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SCSL-2004-14-T

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SPECIAL COURT FOR SIERRA LEONE

OFFICE OF THE PROSECUTOR

FREETOWN – SIERRA LEONE

TRIAL CHAMBER

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

Registrar: Robin Vincent

Date filed: 6 December 2004

PROSECUTOR **Against** **SAMUEL HINGA NORMAN**
MOININA FOFANA
ALLIEU KONDEWA

Case No. SCSL-2004-14-T

PROSECUTION APPLICATION FOR LEAVE TO APPEAL "DECISION ON THE FIRST ACCUSED'S MOTION FOR SERVICE AND ARRAIGNMENT ON THE CONSOLIDATED INDICTMENT"

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I. INTRODUCTION

1. Pursuant to Rule 73(B) of the Rules of Procedure and Evidence of the Special Court for Sierra Leone ("Rules"), the Prosecution submits this application for leave to file an interlocutory appeal ("Application") against the Trial Chamber's "Decision on the First Accused's Motion for Service and Arraignment on the Consolidated Indictment", dated 29 November 2004 ("Decision").

2. In the Decision, the Trial Chamber identified select portions of the Consolidated Indictment as containing new factual allegations and substantive elements and thereby ordered the Prosecution to apply for leave of the Trial Chamber to either amend the Consolidated Indictment in respect of the impugned portions or to expunge the impugned portions altogether.

II. PROCEDURAL BACKGROUND

3. On 7 March 2003, His Honour Judge Itoe approved the indictment against the First Accused, charging him with 8 counts of crimes against humanity and war crimes. He was arraigned on 15, 17, and 21 March 2003 and pleaded "not guilty" to all 8 counts.

4. On the 26 June 2003 His Honour Judge Bankole Thompson approved separate indictments against the Second and Third Accused, charging them with the same

8 counts of crimes against humanity and war crimes. The indictments against Fofana and Kondewa were similar to the Norman indictment except for some additional factual allegations including the districts of Bonthe and Moyamba not contained in the initial Norman indictment. The Second and Third Accused were arraigned on 30 June 2003 and pleaded not guilty to all 8 counts.

5. On 7 November 2003 the Third Accused filed a motion for defects in the form of the original indictment.[1] By a decision rendered by the Trial Chamber on 27 November 2003 [2] the Trial Chamber ordered the Prosecution to delete the phrase "including but not limited to these events" wherever they appeared in the indictment and file either a Bill of Particulars or apply for an amendment to the indictment. Pursuant to this order, the Prosecution filed a Bill of Particulars on 5 December 2003[3] that contained additional factual allegations envisaged in the original Kondewa indictment. The Third Accused did not challenge the Bill of Particulars.

6. On 9 October 2003, the Prosecution filed a motion for the joint trial of the three accused.[4] The Prosecution further requested that a Consolidated Indictment be filed on which the joint trial would proceed. On 27 January 2004, in its 'Decision and Order on Prosecution Motions for Joinder'(the "Joinder Decision"), the Trial Chamber ordered a joint trial of the three accused and further ordered that a superseding Consolidated Indictment be filed and served on the Accused by the Registry. Based on this Order, the Prosecution filed the Consolidated Indictment on 5 February 2004. This Consolidated Indictment combined all three indictments into a single and whole indictment and, therefore, included all the allegations contained in the original Norman, Fofana, and Kondewa indictments including the

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[1] *Prosecutor Against Kondewa*, SCSL-2003-12-PT, "Preliminary Motion Based on Defects in the Form of the Indictment Against Kondewa", 7 November 2003, Registry Page ("RP") 1121.
[2] *Prosecutor Against Kondewa,* SCSL-2004-12-PT, "Decision and Order on Defence Preliminary Motion for Defects in the Form of the Indictment", 27th November 2003, RP 1533, (hereinafter "Decision on Form of Indictment").
[3] *Prosecutor Against Kondewa*, SCSL-2003-12-PT, "Bill of Particulars", 5 December 2003, RP 1547.
[4] *Prosecutor Against. Norman,* SCSL-2003-08-PT, *Prosecutor Against Fofana,* SCSL-2003-11-PT, *ProsecutorAgainst. Kondewa.* SCSL-2003-12-PT, "Prosecution Motion for Joinder", 9 October 2003, RP 907.

Bill of Particulars filed in the Kondewa case. The phrase "including but not limited to these events" was also removed from the Consolidated Indictment. The Registry served the indictment on all Defence teams but not personally on the Accused. None of the Defence teams objected to the Consolidated Indictment when it was served.

7. The trial (first session) of the three accused on the Consolidated Indictment commenced on 3 June 2004. The First Accused then filed the "Motion for Service and Arraignment on Second Indictment," on 21 September 2004 seeking service and arraignment on the Consolidated Indictment and requesting that the Trial Chamber quash the initial indictment of 7 March 2003. The Prosecution responded on 1 October 2004[5], to which the First Accused filed a reply on 6 October 2004.[6]

8. In the "Decision for Service and Arraignment", the Trial Chamber identified select portions of the Consolidated Indictment as containing new factual allegations and substantive elements. The Prosecution was ordered to apply for leave of the Trial Chamber to either seek and amendment of the Consolidated Indictment in respect of the impugned portions or to expunge the impugned portions altogether.

9. The Prosecution now files this application for leave to appeal the "Decision on the First Accused's Motion for Service and Arraignment on the Consolidated Indictment."

III. ARGUMENTS FOR INTERLOCUTORY APPEAL

A. The Legal Standard

10. Rule 73(B) provides for interlocutory appeals "in exceptional circumstances and to avoid irreparable prejudice to a party." The Trial Chamber has held that both

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[5] *Prosecutor Against Samuel Hinga Norman, Moinina Fofana, Allieu Kondewa,* SCSL-2004-14-T, "Prosecution Response to Norman Motion for Service and Arraignment on Second Indictment", 1 October 2004, RP 9619.

[6] *Prosecutor Against Samuel Hinga Norman, Moinina Fofana, Allieu Kondewa,* SCSL-2004-14-T, "Defence Reply to Prosecution Response to Norman Motion for Service and Arraignment on Second Indictment", 6 October 2004, RP 9671.

limbs of the test must be satisfied before it will exercise its discretion in this regard, emphasizing that a restrictive interpretation of Rule 73(B) is warranted in the interests of expeditiousness and in light of the limited mandate of the Special Court.[7]

11. Despite the imperative for a restrictive application of Rule 73(B), a purposeful approach must be followed in cases that warrant the granting of an interlocutory appeal, to give a practical effect to the Rule. The Trial Chamber has held:

> ...it is a judicial imperative for us to ensure that the proceedings before the court are conducted expeditiously and to continue to apply the enunciated criteria with the same degree of stringency as in previous applications for leave to appeal so as not to defeat or frustrate the rationale that underlies the amendment of Rule 73(B). We are however not suggesting here that the Chamber will remain indifferent to an application where deserving and meritorious grounds that meet the test laid down in Rule 73(B) have been advanced by the party seeking leave to file an interlocutory appeal.[8]

12. The Prosecution submits that the Application presents the requisite "level of exceptional circumstances and irreparable prejudice"[9], such that should the Application be denied, a post-trial appeal could result in a prolongation of the trial in relation to the First Accused. Specifically, the First Accused may be required

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[7] *Prosecutor Against Issa Hassan Sesay, Morris Kallon, Augustine Gbao*, SCSL-2004-15-PT, "Decision on Prosecution's Application for Leave to File an Interlocutory Appeal Against the Decision on the Prosecution Motions for Joinder", 13 February 2004, paras 11 and 12, RP 316 – 318.

