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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-02-61-PT
Date: 25 October 2002
Original: English

IN TRIAL CHAMBER II

Before: Judge Wolfgang Schomburg, Presiding
Judge Florence Ndepele Mwachande Mumba
Judge Carmel A. Agius

Registrar: Mr Hans Holthuis

Decision of: 25 October 2002

PROSECUTOR

v.

MIROSLAV DERONJIĆ

DECISION ON FORM OF THE INDICTMENT

The Office of the Prosecutor:

Mr Mark Harmon

Counsel for the Accused:

Mr Slobodan Cvijetić

1 Background

1. The Trial Chamber is seized of a Defence motion challenging the form of the Indictment (“Motion”) in the present case, and the Prosecution’s response thereto (“Response”).¹ The Defence generally requests that the Prosecution be directed to submit a “precise indictment that is consisted of the facts that determine time, place, manner in which the crimes were committed and especially to describe the mens rea of the accused”, and to submit a “precise indictment with facts concerning specific elements of the commanding responsibility of the accused.”² The Prosecution opposes the Motion.
2. Miroslav Deronjić is charged with various offences allegedly committed when the predominantly Bosnian Muslim village of Glogova, situated in the Bratunac municipality in the then Republic of Bosnia and Herzegovina, was attacked on 9 May 1992. The accused is specifically charged under both Articles 7(1) and 7(3) of the Statute,³ as follows:
 - (a) count 1: persecution as a crime against humanity (Article 5);
 - (b) counts 2 and 3: murder as a crime against humanity (Article 5) and as a violation of the law or customs of war (Article 3); and
 - (c) counts 4, 5 and 6: wanton destruction of cities, towns or villages, destruction of institutions dedicated to religion, and an attack of an undefended village, as violations of the laws or customs of war (Article 3).

2 The general pleading principles

3. The general pleading principles that may be applicable to the present case are as follows.
4. Article 21(4)(a) of the Statute provides as one of the minimum rights of an accused that he shall be entitled to be informed in detail of the nature and cause of the charge against him. This provision also applies to the form of indictments.⁴ This entitlement translates into an obligation on the Prosecution to plead the material facts underpinning the charges in an indictment.⁵ The pleadings in an indictment will therefore be sufficiently particular when it concisely sets out the material facts of the Prosecution case with enough detail to inform an accused clearly of the nature and cause of the charges against him to enable him to prepare a defence⁶ effectively and efficiently.
5. The materiality of a particular fact is dependent on the nature of the Prosecution case.⁷ A decisive factor in determining the degree of specificity with which the Prosecution is required to particularise the facts of its case in an indictment is the nature of the alleged criminal conduct charged to the accused,⁸ which includes the proximity of the accused to the relevant events.⁹

¹ “Defence Preliminary Motion”, 2 Aug 2002; and “Prosecution’s Response to Defence Preliminary Motion”, 16 Aug 2002. The confidentiality of both these filings was lifted on 2 Sept 2002 (“Order Lifting Confidentiality of Filings”). The Indictment was filed on 3 July 2002 and confirmed on 4 July 2002.

² Motion, par 22.

³ Hereinafter, references to “Article” or “Articles” would mean references to an Article or Articles of the Statute.

⁴ *Prosecutor v Kupreškić and Others*, Case IT-95-16-A, Appeal Judgement, 23 Oct 2001 (“*Kupreškić Appeal Judgment*”), par 88.

⁵ *Kupreškić Appeal Judgment* (with reference to Arts 18(4), 21(2) and 21(4)(a) and (b) of the Statute and Rule 47(C)); and *Prosecutor v Hadžihasanović, Alagić and Kubura*, Case IT-01-47-PT, Decision on Form of Indictment, 7 Dec 2002 (“*Hadžihasanović Indictment Decision*”), par 8.

⁶ See *Kupreškić Appeal Judgment*, par 88; Arts 18(4), 21(2) and 21(4)(a) and (b) of the Statute; and Rule 47(C), which essentially restates Art 18(4).

⁷ *Kupreškić Appeal Judgment*, par 89.

⁸ *Ibid.*, par 89. Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

6. Depending on the circumstances of the case, it may be required that with respect to an Article 7(1) case against an accused, the Prosecution “indicate in relation to each individual count precisely and expressly the particular nature of the responsibility alleged”, in other words, that it indicates the particular head of liability.¹⁰ This may be required to avoid ambiguity with respect to the exact nature and cause of the charges against the accused,¹¹ and to enable the accused to effectively and efficiently prepare his defence. The material facts to be pleaded in an indictment may vary depending on the particular head of Article 7(1) liability.¹²
7. In a case based upon superior responsibility, pursuant to Article 7(3), the following are the minimum material facts that have to be pleaded in the indictment:
- (a) (i) that the accused is the superior (ii) of subordinates, sufficiently identified, (iii) over whom he had effective control - in the sense of a material ability to prevent or punish criminal conduct¹³ - and (iv) for whose acts he is alleged to be responsible;¹⁴
 - (b) (i) the accused knew or had reason to know that the crimes were about to be or had been committed by those others,¹⁵ and (ii) the related conduct of those others for whom he is alleged to be responsible.¹⁶ The facts relevant to the acts of those others will usually be stated with less precision,¹⁷ the reasons being that the detail of those acts (by whom and against whom they are done) is often unknown, and, more importantly, because the acts themselves often cannot be greatly in issue;¹⁸ and
 - (c) the accused failed to take the necessary and reasonable measures to prevent such crimes or to punish the persons who committed them.¹⁹
8. All legal prerequisites to the application of the offences charged constitute material facts and must be pleaded in the indictment.²⁰ With respect to the relevant state of mind (*mens rea*),

