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SCSL-2003-13-PT
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SPECIAL COURT FOR SIERRA LEONE
OFFICE OF THE PROSECUTOR
FREETOWN – SIERRA LEONE

Before: Judge Benjamin Itoe

Registrar: Mr. Robin Vincent

Date filed: 24 October 2003

THE PROSECUTOR

Against

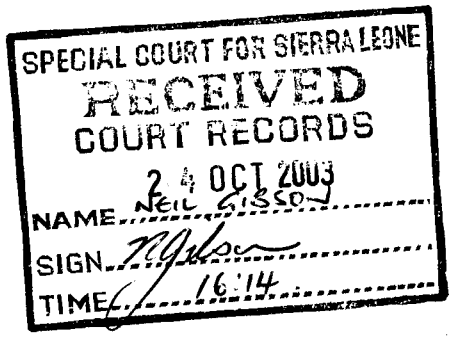
SANTIGIE BORBOR KANU

CASE NO. SCSL – 2003 – 13 – PT

PROSECUTION RESPONSE TO DEFENCE MOTION ON DEFECTS IN THE FORM OF THE INDICTMENT AND FOR PARTICULARIZATION OF THE INDICTMENT

Office of the Prosecutor:
Mr. Luc Coté
Mr. Robert Petit
Mr. Christopher Santora

Defence Counsel:
Mr. Geert-Jan Alexander Knoops



INTRODUCTION

1. The Prosecution submits this Response to *Defence Motion on Defects in the Form of the Indictment and for Particularization of the Indictment* (the Motion) filed on behalf of Santigie Borbor Kanu (the Accused) on 16 October 2003.

2. In the Motion, the Defence requests the deletion of certain parts of the Indictment against the Accused or in the alternative for more specific information based on the following arguments summarized below:

   A. that the theory of joint criminal enterprise is not sufficiently pleaded as the Indictment lacks specificity regarding the role and position of the Accused in the alleged joint criminal enterprise, that the Indictment fails to adequately specify the category of the joint criminal enterprise alleged and that the Indictment fails to "key" the joint criminal enterprise to the crimes alleged;

   B. that the Indictment does not sufficiently allege particular facts to show how the Accused had "effective control over his subordinates" and therefore does not meet the specificity requirements for pleading command responsibility;

   C. that the Indictment does not sufficiently particularize the identity or number of victims;

   D. that the Indictment does not sufficiently particularize the underlying events relating to Count 2: "Collective Punishments" and that the term "Collective Punishments" itself is insufficiently clear;

   E. that various counts in the Indictment contain phrases that are impermissibly broad or vague; and

   F. that the Indictment does not contain sufficient particulars to enable the Defence to investigate an alibi or cross-examine witnesses.

3. The Prosecution submits that the Defence Motion has no basis in fact or in law and should be dismissed.

ARGUMENT

A. Specificity Required When Alleging Joint Criminal Enterprise

4. Contrary to the Defence's assertions in paragraph 5 of its Motion, the Indictment sufficiently alleges the role or nature of the participation of the Accused in the joint criminal enterprise. The purpose of the joint criminal enterprise is set out in the Indictment, in particular in paragraphs 8, 9, 10, 24 and 25. The nature of the participation or role of the Accused in the joint enterprise is set out throughout the Indictment, and in particular in paragraph 18 which sets out, in general, the Accused's participation, and Paragraphs 19-23 which provide detailed particulars as to the Accused's participation. While the Defence focuses only on paragraphs 23-25 of the Indictment which identify the "common plan", it is required that the Indictment be read as a whole.[1] A reading of the full Indictment clearly shows sufficient factual allegations that reflect the "nature of participation" of the Accused in the "common plan" or "joint criminal enterprise."

5. For the same reasons stated in paragraph 3 above, the Prosecution submits that the Indictment sufficiently connects the Accused, as an individual, with the joint criminal enterprise, contrary to paragraph 6 of the Motion. In addition, the Prosecution submits that the Indictment specifically alleges that the Accused "as an individual" held a position of authority within the AFRC and the RUF/AFRC, that the Accused, in his individual capacity, participated in a common plan with other individuals in the RUF and the AFRC and that by virtue of this position and participation is liable for crimes resulting from the joint criminal enterprise. With regards to the Defence's view of the composition of the

[1] *See Prosecutor v. Krnojelac,* IT-97-25, "Decision on the Defence Preliminary Motion on the Form of the Indictment", 24 February 1999, paragraph 7. This principle was also followed in *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, paragraphs 7(vi) & 16.

RUF/AFRC, it is evident from the Indictment that the RUF/AFRC was constituted of "private persons."

6. The Prosecution submits that it is not required to elect between the basic form of joint criminal enterprise and the extended form of joint criminal enterprise, as contended in paragraph 7 of the Defence motion. The Defence's interpretation of the *Krnojelac* judgment as supportive of the proposition that the Prosecution cannot plead both forms of joint criminal enterprise is erroneous. In the Indictment that was the subject of the *Krnojelac* decision, it was the absence of the extended form of joint criminal enterprise that was at issue. During trial, the Prosecution sought to hold the accused person liable based on evidence adduced on the extended form of joint criminal enterprise, while the Prosecution had only alleged the basic form of joint criminal enterprise in the Indictment.[2] Consequently, the Trial Chamber held that since "only a basic joint criminal enterprise has been pleaded, it would not be fair to the Accused to allow the Prosecution to rely upon this extended form of joint criminal enterprise liability in the absence of such an amendment to the Indictment to plead it expressly."[3]

7. The Defence argument in paragraph 8 of the Motion that the "Indictment fails to implement specific formulations whereby the concept of joint criminal enterprise is keyed to each of the separate crimes..." and that this requirement may "be derived from ICTY case law" is also baseless and should be rejected. 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.

8. The *Krnojelac* case upon which the Defence argument in paragraph 8 is predicated provides no support for the Defence position. All of the paragraphs the Defence relies upon in the *Krnojelac* trial judgment are evidentiary findings from the trial as to whether the Prosecution "established" the responsibility of the accused through involvement in a

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[2] *See Krnojelac, supra,* note 1, Third Amended Indictment, paragraphs 5.1-5.3. The Indictment states that the accused "participated in or aided and abetted the execution of a common plan."
[3] *See Krnojelac, supra,* note 1, "Judgment", 15 March 2002, paragraph 86.

joint criminal enterprise.[4] The Defence itself admits in paragraph 8 that the reasoning in *Krnojelac* was applied with respect to burden of proof. The reasoning in that case is therefore inapplicable to the form of an Indictment, and the Defence provides no persuasive argument for such application.

B. Specificity Required When Alleging Command Responsibility

9. The Prosecution derives two possible interpretations from the Defence arguments contained in paragraphs 10-12 of the Motion. To the extent the argument is that the Indictment lacks a foundational basis for the allegation of effective control, the Prosecution submits that paragraphs 18-21 of the Indictment plead facts about the position of authority of the Accused over identified subordinates, which in essence lay the foundation for the allegation of effective control over those subordinates. To the extent the argument is that the Indictment does not plead facts or elements to show effective control, the Prosecution submits that it is not required to plead such evidence in the Indictment. This is a function of the evidence to be adduced at trial.[5]

C. Specificity Regarding Identity and Number of Victims

10. The Prosecution is not required to identify the names and number of victims as requested by the Defence in paragraphs 18 and 35 of its Motion. The case against the Accused is one of mass crimes as he is charged with such crimes as Crimes against Humanity and Violations of Article III Common to the Geneva Convention. The jurisprudence from this Court recognizes that in cases of mass crimes "the sheer scale of the offences makes

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[4] Ibid. at paragraph 127 stating, "[t]he Trial Chamber is also not satisfied that the Prosecution has established . . . "; paragraph 170 stating, "[t]he Trial Chamber is not satisfied that the Prosecution has established . . . "; at paragraph 315 stating, "[w]ith respect to ' common purpose' liability under Article 7(1), there is no acceptable evidence that the Accused entered into any agreement for a joint criminal enterprise . . . "; at paragraph 346 stating "[t]he Trial Chamber is not satisfied that the Prosecution has established that the Accused was a member of any joint criminal enterprise . . . "; at paragraph 427 stating "the Prosecution has failed to prove the Accused membership of any joint criminal enterprise . . . "; at paragraph 487 stating "[t]he Trial Chamber is not satisfied that the evidence is sufficient to establish these allegations."

[5] *Prosecutor v Kupre{ki} and others,* IT-95-16-A, "Appeal Judgement", 23 October 2001, paragraph 88.

it impossible to identify the victims."[6] Thus the Special Court and also the ICTY and the ICTR have held that it is permissible to identify victims by reference to their group or category.[7] 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, and 56 by gender. Paragraph 64 also specifically identifies the victims as UNAMSIL peacekeepers and humanitarian assistance workers in the various regions listed.

11. For the same reasons discussed above in paragraph 10, the Prosecution is not required to provide "the exact number" of victims. Given the nature of the alleged crimes and the scale of the events in Sierra Leone, forcing the Prosecution to give an exact number of victims would be asking the impossible. With regards to victim specificity, the ICTY Trial Chamber in Brdanin and Talic stated that "the Prosecution cannot be forced to do the impossible."[8]

D. Count Two: "Collective Punishments"

12. There is no merit to the Defence argument in paragraph 19 of the Motion that the charge of collective punishments in Count 2 of the Indictment is insufficiently clear. As the Defence Motion itself admits, paragraph 31 of the Indictment provides that the factual bases for the count of collective punishments are the crimes referred to in paragraphs 32-57 and in Counts 3-13 of the Indictment, which also expressly states that these crimes were committed by the Accused in order to punish the civilian population for their support of government forces and allies and/or their failure to support the AFRC/RUF. Paragraphs 28-30 of the Indictment also provide the factual bases for the charge of collective punishments. Having set out the factual bases for the count of collective punishment in paragraphs 28-30, and in particular in paragraph 31 of the Indictment, the Prosecution was not required again to repeat itself in paragraphs 32-57 which also form

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[6] *See Sesay, supra,* note 1, at paragraph 20, relying on *The Prosecutor v. Laurent Semanza*, ICTR-97-20-T, 15 May 2003.

[7] *See Sesay, supra*, note 1; *Kronojelac, supra,* note 1 at paragraph 58; *See generally, Prosecutor v. Musema,* ICTR-96-13-T, Judgment, 27 January 2000, paragraphs 942-951.

[8] *See Prosecutor v Radoslav Brdanin & Momir Talic*, IT-99-36, "Decision on Objections By Momir Talic to the Form of the Amended Indictment," 20 February 2001, paragraph 22.

the bases for other distinct crimes. The Prosecution submits that paragraphs 28-31 of the Indictment adequately put the Defence on notice of the conduct alleged to constitute the crime of collective punishments.

13. There is also no merit to the second half of the Defence argument in paragraph 19 of the Motion that because the term "collective punishments" is not contained in Common Article 3 of the Geneva Conventions, the term itself is not "self-evident" and therefore not "sufficiently clear and precise so as to enable the accused to fully understand the nature of the charges brought against him." The Prosecution submits that collective punishments is one of the proscribed acts under Article 3 of the Special Court's Statute. As such, there is no requirement for the Prosecution to explain the meaning of this count but only to plead sufficient particular facts to allege the crime and the role of the Accused in the crime. The Prosecution also notes that the legitimacy of the count in the Statute is not a matter that should be addressed in a challenge on the form of the Indictment. For all of these reasons, the Defence contentions in paragraph 19 should be rejected.

E. Phrases in the Indictment

14. Contrary to the Defence arguments in paragraphs 15-17 and paragraphs 20-33 of the Motion, the phrases "including but not limited to", "unknown number", "widespread", "hundreds of" and "in relation but not limited to these events" as contained in the Indictment are not impermissibly broad for purposes of the nature of the case against the Accused. The degree of specificity required in an indictment is determined by the nature of the case against an accused, including the proximity of the accused to the relevant events.[9] Where it is alleged that the Accused's participation in the underlying, substantive crimes was less direct, the degree of precision required in relation to the material facts is less.[10]

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[9] *See Prosecutor v. Krajisnic,* IT-00-39-PT, "Decision Concerning Preliminary Motion on the Form of the Indictment," 1 August 2000, paragraph 9.
[10] *See generally Ibid.*

15. In the instant case, the Accused is a high level offender whose liability for the crimes charged in the Indictment is partly based on his alleged control over the perpetrators of these crimes. The crimes charged are also mass crimes alleged to have been committed on a wide scale. Under these conditions, the Prosecution submits that the said phrases are permissible as it would be impossible for the prosecution to list all the locations and all the crimes committed therein by the alleged subordinates of the accused as well as the number of all the victims of these mass crimes.

D. Pleading Particulars of Allegations in the Indictment to Permit the Accused to Investigate an Alibi Defence and the Cross-examination of Witnesses

16. The prosecution submits that the Defence arguments in paragraphs 34-36 are also baseless. The Prosecutor is required to plead in an indictment sufficient information to put the accused on notice of the charges against him.[11] The particular elements or evidence in support of the material facts in an indictment are not required to be pleaded as these are matters to be adduced at trial.[12] In the instant case, the Prosecutor submits that the dates, locations and offences charged are sufficiently clear to notify the Accused of the charges against him and for him to consider a defence of alibi. The location and approximate dates of the crimes which the Accused is charged with are listed throughout the Indictment, in particular in paragraphs 33-39, 41-45, 47-49, 50, 52-57, 59-63 and 64.

17. As to the Defence contention that the Indictment is not specific enough to allow them to engage in the cross-examination of witnesses, the Prosecution submits that there is no such requirement in international criminal law for the Indictment to be specific for such purpose. Indeed, the Defence offers no authority for this submission. As noted above, an indictment functions as an accusatory instrument to put the accused on notice of the charges against him, and the Prosecution submits that the Indictment in the instant case sufficiently puts the Accused on notice of the charges against him.

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[11] *Kupre{ki}, supra,* note 5.
[12] *Ibid.*

CONCLUSION

For the above reasons, the Defense motion should be dismissed in its entirety.

Freetown, 24 October 2003.

For the Prosecution,

Luc Côté,
Chief of Prosecutions

Robert Petit,
Senior Trial Counsel

PROSECUTION BOOK OF AUTHORITIES

PROSECUTION INDEX OF AUTHORITIES

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

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

3. *Prosecutor v. Krnojelac,* IT-97-25, Third Amended Indictment, 25 June 2001.

4. *Prosecutor v. Krnojelac,* IT-97-25, "Judgment", 15 March 2002, paragraphs 127, 170, 315, 346, 427, 487.

5. *Prosecutor v Kupre{ki} and others,* IT-95-16-A, "Appeal Judgement", 23 October 2001, Part IV, paragraphs 77-125.

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

7. *Prosecutor v Radoslav Brdanin & Momir Talic,* IT-99-36, "Decision on Objections By Momir Talic to the Form of the Amended Indictment," 20 February 2001.

8. *Prosecutor v. Krajisnic,* IT-00-39-PT, "Decision Concerning Preliminary Motion on the Form of the Indictment," 1 August 2000.

PROSECUTION AUTHORITIES

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

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

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

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]

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]

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

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.

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.

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.

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

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.

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

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*.

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.

68. Paragraphs 28-29 of the Motion.

69. The order is dated 17 June 1998.

PROSECUTION AUTHORITIES

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

UNITED
NATIONS

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

Case No.: IT-95-13/1-PT

Date: 19 June 2003

Original: English

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 MRKŠIĆ

DECISION ON FORM OF THE INDICTMENT

The Office of the Prosecutor:

Mr Jan Wubben

Counsel for the Accused:

Mr Miroslav Vasić

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 Mrkšić ("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:

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[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").

[2] "Prosecution's Response to the Accused's Preliminary Motion Based on Defects in the Form of the Second 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").

[3] *Prosecutor v Mrkšić, Radić and Šljivančanin*, Case IT-95-13-I, Indictment, 7 November 1995 ("Initial Indictment").

[4] *Prosecutor v Mrkšić, Radić, Šljivančanin and Dokmanović* (†), Case IT-95-13a-I, Indictment, 1 April 1996 ("1996 Amended Indictment"); *see also Prosecutor v Mrkšić, Radić, Šljivančanin and Dokmanović* (†), Case IT-95-13a-I, Amendement de l'acte d'accusation, 3 April 1996.

[5] *Prosecutor v Mrkšić, Radić, Šljivančanin and Dokmanović* (†), Case IT-95-13a-PT, Amended Indictment, 2 December 1997 ("1997 Amended Indictment").

[6] "Decision on Leave to File Amended Indictment", 1 November 2002.

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

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

(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.

[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".

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 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

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[10] *Prosecutor v Kupre{ki} and Others,* Case IT-95-16-A, Appeal Judgement, 23 October 2001 ("*Kupre{ki}* Appeal Judgment"), par 88.
[11] *Kupre{ki}* 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 Had`ihasanovi}, Alagi}* (†) *and Kubura*, Case IT-01-47-PT, Decision on Form of Indictment, 7 December 2002 ("*Had`ihasanovi}* Indictment Decision"), par 8.
[12] *See Kupre{ki}* 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).
[13] *Kupre{ki}* Appeal Judgment, par 89.
[14] *Ibid,* par 89.
[15] *Had`ihasanovi}* Indictment Decision, par 10; *Prosecutor v Br|anin and Tali},* Case IT-99-36-PT, Decision on Objections by Momir Tali} to the Form of the Amended Indictment, 20 February 2001 ("First *Br|anin & Tali}* Decision"), par 18. It is essential for the accused to know from the indictment just what that alleged proximity is: *Prosecutor v Br|anin and Tali},* Case IT-99-36-PT, Decision on Objections by Radoslav Br|anin to the Form of the Amended Indictment, 23 February 2001 ("Second *Br|anin & Tali}* Decision"), par 13.
[16] Second *Br|anin & Tali}* Decision, par 10.
[17] *See Prosecutor v Delali} and Others,* Case IT-96-21-A, Judgement, 20 Feb 2001 ("*Jelebi}i* Appeal Judgment"), par 350. *See also Prosecutor v Deronjić*, Case IT-02-61-PT, Decision on Form of the Indictment, 25 October 2002 ("*Deronjić* Decision"), par 31.

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) (i) 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) (i) 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

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[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 *Prosecutor v Krnojelac*, Case IT-97-25-PT, Decision on Preliminary Motion on Form of Amended Indictment, 11 February 2000 ("First *Krnojelac* Decision"), pars 59-60).

[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 (*Kupre{ki}* Appeal Judgment, par 89), whereas, in a joint criminal enterprise case, different material facts would have to be pleaded (*see also Prosecutor Br|anin and Tali}*, Case IT-99-36-PT, "Decision on Form of Further Amended Indictment and Prosecution Application to Amend", 26 June 2001 ("Third *Br|anin & Tali}* Decision"), pars 21, 22).

