SCSL-2004-14-T 7479

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SPECIAL COURT FOR SIERRA LEONE

OFFICE OF THE PROSECUTOR

FREETOWN – SIERRA LEONE

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

Registrar: Mr. Robin Vincent

Date filed: 18 June 2004

THE PROSECUTOR

Against

SAMUEL HINGA NORMAN

MOININA FOFANA

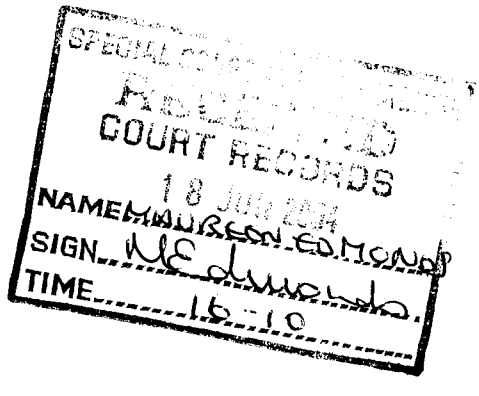
ALLIEU KONDEWA

Case No. SCSL – 2004 – 14 – PT

PROSECUTION REPLY TO DEFENCE JOINT RESPONSE TO PROSECUTION'S APPLICATION FOR LEAVE TO FILE AN INTERLOCUTORY APPEAL AGAINST THE DECISION ON REQUEST FOR LEAVE TO AMEND THE INDICTMENT

Office of the Prosecutor:
Luc Côté
James C. Johnson

Defence Counsel
James Jenkin-Johnston for Norman
Michiel Pestman for Fofana
Charles Margai for Kondewa



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I. BA CKGROUND

1. On 4 June 2004, pursuant to Rule 73(B) of the Rules of Procedure and Evidence of the Special Co ırt ("Rules"), the Prosecutor filed an Application for leave to file an interlocutory appeal ag: inst the Chamber's decision of 1 June 2004 ("Application"), a decision which denied the Pr(secution's Request for Leave to Amend the Indictment in this case ("Decision" and "R :quest" respectfully). On 24 June 2004, Defence for Accused Fofana and Defence for Ac :used Kondewa filed a joint response, requesting the Trial Chamber to deny the Ap plication ("Joint Response"). The Prosecution files this reply to the Joint Response.

II. DI :FENCE SUBMISSIONS

2. In :he Joint Response, the Defence requests the Chamber to dismiss the Application on the gr(unds that the conditions required under Rule 73(B) to warrant the grant of a leave to appeal, na nely the existence of exceptional circumstances and irreparable prejudice to a party, were nc : met in this case. It further argues that even if these conditions were met, the Prosecution fa: led to show why the Trial Chamber should exercise its discretion to grant the Application.

III. AR GUMENTS

Exc eptional circumstances exist

3. The Defence argues that the existence of a dissenting opinion cannot constitute an exceptional circ umstance warranting the granting of a leave to appeal, and that "the practice of appending diss enting opinions at international tribunals is standard".[1] The Prosecution objects and asserts tha in the practice of the ICTY and ICTR, it is extremely rare that dissenting opinions are ma le with regards to interlocutory decisions, including decisions on leave to amend an ind ctment. In fact, as far as the Prosecution was able to ascertain, all ICTY and ICTR dec isions on leave to amend an indictment are unanimous. Furthermore, it is reasserted that the existence of contradicting opinions within the Trial Chamber, emphasizes the complexity of he issue at hand, which could "benefit from the review of the Appeals Chamber".[2]
4. Th e Defence contests that the Prosecution's obligation to prosecute to the full extent of the law , as well as the Court's obligation to establish an accurate historical record of the crimes co mmitted in Sierra Leone, constitute exceptional circumstances justifying the granting of the Ap plications.[3] The Defence bases this argument on its assertion that the Trial Chamber has alr eady dealt with these issues, and that the Prosecution does not have an obligation to pr osecute to the full extent of the law as there exists a plea bargaining option. The Prosecution su bmits that the fact that these issues were previously brought before the Court is no guarantee th t they were duly considered by the Chamber. Furthermore, the fact that different members of the Trial Chamber considered these issues differently, thereby producing a split Decision, de monstrates that these issues are still contentious as a matter of law. Thus these issues may ur derlie the Prosecution's assertions pertaining to the exceptional circumstances warranting gr anting its Application. It is further submitted that the Prosecution is indeed obligated to pr osecute to the full extent of the law, as established by the ICTY and the ICTR;[4] and that the pl ea bargaining possibility does not nullify this obligation. Under international criminal law, a pl ea agreement operates only after the presentation of an Indictment which properly reflects the

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[1] Pa agraph 8 of the Joint Response.
[2] Th s is reasserted in accordance with the Prosecution's submission in paragraph 4 of its Application.
[3] Pa agraph 10 of the Joint Response.
[4] *Pr osecutor v. Naletilic and Martinovic*, IT-98-34, Decision on Vinko Martinovic's Objection to the Amended Indi ctment and Mladen Nalitilic's Preliminary Motion to the Amended Indictment, 14 Feb. 2001 ("*Naletilic,* 14 Feb. 200 ."); *Prosecutor v. Musema*, ICTR-96-13-T, Decision on the Prosecutor's Request for Leave to Amend the Indi ctment, 6 May 1999, para. 17 (annexed as Item no. 7 on Index of Authorities in the Request). In addition, see Dec sion, para. 34.

tota ity of the crimes allegedly committed by the Accused. Only an Indictment which reflects the otality of the crimes allegedly committed will enable the Court to fulfill its important goal to p ovide an accurate historical record of the international crimes committed in the course of the ırmed conflict.[5] It is further submitted that as gender based crimes all the more so deserve to b e highlighted in this historical record, they must be charges in the Indictment.[6]

Irre parable prejudice exist

5. The Defence argues that "an argument that has been raised in the original motion cannot, as a rule, amount to irreparable prejudice."[7] The Prosecution objects and submits that the Defence is v rong in saying that the argument in paragraph 5 of the Application is identical to that in par ıgraph 7 of the Request.[8] Notwithstanding, the Prosecution asserts that the requirements for gra ıting leave to appeal are different than those for granting leave to amend an indictment. To be granted leave to amend an indictment, the requested amendment must be in the overall int rest of justice and must not prejudice the rights of the Accused.[9] Distinguishably, to be gra nted leave to appeal under Rule 73(B), the Prosecution must establish that exceptional cir umstance exist and that it will suffer irreparable prejudice as a result of a denial of such a lea ve. Hence, any argument which may have been raised in the Request to amend, may be rai ied again in the Application for leave to appeal, if it goes to prove the fulfillment of the pe uliar conditions of Rule 73(B). Furthermore, the arguments that were raised in the original m tion were upheld in the dissenting opinion appended to the Decision. Hence, the Pr osecution reasserts that the denial of the Application will result in precluding the Prosecution fr m prosecuting sexual violence acts committed by CDF members as gender based crimes; in pr cluding the victims from having their crimes characterized as gender based crimes; and, in en suring that the Accused will most likely forever be excused from being tried for gender ba sed crimes.[10] It is the cumulative effect of these results that underlies the Prosecution's ar gument that it will suffer irreparable prejudice if the Application is denied. The Prosecution

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[5] In addressing proceedings relating to the public presentation of indictments the ICTY held that: "[t]hese proc edings ... are a public reminder that an accused is wanted for serious violations of international humanitarian law. They also offer the victims of atrocities the opportunity to be heard and create a historical record of the manner in w ıich they were treated." See *Prosecutor v. Rajic*, IT-95-12, Review of the Indictment Pursuant to Rule 61 of the Rule s of Procedure and Evidence, 13 Sept. 1996, para. 2.

[6] Th e importance of highlighting gender based crimes was stressed by this Court in the Decision, para. 42.

[7] Pa agraph 13 of the Joint Response.

[8] Pa agraph 13 of the Joint Response.

[9] Re ısserted in accordance with the submission in para. 9 of the Request and the authorities cited therein.

[10] T is is reasserted in accordance with the Prosecution's submissions in paragraphs 7-9 of its Application.

also reaffirms that raising an issue once, does not preclude it from being raised again, espe cially considering that Trial Chamber judges were divided on this issue.

6. The Defence argues that as the victims are not party to this case, the prejudice they may suffer sho ıld not be considered.[11] The Prosecution submits that the interest of justice requires taking the nterests of victims into account.[12] In addition, Article 17.2 of the Statute demonstrates the higl regard the Special Court accords to victims.[13] Furthermore, the objectives of the Special Coı rt to promote justice and reconciliation in Sierra Leone, will not be met if the victims are not at the heart of the Court's efforts.[14] Lastly and importantly, the Prosecution is charged with brii ging justice to the people of Sierra Leone, and the interests it represents are those of the vic ims. Hence irreparable prejudice to victims are irreparable prejudice to the Prosecution.

7. Th Defence argues that the Prosecution's assertion that denying the Application will forever exc use the Accused from being brought to trial for gender based violence, is "speculative if not dis ngenuous".[15] The Prosecution objects and reasserts that it is improbable that the Accused wil l face domestic prosecution.[16] This is mainly due to the principle of *Non bis in idem* ens hrined in Article 9.1 of the Statute, according to which the Accused may not be tried before a n ational court for acts for which he was tried before the Special Court. Hence, if the Accused pe sons were charged with general violence counts, which include acts of sexual violence, they ma y not be tried for those acts in a national court. The Prosecution reiterates that the im portance of granting the Application stems from the necessity to highlight the nature of the se ual violence acts as gender based crimes, as opposed to general violence crimes. In ad lition, there are no domestic prosecutions of international crimes committed during Sierra Le one's armed conflict currently in progress, and it seems unlikely that such prosecutions will ev er take place in light of the Lome Peace Agreement (Ratification) Act (1999) which im plements domestically the Lome Peace Agreement, including its blanket amnesty provision.

Ex ercise of Court's discretion is justified

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[11] Pa agraph 15 of the Joint Response.
[12] In accordance with the holding of this Chamber, that "the outcome of an application to amend an indictment ...m ist take into consideration the rights of the Parties and the overall interests of justice". Decision, para. 71.
[13] Ar ticle 17.2 balances between the rights of accused and those of victims.
[14] Th e Report of the Planning Mission stresses that "expectations run high among all sections of Sierra Leone soci ty that justice as well as reconciliation will be served by the Special Court..." Report of the Planning Mission on th e Establishment of the Special Court for Sierra Leone, Annex to UN Doc. S/2002/246, para. 57.
[15] Pa ragraph 16 of the Joint Response.
[16] Th is is reasserted in accordance with the Prosecution's submission in paragraph 9 of its Application.

8. The Defence asserts that rule 73(B) affords no guidance as to how to exercise its discretion in deci ding whether to grant leave to file an interlocutory appeal.[17] The Prosecution agrees, but sub nits that the existing jurisprudence on the question of when can a party challenge the disc retion of the Trial Chamber to grant leave to amend indictments, provides guidance as to wh n can it challenge the discretion of the Trial Chamber in deciding whether to grant leave to app al against decisions pertaining to amendments of indictments.[18] According to two recent dec sions of the ICTR Appeal Chamber, a party may challenge the Trial Chamber's discretion to g rant or deny leave to amend an indictment if it demonstrates "that the Trial Chamber mis directed itself either as to the principle to be applied, or as to the law which is relevant to the exercise of the discretion, or that it has given weight to extraneous or irrelevant cor siderations, or that it has failed to give weight or sufficient weight to relevant cor siderations, or that it has made an error as to the facts upon which it has exercised its dis retion."[19] The Prosecution reaffirms its assertions in paragraphs 12-24 of the Application tha highlight the errors made in the majority opinion of the Trial Chamber's Decision, which, un ler international criminal law, render its discretion challengeable. The Prosecution stresses tha t this shows the relevance of the said paragraphs, a matter contested by the Defence.[20]

No prejudice to the right of the Accused to an expeditious trial

9. Th e Defence argues that prejudice to the right of the Accused to a fair and expeditious trial "w ould only be increased if the amendment were made after a lengthy appeal procedure".[21] Th e Prosecution submits that under Rule 73(B) leave to file an interlocutory appeal "shall not op erate as a stay of proceedings unless the Trial Chamber so orders." Furthermore, under Rule 117(A), "...any appeal under Rules 46, 65, 73(B), 77 or 91 shall be heard expeditiously...". H nce, it is submitted that granting the application will not delay the proceedings against the

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[17] Pa agraphs 18-19 of the Joint Response.

[18] *Na etilic*, 14 Feb. 2001; *Prosecutor v. Bizimungu*, ICTR-99-50-AR50, Decision on Prosecutor's Interlocutory App al Against Trial chamber II Decision of 6 October 2003 Denying Leave to File Amended Indictment, 12 Feb ıary 2004 ("*Bizimungu*, 12 Feb. 2004"), para. 11 (annexed as Item no. 5 on Prosecution's Index of Authorities in it Request); *Prosecutor v. Karemera*, ICTR-98-44-AR73, Decision on Prosecutor's Interlocutory Appeal Aga nst Trial Chamber III Decision of 8 October 2003 Denying Leave to file an Amended Indictment, 19 December 200 ("*Karemera*, 19 Dec. 2003") para. 9 (annexed as Item no. 6 on Prosecution's Index of Authorities in its Req ıest). Furthermore, while the standard for granting leave to appeal under Rule 73 of the Special Court Rules may be higher than that of the parallel ICTY/ICTR Rules, an exceptionally wide discretion is granted to the Trial Cha nbers of the latter tribunals in deciding whether to amend an indictment.

[19] *B zimungu*, 12 Feb. 2004, para. 11; *Karemera*, 19 Dec. 2003, para. 9.

[20] P ragraph 22 of the Joint Response.

[21] P ragraph 20 of the Joint Response.

Acc ısed. Furthermore, the Prosecution reasserts that granting the Application need not delay the (urrent proceedings, as the next sessions will not take place until September 2004, Nov ember 2004 and presumably February 2005, allowing sufficient time for the Appeals Cha nber to be seized of and decide the matter, and for the Defence to prepare its case.[22]

Oth :r matters raised by the Defence

10. The Defence argues that the Prosecution "fails to present any evidence to support the dist nction between the difficulties encountered in investigating alleged CDF gender-based crir ıes and those charged against the RUF and AFRC".[23] The Prosecution reiterated its arg ıments in the Application and reaffirms that gathering evidence against CDF members, esp :cially related to gender-based crimes, requires more time than gathering such evidence aga nst other persons, including RUF and AFRC members.[24] The difficulties encountered in inv :stigating alleged CDF gender-based crimes stem mainly from the high security risks facing wit ıesses testifying against CDF members as a result of living in the vicinity of CDF members. Th s specific security risk related to the CDF case, was acknowledged in this very Chamber's rec :nt decision of 8 June 2004, in which it granted protective measures to such witnesses.[25]

11. Th : Defence argues that since one statement pertaining to gender based crimes was taken on 9 Ma y 2003, and several were taken in late September 2003, the Chamber's is correct in holding tha : the Request was filed untimely.[26] The Prosecution first draws attention to the fact that the ps(udonyms footnoted by the Defence do not correspond to the quantities and dates of the sta :ements mentioned by the Defence.[27] The Prosecution furthermore denies this Defence ar{ ument and reasserts that prior to October 2003 it only had *indications* of gender based cri nes, as opposed to real evidence.[28] Indeed, the statements taken in late September 2003, up :n their analysis which was completed in October 2003, formed the basis of this evidence. Or the other hand, the statement of 9 May 2003 merely contained the said *indication*, as it only

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[22] Th s is reasserted in accordance with the Prosecution's submission in paragraph 10 of its Application.
[23] Pa agraph 25 of the Joint Response.
[24] Th s is reasserted in accordance with the Prosecution's submission in paragraph 15 of its Application.
[25] *Pr(secutor v. Norman, Fofana and Kondewa (SCSL-2004-14-PT)*, Decision on Prosecution Motion for Modification of Prot(ctive Measures for Witnesses, 8 June 2004.
[26] Pa agraph 27 of the Joint Response.
[27] W ıen cross-referencing the dates of the statements enumerated in paragraph 27 of the Joint Response with the state nents of the pseudonyms mentioned in the attached footnote 21, there are discrepancies.
[28] Th is is reasserted in accordance with the Prosecution's submission in paragraph 13 of its Application. Also see: Pros :cution's Consolidated Reply to Defence Response, para. 15; Prosecutor's Written Answers, para. 2.

hint that gender based crimes may have been committed.[29] Basing a charge on such an indi ation would neither have been reasonable nor justifiable.

12. The Defence argues that the passage of time between the date on which the Prosecution had evic ence relating to gender based crimes committed by the CDF, and the date it filed the Req uest "cannot be justified under the pretence of judicial economy".[30] The Prosecution reit rates its argument in paragraph 19 of the Application. As to the reference to "nine separate mot ions", which the Defence questions, it is submitted that at the time this was the number of cas s before the Chamber, and that had the Prosecution decided to requests to amend the ind ctments it wished to amend at that time in all cases, it would have had to file nine requests.

13. Fin lly, the Defence argues, that to grant the Application, the Prosecution must demonstrate tha "its interests in the matter outweighed those of the Accused...".[31] The Prosecution rea serts that the interest of justice must also be taken into consideration. It further reaffirms tha the test of whether to grant the Prosecution the possibility of challenging the discretion of the Trial Chamber on whether to grant leave to amend to an Indictment, should be analogous to tha established in the jurisprudence of the ICTY and ICTR.[32] Lastly, it is submitted that in lig lt of the two conflicting opinions held by the respectful judges of the Trial Chamber on this iss ie, both opinions well-substantiated and articulated, the interest of justice calls for a second co sideration of this important matter and the principle of finality will best be served if the ma tter is heard and decided upon by the Appeals Chamber.

IV. C ONCLUSION

14. Fo the foregoing reasons the Prosecution respectfully prays that the Trial Chamber grant the re uested leave to file an interlocutory appeal against its decision on the Prosecution Request.