⁹ *Hadžihasanović* Indictment Decision, par 10; *Prosecutor v Brđanin & Talić*, Case IT-99-36-PT, Decision on Objections by Momir Talić to the Form of the Amended Indictment, 20 Feb 2001 (“First *Brđanin & Talić* Decision”), par 18. It is essential for the accused to know from the indictment just what that alleged proximity is: *Prosecutor v Brđanin & Talić*, Case IT-99-36-PT, Decision on Objections by Radoslav Brđanin to the Form of the Amended Indictment, 23 Feb 2001 (“Second *Brđanin & Talić* Decision”), par 13.

¹⁰ *See Prosecutor v Delalić and Others*, Case IT-96-21-A, Judgement, 20 Feb 2001 (“*Čelebići* Appeal Judgment”), par 350.

¹¹ *See ibid*, par 351; *Prosecutor v Aleksovski*, Case IT-95-14/1-A, Judgement, 24 Mar 2000, par 171, fn 319 (with reference to *Prosecutor v Krnojelac*, Case IT-97-25-PT, Decision on Preliminary Motion on Form of Amended Indictment, 11 Feb 2000 (“First *Krnojelac* Decision”), pars 59-60).

¹² Eg, in a case where the Prosecution alleges that an accused personally committed the criminal acts, the material facts, such as the identity of the victim, the time and place of the events and the means by which the acts were committed, have to be pleaded in detail (*Kupreškić* Appeal Judgment, par 89), whereas, in a joint criminal enterprise case, different material facts would have to be pleaded (*see also Prosecutor Brđanin & Talić*, Case IT-99-36-PT, “Decision on Form of Further Amended Indictment and Prosecution Application to Amend”, 26 June 2001 (“Third *Brđanin & Talić* Decision”), pars 21 and 22).

¹³ *Čelebići* Appeal Judgment, par 256 (*see also* pars 196-198 and 266).

¹⁴ Statute, Art 7(3); *see Hadžihasanović* Indictment Decision, pars 11 and 17; *see also* First *Brđanin & Talić* Decision, par 19; *Prosecutor v Krajišnik*, Case IT-00-39-PT, Decision Concerning Preliminary Motion on the Form of the Indictment, 1 Aug 2000 (“*Krajišnik* Decision”), par 9; First *Krnojelac* Decision, par 9.

¹⁵ Statute, Art 7(3); *see Hadžihasanović* Indictment Decision, par 11; First *Brđanin & Talić* Decision, par 19; *Krajišnik* Decision, par 9.

¹⁶ Statute, Art 21(4)(a); *Hadžihasanović* Indictment Decision, par 11; *Prosecutor v Krnojelac*, Case IT-97-25-PT, Decision on the Defence Preliminary Motion on the Form of the Indictment, 24 Feb 1999, par 38.

¹⁷ *Hadžihasanović* Indictment Decision, par 11; First *Brđanin & Talić* Decision, par 19.

¹⁸ *See Hadžihasanović* Indictment Decision, par 11; First *Brđanin & Talić* Decision, par 19; *Prosecutor v Kvočka*, Case IT-99-30-PT, Decision on Defence Preliminary Motions on the Form of the Indictment, 12 Apr 1999 (“*Kvočka* Decision”), par 17; First *Krnojelac* Decision, par 18(A); *Krajišnik* Decision, par 9. The exact relationship between this material fact and that of effective control, i.e. the *material ability* of a superior to prevent or punish criminal conduct of subordinates, need not be considered here.

¹⁹ Statute, Art 7(3); *see Hadžihasanović* Indictment Decision, par 11; First *Brđanin & Talić* Decision, par 19 (rolling facts (b) and (c) together); *Krajišnik* Decision, par 9.

