625)

SCSL-04-15-T
(24951-25046)

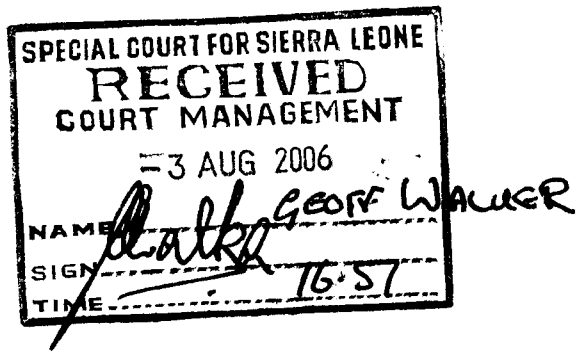
24951

THE SPECIAL COURT FOR SIERRA LEONE

BEFORE:
Hon. Justice Bankole Thompson, Presiding
Hon. Justice Benjamin Itoe,
Hon. Justice Pierre Boutet

Registrar: **Mr. Lovemore Green Munlo, SC**

Date filed: **3rd August 2006**



The Prosecutor

-v-

Issa Hassan Sesay

Case No: SCSL – 04 – 15 – T

PUBLIC

APPLICATION FOR LEAVE TO APPEAL THE DECISION (1st AUGUST 2006) ON DEFENCE MOTION TO REQUEST THE TRIAL CHAMBER TO RULE THAT THE PROSECUTION MOULDING OF EVIDENCE IS IMPERMISSIBLE

Office of the Prosecutor
Christopher Staker
James Johnson
Peter Harrison

Defence
Wayne Jordash
Sareta Ashraph

Defence Counsel for Kallon; Shekou Touray and Charles Taku
Defence Counsel for Gbao; Andreas O'Shea and John Cammegh

1. The Defence submit that the Decision (1st August 2006) on Defence Motion ("The Motion") to Request the Trial Chamber to Rule that the Prosecution Moulding of Evidence is Impermissible ("The Decision") is fundamentally flawed and undermines the Accused's rights to a fair trial pursuant to Article 17(2) and (4) of the Statute of the Special Court for Sierra Leone ("The Statute"). In particular the Decision denies the Accused equality of arms, namely the right to a fair hearing and a reasonable opportunity to present his case. In summary the Decision reflects a failure by the Trial Chamber to conduct a proper examination of the submissions and available evidence relied upon by the Accused in seeking to establish wrongdoing on the part of the Prosecution.

2. The Trial Chamber failed to address the significance of the Prosecution's transparent and intentional failure to admit or deny (*repeatedly*) serious allegations of prohibited conduct. The failure to carry out a proper examination of the Prosecution's obfuscation and the refusal to draw reasonable inferences from it denies the Defence its right to procedural equality and undermines the integrity of the whole judicial process. In circumstances where it is alleged that the Prosecution is acting in bad faith[1] and the misconduct alleged is neither admitted nor denied there arises a clear inference of wrongdoing which cannot, as a matter of law and procedural equality, be simply ignored by the Trial Chamber.

3. The failure by the Trial Chamber to demand from the Prosecution that it address its mind to specific allegations of misconduct, when it has (i) repeatedly refused to admit or deny the allegations and (ii) when an admission would amount to a clear breach of established judicial precedent[2] (acknowledging that the conduct

[1] See Sesay Motion to Request the Trial Chamber to Rule that the Prosecution's Moulding of the Evidence is Impermissible and a Breach of Article 17 of the Statute of the Special Court, SCSL-04-15-T-541 (3rd May 2006) (18557 – 18562) at Para.10 wherein the Defence alleged that, "It is difficult to conceive how a Prosecutor could engage knowingly and systematically in a procedure, which has been prohibited by the Trial Chamber, whilst acting in good faith. It is submitted that this, if proven or admitted, would prima facie be evidence of bad faith. Moreover any ongoing attempt to obfuscate this conduct, by failing to admit or deny allegations of impropriety, would be powerful evidence of bad faith".

[2] Prosecutor v. Sesay, Decision and Order on Defence Preliminary Motion for Defects in the Form of the Indictment; SCSL-03-05-PT-055, 13th October 2003, Para. 33 & Supra. Para. 11 & Prosecutor v. Kupreskic, Appeal Judgement, Case No. IT-95-16-A, 23rd October 2001, Para. 82; [2] Prosecutor v. Brdanin

would undermine a fair trial), is tantamount to judicial acquiescence and/or approval in both the concealment of the conduct and the conduct itself. It is submitted that the Decision suggesting that a "prima facie showing of foul play" could not be inferred from a party refusing *repeatedly* to admit or deny serious allegations of misconduct (but could only be shown through other means) is a conclusion which denies the Defence procedural equality and undermines a fair trial. The Application for Leave to Appeal the Decision thus readily satisfies the criteria of "exceptional circumstances and irreparable prejudice" in order to satisfy the grant of leave to appeal criteria, as outlined by Trial Chamber I.[3]

Background to the Application for Leave

4. On the 3rd May 2006, the Defence filed a "Motion to Request the Trial Chamber to Rule that the Prosecution's Moulding of the Evidence was Impermissible and a Breach of Article 17 of the Statute of the Special Court". The Motion alleged in clear terms that the Prosecution were engaged in an impermissible process which involved the improper "moulding" of their case to suit the evidence as it unfolded.[4] The Defence Motion referred to the three previous occasions when the Prosecution had refused to answer the same allegation.[5]

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and Talic, IT-99-36, Decision on Form of Further Amended Indictment and Prosecution Application to Amend, 26th June 2001, Para. 11.

[3] See Decision on Defence Applications for Leave to Appeal Ruling of the 3rd February 2005 on the Exclusion of Statements of Witness TF1-141, SCSL-04-15-T-357, (28th April 2005) (11275-11286) and Decision on Application for Leave to Appeal the Ruling (2nd May 2005) on Sesay – Motion Seeking Disclosure of the Relationship Between Governmental Agencies of the United States of America And the Office of the Prosecutor, SCSL- 04-15-T-401 (15th June 2005) (12112-12119).

[4] Sesay Motion to Request the Trial Chamber to Rule that the Prosecution's Moulding of the Evidence is Impermissible and a Breach of Article 17 of the Statute of the Special Court, SCSL-04-15-T-541, (3rd May 2006) (18557 – 18562) at Para.1,3, 6, and 7.

[5] See Defence Motion Requesting the Exclusion of Paragraphs 1,2,3,11 and 14 of the Additional Information Provided by Witness TF1-117, Dated 25th, 26th, 27th, and 28th October 2005, SCSL-04-15-T-461 (17128-17137); Defence Motion Requesting the Exclusion of Evidence (as indicated in Annex A) arising from the Additional Information Provided by Witness TF1-168 (14th, 21st January and 4th February 2006)(18142-18157), page 1, Para. 1) SCSL-04-15-T-493 and Prosecutor v. Sesay, Kallon & Gbao, "Public Sesay Defence Response to Prosecution Request for Leave to Call Additional Witnesses and for Order for Protective Measures pursuant to Rules 69 and 73 bis (E)", 20th March 2006, Para. 8 & 9.

5. The Defence alleged that the behaviour of the Prosecution in "moulding" the evidence was prima facie evidence of bad faith.[6] The Defence went further and alleged that the failure of the Prosecution in refusing to address the allegation, on the three separate occasions would, if repeated, be evidence of "an attempt to obfuscate the conduct" and "would be powerful evidence of bad faith".[7]

6. The Prosecution in its Response failed for the fourth time to address the allegation. The Prosecution adamantly and intentionally refused, notwithstanding the categorisation, to either deny or admit the allegations of serious prosecutorial misconduct.

7. The allegations therefore were (and remain) unaddressed by the Prosecution. The Defence thus sought as a corollary to this predicted failure an order from the Trial Chamber:

   (i) To compel the Prosecution to address the issue (and either admit or deny the allegation that they were engaged in a practice of moulding the evidence to suit the evidence as it unfolds) and/or

   (ii) To rule that the practice is impermissible[8]

The Decision

8. Despite the Prosecution's clear obfuscation and avoidance of the issue the Trial Chamber has refused to order the Prosecution to address the allegations of misconduct ("The Decision"). The Trial Chamber has ruled:

   (i) "Any direct challenge to the general integrity of the statement – taking process should be substantiated by a prima facie showing of foul play,

[6] See Para. 10 of the Motion.
[7] See Para. 10 of the Motion.
[8] Para. 15 of the Motion.

either deliberate or negligent, by the Prosecution in order to justify an inquiry into the said process"[9] and

(ii) "Consistent with this Chamber's relevant jurisprudence concerning the Prosecution's practice of disclosure and the lack of evidence impeaching the Prosecution's integrity herein, the Chamber is of the opinion that the Motion is merely speculative. It fails to demonstrate any *prima facie* evidence of any specific breach by the Prosecution of its disclosure obligations or of any deliberate foul play in the presentation of its case which might suggest that the administration of justice has been brought into disrepute"[10]

The Applicable Law

Application for Leave

9. The applicable law has been outlined in a number of decisions. The subject of leave for interlocutory appeal is governed by Rule 73(B) which states as follows:

Decisions rendered on such motions are without interlocutory appeal. However, in exceptional circumstances and to avoid irreparable prejudice to a party, the Trial Chamber may give leave to appeal. Such appeal should be sought within 3 days of the decision and shall not operate as a stay of proceedings unless the Trial Chamber so orders".

[9] Para. 17 of the Decision on Defence Motion to Request the Trial Chamber to Rule that the Prosecution Moulding of the Evidence is Impermissible SCSL-04-15-T-616 (1st August 2006)(24812 – 24817) ("The Decision").
[10] Para. 18 of the Decision.

10. As emphasised by Trial Chamber I Rule 73(B) is restrictive and "the applicant's case must reach a level of exceptional circumstances and irreparable prejudice" to satisfy the conjunctive requirement provided by the Rule".[11]

11. Trial Chamber I has also indicated that, "Exceptional circumstances may exist depending upon the particular facts and circumstances, where for instance the question in relation to which leave to appeal is sought is one of general principle to be decided for the first time, or is a question of public international law importance upon which further argument or decision at the Appellate level would be conclusive to the interests of justice, or where the cause of justice might be interfered with, or is one that raises serious issues of fundamental legal importance to the Special Court for Sierra Leone in particular, or international criminal law, in general, or some novel and substantial aspect of international criminal law for which no guidance can be derived from national criminal law systems"[12]

Equality of Arms – procedural fairness

12. The principle of equality of arms "must be given a more liberal interpretation than that normally upheld with regard to proceedings before domestic courts. This principle means that the Prosecution and the Defence must be equal before the Trial Chamber".[13] The principle of equality of arms is one of the elements of the broader concept of a fair trial.[14] The purpose behind the principle remains the same – to give to each party equal access to the processes of the Tribunal, or an equal opportunity to seek procedural relief where relief is needed.[15] It is a fundamental aspect of the right to a fair trial that criminal proceedings, including the elements of such proceedings which relate to procedure, should be adversarial

[11] Decision on Application for Leave to Appeal the Ruling (2nd May 2005) on Sesay-Motion Seeking Disclosure of the Relationship between Governmental Agencies of the United States of America and the Office of the Prosecutor SCSL-04-15-T-401 (15th June 2005)(12112-12119) at Para. 14 and 15.
[12] *Ibid* Para. 16.
[13] Prosecutor v. Tadic, Judgement, ICTY Appeals Chamber, July 15, 1999, Para. 47.
[14] Case of G.B. v. France (Application no. 44069/98), 2nd October 2001 at Para. 58.
[15] Prosecutor v. Kordic and Cerkez, ICTY Appeals Chamber, 11th September 2001, Para. 7.

and that there should be equality. The principle, derived from the jurisprudence of the European Court of Human Rights, requires a judicial body to ensure that, "each party must have a reasonable opportunity to defend its interests under conditions which do not place him at a substantial disadvantage vis – a – vis his opponent".[16] Moreover, in order to ensure that the accused receives a fair trial, any difficulties caused to the defence by a limitation on its rights must be sufficiently counterbalanced by the procedures followed by the judicial authorities... the Court's task is to ascertain whether the decision making procedure applied in each case complied, as far as possible, with the requirements of adversarial proceedings and equality of arms and incorporated adequate safeguards to protect the interests of the accused".[17]

Equality of Arms - *Responsibility of the Tribunal*

13. The role of any Trial Chamber is to "conduct a proper examination of the submissions, arguments and evidence adduced by the parties, without prejudice to its assessment of whether they are relevant to its decision".[18]

Submissions on Application for Leave to Appeal the "Decision"

Summary

14. The Decision appears to ignore the clear refusal by the Prosecution to either admit or deny clear allegations of misconduct. On four occasions the Defence have alleged that the Prosecution were engaged in impermissible conduct. The Defence have referred to jurisprudence[19] and consequently have categorised this misconduct as;

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[16] Prosecutor v. Tadic, Judgement, ICTY Appeals Chamber Para. 43, 44, 48, 52.
[17] Case of Atlan v. The United Kingdom (Application no. 36533/97), 19th June 2001 at Para. 40 & 41.
[18] Kraska v. Switzerland (Application no. 13942/88), 19 April 1993 at Para. 30 as approved in Prosecutor v. Delalic, Decision on the Motion of the Joint Request of the Accused Persons regarding the Presentation of Evidence, dated 24 May 1998, Para. 47.
[19] See footnote 2.

(i) causing "irreparable damage and prejudice to the accused and the trial process";[20]

(ii) Being inimical to a fair trial[21] and

(iii) If proven or admitted, being prima facie evidence of bad faith.[22]

15. Additionally the Defence have categorised this repeated refusal to admit or deny whether they are engaged in improper behaviour and/or misconduct inter alia as:

(i) an abuse of process[23]

(ii) intentionally opaque and frivolous[24]

(iii) "riding roughshod over" a clear prohibition

(iv) Obfuscating when challenged to obtain convictions, whether fair or otherwise[25] and

(v) Pure sophistry.[26]

Exceptional Circumstances

16. The Decision is wholly inimical to a fair trial. It is submitted that this Decision ought to be considered by the Appeal Chamber because it appears to suggest that (a) the Trial Chamber does not consider that it is under an obligation to conduct a proper analysis of the submissions, arguments and evidence apparent from the exchange of pleadings (b) the Prosecution are under no obligation to admit or refute allegations of wrongdoing and (c) the Defence are expected to do the impossible (that is, enter the Prosecution compound and retrieve evidence of

[20] See Para. 10 of Reply to the Sesay Motion to Request the Trial Chamber to Rule that the Prosecution's Moulding of the Evidence is Impermissible and a Breach of Article 17 of the Statute of the Special Court, SCSL-04-15-T-554, (3rd May 2006) (18933 – 18939) referring to Prosecutor v. Barayagwiza, ICTR – 97-19-A, Separate Opinion of Judge Shahabuddeen, 31 March 2000 at 68.
[21] Sesay Motion to Request the Trial Chamber to Rule that the Prosecution's Moulding of the Evidence is Impermissible and a Breach of Article 17 of the Statute of the Special Court, SCSL-04-15-T-541 (3rd May 2006) (18557 – 18562) at Para. 7.
[22] Ibid Para. 10.
[23] Ibid Para. 1.
[24] Ibid Para. 1.
[25] Ibid Para. 5.
[26] Ibid Para. 6.

wrongdoing, rather than rely upon reasonable inferences arising from available evidence. It appears to suggest that the behaviour of a party in its refusal to address serious allegations could not amount to *prima facie* evidence of foul play.

17. The Decision, in its refusal to demand of a party that it answer serious allegations of bad faith conduct, creates a precedent which is tantamount to judicial approval and/or acquiescence in the concealment of conduct lacking bona fides. It applauds and rewards a lack of candour before the Trial Chamber.

18. There can be only one reasonable inference arising from a party repeatedly refusing to admit or deny allegations of misconduct. A failure by a Trial Chamber to acknowledge the obvious inference that the Prosecution is seeking to conceal its improper behaviour and to then claim that there is an absence of prima facie evidence of "deliberate foul play"[27] is a decision which raises serious issues of procedural fairness of fundamental legal importance to the Special Court for Sierra Leone in particular and international criminal law in general.

19. It suggests that a party to the litigation is not duty bound to address complaints of misconduct and moreover abdicates responsibility to protect the rights of an accused to a fair trial. It represents a wholesale failure to ensure practical and effective procedural equality. It is to close the judicial eye to clear evidence probative of misconduct and amounts to an abdication of judicial responsibility to hold the balance of procedural equality to ensure anything other than illusory rights. It effectively applauds concealment of wrongdoing, ignoring the rights of the accused at the expense of transparency.

20. It is submitted that the correct and appropriate exercise of judicial discretion in relation to these issues, bearing in mind Article 17 of the Statute and the sacrosanct requirement that the Accused should have a fair trial, conducted by a fair and independent tribunal, in full procedural equality, is clear and unequivocal.

[27] Decision, Para. 18.

21. The issues at the centre of this proposed appeal involve (i) questions about the correct supervisory role of the judiciary and (ii) questions concerning the correct application of the equality of arms doctrine and particularly whether it is incumbent upon a Trial Chamber, when faced with a party making serious allegations about misconduct, which are not denied (or admitted) by the opposing party, to investigate further or at the very least to demand an answer to the allegations. It therefore goes to the heart of the role of the judiciary at the Special Court and International Tribunals in general and to the correct interpretation of procedural fairness. It is thus exceptional and ought to be overturned forthwith to avoid the ongoing irreparable prejudice to the Defence, pursuant to Rule 73(B).

Irreparable Prejudice

22. The Trial Chamber has refused to draw any inference adverse to the Prosecution, notwithstanding repeated failures to address serious allegations of misconduct and bad faith, which if proved or admitted would undermine the fair trial guarantees pursuant to Article 17 of the Statute of the Special Court. The consequence of the conduct alleged has been acknowledged by the Trial Chamber as inimical to a fair trial.[28] The Decision therefore provides the Prosecution with the means by which they can continue to undermine a fair trial. The Decision therefore, if wrong in law, should be overturned to prevent irreparable prejudice to both the Accused and to the process. The irreparable prejudice arising thus includes (i) the continued concealment of ongoing prohibited and prejudicial misconduct and (ii) the denial of procedural equality, essential for the integrity of the process.

Dated 3rd August 2006

Wayne Jordash
Sareta Ashraph

[28] See footnote 2 above.

BOOK OF AUTHORITIES

Decisions

Atlan v. *The United Kingdom*, Application no. 36533/97, "Judgment," 19 June 2001.

G.B. v. *France*, Application no. 44069/98, "Judgment," 2 October 2001.

Kraska v. *Switzerland*, Application no. 13942/88, "Judgment," 19 April 1993.

Prosecutor v. *Barayagwiza*, ICTR-97-19-A, "Separate Opinion of Judge Shahabuddeen," 31 March 2000.

Prosecutor v. *Brdanin and Talic*, IT-99-36, "Decision on Form of Further Amended Indictment and Prosecution Application to Amend," 26 June 2001.

Prosecutor v. *Delalic*, IT-96-21, "Decision on the Motion of the Joint Request of the Accused Persons Regarding the Presentation of Evidence, Dated 24 May 1998," 12 June 1998.

Prosecutor v. *Kordic and Cerkez*, IT-95-14/2, "Decision on Application by Mario Cerkez for Extension of Time to File his Respondent's Brief," 11 September 2001.

Prosecutor v. *Kupreskic et al.*, IT-95-16-A, "Appeal Judgement," 23 October 2001.

Prosecutor v. *Sesay*, SCSL-05-80, "Decision and Order on Defence Preliminary Motion for Defects in the Form of the Indictment," 13 October 2003.

Proseuctor v. *Sesay et al.*, SCSL-15-357, "Decision on Defence Applications for Leave to Appeal Ruling of the 3rd February 2005 on the Exclusion of Statements of Witness TF1-141," 28 April 2005.

Prosecutor v. *Sesay et al.*, SCSL-15-401, "Decision on Application for Leave to Appeal the Ruling (2nd May 2005) on Sesay-Motion Seeking Disclosure of the Relationship Between Governmental Agencies of the United States of America And the Office of the Prosecutor," 15th June 2005.

Prosecutor v. *Sesay et al.*, SCSL-15-616, "Decision on Defence Motion to Request the Trial Chamber to Rule that the Prosecution Moulding of the Evidence is Impermissible," 1 August 2006.

Prosecutor v. *Tadic*, IT-94-1-A, "Judgement," July 15, 1999.

Motions

Prosecutor v. *Sesay*, SCSL-15-541, "Defence Motion to Request the Trial Chamber to Rule that the Prosecution's Moulding of the Evidence is Impermissible and a Breach of Article 17 of the Statute of the Special Court," 3 May 2006.

Prosecutor v. *Sesay et al.*, SCSL-04-15-T, "Defence Motion Requesting the Exclusion of Paragraphs 1, 2, 3, 11 and 14 of the Additional Information Provided by Witness TF1-117, Dated 25th, 26th, 27th, and 28th October 2005," 12 January 2006.

Prosecutor v. *Sesay et al.*, SCSL-15-475, "Defence Motion Requesting the Exclusion of Evidence (as indicated in Annex A) Arising from the Additional Information Provided by Witness TF1-168 (14th, 21st January and 4th February 2006)," 23 February 2006.

Prosecutor v. *Sesay et al.*, SCSL-15-518, "Sesay Defence Response to Prosecution Request for Leave to Call Additional Witnesses and for Order for Protective Measures pursuant to Rules 69 and 73 bis (E)," 20th March 2006.

Prosecutor v. *Sesay*, SCSL-15-554, "Defence Reply to Prosecution Response to Motion to Request the Trial Chamber to Rule that the Prosecution's Moulding of the Evidence is Impermissible and a Breach of Article 17 of the Statute of the Special Court," 18 May 2006.

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19.6.2001

Press release issued by the Registrar

JUDGMENT IN THE CASE OF ATLAN v. THE UNITED KINGDOM

In a judgment [fn] (available only in English) today notified in writing in the case ***Atlan v. the United Kingdom*** (application number 36533/97), the European Court of Human Rights held unanimously that there had been a **violation of Article 6 § 1** (right to a fair trial) of the European Convention on Human Rights and that the violation itself constituted sufficient just satisfaction for any pecuniary or non-pecuniary damage suffered by the applicants. The Court awarded the applicants 15,000 pounds sterling (GBP) for legal costs and expenses.

1. Principal facts

The applicants, Armand Atlan and his son Thierry, both French nationals, were born in 1932 and 1970 respectively. Prior to the events in question they lived in Sao Paolo, Brazil. The second applicant died in June 1998 and the first applicant now lives in France.

On 5 July 1991, at the Crown Court at Isleworth, Middlesex, the applicants were convicted of illegally importing 18 kilograms of cocaine (with a street value of GBP 2-3 million) into Heathrow Airport, London, on 3 November 1990. The first applicant was sentenced to 18 years' imprisonment and a confiscation order of GBP 1,918,489.60 with a further 10 years' prison to be served in default of payment. The second applicant was sentenced to 13 years' imprisonment and ordered to pay a confiscation order of GBP 6,140.66 or serve a further six months in prison

The applicants' defence at trial was that they were diamond traders and had been falsely implicated in the drugs importation by a man named Rudi Steiner. However, they had no evidence to connect Mr Steiner to the suitcase full of drugs they claimed had been planted on them at Heathrow or to substantiate their belief that he was a Customs and Excise informer.

Under cross-examination the customs officers involved in the case refused either to confirm or deny whether or not they had used an informer. No evidence relating to an informer or to Mr Steiner was served on the defence or put before the judge and throughout the proceedings the prosecution repeatedly denied possessing any undisclosed relevant material.

In spring 1994, when their appeal was pending, the applicants learned from the French press (*Libération*) that a Swiss undercover police officer, Commissioner Cattaneo, had written a report, called "the Mato Grosso Report", concerning his 1991 investigation into drug trafficking between Brazil and Europe. In early 1995 the applicants' solicitor obtained a copy of the report. It mentioned Rudi Steiner, describing him as one of three regular informers of the Brazilian, Danish and French police. He was said to have an interest in stolen jewels and a long-term involvement in the traffic from Brazil to Europe of large quantities of cocaine, which he was able freely to obtain from the Brazilian police. The applicants provided a copy of the report to the prosecution, which declined to confirm or deny its authenticity or the truth of its contents, and again repeated that there was no undisclosed material relevant to the issues at trial.

The applicants added an additional ground of appeal coupled with an application for leave to call fresh evidence. They maintained that the Mato Grosso Report substantiated their suggestion at trial that Mr Steiner had had access both to stolen jewels and cocaine and that he enjoyed an established relationship with law enforcement agencies in Europe. At this stage, on or about 19 October 1995, the prosecution informed the defence that, contrary to earlier statements, unserved unused material did in fact exist, which the prosecution wished to place before the Court of Appeal in the absence of

the applicants or their lawyers. The prosecution then applied *ex parte* to the Court of Appeal for a ruling whether it was entitled, on grounds of public interest immunity, not to disclose this material. On 16 February 1997, the Court of Appeal decided that justice did not require the disclosure of the public interest immunity evidence and on 20 February 1997 it dismissed the application for leave to appeal.

2. Procedure and composition of the Court

The application was lodged with the European Commission of Human Rights on 28 February 1997. It was transmitted to the Court on 1 November 1998 and allocated to the Third Section of the Court. In a decision of 10 October 2000 the Chamber declared the application admissible.

Judgment was given by a Chamber of seven judges, composed as follows:

Jean-Paul **Costa** (French), ***President***,
Willi **Fuhrmann** (Austrian),
Loukis **Loucaides** (Cypriot),
Nicolas **Bratza** (British),
Hanne Sophie **Greve** (Norwegian),
Kristaq **Traja** (Albanian),
Mindia **Ugrekhelidze** (Georgian), ***judges***,

and also Sally **Dollé**, ***Section Registrar***.

3. Summary of the judgment

Complaints

The applicants complained that they had been denied a fair trial in breach of Article 6 §§ 1 and 3 d) of the European Convention on Human Rights.

Decision of the Court

Article 6

The Court, referring to its judgment in the case of *Rowe and Davis v. the United Kingdom*, observed that Article 6 § 1 required in principle that the prosecution authorities should disclose to the defence all material evidence in their possession for or against the accused. However, in some cases it might be necessary to withhold certain evidence so as to preserve the fundamental rights of another individual (such as an informer whose life might be in danger) or to safeguard an important public interest (such as the need to keep secret police methods of investigation). Such non-disclosure would be acceptable under Article 6 only where strictly necessary and only where any difficulties caused to the defence were sufficiently counterbalanced by the procedures followed by the courts.

The applicants' defence at trial was that they had been falsely implicated in the importation of cocaine by a man known to them as Rudi Steiner, whom they believed to be a Customs and Excise informer. No evidence relating to an informer or to Mr Steiner was served on the defence or put before the judge, and under cross-examination the customs officers involved in the case refused either to confirm or deny whether they had used an informer or heard of Mr Steiner. Before and during the trial the prosecution asserted that there was no further unused relevant evidence in their possession which had not been served on the defence.

However, over four years after the applicants' conviction, and prior to the hearing of their appeal following their discovery of new evidence about Mr Steiner's activities, the prosecution informed

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them that, contrary to earlier statements, unserved unused material did in fact exist. Following an *ex parte* hearing, the Court of Appeal decided that it was not necessary to disclose this evidence to the applicants.

Although the nature of the undisclosed evidence has never been revealed, the sequence of events raised a strong suspicion that it concerned Mr Steiner, his relationship with British Customs and Excise, and his role in the investigation and arrest of the applicants: information which was central to the applicants' defence. As it had explained in the above-mentioned *Rowe and Davis* judgment, the Court considered that the trial judge is best placed to decide whether or not the non-disclosure of public interest immunity evidence would be unfairly prejudicial to the defence. The prosecution's failure to lay the evidence in question before the trial judge and to permit him to rule on the question of disclosure deprived the applicants of a fair trial and there had, therefore, been a breach of Article 6 § 1 of the Convention.

