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

IN THE TRIAL CHAMBER

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

Registrar: Mr Robin Vincent

Date filed: 17 November 2003

THE PROSECUTOR

Against

ALLIEU KONDEWA

CASE NO. SCSL – 2003 – 12 – PT

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

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

Defence Counsel:
James MacGuill
James Evans
Charles Margai

SPECIAL COURT FOR SIERRA LEONE
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INTRODUCTION

1. The Prosecution submits this Response to Defence Preliminary Motion based on Defects in the Form of the Indictment ("**the Defence Motion**") filed on behalf of Allieu Kondewa ("**the Accused**") on 7 November 2003.

2. In the Defence Motion, the Defence challenges the Prosecution's Indictment against the Accused on the following grounds:
   (a) that the Prosecution has failed to distinguish clearly and specify the alleged acts for which the Accused incurs criminal responsibility under Article 6.1 of the Statute of the Special Court for Sierra Leone and that such failure inhibits the ability of the Accused to adequately conduct his defence;
   (b) that the inclusion of the phrases "*included but not limited to*", "*about*" and "*but not limited to these events*", render the Indictment vague and imprecise, and impede the Accused to adequately conduct his defence.

3. On the basis of these grounds, the Defence prays for the following relief from the Trial Chamber:

   (a) that all counts in the Indictment against the Accused which are based on Article 6.1 should be dismissed, or in the alternative that the Prosecution be made to elect which form of responsibility is alleged for each count of the Indictment;

   (b) in addition or in the alternative, that the Trial Chamber makes an order that Prosecution delete certain words and phrases from the indictment specified in paragraphs 14 to 23 of the Motion, to wit: "*included but not limited to*", "*about*", and "*but not limited to these events*".

4. The Prosecution submits that having regard to the Statute for the Special Court for Sierra Leone, the Rules of Procedure and Evidence for the Special Court for Sierra Leone and the applicable jurisprudence, the Indictment against Allieu Kondewa in its current form is sufficient to put the Accused on notice of the charges brought against him to enable him to prepare his defence, and that therefore the present Motion should be dismissed.

ARGUMENT

A. Failure to distinguish and specify alleged acts for which Accused incurs criminal responsibility under Article 6.1

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

6. Further, the Prosecution submits that it is at liberty to plead all of the forms of responsibility under Article 6.1, whether cumulatively or alternatively, provided the evidence exists to prove such modes of liability at the trial. This position is supported by jurisprudence from this Court and from the International Criminal Tribunal for

Yugoslavia[1]. In essence, the Prosecution may freely allege all modes of responsibility, and may apply some or all of these modes, and in such combination as is deemed necessary.

7. As regards compliance with Rule 47(c), the Prosecution submits that the Indictment against the Accused meets the standard under this rule in that it sufficiently informs the Accused of the charges against him. The Prosecution further submits that through the witness statements disclosed to the Defence, the Accused has already been provided with additional material to provide him adequate facilities to prepare his defence.

8. An indictment functions as an accusatory instrument to put the Accused on notice of the charges against him[2]. The Prosecution submits that the Indictment in the instant case sufficiently puts the Accused on notice of the charges against him. The Prosecution further submits that the degree of specificity required in an indictment is "dependent upon whether it sets out material facts of the Prosecution case with enough detail to inform the Accused clearly of the charges against him so he may prepare his defence."[3]

B. Phrases in the Indictment

9. Contrary to the Defence arguments in paragraph 2(ii) and paragraphs 12 - 21 of the Motion, the phrases "*including but not limited to*", "*about*", 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.[4] Where it is alleged that the Accused' participation in the underlying, substantive crimes was less direct, the degree of precision required in relation to the material facts is less.

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[1] *Prosecutor v. Sesay*, "Decision on Defence Preliminary Motion on Defect in the Form of the Indictment", SCSL-2003-05-PT, 13 October 2003, para.9; *Prosecutor v Mile Mrksic*, IT-95-13/1-PT,"ICTY Decision on Form of the Indictment", 19 June 2003.

[2] *Prosecutor v. Kupreski, and others*, "Appeal Judgment", IT-95-16-A, 23 October 2001, para 88.

[3] *Prosecutor v. Elizaphan & Gerard Ntakirutimana,* ICTR-96-10-T & ICTR-96-17-T, "Judgement and Sentence," 21 February 2003, para 42. The Court held that the jurisprudence on specificity for the tribunals "translates to an obligation to state the material facts underpinning the charges of the indictment **but not the evidence by which these facts will be proven** [Emphasis added]."

[4] *Prosecutor v. Krajisnik, Decision Concerning Preliminary Motion on the Form of the Indictment,* IT-00-39-PT, 1 August 2000, para 9. See also *Ntakitutimana, supra* note 3 at para 49.

10. The Prosecution submits that it is required to plead in the indictment sufficient information to put the Accused on notice of the charges against him. In this regard, 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.[5] In the instant case, the Prosecution submits that the dates, locations and offences charged are sufficiently clear to notify the Accused of the charges against him and for him to conduct a defence. The location and approximate dates of the crimes with which the Accused is charged are listed throughout the Indictment, in particular in paragraphs 20 - 24.

11. Furthermore, as regards the use of the phrase "*about*" to denote a time period of the commission of an offence charged, the Prosecution submits that this practice is acceptable in pleadings in indictments before International Tribunals, albeit in qualified circumstances. In *Kayishema*[6] it was held, upholding the use of the phrases "*around*" and "*about*" that it is unnecessary for the Prosecution to prove an exact date where the date or time is not also a material element to the offence. The Prosecution submits that the phrase "*about*" as pleaded in the instant case covers an extended period of time that gives the Accused a sufficient sense of time concerning commission of offences charged. Therefore, time is not a material element to the offences.

12. It is worth noting also in the instant case that 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 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 to fully 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.

13. The Prosecution submits that the Defence request for an Order to delete certain words and phrases from the indictment be dismissed. However, should the Trial Chamber deem it necessary for the Prosecution to provide additional information, the Prosecution submits that it should do so by means of a Bill of Particulars. The Prosecution submits

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[5] *Prosecutor v. Kupreski*, and others, Note 2, *supra.*

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

that the use of a Bill of Particulars to provide additional information would more expeditiously resolve preliminary issues before trial.

CONCLUSION

For the above reasons, the Prosecution prays that the Defence Motion be dismissed in its entirety.