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.²¹

9. Each of the material facts must usually be pleaded expressly, although it may be sufficient in some circumstances if it is expressed by necessary implication.²² This fundamental rule of pleading is, however, not complied with if the pleading merely assumes the existence of the pre-requisite.²³
10. Generally, an *indictment*, as the primary accusatory instrument, must plead with sufficient particularity the material aspects of the Prosecution case, failing which it suffers from a material defect.²⁴ In the light of the primary importance of an indictment, the Prosecution cannot cure a defective indictment by its supporting material and pre-trial brief.²⁵ In the situation where an indictment does not plead the material facts with the requisite degree of specificity because the necessary information is not in the Prosecution's possession, doubt must arise as to whether it is fair to the accused for the trial to proceed.²⁶ The Prosecution is therefore expected to inform the accused of the nature and cause of the case, as set out above, before it goes to trial. It is unacceptable for it to omit the material facts in the indictment with the aim of moulding the case against the accused in the course of the trial depending on how the evidence unfolds.²⁷ Where the evidence at trial turns out differently than expected, the indictment may be required to be amended, an adjournment may be granted or certain evidence may be excluded as not being within the scope of the indictment.²⁸
11. The Prosecution is not required to plead the evidence by which such material facts are to be proven.²⁹

3 Defence objections relating to superior position of accused

12. The first set of Defence objections relates to the alleged superior position of the accused.
13. The first relevant Defence objection appears to be that the Indictment is generally defective in the way in which the superior position held by the accused is specified.³⁰ The Prosecution also

²⁰ *Hadžihasanović* Indictment Decision, par 10.

²¹ Third *Brđanin & Talić* Decision, par 33.

²² *Hadžihasanović* Indictment Decision, par 10; *Prosecutor v Brđanin & Talić*, Case IT-99-36-PT, Decision on Form of Fourth Amended Indictment, 23 Nov 2001, par 12; First *Brđanin & Talić* Decision, par 48.

²³ *Hadžihasanović* Indictment Decision, par 10; First *Brđanin & Talić* Decision, par 48.

²⁴ *Kupreškić* Appeal Judgment, par 114.

²⁵ If the Defence is denied the material facts as to the nature of the accused's responsibility for the events pleaded until the pre-trial brief is filed, it is almost entirely incapacitated from conducting any meaningful investigation for trial until then (see Second *Brđanin & Talić* Decision, pars 11-13).

²⁶ *Kupreškić* Appeal Judgment, par 92.

²⁷ *Ibid.*

²⁸ *Ibid.*

²⁹ *Ibid.*, par 88. It can be left open whether the view expressed by the Appeals Chamber is an *obiter dictum* only, and whether there may not be exceptional cases in which the Prosecution may be required to plead the evidence in an indictment. If the evidentiary material provided by the Prosecution during the pre-trial discovery process does not sufficiently identify the *evidence* upon which the prosecution relies to establish those material facts (see Rule 66), then – and only then – is it appropriate for an application to be made to the Trial Chamber for an order that the Prosecution supply particulars (and even then only if a request to the Prosecution for such particulars has not been satisfactorily answered) (see *Hadžihasanović* Indictment Decision, fn 17, and references therein).

³⁰ Motion, par 8 (the Defence specifically refers to pars 1, 2, 4, 15, 16, 18, 19, 24, 31, 33, 39 and 44 of the Indictment).

understands this to be a Defence objection, but submits that the Indictment makes his position clear.³¹

14. The Indictment appears to (a) charge the accused pursuant to Article 7(3) (superior responsibility) solely on the basis of his presidency of the Bratunac Crisis Staff, and to (b) allege that he held that specific position at the time of the commission of all the offences that he is charged with.³² That this is the Prosecution's case appears to be borne out by Response.³³ However, paragraphs 1, 16, 17, 14, 19 and 42 of the Indictment are not clearly pleaded in this regard. Paragraph 1 of the Indictment states that the accused was President of the Bratunac Crisis Staff "in May 1992, a position that put him in effective control over the command and use of the Territorial Defence ("TO") of the Municipality of Bratunac on 9 May 1992". Elsewhere in the Indictment it is alleged that the accused also held that position on 8 May 1992, when he ordered that Glogova be attacked and burnt.³⁴ Paragraphs 16 and 17 of the Indictment also allege that the accused in various ways committed persecution "in May 1992", without specifically referring to 8 and 9 May 1992. When the paragraphs relating to counts 1 and 4 to 6, in particular paragraphs 19 and 42, are read with paragraph 14 of the Indictment,³⁵ which forms part of a more general part of the Indictment ("Statement of the facts"), it is furthermore unclear in what capacity the accused allegedly told the villagers of Glogova in "late April and early May of 1992" that they had to turn in their weapons, and whether his doing so in some way forms part of the offences charged in counts 1 and 4 to 6.³⁶
15. This objection is therefore upheld. The Prosecution is accordingly ordered to clearly plead (a) what the position forming the basis of the superior responsibility charges is and (b) when exactly the accused held this position.
16. Although not strictly related to this particular objection, the Prosecution is also ordered to clearly plead with respect to the allegations in paragraph 14 of the Indictment, (a) whether the address to the villagers and/or any of the other alleged actions in that paragraph go to his criminal responsibility, and if so, (b) in what capacity he addressed the villagers and/or participated in the disarming of the villagers, and (c) when exactly he is alleged to have addressed the villagers and/or participated in their disarmament.³⁷
17. The second relevant Defence objection is that (i) the Indictment is insufficiently pleaded with respect to the "strength, power and influence" of the accused to prevent the crimes from being committed by other individuals.³⁸ (ii) It is also submitted that the "position of the President of the Bratunac Crisis Staff is flatly overrated and put above the positions in the Bratunac

³¹ Response, par 5.

