057 SCSL-2003-10-PT (1280-1448) 1280

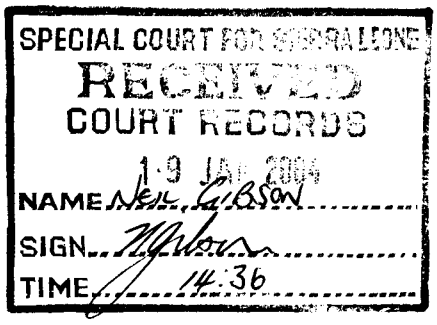
SPECIAL COURT FOR SIERRA LEONE
OFFICE OF THE PROSECUTOR
FREETOWN – SIERRA LEONE

IN THE TRIAL CHAMBER

Before: Judge Bankole Thompson, Presiding
Judge Benjamin Mutanga Itoe
Judge Pierre Boutet

Registrar: Mr Robin Vincent

Date filed: 19 January 2004



THE PROSECUTOR

Against

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

CASE NO. SCSL – 2003 – 10 – PT

PROSECUTION RESPONSE TO DEFENCE PRELIMINARY MOTION ON DEFECTS IN THE FORM OF THE INDICTMENT

Office of the Prosecutor:
Luc Côté, Chief of Prosecutions
Robert Petit, Senior Trial Counsel
Boi-Tia Stevens, Assistant Trial Counsel
Christopher Santora, Assistant Trial Counsel

Defence Counsel:
Ken Fleming, Q.C.

1281

SPECIAL COURT FOR SIERRA LEONE
OFFICE OF THE PROSECUTOR
FREETOWN – SIERRA LEONE

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Against

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

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INTRODUCTION

1. The Prosecution submits that the Defence Preliminary Motion on Defects in the Form of the Indictment ("**the Defence Motion**") filed on behalf of Brima Bazzy Kamara ("**the Accused**") on 7 January 2004 must be rejected as it is time barred. Pursuant to Rule 72, the time for filing such a motion in this case expired on 27 November 2003, 21 days after the Prosecution made preliminary disclosure to the Defence on 6 November 2003. Subsequent disclosure made by the Prosecution pursuant to its continuing disclosure obligations does not extend the time for filing preliminary motions under Rule 72(A).

2. Should the Chamber accept to consider the Defence Motion, the Prosecution submits this Response.

3. In the Defence Motion, the Defence challenges the Indictment against the Accused on the following specific grounds: (a) that the Indictment is defective because when served on the Accused it was not accompanied with a case summary purportedly in violation of Rule 47(c) and (b) that the Prosecutor has not complied with Rule 47(c) because the Indictment as a

whole is vague and ambiguous and fails "to provide any or sufficient particulars," in terms of (i) dates, locations, and names and numbers of victims; (ii) the mode of participation under Article 6(1); (iii) specificity for joint criminal enterprise and (iv) responsibility as a superior under Article 6 (3).

4. On the bases of these grounds, the Defence prays for the following relief from the Trial Chamber: (a) that the Indictment be set aside; (b) in the alternative, that the Trial Chamber order that the Prosecution file an amended Indictment and an accompanying case summary that provides material facts necessary to establish the substantive elements charged, and which indicates precisely the nature of the responsibility alleged in relation to each count and which strikes out from the Indictment the terms "between about" and "included, but not limited to"; (c) in the alternative, that the Prosecution provide additional facts to resolve the alleged ambiguities in the Indictment; and (d) that following any relief granted, the Prosecution make a complete disclosure as required by the Rules.

5. The Prosecution submits that having regard for the principles of pleading set forth by the Ad Hoc Tribunals and the jurisprudence of the Special Court[1] and the applicable Statute and Rules of Procedure and Evidence for the Special Court, the Indictment against Brima Bazzy Kamara in its current form is sufficient to put the Accused on notice of the charges brought against him to enable him to prepare his defence. The Defence Motion should therefore be dismissed.

ARGUMENT

A. The Provision of a "case summary"

6. The Defence argument that the Indictment is defective in its form because of non-compliance with the requirement of Rule 47(c) must be rejected. First of all, the Prosecution fully complied with its obligation under the said rule in that the Prosecution, on 26 May 2003, submitted along with the Indictment for review a copy of the case summary entitled

[1] *See Prosecutor Against Issa Hassan Sesay,* SCSL-2003-05-PT, "Decision and Order on the Defence Motion for Defects in the Form of the Indictment", 13 October 2003; *Prosecutor v. Santigie Borbor Kanu,* SCSL-2003-13-PT, "Decision and Order on the Defence Preliminary Motion for Defects in the Form of the Indictment", 19 November 2003; *Prosecutor v. Allieu Kondewa,* SCSL-2003-12-PT, "Decision on Defence Preliminary Motion on Defect in the Form of the Indictment", 27 November 2003.

"Prosecutor Case Summary."[2] There is no further obligation on the Prosecution regarding service of documents.

7. Secondly, and without any prejudice to the Prosecution's position on whether or not the case summary is required to be served on the Accused, the Prosecution submits that the lack of service of the case summary does not render the Indictment itself defective in form. The technical act of service of a document bears no relevance to a determination on the sufficiency of the contents of an indictment, which determination as stated in the Defence Motion, involves an evaluation of the sufficiency of the allegations in putting the Accused on notice of the charges brought against him. The Defence argument on this grounds should therefore be dismissed.

B. Dates, Locations, Names and Numbers of Victims

8. This Court, in both *Sesay* and *Kanu*, has held that the degree of specificity required in an indictment depends on variables such as "the nature of the allegations," "nature of the specific crimes accused," and "the scale of magnitude on which the acts or events allegedly took place."[3] In the instant case the crimes charged are mass crimes alleged to have been committed on a wide scale and superior responsibility is also alleged. The ICTR stated in the *Ntakirutimana* case that the sheer scale of the alleged crimes may make it "impracticable" to require a high degree of specificity in such matters as the identity of the victims and the time and place of the events[4]. This Court has held that even where mass criminality is not being alleged, the specificity required for pleading such facts as locations and victim identity is less where superior responsibility is alleged.[5] The Prosecution therefore submits that the existing references to dates, locations and names and numbers of victims contained in the Indictment are permissible, as it would be impossible to fully list the exact dates, all the locations and the number and identity of all the victims of these mass crimes.

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[2] *See Indictment Package submitted in this case.*
[3] *Kanu, supra,* note 2 at para. 19; *Sesay, supra* note 2 at para. 8.
[4] *See Prosecutor v. Elizaphan and Gerald Ntakirutimana,* ICTR-96-10 & ICTR-96-17-T, "*Judgement and Sentence",* Trial Chamber I, 21 February 2003, para. 59, *citing Prosecutor v.Kuprekic et. al.* "Appeal Judgement," IT-95-16-A, 23 October 2001.
[5] *Sesay, supra,* note 2 at para. 20.

Dates

9. More specifically and contrary to the Defence's assertion on page 7 of its Motion, the phrase "between about" to denote a time period of the commission of an offence charged is permissible in the context of such wide-spread alleged attacks. In *Kondewa,* this Court upheld a similar use of the word "about" in the Indictment against the accused person in that case.[6] Further, in *Prosecutor v. Kayishema,* the ICTR upheld the use of the phrases "*around*" and "*about*", stating that it is unnecessary for the Prosecution to prove an exact date where the date or time is not a material element to the offence.[7] The Prosecution submits that the phrase "*about*" as pleaded in the instant case covers a specific enough period enabling the Accused to understand sufficiently the time concerning commission of offences. The exact time in itself however, is not a material element to the offences.

10. The Prosecution submits that the phrase "at all times relevant to this indictment" as used in paragraphs 44, 50, 51 and 56 of the Indictment is not vague or unreasonable. The time period is quite clear in that the time frame of the Indictment to which it refers is determinable. Further, the extensive time frame does not render the time period unreasonable per se. Given the alleged regularity with which the relevant offences - forced labour, sexual slavery and use of child soldiers - were committed and the long duration of the offences, it is logical and reasonable that the time frame for these offences would be longer. In a similar challenge in the *Sesay* case, this Court upheld the use of the phrase "at all times relevant to this Indictment".[8]

11. The Defence's complaint about paragraph 57 of the Indictment is untenable. What is of importance is that the Indictment specifically sets out the relevant dates as "between 6 January 1999 and 31 January 1999" and thus puts the Accused on sufficient notice as to the time period that the offences were committed.

Locations

12. The Prosecution submits that the locations referred to in the Indictment are sufficiently precise, given the nature of the case against the Accused. By specifying the districts and in

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[6] *Kondewa, supra,* note 2 at para.12.

[7] *Prosecutor v. Kayishema,* ICTR-95-1-T, 21, "Judgement", 21 May 1999, paras. 81 & 85-86.

[8] *Sesay, supra* note 2 at paras. 21-22.

some instances the villages in which the crimes allegedly occurred, the Accused is on sufficient notice of the locations of the events, particularly given the small size of a country like Sierra Leone.

13. Contrary to the Defence's assertions on page 9 of its Motion, paragraph 20 of the Indictment is sufficiently precise, especially when read in the context of the whole Indictment. While paragraph 20 generally mentions geographic quadrants, paragraph 28 complements paragraph 20 by specifying the exact districts where the Accused's subordinates are alleged to have committed armed attacks. Furthermore, throughout the Indictment, there are specific references to districts and villages where alleged crimes took place as part of these armed attacks.

14. The Defence request for further particularity in relation to paragraph 50 of the Indictment and Count 11 must also be disregarded. Given the alleged regularity and scale of the underlying offence which not only includes the conscription of boys and girls under the age of 15, but also the use of these boys and girls to participate in active hostilities, the reference in the Indictment to the Republic of Sierra Leone as the locus of the offence is sufficiently particular. In *Kanu,* in a similar challenge to *inter alia* a charge identical to the said paragraph 50 and Count 11, this Court accepted that the reference to the Republic of Sierra Leone for purposes of the location of the offence was sufficiently particular.[9]

Names and Numbers of Victims

15. Under the circumstances as stated above in paragraph 7, the Prosecution is not required to identify the names and number of victims as requested by the Defence on pages 9-10 of its Motion. This Court and also the ICTY and the ICTR have held that it is permissible to identify victims by reference to their group or category.[10] The Indictment in the instant case sufficiently identifies the victims in paragraphs 33-39, 41-45, 47-49, 50, 52-57, 59-63 as civilians from the various regions, and where possible, in paragraphs 41-45, 49, 50, 53, 54,

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[9] *See Kanu, supra,* note 2 *at para. 21.*

[10] *Ibid*; *Prosecutor v. Krnojelac,* IT-97-25, "Decision on the Defence Preliminary Motion on the Form of the Indictment", 24 February 1999, paragraph 58; *See generally, Prosecutor v. Musema,* ICTR-96-13-T, "Judgment", 27 January 2000, paragraphs 942-951.

and 56 by gender. Paragraph 64 also specifically identifies the victims as UNAMSIL peacekeepers and humanitarian assistance workers in the various regions listed.

16. Furthermore, the Prosecution is not required at this pre-trial stage to provide the names of some victims, such as child soldiers, even if it possesses them, as these victims are the subject of an existing witness protection order.[11]

C. The Mode of Participation under Article 6(1)

17. The Prosecution submits that the Indictment is indeed specific as to the modes of responsibility with which the Accused is charged under Article 6(1). Paragraph 15, which precedes the counts in the Indictment, clearly states that the Accused *planned, instigated, ordered, committed*, or that he *aided* and *abetted* the *planning, preparation or execution* of the crimes, or participated in a *common purpose plan* or *design*, or joint criminal enterprise. This puts the Accused on notice that the subsequent counts in the Indictment are based on all the forms of responsibility set forth in paragraph 15.

18. The fact that the Prosecution has pled all modes of liability under Article 6(1) does not render the pleading defective. The Prosecution is not obliged to elect between the different heads of responsibility under Article 6(1) and is at liberty to plead those heads of responsibility cumulatively or alternatively.[12]

D. Specificity for Joint Criminal Enterprise

19. The Prosecution submits that the allegation that the Accused participated in a joint criminal enterprise is specific to each of the counts in the Indictment. Paragraph 24 of the Indictment expressly states that the crimes alleged in the Indictment were a result of the joint criminal enterprise, thereby linking each of the crimes charged to the joint criminal enterprise. Having set out this link in the said paragraph 24, there was no need to repeat it in each of the seventeen counts in the Indictment.

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[11] *See Prosecutor v. Brima Bazzy Kamara*, SCSL-2003-10-PT, "Decision on the Prosecutor's Motion for Immediate Protective Measures For Witnesses and Victims And For Non-Public Disclosure", 23 October 2003.
[12] *See Kondewa, supra,* note 2 at para. 10; *See also Prosecutor v. Mile Mrksic,* IT-95-13/1-PT, Decision on Form of the Indictment, 19 June 2003.

20. Contrary to the Defence's assertions on page 13 of its Motion, the Indictment sufficiently alleges the nature of the joint criminal enterprise, the nature of the Accused' participation, the identity of those involved in the joint criminal enterprise, and the time frame of the alleged joint criminal enterprise. The nature and the purpose of the joint criminal enterprise are set out throughout the Indictment, in particular in paragraphs 9, 10, 11, and 23-25. The nature of the Accused' participation is set out generally in paragraph 18 and specifically in paragraphs 19-23. The identity of those involved in the joint criminal enterprise is specified in paragraphs 8, 19, 21 and 22. It is also sufficiently clear from a reading of the Indictment as a whole that the time frame of the joint criminal enterprise is all times relevant to the Indictment. Paragraph 9 for instance, states that shortly after 25 May 1997, the AFRC and the RUF acted jointly thereafter. Paragraphs 23 and 24 speak of the AFRC and RUF common plan and paragraph 24 pegs the joint criminal enterprise to the crimes alleged in the Indictment and therefore to the dates of the alleged crimes.

21. This Court, in *Sesay*, ruling on the Indictment against an Accused in a similar position of authority, found that the said Indictment sufficiently identified the nature of the joint criminal enterprise, the nature of the Accused' participation and the identity of others involved in the joint criminal enterprise.[13] The Prosecution submits that the same circumstances apply to the present Indictment.

State of Mind of the Accused when Pleading Joint Criminal Enterprise

22. The Prosecution submits that it is not required to plead the state of mind of the Accused for the allegation of joint criminal enterprise. The state of mind of the Accused is conspicuously missing from the factors required for pleading joint criminal enterprise as set forth in the seminal case of *Prosecutor v. Krnojelac.*[14]

23. In any event, the Prosecution submits that the state of mind of the Accused for purposes of joint criminal enterprise is sufficiently pleaded in the Indictment. In relation to joint criminal enterprise, the ICTY in *Brdanin and Talic* held that the state of mind can be

[13] *Sesay, supra,* note 2 at para. 27.
[14] *See Prosecutor v. Krnojelac,* IT-97-25, "Decision on Form of Amended Indictment", 11 May 2000, para. 16, stating that an indictment charging joint criminal enterprise is required to include the nature of the enterprise, the time periods and persons involved and the nature of the criminal enterprise.

pleaded in two ways: (1) by pleading evidentiary facts from which the state of mind is necessarily inferred and (2) by pleading the relevant state of mind as a material fact.[15]

24. From the allegations in paragraphs 23-26 of the Indictment that the Accused shared a common plan (joint criminal enterprise) with others and that he participated in crimes within the joint criminal enterprise, it can be inferred that the Accused intended to perpetrate the crimes within the joint criminal enterprise. Paragraphs 24 and 25 also expressly allege in the alternative that the crimes charged were a reasonably foreseeable consequence of the joint criminal enterprise and from which it can be inferred that the Accused, in participating in the joint criminal enterprise, willingly took that risk.

25. The Prosecution also disputes the Defence's assertion that the "unlawful means" of the joint criminal enterprise have not been defined. The unlawful means that were part of the joint criminal enterprise are clearly defined in paragraphs 24 and paragraphs 31-64 of the Indictment.

26. Finally, the Prosecution disputes the Defence's contention that the Prosecution is required to plead that the Accused intended to participate voluntarily in the joint criminal enterprise or that the Accused knew of its existence. The Defence does not cite any authority in support of such proposition. Nevertheless, the Prosecution submits that implicit in the language in paragraph 23 of the Indictment, i.e. that the Accused and the AFRC and the RUF shared a common plan (joint criminal enterprise) is the allegation that the Accused knew of the existence of the joint criminal enterprise, as the Accused can only share a plan with others if he knows of the existence of the plan.

27. As to the voluntary nature of the Accused's participation in the joint criminal enterprise, in *Talic*, the ICTY held that the Prosecution is not required to plead that the Accused acted voluntarily stating that "if Talic [the Accused] wishes to raise an issue as to the voluntary nature of his participation in the joint criminal enterprise pleaded, and if it is a relevant issue in the case, he must at the trial point to or elicit evidence from which it could be inferred that there is at least a reasonable possibility that his participation was not voluntary."[16] Based on this proposition, the Prosecution submits that whether or not the Accused participated

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[15] *See Prosecutor v. Radoslav Brdanin and Momir Talic,* IT 99-36-T, "Decision on Form of Further Amended Indictment and Prosecution Application to Amend", 26 June 2001, para 33.
[16] *Brdanin & Talic, supra,* note 16 at para. 48.

voluntarily in the alleged joint criminal enterprise is an evidentiary matter for trial and not appropriate for challenging the form of the Indictment.

E. Responsibility as Superior under Article 6(3)

28. Contrary to the Defence arguments on pages 13-15 of the Motion, the Prosecution has pled with sufficient particularity criminal responsibility under Article 6(3) and refers to the following paragraphs in the Indictment where the material facts underpinning superior responsibility under Article 6(3) are pled:

    a. the relationship between the Accused and the perpetrators of the offences is sufficiently identified as one of superior-subordinate and is pled in paragraphs 18-20;
    b. the identity of subordinates of the Accused is sufficiently identified in paragraphs 8, 9, 18, 20, 21 and 28 as members of the AFRC, Junta, RUF and AFRC/RUF forces;
    c. the allegation that the Accused had effective control over the subordinates is pled in paragraphs 21 and 26;
    d. the acts or crimes of the subordinates for which the Accused as a superior is alleged to be responsible for are pled throughout the Indictment and more specifically in paragraphs 28-64;
    e. the allegation of knowledge on the part of the Accused and his failure to take reasonable measures to prevent such crimes or punish the perpetrators thereof is pled in paragraph 26 of the Indictment.

29. In a similar attack on the sufficiency of the particulars of the subordinates of the Accused in the *Sesay* case, this Court, stated that "it is clear from the Indictment that the AFRC/RUF were the alleged perpetrators" and that "it is sufficient and permissible in law to identify the subordinates of the Accused by reference to their group or category, namely, the AFRC/RUF."[17] Within the context of the Indictment as a whole, the Court found the reference to the perpetrators as members of the AFRC/RUF sufficient enough. The Prosecution sees no reason why a different conclusion should be reached in this case.

30. Further, notwithstanding the Defence contention, paragraph 8 of the Indictment clearly identifies the group that staged the coup and the Indictment in paragraphs 9, 20 and 28 specifically identifies the forces that conducted armed attacks.

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[17] *Sesay, supra,* note 2 at paras. 17-18.

1290

CONCLUSION

31. For the foregoing reasons, the Defence Motion must be dismissed it its entirety. However, should the Trial Chamber deem it necessary for the Prosecution to provide additional information or delete certain phrases, the Prosecution submits that it be permitted to do so by means of a Bill of Particulars. The Prosecution submits that the use of a Bill of Particulars to provide additional information would more expeditiously resolve preliminary issues before trial.

Done in Freetown, 19 January 2004.

For the Prosecution,

Luc Côté
Chief of Prosecutions

Robert Petit
Senior Trial Counsel

PROSECUTION BOOK OF AUTHOURITIES

PROSECUTION INDEX OF AUTHORITIES

1. *Prosecutor v. Issa Hassan Sesay,* SCSL-2003-05-PT, "Decision and Order on the Defence Motion for Defects in the Form of the Indictment", 13 October 2003.

2. *Prosecutor v. Santigie Borbor Kanu,* SCSL-2003-13-PT, "Decision and Order on the Defence Preliminary Motion for Defects in the Form of the Indictment", 19 November 2003.

3. *Prosecutor v. Allieu Kondowa*, "Decision on Defence Preliminary Motion on Defect in the Form of the Indictment", SCSL-2003-12-PT, 27 November 2003.

4. *Prosecutor v. Elizaphan & Gerard Ntakirutimana,* "Judgment and Sentence", ICTR-96-10-T & ICTR-96-17-T, 21 February 2003, para. 59.

5. *Prosecutor v. Kayishema*, "Judgement", ICTR-95-1-T, 21 May 1999, paras. 81-86.

6. *Prosecutor v. Krnojelac,* IT-97-25, "Decision on the Defence Preliminary Motion on the Form of the Indictment", 24 February 1999.

7. *Prosecutor v. Musema,* ICTR-96-13-T, Judgment, 27 January 2000, paras. 942-951.

8. *Prosecutor v. Brima Bazzy Kamara* "Decision on the Prosecutor's Motion for Immediate Protective Measures For Witnesses and Victims And For Non-Public Disclosure" SCSL-2003-10-PT, 23 October 2003.

9. *Prosecutor v. Mile Mrksic,* IT-95-13/1-PT, Decision on Form of the Indictment, 19 June 2003.

10. *Prosecutor v. Tadic*, Judgement, Appeals Chamber, 15 July 1999, paras 185-192.

11. *Prosecutor v. Radoslav Brdanin and Momir Talic,* IT 99-36-T, Decision on Form of Further Amended Indictment and Prosecution Application to Amend, 26 June 2001.

PROSECUTION AUTHOURITIES

1. *Prosecutor v. Issa Hassan Sesay,* SCSL-2003-05-PT, "Decision and Order on the Defence Motion for Defects in the Form of the Indictment", 13 October 2003.

1294

SPECIAL COURT FOR SIERRA LEONE
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THE TRIAL CHAMBER

Before: Judge Bankole Thompson, Presiding Judge,
Judge Benjamin Mutanga Itoe
Judge Pierre Boutet

Registrar: Robin Vincent

Date: 13th day of October 2003

The Prosecutor against

Issa Hassan Sesay
(Case No.SCSL-2003-05-PT)

DECISION AND ORDER ON DEFENCE PRELIMINARY MOTION FOR DEFECTS IN THE FORM OF THE INDICTMENT

Office of the Prosecutor:
Mr. Luc Côté, Chief of Prosecutions
Robert Petit, Senior Trial Counsel

Defence Counsel:
Mr. William Hartzog, Lead Counsel
Alexandria Marcil, Co-Counsel

THE SPECIAL COURT FOR SIERRA LEONE ("the Special Court"),

SITTING as Trial Chamber ("the Trial Chamber") composed of the Judge Bankole Thompson, Presiding Judge, Judge Pierre Boutet and Judge Benjamin Mutanga Itoe;

BEING SEIZED of the Defence Preliminary Motion for Defects in the Form of the Indictment filed on the 24th day of June 2003 on behalf of Issa Hassan Sesay ("the Motion") pursuant to Rule 72 (B) (ii) and (D) of the Rules of the Special Court ("the Rules");

CONSIDERING that the said Motion is one which, according to Rule 72 (B) (ii), falls within the jurisdiction of the Trial Chamber for determination;

NOTING that the several challenges raised by the Defence in the Motion are as to alleged formal defects in the Indictment against Issa Hassan Sesay approved by Judge Bankole Thompson on the 7th day of March, 2003 sitting as designated Judge of the Trial Chamber pursuant to Rules 28 and 47 of the Rules;

CONSIDERING ALSO the paramount importance of the right of the Accused to object preliminarily to the formal validity of the Indictment and not the substantive issue as to whether the criteria for approving the Indictment were satisfied, and the need to keep the two issues separate and distinct;

CONSIDERING the Response filed by the Prosecution on the 18th day of July, 2003 to the Motion ("the Response");

CONSIDERING ALSO the Reply filed by the Defence on the 28th day of July, 2003 to the Prosecution's Response ("the Reply");

WHEREAS acting on the Chamber's Instructions, the Court Management Section advised the parties on the 17th day of September, 2003 that the Motion, the Response and the Reply would be considered and determined on the basis of the "Briefs" (Written Submissions) of the Parties ONLY pursuant to Rule 73 (A) of the Rules;

NOTING THE SUBMISSIONS OF THE PARTIES

The Defence Motion:

1. By the instant Motion, the Defence seeks the following ORDER:

> "It is hereby requested that the Trial Chamber:
>
> Dismiss the Indictment;
> Alternatively, if the extension of time requested in his separate motion is granted, permit the Defence for Mr. Sesay to file a complete and substantial Preliminary Motion on the Form of the Indictment pursuant to Rule 72;

Alternatively, orders the Prosecutor to clarify this Indictment, and directs the Prosecutor to file the amended Indictment within 30 days from the date of this decision"

2. Specifically, the Defence raises several challenges to the form of the Indictment. They may be categorised as follows:

(i) Failure to distinguish clearly the alleged acts for which the Accused incurs criminal responsibility under Article (1) of the Statute from those in respect of which it is alleged he incurs criminal responsibility under Article 6 (3) of the Statute (paras. 4-5 of the Motion);

(ii) Vague and imprecise nature of the counts in the indictment (paras. 6-15 of the Motion);

(iii) General formulation of counts exemplified by use of phrases like "*including but not limited to*" and the like (paras. 16-23 of the Motion).

The Prosecution's Response

3. In response, the Prosecution seeks to have the Motion dismissed in its entirety; or that, alternatively should the Trial Chamber request any additional particulars, the Prosecution be required to submit the same in the form of a Bill of Particulars and not an Amended Indictment.

The Defence Reply

4. In reply to the Prosecution's Response, the Defence reinforces the submissions and contentions made in the Motion.

AND HAVING DELIBERATED AS FOLLOWS:

5. The fundamental requirement of an indictment in international law as a basis for criminal responsibility underscores its importance and nexus with the principle of *nullum crimen sine lege* as a *sine qua non* of international criminal responsibility. Therefore, as the foundational instrument of criminal adjudication, the requirements of due process demand adherence, within the limits of reasonable practicability, to the régime of rules governing the framing of indictments. The Chamber notes that the rules governing the framing of indictments within the jurisdiction of the Special Court are embodied in the Founding Instruments of the Court. Firstly, according to Article 17 (4) (a) of the Court's Statute, the accused is entitled to be informed "promptly" and "in detail" of the nature of the charges

1254

against him. Secondly, Rule 47 (C) of the Rules of Procedure and Evidence of the Special Court expressly provides that:

> The indictment shall contain, and be sufficient of 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.

6. The cumulative effect of the above provisions is to ensure the integrity of the proceedings against an accused person and to guarantee that there are no undue procedural constraints or burdens on his ability to adequately and effectively prepare his defence. Predicated upon these statutory provisions, the Chamber deems it necessary, at this stage, to articulate briefly the general applicable principles from the evolving jurisprudence on the framing of indictments in the sphere of international criminality. One cardinal principle is that an indictment must embody a concise statement of the facts specifying the crime or crimes preferred against the accused. A second basic principle is that to enable the accused to adequately and effectively prepare his defence, the indictment must plead with sufficient specificity or particularity the facts underpinning the specific crimes. Judicial support for these principles abound in both national legal systems and the international legal system.

7. As to the specific principles on the framing of indictments deducible from the evolving jurisprudence of sister international criminal tribunals, the Chamber finds that the following propositions seem to represent the main body of the law:

(i) Allegations in an indictment are defective in form if they are not sufficiently clear and precise so as to enable the accused to fully understand the nature of the charges brought against him.[1]

(ii) The fundamental question in determining whether an indictment was pleaded with sufficient particularity is whether an accused had enough detail to prepare his defence. [2]

(iii) The indictment must state the material facts underpinning the charges, but need not elaborate on the evidence by which such material facts are to be proved.[3]

(iv) The degree of specificity required in an indictment is dependent upon whether it sets out material facts of the Prosecution's case with enough

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[1] *The Prosecutor v. Karemera* ICTR -98-44-T, Decision on the Defence Motion pursuant to Rule 72 of the Rules of Procedure and Evidence, pertaining to, *inter alia*, lack of jurisdiction and defects in the form of the Indictment, ICTR, Trial Chamber, April 25, 2001, para 16. See also *Prosecutor v. Kanyabashi*, ICTR -96-15-I, Decision in Defence Preliminary Motion for Defects in the Form of the Indictment, 31 May 2000, para 5.1.

[2] *Kupreskic* , Judgement AC, para 88, see also *The Prosecutor v. Laurent Semanza*, Case No. ICTR-97-20-T, 15 May, 2003.

[3] *Kupreskic*, Judgement AC, para 88.

detail to inform the accused clearly of the charges against him so he may prepare his defence.[4]

(v) The nature of the alleged criminal conduct with which the accused is charged, including the proximity of the accused to the relevant events is a decisive factor in determining the degree of specificity in the indictment.[5]

(vi) The indictment must be construed as a whole and not as isolated and separate individual paragraphs.[6]

(vii) The practice of identifying perpetrators of alleged crimes by reference to their category or group is permissible in law.[7]

(viii) Where an indictment charges the commission of crimes on the part of the accused with "other superiors", the Prosecutor is not obliged to provide an exhaustive list of such "other superiors".[8]

(ix) In cases of mass criminality the sheer scale of the offences makes it impossible to give identity of the victims.[9]

(x) Identification of victims in indictments by reference to their group or category is permissible in law.[10]

(xi) The sheer scale of the alleged crimes make it "impracticable" to require a high degree of specificity in such matters as the identity of the victims and the time and place of the events.[11]

(xii) Individual criminal responsibility under Article 6(1) and criminal responsibility as a superior under Article 6(3) of the Statute are not mutually exclusive and can be properly charged both cumulatively and alternatively based on the same set of facts.[12]

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[4] *Prosecutor v. Elizaphan and Gerald Ntakirutimana*, Judgement and Sentence, Case No ICTR -96-10 and ICTR 96-17-T, TCI, 2 February, 2003.

[5] *Prosecutor v. Meakic, Gruban, Fustar, Banovic, Knezevic*, "Decision on Dusan Fustar's Preliminary Motion on the Form of the Indictment"; IT-02-65-PT, 4 April, 2003.

[6] *Prosecutor v. Krnojelac*, "Decision on the Defence Preliminary Motion on the Form of the Indictment.". IT-97-25, 24 February, 1999, para 7.

[7] *Prosecutor v.Kvocka et al*, IT-98-30-PT, "Decision on Defence Preliminary Motion on Form of Indictment" TC III, 12 April 1999, para 22.

[8] *Prosecutor v. Nahimana*, ICTR-96-11-T " Decision on the Defence Motion on Defects in the Form of the Amended Indictment, 17 November, 1998, paras 3-4.

[9] *Kvocka et al*, supra 6, paras 16-17.

[10] *Krnojelac, supra 6.*

[11] *Ntakirutimana, supra 4.*

[12] *Kvocka, supra 9* para 50; see also *Prosecutor v. Musema*, ICTR-96-13-T, Judgement, TCI, 27, Jaunuary 2001, para 884-974; para 891-895, and *Prosecutor v. Delalic* et al, Judgement IT-96-21-T, 16 November 1998.

8. Based generally on the evolving jurisprudence of sister international tribunals, and having particular regard to the object and purpose of Rule 47 (C) of the Special Court Rules of Procedure and Evidence which, *in its plain and ordinary meaning*, does not require an unduly burdensome or exacting degree of specificity in pleading an indictment, but is logically consistent with the foregoing propositions of law, the Chamber considers it necessary to state that in framing an indictment, the degree of specificity required must necessarily depend upon such variables as (i) the nature of the allegations, (ii) the nature of the specific crimes charged, (iii) the scale or magnitude on which the acts or events allegedly took place, (iv) the circumstances under which the crimes were allegedly committed, (v) the duration of time over which the said acts or events constituting the crimes occurred, (vi) the time span between the occurrence of the events and the filing of the indictment (vii) the totality of the circumstances surrounding the commission of the alleged crimes.

9. In this regard, it must be emphasized that where the allegations relate to ordinary or conventional crimes within the setting of domestic or national criminality, the degree of specificity required for pleading the indictment may be much greater than it would be where the allegations relate to unconventional or extraordinary crimes for example, mass killings, mass rapes and wanton and widespread destruction of property (in the context of crimes against humanity and grave violations of international humanitarian law) within the setting of international criminality. This distinction, recently clearly articulated in the jurisprudence[13], follows as a matter of logical necessity, common sense, and due regard to the practical realities. To apply different but logically sound rules and criteria for framing indictments based on the peculiarities of the crimogenic setting in which the crimes charged in an indictment allegedly took place is not tantamount to applying less than minimum judicial guarantees for accused persons appearing before the Special Court. The Defence suggestion that it does, though theoretically attractive, is not a legally compelling argument.

10. The Chamber recalls that the challenges to the Indictment raised by the Defence fall into three main categories, namely: (i) failure to distinguish clearly the alleged acts for which the Accused incurs criminal responsibility under Article 6(1) of the Statute from those in respect of which, it is alleged, he incurs criminal responsibility under Article 6(3) of the Statute; (ii) the vague and imprecise nature of the counts in the Indictment; (iii) general formulation of counts exemplified by use of allegedly impermissible phrases such as "*including but not limited*". In respect of category (i) challenges, one aspect of the Defence complaint is that the Indictment does not differentiate between the acts, allegedly for which the accused incurs criminal responsibility under Article 6(1) of the Statute from those for which criminal responsibility is incurred under Article 6(3). The other is that the same set of facts cannot give rise to both forms of responsibility. Hence, it is contended, the Prosecution must be put to its election. (paras. 4-5 of the Motion).

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[13] See *Archbold International Criminal Courts, Practice, Procedure and Evidence*, Sweet & Maxwell Ltd., London, 2003 at para 6-45 where it is stated: In examining the position of indictments in national law and the degree of specificity required, the Trial Chamber in *Prosecutor v. Kvocka*, Decision on Defence Preliminary Motions on the form of the Indictment, April 12, 1999, paras 14-18, recognized that although a minimum amount of information must be provided in an indictment for it to be valid in form, 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 Trial Chamber at para17, stipulated that this difference is partly due to the massive scale of the crimes falling within the Tribunal's jurisdiction, which might make it impossible to identify all the victims, the perpetrators and the means employed to carry out the crimes.

Paragraph 25 of the Indictment alleges:

> "ISSA HASSAN SESAY, by his acts or omissions, is individually criminally responsible pursuant to Article 6.1 of the Statute for the crimes referred to in Articles 2, 3, and 4 of the Statute as alleged in this Indictment, which crimes 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 reasonably foreseeable consequence of the joint criminal enterprise in which the ACCUSED participated.

Paragraph 26 of the Indictment alleges:

> "In addition, or alternatively, pursuant to Article 6.3 of the Statute, ISSA HASSAN SESAY, while holding positions of superior responsibility and exercising command and control over his subordinates, is individually criminally responsible for the crimes referred in Articles 2, 3, and 4 of the Statute. The ACCUSED is responsible for the criminal acts of his subordinates in that he knew or had reason to know that the subordinate was about to commit such acts or had done so and the ACCUSED failed to take necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof."

11. Article 6 (1) of the Statute provides thus:

> "A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 4 of the present Statute shall be indirectly responsible for the crime."

Article 6 (3) provides as follows:

> "The fact that any of the acts referred to in articles 2 to 4 of the present Statute was committed by a subordinate does not relieve his or her superior of criminal responsibility if he or she knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior had failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrator thereof."

12. Predicated upon the reasoning in the foregoing paragraphs herein, and relying *persuasively* on the decisions of the ICTY in *Prosecutor v. Kvocka et al*,[14] and *Prosecutor v. Mile Mrksic*[15] and that of the ICTR in *Prosecutor v. Musema*[16] and a considered analysis of Article 6(1)

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[14] *Supra 11.*

[15] Case No ICTY- 95-13- PT. Decision on the Form of the Indictment, 19 June 2003.

and 6(3), it is the view of the Chamber that depending on the circumstances of the case, it may be required that with respect to an Article 6(1) case against an accused, the Prosecution is under an obligation to "indicate in relation to each individual count precisely and expressly the particular nature of the responsibility alleged," in other words, that the particular head or heads of liability should be indicated.[17] For example, it may be necessary to indicate disjunctively whether the accused "planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation, or execution" of the particular crime against humanity, or violation of Article 3 common to the Geneva Convention and of Additional Protocol II, or other serious violation of international humanitarian law, as alleged. This may be required to ensure clarity and precision as regards the exact nature and cause of the charges against the accused and to enable him to adequately and effectively prepare his defence. Such a methodology would also have the advantage of showing that each count is neither duplicitous nor multiplicitous. However, the Chamber must emphasize that the material facts to be pleaded in an indictment may vary with the specific head of Article (6) (1) responsibility, and the specificity with which they must be pleaded will necessarily depend upon any or some or all of the factors articulated in paragraph 8 herein especially where the crimes in question are of an international character and dimension. For example, the material facts relating to "planning" the particular crime may be different from those supporting an allegation that the accused "ordered" the commission of the crime depending on the factors set out in paragraph 8.

13. Further, in a case based on superior responsibility pursuant to Article 6(3), the minimum material facts to be pleaded in the indictment are as follows:

(a) (i) that the accused held a superior position;

(ii) in relation to subordinates, sufficiently identified;

(iii) that the accused had effective control over the said subordinates;

(iv) that he allegedly bears responsibility for their criminal acts;

(b) (i) that accused knew or had reason to know that the crimes were about to be or had been committed by his subordinates;

(ii) the related conduct of those subordinates for whom he is alleged to be responsible;

(iii) the accused failed to take the necessary and reasonable means to prevent such crimes or to punish the persons who committed them.

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[16] *Supra* 11.

[17] *The Prosecutor v. Delalic and Others*, Case ICTY-96-21-A, Judgement, 20 February, 2001.

14. With regard to the nature of the material facts to be pleaded in a case under Article 6(3) it follows, in the Chamber's view, that certain facts will necessarily be pleaded with a far lesser degree of specificity than in one under Article 6(1). It would seem, therefore, that in some situations under Article 6(3), given the peculiar features and circumstances of the case and the extraordinary nature of the crimes, it may be sufficient merely to plead as material facts the legal prerequisites to the offences charged as noted in paragraph 13 herein. Further, based on the foregoing reasoning and a close examination of paragraphs 25 and 26 of the Indictment, the Chamber finds the Defence submission that the Prosecution must clearly distinguish the acts for which the Accused incurs criminal responsibility under Article 6 (1) of the Statute from those for which he incurs criminal responsibility under Article 6 (3) to be legally unsustainable. The Chamber also finds that it may be sufficient to plead the legal prerequisites embodied in the statutory provisions. The Defence contention that the same facts cannot give rise to both heads of liability is, likewise, meritricious. The implication that they are mutually exclusive also flies in the face of the law.[18]

15. It is also contended by the Defence that each count charging superior responsibility under Article 6 (3) of the Statute should include "the relationship between the accused and the perpetrators as well as 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 necessary and reasonable measures to prevent such acts or to punish the persons who did them" (para. 8 of the Motion). In response, the Prosecution submits that the Indictment sufficiently pleads the relationship between the Accused and the perpetrators for purposes of superior responsibility at paragraphs 17-19.

16. In this regard, paragraphs 17 -19 allege that:

> 17. At all times relevant to this Indictment, **ISSA HASSAN SESAY** was a senior officer and commander in the RUF, Junta and AFRC/RUF forces.
>
> 18. Between early 1993 and early 1997 the **ACCUSED** occupied the position of RUF Area Commander. Between about April 1997 and December 1999, the **ACCUSED** held the position of the Battled Group commander of the RUF, subordinate only to the RUF Battle Field Commander, SAM BOCKARIE aka MOSQUITO aka MASKITA, the leader of the RUF, FODAY SAYBANA SANKOH and the leader of the AFRC, JOHNNY PAUL KOROMA.
>
> 19. During the Junta regime, the **ACCUSED** was a member of the Junta governing body. From early 2000 to about August 2000, the **ACCUSED** served as the Battle Field Commander of the RUF, subordinate only to the leader of the RUF, FODAY

[18] See *Kvocka*, *supra* 12.

SAYBANA SANKOH, and the leader of the AFRC, JOHNNY PAUL KOROMA.

The Chamber finds that the Indictment sufficiently pleads the relationship between the Accused and the perpetrators in question as "subordinate members of the RUF and AFRC/RUF forces" and the different superior positions that he held at various times, it being sufficient in certain cases under Article 6 (3) to identify the persons who committed the alleged crimes by means of the category or group to which they belong. It is clear from the Indictment that the AFRC/RUF forces were the alleged perpetrators. The Chamber further emphasizes that whether or not the Accused exercised actual control over the subordinate members of the RUF and AFRC/RUF forces is an evidentiary matter that must be determined at the trial. Given such detailed pleading, it is disingenuous to suggest that the Accused does not know precisely his role in the alleged criminality. By no stretch of the legal imagination, taking the indictment as a whole, can it be reasonably inferred that the Accused has been charged for playing the role of a "foot soldier". The Indictment, in various parts, does specify the conduct for which it is being alleged that he must bear responsibility for the acts of his subordinates, for example, paragraphs 31-37.

17. In a more general challenge, the Defence submits that all the counts are vague and imprecise, and that the Prosecution failed to specify the identity or identities of the subordinates with whom the Accused is alleged to be involved in respect of each crime. The Defence submits that it is not enough to identify the alleged subordinates by their group name as " Members of the AFRC/RUF subordinate to or acting in concert with Issa Hassan Sesay" and that such a formulation "does not enable the Accused to understand the nature and the cause of the charges against him" (paras. 6-11 of the Motion). It is noteworthy that in *Prosecutor v. Karemera*, an authority relied upon by the Defence, the order of the Trial Chamber to the Prosecution to specify certain allegations was much qualified. It used the phrase "to the extent possible" and the order was "with regard to the actual crimes allegedly committed that entail his command responsibility, in which capacity, and with regard to which accused's subordinates are concerned". Applying relevant case-law authorities[19] *persuasively*, the Chamber finds that the Indictment herein is pleaded, as far as is practicable, with reasonable particularity, and that it is sufficient and permissible in law to identify the subordinates of the Accused by reference to their group or category, namely, AFRC/RUF.[20]

18. A further Defence submission is that in respect of each and every count, the Prosecution should be ordered to specify , to the extent possible, any further information the Prosecution is in a position to disclose at this stage concerning the identity of the co-accused or co-perpetrator and the involvement of the accused with them. The Defence further submitted that the formulation *"Members of the AFRC/RUF subordinate to or acting in concert with Issa Hassan Sesay..."* is not sufficient (para. 12 of the Motion). The Chamber finds no merit in these submissions, and fails to see how much more detailed information is required in respect of the identities of the co-accused and co-perpetrators and their involvement with the accused, given the scale and level of hostilities, widespread disorder and terrorizing of the population and the

[19] eg. *Kvocka, supra 17.*
[20] *Musema , supra 12.*

routine nature of the crimes, as alleged, in the Indictment as a whole. The Chamber is also mindful that it is trite law that an indictment must plead facts not evidence.

19. Another position taken by Defence is that the Indictment should be more precise as to the formulation *"other superiorss in the RUF"* in paragraph 21 (para. 13 of the Motion). The Chamber disagrees with this submission and notes that where an indictment charges the commission of crimes on the part of the accused with *"other superiors"*, the prosecution is under no obligation to provide an exhaustive list of such *"other superiors"*[21].