[8] *Prosecutor Against Samuel Hinga Norman, Moinina Fofana, Allieu Kondewa,* SCSL-2004-14-T, "Majority Decision on the Prosecution's Application for Leave to File an Interlocutory Appeal Against the Decision on the Prosecution's Request for Leave to Amend the Indictment Against Samuel Hinga Norman, Moinina Fofana and Allieu Kondewa", 2 August 2004, para 25, RP 8870 ("**Leave to Appeal to Amend the Indictment**").
See also the "Dissenting Opinion of Judge Pierre Boutet On Decision On the Prosecution's Application For Leave to File an Interlocutory Appeal Against the Decision on the Prosecution's Request for Leave to Amend the Indictment Against Samuel Hinga Norman, Moinina Fofana and Allieu Kondewa", SCSL-04-14-T, 5 August 2004, at para 7, RP 8895 ("**Dissenting Opinion on Leave to Appeal to Amend the Indictment**"), where the Honourable Judge Boutet stated:
"Although, as stated, Rule 73(B) is a restrictive provision, it should not in my view be given such a limited interpretation that it would inevitably lead to never granting any leave provision, as this Rule would effectively be without purpose. **A purposive interpretation of Rule 73(B), taking into account the restrictive nature of the Rule, must not and cannot be interpreted in such a way as to completely deny any real possibility of any leave to appeal regardless of the circumstances** (Emphasis added)."

[9] *Prosecutor Against Issa Hassan Sesay, Morris Kallon, Augustine Gbao*, SCSL-2004-15-PT, "Decision on Prosecution Application For Leave to file An Interlocutory Appeal Against Decision On Motion For Concurrent Hearing of Evidence Common To Cases SCSL-2004-15-PT and SCSL-2004-16-PT", SCSL-04-15-PT, 1 June 2004, para 21, RP 6495.

to be tried later on those factual allegations that were elaborated upon in the Consolidated Indictment, which the Prosecution has been ordered to either expunge or seek leave to amend.

13. The Prosecution submits that the principal exceptional circumstance in respect of the subject Decision is the conflicting interpretations of the law as expressed by the judges of the Trial Chamber, which inevitably leads to irreparable prejudice as there cannot be a fair trial according to the law, if the law is uncertain. In this instance, the Prosecution submits that exceptional circumstances and irreparable prejudice cannot be separated.

B. Exceptional circumstances

14. The Rules do not provide a definition for the meaning of "exceptional circumstances." Rather, as noted by the Honourable Judge Boutet, "the notion is dependent on the particular subject matter of the Rule and is assessed in the broader context of the interests of justice."[10] This approach is, in keeping with the prevailing position of the Trial Chamber, "to determine every application for leave on the basis of the law [...] on a case by case basis."[11]

15. The Prosecution submits that the differences of legal opinions expressed by the majority, concurring and dissenting opinions that constituted the Decision creates an exceptional circumstance. The irreconcilable differences between the members of the Trial Chamber illustrate how the legal issues raised by the First Accused Motion for Service and Arraignment on the Consolidated Indictment are complex and without the benefit of definitive jurisprudence. Such legal lacunae would benefit from a review by the Appeals Chamber. Indeed, the Separate Concurring Opinion of Honourable Judge Thompson noted that the specific issues being raised in this Application are "extremely complex and controversial, both in

[10] Dissenting Opinion on Leave to Appeal to Amend the Indictment, at para. 10, RP 8897.
[11] Leave to Appeal to Amend the Indictment, para. 22, RP 8869.

terms of legal theory and practice", for which "the law, in some respects, remains intolerably unclear, if not confusing."[12]

16. The Prosecution maintains that the presence of a strong dissenting opinion, and a separate opinion concurring with the majority Decision but for different reasons bolsters the presence of exceptional circumstances that warrant the granting of an interlocutory appeal.

17. The Prosecution accepts that disagreements with some of the multi-faceted legal and factual issues which constitute the core of legal disputes is a normal judicial feature in the exercise by the Judges of judicial independence.[13]

18. Nonetheless, the practice in domestic jurisdictions of an automatic right to appeal where a dissenting opinion is present provides supporting legal foundation to the Prosecution submission that in such particular circumstances, an interlocutory appeal is warranted. In this regard, the Prosecution refers to practice in Canada under the Supreme Court Act (Section 691(1))[14] and in Australia under the Judiciary Act of 1903 (Section 35 A)[15].

19. In this particular case, the Prosecution submits that it is in the interests of justice to have these issues heard on an interlocutory appeal because the differing opinions amongst the Trial Chamber, combined with a "novel or unique legal

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[12] *Prosecutor Against Samuel Hinga Norman, Moinina Fofana, Allieu Kondewa,* SCSL-2004-14-T, "Separate Concurring Opinion of Judge Bankole Thompson on Decision on the First Accused' Motion for Service and Arraignment on the Consolidated Indictment", 29 November 2004, para 1, RP 10900. ("Separate Concurring Opinion on Motion for Service and Arraignment").

[13] Leave to Appeal to Amend the Indictment, para. 28, RP 8871.

[14] Section 691(1) provides:

> [A] person who is convicted of an indictable offence and whose conviction is affirmed by the court of appeal may appeal to the Supreme Court of Canada
> (a) on any question of law on which a judge of the court of appeal dissents

[15] Section 35A provides:

> In considering whether to grant an application for special leave to appeal to the High Court under this Act or under any other Act, the High Court may have regard to any matters that it considers relevant but shall have regard to..[..] (ii) in respect of which a decision of the High Court, as the final appellate court, is required to resolve differences between courts, or within the one court, as to the state of the law [...].

situation"[16] together constitute exceptional circumstances that ought to be deliberated through an interlocutory appeal.

C. Irreparable prejudice

20. As stated by His Honour Judge Boutet, "irreparable prejudice refers to the inability to cure any prejudice suffered."[17] The Prosecution submits that irreparable prejudice to the Prosecution and the Second and Third Accused will result by allowing the Decision to stand because it impedes a continuation of the current trial proceedings against all three accused based upon a single Consolidated Indictment.

21. The presentation of the case of the Prosecution, including witness selection and ordering of crime bases, has been predicated upon an already approved Consolidated Indictment before all three accused. The Prosecution submits that the interests of justice require the granting of the Application due to its immediate impact upon current trial proceedings. Specifically, the remainder of the trial proceedings will result in two accused facing more factual allegations than the First Accused and the First Accused not defending himself, nor being required to defend himself, on the particular allegations.

