

**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-95-11-PT

Date: 2 June 2003

Original: English

BEFORE THE TRIAL CHAMBER

Before: Judge Alphonsus Orie, Presiding
Judge Amin El Mahdi
Judge Joaquín Martín Canivell

Registrar: Mr. Hans Holthuis

Decision of: 2 June 2003

PROSECUTOR

v.

MILAN MARTIĆ

DECISION ON PRELIMINARY MOTION AGAINST THE AMENDED INDICTMENT

The Office of the Prosecutor:

Ms. Hildegard Uertz-Retzlaff
Mr. Alex Whiting
Ms. Sabine Bauer

Defence Counsel:

Mr. Predrag Milovančević

I. INTRODUCTION

1. **TRIAL CHAMBER I** (“the Chamber”) of the International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (“the Tribunal”) is seized of a Preliminary Motion against the Corrected Amended Indictment dated 18 December 2002 (the “Indictment”).¹ The Motion was filed on 26 February 2003 and again on 17 March 2003 in a shortened version (the “Motion”) to comply with the “Practice Direction On The Length Of Briefs and Motions” issued on 5 March 2002 by the President of the Tribunal *pro tempore*.

2. The Defence argues that the Indictment “contains faulty draftings”,² and was prepared contrary to Article 18(4) of the Statute of the Tribunal (the “Statute”) and Rule 47(C) of the Rules of Procedure and Evidence (the “Rules”) since it lacks precision and thereby does not inform the Accused of the nature and cause of charges against him.³ In view of the faults mentioned in the Motion, the Defence moves the Chamber for an order to the Prosecution to amend the Indictment to make it more precise.

3. The Prosecution filed a response to the first Unabridged Motion on 13 March 2003 (the “Response”),⁴ giving detailed reasons for rejecting most of the submissions of the Defence. Since the Prosecution has not filed a response to the shortened version, the Chamber relies on its Response for arguments on the issues raised in the Motion.

II. THE LAW

4. Article 18(4) of the Statute provides *inter alia*, that “the Prosecutor shall prepare an indictment containing a concise statement of the facts and the crime or crimes with which the accused is charged under the Statute.” Rule 47(C) of the Rules provides that “[t]he indictment shall set forth the name and particulars of the suspect, and a concise statement of the facts of the case and of the crime with which the suspect is charged.” The Appeals Chamber has stated that “[t]he Prosecution’s obligation to set out concisely the facts of its case in the indictment must be interpreted in conjunction with Articles 21(2) and (4)(a) and (b) of the Statute. These provisions state that, in the determination of any charges against him, an accused is entitled to a fair hearing

¹ “Preliminary Motion Filed by Defence Counsel Pursuant to the Rule 72 (A)(ii) of the Rules on Procedure and Evidence Against the Amended Indictment Dated 18 December 2002”. The Indictment was filed pursuant to the Chamber’s Decision on the Prosecution’s Motion to Request Leave to File a Corrected Amended Indictment of 13 December 2002.

² Motion, p. 1.

³ Motion, p. 9.

⁴ “Prosecution’s Response to Preliminary Motion Filed by the Accused Pursuant to Rule 72(A)(ii) of the Rules on Procedure and Evidence Against the Amended Indictment dated 18 December 2002”

and, more particularly, to be informed of the nature and cause of the charges against him and to have adequate time and facilities for the preparation of his defence.”⁵ Further, it stated that

the question whether an indictment is pleaded with sufficient particularity is dependent upon whether it sets out the material facts of the Prosecution case with enough detail to inform a defendant clearly of the charges against him so that he may prepare his defence.⁶

5. The Trial Chamber finds that the material facts supporting each Count must be pleaded; the Prosecution is however under no obligation to provide, or make specific reference to, the evidence by which it intends to prove the charges at trial.⁷ “A decisive factor in determining the degree of specificity with which the Prosecution is required to particularise the facts of its case in the indictment is the nature of the alleged criminal conduct charged to the accused.”⁸ In particular, “[w]hether or not a fact is material *depends upon the proximity of the accused person to the events for which that person is alleged to be criminally responsible.*”⁹ The legal prerequisites which apply to the offences charged are material facts and must also be pleaded by the Prosecution.¹⁰

6. In fact, various reasons, among which the sheer scale of the alleged crimes,¹¹ may prevent the Prosecution from identifying many of the victims with precision,¹² and, in some cases, even some of the alleged co-perpetrators, especially in cases of joint criminal enterprise. As a consequence, the inability of the Prosecution to provide each and every detail need not necessarily lead to the deletion of the particular charge.¹³ The Prosecution may not be expected to perform the impossible task to address in detail all material elements of each conduct related to the alleged crimes.¹⁴

⁵ *Kupreškić* Appeal Judgement, 23 October 2001, IT-95-16-A, para 88. Article 21(2) of the Statute provides: “In the determination of charges against him, the accused shall be entitled to a fair and public hearing, subject to article 22 of the Statute” (Article 22 of the Statute concerns the protection of victims and witnesses). Article 21(4) of the Statute provides: “In the determination of any charge against the accused pursuant to the present Statute, the accused shall be entitled to the following minimum guarantees, in full equality: (a) to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him; (b) to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing [...]”