[20] The Prosecution may also be ordered to plead what is the position forming the basis of the superior responsibility charges (*Deronjić* Decision, par 15).

[21] *Deronjić* Decision, par 19.

[22] *]elebi}i* Appeal Judgment, par 256 (*see also* pars 196-198, 266).

[23] Statute, Art 7(3); *see Had`ihasanovi}* Indictment Decision, pars 11 and 17; *see also* First *Br|anin & Tali}* Decision, par 19; *Prosecutor v Krajišnik*, Case IT-00-39-PT, Decision Concerning Preliminary Motion on the Form of the Indictment, 1 August 2000 ("*Kraji{nik* Decision"), par 9; First *Krnojelac* Decision, par 9.

[24] Statute, Art 7(3); *see Had`ihasanovi}* Indictment Decision, par 11; First *Br|anin & Tali}* Decision, par 19; *Kraji{nik* Decision, par 9.

[25] Statute, Art 21(4)(a); *Had`ihasanovi}* 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.

[26] *Had`ihasanovi}* Indictment Decision, par 11; First *Br|anin & Tali}* Decision, par 19.

[27] *See Had`ihasanovi}* Indictment Decision, par 11; First *Br|anin & Tali}* Decision, par 19; *Prosecutor v Kvočka*, Case IT-99-30-PT, Decision on Defence Preliminary Motions on the Form of the Indictment, 12 April 1999 ("*Kvočka* Decision"), par 17; First *Krnojelac* Decision, par 18(A); *Kraji{nik* 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.

(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 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]

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[28] Statute, Art 7(3); *see Had`ihasanovi}* Indictment Decision, par 11; First *Br|anin & Tali}* Decision, par 19 (rolling facts (b) and (c) together); *Kraji{nik* Decision, par 9.
[29] *Had`ihasanovi}* Indictment Decision, par 10.
[30] Third *Br|anin & Tali}* Decision, par 33.
[31] *Had`ihasanovi}* Indictment Decision, par 10; *Prosecutor v Br|anin and Tali},* Case IT-99-36-PT, Decision on Form of Fourth Amended Indictment, 23 November 2001, par 12; First *Br|anin & Tali}* Decision, par 48.
[32] *Had`ihasanovi}* Indictment Decision, par 10; First *Br|anin & Tali}* Decision, par 48.
[33] *Kupre{ki}* Appeal Judgment, par 114.
[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 *Br|anin & Tali}* Decision, pars 11-13).
[35] *Kupre{ki}* Appeal Judgment, par 92.
[36] *Ibid.*
[37] *Ibid.*

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

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[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.
[39] Defence Motion, pars 2, 4.
[40] Defence Motion, par 16, Defence Reply, pars 12, 15, 16.
[41] Defence Motion, par 5.
[42] Defence Motion, pars 4, 5, Defence Reply 4.
[43] Defence Reply, pars 16, 17.
[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).
[45] Prosecution Response, par 15.
[46] Prosecution Response, pars 12, 30.

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 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 Dokmanović ("Dokmanović"), 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

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[47] Prosecution Response, par 30.
[48] See par 14 above.
[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 Br|anin and Tali}*, Case IT-99-36-PT, Decision on Form of Fourth Amended Indictment, 23 November 2001, par 21.
[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).
[51] Defence Response, par 10; Defence Motion, par 30 regarding persecution in particular.
[52] Defence Response, par 6.

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 Dokmanović.[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 Dokmanović, 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

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[53] Prosecution Reply, par 9.
[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 Ovčara 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)
[55] Prosecution Reply, par 9.
[56] Defence Response, par 11.
[57] Defence Response, par 11.

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

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[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".
[59] Prosecution Reply, par 10.
[60] Prosecution Reply, par 12.
[61] Defence Response, par 6.
[62] *See* par 13 above. *See also* Prosecution Reply, par 11.
[63] Defence Motion, par 8.
[64] *See eg. Prosecutor v Milutinović and Others,* Case IT-99-37-AR72, Decision on Drgoljub Ojdanić's Motion Challenging Jurisdiction –Joint Criminal Enterprise, 21 May 2003.
[65] Defence Response, pars 7, 11; Defence Motion, pars 8, 22, 25, 29.
[66] Prosecution Response, par 30.

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 Ovčara 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 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.

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[67] Prosecution Response, par 32.
[68] Defence Motion, par 14.
[69] Amended Indictment, par 11.
[70] Defence Motion, par 19; Defence Reply, par 23.
[71] Defence Motion, pars 22, 41.

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.

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[72] Defence Motion, par 23.
[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).
[74] Defence Motion, par 23.
[75] Defence Motion, par 24.
[76] Prosecution Response, par 32.
[77] First *Krnojelac* Decision, par 18.
[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.

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 Šljivančanin, 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 Ovčara 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 Ovčara and yet the Accused

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[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.
[80] Defence Motion, par 25.
[81] In par 24 of the Second Amended Indictment, it actually reads that soldiers "humiliated and threatened" the detainees.
[82] Defence Motion, par 27.
[83] Second Amended Indictment, par 7(a).
[84] See Third *Br|anin & Tali}* 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.
[85] Defence Motion, par 35; Defence Reply, par 20.
[86] Defence Reply, par 20.

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 Ovčara farm and their eventual transfer to a ravine approximately one kilometer south-east of Ovčara. 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 Vujović and Stanko Vujanović."[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 Šljivančanin (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 Ovčara farm. Paragraph 7(e) specifies that Miroljub Vujović and Stanko Vujanović 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 Ovčara farm. In the view of the Trial Chamber, 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 Ovčara and their role in the events specified.[92] It is clear that in

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[87] Prosecution Response, par 32.
[88] Defence Motion, par 31.
[89] Defence Motion, par 28.
[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).
[91] Defence Motion, par 39.
[92] Defence Motion, par 38.

both instances it was Serb TO forces under the command of Miroljub Vujović and Stanko Vujanović 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 Ovčara. The Defence seeks the identification of these women.[93] While evidence that supports the claim that these women were at Ovčara 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 Ovčara 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 "Ffğrom or about 20 November 1991 until 21 November 1991". In paragraph 34, the timing of events is given as "Fdğuring 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

[93] Defence Motion, par 29; Defence Reply, par 21.
[94] Defence Motion, par 31. In the Defence Motion it is mistakenly stated that the relevant Indictment paragraph is 32.
[95] First *Krnojelac* Decision, par 57.
[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.
[97] Defence Motion, pars 31, 37.

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 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 Ovčara 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 Ovčara 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

[98] Defence Motion, par 40.
[99] Defence Reply, par 14.
[100] Prosecution Response, par 23.
[101] Defence Motion, par 33; Defence Reply, par 19.
[102] Prosecution Response, par 32.

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 Ovčara 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 Ovčara 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 Ovčara 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.

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[103] Defence Motion, par 37.
[104] Prosecution Response, par 32.
[105] Defence Motion, par 37.
[106] Prosecution Response, par 32.
[107] First *Krnojelac* Decision, par 57.
[108] Defence Motion, par 37.

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

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[109] Defence Motion, par 8.
[110] Prosecution Response, par 19, fn 20.
[111] Prosecution Response, par 21.
[112] Defence Motion, pars 9, 30; Defence Reply, par 12.
[113] Defence Motion, pars 12, 13.
[114] Defence Motion, par 26.

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 MRKŠIĆ**, Miroslav RADIĆ, Veselin ŠLJIVANČANIN, Slavko DOKMANOVIĆ, Miroljub VUJOVIĆ and Stanko VUJANOVIĆ, 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 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

[115] Prosecution Response, pars 21, 22.
[116] Second Amended Indictment par 6.
[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".
[118] Defence Motion, par 9.
[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".
[120] Defence Motion, par 11.

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.

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[121] Defence Reply, par 12.
[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).
[123] Third *Br|anin & Tali}* Decision, par 40.
[124] Defence Reply, par 13.
[125] Defence Response, par 8.

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

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[126] Defence Response, pars 5, 6.
[127] The Trial Chamber understands this to mean responsibility under both the basic and extended forms of JCE.
[128] Defence Motion, par 10.
[129] Prosecution Response, par 27.
[130] Defence Motion, par 7; Defence Reply, par 4.
[131] Defence Reply, par 4.
[132] Defence Motion, par 7; *see also* par 17; Defence Reply, par 7.
[133] Defence Reply, par 4.
[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.
[135] Prosecution Reply, par 4.

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

[136] Prosecution Reply, par 7.
[137] Prosecution Response, par 26.
[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.
[139] *See eg Celebici* Appeal Judgment, par 400, for cumulative charging.
[140] Defence Motion, par 34.
[141] Defence Motion, par 17.

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.

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[142] Defence Motion, par 20.
[143] Defence Motion, par 26.
[144] Prosecution Response, par 22.
[145] *See* par 10, *supra*.
[146] *See* pars 8, 10, *supra*; *see also* Prosecution Response, par 17.

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 Ovčara, 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.

[147] Defence Response, par 10.
[148] Defence Motion, par 15.

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]

PROSECUTION AUTHORITIES

3. *Prosecutor v. Krnojelac,* IT-97-25, Third Amended Indictment, 25 June 2001.

905

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA

CASE NO.: IT- 97- 25-I

THE PROSECUTOR OF THE TRIBUNAL

AGAINST

MILORAD KRNOJELAC
also known as "Mico"

THIRD AMENDED INDICTMENT

The Prosecutor of the International Criminal Tribunal for the former Yugoslavia, pursuant to her authority under Article 18 of the Statute of the Tribunal charges:

MILORAD KRNOJELAC

with **CRIMES AGAINST HUMANITY** and **VIOLATIONS OF THE LAWS OR CUSTOMS OF WAR,** as set forth below:

BACKGROUND

1.1 Foca city and municipality are located in Bosnia-Herzegovina, southeast of Sarajevo, near the border of Serbia and Montenegro. According to the 1991 census, the population of Foca, which consisted of 40,513 persons, was 51.6 % Muslim, 45.3% Serbian and 3.1 % others. On 7 April 1992, Serb military forces, which included Bosnian Serbs and citizens of Serbian descent from other parts of the former Yugoslavia, began the occupation of Foca town, which was completed on 16 or 17 April 1992. Surrounding villages remained under siege until mid-July 1992.

1.2 As soon as the Serb forces controlled parts of Foca town, military police, accompanied by local and non-local soldiers, started arresting Muslim and other non-Serb inhabitants. Until mid-July 1992, the Serb authorities continued to round up and arrest Muslim villagers throughout the municipality. The Serb authorities separated the men from the women and unlawfully confined thousands of Muslims and other non-Serbs, including intellectuals, doctors and journalists. The Foca Kazneno-Popravni Dom (KP Dom), one of the largest prisons in the former Yugoslavia, became the primary detention facility for men. Beginning on or around 14 April 1992, the Serb civilian and military authorities began to use the prison to detain Muslims and other non-Serbs, mostly males, and a few Serbs who had tried to avoid military service. The Serb detainees were separated from the non-Serb detainees. Because of continuing arrests, the prison was overcrowded during the first few months, with the number of detainees reaching a peak of more than 760. During the remainder of 1992, the camp population averaged about 600 detainees. The majority of detainees were exchanged or released during 1992 and 1993, but the KP Dom functioned as a detention facility until October 5, 1994.

1.3 Most, if not all, detainees were civilians, who had not been charged with any crime, mostly Muslim men from 16 to 80 years of age, including mentally handicapped, physically disabled and seriously ill persons.

1.4 The prison complex was surrounded by a wall of 3 metres height, with barbed wire on top, and watch towers with machine guns. The inner periphery was mined. Soldiers and prison guards watched

the detainees from the towers and regularly patrolled the complex. The detainees were housed in a four-story building, which consisted of common prison cells and solitary confinement cells, 3 x 3 metres in size. The prison complex also included administration buildings, workshops and a furniture factory.

THE ACCUSED

2.1 **MILORAD KRNOJELAC**, also known as Mico, son of Bogdan, born on 25 July 1940, in the village of Birotici near Foca, resides in Foca. Before the war, he was a teacher. He had the rank of a Captain First Class in the JNA (Yugoslav National Army). From April 1992 until August 1993, **MILORAD KRNOJELAC** was the commander of the KP Dom.

SUPERIOR AUTHORITY

3.1 From April 1992 until 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.

GENERAL ALLEGATIONS

4.1 At all times relevant to this indictment, a state of armed conflict existed in the Republic of Bosnia-Herzegovina in the territory of the former Yugoslavia.

4.2 (Deleted)

4.3 At all times relevant to this indictment, the detainees at the KP Dom referred to in the charges were persons protected by the Geneva Conventions of 1949.

4.4 At all times relevant to this indictment, the accused was required to abide by the laws or customs governing the conduct of war.

4.5 All acts and omissions alleged in this indictment took place between April 1992 and August 1993, unless otherwise indicated.

4.6 In each count charging torture, the acts were committed by, or at the instigation of, or with the consent or acquiescence of, an official or person acting in an official capacity, and for one or more of the following purposes: to obtain information or a confession from the victim or a third person; to punish the victim for an act the victim or a third person committed or was suspected of having committed; to intimidate or coerce the victim or a third person; and/or for any reason based upon discrimination of any kind.

4.7 In each count charging crimes against humanity, the acts or omissions were part of a widespread, large-scale or systematic attack against a civilian population, specifically the Muslim and Croat population of the municipality of Foca.

4.8 Witnesses and victims are identified in this indictment using code names or pseudonyms, such as FWS-137 or initials, such as E.G.

4.9 **MILORAD KRNOJELAC,** from April 1992 until August 1993, is individually responsible for the crimes charged against him in this indictment pursuant to Article 7 (1) of the Statute of the Tribunal relating to the events occurring at KP Dom. Individual criminal responsibility includes committing, planning, ordering or otherwise aiding and abetting in the planning, preparation or execution of any acts or omissions set forth below.

4.10 **MILORAD KRNOJELAC** is also, or alternatively, criminally responsible as a superior for the acts of his subordinates pursuant to Article 7(3) of the Statute of the Tribunal. Command criminal responsibility is the responsibility of a superior officer for the acts of his subordinate if the superior knew or had reason to know that his subordinate was about to commit such acts or had done so and the superior failed to take necessary and reasonable measures to prevent such further acts or to punish the subordinate.

THE CHARGES

COUNT 1
(Persecutions)

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.

5.2 As part of the persecution, **MILORAD KRNOJELAC** participated in or aided and abetted the execution of a common plan 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;
e. the establishment and perpetuation of inhumane conditions against Muslim and other non-Serb male civilian detainees within the KP Dom detention facility; and
f. the deportation and expulsion of Muslim and other non-Serb civilians detained in the KP Dom detention facility to Montenegro and other places which are unknown.

MILORAD KRNOJELAC participated in the prolonged and routine imprisonment of non-Serb civilians under inhumane conditions 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.

In concert with other high-level prison staff, **MILORAD KRNOJELAC** established a pattern of torture and beatings whereby guards took the detainees out of their cells and brought them to the interrogation rooms and provided the office in which these day-time interrogations and beatings took place. In concert with political leaders or military commanders and other high-level prison staff, **MILORAD KRNOJELAC** prepared lists of detainees to be further beaten during night-time interrogations and established a daily routine for these beatings. In concert with other high-level prison staff, **MILORAD KRNOJELAC** ordered the guards to beat detainees even for minor violations of the prison rules; in

conjunction with his subordinates he subjected the other detainees to collective punishment; in concert with other high-level prison staff, he participated by ordering the punishment. **MILORAD KRNOJELAC** participated in the beatings of detainees 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.

MILORAD KRNOJELAC participated in the beatings and killings 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.

MILORAD KRNOJELAC, in concert with other high-level prison staff, formed and began to supervise a workers' group of approximately 70 of the detainees with special skills. Most of these detainees were kept imprisoned from the summer 1992 until 5 October 1994, for the primary purpose of being used for forced labour.

In addition, **MILORAD KRNOJELAC** assisted in the deportation and expulsion of the majority of Muslim and non-Serb males from the Foca municipality by selecting detainees from the KP Dom for deportation or transfer to Montenegro and other unknown places. Several groups of detainees were transported to other detention facilities in Kalinovik, Rudo and Kula. In late August 1992, 35 elderly or ill detainees were deported by bus from the KP Dom to Rozaj in Montenegro. On that same day, Muslim detainees, previously selected with the 35 detainees to be deported to Montenegro, were taken for an alleged exchange in Gorazde. These detainees have never been seen alive again. From June 1992 until March 1993, at least 266 Muslims and other non-Serbs detained in the KP Dom were deported and transferred to unknown places. These detainees have also never been seen alive again. The majority of these disappearances occurred from August 1992 to October 1992. The main reason the prison authorities gave for the removal of these missing detainees was to use them in prisoner exchanges. However, on a few occasions, detainees were told that they were being taken out to perform certain labour such as working in the Miljevina mine in the summer of 1992 or picking plums on or about 17 September 1992.

5.3 By his participation in the acts or omissions described in paragraph 5.2, **MILORAD KRNOJELAC** committed:

Count 1:

A **CRIME AGAINST HUMANITY,** punishable under Article 5 (h) (persecutions on political, racial and/or religious grounds) of the Statute of the Tribunal.

COUNTS 2 – 7
(Torture and Beatings)

Beatings Upon Arrival in the Prison Yard

5.4 Upon their arrival in the prison-camp between April and December 1992, detainees of the KP Dom, including FWS-71, FWS-46 and other Muslim male detainees whose identity is unknown ("unidentified") 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. **MILORAD KRNOJELAC** participated in these beatings by granting soldiers access to the detainees and instructing his guards not to intervene. He also encouraged and approved assaults by the guards.

5.5 On 25 May 1992, FWS-71 arrived at KP Dom in a group of 21 detainees, mostly from Foca and arrested in Montenegro. When they arrived at KP Dom, soldiers forced them to line up against the prison wall with their hands above their heads, then beat, kicked and hit them with rifle butts.

5.6 On 1 June 1992, FWS-46 and 47 other male inhabitants of Jelec who had been captured in Kalinovik and temporarily detained in Bileca were transferred to KP Dom. Upon their arrival at KP Dom, they were beaten by guards.

Beatings Associated with the Canteen

5.7 Between May and December 1992, KP Dom guards and Serb soldiers from outside the KP Dom assaulted detainees on their way to or from the canteen and during the meals, as described in paragraphs 5.8 through 5.13. **MILORAD KRNOJELAC** participated in these beatings by granting soldiers access to the detainees and instructing his guards not to intervene. He also encouraged and approved assaults by the guards.