20. The Defence further submits that the Indictment should also include the identity of the victims (if not protected) and the precise location of the crimes(para. 14 of the Motion). The Chamber's response to this submission is that generally in cases where the Prosecution alleges that an accused personally committed the criminal acts, an indictment generally must plead with particularity the identity of the victims and the time and place of the events. Exceptionally, however, the law is that in cases of mass criminality (as can be gathered from the whole of the Indictment herein) the sheer scale of the offences may make it impossible to identify the victims.[22] Further, the Chamber wishes to emphasize that even where mass criminality is not being alleged, the specificity required to plead these kinds of facts is not necessarily as high where criminal responsibility is predicated upon superior or command responsibility[23] (as is the case in respect of the Accused herein). The Defence submission is, accordingly, rejected.

21. The next Defence challenge focuses on paragraph 51 of the Indictment. It is contended that the paragraph should be more precise and should include the appropriate date of commission of the offence and that the entire paragraph is too vague and should be set aside (para. 15 of the Motion). Paragraph 51 of the Indictment specifically charges the Accused, as a member of the AFRC/RUF, with abductions and forced labour under Count 12. It alleges that *"at all times relevant to this Indictment, AFRC/RUF engaged in widespread and large scale abductions of civilians and use of civilians as forced labour"*. The count goes on to detail the alleged forms of forced labour and abductions engaged in by the AFRC/RUF in diverse places, including Kailahun District where, it is again alleged that *"at all times relevant to this Indictment, captured civilian men, women and children were brought to various locations within the District and used as forced labour"* by the AFRC/RUF. The Chamber does not find the formulation "at *all times relevant to the this Indictment"* problematic in terms of adequate notice of the alleged abductions and forced labour thereby making it difficult for the Accused to prepare his defence. It is, likewise, not vague.

22. The Chamber agrees with the Prosecution that the use of the said formulation is with reference to a determinable time frame. It presupposes that the alleged criminal activities took place over that time frame and with much regularity, a presupposition that can only be refuted by evidence. Given the brutal nature of the specific crimes alleged, the alleged massive and widespread nature of the criminality involved, and the peculiar circumstances in which they

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[21] See *Prosecutor v. Nahimana, supra 8.*
[22] *The Prosecutor v. Laurent Semanza, supra 2.*
[23] Id.

1305

allegedly took place, the date range specified in the Indictment is not too broad or inconsistent with the latitude of prosecutorial discretion allowed the Prosecution in such matters. In addition, the Chamber notes that the said paragraph is specific as to the victims of the alleged forced labour and that the place of the events is patently restrictive, to wit, "*at various locations in the District*" in contrast to, for example, "*at various locations in Sierra Leone,*" or "*at various places in West Africa*". The Defence submission, therefore, fails.

23. Under category (iii) challenges, the Defence takes objection to the general formulation of the counts in certain particular respects. The main submission is that general formulations like "*such as*" or "*various locations*", or "*various areas....including*" do not specify or limit the reading of the counts but expand the Indictment without concretely identifying precise allegations against the Accused. The pith of the Defence submission is that these phrases are imprecise and non-restrictive. The Chamber's response to this submission is that it is inaccurate to suggest that the phrases "*various locations*" and "*various areas including*" in the relevant counts are completely devoid of details as to what is being alleged. Whether they are permissible or not depends primarily upon the context. For example, paragraphs 41, 44, 45 and 51 allege that the acts took place in various locations within those districts, a much narrower geographical unit than, for example "*within the Southern or Eastern Province*" or "*within Sierra Leone*" This is clearly permissible in situations where the alleged criminality was of what seems to be cataclysmic dimensions. By parity of reasoning, the phrases "*such as*" and "*including but not limited to*" would, in similar situations, be acceptable if the reference is, likewise, to locations but not otherwise. It is, therefore, the Chamber's thinking that taking the Indictment in its entirety, it is difficult to fathom how the Accused is unfairly prejudiced by the use of the said phrases in the context herein. In the ultimate analysis, having regard to the cardinal principle of the criminal law that the Prosecution must prove the case against an accused beyond reasonable doubt, the onus is on the Prosecution to adduce evidence at the trial to support the charges, however formulated. The Chamber finds that even though, as a general rule, phrases of the kind should be avoided in framing indictments, yet in the specific context of paragraphs 23 and 24 they do not unfairly prejudice the Accused or burden the preparation of his defence. The Defence protestation, is therefore, untenable.

24. Another complaint of the Defence is that paragraphs 28, 32, 37, 38, 40, 41 as to the location of the sexual violence as well as the location of the camps, paragraph 42 as to the Freetown area, paragraphs 43, 44, 45, 46, 47, 49 as to the location of the abductions as well as the location of the camps and paragraphs 51, 52, 53, 55, 56 etc are not pleaded with specificity. It is also contended that the Prosecution should be ordered to specify in each count, whether the Accused is charged with having committed the acts solely in specific locations (para. 17 of the Motion). In the alternative, the Defence requests that the general formulation be deleted. After a careful review, *seriatim*, of the paragraphs listed in the Defence Motion, the Chamber's response is that, given the magnitude, scale, frequency and widespread nature of the alleged criminal acts, it is unrealistic to expect the perpetrators of such conduct, as alleged, to leave visible and open clues of the locations and of their partners in crime thereby providing incontestible factual bases of the said crimes. The Chamber finds that the submission is without merit. The Chamber, again, reiterates that it is rudimentary law that an indictment must plead facts not evidence.

25. The next Defence submission is that the description of the offences (or crimes alleged) should be precise and not expressed vaguely, for example, as in paragraph 45 relating to counts 9 and 10 as to physical violence, i.e. "*The mutilations included*", and "*Forced labour included*" in paragraph 47 relating to count 12. Based on the reasoning in paragraph 23 above on the issue of prejudice to the Accused, the Chamber rejects this submission as untenable.

26. Another specific Defence challenge revolves around the description of a common plan. It is that the Prosecutor should be ordered to be more specific regarding the nature or purpose of the common plan. The law on this issue where it is alleged (as in the instant Indictment) that the specific international crimes with which an accused is charged involved numerous perpetrators acting in concert, is that the degree of particularity required in pleading the underlying facts is not as high as in case of domestic criminal courts.[24] This principle notwithstanding, the Chamber finds more than sufficient the pleadings in question based on an examination of paragraph 23 and also paragraphs 8, 20, 21 and 22 of the Indictment. Paragraph 23 alleges:

> The RUF, including the Accused, and the AFRC shared a common plan, purpose or design (joint criminal enterprise) which was to take any actions necessary to gain and exercise political power and control over the territory of Sierra Leone, in particular the diamond mining areas. The natural resources of Sierra Leone, in particular the diamonds, were to be provided to persons outside Sierra Leone in return for assistance in carrying out the joint criminal enterprise.

27. It is evident from paragraph 23 that the Indictment sets out with much particularity the nature of the alleged joint criminal enterprise, namely "*to take actions necessary to gain and exercise political power and control over the territory of Sierra Leone, in particular the diamond areas*". As to the specific identities of those alleged to have been involved in the joint criminal enterprise, the Indictment sets these out with a reasonable measure of specificity in paragraphs 8, 20,21 and 22. The Indictment also details in paragraph 24 the crimes alleged to have been within the scope of the joint criminal enterprise. The nature of the participation of the Accused in the said joint criminal enterprise is likewise set out with much specificity in paragraphs 17-23. Based on the foregoing analysis, the Chamber finds the challenges of the Defence on these matters completely devoid of merit.

28. Based on the reasoning in paragraph 23 above on the issue of prejudice to the Accused, the Chamber also rejects the submission of the Defence that the words "*in particular*" and "*included*" in paragraphs 23 and 24 of the Indictment should be deleted (para. 20 of the Motion).

29. For the reasons stated in paragraph 27 above, the Chamber likewise finds no merit in the Defence submission that paragraph 24 of the Indictment should be more precise and that the word "*included*" should not be used in describing the joint criminal enterprise (para. 21 of the Motion).

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[24] See *Archbold*, supra 12 at para.6-45.

30. The next submission by the Defence is that when charging joint criminal enterprise, the indictment should include precisely the nature of the accused's participation in the criminal enterprise. Specifically, the Defence contends that the Indictment against the Accused does not satisfy the criteria of an indictment charging joint criminal enterprise as stated in *Archbold, para 6-57* and should, therefore, be dismissed (para. 22 of the Motion). *Archbold, para 6-57* sets out the criteria for charging joint criminal enterprise in these terms:

> An indictment charging joint criminal enterprise is required to include the nature of the enterprise, the time periods involved, and the nature of the accused's participation in the criminal enterprise (*Krnojelac, Decision on Form of Amended Indictment, May 11, 2000)*

Upon a close examination of the paragraphs of the Indictment herein charging and alluding to joint criminal enterprise, the Chamber is satisfied that the Indictment fulfils the above criteria, and accordingly rejects the Defence submission.

31. The final challenge put forward by the Defence to the Indictment is in relation to each and every count (in particular paragraphs 31, 37, 42, 45, 46, 52, 57, 58).The main submission in this regard is that the Prosecutor should be ordered to delete the general formulation "*By his acts of omissions in relation, but not limited to those events...Issa Hassan Sesay...is individually criminally responsible...*". The pith of the objection here is that the general formulation chosen by the Prosecutor expands the Indictment without concretely identifying precise allegations against the Accused. Accordingly the Defence requests that the Indictment be dismissed, or alternatively that each count should mention the specific allegation against the Accused. (para. 23 of the Motion).

32. The Prosecution's Response is noteworthy for its candour. The Prosecution submit that "while there may be events not specifically alleged in the Indictment, the Statute and Rules provide sufficient safeguards against attempts to unfairly introduce evidence or events outside the framework of the Indictment" (para. 23 of the Response).

33. After meticulously reviewing each count and paragraphs 31, 37, 42, 45, 46, 52, 57 and 58 in particular, the Chamber is satisfied that the phrase "*but not limited to those events*" is impermissibly broad and also objectionable in not specifying the precise allegations against the Accused. It creates a potential for ambiguity. Where there is such potential, the Chamber is entitled to speculate that may be the omission of the additional material facts was done with the aim of moulding the case against the accused in the course of the trial depending on how the evidence unfolds.[25] It is trite law that the Prosecutor should not plead what he does not intend to prove. In the Chamber's considered view, the use of such a formulation is tantamount to pleading by ambush. The doctrine of fundamental fairness precludes judicial endorsement of such a practice. It is, however, not an insuperable procedural difficulty warranting dismissing the Indictment. The Defence submission, in this respect, therefore succeeds. Prosecution is accordingly put to its election: either to delete the said phrase in every count or wherever it appears in the Indictment or provide in a Bill of Particulars specific

[25] *Kupreskic, supra* 2.

additional events alleged against the Accused in each count. The Amended Indictment or Bill of Particulars should be filed within 21 days of the date of service of this Decision; and also served on the Accused in accordance with Rule 52 of the Rules.

34. In conclusion, based on the analysis in paragraphs 5-33 herein and a thorough examination of the Sample Indictments and Charges contained in Appendix H of *Archbold*[26], the Chamber finds the Indictment in substantial compliance with Article 17 (4) (a) of the Court's Statute and Rule 47 (C) of the Rules as to its formal validity.

AND BASED ON THE FOREGOING DELIBERATION, THE CHAMBER HEREBY DENIES THE DEFENCE MOTION in respect of the several challenges raised as to the form of the Indictment except as regards the challenge hereinbefore (paragraphs 31-33) found to be meritorious and upheld, an ORDER to which effect is set out *in extenso* in the annexure hereto for the sake of completeness.

Done at Freetown on the 13th day of October 2003

Judge Bankole Thompson
Presiding Judge, Trial Chamber

[26] Pages 1409 -1481.

1309

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THE TRIAL CHAMBER

Before: Judge Bankole Thompson, Presiding Judge,
Judge Benjamin Mutanga Itoe
Judge Pierre Boutet

Registrar: Robin Vincent

Date: 13th day of October 2003

The Prosecutor against

Issa Hassan Sesay
(Case No.SCSL-2003-05-PT)

ANNEXURE TO THE DECISION AND ORDER ON DEFENCE PRELIMINARY MOTION FOR DEFECTS IN THE FORM OF THE INDICTMENT

Office of the Prosecutor:
Mr. Luc Côté, Chief of Prosecutions
Robert Petit, Senior Trial Counsel

Defence Counsel:
Mr. William Hartzog, Lead Counsel
Alexandria Marcil, Co-Counsel

THE SPECIAL COURT FOR SIERRA LEONE ("the Special Court);

SITTING as Trial Chamber ("the Trial Chamber") composed of Judge Bankole Thompson, Presiding Judge, Judge Pierre Boutet and Judge Benjamin Mutanga Itoe;

BEING SEIZED of the Defence Preliminary Motion for Defects in the Form of the Indictment filed on the 24th day of June, 2003 on behalf of Issa Hassan Sesay ("the Motion") pursuant to Rule 72 (B) (ii) and (D) of the Rules;

CONSIDERING that the said Motion is one which, according to Rule 72 (B) (ii), falls within the jurisdiction of the Trial Chamber for determination;

NOTING that the several challenges raised by the Defence in the Motion are as to alleged defects in the form of the Indictment against Issa Hassan Sesay approved by Judge Bankole Thompson on the 7th day of March, 2003 sitting as designated Judge of the Trial Chamber pursuant to Rules 28 and 47 of the Rules;

CONSIDERING ALSO the paramount importance of the right of the Accused to object preliminarily to the formal validity of the Indictment as distinct from raising the substantive issue as to whether the criteria for approving the Indictment were satisfied, and the need to keep the two issues separate and distinct;

HAVING METICULOUSLY EXAMINED the merits of the challenges and submissions by the Defence in support of the Motion alongside those contained in the Prosecution's Response, and those of the Defence in their Reply;

CONVINCED that the several challenges raised by the Defence as to the formal validity of the Indictment, except one, are devoid of merit; and having so ruled in the Decision herein;

HEREBY DENIES THE SAID MOTION AND ORDER as follows:

(i) that the Defence Preliminary Motion for Defects in the Form of the Indictment filed on the 24th day of June, 2003 on behalf of Issa Hassan Sesay is denied in so far it relates to all challenges except that found to be meritorious and upheld in paragraphs 31-33 of the Decision;

(ii) that consistent with the qualification to (i) above the Prosecution elect either to delete in every count and wherever it appears in the Indictment the phrase *"but not limited to those events"* or provide in a Bill of Particulars specific additional events alleged against the Accused in each count;

(iii) that the aforesaid Amended Indictment or Bill of Particulars be filed within 21days of the date of the service of this Decision and also on the Accused according to Rule 50 of the Rules;

(iv) that this Annexure is deemed to form part of the Decision herein.

Done at Freetown

13th day of October 2003

Judge Bankole Thompson
Presiding Judge

1312

PROSECUTION AUTHOURITIES

2. *Prosecutor v. Santigie Borbor Kanu,* SCSL-2003-13-PT, "Decision and Order on the Defence Preliminary Motion for Defects in the Form of the Indictment", 19 November 2003.

1313

SPECIAL COURT FOR SIERRA LEONE
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THE TRIAL CHAMBER

Before: Judge Bankole Thompson, Presiding Judge,
Judge Benjamin Mutanga Itoe
Judge Pierre Boutet

Registrar: Robin Vincent

Date: 19th day of November, 2003

The Prosecutor against

Santigie Borbor Kanu
(Case No.SCSL-2003-13-PT)

DECISION AND ORDER ON DEFENCE PRELIMINARY MOTION FOR DEFECTS IN THE FORM OF THE INDICTMENT

Office of the Prosecutor:
Mr. Luc Côté, Chief of Prosecutions
Mr. Robert Petit, Senior Trial Counsel
Mr. Christopher Santora

Defence Counsel:
Professor Geert-Jan Alexander Knoops

THE SPECIAL COURT FOR SIERRA LEONE ("the Special Court"),

SITTING as Trial Chamber ("the Trial Chamber") composed of Judge Bankole Thompson, Presiding Judge, Judge Pierre Boutet and Judge Benjamin Mutanga Itoe;

BEING SEIZED of the Defence Preliminary Motion for Defects in the Form of the Indictment filed on the 17th day of October 2003 on behalf of Santigie Borbor Kanu ("the Motion") pursuant to Rule 72 (B) (ii) and (D) of the Rules of Procedure and Evidence of the Special Court ("the Rules");

CONSIDERING that the said Motion is one which, according to Rule 72 (B) (ii), falls within the jurisdiction of the Trial Chamber for determination;

NOTING that the several challenges raised by the Defence in the Motion are as to alleged formal defects in the Indictment against Santigie Borbor Kanu approved by Judge Pierre Boutet on the 16th day of September, 2003 sitting as designated Judge of the Trial Chamber pursuant to Rules 28 and 47 of the Rules;

CONSIDERING ALSO the paramount importance of the right of the Accused to object preliminarily to the formal validity of the Indictment and not the substantive issue as to whether the criteria for approving the Indictment were satisfied, and the need to keep the two issues separate and distinct;

CONSIDERING the Response filed by the Prosecution on the 24th day of October, 2003 to the Motion ("the Response");

CONSIDERING ALSO the Reply filed by the Defence on the 30th day of October, 2003 to the Prosecution's Response ("the Reply");

WHEREAS acting on the Chamber's Instructions, the Court Management Section advised the parties on the 14th day of November 2003 that the Motion, the Response and the Reply would be considered and determined on the basis of the "Briefs" (Written Submissions) of the Parties ONLY pursuant to Rule 73 (A) of the Rules;

NOTING THE SUBMISSIONS OF THE PARTIES

The Defence Motion

1. By the instant Motion, the Defence seeks the following REMEDIES:

> "As regards the judicial consequences and remedies for the analyzed deficiencies, in the particular Indictment, the Defence respectfully prays that primarily the Prosecutor be ordered to specify or particularize the elements of the Indictment as mentioned in Chapter III above within a time frame as to be set by your Court, failure of which should result in dismissal of the Indictment.

With regard to the particularization of the Indictment, the Defence refers to paras 31-33 of the above mentioned *Sesay* Decision, and respectfully prays the Special Court to implement them equally in the case of Mr. Kanu. Accordingly the Defence respectfully prays that the Prosecution be ordered to provide a Bill of Particulars as set out in the Annexure to the *Sesay* Decision, in order to remedy the deficiencies in the present Indictment."

2. Specifically, the Defence raises several challenges to the formal validity of the Indictment. They are grouped as follows:

(A) Lack of Specificity Regarding Different Forms of Individual Criminal Responsibility,

(B) Lack of Specificity Regarding Various Counts.

The Prosecution's Response

3. In response, the Prosecution submits for reasons set out *in extenso* at paragraphs 4-17 of their Response, that the Defence Motion has no basis in fact or in law, and should, therefore, be dismissed.

The Defence Reply

4. In reply to the Prosecution's Response, the Defence reinforces the submissions and contentions put forward in the Motion.

AND HAVING DELIBERATED AS FOLLOWS:

5. Expounding the law governing the framing of indictments in international criminal law, the Court in its recent Decision in the *Prosecutor v. Issa Hassan Sesay*[1] had this to say:

"The fundamental requirement of an indictment in international law as a basis for criminal responsibility underscores its importance and nexus with the principle of *nullum crimen sine lege* as a *sine qua non* of international criminal responsibility. Therefore, as the foundational instrument of criminal adjudication , the requirements of due process demand adherence, within the limits of reasonable practicability, to the regime of rules governing the framing of indictments."[2]

[1] (Case No. SCSL-2003-05-PT) Decision and Order on Defence Preliminary Motion for Defects In the Form of the Indictment dated 13 October 2003 at para. 5 *per* Judge Thompson.

[2] Id. *supra* note 1. The Court in the said Decision further noted as follows: " the rules governing the framing of indictments within the jurisdiction of the Special Court are embodied in the Founding Instruments of the Court. Firstly, according to Article 17 (4) of the Court's Statute, the accused is entitled to be informed "promptly" and in "detail" of the nature of the charges against him." Secondly, Rule 47(C) of the Rules of Procedure and Evidence of the Special Court expressly provides:" The Indictment shall contain, and be sufficient if it contains, the name

6. Consistent with the general and specific principles governing the framing of indictments adumbrated by the Court in the aforesaid Decision, this Chamber, guided by the said principles and criteria enunciated in paragraphs 5-9 therein, now proceeds to examine *seriatim* the several challenges and submissions put forward by the Defence as to the formal validity of the Indictment herein.

7. As already noted, the challenges or objections taken by the Defence to the form of the Indictment are (A) lack of specificity regarding different forms of individual criminal responsibility and (B) lack of specificity regarding various counts.

8. Under group (A) of the objections, the Defence contends generally that the Prosecution's allegations in paragraphs 23-26 of the Indictment that "(i) primarily, the Accused participated in a joint criminal enterprise and (ii) alternatively, the Accused would bear individual criminal responsibility.....lack the requisite specificity" as required by Article 17(4) of the Court's Statute and Rule 47 (C) of its Rules of Procedure and Evidence. Specifically, this challenge is of a four-fold dimension. It is that the doctrine of joint criminal enterprise, as pleaded, lacks specificity as to the role and position of the Accused in the alleged joint criminal enterprise; that the Indictment, in its present form, does not particularize how the Accused, as an individual, could have played a relevant role in an alleged joint criminal enterprise comprising two organised armed factions; that the Indictment does not adequately specify the category of the joint criminal enterprise alleged; and further that the Indictment fails to establish the nexus between the joint criminal enterprise and the specific crimes alleged.

9. Paragraph 23 of the Indictment charges the Accused in these terms:

> "The AFRC, including the ACCUSED, and the RUF shared a common plan, purpose or design (joint criminal enterprise) which was to take any actions necessary to gain and exercise political power and control over the territory of Sierra Leone, in particular the diamond mining areas. The natural resources of Sierra Leone, in particular the diamonds, were to be provided to persons outside Sierra Leone in return for assistance in carrying out the joint criminal enterprise."

10. Paragraph 24 of the Indictment alleges:

> "The joint criminal enterprise included gaining and exercising control over the population of Sierra Leone in order to prevent or minimize resistance to their geographic control, and to use members of the population to provide support to the members of the joint criminal enterprise. The crimes alleged in this Indictment, including unlawful killings, abductions, forced labour, physical and sexual violence, use of child soldiers, looting and burning of civilian structures, were either actions within the joint criminal enterprise or were a reasonable consequence of the joint criminal enterprise."

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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 the making of his case."

11. Paragraph 25 of the Indictment alleges:

> "SANTIGIE BORBOR KANU, by his acts or omissions, is individually criminally responsible pursuant to Article 6.1 of the Statute for the crimes referred to in Articles 2, 3, and 4 of the Statute as alleged in this Indictment, which crimes 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."

12. From a close examination of the entire Indictment and paragraphs 23 -26, it is inaccurate to suggest that the alleged joint criminal enterprise is not pleaded with sufficient particularity as to the role and position of the Accused. For example, paragraph 25 delineates with much specificity the details of the Accused's alleged role in the joint criminal enterprise. The allegation is that he "planned, instigated, ordered, committed the said crimes within the joint criminal enterprise or "otherwise aided and abetted" in the planning, preparation or execution of the said crimes. As regards his position in the joint criminal enterprise, the Chamber finds that, according to the Indictment, the Accused was "a senior member of the AFRC/RUF, Junta and AFRC/RUF forces" (para. 18 of Indictment) and variously, that he was "a member of the Junta governing body, the AFRC Supreme Council" (para. 19 of the Indictment), and that he was also "a senior commander of the AFRC/RUF forces in Kono District" (para. 20 of the Indictment, and "one of the three Commanders of AFRC/RUF forces during the attack on Freetown on 6th July, 1999" (para. 20 of Indictment). The Chamber, accordingly, rejects this challenge as untenable.

13. The Chamber also rejects the Defence contention that the Indictment does not particularize how the Accused, as an individual, would have played a relevant role in an alleged joint criminal enterprise comprising two organised armed forces not constituted of private persons. This contention is meritricious since it is clear from the Indictment that the AFRC/RUF forces comprised "private persons" of which the Accused was, allegedly, one. The Indictment alleges throughout that there was an alliance between the two organized armed factions even though, initially, they were separate entities.

14. The Defence contention that the Indictment does not adequately specify the category of joint criminal enterprise alleged, in the opinion of the Chamber, lacks substance for the reasons hereinafter articulated. In this connection, the Chamber disagrees with the Defence submission that there is an obligation on the Prosecutor to elect between the basic joint criminal enterprise concept of liability and the extended one. The Chamber finds nothing in the case-law authorities requiring the Prosecution to elect between the basic category of joint criminal enterprise theory of liability and the extended category theory. The Appeals Judgment in *Prosecutor v Tadic*[3] imposes no such obligation. On this issue, all the Court did in that case was recall that a close scrutiny of the relevant case-law on the subject "shows that broadly speaking, the notion of common purpose encompasses three distinct categories of collective criminality", and then

[3] Case No. IT-94-IA, July 15,1999.

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articulate in paragraphs 196 - 206 the different categories of joint criminal enterprise, and the extent to which the second category is a variant of the first. The Chamber also wishes to emphasize that the *Prosecutor v Krnojelac*[4] is no authority for the proposition that there is an obligation on the Prosecution to elect in an indictment between the two categories of joint criminal enterprise liability. Clearly, in that case the Trial Chamber held that where "only a basic joint criminal enterprise had been pleaded, it would not be fair to the Accused to allow the Prosecutor to rely upon the extended form of joint criminal enterprise liability in the absence of such an amendment to the Indictment to plead it expressly"[5]. For the foregoing reasons, the Chamber cannot sustain the Defence challenge.

15. As regards the issue that the Indictment fails to establish a nexus between the joint criminal enterprise and the specific crimes alleged, the Chamber's response is that such nexus seems clear from a careful reading of paragraph 24 of the Indictment, the scope of which is of general applicability to the whole Indictment, to wit:

> "The crimes alleged in this Indictment, including unlawful killings, abductions, forced labour, physical and sexual violence, use of child soldiers, looting and burning of civilian structures, were either actions within the joint criminal enterprise or were a reasonably foreseeable consequence of the joint criminal enterprise".

16. Further, under group (A) challenges, the Defence contends that nowhere in the Indictment are the factual and material elements as to the alleged "effective control over his subordinates" by the Accused specified in respect of the alleged superior responsibility doctrine. The pith of this objection is that the Prosecution has not provided the factual foundation for the assertion that the Accused had "effective control over his subordinates" as mentioned in paragraph 26 of the Indictment. The short answer of the Chamber to this complaint is that the factual basis for the allegation is found at paragraphs 18-21 of the Indictment. Further, as was emphasized in the *Sesay* Decision,[6] whether or not the Accused exercised actual control over the subordinate members of the RUF and AFRC/RUF forces is an evidentiary matter that must be determined at the trial.[7]

17. Under group (B) challenges, the first complaint of the Defence is "about the lack of specificity of the language of the Indictment" concerning the phrases "*but not limited to these events*" as well as "*included but were not limited to*" used variously in the Indictment. Relying on the ruling in *Sesay* on the first of those phrases, the Defence submits that the Prosecution must elect for the purpose of this Indictment in respect of the same issue as in *Sesay*. After a close scrutiny of the Indictment as to the use of the phrase "*but not limited to these events*", consistent with that ruling, this Chamber finds merit in the Defence Motion on this point. The Prosecution is, accordingly, put to its election: either to delete the said phrase in every count or wherever it appears in the Indictment or provide in a Bill of Particulars specific additional events alleged against the Accused in each count. In so far as the phrase " *included but were not limited to*" is concerned, the Court's decision in *Sesay* left open the possibility that the said phrase could be impermissibly broad if it referred to *'events'* as distinct from *'locations'* and *'dates'*. A close examination of the Indictment herein shows that the phrases "*including but not limited to*" and

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[4] IT-95-25 "Decision on the Defence Preliminary Motion on the Form of the Indictment", 24 February 1999.
[5] Id. *supra* note 4. Judgment 15 March 2002 para.86.
[6] *Supra* note 1 para. 16.
[7] Id.

"*included, but were not limited*" appear at paragraphs 20, 46, and 51 of this Indictment. The Chamber finds that their use in those paragraphs is inextricably interwoven with other key elements of the alleged crimes than mere locations and dates of the events. Hence, the Prosecution is directed to elect in the same manner as in relation to the phrase "*including, but not limited to these events*".

18. The second Defence complaint under this class of challenges is about the use of these allegedly impermissible phrases: (a) "*unknown number of*", (b) "*hundreds of*", (c) "*large- scale*", (d) "*widespread*", (e) "*unknown number of civilians*", (f) "*an unknown number of*", (g) " *widespread and large-scale*", (h) "*a large number of children*".

19. As regards each of these phrases, based upon a thorough examination of the entire Indictment and in particular paragraphs 33-45, paragraphs 51-57, paragraphs 59-64, the Chamber adopts the reasoning of this Court in the *Sesay* case that whether these phrases " are permissible" for the purposes of an indictment alleging criminality in the international domain as distinct from criminality in the domestic sphere "depends primarily upon the context". The Chamber is strongly of the opinion that the use of such phrases " is clearly permissible in situations where the alleged criminality was of what seems to be cataclysmic dimensions,"[8] and where statistics are hard to come by. The Chamber takes note that where there is mass criminality, statistical data collection may not yield exactitude in, for example, the number of civilians or children killed *en masse*. In this connection, the Chamber restates its exposition of the law in the *Sesay* case that:

> "*in framing an indictment, the degree of specificity required must necessarily depend upon such variables as (i) the nature of the allegations; (ii) the nature of the specific crimes charged, (iii) the scale or magnitude on which the acts or events allegedly took place (iv) the circumstances under which the crimes were allegedly committed, (v) the duration of time over which the said acts or events constituting the crimes occurred, (vi) the time span between the occurrence of the events and the filing of the indictment, (vii) the totality of the circumstances surrounding the commission of the alleged crimes*"[9]

20. Applying the foregoing principle to the instant situation, the Chamber is of the view that having regard, ***as alleged,*** to the totality of the circumstances under which the crimes charged in the Indictment were committed, the superior position of the Accused at the material time, the nature of the crimes, their magnitude and scale, the widespread character of the same in terms of locations, the regularity with which the acts took place, that the specificity requirement must be assessed with reference to the nature and peculiarities "of the crimogenic setting in which the crimes charged allegedly took place....."[10] For these reasons, the Chamber rejects these complaints as lacking merit.

21. Another objection put forward by the Defence is that "the Indictment does not make any mention of names or particulars of the victims mentioned therein", and that this "leads to insufficient specificity given the fact that,.....the Indictment does not even provide a close indication of the number of the alleged victims of the mentioned crimes." A submission on this point is made in paragraph 35 of the Motion. The Chamber's response to this complaint is that

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[8] *Supra* note 1 para. 23.
[9] Id. para. 8.
[10] Id. 9.

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given, ***as alleged***, the scale of the mass killings and destruction, and the widespread and systematic nature of the crimes charged together with their frequency, it would seem unrealistic to expect *pin-point particularity in laying the charges in the Indictment on matters like identity of victims, locations and dates of the events. It is also trite law, as recognised by this Court, that in cases of mass criminality, "the sheer scale of the offences makes it impossible to identify the victims"*[11] *and the time and place of the events"*[12]. Taking the Indictment as whole and particularly paragraphs 33-39, 41-45, 47-49, 50, 52-57, 59-63, 41-45, 49, 53 and 64, the Chamber finds pleaded, within the limits of reasonable practicability, sufficient information as to the identities of victims, locations and dates of events in respect of the alleged crimes. To require more is tantamount to asking the Prosecution "to do the impossible".[13] The Chamber is convinced, therefore, that no unfair prejudice is done to the Accused by the use of such phrases. At the end of the day, in the Chamber's view, *"having regard to the cardinal principle of the criminal law that the Prosecution must prove the case against an accused beyond reasonable doubt, the onus is on the Prosecution to adduce evidence at the trial to support the charges, however formulated."*[14] *In effect, the Prosecution must stand or fall by their own charges.*

22. The final complaint put forward by the Defence concerns Count 2 of the Indictment. For a fuller comprehension of its gravamen, it is reproduced below *verbatim*:

> Concerning Count 2 of the Indictment, The Defence holds the opinion that the term "collective punishments" has not been specified because it is as such not keyed to the alleged events set forth in the paras. 32-57 to which paragraphs the Indictment here refers. Para 31 of the Indictment merely states that the charges in Count 3-13 were committed to punish the civilian population for allegedly supporting the elected government of President Kabbah, or for failing to provide sufficient support to the AFRC/RUF. However, when reading the paras. 32-57 of the Indictment, no mention is made of these crimes being committed as part of the alleged collective punishments. It is thus not clear to the Accused what exactly he has been accused of in this matter. Moreover, as this term "collective punishments" is only inserted in Article 4(2) of the Additional Protocol II to the Geneva Conventions, without being explicitly employed in common Article 3 of the Geneva Conventions, arguably this is not a self-evident term. This part of Count 2 does therefore not fulfil the requirement mentioned in the *Sesay* Decision, namely the observation that "[allegations in an indictment are defective in form if they are not sufficiently clear and precise so as to enable the accused to fully understand the nature of the charges brought against him". The Defence therefore submits that the term "collective punishments" be deleted in the Count or, in the alternative, the Prosecutor be ordered to provide particulars as to the alleged nexus between this term and the separate Counts 3-13.

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[11] *Prosecutor V. Kvocka et al.* IT-98-30-PT "Decision on Preliminary Motion on Form of Indictment" TC III,12 April 1999, para.22. *Prosecutor v. Issa Hassan Sesay*, Case No. SCSL-2003-05-PT, Decision and Order on Defence Preliminary Motion for Defects in the Form of the Indictment, 13 October, 2003 para. 7

[12] *Prosecutor v. Elizaphan and Gerald Ntakirutima*, Judgment and Sentence, Case No ICTR-96-10 and ICTR 96-17-T, TCI, 2 February 2003.

[13] *Prosecutor v. Radoslav Brdanin & Momir Tadic*, IT-99-36, "Decision on Objections by Momir Tadic to the Form of the Amended Indictment", 20 February, 2001 para. 22.

[14] *Sesay, supra* note 1 at para 23 *per* Judge Thompson.

23. The Indictment charges the Accused in Counts 1 and 2 respectively (page 1) with "Terrorizing the Civilian Population *and Collective Punishment*". The Indictment further alleges that:

> "Members of the AFRC/RUF subordinate to and/or acting in concert with SANTIGIE BORBOR KANU *committed the crimes set forth below in paragraphs 32 through 57 and charged in Counts 3 through 13*, as part of a campaign to terrorize the civilian population of the Republic of Sierra Leone," (para. 31).

There is the further allegation that:

> "The AFRC/RUF *also committed the crimes to punish the civilian population* for allegedly supporting the elected government of President Ahmed Tejan Kabbah and factions aligned with that government, or for failing to provide sufficient support to the AFRC/RUF." (para. 31).

The Chamber's interpretation of the above extracts ***is that the same crimes which were committed to terrorize the civilian population, and those set forth in paragraphs 32 through 52 and also charged in Counts 3-13 were the same crimes that were committed to punish the civilian population.*** The Chamber is strongly of the view that any other interpretation is tantamount to doing violence to the language of the Indictment. From the Chamber's perspective, the phrase "collective punishments" is not problematic; what acts constitute "collective punishments" is a function of evidence that will be determined at the trial. The Defence contention, therefore, fails.

24. The Chamber notes with interest that relying on a proposition found at page 104 of his recently published book[15], learned Counsel for the Defence made this submission at paragraph 35 of his Motion under the theme "Criteria Deriving From Case Law with Respect To Forms of Indictment":

> "Therefore, the indictment should not prevent the defense in, for example, investigating the potential alibi or in the cross-examination of witnesses. In the event the identity of victims, place and date of the events and other factual elements are more material, the degree of specificity is required to be more particular."

Evidently, as a proposition deducible from the ICTY case-law on the subject, learned Counsel is correct in referencing the point. But he himself rightly notes, at the same page, that the ICTY held in *Kvocka case*[16] that "the massive scale of crimes (.....) make it impractical to require a high degree of specificity in such matters as the identity of the victims and the dates for the commission of crimes." The citation also references the *Krnojelac* [17] decision as authority for the proposition that "albeit ....the indictment must enable the accused and the defence to finally and adequately prepare the defence so that it must provide (some) information as to the identity of victims, place, date of the alleged crimes and means by which the offence was committed". The clear effect, in the Chamber's view, of *Kvocka* is to postulate, as learned Counsel himself

[15] Geert-Jan Alexander Knoops, An Introduction to the Law of International Criminal Tribunals, A Comparative Study , New York: Transnational Publishers,2003.
[16] *Supra note* 11.
[17] "Decision on the Defence Preliminary Motion on the Form of the Indictment", IT-99-25, 24 February 1999.

acknowledges, *that specificity in cases of such extraordinary crimes, as alleged, is not absolute.* This view of the law is consistent with the principles developed by this Court in *Sesay*, relying persuasively upon logically coherent and consistent decisions of ICTY and ICTR on the subject.

25. Based upon those principles and consistent with the decision in *Sesay*, the Chamber finds that the Indictment, as a whole, *except in relation to the use of the formulations "but not limited to these events" "including, but not limited to," "included but were not limited to"*, contains sufficient information to put the Accused on notice as to the charges against him. The Chamber also finds that, in the context of the extraordinary character of the crimes alleged, the dates, locations and offences charged are sufficiently clear to notify the Accused of the charges against him as one of those who ***allegedly*** "bear the greatest responsibility" for the said crimes, and to enable him to put forward the defence of *alibi*. Further, the Chamber does not find legally compelling and cogent the contention that specificity is required to enable an accused person to engage in cross-examination of witnesses. Of course, the Chamber agrees with learned Counsel that the requirement of specificity is part and parcel of the notion of a fair trial. *However, the Chamber wishes to emphasize that it remains true (as noted in paragraph 23) that, in the ultimate analysis, the crux of the matter is whether the Prosecution have proved their case beyond a reasonable doubt predicated upon the charges as formulated.*

26. In conclusion, based on the analysis in paragraphs 5-25 herein and a thorough view of the Sample Indictments and Charges contained in Appendix H of *Archbold*[18], the Chamber finds the Indictment in substantial compliance with Article 17 (4) (a) of the Court's Statute and Rule 47 (C) of the Rules as to its formal validity.

AND BASED ON THE FOREGOING DELIBERATION, THE CHAMBER HEREBY DENIES THE DEFENCE MOTION in respect to the several challenges raised as to the form of the Indictment except as regards the challenge hereinbefore (paragraph 17) found to be meritorious and upheld, an ORDER to which effect is set out *in extenso* in the annexure hereto for the sake of completeness.

Done at Freetown
on the 19th day of November, 2003

Judge Bankole Thompson
Presiding Judge, Trial Chamber

Seal of the Special Court

[18] International Criminal Courts, Practice, Procedure and Evidence, Sweet and Maxwell, London, 2003, pages 1409 -1481.

1323

SPECIAL COURT FOR SIERRA LEONE
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THE TRIAL CHAMBER

Before: Judge Bankole Thompson, Presiding Judge,
Judge Benjamin Mutanga Itoe
Judge Pierre Boutet

Registrar: Robin Vincent

Date: 19th day of November, 2003

The Prosecutor against

Santigie Borbor Kanu
(Case No. SCSL -2003-13-PT)

ANNEXURE TO THE DECISION AND ORDER ON DEFENCE PRELIMINARY MOTION FOR DEFECTS IN THE FORM OF THE INDICTMENT

Office of the Prosecutor:
Mr. Luc Côté, Chief of Prosecutions
Mr. Robert Petit, Senior Trial Counsel
Mr. Christopher Santora, Senior Trial Counsel

Defence Counsel:
Professor Geert-Jan Alexander Knoops

THE SPECIAL COURT FOR SIERRA LEONE ("the Special Court")

SITTING as Trial Chamber ("the Trial Chamber ") composed of Judge Bankole Thompson, Presiding Judge, Judge Pierre Boutet and Judge Benjamin Mutanga Itoe;

BEING SEIZED of the Defence Preliminary Motion for Defects in the Form of the Indictment filed on the 16th day of October, 2003 on behalf of Santigie Borbor Kanu ("the Motion") pursuant to Rule 72 (B) (ii) and (D) of the Rules;

CONSIDERING that the said Motion is one which, according to Rule 72 (B) (ii), falls within the jurisdiction of the Trial Chamber for determination;

NOTING that the several challenges raised by the Defence in the Motion are as to alleged defects in the form of the Indictment against Santigie Borbor Kanu approved by Judge Pierre Boutet on the 16th day of September, 2003 sitting as designated Judge of the Trial Chamber pursuant to Rules 28 and 47 of the Rules;

CONSIDERING ALSO the paramount importance of the right of the Accused to object preliminarily to the formal validity of the Indictment as distinct from raising the substantive issue as to whether the criteria for approving the Indictment were satisfied, and the need to keep the two issues separate and distinct;

HAVING METICULOUSLY EXAMINED the merits of the challenges and submissions by the Defence in support of the Motion alongside those contained in the Prosecution's Response, and those of the Defence in their Reply;

CONVINCED that the several challenges raised by the Defence as to the formal validity of the Indictment, except two, are devoid of merit; and having so ruled in the Decision herein;

HEREBY DENIES THE SAID MOTION AND ORDER as follows:

(i) that the Defence Preliminary Motion for Defects in the Form of the Indictment filed on the 16th day of October, 2003 on behalf of Santigie Borbor Kanu is denied in so far it relates to all challenges except those found to be meritorious and upheld in paragraph 17 of the Decision;

(ii) that consistent with the qualification to (i) above the Prosecution elect either to delete in every count and wherever it appears in the Indictment the phrases "but not limited to those events", "including but not limited to", and "included, but were not limited to" or provide in a Bill of Particulars specific additional events alleged against the Accused in each count;

1325

(iii) that the aforesaid Amended Indictment or Bill of Particulars be filed within 7 days of the date of the service of this Decision and also on the Accused according to Rule 50 of the Rules;

(iv) that this Annexure is deemed to form part of the Decision herein.

Done at Freetown
on the 19th day of November 2003

Judge Bankole Thompson
Presiding Judge

Seal of the Special Court

1326

PROSECUTION AUTHOURITIES

3. *Prosecutor v. Allieu Kondowa*, "Decision on Defence Preliminary Motion on Defect in the Form of the Indictment", SCSL-2003-12-PT, 27 November 2003.

1327

SPECIAL COURT FOR SIERRA LEONE
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THE TRIAL CHAMBER

Before: Judge Bankole Thompson, Presiding Judge,
Judge Benjamin Mutanga Itoe
Judge Pierre Boutet

Registrar: Robin Vincent

Date: 27th day of November 2003

The Prosecutor against

Allieu Kondewa
(Case No.SCSL-2003-12-PT)

DECISION AND ORDER ON DEFENCE PRELIMINARY MOTION FOR DEFECTS IN THE FORM OF THE INDICTMENT

Office of the Prosecutor:
Mr. Luc Côté, Chief of Prosecutions
James C. Johnson, Senior Trial Counsel
Mohamed A. Bangura, Associate Trial Counsel

Defence Counsel:
James McGuill, Lead Counsel
James Evans, Co-Counsel
Charles Margai, Co-Counsel

1328

THE SPECIAL COURT FOR SIERRA LEONE ("the Special Court"),

SITTING as Trial Chamber ("the Trial Chamber") composed of the Judge Bankole Thompson, Presiding Judge, Judge Pierre Boutet and Judge Benjamin Mutanga Itoe;

BEING SEIZED of the Defence Preliminary Motion for Defects in the Form of the Indictment filed on the 7th day of November 2003 on behalf of Allieu Kondewa ("the Motion") pursuant to Rule 72 (B) (ii) and (D) of the Rules of the Special Court ("the Rules");

CONSIDERING that the said Motion is one which, according to Rule 72 (B) (ii), falls within the jurisdiction of the Trial Chamber for determination;

NOTING that the several challenges raised by the Defence in the Motion are as to alleged formal defects in the Indictment against Allieu Kondewa approved by Judge Bankole Thompson on the 26th day of June, 2003 sitting as designated Judge of the Trial Chamber pursuant to Rules 28 and 47 of the Rules;

CONSIDERING ALSO the paramount importance of the right of the Accused to object preliminarily to the formal validity of the Indictment and not the substantive issue as to whether the criteria for approving the Indictment were satisfied, and the need to keep the two issues separate and distinct;

CONSIDERING the Response filed by the Prosecution on the 17th day of November, 2003 to the Motion ("the Response");

CONSIDERING ALSO that no Reply was filed by the Defence;

WHEREAS acting on the Chamber's Instructions, the Court Management Section advised the parties on the 26th day of November, 2003 that the Motion and the Response would be considered and determined on the basis of the "Briefs" (Written Submissions) of the Parties ONLY pursuant to Rule 73 (A) of the Rules;

NOTING THE SUBMISSIONS OF THE PARTIES

The Defence Motion

1. By the instant Motion, the Defence seeks the following Reliefs from the Court:

> "The Accused asks the Court to dismiss all counts in the Indictment based on Article 6.1 for the reasons outlined in paragraphs 8-13 of the Defence Motion or in the alternative that the Prosecution elect which form of responsibility is alleged for each count."

