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UNITED
NATIONS

International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991	Case No.	IT-05-88-PT
	Date:	31 May 2006
	Original:	English

IN TRIAL CHAMBER II

Before: **Judge Carmel Agius, Presiding**
Judge Kevin Parker
Judge O-Gon Kwon

Registrar: **Mr. Hans Holthuis**

Decision of: **31 May 2006**

PROSECUTOR

v.

VUJADIN POPOVIĆ
LJUBIŠA BEARA
DRAGO NIKOLIĆ
LJUBOMIR BOROVČANIN
ZDRAVKO TOLIMIR
RADIVOJE MILETIĆ
MILAN GVERO
VINKO PANDUREVIĆ
MILORAD TRBIĆ

DECISION ON MOTIONS CHALLENGING THE INDICTMENT PURSUANT TO RULE 72 OF THE RULES

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Peter McCloskey

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Zoran Živanović for Vujadin Popović
John Ostojić and Christopher Meek for Ljubiša Beara
Jelena Nikolić and Stephane Bourgon for Drago Nikolić
Aleksandar Lazarević and Miodrag Stojanović for Ljubomir Borovčanin
Natacha Fauveau Ivanović for Radivoje Miletić
Dragan Krgović for Milan Gvero
Peter Haynes and Đorđe Sarapa for Vinko Pandurević
Colleen Rohan and Vesna Janjić for Milorad Trbić

TRIAL CHAMBER II 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") is seised of seven preliminary motions alleging defects in the form of the Consolidated Amended Indictment, dated 28 June 2005 ("Indictment"), namely: the "Defence Motion on Behalf of Drago Nikolić Alleging Defects in the Form of the Consolidated Amended Indictment", filed on 29 December 2005 ("Nikolić Motion"); "General Gvero's Preliminary Motion Challenging Jurisdiction: Indirect Co-Perpetration", filed on 30 December 2005 ("Gvero Motion"); "Vinko Pandurević's Preliminary Motion on the Form of the Consolidated Amended Indictment", filed on 5 January 2006 ("Pandurević Motion"); the "Motion of Vujadin Popović Objecting the Form of Consolidated Indictment", filed on 6 January 2006 ("Popović Motion"); "Defendant Milorad Trbić's Challenge to the Indictment Pursuant to Rule 72", filed on 8 January 2006 ("Trbić Motion"); the "Preliminary Motion of General Miletić Regarding Defects in the Form of the Indictment", filed on 9 January 2006 ("Miletić Motion"); and "Ljubomir Borovčanin's Defence Preliminary Motion on the Form of the Consolidated Amended Indictment", filed on 9 January 2006 ("Borovčanin Motion"). On 23 January 2006, the Office of the Prosecutor ("Prosecution") filed its "Consolidated Response to Defence Motions under Rule 72" ("Prosecution Response") with a proposed Amended Indictment attached as Annex A ("Annex A of the Prosecution Response"). On 30 January 2006, the Defence of Vinko Pandurević, Vujadin Popović, Drago Nikolić, Radivoje Miletić, Milan Gvero, and Milorad Trbić filed Replies to the Prosecution Response.[1]

1. In addition, on 22 March 2006, the Prosecution filed a "Motion to Amend the Indictment Relating to Ljubomir Borovčanin", in which it seeks leave to amend one paragraph in the Indictment ("Motion to Amend Paragraph 92 of the Indictment"). On 29 March 2006, the Prosecution filed a "Motion to Amend the Indictment Relating to the 22 March 2006 Appeals Chamber Judgement in the Case of *Stakić*" ("Motion to Amend the Indictment") with a proposed

[1] "Vinko Pandurević's Defence Request for leave to File Reply to the Prosecution's Consolidated Response to the Defence Motions under Rule 72", filed together with "Vinko Pandurević's Defence Reply to the Prosecution's Consolidated Response to the Defence Motions Under Rule 72" ("Pandurević Reply"); "Motion of Vujadin Popović for Leave to Reply to the Prosecution Consolidated Motion Responding to the Motion of Vujadin Popović Objecting the Form of Consolidated Indictment" ("Popović Reply"); "Defence Motion on Behalf of Drago Nikolić Seeking Leave to Reply and Reply to the Prosecution Consolidated Response to Defence Motions Under Rule 72" ("Nikolić Reply"); "Application for Leave to Reply and Reply by General Miletić to the Prosecution Response to the Defence Preliminary Motion" ("Miletić Reply"); "Reply Brief: General Gvero's Preliminary Motion Challenging Jurisdiction: Indirect Co-Perpetration" ("Gvero Reply"). "Defendant Milorad Trbić's Request for Leave to Reply to the Prosecution's Consolidated Response to Defence Motions under Rule 72" and an "Addendum to Defendant Milorad Trbić's Request for Leave to Reply to the Prosecution's Consolidated Response to Defence Motions under Rule 72", were filed on 25 and 27 January 2006. The Request was granted by the Pre-Trial Judge in the "Decision on Milorad Trbić's Request for Leave to Reply to the Prosecution's Consolidated Response to Defence Motions under Rule 72", issued on 27 January 2006. "Defendant Milorad Trbić's Reply to the Prosecution's Consolidated Response to Defence Motions under Rule 72" ("Trbić Reply") was filed on 30 January 2006.

Amended Indictment attached as Annex I ("Proposed Amended Indictment").[2] During the status conference of 4 April 2006, the Pre-Trial Judge issued an oral order in which he directed the parties, pursuant to Rules 50, 72, 126 *bis*, and 127 of the Rules of Procedure and Evidence of the Tribunal ("Rules"), to file any responses to the Motion to Amend the Indictment by 12 April 2006. The Pre-Trial Judge further directed the Defence of Ljubomir Borovčanin ("Borovčanin Defence") also to file any response to the Motion to Amend Paragraph 92 of the Indictment by 12 April 2006. The Prosecution was directed to file a consolidated reply to all responses, if any, by 19 April 2006.[3] The Borovčanin Defence filed a response to these two motions on 7 April 2006 ("Borovčanin Response").[4] On 11 and 12 April 2006, Responses to the Motion to Amend the Indictment were filed by the Defence of Radivoje Miletić, Drago Nikolić, Milorad Trbić, Milan Gvero, and Ljubomir Borovčanin.[5] The Prosecution filed a "Consolidated Reply to Defence Motions filed under Rule 72" on 19 April 2006 ("Prosecution Reply").[6]

I. BACKGROUND

2. On 10 June 2005, the Prosecution filed a motion seeking to join the six cases against the nine Accused in this case[7] into a single Consolidated Indictment ("Joinder Motion").[8] On 28 June 2005, the Prosecution requested to amend the Indictments against the nine Accused, proposing one Consolidated Amended Indictment ("Motion to Amend the Indictments Against the Nine

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[2] The Proposed Amended Indictment only reflects the amendments sought in the Motion to Amend the Indictment and does not reflect the amendments as proposed in Annex A of the Prosecution Response. *See* Motion to Amend the Indictment, para. 18.

[3] *Prosecutor v. Popović, Beara, Nikolić, Borovčanin, Tolimir, Miletić, Gvero, Pandurević, and Trbić* ("*Popović et al.*"), Case No. IT-05-88-PT, T. 85 (4 April 2006). The Trial Chamber notes in this respect the Borovčanin Defence "Motion for Extension of Time and for Leave to File a Consolidated Response to Prosecution's Motions to Amend Indictment", filed 31 March 2006. The Chamber recalls additionally that the order to the Prosecution to file a reply was made pursuant to Rule 126 *bis* of the Rules, and thus leave to reply has already been granted and need not be granted in the present Decision.

[4] The full title of this submission is "Borovčanin Defence Submission Regarding Prosecution's Motions to Amend the Indictment".

[5] "Reponse du General Miletić Relative a la Requete du Procureur aux fins de Modifications de l'Acte d'Accusation", filed 11 April 2006 ("Miletić Response"); "Defence Consolidated Response on behalf of Drago Nikolić to the Prosecution's Motions to Amend the Indictment dated 22 and 29 March 2006", filed 12 April 2006 ("Nikolić Response"); "Defendant Milorad Trbić's Challenge, Pursuant to Rule 72, to the Proposed Indictment Dated 29 March 2006, filed 12 April 2006" ("Trbić's Response"); "General Gvero's Preliminary Motion Challenging Jurisdiction: Joint Criminal Enterprise with Common Purpose", filed 12 April 2006 ("Gvero Response"); "Borovčanin Defence Notification on Joining 'General Gvero's Preliminary Motion Challenging Jurisdiction: Joint Criminal Enterprise with Common Purpose'", filed 12 April 2006 ("Second Borovčanin Response") .

[6] The Gvero Defence, Borovčanin Defence, and Trbić Defence filed what appear to be Sur-Replies to the Prosecution Reply. *See* "Reply Brief: General Gvero's Preliminary Motion Challenging Jurisdiction: Joint Criminal Enterprise with Common Purpose", filed 24 April 2006; "Borovčanin Defence Notification on Joining 'Reply Brief: General Gvero's Preliminary Motion Challenging Jurisdiction: Joint Criminal Enterprise with Common Purpose'", filed 26 April 2006; and "Defendant Milorad Trbić's Reply to the Prosecution's 'Consolidated Reply to Defence Motions under Rule 72'", filed 26 April 2006. The Trial Chamber has considered the arguments set forth in these Sur-Replies, and grants leave to file them as indicated in the Disposition to this Decision.

[7] *Prosecutor v. Popović*, Case No. IT-02-57-PT; *Prosecutor v. Beara*, Case No. IT-02-58-PT; *Prosecutor v. Nikolić*, Case No. IT-02-63-PT; *Prosecutor v. Borovčanin*, Case No. IT-02-64-PT; *Prosecutor v. Tolimir, Miletić, and Gvero*, Case No. IT-04-80-PT; *Prosecutor v. Pandurević and Trbić*, Case No. IT-05-86-PT.

[8] The full title of this submission is "Prosecution's Motion for Joinder of Accused".

Accused").[9] On 15 July 2005, the Prosecution filed a "Corrigendum to Prosecution's Consolidated Amended Indictment" ("Corrigendum"). The Joinder Motion was granted on 21 September 2005.[10] The joined case, *Prosecutor v. Popović, Beara, Nikolić, Borovčanin, Tolimir, Miletić, Gvero, Pandurević, and Trbić*, Case No. IT-05-88-PT, was assigned to Trial Chamber II on 26 September 2005.[11] The Defence of Vinko Pandurević ("Pandurević Defence") and the Defence of Radivoje Miletić ("Miletić Defence") filed separate appeals against the Joinder Decision on 11 and 13 October 2005;[12] these appeals were dismissed by the Appeals Chamber on 24 and 27 January 2006, respectively.[13]

3. Pursuant to the "Order on the Consolidated Amended Indictment" of 31 October 2005, the Prosecution filed the Consolidated Amended Indictment under a single case number, Case No. IT-05-88-PT, on 11 November 2005. On 7 December 2005, the Trial Chamber ordered the Accused to file any preliminary motions against the form of the Indictment by no later than 9 January 2006.[14]

II. GENERAL PLEADING PRINCIPLES

4. Article 18(4) of the Statute of the Tribunal ("Statute") and Rule 47(C) of the Rules provide that an indictment shall contain a concise statement of the facts of the case and the crimes with which the accused is charged under the Statute. The provisions should be interpreted together with the rights of the accused set out in Article 21(2) and, in particular, Article 21(4)(a) and (b) of the Statute, which entitle the accused to be informed of the nature and cause of the charges against him in a language he understands, and to have adequate time and facilities for the preparation of his defence. These provisions translate into an obligation on the part of the Prosecution to plead the

[9] The full title of this submission is "Prosecution's Motion for Amendments to the Indictments".

[10] *Popović et al.*, Decision on Motion for Joinder, 21 September 2005 ("Joinder Decision"), para. 36. On 29 June 2005, the President of the Tribunal appointed Judges Patrick Robinson, Carmel Agius, and Liu Daqun to constitute a Trial Chamber for the purpose of determining the Joinder Motion. *See Prosecutor v. Popović*, Case No. IT-02-57-PT, Order Referring the Joinder Motion, 29 June 2005, p. 2; *Prosecutor v. Beara*, Case No. IT-02-58-PT, Order Referring the Joinder Motion, 29 June 2005, p. 2; *Prosecutor v. Nikolić*, Case No. IT-02-63-PT, Order Referring the Joinder Motion, 29 June 2005, p. 2; *Prosecutor v. Borovčanin*, Case No. IT-02-64-PT, Order Referring the Joinder Motion, 29 June 2005, p. 2; *Prosecutor v. Tolimir, Miletić, and Gvero* ("*Tolimir et al.*"), Case No. IT-04-80-PT, Order Referring the Joinder Motion, 29 June 2005, p. 2; *Prosecutor v. Pandurević and Trbić* ("*Pandurević and Trbić*"), Case No. IT-05-86-PT, Order Referring the Joinder Motion, 29 June 2005, p. 2.

[11] *Popović et al.*, Order Assigning a Case to a Trial Chamber, 26 September 2005, p. 2. As of the date of the present Decision, Zdravko Tolimir has not yet been rendered into the custody of the Tribunal.

[12] These submissions were "Vinko Pandurević's Defence Interlocutory Appeal Against the Trial Chamber's Decision on Motion for Joinder", filed on 11 October 2005, and Radivoje Miletić's "Appel contre la Décision relative a la junction d'instances en date 21 septembre 2005", filed on 13 October 2005. The respective requests for certification to appeal the Joinder Decision were granted on 6 October 2005. *See Pandurević and Trbić*, Decision on Motion for Certification of Joinder Decision for Interlocutory Appeal, 6 October 2005, para. 14; *Tolimir et al.*, Decision on Motion for Certification of Joinder Decision for Interlocutory Appeal, 6 October 2005, para. 14.

[13] *Prosecutor v. Pandurević and Trbić*, Case No. IT-05-86-AR73.1, Decision on Vinko Pandurević's Interlocutory Appeal Against the Trial Chamber's Decision on Joinder of Accused, 24 January 2006, para. 28; *Prosecutor v. Tolimir, Miletić, and Gvero*, Case No. IT-04-80-AR73.1, Decision on Radivoje Miletić's Interlocutory Appeal against the Trial Chamber's Decision on Joinder of Accused, 27 January 2006, para. 30.

material facts underpinning the charges with enough detail to inform the accused clearly of the charges against him so that he may prepare his defence.[15]

5. The materiality of a particular fact depends on the nature of the Prosecution case and the alleged criminal conduct with which the accused is charged. The materiality of facts such as the identity of the victims, the time and place of the events alleged in the indictment and the description of those events depends upon the proximity of the accused to those events and, therefore, the form of individual responsibility with which the accused is charged. It has been established in the jurisprudence of the Tribunal that the precise details to be pleaded as material facts are the acts of the accused himself, not the acts of those persons for whose acts he is alleged to be responsible.[16] Furthermore, where the scale of the crimes renders it impractical to require a high degree of specificity regarding, for example, the identity of the victims, the Prosecution does not need to identify every victim in the indictment in order to meet its obligation of specifying the material facts of the case.[17] The Trial Chamber will now address in detail the submissions of the parties.

