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SCSL-2004-16-PT
(6141 - 6188)

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THE SPECIAL COURT FOR SIERRA LEONE Case No. SCSL-2004-16-PT

BEFORE:

Judge Teresa Doherty, Presiding
Judge Julia Sebutinde
Judge Richard Lissack

Registrar: Mr Robin Vincent

Date Filed: 17th February 2005

The Prosecutor

-v-

ALEX TAMBA BRIMA also known as TAMBA ALEX BRIMA also known as GULLIT

BRIMA BAZZY KAMARA also known as IBRAHIM BAZZY KAMARA also known as ALHAJI IBRAHIM KAMARA

And

SANTIGIE BORBOR KANU ALSO KNOWN AS 55 also known as FIVE - FIVE also known as SANTIGIE KHANU also known as SANTIGIE BOBSON KANU also known as BORBOR SANTIGIE KANU

CASE NO. SCSL-2004-16-PT

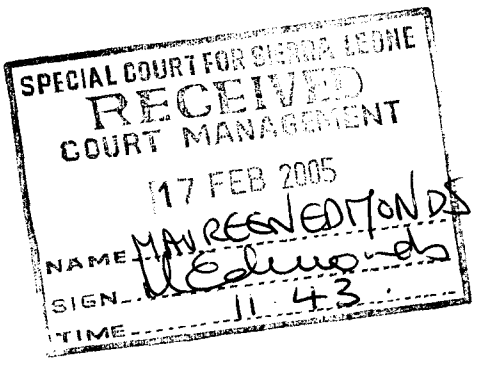
DEFENCE PRE- TRIAL BRIEF FOR TAMBA ALEX BRIMA

Office of the Prosecutor

Luc Coté
Robert Petit

Defence Counsel

Kevin Metzger
Glenna Thompson
Kojo Graham



1. Tamba Brima, the first accused named in the amended consolidated indictment filed on the 13th day of May 2004, by the Prosecutor is charged with a series of offences for which, if convicted, by this court, would mean that he is one of the persons who bear the greatest responsibility for violations of international humanitarian law and Sierra Leonean law.

2. The Defence files this pre-trial brief on the premise that until it receives all the disclosure from the Prosecution, including un-redacted witness statements and heard oral evidence of all prosecution witnesses, the Defence will not be in a position to fully appreciate the case against it.

3. The Defence asserts that it is for the Prosecution to prove its case and not for the Defence to prove its innocence.

4. All allegations contained in the amended consolidated indictment of the 15th May, 2004 and the Prosecution Pre – Trial Brief of 5th March 2004 are denied. No omission or failure to expressly address any aspects of these documents should be taken as expressions of guilt or any form of admission on the part of Tamba Brima.

Personal Background

5. Tamba Brima was born on the 23rd November 1971 at Wilberforce Village in Freetown and not Yaryah Village as alleged by the prosecution. He does not accept the name 'Alex' used by the Prosecution as he has never been so named nor does he accept that he was ever nicknamed 'Gullit'. He is married with two wives and four children.

6. Tamba Brima further asserts that he joined the Sierra Leone Army in June 1991(and not April 1985 as alleged by the Prosecution) in order to assist in the defence of his country. He was born into a military family – both his father and brother were soldiers. He retired from the Army in 2001 having risen to the rank of Corporal and not Staff Sergeant as stated by the Prosecution.

7. The Defence submits that this Court was established to try those who bear the greatest responsibility for those serious violations of International Humanitarian Law and Sierra Leonean law.[1] The Defence wishes the Court to note that as a Corporal, a junior rank in the military hierarchy, Tamba Brima could not be said to be one of those who bears the greatest responsibility. It is submitted in the first instance that the Accused therefore falls outside the jurisdiction of the Court.

8. Should the Prosecution remain of the view that as a junior officer in the Army, Tamba Brima is one of 'those who bears the greatest responsibility', then the Defence will seek clarification of that phrase and of the phrase 'damage to the Peace Process'

9. The Defence will also submit that Tamba Brima served as Principal Liason Officer 11 in the government of AFRC. He was not part of the Supreme Council, nor did he hold any Cabinet position, nor was he part of any decision making body. The Prosecution is therefore put to strict proof of the assertion that Tamba Brima acted or held positions which render him one of the persons who bear the greatest responsibility for the crimes committed in Sierra Leone. If the Prosecution fails to prove this, then Tamba Brima falls outside the jurisdiction of the Court and there need not be any further consideration of his culpability for the offences charged.

10. The Defence for Tamba Brima asserts that as a trained soldier, his training was solely in the hands of the government of Sierra Leone. That training took place at military training camps at Lungi and Benguema and it was at a time when the rebel war had intensified against the government of Sierra Leone. It was therefore incumbent on the government and the military hierarchy to ensure that training of recruits included lessons on the conduct of war and more particularly the Geneva Conventions and Additional Protocol II as pleaded. This accused received no such training or instruction on the subject and was never provided with any manual, pamphlet or other reading material

[1] Article 1(1) of the Special Court Statute.

or learning aid in respect of the same. Instead they were taught to seek and fight the enemy. The Prosecution is put to strict proof of any assertions to the contrary.

11. The Prosecution has asserted that Tamba Brima was in 'direct control of AFRC/RUF forces in Kono District. This is denied by the Accused. For the reasons given elsewhere in this pre – trial brief the Accused could not have been in command of any forces. In any event, the Defence will seek to call evidence, if required, to show that Mr. Brima was held in custody by the RUF between February and July 1998. Accordingly it is submitted that he had an alibi for the period relating to the allegations. It is further specifically denied that the accused person was in command of AFRC/RUF, or any other factional units between 22nd December, 1998 and January 1999 as alleged.

General Factual Background

12. The Defence accepts so far as it is within its knowledge, and therefore competent to do so, certain aspects of the Prosecution's General Factual Background. In particular that:

a. That Sierra Leone became independent on the 27th April 1961.
b. That Siaka Stevens became Head of State in 1968
c. That Joseph Saidu Momoh was elected President in a one party election.
d. That on the 29th April 1992, President Momoh was overthrown in a military coup by junior officers of the Sierra Leone Army and a new administration was formed under the National Provisional Ruling Council (NPRC) and headed by Captain Valentine Strasser.
e. That the NPRC deputy Julius Maada Bio subsequently replaced Valentine Strasser and that in February 1996, Ahmed Tejan Kabbah of the SLPP was elected President of Sierra Leone.
f. That on the 30th November 1996, President Kabbah and Foday Sankoh, the RUF leader signed the Abidjan Peace Accord.

13. The AFRC seized power in May 1995 with Major Johnny Paul Koroma as the Head of State. The AFRC was not an armed faction, but rather the Armed

Forces of the Republic of Sierra Leone, which after taking control became the 'de facto' government of Sierra Leone.

14. Tamba Brima was named in the AFRC government but only as PLO 11 serving in the Council which is not only separate and distinct from the Supreme Council, but also lower in status. The Supreme Council was the decision making body and Tamba Brima was not part of that body.

15. The Defence submits that there was never any AFRC/RUF alliance in the way alleged by the Prosecution. The Prosecution has put forward a simplistic, albeit convenient, theory that the two organisations were the same. It seeks to suggest that crimes committed by the RUF and the perpetrators of those crimes were one and the same as members of the AFRC. The AFRC was the military and was not part of the RUF or any rebel movement nor did they share the same objectives. The Defence asserts that the Prosecution cannot seek to convict members of the AFRC by leading evidence of acts said to have been done by the RUF and relying on the fact that the RUF was said to have been part of a power sharing government after May 1997.

16. The Defence can therefore not comment on any of those parts of the Prosecutions Pre – trial brief which deal with the activities of the RUF and would invite the Prosecution to put exactly what their case is against Tamba Brima.

<u>The Essence of the Prosecution's Case</u>

17. The Prosecution asserts in Paragraph 23 of the Amended Consolidated Indictment that the accused person was "a member of the group which staged the coup and ousted the government of President Kabbah". It is submitted that even if the Prosecution were in a position to know this, this fact in itself is not a matter for the present tribunal and does not amount to an offence within the remit of the Statute of the Special Court for Sierra Leone. In any event it is an assertion which is emphatically denied by the Accused. The Prosecution will recall that at the time the AFRC took control of the governing of Sierra Leone,

there was no effective government within its territory with the then Government being in self-imposed exile outwith the Sierra Leonean borders.

18. The prosecution alleges that Tamba Brima was a senior member of the AFRC[2] and was in direct command of AFRC/RUF forces[3]. As stated above the Defendant was named as PLO 11 in the administration of the AFRC. It is the Defendant's case that the said position could not have conferred on him any position of command or superior responsibility.

19. The Prosecution has failed to appreciate that even if their case was to be accepted that the accused was a Staff Sergeant, (and this is not accepted) his rank within the Military hierarchy was such that he could not possibly exercise such command and control over the fighting forces in the way alleged by the Prosecution. The military has always operated on the basis of command structure and a Corporal could never exercise the command, control, power or superiority attributed to this Accused.

20. Furthermore, as a PLO 11, he could hardly be described as a senior member of the AFRC above others who ranked higher in the military and in that administration than himself. It would appear that the Prosecution are relying on a premise of guilt by association or guilt by virtue of being part of the Sierra Leone Army.

21. By virtue of the forgoing and the established military tradition of ranks and the fact that the Accused, even on the Prosecutions own case was a junior Non – Commissioned Officer, Tamba Brima could not have exercised authority and control over the AFRC, the Sierra Leone Army and certainly not the RUF. The Prosecution must not be allowed to rely on an exaggerated version of events which describes a network alien to the military in the hope that at the end of the day it will be easier to prove a lesser case against the Defendant.

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[2] Paragraph 22 of the Indictment dated 5th February 2005
[3] Paragraph 24 of the Indictment

22. The Defence notes that the Prosecution has drafted the indictment in the widest possible way. The allegations are general in nature and lack particularity. The Accused and others are said to have 'planned, instigated, ordered, committed or in whose planning, preparation or execution each Accused otherwise aided, abetted, or which crimes were within a joint criminal enterprise in which each Accused participated.'[4] The Prosecution asserts that additionally or in the alternative the accused are each liable for offences committed under the principle of command responsibility.

