054 SCSL-2003-10-PT. (1147-1267) 1147

THE SPECIAL COURT FOR SIERRA LEONE

Before: Judge Benjamin Itoe
Judge Bankole Thompson
Judge Pierre Boutet

Registrar: Mr Robin Vincent

Date Filed:

THE PROSECUTOR

V.

BRIMA BAZZY KAMARA also known as IBRAHIM BAZZY KAMARA also known as ALHAJI IBRAHIM KAMARA

Case No. SCSL-2003-10-PT

BRIEF IN SUPPORT OF PRELIMINARY MOTION ON DEFECTS IN THE FORM OF THE INDICTMENT

Office of the Prosecutor:
Mr Luc Côté
Ms Brenda J. Hollis
Mr Robert Petit
Ms Boi-Tia Stevens

Defence Counsel:
Mr Ken Fleming Q.C.

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TIME 15:45

1. The Preliminary Motion is filed pursuant to Rule 72 (c) (Defects in the Form of the Indictment) of the Rules of Procedure and Evidence ("Rules").

2. In short, the following Article and Rule have not been complied with in the indictment, so there are defects in the form of the Indictment.

   (a) Article 17 (4) (a): To be informed promptly and in detail in a language which he or she understands of the nature and cause of the charge against him or her.

   (b) Rule 47 (c):

   > The indictment shall contain, and be sufficient if it contains, *the name and particulars of the suspect, a statement of each specific offence* of which the named suspect is charged and a *short description of the particulars of the offence. It shall be accompanied by a Prosecutor's case summary* briefly setting out the allegations he proposes to prove in making his case. [...](emphasis added)

3. The jurisprudence of the ICTR is that the "form of the indictment is interpreted to give an accused sufficient, accurate and specific information of the crimes raised against an accused, which enables an accused to recognize the circumstances and the actions attributed to him and to understand how and when, under the particular circumstances, such actions constitute one or more crimes covered by the Tribunal's jurisdiction."[1] This interpretation is in accordance with an accused rights under Article 17 (4) of the Statute.

4. Allegations in an indictment are, therefore, "defective in their form if they are not sufficiently clear and precise, in the way they are spelt out and with respect to their factual and legal constituent elements, so as to enable the Accused to fully understand the nature and the cause of the charges brought against him."[2]

   The standard applied by the ICTR and ICTY regarding the pleading is that the allegations in the indictment be sufficiently specific for the Accused to understand the nature and extent of the charges.

5. Both the ICTY and the ICTR draw on an interpretation of their Rule 47 (c) to determine the degree of specificity required for an indictment. This rule differs

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[1] *Prosecutor V. Nyiramasuhuko And Ntahobali*, Case No: Ictr-97-21-T, Decision On Arsène Shalom Ntahobali's Preliminary Motion Objecting To Defects In The Form And Substance Of The Indictment, 1 November 2000, para. 22.

[2] *Prosecutor V. Karemera*, Case No. Ictr: 98-44-T, Decision On The Defence Motion, Pursuant To Rule 72 Of Rules Of Procedure And Evidence, Pertaining To, *Inter Alia*, Lack Of Jurisdiction And Defects In The Form Of The Indictment, 25 April 2001, para. 16.

from Rule 47 (c) of the SCSL in that it requires the indictment to contain a "*concise* statement of the facts and the crime or crimes with which the accused is charged under the Statute". In the absence of any such qualification in the Rules of the SCSL, it is submitted that this Court should adopt a similar interpretation of Rule 47. This is necessary in order to protect the rights of the accused enshrined in Article 17. A non-specific, ambiguous indictment will necessarily result in the Defence being unable to properly and adequately prepare its case and may result in delays.

SPECIFIC DEFECTS IN THE FORM OF THE INDICTMENT

6. **FAILURE TO COMPLY WITH RULE 47 (C) AND ARTICLE 17 (4) (A)**

(a) Rule 47 (c) contains a mandatory requirement that the Indictment "*shall* be accompanied by a Prosecutor's case summary." (emphasis added) The Accused has not been provided with a case summary. The Indictment served indicates on pages 16-18 the existence of such a summary but no summary was attached to the Indictment. Accordingly, the under Rule 47 (c) requirement has not been complied with, rendering the Indictment defective and invalid.

(b) Further, as will be examined in greater detail below under sub-sections B, C and D, the Prosecutor has failed to provide in the indictment "the name and particulars of the suspect, a statement of each specific offence of which the named suspect is charged and a short description of the particulars of the offence."

(c) The failure by the Prosecution to comply with the terms of Rule 47 (c) results in the Accused being denied his minimum rights under Article 17 (4) (a).

7. **LACK OF PRECISION IN THE FORM OF THE INDICTMENT**

(a) **FAILURE TO PROVIDE ANY OR SUFFICIENT PARTICULARS**

(i) The basis for this objection relies on the entitlement given to the accused to be informed of the "nature and cause of the charge" against him pursuant to Article 17 (4) (a) of the Statute. The ICTY Appeals Chamber has held that this provision also applies to the form of indictments.[3] Further, that this right translates into an obligation on the Prosecution to plead the material facts underpinning the charges in an indictment.[4] The pleadings in an

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[3] *Prosecutor v Kupreskic and Others,* Case IT-95-16-A, Appeal Judgement, 23 October 2001 ("*Kupreskic* Appeal Judgment"), para. 88.

[4] *Kupreskic* Appeal Judgment (with reference to Arts 18(4), 21(2) and 21(4)(a) and (b) of the Statute and Rule 47(C)); and *Prosecutor v Hadzihasanovic, Alagic* (†) *and Kubura,* Case IT-01-47-PT, Decision on Form of Indictment, 7 December 2002 ("*Hadzihasanovic* Indictment Decision"), par 8.

indictment will therefore be sufficiently particular when it concisely sets out the material facts of the Prosecution case with enough detail to inform an accused clearly of the nature and cause of the charges against him enabling him to prepare a defence effectively and efficiently.[5]

(ii) The Accused, therefore, is entitled to particulars necessary in order for the accused to prepare his defence and avoid prejudicial surprise.[6] This, therefore, places a responsibility on the Prosecution to provide a sufficiently detailed Indictment per Rule 47 (c).

(iii) Thus, the Indictment "must set out precise and specific allegations against [the accused]. The indictment must inform the accused with sufficient clarity and certainty the nature of the charges against him and the essential facts on which they are based [... The Indictment ...] *on its own* must be able to present clear and concise charges against the accused, to enable the accused to understand the charges. This is particularly important since the accused does not have the benefit of the supporting material at his initial appearance."[7] Further, "the indictment *must* state all of the *material* facts upon which the prosecution relies to establish the charges laid."[8] In the *Krnojelac Decision as to Form*, that Trial Chamber found that "an indictment must contain information as to the identity of the victim, the place and the approximate date of the alleged offence and the means by which the offence was committed"[9].

(iv) The jurisprudence of the ICTY and ICTR draws a distinction between the material facts upon which the prosecution relies (which must be pleaded) and the evidence by which those material facts will be proved (which need not be pleaded but which must be provided by way of pre-trial discovery).[10] Whether

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[5] *See Kupreskic* Appeal Judgment, para. 88; Arts 18(4), 21(2) and 21(4)(a) and (b) of the Statute; and Rule 47(C) of the Rules of Procedure and Evidence ("Rules"), which essentially restates Art 18(4).

[6] *Prosecutor v. Delalic et al*, Decision on the Accused Mucic's Motion for Particulars, 26 June 1996.

[7] *Prosecutor v Nyiramashuko,* Case No: ICTR-97-21-I, Decision on the Preliminary Motion by Defence Counsel on Defects in the Form of the Indictment, 4 Sept 1998, paras. 9, 13.

[8] *Prosecutor v. Talic*, Case No. 99-36-T; Decision on Objections by Momir Talic to the Form of the Amended Indictment, 20 February 2001, para.27

[9] *Prosecutor v Krnolejac*, Case IT-97-25-PT, Decision on the Defence Preliminary Motion on the Form of the Indictment, 24 Feb 1999 ("*First Krnojelac Decision*"), par 12

[10] *Prosecutor v Krnolejac*, Case IT-97-25-PT, Decision on the Defence Preliminary Motion on the Form of the Indictment, 24 Feb 1999 ("*First Krnojelac Decision*"), par 12; *Prosecutor v Došen & Kolundžija*, Case IT-98-8-PT, Decision on Preliminary Motions, 10 Feb 2000 ("Došen Decision"), para. 21; Second Krnolejac Decision, para. 17; *Prosecutor v Naletilic & Martinovic*, Case IT-98-34-PT, Decision on Defendant Vinko Martinovic's Objection to the Indictment, 15 Feb 2000 ("Martinovic Decision"), paras. 17-18; *Prosecutor v Furundžija*, Case IT-95-17/1-A, Judgment, 21 July 2000, par 153; *Prosecutor v Krajisnik*, Case IT-00-39-PT, Decision Concerning Preliminary Motion on the Form of the Indictment, 1 Aug 2000 ("Krajisnik Decision"),

a particular fact is a material one, which must be pleaded, depends in turn upon the nature of the case that the prosecution seeks to make, and of which the accused must be informed.[11] The materiality of such details as the identity of the victim, the place and date of the events for which an accused is alleged to be responsible, and the description of the events themselves, necessarily depends upon the alleged proximity of the accused to those events.[12]

(v) A decisive factor in determining the degree of specificity with which the Prosecution is required to particularise the facts of its case in an indictment is the nature of the alleged criminal conduct charged to the accused,[13] which includes the proximity of the accused to the relevant events.[14]

(vi) It is submitted that it is "no answer to a request for particulars that the accused knows the facts for himself; the issue in relation to particulars is not whether the accused knows the true facts but, rather, whether he knows what facts are to be alleged against him."[15] It cannot be assumed that the two are the same. Furthermore, the accused needs to know "not only what is to be alleged to have been his own conduct giving rise to his responsibility as a superior but also what is to be alleged to have been the conduct of those persons for which he is alleged to be responsible as such a superior. Only in that way can the accused know the "nature and cause of the charge against him".[16]

(vii) Each of the material facts must usually be pleaded expressly, although it may be sufficient in some circumstances if it is

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para. 8 (Leave to appeal was refused on the basis that there had been no abuse of the Trial Chamber's discretion: *Prosecutor v Krajisnik*, Case IT-00-39-AR72, Decision on Application for Leave to Appeal the Trial Chamber's Decision Concerning Preliminary Motion on the Form of the Indictment, 13 Sept 2000, p. 3; *Prosecutor v. Talic*, Case No. 99-36-T; Decision on Objections by Momir Talic to the Form of the Amended Indictment, 20 February 2001, para. 18.

[11] *Kupreskic* Appeal Judgment, para. 89.

[12] Second Krnojelac Decision, par 18; Krajisnik Decision, para. 9

[13] *Kupre{ki}* Appeal Judgment, para. 89.

[14] *Hadzihasanovic* Indictment Decision, par 10; *Prosecutor v Br|anin and Talic,* Case IT-99-36-PT, Decision on Objections by Momir Talic to the Form of the Amended Indictment, 20 February 2001 ("First *Br|anin & Talic* Decision"), par 18. It is essential for the accused to know from the indictment just what that alleged proximity is: *Prosecutor v Br|anin and Talic,* Case IT-99-36-PT, Decision on Objections by Radoslav Br|anin to the Form of the Amended Indictment, 23 February 2001 ("Second *Br|anin & Talic* Decision"), par 13.

[15] *Krnojelac First Decision*, para. 38, This is a matter of fairness, and has been recognised in many cases in common law jurisdictions: *Spedding v Fitzpatrick* (1888) 38 Ch D 410 at 413; *Turner v Dalgety & Co Ltd* (1952) 69 WN (NSW) 228 at 229; *Philliponi v Leithead* (1959) SR (NSW) 352 at 358-359; *Bailey v FCT* (1977) 136 CLR 214 at 219, 220. (Cited in footnote 52, *Krnojelac First Decision*)

[16] *Krnojelac First Decision*, para. 38

expressed by necessary implication.[17] This fundamental rule of pleading is, however, not complied with if the pleading merely assumes the existence of the pre-requisite.[18]

(viii) Generally, an indictment, as the primary accusatory instrument, must plead with sufficient particularity the material aspects of the Prosecution case, failing which it suffers from a material defect.[19] In the light of the primary importance of an indictment, the Prosecution cannot cure a defective indictment by its supporting material and pre-trial brief.[20] In the situation where an indictment does not plead the material facts with the requisite degree of specificity because the necessary information is not in the Prosecution's possession, doubt must arise as to whether it is fair to the accused for the trial to proceed.[21] The Prosecution is therefore expected to inform the accused of the nature and cause of the case, as set out above, before it goes to trial. It is unacceptable for it to omit the material facts in the indictment with the aim of moulding the case against the accused in the course of the trial depending on how the evidence unfolds.[22] Where the evidence at trial turns out differently than expected, the indictment may be required to be amended, an adjournment may be granted or certain evidence may be excluded as not being within the scope of the indictment.[23]

(ix) In a case based upon individual responsibility where the accused is alleged to have *personally* done the acts pleaded in the indictment, the material facts must be pleaded with precision– the information pleaded as material facts must, so far as it is possible to do so, include the identity of the victim, the places and the approximate date of those acts and the means by which the offence was committed. "Where the prosecution is unable to specify any of these matters, it cannot be obliged to perform the impossible . Where the precise date cannot be specified, a *reasonable* range of dates may be sufficient. Where a precise identification of the victim or victims cannot be specified, a reference to their category or position as a group may be sufficient. Where the prosecution is unable to specify matters

[17] *Hadzihasanovic* Indictment Decision, par 10; *Prosecutor v Br|anin and Talic,* Case IT-99-36-PT, Decision on Form of Fourth Amended Indictment, 23 November 2001, par 12; First *Brdjanin & Talic* Decision, para.48.

[18] *Hadzihasanovic* Indictment Decision, par 10; First *Brdjanin & Talic* Decision, para. 48.

[19] *Kupreskic* Appeal Judgment, par 114.

[20] If the Defence is denied the material facts as to the nature of the accused's responsibility for the events pleaded until the pre-trial brief is filed, it is almost entirely incapacitated from conducting any meaningful investigation for trial until then (*see* Second *Brdjanin & Talic* Decision, paras.11-13).

[21] *Kupreskic* Appeal Judgment, par 92.

[22] *Ibid.*

[23] *Ibid.*

such as these, it must make it clear in the indictment that it is unable to do so and that it has provided the best information it can."[24]

With respect to the relevant state of mind (*mens rea*), either the specific state of mind itself should be pleaded (in which case, the facts by which that material fact is to be established are ordinarily matters of evidence, and need not be pleaded), or the evidentiary facts from which the state of mind is necessarily to be inferred, should be pleaded.[25]

(b) **Vagueness of the Indictment**

In accordance with the above principles of pleadings, it is submitted that the Prosecution has failed to produce a precise and particularized Indictment. The Indictment is vague and ambiguous, which negatively impacts on the rights of the accused in the preparation of his case.

This objection is a general one that applies to the Indictment in its entirety. In the following section, arguments are presented in relation to specific aspects of the Indictment. Unless paragraphs are provided, the objections raised apply to the entire Indictment.

i) Dates

In paragraphs 20, 34, 35, 36, 37, 38, 41, 42, 43, 47, 48, 52, 53, 54, 55, 60, 61 and 64 of the Indictment, the Prosecution uses the term "Between about" to specify dates. It is argued that this is an overly vague and ambiguous term. Are the dates provided in each paragraph taken to cover only those dates specified or does the inclusion of the word "about" mean that the Prosecution will have the ability to lead evidence any other evidence beyond the already wide range of dates specified? If the reference to "about between" is intended to permit the prosecution to prove crimes were committed at any time after that date, the accused is left without any real assistance as to the nature of the prosecution case upon an important material fact.

The Prosecution at the ICTY also employed the term "between about" but, in response to an objection by Defence, was instructed by the Trial Chamber to delete the word "about" whenever it appeared in the Indictment.[26] It is submitted that the Trial Chamber in the instant case should make a similar finding.

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[24] *Prosecutor v. Talic*, Decision 20 February 2001, para. 22

[25] Third *Brdjanin & Talic* Decision, para.33.

[26] *Prosecutor v Kvocka et al*, IT-98-30, Decision on Defence Preliminary Motions on the Form of the Indictment, 12 April 1999, para. 19. Further in *Prosecutor v Blaskic*, IT-95-14, the Trial Chamber held "an indictment cannot permit itself to be overly vague. The adverb "about", whenever used, must therefore be stricken." Decision on Defence Motion to Dismiss the Indictment Based on Defects in the Form Thereof, 4 April 1997, para. 23

Further, it is submitted that the range of dates specified in the above paragraphs, and also in the following paragraphs are too wide, imprecise and therefore not reasonable:[27]: 33, 39, 45, 49, 57, 62 and 63 . The minimum range of dates specified in these paragraphs is 25 days (paras. 39, 45, 49, 57 and 63), whereas the maximum range of dates covers a period of 10 months (para.34). It is submitted that for each of the above listed paragraphs, the Prosecution should provide more precise dates for the alleged crimes. Rather than listing a range of dates for crimes committed per district, it should provide details of the dates of crimes committed per location.

Paragraphs 44, 50, 51 and 56 are even vaguer; the Prosecution simply asserts "At all time relevant to this Indictment". This would appear to cover the period 25 May 1997 (para. 34) to 15 September 2000 (para. 64), which is an unreasonable period.[28]

Other paragraphs are replete with ambiguity. For instance, paragraph 57 refers to the period "between 6 January 1999 and 31 January 1999, in particular as the AFRC / RUF were being driven out of Freetown." However no indication is given as to the date the AFRC / RUF were driven out of Freetown, leaving the Defence to second guess the dates.

It is submitted that the ranges of dates specified for each Count in the Indictment are vague, and lack precision in order to comply with the requirements of pleadings noted above. The Counts refer to various attacks, killings and so forth. It is argued that the Prosecution must have evidence relating to all the Counts that enables it to provide more precise dates. It is inconceivable that the Prosecution, whilst providing generic locations for the crimes, lacks further particulars as to the dates of the crimes. Where such specific dates, or even a narrower range of dates, are known they must be specified in the indictment. Where the precise date cannot be specified, a *reasonable* range of dates may be sufficient.[29]

In the absence of a more specific or narrow time-frame for the crimes alleged, the accused is unable to prepare his defence properly, particularly regards establishing an alibi.

ii) ***Locations***

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[27] Krnojelac, Case No: IT-97-25, Decision *on* the Defence Preliminary Motion on the Form of the Indictment, dated 24 February 1999

[28] *Prosecutor v. Krnoljelac*, IT-97-25, Decision on the Defence Preliminary Motion on the Form of the Indictment, 24 February 1999, para. 42 stating: "The period of April 1992 to August 1993 would not be a reasonable period."

[29] First Krnoljelac decision para. 42

Paragraphs 32, 40, 46, 51, 58, 64 all contain the expression "included, but not limited to, the following (locations)." This is a vague expression open to interpretation and should be struck from the Indictment entirely.[30] It is argued that such expressions represent a general caveat employed by the Prosecution to enable it to lead additional evidence, which is not specified in the indictment, as it obtains such evidence during its investigations and trial. Such procedure would undermine the rights of the Accused to a fair trial and to adequately prepare his case as these paragraphs would essentially enable the Prosecution to ambush the Defence during the trial with evidence concerning locations not specified in the Indictment.

In paragraph 20, the Prosecution alleges that the Accused was a commander of AFRC / RUF forces which conducted armed operations throughout the north, eastern and central areas of the Republic of Sierra Leone. These are vague assertions, which do not provide sufficient detail for the Defence to prepare its case on superior responsibility. The Prosecution should provide further particulars regarding the specific locations of those forces allegedly under the command of the Accused.

Further, paragraph 50 fails to particularise any locations. Instead the Prosecution applies the blanket location of the entire Republic of Sierra Leone for the basis of the crime under Count 11. It is submitted that the Prosecution must provide further details regarding the locations of the alleged training camps and also the locations where the children were allegedly conscripted.

Finally, for each Count, the Prosecution lists various locations within each district where crimes allegedly occurred but fails to identify with greater precision the exact locations of the crimes. The Defence notes that some locations are particularised in the following paragraphs: 39, 41, 49 and 63. It is submitted that the Prosecution should provide, as a minimum, a similar degree of precision for all the other districts listed in all the Counts. This is necessary in order for the Defence to prepare an alibi case and case on superior responsibility.

iii) Names and Numbers of Victims

The Prosecution asserts throughout the Indictment that the crimes were committed against "an unknown number" of civilians and fails to provide even a general number of victims (paragraphs 33 - 34, 36 - 39, 41 – 44, 47 – 49, 52, 54 – 56, 59-60, 61 and 64,). Further, it has failed to provide the identity of a single victim for any of the 17 Counts charged in the Indictment.

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[30] *Prosecutor v Blaskic*, IT-95-14, where the Trial Chamber agreed with the Defence "that expressions such as "including, but not limited to" or "among others" are vague and subject to interpretation and that they do not belong in the indictment when it is issued against the accused." Decision on Defence Motion to Dismiss the Indictment Based on Defects in the Form Thereof, 4 April 1997, para. 23

It is beyond the realm of reason to suppose that the Prosecution does not have such information. For instance, in paragraph 50, the Prosecution refers to the use of Child Soldiers. It is submitted that it must have knowledge of the identity of some of those Child Soldiers and should have included such particulars in the Indictment.

In accordance with the general principles of pleadings, the Prosecution must provide such information where it is known. Where precise identification of a victim or victims cannot be specified, reference to their category or position as a group may be sufficient.[31]

The Prosecution's failure to particularize the material facts regarding the identity and numbers of victims necessarily creates a vague and imprecise indictment, rendering the Accused unable to properly prepare his Defence.

8. FAILURE TO PARTICULARISE MODE OF PARTICIPATION UNDER ARTICLE 6 (1)

(a) Paragraph 25 of the Indictment states that the accused is individually criminally responsible pursuant to Article 6.1 of the Statute for the crimes alleged in the Indictment. Article 6.1 of the Statute contains several different modes of participation. However the Prosecution fails to identify the mode of participation with which the accused is charged and has merely recited the terms of Article 6.1.[32]

(b) It has been firmly established at the ICTY that pleading individual responsibility by reference merely to all the terms of Article 6.1, as in the current Indictment, is likely to cause ambiguity.[33] It is only appropriate for the indictment to define individual responsibility in such extensive broad terms if the prosecution intends to rely on each of the different modes of participation pleaded.[34] If the prosecution does not have such intention, the irrelevant material should not have been pleaded due to the ambiguity it creates. The Prosecution must, therefore, have made its intention clearer.[35]

(c) In a case based upon individual responsibility where it is not alleged that the accused personally did the acts for which he is to be held

[31] First Krnojelac Decision, par 58; Third Krnojelac Decision, par 18; Talic Decision, 20 February 2001, para.22

[32] Para. 25 of the Indictment: "the Accused planned, instigated, ordered, committed or in whose planning, preparation or execution the Accused otherwise aided and abetted, or which crimes were within a joint criminal enterprise in which the Accused participated or were a reasonably foreseeable consequence of the joint criminal enterprise in which the Accused participated."

[33] Prosecutor v Krnolejac, Decision on Preliminary Motion on Form of Amended Indictment, 11 February 2000 ("Second Krnolejac Decision"), par 60; Aleksovski Appeal Judgment, para. 171, footnote 319, which cites the Second Krnojelac Decision; Prosecutor v Delalic, Case IT-96-21-A, Judgment, 20 Feb 2001 ("Celebici Appeal Judgment"), para. 351; Talic decision, 20 February 2001, para. 10

[34] Talic decision para 10. 20 February 2001.

[35] *Ibid.*

responsible – where the accused is being placed in greater proximity to the acts of other persons for which he is alleged to be responsible than he is for superior responsibility – again what is most material is the conduct of the accused by which he may be found to have planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of those acts[36]. "But more precision is required in relation to the material facts relating to those acts of other persons than is required for an allegation of superior responsibility. In those circumstances, what the accused needs to know as to the case he has to meet is not only what is alleged to have been his own conduct but also in somewhat more detail than for superior responsibility what are alleged to have been the acts for which he is to be held responsible, subject of course to the prosecution's ability to provide such particulars. But the precision required in relation to those acts is not as great as where the accused is alleged to have personally done the acts in question."[37]

(d) The material facts to be pleaded in an indictment may vary depending on the particular head of Article 6 (1) responsibility.[38] Therefore, it is submitted that the Prosecution in the instant case must "indicate in relation to each individual count precisely and expressly the particular nature of the responsibility alleged."[39]

(e) The present indictment, without further elucidation, leaves the Accused unaware as to whether he is alleged to have "planned and/or instigated and/or ordered and/or aided and abetted in the crimes with which he is charged". It fails, therefore, to give the Accused any idea of the nature and cause of the charges against him so far as they are based upon his individual responsibility – either by way of personal participation or by aiding and abetting others.

(f) Further, it is not sufficient that an accused is made aware of the case to be established upon only one of the alternative bases pleaded.[40] The

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[36] *Prosecutor v. Talic*, Decision on Form of the Indictment, 20 February 2001 referring in para. 20 to Article 7.1 of the Statute which is the same as Article 6.1 of the SCSL Statute.

[37] *Ibid.*, para. 20

[38] *Eg*, in a case where the Prosecution alleges that an accused personally committed the criminal acts, the material facts, such as the identity of the victim, the time and place of the events and the means by which the acts were committed, have to be pleaded in detail (*Kupreskic* Appeal Judgment, para. 89), whereas, in a joint criminal enterprise case, different material facts would have to be pleaded (*see also Prosecutor v Brdjanin and Talic*, Case IT-99-36-PT, "Decision on Form of Further Amended Indictment and Prosecution Application to Amend", 26 June 2001 ("Third *Brdjanin & Talic* Decision"), paras. 21, 22).

[39] *See Prosecutor v Delalic et al*, Case IT-96-21-A, Judgement, 20 Feb 2001 ("*Jelebici* Appeal Judgment"), para. 350. *See also Prosecutor v Deronjić*, Case IT-02-61-PT, Decision on Form of the Indictment, 25 October 2002 ("*Deronjić* Decision"), para. 31.

[40] The Prosecution suggested that the decision in *Prosecutor v Blaškić*, Case No IT-95-14-PT, Decision on the Defence Motion to Dismiss the Indictment Based upon Defects in the Form Thereof, 4 Apr 1997, para 32, has said to the contrary, but that is not correct. That decision makes it clear that the accused must be able to prepare his defence on "either or *both* alternatives" (emphasis added).

prosecution must clearly identify, so far as the individual responsibility of the accused in the present case is concerned, the particular acts of the accused himself or the particular course of conduct on his part which are alleged to constitute that responsibility.[41]

(g) With the exception of the general grounds of liability contained in paragraph 25 and the reference in paragraph 31 that the Accused committed the crimes charged in paragraphs 32 through 57, the Prosecution fails to indicate for each Count, notably paragraphs 31, 39 45, 49, 50, 57, 63 and 64 of the Indictment, the nature of the accused's responsibility under Article 6.1. These paragraphs all state in general terms that "by his acts or omissions in relation, but not limited to these events, Brima Bazzy Kamara, pursuant to Article 6.1 and, or alternatively, Article 6.3 of the Statute, is individually criminally responsible [...]".

(h) This failure to provide any indication of the Accused's participation per Article 6.1 suggests that the Prosecution is relying solely on Article 6.3 to allege the accused's liability for each Count. Indeed, paras. 31 – 64 fail to specify any involvement of the accused, other than alleging he was acting in concert with his subordinates, and refer only to the alleged acts of members of the AFRC / RUF.

(i) This failure by the Prosecution to specify for each count, the different heads of liability under Article 6.1, results in ambiguity with respect to the exact nature and cause of the charges against the accused.[42] This negatively impacts on his ability to effectively and efficiently prepare his defence per Article 17 (4) (b).

9. *Lack of Specificity for Joint Criminal Enterprise*

(a) The Accused is also charged in paragraph 25, within the meaning of Article 6.1, with acting in concert with the AFRC and the RUF as part of a common plan, purpose or design, (joint criminal enterprise). This is a general allegation is not specified to any of the individual Counts charged and represents further ambiguity in the form of the Indictment.

(b) Where such liability is charged, the indictment must "inform the accused of the nature or purpose of the joint criminal enterprise (or its "essence"), the time at which or the period over which the enterprise is said to have existed, the identity of those engaged in the enterprise – so

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[41] *Prosecutor v Tadić*, Case No IT-94-1-T, Decision on the Defence Motion on the Form of the Indictment, 14 Nov 1995, para. 12; *Prosecutor v Djukić*, Case No IT-96-20-T, Decision on Preliminary Motion of the Accused, 26 Apr 1996, para. 18.

[42] *See ibid*, para. 351; *Prosecutor v Aleksovski*, Case IT-95-14/1-A, Judgement, 24 March 2000, para. 171, fn 319 (with reference to *Prosecutor v Krnojelac*, Case IT-97-25-PT, Decision on Preliminary Motion on Form of Amended Indictment, 11 February 2000 ("First *Krnojelac* Decision"), paras.59-60).

far as their identity is known, but at least by reference to their category as a group – and the nature of the participation *by the accused* in that enterprise."[43]

(c) The present Indictment refers, in paragraphs 23-24, to the general purpose of the alleged joint criminal enterprise. However the Prosecution fails to provide sufficient particulars regarding the criminal nature of its purpose. Further, it fails to identify any other individuals engaged in the enterprise or the identity of those persons outside Sierra Leone who were allegedly provided with the natural resources in return for assistance in carrying out the joint criminal enterprise.

(d) The Prosecution merely refers to the AFRC and the RUF as sharing the common plan with the Accused. This is totally insufficient detail to support such an allegation. Further, the Prosecution fails to specify the nature of the participation by the accused in the alleged common plan. Finally, the Prosecution provides no indication of the timeframe over which the common plan is alleged to have existed.

(e) In addition to the above objections to the defective pleadings regarding the joint criminal enterprise, the following specific objections are raised as to the form in which the joint criminal enterprise is pleaded:

- the state of mind of the accused pleaded is insufficient
- there is no definition of the "unlawful means" through which the joint criminal enterprise is effected; and
- the indictment provides no details of the Accused's intention to participate voluntarily in the joint criminal enterprise or of his knowledge of its existence.

10. FAILURE TO PARTICULARISE: RESPONSIBILITY AS A SUPERIOR

(a) The Accused is also charged jointly and or in the alternative under Article 6.3.

(b) It is submitted that the Prosecution, in alleging superior responsibility, under Article 6.3, must plead the following the minimum material facts in the indictment:

(i) that the accused is the superior;[44]

(ii) of subordinates, sufficiently identified;[45]

[43] Talic decision, para. 21
[44] The Prosecution may also be ordered to plead what is the position forming the basis of the superior responsibility charges (*Deronjić* Decision, para. 15).
[45] *Deronjić* Decision, para.19.

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(iii) over whom he had effective control - in the sense of a material ability to prevent or punish criminal conduct;[46]

(iv) for whose acts he is alleged to be responsible;[47]

(v) the accused knew or had reason to know that the crimes were about to be or had been committed by those others;[48]

(vi) the related conduct of those others for whom he is alleged to be responsible.[49] The facts relevant to the acts of those others will usually be stated with less precision,[50] the reasons being that the detail of those acts (by whom and against whom they are done) is often unknown, and, more importantly, because the acts themselves often cannot be greatly in issue;[51] and

(vii) the accused failed to take the necessary and reasonable measures to prevent such crimes or to punish the persons who committed them.[52]

(c) The Prosecution has failed throughout the Indictment to plead any one of the above material facts. It is insufficient for the Prosecution to merely allege members or forces of the AFRC / RUF committed the crimes without providing further particulars as to their identities, their areas of responsibility, their relationship with the Accused, his responsibility over them, his knowledge of the crimes and his failure to take any preventative or punitive measures.

(d) The information provided in paragraphs 18 to 20 of the Indictment is not sufficient to cover the lack of particularized details. Specifically paragraph 19 fails to identity the group that staged the coup and paragraph 20 fails to specify the identities of the forces that conducted

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[46] *Jelebici* Appeal Judgment, para.256 (*see also* paras.196-198, 266).

[47] Statute, Art.7(3); *see Hadzihasanovic* Indictment Decision, paras. 11 and 17; *see also* First *Brdjanin & Talic* Decision, para. 19; *Prosecutor v Krajišnik*, Case IT-00-39-PT, Decision Concerning Preliminary Motion on the Form of the Indictment, 1August 2000 ("*Krajisnik* Decision"), para. 9; First *Krnojelac* Decision, para. 9.

[48] *Ibid.*

[49] Statute, Art 21(4)(a); *Hadzihasanovic* Indictment Decision, par 11; *Prosecutor v Krnojelac*, Case IT-97-25-PT, Decision on the Defence Preliminary Motion on the Form of the Indictment, 24 February 1999, para.38.

[50] *Hadzihasanovic* Indictment Decision, par 11; First *Brdjanin & Talic* Decision, par 19.

[51] *See Hadzihasanovic* Indictment Decision, par 11; First *Brdjanin & Talic* Decision, para.19; *Prosecutor v Kvočka*, Case IT-99-30-PT, Decision on Defence Preliminary Motions on the Form of the Indictment, 12 April 1999 ("*Kvočka* Decision"), para. 17; First *Krnojelac* Decision, para. 18(A); *Krajisnik* Decision, para. 9. The exact relationship between this material fact and that of effective control, i.e. the *material ability* of a superior to prevent or punish criminal conduct of subordinates, need not be considered here.

[52] Statute, Art. 7(3); *see Hadzihasanovic* Indictment Decision, para. 11; First *Brdjanin & Talic* Decision, para. 19 (rolling facts (b) and (c) together); *Krajisnik* Decision, para. 9.

armed attacks, for which the Accused was allegedly the commander of, and their areas of responsibility.

(e) The Prosecution must identify with some precision in the Indictment, the base or basis upon which it seeks to make the Accused criminally responsible as a Commander of the AFRC / RUF. Mere allegation that he was a Commander is not sufficient to plead the elements prerequisite under Article 6.3. Lack of such precision and detail renders the Defence unable to prepare its case.