22. Moreover, the Prosecution submits that irreparable harm prejudice would be occasioned to the Prosecution case and may affect the outcome of trial due to the resulting inability to accurately present matters for which the First Accused is also alleged to bear responsibility.[18]

D. Delay

23. The Prosecution would request an expedited interlocutory appeal to ensure that there is no delay to these proceedings, especially in light of the timing of the following trial session scheduled for February 2005. In this regard, measures may be undertaken to ensure that the interlocutory appeal will not "encumber and

[16] Leave to Appeal to Amend the Indictment, para. 27, RP 8871.
[17] Dissenting Opinion on Leave to Appeal to Amend the Indictment, at para. 19, RP 8900.
[18] See Dissenting Opinion on Leave to Appeal to Amend the Indictment, para. 20, RP 8900.

unduly protract the ongoing trials."[19] Indeed, the Prosecution submits that a granting of the instant Application would lend finality to this issue and ensure that a post-findings appeal would not prolong the fact-finding process with regard to the First Accused.

IV. ERRORS COMMITTED BY THE TRIAL CHAMBER

24. If granted leave to appeal, the Prosecution will argue the following:

A. No materiality to the differences between the Initial Indictment and Consolidated Indictment.

25. The Prosecution submits that the Trial Chamber erred when it considered that many of the changes were material to the indictment. The Trial Chamber nominated the material changes as:

a. The addition of geographic locations;

b. The extension of temporal jurisdiction;

c. There are new substantive elements of the charges including the charges of unlawful arrest and detention, conscription of children, personal injury and extorting of money from civilians.

26. The majority Decision stated:

> Upon close analysis of the Consolidated Indictment, there are clearly new factual allegations adduced in support of existing confirmed counts, as well as new substantive elements of the charges that were not in the Initial Indictment of the First Accused[...]. We consider that all these additions to the Consolidated Indictment, without any amendment to the counts against the Accused and personal service on the Accused and personal service on the Accused, in accordance with the prescribed procedure, could prejudice the Accused right to a fair trial if the trial proceeds on this basis.[20]

27. His Honour Judge Bankole Thompson stated:

> I stress that it is not my view that the Consolidated Indictment contains new offences or crimes against the First Accused. Nor is it my hypothesis

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[19] Leave to Appeal to Amend the Indictment, para. 25, RP 8870.

[20] *Prosecutor Against Samuel Hinga Norman, Moinina Fofana, Allieu Kondewa,* SCSL-2004-14-T, "Decision on the First Accused' Motion for Service and Arraignment on the Consolidated Indictment", 29 November 2004, para. 30, RP 10888. ("**Majority Decision on Motion for Service and Arraignment**").

> that because the Consolidated Indictment incorporates new expanded factual allegations, it is therefore a new accusatory instrument. [21]

28. His Honour Judge Benjamin Itoe stated:

> An analysis of the contents of the Consolidated Indictment and those of the Initial Indictment of the Applicant, the First Accused, reveals that the particulars of the offences and the time frames have been expanded and that new offences have been added.[22]

29. His Honour Judge Benjamin Itoe further stated:

> In addition, a re-arraignment of the Third Accused of that extensively amended Indictment is necessary because it has now unveiled itself and confirmed its real designation and characterisation as a New Indictment, a fact which stands on even firmer ground today that we are witnessing the bare reality of the extensive and fundamental amendments which the Prosecution have introduced into in, to the extent of even including the New Charges.[23]

30. The Prosecution maintains that the additional material, being the changes as identified by the Trial Chamber it its Decision, did no more than provide additional factual specifications. The changes augmented the indictment in respect of certain particulars relating to specific offences. As the chronology outlined above records, the Court approved the Consolidated Indictment.

31. The changes did not lead to the raising of new charges against the Accused. The number of charges facing the Accused remained unaltered, however, additional particulars were provided to the Accused, in accordance with the particulars alleged against the co-Accused. The number of victims and locations of crime scenes, for example, did not increase the number of charges or counts presented against the accused. Nor did the changes add "new substantive elements of the charges" – that is, the elements of the respective offences have not changed, nor have the number of charges.

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[21] Separate Concurring Opinion on Motion for Service and Arraignment, para 5.

22 *Prosecutor Against Samuel Hinga Norman, Moinina Fofana, Allieu Kondewa,* SCSL-2004-14-T, "Dissenting Opinion of Hon. Judge Benjamin Mutanga Itoe, Presiding Judge, on the Chamber Majority Decision Supported by Hon. Judge Bankole Thompson's Separate But Concurring Opinion, on the Motion Filed by the First Accused, Samuel Hinga Norman for Service and Arraignment on the Second Indictment" para 64, RP 10971. ("**Dissenting Opinion on Motion for Service and Arraignment**")

[23] *Id.* at para. 72.

32. It is accepted that the extension of the time frame, for example, was a change but it is not a material amendment in the light of the case presented against the First Accused. In these circumstances, the changes relate to a particular and are not raised to the level of an element or a charge. In the same manner, the case against the First Accused arises from his position and authority, and not from his active involvement in individual criminal acts.

33. The Prosecution submits that whether or not a fact is material depends upon the proximity of the accused person to the events for which the person is alleged to be criminally responsible. The International Criminal Tribunal for the Former Yugoslavia ("ICTY") Appeals Chamber stressed in *Kupreskic* that the materiality of a fact cannot be decided in the abstract. Rather, the materiality of a fact will turn largely on the proximity of the accused to the criminal acts. The greater the proximity of the accused to the events for which he is alleged to be responsible, the greater precision required of the particulars pleaded in relation to those events.[24]

34. The Prosecution accepts that international jurisprudence in this area is not clear and, indeed, the Decision reflects the absence of clear guidelines as to how to determine that particular issue. That is, in the practical application of this determinative factor, there is little instructive jurisprudence. The law, being unresolved, is subject to a range of interpretations which does not assist in the conduct of a fair trial.

35. The *Krnojelac* decision, for example, found that the Prosecutor can adopt a pleading style by which it inserts or alters factual allegations so as to effectively create new charges without explicitly adding any counts. Where this is the case, the amended indictment has to be reviewed and the accused must enter a new plea on those charges.[25] The decision does not identify the threshold after which such

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[24] *Prosecutor v. Kupreskic*, ICTY Appeals Chamber, IT-95-16-A, "Appeal Judgment", 23 October 2001, paras. 88 – 90. ("**Kupresckic Appeal Judgment**").

[25] *Prosecutor v. Milorad Krnojelac*, ICTY Trial Chamber, IT-97-25-T, "Decision on Prosecutor's Response to Decision of 24 February 1999", 20 May 1999, paras. 19 and 20.

alterations amount to new charges, which is an issue that requires a definitive resolution.

36. Clearly, there is no 'bright line' test for the determination of what constitutes a material fact. The Prosecution submits that the less the proximity of the accused to the criminal acts, the less material will be the specifics details of the offence, including time frames. Consequently, in view of the allegations against the First Accused, the manner in which he attracts criminal responsibility is not by being proximate to the criminal acts but rather by, generally, his position of authority and control. The changes to the indictment do not relate to offences committed directly by the First Accused. Rather, the changes relate to crimes allegedly committed by sub-ordinates of the First Accused and as such provide additional particulars rather than material facts.