Article 41

The Court was unable to speculate as to whether the applicants would have been convicted had the violation not occurred. It considered that the finding of a violation constituted in itself sufficient just satisfaction for any pecuniary or non-pecuniary damage which the applicants might have suffered. It awarded them GBP 15,000 in respect of legal costs and expenses.

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The Court's judgments are accessible on its Internet site (http://www.echr.coe.int).

Registry of the European Court of Human Rights
F – 67075 Strasbourg Cedex
Contacts: Roderick Liddell (telephone: (0)3 88 41 24 92)
Emma Hellyer (telephone: (0)3 90 21 42 15)
Fax: (0)3 88 41 27 91

The European Court of Human Rights *was set up in Strasbourg in 1959 to deal with alleged violations of the 1950 European Convention on Human Rights. On 1 November 1998 a full-time Court was established, replacing the original two-tier system of a part-time Commission and Court.*

[fn] Under Article 43 of the European Convention on Human Rights, within three months from the date of a Chamber judgment, any party to the case may, in exceptional cases, request that the case be referred to the 17-member Grand Chamber of the Court. In that event, a panel of five judges considers whether the case raises a serious question affecting the interpretation or application of the Convention or its Protocols, or a serious issue of general importance, in which case the Grand Chamber will deliver a final judgment. If no such question or issue arises, the panel will reject the request, at which point the judgment becomes final. Otherwise Chamber judgments become final on the expiry of the three-month period or earlier if the parties declare that they do not intend to make a request to refer.

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G.B. v. FRANCE - 44069/98 [2001] ECHR 564 (2 October 2001)

THIRD SECTION

CASE OF G.B. v. FRANCE

(Application no. 44069/98)

JUDGMENT

STRASBOURG

2 October 2001

FINAL

02/01/2002

In the case of G.B. v. France,

The European Court of Human Rights (Third Section), sitting as a Chamber composed of:

Mr W. FUHRMANN, *President*,

Mr J.-P. COSTA,

Mr P. KūRIS,

Mrs F. TULKENS,

Mr K. JUNGWIERT,

Sir Nicolas BRATZA,

Mr K. TRAJA, *judges*,

and Mrs S. DOLLé, *Section Registrar*,

Having deliberated in private on 16 May 2000 and 11 September 2001,

Delivers the following judgment, which was adopted on the last-mentioned date:

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PROCEDURE

1. The case originated in an application (no. 44069/98) against the French Republic lodged with the European Commission of Human Rights ("the Commission") under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a French national, Mr G.B. ("the applicant"), on 30 July 1998.

2. The applicant was represented by Mrs C. Waquet, of the *Conseil d'Etat* and Court of Cassation Bar. The French Government ("the Government") were represented by their Agent, Mr R. Abraham, Director of Legal Affairs at the Ministry of Foreign Affairs. The President of the Chamber acceded to the applicant's request not to have his identity disclosed (Rule 47 § 3 of the Rules of Court).

3. Relying in particular on Article 6 §§ 1 and 3 (b) of the Convention, the applicant complained of an infringement of the principle of equality of arms and the rights of the defence, firstly, in that, at the beginning of his trial at the Assize Court, the prosecution had filed documents that had never been brought to his notice and, secondly, in that the Assize Court had refused to order a further expert opinion when the expert contradicted his written report in the course of his oral submissions.

4. The application was transmitted to the Court on 1 November 1998, when Protocol No. 11 to the Convention came into force (Article 5 § 2 of Protocol No. 11).

5. The application was allocated to the Third Section of the Court (Rule 52 § 1). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1.

6. By a decision of 16 May 2000 taken in the light of the parties' written observations, the application was declared partly admissible [*Note by the Registry*. The Court's decision is obtainable from the Registry]. The Court decided that no hearing was necessary (Rule 59 § 2).

7. The Court also asked the Government to produce the documents filed by the prosecution at the start of the trial at the Assize Court.

8. On 27 July 2000 the Government filed the documents requested along with further observations on the merits of the application.

9. On 15 September 2000 the applicant's lawyer filed further observations in reply to those of the Government.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

A. The investigation proceedings

10. In the course of a judicial investigation concerning the applicant, his wife, his former brother-in-law and one of his nephews, the applicant was remanded in custody on 16 June 1993 and charged with rape of a child under 15 (his niece), sexual assaults on children under 15 (his nephews) and a number of further counts of sexual assault.

On 16 September 1993 the investigating judge at the Lorient *tribunal de grande instance* ordered medico-psychological examinations of the applicant's niece and all the persons under investigation. He appointed two doctors, named Gautier and Daumer, for that purpose.

11. The two doctors were informed of the applicant's criminal record. In addition to a number of

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prison sentences, this included an investigation opened in 1989 into charges against the applicant of sexual interference with the daughter of his brother-in-law's sister.

12. On 29 October 1993 the experts filed their report on the applicant. They stated, among other things, that although the applicant, by his own admission, did have fantasist and even mythomaniac tendencies, these were not obviously pathological in nature, as had been shown two years previously by his statements regarding the relations between P.H. and K.S, two of the victims.

13. The doctors concluded as follows:

"1. Our examination of G.B. has revealed psychopathic traits and signs of sexual perversion for which objective evidence is provided by his statements regarding P.H. and C.H.

2. The offence of which he stands accused with respect to C.H. and P.H. is linked to a state of sexual perversion. It is difficult to assess the extent or the nature of this state in so far as the accused presents the facts as isolated incidents. He denies raping K.S. and so it is not possible to address that issue from a clinical viewpoint.

3. The subject is not in a dangerous state in the psychiatric sense.

4. It would not be inappropriate to impose a criminal penalty on him.

5. Rehabilitation will not pose a problem, but a cure will depend on clearer identification of the subject's underlying sexual problem.

6. The subject was not insane within the meaning of (former) Article 64 of the Criminal Code when committing the offences of which he stands accused.

7. His state is not such as to require confinement or psychotherapeutic assistance."

14. In November 1993 the experts' conclusions were served on the applicant. The applicant's detention pending trial was extended several times during the investigation of the case.

15. On 19 October 1995 the applicant and his co-defendants (J.C.H., C.H. and S.C., the applicant's wife) were committed for trial at the Morbihan Assize Court by a judgment delivered by the Indictment Division of the Rennes Court of Appeal. The Indictment Division pointed out, in particular, that the applicant had initially denied any sexual abuse of his niece and nephews and then admitted to the conduct of which he was accused only to retract that admission. It related what had been said during the examination of the applicant's niece on the one hand and his nephews on the other, the latter having also been accused of rape and sexual abuse by the niece. The Indictment Division also mentioned the previous convictions on the applicant's criminal record, namely driving under the influence of alcohol, insulting a member of the police force in the performance of his duties, a hit-and-run offence and a further conviction for driving under the influence of alcohol.

16. The applicant appealed on points of law against the decision to commit him for trial, drawing attention to the vagueness of the terms used in the operative provisions of that decision. In a judgment of 26 February 1996 the Court of Cassation rejected that appeal.

B. The trial

17. The trial at the Assize Court began on 13 March 1997. The registrar read out the decision of the Indictment Division committing the applicant for trial. At that point the advocate-general stated that he wished to file certain documents regarding the personality of the defendants, including the applicant, and relating primarily to offences reported in 1979 and 1980.

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18. The documents in question were records of evidence taken from witnesses, a procedural report by a police superintendent, a psychiatric report on the applicant at the age of 17 and a judgment relating to educational assistance. They comprised mainly a description of the applicant's sexual conduct when he was a minor and information about his family background. They related firstly to a charge of indecent assault on a girl under 15 brought against him in 1979 in proceedings during which the applicant had said that he had done the same thing "at least a dozen times both with little girls and with little boys aged between 7 and 9" and, secondly, to several counts of indecent assault without violence on three children under the age of 15. The proceedings concerning these offences, brought in 1979, and those mentioned above were discontinued.

19. The applicant's lawyer objected to the filing of those documents and requested an adjournment to prepare a pleading to that effect. The hearing was adjourned for thirty-five minutes. The applicant's lawyer lodged an application for all the documents to be rejected on the ground that they related to offences that were subject to limitation and had occurred prior to various amnesty laws which could apply to them. According to the defence, the documents were so old that they contravened the principle that a defendant's antecedents were inadmissible in evidence against him.

20. In an interlocutory judgment delivered on the same day the Assize Court rejected that application on the following grounds:

"... The prosecution, like every other party to a criminal trial, is entitled to produce at the hearing any documents that appear to be helpful in establishing the truth provided that they relate to the offences of which the defendants stand accused and shed light on their personality.

Provided that they are communicated to all the parties and can thus be examined adversarially, the production of such documents cannot have any adverse effect on the rights of the defence. ..."

21. Copies of the documents filed by the prosecution were distributed to each of the civil parties' lawyers and the defence lawyers but the case was not adjourned.

22. When the examination of the defendants began as to their backgrounds, the applicant's hearing was deliberately put back until the end of the afternoon. Exercising his discretionary powers, the President of the Assize Court called a teacher of children with special needs as a witness to be heard for information purposes only. Following that hearing, the respective lawyers of C.H., who stood accused along with the applicant, and of P.H. declared that they were bringing civil-party proceedings on their clients' behalf and made a written application.

The trial was adjourned.

23. At the beginning of the afternoon the lawyer representing the applicant's wife in turn applied for the investigation to be reopened to take account of the documents relating to her that had been filed by the prosecution. Those documents included a judgment delivered by the Lorient *tribunal de grande instance* in 1996, records of the hearing by that court's registrar and written statements by S.C. The applicant's wife's lawyer requested that in the course of the reopened investigation the statements on the proceedings made by Mr and Mrs B. in the documents filed by the prosecution be added to the file. Failing that, the trial would have to be adjourned to a subsequent session. In support of his requests, the lawyer relied on the requirement of a fair trial.

24. In an interlocutory judgment the Assize Court deferred its decision on the above application pending completion of the hearing of evidence. The President continued his examination of the defendants until 6 p.m. with one short adjournment of fifteen minutes. At 6.20 p.m. the examination of the defendants resumed and thereafter a witness was heard.

25. Lastly, on the evening of the first day of the trial, that is on 13 March 1997, the Court heard one

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of the experts who had been appointed to prepare an opinion during the pre-trial investigation. He made an oral presentation of the report he had submitted on 29 October 1993 during the investigation proceedings (see paragraph 13 above).

26. The President then adjourned the proceedings for fifteen minutes during which the expert studied the new documents produced by the prosecution.

27. As soon as the hearing of the expert resumed, the latter allegedly changed his opinion, stating, among other things, that the applicant was a "paedophile" and that "psychotherapy [was] necessary, but would be ineffective for the time being".

28. The examination of the expert lasted about two hours, at the end of which the President authorised him to withdraw permanently, a decision on which he had consulted the parties and to which none of them had raised any objection.

29. On the following day, 14 March 1997, the applicant's lawyer disputed the expert's oral submissions and applied for a second opinion, on the following grounds:

"After ... one of the two experts appointed by the investigating judge had made his statement before the Assize Court, he was informed of the two discontinued sets of proceedings that had been brought against G.B., who is now 34, when he was 16 years old. The depositions made by G.B. at that time were read out to the expert. Immediately after being informed of those facts, of which he had been unaware when preparing his expert opinion, the expert radically altered his submissions, stating that:

- in his view G.B. is unquestionably a paedophile;

- psychotherapeutic treatment is necessary, but, given G.B.'s current state of mind, would be totally ineffective because he has no feelings of guilt;

- the length of a prison sentence has no effect on an individual of that type as the potential to be cured depends solely on a feeling of guilt, which G.B. lacks;

- in the absence of a feeling of guilt, there is a major risk that G.B. will reoffend even after a long sentence, meaning that imprisonment can only serve as a means of protecting society. ...

G.B. formally disputes the expert's oral submissions. A second opinion is indispensable. If it had considered it necessary, it was during the investigation that the prosecution should have filed the documents it produced at the beginning of the trial relating to proceedings brought over fifteen years ago. In that case the expert would have drawn up his report in the light of the evidence contained therein and G.B. would undoubtedly have requested a second opinion, prepared by two experts.

The Assize Court therefore heard an oral report that differed radically from the written report by the two experts.

Respect for the rights of the defence requires that a new expert opinion be ordered in the context of an application for the investigation to be reopened. Everyone has the right to a fair trial."

30. The lawyer also applied for the applicant's release on the ground that his client should not have to suffer the consequences of the prosecution's having taken three years and nine months to file documents that it considered indispensable.

31. In an interlocutory judgment of 14 March the Assize Court deferred its decision on the application for further investigative measures pending completion of the hearing of evidence and rejected the application for release on the ground that detention was "necessary to ensure that the

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defendant remain[ed] at the disposal of the judicial authorities".

32. The President continued to examine the defendants and obtained their statements. After that he took evidence from the applicant's mother, from a person sentenced for a serious crime and from eight witnesses.

33. The applicant's lawyer then reiterated his previous submissions while his wife's lawyer withdrew the interlocutory application he had lodged with the Assize Court.

34. On 15 March 1997 the Assize Court took formal note of the withdrawal by S.C.'s lawyer. On 15 March 1997, after a procedural defect vitiating the interlocutory application made by the applicant's lawyer had in the meantime been cured, the Assize Court nevertheless refused it. It made the following points regarding the complaint of an infringement of the rights of the defence:

"Firstly, the new documents produced by the prosecution and duly communicated to each of the parties to the proceedings could have been contested, particularly by G.B., whether directly or through the intermediary of his counsel.

Secondly, once the above documents had been brought to the notice of the expert ... and he had completed the presentation of his report, G.B. and his counsel were in a position to request any further information or explanations from him that they required.

Thus it cannot legitimately be argued that the production of new documents and their consideration by the psychiatric expert were capable of infringing the rights of the defence.

At all events, in view of the outcome of the oral examination at the hearing, it does not seem essential for the establishment of the truth to seek a second psychiatric opinion.

Consequently, there is no cause for the proceedings to be adjourned ..."

35. The Assize Court also rejected the applicant's application for release.

36. On 15 March 1997 the Assize Court sentenced the applicant to eighteen years' imprisonment for a number of counts of raping his niece, a child under 15, sexually assaulting a girl under 15 and sexually assaulting his nephews. The sentences imposed on the three other co-defendants were less severe (ten years' imprisonment, a fully suspended five-year prison sentence with probation, and a five-year prison sentence, one year of which was suspended with probation).

37. The applicant appealed on points of law. In his first ground of appeal he argued that the Assize Court's consenting to file the documents produced by the prosecution amounted to a violation of his right to a fair trial, particularly the principle of equality of arms, since his lawyer had only had half a day to study the documents in issue whereas the prosecution had had them for some time. Relying also on Article 6 of the Convention, the applicant submitted another plea regarding the Assize Court's refusal to order a second opinion. He argued that the examination by the expert of the new documents that had been produced at the hearing, which had made him radically change his initial submissions, required an effective second opinion for the sentence imposed to satisfy the legal requirement that it must be suited to the personality of the defendant.

38. In a judgment of 11 February 1998 the Criminal Division of the Court of Cassation rejected the appeal in its entirety. Regarding the grounds of appeal based on an infringement of the right to a fair trial, the Court of Cassation stated as follows:

"When, after the decision committing the defendant for trial had been read out, the advocate-general produced various documents including the records of a number of discontinued proceedings relating

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to the defendant, the defence objected and requested that those documents should not be filed.

As justification for its rejection of that request, the Assize Court stated that the prosecution, like every other party to criminal proceedings, is entitled to produce at the trial any documents that appear to afford assistance in establishing the truth in so far as they relate to the offences of which the defendants stand accused and shed light on their personality. If they have been communicated to all the parties so that there has been an opportunity for adversarial argument about them, the production of such documents cannot legitimately be said to have any adverse effect on the rights of the defence.

In ruling to that effect, the Assize Court provided a legal basis for its decision without laying itself open to the objection raised in the ground of appeal because, the adversarial principle having been respected, no statutory or treaty provision prevented documents relating to offences subject to limitation but not covered by an amnesty being filed in that way. ...

As justification for its refusal to order the second expert opinion sought by the defence, the Court, having deferred its decision on the examination of that application, held, after taking evidence, that the requested measure was not indispensable for the establishment of the truth.

In ruling to that effect, the Assize Court, which was not obliged to respond to mere arguments in submissions, determined a matter over which it alone had jurisdiction, deciding that there was no reason to allow the application."

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Hearings before assize courts

1. The Code of Criminal Procedure

39. The relevant provisions of the Code of Criminal Procedure on hearings before assize courts provide as follows:

Article 283

"If the investigation appears to him to be incomplete or if new evidence has emerged since its closure, the president may order any further inquiries he deems necessary. ..."

Article 287

"The president may, of his own motion or on an application by the public prosecutor, order cases which do not seem to him to be ready to be tried during the session in which they have been listed for hearing to be adjourned to a subsequent session."

Article 309

"The president shall be responsible for the proper management of the trial and shall direct the proceedings.

He shall reject anything that is calculated to undermine their dignity or prolong them without creating the hope of more certain results."

Article 310

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"The president is vested with a discretionary power under which he may, on his honour and according to his conscience, take any steps that he believes may assist in establishing the truth. He may, if he deems it appropriate, place the matter before the court, which shall rule in accordance with the conditions set out in Article 316.

During the trial he may summon any person, where necessary by means of a warrant, and examine him, or demand to see any new evidence which he considers likely, in the light of argument at the trial, to assist in establishing the truth. Witnesses called in this way shall not be required to take an oath and their statements shall be regarded as being solely for information purposes."

Article 316

(in its wording prior to the Act of 15 June 2000

enhancing the presumption of innocence and victims' rights)

"All interlocutory issues shall be decided by the court, after the prosecution, the parties or their lawyers have been heard.

Interlocutory judgments may not prejudge the merits.

They may be challenged by means of an appeal on points of law, but only at the same time as the judgment on the merits."

Article 346

"Once the evidence has been heard, civil parties or their lawyers shall be heard. The prosecution shall make its submissions.

The defendant and his lawyer shall submit their defence pleadings.

Civil parties and the prosecution have the right to reply but the defendant or his lawyer shall always speak last."

2. Relevant case-law

40. According to the established case-law of the Criminal Division of the Court of Cassation (*Cass. crim.*) (see, in particular, *Cass. crim.* 13 May 1976, *Bulletin criminel* (*Bull. crim.*) no. 157, and *Cass. crim.* 4 May 1988, *Bull. crim.* no. 193):

"The prosecution shall be free to decide the content of its submissions. It shall be entitled to produce any documents and provide any explanations that it considers necessary, subject to the right of the parties concerned to reply."

41. According to other established precedents of the Criminal Division of the Court of Cassation (see, in particular, *Cass. crim.* 19 April 1972, *Bull. crim.* no. 132, and *Cass. crim.* 5 February 1992, *Bull. crim.* no. 51):

"Under Article 287 of the Code of Criminal Procedure, defendants are not entitled *before* the opening of the trial to file an application for the case relating to them to be adjourned to a subsequent session."

B. Evidence given to trial courts by experts

42. Evidence given by experts is governed by the following provisions of the Code of Criminal Procedure:

Article 168

"Experts shall, if necessary, give evidence in court on the results of their technical investigations, after swearing to assist the court on their honour and according to their conscience. When giving evidence, they may consult their report and its annexes.

The president may, of his own motion or at the request of the prosecution, the parties or their counsel, ask experts any questions falling within the sphere of the task assigned to them.

Following their statement, experts shall attend the hearing unless the president authorises them to withdraw."

Article 169

"If at the hearing of a trial court a person heard as a witness or for information purposes contradicts the conclusions of an expert report or provides new technical insights, the president shall ask the experts, the prosecution, the defence and, if the case arises, the civil party, to submit their observations. The court shall declare in a reasoned decision either that the contradiction shall be disregarded or that the case shall be adjourned to a subsequent date. In the latter case, the court may order any measure it deems necessary with regard to the expert opinion."

C. Records of proceedings before assize courts

43. The provisions of the Code of Criminal Procedure relating to such records provide as follows:

Article 378

"To ensure that the required formalities have been carried out, the registrar shall draw up a record which shall be signed by the president and the registrar.

The record shall be drawn up and signed within three days at the latest of the delivery of judgment."

Article 379

"Unless the president orders otherwise, of his own motion or at the request of the prosecution or the parties, the record shall include neither the defendants' replies nor the content of depositions, subject nonetheless to the implementation of Article 333 regarding additions, changes or variations in witnesses' statements."

THE LAW

I. ALLEGED VIOLATIONS OF ARTICLE 6 §§ 1 AND 3 (b) OF THE CONVENTION

44. The applicant alleged violations of Article 6 §§ 1 and 3 (b) of the Convention, the relevant provisions of which provide:

"1. In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by [a] ... tribunal ...

...

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3. Everyone charged with a criminal offence has the following minimum rights:

...

(b) to have adequate time and facilities for the preparation of his defence;

..."

A. Submissions of the parties

45. The applicant complained that the principles of equality of arms and a fair trial had been infringed when the prosecution produced new evidence at the beginning of the trial at the Assize Court.

46. The applicant did not criticise the production of that evidence in itself but complained that his lawyer had not been given reasonable time to defend him properly in the light of the content of the documents produced. He pointed out in that connection that his lawyer had been granted only a 35-minute adjournment in which to prepare submissions calling for rejection of all the new evidence and then only half a day in which to study the documents in issue while at the same time having to follow the continuing proceedings. The applicant further observed that during the three and a half years of preliminary investigation, neither the prosecution nor the investigating judge had deemed it necessary to conduct any inquiries into the applicant's past. He also argued that the documents in issue, relating to accusations levelled against him when he was a minor or had only just reached his majority, had shed a new and radically different light on his conduct, as evidenced by the reaction of the expert heard during the trial.

47. The applicant further submitted, with regard to the conditions in which the expert had been examined on the evidence, that, although the formal, written rules had been respected, the seeming respect had in fact led to a violation of the rights of the defence on account of the derisory length of time that the expert had been given – a quarter of an hour during the trial and without any real adjournment of the proceedings – to comment on new documents which had prompted him to change his mind so abruptly.

48. Lastly, the applicant submitted that the rejection of his application for a second opinion had constituted a breach of the rights of the defence because a second opinion had been essential in view both of the expert's volte-face and of the influence that the latter's abrupt change of mind might have had in establishing the defendant's criminal responsibility and deciding on the sentence most suited to him personally. On the latter point, the applicant noted that the sentence imposed on him (eighteen years' imprisonment) had been heavier than that imposed on the three other co-defendants (ten years' imprisonment, a five-year fully suspended prison sentence with probation and a five-year prison sentence one year of which was suspended with probation).

49. The applicant considered therefore that the proceedings before the Assize Court had been unfair.

50. Regarding the filing of documentary evidence by the prosecution, the Government argued that each party was free to submit whatever arguments it wished to the Assize Court. The latter did not decide the case on the written evidence but on the evidence adduced in court. While the defendant was free to choose his defence, the prosecution had the right to produce new evidence in support of its argument. The documents in issue in the instant case had been intended to provide information about the applicant's personality. The Government pointed out that the Assize Court had confirmed that possibility in its interlocutory judgment of 13 March 1997 and stated that the documents in issue had been communicated to the parties and there had been an opportunity to examine them adversarially.

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51. In that connection, the Government observed that although, in his initial application, the applicant had criticised the filing of evidence taken from proceedings long before, he had narrowed the scope of that complaint in his further observations, merely alleging a lack of time to prepare his defence. The Government pointed out that the complaint in question had never been raised before the Assize Court. It was only after the expert had made his submissions, and having regard to the possible impact of his statements, that the applicant's lawyer applied for the investigation to be reopened and the hearing to be adjourned to a subsequent session.

52. As to the legality of the prosecution's conduct, the Government considered that the rights of the defence had been respected in the instant case. They noted in that connection that copies of the documents in issue had been distributed to each of the lawyers of the civil parties and the defence lawyers. Moreover, the examination of the applicant as to his background had been adjourned until the afternoon to give the applicant and his counsel the time they needed to study the new evidence. The applicant's lawyer had also been granted an adjournment to prepare his application to reject the documents in issue and had thus been able to criticise them. The defence had also been able to present its version of the facts on the second and third days of the trial and had been given the last word, in accordance with the provisions of Article 346 of the Code of Criminal Procedure. At all events, the Government pointed out that the applicant had not been unaware of the existence of those documents and that his sexual problems in adolescence had already been mentioned in the report on his personality drawn up by the investigating judge. No evidence had therefore been concealed.

53. Furthermore, with regard to the psychiatrist's evidence at the trial, the Government pointed out that psychiatric experts played no part in establishing whether defendants had committed the offences of which they were accused since their sole function was to help the court to arrive at a more informed opinion about the personality of the accused, so that it could determine, *inter alia*, his degree of responsibility at the material time. The expert's comments on the documents in issue came within the scope of his freedom of expression. The Government also pointed out that, as a skilled professional, the expert was entirely at liberty to assess the time he required to familiarise himself with the documents on the file that would provide him with useful information and form an opinion on their potential impact on his previous diagnosis. If the expert had thought the adjournment was not long enough, he would have asked for an extension or even for an adjournment until the following morning in view of the late hour at which he was examined. Moreover, it was impossible to know exactly what the expert had said in evidence because all proceedings before the Assize Court were oral. At all events and contrary to what the applicant asserted, the Government considered that the expert's oral evidence had not conflicted with his report, which had already pointed to the accused's psychopathic traits and signs of sexual perversion.

54. The Government also pointed out that the applicant had had an opportunity to contradict the psychiatric expert's comments freely because he had been able to exercise his right to examine him in accordance with Article 168 of the Code of Criminal Procedure. The Assize Court had not considered it necessary to allow the applicant's application for a second opinion to be ordered because nine other witnesses had been heard after the psychiatric expert. The Government argued that the right to a second opinion was not an absolute right under the requirements of the Convention, the national courts being free to judge for themselves whether it was appropriate to order a second opinion.

55. Lastly, the Government asserted that the applicant's conviction had not been based solely on the expert's evidence at the trial and that the applicant had been able to put his arguments to the jury throughout the proceedings and make use of the remedies available to him. The documents in issue and the expert's oral evidence had been only a part of the evidence submitted to the jury.

B. The Court's assessment

56. The applicant complained under Article 6 §§ 1 and 3 (b) of the Convention that he had not had a

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fair trial before the Assize Court. The complaint can be divided into three parts: firstly, the applicant alleged an infringement of the principle of equality of arms and the rights of the defence on account of the circumstances in which the prosecution had filed new documents at the beginning of the trial in the Assize Court and the lack of time that his lawyer had had to prepare his defence thereafter; secondly, he complained that the expert had had only a quarter of an hour to study the new evidence, which nonetheless had caused him to effect a complete volte-face in his submissions; finally, the applicant considered it unfair of the Assize Court to reject his application for a second opinion when the expert's change of mind had strongly influenced the jury's opinion in a direction that was unfavourable to him.

57. Bearing in mind that the requirements of paragraph 3 (b) of Article 6 of the Convention amount to specific elements of the right to a fair trial guaranteed under paragraph 1, the Court will examine all the complaints under both provisions taken together (see, in particular, *Hadjianastassiou v. Greece*, judgment of 16 December 1992, Series A no. 252, p. 16, § 31).

58. The Court reiterates that the principle of equality of arms relied on by the applicant – which is one of the elements of the broader concept of fair trial – requires each party to be given a reasonable opportunity to present his case under conditions that do not place him at a substantial disadvantage *vis-à-vis* his opponent (see, among many other authorities, *Nideröst-Huber v. Switzerland*, judgment of 18 February 1997, *Reports of Judgments and Decisions* 1997-I, pp. 107-08, § 23, and *Coëme and Others v. Belgium*, nos. 32492/96, 32547/96, 32548/96, 33209/96 and 33210/96, § 102, ECHR 2000-VII).