Freetown, 17 November 2003

For the Prosecution,

Luc Côté
Chief of Prosecutions

James C. Johnson
Senior Trial Counsel

Mohamed A. Bangura
Associate Trial Counsel

PROSECUTION INDEX OF AUTHORITIES

1. *Prosecutor v. Issa Hassan Sesay,* SCSL-2003-05-PT, Decision on Preliminary Motion on defect in the Form of the Indictment, 13 October 2003.

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

3. *Prosecutor v. Kupreski, and others*, IT-95-16-A, "Appeal Judgment", 23 October 2001.

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

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

6. *Prosecutor v. Kayishema*, "Judgement", ICTR-95-1-T, 21 May 1999.

PROSECUTION AUTHORITIES

1. *Prosecutor v. Issa Hassan Sesay,* SCSL-2003-05-PT, Decision on Preliminary Motion on defect in the Form of the Indictment, 13 October 2003.

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SPECIAL COURT FOR SIERRA LEONE
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THE TRIAL CHAMBER

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

Registrar: Robin Vincent

Date: 13th day of October 2003

The Prosecutor against

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

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

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

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

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

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

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

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

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

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

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

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

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

NOTING THE SUBMISSIONS OF THE PARTIES

The Defence Motion:

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

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

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

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

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

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

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

The Prosecution's Response

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

The Defence Reply

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

AND HAVING DELIBERATED AS FOLLOWS:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[10] *Krnojelac, supra 6.*

[11] *Ntakirutimana, supra 4.*

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

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

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

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

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[13] See *Archbold International Criminal Courts, Practice, Procedure and Evidence*, Sweet & Maxwell Ltd., London, 2003 at para 6-45 where it is stated: In examining the position of indictments in national law and the degree of specificity required, the Trial Chamber in *Prosecutor v. Kvocka*, Decision on Defence Preliminary Motions on the form of the Indictment, April 12, 1999, paras 14-18, recognized that although a minimum amount of information must be provided in an indictment for it to be valid in form, the "degree of particularity required in indictments before the International Tribunal is different from, and perhaps not as high as, the particularity required in domestic criminal law jurisdictions. The Trial Chamber at para17, stipulated that this difference is partly due to the massive scale of the crimes falling within the Tribunal's jurisdiction, which might make it impossible to identify all the victims, the perpetrators and the means employed to carry out the crimes.

Paragraph 25 of the Indictment alleges:

> "ISSA HASSAN SESAY, by his acts or omissions, is individually criminally responsible pursuant to Article 6.1 of the Statute for the crimes referred to in Articles 2, 3, and 4 of the Statute as alleged in this Indictment, which crimes the ACCUSED planned, instigated, ordered, committed or in whose planning, preparation or execution the ACCUSED otherwise aided and abetted, or which crimes were within a joint criminal enterprise in which the ACCUSED participated or were reasonably foreseeable consequence of the joint criminal enterprise in which the ACCUSED participated.

Paragraph 26 of the Indictment alleges:

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

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

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

Article 6 (3) provides as follows:

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

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

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[14] *Supra 11.*

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

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

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

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

(ii) in relation to subordinates, sufficiently identified;

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

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

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

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

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

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[16] *Supra* 11.

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

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

15. It is also contended by the Defence that each count charging superior responsibility under Article 6 (3) of the Statute should include "the relationship between the accused and the perpetrators as well as the conduct of the accused by which he may be found (a) to have known or had reason to know that the acts were about to be done, or had been done, by those others, and (b) to have failed to take necessary and reasonable measures to prevent such acts or to punish the persons who did them" (para. 8 of the Motion). In response, the Prosecution submits that the Indictment sufficiently pleads the relationship between the Accused and the perpetrators for purposes of superior responsibility at paragraphs 17-19.

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

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

[18] See *Kvocka, supra* 12.

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

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

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

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

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

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

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

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

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

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

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[21] See *Prosecutor v. Nahimana, supra 8.*

[22] *The Prosecutor v. Laurent Semanza, supra 2.*

[23] Id.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[25] *Kupreskic, supra* 2.

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

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

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

Done at Freetown on the 13th day of October 2003

Judge Bankole Thompson
Presiding Judge, Trial Chamber

[26] Pages 1409 -1481.

PROSECUTION AUTHORITIES

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

1458
Case No.: IT-95-13/1-PT

IN TRIAL CHAMBER II

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

Registrar:
Mr Hans Holthuis

Decision of:
19 June 2003

PROSECUTOR
v.
MILE MRKSIC

DECISION ON FORM OF THE INDICTMENT

The Office of the Prosecutor:

Mr Jan Wubben

Counsel for the Accused:

Mr Miroslav Vasic

1. Background

1. Trial Chamber II ("Trial Chamber") of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 ("Tribunal") is seised of a series of Defence filings[1] by which the Defence challenges the form of the Second Amended Indictment in the present case, and the Prosecution's responses[2] thereto. The Defence generally alleges that the Prosecution has not set out all of the relevant material facts and has provided insufficient supporting evidence to allow the Defence to properly prepare its case. The Prosecution submits that all relevant material facts have been provided and that the sufficiency of the evidence is a matter for trial.

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

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

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

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

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

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

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

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

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

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

2. Preliminary comments

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

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

3. General pleading principles

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

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

be entitled to be informed in detail of the nature and cause of the charge against him. This provision also applies to the form of indictments.[10] This right translates into an obligation on the Prosecution to plead the material facts underpinning the charges in an indictment.[11] The pleadings in an indictment will therefore be sufficiently particular when it concisely sets out the material facts of the Prosecution case with enough detail to inform an accused clearly of the nature and cause of the charges against him enabling him to prepare a defence effectively and efficiently.[12]

8. The materiality of a particular fact is dependent on the nature of the Prosecution case.[13] A decisive factor in determining the degree of specificity with which the Prosecution is required to particularise the facts of its case in an indictment is the nature of the alleged criminal conduct charged to the accused,[14] which includes the proximity of the accused to the relevant events.[15] The precise details to be pleaded as material facts are of the acts of the accused, rather than the acts of those persons for whose acts he is alleged to be responsible.[16]

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

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

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

(b) the accused knew or had reason to know that the crimes were about to be or had been committed by those others,[24] and (ii) the related conduct of those others for whom he is alleged to be responsible.[25] The facts relevant to the acts of those others will usually be stated with less precision,[26] the reasons being that the detail of those acts (by whom and against whom they are done) is often unknown, and, more importantly, because the acts themselves often cannot be greatly in issue;[27] and