III. DISCUSSION OF ALLEGED DEFECTS

A. Pleading of "Direct and/or Indirect Co-Perpetration", "JCE with Agreement" and "JCE with Common Purpose"

1. Pleading of "Direct and/or Indirect Co-Perpetration"

6. The Indictment pleads the term "committed" under Article 7(1) of the Statute to include "two forms of Co-Perpetration", namely JCE and "Direct and/or Indirect Co-Perpetration".[18] "Direct and/or Indirect Co-Perpetration" is defined as not requiring membership in a criminal enterprise or plan, nor an agreement. It is alleged that under "Direct and/or Indirect Co-Perpetration", each Accused is responsible as a co-perpetrator for his participation in the crimes charged, based on his own acts, whether individually or jointly with others, in participating knowingly, with criminal intent, directly and/or indirectly, with or without an agreement, through or by way of his subordinates or other persons, in the commission of the crimes charged, including,

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[14] *Popović et al.*, Further Order on the Consolidated Amended Indictment, 7 December 2005, p. 2. *See also Popović et al.*, Order on the Consolidated Amended Indictment, 31 October 2005 ("Order on the Consolidated Amended Indictment").
[15] *Prosecutor v. Blaškić*, Case No. IT-95-14-A, Judgement, 29 July 2004 ("*Blaškić* Appeal Judgement"), para. 209 (citing *Prosecutor v. Kupreškić, Kupreškić, Kupreškić, Josipović, and Šantić*, Case No. IT-95-16-A, Judgement, 23 October 2001 ("*Kupreškić et al.* Appeal Judgement"), para. 88).
[16] *Blaškić* Appeal Judgement, *supra* note 15, para. 210.
[17] *Kupreškić et al.* Appeal Judgement, *supra* note 15, paras. 89–90.
[18] *See* Indictment, para. 88.

inter alia, communicating, organising, co-ordinating, facilitating, or providing supervision or failing to act in furtherance of the crimes charged.[19]

7. The Indictment further pleads that both forms of liability identify the same set of facts—that is, "the criminal endeavour to force the Muslim population from the Srebrenica and Žepa enclaves and murder all the able bodied men captured from the Srebrenica enclave".[20] The Indictment also states that the term "operation" is used in conjunction with "Direct and/or Indirect Co-Perpetration" to identify the facts upon which liability under "Direct and/or Indirect Co-Perpetration" is based. It is alleged that "[JCE] and Operation are identified separately in this Indictment because the [JCE] necessarily includes membership in a criminal enterprise and agreement, whereas the facts of the Operation can be viewed without a criminal enterprise and agreement."[21]

8. In their Motions challenging the form of the Indictment, the respective Accused objected to "Direct and/or Indirect Co-Perpetration" as pleaded in the Indictment, arguing that no such form of liability exists in the Statute or in customary international law.[22]

2. Motion to Amend the Indictment

9. In its Motion to Amend the Indictment, filed on 29 March 2006, the Prosecution requests to amend the Indictment "in light of the fact that the *Stakić* Appeal Judgement has struck down a form of co-perpetratorship set out by the *Stakić* Trial Judgement which the Prosecution had relied upon in its original Indictment."[23] The Prosecution seeks to withdraw the pleading of "Direct/Indirect Co-Perpetratorship" and to amend the language in paragraphs 88, 89 and 90 in the Indictment in order to clarify the two forms of participation pursuant to which the Accused are said to be liable.[24]

10. The Prosecution submits that the *Stakić* Appeal Judgement clarifies the holding of the *Tadić* Appeal Judgement that the common requirements for all three categories of JCE liability are: (1) a plurality of persons, (2) who participate in, (3) a common purpose which amounts to or involves the commission of a crime provided for in the Statute. The Prosecution further states that as to the common-purpose requirement, the *Stakić* Appeal Judgement confirms the holding of the *Tadić* Appeals Chamber that "there is no need for this purpose to have been previously arranged or formulated ... [as] it may materialise extemporaneously and be inferred from the facts."[25]

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[19] *Ibid.*, para. 88.2.
[20] *Ibid.*, para. 89.
[21] *Ibid.*
[22] For the submissions of the Accused, see the Gvero Motion and the Gvero Reply, which extensively address this issue.
[23] Motion to Amend the Indictment, para. 3.
[24] *Ibid.*
[25] *Ibid.*, para. 4 (referring to *Prosecutor v. Stakić*, Case No. IT-97-24-A, Judgement, 22 March 2006 ("*Stakić* Appeal Judgement"), para. 64).

11. Basing its proposal on these conclusions of the *Stakić* Appeals Chamber, the Prosecution now suggests to amend the Indictment to plead two separate forms of JCE liability: (1) "JCE with Agreement", which ostensibly requires an agreement, as provided for previously in paragraph 88.1 of the Indictment under the name "JCE"; and (2) "JCE with Common Purpose", which does not require an agreement, as provided for previously in paragraph 88.2 of the Indictment under the name "Direct and/or Indirect Co-Perpetration".[26]

12. All Defence Responses argue that "JCE with Common Purpose" as pleaded in the Proposed Amended Indictment is not a form of liability recognised under customary international law or in the Statute of the Tribunal.[27] They argue that the Prosecution has incorrectly interpreted the statement of the *Stakić* Appeal Judgement, namely that there is no need for the common purpose to have been previously arranged or formulated, as to mean that no agreement is necessary.[28] The Defence of Milan Gvero ("Gvero Defence") argues that no form of liability exists in the Statute or in customary international law which would impose liability on an accused as a principal for acts of a person with whom he has no agreement.[29] The Miletić Defence submits that the Prosecution continues to confuse participation in a JCE and co-perpetration, and refers in this respect to the last sentence of paragraph 88 of the Proposed Amended Indictment, where it is stated that "the term 'committed' as it is used herein, includes two forms of participation in a [JCE] or Co-Perpetration".[30] The Gvero Defence submits that there is no substantial difference between "indirect co-perpetration" as rejected in the *Stakić* Appeal Judgement and "JCE with Common Purpose". It therefore requests that "JCE with Common Purpose" be stricken from the Proposed Amended Indictment.[31] The Miletić Defence further submits that the definition of "JCE with Common Purpose" provided in the Proposed Amended Indictment does not satisfy the JCE requirement of a "plurality of persons" because the Prosecution "is assuming that this form of responsibility can be applied to the acts committed individually."[32]

13. The Defence of Milorad Trbić ("Trbić Defence") further argues that "the term 'operation', used in conjunction with [JCE] with Common Purpose, also does not constitute a recognised form of criminal liability under the Statute."[33]

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[26] Motion to Amend the Indictment, para. 5.
[27] See, in particular, Miletić Response, para. 17; Trbić Response, para. 15; Nikolić Response, para. 12.
[28] Miletić Response, para. 23; Trbić Response, paras. 19, 23, 25.
[29] Gvero Response, paras. 8, 17–29.
[30] Miletić Response, para. 20.
[31] Gvero Response, para. 7.
[32] Miletić Response, para. 22 (referring to paragraph 88.2 of the Proposed Amended Indictment, which alleges that "each accused is responsible as a co perpetrator for his participation in the crimes charged, based on his own acts, whether individually or jointly with others").
[33] Trbić Response, para. 15.

14. In the context of challenging the Prosecution's pleading of a JCE not requiring an agreement, the Trbić Defence also objects to the Accused's liability under the first category of JCE for the alleged killing of six Muslim men described in paragraph 30.16 of the Indictment; and his liability under the third category of JCE for the alleged "opportunistic" killings described in paragraph 31 of the Indictment. Its objection is based on the argument that these crimes were allegedly committed by individuals who were not participants in the JCEs.[34] The Trbić Defence argues that the physical perpetrators of the crimes at issue must be participants in the JCE. It submits that the third category of JCE "which allows for liability for entirely unplanned acts which are the natural and probable consequences of the [JCE], however, requires that such unplanned acts be committed by *a member of the alleged criminal enterprise*."[35] It further submits that "proof of the existence of an agreement is also pre-requisite to having any evidentiary basis whatsoever upon which to assess whether, under JCE III, individual JCE participants can be found guilty for the unplanned crimes of other JCE participants, since liability for such crimes can be found *only* if the crimes were foreseeable *and* the particular accused, personally and willingly, took the risk that such crimes might occur."[36]

15. In its Reply, the Prosecution responds that "JCE with Common Purpose" is a valid form of liability—that is, that a "common purpose" or "understanding", but not necessarily an "agreement", is sufficient to prove commission through a JCE under Article 7(1) of the Statute.[37] The Prosecution argues that the *Stakić* Appeals Chamber clarified the requirements of JCE without finding or setting forth the factual basis for any "agreement" among the participants in the JCE, or analysing whether the physical perpetrators of the crimes were parties to any agreement.[38] It submits that it is clear that the *Stakić* Appeals Chamber did not view the term "common purpose" as synonymous with "agreement".[39]

16. The Trial Chamber notes that the *Stakić* Appeals Chamber held that

> [the *Stakić* Trial] Chamber erred in conducting its analysis of the responsibility of the Appellant within the framework of 'co-perpetratorship'. This mode of liability, as defined and applied by the Trial Chamber, does not have support in customary international law or in the settled jurisprudence of this Tribunal. By way of contrast, [JCE] is a mode of liability which is 'firmly established in customary international law' and is routinely applied in the Tribunal's jurisprudence.[40]

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[34] Trbić Motion, paras. 15–28 (see, in particular, para. 27); Trbić Response, paras. 27–29.
[35] Trbić Motion, paras. 24–26 (citing *Prosecutor v. Brđanin*, Case No. IT-99-36-T, Judgement, 1 September 2004 ("*Brđanin* Trial Judgement"), para. 344 and *Prosecutor v. Tadić*, Case No. IT-94-I-A, Judgement, 15 July 1999 ("*Tadić* Appeal Judgement"), para. 220. *See also* Trbić Reply, paras. 12–22.
[36] Trbić Response, para. 24. *See also* Gvero Response, para. 14.
[37] Prosecution Reply, para. 3.
[38] *Ibid.*, paras. 5–6.
[39] *Ibid.*, para. 6.
[40] *Stakić* Appeal Judgement, *supra* note 25, para. 62.

The *Stakić* Appeals Chamber concluded that "it appears that the Trial Chamber erred in employing a mode of liability which is not valid law within the jurisdiction of this Tribunal."[41]

17. In the wake of the *Stakić* Appeal Judgement, the Prosecution seeks to amend the Indictment in order to replace its previous pleading of JCE and "Direct and/or Indirect Co-Perpetration" with two forms of JCE liability: "JCE with Agreement" and "JCE with Common Purpose". Accordingly, the Trial Chamber will not engage in any further examination as to the pleading of "Direct/Indirect Co-Perpetration" in the Indictment.

18. The Trial Chamber will now address the question of whether the Prosecution should be allowed to plead the two purportedly different forms of JCE. In this respect, the Trial Chamber considers that the issue of whether JCE requires an "agreement" consists of two questions: (1) whether JCE requires an agreement among the participants in the JCE in general; and (2) whether JCE requires an agreement between the physical perpetrator and the Accused who is charged as a participant in the JCE—that is, whether the physical perpetrator has to be a participant in the JCE.

19. It is settled jurisprudence of the Tribunal that all three categories of JCE require (1) a plurality of persons; (2) the existence of a common plan, design or purpose that amounts to or involves the commission of a crime provided for in the Statute; and (3) the participation of the accused in the common plan involving the perpetration of one of the crimes provided for in the Statute.[42] The jurisprudence has also established that "the accused need merely have participated in the common plan, design, or purpose at the core of the JCE, and he need not have performed any part of the *actus reus* of the perpetrated crime."[43]

20. The Prosecution submits that there is a difference between "agreement" and "common purpose".[44] The Prosecution seems also to base its allegation that JCE does not require an "agreement" on the Appeals Chamber's jurisprudence that there is no need for the common purpose under JCE to have been previously arranged or formulated, and that it may materialise extemporaneously and be inferred from the facts.[45] In the Trial Chamber's opinion, it cannot be inferred from this jurisprudence that an "agreement" is not required. This holding of the Appeals

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[41] *Ibid.*
[42] *Tadić* Appeal Judgement, *supra* note 35, para. 227; *Stakić* Appeal Judgement, *supra* note 25, para. 64.
[43] *Prosecutor v. Milutinović, Šainović, Ojdanić, Pavković, Lazarević, Đorđević, and Lukić*, Case No. IT-05-87-PT, Decision on Ojdanić's Motion Challenging Jurisdiction: Indirect Co-Perpetration, 22 March 2006 ("*Milutinović et al.* Pre-Trial Decision"), para. 22 (citing, among other jurisprudence, *Prosecutor v. Kvočka, Radić, Žigić, and Prcać*, Case No. IT-98-30/1-A, Judgement, 28 February 2005 ("*Kvočka et al.* Appeal Judgement"), para. 99; *Prosecutor v. Vasiljević*, Case No. IT-98-32-A, Judgement, 25 February 2004 ("*Vasiljević* Appeal Judgement"), paras. 100, 119; and *Tadić* Appeal Judgement, *supra* note 35, paras. 196, 227).
[44] Prosecution Reply, para. 15.
[45] Motion to Amend the Indictment, para. 4 (referring to *Stakić* Appeal Judgement, *supra* note 25, para. 64, which confirms *Tadić* Appeal Judgement, *supra* note 35, para. 227).

Chamber only clarifies that the common purpose can develop in the specific circumstances of the case, does not have to be stated expressly, and can be established by circumstantial evidence. The Trial Chamber holds that the Prosecution has not provided any basis for its submission that there is a difference between "agreement" and "common purpose" in the context of JCE. On the contrary, the Trial Chamber holds that "common purpose" means that there is some form of "agreement" between the participants in the JCE, as there can be no "common purpose" among individuals acting in concert without some kind of agreement.[46] The Trial Chamber therefore concludes that JCE, at least in the first and third categories,[47] requires some form of agreement, express or implied, among the participants in the JCE.[48]

21. As to the question of whether JCE requires that the physical perpetrator has an agreement with the accused who is charged as a participant in the JCE, and thus whether the physical perpetrator has to be a participant in the JCE himself, the Trial Chamber endorses, by majority,[49] the holding of the Trial Chamber in the *Milutinović* decision on indirect co-perpetration.[50] In that decision the Trial Chamber held that this question "does not raise the issue of the Tribunal's jurisdiction over the activities of a JCE, but instead relates to the contours of JCE responsibility."[51] Whether the physical perpetrator must be a participant in the JCE is therefore an issue to be addressed at trial.[52] Accordingly, in the present case it will have to be determined at trial whether, under the JCE doctrine, crimes committed by non-participants in the alleged JCEs can be attributed

[46] The Trial Chamber notes in this respect the *Tadić* Appeals Chamber's holding that "the common plan or purpose may ... be inferred from the fact that a plurality of persons acts in unison to put into effect a [JCE]". *Tadić* Appeal Judgement, *supra* note 35, para. 227.

[47] *See Kvočka et al.* Appeal Judgement, *supra* note 43, para. 118 (recalling that, "[in] the *Krnojelac* Appeal Judgement, the Appeals Chamber confirmed that the systemic form of joint criminal enterprise does not require proof of an agreement"); *ibid.*, para. 119 (dismissing the appellants' arguments that the second category of JCE requires proof of an agreement); *Prosecutor v. Krnojelac*, Case No. IT-97-25-A, Judgement, 17 September 2003 ("*Krnojelac* Appeal Judgement"), para. 97 (holding that the Trial Chamber erred by requiring proof of an agreement between Krnojelac and the guards and soldiers at his prison in order to hold him liable for their crimes by virtue of his participation in a second-category JCE to persecute non-Serb detainees).

[48] *See Prosecutor v. Blagojević and Jokić*, Case No. IT-02-60-T, Judgement, 17 January 2005, para. 699 ("The participation of two or more persons in the commission of a particular crime may itself establish an unspoken understanding or arrangement amounting to an agreement formed between them then and there to commit that particular criminal act."); *Prosecutor v. Simić, Tadić, and Zarić*, Case No. IT-95-9-T, Judgement, 17 October 2003 ("*Simić et al.* Trial Judgement"), para. 158 (holding that, pursuant to the JCE doctrine, the common plan, design, or purpose must take the form of "[a]n arrangement or understanding amounting to an agreement between two or more persons that a particular crime will be committed").

[49] Judge Agius agrees entirely with the holding in paragraph 22 of this Decision—that there is no basis in law for a distinct pleading of "JCE with Common Purpose" and "JCE with Agreement"—and with the Disposition in this respect. It is Judge Agius's position, however, that the question of whether the physical perpetrator must be a participant in the JCE should be decided at this stage of the proceedings, in order for the Accused to be able to adequately prepare their respective cases.

[50] *Milutinović et al.* Pre-Trial Decision, *supra* note 43, paras. 23, 42.

[51] *Ibid.*, para. 23.

[52] *Cf. Prosecutor v. Furundžija*, Case No. IT-95-17/1-T, Judgement, 10 December 1998 ("*Furundžija* Trial Judgement"), paras. 190–249 (Trial Judgement ascertaining the contours of aiding and abetting under Article 7(1) of the Statute); *Blaškić* Appeal Judgement, *supra* note 15, paras. 34–42 (Appeal Judgement ascertaining the contours of the mental element of "ordering" under Article 7(1)).

to the Accused charged with participation in those JCEs. This applies also to the alleged "opportunistic killings", with which the Accused are charged pursuant to the third category of JCE.

22. Accordingly, the Trial Chamber holds that there is no basis in law for a distinct pleading of "JCE with Common Purpose" and "JCE with Agreement". The Chamber therefore denies the Prosecution's Motion to Amend the Indictment in this respect. The Trial Chamber directs the Prosecution to strike out of the Indictment "Direct and/or Indirect Co-Perpetration", and to plead only participation in a JCE, leaving the contours of JCE responsibility to be determined at trial. For the same reason, the Trial Chamber rejects as premature the arguments raised in the Trbić Motion in this respect. As to the term "operation", the Trial Chamber recalls that the Indictment states that this term is used in conjunction with "Direct and/or Indirect Co-Perpetration" to identify the facts upon which liability under that purported form of responsibility is based.[53] The Trial Chamber therefore directs the Prosecution to harmonise the use of the terms "JCE" and "operation" in the Indictment with the deletion of "Direct and/or Indirect Co-Perpetration", and to delete the term "operation" where its use is no longer appropriate.

B. Cumulative and Alternative Charging

23. The Borovčanin Defence submits that "covering the same behaviour with various forms of criminal acts envisaged by the Statute is unfair and [a] legally non-sustainable principle."[54] The Defence of Vujadin Popović ("Popović Defence") argues that, as the alleged murder of the Bosnian Muslim men and boys is charged as an element of both genocide and crimes against humanity, the Indictment should inform the Accused why these acts are charged cumulatively and not alternatively.[55] It further alleges "confusion" because the same acts are used to charge the Accused with persecution and other crimes against humanity.[56] The Miletić Defence claims ambiguity because the Prosecution has pleaded individual responsibility by merely listing all forms of responsibility under Article 7(1) of the Statute.[57] The Prosecution responds that cumulative and alternative charging is allowed and that the Defence arguments should be rejected as premature.[58]

[53] *See supra* para. 7.
[54] Borovčanin Motion, para. 20.
[55] Popović Motion, para. 30.
[56] *Ibid.*, para. 30.
[57] Miletić Motion, para. 19.
[58] Prosecution Response, paras. 61–62.