Fr etown, 18 June 2004

Fo the Prosecution,

Lu c Cote

[29] Th relevant information stated in the statement taken on 9 May 2003 reads as follows: *"The only rule was that at 7 am you had to meet them at the field at Base Zero, but during the night you could do what you want. Girls came from surrounding villages into base Zero, plenty of them. This was the only safe place in Talia. I know there was plen y of Gonnorea [sic]around there."* (page 9).

[30] Pa agraph 27 of the Joint Response.

[31] Pa agraph 28 of the Joint Response.

[32] Se discussion in paragraph 13 above.

Prosecution Index of Authorities

Prosecutor v. Naletilic and Martinovic, IT-98-34, Decision on Vinko Martinovic's Objection to the Amended Indictment and Mladen Nalitilic's Preliminary Motion to the Amended Indictment, 14 Feb. 2001

Prosecutor v. Musema, ICTR-96-13-T, Decision on the Prosecutor's Request for Leave to Amend the Indictment, 6 May 1999. (Annexed as Item no. 7 on Prosecution's Index of Authorities in the Request)

Prosecutor v. Rajic, IT-95-12, Review of the Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence, 13 Sept. 1996.

Report of the Planning Mission on the Establishment of the Special Court for Sierra Leone, Annex to UN Doc. S/2002/246.

Prosecutor v. Bizimungu, ICTR-99-50-AR50, Decision on Prosecutor's Interlocutory Appeal Against Trial chamber II Decision of 6 October 2003 Denying Leave to File Amended Indictment, 12 February 2004. (Annexed as Item no. 5 on Prosecution's Index of Authorities in the Request).

Prosecutor v. Karemera, ICTR-98-44-AR73, Decision on Prosecutor's Interlocutory Appeal Against Trial Chamber III Decision of 8 October 2003 Denying Leave to file an Amended Indictment, 19 December 2003. (Annexed as Item no. 6 on Prosecution's Index of Authorities in the Request).

Prosecutor v. Norman, Fofana and Kondewa (SCSL-2004-14-PT), Decision on Prosecution Motion for Modification of Protective Measures for Witnesses, 8 June 2004.

Annex I

Prosecutor v. Naletilic and Martinovic, IT-98-34, Decision on Vinko Martinovic's Objection to the Amended Indictment and Mladen Nalitilic's Preliminary Motion to the Amended Indictment, 14 Feb. 2001

IN THE TRIAL CHAMBER

74-89

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

Regist ar:
Mr. H ns Holthuis

Decisi n of:
14 Feb ruary 2001

THE PROSECUTOR

v.

MLADEN NALETILIC aka "TUTA"
and
VINKO MARTINOVIC aka "ŠTELA"

DEC ISION ON VINKO MARTINOVIC'S OBJECTION TO THE AMENDED INDICTMENT AND MLADEN NALETILIC'S PRELIMINARY MOTION TO THE AMENDED INDICTMENT

The C ffice of the Prosecutor:

Mr. K enneth Scott

Coun el for the Accused:

Mr. K resimir Krsnik, for Mladen NALETILIC
Mr. K ranko Seric, for Vinko MARTINOVIC

TRIA L CHAMBER I (hereafter "Chamber") of the International Criminal Tribunal for the Prosecution of Pe sons Responsible for Serious Violations of International Humanitarian Law Committed in the Territ ory of the Former Yugoslavia since 1991 (hereafter "Tribunal") is seised of Vinko Martinovic's Objec tion to the Amended Indictment, dated 27 December 2000 (hereafter "Martinovic's Objections"), and th e Defence's Preliminary Motion, dated 3 January 2001, filed by the accused Mladen Naletilic (here after "Naletilic's Objections"). Both Martinovic's Objections, and Naletilic's Objections are timely filed pursuant to Rule 72 of the Rules of Procedure and Evidence of the Tribunal (hereafter "Rules").

The i ndictment originally filed against Martinovic and Naletilic is dated 18 December 1998 (hereafter "Orig inal Indictment"). By decision dated 28 November 2000 (hereafter "November Decision"),[1] the

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Trial Cl amber granted leave for the Prosecution to amend Count 5 of the Original Indictment to add a further :harge relating to Article 52 of Geneva Convention III, concerning dangerous or humiliating labour. The original Count 5 referred only to Articles 49 and 50 of Geneva Convention III, and Article 51 of G eneva Convention IV. Accordingly, the Prosecutor filed an amended indictment dated 4 Decem ber 2000 (hereafter "Amended Indictment"), and each of the accused entered a plea of "not guilty" o the new charge on 7 December 2000. In accordance with Rule 50 (C), each of the accused had a perio of 30 days to file preliminary motions pursuant to Rule 72 in respect of the new charge.

I. Preliminary Objections Made by the Accused

The po nts raised in Martinovic's Objections, and Naletilic's Objections are as follows:

1. An i ıdictment cannot be amended in the absence of new factual allegations or new evidence, unless it is adva ıtageous for the accused. The quantity of criminal charges facing the accused cannot be increased at this ate stage of the proceedings. It is argued that the criminal laws of ex-Yugoslavia, as well as those of Bos ıia and Herzegovina and the Republic of Croatia only allow an amendment of the indictment to includ a new offence if supported by new evidence adduced in the course of the proceedings. Furthe more, it is argued that the accused cannot properly prepare his defence if the indictment is subject to amendment at any moment. Similar objections were raised by the accused to the Prosecutor's Motio to Amend Count 5.[2]

2. The charges are cumulative, in that multiple charges (including charges under Articles 2, 3 and 5 of the Sta ute) are levied on the basis of the same conduct.

3. The accused Naletilic also argues that it is not clear which acts in Count 5 are alleged to be violations of Arti le 49, 50 and 52.

II. Arguments of the Prosecutor

The P osecutor filed a response to these objections dated 18 January 2001, arguing that:

1. The objections raised merely repeat those raised by each of the accused in their replies to the Prose utor's motion to amend Count 5. In its November Decision the Trial Chamber found that no prejud ce was caused to the accused by allowing the amendment. Therefore, the issue cannot be recon idered now under the guise of an objection to the form of the indictment.

2. The issue of cumulative charges was raised earlier in the proceedings, and the Trial Chamber held that the m tter should be deferred to the end of the trial.

III. Discussion

A. Ci cumstances in which amendment of the indictment is warranted

Rule 5 0 of the Rules of Procedure and Evidence governs the amendment of indictments, and provides as follo s:

Amer dment of Indictment

(A) (i The Prosecutor may amend an indictment:
(ii) at any time before its confirmation, without leave;

(iii) bet veen its confirmation and the assignment of the case to a Trial Chamber, with the leave of the Judge v ho confirmed the indictment, or a Judge assigned by the President; and

(a) afte the assignment of the case to a Trial Chamber, with the leave of that Trial Chamber or a Judge of that Chamber, after having heard the parties.
(b) Aft r the assignment of the case to a Trial Chamber it shall not be necessary for the amended indictm ent to be confirmed.
(c) Rul 47 (G) and Rule 53 *bis* apply *mutatis mutandis* to the amended indictment.

(B) If t ie amended indictment includes new charges and the accused has already appeared before a Trial Chamb er in accordance with Rule 62, a further appearance shall be held as soon as practicable to enable the acc used to enter a plea on the new charges.
(C) Th accused shall have a further period of thirty days in which to file preliminary motions pursuant to Rul 72 in respect of the new charges and, where necessary, the date for trial may be postponed to ensure adequate time for the preparation of the defence.

After t ie assignment of the case to a Trial Chamber, Rule 50 A (i)(c) simply directs that the indictment can be amended "with the leave of [the] Trial Chamber or a Judge of [the] Chamber, after having heard the par ies." Therefore, pursuant to Rule 50, the discretion as to whether to allow an amendment is left to the Juc ge or Trial Chamber in question.

There s nothing in the Rules to suggest that an indictment can only be amended if new factual allegat ons are added. Furthermore, while Rules 50 (B) and (C) expressly address the issue of new charge s, the rule does not specify that new charges can only be based upon new facts. In contemplating that th accused may require additional time to prepare for trial as a result of an amendment that involv s adding a further count, the rule is simply concerned to ensure that the accused is not prejudiced in the conduct of his or her defence.

Althou gh there are no express limits on the exercise of the discretion contained in Rule 50, when viewir g the Statute and Rules as a whole, it is obvious that it must be exercised with regard to the right of the accused to a fair trial. In particular, depending on the circumstances of the case, the right of the accuse d to an expeditious trial, to be promptly informed of the charges against him or her, and to have adequ te time and facilities for the preparation of his or her defence, potentially arise when considering object ons to an amended indictment.[3]
Virtua ly every indictment filed by the Prosecutor in matters before the ICTY and the International Crimi al Tribunal for Rwanda (ICTR) has been amended at least once. The resulting jurisprudence does not su port the limitation on the exercise of the discretion in Rule 50 advocated by the accused in this case. l ather, the question to be decided is whether the amendment results in any prejudice to the accuse d.[4]

In det rmining whether any prejudice to the accused will follow from an amendment to the indictment, regarc must be had to the circumstances of the case as a whole. For example, in the case of *Prosecutor* v *Kovac evic*, the Appeals Chamber decided that the Prosecutor should be given leave to add 14 new count to the indictment, (which would turn the eight-page indictment into one of 18 pages), for which the de ence would require an additional 7 months to prepare.[5] In its decision, the Appeals Chamber, *inter a lia*, emphasised that the delay to the trial of the accused resulting from the amendment was not unrea onable in light of the complexity of the case. The Appeals Chamber also found that, where the accus d has been told of the crimes contained in the existing indictment at the time of his arrest, his right t be promptly informed of the charges against him has not been violated. In his separate concu ring opinion, Judge Shahabuddeen emphasised that, in light of the complexities inherent in war

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crimes ›rosecutions, a flexible approach to the question of amending indictments is particularly importa nt.[6]

The ad‹ ition of new charges in the absence of new factual or evidentiary material has been accepted in other c: ses before the ICTY and the ICTR. For example, in the case of *Prosecutor* v *Krstic* an amended indictm ent was filed by the Prosecutor in October 1999 charging the accused for the first time with deporta tion as a crime against humanity, or in the alternative, inhumane acts (forcible transfer) as a crime a gainst humanity.[7] The original indictment contained facts upon which such a charge could be brough , and no substantive factual allegations were added to the amended indictment to support the new ch arge of deportation/forcible transfer.[8] In the case of *Prosecutor* v *Niyitegeka*, the Trial Chamber expres: ly accepted that new charges could be added to an indictment to "allege an additional legal theory ›f liability with no new acts".[9]

Civil l: w and common law jurisdictions have different principles governing the amendment of indictn ents. In civil law systems, indictments are scrutinised by the investigating judge and amendments tend to be less controversial.[10] While some common law jurisdictions take a restrictive approach to permit ing amendments,[11] most of the jurisdictions surveyed recognise that the fundamental point of referer ce in determining whether an amendment will be permitted is whether there is any prejudice to the acc used.[12]

The ju isprudence of the ICTY and the ICTR on the exercise of the discretion contained in Rule 50 thus demor strates that a decision to accept an amendment will normally be forthcoming unless prejudice can be sho wn to the accused. This recognises the duty of the Prosecutor to prosecute the accused to the full extent of the law.[13] In the present case the amendment made was not substantial in scope,[14] there is no sugge: tion that the Prosecution has sought an improper tactical advantage,[15] and the amendment has certain ly not delayed the trial of the accused, which is not yet scheduled to begin. Given that the facts upon v /hich the new count is based were in the Original Indictment, there has been no need for the accus‹ d to conduct any new inquiries, approach new witnesses, or expend any additional resources. Accor lingly, the accused have failed to establish that they have been prejudiced in the preparation of their c efence following the amendment of Count 5.

B. Cu nulative Charging

Objec ions to the cumulative nature of the charges have been previously raised in the present case. In a decisi ›n dated 15 February 2000, the Trial Chamber rejected the objections of Martinovic, based on cumu ative charging.[16] The Trial Chamber noted that the Tribunal's jurisprudence on this matter was still e 'olving. Reference was made to the principles distilled in the Kupreskic Judgement of 14 January 2000, [7] namely that cumulative charges will be permitted where each offence requires proof of an eleme nt that the other does not (the "different elements" test), or alternatively, where each offence prote‹ ts substantially different values (although this would seldom be used as an independent ground for permi ting cumulative charges). Ultimately, however, the Trial Chamber saw no reason to depart from the pr actice of leaving the issue to be determined at the end of trial.

The a :cused have raised the issue of cumulative charges again as a preliminary objection on the form of Coun 5 as amended. The Trial Chamber notes that the objection is framed in very general terms, and is not li nited to arguments based on the amendment to Count 5. The issue of cumulative charging is only legiti nately raised here as a preliminary objection insofar as it relates to the new charge, and the Trial Chan ber will only consider it to that extent.

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The Pro secutor has amended Count 5 of the Original Indictment by adding a charge based on Article 52 (humili ting and dangerous labour) of the Third Geneva Convention to the existing charges based on Article 49 (General Observations) of the Third Geneva Convention, Article 50 (Authorised Work) of the Third C eneva Convention, and Article 51 (Enlistment of Labour) of the Fourth Geneva Convention. The same fa cts are relied upon to support all of these charges. On the basis of the test set out by the Trial Chamb r in the Kupreškic Judgement, Article 52 could be viewed as a genuinely separate offence that can be harged in addition to the existing charges in Count 5 of the Indictment. In particular, each offence requires proof of an element that the other does not. For example, in order to prove a violation of Artic le 50 of Geneva Convention III, it is necessary to prove that prisoners of war have been engaged in certa n prohibited categories of work. It is not necessary to prove that this work is also dangerous or humili ting. By contrast, in order to prove a breach of Article 52 of the Geneva Convention III, it is necess ry to prove that the work is dangerous or humiliating. It is not necessary to prove that it falls outside the categories of work specified in Article 50 of Geneva Convention III. Insofar as Article 51 of Genev Convention IV is concerned, it is necessary to prove, *inter alia*, that the alleged victims of the offence were protected persons within the meaning of Geneva Convention IV, whereas for Article 52, it is nece sary to prove, *inter alia*, that the alleged victims were prisoners of war within the meaning of Genev Convention III. To this extent, each provision could be considered as requiring proof of an elemer t that the other does not and, in addition, seeking to protect a different value: the treatment accord d to civilians in one case, and the treatment accorded to prisoners of war in the other. Article 49 of Gen eva Convention III specifies that only prisoners of war who are physically fit may be required to work, nd specifies the circumstances in which non-commissioned officers, and officers may work. Conse quently, to prove a violation of this article it would be necessary to show that somebody who was not ph sically fit was compelled to work, or that the rules respecting the work of officers had been breach ed. None of these things are required to prove a breach of Article 52. Further, at least insofar as Articl 49 relates to the work of officers, it seeks to protect quite a different value from Article 52, namel respect for the status of officers.

Nonet heless, the Tribunal's jurisprudence on cumulative charges is still far from clear, and we expect the ma tter will be considered in detail in the forthcoming judgement by the Appeals Chamber in the *Celebi ci* case. For instance a distinction may be drawn between cumulative charging on the one hand, and cu mulative convictions and penalties on the other. Both of these issues were considered in the Kupre škic Judgement. As regards cumulative charging, the Trial Chamber stated that the Prosecutor:[18]

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

Howe ver, bearing in mind that the fundamental harm to be guarded against by the prohibition of cumu ative charges is to ensure that an accused is not punished more than once in respect of the same crimi al act, there may be less reason for refusing to allow cumulative charging, as distinct from cumu ative convictions or penalties. A strict prohibition on cumulative charging could impede the work of the Prosecutor. The Prosecutor may not always be in a position to select between charges prior to the evide ce being presented during trial, and the crimes over which the Tribunal has jurisdiction are frequ ntly broad and yet to be clarified in the jurisprudence of the Tribunal. This was highlighted in the Kupr škic Judgement where the Trial Chamber stated that "[u]nlike provisions of national criminal

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codes.. each Article of the Statute does not confine itself to indicating a single category of well defined acts" bu: instead "embraces broad clusters of offences sharing certain *general* legal ingredients."[19] As the Trib unal's case law develops, and elements of each offence are clarified, it will become easier to identify overlap in particular charges prior to the trial, but at present, and certainly in this case, it is enough that permitting cumulative charging results in no substantial prejudice to an accused.

C. Rela ionship between the Facts and the Charges

The acc used Naletilic has argued that it is not clear which acts in Count 5 are alleged to be violations of Article 49, 50 and 52. In the Amended Indictment the Prosecutor has included 10 paragraphs of factual allegati ons as the basis for counts 2-8, adopting the usual drafting practice employed throughout the indictm ents. In many cases it is obvious which factual allegations relate to each individual charge. Where the allegations involve civilians, they go to Article 51 of Geneva Convention IV. Where they relate t prisoners of war, they go the relevant articles of the Geneva Convention III. As between Article 49, 50 and 52 of Geneva Convention III, there is some overlap. For example, allegations about forcing prisoners of war to march on combat lines carrying fake weapons relate to both Articles 50 (prohibiting work of a military character) and 52 (prohibiting humiliating or dangerous work). However, in accordance with our discussion on cumulative charges, the use of the same facts to support more than one offence charged is permissible under the circumstances, and, in this case, does not prejudice the accused in the preparation of his defence.

IV. DISPOSITION

FOR THE FOREGOING REASONS

TRIAL CHAMBER I

HEREBY REJECTS Martinovic's Objections and Naletilic's Objections.

