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SCSL-2004-14-PT
(279 - 382)

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THE TRIAL CHAMBER

Before: Judge Bankole Thompson, Presiding Judge
Judge Pierre Boutet
Judge Benjamin Mutanga Itoe
Registrar: Mr. Robin Vincent
Date: 19 February 2004

THE PROSECUTOR

Against

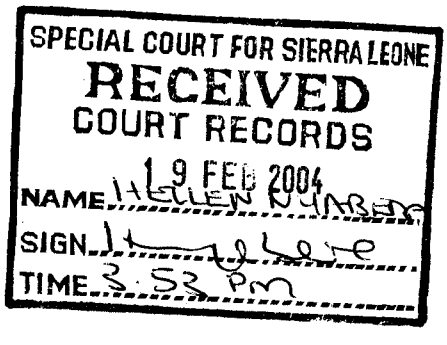
MOININA FOFANA (et. al.)

CASE NO. SCSL-2003-14-PT

RESPONSE TO THE PROSECUTION REQUEST FOR LEAVE TO AMEND THE INDICTMENT AGAINST SAMUEL HINGA NORMAN, MOININA FOFANA AND ALLIEU KONDEWA

Office of the Prosecutor:
Mr. James C. Johnson
Mr. Luc Côté
Mr. Charles A. Caruso

Defence Office:
Mr. Sylvain Roy
Mr. Ibrahim Yillah
Ms. Phoebe Knowles



Defence Counsel:
Mr. Michiel Pestman
Mr. Victor Koppe
Mr. Arrow John Bockarie
Dr. Liesbeth Zegveld
Prof. Dr. P. André Nollkaemper

1. The Defence for Mr. Moinina Fofana hereby files its response to the Prosecution "Request for leave to Amend the Indictment against Samuel Hinga Norman, Moinina Fofana and Allieu Kondewa", filed on 9 February 2004 (the "Request").

2. In this response the Defence also opposes the "Indictment against Samuel Hinga Norman, Moinina Fofana and Allieu Kondewa" (the "Consolidated Indictment"), filed by the Prosecution on 5 February 2004, as this Consolidated Indictment amounts to a *de facto* amendment of the first Indictment (the "Indictment"). The Consolidated Indictment is in fact an unauthorized expansion of the Indictment against Mr. Fofana, as it contains fresh factual allegations against the accused.

3. The Defence opposes both the Request and the Consolidated Indictment. The principal Defence objection is based on its belief that the amendments, if granted, would violate Mr. Fofana's right to a fair trial. However, the Defence will first address two important preliminary issues: first it is unclear exactly what amendments the Prosecution is suggesting to the Consolidated Indictment; second, the Prosecution has not produced any evidence supporting the proposed amendments. The Defence cannot effectively respond to the Request until these two problems are resolved.

Proposed amendments

4. When a request to amend the Indictment is filed, the Prosecution must first of all clearly show what it exactly wishes to amend. In this case, the Prosecution has not filed separate schedules of amendments.[1] The Request itself, however, included a list of proposed amendments,[2] and in principle, the Defence does not object to this procedure.

[1] Jones & Powles note that "[w]hen an Indictment is amended, the prosecution should ordinarily file a schedule showing what is new and what is old in the amended Indictment." J.W.R.D. Jones & S. Powles, International Criminal Practice, Oxford 2003, p. 526, referring to the ICTY Trial Chamber *Order on the Disclosure of Additional Information in respect of the Prosecutor's Motion for Leave to Amend the Indictment,* in Kordic and Cerkez, 21 May 1998.
[2] Request, paras. 14-15.

5. However, close examination shows that one of the amendments proposed in the Request does not correspond with the text of the "Amended Indictment" as annexed to the Request.[3] The difference between Request and the amended Indictment is striking. The Request states in paragraph 14:

> "For the reasons set out in the preceding paragraph, the Prosecution seeks to amend the Indictment in the following paragraphs:
>
> (...)
>
> (ii) paragraph 26.a – time frame amended from "between about 1 November 1997 and 30 April 1998" to "between about 1 November 1997 and about 31 December 1998 (...) [para. 27.a of the Amended Indictment]."[4]

In contrast, the draft amended Indictment reads as follows in paragraph 27:

> "a. between about 1 November 1997 and 31 August 2000 (...)"[5]

As the text of the Request and the amended Indictment diverge, it is not clear which amendment the Prosecution is suggesting to make to the Consolidated Indictment.

6. The lack of clarity is aggravated by the Prosecution in incorrectly quoting the Consolidated Indictment in the Request. In the Request the following is stated:

> "For the reasons set out in the preceding paragraph, the Prosecution seeks to amend the Indictment in the following paragraphs:
>
> (i) paragraph 25.d – time frame amended from "in or about January and December 1998" to "between about January 1998 and about April 1999"; [para. 26.d of the Amended Indictment]."[6]

The Consolidated Indictment, however, actually says the following in paragraph 25:

> "25.d. in or about January and February 1998 (...)"[7]

Again, the difference between the two documents is striking. The Defence can only hope that these are editorial mistakes and were not part of a deliberate strategy to hide the fact that the proposed amendments are more substantial than they appear from the Request.

7. The confusion with regard to the suggested amendments is compounded by the fact that the Consolidated Indictment itself contains new factual allegations not found in the original

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[3] Request, Prosecution Index of Attachments, Amended Indictment, Attachment I, pp. 115-127.
[4] Emphasis added.
[5] Emphasis added.
[6] Emphasis added.
[7] Emphasis added.

Indictment. These new allegations merely appear in the Consolidated Indictment and are not dealt with in the Request. The exact nature of these new facts is outlined in the table below.

INDICTMENT (June 24th, 2003)	**CONSOLIDATED INDICTMENT**[8] (February 5th, 2004)
20.a. "between about 1 November 1997 and about 30 April 1998, at or near Tongo Field, (…)"	25.a. "between about 1 November 1997 and about 30 April 1998, at or near Tongo Field, and at or near the towns of Lalehun, Kamboma, Konia, Talama, Panguma and Sembehun, (…)"
20.b. ""(…) at or near Kenema and at the nearby locations of SS Camp, Kamajors unlawfully (…)"	25.b. "(…) at or near Kenema and at the nearby locations of SS Camp, and Blama, Kamajors unlawfully (…)"
20.d. "in or about January and February 1998, at or near Bo and Koribondo, Kamajors unlawfully (…)"	25.d. "in or about January and February 1998, in locations in Bo District including the District Headquarters town of Bo, Kebi Town, Koribondo, Kpeyama, Fengehun and Mongere, Kamajors unlawfully (…)"
21.a. "(…) including Tongo Field, Kenema and the surrounding areas, (…)"	26.a. "(…) including Tongo Field, Kenema Town, Blama, Kamboma and the surrounding areas, (…)"
22.a. "(…) at various locations to include the towns of Bo, Koribondo, and the surrounding areas (…)"	27.a. "(…) at various locations including in Kenema District, the towns of Kenema, Tongo Field and surrounding areas, in Bo district, the towns of Bo, Koribondo, and the surrounding areas (…)"

8. As it is unclear from the Request what changes the Prosecution seeks to make to the Indictment and the Consolidated Indictment, the Request should be rejected. Alternatively, in order to remedy this deficiency in the Request, the Trial Chamber could decide to issue a separate scheduling order, as was done by ICTY in an Order in the Kordic and Cerkez case delivered on 21 May 1998, in which the Trial Chamber stated:

"it appears indispensable that the Prosecutor provide to the Trial Chamber a detailed exhaustive comparative table of the proposed amendments; that, in the case in point, the Prosecutor specify for each act indicated in the initial indictment whether it also appears in the draft and, if so, in respect of which count(s);"[9]

No supporting material

9. As admitted by the Prosecution, the proposed amendments in the Request are all based on new facts.[10]

10. The amendments in fact amount to an expansion of the Consolidated Indictment. The Prosecution is seeking addition of new factual allegations to the Indictment, by adding new places where crimes were allegedly committed and by considerably extending the time frame within which the alleged acts took place. Moreover, the Prosecution wishes to add no less than four new counts, all based on previously unknown facts.

11. The Prosecutor provides no supporting material for any of the amendments, neither those which simply appear in the Consolidated Indictment, nor those proposed for the Amended Indictment, except for a two-page "Prosecutor's Case Summary" attached to the Request, in which a Prosecution investigator states that this supporting material exists.[11]

12. Although it is no longer necessary for an amended Indictment to be confirmed after a case has been assigned to the Trial Chamber, leave to amend the Indictment by adding new charges and allegations can only be granted if the prosecution is able to demonstrate the material supporting the new allegations. In this respect the ICTY has held:

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[8] All emphasis added.
[9] Kordic and Cerkez,, Case IT-95-14/2,*Order on the Disclosure of Additional Information in respect of the Prosecutor's Motion for Leave to Amend the Indictment,* 21 May 1998.
[10] Request, para. 10.
[11] Request, Prosecution Index of Attachment, Prosecutors Case Summary in the form of an Investigators Statement, Attachment II, pp. 129-131.

> "it is acceptable for the Defence to challenge the sufficiency of the evidence for charges that are newly added (...) and for material facts newly added in support of existing charges" [12]

Regarding new charges the ICTY considered:

> "NOTING that the Office of the Prosecutor ("Prosecution") has stated in the Motion that the Prosecution does not intend to provide the supporting materials for the additional counts in respect of which leave to amend is sought to the Defence unless and until the amendment is granted, (...)
>
> CONSIDERING that it is essential for the Defence to review those materials in order to be able to respond fully to the Motion,
>
> CONSIDERING also that, in another case, the supporting material accompanying an application for leave to amend an indictment pursuant to Rule 50 has been supplied to the Defence without objection"

and then ordered:

> "The Registry shall immediately release to the Defence the supporting material filed in connection with the additional counts for which leave to amend is sought"[13]

13. As all proposed amendments are new, sufficient evidence in support of each proposed amendment should have been presented by the Prosecution. Without this supporting material the Defence is unable to effectively respond to the amendments sought, and for this reason the Request should be rejected. In the alternative, the Trial Chamber is respectfully requested to order the Prosecution to disclose all supporting material related to the new charges and additional allegations.[14]

Fair trial

14. The Defence now turns to its principal objection to the request. Article 17 of the Statue of the Special Court for Sierra Leone (the "Statute") guarantees the right of the accused to a fair trial. For this motion, it is particularly important to note that Article 17 also determines that

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[12] Prosecutor v Mrksic et al., Case No. IT-95-13/1-PT, *Decision on Form of Consolidated Amended Indictment and on Prosecution application to amend,* 23 January 2004, para 17; *see also* the text in footnote 44.
[13] Kupreskic et al., Case No. IT-95-16, *Scheduling Order,* 13 February 1998 (emphasis added); Jones & Powles, p. 526.
[14] *See* e.g. Kupreskic et al., Case No. IT-95-16, *Scheduling Order,* 13 February 1998.

the accused must have "adequate time and facilities for the preparation of his or her defence" and that he or she has the right "to be tried without undue delay".[15]

15. The jurisprudence of the ICTY clearly shows that a requested amendment should be dismissed if the amendment would entail unfair prejudice to the accused's right to a fair trial. It is in the light of the fundamental guarantees of Article 17 of the Statute that the Request should be judged.[16]

16. In a recent decision, the ICTY stated the principle as follows:

> "The fundamental issue in relation to granting leave to amend an Indictment is whether the amendment will prejudice the Accused unfairly. (...) To be relevant, the prejudice caused to an accused would ordinarily need to relate to the fairness of the trial. Where an amendment is sought in order to ensure that the real issues in the case will be determined, the Trial Chamber will normally exercise its discretion to permit the amendment, provided that the amendment does not cause any injustice to the accused, or does not otherwise prejudice the accused unfairly in the conduct of his defence. There should be no injustice caused to the accused if he is given an adequate opportunity to prepare an effective defence to the amended case."[17]

Whether the amendment of an indictment will violate the rights of an accused to have adequate time and facilities to prepare for trial and to be tried without delay has, of course, to be judged on an individual basis. The Defence submits that the suggested amendments in this case unfairly prejudice Mr. Fofana and violate his right to a fair trial.

17. Due to the time schedule that the Special Court for Sierra Leone has set for itself, the cases before this Court are planned to be completed within three years from 10 January 2003.[18] As the Trial Chamber without any doubt realises, this puts enormous pressure on the Court. This pressure is much higher than at the two sister courts in The Netherlands and

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[15] Statute, Article 17 (4) (a) & (c).

[16] *See* e.g. Prosecutor v Kovacevic, Case IT-97-24-AR73, *Decision Stating Reasons for Appeals Chamber's Order of 29 May 1998,* 2 July 1998, para. 28-32; The Prosecutor v. Casimir Bizimungu et al., Case No. ICTR-99-50-Ar50, *Decision on Prosecutor's Interlocutory Appeal Against Trial Chamber II Decision of 6 October 2003 Denying Leave to File Amended Indictment,* 12 February 2004, para. 18-20.

[17] Prosecutor v Mrksic et al., Case No. IT-95-13/1-PT, *Decision on Form of Consolidated Amended Indictment and on Prosecution Application to Amend*, 23 January 2004, para. 61; Prosecutor v Brdanin & Talic, Case IT-99-36-PT, *Decision on Form of Further Amended Indictment and Prosecution Application to Amend*, 26 June 2001, para. 50.

[18] *See* e.g. Amnesty International Press Release, 16 January 2004, AI INDEX: AFR 51/002/2004, addressing both the previewed period of three years and the lack of funds for the third working year and eventual later years.

Tanzania and is reflected in a much tighter schedule for all pre-trial matters. Defence teams at the Special Court have much less time for the preparation of their defence than is the case with the ICTY and ICTR. This is a factor that should be taken into account when judging the proposed amendments to the Consolidated Indictment.

18. Although no date has been fixed for the beginning of the trial, it is generally accepted that it will commence at the beginning of May at the latest. If the trial were indeed to start in May, this would leave the Defence with little over two months to adequately prepare for trial.

19. The ICTR has held that it would cause prejudice to the accused to substantially amend an Indictment two months before the start of the trial, even if his amendment would partially consist of specifications and lead to a substantial reduction of page numbers.[19] In the current matter, the proposed amendments substantially expand the Indictment.

20. If the Trial Chamber were to accept the Amended Indictment, it could also decide to postpone the trial in order to allow the Defence adequate time for preparation. Postponement of the trial might in fact be inevitable. The Amended Indictment would have to be served on Mr. Fofana pursuant to Rule 52. A further appearance should be held pursuant to Rule 50 (B), to enable Mr. Fofana to enter a plea on the new charges and, pursuant to Rule 50 (C), the Defence would e allowed to file fresh preliminary motions against these charges within fourteen days after the initial appearance. These procedural developments would be likely to delay the start of the trial beyond the beginning of May. In the view of the Defence, such a postponement of the trial would violate Mr. Fofana's right to a trial without undue delay.

Conclusion

21. The amendments incorporated in the Consolidated Indictment or proposed in the Request should all be refused, as they would unfairly prejudice the right of Mr. Fofana to a fair trial. Expanding the Indictment so soon before trial would prejudice Mr. Fofana's ability to adequately prepare his defence. On the other hand, a decision to postpone the beginning of the trial, would violate Mr. Fofana's right to be tried without undue delay.

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[19] The Prosecutor v. Casimir Bizimungu et al., Case No. ICTR-99-50-I, *Decision on the Prosecutor's Request for Leave to File an Amended Indictment,* 6 October 2003, para. 35.

22. For the reasons set out above, the Request should be dismissed entirely.

23. The Defence for Mr. Fofana finally and respectfully requests an oral hearing on the matter.

COUNSEL FOR THE ACCUSED

ppi.

Mr. Michiel Pestman

Defence list of authorities

1. J.W.R.D. Jones & S. Powles, International Criminal Practice, Oxford 2003, p. 526

2. Kordic and Cerkez,, Case IT-95-14/2,*Order on the Disclosure of Additional Information in respect of the Prosecutor's Motion for Leave to Amend the Indictment,* 21 May 1998.

3. Prosecutor v Mrksic et al., Case No. IT-95-13/1-PT, *Decision on Form of Consolidated Amended Indictment and on Prosecution application to amend,* 23 January 2004.

4. Kupreskic et al., Case No. IT-95-16, *Scheduling Order,* 13 February 1998.

5. Prosecutor v Kovacevic, Case IT-97-24-AR73, *Decision Stating Reasons for Appeals Chamber's Order of 29 May 1998,* 2 July 1998.

6. The Prosecutor v. Casimir Bizimungu et al., Case No. ICTR-99-50-Ar50, *Decision on Prosecutor's Interlocutory Appeal Against Trial Chamber II Decision of 6 October 2003 Denying Leave to File Amended Indictment,* 12 February 2004.

7. Prosecutor v Brdanin & Talic, Case It-99-36-PT, *Decision on Form of Further Amended Indictment and Prosecution Application to Amend*, 26 June 2001.

8. Amnesty International Press Release, 16 January 2004, AI INDEX: AFR 51/002/2004.

9. The Prosecutor v. Casimir Bizimungu et al., Case No. ICTR-99-50-I, *Decision on the Prosecutor's Request for Leave to File an Amended Indictment,* 6 October 2003.

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INTERNATIONAL CRIMINAL PRACTICE

The International Criminal Tribunal for the Former Yugoslavia
The International Criminal Tribunal for Rwanda
The International Criminal Court
The Special Court for Sierra Leone
The East Timor Special Panel for Serious Crimes
War Crimes Prosecutions in Kosovo

John R. W. D. Jones
MA. (Oxon.), M.A. In Law, LL.M.
of Lincoln's Inn, Barrister

Steven Powles
LL.B. (London), LL.M (Cantab.)
of Middle Temple, Barrister

Transnational Publishers, Inc.
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It is unclear whether "she" here refers to the Prosecutor or to the Confirming Judge.

No Need for Additional Time Where Charges Are Simply Withdrawn

8.2.77 See *Decision on the Prosecutor's Motion for Leave to Amend the Indictment* rendered in *Jelisić* on 12 May 1998, where the charges under Article 2 of the Statute were withdrawn by amendment of the indictment, the Prosecutor deciding, in order to expedite the trial, not to tender evidence of an international armed conflict as required under Article 2, as interpreted by the Tribunal. The Trial Chamber stated that, "since the amendment involves only the withdrawal of some of the counts, the proceedings initiated thus far must follow their normal course with no need to grant additional time for the preparation of the defence of the accused."

Substantial Amendment of Indictment

8.2.78 See *Decision on Prosecutor's Request to file an amended indictment* rendered by the Trial Chamber in *Kovačević* on 5 March 1998, denying the Prosecutor's request to amend the indictment:

> 12. The Trial Chamber's reasons for refusing this Request for Leave to Amend are as follows:
>
> (a) The proposed amendment (consisting of 14 added counts, and factual allegations which would increase the size of the Indictment from 8 to 18 pages) is so substantial as to amount to a substitution of a new indictment; an amendment of this proportion should have been made much more promptly (and not nearly a year after confirmation; and seven months after the arrest of the accused).

8.2.79 This Decision was, however, successfully appealed. Upholding the appeal in part, the Appeals Chamber on 29 May 1998 ordered the Trial Chamber to grant leave to amend the indictment. This seems contradictory inasmuch as leave is a *discretionary* remedy and while it would appear that the Appeals Chamber could itself grant leave, it is not obvious that it could order a Trial Chamber to grant leave. In any event, however, the Trial Chamber did grant leave to amend the indictment in its *Order granting leave to amend the Indictment* of 2 June 1998.

8.2.80 The Appeals Chamber gave the reasons for its Order in its *Decision stating reasons for Appeals Chamber's Order of 29 May 1998*, dated 2 July 1998, in which it held that (1) the *size* of the new indictment was not a valid reason for the Trial Chamber to reject it (para. 25); (2) that undue delay on the part of the Prosecutor was also not a valid reason for the Trial Chamber to reject the new indictment (para. 31). The matter had to be looked at in the context of the case, especially in relation to the concept of *fairness* to an accused; (3) as to whether there had been a failure to disclose the new charges to the accused *promptly* upon his arrest, it was acceptable if the accused were told of at least certain of the crimes charged against him upon his arrest, even if further charges were added subsequently (Judge Shahabuddeen added a Separate Opinion on this issue); and (4) as to whether there existed a "specialty" principle under customary international law which would prohibit the prosecution of the accused on charges

other than those on which he was arrested in Bosnia and Herzegovina and brought to the Netherlands, the Appeals Chamber rejected this argument (para. 37). Thus the Appeals Chamber considered that "in the circumstances of this case, the prosecution was entitled to leave to amend the indictment by the addition of the new charges."

8.2.81 In his Separate Opinion, Judge Shahabuddeen affirmed a principle "which recognises that the prosecution has a right not to institute charges as soon as it has enough material to do so; it may competently defer doing so until it has inquired into the possibility of obtaining better or alternative forms of evidence." Judge Shahabuddeen also turned to the test laid down in Rule 49 for justification for the addition of new charges, namely whether the additional crimes formed "the same transaction" and were committed by the same accused. Judge Shahabuddeen also considered Article 9(2) of the International Covenant on Civil and Political Rights ("ICCPR"), which reads: "Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall promptly be informed of any charges against him." Judge Shahabuddeen agreed with defence counsel that "any charges" meant "all charges," not "some charges": "The purpose of the provision being to put the arrested person in a position to challenge the lawfulness of his arrest, all of the grounds on which the arrest was made are important." This did not mean, however, that the accused could not subsequently be informed of *additional* charges against him; this was permissible provided that such additional charges did not form the basis of his arrest and that he was therefore not informed of those charges at the time of his arrest, which is what Article 9(2) of the ICCPR, and Article 21(4)(a) of the ICTY Statute, expressly require.

Prosecution Must Disclose Supporting Material Proffered for Additional Counts to Defence and Judges

8.2.82 See *Scheduling Order*, Trial Chamber, *Kupreškić et al.*, 13 February 1998.

Schedule of Changes to Indictment

8.2.83 When an indictment is amended, the Prosecution should ordinarily file a schedule showing what is new and what is old in the amended indictment. See *Order on the Disclosure of Additional Information in respect of the Prosecutor's Motion for Leave to Amend the Indictment* issued by the Trial Chamber in *Kordić and Čerkez* on 21 May 1998:

> NOTING therefore that, in respect of the above, it appears indispensable that the Prosecutor provide to the Trial Chamber a detailed exhaustive comparative table of the proposed amendments: that, in the case in point, the Prosecutor specify for each act indicated in the initial indictment whether it also appears in the draft and, if so, in respect of which count(s); that, furthermore, the Prosecutor specify what in the draft, in her opinion, constitutes a new count and, if necessary, that she clearly indicate the facts on which each of the new crimes is based,
>
> FOR THE FOREGOING REASONS,
>
> ORDERS the Prosecutor to submit to the Trial Chamber by 15 June 1998, a brief containing the above-mentioned information.

Procedure Upon Showing Defects in Form of Indictment

12.84 For the procedure to be followed upon a successful motion alleging defects in the form of the indictment, see the *Decision on Prosecutor's Response to Decision of 24 February 1999* rendered in *Krnojelac* on 20 May 1999, in particular paras. 4–14. Noting that, "the practice within the Tribunal has not been consistent as to the precise nature of the relief granted when upholding a complaint by an accused in relation to the form of the indictment pursuant to what is now Rule 72," the Trial Chamber stated that:

> 8. There is no difference in substance between granting leave to amend the indictment and ordering or directing the Prosecution to amend it. In either such case, any application made to the confirming judge pursuant to Rule 50(A) for leave to make the particular amendments which have already been permitted or directed by a Trial Chamber would serve no useful purpose, and the Trial Chamber is satisfied that such a procedure is not contemplated by the wording of the rule. . . .
>
> 9. What happens next depends on whether the amendments do or do not go beyond what was permitted or directed by the Trial Chamber.
>
> 10. If the amendments made by the prosecution *do* go beyond what was permitted or directed by the Trial Chamber and add new charges, Rule 50(A) does apply, and leave to make those amendments is required. Such leave must be sought from the confirming judge or another judge assigned by the President. The reason why the Trial Chamber which heard the Motion by the accused . . . cannot also grant leave to add new charges at this stage lies in the structure of the Rules of Procedure and Evidence. The Rules adopt a division of functions . . .
>
> 11. . . . The intention of this division of functions is to avoid any contamination spreading from the *ex parte* nature of the confirming procedure to the Trial Chamber.
>
> 12. Once evidence has been presented before the Trial Chamber, it is not practicable for the confirming judge to continue to be the authority from whom leave to amend in order to add new charges must be sought. . . . That is why para. (iii) has been added to Rule 50(A). The need to confirm the indictment remains where an application for leave to amend is granted, although the review which must be undertaken by the Trial Chamber for that purpose is performed *inter partes*. . . . The possibility of contamination spreading from the *ex parte* nature of the confirming procedure is therefore effectively eliminated.
>
> 13. If the amendments made by the Prosecution do *not* go beyond what was permitted or directed by the Trial Chamber in relation to defects found in the form of the indictment, and so do not add new charges, leave to amend the indictment need not be sought from the confirming judge or other judge assigned by the President pursuant to Rule 50(A). . . .

No Need to Notify Defence of Motion to Amend Indictment

12.85 See the *Motion for Leave to Amend the Indictment* submitted by the Prosecutor in *Akayesu* on 17 June 1997, which was granted in a Decision by the Trial Chamber on 3 October 1997. The Chamber noted, in reply to a defence objection that it had had insufficient time to respond to the Prosecutor's Motion, that the Prosecutor had no obligation to transmit to the defence the request to amend the indictment which was before the Chamber. This suggests that the amendment of an indictment is essen-

IN THE TRIAL CHAMBER

Before:
Judge Claude Jorda, Presiding
Judge Fouad Riad
Judge Almiro Simões Rodrigues

Registrar:
Mr. Jean-Jacques Heintz, Deputy Registrar

Decision of:
21 May 1998

THE PROSECUTOR

v.