⁶ *Kupreškić* Appeal Judgement, 23 October 2001, IT-95-16-A, para 88.

⁷ See Decision on Defence Preliminary Motion Concerning the Form of the Indictment, *Prosecutor v. Strugar, Jokić et al.*, 28 June 2002, IT-01-42-PT, para 8; Decision on the Defence Motion on the Form of the Indictment, *Prosecutor v. Ademi*, 12 November 2001, IT-01-46-PT, para 4; Decision on Application by Defence for Leave to Appeal, *Prosecutor v. Galić*, 30 November 2002, IT-98-29-AR72, para 15.

⁸ *Kupreškić* Appeal Judgement, 23 October 2001, IT-95-16-A, para 89.

⁹ Decision on Application by Defence for Leave to Appeal, *Prosecutor v. Galić*, 30 November 2002, IT-98-29-AR72, para 15 (emphasis added), referring to Decision on Objections by Momir Talić to the Form of the Amended Indictment, *Prosecutor v. Brđanin and Talić*, 20 February 2001, IT-99-36-PT, para 18, and to the *Kupreškić* Appeal Judgement, 23 October 2001, IT-95-16-A, paras 88-90.

¹⁰ Decision on Form of the Indictment, *Prosecutor v. Hadžihazanović et al.*, 7 December 2001, para 10.

¹¹ Decision on the Defence Preliminary Motions on the Form of the Indictment, *Prosecutor v. Kvočka et al.*, 12 April 1999, IT-98-30-PT, para 17; see also *Kupreškić* Appeal Judgment, 23 October 2001, IT-95-16-A, para 89.

¹² Decision on the Defence Motion to Dismiss the Indictment based upon Defects in the Form thereof, *Prosecutor v. Blaškić*, 4 April 1997, IT-95-14, para 24.

¹³ Decision on Motion Challenging the Form of Amended Joinder Indictment, *Prosecutor v. Blagojević et al.*, 2 August 2002, IT-02-60-PT, para 13.

¹⁴ In this respect, see also *Kupreškić* Appeal Judgement, 23 October 2001, IT-95-16-A, paras 88-90.

III. SUBMISSION OF THE PARTIES AND DISCUSSION

A. Paragraph 3 of the Indictment.

7. The Defence argues that paragraph 3 of the Indictment is defective in that it does not mention the circumstances of the individual criminal responsibility of the Accused.¹⁵ Moreover, the Defence submits that the Prosecution has not stated which crimes the Accused “physically” or “personally” committed.¹⁶ Finally, the Defence argues that no detail was provided by the Prosecution on the joint criminal enterprise to which the Accused was allegedly associated, such as who made such plan, when was the plan envisaged, and what the plan consisted of.¹⁷

8. The Prosecution, relying on the Rules as well as on the jurisprudence of the Tribunal, points to the summary nature of the Indictment.¹⁸ Moreover, it states that the Indictment should be read (i) in its entirety, to place its component parts in context, and (ii) in conjunction with the supporting materials that have been provided to the Accused.¹⁹ Specifically, the Prosecution notes that information on the plan relating to the joint criminal enterprise is set forth in paragraphs 4 to 6 of the Indictment; as regards the beginning and end dates of the joint criminal enterprise, the Prosecution submits that at all times relevant to the Indictment this plan was operative and no more information can or should be provided.²⁰ The Prosecution further notes that certain political events have been stated as background information and not as criminal allegations; this is why the dates relating to the formation of Martić’s police forces and those of the alleged joint criminal enterprise do not exactly match.²¹ Also, the Prosecution clarifies its position that the Accused is personally charged with all crimes mentioned in the Indictment, while only “physically” responsible for the crimes related to the Prison in Knin.²²

9. The Chamber has already discussed the basis of personal responsibility in a joint criminal enterprise in a previous decision in this case.²³ The Chamber finds that the material facts which must be pleaded with respect to an allegation that the Accused participated in a joint criminal enterprise are as follows: the purpose and period of the enterprise; the identity of the participants in the enterprise; the nature of the participation of the Accused in the enterprise.²⁴ The submissions of the Defence are without merit, for the Indictment read in its entirety sufficiently describes the

¹⁵ Motion, p. 1.