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

Almiro Rodrigues
Presiding Judge

Dated this 14th day of February 2001,
At The Hague,
The Netherlands

(Seal of the Tribunal)

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1. *Prosecutor* v *Naletilic and Martinovic*, Case No. IT-98-34-PT, "Decision on Prosecution Motion to Amend Count 5 of the Indictment", 28 November 2000.
2. See *Prosecutor* v *Naletilic and Martinovic*, Case No. IT-98-34-PT, "Prosecutor's Motion to Amend Count 5 of the Indictment", 11 October 2000; *Prosecutor* v *Naletilic and Martinovic*, Case No. IT-98-34-PT, "Statement of the Defence of Mladen Naletilic to the Prosecutor's Statement in Respect of Pre-Trial Filings of 11 October 2000", 24 October 2000; and *Prosecutor* v *Naletilic and Martinovic*, Case No. IT-98-34-PT, "Declaration of the Defence for the Accused Vinko

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Martino ic to the Pre-Trial Documents Submitted by the Prosecutor", 23 October 2000.
3. The ri ght of the accused to a fair trial is guaranteed in Article 20 of the Statute of the Tribunal (hereafter "Statute"), which provides that a trial must be "fair and expeditious...". Article 21 (4) (a) of the Statute further provides that the accused must be " infc med promptly and in detail in a language which he understands of the nature of and cause of the charge against him"; A ticle 21 (4)(b) provides that an accused must "have adequate time and facilities for the preparation of his defence"; and Arti le 21 (4) (c) provides that an accused must be "tried without undue delay". See also Rule 59 *bis* (B) which specifies that, "at he time of being taken into custody, an accused shall be informed immediately, in a language the accused understa ads, of the charges against him or her." These guarantees are substantially based upon human rights standards enshrine d in various international instruments. See for example, Article 9 (2) of the International Covenant on Civil and Political Rights (ICCPR), Article 14 (3) ICCPR, Article 5 (3) European Convention on Human Rights (ECHR), and Article 6 ECRH.
4. See f r example, *Prosecutor* v *Musema*, Case No. ICTR096-13-T, "Decision on the Prosecutor's Request for Leave to Amend he Indictment", 6 May 1999, where the Trial Chamber held that:

> ...Rule 50 of the Rules does not explicitly prescribe a time limit within which the Prosecutor may file to amend the Indictment, leaving it open to the Trial Chamber to consider the motion in light of the circumstances of each individual case. A key consideration would be whether or not, and to what extent, the dilatory filing of the motion impacts on the rights of the accused to a fair trial. In order that justice may take its proper course, due consideration must also be given to the Prosecutor's unfettered responsibility to prosecute the accused to the full extent of the law and to present all relevant evidence before the Trial Chamber.

In *Pros cutor* v *Kabiligi and Ntabakuze*, Case No. ICTR-97-34-I/ICTR-97-30-I, "Decision on the Prosecutor's Motion to Amend he Indictment", 8 October 1999 at para.43, the Trial Chamber noted that Rule 50 "does not lay down any specific standar of proof for the amendment of an indictment. Therefore, on a strict interpretation of this Rule, it is a matter of the discreti n of the Trial Chamber whether or not it allows an amendment of an indictment." See generally: *Prosecutor* v *Baraya wiza*, Case No. ICTR-97-19-I, "Decision on the Prosecutor's Request for Leave to File and Amended Indictment", 11 Apri 2000; *Prosecutor* V *Kajelijeli*, Case No. ICTR-98-44A-T, "Decision on Prosecutor's Motion to Correct the Indictm ent Dated 22 December 2000 and Motion for Leave To File an Amended Indictment" 25 January 2001; and *Prosecu tor* v *Niyitegeka*, Case No. ICTR-96-14-I, "Decision on Prosecutor's Request for Leave to File an Amended Indictm ent, 21 June 2000 (hereafter "*Niyitegeka* Decision").
5. The Appeals Chamber rendered an oral decision on 29 May 1998, and written reasons were given on 2 July 1998. See *Prosecu tor* v *Kovacevic*, Case No. IT-97-24-PT, "Decision Stating Reasons for Appeals Chamber's Order of 29 May 1998", 2 July 1998 (hereafter "*Kovacevic* Appeals Chamber Decision"). The Trial Chamber had refused to permit the amendment. See *Pro secutor* v *Kovacevic*, Case No. IT-97-24-PT, "Decision on Prosecutor's Request to File an Amended Indictment", 5 March 998 (hereafter "*Kovacevic* Trial Chamber Decision")
6. *Pros cutor* v *Kovacevic*, Case No. IT-97-24-PT, "Separate Opinion of Judge Mohamed Shahabuddeen", 2 July 1998.
7. *Pros cutor* v *Krstic*, Case No. IT-98-33-PT, "Amended Indictment", 27 October 1999.
8. See a lso *Prosecutor* v *Musema*, Case No. ICTR-96-13-T, "Decision on the Prosecutor's Request for Leave to Amend the Indictm ent", 18 November 1998, granting leave for the Prosecutor to, *inter alia*, add a new charge of complicity in genocide. No nev facts were introduced to support the charge, although the new charge was included as an alternative to the existing charge of genocide, rather than as an additional count.
9. See *Niyitegeka* Decision, *supra* note 4, at para 33 (1) (ii).
10. See the discussion in *Kovacevic* Trial Chamber Decision, *supra* note 5 at para 10. See also, Article 337 of the Yugoslav Law or Criminal Procedure Senacted by the Socialist Federal Republic of Yugoslavia Assembly, 24 December 1976C which stipula es that:

> (1) If during the trial the prosecutor finds that the evidence presented demonstrates a change in the state of the facts from that presented in the indictment or accusation, he may during the trial orally amend the indictment or accusation, and he may file a motion that the trial be adjourned so that a new indictment or accusation be prepared.
> (2) In such case the court may adjourn the trial for purposes of preparation of the defense.
> (3) If the panel allows adjournment of the trial for preparation of a new indictment or accusation, it shall set the date by which the prosecutor must file the indictment or accusation. A copy of the new indictment or accusation shall be served on the accused, but no traverse of that indictment or accusation is allowed. If the Prosecutor does not file the indictment or accusation by the date specified, the panel shall resume the trial on the basis of the previous indictment or accusation.

Article 332 of the Federation of Bosnian Herzegovina Criminal Procedure Code (1998) is in similar terms.

11. For example, US Federal Rule of Criminal Procedure 7 (e) provides that "[t]he court may permit an information to be

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amende(at any time before verdict or finding if no additional or different offense is charged and if substantial rights of the defenda: t are not prejudiced." The question as to what will constitute an 'additional or different offense" has been controv(rsial in the US. See LaFave and Israel, *Criminal Procedure*, 2nd Ed, at 19.5C

12. See or example, the English Indictments Act of 1915 s 5; New Zealand Crimes Act (1961) s. 335 (which has been interpre(ed to permit the addition of a new count "that is additional or cumulative with the real issue being whether there was prejudic ; to the accused." [See *Bristow* [1996] 2 NZLR 252]) The Criminal Procedure (Scotland) Act of 1995, s 96(3) states that ame(ndments that change the "character of the offence charged" are not permitted. However, this provision has been interpre(ed as specifying that the character of the charge must not be changed "to such a degree as to prejudice the accused's defence on the merits". See *Criminal Procedure (Scotland) Act 1995*, 2nd Ed. Annotated by I. Bradley, and R. Shiels, (1999).

13. See or example, *Niyitegeka* Decision, *supra* note 4, at para. 27.

14. In th ; *Kovacevic* Appeals Chamber Decision, *supra* note 5, at para. 24, it was held that the size of the amendment may be taken in o account but, of itself, is unlikely to afford a basis for refusing to allow an amendment.

15. See *bid*, at para.32, recognising that, if the Prosecutor has sought an improper tactical advantage, that is a matter determi ing whether there has been undue delay in violation of the right of the accused to a fair trial.

16. *Pros ecutor v Naletilic and Martinovic*, Case No. IT-98-34-PT, "Decision on Defendant Vinko Martinovic's Objection to the Indi(tment, 15 February 2000.

17. *Pros ecutor v Kupreskic*, Case No. IT-95-16-T, "Judgement" 14 January 2000, at paras. 681-682, 693.

18. *Ibid* at para. 727

19. *Ibid* at para 697.

Annex II

P osecutor v. Rajic, IT-95-12, Review of the Indictment Pursuant to Rule 61 of the Rules o: Procedure and Evidence, 13 Sept. 1996.

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IN THE TRIAL CHAMBER

Before: Judge Gabrielle Kirk McDonald, Presiding

Judge Rustam S. Sidhwa

Judge Lal C. Vohrah

Registrar: Mrs. Dorothee de Sampayo Garrido-Nijgh

Decision of: 13 September 1996

PROSECUTOR

v.

IVICA RAJIC

a/k/a

VIKTOR ANDRIC

REVIEW OF THE INDICTMENT PURSUANT TO RULE 61 OF THE RULES OF PROCEDURE AND EVIDENCE

The Office of the Prosecutor:

Mr. Eric Ostberg
Mr. Gregory Kehoe
Mr. Andrew Cayley

I. INTRODUCTION

On 25 August 1995, the Prosecutor of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991 ("International Tribunal") submitted to Judge Rustam S. Sidhwa, a Judge of this Trial Chamber, an indictment against Ivica rajic, also known as viktor andric. Judge Sidhwa confirmed the indictment on 29 August 1995 and, on the same day, signed warrants of arrest which were sent to the Republic of Bosnia and Herzegovina and to the Federation of Bosnia and Herzegovina. An additional warrant of arrest, signed on 8 December 1995 by Judge Lal C.

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Vohrah was sent to the Republic of Croatia.

On 9 February 1996, the International Tribunal received a power of attorney signed by Ivica rajic, authorising Mr. Zvonamir Hodak to act as his legal representative in proceedings before the International Tribunal.

On 6 March 1996, Judge Sidhwa issued an order inviting the Prosecutor to report on its efforts to effect service of the indictment. After hearing the Prosecutor, Judge Sidhwa was satisfied that the Prosecutor had taken all reasonable steps to effect personal service and had otherwise tried to inform the accused of the existence of the indictment. Accordingly, on the same day, he ordered that the indictment against Ivica rajic be submitted to this Trial Chamber for review under Rule 61 of the International Tribunal's Rules of Procedure and Evidence ("Rules"). On 26 March 1996, Mr. Hodak was informed of the Rule 61 review hearing scheduled in respect of Ivica rajic.

The Prosecutor filed a motion on 2 April 1996 requesting that the identity of seven Prosecution witnesses be protected from disclosure to the public and the media. This motion was granted by the Trial Chamber on the same day.

On 2 and 3 April 1996, the Rule 61 hearing regarding ivica rajic was conducted by this Trial Chamber. At that time, supporting evidence, both written and oral, was received by the Chamber in open court.

Thereafter, the Prosecutor requested, and was granted, an adjournment of the Rule 61 proceeding so that it could present additional evidence on the issue of the character of the conflict. Such written evidence was submitted to this Trial Chamber on 10 June 1996.

Pursuant to Rule 74, on 30 April 1996, the Republic of Croatia requested leave to appear as *amicus curiae* in this matter on the issue of the nature of the conflict. The Prosecutor filed its opposition to this request on 15 May 1996. On 24 May 1996, the Trial Chamber issued an order rejecting Croatia's request.

On 7 August 1996, the Trial Chamber ordered the Prosecutor to file any material which the Prosecutor wished the Trial Chamber to take into account under Sub-rule 61(E) relating to the efforts to effect personal service of the indictment and the failure or refusal of States to cooperate with the International Tribunal. The Prosecutor filed such material on 12 August 1996, and supplemented this with further material filed on 13 August 1996 with leave of the Trial Chamber.

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

HEREBY ISSUES ITS DECISION.

II. DISCUSSION

A. The Charges

1. Ivica rajic is accused of ordering the 23 October 1993 attack against the village of Stupni Do,

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which was located in the Republic of Bosnia-Herzegovina. The attack was allegedly carried out by the croatian Defence Council ("HVO"), which are identified as the armed forces of the self-proclaimed Croatian Community of Herceg-Bosna ("HB"), acting under Ivica rajic's control. Ivica rajic is charged under six counts: Count I - a grave breach of the Geneva Conventions of 1949, as recognised by Article 2(a) (wilful killing) of the Statute of the International Tribunal ("Statute"); Count II - a grave breach of the Geneva Conventions of 1949, as recognised by Article 2(d) (destruction of property) of the Statute; and Count III - violations of the laws and customs of war, as recognised by Article 3 (deliberate attack on a civilian population and wanton destruction of a village) of the Statute. In the alternative, he is charged with: Count IV - command responsibility for a grave breach of the Geneva Conventions of 1949, as recognised by Article 2(a) (wilful killing) of the Statute; Count V - command responsibility for a grave breach of the Geneva Conventions of 1949, as recognised by Article 2(d) (destruction of property) of the Statute; and Count VI - command responsibility for violations of the laws and customs of war, as recognised by Article 3 (deliberate attack on a civilian population and wanton destruction of a village) of the Statute.

B. Preliminary Matters

2. Before reviewing the indictment against Ivica Rajic, it is necessary to consider some preliminary matters. One such matter is the purpose and nature of Rule 61 proceedings. These proceedings give the Prosecutor the opportunity to present in open court the indictment against an accused and the evidence supporting such indictment. Rule 61 proceedings therefore are a public reminder that an accused is wanted for serious violations of international humanitarian law. They also offer the victims of atrocities the opportunity to be heard and create a historical record of the manner in which they were treated. If the Trial Chamber determines that there are reasonable grounds for believing that the accused committed any or all of the crimes charged in the indictment, it shall issue an international arrest warrant. The issuance of such a warrant, with which all States that are Members of the United Nations are obliged to comply, enables the arrest of the accused if he crosses international borders. After a Rule 61 proceeding, the President of the International Tribunal may notify the Security Council of the failure of a State to cooperate with the International Tribunal. The Prosecutor has submitted material in which it is asserted that failure to effect personal service of the indictment on Ivica Rajic is due in whole or in part to the failure of the Republic of Croatia and the Croatian Community of Herzeg-Bosna to cooperate with the International Tribunal.

3. A Rule 61 proceeding is not a trial *in absentia*. There is no finding of guilt in this proceeding. The only determination the Trial Chamber makes is whether there are reasonable grounds for believing that the accused committed the crimes charged in the indictment. As part of this determination, the Chamber considers whether the acts with which the accused is charged, if proven beyond a reasonable doubt at trial, are crimes falling within its subject-matter jurisdiction and ensures that the charges against the accused are well founded in fact. No penalty is imposed on the accused in a Rule 61 proceeding. The only consequences of the proceeding are the public airing of the evidence against the accused and the possible issuance of an international arrest warrant, thereby enhancing the likelihood of the arrest of the accused and enabling the International Tribunal to discharge its mandate instead of being rendered ineffective by the non-compliance of States. Thus the procedure furthers the purposes for which the International Tribunal was established.

4. Certain evidentiary issues must also be resolved at this stage. The Trial Chamber's examination of the charges against Ivica Rajic requires a review of the evidence submitted by the Prosecutor in support of the indictment. This evidence includes the material that was presented to Judge Sidhwa at the time of the confirmation of the indictment. The Chamber also admitted additional evidence during and after the Rule 61 hearing, including the testimony of witnesses whose statements were

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not sul mitted to Judge Sidhwa. Such evidence is admissible under Sub-rules (B) and (C) of Rule 61, wh ch govern the conduct of proceedings under the Rule. Sub-rule 61(B) states that the Prosec itor shall submit the indictment at issue to the Trial Chamber in open court. It further provid s that the Prosecutor shall submit the evidence that was before the confirming Judge and "may a lso call . . . and examine any witness whose statement has been submitted to the confirn ing Judge." Sub-rule 61(C) allows additional evidence to be submitted at the hearing: it require s the Trial Chamber to decide the case based on the evidence referred to in Sub-rule 61(B) (*i.e.*, th e evidence that was before the confirming Judge) and "such additional evidence as the Prosec itor may tender". The Trial Chamber concludes that the testimony of witnesses whose statem ents were not before the confirming Judge is within the purview of Sub-rule 61(C) because this te timony constitutes "such additional evidence as the Prosecutor may tender". Such a reading of Rule 61 is also consistent with the practice of the International Tribunal in previous Rule 61 proce dings. *See, e.g., Prosecutor v. Karadzic & Mladic*, Review of the Indictments Pursuant to Rule 6 . of the Rules of Procedure and Evidence (No. IT-95-18-R61, T. Ch. I, 11 July 1996); *Prosec itor v. Msksic, Radic & Sljivancanin*, Review of Indictment Pursuant to Rule 61 (No. IT-95-13-R6 ., T. Ch. I, 3 Apr. 1996); *Prosecutor v. Martic*, Decision (No. IT-95-11-R61, T. Ch. I, 8 Mar. 1996) (*"Martic Rule 61 Decision"*).

5. A fi ial evidentiary matter that bears mention is the testimony of Mr. Ehsanullah Bajwa, an invest gator in the Office of the Prosecutor, which was presented during the Rule 61 hearing. Mr. Bajwa testified that he had taken the statements of several persons who witnessed the attack on Stupn Do and orally recounted portions of these statements to the Chamber. The written staten ents that were summarised by Mr. Bajwa during the Rule 61 hearing have been submitted to, an l examined by, the Chamber. Mr. Bajwa's testimony is relevant to the decision of the Trial Cham ber only to the extent that it evidences the taking of certain statements. Otherwise, the Trial Cham ber has relied solely on the written statements and the other evidence before the Chamber. This is discussed in detail by Judge Sidhwa in his separate opinion.

C. Subject-Matter Jurisdiction

6. Th first issue that the Trial Chamber must consider is whether it has subject-matter jurisdiction over t ne offences alleged against Ivica Rajic. This requires the Trial Chamber to examine Articles 2 and 3 of the Statute, under which Ivica Rajic is charged.

1. Article 2 of the Statute - Grave Breaches

7. Th Prosecutor has charged Ivica Rajic with the wilful killing of civilians and the destruction of prope ty under Article 2 of the Statute. In the jurisdictional phase of the case of *Prosecutor v. Tadic* the International Tribunal's Appeals Chamber held that Article 2 encompasses the grave breac nes provisions of the 1949 Geneva Conventions and that there are two prerequisites for its applic ation: (a) there must be an international armed conflict in the sense of Article 2 common to the C nventions; and (b) the crime must be directed against persons or property protected under the p ovisions of the relevant Convention. *Prosecutor v. Tadic*, Decision on the Defence Motion for Interl ocutory Appeal on Jurisdiction ¶¶ 81, 84, (No. IT-94-1-AR72, App. Ch., 2 Oct. 1995)(*"Tadic Appe l Decision on Jurisdiction"*).