24. The Trial Chamber notes that it is settled jurisprudence of the Tribunal that cumulative charging is permissible because it is impossible to determine which of the charges will be proven before the evidence has been presented.[59]

25. As to the pleading of all forms of liability under Article 7(1) of the Statute, the Trial Chamber observes that the nature of the alleged individual responsibility of an accused should not be ambiguous in the indictment.[60] However, the Prosecution is not required to choose between the different forms of responsibility under Article 7(1), but is instead entitled to plead all of them. In such a case the Prosecution has to plead the material facts relevant to each of the modes of liability alleged in the indictment so that the accused may effectively prepare his defence.[61] Likewise, if the accused is charged with the "commission" of a crime, it should be made clear in the indictment whether he is charged with physical commission or participation in a JCE, or both.[62]

26. In the present case, paragraph 88 of the Indictment alleges that the Accused "committed, planned, instigated, ordered and otherwise aided and abetted in the planning, preparation, and execution of these charged crimes, as set out in detail in this indictment".[63] It is further alleged that the term "committing" does include participation in a JCE. The acts and omissions ascribed to all of the Accused are described in paragraphs 26 to 84 of the Indictment. The Trial Chamber notes that the Indictment must be considered as a whole, to the extent that the pleading of different forms of individual criminal liability in the alternative is substantiated by the allegations made throughout the entire Indictment. The Trial Chamber is satisfied that the material facts to support each of those modes are adequately pleaded in the Indictment in order to allow the Accused to prepare their defence.

27. Accordingly, all Defence arguments objecting to cumulative and alternative charging in the Indictment are rejected.

C. Charging of Genocide and Aiding and Abetting Genocide under Article 4(3)(a)

28. The Defence of Drago Nikolić ("Nikolić Defence") opposes the "form of Count 1" in the Indictment where genocide is pleaded pursuant to Article 4(3)(a) of the Statute under all modes of liability including aiding and abetting pursuant to Article 7(1) of the Statute.[64] The Nikolić Defence

[59] *Prosecutor v. Kunarac, Kovač, and Vuković*, Judgement, Case No. IT-96-23 & IT-96-23/1-A, 12 June 2002, para. 167 (citing *Prosecutor v. Delalić, Mucić, Delić and Landžo*, Case No. IT-96-21-A, Judgement, 20 February 2001, para. 400).
[60] *Blaškić* Appeal Judgement, *supra* note 15, para. 226; *Krnojelac* Appeal Judgement, *supra* note 47, para. 138.
[61] *Kvočka et al.* Appeal Judgement, *supra* note 43, paras. 29, 41.
[62] *Krnojelac* Appeal Judgement, *supra* note 47, para. 138.
[63] Indictment, paras. 88, 90, 91. The Trial Chamber notes that, with regard to Ljubomir Borovčanin, it is not entirely clear whether he is charged with all modes of liability pursuant to Article 7(1) of the Statute with respect to Count 1 (genocide). *See infra* para. 98.
[64] Nikolić Motion, paras. 11–14.

argues that the Prosecution cannot plead both genocide and aiding and abetting genocide in the same count.[65] The Trial Chamber notes in this respect that in the original Indictment, Drago Nikolić was charged with genocide under Articles 4(3)(a) and 7(1) (Count 1 A) or, in the alternative, with complicity in genocide under Articles 4(3)(e) and 7(1) (Count 1 B).[66]

29. The Prosecution submits that it has withdrawn the charge of complicity in genocide against the Accused Drago Nikolić, Vujadin Popović and Ljubomir Borovčanin "in light of the *Krstić* Appeals Judgement ... in order to avoid redundancy in or ambiguity created by the provision on complicity in Article 4(3)(e) and the mode of liability of aiding and abetting in Article 7(1)."[67] The Prosecution further submits that while it believes that Drago Nikolić and Vujadin Popović should be convicted of committing genocide as members of a JCE, or conspiracy, to the extent that the Trial Chamber might consider the conduct of these Accused to be that of an accomplice, they are also charged as aiders and abettors.[68]

30. The *Krstić* Appeals Chamber found that the forms of responsibility enumerated in Article 7(1) should be read into Article 4(3), as Article 7(1) is the general provision for individual criminal responsibility that refers to all offences punishable under the Statute. Having thus held that a conviction for aiding and abetting genocide is permissible under the law of the Tribunal, and although Krstić had been charged with complicity in genocide under Article 4(3)(e), the Appeals Chamber found it more appropriate to characterise his responsibility as one of aiding and abetting genocide.[69]

31. Therefore, as to the question whether genocide and aiding and abetting genocide can both be pleaded in the same count, the Trial Chamber reiterates that there is an overlap between Article 7(1) and Article 4(3) of the Statute. The Chamber accordingly holds that the Prosecution is permitted to withdraw the count of complicity in genocide and instead charge the Accused as aiders and abettors of genocide.

D. Identity of Victims

32. Several motions allege a lack of specificity in relation to the number and/or identity of the victims. The Popović Defence argues that, although the Indictment alleges that over 7,000 men and boys were murdered, it only contains the names of 23 alleged victims and refers to various alleged

[65] *Ibid.*, para. 17.
[66] *See generally Prosecutor v. Nikolić*, Case No. IT-02-63-I, Indictment, 6 September 2002 ("*Nikolić* Original Indictment").
[67] Motion to Amend the Indictments Against the Nine Accused, para. 8.
[68] *Ibid.*, para. 5.
[69] *See Prosecutor v. Krstić*, Case No. IT-98-33-A, Judgement, 19 April 2004, paras. 138–139.

murders in different paragraphs of the Indictment that in total amount to 4,515 persons.[70] The Popović Defence argues that the Defence needs to be provided with details about a missing group of 2,500 persons.[71] It further submits that based on the supporting material many members of the Armed Forces of the Government of Bosnia and Herzegovina ("ABiH") were killed during their attempt to break through the Serb line and that the identity of the victims is important information in order to establish whether they were members of the army and whether they were killed during a military action.[72] The Miletić Defence argues that the Prosecution has not determined whether the victims of the crimes with which Radivoje Miletić is charged were civilians or soldiers, while a crime against humanity under Article 5 of the Statute requires that the crimes be directed against a civilian population.[73]

33. The Popović Defence and the Borovčanin Defence as such agree that the Prosecution does not need to specify every single victim that has been killed or expelled, but argue at the same time that as it is relevant information for the preparation of the Defence case, the Prosecution should name the victims if it is in a position to do so.[74] The Popović Defence further submits that the Prosecution should inform the Defence as to whether it considers the persons on the various lists of missing persons to be killed.[75]

34. The Prosecution responds that the identity of the victims is clear from the context of the Indictment and that any known names of the victims can be found in the public record of the two former cases relating to the events alleged in the Indictment, namely *Krstić* and *Blagojević and Jokić*.[76] It claims that in a "genocide case", where the destruction of a group or part of a group is alleged, it is irrelevant whether the group consisted of civilians or military individuals.[77] It further argues that there is no requirement in the jurisprudence of the Tribunal for "a complete and exhaustive list of victims in cases of mass killings".[78] Moreover, the Prosecution submits that it may provide further details to the Defence in its Pre-Trial Brief and in the disclosure process.[79] In its Reply, the Miletić Defence argues that Radivoje Miletić is not charged with mass killings, and requests that the identity of the victims of "opportunistic" killings be provided.[80] The Miletić Defence and the Trbić Defence submit additionally that the case law of the Tribunal requires the

[70] Popović Motion, paras. 22, 24.
[71] *Ibid.*, para. 26.
[72] *Ibid.*, paras. 22–23.
[73] Miletić Motion, paras. 55–57.
[74] Popović Motion, para. 22; Borovčanin Motion, para. 14. The Borovčanin Defence submits that the Prosecution should provide particulars—such as names, dates of birth, or initials—that could be attached to the Indictment. *Ibid.*
[75] Popović Motion, para. 22.
[76] *See Prosecutor v. Krstić*, Case No. IT-98-33; *Prosecutor v. Blagojević and Jokić*, Case No. IT-02-60.
[77] Prosecution Response, para. 50.
[78] *Ibid.*
[79] *Ibid.*
[80] Miletić Reply, para. 45.

Prosecution to identify the victims in the Indictment where their identity is known, and that the Accused cannot be required to check the records in other cases in this respect.[81]

35. The Trial Chamber reiterates the general pleading principle that the Prosecution is not required to identify every victim in the indictment where the scale of the crimes renders such a high degree of specificity impractical.[82] The Prosecution has identified when and where the alleged crimes were committed. The Trial Chamber notes in particular that the Indictment pleads the alleged forcible separation of more than 1,000 Bosnian Muslim men and boys from their families in Potočari on 12 and 13 July 1995, and the removal of the entire Bosnian Muslim population from the area of Potočari by forced bussing of the women and children to Bosnian Muslim-controlled territory, and by forced bussing of the separated men and boys to different detention sites mentioned in the Indictment. The Indictment also pleads that, between 12 and about 17 July 1995, approximately 6,000 Bosnian men and boys, who were trying to escape the Srebrenica enclave, were captured or surrendered, and were together with the men and boys who had been separated from their families in Potočari detained in several detention sites and executed. Many of the detention and execution sites are listed and a detailed description of the alleged organised systematic murder of the Bosnian Muslim men and boys is provided in paragraphs 30.1 to 31.4 of the Indictment. It further pleads that on 14 July 1995 the Bosnian Serb Army ("VRS") started to attack the Žepa enclave by shelling civilian areas, that the women and children were transported out of the enclave from 25 July 1995 onwards, and that the men from the Žepa enclave were forced to flee to Serbia by making life unbearable in the enclave.

36. The Trial Chamber considers that the amount of information provided in the Indictment, against the background of the large-scale character of the crimes committed with the alleged objective to remove the Bosnian Muslim population from the Srebrenica and Žepa enclaves, provides the Defence, in general, with sufficient detail about the victims of the alleged crimes.

37. Nevertheless, the Trial Chamber additionally recalls that, while the Appeals Chamber in *Kupreškić* held that an indictment need not identify each and every victim in cases where large numbers of victims are alleged, that Chamber also held that "since the identity of the victim is information that is valuable to the preparation of the defence case, if the Prosecution is in a position to name the victims, it should do so."[83] The Trial Chamber therefore orders the Prosecution to identify, in a schedule to the Indictment, the names of the victims where known or ascertainable, for

[81] *Ibid.*, para. 46; Trbić Reply, paras. 24–26.
[82] *Kupreškić et al.* Appeal Judgement, *supra* note 15, paras. 89–90.
[83] *Ibid.*, para. 90. *Accord Prosecutor v. Milutinović, Šainović, Ojdanić, Pavković, Lazarević, Đorđević, and Lukić*, Case No. IT-05-87-PT, Decision on Defence Motions Alleging Defects in the Form of the Proposed Amended Joinder Indictment, 22 March 2006, para. 16.

example, from the respective records of the *Krstić* and *Blagojević* cases, or from the relevant reports and ICRC documents disclosed to the Defence pursuant to Rule 65 *ter*(E)(iii) .[84]

E. Identity of Physical Perpetrators under Article 7(1)

38. The Miletić Defence, the Borovčanin Defence, and the Trbić Defence claim that expressions such as "VRS and/or MUP forces or soldiers" and "VRS and/or MUP individuals" are general and imprecise, and do not meet the requirements of precision as to the identity of the direct perpetrators.[85] It is argued that the Prosecution should also clarify whether it was both VRS and MUP ("Ministry of Interior") forces, VRS forces only, or MUP forces only that allegedly performed the crimes.[86] It is further claimed that, given the number and variety of the units alleged to have taken part in the events, the Prosecution should identify

> a) the unit(s) and/or other entities that formed a part of each of the above-cited categories, and to state under whose command they are alleged to have acted; b) names or initials or pseudonyms or approximate number of the persons involved, and to indicate the unit or units which they are said to have belonged to.[87]

39. The Prosecution responds that "the jurisprudence of the Tribunal allows indictments, particularly in leadership cases, to identify perpetrators by groups or categories"[88] and that, in a case charging the accused with mass executions and alleging a JCE on a large scale, the Prosecution is not obliged to identify in detail each perpetrator.[89] The Prosecution argues that it is sufficient to plead the participants in the crimes as VRS and MUP units and that where it is unknown whether the alleged criminal conduct was performed by either the VRS or the MUP, or both, this lack of knowledge is stated in the Indictment.[90]

40. The Trial Chamber notes that, in general, whether or not the identity of the direct perpetrators is a material fact that needs to be pleaded depends on the proximity of the accused to the crimes. The more remote the accused is from the alleged crimes, the more the identity of the physical perpetrator is a matter of evidence.[91] The Trial Chamber further notes that the identity of the physical perpetrators may be indicated by "category" or "group" when the accused is not

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[84] See Annex C of the "Prosecution's Filing of Pre-Trial Brief Pursuant to Rule 65*ter* and List of Exhibits Pursuant to Rule 65*ter*(E)([iii])", filed *confidentially* on 28 April 2006, referring to the respective documents as exhibits no. 565–571.
[85] Miletić Motion, para. 51; Borovčanin Motion, paras. 10–12; Trbić Motion, paras. 32–33.
[86] Borovčanin Motion, para. 12.
[87] *Ibid.*, para. 11.
[88] Prosecution Response, para. 51.
[89] *Ibid.*, para. 52.
[90] *Ibid.*, para. 53.
[91] *Brđanin* Trial Judgement, *supra* note 35, para. 346; *Simić et al.* Trial Judgement, *supra* note 48, para. 145; *Prosecutor v. Brđanin and Talić*, Case No. IT-99-36-PT, Decision on Form of Further Amended Indictment and Prosecution Application to Amend, 26 June 2001, para. 59.

charged with committing the crimes personally,[92] and if the Prosecution is not in a position to identify by name the direct perpetrators of the alleged crimes.[93] Nonetheless, in the Trial Chamber's view, where the Prosecution is in a position to identify physical perpetrators by name, it is obliged to do so.

41. The Indictment alleges that all Accused, with the possible exception of Ljubomir Borovčanin in respect of Count 1,[94] are individually responsible pursuant to Article 7(1) of the Statute for committing, planning, instigating, ordering, and otherwise aiding and abetting the crimes charged. It further charges them as participants in a JCE to forcibly remove the Bosnian Muslim population from the Srebrenica and Žepa enclaves and seven of the Accused—that is, all except for Radivoje Miletić and Milan Gvero—as participants in a JCE to murder the able-bodied Bosnian Muslim men of Srebrenica. It is alleged that all Accused were acting individually and in concert with others. The physical perpetrators of many of the crimes are only alleged to be VRS and MUP forces, defined as including units of the VRS Main Staff, the Drina Corps and special and regular municipal police of the RS Ministry of Interior as listed in Attachment A of the Indictment, which is a very general characterisation. The Trial Chamber notes however, that most of the charged crimes are alleged to have been committed in a short time period of around two weeks in July 1995 in the Srebrenica and Žepa enclaves. The time and places of the alleged expulsion and murders committed on a large scale are specified in the Indictment. Moreover, all Accused are charged for their role in planning, organising, co-ordinating, and facilitating the alleged crimes, mainly by overseeing acts carried out by others that formed part of the alleged expulsion and murder operation. Most of the Accused are alleged to be responsible as commanders at a high level for planning and organising the execution of a criminal operation of the described massive scale of alleged crimes.

42. The Trial Chamber therefore holds that the Indictment provides, in general, sufficient information about the various groups or forces of physical perpetrators to put the Accused on sufficient notice to be able to prepare their respective defence cases.

43. Moreover, the Chamber observes that in several instances the Indictment makes specific reference to certain forces that were under the command of a particular Accused. While further details about which forces were involved in the commission of the alleged crimes will no doubt be a key issue for determination at trial, the Trial Chamber orders the Prosecution to identify the

[92] *See, e.g., Prosecutor v. Martić*, Case No. IT-95-11-PT, Decision on Preliminary Motion Against the Amended Indictment, 2 June 2003, para. 31.
[93] *See Prosecutor v. Kvočka, Radić, Žigić, and Prcać*, Case No. IT-98-30/1-PT, Decision on Defence Preliminary Motions on the Form of the Indictment, 12 April 1999 ("*Kvočka et al.* Pre-Trial Decision"), para. 22; *Prosecutor v. Krnojelac*, Case No. IT-97-25-PT, Decision on the Defence Preliminary Motion on the Form of the Indictment, 24 February 1999, para. 46.

physical perpetrators of the charged crimes as specifically as possible, including by name where known.