DARIO KORDIC
MARIO CERKEZ

ORDER ON THE DISCLOSURE OF ADDITIONAL INFORMATION IN RESPECT OF THE PROSECUTOR'S MOTION FOR LEAVE TO AMEND THE INDICTMENT

The Office of the Prosecutor: **Defence Counsel:**

Mr. Mark Harmon **Mr. Mitko Naumovski**
Ms. Susan Somers **Mr. Bozidar Kovacic**
Mr. Patrick Lopez-Terres
Mr. Kenneth Scott

TRIAL CHAMBER I of the International Criminal Tribunal for the former Yugoslavia (hereinafter "the Tribunal"),

PURSUANT to Articles 20 and 21 of the Statute and Rule 54 of the Rules of Procedure and Evidence,

CONSIDERING the indictment against Dario Kordic and Mario Cerkez confirmed on 10 November 1995,

CONSIDERING the Motion of the Prosecutor for leave to amend the indictment filed on 11 February 1998 (hereinafter "the Application") and the draft amended indictment attached to the Application (hereinafter "the draft"),

CONSIDERING the response of the Defence on 20 February 1998,

CONSIDERING the decision of the Trial Chamber on the application of the accused for the disqualification of Judges Jorda and Riad rendered on 21 May 1998,

NOTING that the suspension of the proceedings pending the decision on the Motion of the accused for the disqualification of Judges Jorda and Riad caused a postponement of the decision on the application,

NOTING that the proposed amendments presented by the Prosecutor represent a significant restructuring of the indictment; that although it is clear that the counts were regrouped and differentiated for each of the two accused and that the geographic and temporal scope was broadened, the Trial Chamber is nonetheless not in a position to make a real evaluation of what in the proposal constitutes additions or withdrawals of counts,

NOTING that for the sake of greater respect for the rights of the defence and for a more informed and expeditions review of the application, the Trial Chamber desires to be kept fully informed by the Prosecutor as to the exact content and nature of the amendments requested,

NOTING therefore that, in respect of the above, it appears indispensable that the Prosecutor provide to the Trial Chamber a detailed exhaustive comparative table of the proposed amendments; that, in the case in point, the Prosecutor specify for each act indicated in the initial indictment whether it also appears in the draft and, if so, in respect of which count(s); that, furthermore, the Prosecutor specify what in the draft, in her opinion, constitutes a new count and, if necessary, that she clearly indicate the facts on which each of the new crimes is based,

FOR THE FOREGOING REASONS,

ORDERS the Prosecutor to submit to the Trial Chamber by 15 June 1998, a brief containing the above-mentioned information.

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

Done this twenty-first day of May 1998
Done at The Hague
The Netherlands

(signed)

_____
Judge Claude Jorda
Presiding Judge Trial Chamber I

(Seal of the Tribunal)

Case No. IT-95-13/1-PT

IN TRIAL CHAMBER II

Before:
Judge Carmel Agius, Presiding
Judge Jean Claude Antonetti
Judge Kevin Parker

Registrar:
Mr. Hans Holthuis

Decision of:
23 January 2004

PROSECUTOR

v.

MILE MRKSIC
MIROSLAV RADIC
VESELIN SLJIVANCANIN

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

The Office of the Prosecutor:

Mr. Jan Wubben
Mr. Mark J. McKeon

Counsel for the Accused Mile Mrksic:

Mr. Miroslav Vasic

Counsel for the Accused Miroslav Radic:

Mr. Borivoje Borovic
Ms. Mira Tapuskovic

Counsel for the Accused Veselin Sljivancanin:

Mr. Novak Lukic
Mr. Momcilo Bulatovic

I. APPLICATIONS AND BACKGROUND

1. The Office of the Prosecutor ("Prosecution") has applied for leave to amend the indictments against the Accused Mile Mrksic ("Mrksic"), the Accused Miroslav Radic ("Radic") and the Accused Veselin Sljivancanin ("Sljivancanin") (collectively : "Accused").[1] The Prosecution attaches to its application a newly amended and consolidated indictment it seeks to file ("Consolidated Amended Indictment").

2. The initial indictment against the Accused was confirmed by Judge Fouad Riad on 7 November 1995.[2] This indictment was amended to include one other co-accused, Slavko Dokmanovic, on 3 April 1996.[3]

A further amended indictment against all four was filed on 2 December 1997.[4] Slavko Dokmanovic passed away on 29 June 1998, with the result that trial proceedings against him were terminated.[5] Mrksic surrendered to the Tribunal on 15 May 2002, and the Prosecution was given leave to file a further amended indictment against him alone.[6] The Prosecution, somewhat confusingly, termed this indictment the "Second Amended Indictment".[7] Mrksic subsequently alleged that it was defective: the Trial Chamber decided on these allegations on 19 June 2003,[8] and ordered the Prosecution to amend the Second Amended Indictment in the terms set in its decision.

3. In the meantime Radic had been arrested. Sljivancanin was arrested soon thereafter. At their initial appearances on 21 May 2003 and 10 July 2003 respectively, both entered pleas of not guilty to all charges in the 1997 Amended Indictment.[9] Radic filed a motion alleging defects in the form of the 1997 Amended Indictment which the Trial Chamber dismissed in anticipation of the current Prosecution Application to Amend the Indictments.[10] The Consolidated Amended Indictment concerns all three Accused. The differences between it, the Second Amended Indictment and the 1997 Amended Indictment are explored further below.

4. On the matter of the Consolidated Amended Indictment, the Trial Chamber directed each of the Accused to file any response pursuant to Rule 50(A)(i)(c) of the Rules of Procedure and Evidence ("Rules")[11] to the Prosecution Application to Amend the Indictments together with any preliminary motion pursuant to Rule 72 alleging defects on the form of the Consolidated Amended Indictment.[12] They did so within the deadline set by the Trial Chamber.[13] Given that the Trial Chamber had already decided upon a preliminary motion from Mrksic on the form of an earlier indictment, it directed him to restrict his submissions to any fresh issues raised in the Consolidated Amended Indictment.[14]

5. The Prosecution responded to the Accused in a single document.[15] For that purpose it sought a variation of page-limits at the time it filed the Prosecution Response.[16] The Trial Chamber hereby allows the variation.

6. The Trial Chamber denied requests from Mrksic and Radic respectively to reply to the Prosecution's Response.[17]

II. THE CONSOLIDATED AMENDED INDICTMENT

7. As indicated earlier, the Consolidated Amended Indictment "re-unifies the indictments against all three Accused" in this case.[18]

8. The Consolidated Amended Indictment eliminates for Mrksic the charge of imprisonment that was brought against him in the Second Amended Indictment.[19] The Consolidated Amended Indictment eliminates two counts of grave breaches of the Geneva Conventions against Radic and Sljivancanin which were contained in the 1997 Amended Indictment,[20] and adds four new charges against them: persecution, extermination and torture, the latter as both a crime against humanity and a violation of the laws and customs of war. These charges were already brought against Mrksic in the Second Amended Indictment. According to the Prosecution, these additional charges against Radic and Sljivancanin "are based on the same operative facts" as the original charges in the 1997 Amended Indictment, and their addition "brings the charges against all three Accused into conformity with one another".[21]

9. Thus, in the Consolidated Amended Indictment, the Accused are charged with various offences allegedly committed subsequent to the Serb takeover of the city of Vukovar (Republic of Croatia), pursuant to Articles 7(1) and 7(3) of the Statute of the Tribunal ("Statute"),[22] which are namely, with the following eight counts:

(a) persecutions,[23] extermination,[24] and inhumane acts,[25] as crimes against humanity;

(b) cruel treatment[26] as a violation of the laws and customs of war;

(c) murder, as both a crime against humanity[27] and a violation of the laws and customs of war[28] and

(d) torture, as both a crime against humanity[29] and a violation of the laws and customs of war.[30]

III. GENERAL PLEADING PRINCIPLES

10. The Decision on Form of Second Amended Indictment was limited to Mrksic. Nevertheless, it outlined the general pleading principles that may be applicable to the present case.[31] Because it was issued publicly, the Trial Chamber finds it unnecessary to reproduce those principles here. Those principles apply in full to the present decision as well.

IV. OBJECTIONS TO AMENDING THE INDICTMENTS

11. Sljivancanin is the only Accused to expressly oppose the Prosecution Application to Amend the Indictments. This notwithstanding, all three Accused object to the Prosecution's attempt to amend the allegations contained in the indictments without producing the evidence to support these amendments.[32] The Prosecution responds that the supporting material is sufficient in this regard.[33]

12. For the purpose of addressing the objections raised by the Accused, the Trial Chamber finds it convenient to distinguish between the new *charges* brought by the Prosecution against Radic and Sljivancanin in the Consolidated Amended Indictment, and the amended *factual allegations* contained in it.

13. The Prosecution specifies that the new charges against Radic and Sljivancanin in the Consolidated Amended Indictment are "based on the same operative facts" as the original charges.[34] The Trial Chamber has verified this statement with the 1997 Amended Indictment and is satisfied that this is the case. Sljivancanin agrees.[35] He nonetheless submits that the Prosecution may only be allowed to introduce new charges "upon presentation of new evidence or new factual allegations".[36] Sljivancanin's submission is ill founded; he misconstrues Rule 47(I), which applies in the event that the reviewing Judge dismisses a count in an indictment at the time of its confirmation, which is not the present case. There is no provision that would prevent the Prosecution from applying to amend the indictment basing amended charges on the same operative facts and without adducing new evidence. Sljivancanin's objection is rejected.

14. Regarding the amended factual allegations in the Consolidated Amended Indictment, Mrksic submits that the Prosecution must provide an explanation to justify the amendments it seeks, in particular the withdrawal of allegations that appeared in the Second Amended Indictment.[37] The Prosecution responds that the fact that it is free to choose how to plead its case has been recognised by this Trial Chamber in its Decision on Form of Second Amended Indictment.[38] The Trial Chamber agrees that it is not necessary for the Prosecution to provide a more detailed explanation of its reasons for applying to amend the indictments than that contained in the Prosecution Application for Leave to Amend the Indictments.[39] The Prosecution is free to plead its case as it sees fit, as long as it sets out the material facts that will allow the Defence to meet the case. Mrksic's request for explanation is rejected.

15. The same reasoning applies to Radic's complaint that the Prosecution has significantly modified the legal qualifications of the acts and the form of the Accused's criminal participation in the Consolidated Amended Indictment. Nothing prevents the Prosecution at this stage from changing its pleading strategy, a change that may simply reflect practices adopted since on the basis of the evolving jurisprudence of the Tribunal. As addressed in more detail below,[40] the issue is not whether amendments to the indictment prejudice the Accused, but whether they do so *unfairly*.[41] Radic's objection is also rejected.

16. Finally, Mrksic submits that, whilst the Prosecution has "significantly altered " the factual allegations for several counts in the Consolidated Amended Indictment compared to those contained in Second Amended Indictment, it has not supplied any supporting material that would sustain those changes.[42] These changes are the object of specific challenges and are addressed in more detail below. However, prior to addressing these concerns, it is necessary to dispel the confusion surrounding the information annexed to the Consolidated Amended Indictment, information which the Prosecution has somewhat unfortunately labelled "material in support of the Consolidated Amended Indictment". Mrksic contends that this material, which consists of only two documents, is insufficient to support the allegations in the Consolidated Amended Indictment. The Trial Chamber notes that this material corresponds to the particulars that the Prosecution was ordered to provide pursuant to the Trial Chamber's Decision on Form of Second Amended Indictment. It is not the only evidence supporting the allegations therein. The Trial Chamber has received assurances that the supporting material on the basis of which the Initial Indictment was originally confirmed has been provided to the Accused.[43]

17. In its Decision on Form of Second Amended Indictment, the Trial Chamber established the following:

> The jurisprudence is clear that it is not necessary to plead in an indictment the evidence which would tend to support the alleged material facts, and that it is inappropriate at this stage of proceedings for the Defence to challenge the sufficiency of the evidence. The Trial Chamber finds it necessary, however, to distinguish between those material facts which were part of the indictment as originally confirmed, and those added subsequently. Concerning the original charges and facts, it is not at this stage possible for the Defence to challenge the sufficiency of the evidence. However, it is acceptable for the Defence to challenge the sufficiency of the evidence for charges that are newly added (...) and for material facts newly added in support of existing charges.[44]

Accordingly, in examining the specific challenges made by the Accused, this distinction will be applied in determining the validity of their objections.

V. CHALLENGES TO THE FORM OF THE CONSOLIDATED AMENDED INDICTMENT

18. The Accused submit that the form of the Consolidated Amended Indictment is defective, generally alleging that the Prosecution has not set out all of the relevant material facts to allow the Defence to properly prepare its case. The Prosecution generally responds that all relevant material facts have been provided and that the sufficiency of the evidence is a matter for trial. Specific challenges are addressed below.

A. The Nature of the Alleged Responsibility of the Accused

1. Article 7(1)

19. The Appeals Chamber has repeatedly held that "[s]ince Article 7(1) allows for several forms of direct criminal responsibility, a failure to specify in the indictment which form or forms of liability the Prosecution is pleading gives rise to ambiguity (...) such ambiguity should be avoided and (...) where it arises, the Prosecution must identify precisely the form or forms of liability alleged for each count as soon as possible and, in any event, before the start of the trial".[45] In accordance with this jurisprudence, the Trial Chamber interprets that the Prosecution in the Consolidated Amended Indictment is pleading the heads of responsibility in Article 7(1) in their entirety with respect to each count and each Accused.[46]

20. The Prosecution also specifies, in paragraph 4 of the Consolidated Amended Indictment, that "[b]y using the word "committed" in this indictment, the Prosecutor does not intend to suggest that any of the [A]ccused physically committed any or all of the crimes charged personally. "Committed" in this indictment includes each of the [A]ccused's participation in a joint criminal enterprise". While this specification accords with the Trial Chamber's preferred manner of pleading, the term "including" could give rise to ambiguity.[47] The Trial Chamber will therefore direct the Prosecution to replace it with the exhaustive phrase "is limited to". The same observation applies to paragraph 13 of the Consolidated Amended Indictment, which, in light of what is contained in paragraph 4, could also result in ambiguity. In paragraph 13, the Prosecution alleges that the Accused are individually criminally responsible for the crimes in the Indictment pursuant to Article 7(1) for their participation in a joint criminal enterprise "*in addition to* their responsibility under the same Article for having planned, instigated, ordered, *committed*, or otherwise aided and abetted in the planning, preparation, execution, and commission of these crimes".[48] The Prosecution will be ordered to remove the term "committed" from this phrase, because there is no case pleaded that the Accused "committed" in a way other than by participating in a joint criminal enterprise.

Joint Criminal Enterprise

21. The Accused raise a number of general and specific objections regarding the pleading in the Consolidated Amended Indictment of a joint criminal enterprise (" JCE").

22. Radic and Sljivancanin submit that the material facts to support their alleged participation in a JCE are lacking in the Consolidated Amended Indictment.[49] Sljivancanin specifically raises the absence of particulars regarding "any element of SaC common plan". Sljivancanin also submits that the purpose of the JCE pleaded by the Prosecution is vague.[50] Radic adds that the Prosecution has failed to plead the exact or the approximate date of the existence of the JCE.[51] The Prosecution responds that, in its Decision on Form of Second Amended Indictment, the Trial Chamber approved of the manner in which the Prosecution had pleaded the JCE.[52]

23. The Consolidated Amended Indictment identifies the purpose of the JCE as "the persecution of Croats or other non-Serbs who were present in the Vukovar Hospital after the fall of Vukovar, through the commission of crimes in violation of Articles 3 and 5 of the Statute".[53] The Trial Chamber would have preferred that the Prosecution make an explicit reference to the Counts in the Indictment rather than to Articles of the Statute. It is, however, of no consequence since an accused cannot be tried for offences other than those contained in the indictment against him. Sljivancanin argues that the stated purpose of the JCE should be narrowed down and limited to the persecution of the several hundred non-Serbs who were actually removed from Vukovar Hospital, rather than of those who were merely present there. The Trial Chamber does not find this necessary. The Prosecution is free to plead its case as it deems fit within the limits of the respect for the rights of the Accused. The purpose of the JCE as charged is pleaded with enough detail to inform the Accused of the nature and cause of the charges against them thus enabling them to prepare a defence effectively and efficiently.[54] Sljivancanin's objection is rejected.

24. The relevant period of the existence of the JCE is identified by using the following formula: "?tghe joint criminal enterprise was in existence at the time of the commission of the underlying criminal acts alleged in this indictment and at the time of the participatory acts of each of the accused in furtherance thereof ".[55] The underlying criminal acts present no difficulty, limited as they are to "from or about 18 November 1991 until 21 November 1991".[56] The reference to the Accused's "participatory acts" necessitates further perusal of the Consolidated Amended Indictment,[57] but does not detract from the fact that the period of the existence of the JCE is pleaded with enough detail to inform the Accused of the nature and cause of the charges against them thus enabling them to prepare a defence effectively and efficiently. Although the Trial Chamber's preferred manner of pleading would have been for the Prosecution to pin down expressly the date the JCE came into existence, there is no material defect in the way it is currently pleaded. Radic's objection is rejected.

25. The element of a common plan has been designated expressly in various paragraphs of the Consolidated Amended Indictment, such as the allegations that the Accused "worked in concert with or through several individuals in the joint criminal enterprise ".[58] Additional information can be gathered from reading it as a whole. Anything further does not concern the pleading of material facts but concerns the sufficiency of the evidence and is a matter properly resolved at trial. Sljivancanin's complaint about the absence of information regarding a common plan is therefore rejected.

26. Finally, contrary to the submissions from Radic and Sljivancanin,[59] the ways in which they allegedly participated in the JCE are expressly pleaded in paragraphs 11 and 12 of the Consolidated Amended Indictment, with enough detail to inform them of the nature and cause of the charges against them thus enabling them to prepare a defence effectively and efficiently. Their objection in this respect is rejected.

27. The next objection raised by Radic and Sljivancanin concerns the inclusion in the Consolidated Amended Indictment of a reference to a "wider joint criminal enterprise".[60] They submit that the material facts related to this wider JCE have not been pleaded. They question the need for its inclusion altogether and submit that it should be removed.[61] The Prosecution responds that the reference to the wider JCE is included as background information only, since no charges stem from it, and that in accordance with the Trial Chamber's Decision on Form of Second Amended Indictment the Accused are not entitled to further particulars with respect to "background facts of a general nature ".[62]

28. The Trial Chamber agrees with the Prosecution that, in line with the Trial Chamber's previous decision, "?igt is in relation to material facts dealing with each count rather than the background facts of a general nature only, that the Accused is entitled to proper particularity in the indictment".[63] Nevertheless, this statement needs to be placed in its proper context. The Trial Chamber was at the time addressing the allegation that Mrksic was entitled to particularity of pleading with respect to background facts relating to the military operations surrounding the siege of Vukovar, and to the siege itself. The alleged criminal responsibility of the Accused stems only from events which occurred after the end of the siege. On the other hand, the reference to the existence of a wider JCE goes beyond a mere background factual allegation, amongst other reasons because it involves a legal characterisation. Its position in the Consolidated Amended Indictment already provides an indication of its different nature: whilst the background facts mentioned earlier appear under the title "Factual Allegations", the reference to the wider JCE appears in the section dealing with the individual criminal responsibility of the Accused.

29. The reference to a wider JCE could give rise to ambiguity in the Consolidated Amended Indictment. Although the Consolidated Amended Indictment expressly states that, for its purpose, participation in the "[JCE] charged" is limited to the Accused and two other named individuals, doubt must arise as to whether this is so. As recognised by the jurisprudence of this Tribunal, participation in a JCE requires the existence of an arrangement or understanding amounting to an agreement between two or more persons that a particular crime will be committed.[64] Radic is correct in protesting that the link between the JCE in which the Accused are alleged to have participated and the wider JCE is not pleaded, and that this could give rise to ambiguity.[65] This ambiguity is already apparent, since the purpose of the wider JCE differs from that of the JCE charged in the Consolidated Amended Indictment.[66]

30. Although the reference to a wider JCE appeared already in the Second Amended Indictment, it was not challenged and the Trial Chamber did not address it in its Decision on Form of Second Amended Indictment.[67] That it did not do so is of no consequence because "SiCt is *not* the function of a Trial Chamber to check for itself whether the form of an indictment complies with the pleading principles which have been laid down. It is, of course, entitled *proprio motu* to raise issues as to the form of an indictment but, unless it does so, it waits until a *specific* complaint is made by the accused before ruling upon the compliance with the indictment with those pleading principles".[68]

31. As noted, the Prosecution maintains that the allegation of a wider JCE has no purpose beyond that of providing the backdrop to the Consolidated Amended Indictment.[69] The Prosecution provides no reason, let alone a compelling one, for its inclusion. The implications for the Accused of that allegation remaining in the Consolidated Amended Indictment outweigh the considerations put forth by the Prosecution. Consequently, the objection by Radic and Sljivancanin is upheld and the Prosecution will be ordered to remove this reference.

32. The next objection by Radic relates to the manner in which the extended form or third category of JCE has been pleaded in the Consolidated Amended Indictment.[70] Radic submits generally that the relevant material facts are lacking that would establish that the crimes enumerated in Counts 2 to 8 were the natural and foreseeable consequences of the execution of the JCE. In particular, he maintains that the Accused's awareness that the crimes enumerated in Counts 2 to 8 were the possible consequence of the execution of the JCE must be "*ab initio* clearly, unambiguously and sufficiently determined in the ?Consolidated Amendedg Indictment for each of the ?Agccused individually".[71] The Prosecution Response does not expressly address this issue.

33. The Tribunal's jurisprudence establishes that "it is preferable for an indictment alleging the accused's responsibility as a participant in a joint criminal enterprise also to refer to the particular form (basic or extended) of joint criminal enterprise envisaged".[72] The Consolidated Amended Indictment complies with this jurisprudence because it pleads in the alternative the basic form of JCE and the extended form of JCE.[73] Insofar as the basic form of JCE is concerned, the Trial Chamber interprets that the Prosecution pleads the first category of JCE, but not the second category of JCE.[74] The Trial Chamber believes it is appropriate to clarify this already at this stage of proceedings to avoid any ambiguity. If the Prosecution considers that the Trial Chamber has misconstrued its intentions on the matter, the Trial Chamber invites it to dispel any ambiguity either by requesting the Trial Chamber to revisit its decision or by seeking leave to further amend the Indictment.[75]

34. The jurisprudence also establishes that, in relation to the relevant state of mind (*mens rea*), either the specific state of mind itself should be pleaded (in which case, the facts by which that material fact is to be established are ordinarily matters of evidence, and need not be pleaded), or the evidentiary facts from which the state of mind is necessarily to be inferred, should be pleaded.[76] Paragraph 6 of the Consolidated Amended Indictment pleads the specific state of mind required for the third category of JCE in terms where it alleges that "the crimes enumerated in the Counts 2 to 8 were the natural and foreseeable consequences of the execution of the ?JCEg and each of the accused was aware that these crimes were the possible consequence of the execution of the ?JCEg".[77] The state of mind is clearly set out with respect to each of the three Accused. Accordingly, Radic's objection is rejected.

2. Article 7(3)

35. The Accused submit separately that the Consolidated Amended Indictment is defective because it fails to properly plead their alleged superior responsibility. Mrksic also challenges the sufficiency of the supporting materials to substantiate the fresh allegations contained in the Consolidated Amended Indictment. The Trial Chamber deems it appropriate to take these objections in turn.

36. Radic and Sljivancanin each submit that the Consolidated Amended Indictment lacks the material facts relating to their acts as superiors and the acts of their alleged subordinates.[78] The Prosecution responds that, read as a whole, the Consolidated Amended Indictment sufficiently pleads the responsibility pursuant to Article 7(3) of the Accused.[79]

37. Radic submits that the material facts regarding the acts of his subordinates, for which he is allegedly responsible, are insufficiently pleaded and that, in effect, his responsibility stems solely from his position in the JNA and specifically in the 1st Battalion of the 1st Guards Motorised Brigade. The Trial Chamber finds that the material facts regarding the acts committed, the individuals who committed them and their relationship to Radic are set out throughout the Consolidated Amended Indictment with enough detail to inform him of the nature and cause of the charges against him thus enabling him to prepare a defence effectively and efficiently.[80] Radic's objection is without merit and is rejected.

38. Sljivancanin submits that there is "no information whatsoever" in the Consolidated Amended Indictment (a) that the individuals who were his *de facto* subordinates committed *any* crimes and (b) that he had effective control over those who allegedly committed the crimes.[81] Sljivancanin also submits that the Prosecution's submissions are contradictory with respect to his position of superiority, because whilst paragraph 18 of the Consolidated Amended Indictment alleges that he was *de facto* in charge of a military police battalion, paragraph 19 alleges that all three Accused "exercised both *de jure* and *de facto* power over the forces under their command". The Trial Chamber finds that the Consolidated Amended Indictment identifies the "physical" perpetrators of the underlying acts for which the Accused are charged with enough detail to inform them of the nature and cause of the charges against them thus enabling them to prepare a defence effectively and efficiently. Whether it is true that the alleged "physical " perpetrators were Sljivancanin's *de facto* subordinates because he had effective control over them in the sense of a material ability to prevent the offences or punish the perpetrators is a matter to be resolved at trial.

39. On the other hand, the Trial Chamber upholds the objection regarding the nature of Sljivancanin's alleged position of superiority over his subordinates. The Trial Chamber's order to the Prosecution is in the following terms. If it *is* the Prosecution's case that Sljivancanin exercised both *de jure* and *de facto* power over the forces under his command, the Prosecution needs to plead this expressly by identifying those forces over which he held a *de jure* position of superiority, as it has done for Mrksic and Radic. In the event that this is *not* the Prosecution's case, it needs to amend paragraph 19 of the Consolidated Amended Indictment accordingly.

40. The next set of objections relate to the Prosecution's obligation to plead, in a case of superior responsibility, that the Accused must have known, or had reason to know, that his subordinates were about to commit the crimes alleged or had done so, and failed to take the necessary and reasonable measures to prevent these crimes or to punish the perpetrators thereof. Mrksic and Radic submit that these material facts have been insufficiently pleaded.[82] Mrksic emphasises that the Prosecution has failed to comply with the Trial Chamber's earlier order that the Prosecution plead these as material facts.[83] The Prosecution responds that the relevant material facts are fully pleaded.[84]

41. The Trial Chamber agrees that these material facts are pleaded with enough detail in the Consolidated Amended Indictment to inform the Accused of the nature and cause of the charges against them thus enabling them to prepare a defence effectively and efficiently.[85] Mrksic's and Radic's objections are rejected. Radic's request that further particulars be pleaded in the Consolidated Amended Indictment is also refused.[86] While the Prosecution is under an obligation to provide the best particulars that it can in presenting its case, this does not affect the form of the Consolidated Amended Indictment.[87]

42. As an additional challenge, Mrksic submits that the Prosecution did not provide any supplementary evidence to support these material facts, and in particular the fresh allegations contained in paragraph 32 of the Consolidated Amended Indictment.[88] The Prosecution responds that the supporting material is sufficient in this regard. Should the Trial Chamber find that it is insufficient, the Prosecution proposes to augment it with two statements previously disclosed to the Accused: the statements of Bogdan Vujic and Sljivancanin respectively to the Belgrade Military Tribunal.[89] In order for the Trial Chamber to determine whether the material which supported the indictments as originally confirmed is sufficient to substantiate material facts not previously pleaded, it must examine the relevant portions.[90] Accordingly, the Prosecution is directed to provide that material that it believes supports the newly pleaded material facts contained in the second and third sentence of paragraph 32 of the Consolidated Amended Indictment.

