



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-95-13/1-T
Date: 19 May 2006
Original: English

IN TRIAL CHAMBER II

Before: Judge Kevin Parker, Presiding
Judge Christine Van Den Wyngaert
Judge Krister Thelin
Registrar: Mr Hans Holthuis
Decision: 19 May 2006

PROSECUTOR

v.

**MILE MRKŠIĆ
MIROSLAV RADIĆ
VESELIN ŠLJIVANČANIN**

**DECISION ON MOTION SEEKING CLARIFICATION WITH
REGARD TO COUNT 1 OF THE INDICTMENT**

The Office of the Prosecutor:

Mr Marks Moore
Mr William Smith
Mr Philip Weiner
Ms Meritxell Regue
Mr Alexis Demirdjian

Counsel for the Accused:

Mr Miroslav Vasić and Mr Vladimir Domazet for Mile Mrkšić
Mr Borivoje Borović and Ms Mira Tapušković for Miroslav Radić
Mr Novak Lukić and Mr Momčilo Bulatović for Veselin Šljivančanin

1. Background

1. This decision of the Trial Chamber is in respect of the “Motion Seeking Clarification with regard to Count 1 of the Indictment and the Particulars Relied Upon” (“Motion”), filed confidentially on 10 April 2006 by the Prosecution. The Motion was submitted in compliance with the Chamber’s order given orally on 31 March 2006. On that date, having been notified by the Prosecution of a dispute between the parties over the scope of Count 1 of the Third Consolidated Amended Indictment¹ (“Indictment”), and, in particular, over the question whether the Accused are charged in that Count for the events that are alleged to have occurred at the Velepromet facility, the Trial Chamber ordered the Parties to provide written submissions on the matter. Pending the outcome of the dispute, the cross-examination of those witnesses whose testimony might have related to the contested issue was to continue on the basis that the Velepromet events form part of the factual basis of Count 1.

2. In the Motion the Prosecution submits that paragraph 40 of the Indictment sets forth a broad time frame, which also includes the crimes allegedly committed at the Velepromet facility. The Prosecution notes that the Indictment does not provide any specific location in respect of any of the crimes included in the charge of persecution and therefore it should be understood that those crimes are alleged to have been committed in any of the locations described in the Indictment and falling within the time scale particularised in Count 1. The Prosecution submits that the Defence has been in the possession of materials indicating that crimes were alleged to be committed at Velepromet and that these crimes fall within the ambit of Count 1, and at no time has it sought clarification on the matter.

3. On 12 April 2006 the Trial Chamber extended the time-limit for the Defence’s response to the Motion until 28 April 2006. On 12 April 2006 the Trial Chamber lifted the confidentiality of the Motion and informed the Parties that further submissions on the matter needed not be filed confidentially.

4. On 28 April 2006 the Defence filed a “Joint Defence Response to the Prosecution Motion Seeking Clarification with regard to Count 1 of the Indictment and the Particulars Relied Upon” (“Response”). The Defence submits that the victims of the acts of persecution allegedly committed at Velepromet have not been sufficiently identified. The Defence notes that in the Prosecution’s Pre-Trial Brief (“Brief”)² the acts of persecution are alleged to have been committed against individuals who were brought from the Vukovar hospital to the JNA barracks and the Ovčara farm

¹ Third Consolidated Amended Indictment, 15 November 2004.

² Prosecution Pre-Trial Brief, filed on 29 August 2005.

on 20 November 1991. The Defence observes that the part of the Brief concerning the criminal responsibility of the Accused identifies the victims of the common plan similarly, that is as the Croats and other non-Serbs taken from Vukovar hospital to the Ovčara farm on 20 November 1991. The Defence submits that both in the Indictment and in the Brief the Velepromet events are mentioned in the context of the Accused's *mens rea* and, in particular, their ability to foresee the events charged in the Indictment. The Defence states that even though it indeed cross-examined witnesses on the crimes allegedly committed at Velepromet, it did so in the context of the Accused's *mens rea*.