(f) Further particulars must be provided for each Count in relation to the above 3 sub-sections, and specifically the identities of the individuals or the units allegedly subordinate to the Accused, which participated in the alleged crimes.

11. **RELIEF SOUGHT**

(a) The Indictment is vague and imprecise. The Prosecution has failed to plead the material facts with sufficient detail in accordance with general principles of pleadings. As such it may be seen as an attempt by the Prosecution to make the allegations as broad and as comprehensible as possible, even though it has no evidence to support them, thus enabling it to take advantage of a subsequent discovery of such evidence without the need to amend the indictment. Both the Trial Chamber and the accused are entitled to know what the prosecution case is from the outset.[53] This is not apparent from the current Indictment.

(b) It is submitted that the defects in the Form of the Indictment, detailed above, negate the rights of the Accused.

FOR THE REASONS SET OUT ABOVE, THE DEFENCE SEEKS THE FOLLOWING RELIEF:

1. *The Indictment be set aside:* It is submitted that such relief is not precluded by virtue of the fact that the Indictment was reviewed and approved by a Designated Judge under Rule 47. The role of the Designated Judge is to approve the Indictment on the basis that the crimes charged are within the jurisdiction of the Court and that the allegations, if proven, would amount to the crimes as particularised in the indictment. It is submitted that this function

[53] *Prosecutor v. Brdjanin & Talic*, Second Decision on Form of Further Amended Indictment, 26 June 2001, para. 11

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therefore involves the examination of the sufficiency of the evidence rather than a concern with the form of the Indictment. It is therefore further submitted that this Trial Chamber's review of the *form* of the Indictment is a distinct and separate function from that of the Designated Judge approving the indictment.

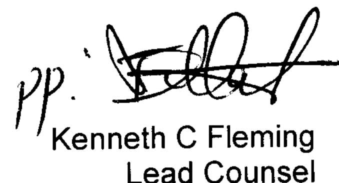
2. Alternatively

- the Trial Chamber order the Prosecution to file an Amended Indictment and accompanying case summary, which provides the material facts necessary to establish the substantive elements charged and indicate precisely the nature of the responsibility alleged in relation to each individual count and to strike out from the Indictment the vague terms "between about" and "included, but not limited to."

3. Alternatively

- the Trial Chamber order the Prosecution to provide additional facts to resolve the ambiguities referred to above.

4. The Prosecutor then make complete disclosure as required by the Rules, upon the provision of the relief in 1, 2 or 3 above.



Kenneth C Fleming
Lead Counsel

Done this 23rd day of December 2003

List of Authorities for Defence Brief in support of Preliminary Motion on defects in the form of the indictment in the case of *Prosecutor v Kamara* SCSL-2003-10-PT

1. *Prosecutor V. Nyiramasuhuko And Ntahobali*, Case No: Ictr-97-21-T, Decision On Arsène Shalom Ntahobali's Preliminary Motion Objecting To Defects In The Form And Substance Of The Indictment, 1 November 2000, para. 22.
2. *Prosecutor V. Karemera*, Case No. Ictr: 98-44-T, Decision on the Defence Motion, Pursuant To Rule 72 Of Rules Of Procedure And Evidence, Pertaining To, *Inter Alia*, Lack Of Jurisdiction And Defects In The Form Of The Indictment, 25 April 2001, para. 16.
3. *Prosecutor v Kupreskic and Others,* Case IT-95-16-A, Appeal Judgement, 23 October 2001 ("*Kupreskic* Appeal Judgment"), para. 88.
4. *Prosecutor v Hadzihasanovic, Alagic* (†) *and Kubura*, Case IT-01-47-PT, Decision on Form of Indictment, 7 December 2002 ("*Hadzihasanovic* Indictment Decision"), par 8.
5. *Prosecutor v. Delalic et al*, Decision on the Accused Mucic's Motion for Particulars, 26 June 1996.
6. *Prosecutor v Nyiramashuko,* Case No: ICTR-97-21-I, Decision on the Preliminary Motion by Defence Counsel on Defects in the Form of the Indictment, 4 Sept 1998, paras. 9, 13.
7. *Prosecutor v. Talic*, Case No. 99-36-T; Decision on Objections by Momir Talic to the Form of the Amended Indictment, 20 February 2001, para.27
8. *Prosecutor v Krnolejac*, Case IT-97-25-PT, Decision on the Defence Preliminary Motion on the Form of the Indictment, 24 Feb 1999 ("*First Krnojelac Decision*"), par 12
9. *Prosecutor v Došen & Kolundžija*, Case IT-98-8-PT, Decision on Preliminary Motions, 10 Feb 2000 ("Došen Decision"), para. 21;
10. *Prosecutor v Naletilic & Martinovic*, Case IT-98-34-PT, Decision on Defendant Vinko Martinovic's Objection to the Indictment, 15 Feb 2000 ("Martinovic Decision"), paras. 17-18.
11. *Prosecutor v Furundžija*, Case IT-95-17/1-A, Judgment, 21 July 2000, par 153.
12. *Prosecutor v Krajisnik*, Case IT-00-39-PT, Decision Concerning Preliminary Motion on the Form of the Indictment, 1 Aug 2000 ("Krajisnik Decision"), para. 8.
13. *Prosecutor v Krajisnik*, Case IT-00-39-AR72, Decision on Application for Leave to Appeal the Trial Chamber's Decision Concerning Preliminary Motion on the Form of the Indictment, 13 Sept 2000, p. 3.

14. *Prosecutor v Br|anin and Talic,* Case IT-99-36-PT, Decision on Objections by Momir Talic to the Form of the Amended Indictment, 20 February 2001 ("First *Br|anin & Talic* Decision"), par 18.
15. *Prosecutor v Br|anin and Talic,* Case IT-99-36-PT, Decision on Objections by Radoslav Br|anin to the Form of the Amended Indictment, 23 February 2001 ("Second *Br|anin & Talic* Decision"), par 13.
16. *Prosecutor v Br|anin and Talic,* Case IT-99-36-PT, Decision on Form of Fourth Amended Indictment, 23 November 2001, par 12; First *Brdjanin & Talic* Decision, para.48.
17. *Prosecutor v. Talic*, Decision 20 February 2001.
18. *Prosecutor v Kvocka et al*, IT-98-30, Decision on Defence Preliminary Motions on the Form of the Indictment, 12 April 1999, para. 19.
19. *Prosecutor v Blaskic*, IT-95-14, Decision on Defence Motion to Dismiss the Indictment Based on Defects in the Form Thereof, 4 April 1997, para. 23
20. Krnojelac, Case No: IT-97-25, Decision *on* the Defence Preliminary Motion on the Form of the Indictment, dated 24 February 1999
21. *Prosecutor v. Krnoljelac*, IT-97-25, Decision on the Defence Preliminary Motion on the Form of the Indictment, 24 February 1999, para. 42.
22. Prosecutor v Krnolejac, Decision on Preliminary Motion on Form of Amended Indictment, 11 February 2000 ("Second Krnolejac Decision"), par 60; Aleksovski Appeal Judgment, para. 171, footnote 319.
23. Prosecutor v Delalic, Case IT-96-21-A, Judgment, 20 Feb 2001 ("Celebici Appeal Judgment"), para. 351;
24. *Prosecutor v Brdjanin and Talic*, Case IT-99-36-PT, "Decision on Form of Further Amended Indictment and Prosecution Application to Amend", 26 June 2001 ("Third *Brdjanin & Talic* Decision"), paras. 21, 22).
25. *Prosecutor v Delalic et al,* Case IT-96-21-A, Judgement, 20 Feb 2001 ("*Jelebici* Appeal Judgment"), para. 350.
26. *Prosecutor v Deronjić*, Case IT-02-61-PT, Decision on Form of the Indictment, 25 October 2002 ("*Deronjić* Decision"), para. 31.
27. *Prosecutor v Blaškić*, Case No IT-95-14-PT, Decision on the Defence Motion to Dismiss the Indictment Based upon Defects in the Form Thereof, 4 Apr 1997, para 32.
28. *Prosecutor v Tadić*, Case No IT-94-1-T, Decision on the Defence Motion on the Form of the Indictment, 14 Nov 1995, para. 12;

29. *Prosecutor v Djukić*, Case No IT-96-20-T, Decision on Preliminary Motion of the Accused, 26 Apr 1996, para. 18, 351.
30. *Prosecutor v Aleksovski*, Case IT-95-14/1-A, Judgement, 24 March 2000, para. 171, fn 319 (with reference to *Prosecutor v Krnojelac*, Case IT-97-25-PT, Decision on Preliminary Motion on Form of Amended Indictment, 11 February 2000 ("First *Krnojelac* Decision"), paras.59-60).

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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

TRIAL CHAMBER II

Original: English

Before:
Judge Laïty Kama, Presiding
Judge William H. Sekule
Judge Pavel Dolenc

Registrar:
Dr. Agwu U. Okali

Date: 1 November 2000

THE PROSECUTOR
v.
PAULINE NYIRAMASUHUKO and

ARSÈNE SHALOM NTAHOBALI

Case No. ICTR-97-21-T

DECISION ON NYIRAMASHUKO'S PRELIMINARY MOTION BASED ON DEFECTS IN THE FORM AND THE SUBSTANCE OF THE INDICTMENT

The Office of the Prosecutor:
Japhet Daniel Mono
Ibukunolu Babjide
Celine Tonye
Sola Adeboyejo
Andra Mobberly

Defence Counsel for Nyiramasuhuko:
Nicole Bergevin
Guy Poupart

1. **THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA** (Tribunal),

SITTING as Trial Chamber II (Chamber), composed of Judges Laïty Kama, presiding, William H.

Sekule, and Pavel Dolenc, whom on 5 June 2000, Judge Navanethem Pillay, President of the Tribunal, assigned to sit in place of Judge Mehmet Güney in this matter;

BEING SEISED of Nyiramasuhuko's "Preliminary Motion Based on Defects in the Form of the Substance of the Indictment, Rules 72(B)(ii) and/or Rule 73 of the Rules of Procedure and Evidence" (Motion) filed on 29 October 1999;

CONSIDERING the "Prosecutor's Response to the Preliminary Motion Based on Defects in the Form and the Substance of the Indictment" (Response) filed on 3 February 2000;

BEING SEISED of Nyiramasuhuko's "Amended Preliminary Motion Based on Defects in the Form and Substance of the Indictment, Rule 72(B)(ii) of the Rules of Procedure and Evidence" (Second Motion) filed on 17 April 2000;

CONSIDERING the "Prosecutor's Response to Accused's [Nyiramasuhuko's] Amended Preliminary Motion on Jurisdiction, Rules 72(B)(I) [*sic*] 50 and 47 G [*sic*] of the Rules of Procedure and Evidence" (Second Response) filed on 31 May 2000;

HAVING HEARD the parties at a hearing on the Motion and Second Motion on 7 June 2000;

NOW CONSIDERS the matter.

SUBMISSIONS OF THE DEFENCE

Legal Bases for the Motion and Second Motion

2. The Defence submits that the legal bases for the Motion are Rules 72(B)(ii) and/or Rule 73. The Defence, in a cover letter dated 17 April 2000 attached to the Second Motion, submits that the legal bases for the Second Motion are Rule 72(B)(ii) and/or Rule 73.

3. The Defence, in the same cover letter, notes that the Second Motion differs from the Motion in the amendments to paragraphs 39, 44, 62, 68, 88, 89, 121, and 124, and the first two new prayers.

4. On 7 June 2000, at the hearing, Defence Counsel for Nyiramasuhuko effectively represented to the Chamber that the substance of her Motion was the same as her Second Motion. *See* Transcript of 7 June 2000, at page 27.

Defects in the Form of the Indictment

5. Some paragraphs contained in the indictment are null due to non-compliance with Rule 47(C). The indictment incorporates facts that do not constitute crimes of which Nyiramasuhuko is charged, nor can they be classified as crimes under Articles 2, 3 and 4 of the Statute.

6. For instance, Chapter I of the indictment, entitled "Historical Context", shows no nexus between the facts of the case and the crimes (the criminal acts) with which the suspect is charged. It is an arbitrary selection of events in Rwanda. It is fraught with sweeping references and fails to specify the names directly relevant to the charges brought against the Accused. Consequently, said chapter should be deleted in its entirety.

7. Chapter 2's reference to the Tribunal's jurisdiction in this context is absolutely immaterial.

8. Chapter 3 does not contain such facts as can constitute criminal acts. Like the two preceding chapters, this chapter should also be deleted from the indictment.

9. In Chapter 5, paragraph 5.1 is general and vague. The Defence also challenges as vague paragraphs 5.2, 5.3, 5.4 to 5.7, 5.8, 5.9, 5.10, 5.11, 5.12, 5.13, 5.14, 5.15, and 5.16.

10. In Chapter 6, paragraph 6.1 to 6.6 makes no allegation of a nexus between such acts and the offences as charged against the Accused under the Statute. Paragraphs 6.7 and 6.8 make no reference to the Accused and should be deleted. Paragraphs 6.9, 6.10, 6.12. 6.18. 6.23 to 6.24, 6.26, 6.41, 6.43 to 6.46, and 6.48 do not involve the Accused. Paragraphs 6.49 to 6.56 constitute findings of the guilt.

Request for Additional Information

11. The Defence requests additional information on certain paragraphs included in the indictment

12. In paragraphs 5.1, 5.3, 5.11, 5.14, 6.25, 6.30, and 6,38, the Defence seeks the identity of the persons concerned so that the Accused may know exactly who was involved, including in the alleged conspiracy.

13. The Defence requests the exact date in paragraphs 6.27 and 6.38.

14. The Defence requests that the Prosecutor disclose the supporting materials filed in support of paragraph 4.1 concerning identity.

Substantive" Defects in the Indictment

15. The Defence challenges the indictment itself based on several legal grounds.

16. The new charges were not confirmed pursuant to Rule 47(E); thus, the defence can object to substantive defects.

17. In *Prosecutor v. Nahimana*, ICTR-96-11-T, at para. 6 (Decision on the Preliminary Objection Filed by the Defence Based on Defects in the Form of the Indictment) (24 November 1997), the Trial Chamber held: "Only in special circumstances can a preliminary motion raising objections against the form of the confirmation of an indictment be applied as an indirect means to obtain a review by a Trial Chamber of a confirming decision." The Defence submits that such a lack of confirmation constitutes a "special circumstance" which allows for a review of the substantive defects.

18. Failure to review an indictment to determine whether a prima facie case exists for each of the counts runs afoul of the basic principle of presumption of innocence. The Defence also cites *Prosecutor v. Kabiligi & Ntabakuze*, ICTR-97-34-I (Decision on the Prosecutor's Motion to Amend the Indictment) (Separate and Concurring Opinion of Judge Dolenc) (8 October 1999).

The Conspiracy Count

19. The charge of conspiracy to commit genocide is null for a lack of a prima facie case. To support the count of conspiracy, the Prosecutor must establish a prima facie case to the effect that the Applicant and the other named accused conspired together to commit the crime of genocide. The Defence submits that there is no prima facie evidence of conspiracy to commit genocide.

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The New Counts Are Null Because They Are Based on False Allegations

20. The Defence submits that all the new counts should be nullified because the Prosecutor based her written request for leave to amend the indictment and her oral submissions thereon on false allegations, namely that the new charges were supported by new evidence.

21. Witnesses ZC and ZB hardly provided any fresh evidence. Though the Defence concedes that "investigations allegedly carried out after 29 May 1997 had unearthed three fresh items of evidence." Motion, at para. 121 (emphasis in original).

Nullity of Counts of Individual Responsibility under Article 6(3)

22. There is no evidence either in the indictment or in the supporting material to sustain the charge that the Accused was individually responsible for crimes pursuant to Article 6(3) of the Statute.

23. Counts 10 and 11 on Violation of Article 3 Common to the Geneva Conventions and Additional Protocol II thereto, lack of evidence. The Defence submits that there is not one shred of evidence establishing a link between her and the Rwandan Armed Forces and no supporting material to sustain any such allegation. Thus, Counts 10 and 11 should be set aside.

Defence Prayers

24. The Defence prays that the Chamber: (a) set aside all new charges in the absence of fresh evidence after 29 May 1997; (b) set aside all charges brought under Article 6(3) of the Statute for lack of evidence; (c) set aside counts 10 and 11 for lack of evidence; (d) set aside the charge of conspiracy to commit genocide for lack of evidence.

25. In the alternative, the Defence prays that the Chamber: (a) direct the Prosecutor to provide further clarifications required with respect to the challenged paragraphs, and; (b) allow the Accused to reserve the right to make submissions on paragraph 6.12.

SUBMISSIONS OF THE PROSECUTOR

The Indictment Complies with Rule 47

26. The Prosecutor submits that Rule 47(B) clearly provides for the exercise of the Prosecutor's discretion in the preparation and forwarding of an indictment to the Registrar.

27. On 29 May 1997, the confirming judge, Judge Ostrovsky, satisfied himself that a prima facie case had been established against the Accused.

28. Under Rule 50(A), the Prosecutor applied for leave to amend the indictment against the accused. The Trial Chamber granted the proposed amendment. The Prosecutor contends that the granting of the amendments would not have occurred if the requirements and intent of Rule 47(C) were not satisfied.

29. The Prosecutor submits that Chapters One, Two and Three of the indictment constitute part of the factual background upon which the indictment is predicated. The "Historical Context", the "Territorial, Temporal and Material Jurisdiction," and the "Power Structure" were all accepted and taken as presenting part of a concise background to the events referred to in the indictment. The Prosecutor relies upon the judgement in *Prosecutor v. Akayesu*, ICTR-96-4-T (Judgement) (2 September 1998).

These chapters do not constitute a defect and should not constitute grounds for the dismissal of the indictment.

30. The Prosecutor contends that it is premature at this stage to call on the Chamber to direct such extensive amendment to the indictment without going into the merits of the case.

Request for Additional Information

31. The Prosecutor submits that the Defence should first address a request for particulars to the Prosecutor who may make further disclosure under Rule 66.

32. The Prosecutor contends that the indictment contains sufficient particulars to enable the Accused to understand the nature of the charges against him. The Prosecutor has surmised all the acts, omissions and conduct of the Accused in drafting the indictment, within the purview of the materials in its custody.

33. The provision of any additional information infringes the decision of the Trial Chamber granting protection of the identities of Prosecution witnesses. The Prosecutor contends that any further information will be made available during the course of trial.

Amendment of the Indictment

34. Further, after the August 1999 hearing of the application for amendment of the indictment, the Chamber decided that: "the victims' and witnesses' protection [are] to be of utmost importance, and cannot entirely be subordinated to the rights of the accused for disclosure". *Prosecutor v. Nyiramasuhuko & Ntahobali*, ICTR-97-21-I, at para. 19 (Decision on the Prosecutor's Request for Leave to Amend the Indictment) (10 August 1999).

35. The Trial Chamber deliberated on principles of fairness and granted the motion to amend the indictment, finding sufficient legal and factual grounds.

Res Judicata

36. The Defence challenge to the indictment is similar to the objections it raised during the hearing of the application to amend the indictment. Raising these issues again offends the principle of *res judicata* as contained in the decision of the Trial Chamber in *Prosecutor v. Nahimana*, ICTR-96-11-T (Decision on the Preliminary Motion Filed by the Defence on Defects in the Form of the Indictment) (30 August 1999).

Review of the Indictment

37. The non-confirmation of the amended indictment does not constitute a special circumstance warranting a Trial Chamber to review the confirmation of the indictment. The Prosecutor contends that once the Trial Chamber finds legal and factual grounds for the amended indictment, it cannot be dismissed on the basis of a preliminary motion.

The Conspiracy Count

38. The Prosecutor urges the Trial Chamber to hold that the Defence challenge to the conspiracy count is premature, inaccurate, and misleading. The Prosecutor contends that the Trial Chamber can best determine the merit of the conspiracy count at trial.

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Original: English

TRIAL CHAMBER II

Before:
Judge Laïty Kama, Presiding
Judge Pavel Dolenc
Judge Mehmet Güney

Registrar: Adama Dieng

Decision of: 25 April 2001

THE PROSECUTOR
v.
ÉDOUARD KAREMERA

Case No. ICTR-98-44-T

Decision on the Defence Motion, pursuant to Rule 72 of Rules of Procedure and Evidence, pertaining to, *inter alia*, lack of jurisdiction and defects in the form of the Indictment

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The Office of the Prosecutor:
Kenneth C. Fleming

Counsel for the Defence:
Didier Skornicki

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA ("the Tribunal"),

SITTING as Trial Chamber II ("the Chamber"), composed of Judge Laïty Kama, Presiding, Judge William H. Sekule, and Judge Pavel Dolenc;

BEING SEIZED OF:

A "Requête, Article 72 du Règlement de Procédure et de Preuve", filed by the Defence on 16 January 2001 ;

A "Response of the Prosecutor to the Preliminary Motion filed by the Accused on 16 January 2001", filed on 21 February 2001;

CONSIDERING the Interoffice Memorandum Ref. po-iom/19-3-01/t.c II of 19 March 2001, whereby Judge Navanethem Pillay, President of the Tribunal, assigned Judge Pavel Dolenc to sit in the place of Judge Sekule for the purposes of the instant motion, pursuant to Rules 15(E) and 27(C) of the Rules of Procedure and Evidence of the Tribunal (the "Rules");

CONSIDERING the provisions of the Statute of the Tribunal ("the Statute"), specifically Article 20 of the Statute, and the Rules, in particular Rules 7, 40, 40 *bis,* 47(C), 53 *bis*, 55, 66(A)(i), 72, 73 of the Rules;

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HAVING HEARD the Parties on 19 March 2001;

NOW REVIEWS THE MOTION.

SUBMISSIONS OF THE PARTIES:

1. The Defence objects to the lack of jurisdiction of the Tribunal on, *inter alia*, the following grounds:

(a) Illegality of Security Council Resolution 955 of 8 November 1994 ("Security Council Resolution 955"):

(i) Establishment of an international tribunal is not part of the measures the Security Council is entitled to take under Chapter VII of the UN Charter;

(ii) In any event, no "threat to international peace and security", within the meaning of Article 39 of the Charter of the United Nations, existed in Rwanda at the time the Security Council decided, pursuant to the said disposition, to set up the Tribunal. This constitutes an obvious error of judgment (une "erreur manifeste d'appréciation") the Trial Chamber has the authority to raise;

(b) As a consequence of its temporal and personal jurisdiction, as defined in the Statute, the Tribunal is not an independent body, in contradiction with Article 14(1) of the Covenant on civil and Political Rights, in so far as the Tribunal has no jurisdiction over members of the current Rwandan Government and all other persons having committed crimes envisioned in the Statute against members of the Hutu community;

(c) The Judges of the Tribunal, and, in particular, those of the present Trial Chamber, should be disqualified as they sit in cases pertaining to identical facts;

(d) The Tribunal has lost personal jurisdiction over the Accused on the following grounds:

(i) Illegal detention since 31 August 1998, as notification of the Decision confirming the Accused's Indictment took place with delay;

(ii) Violation of the Accused's right to a Counsel of his choice;

(iii) Lack of legal representation at the Accused's Initial Appearance of 7 and 8 April 1999.

2. The Defence further objects to defects in the form of several paragraphs of the Accused's Indictment on the grounds of, *inter alia*, error of fact, lack of objectivity, lack of precision and clarity and lack of evidence.

3. The Prosecutor replies that the Motion should be dismissed on, *inter alia*, the following grounds:

(a) Non-admissibility: The Motion is a repeat of the Motion filed in November 1999. The latter Motion was time-barred under Rule 72(A) as in force at the time, the Accused having had a period of 60 days from the date of disclosure of the materials envisaged under Rule 66(A)(i) to file any preliminary motions, whereas the Prosecutor had disclosed the said materials on 5 May 1999. No good cause was shown warranting the

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waiver of the debarment of the instant motion, which is an abuse of process;

(b) On the merits:

(i) The objection based on lack of jurisdiction does not fall under Rule 72(B) as currently in force and, in any case, is defeated by the "Decision on Defence Motion on jurisdiction" of 10 August 1995 rendered in the Case *Prosecutor v. Tadic* by the International Criminal Tribunal for the former Yugoslavia (the "ICTY") (the "Tadic Decision on Jurisdiction");

(ii) Preliminary motions cannot challenge alleged errors of fact in an indictment;

(iii) The sufficiency of *prima facie* evidence supporting the Accused's Indictment was decided upon confirmation of the Indictment, by the confirming Judge. This Decision is not subject to review.

HAVING DELIBERATED,

1. Whether the Motion is time-barred in globo

4. The Defence Motion is brought, as a preliminary motion, under Rule 72 of the Rules. The Defence does not contest that, as submitted by the Prosecutor, the materials envisaged under Rule 66 (A)(i) of the Rules were disclosed more than a year ago, in May 1999, and that the Motion is time-barred pursuant to Rule 72(A) of the Rules.

5. The Defence however moved, during the hearing of 19 March 2001, for a waiver of this deadline, pursuant to Rule 72(F), in the light of, essentially, the following factors:

(i) No Counsel was effectively assisting the Accused during most of the period of time when the preliminary motion was to be filed pursuant to Rule 72(A), that is, from 5 May 1999 to 5 July 1999;

(ii) Once Mr Skornicki was assigned, in February 2000, the Chamber authorized him to review the contents of the original Motion as drafted by the Accused himself and as initially filed by the latter on 16 November 1999;

(iii) From the date of his assignment until several months afterwards, the Counsel and the Accused have had to focus all their efforts on opposing the Prosecutor's Request for joinder, which accounts for the delay in filing the instant Motion.

6. The Chamber considers that the reasons above do account for the delay in the filing of these Preliminary objections, albeit only until the 28 June 2000, when the Defence was heard by this Chamber on their opposition to the joinder in the present case. Indeed, the Motion was sent to the Tribunal, via *facsimile*, on 12 January 2001 only, and officially filed by Court Management Section on 16 January 2001, that is, five months and a half after the said hearing. The Chamber accordingly notes that the Defence could have proved more diligent in filing their Motion sooner. This is especially true in regard to a *facsimile* transmission of 25 April 2000 from Mr Mindua, on behalf of the Court Management Section of the Tribunal ("CMS") to Counsel for the Accused, ref: ICTR/JUD-11-6-382. This document indicates that, in a previous letter to CMS, the Defence mentioned having taken good note of a deadline, set by the Chamber on 30 April 2000, to file their Motion. The Defence has thus failed to justify, to the above extent, their delay in filing the instant Motion.

7. At this point, the Chamber would like to note a variation between Rule 72(F) of the Rules in its French and English versions. Rule 72(F) of the Rules indeed reads thus, in the English version, "[t]he Trial Chamber may, however, grant relief from the waiver upon showing good cause", and in the French version, "[l]a Chambre de première instance peut néanmoins déroger à ces délais pour des raisons jugées valables". One may derive from the English version of the said Rule that the Defence must show good cause for the waiver to be granted, whereas the French version may be construed as, *either* giving such an opportunity to the Defense, *or* giving the Chamber authority to grant waiver *proprio motu*, should it find, good cause not referred to by the Party.

8. The Chamber recalls in this regard that, pursuant to Rule 7 of the Rules, "The English and French texts of the Rules shall be equally authentic". Pursuant to the same provision however, "[i]n case of discrepancy, the version which is more consonant with the spirit of the Statute and the Rules shall prevail. The Chamber recalls in this respect the Akayesu Judgement, where former Trial Chamber I stated twice that, in case of discrepancy between the French and English versions of a text, with regard, either to a disposition of the Statute, or to specific paragraphs of the Accused's Indictment, the version most favorable to the Accused should be upheld, in accordance with a cardinal principle of criminal law. (*See*, The Prosecutor v. Jean-Paul Akayesu, case No. ICTR-96-4-T, "Judgement", 2 September 1998, at para. 319 and 501). This Trial Chamber concurs with the above reasoning and decides to apply Rule 72(F) of the Rules in its French version, as it appears more favorable to the Accused and, therefore, more consonant with the spirit of the Statute and the Rules.

9. While taking partly into account the above reasons submitted by the Defence for filing their Motion with delay, the Chamber therefore *proprio motu* considers that, in the instant case, the seriousness of the Defence's allegations, in so far as they relate to fundamental defects in the form of the Indictment which might affect the trial proceedings, violation of the Accused's individual rights and the establishment of this Tribunal, its jurisdiction and its independence, commend, in the interests of justice, that the Motion, although time-barred, be reviewed pursuant to Rule 72(F) of the Rules.

2. The Defence Objections

10. Having decided on the admissibility as a whole of the Defence Motion with respect to the timeframes under Rule 72(A) and 72(F) of the Rules, the Chamber will now review each of the Defence objections in turn.

2.1. Objection based on defects in the form of the Indictment

11. The Defence raises an objection to defects in the form of the Indictment, within the meaning of Rule 72(B)(ii) of the Rules, on, essentially, the following grounds, which the Chamber classifies below, for purposes of clarity and exhaustiveness:

(i) Errors of fact (notably, at para. 1.6, 1.8, 1.12, 1.16, 1.18, 1.20, 1.24-1.25, 1.27, 3.11, 4.8, 4.10, 6.11, 6.34 to 6.38, 6.40 and 6.41);

(ii) Controversial nature of allegations set out in the Indictment (notably, at para. 1.13 and 6.1 to 6.104);

(iii) Lack of objectivity of allegations set out in the Indictment (notably, at para. 1.13, 1.18, 1.20, 1.21, 1.24 to 1.25, 2.4, 4.8, 6.1 to 6.104, 6.42, 6.44, 6.46 and 6.47);

(iv) Lack of *prima facie* evidence or lack of evidence in general (notably, at para. 1.20, 1.21, 2.4, 5.1, 6.17, 6.22, 6.23, 6.26 to 6.32, 6.33, 6.40, 6.50, 6.51, 6.53, 6.54, 6.59, 6.61 to 6.63, 6.67, 6.68, 6.69, 6.72, 6.76 to 6.81, 6.84 to 6.86, 6.88, 6.89, 6.91, 6.94,

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6.95, 6.96, 6.97);

(v) Contradiction between allegations (at para. 5.2);

(vi) Omissions of facts in general (notably, at para. 2.4, 4.7, 6.11 and 6.34 to 6.38);

(vii) Absence of mention of Karemera's name (notably, at para. 6.5, as referred to under each Count the Accused is charged with respect to Article 6(3) of the Statute, 6.23, 6.26 to 6.32);

(viii) Lack of precision or clarity amounting to excessive globalization, as to the circumstances of the acts alluded to, or as to the alleged involvement of the Accused (notably, at para. 1.28, 5.1, 6.5, 6.12, 6.23, 6.26 to 6.32, 6.42, 6.44, 6.46 and 6.47, 6.58, 6.59, 6.61 to 6.63);

The Chamber thus attempted to be as exhaustive as possible. The Defence however made further reference to several paragraphs, about which general comments were made, that the Chamber could not ascribe to any category of defects in the form of the Indictment (notably, at para. 1.22, 3.9, 4.9, 6.4 to 6.10). Besides, the Defence did not clearly specify, with respect to several paragraphs referred to in their motion, whether they contested their formulation on the basis of their lack of specificity, or on other grounds.

12. As a preliminary matter, the Chamber notes that the categories of alleged defects No. (i) to (iii) above, as well as that of lack of evidence in general to support allegations set out in the Indictment at No. (iv), pertain to the substance of the Indictment, rather than to its form. Such objections cannot be entertained under Rule 72(B)(ii) of the Rules, and can only be raised at trial. These objections are accordingly dismissed.

13. As a further preliminary matter, by contesting the lack of *prima facie* evidence supporting numerous allegations in the Accused's Indictment (para. 10(iv) above), the Chamber notes that the Defence is in fact appealing, before this Trial Chamber, against the Confirmation of the Indictment, a Decision rendered by Judge Navanethem Pillay on 29 August 1998, whereby the Tribunal found that "(...) a *prima facie* case has been established with respect to each and every count in the indictment (...)". Besides, the Defence specifically advocated it during the hearing (*See*, French Transcripts of 19 March 2001, at page 30: "*Et à ce point de vue, vous êtes votre propre Tribunal (...), la juridiction du recours*"). The Chamber reminds the Defence that it has no such authority, under the Statute and the Rules, to act as an appellate jurisdiction with respect to Decisions of the Tribunal and, accordingly, dismisses the Defence objection.

14. The Chamber notes that contradictions between allegations set out in an indictment constitute defects in the form of an indictment, if the Trial Chamber finds, without dwelling into their substance, that these allegations are mutually exclusive in view of the way they are spelt out and with respect to their factual and legal constituent elements.

15. The Defence specifically submits that para. 5.1 and 5.2 are contradictory. The Chamber notes that para. 5.1 relates to the alleged inception and execution, by the Accused and others, including his co-Accused, Ministers of the Interim Government or prominent Rwandan political figures, of a plan to massacre the Tutsi population and moderate Hutu, while para. 5.2 relates to such a plan conceived by members of the Military. The Chamber does not consider that these allegations exclude each other in the way they are spelt out. Indeed, as the Defence rightly notes, the existence of the former plan, if proved at trial, does not exclude the existence of another plan, while the relation between these two plans will have to be determined, if any, at trial.

16. The Chamber notes that allegations within an indictment are defective in their form if they are

not sufficiently clear and precise, in the way they are spelt out and with respect to their factual and legal constituent elements, so as to enable the Accused to fully understand the nature and the cause of the charges brought against him. (*See notably*, on this issue, *Prosecutor v. Anatole Nsengiyumva*, ICTR-96-12-I, "Decision on the Defense Motion Raising Objections on Defects in the Form of the Indictment and to Personal Jurisdiction on the Amended Indictment", 12 May 2000, para. 1: "for an indictment to be sustainable, facts alleging an offence must demonstrate the specific conduct of the accused constituting the offence"; and Prosecutor v. Kanyabashi, ICTR-96-15-I, "Decision on Defence Preliminary Motion for Defects in the Form of the Indictment", 31 May 2000, para. 5.1: "an Indictment must be sufficiently clear to enable the Accused to fully understand the nature and cause of the charges brought against him").

17. The Chamber further bears in mind that, pursuant to Rule 47(C) of the Rules, beside "the name and particulars of the suspect", "[t]he indictment shall set forth (...) a <u>concise</u> statement of the facts of the case and of the crime with which the suspect is charged". When assessing the specificity of allegations set out in an indictment, the Chamber must therefore strike a balance between the right of the Accused to fully understand the nature and the cause of the charges brought against him, and the necessary conciseness of the indictment.

