



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

Case No.: IT-04-74-PT
Date: 22 July 2005
Original: English

BEFORE TRIAL CHAMBER 1

Before: Judge Daqun Liu, Presiding
Judge Amin El Mahdi
Judge Alphons Orié

Registrar: Mr. Hans Holthuis

Decision of: 22 July 2005

PROSECUTOR

v.

**JADRANKO PRLIĆ
BRUNO STOJIĆ
SLOBODAN PRALJAK
MILIVOJ PETKOVIĆ
VALENTIN ĆORIĆ
BERISLAV PUŠIĆ**

**DECISION ON DEFENCE PRELIMINARY MOTIONS
ALLEGING DEFECT IN THE FORM OF THE INDICTMENT**

The Office of the Prosecutor:
Mr. Kenneth Scott

Counsel for the Accused:

Mr. Michael Karnavas for the accused Mr. Jadranko Prlić
Mr. Berislav Živković for the accused Mr. Bruno Stojić
Mr. Bozidar Kovačić for the accused Mr. Slobodan Praljak
Ms. Vesna Alaburić for the accused Mr. Milivoj Petković
Mr. Tomislav Jonjić for the accused Mr. Valentin Ćorić
Mr. Fahrundin Ibrišimović for the accused Mr. Berislav Pušić

1. Introduction

1. Pending before Trial Chamber 1 (“Trial Chamber” or “Chamber”) of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (“Tribunal”) are six motions filed pursuant to Rule 72(A)(ii) of the Rules of Procedure and Evidence of the Tribunal (the “Rules”) by the defence for the accused Jadranko Prlić, Bruno Stojić, Slobodan Praljak, Milivoj Petković, Valentin Ćorić and Berislav Pušić (“Defence”, “Accused”) on 14 and 15 December 2004 and alleging defect in the form of the indictment.¹ These filings are supplemented by “the Accused Slobodan Praljak’s Motion to Strike all Counts Arising under Article 2 for Failure to Allege a Nexus between the Conduct and an International Armed Conflict” filed on 14 December 2004. This separate filing made pursuant to Rule 72(A)(ii) is not respectful to the Chamber’s decision dated 11 November 2004 denying the Defence’s requests to enlarge the page-limit prescribed by the Rules. The Chamber will take into consideration the complaints raised in this filing to the extent that they are also raised in the other preliminary motions.

2. On 28 January 2005, the Prosecution filed a consolidated “Prosecutor’s Response to Defence Motions on the Form of the Indictment” (“Response”). The Response is supplemented by the “Prosecutor’s Response to Motions Concerning International Armed Conflict, Armed Conflict and Partial Occupation” filed on 28 January 2005, whereby the Prosecution responds to the arguments concerning the nature of the armed conflict raised by all accused (“Response on the Nature of the Conflict”).

3. On 4 February 2005, the Defence for all accused except Praljak filed a Reply to the Response. The same day, the Defence for the Accused Petković also filed a reply to the Response on the Nature of the Conflict, complaining that the Prosecution has responded to its arguments concerning the nature of the conflict as alleged in the indictment in a separate filing. The Chamber concurs; a separate filing on this issue should not have been made. The Response on the Nature of the Conflict addresses however the arguments raised in the Petković Motion (and Praljak Motion) and therefore will be taken into consideration.

¹ Preliminary Motion to Dismiss the Defective Indictment Against Jadranko Prlić Pursuant to Rule 72(A)(ii), 15 December 2004, (“Prlić Motion”); Bruno Stojić’s Preliminary Motion on the Defects in the Form of the Indictment, 15 December 2004, (“Stojić Motion”); The Accused Slobodan Praljak’s Motion to Strike the Indictment for Vagueness or to Provide Particulars, 15 December 2004, (“Praljak Motion”); The Accused Milivoj Petković’s Preliminary Motion on the Form of the Indictment, 15 December 2004, (“Petković Motion”); The Accused Valentin Ćorić’s Motion on the Form of the Indictment, 15 December 2004, (“Ćorić Motion”); Berislav Pušić’s Preliminary Motion on the Flaw in the Form of the Indictment Rule 72a(ii), 14 December 2004, (“Pušić Motion”).

2. The Indictment

4. The indictment in this case was confirmed by Judge Claude Antonetti on 4 March 2004 (“Indictment”). It jointly charges Jadranko Prlić, Bruno Stojić, Slobodan Praljak, Milivoj Petković, Valentin Ćorić and Berislav Pušić with 8 counts of *Crimes Against Humanity* (persecutions on political, racial or religious grounds, murder, rape, deportation, inhumane acts and imprisonment); 9 counts of *Grave Breaches of the Geneva Conventions* (wilful killing, inhuman treatment (sexual assault), unlawful deportation and transfer and confinement of civilians, wanton destruction and unlawful appropriation of property); and 9 counts of *Violations of the Laws or Customs of War* (cruel treatment, unlawful labour, wanton destruction of cities and towns, unjustified devastation, destruction of religious and educational institutions and infliction of terror) for participating in a joint criminal enterprise, from on or before 18 November 1991 to about April 1994, the aim of which was to politically and militarily subjugate, permanently remove and ethnically cleanse Bosnian Muslims and other non-Croats who lived in areas on the territory of the Republic of Bosnia and Herzegovina which were claimed to be part of the Croatian Community of Herceg-Bosna, and to join these areas as parts of a “Greater Croatia”.

5. The Indictment is a document of 238 paragraphs (or 60 pages) divided into seven sections. The first part consists of a description of the personal background and official positions of each Accused. The pleading of the joint criminal enterprise alleged is contained in paragraphs 15 to 17. The third part of the Indictment is a statement of the case, beginning with a narrative overview of the political and military context of the case (paragraphs 18-38, 40-42) and continuing with a description of the criminal acts in which the six Accused engaged in that context (paragraph 39). The fourth part of the indictment consists of a statement of facts for the municipalities of Prozor, Gornji Vukuf, Jablanica, Mostar, Stolac, Čapljina and Vareš municipalities, for the Heliodrom and Vojno Camps, for the municipality and detention centres of Ljubuški and for the Dretelj and Gabela District Military Prisons. Each of these sub-sections which describe the criminal acts committed in the municipalities, detention centres and district military prisons concludes with a paragraph stating the counts or criminal offences for which each Accused is held responsible. The fifth part of the Indictment (paragraphs 218-228) provides details concerning the criminal responsibility of the six co-Accused. Based on the factual statement of the case and the statement on the criminal responsibility of the Accused, the Indictment’s sixth part (paragraphs 229-230) recalls the 26 counts of the Indictment, concluding with a paragraph (paragraph 230) that the criminal responsibility of the Accused Pušić is excluded for crimes in connection with the events in Prozor municipality in October 1992, and in Gornji Vakuf municipality in January 1992. Finally, the last part of the

Indictment consists of additional allegations mostly concerned with legal pre-requisites, including chapeau elements, of the offences and liabilities charged therein.

3. General pleading principles

6. The Defence allege generally that the Indictment is defective and must be amended to specify the factual allegations underlying the charges against the Accused with more particularity or, alternatively, to dismiss any charges the Prosecution fails to specify adequately. The Chamber will examine the complaints of the Defence in accordance with the general pleading principles set out below.

7. *Relevant provisions.* 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 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”.²

8. *Facts to be pleaded.* The Appeals Chamber in the *Kupreškić* case further stated in relation to these provisions that:

[i]n the jurisprudence of the Tribunal, this translates into an obligation on the part of the Prosecution to state the material facts underpinning the charges in the indictment, but not the evidence by which such material facts are to be proven. Hence, the question whether an indictment is pleaded with sufficient particularity is dependent upon whether it sets out the material facts of the Prosecution case with enough detail to inform a defendant clearly of the charges against him so that he may prepare his defence.³

² *Prosecutor v. Kupreškić et al.*, Case No. IT-95-16-A, Appeal Judgement, 23 October 2001 (“*Kupreškić* Appeal Judgement”), 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;[....]”

³ *Kupreškić* Appeal Judgement, para. 88 (footnote omitted).

9. The Chamber agrees that “there is a floor below which the level of information must not fall if the indictment is to be valid as to its form”⁴ and endorses the Appeals Chamber’s statements that the “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”⁵, or in other words “whether 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”.⁶ In application to this pleading principle, the Tribunal’s Chambers consistently held that facts in support of legal prerequisites (*actus reus*, *mens rea*, *chapeau elements*) which apply to offences charged are material facts and must be pleaded.⁷ It is again emphasised that such determination is not to be made in the abstract but on a case by case basis depending on the accused’s proximity to the crimes alleged. Therefore, in relation to the Defence’s complaint that the Indictment is vague because it does not give sufficient details concerning victims, perpetrators or events, the Chamber’s determination of the materiality of facts is made by assessing the particular circumstances of this case and not in the abstract.

