



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: IT-97-25-PT  
Date: 11 February 2000  
Original: English

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**IN TRIAL CHAMBER II**

**Before:** Judge David Hunt, Presiding  
Judge Florence Ndepele Mwachande Mumba  
Judge Fausto Pocar

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

**Decision of:** 11 February 2000

**PROSECUTOR**

v

**Milorad KRNOJELAC**

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**DECISION ON PRELIMINARY MOTION  
ON FORM OF AMENDED INDICTMENT**

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**The Office of the Prosecutor:**

Mr Dirk Ryneveld  
Ms Peggy Kuo  
Ms Hildegard Uertz-Retzlaff

**Counsel for the Accused:**

Mr Mihajlo Bakrač  
Mr Miroslav Vasič

## I Introduction

1. The charges against Milorad Krnojelac ("accused") are referred to in sufficient detail in the decision of the Trial Chamber on his preliminary motion concerning the form of the original indictment ("previous decision").<sup>1</sup>

2. On 26 July 1999, the prosecution filed an amended indictment, following its confirmation by Judge Vohrah on 21 July. The additional supporting material was not served until 27 August. In accordance with Rule 50(B) of the Rules of Procedure and Evidence, the accused pleaded to the amended indictment on 14 September, and Rule 50(C) gave him a further period of thirty days in which to file a preliminary motion concerning the form of the amended indictment. Such a preliminary motion was filed on 14 October ("Motion").

3. The obligations of the prosecution when pleading an indictment are discussed in considerable detail in the Trial Chamber's previous decision. What is said there will not be repeated in this decision, but it will be necessary to give further consideration here to some of those obligations.

## II The complaints made by the accused

(a) *Paragraph 3.1 of the amended indictment.*

4. The paragraph reads:

### SUPERIOR AUTHORITY

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

The accused complains that the statement that he "communicated with military and political authorities beyond the prison"<sup>2</sup> is insufficiently precise without knowing what was intended by the

<sup>1</sup> Decision on the Defence Preliminary Motion on the Form of the Indictment, 24 Feb 1999, par 1.

<sup>2</sup> The words quoted are as stated in the Motion, and appear to be an English translation of the indictment served in the B/C/S language.

word “communicated”.<sup>3</sup> Except for the omission of two words not here relevant, par 3.1 was pleaded in the same terms in the original indictment. In its previous decision, the Trial Chamber said that the manner in which this and the other material facts demonstrating that the accused was the “commander” of the camp had been pleaded was sufficient, and that how the facts were to be proved is a matter of evidence, not pleading.<sup>4</sup>

5. The accused has nevertheless argued that documents within the supporting material provided by the prosecution demonstrate that the KP Dom was, during the “critical” period, divided into civil and military areas, requiring greater precision in the material facts pleaded in order to enable the accused, who claims to have been in charge only of the civil correction centre,<sup>5</sup> to prepare his defence.<sup>6</sup> The prosecution denies that the documents demonstrate the proposition asserted by the accused.<sup>7</sup> An objection to the form of the indictment is not an appropriate proceeding for contesting factual issues such as this one. The accused raised the same issue in his submissions which led to the previous decision on this very point, and there is nothing in his submissions in support of the present Motion which warrants a review of the Trial Chamber’s previous decision.

6. This complaint is rejected.

(b) *Paragraph 4.5*

7. Under the heading “General Allegations”, the paragraph reads:

4.5 All acts and omissions alleged in this indictment took place between April 1992 and August 1993, unless otherwise indicated.

The accused complains that the expression “unless otherwise alleged”<sup>8</sup> permits the prosecution to go outside the period of April 1992 to August 1993, making the period insufficiently specific and contravening what was said by the Trial Chamber in its previous decision.<sup>9</sup>

<sup>3</sup> Motion, par 14.

<sup>4</sup> Previous decision, par 19.

<sup>5</sup> *Ibid*, par 20.

<sup>6</sup> Defence Reply to the Prosecution Response to the Defence Preliminary Motion on the Form of the Amended Indictment, 16 Nov 1999 (“Reply”), par 8.

<sup>7</sup> Prosecution Response to Defence Reply to the Prosecution Response to the Defence Preliminary Motion on the Form of the Amended Indictment, 18 Nov 1999 (“Further Response”), par 3.

<sup>8</sup> The words quoted are as stated in the Motion, and appear to be an English translation of the indictment served in the B/C/S language.

<sup>9</sup> Motion, par 15, referring to par 30 of the previous decision.

8. This complaint demonstrates a misunderstanding by the accused of what is said. In the original indictment, par 4.5 was pleaded in the same terms except that it referred to a longer period – “between April 1992 and October 1994, unless otherwise indicated”. Attention was drawn to par 4.9 of the original indictment, which expressly limited the individual responsibility of this accused to the period ending August 1993. The inconsistency arose out of the manner in which the original indictment had been redacted (others having been charged, and the indictment sealed), and it was conceded by the prosecution that, so far as this accused was concerned, par 4.5 should be treated as having been limited to the period ending August 1993.<sup>10</sup> The prosecution was directed to reduce the period stated in par 4.5 to accord with its case against this accused. That is what has been done.