F. Nature of Alleged Responsibility of the Accused

1. Participation in a JCE

44. Accused charged with participation in a JCE must be informed by the indictment of (i) the nature or purpose of the JCE; (ii) the period over which the enterprise is said to have existed; (iii) the identity of those engaged in the JCE, at least by reference to their category as a group; and (iv) the nature of participation of the accused in the JCE.[95]

(a) Purpose of the JCE

45. In this context, the Trial Chamber first notes that the submissions of the Prosecution were not always consistent as to the alleged number of JCEs in relation to the forced removal of the Bosnian Muslim population from the Srebrenica and Žepa enclaves. In its Motion to Amend the Indictments Against the Nine Accused, filed on 28 June 2005, the Prosecution alleged in Attachment A of the proposed Indictment that "the forced movement of the Muslim populations of Srebrenica and Žepa have been identified in this Indictment as two [JCEs]." On 15 July 2005, the Prosecution filed a Corrigendum, in which it submitted that Attachment A of the Indictment mistakenly refers to the forcible movement of the Bosnian Muslim population from the Srebrenica and Žepa enclaves as two JCEs. The Corrigendum submits that, as clearly indicated from the overall context, the Indictment alleges one JCE to forcibly remove the Bosnian Muslim population from the Srebrenica and Žepa enclaves and one JCE to kill the able-bodied men of Srebrenica.[96]

46. In its Motion to Amend the Indictment, filed on 29 March 2006, the Prosecution is now seeking this clarification to be reflected in Attachment A of the Indictment.[97] The Trial Chamber recalls that the Corrigendum was already submitted on 15 July 2005. The Chamber holds that paragraphs 88 to 91, read with the Indictment as a whole, plead one JCE to forcibly remove the Bosnian Muslim population from the two enclaves and one JCE to kill the Bosnian Muslim men of Srebrenica. The Trial Chamber therefore grants this Prosecution request, as it does not prejudice the Accused unfairly in their defence.

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[94] *See infra* para. 98.
[95] *Brdanin* Trial Judgement, *supra* note 35, para. 346; *Simić et al.* Trial Judgement, *supra* note 48, para. 145; *Prosecutor v. Krnojelac*, Case No. IT-97-25-PT, Decision on Form of Second Amended Indictment, 11 May 2000, para. 16.
[96] Corrigendum, para. 3.
[97] Motion to Amend the Indictment, para. 10.

47. The Miletić Defence argues that the Prosecution should unambiguously identify the JCE in which Radivoje Miletić is alleged to have participated.[98] The Trial Chamber holds that paragraphs 88 to 91, read together with the Indictment as a whole, clearly identify that Radivoje Miletić is charged as a participant in the JCE to forcibly remove the Bosnian Muslim population out of the Žepa and Srebrenica enclaves, and that he is charged as a participant in that JCE only.[99]

(b) Period over which the Enterprise is alleged to have existed

48. The Miletić Defence submits that the Indictment contains references to several JCEs without specifying the period in which they are said to have existed.[100] The Borovčanin Defence argues that the Indictment should indicate, for each Accused separately, the time period in which they allegedly participated in the JCE.[101] The Prosecution argues by responding to the Borovčanin Motion that the time frame of the JCE is stated in paragraphs 26 and 36 of the Indictment. It further submits that the dates of the criminal acts committed by the Accused in furtherance of the JCE are specified throughout the Indictment.[102]

49. The Trial Chamber recalls that the Indictment alleges two JCEs, namely one JCE to forcibly remove the Bosnian Muslim population from the Srebrenica and Žepa enclaves and one JCE to kill the able-bodied men of Srebrenica.[103] Paragraphs 24 to 28 address both JCEs together, as the two JCEs were closely interlinked. Paragraph 24 of the Indictment states that, following Radovan Karadžić's order of 8 March 1995 to remove the Muslim population from the Srebrenica and Žepa enclaves, the Srebrenica enclave was taken over on 11 and 12 July 1995 and the plan to remove the Muslim population from Srebrenica was implemented, along with the plan to murder all the able-bodied men of Srebrenica. Paragraph 25 of the Indictment alleges that, by 1 November 1995, the entire Bosnian Muslim population had either been removed or had fled from Srebrenica and Žepa, and that over 7,000 Muslim men and boys from Srebrenica had been murdered. The Trial Chamber further notes that paragraph 26 of the Indictment states that the time period during which seven of the nine Accused are said to have committed the alleged genocide, including the killing of the Bosnian Muslim men and the forced movement of the Bosnian Muslim population, was between 11 July and 1 November 1995. Moreover, the Trial Chamber notes that paragraph 27 of the Indictment alleges that, in the evening hours of 11 July and morning of 12 July—at the same time the plan to forcibly transport the Muslim population from Potočari was developed—Ratko Mladić and members of his staff developed the plan to murder the hundreds of able-bodied men identified from

[98] Miletić Motion, para. 29.
[99] The Trial Chamber notes that, while Radivoje Miletić is charged with murder, in relation to him murder is charged only as an "opportunistic" crime alleged to have been committed in the course of the forcible removal.
[100] Miletić Motion, paras. 28, 31.
[101] Borovčanin Motion, para. 20. *See also* Miletić Motion, paras. 58–60.
[102] Prosecution Response, para. 72.

the crowd of Muslims in Potočari. This paragraph further identifies the respective responsibilities of the seven Accused in relation to the execution of the plan to murder these men. In paragraph 28 it is alleged that on the afternoon of 12 July the plan to murder the able-bodied men of Srebrenica began to be carried out.

50. In relation specifically to the JCE to kill the Bosnian Muslim men, paragraph 36 explicitly deals with "the Conspiracy, Joint Criminal Enterprise and Operation to murder the able bodied Muslim men from Srebrenica". It states that, on or about 12 July 1995, this JCE was implemented, and further specifies that the initial plan was to execute around 1,000 Muslim men who had been separated in Potočari on 12 and 13 July, but that on 12 or 13 July this plan was broadened to include the summary execution of more than 6,000 men who were captured from the column of Bosnian Muslim men escaping the Srebrenica enclave. The plan is alleged to have extended in duration from 12 July through about 1 November 1995.

51. As to the JCE to forcibly remove the Bosnian Muslim population, paragraph 49 of the Indictment states that all nine Accused, together with other VRS and MUP officers and units and RS officials, were members of and knowingly participated in a JCE whose common purpose was to force the Muslim population out of the Srebrenica and Žepa enclaves to areas outside the control of the RS, from about 8 March 1995 through the end of August 1995.

52. The Trial Chamber holds that with the above cited allegations in the Indictment the Prosecution has pleaded with enough detail the time periods of the existence of the two alleged JCEs, namely that the JCE to forcibly remove the Bosnian Muslim population from the Srebrenica and Žepa enclaves existed from about 8 March 1995 until the end of August 1995; and that the JCE to kill the able-bodied men of Srebrenica existed from 11 July 1995 until 1 November 1995. Furthermore, the Trial Chamber observes that the respective paragraphs which describe the actions of each Accused in the JCE in which he is alleged to have participated provide sufficient information as to when the respective actions took place.[104] The submissions of the Miletić and Borovčanin Defence are therefore rejected.

(c) Nature of Participation by the Accused in the JCE

(i) Borovčanin and Nikolić Motion

53. The Borovčanin Defence argues that the Indictment "seems" to charge Ljubomir Borovčanin "for Žepa as well", but that these allegations are "vague" and "unsubstantiated". The

[103] *See supra* paras. 45–46.
[104] For example, in respect of Radivoje Miletić, see paragraphs 50, 51, and 75 of the Indictment; in respect of Ljubomir Borovčanin, see paragraphs 30.4, 61 to 63, and 81 of the Indictment.

Borovčanin Defence submits that "if the Prosecution's intention indeed is to charge Mr. Borovčanin with Žepa-related events, the Prosecution should be ordered to refer to his specific acts and to provide the basis for the assertions made."[105] The Nikolić Defence submits that the forcible removal of the Bosnian Muslim population from the Srebrenica enclave on the one hand, and Žepa enclave on the other, were not part of the same common purpose.[106] It further submits that there is no indication in the supporting material for any involvement of Drago Nikolić in the forced removal of the Bosnian Muslim population from the Žepa enclave. It concludes that Drago Nikolić must not be charged in relation to the alleged JCE linked to the Žepa enclave unless the Prosecution is able to plead with precision his involvement in these events.[107] The Prosecution responds that the removal of the Bosnian Muslim population from the Srebrenica and Žepa enclaves is charged as one JCE, and that whether this JCE should be separated into two distinct enterprises is not an appropriate challenge to the form of the indictment.[108] It also argues that, contrary to Drago Nikolić's contentions, the accused need not participate in every aspect of the JCE.[109] The Prosecution further responds in relation to Ljubomir Borovčanin that it is clear from the allegations in the Indictment that he is also charged with the crimes as they relate to Žepa.[110]

54. Earlier in these proceedings, the Prosecution sought to add the forcible removal of the Bosnian Muslim population from the Žepa enclave to the charges in the Indictment against, among others, Ljubomir Borovčanin and Drago Nikolić.[111] As far as these Accused argue that these allegations are unsubstantiated, the Trial Chamber notes that it has already found that, based on the supporting material, a *prima facie* case in relation to the proposed amendments has been established.[112] Proof of the allegation of the existence of one JCE to forcibly remove the Bosnian Muslim population from both the Srebrenica and the Žepa enclaves is a matter of evidence to be determined at trial.

55. The Accused submit that the Indictment charges them with crimes committed in relation to the Žepa enclave, although it does not allege that the two Accused performed any criminal acts in relation to that enclave. Both Accused are charged with all crimes within the common purpose of the alleged JCE in the Srebrenica and Žepa enclaves on the basis of the criminal acts which they allegedly performed in the Srebrenica enclave.[113] The jurisprudence of the Tribunal holds that liability for participation in a JCE requires the participation of the accused in the common purpose,

[105] Borovčanin Motion, para. 16.
[106] Nikolić Motion, paras. 37–39.
[107] *Ibid.*, paras. 40–46.
[108] Prosecution Response, paras. 66–67.
[109] *Ibid.*, para. 70.
[110] *Ibid.*, para. 97.
[111] *See* Motion to Amend the Indictments Against the Nine Accused, para. 20.
[112] Order on the Consolidated Amended Indictment, *supra* note 14, p. 2.

which does not need to involve the commission of a specific crime, but may take the form of assistance in, or contribution to, the execution of the common purpose.[114] Therefore, it is sufficient for a participant in a JCE to perform acts that in some way are directed to the furtherance of the common design.[115] As established above, the alleged common purpose was to force the Bosnian Muslim population out of the Srebrenica and Žepa enclaves to areas outside the control of the RS. Thus, acts performed in relation to the Srebrenica enclave could also have furthered the alleged common purpose. The Trial Chamber therefore concludes that, in order for the two Accused to contribute to the alleged JCE, it would not have been necessary for them to have performed any specific acts in relation to the Žepa enclave. Accordingly, the Indictment does not need to plead any such acts. The Trial Chamber reiterates that whether the removal of the Bosnian Muslim population from both enclaves can be considered as one JCE is a question to be determined at trial. The Trial Chamber therefore rejects the arguments of the Borovčanin Defence and the Nikolić Defence in this respect.

(ii) Miletić Motion

56. The Miletić Defence argues that the Prosecution has failed to indicate by which acts and conduct Radivoje Miletić contributed to the common plan and was linked with the crimes alleged.[116] In particular, the Miletić Defence argues that no paragraph in the Indictment *preceding* Counts 4 and 5, which charge Radivoje Miletić with murder, describe any act or omission which might be ascribed to him.[117] The Miletić Defence further claims that most of the paragraphs referred to in support of Counts 6, 7, and 8 of the Indictment do not describe acts which could be ascribed to Radivoje Miletić and would link him to the respective counts.[118] The Prosecution responds that a contextual reading of the Indictment makes Radivoje Miletić's conduct clear, and that it will in any event provide additional details concerning the Accused in its Pre-Trial Brief.[119]

57. As to the objection of the Miletić Defence in relation to Counts 4 and 5 (Murder), the Trial Chamber notes that paragraphs 49 to 51, 75, 83, 88 to 89, and 91 of the Indictment allege Radivoje Miletić's participation in the JCE to forcibly remove the Bosnian Muslim population out of the Srebrenica and Žepa enclaves. Paragraphs 50, 51, and 75 specify the conduct by which Radivoje Miletić allegedly participated in this JCE. Paragraph 31 describes the "opportunistic killings" for which Radivoje Miletić is charged in paragraph 83 under the third category of JCE, based on his

[113] In respect of Ljubomir Borovčanin, see paragraphs 61 to 63 of the Indictment; in respect of Drago Nikolić, see paragraphs 30.6, 30.14 to 30.15, and 32 of the Indictment.
[114] *Stakić* Appeal Judgement, *supra* note 25, para. 64; *Tadić* Appeal Judgement, *supra* note 35, para. 227.
[115] *Vasiljević* Appeal Judgement, *supra* note 43, para. 102.
[116] Miletić Motion, paras. 34–48.
[117] *Ibid.*, paras. 35–36.
[118] *Ibid.*, paras. 39, 42–47.
[119] Prosecution Response, para. 71.

conduct described in paragraphs 50, 51, and 75. Counts 4 and 5 refer to the conduct of the Accused specified in the *preceding* paragraphs that describe the murder operation and the "opportunistic killings". As Radivoje Miletić and Milan Gvero are not charged with the murder operation, their acts are not mentioned in the paragraphs preceding Counts 4 and 5. However, their acts in furtherance of the forced removal of the Bosnian Muslim population are pleaded in the paragraphs following Counts 4 and 5, describing the forcible removal of the Bosnian Muslim population. Thus, the Trial Chamber holds that, although Radivoje Miletić's and Milan Gvero's acts and conduct are not pleaded in paragraphs preceding Counts 4 and 5, both Accused are clearly put on notice in the Indictment of their alleged acts in furtherance of the JCE to forcibly remove the Bosnian Muslim population, on the basis of which they are charged with the "opportunistic killings". The Trial Chamber therefore rejects this challenge of the Miletić Defence.

58. The Trial Chamber also addresses here the argument made by the Miletić Defence, that paragraph 46 of the Indictment refers to paragraphs 30 and 31 as the factual basis for the crimes of murder, but that Radivoje Miletić is not mentioned in either of them.[120] Paragraph 46 states that "the crime of Murder was perpetrated, executed, and carried out by and through the means identified in paragraphs 30 to 31 of this Indictment." The Trial Chamber holds that it is clear from a reading of paragraphs 83, 88 to 89, and 91 that Radivoje Miletić is not charged as participant in the JCE to murder the able-bodied men. Therefore, the reference in paragraph 46 of the Indictment to paragraph 30, which provides details in relation to the murder operation, does not concern him. Paragraph 31 of the Indictment describes the alleged "opportunistic killings". The Trial Chamber considers that it is clear from a reading of paragraphs 83, 88 to 89, and 91 that Radivoje Miletić is charged for the alleged "opportunistic killings" as a foreseeable consequence of the JCE to forcibly remove the Bosnian Muslim population, and that he is alleged to have participated in this JCE. Paragraph 31 therefore concerns Radivoje Miletić, even though he does not need to be mentioned in that paragraph. This argument of the Miletić Defence is therefore rejected as well.

59. As to the objections of the Miletić Defence in relation to Counts 6 (Persecution), 7 (Forcible Transfer) and 8 (Deportation) of the Indictment, the Trial Chamber holds, first of all, that not all paragraphs referred to under each Count necessarily need to address or concern in particular the alleged criminal conduct of Radivoje Miletić, because the Counts charge not only him, but the other Accused as well. The Trial Chamber further holds that, while most of the paragraphs referred to describe all facts on which Counts 6, 7, and 8 of the Indictment are based, paragraphs 50, 51, and 75 describe the specific acts of Radivoje Miletić on which the Prosecution bases the charges against him in Counts 6, 7, and 8 of the Indictment. In this respect the Trial Chamber notes in particular that paragraph 50 of the Indictment alleges that Radivoje Miletić drafted the directive of 8 March

1995, in which Radovan Karadžić gave the order "to complete the physical separation of the Srebrenica and Žepa enclaves as soon as possible" and to "create an unbearable situation of total insecurity, with no hope of further survival or life for the inhabitants of Srebrenica and Žepa". It further notes that paragraph 51 alleges that Radivoje Miletić "played a central role in organizing and facilitating the effort to restrict aid and supplies to the Srebrenica and Žepa enclaves" in order to make life impossible for the Muslim population in the enclaves and thereby remove them. Finally, it notes that paragraph 75(c) alleges, *inter alia*, that Radivoje Miletić monitored the progress of the transfer of the civilians from the Srebrenica and Žepa enclaves and monitored the VRS efforts to clear Žepa of any remaining Muslims. The Trial Chamber holds that these allegations define Radivoje Miletić's contribution as to Counts 6, 7, and 8. Accordingly, the Trial Chamber rejects the arguments of the Miletić Defence in this respect.