5.8 On an unknown date in August 1992, a group of 7 or 8 unidentified military policemen from Trebinje entered the prison and approached a group of unidentified detainees, who were on their way back from the mess. In the presence of several unidentified guards, the military policemen beat the detainees severely. At first, the guards watched without interfering. Only after the men from Trebinje pointed their weapons at the detainees and intended to shoot them, did the guards' commander intervene.

5.9 On an unknown date in June 1992, the detainee E. G., who was disabled in one arm and leg, and also suffered from epilepsy, complained about the small food rations. As a result, he was beaten and kicked by three unidentified guards.

5.10 On an unknown date in July 1992, while detainee P. ("Pace") was lining up in front of the canteen, he was beaten by the guard Pedrag Stefanovic.

5.11 On several unknown occasions between April and December 1992, unidentified soldiers from outside the KP Dom approached detainee FWS-137, who was on his way to or from the canteen in a group of unidentified detainees, and assaulted him and the other detainees, while unidentified guards watched without interfering.

5.12 On an unknown date at the end of October or beginning of November 1992, in the presence of unidentified guards, unidentified soldiers from Nevisenje assaulted detainees FWS-214 and FWS-113 when they left the canteen.

5.13 At lunchtime on 30 October 1992, a group of 3 or 4 unidentified soldiers from outside the KP Dom assaulted FWS-215 and other unidentified detainees who were standing in front of the canteen. The soldiers hit the detainees with their rifle butts and kicked them for about 10 minutes in the presence of unidentified guards, who watched without interfering.

Arbitrary Beatings

5.14 During their confinement, the detainees were subjected to sudden arbitrary beatings by guards or soldiers from outside KP Dom for unknown reasons. Usually during the evenings and nights, local military and paramilitary staff came to the prison. The prison guards led the soldiers to the various cells to select detainees for beatings. These beatings are described in paragraphs 5.15 and 5.16 and attached

Schedule A. **MILORAD KRNOJELAC** participated in these beatings 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.

5.15 On 10 June 1992, the detainee Z. B. was beaten severely by a Serb soldier from outside the KP Dom. After the beating, he was locked into a solitary confinement cell for about one month. Due to the beating, Z. B. became deaf.

5.16 On 11 July 1992, two guards called out the detainee FWS-71 from his cell, took him to the solitary confinement cells in the detainees' building and beat him with various objects for about 20 minutes until FWS-71 fainted. When FWS-71 regained consciousness in his cell, he had bruises all over his body.

Torture and Beatings as Punishment

5.17 **MILORAD KRNOJELAC**, in concert with other high-level prison staff, ordered the guards to beat detainees even for minor violations of the prison rules, as described in paragraphs 5.18 through 5.21.

5.18 The detainee FWS-54 was in charge of distributing food to the detainees. While giving him this task, he had been warned himnot to give any extra food to any detainee. On 8 August 1992, FWS-54 gave an extra slice of bread to a detainee. As punishment the witness was kicked and beaten with a truncheon by a guard and locked in solitary confinement. He was released FWS-54 after four days.

5.19 On an unknown date during the summer of 1992, detainees A. M., F. M., H. T. and S., who passed messages to one another, were beaten by a guard, Dragomir Obrenovic (aka "Dragan," "Obren") as punishment.

5.20 On an unknown date in April or May 1993, at approximately 6:00 in the morning, guards Dragomir Obrenovic (aka "Dragan," "Obren") and Zoran Matovic called out detainees FWS-71, FWS-76, and I.I. and D.C. from their rooms and led them to the solitary confinement cells in the prisoners' quarters. In the corridor, these guards beat the detainees as punishment for stealing bread from the canteen the previous day.

5.21 In June, July or August 1993, after the detainee E. Z., who worked in the mechanical workshop at KP Dom, tried to escape, **MILORAD KRNOJELAC** and his subordinates subjected the other detainees to collective punishment. **MILORAD KRNOJELAC**, in concert with other high-level prison staff, participated by ordering the punishment. From the beginning of their confinement, the detainees were threatened with death if anyone tried to escape. As a collective punishment after E.Z.'s escape, the food rations of all detainees in KP Dom were halved for at least 10 days. FWS-73, FWS-110, FWS-144, FWS-210 and approximately 10 other detainees, all work companions of the escapee and the detainee in charge of the escapee's room, were taken to the administration building and in the presence of **MILORAD KRNOJELAC,** severely beaten by about 10 members of the prison staff. FWS-73 was beaten and kicked mostly in his lower abdominal region for about 5 minutes. FWS-110 was kicked so severely that he lost consciousness. As further punishment, FWS-73, FWS-110, FWS-144, FWS-210, and other unidentified detainees were locked in solitary confinement for various time periods lasting up to 15 days.

Torture and Beatings During Interrogations

5.22 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. He also provided the office in which these day-time interrogations took place. The interrogations focused on whether the detainee was an SDA (Party for Democratic Action) member, possessed weapons, or had fought against the Serb forces. During or after the interrogation, the guards and police often beat the detainees, as described in paragraphs 5.23 through 5.25. **MILORAD KRNOJELAC** aided and abetted these beatings by granting local and military police access to the detainees and encouraging and approving the actions of his guards.

5.23 On 24 May 1992, military police arrested FWS-03 and H.D., both members of the SDA, and their neighbour H. S. and took them to KP Dom. On the same day, 5 or 6 military policemen interrogated them at KP Dom. To force them to give a confession, the policemen beat all three of them during the interrogation. The beatings were so severe that H. S. fainted twice.

5.24 On several unknown dates between April and August 1992, unidentified KP Dom guards severely beat Hasim Glusac. Due to these beatings, in concert with the brutal living conditions, his lungs were severely damaged.

5.25 On an unknown date in May or June 1992, KP Dom guards severely beat Ibrahim Sandal, in connection with interrogation, and returned him to his cell seriously injured.

5.26 From April until July 1992, **MILORAD KRNOJELAC,** in concert with political leaders or military commanders and other high-level prison staff, prepared lists of detainees to be further beaten during nighttime interrogations and established a daily routine for these beatings. The selected detainees were mostly prominent inhabitants of Foca, who were suspected of not having told the truth during the daytime interrogations, who were accused of possessing weapons, or who were members of the SDA. Most evenings during this time, the lists were delivered to the guards, who then took the detainees to the administration building for additional interrogations and beatings. Generally, the guard commander was present during the selection of the detainees. Sometimes he read out the names of the selected detainees from the lists. Then, the detainees were led to the administration building, where they were beaten by unidentified prison guards or soldiers whom **MILORAD KRNOJELAC** had allowed to enter the prison to beat the detainees. The guards and soldiers assaulted the detainees with all sorts of weapons, including batons, rifle butts, knives and tools. 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. These incidents are further described in paragraphs 5.27 through 5.29 and attached **Schedule B.**

5.27 In June or July 1992, KP Dom guards, on at least two occasions, severely beat Nurko Nisic, a former officer from the municipality administration and an SDA member, Zulfo Veiz and Salem Bico, both former policemen, and Krunoslav Marinovic, a Croat reporter, and returned them to their cells bruised, bloody and seriously injured.

5.28 In June 1992, the KP Dom guards tortured and beat detainee S. M. having mistaken him for another detainee, whose name appeared on the list of detainees who had been selected for interrogation and torture. The perpetrators beat and cut S. M. with a knife. They threatened to take out his eye. While he was being beaten, MILORAD KRNOJELAC appeared, discovered the mistake, and ordered the guards to stop beating S.M. The victim was returned to his cell, seriously injured and covered in blood.

5.29 Between May and July 1992, on at least two occasions, the KP Dom guards and military policemen tortured and beat the detainees Vahida Dzemal, a former policeman, Enes Uzunovic, an SDA member,

A. S. and E. C. As a result of the torture and beatings, A. S. suffered three broken ribs, Dzemal Vahida's jaw was broken, and Dzemal Vahida lost several teeth. Three fingers of E. C.'s hand were broken and his body was bruised. After the beatings the victims were kept in solitary confinement for several days and then returned to their cells severely injured. Enes Uzunovic and Dzemal Vahida later were killed as described in paragraph 5.32; A. S. and E. C. are missing.

5.30 By his participation in the acts or omissions described in the paragraphs 5.17 to 5.29, the accused **MILORAD KRNOJELAC** committed:

Count 2:

A **CRIME AGAINST HUMANITY** punishable under Article 5 (f) (torture) of the Statute of the Tribunal;

Count 3: (Withdrawn);

Count 4:

A **VIOLATION OF THE LAWS OR CUSTOMS OF WAR,** punishable under Article 3 of the Statute of the Tribunal and recognised by Article 3 (1) (a) (torture) of the Geneva Conventions.

5.31 By his participation in the acts or omissions described in the paragraphs 5.4 to 5.29, the accused **MILORAD KRNOJELAC** committed:

Count 5:

A **CRIME AGAINST HUMANITY** punishable under Article 5(i) (inhumane acts) of the Statute of the Tribunal;

Count 6: (Withdrawn);

Count 7:

A **VIOLATION OF THE LAWS OR CUSTOMS OF WAR** punishable under Article 3 of the Statute of the Tribunal and recognised by Article 3(1)(a) (cruel treatment) of the Geneva Conventions.

COUNTS 8 – 10
(Wilful Killings and Murder)

5.32 Between June and August 1992, **MILORAD KRNOJELAC** and the KP Dom guards under his control increased the number of interrogations and beatings. During this period, guards selected groups of detainees according to lists provided by the prison authorities and took them, one by one, into a room in the administration building. In this room, the guards and soldiers, including members of the military police, often would chain the detainee, with his arms and legs spread, before beating him. The guards and soldiers, including members of the military police, kicked and beat each detainee with rubber batons, axe-handles and fists. During the beatings, the guards and soldiers, including members of the military police, 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. **MILORAD KRNOJELAC** participated in these beatings and killings by ordering and supervising the actions of his guards and allowing military

personnel access to the detainees for this purpose.

5.33 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 in the death of the detainees listed in **Schedule C** to this indictment, as well as an unknown number of other unidentified detainees.

5.34 By his participation in the acts or omissions described in paragraphs 5.32 and 5.33, the accused **MILORAD KRNOJELAC** committed:

Count 8:

A **CRIME AGAINST HUMANITY** punishable under Article 5 (a) (murder) of the Statute of the Tribunal;

Count 9: (Withdrawn);

Count 10:

A **VIOLATION OF THE LAWS OR CUSTOMS OF WAR,** punishable under Article 3 of the Statute of the Tribunal and recognised by Article 3 (1) (a) (murder) of the Geneva Conventions.

COUNTS 11 – 15
(Unlawful Confinement, Imprisonment and Inhumane Conditions at KP Dom)

5.35 Beginning on or around 14 April 1992 until 5 October 1994, the Serb civilian and military authorities used the KP Dom to detain Muslims and other non-Serbs, mostly males, including mentally handicapped, physically disabled and seriously ill persons. Although the occupation of Foca town was completed on 16 or 17 April 1992, and the entire Foca municipality was under Serb control at least from mid-July 1992 onwards, the KP Dom functioned as a detention facility for male Muslim and non-Serb civilians until 5 October 1994. Among the detainees were intellectuals, doctors, journalists and SDA members. From April 1992 until August 1993, **MILORAD KRNOJELAC** participated in implementing the unlawful confinement through his actions as head of the prison-camp.

5.36 The conditions in the KP Dom were brutal. While **MILORAD KRNOJELAC** was the head of the prison from April 1992 until August 1993, the living conditions in the detention camp were characterised by inhumane treatment, overcrowding, starvation, forced labour, and constant physical and psychological assault.

5.37 During their confinement, the detainees were locked in their cells, except when they were lined up and taken to the canteen 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. Additional incidents are described in the attached **Schedule D**.

5.38 The sounds of the torture, beatings, and killings, as specified in paragraphs 5.4 to 5.33 of this Indictment, were audible to the detainees. As a result, the detainees lived in constant fear that they would be the next victims. The solitary confinement cells were used as a source of terror and threats.

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. These incidents are described in attached **Schedule D**.

5.39 By his participation in the acts or omissions described in paragraphs 5.35 to 5.38, the accused **MILORAD KRNOJELAC** committed:

Count 11:

A **CRIME AGAINST HUMANITY** punishable under Article 5 (e) (imprisonment) of the Statute of the Tribunal;

Count 12: (Withdrawn).

5.40 By his participation in the acts or omissions described in paragraphs 5.36 to 5.38, the accused **MILORAD KRNOJELAC** committed:

Count 13:

A **CRIME AGAINST HUMANITY** punishable under Article 5 (i) (inhumane acts) of the Statute of the Tribunal;

Count 14: (Withdrawn);

Count 15:

A **VIOLATION OF THE LAWS OR CUSTOMS OF WAR,** punishable under Article 3 of the Statute of the Tribunal and recognised by Article 3 (1) (a) (cruel treatment) of the Geneva Conventions.

COUNTS 16-18
(Enslavement)

5.41 From May 1992 until October 1994, detainees were subjected to forced labour. **MILORAD KRNOJELAC** participated in these criminal actions from May 1992 until August 1993. During May 1992, **MILORAD KRNOJELAC** approved decisions to force individual detainees to work. In July 1992, **MILORAD KRNOJELAC,** in concert with other high-level prison staff, formed and began to supervise a workers' group of approximately 70 of the detainees with special skills. Most of these detainees were kept imprisoned from the summer 1992 until 5 October 1994, for the primary purpose of being used for forced labour. Further details of the forced labour occurring during the administration of **MILORAD KRNOJELAC** are described in paragraphs 5.42 through 5.45. The names of detainees subjected to forced labour are provided in attached **Schedule E**.

5.42 At all times relevant to this Indictment, the guards called out members of the workers' group on a daily basis and forced them to work inside and outside the camp, from 7 a.m. to at least 3 or 4 p.m. The detainees were not paid for their work. Work was not voluntary. Even ill or injured detainees were forced to work. Those who refused were sent to solitary confinement. During their work, the detainees were either guarded by the regular prison guards or by Serb soldiers.

5.43 Within the [illegible], the detainees had to work in the kitchen, the furniture factory and the metal and

mechanical workshop. In the workshop, the detainees had to repair army vehicles or looted cars.

5.44 Outside the prison, the detainees were forced to perform farming jobs at the prison outpost Brioni, to work in mills and the Miljevina mine, and to clean up rubble of damaged buildings at various places in Foca. During the winter of 1992 to 1993, detainees were forced to repair the private house of **MILORAD KRNOJELAC,** to install a bar in the house of one of his sons, and to furnish a store for one of his sons. The detainees were ordered by prison staff to help the Serb soldiers to loot Muslim houses and mosques.

5.45 Detainees were taken to the front lines to perform work, such as digging trenches or building barracks. From around June until October 1992, the detainee FWS-141 had to drive soldiers and material to the front lines. Detainees FWS-109 and G. K. were taken to the Kalinovik police station for the discovery of land mines. Between September 1992 and March 1993, on at least 8 occasions, they had to drive ahead of Serb convoys to detect land mines. For approximately 10 days in the winter 1992/1993, a group of KP Dom detainees, among them the witness FWS-110, was taken to the front lines in Previla to cut wood and take it to the trenches. FWS-110 also had to lay telephone lines to connect the trenches.

5.46 By his participation in the acts or omissions described in paragraphs 5.41 to 5.45, **MILORAD KRNOJELAC** committed:

Count 16:

A **CRIME AGAINST HUMANITY** punishable under Article 5 (c) (enslavement) of the Statute of the Tribunal;

Count 17: (Withdrawn);

Count 18:

A **VIOLATION OF THE LAWS OR CUSTOMS OF WAR,** punishable under Article 3 of the Statute of the Tribunal and recognised under the Slavery Convention and International Customary Law (slavery).

Carla Del Ponte
Prosecutor

Dated this 25th day of June 2001
At The Hague
The Netherlands

PROSECUTION AUTHORITIES

4. *Prosecutor v. Krnojelac,* IT-97-25, "Judgment", 15 March 2002, paragraphs 127, 170, 315, 346, 427, 487.

917

Case No: IT-97-25

IN TRIAL CHAMBER II

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

Registrar:
Mr Hans Holthuis

Judgment of: 15 March 2002

PROSECUTOR

v.

MILORAD KRNOJELAC

JUDGMENT

Counsel for the Prosecutor:

Ms Hildegard Uertz-Retzlaff
Ms Peggy Kuo
Mr William Smith

Counsel for the Accused:

Mr Mihajlo Bakrac

Mr Miroslav Vasic

I. SUMMARY OF THE CHARGES

1. Milorad Krnojelac ("Accused") is charged under the third amended indictment ("Indictment"), dated 25 June 2001, with 12 counts.[1]

2. The Prosecution alleges that, on 7 April 1992, Serb military forces began the occupation of Foca town. The occupation was completed on 16 or 17 April 1992. Once the Serb forces had gained control over parts of Foca town, military police, accompanied by local and non-local soldiers, started to arrest Muslim and other non-Serb inhabitants. Men and women were separated and arrested. Beginning on or around 14 April 1992, the Foca Kazneno-Popravni Dom ("KP Dom"), a prison, became the primary detention centre for Muslim and other non-Serb men, as well as for a

127. The Trial Chamber is also not satisfied that the Prosecution has established that the Accused shared the intent of the joint criminal enterprise to illegally imprison the non-Serb detainees. The Trial Chamber has already determined that the Accused knew the imprisonment of the non-Serb detainees was unlawful and it is also satisfied that he knew that his acts and omissions were contributing to the maintenance of that unlawful system by the principal offenders. However, the Trial Chamber is not satisfied that the only reasonable inference which can be drawn from these facts is that the Accused shared the intent of that joint criminal enterprise. In particular, the Trial Chamber does not consider that the Prosecution has excluded the reasonable possibility that the Accused was merely carrying out the orders given to him by those who appointed him to the position of warden of the KP Dom without sharing their criminal intent. In these circumstances, the Trial Chamber is of the view that the criminal conduct of the Accused is most appropriately characterised as that of an aider and abettor to the principal offenders of the joint criminal enterprise to illegally imprison the non-Serb detainees pursuant to Article 7(1) of the Statute. As to the Accused's superior responsibility for illegal imprisonment of non-Serb detainees pursuant to Article 7(3), the most which could have been done by the Accused as a superior would have been to report the illegal conduct to the very persons who had ordered it.[379] Accordingly, the Trial Chamber considers that it would not be appropriate to find him responsible as a superior.

170. The Prosecution alleges that the Accused incurred criminal responsibility for the inhumane conditions as inhumane acts and cruel treatment imposed on the non- Serb detainees at the KP Dom as a participant in a joint criminal enterprise pursuant to Article 7(1) of the Statute. To establish the Accused's responsibility on this basis, the Prosecution must establish that the Accused entered into an agreement with the guards of the KP Dom and the military authorities to subject the non-Serb detainees to the inhumane conditions which constituted inhumane acts and cruel treatment, and that each of the participants, including the Accused, shared the intent of this crime. The Trial Chamber is not satisfied that the Prosecution has established either that the Accused entered into such an agreement or that he had the intent to subject the non-Serb detainees to inhumane living conditions constituting inhumane acts and cruel treatment while he was warden of the KP Dom.