RGT

"Alternatively or in addition the Accused asks the Court to order the Prosecution to delete certain words and phrases from the Indictment as outlined in paragraphs 14-23."

2. Specifically, the Defence raises several challenges to the formal validity of the Indictment set out fully in paragraph 2 of the Motion and elaborated at paragraphs 3-20 of the same, with supporting authorities;

The Prosecution's Response

3. In response, the Prosecution submits that having regard to the Statute of the Special Court for Sierra Leone, the Rules of Procedure and Evidence of the said Court and the applicable jurisprudence, the Indictment against Allieu Kondewa in its current form is sufficient to put the Accused on notice of the charges brought against him to enable him to prepare his defence, and that, therefore, the instant Motion should be dismissed. The Prosecution's submissions are fully articulated, with supporting authorities, at paragraphs 5-13 of their Response.

4. The Defence filed no Reply.

AND HAVING DELIBERATED THUS:

5. In a seminal Decision[1] on objections and challenges to the formal validity of indictment, this Court took the opportunity to expound exhaustively the principles governing the framing of indictments for the purpose of International Criminal Law, predicated upon an analysis of the evolving jurisprudence of sister international criminal tribunals on the subject. The principles applied in that case were also followed, with necessary adaptations and modifications, in the more recent Decision of *The Prosecutor Against Santigie Borbor Kanu*[2] of the Court. Conscious of the need to preserve logical coherence and consistency in developing the Court's jurisprudence, the Chamber now proceeds to examine, as to their merit, the several challenges and objections raised by the Defence to the formal validity of the Indictment herein in the light of the aforesaid principles.

6. In addressing the issue of the formal validity of the Indictment, the Chamber, by way of precedent, must begin with two fundamental principles. First, "that an indictment must embody a concise statement of the facts specifying the crime or crimes preferred against the accused".[3] Second, that "to enable the accused to adequately and effectively prepare his defence, the indictment must plead with

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[1] *The Prosecutor v. Hassan Issa Sesay* (Case No. SCSL-2003-05-PT), Decision and Order on Defence Preliminary Motion for Defects In the Form of the Indictment, 13 October, 2003.
[2] (Case No. SCSL- 2003 -13- Pt) Decision and Order on Defence Preliminary Motion for Defects in the Form of the Indictment, 19 November, 2003.
[3] See Decision on the *Sesay* Case, *supra* note 1 para 6; see also Article 17 (4) (a) of the Statute of the Special Court for Sierra Leone and Rule 47 (C) of the Court's Rules of Procedure and Evidence; and *The Prosecutor v. Santigie Borbor Kanu, supra* note 2 (footnote 2). p3.

1329

sufficient specificity or particularity the facts underpinning the specific crimes".[4] *Sesay* also laid down that:

> " *in framing the indictment the degree of specificity required must necessarily depend upon such variables as (i) the nature of the allegations, (ii) the nature of the specific crimes charged, (iii) the scale or magnitude on which the acts or events allegedly took place, (iv) the circumstances under which the crimes were committed (v) the duration of the time over which the said acts or events constituting the crimes occurred, (vi) the time span between the occurrence of the events and the filing of the indictment, and (vii) the totality of the circumstances surrounding the commission of the alleged crime.*"[5]

7. Furthermore, in *Sesay*, the Court was at pains to emphasize that whichever régime of rules is being developed by the Courts in framing indictments, the law could not, as "a matter of logical necessity, commonsense, and due regard to the practical realities", fail to distinguish between rules governing the framing of indictments where allegations relate to criminality in the domestic law context and those applicable to the framing of indictments in the international criminal law sphere. In effect, that the "degree of specificity required in indictments before the International Tribunal is different from and perhaps not as high as, the particularity required in domestic criminal law jurisdictions." It was from the foregoing conceptual and doctrinal perspectives that the Chamber in the Preliminary Motions brought on behalf of Issa Sesay and Santigie Borbor Kanu respectively examined the formal validity of the indictments in those cases in response to the several objections raised by the Defence.

8. The challenges in question here fall under two heads, namely:

   i) ***The Prosecution failed to distinguish clearly and specify the alleged acts for which the Accused incurs criminal responsibility under Article 6 (1). Such failure inhibits the ability of the Accused to adequately conduct his defence.***

   ii) ***The inclusion of the phrases "included but not limited to", "about" and "but not limited to those events" renders the Indictment vague and imprecise thereby impeding the Accused in the proper conduct of his defence.***

9. In considering ***the first head of challenges***, it is necessary to reproduce herein the text of Article 6 (1) of the Statute of the Court. It reads thus:

> " *A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in Articles 2 to 4 of the present statute shall be individually responsible for the crime.*"

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[4] Id.
[5] Id. para 8.

In the Chamber's opinion, as a matter of statutory interpretation, Article 6 (1) "sets out the parameters of personal criminal responsibility under the Statute. Any act falling under one of the five categories contained in the provision may entail the criminal responsibility of the perpetrator or whoever has participated in the crime in one of the ways specified in the same provision of the Statute."[6] On the basis of this analysis, it follows that the Indictment, at paragraph 15, sufficiently specifies the various modes of criminal responsibility with which the Accused is charged pursuant to Article 6 (1). Consistent with this reasoning, the Court in *Sesay*[7], stated that:

> "*it may be necessary to indicate disjunctively whether the accused planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation, or execution of the particular crime.*"

But the Court qualified this general proposition by noting that:

> "*material facts to be pleaded in an indictment may vary with the specific head of Article 6 (1) responsibility, and the specificity with which they must be pleaded will necessarily depend upon any or some or all of the factors articulated in paragraph 8 herein especially where the crimes in question are of an international character and dimension.*"

10. What factors did the Chamber articulate? They are:

> "*i.) the nature of the allegations, ii) the nature of the specific crimes charged, iii) the scale or magnitude on which the acts or events allegedly took place, iv.) the circumstances under which the crimes were allegedly committed, v.) the duration of time over which the said acts or events constituting the crimes occurred, vi.) the time span between the occurrence of the events and the filing of the indictment, vii.) the totality of the circumstances surrounding the commission of the alleged crimes.*"[8]

Given the international character and dimension of the crimes alleged in the Indictment herein and the totality of the circumstances surrounding the commission of the alleged crimes gathered, from a review of the Indictment, *as a whole*, the Chamber finds that the Accused is in no way prejudiced by the present state of the pleadings in relation to Article 6 (1) in the context of paragraphs 15, and 20-24. As a matter of law, the Chamber wishes to stress that the Prosecution is not obliged to elect between the different heads of responsibility under Article 6 (1). In the instant case, it has chosen to plead all the different heads of responsibility, consistent with its discretion. Having adopted that course of pleading, the Prosecution will carry the burden of proving the existence of each

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[6] *The Prosecutor v. Dusko Tadic*, Judgment of Appeals Chamber (Case No IT-94-1-A) 15 July 1999 para. 186.

[7] *Supra*, note 1 para. 12.

[8] *Id. Supra*, note 1 para. 8., See also *The Prosecutor v. Santigie Borbor Kanu*, supra note 2 at para. 19 *per* Judge Thompson.

at the trial.[9] Moreover, the Chamber notes that, despite the fact that the law governing the framing of indictments bristles with technicalities, yet it must be emphasized "that the materiality of a particular fact cannot be decided in the abstract. It is dependent on the nature of the Prosecution's case. A decisive factor in determining the degree of specificity with which the Prosecution is required to particularise the facts of its case in the indictment is the nature of the alleged criminal conduct charged to the accused."[10] The Defence challenge relating to Article 6 (1), therefore, fails. Whether the Accused, for example "*planned*", or "*instigated*", or "*ordered*", the commission of any of the crimes specified in Articles 2 to 4 of the Statute is, in the Chamber's view, pre-eminently an evidentiary matter"[11], the key determinant of the success or failure of the Prosecution's case.

11. The ***other head of challenges*** brought by the Defence against the Indictment concerns the inclusion of the phrases "*included but not limited to*", "*about*", and "*but not limited to these events*". In this connection, the Defence submits that the use of these phrases renders the Indictment vague and imprecise thereby impeding the Accused in the conduct of his defence. After a careful review of paragraphs 19-24 of the Indictment, the Chamber agrees with the Defence that the expressions "*but not limited to these events*" and "*included but not limited to*", except in so far as the phrase "*included but not limited to*" relates only to dates and locations *simpliciter* are, consistent with the principle in *Sesay*, "impermissibly broad and also objectionable in not specifying the precise allegations against the Accused." [12] The Chamber, therefore, upholds the Defence challenge on this issue. The Prosecution is, accordingly, put to its election: either to delete the said phrases in every count or wherever they appear in the Indictment or provide in a Bill of Particulars specific additional events alleged against the Accused in each count. The Amended Indictment or Bill of Particulars should be filed within 7 (seven) days of the date of service of this Decision; and also served on the Accused in accordance with Rule 52 of the Rules.

12. In respect of the use of the word "*about*", after a careful review of the Indictment and the specific paragraphs referenced by the Defence, the Chamber does not find the word "*about*" problematic at all in so far as the formulation of the Prosecution's charges goes in the context of the Indictment herein. The Defence contention as to the use of the word is, therefore, untenable.

13. In conclusion, based on the analysis in paragraphs 5-12 herein and a thorough examination of the Sample Indictments and Charges contained in Appendix H of *Archbold*[13], the Chamber finds the Indictment in substantial compliance with

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[9] *See Prosecutor v. Mile Mrksic*, Case No. IT-95-13/1-PT, Decision On Form of the Indictment, TC III, 19 June 2003. at para. 89.

[10] *Kupreskic* et al. Appeals Judgment, para 89.

[11] See *The Prosecutor v. Santigie Borbor Kanu, supra*, note 2 para 21 where the Chamber observed that "the Prosecution must stand or fall by their own charges", *per* Judge Thompson.

[12] Id. para. 33.

[13] *International Criminal Courts, Practice, Procedure and Evidence*, London: Sweet and Maxwell Ltd, 2003, pages 1409-1481.

1357

Article 17 (4) of the Court's Statute and Rule 47 (C) of the Rules as to its formal validity.

AND BASED ON THE FOREGOING DELIBERATION, THE CHAMBER HEREBY DENIES THE DEFENCE MOTION in respect of the several challenges raised as to the form of the Indictment except as regards the challenge hereinbefore (paragraph 11) found to be meritorious and upheld, an ORDER to which effect is set out *in extenso* in the annexure hereto for the sake of completeness.

Done in Freetown on the 27th day of November 2003.

Judge Bankole Thompson
Presiding Judge, Trial Chamber

Seal of the Court

1334

SPECIAL COURT FOR SIERRA LEONE
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FAX: Extension: 178 7001 or +39 0831 257001 Extension: 174 6996 or +232 22 295996

THE TRIAL CHAMBER

Before: Judge Bankole Thompson, Presiding Judge,
Judge Benjamin Mutanga Itoe
Judge Pierre Boutet

Registrar: Robin Vincent

Date: 27th day of November 2003

The Prosecutor against

Allieu Kondewa
(Case No.SCSL-2003-12-PT)

ANNEXURE TO DECISION AND ORDER ON DEFENCE PRELIMINARY MOTION FOR DEFECTS IN THE FORM OF THE INDICTMENT

Office of the Prosecutor:
Mr. Luc Côté, Chief of Prosecutions
James C. Johnson, Senior Trial Counsel
Mohamed A. Bangura, Associate Trial Counsel

Defence Counsel:
James McGuill, Lead Counsel
James Evans, Co-Counsel
Charles Margai, Co-Counsel

THE SPECIAL COURT FOR SIERRA LEONE ("the Special Court"),

SITTING as Trial Chamber ("the Trial Chamber") composed of the Judge Bankole Thompson, Presiding Judge, Judge Pierre Boutet and Judge Benjamin Mutanga Itoe;

BEING SEIZED of the Defence Preliminary Motion for Defects in the Form of the Indictment filed on the 7th day of November, 2003 on behalf of Allieu Kondewa ("the Motion") pursuant to Rule 72 (B) (ii) and (D) of the Rules of the Special Court ("the Rules");

CONSIDERING that the said Motion is one which, according to Rule 72 (B) (ii), falls within the jurisdiction of the Trial Chamber for determination;

NOTING that the several challenges raised by the Defence in the Motion are as to alleged formal defects in the Indictment against Allieu Kondewa approved by Judge Bankole Thompson on the 26th day of June, 2003 sitting as designated Judge of the Trial Chamber pursuant to Rules 28 and 47 of the Rules;

CONSIDERING ALSO the paramount importance of the right of the Accused to object preliminarily to the formal validity of the Indictment and not the substantive issue as to whether the criteria for approving the Indictment were satisfied, and the need to keep the two issues separate and distinct;

HAVING METICULOUSLY EXAMINED the merits of the challenges and submissions by the Defence in support of the Motion alongside those contained in the Prosecution's Response;

CONVINCED that several challenges raised by the Defense as to the formal validity of the Indictment, except in respect of two impermissible phrases, are devoid of merit; and having so ruled in the Decision herein;

HEREBY DENIES THE SAID MOTION AND ORDER as follows:

(i) that the Defence Preliminary Motion for Defects in the Form of the Indictment filed on the 7th day of November 2003 on behalf of Allieu Kondewa is denied in so far it relates to all challenges except those found to be meritorious and upheld in paragraph 17 of the Decision;

(ii) that consistent with the qualification to (i) above the Prosecution elect either to delete in every count and wherever they appear in the Indictment the phrases "*but not limited to those events*", and "*including but not limited to*", or provide in a Bill of Particulars specific additional events alleged against the Accused in each count;

(iii) that the aforesaid Amended Indictment or Bill of Particulars be filed within 7 days of the date of service of this Decision and also on the Accused according to Rule 50 of the Rules;

(iv) that this Annexure is deemed to form part of the Decision herein.

Done at Freetown
On the 27th day of November 2003

Judge Bankole Thompson
Presiding Judge

Seal of the Special Court

1337

PROSECUTION AUTHOURITIES

4. *Prosecutor v. Elizaphan & Gerard Ntakirutimana,* "Judgment and Sentence", ICTR-96-10-T & ICTR-96-17-T, 21 February 2003, para. 59.

1338

UNITED NATIONS
NATIONS UNIES

Tribunal Pénal International pour le Rwanda
International Criminal Tribunal for Rwanda

Or. : Eng.

TRIAL CHAMBER I

Before Judges: Erik Møse, Presiding
Navanethem Pillay
Andrésia Vaz

Registrar: Adama Dieng

Judgement of: 21 February 2003

THE PROSECUTOR

V.

ELIZAPHAN and GÉRARD NTAKIRUTIMANA

Cases No. ICTR-96-10 & ICTR-96-17-T

JUDGEMENT AND SENTENCE

Counsel for the Defence:

Ramsey Clark
David Jacobs

Counsel for the Prosecution:

Charles Adeogun-Phillips
Wallace Kapaya
Boi-Tia Stevens

wealth of detailed evidence, which it had disclosed to the Defence in a timely fashion, concerning times, locations, and victims, from which to draw for the purpose of reducing the imprecision in the Indictments.

59. The question as to whether the Indictments in the present case are defective depends on a concrete assessment of each allegation and involves a comparison of the material that was available to the Prosecution before the trial and the evidence adduced at trial. The Chamber will address this question further by way of a careful examination of the particularity of each specific allegation in connection with the events where this issue arises. It is also important to recall that even if an indictment is considered defective, this may, in some cases, be cured by provision to the Defence of timely, clear, and consistent information detailing the factual basis of the charges. It follows from *Kupreskic* that in light of the factual and legal complexities normally associated with the crimes within the jurisdiction of the Tribunal, there can only be a limited number of cases that fall within that category. In *Kupreskic*, in order to assess whether the Accused were sufficiently informed of the charges, the Appeals Chamber considered disclosed evidence, the information conveyed in the Prosecution's Pre-trial Brief and knowledge acquired during trial.[62] The Trial Chamber is of the view that a similar approach should be adopted in the present case. It recalls that the *Kupreskic* Judgement, which clarified the legal situation, was handed down after the commencement of the trial and almost at the end of the Prosecution's case.

60. The Prosecution's Pre-trial Brief was submitted on 26 July 2001. The trial commenced on 18 September 2001. The Brief contains three paragraphs on the Mugonero Complex attack of 16 April 1994. The first alleges that a convoy of attackers went to the Complex "in vehicles belonging to Pastor Ntakirutimana and others". It does not specifically allege that either Accused was in the convoy. Of particular interest is the third paragraph, which claims that the two Accused were present during the attack, that Elizaphan Ntakirutimana was "present" at the killing of Pastor Sebihe, and that Gérard Ntakirutimana "personally killed" several Tutsi persons, of whom Ukobizaba and Kajongi are the two referred to by name. The approximate time, location, and manner in which the named persons were allegedly killed are not discussed. The Chamber notes that in some respects the Brief provides more details than the Mugonero Indictment.

61. The events in Bisesero are covered by four paragraphs in the Pre-trial Brief. It is alleged that convoys of armed attackers including the two Accused regularly went to Bisesero; that Elizaphan Ntakirutimana ordered two persons to kill an unnamed witness, who was later spared; and that the same Accused "pointed out hiding Tutsi for the attackers to kill". In contrast with the Bisesero Indictment (para. 4.15), these paragraphs do not allege that either Accused killed anyone in Bisesero. In the Chamber's opinion, the Brief provides only limited supplementary details.

[62] *Kupreskic* (AC) para. 124. See also paras. 114-120. The Appeals Chamber considered to what extent the Accused was given appropriate notice by prior disclosure of witness statements or through the Prosecution's opening statement.

1340

PROSECUTION AUTHOURITIES

5. *Prosecutor v. Kayishema*, "Judgement", ICTR-95-1-T, 21 May 1999, paras. 81-86.

1341

United Nations
Nations Unies

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

Before:
Judge William H. Sekule, Presiding
Judge Yakov A. Ostrovsky
Judge Tafazzal Hossain Khan

Registrar:
Mr. Agwu U. Okali

Decision of: 21 May 1999

THE PROSECUTOR
versus
CLÉMENT KAYISHEMA
and
OBED RUZINDANA

Case No. ICTR-95-1-T

JUDGEMENT

The Office of the Prosecutor:
Mr. Jonah Rahetlah
Ms. Brenda Sue Thornton
Ms. Holo Makwaia

Counsel for Clément Kayishema:
Mr. André Ferran
Mr. Philippe Moriceau

Counsel for Obed Ruzindana:
Mr. Pascal Besnier
Mr. Willem Van der Griend

List of Contents

1342

1343

3.4 Specificity of the Indictment

Introduction

81. The Indictment, in setting out the particulars of the charges against the accused, refers to events "around" and "about" a specific date, or between two specified dates. Kayishema is charged separately for massacres at the sites of the Catholic Church and Home St. Jean, the Stadium in Kibuye and Mubuga Church. Paragraphs 28, 35 and 41 of the Indictment detail these massacres as occurring on or about the 17, 18 and 14 April 1994 respectively. The fourth crime site for which both Kayishema and Ruzindana are charged is the Bisesero area between 9 April and 30 June. The question arises, therefore, as to whether sufficient certainty exists to enable an adequate defence to be advanced, thus to ensure the right of the accused to a fair trial.

The Allegations in Relation to the Massacres in the Bisesero Area

82. The Trial Chamber considers it appropriate to distinguish between the first three sites in the Indictment, and the charges raised in respect of the Bisesero area. The exact dates on which massacres occurred at the Catholic Church and Home St. Jean, the Stadium and Mubuga Church were identified in the course of the trial by the Prosecution's case-in-chief. Accordingly, the findings made by this Chamber are set out below in the Factual Findings Part.

83. The Chamber is aware of the difficulties of raising a defence where all of the elements of the offence are not precisely detailed in the Indictment. The difficulties are compounded because the alibi defence advanced by both accused persons does not remove them from the Bisesero vicinity at the time in question. The accused in the *Tadic* case faced similar difficulties.[14] In that instance the Trial Chamber observed the near impossibility of providing a 24-hour, day-by-day, and week-by-week account of the accused's whereabouts for an alibi defence which covers a duration of several months. The Trial Chamber is of the opinion that this is a substantive issue.

84. Nevertheless, it is important to note here that throughout the trial the burden of proving each material element of the offence, beyond a reasonable doubt, has remained firmly on the Prosecution. Whilst, *prima facie*, the accused should be informed in as greater detail as possible of the elements of the offence against them, such details will necessarily depend on the nature of the alleged crimes. The Trial Chamber finds that during its case-in-chief the Prosecution did focus upon various sites throughout the Bisesero region, but because of the wide-ranging nature of the attacks no further specificity was possible in the Indictment.

85. It is unnecessary, however, for the Prosecution to prove an exact date of an offence where the date or time is not also a material element of the offence. Whilst it would be preferable to allege and prove an exact date of each offence, this can clearly not be demanded as a prerequisite for conviction

1344

where the time is not an essential element of that offence.[15] Furthermore, even where the date of the offence is an essential element, it is necessary to consider with what precision the timing of the offence must be detailed. It is not always possible to be precise as to exact events; this is especially true in light of the events that occurred in Rwanda in 1994 and in light of the evidence we have heard from witnesses. Consequently, the Chamber recognises that it has balanced the necessary practical considerations to enable the Prosecution to present its case, with the need to ensure sufficient specificity of location and matter of offence in order to allow a comprehensive defence to be raised.

86. However, because of the foregoing observations, the Trial Chamber opines that where timing is of material importance to the charges, then the wording of the count should lift the offence from the general to the particular.[16] In this respect, the Trial Chamber notes that the *ratione temporis* of this Tribunal extends from 1 January 1994 to 31 December 1994, and the Indictment only refers only to events that occurred in the Bisesero area between the 9 April and 30 June. In fact, during its case-in-chief, and with the more precise definition of massacre sites within the Bisesero area, the Prosecution was able to pinpoint specific periods during which the alleged events occurred. Therefore, the date need only be identified where it is a material element of the offence and, where it is such a necessary element, the precision with which such dates need be identified varies from case to case. In light of this, the Trial Chamber opines that the lack of specificity does not have a bearing upon the otherwise proper and complete counts, and it did not prejudice the right of the accused to a fair trial.

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[1] Motion by the Defence Counsel for Kayishema Calling for the Application by the Prosecutor of Article 20(2) and 20(4) (b) of the Statute. Filed with the Registry, 13 March 1997. The issue was raised again by Mr. Ferran in his closing arguments, Trans., 3 Nov 1998, from p. 30.

[2] The Prosecution's response to the Motion was filed with the Registry on 29 April 1997 and additional information was filed on 5 May 1997.

[3] Order on the Motion by the Defence Counsel for Application of Article 20(2) and (4)(b) of the Statute, 5 May 1997.

[4] Defence Closing Brief for Kayishema, 16 Oct. 1998, p. 3.

[5] *Ibid.*, p. 2-3.

[6] See Mr. Ferran's closing arguments, Trans., 3 Nov. 1998, pp. 54-55.

[7] Trans., 3 Nov. 1998, pp. 55-56.

[8] Def. exh. 59, Report on the Crowd Psychology. Dr. Pouget has been , *inter alia*, Professor of Psychiatry and Psychology, Director of Education, Montpellier University, France; and the appointed expert in psychology for Nimes and Montepellier Courts of Appeal, France.

[9] Motion by the Prosecutor that Evidence of a Defence Expert Witness, Dr. Pouget, be Ruled Inadmissible Pursuant to Article 19(1) of the Statute and Rules 54 and 89 of the Rules.

[10] 1980 TLR 250, 252.

[11] 469 F.2d 552 (D.C. Cir. 1972).

[12] An article by Ann Maass and Gautier Kohnken, in the Law and Human Behaviour Journal, vol. 13, no. 4, 1989, was

1345

shown to the witness and discussed in cross-examination. Trans., 2 Jul. 1998, p. 104.

[13] See Pros. exh. 350A, 350B and 350C.

[14] *Prosecutor v. Dusko Tadic*, International Criminal Tribunal for the Former Yugoslavia, Case No. IT-94-1-T, 7 May 1997, para. 533. (*Tadic* Judgement.)

[15] See, the *Tadic* Judgement, para. 534 and the cases cited therein.

[16] See, for example, the Canadian cases of, *G.B., A.B. and C.S. v. R* (1990) 2 S.C.R. 30, and *R v. Colgan* (1986) 30 C.C.C. (3d) 193 (Court of Appeal), where Monnin C.J.M. found an offence specified as occurring at some point within a six year period to be sufficiently precise.

PROSECUTION AUTHOURITIES

6. *Prosecutor v. Krnojelac,* IT-97-25, "Decision on the Defence Preliminary Motion on the Form of the Indictment", 24 February 1999.

1347

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

1348

causing great suffering (Count 14) and inhuman treatment (Count 17);[1]

1.2 violations of the laws and customs of war, consisting of torture (Count 4), cruel treatment (Counts 7 and 15), murder (Count 10) and slavery (Count 18);[2] and

1.3 crimes against humanity, consisting of persecution on political, racial and/or religious grounds (Count 1), torture (Count 2), inhumane acts (Counts 5 and 13), murder (Count 8), imprisonment (Count 11) and enslavement (Count 16).[3]

2. On 8 January 1999, the accused filed a Defence Preliminary Motion on the Form of the Indictment ("Motion"). On 22 January, the prosecution filed its Response to the Motion ("Response"). Leave was granted to the accused to file a Reply to that Response ("Reply"), and such Reply was filed on 10 February. The prosecution was given leave to file a further Response to two new matters raised in the Reply ("Further Response"), and this was done on 17 February.

II Nature of Accused's Responsibility

3. As to all counts, the accused requires the prosecution to identify, in relation to each count, whether the charge laid in that count is based on the accused's individual responsibility (Art 7(1) of the Statute) or on his responsibility as a superior (Art 7(3) of the Statute).[4] However, paras 4.9 and 4.10 of the indictment assert that the accused has both individual responsibility and responsibility as a superior, as well as (in the alternative) responsibility as a superior only. These assertions are

clearly intended to be read distributively as applying to all the counts in the indictment. This indictment may not be the most stylish of pleadings, but this particular complaint as to form is rejected.

4. The next complaint is that, by pleading in this way, the prosecution does not know whether the accused is being charged "cumulatively or alternatively" which, the accused says, makes the indictment imprecise.[5] As paras 4.9 and 4.10 are to be read distributively, there is no such imprecision, and this complaint is also rejected.

III Different charges based upon the same facts

5. It is also submitted that, because these different responsibilities are based upon the same factual grounds, the indictment is nevertheless defective because "[r]esponsibility may not be accumulated".[6] Such a pleading is said to be contrary to the laws of the former Yugoslavia, but the Statute and the Rules of Procedure and Evidence of the International Tribunal ("Rules") are not to be read down so as to comply with those laws. This pleading issue has already been determined by the International Tribunal in favour of the prosecution: previous complaints that there has been an impermissible accumulation where the prosecution has charged such different offences based upon the same facts – as it has here – have been consistently dismissed by the Trial Chambers, upon the basis that the significance of that fact is relevant only to the question of penalty.[7] More importantly, the Appeals Chamber has similarly dismissed such a complaint.[8]

6. Two specific arguments are nevertheless put by the accused. The first is that the same act or omission cannot support both a charge of individual responsibility and a charge of responsibility as a superior. Whether or not that is so (and it is unnecessary in this case to resolve that issue), that is not the way in

1349

which the indictment here has been pleaded. What the prosecution has done is to assert in fairly general terms that the accused is guilty of a particular offence without identifying any specific acts or omissions of the accused which would demonstrate whether his responsibility is alleged to be individual (either by way of personal participation or as aiding and abetting those who did so participate) or as a superior. For example, par 5.2 says (in part):

> **MILORAD KRNOJELAC** persecuted the Muslim and other non-Serb males by subjecting them to prolonged and routine imprisonment and confinement, repeated torture and beatings, countless killings, prolonged and frequent forced labour, and inhumane conditions within the KP Dom detention facility.

Such an allegation is consistent with either type of responsibility, and the nature of the alleged responsibilities of the accused are spelt out in paras 4.9 and 4.10, in the way already stated.

7. This somewhat clumsy style of pleading appears to have been adopted because this accused was indicted with a number of others whose names remain under seal. There appears to have been an attempt to state the charge in general terms against all of the accused and then to assert that different accused have different responsibilities for the matters so charged. A pleading is not defective because its style is clumsy provided that, when taken as a whole, the indictment makes clear to each accused (a) the nature of the responsibility (or responsibilities) alleged against him and (b) the material facts – but not the evidence – by which his particular responsibility (or responsibilities) will be established. In the present case, the first of those matters has been made clear, as already stated. Something will be said later about the failure of the prosecution to give sufficient (and, in many cases, any) particulars of the material facts by which his different responsibilities will be established. At this stage, it is sufficient to say that there is no basis for this first specific argument put by the accused.

8. The second specific argument put is that crimes against humanity (Art 5 of the Statute), grave breaches of the Geneva Conventions (Art 2 of the Statute) and violations of the laws and customs or war (Art 3 of the Statute) are mutually exclusive, and that the prosecution is not permitted to rely upon them all in relation to the same facts.[9] But each Article is designed to protect different values, and each requires proof of a particular element which is not required by the others.[10] It therefore does not follow that the same conduct cannot offend more than one of those values and thus fall within more than one of those Articles.

9. This submission by the accused may be the product of a confusion with the principle of double jeopardy which, in very general terms, states that a person should not be prosecuted for an offence where he has already been prosecuted and either convicted or acquitted of a different offence arising out the same or substantially the same facts. This principle has found expression in the Constitution of the United States of America:

> [N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb [...].[11]
>
> The International Covenant on Civil and Political Rights also reads:
>
> No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.[12]

B50

The former has been interpreted as saying, and the latter states expressly, that it is concerned with *successive* prosecutions upon different charges arising out of the same (or substantially the same) facts, and not with the prosecution of such charges in the *same* trial.[13]

10. The prosecution must be allowed to frame charges within the one indictment on the basis that the tribunal of fact may not accept a particular element of one charge which does not have to be established for the other charges, and in any event in order to reflect the totality of the accused's criminal conduct, so that the punishment imposed will do the same. Of course, great care must be taken in sentencing that an offender convicted of different charges arising out of the same or substantially the same facts is not punished more than once for his commission of the individual acts (or omissions) which are common to two or more of those charges. But there is no breach of the double jeopardy principle by the inclusion in the one indictment of different charges arising out of the same or substantially the same facts.

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]

1351

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]

15. It is true that, in a limited class of case, less emphasis may be placed upon the need for precision in the indictment where complete pre-trial discovery has been given. For example, if all of the witness statements identify uniformly and with precision the circumstances in which the offence charged is alleged to have occurred, it would be a pointless technicality to insist upon the indictment being amended to reflect that information. That is, however, a rare situation. It has not been shown to be the case here. Indeed, the lack of particularity in the indictment strongly suggests that the prosecution does not have statements which fall within that limited class of case. It is not clear from the judgment of the ICTR in *Prosecutor v Nyiramashuko* whether that case fell within such a limited class, but this Trial Chamber does not accept any interpretation of the ICTR decision which suggests that the supporting material given during the discovery process can be used by the prosecution to fill any gaps in the material facts pleaded in the indictment, except in the limited class of case to which reference has already been made.

16. Where the discovered material does not cure the imprecision in the indictment, the dangers of an imprecise indictment remain – such as in relation to subsequent pleas of *autrefois acquit* and *autrefois convict*.[28] The prosecution has not established that the discovered material does cure these imprecisions.

17. The prosecution is therefore required to amend the indictment so as to identify, *in relation to each count or group of counts*, the material facts (but not the evidence) upon which it relies to establish the individual responsibility of the accused for the particular offence or group of offences charged. The complaints by the accused in relation to the particulars of his responsibility as a superior will be dealt with separately.

V Particularity in pleading – responsibility as a superior

18. In relation to the allegation that the accused was in a position of superior authority,[29] the accused requires the prosecution to identify with precision the "grounds" for the allegations made that, "at the critical time", he was "the head of the KPD FOCA and in a superior position to everybody in the detention camp" and "the person responsible for the functioning of the KPD FOCA as a detention camp".[30] The indictment identifies the relevant time as being from April 1992 until at least August 1993. The statements quoted by the accused are to some extent inaccurately transcribed, and in one aspect significantly so. They are also taken out of context. Paragraph 3.1 in its entirety is in the

1352

following terms:

> SUPERIOR AUTHORITY
>
> 3.1 From April 1992 until at least August 1993, MILORAD KRNOJELAC was the commander of the KP Dom and was in a position of superior authority to everyone in the camp. As commander of the KP Dom, MILORAD KRNOJELAC was the person responsible for running the Foca KP Dom as a detention camp. MILORAD KRNOJELAC exercised powers and duties consistent with his superior position. He ordered and supervised the prison staff on a daily basis. He communicated with military and political authorities from outside the prison. MILORAD KRNOJELAC was present when detainees arrived, appeared during beatings, and had personal contact with some detainees.

19. The accused's argument fails once the actual wording of the paragraph itself is considered. To describe the accused as the "commander" of a camp – the word "commander" is significantly omitted in the statements quoted by the accused – is sufficient "ground" for asserting that he was superior to everyone else and that he was responsible for the functioning of the camp. Even if it were not, the allegations made in the remainder of the paragraph provide sufficient "ground" for asserting that the accused was in a position of superior authority as part of the basis for making him criminally responsible in accordance with Art 7(3). The manner in which these material facts are to be proved is a matter of evidence and thus for pre-trial discovery, not pleading.

20. The accused's second argument is that particular precision is required in relation to these assertions because, he says, at the relevant time the Foca KP Dom in fact consisted of two institutions – one which was under the control of the army and used for detaining war prisoners, and the other a civil correction centre. It is said that the accused will prove that he was the "head" of the second such institution, but that he had "no competence" in relation to the first. This argument also fails. An objection to the form of an indictment is not an appropriate proceeding for contesting the accuracy of the facts pleaded.[31] The prosecution's obligation is to establish the fact alleged in the indictment, that the accused was "the person responsible for running the Foca KP Dom as a detention camp". Its obligation to eliminate any reasonable doubt as to that fact arises only when

the material giving rise to such a doubt appears in the evidence; it does not have to eliminate some possibility merely suggested during the course of argument,[32] still less does it have to plead the evidence by which it will do so.

21. The accused's complaint is rejected.

VI Complaints as to imprecision in the indictment

22. The accused complains of the imprecision of a number of allegations made in the indictment.[33] There is some merit in that complaint, although the details of that complaint provided in his Motion demonstrates at times a misunderstanding of the distinction between the material facts which must be pleaded and the evidence which must be disclosed by way of pre-trial discovery. It is necessary to deal separately with each of these complaints of imprecision.

1353

23. Under the heading "Background", the indictment asserts that "[m]ost, if not all" of the detainees in the Foca KP Dom were "civilians, who had not been charged with any crime".[34] The purpose of this allegation is to demonstrate that such detainees were persons protected by the Fourth Geneva Convention of 1949, an allegation made expressly in para 4.3, and thus relevant to the International Tribunal's jurisdiction to try the charges made under Art 2 of its Statute.

24. The accused complains that he has not been informed of the identity of the detainees who were *not* civilians, which identity, it is said, is an important matter in relation to his responsibility under Art 2.[35] The prosecution, however, does not have to establish who were *not* civilians; it has to establish that the detainees who are alleged to be the victims of the offences charged under Art 2 *were* civilians. The allegations under the heading "Background" are in any event intended only to place in their context the material facts which are alleged in the indictment when dealing with each count or group of counts. It is in relation to those material facts, rather than the background facts of a general nature only, that the accused is entitled to proper particularity.[36]

25. This complaint is rejected.

26. The accused also complains of what is said to be an inconsistency between this assertion that "[m]ost if not all" of the detainees were "civilians, who had not been charged with any crime" (to which reference has already been made) and the assertion (made later in the indictment)[37] that torture had been applied to these detainees in order to obtain a confession from them or to punish them for acts which they had committed.[38] But there is no suggestion in the later assertion that the persons who had been tortured were being detained as a result of some legal process following formal charges laid against them. Indeed, the assertion assumes the absence of any proper legal process.

27. This complaint is also rejected.

28. The accused complains[39] of what is said to be an inconsistency between the allegation that he was the commander of the Foca KP Dom "from April 1992 until at least August 1993" (made in paras 2.1 and 3.1 of the indictment) and that made in para 4.5 of the indictment:

> All acts and omissions alleged in this indictment took place between April 1992 and October 1994, unless otherwise indicated.

If the reference to "at least" August 1993 is intended to permit the prosecution to prove that the accused was such commander 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 is directed to amend paras 2.1 and 3.1 of the indictment by deleting the words "at least" in each paragraph.

29. Upon the assumption that the words "at least" are deleted, there can be an inconsistency between these allegations only if it is assumed that all the offences charged took place at a time when the accused was the commander of the camp. As a matter of *form*, that assumption cannot be made, as the accused is charged with individual responsibility as well as responsibility as a superior. Nevertheless, para 4.9 of the indictment expressly limits the individual responsibility of the accused to the same period ending August 1993, so that it is clear as a matter of *substance* that, if the accused is being charged in the alternative upon both bases in relation to each count,[40] there is no room for an interpretation of the indictment as alleging *any* responsibility on the part of the accused in relation to events which took place after he ceased to be the commander of the Foca KP Dom.

1354

30. The prosecution says that the references in the indictment to the longer period are intended to reflect the responsibilities of others indicted with the accused but whose names remain under seal. The current redacted form of the indictment is thus unintentionally misleading, but the prosecution has now conceded that, so far as *this* accused is concerned, para 4.5 of the indictment should be treated as having been limited to the period ending August 1993. There are appears to be some similar inconsistencies in the indictment, at paras 5.16, 5.30 and 5.36, and the prosecution is directed to make similar concessions in relation to the periods upon which it relies so far as this accused is concerned.

31. A new complaint by the accused, made for the first time in the Reply, is that the allegation that he was the commander of the Foca KP Dom "from April 1992 until [...] August 1993" (made in paras 2.1 and 3.1 of the indictment, and to which reference was made when dealing with the last complaint) is in any event imprecise because the specific date in April upon which he became such commander is not stated.[41] He draws attention to a particular event which is stated in para 5.6 of the indictment to have occurred on 17 April, and he claims not to know whether he is alleged to be responsible for that event as a superior.

32. That complaint is answered once more by paras 4.9 and 4.10 being read distributively as applying to all counts in the indictment. The prosecution does not have to establish the date upon which the accused became commander of the Foca KP Dom. The only fair interpretation of the allegation in question is that the accused is alleged to have been such commander during the period from the beginning of April 1992 until the end of August 1993. It will be sufficient for the prosecution to establish that he was such commander at the time of the various incidents which are alleged to have taken place during that period and of any other incidents upon which the prosecution may rely to establish his responsibility as a superior. In any event, the prosecution now says[42] that the earliest date upon which its best available evidence shows the accused to be the "head" of the Foca KP Dom is 18 April 1992, so that – unless evidence not currently available to it shows otherwise – it will not attribute to the accused any criminal conduct earlier than that date (including the event described in para 5.6 of the indictment).

33. The accused complains[43] of the inclusion of the words "aiding and abetting" in para 4.9 of the redacted indictment, which falls under the heading "General Allegations" and which alleges:

> 4.9 **MILORAD KRNOJELAC,** from April 1992 until August 1993, and others are individually responsible for the crimes charged against them in this indictment, pursuant to Article 7 (1) of the Statute of the Tribunal. Individual criminal responsibility includes committing, planning, initiating, ordering or aiding and abetting in the planning, preparation or execution of any acts or omissions set forth below.

The accused says that the words "aiding and abetting" do not provide sufficient clarity as to the case which he has to meet.

34. The concept of individual responsibility by way of aiding and abetting in the commission of an offence by others was extensively discussed recently in *Prosecutor v Furundzija*,[44] and the concept itself cannot be said to be unclear. The Trial Chamber has already determined in this present decision that the accused is entitled to particulars of the material facts (but not the evidence) upon which the prosecution relies to establish the individual responsibility of the accused for each offence or group of offences charged.[45] Such particulars must necessarily demonstrate the basis upon which it is alleged that the accused aided and abetted those who personally participated in each of the offences charged.

1355

35. This complaint is rejected.

36. The accused complains[46] that the indictment fails in many instances to identify even the approximate time when the various offences are alleged to have occurred.[47] The prosecution submits that, because the charges concern events which took place over a specified period in the conduct of a detention center, it is not obliged to provide information as to the identity of the victim, the specific area where and the approximate date when the events are alleged to have taken place or (where the accused is charged with responsibility as a superior or as aiding and abetting rather than as having personally participated in those events) the identity of the persons who did personally participate in those events.

37. On the face of it, the stand taken by the prosecution is directly contrary to its obligations as to pleading an indictment as imposed by the Statute and the Rules, to which reference has already been made,[48] as interpreted by the Trial Chamber in *Prosecutor v Blaskic*.[49] The prosecution nevertheless relies upon the decision of the Trial Chamber in *Prosecutor v Aleksovski*[50] as justifying its stand.

38. According to that decision, the indictment charged Aleksovski in relation to certain events which occurred in the Kaonik prison while he was responsible for it. The indictment identified a period of five months during which it was alleged that he was so responsible. It is apparent from the decision that the indictment did not identify either the place or the approximate date of the events which are alleged to have occurred. The Trial Chamber stated:[51]

> The time period – the first five months of 1993 – is sufficiently circumscribed and permits the accused to organise his defence with full knowledge of what he was doing. It follows that, because it specifies the overall period during which the crimes were allegedly committed, the indictment does not violate the rules governing the presentation of the charges.

Insofar as that decision supports the submission of the prosecution, that it is not obliged to provide the information referred to in the paragraph before last, there are two observations to be made about it. The first is 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.[52] It cannot be assumed that the two are the same. The second observation is that what the accused needs to know is 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".[53] With great respect to the Trial Chamber in *Aleksovski*, this Trial Chamber is unable to agree with the decision insofar as it supports the prosecution's submission.

39. In any event, the accused in the present case is also charged upon the alternative basis of his own individual participation in these events. Particulars must be supplied which enable the accused to know the nature of the case which he must meet upon that basis.

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

1357

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]

47. Paragraphs 5.6 to 5.9 of the indictment go on to allege facts with a reasonable degree of particularity, and it may be that the prosecution intended paras 5.4 and 5.5 to be merely descriptive in general terms of what follows in those paragraphs. If that is so, this should be made clear. Better still, paras 5.4 and 5.5 should be either deleted or incorporated in the later paragraphs.

48. The complaint as to imprecision is upheld, and the prosecution is directed to amend paras 5.4 and 5.5 of the indictment accordingly.

