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SCSL-2003-05-PT-059
(1206-1354)

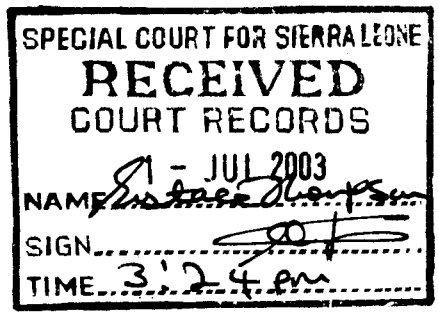
1206

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

Before: Judge Thompson, Presiding Judge
Judge Itoe
Judge Boutet

Registrar: Robin Vincent

Date filed: 01 July 2003



THE PROSECUTOR

Against

ISSA HASSAN SESAY

CASE NO. SCSL – 2003 – 05 – PT

PROSECUTION RESPONSE TO DEFENCE PRELIMINARY MOTION FOR DEFECTS IN THE FORM OF THE INDICTMENT (Rule 72(B)(ii) of the Rules of Procedure and Evidence)

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

Defence Counsel:
William Hartzog
Alexandra Marcil

INTRODUCTION

1. The Prosecution submits that having regards to the Statute for the Special Court for Sierra Leone (the **"Statute"**), the Rules of Procedure and Evidence for the Special Court for Sierra Leone (the "**Rules**") and the applicable jurisprudence, the Indictment against Issa Hassan Sesay (the "**Accused**") in its current form is sufficient to put the Accused on notice of the charges against him so he may prepare his defence. Alternatively, the Prosecution submits that should some additional facts be required, that the proper administration of justice demands that they be furnished by the Prosecution in a Bill of Particulars and not an amended indictment.

2. On 24 June 2003 the Defence for the Accused filed *Preliminary Motion For Defects in the Form of the Indictment* (the "**Motion**"). The Defence in its Motion submits that:

   i. the Indictment is defective and should be dismissed;

   ii. alternatively, that should a separate pending Defence motion requesting an extension of time be granted, the Defence be allowed to file a "complete and substantial Preliminary Motion on Form of the Indictment";

   iii. alternatively, that the Prosecution be required to provide additional facts and clarification with regard to form of liability under Articles 6(1) or 6(3), various individuals identities, locations referred to and the striking out of certain language; and

   iv. that the Chamber should issue an Order requiring the Prosecution to submit an Amended Indictment within 30 days.

ARGUMENT

I. The Statute of the Special Court and the Rules of Procedure and Evidence

3. The Prosecution submits that the Indictment against the Accused should be assessed under the Rules. Rule 47(c) requires that the Indictment contain "a short description of the particulars of the offence." This Rule differs from the corresponding Rules of the International Criminal Tribunal for Yugoslavia (ICTY) and International Criminal

Tribunal for Rwanda (ICTR), a fact the Defence Motion fails to take into adequate consideration.

4. ICTY and ICTR Rule 47(c) provide that the indictment should contain "a concise statement of the facts" of the case and of the crime with which the suspect is charged. The jurisprudence from the International Tribunals has specifically defined a "concise statement of facts" as "a brief statement of facts but comprehensive in its expression"[1], which by any ordinary meaning requires a higher level of specificity than Rule 47(c).

5. The Prosecution further submits that the Rules place an accused on better notice of the events and charges against him at an early stage in the proceedings, than under the rules governing the International Tribunals, which the Trial Chamber should consider in its assessment as to whether the Accused is sufficiently informed of the charges against him. Specifically, under Rule 66 (A)(i), the Prosecution is required to disclose witness statements intended to be called at trial 30 days after the initial appearance of the accused, whereas the practice of the International Tribunals does not require the disclosure of such statements until 60 days *before* trial.[2] While the jurisprudence of the International Tribunals is clear that supporting materials should not substitute for the indictment, it does indicate that the supporting materials certainly are relevant as to whether the defendant is sufficiently informed of the charges against him.[3]

6. In light of these differences and cognisant of the Trial Chamber's earlier ruling which stated that the Statute of the Special Court for Sierra Leone (the "**Statute**") "does not mandate a slavish and uncritical emulation, either precedentially or persuasively, of the principles and doctrines enunciated by our sister Tribunals,"[4] the Prosecution submits that the extensive body of jurisprudence of the ICTY and ICTR should be interpreted in light of the Statute and the Rules.

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[1] *Prosecutor v. Ferdinand Nahimana,* "Decision on the Preliminary Motion Filed by the Defence Based on the Defects in the form of the Indictment," ICTR-96-11-T, Trial Chamber I, 24 November 1997, para 20.
[2] Rules of Procedure and Evidence, ICTY Rule 66 (a)(ii); ICTR Rule 66 (a)(ii).
[3] *See Prosecutor v. Elizaphan and Gerald Ntakirutimana, Judgement and Sentence,* Case No. ICTR-96-10 & ICTR-96-17-T, Trial Chamber I, 21 February 2003, para 59 *citing Prosecutor v.Kuprekic et. al.* "Appeal Judgement," IT-95-16-A, 23 October 2001.
[4] *Prosecutor v. Issa Hassan Sesay*, "Decision on the Prosecution's Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure", SCSL-2003-05-PT, 23 May, 2003, para 11.

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7. The Prosecution submits that the Indictment against the Accused meets the requirement of Rule 47(c) of the Special Court and sufficiently informs the Accused of the charges against him, as developed in the specific paragraphs below.

II. The Specificity of the Indictment

8. The Prosecution submits that the degree of specificity required in an indictment is "dependent upon whether it sets out material facts of the Prosecution case with enough detail to inform the accused clearly of the charges against him so he may prepare his defence."[5]

9. The Prosecution further submits that the nature of the alleged criminal conduct with which the Accused is charged, including the proximity of the Accused to relevant events, is a decisive factor in determining the degree of specificity required in the indictment."[6] For example, where it is alleged that the Accused physically "committed" the killings, rapes, mutilations, etc, alleged in the underlying substantive offences, the requirement for precision when pleading the material facts is greater, as opposed to where it is alleged that the Accused' participation in the underlying, substantive crimes was less direct, such as a case alleging superior responsibility.[7] For instance, at the ICTY where the accused was alleged to be "a high ranking official in the Bosnian Serb leadership" and therefore "there was alleged this broad based authority and wide range of offences", the Trial Chamber held "there was less specificity required in the indictment."[8]

10. In interpreting the Indictment it is important not to take individual paragraphs and assess them in isolation and out of context but rather to assess the Indictment as a whole.[9]

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[5] *Ntakirutimana, supra 3* para 42. The Court states that the jurisprudence on specificity for the tribunals "translates to an obligation to state the material facts underpinning the charges of the indictment **but not the evidence by which these facts will be proven**" *Ibid* [Emphasis added] .

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

[7] See *Prosecutor v. Krajisnik,* "Decision Concerning Preliminary Motion on the Form of the Indictment", IT-00-39-PT, 1 August 2000, para 9. See also *Ntakitutiman, supra* 5 at para 49.

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

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

III. Specificity of Names of Individuals and Places and Time Period

A. Subordinates

11. The Prosecution submits that given the high level of authority with which the Accused is alleged to have wielded, the Indictment sufficiently identifies subordinates of the Accused by describing them as members of the AFRC/RUF. The Accused is alleged to have held authority and control at the highest levels of the AFRC/RUF power structure: in paragraph 17 of the Indictment, he is alleged to have been a member of the AFRC/RUF governing body, and in paragraphs 18 – 19, he is alleged to have held positions in which he was second in charge and subsequently next in charge to the RUF leader during the time period alleged in the Indictment. Such broad based authority requires less specificity of the alleged subordinates of the Accused[10]. The Prosecution submits that identifying the subordinates as members of the group which the Accused is alleged to have exercised control over, in the instant case the AFRC/RUF, is sufficient, given the high ranking position of the Accused within the group.

12. The Defence reliance on the *Kanyabashi* and *Karemera* cases in support of its position that the Prosecution should identify the subordinates is misplaced. First of all, as argued above, the indictment in the instant case identifies the subordinates of the Accused. Further, both the *Kanayabashi* (para. 6.64) and *Karemera* para. (6.46) indictments respectively, merely make reference to the "subordinates" of the accused persons[11]. The alleged "subordinates" are not described nor identified in any way. In the instant case the Indictment clearly describes subordinates of the Accused (members of the AFRC/RUF), and therefore puts the Accused on notice as to whom the alleged subordinates are.

13. As to the assertions in paragraphs 8 and 9 of the Defence Motion, the Prosecution submits that the Indictment sufficiently pleads the relationship between the Accused and the perpetrators for the purposes of superior responsibility. Paragraphs 17 to 19 of the Indictment set out various senior level and command positions that the Accused held within the RUF, AFRC and the AFRC/RUF structure. Paragraph 21 alleges the Accused' authority and control over subordinate members of the RUF and AFRC/RUF forces. A

[10] See *Krajisnik, supra* 8 at para 9.
[11] See paragraph 6.64 of the *Kanyabashi* Indictment and paragraph 6.46 of the *Karemera* Indictment, attached.

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category of perpetrators is identified in paragraph 28 as members of the RUF and AFRC/RUF forces subordinate to the Accused. It is therefore clear that the relationship between the Accused and the perpetrators identified in paragraph 8 of the Defence Motion is set forth in the Indictment as one of superior-subordinate.

B. Co-Accused and Perpetrators

14. With respect to paragraphs 12 and 13 of the Defence Motion concerning co-accused persons or co-perpetrators, the Prosecution submits that reference to members of the AFRC/RUF is sufficient identification since identifying perpetrators of the alleged crime by reference to their category as a group is permissible[12]. In relation to "other superiors in the RUF", paragraphs 18, 19 and 21 of the Indictment give a clear and concise list of superiors in the RUF and the AFRC. The Prosecution is not required to give an exhaustive list of "other superiors in the RUF"[13]. Moreover, the Indictment, read as a whole, puts the Accused on notice that his liability flows from his participation in various high level bodies and his high-level positions of authority and by virtue of his association with other identified leaders who operated, as he did, at the highest levels of authority.

15. With respect to paragraphs 10 and 11 of the Defence Motion to the extent the argument is that "Members of the AFRC/RUF" does not satisfy criterion (c) laid out in the said paragraph 10, i.e. the identity of those engaged in the criminal enterprise, the Prosecution submits that it does, without prejudice to its position on the use of the precise formulation of AFRC/RUF in the Indictment. To the extent that this Court adopts the *Kronjelac* criteria, the Prosecution submits that reference to the group of members of the AFRC/RUF, RUF or AFRC is sufficiently precise for purposes of pleading the identity of those engaged in a joint criminal enterprise. The Defence itself clearly admits in paragraph 10 of its motion that the identity of those engaged in the enterprise, so far as their identity is known, may be stated by reference to their category as a group.

16. Furthermore with respect to paragraph 11, the Prosecution submits that the Defence contention misrepresents the Indictment. The identity of those engaged in the joint

[12] See *Prosecutor v. Kvocka et al*, IT-98-30-PT, "Decision on Defence Preliminary Motions on Form of Indictment", TCIII, 12 April 1999, para 22.
[13] See *Prosecutor v. Nahimana,* ICTR-96-11-T, "Decision on the Defence Motion on Defects in the Form of the Amended Indictment", 17 November 1998, para 3-4.

criminal enterprise, in addition to the Accused, is clearly laid out in paragraphs 8, 20, 21, and 22 of the Indictment. The Prosecution does not use the formulation "Members of the AFRC/RUF" in these paragraphs but rather gives the specific identity of individuals alleged to comprise the joint criminal enterprise.

C. Victims

17. The Prosecution submits that the Indictment, particularly in paragraphs 33-37, 38-42, 43-45, 46, 48-52, 54-57, sufficiently identifies the victims as civilians from the various regions, and where possible, in paragraphs 37-42, 45, 46, 49, 51 and 52 by gender. Paragraph 58 also specifically identifies the victims as UNAMSIL peacekeepers and humanitarian assistance in the various regions listed. As noted above, given the nature of the case against the Accused, the Prosecution is not required to give specific details on the identity of the victims. Further, both of the International Tribunals have recognized that in cases of mass crimes, such as those with which the Accused is charged, the sheer scale of the offences makes it impossible to give the identity of the victims[14]. Identification of victims by reference to their group or category has been held permissible by both the ICTY and the ICTR[15].

D. Location and Time Period

18. The Prosecution submits that the locations referred to in the Indictment are sufficiently precise, given the nature of the case against the Accused. As indicated above, a case such as the instant one alleging superior responsibility requires less specificity. Further, the crimes in the instant case allegedly occurred over an extensive period of time and on a wide scale. Under such circumstances, it would be impossible to require particular details about all locations. In reliance on the Appeals Chamber decision in the *Kuprescic* case, the ICTR in the *Ntakirutimana* case noted that the sheer scale of alleged crimes may make it "impracticable" to require a high degree of specificity in such matters as the identity of the victims and the time and place of the events[16]. By specifying the districts, and where possible the villages in which the crimes allegedly occurred, the Prosecution

[14] *Kvocka, supra* 12, paras 16 -17; See also *The Prosecutor v. Kayishema*, Judgment, ICTR-95-1-T, 21 May 1999.
[15] See *Prosecutor v. Kronojelac,* "Decision on the Defence Preliminary Motion on the Form of the Indictment Preliminary Motion Decision", IT-97-25, 24 February 1999; See also *Kayishema, supra* 14.
[16] See *Ntakirutimana, supra* 3 at para 55.

submits that the Accused is on sufficient notice of the locations of the events, particularly given the small size of a country like Sierra Leone.

19. The Prosecution submits that paragraph 51 as a whole is adequately specific. First, the phrase "at **all** times relevant in this indictment" is quite clear in that the time frame of the Indictment to which it refers is determinable (Emphasis added). The location given as Kailahun District is sufficiently precise for the reasons advanced in paragraph 16 above. The extensive time frame and the allegation that the crime occurred throughout the district does not mean it lacks specificity per se. Given the alleged regularity of the underlying offence of forced labour, it is logical that the time frame is of a longer duration and the location is expansive.

IV. Joint Criminal Enterprise

20. Contrary to the Defence's assertions in paragraphs 19-22 of its Motion, the Indictment meets the *Kronjelac* criteria for pleading joint criminal enterprise in that it specifically alleges the purpose of and nature of the role of the Accused in the common plan. The nature and purpose of the joint criminal enterprise are set out in the Indictment, in particular at paragraphs 8, 9, 10, 24, and 25. The nature of the participation by the Accused in the joint enterprise is set out throughout the Indictment, and in particular in paragraph 17 which sets out, in general, the Accused' participation, and paragraphs 18-23 which provide detailed particulars as to the Accused' participation. While the Defence focuses only upon the paragraph that identifies the "common plan", it is required that the indictment be examined as a whole. A reading of the full indictment clearly makes sufficient factual allegations that show the "nature of participation" of the Accused in the "common plan" or "joint criminal enterprise."

V. Formulation of Counts in the Indictment

21. Contrary to the Defence argument in paragraph 18 of its Motion, the Prosecution submits that the use of the phrase "the mutilation included" in paragraph 45 of the Indictment and "forced labour included" in paragraph 47 of the Indictment do not in any way render vague the description of the respective offences of mutilation and forced labour. To the

contrary, the phrases, in the context in which they are used, provide further details about the offences by specifying the manner in which the offences were committed.

22. With respect to paragraphs 20 of the Defence Motion, the Prosecution similarly submits that the words "in particular" and "included" in paragraphs 23 and 24 of the Indictment do not in any way adversely affect the nature of the case of joint criminal enterprise. Paragraph 23 of the indictment unequivocally sets forth the purpose of the common plan in general terms. The function of the words "in particular" in paragraph 23 is to provide further specificity to the general class of natural resources mentioned in the paragraph. Likewise, the word "included" as used in paragraph 24 provides specific information regarding the joint criminal enterprise.

23. Finally, the Prosecution submits that the Defence submission that the use in the Indictment of the phrases mentioned in paragraphs 16 and 23 of its Motion expand the Indictment is not persuasive. While there may be events not specifically alleged in the Indictment, the Statute and the Rules provide sufficient safeguards against attempts to unfairly introduce evidence on events outside the framework of the Indictment.

24. In sum, given the massive and widespread nature of the case, and the Accused' high-level authority which gives rise to his liability, the nature of the crimes alleged, the material facts alleged in the indictment against the Accused are sufficiently precise. Having regard to the nature of the case against the Accused, the Prosecution submits that the Accused has been provided with adequate particulars.

VI. Charging Article 6(1) and 6(3) based on the same set of facts

25. Contrary to the Defence assertion, the Indictment properly charges the Accused cumulatively under Articles 6(1) and 6(3) of the Statute and the Indictment clearly sets forth the underlying facts. The *Kanyabashi* decision of Trial Chamber II of the ICTR relied upon by the Defence in support of its proposition that the Prosecution should elect between the 2 theories of liability, is not reflective of established law on the matter.

26. A significant body of jurisprudence from the ICTY and the ICTR reflects the view that the two forms of responsibility are not mutually exclusive and can be charged both

cumulatively and alternatively[17] and that an accused can be convicted under both forms of liability based on the same set of facts.[18]

27. In particular, in *Delalic et al.*, which has been relied upon by a number of cases, the Trial Chamber held that it is "a well-established norm of customary and conventional international law" that "a superior may be held criminally responsible not only for ordering, instigating or planning criminal acts carried out by his subordinates, but also for failing to take measures to prevent or repress the unlawful conduct of his subordinates."[19]

28. The Prosecutor urges the Chamber to follow the above line of cases permitting cumulative charging under a theory of direct responsibility and superior responsibility. The Prosecution sees no reason why the Chamber should deviate from a practice which is consistent with customary and conventional international law. The Prosecution recognizes that factual situations may arise where a superior not only fails to prevent his subordinates from participating in criminal activity or punish them thereafter, but also joins in the participation of the criminal activity. In such situations, it would be appropriate to hold the Accused liable both for his direct participation as well as his failure to prevent his subordinates from committing crimes or his failure to punish them. Cumulative charging allows for a complete reflection of the total culpability of an accused, which the Prosecution submits is important given the gravity of the offences within the jurisdiction of this Court.

VII. Request to File a Second Motion

29. The Defence request to file a second motion on the form of the indictment should be rejected. It is clear that the drafters of the Rules intended for challenges to the form of an indictment be brought in one motion. Rule 72 (G) states that "[o]bjections to the form of the indictment, including an amended indictment, shall be raised by a party in one motion

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[17] *Prosecutor v. Kvocka et al*, IT-98-30-PT, "Decision on Defence Preliminary Motions on Form of Indictment", TCIII, 12 April 1999, para 50; *Prosecutor v. Naletilic et al.*, "Decision on Defendant Vinko Martinovic's Objection to the Indictment", TC I, 15 February 2000; *Prosecutor v. Delalic, et al.*, IT-96-21-T, Judgement, 16 November 1998, para. 333 – 342.

[18] *See Prosecutor v. Musema,* ICTR-96-13-T, Judgement, TC I, 27 January 2001, para. 884 – 974, and in particular para. 891-895, convicting the Accused of genocide under Article 6(1) and Article 6(3) based on the same set of facts.

[19] See *Delalic, et al., supra* 17 at para. 333

only, unless otherwise allowed by a Trial Chamber." The Prosecution submits that the Defence desire to file a second motion so that they may be able to file "a more complete and substantial" motion has no basis in law or fact.

VIII. Bill of Particulars

30. The Prosecution submits that the Defence request for an Order compelling the Prosecution to file an Amended Indictment should be dismissed. In the instant case, an Amended Indictment would not only be unnecessary but would needlessly delay the prompt resolution of issues.

31. Should the Trial Chamber deem it necessary for the Prosecution to provide additional information, the Prosecution submits that it should do so by means of a Bill of Particulars. The Indictment is not the only instrument available to the Defence to prepare its case; other avenues for seeking additional information, such as a Bill of Particulars, are also available to the Defence[20]. The Prosecution submits that the use of a Bill of Particulars to provide additional information would provide for a more expeditious resolution of issues.

CONCLUSION

For the above reasons, the Defence motion should be dismissed in its entirety. Alternatively the Prosecution submits that should the Trial Chamber request any additional particulars, that the Prosecution submit these in the form of a Bill of Particulars and not be required to amend the Indictment.

Freetown, 01 July 2003

For the Prosecution,

Luc Côté,
Chief of Prosecutions

Robert Petit,
Senior Trial Counsel

[20] See *Naletilic, supra* 17 at para 17.

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1. ICTY Rule 47
2. ICTR Rule 47
3. *The Prosecutor v. Ferdinand Nahimana, Decision on the Preliminary Motion Filed by the Defence Based on the Defects in the form of the Indictment*, Case No. ICTR-96-11-T, Trial Chamber I, 24 November 1997
4. ICTY Rule 66
5. ICTR Rule 66
6. *The Prosecutor v. Elizaphan & Gerard Ntakirutimana, Judgment and Sentence*, ICTR-96-10-T & ICTR-96-17-T, 21 February 2003
7. *The Prosecutor v. Issa Hassan Sesay, Decision on the Prosecution's Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure,* Case No. SCSL-2003-05-PT, 23 May, 2003
8. *Prosecutor v. Meakic, Gruban, Fustar, Banovic, Knezevic, Decision on Dusan Fustar's Preliminary Motion on the Form of the Indictment*, Case No. IT-02-65-PT, 4 April 2003
9. *Prosecutor v. Krajisnik, Decision Concerning Preliminary Motion on the Form of the Indictment,* Case No. IT-00-39-PT, 1 August 2000
10. *Prosecutor v. Kronojelac, Decision on the Defence Preliminary Motion on the Form of the Indictment Preliminary Motion Decision*, IT-97-25, 24 February 1999
11. Excerpt from Redacted Amended Indictment of Edward Karemera, ICTR-98-44-I
12. Excerpt from Amended Indictment of Joseph Kanyabashi, ICTR-96-15-I
13. *Prosecutor v. Kvocka et al, Decision on Defence Preliminary Motions on Form of Indictment*, IT-98-30-PT, TCIII, 12 April 1999
14. *Prosecutor v. Nahimana, Decision on the Defence Motion on Defects in the Form of the Amended Indictment,* ICTR-96-11-T, 17 November 1998
15. *Prosecutor v. Naletilic et al., Decision on Defendant Vinko Martinovic's Objection to the Indictment*, TC I, 15 February 2000

16. *Prosecutor v. Delalic, et al., Judgement*, IT-96-21-T, 16 November 1998

17. *Prosecutor v. Musema, Judgement*, ICTR-96-13-T, TC I, 27 January 2001

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ANNEX I

ICTY Rule 47

INTERNATIONAL CRIMINAL TRIBUNAL FOR YUGOSLAVIA

RULES OF PROCEDURE AND EVIDENCE

Rule 47
Submission of Indictment by the Prosecutor

(A) An indictment, submitted in accordance with the following procedure, shall be reviewed by a Judge designated in accordance with Rule 28 for this purpose.

(B) The Prosecutor, if satisfied in the course of an investigation that there is sufficient evidence to provide reasonable grounds for believing that a suspect has committed a crime within the jurisdiction of the Tribunal, shall prepare and forward to the Registrar an indictment for confirmation by a Judge, together with supporting material.

(C) The indictment shall set forth the name and particulars of the suspect, and a concise statement of the facts of the case and of the crime with which the suspect is charged.

(D) The Registrar shall forward the indictment and accompanying material to the designated Judge, who will inform the Prosecutor of the date fixed for review of the indictment.

(E) The reviewing Judge shall examine each of the counts in the indictment, and any supporting materials the Prosecutor may provide, to determine, applying the standard set forth in Article 19, paragraph 1, of the Statute, whether a case exists against the suspect.

(F) The reviewing Judge may:

(i) request the Prosecutor to present additional material in support of any or all counts;

(ii) confirm each count;

(iii) dismiss each count; or

(iv) adjourn the review so as to give the Prosecutor the opportunity to modify the indictment.

(G) The indictment as confirmed by the Judge shall be retained by the Registrar, who shall prepare certified copies bearing the seal of the Tribunal. If the accused does not understand either of the official languages of the Tribunal and if the language understood is known to the Registrar, a translation of the indictment in that language shall also be prepared, and shall be included as part of each certified copy of the indictment.

(H) Upon confirmation of any or all counts in the indictment,

(i) the Judge may issue an arrest warrant, in accordance with Sub-rule 55 (A), and any orders as provided in Article 19 of the Statute, and

(ii) the suspect shall have the status of an accused.

(I) The dismissal of a count in an indictment shall not preclude the Prosecutor from subsequently bringing an amended indictment based on the acts underlying that count if supported by additional evidence.

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ANNEX II

ICTY Rule 47

INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (ICTR)

RULES OF PROCEDURE AND EVIDENCE

PRE-TRIAL PROCEEDINGS

Section 1: Indictments

Rule 47: Submission of Indictment by the Prosecutor

(A) An indictment, submitted in accordance with the following procedure, shall be reviewed by a Judge designated in accordance with Rule 28 for this purpose.

(B) The Prosecutor, if satisfied in the course of an investigation that there is sufficient evidence to provide reasonable grounds for believing that a suspect has committed a crime within the jurisdiction of the Tribunal, shall prepare and forward to the Registrar an indictment for confirmation by a Judge, together with supporting material.

(C) The indictment shall set forth the name and particulars of the suspect, and a concise statement of the facts of the case and of the crime with which the suspect is charged.

(D) The Registrar shall forward the indictment and accompanying material to the designated Judge, who will inform the Prosecutor of the scheduled date for review of the indictment.

(E) The reviewing Judge shall examine each of the counts in the indictment, and any supporting materials the Prosecutor may provide, to determine, applying the standard set forth in Article 18 of the Statute, whether a case exists against the suspect.

(F) The reviewing Judge may:

(i) Request the Prosecutor to present additional material in support of any or all counts, or to take any further measures which appear appropriate;

(ii) Confirm each count;

(iii) Dismiss each count; or

(iv) Adjourn the review so as to give the Prosecutor the opportunity to modify the indictment.

(G) The indictment as confirmed by the Judge shall be retained by the Registrar, who shall prepare certified copies bearing the seal of the Tribunal. If the accused does not understand either of the official languages of the Tribunal and if the language understood

is known to the Registrar, a translation of the indictment in that language shall also be prepared, and a copy of the translation attached to each certified copy of the indictment.

(H) Upon confirmation of any or all counts in the indictment:

(i) The Judge may issue an arrest warrant, in accordance with Sub-Rule 55 (A), and any orders as provided in Article 19 of the Statute; and

(ii) The suspect shall have the status of an accused.

(I) The dismissal of a count in an indictment shall not preclude the Prosecutor from subsequently bringing an amended indictment based on the acts underlying that count if supported by additional evidence.

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ANNEX III

The Prosecutor v. Ferdinand Nahimana, Decision on the Preliminary Motion Filed by the Defence Based on the Defects in the form of the Indictment, Case No. ICTR-96-11-T, Trial Chamber I, 24 November 1997

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International Criminal Tribunal for Rwanda
Trial Chamber 1

THE PROSECUTOR
v.