59. The Court also points out that it is not within the province of the European Court to substitute its own assessment of the facts and the evidence for that of the domestic courts and, as a general rule, it is for these courts to assess the evidence before them. The Court's task is to ascertain whether the proceedings in their entirety, including the way in which evidence was taken, were fair (see the following judgments: *Edwards v. the United Kingdom*, 16 December 1992, Series A no. 247-B, pp. 34-35, § 34; *Mantovanelli v. France*, 18 March 1997, *Reports* 1997-II, pp. 436-37, § 34; and *Bernard v. France*, 23 April 1998, *Reports* 1998-II, p. 879, § 37).

1. The time afforded to the applicant's lawyer to prepare his defence following the production of new evidence by the prosecution

60. The Court notes that it was entirely lawful for the prosecution, at the beginning of the trial, to file new documents relating to the applicant's personality; these were communicated to the defence and subsequently examined adversarially. It also notes that the applicant himself did not criticise the production of those documents in itself. It finds therefore that this did not in itself give rise to any infringement of the principle of equality of arms between the parties.

61. The Court has also carefully analysed the sequence of events described in the record of proceedings before the Assize Court, noting that it was at the beginning of the trial, at 10 a.m. on 13 March 1997, that the deputy public prosecutor produced the new evidence, which the applicant's lawyer unsuccessfully asked the court to refuse to place in the file. On 13, 14 and 15 March there followed the examination of the defendants, the hearing of the witnesses and the expert, the civil parties' pleadings, the deputy public prosecutor's submissions, the pleadings of the co-defendants' lawyers and finally the pleadings by the lawyer of the main defendant, namely the applicant, which were submitted from 7.05 to 8.45 p.m. on 15 March 1997 and brought the hearing to a close (the court and the jury then retired to discuss the verdict, which they delivered some three hours later at 11.45 p.m.).

62. In that connection, the Court points out that it is not true that the applicant's lawyer had only half a day to read the new evidence (while following the continuing proceedings), as the applicant submitted. The half day in question was only the time between the production of the evidence and

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the beginning of the expert's evidence, the importance of which must be examined separately (see paragraphs 68 et seq. below).

63. In view of the foregoing, the Court considers that the applicant had adequate time and facilities to prepare his defence when faced with the new evidence and finds that in the instant case there has been no violation of Article 6 § 1 of the Convention taken in conjunction with Article 6 § 3 (b) on that account.

2. The time afforded to the expert to study the new evidence filed and the Assize Court's refusal to order a second opinion

64. The Court notes that the hearing of Dr Gautier, one of the experts appointed during the investigation, began in the late afternoon of 13 March when he read out his written report. In that connection, the Court would point out that the psychiatric opinion ordered during the investigation was intended to determine whether the applicant suffered from any kind of mental or psychological anomaly and, if so, whether there was a link between that disorder and the offences of which he stood accused. It was also supposed to assess how dangerous the defendant was. The two experts appointed by the investigating judge concluded that the offences with which the applicant had been charged, and of which his nephews and niece, the alleged victims, had accused him, were linked with a state of sexual perversion. They stated, however, that it was difficult to assess the extent and nature of that perversion – in so far as the applicant presented the facts as isolated incidents – or to gauge the applicant's potential for rehabilitation since a cure would be possible only if his underlying sexual problems were more clearly identified. The experts also asserted that the applicant was not dangerous in the psychiatric sense of that term. Consequently, their written report was, though not favourable towards the applicant, at least mitigated.

65. The Court further notes that in the middle of his evidence to the Assize Court Dr Gautier was granted a fifteen-minute adjournment to examine the new documents produced by the prosecution relating, in particular, to the applicant's sexual conduct at the age of 16 and 17. The expert was thus able to study a statement dating from 1979 in which the applicant spontaneously admitted to having sexually interfered with young children of both sexes on a dozen or so occasions.

66. The applicant asserted that when the hearing resumed, the expert expressed a totally damning opinion about him that was entirely at odds with the written report he had prepared three and a half years earlier. The expert is alleged to have stated as follows:

"G.B. is a paedophile, for whom psychotherapy is necessary but would be ineffective because G.B. would have no feelings of guilt. The length of a prison sentence has no effect on an individual of this type and there is a high risk that he will reoffend."

67. The Court concedes that it is impossible to know exactly what the expert said in evidence since there are no written records of hearings before assize courts. However, it notes that the Government have never disputed that the expert had a brief opportunity to study the new documents in the middle of his evidence or that he made the comments attributed to him by the applicant; they have merely pointed out that the written report had already drawn attention to the defendant's psychopathic traits and signs of sexual perversion.

68. The Court would point out that the mere fact that an expert expresses a different opinion to that in his written statement when addressing an assize court is not in itself an infringement of the principle of a fair trial (see, *mutatis mutandis*, *Bernard*, cited above, p. 880, § 40). Similarly, the right to a fair trial does not require that a national court should appoint, at the request of the defence, a further expert even when the opinion of the expert appointed by the defence supports the prosecution case (see *Brandstetter v. Austria*, judgment of 28 August 1991, Series A no. 211, p. 22, § 46). Accordingly, the refusal to order a second opinion cannot in itself be regarded as unfair.

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69. The Court notes, however, that in the instant case the expert not only expressed a different opinion when addressing the court from that set out in his written report – he completely changed his mind in the course of one and the same hearing (see, by way of contrast, *Bernard*, cited above). It also notes that the application for a second opinion lodged by the applicant followed this "volte-face" which the expert had effected having rapidly perused the new evidence, adopting a highly unfavourable stance towards the applicant. While it is difficult to ascertain what influence an expert's opinion may have had on the assessment of a jury, the Court considers it highly likely that such an abrupt turnaround would inevitably have lent the expert's opinion particular weight.

70. Having regard to these particular circumstances, namely the expert's volte-face, combined with the rejection of the application for a second opinion, the Court considers that the requirements of a fair trial were infringed and the rights of the defence were not respected. Accordingly, there has been a breach of Article 6 §§ 1 and 3 (b) of the Convention taken together.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

71. Article 41 of the Convention provides:

"If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

72. The applicant claimed 500,000 French francs (FRF) in respect of non-pecuniary damage.

73. The Government submitted that if the Court were to find a violation, that finding would in itself constitute sufficient compensation for the non-pecuniary damage sustained by the applicant.

74. The Court notes that in the present case an award of just satisfaction can only be based on the fact that the applicant did not have the benefit of the guarantees of Article 6. Whilst the Court cannot speculate as to the outcome of the trial had the position been otherwise, it does not find it unreasonable to regard the applicant as having suffered a loss of real opportunities (see *Pélissier and Sassi v. France* [GC], no. 25444/94, § 80, ECHR 1999-II). To this has to be added the non-pecuniary damage which the finding of a violation of the Convention in the present judgment is not sufficient to make good. Ruling on an equitable basis, in accordance with Article 41, it awards him FRF 90,000.

B. Costs and expenses

75. The applicant did not make any claim in this respect.

76. The Government expressed no view on the matter.

77. This being the case, the Court concludes that it is not necessary to reimburse the applicant's costs and expenses.

C. Default interest

78. According to the information available to the Court, the statutory rate of interest applicable in France at the date of adoption of the present judgment is 4.26% per annum.

FOR THESE REASONS, THE COURT UNANIMOUSLY

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1. *Holds* that there has been a violation of Article 6 §§ 1 and 3 (b) of the Convention;

2. *Holds* that the respondent State is to pay the applicant, within three months, FRF 90,000 (ninety thousand French francs) in respect of non-pecuniary damage plus simple interest at an annual rate of 4.26% from the expiry of the above-mentioned three months until settlement;

3. *Dismisses* the remainder of the claim for just satisfaction.

Done in French, and notified in writing on 2 October 2001, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

S. DOLLé W. FUHRMANN

Registrar President

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CONSEIL DE L'EUROPE
COUNCIL OF EUROPE

COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

COURT (CHAMBER)

CASE OF KRASKA c. SUISSE

(Application no. 13942/88)

JUDGMENT

STRASBOURG

19 April 1993

In the case of Kraska v. Switzerland*,

The European Court of Human Rights, sitting, in accordance with Article 43 (art. 43) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention")** and the relevant provisions of the Rules of Court, as a Chamber composed of the following judges:

Mr R. RYSSDAL, *President*,
Mr F. MATSCHER,
Mr J. DE MEYER,
Mrs E. PALM,
Mr R. PEKKANEN,
Mr J.M. MORENILLA,
Mr A.B. BAKA,
Mr M.A. LOPES ROCHA,
Mr L. WILDHABER,

and also of Mr M.-A. EISSEN, *Registrar*, and Mr H. PETZOLD, *Deputy Registrar*,

Having deliberated in private on 28 October 1992 and 24 March 1993,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case was referred to the Court by the European Commission of Human Rights ("the Commission") on 13 December 1991 and by the Government of the Swiss Confederation ("the Government") on 13 February 1992, within the three-month period laid down by Article 32 para. 1 and Article 47 (art. 32-1, art. 47) of the Convention. It originated in an application (no. 13942/88) against Switzerland lodged with the Commission under Article 25 (art. 25) by a Swiss national, Mr Martin Kraska, on 2 April 1988.

The Commission's request referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration whereby Switzerland recognised the compulsory jurisdiction of the Court (Article 46) (art. 46); the Government's application referred to Articles 45, 47 and 48 (art. 45, art. 47, art. 48). The object of the request and of the application was to obtain a decision as to whether the

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* The case is numbered 90/1991/342/415. The first number is the case's position on the list of cases referred to the Court in the relevant year (second number). The last two numbers indicate the case's position on the list of cases referred to the Court since its creation and on the list of the corresponding originating applications to the Commission.

** As amended by Article 11 of Protocol No. 8 (P8-11), which came into force on 1 January 1990.

facts of the case disclosed a breach by the respondent State of its obligations under Article 6 para. 1 (art. 6-1) of the Convention.

2. In response to the enquiry made in accordance with Rule 33 para. 3 (d) of the Rules of Court, the applicant stated that he wished to take part in the proceedings and designated the lawyer who would represent him (Rule 30).

3. The Chamber to be constituted included ex officio Mr L. Wildhaber, the elected judge of Swiss nationality (Article 43 of the Convention) (art. 43), and Mr R. Ryssdal, the President of the Court (Rule 21 para. 3 (b)). On 24 January 1992, in the presence of the Registrar, the President drew by lot the names of the other seven members, namely Mr F. Matscher, Mr J. De Meyer, Mrs E. Palm, Mr R. Pekkanen, Mr J.M. Morenilla, Mr A.B. Baka and Mr M.A. Lopes Rocha (Article 43 in fine of the Convention and Rule 21 para. 4) (art. 43).

4. Mr Ryssdal assumed the office of President of the Chamber (Rule 21 para. 5) and, through the Registrar, consulted the Agent of the Government, the Delegate of the Commission and the applicant's lawyer on the organisation of the proceedings (Rules 37 para. 1 and 38). Pursuant to the orders made in consequence, the Registrar received the memorials of the Government and the applicant on 10 and 11 August 1992 respectively. On 17 September the Secretary to the Commission informed the Registrar that the Delegate would submit oral observations; he had previously produced various documents requested by the Registrar on the President's instructions.

5. In accordance with the President's decision, the hearing took place in public in the Human Rights Building, Strasbourg, on 26 October 1992. The Court had held a preparatory meeting beforehand, in the course of which it rejected a request made in the applicant's memorial for it to hear witnesses.

There appeared before the Court:

- for the Government

Mr P. BOILLAT, Head
of the European Law and International Affairs Section, Federal Office of Justice, *Agent*,

Mr C.H. BRUNSCHWILER, judge
at the Federal Court,

Mr F. SCHÜRMANN, Deputy Head
of the European Law and International Affairs Section, Federal Office of Justice, *Counsel*;

- for the Commission

Mr L. LOUCAIDES, *Delegate*;

- for the applicant

Mr J. LOB, avocat, *Counsel*.

The Court heard addresses by Mr Boillat for the Government, Mr Loucaides for the Commission and Mr Lob for the applicant, as well as their replies to its questions. Mr Lob lodged various documents.

AS TO THE FACTS

6. Mr Martin Kraska is a Swiss national and lives in Zurich. He obtained his diploma in medicine in 1981 and has since practised mostly as an assistant doctor (Assistenzarzt), for which activity he does not require an authorisation in the Canton of Zurich.

A. Proceedings before the Zurich authorities and courts

7. On 19 October 1982 he received the authorisation to practise independently in the canton. The authorisation was, however, withdrawn by the Health Authority (Gesundheitsdirektion) on 26 April 1983 on the ground that, having moved to another canton, he had not used it.

8. The applicant lodged an administrative appeal (Rekurs) which the Cantonal Government (Regierungsrat) of Zurich rejected on 17 August 1983 for the following reasons: the possibility that a new authorisation would be granted as soon as he returned to Zurich was not sufficient to confer on the applicant a legally protected interest; in any event the authorisation in question was not of general validity, but related to a specific activity; as it was, Mr Kraska no longer lived in the canton.

9. From 6 August to 17 September 1984 the applicant worked as an assistant doctor in the emergency service of the District of Zurich Medical Association (Ärztlicher Notfalldienst des Ärzteverbandes des Bezirks Zurich).

10. On 28 August 1984 he fetched a partially paralysed patient from a private old peoples' home and took her back to her flat, where he treated her. Shortly afterwards he drew up a bill on an emergency service form for 7,447.80 Swiss francs and sent it to the guardian (gesetzlicher Vertreter) of the patient, who had been placed in guardianship on a temporary basis on 13 September 1984. The sum in question was to be paid directly into the applicant's post office account and not that of the medical association.

A prosecution was subsequently brought against Mr Kraska for fraud and various infringements of the Zurich Public Health Act 1962; in particular it was alleged that he had treated the patient without being in possession of an authorisation to practise medicine independently as was required under section 7 para. 1 (a) of that Act.

The Zurich District Court (Bezirksgericht) acquitted him on 13 January 1986, finding inter alia that the indictment had not indicated in sufficiently specific terms the medical treatment involved.

11. In the meantime, on 31 January 1985, the applicant had attempted to obtain a new authorisation. On 11 September 1985 the Zurich Health Authority had refused his request on the ground that he was not "trustworthy" within the meaning of section 8 para. 1 of the Public Health Act.

On 1 October 1986 the Zurich Cantonal Government dismissed the applicant's appeal. It took the view that he had infringed section 7 para. 1 (a) of the Act by submitting a bill for the treatment in question and that his acquittal by the District Court made no difference in this respect. The Cantonal Government noted in particular that in his bill the applicant had himself classified the treatment as medical acts.

12. In an appeal (Beschwerde) to the Zurich Administrative Court (Verwaltungsgericht) the applicant again sought the authorisation to practise his profession independently. The court dismissed his appeal on 11 March 1987. It also directed that he should wait until the beginning of 1988 before re-applying.

B. Proceedings in the Federal Court

1. The public-law appeal

13. By a memorial of seventy-three pages Mr Kraska's lawyer lodged with the Federal Court (Bundesgericht) a public-law appeal (staatsrechtliche Beschwerde), on which five judges deliberated at a public hearing on 22 October 1987 (section 17 para. 1 of the Federal Courts Act). The applicant's lawyer was present in the courtroom, but was not allowed to address the court. Judge X submitted his report; Judge Y, who did not in fact have the status of co-rapporteur attributed to him at paragraph 68 of the Commission's opinion, stated that he was unable to accept the conclusions of the report and proposed a solution contrary thereto. During the discussion which followed, a third judge put forward a counter proposal, which was adopted by the majority.

In a letter to his client, the lawyer described the course of the deliberations. According to him, Judge X had proposed that the applicant's public-law appeal should be allowed in full and that he should be granted the authorisation to practise. Judge Y had stated that he had been irritated by the length of the memorial, of which he had been able to read only thirty or so pages, and had complained that it had not been possible for him to study the file because, owing to an error on the part of the registry, he had not received it until a day before the hearing; he had then called for the dismissal of the appeal, basing his view exclusively on the above-mentioned decisions of 11 September 1985, 1 October 1986 and 11 March 1987 (see paragraphs 11-12 above).

14. The Federal Court gave judgment on the same day. By four votes to one, that of Judge X, it quashed the decision in so far as it imposed a waiting period on the applicant but dismissed the remainder of the appeal.

It first declared a number of the applicant's complaints inadmissible. It stated, nevertheless, that in cases of this kind, in the event of the appeal's succeeding, it could by way of exception not only quash the contested

decision, but also grant the authorisation sought, if all the other conditions were satisfied.

The Federal Court then noted that, according to its case-law, the right to freedom of commerce and industry, guaranteed by Article 31 of the Federal Constitution, embraced the right to practise medicine on a professional basis.

Having examined the criticisms levelled by the health authorities, it formed the opinion that at least two of them appeared material to assessing the applicant's honesty: he had carried out a medical act without the necessary authorisation; in addition, the bill relating thereto dealt with both medical and non-medical acts and he had drawn it up on an emergency service form, thereby giving the impression that it concerned only the former.

15. On 8 December 1987 the Health Authority of the Canton of Zurich granted Mr Kraska's third application for a new authorisation.

2. The applications to reopen the proceedings

16. On 6 November 1987 Mr Kraska requested the Federal Court to re-examine its judgment of 22 October 1987, complaining that it had given its decision without sufficient knowledge of the file.

His application was dismissed on 14 March 1988 on the ground, inter alia, that there was no legal basis for reopening the proceedings. The Federal Court summarised the contested deliberations as follows:

> "On the occasion of the public deliberations one judge expressed his dissatisfaction that the documents had not been available for a sufficiently long time (they had been sent first to a substitute judge); he had therefore been able to read thoroughly only the first thirty-five pages of the - much too long - appeal memorial which comprised seventy-three pages."

17. Mr Kraska subsequently filed three other applications for the reopening of the proceedings in the Federal Court; they were dismissed on 5 May and 23 August 1988 and on 6 June 1989.

PROCEEDINGS BEFORE THE COMMISSION

18. Mr Kraska lodged his application with the Commission on 2 April 1988. He complained of a violation of Article 6 paras. 1 and 2 (art. 6-1, art. 6-2) of the Convention, and of Article 3 (art. 3). A member of the Federal Court had allegedly expressed his view on the applicant's public-law appeal without having examined the file; the Federal Court had, he maintained, found a violation of the Zurich Public Health Act despite the judgment of 13 January 1986 acquitting him; finally he claimed that the proceedings

conducted before the competent authorities and courts had constituted inhuman and degrading treatment.

19. On 4 October 1990 the Commission declared the complaint based on Article 6 para. 1 (art. 6-1) admissible, but found the remainder of the application (no. 13942/88) inadmissible. In its report of 15 October 1991 (made under Article 31) (art. 31), the Commission expressed the opinion by fourteen votes to five that there had been a violation of that provision. The full text of the Commission's opinion and of the dissenting opinion contained in the report is reproduced as an annex to this judgment*.

FINAL SUBMISSIONS TO THE COURT BY THE GOVERNMENT

20. In their memorial the Government requested the Court to "find that Switzerland did not violate the ... Convention ... in respect of the facts that gave rise to Mr Martin Kraska's application".

AS TO THE LAW

21. Mr Kraska claimed that he had not had a fair trial in the Federal Court on 22 October 1987 inasmuch as one of the judges had not been able to read the whole file. He relied on Article 6 para. 1 (art. 6-1) of the Convention, according to which:

> "In the determination of his civil rights and obligations ..., everyone is entitled to a fair ... hearing by ... [a] ... tribunal ..."

The Government contested this allegation, whereas the Commission accepted it in substance.

22. In his oral pleadings the applicant's lawyer questioned whether the Court had jurisdiction to rule on various points raised by the Government concerning the facts of the case, the establishment of which, he argued, fell to the Commission and to the Commission alone.

The Court cannot accept this argument, which is not consistent either with Article 45 (art. 45) of the Convention, or with Rule 41 et seq. of the Rules of Court, or with its case-law and practice. The Court is vested with full jurisdiction within the limits of the case as referred to it and is competent, inter alia, to take cognisance of any question of fact which may

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* Note by the Registrar: for practical reasons this annex will appear only with the printed version of the judgment (volume 254-B of Series A of the Publications of the Court), but a copy of the Commission's report is available from the registry.

arise in the course of consideration of the case. Admittedly it has recourse to this power fairly exceptionally, in view of the primary role in this sphere which Articles 28 para. 1 and 31 (art. 28-1, art. 31) of the Convention entrust to the Commission, but it is not bound by the findings in the Commission's report; it remains free to make its own assessment of these findings and, where appropriate, to depart from them, in the light of all the material which is before it or which, if necessary, it obtains (see, among other authorities, the De Wilde, Ooms and Versyp v. Belgium judgment of 18 June 1971, Series A no. 12, p. 29, para. 49, and the Cruz Varas and Others v. Sweden judgment of 20 March 1991, Series A no. 201, p. 29, para. 74).

A. Applicability of Article 6 para. 1 (art. 6-1)

23. In the Government's contention, Article 6 para. 1 (art. 6-1) does not apply to the examination of an application for an authorisation to practise medicine. The grant of such an authorisation was, they maintained, an administrative act which was subject to certain conditions and conferred no individual right; it was accordingly impossible to speak in the instant case of a dispute (contestation) concerning a "right". In the alternative, if there were such a right, it was not a "civil right", on account of the public-law features inherent in the exercise of the profession in question.

In addition, the Government requested the Court to rule on the applicability of Article 6 para. 1 (art. 6-1) where the Federal Court gives judgment, on a public-law appeal, as a constitutional court.

24. The Court notes in the first place that Article 31 of the Swiss Constitution guarantees the freedom of professional activity, construed by the Federal Court as embracing the medical profession (see paragraph 14 above). The dispute therefore concerned the very existence of a right which could be said, on arguable grounds, to be recognised under domestic law (see, inter alia, the H. v. Belgium judgment of 30 November 1987, Series A no. 127-B, p. 31, para. 40). In addition, the dispute was genuine and of a serious nature (see, among other authorities, the Benthem v. the Netherlands judgment of 23 October 1985, Series A no. 97, p. 15, para. 32). As Mr Kraska had obtained a medical diploma in 1981, he was entitled to apply for an authorisation to practise independently in Zurich once he satisfied the conditions laid down by law; he had held one in 1982 and 1983, but had subsequently lost it because he no longer lived in the canton (see paragraphs 6-7 above).

25. On the question of whether the right in issue was a "civil right", the Court refers to its case-law concerning the medical profession (the König v. Germany judgment of 28 June 1978, Series A no. 27, p. 31, paras. 91-92; the Le Compte, Van Leuven and De Meyere v. Belgium judgment of 23 June 1981, Series A no. 43, p. 20, paras. 44-45; and the Albert and Le

Compte v. Belgium judgment of 10 February 1983, Series A no. 58, p. 14, para. 27). It is true that in Switzerland this profession has features which are undeniably of a public-law nature: it is subject to administrative rules, enacted in the public interest, and its exercise depends on the issue of an authorisation by the Cantonal Health Authority. Nevertheless, the applicant wished to work in the private sector, on the basis of contracts concluded between him and his patients (see, mutatis mutandis, the H. v. Belgium judgment, cited above, Series A no. 127-B, p. 33, para. 47 (a)). The dispute between him and the Zurich Government therefore concerned a "civil right".

26. As to whether Article 6 para. 1 (art. 6-1) also applied to the examination of Mr Kraska's public-law appeal, the Court reiterates that proceedings come within the scope of this provision, even if they are conducted before a constitutional court, where their outcome is decisive for civil rights and obligations (see, inter alia, the Ringeisen v. Austria judgment of 16 July 1971, Series A no. 13, p. 39, para. 94, and the Le Compte, Van Leuven and De Meyere judgment, cited above, p. 20, para. 44); in order to determine whether this is so in a given case, it is necessary to have regard to all the circumstances (see, among other authorities, mutatis mutandis, the Bock v. Germany judgment of 29 March 1989, Series A no. 150, p. 18, para. 37).

The applicant complained that the Zurich Administrative Court had denied him the right to practise medicine independently. Moreover, it was open to the Federal Court not only to quash the contested judgment, but also - albeit exceptionally - to grant the authorisation which the applicant was seeking (see paragraph 14 above). Indeed he was able to obtain the authorisation on 8 December 1987 as a result of the Federal Court's decision to annul the waiting period imposed on 11 March 1987 (see paragraphs 12, 14 and 15 above). The direct effect of its judgment of 22 October 1987 on the recognition of the right claimed is consequently beyond question.

27. In short, Article 6 para. 1 (art. 6-1) is applicable in the instant case.

B. Compliance with Article 6 para. 1 (art. 6-1)

28. Mr Kraska inferred from certain remarks made by Judge Y during the public deliberations in the Federal Court that the judge must have given his opinion without thorough knowledge of the file (see paragraphs 13 and 16 above). In his submission, there would only have been a fair trial if each of the members of the court had been able to examine the available documents at length.

29. The Commission stressed the particular importance of the document which the judge had been unable to finish reading, namely the appeal memorial or the document instituting the proceedings in the Federal Court.

30. It falls to the Court to decide whether the contested proceedings considered as a whole were fair within the meaning of the Convention. The effect of Article 6 para. 1 (art. 6-1) is, inter alia, to place the "tribunal" under a duty to conduct a proper examination of the submissions, arguments and evidence adduced by the parties, without prejudice to its assessment of whether they are relevant to its decision (see, among other authorities, mutatis mutandis, the Barberà, Messegué and Jabardo v. Spain judgment of 6 December 1988, Series A no. 146, p. 31, para. 68). It has to be determined whether this condition was satisfied in the instant case.

31. As the Government pointed out, the Health Authority, the Cantonal Government and the Administrative Court of Zurich had carefully studied Mr Kraska's application for an authorisation. Once the matter was brought before the Federal Court, the judges assigned to sit in the case all had access to the file of the cantonal proceedings and the rapporteur communicated to them his opinion a few days before the deliberations. They were also able, in principle, to consult their own court's file and in particular the appeal memorial. However, one of them, Judge Y, complained, at the public deliberations on 22 October 1987, that he had received it only the previous day and that he had been able to read thoroughly only half of the memorial, which was moreover much too long in his view (see paragraphs 13 and 16 above). Mr Kraska's lawyer was left with the impression that the judge did not have sufficient knowledge of the case.

32. The Court has already stressed on numerous occasions the importance of appearances in the administration of justice, but it has at the same time made clear that the standpoint of the persons concerned is not in itself decisive. The misgivings of the individuals before the courts, for instance with regard to the fairness of the proceedings, must in addition be capable of being held to be objectively justified (see, among other authorities, mutatis mutandis, the Hauschildt v. Denmark judgment of 24 May 1989, Series A no. 154, p. 21, para. 48).

In the present case Judge Y took an active part in the deliberations; he went so far as to propose a solution contrary to that recommended by the rapporteur and showed that he was familiar with the case. Ultimately the Federal Court adopted neither of these two opinions; it chose a third possibility, put forward by one of the other three judges (see paragraphs 13-14 above). All things considered, there is no evidence to suggest that its members failed to examine the appeal with due care before taking their decision. One fact, to which the Government rightly drew attention, appears significant in this respect: neither Judge Y, nor any of his four colleagues, requested the adjournment of the deliberations, although they could have done so, in accordance with the practice of the Federal Court, if they had felt the need to acquaint themselves further with the file.

33. In the light of all of these circumstances, Mr Kraska's complaint does not prove to be well-founded. Even though Judge Y's comment is open to

criticism, the manner in which the Federal Court dealt with the case does not give rise to any reasonable misgivings.

34. There has therefore been no violation of Article 6 para. 1 (art. 6-1).

FOR THESE REASONS, THE COURT

1. Holds unanimously that Article 6 para. 1 (art. 6-1) applies in this case;

2. Holds by six votes to three that there has been no violation of that provision.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 19 April 1993.