315. With respect to "common purpose" liability under Article 7(1), there is no acceptable evidence that the Accused entered into any agreement for a joint criminal enterprise to commit beatings and torture against non-Serb detainees.

346. The Prosecution alleges that the Accused's responsibility for the murders arises from his involvement in a joint criminal enterprise to murder detainees pursuant to Article 7(1).[945] To attach criminal liability to the Accused for the joint criminal enterprise of murder, the Prosecution must establish that there was an agreement among the military authorities, guards of the KP Dom and the Accused to murder detainees and that each of these persons, including the Accused, shared the intent of murder. The Trial Chamber is not satisfied that the Prosecution has established that the Accused was a member of any joint criminal enterprise to commit murder, and therefore is not satisfied that his responsibility under this head has been established.

427. With respect to common purpose liability under Article 7(1) of the Statute, the Prosecution has failed to prove the Accused's membership of any joint criminal enterprise which may have

existed to enslave the non-Serb detainees. Accordingly, the Trial Chamber is not satisfied that the Accused was responsible for having participated in any joint criminal enterprise to do so.

487. The Prosecution alleges that the Accused incurred criminal responsibility under Article 7(1) as a participant in a joint criminal enterprise with guards and soldiers to persecute the Muslim and other male non-Serb civilian detainees. To attach criminal responsibility to the Accused for the joint criminal enterprise of persecution, the Prosecution must prove that there was an agreement between himself and the other participants to persecute the Muslim and other non-Serb civilian male detainees by way of the underlying crimes found to have been committed, and that the principal offenders and the Accused shared the intent required for each of the underlying crimes and the intent to discriminate in their commission. The Prosecution alleges that the Accused was affiliated with the SDS and supported Serb nationalistic policies, which (it is alleged) provides direct evidence of his conscious intention to discriminate. The Trial Chamber is not satisfied that the evidence is sufficient to establish these allegations. [1479] Moreover, the Trial Chamber has already determined that the Accused did not share the intent to commit any of the underlying crimes charged as persecution pursuant to any joint criminal enterprise.[1480] Accordingly, the crime of persecution cannot be established on the basis of any of these underlying crimes as part of a joint criminal enterprise in which the Accused was involved.

PROSECUTION AUTHORITIES

5. *Prosecutor v Kupre{ki} and others,* IT-95-16-A, "Appeal Judgement", 23 October 2001, Part IV, paragraphs 77-125.

IN THE APPEALS CHAMBER

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

Registrar:
Mr. Hans Holthuis

Judgement of:
23 October 2001

PROSECUTOR

v

ZORAN KUPRESKIC
MIRJAN KUPRESKIC
VLATKO KUPRESKIC
DRAGO JOSIPOVIC
VLADIMIR SANTIC

APPEAL JUDGEMENT

The Office of the Prosecutor:

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

Counsel for the Defendants:

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

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

IV. APPEAL AGAINST THE CONVICTIONS OF ZORAN KUPREŠKIC AND MIRJAN KUPREŠKIC

A.Introduction

77. The convictions of Zoran and Mirjan Kupreskic for persecution as co-perpetrators of a common plan to ethnically cleanse the village of Ahmici of its Bonsian Muslim inhabitants[128] were primarily based upon two factors: their involvement with the HVO prior to 16 April 1993[129] and their role in the attack on Ahmici on the morning of 16 April 1993.[130] The mere involvement of the Defendants in the HVO prior to 16 April 1993 does not , of itself, amount to criminal conduct. However, the Trial Chamber found that the attack on Ahmici was carried out by "military units of the HVO and members of the Jokers.[131] Accordingly, the Trial Chamber's findings that both Defendants were active members of the HVO,[132] and that Zoran Kupreskic was a local HVO Commander,[133] appear to have been viewed as support for evidence purporting to show that Zoran and Mirjan Kupreskic were participants in the planning and execution of the 16 April 1993 attack. Regarding their activities on 16 April 1993, the Trial Chamber found that, by 15 April 1993, Zoran and Mirjan Kupreskic knew of plans for the attack on Ahmici the following morning and were ready to play a part in it.[134] Most importantly, the Trial Chamber found that, on 16 April 1993, they "were in the house of Suhret Ahmic immediately after he and Meho Hrstanovic were shot and immediately before the house was set on fire...(and(were participants in the attack on the house as part of the group of soldiers who carried it out".[135] The Trial Chamber further concluded that Zoran and Mirjan Kupreskic provided "local knowledge and their houses as bases for the attacking troops."[136]

78. The evidence of Witness H is the lynchpin of the convictions entered against Zoran and Mirjan Kupreskic. The Trial Chamber rejected the evidence given by two out of three eyewitnesses about the participation of the two Defendants in the attack of 16 April 1993, but accepted Witness H's evidence relating to the house of Suhret Ahmic. Witness H was present in the Ahmic house that morning and the Trial Chamber accepted her evidence that Zoran and Mirjan Kupreskic were amongst the group of soldiers who attacked, killed Suhret Ahmic and Meho Hrstanovic, set the house on fire and expelled Witness H and her surviving family members.[137] In the case of Zoran Kupreskic, the Trial Chamber also relied upon the testimony of Witness JJ as further evidence that he was involved in the attack on Ahmici. According to Witness JJ, following the April 1993 attack on Ahmici, Zoran Kupreskic admitted to her that, during the attack, members of the Jokers had been firing upon fleeing Bosnian Muslim civilians. Upon being forced by the Jokers to do likewise , Zoran Kupreskic said that he shot into the air with the pretence of aiming at civilians.[138] This, the Trial Chamber found, further undermined the claim made by Zoran Kupreskic that he did not participate in the conflict,[139] although Witness JJ's evidence does not directly corroborate the involvement of Zoran Kupreskic in the events at the Ahmic house.

B. Vagueness of the Amended Indictment

79. The Appeals Chamber understands Zoran and Mirjan Kupreskic's complaint on appeal to be that the Trial Chamber erred in law by returning convictions on the basis of material facts not pleaded in the Amended Indictment. They argue that the trial against them was thereby rendered unfair, since they were deprived of fair notice of the charges against them. This ground of appeal requires the Appeals Chamber to discuss the issue of the vagueness of the Amended Indictment from a somewhat unusual perspective. Normally, an allegation pertaining to the vagueness of an

indictment is dealt with at the pre-trial stage by the Trial Chamber, or, if leave to pursue an interlocutory appeal has been granted, under Rule 72(B)(ii), by the Appeals Chamber. In the instant case, this stage has passed, and Zoran and Mirjan Kupreskic have already been found guilty solely on the charge of persecution (count 1). Consequently, their complaint about the vagueness of the Amended Indictment will be considered only in relation to the criminal conduct for which Zoran and Mirjan Kupreskic was convicted under count 1.

80. The original indictment did not charge Zoran and Mirjan Kupreskic with persecution under Article 5(h) of the Statute. Instead, they were charged in count 1 with a grave breach under Article 2(d) of the Statute (unlawful and wanton destruction of property not justified by military necessity) for participating in an unlawful attack against the civilian population and individual citizens of the village of Ahmici between 16 April and, or about, 25 April 1993, which caused human deaths and the total destruction of the Muslim homes in that village.

81. In February 1998, the Prosecution requested leave from the Trial Chamber to amend the original indictment. In respect of count 1, the Prosecution sought leave to replace the previous charge brought under Article 2(d) of the Statute with a persecution charge under Article 5(h) of the Statute. The reason for this request appears to have been a desire on the part of the Prosecution to avoid having to prove the internationality of the conflict, as would be required under Article 2 of the Statute.[140] Accordingly, the Prosecution requested leave to reclassify the alleged criminal conduct, based on the evidence that was already in its possession, as a crime against humanity under Article 5 which applies to violations committed in armed conflict whether of international or internal character. The Trial Chamber granted leave to amend the indictment as requested in an oral decision during a hearing on 10 March 1998 .[141]

82. There are two parts to the Amended Indictment: the first part, count 1, charges each Defendant, including Zoran and Mirjan Kupreskic, with having participated in certain categories of persecutory conduct, whereas the second part, counts 2-19, "set forth specific acts of the various accused which constitute further violations of international law."[142]

83. The relevant parts of the Amended Indictment read:

> 9. ZORAN KUPRESKIC , MIRJAN KUPRESKIC , VLATKO KUPRESKIC , DRAGO JOSIPOVIC, DRAGAN PAPIC and VLADIMIR SANTIC helped prepare the April attack on the Ahmici-Santici civilians by: participating in military training and arming themselves; evacuating Bosnian Croat civilians the night before the attack; organising HVO soldiers, weapons and ammunition in and around the village of Ahmici-Santici; preparing their homes and the homes of their relatives as staging areas and firing locations for the attack ; and, by concealing from the other residents that the attack was imminent.
>
> 10. The HVO attack on Ahmici-Santici targeted houses, stables, sheds and livestock owned by Bosnian Muslim civilians. The HVO first shelled Ahmici-Santici from a distance, then groups of soldiers went from house-to-house attacking civilians and their properties using flammable tracer rounds and explosives. The HVO soldiers deliberately and systematically fired upon Bosnian Muslim civilians. The HVO soldiers also set fire to virtually every Bosnian Muslim-owned house in Ahmici-Santici.
>
> 11. Approximately 103 Bosnian Muslim civilians were killed in and around Ahmici-

Santici. Of the 103 persons killed, approximately 33 were women and children. The HVO soldiers destroyed approximately 176 Bosnian Muslim houses in Ahmici-Santici , along with two mosques.

[...]

20. From October 1992 until April 1993, ZORAN KUPRESKIC , MIRJAN KUPRESKIC , VLATKO KUPRESKIC , DRAGO JOSIPOVIC, DRAGAN PAPIC and VLADIMIR SANTIC persecuted the Bosnian Muslim inhabitants of Ahmici-Santici and its environs on political, racial or religious grounds by planning, organising and implementing an attack which was designed to remove or "cleanse" all Bosnian Muslims from the village and surrounding areas.

21. As part of the persecution, ZORAN KUPRESKIC , MIRJAN KUPRESKIC , VLATKO KUPRESKIC, DRAGO JOSIPOVIC, DRAGAN PAPIC and VLADIMIR SANTIC participated in or aided and abetted:

(a) the deliberate and systematic killing of Bosnian Muslim civilians;

(b) the comprehensive destruction of Bosnian Muslim homes and property;

(c) and the organised detention and expulsion of the Bosnian Muslims from Ahmici - Santici and its environs.

22. By their participation in the acts described in paragraphs 9, 10, 20 and 21, ZORAN KUPRESKIC , MIRJAN KUPRESKIC , VLATKO KUPRESKIC , DRAGO JOSIPOVIC, DRAGAN PAPIC and VLADIMIR SANTIC committed the following crime:

Count 1: A **CRIME AGAINST HUMANITY**, punishable under Article 5(h) (persecutions on political, racial or religious grounds) of the Statute of the Tribunal .

84. Zoran and Mirjan Kupreskic were also charged in counts 2 through to 11 in the Amended Indictment with murder, inhumane acts and cruel treatment under Articles 3 and 5 for their alleged participation in a specific event that took place at Witness KL's house in Ahmici in the early morning of 16 April 1993, and which resulted, *inter alia*, in the death of four people, including two young children.[143]

85. The Prosecution case at trial against Zoran and Mirjan Kupreskic on count 1 rested on proof of only three main allegations: (1) their participation in murder and arson at the house of Witness KL; (2) their participation in murder and arson at the house of Suhret Ahmic; and (3) their presence as HVO members in Ahmici on 16 April 1993.[144] Accordingly, the Prosecution sought to establish during trial that Zoran and Mirjan Kupreskic participated , as active HVO members, in the attack on the houses of Suhret Ahmic and Witness KL. To that end, the Prosecution introduced the evidence of Witness H (the attack on Suhret Ahmic house), Witness KL (the attack on his house) and Witness C (further evidence of their presence as HVO members in the village on 16 April 1993). Notably , the Prosecution did not present any substantial evidence relating to the allegation that Zoran and Mirjan Kupreskic helped prepare the attack on Ahmici by the various means set out in paragraph 9 of the Amended Indictment. Neither did it specifically attempt to introduce evidence supporting the allegation in paragraph 20 of the Amended

Indictment that Zoran and Mirjan Kupreskic had been involved in the planning and organising of the attack. For this reason, and because of the insufficiency of Witness KL's evidence, the Prosecution managed to prove its remaining case to the satisfaction of the Trial Chamber only in part.

86. Zoran and Mirjan Kupreskic were found guilty as co-perpetrators of persecution (count 1). The Trial Chamber based this conviction almost exclusively on the testimony of Witness H. It concluded that Zoran and Mirjan Kupreskic, armed, in uniform and with polish on their faces, were in the house of Suhret Ahmic immediately after he and Meho Hrstanovic were shot and immediately before the house was set on fire and the family of Suhret Ahmic was forcibly removed.[145] Zoran and Mirjan Kupreskic were, however, acquitted on counts 2 through to 11 (the attack on Witness KL's house). The Trial Chamber rejected the evidence of Witness KL and found that it was "not satisfied beyond reasonable doubt that [Zoran and Mirjan Kupreskic were] present at the scene of the crime and thus [could not] draw any inferences as to [their] possible participation in these events."[146]

87. In order to address the complaint raised by Zoran and Mirjan Kupreskic, the Appeals Chamber has to determine (i) whether the Trial Chamber returned convictions on the basis of material facts not pleaded in the Amended Indictment; and (ii) if the Appeals Chamber finds that the Trial Chamber did rely on such facts, whether the trial of Zoran and Mirjan Kupreskic was thereby rendered unfair. The first aspect of this determination begins with a discussion of the statutory framework relating to indictments and how this body of law has been interpreted in the jurisprudence of the Tribunal.

1. Were the convictions based on material facts not pleaded in the Amended Indictment?

88. An indictment shall, pursuant to Article 18(4) of the Statute, contain "a concise statement of the facts and the crime or crimes with which the accused is charged ". Similarly, Rule 47(C) of the Rules provides that an indictment, apart from the name and particulars of the suspect, shall set forth "a concise statement of the facts of the case". The Prosecution's obligation to set out concisely the facts of its case in the indictment must be interpreted in conjunction with Articles 21 (2) and (4)(a) and (b) of the Statute. These provisions state that, in the determination of any charges against him, an accused is entitled to a fair hearing and, more particularly , to be informed of the nature and cause of the charges against him and to have adequate time and facilities for the preparation of his defence. In the jurisprudence of the Tribunal, this translates into an obligation on the part of the Prosecution to state the material facts underpinning the charges in the indictment, but not the evidence by which such material facts are to be proven.[147] Hence, the question whether an indictment is pleaded with sufficient particularity is dependent upon whether it sets out the material facts of the Prosecution case with enough detail to inform a defendant clearly of the charges against him so that he may prepare his defence.

89. The Appeals Chamber must stress initially that the materiality of a particular fact cannot be decided in the abstract. It is dependent on the nature of the Prosecution 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. For example , 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.[148] Obviously , there may be instances where the sheer scale of the alleged crimes "makes it impracticable to require a high degree of specificity in such matters as the identity of the victims

and the dates for the commission of the crimes".[149]

90. Such would be the case where the Prosecution alleges that an accused participated , as a member of an execution squad, in the killing of hundreds of men. The nature of such a case would not demand that each and every victim be identified in the indictment.[150] Similarly, an accused may be charged with having participated as a member of a military force in an extensive number of attacks on civilians that took place over a prolonged period of time and resulted in large numbers of killings and forced removals. In such a case the Prosecution need not specify every single victim that has been killed or expelled in order to meet its obligation of specifying the material facts of the case in the indictment . Nevertheless, since the identity of the victim is information that is valuable to the preparation of the defence case, if the Prosecution is in a position to name the victims, it should do so.[151]

91. Despite the broad-ranging allegations in the Amended Indictment, the case against Zoran and Mirjan Kupreskic was not one that fell within the category where it would have been impracticable for the Prosecution to plead, with specificity, the identity of the victims and the dates for the commission of the crimes. On the contrary, the nature of the Prosecution case at trial was confined mainly to showing that Zoran and Mirjan Kupreskic were present as HVO members in Ahmici on 16 April 1993 and personally participated in the attack on two different houses resulting, *inter alia*, in the killing of six people. Clearly, in such circumstances, an argument that the sheer scale of the alleged crimes prevented the Prosecution from setting out the details of the alleged criminal conduct is not persuasive.

92. It is of course possible that an indictment may not plead the material facts with the requisite degree of specificity because the necessary information is not in the Prosecution's possession. However, in such a situation, doubt must arise as to whether it is fair to the accused for the trial to proceed.[152] In this connection, the Appeals Chamber emphasises that the Prosecution is expected to know its case before it goes to trial. It is not acceptable for the Prosecution to omit the material aspects of its main allegations 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.[153] There are, of course, instances in criminal trials where the evidence turns out differently than expected. Such a situation may require the indictment to be amended , an adjournment to be granted, or certain evidence to be excluded as not being within the scope of the indictment.

93. The Appeals Chamber observes that the case against Zoran and Mirjan Kupreskic, however, does not fall within this category either. Instead, the thrust of the persecution allegation against them somehow changed between the filing of the Amended Indictment and the presentation of the Prosecution case, so that the latter was no longer reflected in the former. The allegations in the Amended Indictment were broad and imprecise and there was, for example, a substantial part of the allegations under count 1, as noted above, upon which the Prosecution presented no evidence at all. In effect, the main case against Zoran and Mirjan Kupreskic was dramatically transformed from alleging integral involvement in the preparation, planning, organisation and implementation of the attack on Ahmici on 16 April 1993, as presented in the Amended Indictment, to alleging mere presence in Ahmici on that day and direct participation in the attack on two individual houses, as presented at trial. The Trial Chamber rejected all evidence relating to one of these houses and the other was not mentioned in the Amended Indictment.

94. In view of the factual basis of the conviction of Zoran and Mirjan Kupreskic, the relevant facts of the Prosecution case pleaded in the Amended Indictment are: i) the deliberate and systematic killing of Bosnian Muslim civilians; ii) the comprehensive destruction of Bosnian Muslim homes

and property; and iii) the organised expulsion of the Bosnian Muslims from Ahmici-Santici and its environs.[154] The Prosecution contends that the Amended Indictment thereby pleads the material facts underlying the persecution charge on which Zoran and Mirjan Kupreskic were found guilty with sufficient detail. The Appeal Chamber disagrees.