43. Radic also complains that the allegation in paragraphs 16 and 17 of the Consolidated Amended Indictment that Miroljub Vukanovic and Stanko Vujanovic were subordinate to Mrksic and Radic does not provide enough information to distinguish the area of responsibility of each within the JNA.[91] The Trial Chamber finds that this submission does not concern the sufficiency of pleading of material facts in the Consolidated Amended Indictment, but concerns instead the sufficiency of the evidence, and is an issue properly resolved at trial. Radic's objection is rejected.

44. Similarly, Mrksic's submission at paragraph 15 of his Motion, regarding conclusions to be drawn from the "Decision of the Great People's Assembly of the Serb province of Slavonija, Baranja and Western Srem", does not concern the sufficiency of pleading of material facts in the Consolidated Amended Indictment, but concerns instead an issue properly resolved at trial. The same applies to his submission that paragraph 32 of the Consolidated Amended Indictment is unclear about whether the "TO, volunteer and paramilitary soldiers [...] torturing and killing non-Serb prisoners being held at the Velepromet" were, if at all, subordinated to Mrksic.[92] Mrksic's objections are rejected.

B. Other Alleged Deficiencies in Particularity of Pleading

1. Relevance of Factual Allegation

45. Mrksic questions the significance of the allegation contained in paragraph 35 of the Consolidated Amended Indictment regarding the "meeting of the so-called government of the SAO SBWS" that was being held on 20 November 1991 at the Velepromet building, "a short distance away from the JNA barracks" where the detainees from Vukovar Hospital were being kept.[93] In addition, Mrksic complains about the omission of the material facts regarding this meeting that appeared in the Second Amended Indictment.[94] Paragraph 25 of the Second Amended Indictment stated that "[a]t this meeting, the JNA agreed to transfer the detainees to Ovcara farm, located about four kilometres southeast of Vukovar, and thereafter to relinquish custody of them to the local Serbs".[95] The Prosecution responds that in the Consolidated Amended Indictment this event is included as background information only and that no charges stem from it, so that the Prosecution "is under no obligation to prove any facts related to this meeting".[96] The Trial Chamber reiterates that the Prosecution is free to choose how to plead its case, as long as it sets out the material facts that will allow the Defence to meet the case. However, the Trial Chamber agrees with Mrksic that it is not apparent what the reference to the "meeting of the so-called government of the SAO SBWS", in paragraph 35 of the Consolidated Amended Indictment, was designed to achieve or how it is relevant. This paragraph could give rise to ambiguity, particularly in light of the material facts that were pleaded in the Second Amended Indictment. The Prosecution will be ordered to supplement its pleadings in the Consolidated Amended Indictment regarding the said meeting so that its relevance to the allegations contained therein becomes evident.

2. Designation of "Serb Forces" and Related Terms

46. The Accused challenge the Prosecution's use of the term "Serb forces" in the Consolidated Amended Indictment, on the grounds that it is imprecise.[97] The Prosecution responds that, in compliance with the Trial Chamber's previous order, the term "Serb forces" is designated in paragraph 7 of the Consolidated Amended Indictment and used consistently throughout, with the exception of those sections of it "where the term seemed over-inclusive"; there, the Prosecution has "specifically identified the subset of these Serb forces that participated in the events in question ".[98]

47. Mrksic raises a number of objections at paragraphs 6, 7, 8 and 16 of his Motion regarding the use of the term "Serb forces" in the Consolidated Amended Indictment. It is unnecessary to reproduce these objections here. The Trial Chamber agrees with the Prosecution that these submissions do not concern the sufficiency of pleading of material facts, but concern instead the sufficiency of the evidence and are issues properly resolved at trial.[99]

48. Sljivancanin submits that the reference to the category of "radical local Serbs " which appears in paragraph 12(f) of the Consolidated Amended Indictment is not designated as part of the "Serb forces" in paragraph 7 and is unclear.[100] The Trial Chamber upholds Sljivancanin's objection to the extent that the Prosecution must plead this category with a higher degree of specificity. If the Prosecution was referring to radical local Serb civilians, it should plead so in terms.

49. Sljivancanin further submits that the Consolidated Amended Indictment contains no definition of the category of "JNA forces" which appears in paragraphs 12(d) and 33.[101] The Trial Chamber understands this reference to mean JNA soldiers (or, as they appear in paragraph 7, members of the JNA). If its understanding is correct, the Trial Chamber invites the Prosecution to amend the Consolidated

Amended Indictment accordingly. If it is not correct, the Prosecution must plead this category with a higher degree of specificity. To this extent, Sljivancanin's objection is upheld.

50. Sljivancanin's final challenge to paragraph 7 of the Consolidated Amended Indictment consists of the submission that "the epithet "Serb forces" is completely inappropriate when it comes to StheC JNA", because according to him it is "undisputable" that in the period relevant to the Consolidated Amended Indictment, a "significant number of JNA members were of all nationalities and that its constitutional function was to protect StheC territorial integrity of SFRY".[102] The Trial Chamber reiterates that it is for the Prosecution to choose how to plead its case. If the Defence wishes to make a specific challenge to the way in which the Prosecution has done so, it can do this at trial. Sljivancanin's objection is rejected.

51. Sljivancanin also raises an objection to other terms employed in the Consolidated Amended Indictment. He submits that the Prosecution uses inconsistently the terms "individuals in a joint criminal enterprise" and "members of a joint criminal enterprise ". Whilst the Trial Chamber's preferred term is "members of a joint criminal enterprise ", nevertheless the Consolidated Amended Indictment is already sufficiently clear in this respect. Sljivancanin's objection is rejected.

3. Discrepancy in the Number of Victims

52. Mrksic notes the discrepancy in the Consolidated Amended Indictment between the number of victims alleged in paragraphs 39 and 45.[103] The Prosecution responds that Mrksic has failed to show that this discrepancy would prejudice the Accused; both paragraphs employ the phrase "at least", "thus giving the Accused adequate notice of the scope of the victims of the crimes charged", and the Annex to the Consolidated Amended Indictment specifies the victims' particulars.[104] For the sake of consistency, the Trial Chamber upholds Mrksic's objection and directs the Prosecution to harmonise these two paragraphs.

4. Requests for Further Particulars

53. The Trial Chamber has previously recognised that, while the Prosecution is under an obligation to provide the best particulars that it can in presenting its case, this does not affect the form of the Consolidated Amended Indictment.[105] It is inappropriate at this stage for the Accused to challenge the sufficiency of the evidence. If the information the Accused seek is not apparent from the witness statements made available by the Prosecution in accordance with Rule 66(A), the Accused's remedy lies in requesting the Prosecution to supply particulars of the statements upon which it relies to prove the specific material facts in question. If the Prosecution's response to that request is unsatisfactory, then and only then, the Accused may seek an order from the Trial Chamber that such particulars be supplied.[106]

54. The Trial Chamber finds that Sljivancanin's request for the Prosecution to plead more details with respect to the approximate time when he allegedly became aware that the crimes had been committed and what steps, if any, he took to conceal these crimes is a request effectively seeking particulars regarding material facts.[107] The same applies to his objection that "it is unclear how and by what means [he] personally prevented international observers from reaching the Vukovar Hospital".[108] The Trial Chamber agrees with the Prosecution that it is not required to plead evidence.[109] As stated above, Sljivancanin's remedy does not lie with the Trial Chamber at this time.[110] Sljivancanin's request is refused and his objection rejected.

55. In its Decision on Form of Second Indictment, the Trial Chamber ordered the Prosecution to disclose the identities of as many of the sick and wounded detainees referred to as were available to it.[111] Mrksic claims that the Prosecution has failed to comply with the Trial Chamber's order.[112] The Prosecution describes the measures it has taken to comply with this order and claims that it has done so to the best of its ability.[113] The Trial Chamber urges it to continue in its efforts to supplement them as best it can and provide them to the Accused.

56. Sljivancanin also raises the objection that the material facts regarding his alleged participation in negotiations over the evacuation of patients at Vukovar Hospital, and his subsequent disregard of the agreements reached are insufficiently pleaded in the Consolidated Amended Indictment.[114] The Prosecution responds that these material facts have been sufficiently pleaded and are substantiated by the supporting materials. It claims that Sljivancanin has failed to read the Consolidated Amended Indictment as a whole.[115] The Consolidated Amended Indictment specifies in paragraph 29 that the evacuation of Vukovar Hospital in the presence of international observers was agreed upon in Zagreb in

negotiations between the JNA and the Croatian government on 18 November 1991. The Prosecution further maintains that paragraph 31 shows that Sljivancanin "was assigned the task of organising and executing the evacuation pursuant to this agreement".[116] The Trial Chamber disagrees that the allegation that he was acting pursuant to this agreement is apparent from paragraph 31; if this is the Prosecution's case then it should plead it in terms. Moreover, the allegation that Sljivancanin was acting pursuant to an agreement is a far cry from the claim that he himself "participated in negotiations over the evacuation of patients at Vukovar Hospital".[117] Sljivancanin's objection is upheld. The Prosecution is ordered to plead its case more specifically as regards the alleged participation, if any, of Sljivancanin, and also of Mrksic,[118] in the negotiations between the JNA and the Croatian government on 18 November 1991 in Zagreb, if necessary by amending paragraphs 10(b), 12 (b), 29 and 31 of the Consolidated Amended Indictment.

5. Standard of Form of the Indictment

57. Radic and Sljivancanin contend that an indictment is required to satisfy the standard that the accused himself will understand its contents, whether factual or legal.[119] To enable him to do so, Radic requests that the Prosecution reorganise the Consolidated Amended Indictment.[120] The Prosecution resists this call for reorganisation and disputes the assertion that the legal standard required for the form of an indictment is that the indictment be presented "in a specific form understandable to every accused person, irrespective of the accused's general culture and level of education".[121] The Prosecution does not identify the relevant standard, but submits instead that "the Consolidated Amended Indictment is clear with respect to the charges against the Accused and the material facts supporting these charges".[122]

58. Indeed, the Appeals Chamber did not envisage the standard put forward by Radic and Sljivancanin when it held that:

> An indictment shall, pursuant to Article 18(4) of the Statute, contain "a concise statement of the facts and the crime or crimes with which the accused is charged ". Similarly, Rule 47(C) of the Rules provides that an indictment, apart from the name and particulars of the suspect, shall set forth "a concise statement of the facts of the case". The Prosecution's obligation to set out concisely the facts of its case in the indictment must be interpreted in conjunction with Articles 21 (2) and (4)(a) and (b) of the Statute. These provisions state that, in the determination of any charges against him, an accused is entitled to a fair hearing and, more particularly, to be informed of the nature and cause of the charges against him and to have adequate time and facilities for the preparation of his defence. In the jurisprudence of the Tribunal, this translates into an obligation on the part of the Prosecution to state the material facts underpinning the charges in the indictment, but not the evidence by which such material facts are to be proven. Hence, the question whether an indictment is pleaded with sufficient particularity is dependent upon whether it sets out the material facts of the Prosecution case with enough detail to inform a defendant clearly of the charges against him so that he may prepare his defence.[123]

Radic's and Sljivancanin's objection is rejected and Radic's request refused.

VI. THE APPLICATION TO AMEND

59. As stated earlier, the Prosecution Application for Leave to Amend the Indictments specifies that the Consolidated Amended Indictment "re-unifies the indictments against all three Accused".[124] It eliminates counts from previous indictments against the Accused and contains additional counts against Radic and Sljivancanin. These additional charges are, according to the Prosecution, "based on the same operative facts" as the original charges.[125] Furthermore, the Prosecution submits that the Consolidated Amended Indictment includes the information required by the Trial Chamber in its Decision on Form of Second Amended Indictment. Finally, the Prosecution claims that it "provides greater detail as to the nature of the individual criminal responsibility of all of the Accused, including their participation in the joint criminal enterprise".[126]

60. As noted earlier, only Sljivancanin expressly opposes the Prosecution's application to amend the existing indictments, and calls upon the Trial Chamber to "completely and thoroughly assess whether the Prosecution has given relevant argumentation in support of its request".[127] His grounds for opposing it have been explained throughout the present decision.[128]

61. The Tribunal's jurisprudence establishes as follows:

> The fundamental issue in relation to granting leave to amend an indictment is whether the amendment will prejudice the Accused unfairly. The word "unfairly" is used in order to emphasise that an amendment will not be refused merely because it assists the prosecution quite fairly to obtain a conviction. To be relevant, the prejudice caused to an accused would ordinarily need to relate to the fairness of the trial. Where an amendment is sought in order to ensure that the real issues in the case will be determined, the Trial Chamber will normally exercise its discretion to permit the amendment, provided that the amendment does not cause any injustice to the accused, or does not otherwise prejudice the accused unfairly in the conduct of his defence. There should be no injustice caused to the accused if he is given an adequate opportunity to prepare an effective defence to the amended case.[129]

62. There is nothing that in the belief of the Trial Chamber would indicate that the requested amendments could in any way prejudice the Accused unfairly.

63. The Trial Chamber has accepted that the Consolidated Amended Indictment contains certain deficiencies that need to be addressed and will order the Prosecution to amend it accordingly. Provided these defects are remedied, the Trial Chamber sees no reason to prevent the Prosecution from amending the existing indictments. Consolidating the charges against the Accused under a single indictment will ensure that the real issues in the case will be determined. Leave will accordingly be granted subject to the condition that the defects upheld by the Trial Chamber are cured. Radic and Sljivancanin will be allowed to enter a plea on the new charges as soon as practicable thereafter.

VII. DISPOSITION

For the foregoing reasons,

PURSUANT TO Rule 50(A)(i)(c) and Rule 72 (A)(ii),

TRIAL CHAMBER II HEREBY

1. **ALLOWS** a variation of page-limits regarding the Prosecution Response;

2. **ORDERS** the Prosecution to modify the Consolidated Amended Indictment attached to the Prosecution Application to Amend the Indictment in the terms set out in paragraphs 20, 31, 39, 45, 48, 52 and 56 of this decision and **INVITES** it to modify it in the terms set out in paragraph 49 of this decision;

3. **ORDERS** the Prosecution to provide the Trial Chamber with the supporting material referred to in paragraph 42 of this decision;

4. **GRANTS** the Prosecution leave to amend the 1997 Amended Indictment and the Second Amended Indictment as proposed in the Consolidated Amended Indictment subject to its modification pursuant to the order in number 2 above;

5. **DECIDES** that the modified Consolidated Amended Indictment shall replace the 1997 Amended Indictment and the Second Amended Indictment with respect to all charges against Mrksic, Radic and Sljivancanin;

6. **ORDERS** the Prosecution to file the modified Consolidated Amended Indictment within 14 days of the filing of this decision, *i.e.* by no later than 6 February 2004;

7. **DECIDES** that a further appearance of Radic and Sljivancanin will be scheduled by the Trial Chamber to be held as soon as practicable thereafter to allow them to enter a plea on the new charges contained in the Consolidated Amended Indictment;

8. **DECIDES** that Mrksic, Radic and Sljivancanin shall have a further period of 30 days, *i.e.* until no later than 8 March 2004, in which to file preliminary motions pursuant to Rule 72 in respect of the new aspects of the Consolidated Amended Indictment.

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

Dated this twenty-third day of January 2004,
At The Hague
The Netherlands

Carmel Agius
Presiding Judge

[Seal of the Tribunal]

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1 - Prosecution's Motion for Leave to File a Consolidated Amended Indictment, 21 July 2003 ("Prosecution Application to Amend the Indictments").
2 - *Prosecutor v Mrksic, Radic and Sljivancanin*, Case IT-95-13-I, Indictment, 7 Nov 1995 ("Initial Indictment").
3 - *Prosecutor v Mrksic, Radic, Sljivancanin and Dokmanovic* (†), Case IT-95-13a-I, Indictment, 1 Apr 1996 ("1996 Amended Indictment"); see also Prosecutor v Mrksic, Radic, Sljivancanin and Dokmanovic (†), Case IT-95-13a-I, Amendement de l'acte d'accusation, 3 Apr 1996.
4 - *Prosecutor v Mrksic, Radic, Sljivancanin and Dokmanovic* (†), Case IT-95-13a-PT, Amended Indictment, 2 Dec 1997 ("1997 Amended Indictment").
5 - *Prosecutor v Mrksic, Radic, Sljivancanin and Dokmanovic* (†),Case IT-95-13-a-T, Order Terminating Proceedings against Slavko Dokmanovic, 15 July 1998.
6 - *Prosecutor v Mrksic*, Case IT-95-13/1, Decision on Leave to File Amended Indictment, 1 Nov 2002.
7 - *Prosecutor v Mrksic*, Case IT-95-13/1, Second Amended Indictment, 29 Aug 2002 ("Second Amended Indictment"). The Trial Chamber will adopt this term for the sake of consistency and in order to avoid further confusion.
8 - *Prosecutor v Mrksic*, Case IT-95-13/1-PT, Decision on Form of the Indictment, 19 June 2003 ("Decision on Form of Second Amended Indictment").
9 - Sljivancanin initially appeared before a Judge of the Tribunal on 3 July 2003, but did not enter a plea until his further initial appearance on 10 July 2003.
10 - In this connection, Radic cautions that his current preliminary motion may repeat some of his earlier submissions contained in his "Defence Preliminary Motion" filed on 17 June 2003. This was to be expected to an extent. The Trial Chamber recalls that Radic's previous motion was dismissed because the alleged defects pertain to an earlier indictment which the Prosecution is presently seeking to amend. *See* Decision Dismissing Miroslav Radic's Preliminary Motion, 25 June 2003.
11 - Rules of Procedure and Evidence, IT/32/Rev.28, 28 July 2003.
12 - Scheduling Order for Filings, 25 July 2003. The deadline of 25 August 2003 established in the said "Scheduling Order for Filings" was postponed until 30 days after Sljivancanin was assigned defence counsel, which in practice turned out to be 31 October 2003. See Decision to Postpone the Deadline Established in the Scheduling Order for Filings, 1 Aug 2003; Second Scheduling Order for Filings, 7 Oct 2003.
13 - Defence Preliminary Motion, 8 Aug 2003 ("Mrksic Motion"); Preliminary Motion of the Accused Radic pursuant the Rule 72(A)(ii), 23 Oct 2003 ("Radic Motion"); Defendant Veselin Sljivancanin's Preliminary Motion, 31 Oct 2003 ("Sljivancanin Motion").
14 - Scheduling Order for Filings, 25 July 2003.
15 - Prosecution's Consolidated Response to Motions by Accused Mile Mrksic, Miroslav Radic and Veselin Sljivancanin Alleging Defects in the Form of the Consolidated Amended Indictment, 13 Nov 2003 ("Prosecution Response").
16 - *See* Prosecution Motion Requesting Variation of Page Limit for the Prosecution's Consolidated Response to Defence Motions Alleging Defects in the Form of the Indictment, 13 Nov 2003. *See also* Practice Direction on the Length of Briefs and Motions, IT/ 184 Rev.1, 5 Mar 2002, par C.5: "Motions and replies and responses before a Chamber will not exceed 10 pages or 3000 words, whichever is greater".

17 - *See* Defense Request to File a Reply to Prosecution's Response to Motions by Accused Mile Mrksic, Miroslav Radic and Veselin Sljivancanin Alleging Defects in the Form of the Consolidated Amended Indictment dated 13 November 2003, 17 Nov 2003; Request by the Accused Radic's Defence to Trial Chamber to Grant Leave to File a Reply to Prosecution's Consolidated Response to Motions by Accused Mile Mrksic, Miroslav Radic and Veselin Sljivancanin Alleging Defects in the Form of the Consolidated Amended Indictment Filed 13.11.2003, 20 Nov 2003; *See* also Decision Denying Mrksic's Request for Leave to File a Reply, 21 Nov 2003; Decision Denying Radic's Request for Leave to File a Reply, 28 Nov 2003.
18 - Prosecution Application to Amend the Indictment, par 7.
19 - Second Amended Indictment, Count 5. See also fn 7 above.
20 - 1997 Amended Indictment, Count 1 ("wilfully causing great suffering") and Count 4 ("wilful killing"). *See* also n 4 above.
21 - Prosecution Application to Amend the Indictments, pars 7 and 14.
22 - Statute of the International Criminal Tribunal for the former Yugoslavia ("Statute"), as amended by SRES/1481 (19 May 2003). Hereinafter, "Article" or "Articles" refer to an Article or Articles of the Statute.
23 - Count 1, Article 5(h) of the Statute.
24 - Count 2, Article 5(b) of the Statute.
25 - Count 6, Article 5(i) of the Statute.
26 - Count 8, recognised by Common Article 3(1)(a) of the Geneva Conventions and punishable under Article 3 of the Statute.
27 - Count 3, Article 5(a) of the Statute.
28 - Count 4, recognised by Common Article 3(1)(a) of the Geneva Conventions and punishable under Article 3 of the Statute.
29 - Count 5, Article 5(f) of the Statute.
30 - Count 7, recognised by Common Article 3(1)(a) of the Geneva Conventions and punishable under Article 3 of the Statute.
31 - Decision on Form of Second Amended Indictment, pars 7-14.
32 - Mrksic Motion, par 5; Radic Motion, par 46; Sljivancanin Motion, par 6.
33 - Prosecution Response, par 29.
34 - Prosecution Application for Leave to Amend the Indictments, pars 7 and 14.
35 - Sljivancanin Motion, pars 6 and 8.
36 - Sljivancanin Motion, par 14.
37 - Mrksic Motion, pars 5, 10.
38 - Prosecution Response, par 25.
39 - *See* par 59 below.
40 - *See* pars 61-62 below.
41 - Decision on Form of Second Amended Indictment, par 24; *Prosecutor v Brdanin and Talic*, Case IT-99-36-PT, Decision on Form of Further Amended Indictment and Prosecution Application to Amend, 26 June 2001, par 50.
42 - Mrksic Motion, par 5.
43 - Transcript of the Status Conference of Mrksic and Radic on 2 July 2003, at page 80; *See* also Transcript of the initial appearance of Sljivancanin on 3 July 2003, at page 110.
44 - Decision on Form of Second Amended Indictment, par 18 (footnotes omitted). In support of this conclusion, the Trial Chamber quoted from a decision in the case of *Prosecutor v Brdanin and Talic* which established as follows: "Although it is no longer necessary for an amended indictment to be "confirmed" after the case has been assigned to a Trial Chamber, leave will not be granted to add *new* allegations to an indictment unless the prosecution is able to demonstrate that it has material to support these new allegations –unless, of course, the evidence has already been given and the indictment is being amended merely to accord with the case which has been presented". *Prosecutor v Brdanin and Talic*, Case IT-99-36-PT, Decision on Form of Fourth Amended Indictment, 23 Nov 2001, par 21.
45 - *Prosecutor v Krnojelac*, Case IT-97-25-A, Judgement, 17 Sept 2003 ("*Krnojelac* Appeals Judgement"), par 138.
46 - See Consolidated Amended Indictment, pars 4, 13 and Counts 1-8.
47 - See *Prosecutor v Blaskic*, IT 95-14, Decision on the Defence Motion to Dismiss the Indictment Based Upon Defects in the Form Thereof (Vagueness/Lack of Adequate Notice of Charges), 4 Apr 1997, par 22.
48 - Emphasis added.
49 - Radic Motion, pars 16-17; Sljivancanin Motion, pars 48-49.
50 - Sljivancanin Motion, pars 40-44.
51 - Radic Motion, pars 18 and 21.
52 - Prosecution Response, par 17.
53 - Consolidated Amended Indictment, par 5.

54 - See *Prosecutor v Kupreskic et al*, IT-95-16-A, Appeal Judgement, 23 Oct 2001 ("*Kupreskic* Appeal Judgment"), par 88; Articles 18(4), 21(2) and 21(4)(a) and (b) and Rule 47(C), which essentially restates Article 18(4).
55 - Consolidated Amended Indictment, par 7.
56 - See Consolidated Amended Indictment, pars 41, 44 and 47.
57 - See Consolidated Amended Indictment, pars 10, 11 and 12.
58 - Consolidated Amended Indictment, par 9. *See* also *ibid*, pars 7, 10-12.
59 - Radic adds the submission that "[p]aragraph 11 (a) of the Indictment is in direct disagreement with the paragraph 7(c) of the Indictment" (Radic Motion, par 16). There is no paragraph 7 (c) in the Consolidated Amended Indictment. The Trial Chamber has understood Radic to mean paragraph 9 (c) instead, but fails to appreciate any inconsistency between the two said paragraphs.
60 - Paragraph 8 of the Consolidated Amended Indictment provides as follows: "[a]though this joint criminal enterprise was part of a wider joint criminal enterprise whose purpose was the forcible removal of a majority of the Croat, Muslim and other non-Serb population from approximately one-third of the territory of Croatia through the commission of crimes in violation of Articles 3 and 5 of the Statute of the Tribunal, including those who were present in the Vukovar Hospital after the fall of Vukovar, for the purpose of this indictment participation in the joint criminal enterprise charged in this indictment is limited to Mile MRKSIC, Miroslav RADIC, Veselin SLJIVANCANIN, Miroljub VUJOVIC and Stanko VUJANOVIC, and their subordinates".
61 - Radic Motion, pars 22-29; Sljivancanin Motion, pars 45-47.
62 - Prosecution Response, par 15.
63 - Decision on Form of Second Amended Indictment, par 33.
64 - *Prosecutor v Vasiljevic*, Case IT-98-32-T, Judgment, 29 Nov 2002 ("*Vasiljevic* Trial Judgement"), par 66.
65 - Radic Motion, pars 23-24.
66 - In this connection Radic raises the concern as to whether the crimes alleged in the Consolidated Amended Indictment were also natural and foreseeable consequences of the execution of the wider JCE: Radic Motion, par 27.
67 - See Second Amended Indictment, par 6.
68 - "This is fundamental to the primarily adversarial system adopted for the Tribunal by its Statute." *Prosecutor v Brdanin and Talic*, Case IT-99-36-PT, Decision on Objections by Momir Talic to the Form of the Amended Indictment, 20 Feb 2001, par 23 (footnotes omitted).
69 - The Prosecution concedes that "[t]he description of a wider joint criminal enterprise is included as background information only" and that "[n]one of the Accused face charges in connection with the wider joint criminal enterprise". Prosecution Response, par 15.
70 - For the different categories of JCE, *see Prosecutor v Tadic*, Case IT-94-1-A, Judgement, 15 July 1999 ("Tadic" Appeals Judgement), pars 185-229; *see* also *Prosecutor v Brdanin and Talic*, Case IT-99-36-PT, Decision on Form of Further Amended Indictment and Prosecution Application to Amend, 26 June 2001, pars 24-32.
71 - Radic Motion, par 15.
72 - *Krnojelac* Appeals Judgement, par 138.
73 - Consolidated Amended Indictment, pars 4 and 6.
74 - Consolidated Amended Indictment, par 6, because it does not plead that the Accused were acting in furtherance of a particular system in which the crime is committed by reason of the Accused's position of authority or function, and with knowledge if the nature of that system and intent to further that system. See Krnojelac Appeal Judgement, par 80; See also *Vasiljevic* Trial Judgement, par 64.
75 - See *Krnojelac* Appeals Judgement, par 141.
76 - Third *Brdjanin & Talic* Decision, par 33.
77 - Consolidated Amended Indictment, par 6. See *Prosecutor v Brdanin and Talic*, IT-99-36-T, Decision on Form of Further Amended Indictment and Prosecution Application to Amend, 26 June 2001, par 30; *See* also *Prosecutor v Milutinovic, Sainovic and Ojdanic*, IT-99-37-AR72, Separate Opinion of Judge David Hunt on Challenge by Ojdanic to Jurisdiction –Joint Criminal Enterprise, 21 May 2003, par 11.
78 - Radic Motion, par 36; Sljivancanin Motion, par 35.
79 - Prosecution Response, pars 19 and 21.
80 - *See* Consolidated Amended Indictment, pars 7, 17, 18, 34-41.
81 - Sljivancanin Motion, par 35.
82 - Mrksic Motion, par 12; Radic Motion, pars 40, 42 and 45.
83 - Mrksic Motion, par 12. See also Decision on Form of Second Amended Indictment, par 65.
84 - Prosecution Response, par 19.
85 - *See e.g.*: Consolidated Amended Indictment, pars 20 and 32.
86 - Radic Motion, par 45.
87 - *See* par 53 below.