23. The Prosecution ought to be able to particularise the allegations it makes. If the Prosecution has evidence of the Defendant's particular wrongdoing, then it must specify it in the indictment. These wide allegations make it extremely difficult for the defence to know the case it has to meet. This is made all the more difficult because the Prosecution has sought to allege an AFRC/RUF alliance, thus making it difficult to see the difference between what the AFRC is supposed to have done, what the individual accused is alleged to have done and what acts the RUF are said to be responsible for. It is as if the Prosecution is asking the Court to infer the guilt of the Accused from the varying circumstances it relies upon to prove its case. The Prosecution is invited to detail specifically the "armed attacks" it relies on and to sever the RUF connection it has hitherto relied on so as to afford the accused person a fair opportunity of defending himself against these allegations.

24. As part of the Defence's request for the Prosecution to particularise the allegations the Prosecution is respectfully requested to clarify the meaning of the phrase "..or who were no longer taking an active part in the hostilities". This definition, it is submitted fails to identify the persons or group of persons the Prosecution are referring to sufficiently so as to enable the Defence to assess the import of this phrase and commence potentially necessary and relevant investigations to refute the allegation made.

[4] Paragraph 35

25. The Defence would also submit that Paragraphs 33, 34, 35, 36, 37 and 38 are imprecise and non-specific in nature. In any event, the Defence case is that the accused person never involved himself in a common plan, purpose or design as alleged, or at all. The Prosecution is put to strict proof of its submitted hypotheses in relation to Command responsibility, Individual Responsibility and Common Purpose.

26. It is submitted that the charges in their current form are either flawed, misconceived, or both.

27. The Defence wishes it to be noted that quite apart from the generality of the allegations, the Prosecution has compounded this by asserting alternative but mutually exclusive forms of liability. The Prosecution is alleging that Tamba Brima's criminal liability is founded in command responsibility[5] and individual criminal responsibility[6] which also includes joint criminal responsibility. The Prosecution it seems is saying that the accused acted as principal and also as an accessory in addition to participating in a joint criminal enterprise. This is all part of the prosecution's practice of casting the widest possible net. It gives the impression that the Prosecutions are unsure of the strength of the case they have. This uncertainty, clearly exhibited, is unfair to the Defence and hampers the Defence's preparation of its case.

28. The Defence would therefore wish the Court to note the following as regards each count against Tamba Brima:

    a. Counts 1 and 2 are, it is submitted, insufficiently precise and are therefore defective. Further, or in the alternative they appear to incorporate Counts 3 to 14, even to the extent that Paragraph 41 of the Consolidated Amended Indictment concedes this. The Defence submits that the Prosecution should be ordered to consider the duplicity in these allegations or state clearly where alternative, substantive, allegations are made in respect of the general

[5] Article 6(3) of the Statute
[6] Article 6 (1)

formulation Counts 1 and 2. Additionally, clarifying the issues raised herein beneficial in terms of serving judicial economy.

b. Counts 6 to 9 suffer from a significant lack of particularisation and, as with all other counts, objection is taken to the use of the joint term "AFRC/RUF" on the basis that the Defence denies any joint participation with the RUF in relation to any allegation on this indictment.

c. Counts 10 to 11 again lack particularity. It is submitted that the Prosecution should properly list the incidents that are relied on so that the Defence is given a fair picture of the case it has to meet. As currently drafted the indictment serves the interest of the Prosecution in that it leaves the possibility of widening the net once, or even after, evidence has been called.

d. It is submitted that there is no prima facie evidence that the Accused was ever involved in the use of child soldiers as alleged in Count 12 or forced labour as alleged in Count 13. The Prosecutor is respectfully invited to particularise which particular acts or omissions are relied on against this Accused.

e. In relation to count 14 the Defence will rely on alibi or partial alibi in that it is asserted that the Accused was placed under arrest by the RUF in Kailahun in mid February 1998 and that he was incarcerated until around 8th July 1998 whereupon he fled and stayed with family until October 1998. He will assert that he was not engaged in any operations or hostilities during that time.

29. The Defence respectfully submits that the Prosecutor should delete the phrase "including but not limited to" contained in the Amended Consolidated Indictment pursuant to the decision of *Prosecutor v Blaskic*[7].

30. Additionally the following clarifications are sought:-

a. Paragraph 12, Amended Consolidated Indictment states that "Soldiers of the Sierra Leone Army (SLA) comprised of the majority of the AFRC membership; The Prosecutor should state who or what comprised the "minority" and the basis for their assertion. In due course objection will be taken to the averral that the AFRC forces were referred to as "Junta" and "ex-SLA".

b. It is not accepted, as stated in Paragraph 15 of the Amended Consolidated Indictment that after the "Junta" was removed from power the AFRC/RUF alliance continued.

c. It is not accepted, as stated in Paragraph 16, Amended Consolidated Indictment, that after the Lome Peace Agreement was signed, active hostilities continued, and, in any event, the Defence submits that any so-called hostilities, if they existed at all, had nothing to do with this Accused.

d. As regards Paragraph 17 of the Amended Consolidated Indictment, it is submitted that at no stage during his army training, or indeed career, was the Accused provided with a copy of the conduct of armed conflicts including the Geneva Conventions and Its Additional Protocol II, nor was he ever given any training or education about the same. In the circumstances it is respectfully submitted that the Prosecutor ought properly to adduce evidence of any such training before this assertion can be relied on as part of the Prosecution case.

e. Regarding Paragraph 20, Amended Consolidated Indictment, the Prosecutor purports to include those "who were no longer taking an active part in the hostilities". It is respectfully submitted that the Prosecutor ought properly to fully explain the meaning of this phrase.

[7] Decision of the 4th April 1997

f. Paragraph 24 contains the general formulation "including, but not limited to". It is respectfully submitted that this phrase falls within the range of a defective allegation within an indictment as per the Decision on the Defence Motion Raising Objection on Defects in the Form of the Indictment and to Personal jurisdiction on the Amended indictment in the case of *Prosecutor v. Anatole Nsengiyumba, ICTR-96-12-I, 12 May 2000.*

g. In view of the decision of Trial Chamber 1, refusing to allow joinder in the AFRC and RUF cases, it is respectfully submitted that the Prosecution ought to remove the allegation that the Accused was acting in concert with RUF personnel. Further, or in the alternative, the Prosecutor should specify, to the extent possible, the identity of the superiors with whom the Defendantis said to have acted in concert with in respect of each crime alleged. It is respectfully submitted that failure to so specify in these circumstances would unfairly prejudice the Defendant's case in that, it circumvents the general rule that he ought to be able to fully understand the nature and the cause of the charges brought against him.

h. As regards Paragraph 36, Amended Consolidated Indictment, the Defence submits that the Prosecutor ought properly to specify the identity of the subordinates of the Defendant in relation to each crime alleged.

i. It is further submitted that Paragraphs 38 to 41 are far too widely drafted in combining the AFRC and RUF. It is respectfully submitted that by casting their net this wide the Prosecution has made it extremely difficult if not impossible for the Defendant to understand the nature and cause of the charges brought against him (*Kanyabashi*[8]), as the Defence are unable to ascertain the relationship between the Accused and the perpetrators in each crime alleged, nor the precise nature of the alleged participation by the Accused in the relevant enterprise with any degree of precision.

[8] Prosecutor v Kanyabashi - decision of 31st May 2000

31. The Defence wishes the Trial Chamber to note, however, that it reserves its position to revisit and advance further arguments on any or all of the points raised in this pre – trial brief.

Respectfully Submitted
Done this 17th day of February 2005

Kevin Metzger
Glenna Thompson

LIST OF AUTHORITIES.

1. The Prosecutor Vs. Anatole Nsengiyuma. Case No.ICTR-96-12-I Trial Chamber Decision of 12th May 2000.

2. The Prosecutor Vs. Kanyabashi. Case No. ICTR-96-I Trial Chamber of 31st May 2000.

3. The Prosecutor Vs. Thomir Blaskic. ICTY Trial Chamber Trial Chaber Decision of 4th April 1997.

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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

United Nations
Nations Unies

TRIAL CHAMBER III

ORIG: Eng.

Before:
Judge George Lloyd Williams, Presiding
Judge Yakov Ostrovsky
Judge Pavel Dolenc

Registrar: Dr. Agwu Ukiwe Okali

Decision of : 12 May 2000

THE PROSECUTOR
versus
ANATOLE NSENGIYUMVA

Case No. ICTR-96-12-I

DECISION ON THE DEFENCE MOTION RAISING OBJECTIONS ON DEFECTS IN THE FORM OF THE INDICTMENT AND TO PERSONAL JURISDICTION ON THE AMENDED INDICTMENT

Counsel for the Accused:
Mr. Kennedy Ogetto
Mr. Gershom Otachi Bw'omanwa

Counsel for the Prosecutor:
Mr. Chile Eboe-Osuji
Mr. Frederic Ossogo

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

SITTING as Trial Chamber III, composed of Presiding Judge Lloyd George Williams, Judge Yakov Ostrovsky, and Judge Pavel Dolenc (the "Trial Chamber" or the "Chamber");

BEING SEIZED of a Defence Motion Raising Objections on Defects in the Form of

the Indictment and to Personal Jurisdiction on the Amended Indictment, dated 2 December 1999 and filed on 3 December 1999 (the "Motion");

NOTING the Prosecutor's response to the Motion, dated and filed on 30 March 2000;

NOTING the Chamber's Decision on the Defence Motions Objecting to the Jurisdiction of the Trial Chamber on the Amended Indictment, dated and filed on 13 April 2000 (the "Decision on Jurisdiction");

HAVING HEARD the arguments of the parties on 8 May 2000.

PLEADINGS BY THE PARTIES

Defence Submissions

The Defence submits that the amended indictment against Anatole Nsengiumva (the "Accused") is defective to the extent that certain of its paragraphs do not allege any specific indictable conduct of the Accused.

Consequently, the Defence requests the Chamber to make a declaration to this effect.

At the hearing, the Defence withdrew its request for the Chamber to declare that it lacks jurisdiction to adjudicate charges relating to institutions or organizations rather than natural persons since the Chamber already decided that matter on 13 April 2000 in its Decision on Jurisdiction.

Prosecutor's Response

The Prosecutor responds that if the amended indictment is considered as a whole, it is clear that the concise statement of facts set out in it demonstrates the specific role of the Accused in indictable offences.

Consequently, the Prosecutor argues the amended indictment is not defective and requests the Chamber to dismiss the Motion.

DELIBERATIONS

1. It is a general principle of criminal law that all the facts of a given offence attributed to an accused person are to be set out in the indictment against him or her. Therefore, for an indictment to be sustainable, facts alleging an offence must demonstrate the specific conduct of the accused constituting the offence. Rule 47 (C) of the Rules of Evidence and Procedure of the Tribunal (the "Rules") reflects this principle when it prescribes that "The indictment shall set forth the name and particulars of the suspect, and a concise statement of the facts of the case and of the crime with which the suspect is charged."