9. In their context in the indictment as a whole, therefore, the words “unless otherwise alleged” refer to the situation where the prosecution has been able in the amended indictment to be *more* precise as to the time at which certain events occurred, not where it wished to be *less* precise.

10. The accused, however, points to allegations in Schedule E to the amended indictment, which lists the names of the detainees alleged in par 5.41 of that indictment to have been subjected to forced labour.<sup>11</sup> The dates specified in the schedule as the period during which the various detainees are alleged to have been forced to work go beyond August 1993 and include many as late as October 1994. Some of them are alleged to have worked on the property of the accused at an unspecified time during the relevant period. But, as the prosecution points out, the terms of the indictment itself are now quite specific.<sup>12</sup> Paragraph 5.41 expressly limits the allegation that the accused participated in these criminal actions to the period from May 1992 until August 1993, and par 5.44 expressly limits the allegation that the detainees worked on the property of the accused to the Winter of 1992-1993. The dates in Schedule E can therefore be interpreted only as the total periods during which the detainees worked, and not as extending the express limitations stated in the indictment itself.

11. This complaint is rejected.

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<sup>10</sup> Previous decision, par 30.

<sup>11</sup> Reply, par 9.

<sup>12</sup> Further Response, par 4.

(c) *Paragraph 5.2*

12. Paragraph 5.2 is the sole foundation for the charge of a crime against humanity (“persecutions on political, racial and/or religious grounds”) laid in Count 1 (“Persecutions”). It is in the following terms:

5.2. MILORAD KRNOJELAC persecuted the Muslim and other non-Serb males by subjecting them to prolonged and routine imprisonment and confinement, repeated torture and beatings, countless killings, prolonged and frequent forced labour, and inhumane conditions within the KP Dom detention facility. As part of the persecution, MILORAD KRNOJELAC assisted in the deportation or expulsion of the majority of Muslim and non-Serb males from the Foča municipality.

The accused seeks –

- (a) to know whether his alleged liability is based on individual or command responsibility, and
- (b) particulars of the specific acts on his part by which he is alleged to bear any individual responsibility,

in relation to the persecution and acts of torture and beatings alleged in this paragraph.<sup>13</sup>

13. The accused is, however, already alleged to bear both individual and superior authority for the acts of torture and beatings alleged in that paragraph. Paragraph 4.10 asserts his responsibility as a superior, and particulars of that assertion are elsewhere supplied. Paragraph 4.9 asserts his individual responsibility, for each of the crimes alleged against him, in the terms of Article 7(1) of the Tribunal’s Statute:

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

However, no facts demonstrating the nature of the prosecution case that the accused bears such an individual responsibility are pleaded in the indictment beyond generalities such as “assisted in the deportation or expulsion” and “encouraged and approved”. The absence of any such pleaded facts is the basis of the accused’s complaint.

14. The prosecution answers the complaint in two ways. First, it argues that, as this paragraph is pleaded in the same terms as it was in the original indictment, and as no complaint was made by the accused in relation to its terms when so pleaded, he should not be permitted to complain now for

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<sup>13</sup> Motion, pars 16-18.

the first time.<sup>14</sup> Secondly, the prosecution says that the amended indictment pleads sufficient facts to enable the accused to know the case he has to meet on this issue.<sup>15</sup>

15. It should be clearly understood that the opportunity given by Rule 50(C) to file a preliminary motion alleging defects in the form of an *amended* indictment is directed to the material added by way of amendment. That opportunity cannot be used to raise issues in relation to the amended indictment which could have been raised in relation to the original indictment but were not, although in an appropriate case an extension of time to complain of a particular defect may be granted.

16. But it is not correct to say that the particulars supplied by the prosecution of the accused's individual responsibility generally in relation to the original indictment was not the subject of investigation in the earlier preliminary motion. In its previous decision, the Trial Chamber said:<sup>16</sup>

The prosecution is therefore required to amend the indictment so as to identify, *in relation to each count or group of counts*, the material facts (but not the evidence) upon which it relies to establish the individual responsibility of the accused for the particular offence or group of offences charged.

The issue in the present Motion is whether the amended indictment has complied with that order.

17. The prosecution says that it has sufficiently identified the accused's course of conduct which gave rise to his individual responsibility for the persecutions alleged in Count 1.<sup>17</sup> Reliance is placed upon what the Trial Chamber said in its previous decision:<sup>18</sup>

What must clearly be identified by the prosecution so far as the individual responsibility of the accused in the present case is concerned are the particular acts of the accused himself or the particular course of conduct on his part which are alleged to constitute that responsibility.