¹⁶ Motion, p. 2.

¹⁷ Motion, p. 2.

¹⁸ Response, paras 4-5.

¹⁹ Response, paras 5-6.

²⁰ Response, para 6.

²¹ Response, para 19.

²² Response, para 7.

²³ Decision on the Prosecution’s Motion to Request Leave to File a Corrected Amended Indictment of 13 December 2002, paras 25-27.

²⁴ Decision on Prosecution’s Motion for Leave to Amend the Consolidated Indictment, *Prosecutor v. Krajišnik and Plavšić*, 4 March 2002, IT-00-39&40-PT, para 13.

specific crimes for which the Accused is charged, as well as the above-mentioned elements of the alleged joint criminal enterprise. The Prosecution, in its Response, also clarified that it is willing to charge the Accused for personally committing only the crimes related to the prison in Knin; it is the Chamber's view that this explanation is sufficient to put the Accused on enough notice with respect to the preparation of his Defence. With respect to the identity of the participants in the joint criminal enterprise, although the list of participants in the enterprise is broad and far-reaching, the nature of this case and the role of the Accused are such that it would be impossible to plead the position and specific role of each co-perpetrator. The Chamber is therefore satisfied that all necessary material facts have been pleaded. The Prosecution will be required in its Pre-Trial Brief, and more fully at trial, to indicate in detail the plan and the role of the Accused in it.

B. Paragraphs 4 and 6 of the Indictment

10. The Defence argues that the Prosecution attempts to “turn its own claim on the existence [sic] of [the joint criminal enterprise] into an alleged fact”, apparently by not stating the timeframe of the enterprise and, thus, rendering any defence impossible.²⁵ The Defence further submits that all the other participants, and their roles, in the joint criminal enterprise should have been presented in the Indictment in order to allow a meaningful defence on the part of the Accused.²⁶ Also, the Defence deems it “factually and legally” impossible to reconcile the alleged state of armed conflict throughout Croatia and Bosnia and Herzegovina [BiH] with the territorial scope of the Indictment, which is limited to one third of Croatia and some portions of BiH.²⁷ Finally, the Defence argues that omitting reference to important political decisions of the period renders the Indictment faulty by distorting reality.²⁸

11. The Prosecution relies on the Tribunal's case-law to submit that because of the very nature and scope of the joint criminal enterprise, it is allowed to identify in the Indictment groups or categories of persons participating in the enterprise, and is not required to identify each participant thereof.²⁹ Also, it points out that the Prosecution may exercise its discretion so as to charge some, but not all, of the criminal acts for which the Accused might be responsible.³⁰

12. The Chamber finds that the Prosecution is indeed under an obligation to identify the fundamental features of the form of responsibility with which the Accused is charged, and is satisfied that it has done so. In accordance with the jurisprudence of the Tribunal, where an accused has held various leadership positions, it is only through evidence presented in Court pursuant to the

²⁵ Motion, p. 2.

²⁶ Motion, p. 2.

²⁷ Motion, p. 2. This submission is repeated under Paragraphs 18-20 (p. 4).

²⁸ Motion, p. 3.

²⁹ Response, para 9.

³⁰ Response, para 19.

Statute that it will be possible to establish the overall plan and the role of the Accused in this plan.³¹ In this case, the Prosecution has pleaded the period during which it deems the joint criminal enterprise operative. As regards the identification of participants in the joint criminal enterprise, the Chamber has already stated that the nature of the case and the position of the Accused allow the Prosecution to identify only the most prominent participants and to refer to the others as members of groups of persons participating in the enterprise.³² With regard to the alleged distortion of reality in the allegations against the Accused, and the existence of an armed conflict in both States, the Chamber finds that these are factual matters and that therefore they should be addressed at trial.