2. It is true that a number of paragraphs in the amended indictment, including those listed in the Motion, do not mention the Accused and his role in the events

alleged therein. However, it is not reasonable to expect the Prosecutor to mention the Accused in every paragraph of the amended indictment. Nor is it proper to consider the amended indictment in such a way as to disregard those paragraphs where not only is the Accused mentioned, but where acts and omissions for which the Prosecutor finds him individually responsible under the Statute of the Tribunal are described.

3. It is misleading to raise the question of defects in the amended indictment on the basis of isolated paragraphs. The amended indictment must be considered in its totality and it would be incorrect to make a conclusion as to any defect in it upon a selective reading of only certain of its paragraphs.

4. The Chamber therefore cannot adopt the approach of the Defence based upon a reading of certain paragraphs of the amended indictment in isolation from the rest of the document. As the Chamber pointed out earlier in its Decision on Jurisdiction, "The Trial Chamber does not read in isolation the paragraphs of the indictment challenged by the Defence. The Trial Chamber reads them in conjunction with, and in the context of, the other paragraphs relating to the crimes...." (Para. 34)

FOR THESE REASONS, THE TRIBUNAL

DISMISSES the Motion.

Arusha, 12 May 2000.

George Lloyd Williams	Yakov Ostrovsky	Pavel Dolenc
Judge, Presiding	Judge	Judge

[Seal of the Tribunal]

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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

United Nations
Nations Unies

TRIAL CHAMBER II

Before Judges:
Laïty Kama, presiding
William H. Sekule
Mehmet Güney

Registry:
Ms Aminatta N'Gum

Decision of: 31 May 2000

THE PROSECUTOR
vs.
JOSEPH KANYABASHI

Case No ICTR-96-15-I

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

(Rule 72 (B)(ii) of the Rules of Procedure and Evidence)

Office of the Prosecutor:

Mr. Japhet Mono
Ms Andra Mobberley
Mr. Ibukundu A. Babajide

Defence Counsel:

Mr. Michel Marchand
Mr. Michel Boyer

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA ("The Tribunal")

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SITTING as Trial Chamber II, composed of Judges Laïty Kama, presiding, William H. Sekule and Mehmet Güney;

CONSIDERING the initial indictment confirmed by Judge Yakov Ostrovsky on 15 June 1996 ;

CONSIDERING the indictment amended on 17 August 1999 ("the Indictment"), upon leave granted by this Chamber on 12 August 1999;

HAVING BEEN SEIZED of Defence preliminary motion for defects in the form of the indictment dated 9 October 1999;

CONSIDERING the Prosecutor's response to the said motion dated 14 February 2000;

HAVING HEARD the parties during the hearing held for this purpose on 29 February 2000.

Submissions by the parties:

The Defence

1. Under Rule 72 (B)(ii) of the Rules of Procedure and Evidence (the "Rules"), the Defence raises a number of defects in the form of the indictment, and submits essentially as follows:

1.1. In addition to the relevant provisions, specifically, Articles 17 (4) and 20 (4)(a) of the Statute of the Tribunal (the "Statute"), and Rule 47 (C) of the Rules, an indictment must include some degree of specificity concerning temporal references, the charges, the distinction between the types of the Accused's individual responsibility, his conduct or the extent of his participation in the acts with which he is charged. In support of this submission, the Defence refers, particularly, to the decisions of 24 November 1997 and 17 November 1998 in the *Nahimana* case, and to the decision of 30 June 1998 in the *Ntakirutimana* case as well as the relevant case-law of the International Criminal Tribunal for the Former Yugoslavia.

1.2. All nine counts of the Indictment begin with the following words:

By the acts or omissions described in paragraphs 5.1 to 6.65 and more specifically in the paragraphs referred to below [...]

Now, the words *"and more specifically"* are imprecise and not at all restrictive. Therefore the charges must be set aside or, alternatively this formulation deleted.

1.3. With the exception of Count 4, all the counts refer to the same paragraphs concerning the alleged facts. This identical formulation reads as follows:

"- *pursuant to Article 6 (1), according to paragraphs: 5.1, 5.8, 5.12, 5.13, 6.22, 6.26,*

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6.28 to 6.35,6.37, 6.38, 6.41 to 6.46, 6.57 to 6.65

- pursuant to 6(3), according to paragraphs: 5.1, 5.8, 5.12, 5.13, 6.22, 6.26, 6.28 to 6.35, 6.37, 6.38, 6.41 to 6.46, 6.57 to 6.65".

According to the Defence, the effect of such practice certainly is to "*facilitate the work of the Prosecutor*[...]",but at the same time it prevents the Accused from knowing precisely what he is accused of individually or on account of the conduct of his subordinates. Consequently, these eight counts must be set aside.

1.4. Count 4 must also be set aside because it is vague and imprecise. The Defence submits that the Prosecutor failed to specify the time or to provide specific factual references as to the deeds or conduct of the Accused or his subordinates and as to Accused's exact role in the acts charged.

1.5. The paragraphs included in the formulation "5.1 to 6.65" , but which are not specifically mentioned in the various counts namely 5.2 to 5.7, 5.9 to 5.11, 5.14 to 5.18, 6.1 to 6.21, 6.23 to 6.25, 6.27, 6.36, 6.39. 6.40, 6.47 to 6.56, must be deleted, firstly, on account of their vagueness and imprecision and, secondly, because they in no way cover the accused or his subordinates. Since joinder of Accused was granted in the absence of a joint indictment, all allegations unrelated to the Accused must be deleted from his Indictment;

1.6. Those paragraphs specifically referred to in the various counts namely 5.1, 5.8, 5.12, 5.13, 6.22, 6.26, 6.28 to 6.35, 6.37, 6.38, 6.41 to 6.46, 6.57 to 6.65, should all be set aside, again, on account of their vagueness and imprecision and, more specifically, on account of one or more of the following reason:

(1) Absence of or imprecision in time references;

(2) Lack of specific factual reference as to the Accused's individual conduct with respect to the acts with which he is charged and as to role in the alleged crimes in relation to his hierarchical superiors, his co-conspirators, or his subordinates;

(3) Failure to disclose the identity of his co-conspirators.

2. Consequently, in light of the foregoing the Defence prays:

2.1. That the indictment be set aside because it is vitiated by serious defects;

2.2. Alternatively, that should the Chamber decline to quash the indictment, the Prosecutor be ordered to effect the corrections requested by the Defence within 30 days.

2.3. That the Defence be allowed to reserve its right to raise objections to the indictment as amended following the decision of this present Chamber.

The Prosecutor

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3. In response to the Defence, the Prosecutor mainly submits the following:

3.1. The style of the Indictment is within the sole prerogative of the Prosecutor, who has the power to adopt, under the guidance of the Trial Chamber, styles drawn from different jurisdictions throughout the world.

3.2. Regarding the nature and the scope of the facts indicated in the Indictment, it is necessary to make a distinction, between the minimum guarantees which the Accused is entitled to in the yes"> outline of the Indictment on the one hand, and, on the other hand, the right of the Accused to be provided subsequently with more detailed information so as to enable him prepare his defence. At this stage of the proceedings, the object of the Indictment is not to enable the Accused to prepare his defence, but rather to ensure that the Accused can read and fully understand the charges brought against him.

3.3. Regarding the wording "*and more specifically*", used in each of the counts, the Prosecutor submits that this formulation far from misleading the Defence, yes"> enables it to differentiate between the paragraphs which are purely of a narrative nature and those which describe specifically the acts alleged.

3.4. In response to the allegation by the Defence that counts 1 to 3 and 5 to 9 are cumulative since they all refer to the same factual paragraphs, the Prosecutor submits that the acts and omissions charged against the Accused all result from the same criminal transaction, in the instance, the genocide of 1994. The paragraphs cited all relate to each of the counts, but not necessarily in similar fashion to each of the factual ingredients of each count. In addition, the Prosecutor refers to the Decision of 24 November 1997 in the matter of *Nahimana* in which the Trial Chamber dismissed the allegation of cumulative charges made by the Defence, holding that the matter would only be relevant when determining the penalty.

3.5. Regarding temporal references, the Prosecutor submits that she focused on the sequence of events in which the Accused was allegedly involved, and that consequently, it is necessary to use *inclusive* rather than *exclusive* time frames.

3.6. Regarding the identity of the co-conspirators, Article 3 of the Statute does not require that the Prosecutor should name all the co-conspirators and the Prosecutor contends that with respect to the facts referred to in the first count of the Indictment on conspiracy to commit genocide, she followed the case–law established by the Decision of 24 November 1997 in *Nahimana* case, requesting the Prosecutor *"to identify some or all of the persons with whom the Accused, in the first count allegedly conspired to commit genocide"*.

3.7 The submission by the Defence that the Indictment is vague as to the individual acts or the role of the Accused in the crimes alleged, or as to his acts or role as a subordinate, co-conspirator or hierarchical superior, is without merit. The specific factual information sought by the Defence is contained in the paragraphs referred to in each of the counts.

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3.8 Moreover, the provisions of the Statute and the Rules provide that the clarifications sought by the Accused shall be specified during the disclosure process after his initial appearance.

3.9 Regarding the paragraphs which have not specifically been referred to in the counts, it appears from the structure of the Indictment that these mention the context within which the paragraphs which relate directly to the Accused should be situated, thus forming an integral part of the Prosecutor's argument.

3.10 Furthermore, in case of defects in the form of the indictment, the Rules do not provide that the Indictment be set aside. The practice is rather to direct, if necessary, the Prosecutor to cure if necessary, the defects in the form of the Indictment.

4. 1 For all the foregoing reasons, the Prosecutor prays the Chamber to dismiss the Defence motion.