Rolv RYSSDAL
President

Marc-André EISSEN
Registrar

In accordance with Article 51 para. 2 (art. 51-2) of the Convention and Rule 53 para. 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

(a) joint dissenting opinion of Mr Ryssdal, Mrs Palm and Mr Pekkanen;

(b) concurring opinion of Mr Matscher,

(c) concurring opinion of Mr De Meyer.

R. R.
M.-A. E.

JOINT DISSENTING OPINION OF JUDGES RYSSDAL, PALM AND PEKKANEN

1. According to Article 6 para. 1 (art. 6-1) of the Convention everyone is entitled to a fair trial by an impartial tribunal. The right to a fair hearing includes, inter alia, the right for the parties to the proceedings to submit to the court observations which they regard as relevant to their case. This right is, however, effective only if the submissions made to the court are also duly considered by the court.

2. The Court has on many occasions stressed the importance of appearances in the administration of justice. The courts in a democratic society must inspire confidence in the public and, above all, in the parties to the proceedings. The perceptions of the persons involved in the proceedings are important, but not decisive; any doubts as to the unfairness of the hearing must also be objectively justified (see, among others, mutatis mutandis, the Hauschildt v. Denmark judgment of 24 May 1989, Series A no. 154, p. 21, para. 48).

3. According to a summary made by the Federal Court on 14 March 1988, one of the judges of that court expressed dissatisfaction during the public deliberations of the case on 22 October 1987 that the documents had not been available for a long enough period of time; he had therefore been able to read thoroughly only the first thirty-five pages of the over-lengthy public-law appeal statement which comprised seventy-three pages (see paragraph 16 of the Court's judgment). After this statement the judge proceeded to take part in the deliberations and decision on the appeal.

In a letter to his client describing the deliberations of the Federal Court, Mr Kraska's lawyer indicated that he had misgivings as to the fairness of the hearing since the judge in question had called for the dismissal of the appeal without having had the possibility to study the file which he had received only a day before (see paragraph 13 of the Court's judgment).

4. From these facts we can only draw the same conclusion as the Commission that the judge in question gave the impression by his remarks that he wanted to read the entire public-law appeal statement, but had not been able to do so, although he regarded the document as being pertinent to the case. Mr Kraska had been able to make his submissions to the court, but there was a doubt as to whether his observations had been given proper consideration by one member of the court. Since these misgivings were based on the admission of the judge himself no other objective justification is in our opinion necessary.

In our view the decisive fact in this case is the above-mentioned statement of the judge in question and the impression which it made on the parties as to the fairness of the hearing.

5. For these reasons we are of the opinion that there has been a violation of Article 6 para. 1 (art. 6-1) of the Convention with regard to Mr Kraska's right to a fair hearing.

CONCURRING OPINION OF JUDGE MATSCHER

(Translation)

While I agree with the conclusions of the majority concerning the finding of no violation of Article 6 para. 1 (art. 6-1), I wish to reaffirm my view (which I expressed in my dissenting opinions in the cases of König v. Germany, Series A no. 27, p. 45; Le Compte, Van Leuven and De Meyere v. Belgium, Series A no. 43, p. 34; and Albert and Le Compte v. Belgium, Series A no. 58, p. 26), that proceedings relating to the practice of medicine - or indeed the practice of any other profession governed by public law - are not proceedings concerning a civil right, as their outcome has only an indirect bearing on such a right, in this case the right to conclude (private law) contracts for medical treatment.

I recognise that it is also important for an individual to enjoy certain procedural guarantees in his relations with the administrative authorities, but this should be the subject of specific rules in the Convention, as Article 6 (art. 6), which was intended to apply to civil (and criminal) cases, constitutes a somewhat inappropriate basis for such protection.

If I did not vote against finding Article 6 para. 1 (art. 6-1) applicable, it was purely out of respect for the well-established case-law of the Court.

CONCURRING OPINION OF JUDGE DE MEYER

(Translation)

I. The right to engage in a professional activity must undoubtedly be regarded as a "civil right" within the meaning of Article 6 para. 1 (art. 6-1) of the Convention.

In this connection it matters little that the status of the profession in question in this case "has features [in Switzerland] which are undeniably of a public-law nature" or that "the applicant wished to work in the private sector, on the basis of contracts concluded between him and his patients"[1].

The nature of the right in question would not have been any different if the applicant had wished to practise medicine on another "basis" or in the "public sector". Nor would it have been if the status of the medical profession did not embrace "public-law features"[2].

II. Similarly, the Court did not have to ask itself, yet again, whether it was "a right which could be said, on arguable grounds, to be recognised under domestic law" and whether the dispute "was genuine and of a serious nature"[3].

In the first place, it is not for us, but for the national courts to resolve questions of this type[4]. Secondly, the fact that a right does not seem to be recognised under the domestic legislation of a State cannot remove the latter's obligation, in respect of this right, to ensure that the principles laid down in Article 6 para. 1 (art. 6-1) are applied[5].

III. The right to a fair trial is so important that "there can be no justification for interpreting Article 6 para. 1 (art. 6-1) of the Convention restrictively"[6].

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[1] Paragragh 25 of the judgment.

[2] It is interesting to note that, in a recent case, the Court would seem to have begun to accept that, at least in the pensions field, the legal position of "public sector" employees is the same as that of "private sector" employees: judgment of 26 November 1992, Giancarlo Lombardo v. Italy, Series A no. 249-C, p. 42, para. 16.

[3] Paragraph 24 of the judgment.

[4] See in this connection my separate opinion annexed to the Allan Jacobsson v. Sweden judgment of 25 October 1989, Series A no. 163, p. 24.

[5] See on this point the concurring opinion of Mr Lagergren, annexed to the Ashingdane v. the United Kingdom judgment of 28 May 1985, Series A no. 93, p. 27, and his separate opinion, approved by Mr Macdonald, annexed to the Lithgow and Others v. the United Kingdom judgment of 8 July 1986, Series A no. 102, p. 80, together with the joint separate opinion of Mr Lagergren, Mr Pinheiro Farinha, Mr Pettiti, Mr Macdonald, Mr Valticos and myself, annexed to the W. v. the United Kingdom judgment of 8 July 1987, Series A no. 121, p. 39.

[6] Judgment of 13 October 1990, Moreira de Azevedo v. Portugal, Series A no. 189, p. 16, para. 66.

The effective enjoyment of this right must be secured each time that the determination of a right is in issue. That was the case in this instance; it was sufficient to note that this was so.

As regards the rest, I should like to be permitted to refer, mutatis mutandis, to what I said in this connection in my separate opinion in the cases of Pudas v. Sweden[7], H v. Belgium[8] and Allan Jacobsson v. Sweden[9].

I would simply add that what I was "inclined to think" in November 1987[10] as regards the "civil" character, within the meaning of the above-mentioned Article (art. 6-1), of rights and obligations has since become a profound conviction. All the rights and obligations which are not related more specifically to the determination of a "criminal charge" should be regarded as "civil rights".

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[7] Judgment of 27 October 1987, Series A no. 125, p. 21.
[8] Judgment of 30 November 1987, Series A no. 127-B, pp. 48-49.
[9] Judgment of 25 October 1989, cited above, loc. cit.
[10] Judgment of 30 November 1987, cited above, p. 49, para. 4.

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IN TRIAL CHAMBER II

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

Registrar:
Mr Hans Holthuis

Decision of:
26 June 2001

PROSECUTOR

v

RADOSLAV BRDANIN & MOMIR TALIC

DECISION ON FORM OF FURTHER AMENDED INDICTMENT AND PROSECUTION APPLICATION TO AMEND

The Office of the Prosecutor:

Ms Joanna Korner
Mr Andrew Cayley
Mr Nicolas Koumjian
Ms Anna Richterova
Ms Ann Sutherland

Counsel for Accused:

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

1 The application and its background

1. The accused Momir Talic ("Talic") has filed a Preliminary Motion in accordance with Rule 72 of the Rules of Procedure and Evidence ("Rules"),[1] in which he alleges that the form of the further amended indictment now filed by the prosecution is defective.[2]

2. The further amended indictment pleads the same twelve counts against Talic as were pleaded in the amended indictment.[3] These are:

(a) genocide,[4] and complicity in genocide ;[5]

(b) persecutions,[6] extermination,[7] deportation[8] and forcible transfer (amounting to inhumane acts),[9] as crimes against humanity;

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(c) torture, as both a crime against humanity,[10] and a grave breach of the Geneva Conventions; [11]

(d) wilful killing, [12] and unlawful and wanton extensive destruction and appropriation of property not justified by military necessity, [13] as grave breaches of the Geneva Conventions; and

(e) wanton destruction of cities, towns or villages or devastation not justified by military necessity, [14] and destruction or wilful damage done to institutions dedicated to religion, [15] as violations of the laws or customs of war.

The material facts upon which those charges are based as pleaded in the further amended indictment do not appear to be different in substance from those facts pleaded in the amended indictment. In relation to some matters they are differently expressed , and in relation to other matters additional material facts have been pleaded.

3. The main burden of the complaints made by Talic is that the further amended indictment still fails to plead those material facts in sufficient detail. These complaints are disputed by the prosecution, [16] although its response does make clear some matters which had not been made sufficiently clear in the pleading. An application in the Talic Motion for "a deadline" for filing a reply to the Prosecution Response "should he elect to do so", [17] has been refused. [18] Following a discussion at a recent Status Conference concerning the validity of the way common purpose has been pleaded, [19] the prosecution sought leave to amend the indictment further in relation to the allegation of common purpose. [20] Talic objected to the proposed amendment upon two bases: (1) that the proposed amendment does not correct the deficiencies in the common purpose pleaded in the current indictment, [21] and (2) that the proposed amendment is itself defective in form. [22] The prosecution was granted leave to file a reply to three of the specific issues raised by Talic, [23] and the prosecution has done so. [24] Talic has subsequently been refused leave to file a further response to that reply, upon the basis that the reply had raised no fresh issues. [25] The application to amend is discussed later in the decision. [26]

4. The Trial Chamber has already outlined in detail the obligations which have been placed upon the prosecution by the Tribunal's jurisprudence in pleading indictments , in its decision on the form of the previous indictment in this case. [27] It did so because the prosecution had sought to explain the inadequacies of that indictment upon the basis that those responsible for its drafting had been ignorant of those obligations. [28] It was therefore necessary to ensure that there could be no further claim of ignorance as to the Trial Chamber's view of that jurisprudence. The prosecution was instructed to file a further amended indictment which complied with the pleading principles which had been stated in that decision. [29]

5. The Trial Chamber had understood the prosecution to have indicated an intention to be co-operative with it in the production of an indictment which would enable the trial to proceed with some expedition, following the long delay caused by the need to resolve various issues raised unsuccessfully not only by the two accused but also to a large extent by the prosecution itself. [30] The 20 February 2001 Decision accordingly drew the attention of the prosecution to the Trial Chamber's preference for an indictment to indicate precisely *and expressly* the particular nature of the responsibility alleged in relation to the accused in *each* individual count. Such an indictment would avoid many of the ambiguities engendered by the style of pleading adopted by the prosecution in this and other cases. [31] The Trial Chamber said that the extent to which the prosecution adopted its preferred manner of pleading in this regard would provide a good indication of the degree to which the prosecution was prepared to co-operate with it in bringing this case to trial . [32]

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6. The further amended indictment now filed by the prosecution has ignored the Trial Chamber's preferred manner of pleading. It has repeated the prosecution's previous style, by pleading the alleged criminal responsibility of the accused merely by reciting all of the terms of Articles 7.1 and 7.3 of the Tribunal's Statute, to be applied globally to all counts.[33] This style of pleading continues to cause ambiguity, as has become apparent once again in relation to the Talic Motion. This is unfortunate, but it is obvious that the Trial Chamber can no longer expect the prosecution to give it the cooperation to which the Trial Chamber is entitled.[34] So that the trial may commence within the reasonable future, the Trial Chamber will accordingly need to ensure, by the terms in which its orders are expressed, that any continued non-cooperation by the prosecution does not prevent proper expedition in the resolution of these present issues.

7. Except where it is necessary to do so, it is not proposed to repeat what has already been said by the Trial Chamber as to the obligations placed upon the prosecution in pleading an indictment. This decision deals with the various complaints made so far as possible in the order in which those complaints occur in the Talic Motion .

2 The nature of the alleged criminal responsibility of the accused

8. Talic complains that the mere recitation in pars 33-34 of the indictment of the terms of Articles 7.1 and 7.3, without further elucidation,[35] leaves him unaware as to whether he is alleged to have "planned and/or instigated and/or ordered and/or aided and abetted in the crimes with which he is charged".[36] The prosecution has not addressed this complaint in its Response. The Trial Chamber has already said that it is appropriate to define individual responsibility in such extensive terms only if the prosecution intends to rely upon each of the different ways pleaded.[37] The repetition of this style of pleading in the further amended indictment following that statement by the Trial Chamber necessarily means that the prosecution does indeed intend to rely upon each of the different ways pleaded.[38]

9. Talic complains that, although the prosecution has conceded that it does not (presently) suggest that either accused engaged in the "physical perpetration of the crime", it reserves the right to rely upon any evidence indicating "actual physical perpetration of a crime by one or both of the accused".[39] Talic says that the prosecution should therefore plead as material facts all the specific details known to it of the victims, places, dates and the means by which the offences were committed by him personally.[40] The prosecution's response is that, as Talic is not accused of "physically" perpetrating any of the crimes in the indictment, the provision of such particulars "would make the indictment far from a 'concise' statement of the facts and would be of little or no assistance to the accused in this case".[41]

10. The opposing stands taken by the parties in relation to this issue demonstrate clearly the ambiguities which remain as a result of the prosecution's persistence in pleading that the accused "committed" the various crimes charged (in the sense of personally perpetrating the offences). The prosecution's fallacious argument that it was entitled to do so in order to comprehend the participation of the accused in a common purpose to perpetrate them has already been rejected by the Trial Chamber .[42]

11. This trial has become very complex. That is the inevitable consequence of the very general nature of the case which the prosecution has pleaded. Unfortunately , however, the prosecution appears to have adopted a policy of avoiding a disclosure of as much of that case as possible until as late as possible.[43] The Trial Chamber draws the inference that the prosecution has done so to enable it to mould its case in a substantial way during the trial, according to how its evidence actually turns out. The only alternative explanation for the recalcitrant attitude which the prosecution is exhibiting is that it still does not know what its case is. The Trial Chamber would be hesitant to draw such an

inference. Both the Trial Chamber and the accused are entitled to know what the prosecution case is from the outset. The Trial Chamber acknowledges that the evidence may sometimes turn out differently to the expectations of the prosecution, and that it may be necessary in the interests of justice to permit the prosecution to change its case so as to adjust it to that evidence. But such changes must be made openly, if necessary by amendments to the indictment even during the course of the trial; [44] they must not be made covertly, to the detriment of the interests of justice.

12. There have been, and there remain, enormous problems posed by the flood of paper which is still in the process of being disclosed by the prosecution in accordance with what it sees to be its obligations under the Rules. It appears that the prosecution is also either unwilling or unable to explain to the defence even in general terms the possible relevance of this material. [45] It is obvious that any fair trial in the present case (with all of its complexities) within a reasonable period will require a strict insistence by the Trial Chamber that the prosecution case is made very clear to the accused (and to the Trial Chamber itself) from the outset, and that such case is not thereafter *unfairly* enlarged by the chance introduction of evidence which is not presently available, particularly if it were to be enlarged to the radical extent contemplated by the prosecution. In the circumstances of the present case (including the mode of pleading adopted by the prosecution), it would necessarily be unfair to the accused if, after the trial has commenced *and without sufficient notice*, they had to face a case for the first time that they are guilty of "personal perpetration" of the offences charged.

13. The prosecution has referred to the judgment of the Appeals Chamber in the *Celebici* Appeal [46] as a justification for its approach. [47] An issue arose in that appeal (which the Appeals Chamber found unnecessary to consider) [48] as to whether, in view of the very general wording used in the indictment in that case, the accused had been sufficiently put on notice during the trial that "offences " in addition to those pleaded were alleged against him, and of the nature of those offences, so that he could meet the allegations in his defence case. [49] That was a case where the existing counts incorporated many separate offences – such as murder – which were identified by lists introduced by the word "including ". The prosecution had argued that murders not included in the list but which assisted in establishing the existing count should have been considered by the Trial Chamber when sentencing the accused. [50] That was *not* a case where the prosecution gave notice during the trial for the first time of its intention to establish a case that the accused personally perpetrated the crime charged. Such a new case would require extensive amendments to the current indictment, to include detailed material facts such as the identity of the victim , the place and the approximate date of the crime and the means by which the crime was committed. [51] In some cases, _ it may be appropriate to permit an amendment of the indictment during the trial to change completely the basis of criminal responsibility upon which the case had hitherto proceeded. In this case, the prosecution has declined to plead at this time even those details of such a case which are presently known to it, upon the ground that Talic is not accused of "physically" perpetrating any of the crimes in the indictment. [52] That is a course which the prosecution was entitled to take, but the absence of a proper opportunity for the defence to investigate even the details which are presently known to the prosecution will be relevant to any application to raise such a case for the first time during the course of the trial.

14. The Trial Chamber proposes therefore to strike the word "committed" from par 33 of the further amended indictment, which is incorporated in each of the counts , so that any suggestion that either of the accused "committed" the crimes (in the specific sense of personally perpetrating the offences) is presently removed. [53] There can be no prejudice to the prosecution, which concedes that it has nothing to support such a case. Only in this way will it be possible to ensure that the parties concentrate their attention on the case which the prosecution contends that it is *able* to prove, and to deflect their attention from a case which the prosecution concedes that it is presently *unable* to prove. If the prosecution does obtain evidence which is capable of supporting a conviction of either of the accused on the basis that he "committed" any of these crimes (in that same specific sense), it may seek to amend the indictment to reinstate that allegation. Such an application will be considered

on its merits in the circumstances which then obtain. *At this stage*, however, the trial will not commence with the prospect of it becoming completely destabilised by the ambiguities which result from the way in which the indictment is presently pleaded.

3 Multiple bases alleged for the accused's criminal responsibility

15. Talic complains that his criminal responsibility is "indiscriminately" portrayed as commander of the 1st Krajina Corps, as a member of the Crisis Staff and as a participant in a criminal enterprise, thus rendering the further amended indictment vague. [54] He asserts that, as commander of the 1st Krajina Corps, he would not be responsible for acts committed by a unit which did not form part of the 1st Krajina Corps, [55] or for acts committed within the Krajina Region which were not within his area of responsibility as such commander. [56] Since not all of the municipalities fell within his area of responsibility as such commander at the same time, [57] he says that the indictment should indicate in relation to each municipality when it fell within his area of responsibility as such. [58]

16. Talic then complains that, as the indictment alleges that he was responsible for implementing the policy of incorporating the Autonomous Region of Krajina (" ARK") into a Serb state, [59] and a plan to separate the ethnic communities in Bosnia and Herzegovina, [60] as both the commander of the 1st Krajina Corps and a member of the ARK Crisis Staff , he would be made responsible for acts committed outside the area of responsibility of the 1st Krajina Corps and for acts which were not done under his authority. Since his powers are not the same under each of these positions of authority, particularly his power to issue orders or to punish the perpetrators of crimes, he says that he is entitled to know, in relation to each act for which he is sought to be made criminally responsible, whether that responsibility is alleged to flow from his position as commander of the 1st Krajina Corps or as a member of the ARK Crisis Staff. [61]

17. The prosecution concedes that the indictment *does* seek to make Talic responsible as commander of the 1st Krajina Corps for acts committed by units of that Corps where they operated outside its geographical area of responsibility. [62] The Trial Chamber accepts that, if there be evidence to support the allegation, it would be appropriate to charge Talic with such responsibility upon the basis that he was in effective control of those units in such circumstances. He is not charged as being the commander of some defined geographical area, but as the commander of the 1st Krajina Corps. He may therefore be found criminally responsible as such commander in relation to the acts of those over whom he was in effective control , regardless of the place where those acts took place. It is, in any event, unclear to the Trial Chamber just where the indictment does assert expressly that units of the 1st Krajina Corps did act outside that geographical area. [63] If it is indeed the prosecution case that units of the 1st Krajina Corps committed crimes outside its geographical _area of responsibility, and that Talic is responsible for those crimes because he was in effective control of the Corps when they did so, it must identify with sufficient detail the areas outside whatever geographical area is defined where, it is alleged, the units of the 1st Krajina Corps committed such crimes. The prosecution will be ordered to do so. [64]

18. The prosecution also responds that the link between the criminal acts charged and the criminal responsibility of Talic for those acts does not belong exclusively to either his position as commander of the 1st Krajina Corps or his position as a member of the ARK Crisis Staff. [65] The Trial Chamber agrees with the prosecution that this is made clear in the further amended indictment. [66] The Trial Chamber also accepts that the prosecution is entitled to plead its case in this way. It causes no prejudice (in the relevant sense of rendering his trial unfair) or embarrassment to Talic, provided that the basis upon which he is alleged to be criminally responsible in each position of authority is pleaded with sufficient particularity in the indictment .

19. So far as the Article 7.1 responsibility of Talic as commander of the 1st Krajina Corps is concerned, he is alleged to have commanded the Corps when it executed the policy of the ARK Crisis Staff. [67] By virtue of his authority set out in identified military documents, it is alleged that he controlled the work of the Corps by making decisions and issuing orders to subordinates. [68] As such commander , and in accordance with identified military instructions, [69] it is also alleged that he was obliged to prevent those under his command violating the international laws of war and international humanitarian law and to punish those who did so. [70] The Trial Chamber is satisfied that the current indictment is pleaded with sufficient particularity in relation to the basis upon which Talic is alleged to be criminally responsible as commander of the 1st Krajina Corps. Anything further would be pleading the evidence by which those material facts are to be established. That evidence should be apparent from the witness statements made available by the prosecution to the accused in accordance with Rule 66(A). If Talic claims that the evidence is not so apparent from that material, his remedy is to request the prosecution to supply particulars of the statements upon which it relies to prove the specific material fact in question . If the prosecution's response to that request is unsatisfactory, and only then , he may seek an order from the Trial Chamber that such particulars be supplied. [71]

20. So far as the Article 7.1 responsibility of Talic as a member of the ARK Crisis Staff is concerned, the indictment presently appears to allege only that he implemented its policies as the commander of the 1st Krajina Corps. [72] If the prosecution case *was* intended to be so limited, there may well be a problem for the prosecution in establishing Talic's responsibility for crimes committed by persons who were not under his authority as such commander. There is no express allegation, for example, that Talic participated in the decisions of the ARK Crisis Staff. If such participation *is* to be the prosecution case, then Talic would also appear to be responsible for the acts of persons who were not under his authority as the commander of the 1st Krajina Corps. If such participation is *not* to be the prosecution case, it is difficult to understand from the indictment what his membership of the ARK Crisis Staff adds to the prosecution case, other than perhaps as a source of information concerning the objectives of the alleged joint criminal enterprise. However, if it *is* part of the prosecution case that Talic is criminally responsible because he participated in the decisions of the ARK Crisis Staff, this is a material fact which must be pleaded expressly .

21. The prosecution case in relation to the responsibility of Talic as a member of the ARK Crisis Staff is certainly not clearly or sufficiently stated in the indictment . The prosecution was obliged to identify with some precision in the indictment the basis or bases upon which it seeks to make Talic criminally responsible *as a member of the ARK Crisis Staff*, and it has failed to do so. It will be ordered to make good that deficiency. [73]

4 Common purpose

22. Talic next complains of the way in which his alleged participation in what has been described as "a common purpose" has been pleaded. Following his complaint, and as already stated, [74] the prosecution sought leave to amend the indictment in relation to this issue. Talic has asserted that the proposed amendment does not correct the deficiencies in the current indictment and is itself defective in form. It will be convenient to deal with *all* of the objections taken to common purpose before determining whether the amendment sought should be granted.

23. As proposed to be amended, [75] par 27 of the further amended indictment pleads common purpose in this way (the amendments are shown in italics): [76]

> Radoslav Brdanin and Momir Talic each participated in a criminal enterprise, in their roles as set out in paragraphs 17-*26* above. *The* common purpose of *the enterprise* was the permanent removal, *through unlawful means* , of the majority of Bosnian Muslim and Bosnian Croat inhabitants from the territory of the planned Serbian state [...].

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This criminal enterprise is alleged to have come into existence no later than 24 October 1991 and to have continued until the signing of the Dayton Accords in 1995 . Various named groups of persons are alleged to have participated with the two accused in that criminal enterprise. The participation by the two accused in this enterprise is identified by reference to their roles described in an earlier part of the indictment. [77] As proposed to be amended, the paragraph concludes:

> *All* of the crimes enumerated in Counts 1 though 12 of this indictment, were natural and foreseeable consequences of this enterprise. *Radoslav Brdanin and Momir Talic, aware that these crimes were likely to result from the implementation of the common purpose, knowingly and wilfully participated in the criminal enterprise* .

The *Tadic* Conviction Appeal Judgment

24. Before considering the submissions which have been made, it is necessary to discuss in some detail just what is involved in the notion or concept of "common purpose" upon which the prosecution relies, in particular the state of mind of the accused which must be established by the prosecution. The starting point, so far as this Trial Chamber is concerned, is the *Tadic* Conviction Appeal Judgment . [78] The issues which the Appeals Chamber determined in that judgment were (i) whether the acts of one person can give rise to the criminal responsibility of another person where both persons participate in the execution of "a common criminal plan", and (ii) the degree of *mens rea* required in such a case. [79] The first issue was subsequently re-stated as being whether criminal responsibility in a "common criminal purpose" fell within the ambit of individual responsibility in Article 7(1) of the Tribunal's Statute. [80] The Appeals Chamber labelled this concept variously, and apparently interchangeably , as a common criminal plan, [81] a common criminal purpose, [82] a common design or purpose, [83] a common criminal design , [84] a common purpose, [85] a common design, [86] and a common concerted design. [87] The common purpose is also described, more generally, as being part of a criminal enterprise, [88] a common enterprise, [89] and a joint criminal enterprise. [90] For reasons which will become clear, the Trial Chamber prefers the last of these labels, a " joint criminal enterprise", to describe a common purpose case. It proposes to adhere to that label wherever possible. The Appeals Chamber held that the notion of a joint criminal enterprise "as a form of accomplice liability" was firmly established in customary international law, and that it was available under the Tribunal's Statute . [91]

25. The Appeals Chamber stated that three "distinct categories of collective criminality " were encompassed within the concept of joint criminal enterprise, [92] although it subsequently suggested that the second category was in many respects similar to the first, [93] and that it was really a variant of the first category. [94] However, in order to make clear how the Appeals Chamber went on to define the relative state of mind in relation to crimes based upon each of the categories, it is preferable to describe all three:

> ***Category 1***: [95] All of the participants in the joint criminal enterprise, [96] acting pursuant to a common design, possessed the same criminal intention. The example is given of a plan formulated by the participants in the joint criminal enterprise to kill, where, although each of the participants in the plan may carry out a different role, each of them has the intent to kill. [97]
>
> ***Category 2***: [98] All of the participants in the joint criminal enterprise were members of military or administrative groups acting pursuant to a concerted plan, where the person charged held a position of authority within the hierarchy; although he did not personally perpetrate any of the crimes charged, he actively participated in enforcing the plan by aiding and abetting the other participants in the joint criminal enterprise who did

perpetrate them. The example is given of a concentration camp, in which the prisoners are killed or otherwise mistreated pursuant to the joint criminal enterprise.

Category 3: [99] All of the participants were parties to a common design to pursue one course of conduct , where one of the persons carrying out the agreed object of that design also commits an act which, whilst outside the "common design", was nevertheless a natural and foreseeable consequence of executing "that common purpose". [100] The example is given of a common, shared intention on the part of a group to remove forcibly members of one ethnicity from their town, village or region (labelled " ethnic cleansing"), with the consequence that, in the course of doing so, one or more of the victims is shot and killed.

