broad category of offences, namely all "violations of the laws or customs of war."⁸² It has thus been interpreted as a residual clause covering all violations of humanitarian law not falling under Articles 2, 4 or 5 of the Statute, more specifically: (i) violations of the Hague law on international conflicts; (ii) infringements of provisions of the Geneva Conventions other than those classified as "grave breaches" by those Conventions; (iii) violations of common Article 3 of the Geneva Conventions ("common Article 3") and other customary rules on internal armed conflicts; and (iv) violations of

⁷⁸ *Brdanin* Trial Judgement, para 281; *Čelebići* Trial Judgement, para. 672, *Kordić and Čerkez* Trial Judgement, para. 421.

⁷⁹ *Brdanin* Trial Judgement, para 282; *Čelebići* Appeal Judgement, paras 223-226; *Krnjelac* Trial Judgement, para. 94; *Musema* Trial Judgement, paras 147-148.

⁸⁰ *Brdanin* Trial Judgement, para. 283; *Kordić and Čerkez* Trial Judgement, para. 446.

⁸¹ Indictment, paras 23, 25 and 42.

⁸² *Prosecutor v. Duško Tadić a/k/a "Dule,"* Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94-1-AR72, 2 October 1995 (hereinafter *Tadić* Jurisdiction Decision), para. 87.

agreements binding upon the parties to the conflict, considered *qua* treaty law, such as agreements which have not turned into customary international law.⁸³

113. The application of Article 3 of the Statute presupposes that there must be an armed conflict and that the acts of the Accused must be closely related to the armed conflict.⁸⁴ It is immaterial whether this conflict was internal or international in nature.⁸⁵

114. An armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organised armed groups or between such groups within a State.⁸⁶

115. The nexus between the crime and the armed conflict does not require that the armed conflict is causal to the commission of the crime, but the existence of an armed conflict must, at a minimum, have played a substantial part in the perpetrator's ability to commit it, his decision to commit it, the manner in which it was committed or the purpose for which it was committed.⁸⁷ It is sufficient to establish that the Accused acted in furtherance of or under the guise of the armed conflict.⁸⁸

116. The jurisprudence of this Tribunal has established four additional conditions which must be fulfilled for an offence to be prosecuted under Article 3 of the Statute: (i) the violation must constitute an infringement of a rule of international humanitarian law; (ii) the rule must be customary in nature or, if it belongs to treaty law, the required conditions must be met; (iii) the violation must be "serious", that is to say, it must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim; and (iv) the violation of the rule must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule.⁸⁹

⁸³ *Ibid*, paras 89-91; *Krnjelac* Trial Judgement, para. 52; *Kunarac* Trial Judgement, para. 401; *Prosecutor v. Naletilić and Martinović*, Judgement, Case No. IT-98-34-T, 30 March 2003 (hereinafter "Tuta/Stella Trial Judgement"), para. 224.

⁸⁴ *Kunarac* Appeal Judgement, para. 55.

⁸⁵ *Čelebići* Trial Judgement, para. 303; *Čelebići* Appeal Judgement, paras 140, 150; *Prosecutor v. Anto Furundžija*, Case No. IT-95-17/1-T, Judgement, 10 December 1998 ("*Furundžija* Trial Judgement"), para. 132; *Blaškić* Trial Judgement, para. 161.

⁸⁶ *Tadić* Jurisdiction Decision, para. 70; *Kunarac* Appeal Judgement, para. 56.

⁸⁷ *Kunarac* Appeal Judgment, para. 58.

⁸⁸ *Kunarac* Appeal Judgment, para. 58.

⁸⁹ *Tadić* Jurisdiction Decision, para. 94; *Kvočka* Trial Judgement, para. 123; *Krnjelac* Trial Judgement, para. 52; *Kunarac* Trial Judgement, para. 403; *Kunarac* Appeal Judgement, para. 66.

117. There is an additional general requirement under common Article 3 that victims be mere bystanders to the hostilities, including civilians, members of the armed forces who have laid down their arms and those placed *hors de combat*.⁹⁰

2. Elements of Specific Crimes

(a) General

118. For all the specific crimes charged, criminal liability arises if the Accused acted wilfully, that is, deliberately and not by accident. Statements made by the Accused outside the time period relevant to the Indictment may be indicative of the Accused's state of mind during the time relevant to the Indictment.⁹¹

(b) Murder

119. For "murder"⁹² under common Article 3(1)(a), the Prosecution must establish: (i) that the perpetrator's conduct caused the death of one or more persons; and (ii) that the perpetrator thereby intended to kill.⁹³ The *mens rea* is not confined to cases where the perpetrator has a direct intent to kill, it is sufficient that he acts in the knowledge that death is a probable consequence of the act or omission.⁹⁴ Omissions as well as concrete acts can satisfy the *actus reus*.⁹⁵ The victim's death may be proved either directly or circumstantially.⁹⁶

(c) Wanton Destruction

120. Article 3(b) covers "wanton destruction"⁹⁷ of cities, town and villages. The *actus reus* of wanton destruction of property requires: (i) the destruction of property occurs on a large scale; (ii) the destruction is not justified by military necessity; and (iii) the perpetrator acted with the intent to destroy the property in question or in reckless disregard of the likelihood of its destruction.⁹⁸ This element requires a showing that a considerable number of objects were damaged or destroyed. It does not require destruction in its entirety of a city, town or

⁹⁰ See Article 3(1) common to the 1949 Geneva Conventions; *Tadić* Jurisdiction Decision, para. 69.

⁹¹ *Brđanin* Trial Judgement, note 853.

⁹² Indictment Count 1.

⁹³ *Kordić and Čerkez* Appeal Judgement, para.37.

⁹⁴ *Strugar* Trial Judgement, paras. 235, 236.

⁹⁵ *Čelebici* Trial Judgement, para. 424.

⁹⁶ ICTY jurisprudence has taken into consideration the impossibility of providing death certificates or even bodies to prove death. See *Krnjelac* Trial Judgement, para 326-27; see also *Tadić* Trial Judgement, paras. 240.

⁹⁷ Amended Indictment Count 2.

⁹⁸ *Kordić and Čerkez* Appeal Judgement para. 74; *Strugar* Trial Judgement para. 292.

village.⁹⁹ Rendering houses or communal structures uninhabitable or useless would be covered by this prohibition.¹⁰⁰

121. It is moreover required that the destruction is not justified by military necessity. Military necessity is understood to be the application of force or measures, to the extent necessary and in conformity with international law, in pursuit of specific military goal(s) or objective(s). Military necessity never justifies destruction of property to drive owners of a particular nationality or ethnicity out of the area.¹⁰¹ The perpetrator must have acted with direct intent or in the awareness that destruction was a probable consequence of his acts.¹⁰²

(d) Cruel Treatment

122. The crime of “cruel treatment”¹⁰³ as a violation of the laws or customs of war pursuant to Article 3 of the Statute is defined in the jurisprudence of the Tribunal as an intentional act or omission causing serious mental or physical suffering or injury, or constituting a serious attack on human dignity.¹⁰⁴ The perpetrator must act with direct intent or in the knowledge that cruel treatment was a probable consequence of the perpetrator’s act or omission, may also fulfil the intent requirement for this crime.¹⁰⁵ In determining the gravity of an act, all the factual circumstances must be taken into consideration, “including the nature of the act or omission, the context in which it occurs, its duration and/or repetition, the physical, mental and moral effects of the act on the victim and the personal circumstances of the victim, including age, sex and health.”¹⁰⁶

⁹⁹ *Strugar* Trial Judgement, para. 295.

¹⁰⁰ *See, e.g., Prosecutor v. Rajić*, Review of the Amended Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence, Case No. IT-95-12-R61, 13 September 1996, paras. 52 – 53 and 56.

¹⁰¹ *See Krstić* Trial Judgement at para. 527.

¹⁰² *Strugar* Trial Judgement, para. 296.

¹⁰³ Indictment Count 3.

¹⁰⁴ *Strugar* Trial Judgement, para. 261.

¹⁰⁵ *Strugar* Trial Judgement, para. 261.

¹⁰⁶ *Prosecutor v. Hadžihasanović and Kubura*, Decision on Motions for Acquittal Pursuant to Rule 98 bis, Case No. IT-01-47-T, T. Ch. II, 27 September 2004, para.49; *Krnjelac* Trial, Judgement, para. 131.

Prosecutor v. BOŠKOSKI and TARČULOVSKI

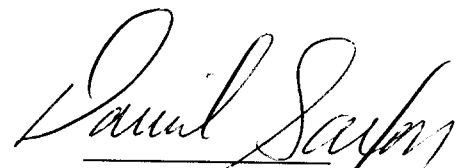
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IV. CONCLUSION

123. In the facts and under the circumstances of the case as described above and in terms of the jurisprudence of this Tribunal, it is submitted that this Trial Chamber find the Accused herein guilty as charged.

Word count: 14, 803

Respectfully submitted,



Dan Saxon
Trial Attorney

Dated this 4th day of April 2006
The Hague
The Netherlands

THE INTERNATIONAL CRIMINAL TRIBUNAL
FOR THE FORMER YUGOSLAVIA

Case No. IT- 04 - 82 - PT

Before: Judge Carmel A. Agius, Presiding
Judge Hans Henrik Brydensholt
Judge Albin Eser

Registrar: Mr. Hans Holthuis

Date filed: ~~7 November 2005~~ 4 April 2006

THE PROSECUTOR

v.

LJUBE BOŠKOSKI
JOHAN TARČULOVSKI

ANNEX A

PROSECUTION'S AMENDED PRE-TRIAL BRIEF

The Office of the Prosecutor

Dan Saxon
William Smith
Anees Ahmed

Counsel for the Accused

Dragan Godžo for Ljube Boškoski
Antonio Apostolski for Johan Tarčulovski

I. INTRODUCTION

1. This case concerns war crimes committed during and following an unlawful attack on the village of Ljuboten in the Former Yugoslav Republic of Macedonia (hereinafter “Macedonia”). The unlawful attack occurred between Friday, 10 August 2001 and up to and including Sunday, 12 August 2001. While units of both the Macedonian Police and the Macedonian Army were involved in the unlawful attack, the Second Amended Indictment (hereinafter the “Indictment”) charges only members of the Macedonian Police with individual criminal responsibility for the crimes alleged. All of the charged crimes in the proposed Second Amended Indictment dated 24 November 2005April 2006¹ (hereinafter “the Indictment”) were committed between 12 and 21 August 2001, in the midst of the armed conflict between the ethnic-Albanian National Liberation Army (hereinafter “NLA”) and the Macedonian Security Forces (army and police units) of the government of Macedonia (hereinafter “MSF”).

2. The first Accused in this case is **Ljube BOŠKOSKI**, the Minister of the Interior at the time of the unlawful attack on Ljuboten. He was directly responsible for the functioning of the police forces within Macedonia. The second Accused is **Johan TARČULOVSKI**, a police officer in the Ministry of the Interior (hereinafter “MOI”) at the time of the unlawful attack. He led regular and reserve police officers in the attack and directly participated in the crimes charged in the Indictment. The purpose of this case is to establish the criminal responsibility of both Accused for these crimes.

3. On 12 August 2001, **Johan TARČULOVSKI** led a police unit which, during their unlawful attack on Ljuboten, murdered six civilian ethnic Albanian residents from Ljuboten as well as substantially contributing to the murder of a seventh resident. As part of this unlawful attack, this police unit also wantonly destroyed the homes and properties of residents in the village, making at least 14 of them uninhabitable. During and following this unlawful attack, **Johan TARČULOVSKI**'s unit and other regular and reserve police officers together

¹ The amendments to this Brief are based upon the proposed Second Amended Indictment dated 2 November 2005 4 April 2006 and the directions provided by the Pre-Trial Judge in the Rule 65 ter Conference held on 23 March 2006, contained in the Trial Chamber's Decision dated 1 November 2005 ordering amendments to the Original Indictment. In the said Decision of 1 November 2005, the Trial Chamber, *inter alia*, directed the Prosecution to clarify, in this Brief, its position regarding Ljube BOŠKOSKI's effective control over the physical perpetrators of the crimes charged.

subjected about 100 Ljuboten civilian residents to cruel treatment in Ljuboten and its environs, and in police stations and other locations in and outside Skopje, the capital of Macedonia.

