

UNITED
NATIONS



International Tribunal for the
Prosecution of Persons
Responsible for Serious Violations of
International Humanitarian Law
Committed in the Territory of the
Former Yugoslavia since 1991

Case No. IT-97-25/1-PT

Date: 28 April 2004

Original: English

IN TRIAL CHAMBER II

Before: **Judge Carmel A. Agius, Presiding**
Judge Jean-Claude Antonetti
Judge Kevin Parker

Registrar: **Mr. Hans Holthuis**

Decision of: **28 April 2004**

THE PROSECUTOR

v.

MITAR RAŠEVIĆ

**DECISION REGARDING DEFENCE PRELIMINARY MOTION
ON THE FORM OF THE INDICTMENT**

The Office of the Prosecutor:

Ms. Hildegard Uertz-Retzlaff
Mr. William Smith
Ms. Christina Moeller

Counsel for the Accused:

Mr. Vladimir Domazet

I. BACKGROUND

1. On 17 June 1997, the initial indictment against Milorad Krnojelac, Savo Todović and Mitar Rašević (“Initial Indictment”) was reviewed and confirmed by Judge Lal Chand Vohrah.
2. On 20 November 2003, the Defence filed the “Defence’s Preliminary Motion pursuant to Rule 72(A)(ii)” (“Defence’s Preliminary Motion I”) which alleged defects in the form of the Initial Indictment.
3. On 28 November 2003, the Prosecution filed the “Prosecution’s Request to Hold the Decision on the Defence Preliminary Motion on the Form of the Indictment in Abeyance” (“Prosecution’s Request to Hold the Decision”), in which it requested that Trial Chamber II (“Trial Chamber”) suspend the deadline imposed on the Prosecution to respond to the Defence’s Preliminary Motion I and defer rendering its decision until the Prosecution filed, on 2 December 2003, its “Motion for Leave to Amend the Original Indictment with attached Annex A and B and Confidential Annex C and D” (“Motion to Amend Indictment”) in order to file its “First Amended Indictment with Schedules A to E,” dated 2 December 2003 (“First Amended Indictment”).
4. By its Scheduling Order dated 5 December 2003, the Trial Chamber granted the Prosecution’s Request to Hold the Decision, which was unopposed by the Defence,¹ and ordered the Defence to file a response to the Prosecution’s Motion to Amend Indictment.
5. On 12 January 2004, the Defence filed another “Defence’s Preliminary Motion on the Form of the Indictment pursuant to Rule 72(A)(ii)” (“Defence’s Preliminary Motion II”) in which it objects to the First Amended Indictment and requests that the Trial Chamber order the Prosecution to correct the First Amended Indictment.
6. On 26 January 2004, the Prosecution filed its “Prosecution’s Response to Defence Preliminary Motion on the Form of the Indictment” (“Prosecution’s Response”), in which it submits that the form of the First Amended Indictment is not defective and that the Defence’s Preliminary Motion II should be dismissed.
7. In its Motion to Amend Indictment, the Prosecution, pursuant to Rule 50 of the Rules of Procedure and Evidence (“Rules”) seeks leave to amend the Initial Indictment against Mitar Rašević (“Accused”). According to the Prosecution, the substantial amendments contained in the First Amended Indictment are:

¹ See *The Prosecutor v. Mitar Rašević*, Case No. IT-97-25/1 PT, Defence Response upon Prosecution Request to Hold the Decision on the Defence Preliminary Motion on the Form of the Indictment in Abeyance, 1 December 2003.

- (a) the removal of the charges against Milorad Krnojelac and Savo Todović;
- (b) the removal of the Article 2 charges relating to grave breaches of the Geneva Conventions;
- (c) the addition of five Schedules (A-E) to further particularize the allegations of the indictment; and
- (d) the addition of allegations that the Accused was a co-perpetrator or aider and abettor in a joint criminal enterprise (“JCE”).²

According to the Prosecution, the procedural amendments primarily affect style and format.³

8. In the First Amended Indictment, the Accused is charged under Articles 7(1) and 7(3) of the Statute of the Tribunal (“Statute”) with twelve counts based on the events at the Foča Kazneni-Popravni Dom (“KP Dom”), one of the largest prisons in the former Yugoslavia. He was allegedly a commanding officer and in a position of authority at this prison. The charges against him allege:

- (a) **Crimes against humanity**, consisting of persecutions on political, racial and religious grounds (Count 1), torture (Count 2), inhumane acts (Counts 4 and 9), murder (Count 6), imprisonment (Count 8), and enslavement (Count 11).
- (b) **Violations of the laws or customs of war**, consisting of torture (Count 3), cruel treatment (Counts 5 and 10), murder (Count 7), and slavery (Count 12).

II. GENERAL PLEADING PRINCIPLES

9. The Trial Chamber has established the following **general pleading principles** that may be applicable to the present case.⁴

10. Article 21(4)(a) of the Statute provides that the accused shall be entitled to be informed in detail of the nature and cause of the charges against him. This provision applies to the form of indictments.⁵ This right translates into an obligation on the part of the Prosecution to plead the material facts underpinning the charges in an indictment.⁶ The pleadings in an indictment are sufficiently particular when they concisely set out the material facts of the Prosecution’s case with

² Prosecution’s Motion to Amend Indictment, para. 4.

³ Prosecution’s Motion to Amend Indictment, para. 5.

⁴ See, e.g., *The Prosecutor v. Mile Mrksic*, Case No. IT-95-13/1-PT, Decision on Form of the Indictment, 19 June 2003 (“Mrksic Decision”), paras. 6-14.

⁵ *The Prosecutor v. Kupreškić and Others*, Case No. IT-95-16-A, Judgment, 23 October 2001 (“Kupreškić Appeals Judgment”), para. 88.