49. Paragraph 5.15 of the indictment, under a general heading of "Torture and Beatings as Punishment", alleges as facts to be proved:

> 5.15 In the summer of 1992, the detainees AM, FM, HT and S, who passed messages to one another, were beaten by guards as a punishment.

The accused complains, again with some justification, that the prosecution should plead with more particularity than this.[62] The period specified is far too wide, and there is no specification as to whether this happened on one occasion or on different occasions, where and approximately when it happened or the identity of the guards concerned (at least by reference to their category or position as a group).

50. The prosecution is therefore ordered to amend the indictment in order to provide such further and better particulars of the allegation in para 5.15.

51. Paragraph 5.16 of the indictment refers in general terms (and without any particularity) to detainees being subjected to collective punishment for the misdeeds of individual detainees. It then identifies one such incident which is alleged to have occurred in June 1994. If the general allegation is intended to stand alone, it gives the accused no idea at all as to the nature of the case against him.[63] If it is intended to be merely be descriptive in general terms of what follows, then the date is outside the period during which the accused is alleged to have been the commander of the

Foca KP Dom and outside the period identified as that during which he is alleged to have an individual responsibility for the offences alleged. One or the other has to be amended so far as this accused is concerned. The prosecution is directed to amend par 5.16 of the indictment.

52. Paragraph 5.17 of the indictment reads:

> 5.17 Policemen from the local or the military police, in concert with the prison authorities, interrogated the detainees after their arrival. [...] During or after the interrogation, the guards and others often beat the detainees.

The accused complains that it is not clear what was intended by the reference to "others" in the second

sentence.[64] It seems that it was intended to refer to the policemen from the local or military police who also took part in the interrogations but, if this were not intended, the allegation should be made clear. The prosecution is directed to amend para 5.17 accordingly.

53. Paragraph 5.21 of the indictment alleges that the accused participated in concert with political leaders or military commanders in the selection of detainees to be beaten. Those selected are alleged to have been taken for interrogation and then beaten. The indictment then alleges:

> Some of the detainees returned to their rooms severely injured. Some of the detainees were selected for beatings several times. A substantial number of the selected detainees never returned from the beatings and are still missing.

The accused submits that the last sentence renders his defence impossible, because he is not made aware of the identity of those still missing, when they were beaten up and whether the beating is alleged to have a direct bearing upon their disappearance.[65]

54. The indictment does assert, in the same paragraph, that:

> The selected detainees were mostly prominent inhabitants of Foca, who were suspected of not having told the truth during the official interrogations, who were accused of possessing weapons, or who were members of the SDA.

This assertion provides insufficient information as to the identity of the detainees involved. The prosecution is, however, entitled to ask the International Tribunal to infer that the beatings led directly to the disappearance, and it is not to the point at the pleading stage that, as the accused suggests, there may be the possibility that the detainees were "exchanged" (or, as was probably intended, transferred).

55. The accused is nevertheless entitled to particulars of those beaten, those who disappeared, approximately when the beatings occurred and by whom. In each case, those persons should be identified at least by reference to their category (or position) as a group. The complaint as to imprecision is upheld, and the prosecution is directed to amend the indictment accordingly.

56. Paragraphs 5.27-28 allege:

> 5.27 Between June and August 1992, the KP Dom guards increased the number of interrogations and beatings. During this period, guards selected groups of detainees and took them, one by one, into a room in the administration building. In this room, the guards often would chain the detainee, with his arms and legs spread, before beating him. The guards kicked and beat each detainee with rubber batons, axe-handles and fists. During the beatings, the guards asked the detainees where they had hidden their weapons or about their knowledge of other persons. After some of the beatings, the guards threw the detainees on blankets, wrapped them up and dragged them out of the administration building.
>
> 5.28 An unknown number of the tortured and beaten detainees died during these incidents. Some of those still alive after the beatings were shot or died from their injuries in the solitary confinement cells. The beatings and torture resulted, at least, in the death of the detainees listed in Schedule A to this indictment.

1359

Twenty-nine names are listed in the schedule.

57. The accused says in effect that, by dividing these allegations into two paragraphs, the prosecution fails to link the allegations in para 5.27 with the charge of murder (as a crime against humanity and as a violation of the laws and customs of war), whilst para 5.28 contains no detail in relation to the detainees who died.[66] There is no basis for this complaint. If the accused had complained to the prosecution *before* seeking relief by way of motion, as he should have, the answer would simply have been that the two paragraphs should be read together. That is necessarily self-evident.

58. The accused is, however, justified in his complaint as to the lack of precision even when the two paragraphs are read together. The complaint that, because the prosecution is unable to state the number of detainees who died, the accused cannot defend himself is nevertheless rejected. The prosecution must provide some identification of who died (at least by reference to their category or position as a group), and it is directed to amend the indictment accordingly. If its case is to be that the detainees which it identifies died, and also that a number of other persons died whom it is unable to identify, the charge would nevertheless be sufficiently pleaded in the circumstances of this case once those particulars have been included in the indictment.

59. Counts 11-15 of the indictment allege, *inter alia*, that the conditions under which the detainees were kept at the Foca KP Dom were inhumane. The accused complains that the generality of the allegations in the indictment that "the health of many detainees was destroyed" and that "some became suicidal, while others simply became indifferent as to what would happen to them" denies to him the opportunity of proving, for example, that this was no more than a consequence which typically manifests itself in detainees.[67]

60. There is, of course, no onus of proof upon the accused to prove anything, but even a complaint that the accused has been completely denied the opportunity of investigating the allegations must be rejected when the context in which these two allegations appear in the indictment:

> 5.32 During their confinement, the detainees were locked in their cells, except when they were lined up and taken to the mess to eat or to work duties. After April 1992, the cells were overcrowded, with insufficient facilities for bedding and personal hygiene. The detainees were fed starvation rations. They had no change of clothes. During the winter they had no heating. They received no proper medical care. As a result of the living conditions in the KP Dom, the health of many detainees was destroyed. Due to the lack of proper medical treatment, the 40-year old detainee, Enes Hadzic, died in April or May 1992 from a perforated ulcer.
>
> 5.33 Torture, beatings and killings were commonplace in the KP Dom prison. The detainees could hear the sounds of the torture and beatings. The detainees lived in constant fear that they would be next. The detainees kept in solitary confinement were terrified because the solitary confinement cells were generally known to be used for severe assaults. Because all detainees lived in a constant state of fear, some became suicidal, while others simply became indifferent as to what would happen to them. Most, if not all of the detainees, suffered from depression and still bear the physical and psychological wounds resulting from their confinement at KP Dom.

There is thus a clear causal connection asserted by the prosecution. That said, however, the allegations are insufficiently precise as to where and approximately when the torture, the beatings and the killings took place and who was individually responsible for that conduct (at least by reference to their category

or position as a group). If the prosecution is able to do so, particulars as to who (other than Enes Hadzic) were the victims, should be supplied but, if the events themselves are sufficiently identified, the names of the victims are of less importance.

61. The prosecution is ordered to provide such particulars.

62. Both para 5.36 of the indictment expressly, and para 5.37 by implication, assert either individual responsibility or responsibility as a superior on the part of the accused for offences which took place in 1994 – that is, after the period from April 1992 to August 1993 limited by the general allegations in the earlier part of the indictment for such responsibility. The prosecution must concede that, so far as *this* accused is concerned, these allegations are limited to that period ending August 1993.

63. The accused also points to the absence of any identification of time in para 5.39 of the indictment (which falls within the same group of charges alleging enslavement as paras 5.36-37), and requires particulars.[68] The prosecution is directed to amend the indictment so as to provide such particulars.

VII Application for oral argument

64. In his Preliminary Motion on the Form of the Indictment, in his Motion to file a Reply to the prosecution's Response to the Preliminary Motion, and in a separate request following the filing of the prosecution's Further Response, the accused sought leave to make oral submissions. He did so because the Trial Chamber, in its Order for Filing of Motions,[69] ordered that there will be no oral argument on any motion unless specifically requested by counsel for either party and approved by the Trial Chamber, taking into account the need to ensure a fair and expeditious trial.

65. The general practice of the International Tribunal is not to hear oral argument on such motions prior to the trial unless good reason is shown for its need in the particular case. That general practice is soundly based upon the peculiar circumstances in which the International Tribunal operates, in that counsel appearing for accused persons before it invariably have to travel long distances from where they ordinarily practise in order to appear for such oral argument; counsel appearing for the prosecution are often appearing in other trials currently being heard; and the judges comprising the Trial Chamber in question are usually engaged in other trials at the time when the motion has to be determined.

66. Counsel for the accused has not identified any particular issues upon which he wishes to put oral arguments or explained why he was unable to put those arguments in writing. In his most recent request, Counsel for the accused has sought to justify oral submissions upon the basis that the prosecution's Further Response has failed to respond, or has responded in a contradictory and insufficient way, to the submissions which he had put in support of the accused's Motion. Insofar as that very general assertion may be accurate, it is well within the competence of the judges of the International Tribunal to see that fact for themselves.

67. Having regard to the very extensive written submissions already put forward by counsel for the accused, and the need to ensure a fair and expeditious trial, the Trial Chamber is not persuaded of the need for oral argument in this case.

68. The application is refused.

VIII Disposition

1361

FOR THE FOREGOING REASONS, Trial Chamber II decides that –

1. the Motion is granted, with regards to and as set out in paras 17, 28, 30, 39, 42, 46-48, 49-50, 51, 52, 55, 58, 60-61, 62 and 63 of this decision. The Prosecutor is directed to amend the indictment accordingly and to file and serve an amended indictment on or before 26 March 1999; and
2. the Motion is rejected, including the application for oral argument, with regards to and as set out in the remainder of this decision.

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

Done this 24th day of February 1999

At The Hague

The Netherlands

_____

David Hunt

Presiding Judge

[Seal of the Tribunal]

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1. The jurisdiction 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") to try these offences is to be found in Article 2 of the Statute of the International Tribunal ("Statute").

2. Article 3 of the Statute.

3. Article 5 of the Statute.

4. Paragraph 5 of the Motion. See also para 30 of the Motion.

5. *Ibid*, para 18.

6. *Ibid*, paras 5 and 31.

7. See, for example, *Prosecutor v Tadic*, Case No IT-94-1-T, Decision on the Defence Motion on the Form of the Indictment, 14 Nov 1995, paras 15-18; *Prosecutor v Delalic*, Case No IT-96-21-T, Decision on Motion by the Accused Zejnil Delalic Based on Defects in the Form of the Indictment, 2 Oct 1996, para 24; *Prosecutor v Blaškic*, Case No IT-95-14-PT, Decision on the Defence Motion to Dismiss the Indictment Based on Defects in the Form Thereof, 4 Apr 1997, para 32; *Prosecutor v Kupreškic*, Case No IT-95-16-PT, Decision on Defence Challenges to Form of the Indictment, 15 May 1998, p 3. See also *Prosecutor v Delalic*, Case No IT-96-21-T, Judgment, 16 Nov 1998, paras 1221-1223. The International Criminal Tribunal

for Rwanda ("ICTR") – whose Statute does not differ significantly from this Tribunal's Statute in any way relevant to this issue – has as well held that an accused may properly be convicted of two offences arising from the same facts where the offences have different elements, or the provisions creating the offences protect different interests, or it is necessary to record a conviction for both offences in order fully to describe the true character of what the accused did: *Prosecutor v Akayesu*, Case No ICTR-96-4-T, Judgment, 2 Sept 1998, para 468.

8. *Prosecutor v Delic*, Case No IT-96-21-AR72.5, Appeal Decision, 6 Dec 1996, paras 35-36.

9. Paragraph 32 of the Motion.

10. *Prosecutor v Tadic*, Case No IT-94-1-T, Opinion and Judgment, 7 May 1997, para 609; *Prosecutor v Kupreškic*, Case No IT-95-16-PT, Decision on Defence Challenges to Form of Indictment, 15 May 1998, p 3.

11. Fifth Amendment to the Constitution.

12. Article 14(7). See also the European Convention for the Protection of Human Rights and Fundamental Freedoms, Protocol No 7, Art 4(1); and the American Convention on Human Rights, Art 8(4).

13. *Green v United States* 355 US 184 (1957) at 187-188; *United States v Dixon* 509 US 688 (1993) at 704. Such was also the law of ancient Greece: *United States v Jenkins* 490 F 2d 868 (1973) at 870; affd 420 US 358 (1975); and of ancient Rome: *Bartukus v Illinois* 359 US 121 (1959) at 152.

14. See, generally, *Prosecutor v Furundzija*, Case No IT-95-17/1-T, Judgment, 10 Dec 1998, para 249.

15. Paragraph 30 of the Motion.

16. Article 18 of the Statute; and Rule 47(B) of the Rules.

17. Article 21(4)(a) of the Statute.

18. *Ibid*, Art 21(4)(b).

19. *Prosecutor v Blaškic*, 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 20. An oft quoted statement as to the particularity with which a criminal offence must be pleaded in common law jurisdictions is that of Isaacs J in *R v Associated Northern Collieries* (1910) 11 CLR 738 at 740-741:

> "I take the fundamental principle to be that the opposite party shall always be fairly apprised of the nature of the case he is called upon to meet, shall be placed in possession of its broad outlines and the constitutive facts which are said to raise his legal liability. He is to receive sufficient information to ensure a fair trial and to guard against what the law terms 'surprise', but he is not entitled to be told the mode by which the case is to be proved against him."

A valid indictment must identify the essential factual ingredients of the offence charged; it must specify the approximate time, place and manner of the acts or omissions of the accused upon which the prosecution relies, and it must provide fair information and reasonable particularity as to the nature of the offence charged: *Smith v Moody* [1903] 1 KB 56 at 60, 61, 63; *Johnson v Miller* (1937) 59 CLR 467 at 486-487, 501; *John L Pty Ltd v Attorney General (NSW)* (1987) 163 CLR 508 at 519-520; *R v Saffron* (1988) 17 NSWLR 395 at 445.

20. *Prosecutor v Delalic*, Case No IT-96-21-T, Decision on the Accused Mucic's Motion for Particulars, 26 June 1996, paras 9-10.

21. The prosecution has suggested that the decision in *Prosecutor v Blaškic*, 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).

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

23. Rule 66(A)(i).

24. Rule 66(A)(ii).

25. Paragraph 15 of the Response. The proposition is repeated in para 6 of the Further Response.

26. Case ICTR-97-21-I, Decision on the Preliminary Motion by Defence Counsel on Defects in the Form of the Indictment, 4 Sept 1998.

27. (Paragraph 13). The emphasis has been supplied.

28. See, generally, *Connelly v DPP* [1964] AC 1254 at 1301-1302, 1339-1340, 1364, 1368; *Rogers v The Queen* (1994) 181 CLR 251 at 256; and *R v Beedie* [1998] QB 356 at 361.

29. Paragraph 3.1 of the indictment.

30. Paragraph 9 of the Motion.

31. *Prosecutor v Delalic*, Case No IT-96-21-T, Decision on the Accused Mucic's Motion for Particulars, 26 June 1996, paras 7-8; *Prosecutor v Blaškic*, 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 20; and *Prosecutor v Kupreškic*, Case No IT-95-16-PT, Order on the Motion to Withdraw the Indictment Against the Accused Vlatko Kupreškic, 11 Aug 1998, p 2.

32. *R v Youssef* (1990) 50 A Crim R 1 at 2-3 (NSW CCA).

33. Paragraph 14 of the Motion.

34. Paragraph 1.3 of the indictment.

35. Paragraph 15 of the Motion.

36. cf *Prosecutor v Kunarac*, Case No IT-96-23-PT, Decision on Defence Preliminary Motion on the Form of the Amended Indictment, 21 Oct 1998, p 1.

37. Paragraph 4.6 of the indictment.

38. Paragraph 15 of the Motion.

39. Paragraph 16 of the Motion.

40. See paras 3-4, *supra*.

41. Paragraph 12 of the Reply.

42. Paragraph 4 of the Further Response.

43. Paragraph 23 of the Reply. This complaint replaces that originally made in para 17 of the Motion.

44. Case No IT-95-17/1-T, Judgment, 10 Dec 1998, paras 190-249. The legal ingredients to be established by the prosecution are stated in para 249.

45. Paragraphs 13 and 17, *supra*.

1364

46. Paragraph 19 of the Motion.

47. See *Prosecutor v Blaškic*, 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 20, referred to in para 12, *supra*.

48. See para 12, *supra*.

49. 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 20.

50. Case No IT-95-14/1-PT, Decision of Trial Chamber I on the Defence Motion of 19 June 1997 in Respect of Defects in the Form of the Indictment, 25 Sept 1997, para 11.

51. Paragraph 11.

52. 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.

53. Article 21(4)(a) of the Statute.

54. See, for example, *S v The Queen* (1989) 168 CLR 266 at 275 (that case was primarily concerned with the situation where there had been sexual assaults over a long period of time, and where the prosecution had failed to identify from that course of conduct the particular assaults upon which the three counts had been based, but the principle remains the same); *R v Kennedy* (1997) 94 A Crim R 341 (NSW CCA).

55. The procedure is examined in some detail in two New South Wales cases: *R v Basha* (1989) 39 A Crim R 337 at 339-340 (NSW CCA); *R v Sandford* (1994) 33 NSWLR 172 at 180-181 (NSW CCA).

56. Case No IT-94-1-T, Judgment, 7 May 1997, para 607.

57. *Prosecutor v Delalic*, Case No IT-96-21-T, Judgment, 16 Nov 1998, para 228. See also *Prosecutor v Blaškic*, 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 28.

58. *Prosecutor v Delalic*, Case IT-96-21-T, Judgment, 16 Nov 1998, par 234.

59. They charge crimes against humanity (torture and inhumane acts), grave breaches of the Geneva Conventions (torture and wilfully causing serious injury to body or health) and violations of the laws or customs of war (torture and cruel treatment).

60. Paragraphs 20-21 of the Motion.

61. Paragraphs 20 and 22 of the Reply.

62. Paragraph 22 of the Motion.

63. Paragraph 23 of the Motion.

64. Paragraph 24 of the Motion.

65. Paragraph 25 of the Motion.

66. Paragraph 26 of the Motion.

67. Paragraph 27 of the Motion.

B65

68. Paragraphs 28-29 of the Motion.

69. The order is dated 17 June 1998.

1366

PROSECUTION AUTHOURITIES

7. *Prosecutor v. Musema,* ICTR-96-13-T, Judgment, 27 January 2000, paras. 942-951.

1367

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

United Nations
Nations Unies

Original: ENGLISH

Trial Chamber I

Before Judges:
Judge Lennart Aspegren, President
Judge Laïty Kama
Judge Navanethem Pillay

Registry: Mr. Agwu U. Okali

Judgement of: 27 January 2000

THE PROSECUTOR
v.
ALFRED MUSEMA

Case No. ICTR-96-13-A

JUDGEMENT AND SENTENCE

Office of the Prosecutor:
Ms Carla Del Ponte
Ms Jane Anywar Adong
Mr Charles Adeogun-Philips
Ms Holo Makwaia

Counsel for the Defence:
Mr Steven Kay, QC
Prof Michaïl Wladimiroff

TABLE OF CONTENTS

1368

6.3 Legal Findings - Count 5: Crime against Humanity (extermination)

942. *Count 5* of the Indictment charges Musema with *crime against humanity (extermination)*, pursuant to Articles 3(b), 6(1) and 6(3) of the Statute, for the acts alleged in paragraphs 4.1 to 4.11 of the Indictment.
943. The Chamber notes that the Defence has made certain admissions *inter alia*: that the Tutsi were either a racial or ethnic group; that there were widespread or systematic attacks throughout Rwanda, between the period 1 January and 31 December 1994 and these attacks were directed against civilians on the grounds, ethnic affiliation and racial origin. The Chamber finds that the Prosecutor is discharged of the burden of proving these elements in respect of crime against humanity (extermination).
944. The Chamber notes that Article 6(1) of the Statute, provides that a person who "planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in Articles 2 to 4 of the present Statute, shall be individually responsible for the crime." It is also noted that Article 6(3) of the Statute provides that "acts [...] committed by a subordinate does not relieve his or her superior of criminal responsibility if he or she knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof".
945. The Chamber has found, beyond a reasonable doubt that Musema:

- was armed with a rifle and that he ordered, aided and abetted and participated in the commission of attacks on Tutsi civilians who had sought refuge on Muyira hill on 13 and 14 May 1994, and in mid-May 1994. The Accused was one of the leaders of the attacks and some of the attackers were employees of the Gisovu Tea Factory who had traveled to Muyira hill in motor vehicles belonging to the Gisovu Tea Factory;(4)
- participated in an attack on Tutsi civilians, who had sought refuge on Mumataba hill in mid-May 1994. Some of the attackers were tea factory employees who were transported to Mumataba hill in motor vehicles belonging to Gisovu Tea Factory. The Accused was present through out the attack and left with the attackers;(5)
- participated in an attack on Tutsi civilians who had sought refuge in the Nyakavumu cave;(6)
- participated in an attack on Tutsi civilians who had sought refuge on Gitwa hill on 26 April 1994 (7); and;
- participated in an attack on Tutsi civilians between 27 April and 3 May 1994 in Rwirambo.

946. The Chamber finds that in 1994, the Accused had knowledge of a widespread or systematic attack that was directed against the civilian population in Rwanda. This finding is supported by the presence of Musema at attacks in different locations in Kibuye *Préfecture*, as found above, by the testimony of the Accused, and by Defence exhibits. The Chamber recalls, in particular, the following testimony of the Accused:

"[...] compte tenu d'abord d'une part les massacres qui se faisaient à l'intérieur [...] il y avait ce génocide qui venait de se commettre, qui était encore en train de se commettre [...]"(8);

"[...] des gens ont été massacrés à Kibuye, dans d'autres préfectures [...]"(9);

"[...] Ce bébé qui est mort, cette vieille femme, ce petit enfant qui est mort, qui a été massacré, par des bourreaux impitoyables, pour moi ce sont des martyrs."(10)

947. The Chamber further recalls statements made by Musema in letters written to Nicole Pletscher, which were tendered as Defence exhibits, specifically:

"Depuis le 06/04 le pays a vécu un bain de sang incroyable: troubles ethniques - massacres - vols - tout ce qu'on puisse ou plutôt qu'on ne peut pas s'imaginer sur le plan de l'horreur humaine ... Ruhengeri est plus ou moins touché. Mais Byumba est occupé à 100% ... Mais on indique que les morts dépassent des centaine de milliers de gens [...] Des milliers et des milliers de déplacés de guerre, quelle horreur qui s'ajoute à des milliers de cadavres!"(11)

"Au niveaux des droits humanitaires des massacres se sont arrêtés dans la Zône gouvernmentale mais se perpetrent toujours dans la Zône FPR. L'aide humanitaire est attendue mais n'arrive pas."(12)

948. The Chamber finds that, Musema's criminal conduct was consistent with the pattern of the then ongoing widespread or systematic attack on the civilian population and his conduct formed a part of this attack.

949. The Chamber finds, that Musema's conduct: in ordering and participating in the attacks on Tutsi civilians who had sought refuge on Muyira hill and on Mumataba hill; in aiding and abetting in the aforementioned attacks by providing motor vehicles belonging to Gisovu Tea Factory, for the transport of attackers to Muyira hill and Mumataba hill; and in his participation in attacks on Tutsi civilians who had sought refuge in Nyakavumu cave, Gitwa hill and Rwirambo, renders the Accused individually criminally responsible, pursuant to Article 6(1) of the Statute.

950. The Chamber has already found that there existed at the time of the events alleged in the indictment a *de jure* superior-subordinate relationship between Musema and the employees at the Gisovu Tea Factory.(13) The Chamber also found that the Accused had the authority to take reasonable measures to prevent the use of Tea Factory vehicles, uniforms or other Tea Factory property in the commission of the attacks(14). The Chamber finds that the Accused, despite his knowledge of the participation of Gisovu Tea Factory employees in these attacks and their use of Tea Factory property in the commission of these attacks, failed to take any reasonable measures to prevent or punish such participation or such use of Tea Factory property.

951. The Chamber therefore finds beyond a reasonable doubt that Musema is individually criminally responsible for crime against humanity (extermination), pursuant to Articles 3(b), 6(1) and 6(3) of the Statute, as charged in Count 5 of the Indictment.

PROSECUTION AUTHOURITIES

8. *Prosecutor v. Brima Bazzy Kamara* "Decision on the Prosecutor's Motion for Immediate Protective Measures For Witnesses and Victims And For Non-Public Disclosure" SCSL-2003-10-PT, 23 October 2003.

1371

SPECIAL COURT FOR SIERRA LEONE
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THE TRIAL CHAMBER

Before: Judge Bankole Thompson
Presiding Judge, Trial Chamber
Designated Judge Pursuant to Rule 28 of the Rules

Registrar: Robin Vincent

Date: 23rd day of October, 2003

The Prosecutor Against:

Brima Bazzy Kamara
(Case No. SCSL-2003-10-PT)

DECISION ON THE PROSECUTOR'S MOTION FOR IMMEDIATE PROTECTIVE MEASURES FOR WITNESSES AND VICTIMS AND FOR NON-PUBLIC DISCLOSURE

Office of the Prosecutor:
Luc Côté, Chief of Prosecution
James C. Johnson, Senior Trial Counsel
Sharan Parmar, Assistant Trial Counsel

Defence Office:
Ken Fleming QC

THE SPECIAL COURT FOR SIERRA LEONE ("the Court")

BEFORE JUDGE BANKOLE THOMPSON, sitting as a Designated Judge pursuant to Rule 28 of the Rules of Procedure and Evidence ("the Rules") on behalf of the Trial Chamber;

BEING SEIZED of the Motion by the Office of the Prosecutor for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure ("the Motion") and of the "Briefs" (Written Submissions) with attachments in support of the said Motion, filed on the 11th day of July, 2003;

CONSIDERING also the Response filed by the Defence Office on behalf of the Accused on 22nd day of July, 2003, to the aforementioned Prosecution Motion ("the Response");

CONSIDERING the Prosecutor's Reply filed on 24th day of July, 2003 to the aforesaid Defence Response ("the Reply");

WHEREAS acting on the Chamber's Instruction, the Court Management Section advised the parties on the 20th day of October, 2003 that the merits of the Motion, the Response, and the Reply would be determined on the basis of the "Briefs" (Written Submissions) of the parties **ONLY** pursuant to Rule 73 of the Rules;

COGNISANT OF the Statute of the Court ("the Statute"), particularly Articles 16 and 17 thereof, and specifically Rules 53, 54, 73, and 75 of the Rules;

NOTING THE SUBMISSIONS OF THE PARTIES

The Prosecution Motion

1. By the aforementioned Motion, the Prosecutor seeks orders for protective measures for persons who fall into three categories (paragraph 18 of the Motion):

(a) Witnesses who presently reside in Sierra Leone and who have not affirmatively waived their rights to protective measures;

(b) Witnesses who presently reside outside Sierra Leone but in other countries in West Africa or who have relatives in Sierra Leone, and who have not affirmatively waived their rights to protective measures;

(c) Witnesses residing outside West Africa who have requested protective measures.

2. By the said Motion, the Prosecutor also requests that the Defence be prohibited from disclosing to the public or media any non-public materials which are provided to them as part of the disclosure process.

3. Further, the Prosecutor requests that the persons categorised in paragraph 18 of the Motion and the prohibition as to non-public disclosure sought in paragraph 20 of the Motion be provided protection and effected respectively by the Orders sought as set out below (Paragraph 24 of Motion):

(a) An Order allowing the Prosecution to withhold identifying data of the persons the Prosecution is seeking protection for as set out in paragraph 18 or any other information which could lead to the identity of such a person to the Defence until twenty-one days before the witness is to testify at trial; and consequently allowing the Prosecution to disclose any materials provided to the Defence in redacted form until twenty-one (21) days before the witness is to testify at the trial, unless otherwise ordered;

(b) An Order requiring that the names and any other identifying information concerning all witnesses, be sealed by the Registry and not included in any existing or future records of the Court;

(c) An Order permitting the Prosecution to designate a pseudonym for each witness, which was and will be used for pre-trial disclosure and whenever referring to such witness in the Court proceedings, communications and discussions between the parties to the trial, and the public; it is understood that the Defence shall not make an independent determination of the identity of any protected witness or encourage or otherwise aid any person determine the identity of any such person;

(d) An Order that the names and any other identifying information concerning all witnesses described in paragraph 24, be communicated only to the Victims and Witnesses Unit personnel by the Registry or the Prosecution in accordance with the established procedure and only in order to implement protection measures for these individuals;

(e) An Order prohibiting the disclosure to the public or the media of the names and any other identifying data or information on file with the Registry, or any other information which could reveal the identity of witnesses and victims, and this order shall remain in effect after the termination of the proceedings in this case;

(f) An Order prohibiting the Defence from sharing, discussing or revealing, directly or indirectly, any disclosed non-public materials of any sort, or any information contained in any such documents, to any persons or entity other than the Defence;

(g) An Order that the Defence shall maintain a log indicating the name, address and position of each person or entity which receives a copy of, or information from, a witness statement, interview report or summary of expected testimony, or any other non-public material, as well as the

1374

date of disclosure; and that the Defence shall ensure that the person to whom such information was disclosed follows the order of non-public disclosure;

(h) An Order requiring the Defence to provide to the Chamber and the Prosecution a designation of all persons working on the Defence team who, pursuant to paragraph 24 (a) above, have access to any information referred to in paragraph 24 (a) through 24 (e) above, and requiring the Defence to advise the Chamber and the Prosecution in writing of any changes in the composition of this Defence team;

(i) An Order requiring the Defence to ensure that any member leaving the Defence team remits to the Defence team all disclosed non-public materials;

(j) An Order requiring the Defence to return to the Registry, at the conclusion of the proceedings in this case, all disclosed materials and copies thereof, which have not become part of the public record;

(k) An Order that the Defence Counsel shall make a written request to the Trial Chamber or a Judge thereof, for permission to contact any protected witnesses or any relative of such person, and such request shall be timely served on the Prosecution. At the direction of the Trial Chamber or a Judge thereof, the Prosecution shall contact the protected person and ask for his or her consent or the parents or guardian of that person if that person is under the age of 18, to an interview by the Defence, and shall undertake the necessary arrangements to facilitate such contact.

The Defence Response

4. On behalf of the Accused, the Defence submits that the Prosecution's Motion must fail. The contentions in support are set out in detail below:

(i) that the Rules provide for the protection of witnesses and victims, "but not as alleged by the Prosecution material";

(ii) that the Rules require that there must be "exceptional circumstances" to justify non-disclosure of the identity of a victim or a victim or a witness who may be in danger or at risk and that the material presented by the Prosecution does not show "exceptional circumstance";

(iii) that Rule 75 authorises the granting of protective measures "consistent with the rights of the accused";

(iv) that "the fundamental error in the application of the Prosecution is to ignore the specific, and concentrate on the general", there is not "a single mention of the Accused in this matter in any of the material...";

(v) that the assertion about "threats, harassment, violence, bribery and other intimidations, interference and obstruction of justice" being "serious problems in paragraph 12 of the Prosecution's Motion is "baseless, presumptuous and offensive";

(vi) that there is no evidence that the Accused in this case has ever indulged in such behaviour or is likely to indulge in such behaviour";

(vi) that the Orders sought by the Prosecution are unworkable, "impractical", "impossible" and "futile"

The Prosecution Reply

5. The Prosecution, in its Reply, filed on the 24th day of April, 2003 to the Response of the Defence in respect of Brima Bazzy Kamara, submits in summary as follows:

> The arguments raised in the Response of Defence Counsel should be rejected as they are either incorrect or are not supported by the jurisprudence of the international tribunals. The assertions fail to realise that it has been accepted by the International Criminal Tribunals for Yugoslavia and Rwanda and the Special Court that the rights of the Accused must be balanced with the need for protective measures for witnesses and victims. Finally the Defence Response is clearly in violation of prescribed time limit for filing of documents which cannot be corrected by bringing an application for extension within the said Response.

ORDER GRANTING LEAVE

6. I take full cognisance of the merit of the Prosecution's submission that the Defence is in clear violation of the prescribed time limit for filing documents. In upholding the Prosecution's submission, I strongly reprimand the Defence for the said procedural irregularity, and caution them against future infringements. It is, however, my considered opinion that no prejudice is caused to the Prosecution by the said infringement. Accordingly, in the interest of justice, leave is hereby granted retroactively to the Defence to file the said Response out of time.

AND HAVING DELIBERATED AS FOLLOWS

7. Pursuant to Article 16 of the Statute, the Court is authorized to provide in its Rules for the protection of victims and witnesses. Such protective measures shall include, without being limited to, the protection of a witness's identity. Rule 75 provides, *inter alia*, that a Judge or a Chamber may, on its own Motion, or at the request of either party, or of the victims or witnesses concerned, or of the Victims and Witnesses Unit, order appropriate measures to safeguard the privacy and security of victims and witnesses, provided that the measures are consistent with the rights of the Accused.

8. According to Rule 69 of the Rules, under exceptional circumstances, either of the parties may apply to a Judge of the Trial Chamber or the Trial Chamber to order the non-disclosure of the identity of a witness who may be in danger or at risk until the Judge or Chamber otherwise decides.

9. Article 17 of the Statute of the Court sets out the Rights of the Accused including *inter alia*, the right "to have adequate time and facilities for the preparation of his or her defence and the right to examine, or have examined the witnesses against him or her". As designated Judge, I also take cognisance of Rule 69 (C) of the Rules whereby the identity of a witness shall be disclosed in sufficient time before a witness is called to allow adequate time for preparation of the Defence.

10. Pre-eminently mindful of the need to guarantee the utmost protection and respect for the rights of the victims and witnesses, and seeking to balance those rights with the competing interests of the public in the administration of justice, of the international community in ensuring that persons accused of violations of humanitarian law be brought to trial on the one hand, and the paramount due process right of the Accused to a fair trial, on the other, I am enjoined to order any appropriate measures for the protection of the victims and witnesses at *the pre-trial stage* that will ensure a fair determination of the matter before me, deciding the issue on a case-by-case basis consistent with internationally recognised standards of due process. Such orders are to take effect once the particulars and locations of the witnesses have been forwarded to the Victims and Witnesses Support Unit.

11. In determining the appropriateness of the protective measures sought, I have evaluated the security situation affecting concerned witnesses in the light of the available information presented by the Prosecution in support of the Motion, specifically the Affidavit of Thomas Lahun dated the 10th day of June, 2003, the Declaration of Dr. Alan White dated the 10th day of June, 2003, the Declaration of Alan Quee dated the 25th day of April, 2003, and the Declaration of Saleem Vahidy dated the 28th day of April, 2003. In putting the entire situation in its proper context, the Affidavit of Officer Lahun and Mr. Vahidy are pre-eminent and illuminating. I have therefore taken the liberty of highlighting, for the sake of emphasis, certain relevant passages from the aforesaid documents so as to evaluate the merits of the key submissions of the Defence. The Defence submitted (a) that instead of showing "exceptional circumstances" the Prosecution had relied upon material prepared "in a general and vague manner"; (b) that not a single mention is made of the Accused in the Prosecution's papers; and (c) that the Motion is "baseless", "presumptuous" and "offensive".

12. In paragraph 4 of his affidavit, Officer Lahun firsts attests to his area of expertise as an investigator with the rank of Superintendent, and proceeds to depose thus:

> "Since 14th August, 2002, I have been working in the Office of the Prosecutor, Special Court for Sierra Leone, where my duties include investigating crimes against international humanitarian law committed within the territory of Sierra Leone from 30th November 1996, during the period of armed conflict in Sierra Leone. My *investigative duties include conducting interviews of persons who may appear*

as witnesses before the Special Court, and reviewing investigative notes and statements of such persons taken by other investigators in the Office of the Prosecutor" (emphasis added).

13. It is further deposed to at paragraphs 6, 8 and 9 that:

> 6. *"Members of the civilian population of Sierra Leone who may be called upon to appear as witnesses before the Special Court have expressed concern regarding their safety and security if it becomes known that they are co-operating with the Special Court, especially if the identities are revealed to the general public, or to the suspect or accused, before appropriate protective measures can be put in place."*
>
> 8. *"Potential witnesses have expressed fear of reprisals not only from those who are associated with the Accused, and from those who support the causes or factions that the Accused represents."*
>
> 9. *"The fears expressed are genuine, and in my opinion, are well-founded, especially considering that many of the potential witnesses live in remote areas without any police presence or other semblance of security."*

In addition, paragraphs 7 and 10 of the aforesaid affidavit do reinforce the evidence of fear, threats, intimidation, risk and danger to witnesses and potential witnesses.

14. Officer Gbekie's affidavit evidence is corroborated, in material particulars, by paragraphs 5 and 6 of the Declaration of Saleem Vahidy, Chief of the Witness and Victims Unit of the Court. At paragraph 6, Mr. Vahidy states:

> "In my opinion in Sierra Leone the issue of protection of witnesses is a far more serious and difficult matter even than in Rwanda. The trials are being carried out in a country where the crimes took place, and the witnesses feel particularly vulnerable..."

It is further deposed to in paragraph 6 that:

> *"At present the Unit is already looking after numerous witnesses, ad several threat assessments have been carried out. Without going into details, it is a fact that specific threats have been issued against some of the witnesses, to the extent that active efforts are being made by members of interested faction to determine their exact locations, probably with a view to carrying out reprisals."*

15. Consistent with the Court's previous Decisions[1] on the issue of protective measures for prosecution witnesses, I find that the combined effect of the affidavit evidence of Officer Lahun and the declarations of Dr. Alan White, Alan Quee and

[1] Decisions on the Prosecutor's Motion for Immediate Protective Measures For Witnesses and Victims and for Non- Public Disclosure, dated 23 May 2003 in *Prosecution Against Issa Hassan Sesay*, SCSL-2003-05-PT, *Alex Tamba Brima*, SCSL-2003-06-PT, *Morris Kallon*, SCSL-2003-07-PT, *Samuel Hinga Norman*, SCSL-2003-08-PT and after 13th October 2003, in *Prosecutor Against Moinina Fofana*, SCSL-2003-11-PD.

1378

Saleem Vahidy is to demonstrate, within the bounds of reasonable foreseeability and not absolute certainty, the delicate and complex nature of the security situation in the country and the level of threat from several quarters of the ex-combatant population that participated in the conflict to witnesses and potential witnesses. It would not be judicially prudent to treat such affidavit evidence lightly, as to its probative value, especially in the absence of an affidavit in rebuttal. The irresistible inference, therefore, is that such threats may well pose serious problems to such witnesses and the effectiveness of the Court in the discharge of its international mandate. To the same effect is the finding of the Court *per* Judge Boutet in a recent *Decision On the Prosecution Motion For Immediate Protective Measures For Witnesses And Victims And For Non-Public Disclosure*[2], to wit:

> " "The Special Court", therefore, based upon its examination of the documentation produced, and in particular, of the foregoing, concludes that there exists at this particular time in Sierra Leone, a very exceptional situation causing a serious threat the security of potential witnesses and victims and accepts the affirmation that, according to Mr. Vahidy 'in Sierra Leone the protection of witnesses is a far more serious and difficult matter even than in Rwanda'"

16. Concerning the need for the protection of witnesses' identities at *the pre-trial* phase as distinct from *the trial phase*, I have sufficiently advised myself on the applicable body of jurisprudence. Without meaning to detract from the precedential or persuasive utility of decisions of the ICTR and the ICTY and to diminish the general thrust of the Prosecution's submissions on this point at paragraphs 17 and 19 of the Motion it must be emphasized that the use of the formula "shall be guided by" in Article 20 of the Statute does not mandate a slavish and uncritical emulation, either precedentially or persuasively, of the principles and doctrines enunciated by our sister tribunals. Such an approach would inhibit the evolutionary jurisprudential growth of the Special Court consistent with its own distinctive origins and features. On the contrary, the Special Court is empowered to develop its own jurisprudence having regard to some of the unique and different socio-cultural and juridical dynamics prevailing in the *locus* of the Court. *This is not to contend that sound and logically correct principles of the law enunciated by ICTR and ICTY cannot, with necessary adaptations and modifications, be applied to similar factual situations that come before the Special Court in the course of adjudication so as to maintain logical consistency and uniformity in judicial rulings on interpretation and application of the procedural and evidentiary rules of the international criminal tribunals.*

17. Instructive though, from a general jurisprudential viewpoint, some of the decisions of ICTR and ICTY relied upon by both Prosecution and Defence Office on the subject of delayed disclosure and confidentiality of witnesses and victims may be in terms of the principles therein enunciated, the issue is really one of contextual socio-legal perspective. Predicated upon such a perspective, one can reach various equally valid conclusions applying a comparative methodology on: (a) whether the security situation in Sierra Leone can, at this point in time, in relation to Rwanda, be objectively characterized as really more or less or equally volatile; (b) whether the

[2] *Prosecutor v. Augustine Gbao*, SCSL-2003-09-PT dated 10th October 2003 para. 25.

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1379

security situation in Rwanda during the grant or denial of the protective measures sought in those cases, was more or less or equally volatile as the present security situation in Sierra Leone; or (c) whether there is any logical basis for comparison at all, a position rightly taken by the Defence. Evidently, it takes no stretch of the legal imagination to discover that in such matters speculation can be endless and quite fruitless. It depends on one's analytical or methodological approach. They are not matters that can be determined with any mathematical exactitude.

18. Which principle, then, is applicable in determining the merits of the instant Motion? The answer is that it is the ***general principle*** propounded by the ICTY, in the case of *The Prosecutor v. Blaskic*, IT-95-14, Decision on the Application of the Prosecution dated 17th October 1996 Requesting of Protective Measures for Victims and Witnesses, 5th November 1996. It states that:

> The philosophy which imbues the Statute and Rules of the Tribunal appears clear: the Victims and Witnesses merit protection, even from the Accused, *during the preliminary proceedings and continuing until a reasonable time before the start of the trial itself*; from that time forth, however, the right of the Accused to an equitable trial must take precedence and require that the veil of anonymity be lifted in his favour, even if the veil must continue to obstruct the view of the public and the media.

Applying this ***general principle*** to the totality of the affidavit evidence before me, it is my considered view that a reasonable case has been made for the prosecution witnesses herein to be granted at *this preliminary stage* a measure of anonymity and confidentiality. In addition, in matters of such delicacy and sensitivity, it would be unrealistic to expect the Prosecution, at *the pre-trial phase*, to carry the undue burden of proving, as implied by the Defence, in respect of each accused whether he has, directly or indirectly, threatened or intimidated or caused to be threatened or intimidated any or all of the witnesses or potential witnesses for whom protective measures are sought. Such an approach would frustrate, if not, (using a familiar legal metaphor) drive a horse and coach through the entire machinery created by the Founding Instruments of the Court and its Rules for Protection of witnesses and victims.

19. Further, as designated Judge under Rule 28 of the Rules, my judicial evaluation of the measures requested by the Prosecution pursuant to Articles 16 and 17 of the Statute and Rules 53, 54, and 75 of the Rules, is also predicated upon the reasoning that even though the Court must, in such matters, seek to balance the right of the Accused to a fair and public trial with the interest of the witnesses in being given protection, such a right is subject to derogating exceptional circumstances (Article 17 (2) of the Statute) and that the existing context of the security situation in Sierra Leone does justify, at this point in time, delaying the disclosure of the identities of witnesses during *the pre-trial phase*.