8. Be cause the crimes alleged by the Prosecutor were directed against civilian persons and prope rty, the Geneva Convention relevant to this case is the Convention Relative to the Protection

of Civilian Persons in Time of War, 12 August 1949, 75 UNTS 287 ("Geneva Convention IV"). Based on the provisions of this Convention, the Trial Chamber first considers whether the Prosecutor has shown sufficiently that the alleged attack on Stupni Do took place during an international armed conflict and then addresses the issue of whether the attack involved persons and/or property protected under Geneva Convention IV.

a. International Armed Conflict

9. The evidence submitted by the Prosecutor indicates that the attack on the village of Stupni Do was part of the clashes occurring in central and southern Bosnia between the HVO (the armed forces of the Croatian Community of Herceg-Bosna) on the one hand, and the forces of the Bosnian Government on the other. These clashes started in the latter part of 1992 and continued until the conclusion of the Washington Peace Agreement in March 1994. *See Bosnia and Herzegovina-Croatia: Preliminary Agreement Concerning The Establishment Of A Confederation* 33 I.L.M. 605 (18 March 1994). The HVO's attacks in the area of the Lasva River Valley in April 1993 and on Mostar in May 1993 were part of these clashes. The village of Stupni Do was located in the same general area as the objects of these attacks, approximately four kilometres south-east of the town of Vares. The accused Ivica Rajic was apparently the commander of the HVO's second operational group in the Central Bosnian Operational Zone. The evidence further indicates that the second operational group included the Bobavac Brigade, which actually carried out the attack on the village of Stupni Do, and that prior to the attack Ivica Rajic personally took command of the Bobavac Brigade. Thus, the "conflict" that the Trial Chamber has to examine in this case may be described broadly as the fighting between the HVO and the Bosnian Government in central and southern Bosnia from the autumn of 1992 to the spring of 1994.

10. Deciding on the character of an armed conflict is a difficult exercise in a world "where power struggles are in every continent carried on by destabilisation, interference in civil strife, comfort, aid and encouragement to rebels, and the like." *Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.)*, 1986 I.C.J. Rep. 14, p. 543 (Merits Judgment of 27 June 1986) ("*Nicaragua*") (diss. op. of Judge Jennings). In the case of the former Yugoslavia, for example, one is frequently confronted with conflicts between the citizens of a State and their central government in which other States are allegedly involved to a greater or lesser degree.

11. In the *Tadic Appeals Decision on Jurisdiction,* the Appeals Chamber provides some guidance for determining the character of such conflicts. The Appeals Chamber held at paragraph 72 that:

> To the extent that the conflicts Sin the former YugoslaviaC had been limited to clashes between Bosnian Government forces and Bosnian Serb rebel forces in Bosnia-Herzegovina, as well as between the Croatian Government and Croatian Serb rebel forces in Krajina (Croatia), they had been internal (unless direct involvement of the Federal Republic of Yugoslavia (Serbia-Montenegro) could be proven).

The conflict between the HVO and Bosnian Government forces may be regarded as analogous to the conflicts described above. It therefore should be treated as internal unless the direct involvement of a State is proven. Thus, the issue of whether the alleged attack on the civilian population of Stupni Do was part of an international armed conflict turns on the existence and extent of outside involvement in the clashes between the Bosnian Government forces and the HVO in central and southern Bosnia.

12. The Appeals Chamber's decision on jurisdiction in the *Tadic* case did not, however, set out the quantum of involvement by a third State that is needed to convert a domestic conflict into an international one. The Prosecutor has presented two theories regarding the internationality of the conflict at issue in this case:

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> STChe conflict can be classified as international on the basis of the direct military involvement of Croatia in SBosniaC and the existence of hostilities resulting therefrom, and the existence of hostilities between SBosniaC and the Croatian Community of HB, which was very closely related to and controlled by Croatia and its armed forces.

Prosecutor's Brief on the Applicable Law for the Armed Conflict involving Bosnia-Herzegovina and Croatia and the Self-proclaimed Croatian Community of Herceg-Bosna at 4, *Prosecutor v. Ivica Rajic* (No. IT-95-12-R61 T. Ch. II, 1 April 1996) ("*Prosecutor Brief*"). Each of these contentions will be considered below.

i. Direct Military Intervention by Croatia

13. The Chamber finds that, for purposes of the application of the grave breaches provisions of Geneva Convention IV, the significant and continuous military action by the armed forces of Croatia in support of the Bosnian Croats against the forces of the Bosnian Government on the territory of the latter was sufficient to convert the domestic conflict between the Bosnian Croats and the Bosnian Government into an international one. The evidence submitted by the Prosecutor provides reasonable grounds to believe that between 5000 to 7000 members of the Croatian Army, as well as some members of the Croatian Armed Forces ("HOS"), were present in the territory of Bosnia and were involved, both directly and through their relations with HB and the HVO, in clashes with Bosnian Government forces in central and southern Bosnia.

14. There is no doubt that elements of the Croatian Army were located on the territory of Bosnia at least during the period 1992 to March 1994. This presence was reported in several United Nations documents, including reports of the United Nations Secretary-General based on information relayed by the United Nations Protection Force ("UNPROFOR") in Bosnia, Security Council statements and General Assembly resolutions. *See, e.g., Further Report of the Secretary-General Pursuant to Security Council Resolution 743 (1992)*, U.N. SCOR, 47th Sess., ¶ 28, U.N. Doc. S/24848 (24 Nov. 1992) (*"S.G. 24 Nov. 1992 Report"*); *Report of the Secretary-General*, U.N. GAOR, 47th Sess., ¶¶ 9-11, U.N. Doc. A/47/747 (3 Dec. 1992); G.A. Res. 47/121, U.N. GAOR, 47th Sess., ¶ 5, U.N. Doc. A/47/747 (18 Dec. 1992) ("G.A. Res. 47/121"); *Report of the Secretary-General Pursuant to Paragraph 12 of General Assembly Resolution 47/121*, U.N. GAOR, 47th Sess., ¶ 32, U.N. Doc. A/47/369 (18 Jan. 1993) (*"S.G. 18 Jan. 1993 Report"*); *Statement by the President of the Security Council*, U.N. SCOR, 48th Sess., U.N. Doc. S/25746 (10 May 1993) (*"S.C. 10 May 1993 Statement"*); *Letter dated 1 February 1994 from the Secretary-General Addressed to the President of the Security Council*, U.N. SCOR, 49th Sess. U.N. Doc. S/1994/109 (2 Feb. 1994) (*"S.G. 1 Feb. 1994 Letter"*).

15. The Republic of Croatia has acknowledged that elements of its army were present in Bosnian territory, although it has taken varying positions on the status of the Croatian troops in Bosnia and their role in the fighting there. In early 1993, for example, Croatia stated that if any units of the Croatian Army were in Bosnia, "they would be operating in accord with the authority of the Government of the Republic of Bosnia and Herzegovina". *S.G. 18 Jan. 1993 Report, supra*, ¶ 32. By the summer, however, Croatia denied that there were any members of the Croatian Army present in Bosnia. *See Letter dated 3 June 1993 from the President of the Republic of Croatia addressed to the Secretary-General*, U.N. SCOR, 48th Sess., ¶ 3(b), U.N. Doc. S/25885 (4 June 1993). Croatia changed again its position shortly thereafter. It admitted that Croatian Army units were present in the "border areas" between Croatia and Bosnia, but it claimed that they were placed there in accordance with the 12 July 1992 Joint Agreement between Croatia and the Republic of Bosnia-Herzegovina. Further, Croatia conceded that the HVO had been "joined by individuals, former members of the Croatian Armed Forces natives of Bosnia and Herzegovina, who had joined, as volunteers, the Croatian Armed Forces during the Serbian aggression against Croatia in order to defend the Republic of Croatia, and have now returned to defend their century-old homes." *Letter dated 16 July 1993 from the President of the Republic of Croatia addressed to the Secretary-General*, U.N. SCOR, 48th Sess., ¶ 2(e), U.N. Doc. S/26101 (16 July 1993).

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16. By early 1994, Croatia effectively admitted that its army was present in Bosnia against the will of the Bosnian Government. At the start of peace talks with Bosnia, Croatia informed the United Nations Secretary-General that "as a goodwill gesture to the Sarajevo Government", Croatia was ready to withdraw certain units from the border areas with Bosnia and Herzegovina - *i.e.*, it was "ready to call off the units of the Croatian Army on the left bank of the Neretva River and elements of the Croatian Army on the right bank of the Neretva." *Letter dated 11 Feb. 1994 from the Deputy Prime Minister and Minister for Foreign Affairs of Croatia to the Secretary-General*, U.N. SCOR, 49th Sess., at 3, U.N. Doc. S/1994/177 (16 Feb. 1994). Some days later, Croatia reported that "Croatian volunteers that had been situated in . . . Central Bosnia have returned to the Republic of Croatia on 10 February 1994" and that "SoCn 16 February . . . elements of the Croatian Army left the wider Neretva river region and have been repositioned in the Metkovic area on the territory of the Republic of Croatia." *Letter dated 17 Feb. 1994 from the Permanent Representative of Croatia to the United Nations addressed to the Secretary-General*, U.N. SCOR, 49th Sess., U.N. Doc. S/1994/197 (18 Feb. 1994).

17. The Trial Chamber has received substantial evidence indicating that members of the Croatian Army were present in Bosnia at the behest of the Croatian Government. Documentary support for this assertion includes a 5 June 1992 order from the Croatian Minister of Defence mobilizing the 101st brigade of the Croatian Army for service in Bosnia. *See* Supporting Record of the Rule 61 Proceeding of Ivica rajic ("SR") at 781. A subsequent document confirms that this mobilization occurred. On 16 March 1993, the Deputy Head of Army Command of HB and the HVO, Miro Andric, authorised the return of one Ivan Zlatic of the 101st brigade of the Croatian Army to his original unit. SR at 776. In addition, the Prosecutor has submitted copies of internal HVO correspondence which shows that the HVO was trying to determine the status of HV officers serving in the HVO. *See* SR at 745-44, 755. These documents suggest that HV soldiers serving in the HVO were not volunteers, but rather were mobilized by Croatia and were serving in their capacity as HV soldiers with a special status within the HVO.

18. The above conclusion is supported by witness statements reporting sightings of entire brigades of Croatian Army troops in Bosnia. SR at 682, 724. It is unlikely that units of this size would of their own accord volunteer for service in a foreign country. Moreover, witnesses testified to seeing military equipment such as tanks, helicopters and artillery bearing Croatian Army insignia in central and southern Bosnia. SR at 698, 720, 942, 950. It does not seem probable that such equipment could have been transported to Bosnia by volunteers without the cooperation of the Croatian Government.

19. The material before the Trial Chamber also suggests that, contrary to Croatia's claims, Croatian troops were not just stationed in border areas and that they were involved in hostilities against Bosnian Government forces in central and southern Bosnia. In November 1992, the Secretary-General reported that the Croatian Army was "reliably reported to be engaged extensively in the Republic Sof Bosnia-HerzegovinaC." *S.G. 24 Nov. 1992 Report*, *supra*, ¶ 47. A month later, the Secretary-General reiterated this finding and the General Assembly implicitly endorsed it by calling for the removal of "all elements of the Croatian Army that may be in the Republic of Bosnia and Herzegovina and that are already not operating in accord with the authority of the Government". G.A. Res. 47/121, *supra* ¶ 5; *see also* European Council Declaration on Former Yugoslavia ¶ 2 (Edinburgh, 11-12 December 1992) (noting that Croatia carried a share of the responsibility for attacks on the Muslim population of Bosnia-Herzegovina). In May 1993, the Security Council expressed its grave concern at the new military offensive of the Bosnian Croats in the area of Mostar, Jablanica and Drenica and called upon Croatia to "adhere strictly to its obligations under Security Council resolution 752, including putting an end to all forms of interference and respecting the territorial integrity of the Republic of Bosnia and Herzegovina." *S.C. Statement, 10 May 1993, supra*, at 1105. On 1 February 1994, the Secretary-General stated that UNPROFOR had indicated that there were no new reports of significant military activity in its area of operations. UNPROFOR's assessment, which was based on previous information, was that between 3000 and 5000 members of the Croatian Army were in central Bosnia and the Croatian Army had directly supported the HVO

in terms of manpower, equipment and weapons. The involvement of Croatian Army soldiers had become more prevalent since "the offences of the Bosnia and Herzegovina Government forces against the HVO have become successful." *S.G. 1 Feb. 1994 Letter*, *supra*, at 1.

20. The United Nations' findings are supported by the statements of people on the ground. The British Battalion of UNPROFOR, as well as other witnesses, saw Croatian Army troops and equipment in and around the central Bosnian towns of Vares, Prozor and Gorni Vakuf during 1992 and 1993. British Battalion Reports of December 1992 - October 1993, SR at 933, 937-936, 940, 944, 950, 952, 956, 958, 959, 970, 978, 979, 981, 994, 1006, 1010, 1023, 1028, 1038, 1050, 1051. In May 1993, the British Battalion reported evidence of the involvement of certain units of the Croatian Army in fighting against Bosnian Government forces around the town of Jablanica. British Battalion Report of 28 May 1993, SR at 1023. In addition, witnesses reported sightings of the bodies of soldiers wearing HV insignia after clashes between HB and the Bosnian Government forces. *See* SR at 681, 698-99. The Chamber has received witness testimony and statements indicating that members of the HV and HOS were present in the area of Stupni Do at around the time of the alleged attack on the village. *See* Official Transcript of the Ivica rajic Rule 61 Proceeding at 89-90; SR at 103, 147.

21. The materials described above constitute prima facie evidence that units of the Croatian Army were present in central Bosnia during the period from late 1992 to March 1994 and that these Croatian Army troops were sent to Bosnia by the Croatian Government and were engaged, alongside the Bosnian Croat forces, in fighting against the forces of the Bosnian Government. There is therefore enough evidence to establish for the purpose of the present proceedings that, as a result of the significant and continuous military intervention of the Croatian Army in support of the Bosnian Croats, the domestic conflict between the Bosnian Croats and their Government in central Bosnia became an international armed conflict, and that this conflict was ongoing at the time of the attack on Stupni Do in October 1993.

ii. Croatia's Control of the Bosnian Croats

22. The Chamber's finding regarding the nature of the conflict stated above is all that is necessary to meet the international armed conflict requirement of Geneva Convention IV. Nonetheless, for purposes of the Prosecutor's arguments regarding persons protected under Geneva Convention IV, which are discussed below, the Chamber believes it appropriate to consider the Prosecutor's additional argument that the conflict between the Bosnian Government and HB may be regarded as international because of the relationship between Croatia and HB. The Prosecutor has asserted that Croatia exerted such political and military control over the Bosnian Croats that the latter may be regarded as an agent or extension of Croatia.

23. The Trial Chamber believes that an agency relationship between Croatia and the Bosnian Croats - if proven at trial - would also be sufficient to establish that the conflict between the Bosnian Croats and the Bosnian Government was international in character.

24. The issue of when a group of persons may be regarded as the agent of a State has been considered frequently in the context of imposing responsibility on States for the actions of their agents. The International Law Commission considered the issue in its 1980 Draft Articles on State Responsibility. Draft Article 8 provides in relevant part that the conduct of a person or a group of persons shall "be considered as an act of the State under international law" if "it is established that such person or group of persons was in fact acting on behalf of that State". 1980 II (Part Two) Y.B. Int'l L. Commission at p.31. The matter was also addressed by the International Court of Justice in

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the *Nicaragua* case. There, the Court considered whether the *contras*, who were irregular forces fighting against the Government of Nicaragua, were agents of the United States of America in order to decide whether the United States was liable for violations of international humanitarian law alleged ly committed by the *contras*. The Court held that the relevant standard was

> whether the relationship was so much one of dependence on the one side and control on the other that it would be right to equate the *contras*, for legal purposes, with an organ of the United States Government, or as acting on behalf of that Government.

Nicaragua, 1986 I.C.J. Rep. ¶ 109. It found that the United States had financed, organised, trained, supplied and equipped the *contras* and had assisted them in selecting military and paramilitary targets. These activities were not, however, sufficient to hold the United States liable for any violations of international humanitarian law committed by the *contras*.

25. The Trial Chamber deems it necessary to emphasise that the International Court of Justice in the *Nicaragua* case considered the issue of agency in a very different context from the one before the Trial Chamber in this case. First, the Court's decision in the *Nicaragua* case was a final determination of the United States' responsibility for the acts of the *contras.* In contrast, the instant proceedings are preliminary in nature and may be revised at trial. Second, in the *Nicaragua* case the Court was charged with determining State responsibility for violations of international humanitarian law. It therefore rightly focused on the United States' operational control over the *contras*, holding that the "general control by the SUnited StatesC over a force with a high degree of dependency on Sthe United StatesC" was not sufficient to establish liability for violations by that force. *Nicaragua*, 1986 I.C.J. Rep. ¶ 115. In contrast, this Chamber is not called upon to determine Croatia's liability for the acts of the Bosnian Croats. Rather, it is required to decide whether the Bosnian Croats can be regarded as agents of Croatia for establishing subject-matter jurisdiction over discrete acts which are alleged to be violations of the grave breaches provisions of the Geneva Convention. Specific operational control is therefore not critical to the inquiry. Rather, the Trial Chamber focuses on the general political and military control exercised by Croatia over the Bosnian Croats.

26. The evidence submitted in this case establishes reasonable grounds for believing that the Bosnian Croats were agents of Croatia in clashes with the Bosnian Government in central and southern Bosnia from the autumn of 1992 to the spring of 1993. It appears that Croatia, in addition to assisting the Bosnian Croats in much the same manner in which the United States backed the *contras* in *Nicaragua*, inserted its own armed forces into the conflict on the territory of Bosnia and exercised a high degree of control over both the military and political institutions of the Bosnian Croats.