C. Paragraphs 2, 7, 10-17 of the Indictment

13. The Defence objects to the enumeration of posts held by the Accused, for in its view they are used by the Prosecution as proof of the Accused's guilt as such.³³ Also, it objects to the presentation of certain facts on the ground that the dates of the conflict and of the creation of the security forces are inconsistent with the allegations contained in the Indictment regarding the joint criminal enterprise.³⁴

14. The Prosecution notes, with reference to paragraphs 1 and 3 at page 3 of the Motion, that alleged criminal responsibility under Article 7 of the Statute is not merely based on the Accused's command or leadership position. Rather, the Prosecution recounts specific ways in which the Accused allegedly participated in the joint criminal enterprise and/or exercised *de facto* and *de jure* control over his subordinates.³⁵

15. The Chamber finds that the Defence's objections have no merit, since it appears clearly from the reading of the Indictment that the position of the Prosecution is not that the alleged responsibility of the Accused flows automatically from the posts he held, but flows rather from the Accused's specific conduct in the leadership positions he held as well as that of his subordinates, and for which he bears personal responsibility under Article 7(1) and/or 7(3) of the Statute.³⁶ The Chamber also finds that any incongruity of dates is a factual matter to be addressed at trial.

D. Paragraphs 5, 8, 14, and 17 of the Indictment

16. The Defence submits that the claim that the Accused had the "state of mind" necessary for the commission of each of the crimes is not sufficient to hold him responsible. It suggests that only

³¹ See, *inter alia*, Decision on Prosecution's Motion for Leave to Amend the Consolidated Indictment, *Prosecutor v. Krajišnik and Plavšić*, 4 March 2002, IT-00-39&40-PT, para 22.

³² See *supra*, para 9.

³³ Motion, p. 3.

³⁴ Motion, p. 3.

³⁵ Response, para 10.

³⁶ The laws governing the procedure before the Tribunal do not envisage the need of providing in an Indictment more specific grounds in respect to legal theories. On this issues, see Decision on Motion Challenging the Form of Amended Joinder Indictment, *Prosecutor v. Blagojević et al.*, 2 August 2002, IT-02-60-PT, para 5.

by establishing the identity of immediate perpetrators, the circumstances, manner of commission, motives, level of responsibility of each immediate perpetrator, and therefore the plan for the joint criminal enterprise, can the Prosecution be in a position to discuss such responsibility.³⁷

17. The Prosecution points out that it is permissible to charge the Accused, in the alternative, of having the state of mind necessary for the commission of each of the crimes alleged, of sharing the intent of the joint criminal enterprise, or of being aware that certain of the crimes alleged were the foreseeable consequence of the joint criminal enterprise.³⁸

18. The Chamber considers that it is indeed the responsibility of the Prosecution to prove each of the elements of the alleged crimes; nonetheless, in the Indictment the Prosecution is mandated only to present “a concise statements of the facts and the crime or crimes alleged with which the Accused is charged”, including the subjective element (*mens rea*) of the crime(s);³⁹ therefore these submissions by the Defence are without merit.

19. The submissions of the Defence might however also be interpreted so as to challenge the portions of the Indictment referring to responsibility under Article 7(3) of the Statute because they fail to identify the Accused’s alleged subordinates and their specific illegal actions. The Chamber finds that the Indictment properly identifies the subordinates of the Accused as “Martić’s police”, and in some cases as members of the Yugoslav People’s Army (JNA), of the Territorial Defence (TO), and of other military of paramilitary forces.⁴⁰ Under each Count, the Indictment provides a general description of the crimes they allegedly committed. The particulars sought by the Defence, in addition to the ones already offered, are clearly matters for evidence.

E. Paragraphs 18-20 of the Indictment

20. The Defence objects to the characterization of the situation in Croatia and BiH in the Indictment as that of an armed conflict. As regards the period of the armed conflict, the Defence submits that there is a discrepancy between the submissions in paragraphs 59, 62, and 63 of the Indictment (stating that the armed conflict commenced already in Spring 1991) and the period during which the joint criminal enterprise allegedly existed (from before August 1991 to at least December 1995).⁴¹ As regards the territorial scope of the Indictment, the Defence submits that there is a discrepancy between paragraph 18 (allegedly stating that the armed conflict took place on the entire territory of Croatia and BiH) and paragraph 19 (allegedly stating that the armed conflict took place on only one third of Croatia and parts of BiH). This latter discrepancy would render it impossible “to establish what is the real state, what are the causes and what are the consequences,

³⁷ Motion, p. 4.

³⁸ Response, para 21.

³⁹ Article 18(4) of the Statute and Rule 41(C) of the Rules.

⁴⁰ For a description of the various units, see para 6 of the Indictment.