³² See Indictment, pars 1, 2, 14, 15, 16, 17, 18, 32, 33, 41, 44.

³³ Response, par 20.

³⁴ Indictment, pars 2, 15, 18, 33. The Trial Chamber notes that pars 2, 15, 18 and 33 of the Indictment allege that the accused ordered that Glogova be attacked *and* burnt, whereas par 44 of the Indictment, which is part of the counts relating to the destruction of the village and institutions dedicated to religion, does not repeat the allegation that the accused ordered that Glogova be burnt down. Par 44 of the Indictment also does not repeat the relevant date on which the order was allegedly given. The Trial Chamber also notes that par 7 of the Indictment oddly states that the accused was required to abide by the laws and customs governing the conduct of armed conflicts on 9 May 1992, with no mention of any other potentially relevant dates.

³⁵ Indictment, par 14, reads: "In late April and early May of 1992 the Bosnian Muslim villagers of Glogova were disarmed. On at least three occasions during that timeframe, Bratunac police forces and the JNA went through Glogova and secured weapons from the Bosnian Muslim population. On one occasion, the Bosnian Muslim population was directed to appear at a meeting at the community building. **Miroslav DERONJIC** told the gathered villagers that they had to turn in their weapons. Over the next few days soldiers gathered weapons from the Bosnian Muslim residents of Glogova."

³⁶ It is also unclear when exactly the accused is alleged to have addressed the villagers, whether forces under his effective control disarmed the villagers, and if so, when exactly this happened.

³⁷ This issue also touches on the objections addressed in pars 19, 20, 23-26 and 31 of this Decision.

³⁸ Motion, par 8

Territorial Defense (TO) and Yugoslav National Army (JNA) and all other military and paramilitary units of the “attacking force”, without any facts mentioned to support this position in charge.”³⁹ The Prosecution submits that the material facts relating to the superior responsibility of the accused have been sufficiently pleaded, and that whether or not the accused had the power and influence to prevent crimes being committed by others and whether he took measures to prevent crimes or punish the perpetrators thereof are matters for trial.⁴⁰

18. This objection goes to paragraphs 7(a) and (c) of this Decision. The Indictment sufficiently pleads the material fact that the accused failed to take the necessary and reasonable measures to prevent the relevant crimes or to punish the perpetrators thereof.⁴¹ Whether the accused in fact had the material ability to prevent or punish crimes about to be committed or committed by his subordinates, and whether he failed to do so, is a matter to be determined at trial. This part of the Defence objection is therefore rejected.
19. However, the Indictment is defective in that it does not clearly plead that the accused is the superior of sufficiently identified subordinates for whose acts he is alleged to be responsible. On the one hand, it is pleaded that the accused was “in effective control over the use and command” or “exercised effective control” of the TO of the Bratunac Municipality or members of the TO, in a way that suggests that it is for the crimes of those members only that he is charged with superior responsibility.⁴² On the other hand, the Indictment refers to “the attacking forces”, consisting of the Bratunac TO, JNA and unidentified “others”,⁴³ as having committed various crimes without always making it clear whether members of the Bratunac TO in some way participated in those crimes, and in a manner which creates uncertainty as to whether the accused is charged with superior responsibility for the crimes of others who are not expressly alleged to have been his subordinates.⁴⁴ The distinction between the acts of the subordinates, for which the accused is alleged to be responsible as a superior, and the acts of those who are not alleged to be his subordinates, is not clear. The Indictment is not, however, required to set out the facts or evidence forming the basis for a pleading that the accused was the superior of such or other subordinates.
20. The second part of the Defence objection is therefore upheld in part. The Prosecution is accordingly ordered to amend the Indictment to comply with paragraph 7(a) of this Decision. In particular, it has to clearly plead over which sufficiently identified subordinate forces or members of which forces the accused had effective control, and that those subordinate forces committed the crimes that he is alleged to be responsible for.
21. The third relevant Defence objection is that the Indictment is vague in the manner in which Article 7(3) responsibility is pleaded.⁴⁵ It is submitted that the Prosecution “ought to present basic facts that implicate individual responsibility for the crimes of the subordinates”.⁴⁶ It is submitted that these facts include the status of the accused, “information on alleged crimes that his allegedly subordinates committed or intended to commit”, “acknowledgement of the accused that there was a violation of the international humanitarian law”, omission of the accused to take any measures to prevent crimes and to punish the perpetrators, and “facts that connect crimes of

³⁹ *Ibid*, par 9.

⁴⁰ Response, par 17.