⁶ *Kupreškić Appeals Judgment* (with reference to Arts. 18(4), 21(2) and 21(4)(a) and (b) of the Statute and Rule 47(C) of the Rules); and *The Prosecutor v. Hadžihasanović, Alagić and Kubura*, Case No. IT-01-47-PT, Decision on Form of Indictment, 7 December 2001 (“Hadžihasanović Indictment Decision”), para. 8.

enough detail to inform an accused clearly of the nature and cause of the charges against him, enabling him to prepare a defence effectively and efficiently.⁷

11. The materiality of a particular fact depends on the nature of the Prosecution's case.⁸ A decisive factor in determining the degree of specificity with which the Prosecution must particularise the facts of its case in an indictment is the nature of the alleged criminal conduct charged,⁹ which includes the proximity of the accused to the relevant events.¹⁰ The precise details to be pleaded as material facts are those regarding the acts of the accused, rather than those persons for whose acts he is alleged to be responsible.¹¹

12. With respect to an Article 7(1) case, depending on the circumstances of the case, the Prosecution may be required to "indicate in relation to each individual count precisely and expressly the particular nature of the responsibility alleged," in other words, to indicate the particular head or heads of liability.¹² This may be necessary in order to avoid ambiguity with respect to the exact nature and cause of the charges against the accused¹³ 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) responsibility.¹⁴

13. When an accused is charged with "commission" of a crime under Article 7(1), the indictment must specify whether such "commission" is a physical commission by the accused or participation by the accused in a JCE.¹⁵

14. As for pleadings regarding JCE liability, the Trial Chamber recalls that the *actus reus* of JCE liability comprises three elements:

⁷ See *Kupreškić Appeals Judgment*, para. 88; Arts. 18(4), 21(2) and 21(4)(a) and (b) of the Statute; and Rule 47(C) of the Rules, which essentially restates Art. 18(4).

⁸ *Kupreškić Appeals Judgment*, para. 89.

⁹ *Ibid.*

¹⁰ *Hadžihasanović Indictment Decision*, para. 10; *The Prosecutor v. Brđanin and Talić*, Case No. IT-99-36-PT, Decision on Objections by Momir Talić to the Form of the Amended Indictment, 20 February 2001 ("First Brđanin & Talić Decision"), para. 18. It is essential for the accused to know from the indictment just what that alleged proximity is: *The Prosecutor v. Brđanin and Talić*, Case No. IT-99-36-PT, Decision on Objections by Radoslav Brđanin to the Form of the Amended Indictment, 23 February 2001 ("Second Brđanin & Talić Decision"), para. 13.

¹¹ Second *Brđanin & Talić Decision*, para. 10.

¹² See *The Prosecutor v. Delatić and Others*, Case No. IT-96-21-A, Judgment, 20 February 2001 ("Čelebići Appeals Judgment"), para. 350. See also *The Prosecutor v. Deronjić*, Case No. IT-02-61-PT, Decision on Form of the Indictment, 25 October 2002 ("Deronjić Decision"), para. 31.

¹³ See Čelebići Appeals Judgment, para. 351; *The Prosecutor v. Aleksovski*, Case No. IT-95-14/1-A, Judgment, 24 March 2000 ("Aleksovski Appeals Judgment"), para. 171, fn. 319 (with reference to *The Prosecutor v. Krnojelac*, Case No. IT-97-25-PT, Decision on Preliminary Motion on Form of Amended Indictment, 11 February 2000 ("First Krnojelac Decision")), paras. 59-60.

¹⁴ For example, 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, must be pleaded in detail (*Kupreškić Appeals Judgment*, para. 89), whereas, in a JCE case, different material facts would have to be pleaded (see also *The Prosecutor Brđanin and Talić*, Case No. IT-99-36-PT, Decision

(a) *A plurality of persons.* They need not be organised in a military, political or administrative structure, as is clearly shown by the *Essen Lynching* and the *Kurt Goebell* cases.

(b) *The existence of a common plan, design or purpose which amounts to or involves the commission of a crime provided for in the Statute.* There is no necessity for this plan, design or purpose to have been previously arranged or formulated. The common plan or purpose may materialise extemporaneously and be inferred from the fact that a plurality of persons acts in unison to put into effect a joint criminal enterprise.

(c) *Participation of the accused in the common design* involving the perpetration of one of the crimes provided for in the Statute. This participation need not involve commission of a specific crime under one of those provisions (for example murder, extermination, torture, rape, etc.), but may take the form of assistance in, or contribution to, the execution of the common plan or purpose.¹⁶

15. The *Krnojelac* Trial Chamber distinguished the following four categories of supporting facts which must be present in an indictment charging an accused with JCE:

- (a) the nature or purpose of the JCE;
- (b) the time at which or the period over which the enterprise is said to have existed;
- (c) the identity of those engaged in the enterprise, so far as their identity is known, but at least by reference to their category as a group;
- (d) the nature of the participation by the accused in that enterprise.¹⁷

16. With respect to an Article 7(3) case, the following are the minimum material facts that must be pleaded in the indictment:

- (a) (i) the accused is the superior¹⁸ (ii) of subordinates, sufficiently identified,¹⁹ (iii) over whom he had effective control—in the sense of a material ability to prevent or punish criminal conduct²⁰—and (iv) for whose acts he is alleged to be responsible;²¹
- (b) (i) the accused knew or had reason to know that the crimes were about to be or had been committed by those others,²² and (ii) the related conduct of those others for whom he is

on Form of Further Amended Indictment and Prosecution Application to Amend, 26 June 2001 (“Third Brdanin & Talić Decision”), paras. 21-22).

¹⁵ See *Aleksovski Appeals Judgment*, fn. 319 (citing and upholding First *Krnojelac* Decision, paras. 59-60).