27. The Prosecutor has provided the Chamber with considerable evidence of Croatian control of the military arm of the Bosnian Croats, the HVO. The HVO was founded in the face of "aggression on the territories of the Croatian Community of Herceg-Bosna", with the objective of defending "the sovereignty of the territories of the Croatian Community of Herceg-Bosna and to protect the Croatian people as well as other peoples in this community attacked by the aggressor." Translation of the Decision on the Creation of the Croatian Defence Council (HVO) (8 April 1992), SR at 171. In addition to the assistance of Croatian Army personnel the evidence indicates that Croatia provided financial support for the Bosnian Croats, particularly for the purchase of arms, and logistical support in the form of assistance in purchasing weapons and the provision of military equipment. *See, e.g.,* 3 March 1992 Letter from the President of the Municipal Board, Bugojno HDZ to the Regional Crisis Staff, Grude (noting that in relation to the equipment necessary for the defence of Bugojno, the Board would use the 540,000 DM previously granted by the Ministry of Finance of the Republic of Croatia and that the Board had placed the fund "at the disposal of the Ministry of National Defence of the Republic of Croatia so that the Ministry can cover the aforementioned expenses"); Receipt issued by the Ministry of Finance of Croatia (confirming that a representative of the Bugojno HDZ had received 10,000 DM); British Battalion Reports of 13 Mar. 1993 (reporting

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HVO claims of support from Zagreb and Vienna in the supply of equipment and finance); 21 Aug. 1993 (noting HV supply of manpower and ammunition to HVO); 1 Oct. 1993 (noting regular sighting of HV/HVO helicopter near Travnik); 6 Oct. 1993 (reporting more sightings of HV/HVO helicopter); 22 Oct. 1993 (noting reports that HVO was employing armour and artillery belonging to HV). SR at 783, 787, 932, 942, 950, 959, 1044.

28. On 1 August 1993, a company of the British Battalion reported that General Praljak, who was "reputedly the former Croatian Deputy Minister for National Defence" had become the commander of the HVO. SR at 986. Finally, witnesses report that Croatian officials exerted great influence on the HVO during negotiations with other parties. SR at 687-90, 721.

29. In addition to the evidence of Croatian domination of the military institutions of the Bosnian Croats described above, the Prosecutor has also provided the Trial Chamber with material that suggests that the Bosnian Croat political institutions were influenced by Croatia. The Prosecutor alleges that from the earliest days of the creation of HB, it was politically dominated by Croatia. It appears that both Croatia and HB were governed by branches of the same party, the Croatian Democratic Union, also known as the HDZ, and there is evidence that the Bosnian Croats considered themselves to be closely linked to Croatia. For example, the 18 December 1991 founding document of HB at page 177 notes the Bosnian Croats' historical and ethnic alliance with Croatia and states that they "are aware that their future is linked to the future of the entire Croat nation " In addition, the Prosecutor has submitted the statement of a Bosnian Army officer, who indicates that he personally saw the Bosnian Croat leader, Ante Valenta, proclaim that HB was Croatian ground which belonged to Croatia and that he saw a video tape of the Bosnian Croat leader Dario Kordic, in which Kordic stated that central Bosnia was part of the Republic of Croatia. SR at 705. Another Bosnian witness, who was a resident of Travnik in central Bosnia, also reported hearing similar statements from these persons. SR at 687 - 690.

30. In its 7 April 1992 decision recognising the existence of the Republic of Bosnia and Herzegovina, Croatia explicitly stated that recognition of Bosnia implied that "the Croatian people, as one of the three constituent nations in Bosnia and Herzegovina, shall be guaranteed their sovereign rights" and granted Bosnian Croats the right to Croatian citizenship. SR at 812.

31. Croatia has itself conceded - both implicitly and explicitly - its military and political control and influence over the Bosnian Croats. For example, in November 1993, the Deputy Prime Minister and Foreign Minister of the Republic of Croatia, Mate Granic, and the Prime Minister of the Republic of Bosnia and Herzegovina, Haris Silajdzic, reached an agreement regarding modalities for ending the fighting between the Bosnian Croats and the Bosnian Government. *See Letter dated 18 November from the Permanent Representative of Croatia to the United Nations addressed to the President of the Security Council*, U.N. SCOR, 48th Sess., at 2, U.N. Doc. S/26764 (18 Nov. 1993). At the time of the establishment of a federation between the Bosnian Croats and the Bosnian Government and the creation of a confederation between Bosnia-Herzegovina and Croatia, the latter not only signed the confederation agreement but also was a party to the federation agreement. *See Letter dated 3 March 1994 from the Permanent Representatives of Bosnia and Herzegovina and Croatia to the United Nations addressed to the Secretary-General*, U.N. SCOR, 49th Sess., at 2, U.N. Doc. S/1994/255 (4 March 1994). Perhaps most tellingly, at the time of the conclusion of the Dayton Peace Agreement, the Foreign Minister of the Republic of Croatia, Mate Granic, wrote to the foreign ministers of several States assuring them that the Republic of Croatia would take all necessary steps "to ensure that personnel or organizations in Bosnia and Herzegovina which are under its control or with which it has influence fully respects SsicC and comply with the provisions of Scertain portions of the Dayton Peace AgreementC". *Letter dated 29 November 1995 from the Permanent Representative of the United States of America to the United Nations addressed to the Secretary-General*, U.N. GAOR, 50th Sess., U.N. SCOR, 50th Sess., at 126-130, U.N. Doc. A/50/790 & S/1995/999 (30 Nov. 1995) ("*Dayton Peace Agreement*").

32. The evidence detailed above provides reasonable grounds for the determination that the

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Bosnian Croats can, for the purposes of these proceedings, be regarded as agents of Croatia in respect of discrete acts which are alleged to be violations of the grave breaches provisions of the Geneva Conventions.

b. Protected Persons and Property

33. Having concluded that the attack on Stupni Do was part of an international armed conflict, the Trial Chamber now turns to the second requirement for the application of Article 2 of the International Tribunal's Statute: whether the alleged crimes were "against persons or property protected under the provisions of the relevant Geneva Convention". In the *Tadic Appeals Decision on Jurisdiction*, the Appeals Chamber stated at paragraph 81 that "the offences listed under Article 2 can only be prosecuted when perpetrated against persons or property regarded as 'protected' by the Geneva Conventions under the strict conditions set out by the Conventions themselves". In order for the Trial Chamber to determine whether this requirement is met it is necessary to examine the definitions of protected persons and property contained in Geneva Convention IV.

i. Protected persons

34. Article 4 of Geneva Convention IV, which addresses the protection of civilian persons in time of war, reads in pertinent part:

> Persons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals.

Under this definition, Bosnian civilian victims qualify as "protected persons" if they are "in any manner whatsoever . . . in the hands of a Party to the conflict . . . of which they are not nationals." The Prosecutor asserts that the HVO forces under the command of Ivica rajic were under the control of Croatia to such an extent that Bosnian persons who were the object of the attack by Ivica rajic's forces may be regarded as being in the hands of Croatia.

35. The Trial Chamber has found that HB and the HVO may be regarded as agents of Croatia so that the conflict between the HVO and the Bosnian Government may be regarded as international in character for purposes of the application of the grave breaches regime. The question now is whether this level of control is also sufficient to meet the protected person requirement of Article 4 of Geneva Convention IV.

36. The International Committee of the Red Cross's Commentary on Geneva Convention IV suggests that the protected person requirement should be interpreted to provide broad coverage. The Commentary states that the words "at a given moment and in any manner whatsoever" were "intended to ensure that all situations and all cases were covered." International Committee of the Red Cross, Commentary: IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War 47 (Geneva 1958) ("*Commentary on Geneva Convention IV*"). At page 47 it further notes that the expression "in the hands of" is used in an extremely general sense.

> It is not merely a question of being in enemy hands directly, as a prisoner is . . . In other words, the expression "in the hands of" need not necessarily be understood in the physical sense; it simply means that the person is in territory under the control of the Power in question.

37. The Chamber has been presented with considerable evidence that the Bosnian Croats controlled the territory surrounding the village of Stupni Do. *See* SR at 59-60, 119, 149-151, 441-42, 453. Because the Trial Chamber has already held that there are reasonable grounds for believing that Croatia controlled the Bosnian Croats, Croatia may be regarded as being in control of

this area. Thus, although the residents of Stupni Do were not directly or physically "in the hands of" Croatia, they can be treated as being constructively "in the hands of" Croatia, a country of which they were not nationals. The Trial Chamber therefore finds that the civilian residents of the village of Stupni Do were - for the purposes of the grave breaches provisions of Geneva Convention IV - protected persons *vis-à-vis* the Bosnian Croats because the latter were controlled by Croatia. The Trial Chamber notes this holding is solely for the purpose of establishing subject-matter jurisdiction over the offences allegedly committed by the accused.

ii. Protected property

38. Geneva Convention IV also contains several provisions that set out the types of property that are protected under the Convention. The Prosecutor has suggested that Article 53 of the Convention is the appropriate definition in this case. Article 53 provides as follows:

> Any destruction by the Occupying Power of real or personal property belonging individually or collectively to private persons, or to the State, or to other public authorities, or to social or co-operative organizations, is prohibited, except where such destruction is rendered absolutely necessary by military operations.

The Prosecutor argues that when Stupni Do was overrun by HVO forces under the command of Ivica Rajic and came under their control, "the property of Stupni Do became protected property in terms of Article 53 . . . SbecauseC it was SBosnianC property under the control of HVO forces, who are to be regarded as part of the opposite side, namely Croatia, in an international conflict." *Prosecutor Brief* at 9.

39. Article 53 describes the property that is protected under the Convention in terms of the prohibitions applicable in the case of an occupation. Accordingly, an occupation is necessary in order for civilian property to be protected against destruction under Geneva Convention IV. The only provisions of Geneva Convention IV which assist with any definition of occupation are Articles 2 and 6. Article 2 states: "The Convention shall also apply to all cases of partial or total occupation . . . even if the said occupation meets with no armed resistance" while Article 6 provides that Geneva Convention IV "shall apply from the outset of any conflict or occupation mentioned in Article 2."

40. The Trial Chamber has already held that Croatia may be regarded as being in control of this area. The question is whether the degree of control exercised by the HVO forces over the village of Stupni Do was sufficient to amount to occupation within the meaning of Article 53.

41. Once again, the Commentary on Geneva Convention IV suggests that the requirement may be interpreted to provide broad coverage. It states:

> The relations between the civilian population of a territory and troops advancing into that territory, whether fighting or not, are governed by the present Convention. There is no intermediate period between what might be termed the invasion phase and the inauguration of a stable regime of occupation.

Commentary on Geneva Convention IV at 60. Other commentators have also suggested that a broad interpretation is warranted. One writer has suggested that there are certain common features which, when present, indicate the existence of an occupation, being:

> (i) there is a military force whose presence in a territory is not sanctioned . . . ;
>
> (ii) the military force has . . . displaced the territory's ordinary system of public order and government, replacing it with its own command structure . . . ;

> (iii) there is a difference of nationality and interest between the inhabitants on the one hand and the forces intervening and exercising power over them on the other . . . ;
>
> (iv) . . . there is a practical need for an emergency set of rules to reduce the dangers which can result from clashes between the military force and the inhabitants.

Adam Roberts, *What is a Military Occupation?,* vol. 53, Brit. Y.B. Int'l L., p. 249 at 274 -275 (1984).

42. The Trial Chamber has held that the Bosnian Croats controlled the territory surrounding the village of Stupni Do and that Croatia may be regarded as being in control of this area. Thus, when Stupni Do was overrun by HVO forces, the property of the Bosnian village came under the control of Croatia, in an international conflict. The Trial Chamber therefore finds that the property of Stupni Do became protected property for the purposes of the grave breaches provisions of Geneva Convention IV. The Trial Chamber notes this holding is for the sole purpose of establishing subject-matter jurisdiction over the offences allegedly committed by the accused.

43. For the reasons set forth above, the Trial Chamber finds that it has subject-matter jurisdiction under Article 2 of the Statute over Counts I, II, IV and V of the indictment.

2. Article 3 - Violations of the Laws or Customs of War

44. The Trial Chamber must now consider whether it has subject-matter jurisdiction over the offences charged by the Prosecutor under Article 3 of the Statute. The first violation of Article 3 alleged by the Prosecutor is the wanton destruction of the village of Stupni Do, and the second alleged violation is the attack on the civilian population of Stupni Do.

45. Article 3 of the Statute provides that the International Tribunal has the power to prosecute violations of the laws and customs of war and specifically enumerates certain violations over which the International Tribunal has jurisdiction.

46. One of the enumerated violations over which the International Tribunal has jurisdiction under Article 3(b) is the "wanton destruction of cities, towns or villages, or devastation not justified by military necessity". The prohibitions listed in Article 3 clearly are applicable in cases of international armed conflict and may also apply in internal armed conflicts. *See Tadic Appeal Decision on Jurisdiction* at ¶ 89. The Trial Chamber has held that there is sufficient evidence to conclude that the conflict at issue here was international in character. Accordingly, the Trial Chamber does not have to consider whether the prohibition on wanton destruction reflected in Article 3(b) of the Statute extends - as a matter of customary international law - to internal armed conflicts.

47. The second violation of Article 3 alleged by the Prosecutor is the attack on the civilian population of Stupni Do. The offence of attack on a civilian population is not fully covered by the enumerated provisions of Article 3. The Appeals Chamber has determined that the list in Article 3 of the Statute is not exhaustive, and that the International Tribunal has jurisdiction over violations of the laws and customs of war in addition to the ones expressly listed in Article 3. *See Tadic Appeal Decision on Jurisdiction* at ¶¶ 87-89. Accordingly, this Chamber must ensure that such attacks constitute a violation of the laws or customs of war covered by Article 3 of the Statute.

48. In the *Tadic* case the Appeals Chamber established the principle that civilians are protected during internal armed conflicts. *Tadic Appeal Decision on Jurisdiction* at ¶¶ 119, 127. The specific issue of whether an attack on a civilian population constitutes a violation of the laws or customs of war was addressed by Trial Chamber I of the International Tribunal in the *Martic Rule 61 Decision*. Trial Chamber I held that attacks on civilian populations were prohibited under conventional and customary law in both international and internal armed conflicts. With respect to conventional law,

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the Chamber relied on the provisions of Additional Protocols I and II. It also found a customary prohibition on such conduct based on the Appeals Chamber Decision, resolutions of the United Nations General Assembly, Article 3 Common to the Geneva Conventions and the provisions of Additional Protocols I and II as reflective of customary law. Trial Chamber I further found that the other conditions identified in the Appeals Chamber Decision for the International Tribunal's jurisdiction under Article 3 had been met, *i.e.*, that the violation was serious because it undermined important values and had serious consequences for the victims and involved the individual criminal responsibility of the perpetrator of the violation. *See Martic Rule 61 Decision*, ¶¶ 8, 10, 19, 20. This Trial Chamber agrees with the analysis conducted by Trial Chamber I in the *Martic Rule 61 Decision* and holds that the International Tribunal has jurisdiction under Article 3 of its Statute to entertain the charge of attack against a civilian population.

49. For the reasons set out above, the Trial Chamber concludes that it has subject-matter jurisdiction over counts III and VI of the indictment against Ivica Rajic.

D. Reasonable Grounds

50. The Trial Chamber must now, pursuant to Sub-rule 61(C), determine whether the Prosecutor has established reasonable grounds to believe that Ivica rajic committed the crimes charged in the indictment. The crimes alleged are: wilful killing of several civilians in Stupni Do, destruction of property, deliberate attack on the civilian population of Stupni Do and causing the wanton destruction and devastation of Stupni Do unjustified by military necessity.

51. The evidence submitted by the Prosecutor indicates that Stupni Do was a small village approximately four kilometres south-east of Vares in central Bosnia. In contrast to nearby Vares, Stupni Do had a mostly Muslim population of approximately two hundred and fifty people. Witnesses testified that at approximately eight o'clock on the morning of 23 October 1993, HVO soldiers under the command of Ivica rajic attacked Stupni Do. On hearing the gunfire which signalled the beginning of the attack, villagers took to shelters, cellars, and other hiding places. Approximately forty lightly armed local villagers, constituting the local defence force, attempted to defend and protect their families and property. The shooting continued for approximately three hours, but because the villagers were the HVO's only opposition, they were soon overrun. The village defenders then withdrew to a main shelter to try to protect and warn the people located there. *See* SR at 27-29, 66-69, 148, 151, 165.

52. It appears that HVO soldiers went from house to house, searching for village residents. On finding the villagers, the evidence indicates, the HVO forced them out of the shelters and terrorised them. Witnesses statements indicate that the HVO forcibly took money and possessions from the villagers and that they stabbed, shot, raped, and threatened to kill the unarmed civilians they encountered. The HVO soldiers apparently had no regard for the defencelessness of the villagers. For example, four women who were hiding in a cellar were shot at from above. Three of the four died. The one that survived reported that she escaped from the house only to be shot at by the HVO as she ran away toward the woods. Witnesses indicated that they saw the bodies of at least sixteen unarmed residents who appeared to have been murdered in this or a similar manner. In addition, HVO soldiers attempted to burn approximately twelve civilians alive by locking them in a house and setting the house on fire. The civilians eventually managed to escape by breaking the door with an axe. Throughout the attack, HVO soldiers fired exploding phosphorus munitions into the houses, causing them to burst into flames. The HVO soldiers dragged many of the corpses into burning houses. *See* SR at 164, 330, 426-27, 434-38, 446-52.

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53. According to the Registrar's Office of the Vares municipality, which was responsible for maintaining Stupni Do's death records, by the time the attack ended, thirty-seven Stupni Do residents were dead. Nearly all of the sixty homes in the village were virtually destroyed. *See* SR at 416, 419.

54. Several witness statements report that Stupni Do had no military significance. The village had no militia to speak of; the "defence force" was made up almost entirely of village residents who came together to defend themselves. SR at 427-28. Moreover, the evidence submitted indicates that Stupni Do was located off the main road and its destruction was not necessary to fulfil any legitimate military objectives. *See, e.g.,* SR at 161.