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

11. All legal prerequisites to the application of the offences charged constitute material facts and must be pleaded in the indictment.[29] With respect to the relevant state of mind (*mens rea*), either the specific state of mind itself should be pleaded (in which case, the facts by which that material fact is to be established are ordinarily matters of evidence, and need not be pleaded), or the evidentiary facts from which the state of mind is necessarily to be inferred, should be pleaded.[30]

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

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

13. Generally, an indictment, as the primary accusatory instrument, must plead with sufficient particularity the material aspects of the Prosecution case, failing which it suffers from a material defect.[33] In the light of the primary importance of an indictment, the Prosecution cannot cure a defective indictment by its supporting material and pre-trial brief.[34] In the situation where an indictment does not plead the material facts with the requisite degree of specificity because the necessary information is not in the Prosecution's possession, doubt must arise as to whether it is fair to the accused for the trial to proceed.[35] The Prosecution is therefore expected to inform the accused of the nature and cause of the case, as set out above, before it goes to trial. It is unacceptable for it to omit the material facts in the indictment with the aim of moulding the case against the accused in the course of the trial depending on how the evidence unfolds.[36] Where the evidence at trial turns out differently than expected, the indictment may be required to be amended, an adjournment may be granted or certain evidence may be excluded as not being within the scope of the indictment.[37]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

6. Defence objections relating to facts supporting charges

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

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

refused.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Joint Criminal Enterprise

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

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

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

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

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

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

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

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

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

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

Pleading different heads of responsibility under Article 7(1)

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

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

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

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

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

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

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

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

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

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

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

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

9. Disposition

68. Pursuant to Rule 72,

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

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

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

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

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

(b) The remainder of the Motion is denied.

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

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

Wolfgang Schomburg
Presiding Judge

[Seal of the Tribunal]

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

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

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

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

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

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

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

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

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

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

Footnote 11 - *Kupreskic* Appeal Judgment (with reference to Arts 18(4), 21(2) and 21(4)(a) and (b) of the Statute and Rule 47(C)); and *Prosecutor v Hadzihasanovic, Alagic (†) and Kubura*, Case IT-01-47-PT, Decision on Form of Indictment, 7 December 2002 ("*Hadzihasanovic* Indictment Decision"), par 8.

Footnote 12 - See *Kupreskic* Appeal Judgment, par 88; Arts 18(4), 21(2) and 21(4)(a) and (b) of the Statute; and Rule 47(C) of the Rules of Procedure and Evidence ("Rules"), which essentially restates Art 18(4).

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

Footnote 14 - *Ibid*, par 89.

Footnote 15 - *Hadzihasanovic* Indictment Decision, par 10; *Prosecutor v Brdjanin and Talic*, Case IT-99-36-PT, Decision on Objections by Momir Talic to the Form of the Amended Indictment, 20 February 2001 ("First *Brdjanin & Talic* Decision"), par 18. It is essential for the accused to know from the indictment just what that alleged proximity is: *Prosecutor v Brdjanin and Talic*, Case IT-99-36-PT, Decision on Objections by Radoslav Brdjanin to the Form of the Amended Indictment, 23 February 2001 ("Second *Brdjanin & Talic* Decision"), par 13.

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

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

Footnote 18 - *See ibid*, par 351; *Prosecutor v Aleksovski*, Case IT-95-14/1-A, Judgement, 24 March 2000, par 171, fn 319 (with reference to *Prosecutor v Krnojelac*, Case IT-97-25-PT, Decision on Preliminary Motion on Form of Amended Indictment, 11 February 2001 [illegible]).

Footnote 19 - *Eg*, in a case where the Prosecution alleges that an accused personally committed the criminal acts, the material facts, such as the identity of the victim, the time and place of the events and the means by which the acts were committed, have to be pleaded in detail (*Kupreskic* Appeal Judgment, par 89), whereas, in a joint criminal enterprise case, different material facts would have to be pleaded (*see also Prosecutor Brdjanin and Talic*, Case IT-99-36-PT, "Decision on Form of Further Amended Indictment and Prosecution Application to Amend", 26 June 2001 ("Third *Brdjanin & Talic* Decision"), pars 21, 22).

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

Footnote 21 - *Deronjic* Decision, par 19.

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

Footnote 23 - Statute, Art 7(3); see *Hadzihasanovic* Indictment Decision, pars 11 and 17; see also First *Brdjanin & Talic* Decision, par 19; *Prosecutor v Krajisnik*, Case IT-00-39-PT, Decision Concerning Preliminary Motion on the Form of the Indictment, 1 August *2000* ("*Krajisnik* Decision"), par 9; First *Krnojelac* Decision, par 9.

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

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

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

Footnote 27 - See *Hadzihasanovic* Indictment Decision, par 11; First *Brdjanin & Talic* Decision, par 19; *Prosecutor v Kvocka*, Case IT-99-30-PT, Decision on Defence Preliminary Motions on the Form of the Indictment, 12 April 1999 ("*Kvocka* Decision"), par 17; First *Krnojelac* Decision, par 18(A); *Krajisnik* Decision, par 9. The exact relationship between this material fact and that of effective control, i.e. the *material ability* of a superior to prevent or punish criminal conduct of