¹⁶ *The Prosecutor v. Duško Tadić*, Case No. IT-94-1-A, Judgment, 15 July 1999 (“Tadić Appeals Judgment”), para. 227. Emphasis in original.

¹⁷ *The Prosecutor v. Milorad Krnojelac*, Case No. IT-97-25-PT, Decision on the Form of the Second Amended Indictment, 11 May 2000 (“Third Krnojelac Decision”), para. 16. See *The Prosecutor v. Milutinović, Nikola Šainović & Dragoljub Ojdanić*, Case No. IT-99-37-PT, Decision on Defence Preliminary Motion Filed by the Defence for Nikola Šainović, 27 March 2003 (“Milutinović Decision”), p. 4, for a similar presentation as to pleading requirements for a JCE.

¹⁸ The Prosecution may also be ordered to plead the position forming the basis of the superior responsibility charges (*Deronjić Decision*, para. 15).

¹⁹ *Deronjić Decision*, para. 19.

²⁰ *Celebići Appeals Judgment*, para. 256 (see also paras. 196-198, 266).

²¹ Statute, Art. 7(3); see *Hadžihasanović Indictment Decision*, paras. 11, 17; see also First *Brdanin & Talić Decision*, para. 19; *The Prosecutor v. Krajnišnik*, Case No. IT-00-39-PT, Decision Concerning Preliminary Motion on the Form of the Indictment, 1 August 2000 (“Krajnišnik Decision”), para. 9; First *Krnojelac Decision*, para. 9.

alleged to be responsible.²³ The facts relevant to the acts of those others will usually be stated with less precision,²⁴ since the details of those acts (by whom and against whom they are done) are often unknown, and the acts themselves often are not greatly at issue;²⁵ and

(c) the accused failed to take the necessary and reasonable measures to prevent such crimes or to punish the persons who committed them.²⁶

17. All legal prerequisites to the application of the offences charged constitute material facts and must be pleaded in the indictment.²⁷ With respect to the relevant state of mind (*mens rea*), either the specific state of mind itself (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 to be inferred should be pleaded.²⁸

18. Each of the material facts must usually be pleaded expressly, although it may be sufficient in some circumstances if it is pleaded by necessary implication.²⁹ However, if a pleading merely assumes the existence of the pre-requisite, this fundamental rule of pleading has not been met.³⁰

19. Generally, an indictment, as the primary accusatory instrument, must plead with sufficient particularity the material aspects of the Prosecution's case, failing which it suffers from a material defect.³¹ In the light of the primary importance of the indictment, the Prosecution cannot cure a defective indictment via its supporting material and pre-trial brief.³² 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 to proceed with the trial.³³ The Prosecution is 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 the

²² Statute, Art. 7(3); see *Hadžihasanović* Indictment Decision, para. 11; First *Brđanin & Talić* Decision, para. 19; *Krajišnik* Decision, para. 9.

²³ Statute, Art. 21(4)(a); *Hadžihasanović* Indictment Decision, para. 11; *The Prosecutor v. Krnojelac*, Case No. IT-97-25-PT, Decision on the Defence Preliminary Motion on the Form of the Indictment, 24 February 1999 ("Second *Krnojelac* Decision"), para. 38.

²⁴ *Hadžihasanović* Indictment Decision, para. 11; First *Brđanin & Talić* Decision, para. 19.

²⁵ See *Hadžihasanović* Indictment Decision, para. 11; First *Brđanin & Talić* Decision, para. 19; *The Prosecutor v. Kvočka*, Case No. IT-99-30-PT, Decision on Defence Preliminary Motions on the Form of the Indictment, 12 April 1999, para. 17; First *Krnojelac* Decision, para. 18(A); *Krajišnik* Decision, para. 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.

²⁶ Statute, Art. 7(3); see *Hadžihasanović* Indictment Decision, para. 11; First *Brđanin & Talić* Decision, para. 19 (rolling facts (b) and (c) together); *Krajišnik* Decision, para. 9.

²⁷ *Hadžihasanović* Indictment Decision, para. 10.

²⁸ Third *Brđanin & Talić* Decision, para. 33.

²⁹ *Hadžihasanović* Indictment Decision, para. 10; *The Prosecutor v. Brđanin and Talić*, Case No. IT-99-36-PT, Decision on Form of Fourth Amended Indictment, 23 November 2001, para. 12; First *Brđanin & Talić* Decision, para. 48.

³⁰ *Hadžihasanović* Indictment Decision, para. 10; First *Brđanin & Talić* Decision, para. 48.

³¹ *Kupreškić* Appeals Judgment, para. 114.

³² 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, paras. 11-13).

³³ *Kupreškić* Appeals Judgment, para. 92.

Prosecution to omit the material facts in the indictment with the aim of moulding the case against the accused as the trial proceeds, depending on how the evidence unfolds.³⁴ Where 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.³⁵

20. The Prosecution is not required to plead the evidence by which such material facts are to be proven.³⁶

III. ARGUMENTS OF THE PARTIES AND DISCUSSION

21. In the Defence's Preliminary Motion II, the Defence argues three main defects in the form of the indictment:

- (a) improper alternative and cumulative charging;
- (b) insufficient pleading relating to the basis of criminal liability and the Accused's participation in the respective crimes;
- (c) incorrect factual allegations supporting the charges.

22. The Trial Chamber will consider each of the Defence's main contentions in turn.

A. Alternative and Cumulative Charging

1. Defence

23. In the Defence's Preliminary Motion II, the Accused objects to the principle of alternative accusations such as the Accused's alleged participation in a JCE as a co-perpetrator or, alternatively, as an aider or abettor.³⁷ The Defence argues that this principle has been abandoned by "modern criminal legislature."³⁸

24. The Defence also objects to cumulative charging under Articles 7(1) and 7(3) for the same act or event.³⁹ The Defence contends that such charging prejudices the Defence because it does not know which theory of criminal liability to defend against.⁴⁰

³⁴ *Ibid.*

³⁵ *Ibid.*

³⁶ *Ibid.*, para. 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.