95. In the circumstances of the present case, the Prosecution could, and should , have been more specific in setting out the allegations in the Amended Indictment . In particular, the Appeals Chamber notes the absence of any detailed information about the nature of Zoran and Mirjan Kupreskic's role in the three alleged categories of criminal conduct. The Amended Indictment in no way particularises what form this alleged participation took. By framing the charges against Zoran and Mirjan Kupreskic in such a general way, the Amended Indictment fails to fulfil the fundamental purpose of providing the accused with a description of the charges against him with sufficient particularity to enable him to mount his defence. Pursuant to Articles 18(4), 21(2), 21(4)(a) and 21(4)(a) and (b) of the Statute, the Prosecution should have articulated, to the best of its ability, the specific acts of the Defendants that went to the three different categories of conduct pleaded in the Amended Indictment .

96. The Appeals Chamber notes the Prosecution's argument that

> in the case of murder, clearly, you need to put a list of the individuals that you have killed. That's a natural consequence of the crime you are pleading as a Prosecutor . But as far as crimes of persecution are concerned, then basically the Prosecution – [in] the indictment ... provid[ed]... notice by describing which acts the Prosecution considered to amount to persecution, and then it was a matter of disclosure of the evidence at trial or before trial much.[155]

97. Why the same "natural consequence" would not apply in the present case, where the Prosecution was alleging two clearly identifiable attacks on houses, resulting , *inter alia*, in murders, as the primary criminal conduct underlying persecution , is unclear to the Appeals Chamber.[156] Admittedly, persecution, as a crime against humanity under Article 5(h) of the Statute , is an offence that can encompass various forms of criminal conduct. In most instances it comprises a course of conduct or a series of acts, even though a single act can constitute persecution, provided this act occurred within the necessary context.[157]

98. However, the fact that the offence of persecution is a so-called "umbrella" crime does not mean that an indictment need not specifically plead the material aspects of the Prosecution case with the same detail as other crimes. Persecution cannot, because of its nebulous character, be used as a catch-all charge. Pursuant to elementary principles of criminal pleading, it is not sufficient for an indictment to charge a crime in generic terms. An indictment must delve into particulars. This does not mean, however, as correctly noted in the jurisprudence of this Tribunal ,[158] that the Prosecution is required to lay a separate charge in respect of each basic crime that makes up the general charge of persecution. What the Prosecution must do, as with any other offence under the Statute, is to particularise the material facts of the alleged criminal conduct of the accused that, in its view, goes to the accused's role in the alleged crime. Failure to do so results in the indictment being unacceptably vague since such an omission would impact negatively on the ability of the accused to prepare his defence.

99. As discussed above, the Prosecution case at trial against Zoran and Mirjan Kupreskic was founded on three principle allegations: (i) their presence as HVO members in Ahmici on 16 April 1993; (ii)

their participation in the attack on the house of Suhret Ahmic; and (iii) their participation in the attack on the house of Witness KL. The attack on Suhret Ahmic's house was, as conceded by the Prosecution during the trial,[159] not specifically charged in the Amended Indictment. In the view of the Appeals Chamber, the allegations relating to this attack and its consequences were clearly material to the Prosecution case against Zoran and Mirjan Kupreskic in the sense that the verdict on the persecution count was critically dependent upon it. Had the Trial Chamber not concluded that the Prosecution had successfully proven that allegation beyond reasonable doubt, Zoran and Mirjan Kupreskic's conviction on the persecution count could not conceivably have been sustained.[160] The Appeals Chamber, accordingly, finds that the allegation that Zoran and Mirjan Kupreskic were part of a group of soldiers who, in the early morning of 16 April 1993, participated in the attack on Suhret Ahmic's house, which resulted in the murder of Suhret Ahmic and Meho Hrustanovic, the house being set on fire, and the surviving members of the Suhret Ahmic family being expelled, constituted material facts in the Prosecution case against them. Thus, the attack on the house and its consequences should have been specifically pleaded in the Amended Indictment.

100. In this connection, the Appeals Chamber notes that the reason that the Prosecution chose not to formally charge Zoran and Mirjan Kupreskic with the specific attack on Suhret Ahmic's house appears to have been expediency. The Prosecution claimed , prior to and during trial, that evidence relating to the attack on Suhret Ahmic's house (Witness H) came into its possession late in the day and that it was anxious not to delay the commencement of the trial by amending again the already once Amended Indictment.[161] In the view of the Appeals Chamber, the goal of expediency should never be allowed to over-ride the fundamental rights of the accused to a fair trial. If expediency was a priority for the Prosecution, it should have proceeded to trial without the evidence of Witness H.

101. The Appeals Chamber further observes that the trial record demonstrates that the absence of any specific reference to the attack on Suhret Ahmic's house was a matter of some concern to the Trial Chamber.

102. The trial commenced on 17 August 1998. On 3 September 1998, during the Prosecution's examination-in-chief of Witness H, the Presiding Judge sought clarification from the Prosecution on whether it alleged that Zoran and Mirjan Kupreskic played a part in the killing of Witness H's father.[162] He stated:

> Before we move on to the cross-examination, may I ask you to clarify one point, Mr. Moskowitz? Mr. Moskowitz, are you alleging that the accused Zoran Kupreskic and Mirjan Kupreskic had a role in the killing of the witness's father? Or do you exclude any such role.

103. The Prosecution responded:

> We do not exclude that role. We allege that they were in the house, that they were , therefore, participants in the murder of the father and of Meho Hrustanovic. It is not charged in the indictment. This is information that we gave serious consideration to charging in the indictment. However, we decided that -- not to delay further the trial and reamend the indictment once again, but to instead proceed with the evidence as we had it, and to have that evidence used by this Tribunal for purposes of the persecution count which has been alleged, and also to corroborate the murder counts that have also been alleged. So it was our decision that instead of reamending the

> indictment once again, to proceed to trial as quickly as possible, as I think everyone wanted, and simply introduce this evidence for the purposes I've just mentioned . And I believe in our brief, our Pre-Trial Brief, we may have made a brief reference to the fact that additional information has come to us fairly recently, and that rather than amending the indictment, we will proceed with the evidence as we have it.[163]

104. Counsel for Mirjan Kupreskic then complained of the late notification of the charges against her client. She stated:

> Mr. President, I believe that a basic rule of a fair trial is for the accused to be informed of what they are charged with. We now, for the first time, are told that he is charged with the killing of Meho Hrustanovic. The Prosecution has said that this is within the framework of the persecution charge, that the killing of Meho Hrustanovic is going to be part of that charge, as well as the killing of a member of his family, and that this will all be dealt with within the context of the persecution charge. My understanding was that this will be part of the persecution charge further on.[164]

The Presiding Judge responded in the following manner:

> As for the charges, it's very clear. I think Mr. Moskowitz made it very clear a few minutes ago following my question, that they are not charging the accused Zoran and Mirjan Kupreskic with murder in this particular case, but only with persecution . So there's been no change. I wanted the Prosecutor to clarify his position. I don't see any particular problem.[165]

105. The Appeals Chamber finds that the response of the Presiding Judge that Zoran and Mirjan Kupreskic were not charged with murder, *only* with persecution, is ambiguous and does not adequately address the concern raised by Mirjan Kupreskic as to whether he was charged with a role in killing the two victims. Furthermore , this exchange between the Prosecution and the Bench demonstrates a failure to distinguish between the "umbrella" nature of persecution as a legal concept and the need to identify and plead the acts of the accused that constitute that crime with the requisite detail. The material facts of the Prosecution case against the accused must be determined by reference to the latter, not the former. The accused is entitled to be informed of the material facts of the specific allegation that the Prosecution is making against him so as to prepare his defence adequately. Hence, in the context of persecution, the indictment must set out the material facts as they allegedly pertain to the persecutory acts of the accused.

106. The Trial Chamber returned to the issue of the failure of the Amended Indictment to plead Zoran and Mirjan Kupreskic's participation in the murders of Suhret Ahmic and Meho Hrustanovic on the next to last day of the trial, during the Prosecution's closing submissions. The Presiding Judge asked counsel for the Prosecution the following question:

> In the brief which you filed last week, you accused Zoran and Mirjan Kupreskic, among other things, of the murder of the father of Witness H. And perhaps you would remember that on the 3rd of September I had asked that same question of your colleague Mr. Moskowitz when I asked him whether the Prosecution was going to bring charges , a specific charge that is, against the two accused in respect of that murder. And at that time Mr. Moskowitz said, "Yes, we had thought about bringing a specific charge, but we decided not to ask that the indictment be amended. In any case, you will take into account the evidence that we have presented." And I have in

> front of me the relevant pages of the transcript. These are pages 1.696 FF. And he added, "And you must decide to what extent one could take into account that evidence as regards persecution." All right. Now, here is my question: What is your position now about that murder? I repeat. In the written brief you accused the two accused of that murder, which, however, does not appear officially, in the indictment. To what extent can the Tribunal take into account the charges that were not actually formulated in an official way in the indictment itself, but which were put forth during the trial?[166]

107. Counsel for the Prosecution answered as follows:

> Mr. President, I will answer you analogously as – like the way Mr. Moskowitz said for the Prosecution, and which you've just recalled. It is true that the murder of Witness H's father is not in the indictment. It is true that the evidence, at least this is the point of view of the Prosecution, that the evidence that was presented to the Tribunal shows that most probably one or the other of the accused, Zoran and Mirjan, both of them were near it when that happened. But we do not say that they themselves are the perpetrators of that murder. We do not know who were the ones who killed Witness H's father. However, we do know that the two accused, according to the Prosecution evidence, were there. Therefore, according to the point of view that I am expressing today, it seems to me that it is pursuant to the charge of persecution that this aspect of the -- both of their behaviours can be taken into account, the behaviour in front of Witness H's house, not as a specific crime which could be ascribed to them personally, but we have a more reliable source, and this is the point of view of the Prosecution, is that they were in the house a few moments after Witness H's father was murdered, and the exchange that took place there between the two accused and the Witness H. Therefore, my answer to the question, Mr. President , goes back to the one which was already given to you by Mr. Moskowitz.[167]

108. The Presiding Judge continued:

> Well, very well. Well, let me ask you another question then. Therefore, you are suggesting that we take into account, assuming that the Trial Chamber is convinced by the Prosecution evidence, that you want this --[168]

109. To which counsel for the Prosecution added:

> Well, more specifically, the Prosecution suggests to the Trial Chamber to take into account, pursuant to Count number 1, persecution, the behaviour of the accused, in front of and inside Witness H's house, as it appeared through the Prosecution's evidence, which the Tribunal, of course, will evaluate. Once again, we cannot state -- we know that Witness H's father was shot, was executed on that location at that time, in front of his house. We also know that the accused, Zoran and Mirjan Kupreskic, were a few metres away from there, but we do not know any more about what their role was in that execution. However, we do know through Witness H what their role was in Witness H's house, and lastly, pursuant to persecutions that were carried out against that family.[169]

110. From the above exchange, the Appeals Chamber must conclude that the question whether the Trial Chamber would take into account the attack on Suhret Ahmic's house , which resulted in the

murder of Suhret Ahmic and Meho Hrustanovic, the house being set on fire, and the surviving members of the Suhret Ahmic family being expelled , as a possible basis for liability in respect of the persecution count was, until the very end of the trial, not settled. The Appeals Chamber also notes that this matter appears not to have been completely resolved in the Trial Judgement. The Trial Chamber stated in paragraph 626 that

> in the light of its broad definition of persecution, the Prosecution cannot merely rely on a general charge of "persecution" in bringing its case. This would be inconsistent with the concept of legality. To observe the principle of legality, the Prosecution must charge particular acts (and this *seems* to have been done in this case). These acts should be charged in sufficient detail for the accused to be able to fully prepare their defence.[170]

111. The Appeals Chamber notes that a similar issue arose in relation to Drago Josipovic.[171] In the legal findings pertaining to Drago Josipovic on count 1 (persecution), the Trial Chamber found that both the allegations relating to the attack on Musafer Puscul's house and Nazif Ahmic's house had been made out. On the basis of the evidence of Witness EE, it held that Drago Josipovic participated in the attack on the Puscul house on 16 April 1993 as a member of the group of soldiers who attacked and burned the house and murdered Musafer Puscul. The Trial Chamber further found that

> Drago Josipovic also participated in the attack on the house of Nazif Ahmic in which Nazif and his 14 year old son were killed. This was not charged as a separate count in the indictment, nor did the Prosecutor request after the commencement of the trial to be granted leave to amend the indictment so as to afford the Defence the opportunity to contest the charge. Consequently, in light of the principle set out above in the part on the applicable law, these facts cannot be taken into account by the Trial Chamber as forming the basis for a separate and specific charge. They constitute, however, relevant evidence for the charge of persecution.[172]

112. Compared to Drago Josipovic, the Trial Chamber was not as explicit in its legal findings relating to Zoran and Mirjan Kupreskic. Nevertheless, it is a reasonable assumption that the Trial Chamber applied the same logic in relation to Zoran and Mirjan Kupreskic in returning convictions on the persecution count based upon a factual basis not pleaded in the Amended Indictment. The Appeals Chamber understands the Trial Chamber's reasoning to be as follows. By alleging participation during a seven-month period in (i) the deliberate and systematic killing of Bosnian Muslim civilians; (ii) the comprehensive destruction of Bosnian Muslim homes and property ; and (iii) the organised detention and expulsion of Bosnian Muslims, the Amended Indictment pleaded the underlying criminal conduct of the accused with sufficient detail. On that basis, the Trial Chamber was satisfied that Zoran and Mirjan Kupreskic had sufficient information to prepare their defence. Consequently, any allegation of specific criminal conduct not pleaded in the Amended Indictment, such as the attack on Suhret Ahmic's house, could be taken into account as relevant evidence for the charge of persecution (count 1). This was so regardless of the fact that the specific criminal act constituting the primary basis for holding Zoran and Mirjan Kupreskic criminally liable for persecution was not pleaded in the Amended Indictment .

113. The Appeals Chamber is unable to agree with this reasoning. As found above , the attack on Suhret Ahmic's house and its consequences constituted a material fact in the Prosecution case and, as such, should have been pleaded in the Amended Indictment. Absent such pleading, the allegation pertaining to this event should not have been taken into account as a basis for finding

Zoran and Mirjan Kupreskic criminally liable for the crime of persecution. Hence, the Trial Chamber erred in entering convictions on the persecution count because these convictions depended upon material facts that were not properly pleaded in the Amended Indictment.

114. The Appeals Chamber notes that, generally, an indictment, as the primary accusatory instrument, must plead with sufficient detail the essential aspect of the Prosecution case. If it fails to do so, it suffers from a material defect. A defective indictment , in and of itself, may, in certain circumstances cause the Appeals Chamber to reverse a conviction. The Appeals Chamber, however, does not exclude the possibility that , in some instances, a defective indictment can be cured if the Prosecution provides the accused with timely, clear and consistent information detailing the factual basis underpinning the charges against him or her. Nevertheless, in light of the factual and legal complexities normally associated with the crimes within the jurisdiction of this Tribunal, there can only be a limited number of cases that fall within that category. For the reasons that follow, the Appeals Chamber finds that this case is not one of them.

2. Did the defects in the Amended Indictment render the trial unfair?

115. The second inquiry that the Appeals Chamber must make is whether the trial against Zoran and Mirjan Kupreskic was rendered unfair by virtue of the defects in the Amended Indictment. The Prosecution submits that, in the event that the Amended Indictment did not plead the material facts with the requisite detail, Zoran and Mirjan Kupreskic must be considered to have been put on notice by the Prosecution Pre-Trial Brief, or through the knowledge acquired during the trial.[173] The Prosecution specifically claims that the Pre-Trial Brief, which was filed in mid-July 1998, adequately informed Zoran and Mirjan Kupreskic of the charges against them.[174] The Appeals Chamber disagrees with the Prosecution's contention.

116. The Appeals Chamber observes that, in its Pre-Trial Brief, the Prosecution simply stated that at the outset of the attack in the early morning of 16 April 1993, Zoran and Mirjan Kupreskic

> were accompanying HVO troops unfamiliar with Ahmici, pointing out Muslim houses suitable for destruction. Both Mirjan and Zoran joined in the attack on several of these homes, participating in at least a half a dozen murders in the area, including the killing of an eight year old child and a three month old baby boy crying in his crib.[175]

The Pre-Trial Brief further stated that the Prosecution anticipated

> presenting recently acquired evidence of individual acts of violence perpetrated by the accused. This conduct has not been specifically charged as individual crimes , because the evidence upon which it is based was not available until after the Amended Indictment was confirmed. Since such evidence is, in any event, admissible as relevant to Count 1 Persecution charge, no further request to amend the [Amended] Indictment by adding new Counts has been made in an effort to avoid delay to the trial schedule.[176]

117. In the Appeals Chamber's view, the information given in the Prosecution Pre -Trial Brief is extremely general in nature and it is difficult to see how it could have assisted Zoran and Mirjan Kupreskic in the preparation of their defence. In the short section pertaining directly to Zoran and Mirjan Kupreskic it is stated that they "joined in the attack" on several houses, "participating in at

least a half a dozen murders".[177] There is no mention of which particular houses they attacked or whose murders they participated in. Similarly, the paragraph referring to "recently acquired evidence of individual acts of violence" does not establish whether those acts were additional to the attacks on the two houses and "the half a dozen murders".[178] In light of the evidence actually presented at trial, it appears that they were not.

118. During the opening statements, on the first day of the trial, the Prosecution stated that Zoran and Mirjan Kupreskic committed "specific crimes" during the attack on Ahmici on 16 April 1993. Although referring specifically to the attack on Witness KL's house in this connection, the Prosecution made no reference whatsoever to the attack on Suhret Ahmic's house or to Zoran and Mirjan Kupreskic's involvement in that event (Witness H's evidence).[179]

119. In light of the above, the Appeals Chamber is not persuaded by the Prosecution's submission on this point that the "mechanics of the process of the indictment, notice in the Prosecution Pre-Trial Brief, and disclosure of the evidence" put Zoran and Mirjan Kupreskic on sufficient notice of the factual charge underpinning the persecution count, i.e., the attack, including the resulting murders, on Suhret Ahmic 's house.[180] The Appeals Chamber accepts that, from what occurred during the trial on 3 September 1998, it appears that, by that time, Zoran and Mirjan Kupreskic had been informed that the allegation pertaining to the attack on Suhret Ahmic house was relevant to the persecution count . Nonetheless, the information provided on that day did not adequately convey the relevance of Witness H's evidence for the persecution count. No certain conclusion could be drawn as to how that evidence was going to be relied upon by the Trial Chamber for the purpose of deciding the issue of Zoran and Mirjan Kupreskic's criminal liability for persecution. What transpired on the next to last day of the trial only confirms the uncertainty surrounding this matter. In these circumstances, the conclusion that this uncertainty materially affected Zoran and Mirjan Kupreskic's ability to prepare their defence is unavoidable.