26. It is clear from the *Tadic* Conviction Appeal Judgment that, in relation to both the first and the second categories, the prosecution must demonstrate that all of the persons charged and all of the persons who personally perpetrated the crime charged had a common state of mind – that the crime charged should be carried out, and the state of mind required for that crime. This *is* an appropriate use of the phrase "common purpose", [101] and it is reflected in various other phrases used in the judgment, such as "acting in pursuance of a common criminal design". [102] Insofar as the *first* category is concerned, this is stated expressly: [103]

> [...] all co-defendants, acting pursuant to a common design, possess the same criminal intention [...].

The example is given of a plan to kill in effecting this common design, and it is said that, even though the various participants in that plan may be carrying out different roles within that plan, it must be shown that "all possess the intent to kill". The passage concludes:

> [The] accused, even if not personally effecting the killing, must nevertheless intend this result.

Insofar as the *second* category is concerned, the position is stated a little more discursively, but nevertheless to the same effect. After referring to the joint criminal enterprise as being one "to kill or mistreat prisoners", [104] and as "a system of repression", [105] the judgment states: [106]

> The *mens rea* element comprised: (i) knowledge of the nature of the system and (ii) the intent to further the common concerted design to ill-treat inmates.

27. As the Appeals Chamber has suggested, the second category is not substantially different to the first. The position of the accused in the second category is exactly the same as the accused in the first category. Both carry out a role within the joint criminal enterprise to effect the object of that enterprise which is different to the role played by the person who personally perpetrates the crime charged. The role of the accused in the second category is enforcing the plan by aiding and abetting the perpetrator. [107] Both of them must intend that the crime charged is to take place. [108] The Trial Chamber accordingly proposes to deal with the first and second categories together as the *basic* form of joint criminal enterprise, and with the third category as an *extended* form of joint criminal enterprise.

28. Insofar as the *third* category (the extended form of joint criminal enterprise) is concerned, the Appeals Chamber identified the relevant state of mind in various ways. The first statement was in these terms: [109]

> Criminal responsibility may be imputed to all participants within the common enterprise

> where the risk of death occurring was both [*sic*] a predictable consequence of the execution of the common design and the accused was either reckless or indifferent to that risk.

The next passage summarises the relevant state of mind in these terms: [110]

> What is required is a state of mind in which a person, although he did not intend to bring about a certain result, was aware that the actions of the group were most likely to lead to that result but nevertheless willingly took that risk. In other words, the so-called *dolus eventualis* is required (also called "advertent recklessness" in some national legal systems).

The third passage summarises the relevant state of mind in these terms: [111]

> [...] responsibility for a crime other than the one agreed upon in the common plan arises only if, under the circumstances of the case, (i) it was *foreseeable* that such a crime might be perpetrated by one or other members of the group and (ii) the accused *willingly took that risk*.

29. It is unfortunate that expressions conveying different shades of meaning have been used in these three formulations, apparently interchangeably. So far as the *subjective* state of mind is concerned, there is a clear distinction between a perception that an event is possible and a perception that the event is likely (a synonym for probable). The latter places a greater burden on the prosecution than the former. The word "risk" is an equivocal one, taking its meaning from its context. In the first of these three formulations stated ("the risk of death occurring "), it would seem that it is used in the sense of a possibility. In the second formulation, "most likely" means at least probable (if not more), but its stated equivalence to the civil law notion of *dolus eventualis* would seem to reduce it once more to a possibility. [112] The word "might" in the third formulation indicates again a possibility. In many common law national jurisdictions, where the crime charged goes beyond what was agreed in the joint criminal enterprise, the prosecution must establish that the participant who did not himself commit that crime nevertheless participated in that enterprise with the contemplation of the crime charged as a *possible* incident in the execution of that enterprise. This is very similar to the civil law notion of *dolus eventualis* or advertent recklessness. So far as the *objective* element to be proved is concerned, the words "predictable" in the first formulation and "foreseeable" in the third formulation are truly interchangeable in this context .

30. Accordingly, in the case of a participant in the joint criminal enterprise who is charged with a crime committed by another participant which goes beyond the agreed object of that enterprise, the Trial Chamber interprets the *Tadic* Conviction Appeal Judgment as requiring the prosecution to establish:

> (i) that the crime was a natural and foreseeable consequence of the execution of that enterprise, and
>
> (ii) that the accused was aware that such a crime was a possible consequence of the execution of that enterprise, and that, with that awareness, he participated in that enterprise.

The first is an *objective* element of the crime, and does not depend upon the state of mind on the part of the accused. The second is the *subjective* state of mind on the part of the accused which the prosecution must establish. None of the various formulations in *Tadic* Conviction Appeal Judgment require the prosecution in such a case to establish that the accused intended such further crime to be committed, or that he shared with that other participant the state of mind required for that further

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crime. The Trial Chamber is satisfied that the prosecution does *not* have to do so.

31. The state of mind of the accused to be established by the prosecution accordingly differs according to whether the crime charged:

(a) was *within* the object of the joint criminal enterprise, or

(b) went *beyond* the object of that enterprise, but was nevertheless a natural and foreseeable consequence of that enterprise.

If the crime charged fell *within* the object of the joint criminal enterprise , the prosecution must establish that the accused shared with the person who personally perpetrated the crime the state of mind required for that crime. If the crime charged went *beyond* the object of the joint criminal enterprise, the prosecution needs to establish only that the accused was aware that the further crime was a possible consequence in the execution of that enterprise and that, with that awareness , he participated in that enterprise.

32. A familiar example of a joint criminal enterprise, which incorporates both the basic and the extended forms of the enterprise, will illustrate these differences more clearly.

Three men (A, B and C) reach an understanding or arrangement amounting to an agreement between them that they will rob a bank, and that they will carry with them a loaded weapon for the purposes of persuading the bank teller to hand over the money and of frightening off anyone who attempts to prevent the armed robbery from taking place. The agreement is that A is to carry the weapon and to demand the money from the teller, B is to stand at the doorway to the bank to keep watch, and C is to drive the getaway vehicle and to remain with the vehicle whilst the other two go inside the bank. The basic form of the joint criminal enterprise is therefore one to commit an armed robbery.

During the course of the armed robbery, A produces the weapon and demands that the bank teller hand over the money. As the teller does so, A observes him also pressing a button, which A thinks would alert the police that a robbery is taking place. A panics and fires his weapon, wounding the bank teller. In such a situation, in order to establish that all three men (A, B and C) were guilty of the armed robbery (the basic form of the joint criminal enterprise), the prosecution would have to prove that all three men intended the armed robbery to take place and that they shared the relevant state of mind required for the crime of armed robbery. If B and C are shown to have shared that state of mind with A, they are guilty with him of the armed robbery, even though they did not personally perpetrate the crime themselves .

The wounding of the teller, however, was not within the object of the basic joint criminal enterprise to which B and C had agreed. In order to establish that not only A but also B and C were responsible for the wounding of the teller (the extended form of the joint criminal enterprise), the prosecution would have to prove that such a wounding was a natural and foreseeable consequence of carrying a loaded weapon during an armed robbery, that each of B and C was aware that the wounding of someone was a possible consequence in the execution of the armed robbery he had agreed to , and that, with that awareness, he participated in that armed robbery. The prosecution would *not* have to establish that B and C intended that anyone would be wounded or that they shared with A the relevant state of mind required for the further crime of wounding.

The objections taken by Talic

33. Talic has taken three objections to the form in which the joint criminal enterprise is proposed to be pleaded:

(1) the state of mind of the accused now pleaded by the prosecution in its proposed

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amendment is insufficient; [113]

(2) there is no definition of the "unlawful means" through which the criminal enterprise effected the permanent removal of the majority of Bosnian Muslim and Bosnian Croat inhabitants from the territory of the planned Serbian state; [114] and

(3) the indictment provides no details of Talic's intention to participate voluntarily in the criminal enterprise or of his knowledge of its existence. [115]

By way of a general response, the prosecution asserts that par 27, as it is proposed to be amended, already provides greater detail regarding the accused's state of mind than is required. [116] It relies upon an 1999 Trial Chamber decision which held:

[...] the indictment need not specify the precise elements of each crime, since all that is required under Article 18, paragraph 4, is a concise statement of the facts and the crime or crimes with which the accused is charged under the Statute. [117]

Article 18.4 of the Tribunal's Statute does indeed require the Prosecutor to prepare an indictment "containing a concise statement of the facts and the crime or crimes with which the accused is charged under the Statute". That *obligation* of the Prosecutor must be interpreted in the light of the *entitlement* given to the accused, by Article 21.4(a), "to be informed promptly and in detail [...] of the nature and cause of the charge against him". Where the state of mind with which the accused carried out his alleged acts is relevant, that state of mind is just as much a fact to be proved by the prosecution as are the accused's acts themselves . Where those acts of the accused are material facts to be pleaded, so to, in the opinion of this Trial Chamber, is the state of mind with which he carried out those acts (where relevant) a material fact to be pleaded, in accordance with these provisions of the Tribunal's Statute. There are two ways in which the relevant state of mind may be pleaded:

(i) by pleading the evidentiary facts from which the state of mind is necessarily to be inferred, [118] or

(ii) by pleading the relevant state of mind itself as the material fact.

In the event that the prosecution adopts the second course, the facts by which that material fact is to be established are ordinarily matters of evidence, and need not be pleaded.

(1) State of mind

34. In support of his first objection, Talic says that the state of mind as pleaded in the proposed amendment would render a person individually responsible for crimes committed by others merely because "he intellectually subscribed to a plan adjudged criminal". [119] He asserts that it is necessary for the prosecution to plead in relation to the genocide charges that his intention was to destroy the discriminated group (at least in part), [120] as well as the specific intent required in the other crimes charged. [121] He has maintained this objection notwithstanding the amendment proposed. [122] He says that the proposed amendment does not allege that the criminal enterprise had as its objective any of the crimes charged, [123] and that it alleges only that he was aware that such crimes were likely to result from the execution of the common purpose (that is, the ethnic cleansing). [124] Talic repeats that the prosecution is obliged to plead "a special and direct intention " on his part, the specific intent required for genocide and the other crimes charged . [125] The indictment therefore fails to demonstrate "one of the essential ingredients of the international crimes the indictment alleged". [126] In response , the prosecution relies upon what is said in the *Tadic* Conviction Appeal Judgment, in

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particular what was said in the second of the three passages already quoted in this decision. [127]

35. For the purposes of his objection, Talic has assumed that the object of the joint criminal enterprise to remove permanently the majority of Bosnian Muslim and Bosnian Croat inhabitants from the territory of the planned Serbian state did not include *any* of the crimes charged. [128] Both the current par 27 and the proposed amendment to it state that each (or all) of the crimes charged were "natural and foreseeable consequences" of the pleaded joint criminal enterprise. The unexpressed assertion that the crimes charged were *no more* than natural and foreseeable consequences, and therefore that each (or all) of them went *beyond* the object of that enterprise, could therefore easily be assumed. A proper pleading would not have left such an important assertion unexpressed The criminal object of the enterprise must be clearly identified. [129] The Prosecution Reply proceeds upon the same assumption as that made by Talic, [130] and it may therefore be accepted that the prosecution does intend to assert that each (or all) of the crimes charged in the indictment went beyond the object of the joint criminal enterprise as pleaded. Unfortunately, however, both the current indictment and the proposed amendment to it remain possibly equivocal in relation to that issue. To that defect, the Trial Chamber will return. [131]

36. Nevertheless, if this assertion intended by the prosecution is correct – that each (or all) of the crimes charged in the indictment went beyond the object of the joint criminal enterprise as pleaded – the assertion made by Talic, that the prosecution is nevertheless obliged to plead and to prove that he shared with those who personally perpetrated the crimes charged the state of mind which those crimes require, is indeed contrary to what the Appeals Chamber has held in the *Tadic* Conviction Appeal Judgment. Again, if the assertion intended by the prosecution is correct, the proposed amendments to par 27 of the further amended indictment more than adequately allege the state of mind required of a participant in the enterprise where the crimes charged went beyond the object of that enterprise. [132] The prosecution may even have accepted a greater burden than is necessary by pleading that the accused were aware that the crimes charged were "likely" to result from the implementation of that enterprise.

37. The objection taken by Talic is therefore rejected insofar as it relates to the crimes charged which went *beyond* the object of the joint criminal enterprise . The objection may perhaps have had its genesis in the misleading label given to the concept upon which the prosecution relies, that of "common purpose". That label may have respectable origins, but it remains a misleading one. The only " purpose" which the prosecution must prove to have been "common" to the participants in the joint criminal enterprise relates to the crime which fell *within* the agreed object of that enterprise. The prosecution does not have to prove that any crime committed which goes *beyond* the agreed object of that enterprise was also agreed to by the participants. It would be preferable for the prosecution to avoid the use of the misleading label "common purpose" in the future. The Appeals Chamber has treated the expression "joint criminal enterprise" as synonymous with common purpose. [133] That label does not produce the confusion which "common purpose" produces in relation to the relevant state of mind which must be established, depending upon whether the crime charged fell within the agreed object of the enterprise or was merely a foreseeable consequence of its execution.

38. The Trial Chamber, however, doubts whether the assertion intended by the prosecution could possibly be correct in fact. The "permanent removal" of inhabitants of a particular ethnicity from their normal place of residence to some other place in the circumstances pleaded would appear *necessarily* to imply, for example, actions which involve:

> (a) deportation and/or forcible transfer directed against a particular civilian population in the course of an armed conflict – thus possibly crimes against humanity as pleaded in counts 8 and 9 of the current indictment, and

(b) appropriation of the property of those removed in the course of an international armed conflict, not justified by military necessity and carried out unlawfully and wantonly – thus possibly a grave breach of the Geneva Conventions of 1949 as pleaded in count 10 of the current indictment.

There may be other examples, but these two will suffice. If the Trial Chamber accepts the prosecution's case that the object of the joint criminal enterprise was, to use the colloquial phrase adopted in the indictment, to effect ethnic cleansing, it may well be that it would be obliged to find that these crimes fell *within* the object of that enterprise, rather than that they went *beyond* that object. If any of the crimes charged do fall within the ethnic cleansing agreed to, the prosecution could succeed in relation to those crimes only if it established that the accused shared the state of mind required of the persons who personally perpetrated those crimes.

The need to characterise the offences charged

39. The Trial Chamber has already suggested that the prosecution case as pleaded , and even as it is proposed that it be amended, is possibly equivocal in relation to whether the crimes charged are *necessarily* to be regarded as having gone *beyond* the object of the joint criminal enterprise pleaded. [134] It is of considerable importance that both the Trial Chamber and the accused know with some precision *from the terms of the indictment* whether any particular crime charged is alleged by the prosecution to fall *within* the object of the enterprise (when each participant must have the specific intent required for that crime) or to go *beyond* that object (when each participant need only have been aware of its commission as a possible consequence of the execution of that enterprise when he participated in it). Just as with the other forms of accomplice liability identified in Article 7.1 of the Tribunal's Statute, the prosecution must plead as material facts the conduct of the accused (which includes his state of mind) which is alleged to make him responsible for the crimes charged as a participant of a joint criminal enterprise. [135] The Trial Chamber proposes to order the prosecution to plead its case upon this issue expressly in the indictment. [136]

40. It is, of course, always open to the prosecution (if it wishes to do so) to limit its case, and to rely upon such crimes only as having gone *beyond* the agreed object of the joint criminal enterprise. If it does limit its case in this way, and if the Trial Chamber does not accept that such crimes did go beyond that agreed object, then the prosecution case in relation to those particular crimes must necessarily fail, as the prosecution has not pleaded any case that the crimes fell *within* the agreed object. This would put the prosecution in an extraordinary position, and it would also be open to the prosecution (if it is able to prove such a case) to plead any of the crimes charged in the alternative – that they either fell *within* the agreed object of the joint criminal enterprise or went *beyond* that enterprise but were nevertheless a natural and foreseeable consequence of that enterprise.

41. However, if the prosecution does propose to rely upon such crimes charged as falling *within* the object of the joint criminal enterprise, either solely or in the alternative, it must plead such a case clearly in the indictment. And , when pleading any case that the crimes charged did fall *within* the agreed object of the joint criminal enterprise, it will be necessary for the prosecution to plead that the accused had the state of mind required for those crimes. If this is to be the prosecution case, the Trial Chamber will order the prosecution to include such material facts in the amendment which it is seeking. [137]

(2) Unlawful means

42. In support of his second objection, Talic says that the purpose (or object) of the joint criminal enterprise must be "criminal in and of itself". [138] The prosecution accepts that this is so, [139] and the Trial Chamber agrees that, as the name suggests, the basic object of a joint criminal enterprise must itself be criminal in nature. Talic, however, goes on to say that, as none of the crimes charged falls

within the pleaded objective of the criminal enterprise (the ethnic cleansing), the prosecution has failed to identify in the indictment the criminal objective of that criminal enterprise.[140] The prosecution responds that, by pleading that the object of the enterprise was effected "through unlawful means", it is asserting that the participants in that enterprise "had no lawful purpose for the removal of the non-Serb populations and no intent to use lawful means to accomplish their goal".[141] It says that "it is not necessary to prove that each participant held the identical vision of the illegal means they planned to use", and therefore that it is sufficient merely to plead "through unlawful means" without identifying them in the indictment .[142]

43. The stand taken by the prosecution fails, however, to acknowledge that the first thing which it must establish, in a case that the accused is responsible for a crime as a member of a joint criminal enterprise, is that he participated in a particular joint *criminal* enterprise, even where the crime charged went beyond the object of that enterprise. That is clear from the *Tadic* Conviction Appeal Judgment . There must be a common object, or a common purpose, to carry out a particular crime (the criminal object of the enterprise), and – if a further crime is committed which went beyond *that* criminal object of the enterprise, but which is nevertheless a natural and foreseeable consequence of executing *that* criminal object or enterprise – each participant in that enterprise will be responsible if he was aware that such a further crime was a possible consequence in the execution of that enterprise , and that, with that awareness, he participated in that enterprise.[143] Unless the criminal object of that enterprise is identified, it is not possible to determine whether the further crime charged was a natural and foreseeable consequence of executing *that* criminal object. That criminal object is *not* identified by asserting (and then only by implication in the indictment) merely that there was "no lawful purpose".

44. The Trial Chamber accepts that, where there could be a number of different criminal objects of a joint criminal enterprise, it is not necessary for the prosecution to prove that *every* participant agreed to every one of those crimes being committed.[144] But it *is* necessary for the prosecution to prove that, between the person who personally perpetrated the further crime charged and the person charged with that crime, there was an agreement (or a common purpose) to commit at least *a* particular crime, so that it can then be determined whether the further crime charged was a natural and foreseeable consequence of executing *that* agreed crime. Without such proof, it cannot be held that the accused was a member of a joint criminal enterprise together with the person who committed that further crime charged. The real difficulty which the prosecution faces in identifying the agreed criminal object of the enterprise in which *these* accused were members together with the persons who committed the crimes charged may lie in the extraordinarily wide nature of the case which it seeks to make in the present prosecution.

45. Although joint criminal enterprise cases *can* be applicable in relation to ethnic cleansing, as the *Tadic* Conviction Appeal Judgment recognises,[145] it is obvious that the Appeals Chamber had in mind a somewhat smaller enterprise than that which is invoked in the present case.[146] If, in the course of an armed conflict and a widespread or systematic attack directed against a civilian population, the commander of a small group of soldiers directs those soldiers to collect all the inhabitants of a particular ethnicity within a particular town and to remove them forcibly out of the region, he becomes a participant in an enterprise to commit deportation and forcible transfer (as crimes against humanity), and there could be little doubt, having regard to previous episodes of ethnic cleansing in the former Yugoslavia, that, for example, murder (as another crime against humanity) and wanton destruction of the town (as a violation of the laws and customs of war) were natural and foreseeable consequences of the execution of that enterprise. There would be no difficulty in determining what crimes fell within the agreed criminal object of the enterprise and whether any further crimes charged were natural and foreseeable consequences in the execution of *that* enterprise. It is only when the prosecution seeks to include within that joint criminal enterprise persons as remote from the commission of the crimes charged as are the two accused in the present case that a difficulty arises in identifying the agreed criminal object of that enterprise. That difficulty

is of the prosecution's own making, as it is a difficulty necessarily arising out of the case it seeks to make. That very difficulty *may*, of course, indicate that a case based upon a joint criminal enterprise is inappropriate in the circumstances of the present prosecution. That is a matter which will have to be determined at the trial. But the prosecution cannot avoid its difficulty simply by seeking to avoid pleading properly the joint criminal enterprise upon which it relies. It is sufficient at this stage for the Trial Chamber to say merely that, if the prosecution does plead that *all* of the crimes charged went *beyond* the object of the joint criminal enterprise, it must identify in the indictment the agreed criminal object of the enterprise upon which it relies. An order will be made accordingly. [147]

(3) Knowledge of existence of criminal enterprise and intention to participate voluntarily

46. In support of his third objection, Talic asserts that the prosecution must plead and establish that he knew of the existence of the criminal enterprise and that he participated in it voluntarily. He relies upon the judgment of the International Military Tribunal at Nuremberg for his assertion that the participation must be shown to have been voluntary. [148] No reference is given to the relevant passage in that judgment which supports his objection. The only passage which could conceivably be relevant is that dealing with the Tribunal's power under Article 9 of its Charter to declare organisations to be have been criminal in nature: [149]

> A criminal organization is analogous to a criminal conspiracy in that the essence of both is cooperation for criminal purposes. There must be a group bound together and organized for a common purpose. The group must be formed or used in connection with the commission of crimes denounced by the Charter. Since the declaration with respect to the organizations and groups will, as has been pointed out, fix the criminality of its members, that definition should exclude persons who had no knowledge of the criminal purposes or acts of the organization and those who were drafted by the State for membership, unless they were personally implicated in the commission of acts declared criminal by Article 6 of the Charter as members of the organization . Membership alone is not enough to come within the scope of these declarations .

The prosecution responds that the proposed amendment to par 27 of the current indictment alleges that each of the accused, "aware that the crimes charged were likely to result from the implementation of the common purpose, *knowing and wilfully* participated in the criminal enterprise". [150]

47. The Trial Chamber accepts that this allegation to be added to par 27 sufficiently takes up the issue of Talic's knowledge of the existence of the enterprise and his voluntary participation in it. As already stated, the facts from which that state of mind is to be established are ordinarily matters of evidence. [151] They are so in the present case. Again, if Talic claims that the evidence is not so apparent from the material which has been disclosed by the prosecution, his remedy is to request the prosecution to supply particulars of the statements upon which it relies to prove the specific material fact in question. If the prosecution's response to that request is unsatisfactory, and only then, he may seek an order from the Trial Chamber that such particulars be supplied. [152]

48. If a person does something "knowingly and wilfully", it may ordinarily be assumed that he did it voluntarily. The prosecution is not obliged to meet every issue which may be raised by an accused to avoid responsibility for his knowing and wilful acts until that issue is raised in evidence at the trial. If Talic wishes to raise an issue as to the voluntary nature of his participation in the joint criminal enterprise pleaded, and if that is a relevant issue in the case, he must at the trial point to or elicit evidence from which it could be inferred that there is at least a reasonable possibility that his participation was not voluntary. Only then does the prosecution bear the onus of establishing that his action was indeed voluntary. This is not to suggest that Talic bears some *legal* onus in relation to the issue. That legal onus remains at all times upon the prosecution. His onus is merely an *evidentiary*

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one – to point to or to elicit evidence which raises the particular issue, and which places an onus on the prosecution to establish its case upon that issue, just as in relation to an alibi.[153]

49. The complaint made by Talic is rejected.

5 The application to amend

50. The basis upon which leave will be granted to amend the indictment was examined by the Trial Chamber in a recent decision in the present case.[154] The fundamental issue in relation to granting leave to amend an indictment is whether the amendment will prejudice the accused unfairly.[155] The word "unfairly" is used in order to emphasise that an amendment will not be refused merely because it assists the prosecution quite fairly to obtain a conviction . To be relevant, the prejudice caused to an accused would ordinarily need to relate to the fairness of the trial. Where an amendment is sought in order to ensure that the real issues in the case will be determined, the Trial Chamber will normally exercise its discretion to permit the amendment, provided that the amendment does not cause any injustice to the accused, or does not otherwise prejudice the accused unfairly in the conduct of his defence.[156] There should be no injustice caused to the accused if he is given an adequate opportunity to prepare an effective defence to the amended case. There is no suggestion in the present case that this amendment will cause delay such as to deny the two accused their right to be tried without undue delay.

51. The Trial Chamber has accepted that the proposed amendment is itself defective in form. Nevertheless, now that those defects have been identified, no reason has been put forward as to why leave should not be granted to make the amendment sought provided that those defects are remedied. No relevant prejudice resulting from the proposed amendment once those defects are cured has been suggested by Talic. The Trial Chamber has been informed orally by counsel for Brdanin that there is no objection to the amendment sought to par 27. The purpose of the amendment is to ensure that the real issues in the case will be determined. Leave will accordingly be granted subject to the condition that the defects upheld by the Trial Chamber are cured.[157]

6 Other alleged deficiencies in particularity of pleading

General complaint relating to all counts

52. Talic concedes that the further amended indictment is more precise and detailed than its predecessor, but he asserts that it still does not satisfy the requirements stated in the 20 February 2001 Decision.[158] His general complaints are based upon the assumption that the prosecution is obliged in its indictment in this case to plead details such as the identity of the victim , the place and the approximate date of the alleged crime and the means used to perpetrate it. He concedes that the materiality of these details necessarily depends upon the degree of proximity he is alleged to have to the events for which he is charged with responsibility, but he says that, as the prosecution has reserved the right to proceed upon the basis that he personally committed these crimes, it must set down in detail everything which the prosecution knows.[159] In the light of the order to be made striking the word "committed" from par 33 of the further amended indictment,[160] there will no longer be any such case reserved. The complaint that the prosecution has failed to plead such details is dismissed.

Superior responsibility

53. Talic also complains that the indictment provides "no information whatsoever " regarding his conduct by which he may be found to have known or had reason to know that the acts were about to be done by those for whose acts he is charged with responsibility, or that those acts had been done by

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those persons. He says that his responsibility is based solely upon "his superior command position" with the 1st Krajina Corps. [161] The prosecution case, however, is not so limited. The criminal responsibility of Talic is alleged to arise out of both his position as commander of the 1st Krajina Corps and his position as a member of the ARK Crisis Staff. Where the basic crimes for which he is alleged to be responsible were committed by persons other than units of the 1st Krajina Corps, the prosecution relies upon his position as a member of the ARK Crisis Staff to make him responsible. [162]

54. Nor is the prosecution case against Talic limited to his responsibility as a superior, as is suggested by the reference in the Talic Motion to his "superior command position". [163] The indictment alleges, *inter alia*, that, as commander of the 1st Krajina Corps, Talic made decisions for the Corps and the subordinate units, he assigned tasks to his subordinates , he issued orders, instructions and directives, and he ensured their implementation . [164] Those allegations are clearly intended in part as an allegation of individual responsibility for any criminal acts so ordered, in accordance with Article 7.1 of the Tribunal's Statute. [165] As already stated, [166] the indictment is deficient as to the basis upon which it seeks to make Talic criminally responsible as a member of the ARK Crisis Staff. If the amendment made pursuant to the order to plead that basis with some precision does not answer the present complaint made by Talic, this complaint will be revisited. However, the conduct upon which the prosecution relies to establish the responsibility of Talic as a superior is otherwise sufficiently pleaded in the indictment. Anything further would once more be pleading the evidence by which the material facts pleaded are to be established, and which should be apparent from the witness statements made available.