³⁷ Defence's Preliminary Motion II, paras. 11, 20.

³⁸ Defence's Preliminary Motion II, para. 11.

³⁹ Defence's Preliminary Motion II, para. 19.

2. Prosecution

25. In response to these objections, the Prosecution argues that the Tribunal has repeatedly held that charging in the alternative is permissible and that the Prosecution is not required to choose between different heads of responsibility when submitting an indictment.⁴¹

26. The Prosecution contends that charges under Article 7(3) are aimed at a fundamentally different type of conduct than Article 7(1) charges.⁴² It recalls that the *Krnojelac* Appeals Chamber, in its discussion on the form of the indictment, held that multiple charging for the same acts under different theories of liability both between Articles 7(1) and 7(3) and within Article 7(1) is acceptable so long as the form of liabilities is made clear.⁴³

27. The Prosecution concludes that it may charge the same conduct under both Articles 7(1) and 7(3), and the Trial Chamber shall, when rendering its judgement, determine whether conviction under both provisions is appropriate.⁴⁴ The Prosecution asserts that it has made clear to the Accused the nature of the responsibility with which he is charged; the Accused should prepare his defence against both theories of responsibility.⁴⁵

3. Discussion

28. The Trial Chamber recalls the relevant pleadings principles, set out in Section II above.

29. With respect to the nature of liability incurred, the Appeals Chamber held in *Krnojelac* that it is vital for the indictment to specify under what article of the Statute an individual is being charged.⁴⁶ However, the Tribunal has held that alternative (or cumulative) charging does not violate an accused's rights. When considering alternative charging, the *Blaškić* Trial Chamber stressed that “[n]othing prevents the Prosecutor from pleading an alternative responsibility (Article 7(1) or 7(3) of the Statute), but the factual allegations supporting either alternative must be sufficiently precise so as to permit the accused to prepare his defence on either or both alternatives.”⁴⁷ More recently, this Trial Chamber reiterated that the Prosecution is not required to

⁴⁰ Defence's Preliminary Motion II, para. 20.

⁴¹ Prosecution's Response, para. 3.

⁴² Prosecution's Response, para. 6.

⁴³ Prosecution's Response, para. 6 (citing *The Prosecutor v. Milorad Krnojelac*, Case No. 97-25-A, Judgment, 17 September 2003 (“*Krnojelac* Appeals Judgment”), para. 138).

⁴⁴ Prosecution's Response, para. 7.

⁴⁵ Prosecution's Response, para. 8.

⁴⁶ *Krnojelac* Appeals Judgment, para. 138.

⁴⁷ *The Prosecutor v. Blaškić*, Case No. IT-95-14-PT, Decision on the Defence Motion to Dismiss the Indictment Based Upon Defects in the Form Thereof (Vagueness/Lack of Adequate Notice of Charges), 4 April 1997 (“*Blaškić* Defects Decision”), para. 32.

choose among different heads of responsibility, stressing that the approach of pleading heads of responsibility in the alternative has been accepted by the Tribunal's jurisprudence.⁴⁸

30. It is now settled law of the Tribunal that cumulative charging is permissible. The *Čelebić* Appeals Chamber declared that “[c]umulative charging is to be allowed in light of the fact that, prior to the presentation of all of the evidence, it is not possible to determine to a certainty which of the charges brought against an accused will be proven.”⁴⁹

31. The Trial Chamber therefore rejects the Defence's first contention.

B. Insufficient Pleading Relating to Basis of Criminal Liability and Accused's Participation in Respective Crimes

1. Insufficient Pleading Relating to Article 7(1)

a. Defence

32. The Defence argues that there is a lack of specificity in relation to the nature and object of the JCE, the identification of the co-perpetrators of the JCE, and the role of each participant and the Accused in the crimes charged.⁵⁰ For instance, the Accused argues that the Prosecution does not mention the other members of the JCE and asserts that the phrase “with other known and unknown members of JCE” (paragraphs 10, 19, 40, 45, and 49 of the First Amended Indictment) is imprecise and does not allow the Accused to adequately prepare his defence.⁵¹

b. Prosecution

33. In response, the Prosecution argues that the First Amended Indictment contains all the necessary facts in sufficient detail to give the Accused warning of the nature of the crimes with which he is charged. It stresses the summary nature of the indictment and argues that it must be read in conjunction with the supporting materials which provide the Accused additional information with which to prepare his defence.⁵²

34. The Prosecution lays out the factual requirements to be pleaded in an indictment, as specified by the Appeals Chamber in the *Kupreškić* and *Krnojelac* cases.⁵³ The Prosecution stresses that it need not identify all members of the JCE and their roles. It maintains that the names of all the members of the JCE and the requisite factual allegations for the two alternative bases of JCE

⁴⁸ *Mrksić* Decision, para. 62.

⁴⁹ *Čelebić* Appeals Judgment, para. 400.

⁵⁰ Defence's Preliminary Motion II, paras. 12-13; *see also* Defence's Preliminary Motion II, paras. 16, 18.

⁵¹ Defence's Preliminary Motion II, para. 13.

⁵² Prosecution's Response, paras. 10-11.