2. Article 7(3) – Superior Responsibility

60. The Indictment charges Vinko Pandurević and Ljubomir Borovčanin pursuant to Article 7(3) of the Statute.

61. The Trial Chamber endorses the following holding of the *Blaškić* Appeals Chamber:

> [I]n a case where superior criminal responsibility pursuant to Article 7(3) of the Statute is alleged, the material facts which must be pleaded in the indictment are:
>
> (a) (i) that the accused is the superior of (ii) subordinates sufficiently identified, (iii) over whom he had effective control—in the sense of a material ability to prevent or punish criminal conduct—and (iv) for whose acts he is alleged to be responsible;
>
> (b) the conduct of the accused by which he may be found to (i) have known or had reason to know that the crimes were about to be committed or had been committed by his subordinates, and (ii) the related conduct of those others for whom he is alleged to be responsible. The facts relevant to the acts of those others for whose acts the accused is alleged to be responsible as a superior, although the Prosecution remains obliged to give all the particulars which it is able to give, will usually be stated with less precision, because the detail of those acts are often unknown, and because the acts themselves are often not very much in issue; and
>
> (c) the conduct of the accused by which he may be found to have failed to take the necessary and reasonable measures to prevent such acts or to punish the persons who committed them."[121]

(a) Vinko Pandurević

62. The Pandurević Defence claims that the Indictment does not sufficiently specify the persons for whose acts Vinko Pandurević is charged with responsibility pursuant to Article 7(3) of the Statute; does not mention any relevant connection between those persons and him; does not specify

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[120] Miletić Motion, para. 37.

[121] *Blaškić* Appeal Judgement, *supra* note 15, para. 218. *Accord Prosecutor v. Čermak and Markać*, Case No. IT-03-73-PT, Decision on Ivan Čermak and Mladen Markać's Motions on Form of Indictment, 8 March 2005, para. 10.

his "functional status"; and does not specify his "zone of responsibility". The Pandurević Defence further argues that the Indictment does not specify how he allegedly knew about the committed crimes.[122] The Prosecution responds that the facts alleged in the Indictment are sufficient to put Vinko Pandurević on notice of the case against him and his actions.[123]

63. As to Vinko Pandurević's alleged position of superior authority, the Indictment charges him as commander of the Zvornik Brigade of the Drina Corps, who was, "*inter alia*, responsible for planning and directing the activities of all the subordinate formations of his brigade, in accordance with the directives received from his higher command."[124] Most of the paragraphs in the Indictment describing the criminal conduct of units and members of the Zvornik Brigade allege that they were acting "under the command and *control*[125] of Vinko Pandurević".[126] The Trial Chamber notes that the Indictment does not specifically plead the term "effective control". However, the Trial Chamber considers the above-cited pleading as alleging that Vinko Pandurević was in a position of superior authority with effective control over his alleged subordinates as required by Article 7(3).[127]

64. Regarding the alleged criminal conduct of the troops of the Zvornik Brigade described in paragraphs 30.13 to 30.15, while it is not explicitly mentioned that such troops were acting under Vinko Pandurević's "control", the Trial Chamber considers that, when placed in the overall context of the Indictment, these paragraphs sufficiently plead that he had effective control over these troops.

65. According to the jurisprudence of the Tribunal, the identification of subordinates who allegedly committed the criminal acts by their "category" or "as a group" is sufficient, if the Prosecution is unable to identify those participating in the alleged crimes by name.[128]

66. With one exception, the alleged subordinates for whose conduct Vinko Pandurević is alleged to be responsible are described as members and units of the Zvornik Brigade, and are often specified by name.[129] The Trial Chamber holds that the identification of Vinko Pandurević's subordinates as personnel of the Zvornik Brigade is sufficient in all instances, except in paragraph 30.15. That paragraph charges him with executions perpetrated by the "VRS" against men taken from the Zvornik Brigade Headquarters, after those men had been removed from the Zvornik Hospital to the infirmary of the Zvornik Brigade. In the Trial Chamber's view, the reference to VRS

[122] Pandurević Motion, paras. 43–45, 49.
[123] Prosecution Response, para. 54.
[124] Indictment, para. 13.
[125] Emphasis added.
[126] *See, e.g.*, Indictment, paras. 30.6, 30.8–30.12. Paragraphs 30.13 to 30.15 of the Indictment do not use the term "control".
[127] *See Blaškić* Appeal Judgement, *supra* note 15, para. 227.
[128] *Ibid.*, para. 217 (citing *Prosecutor v. Krnojelac*, Case No. IT-97-25-PT, Decision on the Defence Preliminary Motion on the Form of the Indictment, 24 February 1999, para. 46).
[129] *See* Indictment, paras. 30.6, 30.8–30.14.

in this paragraph as currently drafted, when read in context, refers to personnel of the Zvornik Brigade. If the Prosecution intends to charge the physical perpetration of these executions by some other personnel, it should identify such personnel as specifically as possible.

67. As to Vinko Pandurević's alleged conduct by which he may be found to have known or had reason to know about the crimes, the Indictment charges Vinko Pandurević as a participant in the two JCEs to murder the able-bodied men of Srebrenica and to forcibly remove the Bosnian Muslim population from Srebrenica and Žepa. The Indictment states that the security officers of the VRS Main Staff and the Drina Corps relied upon, among others, Vinko Pandurević "for the men, material, directions and orders, to carry out the murder operation".[130] It charges Vinko Pandurević with having authorised the transportation of hundreds of Muslim men from Bratunac to the Zvornik Brigade zone of responsibility, their detention and execution. It also charges Vinko Pandurević with having authorised the detention of thousands of Muslim men from Srebrenica in the zone of responsibility of the Zvornik Brigade, their summary execution, and their burial.[131] These allegations all bear, directly or indirectly, upon the knowledge Vinko Pandurević is said to have had of the events. Thus, the Trial Chamber holds that the Prosecution has pleaded with sufficient detail for the purposes of the Indictment the conduct of Vinko Pandurević by which he may be found to have known or had reason to know about the crimes.

68. As to the conduct of those others for whom Vinko Pandurević is alleged to be responsible, the Trial Chamber finds that the Indictment describes the involvement and criminal conduct of the soldiers and units under Vinko Pandurević's alleged command and identifies time and locations in this respect.[132] Thus, the Trial Chamber holds that the Prosecution has also pleaded with sufficient detail for the purposes of the Indictment the conduct of those others for which Vinko Pandurević is alleged to have been responsible. Accordingly, this challenge to the Indictment is rejected.

G. *Mens Rea* for Persecutions

69. The Miletić Defence argues that the charges of persecutions as a crime against humanity in the Indictment do not allege discriminatory intent, and that discriminatory intent is the "constituent element" for the crime of persecutions.[133]

70. The Trial Chamber recalls that the *Blaskić* Appeals Chamber held, with respect to the *mens rea*,

[130] *Ibid.*, para. 27.
[131] *See, e.g., ibid.*, paras. 39, 77.
[132] *See, e.g., ibid.*, paras. 30.6–30.15, 32.
[133] Miletić Motion, para. 40.

> there are two ways in which the relevant state of mind may be pleaded: (i) either the specific state of mind itself should be pleaded as a material fact, in which case, the facts by which that material fact is to be established are ordinarily matters of evidence, and need not be pleaded; or (ii) the evidentiary facts from which the state of mind is to be inferred, should be pleaded.[134]

71. The Trial Chamber notes that the Indictment does not explicitly plead the requisite discriminatory intent of the Accused.[135] However, the evidentiary facts from which the discriminatory intent is to be inferred are pleaded throughout the Indictment.[136] Moreover, the alleged common purpose of all Accused was to force the Bosnian Muslim population out of the Srebrenica and Žepa enclaves and, in the Trial Chamber's view, this common purpose—explicitly referred to in paragraphs 24, 49, and 91 of the Indictment—is itself of a discriminatory nature. The Trial Chamber therefore rejects this argument of the Miletić Defence.

H. Alleged Vagueness of Terms and Expressions

72. The Trbić Defence argues that alleged facts and conduct of Milorad Trbić are qualified by the terms "*inter alia*" and "including, but not limited to, the following", which are vague and do not provide adequate notice to Milorad Trbić of the charges against him.[137] According to the Trbić Defence, the use of these terms does not conform with the jurisprudence of the Tribunal.[138] The Prosecution responds that the use of these terms in the Indictment is not ambiguous and that the objection of the Trbić Defence does not find support in the Tribunal's jurisprudence.[139] It further submits that the Indictment "is merely required to put the Accused on notice of the allegations against him, and not to plead every detail or every piece of evidence that the Prosecution may lead at trial."[140]

73. The Trial Chamber holds that whether the use of a term or expression in an indictment is too vague and therefore unacceptable cannot be assessed *per se*, but only in the context of the indictment.[141] The Trial Chamber will therefore assess the allegations in each paragraph where the Trbić Defence claims ambiguities as to the use of the terms "*inter alia*" and "including, but not limited to, the following".

74. The allegation in paragraph 17 of the Indictment that "Milorad Trbić was responsible, *inter alia*, for helping Drago Nikolić in managing the Military Police Company" addresses one of the general tasks of Milorad Trbić as assistant of Drago Nikolić. This allegation clearly sets out that

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[134] *Blaškić* Appeal Judgement, *supra* note 15, para. 219.
[135] *See* Indictment, para. 48.
[136] See, in particular, paragraphs 50 to 82 of the Indictment.
[137] Trbić Motion, paras. 34–37.
[138] *Ibid.*, paras. 35–36.
[139] Prosecution Response, paras. 101–102.
[140] *Ibid.*, para. 102.
[141] *See Kvočka et al.* Pre-Trial Decision, *supra* note 93, para. 26; *Prosecutor v. Delalić, Mucić, Delić, and Landžo*, Case IT-96-21-T, Decision on the Accused Mucić's Motion for Particulars, 26 June 1996, para. 14.

Milorad Trbić was an assistant of and reported to Drago Nikolić. The alleged conduct of Milorad Trbić as to the crimes charged is pleaded under the respective Counts. The Trial Chamber therefore does not find any ambiguity in paragraph 17 that would lead to Milorad Trbić not being sufficiently informed about the charges against him.

75. Paragraph 26(b) pleads one of the acts by which Count 1, genocide, was allegedly committed. It states that the Accused "caused serious bodily or mental harm to both female and male members of the Bosnian Muslim population of Srebrenica and Žepa, *including but not limited to* the separation of able bodied men from their families and the forced movement of the population from their homes to areas outside the RS."[142] This paragraph is the introductory paragraph for Count 1, and is followed by a long and detailed description of acts and omissions of the various Accused allegedly involved. As a whole, the Trial Chamber considers Milorad Trbić to be provided with adequate notice of the charges against him under this count.

76. Paragraph 30 provides a non-exhaustive list of detention and execution sites where the mass murder of more than 7,000 Bosnian Muslim men and boys is said to have taken place. The Trial Chamber considers that a listing of alleged crime locations falls within that category of items that should be pleaded as exhaustively as possible in the Indictment, in order for the accused to be put as fully on notice as possible of the criminal conduct for which he is charged to be responsible. The Chamber accordingly orders the Prosecution to enumerate as exhaustively as possible the detention and execution sites in question.[143]

77. The Prosecution alleges in paragraph 33 that the forcible transfer of the women and children made a contribution to the destruction of the entire Muslim population of Eastern Bosnia, "*including but not limited to* the failure in part, of the population to live and reproduce normally."[144] The Trial Chamber recalls that the Prosecution is obliged to plead in the Indictment the material facts underpinning the charges.[145] Whether the forcible transfer of the women can be considered as contributing to the alleged intended destruction of the entire Muslim population of Eastern Bosnia is a matter to be determined at trial.

78. However, paragraph 33 generally pleads the forcible transfer of the women and children without referring to the respective enclaves. The Trial Chamber notes in this respect paragraph

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[142] Emphasis added.
[143] *Cf. Prosecutor v. Stanišić and Simatović*, Case No. IT-03-69-PT, Decision on Defence Preliminary Motions, 14 November 2003, pp. 5–6 (holding that the phrase "including, but not limited to" in several paragraphs in the indictment "causes an ambiguity in that the Prosecution is holding both accused responsible for crimes allegedly committed in municipalities of Bosnia and Herzegovina not stated in the Indictment", and ordering the Prosecution to clarify this ambiguity); *Prosecutor v. Blaškić*, Case No. IT-95-14-PT, Decision on the Defence Motion to Dismiss the Indictment Based upon Defects in the Form Thereof (Vagueness/Lack of Adequate Notice of Charges), 4 April 1997, para. 22.
[144] Emphasis added.
[145] *See supra* para. 4.

5(viii) of the 28 June 2005 Motion to Amend the Indictments Against the Nine Accused, where the Prosecution states that the Indictment clarifies that the charge of genocide in the context of the *Srebrenica* crimes includes the destruction of the women as part of the group. The Trial Chamber therefore directs the Prosecution to clarify whether, in the context of the alleged destruction of the women and children, it refers in paragraph 33 of the Indictment to both enclaves or only to the alleged forcible transfer of the women and children from the Srebrenica enclave.

79. Regarding paragraph 72, the Trbić Defence objects to the non-exhaustive list of actions described as means to achieve the goal of the JCE to remove the Bosnian Muslim population of the Srebrenica and Žepa enclaves. The Trial Chamber holds that the actions listed are sufficient, as paragraph 72 only provides a general description of the policy established.

80. Regarding the alleged ambiguities in paragraphs 74, 75, 76, 77, 78, 79, 80, 81, and 82, the Trial Chamber notes that these paragraphs describe the role and actions of each Accused in furtherance of the JCE to forcibly remove the Bosnian Muslim population from the two enclaves. Each of these paragraphs states that the respective Accused "committed acts in furtherance of the [JCE] and Operation *including but not limited to* the following"[146] before it lists alleged acts on the basis of which the Accused are charged. The Trial Chamber considers that the alleged acts of the Accused in furtherance of the JCE should be pleaded as exhaustively as possible, in order for the Accused to be put fully on notice of the charges against them.[147]

81. In relation to paragraphs 94 and 95, the Trbić Defence objects to the non-exhaustive reference to acts of subordinates in the context of Vinko Pandurević's and Ljubomir Borovčanin's alleged superior responsibility. The Trial Chamber points out once again the undesirability of pleading a non-exhaustive listing of crimes or underlying offences for which the accused may be held responsible, as such allegations expose the accused to bases of liability not specifically charged in the indictment. The Chamber holds, moreover, that the responsibility of the two Accused pursuant to Article 7(3) of the Statute is only appropriately pleaded where the acts of the subordinates described in the Indictment are specified as acts committed under the command and control of the two Accused. The Trial Chamber therefore considers that the references to paragraphs 39 and 77 in paragraph 94, on the one hand, and to paragraphs 43 and 81 in paragraph 95, on the other, are too general, as these paragraphs are meant to describe all acts of the Accused in furtherance of the two JCEs, and are not limited to conduct relating to their superior responsibility. Paragraphs 94 and 95 should refer back to the paragraphs in the Indictment that explicitly plead the

[146] Emphasis added.
[147] *Cf. Prosecutor v. Halilović*, Case No. IT-01-48, Decision on Prosecutor's Motion Seeking Leave to Amend the Indictment, 17 December 2004, para. 28 (holding that the concept of "new charge" includes "the addition of an underlying offence without changing the crime that is alleged under the Statute").

acts of the Accused's subordinates and that they were acting under the command and control of the two Accused. The Trial Chamber orders the Prosecution to amend paragraphs 94 and 95 accordingly, and to list as exhaustively as possible "the criminal acts of subordinates" for which each Accused is alleged to be liable.

82. The Borovčanin Defence argues that the allegation in paragraph 27 of the Indictment that security officers Vujadin Popović, Drago Nikolić, and Milorad Trbić "relied upon" commanders Ratko Mladić, Radislav Krstić, Vinko Pandurević, Ljubomir Borovčanin, Vidoje Blagojević, and others for the men, materials, directions, and orders to carry out the murder operation is vague and imprecise; it submits in this regard that the Prosecution "ought to state with greater precision the alleged relationship between Mr. Borovčanin and the said officers."[148] The Prosecution responds that the use of the term "relied upon" is not vague in the context of paragraph 27 and the Indictment as a whole. It further argues that throughout the Indictment "the role and actions of the MUP in the crimes alleged are detailed with all precision necessary to make clear the meaning of the term 'relied upon' in paragraph 27."[149]

83. Before turning to the merits of this contention of the Borovčanin Defence, the Trial Chamber will address a related issue as regards Ljubomir Borovčanin's alleged superior responsibility; although this matter was not raised by the Borovčanin Defence, the Chamber considers that it nonetheless warrants consideration *proprio motu*. The Indictment states that Ljubomir Borovčanin was deputy commander of the MUP Special Police Brigade and was appointed commander of a joint force of MUP units.[150] It alleges that "as the commander of the joint MUP forces, he was, *inter alia*, responsible for planning and directing the activities of all the subordinate formations under his command, in accordance with the directives received from his higher command."[151] It further states that MUP Special Police Forces "under the command and control of Ljubomir Borovčanin" committed the alleged executions in the Kravica Warehouse.[152] In relation to the alleged separation of the Muslim population and their transportation from Potočari on 12 and 13 July 1995, as well as the capturing and transporting to detention sites of the Bosnian Muslim men from the column of men escaping the Srebrenica enclave between 12 and 17 July, paragraphs 61 to 63 of the Indictment, which detail these facts, allege that the MUP forces performing those acts were acting "under the command of Ljubomir Borovčanin". Paragraph 61 further alleges that Ljubomir Borovčanin was present in Potočari on 12 July when the buses and trucks arrived to transport the Muslim population. Moreover, paragraphs 43 and 81 of the

[148] Borovčanin Motion, para. 9.
[149] Prosecution Response, para. 95.
[150] Indictment, para. 18.
[151] *Ibid.*
[152] *Ibid.*, para. 30.4.