10. In relation to the Defence’s complaint that the indictment does not sufficiently state the Accused’s state of mind, the Prosecution may not simply presume that the legal prerequisites are met.⁸ As stated, the *mens rea* of an accused is a legal prerequisite which must be expressly pleaded as a material fact; however under certain circumstances the *mens rea* may be pleaded by necessary implication.⁹ For instance, when alleging criminal responsibility for crimes committed by subordinates or others, the Chamber will not expect the Prosecution to plead in detail the *mens rea* of the Accused in relation to each underlying crime pleaded. In such case where the proximity of the Accused in relation to the offence alleged is not great, the facts by which that material fact is to

⁴ *Prosecutor v. Miroslav Kvočka et al.*, Case No. IT-98-30-PT, Decision on Defence Preliminary Motions on the Form of the Indictment, 12 April 1999 (“*Kvočka* Decision”), para. 14. The Trial Chamber considered that “[a]lthough Article 18, paragraph 4, of the Statute and Sub-rule 47(C) of the Rules do not appear to set a high threshold as to the level of information required in an indictment, a concise statement of the facts of the case and of the crime with which the suspect is charged being all that is needed, there is a minimum level of information that must be provided by the indictment; there is a floor below which the level of information must not fall if the indictment is to be valid as to its form.” see also *Prosecutor v. Milorad Krnojelac*, Case No. IT-97-25-PT, Decision on the Defence Preliminary Motion on the Form of the Indictment, 24 February 1999 (“*First Krnojelac* Decision”), para. 12.

⁵ *Kupreškić* Appeal Judgement, para. 89.

⁶ *Kupreškić* Appeal Judgement, paras. 88-90, see also *Prosecutor v. Radoslav Brdanin and Momir Talić*, Case No. IT-99-36-PT, Decision on Objections by Momir Talić to the Form of the Amended Indictment, 20 February 2001 (“*First Talić* Decision”), para. 18.

⁷ *Prosecutor v. Enver Hadžihasanović et al.*, Case No. IT-01-47-PT, Decision on Form of Indictment, 7 December 2001 (“*Hadžihasanović* Decision”), para. 10; *Prosecutor v. Momčilo Krajišnik and Biljana Plavšić*, Case No. IT-00-39 & 40-PT, Decision on Prosecution’s Motion for Leave to Amend the Consolidated Indictment, 4 March 2002 (“*Second Krajišnik* Decision”), para. 9.

⁸ *First Talić* Decision, para 48; *Hadžihasanović* Decision, para 10, *Blaškić* Appeal Judgment, para 219.

⁹ *First Talić* Decision, para 48; *Hadžihasanović* Decision, para 10; *Blaškić* Appeal Judgment, para 219.

be established are ordinary matters of evidence although the Prosecution may also plead the evidentiary facts from where the relevant state of mind is to be inferred.¹⁰

11. *Material facts concerning individual responsibility under Article 7(1)*. The Accused in the present case are charged under both Article 7(1) and Article 7(3) of the Statute and take issue with the fact that there is an ambiguity as to what type of responsibility is attached to each Accused and for which offence. The Appeals Chamber recommended that where an indictment is based on individual criminal responsibility under Article 7(1) of the Statute, the Prosecution should indicate expressly and precisely in relation to each individual count the particular form of the responsibility alleged.¹¹ In relation to particular heads of responsibility, e.g., where it is alleged that the Accused planned, instigated, ordered, or aided and abetted in the planning, preparation or execution of the alleged crimes, the Appeals Chamber also endorsed the Trial Chamber's statement in the *Krnojelac* and *Talić* cases that the Prosecution is required to identify the "particular acts" or "course of conduct" of the accused which form the basis for the allegations:¹²

In a case based upon individual responsibility where it is not alleged that the accused personally did the acts for which he is to be held responsible – where the accused is being placed in greater proximity to the acts of other persons for which he is alleged to be responsible than he is for superior responsibility – again what is most material is the conduct of the accused by which he may be found to have planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of those acts. But more precision is required in relation to the material facts relating to those acts of other persons than is required for an allegation of superior responsibility. In those circumstances, what the accused needs to know as to the case he has to meet is not only what is alleged to have been his own conduct but also in somewhat more detail than for superior responsibility what are alleged to have been the acts for which he is to be held responsible, subject of course to the prosecution's ability to provide such particulars. But the precision required in relation to those acts is not as great as where the accused is alleged to have personally done the acts in question.¹³

Similarly, where the indictment cumulatively or alternatively pleads the JCE theory of liability, the indictment should contain not only a description of the legal prerequisites which apply to this head of responsibility (the *actus reus* elements are: a plurality of persons, the existence of a plan and the participation of the accused in the plan) but also other material facts which will assist the Defence in preparing the Defence such as the nature of the JCE, the time at which or the period over which the enterprise is said to have existed, the identity of those engaged in the enterprise so far as their identity is known (or at least a general description such as by reference to their category as a

¹⁰ First *Talić* Decision, para 33; see also *Blaškić* Appeal Judgment, para 219, addressing the issue of pleading responsibility under Article 7(3).

¹¹ *Prosecutor v. Žlatko Aleksovski*, Judgement, Case No. IT-95-14/1-A, para. 171, footnote 319.

¹² *Blaškić* Appeal Judgement, para. 213, quoting *Krnojelac* 11 February 2000 Decision, para. 18.

¹³ First *Talić* Decision, para. 20 (footnotes omitted). See also, Second *Krnojelac* Decision, para. 18; *Prosecutor v. Momčilo Krajišnik*, Case No. IT-00-39-PT, Decision Concerning Preliminary Motion on the Form of the Indictment, 1 August 2000 ("First *Krajišnik* Decision"), para. 9; Second *Krajišnik* Decision, para. 11.

group),¹⁴ the identity of the victims of the enterprise (again so far as their identity is known or at least a general description such as by reference to their category as a group must be given).

12. *Material facts concerning individual responsibility under Article 7(3)*. The accused in this case complain that the legal prerequisites under Article 7(3) are not pleaded in the Indictment. The Tribunal's Chambers consistently held that where an indictment alleges the Accused's individual criminal responsibility for acts committed by subordinates, the Accused needs to know not only his alleged conduct forming the basis of his responsibility, but also what is alleged to have been the conduct of those persons for whom he is allegedly responsible, subject to the Prosecution's ability to provide those particulars.¹⁵ The Indictment must make clear the nature of the responsibility alleged against the Accused and the material facts by which that responsibility will be established.¹⁶

In a case based upon superior responsibility, what is most material is the relationship between the accused and the others who did the acts for which he is alleged to be responsible, and the conduct of the accused by which he may be found to have known or had reason to know that the acts were about to be done, or had been done, by those others, and to have failed to take the necessary and reasonable measures to prevent such acts or to punish the persons who did them. However, so far as those acts of the other persons are concerned, although the prosecution remains under an obligation to give all the particulars which it is able to give, the relevant facts will usually be stated with less precision, and that is because the detail of those acts (by whom and against whom they are done) is often unknown – and because the acts themselves often cannot be greatly in issue.¹⁷

In summary, an Indictment alleging superior or command responsibility should contain a concise statement or description of the three legal prerequisites that the accused was a commander or superior of subordinates sufficiently identified¹⁸ (and over whom he had effective control – in the sense of a material ability to prevent or punish criminal conduct¹⁹ – and for whose acts he is alleged to be responsible),²⁰ that the accused knew or had reason to know that the alleged criminal conduct was about to be committed or was being committed, or had been committed, by his subordinates,²¹

¹⁴ Second *Krnjelac* Decision, para 16; see also *Prosecutor v. Milan Milutinović, Dragoljub Odjanić and Nikola Šainović*, Case No.: IT-99-37-PT, Decision on Defence Preliminary Motion Filed by the Defence for Nikola Šainović, 27 March 2003 (“*Milutinović* Decision”).

¹⁵ Second *Krnjelac* Decision, para 18; *Prosecutor v. Milorad Krnjelac*, Case No.: IT-97-25, PT, Decision on the Defence Preliminary Motion on the Form of the Indictment, 24 February 1999 (“*First Krnjelac* Decision”), para 40.