37. The Prosecution maintains that the changes to the indictment did not amount to new charges being laid against the Accused. In view of the Prosecution case, as outlined in the Prosecution's Pre-trial briefs, the additional material provided more specificity in respect of the alleged particulars and did not impact on the charges and their respective elements.

B. No unfair prejudice to the First Accused from failure to serve and arraign the First Accused on the Consolidated Indictment

38. The Prosecution submits that the Trial Chamber erred when it considered that all these additions to the Consolidated Indictment, without any amendments to the Counts against the Accused, could prejudice the Accused's right to a fair trial.[26] The Prosecution maintains that the additions were not of such a quality, in the light of the Prosecution case against the First Accused, which required an amendment to the Consolidated Indictment. Nonetheless, the Prosecution will seek to amend the Consolidated Indictment in response to a direction from the Court.

[26] Majority Decision on Motion for Service and Arraignment, para 30.

39. The Prosecution also notes that the First Accused did not file a motion in respect of his complaint concerning the indictment, at the time of its presentment. Instead, the First Accused, or his legal counsel, have been present during the course of the trial and have engaged in the usual trial procedures. The Prosecution submits that the instant Motion by the Accused ought to have been lodged at the first available opportunity.

40. In determining whether unfair prejudice exists due to an "administrative or procedural anomaly", one must first determine the primary purpose of the procedure. In the case of the service of an indictment, the ICTY has articulated that "the substantial safeguards that an indictment is intended to furnish to an accused, [is] namely to inform him of the case he has to meet."[27]

41. The principal question is whether the accused has been "unfairly prejudiced in the preparation of his defence."[28] The *Ljubicic* decision outlined certain factors that should be considered in this determination: firstly, whether the amendments made were substantial in scope; secondly, the stage in the proceedings; thirdly, whether the amendments would deny the accused his right to be tried without undue delay; and fourthly, whether the Prosecution has sought an improper tactical advantage.[29]

42. It was found that no unfair prejudice exists when the subject amendments were not substantial in scope because the amendments provided further detail of an attack and, in particular, the alleged criminal responsibility of the accused in these acts is set out in detail. The Court also noted the importance of the new allegations being asserted early in the proceedings (prior to the commencement of trial). The Court further considered the Prosecution's argument in *Ljubicic*, that the additions to the indictment were pursued in compliance with "its duty to prosecute to the fullest extent of the law and to bring all relevant issues before the Trial Chamber;" and, in this sense, the Prosecution did not "intend to seek an

[27] *Kuprekic* Appeal Judgment, 23 October 2001, para. 88-95.
[28] *The Prosecutor v. Ljubicic*, ICTY Trial Chamber, IT-00-41-PT, "Decision on Motion for Leave to Amend the Indictment", 2 August 2002, page 2.
[29] *Id.* at page 2.

improper tactical advantage by adding these new allegations." The Trial Chamber concluded that the right of the accused to be promptly informed of the charges against him had not been violated, since he was informed at the outset of these charges, and thus the changes in the indictment in this manner did not cause unfair prejudice to the accused in the preparation of his defence.

43. While there is not a substantial body of jurisprudence on the issue of whether unfair prejudice necessarily arises out of errors concerning the indictment, the Prosecution would submit that the matter is determined according to the circumstances of the case and specific effect on an articulated and relevant right of the accused.

44. A fundamental principle is the right of the accused to be informed of the case he has to meet and more generally whether he has been unfairly prejudiced in the preparation of his defence. The Prosecution submits that this is a subjective test and, thus, it follows that alterations or additions, even if material, and despite the fact that the Accused was not re-arraigned, can not trigger a conclusion that this error necessarily constitutes unfair prejudice.

45. Based upon the foregoing, the Prosecution submits that First Accused has not been unfairly prejudiced by the additions made to the Consolidated Indictment. Specifically, "(t)he substantial safeguards that an indictment is intended to furnish to an accused, namely to inform him of the case he has to meet,"[30] have not been infringed upon. The Prosecution submits that since the original indictment was served personally upon the First Accused, the test of a valid indictment upon Rule 47 review by the Trial Chamber was satisfied. Following the joinder of the trials of all three CDF Accused being granted on 28 January 2004, the Consolidated Indictment was filed and served upon defence council on 5 February 2004. Trial later commenced on 3 June 2004. As noted in the Majority Decision, the First Accused was clearly informed of the additional factual allegations as evidenced by his use of the Consolidated Indictment in his defence of his case in the First

[30] *Kuprekic* Appeal Judgment, para. 88-95.

and Second Trial Sessions, and use by Defence Counsel for the First Accused of the Consolidated Indictment during all three Trial Sessions.[31]

46. In both the Majority Decision and in His Honour Judge Thompson's Concurring Opinion, the Trial Chamber noted that procedural steps were taken by the First Accused, "subsequent to the making of his opening statement in court and his decision to represent himself and having participated actively in the cross-examination of some prosecution witnesses against him as noted in the majority Decision."[32] His Honour Judge Thompson concluded that "such non-compliance is not fatal for the reason that it has not in any way derogated from the right of the First Accused to a fair trial or caused any prejudice to him."[33] The Majority Decision also noted that Norman "responded to the charges against him" (as laid out in the Consolidated Indictment) "in his Pre-Trial Brief filed on the 31st of May, 2004, and has defended the charges against him in the first and second session of the CDF trial."[34]

47. The Prosecution maintains that the additional material, in light of the Prosecution case as outlined in pre-trial material, only provided greater detail in respect of the particulars of the allegations and did not impact upon any of the elements of the offences. The additional material has to be read in the light of the Prosecution's Pre-Trial Briefs and as such does no more than augment the factual allegations against the First Accused.

V. CONCLUSION

49. The Prosecution submits that it is crucial to conduct this trial in a manner that:

a. Fully reflects the nature of the criminal acts alleged to have been committed by all three accused persons; and

b. Avoids conflicting jurisprudence on key issues that affect the integrity of these proceedings, which can be resolved by a review on such difficult issues of law on appeal.

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[31] Majority Decision on Motion for Service and Arraignment, para. 14.
[32] Separate Concurring Opinion on Motion for Service and Arraignment, para. 4.
[33] *Id.* at para. 4.
[34] Majority Decision on Motion for Service and Arraignment, para. 14.

50. For the foregoing reasons, the Prosecution respectfully prays that the Trial Chamber grants the requested leave to file an interlocutory appeal against its Decision on the matter of service and arraignment of the Consolidated Indictment.

Filed in Freetown, 6 December 2004

For the Prosecution,

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PROSECUTION INDEX OF AUTHORITIES

1. *Prosecutor Against Kondewa*, SCSL-2003-12-PT, "Preliminary Motion Based on Defects in the Form of the Indictment Against Kondewa", 7 November 2003.

2. *Prosecutor Against Kondewa,* SCSL-2004-12-PT, "Decision and Order on Defence Preliminary Motion for Defects in the Form of the Indictment", 27th November 2003.