That statement was made against the background of more general statements as to the obligation of the prosecution to give particulars in the indictment:<sup>19</sup>

The extent of the prosecution's obligation to give particulars in an indictment is to ensure that the accused has "a concise statement of the facts" upon which reliance is placed to establish the offences charged, but only to the extent that such statement enables the accused to be informed of the "nature and cause of the charge against him" and in "adequate time [...] for the preparation of his defence". An indictment must contain information as to the identity of the victim, the place and the approximate date of the alleged offence and the means by which the offence was committed.

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<sup>14</sup> Response, par 10.

<sup>15</sup> Response, par 12; Further Response, par 5.

<sup>16</sup> Previous decision, par 17.

<sup>17</sup> Response, par 12.

<sup>18</sup> Previous decision, par 13. The references to authority for those propositions cited in the original have been omitted.

<sup>19</sup> *Ibid*, par 12. Similarly, the references to authority have been omitted.

The previous decision then went on to refer to the clear distinction drawn between the material facts upon which the prosecution relies (which must be pleaded) and the evidence by which those material facts will be proved (which need not be pleaded).<sup>20</sup>

18. That distinction is an important one. Whether a particular fact is material depends in turn upon the nature of the case which the prosecution seeks to make. The materiality of such things as the identity of the victim, the place and date of the events for which the accused is alleged to be responsible, and the description of the events themselves, necessarily depends upon the alleged proximity of the accused to those events. There are, in general, three different situations to be considered:

(A) In a case based upon superior responsibility, what is most material is:

- (i) the relationship between the accused and the others who did the acts for which he is alleged to be responsible; and
- (ii) the conduct of the accused by which he may be found (a) to have known or had reason to know that the acts were about to be done, or had been done, by those others, and (b) to have failed to take the necessary and reasonable measures to prevent such acts or to punish the persons who did them.<sup>21</sup>

However, so far as those acts of the other persons are concerned, although the prosecution remains under an obligation to give all the particulars which it is able to give, the relevant facts will usually be stated with less precision, and that is because the detail of those acts (by whom and against whom they are done) are often unknown – and because the acts themselves often cannot be greatly in issue.<sup>22</sup>

<sup>20</sup> *Ibid*, par 12.

<sup>21</sup> Statute, Article 7(3).

<sup>22</sup> In this sense, the Trial Chamber agrees with what has been described by Trial Chamber III as a qualification to the previous decision in this case, in *Prosecutor v Kvočka*, Case IT-99-30-PT, Decision on Defence Preliminary Motions on the Form of the Indictment, 12 Apr 1999, par 17:

“The massive scale of the crimes with which the International Tribunal has to deal makes it impracticable to require a degree of specificity in such matters as the identity of the victims and the dates for the commission of the crimes [...]. However, there may be cases in which more specific information can be provided as to the time, the place, the identity of the victims and the means by which the crime was perpetrated; in those circumstances, the Prosecutor should be required to provide such information. The Trial Chamber understands and accepts the findings in the *Krnjelac Decision as to Form* as to the degree of particularity required in an indictment [at par 12] subject to the above-mentioned qualification.”

As stated in the text of the present decision, the degree of materiality of such facts (and therefore their need to be pleaded) depends upon the proximity of the accused to the events for which he is alleged to be responsible.

- (B) In a case based upon individual responsibility where it is not alleged that the accused personally did the acts for which he is to be held responsible – where the accused is being placed in greater proximity to the acts of other persons for which he is alleged to be responsible than he is for superior responsibility – again what is most material is the conduct of the accused by which he may be found to have planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of those acts.<sup>23</sup> (This may more conveniently be described in general terms as an “aiding and abetting” responsibility.) But more precision is required in relation to the material facts relating to those acts of other persons than is required for an allegation of superior responsibility. As the Trial Chamber said in its previous decision, in those circumstances what the accused needs to know as to the case he has to meet is not only what is alleged to have been his own conduct but also what are alleged to have been the acts for which he is to be held responsible,<sup>24</sup> subject of course to the prosecution’s ability to provide such particulars.<sup>25</sup> But the precision required in relation to those acts is not as great as where the accused is alleged to have personally done the acts in question.<sup>26</sup>
- (C) In a case where it *is* alleged that the accused personally did the acts in question (which may more conveniently be described in general terms as “personal” responsibility), the material facts must be stated with the greatest precision – the information pleaded as material facts must, so far as it is possible to do so, include the identity of the victim, the place and the approximate date of those acts and the means by which the offence was committed.<sup>27</sup>

19. Against that background, it should be clear that what was said in the Trial Chamber’s previous decision concerning the course of conduct on the part of the accused appears to have been misinterpreted by the prosecution. For convenience, the statement in that previous decision is repeated:<sup>28</sup>

What must clearly be identified by the prosecution so far as the individual responsibility of the accused in the present case is concerned are the particular acts of the accused himself or the particular course of conduct on his part which are alleged to constitute that responsibility.