¹⁶ Second *Kunarac* Decision, paras 6, 60; First *Krnjelac* Decision, para. 7. Trial Chamber II has stated that “it is preferable that an indictment indicate precisely and expressly the particular nature of the responsibility alleged in relation to each individual count.” First *Talić* Decision, para. 28.

¹⁷ First *Talić* Decision, para. 19. See also Second *Krnjelac* Decision, para. 18; “*First Krajisnik* Decision, para. 9; Second *Krajisnik* Decision, para. 11. Second *Kunarac* Decision, para. 6; First *Krnjelac* Decision, para. 7. Also, Second *Talić* Decision, para. 5; Second *Krnjelac* Decision, para. 60.

¹⁸ *Prosecutor v. Mile Mrkšić*, Case No.: IT-95-13/1-PT, Decision on the Form of the Indictment, 19 June 2003, (“*Mrkšić* Decision”), para 10.

¹⁹ *Mrkšić* Decision, para 10; With regard to this element as a pre-requisite see *Delalić et al.* Appeal Judgement, para. 256.

²⁰ First *Talić* Decision, para 19; *Krajisnik* Decision, para 9; *Mrkšić* Decision, para. 10.

²¹ Second *Krnjelac* Decision, para 18; *Krajisnik* Decision, para 9; First *Talić* Decision, para. 19; *Mrkšić* Decision, para. 10.

and that the accused failed to take necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.²²

4. The Challenges to the Indictment

13. The Chamber has carefully examined all of the Defence complaints and arguments concerning defects in the form of the Indictment²³ which - the Chamber insists - is not intended to be an exhaustive summary of the material brought in support of the Indictment and is to be read as a whole and not as a series of paragraphs existing in isolation.²⁴ Only the essence of those complaints or arguments is recalled below and addressed in relation to each part of the Indictment for clarity purposes in view of the particular length of the Indictment.

I- Accused's Personal Background and official positions (paragraphs 1-14 of the Indictment)

14. The Defence submits that the Accused's personal data and positions, including the exact time-frame, should be specified or corrected.²⁵ The Prosecution responds that "the indictment plainly states the various dates of certain functions and responsibilities (particularly in paragraphs 2-14), and gives the dates of events and charges"²⁶ but it agrees that paragraph 13 of the Indictment contains an error in that the accused Pušić was born in Krivodol and not in Mostar.²⁷ The Prosecution further submits that allegations about the role and positions of the accused, wrongly stated according to the Defence, are matters for trial.²⁸

15. The Chamber accepts that the Accused's personal data and positions must be stated as accurately as possible in the Indictment. The Prosecution is directed to make appropriate amendments to the Indictment, with the assistance of the Defence, to correct details concerning the Accused's personal data. In relation to the Accused official positions, including the relevant time-frame, those matters will have to be resolved at trial as they concern alleged control or powers exercised by the accused which will need to be proved at trial.

II- JCE pleading (paragraphs 15-17 of the Indictment)

²² First *Talić* Decision, para. 19; Second *Krnjelac*, para. 18; *Krajišnik* Decision, para. 9; *Hadžihasanović* Decision, para. 11.

²³ The Defence has raised many arguments which do not pertain to the form of the Indictment but to for instance the veracity of the facts pleaded by the Prosecution (e.g., Pušić Defence's request that Pušić's role in peace agreement be pleaded, Pušić Motion, para. 13) or to the confirmation *de novo* of the Indictment (e.g., Prlić Motion, para. 3). The Chamber will not address arguments not related to the form of the Indictment and will indicate so when appropriate.

²⁴ The Prosecution disclosed about 11,000 pages in support of the Indictment.

²⁵ Stojić Motion, para 11, Praljak Motion, paras 21-22, Petković Motion, paras 35-36, Prlić Motion, paras 6, 9, Pušić Motion, paras 7-13.

²⁶ Response, para. 37.

²⁷ Response, para. 79.

²⁸ Response, para. 80.

16. *Existence of a JCE.* The Defence argues, in essence, that the existence and nature of a JCE is not sufficiently pleaded (paragraphs 15-17 and 39 of the indictment are not sufficiently detailed according to the Defence).²⁹ For instance, the Praljak Defence argues that the purpose of the JCE is not criminal because it is about “territorial ambitions”,³⁰ the Pušić Defence argues that it is not clear what geographical territory is described or included as part of the Croatian community of Herceg-Bosna,³¹ the Ćorić Defence argues that the Indictment does not give sufficient dates concerning the criminal enterprise³² and the Prlić Defence argues that the Prosecution should specify upon which form of JCE the Prosecution will rely.³³ The Prosecution responds that the “Indictment is fully adequate in stating the JCE’s territorial and political goals”³⁴, that the JCE’s purpose which is correctly stated in the Indictment need not to have been previously arranged or formulated and that the time over which the JCE existed is plainly stated in the Indictment.³⁵ The Prlić Defence replies that the temporal time-frame is only approximate and should be precise.³⁶ The Pušić Defence replies that the Prosecution must plead whether the underlying crimes charged in the Indictment fall within the object of the JCE or beyond of that object³⁷ and specify as many details as possible concerning for instance the dates and goals formulated by the JCE if the Prosecution has them.³⁸

17. As stated above, the accused should be given the material facts in support of the legal prerequisites of charges held against them. The JCE liability theory is described in the Indictment in paragraphs 15 to 17.

18. Paragraph 15 of the Indictment provides the approximate temporal framework of the enterprise (on or before 18 November 1991 to about April 1994 or thereafter), describes its objective (politically and militarily subjugate, permanently remove and ethnically cleanse Bosnian Muslims and other non-Croats), its geographical framework (areas on the territory of the Republic of Bosnia and Herzegovina which were claimed to be part of the Croatian Community (and later Republic) of Herceg-Bosna), the criminal acts in pursuance of the objective (use of force, fear or threat of force, persecution, imprisonment and detention, forcible transfer and deportation, appropriation and destruction of property and other means, which constituted or involved the commission of crimes which are punishable under Articles 2, 3, and 5 of the Tribunal Statute) and

²⁹ Stojić Motion, paras 15-23, Praljak Motion, para. 10, Ćorić Motion, para. 5, Pušić Motion, paras 18-20, 28-29.

³⁰ Petković Motion, paras 8-12.

³¹ Pušić Motion, paras 18-20.

³² Ćorić Motion, para. 5.

³³ Prlić Reply, para. 5.

³⁴ Response, para. 5, according to the Prosecution, the indictment read as a whole “presents a concise and cogent description of the course of conduct engaged in by the Herceg-Bosna leadership, including the Accused, in the course of, and as part of the JCE”.

³⁵ Response, paras 6-14.

³⁶ Prlić Reply, para. 8.

³⁷ Pušić Reply, para. 2.

³⁸ Pušić Reply, para. 7.

the motive of the enterprise (the territorial ambition of the joint criminal enterprise was to establish a Croatian territory with the borders of the Croatian Banovina, a territorial entity that existed from 1939 to 1941. It was part of the joint criminal enterprise to engineer the political and ethnic map of these areas so that they would be Croat-dominated, both politically and demographically).

19. In relation to the Defence's complaint that the Prosecution should specify upon which form of JCE the Prosecution will rely, the Chamber observes that paragraphs 224, 225 and 227 of the Indictment read as follow:

224. Each accused was a knowing and significant member or part of, or substantially participated in establishing, supporting, operating and/or enforcing, a system of ill-treatment involving a network of prisons, concentration camps and other detention facilities which were systematically used in arresting, detaining and imprisoning thousands of Bosnian Muslims in unlawful and harsh conditions, where they were subjected or exposed to beatings, sexual assaults and other deprivations and abuse, and is criminally responsible for participating in this system, including as a co-perpetrator and/or indirect perpetrator.

225. Each accused was a knowing and significant member or part of, or substantially participated in establishing, supporting, operating and/or enforcing, a system of ill-treatment designed and implemented to deport Bosnian Muslims to other countries or transfer them to parts of Bosnia and Herzegovina not claimed or controlled by Herceg-Bosna or the HVO, and is criminally responsible for participating in this system, including as a co-perpetrator and/or indirect perpetrator.

227. In addition or in the alternative, as to any crime charged in this indictment which was not within the objective or an intended part of the joint criminal enterprise, such crime was the natural and foreseeable consequence of the joint criminal enterprise and of implementing or attempting to implement the enterprise and each accused was aware of the possible consequence and, despite this awareness, joined and continued in the enterprise and is responsible for the crime charged.