5. On 5 May 2006 the Prosecution filed its "Reply to the Joint Defence Response to the Prosecution Motion Seeking Clarification with regard to Count 1 of the Indictment and the Particulars Relied Upon" ("Reply"). It submits that the Prosecution's Pre-Trial Brief makes reference, in the context of Velepromet, to a plan among Colonel Mrkšić, Major Šljivančanin, Captain Radić and other officers to identify and isolate the individuals who they believed committed crimes against the local Serbs. The Prosecution observes that the Defence's cross-examination of the witnesses whose testimony concerned Velepromet went further than the Accused's knowledge of violent acts allegedly committed there and thus the Defence was aware that Velepromet featured as a location where crimes with which the Accused are charged are alleged to have been committed. The Prosecution seeks leave to file its Reply. The Trial Chamber grants leave to reply and takes note of the contents of this Reply.

2. The law

6. Pursuant to Article 18(4) of the Statute of the Tribunal an indictment shall contain "a concise statement of the facts and the crime or crimes with which the accused is charged". Rule 47(C) of the Rules of Procedure and Evidence sets forth a similar requirement. The Appeals Chamber held that:

The 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. In 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

³ *Prosecutor v. Zoran Kupreškić et al.*, Case No. IT-95-16-A, Appeal Judgement, 23 October 2001 ("Kupreškić Appeal Judgement"), para 88; *Prosecutor v. Mladen Naletilić and Vinko Martinović*, Case No. IT-98-34-A, Appeal Judgement, 3 May 2006, para 23.

The materiality of a fact is dependent on the nature of the Prosecution case. The Prosecution's characterization of the alleged criminal conduct and the proximity of the accused to the underlying crime are decisive factors in determining the degree of specificity with which the Prosecution must plead the material facts of its case in the indictment in order to provide the accused with adequate notice.⁴

7. The dispute in the present case concerns the charge of persecutions. The Appeals Chamber recalled that:

the fact that the offence of persecution is a so-called "umbrella" crime does not mean that an indictment need not specifically plead the material aspects of the Prosecution case with the same detail as other crimes. Persecution cannot, because of its nebulous character, be used as a catch-all charge. Pursuant to elementary principles of criminal pleading, it is not sufficient for an indictment to charge a crime in generic terms. An indictment must delve into particulars. This does not mean, however, as correctly noted in the jurisprudence of this Tribunal, that the Prosecution is required to lay a separate charge in respect of each basic crime that makes up the general charge of persecution. What the Prosecution must do, as with any other offence under the Statute, is to particularise the material facts of the alleged criminal conduct of the accused that, in its view, goes to the accused's role in the alleged crime. Failure to do so results in the indictment being unacceptably vague since such an omission would impact negatively on the ability of the accused to prepare his defence.⁵

8. If an indictment fails to plead with sufficient detail the essential aspect of the Prosecution case, it suffers from a material defect, which may, in certain circumstances, cause the Appeals Chamber to reverse a conviction.⁶ "If the indictment is found to be defective because of vagueness or ambiguity, then the Trial Chamber must consider whether the accused has nevertheless been accorded a fair trial. In some instances, where the accused has received timely, clear, and consistent information from the Prosecution which resolves the ambiguity or clears up the vagueness, a conviction may be entered."⁷ In this respect a material issue is whether, by virtue of the Indictment read with the additional clear and consistent information from the Prosecution, the Accused were in a reasonable position to identify the charges against them, and the conduct relied upon by the Prosecution in support of each offence charged, and to be aware as a consequence, notwithstanding the defect of the indictment, that the events at Velepromet on 19 November 1991 were among the material facts relied on by the Prosecution in support of Count 1 of the Indictment, which charged an offence of persecution.⁸

⁴ *Prosecutor v. Miroslav Kvočka et al.*, Case No. IT-98-30/1-A, Appeal Judgement, 28 February 2005 ("Kvočka Appeal Judgement"), para 28.

⁵ *Kupreškić Appeal Judgement*, para 98.

⁶ *Kupreškić Appeal Judgement*, para 114.

⁷ *Kvočka Appeal Judgement*, para 33.