18. As regards the omission of specific facts in the Indictment (para. 10(vi) above), the Trial Chamber similarly notes that this objection pertains to the substance of the Indictment rather than to its form. It may however constitute a defect in the form of an indictment if the Trial Chamber is satisfied that the omission does not enable the Accused to fully understand the nature and the cause of the charges brought against him. In this case, the objection is to be reviewed with allegations pertaining to the lack of precision or clarity of the indictment (*See*, in the present case, para. 19, below).

19. As regards, more specifically, the absence of mention of Karemera's name in several paragraphs of the Indictment, The Chamber refers to the "Decision on the Defense Motion Raising Objections on Defects in the Form of the Indictment and to Personal Jurisdiction on the Amended Indictment" rendered on 12 May 2000 in the Case Prosecutor v. Anatole Nsengiyumva, No. ICTR-96-12-I, where Trial Chamber III of the Tribunal held, at para. 2, that: "(...) it is not reasonable to expect the Prosecutor to mention the Accused in every paragraph of the amended indictment. Nor is it proper to consider the amended indictment in such a way as to disregard those paragraphs where not only is the Accused mentioned, but where acts and omissions for which the Prosecutor finds him individually responsible under the Statute of the Tribunal are described". Further, the same Trial Chamber stated, at para 3, that: "[t]he amended indictment must be considered in its totality and it would be incorrect to make a conclusion as to any defect in it upon a selective reading of only certain of its paragraphs" (*See also*, on this issue, the "Decision on Defence motion on Matters arising from Trial Chamber Decisions and Preliminary Motion based on Defects in the Form of the Indictment and Lack of Jurisdiction", rendered on 20 November 2000 in the Case Prosecutor v. Eliézer Niyitegeka, No. ICTR-96-14-T, at para. 34). In the view of the Chamber indeed, the absence of mention of an accused's name in specific paragraphs of his indictment does not constitute, *per se*, a defect in the form of the indictment. In any case, this issue pertains to the lack of precision or clarity of the indictment, and is to be assessed at this stage.

20. The Chamber now turns to each of the paragraphs specifically mentioned by the Defence as lacking precision and/or clarity and notes that:

(i) Para. 1.28, which relates, *inter alia*, the espousal, by the Interim Government, of the plan of extermination of the Tutsi population and of Hutu political opponents, is not specific with respect to the plan as such as well as to the Accused and his alleged participation in the said plan. However, this paragraph does not lack specificity in that its purpose is mainly to describe the overall historical context surrounding the events alleged in the Indictment, rather than the individual criminal responsibility of the

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IN THE APPEALS CHAMBER

Before:
Judge Patricia Wald, Presiding
Judge Lal Chand Vohrah
Judge Rafael Nieto-Navia
Judge Fausto Pocar
Judge Liu Daqun

Registrar:
Mr. Hans Holthuis

Judgement of:
23 October 2001

PROSECUTOR

v

ZORAN KUPRESKIC
MIRJAN KUPRESKIC
VLATKO KUPRESKIC
DRAGO JOSIPOVIC
VLADIMIR SANTIC

APPEAL JUDGEMENT

The Office of the Prosecutor:

Mr. Upawansa Yapa
Mr. Anthony Carmona
Mr. Fabricio Guariglia
Ms. Sonja Boelaert-Suominen
Ms. Norul Rashid

Counsel for the Defendants:

Mr. Ranko Radovic, Mr. Tomislav Pasaric for Zoran Kupreskic
Ms. Jadranka Slokovic-Glumac, Ms. Desanka Vranjican for Mirjan Kupreskic
Mr. Anthony Abell, Mr. John Livingston for Vlatko Kupreskic
Mr. William Clegg Q.C., Ms. Valerie Charbit for Drago Josipovic
Mr. Petar Pavkovic for Vladimir Santic

The Appeals Chamber of the International Tribunal for the Prosecution of Persons Responsible for

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Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 is seised of appeals against the Trial Judgement rendered by Trial Chamber II on 14 January 2000 in the case of *Prosecutor v Zoran Kupreskic, Mirjan Kupreskic, Vlatko Kupreskic, Drago Josipovic, Dragan Papic and Vladimir Santic.*[1]

Having considered the written and oral submissions of the parties, the Appeals Chamber

HEREBY RENDERS ITS JUDGEMENT.

I. INTRODUCTION

1. In the early morning of 16 April 1993, Bosnian Croat forces attacked Ahmici, a small village in central Bosnia. The Trial Chamber found that this attack resulted in the deaths of over a hundred of the Bosnian Muslim civilian inhabitants of the village, the wounding of numerous others and the complete destruction of Muslim houses and two mosques. The Trial Chamber convicted Zoran Kupreskic, Mirjan Kupreskic, Vlatko Kupreskic, Drago Josipovic and Vladimir Santic for various forms of crimes against humanity, including persecution, under Article 5 of the Statute of the Tribunal, because of their individual involvement in this attack. The Trial Chamber defined persecution as "the gross or blatant denial, on discriminatory grounds, of a fundamental right, laid down in international customary or treaty law, reaching the same level of gravity as other acts prohibited in Article 5".[2] The Trial Chamber, however, acquitted the Defendants on certain counts, either because it found the evidence to be insufficient or due to cumulative conviction considerations . For the convictions, the Trial Chamber imposed prison sentences ranging between six and twenty-five years.

2. All of the Defendants,[3] are now appealing against their convictions, as set out below in the individual sections pertaining to each of them and all of the Defendants appeal against the sentences imposed by the Trial Chamber. To the extent necessary, this aspect of their appeals is discussed in a separate part of the Judgement confined to sentencing matters. In addition, the Appeals Chamber has identified certain issues that are of general interest to all of the Defendants. These issues are dealt with in an initial part of the Judgement under the heading "General Issues".

3. The Prosecution, as well as Josipovic, has also raised cumulative conviction considerations. This appeal is discussed in a separate section devoted to the issue of cumulative convictions.

4. The procedural background of these appellate proceedings is found in Annex A.

5. Insofar as this Judgement refers to testimony in this case, either before the Trial Chamber or the Appeals Chamber, given in closed session or any other material filed under seal, that testimony or material is released to the extent that it is recited or relied upon herein.[4]

II. THE DEFENDANTS

1. Zoran Kupreskic

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6. Zoran Kupreskic was born on 23 September 1958. He is married with three children. Prior to the conflict, he was an employee of the Slobodan Princip Seljo factory in Vitez, where he was in charge of maintenance for one of the units.[5] The Trial Chamber found undisputed evidence of Zoran Kupreskic's general good character.[6]

7. The Trial Chamber concluded that Zoran Kupreskic was a local HVO Commander at the time of the attack on Ahmici on 16 April 1993.[7] The Trial Chamber further concluded, on the basis of the evidence of Witness H, that Zoran Kupreskic, on that same day, was armed, in uniform and with polish on his face, in the house of Suhret Ahmic immediately after Suhret Ahmic and Meho Hrstanovic were shot and killed, and immediately before the house was set on fire and the Suhret Ahmic family was expelled.[8] In addition, the Trial Chamber found that Zoran Kupreškic participated in the attack on Ahmici by providing local knowledge and the use of his house as a base for the attacking troops.[9]

8. The Trial Chamber accordingly found Zoran Kupreskic guilty of persecution as a crime against humanity pursuant to Article 5(h) of the Statute (count 1), for which he was sentenced to ten years of imprisonment.

2. Mirjan Kupreskic

9. Mirjan Kupreskic was born on 21 October 1963. He is the brother of Zoran Kupreskic. He is married with two children. He was employed as a mechanical technician until February 1992 in the Slobodan Princip Seljo Factory. From August 1992 until April 1993, he worked for his cousin Ivica, first in the Sutra[10] store in Ahmici and then, ten days before the conflict, at a store in Vitez. In April 1994, when he was demobilised, he returned to work in the Sutra store.[11] As with his brother Zoran, it was undisputed that Mirjan Kupreškic had previously been of good character.[12]

10. The Trial Chamber found that Mirjan Kupreskic was an "active" member of the HVO and that, together with his brother, Zoran, he participated in the attack on Ahmici on 16 April 1993 as an HVO soldier.[13] The Trial Chamber concluded, based upon the testimony of Witness H, that Mirjan Kupreskic, on that same day, was armed, in uniform and with polish on his face, in the house of Suhret Ahmic immediately after Suhret Ahmic and Meho Hrstanovic were shot and killed, and immediately before the house was set on fire and the Suhret Ahmic family was expelled.[14] In addition , the Trial Chamber found that, along with his brother Zoran, Mirjan Kupreskic participated in the Ahmici attack by providing local knowledge and the use of his house as a base for the attacking troops.[15]

11. For his part, the Trial Chamber found Mirjan Kupreskic guilty of persecution as a crime against humanity pursuant to Article 5(h) of the Statute (count 1). He was sentenced to eight years of imprisonment.

3. Vlatko Kupreskic

12. Vlatko Kupreskic was born on 1 January 1958. He is married with two children . He is the cousin of Zoran and Mirjan Kupreskic and co-owner of the Sutra store .[16] The Trial Chamber found that in 1992 and 1993, Vlatko Kupreskic was an active operations officer in the police with the rank of inspector, and that he unloaded weapons from a car in front of his house in October 1992.[17]

13. The Trial Chamber concluded that Vlatko Kupreskic "was involved in the preparations for the attack on Ahmici in his role as police operations officer and as a resident of the village", and furthermore, "allowed his house to be used for the purposes of the attack and as a place for the troops to gather the night before."[18] The Trial Chamber determined that Vlatko Kupreskic was in the vicinity of Suhret Ahmic's house at about 5:45 a.m. on 16 April 1993, shortly after Suhret Ahmic was murdered, and that "he was present and ready to lend assistance in whatever way he could to the attacking forces".[19]

14. The Trial Chamber accordingly found Vlatko Kupreskic guilty of aiding and abetting persecution as a crime against humanity pursuant to Article 5(h) of the Statute (count 1) and sentenced him to six years of imprisonment.

4. Drago Josipovic

15. Drago Josipovic was born on 14 February 1955. He was a life-long resident of Ahmici. Before the conflict, he worked in a factory. The Trial Chamber found that Josipovic, prior to 16 April 1993, was a member of the HVO. It also found that he was a member of the Ahmici village guard and that he was seen in Ahmici with a rifle and wearing a uniform.[20] On the basis of the evidence of Witness EE, the Trial Chamber held that Josipovic, on 16 April 1993, was a participant in the attack on, and burning of, Musafer Puscul's house, which resulted, *inter alia*, in the murder of Musafer Pusc ul.[21]

16. Furthermore, relying on the evidence of Witness DD, the Trial Chamber concluded that Josipovic was, while in a "commanding position with regard to the troops involved ",[22] a participant in the 16 April 1993 attack on the house of Nazif Ahmic, which resulted in the murder of Nazif and his 14-year old son.

17. Accordingly, the Trial Chamber found Josipovic guilty of persecution as a crime against humanity pursuant to Article 5(h) of the Statute (count 1) for the active part he played in the "killing of Bosnian Muslim civilians in Ahmici, the destruction of Bosnian Muslim homes and property and expulsion of Bosnian Muslims from the Ahmici–Santici region" and, in particular, the incidents involving the Puscul and Ahmic families described above.[23] Josipovic was also convicted of the murder of Musafer Puscul as a crime against humanity pursuant to Article 5(a) of the Statute (count 16), and inhumane acts as a crime against humanity pursuant to Article 5(i) of the Statute (count 18). Josipovic was sentenced to 10 years of imprisonment on count 1, 15 years of imprisonment on count 16, and 10 years of imprisonment on count 18, to be served concurrently.

5. Vladimir Santic

18. Vladimir Santic was born on 1 April 1958. Prior to the conflict, he was, by profession, a policeman.[24] Based upon the evidence of Witness B and Witness AA, the Trial Chamber concluded that, in April 1993, Santic was the Commander of the 1st Company of the 4th Battalion of the Military Police and that he was, in fact, the Commander of the "Jokers", "a specialist, anti-terrorist unit of the Croatian Military Police".[25]

19. Accepting the testimony of Witness EE, the Trial Chamber concluded that Santic, on 16 April 1993, participated in the attack on and the burning of Musafer Pu scul's house, which resulted, *inter alia*, in the murder of Musafer Puscul .[26] The Trial Chamber held that Santic "played an

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active role in the killing of Bosnian Muslim civilians in Ahmici, the destruction of Bosnian Muslim homes and property and the expulsion of Bosnian Muslims from the Ahmici-Santici region."[27]

20. The Trial Chamber found Santic guilty of persecution as a crime against humanity pursuant to Article 5(h) of the Statute (count 1); murder as a crime against humanity pursuant to Article 5(a) of the Statute (count 16); and inhumane acts as a crime against humanity pursuant to Article 5(i) of the Statute (count 18). Santic was sentenced to 25 years of imprisonment on count 1, 15 years of imprisonment on count 16, and 10 years of imprisonment on count 18, to be served concurrently.

III. GENERAL ISSUES

A. Appropriate grounds of appeal

21. In view of the nature of the arguments advanced by some of the parties to this appeal, the Appeals Chamber considers it appropriate to discuss initially the issue of the grounds of appeal that an appellant can legitimately raise. Such a discussion begins with Article 25 of the Statute, which provides the authority for the Appeals Chamber's function to hear appeals. This provision states:

> 1. The Appeals Chamber shall hear appeals from persons convicted by the Trial Chambers or from the Prosecutor on the following two grounds:
>
> (a) an error on a question of law invalidating the decision; or
>
> (b) an error of fact which has occasioned a miscarriage of justice.
>
> 2. The Appeals Chamber may affirm, reverse or revise the decisions taken by the Trial Chambers.

22. As has been held by the Appeals Chamber on numerous occasions, an appeal is not an opportunity for the parties to reargue their cases. It does not involve a trial *de novo*.[28] On appeal , parties must limit their arguments to matters that fall within the scope of Article 25 of the Statute. The general rule is that the Appeals Chamber will not entertain arguments that do not allege legal errors invalidating the judgement, or factual errors occasioning a miscarriage of justice, apart from the exceptional situation where a party has raised a legal issue that is of general significance to the Tribunal's jurisprudence.[29] Only in such a rare case may the Appeals Chamber consider it appropriate to make an exception to the general rule.

23. Some of the parties in the instant case have advanced arguments that do not fall within the scope of Article 25 of the Statute and to which the exception to the general rule does not apply. For example, Zoran Kupreskic appears to take issue with certain general allegations set out in paragraph 9 of the Amended Indictment , such as the accusations that he helped prepare the April attack on Ahmici- Santici by participating in military training; evacuating Bosnian Croat civilians the night before the attack; organising HVO soldiers, weapons and ammunition in and around the village; and concealing from the other residents that the attack was imminent.[30] A review of the factual and legal findings pertaining to Zoran Kupreskic demonstrate that these allegations did not

play a part in his conviction on count 1 (persecution). In such a situation , the argument does not have the potential to affect the outcome of this appeal and, therefore, does not constitute an appropriate ground of appeal. Zoran Kupreskic further complains that the Trial Chamber failed to establish whether he was a perpetrator or a co-perpetrator of the crime for which he was convicted.[31] The Appeals Chamber considers this argument to be misconceived. The Trial Chamber found in paragraph 782 of the Trial Judgement that he, in the commission of persecution , "acted as a co-perpetrator...within the meaning of Article 7(1) of the Statute".

24. The Appeals Chamber finds that these arguments made by Zoran Kupreskic illustrate grounds of appeal that cannot appropriately be argued on appeal since they fail to raise errors of law or fact that invalidate the judgement or that have occasioned a miscarriage of justice. Accordingly, they are dismissed.

25. In a similar vein, the Appeals Chamber dismisses Zoran and Mirjan Kupreskic 's common argument that the Trial Chamber incorrectly attributed the defence of reciprocity (*tu quoque*) to them. The Trial Chamber rejected this as a legitimate defence. The Trial Judgement stated that "[d]efence counsel have indirectly or implicitly relied upon the *tu quoque* principle".[32] Zoran and Mirjan Kupreskic have both emphatically denied that they raised such a defence before the Trial Chamber. It may well have been that neither Zoran nor Mirjan Kupreskic intended to raise this particular defence, but that the Trial Chamber interpreted their arguments to fall under the *tu quoque* principle. Whether the Trial Chamber was correct or not in so doing is a matter upon which the Appeals Chamber expresses no view. It is sufficient to observe that the point raised by Zoran and Mirjan Kupreskic is of no significance for the purpose of deciding this appeal as it had no bearing upon the convictions of the Defendants. In such circumstances , this argument constitutes an inappropriate ground of appeal.

26. Mirjan Kupreskic has made certain submissions in respect of the preconditions for crimes against humanity and the elements of the crime of persecution under Article 5(h) of the Statute.[33] The Appeals Chamber notes that he appears to be rearguing the same case that he raised before the Trial Chamber. A comparison between Mirjan Kupreskic's Closing Brief, filed at trial, and his Appeal Brief shows that his submissions on these issues in the two documents are virtually identical.[34] Importantly, the relevant section of Mirjan Kupreskic's Appeal Brief does not identify any legal error on the part of the Trial Chamber, such as, for example, a discrepancy between the elements of the crime identified by him and those identified by the Trial Chamber. Admittedly, alleged errors of law do not require that the appellant make as specific a showing of an error by the Trial Chamber as do alleged errors of fact. In the *Furundzija* Appeal Judgement, the Appeals Chamber held that

> [w]here a party contends that a Trial Chamber made an error of law, the Appeals Chamber, as the final arbiter of the law of the Tribunal, must determine whether there was such a mistake. A party alleging that there was an error of law must be prepared to advance arguments in support of the contention; but, if the arguments do not support the contention, that party has not failed to discharge a burden in the sense that a person who fails to discharge a burden automatically loses his point. The Appeals Chamber may step in and, for other reasons, find in favour of the contention that there is an error of law.[35]

27. The Appeals Chamber notes, however, that a party who submits that the Trial Chamber erred in law must at least identify the alleged error and advance some arguments in support of its contention. An appeal cannot be allowed to deteriorate into a guessing game for the Appeals

Chamber. Without guidance from the appellant, the Appeals Chamber will only address legal errors where the Trial Chamber has made a glaring mistake. If the party is unable to at least identify the alleged legal error, he or she should not raise the argument on appeal. It is not sufficient to simply duplicate the submissions already raised before the Trial Chamber without seeking to clarify how these arguments support a legal error allegedly committed by the Trial Chamber. The Appeals Chamber, therefore, finds that the arguments of Mirjan Kupreskic relating to the preconditions of crimes against humanity and elements of persecution must be dismissed for failure to identify any legal error on the part of the Trial Chamber.

B. Reconsideration of factual findings made by the Trial Chamber

1. General principles

28. Under this heading, the Appeals Chamber will discuss the standard that applies with respect to the reconsideration of factual findings by the Trial Chamber. The vast majority of the grounds of appeal raised by the Defendants in this case concerns alleged errors of fact. Several of the parties to the present appeal have also raised questions of a more general nature relating to the Appeals Chamber's review of errors of fact under Article 25(1)(b) of the Statute.[36] In light thereof, the Appeals Chamber considers it appropriate to elaborate upon this matter.

29. In order for the Appeals Chamber to overturn a factual finding by the Trial Chamber, an appellant must demonstrate that the Trial Chamber committed a factual error and the error resulted in a miscarriage of justice.[37] The appellant must establish that the error of fact was critical to the verdict reached by the Trial Chamber, thereby resulting in a "grossly unfair outcome in judicial proceedings, as when a defendant is convicted despite a lack of evidence on an essential element of the crime."[38] Consequently, it is not each and every error of fact that will cause the Appeals Chamber to overturn a decision of the Trial Chamber, but only one that has occasioned a miscarriage of justice.[39]

30. Pursuant to the jurisprudence of the Tribunal, the task of hearing, assessing and weighing the evidence presented at trial is left primarily to the Trial Chamber . Thus, the Appeals Chamber must give a margin of deference to a finding of fact reached by a Trial Chamber. Only where the evidence relied on by the Trial Chamber could not have been accepted by any reasonable tribunal of fact or where the evaluation of the evidence is "wholly erroneous" may the Appeals Chamber substitute its own finding for that of the Trial Chamber. It must be borne in mind that two judges , both acting reasonably, can come to different conclusions on the basis of the same evidence.[40]

31. As stated above, it is initially the Trial Chamber's task to assess and weigh the evidence presented at trial. In that exercise, it has the discretion to "admit any relevant evidence which it deems to have probative value", as well as to exclude evidence "if its probative value is substantially outweighed by the need to ensure a fair trial."[41] As the primary trier of fact, it is the Trial Chamber that has the main responsibility to resolve any inconsistencies that may arise within and/or amongst witnesses' testimonies. It is certainly within the discretion of the Trial Chamber to evaluate any inconsistencies , to consider whether the evidence taken as a whole is reliable and credible and to accept or reject the "fundamental features" of the evidence.[42] The presence of inconsistencies in the evidence does not, *per se*, require a reasonable Trial Chamber to reject it as being unreliable.[43] Similarly, factors such as the passage of time between the events and the testimony of the witness, the possible influence of third persons, discrepancies, or the existence of stressful conditions at the time the events took place do not automatically exclude the Trial

Chamber from relying on the evidence. However, the Trial Chamber should consider such factors as it assesses and weighs the evidence.

32. The reason that the Appeals Chamber will not lightly disturb findings of fact by a Trial Chamber is well known. The Trial Chamber has the advantage of observing witnesses in person and so is better positioned than the Appeals Chamber to assess the reliability and credibility of the evidence.[44] Accordingly, it is primarily for the Trial Chamber to determine whether a witness is credible and to decide which witness' testimony to prefer, without necessarily articulating every step of the reasoning in reaching a decision on these points. This discretion is, however, tempered by the Trial Chamber's duty to provide a reasoned opinion, following from Article 23(2) of the Statute. In the *Furundzija* Appeal Judgement, the Appeals Chamber considered the right of an accused under Article 23 of the Statute to a reasoned opinion to be an aspect of the fair trial requirement embodied in Articles 20 and 21 of the Statute.[45]

33. It follows from the jurisprudence of the Appeals Chambers of both the ICTY and ICTR that the testimony of a single witness, even as to a material fact, may be accepted without the need for corroboration.[46] With the exception of the testimony of a child not given under solemn declaration ,[47] the Trial Chamber is at liberty , in appropriate circumstances, to rely on the evidence of a single witness.

34. The Appeals Chamber notes, however, that a reasonable Trial Chamber must take into account the difficulties associated with identification evidence in a particular case and must carefully evaluate any such evidence, before accepting it as the sole basis for sustaining a conviction. Domestic criminal law systems from around the world recognise the need to exercise extreme caution before proceeding to convict an accused person based upon the identification evidence of a witness made under difficult circumstances. The principles developed in these jurisdictions acknowledge the frailties of human perceptions and the very serious risk that a miscarriage of justice might result from reliance upon even the most confident witnesses who purport to identify an accused without an adequate opportunity to verify their observations . In the well known United Kingdom case of *R.* v *Turnbull*, the court held that, when a witness has purported to identify the accused under difficult circumstances, the judge should "withdraw the case from the jury and direct an acquittal unless there is other evidence which goes to support the correctness of the identification ...". It further underscored the need always to caution a jury about the dangers of identification evidence.[48]

35. The *Turnbull* principles are reflected in the jurisprudence of many other common law countries.[49] The High Court of Malaya, for example, has pointed out that

> [t]here have been many cases of wrongful convictions based on mistaken eyewitness identification. It has been held that evidence as to identity based on personal impressions, however bona fida, is perhaps of all classes of evidence the least to be relied upon, and therefore, unless supported by other facts, an unsafe basis for the verdict.[50]

36. Similarly, the Supreme Court of the United States, has emphasised that the

> 'influence of improper suggestion upon identifying witnesses probably accounts for more miscarriages of justice than any other single factor--perhaps it is responsible for more errors than all other factors combined'...And the dangers for the suspect are

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> particularly grave when the witness' opportunity for observation was insubstantial, and thus his susceptibility to suggestion the greatest...the vagaries of eyewitness identification are well known; the annals of criminal law are rife with instances of mistaken identification....[51]

37. Despite the deference afforded to trial court findings of fact in domestic legal systems, particularly on issues of witness credibility, appellate courts have, on occasion, found the factual findings upon which lower courts have based their conclusions unreasonable and have quashed resulting convictions. In one of the appeals considered in *Turnbull*, for example, the appellate court found that the decision of the trial court to convict the accused was unsafe and unsatisfactory. In doing so, the court noted that there was no suggestion that the identification witnesses were dishonest and that one of the witnesses, in particular, was acknowledged to have been a very "impressive" witness. Nonetheless, the appellate court found that "the quality of the identifications was not good, indeed there were notable weaknesses in it and there was no evidence capable of supporting the identifications made." Accordingly, the court allowed the appeal against conviction.[52]

38. Most civil law countries adopt the principle of "free evaluation of evidence", allowing judges considerable scope in assessing the evidence put before them.[53] The decisive element is the intimate conviction of the trial judge, which determines whether or not a given fact has been proven. However, the Federal Court of Germany, for example, has pointed out that a trial judge must exercise extreme caution in the evaluation of a witness' recognition of a person.[54] Particularly in cases where the identification of the accused depends upon the credibility of a witness testimony, the trial judge must comprehensively articulate the factors relied upon in support of the identification of the accused and the evidence must be weighed with the greatest care.[55] The Supreme Court of Austria, has emphasised that, where the identification of the accused depends upon a single witness, a fact finder must be extremely careful in addressing specific arguments raised by the defendant about the credibility of the witness.[56] Similarly, the Supreme Court of Sweden has held, on numerous occasions, that all imprecision or inaccuracy in a witness' testimony must be addressed and analysed thoroughly by the fact finder.[57]

39. In cases before this Tribunal, a Trial Chamber must always, in the interests of justice, proceed with extreme caution when assessing a witness' identification of the accused made under difficult circumstances. While a Trial Chamber is not obliged to refer to every piece of evidence on the trial record in its judgement, where a finding of guilt is made on the basis of identification evidence given by a witness under difficult circumstances, the Trial Chamber must rigorously implement its duty to provide a "reasoned opinion". In particular, a reasoned opinion must carefully articulate the factors relied upon in support of the identification of the accused and adequately address any significant factors impacting negatively on the reliability of the identification evidence. As stated by the Canadian Court of Appeal in *R.* v *Harper*:

> Where the record, including the reasons for judgment, discloses a lack of appreciation of relevant evidence and more particularly the complete disregard of such evidence, then it falls upon the reviewing tribunal to intercede.[58]

40. Courts in domestic jurisdictions have identified the following factors as relevant to an appellate court's determination of whether a fact finder's decision to rely upon identification evidence was unreasonable or renders a conviction unsafe: identifications of defendants by witnesses who had only a fleeting glance or an obstructed view of the defendant;[59] identifications occurring in the

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dark[60] and as a result of a traumatic event experienced by the witness;[61] inconsistent or inaccurate testimony about the defendant's physical characteristics at the time of the event;[62] misidentification or denial of the ability to identify followed by later identification of the defendant by a witness;[63] the existence of irreconcilable witness testimonies;[64] and a witness' delayed assertion of memory regarding the defendant coupled with the "clear possibility " from the circumstances that the witness had been influenced by suggestions from others.[65]

41. In sum, where the Appeals Chamber is satisfied that the Trial Chamber returned a conviction on the basis of evidence that could not have been accepted by any reasonable tribunal or where the evaluation of the evidence was "wholly erroneous", it will overturn the conviction since, under such circumstances, no reasonable tribunal of fact could be satisfied beyond reasonable doubt that the accused had participated in the criminal conduct.[66] This is the standard the Appeals Chamber will apply when considering the challenges raised by the Defendants to the Trial Chamber's factual findings in the present case.

2. Reconsideration of factual findings where additional evidence has been admitted under Rule 115

(a) Introduction

42. During this appeal, a total of 26 motions were filed before the Appeals Chamber by the Defendants pursuant to Rule 115 of the Rules, seeking to admit a wide variety of additional evidence, including the evidence of new witnesses, documents obtained from Croatian State archives and other sources, as well as video-recordings.[67] During the Appeal Hearing, the Defendants contended that the additional evidence would cast new light upon the evidence already presented at trial, putting the Appeals Chamber "in a much better position to see the fuller picture, to evaluate [and] to recognise the limitations of the evidence" before the Trial Chamber upon which the Defendants' convictions were based.[68] As a result of the applications, seven Appeals Chamber decisions were issued, an oral hearing was held, and an evidentiary hearing conducted involving the testimony of live witnesses.[69]

43. Rule 115 refers to "additional evidence", but variously during the course of these appellate proceedings, the terms "fresh evidence" and "new evidence" were also used to describe evidence submitted after the trial was over. This Chamber uses all three terms synonymously.

44. Article 25 of the Statute mandates the Appeals Chamber to hear appeals from persons convicted by the Trial Chambers or from the Prosecution on the ground of "an error of fact which has occasioned a miscarriage of justice". The decision of the Trial Chamber may be affirmed, reversed or revised. As stated above, where an appellant establishes that no reasonable tribunal of fact could have reached a conclusion of guilt upon the evidence before it, the Appeals Chamber will allow the appeal and enter a judgement of acquittal.[70] A miscarriage of justice may equally be occasioned where the evidence before a Trial Chamber appears to be reliable but, in the light of additional evidence presented upon appeal, is exposed as unreliable. It is possible that the Trial Chamber may reach a conclusion of guilt based on the evidence presented at trial that is reasonable at the time (and thus would not fall within the category of error of fact just mentioned) but, *in reality*, is incorrect.[71] As a result of a perfectly reasonable decision based upon seemingly reliable evidence before it, the Trial Chamber may have convicted an innocent person. There are a host of reasons as to why evidence that was accepted as reliable by a Trial Chamber may

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subsequently be shown to be incorrect: the numerous practical difficulties that all parties at trial before the Tribunal face in locating all relevant witnesses and documentary evidence from distant countries, not always co-operative with the Tribunal, is one such problem. There is a real danger of a miscarriage of justice when a Trial Chamber is deprived of crucial evidence relating to the guilt or innocence of an accused that does not surface until the trial is completed – through no fault of the parties. Where, during the appellate proceedings, a party is successful in locating additional evidence demonstrating that a Trial Chamber's finding of guilt is erroneous, it will fall within the Appeals Chamber's jurisdiction to hear an appeal on the ground of "an error of fact that has occasioned a miscarriage of justice".

45. A review of some of the world's legal systems reveals that, where new facts or new evidence demonstrate that first instance decisions are erroneous, appellate courts are permitted to revisit their factual determinations. Civil law systems provide the accused with the right to appeal to a superior court against a judgement of conviction, which involves reconsideration of both fact and law. Such an appeal enables the merits of a case to be re-determined,[72] with the accused being able to adduce, without any restriction, new evidence that was not before the court of first instance. Additionally, civil law systems normally provide a further appeal to a supreme court confined to errors of law,[73] whereby the court may confirm or quash a conviction, or order a retrial before a lower court.

46. By contrast, in the common law criminal systems, if an appellant is permitted to appeal against a judgement of conviction, there is no automatic entitlement to adduce new evidence before the appellate body. The admission of additional evidence is generally governed by statutory provisions. In England and Wales, the Court of Appeal can receive fresh evidence adduced by an appellant if it is of the view that the evidence "may afford any ground for allowing the appeal".[74] Similarly, in Canada, Section 683(d) of the Criminal Code, setting out the powers of the Court of Appeal, permits the admission of new evidence where it is considered to be "in the interests of justice".[75] The test for admission is whether the fresh evidence is of sufficient strength that it might reasonably affect the verdict of the jury.[76] In the United States of America, a person convicted of a federal crime may challenge his or her conviction by petitioning an appellate court of the appropriate jurisdiction for review, and ultimately, reversal of the lower court verdict. However, an appellate court will not, upon review of legal error, review the findings of fact made by the court of first instance; it is not free to disturb the findings of fact made by the original trial court by considering new facts not presented to the trial court. In such a case, the Federal Rules of Criminal Procedure prescribe that the convicted person may file a motion for a new trial on the basis of newly discovered evidence before the trial court, which may grant the motion "if the interests of justice so require".[77] It is to be noted that motions for new trial based upon newly discovered evidence are disfavoured by the U.S. courts.[78] In Australia , all jurisdictions provide for the admission of new evidence at the appeal stage in the state courts, if the court thinks "it necessary or expedient in the interests of justice".[79] In South Africa, appellate courts are empowered to hear additional evidence.[80] In order to admit new evidence, the appellate court must consider the evidence to be materially relevant to the outcome of the trial.[81] In Malaysia, following an appeal from a Magistrates' or Sessions Court judgement to the High Court, a High Court Judge may, if he thinks additional evidence necessary , take that new evidence himself or direct it to be taken by a Magistrate (i.e ., in the lower court).[82]

47. It may also be noted that the Rome Statute of the International Criminal Court , like the Statute of the Tribunal, provides that, when it revisits a first instance judgement in light of new evidence

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showing that such a judgement is erroneous, the Appeals Chamber may remand a "factual issue" to the original Trial Chamber for it to determine a new factual issue that arises on appeal, or may itself call evidence to determine the issue.[83] As to revision of conviction or sentence, a party may apply to the Appeals Chamber to revise a final judgement on the grounds that new evidence has been discovered that "is sufficiently important that had it been proved at trial it would have been likely to have resulted in a different verdict".[84]

(b) Tribunal jurisprudence relating to Rule 115

48. The Appeals Chamber first addressed the issue of admitting additional evidence under Rule 115 of the Rules during the *Tadic* appellate proceedings. There , Tadic sought to call more than 80 new witnesses as well as to adduce new documentary material. In its decision of 15 October 1998 (*Tadic* Rule 115 Decision), the Appeals Chamber considered whether the appropriate vehicle for the presentation of additional evidence during the pendency of appeal was a "review proceeding" under Article 26 of the Statute and Rule 119, or as part of "appellate proceedings" under Article 25 and Rule 115. In *Tadic*, the Appeals Chamber held that

> where an applicant seeks to present *a new fact* which becomes known only after trial, ... Rule 119 is the governing provision. In such a case the Appellant is not seeking to admit additional evidence of a fact that was considered at trial, but rather a new fact".[85]

Further, "[t]he mere subsequent discovery of evidence of a fact which was known at trial is not itself a new fact within the meaning of Rule 119 of the Rules".[86] Rule 115 was held to be applicable in *Tadic* because the appellant proposed to admit "additional evidence of facts put in issue at trial".[87]

49. The Appeals Chamber thus ruled that Rule 115 could be utilised to admit new evidence on appeal that had not been put before a Trial Chamber provided that it was *additional* to evidence adduced at trial in respect of what was variously termed, "a fact that was considered at trial", "a fact which was known at trial" or "facts put in issue at trial". To summarise, Rule 115 is applicable provided that the new evidence goes to prove an underlying fact that was at issue in the original trial. The Appeals Chamber then proceeded to consider the applicable criteria for admitting additional evidence under Rule 115.