4. At trial, the Prosecution will submit evidence that will establish beyond a reasonable doubt that these two Accused are individually criminally responsible for the crimes of Murder, Wanton Destruction and Cruel Treatment as charged in the Indictment. Section II of this brief summarizes the evidence that will substantiate these charges and Section III addresses the applicable law.

5. Before filing this Brief, the Prosecution had an obligation to seek agreement with the Defence on individual facts or points of law pursuant to Rule 65ter (E) (i) and (H) of the Rules of Procedure and Evidence of the International Tribunal (hereinafter, "the Rules"). Consequently, on 19 August 2005, the Prosecution sent letters to the respective counsel of the Accused (hereinafter, collectively referred to as "Defence") identifying 276 factual and legal assertions, asking them to state their positions. The Defence was reminded of this request by the Prosecution during the Rule 65ter Conference with the Senior Legal Officer of the Trial Chamber on 29 September 2005. Thereafter, on 2 November 2005, the Prosecution sent to the Defence its amended agreed facts proposal in terms of the Amended Indictment dated 2 November 2005. To date, the Defence has not responded substantially to the Prosecution's requests. A letter was received by the Prosecution on 27 October 2005 from the counsel of **Ljube BOŠKOSKI** indicating that the Defence of that Accused disputes all facts relating to the crime base and the alleged criminal responsibility of that Accused.² On 12 December 2005, the Prosecution received a letter from the Counsel for the Accused Boškosi indicating that the Defence of that Accused would agree to the admissibility, but not the veracity, of exhibits 10 – 21, 61 – 77 and 82 - 102 on the Prosecution's Rule 65 ter Exhibit List. Accordingly, the Prosecution files this Brief with the assumption that the Defence does not agree with any of the substantive legal or factual assertions in the Indictment.

² In that letter, which is being filed along with the other Rule 65ter filings today, the Defence for **Ljube BOŠKOSKI** has agreed to the Prosecution's assertions relating to the identity of that Accused and some aspects of the geography of Macedonia.

II. THE FACTS

A. Background

6. The crimes charged in the Indictment occurred in the context of an armed conflict waged in 2001 between the ethnic Albanian National Liberation Army (hereinafter, “the NLA”) and the MSF on the territory of Macedonia. The following paragraphs provide an overview of this conflict, the nature and composition of the parties to the conflict and the events that occurred in and around the village of Ljuboten between 10 and 12 August 2001 and the days thereafter, which led to the commission of the crimes charged.

7. Macedonia was constituted as a Yugoslav Republic in 1944 and remained one of the ~~six~~ constituent republics of the Socialist Federal Republic of Yugoslavia (hereinafter, “the SFRY”) together with Bosnia-Herzegovina, Croatia, Montenegro, Serbia and Slovenia until the SFRY’s dissolution in 1991-1992. On 17 September 1991, the Macedonian Parliament adopted a Declaration of Independence. On 8 April 1993, the country was admitted to the United Nations.

8. Macedonia is a land-locked country bordered by Albania, Bulgaria, Greece and Serbia and Montenegro. According to the 1994 population census, ethnic Macedonians constituted 66.6% and ethnic Albanians 22.7% of the country’s population. The areas with a considerable distribution of ethnic Albanians are in the north and northwest of the country, bordering on Serbia and Montenegro (including Kosovo) and Albania respectively. At the time of the conflict in 2001, Macedonia was divided into 123 municipalities. Čair municipality encompassed parts of Skopje as well as a number of nearby villages, including the village of Ljuboten. According to the 1994 population census, the municipality of Čair had a population of 63,375 persons, of whom approximately 57% were Macedonians, 29% were Albanians and 14% were “other.”

9. Relations between ethnic Albanians and Macedonians have dominated the politico-economic discourse of the Macedonian state during most of its existence as an independent entity. Ethnic Albanian dissatisfaction with their group status, language and educational rights as well as alleged discriminatory practices, contributed to political tensions between the ethnic Albanian and ethnic Macedonian communities. Ethnic Albanians boycotted the Referendum on Macedonian Independence in 1991 and held their own Referendum on Territorial

Autonomy in January 1992, in which approximately 99.9% of them voted in favour of autonomy. This Referendum was subsequently declared illegal by the Macedonian government.

10. The war in Kosovo and the subsequent influx of ethnic Albanian refugees into Macedonia in 1999 exacerbated the simmering political tensions between the country's ethnic Macedonian and ethnic Albanian communities. In 2001, these tensions culminated in an internal ethnic Albanian-ethnic Macedonian armed conflict within the Macedonian borders.

11. The armed conflict began in January 2001 and continued until at least late September 2001. The two major warring parties in the conflict were the NLA and the MSF. On 13 August 2001, the Ohrid Peace Agreement was signed between the two parties. However, clashes continued until at least late September of that year. At least 60 members of the MSF were killed and about 300 were wounded in the conflict. Additionally, approximately 67 NLA members were killed. During this period, an estimated 170,000 persons fled their homes and approximately 6,500 houses were damaged. As of August 2002, approximately 7,400 persons remained displaced within the country, with some 3,000 refugees residing in Kosovo.

12. The NLA waged the conflict in the form of guerrilla warfare which included a number of hit and run operations. It attacked Macedonian police stations and police patrols, planted mines and engaged units of the Macedonian Army. As the conflict spread from the areas bordering on Kosovo towards Tetovo and Skopje, the NLA established control over a number of villages. Almost daily skirmishes between the NLA and the MSF culminated in full-scale battles in the area of Tetovo in March and in the Skopje suburb of Aračinovo in June 2001. In the course of the conflict, the MSF used tanks, artillery, helicopter gun-ships and combat aircraft. The attack on Ljuboten was the last joint operation of the MSF before the signing of the Ohrid Peace Agreement on 13 August 2001. Documentary and oral evidence will be presented by the Prosecution at trial to establish that this armed conflict was protracted and spread over a substantial part of the Macedonian territory.

13. Ljuboten was a predominately ethnic Albanian village about 12 kilometres by air from the closest section of the Kosovo-Macedonia border and 10 kilometres by air from the centre of Skopje. The village is situated in the Čair municipality and sits at the southwestern foot of the Skopska Crna Gora mountain ridge in the northern part of Macedonia. It is surrounded by the predominantly ethnic Macedonian villages of Raštak, Radišani and Ljubanci, the latter's

centre being about 1.5 kilometres from Ljuboten. According to the 1994 population census, Ljuboten had a population of 2,010 persons of whom 93% were ethnic Albanians.

14. In August 2001, Macedonian Army positions were located in the vicinity of Ljuboten. The village was in the operational area of the 1st Guardist Brigade of the Macedonian Army. Units of the 1st Guardist Brigade held the front line at Ečmenište, Kula, Vukova Glava, St. Nikita Monastery, Bel Kamen and Čaršija. The positions of the 3rd Battalion of the 1st Guardist Brigade were very close to Ljuboten. The headquarters of the 3rd Battalion was located in Ljubanci, less than 1 kilometre away from Ljuboten. The total strength of the 3rd Battalion was about 500 men.

15. The 1st Company of the 3rd Battalion held positions in the village of Brodec, about 6 kilometers from Ljuboten. The 2nd Company of the 3rd Battalion held positions on the mountain ridge north of Ljuboten, directly above the village. The nearest Macedonian Army position, "Smok," manned by the 2nd Company of the 3rd Battalion, was about 300 meters from Ljuboten. The 2nd Company also had two 82-mm mortars and two B-1 76-mm artillery pieces. The 3rd Company of the Battalion held positions in the village of Raštak, about 5 kilometers from Ljuboten by road. The Battalion's heavy mortar battery of six 120-mm mortars was located about 2 kilometers above Ljuboten. During 10-13 August 2001, the period of the unlawful attack alleged in the Indictment, while there were NLA sympathizers present in Ljuboten, there was no armed NLA presence in the village of Ljuboten.

16. In August 2001, the nearest positions of the NLA to Ljuboten were those of its 114th Brigade. These positions were based in the area of Matejče Monastery, on the other side of the Skopska Crna Gora ridge, about 8 kilometers by air northeast of Ljuboten, and were manned by the 2nd Battalion of the NLA's 114th Brigade. The strength of the 2nd Battalion was between 400 - 500 men. The 2nd Battalion had several 60-mm and 82-mm mortars.

17. At about 8 a.m. on Friday, 10 August 2001, about 5 kilometers north of Ljuboten, in the Skopska Crna Gora mountain ridge area, a Macedonian military vehicle belonging to the 3rd Battalion of the 1st Guardist Brigade of the Macedonian Army was destroyed by a remote-controlled explosive device in an ambush at a place called Ljubotenski Bačila, about 200 meters from the positions of the Army's 3rd Battalion. The vehicle was carrying an outgoing shift of soldiers of the 2nd Company to Ljubanci. Eight Macedonian soldiers were killed in the incident, two of whom were residents of Ljubanci.

18. Immediately following the explosion, members of the NLA opened fire on the Macedonian military vehicle, causing the Macedonian Army's 2nd Company to respond. An exchange of fire between the two groups lasted for several hours. Mi-24 helicopters of the Macedonian Air Force also attacked the NLA elements in the area of Ljubotenski Bačila that morning.

19. The same day, following the exchange of fire between the NLA and the Macedonian 3rd Battalion, the latter opened small arms fire on the village of Ljuboten and launched at least two mortar/cannon rounds into Ljuboten, presumably in retaliation for the death of the 8 soldiers that morning. These rounds killed two civilians, one a 5-year-old child. At this time, there were no legitimate military targets in the village other than possibly a group of 3 armed persons. No hostile or defensive acts were committed by these men or any residents of Ljuboten. Later that day, the police unit commanded by **Johan TARČULOVSKI** arrived in the neighboring village of Ljubanci. During the night of 10-11 August 2001, this unit made a reconnaissance of Ljuboten.

20. The following day, 11 August 2001, between 8 and 10 a.m., the Macedonian Army's 3rd Battalion opened small arms fire on Ljuboten. Between 5.30 and 6 p.m., members of **Johan TARČULOVSKI's** police unit fired several 64-mm rockets into the village. At this time there were no legitimate military targets in the village nor were any hostile or defensive acts committed by residents of Ljuboten.

21. On Sunday, 12 August 2001, as part of the ongoing unlawful attack by Macedonian police and military forces, Ljuboten came under an intense, combined attack by the police unit commanded by **Johan TARČULOVSKI** and from the Macedonian Army. At approximately 8 a.m., **Johan TARČULOVSKI's** police unit, comprised of about 100 men, entered the northwestern end of Ljuboten from Ljubanci. The unit's ground ~~assault~~attack proceeded along the main road of the village. The ~~assault~~attack focused mainly on the northern and eastern parts of the village, as the unit moved down Fifth Street (Ulica Pet), before turning east towards Raštak. The police unit burned houses and left a trail of destruction as it progressed through the village.

22. The 3rd Battalion of the Macedonian Army's 1st Guardist Brigade provided fire support for the police ground ~~assault~~attack and fired about 40-60 120-mm, 82-mm and 76-mm rounds

into and around the village between 6 and 10 a.m. The shelling was calculated to dissolve any possible resistance to **Johan TARČULOVSKI's** advancing police unit.