Genocide and complicity in genocide (counts 1 and 2)

55. The indictment alleges the participation of the accused in a campaign designed to destroy Bosnian Muslims and Bosnian Croats, in whole or in part, as national, racial or religious groups in various identified municipalities within the ARK. [167] The execution of the campaign is alleged to have "included": (1) the killing of Bosnian Muslims and Bosnian Croats by Bosnian Serb forces ("including" units of the 1st Krajina Corps) in villages and non-Serb areas, in camps and other detention facilities and during the deportation or forcible transfer of the Bosnian Muslims and Bosnian Croats; (2) causing serious bodily or mental harm to Bosnian Muslims and Bosnian Croats during their confinement in camps and other detention facilities , and during their interrogations at police stations and military barracks, where detainees were continuously subjected to or forced to witness inhumane acts "including " murder, rape, sexual assault, torture and beating; and (3) detaining Bosnian Muslims and Bosnian Croats under conditions calculated to bring about the physical destruction of a part of those groups, through beatings or other physical maltreatment described elsewhere in the indictment, starvation rations, contaminated water, insufficient or non-existent medical care, unhygienic conditions and lack of space. [168] Superior responsibility of the accused is also alleged in terms of Article 7.3 of the Tribunal's Statute in relation to those acts and omissions. [169]

56. The killings of Bosnian Muslims and Bosnian Croats are alleged to have "included " twenty-nine killing incidents. These are described by reference to the municipalities and the general area where they occurred and their approximate date. [170] The camps referred to are alleged to have been staffed and operated by military and police personnel under the direction of Crisis Staffs (plural) and the VRS (the Army of the Serbian Republic of Bosnia and Herzegovina). They are said to have "included" thirteen facilities, which are described by reference to particular buildings in various identified municipalities. [171] The killing of Bosnian Muslims and Bosnian Croats in the camps and detention facilities , or subsequent to their removal from those camps and detention facilities, are alleged to have "included" twelve killing incidents. These are described by reference to the municipalities and the place where they occurred and their approximate date . [172] In addition, it is

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alleged that Bosnian Serbs "and others" were given access to camps where they subjected Bosnian Muslims and Bosnian Croat detainees to physical and mental abuse, "including " torture, beatings with weapons, sexual assaults and the witnessing of inhumane acts, "including" murder, causing them serious bodily or mental harm. As a result of these inhumane acts, it is alleged, a large number of Bosnian Muslims and Bosnian Croats died in these detention facilities. [173]

57. Talic complains that insufficient details are supplied as to the victims and of the direct and immediate perpetrators of the crimes pleaded. [174] He asserts that the prosecution knows the identity of at least some of the victims because of exhumations carried out, and that it should therefore identify the victims by names, sex and age, or at least as either civil or military personnel. [175] He points out that the expression "Bosnian Serb Forces" is defined in par 8 of the indictment as the army, paramilitary, territorial defence, police units and civilians armed by those forces, and he says that not all of those units were under the control of the same authority. The particular units which were alleged to have committed these crimes should therefore be identified in as much detail as possible. [176] He argues that, where the prosecution is unable to specify either the victims or the perpetrators, there must be at least a reference to their category or position as a group. Where it is unable to do either of these things, he says, it must be made clear in the indictment that the prosecution is unable to do so and that it has provided the best information it can. [177]

58. The prosecution has responded that the Bosnian Muslims and Bosnian Croats killed in the incidents identified in pars 38 and 41 (and presumably also in the incidents referred to in par 37) of the indictment were "non-combatants". [178] If that is indeed the prosecution case, it should have been pleaded as a material fact. Although that fact may be irrelevant to the genocide counts, the incidents pleaded in pars 38 and 41 are also incorporated in other counts (for example, extermination in count 4) where it *is* a relevant and material fact, as the consequences of killing non-combatants would usually be different from the consequences of killing combatants. The prosecution will be ordered to plead such a case expressly. [179]

59. The remaining complaints made by Talic assume that the identity of the victims and of the perpetrators are material facts which must be pleaded in this case. However, they are not material facts to be pleaded where – as in this case – the accused person is remote in proximity from the crimes alleged to have been committed ; rather, they are matters of evidence. Talic nevertheless relies upon what was said by the Trial Chamber in par 22 of the 20 February 2001 Decision as requiring either such particularity or a statement in the indictment that the prosecution is unable to provide better particulars. [180] Paragraph 22 of that decision makes it clear that such an obligation arises primarily in "a case based upon individual responsibility where the accused is alleged to have personally done the acts pleaded in the indictment". In par 20 of the same decision, the Trial Chamber discussed the need for detail to be pleaded where the prosecution case is based upon the allegation that the accused is individually responsible for having aided and abetted the person who personally did those acts. It was also made clear that the extent of that detail depends again upon the degree of proximity alleged. Insistence upon such detail being pleaded has occurred only in those cases where the accused is alleged to have been in much greater proximity to those acts than are the two accused in the present case. For example, in the *Krnojelac* case, the accused is alleged to have been the warden of the prison where the crimes were committed and to have had direct and immediate authority over the perpetrators . The two accused in the present case are considerably more remote from the crimes for which they are alleged to be responsible than Mr Krnojelac was alleged to be . Such details are matters of evidence and not material facts which must be pleaded in the present case. [181]

60. Talic draws attention to the repeated use of the word "including" in the indictment – in the description of the way in which the ethnic cleansing campaign was executed , in the maltreatment of the detainees, in the killing incidents, in the identity of the facilities where the killings and

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maltreatment are alleged to have occurred and in the inhumane acts committed. He asserts that he is entitled to know whether these lists are intended to be exhaustive or, if they are not so intended, the details which are not presently listed. [182] The prosecution responds that the lists are *not* intended to be exhaustive . It says that it will be leading evidence of each of the incidents listed and each of the facilities listed. In addition, evidence may be given in relation to other incidents and other facilities. It argues that it is permitted to do so where , as here, it does not assert that either of the accused was directly involved in those incidents. [183]

61. The right of the prosecution to lead evidence in relation to facts not pleaded in the indictment is not as unlimited as its response to this complaint may suggest . Article 21.4(a) entitles the accused "to be informed promptly and in detail [...] of the nature and cause of the charge against him". For example, it would not be possible, simply because the accused was not alleged to be directly involved, to lead evidence of a completely new offence which has not been charged in the indictment without first amending the indictment to include the charge. Where, however, the offence charged, such as persecution and other crimes against humanity, almost always depends upon proof of a number of basic crimes (such as murder), the prosecution is not required to lay a separate charge in respect of each murder. The old pleading rule was that a count which contained more than one offence was bad for duplicity , because it did not permit an accused to plead guilty to one or more offences and not guilty to the other or other offences included within the one count. Such a rule is completely impracticable in this Tribunal, given the massive scale of the offences which it has to deal with. [184] But the rule against duplicity was nevertheless also one of elementary fairness, and the consideration of fairness involved was that the accused must know the nature of the case he has to meet.

62. Where, therefore, the prosecution seeks to lead evidence of an incident which supports the general offence charged, but the particular incident has not been pleaded in the indictment in relation to that offence, the admissibility of the evidence depends upon the sufficiency of the notice which the accused has been given that such evidence is to be led in relation to that offence. [185] Until such notice is given, an accused is entitled to proceed upon the basis that the details pleaded *are* the only case which he has to meet in relation to the offence or offences charged. Notice that such evidence will be led in relation to a particular offence charged is *not* sufficiently given by the mere service of witness statements by the prosecution pursuant to the disclosure requirements imposed by Rule 66 (A). This necessarily follows from the obligation now imposed upon the prosecution to identify in its Pre-Trial Brief, in relation to *each* count, a summary of the evidence which it intends to elicit regarding the commission of the alleged crime and the form of the responsibility incurred by the accused. [186] If the prosecution intends to elicit evidence in relation to a particular count additional to that summarised in its Pre-Trial Brief, specific notice must be given to the accused of that particular intention.

63. Accordingly, at this stage and until given sufficient notice that evidence will be led of additional incidents or facilities in relation to a particular offence charged, both accused are entitled to proceed upon the basis that the lists of killings and facilities *are* exhaustive in nature.

64. Talic also complains that insufficient details are supplied as to the means by which the crimes other than the killings pleaded in the indictment were perpetrated . [187] Specifically, he complains that the prosecution has failed to provide any details as to the acts which constitute the torture, sexual assaults and other inhumane acts to which reference is made in the indictment in relation to these two counts. [188] The prosecution has responded that, in a case such as the present case, these are matters of evidence and not material facts, because the criminal responsibility of Talic is "based upon his high position within the leadership and a widespread and extensive pattern of criminal conduct, rather than on his proximity to any particular crime". [189]

65. Reference has already been made in general terms to the way in which the genocide charges have

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been pleaded. [190] Such generality is not displaced by reference to the exact wording of the indictment. After asserting the participation of both accused in "a campaign designed to destroy Bosnian Muslims and Bosnian Croats, in whole or in part, as national, ethnical, racial, or religious groups, as such" in various identified municipalities within the ARK, the indictment proceeds:

> [...] the execution of the above campaign included:
>
> [...] causing serious bodily or mental harm to Bosnian Muslims and Bosnian Croats during their confinement in camps, other detention facilities, and during their interrogations at police stations and military barracks when detainees were continuously subjected to or forced to witness inhumane acts including murder, rape, sexual assault , torture and beating. [191]

Later, and still dealing with the genocide counts, the indictment returns to this subject:

> In the camps and detention facilities, Bosnian Serb forces and others who were given access to the camps, subjected Bosnian Muslim and Bosnian Croat detainees from the municipalities to physical and mental abuse including torture, beatings with weapons , sexual assaults and the witnessing of inhumane acts, including murder, causing them serious bodily or mental harm. As a result of these inhumane acts, during the period from 1 April 1992 to 31 December 1992, a large number of Bosnian Muslims and Bosnian Croats died in these detention facilities. [192]

No details at all are given of these matters. This is an omission which is repeated in relation to the count for persecutions as a crime against humanity (count 3), which alleges that the planning, preparation or execution of the persecution included :

> [...] torture, physical violence, rapes and sexual assaults, constant humiliation and degradation of Bosnian Muslims and Bosnian Croats [...]. [193]

The omission is repeated yet again in relation to the counts for torture (counts 6 and 7), which allege that the campaign of terror designed to drive the Bosnian Muslim and Bosnian Croat population away included:

> [...] the intentional infliction of severe pain or suffering on Bosnian Muslims or Bosnian Croats by inhumane treatment including sexual assaults, rape, brutal beatings , and other forms of severe maltreatment in camps, police stations, military barracks and private homes or other locations, as well as during transfers of persons and deportations. Camp guards and others, including members of the Bosnian Serb forces , used all manner of weapons during these assaults. Many Bosnian Muslims or Bosnian Croats were forced to witness executions and brutal assaults on other detainees. [194]

66. Such generality must be contrasted with the amount of detail disclosed in the indictment in relation, for example, to the killings to be established in support of the genocide counts. [195] There , pars 38 and 41 of the indictment identify twenty-nine killing incidents by reference to the municipalities and the general area where they occurred and their approximate dates, and twelve further killing incidents by reference to the municipalities and the place where they occurred and their approximate date. The Trial Chamber has already determined that, because of the remoteness of the two accused from these crimes for which they are alleged to be responsible, the identities of the victims and of the perpetrators in those killings are matters of evidence and not material facts to be pleaded in the present case. [196] That is because there are sufficient material facts pleaded in relation to the killings to enable both the Trial Chamber and the accused to identify the issues to which evidence elicited by the prosecution is relevant. There is no such assistance given by the indictment

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in relation to these other matters. Any trial such as the present (with all its complexities) in which such issues are not identified on the record would be likely to descend quickly into confusion. The prosecution does not suggest that there is any relevant distinction between killings and the other acts to which reference is made, and the Trial Chamber cannot see any such distinction. The prosecution will be ordered to plead sufficient detail to enable the various incidents referred to in pars 37(2) and 42 of the further amended indictment to be identified, in the same way and to the same extent as it has given details of the killing incidents in pars 38 and 41. [197]

Persecution as a crime against humanity (count 3)

67. Talic has complained, first, of the descriptions under this count of torture , physical violence, rapes and sexual assaults: of the use of the word "including ", and of the absence of any details of the direct and immediate perpetrators. [198] These complaints have already been considered, and dismissed. [199]

68. Paragraph 47(3) of the further amended indictment alleges that the planning, preparation or execution of the persecution included:

> the destruction of Bosnian Muslim and Bosnian Croat villages and areas, including the destruction or wilful damage to religious and cultural buildings and the looting of residential and commercial property [...].

This statement is followed by a list which identifies, under various municipalities , the names of the localities, together with references to various mosques and Roman Catholic (that is, Bosnian Croat) churches. Talic says that it is unclear whether this list is intended to identify only the religious edifices which were destroyed or damaged or whether it is intended also to identify these localities as the "villages and areas" which were destroyed. [200] The resolution of this lack of clarity is not assisted by the statement which follows the list, which appears to suggest that *other* "cities, towns [and] villages " were also destroyed: [201]

> During and after the attacks on these municipalities, Bosnian Serb forces systematically destroyed or damaged Bosnian Muslim and Bosnian Croat cities, towns, villages and property, including homes, businesses and Muslim and Roman Catholic sacred sites listed above.

69. The prosecution has responded that "the municipalities in which the crimes in the indictment are alleged to have occurred" are listed in par 4 of the indictment , and thus that the indictment is "sufficiently specific regarding the location of the crimes". [202] Paragraph 4 identifies sixteen municipalities as being some of those which constituted the ARK:

> Banja Luka, Bihac-Ripac, Bosanska Dubica, Bosanska Gradiska, Bosanska Krupa, Bosanski Novi, Bosanski Petrovac, Celinac, Donji Vakuf, Kljuc, Kotor Varoš, Prijedor, Prnjavor , Sanski Most, Sipovo and Teslic.

This group of municipalities is referred to in each of the counts as the scene of the campaign of ethnic cleansing in which the accused are alleged to have participated , and they correspond to the municipalities under which various towns and religious edifices are listed in par 47(3) of the indictment.

70. But the reference to those sixteen municipalities does nothing to resolve the lack of clarity in the way the list in par 47(3) of the indictment has been compiled . There should be no confusion in an indictment of this complexity. The prosecution will be ordered to make it clear whether it is alleged that the localities against which the religious edifices are listed are the "villages and areas" and the

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"cities , towns [and] villages" which are alleged in the same paragraph to have been destroyed or damaged. [203]

Extermination as a crime against humanity (count 4) and as a grave breach (count 5)

71. Talic has complained of the vagueness of the descriptions under this count of the killings which are alleged to have taken place. He repeats the complaint which he made in relation to the details given of the killings alleged in the genocide counts (counts 1 and 2). [204] That complaint has already been dismissed by the Trial Chamber. [205] However, although details were given in pars 38 and 41 of the killings pleaded in relation to the genocide counts (which details the Trial Chamber has accepted as sufficient), no such details have been given of the killings which relate to these counts. Paragraph 51 of the further amended indictment says merely that, as part of the campaign designed to exterminate members of the Bosnian Muslim and Bosnian Croat population:

> [...] a significant number of Bosnian Muslims and Bosnian Croats were killed by Bosnian Serb forces in villages and non-Serb areas, in camps and other detention facilities and during the deportations or forcible transfers.

72. Talic appears to have assumed that the lists of killings in pars 38 and 41 (which relate to counts 1 and 2) were intended to relate also to these counts, [206] and the prosecution has responded upon the assumption that they do. [207] It is poor pleading that this is not stated expressly in par 51, but the intention has now been made sufficiently clear, and (unless the prosecution formally demurs) the trial will proceed upon that basis. What has already been said in this decision in relation to counts 1 and 2 is therefore applicable also to counts 4 and 5: the details given of the killings are sufficient, [208] and both accused are entitled to proceed upon the basis that the lists of killings are exhaustive at this stage and until given sufficient notice that evidence will be led of additional incidents in relation to a particular offence charged. [209] The complaint made by Talic is rejected.

Torture as a crime against humanity (count 6) and as a grave breach (count 7)

73. Talic has complained of the vagueness of the descriptions under these counts of the serious bodily and mental injury which, it is asserted, is alleged in the indictment to have been inflicted on Bosnian Muslims and Bosnian Croats during a campaign of terror. [210] The relevant passage from par 55 of the indictment has already been quoted. [211] It gives no detail which enables the various incidents to be identified, as the prosecution has been able to give in relation to the killings relied upon in the first and second counts pleading genocide (and perhaps also in the fourth and fifth counts pleading extermination and wilful killings). The prosecution has made the same response – that, in a case such as the present case, these are matters of evidence and not material facts, because (in effect) Talic was very remote in proximity to the commission of the offences for which he is alleged to be criminally responsible . [212] The Trial Chamber repeats that any trial such as the present (with all of its complexities) in which such issues are not identified on the record would be likely to descend quickly into confusion . [213] The prosecution will be ordered to plead sufficient detail to enable the various incidents alleged to constitute the infliction of severe pain and suffering referred to in par 55 to be identified , in the same way and to the same extent as it has given details of the killing incidents in pars 38 and 41. [214]

Unlawful and wanton extensive destruction and appropriation of property as a grave breach (count 10), wanton destruction of cities, towns or villages, or devastation not justified by military necessity as a violation of the laws or customs of war (count 11), and destruction or wilful damage done to institutions dedicated to religion as a violation of the laws or customs of war (count 12)

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74. Talic has complained of the vagueness of the descriptions under these counts of the destruction of villages and religious edifices. [215] Paragraph 61 of the indictment incorporates in relation to these three counts the allegations made in par 47(3) of the indictment, which relates to count 3 ("Persecutions "). The complaint is one of lack of clarity. The relevant passage from par 47(3) has already been quoted, and both the complaint and the prosecution's response have already been discussed in the present decision. [216] The Trial Chamber has already stated that the prosecution will be ordered to make it clear in relation to par 47(3) whether it is alleged that the localities against which the religious edifices are listed are the "villages and areas" and the "cities , town [and] villages" which are alleged to have been destroyed or damaged. [217]

The allegation of an international armed conflict

75. The previous indictment had charged the accused with various crimes as

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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

Decision of: 12 June 1998

PROSECUTOR

v.

ZEJNIL DELALIC
ZDRAVKO MUCIC also known as "PAVO"
HAZIM DELIC
ESAD LANDZO also known as "ZENGA"

DECISION ON THE MOTION OF THE JOINT REQUEST OF THE ACCUSED PERSONS REGARDING THE PRESENTATION OF EVIDENCE, DATED 24 MAY 1998

The Office of the Prosecutor:

Mr. Grant Niemann

Ms. Teresa McHenry

Mr. Giuliano Turone

Counsel for the Accused:

Ms. Edina Residovic, Mr. Ekrem Galijatovic, Mr. Eugene O'Sullivan, for Zejnil Delalic

Mr. Zeljko Olujic, Mr. Tomislav Kuzmanovic, for Zdravko Mucic

Mr. Salih Karabdic, Mr. Thomas Moran, for Hazim Delic

Ms. Cynthia McMurrey, Ms. Nancy Boler, for Esad Landzo

I. INTRODUCTION AND PROCEDURAL BACKGROUND

1. On 24 April 1998, this Trial Chamber of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the former Yugoslavia since 1991 ("International Tribunal") issued a scheduling order pursuant to the

provisions of Article 20 paragraph 1 of the Statute of the International Criminal Tribunal for the former Yugoslavia ("Statute") and Rule 54 of the Rules of Procedure and Evidence ("Rules"). This Trial Chamber is here considering a motion of the Joint Request by the Defendants Delalic, Mucic, Delic and Landzo Regarding Presentation of Evidence filed on 25 May 1998 ("Motion") (Official Record at Registry Page ("RP") D6192 - D6199).

The Office of the Prosecutor ("Prosecution") did not file a response to the Motion.

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

HEREBY ISSUES ITS DECISION.

II. DISCUSSION

A. Summary of the Motion.

2. The defendants rely on the provisions of Article 21(4)(e) of the Statute of the Tribunal. The motion seeks to restrain the Trial Chamber from "unduly restricting which witnesses the Defendants will be allowed to call and unreasonably limiting the number of witnesses the Defendants will be allowed to present on a given issue of fact as was indicated by the Trial Chamber during the Status Conference of 21 May 1998".

3. More specifically, the Defence claims that the actions of the Trial Chamber has the effect of denying the accused persons their right to assistance by counsel, in that they are prevented from presenting evidence under the same conditions as the Prosecution presented evidence against them. Accordingly, they are (a) deprived of the right to challenge evidence previously presented against them by the Prosecution and found by the Trial Chamber to be relevant; (b) the Trial Chamber is determining the credibility of Defence witnesses without hearing those witnesses; (c) the Trial Chamber's rulings with regard to unnecessary repetition and relevance as applied to Prosecution witnesses has been considerably different from the standards applied to Defence witnesses.

4. The provisions of Articles 20, 21(1),(2),(4)(e) of the Statute and Rules 89(1),(2),(3),(4) and 95 of the Rules (as amended) are specifically cited and relied upon. The Defence also cited and relied upon the Trial Chamber's oral Ruling of 30 March 1998 (Draft Transcript Pages 10104-10105) on Prosecutor's Motion on the Order of Appearance of Defence Witnesses and the Order of Cross-examination by the Prosecution and Counsel for the Co-accused, filed on 18 March 1998 (RP D5929 - D5935).

5. The motion referred to the Scheduling Order of 24 April 1998 which directed the Defendants *inter alia* to file confidentially with the Registry for service on the other Defendants and the Trial Chamber a complete list of the witnesses they intend to call stating the order in which they are to appear, a summary of the evidence related to the counts which each witness is to testify, and the expected duration of the examination in chief. All the Defendants have complied with the Scheduling Order.

6. At the Status Conference of 21 May 1998, the Trial Chamber announced its intention of establishing witness lists for the Defendants.

B. Arguments in Support of the Motion

7. Mr. Greaves arguing the motion on behalf of the Defendants adopted as the basis of his argument the nature and basis for the request as in the motion, and set out in paragraphs 2 and 3 above.

8. The Defendants recognise the necessity for a fair and expeditious trial as guaranteed by Articles 20 and 21 of the Statute of the Tribunal. They also appreciate the responsibility of the Trial Chamber to give effect to the rights of the Defendants as elucidated by the Trial Chamber at the Status Conferences of Friday, 17 April 1998 and Thursday, 21 May 1998.

9. At the Status Conference of 21 May 1998, counsels for the Defendants stated clearly that whenever possible there will be no duplication of evidence. When a potential witness appears on the list of more than one Defendant, in order to avoid duplication of testimony, his or her evidence will be elucidated either through direct examination or cross-examination. The witness lists filed by the Defendants pursuant to the order of the Trial Chamber is designed to give an overview of the Defendants' witnesses.

10. The Defence submits that the Trial Chamber is not entitled to determine which witnesses should be called by each Defendant, or the order in which witnesses are to be called. Only counsel to the Defendants can determine the witnesses for their respective clients, and the order in which they will testify.

11. Mr. Greaves moving the Motion, elaborated on the submissions of the Defendants. He relied on Articles 20 and 21 of the Statute, relied upon by the Defendants as the fair trial provisions found in a number of similar statutes throughout the 'civilised world'. Counsel referred to the *Tadic* case where the Judges noted that the provisions of Articles 20 and 21 are an adaptation of Article 14 of the ICCPR. He submitted that the words used are almost verbatim. They are contained in the European Convention on Human Rights, and as Bills of Rights of national laws. Similar guarantees also appear in Article 75 of Protocol 1 of the Geneva Conventions.

12. Counsel lay emphasis on paragraph 1 of Article 20 of the Statute, and the use of the words "shall ensure" that a trial is fair and expeditious, that proceedings are conducted in accordance with the Rules of Procedure and Evidence with full respect for the rights of the accused. It was submitted that the rights referred to are those headed "Rights of the Accused". The important rights are: (a) Article 21(1) on the equality of all persons before the International Tribunal; (b) Article 21(2) entitles the accused to a fair and public hearing subject to Article 22 in the determination of the charges against him; (c) Article 21(4) prescribes the minimum guarantees to which the accused shall be entitled in full equality in the determination of any charge against him.

13. One of these guarantees is that contained in sub-paragraph (e) which is "to examine or have examined the witness against him and to obtain the attendance and examination of witnesses on his behalf under *the same conditions as those against him.*" Counsel stressed the words italicised as being mandatory, and not at the discretion of the Trial Chamber. It was submitted that these are what might properly be referred to as the equality of arms provision.

14. In support of the equality of arms provision, counsel cited the dictum of Judge Vohrah in the Decision on the Prosecution Motion for Production of Defence Witness Statements, in *Prosecutor v Dusko Tadic* (Case No. IT-94-1-T, decision of 27 November 1996, Separate Opinion of Judge Vohrah, RP D15324 - D15330) where he said:

> The principle is intended in an ordinary trial to ensure that the Defence has means to prepare and present its case equal to those available to the Prosecution which has all the advantages of the State on its side. [...] Thus the European Commission of Human Rights equates the principle of equality of arms with the right of the accused to have procedural equality with the Prosecution. [...] It seems to me from the above authorities that the application of the equality of arms principle especially in criminal proceedings should be inclined in favour of the Defence acquiring parity with the Prosecution in the presentation of the Defence case before the Court to preclude any injustice against the accused.

The above dictum was submitted as "a concise but accurate exposition of what all of us understand by the principle of equality of arms".

15. Adopting the analogy of a level playing field, counsel submitted that the Prosecution and Defence must operate according to the same regime. It is neither proper nor indeed lawful to apply different regimes to the Prosecution and the Defence in the presentation of evidence. Counsel argued that the Prosecution in this case was able to call such witnesses as they chose, with the exception of the evidence relating to a handwriting expert which was refused on specific grounds.

16. Counsel referred to circumstances in which the Trial Chamber had the right to exclude evidence it considered irrelevant as set out in rule 89(D). Rule 95 enables evidence to be excluded, if the method of obtaining such evidence casts "substantial doubts on its reliability or if the admission of the evidence is antithetical to and would seriously damage the integrity of the proceedings".

17. Counsel submitted that the Trial Chamber had earlier held, and properly too, that it is not for the Trial Chamber to organise and determine the case for the Defence. It is also not its duty to determine the order in which witnesses are called. Although counsel conceded that if a witness gives irrelevant evidence or evidence without probative value, the Trial Chamber is entitled to exclude it. He however submitted that there is no power under the Statute or the Rules of the Tribunal to determine which witness the Defence will call. Furthermore that the effect of a breach of this rule is to put the Trial Chamber effectively in the place of Defence counsel, whose duty it is to organise the defence of the accused and to determine which witnesses to call and the evidence to be presented. Finally, that the Trial Chamber by so doing would in effect be descending into the arena of conflict, and thereby fettering the discretion of counsel charged with the defence of the accused.

C. Submissions of the Prosecution

18. Ms. McHenry in her contribution on behalf of the Prosecution submitted that the right of the Trial Chamber to control the Courtroom and to prevent irrelevant, unnecessary or duplicative testimony is undisputed. The Prosecution however denied that different rules were being applied to the Prosecution and the Defence. It was submitted that in very important matters which are contested, some leeway needs to be given to all sides.

D. Applicable Provisions

19. The provisions of the Statute and Rules of the Tribunal set out hereunder and the provisions of the International Covenant on Civil and Political Rights ("ICCPR") and the European Convention on Human Rights ("ECHR") are applicable and considered in the determination of the motion.

STATUTE

ARTICLE 20

Commencement and conduct of trial proceedings.

(1) The Trial Chambers shall ensure that a trial is fair and expeditious and that proceedings are conducted in accordance with the rules of procedure and evidence, with full respect for the rights of the accused and due regard for the protection of victims and witnesses.

[. . .]

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ARTICLE 21

Rights of the accused.

(1) All persons shall be equal before the International Tribunal.

(2) In the determination of charges against him, the accused shall be entitled to a fair and public hearing, subject to article 22 of the Statute.