FERDINAND NAHIMANA

ICTR-96-11-T

Decision of: 24 November 1997

Original: English

DECISION ON THE PRELIMINARY MOTION FILED BY THE DEFENCE BASED ON DEFECTS IN THE FORM OF THE INDICTMENT

Office of the Prosecutor: Mr. James Stewart, Mr. Alphonse Van

Counsel for the Defence: Mr. Jean-Marie Biju-Duval, Ms. Diane Sénéchal

Before: Presiding Judge Navanethem Pillay, Judge Laïty Kama, Judge William H. Sekule

Registry: Ms. Prisca Nyambe, Mr. Antoine Mindua

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA ("the TRIBUNAL"),

SITTING AS Trial Chamber I composed of Judge Navanethem Pillay as Presiding Judge, Judge Laïty Kama and Judge William H. Sekule;

TAKING INTO ACCOUNT that the accused, Ferdinand NAHIMANA, was arrested in the Republic of Cameroon on 27 March 1996 pursuant to an international warrant of arrest issued by the General Prosecutor of the Republic of Rwanda, and subsequently indicted by the Tribunal on 11 July 1996;

CONSIDERING the Registrar's letter of 12 July 1996 to the Minister of Justice of the Republic of Cameroon by which the Registrar submitted the Tribunal's warrant of arrest and order for surrender along with a copy of the Tribunal's indictment and a statement of the rights of the accused to the Cameroonian authorities with a request for service of the these instruments on the accused;

TAKING NOTE OF THE FACT that the accused was subsequently transferred to the Tribunal's Detention Facilities in Arusha on 23 January 1997 and made his initial appearance before the Tribunal on 19 February 1997 pursuant to Rule 62 of the Rules;

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HAVING NOW BEEN SEIZED of a preliminary motion filed by the Defence on 17 April 1997 pursuant to Rules 72 and 73 of the Rules of Procedure and Evidence ("the Rules"), in which Counsel for the Defence raises a number of objections on the form of the Prosecutor's indictment of 12 July 1996 and the basis of the Tribunal's Decision of that same date confirming the indictment, and also against the manner in which the warrant of arrest and the indictment were served on the accused;

HAVING RECEIVED the Prosecutor's brief of 29 May 1997, submitted to the Registry on 13 June 1997, in reply to the Defence Counsel's preliminary motion;

HAVING FURTHER RECEIVED the Defence Counsel's response filed on 18 August 1997 to the Prosecutor's aforementioned brief;

HAVING HEARD the parties during the hearing held on Wednesday 27 August 1997;

CONSIDERING Articles 17(4) and 18 of the Tribunal's Statute (the "Statute") and Rules 5, 47, 55, 72 and 73 of the Rules;

AFTER HAVING DELIBERATED

1. In its written submission, filed pursuant to Rule 72(B), the Defence argues that the indictment as well as the subsequent proceedings should be nullified and that the accused, accordingly, should be released for the following three reasons:

(i) the indictment is defective by virtue of the inaccurate manner in which the facts and the counts are stated in the indictment and because of the cumulation of counts based on the same acts which, in the Defence Counsel's argument, is in violation of the principle of non-bis-in-idem;

(ii) the Judge's decision confirming the indictment is defective due to the lack of sufficient evidence in the supporting documentation to substantiate the charges brought against the accused;

(iii) the service of the warrant of arrest and the indictment on the accused is defective since the accused was neither provided with a copy of these instruments nor with a statement of his rights before his transfer to the Tribunal's Detention Facilities.

2. The Trial Chamber will first consider point (ii) relating to the decision confirming the indictment and point (iii) on the manner of service of the indictment

A. ON THE OBJECTION BASED ON DEFECTS IN THE CONFIRMATION OF THE INDICTMENT

3. With respect to point (ii) relating to the decision confirming the indictment, the Chamber strongly maintains that the procedure indicated in Rule 72 (B) refers

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solely to defects in the form of the indictment and could not be used as grounds to challenge the decision rendered by the confirming Judge.

4.. In his written and oral submissions, the Defence contends that the confirming Judge did not have sufficient evidence or justification to provide reasonable grounds for believing that the suspect had committed the crimes charged against the accused in the indictment, and thus could not legitimately have confirmed the indictment pursuant to Article 18(1) of the Statute and Rule 47(D) of the Rules.

5. The Prosecutor, in her brief, argued to the contrary that the confirming Judge did, in fact, have enough material before him to determine that a prima facie case had been established by the Prosecutor. She further asserted that the confirming Judge's discretionary power to review the indictment and decide whether or not there existed sufficient evidence to justify a confirmation of the indictment is not and indeed cannot be subject to appeal and that, anyway, such appeal is inadmissible short of any provision to this effect in the Statute and the Rules.

6. The Trial Chamber observes initially that what the Defence is really asking for is a measure of re-examination or review of the decision by which the Judge confirmed the indictment pursuant to Rule 47 of the Rules. On this point, however, the Chamber considers that neither Rule 47 nor Rules 72 and 73 of the Rules permit appeals against a decision rendered by a single Judge to confirm an indictment. Only in special circumstances can a preliminary motion raising objections against the form of the confirmation of an indictment be applied as an indirect means to obtain a review by a Trial Chamber of a confirming decision.

7. The Trial Chamber further recalls that the test to be made by the confirming Judge in establishing whether or not a prima facie case has been made out by the Prosecutor is inherently different from the Trial Chamber's evaluation of the evidence brought forward by the parties during trial. At the stage of confirmation of an indictment, notably, the confirming Judge is only required to assess whether or not the Prosecutor has provided documentation of facts carrying sufficient weight to justify a reasonable inference that the suspect has committed crimes falling within the Tribunal's jurisdiction, but which do not have to amount to conclusive evidence of these crimes.

8. The purpose of the confirmation, in other words, is merely to ensure that the investigations carried out by the Prosecutor have reached an acceptable level of probability to justify a belief that the suspect may have committed certain crimes, without going into any specific evaluation of the culpability of the suspect. The autonomous power of discretion exercised by the confirming Judge in this endeavour is by its very nature subjective and could therefore be reviewable in circumstances where, the confirming decision was in flagrant violation of the Statute and/or the Rules or was inconsistent with the fundamental principles of fairness, and had entailed a miscarriage of justice. Under such circumstances only could there be room for consideration of annulment pursuant to the principle included in Rule 5 of the Rules. However, none of these circumstances apply in the present case.

9. Trial Chamber, thus, rejects the Defence Counsel's quest for annulment of the indictment and release of the accused on the basis of defects in the confirmation of the indictment.

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B. ON THE OBJECTION BASED ON DEFECTS IN THE MANNER OF SERVICE OF THE INDICTMENT

10. The Defence Counsel has further suggested that, contrary to the provisions in Article 19 of the Statute and Rule 55 of the Rules, the warrant of arrest, the indictment and the statement of the rights of the accused were never served on the accused by the Cameroonian authorities during the period he was detained in Cameroon and that, consequently, the indictment should be rendered null and void and the accused released.

11. The Prosecutor, in response, argues that no evidence has been brought forward so far to support the allegation that the accused was not properly served with the relevant instruments as requested in the Registrar's letter of 12 July 1996 to the Cameroonian Minister of Justice. The presumption is, therefore, that the Cameroonian authorities acted in conformity with the Registrar's request and actually did serve the documents on the accused. Even if this were not the case, however, the Prosecutor holds that lack of service of the indictment on the accused could never result in annulment of this instrument, as the control of internal acts of compliance by a sovereign State falls outside the Tribunal's jurisdiction.

12. The Trial Chamber reminds that the Registrar's obligation under Rule 55(B) of the Rules is to transmit the warrant of arrest and order for surrender to the national authorities together with a copy of the indictment and a statement of the rights of the accused, and to instruct the national authorities to read out these documents to the accused upon his arrest in a language he understands. Having done so, which in this case is verified by production in Court of a copy of the Registrar's aforementioned letter to the Cameroonian Minister of Justice, the Registrar has complied fully with the requirements contained in Rule 55. The Chamber is not in possession of any verified information of whether or not the warrant of arrest and the accompanying documents were actually served by the Cameroonian authorities on the accused. Even if this did not take place, however, the Chamber cannot but regret this fact, but failure of the Cameroonian authorities to serve the documents on the accused does not constitute any intentional breach of the Statute or the Rules by the Registrar and thus cannot entail the nullification of the indictment as requested by the Defence.

13. The Trial Chamber underscores the need to respect the rights of the accused during all stages of the trials but is unable to verify whether or not the relevant instruments in this case were actually served on the accused. The Chamber notes, however, that any possible defect in the service of these documents was remedied as soon as possible, namely upon the accused's transfer to the Tribunal's Detention Facilities in Arusha, by which time the accused was given a copy of the indictment and the supporting material was submitted to the Defence Counsel. It should also be noted that during the initial appearance hearing, the accused did not not raise any objection with regard to the indictment, but rather pleaded not guilty.

14. For these reasons, the Trial Chamber is of the opinion that the rights of the accused in the present case were respected as far as possible, irrespective of whether or not the warrant of arrest, the indictment and a statement of the rights of the accused were served on the accused in Cameroon by the Cameroonian authorities. The Chamber refuses, therefore, to terminate and nullify the

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proceedings before it as a consequence of acts of State over which it has no knowledge or control.

C. ON THE OBJECTIONS BASED ON DEFECTS IN THE FORM OF THE INDICTMENT

15. Rule 72(B) of the Rules includes a non-exhaustive list of pre-trial motions which the accused may bring forward prior to the trial on its merits, and paragraph (ii) of this provision establishes in particular that the accused may file a motion to challenge the form of the indictment, which is what the accused has done in the present case.

16. Article 20(4)(a) of the Statute stipulates that the accused must be informed promptly and in a language he or she understands of the nature and cause of charges against him or her, and Rule 47(B) of the Rules incorporates this obligation by establishing that the indictment shall set forth the name and particulars of the suspect and a concise statement of the facts of the case and of the crime with which the suspect is charged.

17. The Defence Counsel claims in his written and oral submissions that the indictment should be declared null and void because of serious defects in the form of the indictment. More particularly, the Counsel maintains that the imprecise and erroneous manner in which the facts are stated in the indictment effectively obstruct his possibilities of preparing the defence. He submits, moreover, that the Prosecutor's cumulation of charges based on the same action by the accused is in violation of the principle of non-bis-in-idem. In conclusion, the Counsel requests that if the indictment is not annulled, the Prosecutor should at least amend it, in order to include a precise statement of facts for each charge.

18. The Prosecutor has responded in essence, firstly, that the statement of facts in the indictment, concise as it is, does satisfy the requirements of the Statute and the Rules and amply enables the accused to understand and prepare his defence against the charges brought against him. Any request for further details beyond what has already been given to the Defence is but an unjustified request for particulars, which should have been addressed directly to the Prosecutor. Secondly, the Prosecutor argues that the principle of non-bis-in- idem is inapplicable in cases, such as the present, where the accused has not already been prosecuted or convicted abroad of any of the crimes for which he now stands indicted before this Tribunal. However, both in her written submissions and oral arguments during the hearing, the Prosecutor signified her willingness to amend the indictment, if the Tribunal so requested.

19. The Trial Chamber notes initially that there is an important distinction to be made between defects in the form and defects in the merits of the indictment. At this stage of the proceedings, the Chamber is bound to examine and dispose of defects in the form only, whereas defects on the merits of the indictment may raise questions of evidence and facts which more appropriately should be considered during trial. For this reason,the Trial Chamber will only deal with objections raised against the vagueness, the lack of sufficient indication of time and against the lack of specification of the charges raised against the accused in the indictment. The Chamber will thereafter consider the objection raised by the Defence regarding the non-bis-in-idem principle.

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20. As a general observation, the Trial Chamber holds that the accused must be able to recognize the circumstances and the actions attributed to him in the indictment and the supporting material, and must be made to understand how and when his actions under the particular circumstances constituted one or more crimes covered by the Tribunal's jurisdiction. Furthermore, the Trial Chamber interprets the word 'concise statement of the facts' in Rule 47 to mean a brief statement of facts but comprehensive in expression. From this perspective, then, the Chamber will address the various objections raised by the Defence.

On the objections based on the vagueness and imprecision of the facts in the indictment.

21. The Defence submitted that the indictment is vague due to factual imprecision in the indictment. The statement of facts in the indictment does not give the accused the possibility of knowing in detail the nature and cause of the charge against him. The Defence, in his oral submission, pointed out that the indictment must contain express statements and not just a hypothesis. He further submitted that there are approximately forty seven possible combinations of interpretation of the charges and of the statement of facts in the indictment.

22. The Prosecutor's response is that every indictment is concise in nature and the indictment win this case is sufficient to inform the accused of the charges against him. The indictment complies with Article 17 of the Statute and Rule 47 of the Rules.

23. The Trial Chamber notes that in the case before the International Criminal Tribunal for the Former Yugoslavia (the "ICTY") against Delalic, Mucic, Delic and Landzo, IT-96-21-T, the Chamber of first instance held that a particular paragraph of the indictment: "did not give the accused a specific statement of facts of the case and of the crimes with which he was charged because it alleged at least six different types of conduct over a period of seven months''. The Trial Chamber in this case went on to state that: "there should be a clear identification of particular acts of participation by the accused''.

24. The Defence further submitted that Count 1 of the charge is vague in that it merely states that the accused conspired with "others" without even knowing who it is alleged that he conspired with.

25. The Prosecutor's response was that the count cannot be void for the sole reason that the identity of the alleged co-conspirator or co-conspirators is not mentioned

26. This Trial Chamber is of the view that in order for the accused to fully understand the charge against him he needs to know who he is alleged to have conspired with. The Trial Chamber notes the decision in the case before the ICTY of the Prosecutor against Tihomir Blaskic, case number IT-95-14-PT, in which it was stated that: "expressions such as "including but not limited to" or "among others" are vague and subject to interpretation and they do not belong in an indictment when it is issued against the accused''.

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27. The Trial Chamber therefore holds that Count 1 should be amended so as to indicate the names of the people with whom the accused is alleged to have conspired to commit genocide.

On the lack of any specific time-frame of the alleged crimes in the indictment

28. With regard to the date and time the offences stated in Count 1 were allegedly committed, the Defence points out that reference is made to the period "between 1 January 1994 and approximately 31 July 1994''. The Tribunal notes, in fact, that the Prosecutor refers to the same period of time in Counts 2, 3 and 4 of the indictment. The Defence submits that such information does not meet the requirement of precision, insofar as it does not enable the accused to place in time the specific acts or omissions he is being asked to answer for.

However, in response to this argument, the Prosecutor submits that the description of a time-frame as provided in the various counts is sufficient to place in time the acts and crimes with which the accused is charged.

29. The Trial Chamber observes that in addition to making specific reference to the period "1 January 1994 to approximately 31 July 1994", the Prosecutor also refers in the concise statement of facts contained in the indictment to other periods of time as follows:

(a) In paragraph 3.2 the Prosecutor refers to "In or around 1993'';

(b) In paragraph 3.3 the Prosecutor refers to "During the time of the events alleged in the indictment'';

(c) In paragraph 3.6 the time is referred to as "From a date unknown to the Prosecutor'''

30. The Chamber acknowledges that, given the particular circumstances of the conflict in Rwanda and the alleged crimes, it could be difficult to determine the exact times and places of the acts with which the accused is charged. It is of the opinion, nonetheless, that the temporal and geographic references given by the Prosecutor are not sufficiently precise to enable the accused to unmistakably identify the acts or the sequence of acts for which he is criminally charged in the indictment. The Trial Chamber therefore suggests that the Prosecutor amends the statement of facts in the indictment so as to include more specific indications of the time when and the place where the alleged crimes were committed by the accused.

On the Vagueness of the Counts Against the Accused

31. The Defence submits that the charges stated in Count 2 are vague and do not clearly indicate whether the accused is charged individually under Article 6.1 of the Statute or under Article 6.3 as a superior, or under both provisions.

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32. The Prosecutor responded that the accused was, in fact, charged under both provisions and that this had been formulated in the indictment in the simplest possible way; the Prosecutor avers in Count 2 that the accused has, amongst others, committed a crime pursuant to "Articles 6(1) and/or 6(3)" of the Statute.

33. The Chamber considers that, as did Trial Chamber 1 of the ICTY in the case of Dukic, in view of the seriousness of the allegations against the accused, he has every right to obtain, and in the most precise manner, the necessary information on the charges against him so as to enable him to prepare his defence effectively and efficiently. In other words, an indictment must always have the appropriate degree of precision.

The Chamber notes that the wording of the charges in question is not precise enough in that it does not provide the accused with information that would enable him to establish a link between his acts and the charges against him. The Chamber therefore suggests that the Prosecutor specifies which acts of the accused are covered by Article 6(1) and which fall under Article 6(3) of the Statute, or if there is a cumulation of charges.

34. The Chamber observes the same degree of vagueness in the expression "other persons" contained in Count 1. The Chamber is, in fact, of the opinion that this expression must be clarified by mentioning the names or other identifying information concerning the persons with whom the accused allegedly conspired to commit genocide.

On the Principle of Non-bis-in-idem

35. The Defence contends that the cumulation of charges against the accused in the indictment entails a violation of the principle of non-bis-in-idem, since he appears to be charged several times for the same act. The Defence further asserts that this principle applies not only in instances where a person is tried before several courts for the same acts, but also in instances where a person is charged several times for the same act before the same court.

36. The Prosecutor responded that the non-bis-in-idem principle does not applyat this stage of the proceedings.

37. The Chamber is of the opinion that under Article 9 of the Statute, the principle of non-bis-in idem cannot be invoked, as does the Defence, when raising a matter of cumulation of charges, whether the offender has committed several acts each of which constitutes an offence or whether a single act constitutes more than one offence, as distinguished in the legal systems of the Roman-Continental tradition. In fact, Article 9 of the Statute stipulates that:

"1. No person shall be tried before a national court for acts constituting serious violations of international humanitarian law under the present Statute, for which he or she has already been tried by the International Tribunal for Rwanda.

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2. A person who has been tried before a national court for acts constituting serious violations of international humanitarian law may be subsequently tried by the International Tribunal for Rwanda only if:

a) The act for which he or she was tried was characterised as an ordinary crime; or

b) The national court proceedings were not impartial or independent, were designed to shield the accused from international criminal responsibility, or the case was not diligently prosecuted.

3. In considering the penalty to be imposed on a person convicted of a crime under the present Statute, the Iinternational Tribunal for Rwanda shall take into acount the extent to which any penalty imposed by a national court on the same person for the same acts has already been served."

In any case and as far as the cumulation of charges is concerned, it is the highest penalty that should be imposed. However, it is evident that we are not at this stage yet.

Finally, it should be pointed out in this regard that in the Delalic case, Trial Chamber 1 of the ICTY dismissed the objection raised by the Defence regarding the cumulation of charges on the grounds that the question was only relevant to the penalty if the accused is ultimately found guilty, (see ICTY Decision on the preliminary motion filed by the accused Delalic on defects in the form of the indictment, paragraph 24.)

FOR THESE REASONS,

THE TRIBUNAL

REQUESTS the Prosecutor, especially as she does not object thereto, to amend the following parts of the indictment in order to:

(i) specify the time-frames indicated in paragraphs 3.2, 3.3 and 3.6 of the statement of facts; and to

(ii) identify some or all of the persons with whom the accused is alleged to have conspired to commit genocide in Count 1; and finally to

(iii) identify on the one hand the acts or sequence of acts for which the accused himself is held individually responsible for having committed direct and public incitement to genocide, and on the other hand, the acts or sequence of acts of his subordinates for which he is held responsible as their superior.

INVITES her to make the amendment within 30 days from the date of this Decision.

DISMISSES the Defence Counsel's motion on all other points.

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1997 WL 33125636 (UN ICT (Trial)(Rwa))

Arusha, 24 November 1997

Navanethem Pillay, Presiding Judge

Laïty Kama, Judge

William H. Sekule, Judge

Seal of the Tribunal

END OF DOCUMENT

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PROSECUTION INDEX OF AUTHORITIES

ANNEX IV

ICTY Rule 66

INTERNATIONAL CRIMINAL TRIBUNAL FOR YUGOSLAVIA

RULES OF PROCEDURE AND EVIDENCE

Rule 66
Disclosure by the Prosecutor

(A) Subject to the provisions of Rules 53 and 69, the Prosecutor shall make available to the defence in a language which the accused understands

(i) within thirty days of the initial appearance of the accused, copies of the supporting material which accompanied the indictment when confirmation was sought as well as all prior statements obtained by the Prosecutor from the accused; and
(ii) within the time-limit prescribed by the Trial Chamber or by the pre-trial Judge appointed pursuant to Rule 65 *ter*, copies of the statements of all witnesses whom the Prosecutor intends to call to testify at trial, and copies of all written statements taken in accordance with Rule 92 *bis*; copies of the statements of additional prosecution witnesses shall be made available to the defence when a decision is made to call those witnesses.

(B) The Prosecutor shall, on request, permit the defence to inspect any books, documents, photographs and tangible objects in the Prosecutor's custody or control, which are material to the preparation of the defence, or are intended for use by the Prosecutor as evidence at trial or were obtained from or belonged to the accused.

(C) Where information is in the possession of the Prosecutor, the disclosure of which may prejudice further or ongoing investigations, or for any other reasons may be contrary to the public interest or affect the security interests of any State, the Prosecutor may apply to the Trial Chamber sitting in camera to be relieved from an obligation under the Rules to disclose that information. When making such application the Prosecutor shall provide the Trial Chamber (but only the Trial Chamber) with the information that is sought to be kept confidential.

PROSECUTION INDEX OF AUTHORITIES

ANNEX V

ICTR Rule 66

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PROSECUTION INDEX OF AUTHORITIES

ANNEX VI

The Prosecutor v. Elizaphan & Gerard Ntakirutimana, Judgment and Sentence, ICTR-96-10-T & ICTR-96-17-T, 21 February 2003 paras 39-63.[1]

[1]Full test of Judgement available at http://www.ictr.org/wwwroot/ENGLISH/cases/NtakirutimanaE/judgement/ch2.htm

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UNITED NATIONS
NATIONS UNIES

Tribunal Pénal International pour le Rwanda
International Criminal Tribunal for Rwanda

Or. : Eng.

TRIAL CHAMBER I

Before Judges:	Erik Møse, Presiding Navanethem Pillay Andrésia Vaz
Registrar:	Adama Dieng
Judgement of:	21 February 2003

THE PROSECUTOR

V.

ELIZAPHAN and GÉRARD NTAKIRUTIMANA

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

JUDGEMENT AND SENTENCE

Counsel for the Defence:

Ramsey Clark
David Jacobs

Counsel for the Prosecution:

Charles Adeogun-Phillips
Wallace Kapaya
Boi-Tia Stevens

CHAPTER II

FACTUAL FINDINGS

1. Introduction

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

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

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

2. Specificity of the Indictments

2.1 Introduction

42. According to Article 17 (4) of the Statute, an indictment shall contain "a concise statement of the facts and the crime or crimes with which the accused are charged". Similarly, Rule 47 (C) of the Rules provides that an indictment, apart from the name and particulars of the suspect, shall set forth "a concise statement of the facts of the case". It follows from case law that the Prosecution's obligation to set out concisely the facts of its case in the indictment must be interpreted in conjunction with Articles 20 (2) and (4)(a) and (b) of the Statute. These provisions state that, in the determination of any charges against him, an accused is entitled to a fair hearing and, more particularly, to be informed of the nature and cause of the charges against him and to have adequate time and facilities for the preparation of his defence. In the jurisprudence of the *ad hoc* Tribunals, this translates into an obligation on the part of the Prosecution to state the material facts underpinning the charges in the indictment, but not the evidence by which such material facts are to be proven. Hence, the question whether an indictment is pleaded with sufficient particularity is dependent upon whether it sets out the material facts of the Prosecution case with enough detail to inform an accused clearly of the charges against him so that he may prepare his defence. Reference is made to the ICTY Appeals Chamber's Judgement in *The Prosecutor v. Kupreskic et al.* (henceforth *Kupreskic*), which was delivered on 23 October 2001, more than a month after the commencement of the trial in the present case. [45]

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

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

2.2 Prosecution

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

2.3. Defence

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

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

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

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

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

2.4 Discussion

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

> 89. The Appeals Chamber must stress initially that the materiality of a particular fact cannot be decided in the abstract. It is dependent on the nature of the Prosecution case. A decisive factor in determining the degree of specificity with which the Prosecution is required to particularise the facts of its case in the indictment is the nature of the alleged criminal conduct charged to the accused. For example, in a case where the Prosecution alleges that an accused personally committed the criminal acts, the material facts, such as the identity of the victim, the time and place of the events and the means by which the acts were committed, have to be pleaded in detail. Obviously, there may be instances where the sheer scale of the alleged crimes "makes it impracticable to require a high degree of specificity in such matters as the identity of the victims and the dates for the commission of the crimes" [footnote omitted].
>
> 90. Such would be the case where the Prosecution alleges that an accused participated, as a member of an execution squad, in the killing of hundreds of men. The nature of such a case would not demand that each and every victim be identified in the indictment.Similarly, an accused may be charged with having participated as a member of a military force in an extensive number of attacks on civilians that took place over a prolonged period of time and resulted in large numbers of killings and forced removals. In such a case the Prosecution need not specify every single victim that has been killed or expelled in order to meet its obligation of specifying the material facts of the case in the indictment. Nevertheless, since the identity of the victim is information that is valuable to the preparation of the defence case, if the Prosecution is in a position to name the victims, it should do so.
>
> ...
>
> 92. It is of course possible that an indictment may not plead the material facts with the requisite degree of specificity because the necessary information is not in the Prosecution's possession. However, in such a situation, doubt must arise as to whether it is fair to the accused for the trial to proceed. In this connection, the Appeals Chamber emphasises that the Prosecution is expected to know its case before it goes to trial. It is not acceptable for the Prosecution to omit the material aspects of its main allegations in the Indictment with the aim of moulding the case against the accused in the course of the trial depending on how the evidence unfolds. There are, of course, instances in criminal trials where the evidence turns out differently than expected. Such a situation may require the indictment to be amended, an adjournment to be granted, or certain evidence to be excluded as not being within the scope of the indictment.

...

> 114. The Appeals Chamber notes that, generally, an indictment, as the primary accusatory instrument, must plead with sufficient detail the essential aspect of the Prosecution case. If it fails to do so, it suffers from a material defect. A defective Indictment, in and of itself, may, in certain circumstances cause the Appeals Chamber to reverse a conviction. The Appeals Chamber, however, does not exclude the possibility that, in some instances, a defective indictment can be cured if the Prosecution provides the accused with timely, clear and consistent information detailing the factual basis underpinning the charges against him or her. Nevertheless, in light of the factual and legal complexities normally associated with the crimes within the jurisdiction of this Tribunal, there can only be a limited number of cases that fall within that category. ....[55]

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

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

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

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

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

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

55. The Chamber recalls that, according to *Kupreskic*, the degree of specificity required in indictments depends on the nature of the alleged criminal conduct charged to the accused. There may be instances where "the sheer scale of the alleged crimes" makes it "impracticable" to require a high degree of specificity in such matters as the identity of the victims, the time and place of the events, and the means by which the acts were committed. According to the Appeals Chamber, one example is where the accused participated as a member of a military force "in an extensive number of attacks on civilians that took place over a prolonged period of time and resulted in large numbers of killings". [59]

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

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

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

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

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

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

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

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

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

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

[45] *Kupreskic* (AC).

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

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

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

[49] Id. p. 50.

[50] Id. pp. 59-60.

[51] Id. pp. 155-158.

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

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

[54] Id. pp. 163-164.

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

[56] Id. paras. 99 and 113.

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

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

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

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

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

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

[63] Id. para. 120.