23. During the course of the combined police and army attack on Ljuboten on Sunday, 12 August 2001, 6 Albanian civilian residents were shot dead by **Johan TARČULOVSKI's** police unit and one Albanian civilian resident was killed by the Macedonian Army's shelling. During and after the killings, **Johan TARČULOVSKI's** police unit systematically set fire to, shot at and damaged with hand grenades and other explosive devices at least 14 houses in the village. A total of 21 houses were destroyed or damaged by torching, shooting and/or shelling during the attack. Residents were detained and severely beaten by **Johan TARČULOVSKI's** police unit, ten of whom were taken to Mirkovci Police Station. One of these men died due to the cruel treatment he received. Most of the residents were forced to flee the village to avoid death and injury at the hands of **Johan TARČULOVSKI's** police unit.

24. After the ground attack, between the early afternoon and 6 p.m. on 12 August 2001, some of the fleeing residents were stopped and harassed at Buzalak Checkpoint, where police arrested about 90 of the male civilian residents. At this checkpoint many of these men were seriously beaten. The police then transported these male civilians to various detention centres in and around Skopje where they were held and cruelly treated for up to 48 hours. These residents were cruelly treated within Ljuboten, at the two police checkpoints nearby and outside the village, five police stations in Čair municipality and Skopje as well as at a Skopje Court and Hospital. At all of these locations, the beatings were committed by police officers, reservists or civilians who were permitted and/or encouraged by the police to carry out the beatings. The detention and beatings of these men were organised, systematic and pervasive.

25. During the police ground attack on Sunday, 12 August 2001, the presence of armed Albanian combatants in Ljuboten was assessed to be limited to a maximum of 10-15 persons armed with automatic weapons and at least one machine-gun. These individuals acted both alone and in small groups to oppose the advance of **Johan TARČULOVSKI's** police unit.

26. In addition, on 12 August 2001, a contingent of about 60 NLA combatants arrived outside Ljuboten from Nikuštak, a village about 12 kilometres from Ljuboten. The NLA group attempted to outflank the 2nd Company of the Macedonian Army's 3rd Battalion and sought to enter Ljuboten. However, this group was spotted by the Army in the area of Bel

Kamen and Raštanski Potok, about 4 kilometres from Ljuboten and the 2nd Company of the 3rd Battalion opened fire on them. It was reported that the NLA suffered casualties.

27. Between 10 and 11 a.m. on 12 August 2001, the NLA opened fire with 82-mm mortars from the area of Bel Kamen Hill located approximately 4 kilometres from Ljuboten, at the positions of the 2nd Company of the 3rd Battalion, in an attempt to cover the withdrawal of the NLA unit. All weapon exchanges on 12 August 2001 around the village of Ljuboten ceased between 4 and 5 p.m.

B. Count 1 - Murder

28. The first person who was killed by the police unit commanded by **Johan TARČULOVSKI** on Sunday, 12 August 2001 was Rami JUSUFI, a 33 year old ethnic Albanian male, who lived in the northern part of Ljuboten. At approximately 8.20 a.m., members of this police unit forcibly entered his yard. Rami JUSUFI was asleep in his bed when his mother called him to the front door. He got up and went to the door, unarmed and in his pyjamas. On arrival he was immediately shot at close range in his stomach through the open door by at least one of the police officers in the yard. Rami JUSUFI then fell in agony and died two hours later.

29. Following the death of Rami JUSUFI, this police unit moved to the upper eastern part of Ljuboten where they arrived at the houses of Adem AMETOVSKI and Zija ADEMI at about 11 a.m. on 12 August 2001. Men, women and children, all unarmed, sought cover in the two basements from the police ground attack and the shelling by the Army. On arrival, the police ordered the men out from the basements and detained 13 of them near the main gate of Adem AMETOVSKI's house. These men were forced by the police to lie on the ground where they were beaten, repeatedly and severely.

30. During these beatings, Sulejman BAJRAMI, a 23 year-old ethnic Albanian, attempted to escape. He was immediately shot and killed by at least one of the police officers. The remaining 12 men were then forced to walk under armed escort to the adjoining village of Ljubanci. Two men from the group, apparently due to their elderly age, were ordered to leave. As they walked away, members of this police unit fired at them, killing Muharem RAMADANI, a 65 year-old ethnic Albanian resident.

31. Atulla QAILI, a 35 year-old ethnic Albanian, was one of the remaining ten men who were forced to walk to Ljubanci on 12 August 2001. En route, he and the other men were continually beaten until they arrived at Braca's House, situated at the edge of Ljuboten and Ljubanci, where a Macedonian police checkpoint was located. On arrival, Atulla QAILI was in a seriously injured state. However, he was again kicked repeatedly at the checkpoint before being thrown into the back of an open police truck with the other men and taken to Mirkovci Police Station, where the beatings continued. The cumulative effect of all these beatings left Atulla QAILI unconscious, unable to speak, his body bruised, battered and bloody. He was then transported to Skopje City Hospital, where he died on 13 August 2001 as a result of his injuries.

32. Following the murders of Sulejman BAJRAMI and Muharem RAMADANI and whilst the 10 men were being marched to and detained at Braca's House on 12 August 2001, the police unit under the command of **Johan TARČULOVSKI** moved further east across the village to the house of Qani JASHARI, where 5 unarmed men had taken refuge from the advancing police unit. When the police arrived they called out for the owner of the house and then proceeded to open fire on it before using petrol to set both the house and barn on fire.

33. The men inside the house jumped out of a back window and hid a short distance away under a tobacco-drying stall. On seeing these men, the police opened fire causing the men to flee through an open field towards the mountains. As they ran, 3 of them, Xhelal BAJRAMI, Bajram JASHARI and Kadri JASHARI, all ethnic Albanians, were shot and killed within 150 metres of the house. The other 2 men escaped, one injured by a bullet and the other unharmed.

34. The Prosecution will tender autopsy reports that will confirm the witnesses' accounts as to the manner and cause of the seven deaths.

C. Count 2 – Wanton Destruction

35. On the way through Ljuboten on Sunday, 12 August 2001, between, during and after the killings of the civilian residents, the police unit led by **Johan TARČULOVSKI** intentionally set fire to and damaged at least 14 houses using hand grenades and small arms. This intentional attack on the property of the civilian residents left the houses either seriously damaged or, in most cases, completely destroyed.

36. In the northern part of the village on Sunday, 12 August 2001, police set fire to a line of neighbouring houses with petrol, leaving 6 of them heavily damaged. In the upper eastern part of the village, they further set alight 5 houses with petrol while they opened fire at others with small arms. In the lower eastern part of the village, the police ignited at least 3 houses with petrol, after which they opened fire on the burning houses with small arms.

37. The method and extent of the damage will be confirmed at trial by an independent assessment conducted by an international housing reconstruction group which recorded its findings shortly after the attack in respect of the rehabilitation of the destroyed and damaged properties in the village. This assessment will confirm that there were approximately 78 houses damaged in Ljuboten as a result of the attack on the village. None of these houses were occupied by combatants nor were they used as a point of resistance in the village by its residents. The evidence presented by the Prosecution at trial will show that the destruction was completely wanton, intended and committed without any military justification.

D. Count 3 - Cruel Treatment

38. The malicious and criminal intent towards the ethnic Albanian residents in Ljuboten by **Johan TARČULOVSKI** and his police unit as well as other police, both regular and reserve, is evidenced by the detention and cruel treatment of approximately 100 men during and following the attack.

39. During the attack between 11 a.m. and noon on 12 August 2001, the Ljuboten residents ordered out of Adem AMETOVSKI's and Zija ADEMI's houses by **Johan TARČULOVSKI** and members of his police unit were forced to lie face down on the ground. The police then punched, kicked, jumped on and hit these men with rifle butts and wooden sticks. One police officer shot the father of Sulejman BAJRAMI in the hand; another carved a large cross with a knife into the back of another detainee. These men sustained injuries to their heads, ribs, shoulders, and hands. Sulejman BAJRAMI was kicked in the head before being shot and killed. Following this, the remaining men detained by this police unit were further beaten as they were marched to the police checkpoint at Braca's House. At Braca's House, the beatings continued for about half an hour. The men were kicked, jumped on and hit with pieces of burning wood. This mistreatment resulted in injuries to their heads, ribs, backs, shoulders, hands and noses. The men were then thrown forcibly onto a police truck and taken to Mirkovci Police Station where they were detained.

40. Between 12-14 August 2001, regular and reserve police officers in and outside of Mirkovci Police Station physically and mentally abused the men from Ljuboten. On arrival at the station, some of the men were thrown off the truck while still unconscious from earlier beatings. The detainees were punched, kicked and hit with various implements such as rifle butts, shovels and truncheons. The beatings were executed with such force that some detainees were rendered immobile due to the pain. They suffered injuries such as broken teeth, open wounds and bruising.

41. Aside from these men who were cruelly treated by **Johan TARČULOVSKI** and members of his police unit and regular and reserve police from Mirkovci Police Station, up to 90 other men from Ljuboten were cruelly treated at Buzalak Checkpoint and other locations both in and outside Skopje. Between the early afternoon and 6 p.m. on 12 August 2001, these men were arrested at gunpoint as they fled the village with their families. They were beaten by regular and reserve police as well as some civilians who acted at the encouragement of the police. They were kicked, punched and stepped on whilst they were forced to lie face down on the ground. They were hit repeatedly with rifle butts, truncheons, tree branches, wooden sticks and other objects. One man was shot in the head as he ran away from the Checkpoint in fear. Another was beaten while carrying a 2-month-old baby. A mentally disabled man was beaten. The injuries inflicted included lacerations to the head, broken ribs, bloody noses and ears, heavy bruising, and swollen eyes. Permanent disabilities resulted from some of the injuries received by the detainees from the beatings such as a damaged shoulder, recurring headaches and permanent back pains.

42. During the afternoon of 12 August 2001, at least 76 of the detainees from Buzalak Checkpoint arrived at Čair Police Station in separate groups and were detained. At least 30 of them were beaten by regular and reserve police officers in and outside of the station during their detention and upon their arrival and departure. They were hit with rifle butts, fists, boots, wooden sticks, baseball bats and metal pipes on the neck, back and head. One detainee's face was smashed against the floor. Another detainee received a broken rib. Others fainted from the beatings. The men were kept in cramped cells for 2-3 hours with 15-50 other men. These cells had no fresh air, water or proper sanitation facilities.

43. At Kisela Voda Police Station, during 12-14 August 2001, at least 32 Ljuboten villagers were detained. Of these, at least 27 were beaten by regular and reserve police

officers in front of and inside the station. The men were punched, kicked *etc* in the face and neck and hit over their entire bodies. They were stepped on and hit with rifle butts, truncheons, sticks and cables. One detainee had a gun barrel placed in his mouth while another had his hand cut with scissors. The beatings were accompanied by verbal threats and curses. At Bit Pazar Police Station, from 12-14 August 2001, at least a quarter of the 24 detainees were beaten in the station yard by regular or reserve police. Detainees were again punched and hit with rifle butts. Conditions of detention were extremely poor. At Karpoš Police Station, from 12-14 August 2001, at least 53 detainees were brought in different groups and detained. At least 19 of these men were beaten by regular, reserve and special police. They were punched, kicked, and hit with rifles and baseball bats by the police both en route to and inside the station.

44. At Skopje Court II, on 14 August 2001, in the late afternoon and evening, 22 detainees were brought for trial, where at least 19 of them were beaten. The beatings occurred in the hallways and corridors of the court. The detainees were beaten by regular and reserve police, prison guards and some civilians with the permission and encouragement of the police and guards. They were beaten with truncheons and rifle butts and were stepped on and burned with cigarettes.

45. Between 12-21 August 2001, 14 badly injured detainees were brought from various locations to Skopje City Hospital. At least 11 of them were beaten in front of the hospital or in their rooms by regular and reserve police and hospital personnel. Victims were punched, jumped on and hit with truncheons.

46. The detention and beatings of these men were organised, systematic and pervasive. Most of the detainees were beaten repetitively at successive locations. For example, over this period, the same seven men were beaten at five different locations, the same twenty-five men were beaten at four different locations, the same forty-four men were beaten at three different locations and the same twelve men were beaten at two locations.