(i) Not available at trial

50. As to Rule 115(A)'s requirement that the evidence "was not available" to the party at trial, the Appeals Chamber in *Tadic* held, following the approach adopted for Rule 119, that a party must demonstrate that due diligence had been exercised by the moving party at trial.[88] The Statute imposes "a duty to be reasonably diligent" upon trial counsel.[89] This requirement conforms with the position in many of the common-law criminal systems . Moreover, *Tadic* held that the duty to act with reasonable diligence includes making "appropriate use of all mechanisms of protection and compulsion available under the Statute and the Rules of the International Tribunal to bring evidence on behalf of an accused before the Trial Chamber".[90] This means, for example, that if a party experiences difficulty in calling a witness to testify at trial, it must apprise the Trial Chamber so that the Chamber may consider imposing coercive or protective measures. Otherwise, the party will not be able to demonstrate that it has acted with reasonable diligence.[91]

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51. The Appeals Chamber also recognised an exception to the requirement that the new evidence "was not available" in cases where "*gross negligence is shown to exist*"[92] on the part of counsel at trial.

(ii) Admission required in the interests of justice

52. Rule 115(B) requires that "the Appeals Chamber shall authorise the presentation of such evidence if it considers that the interests of justice so require". In interpreting this Rule, the Appeals Chamber in *Tadic* held that

> [f]or the purposes of this case, the Chamber considers that the interests of justice require admission only if:
>
> (a) the evidence is relevant to a material issue;
>
> (b) the evidence is credible; and
>
> (c) the evidence is such that it would probably show that the conviction was unsafe .[93]

53. In *Tadic*, having found that there were items of additional evidence that satisfied the requirement of non-availability at trial, the Appeals Chamber was not satisfied that it was necessary to admit any of those items in the interests of justice.[94] The Chamber did not elaborate, however, upon precisely how the criteria enunciated above were applied to these items.

54. The third component of the *Tadic* criteria (the evidence is such that it would probably show that the conviction was unsafe) was developed further by the Appeals Chamber in *Jelisic*. There, the Appeals Chamber held that "the admission of additional evidence is in the interests of justice if it is relevant to a material issue, if it is credible and if it is such that it would probably show that a conviction *or sentence* was unsafe".[95] This permits of the possibility that an item of fresh evidence, while lacking the capacity to demonstrate that a conviction is unsafe, could reveal that factors taken into account by the Trial Chamber *during sentence* were incorrect and, therefore , that the culpability of the appellant for an offence may be reduced.

(iii) Rule 89(C)

55. In both *Furundzija* and *Celebici*, appeals were filed challenging the fairness of the trial. In *Celebici*, it was alleged that one of the trial judges was disqualified from being a judge of the Tribunal; in *Furundzija* , an attack was made on the impartiality of one of the trial judges. In each appeal , the appellants sought to adduce new evidence before the Appeals Chamber to support their arguments, however, Rule 115 was held to be inapplicable.[96] Nonetheless, the appellants in those cases were permitted to file new evidence before the Appeals Chamber. In *Celebici*, the Appeals Chamber held that

> [w]hile Rule 115 of the Rules of Procedure and Evidence limits the extent to which evidence upon matters relating to the guilt or innocence of the accused may be given before the Appeals Chamber (being the issue litigated in the Trial Chamber), when the Appeals Chamber is hearing evidence which relates to matters other than the issues litigated in the Trial Chamber, *the Appeals Chamber is in the same position as*

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a Trial Chamber, so that Rule 107 applies to permit the Appeals Chamber to admit any relevant or probative evidence pursuant to Rule 89(C)...[97]

56. Under sub-Rule 89(C), a Trial Chamber has residual discretion to admit any item of evidence it deems to have probative value. Rule 107 of the Rules, setting out general provisions governing appellate proceedings, provides that the rules of procedure and evidence governing proceedings in the Trial Chambers also apply *mutatis mutandis* to proceedings in the Appeals Chamber, although not all Rules applicable at the trial stage automatically apply at the appellate stage.[98]

57. It follows that Rule 115 does not provide the sole basis for the admission of evidence during appellate proceedings. A question then arises as to which is the applicable Rule when a party is seeking to admit new evidence: Rule 115 or 89 (C)? In the *Kupreskic* appellate proceedings, in deciding whether Rule 115 was the applicable Rule in dealing with the motions, the Appeals Chamber adopted the *Tadic* approach. If the Appeals Chamber considered that the proposed additional evidence related to a fact or issue already litigated at trial, Rule 115 was usually applied.[99] In view of the extension of Rule 115 to sentencing matters in *Jelisic*, the Appeals Chamber in the present appeal did not limit its consideration to whether the new evidence related to the "guilt or innocence of the accused", as did some of the earlier Appeals Chamber decisions on the applicability of Rule 115.[100]

(iv) Miscarriage of justice

58. Rule 115, as interpreted in *Tadic*, sets a strict standard for the admission of additional evidence. As to Rule 115(A), subject to the exception of proof that counsel at trial was grossly negligent, the evidence must not have been available at trial to counsel acting with reasonable diligence. A less rigid application of this sub-Rule was adopted in *Semanza*, which concerned an interlocutory appeal. The *Tadic* Rule 115 Decision emphasised that the principle of finality of decisions does not "prevent the admission of evidence that would assist in determining whether there could have been a miscarriage of justice".[101] In *Semanza*, the Appeals Chamber of the ICTR interpreted this to mean that the "principle [of finality] may exceptionally be rendered less absolute by the need to avoid a miscarriage of justice".[102] In that case, Semanza had applied to the Trial Chamber for release on the basis that the ICTR lacked jurisdiction due to his alleged illegal arrest and detention . Following dismissal of the motion, he appealed to the Appeals Chamber of the ICTR. During the appellate proceedings, the Prosecution sought to admit fresh evidence under Rule 115 to demonstrate further that Semanza's arrest and detention was lawful . Finding that the Prosecution had failed to demonstrate that the evidence was unavailable at trial, and thus had failed to satisfy the requirement of Rule 115 (A), the Appeals Chamber, nonetheless, admitted certain items of evidence. It did so on the basis that, "if henceforth it refuses to admit certain items of evidence in the instant case a miscarriage of justice will result".[103] While *Semanza* was concerned with the admission of additional evidence during the course of an interlocutory appeal, the Appeals Chamber of the ICTY in *Jelisic* confirmed the applicability of this principle to ICTY appellate proceedings on the merits. In that case, the Appeals Chamber held that it "maintains an inherent power to admit such evidence even if it was available at trial, in cases in which its exclusion would lead to a miscarriage of justice".[104]

(c) Application of the above principles in *Kupreskic*

59. Against this jurisprudential background and with these principles in mind, the Appeals Chamber dealt with the many motions for the admission of fresh evidence in this appeal.

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(i) Not available at trial

60. The decision as to whether the evidence in issue was available at trial sometimes required the Appeals Chamber to carry out a preliminary factual determination. In relation to those motions seeking to admit documents from the Croatian State archives, the issue of non-availability was not in dispute as the Prosecution conceded that, since the documents had not been available to it, they would not have been available to the Defendants during trial either.[105] Where non-availability was in issue, however, the moving party was required to supplement the material presented to the Appeals Chamber relating to the substantive value of the evidence with material tendered for the purpose of demonstrating why the additional evidence was not available at trial.[106] For example, in explaining why the additional evidence that he proposed to tender under Rule 115 was not available at trial, Vlatko Kupreškic sought to rely upon the exception to Rule 115(A), where "gross negligence is shown to exist". He attempted to demonstrate that counsel representing the Defendant at trial had been grossly negligent in the performance of his duties, by failing to present any adequate defence to the persecution charge. In addition to the additional evidence itself, Vlatko Kupreskic also tendered evidence to demonstrate the existence of gross negligence .[107] The Appeals Chamber confirmed that proof of gross negligence by trial counsel constitutes an exception to Rule 115(A). It then considered whether, on the material presented to it by the parties , Vlatko Kupreškic had demonstrated that the performance of counsel at trial fell outside of the range of reasonable professional assistance.[108] In this case, the Defendant was unable to do so.

(ii) Admission required in the interests of justice

61. The Appeals Chamber in the present appeal gave detailed consideration to the three components that must be fulfilled in order to satisfy the "interests of justice " requirement: the evidence must be relevant to a material issue; credible; and such that it would probably show that the conviction or sentence was unsafe. Following the *Tadic* formulation, the Appeals Chamber was concerned that only new evidence with the potential to demonstrate a miscarriage of justice should be admitted.

62. As to the relevance component, if the new evidence does not relate to findings material to the conviction or sentence, in the sense that those findings were crucial or instrumental to the conviction or sentence, then the new evidence is not capable of demonstrating that a miscarriage of justice had been occasioned, and thus will not be admitted.

63. The credibility component is linked to the danger that appellate proceedings can be abused by a party presenting evidence to the appeal body that appears to be relevant to a material issue, but that has not been tested in the crucible of a trial. In this case, however, the Appeals Chamber was also concerned that, at the relatively early stage of the appeal that the motions for additional evidence were received, the main proceedings should not be unduly delayed by protracted proceedings litigating credibility of evidence tendered in the Rule 115 motions. It would have been counter-productive for the Appeals Chamber to require the parties to present copious amounts of supplementary evidence to demonstrate the veracity of the new evidence, taking up time and resources of the court as well as the parties, only to rule later that the additional evidence did not have the potential of demonstrating that a conviction or sentence was unsafe. The most appropriate course, it was felt at the time, was to apply a relatively low threshold for credibility in admitting additional evidence, with the issue of its weight being decided at a later stage . Accordingly, the Chamber asked itself: does the evidence appear to be reasonably capable of belief or reliance?[109] In doing so, the Appeals Chamber was not accepting the evidence as true, but was acknowledging that there was nothing inherently unbelievable or incredible about it. On

the basis that the veracity of the additional evidence would have to be tested at a later stage, in each instance the evidence was admitted, "without prejudice to a determination of the weight to be afforded".[110] However, the Appeals Chamber acknowledged there were instances where credibility had to be determined by hearing witnesses in open court where they could be subjected to cross-examination and it conducted such hearings in the case of three witnesses .[111]

64. The final requirement, that the new evidence must be such that it "would probably show that a conviction or sentence was unsafe", was the most difficult to interpret and has been the focus of vigorous debate between the parties on appeal. In the course of interpreting what that standard means, the Appeals Chamber had cause to reflect whether it is the standard best suited to the initial decision on admissibility or whether it is more effectively used as the criterion when the new evidence is weighed alongside the old in determining the final outcome on appeal. The standard set out in Rule 115 says that the Appeals Chamber shall consider the new evidence if "the interests of justice so require". However, if the standard from *Tadic,* namely that the additional evidence "would probably show that the conviction was unsafe", is applied at the time of admission, the Appeals Chamber must, at that early point, gauge the capacity of the additional evidence to demonstrate that a conviction has occasioned a miscarriage of justice.

65. It may be the case with some convictions that a new item of evidence is so powerful that its capacity to demonstrate a miscarriage of justice is beyond question . For example, a DNA sample may show that a man could not have been responsible for a rape, or incontestable video footage may emerge showing clearly that somebody other than the convicted person committed a murder. In such a case, an appeal body could conclude with certainty that, had the new evidence been before the Trial Chamber , the new evidence *would* have had effect upon its decision to convict and that a miscarriage of justice has been occasioned. However, in proceedings before this Tribunal, the offences for which the accused are charged and tried usually comprise a series of acts spread over a period of time. The Appeals Chamber is, therefore, far less likely to find situations at the beginning of the appellate proceedings where discrete items of additional evidence so clearly lead it to conclude that a Trial Chamber's finding of guilt was erroneous.

66. In determining whether the new evidence would probably show that a conviction or sentence was unsafe, the Appeals Chamber, in deciding the many Rule 115 motions in this case, first assessed the rationale of the Trial Chamber and the evidence before the Trial Chamber in making its decision. Then, taking into account the submissions of the parties in their written pleadings, the Appeals Chamber made a judgement as to whether the new evidence *could* have had an impact on the Trial Chamber's decision to convict. The application of this principle was expressed in different ways. For example: "if some of the proposed evidence had been presented to the Trial Chamber at trial, and had been accepted, it could have affected some of the Trial Chamber's findings leading to its decision to convict the appellant ";[112] it "would probably show that the conviction or sentence is unsafe";[113] "this evidence could have had an effect on the Trial Chamber's findings at trial ";[114] and "had the Trial Chamber had such evidence before it, it probably would have come to a different result".[115] Although expressed in these various ways, a realistic evaluation of the standard applied throughout the Rule 115 process shows it to be lower than a strict requirement that the new evidence *would* have had an impact on the Trial Chamber's decision and is more akin to a test of whether the new evidence *could* have had an impact on the Trial Chamber's decision. Much of the additional evidence proffered under Rule 115 was rejected, because on assessment by the Chamber, it was clear that it was not capable of having such an impact. In those instances, the Appeals Chamber satisfied itself that, had it been before the Trial Chamber, the evidence could not have made any difference to the outcome. Often, the Chamber

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stated this with certitude: "The Appeals Chamber is not satisfied that, if the evidence of this witness had been adduced before the Trial Chamber, it would have issued any different findings. The evidence certainly would not have led to a different verdict".[116]

67. The Appeals Chamber must acknowledge, however, that this may not have been true in every instance. In the main appeal of Zoran and Mirjan Kupreškic, the Appeals Chamber's decision that the evidence of Witness AT would not have impacted upon their convictions turned out, on closer inspection of the record, not to be accurate . However, since Witness AT's testimony was available in the record for all the Defendants to utilise, no prejudice resulted.

68. During its deliberations, having heard the submissions of the parties at the Appeal Hearing, the Appeals Chamber has had the opportunity of reviewing its earlier decisions concerning the admission of additional evidence under Rule 115 and is satisfied that no injustice has been caused to the parties that has not been compensated for in the determination of this appeal. The Appeals Chamber does, however, take this opportunity to clarify that, in its view, the more appropriate standard for the admission of additional evidence under Rule 115 on appeal is whether that evidence "could" have had an impact on the verdict, rather than whether it "would probably " have done so.

69. The Appeals Chamber considers this change from the earlier *Tadic* formulation as more a matter of timing than substance. The "would probably" standard is still basically appropriate for the ultimate determination of whether a miscarriage of justice has occurred requiring a reversal. The Appeals Chamber emphasises too that , regardless of the standard used, it is a difficult task to determine whether the interests of justice require the admission of new evidence. The Appeals Chamber , therefore, expects a party seeking to admit evidence to specify clearly the impact the additional evidence could have upon the Trial Chamber's decision. If it fails to do so, it runs the risk of the evidence being rejected without detailed consideration .

(iii) Testing the admitted evidence

70. Where the Rule 115 evidence is accepted for consideration, the Appeals Chamber has, in effect, decided that the evidence is sufficiently important that, if it had been before the Trial Chamber at trial, the conclusion of guilt could have been different. At that stage in the proceedings, the new evidence may not have been subjected to any form of adversarial scrutiny, save for the Appeals Chamber's initial assessment as to whether it was, on its face, credible. It may be that there is no dispute between the parties as to this issue. But, in the more likely case that the opposing party challenges the veracity of the additional evidence, the Appeals Chamber is faced with a choice – either it can test the evidence itself to determine veracity, or order the case to be remitted to a Trial Chamber (either the Trial Chamber at first instance, or a differently constituted Trial Chamber) to hear the new evidence. In the present case, the Prosecution wished to challenge the veracity of several pieces of additional evidence submitted by the Defendants[117] and the Appeals Chamber decided that the most appropriate course was to hold an evidentiary hearing.[118] In another instance, it admitted two pieces of conflicting evidence without such a hearing, without prejudice to the determination of the weight to be attached thereto.[119]

71. Obviously, an Appeals Chamber may choose to delay its entire decision on the admissibility and weight of new evidence until the time of the main appeal and decide , at one stage, whether the new material will be admitted and whether it will reverse the conviction. Such an approach has advantages since the Appeals Chamber will be making its decision on impact at the same time it considers all the other evidence in the case and after it has completed its study of the trial record.

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The disadvantage to this procedure is that the parties, in making their main submissions on appeal , are not informed as to whether they can rely on the additional evidence or not . In some cases, the final appeal hearing will be prolonged considerably. The present Rule 115 does not require the admissibility of new evidence to be decided at any particular time. Thus, the Appeals Chamber should choose whether it is most expeditious to postpone hearing the evidence until the time of the main appeal hearing , or to do it earlier, according to the complexity of the new material and of the trial record in the context of what will be assessed. It should be noted that Rule 117 instructs the Chamber to pronounce judgement on the basis of the record on appeal along with any additional evidence it has received. This suggests that, even if the decision to admit the evidence is made at the same time as the main appeal, a two-step process is nonetheless envisioned in which new evidence, once admitted , will then be assessed as to its effect upon the appeal as a whole.

(d) Determining miscarriage of justice where additional evidence has been admitted

72. Where additional evidence has been admitted, the Appeals Chamber is then required to determine whether the additional evidence actually reveals an error of fact of such magnitude as to occasion a miscarriage of justice.

73. During the Appeal Hearing, Josipovic advanced arguments on this issue on behalf of all the Defendants[120] and submitted that the Appeals Chamber should adopt the test existing in most common-law jurisdictions , namely: might or could the additional evidence have caused the Trial Chamber to have arrived at a different verdict.[121] If the answer is 'yes', the Appeals Chamber would allow the appeal, quash the conviction and consider whether to order a retrial.[122] This, it was submitted, is consistent with the Rules relating to review proceedings , which provide that where a new fact has been discovered after judgement, the Chamber rendering the original decision determines whether that new fact *could* have been a decisive factor in reaching a different verdict and, if so, reviews the judgement and makes a further judgement.[123]

74. The Prosecution notes that the Appeals Chamber is not bound by jurisprudence from national jurisdictions[124] and submits that the standard for allowing an appeal where additional evidence has been admitted should be that "[t]he additional evidence must be sufficiently compelling that when assessed in light of all the evidence in the record on appeal, and if believed, it would have tilted the balance in favour of another verdict if it was made available before the Trial Chamber".[125] In reply, the Defendants cautioned against accepting such a "would" standard, which could result in injustice in cases that were not crystal clear.[126] Numerous cases from various jurisdictions were cited in support of both tests.[127]

75. Having considered the submissions of the parties, and the case-law cited, the Appeals Chamber has decided against importing tests from domestic jurisdictions, such as the "would" or "could" test. The test to be applied by the Appeals Chamber in deciding whether or not to uphold a conviction where additional evidence has been admitted before the Chamber is: has the appellant established that no reasonable tribunal of fact could have reached a conclusion of guilt based upon the evidence before the Trial Chamber together with the additional evidence admitted during the appellate proceedings. In framing the test in this manner, the Appeals Chamber has been guided by Rule 117(A) which provides that "[t]he Appeals Chamber shall pronounce judgement on the basis of the record on appeal together with such additional evidence as has been presented to it".

76. In summary, the Appeals Chamber may exercise its discretion as to whether to decide upon the

admissibility of additional evidence under Rule 115 during the pre -appeal phase of the proceedings or, alternatively, at the same time as the appeal hearing. In determining whether to admit the evidence in the first instance, the relevant question is whether the additional evidence could have had an impact on the trial verdict. In deciding whether to uphold a conviction where additional evidence has been admitted, the relevant question is: has the appellant established that no reasonable tribunal of fact could have reached a conclusion of guilt based on the evidence before the Trial Chamber together with the additional evidence admitted during the appeal proceedings. In the subsequent sections of this judgement, these principles will be applied to the additional evidence admitted under Rule 115 in the current proceedings.

Case No: IT-01-47-PT

IN TRIAL CHAMBER II

Before:
Judge Wolfgang Schomburg, Presiding

Judge Florence Ndepele Mwachande Mumba

Judge Carmel Agius

Registrar:
Mr Hans Holthuis

Decision of:
7 December 2001

PROSECUTOR

v

ENVER HADZIHASANOVIC

MEHMED ALAGIC

AMIR KUBURA

DECISION ON FORM OF INDICTMENT

The Office of the Prosecutor:

Ms Jocelyne Bodson

Mr Ekkehard Withopf

Counsel for the Accused:

Ms Edina Residovic for Enver Hadzihasanovic
Mr Vasvija Vidovic and Mr John Jones for Mehmed Alagic

Mr Fahrudin Ibrisimovic and Mr Rodney Dixon for Amir Kubura

1. Background

1. The Trial Chamber is seized of a joint Defence Motion on the form of the indictment in the present case,[1] and the subsequent related filings.[2] A part of the Motion may be considered as a

challenge to the Tribunal's jurisdiction. Since issues on the form of the indictment are substantially different from jurisdictional issues , the Trial Chamber considers them in separate decisions.[3] The objections on the form of the indictment are the subject of this decision.

2. The three accused, Enver Hadzihasanovic, Mehmed Alagic and Amir Kubura, are charged with a number of crimes alleged to have been committed between 1 January 1993 and 31 January 1994 against Bosnian Croats and Bosnian Serbs in various municipalities in central Bosnia and Herzegovina.[4] All the charges are based on command responsibility provided for in Article 7(3) of the Tribunal's Statute. At the relevant time, Enver Hadzihasanovic is alleged to have been the commander of the 3rd Corps of the Army of Bosnia and Herzegovina ("ABiH"), the Chief of the Supreme Command Staff of the ABiH and Brigadier General of the ABiH.[5] Mehmed Alagic is alleged to have been the commander of the ABiH 3rd Corps Operational Group ("OG") "Bosanska Krajina" and the commander of the ABiH 3rd Corps.[6] Amir Kubura is alleged to have been the Assistant Chief of Staff for Operations and Instruction Matters of the ABiH 3rd Corps 7th Muslim Mountain Brigade and the Chief of Staff of that Brigade and to have acted as the substitute for the commander of that Brigade before being appointed its commander.[7] None of the accused is charged with having personally committed any of the alleged crimes under Article 7(1) of the Statute.

3. The charges against the accused are based on Article 2 (grave breaches of the Geneva Conventions of 1949) and Article 3 (violations of the laws or customs of war) of the Statute. Specifically, all three the accused are charged with:

(a) Count 1, murder, a violation of Article 3 of the Statute, based on Article 3 (1)(a) common to the Geneva Conventions of 1949 ("common Article 3").

(b) Count 2, wilful killing, a violation of Article 2(a) of the Statute.

(c) Count 3, violence to life and person, a violation of Article 3 of the Statute , based on common Article 3(1)(a).

(d) Count 4, wilfully causing great suffering or serious injury to body or health , a violation of Article 2(c) of the Statute.

(e) Count 5, inhuman treatment, a violation of Article 2(b) of the Statute.

(f) Count 6, unlawful confinement of civilians, a violation of Article 2(g) of the Statute.

(g) Count 7, murder, a violation of Article 3 of the Statute, based on common Article 3(1)(a).

(h) Count 8, wilful killing, a violation of Article 2(a) of the Statute.

(i) Count 9, cruel treatment, a violation of Article 3 of the Statute, based on common Article 3(1) (a).

(j) Count 10, inhuman treatment, a violation of Article 2(b) of the Statute.

(k) Count 16, wanton destruction of cities, towns or villages, not justified by military necessity, a violation of Article 3(b) of the Statute.

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(l) Count 17, plunder of public or private property, a violation of Article 3(e) of the Statute.

(m) Count 18, extensive destruction of property, not justified by military necessity , a violation of Article 2(d) of the Statute.

Enver Hadzihasanovic is additionally charged with:

(a) Count 11, unlawful labour, a violation of Article 3 of the Statute, based on customary international law, Articles 40 and 51 of Geneva Convention IV and Articles 49, 50 and 52 of Geneva Convention III.

(b) Count 12, taking of hostages, a violation of Article 3 of the Statute, based on common Article 3(1)(b).

(c) Count 13, taking of civilians as hostages, a violation of Article 2(h) of the Statute.

Enver Hadzihasanovic and Amir Kubura are further together charged with:

(a) Count 14, cruel treatment, a violation of Article 3 of the Statute, based on common Article 3(1)(a).

(b) Count 15, inhuman treatment, a violation of Article 2(b) of the Statute.

Finally, Enver Hadzihasanovic and Mehmed Alagic are together charged under count 19 with destruction or wilful damage done to institutions dedicated to religion, a violation of Article 3(d) of the Statute.

4. Two preliminary matters are to be addressed before turning to the specific objections on the form of the indictment.

2. Reply and Supplementary Response

5. The Trial Chamber's "Order on Filing of Motions" makes no mention of the right of a party to file a reply or to supplement a previous filing.[8] Counsel for the accused Alagic faxed an application for leave to reply to the Chamber , and leave was granted orally.[9] The Prosecution has applied for leave to file a supplement to its Response in the light of the recent *Kupreskic* Appeal Judgment,[10] where issues relating to the form of indictment were addressed.[11] Leave is granted to the Prosecution to file the Supplementary Response. However , the Chamber has in the meantime issued a "Further Order on Filings of Motions", *inter alia* providing that a party must seek and be granted leave to file a reply or a supplement to a previous filing *prior* to the filing of such reply or supplement.[12] To ensure that both the other party and the Chamber are sufficiently put on notice as to what is sought, such filings must in future be made by way of formal motion.

3. Length of joint motions

6. The parties have previously been instructed to familiarise themselves with the " Practice Direction on the Length of Briefs and Motions" ("Practice Direction").[13] In the interests of expediting the proceedings the Trial Chamber, in the exceptional circumstances of the present case, grants leave to file the Motion and Reply in their present form.

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4. The general pleading principles

7. The general pleading principles identified in *previous cases* and which may be applicable to the present are as follows.

8. Article 21(4)(a) of the Statute provides, as one of the minimum rights of an accused , that he/she shall be entitled to be informed in detail of the nature and cause of the charge against him/her, and this provision also applies to the form of indictments .[14] This entitlement translates into an obligation on the Prosecution to plead the material facts underpinning the charges in the indictment.[15] The pleadings in an indictment will therefore be sufficiently particular when it concisely sets out the material facts of the Prosecution case with enough detail to inform a defendant clearly of the nature and cause of the charges against him/her to enable him/her to prepare a defence.[16] The Prosecution is, however, not required to plead the evidence by which such material facts are to be proven.[17]

9. The basis of these pleading principles are to be found in Article 14 of the International Covenant on Civil and Political Rights ("ICCPR") and Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR").[18] The former, in relevant part, reads that "SiCn the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees , in full equality: (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him S... C."[19] The latter essentially provides the same as the ICCPR.[20]

10. All legal prerequisites to the application of the offences charged constitute material facts, and must be pleaded in the indictment. The materiality of other facts (facts not directly going to legal prerequisites), which also have to be pleaded in the indictment, cannot be determined in the abstract. A decisive factor in determining their materiality is the nature of the alleged criminal conduct charged to the accused ,[21] which includes the proximity of the accused to the relevant events.[22] Each of the material facts must usually be pleaded expressly, although it may be sufficient in some circumstances if it is expressed by necessary implication.[23] This fundamental rule of pleading, however, is not complied with if the pleading merely assumes the existence of the pre-requisite.[24]

11. In a case based upon superior responsibility, the following are material facts that have to be pleaded in the indictment:

(a) The relationship between the accused and the others whose acts he is alleged to be responsible for.[25] In particular , the superior-subordinate relationship between the accused and those others, is a material fact that must be pleaded.

(b) The accused knew or had reason to know that the crimes were about to be or had been committed by those others,[26] and the related conduct of those others for whom he is alleged to be responsible .[27] The facts relevant to the acts of those will usually be stated with less precision,[28] the reasons being that the detail of those acts (by whom and against whom they are done) is often unknown, and, more importantly, because the acts themselves often cannot be greatly in issue.[29]

(c) The accused failed to take the necessary and reasonable measures to prevent such crimes or to punish the persons who committed them.[30]

12. Generally, an *indictment*, as the primary accusatory instrument, must plead with sufficient particularity the material aspects of the Prosecution case, failing which it suffers from a material defect.[31] In the light of the primary importance of an indictment, the Prosecution cannot cure a defective indictment by its supporting material and pre-trial brief.[32] In the situation where an indictment does not plead the material facts with the requisite degree of specificity because the necessary information is not in the Prosecution's possession, doubt must arise as to whether it is fair to the accused for the trial to proceed.[33] The Prosecution is therefore expected to inform the accused of the nature and cause of the case, as set out above, before it goes to trial. It is unacceptable for it to omit the material facts in the indictment with the aim of moulding the case against the accused in the course of the trial depending on how the evidence unfolds.[34] Where the evidence at trial turns out differently than expected, the indictment may be required to be amended, an adjournment may be granted or certain evidence may be excluded as not being within the scope of the indictment.[35]

5. Objections relating to the pleading of command responsibility

13. The Defence has raised six objections relating to the pleading of command responsibility of the three accused.[36]

14. The first objection is that the alleged superior-subordinate relationship between the accused and foreign Muslim fighters or Mujahedin is insufficiently pleaded in the indictment.[37] Paragraphs 11, 20, 62 and 67 of the indictment are, it is submitted, relevant to this objection . The Defence submits that the indictment fails to properly allege that the specific foreign Muslim individuals who committed the crimes were attached to or subordinated to the accused.[38] It is further submitted that paragraph 11 also fails to specify whether all or some foreign Muslim fighters referred to themselves as "Mujahedin" or only those who were attached to the ABiH 3rd Corps 7th Muslim Mountain Brigade.[39] The relief requested is that the Prosecution be ordered to plead that the specific foreign Muslim fighters or individual Mujahedin who committed the criminal acts referred to in the indictment were in a superior-subordinate relationship to each of the accused.[40] The Prosecution response is that this objection does not concern material facts, which must be pleaded , but rather evidence by which the relevant material facts could be proved, and that the relevant specificity requirements have been satisfied.[41]

15. Paragraphs 11, 20, 38, 62 and 67 are unclear as to whether all the foreign Muslim individuals who committed acts for which the accused are alleged to be responsible were subordinate to the accused, either individually or as members of units subordinate to their command. The rest of the indictment also does not assist in clarifying this matter. For example, paragraphs 17 and 20(a) refer to, *inter alia*, the 7th Muslim Mountain Brigade "and" Mujahedin who allegedly committed crimes. In a case such as the present, resting on command responsibility charges, the Defence is entitled to know whether it is alleged that the foreign Muslim fighters or Mujahedin who are alleged to have committed crimes for which the accused are charged with being responsible, were their subordinates. The objection is therefore upheld. The Prosecution is ordered to amend the indictment accordingly.[42]

16. The second objection is that the "attached to and subordinated to" formula used in the

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indictment is insufficient to plead command responsibility.[43] It is submitted that based on the Tribunal's jurisprudence the Prosecution has to plead as an essential element of command responsibility the exercise of "effective control" in all superior-subordinate relationships alleged in the indictment, including the relationship between the accused and the foreign Muslim fighters or Mujahedin .[44] It is submitted that the indictment must plead that the accused exercise effective control over those individuals carrying out crimes who are alleged to be their subordinates and specifically plead that the accused had the material ability to prevent or punish their criminal acts.[45] The Prosecution response is the same as with the first objection.[46]

17. The indictment alleges in various paragraphs that the three accused are criminally responsible for crimes committed by their "subordinates"[47] or forces "under [their] command and control".[48] It also alleges that the three accused "demonstrated or exercised both, formal de iure and de facto power" by their command and control over units and troops under their command.[49] The only instances in the indictment where what the Defence refers to as the "'attached to and subordinated to' formula" is used, are paragraphs 10 and 62, concerning the relationship between the Mujahedin and the 7th Muslim Mountain Brigade. The indictment does not expressly plead effective control of the accused over their subordinates - the requisite standard for establishing a superior-subordinate relationship for the purpose of Article 7(3) of the Statute[50] - in those terms . Neither, in the view of the Trial Chamber, is the exercise of such control necessarily pleaded implicitly in the indictment, mainly because the pleading of the exercise of *de iure* and *de facto* power obscures what may, perhaps, otherwise have been a sufficiently precise pleading. For the purposes of criminal responsibility as a superior, *de iure* power is not synonymous with effective control, as the former may not in itself amount to the latter.[51] The same applies with respect to *de facto* power, since a *de facto* superior must be found to wield substantially similar powers of control as *de iure* superiors who exercise effective control over subordinates to be held criminally responsible for their acts.[52] It therefore cannot be said that pleading the exercise of both *de iure* and *de facto* amounts to pleading effective control. Thus, as a legal prerequisite , or element, of command responsibility, the exercise of the accused over their subordinates of effective control is, in the circumstances, a material fact which has to be pleaded in the indictment. This objection is therefore upheld. The Prosecution is ordered to amend the indictment to plead that the accused exercised effective control over all subordinates alleged to have committed crimes for which they are said to be responsible.