(3) The accused shall be presumed innocent until proved guilty according to the provisions of the present Statute.

(4) In the determination of any charge against the accused pursuant to the present Statute, the accused shall be entitled to the following minimum guarantees, in full equality:

(a) to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;

(b) to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;

(c) to be tried without undue delay;

(d) to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;

(e) to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

[. . .]

RULES OF PROCEDURE AND EVIDENCE

Rule 54

General Rule

At the request of either party or *proprio motu*, a Judge or a Trial Chamber may issue such orders, summonses, subpoenas, warrants and transfer orders as may be necessary for the purposes of an investigation or for the preparation or conduct of the trial.

Rule 89

General Provisions

(A) The rules of evidence set forth in this Section shall govern the proceedings before the Chambers. The Chambers shall not be bound by national rules of evidence.

(B) In cases not otherwise provided for in this Section, a Chamber shall apply rules of evidence which will best favour a fair determination of the matter before it and are consonant with the spirit of the Statute and the general principles of law.

(C) A Chamber may admit any relevant evidence which it deems to have probative value.

(D) A Chamber may exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial.

[. . .]

Rule 95

Exclusion of Certain Evidence

No evidence shall be admissible if obtained by methods which cast substantial doubt on its reliability or if its admission is antithetical to, and would seriously damage, the integrity of the proceedings.

Rule 96

Evidence in Cases of Sexual Assault

In cases of sexual assault:

[. . .]

(iv) prior sexual conduct of the victim shall not be admitted in evidence.

Rule 98

Power of Chambers to Order Production of Additional Evidence

A Trial Chamber may order either party to produce additional evidence. It may *proprio motu* summon witnesses and order their attendance.

INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

Article 14

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. [. . .]

2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

(a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;

(b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;

(c) To be tried without undue delay;

(d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;

(e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

[. . .]

EUROPEAN CONVENTION ON HUMAN RIGHTS

Article 6

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. [. . .]

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

3. Everyone charged with a criminal offence has the following minimum rights:

(a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;

(b) to have adequate time and facilities for the preparation of his defence;

(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

[. . .]

E. Findings

20. The Trial Chamber deems it appropriate to recount the circumstances which provoked the Defence counsel in assuming the posture of challenging the principles laid down by the Trial Chamber as enabling in the circumstances, a fair and expeditious trial. It is also helpful to state in a concise and intelligible manner the issues at stake. In a nutshell, it is the exercise of the unrestricted right of the Defence to call witnesses and introduce evidence in their defence.

21. The contention of the accused persons concisely stated is that by a cumulative reading of Articles 20(1) and 21(4)(e) of the Statute of the Tribunal, the accused persons are entitled to call such witnesses as in the judgement of their counsel are deemed appropriate for the presentation of the case for the Defence. Furthermore that the Trial Chamber has no power under the Statute or the Rules to regulate the manner in which the Defence will call its witnesses or to interfere with the testimony that such witnesses will give. The main plank of the principles rests upon the statutory provisions relating to the equality of arms which require that the Defence be entitled to the same conditions for the presentation of its case as the Prosecution (see Art. 21(4)(e) of the Statute).

The Source of the Motion.

22. This motion originates from the effort of the Trial Chamber to control the incidence of duplication of defence witnesses and the repetitive testimony in the evidence of witnesses. At the close of the case for the Prosecution, and before the Defence commenced with the presentation of its case, the Trial Chamber observed from the nature of the defence case and the evidence required to answer the case of the Prosecution, the likelihood of duplication of witnesses and repetition of the same evidence by the various witnesses.

23. There are four accused persons. The charges against the accused persons succinctly stated are founded on the exercise of command authority by the first three accused persons, and specific charges under Articles 2, 3 and 5 of the Statute of the Tribunal. The fourth accused entirely and the third accused partly are excluded from the principle of command responsibility. All the offences alleged were committed in the same place. It therefore became obvious to the Trial Chamber that the witnesses who would be called to testify are likely to testify about matters relating to, deriving from and acting on command authority. Since the events occurred in the same place and in respect of the same actors, it was inevitable that witnesses would testify about the same events.

24. Accordingly in the status conference convened by the Trial Chamber on Friday, 17 April 1998, counsel to the accused persons were informed of the need to avoid duplication of defence witnesses, and the desirability of streamlining the testimony of defence witnesses in line with the nature of their defence. The Trial Chamber advised counsel to draw up and file with the Registry a list of their witnesses, with a summary of their testimony in relation to the counts in the Indictment. In addition, they were to indicate an estimated duration of their evidence in chief. Counsel were directed to serve counsel to each of the accused persons and the Trial Chamber with these lists.

25. On 21 May 1998, the Trial Chamber convened a status conference. This became necessary because it was observed that counsel on behalf of the Defence had not heeded to the advice to avoid the duplication of witnesses in their lists of witnesses and continued to lead repeated evidence which shed no light on what actually transpired in the Celebici prison or the relationship of the accused with it or its staff. The Trial Chamber impressed upon counsel the need to adhere strictly to the principles of avoiding the duplication of its witnesses, and the repetition of such testimony, otherwise the Trial Chamber would be left with the choice of drawing up its own witness lists for each of the accused persons. The consequence of the decision reached by the Trial Chamber in drawing up an alternative witness list gave rise to the motion filed by the Defence.

Powers of the Trial Chamber- General.

26. There is no doubt that the Trial Chamber is vested with powers as defined in the Statute and the Rules for regulating the proceedings before it. This power involves control of the witnesses before it, and their testimony. If properly construed, it extends to the calling of witnesses. Article 20(1) of the Statute states the general powers vested in the Trial Chambers "to ensure that a trial is fair and expeditious and that proceedings are conducted in accordance with the rules of procedure and evidence, with full respect for the rights of the accused...". This provision summarises and includes the protection of the rights of the accused, without spelling them out *in extenso* as in Article 21. A fair trial involves all the protection for the accused as stated in Article 21. It will be fair to describe it as a pithy epitome of what constitutes "a fair administration of justice". In addition, Rule 54 provides another general rule under which "at the request of either party or *proprio motu,* a Judge or Trial Chamber may issue such orders, summonses etc., as may be necessary for the purposes of an investigation or for the preparation or conduct of the trial". Although this rule has been applied to orders, summonses, safe conduct, arrest warrants deemed necessary for the purposes of investigation or conduct of the trial, it is also applicable to measures for the control of proceedings necessary for the conduct of the trial.

27. The Trial Chamber's control of proceedings extends to its power to admit any relevant evidence which it deems to have probative value (see Rule 89). A chamber is entitled to exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial (see Rule 89(D)). Similarly excluded is evidence obtained by methods which cast substantial doubts on its reliability or if its admission is antithetical to, and would seriously damage the integrity of the proceedings (Rule 95). In respect of evidence in cases of sexual assault, the Trial Chamber is empowered to determine admissibility of the consent of the victim, and to satisfy itself that the evidence is relevant and credible (Rule 96(ii)(iv)).

28. There is therefore ample statutory provisions enabling the Trial Chamber to determine whether a particular witness could be called and to control the nature of the testimony.

Rights of the Accused

29. The rights of the accused are clearly spelt out in Article 21 of the Statute. This article prescribes the right of equality of all persons before the Tribunal (Art. 21(1)), the right to a fair and public hearing (Art. 21(2)), and the right to a presumption of innocence until proved guilty according to the provisions of the Statute (Art. 21(3)). It also contains minimum guarantees for the accused (Art. 21 (4)). The minimum guarantee directly relevant in this motion is the right of the accused to "examine or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him" (Art. 21(4)(e)).

Exercise of the Powers of the Trial Chamber and Control of the Trial.

30. It is well settled law that the exercise of the powers of the Trial Chamber under Article 20(1) is subject to the rights of the accused under Article 21. The rights of the accused so protected occupies a pivotal place in the trial of the accused. Indeed Article 20(1) ensures the observance of the provisions of Article 21 which epitomises the concept of a fair trial. It is important to appreciate that in addition to the general rights in Article 21(1)-(3), Article 21(4)(e) which is in issue in this motion is one of the five minimum rights guaranteed the accused.

31. The procedural regime designed for the Tribunal and applied by the Trial Chamber consists of a synthesis which is an amalgam of the accusatorial features of the common law and the inquisitorial features of the civil law systems. It is conceded that the former predominates. This procedural philosophy is consistent with the formulation of the Human Rights provisions in the ICCPR and ECHR from which Articles 20 and 21 of the Statute of the Tribunal derive their origin. Accordingly

in the interpretation of the provisions of the Articles, regard should be had to their legislative origin and the underlying philosophy.

Interpretation of Article 21(4)(e)

Article 21(4)(e) provides as follows:

> (e) to examine or have examined the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;...

32. This provision which is ambiguous is deceptively simple in its construction. It is important to appreciate that the right of the accused, though guaranteed is subject to the power of the Trial Chamber in Article 20(1) to ensure a fair and expeditious trial. Again, it should be construed within the context of the accusatorial system of procedure, where the accused decides, subject to the control of the court, which witnesses he wishes to call; as well as in the inquisitorial system where the court decides for itself which witnesses it wishes to hear. It is well known that in the accusatorial system, witnesses are examined and cross-examined by the parties or their counsel. The court is also free to put questions to witnesses. In the inquisitorial system, only the court examines witnesses.

33. The intention of Article 21(4)(e) is to ensure that the accused is placed in a position of complete equality with respect to the calling and examination of witnesses with the Prosecution. The Trial Chamber may in appropriate cases refuse to hear evidence which is irrelevant and witnesses whose evidence is repetitious (see Rule 89(C)). It cannot be disputed that repetitious evidence is not only irrelevant to the issue to be established, it also impedes the expeditious trial that the Trial Chamber is enjoined to ensure. The underlying principles governing the exercise of the right to control witnesses is that the evidence sought to be adduced must be relevant, and the testimony must not be repetitive. It is also obvious that even where evidence is relevant, but has no probative value, the Trial Chamber will be free to exclude it (see Rule 89(D)). The defendants have in this motion relying on Art. 21(4)(e) argued that the Trial Chamber has no power to exclude evidence because the right to examine or have examined witnesses and to obtain the attendance of witnesses on his behalf under the same conditions as witnesses against him vested in the accused, cannot be interfered with. This submission has not taken cognisance of the powers vested in the Trial Chamber by Statute. We have stated that Article 21(4)(e) is in *pari materia* with Article 14(3) of the ICCPR and Article 6(3)(d) of the ECHR.

34. In *X v FRG,* Application No. 3566/68, the European Commission of Human Rights, ("Commission") construing Art. 6(3)(d) of the ECHR in *pari materia* with Article 21(4)(e) held that there was no general right to call witnesses. In particular, a court is justified in refusing to summon witnesses whose statements would not be of any relevance in the case. (See Application No. 617/59 *Hopfinger v Austria*, Yearbook III, p. 370).

35. Similarly in *X v Austria*, Application No. 4428/70, in interpreting the provisions of Article 6(3)(d) of ECHR, the Commission said that the provision aimed at ensuring equality between the defence and the Public Prosecutor in criminal proceedings with regard to the calling and interrogation of witnesses, but that it does not give an accused person an unlimited right to obtain the attendance of witnesses in court. The Commission went on to point out that the competent court was free, subject to respect for the terms of the Convention and particularly for the principle of equality established by Art. 6 (3)(d) to refuse calling witnesses nominated by the defence, for instance, on the ground that the court considered their evidence as being unlikely to assist in ascertaining the truth. (See for example, opinion of the Commission in its report of 31 March, 1963 on Application No. 788/60, *Austria V Italy*, paras. 112, 115).

36. In the particular circumstances of this motion, the Defence is challenging the statement of principle formulated by the Trial Chamber outlining the basis on which witnesses would be called to

give evidence, and testimony of witnesses will be admitted. The principles are that witnesses called should not merely duplicate the evidence of earlier witnesses, and the testimony of witnesses should not be repetitive of testimony already admitted. The Trial Chamber is of the opinion that the principle applied is consistent with Article 20(1) and does not in any way violate any of the provisions of Article 21.

37. By virtue of Article 20, the Prosecution can be directed to file a list of witnesses intended to be called, with a summary of the facts on which each witness will testify relevant to the counts in the Indictment. The Prosecution is required to indicate the estimated duration of the testimony of each witness.

38. The Defence has contended that by drawing up a list of the witnesses for the Defence, the Trial Chamber will be descending into the arena of conflict. Of course it is unarguable that the Trial Chamber is ill equipped to draw up a list of witnesses for the Defence and would be usurping the discretion of the Defence if it had to play that role. The Trial Chamber would in such a case be violating the right of the Defence to communicate with counsel of his own choosing in the preparation of his defence. The Trial Chamber has not in the instant case violated Article 21(4)(b). The principles formulated are intended to guide Defence counsel in determining the witnesses they should call and the evidence they are required to give. It is also intended to enable the Trial Chamber discharge the responsibility of an expeditious trial in Article 20(1) which corresponds with the accused's right in Article 21(4)(e) to be tried without undue delay. Counsel is free to call its witnesses bearing in mind the guidelines.

39. The Defence contends that the principles enunciated by the Trial Chamber are in violation of the principle of the equality of arms between the Prosecution and the Defence. They argue that the Prosecution was not subjected to the same scrutiny and control in the presentation of their evidence and calling of their witnesses. The Defence should therefore be treated similarly.

40. Admissibility of evidence is founded on relevance. Relevance is based on the nature of the issue before the Trial Chamber. A sharp distinction is usually drawn between relevance and admissibility. The determination of relevance is based on the nexus between the testimony and the issue subject matter of the testimony. A matter is relevant if taken by itself or in connection with other facts, it proves or renders probable the existence or non-existence of the issue. Otherwise, it is irrelevant to the issue before the Trial Chamber.

41. The Defence has not by the application of the guidelines been placed at any disadvantage vis-à-vis the defence of the accused person. The right to examine and cross-examine witnesses on the same terms and conditions as the Prosecution witnesses has not been denied. The Defence is entitled and have exercised their right under Article 21(4)(e). This is consistent with the principle that their right to call witnesses is not unlimited. Similarly their right to give testimony is also not without restrictions imposed by law and the exercise of judicial discretion allowed the Trial Chamber. It is erroneous to accuse the Trial Chamber of a violation of the right of the Defence.

42. The fact that Article 20(1) vests in the Trial Chamber the power to protect the right of the accused is usually ignored. It ought to be stressed that where the error of Counsel in the calling of witnesses and leading evidence at the trial will lead to unreasonable and undue delay in the trial, and may be prejudicial to the case of the accused. The Trial Chamber should exercise its power *proprio motu* to avert any injustice that will result if it did not intervene.

43. Adherence by the Defence to the principles in the guidelines formulated by the Trial Chamber in calling of witnesses and leading of evidence at trial will in no way deprive the accused of assistance of Counsel to discharge a different burden. Each accused is expected to discharge his or her burden of proof in presenting evidence. Application of the principles in the guidelines will effectively streamline the evidence of the witnesses by avoiding the duplication of witnesses and repetitive

testimony at the trial. It does not in any way deprive the Defence of the right to challenge evidence previously presented by the Prosecution and found to be relevant. The witnesses are to be determined by the accused. Only witnesses who are duplicated and whose evidence is likely to be repetitive is sought to be excluded. There is no question of the Trial Chamber determining credibility without a hearing. Clearly, that issue does not arise. The Trial Chamber has scrupulously observed the mandatory provisions of Articles 20(1) and 21.

The issue of Fair Hearing

44. The Trial Chamber is aware of the importance of a fair trial which is a central principle and cardinal rule of the rule of law. The cumulative provisions of Articles 20(1) and 21 of the Statute of the Tribunal and the Rules of Procedure and Evidence are formulated and designed to ensure a fair trial within the rule of law. It is obvious that compliance with the specific rights set out in Article 21 alone may not necessarily guarantee that there has been a fair trial. The content of the requirement of a fair hearing cannot be stated *in abstracto*. A fair trial can only be considered within the plenitude of the trial as a whole.

45. In *Mohammed v Kano N.A.* (1968) 1 All NLR 115, the Supreme Court of Nigeria observed of a fair hearing as follows:

> A fair hearing must involve a fair trial; and a fair trial of a case consists of the whole hearing. The test of a fair hearing is the impression of a reasonable man present at the trial, whether from his observation justice has been done in the case. The burden is on the party complaining to show that the irregularity complained of led to a failure of justice.

This observation applies *mutatis mutandis* to a fair trial.

46. By prescribing guidelines to assist the Defence to call its witnesses and avoid duplication of witnesses and repetitive testimony, the Trial Chamber is not descending into the arena of conflict. These are guidelines which the parties can usefully apply to save cost in time and expense. It is not a valid criticism that the guidelines were introduced only when the Defence was giving evidence and not during the presentation of evidence of the Prosecution. There is no doubt that the principles formulated do not in any way fetter the exercise of discretion of counsel in management and organisation of the case of the defence, since counsel is still entirely in charge of the defence of the accused.

47. In ***Kraska v. Switzerland*** (1994) 18 EHRR 188, para. 30 of the judgment, the Court interpreting Article 6(1) said; *inter alia*

> The effect of Article 6(1) is, inter alia, to place the "tribunal" under a duty to conduct a proper examination of the submissions, arguments and evidence adduced by the parties, without prejudice to its assessment of whether they are relevant to the decision.

48. The Trial Chamber accepts and adopts this view as correctly expressing the role of the Trial Chamber pursuant to Art. 20(1) of the Statute. A fair trial can only be determined from a consideration of the case as a whole whether the trial in accordance with laws regulating the trial has been fair. The Defence has fastened on the erroneous view of their construction of Article 21(4)(e), that the Defence has an unlimited right to call witnesses, and unrestricted right to lead evidence irrespective of their relevance to the issues before the Trial Chamber. Nothing is further than the true legal position. The Trial Chamber has observed all the rules enabling the accused persons to enjoy their right to a fair trial.

III. DISPOSITION

25033

For the foregoing reasons, **THE TRIAL CHAMBER,**

HEREBY DISMISSES the Motion.

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

Adolphus
G.
Karibi
-
Whyte

Presiding
Judge

Dated this twelfth day of June 1998

At The Hague,

The Netherlands.

[Seal
of
the
Tribunal]

25034

Case: IT-95-14/2-A

IN THE APPEALS CHAMBER

Before: Judge David Hunt, Pre-Appeal Judge

Registrar: Mr Hans Holthuis

Decision of: 11 September 2001

PROSECUTOR

v

Dario KORDIC & Mario CERKEZ

DECISION ON APPLICATION BY MARIO CERKEZ FOR EXTENSION OF TIME TO FILE HIS RESPONDENT'S BRIEF

Office of the Prosecutor:

Mr Upawansa Yapa and Mr Norman Farrell

Counsel for the Defence:

Mr Mitko Naumovski for Dario Kordic

Mr Bozidar Kovacic and Mr Goran Mikulicic for Mario Cerkez

1. The appellant Mario Cerkez ("Cerkez") has sought an order, pursuant to Rule 127(B) of the Rules of Procedure and Evidence ("Rules"), extending the time within which he must file his Respondent's Brief to the Appellant's Brief filed by the prosecution on 9 August 2001.[1] The prosecution has filed a Response to the Motion,[2] and Cerkez has filed a Reply.[3]

2. The application follows, and is associated with, an earlier flurry of filings by the parties. The prosecution had sought an extension of time in which to file its Respondent's Brief to the Appellant's Briefs filed by Cerkez and his fellow appellant, Dario Kordic ("Kordic"), also on 9 August 2001.[4] The extension sought was from 10 September to 1 October 2001, and in support of that application the prosecution had relied upon specific matters arising from the nature and the complexity of the issues raised in the Appellant's Briefs which had been filed.[5] The prosecution's argument was accepted,[6] and the extension sought was granted.[7]

3. In the meantime, Cerkez filed a document entitled "Appellant Mario Cerkez's Notice Pursuant to Rule 126 of the Rules of Procedure and Evidence",[8] in which he stated that a copy of the prosecution's Appellant's Brief (which had been filed on 9 August and sent by the Registry to Croatia on that date) had been received by his counsel only on 14 August, at approximately 6.30 pm

and thus after the close of business on that day.[9] He asserted that the time for filing his Respondent's Brief to the prosecution's Appellant's Brief therefore began to run from the following day, 15 August,[10] so that his Respondent's Brief did not need to be filed until 13 September. The prosecution responded that it did not necessarily oppose such an interpretation of the Rules, but it sought a clarification from the Appeals Chamber as to whether it was correct.[11] The present Motion filed by Cerkez renders the resolution of that issue largely unnecessary, as he puts forward a considerably bolder proposition.

4. Cerkez says that, because the prosecution obtained an extension of time until 1 October to file its Respondent's Brief to his Appellant's Brief, he (Cerkez) must be entitled to a similar extension of time to file his Respondent's Brief to the prosecution's Appellant's Brief.[12] He argues that he is entitled to a similar extension of time *not* because he needs the additional time in order to file his Respondent's Brief (indeed, he expressly disclaims such an argument),[13] but because of the principle of equality of arms, and because the situation would otherwise be "manifestly prejudicial" to him.[14] He identifies the prejudice as an unjustified advantage to the prosecution in two ways:

> (i) the prosecution will have twenty days more to file its Respondent's Brief to his Appellant's Brief than he will have to file his Respondent's Brief to the prosecution's Appellant's Brief;[15] and
>
> (ii) the prosecution will become aware of the arguments he puts in his Respondent's Brief to its Appellant's Brief before it has to file its Respondent's Brief to his Appellant's Brief, and thus will have "an exceptional opportunity" to use its Respondent's Brief to answer those arguments. Cerkez adds:[16]
>
> > Every counsel would do that and every counsel would know how to use the opportunity .

5. The argument based upon the principle of equality of arms is wholly misconceived . That principle, taken from the jurisprudence of the European Court of Human Rights , was adopted by Article 21.1 of the Tribunal's Statute.[17] The principle of equality of arms is described as being only one feature of the wider concept of a fair trial.[18] That wider concept includes not only the need for an independent and impartial tribunal but also such things as the right of each party to call witnesses "under the same conditions as witnesses against him",[19] an equal opportunity to present his case,[20] and what is described as the fundamental right that criminal proceedings are adversarial in nature – defined as meaning the opportunity for both the prosecution and the accused to have knowledge of and comment on the observations filed or evidence adduced by either party.[21]

6. The wider concept of a fair trial is thus correctly described in many of those and other cases in terms of its application to both parties in the trial (including a criminal trial). In *Ekbatani v Sweden*,[22] the European Court of Human Rights held that the court below had observed the principle of equality of arms because neither the accused nor the prosecution had been allowed to appear in person but each had been given equal opportunities to present their cases in writing. In *Barberà v Spain*,[23] the Court emphasised that the provisions of Art 6(1) entail equal treatment of the prosecution and the defence. In *Brandstetter v Austria*,[24] the Court emphasised that both the prosecution and the accused must be given equal opportunities in relation to the evidence tendered by the other. In *Dombo Beheer BV v The Netherlands*,[25] when referring to the Court's case law concerning the requirements of a fair trial, described the requirement of equality of arms as providing a "fair balance" between the parties and as implying that each party must be afforded a reasonable opportunity to present his case – including his evidence – under conditions that do not place him at a substantial disadvantage *vis-à-vis* his opponent.

7. The principle of equality of arms has been given a liberal interpretation in its application to the Tribunal's procedures, in recognition of the peculiar difficulties under which both parties have to operate in this Tribunal.[26] But the purpose behind the principle remains the same – to give to each party equal access to the processes of the Tribunal, or an equal opportunity to seek procedural relief where relief is needed.[27] In relation to the present issues, the Rules provide that either party may apply for relief, by obtaining an extension of time in which to file its Respondent's Brief, provided that "good cause" is shown by the party applying.[28] The obligation to show "good cause" is placed equally upon both parties.

8. In the present case, the prosecution was able to show "good cause" for the extension by reason of the nature and the complexity of the issues raised in each of the Appellant's Briefs. It was said that those Briefs raised some thirty-one issues to which the prosecution had to respond, including issues relating to the prosecution's conduct at the trial (when the members of the prosecution trial team were either no longer available or otherwise engaged),[29] and therefore that additional time was *needed* by the prosecution to file its Response. On the other hand, the prosecution's Appellant's Brief to which Cerkez is required to respond is only thirty-seven pages in length, and raises only two grounds of appeal – one as to the reasonableness of a finding by the Trial Chamber as to his individual responsibility for the Ahmici attack, and the other as to the sentence which was imposed.[30] Cerkez , as it has already been stated, expressly disclaims any suggestion that he *needed* additional time to respond to the prosecution's Appellant's Brief.[31]

9. Where then does Cerkez show "good cause" for relief under Rule 127? It cannot be "good cause" for an extension of time to be granted to Cerkez to file his Respondent's Brief to the prosecution's Appellant's Brief simply because the prosecution has shown "good cause" for an extension of time to file its Respondent's Brief to the Appellant's Briefs filed by Cerkez and Kordic. That is to read into the right to equality of *arms* a right to equality of *relief*, even when the circumstances are quite different in each case and provide no basis whatsoever for granting equal relief. The argument is rejected.

10. The other ground put forward by Cerkez was that the prosecution will become aware of the arguments he puts in his Respondent's Brief to its Appellant's Brief before it has to file its Respondent's Brief to his Appellant's Brief, and thus will have "an exceptional opportunity" to use its Respondent's Brief to answer those arguments. It may be that *some* counsel would, as Cerkez suggests, take advantage of such an opportunity, although I would not subscribe to his suggestion that *every* counsel would do so. It is difficult to imagine how the prosecution could do so in the present case with any real pretence of legitimacy, as the only common issue in the two appeals relates to the sentence imposed, with Cerkez directing his attention to matters of mitigation and the prosecution directing its attention to matters of aggravation. But what are the prejudicial consequences to Cerkez if the prosecution *were* to use its Respondent's Brief to answer matters relating to these issues put by Cerkez in his Respondent's Brief? The prosecution would have been entitled in any event to answer those matters when the oral hearing of these appeals takes place. If anyone would be advantaged (rather than disadvantaged) by this unlikely scenario, it would be Cerkez, who will have additional time to prepare his refutation at the oral hearing of the appeal of any answer the prosecution may slip into its own Respondent's Brief.

11. Cerkez is, nevertheless, entitled to have consideration given to his application for an extension of time upon the lesser basis by implication put forward in his Notice, that he did not receive a copy of the prosecution's Appellant's Brief until 14 August, after the close of business on that day.

12. Rule 112 provides that a Respondent's Brief is to be filed "within thirty days of the filing" of the Appellant's Brief. Cerkez has submitted that the reference to "filing" in Rule 112 must, however, be interpreted in accordance with Rule 126 , which provides:

> Where the time prescribed by or under these Rules for the doing of any act is to run as from the occurrence of an event, that time shall begin to run as from the date on which notice of the occurrence of the event would have been received in the normal course of transmission by counsel for the accused or the Prosecutor as the case may be.

There is certainly an argument available that the filing of the Appellant's Brief referred to in Rule 112 constitutes "the occurrence of an event" from which the time for filing runs, so that (in accordance with Rule 126) time would not commence to run in the present case pursuant to Rule 112 until the time when a copy of the Appellant's Brief would have been received by Counsel for Cerkez in Croatia "in the ordinary course of transmission". It is an attractive argument, and minds may differ as to whether it is correct. However, such an interpretation of the interaction between Rules 112 and 126 has already been rejected by a Bench of three judges of the Appeals Chamber.[32] The present case is hardly an appropriate vehicle for seeking a reconsideration of that decision . Indeed, the difficulty in determining in *any* particular case just when a document sent by the Registry to Croatia (for example) "would have been received in the normal course of transmission" suggests that the whole of Rule 126 requires a further consideration by the Rules Committee.[33]

13. So far as the further submission made by Cerkez in the present case is concerned – that time began to run from the day *after* his counsel received the prosecution's Appellant's Brief – the fact that he received it after the close of business hours , or even that in the normal course he would have received it after the close of business hours, is irrelevant. Even under Rule 126, it is the "date" when the copy would have been received in the normal course which is relevant, not the time. There is no provision in the Rules which gives to a party an extra day because a copy of a document which has been filed is in fact received by him out of office hours, or even that it would have been received by him out of office hours in the ordinary course.