⁴¹ See par 4 of the Indictment, as read with: pars 16, 18, 31 and summary charge of count 1; pars 32 and summary charge of counts 2 and 3; pars 41, 44 and summary charge of counts 4 to 6. Oddly, the Prosecution did not repeat something similar to par 13 of the Indictment (relating to count 1) under counts 2 to 6. However, par 4 of the Indictment, when read with the cited paragraphs, sufficiently pleads this aspect of the superior responsibility case.

⁴² *Ibid*, pars 1, 2, 15, 16, 17, 18, 20, 24, 29, 31, 35, 39 and 44. Pars 24, 29 and 39 of the Indictment specifically plead that subordinates of the accused and members of the TO were involved in a crime.

⁴³ *Ibid*, par 19.

⁴⁴ *Ibid*, pars 19, 21, 22, 23, 24, 26, 27, 34, 36, 37, 38, 39 and 43.

⁴⁵ Motion, par 15.

⁴⁶ *Ibid*, par 15.

the accused and his omissions and violations of legal regulations”.⁴⁷ The Prosecution response is that the Indictment fully satisfies the requirements for specificity set out in the Statute, Rules and jurisprudence of the Tribunal.⁴⁸

22. With the exception of an “acknowledgement of the accused that there was a violation of the international humanitarian law”, what the Defence refers to as “basic facts” essentially are material facts that the Prosecution has to plead in a case of superior responsibility.⁴⁹ Subject to the Trial Chamber’s findings in paragraphs 14-16, 19 and 20, and 25 and 26 of this Decision, the Prosecution has pleaded the material facts relating to a case of superior responsibility, as set out in paragraph 7 of this Decision, with sufficient particularity. An “acknowledgement of the accused that there was a violation of the international humanitarian law” is not an element of any of the offences within the Tribunal’s jurisdiction, and does not need to be pleaded in an indictment. This objection is therefore rejected.
23. The last Defence objection under this heading,⁵⁰ is that the Indictment does not provide enough facts for the accused to distinguish between the crimes that he is charged for pursuant to Article 7(1), and the crimes that he is charged for pursuant to Article 7(3).⁵¹ It is requested that the Prosecution be directed to provide more information about the “concrete crimes of the accused on basis of which his criminal responsibility could be determined pursuant to Articles 7(1) or 7(3) or both of them.”⁵² The Prosecution submits that this objection misinterprets its case.⁵³ It is submitted that the accused is charged under both Articles 7(1) and 7(3) in respect of each count, that the material facts set out in each count are sufficient to sustain a conviction under both those Articles, that cumulative charging and conviction involving both those Articles is permissible, and that with respect to Article 7(1) charges, the Trial Chamber has the discretion to find that the evidence supports any of the modes of liability whether or not they were expressly charged.⁵⁴
24. The Trial Chamber considers that the Defence objection is rather straightforward: what is sought is an indication of which facts go to Article 7(1) liability, and which to Article 7(3). The accused does not appear to challenge what the Prosecution – mistakenly - considers he does, including matters like cumulative charging and conviction, and the discretion of a Chamber to find evidence in support of any Article 7(1) head of liability.⁵⁵
25. The Trial Chamber upholds this objection. Had each count in the Indictment for example related to only one incident, or had it been clear with respect to each of the various incidents falling under each count whether the accused is charged pursuant to Article 7(1) or 7(3) or both, the objection may have been groundless. However, none of the counts in the Indictment is that straightforward. Each count consists or appears to consist of more than one incident. As pleaded, the Indictment therefore raises the possibility that the Prosecution may lead, for example, a case of Article 7(3) responsibility with respect to one incident falling under one

⁴⁷ *Ibid*, par 15.

⁴⁸ Response, pars 18-22.

⁴⁹ See par 7 of this Decision.

⁵⁰ This objection could also fall under the set of objections relating to the manner in which crimes were allegedly committed.

⁵¹ Motion, par 16. The Trial Chamber is directed to the *Kvočka* Decision (Motion, par 16). No specific paragraph is referenced here, although from the context, and from pars 12 and 20 of the Motion, it appears as if par 18 of that Decision is directly relevant (it reads: “However, the Trial Chamber finds that it is reasonable to require the Prosecution, depending on the particular circumstances of each case, to provide more specific information, if available, as to the place, the time, the identity of the victims and the means by which the crime was perpetrated.”).

⁵² Motion, par 16.

⁵³ Response, par 16.

⁵⁴ *Ibid*, par 16.

⁵⁵ This Trial Chamber does not necessarily agree with the Prosecution’s submissions with respect to these issues, and jurisprudence cited by it, may not always support its submissions.

count, and Articles 7(1) and 7(3) to another incident under the same count. This form of pleading does not clearly inform the accused of the nature and cause of the specific allegations against him. It would also hinder the effective and efficient preparation of the Defence case. The Prosecution is reminded that generally, the material facts with respect to an Article 7(1) case has to be pleaded with greater specificity, in particular where the accused is alleged to have been involved in some direct manner in the alleged crimes.⁵⁶

26. The Prosecution is accordingly ordered to clearly plead with respect to each incident under each count, whether its case is one of Article 7(1) or Article 7(3) responsibility, or both.