The reference to the “particular course of conduct” of the accused is relevant to the first and (to some extent) the second of the three general situations identified in par 18 above. But, where

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<sup>23</sup> *Ibid*, Article 7(1).

<sup>24</sup> Previous decision, par 38. This is expressed as applicable to superior responsibility, but it is relevant also to individual responsibility where it is not alleged that the accused personally did the acts for which he is alleged to be responsible.

<sup>25</sup> *Ibid*, par 40.

<sup>26</sup> See footnote 22.

<sup>27</sup> Previous decision, par 12.

<sup>28</sup> *Ibid*, par 13.

precision is required in relation to the acts of the accused himself, as in the third general situation identified above, the prosecution does *not* fulfil its obligation to state the material facts in the indictment by merely identifying some course of conduct on his part.

20. The remainder of this decision does not concern the allegation of superior responsibility; it is concerned only with personal responsibility and with aiding and abetting responsibility.

21. As the prosecution has alleged in par 4.9 of the indictment that, *inter alia*, the accused personally committed the offence of persecution pleaded in par 5.2, and as it has not identified with sufficient precision the material facts upon which it relies to establish that he did so, it has not complied with the Trial Chamber's previous decision that this be done.<sup>29</sup> The information to be pleaded must, so far as it is possible to do so, identify the victim or victims, the place and the approximate date of the alleged offence and the means by which it was committed.<sup>30</sup> Alternatively, the prosecution must either withdraw from the charge of individual responsibility the allegation that the accused personally committed these offences or make it clear in the indictment (as it has in relation to other allegations) that the individual responsibility of the accused for the matters alleged in par 5.2 is for the acts of others and not for his own acts otherwise than of an aiding and abetting nature only.<sup>31</sup>

22. Even if par 5.2 is considered without the allegation that the accused personally committed the offences, so that he remains charged with an aiding and abetting responsibility, greater precision is required than has been given. The prosecution does not have to identify precise conversations or actions taken by the accused, but the accused is entitled to know the manner in which he is to be held responsible – for example, whether it is alleged that he ordered the persecution, torture, beatings, countless killings, forced labour and inhumane conditions, or whether he merely assisted in some other *identified* way. The accused is entitled to a specific, albeit concise, statement in the indictment of the nature and extent of his participation in the several courses of conduct alleged.<sup>32</sup>

23. The prosecution has submitted that such a degree of specificity “would render redundant the disclosure materials provided to the Defence”.<sup>33</sup> This was an argument put before, and rejected in

<sup>29</sup> *Ibid*, par 17, quoted above.

<sup>30</sup> *Ibid*, par 12.

<sup>31</sup> The Trial Chamber makes some general comments in Section III of this decision concerning the form of pleading adopted by the prosecution in this and in other cases.

<sup>32</sup> *Prosecutor v Tadić* (1995) I ICTYJR 293 at par 12; *Prosecutor v Djukić*, Case IT-96-20-T, Decision on Preliminary Motion of the Accused, 26 Apr 1996, par 18.

<sup>33</sup> Further Response, par 5.

the Trial Chamber's previous decision.<sup>34</sup> At the present time, it must be said, the prosecution appears to have attempted to make its allegations as broad and as comprehensive as possible without giving any real idea of what the case actually is. It is not entitled to do so.

24. This complaint is upheld.

(d) *Paragraph 5.4*

25. Paragraphs 5.4-6 are the sole foundation for that part of Counts 5 to 7 ("Torture and Beatings") which appears under the heading "Beatings Upon Arrival in the Prison Yard".<sup>35</sup>

Paragraph 5.4 is in the following terms:

Upon their arrival in the prison-camp between April and December 1992, detainees of the KP Dom were beaten in the prison yard by the prison guards or by soldiers in the presence of regular prison personnel, as described in paragraphs 5.5 and 5.6. MILORAD KRNOJELAC participated in these beating by granting soldiers access to the detainees and instructing his guards not to intervene. He also encouraged and approved assaults by the guards.

Again, the accused seeks –

- (a) to know whether his alleged liability is based on individual or command responsibility, and
- (b) particulars of the specific acts on his part by which he is alleged to bear any individual responsibility,

in relation to the beatings alleged in this paragraph.<sup>36</sup>

26. Again the indictment already discloses that the accused is alleged to bear both individual and superior responsibility. However, although par 4.9 still alleges by way of universal application that the accused's individual responsibility includes his personal commission of the offences pleaded, the terms of par 5.4 should be interpreted as alleging by implication that the individual responsibility of the accused is for the acts of others and not for his own acts otherwise than of an aiding and abetting nature only.

27. Paragraph 5.4, by its reference to pars 5.5 and 5.6, sufficiently (with one exception) identifies the circumstances in which those acts by other persons were done. The exception relates to the identity of all the victims. In accordance with the authorities, the victims must be identified

<sup>34</sup> Previous decision, par 14.