subordinates, need not be considered here.
Footnote 28 - Statute, Art 7(3); *see Hadzihasanovic* Indictment Decision, par 11; First *Brdjanin & Talic* Decision, par 19 (rolling facts (b) and (c) together); *Krajisnik* Decision, par 9.
Footnote 29 - *Hadzihasanovic* Indictment Decision, par 10.
Footnote 30 - Third *Brdjanin & Talic* Decision, par 33.
Footnote 31 - *Hadzihasanovic* Indictment Decision, par 10; *Prosecutor v Brdjanin and Talic*, Case IT-99-36-PT, Decision on Form of Fourth Amended Indictment, 23 November 2001, par 12; First *Brdjanin & Talic* Decision, par 48.
Footnote 32 - *Hadzihasanovic* Indictment Decision, par 10; First *Brdjanin & Talic* Decision, par 48.
Footnote 33 - *Kupreskic* Appeal Judgment, par 114.
Footnote 34 - If the Defence is denied the material facts as to the nature of the accused's responsibility for the events pleaded until the pre-trial brief is filed, it is almost entirely incapacitated from conducting any meaningful investigation for trial until then (*see* Second *Brdjanin & Talic* Decision, pars 11-13).
Footnote 35 - *Kupreskic* Appeal Judgment, par 92.
Footnote 36 - *Ibid.*
Footnote 37 - *Ibid.*
Footnote 38 - *Ibid*, par 88. It can be left open whether the view expressed by the Appeals Chamber is an *obiter dictum* only, and whether there may not be exceptional cases in which the Prosecution may be required to plead the evidence in an indictment.
Footnote 39 - Defence Motion, pars 2, 4.
Footnote 40 - Defence Motion, par 16, Defence Reply, pars 12, 15, 16.
Footnote 41 - Defence Motion, par 5.
Footnote 42 - Defence Motion, pars 4, 5, Defence Reply 4.
Footnote 43 - Defence Reply, pars 16, 17.
Footnote 44 - Prosecution Response, pars 8, 20. Including with regard to: the command position held by the Accused; the identity of the participants in the joint criminal enterprise; the location and approximate time of each criminal event; the person or persons involved in the crimes committed; the manner in which the crimes were committed; the nature of the Accused's participation in the crimes; and the identities of the victims (Prosecution Response, par 8).
Footnote 45 - Prosecution Response, par 15.
Footnote 46 - Prosecution Response, pars 12, 30.
Footnote 47 - Prosecution Response, par 30.
Footnote 48 - *See* par 14 above.
Footnote 49 - "Although it is no longer necessary for an amended indictment to be "confirmed" after the case has been assigned to a Trial Chamber, leave will not be granted to *add* new allegations to an indictment unless the prosecution is able to demonstrate that it has material to support these new allegations - unless, of course, the evidence has already been given and the indictment is being amended merely to accord with the case which has been presented", *Prosecutor v Brdjanin and Talic*, Case IT-99-36-PT, Decision on Form of Fourth Amended Indictment, 23 November 2001, par 21.
Footnote 50 - Namely persecution (count 1), extermination (count 2), imprisonment (count 5) and torture, both as a crime against humanity (count 6) and as a violation of the laws or customs of war (count 8).
Footnote 51 - Defence Response, par 10; Defence Motion, par 30 regarding persecution in particular.
Footnote 52 - Defence Response, par 6.
Footnote 53 - Prosecution Reply, par 9.
Footnote 54 - "It is somewhat of a paradox that the Prosecution now wishes to charge the Accused with these additional charges if one bears in mind that the Prosecution claims that even though the perpetrators of the crimes against the victims in Ovcara were in fact members of the local territorial defence units, these charges did not exist when a member of the government of Eastern Slavonia, Baranje and Western Srem was tried, under whose command the said units were." (Defence Response, par 10)
Footnote 55 - Prosecution Reply, par 9.
Footnote 56 - Defence Response, par 11.
Footnote 57 - Defence Response, par 11.
Footnote 58 - Defence Response, pars 11, 12. *See also* par 6, in which the Defence submits that the Accused "is placed in a more difficult position *id est* he is expected to prove a fact which is incompatible with both his own role and the role of the army to which he belonged".
Footnote 59 - Prosecution Reply, par 10.
Footnote 60 - Prosecution Reply, par 12.
Footnote 61 - Defence Response, par 6.
Footnote 62 - *See* par 13 above. *See also* Prosecution Reply, par 11.
Footnote 63 - Defence Motion, par 8.
Footnote 64 - *See eg. Prosecutor v Milutinovic and Others*, Case IT-99-37-AR72, Decision on Drgoljub Ojdanic's Motion Challenging Jurisdiction –Joint Criminal Enterprise, 21 May 2003.
Footnote 65 - Defence Response, pars 7, 11; Defence Motion, pars 8, 22, 25, 29.
Footnote 66 - Prosecution Response, par 30.

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

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

PROSECUTION AUTHORITIES

3. *Prosecutor v. Kupreski, and others*, IT-95-16-A, "Appeal Judgment", 23 October 2001.

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IN THE APPEALS CHAMBER

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

Registrar:
Mr. Hans Holthuis

Judgement of:
23 October 2001

PROSECUTOR

v

ZORAN KUPRESKIC
MIRJAN KUPRESKIC
VLATKO KUPRESKIC
DRAGO JOSIPOVIC
VLADIMIR SANTIC

APPEAL JUDGEMENT

The Office of the Prosecutor:

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

Counsel for the Defendants:

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

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

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

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

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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

Or. : Eng.

TRIAL CHAMBER I

Before Judges:
Erik Møse, Presiding
Navanethem Pillay
Andrésia Vaz

Registrar: Adama Dieng

Judgement of: 21 February 2003

THE PROSECUTOR
V.
ELIZAPHAN and GÉRARD NTAKIRUTIMANA

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

JUDGEMENT AND SENTENCE

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CHAPTER II

FACTUAL FINDINGS

1. Introduction

39. This Chapter contains an assessment of the evidence adduced by the Prosecution in support of its case. The Chamber will consider the specific events alleged in the Mugonero and Bisesero Indictments in approximate chronological order (see II.3 and 4, respectively). In connection with its discussion of the Prosecution evidence the Chamber will take into account the submissions of the Defence concerning the credibility of witnesses who testified against the two Accused. It will also discuss the Accused's alibi in relation to the events in the Indictments.

40. Before doing so, the Chamber will consider whether the Indictments provide the Accused with sufficient information on the nature of the charges against them, as required by the Statute and the Rules of the Tribunal (II.2). This issue was not included in the closing briefs submitted by the parties. The Chamber therefore invited the parties to address the issue during their closing arguments. [44]

41. The remaining components of the Defence case are considered in section II.5 and the following sections. After a brief section on the alibi submissions (II.5) comes the Chamber's assessment of the contention that the allegations against the Accused are totally inconsistent with their previous life and character (II.6). Furthermore, the Defence argues that there was a political campaign against the Accused (II.7).

2. Specificity of the Indictments

2.1 Introduction

42. According to Article 17 (4) of the Statute, an indictment shall contain "a concise statement of the facts and the crime or crimes with which the accused are 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". It follows from case law that the Prosecution's obligation to set out concisely the facts of its case in the indictment must be interpreted in conjunction with Articles 20 (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 *ad hoc* Tribunals, 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. 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 an accused clearly of the charges against him so that he may prepare his defence. Reference is made to the ICTY Appeals Chamber's Judgement in *The Prosecutor v. Kupreskic et al.* (henceforth *Kupreskic*), which was delivered on 23 October 2001, more than a month after the commencement of the trial in the present case. [45]

43. In *Kupreskic*, the Appeals Chamber found that the convictions of two of the Accused were based

on material facts not specifically pleaded in the Indictment. Furthermore, it concluded that the defects in the Indictment had not been cured, because timely, clear and consistent information had not been provided to the Accused. The trial was therefore considered unfair in relation to these Accused, and their convictions were overturned. In the present case, some paragraphs of the Mugonero and Bisesero Indictments are rather generally formulated. These paragraphs give rise to the question whether the Indictments were pleaded with sufficient particularity.