20. The Chamber is satisfied that the Prosecution sufficiently informs the Accused of the nature, time-frame, geographical frame, criminal objective, form of the JCE and whether the crimes not included in the objective of the JCE could be the natural and foreseeable consequence of the alleged criminal enterprise. In relation to the Defence's complaint that the time-frame of the JCE is only approximate, the Chamber emphasises that the Prosecution's duty is to inform the Defence of a temporal time-frame as precise as possible. The degree of accuracy may vary depending on the determination of the issue. For instance, the Prosecution is expected to provide the Defence with exact dates and locations when alleging attacks of villages when possible. The Prosecution is not expected to give the exact dates of the beginning of a plan which need not to be prearranged to exist but to inform, including approximately if accuracy is not possible, the Defence of what it believes is the temporal time-frame of the JCE based on the elements of the case. The determination of the exact dates, if possible, at which the JCE commenced and ended is a matter for resolution at trial.

21. Accordingly, the Defence's complaints in relation to the existence and nature of the alleged JCE are rejected.

22. *The role of the accused in the JCE.* To the Defence's arguments that the Indictment does not provide sufficient details concerning the role of the accused in the JCE,³⁹ the Prosecution discusses the nature of the participation of the Accused in the enterprise, stating that "paragraphs 2 to 14 of the Indictment plead substantial information about each Accused, their positions, authority and roles. Paragraph 39 sets out an overview of the crimes in which the Accused were involved, and paragraph 17 describes the ways in which they committed, participated in and facilitated the criminal enterprise and crimes".⁴⁰ The Prosecution further states that "Paragraphs 2-17, 39 and 218 and 229 fully describe the roles, participations and responsibility of each accused for purposes of an indictment".⁴¹ The Prlić Defence replies that the Indictment should plead in an unambiguous manner whether the accused is to be held responsible as a co-perpetrator or as an accomplice of the underlying crimes.⁴² The Prlić Defence adds that it disagrees that reading the Indictment as a whole allows a determination of the exact role, participation and responsibility of the accused. It states that even with such reading, "it is still not possible to see the degree of closeness and causality between the acts of the accused Jadranko Prlić and the acts stated in paragraphs 43-216".⁴³

23. A review of the paragraphs which according to the Prosecution sufficiently describe the role of the Accused show that indeed the official posts and role of each Accused in these positions are briefly described in paragraphs 1 to 14. For instance, paragraph 3 alleges that the accused Prlić "directed the work of and was responsible for the HVO government, including military matters. He signed decisions and decrees that comprised the HVO's official policy. JADRANKO PRLIC had the power to appoint and dismiss persons in positions of significant authority in the civilian, military and judicial organs of Herceg-Bosna and the HVO. He also possessed authority to close Herceg-Bosna/HVO prisons and concentration camps". These introductory paragraphs sufficiently inform the Defence about the positions held by the accused and introduce their role in relation to their official tenures.

24. By contrast, paragraph 17 of the Indictment states that: "Each of the accused -- JADRANKO PRLIC, BRUNO STOJIC, SLOBODAN PRALJAK, MILIVOJ PETKOVIC, VALENTIN CORIC and BERISLAV PUSIC -- acting individually and through the positions and powers described above, and in concert with other members of the joint criminal enterprise, participated as leaders in the joint criminal enterprise in one or more of the following ways" and then gives 12 ways of participation in the JCE. The

³⁹ Stojić Motion, paras 15-23, Praljak Motion, paras 7-9, 11-14, Petković Motion, paras 19-21, Pušić Motion, paras 14-16, 30-34, Prlić Motion, paras 3, 7.

⁴⁰ Response, para. 25.

⁴¹ Response, para. 28.

⁴² Prlić Reply, para. 5.

⁴³ Prlić Reply, paras 11-14.

paragraph is vague in that it states that the accused participated in the JCE “in one or more of the following ways” without attaching one or more ways to a specific accused.

25. Paragraph 39 of the Indictment which according to the Prosecution further describes the role of the accused concludes the part of the Indictment on the historical and political context of the case and presents an overview of the crimes in which the accused were involved. It states that: “As part of and in the course of these actions, involving ethnic cleansing on a widespread and systematic basis, and in furtherance of the joint criminal enterprise, JADRANKO PRLIC, BRUNO STOJIC, SLOBODAN PRALJAK, MILIVOJ PETKOVIC, VALENTIN CORIC and BERISLAV PUSIC, together with other leaders and members of the Herceg-Bosna/HVO authorities and forces, engaged in “*Instigation and Fomentation of Political, Ethnic or Religious Strife*”, “*Division and Hatred*”, “*Forcible Transfer and Deportation*”, “*Use of Force*”, “*Intimidation and Terror*”, “*Appropriation and Destruction of Property*”, “*Detention and Imprisonment*”, “*Forcible Transfer and Deportation*” and “*Forced Labour*”. The paragraph alleges that these acts which description is not reproduced here were committed by all six accused.

26. Paragraphs 218 to 228 of the Indictment (which, according to the Prosecution, also further describe the role of the accused) list legal prerequisites the accused allegedly meet for criminal responsibility to cumulatively charge the Accused under several heads of responsibility.

27. The Chamber is not fully satisfied that the paragraphs mentioned by the Prosecution as describing the role of the Accused sufficiently describe their alleged role in the alleged events. Paragraphs 17 and 39 are the most relevant ones and they do not permit, in the Chamber’s view, the Defence to adequately prepare. As stated above, paragraph 17 of the Indictment is impermissibly vague in that it states that the accused participated in the JCE “in one or more of the following ways” without attaching one or more ways to a specific accused. Each Accused should be in a position to determine from the Indictment what exact conduct or participatory act he allegedly had. Paragraph 39 alleges that the acts listed were committed by all Accused and to that extent is clear. However, it is unclear what role or conduct *each* Accused had in respect of the offences charged.

28. The Prosecution is directed to amend the Indictment to further specify the exact alleged role or conduct of each Accused.

29. *The causal nexus between the JCE and the acts of the Accused.* To the Defence’s argument that the causal nexus between the JCE, the perpetrators and the acts of the Accused⁴⁴ is not sufficiently pleaded, the Prosecution responds that “an indictment is not supposed to name every

⁴⁴ Stojić Motion, paras 15-23, Praljak Motion, paras 9, 28.

perpetrator, or to allege the inter (or inner-) workings of the enterprise or detailed relationships” because “it is not necessary that a JCE participant’s role be a condition sine qua non in a crime’s commission”.⁴⁵

30. The Chamber endorses the Appeals Chamber’s finding that in terms of causation “it is sufficient for a participant in a joint criminal enterprise to perform acts that in some way are directed to the furtherance of the common design”.⁴⁶ Similarly, the Appeals Chamber ruled out proof of a causal nexus between the acts of the perpetrators and the acts of the accused. Such a nexus is not a legal requirement therefore the Prosecution is not expected to plead this nexus.

31. The Defence’s arguments for the pleading of a link of causation between the acts of the Accused and the acts of the perpetrators and the existence of a JCE are rejected.

32. *The identity of the alleged members of the JCE.* The Defence argues that the identity of the alleged members of the JCE (at the exception of deceased members who are “not in a position to defend themselves or explain facts essential for their decisions or conduct in the time relevant to the indictment”) for each offence charged is not specified.⁴⁷ The Prosecution responds that “the Indictment sufficiently pleads the members and participants in the JCE, to the extent required by the jurisprudence of the Tribunal”, including by identifying other alleged participants by category or group which is allowed.⁴⁸ The Prosecution further submits that the “alleged roles of these four [deceased] top-level persons, however, was important to stating the nature and scope of the conduct charged in the Indictment, designed and co-ordinated at a high-level”.⁴⁹ The Prlić Defence replies that it accepts the Prosecution’s explanation “that taking part in the government structure of the Croatian Community of the Herceg-Bosna is not membership in joint criminal enterprise, that HZ HB is not criminal” but argues that the “classification of the governmental structure relevant for indicting” has to be pleaded.⁵⁰ The Pušić Defence adds that the Prosecution should submit the details of the “known” other members of the JCE.⁵¹

33. Paragraph 16 of the Indictment provides a list of participants to the enterprise:

...The following persons, among others, participated in the joint criminal enterprise: Franjo Tudjman (deceased, 10 December 1999), the President of the Republic of Croatia; Gojko Šusak (deceased, 3 May 1998), the Minister of Defence of the Republic of Croatia; Janko Bobetko (deceased, 29 April 2003), a senior General in the Army of the Republic of Croatia; Mate Boban (deceased, 8 July 1997), President of the Croatian Community (and Republic) of Herceg-Bosna; JADRANKO PRLIĆ;

⁴⁵ Response, para. 27.