55. The testimony and photographs submitted by the Prosecutor suggest that the civilian population of Stupni Do was the target of the attack. SR at 27-29, 47-62, 66-69, 147-48. The offensive appears to have been planned in advance, as exhibited by substantial testimony that special units commanded by Ivica rajic came to the area from Kiseljak, a town some distance from Stupni Do, to carry out this attack. SR at 113, 163. Several witnesses indicate that a Croat woman who was married to a Muslim and lived in the village was taken by her brother from the village the night before, apparently due to his knowledge of the events that would take place the following day. SR at 68, 440. In addition, one witness testified that eight days before the attack the HVO arrested six men and detained them at a prison in Vares. Five of these men were then taken to watch the destruction of Stupni Do. SR at 484. Finally, Ivica rajic's own statements - as reported by witnesses - indicate that the attack was deliberate. For example, evidence submitted reveals that in conversation with UNPROFOR personnel, Ivica rajic stated that taking Stupni Do was necessary because of a prior attack by Bosnian Muslim forces against Bosnian Croats that had taken place in the area of Kopjari. SR at 100 - 101.

56. The evidence also shows that the village of Stupni Do was destroyed by the attack. SR at 82, 370-73. At the hearing, the Trial Chamber had the opportunity to view photographs of the destroyed village, as well as of burned bodies. *See generally* SR at 6-166, 327-494. Virtually every witness testified about the destruction of the village and about having seen or smelled the houses and other buildings on fire or already burned. There is no evidence that there was a military installation or any other legitimate target in the village. SR at 161.

57. Accordingly, the evidence presented by the Prosecutor provides a reasonable basis for a finding that there was wanton destruction of the village of Stupni Do, wilful killing of its civilian residents, destruction of property, and a deliberate attack on the civilian population as a whole, all of which were unjustified by military necessity. Thus, the only remaining question is that of Ivica rajic's involvement in the attack.

58. There is significant evidence to connect Ivica rajic with the attack on Stupni Do. *See, e.g.,* SR at 90, 95, 98, 101, 113, 121, 140, 332. For example, Ivica rajic personally informed Colonel Ulf Henricsson, the commanding officer of the NORDBAT battalion of UNPROFOR at the time, that he was the "new brigade commander". SR at 83-84. In addition, a United Nations Military Observation officer testified that after an unsuccessful attempt to gain access to Stupni Do, he returned with Ivica rajic and was given free access to the village through the checkpoint. SR at 24-26. Finally, Major Hakan Birger, another UNPROFOR officer, attended a meeting on or about the day of the attack with Ivica rajic, Colonel Henricsson and Sergeant Ruzdi Ekenheim, a UNPROFOR soldier. At that meeting, Ivica rajic presented himself as being in charge of the situation. He denied the United Nations personnel permission to enter Stupni Do. SR at 120.

59. There is proof Ivica rajic knew about the attack and actually ordered it. Evidence of this includes the testimony of Brigadier Angus Ramsay, a UNPROFOR Chief of Staff at the relevant time. Brigadier Ramsay often dealt with Ivica rajic prior to the attack. At those meetings, Ivica rajic presented himself as the military commander of the HVO troops in Kiseljak. SR at 163. Brigadier Ramsay opined that Ivica rajic was the operational commander of the Stupni Do attack and that he

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was ser ior enough in the HVO as well as brutal enough to have been in charge of the attack. SR at 162. Si nilarly, Sergeant Ekenheim believes that there is no question that Ivica Rajic knew about the atta ck. SR at 90. He testified that during the several meetings he attended at Ivica Rajic's military headquarters, Ivica Rajic had both telephone and radio. SR at 90. Sergeant Ekenheim stated t nat Ivica Rajic planned the attack and noted that Ivica Rajic had explicitly stated that he took ov er Stupni Do "because he thought the Bosnian Army would launch an attack against Vares through Stupni Do so they had to neutralise Stupni Do. It was a Bosnian stronghold filled with soldiers and traitors". SR at 101.

At one of several meetings with UNPROFOR representatives, Ivica Rajic informed Sergeant Ekenhe m and Colonel Henricsson that he would not hurt the civilians, that the troops in Stupni Do were hi s, and, because he was in charge, he could guarantee that the civilians would not get hurt. SR at 1)0-101.

60. It is also evident that HVO troops in the area recognised Ivica Rajic's authority. For example, on the way to Vares, Sergeant Ekenheim and Colonel Henricsson passed a HVO checkpoint at which H VO soldiers said they could not pass without permission from Ivica Rajic, their commanding officer. SR at 100.

61. Fin lly, a witness who had been a member of the HVO and the Croatian Armed Forces stated that pri or to the attack, most of the local HVO troops were deployed to the front line areas by Ivica Rajic. S R at 73-74. This witness believes that Ivica Rajic was in charge of the troops because Ivica Rajic h d given him a hand-written note authorising him to retain his weapons while going in and out of c heckpoints around Stupni Do. When they were meeting for this purpose, Ivica Rajic indicate d that he was proud of his men's actions and that the casualties were normal for this type of actio n. SR at 72. This witness also claims that he saw Ivica Rajic slap an HVO soldier who suppos dly released a girl during the Stupni Do attack. SR at 72.

E. Failure To Cooperate With The International Tribunal

62. Aft r the indictment was initially confirmed by Judge Sidhwa, warrants of arrest addressed to the Re ublic of Bosnia and Herzegovina and the Federation of Bosnia and Herzegovina were transm tted on 29 August 1995. A further warrant of arrest signed by Judge Vohrah on 8 December 1995, a ddressed to the Republic of Croatia, was served on the Croatian Deputy Minister of Justice, Tomisl v Panic, on 13 December 1995.

63. On 23 January 1996 the Registrar of the International Tribunal transmitted to the respective embas ies in Belgium of the Republic of Bosnia and Herzegovina and the Republic of Croatia, and to the Minister of Justice of the Federation of Bosnia and Herzegovina, an advertisement in respect of the i ndictment against Ivica Rajic and request for publication pursuant to Rule 60 of the Rules. On 12 ebruary 1996 the Embassy of Bosnia and Herzegovina provided evidence of publication. Neithe the Republic of Croatia nor the Federation of Bosnia and Herzegovina has notified the Registr ar of compliance with the request.

64. To date, personal service of the indictment has not been effected on Ivica Rajic and the arrest warran s have not been executed.

65. The Prosecutor has produced a copy of an indictment issued against Ivica Rajic filed in the Branch Office in Vitez of the High Court of Travnik on 14 August 1995. This indictment, which was transfe red to the High Court of Mostar on 21 August 1995, indicates that Ivica Rajic had been in

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custody since 3 July 1995. SR at 1372. The Trial Chamber has no information as to the outcome of these proceedings but understands from the Prosecutor that Ivica Rajic has since been released. The Trial Chamber does not know whether this was before or after service of the warrant of arrest on the Federation of Bosnia and Herzegovina.

66. The Trial Chamber believes that Ivica Rajic has been present in Croatia and in the territory of the Federation of Bosnia and Herzegovina on several occasions since his release. The Prosecutor has produced reliable information indicating that Ivica Rajic resides or has been residing in Split in the Republic of Croatia and that he visits Kiseljak, in the Federation of Bosnia and Herzegovina, for short periods. SR at 1353. In addition, the Trial Chamber has received a power of attorney, signed by Ivica Rajic while in Kiseljak, appointing a Croatian lawyer, Mr. Hodak, as his representative in the proceedings in this case.

67. The Republic of Croatia is bound to cooperate with the International Tribunal pursuant to Article 29 of the Statute. Despite the presence of Ivica Rajic on its territory, the Republic of Croatia has neither served the indictment nor executed the warrant of arrest addressed to it.

68. The Federation of Bosnia and Herzegovina is also bound to cooperate with the International Tribuna , following the signing of the Dayton Peace Agreement. Pursuant to Article X of annex 1-A of the Dayton Peace Agreement, the Federation of Bosnia and Herzegovina has undertaken to "cooperate fully with all entities involved in implementation of this peace agreement . . . including the International Tribunal for the Former Yugoslavia." Again, despite the presence of Ivica Rajic on its territory, the Federation of Bosnia and Herzegovina has neither served the indictment nor executed the warrant of arrest addressed to it.

69. In a side letter to the Dayton Peace Agreement, on 21 November 1995, the Republic of Croatia undertook to ensure that personnel or organizations in Bosnia and Herzegovina which are under its control or with which it has influence fully respects [sic] and comply with the provisions of the aforementioned Annexes [i.e., annexes 1-A and 2 of the Dayton Peace Agreement].

Dayton Peace Agreement at 126 -30. Both the Security Council of the United Nations and the Presidency of the European Union have recently called upon the Republic of Croatia to use its influence on the Bosnian Croat leadership to ensure full compliance by the Federation of Bosnia and Herzegovina with its international obligations. The failure of the Federation of Bosnia and Herzegovina to comply also implies the failure of the Republic of Croatia.

70. In light of the above, the Trial Chamber considers that the failure to effect personal service of the indictment and to execute the warrants of arrest against Ivica Rajic may be ascribed to the refusal of the Republic of Croatia and the Federation of Bosnia and Herzegovina to cooperate with the International Tribunal. Accordingly, the Trial Chamber so certifies for the purpose of notifying the Security Council.

F. Conclusion

71. Based on the evidence produced and the testimony heard, the Trial Chamber is satisfied that the Prosecutor has presented reasonable grounds for believing that, on 23 October 1993, the civilian village of Stupni Do was attacked by HVO forces who were acting with Ivica Rajic's aid and assistance or on his orders. The attack appears to have been aimed at the civilian population of the village, many of whom were killed during it. The village, which had no military significance, was devastated and the civilian property in it was destroyed.

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72. The Trial Chamber is satisfied that there are grounds to confirm all counts of the indictment against Ivica Rajic and to issue an international arrest warrant against him to be sent to all States. Furthermore, the Trial Chamber orders that the warrant of arrest be sent to the multinational military Implementation Force (IFOR) deployed on the territory of Bosnia and Herzegovina pursuant to the Dayton Peace Agreement.

III. DISPOSITION

FOR THE FOREGOING REASONS,

THE TRIAL CHAMBER, PURSUANT TO RULE 61,

UNANIMOUSLY

RULES that it has subject-matter jurisdiction over all counts of the indictment against Ivica Rajic;

FURTHER RULES that it is satisfied that there are reasonable grounds for believing that ivica Rajic committed the crimes charged in all counts of the indictment against him;

HEREBY CONFIRMS all counts of the indictment;

ISSUES an international arrest warrant for ivica Rajic; and

ORDERS that the arrest warrant shall be transmitted to all States and to the multinational military Implementation Force (IFOR).

NOTES that the failure to effect personal service of the indictment can be ascribed to the refusal to cooperate with the International Tribunal by the Republic of Croatia and by the Federation of Bosnia and Herzegovina and entrusts the responsibility of so informing the Security Council to the President of the International Tribunal, pursuant to Sub-rule 61(E).

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

_____

Gabrielle
Kirk
McDonald

Presiding
Judge

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Judge Shahabuddeen appends a Separate Opinion to this Decision.

Dated this thirteenth day of September 1996

At The Hague

The Netherlands

[Seal of the Tribunal]

Annex III

R :port of the Planning Mission on the Establishment of the Special Court for Sierra L :one, Annex to UN Doc. S/2002/246.

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United Nations

S/2002/246

Security Council

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Letter dated 6 March 2002 from the Secretary-General addressed to the President of the Security Council

You will recall that in my letter to you of 26 December 2001 I had informed members of the Security Council of my decision to authorize the commencement of the operation of the Special Court for Sierra Leone beginning with the dispatch of a planning mission.

In that letter I had also indicated that upon the return of the planning mission I would report to members of the Council on its recommendations on the organization of the start-up phase and all aspects of the establishment and operation of the Special Court. Please find attached in the annex to the present letter the report of the Planning Mission on the Establishment of the Special Court for Sierra Leone, which took place from 7 to 19 January 2002.

(*Signed*) Kofi A. **Annan**

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Annex

Report of the Planning Mission on the Establishment of the Special Court for Sierra Leone

I. Introduction

1. In a letter addressed to the President of the Security Council on 26 December 2001, you informed the Council of your decision to authorize the commencement of the operation of the Special Court for Sierra Leone (Special Court) beginning with the dispatch of a planning mission to Sierra Leone.

2. The terms of reference of the Planning Mission approved by you were to discuss with the Government of Sierra Leone the practical arrangements for the establishment and operation of the Special Court, including, inter alia, the question of premises, the provision of local personnel and services, and the launching of the investigative and prosecutorial processes. The specific outcomes of the mission that were envisaged included the signing of the Agreement with the Government of Sierra Leone, laying the framework for the arrival of the members of the administrative and prosecutorial staff of the Special Court, and a report containing detailed recommendations on the organization of the start-up of the Special Court.

3. The Planning Mission, led by Ralph Zacklin, Assistant Secretary-General for Legal Affairs, visited Sierra Leone from 7 to 19 January 2002. The mission was composed of members of the Office of Legal Affairs, a Security Coordinator, a building management expert, an Interim Prosecutor and two investigators, an Interim Registrar, an administrative expert, a representative of the United Nations Office for Project Services (UNOPS) in the region and representatives of Member States who are members of the Management Committee of the Special Court (see paras. 45-47 below). The complete list of members of the Planning Mission is contained in appendix I to the present report. Hans Corell, Under-Secretary-General for Legal Affairs, the Legal Counsel, joined the mission on 13 January 2002. The Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone (see appendix II) was signed on 16 January 2002 by Hans Corell and the Attorney General and Minister of Justice of Sierra Leone, Solomon E. Berewa, in the presence of the President of Sierra Leone, Ahmad Tejan Kabbah.

4. The Planning Mission interfaced with a Government of Sierra Leone task force headed by Solomon E. Berewa and carried out its activities at both the plenary and the working group level.

5. At the plenary level, the Planning Mission met several times with the government task force. The mission visited the High Court and a number of proposed locations for the permanent premises of the Special Court and detention facilities. Meetings were also held with the police and prison authorities, members of the Bar Association and representatives of civil society and human rights non-governmental organizations. The mission also travelled to the provinces and the regional capitals of Bo and Kenema where it met with the Paramount Chiefs, local government officials and NGOs. In Koidu, the capital of Kono District, it met with representatives of the Revolutionary United Front (RUF), the Civil Defence Forces (CDF) and the Movement of Concerned Kono Youth (MOCKY). The mission also met with Traditional Leaders, and on the margins of a tripartite meeting between the United Nations Mission in Sierra Leone (UNAMSIL), RUF and the Government of Sierra Leone, it met with the RUF political leadership to answer questions pertaining to all aspects of the Special Court.

6. At the working group level, the Planning Mission assessed the locally available resources, re-assessed the needs of the Special Court and developed an operational plan for the different organs of the Court. The Interim Prosecutor and two investigators met with members of the police and security forces, the Director of Public Prosecutions, the Director of Prisons, the Chief Justice and members of the Bar Association, human rights organizations and the UNAMSIL Human Rights Section to assess the availability of any information or evidentiary material in their possession. The Interim Registrar and Administrative Officers met with the High Court Registrar and court management officers to review the Registrar's system in place and assess the availability of local staffing resources and the possibility of sharing existing infrastructures. The Registry team met with the UNAMSIL Administration to assess its capacity to assist in the initial stage of the

establishment and operation of the Special Court. The building management expert, along with the Registrar, the Administrative Officers and the Security Coordinator, met with representatives of the Ministry of Lands and the Ministry of Works to discuss the logistical aspects of the temporary and permanent premises of the Special Court and the detention facilities as well as security requirements for the premises, archives, investigations and the staff of the Court.

7. As part of the Secretary-General's statutory responsibilities under the Agreement, the Office of Legal Affairs engaged in consultations with the Attorney General of Sierra Leone on the candidates for judges, the Prosecutor and the Deputy Prosecutor, and discussed the practical implementation of the Agreement in the legal system of Sierra Leone. The Office of Legal Affairs and the Office of the United Nations High Commissioner for Human Rights convened the second session of the Group of Experts on the Relationship between the Truth and Reconciliation Commission and the Special Court and recommended a general framework of principles which might govern the relationship between the two institutions.

8. The present report contains, by way of conclusions, the recommendations of the Planning Mission on the organization of the start-up phase and all aspects of the establishment and operation of the Special Court.

II. General observations

9. Since 14 August 2000, when the Security Council first requested the Secretary-General to negotiate an agreement with the Government of Sierra Leone to create an independent Special Court and since the first exploratory visit by a United Nations team in September 2000 (S/2000/915), Sierra Leone has undergone a period of difficult post-conflict peacekeeping and peace-building in which UNAMSIL has played a significant role. During the period of the Planning Mission's visit, the successful conclusion of the disarmament programme was celebrated with a symbolic arms destruction ceremony on 17 January 2002, an official declaration ending the war was signed by the Government, RUF and CDF on 18 January 2002, and preparations for national elections to be held on 14 May 2002 commenced. It is important to recognize that the establishment and operation of the Special Court is not taking place as an isolated event, but rather as part of a complex and multifaceted peace process.

10. In its various formal and informal meetings with government representatives, UNAMSIL staff and military personnel, representatives of civil society and individuals, members of the Planning Mission were able to appreciate the seriousness of the debate on the timing of the establishment of the Special Court; the high level of expectations for the early establishment of the Court combined with fears, concerns and misconceptions in some quarters, as to its role and jurisdictional scope; the availability of local resources; the willingness on the part of the Government to assist, despite its limited ability to do so; and the paramount role that UNAMSIL can play in the initial and subsequent stages of the operation of the Special Court.

11. Along with the high level of expectations among the people of Sierra Leone, concerns were expressed by all sectors of society that the judicial process should be fair, impartial and comprehensive in its temporal and territorial reach, and that the Special Court be, and should be seen to be, independent of both the Government and the United Nations. Since last year, UNAMSIL has been conducting a wide campaign of sensitization both on the Special Court and on the Truth and Reconciliation Commission in collaboration with local and international NGOs. Notwithstanding this laudable effort, concerns and misconceptions persist which must, as a matter of priority, be allayed. It is proposed, therefore, that a dynamic strategy of dissemination of information and education should be developed by the Special Court for the general public. This outreach campaign would explain the nature of the Special Court, its territorial, temporal and personal scope of jurisdiction, and the relationship between the Special Court and the Truth and Reconciliation Commission. The campaign should be multifaceted and adapted to the needs of specific groups, such as victims, ex-combatants and children.