AFTER HAVING DELIBERATED,

Regarding the defects in the form of the Indictment:

5.1. WHEREAS an Indictment must be sufficiently clear to enable the Accused to fully understand the nature and cause of yes"> the charges brought against him;

5.2. WHEREAS the Trial Chamber reminds the Prosecutor that, pursuant to Article 20 (4) (a) of the Statute, an Indictment should present in a precise and detailed manner, the charges brought against the Accused;

5.3. WHEREAS the Accused may, pursuant to Rule 72 of the Rules, raise objections based on defects in the form of the indictment, which procedure enables him to obtain further information in order to fully understand the nature and cause of the charges brought against him;

5.4. WHEREAS, in the opinion of the Trial Chamber, contrary to the Prosecutor's submission, the clarification required in the Indictment therefore does not relate to style;

Regarding the fact that, with the exception of count 4, all counts refer to exactly the same paragraphs of the Indictment:

5.5 WHEREAS counts 1 to 3 and 5 to 9 refer without distinction to the same paragraphs of the Indictment, that is, paragraphs 5.1, 5.8.5.12,5.13, 6.22, 6.26, 6.28 to 6.35, 6.37, 6.38, 6.41 to 6.46, 6.576 to 6.65;

5.6 WHEREAS the Trial Chamber notes that it is the usual practice before the Tribunal, which does not in anyway prejudice the Accused;

5.7 WHEREAS, furthermore, the Trial Chamber recalls that the issue of multiple charges can only be considered at trial and ruled on when judgement is passed, and not

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at this stage of the proceedings;

Regarding the fact that, according to the Indictment, the Accused incurs individual criminal responsibility, by reason of the same facts, pursuant to Article 6 (1) and Article 6 (3) of the Statute:

5.8 Whereas the Trial Chamber notes that with the exception of count 4, the wording of the charges states that the Accused incurs individual criminal responsibility based on the same facts, both under Article 6 (1) of the Statute and that of Article 6 (3) as hierarchical superior;

5.9 Whereas the Trial Chamber holds that such a practice makes it impossible for the Accused to understand the nature and the cause of the specific charges brought against him, since the same facts cannot simultaneously give rise to the two types of responsibility provided for under the Statute;

5.10 Whereas the Trial Chamber notes the case-law established by Trial Chamber I in its Decision rendered on 17 November 1998, in the *Nahimana* case, which directed the Prosecutor to amend the Indictment "*specifying [...] the alleged acts for which the Accused is held individually criminally responsible pursuant to Article 6 (1) of the Statute and the acts allegedly committed by the Accused's subordinates for which he is held individually criminally responsible pursuant to Article 6 (3) of the Statute*".

5.11 Whereas the Trial Chamber consequently holds that the Prosecutor must clearly distinguish between facts as a result of which the Accused incurs criminal responsibility under Article 6 (1) of the Statute from those giving rise to his responsibility under Article 6 (3);

Regarding the alternative nature of the charges of genocide and complicity in genocide :

5.12 Whereas the Trial Chamber notes that in its oral decision of 12 August 1999 granting leave to amend the indictment, it stated :

"that it follows from the Prosecutor's clarification during the hearing of the motion, that count 2 of the amended indictment of genocide and count 3 of the amended indictment of complicity in genocide are meant to be charged alternatively";

5.13 Whereas it is clear that the counts of genocide and complicity in genocide are alternative counts and that in the opinion of the Chamber the Indictment must clearly indicate that the said two counts are charged alternatively;

The paragraphs referred to in the counts which the Defence claims do not concern the Accused

5.14 WHEREAS the Trial Chamber notes that while certain paragraphs in the Indictment do not refer directly to the Accused, they nevertheless make for an understanding of the background to the acts with which the Accused is charged;

5.15 Whereas, the Trial Chamber holds that the Indictment must be read as a whole and that the paragraphs which do not refer specifically to acts with which the Accused is charged must be read in conjunction with those that concern him directly, and that consequently, it is not appropriate to delete them;

5.16 Whereas, in any case, the Trial Chamber reminds the Defence that yes"> the paragraphs which do not directly refer to the Accused are only of general import and, therefore, must not be construed as supporting the counts;

The general introductory formulation of each count:

5.17 WHEREAS, contrary to the Prosecutor's assertion, the Chamber finds that the general introductory formulation to each count, "*By the acts or omissions described in paragraphs 5.1 to 6.65 and more specifically in the paragraphs referred to below*", does not specify nor does it limit the reading of the counts, but rather expands the Indictment without concretely identifying precise allegations against the Accused;

5.18 Therefore, the Trial Chamber holds that the said introductory formulation must be deleted from each count and that each count must consequently only mention the specific paragraphs of the Indictment which directly concern the allegations against the Accused;

The vague and imprecise nature of the counts and the paragraphs to which they refer:

5.19 WHEREAS the Trial Chamber finds that the vague and imprecise nature of the counts, as alleged by the Defence, indeed stems from the lack of specificity of the paragraphs to which the said counts refer;

5.20 Whereas, with respect to the paragraphs which are not specifically referred to in the counts, the Chamber finds that it is not necessary to consider whether they are vague and imprecise, since as a result of the general introductory formulation to each count being deleted, such formulation will no longer be reflected in the charges against the Accused;

5.21 Whereas, therefore, after having carefully reviewed the paragraphs specifically referred to in the Indictment, the Chamber is of the opinion that the following paragraphs of the Indictment must be clarified:

(a) Paragraph 5.8:

The Prosecutor must align the wording of this paragraph of the Indictment with that of paragraphs 7, 13 and 14 of the initial Indictment dated 15 June 1996, which is more precise;

(b) Paragraph 5.12:

The Prosecutor must specify whether the Accused is charged with having committed

acts solely in Ngoma *commune* or also in Nyakizu *commune*, as indicated in paragraph 6.31;

(c) Paragraph 6.29:

It is necessary to specify the identity of the subordinates referred to in this paragraph;

(d) Paragraph 6.37:

There appears to be a discrepancy between the English version and the French version with regard to the word "*éventuellement*", which appears in the last sentence of the paragraph. The Prosecutor should therefore harmonize the two versions;

(e) Paragraph 6.63:

The phrase "*During the events referred to in this indictment*" is not sufficiently precise; the Prosecutor must make reference to more specific dates;

(f) Paragraph 6.64:

This paragraph gives no indication as to the period during which the events referred to occurred; the Prosecutor must specify dates, and moreover, identify who the subordinates referred to in the paragraph are.

5.22 WHEREAS the Chamber finds that it is not necessary to respond to the Defence's objections relating to the other paragraphs, either because the paragraphs in the Indictment are sufficiently clear or because the factual precisions sought by the Defence bear on issues to be addressed during the trial on the merits, or also because the requested precisions sought can be inferred from the context of the paragraphs in question, bearing in mind the Chamber's opinion that the Indictment must be read as a whole.

Paragraph 6.66

5.23 WHEREAS, on this point, the Trial Chamber simply notes that said paragraph 6.66 is not referred to in any of the counts and does not rule on this matter.

FOR THE FOREGOING REASONS,

THE TRIBUNAL,

DISMISSES the Defence request to set aside the Indictment;

RULES that the Prosecutor must clearly distinguish the acts for which the Accused incurs criminal responsibility under Article 6 (1) of the Statute from those for which he incurs criminal responsibility under Article 6 (3);

ORDERS that the Indictment must clearly indicate that the counts of genocide and

conspiracy to commit genocide be clearly indicated in the Indictment; 6165

RULES that the general introductory formulation to each count, "*By the acts or omissions described in paragraphs 5.1 to 6.65 and more specifically in the paragraphs referred to below*", must be deleted from each count and that each count must consequently only mention the specific paragraphs of the Indictment which directly concern the allegations against the Accused;

DIRECTS the Prosecutor to clarify paragraphs 5.8, 5.12,6.29, 6.37, 6.63 and 6.64 of the Indictment as follows:

Paragraph 5.8:

The Prosecutor must align the wording of this paragraph in the Indictment with that of paragraphs 7, 13 and 14 of the initial Indictment dated 15 June 1996;

Paragraph 5.12:

The Prosecutor must specify whether the Accused is charged with acts committed only in Ngoma *commune* or also in Nyakizu *commune,* as indicated in paragraph 6.31;

Paragraph 6.29:

The Prosecutor must specify the identity of the subordinates referred to;

(g) Paragraph 6.37:

The Prosecutor must harmonize the meaning of the word "*eventuellement*" which appears in the last sentence of the paragraph in the English and French versions of the indictment;

(h) Paragraph 6.63:

The Prosecutor must make reference to more specific dates;

(i) Paragraph 6.64:

The Prosecutor must provide specific dates and identify who the subordinates referred to in this paragraph;

FURTHER DIRECTS the Prosecutor to file with the Registry within 30 days from the date of this Decision, the English and French versions of the Indictment amended pursuant to this Decision.

Done in Arusha on 31 May 2000

Laïty Kama: Presiding
William H. Sekule: Judge

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Mehmet Güney: Judge

(Seal of the Tribunal)

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IN THE TRIAL CHAMBER

Before:
Judge Claude Jorda, Presiding
Judge Haopei Li
Judge Fouad Riad

Registrar:
Mr. Jean-Jacques Heintz, Deputy Registrar

Decision of:
4 April 1997

THE PROSECUTOR

v.

TIHOMIR BLASKIC

DECISION ON THE DEFENCE MOTION TO DISMISS THE INDICTMENT BASED UPON DEFECTS IN THE FORM THEREOF (VAGUENESS/LACK OF ADEQUATE NOTICE OF CHARGES)

The Office of the Prosecutor:

Mr. Mark Harmon
Mr. Russell Hayman
Mr. Gregory Kehoe
Mr. William Fenrick

Defence Counsel:

Mr. Anto Nobilo
Mr. Russell Hayman

1. On 16 December 1996, the Defence submitted to Trial Chamber I a preliminary motion "to dismiss the indictment based on defects in the form of the indictment (vagueness/lack of adequate notice of charges)" (hereinafter "the Motion"). The Prosecutor, in opposition to the Defence, responded to the Motion on 20 January 1997 (hereinafter "the Response"). The Defence replied to the Response in a brief filed on 3 February 1997 (hereinafter "the Reply"). The Trial Chamber heard the parties at a hearing on 12 and 13 March 1997.

The Trial Chamber would first analyse the claims and arguments of the parties and then the disputed points of fact and law.

I) Analysis of the claims and arguments of the parties

2. The Defence motion concerns the amended indictment, confirmed on 22 November 1996, of which the accused was officially notified by the Trial Chamber on 4 December 1996 during a public hearing. It replaces the initial indictment which was confirmed on 10 November 1995.

The Defence considers that the crimes ascribed to the accused in the amended indictment are vague and contain no details as to the alleged criminal behaviour of the accused nor the circumstances of time and place nor of those concerning the victims.

In consequence, the accused cannot properly prepare his defence and risks exposing himself to double jeopardy.

It has been requested that the Prosecutor file a new amended indictment, failing which, the Trial Chamber should dismiss all the counts which have remained vague .

3. The Prosecutor requested that the Motion of the accused be rejected; she asserts that she has satisfied the legal obligations imposed by the Statute of the International Criminal Tribunal for the former Yugoslavia (hereinafter "the Statute") and the Rules of Procedure and Evidence (hereinafter "the Rules") in respect of the presentation of indictments. Nonetheless she states that she is prepared to amend the drafting of the indictment in respect of precision regarding place.