⁵³ Prosecution's Response, para. 12-13.

liability are not material facts required to be pleaded in the First Amended Indictment but rather are matters of evidence. The Prosecution argues that reference to the category as a group (of the members of the JCE) is sufficient.⁵⁴

35. The Prosecution also contends that the Defence can refer to supporting material containing witness statements to obtain further information regarding the roles of other named participants in the JCE.⁵⁵ In response to the Defence's contention that the Prosecution has an obligation to provide sufficient particulars as to the Accused's role in the crimes charged, the Prosecution argues that the First Amended Indictment sets out in sufficient detail how the Accused acted in furtherance of the JCE.⁵⁶ Regarding the nature and object of the JCE, the Prosecutor submits that such elements are clearly pleaded in paragraphs 3, 4 and 5 of the First Amended Indictment.⁵⁷

c. Discussion

36. The Trial Chamber recalls the relevant pleadings principles, set out in Section II above.

37. Contrary to the Prosecution's argument, supporting materials used in the review of the indictment cannot supplement a defective indictment.⁵⁸ They will not be taken into consideration when assessing the indictment.

Clarity of JCE Pleadings

38. The Trial Chamber is mindful of the *Aleksovski* Appeals Chamber's holding that "[t]he practice by the Prosecution of merely quoting the provisions of Article 7(1) in the indictment is likely to cause ambiguity, and it is preferable that the Prosecution indicate in relation to each individual count precisely and expressly the particular nature of the responsibility alleged."⁵⁹ The Trial Chamber reads the First Amended Indictment as pleading all potential forms of responsibility covered by Article 7(1) with respect to each count.⁶⁰

39. The *Aleksovski* Appeal Chamber holding also implies that when the Prosecution charges an accused with "commission" of a crime under Article 7(1), it must specify whether such "commission" is a physical commission by the accused or participation by the accused in a JCE. The Trial Chamber notes that paragraph 2 of the First Amended Indictment expressly excludes

⁵⁴ Prosecution's Response, para. 15.

⁵⁵ Prosecution's Response, para. 16.

⁵⁶ Prosecution's Response, para. 17.

⁵⁷ Prosecution's Response, para. 19.

⁵⁸ See *supra* para. 19.

⁵⁹ *Aleksovski* Appeals Judgment, fn. 319 (citing and upholding First *Krnojelac* Decision, paras. 59-60).

⁶⁰ See First Amended Indictment, paras. 2, 8, 10, 19, 40, 45, and 49.

physical commission from the ambit of the Accused's participation in the JCE.⁶¹ However, the same paragraph specifies that “[c]ommitting” in this indictment includes the Accused's participation in a JCE as a co-perpetrator or alternatively as an aider or abettor.” The Trial Chamber finds that this wording may give rise to confusion and directs the Prosecution to resolve this ambiguity.

40. The Trial Chamber also find the wording in paragraph 8 of the First Amended Indictment regarding the Accused's individual criminal responsibility under Article 7(1) for his participation in a JCE “in addition to his responsibility under that same Article for having planned, instigated, ordered, committed, or otherwise aided and abetted in the planning, preparation, and execution of these crimes” to be ambiguous, as the First Amended Indictment appears to have previously restricted the meaning of “committed” to participation in a JCE or aiding and abetting. The Trial Chamber therefore directs the Prosecution to resolve this ambiguity.

Actus Reus of JCE Liability

41. The Trial Chamber will assess the sufficiency of the Prosecution's pleading with regard to each of the four *Krnojelac* categories.⁶²

Nature or purpose of the JCE

42. As noted by the *Krnojelac* Trial Chamber, a JCE exists where there is an understanding or arrangement amounting to an agreement between two or more persons: “The understanding or arrangement need not be express, and its existence may be inferred from all the circumstances. It need not have been reached at any time before the crime is committed.”⁶³

43. The Prosecution has set out such an arrangement in, *inter alia*, the following paragraphs of the First Amended Indictment: generally, in paragraph 6 (“each participant or co-perpetrator within the joint criminal enterprise played his role or roles that significantly contributed to the overall objective of this enterprise”); with regard to the “persecution of the Muslim and other non-Serb male detainees at the KP Dom facility,” in paragraph 10 (“acting individually or in concert with other known and unknown members of the joint criminal enterprise”); with regard to “torture and beatings against Muslim and other non-Serb male detainees at the KP Dom facility,” in paragraph 19 (“acting individually or in concert with other known and unknown members of the joint criminal enterprise”); with regard to “wilful killings and murder of Muslim and other non-

⁶¹ In para. 2 of the First Amended Indictment, the Prosecution specifies that “[b]y using the word ‘committed’ in this indictment, the Prosecutor does not intend to suggest that the Accused physically committed any or all of the crimes charged personally.”

⁶² See *supra* para. 15.

⁶³ Third *Krnojelac* Decision, para. 15.

Serb male detainees at the KP Dom facility," in paragraph 40 ("acting individually or in concert with other known and unknown members of the joint criminal enterprise"); with regard to "imprisonment of Muslim and other non-Serb male detainees under inhumane conditions at the KP Dom facility," in paragraph 45 ("acting individually or in concert with other known and unknown members of the joint criminal enterprise"); and with regard to "enslavement of Muslim and other non-Serb male detainees at the KP Dom facility," in paragraph 49 ("acting individually or in concert with other known and unknown members of the joint criminal enterprise").

44. In paragraph 3 of the First Amended Indictment, the Prosecution identifies the purpose of the JCE as "to imprison Muslims and other non-Serb civilians from Foča and the surrounding areas in inhumane conditions and subject them to beatings, torture, enslavement, deportations and forcible transfers." The Trial Chamber is satisfied that Counts 1-5 (Persecutions, Torture and Beatings) and 8-12 (Imprisonment, Inhumane Acts, and Cruel Treatment, and Enslavement) include allegations that fall within the stated purpose of the JCE, and that the alleged acts in Counts 6-7 (Wilful Killings and Murder) may be considered as natural and foreseeable consequences of the execution of this purpose.