2.2 Prosecution

44. Counsel for the Prosecution sought to distinguish the facts dealt with in *Kupreskic* from the facts in the present case. He submitted that the main paragraphs of the Bisesero Indictment allege, firstly, that the two Accused went to Bisesero in April, May and June; secondly, that they went there in convoys of attackers; and thirdly, that they participated in attacks in the Bisesero area. According to the Prosecution, the first two allegations are contained in the Indictment and the supporting material. [46] The Accused had the opportunity to challenge the Indictments at the pre-trial stage, as well as after the close of the Prosecution's case (by way of a motion for acquittal under Rule 98*bis*), but failed to do so. Certain specific allegations, such as the killings at Murambi Church alleged by Witness YY, or the killing of Ignace Rugwizangoga at Murambi Hill alleged by Witness GG, [47] came to the Prosecution's attention just prior to the testimony of the witnesses concerned. In the Prosecution's view, the allegation should not have come as a surprise to the Defence because it follows from paragraph 4.14 of the Bisesero Indictment that the Accused allegedly participated in the killing of refugees. [48]

2.3. Defence

45. Counsel for Elizaphan Ntakirutimana argued that paragraph 91 of *Kupreskic* (which states that where it is practicable for the Prosecution to plead with specificity the identity of the victims, etc., it must do so) impacts on both Indictments, but especially on the Bisesero Indictment. No victims of the killings were identified by name and there was no particularization of the time and place of their commission. Consequently, the Indictment did not provide sufficient information. [49]

46. Counsel for Gérard Ntakirutimana submitted that there is no difference in the principles governing ICTY and ICTR indictments. The statutory provisions of the two Tribunals are in this respect substantially the same. Citing particularly paragraphs 114 and 117 of *Kupreskic*, he argued that the Bisesero Indictment did not meet the high standard set for Indictments in *Kupreskic*, as it was vague, wholly lacking in particularity and did not mention places. Names and particulars were not included in either Indictment and were not given to the Defence in sufficient time to enable it to prepare its case. [50]

47. According to Counsel for Gérard Ntakirutimana it follows from *Kupreskic* that the new allegations made by Witnesses YY and GG during their testimony must be excluded. That Judgement established that material facts on which the Prosecution's case is based cannot be allowed to unfold during trial. The Prosecution has to proceed without them. Counsel submitted that the new information had prejudiced the Defence because incriminating evidence had been provided unexpectedly after the hearing of several Prosecution witnesses, who could not be cross-examined anew. The Defence stressed that both Indictments are silent about many events on which the Prosecution led evidence. [51]

48. The Defence made similar observations in its closing brief, although without reference to *Kupreskic*. For example, it was argued that Witnesses YY, DD, KK, VV, and UU "withheld their most extreme testimony for trial to prevent the defense from preparing to counter it." [52] In relation to a certain part of the oral testimony of Witness MM the Defence stated that the introduction of new and

critical information was highly improper, violated the Prosecution's legal and ethical obligation to the Tribunal and the Accused, and thereby improperly prejudiced the administration of justice. [53] The Defence submitted that the testimony of every factual witness conflicted with or covered matters not mentioned in prior statements, and that this violated the rights of an accused to be given notice of the charges and the evidence to be presented against him so that he can challenge the charges and prepare his defence. [54]

2.4 Discussion

49. As mentioned above, if follows from the Statute and the Rules that the Prosecution is under an obligation to state the material facts underpinning the charges in the Indictment, but not the evidence by which such material facts are to be proven. In *Kupreskic*, the Appeals Chamber interpreted the Prosecution's obligation in the following way:

> 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. 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" [footnote omitted].
>
> 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.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.
>
> ...
>
> 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. 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. 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.

...

> 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. ... [55]

50. The Chamber notes that the allegations under consideration by the Appeals Chamber in *Kupreskic* related to the attack on the house of a victim and formed the basis of the verdict of crimes against humanity (persecution). Had the Trial Chamber in that case not concluded that the Prosecution had successfully proven that allegation, the two convictions could not have been sustained. The Appeals Chamber found that the attack constituted a material fact in the Prosecution case against two of the Accused and should have been specifically pleaded in the Indictment. [56] It is further noted that the conviction was made on the basis of the testimony of a single witness.

51. The Indictments in the case concerning Elizaphan and Gérard Ntakirutimana are distinguishable from *Kupreskic*. The allegations include charges of genocide, complicity in genocide, conspiracy to commit genocide and crimes against humanity (murder). The general principles laid down by the Appeals Chamber in *Kupreskic* are, of course, still applicable to the present case.

52. In this connection the Chamber does not accept the Prosecution's submission that the Defence sat on its rights and did not challenge the lack of specificity in the Indictments. Such challenges were in fact made, albeit to an earlier version of the Mugonero Indictment, by a Defence motion filed on 17 April 1997 and decided upon by Trial Chamber II, which included references to a similar decision by Trial Chamber I (differently constituted) concerning the Bisesero Indictment. [57] Moreover, irrespective of previous challenges, the Chamber must apply principles expressed subsequently by the Appeals Chamber.

53. The concise statement of facts of the Mugonero Indictment contains three paragraphs concerning the attack on the Mugonero Complex on 16 April 1994. These paragraphs allege that the two Accused went together in a convoy with armed individuals to the Complex on the morning of that day (4.7) and that the Accused, along with others, participated in the attack which continued throughout the day (4.8). The equivalent provision in the Bisesero Indictment (4.8) adds that the attack continued into the night. Both Indictments allege (4.9) that the attack resulted in hundreds of dead and wounded.