[Chapter I] [Chapter II] [Chapter III] [Chapter IV] [Chapter V] [Annex IV]

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PROSECUTION INDEX OF AUTHORITIES

ANNEX VII

The Prosecutor v. Issa Hassan Sesay, Decision on the Prosecution's Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure, Case No. SCSL-2003-05-PT, 23 May, 2003

SCSL-2003-05-PT
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SPECIAL COURT FOR SIERRA LEONE
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THE TRIAL CHAMBER

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

Registrar: Robin Vincent

Date: 23rd May 2003

The Prosecutor Against: Issa Hassan Sesay
(Case No. SCSL-2003-05-PT)

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

Office of the Prosecutor:
Luc Côté, Chief of Prosecution
Brenda Hollis, Senior Trial Counsel

Defence Office:
John R.W.D. Jones, Acting Chief of Defence Office
Claire Carlton-Hanciles, Defence Associate
Ibrahim Yillah, Defence Associate
Haddijatu Kah-Jallow, Defence Associate
Sam Scratch, Defence Intern

Defence Counsel:
William Hartzog

SPECIAL COURT FOR SIERRA LEONE
COURT RECORDS
RECEIVED
NAME J.O. Jones
SIGNATURE J. Jones
DATE 23 May 2003 TIME 1:35

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

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

BEING SEIZED of the Motion by the Office of the Prosecutor for Immediate Protective Measures for Victims and Witnesses and for Non-Public Disclosure ("the Motion") and of the "Briefs" (Written Submissions) with attachments in support of the said Motion, filed on the 7th April 2003;

CONSIDERING also the Response filed by the Defence Office on behalf of the Accused Issa Hassan Sesay on 23rd April 2003, to the aforementioned Prosecution Motion ("the Response");

CONSIDERING the Prosecutor's Reply filed on 29th April 2003 to the aforesaid Defence Response ('the Reply");

WHEREAS acting on the Chamber's Instruction, the Court Management Section advised the parties on 29th April 2003 that the Motion, the Response, and the Reply would be considered and determined on the "Briefs" (Written Submissions) of the parties ONLY pursuant to Rule 73 of the Rules;

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

NOTING THE SUBMISSIONS OF THE PARTIES

The Prosecution Motion:

1. By the aforementioned Motion, the Prosecutor seeks orders for protective measures for persons who fall into three categories (paragraph 16 of the Motion):

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

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

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

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

3. Further, the Prosecutor requests that the persons categorised in paragraph 16 of the Motion and the prohibition as to non-public disclosure sought in paragraph 17 of the Motion be provided protection and effected respectively by the sought Orders set out below (as contained in paragraph 20 of the Motion):

(a) An Order allowing the Prosecution to withhold identifying data of the persons the Prosecution is seeking protection for as set out in paragraph 16 or any other information which could lead to the identity of such a person to the Defence until twenty-one days before the witness is to testify at trial; and consequently allowing the Prosecution to disclose any materials provided to the Defence in a redacted form until twenty-one days before the witness is to testify at trial, unless otherwise ordered;

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

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

(d) An Order that the names and any other identifying information concerning all witnesses described in paragraph 20 (a), be communicated only to the Victims and Witnesses Unit personnel by the Registry or the Prosecution in accordance with the established procedure and only in order to implement protection measures for these individuals;

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

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

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

(h) An Order requiring the Defence to provide to the Chamber and the Prosecution a designation of all persons working on the defence team who, pursuant to paragraph 20 (f) above, have access to any information referred to in paragraph 20 (a) through 20 (e) above, and requiring the Defence to advise the Chamber and the Prosecution in writing of any changes in the composition of this Defence team;

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

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

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

The Defence Response:

4. On behalf of Issa Hassan Sesay, the Defence Office states that it "does not oppose measures genuinely designed for "the protection of witnesses and victims" within the meaning of Articles 16 and 17 of the Statute of the Special Court for Sierra Leone and Rules 69 and 75 of the Special Court Rules of Procedure and Evidence" (paragraph 4 of the Response) but that the Prosecution "is requesting measures far in excess of what is necessary to achieve this legitimate purpose" (paragraph 4 of the Response). The overall position taken by the Defence on behalf of Issa Hassan Sesay summed up at paragraph 44 of the Response is as follows:

> The Prosecution Motion is ill-founded in that (a) it does not make clear whether all witnesses were asked whether they had fears for their safety, (b) it does not attempt to determine which fears are objectively grounded and which are not, (c) it does not draw distinctions between the different situations of witnesses in different parts of Sierra Leone, or in West Africa, (d) it does not distinguish between the cases of the different Accused, (e) it bases itself on measures ordered by the ICTR which were based on the particular security situation prevailing in Rwanda and its surroundings, which are not applicable to the situation in Sierra Leone, and (f) it does not attempt to minimise the intrusiveness of the measures on the rights of the Accused to a fair trial but seeks, in respect of virtually all witnesses, the most restrictive measures, which would make it all but impossible for the Accused adequately to investigate the witnesses's backgrounds to determine whether they are trustworthy or whether they have motives for lying, or might otherwise be mistaken in their testimony, and if granted, would render a fair trial difficult, if not impossible.

The Prosecution Reply:

5. The Prosecution, in its Reply filed on the 29th April 2003 to the Response of the Defence Office in respect of Issa Hassan Sesay, submits, *inter alia*, thus:

> The arguments raised in the submission filed by the Acting Chief of Defence Office and Legal Advisor (Acting Chief) should be rejected. As to the substantive issues addressed, the Acting Chief's assertions fail to appreciate the difference between Rule 69 (C) of the ICTY's Rules of Procedure and Evidence and Rule 69 (C) of this Court's

Rules. In addition, the assertions are either incorrect or are not supported by the jurisprudence of the international ad hoc tribunals. Finally, as a procedural matter, the Acting Chief attempts to inappropriately qualify his response to the Prosecution Motion.

AND HAVING DELIBERATED AS FOLLOWS

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

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

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

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

10. In determining the appropriateness of the protective measures sought, I have evaluated the security situation affecting concerned witnesses in the context of the available information attached to the Prosecutor's "Briefs" (Written Submissions), more particularly the affidavit of Morie Lengor dated 5th March 2003 and the Declaration of Dr. Alan W. White dated 7th April 2003. Despite some formal defects, generalities and unsubstantiated matters, rightly pointed out by the Defence, in respect of those documents, it is my considered view that, in terms of substance, the combined effect of those affirmations is to demonstrate, within the bounds of reasonable foreseeability and not absolute certainty, the delicate and complex nature of the security situation in the country and the level of threat from several quarters of the ex-combatant population that participated in the conflict to witnesses and potential witnesses. It

is significant to note that there was no affidavit in opposition. The irresistible inference, therefore, is that such threats may well pose serious problems to such witnesses and the effectiveness of the Court in the faithful discharge of its international mandate.

11. Concerning the need for the protection of witnesses' identities, *at the pre-trial phase* as distinct from *the trial phase*, I have sufficiently advised myself on the applicable body of jurisprudence. Without meaning to detract from the precedential or persuasive utility of decisions of the ICTR and the ICTY and to diminish the general thrust of the Prosecution's submissions on this point at paragraphs 22 and 23 of its Reply, it must be emphasized, that the use of the formula "shall be guided by" in Article 20 of the Statute does not mandate a slavish and uncritical emulation, either precedentially or persuasively, of the principles and doctrines enunciated by our sister tribunals. Such an approach would inhibit the evolutionary jurisprudential growth of the Special Court consistent with its own distinctive origins and features. On the contrary, the Special Court is empowered to develop its own jurisprudence having regard to some of the unique and different socio-cultural and juridical dynamics prevailing in the *locus* of the Court. This is not to contend that sound and logically correct principles of law enunciated by ICTR and ICTY cannot, with necessary adaptations and modifications, be applied to similar factual situations that come before the Special Court in the course of adjudication so as to maintain logical consistency and uniformity in judicial rulings on interpretation and application of the procedural and evidentiary rules of international criminal tribunals.

12. Instructive though, from a general jurisprudential viewpoint, some of the decisions of ICTR and ICTY relied upon by both Prosecution and Defence Office on the subject of delayed disclosure and confidentiality of witnesses and victims may be in terms of the principles therein enunciated, the issue is really one of contextual socio-legal perspective. Predicated upon such a perspective, one can reach various equally valid conclusions applying a comparative methodology into: (a) whether the security situation in Sierra Leone can, at this point in time, in relation to Rwanda be objectively characterized as really more or less volatile; (b) whether the security situation in Rwanda during the grant or denial of the protective measures sought in those cases, was more or less volatile than the present security situation in Sierra Leone; or (c) whether there is any logical basis for comparison at all. Evidently, it takes no stretch of the legal imagination to discover that in such matters speculation can be endless and quite fruitless. It depends on one's analytical or methodological approach. They are not matters that can be determined with any mathematical exactitude.

13. With all due respect to the learned Counsels of the Defence Office, it must be pointed out that the five-fold criteria enunciated by the ICTY in the case of *The Prosecutor vs. Tadic*, IT-4-I-10, Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, 10th August 1995, cannot logically be applied to the instant Motion. In that case, the Trial Chamber was confronted with a request by the Prosecution to provide anonymity for one of its witnesses in testifying by withholding the identity of the witness from the Accused. A majority of the Trial Chamber held that it had to balance the right of the Accused to a "fair and public trial" against the protection of victims and witnesses. Observing that the right to a "fair trial" was not absolute but was subject to derogation in exceptional circumstances such as a state of emergency and that the situation of on-going conflict in the area where the alleged atrocities took place constituted such exceptional circumstances, the Chamber took a "contextual approach" and held that it was justified in accepting anonymous testimony if: (1) there was real fear for the safety of the witness or his or her family; (2) the testimony of the

witness was important to the Prosecution's case; (3) there was no *prima facie* evidence that the witness is untrustworthy; (4) the measures were strictly necessary (see May and Wierda, *International Criminal Evidence*, 2002 at page 282). It is evident that the situation in *Tadic* concerning that of a witness seeking to testify anonymously and that (as in the instant Motion) of an order for delayed disclosure of identifying data in respect of certain categories of prosecution witnesses *at the pre-trial stage* are clearly distinguishable both as a matter of fact and as a matter of law.

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

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

Applying this general principle to the totality of the affidavit evidence before me, it is my considered view that a reasonable case has been made for the prosecution witnesses herein to be granted at this preliminary stage a measure of anonymity and confidentiality. In addition, in matters of such delicacy and sensitivity, it would be unrealistic to expect either the Prosecution or the Defence, *at the pre-trial phase*, to carry the undue burden of having each witness narrate in specific terms or document the nature of his or her fears as to the actual or anticipated threats or intimidation. Such an approach would frustrate, if not, (using a familiar legal metaphor) drive a horse and coach through the entire machinery created by the Founding Instruments of the Court and its Rules for protection of witnesses and victims.

15. Further, as designated Judge under Rule 28 of the Rules, my judicial evaluation of the measures requested by the Prosecution pursuant to Articles 16 and 17 of the Statute and Rules 53, 54, and 75 of the Rules, is also predicated upon the reasoning that even though the Court must, in such matters, seek to balance the right of the Accused to a fair and public trial with the interest of the witnesses in being given protection, such a right is subject to derogating exceptional circumstances (Article17 (2) of the Statute) and that the existing context of the security situation in Sierra Leone does justify, at this point in time, delaying the disclosure of the identities of witnesses *during the pre-trial phase*.

16. As regards the 21(twenty-one) day time limit prayed for by the Prosecution in sought Order (a), despite the existence of some instructive ICTY and ICTR decisions supporting the 21 day rule limitation for disclosure, it is my considered view that there is no legal logic or norm compelling an inflexible adherence to this rule. In the context of the security situation in Sierra Leone and in the interest of justice, one judicial option available to me, at this stage, in trying to balance the interest of the victims and witnesses for protection by a grant of anonymity and confidentiality with the pre-eminent interest of effectively protecting the Accused's right to a fair and public trial is to enlarge the time frame for disclosure beyond 21 (twenty-one) days to 42 (forty-two) days. And I so order.

RiST

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AND BASED ON THE FOREGOING DELIBERATION,

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

Done at Freetown

23rd May 2003

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

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ANNEX VIII.

Prosecutor v. Meakic, Gruban, Fustar, Banovic, Knezevic, Decision on Dusan Fustar's Preliminary Motion on the Form of the Indictment, Case No. IT-02-65-PT, 4 April 2003

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Case No. IT-02-65-PT

IN THE TRIAL CHAMBER

Before:
Judge May, Presiding
Judge Kwon
Judge Patrick Robinson

Registrar:
Mr. Hans Holthuis

Decision of:
4 April 2003

PROSECUTOR
v.
ZELJKO MEAKIC
MOMCILO GRUBAN DUSAN FUSTAR
PREDRAG BANOVIC
DUSKO KNEZEVIC

DECISION ON DUSAN FUSTAR'S PRELIMINARY MOTION ON THE FORM OF THE INDICTMENT

The Office of the Prosecutor:

Ms. Joanna Korner

Counsel for the Accused:

Ms. Sanja Turkalov, for Momcilo Gruban
Ms. Slobodanka Nedic, for Dusko Knezevic
Mr. Theodore Scudder and Mr. Dragan Ivetic, for Dusan Fustar
Mr. Jovan Babic, for Predrag Banovic

THIS TRIAL CHAMBER of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 ("International Tribunal"),

BEING SEISED OF "Defendant Dušan Fustar's Preliminary Motion, Pursuant to Rule 72, Objecting to Defects in the Form of the Consolidated Indictment" filed by the Defence for the accused Dušan Fustar ("Defence") on 24 December 2002 ("Motion "),

NOTING the "Prosecution's Consolidated Response to Defence Preliminary Motions Alleging Defects in the Form of the Consolidated Indictment and Seeking a Separate Trial, Filed by the Accused Momcilo

Gruban, Dusan Fustar, Predrag Banovic and Dusko Knezevic", filed on 24 January 2003 ("Response"),

Form of the Indictment

NOTING the Defence argument that the indictment as a whole is too vague, using phrases that have no substantial content and that the indictment should outline when the events happened, the identity of the victims and the means by which the crimes occurred,

NOTING the Prosecution's argument that the material facts, including the identity of the victims, the time and place of the event and the means by which the acts were committed, are sufficiently pleaded within the Schedules A to F of the Indictment, and that the Defence has copies of the witness statements on which the allegations are based,

CONSIDERING Article 18(4) of the Statute, requiring the Prosecutor to prepare an indictment containing a concise statement of the facts and the crime or crimes with which the accused is charged, but that the indictment need not specify the precise elements of each crime, since all that is required is a concise statement of the facts and the crime or crimes with which the accused is charged under the Statute,[1]

CONSIDERING that this obligation must be interpreted in the light of the rights of the accused under Article 21(4)(a) and (b) of the Statute,[2]

NOTING Rule 47(C) of the Rules, which provides that "the indictment shall set forth the name and particulars of the suspect, and a concise statement of the facts of the case and of the crime with which the suspect is charged",

CONSIDERING that the pleading of an indictment will be sufficiently particular when the material facts of the Prosecution case are concisely set out with sufficient detail to inform the accused clearly of the nature and cause of the charges against them, such that he is in a position to prepare a defence,[3]

CONSIDERING that the materiality of a particular fact cannot be decided in the abstract, it being dependent on the nature of the Prosecution case and that a decisive factor in determining the degree of specificity with which the Prosecution is required to particularise the facts of its case is the nature of the alleged criminal conduct charged, which includes the proximity of the accused to the relevant events,[4]

CONSIDERING that:

(a) the indictment lists the victims in the attached Schedules and which accused is alleged to have been personally responsible for them; and
(b) the crimes alleged to have been committed against these victims are also present as are the dates when the crimes are alleged to have occurred, and also the specific date or date range when the alleged crime took place,

CONSIDERING THEREFORE that the Trial Chamber is satisfied that, having regard to the scale of the case alleged in the Indictment, to the extent possible the identity of the victims, the alleged crimes and the dates of the crimes have been sufficiently pleaded so that the accused is sufficiently informed of the nature and cause of the charges against them, such that he is in a position to prepare a defence,

Joint Criminal Enterprise

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NOTING the Defence argument that the Indictment must detail the allegations against the accused, clearly differentiating between acts alleged in Omarska, where he was not present, and Keraterm where he was present, or in the alternative the Trial Chamber should reconsider its Decision to join the indictments,[5]

NOTING the Prosecution response that the Consolidated Indictment specifies which of the two camps pertains to which of the accused, as follows:

> a) Paragraph 21 of the Indictment informs Dušan Fustar of the general role he played within the camps; and
> b) Paragraphs 21(a) and (b) of the Indictment informs Dušan Fustar of the specific role he played as a shift commander within the Keraterm camp and the related Schedules C, D and F inform him of the acts he committed as an accomplice and as a participant within the joint criminal enterprise,

CONSIDERING that what must be pleaded with respect to an allegation that the accused participated in a joint criminal enterprise is:

> a) the nature or purpose of the joint criminal enterprise;
> b) the time at which or the period over which the enterprise is said to have existed ;
> c) the identity of those engaged in the enterprise – so far as their identity is known , but at least by reference to their category as a group; and
> d) the nature of the participation by the accused in that enterprise, and the nature of the participation of the accused in the enterprise,[6]

CONSIDERING that the Trial Chamber is persuaded that these requirements are satisfactorily pleaded in the Indictment with respect to the accused's involvement in a joint criminal enterprise, and that no justification is offered for the Chamber to reconsider its Joinder Decision,[7]

Same facts for charges under Articles 7(1) and 7(3)

NOTING the Defence submission that the Prosecution uses the same facts to allege different forms of liability under Articles 7(1) and 7(3) of the Statute ,

NOTING the response of the Prosecution that with respect to Article 7(1), the Indictment outlines the modes of Article 7(1) participation, the required mens rea, the identity of participants and the natural and foreseeable consequences of the joint criminal enterprise which the accused is alleged to have participated in,

NOTING the response of the Prosecution that with respect to Article 7(3), the indictment outlines the different modes of Article 7(3) participation, the subordinates over whom the accused had control and the nature of the authority over these subordinates ,

CONSIDERING that in an Indictment alleging responsibility under Article 7 (1), 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",[8]

CONSIDERING that in a case based upon superior responsibility, pursuant to Article 7(3), the following are the minimum material facts that must be pleaded in the Indictment:

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(a) (i) that the accused is the superior, (ii) of subordinates who are sufficiently identified, (iii) over whom he had effective control – in the sense of a material ability to prevent or punish criminal conduct – and (iv) for whose acts he is alleged to be responsible;
(b) (i) the accused knew or had reason to know that the crimes were about to be or had been committed by those others, and (ii) the related conduct of those others for whom he is alleged to be responsible. The facts relevant to the acts of those others will usually be stated with less precision, the reason being that the details of those acts (by whom and against whom they are done) is often unknown, and, more importantly, because the acts themselves often cannot be greatly in issue; and
(c) the accused failed to take the necessary and reasonable measures to prevent such crimes or to punish the persons who committed them,[9]

CONSIDERING that the Indictment includes different material facts for charges pleaded pursuant to Articles 7(1) and 7(3), and fulfils the requirements for pleading material facts with respect to each form of responsibility,

Content of Previous Judgements

NOTING the Defence submission that the Indictment includes allegations that are contrary to the Judgement in the *Sikirica* case,[10] where plea agreements were entered into and ratified by the Trial Chamber, concluding that the individuals in that case had very limited authority within Keraterm, and did not have the power to punish anyone, had no role in the administration of the camp and were not responsible for the administration of supplies in the camp, and that therefore the Indictment is defective,

NOTING the Prosecution response that this objection should be dismissed as it is not relevant at this stage because the key question is not whether the evidence will warrant a conviction under Article 7(3) but whether or not the material facts informed the accused sufficiently about the nature and cause of the case against him, such that he is in a position to prepare his defence,

CONSIDERING that the question of whether the evidence is sufficient to warrant a conviction is a matter for trial and not a question concerning the form of the indictment,

PURSUANT TO RULE 72 OF THE RULES

HEREBY REJECTS THE MOTION.

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

_____
Judge May
Presiding

Dated this fourth day of April 2003
At The Hague
The Netherlands

1 - *Prosecution v. Kordic*, Decision on Defence Application for Bill of Particulars, Case IT-95-14/2-PT, 2 March 1999, para.8, referred to in *Prosecutor v. Brdjanin and Talic*, Decision on Form of Future Amended Indictment and Prosecution Application to Amend, Case IT-99-36-PT, 26 June 2001 ("*Brdjanin* Decision"), para. 33.
2 - *Brdjanin* Decision, para.33
3 - *Prosecutor v. Kupreskic*, Case No.IT-95-16-A, Appeal Judgement, 23 October 2001 ("*Kupreskic* Appeal Judgement"),

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para. 88, referred to in *Prosecutor v. Krajisnik & Plavsic*, Decision on Prosecution's motion for leave to amend the Consolidated Indictment, Case No IT-00-39 & 40–PT, 4 March 2002 ("*Krajisnik and Plavsic* Decision of 4 March 2002"), para.9 (fn3).
4 - *Prosecutor v. Deronjic*, Decision on Form of the Indictment, Case IT-02-61-PT, 25 October 2002 ("*Deronjic* decision"), para.5 and cases referred to in footnotes 8 and 9.
5 - *Prosecutor v Meakic et al*, Decision on Prosecution's Motion for Joinder of Accused Case Nos. IT-95-4-PT & IT-95-8/1-PT, 17 September 2002.
6 - *Prosecutor v. Krnojelac*, Case No. IT-97-25-PT Decision on Form of Second Amended Indictment, 11 May 2000, para.16.
7 - *Prosecutor v Meakic et al*, Decision on Prosecution's Motion for Joinder of Accused Case Nos. IT-95-4-PT & IT-95-8/1-PT, 17 September 2002.
8 - *Kupreskic* Appeal Judgment, para. 89.
9 - *Deronjic* Decision, para. 7.
10 - *Prosecutor v. Sikirica et al*, Sentencing Judgment, Case No. IT-95-8-S, 13 November 2001.

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ANNEX IX.

Prosecutor v. Krajisnik, Decision Concerning Preliminary Motion on the Form of the Indictment, Case No. IT-00-39-PT, 1 August 2000

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IN THE TRIAL CHAMBER

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

Registrar:
Dorothee de Sampayo Garrido-Nijgh

Order of:
1 August 2000

PROSECUTOR

v.

MOMCILO KRAJISNIK

DECISION CONCERNING PRELIMINARY MOTION ON THE FORM OF THE INDICTMENT

Office of the Prosecutor:

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

Counsel for the Accused:

Mr. Goran Neskovic

I. INTRODUCTION

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

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

HEREBY ISSUES ITS WRITTEN DECISION.

II. ARGUMENTS OF THE PARTIES

A. The Defence

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

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

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

B. The Prosecution

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

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

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

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III. APPLICABLE LAW

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

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

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

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

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

IV. ANALYSIS

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

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

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

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

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

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

V. DISPOSITION

PURSUANT TO Rule 72 of the Rules,

THE TRIAL CHAMBER HEREBY DISMISSES the Defence motion.

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

_____

Richard May
Presiding

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

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

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

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ANNEX X

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

IN TRIAL CHAMBER II

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Before: Judge David Hunt, Presiding

Judge Antonio Cassese

Judge Florence Ndepele Mwachande Mumba

Registrar: Mrs Dorothee de Sampayo Garrido-Nijgh

Decision of: 24 February 1999

PROSECUTOR

v

MILORAD KRNOJELAC

DECISION ON THE DEFENCE PRELIMINARY MOTION ON THE FORM OF THE INDICTMENT

The Office of the Prosecutor:

Mr Franck Terrier
Ms Peggy Kuo
Ms Hildegard Uertz-Retzlaff

Counsel for the Accused:

Mr Mihajlo Bakrac
Mr Miroslav Vasic

I Introduction

1. Milorad Krnojelac ("the accused") is charged on eighteen counts arising out of events at the Foca Kazneno-Popravni Dom ("KP Dom" or "KPD FOCA") – said to be one of the largest prisons in the former Yugoslavia – of which he is alleged to have been the commander and in a position of superior authority. The charges against him allege:

> 1.1 grave breaches of the Geneva Conventions of 1949, consisting of torture (Count 3), wilfully causing serious injury to body or health (Count 6), wilful killing (Count 9), unlawful confinement of civilians (Count 12), wilfully

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

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

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

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

II Nature of Accused's Responsibility

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

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

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

III Different charges based upon the same facts

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

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

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

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

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

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

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

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

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

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

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

IV Particularity in pleading – individual responsibility

11. However, the only specific facts alleged in the indictment in the present case relevant to the accused's *individual* responsibility in relation to any of the charges are to be found in para 3.1 of the indictment, where it is alleged in general terms (and without any particularity) that the accused was present when detainees arrived and that he appeared during beatings. Even so, para 3.1 is directed only to showing that the accused had responsibility as a superior, not that he personally participated in any beatings. It may be that – differently expressed, and in a distinct, separate and more detailed allegation – these facts would go at least some way to support a finding that the accused had aided and abetted in the beatings and that he was therefore individually responsible for those beatings,[14] but para 3.1 does not provide particulars of the individual responsibility of the accused.

12. The accused therefore complains, with some justification, that he has not been informed of the facts upon which the prosecution relies to establish his individual responsibility.[15] The extent of the prosecution's obligation to give particulars in an indictment is to ensure that the accused has "a concise statement of the facts" upon which reliance is placed to establish the offences charged,[16] but only to the extent that such statement enables the accused to be informed of the "nature and cause of the charge against him"[17] and in "adequate time [...] for the preparation of his defence".[18] An indictment must contain information as to the identity of the victim, the place and the approximate date of the alleged offence and the means by which the offence was committed.[19] However, these obligations in relation to what must be pleaded in the indictment are not to be seen as a substitute for the prosecution's obligation to give pre-trial discovery (which is provided by Rule 66 of the Rules) or the names of witnesses (which is provided by Rule 67 of the Rules).[20] There is thus a clear distinction drawn between the material facts upon which the prosecution relies (which must be pleaded) and the evidence by which those material facts will be proved (which must be provided by way of pre-trial discovery).

13. But, even recognising that distinction, the indictment as presently drafted gives the accused no idea at all of the nature and cause of the charges against him so far as they are based upon his individual responsibility – either by way of personal participation or as aiding and abetting those who did so participate. It is not sufficient that an accused is made aware of the case to be established upon only one of the alternative bases pleaded.[21] What must clearly be identified by the prosecution so far as the individual responsibility of the accused in the present case is concerned are the particular acts of the accused himself or the particular course of conduct on his part which are alleged to constitute that responsibility.[22]

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14. The prosecution has already given pre-trial discovery of all the supporting material which accompanied the indictment when confirmation was sought.[23] It has not yet provided the accused with translated witness statements.[24] It submits that the supporting material "should" supply all necessary details as to the nature of the case to be made against the accused sufficient to enable him to prepare his defence, so that there is no need to amend the indictment.[25] Reliance is placed upon the decision of the ICTR in *Prosecutor v Nyiramashuko*[26] as supporting that proposition. What the ICTR said was:

> "Whilst it is essential to read the indictment together with the supporting material, the indictment *on its own* must be able to present clear and concise charges against the accused, to enable the accused to understand the charges. This is particularly important since the accused does not have the benefit of the supporting material at his initial appearance."[27]

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

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

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

V Particularity in pleading – responsibility as a superior

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

following terms: 1276

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

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

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

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

21. The accused's complaint is rejected.

VI Complaints as to imprecision in the indictment

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

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

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

25. This complaint is rejected.

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

27. This complaint is also rejected.

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

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

If the reference to "at least" August 1993 is intended to permit the prosecution to prove that the accused was such commander at any time after that date, the accused is left without any real assistance as to the nature of the prosecution case upon an important material fact. The prosecution is directed to amend paras 2.1 and 3.1 of the indictment by deleting the words "at least" in each paragraph.

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

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

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

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

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

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

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

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

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35. This complaint is rejected.

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

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

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

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

Insofar as that decision supports the submission of the prosecution, that it is not obliged to provide the information referred to in the paragraph before last, there are two observations to be made about it. The first is that it is no answer to a request for particulars that the accused knows the facts for himself; the issue in relation to particulars is not whether the accused knows the true facts but, rather, whether he knows what facts are to be alleged against him.[52] It cannot be assumed that the two are the same. The second observation is that what the accused needs to know is not only what is to be alleged to have been his own conduct giving rise to his responsibility as a superior but also what is to be alleged to have been the conduct of those persons for which he is alleged to be responsible as such a superior. Only in that way can the accused know the "nature and cause of the charge against him".[53] With great respect to the Trial Chamber in *Aleksovski*, this Trial Chamber is unable to agree with the decision insofar as it supports the prosecution's submission.