20. As regards the 21 (twenty-one) day time limit prayed for by the Prosecution in Order (a), *despite the existence of some instructive ICTY and ICTR decisions supporting the 21 day rule limitation for disclosure, it is my considered view that there is no legal logic or norm compelling an inflexible adherence to this rule.* In the context of the security situation in

1355

Sierra Leone and in the interest of justice, one judicial option available to me, at this stage, in trying to balance the interest of the victims and witnesses for protection by a grant of anonymity and confidentiality with the pre-eminent interest of effectively protecting the Accused's right to a fair and public trial is to enlarge the time frame for disclosure beyond 21 (twenty-one) days to 42 (forty-two) days, the Prosecution's submission notwithstanding, in line with the Court's recent decision on the same issue in *Prosecutor v. Augustine Gbao*[3] where Judge Boutet ruled thus:

> "Therefore , "the Special Court" rules that no disclosure shall be made within forty-two (42) days of the date of the testimony of the witness, instead of twenty - one (21) days such disclosure achieving a fair balance between "*full respect*" for the rights of the Accused and "*due respect*" for the protection of witnesses and victims."

And I so order.

AND BASED ON THE FOREGOING DELIBERATION,

I HEREBY GRANT THE PROSECUTION'S MOTION AND IN PARTICULAR THE ORDERS SOUGHT IN (a) TO (k) as specified and particularised therein with the necessary modification to Order (a) in respect of the time frame for disclosure prior to testimony at trial, which said ORDERS, for the sake of completeness, are set out *in extenso* in the annexure hereto.

Done at Freetown

23rd day of October, 2003

Judge Bankole Thompson
Presiding Judge, Trial Chamber
Designated Judge Pursuant to Rule 28 of the Rules

Seal Of The Special Court

[3] Id. Supra 2; see also Court's earlier decisions referred to already.

1381

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THE TRIAL CHAMBER

Before: Judge Bankole Thompson
Presiding Judge, Trial Chamber
Designated Judge Pursuant to Rule 28 of the Rules

Registrar: Robin Vincent

Date: 23rd day of October, 2003

The Prosecutor Against:

Brima Bazzy Kamara
(Case No. SCSL-2003-10-PT)

ANNEXURE TO THE DECISION ON THE PROSECUTOR'S MOTION FOR IMMEDIATE PROTECTIVE MEASURES FOR WITNESSES AND VICTIMS AND FOR NON-PUBLIC DISCLOSURE:

ORDERS FOR IMMEDIATE PROTECTIVE MEASURES FOR WITNESSES AND VICTIMS AND FOR NON PUBLIC DISCLOSURE

Office of the Prosecutor:
Luc Côté, Chief of Prosecution
Sharan ParmarAssistant Trial Counsel

Defence Office:
Ken Fleming QC

THE SPECIAL COURT FOR SIERRA LEONE (the "Special Court")

PRESIDED OVER by Judge Bankole Thompson designated in accordance with provisions of Rule 28 of the Rules of Procedure and Evidence ("the Rules");

BEING SEIZED of the Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure filed by the Prosecutor on the 11th day of June, 2003 ("the Motion") for an order requesting various protective measures to safeguard the security and privacy of victims, witnesses and to safeguard the integrity of the prosecution's evidence and of these proceedings;

CONSIDERING that non-public material is disclosed to the Accused primarily for the purpose of allowing him to prepare to meet the charges against him and for no other purpose;

CONSIDERING FURTHER that the Designated Judge takes very seriously the interests and concerns of victims and witnesses, is genuinely concerned for their safety, protection and welfare, is authorised to take all appropriate measures to ensure their protection and privacy, and is judicially obliged to safeguard non-public materials provided to the Accused in order to enable him to prepare for trial, where the interests of justice so demand;

CONSIDERING ALSO that it is of paramount importance to protect the right of the Accused to a fair and public trial and that only in exceptional circumstances should such a right be derogated from;

HAVING METICULOUSLY EXAMINED the merits of the submissions by the Defence in response to the said Prosecution Motion and sought to balance the interests of the victims and witnesses for protection and privacy with the right of the Accused to fair trial in the context of the specific measures requested;

CONVINCED that despite the Defence submissions, in the specific context of this case, there is clear and convincing evidence submitted by the Prosecution for protective measures for witnesses and victims and for non-public disclosure of the material in this case at the pre-trial stage;

NOTING that Articles 17 (2) and 16 (4) of the Statute of the Special Court for Sierra Leone ("the Statute") envisage that the Trial Chamber shall, where expedient in the interests of justice, issue appropriate orders for the protection of victims and witnesses;

COGNISANT of the provisions of Rules 69 and 75 of the Rules concerning the protection of witnesses;

ACTING IN ACCORDANCE WITH Articles 16 and 17 of the Statute and pursuant to Rules 53, 54, 56, 69, and 75 of the Rules;

I HEREBY GRANT THE PROSECUTION MOTION AND ORDER as follows:

(a) The Prosecution may withhold identifying data of the persons the Prosecution is seeking protection as set forth in paragraph 18 of the Motion and any other information which could lead to the identity of such a person to the Defence, until 42 (forty-two) days before the witness is to testify at trial; and may not disclose any materials provided to the Defence in a redacted form until 42 (forty-two) days before the witness is to testify at trial, unless otherwise ordered;

(b) That the names and any other identifying information concerning all witnesses be sealed by the Registry and not included in any existing or future records of the Court;

(c) The Prosecution may designate a pseudonym for each witness, which was and will be used for pre-trial disclosure and whenever referring to such witness in Court proceedings, communications and discussions between the parties to the trial, and the public; it is understood that the Defence shall not make an independent determination of the identity of any protected witness or encourage or otherwise aid any person to attempt to determine the identity of any such person;

(d) That the names and any other identifying information concerning all witnesses described in order (a) be communicated only to the Victims and Witnesses Unit personnel by the Registry or the Prosecution in accordance with established procedure and only in order to implement protection measures for these individuals;

(e) That the names and any other identifying data or information on file with the Registry, or any other information which could reveal the identity of Witnesses and Victims, shall not be disclosed to the public or the media and this order shall remain in effect after the termination of the proceedings in this case;

(f) That the Defence shall not share, discuss or reveal, directly or indirectly, any disclosed non-public materials of any sort, or any information contained in any such documents, to any person or entity other than the Defence;

(g) That the Defence shall maintain a log indicating the name, address and position of each person or entity which receives a copy of, or information from, a witness statement, interview report or summary of expected testimony, or any other non-public material, as well as the date of disclosure; and that the Defence shall ensure that the person to whom such information was disclosed follows the order of non-public disclosure;

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(h) That the Defence provide to the Chamber and the Prosecution a designation of all persons working on the Defence team who, pursuant to order (f) above, have access to any information referred to in order (a) through (e) above (reference herein being made to the Motion), and requiring the Defence to advise the Chamber and the Prosecution in writing of any changes in the composition of this Defence team;

(i) That the Defence ensure that any member leaving the Defence team remits to the Defence team all disclosed non-public materials;

(j) That the Defence return to the Registry, at the conclusion of the proceedings in this case, all disclosed materials and copies thereof, which have not become part of the public record;

(k) That the Defence Counsel make a written request to the Trial Chamber or a Judge thereof, for permission to contact any protected witnesses or any relative of such person, and such request shall be timely served on the Prosecution .At the direction of the Trial Chamber or a Judge thereof, the Prosecution shall contact the protected person and ask for his or her consent or the parents or guardian of that person if that person is under the age of 18, to an interview by the Defence, and shall undertake the necessary arrangements to facilitate such contact.

HEREBY FURTHER ORDER that consistent with Order (a) above, the Prosecutor shall disclose the names and unredacted statements of the witnesses to the Defence in at least 42 (forty-two) days before the witness is to testify at trial to allow the Defence sufficient and reasonable time to prepare effectively for trial, having regard to the gravity of the charges against the Accused person and the magnitude of the Prosecutor's allegations against him.

For the purpose of this Order:

(a) "the Prosecution" means and includes the Prosecutor of the Special Court for Sierra Leone (the Court) and his staff;

(b) "the Defence" means and includes the Accused, the Defence counsel and their immediate legal assistants and staff, and others specifically assigned by the court to the Accused's trial Defence team in conformity with Rule 44;

(c) "witnesses" means and includes witnesses and potential witnesses of the Prosecution;

(d) "protected witnesses" means and includes the witnesses in the categories as set forth in paragraph 18 of the Motion;

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(e) "victims" means and includes victims of sexual violence, torture, as well as all persons who were under the age of 15 at the time of the alleged commission of the crime;

(f) "the public" means and includes all persons, governments ,organisations, entities, clients, associations, and groups, other than the Judges of the Court and the staff of the Registry ,the Prosecution, the Defence, as defined above. "The public" specifically includes, without limitation, family, friends and associates of the Accused, and the Defence in other cases or proceedings before the court;

(g) "the media" means and includes all video, audio, print media personnel, including journalists, authors, television, and radio personnel, their agents and representatives.

Done at Freetown,

23rd day of October, 2003

Judge Bankole Thompson
Presiding Judge, Trial Chamber
Designated Judge Pursuant to Rule 28 of the Rules

Seal Of The Special Court

1386

PROSECUTION AUTHOURITIES

9. *Prosecutor v. Mile Mrksic,* IT-95-13/1-PT, Decision on Form of the Indictment, 19 June 2003.

IN TRIAL CHAMBER II

Before:
Judge Wolfgang Schomburg, Presiding
Judge Florence Ndepele Mwachande Mumba
Judge Carmel Agius

Registrar:
Mr Hans Holthuis

Decision of:
19 June 2003

PROSECUTOR
v.
MILE MRKSIC

DECISION ON FORM OF THE INDICTMENT

The Office of the Prosecutor:

Mr Jan Wubben

Counsel for the Accused:

Mr Miroslav Vasic

1. Background

1. Trial Chamber II ("Trial 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 ("Tribunal") is seised of a series of Defence filings[1] by which the Defence challenges the form of the Second Amended Indictment in the present case, and the Prosecution's responses[2] thereto. The Defence generally alleges that the Prosecution has not set out all of the relevant material facts and has provided insufficient supporting evidence to allow the Defence to properly prepare its case. The Prosecution submits that all relevant material facts have been provided and that the sufficiency of the evidence is a matter for trial.

2. There has been some confusion in previous filings in this case as to the number of existing indictments against Mile Mrksic ("Accused"). The initial indictment against the Accused and two others was confirmed by Judge Fouad Riad on 7 November 1995.[3] This indictment was amended to include one other co-accused on 3 April 1996.[4] A further amended indictment against all four was filed on 2 December 1997.[5] Finally, on 1 November 2002 the Prosecution was given leave to

file a further amended indictment against the Accused alone.[6] The Prosecution termed this indictment the "Second Amended Indictment".[7] For the sake of consistency and in order to avoid further confusion, this Decision will adopt this term to refer to the latest indictment against the Accused.

3. In the Second Amended Indictment, the Accused stands charged with various offences allegedly committed subsequent to the Serb take over of the city of Vukovar and surrounding areas in the Republic of Croatia. The Accused is specifically charged in the Second Amended Indictment under both Articles 7(1) and 7(3) of the Statute of the Tribunal ("Statute"),[8] as follows :

(a) count 1: persecution as a crime against humanity (Article 5);

(b) count 2: extermination as a crime against humanity (Article 5);

(c) counts 3 and 4: murder as a crime against humanity (Article 5) and as a violation of the law or customs of war (Article 3);

(d) count 5: imprisonment as a crime against humanity (Article 5);

(e) counts 6 and 8: torture as a crime against humanity (Article 5) and as a violation of the laws or customs of war (Article 3);

(f) count 7: inhumane acts as a crime against humanity (Article 5); and

(g) count 9: cruel treatment as a violation of the laws or customs of war (Article 3).

2. Preliminary comments

4. As noted above, the challenge to the form of the Second Amended Indictment that is addressed herein is set out in multiple filings authorised by the Trial Chamber. The Defence was specifically instructed not to repeat arguments set out in previous filings,[9] but this instruction was ignored. As a result, the filings overlap to a significant extent and the Trial Chamber has had some difficulty succinctly summarising the Defence arguments. This is not an acceptable practice. In the future, the Defence shall adhere closely to instructions regarding filings that are issued by the Trial Chamber failing which the Chamber shall apply the appropriate sanctions.

5. The Trial Chamber also wishes to note that the Defence arguments were often difficult to understand due to the poor use of language. While this may to some extent result from translation difficulties, it is surely not solely as a result of this. For the purposes of the current decision, the Trial Chamber has summarised to the best of its ability the arguments as it understands them. In the future, the Defence should take greater care in formulating its arguments to ensure that they are correctly understood and that any eventual decision may be prepared in a timely and efficient manner.

3. General pleading principles

6. The general pleading principles that may be applicable to the present case are as follows.

7. Article 21(4)(a) of the Statute provides as one of the minimum rights of an accused that he shall

1389

be entitled to be informed in detail of the nature and cause of the charge against him. This provision also applies to the form of indictments.[10] This right translates into an obligation on the Prosecution to plead the material facts underpinning the charges in an indictment.[11] 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 an accused clearly of the nature and cause of the charges against him enabling him to prepare a defence effectively and efficiently.[12]

8. The materiality of a particular fact is dependent on the nature of the Prosecution case.[13] 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,[14] which includes the proximity of the accused to the relevant events.[15] The precise details to be pleaded as material facts are of the acts of the accused, rather than the acts of those persons for whose acts he is alleged to be responsible.[16]

9. Depending on the circumstances of the case, it may be required that with respect to an Article 7(1) case against an accused, the Prosecution "indicate in relation to each individual count precisely and expressly the particular nature of the responsibility alleged", in other words, that it indicates the particular head or heads of liability.[17] This may be required to avoid ambiguity with respect to the exact nature and cause of the charges against the accused,[18] and to enable the accused to effectively and efficiently prepare his defence. The material facts to be pleaded in an indictment may vary depending on the particular head of Article 7(1) responsibility.[19]

10. In a case based upon superior responsibility, pursuant to Article 7(3), the following are the minimum material facts that have to be pleaded in the indictment :

    (a) that the accused is the superior[20] (ii) of subordinates, sufficiently identified,[21] (iii) over whom he had effective control - in the sense of a material ability to prevent or punish criminal conduct[22] - and (iv) for whose acts he is alleged to be responsible;[23]

    (b) the accused knew or had reason to know that the crimes were about to be or had been committed by those others,[24] and (ii) the related conduct of those others for whom he is alleged to be responsible.[25] The facts relevant to the acts of those others will usually be stated with less precision,[26] 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;[27] and

    (c) the accused failed to take the necessary and reasonable measures to prevent such crimes or to punish the persons who committed them.[28]

11. All legal prerequisites to the application of the offences charged constitute material facts and must be pleaded in the indictment.[29] 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.[30]

12. Each of the material facts must usually be pleaded expressly, although it may be sufficient in

1390

some circumstances if it is expressed by necessary implication.[31] This fundamental rule of pleading is, however, not complied with if the pleading merely assumes the existence of the pre-requisite.[32]

13. 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.[33] 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.[34] 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.[35] 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.[36] 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.[37]

14. The Prosecution is not required to plead the evidence by which such material facts are to be proven.[38]

4. Defence objections relating to the insufficiency of the pleading of material facts and supporting evidence

15. The first set of Defence objections relate to the general insufficiency of the material facts pleaded and the evidence supporting those material facts.

16. The Defence submits that the Prosecution fails to comply with Article 18(4) of the Statute and Rule 47(C) of the Rules by not submitting a summarised presentation of the facts and charges against the Accused.[39] This failure to make clear the nature of the responsibility alleged against the Accused and the material facts by which that responsibility will be established,[40] and in particular the precise link between those material facts and the Accused,[41] means that the Defence is left without the elements necessary for the adequate preparation of its case.[42] Further, the Defence submits that some of the allegations in the Second Amended Indictment are not based on supporting material annexed to it.[43]

17. In response, the Prosecution argues that it has met its obligations under the Statute and Rules to plead the material facts upon which the charges are based with a level of specificity that allows the Defence to prepare its case.[44] The Prosecution distinguishes between the necessity of pleading material facts and the evidence that tends to prove those facts, which is not required to be pleaded.[45] Further to this point, the Prosecution submits that, the Initial Indictment against the Accused having already been confirmed, the Trial Chamber is now restricted to the issue whether the Second Amended Indictment pleads the required material facts to support the charges it raises.[46] There cannot be any evaluation of the sufficiency of the evidence upon which the reviewing Judge based his confirmation of the indictment.[47]

18. The jurisprudence is clear that it is not necessary to plead in an indictment the evidence which

1391

would tend to support the alleged material facts, and that it is inappropriate at this stage of proceedings for the Defence to challenge the sufficiency of the evidence.[48] The Trial Chamber finds it necessary, however, to distinguish between those material facts which were part of the indictment as originally confirmed, and those added subsequently. Concerning the original charges and material facts, it is not at this stage possible for the Defence to challenge the sufficiency of the evidence. However, it is acceptable for the Defence to challenge the sufficiency of the evidence for charges that are newly added (5 counts in the Second Amended Indictment) and for material facts newly added in support of existing charges.[49] Accordingly, in examining below the specific challenges made by the Defence, this distinction will be applied in determining the validity of their requests.

5. Defence preliminary objections to additional charges and heads of responsibility

19. With respect to the new charges added in the Second Amended Indictment,[50] the Defence makes two preliminary arguments that the addition of these counts is invalid. Both of these arguments are made with reference to other indictments.

20. First, it is argued that these counts were not levelled at Slavko Dokmanovic ("Dokmanovic"), who was charged alongside the Accused in the 1996 and 1997 Amended Indictments, and therefore cannot legitimately be included in the Second Amended Indictment against the Accused.[51] This argument is also made with respect to the joint criminal enterprise alleged in the Second Amended Indictment.[52] The Prosecution, correctly in the view of this Trial Chamber, submits that there is no requirement in the Statute or the Rules that every accused be charged with every conceivable offence that is supported by the evidence.[53] It is for the Prosecution to choose how it wishes to plead its case, and which charges it wishes to bring. This Defence argument is therefore rejected.

21. In a related argument, the Defence submits that it is in some way a paradox that these new and serious charges are made against the Accused when they were not earlier levelled at Dokmanovic.[54] In response the Prosecution argues that there is nothing paradoxical about the fact that the Accused, as senior military commander charged in the case, should face more serious charges than Dokmanovic, who was a minor political leader.[55] Paradox or not, the Trial Chamber again stresses that it is for the Prosecution to choose how it wishes to plead its case. The argument is rejected.

22. The Defence presents further arguments that are based on the same fallacious thinking as that advanced in paragraph 24 below.[56] The Defence argues that since the facts remain unaltered from the Initial Indictment, and hence the Prosecution bears no new evidence, the question arises why such charges were not included in that initial indictment "bearing in mind that the International Law provisions and customs existed at the pertinent time as well. According to the Defence, the answer to this question can only be that the Prosecution has also felt at the time that there was no basis for such charges". The Prosecution is free to plead its case as it sees fit, as long as it sets out the material facts. No adverse inferences may be drawn from a change in pleading strategy in this instance. In this connection the Defence also submits that the Prosecution is merely attempting to use this case so as to enforce its position in other cases that it finds of greater importance.[57] Thus, it is alleged, the Accused is being forced to defend himself from charges for which individuals of a much higher rank are charged, in respect of the events that took place in 1991. The Trial Chamber emphasises that this argument is entirely unsubstantiated. The Defence arguments are again rejected.

23. In its second preliminary argument, the Defence focuses on the Initial Indictment in this case. It submits that the introduction of new counts into the Second Amended Indictment without the corresponding introduction of more evidence is illogical and places the Accused in a far worse situation without due reason.[58] The Prosecution responds that the only reason the Accused faces a more difficult position with respect to the Initial Indictment is because if the new charges are included, he will have to address the evidence at trial that will show he is guilty of these additional charges.[59] In effect, the Defence does not claim any prejudice other than the difficulty of responding to additional charges.[60]

24. The Defence argument on this point is ill founded. The Prosecution does not have to "present (...) arguments as to why it desires to amend its allegations in respect to the responsibility of the accused"[61]. It may choose to plead the case as it wishes, as long as it sets out the material facts that will allow the Defence to meet the case. The issue is not whether amendments to the indictment prejudice the accused, but whether they do so *unfairly*.[62] There is no indication that the new counts would in fact unfairly prejudice the Accused. This Defence argument is accordingly rejected.

25. Similarly, the Defence submits that broadening the indictment to include the concept of joint criminal enterprise is unacceptable.[63] No reasoning is advanced in support of this argument. Given that the joint criminal enterprise mode of responsibility is clearly within the jurisdiction of the Tribunal,[64] the Prosecution is free to plead it. This complaint is rejected.

26. Taking a different approach to the additional counts pleaded, the Defence submits that the "Prosecution has failed to provide evidence that would justify the additional charges".[65] The Prosecution responds that the additional charges are fully supported by the evidence which was introduced at the time of the initial indictment.[66] These new charges are the subject of individual challenges which the Trial Chamber addresses below.

6. Defence objections relating to facts supporting charges

27. The Defence makes a number of specific challenges to the form of the Second Amended Indictment as it concerns the facts alleged in support of the ten counts, which the Trial Chamber will deal with below in the order in which they arise in the Second Amended Indictment. Overwhelmingly, the Prosecution has responded that these challenges concern factual or evidentiary issues that should be determined at the trial stage.[67]

28. With respect to paragraph 8(c) of the Second Amended Indictment, concerning JNA soldiers allegedly ordered or permitted by the Accused to transfer detainees from the Vukovar hospital to Ovcara farm, the Defence requests that the Prosecution specify which units of the JNA carried out these orders.[68] The Trial Chamber notes that the Second Amended Indictment is to be read as a whole, not as a series of paragraphs existing in isolation. The JNA soldiers referred to in this paragraph may be identified by cross-referencing other paragraphs in the Second Amended Indictment. The Belgrade-based 1rst Guards Motorised Brigade, commanded by the Accused, is identified by the Prosecution as the JNA Unit with primary responsibility for the attack on Vukovar and the subsequent evacuation and detention of persons from Vukovar hospital.[69] That this was the relevant unit for the purposes of paragraph 8(c) is confirmed in paragraph 7(a), where there is also a reference to the involvement of a military police battalion in the evacuation and detention of persons from Vukovar hospital. The Defence request for greater precision is therefore

1393

refused.

29. The Defence submits that the decision of the Great People's Assembly SAO SBWS (10 October 1991) referred to in paragraph 12 of the Second Amended Indictment needs to be provided or the reference dropped.[70] The Prosecution relies on this decision to allege a material fact, the attachment of the Territorial Defence ("TO") of the SAO SBWS to the JNA on a permanent basis. This material fact was not pleaded in the Initial Indictment and therefore was not confirmed on the basis of supporting evidence. The Defence objection is upheld, and the Prosecution is ordered to provide a copy of the decision in question.

30. The Defence submits that claims in paragraph 17 of the Second Amended Indictment that alleged crimes against humanity were part of a widespread and systematic attack directed against the Croat and other non-Serb civilian population of parts of Croatia, including Vukovar, are not supported by annexed material. Specifically the Defence submits that some of the names of persons "on the list" in the Second Amended Indictment could be Serb names.[71] This objection goes directly to evidence proving a material fact, which need not be pleaded at this stage. The objection is therefore refused.

31. The alleged events set out in paragraph 19 of the Second Amended Indictment begin in August 1991. The Defence submits that, because the Accused and his unit arrived in Vukovar only on 30 September 1991, the Second Amended Indictment must be limited by this time frame.[72] The objection is misconceived. The Prosecution has clearly pleaded that the charges against the Accused relate to the period after the fall of Vukovar.[73] This does not prevent the Prosecution from providing context for those charges by way of background information. Such background facts will necessarily concern a period prior to the alleged commission of crimes. The Defence objection is refused.

32. The Defence submits that in paragraph 19 of the Second Amended Indictment, it is unclear whether the Prosecution claims that Serb forces under the Accused's command took over places in Eastern Slavonia other than Vukovar before mid-October 1991. The Defence seeks this clarification and, if the Prosecution is making such an assertion, an indication of which units were involved, who controlled those units and clarification as to the Accused's participation.[74] Regarding the allegations of occupation, killings and forcing non-Serbs from the area, the Defence request names of places of alleged events; names of persons involved in the takeover of places; names of persons exercising power after takeover; and the connection between the allegations and the Accused.[75] The Prosecution responds that these are factual or evidentiary issues to be determined at the trial stage.[76]

33. These Defence objections need to be viewed in context. Paragraph 19 sets out background information rather than material facts relevant to the counts in the Second Amended Indictment. It is in relation to material facts dealing with each count, rather than the background facts of a general nature only, that the Accused is entitled to proper particularity in the indictment.[77] The Defence request for clarification of these background facts is therefore refused.

34. The Defence also requests particulars with respect to the events described in paragraph 20 of the Second Amended Indictment, regarding the siege, shelling, occupation and clearance of Vukovar,[78] as well as the alleged expulsion of citizens therefrom.[79] Again, this paragraph provides background information rather than material facts in support of the counts of the Second Amended Indictment. The Defence is therefore not entitled to further particulars. Furthermore, the

Defence argument regarding the timing of the Accused's liability for the acts in this paragraph is moot, as there are no charges in the Second Amended Indictment based on these acts.[80]

35. Paragraphs 22-24 of the Second Amended Indictment detail the alleged removal of approximately 400 non-Serbs from Vukovar hospital, the transfer of about 300 of these by bus to JNA barracks and their treatment on arrival there. The Defence requests that the Prosecution identify which units of the JNA allegedly carried out these acts, specifying the persons in command and identifying the soldiers who allegedly "molested and threatened"[81] the prisoners within the barrack complex.[82] As stated above, the Second Amended Indictment should be read as a whole rather than as isolated parts. The Trial Chamber finds that the Prosecution has already clearly indicated that forces under the command of Veselin Sljivancanin, himself subordinated to the Accused, carried out these acts.[83] The Defence request is accordingly rejected. While it does not affect the form of the indictment, however, the Trial Chamber recognises that greater precision could be provided with respect to the identification of individuals alleged to have committed the acts.[84] The Prosecution must disclose these particulars to the Defence.

36. With respect to paragraph 25 of the Second Amended Indictment, and the claim that it was agreed at the meeting of the government of SAO SBWS that the JNA should merely transport persons to Ovcara where they would be left under the control of the local Serb forces, the Defence argues that this implies that the government of SAO SBWS had authority over the local Serb forces.[85] The Defence further submits that this is inconsistent with claims in other paragraphs of the Second Amended Indictment that the JNA also participated in the confinement and killings, under the Accused's command.[86] The Trial Chamber, in agreement with the Prosecution,[87] finds that these arguments do not concern the sufficiency of material facts, but are rather issues to be resolved at trial. The Defence objections are rejected.

37. Similarly, the Defence objects that paragraph 26 of the Second Amended Indictment is somehow deficient because it claims that local forces were in control at Ovcara and yet the Accused is charged with the unlawful detention of civilians there.[88] The Prosecution has pleaded a case based on superior responsibility in which the Accused is alleged to be the superior of these local forces. Whether or not this case can be proved is a matter for trial. The Defence objection is rejected.

38. The Defence seeks the precise identification of the Serb forces mentioned in paragraphs 26-29 of the Second Amended Indictment, dealing with the transfer of the detainees from the JNA barracks to the Ovcara farm and their eventual transfer to a ravine approximately one kilometer south-east of Ovcara. In these paragraphs the Prosecution refers variously to "Serb forces" or "Serb soldiers". The Defence submits that identification can be done by simply "affirming that the forces that are mentioned in the paragraph were in fact members of the Territorial Defence of Vukovar under the command of Miroljub Vujovic and Stanko Vujanovic."[89]

39. Once again it is possible to answer much of the Defence objection by looking elsewhere in the Second Amended Indictment. Paragraph 5 identifies those bodies which collectively are identified as "Serb forces".[90] Paragraph 7(a) specifies that it was forces under the command of Veselin Sljivancanin (i.e. soldiers in the 1rst Guards Motorised Brigade of the JNA, as well as a military police battalion) that transferred the non-Serbs from the JNA barracks to the Ovcara farm. Paragraph 7(e) specifies that Miroljub Vujovic and Stanko Vujanovic had direct operational command of Serb Territorial Defence forces responsible for the mistreatment and killing of non-Serbs taken from the Vukovar Hospital to the Ovcara farm. In the view of the Trial Chamber,

1395

further specification of the identity of the Serb forces referred to in these paragraphs is not necessary. The request is rejected.

40. The information set out in paragraph 7(e) of the Second Amended Indictment also serves to respond to two other Defence requests for further clarifications. The first concerns whether the soldiers leading prisoners out of trucks (in paragraph 28 of the Second Amended Indictment) belonged to the JNA, the Territorial Defence or paramilitary formations.[91] The second concerns the identification of the Serb authorities (whether civilian or military) that collected information regarding the persons brought to Ovcara and their role in the events specified.[92] It is clear that in both instances it was Serb TO forces under the command of Miroljub Vujovic and Stanko Vujanovic that were responsible. These Defence requests are therefore rejected.

41. Further specifications are sought by the Defence with respect to paragraph 27 of the Second Amended Indictment. In that paragraph there is a reference to two women being present in Ovcara. The Defence seeks the identification of these women.[93] While evidence that supports the claim that these women were at Ovcara is properly left for trial, their identities must, if available to the Prosecution, be disclosed to the Defence.

42. The Defence further objects to paragraph 31 of the Second Amended Indictment in which the Prosecution asserts that women were allegedly killed at Ovcara without providing any names in support of its claims.[94] While the Prosecution is under an obligation to provide the best particulars that it can in presenting its case, this does not affect the form of the Second Amended Indictment.[95] However, the Prosecution will be ordered in the disposition of this decision to disclose to the Defence the names of the women alleged in paragraph 31(a) to have been murdered.

43. The Defence submits that in certain instances the new material facts pleaded are not supported by the provided material, although it fails to provide the necessary specification. This is alleged to be the case with respect to allegations that the Accused is responsible for sexual violence, where no victims or perpetrators are identified.[96] It is also submitted that there is no foundation in the provided material for the fact pleaded in paragraph 31(d) of the Second Amended Indictment that the Accused was responsible for withholding necessary medical aid. Further, the Defence submits that the Prosecution must specify the locations where medical aid was withheld.[97] The Trial Chamber considers that these matters may be resolved during the disclosure stage.

44. The next Defence objection concerns the lack of precision in the pleading of the relevant dates in paragraphs 33 and 34 of the Second Amended Indictment concerning the extermination and murder charges. In paragraph 33, the Second Amended Indictment states that the relevant events took place "?fgrom or about 20 November 1991 until 21 November 1991". In paragraph 34, the timing of events is given as "?dguring the evening hours of 20/21 November 1991". The Defence submits that the discrepancy between the dates given has an important effect on the preparation of its case,[98] and that the Prosecution must "either claim that it is certain that the incident occurred on the 20th November 1991 or not claim at all".[99] In response, the Prosecution submits that the language "from or about 20 November 1991 until 21 November 1991" is commonplace legal pleading language that in no way prevents the Defence from preparing its case. It submits further that the events which form the basis of the Second Amended Indictment against the Accused cover a relatively limited period of time (between 17-21 November 1991) and a limited geographic area (Vukovar and areas within a few kilometres of the city of Vukovar).[100] The Trial

1396

Chamber agrees that the Second Amended Indictment is sufficiently specific in respect of the timing of the acts pleaded in paragraphs 33 and 34 to allow the Defence to prepare its case. The Defence objection is rejected.

45. The next Defence objection concerns allegedly inconsistent Prosecution claims concerning the forces responsible for the execution of detainees taken to Ovcara farm. In paragraph 34 of the Second Amended Indictment it is alleged that "Serb forces comprised of JNA units and the TO, volunteer and paramilitary units acting in coordination and under the supervision of the JNA shot and otherwise executed them". The Defence submits that this is factually inconsistent with paragraphs 26 -29 of the Second Amended Indictment where it is alleged that the people at Ovcara were beaten and killed by members of the Territorial Defence under the command of Miroljub Vujovic and Stanko Vujanovic. The Defence accordingly requests that these claims be harmonised.[101] In response, the Prosecution submits that this is an evidentiary issue, to be determined at the trial stage.[102]

46. The Trial Chamber finds that the objection raised regarding the inconsistency in the pleading of the Prosecution case affects the ability of the Defence to know the case against it. The Second Amended Indictment clearly states that the TO formed part of the Serb forces under the authority of the Accused. The Defence is entitled to know whether it was only the TO that was responsible for the executions (as pleaded by the Prosecution in paragraphs 26-29 of the Second Amended Indictment), or whether other parts of the "Serb forces" were also involved (as pleaded in paragraph 34). The Prosecution is incorrect in arguing that the Defence is challenging the accuracy of the facts alleged – in fact, it is asking for precision as to what those facts are. The Prosecution will be ordered to provide such clarification. This Defence objection is upheld to the extent that the Prosecution is required to clarify the use of its terminology ("Serb forces", "Serb soldiers") and to ensure that the identification of those responsible for the alleged crimes in paragraphs 26-29 is factually consistent with those identified as being responsible for the alleged crimes in paragraph 34.

47. In paragraph 38 of the Second Amended Indictment, the Prosecution alleges that among the detainees were women, elderly men and patients from Vukovar Hospital who were wounded or sick but did not receive any medical care. The Defence requests a clarification whether these allegations pertain to prisoners of Ovcara exclusively or to other locations as well.[103] The Prosecution responds that this is an evidentiary issue, to be determined at the trial stage.[104] Once again, the Defence is reading the paragraph concerned in isolation. It is quite clear that the Second Amended Indictment is concerned with events which took place in and around Vukovar, and that the only relevant place of detention is the Ovcara farm. In paragraph 36 this is specified. The reference in paragraph 38 is clearly to be read in light of what precedes and therefore makes sufficiently clear that the allegations concern detainees at the Ovcara farm only. The Defence request for clarification is rejected.

48. The Defence makes a further request concerning the sick and wounded detainees noted in paragraph 38 of the Second Amended Indictment, namely that as many of them as possible should be identified.[105] The Prosecution responds that this is an evidentiary issue, to be determined at the trial stage.[106] The Defence request effectively seeks particulars regarding material facts and, as already stated, while the Prosecution is under an obligation to provide the best particulars that it can in presenting its case, this does not affect the form of the Second Amended Indictment.[107] However, the Prosecution will be ordered to disclose to the Defence the names of as many of the sick and wounded detainees referred to in paragraph 38 as are available to it.

49. The Defence makes a different type of challenge with respect to, it would appear, paragraph 38 of the Second Amended Indictment. It is submitted that the Prosecution lacks consistency in naming categories of persons, with the suggestion that city defence units and political activists have been omitted. In addition, the Defence suggests that separating the patients and the sick and wounded into two separate categories is illogical.[108] The Trial Chamber rejects these Defence complaints. It is for the Prosecution to choose how to plead its case. If the Defence wishes to make a specific challenge to the way in which the Prosecution has done so, it can do this at trial.

7. Defence objections relating to the pleading of Article 7(1)

Joint Criminal Enterprise

50. The Defence makes a number of general and specific objections regarding the pleading in the Second Amended Indictment of a joint criminal enterprise (JCE).

51. First, the Defence submits that no evidence has been submitted by the Prosecution that would suggest the existence of a JCE, especially in the form set out in paragraph 6 of the Second Amended Indictment.[109] In response, the Prosecution submits that it pleads the relevant material facts in paragraphs 2, 7 and 8, and that the Second Amended Indictment must be read as a whole and individual paragraphs must not be analysed in isolation and out of context.[110] The Prosecution submits that all of the requisite elements of the JCE are pleaded: the Accused's participation (paragraphs 2, 5); the criminal purpose of the enterprise (paragraph 3); the *mens rea* of the Accused with regard to the commission of the crimes in furtherance of the enterprise (paragraph 4); the time and location of the underlying criminal acts committed in connection with the enterprise (paragraphs 3, 6-9, 18-29); and the specific acts of the Accused which furthered the goal of the enterprise (paragraphs 8 and 9).[111]

52. Second, the Defence submits that there is a failure to precisely identify the participants in the JCE. In paragraph 5 of the Second Amended Indictment the Prosecution uses the imprecise term "known and unknown participants".[112] With reference to paragraphs 5 and 7 of the Second Amended Indictment, the Defence submits that it is not clear "with whom did the accused act in conjunction, nor did he act in fact indirectly" and that it "remains unclear if he is liable for the acts and omissions, as well as what were the roles of the participants according to the Prosecution's claims, if they are not to be confined to the allegations of the Indictment".[113] The Defence submits that, in line with previous Tribunal decisions, all other participants must be identified together with their relation to the Accused.[114]

53. The Defence submissions with respect to the insufficiency of the material facts regarding the participants in the JCE demonstrate an incomprehensible reluctance or refusal to consider the Second Amended Indictment as a whole. The Prosecution has clearly identified in paragraphs 5 through 7 the five major co-participants in the alleged JCE.[115] It is precisely stated that "for the purpose of the indictment participation in the joint criminal enterprise charged in this indictment is limited to **Mile MRKSIC**, Miroslav RADIC, Veselin SLJIVANCANIN, Slavko DOKMANOVIC, Miroljub VUJOVIC and Stanko VUJANOVIC, and their subordinates".[116] Further, paragraphs 19, 20, 22-29 identify in a general way the criminal perpetrators of the acts for which the Accused is alleged to be responsible.[117] The Prosecution case regarding the participants in the JCE and their roles for the purposes of the preparation of the Defence case is made abundantly clear. In addition, there is no ambiguity as to whether the Accused is charged with

1398

indirect or direct acts. He is charged under both Articles 7(1) and 7(3) for all the alleged crimes committed by the other participants in the JCE, as identified above. With respect to the Defence claim that there may be a need for clarification regarding the roles, acts and omissions of the JCE participants "if they are not to be confined to the allegations of the Indictment", the Trial Chamber is of the view that this requests is merely spurious. It goes without saying that the Defence will never be required to meet a case which is not set out in the Second Amended Indictment. The Defence objections with respect to the identity of the JCE participants are rejected.

54. The Defence further alleges a failure to identify the common goals and agreements of the JCE.[118] The Prosecution responds that it has set out the criminal purpose of the enterprise in paragraph 3 of the Second Amended Indictment.[119] The Trial Chamber finds that the purpose of the JCE as set out in paragraph 3 sufficiently identifies the common goals and agreements of the enterprise. The Defence argument is rejected.

55. The Defence submits that the allegation in paragraph 5 of the Second Amended Indictment that the Accused participated in the basic form of JCE is inconsistent with the alternatively alleged extended form of JCE alleged in paragraph 4.[120] Further the Defence submits that the Prosecution must specifically identify the Accused's acts or conduct based on which it infers the Accused's responsibility and "thus it is not permissible to make the accused responsible for acting in the alleged joint criminal enterprise, by both claiming him responsible under the primary form of responsibility and the broad form of the responsibility altogether (...) the Prosecution has to know whether its allegations would go to charging the accused for acting as a main perpetrator in the JCE or to charging the accused for aiding and abetting others to commit crimes (...) (t)he Prosecution has to decide whether the accused shared the same intent with other members of the joint criminal enterprise, or this is a case that the crimes were committed by a person outside the intended joint criminal enterprise, but which was nevertheless a natural and foreseeable consequence of affecting the agreed joint criminal enterprise".[121]

56. Despite its protestations, the Defence objection appears to go to the permissibility of charging under alternative heads of liability (or, in this case, alternative forms of JCE liability).[122] It is clear from the Tribunal jurisprudence that it is permissible to plead the basic and extended forms of JCE liability in the alternative on the basis that it is not always possible for the Prosecution to know ahead of trial which of the two forms of responsibility will be proved by the evidence.[123] It is not, therefore, a question of proving responsibility under both forms, but of maintaining the option of both forms pending the presentation of evidence, at which time the Trial Chamber will establish which form, if any, is the applicable one.

57. Other Defence objections to the pleading of JCE in the Second Amended Indictment are equally misguided. The Defence submits that allowing the Prosecution to plead both forms of JCE would result in the Accused having "to defend himself from one fact in two opposite ways, (...) therefore rendering any possibility of a defence preparation impossible."[124] The Defence further alleges that this "broadened form of responsibility" disables the Accused from adequately preparing its defence and that the Prosecution should thus be ordered to decide on what it actually desires to charge the accused with.[125] The Trial Chamber notes again that the Prosecution is entitled to plead the basic and extended forms of JCE liability in the alternative. The Defence submission that this may make the preparation of its case more difficult or "impossible" has not been substantiated, and does not justify a change in the Prosecution's pleading approach. The Second Amended Indictment clearly identifies those acts for which the Accused is alleged to be responsible, as well as the modes of such responsibility. The Defence objections are rejected.

1399

58. The Defence argues that, by charging the Accused as an accomplice within a JCE, the Prosecution puts it in a more onerous position based on an identical state of facts.[126] Similarly, the Defence submits that by presenting Accused's responsibility "alternatively both as subjective and objective"[127] in paragraphs 4 and 9 of the Second Amended Indictment, the Accused is placed in an onerous position.[128] It is not the task of the Trial Chamber to ensure that the position of the Defence is not onerous, but rather that it is not *unfairly* so. The Prosecution correctly responds that the suggestion that pleading in the alternative places an accused in a more onerous position and that it should therefore be disallowed is without support in the Tribunal jurisprudence.[129] This Defence objection is rejected.

Pleading different heads of responsibility under Article 7(1)

59. The next set of Defence objections challenge the approach that the Prosecution has adopted with respect to pleading various headings of responsibility under Article 7(1).

60. The Defence submits that the Second Amended Indictment does not specify the elements of the Accused's individual responsibility, but rather copies the formulation of Article 7(1).[130] As a result, the Accused must defend himself from charges both as a perpetrator and as an aider and abettor, which is "not common in the jurisprudence of the Tribunal".[131] The "Accused could not have at the same time ordered and abetted the crime, nor could he have planned, committed and aided *id est* supported its preparation."[132] The Accused must be informed if the Prosecution claims that the Accused committed or ordered commission of criminal acts or if he only aided and abetted.[133] Further Defence arguments also focus on the alternative nature of the pleadings.[134]

61. The Prosecution responds that, in paragraph 9 of the Second Amended Indictment, all the bases for Article 7(1) are alleged.[135] The Accused is charged in the alternative with all of the modes of liability set out in Article 7(1), including liability as an aider and abettor. The Second Amended Indictment need not limit or elect specific modes of liability under Article 7(1). The Accused is on notice that all modes of liability under 7(1) are available to the finder of fact.[136] The Prosecution submits that it is well settled in Tribunal jurisprudence that pleading may be both in the alternative and cumulative, and that the Defence arguments are based on a mistaken belief that pleading in the alternative is not allowed.[137]

62. As set out above in paragraph 9 of this decision, the Prosecution is obliged to indicate the particular head or heads of Article 7(1) responsibility alleged in order to enable the Accused to effectively and efficiently prepare his defence. Contrary to the Defence submissions, however, the Prosecution is not required to choose between different heads of responsibility. In this case it has chosen to plead all the different heads of responsibility, as is its right. It will be required to prove the existence of each of these at trial. Further, despite Defence protestations to the contrary,[138] the arguments advanced clearly challenge the approach of pleading heads of responsibility in the alternative. Such an approach has clearly been accepted within the Tribunal's jurisprudence.[139] The Defence objections are therefore rejected.

63. In addition to its general objections, the Defence makes a specific request for clarification with respect to the Article 7(1) modes of liability pleaded in paragraph 36 of the Second Amended Indictment, regarding the charges for imprisonment, torture, inhumane acts and cruel treatment. The Defence submits that the Prosecution must specify "whether the Accused is being charged with ordering the detention of the relevant people or aiding it".[140] As noted above, the

Prosecution is free to plead more than one mode of liability. In paragraph 36 of the Second Amended Indictment, it has clearly done so. The Trial Chamber finds that the case to be met by the Defence is clear and that no clarification is necessary. The request is rejected.