<sup>35</sup> See Amended Indictment, par 5.31.

<sup>36</sup> Motion, par 17.

so far as it is possible to do so. Paragraph 5.4 itself sufficiently identifies the manner in which the accused is alleged to have aided and abetted in the commission of these crimes.

28. This complaint is partially upheld.

(e) *Paragraphs 5.7-13*

29. Paragraphs 5.7-13 are the sole foundation for that part of Counts 5 to 7 (“Torture and Beatings”) which appears under the heading “Beatings Associated with the Canteen”. Paragraph 5.7 is in the following terms:

5.7 Between May and December 1992, KP Dom guards and Serb soldiers from outside the KP Dom assaulted detainees on their way to or from the canteen and during the meals, as described in paragraphs 5.8 through 5.13. MILORAD KRNOJELAC participated in these beatings by granting soldiers access to the detainees and instructing his guards not to intervene. He also encouraged and approved assaults by the guards.

The accused again seeks the same relief as in relation to the last matter.<sup>37</sup> It is implicit from the last two sentences that, once more, and despite the allegation in par 4.9 of the accused’s personal commission of the offences, the prosecution is here alleging an individual responsibility of an aiding and abetting nature only.

30. The accused also complains that the circumstances in which the acts by other persons were done are insufficiently specified in pars 5.11 and 5.12. Those paragraphs are in the following terms:

5.11 On several occasions between April and December 1992, unknown soldiers from outside the KP Dom approached detainee FWS-137, who was on his way to or from the canteen in a group of detainees, and assaulted him and the other detainees, while guards watched without interfering.

5.12 On an unknown date at the end of October or beginning of November 1992, in the presence of guards, unknown soldiers from Nevišenje assaulted detainees FWS-214 and FWS-113 when they left the canteen.

The accused says that the concrete manifestation of the ill-treatment has not been specified.<sup>38</sup>

31. Counts 5 to 7 charge inhumane acts (as a crime against humanity), wilfully causing serious injury to body or health (as a grave breach of the Geneva Conventions) and cruel treatment (as a violation of the laws or customs of war). Only one of those charges *necessarily* requires the prosecution to establish any particular consequences of the conduct in question, and that is the grave breach of the Geneva Conventions. Depending upon the circumstances, the other two charges *may*

<sup>37</sup> *Ibid*, par 18. See para 25 of this decision.

<sup>38</sup> *Ibid*, par 19: “[...] without specifying what the ill-treatment concretely manifested in.”

involve particular consequences to be established. There is nothing in either of these two paragraphs to identify any consequences at all which the prosecution may seek to establish.

32. However, in his reply, the accused has changed the ground of his complaint to say that (a) the time of alleged offences is too widely stated, (b) it is unknown whether the assault was verbal or physical, and (c) the reference to “other detainees” is insufficiently precise.<sup>39</sup> These new complaints appear to refer only to par 5.11. The prosecution’s response to this re-defined complaint is that (a) no more specific information is available or necessary as to the time of the alleged offences, (b) it is clear that the assault is alleged to be physical, and (c) the only purpose of referring to the “other detainees” (whose identity is unknown) was to demonstrate that the victim who is identified was not singled out.<sup>40</sup>

33. In the opinion of the Trial Chamber: as to (a), it should have been made clear in the indictment that better particulars as to the time of the alleged offences were not available because, if they were available, it was necessary to plead them;<sup>41</sup> as to (b), the prosecution’s response is correct; and as to (c), this also should have been made clear in the indictment.

34. The accused’s general complaint that the circumstances in which the acts of other persons were done are insufficiently specified in pars 5.7-13 is in itself insufficiently specific, although the prosecution has again failed to make it clear in the indictment as to whether it is able to identify the group of detainees referred to in par 5.8 and the three guards in par 5.9. In accordance with the authorities, these must be identified so far as it is possible to do so. Paragraph 5.7 itself sufficiently identifies the manner in which the accused is alleged to have aided and abetted in the commission of these offences.

35. This complaint is partially upheld.

*(f) Paragraph 5.19*

36. Paragraph 5.19 (in the section headed “Torture and Beatings as Punishment”) is in the following terms:

5.19 On an unknown date during the summer of 1992, detainees AM, FM, HT and S, who passed messages to one another, were beaten by a guard, Dragomir Obrenović (aka “Dragan,” “Obren”) as punishment.

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<sup>39</sup> Reply, par 12.

<sup>40</sup> Further Response, par 6.

<sup>41</sup> See par 18(B), above.

As pleaded in the original indictment, the paragraph was in these terms:<sup>42</sup>

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

In its previous decision, the Trial Chamber ruled that greater particularity was required, in that the period specified was far too wide, and there was no specification as to whether this happened on one occasion or on different occasions, where and approximately when it happened or as to the identity of the guards.