4 Defence objections relating to manner in which crimes were allegedly committed

27. The second set of Defence objections relates to the manner in which the alleged crimes were committed.⁵⁷

28. The first relevant Defence objection is that “statements such as ... “planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of the persecution of Bosnian Muslims on political, racial or religious grounds...” without facts to support them are groundless and unfounded”.⁵⁸ The Prosecution submits that the Indictment fully satisfies the requirements for specificity.⁵⁹

29. The Trial Chamber understands this objection to be that, given the material facts pleaded, a mere repetition of the terms of Article 7(1) in the Indictment does not make it clear to the accused what the Article 7(1) case is that he has to meet. The Trial Chamber upholds this objection.

30. The following gives some indication of the often inconsistent and different ways in which the Prosecution has pleaded Article 7(1) liability. The Indictment under the heading “Individual criminal responsibility” generally, with respect to all the counts (and by implication, each of the incidents under each of the counts, except with respect to the one instance where the Prosecution has pleaded a specific Article 7(1) head of liability⁶⁰), pleads that the accused is responsible for the crimes which he “planned, instigated, ordered, committed *or* in whose planning, preparation *or* execution he otherwise aided and abetted”.⁶¹ However, (i) with respect to the persecution count, it is generally (seemingly with respect to all the various alleged incidents of persecution) that the accused “planned, instigated, ordered, committed *or* otherwise aided and abetted in the planning, preparation *or* execution of”⁶² and “perpetrated” the persecution.⁶³ The Indictment then refers to various incidents of persecution under four sub-headings: Attack on the Village of Glogova; Killing of Muslim Villagers from Glogova; Destruction of Property in the Village of Glogova; and, Forcible Transfer of Civilians from Glogova.⁶⁴ However, under these sub-headings, it is then variously pleaded that the accused ordered the attack⁶⁵ that he was present during the attack,⁶⁶ that he was present near the

⁵⁶ See pars 5 and 6 of this Decision. Also see par 37 of this Decision, where the Prosecution is ordered to plead names of murder victims wherever it will lead a case of Article 7(1) responsibility.

⁵⁷ Reference is generally made to pars 3, 4, 7, 19, 23, 27-29, 31-33, 38, 39, 41 and 44 of the Indictment (Motion, par 9).

⁵⁸ Motion, par 9.

⁵⁹ Response, pars 18-22.

⁶⁰ Eg, par 28.

⁶¹ Indictment, par 3 (emphasis added).

⁶² *Ibid*, par 16 (emphasis added).

⁶³ *Ibid*, par 17.

⁶⁴ *Ibid*, pars 18-29.

⁶⁵ *Ibid*, par 18.

⁶⁶ *Ibid*, par 19.

riverbank where the bodies of executed Bosnian Muslim were dumped,⁶⁷ that a villager was executed in his immediate presence,⁶⁸ and that he aided and abetted the forcible expulsion and transfer of the Bosnian Muslims.⁶⁹ (ii) With respect to the murder counts, the Indictment generally (seemingly with respect to all the various incidents of murder) pleads that the accused, “*acting in concert with others who shared his intent*, planned, instigated, ordered, committed, *or* otherwise aided and abetted the planning, preparation, *or* execution of the attack on the village of Glogova, including the killing of over 60 Muslim civilians”.⁷⁰ With respect to counts 4 to 6, the Indictment generally (seemingly with respect to all the various incidents under those counts) pleads that the accused “*acting individually and in concert with others who shared his intent*, planned, instigated, ordered, committed, *or* otherwise aided and abetted the planning, preparation, *or* execution of an attack on Glogova, an undefended village, and the wanton and extensive destruction of the Bosnian Muslim dwellings, businesses, institutions dedicated to religion, and personal property in the village of Glogova”.⁷¹ However, it is then pleaded that the accused only ordered the attack, and that he was present during the attack.⁷² Such a pleading style only creates ambiguity with respect to the exact nature and cause of the case against the accused. Therefore, the Prosecution must plead the particular head or heads of Article 7(1) liability with respect to each incident under each count (not only with respect to each count generally) that it intends to prove at trial.⁷³ Not only do Article 7(1) charges generally require more precise pleading than Article 7(3) charges, but the requisite material facts to be pleaded may also differ depending on the particular head of Article 7(1) liability. For example, in a common purpose or common criminal enterprise case, the material facts to be pleaded differ from those to be pleaded in relation to a case of direct, personal perpetration.⁷⁴ The Trial Chamber notes that the Indictment for example does not plead a case of common purpose or common criminal enterprise liability against the accused, unless the vague reference to the accused acting “in concert with others who share his intent” is meant to include such a case, in which event it is not pleaded with sufficient particularity.