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

40. It may be, of course, that the prosecution is simply unable to be more specific because the witness statement or statements in its possession do not provide the information in order for it to do so. It cannot be obliged to perform the impossible, but in some cases there will then arise the question as to whether it is fair to the accused to permit such an imprecise charge to proceed. The inability of the prosecution to provide proper particulars may itself demonstrate sufficient prejudice to an accused person as to make a trial upon the relevant charge necessarily unfair.[54] The fact that the witnesses are unable to provide the

needed information will inevitably reduce the value of their evidence. The absence of such information effectively reduces the defence of the accused to a mere blanket denial; he will be unable, for example, to set up any meaningful alibi, or to cross-examine the witnesses by reference to surrounding circumstances such as would exist if the acts charged had been identified by reference to some more precise time or other event or surrounding circumstance.

41. In some jurisdictions, a procedure has been adopted of permitting an oral examination and cross-examination of a witness prior to the trial by counsel in the case (who are less restricted in their scope for questioning than police officers or other investigators), in an endeavour to elicit from the witness sufficient information to cure the prejudice which would otherwise exist.[55] But it is necessary first to determine whether the prosecution is able to give better particulars.

42. The complaint by the accused is at this stage upheld, and the prosecution is required to identify in the indictment the approximate time when each offence is alleged to have taken place. Obviously, there will be cases where the identification cannot be of a specific date, but a reasonable range should be specified. The period of April 1992 to August 1993 would *not* be a reasonable period.

43. The accused has also suggested that greater precision than usual will be required in specifying these times in relation to the offences based upon Art 2 of the Statute because the period from April 1992 to August 1993 straddles the period of May 1992 when – so it was found by the Trial Chamber in *Prosecutor v Tadic* – the conflict ceased to be an international one in the relevant area.[56] However, that finding was one of fact only, made upon the evidence presented in that trial and in proceedings between different parties. It cannot amount to a *res judicata* binding the Trial Chamber in this trial.[57] In the Celebici case, for example, it was held that the conflict in that area continued to be international in character for the rest of 1992.[58] It is clear that it is for the Trial Chamber in each individual trial to determine this issue for itself upon the evidence given in that trial. That is not an issue of fact which can be resolved at this stage.

44. When identifying the facts by which Counts 2 to 7 are to be proved,[59] the indictment, under the general heading "Beatings in the Prison Yard", has alleged as facts:

> 5.4 On their arrival in the prison and/or during their confinement, many detainees of the KP Dom were beaten on numerous occasions by the prison guards or by soldiers in the presence of regular prison personnel.
>
> 5.5 On several occasions between April and December 1992, soldiers approached and beat detainees in the prison yard, among them FWS-137, while guards watched without interfering.

The accused asserts that it is unclear whether the case against him is to be that it was the guards or the soldiers who were the perpetrators, and that, if the former, the reference to regular prison personnel is unclear.[60]

45. It is reasonably clear that the prosecution here is relying upon a number of beatings at different times – some by the prison guards, and some by soldiers in the presence of regular prison personnel. The significance of the presence of the regular prison personnel and their inaction at the time is that the beatings by the soldiers were being at least condoned, and perhaps also encouraged, by the regular prison personnel. This in turn suggests that the infliction of such beatings, either by the prison guards or by the soldiers, was a course of conduct approved by the accused as the person in command of the

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prison.

46. But, if these two paragraphs were intended to stand alone, the prosecution has failed to give the accused any idea at all of the basis of its case. The accused is entitled to know where and approximately when these beatings occurred and the identity of the prison guards, the soldiers and the regular prison personnel. The accused has very properly conceded that, if the prosecution is unable to identify those directly participating in such events by name, it will be sufficient for it to identify them at least by reference to their "category" (or their official position) as a group.[61]

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

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

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

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

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

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

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

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

52. Paragraph 5.17 of the indictment reads:

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

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

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

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

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

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

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

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

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

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

56. Paragraphs 5.27-28 allege:

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

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Twenty-nine names are listed in the schedule.

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

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

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

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

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

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

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

61. The prosecution is ordered to provide such particulars.

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

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

VII Application for oral argument

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

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

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

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

68. The application is refused.

VIII Disposition

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FOR THE FOREGOING REASONS, Trial Chamber II decides that –

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

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

Done this 24th day of February 1999

At The Hague

The Netherlands

_____

David Hunt

Presiding Judge

[Seal of the Tribunal]

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1. The jurisdiction of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 ("International Tribunal") to try these offences is to be found in Article 2 of the Statute of the International Tribunal ("Statute").

2. Article 3 of the Statute.

3. Article 5 of the Statute.

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

5. *Ibid*, para 18.

6. *Ibid*, paras 5 and 31.

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

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

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

9. Paragraph 32 of the Motion.

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

11. Fifth Amendment to the Constitution.

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

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

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

15. Paragraph 30 of the Motion.

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

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

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

19. *Prosecutor v Blaškic*, Case No IT-95-14-PT, Decision on the Defence Motion to Dismiss the Indictment Based upon Defects in the Form Thereof, 4 Apr 1997, para 20. An oft quoted statement as to the particularity with which a criminal offence must be pleaded in common law jurisdictions is that of Isaacs J in *R v Associated Northern Collieries* (1910) 11 CLR 738 at 740-741:

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

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

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

21. The prosecution has suggested that the decision in *Prosecutor v Blaškic*, Case No IT-95-14-PT, Decision on the Defence Motion to Dismiss the Indictment Based upon Defects in the Form Thereof, 4 Apr 1997, para 32, has said to the contrary, but that is not correct. That decision makes it clear that the accused must be able to prepare his defence on "either or *both* alternatives" (emphasis added).

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

23. Rule 66(A)(i).

24. Rule 66(A)(ii).

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

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

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

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

29. Paragraph 3.1 of the indictment.

30. Paragraph 9 of the Motion.

31. *Prosecutor v Delalic*, Case No IT-96-21-T, Decision on the Accused Mucic's Motion for Particulars, 26 June 1996, paras 7-8; *Prosecutor v Blaškic*, Case No IT-95-14-PT, Decision on the Defence Motion to Dismiss the Indictment Based upon Defects in the Form Thereof, 4 Apr 1997, para 20; and *Prosecutor v Kupreškic*, Case No IT-95-16-PT, Order on the Motion to Withdraw the Indictment Against the Accused Vlatko Kupreškic, 11 Aug 1998, p 2.

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

33. Paragraph 14 of the Motion.

34. Paragraph 1.3 of the indictment.

35. Paragraph 15 of the Motion.

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

37. Paragraph 4.6 of the indictment.

38. Paragraph 15 of the Motion.

39. Paragraph 16 of the Motion.

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

41. Paragraph 12 of the Reply.

42. Paragraph 4 of the Further Response.

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

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

45. Paragraphs 13 and 17, *supra*.

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46. Paragraph 19 of the Motion.

47. See *Prosecutor v Blaškic*, Case No IT-95-14-PT, Decision on the Defence Motion to Dismiss the Indictment Based upon Defects in the Form Thereof, 4 Apr 1997, para 20, referred to in para 12, *supra*.

48. See para 12, *supra*.

49. Case No IT-95-14-PT, Decision on the Defence Motion to Dismiss the Indictment Based upon Defects in the Form Thereof, 4 Apr 1997, para 20.

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

51. Paragraph 11.

52. This is a matter of fairness, and has been recognised in many cases in common law jurisdictions: *Spedding v Fitzpatrick* (1888) 38 Ch D 410 at 413; *Turner v Dalgety & Co Ltd* (1952) 69 WN (NSW) 228 at 229; *Philliponi v Leithead* (1959) SR (NSW) 352 at 358-359; *Bailey v FCT* (1977) 136 CLR 214 at 219, 220.

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

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

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

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

57. *Prosecutor v Delalic*, Case No IT-96-21-T, Judgment, 16 Nov 1998, para 228. See also *Prosecutor v Blaškic*, Case No IT-95-14-PT, Decision on the Defence Motion to Dismiss the Indictment Based upon Defects in the Form Thereof, 4 Apr 1997, para 28.

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

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

60. Paragraphs 20-21 of the Motion.

61. Paragraphs 20 and 22 of the Reply.

62. Paragraph 22 of the Motion.

63. Paragraph 23 of the Motion.

64. Paragraph 24 of the Motion.

65. Paragraph 25 of the Motion.

66. Paragraph 26 of the Motion.

67. Paragraph 27 of the Motion.

68. Paragraphs 28-29 of the Motion.

69. The order is dated 17 June 1998.

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PROSECUTION INDEX OF AUTHORITIES

ANNEX XI

Excerpt from Redacted Amended Indictment of Edward Karemera, ICTR-98-44-I[2]

[2] Full text of indictment available at http://www.ictr.org/wwwroot/default.htm.

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ICTR-98-44-I
26-06-1998
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INTERNATINAL CRIMINAL TRIBUNAL FOR RWANDA

Case No. ICTR-98-44-I

THE PROSECUTOR

AGAINST

[redacted]
EDOUARD KAREMERA
[redacted]
MATHIEU NGIRUMPATSE
JOSEPH NZIRORERA
[redacted]

REDACTED AMENDED INDICTMENT

The Prosecutor of the International Criminal Tribunal for Rwanda, pursuant tothe authority stipulated in Article 17 of the Statute of the International Criminal Tribunal for Rwanda ("the Statute of the Tribunal") charges:

[redacted]
EDOUARD ~~EDUARDO~~ KAREMERA
[redacted]
MATHIEU NGIRUMPATSE
JOSEPH NZIRORERA
[redacted]

with CONSPIRACY TO COMMIT GENOCIDE, GENOCIDE, COMPLICITY IN GENOCIDE, DIRECT AND PUBLIC INCITEMENT TO COMMIT GENOCIDE, CRIMES AGAINST HUMANITY, and VIOLATIONS OF ARTICLE 3 COMMON TO THE GENEVA CONVENTIONS AND ADDITIONAL PROTOCOL II, offences stipulated in Articles 2, 3, and 4 of the Statute of the Tribunal.

TRIBUNAL PENAL INTERNATIONAL POUR LE RWANDA

N de dossier: ICTR-98-44-I

LE PROCUREUR DU TRIBUNAL

CONTRE

[redacted]
EDOUARD KAREMERA
[redacted]
MATHIEU NGIRUMPATSE
JOSEPH NZIRORERA
[redacted]

ACTE D'ACCUSATION AMENDÉ CAVIARDE

Le Procureur du Tribunal Pénal International pour le Rwanda, en vertu des pouvoirs que lui confére l'article 17 du Statut du tribunal Pénal International pour le Rwanda ("le Statut du Tribunal") accuse:

[redacted]
~~EDUARDO~~ KAREMERA
[redacted]
MATHIEU NGIRUMPATSE
JOSEPH NZIRORERA
[redacted]

d'ENTENTE EN VUE DE COMMETTRE LE GÉNOCIDE, de GÉNOCIDE de COMPLICITÉ, DE GÉNOCIDE, d'INCITATION PUBLIQUE ET DIRECTE Á COMMETTRE LE GÉNOCIDE, de CRIMES CONTRE L'HUMANITÉ, et de VIOLATIONS DE L'ARTICLE 3 COMMUN AUX CONVENTIONS DE GENÉVE ET DU PROTOCOLE ADDITIONNEL II, crimes prévus aux articles 2, 3 et 4 du Statut du Tribunal.

indispensable weapon in the fight against the enemy." Between 8 April and 14 July 1994, at meetings in various places in the country and over the radio, Jean Kambanda directly and publicly incited the population to carry out acts of violence, i.e. murders and assaults, against the Tutsis and their "accomplices". In the radio broadcasts, the Prime Minister called on the Rwandans to rise up and mobilize against the enemy; he appealed to the *chefs de cellule* to dedicate themselves to the *work.* On several occasions, [redacted] also encouraged the massacre of the Tutsis over the radio. [redacted] inflammatory speeches over the Radio Rwanda and RTLM airwaves. Following all these repeated appeals, massacres were perpetrated against the civilian population.

Entre le 8 avril et le 14 juillet 1994, lors de réunions tenues à divers endroits du pays et sur les ondes de la radio, le Premier Ministre Jean Kambanda a directement et publiquement incité la population à commettre sur les Tutsi et leurs "complices" des actes de violence, en l'occurrence des meurtres et des agressions. Durant les radiodiffusions, le Premier ministre a invité les Rwandais à se soulever et à se mobiliser contre l'ennemi, et les chefs de cellule à se consacrer au *travail.* A plusieurs reprises [redacted] avait également encouragé à l'antenne les massacres des Tutsis. [redacted] discours incendiaires à travers les ondes de Radio Rwanda et sur RTLM. Suite à tous ces appels réitérés, des massacres de la population civile ont été commis.

6.46 Between 8 April and 14 July 1994, in several *préfectures*, including Butare, Kibuye, Kigali, Gitarama and Gisenyi, ministers, *préfets*, *bourgmestres*, civil servants and soldiers gave orders to commit, instigated, assisted in commiting and did themselves commit massacres of members of the Tutsi population and moderate Hutu population. Jean Kambanda, [redacted] **Edouard Karemera,** [redacted] ndré Ntagerura, Pauline Nyiramasuhuko and Éliezer Niyitegeka knew or had reason to know that their subordinates had committed or were preparing to commit crimes, and failed to prevent these crimes from being committed or to punish the perpetrators thereof.

6.46 Entre le 8 avril et le 14 juillet 1994, dans plusieurs préfectures telles que Butare, Kibuye, Kigali, Gitarama et Gisenyi, des ministres, des préfets, des bourgmestres, des fonctionnaires de l'Etat et des militaires ont donné l'ordre de commettre, ont incité, ont aidé à commettre et ont commis des massacres de Tutsi et de Hutu modérés. Jean Kambanda, [redacted] **Edouard Karemera,** [redacted], André Ntagerura, Pauline Nyiramasuhuko et Éliezer Niyitegeka savaient ou devaient savoir que leurs subordonnés avaient commis ou s'apprêtaient à commettre des crimes et ont omis d'en prévenir la commission ou d'en punir les auteurs.

6.47 [redacted] **Edouard Karemera,** [redacted], André

6.47 [redacted] **Edouard Karemera,** [redacted] André

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ANNEX XII

Excerpt from Amended Indictment of Joseph Kanyabashi, ICTR-96-15-I[3]

[3] Full text of indictment available at http://www.ictr.org/wwwroot/default.htm.

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INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

TRIBUNAL PENAL INTERNATIONAL POUR LE RWANDA

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Case No. ICTR-96-15-I

N de dossier:ICTR-96-15-I

THE PROSECUTOR

AGAINST

JOSEPH KANYABASHI

AMENDED INDICTMENT

LE PROCUREUR DU TRIBUNAL

CONTRE

JOSEPH KANYABASHI

ACTE D'ACCUSATION AMENDÉ

The Prosecutor of the International Criminal Tribunal for Rwanda, pursuant to the authority stipulated in Article 17 of the Statute of the International Criminal Tribunal for Rwanda ('the Statute of the Tribunal') charges:

JOSEPH KANYABASHI

with **CONSPIRACY TO COMMIT GENOCIDE, GENOCIDE, COMPLICITY IN GENOCIDE, DIRECT AND PUBLIC INCITEMENT TO COMMIT GENOCIDE, CRIMES AGAINST HUMANITY,** and **VIOLATIONS OF ARTICLE 3 COMMON TO THE GENEVA CONVENTIONS AND ADDITIONAL PROTOCOL II,** offences stipulated in Articles 2, 3 and 4 of the Statute of the Tribunal.

Le Procureur du Tribunal Pénal International pour le Rwanda, en vertu des pouvoirs que lui confère l'article 17 du Statut du Tribunal Pénal International pour le Rwanda ("le Statut du Tribunal") accuse:

JOSEPH KANYABASHI

d'**ENTENTE EN VUE DE COMMETTRE LE GÉNOCIDE,** de **GÉNOCIDE** de **COMPLICITÉ DE GÉNOCIDE, d'INCITATION PUBLIQUE ET DIRECTE À COMMETTRE LE GÉNOCIDE,** de **CRIMES CONTRE L'HUMANITÉ,** et de **VIOLATIONS DE L'ARTICLE 3 COMMUN AUX CONVENTIONS DE GENÈVE ET DU PROTOCOLE ADDITIONNEL II,** crimes prévus aux articles 2, 3 et 4 du Statut du Tribunal.

Presidential Guard battalions were the most implicated in these crimes in the capital and in other *préfectures*, often acting in concert with the militiamen.

6.61 Further, from April to July 1994, in the course of the massacres, some soldiers gave assistance to militiamen, notably by providing them logistical support, i.e. weapons, transport and fuel.

6.62 The massacres and the assaults thus perpetrated were the result of a strategy adopted and elaborated by political, civil and military authorities in the country, at the national as well as the local level, such as **Joseph Kanyabashi**, Elie Ndayambaje, Pauline Nyiramasuhuko, André Rwamakuba, Sylvain Nsabimana, Alphonse Nteziryayo, Ladislas Ntaganzwa and Shalome Arsène Ntahobali, who conspired to exterminate the Tutsi population.

6.63 During the events referred to in this indictment, rapes, sexual assaults and other crimes of a sexual nature were widely and notoriously committed throughout Rwanda. These crimes were perpetrated by, among others, soldiers, militiamen and gendarmes against the Tutsi population, in particular Tutsi women and girls.

6.64 Military officers, members of the Interim Government and local authorities such as **Joseph Kanyabashi**, Pauline Nyiramasuhuko, André Rwamakuba, Sylvain Nsabimana, Alphonse Nteziryayo, Ladislas Ntaganzwa, Elie Ndayambaje and Shalome Arsène Ntahobali aided and abetted their subordinates and others in carrying out the massacres of the Tutsi population and its accomplices. Without the complicity of the local and national civil and

Reconnaissance et de la Garde Présidentielle ont été les plus impliquées dans la commission de ces crimes dans la capitale et dans d'autres préfectures du pays, agissant souvent de concert avec les miliciens.

6.61 En outre, d'avril à juillet 1994, durant la commission des massacres, des militaires ont aidé des miliciens, notamment en leur fournissant la logistique, à savoir des armes, du transport et du carburant.

6.62 Les massacres et les agressions ainsi perpétrés furent le résultat d'une stratégie adoptée, élaborée et mise en exécution par des autorités politiques, civiles et militaires du pays, tant au niveau national que local, dont **Joseph Kanyabashi**, Elie Ndayambaje, Pauline Nyiramasuhuko, André Rwamakuba, Sylvain Nsabimana, Alphonse Nteziryayo, Ladislas Ntaganzwa et Shalome Arsène Ntahobali, qui se sont entendues pour exterminer la population Tutsi.

6.63 Lors des événements auxquels se réfère le présent acte d'accusation, des viols, des agressions sexuelles et d'autres crimes de nature sexuelle ont été commis, d'une façon généralisée et notoire sur tout le territoire du Rwanda. Ces crimes ont été perpétrés, entre autres, par des militaires, des miliciens et des gendarmes contre la population Tutsi, en particulier des femmes et des jeunes filles Tutsi.

6.64 Des officiers militaires, des membres du Gouvernement Intérimaire et des autorités locales dont, **Joseph Kanyabashi**, Pauline Nyiramasuhuko, André Rwamakuba, Sylvain Nsabimana, Alphonse Nteziryayo, Ladislas Ntaganzwa, Elie Ndayambaje et Shalome Arsène Ntahobali ont aidé et encouragé leurs subordonnés et des tiers à commettre les massacres de la population Tutsi et de ses "complices". Sans

military authorities, the principal massacres would not have occurred.

6.65 Knowing that massacres of the civilian population were being committed, political and military authorities, including **Joseph Kanyabashi,** took no measures to stop them. On the contrary, they refused to intervene to control and appeal to the population as long as a cease-fire had not been declared. This categorical refusal was communicated to the Special Rapporteur via the Chief of Staff of Rwandan Army, Major-General Augustin Bizimungu.

6.66 **Joseph Kanyabashi**, in his position of authority, acting in concert with, notably Pauline Nyiramasuhuko, André Rwamakuba, Sylvain Nsabimana, Alphonse Nteziryayo, Ladislas Ntaganzwa, Elie Ndayambaje and Shalome Arsène Ntahobali, participated in the planning, preparation or execution of a common scheme, strategy or plan, to commit the atrocities set forth above. The crimes were committed by him personally, by persons he assisted or by his subordinates, and with his knowledge or consent.

la complicité des autorités locales et nationales, civiles et militaires, les principaux massacres n'auraient pas eu lieu.

6.65 Sachant que des massacres étaient commis contre la population civile, des autorités politiques et militaires dont le **Joseph Kanyabashi**, n'ont pris aucune disposition pour les arrêter. Au contraire ils ont refusé d'intervenir pour contrôler et faire appel à la population tant qu'un accord de cessez-le-feu ne serait pas ordonné. Ce refus catégorique a été transmis au Rapporteur spécial par l'intermédiaire du Chef de l'Etat-Major de l'Armée Rwandaise, le Major-Général Augustin Bizimungu.

6.66 **Joseph Kanyabashi** dans sa position d'autorité, en agissant de concert avec notamment Pauline Nyiramasuhuko, André Rwamakuba, Sylvain Nsabimana, Alphonse Nteziryayo, Ladislas Ntaganzwa, Elie Ndayambaje et Shalome Arsène Ntahobali, a participé à la planification, la préparation ou l'exécution d'un plan, d'une stratégie ou d'un dessein commun, afin de perpétrer les atrocités énoncées ci-dessus. Ces crimes ont été perpétrés par lui-même ou par des personnes qu'il a aidées ou par ses subordonnés, alors qu'il en avait connaissance ou y consentait.

PROSECUTION INDEX OF AUTHORITIES

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ANNEX XIII

Prosecutor v. Kvocka et al, Decision on Defence Preliminary Motions on Form of Indictment, IT-98-30-PT, TCIII, 12 April 1999

IN THE TRIAL CHAMBER

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

Registrar:
Mrs. Dorothee de Sampayo Garrido-Nijgh

Decision of:
12 April 1999

PROSECUTOR

v.

MIROSLAV KVOCKA
MILOJICA KOS
MLADO RADIC
ZORAN ZIGIC

DECISION ON DEFENCE PRELIMINARY MOTIONS ON THE FORM OF THE INDICTMENT

The Office of the Prosecutor:

Mr. Grant Niemann
Mr. Michael Keegan
Mr. Kapila Waidyaratne

Counsel for the Accused:

Mr. Krstan Simic, for Miroslav Kvocka
Mr. Zarko Nikolic, for Milojica Kos
Mr. Toma Fila, for Mlado Radic
Mr. Simo Tosic, for Zoran Zigic

I. INTRODUCTION

Pending before this Trial Chamber of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Law Committed in the Territory of the Former Yugoslavia since 1991 ("International Tribunal") are four preliminary motions alleging defects in the form of the Amended Indictment confirmed on 9 November 1998 in this case, namely: the "Defence

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Preliminary Motion" filed by counsel for the accused, Mlado Radic (the "Radic Defence") on 15 January 1999, the "Defence Response to Prosecutor's Reply to Defence Preliminary Motion" filed by the Radic Defence on 19 February 1999 and the "Addendum to Defence Response to Prosecutor's Reply to Defence Preliminary Motion" filed by the Radic Defence on 3 March 1999; "A Preliminary Appeal to the Amended Indictment Against Miroslav Kvocka" filed by counsel for the accused, Miroslav Kvocka (the "Kvocka Defence") on 25 January 1999; the "Defence Preliminary Motion on the Form of Amended Indictment" filed by counsel for the accused, Milojica Kos (the "Kos Defence") on 1 February 1999; and the "Defence Preliminary Motion on the Form of Amended Indictment" filed by counsel for the accused, Zoran Zigic (the "Zigic Defence") on 1 February 1999, (collectively "the Defence"), together with the "Prosecutor's Reply to the Defence's Preliminary Motion," filed by the Office of the Prosecutor ("Prosecution") on 28 January 1999, the "Prosecutor's Reply to the Defence's Preliminary Appeal to the Amended Indictment Against Miroslav Kvocka" filed by the Prosecution on 8 February 1999, and the "Prosecutor's Reply to the Defence's Preliminary Motions to the Amended Indictment Against Milojica Kos and Zoran Zigic" filed by the Prosecution on 15 February 1999.

THE TRIAL CHAMBER, HAVING CONSIDERED the written submissions and oral arguments of the parties heard on 9 March 1999,

HEREBY ISSUES ITS WRITTEN DECISION.

II. DISCUSSION

A. Vagueness and imprecision in the indictment

1. Arguments of the Parties

(a) Mlado Radic

1. The Radic Defence submits that an indictment must meet the following minimum requirements under the Statute of the International Tribunal ("Statute") and the Rules of Procedure and Evidence of the International Tribunal ("Rules") as set out in *Prosecutor v. Blaskic* which held that an indictment should: (i) notify the accused in a summary manner as to the nature of the crimes with which he is charged and present the factual basis for the accusations; and (ii) contain certain information which permits the accused to prepare his defence (namely, the identity of the victim, the place and approximate date of the alleged crime and the means used to perpetrate it) in order to avoid prejudicial surprise[1].

2. With respect to the allegations underlying Counts 14 to 17 of the Amended Indictment, the Radic Defence requests that the Prosecution be required to specify more precisely the times when the crimes are alleged to have been committed. The Radic Defence claims that in the absence of a narrow time-frame for the crime, the accused is effectively prevented from mounting an alibi defence under Rule 67 (A)(ii)(a). The Radic Defence also seeks clarification as to whether the charges in Counts 14 to 17 are charged in the alternative or cumulatively, noting that in the original indictment, the same charges were presented in the alternative.

3. The Radic Defence submits that the Amended Indictment contains terms which render the allegations less precise, such as "including" and "between". The Radic Defence requests that the Prosecution be required to delete these terms from the Amended Indictment. Also, in several of the paragraphs of the Amended Indictment containing factual allegations underlying the charges, the Prosecution has

employed the formulation "and/or", between two alleged acts or courses of conduct, without specifying which of the accused is responsible for which of the two or more alleged acts or courses of conduct. The Radic Defence objects to the use of this formulation as it does not permit the accused to know precisely the conduct with which he is charged.

4. The Radic Defence requests that the Prosecution be ordered to amend the Amended Indictment further to include details as to the time, place, identity of victim and manner in which each crime was committed.

5. The Radic Defence further submits that the accused's command responsibility is predicated on his alleged position as a "shift commander" of the Omarska camp during the time-period relevant to the Amended Indictment. Accordingly, the Prosecution must specify, with respect to each crime charged against the accused, the shift during which the crime is alleged to have been committed and whether the accused was in command during that shift.

(b) Miroslav Kvocka

6. The Kvocka Defence argues that an indictment should conform to the standards set forth in the *Blaskic* case which held that an indictment should: (i) notify the accused in a summary manner as to the nature of the crimes with which he is charged and to present the factual basis for the accusations; and (ii) contain certain information which permits the accused to prepare his defence (namely, the identity of the victim, the place and approximate date of the alleged crime and the means used to perpetrate it) in order to avoid prejudicial surprise.

7. The Kvocka Defence submits that the Amended Indictment in this case contains insufficient factual detail regarding the crimes with which the accused is charged. For example, in relation to Counts 4 and 5, charging the accused with murder under Articles 3 and 5 of the Statute, the Kvocka Defence asserts that the Prosecution has not identified the time of the alleged offences, the participants, any witnesses or the victims. The Kvocka Defence further notes that the Amended Indictment does not specify the time-periods of the crimes with precision, instead employing terms such as "approximately" to modify the time-periods specified. In contrast to the lack of specificity set out in the charges against the accused, Miroslav Kvocka, the Kvocka Defence notes the relative precision of the framing of charges against one of the co-accused, Zoran Zigic.