3. *Prosecutor Against Kondewa*, SCSL-2003-12-PT, "Bill of Particulars", 5 December 2003.

4. *Prosecutor Against Norman,* SCSL-2003-08-PT, *Prosecutor Against Fofana,* SCSL-2003-11-PT, *ProsecutorAgainst Kondewa,* SCSL-2003-12-PT, "Prosecution Motion for Joinder", 9 October 2003.

5. *Prosecutor Against Samuel Hinga Norman, Moinina Fofana, Allieu Kondewa,* SCSL-2004-14-T, "Prosecution Response to Norman Motion for Service and Arraignment on Second Indictment", 1 October 2004.

6. *Prosecutor Against Samuel Hinga Norman, Moinina Fofana, Allieu Kondewa,* SCSL-2004-14-T, "Defence Reply to Prosecution Response to Norman Motion for Service and Arraignment on Second Indictment", 6 October 2004.

7. *Prosecutor Against Issa Hassan Sesay, Morris Kallon, Augustine Gbao*, SCSL-2004-15-PT, "Decision on Prosecution's Application for Leave to File an Interlocutory Appeal Against the Decision on the Prosecution Motions for Joinder", 13 February 2004.

8. *Prosecutor Against Samuel Hinga Norman, Moinina Fofana, Allieu Kondewa,* SCSL-2004-14-T, "Majority Decision on the Prosecution's Application for Leave to File an Interlocutory Appeal Against the Decision on the Prosecution's Request for Leave to Amend the Indictment Against Samuel Hinga Norman, Moinina Fofana and Allieu Kondewa", 2 August 2004.

9. *Prosecutor Against Samuel Hinga Norman, Moinina Fofana, Allieu Kondewa,* SCSL-2004-14-T, "Dissenting Opinion of Judge Pierre Boutet On Decision On the Prosecution's Application For Leave to File an Interlocutory Appeal Against the Decision on the Prosecution's Request for Leave to Amend the Indictment Against Samuel Hinga Norman, Moinina Fofana and Allieu Kondewa", SCSL-04-14-T, 5 August 2004.

10. *Prosecutor Against Issa Hassan Sesay, Morris Kallon, Augustine Gbao*, SCSL-2004-15-PT, "Decision on Prosecution Application For Leave to file An Interlocutory Appeal Against Decision On Motion For Concurrent Hearing of

Evidence Common To Cases SCSL-2004-15-PT and SCSL-2004-16-PT", SCSL-04-15-PT, 1 June 2004.

11. *Prosecutor Against Samuel Hinga Norman, Moinina Fofana, Allieu Kondewa,* SCSL-2004-14-T, "Separate Concurring Opinion of Judge Bankole Thompson on Decision on the First Accused' Motion for Service and Arraignment on the Consolidated Indictment", 29 November 2004.

12. *Prosecutor Against Samuel Hinga Norman, Moinina Fofana, Allieu Kondewa,* SCSL-2004-14-T, "Decision on the First Accused' Motion for Service and Arraignment on the Consolidated Indictment", 29 November 2004.

13. *Prosecutor Against Samuel Hinga Norman, Moinina Fofana, Allieu Kondewa,* SCSL-2004-14-T, "Dissenting Opinion of Hon. Judge Benjamin Mutanga Itoe, Presiding Judge, on the Chamber Majority Decision Supported by Hon. Judge Bankole Thompson's Separate But Concurring Opinion, on the Motion Filed by the First Accused, Samuel Hinga Norman for Service and Arraignment on the Second Indictment", 29 November 2004.

14. *Prosecutor Against Kupreskic*, ICTY Appeals Chamber, IT-95-16-A, "Appeal Judgment", 23 October 2001. (http://www.un.org/icty/kupreskic/appeal/judgement/index.htm). ANNEX A

15. *ProsecutorAgainst Krnojelac*, ICTY Trial Chamber, IT-97-25-T, "Decision on Prosecutor's Response to Decision of 24 February 1999", 20 May 1999. (http://www.un.org/icty/krnojelac/trialc2/decision-e/90520FI27429.htm).

16. *The Prosecutor Against Ljubicic*, ICTY Trial Chamber, IT-00-41-PT, "Decision on Motion for Leave to Amend the Indictment", 2 August 2002. (http://www.un.org/icty/ljubicic/trialc1/decision-e/06104513.htm).

Annex A

14. *Prosecutor Against Kupreskic*, ICTY Appeals Chamber, IT-95-16-A, "Appeal Judgment", 23 October 2001.

The "Appeal Judgment" is over 30 pages in length. Attached is the relevant section of the Judgment: pages 28-45.

UNITED NATIONS

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

Case No.: IT-95-16-A

Date: 23 October 2001

Original: English

IN THE APPEALS CHAMBER

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

Registrar: **Mr. Hans Holthuis**

Judgement of: **23 October 2001**

PROSECUTOR

v

ZORAN KUPRE[KI]
MIRJAN KUPRE[KI]
VLATKO KUPRE[KI]
DRAGO JOSIPOVI]
VLADIMIR ŠANTIC

APPEAL JUDGEMENT

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Mr. William Clegg Q.C., Ms. Valerie Charbit for Drago Josipovi}
Mr. Petar Pavkovi} for Vladimir [anti}

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

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

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

A. Introduction

77. The convictions of Zoran and Mirjan Kupreškic for persecution as co-perpetrators of a common plan to ethnically cleanse the village of Ahmici of its Bonsian Muslim inhabitants[128] were primarily based upon two factors: their involvement with the HVO prior to 16 April 1993[129] and

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affected the result"); *R.* v *McMartin* [1964] S.C.R. 464 at 493 ("the proposed evidence is of sufficient strength that it might reasonably affect the verdict of the jury"). Regarding Australia, *see* Australian Legal Monthly Digest § 7105 (2000) ("would have produced a significant possibility that the verdict would have been one of acquittal"). Regarding New Zealand, *see R.* v *Dougherty* [1966] 3 NZLR 257 at 265 ("might reasonably have led the jury to return different verdicts"). Finally, regarding South Africa, *see S* v *Ndweni & Ors.* 1999 (4) SA 877 (A) at 880 ("materially relevant").

[128] Trial Judgement, para. 782. The Trial Chamber further found that the attack on Ahmici was part of a broader Bosnian Croat campaign to forcibly expel the Bosnian Muslims from the entire Lašva Valley region, and that the Kupreškic brothers knew this was the context in which their acts occurred. *See* Trial Judgement, paras. 783 and 790.

[129] Trial Judgement, paras. 421-422.

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

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

[130] Trial Judgement, para. 430.
[131] Trial Judgement, para. 334. The Trial Chamber also found that "able-bodied Croatian inhabitants of Ahmici provided assistance and support in various forms." The Trial Chamber described the "Jokers" or "Jokeri" as a special anti-terrorist unit of the Croatian military police. *See* Trial Judgement, para. 132.
[132] Trial Judgement, paras 421, 773 and 789.
[133] Trial Judgement, paras 422 and 773.
[134] Trial Judgement, paras. 423 and 773.
[135] Trial Judgement, para. 426.
[136] Trial Judgement, para. 430.
[137] Trial Judgement, paras 425-426 and 775-776.
[138] Trial Judgement, para. 407.

participate in the conflict,[139] although Witness JJ's evidence does not directly corroborate the involvement of Zoran Kupreškic in the events at the Ahmic house.