37. The accused complains that the only alteration made by the prosecution has been to identify the guard.<sup>43</sup> That is not so. The allegation now specifies that the incident happened on only one occasion and that it was on an unknown date during the stated period. The prosecution responds that it can provide no better particulars.<sup>44</sup> The accused replies that this explanation is unacceptable because of the detailed plans of the Foča KP Dom supplied in the supporting material.<sup>45</sup> The Trial Chamber agrees with the argument put by the prosecution that it cannot be obliged to perform the impossible.<sup>46</sup> That state of affairs will inevitably reduce the value of the evidence of the witnesses who are unable to identify even the location of the incident, but it does not affect the form of the indictment.

38. This complaint is rejected.

(g) *Paragraph 5.22*

39. Paragraph 5.22 (in the section headed "Torture and Beatings During Interrogations") is in the following terms:

5.22 Local and military police, in concert with the prison authorities, interrogated the detainees after their arrival at the KP Dom. These daytime interrogations took place in offices provided by MILORAD KRNOJELAC. In accordance with a pattern established by MILORAD KRNOJELAC in concert with other high-level prison staff, guards took the detainees out of their cells and brought them to the interrogation rooms. The interrogations focused on whether the detainee was an SDA (Party for Democratic Action) member, possessed weapons, or had fought against the Serb forces. During or after the interrogation, the guards and police often beat the detainees, as described in paragraphs 5.23 through 5.25. MILORAD KRNOJELAC participated in these beatings by granting local and military police access to the detainees and encouraging and approving the actions of his guards.

<sup>42</sup> Paragraph 5.15.

<sup>43</sup> Motion, par 20.

<sup>44</sup> Response, par 15-16.

<sup>45</sup> Reply, par 13.

<sup>46</sup> Previous decision, par 40. The reference in *Prosecutor v Kvočka* (quoted in footnote 22) to the impracticability of *requiring* a degree of specificity in relation to certain crimes does not deny the continuing obligation of the prosecution to *provide* all the particulars which it is able to give, as stated in the text of this decision (par 18).

The accused again seeks –

- (a) to know whether his alleged liability is based on individual or command responsibility, and
- (b) particulars of the specific acts on his part by which he is alleged to bear any individual responsibility

in relation to the acts of torture and beatings alleged in this paragraph.<sup>47</sup> Again it is clear – from the allegations that the accused (i) provided the offices in which the interrogation took place, (ii) granted local and military police access to the detainees, and (iii) encouraged and approved the actions of his guards – that, so far as those allegations are concerned, the prosecution is alleging an individual responsibility on the part of the accused of an aiding and abetting nature only.

40. However, it is not so clear that that is all which is being alleged by the statement “in accordance with a pattern established by [the accused] in concert with other high-level prison staff” in par 5.22. One interpretation fairly open is that the accused personally committed some of these offences when establishing the “pattern”, but this may well be the result of the sloppy drafting of that statement. The intended interpretation should be made clear. If this statement was intended to allege the personal participation by the accused in these offences, proper particulars are required in accordance with the principles already discussed. If it was intended to add to the manner in which the accused is alleged to have aided and abetted in the commission of these offences by others, then again it fails to make clear what was intended. Otherwise, the manner in which the accused is alleged to have aided and abetted in the commission of these offences is sufficiently identified.

41. This complaint is partially upheld.

(h) *Paragraph 5.24*

42. Paragraph 5.24 is in the same section as par 5.22. It is in the following terms:

5.24 On several unknown dates between April and August 1992, KP Dom guards severely beat Hasim Glusac. Due to these beatings, in concert with the brutal living conditions, his lungs were damaged, which led to his death on 7 May 1994.

The accused seeks to know the number of times the beatings occurred, the place where and the “time-framework” in which they occurred, and the basis upon which it will be established that the victim’s death two years later resulted directly from the beatings.<sup>48</sup> In response, the prosecution

<sup>47</sup> Motion, par 18.

<sup>48</sup> *Ibid*, par 21.

says that it does not seek to make the accused responsible for the death of the victim.<sup>49</sup> This should have been made clear in the indictment.

43. Insofar as the accused may be alleged to bear an individual responsibility of an aiding and abetting nature only, and in the light of the inability of the prosecution to provide any better particulars as to time, place and date, the accused is not entitled to the further particulars which he seeks, although it is not clear from the indictment that the prosecution is unable to identify the guards involved. But, for the reasons given in relation to par 5.22, it is not clear whether the individual responsibility on the part of the accused is restricted to an aiding and abetting responsibility. This must be made clear.