45. The Trial Chamber is thus satisfied that the nature and purpose of the JCE have been sufficiently pleaded.

Timeline of the JCE

46. Although the Defence does not raise any objection relating to the timeframe of the JCE, the Trial Chamber will consider this *Krnojelac* category. In paragraph 3 of the First Amended Indictment, the Prosecution alleges that the Accused participated in a JCE "that came into existence no later than April 1992 and continued until at least October 1994." First, the Trial Chamber finds that there is an apparent inconsistency between this formulation and the date specified in paragraph 49 of the First Amended Indictment: "from May 1992 until October 1994." The Trial Chamber directs the Prosecution to remove this inconsistency. Second, it is the Trial Chamber's understanding, based on the language "no later than April 1992" and "at least October 1994," that the Prosecution will rely only on events and conduct between April 1992 and October 1994 as a basis for a conviction. The Trial Chamber directs the Prosecution, in the case that it does not share this understanding, to clarify its intentions in the First Amended Indictment.

Identity of the participants

47. As to the identity of the participants in the JCE, the First Amended Indictment only identifies two persons by name (apart from the Accused): Milorad Krnojelac and Savo

Todorović.⁶⁴ The other members of the JCE are identified by category: known and unknown persons of the “prison staff,” the “Yugoslav People’s Army” (“JNA”), the “Serb Territorial Defence” (“TO”), the “Republika Srpska” (“RS”), “armed forces” (“VRS”), the “RS police forces,” and “Serb paramilitary formations.”⁶⁵ The Annexes to the First Amended Indictment provide a number of names of individual guards/soldiers and military personnel who allegedly took part in the JCE. The precise names of each participant in the JCE need not be pleaded in an indictment but rather are matters of evidence and should be addressed at pre-trial discovery if known.⁶⁶ Furthermore, as noted by the *Krnojelac* Trial Chamber, identification of a perpetrator by category is sufficient if the precise identity is not known.⁶⁷ The Trial Chamber finds that the requirement that the identity of the participants be sufficiently pleaded in the indictment is therefore satisfied.

Nature of Accused's participation

48. The Prosecutor pleads the nature of the Accused's participation in the alleged JCE in, *inter alia*, the following paragraphs of the First Amended Indictment: paragraph 7(a)-(j) (“[the Accused] acting individually or in concert with other members of the joint criminal enterprise...participated in establishing a pattern of widespread mistreatment...contributed to a climate of fear...participated in the establishment of a system of forced labour); paragraph 17(a)-(f) (“the persecutions in which [the Accused] participated were based on political, racial or religious grounds and included...the establishment and perpetuation of inhumane conditions...the prolonged and frequent forced labour”); paragraph 50 (“[the Accused] assigned detainees to perform particular work”); and paragraph 53 (“[the Accused] was present while detainees were performing forced labour”). These paragraphs should be read in conjunction with, *inter alia*, the following paragraphs detailing the Accused's position of authority: paragraphs 7(a)-(e) (“commander of the KP Dom guards”), 9 (“commander of the prison guards”), and 50 (“high-level prison staff”). The Trial Chamber is thus satisfied that the nature of the Accused's participation in the alleged JCE has been sufficiently pleaded.

49. Having considered the Prosecution's pleading in regard to the *actus reus* of JCE liability, the Trial Chamber will now turn to the *mens rea* of JCE liability.

Mens Rea of JCE Liability

⁶⁴ First Amended Indictment, para. 6.

⁶⁵ *Ibid.*

⁶⁶ See *Milutinović* Decision, fn. 17 (citing *The Prosecutor v. Strugar, Jokić, et al.*, Case No. IT-01-42-PT, Decision on the Defence Preliminary Motion Concerning the Form of the Indictment, 28 June 2002, para. 18).

⁶⁷ Third *Krnojelac* Decision, para.18.

50. The *Tadić* Appeals Chamber identified three categories of JCE liability: (a) cases in which all co-defendants are acting pursuant to a common design and possess the same criminal intention; (b) so-called “concentration camp” cases, where the notion of common purpose was applied to instances where the offences charged were alleged to have been committed by groups of persons acting pursuant to a concerted plan; and (c) cases involving a common design where one of the perpetrators commits an act, which, while outside the common design, is nevertheless a natural and foreseeable consequence of the effecting of that common purpose.⁶⁸

51. The Appeals Chamber has held that “it is preferable for an indictment alleging the accused’s responsibility as a participant in a joint criminal enterprise also to refer to the particular form...of joint criminal enterprise envisaged.”⁶⁹ When the third, or extended, category of JCE is envisaged, this Trial Chamber has previously required that the Prosecution plead it expressly in the indictment.⁷⁰ The Trial Chamber directs the Prosecution to amend the First Amended Indictment so that the form(s) of JCE being pleaded are clear.

52. The *Tadić* Appeals Chamber determined that the requisite *mens rea* of JCE liability differs depending on the category of JCE under consideration:

- (a) The first category of cases requires the intent to perpetrate a specific crime (this intent being shared by all co-perpetrators).
- (b) For the second category, (which, as noted above, is really a variant of the first), personal knowledge of the system of ill-treatment is required (whether proved by express testimony or a matter of reasonable inference from the accused’s position of authority) as well as the intent to further this concerted system of ill-treatment.
- (c) The third category requires the *intention* to participate in and further the criminal activity or the criminal purpose of a group and to contribute to the joint criminal enterprise or in any event to the commission of a crime by the group. In addition, responsibility for a crime other than the one agreed upon in the common plan arises only if, in the circumstances of the case, (i) it was *foreseeable* that such a crime might be perpetrated by one or other members of the group and (ii) the accused *willingly took that risk*.⁷¹

53. The Tribunal’s jurisprudence requires that the relevant *mens rea* of JCE liability be pleaded in the indictment.⁷² As pointed out by the *Brdanin & Talić* Trial Chamber, there are two

⁶⁸ *Tadić* Appeals Judgment, para. 220.