88 - "By no later than the onset of the evacuation operation, Mile MRKSIC, Veselin SLJIVANCANIN and Miroslav RADIC knew of had reason to know of the serious threat radical elements of Serb forces comprised of JNA, TO, volunteer and paramilitary soldiers posed to the security of the patients and other people evacuated from the hospital, and the desire of these elements of Serb forces for revenge against the evacuees. In November 1991 before the fall of Vukovar, Miroslav RADIC was present with Stanko VUJANOVIC and others when Vojislav SESELJ visited the house of Stanko VUJANOVIC and publicly pronounced "Not one Ustasha must leave Vukovar alive". On the evening of 19 November 1991, reports reached Mile MRKSIC and Veselin SLJIVANCANIN that certain TO, volunteer and paramilitary soldiers were torturing and killing non-Serb prisoners being held at the Velepromet". Consolidated Amended Indictment, par 32. Mrksic also alleges that the material *annexed* to the Consolidated Amended Indictment fails to support the Prosecution's allegation that Vukovar TO units, volunteers and paramilitaries were subordinated to the Accused (Mrksic Motion, par 13). The difficulties that stem from calling these documents "Material in Support of the Consolidated Amended Indictment" have already been indicated, and also that it is the Trial Chamber's understanding that this is not the sole supporting material has already been indicated in par 16 above.
89 - Prosecution Response, par 29.
90 - According to the Prosecution, besides the supporting material it submitted with the Initial Indictment, the Prosecution submitted additional material for the confirmation of the 1997 Amended Indictment. See Prosecution Application to Amend, par 4.
91 - Radic Motion, par 35.
92 - Mrksic Motion, par 14.
93 - Mrksic Motion, par 10. See Consolidated Amended Indictment, par 35.
94 - Mrksic Motion, par 10.
95 - Second Amended Indictment, par 25.
96 - Prosecution Response, par 25.
97 - Mrksic Motion, pars 6-7; Radic Motion, par 36; Sljivancanin Motion, pars 58-59.
98 - Prosecution Response, par 14. *See* also Consolidated Amended Indictment, e.g.: pars 34, 35 and 37.
99 - Prosecution Response, pars 12 and 23.
100 - Sljivancanin Motion, par 58.
101 - Sljivancanin Motion, par 59.
102 - Sljivancanin Motion, par 57.
103 - Mrksic Motion, par 10. Par 39 of the Consolidated Amended Indictment alleges that "at least two hundred and sixty-seven Croats and other non-Serbs from Vukovar Hospital" were killed, whilst par 45 alleges that "at least two-hundred and fifty-five Croats and other non-Serbs were taken in groups and executed".
104 - Prosecution Response, par 26. The Trial Chamber notes that the Annex contains the names of 277 victims, including around 82 persons missing whose remains have not yet been identified.
105 - Decision on Form of Second Amended Indictment, par 48.
106 - *Prosecutor v Brdanin and Talic*, Case IT-99-36-PT, Decision on Form of Third Amended Indictment, 21 Sept 2001, par 8.
107 - Sljivancanin Motion, pars 54-55.
108 - Sljivancanin Motion, par 53.
109 - Prosecution Response, par 32.
110 - *See* par 53 above.
111 - Decision on Form of Second Amended Indictment, par 48.
112 - Mrksic Motion, par 18. See Decision on Form of Second Amended Indictment, par 48.
113 - Prosecution Response, pars 27-28.
114 - Sljivancanin Motion, pars 50-51.
115 - Prosecution Response, par 31.
116 - Prosecution Response, par 31.
117 - Consolidated Amended Indictment, par 12(b).
118 - *See* Consolidated Amended Indictment, par 10(b).
119 - Radic Motion, pars 28, 47-50. Sljivancanin Motion, par 24.
120 - Radic Motion, pars 49-50.
121 - Prosecution Motion, par 34.
122 - Prosecution Motion, par 34.
123 - *Kupreskic* Appeal Judgement, par 88 (footnotes omitted).
124 - Prosecution Application for Leave to Amend the Indictments, par 7.
125 - Prosecution Application for Leave to Amend the Indictments, pars 7 and 14.
126 - Prosecution Application for Leave to Amend the Indictments, par 7.
127 - Sljivancanin Motion, pars 11 and 15.
128 - See pars 11 and 13 above.

129 - *Prosecutor v Brdanin and Talic*, Case IT-99-36-PT, Decision on Form of Further Amended Indictment and Prosecution Application to Amend, 26 June 2001, par 50 (footnotes omitted).

IN THE TRIAL CHAMBER

Before: Judge Antonio Cassese, Presiding

Judge Richard May

Judge Florence Ndepele Mwachande Mumba

Registrar: Mrs. Dorothee de Sampayo Garrido-Nijgh

Order of: 13 February 1998

PROSECUTOR

v.

ZORAN KUPRESKIC
MIRJAN KUPRESKIC
VLATKO KUPRESKIC
VLADIMIR SANTIC also known as "VLADO"
DRAGO JOSIPOVIC
DRAGAN PAPIC

SCHEDULING ORDER

The Office of the Prosecutor:

Mr. Mark Harmon
Mr. Terree Bowers
Mr. Michael Blaxill

Counsel for the Accused:

Mr. Ranko Radovic, for Zoran Kupreskic
Ms. Jadranka Slokovic Glumac, for Mirjan Kupreskic
Mr. Borislav Krajina and Mr Zelimir Par, for Vlatko Kupreskic
Mr. Petar Pavkovic, for Vladimir Santic
Mr. Luko Susak, for Drago Josipovic
Mr. Petar Puliselic, for Dragan Papic

THE TRIAL CHAMBER, *proprio motu*,

NOTING the Prosecutor's Motion For Leave To Amend the Indictment filed on 9 February 1998 ("the Motion"), pursuant to Rule 50 of the Rules of Procedure and Evidence of the International Tribunal ("Rules"),

NOTING that the Office of the Prosecutor ("Prosecution") has stated in the Motion that the Prosecution does not intend to provide the supporting materials for the additional counts in

respect of which leave to amend is sought to the Defence unless and until the amendment is granted,

NOTING that the Defence has until Monday 23 February 1998 to file its response to the Motion,

CONSIDERING that it is essential for the Defence to review those materials in order to be able to respond fully to the Motion,

CONSIDERING also that, in another case, the supporting material accompanying an application for leave to amend an indictment pursuant to Rule 50 has been supplied to the Defence without objection,

NOTING FURTHER that the Prosecution seeks to withdraw certain of the charges contained in the original indictment confirmed by Judge McDonald on 11 November 1995,

CONSIDERING that, in order to determine the Motion, it is necessary for the Trial Chamber to examine the supporting materials presented to the confirming Judge, so as to understand and be fully informed as to the reasons why the Prosecution wishes to withdraw these charges, such materials having already been provided to the Defence,

PURSUANT to Rule 54 of the Rules

HEREBY ORDERS AS FOLLOWS:

1. The Registry shall immediately release to the Defence the supporting material filed in connection with the additional counts for which leave to amend is sought;

2. The Defence has until Monday 2 March 1998 to file its response to the Motion;

3. The Prosecution shall provide the Trial Chamber, no later than Thursday 19 February 1998, with copies of the supporting material presented to Judge McDonald in support of the charges to be withdrawn;

4. The Trial Chamber will hear oral argument on the Motion on Tuesday 10 March 1998 at 10 a.m.

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

Antonio Cassese
Presiding Judge

Dated this thirteenth day of February 1998

At The Hague

The Netherlands

[Seal of the Tribunal

IN THE SPECIAL COURT FOR SIERRA LEONE

THE TRIAL CHAMBER

Before: The Trial Chamber
Judge Bankole Thompson presiding
Judge Benjamin Itoe
Judge Pierre Boutet

Registrar: Mr Robin Vincent

Date filed: 19th February 2004

Case No. SCSL 2004 – 15 – PT

In the matter of:

THE PROSECUTOR

Against

ISSA SESAY
MORRIS KALLON
AUGUSTINE BAO

RESPONSE TO PROSECUTION'S MOTION TO AMEND THE INDICTMENT

Office of the Prosecutor

Mr Luc Cote, Chief of Prosecutions
Mr Robert Petit

Counsel for Augustine Bao

Mr Girish Thanki,
Professor Andreas O'Shea
Mr Kenneth Carr

Counsel for co-accused

Mr Timothy Clayson for Issa Sessay
Mr James Oury and Mr Steven Powles for Morris Kallon

A. Procedural background

1. The indictment against Augustine Bao was confirmed on 16 April 2003. The indictments against his co-accused on the current indictment (as amended on) were confirmed a little earlier on 7th March 2003. The initial appearances of these accused then took place on the 15, 21 and 25th March before their Honours Judge Itoe and Thomson respectively;

2. The current indictment results from an amendment ordered by the Trial Chamber after a decision to join the indictments against the said three accused. The substance of the allegations against the accused have not changed as a result of their joinder into one consolidated indictment;

3. The prosecution now submits a request to amend the indictment by adding a fresh and different count, that is forced marriages. This is a count which is factually and legally quite distinct from any existing count. Yet the prosecution does not offer a proper factual and legal basis for its request. It produces no supporting material or fresh evidence to justify the said count in support of its motion to amend. It further has not demonstrated why the count or the evidence to support it could not have been included in the original charges, forming the basis of the arrest of the accused, or at least before the respective indictments were approved;

4. The prosecution further wishes to amend certain time periods and places for offences. Save in one respect the prosecution fails to demonstrate that it has come into possession of fresh evidence that could justify seeking an amendment at this stage of the proceedings;

5. The prosecution further seeks an amendment in proposal I by way of including alternative spellings to place names. The defence has no objection to these amendments;

B. Nature of discretion to grant or refuse leave to amend in terms of Rule 50 of the Rules of Procedure and Evidence

6. While it is the prerogative of the Prosecutor to amend the indictment, this prerogative is supervised by the Trial Chamber. The Prosecutor has an opportunity to amend the indictment without leave before its approval. Once it has been approved it becomes the premise of the trial. Thereafter, the Trial Chamber has a discretion whether to grant or refuse further requests for amendment. In *Prosecutor v Niyitigeka* and also in *Prosecutor v Bizimungu* it was aptly noted that 'once the indictment is confirmed, the Prosecutor's power to confirm an indictment is not unlimited and must be considered in the light of the overall interests of justice as envisaged by Rule 50(A)';[1]

7. It is respectfully submitted that in order to preserve the integrity of proceedings and ensure the highest standards of fairness in a trial the Trial Chamber has the right and duty to closely scrutinise any request for amendment that is made after the approval of the indictment. It is further submitted that such supervision of the prosecution's amendments should become stricter after the accused has pleaded to the indictment, exercising greater caution in permitting amendments as the trial approaches. It is submitted that this follows if the rights of the accused to fair and prompt notice of the charges, knowledge of the basis of his arrest, a speedy trial and the right to adequate time and facilities to prepare for trial are all to be respected;

8. It is therefore submitted that the discretion of the Trial Chamber is a broad one, but one which should be exercised having full regard to the rights of the accused and reasonableness of the conduct of the prosecution;

C. Supporting material or fresh evidence

9. When requesting leave to amend the indictment the prosecution clearly has the onus to establish the factual and legal basis of the proposed amendment.[2] The prosecution seems to interpret the notion of factual basis to mean the factual grounds for the count, when it is submitted what is also important is the factual context of its failure to seek an amendment at an earlier stage. The prosecution does not indicate if or when it has received any fresh evidence to substantiate the proposed new count of forced marriages. It simply states that it will rely on existing disclosure on the defence. Furthermore, the prosecution has failed to show why it could not have sought the proposed amendment at an earlier stage. It is respectfully submitted that, when requesting leave to amend, the prosecution must establish a factual premise to its request for leave, and afford the defence an opportunity to respond to that asserted factual basis. It is submitted that the onus to establish the basis of the prosecution's request has not been discharged in this case and that such leave should therefore not be granted.

D. Due diligence on the part of the prosecution

10. It is respectfully submitted that the Trial Chamber, before granting leave to amend after it has approved an indictment, must be satisfied that there are good reasons why the inclusion of the new count or the amendment of the indictment could not have been sought at an earlier stage. It is submitted that the prosecution must not be permitted to take a tactical advantage of the defence through the unnecessarily late inclusion of a count in an indictment.[3] The prosecution has exclusive knowledge of the extent and nature of its investigations. Thus, the prosecution's bone fides and reasonableness in

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[1] See *Prosecutor v Bizimungu et al* (Government II),), ICTR 99-50-I, Decision on the Prosecutor's Request to File an Amended Indictment, 6th October 2003 par 26

[2] See *Prosecutor v Bizimungu* et al (Government II), ICTR 99-50-I, Decision on the Prosecutor's Request to File an Amended Indictment, 6th October 2003 (Trial Chamber II).

[3] See *Prosecutor v Karamera* et al (Government I)ICTR 98-44-T, Decision of 19th December 2003 (AC); and *Prosecutor v Kovacevic*, Decision stating reasons for Appeals Chamber's Order of 29 May 1998, 2 July 1998

seeking a particular amendment can only be monitored by the defence and the court if the prosecution has established the factual basis of its proposed amendment with sufficient clarity to enable the conduct of the prosecution to be discernable. Again, the defence should be in a position to respond to the prosecution's request, based on the its assertions in this respect;

11. In principle, although the prosecution may conduct continuing investigations, it is submitted that it has a duty to inform the accused of the charges against him at the earliest opportunity. This follows from the requirement, enshrined in article 17(4)(a) of the Statute of the Special Court for Sierra Leone and international instruments including articles 9 and 14 of the International Covenant on Civil and Political Rights of 1966,[4] article 6(3)(a) of the European Convention of Human Rights and articles 7(4) and 8(2)(b) of the American Convention on Human Rights,[5] that the accused be informed promptly of 'all' the charges against him. This principle not only protects the accused from unlawful arrest but also incorporates the notion that the accused should know the whole case against him as soon as possible to preserve the integrity and fairness of the trial. The duty to supply prompt information on charges also follows from the right to time and facilities to prepare one's case as well as the right to a speedy trial;

12. In this case the prosecution's motion does not clarify or afford the defence an opportunity to respond as to the extent to which the prosecution has acted with diligence in seeking the proposed amendment. The defence and the court are not appraised of the necessary information as to whether or when fresh evidence was obtained and what prevented the inclusion of this count at an earlier stage;

E. Justification of resultant delay

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[4] Articles 9 and 14 (3) (a) differ to the extent that the former relates specifically to the time of the arrest, whereas the latter is expressed in general terms. Article 14(3)(a) provides for the right 'to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him.

[5] Articles 7(4) and 8(2)(b) differ to the extent that the former relates specifically to the time of the arrest, whereas the latter is expressed in general terms. Article 8(2)(b) provides for the right to 'prior notification to the accused in detail of the charges against him'.

13. While a trial date has not been set at the date of this response, one may have been set by the time the court decides this question, since a status conference is envisaged for the beginning of March 2004. In all the circumstances including the limited budget of the court it should be clear to all parties that the setting of a trial date is imminent and likely to be envisaged for a date as early as the month of May 2004. If the proposed amendment is accepted, the prosecution may seek to disclose further witness statements (a matter on which there is no clarity from the prosecution motion) and the defence may require additional time to investigate the substance of the additional charge. Furthermore, the inclusion of this proposed count will require a further initial appearance of the accused and a period of fourteen days for the defence to file further preliminary motions in terms of Rule 50 (B) and (C). This may require a postponement of the commencement of the trial or the presentation of evidence depending on the nature of the preliminary motions submitted. The prosecution suggests that the defence would need no further time to prepare since its proposed change is a matter of legal caracterization. However, the accused had no previous notice that the particular charge of forced marriages formed part of the prosecution case. The reference to other inhumane acts is far to vague for this purpose;

14. The prosecution refers to the case of *Prosecutor v Karamera et al,* decided before the Appeals Chamber of the International Criminal Tribunal for Rwanda, for its proposition that there has not been undue delay. The Appeal Chamber in that case referred the matter back to the Trial Chamber on the basis that it had taken into account irrelevant considerations and not taken into account relevant ones. The Trial Chamber subsequently, on 13th February 2004, decided to grant the prosecution's amendment partially.[6] However, the case was very different from the present one since in its arguments before the Trial Chamber the prosecution relied on fresh evidence discovered or obtained subsequent to the confirmation of the indictment and developments in the jurisprudence as a justification for not having made its proposed amendments

earlier. In its decision on amendment of 13th February 2004, the Trial Chamber examined in detail the prosecution's assertion of fresh evidence in order to determine whether the prosecution had acted with due diligence in seeking its amendment.

15. For such reasons, it is submitted that, having regard to the accused right to be tried without undue delay under article 17(4)(C) of the Statute, the prosecution's delay in seeking its amendment can only be justified to the extent that it can demonstrate that any consequent further delays are a reasonable sacrifice having regard to inter alia its own diligence and do not cause prejudice to the accused. It is submitted that this onus has not been discharged.

THEREFORE THE DEFENCE HEREBY MAKES THE FOLLOWING PRAYER:

It is respectfully requested that the prosecution request to amend the indictment be rejected save in the one respect indicated hereinbefore at paragraph 5 of this response.

Girish Thanki
Andreas O'Shea
Kenneth Carr

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[6] *Prosecutor v Karamera et al(Government I)*, (TC III-ICTR) Decision Relative a la Requete du Procureur aux Fins d'Etre Autorise a modifier l'Acte d'Accusation, 13th February 2004

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UNITED

NATIONS

International Tribunal for the

Prosecution of Persons

Responsible for Serious Violations of International Humanitarian Law

Committed in the Territory of the

Former Yugoslavia since 1991

Case No: IT-97-24-AR73

Date: 2 July 1998

Original: English

IN THE APPEALS CHAMBER

Before: Judge Gabrielle Kirk McDonald (Presiding)

Judge Mohamed Shahabuddeen

Judge Wang Tieya

Judge Rafael Nieto-Navia

Judge Almiro Simões Rodrigues

Registrar: Mrs. Dorothee de Sampayo Garrido-Nijgh

Decision of: 2 July 1998

PROSECUTOR

v.

MILAN KOVACEVIC

DECISION STATING REASONS FOR APPEALS CHAMBER'S ORDER OF

29 MAY 1998

Office of the Prosecutor:

Ms. Brenda Hollis

Mr. Michael Keegan

Counsel for the Accused:

Mr. Dusan Vucicevic

Mr. Anthony D'Amato

I. INTRODUCTION

A. Background

1. The Prosecutor sought leave before the Appeals Chamber of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 ("International Tribunal") to appeal against a decision of Trial Chamber II refusing her leave to amend an indictment by the addition of fourteen counts to an original single count. By Order dated 29 May 1998, the appeal was allowed. The Order indicated that the reasons for allowing the appeal would be put in writing in due course. This Decision sets forth those reasons.

2. In the original Indictment ("Indictment") against the accused Milan Kovacevic, confirmed by Judge Odio-Benito on 13 March 1997, Mr. Kovacevic was charged with a single violation of Article 4, sub-paragraph (3)(e), of the Statute of the International Tribunal ("Statute"), complicity in genocide. At the confirmation hearing on the same date, the Deputy Prosecutor explained that, while the Indictment contained only one count, the Office of the Prosecutor ("prosecution") intended to amend the Indictment to include other charges in the event of an arrest. The accused was arrested and transferred to the custody of the International Tribunal on 10 July 1997. At the Initial Appearance held on 30 July 1997, the accused pleaded not guilty to the charge of complicity in genocide.

3. The defence was first notified of the prosecution's intention to amend the Indictment on 11 July 1997, during the first meeting between the defence and prosecution. The defence then filed a Motion to Clarify Standards Implicit in Rule 50 Regarding Amendment on Indictment on 10 September 1997, to which the prosecution responded on 24 September 1997. In its Decision on this Motion, the Trial Chamber, on 1 October 1997, held that the issues involved were to be considered in Plenary. Rule 50 of the Rules of Procedure and Evidence ("Rules") was subsequently amended in Plenary, and became effective on 12 November 1997.

4. The matter of amendment of the Indictment was further addressed at a motions hearing before the Trial Chamber on 10 October 1997, where the Presiding Judge noted that the Indictment was to be amended "in due course, whatever that may mean". Pointing out that the composition of the Trial Chamber was to be altered, he observed that this was a matter that would be dealt with by the new Trial Chamber to be constituted in November. On this occasion the prosecution indicated that there was a possibility that the envisaged amendment would include "a more substantive charge" which would need to be supported by additional materials.

5. During a status conference before the Trial Chamber in its new composition, on 24 November 1997, the prosecution confirmed its intention to seek an amendment to the Indictment and declared that it would be in a position to do so on 19 December 1997. However, expressing concern that the medical condition of the accused might be such that going through the process of seeking leave to amend the Indictment would prove to be irrelevant, the prosecution expressed its preference for this matter be considered only after a decision had been reached on a pending application for provisional release filed by the defence. The prosecution further declared that, in its amendment, it would be seeking to include not only the genocide count, but also charges of grave breaches of the Geneva Conventions. Neither the Bench nor the defence responded to this latter statement. The Trial Chamber on this occasion decided not to timetable anything beyond the application for provisional release, and declared that depending on the outcome of that decision it would then go on to timetable the prosecution motion to amend the Indictment, if filed, in the new year. On 16 January 1998, the Trial Chamber rejected the defence's application for provisional release, and ordered the prosecution to file its motion to amend the Indictment by 28 January 1998.

6. The full scope of the amendment to the Indictment became apparent on 28 January 1998, when the prosecution filed its Request for Leave to file an Amended Indictment ("Request"). The draft Amended Indictment seeks to add fourteen additional counts to the single count of complicity in genocide. These new counts would cover Articles 2, 3, and 5 of the Statute and are based on expanded factual allegations. While the original Indictment is 8 pages in length, the proposed Amended Indictment is 18 pages.

7. On 5 March 1998, the Trial Chamber issued the Decision on Prosecution's Request to File an Amended Indictment ("Decision"), pursuant to Rules 50 and 73(A) of the Rules, refusing the prosecution's Request. The Trial Chamber found the amendments to be so substantial as to amount to a new indictment. In its view, to accept the Amended Indictment would be to substitute a new indictment for the confirmed Indictment at the stage of the proceedings when the trial was set to begin on 11 May 1998. The Trial Chamber found that the prosecution produced insufficient reasons that do not justify its delay in bringing the Request nearly one year after confirmation and seven months after the arrest of the accused. The Trial Chamber decided to deny the Request, in order to protect the rights of the accused to be informed promptly of the charges against him, and to be accorded a fair and expeditious trial, as well as in the interests of justice.

8. Noting that the defence had no objection to the prosecution's request for interlocutory review of the Trial Chamber's Decision, on 22 April 1998, a Bench of the Appeals Chamber, in the Decision on Application for Leave to Appeal by the Prosecution ("Decision on Application") granted leave to appeal. The Appeals Chamber decided to hear the appeal "expeditiously on the basis of the original record of the Trial Chamber and without the necessity of any written brief . . . and without oral hearing".

9. On 1 May 1998, the prosecution submitted a Brief in Support of Prosecutor's Application for Leave to Appeal From the Trial Chamber's Denial of the Prosecutor's Request for Leave to File an Amended Indictment. A Defence Reply to Prosecutor's Brief in Support of Leave to Appeal was filed on 5 May 1998.

B. Submissions of the Parties

Prosecution

10. The prosecution submits that the Decision is contrary to the standards set down by international human rights law with respect to reasonable delay. It contends that the pre-trial detention in the present case does not violate international standards under the International Covenant on Civil and Political Rights ("ICCPR") or regional standards under the European Convention on Human Rights ("ECHR").

11. In the view of the prosecution, Article 21, sub-paragraph (4)(c) of the Statute should be interpreted in the light of Article 14(3)(c) of the ICCPR because the former was based almost verbatim on the latter. The prosecution submits that a commentary to the ICCPR states that "undue delay" or "reasonable time" under Article 14(3)(c) "depends on the circumstances and complexity of the case".

12. The prosecution submits that the Trial Chamber erred in law by holding that the right of the accused to be informed promptly of the charges against him would be infringed by allowing leave to amend the Indictment. It asserts that the Trial Chamber misapplied Article 9 of the ICCPR in coming to this conclusion.

13. The prosecution submits that the decisions of the European Commission and of the European Court of Human Rights interpreting Articles 5(3) and 6(1) of the ECHR establish that the judiciary must determine the meaning and requirements of the phrase "within a reasonable time" according to the specific circumstances of the case at hand. With respect to Article 5(3), the prosecution finds in the jurisprudence the following essential factors that the court must consider: "the complexity and special characteristics of the investigation; the conduct of the accused; the manner in which the investigation was conducted; the actual length of detention; the length of detention on remand in relation to the nature of the offence; and the penalty prescribed and to be expected in the case of conviction". With respect to the interpretation of "within a reasonable time" in Article 6(1), the prosecution finds in the settled law the following criteria: the "complexity of the case, the manner in which the investigation was conducted, the conduct of the accused relating to his role in delaying the proceedings and his request for release, the conduct of judicial authorities, and the length of proceedings".