44. This complaint is partially upheld.

(i) *Paragraphs 5.32-33*

45. Paragraphs 5.32-33 are the sole foundation for Counts 8 to 10 (“Wilful Killings and Murder”). They are in the following terms:

5.32 Between June and August 1992, MILORAD KRNOJELAC and the KP Dom guards under his control increased the number of interrogations and beatings. During this period, guards selected groups of detainees according to lists provided by the prison authorities and took them, one by one, into a room in the administration building. In this room, the guards and soldiers, including members of the military police, often would chain the detainee, with his arms and legs spread, before beating him. The guards and soldiers, including members of the military police, kicked and beat each detainee with rubber batons, axe-handles and fists. During the beatings, the guards and soldiers, including members of the military police, asked the detainees where they had hidden their weapons or about their knowledge of other persons. After some of the beatings, the guards threw the detainees on blankets, wrapped them up and dragged them out of the administration building. MILORAD KRNOJELAC participated in these beatings and killings by ordering and supervising the actions of his guards and allowing military personnel access to the detainees for this purpose.

5.33 An unknown number of the tortured and beaten detainees died during these incidents. Some of those still alive after the beatings were shot or died from their injuries in the solitary confinement cells. The beatings and torture resulted in the death of the detainees listed in Schedule C to this indictment, as well as an unknown number of other unidentified detainees.

46. In the original indictment, the prosecution had pleaded that the beatings and torture “resulted, at least, in the death of the detainees” listed in the schedule.<sup>50</sup> The prosecution was directed to provide some identification of those who are alleged to have died as a result of the

<sup>49</sup> Further Response, par 8.

<sup>50</sup> Paragraph 5.28.

beatings and torture (that is, to remove the imprecision caused by the words “at least”) but, if its case were that it was unable to identify those whom it had not identified, it should make this clear.<sup>51</sup>

47. The accused complains that it remains unclear which of the detainees died due to their injuries in the solitary confinement cells and which were still alive and then shot, who shot them, and whether they were shot within the KP Dom or outside it. He points out that, whereas the original indictment asserted that these acts were alleged to have been committed by the guards, the amended indictment has now added soldiers (including members of the military police).<sup>52</sup> In response, the prosecution says that the identification in the amended indictment of those who died complies with the direction given, and that, in the context, it is clear that the shootings were by the guards inside the KP Dom.<sup>53</sup> In reply, the accused re-iterates his complaint that he is entitled to know who was shot and by whom. He adds that he is entitled to know when each of the detainees died.<sup>54</sup>

48. In the opinion of the Trial Chamber, it is by no means clear from the amended indictment that the detainees were shot by the guards rather than the soldiers. But it sees no significance to the issue of individual responsibility in the circumstances of this case as to whether it was the guards or the soldiers. The further particulars which the accused seeks – in both his Motion and Reply – were matters which arose in relation to the original indictment, and no such complaint was made in relation to them at that stage. As already stated, an accused is not entitled to raise issues in relation to an amended indictment which could have been raised in relation to the original indictment but were not.<sup>55</sup> The matters now raised for the first time are not of such a nature as to warrant extending the time allowed by Rule 72 to permit them to be raised at this stage.

49. This complaint is rejected.

(j) *Paragraph 5.37*

50. Paragraph 5.37 (in the section headed “Unlawful Confinement, Imprisonment and Inhumane Conditions at KP Dom”) alleges that the detainees were locked in their cells during their confinement except to eat or work. After April 1992, the cells were overcrowded, unhygienic and without heating in winter. The detainees were fed starvation rations and received no medical care.

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<sup>51</sup> Previous decision, par 58.

<sup>52</sup> Motion, par 22.

<sup>53</sup> Response, pars 18-20.

<sup>54</sup> Reply, par 15.

<sup>55</sup> Paragraph 15, above.

The health of many was destroyed. It is then alleged that, due to the lack of proper medical treatment, a forty-year old detainee, one Enes Hadžić, “died in April or May 1992” from a perforated ulcer.

51. The accused complains that, in order to make him responsible for the death of Hadžić, the prosecution must identify the exact date of his death. He asserts that 18 April 1992 is the earliest date that he can be shown to have been the “administrator” of the KP Dom.<sup>56</sup> The logic of this complaint is not immediately apparent. Whatever the date in April the accused assumed responsibility for the administration of the KP Dom, what the prosecution must establish is that he had that responsibility during the period when the destruction of Hadžić’s health causing his death occurred to a material extent. The actual date of Hadžić’s death is immaterial, provided that the prosecution has established the relationship between that death and the lack of proper medical treatment during the period that the accused had that responsibility. His death may even have occurred after the accused’s administration of the KP Dom concluded.

52. This complaint is rejected.

(k) *Schedules A, B, C, D and E*

53. The indictment contains a number of Schedules:

*Schedule A* is said by par 5.14 of the indictment to contain descriptions of arbitrary beatings which are alleged in general terms in that paragraph. The schedule is headed “List of arbitrary beatings”.

*Schedule B* is said by par 5.26 to contain descriptions of the incidents of beatings during interrogation which are alleged in general terms in that paragraph. The schedule is headed “List of beatings during interrogation”.

*Schedule C* is said by par 5.33 to identify the detainees whose death resulted from the beatings and torture alleged in general terms in that paragraph. The schedule contains twenty-nine names.