* *

*

4. Two methods of legal reasoning can be distinguished in the Defence's argument in support of its preliminary motion:

The first relates to the general presentation of the indictment which it considers does not comply with the provisions of the Statute and the Rules nor with the standards appearing in international instruments on human rights and applied by the major legal systems. The reasoning leads the Defence to denounce the vagueness of the indictment in respect of the place and time the alleged crimes were committed and of the identity of the victims and the participants in the crimes.

The second relates to the vagueness in respect of the very elements which constitute the offences identified, namely: an objective element such as the existence of an international armed conflict in support of the charge based on Article 2 of the Statute and the intentional element relating to the supposed conduct of the accused , *inter alia* to characterise command responsibility. Thus, for some of the charges, the lack of precision as to those elements which constitute violations totally invalidate those counts of the indictment and should simply be withdrawn . Specifically, these are:

- unlawful attacks on civilians and civilian objects (counts 2 and 3);

- destruction and plunder of property (count 10);

- devastation not justified by military necessity (count 11);

- destruction or wilful damage to institutions dedicated to religion or education (count 12);

- taking civilians as hostages (count 16);

- taking of hostages (count 17).

5. The Trial Chamber will now consider each of the legal questions in light of the arguments of both parties - in their written presentations and during the hearing - as well as in light of the actual content of the amended indictment.

II. ANALYSIS

A. General presentation of the indictment

6. The Defence states (Point A of the Motion) that an indictment must allege in detail the facts supporting each element of the offence charged.

In support of its thesis, it invokes the relevant articles of the Statute (Articles 18(4) and 21(4)(a)) and Sub-rule 47(B) of the Rules as well as Article 14 of the International Covenant on Civil and Political Rights (hereinafter "the International Covenant") and Article 6 of the European Convention of Human Rights and Fundamental Freedoms (hereinafter "the European Convention on Human Rights"). It recalls that the aim of these various provisions is to allow the accused to prepare a proper defence for the charges against him. Most national legal systems contain the same requirement.

7. The Prosecution interprets the texts referred to by the Defence more restrictively and is supported by the case-law of this Tribunal.

For the Office of the Prosecutor, the indictment must provide a concise description of the crimes charged and of the participation of the accused and his subordinates . This complies with the relevant texts of the Statute and the Rules, with the first decisions rendered by the Tribunal in the matter and with the interpretation generally given to the international legal instruments cited by both parties. The accused must then be informed in detail as to the nature and cause for the charges against him. The Prosecutor requests that the Trial Chamber confirm that she has satisfied her legal obligations.

8. In order to determine which of the arguments put forward is valid, the Trial Chamber considered that it needed to interpret the texts of its own Statute and Rules. It will do so in light of the decision rendered both by the Tribunal and other courts.

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1. Texts

9. Article 18(4) of the Statute states:

"Upon a determination that a prima facie case exists, the Prosecutor shall prepare an indictment containing *a concise statement of the facts and the crime or crimes with which the accused is accused* under the Statute". (italics added)

Article 21(4)(a) of the Statute states:

"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".

The Rules further expound on these provisions in Sub-rule 47(B):

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

10. A literal reading of these texts leads the Trial Chamber to the observation that everything in an indictment which concerns the facts of the case must be stated or recounted concisely (Article 18(4) of the Statute) and (Sub-rule 47(B) of the Rules). The accused must be informed promptly and in detail of the nature and cause of the charges - which must be distinguished from the facts themselves in the case insofar as those facts are, to some extent, the necessary but not necessarily sufficient support for the indictment (Article 21(4)(a) of the Statute).

The latter text does not contradict the two previous ones referred to above. The purpose of all the provisions is to guarantee to the accused the fundamental rights recognised as his, that is: to be informed of the charges against him and to be in a position to prepare his defence in due time.

11. However, the guarantees are not the same at all stages of the proceedings. In this respect, a distinction should be made between the time the accused is informed of the indictment for the first time and the phase devoted to the preparation of his defence since the latter occurs between the issuance of the indictment and the start of the trial.

The information describing the charges contained in the indictment is set forth *inter alia* for the purpose of the accused's initial appearance provided for in Sub-rule 62 (ii) of the Rules. The notification which is part of the initial appearance should occur shortly after the confirmation of the indictment, as provided for in Sub-rule 47(B) of the Rules. The recounting of the facts of the case at that stage must be concise.

The preparation of his defence by the accused assumes a more detailed level of information which may not be available at the time the indictment is framed. Article 21(4)(a) of the Statute moreover explicitly provides that this take place promptly , even if the time period must be as short as possible. The text speaks of the " nature

and cause" of the indictment, a concept which includes not only the acts but also the evidence in support of the indictment. Article 21(4)(a) - a general principle of the accused's right to receive the most complete information regarding the charges against him in order for him to prepare his defence under the best conditions - establishes the context for the accused's exercising his right to disclosure of evidence collected against him by the Prosecutor. This right is established by Rule 66 and following of the rules. Sub-rule 66(A), like Article 21(4)(a) of the Statute , states: "as soon as practicable after the initial appearance of the accused" and adds that the Prosecutor must give to the accused "copies of the supporting material which accompanied the indictment when confirmation was sought as well as all prior statements obtained by the Prosecutor from the accused or from prosecution witness ", which indeed suggests that the information contained in the indictment when it was confirmed and at the time of the initial appearance does not contain the same type of information to be made available to the accused.

It is therefore necessary to distinguish between the issuance of the indictment which is governed by Article 18(4) of the Statute and Sub-rule 47(B) of the Rules and the disclosure of evidence which is, rather, governed by Article 21(4) of the Statute and Rule 66 et seq. of the Rules - although not exclusively so governed . Both rights are included in the same concept which aims to guarantee that the accused will be in a position to prepare his defence in due time with complete knowledge of the matter.

In the case at hand, the Trial Chamber moreover had the occasion to rule on the disclosure of evidence to be made available to the accused in its recent decision of 27 January 1997. It does not intend to return to this question since the present contention deals with the alleged defects in the form of the indictment.

In respect of this indictment, the Trial Chamber stresses that, at this stage of the proceedings, the standard to be exercised is one only of "prima facie" (Article 18(4) of the Statute) and "sufficient evidence to provide reasonable grounds for believing that a suspect has committed a crime within the jurisdiction of the Tribunal ..." (Sub-rule 47 (A) of the Rules).

12. As regards the relevant international instruments to which reference should be made, as the Secretary-General suggests in his Report[1] - the Trial Chamber takes note of the similarity of the wording of articles 14 3 . (a) of the International Covenant and Article 6 (3)(a) of the European Convention on Human Rights with that of Article 21 (4)(a) of the Statute.

Article 6 (3)(a) of the European Convention on Human Rights:

"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".

Article 14(3)a) of the International Covenant:

"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."

13. Nevertheless, the Trial Chamber considers that it must now review how the various texts have been interpreted, specifically by the courts or organs having jurisdiction to apply or to analyse them.

2. Interpretation and application of the texts

14. It must first be observed that the accused does not cite the sources of the comments on the International Covenant and the European Convention on Human Rights which appear to support his thesis.

The Trial Chamber will review successively the commentaries of the United Nations Human Rights Committee on the International Covenant and then the case-law of the European Court of Human Rights and that of the International Tribunal:

a) The International Covenant

15. The United Nations Human Rights Committee, following its review of the reports submitted by States which identify the problems which may arise in the application of the Covenant, considered that as regards Article 14, paragraph 3(a): "the specific requirements of sub-paragraph 3(a) may be met by stating the charge either orally or in writing, provided that the information indicates both the law and the alleged facts on which it is based".[2]

The Trial Chamber notes that in view of this comment, the Prosecutor is obliged to specify, other than the legal provisions referred to, the facts in support of the indictment. The Committee gave no further guidance as to the "nature and cause " of the accusations against the accused.[3] However, the Trial Chamber also notes that the information which the accused needs to prepare his defence must not only appear in the indictment, that is, in writing , because the charge may be made "orally or in writing".

b. Case-law of the European Court of Human Rights

16. In light of this case-law, the Trial Chamber considers that the information required by the accused need not appear only in the indictment.

Thus, in the decision *Kamasinsky v. Austria of 19 December 1989*4, the European Court considered that oral explanations dealing merely with the titles of the offences stated in the indictment (which was drafted in a language the accused did not understand) were, according to the provisions of Article 6.3 (a) of the European Convention, sufficient to inform the accused of the nature and causes of the

accusations against him.

Thus, in the decision *De Salvador Torres v. Spain of 24 October 1996*[5], the Court also considered that although a difference existed between the legal characterisation of the crimes for which he was indicted and those of which he was convicted, the accused had been sufficiently informed - in the sense of Article 6.3 of the European Convention on Human Rights - of the elements of the accusation against him from the time of the start of the proceedings. In another case also involving a discrepancy between the initial legal characterisation and that selected for the conviction, the Court, reasoning analogously, based itself on the concept of "clarity of the legal classification given to the findings of fact" or "minimum recourse to logic" required apparently for the identification of the applicable text.[6]

c. Case-law of the Tribunal.

17. The Tribunal has had several occasions to rule on the question of defects in the form of the indictment alleged by the Defence.

(i) in the case *The Prosecutor v. Dusko Tadic (IT-94-I-T)*[7]

18. The point of the decision which concerns this discussion relates to imprecision of the allegations against Dusko Tadic[8]. The Defence considered that, for each of the counts, the specific conduct of the accused at a specific date and place should have been indicated instead of merely having stated that it was a "unique and factual description of both the criminal offence and the participation of the accused in that offence".[9]

Trial Chamber II made a distinction between two cases:

- for a whole series of counts, the Trial Chamber considered that since the indictment identified the accused, stated paragraph by paragraph the facts of each incident , and specified clearly the particular provisions of international humanitarian law that had been violated, the provisions of Sub-rule 47(B) of the Rules had been complied with[10].

- then, referring to Article 21(4)(a) of the Statute, the Trial Chamber made arrangements for the manner in which, under its supervision, the additional material would be made available to the accused in accordance with Sub-rules 66(A) and 67(A) of the Rules[11].