31. Accordingly, in the event that it is the Prosecution’s case that the accused is liable under each of the Article 7(1) heads of liability for each of the incidents under each of the counts, it should reformulate the relevant pleadings, including replacing the disjunctive word “or”, and, for example, plead joint enterprise clearly, if this be its case. Should it not be the Prosecution’s case that the accused is liable under each of the headings for each of the incidents under each of the counts, it has to plead the particular head or heads of Article 7(1) liability with respect to each of the incidents under each of the counts that it intends to prove at trial under that Article.⁷⁵ The Trial Chamber notes that “instigation” is a distinct head of Art 7(1) liability, and should the Prosecution plead such a case, the instigating acts, the instigated persons or group of persons that are not yet prepared to commit the crime (as opposed to an *omnimodo facturus*), are to be described precisely.
32. What appears to be a second relevant Defence objection, reads as follows: “‘Miroslav Deronjić was present near the riverbank where Bosnian Muslim bodies were dumped’ according to the Prosecution, give enough grounds to find the accused responsible, even though in the Indictment itself there are no facts to bring the accused into connection with the event.”⁷⁶ The

⁶⁷ *Ibid*, par 23.

⁶⁸ *Ibid*.

⁶⁹ *Ibid*, par 28.

⁷⁰ *Ibid*, par 32 (emphasis added).

⁷¹ *Ibid*, par 41 (emphasis added).

⁷² *Ibid*, par 44.

⁷³ See also *Prosecutor v Brđanin & Talić*, Case IT-99-36-PT, Decision on Form of Further Amended Indictment and Prosecution Application to Amend, 26 June 2001 (“Third *Brđanin & Talić* Decision”), par 8.

⁷⁴ See also Third *Brđanin & Talić* Decision, pars 21 and 22.

⁷⁵ The Prosecution is reminded that should the evidence at trial turn out to support a different head of liability, the Indictment could be amended (see *Kupreškić* Appeal Judgment, pars 92 and 114).

⁷⁶ Motion, par 9, quoting from pars 23 and 38 of the Indictment.

Defence later objects that: “in the Indictment against Miroslav Deronjić the ground for criminal responsibility the Prosecution finds in the fact: “Miroslav Deronjić was present near the riverbank where Bosnian Muslim bodies were dumped.”⁷⁷ This would appear to be an objection that it is not clear to the accused what the importance or specific relevance of his presence near the site is for his alleged criminal responsibility. Following the reference to this allegation, the Defence objects to the general vagueness of the Indictment with respect to the names of the victims, the time, place and manner in which the crimes were committed, and requests that the evidence be incorporated in the Indictment.⁷⁸ The Prosecution, in response to the general objection that the Indictment is vague, submits that the Indictment fully satisfies the requirements for specificity.⁷⁹

33. The apparent objection with respect to the presence of the accused near the riverbank is upheld, but should be answered when the Prosecution amends the Indictment as ordered in paragraphs 26 and 31 of this Decision. The Trial Chamber notes that the Prosecution states in its Response that the accused was “present *where*” the bodies of the executed Bosnian Muslims were dumped,⁸⁰ and that he “*observed* the bodies of executed Bosnian Muslims being dumped”.⁸¹ However, this differs from what the Indictment alleges, namely, that the accused “was present near the riverbank where Bosnian Muslim bodies were dumped”.⁸²
34. The general objection that the Indictment is vague with respect to the identity of the victims is also upheld, but should be answered when the Prosecution amend the Indictment as ordered in paragraph 37 of this Decision. The Trial Chamber considers that the general objection that the Indictment is vague with respect to the time, place and manner in which the alleged crimes for which the accused is charged were committed, is unfounded in the circumstances, considering that the alleged crimes were for the most committed on one day in or near Glogova. When amended in accordance with paragraphs 26 and 31 of this Decision, the Indictment should provide the accused with the requisite material facts with respect to the manner in which the crimes for which he is charged, were committed. Lastly, there is no requirement that the evidence be pleaded in an indictment, and the Defence has not made out a case for the evidence to be pleaded in this Indictment.⁸³

5 Defence objection relating to identity of victims

35. The Defence appears to object that the Prosecution has to plead when specific individuals, listed as murdered in Schedule A to the Indictment,⁸⁴ were murdered.⁸⁵ The Prosecution submits that it has sufficiently identified the victims of the attack, and refers to Schedule A in this regard.⁸⁶
36. The Indictment makes numerous references to various murders of Bosnian Muslim “civilians”, “men” or “villagers”.⁸⁷ With respect to only two incidents are those who were murdered, named.⁸⁸ The Indictment further includes references to three other incidents involving the murders of approximately fifty (50) Bosnian Muslim men and villagers, without mentioning any

⁷⁷ *Ibid*, par 19.

⁷⁸ *Ibid*, pars 19-21, and generally, par 18.