*Schedule D* is said by par 5.37 to contain descriptions of the injuries to the health of detainees other than Enes Hadžić caused by the inhumane conditions in the KP Dom alleged in general terms in that paragraph. The schedule is headed “Detainees who died or suffered physical and/or psychological results due to living conditions in KP Dom during Krnojelac’s administration”.

*Schedule E* is said by par 5.41 to contain the names of detainees subjected to the forced labour which is alleged in general terms in that paragraph. The schedule is headed “Detainees who were forced to work”.

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<sup>56</sup> Motion, par 23. It is not clear where this date comes from.

54. The accused complains that –<sup>57</sup>

[...] it is not clear whether the said Enclosures represent an integral text of the indictment or not, because there is no clear statement made by the Prosecutor in that regard, and whether the allegations with respect to the accused's individual responsibility refer in the same modality to each of the items of the mentioned Schedules.

This complaint is misconceived. It is abundantly clear that the contents of the schedules form an integral part of the indictment, and that they have been added in that form in order to avoid cluttering up the text of the indictment at the places where they are so described.<sup>58</sup> They must be treated as if they were incorporated into the text at those places. The general allegations of the individual and superior responsibilities of the accused made in pars 4.9-10 of the indictment apply to those schedules in the same way as they apply to any other part of the indictment.

55. This complaint is rejected.

(1) *Particularity of Schedules*

56. The accused complains that, if the schedules are to be treated as an integral part of the indictment, they lack sufficient particularity to enable him to know the case which he has to meet.<sup>59</sup> Some examples are given, none of them deserving of detailed treatment in this decision. He concludes with the request for an order in general terms that a more precise indictment be submitted.

57. The Trial Chamber is not prepared to make an order in those general terms. Like so many of the complaints made by the accused in this and in his preliminary motion concerning the original indictment, his counsel appears to have overlooked the reality of the situation where the prosecution is simply unable to provide better particulars than it has. It should be apparent from both this decision and the previous decision that the prosecution cannot be obliged to perform the impossible. Where appropriate, the prosecution must, of course, make it clear that it has provided the best particulars it can. An inability to provide better particulars will inevitably reduce the value of the evidence of the witnesses who are unable to be more specific, but it does not affect the form of the indictment.

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<sup>57</sup> *Ibid*, par 24.

<sup>58</sup> If there are any inconsistencies between what is alleged in the text of the indictment and what is alleged in the schedules, those inconsistencies must be resolved in the same way as those which appear in the text of the indictment. See, for example, pars 7-10 of this decision.

<sup>59</sup> Motion, pars 25-26.

58. This complaint is rejected, as is the request for an order in general terms that a more precise indictment be submitted.

### III Form of pleading adopted

59. The form of pleading adopted by the prosecution in this case (and in some other cases) is to plead in terms of universal application an allegation that the accused bears three types of responsibility – superior, aiding and abetting and personal, as those terms are defined in par 18 of this decision – and then, in relation to individual counts, to plead facts which imply that, in relation to that particular count, personal liability is not being pursued.

60. It must be firmly stated that such a form of pleading is likely to cause ambiguity, as the present case has demonstrated. It would be preferable in future cases that an indictment indicate in relation to each individual count precisely *and expressly* the particular nature of the responsibility alleged. This would not be necessary where, for example, the nature of the responsibility alleged is the same in relation to every count but, where the nature of the responsibility differs, it should not be left to the accused (and ultimately to the Trial Chamber in the inevitable preliminary motion) to infer from the absence of any facts which indicate a personal responsibility that no such responsibility is being pursued.

### IV Disposition

59. For the foregoing reasons, Trial Chamber II –

- (1) dismisses the complaints identified in Sections II(a), (b), (f), (i), (j), (k) and (l);
- (2) upholds the complaint identified in Section II(c);
- (3) partially upholds the complaints identified in Sections II(d), (e), (g) and (h);
- (4) denies the request for an order in general terms that a more precise indictment be submitted;
- (5) orders the prosecution within thirty days of the date of this decision to amend the indictment further so as to plead:
  - (i) the specific acts on the part of the accused by which he is alleged to bear individual responsibility:
    - (a) by way of his personal participation in the acts which constitute the crimes charged (see par 21 of this decision), and

- (b) by way of an aiding and abetting responsibility for the acts of others (see par 22), except to the extent otherwise indicated in this decision (see pars 4-5, 27, 34, 40, and 43); and
- (ii) the further matters identified in pars 27, 33-34, 40 and 42-43 of this decision; and
- (5) grants leave to the prosecution pursuant to Rule 50(A)(i)(c) to make the amendments to the indictment necessary for that purpose.

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

Dated this 11<sup>th</sup> day of February 2000,  
At The Hague,  
The Netherlands.



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Judge David Hunt  
Presiding Judge

[Seal of the Tribunal]