Indictment, which describe Ljubomir Borovčanin's acts in furtherance of the two alleged JCEs, state that he was present in Potočari and along the Bratunac-Konjević Polje Road on 12 and 13 July and commanded the troops there. The Trial Chamber does not find these allegations sufficient to plead Ljubomir Borovčanin's effective control over these MUP troops performing the alleged acts from 12 to 17 July 1995. For harmonisation purposes, the Trial Chamber orders the Prosecution to plead expressly Ljubomir Borovčanin's command and control over the respective MUP troops throughout the relevant time.

84. Regarding the executions that are described in many paragraphs as being committed by VRS or MUP forces, or both, without mentioning Ljubomir Borovčanin,[153] the Trial Chamber considers the Indictment not to plead the superior responsibility of Ljubomir Borovčanin for these crimes. The Trial Chamber directs the Prosecution to clarify in the respective paragraphs whether the MUP forces were acting under Ljubomir Borovčanin's command and control. The Trial Chamber further holds that the subordinates for whose conduct Ljubomir Borovčanin is alleged to have been responsible are sufficiently identified as MUP forces.

85. As concerns the contentions of the Borovčanin Defence that the term "relied upon" in paragraph 27 of the Indictment makes the allegation in that paragraph vague and imprecise, the Trial Chamber recalls that the Indictment alleges the participation of Ljubomir Borovčanin in a JCE to murder the able-bodied men of Srebrenica with, among others, Vujadin Popović, Drago Nikolić, and Milorad Trbić. It is clear that Ljubomir Borovčanin's role and actions in the JCE with the other Accused and the conduct of the MUP forces are described throughout the Indictment.[154] In the Trial Chamber's view, provided the Prosecution amends the Indictment as ordered in paragraphs 83 and 84 above, the allegation in paragraph 27 of the Indictment will not be unclear when read in the overall context of the Indictment.

I. Truth of Allegations in the Indictment

86. The Pandurević Defence challenges the truth of the allegations in the Indictment[155] and both the Pandurević Defence and the Nikolić Defence submit that the supporting material does not contain proof that the assertions from the Indictment are grounded.[156] In this context, the Trial Chamber first notes that the original and amended Indictment against the Accused have been confirmed,[157] and recalls that the Trial Chamber has already found that the supporting material is

[153] *See, e.g., ibid.*, paras. 30.2, 30.3, 30.5, 31.
[154] *See ibid.*, paras. 18, 30, 31, 36–37, 43, 61–63, 81.
[155] Pandurević Motion, paras. 4, 10–11, 16, 21, 25–27, 40–42.
[156] *Ibid.*, paras. 7, 22, 28–29, 47; Nikolić Motion, paras. 31, 44, 49.
[157] *See Prosecutor v. Pandurević and Trbić*, Case No. IT-05-86-I, Decision on Review of Indictment and Order for Non-Disclosure, 24 March 2005; *Prosecutor v. Niikolić*, Case No. IT-02-63-I, Order Confirming Indictment Pursuant to Article 19, Order Concerning Non-Disclosure, and Order Issuing Arrest Warrant, 6 September 2002.

sufficient to prove a *prima facie* case against the Accused in respect of the proposed amendments contained in the present Indictment.[158] Whether the allegations of the Indictment are true or not is not a matter to be considered at the pre-trial stage pursuant to Rule 72 of the Rules, but a matter of evidence to be proven during trial. Accordingly, the Trial Chamber notes in this respect that the submissions of the Pandurević Defence in paragraphs 6 to 42 and the Nikolić Defence in paragraphs 31, 37, and 39 to 45 of their respective motions relate to matters to be resolved at trial, and these matters do not concern the form of the Indictment.[159]

J. Further Alleged Ambiguities

1. Miletić Motion

87. The Miletić Defence submits that the Indictment is imprecise and vague in respect of the position of Radivoje Miletić in the VRS during the time relevant to the Indictment. The Miletić Defence submits that Radivoje Miletić is described as "Deputy Chief of Staff, "standing in for the Chief of Staff", and as "Acting Chief of Staff", but that the Prosecution does not specify the periods when he held any of these positions, even though he could not have held all at the same time.[160] The Prosecution agrees that there may be some ambiguity, and has proposed to remove the "Acting Chief of Staff" and replace it with "standing in for the Chief of Staff".[161] The Trial Chamber notes that paragraph 11 of the Indictment states that, "[d]uring the time period relevant to the events described in this Indictment, Radivoje Miletić was ... Deputy Chief of Staff and was Standing in for the Chief of Staff of the Main Staff of the VRS" and that in Attachment A of the Indictment he is described as "Acting Chief of Staff". The Trial Chamber is of the opinion that there is no ambiguity in a description of Radivoje Miletić's position during the time period relevant to the Indictment by the use of all three terms. However, for the purpose of standardisation, it finds the Prosecution proposal appropriate in order to limit the terms describing Radivoje Miletić's position at the time relevant to the Indictment.

88. The Miletić Defence further submits that the Indictment is vague as to Radivoje Miletić's role in relation to Directive 7. It argues that, while paragraph 24 of the Indictment alleges that President Karadžić set out an order in Directive 7, paragraph 75(a)(i) seems to allege that Radivoje

[158] Order on the Consolidated Amended Indictment, *supra* note 14, p. 2.
[159] The Pandurević Defence also submits that there are contradictions in the alleged facts. *See* Pandurević Motion, para. 9. Concerning the alleged contradictions in paragraphs 27 and 28 of the Indictment, the Trial Chamber notes that it will be determined during trial at which locations Vinko Pandurević was present during the relevant time. Regarding the alleged contradictions in paragraphs 77(b)(i) and 67 of the Indictment, the Chamber considers that the allegation in paragraph 67—that Vinko Pandurević personally commanded a unit in the 14 July attack on Žepa—does not exclude the possibility that he had knowledge of and assisted in the forcible movement of the men from Srebrenica on 13 to 15 July 1995, through the acts of units of the Zvornik Brigade, as described in the paragraphs referred to in paragraph 77 of the Indictment.
[160] Miletić Motion, paras. 61–62.

Miletić gave the orders in the same Directive.[162] The Prosecution responds that the language of the Indictment is more than adequate to put the Accused on notice as to his role regarding Directive 7 and that paragraph 75(a)(i) clearly states that he "drafted" this Directive.[163] Paragraph 75(a)(i) of the Indictment states that Radivoje Miletić

> drafted Directive 7, which was signed by President Karadžić on March 21, 1995 and called for the VRS to *inter alia* 'create an unbearable situation ...' and ordered that; 'The relevant State and military organs responsible for work with UNPROFOR and humanitarian organisations shall ... reduce and limit the logistics support of UNPROFOR to the enclaves and the supply of material resources to the Muslim population['].

The Trial Chamber points out, first of all, that there are no quotation marks at the end of the cited order. Second, even though paragraph 75(a)(i) alleges that the Directive was not signed until 21 March 1995, paragraph 50 of the Indictment mentions 8 March 1995 as the date of issuance of Directive 7. Third, there is an unnecessary semicolon after the word "that" in the quoted passage. Fourth, the Trial Chamber considers this paragraph ambiguous as to whether this order is alleged to have been issued by Radivoje Miletić or to have been part of Karadžić's Directive. The Chamber therefore orders the Prosecution to clarify this passage, to make clear the dates of signing and issuance of Directive 7, to insert the closing quotation marks where appropriate, and to replace the semicolon with a comma.

89. The Miletić Defence argues that there is a contradiction between the forms of individual liability pleaded in Counts 4, 5, 6, 7, and 8, on the one hand, and the ones pleaded in paragraphs 88 and 91 of the Indictment, on the other.[164] The Prosecution has not addressed this challenge. The Trial Chamber notes that under each Count of the Indictment, before referring to the respective crimes, the pleading starts with "by their acts and omissions", described in the preceding paragraphs or the paragraphs below an allegation that the Accused "committed" the crime in question. The Chamber further notes that the forms of liability in paragraphs 88 to 95 of the Indictment are pleaded under the heading "Individual Criminal Responsibility". As the term "committed" in the settled jurisprudence of the Tribunal refers specifically to the physical perpetration of a crime or participation in a JCE,[165] and does not encompass the other forms of responsibility with which the Accused are charged, the Trial Chamber orders the Prosecution to harmonise these allegations by deleting the word "committed" under each Count of the Indictment and replacing it with the words "are responsible for".

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[161] Prosecution Response, para. 57.
[162] Miletić Motion, para. 63.
[163] Prosecution Response, para. 56.
[164] Miletić Motion, para. 20.
[165] *Kvočka et al.* Appeal Judgement, *supra* note 43, para. 79; *Vasiljević* Appeal Judgement, *supra* note 43, para. 95.

90. The Miletić Defence submits that paragraph 84(a) of the Indictment "refers to the shelling of the civilian areas and the murders of the Muslim men said to have been described in paragraph 71, although that paragraph makes no reference to those events."[166] The Prosecution has not explicitly addressed this challenge, but it has suggested in Annex A of the Prosecution Response that "killing the Muslim men" be deleted. As concerns the alleged reference to the shelling of the civilian areas, the Trial Chamber is of the view that the reference to paragraph 71 in paragraph 84(a) of the Indictment should not be read as a reference to the shelling of the civilian areas, but as reference to the forced movement of the Bosnian Muslim men from Žepa, across the Drina River to Serbia.[167] As it concerns the reference to murders of the Muslim men, the Trial Chamber notes that paragraph 84(a) lists "killing the Muslim men" as one means of the forced movement of the Bosnian Muslim men from Žepa, which is not described in paragraph 71 or any other paragraph in the Indictment related to the events in Žepa. The Trial Chamber observes in this respect that paragraph 71 states that "the Muslim men fled to Serbia because they *feared* they would be harmed or killed if they surrendered to the VRS."[168] The Trial Chamber therefore holds that the proposed amendment as reflected in Annex A of the Prosecution Response satisfies this concern of the Miletić Defence.

91. The Miletić Defence further argues that, in relation to Radivoje Miletić, paragraphs 46 and 47 under Counts 4 and 5 are ambiguous because they not only refer to paragraph 31, which is describing the alleged opportunistic killings, but also refer to paragraph 30, which is describing the mass murder, for which Radivoje Miletić is not charged.[169] The Prosecution responds that the reference to paragraph 30 is relevant to the other co-Accused except for Radivoje Miletić and Milan Gvero, and therefore suggests for clarification purposes to amend paragraphs 46 and 47 as follows:

> The crime of Murder was perpetrated, executed, and carried out by and through the means identified in paragraphs 30 to 31 of this Indictment with the exception of Miletić and Gvero, for whom the crime of Murder was perpetrated, executed and carried out by and through the means identified in paragraph 31 exclusively ('opportunistic killings') of this Indictment.[170]

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[166] Miletić Motion, para. 48.

[167] *See* Indictment, para. 84:

> The crime of Deportation was perpetrated, executed, and carried out by and through the following means: a. the forced movement of Bosnian Muslim men from Žepa, across the Drina River to Serbia, by means of making life unbearable in the enclave by restricting aid to the enclave and instilling fear and terror in the population by shelling civilian areas and attacking the enclave, killing the Muslim men, as described in paragraph 71 of the Indictment.

See also Indictment, para. 71 ("On or about the same day, hundreds of mostly able-bodied Muslim men began to flee across the Drina River to Serbia ... . The Muslim men fled to Serbia because they feared they would be harmed or killed if they surrendered to the VRS.").

[168] Emphasis added.

[169] Miletić Motion, paras. 64–69.

[170] Prosecution Response, para. 103 (referring to the proposed amendment in Annex A of the Prosecution Response).

The Trial Chamber holds that the proposed amendment as reflected in Annex A of the Prosecution Response meets the argument of the Miletić Defence.[171] Accordingly, the Prosecution has suggested in Annex A of the Prosecution Response a similar modification in paragraph 48 under Count 6, which the Trial Chamber accepts as well.[172]

92. The Miletić Defence also submits that, in relation to the alleged "opportunistic killings" in paragraph 31 of the Indictment, the Prosecution pleads that these "opportunistic killings" were not only the natural and foreseeable consequence of the JCE to forcibly remove the Bosnian Muslim population, but also the natural and foreseeable consequence of the JCE to murder all the able-bodied Muslim men of Srebrenica. The Miletić Defence argues that, since the great majority of the victims indicated were men, and nothing indicates that they were not able-bodied, it has difficulties in understanding how a murder can be the objective of a JCE and also its natural and foreseeable consequence. The Miletić Defence requests that the Prosecution clearly indicate the reasons for considering these killings as opportunistic.[173] The Prosecution has not addressed this argument. The Trial Chamber considers that paragraph 31 of the Indictment sufficiently indicates that the killings listed therein are not alleged as part of the organised mass executions, but as individual incidents, and that the Prosecution seeks to make a legal distinction between these killings and the organised mass executions. How these "opportunistic" killings will eventually be interpreted is a matter to be resolved at trial. The Trial Chamber therefore rejects as premature this argument of the Miletić Defence.

93. The Miletić Defence and the Popović Defence also submit that the facts alleged in paragraph 31.4 of the Indictment, which deals with "opportunistic killings", are identical to those alleged in the second sentence of paragraph 30.7, which deals with mass executions, and that paragraph 31.4 should therefore be deleted,[174] or additional information should be provided to allow for a clear distinction.[175] The Miletić Defence further claims that paragraph 31.4 is illogical, as it suggests that the Bosnian Muslim men were killed prior to their being transported to be executed.[176] The Prosecution has not addressed these objections. Both paragraphs 30.7 and 31.4 allege that Bosnian Muslim men were detained in the Petkovci School and that a number of them were killed there. Paragraph 30.8 indicates that the surviving men were transported to the Petkovci Dam for execution. Contrary to what the Miletić Defence argues, it is clear that none of those executed, were among those previously killed at the school. Nevertheless, although paragraph 31.4 indicates that

[171] The Trial Chamber recalls in relation to the submissions in paragraphs 32 to 34 of the Miletić Response that the Proposed Amended Indictment in Annex I of the Motion to Amend the Indictment only reflects the amendments suggested in the Motion to Amend the Indictment.
[172] *See* Prosecution Response, n.132 (referring to the proposed amendment in Annex A of the Prosecution Response).
[173] Miletić Motion, para. 70.
[174] *Ibid.*, para. 71.
[175] Popović Motion, para. 27.

the shootings of the men at the Petkovci School are charged as "opportunistic killings" and not part of the mass executions, the Trial Chamber agrees with the Defence that the mention of these same shootings in paragraph 30.7 gives rise to confusion as to whether they are also charged as pertaining to the mass executions. Therefore, the Trial Chamber orders the Prosecution to remove the reference to the shootings in paragraph 30.7.

2. Borovčanin Motion

94. The Borovčanin Defence argues that, in relation to Counts 3 to 8 of the Indictment, it is unclear whether Ljubomir Borovčanin is charged under both Article 7(1) and 7(3) of the Statute or under Article 7(3) only.[177] The Prosecution argues that "as expressly stated in the counts the Accused is charged under both Articles 7(1) and 7(3)."[178] The Trial Chamber notes that the allegations in relation to each Count start with listing the Accused who—if read together with the formula at the end of each Count—are charged under the respective Count under Article 7(1). Only the names of the Accused Ljubomir Borovčanin and Vinko Pandurević are mentioned in the formula, indicating that they are charged as well under Article 7(3). Moreover, paragraphs 88 to 95, dealing in particular with the various forms of individual responsibility of all Accused, state again that all Accused are charged under Article 7(1) and that Ljubomir Borovčanin and Vinko Pandurević are "also, or alternatively" criminally responsible pursuant to Article 7(3). The Trial Chamber therefore holds that it is clearly reflected in the Indictment that Ljubomir Borovčanin is charged under both Articles 7(1) and 7(3).