⁸ *Prosecutor v. Dario Kordić and Mario Čerkez*, Case No. IT-95-14/2-A, Appeal Judgement, 17 December 2004 ("Kordić and Čerkez Appeal Judgement"), para 142.

9. The indictment must be read in its entirety when determining whether material facts have been appropriately pleaded.⁹ In some cases, the vagueness of the indictment may be cured by the information provided in the pre-trial brief and/or in an opening statement of the Prosecution.¹⁰

3. Discussion

(a) Is the Indictment pleaded with sufficient particularity?

10. The Indictment contains one reference to the Velepromet facility in paragraph 31, summarising the facts relevant to Count 1:

On the evening of 19 November 1991, reports reached Mile MRKŠIĆ and Veselin ŠLJIVANČANIN that certain TO, volunteer and paramilitary soldiers were torturing and killing non-Serb prisoners being held at the Velepromet.

The alleged persecution, according to the Indictment, included:

(a) The extermination or murder of at least two hundred sixty-four Croats and other non-Serbs, including women and elderly persons.

(b) The cruel or inhumane treatment of Croats and other non-Serbs, including torture, beatings, sexual assault and psychological abuse.

(c) The wilful deprivation of due medical care from sick and wounded Croats and other non-Serbs”.

42. By these acts and omissions, Mile MRKŠIĆ, Miroslav RADIĆ, and Veselin ŠLJIVANČANIN committed: Count 1: Persecutions on political, racial, and religious grounds, a CRIME AGAINST HUMANITY, punishable under Article 5(h), and 7(1) and 7(3) of the Statute of the Tribunal.¹¹

The Indictment specifies that the acts underlying the charge of persecution were allegedly committed from or about 18 November 1991 until 21 November 1991. It therefore includes the time when the incidents of mistreatment allegedly took place at Velepromet, that is on 19 November 1991.¹² If Count 1 as pleaded in para 42 of the Indictment, read with paras 40 and 41 stood alone, they are worded sufficiently widely to include the events at Velepromet on 19 November 1991. However, paras 40 to 42 are not to be read in isolation. They must be read in the context of the full Indictment. Further, and in particular, paras 40 to 42 do not sufficiently particularise the conduct on which the Prosecution relies in support of Count 1, so that it is necessary to refer more widely to other parts of the Indictment to understand the Prosecution case for Count 1. It is to be noted that the other counts of the Indictment also refer to the period from 18 November 1991 until 21 November 1991, even though it is apparent that none of them relates to the

⁹ *Prosecutor v. Milomir Stakić*, Case No. IT-97-24-A, Appeal Judgement, 22 March 2006, para 117.

¹⁰ *Kordić and Čerkez* Appeal Judgement, paras 165, 168 and 169.

¹¹ Indictment, para 41.

¹² Brief, paras 81-91

events at Velepromet.¹³ The number of casualties, “at least two hundred sixty-four”, is formulated in Count 1 in the same way as in the context of Counts 2 to 4 relating to the killing of “at least two hundred six-four” persons at Ovčara.¹⁴ Even though the number of victims is not definite and the formulation, including the phrase “at least”, is such as to potentially include more victims if relevant evidence is presented during the trial, the use of identical wording is strongly indicative that the victims of all these alleged crimes are the same. Therefore, in the context of this Indictment, it is the view of the Chamber that the reference in relation to the charge of persecutions to the extermination and murder of 264 persons is not properly to be read and understood as relating to crimes allegedly committed at Velepromet, notwithstanding the reference to Velepromet in paragraph 31 of the Indictment, which could so suggest if read in isolation. With respect to allegations other than murder, it is not impossible to understand Count 1 of the Indictment, at least read in isolation, as including the alleged cruel or inhumane treatment of persons and the wilful deprivation of due medical care allegedly committed at Velepromet.