14. The prosecution submits that the Trial Chamber arrived at the Decision on the basis of expediency to maintain a starting date for trial of 11 May 1998, rather than by looking at the merits of the Prosecution's Request to File an Amended Indictment. The prosecution argues that Article 20 of the Statute guarantees both parties a fair and expeditious trial, and that the Trial Chamber did not consider the harm to the prosecution's case caused by the Decision. The prosecution claims that the Decision forces it "to proceed to trial on a single charge of complicity in genocide which does not accurately reflect the totality of the alleged conduct of the accused", and "without any options to account for the contingencies of proof at trial, despite the fact that the evidence submitted with the Amended Indictment establish[es] [what it considers to be] a *prima facie* case against the accused" for violations other than complicity in genocide.

15. The prosecution contends that the Trial Chamber erred by not affording it an opportunity to present additional material in support of the delay in submitting the request for leave to amend. The prosecution further claims that the Trial Chamber erred in failing to determine whether any of the proposed charges in the Amended Indictment could have been confirmed without resulting in undue delay of the scheduled trial date.

Defence

16. The defence submits that the prosecution should not be permitted to amend the Indictment by adding 14 new counts ten and a half months after confirmation of the Indictment. It is the position of the defence that the "Prosecution deliberately chose to withhold the addition of these counts until 28 January 1998". The defence claims that Article 9(2) of the ICCPR is applicable in this case and entitles Mr. Kovacevic to full disclosure of the reasons for his arrest and prompt disclosure of the charges against him. The defence argues that the accused was denied his right to be fully and promptly informed of the case against him because the prosecution did not reveal the 14 additional charges against the accused until six and a half months after his arrest. The defence contends that the prosecution behaved in an opportunistic fashion that is in clear violation of international human rights principles under the ICCPR.

17. The defence submits that the delay is *ipso facto* undue and unreasonable because the Trial Chamber found that the prosecution had no legitimate reason for the delay in amending the Indictment. It is the position of the defence that the delay by the prosecution in amending the Indictment is due to the prosecution's strategic manoeuvring. The defence alleges that not only did the prosecution purposely delay disclosing the new charges to the accused, but that it withheld these charges from the accused in an effort to obtain his co-operation against other persons. In its submissions to the Trial Chamber, the defence asserted that it would require seven months to prepare its case if the new charges were to be added. The Trial Chamber accepted this assertion. The defence submits that the resulting delay of trial would violate the accused's right to be tried without undue delay.

18. The defence asserts that the prosecution's supporting materials do not give rise to a *prima facie* case, given that certain elements of the prosecution's case have not been proved, including the intent on the part of the accused to participate in a plan to commit genocide, and the position of the accused as a civilian in the chain of command of the military and police forces.

C. Applicable Provisions

19. It is appropriate to set out in relevant parts the applicable provisions of the Statute and the Rules of the International Tribunal, as well as certain provisions of the International Covenant on Civil and Political Rights and the European Convention on Human Rights.

Statute

Article 20

Commencement and conduct of trial proceedings

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

2. A person against whom an indictment has been confirmed shall, pursuant to an order or an arrest warrant of the International Tribunal, be taken into custody, immediately informed of the charges against him and transferred to the International Tribunal.

3. The Trial Chamber shall read the indictment, satisfy itself that the rights of the accused are respected, confirm that the accused understands the indictment, and instruct the accused to enter a plea. The Trial Chamber shall then set a date for trial.

[...]

Article 21

Rights of the accused

[...]

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

[...]

4. In the determination of an 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;

(c) to be tried without undue delay;

[...]

Rules

Rule 50

Amendment of Indictment

(A) The Prosecutor may amend an indictment, without leave, at any time before its confirmation, but thereafter, until the initial appearance of the accused before a Trial Chamber pursuant to Rule 62, only with leave of the Judge who confirmed it. At or after such initial appearance amendment of an indictment may only be made by motion before that Trial Chamber pursuant to Rule 73. If leave to amend is granted, Rule 47(G) and Rule 53 *bis* apply *mutatis mutandis* to the amended indictment.

(B) If the amended indictment includes new charges and the accused has already appeared before a Trial Chamber in accordance with Rule 62, a further appearance shall be held as soon as practicable to enable the accused to enter a plea on the new charges.

(C) The accused shall have a further period of sixty days in which to file preliminary motions pursuant to Rule 72 in respect of the new charges and, where necessary, the date for trial may be postponed to ensure adequate time for the preparation of the defence.

Rule 59 *bis*

Transmission of Arrest Warrants

[...]

(B) At the time of being taken into custody an accused shall be informed immediately, in a language the accused understands, of the charges against him or her and of the fact that he or she is being transferred to the Tribunal. Upon such transfer, the indictment and a statement of the rights of the accused shall be read to the accused and the accused shall be cautioned in such a language.

[...]

Rule 62

Initial Appearance of Accused

Upon the transfer of an accused to the seat of the Tribunal, the President shall forthwith assign the case to a Trial Chamber. The accused shall be brought before that Trial Chamber without delay, and shall be formally charged. The Trial Chamber shall:

(i) satisfy itself that the right of the accused to counsel is respected;

(ii) read or have the indictment read to the accused in a language the accused speaks and understands, and satisfy itself that the accused understands the indictment;

(iii) call upon the accused to enter a plea of guilty or not guilty on each count; should the accused fail to do so, enter a plea of not guilty on the accused's behalf;

[...]

ICCPR

Article 9

1. Everyone has the right to liberty and security of persons. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law.

2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.

[...]

Article 14

[...]

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

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

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

(c) To be tried without undue delay.

[...]

ECHR

Article 6

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

[...]

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

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

[...]

II. DISCUSSION

20. In sum, the motion for leave to amend was refused on the general ground that to allow the amendments would prejudice the right of the accused to a fair and expeditious trial, and, more particularly, because of the following reasons:

21. First, the new counts involved an unacceptable increase in the size of the original Indictment. Secondly, they led to undue delay. Thirdly, the accused was not informed promptly of the additional charges. Before this Chamber, the defence raised the point whether the addition of the new counts was barred by the speciality principle of extradition law.

These four points are dealt with below.

i). Whether the size of the proposed amendments was objectionable

22. As to the first ground on which leave to amend was refused, the Trial Chamber found that the new "counts cover Articles 2, 3, and 4 of the Statute, and are based on substantially expanded factual allegations", and that "[t]he proposed amendment ... is so substantial as to amount to a substitution of a new indictment". It noted that the amendments would add fourteen counts to one original, and would increase the length of the Indictment from 8 pages to 18.

23. This Chamber sees no sufficient reason to reject the substance of the explanation of the Prosecutor that the "expansion of the indictment from 8 to 18 pages, referred to by the Trial Chamber, is merely due to the organisational layout of the document, which repeats many of the same facts in the prefatory paragraphs for each group of counts". But for that editorial approach, a shorter document would have been produced.

24. No doubt, size can be taken into account in considering whether any injustice would be caused to the accused; but, provided other relevant requirements are met, a court would be slow to deny the prosecution a right to amend on that ground only. The Trial Chamber did not consider whether any possible injustice arising from size could be remedied by disallowing only some of the amendments, in which case, the prosecution could have been asked to indicate its preferences: it rejected the whole.

25. In the circumstances of the case, this Chamber is not satisfied that the size of the amendments was objectionable.

ii). Whether the amendments would cause undue delay

26. The second ground of refusal was undue delay. Some domestic systems impose stricter limits than those enjoined by internationally recognised standards. It is the latter which apply to proceedings before the International Tribunal. Does any basis appear for saying that these latter standards would be violated by granting the requested amendments?

27. The accused spent six and a half months in detention before the prosecution filed its motion for leave to amend the Indictment. The trial was due to take place three and half months later. If the motion was granted, the defence would need seven months to prepare in respect of the new changes. How long the trial will take is not something to be considered at this stage.

28. The question faced by the Appeals Chamber is whether the additional time which the granting of the motion for leave to amend would occasion is reasonable in the light of the right of the accused to a fair and expeditious trial, as enshrined under Article 20, paragraph 1, and Article 21, sub-paragraph 4(c), of the Statute. These statutory provisions mirror the

protections offered under Article 14(3) of the International Covenant on Civil and Political Rights. The jurisprudence of the United Nations Human Rights Committee shows that the question of what constitutes an undue delay turns on the circumstances of the particular case.

29. In the case at hand, although the details were not given and the exact size of the amendments was not conveyed, from the beginning of the proceedings the prosecution did indicate its intention to amend the Indictment, by adding new counts. In subsequent motion hearings, the prosecution raised the issue of setting a suitable date for the Trial Chamber to hear the prosecution's motion for leave to amend. The prosecution submitted that it would be better to wait until after the Trial Chamber had disposed of the provisional release motion brought by the defence. The defence made no objection to this submission. The Trial Chamber agreed with the prosecution's submission and scheduled the motions accordingly.

30. The right of an accused to be informed promptly of the nature and cause of the charges against him, enshrined in similar terms in Article 6(3)(a) of the ECHR, Article 14(3)(a) of the ICCPR and Article 21, sub-paragraph 4(a) of the Statute of the International Tribunal, constitutes one element of the general requirement of fairness that is a fundamental aspect of a right to a fair trial. The following common general principles which may be derived from the practice of the European Court of Human Rights in relation to Article 6 of the ECHR provides some guidance as to how to interpret the requirements set out in Article 21, sub-paragraphs 4 (a) and (c) of the Tribunal's Statute: firstly, that the accused's right to be informed promptly of the charges against him has to be assessed in the light of the general requirement of fairness to the accused; secondly, that the information provided to the accused must enable him to prepare an effective defence; thirdly, that the accused must be tried without undue delay; and fourthly, that the requirement must be interpreted according to the special features of each case. This is consistent with the provisions of the Statute, which in Article 21, sub-paragraph 2 provides that all accused are entitled to a fair and public hearing, and thereafter in sub-paragraph 4 sets out the right of the accused to be informed promptly of the charge against him, and to be tried without undue delay, as part of the specific minimum guarantees necessary to ensure that this general requirement of fairness is met.

31. As it relates to the present Appeal, the timeliness of the Prosecutor's request for leave to amend the Indictment must thus be measured within the framework of the overall requirement of the fairness of the proceedings. Based upon the estimates of the defence, which were accepted by the Trial Chamber, it would take an additional seven months for the defence to prepare to defend against the charges in the Amended Indictment. Considering the complexity of the case, the omission of the defence to object to the prosecution's motion to schedule consideration of the request for leave to amend the Indictment until after the motion for provisional release had been decided, and the Trial Chamber's decision accepting the prosecution's proposal, the extension of the proceedings, even by a period of seven months, would not constitute undue delay and would afford the accused a fair trial.

32. There is one other aspect of this branch. Delay which is substantial would be undue if it occurred because of any improper tactical advantage sought by the prosecution. Was such advantage sought?

33. In replying to the prosecution's application for leave to appeal, the accused asserted that the prosecution had been deferring its request for the amendment in order to compel the accused to grant an interview to the prosecution, to obtain his co-operation against other persons, and to change his plea. The prosecution did not reply to that complaint. But the complaint had not been made before the Trial Chamber even though, before that Chamber, prosecuting counsel had volunteered, as one of the reasons for not earlier applying for leave to

amend, that the prosecution "had a question of whether the accused was going to submit to an interrogation, which he ultimately chose not to do, which is his right, but that would also affect the question of when to bring forth an amendment". In its Decision, the Trial Chamber did not mention any complaint by the accused that the prosecution was seeking a tactical advantage, and did not found its holding on that point. In the circumstances, this Chamber would not give effect to the allegation of the defence that an improper advantage was being sought by the prosecution.

iii). Whether there was a failure to disclose the new charges promptly

34. As to the third ground of refusal, the defence argues that, where the prosecution brings an indictment for only some of the charges which it was then in a position to bring, the other charges are charges which it is required promptly then to disclose to the defence by reason of Article 9(2) of the International Covenant on Civil and Political Rights, and that, not having done so, it is prohibited from later seeking an amendment of the Indictment for the purpose of including them. In contrast, the prosecution regards Article 9 of the ICCPR as having "absolutely no application to the issues at hand". In its view neither the Statute and Rules of the International Tribunal, nor Articles 9 and 14 of the ICCPR, require that an indicted person be promptly informed of charges for which he has not been indicted. Pointing out that the accused upon his arrest was immediately notified of the basis for the arrest and served with a copy of the confirmed Indictment, the prosecution asserts that the completion of that process satisfied the requirements of Article 9(2) and ended its application.

35. The authorities relied upon by the defence in support of its position that allowing the prosecution leave to amend the Indictment would contravene Article 9(2) are not applicable, for in each a violation was found because of the failure to charge a person with any crime at the time of their arrest. In *Moriana Hernándes Valentini de Bazzano* (Communication No. 5/1977), Martha Valentini de Massera was arrested on 28 January 1976, but was charged only in September 1976, after spending nearly eight months in prison. In *Leopoldo Buffo Carballal* (Communication No. 33/1978), the complainant was arrested in Argentina on 4 January 1976, and was handed over to members of the Uruguayan Navy who later transferred him to Montevideo. He was not informed of any charges brought against him and remained detained until 26 January 1977. In *Alba Pietraroia* (Communication No. 44/1979), the Committee found that Rossario Pietraroia Zapala was arrested without an arrest warrant in early 1976 and held incommunicado for four to six months. He was not charged until his trial began on 10 August 1976. In *Monja Jaona* (Communication No. 132/1982), the Committee found that Monja Jaona was put under house arrest on 15 December 1982, without any explanation being given, and subsequently detained until 15 August 1983. In *Glenford Campbell v. Jamaica* (Communication No. 248/1987) a violation of Article 9(2) was found because of the failure to formally charge Mr. Campbell with any crime until over one month after he was arrested. None of these cases relied upon by the defence involved an arrest based on an indictment which was subsequently sought to be amended to add new charges.

36. Whatever the true meaning of "any" in Article 9(2) of the ICCPR, a point addressed by defence counsel, the Chamber does not accept that the requirement to inform an arrested person of any charges against him was breached in this case. Article 20, sub-paragraph 2 of the Statute of the International Tribunal is analogous to Article 9(2) of the ICCPR, requiring, however, that the person be "immediately informed of the charges against him". The Report of the Secretary-General submitting the draft Statute to the Security Council, referring to that Article, states that "[a] person against whom an indictment has been confirmed would ... be informed of the contents of the indictment and taken into custody". That is consistent with the

view that what was visualised was that an arrested person would be promptly told of the charges contained in the indictment on the basis of which he was arrested. That was done in this case.

iv). Whether the requested amendments would breach a principle of speciality

37. The fourth and final point concerns the argument of the defence that there exists in customary international law a speciality principle which prohibits the prosecution of the accused on charges other than that on which he was arrested in Bosnia and Herzegovina and brought to The Netherlands. In the view of the Appeals Chamber, if there exists such a customary international law principle, it is associated with the institution of extradition as between states and does not apply in relation to the operations of the International Tribunal. That institution prohibits a state requesting extradition from prosecuting the extradited person on charges other than those alleged in the request for extradition. Obviously, any such additional prosecution could violate the normal sovereignty of the requested state. The fundamental relations between requested and requesting state have no counterpart in the arrangements relating to the International Tribunal.

III. CONCLUSION

For the reasons given, the Appeals Chamber considered that, in the circumstances of this case, the prosecution was entitled to leave to amend the Indictment by the addition of the new charges. The Appeals Chamber has not hereby determined whether a *prima facie* case has been established in relation to the charges added in the Amended Indictment, as required for its confirmation.

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

Gabrielle Kirk McDonald

President

Judge Shahabuddeen appends a Separate Opinion to this Decision.

Dated this second day of July 1998

At The Hague,

The Netherlands.

[Seal of the Tribunal]

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

United Nations
Nations Unies

OR: ENG

TRIAL CHAMBER II

Before:
Judge William H. Sekule, Presiding
Judge Asoka de Zoysa Gunawardana
Judge Arlette Ramaroson

Registrar: Mr. Adama Dieng

Date: 6 October 2003

The PROSECUTOR
v.
Casimir BIZIMUNGU
Justin MUGENZI
Jerome BICAMUMPAKA
Prosper MUGIRANEZA

Case No. ICTR-99-50-I

DECISION ON THE PROSECUTOR'S REQUEST FOR LEAVE TO FILE AN AMENDED INDICTMENT

Office of the Prosecutor
Paul Ng'arua
Melinda Y. Pollard
Elvis Bazawule
George Mugwanya
Dennis Mabura (Case Manager)

Counsel for the Defence
Michelyne C. St. Laurent for Bizimungu
Howard Morrison and Ben Gumper for Mugenzi
Pierre Gaudreau for Bicamumpaka
Tom Moran for Mugiraneza

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

SITTING as Trial Chamber II composed of Judges William H. Sekule, Presiding, Asoka de Zoysa Gunawardana and Arlette Ramaroson (the "Chamber");

BEING SEIZED of the "Prosecutor's Request for Leave to File an Amended Indictment," to which is attached Annexure A which is the proposed Amended Indictment, filed on 26 August 2003 (the "Motion");

HAVING RECEIVED AND CONSIDERED "Prosper Mugiraneza's and Jerome Bicamumpaka's Brief in Opposition to the Prosecutor's Request for Leave to File an Amended Indictment," filed on 3 September 2003 ("Mugiraneza and Bicamumpaka's joint Response"); **AND** the "Prosecutor's Reply to Prosper Mugiraneza's and Jerome Bicamumpaka's Brief in Opposition to the Prosecutor's Request for Leave to File an Amended Indictment," filed on 5 September 2003 (the "Prosecutor's Reply to Mugiraneza and Bicamumpaka's joint Response"); **AND** *"Requete de la Defense afin d'obtenir une extension du delais dans lequel elle doit deposer une reponse a la [*Prosecutor's Request for Leave to File an Amended Indictment]," filed on 1 September 2003; **AND** "Reponse de la Defence de Casimir Bizimungu au [Prosecutor's Request for Leave to File an Amended Indictment]," filed on 24 September 2003 ("Bizimungu's Response"); **AND** "Prosecutor's Reply to Casimir Bizimungu's Response to the Prosecutor's Request for Leave to Amend the Indictment," filed on 2 October 2003, (the "Prosecutor's Reply to the Bizimungu Response;")

CONSIDERING the Statute of the Tribunal (the "Statute") and the Rules of Procedure and Evidence (the "Rules"), in particular Rule 50 of the Rules;

NOW DECIDES the Motion on the basis of the written briefs as filed by the Parties pursuant to Rule 73(A) of the Rules.

SUBMISSIONS OF THE PARTIES

Prosecution Submissions

1. The Prosecution requests leave pursuant to Rule 50 to file an Amended Indictment after the initial appearance of the Accused.

2. The Prosecution submits that the proposed Amended Indictment be admitted because it incorporates new and additional evidence which was not available at the time the current Indictment was submitted for confirmation. It further submits that there has not been any undue delay in bringing the proposed Amended Indictment so that the filing of it will not prejudice the rights of the Accused to a fair trial rather it will expedite the trial. The Prosecution argues that the new and additional evidence expands and elaborates each Accused's participation and accountability for the crimes committed in Rwanda in 1994 by making it more clear and specific so that it is in the interest of international criminal justice. The proposed Amended Indictment pleads extensively and specifically to achieve the ends of establishing the individual responsibility of each Accused, thereby bringing the current Indictment in accord with the jurisprudence of the Tribunal and current charging practices of the Prosecution.

3. The Prosecution further submits that the proposed Amended Indictment will change the charges in the following manner;

a. the Count of Genocide and Complicity in Genocide will be pleaded alternatively but will be presented as a single Count;

b. the Count of Murder as a Crime Against Humanity as well as the charge of Outrage upon personal dignity as a Serious Violation of Article 3, Common to the Geneva Conventions and Additional Protocol II are removed;

c. on the basis of new evidence, the proposed Amended Indictment expands the existing remaining counts to focus and clarify each Accused's participation in the crimes; and

d. the removal of the section on "Historical Context."

4. The Prosecution relies on the jurisprudence of the Tribunal to the effect that before an amendment is granted, the Prosecution must demonstrate that there is sufficient ground both in law and on the evidence to allow the amendment.[1] It recalls that Rule 50 authorises amendments to Indictments resulting from its on-going investigations so that at trial it can present the totality of the Accused's participation in the crimes.[2]

5. In particular, the Prosecution submits the following as highlights of the proposed Amended Indictment;

a. an expansion of all the Accused's participation in the conspiracy to kill or in the planning of the killing of Tutsi and their failure to halt the killings;

b. an expansion on all the Accused participation in the ordering of rape and sexual violence and that this was an integral part of the process of destruction targeting the Tutsi;

c. an expansion and focus of all the Accused participation in ordering/ inciting the killing or rape of the Tutsi on diverse dates and in various parts of Rwanda;

d. an expansion on all the Accused's participation in committing or aiding and abetting the killing or raping of Tutsis on diverse dates in various parts of Rwanda;

e. a clarification on all the Accused's participation in war crimes, including the Accused's direct participation in violence and killing of civilians in connection with the armed conflict, or their ordering or incitement of violence and killing of Tutsi civilians in connection with the armed conflict.

6. The Prosecution submits that there has not been an undue delay in bringing the proposed Amended Indictment given the realities of the case and the complexity of the crimes with which the Accused are indicted for and the complexities involved in carrying out investigations. The Prosecution argues that fears among potential witnesses to readily cooperate with the Tribunal meant that it could not easily access all the evidence for use in the current Indictment. At the December 2002 Status Conference, the Prosecution informed the Trial Chamber and the Defence that it would amend the current Indictment. The Prosecution submits that a determination as to whether there has been an undue delay should be done on a case to case basis taking into account the peculiar circumstances of each case and balancing them with the interests of justice. The Prosecution submits that she has made all efforts to submit the proposed Amended Indictment prior to the commencement of trial although in the *Akayesu* case the Trial Chamber allowed the Indictment to be amended during the trial in the interests of justice.[3]

7. The Prosecution submits that it has already disclosed all the new and additional evidence to the Defence in the interests of justice. It submits that the amendment will not be prejudicial to the Accused because it will not result in the delay of the trial given the amendments proposed in the current Indictment. Whereas the current Indictment is comprised of 80 pages, the proposed Amended Indictment is less than 30 pages.

8. The Prosecution thus prays that the Trial Chamber; (i) grants it leave to amend the Indictment as amended in the proposed Amended Indictment attached in Annexure A; (ii) Order that the proposed Amended Indictment be filed with the registry; and (iii) order that

the proposed Amended Indictment be served on each of the Accused and his counsel immediately.

Joint Response of Mugiraneza and Bicamumpaka

9. Noting Mugiraneza's Motion to dismiss the Indictment for *inter alia* undue delay[4], the Defence Counsel for Mugiraneza and Bicamumpaka submit a short joint response to the Motion.

10. The Defence argue that objective facts contradict the Prosecution submission that the Motion was not filed with undue delay, i.e.; the proposed Amended Indictment is dated 28 July 2003, the same date that the Prosecution informed the Trial Chamber in writing of its intention to amend the Indictment. The Defence wonders why the Prosecution delayed almost one month before filing its request to amend the Indictment. The Defence submits that contrary to the Prosecution submission, it did not undertake all efforts to file the proposed Amended Indictment in a timely manner because on the face of it, the record shows a 28-day delay between the signing of the proposed Amended Indictment and the filing of its Motion.

11. Defence argues further that if the Chamber grants the Motion, it will inevitably result in a delay of the trial because the Defence will be authorized to file Motions under Rule 72 challenging the proposed Amended Indictment. In this respect, Defence for Mugiraneza submits that it will file such a Motion challenging both the form of the Indictment and the subject-matter jurisdiction over certain allegations in the proposed Amended Indictment. The Defence argues that the proposed Amended Indictment includes allegations of crimes committed before 1 January 1994 and so a consideration of a Motion under Rule 72 will delay the proposed commencement of the trial which is set at 3 November 2003.

12. The Defence points out that that the Prosecution have had four years to complete investigations. The Defence submits that for the past four years the Prosecution has been indicating that it intends to amend the Indictment but instead, it files its Motion to amend the Indictment on the eve of trial. The Defence thus prays that the Chamber deny the Prosecution Request for leave to amend the Indictment.

Reply by the Prosecution to the Joint Response of Mugiraneza and Bicamumpaka

13. The Prosecution submits that the Response of Mugiraneza and Bicamumpaka is an attempt to bolster Mugiraneza's Motion for Dismissal of the Indictment.

14. The Prosecution submits that the Defence misstates its procedural rights in the event the Chamber permits the amendment. The Prosecution submits that the proposed Amended Indictment does not contain any new charges as contrasted with the current Indictment. In this respect, the Prosecution argues that under Rule 50, sub-Rule (C) the Defence is only permitted to file Preliminary Motions under Rule 72 only when the proposed Amended Indictment contains new charges.

15. In this respect, the Prosecution prays that the objections of the Defence for Mugiraneza and Bicamumpaka be denied and the Prosecutions request for leave to amend the Indictment should be granted.

Bizimungu's Response

16. The Defence for Bizimungu objects to the Motion.

17. The Defence recalls the provisions of Articles 19(1) and 20(4)(a) – (c) of the Statute.

18. The Defence submits that in conformity with the jurisprudence of the Tribunal, the Motion should be considered by the Trial Chamber to which the Accused made his initial appearance,[5] which in the instant case was composed of Judges Sekule, Maqutu and Ramaroson. The Defence notes that the Chamber now includes Judge Gunawardana in place of Judge Maqutu whose mandate was not extended due to his non re-election. The Defence requests that the President definitively name pursuant to Article 15*bis* and Rule 27, the Judge who is replacing Judge Maqutu to make up the Trial Chamber.

19. The Defence argues that the proposed amendment is unfair to Bizimungu because it includes substantial new facts, yet the Prosecution requests the Chamber to consider it not as a new Indictment but as an amended Indictment. In view of the substantial proposed changes, the Defence requests the Chamber to order the Prosecution to provide a table comparing the elements of the current Indictment and proposed Amended Indictment, in order to understand the magnitude of the requested modifications.