⁴⁶ *Prosecutor v. Mitar Vasiljević*, Case No. IT-98-32-A, Judgement, 25 February 2004, para. 102(i).

⁴⁷ Stojić Motion, para 24, Pušić Motion, para. 17, Prlić Motion, para. 4.

⁴⁸ Response, para. 18

⁴⁹ Response, paras 23, 67.

⁵⁰ Prlić Reply, para. 10.

⁵¹ Pušić Reply, para. 6.

BRUNO STOJIC; SLOBODAN PRALJAK; MILIVOJ PETKOVIC; VALENTIN CORIC; BERISLAV PUSIC; various other officials and members of the Herceg-Bosna/HVO government and political structures, at all levels (including in municipal governments and local organisations); various leaders and members of the Croatian Democratic Union ("HDZ") and Croatian Democratic Union of Bosnia and Herzegovina ("HDZ-BiH"), at all levels; various members of the Herceg-Bosna/HVO armed forces, special units, military and civilian police, security and intelligence services, paramilitaries, local defence forces and other persons acting under the supervision of or in co-ordination or association with such armed forces, police and other elements; various members of the armed forces, police, security and intelligence services of the Republic of Croatia; and other persons, both known and unknown...

34. The Chamber is satisfied that this paragraph sufficiently identifies the alleged participants or groups of participants in the JCE. As stated above, in such a case based upon criminal responsibility where the proximity between the acts of the accused and the underlying crimes is not great the facts may be stated with less precision and it is sufficient to identify the participants in the JCE by means of the category of group to which they belong.

35. *The JCE is pleaded as a crime rather than as a head of liability.* The Prosecution makes no arguments in response to the Defence's argument that the Prosecution pleads the JCE as a crime and not as a form of liability.⁵²

36. The presentation in the Indictment of the criminal enterprise and the Accused's participation therein precedes the statement of the facts of the case. Such presentation may lead to some confusion. Yet, the Chamber has no doubt that the Defence is able to apprehend that the facts upon which the characterisation of the alleged criminal enterprise is made in paragraphs 15-17 will be described in another part of the Indictment or that the Prosecution may find it convenient to present the details of the criminal enterprise at the outset.

37. The Chamber considers that as such the Indictment is not impermissibly vague and rejects the Defence's complaint.

38. *Translation discrepancies.* The Prlić Defence submits that the Indictment is "replete with material and significantly misleading inconsistencies and material differences in meanings between the English and BCS versions", in particular in relation to the JCE pleading and the use of the terms "powers", "in concert", "leaders" which makes the Indictment "utterly defective".⁵³ The Prosecution responds that pursuant to Rule 3 of the Rules, the Indictment prepared in the English language is authoritative, that the Defence co-counsel and the accused Prlić are both fluent in

⁵² Petković Motion, paras 4-7.

⁵³ Prlić Motion, para. 5.

English and that if the Defence wishes to have the translation modified it should utilise the translation services of the Tribunal.⁵⁴

39. The Chamber concurs with the Prosecution's arguments and directs the Prlić Defence to contact the Registry and request that appropriate corrections be made to the Bosnian-Croat-Serb ("BCS") version of the Indictment, if necessary. Prlić's complaint that the Indictment is vague because of translation discrepancies is rejected.

III- Historical and military context of the case (paragraphs 18-42 of the Indictment)

40. The Defence argues, in essence, that the "geo-political and historical circumstances" of the context of the crimes charged is vague and not fully correct; the Defence gives several examples concerning for instance the Vance-Owen peace plan, the sovereignty of Bosnia, the composition of Herceg-Bosna and the cooperation of Croats and Muslims against the Serbs in 1992.⁵⁵ The Prosecution submits that these matters are either irrelevant or require resolution at trial.⁵⁶

41. The Tribunal's Chambers consistently held that the section of an indictment which provides information on the political and military context in which the alleged crimes were committed does not have to be pleaded with necessary particularity.⁵⁷ This Chamber concurs and considers that a lack of particularity of background information in this Indictment does not amount to a defect in the form of the Indictment. It is in the discretion of the Prosecution to select the facts that it finds relevant for the context in which the alleged crimes were committed. The Defence's objections alleging a wrongful presentation of facts, disagreements about such facts do not constitute a basis upon which it can be claimed that an indictment is defective. The veracity of the alleged facts is a matter to be determined on the basis of the evidence presented during the trial.⁵⁸

42. The Defence's arguments in relation to that section of the Indictment are not accepted.

IV- Statement of facts by municipalities, detention camps or centres (paragraphs 43-217 of the Indictment)

43. The Defence submits that the material details of the acts allegedly committed should be clarified, including: the exact time, location and material elements in support of each incident

⁵⁴ Response, paras 69-73

⁵⁵ Stojić Motion, paras 6-10, 25, Pušić Motion, para. 27.

⁵⁶ Response, paras 77-78.

⁵⁷ *Prosecutor v. Dragoljub Kunarac*, Case No.: IT-96-23&23/1, Decision on Defence Preliminary Motion on the Form of the Amended Indictment, 21 October 1998, p. 1; First *Krnjelac* Decision, paras 11, 24; *Prosecutor v. Radovan Stanković*, Case No.: IT-96-23/2, Decision on the Defence Preliminary Motion on the Form of the Indictment, 15 November 2002 ("*Stanković* Decision"), para 11.

pleaded,⁵⁹ the individual role of the Accused in each incident pleaded,⁶⁰ the identity of the HVO units/perpetrators allegedly involved in the commission of crimes charged⁶¹ and the identity of the victims of the crimes charged, in particular their status as civilian.⁶²

44. The Prosecution responds that identification of perpetrators by groups or categories such as “Herceg-Bosna/HVO forces”, “HVO” and “Herceg-Bosna authorities” are allowed by the Tribunal’s case-law, particularly for leadership indictments and that further details, such as details concerning authorities responsible for establishing, operating or policing the camps and other detention facilities mentioned in the Indictment,⁶³ are matters for trial.⁶⁴ Similarly, the Prosecution argues that in the type of large-scale leadership indictment, it is neither required nor possible to list every single victim of mass ethnic cleansing, imprisonments, mistreatments and deportations but that it has nevertheless identified by way of confidential annexes various representative victims,⁶⁵ and stated in paragraph 236 of the Indictment that all victims were protected persons under the Geneva Conventions of 1949 and their additional protocols.⁶⁶ In relation to dates and locations of crimes and events, the Prosecution submits that the Indictment is “one of the most detailed ICTY indictments”.⁶⁷

45. The Ćorić Defence replies that the Prosecution must plead in the Indictment the exact identity of the accused’s subordinates if responsibility under Article 7(3) is alleged.⁶⁸ It adds that the annex to the Indictment does not specify the identity of representative victims for each and every municipality or detention centre referred to in the Indictment and that if the Prosecution is not able to identify at least one victim in each location where crimes were allegedly committed, the relevant parts of the Indictment should be struck out.⁶⁹

46. *Identification of victims.* As stated above, when the accused is remote in proximity from the crimes allegedly committed, the *exact* identity of perpetrators and victims may not be material so as to require specific identification. The Chamber is satisfied that the description of victims in the Indictment (including by way of confidential annex to the Indictment) is sufficient to allow the

⁵⁸ *Prosecutor v. Delalić et al.*, Case No.: IT-96-21, Decision on Motion by the Accused Zejnil Delalić Based on Defects in the Form of the Indictment, 2 October 1996, para 11.

⁵⁹ Stojić Motion, para 14, Praljak Motion, paras 23-27, Ćorić Motion, para. 8, Pušić Motion, paras 26, 49-52, Prlić Motion, para. 9.

⁶⁰ Stojić Motion, paras 30-31, Praljak Motion, paras 15-16, Prlić Motion, para. 5.

⁶¹ Stojić Motion, paras. 25-27, Petković Motion, paras 30-34, 42, Pušić Motion, paras 21-25, Prlić Motion, para. 8.

⁶² Praljak Motion, paras 18-19, 31.

⁶³ Response, para. 65, the Prosecution states that the following paragraphs in the Indictment provide extensive information about the HVO prisons and camps: 17(h), 35, 37-38, 39(d), 119-143, 146-151, 188-194, 196-203 and 224.

⁶⁴ Response, para. 61.

⁶⁵ Response, para. 62.

⁶⁶ Response, para. 63.