8. The Kvocka Defence requests that the Prosecution be ordered to amend the Amended Indictment further to include precise details as to the time and place of each alleged offence, the identity of the victim and the means of perpetration.

(c) Milojica Kos

9. The Kos Defence submits that the factual allegations underlying the charges in Counts 1-3 are very general and do not provide any details as to the participation of the accused in the acts alleged. The Kos Defence further submits that paragraph 26, which alleges that the accused, Milojica Kos, while working as a shift commander at the Omarska camp, participated in daily mistreatment of the detainees, contains insufficient factual support and is contradictory given that, as a shift commander, the accused probably would not have been in the camp on a daily basis. The Kos Defence also cites other instances in the Amended Indictment where the temporal scope of the charges does not take into account the shift nature of the accused's work.

10. The Kos Defence requests that the Prosecution be ordered to amend the Amended Indictment further

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to include details as to the time and place of the alleged offences, the identity of the victims and the manner in which the crimes were perpetrated.

(d) Zoran Zigic

11. The Zigic Defence submits that the factual allegations underlying the charges in Counts 1-3, 6, 7 and 11-13 (paragraphs 22, 23, 28, 31 and 34 of the Amended Indictment) against the accused are very general and do not provide any details as to the participation of the accused in the acts alleged. The Zigic Defence requests information as to when and where the alleged acts took place, details as to the manner in which the crime was perpetrated, and the identity of the victims. The Zigic Defence argues that, in the absence of precise allegations regarding the time at which the offences are said to have occurred, the accused is unable to employ an effective alibi defence.

(e) Prosecution

12. The Prosecution submits that the judicial practice of the International Tribunal in relation to the standards it must meet in an indictment pursuant to Article 18, paragraph 4, of the Statute and Sub-rule 47(C) of the Rules is well established and that the requirements have been fully met in this instance. The Prosecution further notes that it has provided the Defence with all the supporting materials to the original indictment and the Amended Indictment, including witness statements and other documents.

13. In response to the Defence requests for further details regarding the commission of the crimes alleged, the Prosecution, citing previous Decisions of the International Tribunal, argues that this level of detail in an indictment is not required. In this respect, the Prosecution submits that, given the nature of the crimes alleged in this case, it is not required to provide details as to the identity of the victims in an indictment. Similarly, it need provide no more specific details as to the location and time-period of the crimes alleged.

2. Analysis

14. Although Article 18, paragraph 4, of the Statute and Sub-rule 47(C) of the Rules do not appear to set a high threshold as to the level of information required in an indictment, a concise statement of the facts of the case and of the crime with which the suspect is charged being all that is needed, there is a minimum level of information that must be provided by the indictment; there is a floor below which the level of information must not fall if the indictment is to be valid as to its form. This is still an accurate statement of the law even when account is taken of the valid distinction drawn in the Decision on the Defence Preliminary Motion on the Form of the Indictment in *Prosecutor v. Krnojelac* ("*Krnojelac Decision as to Form*") "between the material facts upon which the prosecution relies (which must be pleaded) and the evidence by which those material facts will be proved (which must be provided by way of pre-trial discovery)"[2].

15. In the *Krnojelac Decision as to Form*, that Trial Chamber found that "an indictment must contain information as to the identity of the victim, the place and the approximate date of the alleged offence and the means by which the offence was committed"[3]. The Decision then cites several cases from common-law jurisdictions as to the particularity with which a criminal offence must be pleaded[4].

16. While allusions to the practice in civil- and common-law jurisdictions are helpful, the sole determinant of the law applied by the International Tribunal is its Statute and Rules; moreover, the influence of domestic criminal law practice on the work of the International Tribunal must take due account of the very real differences between a domestic criminal jurisdiction and the system

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administered by the International Tribunal.

17. The Trial Chamber finds that as a general rule, the degree of particularity required in indictments before the International Tribunal is different from, and perhaps not as high as, the particularity required in domestic criminal law jurisdictions. The mandate of the International Tribunal under Article 1 of its Statute is to "prosecute persons responsible for serious violations of international humanitarian law . . . in accordance with the provisions of the present Statute". The massive scale of the crimes with which the International Tribunal has to deal 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 – at any rate, the degree of specificity may not be as high as that called for in domestic jurisdictions. However, there may be cases in which more specific information can be provided as to the time, the place, the identity of victims and the means by which the crime was perpetrated; in those cases, the Prosecution should be required to provide such information. The Trial Chamber understands and accepts the findings in the *Krnojelac Decision as to Form* as to the degree of particularity required in an indictment[5] subject to the above-mentioned qualification.

18. However, the Trial Chamber finds that it is reasonable to require the Prosecution, depending on the particular circumstances of each case, to provide more specific information, if available, as to the place, the time, the identity of the victims and the means by which the crime was perpetrated.

19. Thus, in this case, in respect of the allegations raised by the Defence as to imprecision in time, the Prosecution is directed to delete the word "about" in the phrase "between about"whenever it appears in the Amended Indictment.

20. In respect of the allegations raised by the Defence as to imprecision in the pleadings relating to the location of the crimes alleged, the Trial Chamber finds that there is sufficient information regarding the location of the alleged offences in the Amended Indictment.

21. In respect of the request for particulars of witnesses to the crimes alleged, raised by the Kvocka Defence, the Trial Chamber finds that there is no legal basis for requiring further information about witnesses at this stage of the proceedings.

22. In respect of the allegations by the Kvocka Defence as to lack of information regarding the participation of others in the crimes, the Trial Chamber notes the finding in the *Krnojelac Decision as to Form* that, if the Prosecution is unable to identify those directly participating in the alleged criminal acts by name, "it will be sufficient for it to identify them at least by reference to their 'category' (or their official position) as a group"[6]. The Prosecution is directed to provide information that would allow for the identification of the other participants in the crimes alleged against this accused.

23. As to the Defence request for more specific information regarding victims of the crimes alleged, the degree of detail that is required presents a special difficulty, and it is in this area that the contrast between a domestic criminal law system and an international criminal tribunal is most pronounced. There can be little doubt but that the identity of the victim is information that is valuable to the Defence in the preparation of their cases. But the massive scale of the crimes alleged before this International Tribunal does not allow for specific naming of victims. However, if the Prosecution is in a position to do so, it should. The Prosecution is hereby directed to identify, to the extent it is in a position to do so, the names of the victims of the crimes alleged.

24. In respect of the Defence request for details as to the means by which the crime is perpetrated, the Trial Chamber finds that, where the Prosecution is in a position to do so, it should identify the method of

commission of the crime, or the manner in which it was committed.

25. In response to the request by the Radic Defence that the Prosecution be required to clarify whether Counts 14 to 17 of the Amended Indictment are pleaded in the alternative or cumulatively, the Prosecution is entitled to plead the indictment in this form and therefore there is no basis for granting this request. Alternative charging is permissible and cumulative charging is also permissible in certain circumstances. The Defence will have to prepare their cases in respect of all the charges, irrespective of whether they are charged in the alternative or cumulatively.

26. As to the objection by the Radic Defence to the use of the term "including" in the Amended Indictment, there will be certain situations in which its use is acceptable and others in which it will not be. The Prosecution is directed, in respect of those parts of the Amended Indictment where the term is used to signify some of the victims of a crime, to list, to the extent possible, additional names of victims. The Radic Defence also objects to the use of the term "and/or" in the Amended Indictment. The Trial Chamber finds that this is essentially an evidentiary matter and that it is best left to be determined at trial, on the basis of the evidence presented.

27. As to the allegations raised by the Kos Defence that the Amended Indictment contains insufficient factual support relating to the responsibility of this accused as a shift commander, pursuant to Article 7, paragraph 3, of the Statute, the Trial Chamber finds that this is a matter for determination at trial.

B. Details as to the acts of the accused or course of conduct leading to criminal liability pursuant to Article 7, paragraph 1, or Article 7, paragraph 3 – Miroslav Kvocka and Mlado Radic

1. Arguments of the Parties

28. The Kvocka Defence argues that Counts 1-5 and 8-10 in the Amended Indictment provide insufficient facts in support of the two separate grounds of individual criminal responsibility on which liability of the accused, Miroslav Kvocka, is predicated pursuant to Article 7, paragraph 1, and paragraph 3, of the Statute.

29. The Kvocka Defence notes that Miroslav Kvocka's command responsibility for certain of the crimes alleged in the Amended Indictment arises out of his alleged role as commander and then deputy commander of the camp. In this regard, the Kvocka Defence submits that the Prosecution has failed to specify the role of the accused, as a commander, in relation to the crimes alleged.

30. The Radic Defence contends that the Amended Indictment is defective in that it fails to allege in sufficient detail the facts in support of the charges, including the acts or course of conduct of the accused giving rise to his individual criminal liability under both Article 7, paragraph 1, and Article 7, paragraph 3, of the Statute. In this respect, the Radic Defence notes that those Counts relating solely to the accused, Zoran Zigic, are framed in more detail than Counts involving the accused, Mlado Radic.

31. In response to both sets of allegations, the Prosecution submits that the Amended Indictment contains sufficient allegations of the accused's responsibility under both Article 7, paragraph 1, and paragraph 3, of the Statute.

2. Analysis

32. In considering this complaint, the Trial Chamber finds instructive the statement in the *Krnojelac*

Decision as to Form that "what must clearly be identified by the prosecution so far as the individual responsibility of the accused in the present case is concerned are the particular acts of the accused himself or the particular course of conduct on his part which are alleged to constitute that responsibility"[7]. Merely to allege, as is done throughout the Amended Indictment, that the accused participated in certain crimes without identifying the specific acts alleged to have been committed by the accused does not meet the requirement for a "concise statement of the facts". For example, in paragraphs 22 and 23 of the Amended Indictment, it is alleged that the accused "participated" in persecutions such as murder and torture. The Prosecution is hereby directed to provide more information as to the specific acts of the accused, Mlado Radic and Miroslav Kvocka, that would establish their criminal responsibility under Article 7, paragraph 1, and Article 7, paragraph 3.

33. As for the argument advanced by the Kvocka Defence that the Prosecution has failed to specify the role of the accused as a commander in relation to the crimes alleged, the Trial Chamber finds that this is an issue to be determined at trial on the basis of the evidence presented.

C. Amended Indictment must allege the required elements of Article 7, paragraph 3, and other crimes – Mlado Radic and Miroslav Kvocka

1. Arguments of the Parties

34. The Radic Defence asserts that the Amended Indictment fails to allege the legal elements required to establish Mlado Radic's individual criminal responsibility pursuant to Article 7, paragraph 3, of the Statute. It further argues that the Prosecution must allege the required elements of the crimes charged in the indictment. For example, in Counts 14 and 15, the accused, Mlado Radic, is charged with torture and rape as crimes against humanity. Yet the factual allegations supporting these counts do not allege that the crimes were widespread and systematic, which elements, the Radic Defence argues, are required to establish the offence of a crime against humanity.

35. The Kvocka Defence asserts that the Amended Indictment fails to allege the elements required to demonstrate Miroslav Kvocka's individual criminal responsibility pursuant to Article 7, paragraph 3, of the Statute.

2. Analysis

36. There is no learning that an indictment before the International Tribunal must allege the legal elements of a particular crime. Such an approach is not supported by the jurisprudence of the International Tribunal. The Prosecutor is not conducting a tutorial when she drafts an indictment. If the indictment fails to allege a particular element of a crime, for instance, the widespread and systematic nature of a crime under Article 5 of the Statute, the indictment is not defective for that reason. The indication in the Amended Indictment of the Article of the Statute that is contravened, or pursuant to which an accused is alleged to have incurred individual criminal responsibility, incorporates by reference all the elements set out therein.

D. Disagreement with facts as alleged in the Amended Indictment – Miroslav Kvocka, Milojica Kos and Zoran Zigic

1. Arguments of the Parties

37. The Kvocka Defence alleges that the Amended Indictment is defective in relation to the time-period during which the accused is alleged to have been in the Omarska camp. It submits that evidence

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disclosed by the Prosecution does not support the allegations in the Amended Indictment.

38. Both the Kos Defence and the Zigic Defence object to the background section of the Amended Indictment (paragraphs 1-17), which describes the context in which the crimes are alleged to have occurred. The Kos Defence and the Zigic Defence both allege that the Prosecution has mischaracterised the nature of the conflict as it existed in the Prijedor municipality and its surrounding areas during the time-period relevant to the Amended Indictment.

39. The Prosecution submits that this request amounts to nothing more than disagreement with the facts as alleged and should be resolved at trial.

2. Analysis

40. The Trial Chamber finds that a challenge of this nature, based on disagreement with the facts as alleged, is not appropriately raised in a preliminary motion on defects in the form of the indictment. Disputes as to issues of fact are for determination at trial. Similar objections raised in other cases before this International Tribunal have been dismissed[8].

E. Facts linking the accused, Mlado Radic and Miroslav Kvocka, to the Keraterm and Trnopolje camps

1. Arguments of the Parties

41. Both the Radic Defence and the Kvocka Defence submit that the Amended Indictment is devoid of facts linking the accused in any way, either by their status or actions, to the events alleged to have occurred at the Keraterm and Trnopolje camps. It further alleges that the original indictment against Mlado Radic and Miroslav Kvocka contained no references to the events at the Keraterm and Trnopolje camps.

42. In respect of the objection raised by the Kvocka Defence, the Prosecution would appear to argue that, although paragraph 23 of the Amended Indictment, which underlies Count 1 against the accused, refers to the Keraterm and Trnopolje camps, Miroslav Kvocka is only charged in his capacity as camp commander and then deputy commander of the Omarska camp. The Prosecution states:

> The supporting paragraphs of the Amended Indictment indicate that widespread persecution of non-Serbs occurred in the municipality of Prijedor, including within three detention camps established in the Prijedor area: Omarska, Keraterm and Trnopolje. . . . As part of that wave of persecution, the Amended Indictment clearly charges Kvocka with alleged crimes committed in his role as camp commander and deputy camp commander at the *Omarska Prison Camp*.[9]

2. Analysis

43. The Trial Chamber finds that this matter is best left for resolution at trial, as this is essentially a question of evidence. An objection of this nature is not properly raised at this stage of the proceedings.

F. Cumulative Charges – Mlado Radic and Milojica Kos

1. Arguments of the Parties

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44. The Kos Defence submits that the charges contained in Counts 1-5 and 8-10 are cumulative as they relate to the same set of underlying facts. Similarly, the Radic Defence contends that the charges in Counts 1-3, 4 and 5, 8-10 and 14-17 are cumulated, in that they arise out of the same criminal conduct. It submits that cumulative charging violates substantive norms in both civil- and common-law systems.

45. The Radic Defence contends that the charges against the accused in Counts 3 and 17 of the Amended Indictment are identical and accordingly they should be struck out.

46. In response to the allegations that certain of the charges in the Amended Indictment are improperly cumulated, the Prosecution cites the judicial practice of the International Tribunal which, it contends, permits cumulative charging at the pleading stage and further permits cumulation of charges where the Articles of the Statute are designed to protect different values and when each requires proof of an additional element. The Amended Indictment charges the accused, Milojica Kos and Mlado Radic, with violations of Articles 3 and 5 of the Statute which, in the Prosecution's submission, require different elements of proof and protect different values. The Prosecution further denies the allegation that Counts 3 and 17 are identical and amount to inadmissible cumulation of charges. The Prosecution argues that Count 17 of the Amended Indictment charges Mlado Radic with individual criminal responsibility for the rape of witness A and the sexual assault of witness F under Article 7, paragraph 1, of the Statute, whereas the reference to these acts in paragraph 27 of the Amended Indictment "apply to a finding of liability under Article 7(3) as pleaded"[10].

2. Analysis

47. In relation to the argument that certain of the charges in the Amended Indictment are cumulative, the Trial Chamber notes that cumulative charging has been permitted in the practice of the International Tribunal[11]. The Trial Chamber further notes that the Prosecution may be justified in bringing cumulative charges when the Articles of the Statute referred to are designed to protect different values and when each Article requires proof of a legal element not required by the others. The Trial Chamber finds that both these requirements are met here, where the charges alleged to be cumulated fall under Article 3 and Article 5 of the Statute.

G. Improper cumulation of criminal responsibility under Article 7, paragraph 1, and Article 7, paragraph 3, for the same underlying criminal acts – Mlado Radic, Miroslav Kvocka and Milojica Kos

1. Arguments of the Parties

48. The Radic Defence, the Kvocka Defence and the Kos Defence all contend that an accused may not be charged with individual criminal responsibility pursuant to both Article 7, paragraph 1, and Article 7, paragraph 3, of the Statute, in relation to the same underlying criminal act.

49. The Prosecution submits that an accused may be charged with and convicted of individual criminal responsibility pursuant to both Article 7, paragraph 1, and Article 7, paragraph 3, in relation to the same criminal act.

2. Analysis

50. A review of the jurisprudence of the International Tribunal and of the International Criminal Tribunal for Rwanda reveals that an accused may be charged either alternatively or cumulatively under Article 7, paragraph 1, and paragraph 3. For example, in its Judgement in *Prosecutor v. Delalic et al.,*

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the Trial Chamber found that "in practice there are factual situations rendering the charging and convicting of the same person under both Articles 7(1) and 7(3) perfectly appropriate"[12]. In the Amended Indictment, the accused are charged, in relation to certain Counts, with individual criminal responsibility in respect of both Article 7, paragraph 1, and Article 7, paragraph 3, and it will be for the Trial Chamber to determine, on the basis of the evidence presented at trial, whether the charges are substantiated.

H. Motion to Sever - Zoran Zigic

1. Arguments of the Parties

51. The accused, Zoran Zigic, also seeks to sever his trial from that of the three co-accused pursuant to Rule 82(B) of the Rules, arguing that he has no connection with his co-accused.

52. The Prosecution contends that granting Zoran Zigic a separate trial would be contrary to the interests of justice. The Prosecution submits that the four accused were properly joined pursuant to Rule 48 of the Rules, as the acts alleged against them in the Amended Indictment form part of the same "transaction."

53. The Prosecution notes that the accused has neither provided evidence nor proffered argument as to why he should be entitled to severance under Sub-rule 82(B). Indeed, the Prosecution contends that a grant of severance would be contrary to the interests of justice as it would necessitate a delay in one of the two resulting trials, thereby jeopardising one or more of the accused's right to an expeditious trial. Similarly, severance would result in considerable duplication of evidence, to the detriment of witnesses, who would be forced to testify in two separate proceedings, and the overall functioning of the International Tribunal.

2. Analysis

54. In respect of Zoran Zigic's request for a separate trial, the Trial Chamber notes the absence of reasoned support for this request, other than to state that the accused has no connection to his co-accused.

55. The four accused in this trial were charged in a single indictment pursuant to Rule 48 of the Rules which provides: "Persons accused of the same or different crimes committed in the course of the same transaction may be jointly charged and tried". Rule 2 defines the term "Transaction" as: "A number of acts or omissions whether occurring as one event or a number of events, at the same or different locations and being part of a common scheme, strategy or plan". The Trial Chamber considers that the crimes alleged in the Amended Indictment that were committed in and around the municipality of Prijedor in Bosnia and Herzegovina from approximately 1 April 1992 to 30 August 1992 were committed in the course of the same transaction.

56. The Trial Chamber notes that it has the discretion pursuant to Sub-rule 82(B) of the Rules to order separate trials "if it considers it necessary in order to avoid a conflict of interests that might cause serious prejudice to an accused, or to protect the interests of justice." However, in the instant case, the accused, Zoran Zigic, has presented no evidence to support a finding that a joint trial would cause him serious prejudice. On the other hand, the Prosecution has argued that severance would be contrary to the interests of justice as the evidence that will be presented by most of the Prosecution witnesses will be relevant to the case against each of the four accused.

57. Accordingly, the Trial Chamber finds no basis on which to grant the severance of Zoran Zigic's trial

pursuant to Sub-rule 82(B) and further finds that a joint trial serves the interest of judicial economy as it avoids duplication of the evidence and minimises hardship to witnesses.

III. DISPOSITION

For the foregoing reasons

PURSUANT TO Rule 72 of the Rules of Procedure and Evidence of the International Tribunal,

THE TRIAL CHAMBER HEREBY REJECTS the application by Zoran Zigic for a separate trial and **DIRECTS** the Prosecution to:

i. delete the word "about" in the phrase "between about" whenever it appears in the Amended Indictment;
ii. provide information that would allow for the identification of other participants in the crimes alleged against Miroslav Kvocka;
iii. identify, to the extent possible, the names of the victims in the crimes alleged against all four accused;
iv. identify, to the extent possible, the manner in which the crimes alleged against all four accused were committed;
v. list, to the extent possible, whenever the term "including" appears in the Amended Indictment, additional names of victims of the crimes alleged;
vi. provide more information as to the specific acts of the accused, Mlado Radic and Miroslav Kvocka, that would establish their criminal responsibility under Article 7, paragraph 1, and Article 7, paragraph 3.

In respect of all other issues raised, as set forth in this Decision, the preliminary motions alleging defects in the form of the Amended Indictment are rejected.

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

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Richard May
Presiding

Dated this twelfth day of April 1999
At The Hague
The Netherlands

[Seal of the Tribunal]

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1. Decision on the Defence Motion to Dismiss the Indictment Based Upon Defects in the Form Thereof (Vagueness/Lack of Adequate Notice of Charges), *Prosecutor v. Tihomir Blaskic*, Case No. IT-95-14-PT, T. Ch. I, 4 Apr. 1997.

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2. Decision on the Defence Preliminary Motion on the Form of the Indictment, *Prosecutor v. Krnojelac*, Case No. IT-97-25-PT, T. Ch. II, 24 Feb. 1999, para. 12.
3. *Ibid.*
4. *Ibid.*, n.19.
5. Quoted in paragraph 15 of this Decision and at paragraph 12 of the *Krnojelac Decision as to Form*, *supra* n.2.
6. *Ibid.*, para. 46.
7. *Ibid.*, para. 13.
8. *See, e.g.*, Decision on Motion by the Accused Hazim Delic Based on Defects in the Form of the Indictment, *Prosecutor v. Delalic et al.*, Case No. IT-95-21-T, T. Ch. II, 15 Nov. 1996.
9. Prosecutor's Reply to the Defence's Preliminary Appeal to the Amended Indictment Against Miroslav Kvocka, *Prosecutor v. Kvocka et al.*, Case No. IT-98-30-PT, 8 Feb. 1999, para. 49.
10. Prosecutor's Reply to the Defence's Preliminary Motion, *Prosecutor v. Kvo~ka et al.*, Case No. IT-98-30-PT, 28 Jan. 1999, para. 64.
11. *See, e.g., Tadic* (1995) I ICTY JR 293 at paras. 15-18; *Krnojelac Decision as to Form, supra* n.2.
12. Judgement, *Prosecutor v. Delalic et al.*, Case No. IT-96-21-T, T. Ch. II, 16 Nov. 1998, para. 1222.

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PROSECUTION INDEX OF AUTHORITIES

ANNEX XIV

Prosecutor v. Nahimana, Decision on the Defence Motion on Defects in the Form of the Amended Indictment, ICTR-96-11-T, 17 November 1998

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International Criminal Tribunal for Rwanda

THE PROSECUTOR
v.

FERDINAND NAHIMANA

ICTR 96-11-T

Decision of: 17 November 1998

Original: English

DECISION ON THE DEFENCE MOTION ON DEFECTS IN THE FORM OF THE AMENDED INDICTMENT

Office of the Prosecutor: Mr. William T. Egbe

Counsel for Defence: Mr. Jean-Marie Biju-Duval, Ms. Diane Senechal

Before: Presiding Judge Navanethem Pillay, Judge Laïty Kama, Judge Tafazal H. Khan

Registry: Mr. Antoine Mindua

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (the "TRIBUNAL"),

SITTING AS Trial Chamber 1, composed of Judge Navanethem Pillay, as Presiding Judge, Judge Laïty Kama and Judge Tafazzal H. Khan;

HAVING NOTED that an indictment was confirmed against Ferdinand Nahimana on 12 July 1996 and subsequently amended following the decision of Trial Chamber I on 24 November 1997 (the "previous decision");

HAVING BEEN SEIZED with a motion by Defence Counsel, dated 9 April 1998 and filed with the Registry on 22 April 1998, pursuant to Rules 72 and 73 of the Rules of Procedure and Evidence ("the Rules"), wherein Defence Counsel requested the suspension of all criminal proceedings against Ferdinand Nahimana (the "Accused") and his immediate release;

HAVING CONSIDERED the indictment as amended by the Prosecutor, dated 19 December 1997 and filed with the Registry on 22 December 1997 (the "amended indictment");

HAVING CONSIDERED the Prosecutor's written response filed with the Registry on 22 June 1998;

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HAVING NOTED the difficulties in obtaining from the Registry the translation of the Defence brief, which impediment has occasioned the substantial delay in the rendering of this decision;

HAVING HEARD the parties at a hearing on 26 June 1998;

AFTER HAVING DELIBERATED,

1. The Defence Counsel submitted that the Prosecutor had not amended the indictment against the accused, as ordered to do so by the Tribunal in its previous decision and as such the amended indictment is also defective since it fails to indicate with sufficient certainty and precision:

(1.1) the identity of the person or persons with whom the accused is alleged to have conspired;

(1.2) the period the crimes were allegedly committed;

(1.3) the alleged acts of the accused and the charges against him.

2. The Defence Counsel requested the immediate release of the accused, submitting that:

(2.1) fourteen months after the accused's initial appearance, the Prosecutor is unable to provide an indictment complying with the minimum requirements as set out in the Rules and Statute of the Tribunal;

(2.2) no serious charges exist against the accused to permit the maintenance of the criminal proceedings against the accused, the commencement of the trial on its merits and the continued detention of the accused; and;

(2.3) in these circumstances the criminal proceedings against the accused should be suspended and the accused should be released.

3. The Prosecutor submitted that:

(3.1) she has complied with the Tribunal's previous decision and amended the indictment as ordered;

(3.2) the amended indictment provides with sufficient certainty and clarity the identity of some of the persons with whom the accused is alleged to have conspired, the time frames within which the crimes were allegedly committed and the charges against the accused;

3.3) in the event of the Tribunal finding that the amended indictment is in fact defective the Tribunal should order further amendment of the said indictment, rather than suspending all criminal proceedings against the accused and releasing him.

On the identity of the alleged co-conspirators

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4. The Tribunal refers to its previous decision, wherein it ordered that the Prosecutor "identify some or all of the persons ...'' with whom the accused is alleged to have conspired. The Tribunal notes that the amended indictment identifies two persons the accused is alleged to have conspired with and accordingly finds that the Prosecutor has complied with its previous decision in this regard.

On the period the crimes were allegedly committed

5. The Tribunal refers to its previous decision and notes that it ordered the Prosecutor to specify the time frame in the allegations in paragraphs 3.2, 3.3, and 3.6 of the previous indictment. In this decision the Tribunal acknowledged that "..given the particular circumstances of the conflict in Rwanda and the alleged crimes, it could be difficult to determine the exact times and places of the acts with which the accused is charged." [FN1] Referring to the amended indictment, it is noted that the allegations in the aforementioned paragraphs have been amended to indicate when the alleged acts took place. Paragraph 3.2 alleges that acts described took place "During 1993..". Paragraphs 3.3 and 3.6 allege that the acts described therein were committed "From April 1993 until approximately 31 July 1994." In these circumstances, the Tribunal finds that the Prosecutor has in fact complied with its previous decision in this respect.