18. The third Defence objection concerns the appearance in the indictment, in one and the same count, of both the allegations that the accused "knew" and "had reason to know" that a subordinate was about to commit crimes or had done so.[53] It is objected that these are distinct, mutually exclusive versions of events, that the Prosecution knows its case and should therefore be able to state either the one or the other version.[54] It is also submitted that at the very least, separate, alternative, counts should be drawn for each version, permitting alternative verdicts; the trial, it is asserted, will be more expeditious and fairer, enabling the accused to respond to separate counts , without being faced with a global and ambiguous charge.[55] The Defence also submits that the degree of culpability, and thus the basis for sentencing, will differ depending on which version of events, if either, is proven .[56] The specific relief requested is that the Prosecution must be ordered to amend the indictment by separating the counts alleging that the accused "knew" that crimes were committed or were about to be committed from counts alleging that the accused "should have known" of those crimes.[57] The Prosecution response is the same as with the first objection.[58]

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19. The Prosecution is entitled to plead that the accused "knew" or "had reason to know " that their subordinates were about to commit a specific crime or crimes or had done so. It need not as a matter of law – and in any event probably cannot as a matter of logic - establish both versions with respect to any one charge or any one crime underlying a charge in order to secure a conviction. The Prosecution cannot at this point know which version, if any, will be established on the evidence at trial. The pleading in the indictment with respect to this objection is, however , clear - the Defence is sufficiently apprised that it has to prepare its defence in relation to both versions. Furthermore, it is the Chamber's duty to finding, at trial, whether the accused either knew, or, had reason to know that their subordinates were about to or did commit the alleged crimes. This objection is therefore rejected .

20. The fourth Defence objection is that the Prosecution, in relation to the "reason to know" charges, has to specifically plead that information was available to the accused that put them on notice of offences committed or about to be committed by subordinates.[59] It is submitted that this is essential in order to place the burden on the Prosecution of adducing evidence of this element at trial and proving its existence beyond a reasonable doubt.[60] The relief requested is that in relation to those counts alleging that the accused "should have known", the Prosecution must be ordered to specifically plead that there was information available to the accused which would have put them on notice of offences committed by their subordinates.[61] The Prosecution response is the same as with the first objection.[62]

21. The Defence objection is not that the availability of the relevant information is a material fact, which for that reason, has to be pleaded in the indictment. Pleading the availability to the accused of the relevant information, or not, would not affect the burden upon the Prosecution to prove its case. In any event, what the Defence is requesting to be pleaded is evidence in relation to an element of an offence. This objection is therefore rejected.

22. The fifth Defence objection is that the Prosecution has failed to specify in the indictment, with respect to each incident and with respect to each accused, whether its case is that the accused failed to prevent the crimes or that the accused failed to punish the perpetrators, or both.[63] It is submitted that the disjunctive formulation in the indictment is ambiguous, and that since the Prosecution knows what its case is, it should accordingly indicate precisely what it intends to prove at trial.[64] The relief requested is that the Prosecution specifically plead, for each count, whether the accused failed to prevent the criminal acts of their subordinates or whether they failed to punish them, or both, but not to maintain the alternative formula in relation to any one count.[65] The Prosecution response is the same as with the first objection.[66]

23. There is no ambiguity in the use of the disjunctive formulation - the Prosecution is entitled to plead both versions and the Defence is sufficiently and clearly put on notice that it has to prepare its case to answer both versions. This objection is rejected.

24. The sixth Defence objection concerns the manner in which the Prosecution pleaded "necessary and reasonable measures".[67] It is submitted, that in order to avoid the imposition of strict liability, the phrase "necessary and reasonable measures" must have some meaningful content.[68] It is specifically submitted that the Prosecution must aver that there were necessary and reasonable measures that the accused could have taken, what these measures were and that they were necessary and reasonable.[69] It is asserted that the burden of proof remains throughout on the Prosecution to prove each of these elements; the burden is not on the Defence, for example, to

prove that the accused did take the necessary and reasonable measures.[70] It is further submitted that the necessity of such a pleading is particularly acute when the matter concerns the acts of foreign Muslim fighters or Mujahedin,[71] apparently since they may have been irregular forces, with the accused lacking the ability to exercise control over them. It is asserted that the accused have a right to know at least the nature of the necessary and reasonable measures they are alleged to have taken and failed to take.[72] The Defence has made the general observation that merely reproducing the words of Article 7(3) of the Statute, as the Prosecution has done in the indictment, is insufficient ,[73] apparently to bolster the objection in issue, and to reinforce their point that Article 7(3) of the Statute does not create strict liability.[74] The relief requested is that in relation to counts alleging that the accused failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof, it be pleaded what specific measures the accused should have taken and failed to take.[75] The Prosecution response is the same as with the first objection.[76]

25. It is unclear what exactly the Defence objection is. It seems to be a concern that , as it is, the indictment may leave the door open to the Prosecution to lead a case of strict liability against the accused. The indictment and the jurisprudence of the Tribunal leave no room for the Prosecution to lead and establish such a case . The *Celebici* Appeals Chamber has rejected any notion of command responsibility being a form of strict liability,[77] as pointed out by the Defence.[78] The Defence submission mainly aims at pleading the evidence by which the material facts are to be proven by the Prosecution. This objection is therefore rejected .

6. Objections related to nature of armed conflict and partial occupation

26. The indictment alleges that at all relevant times, "a state of international armed conflict and partial occupation existed in Bosnia and Herzegovina."[79] The Defence has raised a number of objections regarding this allegation.

27. The first objection is that the allegation fails properly and specifically to aver between which states the alleged international armed conflict existed.[80] The Prosecution has failed to respond to this specific objection, apparently misinterpreting the Defence submission as stating that it is necessary to plead or prove at trial that an international armed conflict occurred in the same location where the accused committed the alleged offences.[81]

28. The indictment alleges that the ABiH participated in an armed conflict with the Croatian Defence Council ("HVO")[82] and the Army of the Republic of Croatia ("HV") until at least the end of January 1994.[83] It also alleges that the participation in that conflict took place subsequent to the Vance-Owen peace talks , which ended on 30 January 1993.[84] However, the indictment also contains allegations as to the transformation in 1992 of the Yugoslav People's Army ("JNA") units in Bosnia and Herzegovina into the Army of the Serbian Republic of Bosnia and Herzegovina ("VRS"), and on the strong links that continued to exist between the Yugoslav Army (the renamed JNA) and the VRS.[85]

29. The Prosecution is correct in submitting that it does not have to plead or prove at trial that an international armed conflict existed in the same location where an accused is alleged to have committed the charged offences. The Prosecution has pleaded the existence of an international armed conflict, as it was obliged to do for charges under Article 2 of the Statute. It has, however,

failed to plead clearly between whom the alleged international armed conflict existed. This objection is therefore upheld. The Prosecution is accordingly ordered to amend the indictment to clearly state between which states it is alleging an international armed conflict existed.

30. The second Defence objection relates to the identity of the forces that allegedly partially occupied Bosnia and Herzegovina. The first issue taken is that the Prosecution has failed to specify which forces allegedly partially occupied Bosnia and Herzegovina .[86] It is submitted that it should be clearly stated which states were the occupying forces, and which zones, towns or villages were occupied by the neighbouring states on which dates.[87] The Prosecution has in the Trial Chamber's opinion responded that it is not required to plead or prove that the geographic areas in the indictment were partially occupied .[88] The second issue taken is that , if the allegation is that the ABiH occupied parts of Bosnia and Herzegovina, it is an error on the face of the indictment, as it is clearly established under international law that a state cannot occupy itself.[89] It is therefore requested that, in the event that by "partial occupation" was intended reference to Bosnia and Herzegovina or to forces of the ABiH, the words "partial occupation" be struck out.[90] The Prosecution Response appears to be that it views occupation as an act by a foreign state where it is asserted, in relation to another objection, that the Motion confuses the difference between "a partial occupation by *an international force*" and an area (or zone) of responsibility with respect to a military formation.[91]

31. It has already been stated that the pleadings in an indictment will be sufficiently particular when it concisely sets out the material facts of the Prosecution case with enough detail to inform the Defence clearly of the nature and cause of the charges against him/her to enable him/her to prepare a defence.[92] The pleading of "partial occupation" in this indictment manifestly fails to meet the said standard. Pleading "partial occupation" does not *clearly*, either expressly or by necessary implication, inform the Defence of the nature and cause of the charges against specifically these three accused in relation to that particular pleading. The point is not what the Trial Chamber or the Defence should understand the nature and cause of the case against the accused in relation to the pleading of partial occupation is.

32. The indictment fails to identify the forces that partially occupied Bosnia and Herzegovina , which means that the forces of Bosnia and Herzegovina itself may have been the occupiers that the Prosecution has in mind. This possibility is borne out by count 11. It charges Enver Hadzihasanovic with unlawful labour under Article 3 of the Statute, recognised by customary law and "Articles 40 and 51 of the Geneva Conventions IV and Articles 49, 50 and 52 of the Geneva Conventions III." Geneva Convention IV[93] applies, *inter alia*, to all cases of partial or total occupation of the territory of a party to that Convention , even if the said occupation meets with no armed resistance.[94] Article 51 of that Convention falls under the section specifically relating to occupied territories, and deals with work done by protected persons in such territories.[95] Geneva Convention III[96] applies, *inter alia*, to all cases of partial or total occupation of the territory of a party to that Convention, even if the said occupation meets with no armed resistance .[97] Articles 49, 50 and 52 of that Convention fall under the section dealing with labour of prisoners of war. The indictment also pleads that the victims of grave breaches of the Geneva Conventions were persons protected under the relevant provisions and that all acts and omissions charged as grave breaches of the Geneva Conventions occurred during the partial occupation of Bosnia and Herzegovina.[98] This particular basis of the charge in count 11 would appear to imply that these provisions applied to the three accused, who are alleged to have been commanders at the time of forces of Bosnia and Herzegovina. If it is not the Prosecution's case that the forces of Bosnia and

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Herzegovina occupied its own territory, the question arises as to the relevance of the said provisions of the Geneva Conventions for the criminal responsibility of these three accused, since those provisions on their face address the occupying forces, not the forces resisting such occupation.

33. The Defence did not complain about the indictment for all the reasons raised by the Trial Chamber in the two preceding paragraphs. However, since these issues are inseparably linked, the Trial Chamber considers it appropriate to raise these deficiencies in the indictment *ex officio*. The Prosecution is accordingly ordered to either strike out the pleading of partial occupation and the allegations and the charges or parts of charges based thereon, or to amend the indictment to *clearly* plead what its case against the accused is in relation to the pleading of partial occupation.

34. Should the Prosecution in amending the indictment as ordered elect to plead the partial occupation of Bosnia and Herzegovina, the identity of the occupying forces , the area or areas occupied, and the date or dates when that occupied is alleged to have existed, would, depending on the nature of the case against the accused in relation to the pleading of partial occupation, be material facts that have to be pleaded in the amended indictment.

35. Whether or not as a matter of law a state, by its forces, can occupy its own territory , is a matter of substantive law which is inappropriate to be resolved in a decision on the *form* of the indictment. Should the Prosecution in amending the indictment as ordered elect to plead that the forces of Bosnia and Herzegovina occupied its own territory, this question would be determined at trial. This would put the Defence on sufficient notice of the nature and cause of the case against the accused in relation to that pleading to prepare its case, both with respect to the substantive legal issue raised and the evidentiary case to be answered.

36. Related to the second issue just dealt with, the third Defence objection is that the Prosecution appears to equivocate in the indictment between the notion of occupation and that of zones "listed under the ABiH 3rd Corps area of responsibility".[99] It is asserted that the purpose of this equivocation is to argue that the ABiH 3rd Corps and its commanders were responsible for the "areas of responsibility" in the same way that an occupying force would be responsible for occupied territory.[100] It is submitted that the relevant consideration is whether a foreign army occupied a territory, or whether an army was engaged in combat activities in a territory.[101] It is not pertinent, and it can only engender dangerous ambiguity, by suggesting that being "responsible", that is, tasked with an area, equates to criminal responsibility for all crimes committed within that area, to refer to the internal allocation of tasks or "responsibilities" within the ABiH.[102] It is requested that paragraph 58 be struck out from the indictment as being excessively vague and dangerously ambiguous.[103] The Defence also takes issue with the Prosecution being permitted to put forward in the *Kordic* case[104] that the HVO occupied some of the municipalities it pleads in this case as having been occupied by the ABiH.[105] The Prosecution has submitted in response that there is no such equivocation, that paragraphs 57 and 58, when read together, specify the division of Bosnia and Herzegovina into five geographical areas of responsibility by corps, including the geographical area of responsibility of the ABiH 3rd Corps.[106] It is submitted that the Motion confuses the difference between a partial occupation by an international force and an area (or zone) of responsibility with respect to a military formation.[107]

37. International *humanitarian* law distinguishes between the duties of a commander for occupied

territory and commanders in general.[108] The authority of the former is to a large extent territorial, and the duties applying in occupied territory are more onerous and far-reaching than those applying to commanders generally.[109] It is unsettled whether this distinction has any bearing, as a matter of international *criminal* law , on the nature of the *criminal responsibility* of superiors for the acts of subordinates.[110]

38. The Trial Chamber considers that when, read as a whole, the indictment is not equivocal in the way submitted by the Defence. It is only when read in isolation that paragraph 58 may perhaps be interpreted as being equivocal. Paragraphs 57 and 58 refer to the geographical areas into which Bosnia and Herzegovina was divided for military purposes. Even assuming that the distinction between the responsibility of commanders of occupied territories and commanders in general has a bearing on the *criminal* responsibility of such commanders, the indictment does not charge or purport to charge the three accused in that broader sense. The objection in relation to this issue is therefore rejected. On the issue taken with the Prosecutor being permitted to put forward opposing versions of events in different case, the Trial Chamber considers that the *Kordic* Judgment cannot be read to have found that the HVO *occupied* the said municipalities, or even that the Prosecution put forward such a case. In any event, it is for the Prosecution to put forward whatever version of events it wants to, within the confines of the Statute and the Rules, even if that version is diametrically opposed to versions it put forward in other cases. The objection in relation to this issue is therefore rejected.

7. Cumulative charging

39. The Defence submits that the case law of the Tribunal clearly establishes that charges under Articles 2 and 3 of the Statute in relation to the same conduct are alternatives .[111] The indictment, it is submitted , should be amended to plead such charges in the alternative.[112] The Prosecution submits, *inter alia*, that the overwhelming practice of both *ad hoc* Tribunals, and in particular the practice of the Appeals Chamber, recognises the Prosecution's discretion to charge cumulatively or in the alternative based upon the same facts.[113] It is submitted that any perceived judicial duplicity incurred by cumulative charging or conviction may be addressed at the sentencing stage of the proceedings.[114]

40. Both the majority and minority in the *Celebici* Appeals Chamber expressly held that cumulative charging is to be allowed in light of the fact that, prior to the presentation of all the evidence, it is impossible for the Prosecution to determine to a certainty which of the charges brought against an accused will be proven.[115] There is, however, nothing in the *Celebici* Appeals Judgment, including the minority opinion, which suggests that Articles 2 and 3 charges based on the same conduct must be pleaded in the alternative . Following that Judgment, the Trial Chamber considers that this matter has been settled, at least insofar as Articles 2 and 3 of the Statute, the bases for the charges in the present case, are concerned.[116] This objection is therefore rejected.

8. Complaints relating to alleged imprecisions in indictment

41. The Defence has raised a number of objections relating to alleged imprecisions in the indictment.

42. The Defence objects to the use of the phrases "but are not limited to" and "on or about" in paragraphs 21 and 26.[117] It is submitted that the Prosecution should not be permitted to reserve for itself the possibility of introducing, at trial, evidence of other towns and villages that were attacked or the killing of other victims, since counsel would not have prepared the Defence case on that expanded basis.[118] It is also submitted that the Prosecution should be ordered to add specific dates , rather than merely months, to paragraph 26 of the indictment.[119] The Prosecution response is that when read as a whole, the indictment is sufficiently precise in relation to the locations, time periods and the identity of victims of the alleged crimes to put the accused on notice of the charges against which they must defend.[120]

43. The Prosecution is not required to provide exhaustive lists in the relevant paragraphs of the indictment of all the towns and villages attacked or victims killed. Where the Prosecution seeks to lead evidence of an incident which supports the general offences charged (the attacks and killings), but that particular incident has not been pleaded in the indictment in relation to those offences, the admissibility of the evidence depends upon the sufficiency of the notice which the accused has been given that such evidence is to be led in relation to that offence.[121] Until such notice is given, the accused are entitled to proceed upon the basis that the details pleaded *are* the only case which they have to meet in relation to the offences charged.[122] Accordingly , at this stage and until given sufficient notice that evidence will be led of additional villages or towns or victims in relation to a particular offence charged, the accused are entitled to proceed upon the basis that the lists provided *are* exhaustive in nature. This fully addresses the submitted concern of the Defence. The particular objection is therefore rejected. With respect to the request that the Prosecution plead more specific dates in paragraph 26, the Trial Chamber considers that the indictment informs the accused in sufficient detail of the case they have to meet . The particulars sought are not required to be pleaded in the indictment; the particulars should be provided for in materials disclosed to the Defence. This objection is therefore rejected.

44. The second Defence objection relates to paragraph 65 of the indictment.[123] It is submitted that the term "initially" in the said paragraph is too vague, since the dates, including those on which the accused assumed various commands, are crucial .[124] The Prosecution's response to this objection is the same as the its response to the first objection.[125]

45. It is alleged that one of the operational groups created on 8 March 1993 within the ABiH 3rd Corps by Enver Hadzihasanovic, the commander of that Corps,[126] was OG "Bosanska Krajina",[127] with Mehmed Alagic appointed as that group's commander.[128] It is also alleged that on or around 15 April 1993, elements of the 7th Muslim Mountain Brigade were transferred and put under the direct command of the ABiH 3rd Corps.[129] It is further alleged that at the relevant dates Amir Kubura was the 7th Muslim Mountain Brigade Chief of Staff[130] and that he acted from 1 April 1993 to 20 July 1993 as the substitute for the absent assigned 7th Muslim Mountain Brigade commander.[131] Since the accused are charged with superior responsibility, the date or dates on which they are alleged to have become commanders of specific units is of considerable importance. Paragraph 65 is too imprecise as to the date or dates on which the 7th Muslim Mountain Brigade, the 17th Krajina Mountain Brigade, the 305th Mountain Brigade Jajce, the 27th Motorised Brigade and the Municipal Defence Headquarter Jajce with its units were placed under the command of OG "Bosanska Krajina". This objection is therefore upheld. The Prosecution is ordered to replace the word " initially" with a specific date or dates, or if that be impossible, an indication of the relevant time which is much less vague than the word "initially".

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46. The third Defence objection relates to paragraph 66.[132] It is submitted that the term "elements" in the said paragraph to describe persons who may be alleged to be the accused's subordinates is too imprecise as a matter of pleading, in particular in the case of the accused Mehmed Alagic.[133] It is requested that the Prosecution be ordered to specify which individuals or units were transferred and put under the direct command of the ABiH 3rd Corps and whether any of these individuals or units was involved in the crimes referred to in the indictment.[134] The Prosecution's response to this objection is the same as the its response to the first objection .[135]

47. In the light of the alleged responsibility of the three accused in relation to the 7th Muslim Mountain Brigade and the ABiH 3rd Corps, the identity of the units, and if possible, individuals, at least by reference as an identifiable category, from the 7th Muslim Mountain Brigade that were transferred and put under the direct command of the ABiH 3rd Corps is a material fact. It is, however, unnecessary for the Prosecution to also plead that these transferred individuals or units were involved in the crimes alleged in the indictment, because the other allegations made or ordered to be made sufficiently plead that fact. This objection is therefore upheld in part. The Prosecution is ordered to specify which individuals or units were transferred and put under the direct command of the ABiH 3rd Corps. Where individuals, rather than units, were transferred, the Prosecution need not identify each by name. It can refer to them by a clearly identifiable category in order to sufficiently put the Defence on notice as to their identity to properly prepare its case.

48. The fourth Defence objection concerns counts 1 to 5 of the indictment, which charges the accused with various alleged killings of and injuries inflicted on surrendered HVO soldiers and/or Bosnian Croat and Bosnian Serb civilians.[136] It is submitted that with the exception of paragraph 17(ab), paragraph 17 only states which units attacked the relevant villages, and does not state which individuals or units committed the killings and injuries, rendering the indictment defective .[137] It is requested that the Prosecution be ordered to specify in paragraphs 17(aa), (b) and (c), which troops, units or individuals committed the killings or inflicted the injuries for which the accused are charged by virtue of command responsibility.[138] The Prosecution's response to this objection is the same as the its response to the first objection.[139]

49. Paragraph 17 should not be read in isolation. When read together, the only reasonable interpretation of paragraphs 17 and 18, relevant to counts 1 to 5, is that the forces that attacked the relevant villages committed the alleged crimes. This objection is therefore rejected.

50. The fifth Defence objection concerns counts 1 to 5, 6 to 10, and 16 to 18.[140] It is submitted that the current form of these counts creates a real risk, if not an impossibility, of returning coherent verdicts, in that the various incidents referred to are lumped together without distinction as to the accused or as to place .[141] It is requested that that the counts be struck, or amended so as to permit a verdict to be returned with respect to each accused and in respect of each place.[142] The Prosecution's response to this objection is the same as its response to the first objection.[143]

51. Although it may have been clearer to both the Defence and the Trial Chamber had the Prosecution formulated the relevant charges differently, the current form is not defective for that. This objection is therefore rejected.

52. The sixth Defence objection concerns various asserted deficiencies in the pleading of counts 6 to 10.[144]

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53. In relation to paragraph 19, it is submitted that it is unspecific as to which ABiH forces carried out the unlawful imprisonment and unlawful confinement of civilians in the relevant municipalities.[145] The Prosecution's response to this objection is the same as the its response to the first objection.[146]

54. Paragraph 19, even when read with paragraph 20, does not clearly identify which ABiH forces carried out the alleged unlawful imprisonment and unlawful confinement [147] of civilians in the relevant municipalities. It cannot safely be reasonably assumed that the forces that allegedly committed the other crimes to these counts, which are sufficiently identified, were also responsible for the *unlawful confinement*. This objection is therefore upheld. The Prosecution is ordered to amend the indictment to plead which particular ABiH forces allegedly carried out the said unlawful confinement.

55. In relation to paragraph 20, it is submitted that no dates are provided, as should be done, since these are material averments.[148] The Prosecution's response to this objection is the same as the its response to the first objection.[149]

56. Paragraph 20 has to be read together with paragraph 19. The latter paragraph provides the dates accompanying the allegations made in the former.[150] This objection is therefore rejected.

57. In relation to counts 6 to 10 in general, it is submitted that the specific charges set out against Enver Hadzihasanovic in paragraph 19 go beyond 31 October 1993,[151] whilst the opening sentence of that paragraph alleges that he is responsible for crimes committed from about January 1993 to only 31 October 1993.[152] The Prosecution's response to this objection is the same as the its response to the first objection.[153]

58. The current pleading is obviously ambiguous in relation to this important matter . The objection is therefore upheld. The Prosecution is accordingly ordered to amend the indictment to clearly plead the period during which Enver Hadzihasanovic is alleged to have been responsible for crimes committed by his subordinates.

59. It is submitted that paragraph 21 does not state who carried out the killings of imprisoned and otherwise detained Bosnian Croats and Bosnian Serbs, a material averment which should have been pleaded.[154] The Prosecution's response to this objection is the same as the its response to the first objection.[155]

60. Reading paragraphs 19 and 20 together with paragraph 21 does not assist in providing the identity of the alleged killers of the relevant victims, which is a material fact. This objection is therefore upheld. The Prosecution is ordered to amend the indictment to identify the alleged killers, at least by category, to enable the Defence to prepare its case.

61. The seventh Defence objection concerns count 13, which charges Enver Hadzihasanovic with taking civilians as hostages.[156] It is submitted that the related paragraph 24, in referring to alleged Bosnian Croat hostages, does not aver, as it should, that these Croats were civilians.[157] The Prosecution's response to this objection is the same as the its response to the first objection.[158]

62. When charging an accused with the crime of taking civilians as hostages, it clearly is a

material fact whether the alleged hostages were civilians or not. The related paragraph 24 does not plead this fact. The objection is therefore upheld, and the Prosecution is ordered to amend the indictment accordingly.

63. The eighth Defence objection concerns a number of asserted deficiencies in relation to allegations against the accused Amir Kubura.[159] The Prosecution's response to this objection is the same as the its response to the first objection.[160]

64. It is submitted that since the indictment charges that Amir Kubura fulfilled a command role only after 1 April 1993[161] and that none of the counts allege that he failed to prevent or punish crimes until after the beginning of April 1993,[162] those counts alleging that he is responsible as a commander for crimes committed before 1 April 1993 should be struck.[163]

65. The submission that the indictment charges that Amir Kubura fulfilled a command role only after 1 April 1993 rests on its assertion that under international law "a Chief of Staff does not necessarily occupy a position of command and cannot be held criminally responsible as a commander."[164] The indictment alleges that Amir Kubura was the Chief of Staff of the 7th Muslim Mountain Brigade from 1 January 1993 till 1 April 1993.[165] The indictment very confusingly, where it sets out the specific counts against Amir Kubura, charges him with criminal responsibility for crimes committed both from "about April 1993",[166] *and* prior to that period (but after 1 January 1993).[167] The current pleading is obviously ambiguous in relation to this important matter . The objection is therefore upheld. The Prosecution is accordingly ordered to amend the indictment to clearly plead the period during which Amir Kubura is alleged to have been responsible for crimes committed by his subordinates.

66. It is also submitted that counts concerning Amir Kubura allege that troops from brigades other than the 7th Muslim Mountain Brigade - the only Brigade he is alleged to have commanded from 21 July 1993 to 15 March 1994 - were involved in the incidents that led to the commission of the offences.[168] The examples provided relate to counts 1 to 5 of the indictment, in particular the attack launched on Dusina, and the massacre in Bikosi.[169] It is asserted that it is not alleged that the accused had any command over the other brigades, nor is it alleged from which brigade the troops originated who perpetrated the alleged killings and injuries.[170] It is also complained that counts 6 to 10 suffer form the same defect, the example given relating to the activities at the Mehurici Elementary School, which does not mention the 7th Muslim Mountain Brigade.[171] It is further submitted that some of the counts do not specify which brigades were involved in the commission of crimes, the example given being counts 16 to 18 wherein it is simply alleged that the ABiH 3rd Corps forces committed certain offences, with no mention made of the 7th Muslim Mountain Brigade or any other brigade.[172] It is submitted that as a matter of law, a commander of one brigade cannot *per se* be held responsible for violations committed by troops of another brigade if the brigades were involved in joint operations; the indictment does not allege that Amir Kubura was in command of all of the brigades in joint operations.[173]

67. With respect to the issue taken with referring in the paragraphs relevant to the specific charges against Amir Kubura to brigades or units which are not alleged to have been commanded by him, the Trial Chamber considers that such pleading is not defective when read against the indictment as a whole. The indictment clearly charges Amir Kubura as having been the ABiH 3rd Corps 7th Muslim Mountain Brigade Chief of Staff from 1 January 1993 to 20 July 1993; as having

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acted from 1 April 1993 to 20 July 1993 as the substitute for Asim Koricic, the then assigned ABiH 3rd Corps 7th Muslim Mountain Brigade Commander who was absent during this period ; and as the ABiH 3rd Corps 7th Muslim Mountain Brigade Commander from 21 July 1993 to 15 March 1994.[174] This particular objection is therefore rejected.

68. With respect to the issue taken with the 7th Muslim Mountain Brigade not being mentioned at all in counts 6 to 10 insofar as they relate to Amir Kubura, the following finding is made. Paragraph 20(c) relates to crimes allegedly committed in the Mehurici Elementary School, for which Amir Kubura is charged in paragraph 19(ba). The former paragraph makes no explicit reference to that brigade, but mentions the Mujahedin that were allegedly involved. Paragraph 62, to be amended, alleges that the "Mujahedin " were attached to and subordinated to the 7th Muslim Mountain Brigade and were heavily involved in combat activities with that brigade. It would therefore appear that Amir Kubura is charged for the said alleged crimes on the basis of the involvement of the Mujahedin. However, this is not sufficiently clear, and the objection in relation to this issue is upheld. The Prosecution is ordered to amend the indictment accordingly. Paragraph 20(d) relates to crimes allegedly committed in the Blacksmith Shop Mehurici, for which Amir Kubura is charged in paragraph 19(bb). The former paragraph, however, makes no mention of either the 7th Muslim Mountain Brigade or the Mujahedin. The indictment is defective in this regard, as the Defence is entitled to know on what basis the accused is said to be responsible for these acts. This specific objection is therefore upheld, and the Prosecution is ordered to either strike paragraph 19(bb), or to amend the indictment to make clear on what basis it is alleging that Amir Kubura is responsible for the acts committed in the Blacksmith Shop Mehurici.

69. With respect to the issue taken that counts 16 to 18 do not mention any specific brigade, including the 7th Muslim Mountain Brigade, the Trial Chamber finds that the indictment is not defective for that. Although paragraph 26 refers to the ABiH 3rd Corps forces in general, paragraph 27 refers to ABiH forces under the command and control of the three accused as having been responsible for the relevant crimes . This pleading is sufficient to put the Defence on notice as to the nature and cause of the relevant charges against them. This specific objection is therefore rejected.

9 Pre-trial brief and materials disclosed to Defence

70. The Prosecution has submitted that the supporting material accompanying the indictment and other materials disclosed to the Defence pursuant to the Rules, as well as the pre-trial brief, will provide the Defence with facts, details of the offences allegedly committed, and the nature of the alleged criminal responsibility of the accused.[175] The Defence objected to this submission.[176] The Trial Chamber rejects the Prosecution submission, for the reasons set out above .[177]

10. Request for oral hearing

71. The Defence has requested an oral hearing on the Motion at the earliest opportunity in view of the complexity and importance of the issues raised.[178]

72. The general practice of the Tribunal is not to hear oral argument on motions prior to the trial unless good reason is shown for its need in the particular case.[179] A general assertion that the issues are complex and important is not, in the circumstances , such a reason. The Defence has not suggested that it could for some reason not fully address the issues in the written filings. The Trial

Chamber also sees no need for oral argument upon this Motion. This request is therefore refused.

11. Reorganisation of indictment

73. The placing of the sections on the "Individual criminal responsibility" of the three accused, "General allegations", and "Additional facts" at the back of the indictment , following the specific counts, does not make for an easy understanding and use of the indictment. The indictment is also unnecessarily repetitive in certain instances . Although not defective for that, the Trial Chamber considers that the Prosecution be directed to reorganise the indictment and to redraft it to minimise the repetition of information and material facts. With respect to reorganising the indictment, the "General allegations" and "Additional facts" sections are to be moved to the front of the indictment to follow directly on the section on "The accused". The section on "Individual criminal responsibility" is also to be moved to the front of the indictment to directly follow the "Charges" section, but preceding the specific counts. Where necessary, the cross-references to other sections and paragraphs of the indictment must accordingly be changed.

12. Disposition

74. Pursuant to Rule 72, the Motion is hereby:

(a) Denied in part.

(b) Granted in part.

(c) The Prosecution is ordered to amend the indictment in the terms set out in this decision, and to reorganise and redraft the indictment in accordance with paragraph 73 of this decision.

(d) The amended and reorganised indictment is to be filed no later than 12:00 on 11 January 2002. A table indicating all the amendments and changes made to the indictment shall be filed by the same time (reorganisation table).

(e) The Defence is to file any complaints resulting from the amendments ordered to be made within fourteen days of the filing of the amended and reorganised indictment .

Done in both English and French, the English version being authoritative.

Done the seventh day of December 2001

At The Hague

The Netherlands

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Wolfgang Schomburg

Presiding Judge

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[Seal of the Tribunal]

1 - "Joint Preliminary Motion Alleging Defects in the Form of the Indictment", 8 Oct 2001.
2 - "Prosecution's Response to the Joint Preliminary Motion Alleging Defects in the Form of the Indictment", 22 Oct 2001 ("Response"); "Reply to Prosecution Response to Preliminary Motion Alleging Defects in the Form of the Indictment", 29 Oct 2001 ("Reply") (the Reply was filed by counsel for Mehmed Alagic, but counsel for the other accused on 5 Nov 2001 joined that Reply by filing the "Joint Reply to Prosecution Response to Preliminary Motion Alleging Defects in the Form of the Indictment"); "Request for Leave to File Supplement to Prosecution's Response to the Joint Preliminary Motion Alleging Defects in the Form of the Indictment", 30 Oct 2001 ("Supplementary Response").
3 - *See* Decision on Challenge to Jurisdiction, 7 Dec 2001.
4 - Indictment, par 45 ("All acts and omissions alleged in this indictment occurred between 1 January 1993 and 31 January 1994 on the territory of Bosnia and Herzegovina.").
5 - *Ibid*, pars 3, 29.
6 - *Ibid*, pars 6, 34, 35.
7 - *Ibid*, pars 9, 40, 41.
8 - Of 11 Sept 2001.
9 - Fax dated 26 Oct 2001 (filed with the Registry on 7 Dec 2001).
10 - *Prosecutor v Kupreskic and Others*, Case IT-95-16-A, Appeal Judgement, 23 October 2001.
11 - Supplementary Response, pars 1 and 13.
12 - Of 9 Nov 2001.
13 - The Practice Direction, IT/184 of 19 Jan 2001.
14 - *Kupreskic* Appeal Judgment, par 88.
15 - *Ibid* (with reference to Arts 18(4), 21(2) and 21(4)(a) and (b) of the Statute and Rule 47(C)).
16 - See *Ibid*; Arts 18(4), 21(2) and 21(4)(a) and (b) of the Statute; and Rule 47(C), which essentially restates Art 18 (4).
17 - *Kupreskic* Appeal Judgment, par 88. It can be left open whether the view expressed by the Appeals Chamber is an *obiter dictum* only, and whether there may not be exceptional cases in which the Prosecution may be required to plead the evidence in an indictment. If the evidentiary material provided by the Prosecution during the pre-trial discovery process does not sufficiently identify the *evidence* upon which the prosecution relies to establish those material facts (see Rule 66), then – and only then – is it appropriate for an application to be made to the Trial Chamber for an order that the Prosecution supply particulars (and even then only if a request to the Prosecution for such particulars has not been satisfactorily answered) (*Prosecutor v Brdjanin & Talic*, Case IT-99-36-PT, Decision on Form of Third Amended Indictment, 21 Sept 2001, par 8; *Prosecutor v Brdjanin & Talic*, Case IT-99-36-PT, Decision on Form of Further Amended Indictment and Prosecution Application to Amend, 26 June 2001 ("Third *Brdjanin & Talic* Decision"), par 19; *Prosecutor v Brdjanin & Talic*, Case IT-99-36-PT, Decision on Objections by Momir Talic to the Form of the Amended Indictment, 20 Feb 2001 ("First *Brdjanin & Talic* Decision"), par 27).
18 - *See also* Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (1993), p 255; and Frowein und Peukert, *Europäische MenschenRechtsKonvention: EMRK-Kommentar* (1996), p 295.
19 - Article 14(3)(a) of the ICCPR.
20 - Article 6(3)(a) of the ECHR provides in relevant part: "Everyone charged with a criminal offence has the following minimum rights: (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him [...]."
21 - *Kupreskic* Appeal Judgment, par 89.
22 - First *Brdjanin & Talic* Decision, par 18. It is essential for the accused to know from the indictment just what that alleged proximity is: *Prosecutor v Brdjanin & Talic*, Case IT-99-36-PT, Decision on Objections by Radoslav Brdjanin to the Form of the Amended Indictment, 23 Feb 2001 ("Second *Brdjanin & Talic* Decision"), par 13.
23 - *Prosecutor v Brdjanin & Talic*, Case IT-99-36-PT, Decision on Form of Fourth Amended Indictment, 23 Nov 2001, par 12; First *Brdjanin & Talic* Decision, par 48.
24 - First *Brdjanin & Talic* Decision, par 48.
25 - Statute, Art 7(3); see First *Brdjanin & Talic* Decision, par 19; *Prosecutor v Krajisnik*, Case IT-00-39-PT, Decision Concerning Preliminary Motion on the Form of the Indictment, 1 Aug 2000 ("*Krajisnik* Decision"), par 9; *Prosecutor v Krnojelac*, Case IT-97-25-PT, Decision on Preliminary Motion on Form of Amended Indictment, 11 Feb 2000, par 9.
26 - Statute, Art 7(3); see First *Brdjanin & Talic* Decision, par 19; *Krajisnik* Decision, par 9.
27 - Statute, Art 21(4)(a) of the Statute; *Prosecutor v Krnojelac*, Case IT-97-25-PT, Decision on the Defence Preliminary Motion on the Form of the Indictment, 24 Feb 1999, par 38.
28 - First *Brdjanin & Talic* Decision, par 19.
29 - See *Ibid*; *Prosecutor v Kvocka*, Case IT-99-30-PT, Decision on Defence Preliminary Motions on the Form of the Indictment, 12 Apr 1999, par 17; *Prosecutor v Krnojelac*, Case IT-97-25-PT, Decision on Preliminary Motion on Form of Amended Indictment, 11 Feb 2000, par 18(A); *Krajisnik* Decision, par 9.