⁶⁷ Response, paras 64, 83.

⁶⁸ Ćorić Reply, para. 8.

⁶⁹ Ćorić Reply, paras 8-10.

Defence to prepare. It also notes that paragraph 236 of the Indictment alleges that victims were protected persons under the Geneva Conventions of 1949 and the laws or customs of war. The victims listed in annex to the Indictment should be identified in a way which allows the Defence to challenge them to be victims of the crimes alleged. However, it is not vital to name the victims. Anonymous victims may well be proved to belong to a category of protected persons under the Geneva Conventions (and their additional protocols). Yet, the Chamber deems that if the Prosecution is in a position to add details concerning the identity of at least one victim in each location specified and the number of victims in each of those locations, it should do so by amending the annex to the Indictment. The Prosecution is accordingly invited to review the Indictment in this respect and, if necessary, amend the annex to the Indictment.

47. *Identification of perpetrators.* In relation to the Defence's complaint concerning lack of identification of perpetrators, the Chamber observes that all accused are alleged to be in superior or command position over the "Herceg-Bosna/HVO forces", "HVO" and "Herceg-Bosna authorities". Which forces or authorities exactly committed the alleged underlying crimes is not necessarily material to the allegations made against the accused, given that it is not alleged that the accused were *personally* responsible (see paragraph 222 of the Indictment regarding the accused's direct participation). It is however material that they were committed by forces or authorities that fall within the structure in which the accused could carry out the alleged crimes or at least were under the command or superior authority of the accused. As such, references to any of the three above-mentioned organs as perpetrators, as relevant, are consistent with the allegations that the accused had effective control over the Herceg-Bosna/HVO forces or authorities. However, the Chamber is of the view that a chart recalling the military or governmental structure involved in the commission of the underlying crimes by municipality or detention centres may assist the Defence to prepare more effectively. Such chart needs not to be attached to the Indictment however but be submitted to the Defence in a separate filing.

49. *Dates and locations of underlying crimes.* In relation to the Defence's complaint that the dates and locations of the offences charged are not sufficiently specific, a review of the Indictment satisfies the Chamber that the Defence is provided with sufficient details concerning these data. For instance, in relation to the first municipality listed in the Indictment, paragraph 46 of the Indictment alleges that "On the afternoon of 23 October 1992, Herceg-Bosna/HVO forces attacked the Bosnian Muslims in Prozor town. On 23-24 October 1992, after they had taken control of Prozor town, the Herceg-Bosna/HVO forces plundered, burned and destroyed Bosnian Muslim homes and other properties". In relation to the second municipality listed (Gornji Vakuf), the Indictment alleges in paragraph 66 that "On 18 January 1993, Herceg-Bosna/HVO forces, using heavy artillery, attacked

Bosnian Muslim residential areas in Gornji Vakuf town and several surrounding villages, including Dusa, Hrasnica, Uzricje and Zdrimci. The HVO attacks and artillery fire killed a number of Bosnian Muslim civilians and destroyed or damaged a substantial amount of Bosnian Muslim property. (Annex)". The Chamber acknowledges that other incidents are alleged with less precision (for instance the time-frame is more approximate) but the Chamber is convinced, in view of other parts which are more precise, that the Prosecution has specified location and dates of incidents charged in the Indictment when it had details available. The Chamber emphasises that were the Indictment less detailed it still would meet the level of specificity required to enable the Defence to prepare.

50. *Role of each Accused in each underlying crime.* In relation to the Defence's complaint that the role of each Accused in each crime charged is not described, the Indictment's paragraphs 60, 72, 87, 118, 135, 143, 153, 171, 186, 194, 203 and 217 each conclude a section on a municipality, detention camp or centre by the statement that: "By the foregoing acts, conduct, practices and omissions and as further described in Paragraphs 15-17, 39 and 218-230, JADRANKO PRLIC, BRUNO STOJIC, SLOBODAN PRALJAK, MILIVOJ PETKOVIC, VALENTIN CORIC and BERISLAV PUSIC are responsible for the following crimes", and then a list of relevant crimes committed therein and corresponding counts are provided. The Chamber emphasises that the Indictment must be read as a whole. There is no need to plead in the Indictment to what extent the conduct of each accused specifically contributed to the commission of each crime alleged. Although The Chamber is satisfied that the participatory acts of the accused in the criminal enterprise are sufficiently described, it is not satisfied that the Defence is provided with sufficient details or information concerning the role of *each* accused in the criminal enterprise. As noted above, such imprecision stems from the way paragraph 17 is drafted. The Prosecution has been directed to amend paragraph 17 of the Indictment in order to provide the Defence with more specifics on the role or participatory conduct of *each* Accused. It is expected that the amended paragraph, when read in conjunction with other paragraphs or parts of the Indictment, will place the Defence in a better position to determine what conduct *each* accused is alleged to have had in relation to the underlying crimes alleged.

51. *Paragraph 113 of the Indictment.* The Praljak Defence complains that paragraph 113 of the Indictment is not specific nor legally correct because it alleges that "In the early part of the East Mostar siege, from approximately late June 1993 to late August 1993, international organisations and humanitarian agencies were completely or substantially blocked from entering East Mostar, which caused increasing hardships for the Bosnian Muslims in East Mostar, who were cut off from

outside aid” whereas it is the duty of a commander to prevent humanitarian organization personnel to enter battle theatre during a combat.⁷⁰

52. The Chamber read paragraphs 113 of the Indictment as being part of the context given in relation to the events in Mostar municipality. Paragraph 113 introduces a factual circumstance (a blockade) that added to the hardship of the civilians in East Mostar. Paragraph 118 states that “By the foregoing acts, conduct, practices and omissions and as further described in Paragraphs 15-17, 39 and 218-230, JADRANKO PRLIĆ, BRUNO STOJIĆ, SLOBODAN PRALJAK, MILIVOJ PETKOVIĆ, VALENTIN ĆORIĆ and BERISLAV PUŠIĆ are responsible for the following crimes”. The Chamber deems that there is no ambiguity that it is alleged that the accused are to be held criminally responsible, as a member of an alleged JCE, for having blocked humanitarian aid from entering East Mostar. The veracity and the legal consequences of such assertion are considerations for trial.

V- Individual responsibility of the accused (paragraphs 218-228 of the Indictment)

53. The Defence submits that the nature of the accused’s individual and superior responsibility for the acts charged in the Indictment should be clarified, including: the required mental state of the Accused,⁷¹ the causal relationship between the Accused and the alleged perpetrators⁷² (according to the Defence, the Prosecution seems to attribute criminal responsibility for activities of the organisation based solely on the membership of the accused to that organisation),⁷³ the possible forms of *mens rea* and *actus reus* elements of the charged offences assigned to each particular accused or particular incident.⁷⁴

54. The Prosecution responds that “paragraphs 2-14, 39, 228 and 229, when read in the context of the overall Indictment, provide all of the required allegations, in the context of a leadership indictment”,⁷⁵ that the Indictment is fully consistent with pleading practices in other cases,⁷⁶ and that the Indictment meets all requirements for pleading criminal responsibility under Article 7(3).⁷⁷ In relation to the required mental state of the Accused, the Prosecution submits that the Indictment sufficiently pleads this legal requirement, in particular paragraphs 218-228, 233, 235 and 238 set out the *mens rea* concerning the accused and the charges in a manner similar to other ICTY

⁷⁰ Praljak Motion, para. 32.

⁷¹ Stojić Motion, para. 29, Praljak Motion, para. 34, Petković Motion, paras 22-24, Pušić Motion, paras 35-41, Prlić Motion, para. 10.

⁷² Praljak Motion, paras 28-29, Petković Motion, paras 28-29, Ćorić Motion, para.7, Pušić Motion, paras 42-48, Prlić Motion, para. 8.

⁷³ Stojić Motion, para. 28, Petković Motion, paras 13-18.

⁷⁴ Praljak Motion, para. 33.

⁷⁵ Response, para. 31. The Prosecution also notes in relation to Pušić’s argument that his position of civilian is not founded on “legally relevant arguments” that paragraphs 13-14 sufficiently describe that the accused had effective control over the various components and personnel in the system over which he presided”, Response, para. 35.

⁷⁶ Response, para. 34.