FN1. Decision on Preliminary motion, dated 24 November 1997, ICTR 96-11-T, para. 30, page 8

On the charges against the accused

6. The Tribunal, in its previous decision, requested the Prosecutor to """"identify on the one hand the acts or sequence of acts for which the accused is held individually responsible for having committed direct and public incitement to genocide, and on the other hand, the acts or sequence of acts of his subordinates for which he is held responsible for as their superior." [FN2] Count 2 of the original indictment alleged that the accused is individually criminally responsible for direct and public incitement to commit genocide, pursuant to Articles 6(1) and/or 6(3) of the Statute. The Prosecutor has specified, in count 2 of the amended indictment, that the accused is held individually criminally responsible, pursuant to Article 6(1) of the Statute, for direct and public incitement to commit genocide; and in count 5 of the amended indictment, that the accused is held individually criminally responsible pursuant to Article 6(3) of the Statute for the same crime. It is therefore apparent that count 5 of the amended indictment is not a new count, but rather an amplification of the charges in count 2. However, the Prosecutor has not specified the acts for which the accused is held individually criminally responsible, pursuant to Article 6(1) of the Statute and the acts allegedly committed by the accused's subordinates for which he is held individually criminally responsible, pursuant to Article 6(3) of the Statute.

FN2. ibid page 10

7. The Tribunal notes that count 4 of the amended indictment charges the accused

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with a crime against humanity pursuant to Articles 3(h) and Articles 6(1) and/or 6(3) of the Statute. This count, in its present text is vague and the Prosecutor is called upon to specify whether the alleged responsibility of the accused falls under Articles 6(1) or 6(3) or both. Where the Prosecutor is alleging individual criminal responsibility pursuant to Articles 6(1) and 6(3) of the Statute, She is called upon to specify the acts for which the accused is held individually criminally responsible, pursuant to Article 6(1) of the Statute and the acts allegedly committed by the accused's subordinates for which he is held individually criminally responsible, pursuant to Article 6(3) of the Statute.

8. The Defence Counsel submitted that where the Prosecutor is alleging individual criminal responsibility, pursuant to Article 6(3) of the Statute, the Prosecutor must specify the identity of the subordinates. In response, the Prosecutor submitted that paragraphs 3.3 and 3.8 of the amended indictment provide sufficient preliminary information to enable the accused to identify the sources of his individual responsibility as a superior.

9. The Tribunal notes that paragraph 3.3 of the amended indictment alleges that the accused "..exercised control, or had the opportunity to exercise control, over the programming, operations and finances of RTLM SA and RTLM." and paragraph 3.8 refers to subordinates, journalists and radio broadcasters, in RTLM. It is unclear whether the Prosecutor is alleging that the journalists and radio broadcasters are in fact subordinates or whether there is a separate category of persons who are alleged to be subordinates, in which case she is called upon to indicate who these subordinates are. The Prosecutor is requested to clarify this issue with respect to paragraph 3.8 of the amended indictment.

FOR THESE REASONS,

THE TRIBUNAL,

ORDERS the Prosecutor to further amend the amended indictment by:

(a) specifying whether the accused is held individually criminally responsible pursuant to Articles 6(1) or 6(3) or both, in count 4;

(b) indicating who the alleged subordinates of the accused are;

(c) specifying the alleged acts for which the accused is held individually criminally responsible, pursuant to Article 6(1) of the Statute and the acts allegedly committed by the accused's subordinates for which he is held individually criminally responsible, pursuant to Article 6(3) of the Statute, in counts 2, 4, and 5.

INVITES the Prosecutor to make the aforementioned amendments within 30 days from the date of this decision;

DISMISSES the Defence motion in all other aspects.

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Arusha, 17 November 1998

Navanethem Pillay, Presiding Judge

Laity Kama, Judge

Tafazzal H. Khan, Judge

Seal of the Tribunal

END OF DOCUMENT

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PROSECUTION INDEX OF AUTHORITIES

ANNEX XV

Prosecutor v. Naletilic et al., Decision on Defendant Vinko Martinovic's Objection to the Indictment, TC I, 15 February 2000

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15 February 2000

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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-98-34-PT

Date 15 February 2000

Original: English

IN THE TRIAL CHAMBER

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

Registrar: **Mr. Jean-Jacques Heintz, Deputy Registrar**

Decision of: **15 February 2000**

THE PROSECUTOR

v.

MLADEN NALETILIĆ
VINKO MARTINOVIĆ

DECISION ON DEFENDANT VINKO MARTINOVIĆ'S OBJECTION TO THE INDICTMENT

The Office of the Prosecutor:

Mr. Franck Terrier

Defence Counsel:

Mr. Branko Šerić

1. **TRIAL CHAMBER I** of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 is seised of "Defendant Vinko Martinović's Objection to the Indictment."

2. Vinko Martinović and Mladen Naletilić were charged in a twenty-two-count indictment with crimes against humanity, grave breaches of the Geneva Conventions, and violations of the laws or customs of war.[1] The charges were based on their alleged command of military units in and around the city of Mostar in Bosnia-Herzegovina in 1993 and 1994. The indictment was confirmed on 21 December 1998.[2] Mr. Martinović was transferred into the custody of the Tribunal on 9 August 1999 and entered a plea of not guilty in his initial appearance before the Trial Chamber three days later. The co-accused, Mr. Naletilić, remains in detention in Croatia.

3. Rule 72(A)(ii) allows for preliminary motions alleging "defects in the form of the indictment," and Mr. Martinović filed such a motion on 4 October 1999. Mr. Martinović's challenges to the indictment fall within four general categories. First, he objects that certain factual allegations in the indictment are "incorrect" or that no evidence has been offered to support them.[3] Second, he contends that he should not have been charged with more than one offence based on the same underlying facts.[4] Third, he argues that those portions of the indictment charging him with responsibility under both Article 7(1) and 7(3) of the Statute are defective because, in his view, Article 7(3) does not provide a separate ground for command responsibility and liability can be based only on Article 7(1).[5] Fourth, he claims that portions of the indictment are unclear and asks for more specific details to enable him to prepare his defence.[6]

4. The Trial Chamber rejects these objections as a basis for dismissing or amending the indictment, and notes that the Defence now has extensive witness statements as well as supporting materials in its possession. We also note that the Defendant, in the unlikely event that he still does not feel he may adequately prepare for trial even after reviewing

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[1] *Prosecutor v. Naletilić and Martinović*, Case IT 98-34-I, Indictment, 18 December 1998.
[2] *Prosecutor v. Naletilić and Martinović*, Case IT 98-34-I, Order Confirming Indictment, 21 December 1998.
[3] Defendant Vinko Martinović's Objection to the Indictment ("Objection to the Indictment"), 4 October 1999, (a), (b), AD-I to AD-VII, AD-XIII, AD-XV to XVII, AD-XXI and AD-XXII.
[4] Objection to the Indictment, AD-X, AD-XI, AD-XII, AD-XIV, AD-XIX, and AD-XX.
[5] Objection to the Indictment, AD-XIX and AD-XX.
[6] Objection to the Indictment, AD-IV to AD-IX, AD-XV, AD-XIX to AD-XXI and XXII.

these materials, may seek further particulars from the Prosecution. In addition, the Trial Chamber notes that the parties will be asked to address the issue of cumulative charging in their final pre-trial briefs.

I. Proof of the Facts Alleged in the Indictment

5. Mr. Martinović objects that certain factual allegations in the indictment are "incorrect" or that no evidence has been offered to support them.[7] Two sections of the Tribunal's Statute provide the starting point for our analysis of this claim. Article 18 states that "the Prosecutor shall prepare an indictment containing a *concise statement* of the facts and the crime or crimes with which the accused is charged"[8] (emphasis added). Article 21 guarantees the accused the right "to be informed *promptly and in detail* in a language which he understands of the nature and cause of the charge against him" as well as the right "to have adequate time and facilities for the preparation of his defence" (emphasis added).

6. Previous Tribunal decisions have interpreted these provisions to mean that "there is a minimum level of information that must be provided by the indictment; there is a floor below which the level of information must not fall if the indictment is to be valid as to form."[9] But these decisions have also stressed that a "motion on the form of the indictment is not an appropriate way of challenging the evidence" and that proof of the facts alleged in the indictment is a matter for trial.[10] Many of Mr. Martinović's objections are exactly the sort of challenges to the evidence that can only be decided at trial. For example, he contends that "it is incorrect that a state of international armed conflict existed on the territory of the Republic of Bosnia and Herzegovina."[11] The Trial Chamber in *Blaškić* rejected a similar objection, stating that "the international

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[7] Objection to the Indictment (a), (b), AD-I to AD-VII, AD-XIII, AD-XV to XVII, AD-XXI and AD-XXII.

[8] Rule 47(C) essentially tracks Article 18, stating that "[t]he indictment shall set forth the name and particulars of the suspect, and a concise statement of the facts of the case and of the crime with which the suspect is charged."

[9] *Prosecutor v. Kvočka*, Case No. IT-98-30-PT, Decision on Defence Preliminary Motions on the Form of the Indictment, 12 April 1999, para. 14.

[10] *Prosecutor v. Delalić, et al.*, Decision on Motion by the Accused Esad Landžo Based on Defects in the Form of the Indictment ("*Landžo*"), 15 November 1996, para. 9; *see also, e.g., Prosecutor v. Krnojelac*, Case No. IT-97-25-PT, Decision on the Defence Preliminary Motion on the Form of the Indictment, 24 February 1999, para. 20; *Prosecutor v. Blaškić*, Case No. IT-95-14-PT, Decision on the Defence Motion to Dismiss the Indictment Based on Defects in the Form Thereof, 4 April 1997, para. 20; *Prosecutor v. Delalić, et al.*, Case No. IT-96-21-T, Decision on Motion by the Accused Zejnil Delalić Based on Defects in the Form of the Indictment ("*Delalić*"), 2 October 1996, paras. 7, 11.

characterisation of an armed conflict is an issue intimately involving questions of both law and fact" that must be "discussed at trial."[12] The *Blaškić* decision concluded that the "mere mention of an international character of the conflict, at the stage concerning us here, already allows the accused to comprehend the situation and prepare his defence as soon as the accusation is made."[13]

7. To take another example, Martinović's motion claims that there is "no evidence that members of Vinko Martinović's sub-unit mistreated and tortured imprisoned Bosnian Muslims in [the Heliodrom], nor that they took them to the front-lines, forcing them to labour, and using them as human shields."[14] Again, whether or not the evidence ultimately supports these allegations is a matter for trial.[15]

8. Accordingly, the Trial Chamber rejects those objections of Mr. Martinović that are based on his contention that allegations in the indictment are untrue or that the Prosecution is obliged to offer evidence of their truth at this stage in the proceedings.[16]

II. Cumulative Charges

9. Mr. Martinović also claims that the indictment is defective because it charges him with more than one crime based on the same facts.[17] The Prosecutor points out that the Appeals Chamber and several Trial Chambers have held that any overlap in charges is a matter that may be addressed at the time of conviction and sentencing, and urges this Chamber to leave the issue for the end of trial.[18] The Tribunal's jurisprudence on cumulative charging is still evolving. Previous Tribunal decisions have mentioned several factors that may be relevant to the analysis of cumulative charging, but have not voiced a clear view on how these factors relate to one another: (1) whether each charge requires proof of a legal element not required by the others; (2) whether the offences are

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[11] Objection to the Indictment, AD-II.
[12] *Prosecutor v. Blaškić*, Case No. IT-95-14-PT, Decision on Defence Motion to Dismiss the Indictment Based Upon Defects in the Form Thereof, 4 April 1997, para. 27.
[13] *Id.*
[14] Objection to the Indictment, AD-III.
[15] *See, e.g., Delalić*, para. 11.
[16] Objection to the Indictment (a), (b), AD-I to AD-VII, AD-XIII, AD-XV to XVII, AD-XXI and AD-XXII.
[17] Objection to the Indictment AD-X to AD-XII, AD-XIV, AD-XIX, and AD-XX.
[18] *See, e.g., Prosecutor v. Delić*, Case No. IT-96-21-AR72.5, Appeal Decision, 6 December 1996, paras. 35-36; *Prosecutor v. Krnojelac*, Case No. IT-97-25-PT, Decision on the Defence Preliminary Motion on the Form of the Indictment, 24 February 1999, paras. 5-10; *Landžo*, para. 11.

designed to protect different values; (3) whether it is necessary to record a conviction for both offences in order fully to describe what the accused did.[19]

10. The recent *Kupreškić* judgement provides the most in-depth analysis of the issue to date.[20] After an extensive analysis of the practice in both civil and common law countries, the *Kupreškić* judgement concluded that an accused may be found guilty of two offences for a single act if each offence contains an element not required by the other.[21] The Trial Chamber also recognised that cumulative charges may be justified when the provisions at stake protect different values, but found that this test was seldom used as an independent ground for upholding more than one charge based on the same facts if the elements test was not satisfied as well.

11. Were this analysis to be applied to Martinović's objections, some of the cumulative charging, particularly in counts 2-8 and in counts 13-17, might appear problematic. The Prosecution commendably conceded at argument that in the ordinary meaning of the term as used in the *Kupreškić* decision, many of the Article 3 counts appear to be cumulative with the Article 2 and Article 5 counts, but offered that they might still be justified as advancing different interests.[22] The Prosecution also indicated that its position on the *Kupreškić* decision was not yet final.

12. Since the Tribunal's jurisprudence on cumulative charging is still evolving, this Trial Chamber does not see a reason at this juncture for departing from the Trial Chambers' past practice of declining to decide the issue at the indictment stage, since the defendant will not be prejudiced if cumulativeness is decided after the evidence has been presented.[23] As the Trial Chamber indicated at oral argument, however, it may be helpful if the parties organise their trial presentation in terms of the offences which have the greatest requirements, such as persecution and the Article 2 offences requiring proof of international armed conflict, especially when other offences may be seen as lesser

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[19] *See, e.g., Prosecutor v. Kvočka*, Case No. IT-98-30-PT, Decision on Defence Preliminary Motions on the Form of the Indictment, 12 April 1999, para. 47 (mentioning factors (1) and (2) with conjunctive phrasing); *Prosecutor v. Kupreškić*, Case No. IT-95-16-PT, Decision on Defence Challenges to Form of the Indictment, 15 May 1998, p. 3 (same); *see also* the decision of the ICTR in *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, 2 September 1998, para. 468 (mentioning factors (1), (2) and (3) with disjunctive phrasing).
[20] *See Prosecutor v. Kupreškić*, Case No. IT-95-16-T, Judgement, 14 January 2000.
[21] *Id.*, para. 718; *see also id.*, paras. 680-688 (comparing the separate-elements test followed in many common law jurisdictions and set out in *Blockburger v. United States*, 284 U.S. 299 (1932) and the common law doctrine of "lesser included offences", with the civil law concepts of reciprocal speciality and consumption).
[22] *See* Transcript of Status Conference, 3 February 2000, pp. 130-131.
[23] *See, e.g., Prosecutor v. Krstić*, Case No. It-98-33-PT, Decision on the Form of the Indictment, 28 January 2000, pp. 5-7.

included offences which require some but not all of the elements of the greater offence. To that end, the parties will be asked to address the issue of cumulativeness in greater depth in their final pre-trial briefs.

III. Individual Criminal Responsibility

13. Each count of the indictment charges Mr. Martinović with liability under both Article 7(1) and 7(3). Mr. Martinović contends that "the only foundation for someone to be held responsible for a criminal act is Article 7(1), since Article 7(3) simply says that a person is not exempt from a responsibility if such an act was committed by his subordinate."[24] The Trial Chamber does not think this is a correct statement of the law. The Trial Chamber agrees with those decisions of the Tribunal interpreting the Statute to allow a commanding officer to be held liable either on the basis of his own acts pursuant to Article 7(1), or on the basis of his failure to prevent or punish the illegal actions of his subordinates pursuant to Article 7(3), or, where appropriate, both.[25] Mr. Martinović's objection is, therefore, rejected.

IV. Vagueness

14. Mr. Martinović objects that several portions of the indictment are not specific enough. The touchstones for the analysis are once again Articles 18 and 21 of the Statute.[26] The Trial Chambers have expressed a range of views on how specific an indictment must be to satisfy these provisions. A number of decisions have suggested that "[a]n indictment

[24] Objection to the Indictment, AD-XIX and XX.

[25] *See Prosecutor v. Kvočka, et al.*, Case No. IT-98-30-PT, Decision on the Defence Preliminary Motions on the Form of the Indictment, 12 April 1999, para. 50 ("an accused may be charged either alternatively or cumulatively under Article 7, paragraph 1, and paragraph 3"); *Prosecutor v. Delalić, et al.*, Case No. IT-96-21-T, Judgement, para. 333 (holding that it is a "well-established norm of customary and conventional international law" that "a superior may be held criminally responsible not only for ordering, instigating or planning criminal acts carried out by his subordinates, but also for failing to take measures to prevent or repress the unlawful conduct of his subordinates"); see also *id.*, para. 1222 ("in practice there are factual situations rendering the charging and convicting of the same person under both Articles 7(1) and 7(3) perfectly appropriate").

[26] As noted earlier, Article 18 requires the indictment to contain a "concise statement of the facts." *See also* Rule 47(C) ("The indictment shall set forth the name and particulars of the suspect, and a concise statement of the facts of the case and of the crime."). Article 21 says the accused must be "informed promptly and in detail . . . of the nature and cause of the charge against him" and must "have adequate time and facilities for the preparation of his defence."

must contain information as to the identity of the victim, the place and the approximate date of the alleged offence and the means by which the offence was committed."[27] Other Trial Chambers, however, have taken the view that the "massive scale of the crimes with which the International Tribunal has to deal 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."[28]

15. The Trial Chambers have also expressed a variety of views on the significance of the materials disclosed in discovery in deciding if an indictment is specific enough. Some chambers have stated that "neither the supporting material nor the witness statements made available to an accused under Rule 66 of the Rules of Procedure and Evidence . . . can be used to fill in any gaps in the indictment."[29] Other chambers have intimated a slightly broader view of the role of discovery materials, stating that the guarantees of Article 21 (to be informed of the charges and to put be in a position to prepare a defence) have different meanings at different stages in the proceedings since "the preparation of

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[27] *Prosecutor v. Krnojelac*, Case No. IT-97-25-PT, Decision on the Defence Preliminary Motion on the Form of the Indictment, 24 February 1999, para. 12; *see also, e.g., Prosecutor v. Kunarac,* Case No. IT-96-23-PT, Decision on the Form of the Indictment, 4 November 1999, para. 6 ("[T]he capacity in which the accused allegedly committed the charged offence must be clearly defined. The indictment must also leave no doubt as to what the accused is alleged to have done at a particular venue on a particular date during a particular time period, with whom, to whom, or to what purpose. It must describe the full conduct complained of which amounts to the crime(s) charged. It must identify with reasonable clarity other persons involved, or affected, where necessary."); *Prosecutor v. Blaškić*, Case No. IT- 95-14-PT, Decision on Defence Motion to Dismiss the Indictment Based Upon Defects in the Form Thereof, 4 April 1997, para. 20 ("[T]he indictment must contain certain information which permits the accused to prepare his defence (namely, the identity of the victim, the place and approximate date of the alleged crime and the means used to perpetrate it) in order to avoid prejudicial surprise."); *Prosecutor v. Landžo*, Case No. IT-96-21-T, Decision on Motion By the Accused Based on Defects in the Form of the Indictment, 15 November 1996, para. 5 ("The Indictment before the Trial Chamber contains all the necessary information for the Defence to prepare its defence: the identity of the victim, the place and approximate time of the alleged crime and the means by which it was committed.").

[28] *Prosecutor v. Kvočka*, Case No. IT-98-30-PT, Decision on Defence Preliminary Motions on the Form of the Indictment, 12 April 1999, para.1; *see also, e.g., Prosecutor v. Aleksovski*, Case No. IT-95-14/1-PT, Decision on the Defence Motion in Respect of Defects in the Form of the Indictment, 25 September 1997, para.16 ("in a case of this sort, the specific identification of each victim and perpetrator is neither possible nor necessary"); *Prosecutor v. Krstić*, Case No. IT-98-33-PT, Decision on the Defence Preliminary Motion on the Form of the Indictment, 6 May 1999, p. 3 ("the nature and very scope of the crimes being prosecuted as well as the type of responsibility charged are sufficient to justify the fact that when they began and when they ended cannot be precisely identified"); *Prosecutor v. Blaškić*, para. 37 ("at the indictment stage an exhaustive list of plundered public or private property cannot be demanded because wars characteristically bring in their wake massive and large scale destruction"); *Prosecutor v. Kvočka*, para. 23 ("the massive scale of the crimes alleged before this International Tribunal does not allow for specific naming of victims").

[29] *Prosecutor v. Kunarac, et al.*, Case No. IT-96-23-PT, Decision on the Form of the Indictment, 4 November 1999, para. 7; *see also, e.g., Prosecutor v. Brđanin*, Case No. IT-99-36-PT, Decision on Motion to Dismiss Indictment, 5 October 1999, para.13 ("the supporting material may not be used to fill in any gaps which may exist in the material facts so pleaded when determining whether a *prima facie* case exists in accordance with Article 19.1 of the Statute"); *Krnojelac*, para.15 ("this Trial Chamber does not accept any interpretation . . . which suggests that the supporting material given during the discovery process can be used by the prosecution to fill any gaps in the material facts pleaded in the indictment").

his defence by the accused assumes a more detailed level of information which may not be available at the time the indictment is framed."[30] However, even those Chambers adhering to the view that the supporting materials provided by the Prosecutor in discovery cannot be used to fill in gaps in the indictment have nevertheless concluded that

> in a limited class of case, less emphasis may be placed upon the need for precision in the indictment where complete pre-trial discovery has been given. For example, if all of the witness statements identify uniformly and with precision the circumstances in which the offence charged is alleged to have occurred, it would be a pointless technicality to insist upon the indictment being amended to reflect that information. That is, however, a rare situation.[31]

And there is a general consensus that a distinction may be drawn "between the material facts upon which the prosecution relies (which must be pleaded) and the evidence by which those material facts will be proved (which must be provided by way of pre-trial discovery)."[32]

16. This Trial Chamber's view is that any confusion about the proper role of supporting materials diminishes when the focus is turned on the fact that two separate statutory provisions are in play. By its terms, Article 18(4) pertains only to the indictment, which it says shall contain a "concise statement of the facts and the crime." But the guarantees of Article 21 have broader application. Article 21(4)(a) says the accused must "be informed promptly and in detail in a language which he understands of the nature and cause of the charges against him," while Article 21(4)(b) says that the accused must "have adequate time and facilities for the preparation of his defence." The supporting materials certainly cannot be used to satisfy Article 18's requirement that the *indictment* contain a concise statement of the facts and crime. But the discovery materials do play a role in fulfilling the defendant's right to be informed of the "nature and cause" of the charges against him, which at least one Trial Chamber has found is "a concept which includes not only the acts but also the evidence in support of the indictment."[33] And they obviously contribute to ensuring that the accused has an adequate opportunity to prepare his defence. *See, e.g.*, Rule 69 (C) ("the identity of the victim or witness shall be

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[30] *Prosecutor v. Blaškić*, Case No. IT-95-14-PT, Decision on the Defence Motion to Dismiss the Indictment Based Upon Defects in the Form Thereof, 4 April 1997, paras.10-11.
[31] *Prosecutor v. Krnojelac*, Case No. IT-97-25-PT, Decision on the Defence Preliminary Motion on the Form of the Indictment, 24 February 1999, para. 15.
[32] *Krnojelac*, para. 12; *see, e g., Kvočka*, para. 14 (disagreeing with portions of *Kronojelac* but recognising this distinction as "valid").
[33] *Blaškić*, para. 11.

disclosed in sufficient time prior to the trial to allow adequate time for preparation of the defence").

17. Moreover, it must be kept in mind that the defendant has other avenues besides a motion challenging the form of the indictment for seeking additional particulars. Some Trial Chambers have endorsed the use of a motion for particulars where the indictment is not so vague as to be defective on its face, but where a defendant needs more information to prepare for trial.[34] These cases have held that, before submitting a motion for particulars, the defence must first make a direct request to the Prosecution for the information, specifying the counts in question, the reasons that the material already in the defence's possession is not sufficient, and the specific information that will remedy the inadequacy.[35] If the Prosecution fails to provide sufficient information, the Defence may then file a motion in the trial chamber, which will then consider whether the requested particulars are necessary "in order for the accused to prepare his defence and to avoid prejudicial surprise."[36] A motion for particulars is only properly directed at the indictment and is not to be used to obtain the discovery of evidentiary material.[37] But the extent of discovery already obtained is relevant to the issue of whether a defendant has enough information to prepare for trial and avoid prejudicial surprise.[38]

18. To sum up, the defendant's preparation for trial may begin with the indictment, but it does not end there. While it is clear that "the indictment must contain certain information which permits the accused to prepare his defence,"[39] it need not contain *all* of the information to which the accused will ultimately be entitled under the Rules. The primary focus at this stage must be on whether the indictment contains a concise, but complete, statement of the facts on which the charges are based.

19. With this in mind, the Trial Chamber will now address Mr. Martinović's objections. With regard to all of these objections, it is important to note that, in the time since this motion was filed, the Defence has received extensive discovery, including 137 witness statements. Defence counsel conceded at oral argument that he has not read all of the

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[34] *See, e.g., Prosecutor v. Delalić*, Case No. IT-96-21-T, Decision on Motion by the Accused Zejnil Delalić Based on Defects in the Form of the Indictment ("*Delalić*"), 2 October 1996, para. 21; *Prosecutor v. Delalić*, Case No. IT-96-21-T, Decision on the Accused Mucić's Motion for Particulars ("*Mucić*"), para. 7; *Prosecutor v. Tadić*, Case No. IT-94-1-T, Decision on Defence Motion on Form of Indictment, 14 Nov. 1995, para. 8.
[35] *See Tadić*, para. 8.
[36] *Mucić*, para. 9.
[37] *See id.*
[38] *See id.*
[39] *Blaškić*, para. 20,

witness statements yet (partly due to translation problems), and therefore could not argue that he remained in the dark about the specifics of the Prosecution's case even in light of those statements.

(a) Objections to Counts 2-8 (Unlawful Labour and Human Shields as Inhuman Treatment and Wilful Killing)

20. Objections AD-VIII, AD-IX, and AD-XV appear to refer to paragraphs 35, 36, and 44 of the indictment. Mr. Martinović contends that these portions of the indictment "fail to accurately list the alleged victims, as well as the time and the place of the occurrence of the criminal act" and that they lack "clarity," and contain only "generalisations."[40]

21. The Prosecution responds that paragraphs 35 through 44, when read together, are sufficiently concrete. In addition, the Prosecution argues that the supporting materials and additional witness statements provided in discovery give more details, and that the "widespread practice of using detainees for force labour and as human shields prevents the Prosecutor from being in a position to identify each and every victim of this conduct, and the specific time and place at which it occurred."

22. The Trial Chamber agrees with the Prosecutor that paragraphs 35 to 44 should be read together. While paragraphs 35, 36 and 44 contain fairly general allegations that Bosnian Muslim detainees were used for unlawful labour and as human shields, some of the other paragraphs provide more concrete examples. Paragraph 41 describes a particular incident

[40] The relevant paragraphs read as follows:

> 35. Between about April 1993 and at least through January 1994, MLADEN NALETILLIĆ VINKO MARTINOVIĆ and their subordinates forced Bosnian Muslim detainees from the various detention centres under the authority of the HVO to perform labour in military operations and to be used as human shields on the Bulevar and Šantićeva streets; Raštani, Stotina, and other locations along the front line in the municipality of Mostar.
>
> 36. Following the HV and HVO attack on the city of Mostar on 9 May 1993, the confrontation line with the ABiH was settled along the Bulevar and Šantićeva streets. From May 1993 to February 1994, the KB was engaged in fighting along the Bulevar and Šantićeva streets and had control over particular sections of this confrontation line. This confrontation line was both the scene of intense small arms fire and artillery exchanges between the opposing factions and it was the main site to which Bosnian Muslim prisoners were taken to perform forced labour and to be used as human shields.
>
> ...
>
> 44. Throughout this period, MLADEN NALETILIĆ and VINKO MARTINOVIĆ and their subordinates also forced Bosnian Muslim detainees to perform labour in locations other than the front lines. The Bosnian Muslim detainees were forced, *inter alia*, to engage and participate in the following works: building, maintenance and reparation works in private properties of the members and commanders of the KB; digging trenches, building defences in the positions of the KB or other HV and HVO forces; and assisting the KB members in the process of looting houses and properties of Bosnian Muslims.

on 17 September 1993 in which, pursuant to Mr. Martinović's orders, several detainees were allegedly given imitation rifles and military clothing and forced to walk alongside a tank in combat. Paragraph 42 describes the alleged use of detainees as human shields on the same day, and lists by name three of the approximately ten detainees who were killed. Because the Prosecution intends to prove that these types of activities took place *regularly* throughout the relevant time period, the Prosecution cannot be expected to list each and every instance in the indictment. The allegation of regularity itself, combined with the specific examples given, puts the defendant on notice of the sort of case he will be called to answer and satisfies the requirement that the indictment contain a "concise" statement of the facts.