E. Responsibility of the Accused

47. The evidence submitted at trial will establish beyond reasonable doubt that **Johan TARČULOVSKI** and **Ljube BOŠKOSKI** are responsible for the crimes described in the Indictment. Below is a summary of the acts and omissions upon which each of the Accused's criminal liability is based.

Johan TARČULOVSKI

48. At the time of the attack on Ljuboten, **Johan TARČULOVSKI** was a 27 year old police officer employed by the MOI as a bodyguard in the President's Security Unit. At the time he was also a member of Internal Macedonian Revolutionary Organization – Democratic Party for Macedonian National Unity (“VMRO-DPMNE”) the same party of which **Ljube BOŠKOSKI** was a member. **Johan TARČULOVSKI** served in the Macedonian Army in 1993 at the age of 19 for one year. Six years later he joined the MOI as a police officer, serving as an Escort Inspector for public officials and later served in the personal security of Prime Minister Ljubčo GEORGIEVSKI.

49. About two weeks before the attack on Ljuboten, in July 2001, **Ljube BOŠKOSKI** ordered **Johan TARČULOVSKI** to select a group of individuals who would be under **Johan TARČULOVSKI**'s leadership to participate in a police security operation. Consequently, **Johan TARČULOVSKI** personally selected individuals from the regular and reservist police force to participate in these operations. **Johan TARČULOVSKI** organised the arming of these individuals with semi-automatic weapons and pistols. These individuals included members of KOMETA, a private security agency. The arming of these men was approved by **Ljube BOŠKOSKI** and undertaken at PSOLO Police Station.

50. On 10 August 2001, with tensions extremely high following the killing of the 8 Macedonian soldiers by an explosive device near Ljuboten, – **Ljube BOŠKOSKI** (according to a subsequent statement by **Johan TARČULOVSKI**) ordered **Johan TARČULOVSKI** to conduct a search of Ljuboten village for Xhavid ASANI, whom **Ljube BOŠKOSKI** believed to have been responsible for the killing of the 8 soldiers and who he believed was hiding in Ljuboten. **Johan TARČULOVSKI** was selected because he knew the area of Ljuboten well as he had a family home in the adjoining village of Ljubanci. **Ljube BOŠKOSKI** also ordered **Johan TARČULOVSKI** to collect semi-automatic rifles and pistols at **COKOB** for the operation.

51. As a result of this order, **Johan TARČULOVSKI** selected around 100 men from the active and reserve police as well as employees from the security company KOMETA. **Johan TARČULOVSKI** then commenced planning the logistics for the unlawful attack on the village of Ljuboten during the afternoon of 10 August 2001. He arrived at Čair Police Station

with 50 men dressed in police camouflage uniforms and armed with weapons, including grenades and “Zoljas,” used to launch rocket propelled grenades. Here, **Johan TARČULOVSKI** requested these 50 men to be transported to the school building in his native village of Ljubanci, home to two of the soldiers killed by the explosive device the previous day. In addition, **Johan TARČULOVSKI** informed the commander of the Čair Police Station that the Minister of Interior, **Ljube BOŠKOSKI**, had ordered *-an attack -* rather than a search – on the village of Ljuboten.

52. Later that evening, a MOI truck, driven by police, arrived at **Johan TARČULOVSKI**'s family home to deliver ammunition, bombs and grenade launchers. Then at approximately 9.30 p.m., **Johan TARČULOVSKI** distributed weapons to 60-70 persons who had come to his family home in Ljubanci to receive arms in readiness for the unlawful attack. Some of these weapons were used to attack Ljuboten during the night of 10-11 August 2001.

53. On Saturday, 11 August 2001, between 5.30 and 6 p.m., **Johan TARČULOVSKI**'s police unit used 64-mm grenade launchers to set houses in Ljuboten on fire. The same day, **Johan TARČULOVSKI** attempted to further his efforts by twice urging an Army Major to support him with 120-mm mortar fire. That same evening, **Johan TARČULOVSKI** organised a planning meeting with high ranking government, military and police personnel responsible for the police and army security for the area. **Johan TARČULOVSKI** advised these officials that he would be leading the ~~action~~ unlawful attack against Ljuboten which would commence on 12 August 2001 at 4.30 a.m. regardless of the support from the Macedonian Army. At this meeting, **Johan TARČULOVSKI** demanded more weapons and logistical support and requested that the checkpoints around Ljuboten be reinforced because of the ~~action~~ attack being planned.

54. On the morning of Sunday, 12 August 2001, **Johan TARČULOVSKI** led the unlawful ground attack on Ljuboten. At this time, many of the residents in Ljuboten, including men, women and children, were hiding in the basements of their houses, taking refuge from the previous attacks on the village. The unlawful ground attack began with a 120-mm round fired between 5.30 and 6.30 a.m. at the request of **Johan TARČULOVSKI**. There were a total of 16 rounds fired, 13 of which were fired directly into Ljuboten.

55. Following this shelling, **Johan TARČULOVSKI** contacted **Ljube BOŠKOSKI** to ask his approval to use a MOI Hermelin armoured vehicle to assist in the attack by providing cover to his unit. **Ljube BOŠKOSKI** ordered that this request be implemented, which it duly was. During the unlawful ground attack, **Johan TARČULOVSKI** and his police unit deliberately killed unarmed civilians, wantonly burned and destroyed many homes without justification and cruelly treated a group of residents, 3 of whom were killed. By late afternoon on Sunday, 12 August 2001, this retaliatory ~~criminal campaign~~ unlawful attack of the police unit led by **Johan TARČULOVSKI** left the villagers of Ljuboten grieving for their murdered, beaten, homeless and imprisoned relatives and neighbours.

56. The Prosecution does not allege that **Johan TARČULOVSKI** physically committed the criminal acts charged. However, the evidence will prove that his acts and intentions were directed to furthering the criminal nature of the attack. The actions of **Johan TARČULOVSKI** and the police unit he led in the village clearly had a criminal design, as demonstrated by the manner, method and the results of their attack. The illegal objective of this joint criminal enterprise (hereinafter, "JCE") was to direct an unlawful attack on civilians and civilian objects in the village of Ljuboten, which was not justified by military necessity, a crime under Article 3 of the Statute of the Tribunal (hereinafter, "the Statute"). The crimes charged in the Indictment were within the objective of the joint criminal enterprise.

57. From the first moment when the police unit entered the village on Sunday, 12 August 2001, and Rami JUSUFI, unarmed, was summarily executed, the illegal nature of the attack was obvious. The criminal attack continued with the further executions of two unarmed residents, Sulejman BARJRAMI and Muharem RAMADANI. The final execution of Ljuboten residents, Xhelal BAJRAMI, Bajram JASHARI and Kadri JASHARI on 12 August 2001, occurred when the police unit shot them dead as they fled through the fields after running from a burning house set alight by **Johan TARČULOVSKI's** -police unit, -further confirming the criminal nature of the attack.

58. The destruction of houses along the path followed by the police provides additional evidence of the criminal intent that members of the unit possessed as they moved through the village. Indicative of the criminal nature of the joint enterprise was the police unit's cruel treatment of the detained men from Adem AMETOVSKI's house, which led to the death of one of the detainees, Atulla QAILI.

59. This unlawful ground attack on civilians by the police was formulated at or after the time that **Ljube BOŠKOSKI** ordered **Johan TARČULOVSKI** and the police unit to go to Ljuboten to search for Xhavid ASANI. From the distinctively criminal nature of the entire operation, the plan would have had to be in place before the police entered the village, or, at the very least, developed extremely rapidly after the first crimes were committed.

60. **Johan TARČULOVSKI** clearly participated in this JCE as a co-perpetrator. He was the central figure responsible for the attack, drawing on resources, personnel and logistics as he required them. He was the leader of, and present with, the police unit as it moved and committed crimes throughout the village. His acts determined when and how the village would be attacked. In particular, between Friday, 10 August 2001 up to and including Sunday, 12 August 2001, he participated in the JCE in the following ways :

- (a) ~~From July to August 2001~~ ~~h~~He personally selected individuals to form his regular and reserve police unit that took part in the attack.
- (b) ~~From July to August 2001~~ ~~h~~He co-ordinated the arming of the members of his regular and reserve police unit that took part in the attack.
- (c) ~~Between 10 and 12 August 2001,~~ ~~w~~With the assistance of high level government and police officials, he persuaded the most senior police and army commanders responsible for security in the Ljuboten area to support the attack on Ljuboten.
- (d) He sought and gained logistical, material and fire support for the attack on Ljuboten from the most senior police and army commanders based in the area of Ljuboten, ~~between 10 and 12 August 2001.~~
- (e) He prompted the regular and reserve police in his unit to participate in the attack on Ljuboten.
- (f) He decided on the weaponry, manpower, logistical and other material support that would be used in the attack.
- (g) He determined the timing, method, manner, goals and targets of the attack.
- (h) He ordered, by using his position of authority, the regular and reserve police in his unit to attack Ljuboten.

- (i) He was present and provided leadership and personal guidance in the ground attack and was present at the scenes of individual crimes charged in this Indictment.

61. **Johan TARČULOVSKI** and other members of the JCE, including but not limited to, Zoran JOVANOVSKI, a.k.a. "Bučuk," owner of the KOMETA Security Company, two brothers: Aleksander and Vlado JANEVSKI, Petre STOJANOVSKI, Ljubčo BLIZNAKOVSKI, and other unidentified employees of the KOMETA Security Company who formed part of the police unit lead by **Johan TARČULOVSKI**, acted on the basis of the common criminal purpose to unlawfully attack civilians within the village, with shared intent. Alternatively, the crimes enumerated in Counts 1 to 3 of the Indictment were the natural and foreseeable consequences of the execution of the objective of the JCE, to direct an unlawful attack on civilians and civilian objects in the village of Ljuboten, and **Johan TARČULOVSKI** was aware that such crimes were a possible consequence of the execution of the JCE, and with that awareness decided to participate in that enterprise.

62. In addition to his participation in the JCE as described above, **Johan TARČULOVSKI** is also individually criminally responsible for ordering, planning, and instigating and aiding and abetting the crimes charged in the Indictment. By virtue of the authority vested in **Johan TARČULOVSKI** by **Ljube BOŠKOSKI**, and by virtue of the central role **Johan TARČULOVSKI** played in the planning, preparations and execution of the attack on the village, **Johan TARČULOVSKI** had the authority to issue orders to carry out the attack. The circumstantial evidence relating to the nature, method, timing and results of the attack as described above prove that **Johan TARČULOVSKI** ordered the crimes in the attack or at least **Johan TARČULOVSKI** acted with the awareness of the substantial likelihood that the crimes would be committed in the execution of his orders.

63. The facts described above also demonstrate that **Johan TARČULOVSKI** planned the crimes charged in the Indictment. **Johan TARČULOVSKI**'s selection –and arming of personnel, his receipt of logistical support and his communications with others who participated in or supported the attack before and after its commencement, proves the existence of a plan to execute an unlawful attack on the village of Ljuboten. The circumstantial evidence relating to the nature, method, timing and results of the attack as described above demonstrate that one of the objectives of this plan was to perpetrate the crimes charged in the Indictment. This evidence proves that the crimes perpetrated during the

attack were directly planned by **Johan TARČULOVSKI**, or at least he acted with the awareness of the substantial likelihood that the crimes would be committed in the execution of that plan.

64. The same facts also prove that **Johan TARČULOVSKI** instigated the crimes charged in the Indictment. Given his position as the commander of the policemen who carried out the unlawful attack on Ljuboten, Johan TARČULOVSKI had a duty to prevent such crimes by the policemen in his unit, or to punish those policemen in the unit who committed such crimes. **Johan TARČULOVSKI's** conduct, including his failure to prevent and punish crimes committed by the other policemen participating in the unlawful attack on Ljuboten, substantially contributed to the criminal behaviour of the other perpetrators of crimes. The same facts prove that **Johan TARČULOVSKI** prompted others to commit crimes in Ljuboten with the direct intent that such crimes occur, or that he acted with the awareness of the substantial likelihood that crimes would be committed in Ljuboten in the execution of his instigation.