20. In fact, the Defence points out that the proposed Amended Indictment has 28 new allegations in prefectures where Defense investigators have not made any investigations, i.e., the Prefectures of Ruhengeri, Butare, Gisenyi and Gitarama. It points to the following as substantial new changes made in the proposed Amended Indictment;

a. allegations with regard to Ruhengeri are new and contain new events, new individuals, new dates and new sites;[6]

b. allegation at paragraph 21 are new as they refer to a speech given by the Prime Minister at the University of Butare between 1 and 31 May 1994, inciting the population to exterminate the enemies;

c. allegations of crimes committed in Gitarama in paragraphs 44 and 45 are new as they refer to murders that Bizimungu allegedly ordered and to which he was witness between 15 April and 15 May 1994;

d. allegation at paragraph 125 are new as they refer to a directive from the Interim Government in May 1994 requiring civil servants to report for their salaries; and this paragraph further alleges that Bizimungu knew that this directive was intended to exclude Tutsis and to put them at risk of being killed;

e. allegations at paras. 52, 53, 54, 124 and 126 are new because they refer to incitement by Bizimungu at Umuganda Stadium and the Meridien Hotel between the months of May and June 1994;

f. allegations at paragraphs 28, 29 and 47 are new as they refer to a speech made by Bizimungu in April 1994 and that the RTLM will be controlled by the Interim Government;

g. the allegations at para. 14 are new as they allege that Bizimungu made a radio broadcast on 11 April 1994.

21. The Defence requests the Chamber not to grant the Prosecution request to withdraw the section on Historical Context in the current Indictment. The Defence argues that removing this section will cause prejudice to Bizimungu particularly as the Prosecution has indicated that Mr. André Gichaoua and Ms. Allison Desforges will testify as experts on this section and it has been provided with the reports of the two witnesses.

22. The Defence requests the Chamber to use its discretion under Rule 50 to consider the particular circumstances of its case in the interest of justice. It submits that in most cases at the Tribunal amendments under Rule 50 were made well in advance of commencement of trial and in some cases said requests were allowed on the eve of trial because the amendments were minor. The Defence notes that Bizimungu has been detained for more than four years and seven months. It argues that the Defence will be prejudiced if the Chamber grants the Motion to amend the Indictment after such a long time and only two months before commencement of the trial.

23. The Defence submits that the Prosecution disclosed to it some statements of witnesses on 24 August 2003 but it was surprised to see that most of those statements were signed more than four years prior to this date. It is the Defence's argument that the Motion for amendment should have been made earlier than this. It argues that it is ready to meet the Prosecution case on the basis of the current Indictment but that it is not ready to meet the Prosecution case on the basis of the proposed Amended Indictment.

Prosecutions reply to Bizimungu's Response

24. The Prosecution reiterates its request noting that contrary to the Defence argument, additions of new facts to the proposed Amended Indictment do not completely change the nature of the charges.

HAVING DELIBERATED

25. The Chamber notes that the Prosecution seeks leave to amend the current Indictment filed on 13 August 1999 pursuant to Rule 50. Said Rule provides:

> **Rule 50: Amendment of Indictment**
>
> (A) The Prosecutor may amend an indictment, without prior leave, at any time before its confirmation, but thereafter, until the initial appearance of the accused before a Trial Chamber pursuant to Rule 62, only with leave of the Judge who confirmed it but, in exceptional circumstances, by leave of a Judge assigned by the President. At or after such initial appearance, an amendment of an indictment may only be made by leave granted by a Trial Chamber pursuant to Rule 73. If leave to amend is granted, Rule 47 (G) and Rule 53 *bis* apply *mutatis mutandis* to the amended indictment.
>
> (B) If the amended indictment includes new charges and the accused has already appeared before a Trial Chamber in accordance with Rule 62, a further appearance shall be held as soon as practicable to enable the accused to enter a plea on the new charges.
>
> (C) The accused shall have a further period of thirty days in which to file preliminary motions pursuant to Rule 72 in respect of the new charges.

26. The Chamber recalls its opinion in the *Niyitegeka* Decision that, "[o]nce the indictment is confirmed, the Prosecutor's power to amend a confirmed indictment is not unlimited and must be considered against the overall interests of justice as envisioned by Rule 50(A)." In that Decision it was stated that, "[g]enerally amendments pursuant to Rule 50 are granted in order to; (a) add new charges; (b) develop the factual allegations found in the confirmed indictment; and (c) make minor changes to the indictment.[7]

27. Essentially, the Trial Chamber balances the rights of the Accused as prescribed under Article 19 and 20 of the Statute, which *inter alia* provide for the Accused right to be informed promptly and in detail of the nature and cause of the charge against him or her, and the right to a fair and expeditious trial without undue delay. These rights are balanced with the

complexity of the case. It is therefore the discretion of the Trial Chamber to consider requests under Rule 50 in the light of the particular circumstances of the case before it.

28. Under Rule 50, the onus is on the Prosecutor to set out the factual basis and legal motivation in support of its Motion and it is for the Defence to respond to these arguments.[8]

29. In the instant case, the Prosecution seeks leave to amend the current Indictment following the discovery of new evidence which was not available at the time of confirmation of the current Indictment. The Prosecution submits that she seeks to remove two Counts and combine and charge alternatively the Counts of Genocide and Complicity in Genocide. She further seeks to expand the remaining Counts focusing on the Accused's participation in the crimes they are alleged to have committed in 1994. Finally the Prosecution submits that she seeks to remove the section on 'Historical Context,' thereby reducing the current Indictment from a total of 80 pages and substituting it with the proposed Amended Indictment which consists of a total of less than 30 pages.

30. The Chamber notes that it is only the Defence of Mugenzi who does not object to the Motion, rather it maintains that the Accused, "[v]igorously denies all of the allegations made against him, whether they are said to be supported by the original evidence or any new evidence obtained after the confirmation of the original indictment."[9] On the other hand the Defence Counsel for the Accused Bizimungu, Mugiraneza and Bicamumpaka object to the Motion mainly because of the Prosecution's delay in bringing the Motion particularly as the commencement of the trial in this case has been set to be 3 November 2003 – hardly two months from the date when the Motion was filed.

31. In regard to the Prosecution intention to remove certain Counts of the current Indictment and likewise the section on 'Historical Context,' the Chamber notes that the Prosecution may do so without necessarily requiring an amendment under Rule 50. With regard to the Prosecution intention to combine and charge alternatively the Counts of Genocide and Complicity in Genocide, the Chamber finds this procedure irregular and would render the count bad for duplicity and will pose problemsparticularly when it has to pronounce judgment and sentence on one or the other of the charges. The Chamber thus finds that it is not in the interests of judicial economy to allow the Prosecution to amend the current Indictment for the reasons she has provided above.

32. The Chamber considers the Prosecution further request to amend the current Indictment following its discovery of new evidence which was not available at the time of confirmation of the current Indictment which thereby necessitates the expansion of the remaining Counts.

33. It is noted that the Prosecution submits that although the amendment she makes will result in the expansion of the Accused individual participation in the crimes they are alleged to have committed, the amendments themselves do not result in the addition of new charges. In fact, the Prosecution submits that the proposed Amended Indictment is clearer and more specific making it in accord with the jurisprudence of the Tribunal and the current charging practices of the Prosecution. The Defence on the other hand point to specific areas of the proposed Amended Indictment where in they allege that the factual allegations amount to new charges.

34. In the instant case, after having carefully analysed the proposed Amended Indictment and compared it to the current Indictment, the Chamber is of the opinion that the expansions, clarifications and specificity made in support of the remaining counts, do amount to substantial changes which would cause prejudice to the Accused. For example, the Chamber

notes that although the current Indictment contains broad allegations in support of the Counts, the proposed Amended Indictment contains specific allegations detailing names, places, dates and times wherein the Accused are alleged to have participated in the commission of specific crimes. The Chamber finds that such substantial changes would necessitate that the Accused be given adequate time to prepare his defence.

35. The Chamber also notes that the trial date in this case has been set for 3 November 2003. It is the Chamber's opinion that granting the Prosecution leave to amend the current Indictment will not only cause prejudice to the Accused but would also result in a delay for the commencement of the trial for the reasons outlined above. The Chamber finds that in the particular circumstances of this case, it would not be in the interests of justice to grant the Motion. The Chamber thus denies the Motion in its entirety.

FOR THE ABOVE REASONS, THE TRIBUNAL

DENIES the Motion in its entirety.

Arusha, 6 October 2003

William H. Sekule	Asoka de Zoysa Gunawardana	Arlette Ramaroson
Presiding Judge	Judge	Judge

Seal of the Tribunal

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[1] *Prosecutor v. Kabiligi* "Decision on the Prosecutor's Request for Leave to File an Amended Indictment," filed on 8 October 1999

[2] *Prosecutor v. Ndayambaje*, "Decision on the Prosecutor's Request for leave to File an Amended Indictment," of 2 September 1999; *Prosecutor v Barayagwiza*, "Decision on the Prosecutor's Request for Leave to File and Amended Indictment," filed on 11 April 2000

[3] *Prosecutor v. Akayesu*, "Decision on the Prosecutor's Request for Leave to Amend the Indictment," filed on 17 June 1997

[4] "Prosper Mugiraneza's Motion to Dismiss the Indictment for Violation of Article 20(4)(c) of the Statute, Demand for Speedy Trial and for Appropriate Relief," filed on 17 July 2003.

[5] *Prosecutor v Ndayambaje*, "Decision on the Prosecutor's Motion for modification of the indictment," filed on 2 September 1999 at para. 5 (the "*Ndayambaje* Decision")

[6] See paragraphs, 30 (a) through (f), 34 through 51, 101, 102, 104, 105, 106, 107, 112, 115, 122, and 123 of the proposed Amended Indictment

[7] *Prosecutor v. Ndindabahizi*, "Decision on Prosecution Motion for Leave to amend indictment," filed on 20 August 2003 (the "*Ndindabahizi* Decision"); *Prosecutor v. Niyitegeka*, "Decision on Prosecution Motion for Leave to amend indictment," filed on 21 June 2000 (the "*Niyitegeka* Decision")

[8] *Prosecutor v. Musema*, "Decision on the Prosecutor's Request for Leave to Amend the Indictment," of 18 November 1998

[9] *See* "Motion on Behalf of Justin Mugenzi for the Confirmation of the Trial Date and the Fixing of a Date for the Pre-trial Conference," filed on 22 September 2003, para. 2

IN TRIAL CHAMBER II

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

Registrar:
Mr Hans Holthuis

Decision of:
26 June 2001

PROSECUTOR

v

RADOSLAV BRDANIN & MOMIR TALIC

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

The Office of the Prosecutor:

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

Counsel for Accused:

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

1 The application and its background

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

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

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

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

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

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

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

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

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

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

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

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

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

2 The nature of the alleged criminal responsibility of the accused

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

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

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

11. This trial has become very complex. That is the inevitable consequence of the very general nature of the case which the prosecution has pleaded. Unfortunately , however, the prosecution appears to have adopted a policy of avoiding a disclosure of as much of that case as possible until as late as possible.[43] The Trial Chamber draws the inference that the prosecution has done so to enable it to mould its case in a substantial way during the trial, according to how its evidence actually turns out. The only alternative explanation for the

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

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

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

14. The Trial Chamber proposes therefore to strike the word "committed" from par 33 of the further amended indictment, which is incorporated in each of the counts , so that any suggestion that either of the accused "committed" the crimes (in the specific sense of personally perpetrating the offences) is presently removed.[53] There can be no prejudice to the

prosecution, which concedes that it has nothing to support such a case. Only in this way will it be possible to ensure that the parties concentrate their attention on the case which the prosecution contends that it is *able* to prove, and to deflect their attention from a case which the prosecution concedes that it is presently *unable* to prove. If the prosecution does obtain evidence which is capable of supporting a conviction of either of the accused on the basis that he "committed" any of these crimes (in that same specific sense), it may seek to amend the indictment to reinstate that allegation. Such an application will be considered on its merits in the circumstances which then obtain. *At this stage*, however, the trial will not commence with the prospect of it becoming completely destabilised by the ambiguities which result from the way in which the indictment is presently pleaded.

3 Multiple bases alleged for the accused's criminal responsibility

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

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

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

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

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

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

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

4 Common purpose

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

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

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

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

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

The *Tadic* Conviction Appeal Judgment

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

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

> ***Category 1***:[95] All of the participants in the joint criminal enterprise,[96] acting pursuant to a common design, possessed the same criminal intention. The example is given of a plan formulated by the participants in the joint criminal enterprise to kill, where, although each of the participants in the plan may carry out a different role, each of them has the intent to kill.[97]
>
> ***Category 2***:[98] All of the participants in the joint criminal enterprise were members of military or administrative groups acting pursuant to a concerted plan, where the person charged held a position of authority within the hierarchy; although he did not personally perpetrate any of the crimes charged, he actively participated in enforcing the plan by aiding and abetting the other participants in the joint criminal enterprise who did perpetrate them. The example is given of a concentration camp, in which the prisoners are killed or otherwise mistreated pursuant to the joint criminal enterprise.
>
> **Category 3**:[99] All of the participants were parties to a common design to pursue one course of conduct , where one of the persons carrying out the agreed object of that design also commits an act which, whilst outside the "common design", was nevertheless a natural and foreseeable consequence of executing "that common purpose".[100] The example is given of a common, shared intention on the part of a group to remove forcibly members of one ethnicity from their town, village or region (labelled " ethnic cleansing"), with the consequence that, in the course of doing so, one or more of the victims is shot and killed.

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

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

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

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

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

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

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

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

> Criminal responsibility may be imputed to all participants within the common enterprise where the risk of death occurring was both [*sic*] a predictable consequence of the execution of the common design and the accused was either reckless or indifferent to that risk.

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

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

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

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

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

crime nevertheless participated in that enterprise with the contemplation of the crime charged as a *possible* incident in the execution of that enterprise. This is very similar to the civil law notion of *dolus eventualis* or advertent recklessness. So far as the *objective* element to be proved is concerned, the words "predictable" in the first formulation and "foreseeable" in the third formulation are truly interchangeable in this context .

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

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

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

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

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

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

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

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

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

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

The objections taken by Talic

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

> (1) the state of mind of the accused now pleaded by the prosecution in its proposed amendment is insufficient;[113]
>
> (2) there is no definition of the "unlawful means" through which the criminal enterprise effected the permanent removal of the majority of Bosnian Muslim and Bosnian Croat inhabitants from the territory of the planned Serbian state; [114] and
>
> (3) the indictment provides no details of Talic's intention to participate voluntarily in the criminal enterprise or of his knowledge of its existence.[115]

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

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

Article 18.4 of the Tribunal's Statute does indeed require the Prosecutor to prepare an indictment "containing a concise statement of the facts and the crime or crimes with which the accused is charged under the Statute". That *obligation* of the Prosecutor must be interpreted in the light of the *entitlement* given to the accused, by Article 21.4(a), "to be informed promptly and in detail [...] of the nature and cause of the charge against him". Where the state of mind with which the accused carried out his alleged acts is relevant, that state of mind is just as

much a fact to be proved by the prosecution as are the accused's acts themselves . Where those acts of the accused are material facts to be pleaded, so to, in the opinion of this Trial Chamber, is the state of mind with which he carried out those acts (where relevant) a material fact to be pleaded, in accordance with these provisions of the Tribunal's Statute. There are two ways in which the relevant state of mind may be pleaded:

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

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

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

(1) State of mind

34. In support of his first objection, Talic says that the state of mind as pleaded in the proposed amendment would render a person individually responsible for crimes committed by others merely because "he intellectually subscribed to a plan adjudged criminal".[119] He asserts that it is necessary for the prosecution to plead in relation to the genocide charges that his intention was to destroy the discriminated group (at least in part),[120] as well as the specific intent required in the other crimes charged.[121] He has maintained this objection notwithstanding the amendment proposed.[122] He says that the proposed amendment does not allege that the criminal enterprise had as its objective any of the crimes charged,[123] and that it alleges only that he was aware that such crimes were likely to result from the execution of the common purpose (that is, the ethnic cleansing).[124] Talic repeats that the prosecution is obliged to plead "a special and direct intention " on his part, the specific intent required for genocide and the other crimes charged .[125] The indictment therefore fails to demonstrate "one of the essential ingredients of the international crimes the indictment alleged".[126] In response , the prosecution relies upon what is said in the *Tadic* Conviction Appeal Judgment, in particular what was said in the second of the three passages already quoted in this decision.[127]

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

36. Nevertheless, if this assertion intended by the prosecution is correct – that each (or all) of the crimes charged in the indictment went beyond the object of the joint criminal enterprise as pleaded – the assertion made by Talic, that the prosecution is nevertheless obliged to plead and to prove that he shared with those who personally perpetrated the crimes charged the state

of mind which those crimes require, is indeed contrary to what the Appeals Chamber has held in the *Tadic* Conviction Appeal Judgment. Again, if the assertion intended by the prosecution is correct, the proposed amendments to par 27 of the further amended indictment more than adequately allege the state of mind required of a participant in the enterprise where the crimes charged went beyond the object of that enterprise.[132] The prosecution may even have accepted a greater burden than is necessary by pleading that the accused were aware that the crimes charged were "likely" to result from the implementation of that enterprise.

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

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

> (a) deportation and/or forcible transfer directed against a particular civilian population in the course of an armed conflict – thus possibly crimes against humanity as pleaded in counts 8 and 9 of the current indictment, and
>
> (b) appropriation of the property of those removed in the course of an international armed conflict, not justified by military necessity and carried out unlawfully and wantonly – thus possibly a grave breach of the Geneva Conventions of 1949 as pleaded in count 10 of the current indictment.

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

The need to characterise the offences charged

39. The Trial Chamber has already suggested that the prosecution case as pleaded , and even as it is proposed that it be amended, is possibly equivocal in relation to whether the crimes charged are *necessarily* to be regarded as having gone *beyond* the object of the joint criminal enterprise pleaded.[134] It is of considerable importance that both the Trial Chamber and the

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

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

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

(2) Unlawful means

42. In support of his second objection, Talic says that the purpose (or object) of the joint criminal enterprise must be "criminal in and of itself".[138] The prosecution accepts that this is so,[139] and the Trial Chamber agrees that, as the name suggests, the basic object of a joint criminal enterprise must itself be criminal in nature. Talic, however, goes on to say that, as none of the crimes charged falls within the pleaded objective of the criminal enterprise (the ethnic cleansing), the prosecution has failed to identify in the indictment the criminal objective of that criminal enterprise.[140] The prosecution responds that, by pleading that the object of the enterprise was effected "through unlawful means", it is asserting that the participants in that enterprise "had no lawful purpose for the removal of the non-Serb populations and no intent to use lawful means to accomplish their goal".[141] It says that "it is not necessary to prove that each participant held the identical vision of the illegal means they planned to use", and therefore that it is sufficient merely to plead "through unlawful means" without identifying them in the indictment .[142]

43. The stand taken by the prosecution fails, however, to acknowledge that the first thing which it must establish, in a case that the accused is responsible for a crime as a member of a joint criminal enterprise, is that he participated in a particular joint *criminal* enterprise, even where the crime charged went beyond the object of that enterprise. That is clear from the *Tadic* Conviction Appeal Judgment . There must be a common object, or a common purpose, to carry out a particular crime (the criminal object of the enterprise), and – if a further crime is

committed which went beyond *that* criminal object of the enterprise, but which is nevertheless a natural and foreseeable consequence of executing *that* criminal object or enterprise – each participant in that enterprise will be responsible if he was aware that such a further crime was a possible consequence in the execution of that enterprise , and that, with that awareness, he participated in that enterprise.[143] Unless the criminal object of that enterprise is identified, it is not possible to determine whether the further crime charged was a natural and foreseeable consequence of executing *that* criminal object. That criminal object is *not* identified by asserting (and then only by implication in the indictment) merely that there was "no lawful purpose".

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

45. Although joint criminal enterprise cases *can* be applicable in relation to ethnic cleansing, as the *Tadic* Conviction Appeal Judgment recognises,[145] it is obvious that the Appeals Chamber had in mind a somewhat smaller enterprise than that which is invoked in the present case.[146] If, in the course of an armed conflict and a widespread or systematic attack directed against a civilian population, the commander of a small group of soldiers directs those soldiers to collect all the inhabitants of a particular ethnicity within a particular town and to remove them forcibly out of the region, he becomes a participant in an enterprise to commit deportation and forcible transfer (as crimes against humanity), and there could be little doubt, having regard to previous episodes of ethnic cleansing in the former Yugoslavia, that, for example, murder (as another crime against humanity) and wanton destruction of the town (as a violation of the laws and customs of war) were natural and foreseeable consequences of the execution of that enterprise. There would be no difficulty in determining what crimes fell within the agreed criminal object of the enterprise and whether any further crimes charged were natural and foreseeable consequences in the execution of *that* enterprise. It is only when the prosecution seeks to include within that joint criminal enterprise persons as remote from the commission of the crimes charged as are the two accused in the present case that a difficulty arises in identifying the agreed criminal object of that enterprise. That difficulty is of the prosecution's own making, as it is a difficulty necessarily arising out of the case it seeks to make. That very difficulty *may*, of course, indicate that a case based upon a joint criminal enterprise is inappropriate in the circumstances of the present prosecution. That is a matter which will have to be determined at the trial. But the prosecution cannot avoid its difficulty simply by seeking to avoid pleading properly the joint criminal enterprise upon which it relies. It is sufficient at this stage for the Trial Chamber to say merely that, if the prosecution does plead that *all* of the crimes charged went *beyond* the object of the joint criminal enterprise, it must identify in the indictment the agreed criminal object of the enterprise upon which it relies. An order will be made accordingly.[147]

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

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

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

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

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

48. If a person does something "knowingly and wilfully", it may ordinarily be assumed that he did it voluntarily. The prosecution is not obliged to meet every issue which may be raised by an accused to avoid responsibility for his knowing and wilful acts until that issue is raised in evidence at the trial. If Talic wishes to raise an issue as to the voluntary nature of his participation in the joint criminal enterprise pleaded, and if that is a relevant issue in the case, he must at the trial point to or elicit evidence from which it could be inferred that there is at least a reasonable possibility that his participation was not voluntary. Only then does the prosecution bear the onus of establishing that his action was indeed voluntary. This is not to suggest that Talic bears some *legal* onus in relation to the issue. That legal onus remains at all times upon the prosecution. His onus is merely an *evidentiary* one – to point to or to elicit evidence which raises the particular issue, and which places an onus on the prosecution to establish its case upon that issue, just as in relation to an alibi.[153]

49. The complaint made by Talic is rejected.

5 The application to amend

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

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

6 Other alleged deficiencies in particularity of pleading

General complaint relating to all counts

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

Superior responsibility

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

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

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

Genocide and complicity in genocide (counts 1 and 2)

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

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

removal from those camps and detention facilities, are alleged to have "included" twelve killing incidents. These are described by reference to the municipalities and the place where they occurred and their approximate date .[172] In addition, it is alleged that Bosnian Serbs "and others" were given access to camps where they subjected Bosnian Muslims and Bosnian Croat detainees to physical and mental abuse, "including " torture, beatings with weapons, sexual assaults and the witnessing of inhumane acts, "including" murder, causing them serious bodily or mental harm. As a result of these inhumane acts, it is alleged, a large number of Bosnian Muslims and Bosnian Croats died in these detention facilities.[173]

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

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

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

than Mr Krnojelac was alleged to be . Such details are matters of evidence and not material facts which must be pleaded in the present case.[181]

60. Talic draws attention to the repeated use of the word "including" in the indictment – in the description of the way in which the ethnic cleansing campaign was executed , in the maltreatment of the detainees, in the killing incidents, in the identity of the facilities where the killings and maltreatment are alleged to have occurred and in the inhumane acts committed. He asserts that he is entitled to know whether these lists are intended to be exhaustive or, if they are not so intended, the details which are not presently listed.[182] The prosecution responds that the lists are *not* intended to be exhaustive . It says that it will be leading evidence of each of the incidents listed and each of the facilities listed. In addition, evidence may be given in relation to other incidents and other facilities. It argues that it is permitted to do so where , as here, it does not assert that either of the accused was directly involved in those incidents.[183]

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

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

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

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

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

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

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

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

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

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

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

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

> during these assaults. Many Bosnian Muslims or Bosnian Croats were forced to witness executions and brutal assaults on other detainees.[194]

66. Such generality must be contrasted with the amount of detail disclosed in the indictment in relation, for example, to the killings to be established in support of the genocide counts.[195] There , pars 38 and 41 of the indictment identify twenty-nine killing incidents by reference to the municipalities and the general area where they occurred and their approximate dates, and twelve further killing incidents by reference to the municipalities and the place where they occurred and their approximate date. The Trial Chamber has already determined that, because of the remoteness of the two accused from these crimes for which they are alleged to be responsible, the identities of the victims and of the perpetrators in those killings are matters of evidence and not material facts to be pleaded in the present case.[196] That is because there are sufficient material facts pleaded in relation to the killings to enable both the Trial Chamber and the accused to identify the issues to which evidence elicited by the prosecution is relevant. There is no such assistance given by the indictment in relation to these other matters. Any trial such as the present (with all its complexities) in which such issues are not identified on the record would be likely to descend quickly into confusion. The prosecution does not suggest that there is any relevant distinction between killings and the other acts to which reference is made, and the Trial Chamber cannot see any such distinction. The prosecution will be ordered to plead sufficient detail to enable the various incidents referred to in pars 37(2) and 42 of the further amended indictment to be identified, in the same way and to the same extent as it has given details of the killing incidents in pars 38 and 41.[197]

Persecution as a crime against humanity (count 3)

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

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

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

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

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

69. The prosecution has responded that "the municipalities in which the crimes in the indictment are alleged to have occurred" are listed in par 4 of the indictment , and thus that

the indictment is "sufficiently specific regarding the location of the crimes".[202] Paragraph 4 identifies sixteen municipalities as being some of those which constituted the ARK:

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

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

70. But the reference to those sixteen municipalities does nothing to resolve the lack of clarity in the way the list in par 47(3) of the indictment has been compiled . There should be no confusion in an indictment of this complexity. The prosecution will be ordered to make it clear whether it is alleged that the localities against which the religious edifices are listed are the "villages and areas" and the "cities , towns [and] villages" which are alleged in the same paragraph to have been destroyed or damaged.[203]

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

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

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

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

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

73. Talic has complained of the vagueness of the descriptions under these counts of the serious bodily and mental injury which, it is asserted, is alleged in the indictment to have been inflicted on Bosnian Muslims and Bosnian Croats during a campaign of terror.[210] The relevant passage from par 55 of the indictment has already been quoted.[211] It gives no detail which enables the various incidents to be identified, as the prosecution has been able to give

in relation to the killings relied upon in the first and second counts pleading genocide (and perhaps also in the fourth and fifth counts pleading extermination and wilful killings). The prosecution has made the same response – that, in a case such as the present case, these are matters of evidence and not material facts, because (in effect) Talic was very remote in proximity to the commission of the offences for which he is alleged to be criminally responsible .[212] The Trial Chamber repeats that any trial such as the present (with all of its complexities) in which such issues are not identified on the record would be likely to descend quickly into confusion .[213] The prosecution will be ordered to plead sufficient detail to enable the various incidents alleged to constitute the infliction of severe pain and suffering referred to in par 55 to be identified , in the same way and to the same extent as it has given details of the killing incidents in pars 38 and 41.[214]

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

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

The allegation of an international armed conflict

75. The previous indictment had charged the accused with various crimes as grave breaches of the Geneva Conventions without alleging that the acts upon which they were based took place in the course of an *international* armed conflict. An order was made by the Trial Chamber directing the prosecution to file a further amended indictment which pleads, as material facts, that the armed conflict was international in character and the basis upon which such an assertion is made.[218]

76. Paragraph 30 of the further amended indictment now alleges:

> At all times relevant to this indictment, a state of armed conflict and partial occupation existed in the Republic of Bosnia and Herzegovina. For the period material to this indictment, the armed forces of the Republika Srpska were acting under the overall control of and on behalf of the Federal Republic of Yugoslavia (Serbia and Montenegro). Hence, the armed conflict in Bosnia and Herzegovina between the Bosnian Serbs and the central authorities of Bosnia and Herzegovina was an international armed conflict.