⁷⁷ Response, para. 39.

indictments, following accepted practice.⁷⁸ In relation to the Defence's argument that the relationship between the Accused and the alleged perpetrators is not pleaded, the Prosecution submits that the reference to the function or position of authority or command of an accused is sufficient to notify the Defence that by implication the accused are to be held responsible for the conduct of the alleged perpetrators.⁷⁹ The Prosecution further argues that "paragraphs 218-228 set out the various forms of *mens rea* and liability, including planning, instigating, ordering, committing and aiding and abetting" and that the Indictment has given notice to the accused of the forms and theories of liabilities on which the Prosecution intends to proceed at trial.⁸⁰

55. The Defence replies that the Indictment only refers to the accused's functions as a basis for their alleged superior or command responsibility and this is not a sufficient basis to charge the Accused under Article 7(3).⁸¹ The Prlić Defence, for instance, argues that "a function in the system of the civil authorities" does not contain a duty for command responsibility to arise and the Pušić Defence argues that references in the Indictment of "influence over subordinates" should be struck out because influence is not a prerequisite for command liability to arise.⁸² Similarly, the Petković Defence replies that the *mens rea* of each Accused for each alleged offences is not pleaded.⁸³

56. In this case, the Accused's individual criminal responsibility is based on superior responsibility (Article 7(1) of the Statute) and individual responsibility for underlying crimes physically committed by others (Article 7(3) of the Statute). The Accused are held responsible for having abetted, planned, instigated, ordered the underlying crimes charged in the Indictment or, alternatively or cumulatively, participated in a JCE. Furthermore, the Chamber emphasises that arguments raised in relation to whether superior civilian functions may give rise to command responsibility is not appropriately raised here and will be considered in the Decision on Jurisdiction.

57. In relation to the Defence's complaints that the required *mens rea* of the accused is not sufficiently pleaded, the Chamber observes that paragraphs 219, 220, 224 and 225 of the Indictment properly plead the Accused's alleged *mens rea*. For instance, paragraph 219 provides that "Each of the Accused, JADRANKO PRLIĆ, BRUNO STOJIC, SLOBODAN PRALJAK, MILIVOJ PETKOVIC, VALENTIN CORIC and BERISLAV PUSIC, acted with the knowledge and state of mind required for the commission of each crime charged in this indictment. To the extent required, other perpetrators or actors involved in, or aiding or abetting, the commission of each crime charged in this indictment acted with the requisite state of mind". Similarly paragraph 220 states that the Accused "acting individually and in concert

⁷⁸ Response, para. 49.

⁷⁹ Response, para. 35.

⁸⁰ Response, paras 54-57.

⁸¹ Prlić Reply, paras 16-21, Pušić Reply, paras 9-13.

⁸² Prlić Reply, paras 16-21, Pušić Reply, para. 13.

⁸³ Petković Reply, paras 28-31.

with or through other persons, knowingly and substantially participated in the joint criminal enterprise, possessing the requisite state of mind and/or sharing the requisite state of mind with other members and participants in the joint criminal enterprise or of those otherwise connected to the enterprise, or possessing, sharing or knowing the state of mind of those aiding or abetting the enterprise or committing crimes". The Chamber is satisfied that the Defence is sufficiently informed of the alleged state of mind of the accused. Additional details tending to demonstrate such state of mind are matters for trial.

58. Similarly, in relation to the Defence complaint that the link of subordination between the accused and their alleged subordinates is not sufficiently pleaded, the Chamber observes that paragraph 228 of the Indictment pleads that:

228. In addition or in the alternative, pursuant to Article 7(3), each of the Accused is criminally responsible as a superior official or officer for the criminal acts or omissions of subordinates or other persons about or over whom he had effective *de jure* and/or *de facto* control, where he knew or had reason to know that such persons were about to commit or had committed such acts or omissions and failed to take necessary and reasonable measures to prevent such acts or omissions or punish such persons. Each of the accused acted as a superior over or through other persons or subordinates about whom he exercised, or could have exercised, effective control or substantial influence who were involved in the commission of crimes charged in this indictment, and knew or had reason to know that one or more such persons was about to commit or had committed such acts or omissions and failed to take necessary and reasonable measures to prevent such acts or punish, remove or discipline such persons.

59. The Chamber is satisfied that this paragraph (at the exception of the mention "substantial influence") when read in conjunction with the context of the Indictment (in particular the paragraphs stating the Accused's positions of command or authority) sufficiently inform the accused of their alleged criminal responsibility pursuant to Article 7(3) of the Statute. Details to support those legal prerequisites are to be adduced at trial and are for resolution at trial. With respect to the mention "substantial influence" in paragraph 228 of the Indictment which is concerned with allegations pursuant to Article 7(3) of the Statute, the Chamber agrees with the Defence that this mention is superfluous and misleading. The Appeals Chamber of the Tribunal in the *Delalić et al.* case expressly ruled out the "substantial influence" requirement as a legal element of criminal responsibility under Article 7(3) of the Statute. Yet, the Chamber accepts that this mention may be of some relevance for other heads of responsibility such as "ordering" or "instigating" and therefore directs the Prosecution to strike the mention "substantial influence" from paragraph 228 and, if necessary, to reincorporate such mention in another relevant paragraph of the Indictment concerned with criminal responsibility under Article 7(1) of the Statute.

60. In relation to the Defence's complaints that the *mens rea* and *actus reus* elements of the underlying crimes are not sufficiently pleaded in relation to each Accused, the Chamber observes

again that the accused are not charged for having personally perpetrated the crimes alleged in the Indictment. The lack of proximity between the alleged crimes and the Accused allows the Prosecution to focus the details of its pleading on facts concerned with linkage between the crimes and the Accused. The Chamber accepts that the *actus reus* and *mens rea* of the underlying crimes alleged is pleaded by necessary implication.

61. Accordingly, the Defence's complaints concerning the way individual criminal responsibility is pleaded are rejected at the exception of the complaint concerning the reference to "substantial influence" in paragraph 228 of the Indictment. The Prosecution is directed to amend the Indictment as advised above.

VI- Counts of the indictment (paragraphs 229-230 of the Indictment)

62. In relation to the section "counts of the indictment", the Defence argues that this part is "impermissibly vague in that it alleges that six Accused are responsible for all 26 counts without any specification as to which Accused is charged with which count and without any reference as to the Accused form of responsibility, *mens rea* and other required elements". The Defence gives examples which are not reproduced here.⁸⁴

63. This part of the Indictment begins as follows: "By the foregoing acts, conduct, practices and omissions, JADRANKO PRLIC, BRUNO STOJIC, SLOBODAN PRALJAK, MILIVOJ PETKOVIC, VALENTIN CORIC and BERISLAV PUSIC are responsible for the following crimes" and then lists 26 counts already mentioned in the paragraphs concluding the description of the alleged crimes committed in each municipality and detention centre or camps mentioned in the Indictment. For instance, count 1 reads: "Count 1: persecutions on political, racial and religious grounds, a CRIME AGAINST HUMANITY, punishable under Statute Articles 5(h), 7(1) and 7(3) (as alleged in Paragraphs 15-17, 21-41, 43-59, 61-71, 73-86, 88-117, 119-134, 136-142, 144-152, 154-170, 172-185, 187-193, 195-202 and 204-216)". Clearly, this part is to be read in conjunction with other parts of the Indictment, in particular with regards to paragraphs 60, 72, 87, 118, 135, 143, 153, 171, 186, 194, 203 and 217 of the Indictment which characterise the facts described in the preceding paragraphs as crimes for which the six Accused are allegedly accountable.

64. The Chamber further understand the counts to apply to all Accused, at the exception of an exclusion which concerns the accused Pušić and is contained in paragraph 230 of the Indictment, This paragraph states that: "Notwithstanding any language to the contrary, the accused BERISLAV PUSIC is not charged in this indictment with any crimes in connection with the events in Prozor

⁸⁴ Praljak Motion, para 35, Petković Motion, paras 43-55.

Municipality in October 1992 or in Gornji Vakuf Municipality in January 1993". The Defence argues that the language "Notwithstanding any language to the contrary" is ambiguous and should be corrected.⁸⁵ The Prosecution provides a clear explanation as to how this sentence must be interpreted when read in conjunction with other parts of the Indictment, more specifically paragraphs 229, 43-60 and 61-72.⁸⁶ The Chamber endorses this explanation which is not reproduced here and emphasizes again that each paragraph of the Indictment must be read in the context of the Indictment as a whole.