11. The direct references to Count 1 (Persecutions) commence at para 28 of the Indictment. These paragraphs include allegations of an agreement in Zagreb on 18 November 1991 for the evacuation of several hundred people at Vukovar Hospital,¹⁵ JNA units taking control of the hospital on the afternoon of 19 November 1991,¹⁶ an order to Mile Mrkšić by JNA command on 19 November 1991 to evacuate the hospital pursuant to the Zagreb agreement, which was subsequently delegated to Veselin Šljivančanin,¹⁷ the removal of about four hundred non-Serbs from the hospital early on the morning of 20 November 1991, the loading of about 300 of these onto buses and their detention under guard, and later that morning their movement from the hospital to the JNA barracks,¹⁸ where for about two hours there were acts of humiliation and threats made to them and some were beaten,¹⁹ after which they were transferred to Ovčara farm,²⁰ from which at least 264 were taken to a nearby location and killed. Velepromet is not in this alleged chain of actions.

12. The effect of these allegations is that following events on 18 and 19 November 1991, the actual evacuation of the hospital was undertaken on the morning of 20 November 1991. There is a difference of some one hundred between the four hundred alleged to have been removed from the hospital on 20 November 1991, and the about three hundred alleged to have been transported to the

¹³ See *infra* para 14.

¹⁴ Indictment, para 44.

¹⁵ Indictment, para 28.

¹⁶ Indictment, para 29.

¹⁷ Indictment, para 30.

¹⁸ Indictment, para 33.

¹⁹ Indictment, para 34.

²⁰ Indictment, para 35.

barracks and later (less 15) to the Ovčara farm. That is not explained in the Indictment, but, relevantly, all of the about four hundred are alleged to have been removed early on the morning of 20 November 1991. There is no allegation of the removal of non-Serbs from the hospital on 19 November 1991.

13. In para 31 it is alleged that by “no later than the onset of the evacuation operation”, the Accused knew of the serious threat posed by the security of people evacuated from the hospital by elements of Serb forces. In support of this *inter alia* it is alleged that on the evening of 19 November 1991 reports had reached two of the Accused of the torture and killing of “non-Serb prisoners being held at Velepromet”.²¹ This is apparently pleaded in reference to the knowledge or state of mind of the Accused. It is not an allegation that the events at Velepromet were in the course of the evacuation of the hospital. Further, these events are alleged in time to have occurred before the removal of the about four hundred non-Serbs from the hospital on the morning of 20 November 1991. The victims at Velepromet are alleged to be “non-Serb prisoners being held at Velepromet”; they are not alleged to be from the hospital.

14. The Appeals Chamber found in the *Kordić and Čerkez* case that the vagueness of the indictment in respect of the charge of persecutions in that case was cured by the remainder of the indictment, including the part of the indictment describing the facts pertaining to the charge of persecutions itself and the formulation of other counts, which were viewed as acts underlying the crime of persecutions.²² However, in the present case the Counts following Count 1 do not contain any reference to Velepromet. Counts 2 to 4, *i.e.* extermination and murder, clearly refer to the group of “at least two hundred sixty-four Croats and other non-Serbs” who were allegedly taken to a location nearby the Ovčara farm on 20 November 1991 and executed.²³ The killings allegedly committed before the evening of 19 November 1991 at the Velepromet facility are not covered by these Counts. Counts 5 to 8, including the allegations of imprisonment, brutal conditions of detention, inhuman treatment, physical and psychological assault, and the deprivation of medical care, also relate to the detention facility at the Ovčara farm²⁴ and to the JNA barracks,²⁵ there being no reference to Velepromet. Accordingly, in so far as the crime of persecution was intended to be charged in connection with the other crimes charged in the Indictment, it is not apparent from a reading of the Indictment that the events that allegedly occurred at Velepromet are relied on as being in part the material events relied on by the Prosecution as constituting the offence of persecution. Events at Velepromet appear to relate solely to the knowledge of the Accused.

²¹ Indictment, para 31.

²² *Kordić and Čerkez* Appeal Judgement, para 156.

²³ Indictment, para 44.

(b) Does the information contained in the Prosecution's Pre-Trial Brief and in its opening statement cure the vagueness of the Indictment on Velepromet?