- however, the preliminary motion was deemed to be justified for another set of counts concerning *inter alia* the alleged conduct of the accused. The Trial Chamber considered that "paragraph 4 clearly enough does not, in its very generalised form, provide the accused with any specific, albeit concise, statement of the facts of the case and of the crimes with which he is charged. It says nothing specific about the accused's conduct, about what was the nature and extent of his participation in the

several courses of conduct which are alleged...".[12] And the Trial Chamber concluded that "if the Prosecution is to persist in relation to the matters alleged in that paragraph, the indictment should be further amended so as to provide the necessary degree of specificity."[13]

(ii) in the case *The Prosecutor v. Dorje Djukic (IT-96-20-T)*[14]

19. As regards the information appearing in the indictment which the Defence claimed was imprecise, although it is true that the Trial Chamber took note of the summary nature of the indictment[15], it also considered that "at this stage of the proceedings, the indictment meets the relevant provisions of the Statute and the Rules conditional on its being understood that each of the parties will have to prove its allegations during the trial on the merits ."[16]

However, the Trial Chamber considered that it had to point out the excessively vague or ambiguous character of the indictment (which it did for paragraph 7). Nonetheless , although it invited the Prosecutor to make "such modifications as he deems necessary if he intends maintaining the counts"[17], the Trial Chamber also noted the fact that "the Prosecutor indicated that further evidence will be submitted as part of the process of disclosure".[18]

By this decision, the Trial Chamber intended already to emphasise the distinction pointed out above between the minimum demands required for the presentation of the indictment to the accused and all the guarantees which the accused must enjoy after the indictment in respect of the subsequent production of additional or supplementary evidence permitting him to prepare his defence in due time. In this case, Trial Chamber I also referred to the *Tadic* case-law.

(iii) in the case *The Prosecutor v. Zejnil Delalic, Zdravko Mucic, Hazim Delic, Esad Landzo (IT-96-21-T).*

20. In light of the arguments of the parties in the case *The Prosecutor v. Zejnil Delalic, Zdravko Mucic, Hazim Delic, Esad Landzo (IT-96-21-T),* Trial Chamber II (as well as the Appeals Chamber) identified certain principles regarding the function and content of an indictment by considering that:

1) the principal function of the indictment is to notify the accused in a summary manner[19] as to the nature of the crimes of which he is charged and to present the factual basis for the accusations[20].

2) the indictment must contain certain information which permits the accused to prepare his defence (namely, the identity of the victim, the place and approximate date of the alleged crime and the means used to perpetrate it)[21] in order to avoid prejudicial surprise[22].

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Furthermore, the Appeals Chamber specified that the use of alternative characterisations of the facts, which is accepted in military manuals and international humanitarian law, does not render the indictment fatally vague, although, whenever possible, the Prosecutor should clearly indicate the precise line of conduct and mental element alleged[23].

3) a preliminary motion on the form of the indictment is not the appropriate framework for contesting the facts[24].

4) the question of knowing whether the allegations appearing in the indictment are vague will, in the final analysis, be settled at trial[25].

d) in conclusion of this entire analysis, the Trial Chamber considers that:

21. - an indictment, by its very nature and given the very initial phase in which it is reviewed, is inevitably concise and succinct. Such is the meaning, such is the spirit of the texts governing the proceedings of the International Tribunal, themselves inspired by international standards and their interpretation.

- with respect to this single aspect of the general presentation of the indictment , the Defence confuses the minimum right granted to it by virtue of a presentation , however succinct, of facts and charges made against it, with the right to be promptly provided with far more detailed information so that it may prepare its defence.

- with respect only to the principles underlying the form and the presentation of the amended indictment against General Blaskic, as confirmed on 22 November 1996 , it is obvious that the review of the said indictment generally satisfies the provisions of the Statute and the Rules on the presentation of indictments.

-nevertheless, in line with the case-law established by the Tribunal, the Trial Chamber will review each of the motions filed by the accused in support of the preliminary motion; this review being limited, however, to considering the extent to which an accused was in a position to prepare his defence in due time given the more or less detailed information provided to him by the Prosecutor in the indictment, and in the indictment alone.

B. Review of the indictment

1. Review of the indictment from the perspective of vagueness/ with regard to the location and time of the alleged events, and to the identity of the victims and the participants

a) With regard to the location of alleged events (point C of the Motion)

22. With regard to location (point C.), the Defence considers that the use of expressions such as

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- "including, *but not limited to*"(paragraphs 6.1 to 7: (Count 1), (paragraph 9 (Counts 4 to 9)), (paragraph 10 (Counts 10 to 13) and paragraphs 12 and 15 (Counts 14 to 19)).

- "attacks in, *among others*, the following towns and villages"

casts doubt as to the exact locations where the alleged acts were supposedly committed .

The Trial Chamber agrees with the Defence that expressions such as "including, but not limited to" or "among others" are vague and subject to interpretation and that they do not belong in the indictment when it is issued against the accused.

The Trial Chamber takes note of the proposed amendments to the indictment on this point suggested by the Prosecutor in her response brief of 18 January 1997.

The Trial Chamber requests that such amendments be made by 18 April 1997 at the latest.

b) With regard to the time of alleged events (Point D of the Motion)

23. With regard to the time when the crimes were allegedly committed, the Defence points to the use of expressions such as

- "from about May 1992 to about April 1994"

- "from about January 1993 to about January 1994" (repeated throughout the indictment),

which, due to their lack of specificity, make it impossible for the accused to prepare his defence properly, particularly, as regards the establishment of an alibi.

The Prosecutor bases her arguments on the decision of Trial Chamber II of 14 November 1995 and submits that, in that Decision, Judge McDonald stated that in respect of a charge under Article 5 of the Statute, the charges did not regard a particular act but a type of conduct. Accordingly, the Prosecutor extends the reasoning to all the counts and explains that they charge a type of conduct covering an extended period of time.

The Trial Chamber refers to the view it expressed above as to the inevitably succinct and summary nature of an indictment at the time it is issued.

Nevertheless, succinct or summary as it may be, an indictment cannot permit itself to be overly vague. The adverb "about", whenever used, must therefore be stricken . The context in which it was used should, however, be kept in mind.

The Prosecutor seeks to characterise command responsibility as incurred by the accused under Articles 7 (1) and 7 (3) of the Statute. The accused's role as a colonel in the HVO and, subsequently, as a general appointed commander of the HVO

throughout the times material to this indictment, as well as his conduct, are decisive for clearly specifying this type of responsibility. As a consequence, any indictment specifying with a certain degree of vagueness - rather marginal as it is in this case - the overall time period in which grave violations of international humanitarian law allegedly took place, does not formally contravene the general rules governing the presentation of indictments.

Such a conclusion may be inferred by analogy from the above mentioned *The Prosecutor v. Tadic* Decision[26].

Further specification as to the dates of the alleged events inevitably takes place during the procedural stages following the presentation to the accused of the indictment , specifically when the evidence is disclosed.

In this respect, the Trial Chamber refers the parties to its Decision on the Production of Discovery Materials dated 27 January 1997.

c) With regard to the identity of victims (point E) and of the participants (point F)

24. The Defence maintains that the indictment fails to set forth sufficient factual allegations regarding the identity of victims. The victims are identified only as "Bosnian Muslims" or "persons protected by the Geneva Conventions of 1949". The Defence stresses that a core element of any charge arising under Article 5 of the Statute is that the alleged victim be a civilian.

Similarly, the alleged perpetrators of such acts are also merely identified as "agents of the HVO" (point F). The Defence argues that if these agents are not identified, command responsibility cannot be inferred.

The Prosecutor submits that the identity of some of the victims cannot be ascertained because of the wounds they sustained. As to the members of the HVO who allegedly took part in crimes charged, many managed to disguise their identity. Furthermore , the Prosecutor also points out that the identity of some of the soldiers was provided to the accused in the supporting material which it provided.

The Trial Chamber can only take note of the objective reasons which did not always permit the Prosecutor to identify many of the victims and participants with precision .

It points out however that since 16 December 1996, which is the date the Defence filed its Motion, the Defence has been in a position to inspect a large body of evidence and that it is in the light of such evidence that the Judges might, if appropriate, rule that the Defence was not able to prepare its case. The Trial Chamber does not, at this stage, have at its disposal all the material provided to the accused by the Prosecution. Furthermore, the evaluation by the Judges as to the incompleteness of some of the allegations - specifically as to the compliance with the provisions of Articles 5 and 7 (3) of the Statute - is, of course, a part of the hearing on the merits and will be settled at trial.

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The Trial Chamber therefore rejects this point of the Motion.

2. Review of the indictment from the point of view of vagueness /lack of specificity as to the components of the offences charged .

25. With regard to points B - allegations regarding the existence of an international armed conflict - G - the accused's role in the underlying conduct - H - the required mens rea for command responsibility - I, J and K - failure to adequately allege a required element of the offences charged under Articles 2 and 3 of the Statute , the Defence Motion argues not only factual or evidentiary vagueness, but also substantive vagueness as to the offences charged, which, if not corrected, would completely vitiate the indictment, as least as regards some of the charges.

a) As to the failure to set forth any factual allegations supporting the Prosecutor's legal conclusions regarding the existence of an international armed conflict (Point B of the Motion)

26. Within the scope of the present debate on the argument concerning preliminary motions, the Defence filed another motion on the same day to dismiss Counts 4, 7 , 10, 14, 16 and 18 because of the failure to adequately plead existence of an international armed conflict[27]. Although the two preliminary motions are presented as different in nature and foundation, one being an objection based on lack of jurisdiction under Sub-rule 73 (A)(i) of the Rules - as mentioned above - the other being an objection based on defects in the form of the indictment (the one treated in this decision) under Sub-rule 73 (A) (ii) of the Rules - , both Motions have in common that they deal with whether or not an international armed conflict existed in support of the counts established for grave breaches of the Geneva Conventions of 1949.

In the present Motion, the Defence itself refers to its argument in support of an objection based on lack of jurisdiction. As regards this aspect of the question , the Trial Chamber can only refer the Defence to the decision rendered today on that issue.

27. With regard to the aspect of the Motion referring more specifically to the failure to sufficiently allege existence of an international armed conflict, the Defence states that it is insufficient to characterise the existence of such an armed conflict only once in paragraph 5.1 and to rely on no factual allegation which would permit invoking such an international conflict between the HVO and another army.

At this stage of the proceedings, the Trial Chamber does not consider it necessary to rule in any way as to the nature of the armed conflict which may have existed at the time of the events in order to characterise legally the charges against the accused deriving from Article 2 of the Statute.

The Trial Chamber would only point out that, in the *Tadic* case, the Appeals Chamber, in a split decision which gave rise to several separate opinions, concluded that "in the present state of development of the law, Article 2 of the Statute only applies to offences committed within the context of international armed conflicts ."[28]

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Therefore, the Chamber notes, in the case at hand, that the notion of an international armed conflict would be a prerequisite to the application of Article 2 of the Statute regarding the grave breaches of the 1949 Geneva Conventions.