⁷⁹ Response, pars 18-22.

⁸⁰ *Ibid*, par 12 (emphasis added).

⁸¹ *Ibid*, par 11 (emphasis added).

⁸² Indictment, pars 23 and 38.

⁸³ See fn 29 of this Decision.

⁸⁴ Indictment, Schedule A: Bosnian Muslims murdered in Glogova 9 May 1992. The schedule lists 65 names.

⁸⁵ Motion, pars 9, 20 and 21. In par 9 of the Motion, reference is made to pars 22, 23, 24, 25, 34, 37, 38 and 39 of the Indictment).

⁸⁶ Response, pars 20 and 21.

⁸⁷ Indictment, pars 16; 21 and 36; 22 and 37; 23 and 38; 24 and 39; 25 and 40; 32; 34; 39; and 40.

⁸⁸ Indictment, pars 21 and 35; 23 and 38.

names of the victims.⁸⁹ Subject to the Trial Chamber's finding above,⁹⁰ the Indictment is defective in this regard. It is not clear from the Indictment whether the Prosecution's case will be that the accused is responsible pursuant to Article 7(1) for each of the incidents during which at least sixty-five (65) Bosnian Muslim villagers, men and civilians were allegedly killed, or for only some of these incidents.⁹¹ In particular with respect to those incidents where the Prosecution's case will be that the accused is responsible pursuant to Article 7(1), it has to plead the identity of the victims in order to enable the accused to properly prepare his case.⁹² Given that the offences in the present case were mostly committed on a single day in the course of a single attack on one village, the Prosecution should be able to provide such details.

37. The Prosecution is accordingly ordered to plead the identity of the murder victims with respect to each incident for which it charges the accused with Article 7(1) responsibility. In addition, to the extent possible, the Prosecution is also requested to plead the names of the murder victims with respect to each incident for which it charges the accused with Article 7(3) responsibility. This could assist the accused in preparing his case, and may forestall having to later consider whether the identity of the murder victims should also be pleaded with respect to any Article 7(3) charges.⁹³

6 Defence objection relating to *mens rea* of the accused

38. The last Defence objection is very general in nature, and relates to the *mens rea* of the accused to participate in committing the alleged crimes. The Defence objects that the Indictment does not offer facts to support the responsibility and guilt of the accused, and that without "cognizance and intention there is no responsibility."⁹⁴ A decision directing the Prosecution to, *inter alia*, describe the *mens rea* of the accused, is sought.⁹⁵ The Prosecution submits that the material facts from which the relevant state of mind is necessarily to be inferred, are pleaded in respect of each count.⁹⁶
39. Subject to the Trial Chamber's findings in paragraphs 26, 30 and 31 of this Decision, the Indictment as it currently reads does sufficiently plead the material facts from which the relevant state of mind of the accused is necessarily to be inferred. This objection is therefore rejected.

7 Disposition

40. Pursuant to Rule 72,

(a) The Motion is hereby granted in part, as follows:

- (i) The Prosecution is ordered to amend the Indictment in the terms set out in this Decision; and

⁸⁹ Indictment, pars 22 and 37; 23 and 38; and 24 and 39.

⁹⁰ See pars 30 and 31 of this Decision.

⁹¹ Indictment, pars 23 and 38 allege that the accused was "present near the riverbank" where the bodies of murdered men were dumped in the river, and that another villager was executed in "the immediate presence" of the accused.

⁹² See pars 5 and 6 of this Decision.

⁹³ When complying with par 31 of this Decision, specifying the names of the victims in more detail with respect to counts one and the various incidents thereunder may also be required.

⁹⁴ *Ibid*, par 9.

⁹⁵ *Ibid*, par 22.

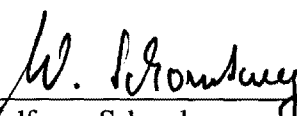
⁹⁶ Response, pars 4 and 24 (with reference to Third *Brđanin & Talić* Decision, par 33). The Prosecution does not use the phrase "necessarily to be inferred" in par 24; it instead uses "may be inferred."

- (ii) The Prosecution is requested to amend the Indictment in the terms set out in paragraph 37 of this Decision.
- (iii) The Prosecution may also amend the Indictment with respect to those unclear or uncertain issues highlighted by the Trial Chamber.⁹⁷
- (iv) The amended indictment is to be filed no later than 12:00 on Friday, 29 November 2002. A table indicating all the amendments and changes made to the indictment shall be filed by the same time (reorganisation table).
- (v) The Defence is to file complaints, if any, resulting from the amendments made in accordance with the above directions within thirty (30) days of the filing of the amended indictment (ie, no later than 12:00 on Monday, 30 December 2002).

(b) The remainder of the Motion is denied.

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

Dated this the twenty-fifth day of October 2002
At The Hague,
The Netherlands.



Wolfgang Schomburg
Presiding Judge

[Seal of the Tribunal]

⁹⁷ Fn 34 of this Decision.