65. **Johan TARČULOVSKI** also aided and abetted the crimes charged in the Indictment by providing practical assistance, encouragement and moral support to the other members of the police unit who committed crimes. His role in the unlawful attack had a substantial effect on the commission of the crimes. This aiding and abetting occurred before, during and after the crimes were committed. Given his position as the commander of the policemen who carried out the unlawful attack on Ljuboten, **Johan TARČULOVSKI's** presence during the operation attack, and his failure to exercise his duty by stopping any of the crimes from being committed, or by punishing any of the policemen who committed the crimes, encouraged the perpetrators. Given the tensions in the Ljuboten area following the killing of 8 Macedonian soldiers on 10 August 2001, **Johan TARČULOVSKI** was aware that one of a number of crimes were likely to be committed during the unlawful attack on the village on 12 August.

66. On the basis of the evidence summarized above, and as set forth in the Indictment, the Prosecution contends that **Johan TARČULOVSKI** is liable pursuant to Article 7(1) of the Statute -for having committed, ordered, planned, instigated or otherwise aided and abetted the crimes charged.

Ljube BOŠKOSKI

67. At the time of the unlawful attack on Ljuboten, **Ljube BOŠKOSKI** was the Minister of the Interior of Macedonia and a prominent member of the governing political party, VMRO-DPMNE. **Ljube BOŠKOSKI** held this position from May 2001 until November 2002. In his capacity as the Minister of the Interior, **Ljube BOŠKOSKI** had the overall authority and responsibility for the functioning of the regular, reserve and special police forces within the MOI. He exercised *de jure* and *de facto* command and control over these police forces, which included **Johan TARČULOVSKI** and the police unit that directly participated in the crimes charged in the Indictment. **Ljube BOŠKOSKI** held the highest position of authority in the MOI. His official responsibility included public and state security.

68. **Ljube BOŠKOSKI**'s subordinates were under an obligation to carry out every order given by him. He had the authority to appoint, punish, discipline, suspend and dismiss police personnel from duty for crimes they may have committed. Other powers included powers to establish police units, execute police operations and determine police rules and regulations. Often, **Ljube BOŠKOSKI** would exercise his command in uniform at major police tactical operations. **Ljube BOŠKOSKI** also exercised his authority over special police units such as the "TIGERS" and the "LIONS." **Ljube BOŠKOSKI** supervised and was actively present during many of the special unit operations during the conflict. Throughout the conflict, **Ljube BOŠKOSKI** issued many orders as to the appointment and dismissal of staff within the MOI.

69. **Ljube BOŠKOSKI** knew or had reason to know that the crimes alleged in the Indictment had been committed by his subordinates. **Ljube BOŠKOSKI**'s knowledge as to the commission of the crimes was obtained in many ways, including, *inter alia*:

- (a) his personal observations near the scene of some of the crimes alleged in the Indictment such as the destruction of houses in Ljuboten and his observations of injured ethnic Albanian men who were detained at the Braca House, where **Ljube BOŠKOSKI** was observing the attack from its staging post for about 3 hours near the end of the attack on Sunday, 12 August 2001.
- (b) his personal meetings with **Johan TARČULOVSKI** and Zoran JOVANOVSKI aka "Bučuk" and other participants near the end of the attack at Braca's House.

- (c) his personal meetings with high level police officials on 12 August 2001 at the checkpoints leading to Ljuboten.
- (d) internal police reports addressed to him as to the results of the operation.
- (e) newspaper and other media reports commencing on 12 August 2001 that continued through to the remainder of that year.
- (f) his contemporaneous personal meetings with international representatives and journalists; and
- (g) reports of international organisations such as Human Rights Watch and the Committee for the Prevention of Torture which were produced shortly after the crimes occurred. |

70. **Ljube BOŠKOSKI's** knowledge of the perpetrators of the crimes was obtained by the following means:

- (a) he personally ordered **Johan TARČULOVSKI** to carry out an operation in Ljuboten shortly before the unlawful attack occurred.
- (b) he personally participated in the unlawful attack on Ljuboten by providing logistical support to assist its completion.
- (c) he personally spoke to **Johan TARČULOVSKI**, Zoran JOVANOVSki aka "Bučuk" and other members of the regular and reserve police, just outside Ljuboten, about the results of the unlawful attack shortly after its completion.
- (d) On the evening of 12 August 2001, in Skopje, he personally spoke to Zoran JOVANOVSki aka "Bučuk" and other persons who participated in the unlawful attack; , and
- (e) through the means indicated in the preceding paragraph.

71. As a person with superior responsibility and with the knowledge of the occurrence of the crimes charged in the Indictment, **Ljube BOŠKOSKI** had an obligation to investigate and establish the facts of the crimes and to impose appropriate punitive and disciplinary measures on the perpetrators. Such an obligation was a continuing one, at least, till such time as in May 2002, when the Prosecutor of this Tribunal informed the Macedonian authorities that she was exercising primacy over the crimes arising out of and following the Ljuboten attack in August 2001.

72. A responsible and reasonable superior with **Ljube BOŠKOSKI**'s obligations should have ensured that members of the MOI undertook a genuine enquiry in respect of the allegations of crimes committed by his subordinates. **Ljube BOŠKOSKI** had a duty to ensure that relevant officials of the MOI undertook a professional and comprehensive enquiry into allegations of murder, wanton destruction and cruel treatment arising out of the unlawful attack on Ljuboten by his subordinates. At a minimum, this duty would have included the tasking of a responsible person to oversee the enquiry and to put in place formal lines of responsibility for it.

73. In relation to these crimes, **Ljube BOŠKOSKI**, as Minister of Interior, should have ensured the collection of evidence from all potential sources. This would potentially have included, but not be limited to the following activities: (1) interviewing eye-witnesses, the perpetrators and victims of the crimes including (a) members of the police (b) members of the army (c) residents of Ljuboten including those detained in custody and (d) international witnesses ; (2) securing the crime scene and (3) initiating forensic investigations.. **Ljube BOŠKOSKI** should have also ensured that the perpetrators were detained.

74. **Ljube BOŠKOSKI** should have ensured that the evidence gathered, together with a comprehensive report concerning each of the criminal allegations, were submitted to the Public Prosecutor. As Minister of Interior and especially in the concrete circumstances of this case, **Ljube BOŠKOSKI** should have played an active role, and done everything within his *de jure* and *de facto* powers, to ensure that all allegations of crimes in Ljuboten were properly resolved within the criminal justice system.

75. Concurrently, **Ljube BOŠKOSKI** had an obligation to initiate within the MOI a genuine and comprehensive internal investigation into these serious criminal allegations to ensure that any employee of the MOI who committed acts of misconduct at Ljuboten or in detention centres outside of Ljuboten were subject to disciplinary measures or dismissal.

76. Neither a genuine investigation, nor even a genuine request for one, was initiated by **Ljube BOŠKOSKI** or by members of the MOI in respect of the murders, cruel treatment and wanton destruction charged in the Indictment. Despite such an obligation and **Ljube BOŠKOSKI**'s knowledge about the crimes, neither **Johan TARČULOVSKI**, nor the police unit that he led in the unlawful attack on Ljuboten, nor any member of the police force that was involved in the murder, cruel treatment and wanton destruction of properties of the ethnic-

Albanian residents was ever punished, disciplined or reprimanded in any way by **Ljube BOŠKOSKI** or any other member of the MOI for their criminal actions. **Johan TARČULOVSKI** continued in his employment with the MOI throughout **Ljube BOŠKOSKI's** term of office.

77. Instead, on 13 August 2001, **Ljube BOŠKOSKI** created a so-called Commission for the "review of the circumstances and to analyze the activities undertaken by the Security Forces of the MOI in order to repulse the armed attack of the terrorist groups on 12 August 2001 in the village of Ljuboten." The Commission was comprised of three high level police officers who were subordinate to **Ljube BOŠKOSKI**. On 4 September 2001, the Commission gave its report, thereby holding that "the activities undertaken by the Security Forces...to repulse the armed attack of the terrorist groups...(were)... justified and lawfully undertaken." The Chairman of the Commission, Goran MITEVSKI, was the Head of Public Security in the MOI and a direct subordinate and a long-term political associate of **Ljube BOŠKOSKI**.

78. This Commission, in fact, did not carry out any investigation into the events of Ljuboten as claimed in the report. The three members of the Commission: (1) never met, (2) never interviewed witnesses or suspects, whether police, army or ethnic Albanian victims identified in connection with the Ljuboten operation, (3) never collected any oral and/or documentary evidence relating to the murders, cruel treatment and destruction of property committed during or after the attack, (4) did not follow any rules of evidence and procedure, and (5) issued a vague and perfunctory 5 page "Opinion," written by one member, "justifying" the actions of the police without addressing the issues related to the crimes charged in the Indictment.

79. It is clear from the report of the so-called Commission that it was not meant to investigate the crimes committed by the MSF, as charged in the Indictment. It is patent that **Ljube BOŠKOSKI** had no intention to undertake a genuine investigation into the crimes committed by the MSF nor to punish and discipline the perpetrators of those crimes who clearly were under his command and effective control. The Prosecution submits that by appointing a sham Commission, comprised of only his immediate subordinates, to investigate the "activities" of the MSF and subsequently absolving them through that Commission, **Ljube BOŠKOSKI** sought to shield the perpetrators from accountability for their actions. Thus,

Ljube BOŠKOSKI criminally circumvented his responsibility to punish his subordinates who perpetrated the crimes charged in the Indictment.

80. As the Minister of the Interior in charge of the police forces under that Ministry's command and control, **Ljube BOŠKOSKI** clearly had the knowledge of the commission of the crimes charged in the Indictment. He received further public notice of these crimes when the matter was widely reported in print and electronic media and when he visited the MSF checkpoints near Ljuboten and his visit was televised on the Macedonian TV on 13 August 2001. **Ljube BOŠKOSKI's** lack of will to genuinely investigate the crimes committed became more apparent once explicit and comprehensive allegations were brought to his attention on 5 September 2001 in the Human Rights Watch report on the crimes committed in and arising out of Ljuboten.

81. It is thus clear that all measures taken by **Ljube BOŠKOSKI** after the attack on Ljuboten were designed solely to cover up his involvement in the unlawful attack and the crimes committed by his subordinates in and around Ljuboten and in the detention centres described in the Indictment, from 12-21 August 2001. . For example, contemporaneous media statements made by **Ljube BOŠKOSKI** sought only to justify the unlawful MSF attack on Ljuboten without any reference to the nature and number of ethnic Albanian casualties, the unlawful nature of the Ljuboten attack and the manner in which civilians met their deaths.

82. **Ljube BOŠKOSKI** is charged with superior responsibility for the crimes of regular and reserve police, including special police units, both for the commission of crimes by those police, as well as for the acts or omissions of those police which aided and abetted prison guards, hospital personnel and civilians to commit those crimes as described in the Second Amended Indictment counts. Although **Ljube BOŠKOSKI** was not the superior of prison guards, hospital personnel and civilians within the meaning of Article 7 (3) of the Statute, his criminal responsibility for those crimes arises as a result of his failure to punish the regular, reserve or special police for their acts or omissions which aided and abetted those prison guards, hospital personnel and other civilians to commit those crimes. It is not the Prosecution's position that **Ljube BOŠKOSKI** had a superior responsibility, within the scope

of Article 7(3), to punish those prison guards, hospital personnel or civilians for their mistreatment of detainees.³

83. On the basis of the evidence summarized above, and as set forth in the Indictment, the Prosecution contends that the Accused **Ljube BOŠKOSKI** is liable, pursuant to Article 7(3) of the Statute, for his failure to take necessary and reasonable measures to punish the crimes of his subordinates if he knew or had reasons to have known that his subordinates committed those crimes.