14. Cerkez thus lost only five days of the time fixed by Rule 112 in which to file his Respondent's Brief to the prosecution's Appellant's Brief by reason of the delay in delivery of a copy. Pursuant to Rule 127, Cerkeze is accordingly granted an extension of five days to do so – that is, until 13 September 2001.[34]

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

Dated this 11th day of September 2001,

At The Hague,

The Netherlands.

Judge David Hunt

Pre-Appeal Judge

[Seal of the Tribunal]

1 - Appellant Mario Cerkez's Motion for Variation of Time Limit for Filing Response to the Prosecutor's Appeal Brief, 31 Aug 2001 ("Motion").
2 - Prosecution's Response to the Motion of Appellant Mario Cerkez Seeking a Variation of Time Limit in Which to File Response to Prosecution Appeal Brief, 5 Sept 2001("Response").
3 - Appellant Mario Cerkez's Reply to Prosecution Response to Appellant Mario Cerkez's Motion for Variation of Time

Limit for Filing Response to the Prosecutor's Appeal Brief, 6 Sept 2001 ("Reply").
4 - The history of these filings is recounted in the Decision Authorising Respondent's Brief to Exceed the Limit Imposed by the Practice Direction on the Length of Briefs and Motions and Granting an Extension of Time to File Brief, 30 Aug 2001 ("Decision Extending Time to File Prosecution's Respondent's Brief").
5 - Decision Extending Time to File Prosecution's Respondent's Brief, par 10.
6 - *Ibid*, par 14.
7 - *Ibid*, par 16.
8 - 15 August 2001 ("Notice").
9 - Notice, pars 1-2.
10 - *Ibid*, par 2.
11 - Prosecution's Request for Clarification, 17 Aug 2001, par 3.
12 - Motion, par 3.1.
13 - Reply, par 4.
14 - *Ibid*, par 10.
15 - *Ibid*, pars 10,12.
16 - *Ibid*, par 12.
17 - *Prosecutor v Aleksovski*, Case IT-95-14/1-AR73, Decision on Prosecutor's Appeal on Admissibility of Evidence, 16 Feb 1999, par 23. Article 21.1 provides: "All persons shall be equal before the International Tribunal."
18 - "*Neumeister" Case*, 27 June 1968, Series A Vol 8, par 22; *Delcourt v Belgium* (1970) 1 EHRR 355, par 28; Monnell v UK (1988) 10 EHRR 205, par 62; *Isgrò v Italy*, 21 February 1991, Series A Vol 194, par 31; *Borgers v Belgium*, 30 October 1991, Series A Vol 214, par 24.
19 - *Engel v The Netherlands* (No 1) (1976) 1 EHRR 647, par 91; *Bönisch v Austria* (1985) 9 EHRR 191, par 32; *Barberà v Spain* (1988) 11 EHRR 360, par 78. Article 6(1)(d) of the Convention is in the same terms as Art 21.4(e) of the Tribunal's Statute.
20 - *Ekbatani v Sweden* (1988) 10 EHRR 510, par 30.
21 - *Brandstetter v Austria* (1991) 15 EHRR 378, pars 66-67.
22 - At par 30.
23 - At par 78.
24 - At par 67.
25 - (1993) 18 EHRR 213 at par 33. This was a civil case, but the Court was considering whether the requirement of equality of arms recognised in criminal cases should apply to civil cases also.
26 - *Prosecutor v Tadic*, Case IT-94-1-A, Judgment [on Conviction Appeal], 15 July 1999, par 52.
27 - *Ibid*, pars 48, 50, 52.
28 - Rule 127 ("Variation of Time-limits").
29 - Decision Extending Time to File Prosecution's Respondent's Brief, par 10.
30 - Response, footnote 6 and par 12.
31 - Reply, par 4.
32 - *Prosecutor v Naletilic and Martinovic*, Case IT-98-34-AR73.2, Decision on Defence's Motion to the Bench of Three Judges of the Appeals Chamber for Application of Rule 126 of the Rules of Procedure and Evidence, 11 May 2001, p 2.
33 - In relation to all but longer documents, the Registry transmits a copy of a filed document by facsimile to Defence Counsel on the same day that the document is filed. This particular document was not sent by facsimile.
34 - Counsel for Cerkez has already been informed that this is the order which would be made.

25039

The Prosecutor v. Dusko Tadic - Case No. IT-94-1-A

"Judgement"

- **15 July 1999**
- **Judges Shahabuddeen [Presiding], Cassese, Wang, Nieto-Navia and Mumba**

Articles 2, 5, 7(1) and 20(1) - international armed conflict and "protected persons"; requisite elements of crimes against humanity; "common purpose" doctrine; equality of arms; substituting a finding by a Trial Chamber for that of the Appeals Chamber; disclosure of a Defence witness statement after testimony.

1. The right to a fair trial, guaranteed in Article 20(1) of the Statute of the Tribunal, covers the principle of equality of arms. This principle dictates that both parties must be equal before the Trial Chamber which must provide them with all requested assistance insofar as possible under the Statute and Rules of Procedure and Evidence. The parties must bring any difficulties in the presentation of their case to the attention of the Trial Chamber.
2. Only where the evidence relied on by the Trial Chamber could not reasonably have been accepted by a reasonable person may the Appeals Chamber substitute its own finding of fact for that of the Trial Chamber.
3. For the purpose of the applicability of Article 2 of the Statute: a) a conflict is international in nature where a State exercises overall control over subordinate armed forces or militias or paramilitary units engaged in armed conflict with another State. The control required for those powers to be considered de facto State organs goes beyond the mere financing and equipping and involves also participation in the planning and supervision of military operations. However, it is not required that specific orders or instructions relating to single military actions be issued; b) victims are "protected persons" if they do not owe allegiance to and receive diplomatic protection from the party in whose hands they find themselves.
4. The "common purpose" doctrine requires an actus reus amounting to a plurality of persons, the existence of a common plan, design or purpose which amounts to or involves the commission of a crime provided for in the Statute, and the participation of the accused in the common design. The mens rea requires the intention to participate in and further the common criminal activity or purpose, while responsibility for crimes outside the common plan arises only if the commission of such a crime by a group member was foreseeable and the accused willingly took that risk.
5. An act carried out for the purely personal motives of the perpetrator can constitute a crime against humanity.
6. Except for "persecutions" under Article 5(h) of the Statute, a discriminatory intent is not required for crimes against humanity.
7. Depending on the circumstances, a Trial Chamber has the inherent power to order the disclosure of Defence witness statements after examination-in-chief of the witness.

On 7 May 1997, Trial Chamber II (Judges Kirk McDonald (Presiding), Stephen and Vohrah) found Dusko Tadic guilty on nine counts, and guilty in part on two counts, charging him on the basis of individual criminal responsibility (Article 7(1) of the Statute) with crimes against humanity (Article 5 of the Statute), namely, persecution on political, racial and/or religious grounds, and inhumane acts; and violations of the laws or customs of war (Article 3 of the Statute), namely, cruel treatment. On 14 July 1997, the Trial Chamber imposed concurrent sentences of imprisonment, the highest being 20 years.

Both the accused and the Prosecution appealed the Trial Chamber's Judgement of 7 May 1997.

The accused also appealed the Sentencing Judgement.

In its Judgement of 15 July 1999, the Appeals Chamber denied Dusko Tadic's appeal against the Trial Chamber's Judgement of 7 May 1997 on all grounds. However, allowing the Prosecution's cross-appeal, the Appeals Chamber reversed that Judgement in part and found the accused guilty on counts 8, 9, 12, 15, 21, 29 and 32 of the indictment charging him on the basis of individual criminal responsibility for grave breaches of the 1949 Geneva Conventions (Article 2 of the Statute), namely, wilful killing, torture or inhuman treatment, and wilfully causing great suffering or serious injury to body or health. The Appeals Chamber also reversed the Trial Chamber's Judgement in respect of count 30, alleging a violation of the laws or customs of war (Article 3 of the Statute), namely, murder, and in respect of count 31, charging a crime against humanity (Article 5 of the Statute), namely, murder.1

This summary cannot address all the legal issues or be a substitute for the subtly formulated legal considerations and findings in the Judgement. The following merely highlights the most important legal aspects of the Judgement.

1. The accused's first ground of appeal2

According to the Defence, the lack of co-operation and obstruction by certain external entities, namely, the Government of *Republika Srpska* and the civic authorities in Prijedor, had a disproportionate impact on its case. Consequently, the Defence asserted that the accused's right to a fair trial was prejudiced since there was no "equality of arms" between the two parties at trial.

The parties did not dispute that the right to a fair trial covers the principle of equality of arms, but while the Prosecution maintained that this principle is restricted to procedural equality the Defence argued that the principle also extends to substantive equality.

In agreement with the Defence, the Appeals Chamber held that, as a minimum, a fair trial must entitle the accused to adequate time and facilities for the preparation of his defence, a right embodied in Article 21(4)(b) of the Statute. The Appeals Chamber concluded from the jurisprudence of the European Court of Human Rights that the principle of equality of arms obligates a judicial body to ensure that in the presentation of its case neither party is put at a disadvantage. Furthermore, that jurisprudence does not suggest that the principle is applicable to conditions outside the control of the Court. The Appeals Chamber further found that the Human Rights Committee had interpreted the principle in a procedural sense only.

However, the Appeals Chamber considered that in contrast to national courts the Tribunal does not have enforcement powers. In order to hold trials it is dependent on the co-operation of States and the ultimate recourse in the case of the failure by a State to co-operate in violation of Article 29 of the Statute is a referral to the Security Council. The Appeals Chamber therefore held that the principle of equality of arms must be given a more liberal interpretation than in a domestic context. The assistance which a Trial Chamber must provide to either party includes *inter alia* adopting witness protection measures, issuing binding orders to States for the production of evidence and, ultimately, if so required by the circumstances, adjourning or staying the proceedings.

The Appeals Chamber held that a party cannot remain silent about any difficulties encountered in the presentation of its case and request a trial de novo before the Appeals Chamber, as the Defence did in this case. In the absence of evidence that the Trial Chamber failed to assist the Appellant when so requested, the Appeals Chamber found that it had not been established that the protection of the principle of equality of arms was not extended to the accused at trial. It consequently dismissed this ground of appeal.

2. The accused's third ground of appeal3

The Trial Chamber found the accused guilty of the murder of two men on the basis of the

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testimony of only one witness. The Appeals Chamber first considered that it is the practice of this Tribunal and the International Criminal Tribunal for Rwanda to accept as evidence the testimony of a single witness on a material fact without corroboration.

However, according to the Defence submission, the witness was unreliable because he was introduced through the Government of Bosnia and Herzegovina, the same source as that used for another Prosecution witness who was withdrawn at trial for being untruthful. By contrast, reviewing the admission and treatment of the testimony at trial, the Appeals Chamber found that the Trial Chamber had not erred in having relied on that testimony. The Appeals Chamber also rejected a further assertion by the Defence that the evidence of the witness was inherently implausible.

Finding no reason to overturn the Trial Chamber's finding, the Appeals Chamber consequently rejected the Appellant's ground of appeal.

3. The Prosecution's first ground of cross-appeal4

The Trial Chamber by majority acquitted the accused of all counts charging violations of Article 2 of the Statute on the ground that it had not been proved that the victims were "protected persons" pursuant to the applicable provisions of the Fourth Geneva Convention of 1949. On appeal, the Prosecution maintained that all relevant criteria under Article 2 of the Statute had been met.

The Appeals Chamber considered that in order for Article 2 of the Statute to apply there must first be an international armed conflict. This was held in the Appeals Chamber's "Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction" of 2 October 1995 in the *Tadic* case. Second, the victims must be "protected persons" according to any of the four Geneva Conventions.

a) The nature of the conflict5

The Appeals Chamber considered that a conflict is international if it takes place between two or more States. Furthermore, an internal armed conflict may become international if another State intervenes through its troops or if some of the participants to the conflict act on behalf of another State. The Appeals Chamber found that there is sufficient evidence to justify the Trial Chamber's finding that until 19 May 1992 the conflict between Bosnia and Herzegovina (BH) and the Federal Republic of Yugoslavia (FRY) was international in nature. The question was whether, after that date, Bosnian Serb forces, in whose hands the Bosnian victims found themselves, could be considered *de jure* or *de facto* organs of the FRY.

Approaching the issue from the viewpoint of international humanitarian law, the Appeals Chamber's discussion started with Article 4 of the Third Geneva Convention of 1949 according to which paramilitary and other irregular troops may be regarded as lawful combatants if they "belong to a party to the conflict". International rules and State practice require both control over such troops by a party to an international armed conflict and a relationship of dependence and allegiance. International humanitarian law further holds accountable not only those having formal positions of authority but also those with *de facto* power or control over perpetrators of serious violations of its provisions.

However, international humanitarian law does not provide the criteria for determining when a group or individuals may be regarded as being under the control of a State, that is, acting as *de facto* State officials. The Appeals Chamber instead referred to general international rules on State responsibility and considered the *Nicaragua* case decided in the International Court of Justice, a case which dealt *inter alia* with the responsibility of the United States for violations of international humanitarian law by organised (para)military groups in *Nicaragua*. Since what is at stake is the legal imputability to a State of acts by non-State officials, as a preliminary matter the Appeals Chamber disagreed with the Prosecution that because *Nicaragua* deals with State responsibility it would be immaterial to the present case of individual criminal

responsibility.

According to the Appeals Chamber's interpretation, in *Nicaragua* the ICJ distinguished between 1) groups of individuals who have the status of State officials, which can be determined through an "agency" test, and 2) those who do not have that status. In the latter case, the test spelled out by the ICJ is "effective control" which, rather than providing an alternative test, entails the requirements for the test of "dependency and control". For State responsibility to arise under the second test, the State must not only pay or finance the private individuals and co-ordinate or supervise their action but also issue specific instructions concerning the perpetration of the unlawful acts at stake.

The Appeals Chamber did not consider persuasive the test enunciated in *Nicaragua*. First, on the basis of the International Law Commission's Draft on State Responsibility, it found that international law on State responsibility is founded on a realistic concept of accountability which transcends legal formalities. A State is responsible for acts by individuals who make up an organised group under its overall control irrespective of whether or not it issued specific instructions.

Second, the Appeals Chamber found that the "effective control test" in *Nicaragua* as an exclusive and all-embracing test is at variance with judicial and State practice. Such institutions as the Mexico-United States General Claims Commission, the Iran-United States Claims Tribunal and the European Court of Human Rights have upheld *Nicaragua* in the case of individuals or unorganised groups of individuals acting on behalf of States but have accepted a lower degree of control in the case of (para)military groups.

Considering the facts as established by the Trial Chamber, the Appeals Chamber held that in 1992 "the armed forces of the *Republika Srpska* were to be regarded as acting under the overall control of and on behalf of the FRY." Consequently, the armed conflict in BH between the Bosnian Serbs and the central authorities of BH remained of an international character after 19 May 1992.

In his Separate Opinion6, Judge Shahabuddeen reached the same conclusion as the majority in the Appeals Chamber but for different reasons. In his view, the question was whether an armed conflict between the FRY and BH took place, that is, whether the FRY used force against BH through the Bosnian Serb army. In the circumstances of the *Nicaragua* case, the ICJ found that the arming and training of (para)military groups amounted to the use of force. Likewise, considering the facts of the present case, Judge Shahabuddeen held that the FRY and BH were in armed conflict. According to him, in challenging *Nicaragua*, the majority of the Appeals Chamber considered the distinguishable question of whether the FRY was responsible for violations of international humanitarian law committed by the Bosnian Serbs.

b) The status of the victims7

The Appeals Chamber then moved to the second requirement for the applicability of Article 2 of the Statute, namely, that the victims be "protected persons". Article 4 of the Fourth Geneva Convention defines such persons as those "in the hands of a party to the conflict or Occupying Power of which they are not nationals". According to its preparatory work, however, the Convention's protection extends to refugees with the same nationality as the party in whose hands they find themselves but who do not owe allegiance to that party and enjoy its diplomatic protection. In the cases under Article 4(2) of the Fourth Geneva Convention, the absence of diplomatic protection automatically leads to granting the status of "protected persons". Hinging on substantial relations rather than formal bonds, the Appeals Chamber found that this legal approach is even more important in modern international armed conflicts in which nationality is no longer necessarily the primary ground for allegiance. Moreover, the Fourth Geneva Convention's object and purpose support this approach.

The Appeals Chamber found that the victims in the instant case were therefore "protected persons" since they did not owe allegiance to and did not receive diplomatic protection from the

FRY on whose behalf the Bosnian Serb armed forces were fighting. In its view, the argument that until October 1992 the nationals of the FRY and BH had the same nationality, namely, that of the Socialist Federal Republic of Yugoslavia, does not change that status.

8. The Prosecution's second ground of cross-appeal8

The Trial Chamber found the accused not guilty of killing five men from the village of Jaskici. While the Prosecution accepted the factual findings of the Trial Chamber, it argued that the Trial Chamber had misdirected itself on the application of the law on the standard of proof beyond reasonable doubt and the application of the common purpose doctrine.

As to the first ground, the Trial Chamber found that the accused was a member of an armed group responsible for the "ethnic cleansing" of the village after which the five men were found killed. Although no witness suggested this, because another armed group might have killed those victims, the Trial Chamber held that the Prosecution had not discharged its burden of proof. The Appeals Chamber disagreed and held that on the basis of the facts the only reasonable conclusion could have been that the group of which the accused was a member was responsible for the killing. The question was whether the accused can be held criminally responsible for the deaths of the five men despite the absence of evidence that he personally killed any one of them.

The basic principle *nulla poena sine culpa*, according to which nobody may be held criminally responsible for acts or transactions in which he has not personally engaged or in some way participated, is enshrined in Article 7(1) of the Statute. The Appeals Chamber considered that this provision first and foremost covers the physical perpetration of a crime or the culpable omission of an act mandated by a rule of criminal law. However, the Statute's object and purpose, the wording of Articles 7(1) and 2 to 5, which set forth the Tribunal's subject matter jurisdiction, and the Secretary-General's Report led the Appeals Chamber to the conclusion that a person who contributes to the commission of a crime by (members of) a group in execution of a common criminal purpose bears criminal liability. This is further warranted by the common manifestations of collective criminality in wartime.

In order to identify the required *actus reus* and the *mens rea* for this form of collective responsibility the Appeals Chamber turned to customary international law. Post-World War II case-law points to three categories of collective responsibility. In the first category cases the co-defendants voluntarily participate in one aspect of the common design and intend its result. In the second category, in actuality really a variant of the first, the accused actively participates in the enforcement of a system of repression with the knowledge of the nature of that system and the intent to further the common concerted design. Cases in the third category, which is relevant to the present case, are categorised by "a common design to pursue one course of conduct where one of the perpetrators commits an act which, while outside the common design, was nevertheless a natural and foreseeable consequence of the effecting of that common purpose."

In addition to case-law, the notion of common plan has been upheld in at least two treaties: the International Convention for the Suppression of Terrorist Bombing and the Statute of the International Criminal Court. Although not yet in force, the Appeals Chamber held that both instruments constitute significant evidence of the legal views of many States. It further held that the notion of common purpose in international criminal law is underpinned in many national legal systems although such support is not strong enough to form a basis for relying on the doctrine of the "general principles of law recognised by the nations of the world" as a source of international principles or rules.

Applying the "third category" notion of "common purpose" to the facts of the case, the Appeals Chamber found that the Trial Chamber should have found the accused guilty under Article 7(1) of the Statute of the ICTY.

9. The Prosecution's third ground of cross-appeal9

The Trial Chamber held that for a conviction of crimes against humanity, a nexus between the armed conflict and the acts in question must be proved. This means *inter alia* that a crime against humanity must not have been committed for the purely personal motives of the perpetrator. It is against this finding that the Prosecution appealed. Although the parties did not dispute that the matter had no bearing on the Judgement in terms of Article 25(1) of the Statute, the Appeals Chamber nevertheless set forth its view on the issue because it is of general significance for the Tribunal's jurisprudence.

According to the Appeals Chamber, Article 5 of the Statute requires only that the acts must comprise part of a pattern of widespread or systematic crimes directed against any civilian population and that the accused must have known that his acts fit into such a pattern. The existence of an armed conflict is a jurisdictional requirement rather than a substantive element of the *mens rea* of crimes against humanity. It is incorrect to require that the motives of the accused not be unrelated to the armed conflict. Indeed, proof of the accused's motives is not required at all, except at the sentencing stage.

In the Appeals Chamber's view, the weight of the post-World War II case law reviewed, including so called "denunciation cases", warrants the proposition that under customary international law purely private motives are not relevant for establishing whether or not a crime against humanity has been perpetrated.

In his Separate Opinion10, Judge Shahabuddeen held that where an accused acted out of purely personal motives, the act might not qualify as a crime against humanity. However, this is not because the absence of personal reasons is an element to be proved by the Prosecution, which it is not, but because the evidence may show that the act was not directed against a civilian population. Judge Nieto-Navia appended a Declaration11 in which he joined in the reasoning and conclusion of Judge Shahabuddeen. However, he added that "there must be a proximate connection between the underlying act(s) and the surrounding armed conflict. An unlawful act perpetrated in the context of an armed conflict, but unrelated to the hostilities, is a common crime under national law."

10. The Prosecution's fourth ground of cross-appeal12

The Prosecution submitted that the Trial Chamber erred in finding that crimes against humanity must be committed with a discriminatory intent. As it did with the third ground of cross-appeal, although not *prima facie* falling within the scope of Article 25 of the Statute, the Appeals Chamber nevertheless set forth its views on the issue since it is of general significance for the Tribunal's jurisprudence.

According to the Appeals Chamber, the ordinary meaning of the text of Article 5 of the Statute makes clear that a discriminatory intent is required only for the crime of persecutions punishable under Article 5(h). This is further warranted by a logical interpretation and by the object and purpose of Article 5.

The Appeals Chamber further held that this conclusion is consonant with customary international law. The text of various post-World War II international instruments is clear and indisputable and support can also be found in the International Law Commission's (hereinafter "ILC") Draft Code of Offences Against the Peace and Security of Mankind, and the Statute of the International Criminal Court. The conclusion is also upheld by national jurisprudence.

Although the Appeals Chamber recognised that the conclusion is not supported by the Report of the Secretary-General, it held that that Report does not have the same legal status and binding authority as the Statute. It also found that the Report does not provide sufficient evidence that the Statute deviates from customary international law. Despite the conspicuous discrepancy between the Report and the Statute, it would seem that the latter's unambiguous language makes it unnecessary to consider the former. Finally, it may be argued that the Report describes rather than legally stipulates a definition of crimes against humanity binding on the Tribunal.

The Appeals Chamber also acknowledged that its interpretation of Article 5 is not in keeping with statements three members of the Security Council made prior to adopting the Statute. While recognising their interpretative weight, the Appeals Chamber held *inter alia* that those statements should not be taken to form part of the "context" of the Statute within the meaning of Article 31 of the Vienna Convention on the Law of Treaties. It held that it may further be argued that the statements actually aimed at stressing the "widespread and systematic" nature of crimes against humanity while also pointing out that, in actual fact, most atrocities in the former Yugoslavia were committed with a discriminatory intent. Lastly, although the statements may be interpreted as *travaux préparatoires* under customary law as codified in Article 32 of the Vienna Convention, the *travaux préparatoires* may be resorted to only in cases of ambiguity or obscurity of the principal normative instrument.

11. The Prosecution's fifth ground of cross-appeal13

This ground of appeal arose out of a Trial Chamber Decision14 dated 27 November 1996 in which the majority rejected a Prosecution motion for disclosure of a prior statement of a Defence witness after he had testified. Lacking the powers under Article 25 of the Statute, the Appeals Chamber nevertheless ruled on the matter since it involves an important point of law.

The issue in point is the credibility of evidence which the Trial Chamber must be able to ascertain in order to fulfil its mandate. Also relevant are *inter alia* Article 20(1), 21 and 22 of the Statute concerning the need to ensure a fair and expeditious trial, the rights of the accused, and the protection of victims and witnesses, respectively.

The question is whether the Tribunal has the power to order disclosure of a Defence witness statement after his testimony in court. The Appeals Chamber found that this power is inherent in the Tribunal's jurisdiction because it is "essential for the carrying out of judicial functions and ensuring the fair administration of justice". Although not yet in force at the time of the Decision under discussion, Sub-rule 73 ter (B) of the Rules of Procedure and Evidence, on the production of a Defence witness' statement summary before his testimony, supports this finding. Rule 97 relates to lawyer-client privilege and cannot be relied on.

Depending on the circumstances, the Trial Chamber may order disclosure of a witness statement only if so requested by the Prosecution. The Appeals Chamber noted that, pursuant to Rule 68, only the Prosecution is obliged to disclose exculpatory evidence. The provisions of Sub-rules 89(C), (D) and (E), regarding the admission of evidence, and 90(F), relating to self-incrimination of a witness, are still applicable.

Judge Shahabuddeen,15 joined by Judge Nieto-Navia,16 agreed with the conclusion of the Appeals Chamber but elaborated on its reasoning. He held that while the Prosecution is bound to provide to the Defence not only exculpatory evidence but also copies of statements of Prosecution witnesses, Sub-rule 66(C) does not grant the Prosecution the right to inspect Defence witness statements. Sub-rule 73 ter (B) further implies that the Prosecution does not have such a right. Accordingly, the Defence litigation privilege is only lost where it is waived, as when the Defence puts a Defence witness statement in issue. Only on a similarly limited basis and where in the particular circumstances it would assist in ascertaining the truth may the disclosure of Defence witness statements be ordered. According to Judge Shahabuddeen, it is not clear that this conclusion is inconsistent with the position taken by the majority of the Trial Chamber.

Finally and on a general note, in his Declaration based on a brief survey of domestic practice, Judge Nieto-Navia held that there is no general principle of law prohibiting prosecution appeals against acquittals.17 He therefore did not analyse whether Article 25 of the Statute is consistent with the principle of *non bis in idem*, but opined that the Appeals Chamber should analyse at the sentencing stage "whether a successful Prosecution appeal should put the person in a worse position than that at the end of trial ("*reformatio in pejus*")."

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1. The Appeals Chamber scheduled a hearing of oral arguments on sentencing for the additional counts on which the accused was found guilty. It held that the Appellant's appeal against the Trial Chamber's Sentencing Judgement of 14 July 1997 would be determined subsequent to a decision on the sentencing on those counts.
2. Paragraphs 29 to 56.
3. Paragraphs 57 to 67. The Appeals Chamber denied leave to amend the accused's notice of appeal to include a further ground of appeal ("ground 2"), alleging that the accused's right to a fair trial was gravely prejudiced by the conduct of his former counsel.
4. Paragraphs 68 to 171.
5. Paragraphs 83 to 162.
6. Chapter XI, Separate Opinion of Judge Shahabuddeen, paragraphs 4 to 32.
7. Paragraphs 163 to 171.
8. Paragraphs 172 to 237.
9. Paragraphs 238 to 272.
10. Separate Opinion of Judge Shahabuddeen, paragraphs 33 to 38.
11. Chapter X, Declaration of Judge Nieto-Navia, paragraph 12.
12. Paragraphs 273 to 305.
13. Paragraphs 306 to 326.
14. "Decision on Prosecution Motion for Production of Defence Witness Statements".
15. Separate Opinion of Judge Shahabuddeen, paragraphs 39 to 57.
16. Declaration of Judge Nieto-Navia, paragraph 13.
17. Declaration of Judge Nieto-Navia, paragraphs 1 to 11.