⁴¹ Cf. Indictment, para 6; Motion, p. 4.

what are the actions and what reactions.” This lack of information would prevent the possibility to establish “the actual responsibility for possible crimes.” Finally, the Defence states that the participants to the conflict are not mentioned, and that this omission is an attempt “to change the nature, character and substance of that armed conflict.”⁴²

21. On a general note, the Prosecution alleges that it properly charged violations of Articles 3 and 5 of the Statute, based on the existence of an armed conflict, internal or international.⁴³

22. The Prosecution then argues that the Indictment clearly states that an armed conflict, between Serbian forces on the one hand and Croatian and Bosnian forces on the other, existed in Croatia and BiH during the time of the alleged crimes and that the precise dates of commencement and cessation of the conflict are irrelevant.⁴⁴ Also, the existence of an armed conflict and the widespread and systematic attack on non-Serb population are both elements that the Prosecution is required to prove at trial and are plainly not mutually exclusive.⁴⁵ Moreover, the Prosecution submits that not all the alleged criminal conduct occurred throughout the period that the joint criminal enterprise existed and that, in any event, the Prosecution has the discretion to charge only *some* of the crimes for which the Accused is responsible.⁴⁶

23. The Chamber finds that it is clear from the Indictment that the Prosecution claims that an armed conflict existed between Serbian forces on the one hand and Croatian and Bosnian forces on the other in Croatia and BiH for the duration of the alleged crimes. It will be the burden of the Prosecution to prove these allegations at trial, and that will be the proper time to discuss any potential discrepancy.

F. Paragraphs 21-24 of the Indictment (Count 1)

24. The Defence objects to the formulation of each single Count in the Indictment on various grounds. As regards Count 1 (persecution), the Defence submits that the Prosecution uses the expression “Serb forces”, which is too vague; that it is unclear how the Accused can be deemed responsible for the activities of the regular Yugoslav armed forces; that the Prosecution does not specify the political, racial, and religious grounds on which the alleged persecution was based; that charging the Accused of single acts underlying persecution (cumulative charging) is contrary to the Statute.⁴⁷ With specific regard to each of the charged acts underlying persecution, the Defence submits lack of precision with respect to:

⁴² Motion, p. 4-5.

⁴³ Response, para 18.

⁴⁴ Response, para 13.

⁴⁵ Response, para 20.

⁴⁶ Response, para 25.

⁴⁷ Motion, p. 5. Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

- a) Details on acts representing extermination and respectively murder, and on their inter-connection;⁴⁸
- b) Details on imprisonment and confinements; and that, moreover, it is not clear how the Accused might be responsible for the prison in Knin, allegedly under JNA control;⁴⁹
- c) Details on the inhumane conditions of detention;⁵⁰
- d) Details on who was tortured, murdered, sexually assaulted, and by whom;⁵¹
- e) Details on which villages were unlawfully attacked;⁵²
- g) Details on victims, location, time, and direct perpetrators of tortures and beatings;⁵³
- h) Details on deportation and forcible transfer, including the meaning of these terms, the alleged perpetrators, and the victims.⁵⁴

The Defence also argues, *sub* (f), that the fact that Serbs were not beaten or robbed “is really amazing”, and questions whether such approach to people is “antiracial” [sic]. The Defence also submits that “the allegation that the whole population...was...killed [allegedly contained in paragraph 45] actually opposed the previous statement that the whole population was only deported or forcibly removed.” Finally, the Defence alleges that it is not clear whom the Prosecution refers to as being the category “others”, in addition to Croats and Muslims, when citing the 1991 Yugoslav census.⁵⁵

25. The Prosecution submits that the supposed lack of precision of Count 1 should be considered in the context of the reference therein to specific allegations of crimes set forth in other Counts of the Indictment.⁵⁶ The Prosecution further notes that, even if the Accused did not hold any position in the JNA, he could be held responsible for the activities of the JNA, for example, through his participation in the joint criminal enterprise or by aiding and abetting those forces.⁵⁷ As regards the 1991 census, and the category of “others” therein, the Prosecution submits that it is not important to ascertain who this category comprised, for it is only alleged that Croat, Muslim and non-Serb population was forcibly transferred, deported, or killed. Finally, the Prosecution notes that the acts charged in Count 1 as persecution can be lawfully charged also as separate crimes

⁴⁸ Motion, p. 5.

⁴⁹ Motion, p. 5.

⁵⁰ Motion, p. 5-6.

⁵¹ Motion, p. 6.

⁵² Motion, p. 6.

⁵³ Motion, p. 6.

⁵⁴ Motion, p. 6.

⁵⁵ Motion, p. 6.

⁵⁶ Response, para 14.