54. According to the first allegation, the two Accused were part of a convoy of armed individuals heading for the Complex in the morning of 16 April 1994. The Chamber considers this description sufficiently precise. The second allegation states that the Accused participated in the attack on that date. This is less precise. It is not alleged that they killed or wounded anyone, nor does it otherwise specify the way in which they allegedly participated in the attack. However, the Chamber does not consider this part of the Indictment vague or so broadly formulated as to hinder the preparation of the Defence case. The attack was particularized to have occurred on a particular date (16 April 1994) and at a specified location (the Mugonero Complex). Large numbers of persons were killed and wounded during the attack. It is the view of the Chamber that the factual allegations in the Indictment, read in conjunction with the charges, provide the Accused with reasonable notice of the Prosecution's case against them.

This being said, it follows from *Kupreskic* that if the Prosecution was, when it drew up the Indictment, in a position to provide details, it should have done so. [58]

55. The Chamber recalls that, according to *Kupreskic*, the degree of specificity required in indictments depends on the nature of the alleged criminal conduct charged to the accused. 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, the time and place of the events, and the means by which the acts were committed. According to the Appeals Chamber, one example is where the accused 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". [59]

56. The statement of facts in the Bisesero Indictment contains six paragraphs (4.11-4.16) concerning attacks in the Bisesero area. According to paragraphs 4.13 and 4.15, the Accused participated in convoys and searched for, attacked, and killed Tutsi persons. However, there is no specification of time, date, location, victims, or other material details concerning any single attack.

57. Previous judgements of the Tribunal have established that there were regular attacks in the Bisesero region from April 1994 through June 1994. The victims were men, women and children who were predominantly Tutsi and who had sought refuge in the Bisesero region. Thousands of Tutsi were killed, injured and maimed. [60] Similar findings follow from the evidence in the present case. In a situation with frequent attacks in the same area it may be difficult for the Prosecution to provide precise evidence, several years after the events, about specific attacks on particular dates against named victims in precise locations. Survivors, who during three months were under great distress and subject to numerous attacks, may have difficulties in recalling the time and place of the alleged crimes as well as the identity of the victims. In such situations the sheer scale of the alleged crimes may well make it impracticable to require a high degree of specificity.

58. As stated above, it follows from *Kupreskic* that if the Prosecution is in a position to provide details, it should do so. In the present case, witness statements containing specific allegations were available to the Prosecution well before the trial. Already on 18 March 1997, the Prosecution disclosed 30 witness statements to Gérard Ntakirutimana. On 10 April 2000, following the co-Accused's surrender, it disclosed 34 witness statements to Elizaphan Ntakirutimana. On 29 August 2000, it disclosed to each Accused 67 statements from 41 witnesses. By 20 February 2001, the Prosecution had disclosed at least 83 statements from 51 witnesses. [61] Understandably, the Accused were not in a position to know precisely which statements were being relied upon by the Prosecution. However the central point is that the Prosecution had in its possession a wealth of detailed evidence, which it had disclosed to the Defence in a timely fashion, concerning times, locations, and victims, from which to draw for the purpose of reducing the imprecision in the Indictments.

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

be adopted in the present case. It recalls that the *Kupreskic* Judgement, which clarified the legal situation, was handed down after the commencement of the trial and almost at the end of the Prosecution's case.

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

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

62. Annex B to the Pre-trial Brief was filed on 15 August 2001, one month prior to commencement of the trial. It consists of summaries of the statements of 21 witnesses whom the Prosecution intended to call at trial. Sixteen of those persons testified. The Chamber observes that the Prosecution, in drawing up these summaries, selected from each witness statement the material allegations it hoped to elicit during testimony, cross-referenced them to paragraphs of the Indictments, and appended the Annex to its Pre-trial Brief. The Defence was entitled to conclude that the allegations in the Annex were the allegations it would have to meet at trial.

63. The information provided by Annex B illustrates that it was not impracticable for the Prosecution to have been more specific. However, bearing in mind that the details were excerpted from statements long disclosed to the Defence, the Chamber holds the view that any defects in the Indictments were cured by the notice given in Annex B of the Pre-trial Brief, and that no unfairness will be suffered by allowing the Prosecution's allegations at the date on which Annex B was filed. Consequently, the Chamber will consider material allegations, supplementing those in the Indictments, which have been provided through the Pre-trial Brief and knowledge acquired during trial, in order to determine the criminal liability of the Accused, but will be cautious in considering allegations where no, or late, notice was given to the Defence. A final determination will be made below in connection with the specific events where the issue of prior notice arises. In this context, the Chamber recalls that in *Kupreskic* the Appeals Chamber did not accept disclosure of new allegations that was made approximately one and a half weeks prior to trial and less than a month prior to the witness's testimony in court. According to the Appeals Chamber, it could not be excluded that the ability of the two Accused in the case to prepare their defence, in particular the cross-examination of the witness, was prejudiced by the fact that disclosure took place so close to the commencement of the trial and to the testimony of the witness in court. [63]

▷ cont ...

[44] T. 21 August 2002 p. 98 and T. 22 August 2002 p. 122.

[45] *Kupreskic* (AC).

[46] T. 22. August 2002 pp. 134-135.

[47] This is not entirely correct. The killing of a certain "Ignace" appears in Annex B to the Pre-trial Brief.

[48] T. 22 August 2002 pp. 135-137.

[49] Id. p. 50.

[50] Id. pp. 59-60.

[51] Id. pp. 155-158.

[52] Defense Closing Brief filed 22 July 2002 p. 44; concerning Witness YY see also pp. 122-123.

[53] Id. p. 52. The Brief contains similar statements regarding Witnesses FF (p. 62), HH (pp. 78, 83, 85), and GG (pp. 96, 97).

[54] Id. pp. 163-164.

[55] *Kupreskic* (AC) paras. 89, 90, 92 and 114.

[56] Id. paras. 99 and 113.

[57] Trial Chamber II, Decision of 30 June 1998 on a Preliminary Motion Filed by Defence Counsel for an Order to Quash Counts 1, 2, 3, and 6 of the Indictment. See also Trial Chamber I, Decision of 23 March 1998 on a Preliminary Motion Filed by Defence Counsel for an Order to Quash Counts 1, 2, 3, 6 and 7 of the Indictment. These decisions predate the clarification provided in *Kupreskic* (AC).

[58] *Kupreskic* (AC) paras. 89, 90 and 95.

[59] Id. para. 90 (quoted above).

[60] See *Kayishema and Ruzindana* (TC) paras. 405 *et seq.*, and *Musema* (TC) para. 363 with further references.

[61] Annex A to Prosecution's Response to Defence Motions for Dismissal or for Disclosure and Investigations by the Prosecution, 20 March 2001.

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

[63] Id. para. 120.