15. The way in which the acts underlying the charge of persecution were identified leaves room for interpretations other than the one indicated in the Motion, especially in view of the Prosecution's Pre-Trial Brief and its opening statement. It is true that the Brief provides an extensive account of events that allegedly took place at Velepromet. However, the part of the Brief which sets out the charges does not contain any references to Velepromet. Furthermore, the victims of the alleged crimes against humanity, including persecution, were described as "more than two-hundred and sixty Croats and other non-Serbs who were originally present in the Vukovar hospital". They are referred to as victims of "persecution, extermination, murder, torture and other inhuman acts".²⁶ The number of victims corresponds with the number of those persons whose extermination or murder is charged in connection with the Ovčara farm. Accordingly, the charge of persecution appears to relate to the same group of victims. Even if it were to be assumed, contrary to the apparent effect of what is pleaded, that persecution was intended to be charged in respect of the Velepromet events, the charge, as defined in the Brief, could relate only to those victims who were subsequently killed at the Ovčara farm. Even that assumed basis faces the further difficulty that it is not alleged that the events at Velepromet occurred after the evacuation of the hospital, but before the morning of 20 November 1991.

16. Another act underlying the charge of persecution and other inhuman acts, the deprivation of medical care, is said in the Brief to relate to the wounded or sick patients of the Vukovar hospital, as well as other detainees "who were injured during the course of the day during which they were detained, first, in the JNA barracks, and, subsequently, in the Ovčara farm".²⁷ Even though the group of "patients of the Vukovar hospital" could also include those patients who were subsequently taken to Velepromet, the second identified group is in connection with the JNA barracks and the Ovčara farm, with no reference to Velepromet. The fact that those two locations are mentioned while Velepromet is not, suggests that the crime of deprivation of medical care is not charged in respect of the events that occurred at Velepromet. Further, the crime of persecution for the imprisonment of Croats and other non-Serbs is said in the Brief to relate to "the JNA barracks and the Ovčara farm", again without a mention of Velepromet.²⁸ Similarly, the Brief describes the intent of the Accused for the crime of persecution only in respect of "the Croats and other non-Serbs taken from the Vukovar Hospital and detained in the JNA barracks and the Ovčara farm",

²⁴ Indictment, para 46.

²⁵ Indictment, para 47.

²⁶ Brief, para 205.

²⁷ Brief, para 205.

there being no reference to Velepomet.²⁹ The section of the Brief concerning the criminal responsibility of the Accused under Article 7(1) of the Statute provides a further indication of the intended scope of the charges. The common plan which a plurality of persons comprising the three Accused are alleged to have endorsed, according to the Brief, was “to persecute and kill the Croats and other non-Serbs taken from Vukovar Hospital ... to the Ovčara farm on the 20th of November 1991”.³⁰ This continuous absence of references to Velepomet in the Brief does not support the position now taken by the Prosecution that the events at Velepomet were themselves alleged within the charge of persecution.

17. The Prosecution’s opening statement is of further relevance. The Prosecution did describe acts of mistreatment allegedly committed at the Velepomet facility.³¹ However, it also limited the group of victims of all the crimes charged in the Indictment to “more than 260 Croat and non-Serb civilians taken from the Vukovar Hospital on the 19th and 20th November”.³² This is, again, consistent with the Brief in that “the crimes charged in this indictment all relate” to those victims who were killed at the Ovčara farm.³³ However, because of the reference to 19 November, it cannot be ruled out on this basis alone that this number may also have included persons who were allegedly mistreated at Velepomet prior to being killed at the Ovčara farm. There is no other support for this understanding, however, to be found elsewhere in the opening statement, the Brief and the Indictment.

4. Conclusions

18. The Indictment, the Prosecution’s Pre-Trial Brief and the Prosecution’s opening statement appear to have a common feature. The events that allegedly took place at the Velepomet facility are referred to in the context of the Accused’s knowledge of crimes being committed. As indicated earlier, the Indictment makes reference to Velepomet in connection with reports of misconduct that allegedly reached Mile Mrkšić and Veselin Šljivančanin.³⁴ One of the conclusions of the section of the Brief presenting the Velepomet events is that before the planned evacuation of the hospital, both Mile Mrkšić and Veselin Šljivančanin were made aware of mistreatment and killings of non-Serbs “at a facility in their zone of responsibility, by Serb Forces under their command”.³⁵ In its opening statement the Prosecution referred to what occurred at Velepomet and what Colonel Vujić

²⁸ Brief, para 205.