⁵⁷ Response, para 22.

under other Counts; whether these cumulative charges are well-founded is a matter to be ascertained at trial.⁵⁸

26. Taking into account the references to other Counts contained in Count 1, the Chamber finds that the allegations in paragraphs 21-23 of the Indictment, also referring to paragraphs 25-36; 39; 42-45; 47) sufficiently substantiate, at this stage, the charge of persecution contained in paragraph 24. With respect to the details supporting each alleged act underlying persecution, the Chamber finds that such details need not be specifically pleaded in the Indictment. Information of this kind is appropriately provided in the form of supporting materials.

27. With regard to the 1991 census data provided by the Prosecution, the Chamber indeed finds that the Indictment is contradictory and that the Prosecution has failed properly to address this issue in its Response. In fact, paragraph 43 of the Indictment refers to surrounded “predominantly non-Serb towns and villages”; statistical data mentioned in paragraph 44, on the contrary, seem to suggest that a majority of Serbs was living in those areas, municipalities, towns or villages. This unclear issue is a material fact underlying the offences charged in Counts 1, 10 and 11.

28. Finally, with regard to the form of the Defence’s submission, the Chamber deems the use of ellipses in quotations at page 6 of the Motion improper.⁵⁹ Paragraph 45 of the Indictment states in its entirety that “Virtually the whole Croat, Muslim and non-Serb population of these areas was forcibly removed, deported or killed” which is clearly far from stating that “The whole population...was...killed.” The Chamber finds paragraph 45 of the Indictment completely consonant with the descriptions contained in paragraphs 42-44 thereof.

G. Paragraphs 25 to 37 of the Indictment (Counts 2 to 4)

29. As regards the specific counts of extermination and murder, the Defence complains that the Prosecution has not stated the identity of the immediate perpetrators, their “state of mind”, their degree of responsibility, nor the relation (if any) among the crimes.⁶⁰ These omissions allegedly reverse the burden of proof on the Accused. The Defence further seems to argue that, by simply enumerating individual crimes, the Prosecution falsely tries to infer the existence of the joint criminal enterprise.⁶¹ Also, the Defence submits that the murder referred to in paragraph 27 and the ones in paragraphs 28-30 are repetitive, and provide for an “unfounded prolongation of the act of commitment for another few months.”⁶² The Defence further argues that the Prosecution has not tried to establish the individual criminal responsibility of the immediate perpetrators of the killings and that it stated that the killings referred to in paragraphs 32-36 were committed by the whole of

⁵⁸ Response, para 23.

⁵⁹ This issue is also raised by the Defence under the specific Counts regarding deportation and forcible transfer (Counts 10 and 11), p. 8 of the Motion. The Chamber’s findings here are also valid in that respect.

⁶⁰ Motion, p. 6.

⁶¹ Motion, p. 7.

Martić's police, by the complete JNA and TO and other Serb forces, "which is physically impossible."⁶³ The Defence alleges that Counts 2 (Extermination as a crime against humanity) and 3 (Murder as a crime against humanity) offer no facts or alleged perpetrators, no link between the Accused and the crimes and no element to construe the existence of the joint criminal enterprise.⁶⁴ Finally, the Defence argues that charging murder as a violation of the laws or customs of war is contrary to Article 3(1) of the Statute of the Tribunal.⁶⁵

30. The Prosecution responds that it sufficiently identified the victims for which it has such information, and that further details would be available with the Pre-Trial Brief and at trial.⁶⁶ The Prosecution also submits that, in a case like this, where the Accused (with a few exceptions) is not charged with committing the crimes personally, it is enough to identify the victims by category or group. The Prosecution points out that paragraph 27 is just an introduction to the following paragraphs, and should not therefore be read as a repetition.⁶⁷ The Prosecution recalls that Article 3 of the Statute refers to Common Article 3 of the Geneva Conventions, which includes murder, torture, and cruel treatment.⁶⁸

31. The Chamber reiterates its view that the identity of the immediate perpetrators of the crimes alleged may be indicated by "category or group" when the Accused is not charged with committing those crimes personally.⁶⁹ Sometimes, if their identity is provided by the supporting material, the Defence is put on enough notice so that the proceedings would not be unfair. Also, the links between the Accused and the crimes identified in the Indictment are material facts to be proven at trial; consequently, the alleged lack of links should not be raised in a motion on the form of the Indictment. Counts 2 to 4 are indeed quite detailed, explicitly referring to places and dates, as well as to the total numbers of victims. Moreover, the names of the alleged victims are set out in Annex I attached to the Indictment. The Chamber deems that no shift in the burden of proof has taken place, and that these Counts are detailed enough to provide fair notice of the charges against the Accused so as to allow him to prepare his defence.