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30 - Statute, Art 7(3); see First *Brdjanin & Talic* Decision, par 19 (rolling facts (b) and (c) together); *Krajisnik* Decision, par 9.
31 - *Kupreskic* Appeal Judgment, par 114.
32 - If the Defence is denied the material facts as to the nature of the nature of the accused's responsibility for the events pleaded until the pre-trial brief is filed, it is almost entirely incapacitated from conducting any meaningful investigation for trial until then (*see* Second *Brdjanin & Talic* Decision, pars 11-13).
33 - *Kupreskic* Appeal Judgment, par 92.
34 - *Ibid.*
35 - *Ibid.*
36 - Motion, pars 3-30.
37 - *Ibid*, pars 10-16; Reply, pars 7-10.
38 - Motion, pars 10, 12-15, 75(1).
39 - *Ibid*, par 14, fn 5.
40 - *Ibid*, par 75(1).
41 - Response, pars 7, 11 and 14.
42 - This amendment will make amending par 11 to specify whether all or some foreign Muslim fighters referred to themselves as "Mujahedin" or only those who were attached to the ABiH 3rd Corps Muslim Mountain Brigade unnecessary.
43 - Motion, pars 17-19; Reply, pars 11-14.
44 - Motion, pars 18-19.
45 - *Ibid*, par 75(2).
46 - Response, pars 7 and 11.
47 - Indictment, par 50.
48 - *Ibid*, pars 18, 19, 22, 24, 25, 27, 28, 49.
49 - Indictment, pars 32, 38.
50 - *Celebici* Appeal Judgment, par 256 (see also pars 196-198 and 266).
51 - *Ibid*, par 197.
52 - *Ibid.*
53 - Motion, pars 20-21; Reply, par 14.
54 - Motion, par 20.
55 - *Ibid.*
56 - *Ibid.*
57 - *Ibid*, par 75(3).
58 - Response, pars 7 and 11.
59 - Motion, pars 22-23; Reply, pars 15-16.
60 - Motion, par 23.
61 - *Ibid*, par 75(4).
62 - Response, pars 7 and 11.
63 - Motion, par 25; Reply, par 17. Although not referred to by the Defence, pars 18, 19, 22, 24, 25, 27 and 28 of the indictment appear to be relevant to this objection.
64 - Motion, par 25.
65 - *Ibid*, par 75(5).
66 - Response, pars 7 and 11.
67 - Motion, pars 26-30; Reply, par 18. Although not referred to by the Defence, pars 18, 19, 22, 24, 25, 27 and 28 of the indictment appear to be relevant to this objection.
68 - Motion, par 26.
69 - *Ibid.*
70 - *Ibid.*
71 - *Ibid*, par 27 (reference is made to the acts of "extremist" foreign Muslim fighters or Mujahedin. The Trial Chamber has nothing before it that would suggest that these fighters were "extremist". The use of discriminatory language is counter-productive to the maintenance of the decorum required for judicial proceedings).
72 - *Ibid.*
73 - Motion, pars 28-30 (with reference to indictment, par 19, as an example).
74 - Motion, par 30, fn 15.
75 - *Ibid*, par 75(6).
76 - Response, pars 7 and 11.
77 - *Celebici* Appeal Judgment, pars 239 and 313.
78 - Motion, par 26, fn 12.
79 - Indictment, par 46.
80 - Motion, par 44 (see also Reply, pars 25-26).
81 - Response, par 18.

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82 - The army of the Bosnian Croat community in Bosnia and Herzegovina.
83 - Indictment, par 74.
84 - *Ibid*, par 73. Paragraphs 73 and 74 have to be read in conjunction with par 68 of the indictment.
85 - *Ibid*, par 72.
86 - Motion, par 44.
87 - *Ibid*, pars 44; 45 and 75(8).
88 - Response, par 18.
89 - Motion, par 46.
90 - *Ibid.*
91 - Response, par 19 (emphasis added).
92 - *See* par 8 of this decision.
93 - Geneva Convention Relative to the Protection of Civilian Persons in Time of War of August 12, 1949.
94 - Geneva Convention IV, Art 2.
95 - Article 40 of Geneva Convention IV falls under the section concerned with aliens in the territory of a party to the conflict and it deals with work done by protected persons.
96 - Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949.
97 - Geneva Convention III, Art 2.
98 - Indictment, pars 47 and 48.
99 - Motion, par 47 (quoting from indictment, par 58).
100 - Motion, par 47.
101 - *Ibid*, par 50.
102 - *Ibid.*
103 - *Ibid.*
104 - Case IT-95-14/2-T, Judgement, 26 Feb 2001 ("*Kordic* Judgment").
105 - Motion, par 49.
106 - Response, par 19.
107 - *Ibid.*
108 - *Celebici* Appeal Judgment, par 258.
109 - *Ibid.*
110 - *Ibid.*
111 - Motion, par 51; Reply, pars 28-30.
112 - Motion, pars 52 and 75(9).
113 - Response, pars 21 and 22.
114 - *Ibid*, par 23.
115 - *Celebici* Appeal Judgment, par 400; *Prosecution v Delalic and Others*, Case IT-96-21-A, Separate and Dissenting Opinion of Judge David Hunt and Judge Mohamed Bennouna, 20 Feb 2001, par 12. The *Kupreskic* Appeals Chamber recently confirmed this ruling (*Kupreskic* Appeal Judgment, pars 385 and 386).
116 - *See also* First *Brdjanin & Talic* Decision, pars 31-43.
117 - Motion, pars 54-56.
118 - *Ibid*, pars 54 and 55.
119 - *Ibid*, par 53.
120 - Response, pars 24-28.
121 - Third *Brdjanin & Talic* Decision, par 62.
122 - *Ibid.*
123 - *Ibid*, par 57.
124 - *Ibid.*
125 - *See* par 42 of this decision.
126 - From 14 Nov 1992 to 31 Oct 1993: indictment, par 29.
127 - Indictment, par 63.
128 - *Ibid*, par 64.
129 - *Ibid*, par 66.
130 - From 1 Jan 1993 to 20 July 1993; indictment, par 40.
131 - Indictment, par 40.
132 - Motion, par 58.
133 - *Ibid.*
134 - *Ibid.*
135 - *See* par 42 of this decision.
136 - Motion, pars 59-62. See par 3 of this decision for exact charges.
137 - *Ibid*, pars 59 and 60.
138 - *Ibid*, par 61.
139 - *See* par 3 of this decision.

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140 - Motion, par 62.
141 - *Ibid.*
142 - *Ibid.*
143 - *See* par 42 of this decision.
144 - Motion, pars 63-66.
145 - *Ibid*, par 63.
146 - *See* par 42 of this decision.
147 - The specific relevant charge is count 6 (unlawful confinement of civilians, punishable under Arts 2(g) and 7(3) of the Statute. The other charges do not specifically relate to what the Defence refers to as "unlawful imprisonment", although "imprisonment" is referred to, *inter alia*, in the first sentence of par 19 of the indictment.
148 - Motion, par 64.
149 - *See* par 42 of this decision.
150 - Paragraph 21 provides very precise dates on which it is alleged that certain victims were killed (on 18 June 1993; 5 Aug 1993; and 20 Oct 1993 in relation to pars 21(b), (c) and (e), respectively), bar two allegations, namely, pars 21(a) and (d) (in May 1993; and in the beginning of Aug 1993, respectively).
151 - Paragraphs 19(a) (to at least Jan 1994); (ba) (to at least 23 Dec 1993); (bc) (to at least Dec 1993); (dd) (to at least 19 Mar 1994)
152 - Motion, par 65.
153 - *See* par 42 of this decision.
154 - Motion, par 66.
155 - *See* par 42 of this decision.
156 - Motion, par 67.
157 - *Ibid*, par 67.
158 - *See* par 42 of this decision.
159 - Motion, pars 68-74.
160 - *See* par 42 of this decision.
161 - Motion, par 68.
162 - *Ibid.*
163 - *Ibid*, pars 68 and 69 (reference is made to counts 1 to 6 (it appears to be an error, since count 6 does not include Dusina; it probably should have read as counts 1 to 5), which include Dusina, 26 Jan 1993; counts 6 to 10, which include Zenica Music School from 26 Jan 1993; counts 14 to 15, which include Zenica, Jan 1993; and counts 16 to 18, which include Dusina, Jan 1993.
164 - Motion, par 68.
165 - Indictment, pars 9 and 40.
166 - *Ibid*, pars 18 (counts 1 to 5), 19 (counts 6 to 10), 25 (counts 14 and 15), 27 (counts 16 to 18).
167 - *Ibid*, pars 18 (counts 1 to 5), which include a charge in relation to crimes allegedly committed in Dusina (Zenica municipality) on 26 Jan 1993; 19 (counts 6 to 10), which include a charge in relation to crimes allegedly committed in Zenica Music School from 26 Jan 1993; 25 (counts 14 to 15), which include a charge in relation to crimes allegedly committed in Zenica, Jan 1993; and 27 (counts 16 to 18), which include a charge in relation to crimes allegedly committed in Dusina, Jan 1993.
168 - Motion, par 70.
169 - *Ibid.*
170 - *Ibid.*
171 - *Ibid*, par 71.
172 - *Ibid*, par 73.
173 - *Ibid*, par 72.
174 - Indictment, pars 40 and 41.
175 - Response, pars 28-29.
176 - Reply, par 33.
177 - *See* par 12 of this decision.
178 - Motion, par 77.
179 - *Prosecutor v Krnojelac*, Case IT-97-25-PT, Decision on Form of Second Amended Indictment, 11 May 2000, par 31.

IN THE TRIAL CHAMBER

Before: Judge Gabrielle Kirk McDonald, Presiding

Judge Rustam S. Sidhwa

Judge Lal C. Vohrah

Registrar: Mrs. Dorothee de Sampayo Garrido-Nijgh

Decision of: 26 June 1996

THE PROSECUTOR

v.

ZEJNIL DELALIC
ZDRAVKO MUCIC also known as "PAVO"
HAZIM DELIC
ESAD LANDZO also known as "ZENGA"

DECISION ON THE ACCUSED MUCIC'S MOTION FOR PARTICULARS

The Office of the Prosecutor:

Mr. Eric Ostberg

Ms. Teresa McHenry

Counsel for the Accused:

Mr. Robert Rhodes, QC, for Zdravko Mucic

I. INTRODUCTION

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On 24 April 1996, a motion was filed on behalf of the accused, Zdravko Mucic,pursuant to Rules 72 and 73 of the International Tribunal's Rules of Procedure and Evidence ("Rules") requesting this Trial Chamber to order the Prosecution to provide full particulars of the indictment in accordance with questions set out in an attached schedule. The Prosecution filed a written opposition to the Defence motion on 8 May 1996.

Oral argument on the motion was heard following a status conference on 14 May 1996, and the decision on it was reserved to a later date.

THE TRIAL CHAMBER, HAVING CONSIDERED the written submissions and oral arguments of the parties,

HEREBY ISSUES ITS DECISION.

II. DISCUSSION

1. The indictment against Zdravko Mucic alleges that he was the commander of the Celebici camp in central Bosnia, where Bosnian Serb civilians were detained. The indictment, which includes charges against three other persons, consists of 49 counts. Zdravko Mucic himself is charged with the following counts: 13, 14, 33 - 35, 38, 39 and 44 - 49. He is charged with command responsibility for specific instances of killing, torture, rape and for acts causing great suffering or serious bodily injury. In addition, the Prosecution asserts that Zdravko Mucic directly participated in the creation of inhumane conditions, the unlawful confinement of civilians and the plunder of private property at the camp.

2. The Defence contends that the indictment is not sufficiently precise. It seeks particulars with regard to the allegations of command responsibility on the part of the accused and further details of certain acts allegedly undertaken by the accused and his subordinates.

3. The Prosecution opposes the Defence motion on the ground that the indictment against Zdravko Mucic fully complies with the requirements of the Statute of the International Tribunal ("Statute") and its Rules. The Prosecution is of the view that the indictment provides the accused with sufficient notice of the nature of the crimes with which he is charged and the facts supporting those charges and that any further details necessary to prepare his defence can be found in the supporting materials.

4. Rules 72 and 73 form the basis of the Defence motion. Rule 72 authorises the filing of preliminary motions by either party and Rule 73 sets out a non-exhaustive list of the motions that may be made by an accused. The latter provides that the accused may, *inter alia*, make "objections based on defects in the form of the indictment." Rule 73(A)(ii). Zdravko Mucic's request for particulars appears to lie somewhere between an objection, under Rule 73(A)(ii), that the indictment is too vague, and a request for further discovery.

A. Vagueness

5. The International Tribunal has had occasion to consider claims relating to the vagueness of an indictment in other cases. See *Prosecutor v. Tadic*, Case No. IT-94-1-T, Decision on the Defence Motion on the Form of the Indictment (T. Ch. II, 14 November 1995) ("*Tadic Indictment Decision*");

Prosecutor v. \yukic, Case No. IT-96-20-T, Decision on Preliminary Motions of the Accused (T. Ch. I, 26 April 1996). These cases have looked to the relevant provisions of the International Tribunal's Statute and Rules for guidance on the issue. Article 18 of the Statute requires the Prosecutor, once he determines that a prima facie case against an accused exists, to prepare "an indictment containing a concise statement of the facts and the crime of crimes with which the accused is charged under the Statute." Article 21, which sets out the rights of the accused, provides that the accused is entitled "to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him". In addition, Rule 47(B), following the language of Article 18, instructs that the indictment "shall set forth the name and particulars of the suspect, and a concise statement of the facts of the case and of the crime with which the suspect is charged."

6. When tested by the standard set out in previous cases, the indictment against Zdravko Mucic is not vague. The command responsibility charges against the accused (counts 13, 14, 33-35, 38, 39, 44, 45) are based on particular actions by his subordinates. The place, the approximate date and the names of the alleged victims are provided. On the issue of the involvement of the accused, the Prosecution asserts that Zdravko Mucic was the commander of the Celebici camp and therefore had command responsibility for the acts alleged. The direct responsibility charges (counts 46 - 49) relate to a prolonged course of conduct --- *ie*. the inhumane conditions at the camp, the unlawful confinement of civilians and the plunder of property. The factual allegations underlying these charges indicate the approximate time period during which the conduct occurred, describe the underlying conduct with specificity and provide some information about the participation of the accused and others. In sum, each count of the indictment against Zdravko Mucic gives him warning of the nature of the crimes with which he is charged and sets out the factual basis of the charges. Thus, to the extent that the accused's motion seeks to challenge the indictment on vagueness grounds, it is rejected.

B. Particulars

7. Although the indictment is not vague, the Defence may be entitled to further particulars regarding the offences charged against Zdravko Mucic . The device of a motion for particulars is well known in several common law jurisdictions and has been specifically endorsed by this Chamber in its Decision on the form of the indictment in the *Tadic* case. *See Tadic Indictment Decision* ¶ 8. The statutory basis of the accused's right to particulars is found in Article 21(2) of the International Tribunal's Statute, which provides that the accused has the right to "a fair and public hearing" and in Article 21(4) (b) which gives the accused the right to "adequate time and facilities for the preparation of his defence".

8. Before an accused can make a motion for particulars, he must first request the Prosecution to provide such particulars. Such a request must "specify the counts in question, the respect in which it is said that the material already in the possession of the Defence is inadequate and the particulars necessary to remedy that inadequacy." *Tadic Indictment Decision*¶ 8. The motion itself must "state with particularity the respect in which a specified count, read in the light of the paragraph which precedes it, is said to require any and what further particulars." *Id.* The record does not indicate that the Prosecution refused a Defence request for particulars. The Trial Chamber can, however, assume that this requirements has been satisfied because Zdvrako Mucic has in fact filed a motion for particulars and the Prosecution has opposed it. The motion filed by the Defence indicated the reasons why particulars were needed with respect to specific allegations. Furthermore, during the oral argument of this motion, the Defence indicated that it had surveyed the documents provided by the Prosecution and was still of the view that it was entitled to particulars on a number of the matters raised. The requirements set out in the Decision on the form of the indictment in the *Tadic* case can therefore be regarded as fulfilled and the Trial Chamber can proceed to a consideration of the Defence request.

9. The essential standard for deciding on a motion for particulars is whether such particulars are

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necessary in order for the accused to prepare his defence and to avoid prejudicial surprise. See Wayne R. LaFave & Jerold H. Israel, Criminal Procedure 823 (2d ed. 1992); 11(2) Halbury's Laws of England ¶ 923 (1990). A request for particulars is not, and may not be used as, a device to obtain discovery of evidentiary matter. The request may be directed only to the sufficiency of the indictment and is not a substitute for pre-trial discovery. The amount of pre-trial discovery available to the defence is, however, relevant in deciding whether to grant such a request. LaFave & Israel, *supra*, at 823-824. The availability of discovery provides the defence with protection against prejudicial surprise at trial and gives it adequate information for preparing a meaningful defence.

10. The International Tribunal's Rules allow the defence to obtain extensive pre-trial discovery. Rule 66 requires the Prosecutor to "make available to the defence, as soon as practicable after the initial appearance of the accused, copies of the supporting material which accompanied the indictment when confirmation was sought as well as all prior statements obtained by the Prosecutor from the accused or from prosecution witnesses" and to "permit the defence to inpect any books, documents, photographs and tangible objects in his custody or control, which are material to the preparation of the defence, or are intended for use by the Prosecutor as evidence at trial or were obtained from or belonged to the accused". In addition, Rule 67 request that "[aCs early as reasonably practicable and in any event prior to the commencement of the trial," the Prosecutor must "notify the defence of the names of the witnesses that he intends to call in proof of the guilt of the accused and in rebuttal of any defence plea of which the Prosecutor has received notice". This Rule also imposes an obligation to notify the defence of newly discovered "evidence or material which should have been produced earlier pursuant to the Rules". Finally, pursuant to Rule 68, the Prosecution must disclose exculpatory evidence to the defence as soon as practicable. The comprehensive scope of pre-trial discovery available to the defence under the Rules weighs against the accused's request.

11. Turning to the specific requests, the Trial Chamber notes that the Defence seeks particulars regarding three categories of allegations: (1) allegations of the accused's knowledge with respect to certain acts by his subordinates, as set out in paragraphs 7, 22, 29, 31, 34, 35, 37 of the indictment; (2) allegations of the accused's failure to take necessary and reasonable measures to prevent or punish certain acts by his subordinates, as set out in paragraphs 7, 22,29,31,34,35,36,37 of the indictment; and (3) insufficient precision in the allegation of certain acts by the accused and his subordinates, as set out in paragraphs 31, 33, 34, 35, 37 of the indictment.

12. With respect to the first category, the Defence asks that the Prosecution specify the evidence on which it relies in alleging that the accused can be regarded as knowing or having reason to know of the acts of his subordinates. The indictment asserts that Zdravko Mucic was the commander of the Celebici camp. Zdravko Mucic's alleged position as camp commander can be regarded -- at this stage of the proceedings -- as sufficient to suggest that he knew or should have known of the actions of his subordinates. In addition, the Prosecution has indicated that the witness statements provided to the Defence contain further evidence of Zdravko Mucic's knowledge of the acts of his subordinates. The Trial Chamber therefore finds that the Prosecution has provided sufficiently particular information with respect to this category.

13. The second category of allegations of which the Defence complains are those asserting that the accused failed to take the measures necessary to fulfil his duty as camp commander. The Defence would like the Prosecution to specify the actions that it believes the accused was obligated to take. This request is more a search for the Prosecution's view of the applicable law than a solicitation of particular facts in the Prosecution's possession. The Trial Chamber has already held that the indictment is not vague and thereby indicated that it sufficiently states the legal elements of the Prosecutor's case. Further information in this regard is not required.

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14. The remainder of the Defence complaints can be described as assertions of insufficient precision in the allegation of acts. The Defence has asked for specific information with regard to paragraphs 31 and 34 of the indictment, in which the Prosecution alleges that the accused committed certain types of acts and follows that allegation with a non-exhaustive list. For example, paragraph 31 of the indictment alleges that the accused has command responsibility for "acts causing great suffering committed in Celebici camp, including the severe beatings of Mirko KULJANIN and Dragan KULJANIN, the placing of a burning fuse cord around the genital areas of Vukasin MRKAJIC and Dusko BEN\O, and including those acts causing great suffering or serious injury described above in paragraph thirty". The Defence objects to the use of the word "including" because it gives the Prosecutor leeway to prove acts in addition to the ones listed in the indictment. Because the acts enumerated in the list -- if proven -- would be sufficient to make out the crime alleged, we do not believe that the Defence is entitled to greater specificity. To the extent that the Prosecutor attempts to prove other incidents that may be classified as "acts causing great suffering". the accused will be protected from surprise at trial by his ability to obtain discovery of materials in the Prosecution's possession and the Proseuction's obligation to provide the Defence with a witness list prior to trial.

15. Finally, the Defence requests particulars relating to Zdravko Mucic's alleged direct participation in the commission of offences. He is accused of directly participating in the creation of inhumane conditions and in the unlawful confinement of civilians at the camp and in plundering the property of detainees. The Defence asks for information on how exactly the accused was involved in the creation of the conditions in the camp and in plunder. Because the Trial Chamber believes that allegations of direct participation are sufficiently clear to allow the Defence to prepare for trial, this request is also denied.

16. The Defence has also asked the Prosection to identify the detainees on whom an electrical device was allegedly used and the number of occasions on which certain alleged actions occurred. Paragraph 33 of the indictment specifies two of the detainees on whom an electrical device was allegedly used. If proved at trial, this would be sufficient to convict the accused of the offence alleged. Therefore, the Prosecutor is not required to provide more particulars with respect to paragraph 33. In paragraph 34 of the indictment, the Prosecution asserts that Zdravko Mucic has responsibility as a superior for inhumane acts committed in the camp, "including forcing persons to commit fellatio with each other [andC forcing a father and son to slap each other repeatedly, and including those acts described above in paragraph thirty-three." Zdravko Mucic could be liable as a commander for inhumane acts based on the incidents set out in paragraph 33, thus further particulars about the acts listed in paragraph 34 are unnecessary. Moreover, the *number* of times the acts listed in paragraph 34 occurred is irrelevant because one commission would be sufficient for the imposition of criminal liability. Thus, the request for particulars relative to paragraph 34 is denied.

III. DISPOSITION

FOR THE FOREGOING REASONS, THE TRIAL CHAMBER, PURSUANT TO RULE 72,

HEREBY UNANIMOUSLY DENIES in all respects the Defence motion for particulars.

Done in English and French, the English text being authoritative.

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Gabrielle
Kirk
McDonald

Presiding
Judge

Dated this twenty-sixth day of June 1996

At The Hague

The Netherlands

[Seal of the Tribunal]

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IN TRIAL CHAMBER II

Before:
Judge David Hunt, Presiding
Judge Florence Ndepele Mwachande Mumba
Judge Liu Daqun

Registrar:
Mr Hans Holthuis

Decision of:
20 February 2001

PROSECUTOR

v

Radoslav BRDANIN & Momir TALIC

DECISION ON OBJECTIONS BY MOMIR TALIC TO THE FORM OF THE AMENDED INDICTMENT

The Office of the Prosecutor:

Ms Joanna Korner
Mr Nicholas Koumjian
Ms Anna Richterova
Ms Ann Sutherland

Counsel for Accused:

Mr John Ackerman for Radoslav Brdanin
Maître Xavier de Roux and Maître Michel Pitron for Momir Talic

1 The application

1. The accused Momir Talic ("Talic") has filed a preliminary motion in accordance with Rule 72 of the Rules of Procedure and Evidence ("Rules"),[1] in which he alleges that the form of the amended indictment is defective.[2] By that Motion, Talic seeks a number of rulings:[3]

> (1) The facts grounding the charges against him give "no indication of places, time frame, identity of the perpetrators and victims or offences put forward".[4]

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27. It is, however, necessary to dispose of the suggestion earlier made by the prosecution , that the detail missing from this indictment should be the subject of a request for further and better particulars. The right of an accused to seek further and better particulars of an allegation in the indictment does *not* overcome a deficiency in the form of the indictment. The indictment *must* state all of the *material* facts upon which the prosecution relies to establish the charges laid. If the evidentiary material provided by the prosecution during the pre-trial discovery process does not sufficiently identify the *evidence* upon which the prosecution relies to establish those material facts,[86] then – and only then – is it appropriate for an application to be made to the Trial Chamber for an order that the prosecution supply particulars (and even then only if a request to the prosecution for such particulars has not been satisfactorily answered).[87] The response by the prosecution that the complaints made by Talic in relation to the form of the indictment should have been the subject of an application for further and better particulars is rejected.

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IN TRIAL CHAMBER II

Before: Judge David Hunt, Presiding

Judge Antonio Cassese

Judge Florence Ndepele Mwachande Mumba

Registrar: Mrs Dorothee de Sampayo Garrido-Nijgh

Decision of: 24 February 1999

PROSECUTOR

v

MILORAD KRNOJELAC

DECISION ON THE DEFENCE PRELIMINARY MOTION ON THE FORM OF THE INDICTMENT

The Office of the Prosecutor:

Mr Franck Terrier
Ms Peggy Kuo
Ms Hildegard Uertz-Retzlaff

Counsel for the Accused:

Mr Mihajlo Bakrac
Mr Miroslav Vasic

I Introduction

1. Milorad Krnojelac ("the accused") is charged on eighteen counts arising out of events at the Foca Kazneno-Popravni Dom ("KP Dom" or "KPD FOCA") – said to be one of the largest prisons in the former Yugoslavia – of which he is alleged to have been the commander and in a position of superior authority. The charges against him allege:

> 1.1 grave breaches of the Geneva Conventions of 1949, consisting of torture (Count 3), wilfully causing serious injury to body or health (Count 6), wilful killing (Count 9), unlawful confinement of civilians (Count 12), wilfully

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IV Particularity in pleading – individual responsibility

11. However, the only specific facts alleged in the indictment in the present case relevant to the accused's *individual* responsibility in relation to any of the charges are to be found in para 3.1 of the indictment, where it is alleged in general terms (and without any particularity) that the accused was present when detainees arrived and that he appeared during beatings. Even so, para 3.1 is directed only to showing that the accused had responsibility as a superior, not that he personally participated in any beatings. It may be that – differently expressed, and in a distinct, separate and more detailed allegation – these facts would go at least some way to support a finding that the accused had aided and abetted in the beatings and that he was therefore individually responsible for those beatings,[14] but para 3.1 does not provide particulars of the individual responsibility of the accused.

12. The accused therefore complains, with some justification, that he has not been informed of the facts upon which the prosecution relies to establish his individual responsibility.[15] The extent of the prosecution's obligation to give particulars in an indictment is to ensure that the accused has "a concise statement of the facts" upon which reliance is placed to establish the offences charged,[16] but only to the extent that such statement enables the accused to be informed of the "nature and cause of the charge against him"[17] and in "adequate time [...] for the preparation of his defence".[18] An indictment must contain information as to the identity of the victim, the place and the approximate date of the alleged offence and the means by which the offence was committed.[19] However, these obligations in relation to what must be pleaded in the indictment are not to be seen as a substitute for the prosecution's obligation to give pre-trial discovery (which is provided by Rule 66 of the Rules) or the names of witnesses (which is provided by Rule 67 of the Rules).[20] There is thus a clear distinction drawn between the material facts upon which the prosecution relies (which must be pleaded) and the evidence by which those material facts will be proved (which must be provided by way of pre-trial discovery).

13. But, even recognising that distinction, the indictment as presently drafted gives the accused no idea at all of the nature and cause of the charges against him so far as they are based upon his individual responsibility – either by way of personal participation or as aiding and abetting those who did so participate. It is not sufficient that an accused is made aware of the case to be established upon only one of the alternative bases pleaded.[21] What must clearly be identified by the prosecution so far as the individual responsibility of the accused in the present case is concerned are the particular acts of the accused himself or the particular course of conduct on his part which are alleged to constitute that responsibility.[22]

14. The prosecution has already given pre-trial discovery of all the supporting material which accompanied the indictment when confirmation was sought.[23] It has not yet provided the accused with translated witness statements.[24] It submits that the supporting material "should" supply all necessary details as to the nature of the case to be made against the accused sufficient to enable him to prepare his defence, so that there is no need to amend the indictment.[25] Reliance is placed upon the decision of the ICTR in *Prosecutor v Nyiramashuko*[26] as supporting that proposition. What the ICTR said was:

> "Whilst it is essential to read the indictment together with the supporting material, the indictment *on its own* must be able to present clear and concise charges against the accused, to enable the accused to understand the charges. This is particularly important since the accused does not have the benefit of the supporting material at his initial appearance."[27]

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40. It may be, of course, that the prosecution is simply unable to be more specific because the witness statement or statements in its possession do not provide the information in order for it to do so. It cannot be obliged to perform the impossible, but in some cases there will then arise the question as to whether it is fair to the accused to permit such an imprecise charge to proceed. The inability of the prosecution to provide proper particulars may itself demonstrate sufficient prejudice to an accused person as to make a trial upon the relevant charge necessarily unfair.[54] The fact that the witnesses are unable to provide the needed information will inevitably reduce the value of their evidence. The absence of such information effectively reduces the defence of the accused to a mere blanket denial; he will be unable, for example, to set up any meaningful alibi, or to cross-examine the witnesses by reference to surrounding circumstances such as would exist if the acts charged had been identified by reference to some more precise time or other event or surrounding circumstance.

41. In some jurisdictions, a procedure has been adopted of permitting an oral examination and cross-examination of a witness prior to the trial by counsel in the case (who are less restricted in their scope for questioning than police officers or other investigators), in an endeavour to elicit from the witness sufficient information to cure the prejudice which would otherwise exist.[55] But it is necessary first to determine whether the prosecution is able to give better particulars.

42. The complaint by the accused is at this stage upheld, and the prosecution is required to identify in the indictment the approximate time when each offence is alleged to have taken place. Obviously, there will be cases where the identification cannot be of a specific date, but a reasonable range should be specified. The period of April 1992 to August 1993 would *not* be a reasonable period.

43. The accused has also suggested that greater precision than usual will be required in specifying these times in relation to the offences based upon Art 2 of the Statute because the period from April 1992 to August 1993 straddles the period of May 1992 when – so it was found by the Trial Chamber in *Prosecutor v Tadic* – the conflict ceased to be an international one in the relevant area.[56] However, that finding was one of fact only, made upon the evidence presented in that trial and in proceedings between different parties. It cannot amount to a *res judicata* binding the Trial Chamber in this trial.[57] In the Celebici case, for example, it was held that the conflict in that area continued to be international in character for the rest of 1992.[58] It is clear that it is for the Trial Chamber in each individual trial to determine this issue for itself upon the evidence given in that trial. That is not an issue of fact which can be resolved at this stage.

44. When identifying the facts by which Counts 2 to 7 are to be proved,[59] the indictment, under the general heading "Beatings in the Prison Yard", has alleged as facts:

> 5.4 On their arrival in the prison and/or during their confinement, many detainees of the KP Dom were beaten on numerous occasions by the prison guards or by soldiers in the presence of regular prison personnel.
>
> 5.5 On several occasions between April and December 1992, soldiers approached and beat detainees in the prison yard, among them FWS-137, while guards watched without interfering.

The accused asserts that it is unclear whether the case against him is to be that it was the guards or the soldiers who were the perpetrators, and that, if the former, the reference to regular prison personnel is unclear.[60]

45. It is reasonably clear that the prosecution here is relying upon a number of beatings at different times – some by the prison guards, and some by soldiers in the presence of regular prison personnel. The significance of the presence of the regular prison personnel and their inaction at the time is that the beatings by the soldiers were being at least condoned, and perhaps also encouraged, by the regular prison personnel. This in turn suggests that the infliction of such beatings, either by the prison guards or by the soldiers, was a course of conduct approved by the accused as the person in command of the prison.