1501

PROSECUTION AUTHORITIES

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

1503

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.

_____

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.

PROSECUTION AUTHORITIES

6. *Prosecutor v. Kayishema*, "Judgement", ICTR-95-1-T, 21 May 1999.

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

United Nations
Nations Unies

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

Registrar:
Mr. Agwu U. Okali

Decision of: 21 May 1999

THE PROSECUTOR
versus
CLÉMENT KAYISHEMA
and
OBED RUZINDANA

Case No. ICTR-95-1-T

JUDGEMENT

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

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

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

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III. EVIDENTIARY MATTERS

3.1 Equality of Arms

55. The notion of equality of arms is laid down in Article 20 of the Statute. Specifically, Article 20 (2) states, ". . . the accused shall be entitled to a fair and public hearing. . . ." Article 20(4) also provides, ". . . the accused shall be entitled to the following minimum guarantees, in full equality. . . ," there then follows a list of rights that must be respected, including the right to a legal counsel and the right to have adequate time and facilities to prepare his or her defence.

56. Counsel for Kayishema filed a Motion, on 13 March 1997, calling for the application of Rule 20 (2) and 20(4).[1] The Defence submitted that in order to conduct a fair trial, full equality should exist between the Prosecution and the Defence in terms of the means and facilities placed at their disposal. To this end, the Defence requested the Chamber to order the disclosure of the number of lawyers, consultants, assistants and investigators that had been at the disposal of the Prosecution since the beginning of the case. The Motion also requested the Chamber to order the Prosecutor to indicate the amount of time spent on the case and the various expenditures made. Finally, the Motion called upon the Chamber to restrict the number of assistants utilised by the Prosecution during trial to the same number as those authorised for the Defence.

57. On the first two points raised by the Defence (request for information on the Prosecutor's resources), the Prosecution submitted that the information requested by Defence was not public and was intrinsically linked to the exercise of the Prosecutor's mandate, in accordance with Article 15 of the Statute.[2]

58. On the third point (request to limit the number of assistants to the Prosecutor), the Prosecution submitted that Article 20 of the Statute establishes an equality of *rights*, rather than an equality of *means and resources*.

59. The Chamber considered that the Defence did not prove any violation of the rights of the accused as laid down in Article 20(2) and 20(4).[3] The Chamber considered that the Defence should have

addressed these issues under Article 17(C) of the Directive on Assignment of Defence Counsel (Defence Counsel Directive). This provision clearly states

> the costs and expenses of legal representation of the suspect or accused necessarily and reasonably incurred shall be covered by the Tribunal *to the extent that such expenses cannot be borne by the suspect or the accused because of his financial situation.* [emphasis added]

60. This provision should be read in conjunction with Article 20(4)(d) of the Statute which stipulates that legal assistance shall be provided by the Tribunal, ". . . *if* he or she does not have sufficient means to pay for it." [emphasis added]. Therefore, at this juncture, the Trial Chamber would reiterate its earlier ruling on this Motion that the rights of the accused should not be interpreted to mean that the Defence is entitled to same means and resources as the Prosecution. Any other position would be contrary to the *status quo* that exists within jurisdictions throughout the world and would clearly not reflect the intentions of the drafters of this Tribunal's Statute.

61. The question of equality of arms was verbally raised on other occasions. The Defence Counsel complained, for example, of the impossibility to verify the technical and material data about Kibuye *Prefecture* submitted by the Prosecution.[4] However, the Trial Chamber is aware that investigators, paid for by the Tribunal, was put at the disposal of the Defence. Furthermore, Article 17(C) establishes that any expenses incurred in the preparation of the Defence case relating, *inter alia*, to investigative costs are to be met by the Tribunal. The Trial Chamber is satisfied that all of the necessary provisions for the preparation of a comprehensive defence were available, and were afforded to all Defence Counsel in this case. The utilisation of those resources is not a matter for the Trial Chamber.

62. Counsel for Kayishema also raised the issue of lack of time afforded to the Defence for the preparation of its case.[5] In this regard the Trial Chamber notes that Kayishema made his initial appearance before the Tribunal on 31 May1996, Counsel having been assigned two days prior. The trial began on 11 April 1997 and the Defence did not commence its case until 11 May 1998, almost two years after the accused's initial appearance. As such, the Trial Chamber is satisfied that sufficient time was accorded to both Parties for the preparation of their respective cases.

63. Specifically, on the time designated for the preparation of the closing arguments, the Defence expressed further dissatisfaction.[6] Having expressed his opinion that "the trial has been fair," Counsel for Kayishema however went on to submit that the eight days allowed him to prepare for his closing arguments was inequitable in light of the one month time frame afforded to the Prosecution. However, the Chamber pronounced itself on this issue from the bench when it was declared,

> . . . for the record, I think the parties . . . agreed that the presentation of oral argument and filing of the relevant documents will be done within a time frame . . . So the concept of either one party being given one month does not arise . . [I]t was discussed openly with the understanding that

each and every respective party had some work to do . . . That is the defence could prepare its own case . . . right from the word go . . . (President of the Chamber)[7]

64. Moreover, were any particular issues of dispute or dissatisfaction to have arisen, the Trial Chamber should have been seized of these concerns in the appropriate manner and at the appropriate time. A cursory reference in the closing brief, and a desultory allusion in Counsel's closing remarks is not an acceptable mode of raising the issue before the Chamber.

3.2 Reliability of Eyewitnesses

65. Unlike the leaders of Nazi Germany, who meticulously documented their acts during World War II, the organisers and perpetrators of the massacres that occurred in Rwanda in 1994 left little documentation behind. Thus, both Parties relied predominantly upon the testimony of witnesses brought before this Chamber in order to establish their respective cases.

66. A majority of the Prosecution witnesses were Tutsis who had survived attacks in Kibuye *Prefecture* (survivor witnesses), in which both accused allegedly participated. As such the Defence presented Dr. Régis Pouget to address the Trial Chamber on the credibility of eyewitness testimonies generally and, more specifically, upon the reliability of testimony from persons who had survived attacks having witnessed violent acts committed against their families, friends and neighbours. [8]

67. The Prosecution contested the submission of the report, submitting that it was unnecessary and without probative value.[9] Nevertheless, the Trial Chamber, in exercising its discretion on this issue, received the report and heard the testimony of Dr. Pouget between 29 June and 2 July 1998.