12. In assessing the availability of local resources, the Planning Mission found that in almost all areas of the operation of the Special Court the resources at the national level were either non-existent or extremely scarce. However, an important exception to the scarcity of local resources is the availability of human resources, in particular in the legal profession. Having met with many of the Sierra Leonean members of the legal profession, the Planning Mission is convinced that, while not experienced in the relevant fields of

internation al criminal law, with the necessary training, they could render an important contribution to the work and succes s of the Special Court.

13. Give n the scarcity of local resources, the ability to rely on the existing administration and infrastructure of UNAM SIL in the initial stage of the operation of the Special Court, indeed for the duration of their simultane us operations, would ensure a quick and cost-effec ive start-up of its operation. The sharing of resources is not only justified as a matter of United Nations p olicy, for both operations represent parts of the over ll United Nations involvement in Sierra Leone, l ut is also administratively sound and financiall cost-effective. While noting that the different financial bases of the two United Nations operation make the sharing of administrative resources more complicated than would have otherwise been the case had both operations been established as subsidiar organs of the United Nations, the difficulties are not in surmountable.

14. In eveloping a road map for the establishment and ope ation of the Special Court, the Planning Mission evisited the earlier recommendations on the premises. assessed the existing local resources in the different areas of operation of the Special Court, re-assessed the needs of the Office of the Prosecutor and the Reg stry in terms of funds, equipment and personne , developed an organizational plan for both organs nd a plan of operation with a tentative timetabl . The following sections describe the selection of the pr emises, the structure, functions and staffing of the Offi e of the Prosecutor and the Registry, the role of the Management Committee and the relationship between the Special Court and the Truth and Reconci iation Commission. A comprehensive operatio al plan for the start-up phase of the operation of the S pecial Court concludes the recommendations of the Plan ing Mission.

III. P emises

15. Th e Secretary-General's report on the establis l ment of a Special Court for Sierra Leone (S/2000 915) had concluded, on the basis of the assessm ent made by the United Nations team in Septem er 2000, that none of the facilities and buildin s proposed by the Government of Sierra Leone to acc mmodate the Special Court and its detention facilitie s were suitable, for reasons of either cost or security. It was the recommendation of the United Nations team that the option of prefabricated, self-contained structures erected on government land should be adopted. That option, it was argued, would be cost-effective and rapid and would have the additional advantages of an easy expansion paced with the growth of the Special Court and a salvage value at the completion of its activities. It was also the recommendation of the United Nations team that the Central Prison at Pademba Road could not be utilized due to the lack of space and security measures, but that the New England Prison could be utilized if it were renovated and secured. Those recommendations were in part reconsidered by the Planning Mission in the light of changing circumstances.

16. In assessing the availability and suitability of the locations offered by the Government for the premises of the Special Court, the Planning Mission examined both permanent and temporary premises which could be made readily available pending the completion of the permanent site. It determined the requirements of the permanent premises to include, as a minimum, the following:

- **One courtroom and associated support space** such as a public gallery, witness waiting rooms, holding cells for the accused and rooms for interpreters and audio-visual technicians, as well as additional space to accommodate a second Trial Chamber and an Appeals Chamber.
- **Office and other support space** such as ablutions, storage, meeting rooms, LAN/PABX (telephone system) rooms, evidence vaults and law library.

A. Permanent premises

17. The building management expert, together with his government interlocutors, the directors of Public Works, Lands and Prisons, visited a number of government-owned properties. These included the City Hall, the United Nations Building, the Old Election Office and the Brookfields Hotel. All of these structures, however, are in need of substantial repair, some are occupied and others are located in the centre of the Freetown business district and are thus considered too risky for holding high-profile trials. Judging these structures to be unsuitable to accommodate the Special Court, the Planning Mission

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requested the Government of Sierra Leone to make available the land adjacent to the New England Prison for the permanent premises of the Special Court. The proximity of the Court to the Detention Facility will have the advantage of reducing the risk of exposing the detainees travelling on the public highway to and from the Court. The cost of construction for the permanent premises on the New England site is estimated at US$ 4,435,250.00.

18. In reconsidering the previous recommendation for prefabricated structures, the Planning Mission took account of the Government's request that the Court's building should be a permanent structure, and the intention expressed by a number of donor countries that the Court building and other facilities should be turned over to the Government of Sierra Leone at the end of the operation of the Special Court. With no apparent advantage of a salvage value, therefore, the Planning Mission recommended that the courthouse should be constructed as a permanent building and the office facilities accommodated in a prefabricated structure.

19. The advantages of prefabricated structures lie in the speed at which they can be obtained and erected, and in their flexibility of use. As the Special Court evolves through a rapid growth phase, a plateau phase and a downsizing phase, its space needs will change. Unlike a permanent structure, therefore, which imposes severe limitations on the re-allocation of space, particularly between the organs of the Registry, the Chambers and the Office of the Prosecutor, prefabricated modular construction is flexible and office units can be relatively easily added on or moved to where they are most needed.

20. The planning for the construction process should take into account the rainy season, which begins at the end of May and ends sometime in October. Accordingly, concrete elements of the construction, such as the perimeter wall, will have to be substantially completed by then. If the office complex were not to be fully completed beforehand, a contingency plan would have to be developed. It is estimated that if construction of the courthouse begins at the end of the wet season, it will in all likelihood not be completed before April 2003.

B. Temporary premises

21. With the prospects of completing the permanent premises for the Special Court by April 2003 at the earliest, the need for temporary premises is acute. In order to accommodate the start-up teams of the Office of the Prosecutor and the Registry, the Government has offered a building in the compound of the Bank of Sierra Leone complex free of rent, and with few security-related adjustments, ready to use. In addition, the Registrar of the Freetown High Court has offered the use of one of the courtrooms and a small room for closed hearings, should hearings be conducted before April 2003. In such an eventuality, a contingency plan for special security arrangements will have to be put in place.

C. Detention facilities

22. The Planning Mission visited two possible sites for detention facilities: the New England Prison, recommended by the United Nations team following its September 2000 visit, and the demolished Masanki Maximum Security Prison. The latter is a site 40 kilometres south-east of Freetown and is a minimum of 1 hour and 30 minutes away by car. It was the view of the Planning Mission that, as the Court facilities will be located in Freetown, it would not be advisable to have the detention facilities located at a great distance, as the risk exposure in transporting the accused is too great, and the additional costs for armoured vehicles and security forces, too high.

23. The Planning Mission was thus able to confirm the previous finding of the United Nations team that, if renovated to provide for the minimum requirements for detention facilities, the New England Prison could be utilized for the Detention Facility of the Special Court. The renovation of the existing structure, however, is not expected to be completed before the end of September 2002.

D. The role of the United Nations Office for Project Services in the procurement of design and construction services

24. Given its experience and expertise in the region, the Planning Mission recommends that the services of UNOPS be retained for the purpose of procuring design

and construction materials and services on behalf of the Special Court and under its authority.

E. Residential accommodation for international staff

25. The Planning Mission has enquired into the availability of suitable accommodation for the international staff of the Special Court in the more secure area of the western part of the city. The cost varies between $1,000.00 and $1,800.00 per month for rent, with the average being $1,500.00. Availability at this time is poor and is likely to become worse in the period leading up to the elections, but it is anticipated to improve thereafter.

IV. The Office of the Prosecutor

A. Availability of evidentiary material

26. In regard to available evidentiary material on the crimes falling within the jurisdiction of the Special Court, the Interim Prosecutor found that it was of limited utility and that substantial investigations would be required in order to bring indictments. The only reliable material available is held by the Sierra Leonean police. Such material, however, pertains exclusively to the period following the 1999 Lomé Agreement, partly because certain assumptions had been made in implementation of the amnesty provision of that Agreement, and partly because of the decimation of the police force and the destruction of the headquarters of the Criminal Investigation Department by rebel forces in 1999. With few exceptions, therefore, there is virtually no evidentiary material for the bulk of the crimes committed against the people of Sierra Leone in the decade-long conflict. Information of a general nature on crimes committed in Sierra Leone, however, has been collated by the UNAMSIL Human Rights Section, the civilian police and military intelligence, as well as by non-governmental organizations, Traditional Leaders and churches. While not in a form appropriate for use in court, such material may be valuable as a lead for further investigations.

27. In the assessment of the Interim Prosecutor, therefore, the paucity of detailed, reliable evidentiary material places a significant burden on the investigative functions of the Office of the Prosecutor.

B. Tentative prosecutorial strategy

28. Developing a prosecutorial strategy is in essence the attribution of concrete content to the notion of "those who bear the greatest responsibility" in terms of the numbers and the identity of potential indictees. Based on the concept laid down in the Secretary-General's earlier report as further developed in subsequent discussions with the members of the Security Council and the Government of Sierra Leone, the personal jurisdiction of the Special Court includes primarily those in political and military leadership positions. It would not exclude, however, others in command authority singled out by the gravity of the crime committed, its massive scale or heinous nature. Two other categories of persons, never before prosecuted by an international jurisdiction, also fall within the jurisdiction of the Special Court, namely, peacekeepers and juveniles. However, in both these categories substantial conditions must be fulfilled prior to a possible prosecution by the Special Court. In the case of peacekeepers, the State of nationality must be either unable or unwilling to prosecute, while in the case of juveniles the Prosecutor must show that all alternative options to prosecution, including the Truth and Reconciliation Commission, have been explored, exhausted and rejected for justifiable reasons.

29. The limited duration of the Special Court, its reduced budget and voluntary financing dictate the need for an exceptionally clear and well-defined prosecutorial strategy. It should, nonetheless, be inclusive of persons of all political affiliations and encompass the crimes committed throughout the country during the relevant period. In developing a prosecutorial strategy, the Prosecutor, bearing in mind the limitations of the evidentiary material, will as a first step be required to "map the conflict", reconstruct the history of the hostilities and study the organizational and command structure of the different factions and the means of their financial support. On the basis of this study, an investigation launched into the crimes committed would lead the Prosecutor to "those who bear the greatest responsibility" and enable him or her to establish a limited but comprehensive list of indictees on the basis of the parameters indicated. While the Planning Mission, in fulfilling its terms of

refe ence has reached certain conclusions as to the tent tive prosecutorial strategy, it nevertheless recc gnizes that the selection for prosecution of those "wh) bear the greatest responsibility" necessarily enta ls a measure of discretion on the part of the Pros ecutor both as to the identification of individual indi tments and to any priority that may be assigned to then .

C. Structure and staffing requirements of the Office of the Prosecutor

30. To ensure the successful implementation of a pros ecutorial strategy in the circumstances of Sierra Leo e, the Planning Mission recommended the foll wing structure and staffing table for the Office of the Prosecutor.

31. The Office of the Prosecutor should comprise a Tria Section and an Investigations Section, each repc rting to the Prosecutor through the Deputy Pros ecutor. The two sections would work closely with eacl other, with investigations conducted on the basis of a dvice provided by the Trial Section. An Evidence and Analysis Section, headed by a trial lawyer, should serv : both the Trial Section and the Investigations Sect on.

32. With relatively small-scale Trial and Inve stigations sections, both the Prosecutor and the Dep ity Prosecutor will be required to perform court func ions. The need for a Chief of Prosecutions could be c ispensed with, and only two Senior Trial Attorneys wou d be necessary. Three Prosecution Teams shall serv : in the Trial Section each with a leader (Pro ecutor, a Deputy Prosecutor or a Senior Trial Atto ney), one Trial Attorney, one Assistant Trial Atto ney or Assistant Legal Adviser, and one Case Mar ager. Under the control of a Chief of Inve stigations, three Investigation Teams should serve in t ie Investigations Section, each of which should com prise one Team Leader, two Senior Investigators, six nvestigators and two Associate Investigators. Each Inve stigation Team should be split further into two sma ler teams of one Senior Investigator, three Inve stigators and one Assistant Investigator. The Evic ence and Analysis Section should have a Chief and an Evidence Custody Officer, supported by General Serv ice or local staff. This section should be the first to start in order to take possession of, process and assess the available material.

V. The Registry

33. The Registry of the Special Court will be responsible for a broad range of administrative and judicial services to the Court. The administrative or non-judicial aspects of the Registry will entail personnel, finance, procurement, information technology, transportation, buildings management, detention facilities, and security and safety. The judicial services will include court management and responsibility for witness and victims support.

34. With a view to ascertaining the local availability of facilities, personnel and services, the Registry component in the Planning Mission carried out extensive discussions with representatives of government authorities and the administration of justice, on the basis of which it concluded that no such resources could be made available by the Government. The mission was advised, however, that there was a pool of candidates available with expertise in legal and judicial issues who would be interested in opportunities with the Special Court. Moreover, the mission was informed that it might be possible to benefit from the temporary secondment of a number of staff from the High Court in Freetown while the necessary recruitment process is undertaken by the Registry.

Possible relationship with UNAMSIL

1. Administration

35. The Registry component of the Planning Mission held discussions with virtually all facets of the UNAMSIL administration with a view to determining if UNAMSIL, given its administrative capacity, could, in the short and the long run, serve both UNAMSIL and the Special Court, thereby avoiding a duplication of similar if not identical functions. It is understood, however, that the assistance of UNAMSIL in areas of commonalities would be on a reimbursable basis, and provided at no or negligible cost to UNAMSIL.

36. During the discussions it was determined that the key areas where use of existing UNAMSIL infrastructure could eliminate the need for establishing separate administrative services for the Special Court would be in personnel administration, communication, transport, finance and procurement. As a follow-up to meetings with the UNAMSIL administration, two different options were prepared by the Planning

Mission, one to reflect the Special Court with a completely independent administrative infrastructure, and another reflecting a reliance on certain UNAMSIL units, while at the same time providing some support staff to augment these administrative units in UNAMSIL. In comparing the two options, the Planning Mission concluded that even with the additional support staff provided to UNAMSIL, there would be a difference of 12 to 15 fewer international staff, and the cost savings in the administration area alone would be quite significant. Given, in addition, the fact that the banking system in Sierra Leone is practically non-existent, the assistance of UNAMSIL in transferring and safeguarding the funds provided to the Special Court would be crucial.

2. Communications

37. In addition to the administrative functions in UNAMSIL, the Planning Mission took special note of the communications facilities already established for UNAMSIL which could be expanded at marginal costs to provide services to the Special Court. This would eliminate the need for the Court to duplicate the expensive installation of communications satellite equipment. In connection with the above, it should be noted that since the communications infrastructure in Sierra Leone does not meet the necessary reliability requirements of the Special Court, there is no alternative but to set up independent facilities, or to join in the use of UNAMSIL facilities.

3. Transportation

38. Discussions with UNAMSIL confirmed that long-term assistance could be provided, if mandated by the Security Council. Any immediate assistance by the UNAMSIL Transportation Service would be difficult in the period leading to the elections; thereafter, however, maintenance of Special Court vehicles could be carried out by UNAMSIL on a fee-for-service basis, or by providing some additional support staff to UNAMSIL. Moreover, certain other transportation assistance such as travel throughout the country could be considered, subject to availability of space on scheduled UNAMSIL flights. This assistance would be crucial since much of the investigative work undertaken by the Office of the Prosecutor would have to be carried out in the field and the roads in Sierra Leone are practically impassable, especially after the onset of the rainy season.

39. The conclusion reached following the discussions with the UNAMSIL administrative units was that significant economies could be achieved by utilizing the infrastructure already in existence in UNAMSIL if the respective UNAMSIL administrative units were augmented by additional support staff provided by the Court, and on the understanding that the provision of assistance to the Special Court would have to be introduced into the mandate of UNAMSIL.

40. While the interviews with UNAMSIL were primarily with administrative units, the Planning Mission was cognizant of the issue of possible medical support for the officials of the Special Court and for detainees once they arrived. In that regard, it was noted that UNAMSIL has a medical support unit up to level three which would provide psychological comfort to the staff of the Special Court.

41. While members of the Planning Mission were of the view that many aspects of the UNAMSIL operation could support the Special Court on a cost-reimbursable basis or at marginal additional costs, UNAMSIL officials pointed out the possibility that the UNAMSIL mandate might be discontinued prior to the Special Court having completed its work. The implications of this point were clearly understood by the Planning Mission. Nevertheless, it remained the view of the mission that, since significant economies could be achieved by maintaining common administrative processes with UNAMSIL, the UNAMSIL support option should be considered for as long as it was available. In the event that UNAMSIL demobilizes before the completion of the activities of the Special Court, installed equipment and materials could be transferred on a cost-recoverable basis to the Special Court.

VI. Security

42. A Security Office within the Registry will be responsible for monitoring and advising on local security conditions, conducting risk assessments, preparing and maintaining emergency security contingency plans, liaising with local authorities, conducting appropriate investigations of security violations and providing security orientation briefings and training. It shall also be responsible for the security guard force, security control centre and associated security equipment (CCTV/alarms). The Security Office shall be headed by a Chief Security Officer and

Deputy Chief Security Officer. Given the confidential nature of the material processed, a secretary at the international level would be assigned to the Office.

43. Security to the Special Court shall be provided to the premises, the judges and in residential areas.

(a) **External security**. Security outside the perimeters of the entire Special Court complex shall be the responsibility of the Government of Sierra Leone. The Government will pay the salaries and other entitlements of the Security Officers and the Special Court will provide the logistical support required. The number of police officers required will be determined in consultation with the operational staff of the Inspector General of the Sierra Leone Police Force.

(b) **Internal security**. Security within the perimeter of the Special Court (Chambers, Office of the Prosecutor and Registry) will be provided by a locally recruited security force on a 24-hour basis. The force will provide security control centre operation, access control, fire safety and internal security. It will be hired, trained and operated by the Deputy Chief Security Officer and under international supervisors.

(c) **Detention facilities**. The Sierra Leone Prison Service will provide the prison officers required to operate the Detention Facility and pay their salaries and other entitlements. The Special Court will provide an international Corrections Officer and supervisors to provide for 24-hour operation of the Detention Facility. It will provide additional training in the operation of the facility and all special equipment, as may be required.

(d) **Protective detail**. The Chief Security Officer will be responsible for the personal protection of the judges and, if circumstances dictate, the Prosecutor and the Registrar as well. Each judge will be assigned one Security Officer to provide personal protection during working hours. Three Security Officers will be assigned to protective detail in the initial period. With the appointment of additional judges, the number of Security Officers will be adjusted accordingly.