120. Moreover, the Appeals Chamber is disturbed by how close to the beginning of the trial the Prosecution disclosed Witness H's statement to Zoran and Mirjan Kupreskic. Pursuant to an order of the Trial Chamber, Witness H's statement was disclosed to them only approximately one to one-and-a-half weeks prior to trial and less than a month prior to Witness H's testimony in court.[181] The Trial Chamber's reason for accepting the delay in the disclosure of Witness H's statement was that the delay only concerned one witness and that, therefore, no prejudice was caused to the Defendants.[182] In hindsight, it is obvious that, in this case, the issue of prejudice was not dependent on the number of witness statements of which disclosure was delayed, but the materiality of the witness' evidence to the question of Zoran and Mirjan Kupreskic's criminal responsibility. Considering the significance of Witness H's evidence, the timing of the disclosure of that evidence was essential for the preparation of Zoran and Mirjan Kupreskic's defence. The Prosecution's motion requesting the delay reveals that it had some merit.[183] However , it cannot be excluded that Zoran and Mirjan Kupreskic's ability to prepare their defence, in particular the cross-examination of Witness H, was prejudiced by the fact that disclosure took place so close to the commencement of the trial and to Witness H testifying in court.

121. The Appeals Chamber also bears in mind the radical "transformation" of the prosecution case against Zoran and Mirjan Kupreskic. Based on the Amended Indictment , they had to mount a defence against an allegation of wide-ranging criminal conduct against Bosnian Muslim civilians in the Ahmici-Santici region during a seven-month period, such as systematic and deliberate killing, comprehensive destruction of houses, and organised detention and expulsion. However, when it came to trial, this was not the case that the Prosecution tried to prove. Instead, it pursued a

trial strategy which sought to demonstrate that Zoran and Mirjan Kupreskic were guilty of persecution, principally, because of their participation in two individual attacks (Suhret Ahmic's house and Witness KL's house).[184] Considering this drastic change in the Prosecution case, in conjunction with the ambiguity as to the pertinence of Witness H's evidence for the persecution count and the late disclosure of Witness H's evidence, the Appeals Chamber is unable to accept that Zoran and Mirjan Kupreskic were informed with sufficient detail of the charges against them, so as to cure the defects the Appeals Chamber has identified in the Amended Indictment.

122. The Appeals Chamber emphasises that the vagueness of the Amended Indictment in the present case constitutes neither a minor defect nor a technical imperfection . It goes to the heart of the substantial safeguards that an indictment is intended to furnish to an accused, namely to inform him of the case he has to meet. If such a fundamental defect can indeed be held to be harmless in any circumstances, it would only be through demonstrating that Zoran and Mirjan Kupreskic's ability to prepare their defence was not materially impaired. In the absence of such a showing here, the conclusion must be that such a fundamental defect in the Amended Indictment did indeed cause injustice, since the Defendants' right to prepare their defence was seriously infringed. The trial against Zoran and Mirjan Kupreskic was, thereby , rendered unfair.

123. Finally, the Appeals Chamber observes that no waiver argument has been raised by the Prosecution in this case since Zoran and Mirjan Kupreskic objected to the form of the Amended Indictment, *inter alia*, on the same ground as they are now raising before the Appeals Chamber. On 15 May 1998, the Trial Chamber rejected their objection. As to the specific question of whether the material facts were pleaded with sufficient details, the Trial Chamber did not provide any reasons for its finding. It simply held that the Amended Indictment met the requirements of Rule 47(C).[185]

3. Conclusion

124. For the foregoing reasons, the Appeals Chamber holds that the Amended Indictment failed to plead the material facts of the Prosecution case against Zoran and Mirjan Kupreskic with the requisite detail. By returning convictions on count 1 (persecution) on the basis of such material facts, the Trial Chamber erred in law. The Appeals Chamber is unable to conclude that Zoran and Mirjan Kupreskic were, through the disclosed evidence, the information conveyed in the Prosecution Pre-Trial Brief, and knowledge acquired during trial, sufficiently informed of the charges pertaining to the attack on Suhret Ahmic's house, his resulting murder as well as that of Meho Hrustanovic, the destruction of Suhret Ahmic's house, and the expulsion of the surviving members of the Suhret Ahmic family. The right of Zoran and Mirjan Kupreskic to prepare their defence was thereby infringed and the trial against them rendered unfair. Accordingly, this ground of appeal by Zoran and Mirjan Kupreskic is allowed .

125. Having upheld the objections of Zoran and Mirjan Kupreskic based on the vagueness of the Amended Indictment, the question arises as to whether the appropriate remedy is to remand the matter for retrial. The Appeals Chamber might understandably be reluctant to allow a defect in the form of the indictment to determine finally the outcome of a case in which there is strong evidence pointing towards the guilt of the accused. However, additionally, Zoran and Mirjan Kupreskic have raised a number of objections regarding the factual findings made by the Trial Chamber. If accepted , these complaints would fatally undermine the evidentiary basis for the convictions of these two Defendants, rendering the question of a retrial moot. Accordingly, the Appeals Chamber now proceeds to consider the objections raised by the Kupreskic brothers as to the Trial Chamber's factual findings.

PROSECUTION AUTHORITIES

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

United Nations
Nations Unies

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

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

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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.

6.4 Count 4: Crime against Humanity (murder)

952. *Count 4* of the Indictment charges Musema with *crime against humanity (murder)*, pursuant to Articles 3(a), 6(1) and 6(3) of the Statute, for the acts alleged in paragraphs 4.1 to 4.11 of the Indictment.
953. The Chamber notes that the Accused is also charged, under count 5 of the Indictment, for 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, which acts include the attacks on civilians at various locations in Bisesero. The allegations in the aforementioned paragraphs of the Indictment also form the basis for Count 4, crimes against humanity (murder).
954. The Chamber concurs with the reasoning in *Akayesu* that:

"[...] it is acceptable to convict the accused of two offences in relation to the same set of facts in the following circumstances: (1) where the offences have different elements; or (2) where the provisions creating the offences protect different interests; or (3) where it is necessary to record a conviction for both offences in order fully to describe what the accused did. However, the

PROSECUTION AUTHORITIES

7. *Prosecutor v Radoslav Brdanin & Momir Talic*, IT-99-36, "Decision on Objections By Momir Talic to the Form of the Amended Indictment," 20 February 2001.

IN TRIAL CHAMBER II

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

Registrar:
Mr Hans Holthuis

Decision of:
20 February 2001

PROSECUTOR

v

Radoslav BRDANIN & Momir TALIC

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

The Office of the Prosecutor:

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

Counsel for Accused:

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

1 The application

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

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

(2) The amended indictment fails to identify whether he is alleged to have committed the acts charged himself, or had them committed or whether he knew of those acts or should have known of them.[5]

(3) The prosecution has impermissibly charged him with cumulative charges based upon the same facts, and it must elect upon which of the charges he is to be prosecuted .[6]

(4) The allegation of grave breaches against the Geneva Conventions of 1949 (counts 5, 7 and 10) are irrelevant to the case, because the indictment does not allege that any of the acts charged occurred during an international armed conflict.[7]

2 The amended indictment

2. The amended indictment alleges that:[8]

(i) In 1992, the Assembly of the Serbian People in Bosnia and Herzegovina adopted a declaration on the Proclamation of the Serbian Republic of Bosnia and Herzegovina , an entity which eventually became known as *Republika Srpska*.[9]

(ii) The significant Bosnian Muslim and Bosnian Croat populations in the areas claimed for the new Serbian territory were seen by the political leaders of the Bosnian Serbs as a major problem in the creation of such a territory in those areas, and the removal of nearly all of those populations (or "ethnic cleansing") was part of the overall plan to create the new Serbian territory.[10]

(iii) To achieve this goal, the Bosnian Serb authorities initiated and implemented a course of conduct which included:

(a) the creation of impossible conditions (involving pressure and terror tactics , including summary executions) which would have the effect of encouraging the non -Serbs to leave the area;

(b) the deportation and banishment of those non-Serbs who were reluctant to leave ; and

(c) the liquidation of those non-Serbs who remained and who did not fit into the concept of the Serbian state.[11]

(iv) Between April and December 1992, forces under the control of the Bosnian Serb authorities seized possession of those areas deemed to be a risk to the accomplishment of the overall plan to create a Serbian state within Bosnia and Herzegovina. By the end of 1992, the events which took place in these take-overs had resulted in the death of hundreds, and the forced departure of thousands, from the Bosnian Muslim and Bosnian Croat populations from those areas.[12] Those events constitute the crimes with which the two accused – Radoslav Brdanin ("Brdanin") and Talic – are charged jointly as having both individual responsibility and superior responsibility.

(v) The forces *immediately* responsible for those events (which are referred to in the

indictment collectively as the "Serb forces") comprised the army, the paramilitary, and territorial defence and police units.[13] The Bosnian Serb authorities under whose control the Serb forces acted are not identified in the indictment beyond including the two accused.[14] These authorities had authority and control over:

(a) attacks on non-Serb villages and areas in the Autonomous Region of Krajina (" ARK");

(b) destruction of villages and institutions dedicated to religion;

(c) the seizure and detention of the Bosnian Muslims and Bosnian Croats;

(d) the establishment and operation of detention camps;

(e) the killing and maltreatment of Bosnian Muslims and Bosnian Croats; and

(f) the deportation or forcible transfer of the Bosnian Muslims and Bosnian Croats from the area of the ARK.

The Bosnian Serb authorities also had power to direct a body identified only as "the regional CSB" – which appears to be the Regional Centre for Public Security – and the Public Prosecutor to investigate, arrest and prosecute any persons believed to have committed crimes within the ARK.[15]

(vi) Brdanin was the President of the ARK Crisis Staff, one of the bodies responsible for the co-ordination and execution of most of the operational phase of the plan .[16] As such, he had executive authority in the ARK and was responsible for managing the work of the Crisis Staff and the implementation and co-ordination of Crisis Staff decisions.[17]

(vii) Talic was the Commander of the 5th Corps/1st Krajina Corps, which was deployed in the ARK into, or near, areas predominantly inhabited by Bosnian Muslims and Bosnian Croats.[18] He had authority to direct and control the actions of all forces assigned to the 5th Corps/1st Krajina Corps or within his area of control, and all plans for military engagement and attack plans had to be approved by him in advance. Troops under his command took part in the events which constitute the crimes for which the two accused are charged as having responsibility.[19] His approval or consent was required for any significant activity or action by forces under the command or control of the 5th Corps/1st Krajina Corps, all units under his command were required to report their activities to him, and he had power to punish members of those units for any crimes they may have committed.[20] In addition (with respect to attacks conducted against Bosnian Muslims and Bosnian Croatians in municipalities such as Prijedor and Sanski Most within the ARK), he had power to direct and control the actions of the territorial defence units, the police and paramilitary forces,[21] which were immediately responsible for the events which occurred there.[22]

(viii) Talic was also a member of the ARK Crisis Staff,[23] and he and Brdanin, as such members, participated individually or in concert in the operations relating to the conduct of the hostilities and the destruction of the Bosnian Muslim and Bosnian Croat communities in the ARK area. The ARK Crisis Staff worked as a collective body to co-ordinate and

implement the overall plan to seize control of and "ethnically cleanse" the area of the ARK. After the dissolution of the ARK Crisis Staff, Brdanin and Talic continued in their respective positions in the Bosnian Serb power structures with the implementation of this overall plan .[24]

3. Brdanin and Talic are charged with twelve counts:

(a) genocide[25] and complicity in genocide ;[26]

(b) persecutions,[27] extermination,[28] deportation[29] and forcible transfer (amounting to inhumane acts),[30] as crimes against humanity;

(c) torture, as both a crime against humanity[31] and a grave breach of the Geneva Conventions;[32]

(d) wilful killing[33] and unlawful and wanton extensive destruction and appropriation of property not justified by military necessity,[34] as grave breaches of the Geneva Conventions; and

(e) wanton destruction of cities, towns or villages or devastation not justified by military necessity[35] and destruction or wilful damage done to institutions dedicated to religion,[36] as violations of the laws or customs of war.

3 Delay in disposal of Motion

4. The Motion was filed by Talic within six weeks of the date of the amended indictment ,[37] and the submissions of the parties followed a regular course – with a response by the prosecution,[38] a reply by Talic,[39] and a further response by the prosecution.[40] Following the statement by the prosecution that it was not calling as witnesses a number of persons whose statements formed part of the supporting material accompanying the indictment when confirmation was sought,[41] Talic filed a "Memorandum" with further submissions as to the validity of the indictment .[42] The prosecution has not filed any response to that Memorandum.

5. The usual practice of this Trial Chamber is to give its decision on preliminary motions – indeed, on any procedural motions – as soon as it is able conveniently to do so consistently with its obligation to hear evidence in other trials. That practice was not followed by the Trial Chamber in relation to the Motion in this present case. The reason for not doing so was the inclusion in that Motion of the application by Talic for a ruling that he had been impermissibly charged with cumulative charges based upon the same facts, and that the prosecution must elect which of the charges he is being prosecuted for.

6. In support of that application, reliance was placed by Talic upon the judgment given early last year, in *Prosecutor v Kupreškic,*[43] in which attention was paid to the issue of cumulative charges and views were expressed which were inconsistent with the then state of jurisprudence within the Tribunal. That judgment is the subject of an appeal by the prosecution to the Appeals Chamber. The same issue was also raised by two of the appellants in the *Celebici* Appeal,[44] in which argument was heard last June. The arguments in that appeal covered many different issues, but considerable attention was paid to the issue of cumulative charging and cumulative convictions. It was understood that the judgment in that

appeal would deal with the issue comprehensively.

7. If the Trial Chamber had given its decision on the Motion before judgment had been given in the *Celebici* Appeal – whether it decided to follow the previous jurisprudence of the Tribunal concerning cumulative charging, or whether it decided to follow the views expressed in the *Kupreškic* Judgment, or whether it formed its own views concerning cumulative charging – the unsuccessful party upon this issue would have had to appeal, an appeal which in turn would obviously not have been decided until judgment had been given in the *Celebici* Appeal. It therefore seemed to the Trial Chamber that the more expeditious course was for it to await the judgment of the Appeals Chamber in the *Celebici* Appeal, whose *ratio decidendi* upon this issue would be binding on the Trial Chamber.[45] No further appeal would then be necessary.

8. The Trial Chamber has twice drawn the attention of the prosecution during status conferences to the very apparent lack of particularity in the amended indictment , and warned it to start work – in advance of the decision on the Motion – on the further amendments which will be necessary to the amended indictment for it to comply with the principles discussed in the Trial Chamber's earlier decisions in *Prosecutor v Krnojelac*.[46] These principles are again discussed later, in Sections 4 and 5 of this decision. The prosecution was also told that, in view of the time available to it to make those amendments once such a specific warning had been given and whilst the judgment in the *Celebici* Appeal was awaited, it would be given a very short period after this decision is given in which to file a further amended indictment.[47]

4 The alleged responsibility of the accused

9. The amended indictment asserts that each of the two accused is "individually responsible" pursuant to Article 7.1 of the Tribunal's Statute for the crimes alleged against him in the indictment.[48] The pleading then defines individual criminal responsibility, using all of the terminology employed in Article 7.1:

> Individual criminal responsibility includes committing, planning, instigating, ordering 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.

The order in which the different terms of Article 7.1 are used here is not the same as they are used in Article 7.1. It may or may not be significant that the prosecution has promoted the term "committing" to first in order, rather than the later position in which it is found in the Statute.

10. It was appropriate for the indictment to define individual responsibility in such extensive terms only if the prosecution intended to rely upon each of the different ways pleaded. If the prosecution did not have that intention, then the irrelevant material should not have been pleaded because of the ambiguity it creates, and the prosecution should have made its intention clearer. It has been firmly stated that pleading individual responsibility by reference merely to all the terms of Article 7.1 is likely to cause ambiguity.[49] The nature of the prosecution case should not be dependent upon such an ambiguity .

11. So far as the present indictment is concerned, the apparent intention of the prosecution is that one of the ways in which each of the accused is being charged with individual responsibility is that, in addition to aiding and abetting in various ways, he himself actually committed the crime – in the sense that he personally did the acts, such as the killing and maltreatment of Bosnian Muslims and Bosnian Croats, which amounted to the crimes charged. That is the sense in which the word "committed" is used in Article 7.1.[50] The description of Talic's powers and authority given in pars 20-21 of the amended

indictment[51] are *not* expressed as limiting his alleged responsibility pleaded in general terms in par 25,[52] as the prosecution claims.[53] It is this form of pleading which leaves the prosecution open to the criticism that it is attempting to make its allegations as broad and as comprehensive as possible, even though it has no evidence to support them, to enable it to take advantage of a subsequent discovery of such evidence without the need to amend its indictment .[54] If it has no evidence that the two accused personally committed any of the acts which amounted to the crimes charged , it must withdraw any reference to their personal responsibility for "committing " the crimes.

12. Other ways in which the amended indictment asserts that each of the two accused was individually responsible for the crimes alleged against him involve different forms of aiding and abetting in the commission by others of those crimes, as defined in Article 7.1 and quoted earlier, in par 9 of this decision. Each of the two accused is also said to have participated, as members of the ARK Crisis Staff, "individually or in concert in the operations relating to the conduct of the hostilities and the destruction of the Bosnian Muslim and Bosnian Croat communities in the ARK area".[55] This formula of the two accused acting "individually and in concert" is repeated in relation to different counts in the amended indictment.[56] In its context, this appears to have been intended as an allegation that each of the accused acted individually and *in concert with each other*, but it could also be interpreted as meaning *in concert with others*. It may or may not be significant that the earlier joint indictment against the two accused, dated 12 March 1999, pleaded that the two accused had acted "in concert with others".[57] This sort of ambiguity should not remain. If the prosecution seeks to rely upon the "accomplice" liability of acting in concert as part of a common purpose or design , or as part of a common criminal enterprise, held by the Appeals Chamber to fall within Article 7.1,[58] then this should be made clear.

13. Finally, the amended indictment asserts that each of the two accused, whilst in the position of authority set out in pars 19-23 of the pleading,[59] is also criminally responsible for the acts of his subordinates pursuant to Article 7.3 of the Tribunal's Statute.