III. THE LAW

A. General

84. The Indictment charges **Johan TARČULOVSKI** with individual criminal responsibility, pursuant to Article 7(1) of the Statute, for crimes referred to in Article 3 which he committed, ordered, planned, instigated and otherwise aided and abetted. By using the word “committed” in the Indictment, it is not alleged that he physically committed any of the crimes charged. However, “committed” refers to his participation in the JCE.⁴

85. The Accused **Ljube BOŠKOSKI** is charged with individual criminal responsibility, pursuant to Article 7(3) of the Statute, for crimes referred to in Article 3 of the Statute as alleged in the Indictment. He, in his capacity as the Macedonian Minister of the Interior, exercised *de jure* and *de facto* control over the active and reserve police forces that participated in the crimes alleged in the Indictment. **Ljube BOŠKOSKI**, thus, is charged under Article 7(3), as a superior responsible for the criminal acts of his subordinates, as he knew or had reason to know that his subordinates had committed such acts and yet failed to take necessary and reasonable measures to punish them.⁵

³ This clarification is provided in accordance with the Trial Chamber’s Decision on 1 November 2005. *Prosecutor v. Ljube Boškosi and Johan Tarčulovski*, IT-04-82-PT, “Decision on Prosecution’s Motion for Leave to Amend the Original Indictment and Defence Motions Challenging the Form of the Proposed Amended Indictment” 1 November 2005, Disposition at page 21.

⁴ Indictment, para 3.

⁵ Indictment, paras 11-17.

B. Article 7(1) of the Statute

86. For any charge of Article 7(1) responsibility, the Trial Chamber has the discretion to find that the evidence supports any of the modes of liability whether or not expressly charged.⁶ The Indictment charges **Johan TARČULOVSKI** with all forms of criminal participation enumerated in Article 7(1) in relation to all counts: that he planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of the crimes. He is also charged with participating, with members of Macedonian regular and reserve police under his command within the MOI in a JCE with the objective of directing an unlawful attack on civilians and civilian objects, not justified by military necessity. The crimes occurring in Ljuboten and charged in Counts 1, 2 and 3 of the Indictment were within the object of this JCE.⁷ Alternatively, the crimes enumerated in Counts 1, 2 and 3 of the Indictment were the natural and foreseeable consequences of the execution of the object of the JCE to direct an unlawful attack on civilian and civilian objects in the village of Ljuboten.⁸

1. Committing Through Participation in a JCE

87. Because the Accused **Johan TARČULOVSKI** is not charged in this case with direct physical perpetration of the criminal acts charged in the Indictment, the term “committed” refers to his participation, together with others known and unknown, in a JCE.⁹ The principles of a common criminal plan, design or purpose, such as JCE, articulate a mode of individual

⁶ *Prosecutor v. Zoran Kupreškić, et al.*, Judgement, Case No. IT-95-16-T, 14 January 2000 (hereinafter *Kupreškić Trial Judgement*), para. 746; see also *Prosecutor v. Anto Furundžija*, Judgement, Case No. IT-95-17/1-T, 10 December 1998 (hereinafter *Furundžija Trial Judgement*), para. 189; *Prosecutor v. Zejnil Delalić et al.*, Judgement, Case No. IT-96-21-A, 20 February 2001 (hereinafter *Čelebići Appeals Judgement*), paras. 350-51.

⁷ Indictment, paras 4-8.

⁸ Indictment, para 8.

⁹ *Prosecutor v. Vasiljević*, Judgement, Case No. IT-98-32-A, App. Ch., 25 February 2004 (hereinafter *Vasiljević Appeal Judgement*), para. 102. See *Prosecutor v. Radislav Krstić*, Judgement, Case No. IT-98-33-T, 2 August 2001, (hereinafter *Krstić Trial Judgement*), para. 601 and note 1346. The Appeals Chamber has used the term “co-perpetrator” to refer to participants in a joint criminal enterprise. *Prosecutor v. Duško Tadić*, “Judgement,” Case No. IT-94-1-A, 15 July 1999, paras. 196 and 228; *Prosecutor v. Anto Furundžija*, Case No. IT-95-17/1-A, 21 July 2000, para. 118. The use of this term should not be interpreted to exclude the other modes of individual criminal responsibility described in Article 7(1) of the Statute.

criminal responsibility encompassed by Article 7(1),¹⁰ in which one person can be criminally responsible for the acts of another where both participate in a common criminal purpose.¹¹

88. The *actus reus* of a JCE requires 3 elements. First, there must be 2 or more persons, though they need not be organised in a military, political or administrative structure.¹²

89. Second, there must be a common plan, design, or purpose that amounts to or involves the commission of a crime. The plan need not be previously arranged or formulated, but may “materialise extemporaneously and be inferred from the fact that a plurality of persons act in unison to put into effect a JCE.”¹³

90. Third, the Accused must participate in the enterprise. This participation need not involve the commission of a crime, but may take the form of assistance in or contribution to the execution of the common plan or purpose.¹⁴ It is sufficient for the participant to perform acts that in some way are *directed to* the furthering of the plan or purpose.¹⁵

91. Tribunal case law regarding JCE has identified three different situations in which JCE arises, for which the mental state differs.¹⁶ The Indictment charges the first and third form of JCE. In the first situation, the Accused intends to commit a certain crime, this intent being shared by all members of the JCE.¹⁷ All participants, acting pursuant to a common design need to share the intent, although their roles in the enterprise may differ. To prove criminal liability, the Prosecution must show that the Accused “voluntarily participate[d] in one aspect of the common design” and the Accused, “even if not personally effecting the [criminal

¹⁰ *Prosecutor v. Vidoje Blagojević and Dragan Jokić*, Judgement, Case No. IT-02-60-T, T. Ch. I, Sec. A, 17 January 2005 (hereinafter *Blagojević* Trial Judgement), para. 695; *Prosecutor v. Duško Tadić*, Judgement, Case No. IT-94-1-A, 15 July 1999 (hereinafter *Tadić* Appeals Judgement), para. 220; *Prosecutor v. Anto Furundžija*, Judgement, Case No. IT-95-17/1-A, 21 July 2000 (hereinafter *Furundžija* Appeals Judgement), para. 119; *Prosecutor v. Kvočka, et. al.*, Judgement, Case No. IT-98-30/1-T, 2 November 2001 (hereinafter *Kvočka* Trial Judgement), para. 244.

¹¹ *Prosecutor v. Radoslav Brđanin*, Judgement, Case No. IT-99-36-T, T. Ch. II, 1 September 2004 (hereinafter *Brđanin* Trial Judgement), para. 258; *Tadić* Appeals Judgement, para. 185, 196, 222-23, 228; *Furundžija* Appeals Judgement, para. 117-19.

¹² *Vasiljević* Appeal Judgement, para. 100; *Tadić* Appeals Judgement, para. 227.

¹³ *Brđanin* Trial Judgement, para. 264.; *Tadić* Appeals Judgement, para. 227, quoted also in *Furundžija* Appeals Judgement, para. 119.

¹⁴ *Blagojević* Trial Judgement, para. 703.

¹⁵ *Brđanin*, Trial Judgement, para. 259-260; *Tadić* Appeals Judgement, para. 229 (iii); *Furundžija* Appeals Judgement (para. 118-120), *Čelebići* Appeals Judgement (para. 265-266).

¹⁶ *Tadić* Appeals Judgement, para. 227-228.

¹⁷ *Tadić* Appeals Judgement, paras. 220 and 228.

result], must nevertheless [have] intended this result.”¹⁸ Where this is the case, the Accused will be considered to have jointly “committed” the crime as a co-perpetrator.¹⁹

92. In the third situation, one of the participants in the JCE commits a crime “other than the one agreed upon in the common plan.”²⁰ The Accused may be held responsible for that crime if, under the circumstances, it was foreseeable that such crime might be perpetrated by some member of the group and the Accused willingly took that risk – that is, being aware that such crime was a possible consequence of the execution of that enterprise, and with that awareness, the Accused decided to participate in the enterprise.²¹

2. Planning

93. “Planning” requires that one or more persons design the criminal conduct constituting one or more statutory crimes that are later perpetrated.²² It is sufficient to demonstrate that the planning was a factor substantially contributing to such criminal conduct.²³ The *mens rea* is established if the perpetrator acted with direct intent in relation to his own planning, or when he plans an act or omission with the awareness of the substantial likelihood that a crime will be committed in the execution of that plan.²⁴

3. Ordering

94. The *actus reus* of ordering means that a person in a position of authority instructs another person to commit an offence.²⁵ No *formal* superior-subordinate relationship is required for a finding of “ordering” as long as the Accused possessed the authority to order.²⁶ The *mens rea* for ordering is established if the perpetrator acted with direct intent in relation to his own ordering, or when the person orders an act or omission with the awareness of the

¹⁸ *Tadić* Appeals Judgement, para. 196.

¹⁹ *Brđanin*, Trial Judgement, para. 260-5.

²⁰ *Tadić* Appeals Judgement, para. 228.

²¹ *Krstić* Trial Judgement, para. 613; *Vasiljević* Appeal Judgement, para. 101, *Prosecutor v. Tihomir Blaškić*, Judgement, Case No. IT-95-14-A, 29 July 2004, (hereinafter *Blaškić* Appeal Judgement), para. 33.

²² *Prosecutor v. Dario Kordić and Mario Čerkez*, Judgement, Case No. IT-95-14/2-A, 17 December 2004 (hereinafter *Kordić and Čerkez* Appeal Judgement), para. 26.

²³ *Ibid*, para. 26.

²⁴ *Ibid*, paras. 29, 31.

²⁵ *Blaškić* Appeal Judgement, para. 28.

²⁶ *Prosecutor v. Dario Kordić & Mario Čerkez*, Judgement, 26 February 2001, Case No. IT-95-14/2-T (hereinafter *Kordić and Čerkez* Trial Judgement), para. 388; *Prosecutor v. Jean-Paul Akayesu*, Judgement, Case No. ICTR-96-4-T, 2 September 1998 (hereinafter *Akayesu* Trial Judgement), para. 483; *Blaškić* Trial Judgement para. 281.

substantial likelihood that a crime will be committed in the execution of that order.²⁷ The giving of an order may be proven circumstantially, and the order need not be in writing,²⁸ need not be given by the superior directly to the person who commits the crime,²⁹ and may be express or implied.³⁰

4. Instigating

95. The *actus reus* of “instigating” means to prompt another person to commit an offence.³¹ While it is not necessary to prove that the crime would not have been perpetrated without the involvement of the Accused, it is sufficient to demonstrate that the instigation was a factor substantially contributing to the conduct of another person committing the crime.³² In addition, there is no requirement that instigation be direct or public.³³ The *mens rea* is established if the perpetrator either acts with direct intent in relation to his own orders or instigates another person to commit an act or omission with the awareness of the substantial likelihood that a crime will be committed in the execution of that instigation.³⁴

96. Instigation does not require any relationship of authority between the Accused and the physical perpetrator. The Accused’s acts or statements directed at those over whom he had no authority to order may also be considered instigation. A superior’s failure to punish past crimes may constitute instigation of future crimes.³⁵

5. Aiding and Abetting

97. “Aiding and abetting” consists of “practical assistance, encouragement or moral support” to another person perpetrating a crime.³⁶ Aiding and abetting may assume different

²⁷ *Prosecutor v. Tihomir Blaškić*, Judgement, Case No. IT-95-14-A, 29 July 2004, (hereinafter *Blaškić Appeal Judgement*), para. 42, *Kordić and Čerkez Appeal Judgement*, paras. 29, 30

²⁸ *Kordić and Čerkez Trial Judgement*, para. 388.

²⁹ *Ibid.*

³⁰ *Blaškić Trial Judgement*, para. 281.

³¹ *Kordić and Čerkez Appeal Judgement*, para. 27.

³² *Ibid.*

³³ *Akayesu Trial Judgement*, para. 478.

³⁴ *Kordić and Čerkez Appeal Judgement*, para. 29 and 31.

³⁵ *Blaškić Trial Judgement*, para. 337.