(e) **Residential security**. Currently there are reimbursable residential security measures approved and in effect for all internationally recruited staff in Sierra Leone. Such measures should be provided also to all internationally recruited staff of the Special Court, including judges.

44. It should be noted that in the current security phase in effect, Sierra Leone has been classified as a non-family duty station. If, however, the security situation improves to allow a reclassification of Sierra Leone as a family duty station, a number of additional administrative elements, such as the availability of schools, medical facilities and support, suitable housing and other associated issues, will also have to be examined before such a reclassification becomes possible.

VII. The Management Committee

45. In the course of the discussions held between the Secretariat and Member States regarding the implementation of the Security Council resolution requesting that the Secretary-General enter into an agreement with the Government of Sierra Leone to establish the Special Court, an informal group of interested Member States was formed. The need to ensure the cooperation and assistance of interested States in the establishment and continued operation of the Special Court, as well as the necessity of providing the Court with an oversight mechanism for its non-judicial functions, in turn gave rise to the creation of a Management Committee composed largely of major donors to the Special Court (Canada, Netherlands, Nigeria, Lesotho, United Kingdom of Great Britain and Northern Ireland and United States of America). While not an organ of the Special Court in a formal sense, the Management Committee is nevertheless recognized in the Agreement between the United Nations and the Government of Sierra Leone. According to article 7 of the Agreement, its functions are as follows:

> "It is the understanding of the Parties that interested States will establish a management committee to assist the Secretary-General in obtaining adequate funding, and provide advice and policy direction on all non-judicial aspects of the operation of the Court, including questions of efficiency, and to perform other functions as agreed by interested States. The management committee shall consist of important contributors to the Special Court. The Government of Sierra Leone and the Secretary-General will also participate in the management committee."

The functions of the Management Committee are more fully elaborated in the terms of reference of the

Management Committee, contained in appendix III to the present report.

46. Representatives of Canada, the Netherlands, Lesotho, the United Kingdom and the United States participated in the Planning Mission in their capacity as members of the Management Committee. They took part in all aspects of the work of the Planning Mission, as well as in the development of the operational plan for the Special Court contained in this report. The presence of the State representatives on the Planning Mission was a physical demonstration to the people of Sierra Leone of the commitment of the international community to the Special Court. For the members of the Management Committee it was an invaluable opportunity to familiarize themselves with the political and legal environment in Sierra Leone, as well as the infrastructure difficulties that the Special Court faces. The opportunity to observe first hand the laying of the foundation of the Special Court will assist the Committee in fulfilling its functions of providing advice, oversight and policy direction on all institutional aspects of the operation of the Special Court.

47. As the operation of the Special Court progresses, the Management Committee will, pursuant to article 7 of the Agreement, review periodically all non-judicial operations of the Court and exercise its oversight role through receipt of regular reports on the operations, financial status and administration of the Court, as well as through meetings with the principal officers of the Court as appropriate. The Management Committee will report to the Group of Interested States at regular intervals. Despite its informal character, as the Special Court evolves it is likely that the Management Committee itself will play an increasingly important role in advising the senior management of the Court with regard to any non-judicial problems that may be brought to its attention.

VIII. Relationship between the Truth and the Special Court

48. As the establishment of the Special Court for Sierra Leone has become imminent, the question of the relationship between the Truth and Reconciliation Commission and the Special Court has become urgent. The Commission, which was established by the Sierra Leone Truth and Reconciliation Act, 2000, and the Special Court have distinct purposes, and have different legal bases and mandates. Yet their subject matter, and personal and temporal jurisdiction intersect, hence the need to clearly identify the linkages and potential cleavages between them.

49. The earlier report of the Secretary-General recognized the need for the conclusion of cooperative arrangements between the Truth and Reconciliation Commission and the Special Court but left the determination of such arrangements to the two institutions, once they are established. In the period which has ensued, however, the uncertainty as to the scope of amnesty still recognized under the national law of Sierra Leone but which is explicitly excluded by the Statute of the Special Court, the lack of clarity as to their modes of simultaneous operation, and concerns on the part of perpetrators that an appearance before the Truth and Reconciliation Commission could no longer immunize them from prosecution, made necessary a preparatory process designed to elucidate some of these questions.

50. The relationship between the Special Court and the Truth and Reconciliation Commission was discussed in a workshop jointly organized by the Government of Sierra Leone and UNAMSIL in Freetown, in November 2000, and subsequently in a meeting held in May/June 2001 on the protection of children before the Commission. Participants in those meetings included representatives of the various United Nations offices involved in the Special Court, the Truth and Reconciliation Commission and children (the Office of the United Nations High Commissioner for Human Rights, the United Nations Children's Fund, the Office of the Special Representative of the Secretary-General for Children in Armed Conflict, the Office of Legal Affairs and UNAMSIL), representatives of the Government of Sierra Leone, civil society — both national and international non-governmental organizations — and individual experts.

51. The preparatory process culminated in a two-session meeting of a Group of Experts jointly convened by the Office of the United Nations High Commissioner for Human Rights and the Office of Legal Affairs in New York in December 2001 and in Freetown in January 2002, to discuss the relationship between the Commission and the Special Court. The purpose of the meeting was to identify areas of cooperation and potential conflict between the two institutions and to recommend modalities of

coo)eration and means of avoiding conflict. Another pur)ose was to recommend guidelines for the coo)erative arrangements between the Commission and the Special Court for the consideration of the members of ;ne Commission and the Prosecutor, once they are app)inted.

52. The Group of Experts analysed the different legal bas s for the establishment of the two institutions, their resp ective mandates and jurisdictional scope, and their imp ications for the relationship between the two inst tutions. It discussed a range of issues pertaining to infc mation-sharing between the Truth and Rec)nciliation Commission and the Special Court, thei respective powers to compel the appearance of witn esses and accused and the submission of evic entiary material, the treatment of juveniles and a pub ic information campaign.

53. There was a general agreement that the following prin :iples should guide the two institutions in dev loping their modalities of cooperation:

(a) **The principle of complementarity**. The Spe ial Court and the Truth and Reconciliation Con mission perform complementary roles in achieving acc(untability, deterrence, story-telling and national rec(nciliation;

(b) **Independent nature of both institutions**. The Special Court and the Commission should operate in a complementary and mutually supportive manner and in full respect for each other's mandate, inde)endence and their distinct but related functions;

(c) **Setting of priorities**. While respectful of each other's mandate, an agreed set of priorities for each institution in clearly defined areas, circumstances and conditions is a means to ensure cooperation in area ; of potential conflict.

54. In recommending guidelines for the relationship betv een the Truth and Reconciliation Commission and the Special Court, a distinction was drawn between area conducive to cooperation and areas of potential conf ict. In areas conducive to cooperation, it was reco nmended that sharing of resources, services, know ledge and expertise should be considered in matt :rs of commonality between the two institutions, such as protection of victims and witnesses, including chil(ren, rehabilitation and reintegration programmes, joint training programmes, where appropriate, and a coor linated public awareness and education campaign on the roles of the two institutions in general, and the relationship between the Commission and the Special Court in particular.

55. In the areas of potential conflict, such as information-sharing or the exercise of competing powers, the Expert Group made the following recommendations. When information received in confidence by the Truth and Reconciliation Commission is required by the Special Court in a case of an accused "who bears the greatest responsibility", such information should be shared with the Special Court on the following conditions: (a) the information or evidentiary material sought can only be obtained from the Commission, and (b) the evidentiary material requested is essential for the conviction or acquittal of the accused. Similarly, if both institutions exercise their powers to compel the production of the same document or evidentiary material, the person, entity or government authority faced with the competing request should inform both institutions of the fact of the competing request and seek their agreement as to which request should take precedence. If the Prosecutor has convinced the Commission that the evidentiary material sought is required and essential in the case of any one accused of bearing the greatest responsibility, the Special Court shall have priority.

56. The Group of Experts also recommended that a process of consultation should take place between the two institutions on a regular or as-needed basis, it being understood that in the final analysis it will be for the two institutions to decide on their relationship.

IX. Operational plan for the start-up phase of the Special Court

57. The signing of the Agreement between the United Nations and the Government of Sierra Leone for the Establishment of the Special Court for Sierra Leone on 16 January 2002 marks the end of one stage of the process and the beginning of a new stage of implementation and operation. As indicated at the beginning of the present report, expectations run high among all sections of Sierra Leone society that justice as well as reconciliation will be served by the Special Court and that, together with the national Truth and Reconciliation Commission, some measure of accountability and deterrence will at long last be achieved. The signing of the Agreement, therefore,

places th onus on the parties, the United Nations and the Gove nment of Sierra Leone to bring the Special Court int operation as soon as possible.

58. The Planning Mission believes that urgent attention must be given to the fundamental issues of governan e and administration of the Special Court, as well as t e role of the parties, the United Nations and the Gov ernment of Sierra Leone, and of the Managem ent Committee. In that connection, the legal nature of the Special Court as a sui generis, treaty-based or an, independent in its judicial functions of both the United Nations and the Government of Sierra Leone, will have to be given concrete legal content. The Spe cial Court, the United Nations and the Governm nt of Sierra Leone, as well as members of the Managem ent Committee, will have to develop the legal regime a plicable to the financial and administrative aspects o f its operation as well as to the process of recruitme it and the terms and conditions of its employee s. In so doing, they should take into account the fact hat while the United Nations is not, strictly speaking, the parent organ of the Special Court, it is a founding party. They should also be mindful of the fact that whil the financing of the Special Court is based on volun ary contributions and not the United Nations regular b udget, funds held in a United Nations trust fund are subject to the applicability of the Financial Regulatic ns and Rules of the United Nations, with regard, in particular, to the disbursement of such funds and the activities financed therefrom. The legal implicati ns of the relationship between the United Nations a nd the Special Court and the extent of the use of rules f the Organization to the non-judicial aspects of its op ration will have to be resolved urgently as a prerequis te to the rapid, timely and efficient start-up of the Court

59. The visit of the Planning Mission to Sierra Leone and its broad interaction with all segments of Sierra Leone so ciety through public and private meetings and outreach through the radio and press created a momentu n that must not be lost. The mission has thus envisage a start-up phase of the Special Court with identifiat le and achievable objectives. The gradual and sequence l implementation of these objectives together with app opriate public information dissemination will give con crete form to the Agreement as the Special Court slo wly takes shape.

60. In the start-up phase of the operational plan, which s ould be completed by 31 May 2002, the following actions should be taken simultaneously with regard to the premises, both temporary and permanent, the staffing of the Registry and the Office of the Prosecutor, the appointment of the judges, the Prosecutor and the Registrar, and the activities of the Chambers:

(a) Premises

(i) An agreement should be signed between the Special Court, represented by the Interim Registrar, and UNOPS, authorizing UNOPS to procure design and construction services on behalf of the Special Court and under its authority;

(ii) An agreement should be concluded between the Special Court, represented by the Registrar, and the Government of Sierra Leone for the grant of land and the construction of permanent premises;

(iii) While temporary premises are readily available, minor adjustments, such as changing the locks and installing document safes, would be required before the start-up teams could occupy the premises;

(iv) Prior to the start-up of the construction works in the New England site, the Government will have to relocate a number of civil defence forces, ex-combatants and their families currently occupying a former hotel site approximately 500 metres from the site;

(v) The construction of the permanent premises should start with design work undertaken for the New England site, a perimeter fence erected around it and the laying of a foundation for the office accommodation;

(vi) The start-up of the renovation works of the detention facilities should be undertaken, with a view to their completion by September 2002;

(b) Office of the Prosecutor

(i) An advance team of the Office of the Prosecutor should be deployed in Sierra Leone to launch the investigative and prosecutorial process. It should be composed of the Prosecutor, two Trial Attorneys, the Chief of Investigations, the Chief of Evidence, the Evidence Custody Officer, one researcher, three investigators and

four support staff. To ensure a rapid deployment, the advance team should include either staff on loan from the two ad hoc Tribunals, or personnel contributed by Governments;

(ii) The advance team should initiate the research on the history of the conflict ("map the conflict"), take into possession existing evidence from the Sierra Leone Police, UNAMSIL and NGOs, and establish an evidentiary basis from which investigations could be launched;

(c) Registry

(i) An administrative infrastructure should be developed as a matter of priority to ensure the self-sufficiency of the Special Court in all its aspects. Given the reliance of the Registry on the United Nations Administration, it is essential that a core unit of Registry personnel — composed of the Interim Registrar, a Deputy Registrar, whose functions would comprise those of the Chief of Administration as well, and a buildings management expert — should be assembled first at United Nations Headquarters for a short initial period prior to deploying to Freetown in support of the Trial Chambers and the Office of the Prosecutor;

(ii) At United Nations Headquarters, the core unit of the Registry will liaise with the appropriate offices in the Department of Management to establish the budgetary requirements, the staffing table and account structures for the Special Court, the status of personnel, and a recruitment and appointment strategy. In conjunction with the above, the appropriate administrative procedures will be established and approved. In matters related to procurement, the start-up team would have to be equipped with the necessary modalities for approving contracts and general procurement;

(iii) In addition, the core Registry unit at Headquarters would have to carry out work related to the establishment of premises for the Special Court, including preparation of a Statement of Work for a land survey and site plan, preparation of terms of reference for architectural services for the court building and procurement of design and construction services;

(iv) Once the basic administrative operating parameters have been defined and established at Headquarters, the core Registry would have to be established in Sierra Leone. The Registry advance team would include, in addition to the core Registry personnel assembled in New York, financial and personnel officers to manage and disburse the funds and establish information technology and other support systems. An Interim Chief Security Officer or Deputy Chief Security Officer would also have to be included in the Registry advance team to address all security matters arising in the start-up phase of the operation of the Court and provide support to the Prosecutor and the Interim Registrar, once in Freetown;

(d) Appointment of judges, the Prosecutor, the Deputy Prosecutor and the Registrar

(i) After having consulted with the Government of Sierra Leone on the appointment of the judges — both international and Sierra Leone nominees — the Prosecutor and the Deputy Prosecutor, the Secretary-General should, as a matter of priority, appoint the Prosecutor. Once appointed, the Prosecutor and the ~~Government of Sierra Leone should, according~~ to article 3 (2) of the Agreement, consult on the appointment of a Deputy Prosecutor. A Deputy Prosecutor should thereafter be appointed;

(ii) The Secretary-General should, in accordance with article 2 (2) of the Statute, appoint the international judges, two of whom should be appointed to the Trial Chamber and three to the Appeals Chamber. At the same time, the Government of Sierra Leone should appoint one judge to the Trial Chamber and two to the Appeals Chamber;

(iii) In appointing the Registrar, the Secretary-General, according to article 4 of the Agreement, should consult with the President of the Special Court. Pending the election of the President by the judges of the Court, the Interim Registrar should continue to perform his functions;

(e) Chambers

(i) The Agreement on the Establishment of the Special Court adopts a phased-in approach to the

est blishment of the Special Court in accordance wit the chronological order of the legal process. Ac ordingly, judges of the Trial Chamber shall tak permanent office shortly before the inv estigative process has been completed, and jud ges of the Appeals Chamber shall take per nanent office when the first trial process has bee n completed (article 19 (4) of the Agreement);

(ii) While it is not expected that judges would tak up their judicial functions in the first phase of he operation of the Court, it is nonetheless env isaged that during that period, and shortly aft r their appointment, judges of both Chambers sha l meet in Sierra Leone for an organizational me ting, or as may be required. The purpose of the e meetings should be to elect the President of the Court and adopt the Rules of Procedure and Ev idence of the Special Court. It is also rec ommended that a "familiarization trip" should be organized for judges of both Chambers to the Int rnational Tribunals in The Hague and in Ar sha;

(iii When convened on the business of the Co rt before taking permanent office, judges sha l be paid on an ad hoc basis.

61. Ad erence to this schedule would mean that by the third quarter of 2002, the judges will have been appointe , the Offices of the Prosecutor and the Registry will be functioning in their temporary premises in Freetown and the construction of the permane t premises will be substantially under way. In other wo ds, the machinery of the Special Court will be in place o enable it to function in accordance with its Statute. The first indictments and trials could be envisage by the end of the first year of operation, which is well within the parameters of the practice of internati nal criminal tribunals.

Appendix I

Members of the Planning Mission

List of participants

Name	*Title*
Mr. Hans Corell	Under-Secretary-General, The Legal Counsel
Mr. Ralph Zacklin	Assistant Secretary-General for Legal Affairs
Ms. Daphna Shraga	Senior Legal Officer, Office of Legal Affairs
Mr. Ken Lasiuk	Executive Officer, Office of Legal Affairs
Mr. Kenneth Flemming	Senior Trial Attorney, International Tribunal for Rwanda
Mr. Alfred A. Kwende	Commander of Investigations, International Tribunal for Rwanda
Mr. Marcel Savard	Chief, Division of Administration International Tribunal for Rwanda
Mr. Gerald Ganz	Office of the United Nations Security Coordinator
Mr. Robert Kirkwood	Head of Facilities Management, International Tribunal for the Former Yugoslavia
Mr. Robin Vincent	Interim Registrar (Consultant)
Sgt. Sid Gray	(Expert on Mission)
Mr. Doudou Mbye	Senior Portfolio Manager, United Nations Office for Project Services

Representatives of States

Mr. Andras Vamos-Goldman, Counsellor, Permanent Mission of Canada to the United Nations

Mr. Phakiso Mochochoko, Counsellor, Permanent Mission of Lesotho to the United Nations

Mr. Carl Peersman, First Secretary, Permanent Mission of the Netherlands to the United Nations

Ms. Alice Burnett, First Secretary, Permanent Mission of the United Kingdom of Great Britain and Northern Ireland to the United Nations

Mr. Richard Mills, Permanent Mission of the United States of America to the United Nations

Col. Mike Newton, Senior Adviser to the Ambassador-at-Large for War Crimes Issues, United States Department of State

Permanent Mission of Sierra Leone to the United Nations

Ambassador Allieu Ibrahim Kanu

Ms. Giorgia Tortora