The further amended indictment describes elsewhere the creation of the VRS (the Army of the Serbian Republic of Bosnia and Herzegovina) as having had the effect of transforming the units of the JNA (the Yugoslav People's Army) remaining in Bosnia and Herzegovina into commands of the new VRS army, although the VRS is alleged to have retained strong links

with the JNA.[219] There is no further reference elsewhere in the further amended indictment to the relationship between the armed forces of the Republika Srpska and the Federal Republic of Yugoslavia (Serbia and Montenegro).

77. Talic has complained that the further amended indictment fails, therefore, to identify the basis upon which the assertion is made that the armed conflict was an *international* one; he seeks an order that the prosecution provide "a detailed and accurate account of how in SitsC opinion the Federal Republic of Yugoslavia was directly involved as a belligerent".[220] The prosecution responds that it has complied with what the Trial Chamber ordered it to do.[221]

78. What the Trial Chamber said in relation to this issue was this:

> 50. If, for example, the prosecution is relying upon the evidence from which the Appeals Chamber in the *Tadic* Conviction Appeal Judgment concluded that the armed conflict in that case was international, it would have to plead as a material fact that the armed forces of the Bosnian Serbs were acting in the armed conflict in the present case under the overall control of and on behalf of the Federal Republic of Yugoslavia (Serbia and Montenegro). If the evidentiary material provided by the prosecution during the pre-trial discovery process has not sufficiently identified the evidence upon which the prosecution relies to establish that material fact, and if a request to the prosecution for such particulars has not been satisfactorily answered, it would be appropriate for an application to be made to the Trial Chamber for an order that the prosecution supply particulars of that allegation.

The Trial Chamber is satisfied that the basis upon which the prosecution asserts that the armed conflict was an international one has therefore been sufficiently pleaded. The prosecution has now also identified in its response the evidence upon which it relies to establish the material facts which have been pleaded.[222] This evidence is apparently contained in two binders (specifically identified as such), and it consists of evidence given in other trials before the Tribunal. The Trial Chamber has not considered whether this material constitutes sufficient basis for the allegation pleaded, and it makes no finding in relation to that issue.

79. Next, Talic asserts that the allegation of an international armed conflict pleaded in par 30 of the further amended indictment is inconsistent with the allegation in pars 18 and 19 of the same pleading.[223] Paragraph 18 asserts that the crimes alleged in the indictment were committed by members of the municipal Crisis Staffs or by "members of the armed forces under the control of the leadership of the Bosnian Serbs". Paragraph 19 gives a brief description of the hierarchy within the VRS: that Talic was the commander of the 1st Krajina Corps, which was one of the five Corps within the VRS, and that each of these Corps had a commander and a command staff who were all "subordinated to General Mladic and the Main Staff of the VRS". Talic says that:

> In no manner is it presumed that the Republika Srpska army Main Staff or General Mladic might be subordinated to the JNA.[224]

The Trial Chamber sees no necessary inconsistency between these allegations and the allegations now made in par 30, that the armed forces of the Republika Srpska were acting under the overall control of and on behalf of the Federal Republic of Yugoslavia (Serbia and Montenegro). The earlier allegations are concerned with the link between the accused and the persons who are alleged to have committed the crimes pleaded; the later allegation is concerned with the link between the armed forces of Republika Srpska, of which Talic is

alleged to have been a member, and the Federal Republic of Yugoslavia. As a matter of pleading, the later allegation does not qualify the earlier allegations, nor is it affected by them, to such an extent as to make the form of the indictment embarrassing to the accused.

80. Finally, Talic asserts that it can easily be seen, merely by reading the indictment and examining "the historical truth", that the fighting constituted a civil war and not an international one. A brief description of "the historical truth" is supplied.[225] However, a preliminary motion challenging the form of an indictment is not an appropriate procedure for contesting the accuracy of the facts pleaded.[226] That is the function of the trial.

7 Disposition

81. For the foregoing reasons, **Trial Chamber II makes the following orders** :

(1) The word "committed" is struck out from par 33 of the further amended indictment .[227]

(2) The prosecution, if such be its case, is ordered to plead expressly that Momir Talic is criminally responsible for the crimes committed by units of the 1st Krajina Corps outside its geographical area of responsibility, upon the basis that he was in effective control of those units when they did so, and to identify with sufficient detail the areas outside that geographical area where, it is alleged, the units of the 1st Krajina Corps committed such crimes.[228]

(3) The prosecution is ordered to identify with some precision in its indictment the basis or bases upon which it seeks to make Momir Talic criminally responsible as a member of the Crisis Staff of the Autonomous Region of Krajina.[229]

(4) (a) The prosecution is ordered to plead its case expressly as to whether each of the crimes charged is alleged to have fallen *within* the object of the joint criminal enterprise which has been pleaded in par 27 of the further amended indictment or to have gone *beyond* that object.[230]

(b) If any of the crimes charged are alleged to fall *within* that object, either solely or in the alternative, the prosecution is ordered to plead that the accused had the state of mind required for that crime.[231]

(c) If all of the crimes charged are alleged to go *beyond* that object, the prosecution is ordered to identify in the indictment the agreed criminal object of the joint criminal enterprise upon which it relies.[232]

(5) Leave is granted to the prosecution to amend par 27 of the further amended indictment as sought, *provided* that the prosecution complies fully with Order (4), *supra*.[233]

(6) The prosecution, if such be its case, is ordered to plead as a material fact that the Bosnian Muslims and Bosnian Croats killed in the incidents identified in pars 38 and 41 of the indictment (and the incidents referred to in par 37 of the indictment) were non-combatants.[234]

(7) The prosecution is ordered to plead sufficient detail to enable the various incidents referred to in pars 37(2) and 42 of the further amended indictment to

be identified, in the same way and to the same extent as it has given details of the killing incidents in pars 38 and 41.[235]

(8) The prosecution is ordered to make it clear whether it is alleged that the localities against which the religious edifices are listed in par 47(3) of the further amended indictment are the "villages and areas" and the "cities, towns [and] villages" which are alleged in the same paragraph to have been destroyed or damaged.[236]

(9) The prosecution is ordered to plead sufficient detail to enable the various incidents alleged to constitute the infliction of severe pain and suffering referred to in par 55 of the further amended indictment to be identified, in the same way and to the same extent as it has given details of the killing incidents in pars 38 and 41.[237]

(10) The prosecution is to comply with the orders made within three weeks of the date of this decision.

Otherwise, the Trial Chamber dismisses the complaints made in the Talic Motion.

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

Dated this 26th day of June 2001,
At The Hague,
The Netherlands.

_____
Judge David Hunt
Presiding Judge

[Seal of the Tribunal]

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1 - Preliminary Motion Based on the Defects in the Form of the Indictment Dated 12 March 2001, 5 Apr 2001 ("Talic Motion"). Talic appears to have exceeded the limits imposed upon the lengths of motions and responses by the Practice Direction on the Length of Briefs and Motions (IT/184, 19 Jan 2001, par 5). The Practice Direction requires authorisation to exceed the limits imposed to be sought in advance, with an explanation of the exceptional circumstances necessitating the excess (*Ibid*, par 7). No doubt the failure in this case resulted from ignorance of the existence of the Practice Direction, and the breach will therefore be excused. The parties should, however, keep the existence of the Practice Direction in mind in relation to future filings.
2 - Further amended indictment, 12 Mar 2001.
3 - Amended Indictment, 16 Dec 1999.
4 - Count 1, Article 4(3)(a) of the Tribunal's Statute.
5 - Count 2, Article 4(3)(e).
6 - Count 3, Article 5(h).
7 - Count 4, Article 5(b).
8 - Count 8, Article 5(d).
9 - Count 9, Article 5(i).
10 - Count 6, Article 5(f).
11 - Count 7, Article 2(b).
12 - Count 5, Article 2(a).
13 - Count 10, Article 2(d).
14 - Count 11, Article 3(b).
15 - Count 12, Article 3(d).
16 - Prosecution's Response to "Preliminary Motion Based on the Defects in the Form of the Indictment Dated

12 March 2001" Filed by the Accused Momir Talic, 3 May 2001 ("Prosecution Response").
17 - Talic Motion, Section V: Conclusion, last paragraph.
18 - Decision on Filing of Replies, 7 June 2001 ("Decision on Replies"), par 1.
19 - Status Conference, 18 May 2001, Transcript pp 313-316.
20 - Prosecution's Supplementary Response to "Preliminary Motion Based on the Defects in the Form of the Indictment Dated 12 March 2001" Filed by the Accused Momir Talic and Request for Leave to Amend the Further Amended Indictment, 22 May 2001 ("Prosecution Application"), par 5.
21 - Response to the Prosecutor's Request for Leave to Amend the Further Amended Indictment, 1 June 2001 ("*Talic Response*"), Section III: Discussion, third paragraph.
22 - *Ibid*, pars 1-2.
23 - Decision on Replies, par 6.
24 - Prosecution's Reply to the Talic Response to the Prosecutor's Request for Leave to Amend the Further Amended Indictment, 14 June 2001 ("Prosecution Reply").
25 - Decision Refusing Leave to Momir Talic to File Further Response, 20 June 2001.
26 - Paragraphs 50-51, *infra*.
27 - Decision on Objections by Momir Talic to the Form of the Amended Indictment, 20 Feb 2001 ("20 February 2001 Decision"), Sections 4-5; see also Decision on Motion by Momir Talic for Provisional Release, 28 Mar 2001 ("28 March 2001 Decision"), Section 5.
28 - Status Conference, 17 Nov 2000, Transcript pp 221-222.
29 - 20 February 2001 Decision, par 55(iv)(a).
30 - *Ibid*, par 26.
31 - *Prosecutor v Aleksovski*, Case IT-95-14/1-A, Judgment, 24 Mar 2000, par 171, footnote 319, citing *Prosecutor v Krnolejac*, Decision on Preliminary Motion on Form of Amended Indictment, 11 Feb 2000 ("Second *Krnojelac* Decision"), par 60; *Prosecutor v Delalic*, Case IT-96-21-A, Judgment, 20 Feb 2001 ("*Celebici* Appeal Judgment"), par 351.
32 - 20 February 2001 Decision, pars 26-28.
33 - Further amended indictment, pars 33-34. The terms of these paragraphs are quoted in footnote 35, *infra*.
34 - cf *Prosecutor v Kordic*, IT-95-14/2-A, Decision on Motions to Extend Time for Filing Appellant's Briefs, 11 May 2001, par 14: The duty of the prosecution is to act as "ministers of justice assisting in the administration of justice".
35 - Paragraph 33 of the further amended indictment states: Each of the accused are *[sic]* individually responsible for the crimes alleged against him in this indictment, pursuant to Article 7(1) of the Tribunal Statute. Individual criminal responsibility includes planning, instigating, ordering, committing, or otherwise aiding and abetting in the planning, preparation or execution of any crimes referred to in Articles 2, 3, 4 and 5 of the Tribunal Statute. Paragraph 34 states: Each of the accused whilst holding the positions of superior authority as set out in the foregoing paragraphs, is also criminally responsible for the acts of his subordinates, pursuant to Article 7(3) of the Tribunal Statute. A superior is responsible for the acts of his subordinate(s) if he knew or had reason to know that his subordinate(s) were about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.
36 - Talic Motion, Section I: The Deficiencies in the Definition of General Talic's Criminal Conduct, par 2.
37 - 20 February 2001 Decision, par 10.
38 - This is further confirmed in the document filed by the prosecution with its further amended indictment, entitled "Prosecutor's Further Amended Indictment", 12 Mar 2001 ("Prosecution Explanation"). In par 3 of that document, the prosecution identifies that part of the indictment in which the characterisation of the criminal liability of each accused is pleaded as par 33, where it refers to "planning, instigating, ordering, committing, or otherwise aiding and abetting", and which is incorporated within each of the counts pleaded.
39 - Prosecution Explanation, par 4; Talic Motion, Section I, par 3.
40 - Talic Motion, Section III: The Deficiencies in the Facts Ascribed to General Talic, Part 1: Observations relating to all the counts, par 1.a.
41 - Prosecution Response, par 22. See also pars 23-24.
42 - 28 March 2001 Decision, pars 40-45.
43 - *cf* 20 February 2001 Decision, par 26.
44 - The basis upon which leave will be granted to amend an indictment is discussed in the recent decision of the Trial Chamber in the present case, Decision on Replies, pars 3-4.
45 - See, for example: Status Conference, 17 Nov 2000, Transcript p 213; Oral hearing, Motion by Talic for Provisional Release, 2 Feb 2001, Transcript p 247; Status Conference, 2 Feb 2001, Transcript pp 265-266, 268-270, 275-276; Motion (by Brdanin) to Dismiss the Indictment, 2 May 2001, pars 4-6.
46 - *Celebici* Appeal Judgment, pars 760-766.
47 - Prosecution Explanation, par 4.
48 - *Celebici* Appeal Judgment, par 766.

49 - *Ibid*, par 763.
50 - Such a situation is discussed elsewhere in this decision, at pars 60-63, *infra*.
51 - 20 February 2001 Decision, par 22.
52 - Paragraph 9, *supra*.
53 - Paragraph 81, *infra*, Order (1).
54 - Talic Motion, Section II: The Deficiencies Regarding General Talic's Status, first paragraph.
55 - *Ibid*, par 1.1.
56 - *Ibid*, par 1.2.
57 - Further amended indictment, par 23.
58 - Talic Motion, Section II, par 1.2.
59 - Further amended indictment, pars 13, 24.
60 - *Ibid*, par 24.
61 - *Talic Motion*, Section II, par 2.
62 - Prosecution Response, par 17.
63 - Paragraph 23 of the further amended indictment provides only an inclusive, rather than an exclusive, definition of the geographical area of responsibility of the 1st Krajina Corps. Nor is the "planned Serbian state", where par 27 of the indictment alleges that the ethnic cleansing took place for which the two accused are held responsible, defined in any exclusive way – whether in par 4 or elsewhere in the indictment.
64 - Paragraph 81, *infra*, Order (2).
65 - Prosecution Response, par 15.
66 - *Ibid*, par 15, referring to par 13 of the further amended indictment.
67 - Further amended indictment, pars 12-13, 15, 19-20.
68 - *Ibid*, par 20. In its Response, the prosecution has further elaborated this allegation by asserting that Talic was in "effective control" of the Corps: Prosecution Response, par 17.
69 - "Instructions on the Application of the International Laws of War in the Armed Forces of the SFRY", published in 1988 (Further amended indictment, par 26).
70 - Further amended indictment, pars 25-26.
71 - *cf Prosecutor v Naletilic*, IT-98-34-PT, Decision on Defendant Vinko Martinovic's Objection to the Indictment, 15 Feb 2000, par 17; *Prosecutor v Brdanin and Talic*, 20 February 2001 Decision, par 50.
72 - Further amended indictment, par 13.
73 - Paragraph 81, *infra*, Order (3). The attention of the prosecution is drawn to what is also said in relation to this issue in pars 54 and 59 (footnote 181), *infra*.
74 - Paragraph 3, *supra*.
75 - Prosecution Application, par 5.
76 - Further amended indictment, par 27, which is incorporated by reference within each count, and which is bolstered by the express reference in each count to the accused having acted "in concert".
77 - So far as Talic is concerned, this is as commander of the 1st Krajina Corps and as a member of the ARK Crisis Staff (see pars 16-21, *supra*).
78 - *Prosecutor v Tadic*, IT-94-1-A, Judgment, 15 July 1999 ("Tadic Conviction Appeal Judgment").
79 - *Ibid*, par 185.
80 - *Ibid*, par 187.
81 - *Ibid*, par 185.
82 - *Ibid*, par 187.
83 - *Ibid*, par 188.
84 - *Ibid*, pars 191, 193.
85 - *Ibid*, pars 193, 195, 204, 225.
86 - *Ibid*, pars 196, 202, 203, 204.
87 - *Ibid*, par 203.
88 - *Ibid*, par 199.
89 - *Ibid*, par 204.
90 - *Ibid*, par 220.
91 - *Ibid*, par 220.
92 - *Ibid*, par 195.
93 - *Ibid*, par 202
94 - *Ibid*, par 203.
95 - *Ibid*, par 196.
96 - The Tadic Conviction Appeal Judgment (at par 196) describes them all as "co-defendants", but the issue is the same where only some of the participants have been charged and are standing trial. The category does *not* depend upon just who has been charged.
97 - The judgment speaks here (also at par 196) of co-perpetrators, but such a description, with all due respect,

begs the question.
98 - Tadic Conviction Appeal Judgment, par 202.
99 - *Ibid*, par 204.
100 - The judgment's use of the word "perpetrator" (at par 196) is a reference to a person who personally perpetrates the crime falling within the agreed object of the common design, or joint criminal enterprise.
101 - Tadic Conviction Appeal Judgment, par 190.
102 - *Ibid*, pars 191, 193.
103 - *Ibid*, par 196.
104 - *Ibid*, par 202.
105 - *Ibid*, par 203.
106 - *Ibid*, par 203.
107 - *Ibid*, par 202.
108 - The burden carried by the prosecution in relation to the accused's state of mind is therefore higher in relation to a case based upon a joint criminal enterprise (where the crime charged falls within the object of the enterprise) than it is for a case based solely upon aiding and abetting. In a case based solely upon aiding and abetting, the prosecution must establish that the accused *knew* that the perpetrator had the state of mind required for the crime committed, but it need not establish that he also *shared* that state of mind – as it must in a case based upon a joint criminal enterprise: *Prosecutor v Furundzija* , Case IT-95-17/1-T, Judgment, 10 Dec 1998 ("*Furundzija* Trial Judgment"), par 245 ("[...] it is not necessary for the accomplice to share the *mens rea* of the perpetrator"). In the same judgment (at par 249), the state of mind required for aiding and abetting is contrasted in this way with that required for a joint criminal enterprise, as it is also in *Prosecutor v Kupreskic* , Case IT-95-16-T, Judgment, 14 Jan 2000 ("*Kupreskic* Trial Judgment"), par 772. The Appeals Chamber has also drawn attention to the different states of mind required in the two cases: *Tadic* Conviction Appeal Judgment, par 229(iv); *Prosecutor v Furundzija* , Case IT-95-17/1-A, Judgment, 21 July 2000 ("*Furundzija* Appeal Judgment"), pars 118-119.
109 - *Tadic* Conviction Appeal Judgment, par 204.
110 - *Ibid*, par 220.
111 - *Ibid*, par 228. The emphasis appears in the judgment.
112 - Dolus eventualis is a subtle civil law concept with a wide application in relation to the state of mind required for different crimes. It requires an advertence to the possibility that a particular consequence will follow, and acting with either indifference or being reconciled to that possibility (in the sense of being prepared to take that risk). The extent to which the possibility must be perceived differs according to the particular country in which the civil law is adopted, but the highest would appear to be that there must be a "concrete" basis for supposing that the particular consequence will follow.
113 - Talic Response, Section III, par 2.3.
114 - *Ibid*, par 1.1.
115 - *Ibid*, pars 2.1, 2.2.
116 - Prosecution Reply, par 11.
117 - *Prosecutor v Kordic*, Case IT-95-14/2-PT, Decision on Defence Application for Bill of Particulars, 2 Mar 1999, par 8.
118 - 20 February 2001 Decision, pars 48-49.
119 - Talic Motion, Section II, par 3.1.
120 - *Ibid*, par 3.2.
121 - *Ibid*, par 3.3.
122 - Talic Response, Section III, par 2.3.
123 - *Ibid*, pars 1.1, 2.1. Paragraph 1.1 states: None of the crimes alleged were the objective of this enterprise. Stated otherwise, all the crimes alleged in the indictment go beyond the scope of the criminal enterprise. [...] In the Prosecutor's indictment, none of the crimes committed falls within the scope of the criminal enterprise [...]. Paragraph 2.1 states: [...] all of the alleged crimes fall outside the scope of the criminal enterprise [...].
124 - *Ibid*, par 2.3.
125 - *Ibid*, par 2.3.
126 - *Ibid*, par 2.3.
127 - Prosecution Reply, par 6, referring to the *Tadic* Conviction Appeal Judgment, par 220, quoted in par 28, *supra*.
128 - Talic Response, Section III, pars 1.1, 2.1. The relevant passages are quoted in footnote 123, *supra*.
129 - *Trial of the Major War Criminals before the International Military Tribunal*, Judgment, Nuremberg 1947 (1995), Vol XXII ("Nuremberg Judgment"), p 467.
130 - Paragraph 6 of the Prosecution Reply identifies the principle stated in the Tadic Conviction Appeal Judgment, referring to the limited responsibility of the participants in a joint criminal enterprise for crimes which go beyond the object of that enterprise, as an answer to the complaint made by Talic.

131 - Paragraphs 39-41, *infra*.
132 - Paragraph 30, *supra*: The prosecution must establish that, "in the case of a participant in the joint criminal enterprise who is charged with a crime committed by another participant which goes beyond the agreed object of the enterprise, [...] the accused was aware that such a crime was a possible consequence in the execution of that enterprise and that, with that awareness, he participated in that enterprise".
133 - *Tadic* Conviction Appeal Judgment, par 220.
134 - Paragraph 35, *supra*.
135 - 20 February 2001 Decision, par 20.
136 - Paragraph 81, *infra*, Order (4)(a).
137 - *Ibid*, Order 4(b).
138 - Talic Response, Section III, par 1.1.
139 - Prosecution Reply, par 3.
140 - Talic Response, Section III, par 1.1.
141 - Prosecution Reply, par 3.
142 - *Ibid*, par 4.
143 - Paragraphs 25 (Category 3) and 30, *supra*.
144 - Nuremberg Judgment, p 468.
145 - Paragraph 204.
146 - The example given in par 204 is of "a common, shared intention on the part of a group to forcibly remove members of one ethnicity from *their* town, village or region (to effect 'ethnic cleansing') with the consequence that, in the course of doing so, *one or more* of the victims is shot and killed". The emphasis has been added.
147 - Paragraph 81, *infra*, Order 4(c).
148 - Talic Response, Section III, par 2.2.
149 - Nuremberg Judgment, p 500.
150 - Prosecution Reply, par 10. The emphasis has been added.
151 - Paragraph 33, *supra*.
152 - Paragraph 19, *supra*.
153 - *Celebici* Appeal Judgment, par 581.
154 - Decision on Replies, pars 3-4.
155 - *cf Prosecutor v Naletilic and Martinovic*, Case IT-98-34-PT, Decision on Vinko Martinovic's Objection to the Amended Indictment and Mladen Naletilic's Preliminary Motion to the Amended Indictment, 14 Feb 2001, pp 4-7.
156 - *Ibid*, pp 4, 7.
157 - Paragraph 81, *infra*, Order (5).
158 - Talic Motion, Section III: The Deficiencies in the Facts Ascribed to General Talic, last paragraph in the general part.
159 - *Ibid*, par 1.a.
160 - Paragraph 14, *supra*.
161 - Talic Motion, Section III, par 1.b.
162 - The possible circularity of that argument has already been discussed in par 20, *supra*.
163 - *Talic Motion*, Section III, par 1.b.
164 - Further amended indictment, par 20.
165 - Article 7.1 includes actions whereby the accused "planned, instigated, ordered [...] or otherwise aided and abetted in the planning, preparation or execution of a crime".
166 - Paragraph 21, *supra*.
167 - Further amended indictment, par 36.
168 - *Ibid*, par 37.
169 - *Ibid*, par 44.
170 - *Ibid*, par 38.
171 - *Ibid*, par 40.
172 - *Ibid*, par 41.
173 - *Ibid*, par 42.
174 - *Talic Motion,* Section III, par 2.1.
175 - *Ibid*, pars 2.1.1, 2.2.
176 - *Ibid*, par 2.1.2.
177 - *Ibid*, par 2.1.1.
178 - Prosecution Response, par 19.
179 - Paragraph 81, *infra*, Order (6).
180 - Talic Motion, Section III, par 2.1.1.
181 - The Trial Chamber has already stated that the prosecution will be ordered to identify with some precision

in the indictment the basis upon which it seeks to make Talic criminally responsible *as a member of the ARK Crisis Staff* (par 21, *supra*.) It may be that the conclusion reached in the present paragraph will have to be revisited if some basis is shown for making Talic criminally responsible for the actions of persons other than those under his command as commander of the 1st Krajina Corps, in (for example) the subjection of Bosnian Muslim and Bosnian Croat detainees to physical and mental abuse by "others" pleaded in par 42 of the further amended indictment. (See pars 53-54, *supra*.)
182 - Talic Motion, Section III, pars 2.1.1, 2.3.
183 - Prosecution Response, pars 20-21.
184 - *Prosecutor v Kvocka*, Case IT-99-30-PT, Decision on Defence Preliminary Motions on the Form of the Indictment, 12 Apr 1999, par 17.
185 - This is consistent with what was said by the Appeals Chamber in the *Celebici* Appeal Judgment, at pars 763, 766, when discussing the relevance of such evidence to the sentence to be imposed (see par 13, *supra*).
186 - Rule 65*ter*(E)(i).
187 - Talic Motion, Section III, par 2.1.
188 - *Ibid*, par 2.2.
189 - Prosecution Response, par 24.
190 - Paragraph 55, *supra*.
191 - Further amended indictment, par 37(2).
192 - *Ibid*, par 42.
193 - *Ibid*, par 47(2).
194 - *Ibid*, par 55.
195 - Paragraph 56, *supra*.
196 - Paragraph 59, *supra*.
197 - Paragraph 81, *infra*, Order (7).
198 - *Talic Motion*, Section III, par 3.
199 - Paragraphs 57-63, *supra*.
200 - Talic Motion, Section III, par 3.
201 - Further amended indictment, par 47(3).
202 - Prosecution Response, par 26.
203 - Paragraph 81, *infra*, Order (8).
204 - Talic Motion, Section III, par 4.
205 - Paragraph 59, *supra*.
206 - Talic Motion, Section V: Conclusion, par II, in which the heading incorporates both counts 1 and 2 and counts 4 and 5.
207 - Prosecution Response, pars 19-20.
208 - Paragraph 59, *supra*.
209 - Paragraph 63, *supra*.
210 - Talic Motion, Section III, par 5. Paragraph 55 of the indictment refers to "severe pain or suffering" ("*grandes douleurs ou souffrances*" in the French translation). The Talic Motion refers to "*atteintes graves à l'intégrité physique ou mentale*" ("serious bodily and mental injury" in the English translation). The two are not entirely synonymous.
211 - Paragraph 65, *supra*.
212 - Prosecution Response, par 24.
213 - Paragraph 66, *supra*.
214 - Paragraph 81, *infra*, Order (9).
215 - Talic Motion, Section III, par 6.
216 - Paragraphs 68-70, *supra*.
217 - Paragraph 70, *supra*.
218 - 20 February 2001 Decision, par 55(iv)(b).
219 - Further amended indictment, par 12.
220 - Talic Motion, Section IV: Vagueness as to the Allegation that There was an International Conflict. The paragraphs of this Section of the Talic Motion are unnumbered.
221 - Prosecution Response, par 29.
222 - *Ibid*, par 31.
223 - Talic Motion, Section IV.
224 - *Ibid*, Section IV.
225 - *Ibid*, Section IV.
226 - Prosecutor v Delalic, Case IT-96-21-T, Decision on the Accused Mucic's Motion for Particulars, 26 June 1996, pars 7-8; *Prosecutor v Blaskic* , Case IT-95-14-PT, Decision on the Defence Motion to Dismiss the Indictment Based upon Defects in the Form Thereof, 4 Apr 1997, par 20; *Prosecutor v Kupreskic* , Case IT-95-

16-PT, Order on the Motion to Withdraw the Indictment Against the Accused Vlatro Kupreskic, 11 Aug 1998, p 2; *Prosecutor v Krnojelac*, Case IT-97-25-PT, Decision on the Defence Preliminary Motion on the Form of the Indictment, 24 Feb 1999, par 20; 28 March 2001 Decision, par 23.
227 - See par 14, *supra*.
228 - See par 17, *supra*.
229 - See par 21, *supra*.
230 - See par 39, *supra*.
231 - See par 41, *supra*.
232 - See par 45, *supra*.
233 - See par 51, *supra*.
234 - See par 58, *supra*.
235 - See par 66, *supra*.
236 - See pars 70 and 74, *supra*.
237 - See par 73, *supra*.

