

UNITED
NATIONS



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

Case No. IT-01-42-PT
Date: 28 June 2002
Original: English

IN THE TRIAL CHAMBER

Before: Judge Daquin Liu
Judge Amin El Mahdi
Judge Alphons Orie,

Registrar: Mr. Hans Holthuis

Decision of: 28 June 2002

THE PROSECUTOR

v.

**PAVLE STRUGAR
MIODRAG JOKIĆ
& Others**

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

The Office of the Prosecutor:
Ms. Susan Somers

Defence Counsel:
Mr. Goran Rodić
Mr. Žarko Nikolić

1. Introduction

1. This Trial Chamber (the “Trial Chamber”) of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (the “Tribunal”) is seized of a motion filed pursuant to Rule 72 of the Rules of Procedure and Evidence of the Tribunal (the “Rules”) by the defence for the accused, Pavle Strugar (the “Defence”) on 18 January 2002 (the “Motion”).¹ The Motion raises challenges to both the form of the indictment and jurisdiction. This decision concerns solely the former.²

2. On 1 February 2002, the Prosecution filed the “Prosecution’s Response to Defence Preliminary Motion Challenging Jurisdiction” and the “Prosecution’s Response to Defendant’s Preliminary Motion Challenging Jurisdiction and Objecting to the Form of the Indictment.” These filings were supplemented by a “Consolidated Corrigenda and Supplemental Sourcing to Prosecution’s Responses to Defence Preliminary Motions Alleging Defects in the Form of the Indictment and Challenging Jurisdiction” filed on 6 February 2002. The latter document is understood to constitute the Prosecution’s final response to the Motion and is comprised of two separate filings. That relevant to this decision is the “Prosecution’s Response to Defence Preliminary Motion Alleging Defects in the Form of the Indictment” (the “Prosecution Response”). On 6 February 2002, the Trial Chamber granted a request by the Defence for leave to file a reply to the response filed by the Prosecution³ by 15 February 2002 and the Prosecution was granted leave to file a response to the reply (if any) within seven days of such filing. On 15 February 2002, the Defence filed the “Defence Reply to the Prosecution’s Response to the Defence Preliminary Motion” (the “Defence Reply”) and on 21 February 2002, the Prosecution filed the “Prosecution’s Response to the Defence Reply to the Prosecution’s Response to the Defence Preliminary Motion” (the “Response of 21 February 2002”). The Trial Chamber heard oral argument from the parties on 12 March 2002.

2. The Indictment

3. On 22 February 2001, the Prosecution issued an Indictment (the “Indictment”) against Pavle Strugar (the “Accused”), Miodrag Jokić, Milan Zec and Vladimir Kovačević, which was confirmed

¹ The “Defence Preliminary Motion.” The deadline for filing of this motion was enlarged by the Duty Judge in the “Decision on Motion by Defence for Extension of Time,” issued on 28 December 2002.

² The “Decision on Defence Preliminary Motion Challenging Jurisdiction,” issued on 7 June 2002 concerns the question of jurisdiction.

³ “Decision on the Defence Request for Leave to Reply and Extension of Time (Re: Preliminary Motion by the Defence for the Accused Strugar on the form of the indictment and challenging jurisdiction,” issued 6 February 2002.

by Judge Wald on 27 February 2001. An order for limited disclosure dated 27 February 2001 was vacated by a decision issued 2 October 2001.

4. The Indictment is comprised of sixteen counts charging the Accused with grave breaches of the Geneva Conventions of 1949 (one count) and violations of the laws or customs of war (15 counts), pursuant to Articles 2 and 3 of the Amended Statute of the Tribunal (the "Statute"). It is alleged that all acts or omissions charged in the Indictment occurred between 1 October and 31 December 1991, during which time the Accused incurred responsibility under both Article 7(1) and 7(3) of the Statute for the crimes charged. It is alleged that between 1 October and 7 December 1991, the Accused, acting individually or in concert with others, participated in the crimes alleged in the Indictment in his position as commander of the Second Operational Group.

3. Amendment of the Indictment

5. The Defence alleges generally that the Indictment is defective and summarises its arguments in the Reply by listing twelve precise requests.⁴ Although the Prosecution generally disputes these arguments, it has stated in both its written filings and during the hearing, that it intends to apply for leave to amend the Indictment.⁵ It has not indicated the extent of its proposed application. Consequently, pending its receipt, the Trial Chamber will consider the arguments raised in the Motion on the Indictment as it now stands in order to give an indication to the Prosecution of those issues that should be clarified in the new indictment. The Defence will have an opportunity to file a further preliminary motion following the filing of the new indictment. Certain orders for clarification made within the terms of this decision affect the accused Miodrag Jokić (who has not filed a preliminary motion alleging defects in the form of the Indictment). He is entitled to their benefit and the Trial Chamber has not identified any prejudicial effect they could have. However, he may also file a preliminary motion in response to the whole of the new indictment to be filed by the Prosecution. If he chooses to do so, in view of the fact that he did not seek the clarifications ordered in this decision, arguments in relation to them are not excluded.