B. Vagueness of the Amended Indictment

79. The Appeals Chamber understands Zoran and Mirjan Kupre{ki}'s complaint on appeal to be that the Trial Chamber erred in law by returning convictions on the basis of material facts not pleaded in the Amended Indictment. They argue that the trial against them was thereby rendered unfair, since they were deprived of fair notice of the charges against them. This ground of appeal requires the Appeals Chamber to discuss the issue of the vagueness of the Amended Indictment from a somewhat unusual perspective. Normally, an allegation pertaining to the vagueness of an indictment is dealt with at the pre-trial stage by the Trial Chamber, or, if leave to pursue an interlocutory appeal has been granted, under Rule 72(B)(ii), by the Appeals Chamber. In the instant case, this stage has passed, and Zoran and Mirjan Kupreškic have already been found guilty solely on the charge of persecution (count 1). Consequently, their complaint about the vagueness of the Amended Indictment will be considered only in relation to the criminal conduct for which Zoran and Mirjan Kupre{ki} was convicted under count 1.

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

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

[139] Trial Judgement, para 428.
[140] Trial Transcript, 3-4 (recording the motion hearing of 10 March 1998).

internal character. The Trial Chamber granted leave to amend the indictment as requested in an oral decision during a hearing on 10 March 1998.[141]

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

83. The relevant parts of the Amended Indictment read:

> 9. ZORAN KUPRE[KI], MIRJAN KUPRE[KI], VLATKO KUPRE[KI], DRAGO JOSIPOVI], DRAGAN PAPI] and VLADIMIR [ANTI] helped prepare the April attack on the Ahmi}i-[anti}i civilians by: participating in military training and arming themselves; evacuating Bosnian Croat civilians the night before the attack; organising HVO soldiers, weapons and ammunition in and around the village of Ahmi}i-[anti}i; preparing their homes and the homes of their relatives as staging areas and firing locations for the attack; and, by concealing from the other residents that the attack was imminent.
>
> 10. The HVO attack on Ahmi}i-[anti}i targeted houses, stables, sheds and livestock owned by Bosnian Muslim civilians. The HVO first shelled Ahmi}i-[anti}i from a distance, then groups of soldiers went from house-to-house attacking civilians and their properties using flammable tracer rounds and explosives. The HVO soldiers deliberately and systematically fired upon Bosnian Muslim civilians. The HVO soldiers also set fire to virtually every Bosnian Muslim-owned house in Ahmi}i-[anti}i.
>
> 11. Approximately 103 Bosnian Muslim civilians were killed in and around Ahmi}i-[anti}i. Of the 103 persons killed, approximately 33 were women and children. The HVO soldiers destroyed approximately 176 Bosnian Muslim houses in Ahmi}i-[anti}i, along with two mosques.
>
> [...]
>
> 20. From October 1992 until April 1993, ZORAN KUPRE[KI], MIRJAN KUPRE[KI], VLATKO KUPRE[KI], DRAGO JOSIPOVI], DRAGAN PAPI] and VLADIMIR [ANTI] persecuted the Bosnian Muslim inhabitants of Ahmi}i-[anti}i and its environs on political, racial or religious grounds by planning, organising and implementing an attack which was designed to remove or "cleanse" all Bosnian Muslims from the village and surrounding areas.
>
> 21. As part of the persecution, ZORAN KUPRE[KI], MIRJAN KUPRE[KI], VLATKO KUPRE[KI], DRAGO JOSIPOVI], DRAGAN PAPI] and VLADIMIR [ANTI] participated in or aided and abetted:
>
> (a) the deliberate and systematic killing of Bosnian Muslim civilians;
>
> (b) the comprehensive destruction of Bosnian Muslim homes and property;
>
> (c) and the organised detention and expulsion of the Bosnian Muslims from Ahmi}i-[anti}i and its environs.

[141] Trial Transcript, 33 (recording the motion hearing of 10 March 1998). At the time, the Trial Chamber stated that a subsequent decision setting out the reasons would be issued at a later date. The Appeals Chamber has, however, been unable to locate any such decision on the record.
[142] Prosecution Pre-Trial Brief, para. 26.

22. By their participation in the acts described in paragraphs 9, 10, 20 and 21, ZORAN KUPRE[KI], MIRJAN KUPRE[KI], VLATKO KUPRE[KI], DRAGO JOSIPOVI], DRAGAN PAPI] and VLADIMIR [ANTI] committed the following crime:

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

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

85. The Prosecution case at trial against Zoran and Mirjan Kupre{ki} on count 1 rested on proof of only three main allegations: (1) their participation in murder and arson at the house of Witness KL; (2) their participation in murder and arson at the house of Suhret Ahmi}; and (3) their presence as HVO members in Ahmi}i on 16 April 1993.[144] Accordingly, the Prosecution sought to establish during trial that Zoran and Mirjan Kupre{ki} participated, as active HVO members, in the attack on the houses of Suhret Ahmi} and Witness KL. To that end, the Prosecution introduced the evidence of Witness H (the attack on Suhret Ahmi} house), Witness KL (the attack on his house) and Witness C (further evidence of their presence as HVO members in the village on 16 April 1993). Notably, the Prosecution did not present any substantial evidence relating to the allegation that Zoran and Mirjan Kupre{ki} helped prepare the attack on Ahmi}i by the various means set out in paragraph 9 of the Amended Indictment. Neither did it specifically attempt to introduce evidence supporting the allegation in paragraph 20 of the Amended Indictment that Zoran and Mirjan Kupre{ki} had been involved in the planning and organising of the attack. For this reason, and because of the insufficiency of Witness KL's evidence, the Prosecution managed to prove its remaining case to the satisfaction of the Trial Chamber only in part.

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

[143] Naser Ahmi}, his wife Zehrudina Ahmi} and their two children, Elvis and Sejad.
[144] Trial Judgement, paras 388, 405-407.

at the scene of the crime and thus [could not] draw any inferences as to [their] possible participation in these events."[146]

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

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

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

89. The Appeals Chamber must stress initially that the materiality of a particular fact cannot be decided in the abstract. It is dependent on the nature of the Prosecution case. A decisive factor in determining the degree of specificity with which the Prosecution is required to particularise the facts of its case in the indictment is the nature of the alleged criminal conduct charged to the

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[145] Trial Judgement, paras 426 and 779.
[146] Trial Judgement, paras 786 and 793. The Trial Chamber also rejected the evidence of Witness C who testified with regard to Zoran and Mirjan Kupre{ki}'s presence as HVO members in the Ahmi}i village on 16 April 1993, *see* Trial Judgement, para. 774.
[147] *Furund`ija* Appeal Judgement, para. 147. *See also Krnojelac* Decision of 24 February 1999, paras 7 and 12; *Krnojelac* Decision of 11 February 2000, paras 17 and 18; and *Br|anin* Decision of 20 February 2001, para.18.