28. The question is essentially one of knowing whether or not the Prosecution satisfied its obligations by stating in the indictment (paragraph 5.1) that "at all times relevant to this indictment, a state of international armed conflict and partial occupation existed on the territory of the Republic of Bosnia and Herzegovina".

There can be no doubt that the Prosecution was under the obligation to state its intention to charge the accused with a violation of Article 2 of the Statute in all the legal components which are part of the charge, including the requirement that an international armed conflict existed.

Should it be inferred from the above that the Prosecution was under the obligation to provide for this specific case the evidence which would shed light on the components of the said conflict?

The Trial Chamber is not of such an opinion. Besides the fact that the Office of the Prosecutor appears to have provided a "Memorandum on Jurisdiction" to the Defence , above all, the question is to know whether the accused has been and is in a position to prepare his defence when faced with the assertion that an international armed conflict existed on the alleged territory where he is said to have committed the crimes.

The Trial Chamber notes that the international characterisation of an armed conflict is an issue intimately involving questions of both law and fact. These elements will be discussed at trial.

The mere mention of an international character of the conflict, at the stage concerning us here, already allows the accused to comprehend the situation and prepare his defence as soon as the accusation is made. The accused is therefore not in a position to claim any prejudicial surprise on this count.[29]

The Trial Chamber consequently rejects this point of the Motion.

b) With regard to the failure to properly allege the accused's role in the underlying conduct (Point G of the Motion)

29. The Defence puts forward several arguments in support of its Motion:

i) vagueness which, for example, takes the following form in the indictment: " *inter alia* persecution", and which does not permit the accused to defend himself against such unspecified charges;

ii) the contradiction in alleging concurrently three alternative theories of command responsibility against the accused, that is , the one based on Article 7(1) - referring to a superior who "planned, abetted, instigated, ordered, committed or otherwise aided and

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abetted in the planning, preparation or execution of a crime (...)";

the one based on Article 7(3) - referring to the one who "knew or had reason to know that his subordinate was about to commit (such acts)" and consequently failed to take the necessary measures to prevent such acts and, under the same article, the failure to punish the perpetrators of the crimes;

iii) the lack of factual allegations in support any of these theories, which obfuscates the accused's actual role in the alleged events;

iv) lastly, ascribing the crimes charged to other persons who allegedly acted " in concert" with the accused does not leave the latter in a position to identify the exact role he allegedly played.

30. With respect to points i) and iv), the Trial Chamber - as it has already had the opportunity to stress in respect of vagueness as to the location of the alleged events (see above B.1.(a)) - reminds the Prosecutor of the general need to avoid using overly vague and open-ended expressions or formulas in the indictment which might give rise to different interpretations.

With respect to points ii) and iii) which are related to the legal foundation of the responsibility and the underlying conduct of the accused, the Trial Chamber first notes that the Defence has filed, within these same proceedings, another preliminary motion regarding the mens rea required for charges alleging command responsibility

Many of the arguments pleaded therein, including the interpretation to be given to the provision of the Statute in respect of the person who "knew or had reason to know" that his subordinate was about to commit such acts, are repeated in the instant Motion.

The Trial Chamber refers the Defence to the Decision on the mens rea motion handed down in this case this day.

31. The Defence also invokes the contradiction which would arise in ascribing to the accused each of the theories of individual criminal responsibility provided for in Article 7 of the Statute.

It is appropriate first to refer to paragraph 56 of the Secretary-General's Report which did not rule out the possibility that "a person in a position of superior authority should be held individually responsible for giving the unlawful order to commit a crime" but that he "should also be held responsible for failure to prevent a crime or to deter the unlawful behaviour of his subordinates".

In principle, an interpretation of the Report, together with plain common-sense , permits the Trial Chamber to infer that although one and the same individual may be prosecuted on the basis of both theories, this can be done only for distinct acts.

A reading of the provisions of the Statute reveals the existence of two distinct types of responsibility: the one referred to in Article 7(1), which will be called direct command

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responsibility and the one referred to in Article 7(3) which will be called indirect responsibility. The latter may encompass several facets in the elements required (the theoretical or actual knowledge of the act on the point of being committed, the failure to prevent and the failure to punish). The question is therefore one of knowing whether an accused can, by a single criminal act, violate both legal provisions. In some national jurisdictions, this is known as a position where a single act constitutes more than one offence or, more generally, as conflicting legal characterisations.

It is not the role of the Trial Chamber reviewing the preliminary motion on defects in the form of the indictment as it now stands to rule on whether the proceedings instituted against the accused must be based on Article 7(1) or 7(3). In addition , the Trial Chamber would not have all the necessary elements at its disposal to make such a ruling.

32. The Trial Chamber, however, recalls the principles stated above and drawn both from the spirit and letter of the texts as well as from the interpretation provided to date (see above A.2.d).

It can thus be inferred that an indictment, however succinct and concise, must set forth, pursuant to Article 18(4) of the Statute and Sub-rule 47 (B) of the Rules , "the crime or crimes with which the accused is charged" or "a concise statement of the facts of the case". This minimum right must be granted to the accused as of his initial appearance. Yet, a thorough examination of the amended indictment by the Trial Chamber reveals that, as the case now stands, out of the present 19 charges alleged against the accused, the latter is not in a position to distinguish the count or counts charged under either Article 7(1) or Article 7(3) of the Statute . Can it be considered that each count may somehow fall under either type of responsibility ? Such a question can, in theory, be answered in the affirmative since the concept of concurrent legal characterisations has been identified and is known in national criminal law.

The Trial Chamber is, however, of the opinion that, in international humanitarian law, more than in any other area, it is incumbent upon the Prosecutor to specify the type of responsibility under which a criminal act falls as promptly and as far as may be practicable as soon as the indictment has been issued. Indeed, even though the Statute admittedly intends to make no distinction between each of the responsibilities listed in paragraphs 1 to 4 of Article 7, respectively, inasmuch as it does not provide each of them with its own different and specific legal status, the Defence does not find itself in the same situation if the charges against the accused fall under Article 7(1) or under Article 7(3). The challenged indictment must therefore be reviewed in the light of whether or not the accused has been able to prepare his defence. Yet it must be noted that the Prosecutor merely stated the two types of individual criminal responsibility falling under Article 7(1) and Article 7(3) of the Statute respectively in paragraphs 5.6 and 5.7 of paragraph 5 of the indictment under the heading "General Allegations". All the counts then describe the alleged acts as having been committed by the accused "by his order or with his knowledge ".

When reviewed from this strict point of view, which is more than merely technical in

respect of the rights of the Defence, the amended indictment, confirmed on 22 November 1996, has even been changed for the worse when compared to the initial indictment confirmed on 10 November 1995. In the latter, in fact, each count was presented alternatively and in more detail as to the acts committed, which permitted the Defence to prepare itself in respect of either type of responsibility under better conditions.

In conclusion, the Trial Chamber is of the opinion that the indictment should be amended as to the nature and the legal basis of the criminal responsibility for which the accused is liable. Nothing prevents the Prosecutor from pleading an alternative responsibility (Article 7(1) or 7(3) of the Statute), but the factual allegations supporting either alternative must be sufficiently precise so as to permit the accused to prepare his defence on either or both alternatives. The required level of precision is important, if only in order to permit the accused to demonstrate the impossibility of being held responsible both directly for his own deeds and indirectly those of his subordinates.

c) With regard to the failure to properly allege the required mental state (Point H of the Motion)

33. The Defence submits that the failure to indicate or to allege mens rea constitutes a defect in form which *inter alia* affects Counts 1, 2, 3, 10 to 13 and 14 to 19. By way of illustration, the Defence cites Count 1 relating to crimes against humanity sanctioned by Article 5 (h) of the Statute - persecutions on political, racial and religious grounds.

Applying the principles it has just identified, the Trial Chamber states that the admittedly succinct facts and the characterisation - taken literally from the text of the Statute - permit the accused, as soon as he has learned of the indictment , to be fully aware of the charges against him and to start preparing his defence .

Lastly, with respect to command responsibility, the Trial Chamber recalls that the Defence was able to obtain material to prepare its case as soon as the indictment had been notified to the accused inasmuch as the indictment sufficiently notified the accused with regard to the time and place of the alleged events, as confirmed by the Trial Chamber. The accused, whose rank and position as head of the HVO are not disputed, can therefore not invoke surprise and is thus not unable to challenge all of the factual ingredients, including the mental element, of the Prosecutor's charge.

The Motion is consequently rejected on this point.

d) With regard to the lack of specific allegations in support of certain charges deemed to be substantive and which, unless they are modified, must be stricken from the indictment (Points I, J and K of the Motion)

34. The point apparently common to all three Defence Motions would be that the Prosecutor seemingly failed to specify the elements of the offences charged. The counts concerned should simply be stricken.

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It should first be noted that:

- Point I relates to Counts 2, 3, 10 and 11 and respectively: a violation of the laws and customs of war (Article 3 of the Statute (Counts 2, 3 and 11)) and a grave breach of the 1949 Geneva Conventions (Article 2 (d) of the Statute (Count 10));

- Point J relates to Counts 12 and 13 and respectively: a violation of the laws and customs of war under Articles 3 (d) and 3 (e);

- Point K relates to Counts 16 and 17 and respectively: a grave breach of the 1949 Geneva Conventions (Article 2 (h) (Count 16) and a violation of the laws and customs of war (Article 3 of the Statute and Common Article 3 (taking of hostages) of the Geneva Conventions (Count 17).

35. At this stage of the proceedings, the Trial Chamber does not intend to conduct an exhaustive review of the various legal components of the offences charged. The parties will argue all the legal and factual elements of the accusation at trial .

However, in conformity with the principles it has just identified in this Decision , the Trial Chamber will conduct a twofold examination of whether or not, in all the relevant counts, the accused has been informed in the manner granted to him by the basic texts and whether or not he has been given sufficient time to prepare his defence.

i) With regard to Point I of the Motion

36. Article 3 of the Statute "Violations of the laws and customs of war" is referred to by the Prosecutor in support of Counts 2, 3, 10 and 11, in order to cover "unlawful attacks on civilians and civilian objects" as well as "devastation not justified by military necessity".

To be sure, in respect of Counts 2 and 3, related as they are to Article 3 of the Statute, the Prosecutor fails to refer to one of the 5 sub-charges listed in Article 3, and, in particular, to those indicated in paragraphs 3(b) and 3(c).