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Sierra Leone: Commitments to the Special Court must remain firm and not falter

Two years after the Government of Sierra Leone and the United Nations (UN) signed an agreement to establish the Special Court for Sierra Leone, Amnesty International is calling on the international community not to waver in its support for the Special Court.

"16 January 2002 marked a historic development towards ending impunity for a decade of atrocities against the people of Sierra Leone," Amnesty International said today. "The Special Court was established at the initiative of an African state, Sierra Leone, in agreement with the UN, to act on behalf of the entire international community to provide justice to victims of crimes against humanity and war crimes."

"That unique opportunity and the significant progress made so far cannot now be squandered because of the failure by some states to cooperate fully with the Special Court and insufficient funding."

Thirteen people were indicted by the Special Court during 2003 for bearing the greatest responsibility for crimes against humanity, war crimes and other serious violations of international law. Nine of those indicted are currently in the custody of the Special Court and trials are expected to begin in March or April this year.

One of those indicted is the former President of Liberia, Charles Taylor. The charges against him relate to killings, mutilations, rape and other forms of sexual violence, sexual slavery, conscription of children, abduction and forced labour perpetrated by Sierra Leone armed opposition forces which Charles Taylor had actively supported.

Despite his indictment and an international arrest warrant, Charles Taylor was allowed to leave Liberia for Nigeria on 11 August 2003 where he remains with guarantees from the Nigerian government that he will be neither surrendered to the Special Court nor brought before Nigeria's own courts.

"The Nigerian government's action in sheltering a person indicted for crimes against humanity and war crimes violates international law", Amnesty International said. "It is under a legal obligation to arrest Charles Taylor and either surrender him to the Special Court or open an investigation with a view to determining whether to open criminal or extradition proceedings in Nigerian courts".

"No one, regardless of their status - including a head of state - has immunity for the most serious crimes under international law," Amnesty International added.

"We have again written to President Olusegun Obasanjo, pointing out that, while it has been argued that allowing Charles Taylor to travel to Nigeria was in the interests of securing a political settlement to Liberia's armed conflict, this cannot be at the expense of abiding by international law and ending impunity," Amnesty International said.

On 17 August 2003, when asked why former President Taylor had been allowed to leave Liberia for Nigeria, the UN Secretary-General replied that: "*the long arm of the law will still be at work and the indictment still stands*".

Amnesty International has called on all states, including Nigeria, to cooperate fully with the Special Court by entering into binding legal agreements with the Special Court to assist it fully in any investigation and in surrendering individuals who are indicted by the Special Court.

Both the UN Secretary-General and the Security Council have repeatedly expressed their support for the Special Court and called on all states both to cooperate fully with the Special Court and provide adequate funding for the court.

Despite these calls, however, the very existence of the Special Court has been threatened by a financial crisis. The Special Court must receive its full budget if it is to continue its work in a way which adheres to the highest standards of judicial practice and provides a "legacy" to the Sierra Leone legal and justice systems.

"We are urging all states to make urgent and generous contributions towards funding the Special Court, both for the outstanding budget for its current second year of operation and also for the subsequent year," Amnesty International said.

While some of the shortfall for the second year has been met by bringing forward contributions from the third year, this only aggravates the serious shortfall projected for the third and planned final year. If the work of the court is not concluded in exactly three years, the problem is compounded.

"The commitment made by the international community on 16 January 2002 to address impunity, to encourage reconciliation after more than a decade of brutal conflict and to reinforce the foundations of a durable peace in Sierra Leone must remain firm and not falter," Amnesty International concluded.

For further information, see *Open letter to President Olusegun Obasanjo* (AI Index: AFR 44/002/2004), published by Amnesty International on 16 January 2004.

United Nations
Nations Unies

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

IN THE APPEALS CHAMBER

Before: Judge Theodor Meron, Presiding Judge
Judge Mohamed Shahabuddeen
Judge Mehmet Güney
Judge Fausto Pocar
Judge Inés Mónica Weinberg de Roca

Registrar: Mr. Adama Dieng

Decision of: 12 February 2004

THE PROSECUTOR

v.

CASIMIR BIZIMUNGU
JUSTIN MUGENZI
JEROME BICAMUMPAKA
PROSPER MUGIRANEZA

Case No. ICTR-99-50-AR50

DECISION ON PROSECUTOR'S INTERLOCUTORY APPEAL AGAINST TRIAL CHAMBER II DECISION OF 6 OCTOBER 2003 DENYING LEAVE TO FILE AMENDED INDICTMENT

Counsel for the Prosecution Counsel for the Defence

Mr. Paul Ng'aruaMr. Ibukunolu BabajideMr. Elvis BazawuleMr. George Mugwanya Ms. Michelyne C. St. LaurentMr. Howard MorrisonMr. Ben GumpertMr. Pierre GaudreauMr. Tom Moran

1. The Appeals Chamber of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States Between 1 January and 31 December 1994 ("Appeals Chamber" and "International Tribunal," respectively) is seised of the "Prosecutor's Appeal Against Trial Chamber II Decision of 6 October 2003 Denying Leave to File Amended Indictment," filed by the Prosecution on 3 November 2003 ("Appeal"). The Appeals Chamber hereby decides this interlocutory appeal on the basis of the

written submissions of the parties.

Procedural History

2. On 26 August 2003, the Prosecution filed a request for leave to amend the indictment in the Trial Chamber ("Request"). Appended to the Request was an amended indictment dated 28 July 2003 ("Amended Indictment"), which the Prosecution sought to substitute for the operative indictment filed on 16 August 1999 ("Current Indictment"). Two of the Accused, Mugiraneza and Bicamumpaka, filed a joint response, arguing inter alia that the Prosecution's Request was untimely and would unduly postpone the commencement of trial. The Accused Bizimungu also filed a separate response, which argued inter alia that the Amended Indictment contained new allegations regarding which the Defence had not made any investigations, such that the Defence would be prejudiced if required to meet the case set forth in the Amended Indictment. The Accused Mugenzi did not file a response to the Prosecution's Request. The Prosecution submitted replies to both responses.

3. On 6 October 2003, the Trial Chamber issued its decision dismissing the Prosecution's Request ("Decision"). The Decision stated that the Request arose under Rule 50 of the Rules of Procedure and Evidence of the International Tribunal ("Rules"). The Trial Chamber noted that, in exercising its discretion under Rule 50 of the Rules, it would consider "the particular circumstances of the case" and balance the rights of the Accused under Articles 19 and 20 of the Statute of the International Tribunal, including the "right to be informed promptly and in detail of the nature and cause of the charge against him or her, and the right to a fair and expeditious trial without undue delay," against "the complexity of the case."

4. The Trial Chamber held that some of the changes reflected in the Amended Indictment, namely removal of certain counts and deletion of the "Historical Context" section, did not necessarily require an amendment under Rule 50 of the Rules.

5. The Trial Chamber next held that the Prosecution's intention to replace two counts charging genocide and complicity in genocide with a single count charging genocide and, in the alternative, complicity in genocide, was "irregular and would render the count bad for duplicity and will pose problems particularly when [the Trial Chamber] has to pronounce judgment and sentence on one or the other of the charges." The Trial Chamber found that it was "not in the interests of judicial economy" to allow that amendment.

6. Finally, the Trial Chamber addressed the Prosecution's request to amend the Current Indictment following the discovery of new evidence that was not available at the time the Current Indictment was confirmed. The Trial Chamber concluded that "the expansions, clarifications and specificity made in support of the remaining counts do amount to substantial changes which would cause prejudice to the Accused." The Trial Chamber stated, as an example, the fact that although the Current Indictment "contains broad allegations in support of the Counts," the Amended Indictment contains "specific allegations detailing names, places, dates and times wherein the Accused are alleged to have participated in the commission of specific crimes." The Trial Chamber found that "such substantial changes would necessitate that the Accused be given adequate time to prepare his defence."

7. The Trial Chamber also noted that trial was scheduled to begin on 3 November 2003. In the Trial Chamber's view, granting the Prosecution leave to amend the indictment would "not only cause prejudice to the Accused but would also result in a delay for the commencement of the trial for the reasons outlined above." In such circumstances, the Trial Chamber concluded that "it would not be in the interests of justice" to grant leave to amend the indictment. The Trial Chamber therefore denied the Prosecution's Request in its entirety.

8. The Trial Chamber subsequently certified the Decision for interlocutory appeal under Rule 73(B) of the Rules, and the Prosecution filed this Appeal. The Accused Mugiraneza filed a timely response, to which the Prosecution replied. The Accused Bizimungu moved for an extension of time in which to respond to the Appeal, which the Appeals Chamber granted;

Bizimungu then filed a timely response to the Appeal on 25 November 2003, to which the Prosecution did not reply.

9. The Accused Bicamumpaka filed a response on 10 December 2003, 37 days after the filing of the Appeal and 14 days after the expiry of the extension granted to the Accused Bizimungu. The Practice Direction on Procedure for the Filing of Written Submissions in Appeal Proceedings Before the Tribunal, dated 16 September 2002 ("Practice Direction"), provides that responses to interlocutory appeals governed by the Practice Direction are due ten days after the filing of the appeal. The Appeals Chamber notes, however, that the Practice Direction does not specifically provide a deadline for responses to appeals that follow certification of the Trial Chamber, although the Appeals Chamber has recently suggested that the response time of ten days should also apply to appeals following certification. The Appeals Chamber affirms this interpretation of the Practice Direction. However, since that interpretation may not have been apparent to the Accused Bicamumpaka, the Appeals Chamber has decided to consider his response.

Jurisdiction

10. The Accused Mugiraneza raises a threshold challenge to the Appeals Chamber's jurisdiction, claiming that the Amended Indictment is not a proper proposed indictment because it was signed by the Prosecutor on 28 July 2003 but subsequently altered before the Request was filed on 26 August 2003. This objection is not well-founded. A motion for leave to amend an indictment need only submit the proposed amendments to the indictment or the text of the proposed amended indictment. There is no requirement in Rule 50 that the proposed indictment be signed by the Prosecutor. Although the discrepancy between the date of signature and the date of finalization of the Amended Indictment might deserve an explanation (which the Prosecution has provided, namely that the results of further investigations warranted further changes between 28 July and 26 August 2003), the discrepancy does not deprive the Appeals Chamber of jurisdiction in this matter.

Discussion

11. The Appeals Chamber's recent decision in Prosecutor v. Karemera et al. ("Karemera") reaffirmed that Rule 50 of the Rules assigns the decision to allow an amendment to the indictment to the discretion of the Trial Chamber and that "appellate intervention is warranted only in limited circumstances." The party challenging the exercise of discretion must show "that the Trial Chamber misdirected itself either as to the principle to be applied, or as to the law which is relevant to the exercise of the discretion, or that it has given weight to extraneous or irrelevant considerations, or that it has failed to give weight or sufficient weight to relevant considerations, or that it has made an error as to the facts upon which it has exercised its discretion."

12. The Prosecution submits that the Trial Chamber balanced the right of the Accused to a trial without undue delay against the complexity of the case, but failed to take into account "a multiplicity of other material considerations or values against which the rights of the accused must be balanced to reach a correct decision." First, the Prosecution charges that the Trial Chamber did not consider "the obtaining of new and additional evidence since the confirmation of the old Indictment." The Appeals Chamber does not agree that the Trial Chamber ignored this factor. The Trial Chamber understood the Prosecution's position to be that "the Prosecution seeks leave to amend the current Indictment following the discovery of new evidence which was not available at the time of confirmation of the current Indictment." The Trial Chamber then stated, in the context of its discussion of the merits of the Prosecution's Request: "The Chamber considers the Prosecution's further request to amend the current Indictment following its discovery of new evidence which was not available at the time of confirmation of the current Indictment which thereby necessitates the expansion of the remaining Counts." In light of these statements, it is plain that the Trial Chamber considered

the fact that the Prosecution's Request was based on newly obtained evidence.

13. The Prosecution also contends that the Trial Chamber failed to give due consideration to the fundamental purposes of the International Tribunal, including "the gravity or seriousness of the crimes with which the accused is/are indicted; the mandate or fundamental purpose of the [International] Tribunal to bring to justice all those responsible for the heinous crimes in Rwanda in 1994; the rights of victims; the obligation of the Prosecutor to prosecute the accused to the full extent of the law and to present before the [International] Tribunal all relevant evidence reflecting the totality of the accused's participation in the crimes; and establishing the totality of truth of what happened in Rwanda and those who are responsible in order to promote justice and reconciliation." Although the Trial Chamber did not mention these factors in the Decision, it does not follow that they were not considered at all. Furthermore, Karemera cautioned against placing significant weight on such factors when they are invoked "without further elaboration." The Prosecution's Appeal, like the appeal in Karemera, "has not shown that proceeding to trial on the Current Indictment will impair the rights of victims or undermine the mandate of the International Tribunal." The Appeals Chamber therefore cannot conclude that the Trial Chamber exceeded its discretion by failing to give weight to the factors advanced by the Prosecution.

14. The Prosecution also argues that, while the Trial Chamber did balance the right of the Accused to a trial without undue delay against the complexity of the case, it failed to give this latter factor "appropriate weight." Yet the Trial Chamber expressly noted in paragraph 27 of the Decision that the "complexity of the case" is a factor to be balanced against the rights of the Accused. The Trial Chamber was not required to itemize in the Decision the various obstacles that, according to the Prosecution, impeded a faster investigation of this case. In such circumstances, it suffices that the complexity of the case was taken into account as a factor weighing in the Prosecution's favour. The Prosecution's objection that the complexity of the case should have tipped the balance is merely a claim that the Trial Chamber reached the wrong result, although it considered the right factor. Disagreement with the result of an exercise of discretion, without more, is not a basis for appellate interference.

15. The Prosecution's next argument challenges the Trial Chamber's reliance on the finding that amending the indictment would have delayed the start of trial past the scheduled start date of 3 November 2003. The Trial Chamber found that the amendments involved "substantial changes" which would cause prejudice and that "such substantial changes would necessitate that the Accused be given adequate time to prepare his defence." The Trial Chamber then concluded that the amendments would cause "a delay for the commencement of trial" and that it "would not be in the interests of justice to grant the Motion." The Prosecution contends that the Trial Chamber treated the start date of 3 November 2003 as absolutely inflexible and not subject to change under any circumstance. The Prosecution submits that the Trial Chamber should instead have considered the possibility of postponing the trial date if an amendment to the indictment is justifiable in light of the totality of the circumstances.

16. The Prosecution is certainly correct that the Trial Chamber must consider all of the circumstances bearing on a motion to amend the indictment. Interference with the orderly scheduling of trial, however, is one such circumstance. The Appeals Chamber stated in Karemera that "a postponement of the trial date and a prolongation of the pretrial detention of the Accused" are "some, but not all" of the considerations relevant to determining whether a proposed amendment would violate the right of the accused to a trial "without undue delay," which in turn bears on the broader question whether the amendment is justified under Rule 50 of the Rules. The Trial Chamber should also consider such factors as the nature and scope of the proposed amendments, whether the Prosecution was diligent in pursuing its investigations and in presenting the motion, whether the Accused and the Trial Chamber had prior notice of

the Prosecution's intention to seek leave to amend the indictment, when and in what circumstances such notice was given, whether the Prosecution seeks an improper tactical advantage, and whether the addition of specific allegations will actually improve the ability of the Accused to respond to the case against them and thereby enhance the overall fairness of the trial. Likewise, the Trial Chamber must also consider the risk of prejudice to the Accused and the extent to which such prejudice may be cured by methods other than denying the amendment, such as granting adjournments or permitting the Accused to recall witnesses for cross-examination. The above list is not exhaustive; particular cases may present different circumstances that also bear on the proposed amendments.

17. In this case, it cannot be said that the Trial Chamber failed to consider the above-listed points. To begin with, they were specifically argued by the Prosecution in its Request and summarized in the Decision. Although the Decision does not mention them in its summary of its deliberations, that omission is not error of itself; the Trial Chamber is not required to enumerate and dispose of all of the arguments raised in support of a motion. Absent a showing that the Trial Chamber actually refused to consider any factors other than the determination that the amendment would delay the start of trial, or a showing that the Trial Chamber's conclusion was so unreasonable that it cannot have considered all pertinent factors, the Appeals Chamber must conclude that the Trial Chamber took account of all of the arguments put to it.

18. In this case, the Trial Chamber's Decision sufficiently shows that it considered factors other than delay in the commencement of trial. The Decision states that the factors of prejudice and delay are to some extent independent, i.e. the proposed amendments would "not only" prejudice the accused but "would also" cause a delay. This language suggests that the potential delay, which was required to give the Accused "adequate time to prepare" their defence, would not suffice to eliminate all of the prejudice to the Accused that would result from the Amended Indictment. In other words, the Trial Chamber concluded that the Accused would suffer prejudice in the conduct of their defence even if they were given more time to prepare, and that that prejudice was not sufficiently counterbalanced by any factors weighing in the Prosecution's favour.

19. The Trial Chamber's finding of incurable prejudice is supported by the submissions of the Accused that the Amended Indictment contains not only specific allegations that clarify the charges against the Accused – amendments that can actually enhance the overall fairness of the trial – but also an expansion of the charges beyond the scope of the Current Indictment. Although the Prosecution may seek leave to expand its theory of the Accused's liability after the confirmation of the original indictment, the risk of prejudice from such expansions is high and must be carefully weighed. On the other hand, amendments that narrow the indictment, and thereby increase the fairness and efficiency of proceedings, should be encouraged and usually accepted.

20. In this case, the Trial Chamber noted that the proposed changes in the Amended Indictment consist primarily of "expansions" as well as clarifications. Had the Prosecution solely attempted to add particulars to its general allegations, such amendments might well have been allowable because of their positive impact on the fairness of the trial. However, the Prosecution chose to combine changes that narrowed the indictment with changes that expanded its scope in a manner prejudicial to the Accused. Rather than distinguishing these categories of changes, which might have enabled the Trial Chamber to allow the former without allowing the latter, the Prosecution's Motion and Amended Indictment intertwined the two, such that they were not readily separable. In this context, the Trial Chamber was justified in dismissing the entire request. The Trial Chamber was not required to disaggregate the changes that would have caused prejudice from those that would not. However, this holding does not preclude the Prosecution from coming forward with a new proposed

indictment that would provide greater notice of the particulars of the Prosecution's case without causing prejudice in the conduct of trial.

21. The Prosecution has not met its burden of showing that the Trial Chamber failed to consider any of the relevant factors placed before it, nor was its conclusion so unreasonable as to compel appellate intervention in this matter. On the contrary, the Trial Chamber's dismissal of the Motion was reasonable and lay within the Chamber's discretion.

22. The Prosecution also challenges the Trial Chamber's refusal of its request to charge genocide and complicity in genocide alternatively but in a single count. The Prosecution relies on the Trial Chamber judgement in Musema, which stated that an accused cannot be convicted of both genocide and complicity in genocide, since one cannot be both a principal perpetrator of an act and an accomplice thereto. While the Prosecution is correct that the Musema judgement would permit and indeed require that the crimes of genocide and complicity in genocide be charged in the alternative, it says nothing about charging them in the same count.

23. The rule against duplicity generally forbids the charging of two separate offences in a single count, although a single count may charge different means of committing the same offence. The Appeals Chamber need not decide at this time whether genocide and complicity in genocide constitute separate offences or different means of committing the same offence. Regardless of which option is correct, the Trial Chamber was justified in concluding that there was no need to enter into this debate, which would have expended judicial time and resources in a manner that would have little effect on this case. This risk is evident from the suggestion of the Accused Mugiraneza that the amendment might have led him to file a motion under Rule 72 of the Rules challenging the form of the indictment. The Trial Chamber's conclusion that arguments about potential duplicity were "problems" that were "not in the interests of judicial economy" is reasonable, particularly given that the Prosecution does not allege that it has suffered any prejudice from the denial of this amendment. The Trial Chamber was therefore justified in avoiding the filing of further motions challenging the validity of the indictment. Accordingly, the Trial Chamber acted within its discretion in refusing this amendment. This aspect of the Appeal is therefore dismissed.

24. The Accused Bizimungu submits that the Prosecution should not be permitted to withdraw the section on "Historical Context" from the Current Indictment. The Trial Chamber stated that the Prosecution could drop material from the Current Indictment without seeking leave to amend it under Rule 50 of the Rules. The Accused Bizimungu did not seek certification to appeal this issue, so the Appeals Chamber is without jurisdiction to address it.

Disposition

25. The Appeals Chamber dismisses the Appeal.

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

Done this 12th day of February 2004,
At The Hague,
The Netherlands. _____
Theodor Meron
Presiding Judge

Judge Pocar appends an individual opinion to this decision.

[Seal of the International Tribunal]

INDIVIDUAL OPINION OF JUDGE POCAR

1. I concur with the decision of the Appeals Chamber to dismiss this appeal, and I also agree with its reasoning that the Trial Chamber correctly exercised its discretion under Rule 50 of the Rules. In my view, however, the decision should also state that an amendment to an indictment should not be allowed if the conditions for confirming the indictment, set forth in Rule 47 of the Rules, are not satisfied. In failing to do so, both in this appeal and in the Karemera appeal decision rendered on 19 December 2003, the Appeals Chamber has neglected to provide necessary guidance to Trial Chambers on a crucial issue that may affect a number of cases in the future.
2. To me, therefore, this decision remains incomplete, and furthermore, it may be misleading. In paragraph 11 of the decision, it is stated that "...Rule 50 of the Rules assigns the decision to allow an amendment to the indictment to the discretion of the Trial Chamber...." This may give the impression that a decision to allow an amendment rests solely in the discretion of a Trial Chamber, without more. I do not believe, however, that such a decision is solely a matter of discretion, because the conditions set forth in Rule 47 of the Rules must be taken into account by the Trial Chamber when it carries out its assessment. To dispel confusion, the Appeals Chamber should have pronounced on the issue even if the parties did not raise it expressly.
3. Article 18(1) of the Statute of the International Tribunal provides that "[t]he judge of the Trial Chamber to whom the indictment has been transmitted shall review it. If satisfied that a prima facie case has been established by the Prosecutor, he or she shall confirm the indictment. If not so satisfied, the indictment shall be dismissed." The confirmation of an indictment can therefore only take place if a prima facie case exists. This statutory requirement is echoed in Rule 47(E) of the Rules, which states that "[t]he reviewing Judge shall examine each of the counts in the indictment, and any supporting materials the Prosecutor may provide, to determine, applying the standard set forth in Article 18 of the Statute, whether a case exists against the suspect."
4. Rule 50 of the Rules governs the amendment of indictments. This rule does not set forth conditions for allowing an amendment to an indictment. But it does preserve the rights of the accused in relation to new charges—for example, it provides for a further appearance to enable the accused to enter a plea on the new charges, and it also provides for a further period of thirty days to file preliminary motions pursuant to Rule 72 in relation to the new charges. Hence, after a request for an amendment is allowed, the new charges are subject to the same rules that would have applied if they had been presented in the original indictment.
5. In the same way, before an amendment is allowed, the inquiry must be governed by Rule 47, applicable to all indictments submitted, and a prima facie case must be presented. The illogic of any contrary view aside, the following may be noted. First, Rule 50 is placed in the same section in which the provisions for the confirmation of indictments are located, and no derogation from the general rule can be inferred from the text. Second, it cannot be that an amended indictment satisfies fewer requirements than those that were necessary for the original indictment's confirmation. Such an approach would allow the conditions set out in the Statute and Rule 47 to be circumvented in a given case on any number of additional amendments.
6. For these reasons, I believe that the Appeals Chamber should have stated, in this decision, that an amendment to an indictment should not be allowed if the conditions for confirming the indictment, articulated in Rule 47 of the Rules, are not satisfied.

Done this 12th day of February,
At The Hague,
The Netherlands. _____
Judge Fausto Pocar