³⁶ *Prosecutor v. Zlatko Aleksovski*, Judgement, Case No. IT-95-14/1-A, 24 March 2000 (hereinafter the *Aleksovski Appeals Judgement*), para. 162; *Prosecutor v. Milorad Krnojelac*, Judgement, Case No. IT-97-25-T, 15 March 2002 (hereinafter *Krnojelac Trial Judgement*), para. 88; *Prosecutor v. Dragoljub Kunarac, et. al.*, Judgement, Case No. IT-96-23-T & IT-96-23/1-T, 22 February 2001 (hereinafter *Kunarac Trial Judgment*), para. 391; *Blaškić Trial Judgement*, para. 283; *Furundžija Trial Judgement* at 249. See also *Tadić Appeals Judgement*, para. 229.

forms of assistance, including omissions.³⁷ The use of inflammatory, threatening and/or discriminatory statements may constitute aiding and abetting.³⁸ “Proof that the conduct of the aider and abettor had a causal effect on the act of the principal perpetrator is not required,”³⁹ but the Accused’s act “must have had a substantial effect on the commission of the crime.”⁴⁰ Aiding and abetting can take place before, during or after the event.⁴¹ The Accused’s knowing presence when a crime is committed may constitute the act of aiding and abetting if it encourages the perpetrators.⁴² An omission by a superior can contribute to the commission of a subordinate’s crime, “for example by encouraging the perpetrator.”⁴³

98. For the required *mens rea*, the Accused must act in the knowledge that his act will assist the commission of the offence by the perpetrator or is aware of the substantial likelihood that it will do so.⁴⁴ The Accused need not share the *mens rea* of the principal but needs to be aware of the essential elements of the crime, including the *mens rea* of the principal.⁴⁵ It is not necessary that the aider or abettor “know the precise crime that was intended or which was actually committed.”⁴⁶ If he is aware that one of a number of crimes will likely be committed and one of those is in fact committed, he has intended to facilitate the commission of that crime and is guilty as an aider and abettor.⁴⁷

C. Article 7(3) of the Statute

1. General

99. It has been held that “[t]he principle that military and other superiors may be held criminally responsible for the acts of their subordinates is well-established in conventional and

³⁷ *Brđanin* Trial Judgement, para. 271-4; *Krnjelac* Trial Judgement, para. 88; *Kunarac* Trial Judgement, para. 391; *Prosecutor v. Zejnil Delalić, et. al.* Judgement, Case No. IT-96-21-T, 16 November 1998, (hereinafter *Čelebići* Trial Judgement), para. 327 (assistance in different forms); *Blaškić* Trial Judgement, para. 284.

³⁸ *Prosecutor v. Duško Tadić, aka “Dule,”* “Sentencing Judgement,” Case No. IT-94-1-T, 14 July 1997, para. 72, affirmed on Appeal, 26 January 2000; *Brđanin* Trial Judgement, para. 368.

³⁹ *Krnjelac* Trial Judgement, para. 88; *Kunarac* Trial Judgement, para. 391; *Blaškić* Trial Judgement, para. 285; *Furundžija* Trial Judgement at 233.

⁴⁰ *Krnjelac* Trial Judgement, para. 88; *Aleksovski* Appeals Judgement, para. 162. See also *Kunarac* Trial Judgement, para. 391; *Blaškić* Trial Judgement, para. 284 (“decisive effect”); *Furundžija* Trial Judgement at 234.

⁴¹ *Krnjelac* Trial Judgement, para. 88; *Kunarac* Trial Judgement, para. 391; *Čelebići* Trial Judgement, para. 327; *Blaškić* Trial Judgement, para. 285; *Blaškić* Appeal Judgment, para. 48.

⁴² *Prosecutor v. Duško Tadić*, Judgement, Case No. IT-94-1-T, 7 May 1997 (hereinafter *Tadić* Trial Judgement), paras. 689-90; see also *Blaškić* Trial Judgement, para. 284; *Akayesu* Trial Judgement, para. 693.

⁴³ *Kordić and Čerkez* Trial Judgement, para. 371.

⁴⁴ *Kvočka* Trial Judgement para. 251; *Blaškić* Appeals Judgement, para. 46.

⁴⁵ *Aleksovski* Appeals Judgement, para. 162; *Krnjelac* Trial Judgement, para. 90; *Kvočka* Trial Judgement, paras. 255, 262; *Kunarac* Trial Judgement, para. 392; *Furundžija* Trial Judgement, para. 245.

⁴⁶ *Kvočka* Trial Judgement, para. 255; *Blaškić* Trial Judgement, para. 287; *Furundžija* Trial Judgement, para. 246.

⁴⁷ *Blaškić* Appeal Judgement para. 50.

customary law.”⁴⁸ This applies both in the context of international as well as internal armed conflicts.⁴⁹ The jurisprudence of the Tribunal has established the following three-pronged test for criminal liability pursuant to Article 7(3) of the Statute:

- (a) the existence of a superior-subordinate relationship between the superior (the Accused) and the perpetrator of the crime;
- (b) the Accused knew or had reason to know that the crime was about to be or had been committed; and
- (c) the Accused failed to take the necessary and reasonable measures to prevent the crime or punish the perpetrator thereof.⁵⁰

100. The existence of a superior-subordinate relationship is characterised by a formal or informal hierarchical relationship between the superior and subordinate.⁵¹ The hierarchical relationship may exist by virtue of a person’s *de jure* or *de facto* position of authority.⁵² The superior-subordinate relationship need not have been formalised or necessarily determined by formal status alone.⁵³ Both direct and indirect relationships of subordination within the hierarchy are possible⁵⁴ whilst the superior’s effective control over the persons committing the offence must be established.⁵⁵ Effective control is defined as the material ability to prevent or punish the commission of the offence.⁵⁶

⁴⁸ *Čelebići* Appeal Judgement, para. 195.

⁴⁹ *Prosecutor v. Enver Hadžihasanović, Mehmed Alagić and Amir Kubura*, Case No. IT-01-47-AR72, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, 16 July 2003 (hereinafter “*Hadžihasanović et al.* Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility”), paras 13 and 31; see also, *Prosecutor v. Enver Hadžihasanović, Mehmed Alagić and Amir Kubura*, Case No. IT-01-47-PT, Decision on Joint Challenge to Jurisdiction, 12 November 2002 (hereinafter “*Hadžihasanović et al.* Decision on Joint Challenge to Jurisdiction”), paras 178-179.

⁵⁰ *Brdanin* Trial Judgement, para 275; *Čelebići* Trial Judgement, para. 346; *Čelebići* Appeal Judgement, paras 189-198, 225-226, 238-239, 256, 263. The Trial Chamber’s conclusions as to the first two elements of the test were upheld by the Appeals Chamber. The third element of the test did not form part of the appeal. See also *Aleksovski* Trial Judgement, para. 69; *Blaškić* Trial Judgement, para. 294; *Kordić and Čerkez* Trial Judgement, para. 401; *Kunarac* Trial Judgement, para. 395; *Krstić* Trial Judgement, para. 604, *Kvočka* Trial Judgement, para. 314; *Prosecutor v. Stanislav Galić*, Judgement, Case No. IT-98-29-T, 5 December 2003 (hereinafter *Galić* Trial Judgement), para. 173.

⁵¹ *Čelebići* Appeal Judgement, para. 303.

⁵² According to the *Čelebići* Appeal Judgement, para. 193, a formal letter of commission or appointment is not necessary. A *de facto* superior must “wield substantially similar powers of control over subordinates” as a *de jure* superior: *Ibid.*, para. 197. See also *Aleksovski* Appeal Judgement, para. 76.

⁵³ *Čelebići* Trial Judgement, para. 370.

⁵⁴ *Čelebići* Appeal Judgement, para. 252.

⁵⁵ *Čelebići* Appeal Judgement, para. 197.

⁵⁶ *Čelebići* Trial Judgement, para. 378, affirmed in *Čelebići* Appeal Judgement, para. 256.

101. Substantial influence over subordinates which does not meet the threshold of effective control is not sufficient under customary international law to serve as a means of exercising superior criminal responsibility.⁵⁷ A superior vested with *de jure* authority who does not actually have effective control over his subordinates will not incur criminal responsibility pursuant to the doctrine of superior responsibility, whereas a *de facto* superior who lacks formal letters of appointment or commission but does, in reality, have effective control over the perpetrators of offences may incur criminal responsibility.⁵⁸

102. In all circumstances, and especially when an Accused is alleged to have been a member of collective bodies with authority shared among various members, “it is appropriate to assess on a case-by-case basis the power or authority actually devolved to an Accused,”⁵⁹ taking into account the cumulative effect of the Accused’s various functions.⁶⁰

103. To prove the mental element of superior responsibility, it must be established that the superior knew or had reason to know that his subordinate was about to commit or had committed a crime. Superior responsibility is not a form of strict liability.⁶¹ It must be proven that the superior had: (i) actual knowledge, established through either direct or circumstantial evidence, that his subordinates were about to commit or had committed crimes within the jurisdiction of the Tribunal; *or* (ii) constructive knowledge, meaning that the superior had in his possession information that would at least put him on notice of the present and real risk of such offences, such information alerting him to the need for additional investigation to determine whether such crimes were about to be committed or had been committed by his subordinates.⁶² Knowledge may be presumed if a superior had the means to obtain the relevant information of a crime and deliberately refrained from doing so.⁶³

104. It must be established that the superior failed to take the necessary and reasonable measures to punish the crimes of his subordinates. The measures required of the superior are limited to those within his power; that is, those measures that are within his material

⁵⁷ *Čelebići* Appeal Judgement, para. 266.

⁵⁸ *Brdanin* Trial Judgement, para 276; *Čelebići* Appeal Judgement, para. 197.

⁵⁹ *Prosecutor v. Ignace Bagilishema*, Case No. ICTR-95-1A-A, Judgement, 3 July 2003 (hereinafter “*Bagilishema* Appeal Judgement”), para. 51, endorsing the finding in the *Musema* Trial Judgement, para. 135.

⁶⁰ *Brdanin* Trial Judgement, para 277; *Prosecutor v. Milomir Stakić*, Judgement, Case No. IT-97-24-T, 31 July 2003 (hereinafter *Stakić* Trial Judgement), para. 494.

⁶¹ *Čelebići* Appeal Judgement, para. 239.

⁶² *Brdanin* Trial Judgement, para. 278.

⁶³ *Brdanin* Trial Judgement, para 278; *Čelebići* Appeal Judgement, para. 226.

possibility.⁶⁴ The superiors' duty to prevent and punish their subordinates' crimes includes at least an obligation to investigate the crimes to establish the facts and to report them to the competent authorities, if the superior does not have the power to sanction himself.⁶⁵ A superior is not obliged to perform the impossible.⁶⁶ However, he has a duty to exercise the measures reasonably possible under the circumstances,⁶⁷ including those that may be beyond his formal powers.⁶⁸ What constitutes such measures is not a matter of substantive law but of evidence.⁶⁹

105. The question of whether a superior has failed to take all necessary and reasonable measures to prevent the commission of an offence or to punish the perpetrators is intrinsically connected to the question of that superior's position of power. As the Tribunal's definition of a "superior" requires the existence of effective control, whether *de jure* or *de facto*, a superior will be held responsible for failing to take such measures that are within his material possibility. Therefore the question of whether a superior had explicit legal capacity to take such measures will be immaterial if he had the material ability to act.⁷⁰

106. A superior's duty to punish the perpetrators of a crime includes at least an obligation to investigate possible crimes, to establish the facts, and if the superior has no power to sanction, to report them to the competent authorities. Courts have interpreted the superiors' duty to punish as implying an obligation for the superiors to conduct an effective investigation and to take active steps to secure that the perpetrators will be brought to justice. Relevant in this respect could also be whether the superior has called for a report on the incident and the thoroughness of the investigation.⁷¹

2. Responsibility of Civilian Superiors

107. Article 7(3) is applicable both to military and civilian leaders, be they elected or self-proclaimed, once it is established that they had the requisite effective control over their

⁶⁴ *Čelebići* Trial Judgement, para. 395.