Nonetheless, aside from the fact that the Defence has apparently not misunderstood the indictment, it should be noted that the list of violations appearing in Article 3 is not exhaustive. Moreover, the Appeals Chamber stressed that "Article 3 is a general clause covering all violations of humanitarian law not falling under Article 2 or covered by Articles 4 or 5 of the Statute[30]."

The Trial Chamber is nevertheless of the opinion that the Prosecutor would fulfil her obligations as recalled above, thus permitting the Defence to prepare itself under optimum conditions, if the facts referred to in paragraph 8 were presented with a greater degree of precision and, more importantly, characterised in accordance with one of the sub-paragraphs of Article 3 of the Statute.

With regard to Counts 10 and 11, it appears that the Prosecutor did adequately refer to

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the relevant provisions - both Articles 2 (d) and 3 (b) of the Statute - in support of her indictment. At the very most, a degree of factual vagueness in the indictment can be noted - as already pointed out in this Decision regarding other portions of the indictment to which the Trial Chamber is requesting the Prosecutor to add - if she has not already done so - specific or supplementary information as to the time and place of the events.

ii) With regard to Point J of the Motion

37. Article 3 of the Statute is referred to by the Prosecutor in support of Counts 12 and 13 to cover the violations appearing in paragraph 3 (d) "destruction or wilful damage done to institutions dedicated to religion or education" and paragraph 3 (e) "plunder of public or private property".

The Trial Chamber grants the point of the Defence Motion stating that not one religious or educational institution alleged to have been destroyed has been identified. The Prosecutor must therefore be more specific as to her allegations.

The Trial Chamber is nonetheless of the opinion that at the indictment stage an exhaustive list of plundered public or private property cannot be demanded because wars characteristically bring in their wake massive and large-scale destruction. The information on this subject, which the Prosecutor must provide to the Defence , may be brought by any other evidentiary means not necessarily available when the indictment is issued. Nevertheless, the onus of precision remains that of the Prosecutor who, during trial proceedings, must satisfy the required degree of specificity by all means.

iii) With regard to Point K of the Motion

38. Article 2 of the Statute "Grave breaches of the Geneva Conventions", the basis of Count 16, is referred to by the Prosecutor to cover "the taking of civilians as hostages" under paragraph 2 (h). Article 3 of the Statute and Common Article 3 of the Geneva Conventions are referred to for the same facts, that is, the taking of Bosnian Muslims as hostages.

The Defence's argument is not irrelevant when it asserts that the Prosecutor, in her succinct statement of facts, suggests (paragraph 14) that the Muslims concerned were participants in the fighting. In so doing, the Defence highlights the difficulty of making the various legal provisions referred to by the Prosecutor coincide. In her Response, moreover, the Prosecutor does demonstrate a greater awareness of the difficulty and, essentially, uses Common Article 3 of the Geneva Conventions.

The question in fact is to identify in what capacity the Bosnian Muslims were allegedly used in exchanges.

The Trial Chamber first notes that, in this specific case, the statement of facts is overly concise and that such conciseness may might lead the Defence to prepare an inappropriate strategy.

Furthermore, the method of concurrent charges used by the Prosecutor has reached its limit here, and it would be appropriate to decide whether the taking of civilians as hostages falls under the precise scope of Article 2 of the Statute or, rather , under the broader scope of Article 3 of the Statute and Common Article 3 of the Geneva Conventions of 1949.

The Trial Chamber invites the Prosecutor to redraft paragraph 14 of the indictment so as to provide the accused with a statement of facts which will permit him to prepare his defence, either under Article 2 or under Article 3 of the Statute. Should both characterisations be chosen - which can be done - it is nonetheless incumbent on the Prosecutor to specify which exchanges of individuals ascribed relate to civilians , which to soldiers, or even which to "(...) inhabitants of an occupied territory , who, on the approach of the enemy spontaneously take up arms to resist the invading forces (...) (Article 4 (6) of the Geneva Convention on the Treatment of Prisoners of War).

III. DISPOSITION

39. FOR THE FOREGOING REASONS

Trial Chamber I

Ruling *inter partes* and unanimously,

CONSIDERING the Defence Motion dated 16 December 1996 "to dismiss the indictment based on defects in the form of the indictment (vagueness/lack of adequate notice of charges)",

STATES that there is no reason to dismiss the amended indictment (point A of the Motion), subject to the following:

REJECTS the point of the motion that the amended indictment fails to set forth any factual allegation supporting the Prosecutor's legal conclusion regarding the existence of an international armed conflict (Point B of the Motion);

NOTIFIES the Prosecutor of its invitation to supplement the amended indictment in the points of claim related to the place of the events alleged in paragraphs 6.1 to 7 (Count 1), paragraph 9 (Counts 4 to 9), paragraph 10 (Counts 10 to 13) and paragraphs 13 to 15 (Counts 14 to 19) and, as appropriate,

ORDERS such amendments to be made by 18 April 1997 at the latest (Point C of the Motion);

REJECTS the points of claim related to the time when the alleged events took place (Point D of the Motion);

REJECTS, as the case stands, the points of claim relating to the identity of the victims (Point E of Motion) and to that of the perpetrators (Point F of the Motion);

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ORDERS the Prosecutor to amend by 18 April 1997 at the latest paragraphs 5.6 and 5.7 of the amended indictment relating to the accused's role in the acts charged by providing sufficient factual indications in support of the types of responsibility invoked pursuant to the provisions of Articles 7(1) and 7(3) of the Statute (Point G of the Motion);

REJECTS the point of claim relating to the lack of precision in the amended indictment in respect of the mens rea of the accused at the time the acts were allegedly perpetrated (Point H of the Motion);

ORDERS the Prosecutor to specify and to characterise the facts referred to in paragraph 8 (Counts 2 and 3 of the amended indictment) in conformity with one of the sub-paragraphs of Article 3 of the Statute by 18 April 1997 at the latest (Point I of the Motion);

ORDERS the Prosecutor, to amend, as appropriate, by 18 April 1997 at the latest, paragraph 10 of the amended indictment with the required specific and supplementary allegations as to the time and place of the crimes as defined in Articles 2 (d) and 3 (b) of the Statute (Counts 10 and 11) (Point I of the Motion);

ORDERS the Prosecutor to add further precision to paragraph 10 (Count 12) of the amended indictment relating to institutions dedicated to religion or education alleged to have been destroyed (Point J of the Motion) by 18 April 1997 at the latest ;

REJECTS, as the case stands, the point relating to the destruction and plunder of public or private property (paragraph 10 (Count 13)) (Point J of the Motion);

ORDERS the Prosecutor to further specify by 18 April 1997 at the latest the facts contained in paragraph 14 of the amended indictment so as to make it possible for the accused to prepare his defence either under Article 2 or Article 3 of the Statute and, where appropriate, to identify more specifically the categories of the population to which the persons taken hostage allegedly belonged (Point K of the Motion);

REJECTS all of the other points of claim.

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

Done this fourth day of April 1997
At the Hague
The Netherlands

(signed) _____
Claude Jorda
Presiding Judge of Trial Chamber I

(Seal of the Tribunal)

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1- Paragraph 106 of the Secretary-General's Report states: "It is axiomatic that the International Tribunal must fully respect internationally recognised standards regarding the rights of the accused at all stages of its proceedings. In the view of the Secretary-General, such internationally recognized standards are, in particular, contained in article 14 of the International Covenant on Civil and Political Rights..."
2- Summary of the general observations and recommendations adopted by the organs established pursuant to the international instruments in respect of human rights, Instruments in respect of human rights, HRI/GEN/1, 4 September 1992, English version, p. 14.
3- id., p. 14.
4- Kamasinsky v. Austria case, European Court of Human Rights, Decision of 19 December 1989, Series A, Application no. 9783/82 cited in European Human Rights Reports, vol. 13, pp. 36-78, (1991).
5- De Salvador Torres v. Spain, European Court of Human Rights, Decision of 24 October 1996 (50/1995/556/642), paragraph 33 in particular.
6- Gea Catalán v. Spain, European Court of Human Rights, Decision of 10 February 1995 (10/1994/457/538), paras. 28 and 29.
7- Case The Prosecutor v. Dusko Tadic (IT-94-1-T): Decision on the defence motion on the form of the indictment, 14 November 1995.
8- id.
9- id., para. 3.
10- id. para. 7.
11- id. para. 8.
12- id. para. 12.
13- id. para. 14.
14- Case The Prosecutor v. Djorje Djukic (IT-96-20-T): Decision by Trial Chamber I on preliminary motions of the accused, 26 April 1996.
15- id. para. 16.
16- id. para. 16.
17- id. para. 17.
18- id. para. 18.
19- Decision on Motion by the accused Zjenil Delalic based on Defects in the Form of the Indictment, 2 October 1996, paragraph 19.
20- Decision on the accused Mucic's motion seeking full particulars, June 1996, para. 6; Decision on Motion by the Accused Mucic based on Defects in the Form of the Indictment, 15 November 1996, para. 14.
21- Decision on Motion of the the Accused Landzo's based on Defects on the Form of the Indictment 15 November 1996, para. 5.
22- Decision on the accused Mucic's motion seeking full particulars, June 1996, para. 6; Decision on Motion by the Accused Mucic based on Defects in the Form of the Indictment, 15 November 1996, 26 June 1996, para. 9.
23- Decision on application for leave to appeal by the accused (defects in the form of the indictment) before a bench of the Appeals Chamber, 6 December 1996, para. 31.
24- Decision on the motion by the accused Delalic based on defects in the form of the indictment, December 1996, para. 8; Decision on the Defence motion on the form of the indictment raised by the accused, Ezad Landzo, 15 December 1996, para. 9.
25- Decision on application for leave to appeal by the accused (defects in the form of

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the indictment raised by Ezad Landzo), 15 November 1996, para. 9.
26- See the case The Prosecutor v. Dusko Tadic (IT-94-1-T): Decision on the Defence motion on the form of the indictment, 14 November 1995, para. 11.
27- Case The Prosecutor v. Tihomir Blaskic (IT-95-14-T): Defence motion to dismiss counts 4, 7,10,14,16 and 18 based on failure to adequately plead existence of international armed conflict, 16 December 1996..
28- The case The Prosecutor v. Dusko Tadic: Decision on the Defence motion for interlocutory appeal on jurisdiction, 2 October 1995, para. 84.
29- Decision on the motion of the accused Mucic seeking full particulars The Prosecutor v. Zjenil Delalic, Zdravko Mucic, Hazim Delic and Esad Landzo , 26 June 1996, para. 9.
30- The Prosecutor v. Tadic a/k/a "Dule": Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 89.