8. Defence objections relating to the pleading of Article 7(3)

64. The Defence also challenges the sufficiency of the material facts set out by the Prosecution with respect to the superior command head of responsibility.[141] Specifically, the Defence alleges that, in paragraph 10 of the Second Amended Indictment, the Prosecution fails to clarify the material facts regarding the relationship of the Accused to his subordinates, of which acts committed by his subordinates the Accused knew or had reason to know, the identity of the subordinates who committed such acts, and the type of acts committed and measures that the Accused could have but failed to take.[142] The Defence further submits that the Prosecution must specify, where possible, the overall structure including those units under the command of the Accused, their zones of responsibility and which units carried out the acts alleged in the Second Amended Indictment.[143] In response to the Defence allegations, the Prosecution submits that the requisite material facts are to be found in paragraphs 10-14 of the Second Amended Indictment. Whether or not the Accused exercised actual control over the forces in question is an evidentiary matter that must be determined at trial. The material facts regarding his *de jure* and *de facto* control of the military forces in Vukovar have been pleaded with the requisite specificity.[144]

65. The jurisprudence of this Tribunal is clear with respect to the nature of the material facts which need to be pleaded in a case based on superior responsibility.[145] Certain facts will necessarily be stated with less precision than in a case based on Article 7(1) responsibility, and in some cases it may be sufficient to identify the persons who committed the alleged crimes and the victims by means of the category or group to which they belong.[146] The Trial Chamber finds that the Prosecution has clearly identified in paragraphs 7 and 10-14 of the Second Amended Indictment the command position occupied by the Accused and the individuals and units subordinated to him. The material facts regarding the acts committed and the individuals who committed them are set out throughout the Second Amended Indictment and are generally the subject here of individual Defence objections where it is submitted that such facts are insufficiently pleaded. The Trial Chamber finds that the general Defence objections with respect to superior responsibility are without merit, and they are accordingly refused, with one exception. While the Prosecution notes the legal requirements that the Accused must have known or had reason to know that his subordinates were about to commit the crimes alleged or had done so and that he failed to take the necessary and reasonable measures to prevent these crimes or to punish the persons who committed them, it does not plead these as material facts in this case. On this point only the Defence objection is upheld and the Prosecution is ordered to amend the Second Amended Indictment accordingly.

66. In a more general complaint, the Defence submits that because the perpetrators of the crimes alleged were units which held persons under guard at Ovcara, the Accused as a member of the Yugoslav People's Army had neither command nor responsibility over the said units.[147] The Prosecution has properly pleaded the material facts regarding the Accused's superior responsibility, including his superior position vis-à-vis these units. Whether or not these facts are true is a matter to be resolved at trial. The Defence objection is rejected.

67. With respect to the paragraph 8(a) of the Second Amended Indictment, in which the Prosecution alleges that the Accused "directed, commanded, controlled, or otherwise exercised effective

control over Serb forces engaged in the execution of the purpose of the joint criminal enterprise as described in this indictment", the Defence requests clarification whether the Prosecution claims that the Accused "commanded these forces whereby he indirectly led to the execution of the joint criminal enterprise goal, or did he in fact have but a *de iure* control over the said forces or yet a control of a *de facto* nature"[148] The Trial Chamber draws the attention of the Defence to paragraph 13 of the Second Amended Indictment, where both *de iure* and *de facto* control are pleaded.

9. Disposition

68. Pursuant to Rule 72,

(a) The Motion is hereby granted in part, as follows:

(i) The Prosecution is ordered to amend the Second Amended Indictment in the terms set out in paragraphs 46 and 65 of this Decision; and

(ii) The Prosecution is ordered to disclose to the Defence the particulars highlighted by the Trial Chamber in paragraphs 29, 35, 41, 42, 43 and 48 of this Decision, or show good cause why it cannot do so at this stage.

(iii) The amended indictment is to be filed no later than 12:00 on 21 July 2003. A table indicating all the amendments and changes made to the indictment shall be filed by the same time (reorganisation table).

(iv) The Defence is to file complaints, if any, resulting from the amendments made in accordance with the above directions within thirty (30) days of the filing of the amended indictment (i.e., no later than 12:00 on 20 August 2003).

(b) The remainder of the Motion is denied.

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

Dated this nineteenth day of June 2003
At The Hague,
The Netherlands.

_____
Wolfgang Schomburg
Presiding Judge

[Seal of the Tribunal]

Footnote 1 - "Defense Response to Prosecution's Motion for Leave to File an Amended Indictment", 2 October 2002 ("Defence Response"); "Defense Preliminary Motion", 29 November 2002 ("Defence Motion"); "Defence Reply to the Prosecution's Response to Accused's Preliminary Motion Based on Defects in the Form of the Indictment", 6 January 2003 ("Defence Reply").
Footnote 2 - "Prosecution's Response to the Accused's Preliminary Motion Based on Defects in the Form of the Second

1402

Amended Indictment", 13 December 2002 ("Prosecution Response"); "Prosecution's Reply in Support of Motion for Leave to File and Amended Indictment", 30 October 2002 ("Prosecution Reply").

Footnote 3 - *Prosecutor v Mrksic, Radic and Sljivancanin*, Case IT-95-13-I, Indictment, 7 November 1995 ("Initial Indictment").

Footnote 4 - *Prosecutor v Mrksic, Radic, Sljivancanin and Dokmanovic* (†), Case IT-95-13a-I, Indictment, 1 April 1996 ("1996 Amended Indictment"); see also *Prosecutor v Mrksic, Radic, Sljivancanin and Dokmanovic* (†), Case IT-95-13a-I, Amendement de l'acte d'accusation, 3 April 1996.

Footnote 5 - *Prosecutor v Mrksic, Radic, Sljivancanin and Dokmanovic* (†), Case IT-95-13a-PT, Amended Indictment, 2 December 1997 ("1997 Amended Indictment").

Footnote 6 - "Decision on Leave to File Amended Indictment", 1 November 2002.

Footnote 7 - *Prosecutor v Mrksic*, Case IT-95-13/1, Second Amended Indictment, 29 August 2002 ("Second Amended Indictment").

Footnote 8 - Hereinafter, references to "Article" or "Articles" would mean references to an Article or Articles of the Statute.

Footnote 9 - See "Decision on Leave to File Amended Indictment", 1 November 2002, in which the "Defence is granted leave to file a motion on the form of the indictment but should restrict itself to arguments additional to those already raised in the Defence Response"; and the "Decision on Request for Leave to Reply", 20 December 2002, in which the Defence is ordered to "restrict its reply to new issues raised in the Prosecution's Response and shall not repeat arguments already advanced".

Footnote 10 - *Prosecutor v Kupreskic and Others*, Case IT-95-16-A, Appeal Judgement, 23 October 2001 ("*Kupreskic* Appeal Judgment"), par 88.

Footnote 11 - *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.

Footnote 12 - See *Kupreskic* Appeal Judgment, par 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).

Footnote 13 - *Kupreskic* Appeal Judgment, par 89.

Footnote 14 - *Ibid*, par 89.

Footnote 15 - *Hadzihasanovic* Indictment Decision, par 10; *Prosecutor v Brdjanin and Talic*, Case IT-99-36-PT, Decision on Objections by Momir Talic to the Form of the Amended Indictment, 20 February 2001 ("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 and Talic*, Case IT-99-36-PT, Decision on Objections by Radoslav Brdjanin to the Form of the Amended Indictment, 23 February 2001 ("Second *Brdjanin & Talic* Decision"), par 13.

Footnote 16 - Second *Brdjanin & Talic* Decision, par 10.

Footnote 17 - See *Prosecutor v Delalic and Others*, Case IT-96-21-A, Judgement, 20 Feb 2001 ("*Celebici* Appeal Judgment"), par 350. See also *Prosecutor v Deronjic*, Case IT-02-61-PT, Decision on Form of the Indictment, 25 October 2002 ("*Deronjic* Decision"), par 31.

Footnote 18 - *See ibid*, par 351; *Prosecutor v Aleksovski*, Case IT-95-14/1-A, Judgement, 24 March 2000, par 171, fn 319 (with reference to [redacted]).

Footnote 19 - *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, par 89), whereas, in a joint criminal enterprise case, different material facts would have to be pleaded (*see also Prosecutor 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"), pars 21, 22).

Footnote 20 - The Prosecution may also be ordered to plead what is the position forming the basis of the superior responsibility charges (Deronjic Decision, par 15).

Footnote 21 - *Deronjic* Decision, par 19.

Footnote 22 - *Celebici* Appeal Judgment, par 256 (see also pars 196-198, 266).

Footnote 23 - Statute, Art 7(3); see *Hadzihasanovic* Indictment Decision, pars 11 and 17; see also 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 August *2000* ("*Krajisnik* Decision"), par 9; First *Krnojelac* Decision, par 9.

Footnote 24 - Statute, Art 7(3); see *Hadzihasanovic* Indictment Decision, par 11; First *Brdjanin & Talic* Decision, par 19; *Krajisnik* Decision, par 9.

Footnote 25 - 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, par 38.

Footnote 26 - *Hadzihasanovic* Indictment Decision, par 11; First *Brdjanin & Talic* Decision, par 19.

Footnote 27 - See *Hadzihasanovic* Indictment Decision, par 11; First *Brdjanin & Talic* Decision, par 19; *Prosecutor v Kvocka*, Case IT-99-30-PT, Decision on Defence Preliminary Motions on the Form of the Indictment, 12 April 1999 ("*Kvocka* Decision"), par 17; First *Krnojelac* Decision, par 18(A); *Krajisnik* Decision, par 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.
Footnote 28 - Statute, Art 7(3); *see Hadzihasanovic* Indictment Decision, par 11; First *Brdjanin & Talic* Decision, par 19 (rolling facts (b) and (c) together); *Krajisnik* Decision, par 9.
Footnote 29 - *Hadzihasanovic* Indictment Decision, par 10.
Footnote 30 - Third *Brdjanin & Talic* Decision, par 33.
Footnote 31 - *Hadzihasanovic* Indictment Decision, par 10; *Prosecutor v Brdjanin and Talic*, Case IT-99-36-PT, Decision on Form of Fourth Amended Indictment, 23 November 2001, par 12; First *Brdjanin & Talic* Decision, par 48.
Footnote 32 - *Hadzihasanovic* Indictment Decision, par 10; First *Brdjanin & Talic* Decision, par 48.
Footnote 33 - *Kupreskic* Appeal Judgment, par 114.
Footnote 34 - 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, pars 11-13).
Footnote 35 - *Kupreskic* Appeal Judgment, par 92.
Footnote 36 - *Ibid.*
Footnote 37 - *Ibid.*
Footnote 38 - *Ibid*, 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.
Footnote 39 - Defence Motion, pars 2, 4.
Footnote 40 - Defence Motion, par 16, Defence Reply, pars 12, 15, 16.
Footnote 41 - Defence Motion, par 5.
Footnote 42 - Defence Motion, pars 4, 5, Defence Reply 4.
Footnote 43 - Defence Reply, pars 16, 17.
Footnote 44 - Prosecution Response, pars 8, 20. Including with regard to: the command position held by the Accused; the identity of the participants in the joint criminal enterprise; the location and approximate time of each criminal event; the person or persons involved in the crimes committed; the manner in which the crimes were committed; the nature of the Accused's participation in the crimes; and the identities of the victims (Prosecution Response, par 8).
Footnote 45 - Prosecution Response, par 15.
Footnote 46 - Prosecution Response, pars 12, 30.
Footnote 47 - Prosecution Response, par 30.
Footnote 48 - *See* par 14 above.
Footnote 49 - "Although it is no longer necessary for an amended indictment to be "confirmed" after the case has been assigned to a Trial Chamber, leave will not be granted to *add* new allegations to an indictment unless the prosecution is able to demonstrate that it has material to support these new allegations - unless, of course, the evidence has already been given and the indictment is being amended merely to accord with the case which has been presented", *Prosecutor v Brdjanin and Talic*, Case IT-99-36-PT, Decision on Form of Fourth Amended Indictment, 23 November 2001, par 21.
Footnote 50 - Namely persecution (count 1), extermination (count 2), imprisonment (count 5) and torture, both as a crime against humanity (count 6) and as a violation of the laws or customs of war (count 8).
Footnote 51 - Defence Response, par 10; Defence Motion, par 30 regarding persecution in particular.
Footnote 52 - Defence Response, par 6.
Footnote 53 - Prosecution Reply, par 9.
Footnote 54 - "It is somewhat of a paradox that the Prosecution now wishes to charge the Accused with these additional charges if one bears in mind that the Prosecution claims that even though the perpetrators of the crimes against the victims in Ovcara were in fact members of the local territorial defence units, these charges did not exist when a member of the government of Eastern Slavonia, Baranje and Western Srem was tried, under whose command the said units were." (Defence Response, par 10)
Footnote 55 - Prosecution Reply, par 9.
Footnote 56 - Defence Response, par 11.
Footnote 57 - Defence Response, par 11.
Footnote 58 - Defence Response, pars 11, 12. *See also* par 6, in which the Defence submits that the Accused "is placed in a more difficult position *id est* he is expected to prove a fact which is incompatible with both his own role and the role of the army to which he belonged".
Footnote 59 - Prosecution Reply, par 10.
Footnote 60 - Prosecution Reply, par 12.
Footnote 61 - Defence Response, par 6.
Footnote 62 - *See* par 13 above. *See also* Prosecution Reply, par 11.
Footnote 63 - Defence Motion, par 8.
Footnote 64 - *See eg. Prosecutor v Milutinovic and Others*, Case IT-99-37-AR72, Decision on Drgoljub Ojdanic's Motion Challenging Jurisdiction -Joint Criminal Enterprise, 21 May 2003.
Footnote 65 - Defence Response, pars 7, 11; Defence Motion, pars 8, 22, 25, 29.
Footnote 66 - Prosecution Response, par 30.

14804

Footnote 67 - Prosecution Response, par 32.
Footnote 68 - Defence Motion, par 14.
Footnote 69 - Amended Indictment, par 11.
Footnote 70 - Defence Motion, par 19; Defence Reply, par 23.
Footnote 71 - Defence Motion, pars 22, 41.
Footnote 72 - Defence Motion, par 23.
Footnote 73 - *See* Second Amended Indictment par 3: "The purpose of this joint criminal enterprise was the persecution of Croats and other non-Serbs who were present in the Vukovar Hospital *after the fall of Vukovar*, through the commission of crimes in violation of Articles 3 and 5 of the Statute of the Tribunal" (emphasis added).
Footnote 74 - Defence Motion, par 23.
Footnote 75 - Defence Motion, par 24.
Footnote 76 - Prosecution Response, par 32.
Footnote 77 - First *Krnojelac* Decision, par 18.
Footnote 78 - Specifically, the Defence requests data on the number of dead people, the circumstances and locations of deaths, and the units responsible for deaths. *See* Defence Motion, par 25.
Footnote 79 - The Defence submits that it is not possible to adduce from the material that the non-Serb population was forced out and that there is evidence that they left voluntarily. *See* Defence Motion, par 25.
Footnote 80 - Defence Motion, par 25.
Footnote 81 - In par 24 of the Second Amended Indictment, it actually reads that soldiers "humiliated and threatened" the detainees.
Footnote 82 - Defence Motion, par 27.
Footnote 83 - Second Amended Indictment, par 7(a).
Footnote 84 - See Third *Brdjanin & Talic* Decision, par 59, for the principle that the identity of the victims and perpetrators are not material facts in a case in which the accused is remote in proximity from the crimes alleged to have been committed – rather, they are matters of evidence.
Footnote 85 - Defence Motion, par 35; Defence Reply, par 20.
Footnote 86 - Defence Reply, par 20.
Footnote 87 - Prosecution Response, par 32.
Footnote 88 - Defence Motion, par 31.
Footnote 89 - Defence Motion, par 28.
Footnote 90 - The Trial Chamber notes that the definition of Serb forces given clearly includes "members of the JNA" and therefore rejects the Defence argument that the reference to "Serb forces" excludes that they are members of the JNA (Defence Reply, par 21).
Footnote 91 - Defence Motion, par 39.
Footnote 92 - Defence Motion, par 38.
Footnote 93 - Defence Motion, par 29; Defence Reply, par 21.
Footnote 94 - Defence Motion, par 31. In the Defence Motion it is mistakenly stated that the relevant Indictment paragraph is 32.
Footnote 95 - First *Krnojelac* Decision, par 57.
Footnote 96 - Defence Motion, pars 31, 36; Defence Reply, par 21. The sexual violence allegations referred to would appear to be those pleaded in pars 31(c) and 37 of the Second Amended Indictment, although the relevant paragraphs have not been specified by the Defence.
Footnote 97 - Defence Motion, pars 31, 37.
Footnote 98 - Defence Motion, par 40.
Footnote 99 - Defence Reply, par 14.
Footnote 100 - Prosecution Response, par 23.
Footnote 101 - Defence Motion, par 33; Defence Reply, par 19.
Footnote 102 - Prosecution Response, par 32.
Footnote 103 - Defence Motion, par 37.
Footnote 104 - Prosecution Response, par 32.
Footnote 105 - Defence Motion, par 37.
Footnote 106 - Prosecution Response, par 32.
Footnote 107 - First *Krnojelac* Decision, par 57.
Footnote 108 - Defence Motion, par 37.
Footnote 109 - Defence Motion, par 8.
Footnote 110 - Prosecution Response, par 19, fn 20.
Footnote 111 - Prosecution Response, par 21.
Footnote 112 - Defence Motion, pars 9, 30; Defence Reply, par 12.
Footnote 113 - Defence Motion, pars 12, 13.
Footnote 114 - Defence Motion, par 26.
Footnote 115 - Prosecution Response, pars 21, 22.

1405

Footnote 116 - Second Amended Indictment par 6.
Footnote 117 - Prosecution Response, par 22. The Trial Chamber does not agree with the Prosecution submission in this paragraph that the perpetrators have been identified "specifically".
Footnote 118 - Defence Motion, par 9.
Footnote 119 - Prosecution Response, par 21. Par 3 of the Second Amended Indictment states "The purpose of this joint criminal enterprise was the persecution of Croats or other non-Serbs who were present in the Vukovar Hospital after the fall of Vukovar, through the commission of crimes in violation of Articles 3 and 5 of the Statute of the Tribunal".
Footnote 120 - Defence Motion, par 11.
Footnote 121 - Defence Reply, par 12.
Footnote 122 - The Defence states in its Reply that "(...) the aforementioned Prosecution's obligation cannot be questioned as a matter of permissibility of an alternative an cumulative charging, because neither a theoretical possibility if being responsible under both forms of responsibility can be discussed, nor is there justification in the elements required for the validation of the categories." (Defence Reply, par 13).
Footnote 123 - Third *Brdjanin & Talic* Decision, par 40.
Footnote 124 - Defence Reply, par 13.
Footnote 125 - Defence Response, par 8.
Footnote 126 - Defence Response, pars 5, 6.
Footnote 127 - The Trial Chamber understands this to mean responsibility under both the basic and extended forms of JCE.
Footnote 128 - Defence Motion, par 10.
Footnote 129 - Prosecution Response, par 27.
Footnote 130 - Defence Motion, par 7; Defence Reply, par 4.
Footnote 131 - Defence Reply, par 4.
Footnote 132 - Defence Motion, par 7; *see also* par 17; Defence Reply, par 7.
Footnote 133 - Defence Reply, par 4.
Footnote 134 - The Defence asserts that, in par 7 of the Amended Indictment, the Prosecution presents its allegations in relation to the Accused in an imprecise and alternative fashion (Defence Motion, par 13). It states that the result of such an alternative presentation of responsibility is that the Prosecution is claiming that the Accused is both "the co-perpetrator as well as the co-participant" (Defence Motion, par 10). The Defence further objects to "the fact that the Prosecution has presented its request for the individual responsibility of the Accused as an accomplice in a joint criminal enterprise in an alternative fashion." (Defence Response, par 8). Whether participation in a joint criminal enterprise in fact constitutes accomplice liability, disputed by the Prosecution (Prosecution Reply, par 6), is a matter to be resolved at trial.
Footnote 135 - Prosecution Reply, par 4.
Footnote 136 - Prosecution Reply, par 7.
Footnote 137 - Prosecution Response, par 26.
Footnote 138 - The Defence submits that its objection is not to alternative pleading, but to the imprecise allegations of the Prosecution regarding the Accused's conduct: Defence Reply, par 5.
Footnote 139 - *See eg Celebici* Appeal Judgment, par 400, for cumulative charging.
Footnote 140 - Defence Motion, par 34.
Footnote 141 - Defence Motion, par 17.
Footnote 142 - Defence Motion, par 20.
Footnote 143 - Defence Motion, par 26.
Footnote 144 - Prosecution Response, par 22.
Footnote 145 - *See* par 10, supra.
Footnote 146 - *See* pars 8, 10, *supra*; *see also* Prosecution Response, par 17.
Footnote 147 - Defence Response, par 10.
Footnote 148 - Defence Motion, par 15.

PROSECUTION AUTHOURITIES

10. *Prosecutor v. Krnojelac,* IT-97-25, "Decision on Form of Second Amended Indictment", 11 May 2000.

1407

IN TRIAL CHAMBER II

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

Registrar:
Ms Dorothee de Sampayo Garrido-Nijgh

Decision of:
11 May 2000

PROSECUTOR

v

Milorad KRNOJELAC

DECISION ON FORM OF SECOND 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. Milorad Krnojelac ("accused") has been charged with crimes against humanity, grave breaches of the Geneva Conventions and violations of the laws or customs of war. The general nature of the case against him and of the offences with which he has been charged are adequately described in the two decisions already given by the Trial Chamber in relation to the form of the previous indictments filed by the prosecution in this case.[1]

2. An issue raised in both decisions was the sufficiency of the pleading concerning the individual responsibility of the accused for the offences charged pursuant to Article 7(1) of the Tribunal's Statute. A distinction was drawn between the allegation that the accused had himself committed those offences (referred to as his "personal" responsibility) and the allegation that he had planned, instigated, ordered or

otherwise aided and abetted in the planning, preparation or execution of those offences (referred to as his "aiding and abetting" responsibility).[2]

3. In the First Decision, the prosecution was ordered to identify, in relation to each count or group of counts, the material facts (but not the evidence) upon which it relies to establish the individual responsibility of the accused for the particular offence or group of offences charged.[3] In the Second Decision, the prosecution was ordered to identify, so far as it was possible to do so, the victim or victims, the places and the approximate dates of the offences charged and the means by which it was alleged that the accused himself committed those offences, or in the alternative to withdraw from the charge of individual responsibility the allegation that the accused "personally" committed those offences.[4]

4. The prosecution, in its second amended indictment,[5] took neither course. Instead, it pleaded for the first time a "common purpose" case, in the following terms:

> 5.1 MILORAD KRNOJELAC, from April 1992 until August 1993, while acting as the camp commander at the Foca KP Dom, **together with the KP Dom guards under his command and in common purpose with the guards and soldiers specified elsewhere in this indictment,** persecuted the Muslim and other non-Serb male civilian detainees at the KP Dom facility on political, racial or religious grounds.[6]

5. In par 5.2, the "common plan" in the execution of which the accused is alleged to have "participated [...] or aided and abetted" is identified as "involving":

> (a) the prolonged and routine imprisonment and confinement within the KP Dom facility of Muslim and other non-Serb male civilian inhabitants of Foca municipality and its environs;
>
> (b) the repeated torture and beatings of Muslim and other non-Serb male civilian detainees at KP Dom;
>
> (c) numerous killings of Muslim and other non-Serb male civilian detainees at KP Dom;
>
> (d) the prolonged and frequent forced labour of Muslim and other non-Serb male civilian detainees at KP Dom; and
>
> (e) the establishment and perpetuation of inhumane conditions against Muslim and other non-Serb male civilian detainees within the KP Dom detention facility.

The participation of the accused in the "prolonged and routine imprisonment of non-Serb civilians under inhumane conditions" is identified in the same paragraph as:

> [...] by providing the detention facilities, by being in the position of camp administrator and by establishing living conditions characterised by inhumane treatment, overcrowding, starvation, forced labour, and constant physical and psychological assault.

6. Paragraph 5.2 goes on to identify further the nature of the accused's participation in the various elements of the "common plan" and those with whom he is alleged to have acted in concert. The allegations are that the accused, acting as the camp commander:[7]

> (i) (in concert with other high-level prison staff) established a pattern of torture and beatings whereby guards took the detainees out of the cells and brought them to the interrogation rooms and provided the office in which these day-time interrogations and beatings took place;

1409

(ii) (in concert with political leaders or military commanders and other high-level prison staff) prepared lists of detainees to be further beaten during night-time interrogations and established a daily routine for these beatings;

(iii) (in concert with other high-level prison staff) ordered the guards to beat detainees even for minor violations of the prison rules;

(iv) (in conjunction with his subordinates) subjected the other detainees to collective punishment;

(v) (in concert with other high-level prison staff) participated by ordering the punishment; and

(vi) (in concert with other high-level prison staff) formed and began to supervise a workers' group of approximately seventy of the detainees with special skills – of whom most were kept imprisoned from the Summer of 1992 until 5 October 1994 for the primary purpose of being used for forced labour.

7. Paragraph 5.2 also alleges that the accused participated in the beatings of detainees referred to:

> [...] by allowing the Serb military personnel to enter the prison and assault the detainees whenever they wanted and by instructing his guards to lead the soldiers to the cells and select detainees for beatings; he encouraged and approved assaults by the guards.

He is also alleged to have participated in the beatings and killing of non-Serb civilian detainees:

> [...] by ordering and supervising the actions of his guards and allowing military personnel access to the detainees for this purpose.

Finally, par 5.2 alleges that the accused assisted in the deportation or expulsion of the majority of Muslim and non-Serb males from the Foca municipality by selecting detainees from the KP Dom for deportation to Montenegro.

II The complaints made by the accused

(a) Paragraph 5.2 of the second amended indictment

8. The accused has filed a Preliminary Motion pursuant to Rule 72 of the Tribunal's Rules of Procedure and Evidence complaining, *inter alia*, that the form in which par 5.2 has been pleaded is insufficiently precise.[8] He asserts that the indictment is deficient in not identifying (a) the essence of the common plan,[9] (b) the authors of that plan (and, if unknown, their category as a group) and whether they were civil or military authorities, (c) whether the plan was intended for the Municipality of Foca only or for the entire territory of Bosnia and Herzegovina, (d) the persons designated to execute the plan (and, if unknown, their category as a group), (e) the relationship between the accused and those persons, and (f) the acts which the accused is alleged to have done in person, those which he is alleged to have aided and abetted or supported others to do, and those for which he is alleged to have command responsibility.

9. This complaint raises an issue as to the true nature of the "common purpose" case now pleaded for the

first time in the second amended indictment. The availability of a common purpose case under the Tribunal's Statute was upheld by the Appeals Chamber in *Prosecutor v Tadic.*[10] Such a case is described by the Appeals Chamber, variously (and apparently interchangeably), as a common criminal plan,[11] a common criminal purpose,[12] a common design or purpose,[13] a common criminal design,[14] a common purpose,[15] a common design,[16] and a common concerted design.[17] The common purpose is also described, more generally, as being part of a criminal enterprise,[18] a common enterprise,[19] and a joint criminal enterprise.[20]

10. The second amended indictment does not define the term "common purpose", but in pars 5.1-2 it speaks in general of the accused acting "in concert" (or "in conjunction") with others as part of a "common plan". In order to achieve some measure of consistency, the Trial Chamber intends in this decision to refer to this newly pleaded case as one in which the accused is alleged to have shared a common purpose with others as part of a joint criminal enterprise to commit the crime against humanity (based upon persecution) charged in Count 1 to which pars 5.1-2 relate.

11. In the *Tadic* Conviction Appeal Judgment, the Appeals Chamber held, in summary, that the notion of common design "as a form of accomplice liability" was firmly established in customary international law and available under the Tribunal's Statute.[21] It identified the notion of common design as being applied by customary international law in three distinct categories of cases:

> First, in cases of co-perpetration, where all participants in the common design possess the same criminal intent to commit a crime (and one or more of them actually perpetrate the crime, with intent). Secondly, in the so-called "concentration camp" cases, where the requisite *mens rea* comprises knowledge of the nature of the system of ill-treatment and intent to further the common design of ill-treatment. Such intent may be proved either directly or as a matter of inference from the nature of the accused's authority within the camp or organisational hierarchy. With regard to the third category of cases, it is appropriate to apply the notion of "common purpose" only where the following requirements concerning *mens rea* are fulfilled: (i) the intention to take part in a joint criminal enterprise, and to further – individually and jointly – the criminal purposes of that enterprise; and (ii) the foreseeability of the possible commission by other members of the group of offences that do not constitute the object of the common criminal purpose.[22]

As the indictment is silent on the subject, it is unnecessary for present purposes to consider the last of those categories, where the offence charged falls outside the scope of the common purpose of those engaged in the joint criminal enterprise but which is nevertheless within the contemplation of the accused as a possible incident of that enterprise.

12. What is clear from all of the law relating to a joint criminal enterprise is that the prosecution needs to rely upon such a case only where it is unable to establish beyond reasonable doubt that the accused was the person who personally committed the offence charged. It is also reasonably clear – from the circumstances in which the prosecution came to plead the common purpose case, as already described – that the prosecution is indeed unable to establish beyond reasonable doubt that the accused personally committed the offence charged, and that it relies merely upon the inferences available from "the nature of the accused's authority" within the KP Dom.[23]

13. The Trial Chamber interprets the second amended indictment as substituting the common purpose case now pleaded for the allegation of personal liability which arises from inclusion of the word "committing" in par 4.9, upon the basis that the prosecution is unable to plead the information which it was ordered by the Second Decision to include in this indictment. Its case is now that, although it cannot establish that the accused personally committed the offence charged in Count 1, it will prove that he participated with a common purpose as part of a criminal enterprise to commit that offence. Such a case does not exclude the possibility that the accused did in fact personally commit those offences; however,

1411

the prosecution will not be leading evidence in an endeavour to establish beyond reasonable doubt that he personally did so unless it has first obtained leave and, if necessary, made an amendment to the indictment. It may, of course, rely upon any evidence which may emerge during the trial and which establishes that fact.

14. The Trial Chamber recognises the validity of such an approach, and it is satisfied that the accused is not thereby prejudiced by the absence of the particulars which had been ordered – provided that the common purpose case has been pleaded with sufficient particularity. To that issue the Trial Chamber will turn, after making the point that the common purpose case could have been better and more logically pleaded. However, the clumsiness of its expression does not render it deficient in form.

15. The law is that, where two or more persons carry out a joint criminal enterprise, each is responsible for the acts of the other or others in carrying out that enterprise. The prosecution must establish (1) the existence of that joint criminal enterprise, and (2) the participation in it by the accused.

As to (1): A joint criminal enterprise exists where there is an understanding or arrangement amounting to an agreement between two or more persons that they will commit a crime. The understanding or arrangement need not be express, and its existence may be inferred from all the circumstances. It need not have been reached at any time before the crime is committed. The circumstances in which two or more persons are participating together in the commission of a particular crime may themselves establish an unspoken understanding or arrangement amounting to an agreement formed between them then and there to commit that crime.

As to (2): A person participates in that joint criminal enterprise either:

(i) by participating directly in the commission of the agreed crime itself (as a co-perpetrator); or

(ii) by being present at the time when the crime is committed, and (with knowledge that the crime is to be or is being committed) by intentionally assisting or encouraging another participant in the joint criminal enterprise to commit that crime;[24] or

(iii) by acting in furtherance of a particular system (for example, of persecution) in which the crime is committed by reason of the accused's position of authority or function, and with knowledge of the nature of that system and the intent to further that system.[25]

If the agreed crime is committed by one or other of the participants in that joint criminal enterprise, all of the participants in that enterprise are equally guilty of the crime regardless of the part played by each in its commission.

16. In order to know the nature of the case he must meet, the accused must be informed by the indictment of:

> (a) the nature or purpose of the joint criminal enterprise (or its "essence", as the accused here has suggested),
>
> (b) the time at which or the period over which the enterprise is said to have existed,
>
> (c) the identity of those engaged in the enterprise – so far as their identity is known, but at least by reference to their category as a group, and

(d) the nature of the participation by the accused in that enterprise. 1412

Where any of these matters is to be established by inference, the prosecution must identify in the indictment the facts and circumstances from which the inference is sought to be drawn.

17. The only deficiency in the second amended indictment in relation to those matters lies in the identification of those who are alleged to have been engaged in the enterprise with the accused. In par 5.1, the others are identified as the guards and soldiers "specified elsewhere in this indictment". This is inconsistent with the terms of par 5.3, in which the prosecution limits its case on the crime against humanity charged in Count 1 to the participation of the accused in the acts and omissions described in par 5.2. The open-ended reference in par 5.1 to *any* of the guards or soldiers specified *anywhere* else in the indictment is far too wide; indeed, *nowhere* else in the indictment does the prosecution "specify" any guards and soldiers by name or other positive identification. The Motion does not specifically object to the width of this description in par 5.1, but in this context the prosecution cannot in fairness be permitted to go outside those paragraphs which are said to relate to Count 1 for its identification of the guards and soldiers involved – in other words, beyond the persons specified in par 5.2.

18. In par 5.2, the persons alleged to have participated with the accused in the joint criminal enterprise are described only by categories – "high level prison staff", "political leaders", "military commanders" and "subordinates". The Second Decision required the prosecution to make it clear *in the indictment itself* that (if this were the case) it was unable properly to identify any such persons referred to, and *only then* could it identify them in the best way it was able to,[26] such as describing them by their "category" (or their official positions) as a group.[27] The assertion by the prosecution, in its response to the Motion,[28] that it had set forth the information "to the extent that information is known by the Prosecution" does not satisfy that requirement.[29]

19. The Trial Chamber nevertheless believes that both the parties and the Chamber have spent more than enough time already during the pre-trial period of this case endeavoring to ensure that the indictment is pleaded properly. In the light of the statement in its Response that the prosecution is unable to identify these persons any better than it has, and as this is the only defect in the form of the second amended indictment which the accused has been able to demonstrate in his Motion, it would serve no useful purpose after all this time to require the prosecution to plead a third amended indictment simply to fulfil the obligation which it had to make that statement in the current indictment. The Trial Chamber stresses however, that it would not be appropriate for the prosecution to fail to comply with that obligation in other indictments.

(b) Paragraphs 5.4-5.6

20. The accused asserts that paragraphs 5.4 to 5.6 contain contradictory allegations which cause confusion.[30]

21. Paragraph 5.4 alleges that certain Muslim male detainees were "beaten" in the prison yard by the prison guards or by soldiers in the presence of regular prison personnel, "as described in paragraphs 5.5 and 5.6". Paragraph 5.5 describes how soldiers forced certain detainees upon their arrival at KP Dom to line up against the prison wall with their hands above their heads, and then beat, kicked and hit them with rifle butts. Paragraph 5.6 describes how guards beat other detainees upon their arrival at KP Dom. The accused is alleged by par 5.4 to have participated in these "beatings": (i) by granting soldiers access to the detainees and by instructing his guards not to intervene, and (ii) by encouraging and approving assaults by the guards.

22. The Trial Chamber sees no contradiction or confusion in these paragraphs. The words "beaten" and "beatings" in par 5.4 are general in nature, and include all of the conduct by the soldiers described in par 5.5 and of the guards described in par 5.6. The instruction not to intervene which the accused is alleged to have given to his guards is clearly referable to the actions of the soldiers described in par 5.5. The clear implication is that the prison guards would otherwise have been in a position to intervene when the soldiers beat the detainees. In those circumstances, the absence of any express allegation to that effect in par 5.5 does not render the form of the indictment defective. The accused is alleged to bear responsibility for having instructed the guards not to intervene when the soldiers beat the detainees.

23. All of this was discussed in the First Decision,[31] and was the subject of further consideration in the Second Decision.[32] If there *were* confusion now in the second amended indictment (which the Trial Chamber does not accept), it was present also in at least the first amended indictment, but it induced no such complaint at the time. The Trial Chamber has already pointed out to counsel for the accused that the opportunity given by Rule 50(C) to file a preliminary motion alleging defects in the form of an *amended* indictment is directed to the material added by amendment. That opportunity cannot be used to raise issues in relation to the amended indictment which could have been raised in relation to the earlier indictment but were not.[33] Counsel was reminded of this point at the recent Status Conference.[34]

24. The complaint is rejected.

(c) Paragraphs 5.4-5.6, 5.21, 5.23, 5.25, 5.27-5.29

25. The accused complains that, although the prosecution has complied with the directions given in the Second Decision to state in relation to certain nominated paragraphs that (if it were the case) it was unable properly to identify any particular persons referred to,[35] the prosecution has failed to do so in relation to the above paragraphs now nominated in the Motion.[36]

26. There is no suggestion that these paragraphs are significantly different from the corresponding ones in the previous indictment, and no such complaint was made in relation to that indictment. For the reasons already given, it is too late to complain now.

(d) Paragraph 5.22

27. Paragraph 5.22 commences:

> Local and military police, in concert with the prison authorities, interrogated the detainees after their arrival at the KP Dom. **MILORAD KRNOJELAC**, in concert with other high-level prison staff, established a pattern whereby guards took the detainees out of their cells and brought them to the interrogation rooms.

The accused complains that it is not clear whether the reference to "prison authorities" means:

> [...] the leading staff of the prison or not, whether the prison authorities are civil or military, whether the accused's relationship with such authorities is subordinate or superior.[37]

The same expression "prison authorities" was used in the corresponding paragraph in the previous indictment. It did not excite any such complaint at that time and, for that reason alone, the complaint now made for the first time is rejected. In any event, the accused is described in par 3.1 of both this and the previous indictment as "the commander of the KP Dom" and "in a position of superior authority to everyone in the camp".

28. The accused complains that the expression "established a pattern" is unclear.[38] The previous indictment referred to "a pattern established" by the accused.[39] There is no difference. No complaint was made then, and none may therefore be made now. The prosecution has cured the ambiguity criticized in the Second Decision,[40] by expressly alleging the accused's responsibility to have been one of aiding and abetting.

29. Both of these complaints are unjustified, and they are rejected.

III Application for oral argument

30. The accused has proposed that the Trial Chamber should assess the need for oral argument concerning this Motion once the prosecution has responded.[41]

31. The Trial Chamber has already discussed the general practice of the Tribunal not to hear oral argument on motions prior to the trial unless good reason is shown for its need in the particular case.[42] Counsel for the accused has not identified any particular issues upon which he wishes to put oral argument or explained why he was unable to put those arguments in writing. The Trial Chamber sees no need for oral argument upon this Motion.

IV Disposition

32. For the foregoing reasons, Trial Chamber II dismisses the Motion.

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

Dated this 11th day of May 2000,
At The Hague,
The Netherlands.

_____
Judge David Hunt
Presiding Judge

[Seal of the Tribunal]

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1. Decision of the Defence Preliminary Motion on the Form of the Indictment, 24 Feb 1999 ("First Decision") and Decision on Preliminary Motion on Form of Amended Indictment, 11 Feb 2000 ("Second Decision").
2. Second Decision, par 18.
3. First Decision, par 17.
4. Second Decision, par 21. Insofar as the accused has additionally been charged with an aiding and abetting responsibility in relation to the same facts, the prosecution was also ordered to plead "a specific, albeit concise, statement [...] of the nature and extent of his participation in the several courses of conduct alleged": par 22.

1415

5. Filed on 3 March 2000.
6. The additional words are shown in **bold** type.
7. The accused is described in par 3.1 as "the commander of the KP Dom", "in a position of superior authority to everyone in the camp", "the person responsible for running the Foca KP Dom as a detention camp", and as having "ordered and supervised the prison staff on a daily basis".
8. Defence Preliminary Motion of the Second Amanded SsicC Indictment, 25 Apr 2000 ("Motion"), pars 18-19.
9. The Motion describes this as "the collective (joint) plan", which appears to have resulted from an English translation of the Bosnian/Croatian/Serbian version of the original indictment (in the English language) from which counsel has worked.
10. Case IT-94-1-A, Judgment, 15 July 1999 ("*Tadic* Conviction Appeal Judgment"), pars 185-229.
11. *Tadic* Conviction Appeal Judgment, par 185.
12. *Ibid*, par 187.
13. *Ibid*, par 188.
14. *Ibid*, pars 191, 193.
15. *Ibid*, pars 193, 195, 204, 225.
16. *Ibid*, pars 196, 202, 203, 204.
17. *Ibid*, par 203.
18. *Ibid*, par 199.
19. *Ibid*, par 204.
20. *Ibid*, par 220.
21. *Ibid*, par 220.
22. *Ibid*, par 220. The Appeals Chamber returned to summarise the relevant *actus reus* and *mens rea* in the different categories at pars 227-228. There will no doubt be discussion at some later stage as to whether there are some inconsistencies in these formulations, but the passage already quoted is sufficient for present purposes.
23. *Ibid*, par 220.
24. The presence of that person at the time when the crime is committed and a readiness to give aid if required is sufficient to amount to an encouragement to the other participant in the joint criminal enterprise to commit the crime. This is really akin to aiding and abetting as an accessory.
25. This formulation is based upon the "concentration camp" cases, discussed in the *Tadic* Conviction Appeal Judgment, par 203. The requisite intent may, depending upon the circumstances, be inferred from the accused's position of authority: *Ibid*, par 203.|
26. Second Decision, pars 34, 43, 57. See also First Decision, par 58.
27. First Decision, par 46.
28. Prosecutor's Response to Defence Preliminary Motion on the Second Amended Indictment, 2 May 2000 ("Response"), par 5.
29. The inability of the prosecution to identify *any* of these persons – even the "political leaders" – suggests that its case will rely solely upon inferences to be drawn from the mere existence of the armed conflict which is alleged. As stated in the earlier decisions, that inability on the part of the prosecution inevitably reduces the weight to be afforded to such a case, although it does not affect the form of the indictment: First Decision, par 40; Second Decision, par 57.
30. Motion, pars 20-22.
31. Paragraph 45.
32. Paragraph 27.
33. Second Decision, par 15. It was also said that, in an appropriate case, an extension of time to complain of a particular defect maybe granted. The complaints now made in the Motion are not of such a nature as to warrant extending the time allowed by Rule 72 to permit them to be raised at this stage.
34. 17 Apr 2000, Transcript 81-82.
35. This concession overlooks the prosecution's failure to do so in relation to pars 5.1-2.
36. Motion, par 23.
37. Motion, par 24.
38. Motion, par 25. The Motion describes this as "introduced the practice", which appears to have resulted from an English translation of the Bosnian/Croatian/Serbian version of the original indictment (in the English language) from which counsel has worked.
39. Paragraph 5.22.
40. Paragraph 40.
41. Motion, p 1.
42. First Decision, pars 64-68.

1416

PROSECUTION AUTHOURITIES

11. *Prosecutor v. Radoslav Brdanin and Momir Talic,* IT 99-36-T, Decision on Form of Further Amended Indictment and Prosecution Application to Amend, 26 June 2001.

1417

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]

1418

(b) persecutions,[6] extermination,[7] deportation[8] and forcible transfer (amounting to inhumane acts),[9] as crimes against humanity;

(c) torture, as both a crime against humanity,[10] and a grave breach of the Geneva Conventions;[11]

(d) wilful killing,[12] and unlawful and wanton extensive destruction and appropriation of property not justified by military necessity,[13] as grave breaches of the Geneva Conventions; and

(e) wanton destruction of cities, towns or villages or devastation not justified by military necessity,[14] and destruction or wilful damage done to institutions dedicated to religion,[15] as violations of the laws or customs of war.

The material facts upon which those charges are based as pleaded in the further amended indictment do not appear to be different in substance from those facts pleaded in the amended indictment. In relation to some matters they are differently expressed , and in relation to other matters additional material facts have been pleaded.