Eyewitness Testimonies Generally

68. The issue of identification is particularly pertinent in light of the defence of alibi advanced by the accused. The report prepared by Dr. Pouget and submitted on behalf of the Defence suggests that eyewitnesses often are not a reliable source of information.

69. In order to support such a conclusion, Dr. Pouget proffered a number of reasons. It was his opinion, for example, that people do not pay attention to what they see yet, when uncertain about the answer to a question, they often give a definite answer nonetheless. He went on to describe various other, common-place factors that may affect the reliability of witness testimony generally. He observed, *inter alia*, that the passage of time often reduces the accuracy of recollection, and how this recollection may then be influenced either by the individual's own imperfect mental process of reconstructing past events, or by other external factors such as media reports or numerous conversations about the events.

70. The Chamber does not consider that such general observations are in dispute. Equally, the

Chamber concurs with Dr. Pouget's assertion that the corroboration of events, even by many witnesses, does not necessarily make the event and/or its details correct. However, the Trial Chamber is equally cognisant that, notwithstanding the foregoing analysis, all eyewitness testimony cannot be simply disregarded out-of-hand on the premise that it *may* not be an exact recollection. Accordingly, it is for the Trial Chamber to decide upon the reliability of the witness' testimony in light of its presentation in court and after its subjection to cross-examination. Thus, whilst corroboration of such testimony is not a guarantee of its accuracy, it is a factor that the Trial Chamber has taken into account when considering the testimonies.

71. Similarly, prior knowledge of those identified is another factor that the Trial Chamber may take into account in considering the reliability of witness testimonies. For example, in the Tanzanian case of *Waziri Amani v. Republic*[10] the accused called into question his identification by witnesses. The Court of Appeals held that,

> if at the end of his (the witness') examination the judge is satisfied that the quality of identification is good, for example, when the identification was made by a witness after a long period of observation or in satisfactory conditions by a relative, a neighbour, a close friend, a workmate and the like, we think, he could in those circumstances safely convict on the evidence of identification.

The case of *United States v. Telafaire*[11] also offers persuasive guidance on the other factors which may be taken into account. Firstly, the court in *Telafaire* held that the trier of fact must be convinced that the witness had the capacity and an adequate opportunity to observe the offender. Secondly, the identification of the accused by the witness should be the product of his own recollection and, thirdly, the trier of fact should take into consideration any inconsistency in the witness's identification of the accused at trial. Finally, it was held that the general credibility of the witness – his truthfulness and opportunity to make reliable observations – should also be borne in mind by the trier of fact.

72. The Trial Chamber, in its examination of the evidence, has been alive to these various approaches and, where appropriate, has specifically delineated the salient considerations pertinent to its findings.

Survivors as Witnesses

73. The report of Dr. Pouget, an expert in the field of psychology, address the reliability of testimony from those who have witnessed traumatic events. It was his opinion that strong emotions experienced at the time of the events have a negative effect upon the quality of recollection. During traumatic events, he expounded, the natural defensive system either prevents the retention of those incidents or buries their memories so deep that they are not easily, if at all, accessible.

74. This is the view of the expert Defence witness. However, as the Prosecutor highlighted, other

views do exist. She produced, for example, other academic views which stated that stressful conditions lead to an especially vivid and detailed recollection of events.[12] What is apparent to the Trial Chamber is that different witnesses, like different academics, think differently.

75. The Chamber is aware of the impact of trauma on the testimony of witnesses. However, the testimonies cannot be simply disregarded because they describe traumatic and horrific realities. Some inconsistencies and imprecision in the testimonies are expected and were carefully considered in light of the circumstances faced by the witnesses.

3.3 Witness Statements

76. The Parties raised apparent discrepancies or omissions that arose with regard to certain evidence when the witnesses' written statements were juxtaposed with their testimony given orally in Court. These written statements were drafted after the witnesses were interviewed by Prosecution investigators as part of the investigative process. Alleged inconsistencies were raised in relation to both Prosecution and Defence witnesses. The procedure adopted by the Trial Chamber for dealing with apparent inconsistencies was expounded during the hearing of evidence by Prosecution witness A. There, the Trial Chamber ordered that an alleged inconsistency be put to the witness and the witness be offered an opportunity to explain. In light of this explanation, if Counsel asserted that the inconsistency remained, the Counsel would mark the relevant portion of the witness statement and submit it as an exhibit for consideration by the Trial Chamber. Both Prosecution and Defence Counsel submitted such exhibits. [13]

77. The witness statements are not automatically evidence before the Trial Chamber *per se*. However, the statements may be used to impeach a witness. Where the relevant portion of the statement has been submitted as an exhibit, this portion will be considered by the Trial Chamber in light of the oral evidence and explanation offered by the witness. The Chamber is mindful that there was generally a considerable time lapse between the events to which the witnesses testified, the making of their prior statements, and their testimony before the Trial Chamber. However, notwithstanding the above, inconsistencies may raise doubt in relation to the particular piece of evidence in question or, where such inconsistencies are found to be material, to the witnesses' evidence as a whole.

78. Whether or not the explanation by the witness is enough to remove the doubt is determined on a case-by-case basis considering the circumstances surrounding the inconsistency and the subsequent explanation. However, to be released from doubt the Trial Chamber generally demands an explanation of substance rather than mere procedure. For example, a common explanation provided by witnesses was that the interviewing investigator did not accurately reflect in the written statement what the witness said. Although such an explanation may well be true, particularly considering the translation difficulties, in the absence of evidence that corroborates the explanation, it is generally not enough to remove doubt. Indeed, it is not for the Trial Chamber to search for reasons to excuse inadequacies in the Prosecution's investigative process.

79. Conversely, where the witness provides a convincing explanation of substance, perhaps relating to the substance of the investigator's question, then this may be sufficient to remove the doubt raised.

80. Doubts about a testimony can be removed with the corroboration of other testimonies. However,

corroboration of evidence is not a legal requirement to accept a testimony. This Chamber is nevertheless aware of the importance of corroboration and considered the testimonies in this light. This notion has been emphasised in the Factual Findings of this Judgement.

3.4 Specificity of the Indictment

Introduction

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

The Allegations in Relation to the Massacres in the Bisesero Area

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[10] 1980 TLR 250, 252.

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

[12] An article by Ann Maass and Gautier Kohnken, in the Law and Human Behaviour Journal, vol. 13, no. 4, 1989, was shown to the witness and discussed in cross-examination. Trans., 2 Jul. 1998, p. 104.

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

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

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

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