²⁹ Brief, para 213.

³⁰ Brief, para 227.

³¹ T 493-494.

³² T 474.

³³ T 474.

³⁴ Indictment, para 31.

³⁵ Brief, para 89.

did to protect people. It further posed the question “how others were not able to do so later on”.³⁶ Velepromet was mentioned as an example of threatening and aggressive conduct on the part of the local Serb TO towards the non-Serbs, conduct which was said to have been known to Veselin Šljivančanin.³⁷ It would appear from all this that the alleged acts of mistreatment and killing at the Velepromet facility were described in the Indictment only in order to demonstrate the Accused’s knowledge of instances of abuse similar to those that are said to have occurred at the JNA barracks and the Ovčara farm.

19. The Prosecution has already called several witnesses who gave evidence about the events that allegedly took place at Velepromet. Part of the testimony of Colonel Vujić directly related to the issue whether “reports reached Mile Mrkšić and Veselin Šljivančanin that certain TO, volunteer and paramilitary soldiers were torturing and killing non-Serb prisoners being held at the Velepromet”.³⁸ Colonel Vujić was also asked questions on the alleged mistreatment of prisoners at Velepromet. Josip Čović, Emil Cakelić, Vilim Karlović, and witnesses P007, P031 and P032, were examined on the conditions of detention, instances of mistreatment and killings that allegedly occurred at Velepromet. The Defence cross-examined those witnesses on those matters. The Trial Chamber accepts that evidence has been heard which went beyond the specific issue of the Accused being put on notice of prior crimes. However, in the Chamber’s view, evidence about the events themselves may be materially relevant to the question whether one or more Accused was cognisant of those events. Accordingly, the fact that the Defence cross-examined witnesses on the Velepromet events, even when those witnesses gave no evidence relating to the Accused’s knowledge thereof, cannot be regarded as constituting in some way an indirect acceptance on the part of the Defence that the Accused are charged in Count 1 with the crimes allegedly committed at Velepromet.

20. As discussed earlier, paras 40 to 42 of the Indictment, even if read in isolation, do not provide an adequate or unequivocal indication of the scope of Count 1. On its own, the Indictment may not necessarily exclude the events at Velepromet, except for the alleged killings, from the charge of persecution under Count 1, although their exclusion is the apparent effect. However, in light of the Brief, it is not apparent that the Indictment was intended to be interpreted so broadly. On the contrary, the apparent effect of the Brief is to exclude Velepromet. For the reasons given, the natural and appropriate way of understanding the Indictment is, in the Chamber’s view, that which does not include the crimes allegedly committed at Velepromet among the underlying acts of persecution, but puts them solely in the context of the Accused’s knowledge. The Trial Chamber

³⁶ T 496.

³⁷ T 509.


³⁸ Indictment, para 31.

reiterates that the Accused have the right to be informed “clearly”³⁹ of the charges against them. Given the consistent references to the Velepomet events only in connection with the Accused’s knowledge, it should not be required of the Accused that they should have understood those references as charging events at Velepomet as part of the conduct relied on in support of the charge of persecution. Indeed, the comprehensive analysis the Chamber has undertaken to interpret the charge under this count in itself underscores the lack of clarity, which the Indictment expresses in this respect.

5. Disposition

21. In view of the foregoing, the Trial Chamber **CONCLUDES** that the Indictment is not adequately framed to charge the Velepomet events as forming part of the persecutions charged in Count 1, and further that the context in which the Velepomet events are mentioned in the Indictment is that of the Accused being aware of crimes allegedly committed, and none other.

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



Judge Kevin Parker
Presiding

Dated this nineteenth day of May 2006
At The Hague
The Netherlands

[Seal of the Tribunal]

³⁹ See *supra* para 6.