32. The Chamber agrees with the Prosecution as regards the implications conveyed by the reference to Common Article 3 of the Geneva Conventions, and further notes that Article 3 of the Statute explicitly states, *inter alia*, that "[s]uch violations shall include, but not be limited to" the ones listed.

⁶² Motion, p. 7.

⁶³ Motion, p. 7.

⁶⁴ Motion, p. 7.

⁶⁵ Motion, p. 7.

⁶⁶ Response, para 15.

⁶⁷ Response, para 15.

⁶⁸ Response, para 24.

H. Paragraphs 38-41 of the Indictment (Counts 5 to 9)

33. The Defence argues that the Prosecution's overall allegations are unfounded, illogical and untenable because, for the purposes of these Counts, the period of time of the alleged crimes is shorter than in the other Counts.⁷⁰ Also, the Indictment does not state any specific fact proving the poor living conditions in the detention facilities.⁷¹ The Defence further submits that the reference to "Serb Forces" as the perpetrators of the crimes alleged in these counts is too vague, and that perpetrators or immediately responsible individuals should have been mentioned.⁷² Finally, the Defence submits that charging torture and cruel treatment as a violation of the laws or customs of war is contrary to Article 3 of the Statute.⁷³

34. The Prosecution recalls that Article 3 of the Statute refers to Common Article 3 of the Geneva Conventions, which includes murder, torture, and cruel treatment.⁷⁴

35. The Chamber refers to its reasoning *supra*, under paragraph 32, with respect to the scope *ratione materiae* of Article 3 of the Statute. The Chamber also finds that charges brought under these Counts are dealt with by the Prosecution in detail; the Prosecution cites the name of each detention facility and the approximate number of detainees for each one of them. The living conditions are expressly described as "brutal", characterized by "overcrowding, starvation, inadequate medical care, and constant physical and psychological assault, including torture, beatings and sexual assault." The link between the charges and the Accused is sufficiently provided by paragraphs 38 and 39. No relevant inconsistency of dates affects the form of these Counts.

I. Paragraphs 42-46 of the Indictment (Counts 10 and 11)

36. The Defence again points to an alleged discrepancy of dates, where the Indictment refers to deportation continuing until December 1995 while the joint criminal enterprise was earlier said to have lasted until August 1995. According to the Defence, these dates also contradict the fact that in paragraph 78 Milan Martić is said to have fled Croatia in early August 1995.⁷⁵ Also, the Defence alleges that the Prosecution did not mention which villages or towns were occupied by Serbian forces, nor when, where (in Croatia, BiH, or Serbia-Montenegro), and how many non-Serbian civilians were transferred.⁷⁶ The same argument contained in page 6 of the Motion with regard to

⁶⁹ See *supra*, para 9.

⁷⁰ Motion, p. 8.

⁷¹ Motion, p. 8.

⁷² Motion, p. 8.

⁷³ Motion, p. 8.

⁷⁴ Response, para 24.

⁷⁵ Motion, p. 8.

⁷⁶ Motion, p. 8.

the ethnic composition of towns and villages were deportations allegedly took place⁷⁷ is here repeated.

37. The Prosecution submits that the Accused can be held responsible for the effects of criminal actions in which he participated that extend beyond the existence of the joint criminal enterprise.⁷⁸ The Prosecution also contends that the information provided on deportation and forcible transfers is sufficient, stating in detail when the campaign occurred, who participated in it, how it was accomplished, as well as the results of such a campaign. The allegation of the Prosecution is that “nearly all” non-Serbs in these areas were forcibly removed, deported, or killed.⁷⁹

38. Paragraphs 42-45 mention the time-frame of the alleged crimes, as well as the description of how they supposedly took place. The Chamber finds that the allegations of fact in respect to deportation and forcible transfer, with the exception of the issue mentioned above of the ethnic composition of areas, municipalities, towns and villages,⁸⁰ are indeed sufficient to provide enough information to the Accused.

J. Paragraphs 47 and 48 of the Indictment (Counts 12 to 14)

39. The Defence submits that the Prosecution did not identify any specific building, nor the total number of buildings, wantonly destroyed or plundered.⁸¹ The Defence further alleges that the Prosecution, although stating that wanton destruction and plunder were carried out in towns and villages in one of the areas covered by the Indictment, has only identified villages, and not towns.⁸² Finally, the Defence raises the issue that the alleged acts might have been justified by military necessity, and that the Prosecution had failed to specify if the armed conflict could have had an impact on these areas.⁸³

40. The Prosecution contends that, in a case of such magnitude, it is impossible to identify the buildings destroyed or plundered; rather, it is sufficient to specify the towns and villages where such destruction or plunder occurred.⁸⁴

41. The Chamber finds that the time-frame of the alleged crimes is specified and the specific towns and villages are mentioned.⁸⁵ Moreover, the Chamber has already stated, in its Decision on the Prosecution’s Motion to Request Leave to File a Corrected Amended Indictment of 13

⁷⁷ See *supra*, paras 24 and 27.