46. But, if these two paragraphs were intended to stand alone, the prosecution has failed to give the accused any idea at all of the basis of its case. The accused is entitled to know where and approximately when these beatings occurred and the identity of the prison guards, the soldiers and the regular prison personnel. The accused has very properly conceded that, if the prosecution is unable to identify those directly participating in such events by name, it will be sufficient for it to identify them at least by reference to their "category" (or their official position) as a group.[61]

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IN THE TRIAL CHAMBER

Before:
Judge Richard May, Presiding
Judge Mohamed Bennouna
Judge Patrick Robinson

Registrar:
Mrs. Dorothee de Sampayo Garrido-Nijgh

Decision of:
10 February 2000

PROSECUTOR

v.

DAMIR DOSEN
DRAGAN KOLUNDZIJA

DECISION ON PRELIMINARY MOTIONS

The Office of the Prosecutor:

Mr. Grant Niemann
Mr. Michael Keegan
Mr. Kapila Waidyaratne

Counsel for the Accused:

Mr.Vladimir Petrovic, for Damir Dosen
Mr. Dušan Vucicevic, for Dragan Kolundzija

I. INTRODUCTION

Pending before this Trial Chamber of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Law Committed in the Territory of the Former Yugoslavia since 1991 ("International Tribunal") are two preliminary motions: the "Defense Motions Opposing the Amended Indictment Pursuant to the Rule 72 of Procedure and Evidence", filed by counsel for the accused Dragan Kolundzija on 9 November 1999, and the "Defence Preliminary Motion", filed by counsel for the accused Damir Dosen on 15 December 1999. The Office of the Prosecutor ("the Prosecution") filed a Response to Motion of the Accused Dragan Kolundzija on 23 November 1999 and its Response to the Accused Damir Dosen's Preliminary Motion on 22 December 1999. To each Response the Prosecution appended a confidential Attachment A, in order to provide the Defence with further particulars. Counsel for Dragan Kolundzija filed a Reply on 8 December 1999 and

3. Supporting Materials Contain Insufficient Evidence to Support the Charges

21. Defence counsel for Dragan Kolundzija argued that the Trial Chamber is entitled to evaluate the Amended Indictment in the light of the supporting materials. The Trial Chamber disagrees. It is clear from the jurisprudence of the International Tribunal that a challenge to the evidence must wait until trial. In *Prosecutor v. Krnojelac* the Trial Chamber stated that there is a "clear distinction drawn between the material facts upon which the prosecution relies (which must be pleaded) and the evidence by which those material facts will be proved (which must be provided by way of pre-trial discovery)".[13] In *Prosecutor v. Brdjanin* the Trial Chamber stated that "there is no basis in the Rules of Procedure and Evidence upon which the Trial Chamber could review the decision of the confirming judge that the material provided by the prosecution to that judge supports the material facts pleaded in the indictment. The function of the Trial Chamber is, as stated earlier, to determine whether the evidence produced at the trial is sufficient to establish the charges pleaded in the indictment".[14] Most recently, in *Prosecutor v. Krstic*, a Trial Chamber held that a motion on the form of the indictment is not an appropriate way of challenging the evidence, which is a matter for trial.[15] On these grounds the Defence objection based on the sufficiency of evidence in this case is dismissed.

International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of The Former Yugoslavia since 1991

Case No. IT-98-34-PT 1232

Date 15 February 2000

Original: English

IN THE TRIAL CHAMBER

Before: **Judge Almiro Rodrigues, Presiding**
Judge Fouad Riad
Judge Patricia Wald

Registrar: **Mr. Jean-Jacques Heintz, Deputy Registrar**

Decision of: **15 February 2000**

THE PROSECUTOR

v.

MLADEN NALETILIĆ
VINKO MARTINOVIĆ

DECISION ON DEFENDANT VINKO MARTINOVIĆ'S OBJECTION TO THE INDICTMENT

The Office of the Prosecutor:

Mr. Franck Terrier

Defence Counsel:

Mr. Branko Šerić

disclosed in sufficient time prior to the trial to allow adequate time for preparation of the defence").

17. Moreover, it must be kept in mind that the defendant has other avenues besides a motion challenging the form of the indictment for seeking additional particulars. Some Trial Chambers have endorsed the use of a motion for particulars where the indictment is not so vague as to be defective on its face, but where a defendant needs more information to prepare for trial.[34] These cases have held that, before submitting a motion for particulars, the defence must first make a direct request to the Prosecution for the information, specifying the counts in question, the reasons that the material already in the defence's possession is not sufficient, and the specific information that will remedy the inadequacy.[35] If the Prosecution fails to provide sufficient information, the Defence may then file a motion in the trial chamber, which will then consider whether the requested particulars are necessary "in order for the accused to prepare his defence and to avoid prejudicial surprise."[36] A motion for particulars is only properly directed at the indictment and is not to be used to obtain the discovery of evidentiary material.[37] But the extent of discovery already obtained is relevant to the issue of whether a defendant has enough information to prepare for trial and avoid prejudicial surprise.[38]

18. To sum up, the defendant's preparation for trial may begin with the indictment, but it does not end there. While it is clear that "the indictment must contain certain information which permits the accused to prepare his defence,"[39] it need not contain *all* of the information to which the accused will ultimately be entitled under the Rules. The primary focus at this stage must be on whether the indictment contains a concise, but complete, statement of the facts on which the charges are based.

19. With this in mind, the Trial Chamber will now address Mr. Martinović's objections. With regard to all of these objections, it is important to note that, in the time since this motion was filed, the Defence has received extensive discovery, including 137 witness statements. Defence counsel conceded at oral argument that he has not read all of the

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[34] *See, e.g., Prosecutor v. Delalić*, Case No. IT-96-21-T, Decision on Motion by the Accused Zejnil Delalić Based on Defects in the Form of the Indictment ("*Delalić*"), 2 October 1996, para. 21; *Prosecutor v. Delalić*, Case No. IT-96-21-T, Decision on the Accused Mucić's Motion for Particulars ("*Mucić*"), para. 7; *Prosecutor v. Tadić*, Case No. IT-94-1-T, Decision on Defence Motion on Form of Indictment, 14 Nov. 1995, para. 8.
[35] *See Tadić*, para. 8.
[36] *Mucić*, para. 9.
[37] *See id.*
[38] *See id.*
[39] *Blaškić*, para. 20,

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IN THE APPEALS CHAMBER

Before:
Judge Mohamed Shahabuddeen, Presiding
Judge Lal Chand Vohrah
Judge Rafael Nieto-Navia
Judge Patrick Lipton Robinson
Judge Fausto Pocar

Registrar:
Mrs. Dorothee de Sampayo Garrido-Nijgh

Judgement of: 21 July 2000

PROSECUTOR

v.

ANTO FURUNDZIJA

JUDGEMENT

Counsel for the Prosecutor:

Mr. UpawansaYapa
Mr. Christopher Staker
Mr. Norman Farrell

Counsel for the Accused:

Mr. Luka S. Misetic
Mr. Sheldon Davidson

I. INTRODUCTION

The Appeals Chamber of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 ("the International Tribunal" or "the ICTY") is seized of an appeal filed by Anto Furundzija ("the Appellant") against the Judgement rendered by Trial Chamber II of the International Tribunal on 10 December 1998.

The Trial Chamber held the Appellant individually responsible for his participation in the crimes charged in the Amended Indictment pursuant to Article 7(1) of the Statute of the International Tribunal ("the Statute"). The Trial Chamber also found that under Article 3 of the Statute, the Appellant was

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1. Evidence Concerning Other Acts in the Large Room and the Pantry

148. Trial Chambers have been consistently mindful of the primary function of the International Tribunal, which is to ensure that justice is done and that the accused receives a fair trial. It is, no doubt, in light of this preoccupation that in evaluating the testimony of Witness A, the Trial Chamber limited its consideration to that part of the testimony relating to the Amended Indictment. This exercise by the Trial Chamber is indicative of its sensitivity to any prejudice to the fairness of the trial that could result from Witness A's testimony. Consistent with this concern, the Trial Chamber acknowledged that "[t]he witness has testified that rapes and sexual abuse took place in the large room in the presence of the accused", and that the relevant "evidence falls outside the facts alleged in paragraphs 25 and 26 of the Amended Indictment, and is contrary to earlier submissions by the Prosecutor."[198] The Trial Chamber also remarked that during the proceedings the Prosecutor did not seek to modify the Amended Indictment to charge the Accused with participation in the rapes and sexual abuse.

149. It is on the basis of the aforementioned grounds that the Trial Chamber decided that "the Trial Chamber will not consider evidence relating to rapes and sexual assault of Witness A in the presence of the accused, other than those alleged in paragraph 25 and 26 of the Amended Indictment."[199]

150. The factual allegations contained in paragraphs 25 and 26 of the Amended Indictment and pertaining to Counts 13 and 14 are as follows:

> 25. On or about 15 May 1993, at the Jokers Headquarters in Nadioci (the "Bungalow"), Anto FURUNDZIJA the local commander of the Jokers, [REDACTED] and another soldier interrogated Witness A. While being questioned by FURUNDZIJA, [REDACTED] rubbed his knife against Witness A's inner thigh and lower stomach and threatened to put his knife inside Witness A's vagina should she not tell the truth.
>
> 26. Then Witness A and Victim B, a Bosnian Croat who had previously assisted Witness A's family, were taken to another room in the "Bungalow". Victim B had been badly beaten prior to this time. While FURUNDZIJA continued to interrogate Witness A and Victim B, [REDACTED] beat Witness A and Victim B on the feet with a baton. Then [REDACTED] forced Witness A to have oral and vaginal sexual intercourse with him. FURUNDZIJA was present during this entire incident and did nothing to stop or curtail [REDACTED] actions.

151. In its written decision of 12 June 1998, the Trial Chamber allowed the oral motion by the Defence and held that "in the circumstances, the Trial Chamber will only consider as relevant Witness A's evidence in so far as it relates to Paragraphs 25 and 26 as pleaded in the Indictment against the accused." In the written Confidential Decision issued on 15 June 1998, addressing the "Prosecutor's Request for Clarification of Trial Chamber's Decision Regarding Witness A's Testimony", the Trial Chamber "rules as inadmissible all evidence relating to rape and sexual assault perpetrated on [Witness A] by the individual identified as [Accused B] in the presence of the accused in the large room apart from the evidence of sexual assault alleged in paragraph 25 of the [Amended Indictment]."

(a) The interrogation of Witness A by the Appellant while she was in a state of forced nudity

152. In relation to the interrogation of Witness A while she was in a state of forced nudity, the Trial Chamber found that "SWitness AC was forced by Accused B to undress and remain naked before a substantial number of soldiers", and that "Witness A was left by the accused in the custody of Accused B."[200] Although the fact of Witness A's nudity appears in the Judgement under the section entitled "Legal Findings"[201] and was obviously a factor in arriving at the decision to convict, it was nonetheless

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permissible for the Trial Chamber to take account of it, since it fell within the scope of the acts alleged in the Amended Indictment.

153. In this context, the Appeals Chamber considers as correct the distinction made in *Krnojelac*[202] between the material facts underpinning the charges and the evidence that goes to prove those material facts. In terms of Article 18 of the Statute and Rule 47, the indictment need only contain those material facts and need not set out the evidence that is to be adduced in support of them. In the instant case, the Appeals Chamber can find nothing wrong in the Trial Chamber's admission of this evidence which supports the charge of torture, even though it was not specified in the Amended Indictment. It would obviously be unworkable for an indictment to contain all the evidence that the Prosecutor proposes to introduce at the trial.

(b) Alleged threats in the course of the Appellant's interrogation to kill Witness A's sons

154. In relation to this aspect of the third ground of appeal, the Trial Chamber accepted the evidence of Witness A about the nature of her interrogation by the Appellant.[203] This finding was made in the context of the Trial Chamber's discussion of the link between the armed conflict and the Appellant, and did not form part of the legal findings underlying the Appellant's convictions.

(c) Witness A abandoned in the Large Room to further assaults by Accused B

155. The Trial Chamber found that "Witness A was left by the [Appellant] in the custody of Accused B, who proceeded to rape her, sexually assault her, and to physically abuse and degrade her".[204] In this respect, the Appeals Chamber recalls paragraph 67 of this Judgement and reiterates that the finding was not one that influenced the Trial Chamber in coming to a decision to convict the Appellant. This is borne out by a review of the legal findings in Chapter 7 of the Judgement, and in particular paragraphs 264 - 269 relating to Count 13 (torture), which show that the Trial Chamber did not rely upon this evidence in convicting the Appellant. In paragraph 264, the Trial Chamber found that the Appellant

> was present in the large room and interrogated Witness A, whilst she was in a state of nudity. As she was being interrogated, Accused B rubbed his knife on the inner thighs of Witness A and threatened to cut out her private parts if she did not tell the truth in answer to the interrogation by the accused. The accused did not stop his interrogation, which eventually culminated in his threatening to confront Witness A with another person, meaning Witness D and that she would then confess to the allegations against her. To this extent, the interrogation by the accused and the activities of Accused B became one process. The physical attacks, as well as the threats to inflict severe injury, caused severe physical and mental suffering to Witness A.[205]

156. There is no reference in paragraph 264, or in any of the other paragraphs relating to these legal findings, to the evidence of Witness A being "left by [the Appellant] in the custody of Accused B, who proceeded to rape her, sexually assault her, and to physically abuse and degrade her."[206]

IN THE TRIAL CHAMBER

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Before:
Judge Richard May, Presiding
Judge Mohamed Bennouna
Judge Patrick Robinson

Registrar:
Dorothee de Sampayo Garrido-Nijgh

Order of:
1 August 2000

PROSECUTOR

v.

MOMCILO KRAJISNIK

DECISION CONCERNING PRELIMINARY MOTION ON THE FORM OF THE INDICTMENT

Office of the Prosecutor:

Ms. Carla Del Ponte
Mr. Nicola Piacente
Ms. Brenda Hollis

Counsel for the Accused:

Mr. Goran Neskovic

I. INTRODUCTION

Pending before this Trial Chamber of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Law Committed in the Territory of the Former Yugoslavia since 1991 ("International Tribunal") is a preliminary motion alleging defects in the form of the indictment which was confirmed on 25 February 2000 and reconfirmed after being amended on 7 March 2000. On 8 June 2000, the "Defendant's Preliminary Motion Based on Defects in the Form of the Indictment " ("Defence Motion") was filed by counsel for the accused, Momcilo Krajišnik ("Defence "). On 22 June 2000, the "Prosecutor's Response to Defendant's Preliminary Motion Based on Defects in the Form of the Indictment" ("Prosecution Motion") was filed by the Office of the Prosecutor ("Prosecution"). On 4 July 2000, subsequent to leave being granted by the Trial Chamber, the Defence filed the "Defendant's Reply to Prosecutor's Response to Defendant's Preliminary Motion Based on Defects in the Form of the Indictment" ("Defence Response").

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THE TRIAL CHAMBER, HAVING CONSIDERED the written submissions and oral arguments of the parties heard on 19 July 2000,

HEREBY ISSUES ITS WRITTEN DECISION.

II. ARGUMENTS OF THE PARTIES

A. The Defence

1. The Defence submits that the Prosecution must define with more precision and clarity the names of various political groups and the accused's function and position in them[1]. The Defence also complains that the Prosecution fails to name other persons with whom the accused is alleged to have committed the crimes and to differentiate between their actions and those of the accused[2]. The Defence requests that the generalised relationship asserted in the indictment between Radovan Karadzic and the accused be deleted[3]. The Defence further submits that in paragraphs 10, 18, 20, 21, 23 and 25 of the indictment, the Prosecution expands the time frame set out in paragraph 5 from 30 December 1992 to 31 December 1992[4]. It is also submitted that there are various phrases in the indictment which are unclear and merit further clarification[5].

2. The Defence complains that the scope of the accused's individual criminal responsibility is not clearly defined and that allegations for each crime must specify the time and place alleged, as well as the type of the accused's responsibility under Article 7(1) or Article 7(3) of the Statute of the International Tribunal ("Statute")[6]. The Defence seeks an order that the Prosecution submit an annex as part of the indictment indicating the form of participation (planning, instigating, etc.); the precise time and place of the alleged criminal acts and the precise form of individual criminal responsibility alleged pursuant to Article 7(1) or Article 7(3), or both[7].

3. The Defence submits that the supporting materials do not relate to the charges[8] and further submits that an interview with the accused which forms part of the supporting materials should be removed[9].

B. The Prosecution

4. The Prosecution submits that it is not required to provide any of the particulars requested by the Defence[10] and that most of the phrases complained of are either explained in the indictment[11] or have a plain and ordinary meaning. The Prosecution submits that the Defence complaints relate to allegations of fact which are matters to be determined at trial[12].

5. The Prosecution also submits (a) that the facts provided in the indictment are sufficiently precise because of the widespread and massive nature of the allegations and the accused's high level of responsibility[13]; (b) that it is required neither to choose the type of liability under Article 7(1)[14] nor to choose between liability under Article 7(1) and Article 7(3)[15], and (c) it is a matter for the fact finder to determine the legal characterisation of the accused's conduct from the evidence presented[16].

6. The Prosecution further submits that the relationship between the supporting material and the charges[17], as well as the sections of the indictment concerning general allegations and additional facts[18], are not matters to be raised in a preliminary motion on the form of the indictment .

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III. APPLICABLE LAW

7. Article 18.4 of the Statute states that indictments must contain a "concise statement of the facts and the crime or crimes with which the accused is charged under the Statute". Similarly, Rule 47(C) of the Rules of Procedure and Evidence ("Rules") states: "The indictment shall set forth the name and particulars of the suspect, and a concise statement of the facts of the case and of the crime with which the suspect is charged."

8. The accused is entitled to particulars "necessary in order for the accused to prepare his defence and to avoid prejudicial surprise"[19]. However, there is a difference between "the facts of the case" and the evidence required to prove those facts. The facts must be pleaded whilst the evidence is adduced at trial. It is then for the Trial Chamber to determine at the end of the trial whether there is enough evidence to support the charges pleaded in the indictment [20]. It follows that "disputes as to issues of fact are for determination at trial"[21] and not via motions relating to the form of the indictment.

9. In cases where it is alleged that the accused's liability for crimes arising from his position as a superior, the accused is entitled to know the Prosecution allegations as to (a) his conduct as a superior and (b) the conduct of those for whom he is alleged to be responsible[22]. While decisions by Trial Chambers have emphasised the need for precision in the indictment , the need for precision in pleading the material facts depends on the nature of the case and the proximity of the accused to the events. Thus, wherever the accused's liability is said to arise from his superior responsibility, the material facts are:

> (1) the relationship between the accused and the others who did the acts for which he is alleged to be responsible; and (2) the conduct of the accused by which he may be found (a) to have known or had reason to know that the acts were about to be done, or had been done, by those others, and (b) to have failed to take the necessary and reasonable measures to prevent such acts or to punish the persons who did them [23].

In such a case based upon superior responsibility, the facts will necessarily be stated with less precision than in a case based on personal responsibility[24]. A high degree of specificity relating to the identity of the victims and the dates is not possible [25]. It is sufficient to identify the persons who committed alleged crimes and the victims by means of the category or group to which they belong[26].

IV. ANALYSIS

10. The Trial Chamber finds that there is no lack of precision in the pleading of the material facts in the indictment, as the facts are sufficiently pleaded and it would be unreasonable to ask the Prosecution for further precision.[27]

11. Having regard to the higher level of responsibility alleged against this accused , the Trial Chamber finds that the Prosecution has satisfied, for the purpose of the indictment, the requirements for specificity in setting out the means by which the alleged crimes were committed, the persons who committed the alleged crimes, the locations, the victims and the approximate dates of the alleged crimes. However , the Trial Chamber notes that the Prosecution has agreed to confine the allegations in the indictment to the time period set out in paragraph 5, thereby making the time period for the commission of crimes alleged between 1 July 1991 and 30 December 1992.

12. The Defence requests that the Prosecution be ordered to produce an annex to the indictment to set

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out the exact manner in which the accused allegedly committed the crimes. In this request, the Defence rely on a similar order made in *Kolundžija & Dosen*[28]. However, this case differs materially from *Kolundžija*. In that case, the accused are charged as shift commanders of a camp and the scope of their responsibility is therefore limited when compared with the scope of responsibility of the accused in this case who is alleged to have been a high ranking official in the Bosnian Serb leadership . Because the present case is a broadly based case involving forty-one municipalities and a wide range of offences, the degree of specificity required in the indictment is necessarily less than that required in cases such as *Kolundžija*. The Prosecution is therefore not required to provide the annex requested by the Defence as part of the indictment.

13. In this respect however, the Trial Chamber notes that the Prosecution will be required to provide in its pre-trial brief details of the offences allegedly committed and the precise role the accused is said to have played. While it is open to the Prosecution to plead forms of liability in the alternative and it is for the Trial Chamber to determine at the end of the trial what (if any) liability is made out, the Prosecution is not thereby absolved from the responsibility of stating in the brief how they allege that the accused is guilty of the crimes with which he is charged. Thus, the Trial Chamber will expect the pre-trial brief to show, with respect to each crime, what is the nature of the alleged individual criminal responsibility of the accused and how the Prosecution intends to make out its case.

14. Finally, with regard to the Defence's submission that the supporting materials do not reflect the charges and that the interview with the accused provided by the Prosecution be removed from the supporting materials, the Trial Chamber finds that these are not matters appropriately dealt with in a motion on the form of the indictment . Matters concerning the admissibility of evidence are appropriately dealt with at trial.

V. DISPOSITION

PURSUANT TO Rule 72 of the Rules,

THE TRIAL CHAMBER HEREBY DISMISSES the Defence motion.

Done in English and French, the English text being authoritative.

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Richard May
Presiding

Dated this first day of August 2000
At The Hague
The Netherlands (Seal of the Tribunal)

1- Para.20-22, 31 and 37 of the Defence Motion.
2- Para.20, 23, 24, 34, 36 and 39 of the Defence Motion.
3- Para.23 of Defence Motion and Transcript of Oral Argument heard on 19 July 2000 ("Transcript"), p. 39.
4- Para.27, 32 and 33 of Defence Motion.
5- Para.23, 26, 34, 38 and 41 of Defence Motion.
6- Para.28 and 33 of Defence Motion.

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7- Para.47 of Defence Motion, Transcript, p.30.
8- Para.50 of Defence Motion.
9- Para.54 of Defence Motion.
10- Para.25 of Prosecution Motion.
11- Para.23 of Prosecution Motion.
12- Para.27 of Prosecution Motion.
13- Para.44, 47, 52 and 53 of Prosecution Motion, Transcript, p.37-38.
14- Para.64 of Prosecution Motion.
15- Para.72 of Prosecution Motion.
16- Para.63 of Prosecution Motion, Transcript, p.34.
17- Para.75 of Prosecution Motion.
18- Para.59 of Prosecution Motion.
19- *Prosecutor v. Delalic*, "Decision on the Accused Mucic's Motion for Particulars", Case No. IT-96-21-T, 26 June 1996, para.9.
20- *Prosecutor v. Brdanin*, "Decision on Motion to Dismiss Indictment", Case No. IT-99-36-PT, 5 October 1999, para.15.
21- *Prosecutor v. Kvocka,* "Decision on Defence Preliminary Motions on the Form of the Indictment" ("*Kvocka*"), Case No.IT-98-30-PT, 12 April 1999, para.40.
22- *Prosecutor v. Krnojelac*, "Decision on the Defence Preliminary Motion on the Form of the Indictment" ("*Krnojelac* Decision on Form of Indictment"), Case No. IT-97-25-PT, 24 February 1999, para. 38.
23- *Prosecutor v. Krnojelac*, "Decision on Preliminary Motion on Form of the Amended Indictment" ("*Krnojelac* Decision on Form of Amended Indictment"), Case No. IT-97-25-PT, 11 February 2000, para.18.
24- Ibid.
25- *Kvocka*, para.17.
26- *Krnojelac* Decision on Form of the Indictment, para.46 and 55. An accused may be charged either alternatively or cumulatively under Article 7(1) and Article 7(3) of the Statute. Whether the charges are substantiated based on the evidence presented is a matter to be dealt with at trial: *Prosecutor v. Kordic and Cerkez,* "Decision on the Joint Defence Motion to Strike paragraphs 20 and 22 and all References to Article 7(3) as Providing a Separate or an Alternative Basis for Imputing Criminal Responsibility", Case No. IT-95-14/2-PT, 2 March 1999, para.6.
27- The Prosecution is not required to provide evidence in the indictment but only to plead the material facts.
28- *Prosecutor v. Kolundžija and others*, Decision on Preliminary Motions ("Kolundžija"), Case No. IT-95-8-PT, 10 February 2000, para.15.

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BEFORE A BENCH OF THE APPEALS CHAMBER

Before:
Judge Lal Chand Vohrah, Presiding
Judge Mohamed Shahabuddeen
Judge Rafael Nieto-Navia

Registrar:
Mrs. Dorothee de Sampayo Garrido-Nijgh

Decision of:
13 September 2000

PROSECUTOR

v.

MOMCILO KRAJISNIK

DECISION ON APPLICATION FOR LEAVE TO APPEAL THE TRIAL CHAMBER'S DECISION CONCERNING PRELIMINARY MOTION ON THE FORM OF THE INDICTMENT

Counsel for the Prosecution:

Mr. Upawansa Yapa

Counsel for the Defence:

Mr. Goran Neskovic
Mr. Svetislav Stanojevic

THIS BENCH of the Appeals Chamber ("the Bench") of the International Criminal Tribunal for the Former Yugoslavia ("the Tribunal"),

BEING SEIZED of the "Application for Leave to Appeal the Trial Chamber's Decision Concerning Preliminary Motion on the Form of the Indictment", filed by Momcilo Krajisnik ("the Appellant") on 8 August 2000 ("the Application for Leave to Appeal"), seeking leave to appeal pursuant to Rule 72(B)(ii) and Rule 72(C) of the Rules of Procedure and Evidence ("the Rules"),

NOTING the "Decision Concerning Preliminary Motion on the Form of the Indictment" issued by Trial Chamber III on 2 August 2000 ("the Impugned Decision"), in which the Trial Chamber dismissed the Defence motion,

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NOTING the "Prosecution Response to 'Defendant's Application for Leave to Appeal the Trial Chamber's Decision Concerning the Preliminary Motion on the Form of the Indictment'" filed on 18 August 2000,

NOTING that the appeal is filed in a timely manner, pursuant to Rule 72(C) of the Rules, which requires applications for leave to appeal under Rule 72(B)(ii) to be filed within seven days of filing of the Impugned Decision,

NOTING that Rule 72(B) of the Rules stipulates that, unless preliminary motions challenge jurisdiction, decisions on such motions are without interlocutory appeal save "(ii) in other cases where leave to appeal is, upon good cause being shown, granted by a bench of three Judges of the Appeals Chamber",

NOTING that the Application for Leave to Appeal lists five grounds of appeal, namely that (a) the Trial Chamber abused its discretion by finding that the material facts are sufficiently pleaded in the Indictment and that it would be unreasonable to ask the Prosecution for further precision, (b) the Trial Chamber abused its discretion by finding that the Prosecution satisfied the requirements for specificity as regards the criminal responsibility, and that it does not need to provide the annex requested by the Defence, (c) the Trial Chamber abused its discretion by noting that the Prosecution will be required to include more detail in its Pre-Trial Brief, (d) the Impugned Decision will cause irreparable and incurable prejudice to the Appellant, and (e) the issues raised in the proposed appeal are of great significance for the proceedings before the Tribunal and in international law,

CONSIDERING that in the first three grounds of appeal it is asserted that the Trial Chamber abused its discretion, but in each case the Appellant challenges a discretionary finding of the Trial Chamber without presenting any contentions which disclose an arguable case of any abuse of such discretion,

CONSIDERING that in the circumstances no basis has been shown for suggesting any error on the part of the Trial Chamber in reaching its decision on the first three grounds, and that there is therefore no showing of good cause as to these grounds,

CONSIDERING that in the fourth ground of appeal it is asserted that the Impugned Decision will cause irreparable and incurable prejudice to the Appellant but noting that this ground depends upon an error or an abuse of discretion on the part of the Trial Chamber, and that the Appellant's contentions do not disclose an arguable case that there has been such abuse or error, and therefore considering that there has been no showing of good cause as to this ground,

CONSIDERING that in the fifth ground of appeal it is asserted that the issues raised in the proposed appeal are of great significance to the Tribunal or to international law, but that the appellant's contentions relating to this ground do not disclose an arguable case that that is so, and considering further that a mere assertion that an issue is one of general importance to the Tribunal or international law generally does not in itself establish good cause within the meaning of Rule 72(B)(ii) of the Rules,

HEREBY REJECTS the Application for Leave to Appeal.

Done in both English and French, the English text being authoritative.

Judge Lal Chand Vohrah

Presiding

Dated this thirteenth day of September 2000
At The Hague,
The Netherlands.

[Seal of the Tribunal]

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IN TRIAL CHAMBER II

Before:
Judge David Hunt, Presiding
Judge Florence Ndepele Mwachande Mumba
Judge Liu Daqun

Registrar:
Mr Hans Holthuis

Decision of:
20 February 2001

PROSECUTOR

v

Radoslav BRDANIN & Momir TALIC

DECISION ON OBJECTIONS BY MOMIR TALIC TO THE FORM OF THE AMENDED INDICTMENT

The Office of the Prosecutor:

Ms Joanna Korner
Mr Nicholas Koumjian
Ms Anna Richterova
Ms Ann Sutherland

Counsel for Accused:

Mr John Ackerman for Radoslav Brdanin
Maître Xavier de Roux and Maître Michel Pitron for Momir Talic

1 The application

1. The accused Momir Talic ("Talic") has filed a preliminary motion in accordance with Rule 72 of the Rules of Procedure and Evidence ("Rules"),[1] in which he alleges that the form of the amended indictment is defective.[2] By that Motion, Talic seeks a number of rulings:[3]

(1) The facts grounding the charges against him give "no indication of places, time frame, identity of the perpetrators and victims or offences put forward".[4]

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5 Particularity in pleading

14. Talic has complained that the amended indictment does not comply with the requirements of the Tribunal's Statute and Rules as interpreted by the jurisprudence of the Tribunal , which is said to require the indictment in every case, whatever the nature of the responsibility alleged, to contain information as to the identity of the victims , the place and date of the offence and the methods used to perpetrate it.[60] Talic says that the indictment fails to identify the "actual perpetrators" of the alleged crimes, or any connection between them and himself, or the nature of his responsibility for their acts.[61]

15. Talic also argues that, following the statement by the prosecution that it does not intend to call as witnesses a number of persons whose statements formed part of the supporting material accompanying the indictment when confirmation was sought , the amended indictment now has no validity; the suggestion is made that a number of these statements provided the only material before the confirming judge in relation to various of the alleged events pleaded.[62] As stated earlier, the prosecution filed no response to this argument, but it may nevertheless be dismissed. The Trial Chamber has already pointed out that, once the indictment has been confirmed, the issue as to whether there is evidence to support any charge pleaded in the indictment is to be determined by the Trial Chamber at the conclusion of the trial or (if the issue is raised) at the close of the prosecution case.[63] The absence of material which was before the confirming judge has no relevance to the *form* of the indictment .

16. In relation to the other issues raised by Talic, the prosecution denies that it is obliged in an indictment to give the details to which Talic has referred, and it says that such details should be the subject of a request for further and better particulars.[64] It dismissed the decisions of this Trial Chamber to the contrary effect as being out of line with the decisions of the other Trial Chambers.[65] These two assertions are dealt with separately.[66]

17. This Trial Chamber does not accept that its decisions are inconsistent with those of other Trial Chambers. It is not proposed to restate in this decision what has already been said in previous decisions (and not just those of this Trial Chamber) concerning the need for particularity in pleading, except where necessary to deal with a particular issue raised in the present case.

18. The starting point in the present case is the need for the accused to be informed of the "nature and cause of the charge against him".[67] A distinction is drawn in the Tribunal's jurisprudence between the material facts upon which the prosecution relies (which must be pleaded) and the evidence by which those material facts will be proved (which need not be pleaded).[68] Whether a particular fact is a material one which must be pleaded depends in turn upon the nature of the case which the prosecution seeks to make, and of which the accused must be informed. The materiality of such details as the identity of the victim, the place and date of the events for which an accused is alleged to be responsible , and the description of the events themselves, necessarily depends upon the alleged proximity of that accused to those events.[69]

19. In a case based upon superior responsibility, what is most material is the relationship between the accused and the others who did the acts for which he is alleged to be responsible, and the conduct of the accused by which he may be found to have known or had reason to know that the acts were about to be done, or had been done, by those others, and to have failed to take the necessary and reasonable measures to prevent such acts or to punish the persons who did them.[70] However, so far as those acts of the other persons are concerned, although the prosecution remains under an obligation to give all the particulars which it is able to give , the relevant facts will usually be stated with less precision, and that

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is because the detail of those acts (by whom and against whom they are done) is often unknown – and because the acts themselves often cannot be greatly in issue.[71]

20. In a case based upon individual responsibility where it is not alleged that the accused personally did the acts for which he is to be held responsible – where the accused is being placed in greater proximity to the acts of other persons for which he is alleged to be responsible than he is for superior responsibility – again what is most material is the conduct of the accused by which he may be found to have planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of those acts.[72] But more precision is required in relation to the material facts relating to those acts of other persons than is required for an allegation of superior responsibility . In those circumstances, what the accused needs to know as to the case he has to meet is not only what is alleged to have been his own conduct but also in somewhat more detail than for superior responsibility what are alleged to have been the acts for which he is to be held responsible,[73] subject of course to the prosecution's ability to provide such particulars.[74] But the precision required in relation to those acts is not as great as where the accused is alleged to have personally done the acts in question.[75]

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IN TRIAL CHAMBER II

Before:
Judge David Hunt, Presiding
Judge Florence Ndepele Mwachande Mumba
Judge Liu Daqun

Registrar:
Mr Hans Holthuis

Decision of:
23 February 2001

PROSECUTOR

v

Radoslav BRDANIN & Momir TALIC

DECISION ON OBJECTIONS BY RADOSLAV BRDANIN TO THE FORM OF THE AMENDED INDICTMENT

The Office of the Prosecutor:

Ms Joanna Korner
Mr Nicolas Koumjian
Mr Andrew Cayley
Ms Anna Richterova
Ms Ann Sutherland

Counsel for Accused:

Mr John Ackerman for Radoslav Brdanin
Maître Xavier de Roux and Maître Michel Pitron for Momir Talic

1 The application

1. The accused Radoslav Brdanin ("Brdanin") has filed a preliminary motion in accordance with Rule 72 of the Rules of Procedure and Evidence ("Rules"), in which he alleges that the form of the amended indictment is defective.[1] He complains that the indictment fails to provide sufficient information, and he seeks an order that the prosecution provide certain specific information which he says should have been pleaded,[2] and to which reference is made later.