accused. For example, in a case where the Prosecution alleges that an accused personally committed the criminal acts, the material facts, such as the identity of the victim, the time and place of the events and the means by which the acts were committed, have to be pleaded in detail.[148] Obviously, there may be instances where the sheer scale of the alleged crimes "makes it impracticable to require a high degree of specificity in such matters as the identity of the victims and the dates for the commission of the crimes".[149]

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

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

92. It is of course possible that an indictment may not plead the material facts with the requisite degree of specificity because the necessary information is not in the Prosecution's possession. However, in such a situation, doubt must arise as to whether it is fair to the accused for the trial to proceed.[152] In this connection, the Appeals Chamber emphasises that the Prosecution is expected to know its case before it goes to trial. It is not acceptable for the Prosecution to omit the material

[148] *See generally Krnojelac* Decision of 11 February 2000, para. 18; *Br|anin* Decision of 20 February 2001, para. 22.
[149] *Kvo~ka* Decision of 12 April 1999, para 17; *Brdanin* Decision of 26 June 2001, para. 61.
[150] *See Prosecutor* v *Erdemovi}*, Case No.: IT-96-22, Indictment, 22 May 1996, para. 12 (identifying the victims as "hundreds of Bosnian Muslim male civilians").
[151] *Kvo~ka* Decision of 12 April 1999, para. 23.

aspects of its main allegations in the indictment with the aim of moulding the case against the accused in the course of the trial depending on how the evidence unfolds.[153] There are, of course, instances in criminal trials where the evidence turns out differently than expected. Such a situation may require the indictment to be amended, an adjournment to be granted, or certain evidence to be excluded as not being within the scope of the indictment.

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

94. In view of the factual basis of the conviction of Zoran and Mirjan Kupre{ki}, the relevant facts of the Prosecution case pleaded in the Amended Indictment are: i) the deliberate and systematic killing of Bosnian Muslim civilians; ii) the comprehensive destruction of Bosnian Muslim homes and property; and iii) the organised expulsion of the Bosnian Muslims from Ahmi}i-[anti}i and its environs.[154] The Prosecution contends that the Amended Indictment thereby pleads the material facts underlying the persecution charge on which Zoran and Mirjan Kupre{ki} were found guilty with sufficient detail. The Appeal Chamber disagrees.

95. In the circumstances of the present case, the Prosecution could, and should, have been more specific in setting out the allegations in the Amended Indictment. In particular, the Appeals Chamber notes the absence of any detailed information about the nature of Zoran and Mirjan Kupre{ki}'s role in the three alleged categories of criminal conduct. The Amended Indictment in no way particularises what form this alleged participation took. By framing the charges against

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[152] *Krnojelac* Decision of 24 February 1999, para. 40.
[153] *Krnojelac* Decision of 11 February 2000, para. 23.
[154] Organised detention listed in paragraph 21 of the Amended Indictment is excluded because the Prosecution did not present any evidence of such criminal conduct and, accordingly, the Trial Chamber did not address any such allegations in the Trial Judgement.

Zoran and Mirjan Kupre{ki} in such a general way, the Amended Indictment fails to fulfil the fundamental purpose of providing the accused with a description of the charges against him with sufficient particularity to enable him to mount his defence. Pursuant to Articles 18(4), 21(2), 21(4)(a) and 21(4)(a) and (b) of the Statute, the Prosecution should have articulated, to the best of its ability, the specific acts of the Defendants that went to the three different categories of conduct pleaded in the Amended Indictment.

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

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

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

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

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[155] Appeal Transcript, 861-862.
[156] The allegations relating to four of those murders were not upheld at trial.
[157] This is possible when the particular act took place within the context of a widespread or systematic attack directed against a civilian population (occurring during an armed conflict) and when the accused knew of this wider context.
[158] *Br|anin* Decision of 26 June 2001, para. 61.

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

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

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

102. The trial commenced on 17 August 1998. On 3 September 1998, during the Prosecution's examination-in-chief of Witness H, the Presiding Judge sought clarification from the Prosecution on

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[159] Trial Transcript, 1696-1697.
[160] Although the Trial Chamber relied upon some peripheral evidence, in addition to the evidence of Witness H, in support of the persecution charge, it is insufficient to sustain the persecution charge. *See infra* paras. 228 *et seq.*
[161] Prosecution Pre-Trial Brief, para. 27; Trial Transcript, 1696-1697.

whether it alleged that Zoran and Mirjan Kupre{ki} played a part in the killing of Witness H's father.[162] He stated:

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

103. The Prosecution responded:

> We do not exclude that role. We allege that they were in the house, that they were, therefore, participants in the murder of the father and of Meho Hrustanovi}. It is not charged in the indictment. This is information that we gave serious consideration to charging in the indictment. However, we decided that -- not to delay further the trial and reamend the indictment once again, but to instead proceed with the evidence as we had it, and to have that evidence used by this Tribunal for purposes of the persecution count which has been alleged, and also to corroborate the murder counts that have also been alleged. So it was our decision that instead of reamending the indictment once again, to proceed to trial as quickly as possible, as I think everyone wanted, and simply introduce this evidence for the purposes I've just mentioned. And I believe in our brief, our Pre-Trial Brief, we may have made a brief reference to the fact that additional information has come to us fairly recently, and that rather than amending the indictment, we will proceed with the evidence as we have it.[163]

104. Counsel for Mirjan Kupre{ki} then complained of the late notification of the charges against her client. She stated:

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

The Presiding Judge responded in the following manner:

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

105. The Appeals Chamber finds that the response of the Presiding Judge that Zoran and Mirjan Kupre{ki} were not charged with murder, *only* with persecution, is ambiguous and does not adequately address the concern raised by Mirjan Kupre{ki} as to whether he was charged with a role in killing the two victims. Furthermore, this exchange between the Prosecution and the Bench demonstrates a failure to distinguish between the "umbrella" nature of persecution as a legal concept and the need to identify and plead the acts of the accused that constitute that crime with the requisite detail. The material facts of the Prosecution case against the accused must be determined

[162] Trial Transcript, 1696.
[163] Trial Transcript, 1696-1697.
[164] Trial Transcript, 1697-1698
[165] Trial Transcript, 1700.

by reference to the latter, not the former. The accused is entitled to be informed of the material facts of the specific allegation that the Prosecution is making against him so as to prepare his defence adequately. Hence, in the context of persecution, the indictment must set out the material facts as they allegedly pertain to the persecutory acts of the accused.

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

> In the brief which you filed last week, you accused Zoran and Mirjan Kupreški}, among other things, of the murder of the father of Witness H. And perhaps you would remember that on the 3rd of September I had asked that same question of your colleague Mr. Moskowitz when I asked him whether the Prosecution was going to bring charges, a specific charge that is, against the two accused in respect of that murder. And at that time Mr. Moskowitz said, "Yes, we had thought about bringing a specific charge, but we decided not to ask that the indictment be amended. In any case, you will take into account the evidence that we have presented." And I have in front of me the relevant pages of the transcript. These are pages 1.696 FF. And he added, "And you must decide to what extent one could take into account that evidence as regards persecution." All right. Now, here is my question: What is your position now about that murder? I repeat. In the written brief you accused the two accused of that murder, which, however, does not appear officially, in the indictment. To what extent can the Tribunal take into account the charges that were not actually formulated in an official way in the indictment itself, but which were put forth during the trial?[166]

107. Counsel for the Prosecution answered as follows:

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

108. The Presiding Judge continued:

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

109. To which counsel for the Prosecution added:

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[166] Trial Transcript, 12709.