⁷⁸ Response, para 25.

⁷⁹ Response, para 16.

⁸⁰ See *supra*, para 27.

⁸¹ Motion, p. 8-9.

⁸² Motion, p. 9.

⁸³ Motion, p. 9.

⁸⁴ Response, para 15.

⁸⁵ The Chamber does not deem relevant the distinction, if any, between “town” and “village” (see Motion, p. 9). The Chamber understands the charges brought against the accused as referring exclusively to the localities mentioned in para 47 of the Indictment, it therefore does not see any merit in this argument of the Defence.

December 2002 (paragraph 33) that the supporting material provides a sufficient basis for the Counts charged in the Indictment so as not to cause any prejudice to the Accused's right to a fair trial. The Defence has raised no complaint with regard to the lack of such information in the supporting material or in any subsequent disclosure. The Indictment alleges that there was a nexus between the conflict and the crimes charged in these Counts; the Chamber deems this information sufficient. The nature of this nexus is something to be proven at trial by the Prosecution; this will allow the Chamber to establish whether under the laws or customs of war the operations qualify as war crimes or rather as legitimate belligerent conduct.

K. Paragraphs 49-55 of the Indictment (Counts 15 to 19)

42. The Defence submits that the claim that the attack on Zagreb was unlawful is based on the false premise that it was executed in retaliation for "Operation Flash," and not in self-defence of the Serbs in Western Slavonia.⁸⁶

43. The Chamber agrees with the Prosecution that the allegations on charges relating to the bombing of Zagreb are matters to be addressed at trial and not in preliminary motions.⁸⁷ Moreover, the issue raised by the Defence seems to be a repetition of the arguments set forth in the Preliminary Objection filed on 11 October 2002 and decided by the Chamber on 13 December 2002.⁸⁸

L. General Remarks on the form and length of Motions.

44. The procedural history referred to in paragraphs 1-2 of this Decision causes the Chamber to emphasise that Parties, in their submissions, must comply with the Rule, the Practice Direction on the Length of Briefs and Motions, and any other relevant directive from the Tribunal or the Chamber. These standards have been devised in order to assure the Accused, *inter alia*, the rights enshrined in Article 21(4)(c) of the Statute and should be strictly complied with. Moreover, the Chamber reminds the parties that frivolous motions, or frivolous arguments within a motion, may be sanctioned under Rule 46(C).

THEREFORE PURSUANT TO Rule 72 of the Rules;

HEREBY

NOTES of the clarification contained in the Response, under paragraph 7, that the Accused is charged with personally committing only the crimes related to the Prison of Knin referred to in paragraph 39 (*sub a.*) of the Indictment;

⁸⁶ Motion, p. 9.

⁸⁷ Response, para 26.

⁸⁸ Decision on the Prosecution's Motion to Request Leave to File a Corrected Amended Indictment of 13 December 2002, para 28.

GRANTS the Motion with respect to paragraphs 42-44, and thereby

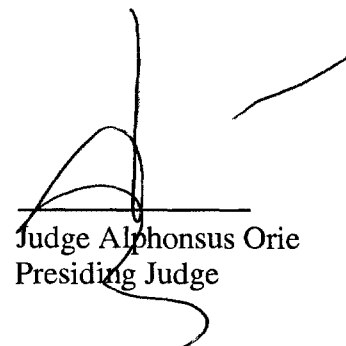
ORDERS the Prosecution to file a new Amended Indictment (to be later known as “Amended Indictment”) clarifying the apparent inconsistencies in paragraphs 42-44 of the Indictment, with special regard to the ethnic composition of clearly identified topographical locations in Counts 10 and 11, and referred to in Count 1, paragraph 23, *sub i*;

ALLOWS the Defence, within 15 days from the filing of the Amended Indictment, to file a Preliminary Motion exclusively with respect to the parts of the Amended Indictment that are modified pursuant to this Decision, and subject to the caveats contained in paragraph 44 of this Decision;

REJECTS the Motion in all other respects.

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

Dated this second day of June 2003,
At The Hague,
The Netherlands



Judge Alphonsus Orié
Presiding Judge

[Seal of the Tribunal]