95. The Borovčanin Defence also submits that the Prosecution should provide further details in paragraph 30.16 of the Indictment relating to "a Serbian unit working with the VRS and/or RS MUP."[179] In its Response, the Prosecution proposes to clarify this paragraph by mentioning that this was "a Serbian MUP unit called the Skorpions".[180] The Trial Chamber accepts this clarification, but considers that it does not fully address the concerns of the Defence. The Trial Chamber notes that paragraph 30.16 of the Indictment alleges that the Skorpion unit executed six Muslim men and boys. Paragraph 14 of Attachment B of the Indictment clearly establishes that all units referred to as having been involved in the two JCEs were units of the VRS or units of the RS MUP, except for the elements of the Skorpion unit from Serbia. Since paragraph 18 of the Indictment alleges that Ljubomir Borovčanin, the alleged Deputy Commander of the Republika Srpska Ministry of Interior Special Police Brigade ("RS MUP SPB"), was appointed Commander of a joint force of MUP units, the Prosecution needs to make it clear under which command the Skorpion unit was

[176] Miletić Motion, para. 71.
[177] Borovčanin Motion, para. 17.
[178] Prosecution Response, para. 99.
[179] Borovčanin Motion, para. 15.
[180] Prosecution Response, para. 96.

operating, and in particular whether or not the unit was under the command of Ljubomir Borovčanin.

(a) Further issues in relation to Ljubomir Borovčanin

(i) Count 2 (Conspiracy to commit genocide)

96. In its Response, the Prosecution requests leave to amend the Indictment in order to include Ljubomir Borovčanin's name in the listing of the Accused above paragraph 34, in paragraphs 34 and 35, and under paragraph 44 as charged under Count 2, also pursuant to Article 7(3) of the Statute.[181] The Prosecution submits that it is a typographical error that Ljubomir Borovčanin's name does not appear in the listing of Accused charged under Count 2 immediately above paragraph 34, and does not appear in paragraphs 34 and 35;[182] the Prosecution refers in this respect to the first page of the Indictment, where Ljubomir Borovčanin is mentioned as one of the Accused charged with Count 1 (genocide) and Count 2 (conspiracy to commit genocide).[183] It argues that

> there can be no possible prejudice to Borovčanin in allowing this proposed amendment, as he has been charged with genocide under 7(1) under the form of commission of JCE, and the [Indictment] is explicit in stating that 'the underlying facts and agreement of the conspiracy to commit genocide are identical to the facts and agreement identified in the [JCE] mentioned in this Indictment.[184]

The Borovčanin Defence opposes the proposed amendment, arguing that the Prosecution is seeking to introduce an entirely unfounded new charge against Ljubomir Borovčanin.[185]

97. In the original Indictment against Ljubomir Borovčanin of September 2002, the Accused was not charged with conspiracy to commit genocide.[186] In its Motion to Amend the Indictments Against the Nine Accused of 28 June 2005, the Prosecution did not mention Ljubomir Borovčanin in its summary of proposed amendments as one of the Accused against whom the count of conspiracy to commit genocide should be added.[187] However, the Trial Chamber notes that, in the Joinder Motion of 10 June 2005, Ljubomir Borovčanin was listed as one of the Accused for whom the Prosecution would be seeking to add the count of conspiracy to commit genocide.[188] The Chamber further and more importantly notes that Ljubomir Borovčanin is mentioned under Count 2

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[181] *Ibid.*, para. 94
[182] *Ibid.*, para. 93.
[183] *Ibid.*, para. 94.
[184] *Ibid.*
[185] Borovčanin Response, para. 19. *See also Popović et al.*, T. 112–114 (4 April 2006) (arguments of the Borovčanin Defence made at the status conference).
[186] *See Prosecutor v. Borovčanin*, Case No. IT-02-64-I, Indictment, 6 September 2002 ("*Borovčanin* Original Indictment").
[187] *See* Motion to Amend the Indictments Against the Nine Accused, paras. 5(ii), 9–14.
[188] *See* Joinder Motion, para. 4. *See also* Borovčanin Response, para. 17 (noting that Ljubomir Borovčanin was listed in the Joinder Motion as one of the Accused for whom the Prosecution would be seeking to add the count of conspiracy to commit genocide).

of the Indictment, namely in paragraphs 36, 37, and 43 under the heading "the *Conspiracy*, Joint Criminal Enterprise and Operation to murder all the able-bodied Muslim men from Srebrenica";[189] these paragraphs allege his participation in this conspiracy. The Trial Chamber therefore holds that Ljubomir Borovčanin is charged under Count 2 of the Indictment, and for purposes of clarification grants leave to the Prosecution to add his name as suggested in Annex A of the Prosecution Response. The Chamber considers additionally that, as the underlying facts for Count 2 are the same as those for Count 1, there is no prejudice to the Accused in allowing the proposed clarifying amendments.

(ii) Count 1 (Genocide)

98. In the original Indictment, Ljubomir Borovčanin was not charged with genocide pursuant to Article 4(3)(a), but with complicity in genocide under Articles 4(3)(e), 7(1), and 7(3) of the Statute.[190] The charge of complicity in genocide has been removed from the Indictment.[191] Instead, paragraph 33 of the Indictment charges Ljubomir Borovčanin with genocide pursuant to Articles 4(3)(a) and 7(1) "*limited to Aiding and Abetting Genocide*".[192] However, reading the Indictment as a whole, and in particular paragraphs 36, 37, 43, 49, 61 to 63, 81, 88, 90, and 91, it would appear that Ljubomir Borovčanin is also charged as a participant in the two alleged JCEs[193]—that is, the JCE to forcibly remove the Bosnian Muslim population from the Srebrenica and Žepa enclaves, and the JCE to murder the able-bodied men of Srebrenica—which both form the basis of the genocide and conspiracy to commit genocide charges. The Trial Chamber therefore orders the Prosecution to clarify in the Indictment under which form or forms of responsibility Ljubomir Borovčanin is charged in Count 1.

(iii) Paragraph 92 of the Indictment

99. In its Motion to Amend Paragraph 92 of the Indictment, the Prosecution seeks "to clarify that Ljubomir Borovčanin's separate and independent basis of liability under 7(1) of the Statute not only includes instigating and/or assisting and aiding and abetting, but also encompasses 'committing' through his culpable 'omission' of failing to intercede to protect prisoners he had a duty to protect."[194] The Prosecution submits that the amendment clarifies "the nature of the charge relating to omissions and provide[s] greater specificity as to the basis of liability."[195] The

[189] Emphasis added.
[190] *See Borovčanin* Original Indictment, *supra* note 186.
[191] *See supra*, para. 31, for the Trial Chamber's holding on this issue.
[192] Emphasis added.
[193] *See* Prosecution Response, para. 94.
[194] Motion to Amend Paragraph 92 of the Indictment, para. 2.
[195] *Ibid.*, para. 3.

Borovčanin Defence does not oppose the sought amendment.[196] The Trial Chamber considers that at this stage of the proceedings this amendment would not prejudice the Accused unfairly in his defence, and therefore grants leave to the Prosecution to provide this clarification. Nevertheless, the Trial Chamber directs the Prosecution to specify whether Ljubomir Borovčanin's alleged duty to protect is meant to be limited to "the prisoners *who remained alive* at the execution site"[197] and, if so, to provide further details in this respect.

100. Paragraph 18 of the Indictment alleges that Ljubomir Borovčanin was "Deputy Commander" of the RS MUP SPB. Attachment A of the Indictment lists Ljubomir Borovčanin as "Commander" of the RS MUP SPB. The Trial Chamber directs the Prosecution to clarify this inconsistency.

3. Nikolić Motion

101. The Nikolić Defence argues that the "description of the alleged involvement of the Accused does not correspond to 'committing genocide', as pleaded in Count 1", but that it appears instead that the Prosecution's case is that the Accused aided and abetted genocide.[198] The Nikolić Defence also refers to a number of paragraphs to contend that the involvement of the Accused alleged in those paragraphs does not support the new charge of conspiracy to commit genocide in Count 2.[199] The Prosecution submits that these objections concern factual disputes to be determined at trial.[200]

102. Drago Nikolić is charged in Count 1 with all forms of liability under Article 7(1), including "committing" (including participation in a JCE) and "aiding and abetting" in the alternative.[201] The Trial Chamber reiterates its holding that it is satisfied that the material facts to support each of the modes of liability under Article 7(1) are adequately pleaded in the Indictment in order to allow the Accused to prepare their defence.[202] The Trial Chamber also notes that the elements constituting the crimes of genocide and conspiracy to commit genocide are pleaded in the Indictment. Moreover, the Trial Chamber notes that the acts the Accused is charged with under Counts 1 and 2 are to be found in paragraph 42 of the Indictment and the paragraphs referred to therein. In the Trial Chamber's view, the allegations made in the respective paragraphs, read as a whole, are coherent with the charges under Count 1 and 2. Which mode of liability best reflects the Accused's criminal

[196] Borovčanin Response, para. 18.
[197] Emphasis added.
[198] Nikolić Motion, para. 22.
[199] *Ibid.*, para. 28.
[200] Prosecution Response, paras. 73–74.
[201] *See supra* para. 31.
[202] *See supra* para. 26.

liability is an issue to be determined at trial.[203] The Trial Chamber therefore rejects these objections of the Nikolić Defence.

103. The Nikolić Defence also claims a lack of details as to the alleged "knowledge" and "assistance" of Drago Nikolić as described in paragraphs 30.14, 30.15, and 32 in relation to the alleged executions and re-burial operation.[204] The Prosecution argues that the conduct of the Accused is clear from a contextual reading of the Indictment as a whole, and submits that the supporting material filed with the Indictment further clarifies the Accused's participation in the alleged events.[205]

104. The Trial Chamber recalls that the Indictment must inform the Accused clearly of the charges against him so that he may prepare his defence. Accordingly, the material facts to be pleaded are the acts of the Accused. The Trial Chamber notes that paragraph 30.14 of the Indictment alleges that, on or about 19 July 1995, four Bosnian Muslim men who had survived the Branjevo Farm executions were captured and turned over to Zvornik Brigade Security personnel under the supervision of Drago Nikolić. It is further alleged that, on 22 July 1995, they were interrogated by Zvornik Brigade personnel, kept in custody for a few days, and then executed by that personnel. It is finally alleged that the executions were carried out with the "knowledge" and "assistance" of Drago Nikolić. The Trial Chamber notes that Drago Nikolić is charged as chief of security of the Zvornik Brigade, and holds that the involvement of Drago Nikolić is sufficiently pleaded by the allegation that the Muslim prisoners were turned over to security personnel under his supervision, which eventually led to their execution.

105. In relation to the allegations in paragraph 30.15 of the Indictment, that paragraph states that Muslim prisoners who had been transferred to the infirmary of the Zvornik Brigade were removed from the Zvornik Brigade Headquarters and executed by the VRS around 20 July 1995. The Chamber recalls its holding above that "VRS" in paragraph 30.15 appears to refer to Zvornik Brigade personnel.[206] Paragraph 30.15 further alleges that the removal and the execution of the prisoners were done with the "knowledge" and "assistance" of Drago Nikolić and Vujadin Popović. The Chamber notes that it is neither explicitly pleaded that security personnel were involved, nor is any conduct of Drago Nikolić or Vujadin Popović—the latter charged as assistant commander for security of the Drina Corps—specified in relation to the alleged execution. Thus, the Trial Chamber holds that the factual allegations are not sufficient to adequately inform the two Accused of the

[203] *See Prosecutor v. Krstić*, Case No. IT-98-33-T, Judgement, 2 August 2001, para. 602; *Prosecutor v. Kunarac, Kovač, and Vuković*, Case No. IT-96-23-T & IT-96-23/1-T, Judgement, 22 February 2001, para. 388; *Furundžija* Trial Judgement, *supra* note 52, para. 189.
[204] Nikolić Motion, paras. 23, 25–26.
[205] Prosecution Response, para. 77.
[206] *See supra* para. 66.

charges against them. The Trial Chamber therefore orders the Prosecution to provide more details as to the alleged "knowledge" and "assistance" of Vujadin Popović and Drago Nikolić regarding the events described in paragraph 30.15 of the Indictment.

106. In relation to the re-burial operation, paragraph 32 describes in general that bodies were exhumed from initial mass graves and transferred to secondary graves, and lists the respective locations. The re-burial operation is alleged to have been an organised and comprehensive effort to conceal the mass killings and a foreseeable consequence of the execution and original burial plan conceived by the JCE. As to the "knowledge" of and "assistance" in the re-burial operation alleged with respect to the Accused Vujadin Popović, Drago Nikolić, Vinko Pandurević, and Milorad Trbić, no details are provided. However, in addressing the Popović Motion,[207] the Prosecution proposes to amend the Indictment by adding in paragraph 32 the following language: "Vujadin Popović, Vinko Pandurević, Drago Nikolić and Milorad Trbić assisted in this massive effort at concealment by supervising, facilitating, and overseeing all aspects of the reburial operation."[208] The Trial Chamber holds that the proposed amendment provides sufficient information as to the alleged "knowledge" and "assistance" of each of the Accused. The Trial Chamber therefore directs the Prosecution to amend the Indictment as proposed.

107. The Nikolić Defence further claims that paragraph 42(a)(i) of the Indictment contains a new factual allegation which is different from the contents of paragraphs 30.6, 30.14, 30.15, and 32, and which was not included in the original Indictment, namely that the Accused "from 13 through 16 July and oversaw and supervised the[] summary execution" of Muslim men from Bratunac.[209] The Prosecution responds that a contextual reading of the original Indictment shows that the allegation that Drago Nikolić "from 13 to 16 July oversaw and supervised their summary execution", was made in several parts of the original Indictment.[210]

108. Unlike the Indictment at issue here, the original Indictment against Drago Nikolić contained specific allegations as to him overseeing and directing military police personnel guarding and transporting detainees to the execution sites from the schools in Orahovac and Petkovci, and directing military police personnel overseeing security operations for the prisoners at the Kula school.[211] In relation to Kula, the Trial Chamber notes that it has always been alleged that many of the prisoners were killed in the school.[212] The Trial Chamber therefore holds that, as it concerns

[207] Popović Motion, paras. 19, 28.
[208] Prosecution Response, para. 85 (referring to Annex A of the Prosecution Response).
[209] Nikolić Motion, para. 30.
[210] Prosecution Response, para. 79.
[211] *See Nikolić* Original Indictment, *supra* note 66, paras. 35.1–35.4.
[212] *Ibid.*, para. 35.4.

Orahovac, Petkovci, and the Kula school, paragraph 42(a)(i) of the Indictment does not contain a new factual allegation and rejects the Nikolić Defence submission in this respect.

109. The Trial Chamber wishes to address *proprio motu* another issue in relation to paragraph 42(a)(i) of the Indictment. That paragraph states that Drago Nikolić "assisted in the transportation and organisation of Muslim men from Bratunac to detention areas in the Zvornik area including the schools at Orahovac, Petkovci, Rocević, Kula and the Pilica Cultural Centre; from 13 through 16 July and oversaw and supervised their summary execution".

110. The Chamber observes that the use of the semicolon in this phrase leads to ambiguity as to what exactly the time period "from 13 to 16 July" refers to. It is the Trial Chamber's understanding, however, that the semicolon is a typographical error, so that the timeframe relates to the previous part of the sentence. The Trial Chamber therefore orders the Prosecution to remove the semicolon or to explain otherwise.

111. In relation to the alleged inconsistencies as to Drago Nikolić having overseen and supervised executions at the locations referred to above, paragraph 30.6 of the Indictment alleges that he organised and facilitated the transportation of Bosnian Muslim men from Bratunac to the school in Orahovac with the knowledge that they were to be collected and executed. The paragraphs in the Indictment dealing in particular with the detention and execution of Bosnian Muslim men held in the schools at Petkovci, Kula, and the Pilica Cultural Centre do not mention Drago Nikolić's name.[213] The Trial Chamber does not consider that the allegation that he organised the transportation of prisoners to one of the detention sites is the same as alleging that he supervised the executions in the different places. It therefore holds that the Indictment does not allege, in the respective paragraphs referred to in paragraph 42 of the Indictment, that Drago Nikolić oversaw and supervised the execution of the Bosnian Muslim men detained in the schools at Orahovac, Petkovci, Kula, and the Pilica Cultural Centre. The Chamber accordingly orders the Prosecution to either strike the words "and oversaw and supervised their summary execution" from paragraph 42(a)(i) or, if it wishes to charge Drago Nikolić with overseeing and supervising these executions, to enumerate such conduct in the paragraphs dealing expressly with the executions in question. The Chamber further notes that the reference in paragraph 42(a)(i) of the Indictment to a place called Ročević is not supported by any other paragraph in the Indictment describing the relevant events. The Trial Chamber therefore further orders the Prosecution to provide clarification as to the alleged detention site called Ročević.[214]

[213] *See* Indictment, paras. 30.7, 30.8, 30.9, 30.12.
[214] The Trial Chamber notes that this order also applies to the mention of Ročević in paragraph 80(b)(ii) of the Indictment. *See infra.* para. 119.

112. The Prosecution concedes that, as stated in the Nikolić Motion, paragraph 42(a)(ii) of the Indictment contains incorrect information in describing Drago Nikolić as Assistant Commander for Security of the Drina Corps.[215] The Prosecution submits that the correction is reflected in Annex A of the Prosecution Response.[216] The Trial Chamber notes, however, that the correction is not in fact reflected in Annex A.[217] Accordingly, the Trial Chamber orders the Prosecution to clarify the exact position of Drago Nikolić in paragraph 42(a)(ii) of the Indictment.