5 Particularity in pleading

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

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

16. In relation to the other issues raised by Talic, the prosecution denies that it is obliged in an

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

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

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

19. In a case based upon superior responsibility, what is most material is the relationship between the accused and the others who did the acts for which he is alleged to be responsible, and the conduct of the accused by which he may be found to have known or had reason to know that the acts were about to be done, or had been done, by those others, and to have failed to take the necessary and reasonable measures to prevent such acts or to punish the persons who did them.[70] However, so far as those acts of the other persons are concerned, although the prosecution remains under an obligation to give all the particulars which it is able to give , the relevant facts will usually be stated with less precision, and that is because the detail of those acts (by whom and against whom they are done) is often unknown – and because the acts themselves often cannot be greatly in issue.[71]

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

21. Another form of "accomplice liability" within the meaning of Article 7.1 is that of acting in concert as part of a common purpose or design, or as part of a common criminal enterprise, referred to above.[76] Where such liability is charged, the indictment must inform the accused of the nature or purpose of the joint criminal enterprise (or its "essence"), the time at which or the period over which the enterprise is said to have existed, the identity of those engaged in the enterprise – so far as their identity is known,

but at least by reference to their category as a group – and the nature of the participation *by the accused* in that enterprise.[77]

22. In a case based upon individual responsibility where the accused is alleged to have *personally* done the acts pleaded in the indictment, the material facts must be pleaded with precision – the information pleaded as material facts must, so far as it is possible to do so, include the identity of the victim, the places and the approximate date of those acts and the means by which the offence was committed.[78] Where the prosecution is unable to specify any of these matters, it cannot be obliged to perform the impossible .[79] Where the precise date cannot be specified, a *reasonable* range of dates may be sufficient.[80] Where a precise identification of the victim or victims cannot be specified, a reference to their category or position as a group may be sufficient.[81] Where the prosecution is unable to specify matters such as these, it must make it clear in the indictment that it is unable to do so and that it has provided the best information it can.[82]

6 Relief in the event that the form of the indictment is defective

23. It is *not* the function of a Trial Chamber to check for itself whether the form of an indictment complies with the pleading principles which have been laid down. The Trial Chamber is, of course, entitled *proprio motu* to raise issues as to the form of an indictment but, unless it does so, it waits until a *specific* complaint is made by the accused before ruling upon the compliance of the indictment with those pleading principles.[83] This is fundamental to the primarily adversarial system adopted for the Tribunal by its Statute.

24. The only sufficiently *specific* complaints made by Talic in relation to the form of the amended indictment in the present case are two in number:

> (1) that he has been improperly charged cumulatively with a number of charges based upon the same facts, and
>
> (2) that the charges alleging grave breaches of the Geneva Conventions are irrelevant in the absence of any allegation in the indictment that the acts upon which the charges are based took place in the course of an international armed conflict.

Both of these complaints are dealt with in the succeeding sections of this decision .

25. The remaining complaints are very general in nature – no real attempt has been made to identify the specific allegations to which they relate. This approach by Talic was perhaps understandable in view of the almost complete lack of detail in the amended indictment, but it does not assist the Trial Chamber to make *specific* orders against the prosecution in relation to the defects in its indictment. However, this difficulty largely disappeared when the Senior Trial Attorney for the prosecution very fairly and properly conceded that the defects in the indictment were a result of a misapprehension on her part as to of the pleading principles which had been laid down in the Tribunal, and her belief that it would be sufficient for the prosecution to provide schedules to the defence disclosing these details at a later stage.[84]

26. Now that this misapprehension has been dispelled, it is sufficient, in the opinion of the Trial Chamber, simply to order the prosecution to file a further amended indictment which *does* comply with the pleading principles which have been laid down by the Tribunal and discussed in the *Krnojelac* cases. Despite the impression conveyed by some sections of the Office of the Prosecutor that it is the

prosecution policy to avoid disclosing what the real nature of its case is until as late a stage as possible, the Trial Chamber is confident – from the assurances given by the Senior Trial Attorney for the prosecution during the status conferences to which reference has been made – that it *will* now comply with those pleading principles. Bearing in mind that – subject to contingencies beyond its control – the Trial Chamber hopes to be able to commence the trial in this case in May or June this year, there is a need for the form of the indictment to be finalised as soon as possible without further litigation. If the defence is dissatisfied with the prosecution's compliance with those pleading principles, the Trial Chamber will entertain a new motion objecting to the form of the further amended indictment – *provided* that the motion identifies the specific allegations to which it takes objection.[85]

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

28. There is one final statement to be made in relation to the form of the further amended indictment which the prosecution is being ordered to file. This Trial Chamber has stated that, in order to avoid ambiguity, it is *preferable* that an indictment indicate precisely *and expressly* the particular nature of the responsibility alleged in relation to each individual count.[88] The extent to which the prosecution adopts this Trial Chamber's *preferred* manner of pleading in this regard will provide a good indication of the degree to which the prosecution is prepared now to co-operate with the Trial Chamber in this case.

7 Cumulative charging

29. Talic says that the indictment does not respect the principles of international law that:[89]

(i) only a single legal characterisation may be applied to the same facts,

(ii) where the same facts may constitute two offences, only the charge which contains the more specific elements may be charged (a principle which he says is derived from the *Blockburger* case),[90] and

(iii) genocide, as a composite offence, incorporates the ingredients of persecution , extermination, wilful killing, torture, deportation and forcible transfer, and therefore cannot be charged with any of those separate offences in relation to the same facts.[91]

30. Yet, Talic says,[92] he has been charged cumulatively in relation to the same facts in each case with:

(a) both genocide and/or complicity in genocide (counts 1 and 2);

(b) not only the genocide charges in counts 1 and 2, which he says amount to a charge of an

aggravated crime against humanity, but also persecution as a crime against humanity (count 3);

(c) not only the genocide charges in counts 1 and 2, but also extermination as a crime against humanity (count 4) and wilful killing as a grave breach of the Geneva Conventions (count 5);

(d) not only the genocide charges in counts 1 and 2, but also torture both as a crime against humanity (count 6) and as a grave breach of the Geneva Conventions (count 7); and

(e) both deportation (count 8) and forcible transfer amounting to inhumane acts (count 9), each as a crime against humanity.

The prosecution responds that such cumulative charging is permitted by the Tribunal's jurisprudence.[93]

31. The fundamental concern raised by the issue of accumulated charges is that an accused should not be subjected to punishment more than once in respect of the same criminal act. The most obvious consequence of this principle is that a Trial Chamber should be vigilant to ensure that the sentence imposed on an accused does not penalise him cumulatively for different offences in respect of the one piece of conduct. The complaint that such accumulation of offences may lead to cumulative convictions based upon the same conduct has been repeatedly rejected by Trial Chambers in the past when considering the form of the indictment, on the basis that the existence of cumulative convictions is a matter to be considered only when imposing penalty .[94]

32. This Trial Chamber, however, accepts that the "penalty" which must not be duplicated refers not only to cumulative *sentences* but also to the entering of cumulative *convictions*. An accused should not be *convicted* of more than one offence in respect of the same conduct where the conduct does not genuinely constitute more than one offence. Such a conclusion had already been reached in some Trial Chamber decisions, before the judgment in the *Celebici* Appeal.[95]

33. In the *Kupreškic* Judgment, upon which Talic relies in part, the Trial Chamber considered a number of issues raised in relation to cumulative convictions . In relation to the question of whether and on what conditions the same act or transaction may constitute two or more offences under international law, it determined that the applicable tests are:[96]

(i) whether each offence requires proof of an element that the other does not (that is, an element unique – or materially distinct – to each offence, the "different elements" test), and

(ii) even if it does not, whether each offence protects substantially different values.

The *Kupreskic* Judgment said that an affirmative answer to either of those questions will justify convictions for both crimes; but, if it is found that there is not more than one distinct offence, the Trial Chamber must convict on the more specialised offence only.[97] The judgment relied on the United States Supreme Court line of authority deriving from *Blockburger v United States*[98] as the principal source for the different elements test, which it considered to be the primary and more important test.

34. The identification of the principles to be applied in determining whether a single act or course of conduct constitutes more than one offence is a complex exercise , one which has now been conducted by the Appeals Chamber in the *Celebici* Appeal. It is therefore unnecessary in the present case for the Trial

Chamber to deal further with the issue relating to cumulative *convictions* in order to determine the issue which arises in this application, relating to cumulative *charges*.

35. The *Kupreskic* Judgment also considered the question of "when the Prosecutor may present cumulative charges for the same act or transaction",[99] which is of significant relevance to the present application. The Trial Chamber referred to two potentially conflicting considerations relevant to the issue: the necessity to safeguard the right of the accused under Article 21.4(a) of the Statute to be informed of the charges against him, and the requirement that the Prosecutor must be granted all the powers consistent with the Statute to enable her to fulfil efficiently her mission of prosecuting persons responsible for serious violations of international humanitarian law. The accused has a right to "be put in a position to know the legal elements of the offence charged" but, on the other hand, the " efficient fulfilment of the Prosecution's mission favours a system that is not hidebound by formal requirements of pleading in the indictment".[100] The Trial Chamber regarded these requirements as having the result that the Prosecutor :[101]

> (a) may make cumulative charges whenever it contends that the facts charged violate simultaneously two or more provisions of the Statute in accordance with the criteria discussed above;
>
> (b) should charge in the alternative rather than cumulatively whenever an offence appears to be in breach of more than one provision, depending on the elements of the crime the Prosecution is able to prove [...];
>
> (c) should refrain as much as possible from making charges based on the same facts but under excessive multiple heads, whenever it would not seem warranted to contend, in line with the principles set out above in the section on the applicable law, that the same facts are simultaneously in breach of various provisions of the Statute.

36. This Trial Chamber does not accept that the authority upon which the *Kupreškic* Judgment relied justified the principles which it stated in relation to cumulative *charging*. The *Blockburger* case upon which that judgment relied related to the double jeopardy clause of the Fifth Amendment. That clause provides, relevantly :

> [N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb [...].

That clause has, however, been interpreted as being concerned with *successive* prosecutions upon different charges arising out of the same facts, rather than with cumulative charges in the *same* prosecution.[102] Thus, even though the prohibition on double jeopardy protects a defendant against even the "risk" of being *convicted* twice for the same offence, such a prohibition is limited to the sense that, not only is it impermissible to convict an accused twice for the same offence, it is also impermissible to subject him to a further trial in which he has been *charged* with an offence of which he has already been acquitted or convicted.[103] The double jeopardy provision has been expressly interpreted as *not* prohibiting the pleading of cumulative *charges* in a single prosecution.[104] These cases were not considered in the *Kupreškic* Judgment.

37. In the context of international human rights law, the double jeopardy principle has also been expressed in terms which suggest that it is not intended to preclude cumulative charging in the same proceedings. Article 14 (7) of the *International Covenant on Civil and Political Rights* provides:

> 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.

This provision clearly limits the protection against cumulative trial or penalty to offences for which a person "has *already been* finally convicted or acquitted ". Its focus is on preventing an accused already convicted or acquitted of an offence being subjected to *subsequent* proceedings in respect of the same offence. Nothing in this provision suggests that an accused may not, in one indictment relating to the same proceedings, be *charged* with more than one offence in respect of the same set of facts.

38. This Trial Chamber does not, therefore and with all due respect, agree with the *Kupreškic* Judgment insofar as it seeks to restrict the right of the prosecutor to *charge* an accused person with more than one offence arising out of the same set of facts unless the cumulative offences are charged in the alternative. In the context of this Tribunal's work, such a restriction would unfairly impede the prosecution in the execution of its duties on behalf of the international community . There are two particular reasons why the limitation should not be imposed.

39. Primarily, and as an important practical matter, it is not reasonable to expect the prosecution to select between charges until all of the evidence has been presented . It is not possible to know with any precision, prior to that time, which offences among those charged the evidence will ultimately prove, particularly in relation to the proof of the differing pre-requisites – such as, for example, the existence of an *international* armed conflict for Article 2 offences, a requirement which does not apply to offences falling under Article 3. Thus the second of the guidelines in the *Kupreškic* judgement – which requires the prosecution to charge in the alternative "whenever an offence appears to be in breach of more than one provision, depending upon the elements of the crime the prosecution is able to prove" – is difficult to apply in practice, given that, at the time of drafting the indictment, the prosecution is not yet realistically in a position to know which crimes it is "able to prove". Nor is it possible for the prosecution to assess in advance of drafting the indictment which of two or more charges based upon the same set of facts will prove to be the most serious of those charges in the circumstances of the particular case, and thus the most appropriate to select as the first charge , to which the others would be made alternative. The ultimate success of the prosecution's case should not be made to depend upon the technicalities of pleading, so that what turns out *on the evidence* to be the most serious charge fails if what turns out to be the least serious charge has been selected as the first of a number of alternative charges. Nor will the requirement of alternative charging save any trial time, as the prosecution must still necessarily lead evidence in support of all of the charges (including the alternative charges). The defence must also still necessarily test such evidence and, where appropriate, lead evidence in contradiction of the prosecution evidence in relation to all charges.

40. There is no readily identifiable prejudice to an accused in permitting cumulative charging, when the issues arising from an accumulation of offences are determined after all of the evidence has been presented,[105] whereas the very real possibilities of prejudice to the prosecution in restricting such charging are manifest. From a practical point of view, therefore, the argument for permitting cumulative *charging* to continue is an overwhelming one.

41. Secondly, the offences in the Tribunal's Statute do not refer to specific categories of well-defined acts (as are to be found in domestic legislation), but rather to broad groups of offences of which the elements are not always clearly defined, and which may still remain to be clarified in the Tribunal's jurisprudence.[106] Although this situation may well change over the next few years, the obligations imposed by the *Kupreškic* Judgment upon the prosecution to assess at the outset whether particular facts do genuinely contravene different provisions of the Statute is an almost impossible task at this stage of

the Tribunal's jurisprudence. The Trial Chamber does not place as much importance upon this second reason as it does upon the practical problems already discussed.

42. This Trial Chamber therefore does not regard the principle of avoiding any accumulation of penalty as precluding the cumulative *charging* of offences in respect of the same conduct. The Trial Chamber agrees with what was said in the *Tadic* proceedings:[107]

> What can [...] be said with certainty is that penalty cannot be made to depend upon whether offences arising from the same conduct are alleged cumulatively or in the alternative. What is to be punished by penalty is proven criminal conduct and that will not depend upon the technicalities of pleading.

Since the above was written, the Appeals Chamber has now given judgment in the *Celebici* Appeal, where it has expressly and unanimously stated that cumulative *charging* is permitted.[108]

43. This complaint by Talic concerning the form of the indictment in the present case is therefore rejected.

8 The international issue

44. The other specific objection taken by Talic to the form of indictment is to the inclusion of charges alleging grave breaches of the Geneva Conventions, notwithstanding the absence of any allegation in the amended indictment that the acts upon which the charges are based took place in the course of an *international* armed conflict,[109] or of any facts pleaded which could establish that the armed conflict in Bosnia Herzegovina was in fact international in character.[110] Talic says, therefore, that these charges alleging grave breaches of the Geneva Conventions are irrelevant to the case.[111]

45. The prosecution says that pars 24, 25 and 27 of the amended indictment sufficiently plead the necessary pre-requisites for the charges alleging grave breaches of the Geneva Conventions.[112] Paragraph 24 states:

> At all times relevant to this indictment, a state of armed conflict and partial occupation existed in the Republic of Bosnia and Herzegovina. All acts or omissions herein set forth as Grave Breaches of the Geneva Conventions of 1949, recognised by Article 2 of the Statute of the Tribunal, occurred during that armed conflict and partial occupation.

Paragraph 25 alleges that each of the two accused is individually responsible for the crimes alleged against him in the indictment, and it states the substance of Article 7(1) of the Tribunal's Statute. Paragraph 27 states:

> At all times relevant to this indictment, all of the accused were required to abide by the laws and customs governing the conduct of armed conflicts, including the Geneva Conventions of 1949.

The prosecution observes that, in this respect, the amended indictment in the present case is in the same form as the indictment in the *Tadic* case, in which a finding that the armed conflict was an international one was ultimately made by the Appeals Chamber, a decision by which this Trial Chamber is said to be bound.[113]

46. In reply, Talic dismisses the reference to the *Tadic* indictment as irrelevant , points out that par 24 of the amended indictment in the present case makes no reference to an *international* armed conflict, and repeats that no facts pleaded in the indictment could establish that such was the nature of that armed conflict .[114] In a further document filed in relation to another (related) application which he had made, Talic added that it is only the *ratio decidendi* of an Appeals Chamber decision (one which relates solely to questions of law) which is binding upon the Trial Chambers; thus , the question of the international character of the armed conflict (which the Appeals Chamber itself described as a factual finding)[115] is for the Trial Chamber in each case to determine for itself upon the evidence given in that case.[116] The Trial Chamber agrees with Talic that it is *not* bound by the factual finding by the Appeals Chamber in the *Tadic* Conviction Appeal Judgment.[117]

47. Article 2 of the Tribunal's Statute gives to the Tribunal power to prosecute "persons committing or ordering to be committed grave breaches of the Geneva Convention of 12 August 1949", which the Article goes on to identify as a number of specified "acts against persons or property protected under the provisions of the relevant Geneva Convention". The Appeals Chamber has concluded that, in the present state of development of international law, Article 2 applies only to offences committed within the context of international armed conflicts, and that an *international* armed conflict is both a pre-requisite for its applicability and relevant to establishing that the persons against whom they were committed were "protected" under the provisions of the relevant Geneva Convention.[118]

48. It is a fundamental rule of pleading that the indictment must identify each of the essential factual ingredients of the offence charged.[119] That requirement includes any legal pre-requisites to the application of the offence in the circumstances of the particular case. Such a rule is not a mere technicality ; compliance with it is essential to enable the accused to know the nature of the case against him, as Article 21.4(a) of the Tribunal's Statute requires. Each of those essential factual ingredients must usually be pleaded expressly, although it may be sufficient in some circumstances if it is expressed by necessary implication .[120] This fundamental rule of pleading , however, is *not* complied with if the pleading merely assumes the existence of the pre-requisite.

49. The amended indictment does not, as it must when an Article 2 offence is charged , plead either that the armed conflict within which the offence is alleged to have been committed was an international one or sufficient facts from which such a finding could be made. The facts pleaded in pars 24, 25 and 27 are not sufficient for that purpose. The character of the armed conflict is not identified by necessary implication – it is merely assumed. Nor does the amended indictment give any indication of the basis upon which the prosecution will be asserting that the armed conflict was international in character. The basis upon which such an assertion is made is clearly also a material fact which must be pleaded to enable the accused to know the nature of the case against them.

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).[121] 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.

51. The objection to the indictment taken by Talic is therefore made out. It is not to the point that the

indictment in *Tadic* was similarly deficient. No point was raised by the accused in that case as to the absence of such an allegation ,[122] so the form of the *Tadic* indictment provides no authority in support of the form of the indictment in this case.