3. The main burden of the complaints made by Talic is that the further amended indictment still fails to plead those material facts in sufficient detail. These complaints are disputed by the prosecution,[16] although its response does make clear some matters which had not been made sufficiently clear in the pleading. An application in the Talic Motion for "a deadline" for filing a reply to the Prosecution Response "should he elect to do so",[17] has been refused.[18] Following a discussion at a recent Status Conference concerning the validity of the way common purpose has been pleaded,[19] the prosecution sought leave to amend the indictment further in relation to the allegation of common purpose.[20] Talic objected to the proposed amendment upon two bases: (1) that the proposed amendment does not correct the deficiencies in the common purpose pleaded in the current indictment,[21] and (2) that the proposed amendment is itself defective in form.[22] The prosecution was granted leave to file a reply to three of the specific issues raised by Talic,[23] and the prosecution has done so.[24] Talic has subsequently been refused leave to file a further response to that reply, upon the basis that the reply had raised no fresh issues.[25] The application to amend is discussed later in the decision.[26]

4. The Trial Chamber has already outlined in detail the obligations which have been placed upon the prosecution by the Tribunal's jurisprudence in pleading indictments , in its decision on the form of the previous indictment in this case.[27] It did so because the prosecution had sought to explain the inadequacies of that indictment upon the basis that those responsible for its drafting had been ignorant of those obligations.[28] It was therefore necessary to ensure that there could be no further claim of ignorance as to the Trial Chamber's view of that jurisprudence. The prosecution was instructed to file a further amended indictment which complied with the pleading principles which had been stated in that decision.[29]

5. The Trial Chamber had understood the prosecution to have indicated an intention to be co-operative with it in the production of an indictment which would enable the trial to proceed with some expedition, following the long delay caused by the need to resolve various issues raised unsuccessfully not only by the two accused but also to a large extent by the prosecution itself.[30] The 20 February 2001 Decision

1419

accordingly drew the attention of the prosecution to the Trial Chamber's preference for an indictment to indicate precisely *and expressly* the particular nature of the responsibility alleged in relation to the accused in *each* individual count. Such an indictment would avoid many of the ambiguities engendered by the style of pleading adopted by the prosecution in this and other cases.[31] The Trial Chamber said that the extent to which the prosecution adopted its preferred manner of pleading in this regard would provide a good indication of the degree to which the prosecution was prepared to co-operate with it in bringing this case to trial .[32]

6. The further amended indictment now filed by the prosecution has ignored the Trial Chamber's preferred manner of pleading. It has repeated the prosecution's previous style, by pleading the alleged criminal responsibility of the accused merely by reciting all of the terms of Articles 7.1 and 7.3 of the Tribunal's Statute, to be applied globally to all counts.[33] This style of pleading continues to cause ambiguity, as has become apparent once again in relation to the Talic Motion. This is unfortunate, but it is obvious that the Trial Chamber can no longer expect the prosecution to give it the cooperation to which the Trial Chamber is entitled.[34] So that the trial may commence within the reasonable future, the Trial Chamber will accordingly need to ensure, by the terms in which its orders are expressed, that any continued non-cooperation by the prosecution does not prevent proper expedition in the resolution of these present issues.

7. Except where it is necessary to do so, it is not proposed to repeat what has already been said by the Trial Chamber as to the obligations placed upon the prosecution in pleading an indictment. This decision deals with the various complaints made so far as possible in the order in which those complaints occur in the Talic Motion .

2 The nature of the alleged criminal responsibility of the accused

8. Talic complains that the mere recitation in pars 33-34 of the indictment of the terms of Articles 7.1 and 7.3, without further elucidation,[35] leaves him 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".[36] The prosecution has not addressed this complaint in its Response. The Trial Chamber has already said that it is appropriate to define individual responsibility in such extensive terms only if the prosecution intends to rely upon each of the different ways pleaded.[37] The repetition of this style of pleading in the further amended indictment following that statement by the Trial Chamber necessarily means that the prosecution does indeed intend to rely upon each of the different ways pleaded.[38]

9. Talic complains that, although the prosecution has conceded that it does not (presently) suggest that either accused engaged in the "physical perpetration of the crime", it reserves the right to rely upon any evidence indicating "actual physical perpetration of a crime by one or both of the accused".[39] Talic says that the prosecution should therefore plead as material facts all the specific details known to it of the victims, places, dates and the means by which the offences were committed by him personally.[40] The prosecution's response is that, as Talic is not accused of "physically" perpetrating any of the crimes in the indictment, the provision of such particulars "would make the indictment far from a 'concise' statement of the facts and would be of little or no assistance to the accused in this case".[41]

10. The opposing stands taken by the parties in relation to this issue demonstrate clearly the ambiguities which remain as a result of the prosecution's persistence in pleading that the accused "committed" the various crimes charged (in the sense of personally perpetrating the offences). The prosecution's fallacious argument that it was entitled to do so in order to comprehend the participation of the accused

1420

in a common purpose to perpetrate them has already been rejected by the Trial Chamber .[42]

11. This trial has become very complex. That is the inevitable consequence of the very general nature of the case which the prosecution has pleaded. Unfortunately , however, the prosecution appears to have adopted a policy of avoiding a disclosure of as much of that case as possible until as late as possible.[43] The Trial Chamber draws the inference that the prosecution has done so to enable it to mould its case in a substantial way during the trial, according to how its evidence actually turns out. The only alternative explanation for the recalcitrant attitude which the prosecution is exhibiting is that it still does not know what its case is. The Trial Chamber would be hesitant to draw such an inference. Both the Trial Chamber and the accused are entitled to know what the prosecution case is from the outset. The Trial Chamber acknowledges that the evidence may sometimes turn out differently to the expectations of the prosecution, and that it may be necessary in the interests of justice to permit the prosecution to change its case so as to adjust it to that evidence. But such changes must be made openly, if necessary by amendments to the indictment even during the course of the trial;[44] they must not be made covertly, to the detriment of the interests of justice.

12. There have been, and there remain, enormous problems posed by the flood of paper which is still in the process of being disclosed by the prosecution in accordance with what it sees to be its obligations under the Rules. It appears that the prosecution is also either unwilling or unable to explain to the defence even in general terms the possible relevance of this material.[45] It is obvious that any fair trial in the present case (with all of its complexities) within a reasonable period will require a strict insistence by the Trial Chamber that the prosecution case is made very clear to the accused (and to the Trial Chamber itself) from the outset, and that such case is not thereafter *unfairly* enlarged by the chance introduction of evidence which is not presently available, particularly if it were to be enlarged to the radical extent contemplated by the prosecution. In the circumstances of the present case (including the mode of pleading adopted by the prosecution), it would necessarily be unfair to the accused if, after the trial has commenced *and without sufficient notice*, they had to face a case for the first time that they are guilty of "personal perpetration" of the offences charged.

13. The prosecution has referred to the judgment of the Appeals Chamber in the *Celebici* Appeal[46] as a justification for its approach.[47] An issue arose in that appeal (which the Appeals Chamber found unnecessary to consider)[48] as to whether, in view of the very general wording used in the indictment in that case, the accused had been sufficiently put on notice during the trial that "offences " in addition to those pleaded were alleged against him, and of the nature of those offences, so that he could meet the allegations in his defence case.[49] That was a case where the existing counts incorporated many separate offences – such as murder – which were identified by lists introduced by the word "including ". The prosecution had argued that murders not included in the list but which assisted in establishing the existing count should have been considered by the Trial Chamber when sentencing the accused.[50] That was *not* a case where the prosecution gave notice during the trial for the first time of its intention to establish a case that the accused personally perpetrated the crime charged. Such a new case would require extensive amendments to the current indictment, to include detailed material facts such as the identity of the victim , the place and the approximate date of the crime and the means by which the crime was committed.[51] In some cases, _ it may be appropriate to permit an amendment of the indictment during the trial to change completely the basis of criminal responsibility upon which the case had hitherto proceeded. In this case, the prosecution has declined to plead at this time even those details of such a case which are presently known to it, upon the ground that Talic is not accused of "physically" perpetrating any of the crimes in the indictment.[52] That is a course which the prosecution was entitled to take, but the absence of a proper opportunity for the defence to investigate even the details which are

1421

presently known to the prosecution will be relevant to any application to raise such a case for the first time during the course of the trial.

14. The Trial Chamber proposes therefore to strike the word "committed" from par 33 of the further amended indictment, which is incorporated in each of the counts , so that any suggestion that either of the accused "committed" the crimes (in the specific sense of personally perpetrating the offences) is presently removed.[53] There can be no prejudice to the prosecution, which concedes that it has nothing to support such a case. Only in this way will it be possible to ensure that the parties concentrate their attention on the case which the prosecution contends that it is *able* to prove, and to deflect their attention from a case which the prosecution concedes that it is presently *unable* to prove. If the prosecution does obtain evidence which is capable of supporting a conviction of either of the accused on the basis that he "committed" any of these crimes (in that same specific sense), it may seek to amend the indictment to reinstate that allegation. Such an application will be considered on its merits in the circumstances which then obtain. *At this stage*, however, the trial will not commence with the prospect of it becoming completely destabilised by the ambiguities which result from the way in which the indictment is presently pleaded.

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 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

1423

good that deficiency.[73]

4 Common purpose

22. Talic next complains of the way in which his alleged participation in what has been described as "a common purpose" has been pleaded. Following his complaint, and as already stated,[74] the prosecution sought leave to amend the indictment in relation to this issue. Talic has asserted that the proposed amendment does not correct the deficiencies in the current indictment and is itself defective in form. It will be convenient to deal with *all* of the objections taken to common purpose before determining whether the amendment sought should be granted.

23. As proposed to be amended,[75] par 27 of the further amended indictment pleads common purpose in this way (the amendments are shown in italics):[76]

> Radoslav Brdanin and Momir Talic each participated in a criminal enterprise, in their roles as set out in paragraphs 17-*26* above. *The* common purpose of *the enterprise* was the permanent removal, *through unlawful means* , of the majority of Bosnian Muslim and Bosnian Croat inhabitants from the territory of the planned Serbian state [...].

This criminal enterprise is alleged to have come into existence no later than 24 October 1991 and to have continued until the signing of the Dayton Accords in 1995 . Various named groups of persons are alleged to have participated with the two accused in that criminal enterprise. The participation by the two accused in this enterprise is identified by reference to their roles described in an earlier part of the indictment.[77] As proposed to be amended, the paragraph concludes:

> *All* of the crimes enumerated in Counts 1 though 12 of this indictment, were natural and foreseeable consequences of this enterprise. *Radoslav Brdanin and Momir Talic, aware that these crimes were likely to result from the implementation of the common purpose, knowingly and wilfully participated in the criminal enterprise* .

The *Tadic* Conviction Appeal Judgment

24. Before considering the submissions which have been made, it is necessary to discuss in some detail just what is involved in the notion or concept of "common purpose" upon which the prosecution relies, in particular the state of mind of the accused which must be established by the prosecution. The starting point, so far as this Trial Chamber is concerned, is the *Tadic* Conviction Appeal Judgment .[78] The issues which the Appeals Chamber determined in that judgment were (i) whether the acts of one person can give rise to the criminal responsibility of another person where both persons participate in the execution of "a common criminal plan", and (ii) the degree of *mens rea* required in such a case.[79] The first issue was subsequently re-stated as being whether criminal responsibility in a "common criminal purpose" fell within the ambit of individual responsibility in Article 7(1) of the Tribunal's Statute.[80] The Appeals Chamber labelled this concept variously, and apparently interchangeably , as a common criminal plan,[81] a common criminal purpose,[82] a common design or purpose,[83] a common criminal design ,[84] a common purpose,[85] a common design,[86] and a common concerted design.[87] The common purpose is also described, more generally, as being part of a criminal enterprise,[88] a common enterprise,[89] and a joint criminal enterprise.[90] For reasons which will become clear, the Trial Chamber prefers the last of these labels, a " joint criminal enterprise", to describe a common purpose case. It proposes to adhere to that label wherever possible. The Appeals Chamber held that the notion of a joint criminal

1424

enterprise "as a form of accomplice liability" was firmly established in customary international law, and that it was available under the Tribunal's Statute .[91]

25. The Appeals Chamber stated that three "distinct categories of collective criminality " were encompassed within the concept of joint criminal enterprise,[92] although it subsequently suggested that the second category was in many respects similar to the first,[93] and that it was really a variant of the first category.[94] However, in order to make clear how the Appeals Chamber went on to define the relative state of mind in relation to crimes based upon each of the categories, it is preferable to describe all three:

> ***Category 1***:[95] All of the participants in the joint criminal enterprise,[96] acting pursuant to a common design, possessed the same criminal intention. The example is given of a plan formulated by the participants in the joint criminal enterprise to kill, where, although each of the participants in the plan may carry out a different role, each of them has the intent to kill.[97]
>
> ***Category 2***:[98] All of the participants in the joint criminal enterprise were members of military or administrative groups acting pursuant to a concerted plan, where the person charged held a position of authority within the hierarchy; although he did not personally perpetrate any of the crimes charged, he actively participated in enforcing the plan by aiding and abetting the other participants in the joint criminal enterprise who did perpetrate them. The example is given of a concentration camp, in which the prisoners are killed or otherwise mistreated pursuant to the joint criminal enterprise.
>
> **Category 3**:[99] All of the participants were parties to a common design to pursue one course of conduct , where one of the persons carrying out the agreed object of that design also commits an act which, whilst outside the "common design", was nevertheless a natural and foreseeable consequence of executing "that common purpose".[100] The example is given of a common, shared intention on the part of a group to remove forcibly members of one ethnicity from their town, village or region (labelled " ethnic cleansing"), with the consequence that, in the course of doing so, one or more of the victims is shot and killed.

26. It is clear from the *Tadic* Conviction Appeal Judgment that, in relation to both the first and the second categories, the prosecution must demonstrate that all of the persons charged and all of the persons who personally perpetrated the crime charged had a common state of mind – that the crime charged should be carried out, and the state of mind required for that crime. This *is* an appropriate use of the phrase "common purpose",[101] and it is reflected in various other phrases used in the judgment, such as "acting in pursuance of a common criminal design".[102] Insofar as the *first* category is concerned, this is stated expressly:[103]

> [...] all co-defendants, acting pursuant to a common design, possess the same criminal intention [...].

The example is given of a plan to kill in effecting this common design, and it is said that, even though the various participants in that plan may be carrying out different roles within that plan, it must be shown that "all possess the intent to kill". The passage concludes:

> [The] accused, even if not personally effecting the killing, must nevertheless intend this

1425

result.

Insofar as the *second* category is concerned, the position is stated a little more discursively, but nevertheless to the same effect. After referring to the joint criminal enterprise as being one "to kill or mistreat prisoners",[104] and as "a system of repression",[105] the judgment states:[106]

> The *mens rea* element comprised: (i) knowledge of the nature of the system and (ii) the intent to further the common concerted design to ill-treat inmates.

27. As the Appeals Chamber has suggested, the second category is not substantially different to the first. The position of the accused in the second category is exactly the same as the accused in the first category. Both carry out a role within the joint criminal enterprise to effect the object of that enterprise which is different to the role played by the person who personally perpetrates the crime charged. The role of the accused in the second category is enforcing the plan by aiding and abetting the perpetrator.[107] Both of them must intend that the crime charged is to take place.[108] The Trial Chamber accordingly proposes to deal with the first and second categories together as the *basic* form of joint criminal enterprise, and with the third category as an *extended* form of joint criminal enterprise.

28. Insofar as the *third* category (the extended form of joint criminal enterprise) is concerned, the Appeals Chamber identified the relevant state of mind in various ways. The first statement was in these terms:[109]

> Criminal responsibility may be imputed to all participants within the common enterprise where the risk of death occurring was both [*sic*] a predictable consequence of the execution of the common design and the accused was either reckless or indifferent to that risk.

The next passage summarises the relevant state of mind in these terms:[110]

> What is required is a state of mind in which a person, although he did not intend to bring about a certain result, was aware that the actions of the group were most likely to lead to that result but nevertheless willingly took that risk. In other words, the so-called *dolus eventualis* is required (also called "advertent recklessness" in some national legal systems).

The third passage summarises the relevant state of mind in these terms:[111]

> [...] responsibility for a crime other than the one agreed upon in the common plan arises only if, under the circumstances of the case, (i) it was *foreseeable* that such a crime might be perpetrated by one or other members of the group and (ii) the accused *willingly took that risk*.

29. It is unfortunate that expressions conveying different shades of meaning have been used in these three formulations, apparently interchangeably. So far as the *subjective* state of mind is concerned, there is a clear distinction between a perception that an event is possible and a perception that the event is likely (a synonym for probable). The latter places a greater burden on the prosecution than the former. The word "risk" is an equivocal one, taking its meaning from its context. In the first of these three formulations stated ("the risk of death occurring "), it would seem that it is used in the sense of a possibility. In the second formulation, "most likely" means at least probable (if not more), but its stated equivalence to the civil law notion of *dolus eventualis* would seem to reduce it once more to a possibility.[112] The word "might" in the third formulation indicates again a possibility. In many common

1426

law national jurisdictions, where the crime charged goes beyond what was agreed in the joint criminal enterprise, the prosecution must establish that the participant who did not himself commit that crime nevertheless participated in that enterprise with the contemplation of the crime charged as a *possible* incident in the execution of that enterprise. This is very similar to the civil law notion of *dolus eventualis* or advertent recklessness. So far as the *objective* element to be proved is concerned, the words "predictable" in the first formulation and "foreseeable" in the third formulation are truly interchangeable in this context .

30. Accordingly, in the case of a participant in the joint criminal enterprise who is charged with a crime committed by another participant which goes beyond the agreed object of that enterprise, the Trial Chamber interprets the *Tadic* Conviction Appeal Judgment as requiring the prosecution to establish:

> (i) that the crime was a natural and foreseeable consequence of the execution of that enterprise, and
>
> (ii) that the accused was aware that such a crime was a possible consequence of the execution of that enterprise, and that, with that awareness, he participated in that enterprise.

The first is an *objective* element of the crime, and does not depend upon the state of mind on the part of the accused. The second is the *subjective* state of mind on the part of the accused which the prosecution must establish. None of the various formulations in *Tadic* Conviction Appeal Judgment require the prosecution in such a case to establish that the accused intended such further crime to be committed, or that he shared with that other participant the state of mind required for that further crime. The Trial Chamber is satisfied that the prosecution does *not* have to do so.

31. The state of mind of the accused to be established by the prosecution accordingly differs according to whether the crime charged:

> (a) was *within* the object of the joint criminal enterprise, or
>
> (b) went *beyond* the object of that enterprise, but was nevertheless a natural and foreseeable consequence of that enterprise.

If the crime charged fell *within* the object of the joint criminal enterprise , the prosecution must establish that the accused shared with the person who personally perpetrated the crime the state of mind required for that crime. If the crime charged went *beyond* the object of the joint criminal enterprise, the prosecution needs to establish only that the accused was aware that the further crime was a possible consequence in the execution of that enterprise and that, with that awareness , he participated in that enterprise.

32. A familiar example of a joint criminal enterprise, which incorporates both the basic and the extended forms of the enterprise, will illustrate these differences more clearly.

Three men (A, B and C) reach an understanding or arrangement amounting to an agreement between them that they will rob a bank, and that they will carry with them a loaded weapon for the purposes of persuading the bank teller to hand over the money and of frightening off anyone who attempts to prevent the armed robbery from taking place. The agreement is that A is to carry the weapon and to demand the money from the teller, B is to stand at the doorway to the bank to keep watch, and C is to drive the getaway vehicle and to remain with the vehicle whilst the other two go inside the bank. The basic form of the joint criminal enterprise is therefore one to commit an armed robbery.

1427

During the course of the armed robbery, A produces the weapon and demands that the bank teller hand over the money. As the teller does so, A observes him also pressing a button, which A thinks would alert the police that a robbery is taking place. A panics and fires his weapon, wounding the bank teller. In such a situation, in order to establish that all three men (A, B and C) were guilty of the armed robbery (the basic form of the joint criminal enterprise), the prosecution would have to prove that all three men intended the armed robbery to take place and that they shared the relevant state of mind required for the crime of armed robbery. If B and C are shown to have shared that state of mind with A, they are guilty with him of the armed robbery, even though they did not personally perpetrate the crime themselves .

The wounding of the teller, however, was not within the object of the basic joint criminal enterprise to which B and C had agreed. In order to establish that not only A but also B and C were responsible for the wounding of the teller (the extended form of the joint criminal enterprise), the prosecution would have to prove that such a wounding was a natural and foreseeable consequence of carrying a loaded weapon during an armed robbery, that each of B and C was aware that the wounding of someone was a possible consequence in the execution of the armed robbery he had agreed to , and that, with that awareness, he participated in that armed robbery. The prosecution would *not* have to establish that B and C intended that anyone would be wounded or that they shared with A the relevant state of mind required for the further crime of wounding.

The objections taken by Talic

33. Talic has taken three objections to the form in which the joint criminal enterprise is proposed to be pleaded:

> (1) the state of mind of the accused now pleaded by the prosecution in its proposed amendment is insufficient;[113]
>
> (2) there is no definition of the "unlawful means" through which the criminal enterprise effected the permanent removal of the majority of Bosnian Muslim and Bosnian Croat inhabitants from the territory of the planned Serbian state;[114] and
>
> (3) the indictment provides no details of Talic's intention to participate voluntarily in the criminal enterprise or of his knowledge of its existence.[115]

By way of a general response, the prosecution asserts that par 27, as it is proposed to be amended, already provides greater detail regarding the accused's state of mind than is required.[116] It relies upon an 1999 Trial Chamber decision which held:

> [...] the indictment need not specify the precise elements of each crime, since all that is required under Article 18, paragraph 4, is a concise statement of the facts and the crime or crimes with which the accused is charged under the Statute.[117]

Article 18.4 of the Tribunal's Statute does indeed require the Prosecutor to prepare an indictment "containing a concise statement of the facts and the crime or crimes with which the accused is charged under the Statute". That *obligation* of the Prosecutor must be interpreted in the light of the *entitlement* given to the accused, by Article 21.4(a), "to be informed promptly and in detail [...] of the nature and cause of the charge against him". Where the state of mind with which the accused carried out his alleged acts is relevant, that state of mind is just as much a fact to be proved by the prosecution as are the accused's acts themselves . Where those acts of the accused are material facts to be pleaded, so to, in the

1428

opinion of this Trial Chamber, is the state of mind with which he carried out those acts (where relevant) a material fact to be pleaded, in accordance with these provisions of the Tribunal's Statute. There are two ways in which the relevant state of mind may be pleaded:

(i) by pleading the evidentiary facts from which the state of mind is necessarily to be inferred,[118] or

(ii) by pleading the relevant state of mind itself as the material fact.

In the event that the prosecution adopts the second course, the facts by which that material fact is to be established are ordinarily matters of evidence, and need not be pleaded.

(1) State of mind

34. In support of his first objection, Talic says that the state of mind as pleaded in the proposed amendment would render a person individually responsible for crimes committed by others merely because "he intellectually subscribed to a plan adjudged criminal".[119] He asserts that it is necessary for the prosecution to plead in relation to the genocide charges that his intention was to destroy the discriminated group (at least in part),[120] as well as the specific intent required in the other crimes charged.[121] He has maintained this objection notwithstanding the amendment proposed.[122] He says that the proposed amendment does not allege that the criminal enterprise had as its objective any of the crimes charged,[123] and that it alleges only that he was aware that such crimes were likely to result from the execution of the common purpose (that is, the ethnic cleansing).[124] Talic repeats that the prosecution is obliged to plead "a special and direct intention " on his part, the specific intent required for genocide and the other crimes charged .[125] The indictment therefore fails to demonstrate "one of the essential ingredients of the international crimes the indictment alleged".[126] In response , the prosecution relies upon what is said in the *Tadic* Conviction Appeal Judgment, in particular what was said in the second of the three passages already quoted in this decision.[127]

35. For the purposes of his objection, Talic has assumed that the object of the joint criminal enterprise to remove permanently the majority of Bosnian Muslim and Bosnian Croat inhabitants from the territory of the planned Serbian state did not include *any* of the crimes charged.[128] Both the current par 27 and the proposed amendment to it state that each (or all) of the crimes charged were "natural and foreseeable consequences" of the pleaded joint criminal enterprise. The unexpressed assertion that the crimes charged were *no more* than natural and foreseeable consequences, and therefore that each (or all) of them went *beyond* the object of that enterprise, could therefore easily be assumed. A proper pleading would not have left such an important assertion unexpressed The criminal object of the enterprise must be clearly identified.[129] The Prosecution Reply proceeds upon the same assumption as that made by Talic,[130] and it may therefore be accepted that the prosecution does intend to assert that each (or all) of the crimes charged in the indictment went beyond the object of the joint criminal enterprise as pleaded. Unfortunately, however, both the current indictment and the proposed amendment to it remain possibly equivocal in relation to that issue. To that defect, the Trial Chamber will return.[131]

36. Nevertheless, if this assertion intended by the prosecution is correct – that each (or all) of the crimes charged in the indictment went beyond the object of the joint criminal enterprise as pleaded – the assertion made by Talic, that the prosecution is nevertheless obliged to plead and to prove that he shared with those who personally perpetrated the crimes charged the state of mind which those crimes require, is indeed contrary to what the Appeals Chamber has held in the *Tadic* Conviction Appeal Judgment.

1429

Again, if the assertion intended by the prosecution is correct, the proposed amendments to par 27 of the further amended indictment more than adequately allege the state of mind required of a participant in the enterprise where the crimes charged went beyond the object of that enterprise.[132] The prosecution may even have accepted a greater burden than is necessary by pleading that the accused were aware that the crimes charged were "likely" to result from the implementation of that enterprise.

37. The objection taken by Talic is therefore rejected insofar as it relates to the crimes charged which went *beyond* the object of the joint criminal enterprise . The objection may perhaps have had its genesis in the misleading label given to the concept upon which the prosecution relies, that of "common purpose". That label may have respectable origins, but it remains a misleading one. The only " purpose" which the prosecution must prove to have been "common" to the participants in the joint criminal enterprise relates to the crime which fell *within* the agreed object of that enterprise. The prosecution does not have to prove that any crime committed which goes *beyond* the agreed object of that enterprise was also agreed to by the participants. It would be preferable for the prosecution to avoid the use of the misleading label "common purpose" in the future. The Appeals Chamber has treated the expression "joint criminal enterprise" as synonymous with common purpose.[133] That label does not produce the confusion which "common purpose" produces in relation to the relevant state of mind which must be established, depending upon whether the crime charged fell within the agreed object of the enterprise or was merely a foreseeable consequence of its execution.

38. The Trial Chamber, however, doubts whether the assertion intended by the prosecution could possibly be correct in fact. The "permanent removal" of inhabitants of a particular ethnicity from their normal place of residence to some other place in the circumstances pleaded would appear *necessarily* to imply, for example, actions which involve:

> (a) deportation and/or forcible transfer directed against a particular civilian population in the course of an armed conflict – thus possibly crimes against humanity as pleaded in counts 8 and 9 of the current indictment, and
>
> (b) appropriation of the property of those removed in the course of an international armed conflict, not justified by military necessity and carried out unlawfully and wantonly – thus possibly a grave breach of the Geneva Conventions of 1949 as pleaded in count 10 of the current indictment.

There may be other examples, but these two will suffice. If the Trial Chamber accepts the prosecution's case that the object of the joint criminal enterprise was, to use the colloquial phrase adopted in the indictment, to effect ethnic cleansing, it may well be that it would be obliged to find that these crimes fell *within* the object of that enterprise, rather than that they went *beyond* that object. If any of the crimes charged do fall within the ethnic cleansing agreed to, the prosecution could succeed in relation to those crimes only if it established that the accused shared the state of mind required of the persons who personally perpetrated those crimes.

The need to characterise the offences charged

39. The Trial Chamber has already suggested that the prosecution case as pleaded , and even as it is proposed that it be amended, is possibly equivocal in relation to whether the crimes charged are *necessarily* to be regarded as having gone *beyond* the object of the joint criminal enterprise pleaded.[134] It is of considerable importance that both the Trial Chamber and the accused know with some precision *from the terms of the indictment* whether any particular crime charged is alleged by the prosecution to fall *within* the object of the enterprise (when each participant must have the specific intent required for

that crime) or to go *beyond* that object (when each participant need only have been aware of its commission as a possible consequence of the execution of that enterprise when he participated in it). Just as with the other forms of accomplice liability identified in Article 7.1 of the Tribunal's Statute, the prosecution must plead as material facts the conduct of the accused (which includes his state of mind) which is alleged to make him responsible for the crimes charged as a participant of a joint criminal enterprise.[135] The Trial Chamber proposes to order the prosecution to plead its case upon this issue expressly in the indictment.[136]

40. It is, of course, always open to the prosecution (if it wishes to do so) to limit its case, and to rely upon such crimes only as having gone *beyond* the agreed object of the joint criminal enterprise. If it does limit its case in this way, and if the Trial Chamber does not accept that such crimes did go beyond that agreed object, then the prosecution case in relation to those particular crimes must necessarily fail, as the prosecution has not pleaded any case that the crimes fell *within* the agreed object. This would put the prosecution in an extraordinary position, and it would also be open to the prosecution (if it is able to prove such a case) to plead any of the crimes charged in the alternative – that they either fell *within* the agreed object of the joint criminal enterprise or went *beyond* that enterprise but were nevertheless a natural and foreseeable consequence of that enterprise.

41. However, if the prosecution does propose to rely upon such crimes charged as falling *within* the object of the joint criminal enterprise, either solely or in the alternative, it must plead such a case clearly in the indictment. And , when pleading any case that the crimes charged did fall *within* the agreed object of the joint criminal enterprise, it will be necessary for the prosecution to plead that the accused had the state of mind required for those crimes. If this is to be the prosecution case, the Trial Chamber will order the prosecution to include such material facts in the amendment which it is seeking.[137]

(2) Unlawful means

42. In support of his second objection, Talic says that the purpose (or object) of the joint criminal enterprise must be "criminal in and of itself".[138] The prosecution accepts that this is so,[139] and the Trial Chamber agrees that, as the name suggests, the basic object of a joint criminal enterprise must itself be criminal in nature. Talic, however, goes on to say that, as none of the crimes charged falls within the pleaded objective of the criminal enterprise (the ethnic cleansing), the prosecution has failed to identify in the indictment the criminal objective of that criminal enterprise.[140] The prosecution responds that, by pleading that the object of the enterprise was effected "through unlawful means", it is asserting that the participants in that enterprise "had no lawful purpose for the removal of the non-Serb populations and no intent to use lawful means to accomplish their goal".[141] It says that "it is not necessary to prove that each participant held the identical vision of the illegal means they planned to use", and therefore that it is sufficient merely to plead "through unlawful means" without identifying them in the indictment .[142]

43. The stand taken by the prosecution fails, however, to acknowledge that the first thing which it must establish, in a case that the accused is responsible for a crime as a member of a joint criminal enterprise, is that he participated in a particular joint *criminal* enterprise, even where the crime charged went beyond the object of that enterprise. That is clear from the *Tadic* Conviction Appeal Judgment . There must be a common object, or a common purpose, to carry out a particular crime (the criminal object of the enterprise), and – if a further crime is committed which went beyond *that* criminal object of the enterprise, but which is nevertheless a natural and foreseeable consequence of executing *that* criminal object or enterprise – each participant in that enterprise will be responsible if he was aware that such a further crime was a possible consequence in the execution of that enterprise , and that, with that awareness, he participated in that enterprise.[143] Unless the criminal object of that enterprise is

1431

identified, it is not possible to determine whether the further crime charged was a natural and foreseeable consequence of executing *that* criminal object. That criminal object is *not* identified by asserting (and then only by implication in the indictment) merely that there was "no lawful purpose".

44. The Trial Chamber accepts that, where there could be a number of different criminal objects of a joint criminal enterprise, it is not necessary for the prosecution to prove that *every* participant agreed to every one of those crimes being committed.[144] But it *is* necessary for the prosecution to prove that, between the person who personally perpetrated the further crime charged and the person charged with that crime, there was an agreement (or a common purpose) to commit at least *a* particular crime, so that it can then be determined whether the further crime charged was a natural and foreseeable consequence of executing *that* agreed crime. Without such proof, it cannot be held that the accused was a member of a joint criminal enterprise together with the person who committed that further crime charged. The real difficulty which the prosecution faces in identifying the agreed criminal object of the enterprise in which *these* accused were members together with the persons who committed the crimes charged may lie in the extraordinarily wide nature of the case which it seeks to make in the present prosecution.

45. Although joint criminal enterprise cases *can* be applicable in relation to ethnic cleansing, as the *Tadic* Conviction Appeal Judgment recognises,[145] it is obvious that the Appeals Chamber had in mind a somewhat smaller enterprise than that which is invoked in the present case.[146] If, in the course of an armed conflict and a widespread or systematic attack directed against a civilian population, the commander of a small group of soldiers directs those soldiers to collect all the inhabitants of a particular ethnicity within a particular town and to remove them forcibly out of the region, he becomes a participant in an enterprise to commit deportation and forcible transfer (as crimes against humanity), and there could be little doubt, having regard to previous episodes of ethnic cleansing in the former Yugoslavia, that, for example, murder (as another crime against humanity) and wanton destruction of the town (as a violation of the laws and customs of war) were natural and foreseeable consequences of the execution of that enterprise. There would be no difficulty in determining what crimes fell within the agreed criminal object of the enterprise and whether any further crimes charged were natural and foreseeable consequences in the execution of *that* enterprise. It is only when the prosecution seeks to include within that joint criminal enterprise persons as remote from the commission of the crimes charged as are the two accused in the present case that a difficulty arises in identifying the agreed criminal object of that enterprise. That difficulty is of the prosecution's own making, as it is a difficulty necessarily arising out of the case it seeks to make. That very difficulty *may*, of course, indicate that a case based upon a joint criminal enterprise is inappropriate in the circumstances of the present prosecution. That is a matter which will have to be determined at the trial. But the prosecution cannot avoid its difficulty simply by seeking to avoid pleading properly the joint criminal enterprise upon which it relies. It is sufficient at this stage for the Trial Chamber to say merely that, if the prosecution does plead that *all* of the crimes charged went *beyond* the object of the joint criminal enterprise, it must identify in the indictment the agreed criminal object of the enterprise upon which it relies. An order will be made accordingly.[147]

(3) Knowledge of existence of criminal enterprise and intention to participate voluntarily

46. In support of his third objection, Talic asserts that the prosecution must plead and establish that he knew of the existence of the criminal enterprise and that he participated in it voluntarily. He relies upon the judgment of the International Military Tribunal at Nuremberg for his assertion that the participation must be shown to have been voluntary.[148] No reference is given to the relevant passage in that judgment which supports his objection. The only passage which could conceivably be relevant is that dealing with the Tribunal's power under Article 9 of its Charter to declare organisations to be have been

1432

criminal in nature:[149]

> A criminal organization is analogous to a criminal conspiracy in that the essence of both is cooperation for criminal purposes. There must be a group bound together and organized for a common purpose. The group must be formed or used in connection with the commission of crimes denounced by the Charter. Since the declaration with respect to the organizations and groups will, as has been pointed out, fix the criminality of its members, that definition should exclude persons who had no knowledge of the criminal purposes or acts of the organization and those who were drafted by the State for membership, unless they were personally implicated in the commission of acts declared criminal by Article 6 of the Charter as members of the organization . Membership alone is not enough to come within the scope of these declarations .

The prosecution responds that the proposed amendment to par 27 of the current indictment alleges that each of the accused, "aware that the crimes charged were likely to result from the implementation of the common purpose, *knowing and wilfully* participated in the criminal enterprise".[150]

47. The Trial Chamber accepts that this allegation to be added to par 27 sufficiently takes up the issue of Talic's knowledge of the existence of the enterprise and his voluntary participation in it. As already stated, the facts from which that state of mind is to be established are ordinarily matters of evidence.[151] They are so in the present case. Again, if Talic claims that the evidence is not so apparent from the material which has been disclosed by the prosecution, 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.[152]

48. If a person does something "knowingly and wilfully", it may ordinarily be assumed that he did it voluntarily. The prosecution is not obliged to meet every issue which may be raised by an accused to avoid responsibility for his knowing and wilful acts until that issue is raised in evidence at the trial. If Talic wishes to raise an issue as to the voluntary nature of his participation in the joint criminal enterprise pleaded, and if that is a relevant issue in the case, he must at the trial point to or elicit evidence from which it could be inferred that there is at least a reasonable possibility that his participation was not voluntary. Only then does the prosecution bear the onus of establishing that his action was indeed voluntary. This is not to suggest that Talic bears some *legal* onus in relation to the issue. That legal onus remains at all times upon the prosecution. His onus is merely an *evidentiary* one – to point to or to elicit evidence which raises the particular issue, and which places an onus on the prosecution to establish its case upon that issue, just as in relation to an alibi.[153]

49. The complaint made by Talic is rejected.

5 The application to amend

50. The basis upon which leave will be granted to amend the indictment was examined by the Trial Chamber in a recent decision in the present case.[154] The fundamental issue in relation to granting leave to amend an indictment is whether the amendment will prejudice the accused unfairly.[155] The word "unfairly" is used in order to emphasise that an amendment will not be refused merely because it assists the prosecution quite fairly to obtain a conviction . To be relevant, the prejudice caused to an accused would ordinarily need to relate to the fairness of the trial. Where an amendment is sought in order to ensure that the real issues in the case will be determined, the Trial Chamber will normally exercise its

discretion to permit the amendment, provided that the amendment does not cause any injustice to the accused, or does not otherwise prejudice the accused unfairly in the conduct of his defence.[156] There should be no injustice caused to the accused if he is given an adequate opportunity to prepare an effective defence to the amended case. There is no suggestion in the present case that this amendment will cause delay such as to deny the two accused their right to be tried without undue delay.

51. The Trial Chamber has accepted that the proposed amendment is itself defective in form. Nevertheless, now that those defects have been identified, no reason has been put forward as to why leave should not be granted to make the amendment sought provided that those defects are remedied. No relevant prejudice resulting from the proposed amendment once those defects are cured has been suggested by Talic. The Trial Chamber has been informed orally by counsel for Brdanin that there is no objection to the amendment sought to par 27. The purpose of the amendment is to ensure that the real issues in the case will be determined. Leave will accordingly be granted subject to the condition that the defects upheld by the Trial Chamber are cured.[157]

6 Other alleged deficiencies in particularity of pleading

General complaint relating to all counts

52. Talic concedes that the further amended indictment is more precise and detailed than its predecessor, but he asserts that it still does not satisfy the requirements stated in the 20 February 2001 Decision.[158] His general complaints are based upon the assumption that the prosecution is obliged in its indictment in this case to plead details such as the identity of the victim , the place and the approximate date of the alleged crime and the means used to perpetrate it. He concedes that the materiality of these details necessarily depends upon the degree of proximity he is alleged to have to the events for which he is charged with responsibility, but he says that, as the prosecution has reserved the right to proceed upon the basis that he personally committed these crimes, it must set down in detail everything which the prosecution knows.[159] In the light of the order to be made striking the word "committed" from par 33 of the further amended indictment,[160] there will no longer be any such case reserved. The complaint that the prosecution has failed to plead such details is dismissed.

Superior responsibility

53. Talic also complains that the indictment provides "no information whatsoever " regarding his conduct by which he may be found to have known or had reason to know that the acts were about to be done by those for whose acts he is charged with responsibility, or that those acts had been done by those persons. He says that his responsibility is based solely upon "his superior command position" with the 1st Krajina Corps.[161] The prosecution case, however, is not so limited. The criminal responsibility of Talic is alleged to arise out of both his position as commander of the 1st Krajina Corps and his position as a member of the ARK Crisis Staff. Where the basic crimes for which he is alleged to be responsible were committed by persons other than units of the 1st Krajina Corps, the prosecution relies upon his position as a member of the ARK Crisis Staff to make him responsible.[162]

54. Nor is the prosecution case against Talic limited to his responsibility as a superior, as is suggested by the reference in the Talic Motion to his "superior command position".[163] The indictment alleges, *inter alia*, that, as commander of the 1st Krajina Corps, Talic made decisions for the Corps and the subordinate units, he assigned tasks to his subordinates , he issued orders, instructions and directives, and he ensured their implementation .[164] Those allegations are clearly intended in part as an allegation of individual responsibility for any criminal acts so ordered, in accordance with Article 7.1 of the

1434

Tribunal's Statute.[165] As already stated,[166] the indictment is deficient as to the basis upon which it seeks to make Talic criminally responsible as a member of the ARK Crisis Staff. If the amendment made pursuant to the order to plead that basis with some precision does not answer the present complaint made by Talic, this complaint will be revisited. However, the conduct upon which the prosecution relies to establish the responsibility of Talic as a superior is otherwise sufficiently pleaded in the indictment. Anything further would once more be pleading the evidence by which the material facts pleaded are to be established, and which should be apparent from the witness statements made available.