⁶⁵ *Kordić and Čerkez* Trial Judgement, para. 446.

⁶⁶ *Čelebići* Trial Judgement, para. 395.

⁶⁷ *Krnjelac* Trial Judgement, para. 95.

⁶⁸ *Čelebići* Trial Judgement, para. 395.

⁶⁹ *Brdanin* Trial Judgement, para 279; *Blaškić* Appeal Judgement, para. 72.

⁷⁰ *Prosecutor v. Pavle Strugar*, Judgement, Case No. IT-01-42-T, T Ch II, 31 January 2005 (hereinafter *Strugar* Trial Judgement), para. 372-377.

⁷¹ *Ibid.*

subordinates.⁷² As in the case of military superiors, civilian superiors will only be held liable under the doctrine of superior criminal responsibility if they were part of a superior-subordinate relationship, even if that relationship is an indirect one.⁷³ A showing that the superior *merely* was an influential person will not be sufficient; however, it will be taken into consideration, together with other relevant facts, when assessing the civilian superior's position of authority.⁷⁴ Nevertheless, the concept of effective control for civilian superiors is different in that a civilian superior's sanctioning power must be interpreted broadly.⁷⁵

108. For a finding that civilian superiors have effective control over their subordinates, it suffices that civilian superiors, through their position in the hierarchy, have the duty to report whenever crimes are committed, and that, in light of their position, the likelihood that those reports will trigger an investigation or initiate disciplinary or criminal measures is extant.⁷⁶ In situations of armed conflict, it is often the case that civilian superiors assume more power than that with which they are officially vested. In such circumstances, *de facto* authority may exist alongside, and may turn out to be more significant than, *de jure* authority.⁷⁷ The capacity to sign orders will be indicative of some authority; it is necessary to look to the substance of the documents signed and whether there is evidence of them being acted upon.⁷⁸

109. The *mens rea* requirement for liability pursuant to Article 7(3) has been applied uniformly in cases before this Tribunal and the ICTR to both civilian and military superiors, in the sense that the same state of knowledge to establish superior criminal responsibility pursuant to Article 7(3) of the Statute is required for both civilian and military superiors.⁷⁹

110. *Civilian* superiors are under similar obligations to prevent their subordinates' crimes and to punish the perpetrators thereof as military superiors. Depending on the effective *de jure* or *de facto* powers enjoyed, one would need to consider whether these include an ability to require the competent authorities to take action.⁸⁰

⁷² *Čelebići* Appeal Judgement, paras 195-196, 240; *Aleksovski* Appeal Judgement, para. 76.

⁷³ *Kordić and Čerkez* Trial Judgement, para. 415.

⁷⁴ *Ibid.*

⁷⁵ *Aleksovski* Trial Judgement, para. 78.

⁷⁶ *Ibid.*

⁷⁷ *Kordić and Čerkez* Trial Judgement, para. 422.

⁷⁸ *Brdanin* Trial Judgement, para 281; *Čelebići* Trial Judgement, para. 672, *Kordić and Čerkez* Trial Judgement, para. 421.

⁷⁹ *Brdanin* Trial Judgement, para 282; *Čelebići* Appeal Judgement, paras 223-226; *Krnjelac* Trial Judgement, para. 94; *Musema* Trial Judgement, paras 147-148.

⁸⁰ *Brdanin* Trial Judgement, para. 283; *Kordić and Čerkez* Trial Judgement, para. 446.

D. Article 3 of the Statute

1. General Requirements of Article 3 of the Statute and Common Article 3

111. *The Accused* have been charged in the Indictment with violations of Articles 3(b) of the Statute, as well as with murder and cruel treatment as violations of Article 3(1)(a) common to the 1949 Geneva Conventions (“common Article 3”) chargeable under Article 3 of the Statute.⁸¹

112. Article 3 of the Statute refers to a broad category of offences, namely all “violations of the laws or customs of war.”⁸² It has thus been interpreted as a residual clause covering all violations of humanitarian law not falling under Articles 2, 4 or 5 of the Statute, more specifically: (i) violations of the Hague law on international conflicts; (ii) infringements of provisions of the Geneva Conventions other than those classified as “grave breaches” by those Conventions; (iii) violations of common Article 3 of the Geneva Conventions (“common Article 3”) and other customary rules on internal armed conflicts; and (iv) violations of agreements binding upon the parties to the conflict, considered *qua* treaty law, such as agreements which have not turned into customary international law.⁸³

113. The application of Article 3 of the Statute presupposes that there must be an armed conflict and that the acts of the Accused must be closely related to the armed conflict.⁸⁴ It is immaterial whether this conflict was internal or international in nature.⁸⁵

114. An armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organised armed groups or between such groups within a State.⁸⁶

115. The nexus between the crime and the armed conflict does not require that the armed conflict is causal to the commission of the crime, but the existence of an armed conflict must, at a minimum, have played a substantial part in the perpetrator’s ability to commit it, his

⁸¹ Indictment, paras 23, 25 and 42.

⁸² *Prosecutor v. Duško Tadić a/k/a “Dule,”* Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94-1-AR72, 2 October 1995 (hereinafter *Tadić* Jurisdiction Decision), para. 87.

⁸³ *Ibid.*, paras 89-91; *Krnjelac* Trial Judgement, para. 52; *Kunarac* Trial Judgement, para. 401; *Prosecutor v. Naletilić and Martinović*, Judgement, Case No. IT-98-34-T, 30 March 2003 (hereinafter “Tuta/Stella Trial Judgement”), para. 224.

⁸⁴ *Kunarac* Appeal Judgement, para. 55.

⁸⁵ *Čelebići* Trial Judgement, para. 303; *Čelebići* Appeal Judgement, paras 140, 150; *Prosecutor v. Anto Furundžija*, Case No. IT-95-17/1-T, Judgement, 10 December 1998 (“*Furundžija* Trial Judgement”), para. 132; *Blaškić* Trial Judgement, para. 161.

⁸⁶ *Tadić* Jurisdiction Decision, para. 70; *Kunarac* Appeal Judgement, para. 56.

decision to commit it, the manner in which it was committed or the purpose for which it was committed.⁸⁷ It is sufficient to establish that the Accused acted in furtherance of or under the guise of the armed conflict.⁸⁸

116. The jurisprudence of this Tribunal has established four additional conditions which must be fulfilled for an offence to be prosecuted under Article 3 of the Statute: (i) the violation must constitute an infringement of a rule of international humanitarian law; (ii) the rule must be customary in nature or, if it belongs to treaty law, the required conditions must be met; (iii) the violation must be “serious”, that is to say, it must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim; and (iv) the violation of the rule must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule.⁸⁹

117. There is an additional general requirement under common Article 3 that victims be mere bystanders to the hostilities, including civilians, members of the armed forces who have laid down their arms and those placed *hors de combat*.⁹⁰

2. Elements of Specific Crimes

(a) General

118. For all the specific crimes charged, criminal liability arises if the Accused acted wilfully, that is, deliberately and not by accident. Statements made by the Accused outside the time period relevant to the Indictment may be indicative of the Accused’s state of mind during the time relevant to the Indictment.⁹¹

(b) Murder

119. For “murder”⁹² under common Article 3(1)(a), the Prosecution must establish: (i) that the perpetrator’s conduct caused the death of one or more persons; and (ii) that the perpetrator thereby intended to kill.⁹³ The *mens rea* is not confined to cases where the perpetrator has a direct intent to kill, it is sufficient that he acts in the knowledge that death is a probable

⁸⁷ *Kunarac* Appeal Judgment, para. 58.

⁸⁸ *Kunarac* Appeal Judgment, para. 58.

⁸⁹ *Tadić* Jurisdiction Decision, para. 94; *Kvočka* Trial Judgement, para. 123; *Krnjelac* Trial Judgement, para. 52; *Kunarac* Trial Judgement, para. 403; *Kunarac* Appeal Judgement, para. 66.

⁹⁰ See Article 3(1) common to the 1949 Geneva Conventions; *Tadić* Jurisdiction Decision, para. 69.

⁹¹ *Brđanin* Trial Judgement, note 853.

⁹² Indictment Count 1.

⁹³ *Kordić and Čerkez* Appeal Judgement, para.37.

consequence of the act or omission.⁹⁴ Omissions as well as concrete acts can satisfy the *actus reus*.⁹⁵ The victim's death may be proved either directly or circumstantially.⁹⁶

(c) Wanton Destruction

120. Article 3(b) covers "wanton destruction"⁹⁷ of cities, town and villages. The *actus reus* of wanton destruction of property requires: (i) the destruction of property occurs on a large scale; (ii) the destruction is not justified by military necessity; and (iii) the perpetrator acted with the intent to destroy the property in question or in reckless disregard of the likelihood of its destruction.⁹⁸ This element requires a showing that a considerable number of objects were damaged or destroyed. It does not require destruction in its entirety of a city, town or village.⁹⁹ Rendering houses or communal structures uninhabitable or useless would be covered by this prohibition.¹⁰⁰

121. It is moreover required that the destruction is not justified by military necessity. Military necessity is understood to be the application of force or measures, to the extent necessary and in conformity with international law, in pursuit of specific military goal(s) or objective(s). Military necessity never justifies destruction of property to drive owners of a particular nationality or ethnicity out of the area.¹⁰¹ The perpetrator must have acted with direct intent or in the awareness that destruction was a probable consequence of his acts.¹⁰²

(d) Cruel Treatment

122. The crime of "cruel treatment"¹⁰³ as a violation of the laws or customs of war pursuant to Article 3 of the Statute is defined in the jurisprudence of the Tribunal as an intentional act or omission causing serious mental or physical suffering or injury, or constituting a serious attack on human dignity.¹⁰⁴ The perpetrator must act with direct intent or in the knowledge that cruel treatment was a probable consequence of the perpetrator's act or omission, may also fulfil the

⁹⁴ Strugar Trial Judgement, paras. 235, 236.

⁹⁵ Čelebici Trial Judgement, para. 424.

⁹⁶ ICTY jurisprudence has taken into consideration the impossibility of providing death certificates or even bodies to prove death. See Krnojelac Trial Judgement, para 326-27; see also Tadić Trial Judgement, paras. 240.

⁹⁷ Amended Indictment Count 2.

⁹⁸ Kordić and Čerkez Appeal Judgement para. 74; Strugar Trial Judgement para. 292.

⁹⁹ Strugar Trial Judgement, para. 295.

¹⁰⁰ See, e.g., Prosecutor v. Rajić, Review of the Amended Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence, Case No. IT-95-12-R61, 13 September 1996, paras. 52 – 53 and 56.

¹⁰¹ See Krstić Trial Judgement at para. 527

¹⁰² Strugar Trial Judgement, para. 296.

¹⁰³ Indictment Count 3.

¹⁰⁴ Strugar Trial Judgement, para. 261.

intent requirement for this crime.¹⁰⁵ In determining the gravity of an act, all the factual circumstances must be taken into consideration, “including the nature of the act or omission, the context in which it occurs, its duration and/or repetition, the physical, mental and moral effects of the act on the victim and the personal circumstances of the victim, including age, sex and health.”¹⁰⁶

IV. CONCLUSION

123. In the facts and under the circumstances of the case as described above and in terms of the jurisprudence of this Tribunal, it is submitted that this Trial Chamber find the Accused herein guilty as charged.

Word count: 14, 362803

Respectfully submitted

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Dated this 74th day of November ~~April~~ 20056
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¹⁰⁵ *Strugar* Trial Judgement, para. 261.

¹⁰⁶ *Prosecutor v. Hadžihasanović and Kubura*, Decision on Motions for Acquittal Pursuant to Rule 98 bis, Case No. IT-01-47-T, T. Ch. II, 27 September 2004, para.49; *Krnjelac* Trial, Judgement, para. 131.