52. There has been no consistent practice within the Tribunal as to the precise nature of the relief granted when upholding a complaint by an accused in relation to the form of the indictment.[123] In the circumstances of some urgency to which reference was made earlier in this decision, the Trial Chamber believes that no good purpose would be served by striking out the allegation of grave breaches of the Geneva Conventions as irrelevant; the more appropriate course is simply to order the prosecution to plead, as material facts, the allegation that the armed conflict was international in character and the basis upon which such an assertion is made. If the prosecution fails to do so within the period allowed, the Trial Chamber will entertain an application from the defence to strike out the allegation of grave breaches of the Geneva Conventions .

9 Time to amend

53. As earlier stated,[124] the prosecution has been aware since at least 17 November last that it would be ordered to amend the indictment further so that it complied with the principles discussed in the Trial Chamber's earlier decisions in *Krnojelac*. It has also been aware since at least 2 February that it would be given a very short period after this decision is given in which to file such an amended pleading. A period of "something like two weeks" was suggested.[125] On both occasions the prosecution was urged to commence that exercise without waiting for the decision.

54. The Trial Chamber is particularly concerned that any further delay in the production of an adequate indictment could well result in an impermissible delay in the commencement of the trial. Because of the number and length of the cases ahead of it in this Trial Chamber's list, the trial in this case has already been delayed in what is unfortunately the ordinary course in the Tribunal. It is therefore vital that, when the Trial Chamber is ready to hear the case, it is ready to proceed. With all the warnings which the prosecution has been given, there can be no prejudice to it if the prosecution is given a very short period after this decision to file the further amended indictment which complies with the principles discussed in the *Krnojelac* Decisions. The only practical effect of the cumulative charging issue in relation to which this decision has been delayed was whether the various cumulative charges could be pleaded without restriction or only in the alternative . That had no effect, or only minimal effect, upon the task of redrafting the indictment .

10 Disposition

55. For the foregoing reasons, **the Trial Chamber determines** as follows:

(i) The complaint by Momir Talic that he has been impermissibly charged with cumulative offences based upon the same facts is dismissed.

(ii) The complaint by Momir Talic that, in the absence of any allegation that the acts charged occurred during an international armed conflict, the allegations of grave breaches of the Geneva Conventions are irrelevant is upheld.

(iii) The complaint by Momir Talic that the amended indictment does not comply with the requirements of the Tribunal's Statute and Rules as interpreted by the jurisprudence of the Tribunal is upheld insofar as it related to a lack of particularity in the pleading, but is

otherwise dismissed.

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

(a) complies with the pleading principles stated in Sections 4 and 5 of this decision , and

(b) pleads, as material facts, that the armed conflict was international in character and the basis upon which such an assertion is made.

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

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

Dated this 20th day of February 2001,
At The Hague,
The Netherlands.

_____

Judge David Hunt
Presiding Judge

[Seal of the Tribunal]

1- Motion for Dismissal of the Indictment, 8 Feb 2000 ("Motion").
2- The original indictment was amended at the request of the prosecution in order to add further charges based on new material: Prosecution's Response to "Motion to Separate Trials" Filed by Counsel for the Accused Momir Talic, 21 Oct 1999, p 2. The need for an amended indictment had already arisen because of some confusion over the extraction of the charges against these two accused in this case – Radoslav Brdanin ("Brdanin") and Talic – from the original, sealed, indictment which charged more than the two accused so far revealed; the confusion is discussed in Prosecutor v Talic, Decision Deferring Decision on Motion for Separate Trials, 4 Nov 1999, pars 4-12.
3- Motion, pp 15-16 (English translation).
4- This is dealt with in the fifth section of the decision, headed "Particularity in pleading". As a matter of convenience, it is dealt with after the section dealing with the alleged responsibility of the accused.
5- This is dealt with in the fourth section, headed "The alleged responsibility of the accused".
6- This is dealt with in the seventh section, headed "Cumulative charging".
7- This is dealt with in the eighth section, headed "The international issue".
8- Counsel for Talic has expressed a fear that a recitation of the allegations in the indictment may be understood as an indication that the Trial Chamber regards as established what are nothing more than allegations: Request to Appeal Against the Decision of 9 March 2000, 16 Mar 2000, p 4 (English translation). The Trial Chamber makes it clear that it is dealing only with the form of the amended indictment, without forming any view as to whether the allegations in it will be established.
9- Amended Indictment, par 6.
10- Ibid, par 7.
11- Ibid, par 8.
12- Ibid, par 16.
13- Ibid, par 16.

14- Ibid, par 8.
15- Ibid, par 22.
16- Ibid, pars 14, 19. The various Crisis Staffs were re-designated as War Presidencies and later as War Commissions, but were still commonly referred to as Crisis Staffs: ibid, par 15.
17- Ibid, par 19.
18- Ibid, pars 11, 20.
19- Ibid, par 20.
20- Ibid, pars 20-21.
21- Ibid, par 21.
22- Ibid, par 16.
23- Ibid, par 18.
24- Ibid, par 23.
25- Count 1, Article 4(3)(a) of the Tribunal's Statute.
26- Count 2, Article 4(3)(e).
27- Count 3, Article 5(h).
28- Count 4, Article 5(b).
29- Count 8, Article 5(d).
30- Count 9, Article 5(i).
31- Count 6, Article 5(f).
32- Count 7, Article 2(b).
33- Count 5, Article 2(a).
34- Count 10, Article 2(d).
35- Count 11, Article 3(b).
36- Count 12, Article 3(d).
37- The time limit imposed by Rule 72 ("not later than thirty days after disclosure by the Prosecutor to the defence of all material and statements referred to in Rule 66(A)(i)") has not yet expired. This is because of the long and protracted course taken by the prosecution seeking protective measures which prevent the identity of certain witnesses being made known to the accused at this stage: Decision on Motion by Prosecution for Protective Measures, 3 July 2000, pars 5-21.
38- Prosecution's Response to "Motion for Dismissal of the Indictment" Filed by Counsel for the Accused Momir Talic, 28 Feb 2000 ("Response").
39- Application for Leave to Reply and Reply to the Response of the Prosecutor of 28 February 2000, 20 Mar 2000 ("Reply").
40- Prosecution's Response as per Scheduling Order of 27 March 2000, 28 Mar 2000 ("Further Response").
41- This was raised in a number of the applications made by the prosecution for protective measures: first, in the Prosecution's Second Motion for Protective Measures for Victims and Witnesses, 31 July 2000, par 10(f); secondly, in the Prosecution's Fourth Motion for Protective Measures for Victims and Witnesses, 21 Sept 2000, par 10(d); and, thirdly, in the Prosecution's Fifth Motion for Protective Measures for Victims and Witnesses, 10 Oct 2000.
42- Memorandum, 11 Oct 2000.
43- Case IT-95-16-T, 14 Jan 2000 ("Kupreškic Judgment").
44- Prosecutor v Delalic, Case IT-96-21-A ("Celebici Appeal").
45- Prosecutor v Aleksovski, Case IT-95-14/1-A, Judgment, 24 Mar 2000 ("Aleksovski Appeal Judgment"), par 113.
46- Case IT-97-25-PT. These warnings were given on 17 Nov 2000 (Status Conference Transcript, pp 220-222) and on 2 Feb 2001 (Ibid, p 262).
47- Status Conference, 2 Feb 2001, Transcript, p 262.
48- Amended Indictment, par 25.
49- Prosecutor v Krnolejac, Decision on Preliminary Motion on Form of Amended Indictment, 11 Feb 2000 ("Second Krnolejac Decision"), par 60; Aleksovski Appeal Judgment, par 171, footnote 319, which cites the Second Krnojelac Decision; Prosecutor v Delalic, Case IT-96-21-A, Judgment, 20 Feb 2001 ("Celebici Appeal Judgment"), par 351.
50- Prosecutor v Tadic, Case IT-94-1-A, Judgment, 15 July 1999 ("Tadic Conviction Appeal Judgment"), par 188.
51- These are summarised in par 2(vii), supra.
52- They are quoted in par 9, supra.
53- Response, par 6.
54- Second Krnojelac Decision, par 23.
55- Amended Indictment, par 23.
56- Ibid, pars 31, 35, 39, 43 and 47.
57- Original Indictment publicly disclosed, par 39.
58- Tadic Conviction Appeal Judgment, pars 185-229.
59- The allegations in these paragraphs of the amended indictment are summarised in par 2(vi)-(viii), supra.
60- Motion, pp 3-4 (English translation); Reply, pp 2-3 (English translation).
61- Motion, pp 5-7 (English translation); Reply, pp 2-4 (English translation).
62- Memorandum, 11 Oct 2000, pars 3, 3.1, 3.2.

63- Prosecutor v Brdanin, Case IT-99-36-PT, Decision on Motion to Dismiss Indictment, 5 Oct 1999, par 15, where reference is made to a submission made, pursuant to Rule 98bis ("Motion for Judgment of Acquittal"), that there is no case to answer.
64- Response, par 7.
65- Status Conference, 17 Nov 2000, Transcript, p 218.
66- The issue of particulars is dealt with in par 27, infra.
67- Tribunal's Statute, Article 21.4(a).
68- Prosecutor v Krnolejac, Case IT-97-25-PT, Decision on the Defence Preliminary Motion on the Form of the Indictment, 24 Feb 1999 ("First Krnojelac Decision"), par 12; Prosecutor v Došen & Kolundžija, Case IT-98-8-PT, Decision on Preliminary Motions, 10 Feb 2000 ("Došen Decision"), par 21; Second Krnolejac Decision, par 17; Prosecutor v Naletilic & Martinovic, Case IT-98-34-PT, Decision on Defendant Vinko Martinovic's Objection to the Indictment, 15 Feb 2000 ("Martinovic Decision"), pars 17-18; Prosecutor v Furundžija, Case IT-95-17/1-A, Judgment, 21 July 2000, par 153; Prosecutor v Krajisnik, Case IT-00-39-PT, Decision Concerning Preliminary Motion on the Form of the Indictment, 1 Aug 2000 ("Krajisnik Decision"), par 8 (Leave to appeal was refused on the basis that there had been no abuse of the Trial Chamber's discretion: Prosecutor v Krajisnik, Case IT-00-39-AR72, Decision on Application for Leave to Appeal the Trial Chamber's Decision Concerning Preliminary Motion on the Form of the Indictment, 13 Sept 2000, p 3).
69- Second Krnojelac Decision, par 18; Krajisnik Decision, par 9.
70- Statute, Article 7(3).
71- Prosecutor v Kvocka, Case IT-99-30-PT, Decision on Defence Preliminary Motions on the Form of the Indictment, 12 Apr 1999 ("Kvocka Decision"), par 17; Second Krnojelac Decision, par 18(A); Krajisnik Decision, par 9.
72- Statute, Article 7(1).
73- First Krnojelac Decision, par 38.
74- Ibid, par 40.
75- Kvocka Decision, par 17; Second Krnojelac Decision, par 18(B).
76- Paragraph 12, supra.
77- Prosecutor v Krnojelac, Decision on Form of Second Amended Indictment, 11 May 2000 ("Third Krnojelac Decision"), par 16.
78- Tribunal's Statute, Articles 18.4, 21.4(a) and 21.4(b), and Rule 47(C); Prosecutor v Tadic, (1995) I JR ICTY 293 at 301, Decision on the Defence Motion on the Form of Indictment, par 12; Prosecutor v Blaškic, 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; First Krnojelac Decision, par 12; Došen Decision, par 8; Second Krnojelac Decision, pars 18(C), 21. The ruling in the Kvocka Decision, at par 17, is consistent with the differing obligations to give particularity, depending upon the proximity of the accused to the acts in question, as stated in the Krnojelac cases.
79- First Krnojelac Decision, par 40; Second Krnojelac Decision, par 57.
80- First Krnojelac Decision, par 42.
81- First Krnojelac Decision, par 58; Third Krnojelac Decision, par 18.
82- Second Krnojelac Decision, pars 33-34, 43; Third Krnojelac Decision, par 18.
83- Prosecutor v Krnojelac, Case IT-97-25-PT, Decision on Prosecutor's Response to Decision of 24 February 1999, 20 May 1999, par 18.
84- Status Conference, 17 Nov 2000, Transcript pp 221-222.
85- See pars 23-25, supra, and par 50, infra.
86- See Rule 66 of the Rules of Procedure and Evidence.
87- Martinovic Decision, par 17.
88- Second Krnojelac Decision, par 60. The statement in the text has been quoted with approval by the Appeals Chamber, in the Aleksovski Appeal Judgment, par 171, footnote 319, and in the Celebici Appeal Judgment, par 351.
89- Motion, pp 8-9 (English translation).
90- Blockburger v United States 284 US 299 (1932), a decision of the US Supreme Court which is discussed later in this decision.
91- Talic also raised in his Reply an argument that the principle upon which Article 10 of the Tribunal's Statute ("Non-bis-in-idem") is based also precludes two convictions upon the same facts within this Tribunal: Reply, par II 2. The Trial Chamber agrees with the prosecution that this principle relates to successive prosecutions upon different charges arising out of the same facts, rather than with cumulative charges in the same prosecution: Further Response, par 2. The authorities are cited in par 36, infra. In any event, the Trial Chamber is now bound by the judgment of the Appeals Chamber in the Celebici Appeal.
92- Motion, p 16 (English translation).
93- Response, pars 9-17.
94- 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, pars 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, par 24; Ibid, Decision on Motion by the Accused Hazim Delic Based on Defects in the Form of the Indictment, 15 Nov 1996, par 22. Leave to appeal was refused in respect of the decisions on both motions: Prosecutor v Delalic, Case IT-96-21-PT, Decision on Application for Leave to Appeal (Form of the Indictment), 15 Oct 1996; Ibid, Decision on Application for Leave to Appeal by Hazim Delic (Defects in the Form of the Indictment), 6 Dec 1996. See also 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, par 32; Prosecutor v Kupreškic, Case No IT-95-16-PT, Decision on Defence Challenges to Form of the Indictment, 15 May 1998, p 3; First Krnojelac Decision, par 5.
95- Kupreškic Judgment, par 719; Martinovic Decision, par 9; Prosecutor v Krstic, Case No IT-98-33-PT, Decision on Defence Preliminary Motion on the Form of the Amended Indictment, Counts 7-8, 28 Jan 2000 ("Krstic Decision"), pp 6-7.
96- Kupreškic Judgment, pars 681-682, 693.
97- Ibid, par 719.
98- 284 US 299 (1932), at 304.
99- Kupreškic Judgment, par 720.
100- Ibid, pars 724-726.
101- Ibid, par 727 (the emphasis appears in the original).
102- North Carolina v Pearce, 395 US 711 (1969), at 717: The double jeopardy clause "protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense." See also Green v United States 355 US 184 (1957), at 187-188; United States v Dixon 509 US 688 (1993), at 696, 704. See also First Krnojelac Decision, par 9.
103- Abney v United States 431 US 651 (1977), at 660-662.
104- Ohio v Johnson 467 US 493 (1984), at 500: "While the Double Jeopardy Clause may protect a defendant against cumulative punishments for convictions on the same offense, the Clause does not prohibit the State from prosecuting respondent for such multiple offenses in a single prosecution."
105- See Martinovic Decision, par 12. This Trial Chamber acknowledges that there may be specific examples of obviously duplicative charging, where there is no reason in the particular circumstances that the prosecution needs to see how the evidence turns out before selecting the most appropriate charge. In those circumstances, it may be oppressive to allow cumulative charging.
106- Krstic Decision, pp 6-7.
107- Prosecutor v Tadic, Case No IT-94-1-T, Decision on the Defence Motion on Form of Indictment, 14 Nov 1995, par 17.
108- Celebici Appeal Judgment, par 400; Separate and Dissenting Opinion by Judge Hunt and Judge Bennouna, par 12.
109- Motion, p 14 (English translation). Reliance is placed upon Prosecutor v Tadic (1995) I JR ICTY 353 ("Tadic Jurisdiction Appeal Decision"), at 443-445 (pars 79 and 81).
110- Motion, pp 14-15 (English translation).
111- Ibid, p 16 (English translation).
112- Response, par 20.
113- Ibid, pars 20-21. The Appeals Chamber held that, for the period with which the Tadic case was concerned, the armed forces of what is described as the Republika Srpska were to be regarded as 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 authority of Bosnia and Herzegovina must be classified as an international armed conflict: Tadic Conviction Appeal Judgment, pars 162, 167.
114- Reply, p 5 (English translation).
115- Tadic Conviction Appeal Judgment, par 167.
116- Memorandum Relating to Prosecutor's Response of 15 May 2000, 16 May 2000, par 3 (filed in relation to Talic's Request for Disqualification of a Trial Judge, 4 May 2000).
117- See Aleksovski Appeal Judgment, par 113(iii).
118- Tadic Jurisdiction Appeal Decision, pars 79-84. This interpretation was restated in, and not contested by the parties to, the subsequent Tadic Conviction Appeal Judgment, at pars 80-83.
119- First Krnojelac Decision, par 12 (footnote 19).
120- Third Krnojelac Decision, par 22.
121- Tadic Conviction Appeal Judgment, pars 162, 167. That was the evidence upon which the Appeals Chamber relied, although the legal test which it applied referred only to "overall control" (pars 137, 145).
122- A motion was filed concerning the form of that indictment, but this point was not argued: Prosecutor v Tadic (1995) I JR ICTY 293, Decision on the Defence Motion on the Form of the Indictment. At the time when that motion was filed and disposed of, the Appeals Chamber had not given its Tadic Jurisdiction Appeal Decision which established the requirement.
123- Prosecutor v Krnojelac, Case IT-97-25-PT, Decision on Prosecutor's Response to Decision of 24 February 1999, 20 May 1999, pars 7-8.
124- Paragraph 8, supra. See also par 54, infra.
125- Status Conference, Transcript, T 262.

PROSECUTION AUTHORITIES

8. *Prosecutor v. Krajisnic,* IT-00-39-PT, "Decision Concerning Preliminary Motion on the Form of the Indictment," 1 August 2000.

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IN THE TRIAL CHAMBER

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

Registrar:
Dorothee de Sampayo Garrido-Nijgh

Order of:
1 August 2000

PROSECUTOR

v.

MOMCILO KRAJISNIK

DECISION CONCERNING PRELIMINARY MOTION ON THE FORM OF THE INDICTMENT

Office of the Prosecutor:

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

Counsel for the Accused:

Mr. Goran Neskovic

I. INTRODUCTION

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

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

HEREBY ISSUES ITS WRITTEN DECISION.

II. ARGUMENTS OF THE PARTIES

A. The Defence

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

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

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

B. The Prosecution

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

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

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

III. APPLICABLE LAW

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

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

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

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

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

IV. ANALYSIS

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

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

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

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

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

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

V. DISPOSITION

PURSUANT TO Rule 72 of the Rules,

THE TRIAL CHAMBER HEREBY DISMISSES the Defence motion.

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

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Richard May
Presiding

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

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

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