2 The amended indictment

2. The allegations made in the amended indictment are sufficiently described in the decision given on 20 February 2001 upon a similar preliminary motion in accordance with Rule 72 filed by Momir Talic ("Talic"),[3] who has also been charged in the same indictment.

3 Preliminary point by prosecution

3. In its Response to the Motion,[4] the prosecution asserts that the Motion is "technically" out of time.[5] That is not correct. Rule 72 permits such a preliminary motion relating to the form of the indictment "not later than thirty days after disclosure by the Prosecutor to the defence of all material and statements referred to in Rule 66(A)(i)". Because the prosecution has taken a long and protracted course seeking protective measures which would prevent the identity of certain witnesses being made known to the accused at this stage,[6] it has not yet complied with the requirements of Rule 66(A)(i).[7]

4. The preliminary point taken by the prosecution is rejected.

4 The information sought by Brdanin

5. It is not entirely clear from the Motion whether the specific information sought by Brdanin is to be pleaded in the further amended indictment which the Trial Chamber has already indicated will be required or supplied by way of particulars.[8] As there was no request made of the prosecution for particulars before the Motion was filed, as there should have been if the Motion were seeking the supply of particulars, the Trial Chamber has interpreted the Motion as seeking a more detailed indictment.[9]

6. The information sought is principally an identification of "the role allegedly played by Defendant Brdanin" in each of the incidents pleaded, together with some detail as to the date and place of each incident. The request for information proceeds upon the assumption that Brdanin has been charged, *inter alia*, with having personally committed the killings, infliction of serious bodily or mental harm, detention, torture, physical violence, rapes and sexual assaults, humiliation and degradation, destruction, looting, forcible transfers and other denials of fundamental rights pleaded.

7. The prosecution submits that, because the required degree of precision in pleading the material facts depends upon the nature of the case and the proximity of the accused to the relevant events, Brdanin is seeking an "unreasonable" degree of specificity, "given the particular facts of this case".[10] That submission, together with the references in the Response to Brdanin's high office[11] and to superior responsibility only,[12] appears to assume that Brdanin is charged only with superior responsibility. For the reasons given in the *Talic* Decision,[13] that is manifestly not so. If it were indeed the prosecution's intention to charge Brdanin with superior responsibility only, it was obliged to make that intention unambiguously clear. At the present time, and until the ambiguity is removed, Brdanin must proceed upon the basis that the prosecution is charging him with having, *inter alia*, personally committed each of the crimes charged.

8. The prosecution then says:[14]

> The Prosecution recognises (as stated in the *Krajisnik* Decision, para 13) that it is required to provide in its pre-trial brief details of the offences allegedly committed and the precise role the accused is said to have played, pursuant to Article 7(1) and 7(3). Thus, the pre-trial

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brief will show, with respect to each crime, what is the nature of the alleged individual criminal responsibility of the accused and how the Prosecution intends to make out its case. The Prosecution submits that this procedure provides adequate notice to the Defence of details of the Prosecution's allegations. No purpose would be served in requiring this same degree of specificity in the indictment.

This was not a submission made by the prosecution in answer to the similar preliminary motion filed by Talic which led to the *Talic* Decision.

9. On its face, this passage clearly appears to be asserting that the prosecution is not obliged to identify either "the precise role the accused is said to have played, pursuant to Article 7(1) and 7(3)" or "the nature of the alleged individual criminal responsibility of the accused" *until* it files its Pre-Trial Brief. If that was indeed intended to be asserted by the prosecution, it would be contrary to what has been held in the decisions discussed in the *Talic* Decision.

10. The reference to the "*Krajisnik* Decision" is to *Prosecutor v Krajisnik.*[15] That Trial Chamber decision does not reveal the generality or otherwise of the allegations in the indictment to which objection was taken, although it is difficult to imagine that the indictment in that case could have been less helpful than that in the present case. The allegations in question there appear to have related mainly to the acts of those persons for which the accused was alleged to be responsible, rather than the acts of the accused himself. This Trial Chamber has made it clear that the precise details to be pleaded as material facts are of the acts of the accused, not the acts of those persons for whose acts he is made responsible, a distinction which the Trial Chamber in that case also expressly recognised.[16] This Trial Chamber finds no support from that decision for the assertion apparently made by the prosecution in its Response. The Trial Chamber is satisfied that such an approach would *not* be in compliance with the obligations imposed by the Statute and the Rules upon the prosecution.

11. Article 21.4(a) of the Tribunal's Statute ("Rights of the accused") requires the accused to be "informed *promptly* and in detail [...] of the nature and cause of the charge against him".[17]

Article 20.3 requires the Trial Chamber, before which the accused must be brought without delay after being transferred to The Hague,[18] to read the indictment and to "satisfy itself that the *rights* of the accused are respected".[19] Rule 47 requires the indictment to set forth "a concise statement of the facts of the case and of the crime with which the suspect is charged". The right of the accused to be informed *promptly* of the *nature* of the charge against him does not permit any suggestion that this need not be revealed until the Pre-Trial Brief is filed.

12. The Pre-Trial Brief is not delivered until preparation for the trial is well under way. Rule 65*ter*(E) contemplates that this will not occur until after disclosure pursuant to Rules 66 and 68 has taken place *and after all Preliminary Motions pursuant to Rule 72 have been disposed of.* If the Defence is denied information as to the nature of the accused's criminal responsibility for the events pleaded until the Pre-Trial Brief is filed, it is almost entirely incapacitated from conducting any meaningful investigation in preparation for trial until then. Some of the bases of responsibility pleaded in the indictment may not be identified in the Pre-Trial Brief when it is filed months later. It would be extraordinary that the accused should be expected to waste time beforehand investigating every basis for his responsibility referred to in Articles 7.1 and 7.3 (as pleaded here).

13. An indictment must fairly apprise the accused of the nature of the case against him, and place him in possession of its broad outlines and the facts which constitute his responsibility. These are the "material

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facts" which must be pleaded.[20] How broadly the outlines may be given depends, as this Trial Chamber has said, upon the proximity of the accused to the particular events pleaded.[21] But it is *essential* for the accused to know from the indictment just what that alleged proximity is. The Trial Chamber cannot determine whether the form of the *indictment* is sufficient in answer to a preliminary motion if the issue of proximity is not to be revealed until the Pre-Trial Brief is filed, after the preliminary motion is disposed of.

14. The Trial Chamber rejects any such approach. The true nature of the responsibility of the accused for the events pleaded is an essential material fact to be pleaded in the indictment. It has not been pleaded as such in the amended indictment in this case (at least not without ambiguity), and it must be made unambiguously clear in the indictment.

15. In his Reply, Brdanin has suggested, somewhat intemperately, that the Response of the prosecution "can only be read as a specific defiance of the oral orders" (to prepare an amended indictment), said to have been made during the Status Conferences in November 2000 and earlier this month,[22] and to display an "attitude of open contempt for the Chamber".[23] No such "oral orders" were made. All that happened during those Status Conferences was that the Pre-Trial Judge drew the attention of the prosecution to the very apparent lack of particularity in the amended indictment, and warned it to start work – in advance of the decision on the motion by Talic objecting to the form of the indictment[24] – on the further amendments which will be necessary to the amended indictment for it to comply with the principles discussed in the Trial Chamber's earlier decisions in *Prosecutor v Krnojelac*.[25] It was made clear that the further amended indictment would have to be filed within a short time *after* that decision was given.[26]

16. The references to "specific defiance" and "open contempt" by the prosecution were therefore unfair, and they should not have been made. Brdanin was nevertheless justified in expressing concern that, despite the assurances given by its Senior Trial Attorney that the prosecution will comply with the pleading principles discussed in the *Krnojelac* cases, it now appeared to be placing an interpretation upon the Tribunal's jurisprudence in relation to pleading which is directly contrary to that discussion.

17. The prosecution has sought to explain its statement in these terms:[27]

> The Prosecution, being aware that a ruling was about to be made, in its response was doing no more than referring the Trial Chamber to a recent decision on the point of the form of the Indictment and using the language of that decision to submit that the detail requested by Counsel for Brdanin was excessive and unreasonable.

This passage may explain the prosecution's rejection of its obligation to plead as material facts the precise details of Brdanin's actions in personally committing the killings, the infliction of

serious bodily or mental harm and the other acts alleged in the indictment, although only if it be assumed that, despite the terms of the indictment, the prosecution did *not* intend to charge Brdanin with having personally committed those crimes. But it does not even come close to explaining the clear suggestion in the Response that the prosecution does not have to identify either "the precise role the accused is said to have played, pursuant to Article 7(1) and 7(3)" or "the nature of the alleged individual criminal responsibility of the accused" *until* it files its Pre-Trial Brief.

18. In the *Talic* Decision, the Trial Chamber has already ordered the prosecution to file, on or before 13 March 2001, a further amended indictment which complies with the pleading principles discussed in

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Sections 4 and 5 of that Decision.[28] Proper compliance with that order will necessarily ensure that sufficient information is given to Brdanin as well as to Talic. The disposition of the present Motion is intended to reflect such a result.

5. Disposition

18. For the foregoing reasons, and for the reasons expressed in the *Talic* Decision, **the Trial Chamber determines** as follows:

(i) The complaint by Radoslav Brdanin that the amended indictment fails to provide sufficient information is upheld.

(ii) The prosecution is to file on or before 13 March 2001 a further amended indictment which:

(a) complies with the pleading principles discussed in Sections 4 and 5 of the *Talic* Decision; and

(b) pleads, as material facts, the precise role of the accused and the nature of the accused's alleged individual criminal responsibility.

(iii) In the event that some *unforeseen* problem arises in relation to the ability of the prosecution to comply with this order in the time allowed, an application may be made to the Pre-Trial Judge for an extension of time.

Done in English and French, the English text being authoritative.

Dated this 23rd day of February 2001,
At The Hague,
The Netherlands.

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Judge David Hunt
Presiding Judge

[Seal of the Tribunal]

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1. Motion Objecting to the Form of the Amended Indictment, 5 Feb 2001 ("Motion").
2. Motion, pars 3-9, 12.
3. Decision on Objections by Momir Talic to the Form of the Amended Indictment, 20 Feb 2001 ("*Talic* Decision").
4. Prosecution's Response to "Motion Objecting to the Form of the Amended Indictment" Filed by the Accused Brdanin on 5 February 2001, 6 Feb 2001 ("Response").
5. Response, par 2.
6. Decision on Motion by Prosecution for Protective Measures, 3 July 2000, pars 5-21.
7. *Ibid,* par 21.
8. *Prosecution v Naletilic & Martinovic,* Case IT-98-34-PT, Decision on Defendant Vinko Martinovic's Objection to the Indictment, 15 Feb 2000, par 17; *Talic* Decision, par 27.

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9. This is also suggested by the comments in par 14 of the Motion.
10. Response, pars 4-5.
11. *Ibid*, par 5.
12. *Ibid*, par 3.
13. *Talic* Decision, pars 9-11.
14. Response, par 6.
15. Case IT-00-39-PT, Decision Concerning Preliminary Motion on the Form of the Indictment, 1 Aug 2000.
16. Paragraph 9.
17. The emphasis has been added.
18. Rule 62.
19. The emphasis has been added.
20. *Prosecutor v Krnojelac*, Case IT-97-25-PT, Decision on the Defence Preliminary Motion on the Form of the Indictment, 24 Feb 1999 ("First *Krnojelac* Decision"), par 12 and footnote 19.
21. *Talic* Decision, par 18.
22. Reply to Prosecution's Response to "Motion Objecting to the Form of the Amended Indictment" Filed by the Accused Brdanin on 5 February 2001, 12 Feb 2001 ("Reply"), par 3.
23. *Ibid*, par 4.
24. The *Talic* Decision had been delayed awaiting an appellate decision directly relevant to the resolution of one of the points taken: see pars 7-8, 42 of that Decision.
25. Status Conference, 17 Nov 2000, Transcript, pp 220-222; Status Conference, 2 Feb 2001, Transcript, p 262. The relevant decisions in *Prosecutor v Krnojelac*, Case IT-97-25-PT, are the First *Krnojelac* Decision already referred to; Decision on Preliminary Motion on Form of Amended Indictment, 11 Feb 2000; and Decision on Form of Second Amended Indictment, 11 May 2000. They are discussed in Sections 4 and 5 of the *Talic* Decision.
26. Status Conferences, 17 Nov 2000, Transcript, pp 220-222; 2 Feb 2001, Transcript, p 262.
27. Response to Pleading Entitled "Reply to Prosecution's Response to 'Motion Objecting to the Form of the Amended Indictment' Filed by the Accused Brdanin on 5 February 2001" Filed by the Accused Radoslav Brdanin on 13 February 2001, 16 Feb 2001, par 10.
28. Paragraph 55(iv).

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IN THE TRIAL CHAMBER

Before:
Judge Richard May, Presiding
Judge Mohamed Bennouna
Judge Patrick Robinson

Registrar:
Mrs. Dorothee de Sampayo Garrido-Nijgh

Decision of:
12 April 1999

PROSECUTOR

v.

MIROSLAV KVOCKA
MILOJICA KOS
MLADO RADIC
ZORAN ZIGIC

DECISION ON DEFENCE PRELIMINARY MOTIONS ON THE FORM OF THE INDICTMENT

The Office of the Prosecutor:

Mr. Grant Niemann
Mr. Michael Keegan
Mr. Kapila Waidyaratne

Counsel for the Accused:

Mr. Krstan Simic, for Miroslav Kvocka
Mr. Zarko Nikolic, for Milojica Kos
Mr. Toma Fila, for Mlado Radic
Mr. Simo Tosic, for Zoran Zigic

I. INTRODUCTION

Pending before this Trial Chamber of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Law Committed in the Territory of the Former Yugoslavia since 1991 ("International Tribunal") are four preliminary motions alleging defects in the form of the Amended Indictment confirmed on 9 November 1998 in this case, namely: the "Defence

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2. Analysis

14. Although Article 18, paragraph 4, of the Statute and Sub-rule 47(C) of the Rules do not appear to set a high threshold as to the level of information required in an indictment, a concise statement of the facts of the case and of the crime with which the suspect is charged being all that is needed, there is a minimum level of information that must be provided by the indictment; there is a floor below which the level of information must not fall if the indictment is to be valid as to its form. This is still an accurate statement of the law even when account is taken of the valid distinction drawn in the Decision on the Defence Preliminary Motion on the Form of the Indictment in *Prosecutor v. Krnojelac* ("*Krnojelac Decision as to Form*") "between the material facts upon which the prosecution relies (which must be pleaded) and the evidence by which those material facts will be proved (which must be provided by way of pre-trial discovery)"[2].

15. In the *Krnojelac Decision as to Form*, that Trial Chamber found that "an indictment must contain information as to the identity of the victim, the place and the approximate date of the alleged offence and the means by which the offence was committed"[3]. The Decision then cites several cases from common-law jurisdictions as to the particularity with which a criminal offence must be pleaded[4].

16. While allusions to the practice in civil- and common-law jurisdictions are helpful, the sole determinant of the law applied by the International Tribunal is its Statute and Rules; moreover, the influence of domestic criminal law practice on the work of the International Tribunal must take due account of the very real differences between a domestic criminal jurisdiction and the system administered by the International Tribunal.

17. The Trial Chamber finds that as a general rule, the degree of particularity required in indictments before the International Tribunal is different from, and perhaps not as high as, the particularity required in domestic criminal law jurisdictions. The mandate of the International Tribunal under Article 1 of its Statute is to "prosecute persons responsible for serious violations of international humanitarian law . . . in accordance with the provisions of the present Statute". The massive scale of the crimes with which the International Tribunal has to deal makes it impracticable to require a high degree of specificity in such matters as the identity of the victims and the dates for the commission of the crimes – at any rate, the degree of specificity may not be as high as that called for in domestic jurisdictions. However, there may be cases in which more specific information can be provided as to the time, the place, the identity of victims and the means by which the crime was perpetrated; in those cases, the Prosecution should be required to provide such information. The Trial Chamber understands and accepts the findings in the *Krnojelac Decision as to Form* as to the degree of particularity required in an indictment[5] subject to the above-mentioned qualification.

18. However, the Trial Chamber finds that it is reasonable to require the Prosecution, depending on the particular circumstances of each case, to provide more specific information, if available, as to the place, the time, the identity of the victims and the means by which the crime was perpetrated.

19. Thus, in this case, in respect of the allegations raised by the Defence as to imprecision in time, the Prosecution is directed to delete the word "about" in the phrase "between about"whenever it appears in the Amended Indictment.

20. In respect of the allegations raised by the Defence as to imprecision in the pleadings relating to the location of the crimes alleged, the Trial Chamber finds that there is sufficient information regarding the location of the alleged offences in the Amended Indictment.

21. In respect of the request for particulars of witnesses to the crimes alleged, raised by the Kvocka Defence, the Trial Chamber finds that there is no legal basis for requiring further information about witnesses at this stage of the proceedings.

22. In respect of the allegations by the Kvocka Defence as to lack of information regarding the participation of others in the crimes, the Trial Chamber notes the finding in the *Krnojelac Decision as to Form* that, if the Prosecution is unable to identify those directly participating in the alleged criminal acts by name, "it will be sufficient for it to identify them at least by reference to their 'category' (or their official position) as a group"[6]. The Prosecution is directed to provide information that would allow for the identification of the other participants in the crimes alleged against this accused.

23. As to the Defence request for more specific information regarding victims of the crimes alleged, the degree of detail that is required presents a special difficulty, and it is in this area that the contrast between a domestic criminal law system and an international criminal tribunal is most pronounced. There can be little doubt but that the identity of the victim is information that is valuable to the Defence in the preparation of their cases. But the massive scale of the crimes alleged before this International Tribunal does not allow for specific naming of victims. However, if the Prosecution is in a position to do so, it should. The Prosecution is hereby directed to identify, to the extent it is in a position to do so, the names of the victims of the crimes alleged.

24. In respect of the Defence request for details as to the means by which the crime is perpetrated, the Trial Chamber finds that, where the Prosecution is in a position to do so, it should identify the method of commission of the crime, or the manner in which it was committed.

25. In response to the request by the Radic Defence that the Prosecution be required to clarify whether Counts 14 to 17 of the Amended Indictment are pleaded in the alternative or cumulatively, the Prosecution is entitled to plead the indictment in this form and therefore there is no basis for granting this request. Alternative charging is permissible and cumulative charging is also permissible in certain circumstances. The Defence will have to prepare their cases in respect of all the charges, irrespective of whether they are charged in the alternative or cumulatively.

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IN THE TRIAL CHAMBER

Before:
Judge Claude Jorda, Presiding
Judge Haopei Li
Judge Fouad Riad

Registrar:
Mr. Jean-Jacques Heintz, Deputy Registrar

Decision of:
4 April 1997

THE PROSECUTOR

v.

TIHOMIR BLASKIC

DECISION ON THE DEFENCE MOTION TO DISMISS THE INDICTMENT BASED UPON DEFECTS IN THE FORM THEREOF (VAGUENESS/LACK OF ADEQUATE NOTICE OF CHARGES)

The Office of the Prosecutor:

Mr. Mark Harmon
Mr. Russell Hayman
Mr. Gregory Kehoe
Mr. William Fenrick

Defence Counsel:

Mr. Anto Nobilo
Mr. Russell Hayman

1. On 16 December 1996, the Defence submitted to Trial Chamber I a preliminary motion "to dismiss the indictment based on defects in the form of the indictment (vagueness/lack of adequate notice of charges)" (hereinafter "the Motion"). The Prosecutor, in opposition to the Defence, responded to the Motion on 20 January 1997 (hereinafter "the Response"). The Defence replied to the Response in a brief filed on 3 February 1997 (hereinafter "the Reply"). The Trial Chamber heard the parties at a hearing on 12 and 13 March 1997.

The Trial Chamber would first analyse the claims and arguments of the parties and then the disputed points of fact and law.

B. Review of the indictment

1. Review of the indictment from the perspective of vagueness/ with regard to the location and time of the alleged events, and to the identity of the victims and the participants

a) With regard to the location of alleged events (point C of the Motion)

22. With regard to location (point C.), the Defence considers that the use of expressions such as

- "including, *but not limited to*"(paragraphs 6.1 to 7: (Count 1), (paragraph 9 (Counts 4 to 9)), (paragraph 10 (Counts 10 to 13) and paragraphs 12 and 15 (Counts 14 to 19)).

- "attacks in, *among others*, the following towns and villages"

casts doubt as to the exact locations where the alleged acts were supposedly committed .

The Trial Chamber agrees with the Defence that expressions such as "including, but not limited to" or "among others" are vague and subject to interpretation and that they do not belong in the indictment when it is issued against the accused.

The Trial Chamber takes note of the proposed amendments to the indictment on this point suggested by the Prosecutor in her response brief of 18 January 1997.

The Trial Chamber requests that such amendments be made by 18 April 1997 at the latest.

b) With regard to the time of alleged events (Point D of the Motion)

23. With regard to the time when the crimes were allegedly committed, the Defence points to the use of expressions such as

- "from about May 1992 to about April 1994"

- "from about January 1993 to about January 1994" (repeated throughout the indictment),

which, due to their lack of specificity, make it impossible for the accused to prepare his defence properly, particularly, as regards the establishment of an alibi.

The Prosecutor bases her arguments on the decision of Trial Chamber II of 14 November 1995 and submits that, in that Decision, Judge McDonald stated that in respect of a charge under Article 5 of the Statute, the charges did not regard a particular act but a type of conduct. Accordingly, the Prosecutor extends the reasoning to all the counts and explains that they charge a type of conduct covering an extended period of time.

The Trial Chamber refers to the view it expressed above as to the inevitably succinct and summary nature of an indictment at the time it is issued.

Nevertheless, succinct or summary as it may be, an indictment cannot permit itself to be overly vague. The adverb "about", whenever used, must therefore be stricken . The context in which it was used should, however, be kept in mind.

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The Prosecutor seeks to characterise command responsibility as incurred by the accused under Articles 7 (1) and 7 (3) of the Statute. The accused's role as a colonel in the HVO and, subsequently, as a general appointed commander of the HVO throughout the times material to this indictment, as well as his conduct, are decisive for clearly specifying this type of responsibility. As a consequence, any indictment specifying with a certain degree of vagueness - rather marginal as it is in this case - the overall time period in which grave violations of international humanitarian law allegedly took place, does not formally contravene the general rules governing the presentation of indictments.

Such a conclusion may be inferred by analogy from the above mentioned *The Prosecutor v. Tadic* Decision[26].

Further specification as to the dates of the alleged events inevitably takes place during the procedural stages following the presentation to the accused of the indictment , specifically when the evidence is disclosed.

In this respect, the Trial Chamber refers the parties to its Decision on the Production of Discovery Materials dated 27 January 1997.

c) With regard to the identity of victims (point E) and of the participants (point F)

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IN TRIAL CHAMBER II

Before:
Judge David Hunt, Presiding
Judge Florence Ndepele Mwachande Mumba
Judge Fausto Pocar

Registrar:
Mrs Dorothee de Sampayo Garrido-Nijgh

Decision of:
11 February 2000

PROSECUTOR

v

Milorad KRNOJELAC

DECISION ON PRELIMINARY MOTION ON FORM OF AMENDED INDICTMENT

The Office of the Prosecutor:

Mr Dirk Ryneveld
Ms Peggy Kuo
Ms Hildegard Uertz-Retzlaff

Counsel for the Accused:

Mr Mihajlo Bakrac
Mr Miroslav Vasic

I Introduction

1. The charges against Milorad Krnojelac ("accused") are referred to in sufficient detail in the decision of the Trial Chamber on his preliminary motion concerning the form of the original indictment ("previous decision").[1]

2. On 26 July 1999, the prosecution filed an amended indictment, following its confirmation by Judge Vohrah on 21 July. The additional supporting material was not served until 27 August. In accordance with Rule 50(B) of the Rules of Procedure and Evidence, the accused pleaded to the amended indictment on 14 September, and Rule 50(C) gave him a further period of thirty days in which to file a preliminary motion concerning the form of the amended indictment. Such a preliminary motion was

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III Form of pleading adopted

59. The form of pleading adopted by the prosecution in this case (and in some other cases) is to plead in terms of universal application an allegation that the accused bears three types of responsibility – superior, aiding and abetting and personal, as those terms are defined in par 18 of this decision – and then, in relation to individual counts, to plead facts which imply that, in relation to that particular count, personal liability is not being pursued.

60. It must be firmly stated that such a form of pleading is likely to cause ambiguity, as the present case has demonstrated. It would be preferable in future cases that an indictment indicate in relation to each individual count precisely *and expressly* the particular nature of the responsibility alleged. This would not be necessary where, for example, the nature of the responsibility alleged is the same in relation to every count but, where the nature of the responsibility differs, it should not be left to the accused (and ultimately to the Trial Chamber in the inevitable preliminary motion) to infer from the absence of any facts which indicate a personal responsibility that no such responsibility is being pursued.

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IN THE APPEALS CHAMBER

Before:
Judge Richard May, Presiding
Judge Florence Ndepele Mwachande Mumba
Judge David Hunt
Judge Wang Tieya
Judge Patrick Robinson

Registrar:
Mrs. Dorothee de Sampayo Garrido-Nijgh

Judgement of: 24 March 2000

PROSECUTOR

v.

ZLATKO ALEKSOVSKI

JUDGEMENT

Office of the Prosecutor:

Mr. Upawansa Yapa
Mr. William Fenrick
Mr. Norman Farrell

Counsel for the Appellant:

Mr. Srdjan Joka for Zlatko Aleksovski

The Appeals Chamber of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 ("International Tribunal" or " Tribunal") is seised of two appeals in relation to the written Judgement rendered by Trial Chamber I *bis* ("Trial Chamber") on 25 June 1999 in the case of *Prosecutor v. Zlatko Aleksovski*, Case No.: IT-95-14/1-T ("*Aleksovski* Judgement" or "Judgement").[1]

Having considered the written and oral submissions of both parties, the Appeals Chamber

HEREBY RENDERS ITS WRITTEN JUDGEMENT.

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171. The Trial Chamber appears to have thought that the Prosecution had restricted its case against the Appellant as having aided and abetted in the crimes committed by the HVO soldiers to using the prisoners as human shields and for trench digging only. The Appeals Chamber is satisfied that the Prosecution did charge the Appellant with individual responsibility by way of aiding and abetting for the mistreatment of the prisoners by the HVO soldiers, and that the Trial Chamber was in error if the second passage quoted in the last paragraph was intended to assert that no such claim had been made.[319] The passage of the Judgement upon which the Prosecution relies as demonstrating an acknowledgement by the Trial Chamber that such a claim had been made,[320] if read carefully, does appear to do so although this may well not have been the intention. Whatever may have been intended, it is clear that the Trial Chamber should have proceeded to make findings in relation to the individual responsibility of the Appellant for aiding and abetting the mistreatment of the prisoners by the HVO soldiers.

319 - The practice by the Prosecution of merely quoting the provisions of Article 7(1) in the indictment is likely to cause ambiguity, and it is preferable that the Prosecution indicate in relation to each individual count precisely and expressly the particular nature of the responsibility alleged: "Decision on Preliminary Motion on Form of Amended Indictment", *Prosecutor v. Krnojelac*, Case No.: IT-97-25-PT, Trial Chamber, 11 Feb. 2000, paras. 59-60.

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IN TRIAL CHAMBER II

Before:
Judge David Hunt, Presiding
Judge Florence Ndepele Mwachande Mumba
Judge Liu Daqun

Registrar:
Mr Hans Holthuis

Decision of:
26 June 2001

PROSECUTOR

v

RADOSLAV BRDANIN & MOMIR TALIC

DECISION ON FORM OF FURTHER AMENDED INDICTMENT AND PROSECUTION APPLICATION TO AMEND

The Office of the Prosecutor:

Ms Joanna Korner
Mr Andrew Cayley
Mr Nicolas Koumjian
Ms Anna Richterova
Ms Ann Sutherland

Counsel for Accused:

Mr John Ackerman for Radoslav Brdanin
Maître Xavier de Roux and Maître Michel Pitron for Momir Talic

1 The application and its background

1. The accused Momir Talic ("Talic") has filed a Preliminary Motion in accordance with Rule 72 of the Rules of Procedure and Evidence ("Rules"),[1] in which he alleges that the form of the further amended indictment now filed by the prosecution is defective.[2]

2. The further amended indictment pleads the same twelve counts against Talic as were pleaded in the amended indictment.[3] These are:

(a) genocide,[4] and complicity in genocide ;[5]

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3 Multiple bases alleged for the accused's criminal responsibility

15. Talic complains that his criminal responsibility is "indiscriminately" portrayed as commander of the 1st Krajina Corps, as a member of the Crisis Staff and as a participant in a criminal enterprise, thus rendering the further amended indictment vague.[54] He asserts that, as commander of the 1st Krajina Corps, he would not be responsible for acts committed by a unit which did not form part of the 1st Krajina Corps,[55] or for acts committed within the Krajina Region which were not within his area of responsibility as such commander.[56] Since not all of the municipalities fell within his area of responsibility as such commander at the same time,[57] he says that the indictment should indicate in relation to each municipality when it fell within his area of responsibility as such.[58]

16. Talic then complains that, as the indictment alleges that he was responsible for implementing the policy of incorporating the Autonomous Region of Krajina (" ARK") into a Serb state,[59] and a plan to separate the ethnic communities in Bosnia and Herzegovina,[60] as both the commander of the 1st Krajina Corps and a member of the ARK Crisis Staff , he would be made responsible for acts committed outside the area of responsibility of the 1st Krajina Corps and for acts which were not done under his authority. Since his powers are not the same under each of these positions of authority, particularly his power to issue orders or to punish the perpetrators of crimes, he says that he is entitled to know, in relation to each act for which he is sought to be made criminally responsible, whether that responsibility is alleged to flow from his position as commander of the 1st Krajina Corps or as a member of the ARK Crisis Staff.[61]

17. The prosecution concedes that the indictment *does* seek to make Talic responsible as commander of the 1st Krajina Corps for acts committed by units of that Corps where they operated outside its geographical area of responsibility.[62] The Trial Chamber accepts that, if there be evidence to support the allegation, it would be appropriate to charge Talic with such responsibility upon the basis that he was in effective control of those units in such circumstances. He is not charged as being the commander of some defined geographical area, but as the commander of the 1st Krajina Corps. He may therefore be found criminally responsible as such commander in relation to the acts of those over whom he was in effective control , regardless of the place where those acts took place. It is, in any event, unclear to the Trial Chamber just where the indictment does assert expressly that units of the 1st Krajina Corps did act outside that geographical area.[63] If it is indeed the prosecution case that units of the 1st Krajina Corps committed crimes outside its geographical _area of responsibility, and that Talic is responsible for those crimes because he was in effective control of the Corps when they did so, it must identify with sufficient detail the areas outside whatever geographical area is defined where, it is alleged, the units of the 1st Krajina Corps committed such crimes. The prosecution will be ordered to do so.[64]

18. The prosecution also responds that the link between the criminal acts charged and the criminal responsibility of Talic for those acts does not belong exclusively to either his position as commander of the 1st Krajina Corps or his position as a member of the ARK Crisis Staff.[65] The Trial Chamber agrees with the prosecution that this is made clear in the further amended indictment.[66] The Trial Chamber also accepts that the prosecution is entitled to plead its case in this way. It causes no prejudice (in the relevant sense of rendering his trial unfair) or embarrassment to Talic, provided that the basis upon which he is alleged to be criminally responsible in each position of authority is pleaded with sufficient particularity in the indictment .

19. So far as the Article 7.1 responsibility of Talic as commander of the 1st Krajina Corps is concerned, he is alleged to have commanded the Corps when it executed the policy of the ARK Crisis Staff.[67] By

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virtue of his authority set out in identified military documents, it is alleged that he controlled the work of the Corps by making decisions and issuing orders to subordinates.[68] As such commander , and in accordance with identified military instructions,[69] it is also alleged that he was obliged to prevent those under his command violating the international laws of war and international humanitarian law and to punish those who did so.[70] The Trial Chamber is satisfied that the current indictment is pleaded with sufficient particularity in relation to the basis upon which Talic is alleged to be criminally responsible as commander of the 1st Krajina Corps. Anything further would be pleading the evidence by which those material facts are to be established. That evidence should be apparent from the witness statements made available by the prosecution to the accused in accordance with Rule 66(A). If Talic claims that the evidence is not so apparent from that material, his remedy is to request the prosecution to supply particulars of the statements upon which it relies to prove the specific material fact in question . If the prosecution's response to that request is unsatisfactory, and only then , he may seek an order from the Trial Chamber that such particulars be supplied.[71]

20. So far as the Article 7.1 responsibility of Talic as a member of the ARK Crisis Staff is concerned, the indictment presently appears to allege only that he implemented its policies as the commander of the 1st Krajina Corps.[72] If the prosecution case *was* intended to be so limited, there may well be a problem for the prosecution in establishing Talic's responsibility for crimes committed by persons who were not under his authority as such commander. There is no express allegation, for example, that Talic participated in the decisions of the ARK Crisis Staff. If such participation *is* to be the prosecution case, then Talic would also appear to be responsible for the acts of persons who were not under his authority as the commander of the 1st Krajina Corps. If such participation is *not* to be the prosecution case, it is difficult to understand from the indictment what his membership of the ARK Crisis Staff adds to the prosecution case, other than perhaps as a source of information concerning the objectives of the alleged joint criminal enterprise. However, if it *is* part of the prosecution case that Talic is criminally responsible because he participated in the decisions of the ARK Crisis Staff, this is a material fact which must be pleaded expressly .

21. The prosecution case in relation to the responsibility of Talic as a member of the ARK Crisis Staff is certainly not clearly or sufficiently stated in the indictment . The prosecution was obliged to identify with some precision in the indictment the basis or bases upon which it seeks to make Talic criminally responsible *as a member of the ARK Crisis Staff*, and it has failed to do so. It will be ordered to make good that deficiency.[73]