65. The Defence's arguments in relation to this part of the Indictment being impermissible vague are rejected.

VII- Additional allegations (paragraphs 231-238 of the Indictment)

66. In relation to the "additional allegations" part of the Indictment, the Defence submits in essence that the Prosecution has failed to give sufficient information concerning the international character of the alleged conflict and the partial occupation of the territory concerned.⁸⁷ The Defence also argues that the Prosecution has improperly cumulatively charged the accused.⁸⁸

67. *International character of the conflict and the partial occupation of the territory concerned.* To the Defence's argument that the Prosecution fails to allege sufficient facts concerning the necessary nexus between the conduct of the Accused and a state of international armed conflict, the Prosecution responds that paragraph 232 of the Indictment read together with other paragraphs of the Indictment such as paragraphs 15, 21-42 and 236-237 clearly allege the existence of an international armed conflict and give sufficient information about the geographical territory of the conflict, the parties to the conflict, the time-frame of the conflict and the nexus between the alleged international armed conflict and the crimes charged against each Accused.⁸⁹ The Prosecution adds that the pleading of other evidentiary details is matter for trial determination.⁹⁰ The Petković Defence replies that there is an ambiguity in paragraph 232 of the Indictment as to the exact identification of the parties to the conflict and the exact timeframe of the conflict and submits that the identity of the occupying forces, the areas occupied and the dates when the partial occupation charged in the Indictment is alleged to have existed must be pleaded.⁹¹ The Defence exemplifies this by stating, *inter alia*, that from the mention of "the State of Bosnia and Herzegovina and/or

⁸⁵ Pušić Reply, paras 17-19.

⁸⁶ Response, paras 81-82.

⁸⁷ Praljak Motion, para. 30, Petković Motion, paras 37-41.

⁸⁸ Praljak Motion, para. 31, Petković Motion, para. 56.

⁸⁹ Response to Armed Conflict, see in particular paras 10-13, 17-19.

⁹⁰ Response to Armed Conflict, para. 19.

⁹¹ Petković Reply, paras 6-11, see also Pušić Reply, paras 14-16.

ABiH and/or Bosnian Muslims” as a party to the conflict “it is impossible to conclude to whom it relates”.⁹²

68. In this case the accused are charged with nine counts pursuant to Article 2 of the Statute (Grave Breach of the Geneva Conventions of 1949).⁹³ Three issues are relevant when pleading grave breaches of the Geneva Conventions of 1949: the existence of an international armed conflict, (the date when the conflict became international and the parties to the conflict are material facts which should be pleaded), the existence of a nexus between the acts of the Accused and the armed conflict and the protection under the relevant Geneva Conventions of persons or property.

69. Paragraph 232 of the Indictment identifies the parties to the alleged conflict as follows:

232. At all times relevant to this indictment, a state of armed conflict, international armed conflict and partial occupation existed in Bosnia and Herzegovina, which involved, in whole or part, the State of the Republic of Croatia and its government, armed forces and representatives in an armed conflict against the State of the Republic of Bosnia and Herzegovina and/or against the ABiH and/or Bosnian Muslims on the territory of the State of the Republic of Bosnia and Herzegovina.

Paragraph 15 of the Indictment defines the temporal framework of the Indictment as running from 18 November 1991 to about April 1994. Paragraphs 21 and 22 of the Indictment specify the date at which the conflict took international traits and the municipalities in the territories of Bosnia and Herzegovina which became parts of Herceg-Bosna respectively. Paragraphs 236 and 237 specify that the acts and omissions charged as crimes against persons were committed against or involved persons and property protected under the Geneva Conventions of 1949 (and the additional protocols thereto) and the laws and customs of war.

70. The Chamber is satisfied that the context of the Indictment makes it sufficiently clear that: the Accused are charged with crimes committed in the course of an armed conflict between two parties (the former Republic of Bosnia and Herzegovina and its representatives and the Republic of Croatia and its representatives)⁹⁴, that the temporal framework of the conflict is sufficiently set out, that the alleged armed conflict took international features at a certain date, that the territory where the armed conflict took place is sufficiently detailed. Facts to support those allegations are matters for trial determination, including those facts concerned with the degree of control by opposing forces necessary to establish the alleged occupation.

⁹² Petković Reply, paras 6-11.

⁹³ Count 3 (Wilful Killing), 5 (Inhuman Treatment), 7 (Unlawful Deportation of a Civilian), 9 (Unlawful Transfer of a Civilian), 11 (Unlawful Confinement of a Civilian), 13 (Inhuman Treatment/condition of confinement), 16 (Inhuman Treatment), 19 (Extensive destruction of property, not justified by military necessity and carried out unlawfully and wantonly), and 22 (Extensive appropriation of property, not justified by military necessity and carried out unlawfully and wantonly).

⁹⁴ The representatives of those two parties include any administrative, military, political and other civilian authorities or entities.

71. The Chamber upholds however the Defence's complaint that the Prosecution failed to expressly plead the existence of a nexus between the acts of the Accused and the armed conflict. The Prosecution's submission that the nexus requirement is pleaded by necessary implication by references to the protected status of victims, property and to the fact that the conflict "existed at all times relevant to this Indictment"⁹⁵ is not fully convincing. The Indictment was drawn at a time where it was clearly established in the case-law of the Tribunal that grave breaches to the Geneva Conventions may be alleged if the alleged acts of accused are committed in connection to an international armed conflict.

72. The Defence's complaints concerning Article 2 of the Statute's allegations are partly accepted. The Chamber directs the Prosecution to amend the Indictment to expressly allege whether the acts or omissions of the accused were connected to the alleged armed conflict.

73. *Cumulative charging.* The Defence accepts that the Tribunal's case-law allows the Prosecution to engage in cumulative and alternative charging but complain that this practice is not correctly applied in the Indictment or is used in this indictment as "a tool to indict all accused under the same wordings".⁹⁶ For example, the Praljak Defence submits that cumulative charging of the offences of wilful killing (punishable under Article 2(a) of the Statute) and murder (punishable under Article 5(a) of the Statute) should be impermissible.⁹⁷ The Prosecution responds that "concerns regarding cumulative and alternative charging are not *pleading* concerns, but concerns which apply at the time of judgement and sentence".⁹⁸ The Prlić Defence insists in its Reply that the counts of the Indictment should indicate whether the Accused are charged in the alternative or cumulatively in view of the rulings of the Trial Chamber in the *Kupreškić* case and of the Appeals Chamber in the *Blaškić* case.⁹⁹ The Prlić Defence adds that the Accused cannot be charged cumulatively as liable for his alleged participation in a JCE and at the same time liable under other heads of responsibility under Article 7(1) of the Statute.¹⁰⁰

74. It must be emphasised that the Tribunal's case-law consistently held that the Prosecution may engage in cumulative charging in the Indictment, including by cumulatively charging the Accused under Article 7(1) and 7(3), if each charge is supported by relevant material facts. The Defence seem to have confused cumulative charging and cumulative convictions issues. The Appeals Chamber solved the issues of cumulative charging and conviction in the *Delalić et al.*

⁹⁵ Response to Nature of Armed Conflict, para. 13.

⁹⁶ Petković Motion, para. 56.

⁹⁷ Petković Motion, para. 44.

⁹⁸ Response, para. 44.

⁹⁹ Prlić Reply, para. 22, the Defence quotes paragraph 721 of the *Kupreškić* Trial Judgement. See also Petković Reply, paras 20-24.

¹⁰⁰ Prlić Reply, paras 24-28.

appeal judgment and reasserted this position in the *Blaskić* case.¹⁰¹ The Chamber is satisfied that the Indictment sufficiently pleads the material facts concerning the offences and liabilities charged therein. The Chamber also agrees with the Prosecution that the Indictment properly pleads cumulative and alternative charges and that all concerns with cumulative convictions will be resolved, if necessary, when all of the evidence has been received.

75. The Defence's complaints concerning cumulative charging are rejected.

¹⁰¹ *Delalić et al.* Appeal Judgement, para. 745, *Blaskić* Appeal Judgement, para. 91.

PURSUANT TO Rule 72 of the Rules;

THIS CHAMBER HEREBY:

1. **GRANTS** the Motion in respect of the Defence's challenge to the form of the Indictment to the extent set out in the terms of this decision;
2. **ORDERS** the Prosecution to file a new indictment within fourteen days of the filing of this decision in which it should (a) indicate in italics those changes made pursuant to the terms of this decision (b) indicate in bold those amendments for which leave is sought (if any). In respect of the latter, the Prosecution should set out its arguments in support of the amendments in an accompanying application for leave to amend the Indictment filed pursuant to Rule 50 of the Rules.

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



Judge Liu Daqun

Presiding

Dated this 22nd day of July 2005
At The Hague,
The Netherlands.

[Seal of the Tribunal]