⁶⁹ *Krnojelac* Appeals Judgment, para. 138 (cited in *The Prosecutor v. Mile Mrkšić, Miroslav Radic and Veselin Šljivančanin*, Decision on Form of Consolidated Amended Indictment and on Prosecution Application to Amend, 23 January 2004 (“Second Mrkšić Decision”), at para. 33).

⁷⁰ See Third *Brdanin & Talić* Decision, paras. 39, 81(4).

⁷¹ *Krnojelac* Appeals Judgment, para. 32 (citing *Tadić* Appeals Judgment, para. 204). Emphasis in original.

⁷² Second *Mrkšić* Decision, at para. 34 (citing Third *Brdanin & Talić* Decision, para. 33).

ways in which the relevant state of mind may be pleaded: (i) by pleading the evidentiary facts from which the state of mind is necessarily inferred, or (ii) by pleading the relevant state of mind itself as the material fact. In the event that the Prosecution adopts the second course, the facts by which that material fact is to be established are ordinarily matters of evidence, and need not be pleaded.⁷³

54. In order to evaluate the Prosecution's pleading as to the *mens rea* of JCE liability, the Trial Chamber will identify the JCE categories that it finds have been pleaded in the First Amended Indictment.

55. The Trial Chamber reads the following language in paragraph 4 of the First Amended Indictment to mean that the Prosecution pleads the first and second categories of JCE in reference to Counts 1-5 and 8-12: “[the Accused] shared the intent either to perpetrate the particular crimes or to further a common concerted system of ill-treatment.” The Trial Chamber reads the following language in paragraph 4 of the First Amended Indictment to mean that the Prosecution pleads the third category of JCE in reference to Counts 6-7, which it alleges were “the natural and foreseeable consequence of the execution of the object of the joint criminal enterprise.” The Trial Chamber reads the following language in paragraph 5 of the First Amended Indictment to mean that the Prosecution pleads the second category of JCE with respect to Counts 8-10: “[the Accused] shared the intent either to perpetrate the particular crimes or to further a common concerted system of ill-treatment.” The Trial Chamber reads the following language in paragraph 5 of the First Amended Indictment to mean that the Prosecution pleads the third category of JCE in reference to Counts 1-7 and 11-12, which it alleges were “the natural and foreseeable consequence of the execution of the object of the joint criminal enterprise.”

56. Regarding the first category of JCE, the Prosecution in paragraphs 4 and 5 of the First Amended Indictment pleads that the Accused “shared the intent...to perpetrate the particular crimes.” The Trial Chamber is satisfied that the Accused’s intent to commit the underlying crimes has been sufficiently pleaded.

57. As for participation in the second category of JCE, the Prosecution in paragraph 4 of the First Amended Indictment pleads that the Accused “shared the intent...to further a common concerted system of ill-treatment.” The Trial Chamber is satisfied that the Accused’s knowledge and intent to further the system of ill-treatment which led to the perpetration of the underlying crimes are sufficiently pleaded.

58. With regard to participation in the third category of JCE, the Prosecution in paragraphs 4 and 5 of the First Amended Indictment pleads that the Accused “was aware that [the crimes in Counts 1-

⁷³ Third *Brdanin & Talić* Decision, para. 33.

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7, and 11-12] were the possible outcome of the execution of the joint criminal enterprise.” The Prosecution pleads that the imprisonment of Muslims and other non-Serb civilians from Foča, and the killing or murdering of detainees at the KP Dom, were foreseeable. The Trial Chamber finds that the Prosecutor sufficiently pleaded the Accused’s awareness of the actions taken by those present at the KP Dom and the Accused’s willingness to take the risk that they might occur.

2. Insufficient Pleading Regarding Article 7(3)

a. Defence

59. In the Defence’s Preliminary Motion II, the Defence alleges that the Prosecution fails in the First Amended Indictment to describe any of the acts that would trigger the Accused’s responsibility as a superior under Article 7(3) of the Statute.⁷⁴

b. Prosecution

60. In the Prosecution’s Response, the Prosecution does not specifically address the issue of its pleadings on Article 7(3) liability in the First Amended Indictment.

c. Discussion

61. The Trial Chamber recalls the relevant pleadings principles, set out in Section II above.

62. The Trial Chamber finds that the Defence has misunderstood the definitional elements of superior responsibility. Article 7(3) liability provides that a superior may incur responsibility for the criminal acts of his subordinates as a result of his failure to prevent such acts or to punish those subordinates for such acts.⁷⁵ Under Article 7(3), a superior’s responsibility does not hinge on the superior’s personal commission of a criminal act. Required pleadings for Article 7(3) liability do not therefore include personal commission of criminal acts.

63. The Accused’s position of authority is asserted in, *inter alia*, paragraphs 7(a)-(e) (“commander of the KP Dom guards”), 9 (“commander of the prison guards”), and 50 (“high-level prison staff”). His subordinates are sufficiently identified in, *inter alia*, paragraphs 7(a)-(e) (“at least 37 prison guards,” “guards under his command”). His effective control over them for acts which he allegedly bears responsibility is pleaded in, *inter alia*, paragraphs 7(a)-(e) (“exercised effective control over the KP Dom guards,” “in charge of the solitary confinement cells”). That the Accused knew or had reason to know that the crimes were committed or were about to be committed by others is pleaded in, *inter alia*, paragraph 8 (“the Accused was aware of the existence

⁷⁴ Defence’s Preliminary Motion II, paras. 21-34.

of a concerted system of ill-treatment within the KP Dom prison and knowingly and wilfully furthered this system"). That the Accused failed to take the necessary and reasonable measures to prevent or punish the alleged crimes is pleaded in, *inter alia*, paragraphs 7(a)-(e) ("had the power to release detainees but, with few exceptions, did not do so"), and 7(g) ("failing to prevent beatings and other inhumane acts").