Genocide and complicity in genocide (counts 1 and 2)

55. The indictment alleges the participation of the accused in a campaign designed to destroy Bosnian Muslims and Bosnian Croats, in whole or in part, as national, racial or religious groups in various identified municipalities within the ARK.[167] The execution of the campaign is alleged to have "included": (1) the killing of Bosnian Muslims and Bosnian Croats by Bosnian Serb forces ("including" units of the 1st Krajina Corps) in villages and non-Serb areas, in camps and other detention facilities and during the deportation or forcible transfer of the Bosnian Muslims and Bosnian Croats; (2) causing serious bodily or mental harm to Bosnian Muslims and Bosnian Croats during their confinement in camps and other detention facilities , and during their interrogations at police stations and military barracks, where detainees were continuously subjected to or forced to witness inhumane acts "including " murder, rape, sexual assault, torture and beating; and (3) detaining Bosnian Muslims and Bosnian Croats under conditions calculated to bring about the physical destruction of a part of those groups, through beatings or other physical maltreatment described elsewhere in the indictment, starvation rations, contaminated water, insufficient or non-existent medical care, unhygienic conditions and lack of space.[168] Superior responsibility of the accused is also alleged in terms of Article 7.3 of the Tribunal's Statute in relation to those acts and omissions.[169]

56. The killings of Bosnian Muslims and Bosnian Croats are alleged to have "included " twenty-nine killing incidents. These are described by reference to the municipalities and the general area where they occurred and their approximate date.[170] The camps referred to are alleged to have been staffed and operated by military and police personnel under the direction of Crisis Staffs (plural) and the VRS (the Army of the Serbian Republic of Bosnia and Herzegovina). They are said to have "included" thirteen facilities, which are described by reference to particular buildings in various identified municipalities.[171] The killing of Bosnian Muslims and Bosnian Croats in the camps and detention facilities , or subsequent to their removal from those camps and detention facilities, are alleged to have "included" twelve killing incidents. These are described by reference to the municipalities and the place where they occurred and their approximate date .[172] In addition, it is alleged that Bosnian Serbs "and others" were given access to camps where they subjected Bosnian Muslims and Bosnian Croat detainees to physical and mental abuse, "including " torture, beatings with weapons, sexual assaults and the witnessing of inhumane acts, "including" murder, causing them serious bodily or mental harm. As a result of these inhumane acts, it is alleged, a large number of Bosnian Muslims and Bosnian Croats died in these detention facilities.[173]

57. Talic complains that insufficient details are supplied as to the victims and of the direct and immediate perpetrators of the crimes pleaded.[174] He asserts that the prosecution knows the identity of at least some of the victims because of exhumations carried out, and that it should therefore identify the victims by names, sex and age, or at least as either civil or military personnel.[175] He points out that the expression "Bosnian Serb Forces" is defined in par 8 of the indictment as the army, paramilitary, territorial defence, police units and civilians armed by those forces, and he says that not all of those units

were under the control of the same authority. The particular units which were alleged to have committed these crimes should therefore be identified in as much detail as possible.[176] He argues that, where the prosecution is unable to specify either the victims or the perpetrators, there must be at least a reference to their category or position as a group. Where it is unable to do either of these things, he says, it must be made clear in the indictment that the prosecution is unable to do so and that it has provided the best information it can.[177]

58. The prosecution has responded that the Bosnian Muslims and Bosnian Croats killed in the incidents identified in pars 38 and 41 (and presumably also in the incidents referred to in par 37) of the indictment were "non-combatants".[178] If that is indeed the prosecution case, it should have been pleaded as a material fact. Although that fact may be irrelevant to the genocide counts, the incidents pleaded in pars 38 and 41 are also incorporated in other counts (for example, extermination in count 4) where it *is* a relevant and material fact, as the consequences of killing non-combatants would usually be different from the consequences of killing combatants. The prosecution will be ordered to plead such a case expressly.[179]

59. The remaining complaints made by Talic assume that the identity of the victims and of the perpetrators are material facts which must be pleaded in this case. However, they are not material facts to be pleaded where – as in this case – the accused person is remote in proximity from the crimes alleged to have been committed ; rather, they are matters of evidence. Talic nevertheless relies upon what was said by the Trial Chamber in par 22 of the 20 February 2001 Decision as requiring either such particularity or a statement in the indictment that the prosecution is unable to provide better particulars.[180] Paragraph 22 of that decision makes it clear that such an obligation arises primarily in "a case based upon individual responsibility where the accused is alleged to have personally done the acts pleaded in the indictment". In par 20 of the same decision, the Trial Chamber discussed the need for detail to be pleaded where the prosecution case is based upon the allegation that the accused is individually responsible for having aided and abetted the person who personally did those acts. It was also made clear that the extent of that detail depends again upon the degree of proximity alleged. Insistence upon such detail being pleaded has occurred only in those cases where the accused is alleged to have been in much greater proximity to those acts than are the two accused in the present case. For example, in the *Krnojelac* case, the accused is alleged to have been the warden of the prison where the crimes were committed and to have had direct and immediate authority over the perpetrators . The two accused in the present case are considerably more remote from the crimes for which they are alleged to be responsible than Mr Krnojelac was alleged to be . Such details are matters of evidence and not material facts which must be pleaded in the present case.[181]

60. Talic draws attention to the repeated use of the word "including" in the indictment – in the description of the way in which the ethnic cleansing campaign was executed , in the maltreatment of the detainees, in the killing incidents, in the identity of the facilities where the killings and maltreatment are alleged to have occurred and in the inhumane acts committed. He asserts that he is entitled to know whether these lists are intended to be exhaustive or, if they are not so intended, the details which are not presently listed.[182] The prosecution responds that the lists are *not* intended to be exhaustive . It says that it will be leading evidence of each of the incidents listed and each of the facilities listed. In addition, evidence may be given in relation to other incidents and other facilities. It argues that it is permitted to do so where , as here, it does not assert that either of the accused was directly involved in those incidents.[183]

61. The right of the prosecution to lead evidence in relation to facts not pleaded in the indictment is not as unlimited as its response to this complaint may suggest . Article 21.4(a) entitles the accused "to be

informed promptly and in detail [...] of the nature and cause of the charge against him". For example, it would not be possible, simply because the accused was not alleged to be directly involved, to lead evidence of a completely new offence which has not been charged in the indictment without first amending the indictment to include the charge. Where, however, the offence charged, such as persecution and other crimes against humanity, almost always depends upon proof of a number of basic crimes (such as murder), the prosecution is not required to lay a separate charge in respect of each murder. The old pleading rule was that a count which contained more than one offence was bad for duplicity , because it did not permit an accused to plead guilty to one or more offences and not guilty to the other or other offences included within the one count. Such a rule is completely impracticable in this Tribunal, given the massive scale of the offences which it has to deal with.[184] But the rule against duplicity was nevertheless also one of elementary fairness, and the consideration of fairness involved was that the accused must know the nature of the case he has to meet.

62. Where, therefore, the prosecution seeks to lead evidence of an incident which supports the general offence charged, but the particular incident has not been pleaded in the indictment in relation to that offence, 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.[185] Until such notice is given, an accused is entitled to proceed upon the basis that the details pleaded *are* the only case which he has to meet in relation to the offence or offences charged. Notice that such evidence will be led in relation to a particular offence charged is *not* sufficiently given by the mere service of witness statements by the prosecution pursuant to the disclosure requirements imposed by Rule 66(A). This necessarily follows from the obligation now imposed upon the prosecution to identify in its Pre-Trial Brief, in relation to *each* count, a summary of the evidence which it intends to elicit regarding the commission of the alleged crime and the form of the responsibility incurred by the accused.[186] If the prosecution intends to elicit evidence in relation to a particular count additional to that summarised in its Pre-Trial Brief, specific notice must be given to the accused of that particular intention.

63. Accordingly, at this stage and until given sufficient notice that evidence will be led of additional incidents or facilities in relation to a particular offence charged, both accused are entitled to proceed upon the basis that the lists of killings and facilities *are* exhaustive in nature.

64. Talic also complains that insufficient details are supplied as to the means by which the crimes other than the killings pleaded in the indictment were perpetrated .[187] Specifically, he complains that the prosecution has failed to provide any details as to the acts which constitute the torture, sexual assaults and other inhumane acts to which reference is made in the indictment in relation to these two counts.[188] The prosecution has responded that, in a case such as the present case, these are matters of evidence and not material facts, because the criminal responsibility of Talic is "based upon his high position within the leadership and a widespread and extensive pattern of criminal conduct, rather than on his proximity to any particular crime".[189]

65. Reference has already been made in general terms to the way in which the genocide charges have been pleaded.[190] Such generality is not displaced by reference to the exact wording of the indictment. After asserting the participation of both accused in "a campaign designed to destroy Bosnian Muslims and Bosnian Croats, in whole or in part, as national, ethnical, racial, or religious groups, as such" in various identified municipalities within the ARK, the indictment proceeds:

> [...] the execution of the above campaign included:
>
> [...] causing serious bodily or mental harm to Bosnian Muslims and Bosnian Croats during

1437

> their confinement in camps, other detention facilities, and during their interrogations at police stations and military barracks when detainees were continuously subjected to or forced to witness inhumane acts including murder, rape, sexual assault , torture and beating. [191]

Later, and still dealing with the genocide counts, the indictment returns to this subject:

> In the camps and detention facilities, Bosnian Serb forces and others who were given access to the camps, subjected Bosnian Muslim and Bosnian Croat detainees from the municipalities to physical and mental abuse including torture, beatings with weapons , sexual assaults and the witnessing of inhumane acts, including murder, causing them serious bodily or mental harm. As a result of these inhumane acts, during the period from 1 April 1992 to 31 December 1992, a large number of Bosnian Muslims and Bosnian Croats died in these detention facilities. [192]

No details at all are given of these matters. This is an omission which is repeated in relation to the count for persecutions as a crime against humanity (count 3), which alleges that the planning, preparation or execution of the persecution included :

> [...] torture, physical violence, rapes and sexual assaults, constant humiliation and degradation of Bosnian Muslims and Bosnian Croats [...]. [193]

The omission is repeated yet again in relation to the counts for torture (counts 6 and 7), which allege that the campaign of terror designed to drive the Bosnian Muslim and Bosnian Croat population away included:

> [...] the intentional infliction of severe pain or suffering on Bosnian Muslims or Bosnian Croats by inhumane treatment including sexual assaults, rape, brutal beatings , and other forms of severe maltreatment in camps, police stations, military barracks and private homes or other locations, as well as during transfers of persons and deportations. Camp guards and others, including members of the Bosnian Serb forces , used all manner of weapons during these assaults. Many Bosnian Muslims or Bosnian Croats were forced to witness executions and brutal assaults on other detainees. [194]

66. Such generality must be contrasted with the amount of detail disclosed in the indictment in relation, for example, to the killings to be established in support of the genocide counts. [195] There , pars 38 and 41 of the indictment identify twenty-nine killing incidents by reference to the municipalities and the general area where they occurred and their approximate dates, and twelve further killing incidents by reference to the municipalities and the place where they occurred and their approximate date. The Trial Chamber has already determined that, because of the remoteness of the two accused from these crimes for which they are alleged to be responsible, the identities of the victims and of the perpetrators in those killings are matters of evidence and not material facts to be pleaded in the present case. [196] That is because there are sufficient material facts pleaded in relation to the killings to enable both the Trial Chamber and the accused to identify the issues to which evidence elicited by the prosecution is relevant. There is no such assistance given by the indictment in relation to these other matters. Any trial such as the present (with all its complexities) in which such issues are not identified on the record would be likely to descend quickly into confusion. The prosecution does not suggest that there is any relevant distinction between killings and the other acts to which reference is made, and the Trial Chamber cannot see any such distinction. The prosecution will be ordered to plead sufficient detail to enable the various

1438

incidents referred to in pars 37(2) and 42 of the further amended indictment to be identified, in the same way and to the same extent as it has given details of the killing incidents in pars 38 and 41.[197]

Persecution as a crime against humanity (count 3)

67. Talic has complained, first, of the descriptions under this count of torture , physical violence, rapes and sexual assaults: of the use of the word "including ", and of the absence of any details of the direct and immediate perpetrators.[198] These complaints have already been considered, and dismissed.[199]

68. Paragraph 47(3) of the further amended indictment alleges that the planning, preparation or execution of the persecution included:

> the destruction of Bosnian Muslim and Bosnian Croat villages and areas, including the destruction or wilful damage to religious and cultural buildings and the looting of residential and commercial property [...].

This statement is followed by a list which identifies, under various municipalities , the names of the localities, together with references to various mosques and Roman Catholic (that is, Bosnian Croat) churches. Talic says that it is unclear whether this list is intended to identify only the religious edifices which were destroyed or damaged or whether it is intended also to identify these localities as the "villages and areas" which were destroyed.[200] The resolution of this lack of clarity is not assisted by the statement which follows the list, which appears to suggest that *other* "cities, towns [and] villages " were also destroyed:[201]

> During and after the attacks on these municipalities, Bosnian Serb forces systematically destroyed or damaged Bosnian Muslim and Bosnian Croat cities, towns, villages and property, including homes, businesses and Muslim and Roman Catholic sacred sites listed above.

69. The prosecution has responded that "the municipalities in which the crimes in the indictment are alleged to have occurred" are listed in par 4 of the indictment , and thus that the indictment is "sufficiently specific regarding the location of the crimes".[202] Paragraph 4 identifies sixteen municipalities as being some of those which constituted the ARK:

> Banja Luka, Bihac-Ripac, Bosanska Dubica, Bosanska Gradiska, Bosanska Krupa, Bosanski Novi, Bosanski Petrovac, Celinac, Donji Vakuf, Kljuc, Kotor Varoš, Prijedor, Prnjavor , Sanski Most, Sipovo and Teslic.

This group of municipalities is referred to in each of the counts as the scene of the campaign of ethnic cleansing in which the accused are alleged to have participated , and they correspond to the municipalities under which various towns and religious edifices are listed in par 47(3) of the indictment.

70. But the reference to those sixteen municipalities does nothing to resolve the lack of clarity in the way the list in par 47(3) of the indictment has been compiled . There should be no confusion in an indictment of this complexity. The prosecution will be ordered to make it clear whether it is alleged that the localities against which the religious edifices are listed are the "villages and areas" and the "cities , towns [and] villages" which are alleged in the same paragraph to have been destroyed or damaged.[203]

Extermination as a crime against humanity (count 4) and as a grave breach (count 5)

1439

71. Talic has complained of the vagueness of the descriptions under this count of the killings which are alleged to have taken place. He repeats the complaint which he made in relation to the details given of the killings alleged in the genocide counts (counts 1 and 2).[204] That complaint has already been dismissed by the Trial Chamber.[205] However, although details were given in pars 38 and 41 of the killings pleaded in relation to the genocide counts (which details the Trial Chamber has accepted as sufficient), no such details have been given of the killings which relate to these counts. Paragraph 51 of the further amended indictment says merely that, as part of the campaign designed to exterminate members of the Bosnian Muslim and Bosnian Croat population:

> [...] a significant number of Bosnian Muslims and Bosnian Croats were killed by Bosnian Serb forces in villages and non-Serb areas, in camps and other detention facilities and during the deportations or forcible transfers.

72. Talic appears to have assumed that the lists of killings in pars 38 and 41 (which relate to counts 1 and 2) were intended to relate also to these counts,[206] and the prosecution has responded upon the assumption that they do.[207] It is poor pleading that this is not stated expressly in par 51, but the intention has now been made sufficiently clear, and (unless the prosecution formally demurs) the trial will proceed upon that basis. What has already been said in this decision in relation to counts 1 and 2 is therefore applicable also to counts 4 and 5: the details given of the killings are sufficient,[208] and both accused are entitled to proceed upon the basis that the lists of killings are exhaustive at this stage and until given sufficient notice that evidence will be led of additional incidents in relation to a particular offence charged.[209] The complaint made by Talic is rejected.

Torture as a crime against humanity (count 6) and as a grave breach (count 7)

73. Talic has complained of the vagueness of the descriptions under these counts of the serious bodily and mental injury which, it is asserted, is alleged in the indictment to have been inflicted on Bosnian Muslims and Bosnian Croats during a campaign of terror.[210] The relevant passage from par 55 of the indictment has already been quoted.[211] It gives no detail which enables the various incidents to be identified, as the prosecution has been able to give in relation to the killings relied upon in the first and second counts pleading genocide (and perhaps also in the fourth and fifth counts pleading extermination and wilful killings). The prosecution has made the same response – that, in a case such as the present case, these are matters of evidence and not material facts, because (in effect) Talic was very remote in proximity to the commission of the offences for which he is alleged to be criminally responsible .[212] The Trial Chamber repeats that any trial such as the present (with all of its complexities) in which such issues are not identified on the record would be likely to descend quickly into confusion .[213] The prosecution will be ordered to plead sufficient detail to enable the various incidents alleged to constitute the infliction of severe pain and suffering referred to in par 55 to be identified , in the same way and to the same extent as it has given details of the killing incidents in pars 38 and 41.[214]

Unlawful and wanton extensive destruction and appropriation of property as a grave breach (count 10), wanton destruction of cities, towns or villages, or devastation not justified by military necessity as a violation of the laws or customs of war (count 11), and destruction or wilful damage done to institutions dedicated to religion as a violation of the laws or customs of war (count 12)

74. Talic has complained of the vagueness of the descriptions under these counts of the destruction of villages and religious edifices.[215] Paragraph 61 of the indictment incorporates in relation to these three counts the allegations made in par 47(3) of the indictment, which relates to count 3 ("Persecutions ").

1440

The complaint is one of lack of clarity. The relevant passage from par 47(3) has already been quoted, and both the complaint and the prosecution's response have already been discussed in the present decision.[216] The Trial Chamber has already stated that the prosecution will be ordered to make it clear in relation to par 47(3) whether it is alleged that the localities against which the religious edifices are listed are the "villages and areas" and the "cities , town [and] villages" which are alleged to have been destroyed or damaged.[217]

The allegation of an international armed conflict

75. The previous indictment had charged the accused with various crimes as grave breaches of the Geneva Conventions without alleging that the acts upon which they were based took place in the course of an *international* armed conflict. An order was made by the Trial Chamber directing the prosecution to file a further amended indictment which pleads, as material facts, that the armed conflict was international in character and the basis upon which such an assertion is made.[218]

76. Paragraph 30 of the further amended indictment now alleges:

> At all times relevant to this indictment, a state of armed conflict and partial occupation existed in the Republic of Bosnia and Herzegovina. For the period material to this indictment, the armed forces of the Republika Srpska were acting under the overall control of and on behalf of the Federal Republic of Yugoslavia (Serbia and Montenegro). Hence, the armed conflict in Bosnia and Herzegovina between the Bosnian Serbs and the central authorities of Bosnia and Herzegovina was an international armed conflict.

The further amended indictment describes elsewhere the creation of the VRS (the Army of the Serbian Republic of Bosnia and Herzegovina) as having had the effect of transforming the units of the JNA (the Yugoslav People's Army) remaining in Bosnia and Herzegovina into commands of the new VRS army, although the VRS is alleged to have retained strong links with the JNA.[219] There is no further reference elsewhere in the further amended indictment to the relationship between the armed forces of the Republika Srpska and the Federal Republic of Yugoslavia (Serbia and Montenegro).

77. Talic has complained that the further amended indictment fails, therefore, to identify the basis upon which the assertion is made that the armed conflict was an *international* one; he seeks an order that the prosecution provide "a detailed and accurate account of how in SitsC opinion the Federal Republic of Yugoslavia was directly involved as a belligerent".[220] The prosecution responds that it has complied with what the Trial Chamber ordered it to do.[221]

78. What the Trial Chamber said in relation to this issue was this:

> 50. If, for example, the prosecution is relying upon the evidence from which the Appeals Chamber in the *Tadic* Conviction Appeal Judgment concluded that the armed conflict in that case was international, it would have to plead as a material fact that the armed forces of the Bosnian Serbs were acting in the armed conflict in the present case under the overall control of and on behalf of the Federal Republic of Yugoslavia (Serbia and Montenegro). If the evidentiary material provided by the prosecution during the pre-trial discovery process has not sufficiently identified the evidence upon which the prosecution relies to establish that material fact, and if a request to the prosecution for such particulars has not been satisfactorily answered, it would be appropriate for an application to be made to the Trial Chamber for an order that the prosecution supply particulars of that allegation.

1441

The Trial Chamber is satisfied that the basis upon which the prosecution asserts that the armed conflict was an international one has therefore been sufficiently pleaded. The prosecution has now also identified in its response the evidence upon which it relies to establish the material facts which have been pleaded. [222] This evidence is apparently contained in two binders (specifically identified as such), and it consists of evidence given in other trials before the Tribunal. The Trial Chamber has not considered whether this material constitutes sufficient basis for the allegation pleaded, and it makes no finding in relation to that issue.

79. Next, Talic asserts that the allegation of an international armed conflict pleaded in par 30 of the further amended indictment is inconsistent with the allegation in pars 18 and 19 of the same pleading. [223] Paragraph 18 asserts that the crimes alleged in the indictment were committed by members of the municipal Crisis Staffs or by "members of the armed forces under the control of the leadership of the Bosnian Serbs". Paragraph 19 gives a brief description of the hierarchy within the VRS: that Talic was the commander of the 1st Krajina Corps, which was one of the five Corps within the VRS, and that each of these Corps had a commander and a command staff who were all "subordinated to General Mladic and the Main Staff of the VRS". Talic says that:

> In no manner is it presumed that the Republika Srpska army Main Staff or General Mladic might be subordinated to the JNA. [224]

The Trial Chamber sees no necessary inconsistency between these allegations and the allegations now made in par 30, that the armed forces of the Republika Srpska were acting under the overall control of and on behalf of the Federal Republic of Yugoslavia (Serbia and Montenegro). The earlier allegations are concerned with the link between the accused and the persons who are alleged to have committed the crimes pleaded; the later allegation is concerned with the link between the armed forces of Republika Srpska, of which Talic is alleged to have been a member, and the Federal Republic of Yugoslavia. As a matter of pleading, the later allegation does not qualify the earlier allegations, nor is it affected by them, to such an extent as to make the form of the indictment embarrassing to the accused.

80. Finally, Talic asserts that it can easily be seen, merely by reading the indictment and examining "the historical truth", that the fighting constituted a civil war and not an international one. A brief description of "the historical truth" is supplied. [225] However, a preliminary motion challenging the form of an indictment is not an appropriate procedure for contesting the accuracy of the facts pleaded. [226] That is the function of the trial.

7 Disposition

81. For the foregoing reasons, **Trial Chamber II makes the following orders** :

> (1) The word "committed" is struck out from par 33 of the further amended indictment . [227]
>
> (2) The prosecution, if such be its case, is ordered to plead expressly that Momir Talic is criminally responsible for the crimes committed by units of the 1st Krajina Corps outside its geographical area of responsibility, upon the basis that he was in effective control of those units when they did so, and to identify with sufficient detail the areas outside that geographical area where, it is alleged, the units of the 1st Krajina Corps committed such crimes. [228]

1442

(3) The prosecution is ordered to identify with some precision in its indictment the basis or bases upon which it seeks to make Momir Talic criminally responsible as a member of the Crisis Staff of the Autonomous Region of Krajina.[229]

(4) (a) The prosecution is ordered to plead its case expressly as to whether each of the crimes charged is alleged to have fallen *within* the object of the joint criminal enterprise which has been pleaded in par 27 of the further amended indictment or to have gone *beyond* that object.[230]

(b) If any of the crimes charged are alleged to fall *within* that object, either solely or in the alternative, the prosecution is ordered to plead that the accused had the state of mind required for that crime.[231]

(c) If all of the crimes charged are alleged to go *beyond* that object, the prosecution is ordered to identify in the indictment the agreed criminal object of the joint criminal enterprise upon which it relies.[232]

(5) Leave is granted to the prosecution to amend par 27 of the further amended indictment as sought, *provided* that the prosecution complies fully with Order (4), *supra*.[233]

(6) The prosecution, if such be its case, is ordered to plead as a material fact that the Bosnian Muslims and Bosnian Croats killed in the incidents identified in pars 38 and 41 of the indictment (and the incidents referred to in par 37 of the indictment) were non-combatants.[234]

(7) The prosecution is ordered to plead sufficient detail to enable the various incidents referred to in pars 37(2) and 42 of the further amended indictment to be identified, in the same way and to the same extent as it has given details of the killing incidents in pars 38 and 41.[235]

(8) The prosecution is ordered to make it clear whether it is alleged that the localities against which the religious edifices are listed in par 47(3) of the further amended indictment are the "villages and areas" and the "cities, towns [and] villages" which are alleged in the same paragraph to have been destroyed or damaged.[236]

(9) The prosecution is ordered to plead sufficient detail to enable the various incidents alleged to constitute the infliction of severe pain and suffering referred to in par 55 of the further amended indictment to be identified, in the same way and to the same extent as it has given details of the killing incidents in pars 38 and 41.[237]

(10) The prosecution is to comply with the orders made within three weeks of the date of this decision.

Otherwise, the Trial Chamber dismisses the complaints made in the Talic Motion.

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

1443

Dated this 26th day of June 2001,
At The Hague,
The Netherlands.

Judge David Hunt
Presiding Judge

[Seal of the Tribunal]

1 - Preliminary Motion Based on the Defects in the Form of the Indictment Dated 12 March 2001, 5 Apr 2001 ("Talic Motion"). Talic appears to have exceeded the limits imposed upon the lengths of motions and responses by the Practice Direction on the Length of Briefs and Motions (IT/184, 19 Jan 2001, par 5). The Practice Direction requires authorisation to exceed the limits imposed to be sought in advance, with an explanation of the exceptional circumstances necessitating the excess (*Ibid*, par 7). No doubt the failure in this case resulted from ignorance of the existence of the Practice Direction, and the breach will therefore be excused. The parties should, however, keep the existence of the Practice Direction in mind in relation to future filings.
2 - Further amended indictment, 12 Mar 2001.
3 - Amended Indictment, 16 Dec 1999.
4 - Count 1, Article 4(3)(a) of the Tribunal's Statute.
5 - Count 2, Article 4(3)(e).
6 - Count 3, Article 5(h).
7 - Count 4, Article 5(b).
8 - Count 8, Article 5(d).
9 - Count 9, Article 5(i).
10 - Count 6, Article 5(f).
11 - Count 7, Article 2(b).
12 - Count 5, Article 2(a).
13 - Count 10, Article 2(d).
14 - Count 11, Article 3(b).
15 - Count 12, Article 3(d).
16 - Prosecution's Response to "Preliminary Motion Based on the Defects in the Form of the Indictment Dated 12 March 2001" Filed by the Accused Momir Talic, 3 May 2001 ("Prosecution Response").
17 - Talic Motion, Section V: Conclusion, last paragraph.
18 - Decision on Filing of Replies, 7 June 2001 ("Decision on Replies"), par 1.
19 - Status Conference, 18 May 2001, Transcript pp 313-316.
20 - Prosecution's Supplementary Response to "Preliminary Motion Based on the Defects in the Form of the Indictment Dated 12 March 2001" Filed by the Accused Momir Talic and Request for Leave to Amend the Further Amended Indictment, 22 May 2001 ("Prosecution Application"), par 5.
21 - Response to the Prosecutor's Request for Leave to Amend the Further Amended Indictment, 1 June 2001 ("*Talic Response*"), Section III: Discussion, third paragraph.
22 - *Ibid*, pars 1-2.
23 - Decision on Replies, par 6.
24 - Prosecution's Reply to the Talic Response to the Prosecutor's Request for Leave to Amend the Further Amended Indictment, 14 June 2001 ("Prosecution Reply").
25 - Decision Refusing Leave to Momir Talic to File Further Response, 20 June 2001.
26 - Paragraphs 50-51, *infra*.
27 - Decision on Objections by Momir Talic to the Form of the Amended Indictment, 20 Feb 2001 ("20 February 2001 Decision"), Sections 4-5; see also Decision on Motion by Momir Talic for Provisional Release, 28 Mar 2001 ("28 March 2001 Decision"), Section 5.
28 - Status Conference, 17 Nov 2000, Transcript pp 221-222.
29 - 20 February 2001 Decision, par 55(iv)(a).
30 - *Ibid*, par 26.
31 - *Prosecutor v Aleksovski*, Case IT-95-14/1-A, Judgment, 24 Mar 2000, par 171, footnote 319, citing *Prosecutor v Krnolejac*, Decision on Preliminary Motion on Form of Amended Indictment, 11 Feb 2000 ("Second *Krnojelac* Decision"),

14464

par 60; *Prosecutor v Delalic*, Case IT-96-21-A, Judgment, 20 Feb 2001 ("*Celebici* Appeal Judgment"), par 351.
32 - 20 February 2001 Decision, pars 26-28.
33 - Further amended indictment, pars 33-34. The terms of these paragraphs are quoted in footnote 35, *infra*.
34 - cf *Prosecutor v Kordic*, IT-95-14/2-A, Decision on Motions to Extend Time for Filing Appellant's Briefs, 11 May 2001, par 14: The duty of the prosecution is to act as "ministers of justice assisting in the administration of justice".
35 - Paragraph 33 of the further amended indictment states: Each of the accused are *[sic]* individually responsible for the crimes alleged against him in this indictment, pursuant to Article 7(1) of the Tribunal Statute. Individual criminal responsibility includes planning, instigating, ordering, committing, or otherwise aiding and abetting in the planning, preparation or execution of any crimes referred to in Articles 2, 3, 4 and 5 of the Tribunal Statute. Paragraph 34 states: Each of the accused whilst holding the positions of superior authority as set out in the foregoing paragraphs, is also criminally responsible for the acts of his subordinates, pursuant to Article 7(3) of the Tribunal Statute. A superior is responsible for the acts of his subordinate(s) if he knew or had reason to know that his subordinate(s) were about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.
36 - Talic Motion, Section I: The Deficiencies in the Definition of General Talic's Criminal Conduct, par 2.
37 - 20 February 2001 Decision, par 10.
38 - This is further confirmed in the document filed by the prosecution with its further amended indictment, entitled "Prosecutor's Further Amended Indictment", 12 Mar 2001 ("Prosecution Explanation"). In par 3 of that document, the prosecution identifies that part of the indictment in which the characterisation of the criminal liability of each accused is pleaded as par 33, where it refers to "planning, instigating, ordering, committing, or otherwise aiding and abetting", and which is incorporated within each of the counts pleaded.
39 - Prosecution Explanation, par 4; Talic Motion, Section I, par 3.
40 - Talic Motion, Section III: The Deficiencies in the Facts Ascribed to General Talic, Part 1: Observations relating to all the counts, par 1.a.
41 - Prosecution Response, par 22. See also pars 23-24.
42 - 28 March 2001 Decision, pars 40-45.
43 - *cf* 20 February 2001 Decision, par 26.
44 - The basis upon which leave will be granted to amend an indictment is discussed in the recent decision of the Trial Chamber in the present case, Decision on Replies, pars 3-4.
45 - See, for example: Status Conference, 17 Nov 2000, Transcript p 213; Oral hearing, Motion by Talic for Provisional Release, 2 Feb 2001, Transcript p 247; Status Conference, 2 Feb 2001, Transcript pp 265-266, 268-270, 275-276; Motion (by Brdanin) to Dismiss the Indictment, 2 May 2001, pars 4-6.
46 - *Celebici* Appeal Judgment, pars 760-766.
47 - Prosecution Explanation, par 4.
48 - *Celebici* Appeal Judgment, par 766.
49 - *Ibid*, par 763.
50 - Such a situation is discussed elsewhere in this decision, at pars 60-63, *infra*.
51 - 20 February 2001 Decision, par 22.
52 - Paragraph 9, *supra*.
53 - Paragraph 81, *infra*, Order (1).
54 - Talic Motion, Section II: The Deficiencies Regarding General Talic's Status, first paragraph.
55 - *Ibid*, par 1.1.
56 - *Ibid*, par 1.2.
57 - Further amended indictment, par 23.
58 - Talic Motion, Section II, par 1.2.
59 - Further amended indictment, pars 13, 24.
60 - *Ibid*, par 24.
61 - *Talic Motion*, Section II, par 2.
62 - Prosecution Response, par 17.
63 - Paragraph 23 of the further amended indictment provides only an inclusive, rather than an exclusive, definition of the geographical area of responsibility of the 1st Krajina Corps. Nor is the "planned Serbian state", where par 27 of the indictment alleges that the ethnic cleansing took place for which the two accused are held responsible, defined in any exclusive way – whether in par 4 or elsewhere in the indictment.
64 - Paragraph 81, *infra*, Order (2).
65 - Prosecution Response, par 15.
66 - *Ibid*, par 15, referring to par 13 of the further amended indictment.
67 - Further amended indictment, pars 12-13, 15, 19-20.
68 - *Ibid*, par 20. In its Response, the prosecution has further elaborated this allegation by asserting that Talic was in "effective control" of the Corps: Prosecution Response, par 17.
69 - "Instructions on the Application of the International Laws of War in the Armed Forces of the SFRY", published in 1988

1445

(Further amended indictment, par 26).
70 - Further amended indictment, pars 25-26.
71 - *cf Prosecutor v Naletilic*, IT-98-34-PT, Decision on Defendant Vinko Martinovic's Objection to the Indictment, 15 Feb 2000, par 17; *Prosecutor v Brdanin and Talic*, 20 February 2001 Decision, par 50.
72 - Further amended indictment, par 13.
73 - Paragraph 81, *infra*, Order (3). The attention of the prosecution is drawn to what is also said in relation to this issue in pars 54 and 59 (footnote 181), *infra*.
74 - Paragraph 3, *supra*.
75 - Prosecution Application, par 5.
76 - Further amended indictment, par 27, which is incorporated by reference within each count, and which is bolstered by the express reference in each count to the accused having acted "in concert".
77 - So far as Talic is concerned, this is as commander of the 1st Krajina Corps and as a member of the ARK Crisis Staff (see pars 16-21, *supra*).
78 - *Prosecutor v Tadic*, IT-94-1-A, Judgment, 15 July 1999 ("Tadic Conviction Appeal Judgment").
79 - *Ibid*, par 185.
80 - *Ibid*, par 187.
81 - *Ibid*, par 185.
82 - *Ibid*, par 187.
83 - *Ibid*, par 188.
84 - *Ibid*, pars 191, 193.
85 - *Ibid*, pars 193, 195, 204, 225.
86 - *Ibid*, pars 196, 202, 203, 204.
87 - *Ibid*, par 203.
88 - *Ibid*, par 199.
89 - *Ibid*, par 204.
90 - *Ibid*, par 220.
91 - *Ibid*, par 220.
92 - *Ibid*, par 195.
93 - *Ibid*, par 202
94 - *Ibid*, par 203.
95 - *Ibid*, par 196.
96 - The Tadic Conviction Appeal Judgment (at par 196) describes them all as "co-defendants", but the issue is the same where only some of the participants have been charged and are standing trial. The category does *not* depend upon just who has been charged.
97 - The judgment speaks here (also at par 196) of co-perpetrators, but such a description, with all due respect, begs the question.
98 - Tadic Conviction Appeal Judgment, par 202.
99 - *Ibid*, par 204.
100 - The judgment's use of the word "perpetrator" (at par 196) is a reference to a person who personally perpetrates the crime falling within the agreed object of the common design, or joint criminal enterprise.
101 - Tadic Conviction Appeal Judgment, par 190.
102 - *Ibid*, pars 191, 193.
103 - *Ibid*, par 196.
104 - *Ibid*, par 202.
105 - *Ibid*, par 203.
106 - *Ibid*, par 203.
107 - *Ibid*, par 202.
108 - The burden carried by the prosecution in relation to the accused's state of mind is therefore higher in relation to a case based upon a joint criminal enterprise (where the crime charged falls within the object of the enterprise) than it is for a case based solely upon aiding and abetting. In a case based solely upon aiding and abetting, the prosecution must establish that the accused *knew* that the perpetrator had the state of mind required for the crime committed, but it need not establish that he also *shared* that state of mind – as it must in a case based upon a joint criminal enterprise: *Prosecutor v Furundzija* , Case IT-95-17/1-T, Judgment, 10 Dec 1998 ("*Furundzija* Trial Judgment"), par 245 ("[...] it is not necessary for the accomplice to share the *mens rea* of the perpetrator"). In the same judgment (at par 249), the state of mind required for aiding and abetting is contrasted in this way with that required for a joint criminal enterprise, as it is also in *Prosecutor v Kupreskic* , Case IT-95-16-T, Judgment, 14 Jan 2000 ("*Kupreskic* Trial Judgment"), par 772. The Appeals Chamber has also drawn attention to the different states of mind required in the two cases: *Tadic* Conviction Appeal Judgment, par 229(iv); *Prosecutor v Furundzija* ,

1446

Case IT-95-17/1-A, Judgment, 21 July 2000 ("*Furundzija* Appeal Judgment"), pars 118-119.
109 - *Tadic* Conviction Appeal Judgment, par 204.
110 - *Ibid*, par 220.
111 - *Ibid*, par 228. The emphasis appears in the judgment.
112 - Dolus eventualis is a subtle civil law concept with a wide application in relation to the state of mind required for different crimes. It requires an advertence to the possibility that a particular consequence will follow, and acting with either indifference or being reconciled to that possibility (in the sense of being prepared to take that risk). The extent to which the possibility must be perceived differs according to the particular country in which the civil law is adopted, but the highest would appear to be that there must be a "concrete" basis for supposing that the particular consequence will follow.
113 - Talic Response, Section III, par 2.3.
114 - *Ibid*, par 1.1.
115 - *Ibid*, pars 2.1, 2.2.
116 - Prosecution Reply, par 11.
117 - *Prosecutor v Kordic*, Case IT-95-14/2-PT, Decision on Defence Application for Bill of Particulars, 2 Mar 1999, par 8.
118 - 20 February 2001 Decision, pars 48-49.
119 - Talic Motion, Section II, par 3.1.
120 - *Ibid*, par 3.2.
121 - *Ibid*, par 3.3.
122 - Talic Response, Section III, par 2.3.
123 - *Ibid*, pars 1.1, 2.1. Paragraph 1.1 states: None of the crimes alleged were the objective of this enterprise. Stated otherwise, all the crimes alleged in the indictment go beyond the scope of the criminal enterprise. [...] In the Prosecutor's indictment, none of the crimes committed falls within the scope of the criminal enterprise [...]. Paragraph 2.1 states: [...] all of the alleged crimes fall outside the scope of the criminal enterprise [...].
124 - *Ibid*, par 2.3.
125 - *Ibid*, par 2.3.
126 - *Ibid*, par 2.3.
127 - Prosecution Reply, par 6, referring to the *Tadic* Conviction Appeal Judgment, par 220, quoted in par 28, *supra*.
128 - Talic Response, Section III, pars 1.1, 2.1. The relevant passages are quoted in footnote 123, *supra*.
129 - *Trial of the Major War Criminals before the International Military Tribunal*, Judgment, Nuremberg 1947 (1995), Vol XXII ("Nuremberg Judgment"), p 467.
130 - Paragraph 6 of the Prosecution Reply identifies the principle stated in the Tadic Conviction Appeal Judgment, referring to the limited responsibility of the participants in a joint criminal enterprise for crimes which go beyond the object of that enterprise, as an answer to the complaint made by Talic.
131 - Paragraphs 39-41, *infra*.
132 - Paragraph 30, *supra*: The prosecution must establish that, "in the case of a participant in the joint criminal enterprise who is charged with a crime committed by another participant which goes beyond the agreed object of the enterprise, [...] the accused was aware that such a crime was a possible consequence in the execution of that enterprise and that, with that awareness, he participated in that enterprise".
133 - *Tadic* Conviction Appeal Judgment, par 220.
134 - Paragraph 35, *supra*.
135 - 20 February 2001 Decision, par 20.
136 - Paragraph 81, *infra*, Order (4)(a).
137 - *Ibid*, Order 4(b).
138 - Talic Response, Section III, par 1.1.
139 - Prosecution Reply, par 3.
140 - Talic Response, Section III, par 1.1.
141 - Prosecution Reply, par 3.
142 - *Ibid*, par 4.
143 - Paragraphs 25 (Category 3) and 30, *supra*.
144 - Nuremberg Judgment, p 468.
145 - Paragraph 204.
146 - The example given in par 204 is of "a common, shared intention on the part of a group to forcibly remove members of one ethnicity from *their* town, village or region (to effect 'ethnic cleansing') with the consequence that, in the course of doing so, *one or more* of the victims is shot and killed". The emphasis has been added.
147 - Paragraph 81, *infra*, Order 4(c).
148 - Talic Response, Section III, par 2.2.
149 - Nuremberg Judgment, p 500.
150 - Prosecution Reply, par 10. The emphasis has been added.

1447

151 - Paragraph 33, *supra*.
152 - Paragraph 19, *supra*.
153 - *Celebici* Appeal Judgment, par 581.
154 - Decision on Replies, pars 3-4.
155 - *cf Prosecutor v Naletilic and Martinovic*, Case IT-98-34-PT, Decision on Vinko Martinovic's Objection to the Amended Indictment and Mladen Naletilic's Preliminary Motion to the Amended Indictment, 14 Feb 2001, pp 4-7.
156 - *Ibid*, pp 4, 7.
157 - Paragraph 81, *infra*, Order (5).
158 - Talic Motion, Section III: The Deficiencies in the Facts Ascribed to General Talic, last paragraph in the general part.
159 - *Ibid*, par 1.a.
160 - Paragraph 14, *supra*.
161 - Talic Motion, Section III, par 1.b.
162 - The possible circularity of that argument has already been discussed in par 20, *supra*.
163 - *Talic Motion*, Section III, par 1.b.
164 - Further amended indictment, par 20.
165 - Article 7.1 includes actions whereby the accused "planned, instigated, ordered [...] or otherwise aided and abetted in the planning, preparation or execution of a crime".
166 - Paragraph 21, *supra*.
167 - Further amended indictment, par 36.
168 - *Ibid*, par 37.
169 - *Ibid*, par 44.
170 - *Ibid*, par 38.
171 - *Ibid*, par 40.
172 - *Ibid*, par 41.
173 - *Ibid*, par 42.
174 - *Talic Motion,* Section III, par 2.1.
175 - *Ibid*, pars 2.1.1, 2.2.
176 - *Ibid*, par 2.1.2.
177 - *Ibid*, par 2.1.1.
178 - Prosecution Response, par 19.
179 - Paragraph 81, *infra*, Order (6).
180 - Talic Motion, Section III, par 2.1.1.
181 - The Trial Chamber has already stated that the prosecution will be ordered to identify with some precision in the indictment the basis upon which it seeks to make Talic criminally responsible *as a member of the ARK Crisis Staff* (par 21, *supra*.) It may be that the conclusion reached in the present paragraph will have to be revisited if some basis is shown for making Talic criminally responsible for the actions of persons other than those under his command as commander of the 1st Krajina Corps, in (for example) the subjection of Bosnian Muslim and Bosnian Croat detainees to physical and mental abuse by "others" pleaded in par 42 of the further amended indictment. (See pars 53-54, *supra*.)
182 - Talic Motion, Section III, pars 2.1.1, 2.3.
183 - Prosecution Response, pars 20-21.
184 - *Prosecutor v Kvocka*, Case IT-99-30-PT, Decision on Defence Preliminary Motions on the Form of the Indictment, 12 Apr 1999, par 17.
185 - This is consistent with what was said by the Appeals Chamber in the *Celebici* Appeal Judgment, at pars 763, 766, when discussing the relevance of such evidence to the sentence to be imposed (see par 13, *supra*).
186 - Rule 65*ter*(E)(i).
187 - Talic Motion, Section III, par 2.1.
188 - *Ibid*, par 2.2.
189 - Prosecution Response, par 24.
190 - Paragraph 55, *supra*.
191 - Further amended indictment, par 37(2).
192 - *Ibid*, par 42.
193 - *Ibid*, par 47(2).
194 - *Ibid*, par 55.
195 - Paragraph 56, *supra*.
196 - Paragraph 59, *supra*.
197 - Paragraph 81, *infra*, Order (7).
198 - *Talic Motion*, Section III, par 3.

1448

199 - Paragraphs 57-63, *supra*.
200 - Talic Motion, Section III, par 3.
201 - Further amended indictment, par 47(3).
202 - Prosecution Response, par 26.
203 - Paragraph 81, *infra*, Order (8).
204 - Talic Motion, Section III, par 4.
205 - Paragraph 59, *supra*.
206 - Talic Motion, Section V: Conclusion, par II, in which the heading incorporates both counts 1 and 2 and counts 4 and 5.
207 - Prosecution Response, pars 19-20.
208 - Paragraph 59, *supra*.
209 - Paragraph 63, *supra*.
210 - Talic Motion, Section III, par 5. Paragraph 55 of the indictment refers to "severe pain or suffering" ("*grandes douleurs ou souffrances*" in the French translation). The Talic Motion refers to "*atteintes graves à l'intégrité physique ou mentale*" ("serious bodily and mental injury" in the English translation). The two are not entirely synonymous.
211 - Paragraph 65, *supra*.
212 - Prosecution Response, par 24.
213 - Paragraph 66, *supra*.
214 - Paragraph 81, *infra*, Order (9).
215 - Talic Motion, Section III, par 6.
216 - Paragraphs 68-70, *supra*.
217 - Paragraph 70, *supra*.
218 - 20 February 2001 Decision, par 55(iv)(b).
219 - Further amended indictment, par 12.
220 - Talic Motion, Section IV: Vagueness as to the Allegation that There was an International Conflict. The paragraphs of this Section of the Talic Motion are unnumbered.
221 - Prosecution Response, par 29.
222 - *Ibid*, par 31.
223 - Talic Motion, Section IV.
224 - *Ibid*, Section IV.
225 - *Ibid*, Section IV.
226 - Prosecutor v Delalic, Case IT-96-21-T, Decision on the Accused Mucic's Motion for Particulars, 26 June 1996, pars 7-8; *Prosecutor v Blaskic* , Case IT-95-14-PT, Decision on the Defence Motion to Dismiss the Indictment Based upon Defects in the Form Thereof, 4 Apr 1997, par 20; *Prosecutor v Kupreskic* , Case IT-95-16-PT, Order on the Motion to Withdraw the Indictment Against the Accused Vlatro Kupreskic, 11 Aug 1998, p 2; *Prosecutor v Krnojelac*, Case IT-97-25-PT, Decision on the Defence Preliminary Motion on the Form of the Indictment, 24 Feb 1999, par 20; 28 March 2001 Decision, par 23.
227 - See par 14, *supra*.
228 - See par 17, *supra*.
229 - See par 21, *supra*.
230 - See par 39, *supra*.
231 - See par 41, *supra*.
232 - See par 45, *supra*.
233 - See par 51, *supra*.
234 - See par 58, *supra*.
235 - See par 66, *supra*.
236 - See pars 70 and 74, *supra*.
237 - See par 73, *supra*.