4. Popović Motion

113. The Popović Defence argues that the language in paragraph 15 of the Indictment—that is, that Vujadin Popović was also responsible for "managing" the Drina Corps Military Police and "proposing ways to utilise those units"—is too vague and does not inform the Accused whether he is alleged to have had "commanding or factual power" over those units.[218] The Prosecution submits that "'managing' in the context of the overall position of the Accused is a term used in the JNA rules which were the regulations that set out the military structure of the VRS during the relevant period of the [Indictment]."[219] It further states that it will set out in greater detail Vujadin Popović's responsibilities as security officer in its Pre-Trial Brief.[220]

114. Vujadin Popović is not charged under Article 7(3) of the Statute. Paragraph 15 of the Indictment only describes his general tasks as assistant commander for security of the Drina Corps. Vujadin Popović's involvement and role in the commission of the alleged crimes is specified in the paragraphs describing such crimes. The Trial Chamber therefore holds that the allegation in paragraph 15, read in context with the Indictment as a whole, is not ambiguous and provides the Accused with sufficient notice to prepare his defence. This argument is rejected.

115. The Popović Defence further claims that the allegation in paragraph 15 that Vujadin Popović "was also responsible, in general, for co-ordinating with the bodies of the MUP in the Drina Corps zone of responsibility" is not clear; it contends that this allegation leaves open the question as to whether "co-ordination implies control of Vujadin Popović over the MUP units, his command authority in relation with these units or some kind of his consent with activities of those units in the Drina Corps zone of responsibility."[221] The Prosecution responds that the term "co-ordinating" has an unambiguous meaning, and is also used in the VRS regulations in force during the period relevant to the Indictment. It argues that this language is "more than adequate" to put the

[215] Prosecution Response, para. 78. *See also* Nikolić Motion, para. 29.
[216] Prosecution Response, para. 78.
[217] *See* Nikolić Reply, para. 30 (also making this observation).
[218] Popović Motion, para. 14.
[219] Prosecution Response, para. 80.
[220] *Ibid.*
[221] Popović Motion, para. 15.

Accused on notice as to his role in the crimes alleged.[222] In the Trial Chamber's view, the use of the term "co-ordinating" is not ambiguous in the context of the Indictment, especially given the fact that Vujadin Popović is not charged under Article 7(3). The Trial Chamber accordingly rejects this argument of the Popović Defence.

116. The Popović Defence also claims that it is unclear what is meant with the phrase "Ratko Mladić and members of his staff" in paragraph 27 of the Indictment, and whether Vujadin Popović was a member of "his staff".[223] The Prosecution submits that paragraph 27 is clear and that the term "his staff" refers to the VRS Main Staff.[224] The Trial Chamber holds that the use of the term "his staff" in paragraph 27 could give rise to ambiguity and therefore directs the Prosecution to replace it with "the VRS Main Staff".

117. The Popović Defence further submits that, where the Indictment alleges that Vujadin Popović and Ljubiša Beara were supervising the transportation and in some instances the execution of Muslim prisoners, the role of Vujadin Popović is unclear because of the presence of Ljubiša Beara, who was a higher security officer.[225] The Prosecution responds that this argument concerns the veracity of pleaded facts and is not a proper challenge to the form of the Indictment.[226] The Trial Chamber holds that the respective paragraphs clearly allege that the troops were acting under the supervision of both Vujadin Popović and Ljubiša Beara.[227] The question of whether and how much the presence of Ljubiša Beara influenced Vujadin Popović's alleged supervisory role and responsibility is a matter to be dealt with at trial. The Trial Chamber therefore rejects this argument of the Popović Defence.[228]

118. Paragraph 41(a)(iii) of the Indictment alleges, *inter alia*, that Vujadin Popović oversaw and supervised the summary execution of the Muslim prisoners detained in the schools at Orahovac, Petkovci, Ročević, Kula, and the Pilica Cultural Centre. The Popović Defence submits that, with respect to Orahovac, Petkovci, and Kula, this allegation is not reflected in the various paragraphs describing the specific events in relation to the Bosnian Muslim men detained there.[229] The Popović Defence argues that Vujadin Popović and Ljubiša Beara are charged with supervising the transportation of the Bosnian Muslim men to these schools, but not with the supervision of their

[222] Prosecution Response, para. 81.
[223] Popović Motion, para. 16. The Popović Defence apparently means to refer here to paragraph 27 of the Indictment.
[224] Prosecution Response, para. 82.
[225] Popović Motion, para. 17.
[226] Prosecution Response, para. 83.
[227] *See* Indictment, paras. 30.7, 30.9–30.12.
[228] This holding also applies to the argument raised by the Popović Defence in paragraph 21 of the Popović Motion. The determination of Vujadin Popović's responsibility while acting in concert with higher security officers like Ljubiša Beara and Zdravko Tolimir is a matter to be dealt with at trial.
[229] Popović Motion, para. 18 (referring to Indictment, paras. 30.6, 30.7–30.9).

execution.[230] The Prosecution responds that the material facts in the respective paragraphs are pleaded with sufficient precision and that

> given Popović's role as Assistant Commander of Security of the Drina Corps and his responsibility over units which participated in the mass executions, such as units of the Drina Corps Military Police, the Amended Indictment makes it plain that Popović is alleged to have overall responsibility for the execution sites[.][231]

119. The Trial Chamber cannot accept the arguments of the Prosecution. There is a clear contradiction as to the scope of responsibility of Vujadin Popović in most of the paragraphs dealing with these events. The paragraphs dealing with the detention and execution of the Bosnian Muslim men in the schools in Orahovac and Petkovci only explicitly mention Vujadin Popović as having supervised the transportation of the Muslim prisoners to these schools. In respect of Orahovac, it is merely mentioned that Vujadin Popović knew that those prisoners were to be collected and summarily executed. Moreover, in addressing the argument of the Prosecution, the Trial Chamber notes that there is no explicit mention of the Drina Corps Military Police as being involved in the executions of the prisoners detained at these schools. However, with respect to Kula it is alleged that Vujadin Popović was supervising the transportation of the Bosnian Muslim men to the school and their transportation from there to the execution site at Branjevo Military Farm.[232] Nevertheless, if it is the Prosecution's case that Vujadin Popović oversaw and supervised mass executions, the Indictment should explicitly state as such in all relevant instances. The Trial Chamber therefore orders the Prosecution to provide clarification as to Vujadin Popović's conduct in the paragraphs dealing expressly with the executions in question. Trial Chamber further directs the Prosecution to provide clarification as to the alleged detention site called Ročević.[233]

120. The Trial Chamber notes that, although not raised as such, the contradictions found with respect to Vujadin Popović in the previous paragraph equally concern Ljubiša Beara. The Trial Chamber therefore orders the Prosecution to either strike the words "and oversaw and supervised their summary execution" from paragraph 40(a)(ii) or, if it wishes to charge Ljubiša Beara with overseeing and supervising these executions, to enumerate such conduct in the paragraphs dealing expressly with the executions in question. The Trial Chamber further directs the Prosecution to provide clarification as to the alleged detention site called Ročević.[234]

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[230] Popović Motion, para. 18.
[231] Prosecution Response, para. 84.
[232] *See* Indictment, para. 30.11.
[233] *See supra* para. 111. The Trial Chamber notes that this order also applies to the mention of Ročević in paragraph 79(a)(iii).
[234] *See supra* para. 111. The Trial Chamber notes that this clarification should also be made in respect of Milorad Trbić in paragraph 44(a)(i) of the Indictment, and that this order also applies to the mention of Ročević in paragraphs 78(a)(ii) and 82(a)(i).

121. The Popović Defence further submits that the allegations in paragraphs 41(a)(i) and 59 of the Indictment are contradictory because the first paragraph states that Vujadin Popović was a "participant" of the Hotel Fontana meeting while the latter states that he was "attending" the meeting.[235] This comment in itself is not correct. Paragraph 41(a)(i) does refer to the fact that Vujadin Popović was a participant of the meeting, but paragraph 59 states that Vujadin Popović and others "convened" the meeting which was *also attended* by DutchBat officers and representatives of the Muslim refugees. The Trial Chamber holds that the use of the terms "convening", "attending" and being a "participant" are not inconsistent.

IV. DISPOSITION

122. Pursuant to Rules 50, 54, 72, and 126 *bis* of the Rules, the Trial Chamber hereby **DECIDES** as follows:

(1) The Miletić Defence is **GRANTED** an extension of the word limit.[236]

(2) The Pandurević Defence, Popović Defence, Nikolić Defence, Miletić Defence, and Gvero Defence are **GRANTED** leave to reply to the Prosecution Response.[237]

(3) The Gvero Defence, Borovčanin Defence, and Trbić Defence are **GRANTED** leave to file their Sur-Replies to the Prosecution Reply.[238]

(4) The Defence Motions are **GRANTED** in part.

(5) The Motion to Amend the Indictment is **GRANTED** in part.

(6) The Motion to Amend Paragraph 92 of the Indictment is **GRANTED**.

(7) The Prosecution is **ORDERED** to amend the Indictment as follows:

(a) to strike out of the Indictment "Direct and/or Indirect Co-Perpetration", and to plead only participation in a JCE, as discussed in paragraph 22;

(b) to harmonise the use of the terms "JCE" and "operation" in the Indictment with the deletion of "Direct and/or Indirect Co-Perpetration", and to delete the term "operation" where its use is no longer appropriate, as discussed in paragraph 22;

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[235] Popović Motion, para. 20. For the arguments of the Prosecution on this issue, see Prosecution Response, para. 86.
[236] *See* Miletić Motion, para. 7; Miletić Reply, para. 10.
[237] The Chamber recalls that the Trbić Defence has already been granted leave to reply. *See Popović et al.*, Decision on Milorad Trbić's Request for Leave to Reply to the Prosecution's Consolidated Response to Defence Motions under Rule 72, 27 January 2006, p. 2.
[238] *See supra* note 6 and accompanying text.

(c) to identify, in a schedule to the Indictment, the names of the victims where known or ascertainable, as discussed in paragraph 37;

(d) to identify the physical perpetrators of the charged crimes as specifically as possible, including by name where known, as discussed in paragraph 43;

(e) to clarify in Attachment A of the Indictment that the Indictment alleges one JCE to forcibly remove the Bosnian Muslim population from the Srebrenica and Žepa enclaves and one JCE to kill the able-bodied men of Srebrenica, as discussed in paragraph 46;

(f) if it intends to charge the physical perpetration of the executions described in paragraph 30.15 of the Indictment by personnel other than the Zvornik Brigade, to identify such personnel as specifically as possible, as discussed in paragraph 66;

(g) to enumerate as exhaustively as possible the detention and execution sites, as discussed in paragraph 76;

(h) to clarify whether, in the context of the alleged destruction of the women and children, it refers in paragraph 33 of the Indictment to both enclaves or only to the alleged forcible transfer of the women and children from the Srebrenica enclave, as discussed in paragraph 78;

(i) to list as exhaustively as possible the acts performed by the Accused in furtherance of the two alleged JCEs, as discussed in paragraph 80;

(j) to list as exhaustively as possible in paragraphs 94 and 95 "the criminal acts of subordinates" for which each Accused is alleged to be liable, as discussed in paragraph 81;

(k) to plead expressly Ljubomir Borovčanin's command and control over the MUP forces performing alleged acts from 12 to 17 July 1995 throughout the relevant time, as discussed in paragraph 83;

(l) to clarify, in the respective paragraphs that allege that VRS and/or MUP forces performed executions but that do not mention Ljubomir Borovčanin, whether the MUP forces were acting under Ljubomir Borovčanin's command and control, as discussed in paragraph 84;

(m) to remove the "Acting Chief of Staff" and replace it with "standing in for the Chief of Staff" in relation to Radivoje Miletić's position during the time period relevant to the Indictment, as discussed in paragraph 87;

(n) to clarify the dates of signing and issuance of Directive 7 as alleged in paragraphs 24 and 75(a)(i) of the Indictment, to insert in paragraph 75(a)(i) the closing quotation marks where appropriate, and to replace the semicolon with a comma, as discussed in paragraph 88;

(o) to replace the word "committed" under each Count of the Indictment with the words "are responsible for", as discussed in paragraph 89;

(p) to delete "killing the Muslim men" in paragraph 84(a) of the Indictment, as discussed in paragraph 90;

(q) to amend, as suggested in Annex A of the Prosecution Response, paragraphs 46, 47, and 48 in relation to Radivoje Miletić and Milan Gvero, as discussed in paragraph 91;

(r) to remove the reference to the shootings in paragraph 30.7 of the Indictment, as discussed in paragraph 93;

(s) to clarify that the Serbian unit mentioned in paragraph 30.16 was "a Serbian MUP unit called the Skorpions", and to clarify under which command the Skorpion unit was operating, and in particular whether or not the unit was under the command of Ljubomir Borovčanin, as discussed in paragraph 95;

(t) to add Ljubomir Borovčanin's name as suggested in Annex A of the Prosecution Response in order to clarify that he is charged under Count 2 of the Indictment, as discussed in paragraph 97;

(u) to clarify under which form or forms of responsibility Ljubomir Borovčanin is charged in Count 1, as discussed in paragraph 98;

(v) to clarify whether Ljubomir Borovčanin's alleged duty to protect in paragraph 92 is meant to be limited to "the prisoners who remained alive at the execution site" and, if so, to provide further details in this respect, as discussed in paragraph 99;

(w) to clarify the inconsistency in paragraph 18 and Attachment A of the Indictment in relation to Ljubomir Borovčanin's position in the RS MUP SPB, as discussed in paragraph 100;

(x) to provide more details as to the alleged "knowledge" and "assistance" of Vujadin Popović and Drago Nikolić regarding the events stated in paragraph 30.15 of the Indictment, as discussed in paragraph 105;

(y) to amend paragraph 32 of the Indictment as proposed in Annex A of the Prosecution Response in order to clarify the participation of the respective Accused in the re-burial operation, as discussed in paragraph 106;

(z) to remove the semicolon in paragraph 41(a)(i) or to explain otherwise, as discussed in paragraph 110;

(aa) to either strike the words "and oversaw and supervised their summary execution" from paragraph 42(a)(i) or, if it wishes to charge Drago Nikolić with overseeing and supervising these executions, to enumerate such conduct in the paragraphs dealing expressly with the executions in question, as discussed in paragraph 111;

(bb) to provide clarification as to the alleged detention site called Ročević in paragraphs 40(a)(ii), 41(a)(iii), 42(a)(i), 44(a)(i), 78(a)(ii), 79(a)(iii), 80(b)(ii), and 82(a)(i) of the Indictment, as discussed in paragraphs 111, 119, and 120;

(cc) to clarify the exact position of Drago Nikolić in the VRS in paragraph 42(a)(ii) of the Indictment, as discussed in paragraph 112;

(dd) to replace the term "his staff" in paragraph 27 of the Indictment with "the VRS Main Staff", as discussed in paragraph 116;

(ee) to provide clarification as to Vujadin Popović's conduct in the paragraphs dealing expressly with the executions in Orahovac, Petkovci, and Kula, as discussed in paragraph 119; and

(ff) to either strike the words "and oversaw and supervised their summary execution" from paragraph 40(a)(ii) or, if it wishes to charge Ljubiša Beara with overseeing and supervising these executions, to enumerate such conduct in the paragraphs dealing expressly with the executions in question, as discussed in paragraph 120.

(8) The Prosecution is **GRANTED** leave to correct minor, non-substantive typographical errors in the Indictment, and is ordered to correct the following errors and ambiguities unless the language in question is to be changed in accordance with another order contained in this Decision:

(a) Closing quotation marks shall be inserted where appropriate in paragraphs 19 and 21 of the Indictment;

(b) The language in paragraph 33 of the Indictment shall be clarified to state clearly what the words "in part" refer to;

(c) The allegation in paragraph 39(c)(iv) of the Indictment concerning "our Branjevo Military farm" shall be clarified and harmonised with the language of paragraph 30.14;

(d) The allegation in paragraphs 40(a)(ii), 41(a)(iii), 42(a)(i), 78(a)(ii), 79(a)(iii), and 80(b)(ii) of the Indictment concerning the "organisation" of Muslim men shall be clarified;

(e) The language in paragraphs 46 and 47 of the Indictment shall be clarified to indicate which paragraph charges murder as a violation of the laws or customs of war, and which paragraph charges murder as a crime against humanity;

(f) Subparagraph (d) of paragraph 73 of the Indictment shall be changed to subparagraph (b); and

(g) Subparagraph (b) of paragraph 80 of the Indictment shall be changed to subparagraph (a).

(9) The Prosecution shall file, no later than 9 June 2006:

(a) a second consolidated amended indictment implementing all changes ordered in this Decision ("second consolidated amended indictment");

(b) a table describing all proposed changes and, where such changes were prompted by an order contained in this Decision, the paragraph or paragraphs of this Decision containing the relevant order; and

(c) a "red-line" or "track changes" version of the second consolidated amended indictment in colour hard copy.

(10) The Defence Motions and the Motion to Amend the Indictment are **DENIED** in all other respects.

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

Dated this thirty-first day of May 2006
At The Hague
The Netherlands

Carmel Agius
Presiding

[Seal of the Tribunal]