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

110. From the above exchange, the Appeals Chamber must conclude that the question whether the Trial Chamber would take into account the attack on Suhret Ahmi}'s house, which resulted in the murder of Suhret Ahmi} and Meho Hrustanovi}, the house being set on fire, and the surviving members of the Suhret Ahmi} family being expelled, as a possible basis for liability in respect of the persecution count was, until the very end of the trial, not settled. The Appeals Chamber also notes that this matter appears not to have been completely resolved in the Trial Judgement. The Trial Chamber stated in paragraph 626 that

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

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

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

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[167] Trial Transcript, 12710-12711.
[168] Trial Transcript, 12710.
[169] Trial Transcript, 12712.
[170] Emphasis added.
[171] *See* the further discussion of this issue *infra* paras 306-326.
[172] Trial Judgement, para. 811. The Appeals Chamber assumes that "the principle set out above" is the principle of legality discussed in para. 626 of the Trial Judgement.

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

113. The Appeals Chamber is unable to agree with this reasoning. As found above, the attack on Suhret Ahmi}'s house and its consequences constituted a material fact in the Prosecution case and, as such, should have been pleaded in the Amended Indictment. Absent such pleading, the allegation pertaining to this event should not have been taken into account as a basis for finding Zoran and Mirjan Kupre{ki} criminally liable for the crime of persecution. Hence, the Trial Chamber erred in entering convictions on the persecution count because these convictions depended upon material facts that were not properly pleaded in the Amended Indictment.

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

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

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

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

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

The Pre-Trial Brief further stated that the Prosecution anticipated

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

117. In the Appeals Chamber's view, the information given in the Prosecution Pre-Trial Brief is extremely general in nature and it is difficult to see how it could have assisted Zoran and Mirjan Kupre{ki} in the preparation of their defence. In the short section pertaining directly to Zoran and Mirjan Kupre{ki} it is stated that they "joined in the attack" on several houses, "participating in at least a half a dozen murders".[177] There is no mention of which particular houses they attacked or whose murders they participated in. Similarly, the paragraph referring to "recently acquired evidence of individual acts of violence" does not establish whether those acts were additional to the attacks on the two houses and "the half a dozen murders".[178] In light of the evidence actually presented at trial, it appears that they were not.

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[173] Appeal Transcript, 862-863.
[174] Appeal Transcript, 838-839, 862.
[175] Prosecution Pre-Trial Brief, para. 23.
[176] Prosecution Pre-Trial Brief, para. 27.
[177] Prosecution Pre-Trial Brief, para. 23.
[178] Prosecution Pre-Trial Brief, para. 27.

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

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

120. Moreover, the Appeals Chamber is disturbed by how close to the beginning of the trial the Prosecution disclosed Witness H's statement to Zoran and Mirjan Kupre{ki}. Pursuant to an order of the Trial Chamber, Witness H's statement was disclosed to them only approximately one to one-and-a-half weeks prior to trial and less than a month prior to Witness H's testimony in court.[181] The Trial Chamber's reason for accepting the delay in the disclosure of Witness H's statement was that the delay only concerned one witness and that, therefore, no prejudice was caused to the Defendants.[182] In hindsight, it is obvious that, in this case, the issue of prejudice was not dependent on the number of witness statements of which disclosure was delayed, but the materiality of the witness' evidence to the question of Zoran and Mirjan Kupre{ki}'s criminal responsibility. Considering the significance of Witness H's evidence, the timing of the disclosure of that evidence was essential for the preparation of Zoran and Mirjan Kupre{ki}'s defence. The Prosecution's

[179] Trial Transcript, 96-127.
[180] Appeal Transcript, 863.
[181] The Trial Chamber's Order for the Protection of Victims and Witnesses, 9 July 1998; *see also* Prosecution Response, para. 11.20.
[182] Order for the Protection of Victims and Witnesses, 9 July 1998, 2.

motion requesting the delay reveals that it had some merit.[183] However, it cannot be excluded that Zoran and Mirjan Kupre{ki}'s ability to prepare their defence, in particular the cross-examination of Witness H, was prejudiced by the fact that disclosure took place so close to the commencement of the trial and to Witness H testifying in court.

121. The Appeals Chamber also bears in mind the radical "transformation" of the prosecution case against Zoran and Mirjan Kupre{ki}. Based on the Amended Indictment, they had to mount a defence against an allegation of wide-ranging criminal conduct against Bosnian Muslim civilians in the Ahmi}i-[anti}i region during a seven-month period, such as systematic and deliberate killing, comprehensive destruction of houses, and organised detention and expulsion. However, when it came to trial, this was not the case that the Prosecution tried to prove. Instead, it pursued a trial strategy which sought to demonstrate that Zoran and Mirjan Kupre{ki} were guilty of persecution, principally, because of their participation in two individual attacks (Suhret Ahmi}'s house and Witness KL's house).[184] Considering this drastic change in the Prosecution case, in conjunction with the ambiguity as to the pertinence of Witness H's evidence for the persecution count and the late disclosure of Witness H's evidence, the Appeals Chamber is unable to accept that Zoran and Mirjan Kupre{ki} were informed with sufficient detail of the charges against them, so as to cure the defects the Appeals Chamber has identified in the Amended Indictment.

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

123. Finally, the Appeals Chamber observes that no waiver argument has been raised by the Prosecution in this case since Zoran and Mirjan Kupre{ki} objected to the form of the Amended Indictment, *inter alia*, on the same ground as they are now raising before the Appeals Chamber. On 15 May 1998, the Trial Chamber rejected their objection. As to the specific question of whether the

[183] Prosecutor's Request for Additional Time to Disclose the Statement of One Witness, 7 July 1998 (*Ex Parte and Under Seal*).
[184] The latter allegation was not upheld because of insufficient evidence.

material facts were pleaded with sufficient details, the Trial Chamber did not provide any reasons for its finding. It simply held that the Amended Indictment met the requirements of Rule 47(C).[185]

3. Conclusion

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

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

C. Participation of Zoran and Mirjan Kupreškic in the attack on the house of Suhret Ahmic on 16 April 1993

126. As outlined above, the Trial Chamber accepted the evidence of Witness H and, in the case of Zoran Kupreškic, Witness JJ, and found that both of these Defendants participated in the attack on the house of Suhret Ahmic on 16 April 1993.[186] Zoran and Mirjan Kupreškic maintain that they

[185] Decision on Defence Challenges to Form of the Indictment, 15 May 1998, 2.
[186] The Trial Chamber's finding that the two Defendant's provided local knowledge and the use of their houses as bases for the attacking forces is considered *infra* paras 233-241.