23. The witness statements and other discovery materials now in the Defence's possession are meant to contain the details of any other specific events during this time period that the Prosecution intends to present at trial.

(b) Objections to Counts 13 to 17 (Murder, Wilful Killing and Wilfully Causing Great Suffering of Nenad Harmandžic)

24. Counts 13 to 17 are based on the alleged torture and killing of Nenad Harmandžic by troops under Mr. Martinović's command in July 1993. In objections XIX and XX, Mr. Martinović objects that Counts 16 and 17 (cruel treatment, a violation of the Laws or Customs of War, and wilfully causing great suffering or serious injury, a Grave Breach of the Geneva Conventions) are charged in the alternative with counts 13, 14 and 15 (murder, a Crime Against Humanity, wilful killing, a Grave Breach of the Geneva Conventions, and murder, a Violation of the Laws and Customs of War). He argues that this deprives him of the right to know what he is charged with and inhibits the preparation of his defence. But we agree with the Trial Chamber in *Prosecutor v. Kvočka*, which held that alternative charging was permissible.[41] It is clear from the indictment that the Prosecution will attempt to prove Mr. Martinović responsible for the death of Harmandžic, but, if it is unable to prove that, then it will try to prove at least that Martinović was responsible for his subordinates' torture of the victim. The indictment is sufficient to put Mr. Martinović on notice of the nature of the Prosecution's case.

[41] *See Kvočka*, Decision on the Defence Preliminary Motion of the Form of the Indictment, Case No. IT-98-30-PT, 12 April 1999, para. 50; *see also Prosecutor v. Musema*, Decision on Prosecutor's Request for Leave to Amend the Indictment, Case No. ICTR-96-13-I, 18 November 1998, para. 7.

(c) Objections to Counts 18 and 19 (Forcible Transfer and Destruction and Plunder of Property)

25. Objections XXI and XXII appear to address paragraphs 54 and 57. Mr. Martinović objects that these charges are "indefinite" and "general," and that "the names of the victims are not stated, nor the time and place of the commission of the criminal act" making it "impossible" for the defence to prepare for trial. [42]

26. The Prosecution responds that it "is not in a position to provide the Defence with the names of all victims and the dates of forcible transfer and plunder by MARTINOVIĆ's units." In support of its position, the Prosecution cites the decision of the Trial Chamber in *Prosecutor v. Blaškić* that "at the indictment stage an exhaustive list of plundered public or private property cannot be demanded because wars characteristically bring in their wake massive and large scale destruction."[43]

27. The Trial Chamber is of the view that this portion of the indictment, while close to the line, is not so vague as to render the indictment defective. The specific date (9 May 1993) on which the forced expulsions allegedly began is given, and they are said to have continued over the next six months. The indictment further specifies that two large waves of transfers occurred in May and July 1993. The events are all said to have occurred in a confined geographic area, in and around the city of Mostar. This is a very "concise statement of the facts," and while it is not vague, the Trial Chamber is not convinced that,

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[42] The relevant paragraphs provide as follows:

> 54. In the municipality of Mostar, MLADEN NALETILIĆ and VINKO MARTINOVIĆ were responsible for and ordered the forcible transfer of Bosnian Muslim civilians that started on the 9 May 1993 and continued until at least January 1994. The KB members under their command were prominent in the eviction, arrest and forcible transfers of Bosnian Muslim civilians throughout the relevant period, and particularly during the two large waves of forcible transfers that took place in May and July 1993. Once KB and other HVO units had identified persons of Muslim ethnic background, they arrested them, evicted them, plundered their homes and forcibly transferred them across the confrontation lines to the territories under ABiH control. The ABiH held a portion of the city which was under siege by HV and HVO forces, who were shelling intensely the area and preventing the arrival of humanitarian and basic supplies. MLADEN NALETELIĆ and VINKO MARTINOVIĆ commanded operations for this purpose and gave orders to their subordinates to proceed with the forcible transfers.
>
> 57. Following the HV and HVO attack on Mostar of 9 May 1993 and in the context of the subsequent campaign of persecution against the Bosnian Muslim population, the units under the command of MLADEN NALETILIĆ and VINKO MARTINOVIĆ plundered systematically the Bosnian Muslim houses and properties.

[43] *Blaškić*, para. 37.

standing alone, it would be sufficient to allow the defendant to prepare for trial: no specific examples of plunder or expulsion are provided, and not much indication is given as to the facts on which the Prosecution rests its theory of Mr. Martinovićs command responsibility. The Defence does not contend, however, that the witness statements and other material in its possession do not provide sufficient particulars to prepare its case. Accordingly, the logical next step is that the Defence review those materials.

(d) Challenges to Count I of the Indictment (Persecutions)

28. Although it is not crystal clear, it appears that the objections headed AD-IV, V, VI, and VII are concerned with the paragraphs supporting the persecution count, paragraphs 30, 32, 33, and 34. Paragraph 34, however, refers to paragraphs 35-58 – basically the rest of the indictment. Mr. Martinović contends in this set of objections that the indictment lacks "precise definition," is "quite general," and does not contain sufficient factual details.

29. The Prosecution counters that the indictment "need not contain the detailed information sought by the Defence."

30. The matters addressed in Paragraphs 30, 32, and 34 have largely been covered in the preceding discussion of the allegations of forced labour, illegal use of detainees as human shields, plunder, expulsion, and the torture and murder of Harmandžic. The indictment specifies the types of actions that are said to have made up the persecution, as well as the time period and geographic area in which these events are said to have occurred. Once again, the accused does not contend that he cannot prepare for trial even if the witness statements and other materials now in his possession are taken into account.

V. Conclusion

For the foregoing reasons,

TRIAL CHAMBER I,

PURSUANT to Rule 72,

HEREBY DENIES the Defendant Vinko Martinović's Objection to the Indictment.

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

Done this fifteenth day of February 2000,
At The Hague,
The Netherlands.

Almiro Rodrigues
Presiding Judge, Trial Chamber I

(Seal of the Tribunal)

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ANNEX XVI

Prosecutor v. Delalic, et al., Judgement, IT-96-21-T, 16 November 1998[4]

[4] Full text of judgement available at http://www.un.org/icty/judgement.htm. (linked under Mucic *et al.* IT-96-21 "Celebici Camp")

UNITED
NATIONS

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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-96-21-T

Date: 16 November 1998

Original: English

IN THE TRIAL CHAMBER

Before: **Judge Adolphus G. Karibi-Whyte, Presiding**
Judge Elizabeth Odio Benito
Judge Saad Saood Jan

Registrar: **Mrs. Dorothee de Sampayo Garrido-Nijgh**

Judgement of: **16 November 1998**

PROSECUTOR

v.

ZEJNIL DELALI]
ZDRAVKO MUCI] also known as "PAVO"
HAZIM DELI]
ESAD LAND@O also known as "ZENGA"

JUDGEMENT

The Office of the Prosecutor:

Mr. Grant Niemann
Ms. Teresa McHenry

Counsel for the Accused:

Ms. Edina Re{idovi}, Mr. Eugene O 'Sullivan, for Zejnil Delali}
Ms. Nihada Buturovi}, Mr. Howard Morrison, for Zdravko Muci}
Mr. Salih Karabdi}, Mr. Thomas Moran, for Hazim Deli}
Ms. Cynthia McMurrey, Ms. Nancy Boler, for Esad Land`o

332. It is, accordingly, to the construction of this provision, properly understood as a formulation of the principle of command responsibility, that the Trial Chamber now must direct its attention. However, it is first necessary to briefly consider the legal character of this species of criminal responsibility and its status under customary international law more generally.

2. Legal Character of Command Responsibility and its Status Under Customary International Law

333. That military commanders and other persons occupying positions of superior authority may be held criminally responsible for the unlawful conduct of their subordinates is a well-established norm of customary and conventional international law. This criminal liability may arise either out of the positive acts of the superior (sometimes referred to as "direct" command responsibility) or from his culpable omissions ("indirect" command responsibility or command responsibility *strictu sensu).* Thus, a superior may be held criminally responsible not only for ordering, instigating or planning criminal acts carried out by his subordinates, but also for failing to take measures to prevent or repress the unlawful conduct of his subordinates. As noted in the Report of the Secretary-General on the establishment of the International Tribunal:

> A person in a position of superior authority should, therefore, be held individually responsible for giving the unlawful order to commit a crime under the present statute. But he should also be held responsible for failure to prevent a crime or to deter the unlawful behaviour of his subordinates. This imputed responsibility or criminal negligence is engaged if the person in superior authority knew, or had reason to know, that his subordinates were about to commit or had committed crimes and yet failed to take the necessary and reasonable steps to prevent or repress the commission of such crimes or to punish those who had committed them.[344]

334. The distinct legal character of the two types of superior responsibility must be noted. While the criminal liability of a superior for positive acts follows from general principles of accomplice liability, as set out in the discussion of Article 7(1) above, the criminal responsibility of superiors for failing to take measures to prevent or repress the unlawful conduct of their subordinates is best understood when seen against the principle that criminal responsibility for omissions is incurred only where there exists a legal obligation to act.[345] As is most clearly evidenced in the case of military commanders by article 87 of Additional Protocol I, international law imposes an

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[344] Report of the Secretary-General, para. 56.

[345] ILC Draft Code 1996. *See also* International Committee of the Red Cross, Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 Aug. 1949 (Yves Sandoz *et al.* eds., 1987) (hereafter "Commentary to the Additional Protocols"), para. 3537.

affirmative duty on superiors to prevent persons under their control from committing violations of international humanitarian law, and it is ultimately this duty that provides the basis for, and defines the contours of, the imputed criminal responsibility under Article 7(3) of the Statute.

335. Although historically not without recognition in domestic military law, it is often suggested that the roots of the modern doctrine of command responsibility may be found in the Hague Conventions of 1907. It was not until the end of the First World War, however, that the notion of individual criminal responsibility for failure to take the necessary measures to prevent or to repress breaches of the laws of armed conflict was given explicit expression in an international context.[346] In its report presented to the Preliminary Peace Conference in 1919, the International Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties recommended that a tribunal be established for the prosecution of, *inter alia,* all those who,

> ordered, or with knowledge thereof and with power to intervene, abstained from preventing or taking measures to prevent, putting an end to or repressing violations of the laws or customs of war.[347]

336. Such a tribunal was never realised, however, and it was only in the aftermath of the Second World War that the doctrine of command responsibility for failure to act received its first judicial recognition in an international context. Whilst not provided for in the Charters of the Nürnberg or Tokyo Tribunals, nor expressly addressed in Control Council Law No. 10, a number of States at this time enacted legislation recognising the principle. For example, article 4 of the French Ordinance of 28 August 1944, Concerning the Suppression of War Crimes, provided:

> Where a subordinate is prosecuted as the actual perpetrator of a war crime, and his superiors cannot be indicted as being equally responsible, they shall be considered as accomplices in so far as they have organised or tolerated the criminal acts of their subordinates.[348]

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[346] *Cf.* Commentary to the Additional Protocols, para. 3530.
[347] Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties - Report Presented to the Preliminary Peace Conference, Versailles, 29 March 1919, reprinted in 14 AJIL, 95 (1920), p. 121.
[348] *See* Vol. IV, Law Reports of Trials of War Criminals (UN War Crimes Commission London, 1949) (hereafter "Law Reports") p. 87.

337. Similarly, article IX of the Chinese Law of 24 October 1946, Governing the Trial of War Criminals, stated:

> Persons who occupy a supervisory or commanding position in relation to war criminals and in their capacity as such have not fulfilled their duty to prevent crimes from being committed by their subordinates shall be treated as the accomplices of such war criminals.[349]

338. In a number of cases against German and Japanese war criminals following the Second World War, beginning with the trial of the Japanese General Tomoyuki Yamashita before a United States Military Commission in Manila,[350] the principle of command responsibility for failure to act was relied upon by military courts and tribunals as a valid basis for placing individual criminal responsibility on superiors for the criminal acts of their subordinates. Thus, the United States Supreme Court, in its well-known holding in *In Re Yamashita,* answered in the affirmative the question of whether the law of war imposed on an army commander a duty to take the appropriate measures within his power to control the troops under his command for the prevention of acts in violation of the laws of war, and whether he may be charged with personal responsibility for failure to take such measures when violations result.[351] Similarly, the United States Military Tribunal at Nürnberg, in *United States v. Karl Brandt and others* (hereafter "*Medical Case*"), declared that "the law of war imposes on a military officer in a position of command an affirmative duty to take such steps as are within his power and appropriate to the circumstances to control those under his command for the prevention of acts which are violations of the law of war."[352] Likewise, in *United States v Wilhelm List et al.* (hereafter "*Hostage Case*") it was held that "a corps commander must be held responsible for the acts of his subordinate commanders in carrying out his orders and for acts

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[349] *See* Vol. IV, Law Reports, p.88.
[350] Vol. IV, Law Reports, p.1.
[351] *In Re Yamashita*, 327 US 1, 14-16 (1945). This case was brought before the Supreme Court on petition for writ of *habeas corpus*, and presented the Court with the limited issue of whether the Military Commission in Manila possessed lawful jurisdiction to try Yamashita. It was alleged that such jurisdiction was lacking, *inter alia*, on the ground that the charges preferred against Yamashita failed to allege a violation of the laws of war. In rejecting this contention the Court described "the gist of the charge" against Yamashita as one of an unlawful breach of duty as an army commander to control the operations of his command by permitting them to commit a number of atrocities.
[352] *United States v. Karl Brandt et al.*, Vol. II, Trials of War Criminals before the Nürnberg Military Tribunals under Control Council Law No. 10, (U.S. Govt. Printing Office: Washington 1950) 186, (hereafter "TWC") p. 212 (relating to the criminal responsibility of the accused Schroeder). *See also* the tribunal's finding in relation to the accused Handloser, *ibid.*, p. 207.

which the corps commander knew or ought to have known about.[353] Again, in *United States v Wilhelm von Leeb et al.* (hereafter "*High Command Case*") the tribunal declared that:

> [u]nder basic principles of command authority and responsibility, an officer who merely stands by while his subordinates execute a criminal order of his superiors which he knows is criminal violates a moral obligation under international law. By doing nothing he cannot wash his hands of international responsibility.[354]

339. While different aspects of this body of case law arising out of the Second World War will be considered in greater detail below as the Trial Chamber addresses the more specific content of the requisite elements of superior responsibility under Article 7(3), it is helpful here to further recall the finding made in the trial of the Japanese Admiral Soemu Toyoda before a military tribunal in Tokyo. Declaring that it had carefully studied, and followed, the precedents of other tribunals on the question of command responsibility, the tribunal, after setting out at some length what it considered to be the essential elements of this principle, concluded:

> In the simplest language it may be said that this Tribunal believes that the principle of command responsibility to be that, if this accused knew, or should by the exercise of ordinary diligence have learned, of the commission by his subordinates, immediate or otherwise, of the atrocities proved beyond a shadow of a doubt before this Tribunal or of the existence of a routine which would countenance such, and, by his failure to take any action to punish the perpetrators, permitted the atrocities to continue, he has failed in his performance of his duty as a commander and must be punished.[355]

340. In the period following the Second World War until the present time, the doctrine of command responsibility has not been applied by any international judicial organ. Nonetheless, there can be no doubt that the concept of the individual criminal responsibility of superiors for failure to act is today firmly placed within the corpus of international humanitarian law. Through the adoption of Additional Protocol I, the principle has now been codified and given a clear expression in international conventional law. Thus, article 87 of the Protocol gives expression to

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[353] United States v. Wilhelm List et al., Vol. XI, TWC, 1230, 1303.
[354] United States v Wilhelm von Leeb et al., Vol. XI, TWC, 462, 512.
[355] *United States v. Soemu Toyoda*, Official Transcript of Record of Trial, p. 5006. In greater detail, the tribunal declared the essential elements of command responsibility to be: 1. [...] that atrocities were actually committed; 2. Notice of the commission thereof. This notice may be either: (a.) Actual, as in the case of an accused who sees their commission or who is informed thereof shortly thereafter; or (b.) Constructive. That is, the commission of such a great number of offences within his command that a reasonable man could come to no other conclusion than that the accused must have known of the offences or of the existence of an understood and acknowledged routine for their commission; 3. Power of command. That is, the accused must be proved to have actual authority over the offenders to issue orders to them not to commit illegal acts, and to punish offenders; 4. Failure to take such appropriate measures as are within his power to control the troops under his command and to prevent acts which are violations to the laws of war; 5. Failure to punish offenders. (*Ibid.*, pp. 5005-06).

the duty of commanders to control the acts of their subordinates and to prevent or, where necessary, to repress violations of the Geneva Conventions or the Protocol. The concomitant principle under which a superior may be held criminally responsible for the crimes committed by his subordinates where the superior has failed to properly exercise this duty is formulated in article 86 of the Protocol. A survey of the *travaux préparatoires* of these provisions reveals that, while their inclusion was not uncontested during the drafting of the Protocol, a number of delegations clearly expressed the view that the principles expressed therein were in conformity with pre-existing law. Thus, the Swedish delegate declared that these articles reaffirmed the principles of international penal responsibility that were developed after the Second World War.[356] Similarly, the Yugoslav delegate expressed the view that the article on the duty of commanders contained provisions which had already been accepted in "military codes of all countries".[357]

341. The Trial Chamber, while not determining the accuracy of this latter statement, notes the inclusion of provisions recognising the principle of command responsibility in two highly influential domestic military manuals: the United States Army Field Manual on the law of war, and the British Manual of Military Law.[358] Certainly, such a provision existed in the regulations concerning the application of the international law of war to the armed forces of the SFRY, which, under the heading "Responsibility for the acts of subordinates", provided as follows:

> The commander is personally responsible for violations of the law of war if he knew or could have known that his subordinate units or individuals are preparing to violate the law, and he does not take measures to prevent violations of the law of war. The commander who knows that the violations of the law of war took place and did not charge those responsible for the violations is personally responsible. In case he is not authorized to charge them, and he did not report them to the authorized military commander, he would also be personally responsible.
>
> A military commander is responsible as a participant or an instigator if, by not taking measures against subordinates who violate the law of war, he allows his subordinate units to continue to commit the acts.[359]

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[356] CCDH/I/SR.64, in Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts (Swiss Federal Political Department: Bern 1978) (hereafter "Official Records") Vol. IV, p. 315, para. 61.
[357] CCDH/1/SR.71, in Official Records, Vol. IX, p. 399, para.2.
[358] US Department of Army FM 27-10: The Law of Land Warfare (1956), para 501; The War Office, *The Law of War on Land being Part III of the Manual of Military Law* (The War Office: London 1958), para. 631.
[359] SFRY Federal Secretariat for National Defence, Regulations Concerning the Application of International law to the Armed forces of SFRY (1988) Art. 21, reprinted in M. Cherif Bassiouni's, *The Law of the International Criminal Tribunal for the Former Yugoslavia* (1996), p. 661.

342. The validity of the principle of superior responsibility for failure to act was further reaffirmed in the ILC's 1996 Draft Code of Crimes Against the Peace and Security of Mankind, which contains a formulation of the doctrine very similar to that found in Article 7(3).[360] Most recently, a provision recognising a superior's failure to take all necessary and reasonable measures to prevent or repress the crimes of subordinates under the superior's effective authority and control, where the superior either knew or consciously disregarded information which clearly indicated that the subordinates were committing or about to commit such crimes, as a ground for individual criminal responsibility was made part of the Rome Statute of the International Criminal Court.[361]

343. On the basis of the foregoing, the Trial Chamber concludes that the principle of individual criminal responsibility of superiors for failure to prevent or repress the crimes committed by subordinates forms part of customary international law.

3. The Elements of Individual Criminal Responsibility Under Article 7(3)

(a) Introduction

344. In brief, the Prosecution avers that the recognised legal requirements of the doctrine of superior responsibility, as contained in Article 7(3) of the Statute, are the following:

> (1) The superior must exercise direct and/or indirect command or control whether *de jure* and/or *de facto*, over the subordinates who commit serious violations of international humanitarian law, and/or their superiors.
> (2) The superior must know or have reason to know, which includes ignorance resulting from the superior's failure to properly supervise his subordinates, that these acts were about to be committed, or had been committed, even before he assumed command and control.
> (3) The superior must fail to take the reasonable and necessary measures, that are within his power, or at his disposal in the circumstances, to prevent or punish these subordinates for these offences.[362]

345. In contrast, the Defence for the accused Zejnil Delali} and Hazim Deli}[363] assert that the Prosecution, in order to establish guilt under a command responsibility theory pursuant to Article 7(3), must prove the following five elements:

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[360] ILC Draft Code, p. 34, Art. 6.
[361] Art. 28(2) of the Rome Statute of the International Criminal Court.
[362] Prosecution Response to the Motion to Dismiss, RP D5310-D5311.

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ANNEX XVII

Prosecutor v. Musema, Judgement, ICTR-96-13-T, TC I, 27 January 2001[5]

[5] Full text of judgement available at http://www.ictr.org/wwwroot/default.htm.

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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

United Nations
Nations Unies

Original: ENGLISH

Trial Chamber I

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

Registry: Mr. Agwu U. Okali

Judgement of: 27 January 2000

THE PROSECUTOR
v.
ALFRED MUSEMA

Case No. ICTR-96-13-A

JUDGEMENT AND SENTENCE

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

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

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6. LEGAL FINDINGS

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6.1 Count 1 - Genocide & Count 2 - Complicity in Genocide

884. *In Count 1*, relating to all the facts alleged in the Indictment, the Prosecutor charges Musema with criminal responsibility, under Article 6 (1) and (3) of the Statute, for the crime of *genocide*, a crime punishable under Article 2 (3) (a) of the Statute.
885. As an alternative, the Prosecutor also charges Musema with *Count 2,* in which Musema is held criminally responsible, under Article 6 (1) and (3) of the Statute, for having committed the crime of *complicity in genocide*, a crime punishable under Article 2 (3) (e) of the Statute. Count 2 also relates to all the acts alleged in the Indictment.
886. The Chamber recalls, as it indicated *supra* in its findings on the applicable law, that it holds that an accused is guilty of the crime of genocide if he committed one of the acts enumerated under Article 2 (2) of the Statute against a national, ethnical, racial or religious group, specifically targeted as such, with the intent to destroy, in whole or in part, said group.
887. Furthermore, the Chamber holds that an accused is liable for complicity in genocide if he knowingly and voluntarily aided or abetted or instigated a person or persons to commit genocide, while knowing that such a person or persons were committing genocide, even though the accused himself did not have the specific intent to destroy, in whole or in part, a national, ethnical, racial or religious group, specifically targeted as such.
888. As Count 2 stands in the alternative to Count 1, the Chamber will now present its findings with respect to both counts by examining, firstly, on the basis of the factual findings set forth above in Chapter 5, which of the acts alleged in the Indictment to have been committed by Musema it considers to have been established beyond a reasonable doubt and for which he incurs responsibility. The Chamber will then determine whether those acts are constituent elements of the crime of genocide and, if not, whether they constitute elements of the crime of complicity in genocide.

With respect, firstly, to the facts alleged in the Indictment, the Chamber is satisfied beyond any reasonable doubt, on the basis of the factual findings, of the following:

889. *Firstly*, regarding the allegations presented under paragraph 4.8 of the Indictment, according to which Musema, in concert with others, ordered and abetted in the rape of Annunciata, a Tutsi, and thereafter ordered that she and her son be killed, the Chamber holds that even if it is proven that Musema ordered that Annunciata be raped, such order, by and of itself, does not suffice for him to incur individual criminal responsibility, given that no evidence has been adduced to show that the

order was executed to produce such result, namely the rape of Annunciata. Nor has it been proven that Musema ordered that she and her son be killed.

890. *Secondly*, the Chamber is satisfied that it has been established beyond a reasonable doubt that on 26 April 1994, Musema led and participated in an attack on Gitwa Hill. Musema arrived at the site of the attack in a Daihatsu vehicle belonging to the Gisovu Tea Factory. He carried a firearm and was accompanied by employees of the Gisovu Tea Factory wearing blue uniforms. Musema and other persons, some of whom wore banana leaves and *Imihurura* belts, attacked Tutsi refugees. It has also been established beyond a reasonable doubt that Musema shot into the crowd of refugees. The attackers killed resolutely, and few refugees survived the large-scale attack.

891. The Chamber finds that Musema incurs individual criminal responsibility for the above-mentioned acts, on the basis of the provisions of Article 6 (1) of the Statute, for having ordered and, by his presence and participation, having aided and abetted in the murder of members of the Tutsi ethnic group, and for the causing of serious bodily and mental harm to members of the said group.

892. With respect to the Prosecutor's contention that Musema could additionally be held criminally responsible, under Article 6 (3) of the Statute, the Chamber finds that for an accused to be held criminally responsible under these statutory provisions, the Prosecutor must establish: (1) that one of the acts referred to under Articles 2 to 4 of the Statute was, indeed, committed by a subordinate of the Accused; (2) that the accused knew or had reason to know that the subordinate was about to commit such act or had done so; and (3) that the accused failed to take the necessary and reasonable measures to prevent the commission of said act by the subordinate or to punish him for the criminal conduct.

893. The Chamber notes that, in the instant case, it has been established that employees of the Gisovu Tea Factory were among the attackers. The Chamber is of the view that their participation resulted, inevitably, in the commission of acts referred to under Articles 2 to 4 of the Statute, including, in particular, causing serious bodily and mental harm to members of the Tutsi group.

894. The Chamber finds that it has also been established that Musema was the superior of said employees and that he held not only *de jure* power over them, but also *de facto* power.[1] Considering that Musema was personally present at the attack sites, the Chamber is of the opinion that he knew or, at least, had reason to know that his subordinates were about to commit such acts or had done so. The Chamber notes that the Accused nevertheless failed to take the necessary and reasonable measures to prevent the commission of said acts by his subordinates, but rather abetted in the commission of those acts, by his presence and personal participation.

895. Consequently, the Chamber finds that, for the acts committed by the employees of the Gisovu Tea Factory during the attack of 26 April 1994 on Gitwa Hill, Musema incurs individual criminal responsibility, as their superior, on the basis of the provisions of Article 6 (3) of the Statute.

896. *Thirdly*, the Chamber is satisfied beyond a reasonable doubt that between 27 April and 3 May 1994, Musema participated in the attack on Rwirambo Hill. Musema arrived in a red Pajero, followed by four Daihatsu pick-ups from the Gisovu Tea Factory which were carrying persons that Witness R described as *Interahamwe*. The witness recognized those persons from their blue uniforms which had the name "*Usine à thé Gisovu*" printed on the back. Musema was armed with a rifle. While trying to flee, Witness R's arm was injured from a bullet which came from Musema's direction.