64. In paragraphs 32 and 41 of the First Amended Indictment, the Prosecution refers to "high-level prison authorities" and "prison authorities," respectively, without referring specifically to the Accused. In other paragraphs where senior management or high-level prison staff members of the KP Dom are mentioned, such as paragraphs 7(a), 7(b) and 50, the Accused is specifically identified. The Trial Chamber finds that this lack of reference to the Accused in paragraphs 32 and 41 may give rise to confusion and directs the Prosecution to eliminate this discrepancy.

65. The Trial Chamber is satisfied that the pleading principles regarding Article 7(3) have been met by the Prosecution in the First Amended Indictment.

C. Incorrect Factual Allegations

1. Defence

66. The Accused disputes the truthfulness of the allegations contained in a number of paragraphs of the First Amended Indictment. In the Defence's Preliminary Motion II, the Defence contests, *inter alia*, the following:

- (a) In paragraph 9, the Accused disputes his role at the KP Dom as described in paragraph 1 of the First Amended Indictment;
- (b) In paragraph 12, he objects to paragraph 3 of the First Amended Indictment, arguing that he neither participated in any JCE nor committed any crime;
- (c) In paragraph 15, he objects to paragraph 5 of the First Amended Indictment declaring that there is no evidence that he participated in the execution of any crime nor that he had any knowledge of the crimes as described in Counts 1-12;
- (d) In paragraph 17 (a)-(j), he denies allegations made in paragraph 7 (a) to (j) of the First Amended Indictment regarding his role and his actions;
- (e) In paragraph 18, he denies the Prosecution's allegations contained in paragraph 8 of the First Amended Indictment regarding his knowledge of a concerted system of ill-treatment;
- (f) In paragraph 21, he denies allegations made in paragraphs 11-16 of the First Amended Indictment regarding the Serb take-over of Foča;

⁷⁵ Statute, Art. 7(3).

- (g) In paragraph 22, which refers to paragraph 17(a)-(f) of the First Amended Indictment, the Accused objects to the allegations of forcible transfer of Muslim and non-Serb civilians detained at the KP Dom to particular locations;
- (h) In paragraph 25, he rejects the allegations contained in paragraph 30 of the First Amended Indictment regarding the fact that prison authorities interrogated the detainees;
- (i) In paragraph 28, he denies allegations contained in paragraph 36 of the First Amended Indictment regarding the fact that the Accused was informed of beatings at the KP Dom;
- (j) In paragraphs 33-34, he denies allegations made in paragraphs 49-54 of the First Amended Indictment regarding the existence of forced labour at the KP Dom or his power to decide who was to be detained;
- (k) In paragraph 35, he objects to allegations contained in paragraphs 56-58 of the First Amended Indictment regarding the existence of an armed conflict or attacks against the civilian population in Foča;
- (l) In paragraph 36, he objects to his duty to abide by the laws and customs governing the conduct of war, as set out in paragraph 57 of the First Amended Indictment.

2. Prosecution

67. Regarding these points,⁷⁶ the Prosecution responds that the Tribunal's jurisprudence has established that the Prosecutor need not provide, in the indictment, any evidence or summary of the evidence it intends to rely upon to prove its case. According to the Prosecution, the Defence's argument should be rejected as irrelevant at this stage of the pre-trial proceedings.⁷⁷

3. Discussion

68. The Trial Chamber recalls the relevant pleadings principles, set out in Section II above. The Prosecution need not include in the indictment the evidence on which it will rely at trial. The Trial Chamber therefore rejects the Defence's complaint.

IV. DISPOSITION

69. For the foregoing reasons, and pursuant to Rule 72, the Trial Chamber grants the Motion to Amend Indictment but orders the Prosecution to file the First Amended Indictment only after having effectuated the changes specified in this Decision, which are as follows:

⁷⁶ It should be noted that in the Prosecution's Response the Prosecution does not mention the objections to factual allegations in paragraphs 9, 10 and 15 of the Defence's Preliminary Motion II.

⁷⁷ Prosecution's Response, para. 21.

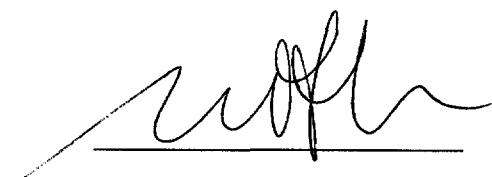
- (a) resolve the ambiguity in paragraph 2 of the First Amended Indictment;⁷⁸
- (b) resolve the ambiguity in paragraph 8 of the First Amended Indictment;⁷⁹
- (c) remove the inconsistency between paragraphs 3 and 49 of the First Amended Indictment;⁸⁰
- (d) in the case that it does not share the understanding of the Trial Chamber regarding the date range within which the events and conduct on which the Prosecution will rely as a basis for a conviction occurred, clarify its intentions in the First Amended Indictment;⁸¹
- (e) amend the First Amended Indictment so that the form(s) of JCE being pleaded is/are clear;⁸²
- (f) eliminate the discrepancy in paragraphs 32 and 41 of the First Amended Indictment.⁸³

70. The corrected First Amended Indictment is to be filed within fourteen (14) days of the filing of this decision. A table indicating all the amendments and changes made to the indictment shall be filed by the same time.

71. Pursuant to Rule 50 of the Rules, 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.

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

Done this 28 day of April 2004,
At The Hague,
The Netherlands



Judge Carmel A. Agius
Presiding

[Seal of the Tribunal]

⁷⁸ See *supra* para. 39.

⁷⁹ See *supra* para. 40.

⁸⁰ See *supra* para. 46.

⁸¹ See *supra* para. 46.

⁸² See *supra* para. 51.

⁸³ See *supra* para. 64.