897. The Chamber finds that, for the above-mentioned acts, Musema incurs individual criminal responsibility, on the basis of the provisions of Article 6 (1) of the Statute, for having committed and, by his presence and participation, having aided and abetted in the causing of, serious bodily and mental harm to members of the Tutsi group.

898. With respect to the Prosecutor's argument that Musema could also be held responsible under Article 6 (3) of the Statute, the Chamber finds, firstly, that among the attackers at Rwirambo were persons identified as employees of the Gisovu Tea Factory. The Chamber is of the view that their participation resulted, inevitably, in the commission of acts referred to under Articles 2 to 4 of the

Statute, including, in particular, causing serious bodily and mental harm to members of the Tutsi group.

899. The Chamber finds that it has also been established, as held *supra*, that Musema was the superior of said employees and that he held not only *de jure* power over them, but also *de facto* power. Noting that Musema was personally present at the attack sites, the Chamber is of the opinion that he knew or, at least, had reason to know that his subordinates were about to commit such acts or had done so. The Chamber notes that Musema, nevertheless, failed to take the necessary and reasonable measures to prevent the commission of said acts by his subordinates, but rather abetted in their commission, by his presence and by his personal participation.

900. Consequently, the Chamber finds that, for the acts committed by the employees of the Gisovu Tea Factory during the attack on Rwirambo Hill, Musema incurs individual criminal responsibility, as their superior, on the basis of the basis of Article 6 (3) of the Statute.

901. *Fourthly*, on the basis of numerous corroborating testimonies, the Chamber is satisfied that it has been established beyond any reasonable doubt that on 13 May 1994 a large-scale attack was launched at Muyira Hill against 40,000 Tutsi refugees. The attack began in the morning. Some of the attackers arrived on Muyira Hill on foot while others came in vehicles, including Daihatsus belonging to the Gisovu Tea Factory. Employees of the Gisovu Tea Factory dressed in their uniforms, gendarmes, soldiers, civilians and members of the *Interahamwe* were among the attackers. The attackers were armed with firearms, grenades, rocket launchers and traditional weapons. They chanted anti-Tutsi slogans.

902. The Chamber is satisfied beyond a reasonable doubt that Musema was among the leaders of the attack. He arrived at the location in his red Pajero. He was armed with a rifle which he used during the attack. Thousands of unarmed Tutsi men, women and children were killed during the attack, while others were forced to flee for their lives.

903. The Chamber finds that, for the acts mentioned *supra*, Musema incurs individual criminal responsibility, on the basis of the provisions of Article 6 (1) of the Statute, for having ordered and, by his presence and participation, aided and abetted in the murder of members of the Tutsi group and the causing of serious bodily and mental harm to members of said group.

904. The Chamber notes, on the basis of the factual findings set forth *supra*, that it has been established beyond a reasonable doubt, that employees of the Gisovu Tea Factory were among the attackers. The Chamber is of the view that their participation resulted, inevitably, in the commission of acts referred to under Articles 2 to 4 of the Statute, including, in particular, the killing of members of the Tutsi group and causing serious bodily and mental harm to members of the said group.

905. The Chamber also finds that it has been established that Musema was the superior of the said employees and that he had not only *de jure* power over them, but also *de facto* power. Noting that Musema was himself present at the attack sites, the Chamber is of the opinion that he knew or, at least, had reason to know that his subordinates were about to commit such acts or had done so. The Chamber notes that the Accused, nevertheless, failed to take necessary and reasonable measures to prevent the commission of said acts by his subordinates, but rather abetted in the commission of those acts, by his presence and personal participation.

906. Consequently, the Chamber finds that, for the acts committed by the employees of the Gisovu Tea Factory during the attack of 13 May 1994, Musema incurs individual criminal responsibility, as their superior, on the basis of the provisions of Article 6 (3) of the Statute.

907. *Fifthly*, the Chamber finds that it has been established beyond a reasonable doubt that on 13 May 1994, during the above-mentioned attack on Muyira Hill, Musema, having been told by a policeman called Ruhindara that a young Tutsi woman, a teacher by the name Nyiramusugi, was still alive, asked Ruhindara to catch her and to bring her to him. With the help of four young men, Ruhindara dragged the woman on the ground and brought her to Musema who had his rifle in his hand. The four young men, who were restraining Nyiramusugi, dropped her on the ground and pinned her down. Two of them held her arms, while the other two clamped her legs. The latter two opened the legs of the young woman and Musema tore her garments and undergarments, before

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undressing himself. In a loud voice, Musema said: "The pride of the Tutsi is going to end today". Musema raped Nyiramusugi. During the rape, as Nyiramusugi struggled, Musema immobilized her by taking her arm which he forcibly held to her neck. Standing nearby, the four men who initially held Nyiramusugi to the ground watched the scene. After Musema's departure, they came back to the woman and also raped her in turns. Thereafter, they left Nyiramusugi for dead.

908. The Chamber finds that Musema incurs individual criminal responsibility under Article 6 (1) of the Statute, for having raped, in concert with others, a young Tutsi woman and for thus having caused serious bodily and mental harm to a member of the Tutsi group. The Chamber also finds that Musema incurs individual criminal responsibility under Article 6(1) of the Statute, for having abetted others to rape the girl, by the said act of rape and the example he thus set.

909. With respect to the Prosecutor's argument that Musema could also be liable under Article 6(3) of the Statute, the Chamber notes that the Prosecutor has not established, nor even alleged, that among the assailants who attacked Nyiramusugi there were employees of the Gisovu Tea Factory or other persons who were Musema's subordinates. Therefore, the Chamber holds that Musema does not incur individual criminal responsibility under Article 6(3) of the Statute for Nyiramusugi's rape.

910. *Sixthly*, the Chamber is satisfied beyond a reasonable doubt that another large-scale attack took place on Muyira Hill on 14 May 1994 against Tutsi civilians. The attackers, who numbered about 15 000, were armed with traditional weapons, firearms and grenades. They chanted slogans. Musema, who was armed with a rifle, was one of the leaders of that attack.

911. Furthermore, the Chamber is satisfied beyond a reasonable doubt that Musema participated in an attack which took place in mid-May 1994 on Muyira Hill against Tutsi civilians and that Musema led the attackers, who included the *Interahamwe* and employees of the Gisovu Tea Factory. Musema's red Pajero and vehicles belonging to the Gisovu Tea Factory were seen at the site of the attack. Musema launched the attack by shooting his rifle, and he personally shot at the refugees, although it has not been established beyond a reasonable doubt that he killed anyone.

912. The Chamber finds that, for the above-mentioned acts, Musema incurs individual criminal responsibility, under Article 6(1) of the Statute, for having ordered, committed and, by his presence and participation, aided and abetted in the causing of serious bodily and mental harm to members of the Tutsi group.

913. The Chamber notes that, on the basis of the factual findings set forth *supra,* it has been established beyond a reasonable doubt that employees of the Gisovu Tea Factory were among the attackers. The Chamber holds that the participation of said employees resulted, inevitably, in the commission of acts referred to under Articles 2 to 4 of the Statute, including, in particular, the causing of serious bodily and mental harm to members of the Tutsi group.

914. The Chamber finds that it has also been established that Musema was the superior of said employees and that he not only held *de jure* power over them, but also *de facto* power. Considering that Musema was personally present at the attack sites, the Chamber is of the view that he knew or, at least, had reason to know that his subordinates were about to commit such acts or had done so. The Chamber notes that the Accused, nevertheless, failed to take the necessary and reasonable measures to prevent the commission of said acts by his subordinates, but rather abetted in the commission of those acts, by his presence and personal participation.

915. Consequently, the Chamber finds that for the acts committed by the employees of the Gisovu Tea Factory on Muyira Hill, Musema incurs individual criminal responsibility as their superior, on the basis of the provisions of Article 6(3) of the Statute.

916. *Seventhly*, the Chamber is satisfied that it has been established beyond a reasonable doubt that Musema participated in an attack on Mumataba Hill in mid-May 1994. Among the attackers, who numbered between 120 and 150, were employees of the Gisovu Tea Factory armed with traditional weapons, and communal policemen. In the presence of Musema, vehicles of the tea factory transported the attackers to the sites. The attack, which was carried out against some 2000 to 3000 Tutsis who had sought refuge in the house of one Sakufe and in the vicinity of the said

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house, was sparked off by blowing whistles. The Chamber is satisfied beyond any reasonable doubt that Musema was present, that he stayed with the others near his vehicle during the attack, and that he left the site with the attackers.

917. The Chamber finds that, for these acts, Musema incurs individual criminal responsibility, on the basis of the provisions of Article 6(1) of the Statute, for having, by his presence and the fact that he witnessed the attack, aided and abetted in the murder of members of the Tutsi group and in the causing of serious bodily and mental harm to members of the said group.

918. The Chamber notes that it has been established beyond a reasonable doubt that employees of the Gisovu Tea Factory were among the attackers and that they were transported to the attack sites by vehicles of the factory, in the presence of Musema. The Chamber is of the view that their participation resulted, inevitably, in the commission of acts referred to under Articles 2 to 4 of the Statute, including, in particular, the killing of members of the Tutsi group and causing serious bodily and mental harm to members of the said group.

919. The Chamber finds that it has been established that Musema was the superior of the said employees and that he had not only *de jure* power over them, but also *de facto* power. Considering that Musema was himself present at the attack sites, the Chamber is of the opinion that he knew or, at least, had reason to know that his subordinates were about to commit such acts or had done so. The Chamber notes that Musema, nevertheless, failed to take the necessary and reasonable measures to prevent the commission of said act by his subordinates, but rather abetted his subordinates in the commission of those acts, by his presence and by his personal participation.

920. Consequently, the Chamber finds that, for the acts committed by the employees of the Gisovu Tea Factory during the Mumataba attack, Musema incurs individual criminal responsibility, as their superior, on the basis of the provisions of Article 6(3) of the Statute.

921. *Eighthly*, the Chamber is convinced beyond reasonable doubt that Musema participated in the attack on Nyakavumu cave. Musema was aboard his Pajero in a convoy, travelling towards the cave, which included tea factory Daihatsus aboard of which were tea factory workers. It has been proved beyond reasonable doubt that Musema was armed with a rifle, and that he was present at the attack during which assailants closed off the entrance to the cave with wood and leaves, and set fire thereto. The Chamber finds that it has been proven beyond reasonable doubt that over 300 Tutsi civilians who had sought refuge in the cave died as a result of the fire.

922. The Chamber finds that, for the above-mentioned acts, Musema incurs individual criminal responsibility, under Article 6(1) of the Statute, for having committed and, by his presence, aided and abetted in the commission of serious bodily and mental harm to members of the Tutsi group.

923. The Chamber notes that, on the basis of the factual findings set forth *supra,* it has been established beyond reasonable doubt that Gisovu Tea Factory workers were among the attackers. The Chamber holds that the participation of these employees resulted, inevitably, in the commission of acts referred to under Articles 2 to 4 of the Statute, including, in particular, the causing of serious bodily and mental harm to members of the Tutsi group.

924. The Chamber finds that it has also been established that Musema was the superior of said employees and that he not only held *de jure* power over them, but also *de facto* control. Considering that Musema was personally present at the attack sites, the Chamber is of the view that he knew or, at least, had reason to know that his subordinates were about to commit such acts or had done so. The Chamber notes that the Accused, nevertheless, failed to take the necessary and reasonable measures to prevent the commission of said acts by his subordinates, but rather abetted in the commission of those acts, by his presence and personal participation.

925. Consequently, the Chamber finds that for the acts committed by the employees of the Gisovu Tea Factory on Muyira Hill, Musema incurs individual criminal responsibility as their superior, on the basis of the provisions of Article 6(3) of the Statute.

926. It emerges from the foregoing findings that the Chamber is satisfied beyond any reasonable doubt that Musema is criminally responsible, under Article 6 (1) of the Statute, for having ordered, committed and, by his presence and his participation aided and abetted in the killing of members

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of the Tutsi group, to whom he caused serious bodily and mental harm. Moreover, the Chamber is satisfied beyond any reasonable doubt that Musema incurs further criminal responsibility under Article 6(3) of the Statute for the acts committed by the employees of the Gisovu Tea Factory.

Regarding ,secondly, whether the above-mentioned acts were committed against the Tutsi group as such, and whether Musema possessed genocidal intent at the time those acts were committed:

927. As held in the findings regarding the applicable law on the determination of genocidal intent, the Chamber is of the view that it is necessary to infer such intent by deduction from the material evidence submitted to the Chamber, including the evidence which demonstrates a consistent pattern of conduct by Musema.
928. The Chamber notes, firstly, that based on numerous submissions of evidence proffered at the trial, and, in particular, on acts referred to in paragraphs 4.4, 4.5, and 4.11 of the Indictment (2), it has been proven that, at the time of the facts alleged in the Indictment, numerous atrocities were committed against the Tutsis in Rwanda. Musema acknowledged that roadblocks manned by individuals, some of whom were armed with machetes and an assortment of weapons, were erected at the time all along the road from Kigali to Gitarama. Musema testified that he personally saw several bodies along the road and also witnessed incidents of looting. Musema conceded that those people had been killed at the roadblocks because they were accused of being *Inyenzi,* a term which at the time was equivalent to Tutsi.
929. In particular, Musema acknowledged that from April to June 1994, thousands of men, women and children, predominantly Tutsis, sought refuge in the Bisesero area. Musema admitted that those people were targets of regular attacks from approximately 9 April to 30 June 1994. The assailants used guns, grenades, machetes, spears, pangas, cudgels and other weapons to kill the Tutsis. In the Bisesero area, the attacks resulted in thousands of deaths and injuries among these men, women and children.
930. Musema also conceded that around 13 May 1994 a large-scale attack was launched against Tutsi civilians who had taken refuge on Muyira Hill in Gisovu *Commune* and that those Tutsis then became victims of acts of genocide. Musema admitted, in general, that during the months of April, May and June 1994, in the *communes* of Gisovu and Gishyita, in Kibuye *Préfecture*, acts of genocide were committed against the Tutsi ethnic group.
931. Consequently, the Chamber notes that the above acts, with which Musema and his subordinates are charged, were committed as part of a widespread and systematic perpetration of other criminal acts against members of the Tutsi group. Furthermore, the Chamber notes that Musema acknowledged that genocide directed against the Tutsis took place at the time of the events alleged in the Indictment and at the very sites where the acts with which he is charged were committed.
932. Next, and foremost, the Chamber notes that, on the basis of corroborating testimonies presented, the participation by Musema in the attacks against members of the Tutsi group has been proved beyond a reasonable doubt. The anti-Tutsi slogans chanted during the attacks, including the slogan "Let's exterminate them", directed at the Tutsis, clearly demonstrated that the objective of the attackers, including Musema, was to destroy the Tutsis. The Chamber is satisfied that Musema, who held *de facto* authority, by virtue *inter alia* of his position as Director of the Gisovu Tea Factory and as an educated man with political influence, ordered the commission of crimes against members of the Tutsi group and abetted in said crimes by participating personally in them. These attacks were pointedly aimed at causing harm to and destroying the Tutsis. The victims, namely men, women and children, were deliberately and systematically targeted on the basis of their membership in the Tutsi ethnic group. Certain degrading acts were purposely intended to humiliate them for being Tutsis.
933. Accordingly, the Chamber notes that on the basis of the evidence presented, it emerges that acts of serious bodily and mental harm, including rape and other forms of sexual violence were often accompanied by humiliating utterances, which clearly indicated that the intention underlying each

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specific act was to destroy the Tutsi group as a whole. The Chamber notes, for example, that during the rape of Nyiramusugi Musema declared: "The pride of the Tutsis will end today". In this context, the acts of rape and sexual violence were an integral part of the plan conceived to destroy the Tutsi group. Such acts targeted Tutsi women, in particular, and specifically contributed to their destruction and therefore that of the Tutsi group as such. Witness N testified before the Chamber that Nyiramusugi, who was left for dead by those who raped her, had indeed been killed in a way. Indeed, the Witness specified that "what they did to her is worse than death".

934. Therefore, the Chamber is satisfied beyond a reasonable doubt that at the time of commission of the above-mentioned acts, which the Chamber considers to have been established, Musema had the intent to destroy the Tutsi ethnic group as such.

935. On that basis, the Chamber recalls that, with regard to the issue of whether the Tutsis were, indeed, a protected group within the meaning of the Genocide Convention, at the time of the events alleged in the Indictment, the Defence did admit that acts of genocide were committed against the Tutsi ethnic group. Consequently, after having considered all the evidence submitted, and the political, social and cultural context prevailing in Rwanda, the Chamber holds that, at the time of the alleged events, the Tutsi group did constitute and still constitutes a protected group within the meaning of the Genocide Convention and , thereby, under Article 2 of the Statute.

936. In conclusion, from all the foregoing, the Chamber is satisfied beyond a reasonable doubt that: *firstly,* Musema incurs individual criminal responsibility for the above-mentioned acts, which are constituent elements of the crime of genocide; *secondly*, that said acts were committed by Musema with the specific intent to destroy the Tutsi group, as such; and *thirdly*, that the Tutsi group is one of the groups legally protected from the crime of genocide. Musema incurs individual criminal responsibility under Article 6(1) and (3) of the Statute for the crime of genocide, a crime punishable under Article 2(3)(a) of the Statute.

6.2 Count 3 - Conspiracy to commit genocide

937. Under Count 3, which relates to all acts alleged in the Indictment, the Prosecutor charges Musema with the crime of conspiracy to commit genocide, a crime punishable under Article 2 (3) (b) of the Statute.

938. The Chamber notes that the acts thus alleged by the Prosecutor under Count 3 are the same as the acts alleged under Count 1(genocide) and Count 2 (complicity in genocide).

939. Regarding the law applicable to the crime of conspiracy to commit genocide, the Chamber held *supra* that:

> "... conspiracy to commit genocide is to be defined as an agreement between two or more persons to commit the crime of genocide".(3)

940. The Chamber notes that the Prosecutor has neither clearly alleged, nor, above all, adduced evidence that Musema, indeed, conspired with other persons to commit genocide and that he and such persons reached an agreement to act to that end.

941. Therefore, the Chamber holds that Musema does not incur criminal responsibility for the crime of conspiracy to commit genocide, under Count 3, all the more so as, on the basis of the same acts, the Prosecutor presented evidence of Musema's participation in the commission of genocide, the substantive offence in relation to conspiracy.

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

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942. *Count 5* of the Indictment charges Musema with *crime against humanity (extermination)*, pursuant to Articles 3(b), 6(1) and 6(3) of the Statute, for the acts alleged in paragraphs 4.1 to 4.11 of the Indictment.

943. The Chamber notes that the Defence has made certain admissions *inter alia*: that the Tutsi were either a racial or ethnic group; that there were widespread or systematic attacks throughout Rwanda, between the period 1 January and 31 December 1994 and these attacks were directed against civilians on the grounds, ethnic affiliation and racial origin. The Chamber finds that the Prosecutor is discharged of the burden of proving these elements in respect of crime against humanity (extermination).

944. The Chamber notes that Article 6(1) of the Statute, provides that a person who "planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in Articles 2 to 4 of the present Statute, shall be individually responsible for the crime." It is also noted that Article 6(3) of the Statute provides that "acts [...] committed by a subordinate does not relieve his or her superior of criminal responsibility if he or she knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof".

945. The Chamber has found, beyond a reasonable doubt that Musema:

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

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

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

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

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

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

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

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

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

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

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

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

6.4 Count 4: Crime against Humanity (murder)

952. *Count 4* of the Indictment charges Musema with *crime against humanity (murder)*, pursuant to Articles 3(a), 6(1) and 6(3) of the Statute, for the acts alleged in paragraphs 4.1 to 4.11 of the Indictment.

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

954. The Chamber concurs with the reasoning in *Akayesu* that:

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

Chamber finds that it is not justifiable to convict an accused of two offences in relation to the same set of facts where (a) one offence is a lesser included offence of the other, for example, murder and grievous bodily harm, robbery and theft, or rape and indecent assault; or (b) where one offence charges accomplice liability and the other offence charges liability as a principal, e.g. genocide and complicity in genocide."(15)

955. The Chamber also concurs with the reasoning in the *Rutaganda* Judgement which states that:

"murder and extermination, as crimes against humanity, share the same constituent elements of the offence, that it is committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds. Both murder and extermination are constituted by unlawful, intentional killing. *However,* murder is the killing of one or more individuals, whereas extermination is a crime which is directed against a group of individuals....."(16) *(Emphasis added)*

956. The Chamber notes that in the *Akayesu* Judgement, a series of acts of murder, as alleged in individual paragraphs of the Indictment were held collectively to constitute an act of extermination. In the *Rutaganda* Judgement a single act of an attack on the "ETO", although charged *inter alia* both as murder and as extermination, was held to constitute extermination, and not murder, because it was found to be a killing of a collective group of individuals.

957. In this case, the killings at Gitwa hill, Muyira hill, Rwirambo hill, Mumataba hill and at the Nyakavumu cave are killings of collective groups of individuals, hence constituting extermination and not murder. Therefore, the Accused cannot be held culpable for crime against humanity (murder), in respect of these killings. The Chamber recalls its findings in Section 6.3 above.

958. The Chamber therefore finds that Musema is not individually criminally responsible, for crime against humanity (murder), pursuant to Article 3(a), 6(1) and 6(3) of the Statute, and as charged in Count 4 of the Indictment.

6.5 Count 6: Crime against Humanity (other inhumane acts)

959. *Count 6* of the Indictment charges Musema with *crime against humanity (other inhumane acts)*, pursuant to Articles 3(i), 6(1) and 6(3) of the Statute, for the acts alleged in paragraphs 4.1 to 4.11 of the Indictment.

960. The Chamber has already defined "Other inhumane Acts", as envisaged in Article 3 of the Statute. (17)

961. The Chamber finds that the Prosecutor has failed to prove beyond a reasonable doubt that Musema is individually criminally responsible for any act, falling within the ambit of crime against humanity (other inhumane acts), pursuant to Articles 3(i), 6(1) and 6(3) of the Statute, as charged in Count 6 of the Indictment.

6.6 Count 7: Crime Against Humanity (rape)

962. *Count 7* of the Indictment charges Musema with *crime against humanity (rape)*, pursuant to Articles 3(g), 6(1) and 6(3) of the Statute, for the acts alleged in paragraphs 4.1 to 4.11 of the Indictment.

963. In light of its factual findings with regard to the allegations in paragraph 4.10 of the Indictment (18), the Chamber considers the criminal responsibility of the Accused, pursuant to Articles 6(1) and 6(3) of the Statute.

964. The Chamber notes that the Defence has made certain admissions *inter alia*: that the Tutsi were a racial or ethnic group; that there were widespread or systematic attacks through out Rwanda,

between the period 1 January and 31 December 1994 and these attacks were directed against civilians on the grounds of ethnic affiliation and racial origin. The Chamber finds that the Prosecutor is discharged of the burden of proving these elements in respect of crime against humanity (rape).

965. The Chamber has adopted the definition of rape set forth in the *Akayesu* Judgement, as "a physical invasion of a sexual nature, committed on a person under circumstances which are coercive"(19) and the definition of sexual violence set forth in the *Akayesu* Judgement as "any act of a sexual nature which is committed on a person under circumstances which are coercive."(20)
966. The Chamber has made the factual finding that on 13 May 1994 the Accused raped a Tutsi woman called Nyiramusugi. The Chamber recalls its finding in Section 6.3 *supra*, that the Accused had knowledge of a widespread or systematic attack on the civilian population. The Chamber finds that the rape of Nyiramusugi by the Accused was consistent with the pattern of this attack and formed a part of this attack.
967. The Chamber therefore finds, that Musema is individually criminally responsible for crime against humanity (rape), pursuant to Articles 3(g) and (6)(1) of the Statute.
968. However, the Chamber finds, that the Prosecutor has failed to prove beyond a reasonable doubt any act of rape that had been committed by Musema's subordinates and that Musema knew or had reason to know of this act and he failed to take reasonable measures to prevent the said act or to punish the perpetrators thereof, following the commission of such act. The Prosecutor has therefore not proved beyond a reasonable the individual criminal responsibility of Musema, pursuant to Articles 3(g) and 6(3) of the Statute, as charged in Count 7 of the Indictment.

6.7 Counts 8 and 9 -Violation of Common Article 3 and Additional Protocol II

969. *Counts 8* and *9* of the Indictment charge Musema with *serious violations of Common Article 3 of the 1949 Geneva Conventions and the 1977 Additional Protocol II thereto*, as incorporated in Article 4 of the Statute of the Tribunal.
970. The Chamber notes that the Defence admitted that, at the time of the events alleged in the Indictment, there existed an internal armed conflict meeting the temporal and territorial requirements of both Common Article 3 and Additional Protocol II. Further, evidence presented during the trial, in particular the testimony of Musema, demonstrated the full extent of the conflict between the dissident armed forces, the FPR, and the Government forces, the FAR, in Rwanda throughout the period the offences were said to have been perpetrated.
971. On the basis of the above, the Chamber finds that it has been established beyond reasonable doubt that at the time of the events alleged in the Indictment there existed a non-international armed conflict meeting the requirements of Common Article 3 and Additional Protocol II.
972. The Chamber is also satisfied beyond reasonable doubt that the victims of the offences alleged, comprised of unarmed civilians, men, women and children, are protected persons under Common Article 3 and Additional Protocol II. Moreover, the Chamber notes that the Defence admitted that the victims of the alleged crimes were individuals protected under Common Article 3 and Additional Protocol II.
973. The Chamber recalls, as developed in Section 3.4 of the Judgement on the Applicable Law, that offences must be closely related to the hostilities or committed in conjunction with the armed conflict to constitute serious violations of Common Article 3 and Additional Protocol II. In other words, there must be a nexus between the offences and the armed conflict.
974. The burden rests on the Prosecutor to establish, on the basis of the evidence adduced during trial, that there exists a nexus, on the one hand, between the acts for which Musema is individually criminally responsible, including those for which he is individually criminally responsible as a superior, and, on the other, the armed conflict. In the opinion of the Chamber, the Prosecutor has failed to establish that there was such a nexus.

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975. Consequently, the Chamber finds Musema not guilty of serious violations of Common Article 3 and Additional Protocol II as charged in Counts 8 and 9 of the Indictment.

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1. See section 5.2 of the Judgement.

2. See Section 4.1.of the Judgement..

3. See Section 3.2.3 of this Judgement.

4. *See Supra* Section 5.2.

5. *See Supra* Section 5.2.

6. *See Supra* Section 5.2.

7. *See Supra* Section 5.2.

8. *See Testimony of the Accused, transcript of 24 May 1999*. English translation: "considering the killings that were taking place inside the country there was this genocide which had been committed, and which was being committed".

9. *See Testimony of the Accused, transcript of 24 May 1999*. English translation: "people were massacred in Kibuye and other Prefectures ...".

10. *See Testimony of the Accused, transcript of 24 May 1999*. English translation: "Babies, elderly women, children who died, who were massacred by butchers. They were butchered."

11. *See* Defence exhibit D36. English translation: " Since 06/04, the country has been living through an incredible blood bath: ethnic unrests - massacres - thefts - all that can or rather all that cannot be imagined at the level of human horror ... Runegeri is more or less affected. But Byumba is 100% affected ... It is estimated that about hundred of thousands of people [*sic*] have been killed ... Thousands and thousands of displaced people, how dreadful in addition to the thousands of corpses!"

12. *See* Defence exhibit D76. "At the level of human rights, the massacres have been halted in the Government zone but still to continue in the FPR zone. Humanitarian assistance is expected but has not arrived". [Unofficial translation]

13. *See Supra* Section 5.4.

14. *See Supra* Section 5.4.

15. *See Akayesu* Judgement, para. 468.

16. *See Rutaganda* Judgement, para.422.

17. *See Supra* Section 3.3.

18. *See Supra* Section 5.3.

19. *See Supra*, Section 3.3.

20. *See Supra*, Section 3.3.