4. The Law

6. Article 18(4) of the Statute provides *inter alia*, that "the Prosecutor shall prepare an indictment containing a concise statement of the facts and the crime or crimes with which the accused is charged under the Statute." Rule 47(C) of the Rules provides that "[t]he indictment shall set forth the name and particulars of the suspect, and a concise statement of the facts of the case and

⁴ Defence Reply, para. 35.

⁵ T, 12 March 2002, p. 90, Prosecution Response, footnote 31, Response of 21 February 2002, para. 12.

of the crime with which the suspect is charged.” The Appeals Chamber has stated that “[t]he Prosecution’s obligation to set out concisely the facts of its case in the indictment must be interpreted in conjunction with Articles 21(2) and (4)(a) and (b) of the Statute. These provisions state that, in the determination of any charges against him, an accused is entitled to a fair hearing and, more particularly, to be informed of the nature and cause of the charges against him and to have adequate time and facilities for the preparation of his defence.”⁶ Further, it stated that,

[i]n the jurisprudence of the Tribunal, this translates into an obligation on the part of the Prosecution to state the material facts underpinning the charges in the indictment, but not the evidence by which such material facts are to be proven. Hence, the question whether an indictment is pleaded with sufficient particularity is dependent upon whether it sets out the material facts of the Prosecution case with enough detail to inform a defendant clearly of the charges against him so that he may prepare his defence.⁷

7. The Trial Chamber agrees that “there is a floor below which the level of information must not fall if the indictment is to be valid as to its form.”⁸ However, as stated, there is a distinction between material facts upon which the Prosecution relies and the evidence by which those material facts will be proven: material facts supporting each charge must be pleaded, but not the evidence by which such material facts are to be proven.⁹ “A decisive factor in determining the degree of specificity with which the Prosecution is required to particularise the facts of its case in the indictment is the nature of the alleged criminal conduct charged to the accused.”¹⁰ In particular, “[w]hether or not a fact is material *depends upon the proximity of the accused person to the events*

⁶ *Prosecutor v. Kupreškić et al.*, Case No. IT-95-16-A, Appeal Judgement, 23 October 2001 (“*Kupreškić Appeal Judgement*”), para. 88. Article 21(2) of the Statute provides: “In the determination of charges against him, the accused shall be entitled to a fair and public hearing, subject to article 22 of the Statute” (Article 22 of the Statute concerns the protection of victims and witnesses). Article 21(4) of the Statute provides: “In the determination of any charge against the accused pursuant to the present Statute, the accused shall be entitled to the following minimum guarantees, in full equality: (a) to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him; (b) to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;[....]”

⁷ *Kupreškić Appeal Judgement*, para. 88 (footnote omitted).

⁸ *Prosecutor v. Miroslav Kvočka et al.*, Case No. IT-98-30-PT, Decision on Defence Preliminary Motions on the Form of the Indictment, 12 April 1999 (“*Kvočka Decision*”), para. 14. This Trial Chamber considered that “[a]lthough Article 18, paragraph 4, of the Statute and Sub-rule 47(C) of the Rules do not appear to set a high threshold as to the level of information required in an indictment, a concise statement of the facts of the case and of the crime with which the suspect is charged being all that is needed, there is a minimum level of information that must be provided by the indictment; there is a floor below which the level of information must not fall if the indictment is to be valid as to its form.” It stated that this was still an accurate description even when considering the distinction drawn between material facts and evidence, in *Prosecutor v. Milorad Krnojelac*, Case No. IT-97-25-PT, Decision on the Defence Preliminary Motion on the Form of the Indictment, 24 February 1999 (“*First Krnojelac Decision*”), para. 12.

⁹ *The Prosecutor v. Rahim Ademi*, Case No. IT-01-46-PT, Decision on the Defence Motion on the Form of the Indictment, 12 November 2001 (“*First Ademi Decision*”), p. 4 (and accompanying references). Also, *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-AR72, Decision on Application by Defence for Leave to Appeal, 30 November 2002 (“*Galić Decision*”), para. 15.

¹⁰ *Kupreškić Appeal Judgement*, para. 89.

for which that person is alleged to be criminally responsible.”¹¹ Legal prerequisites which apply to offences charged are material facts and must also be pleaded.¹²

8. Although it does not dispute the right to be informed promptly of the nature of the charges, nor does it suggest this should be postponed until filing of the pre-trial brief,¹³ the Prosecution points to a distinction between information that should be provided in the Indictment and that to be contained in the pre-trial brief and in evidence.¹⁴ This Trial Chamber emphasises that although pre-trial discovery is an essential part of the disclosure process and may assist the defence in a better understanding of the details of the crimes with which an accused is charged, an indictment must first meet the requisite standards of specificity and precision, as prescribed in the Statute and Rules.¹⁵ It is to this question that the Motion is directed.

5. The Motion

9. *Temporal framework of the Indictment.* The Defence submits that none of the counts refers to the period after 6 December 1991 and that the Indictment should be amended to limit its temporal framework to that date.¹⁶ The Prosecution submits that “[a]lthough the last attack alleged may have been on or about 6 December, other criminal activity charged in the Indictment continued through the time period set forth.”¹⁷ It states that “[c]riminal responsibility attaches not only from acts but also from failure to take the necessary and reasonable measures to punish. Therefore, the criminal responsibility of the accused Strugar continued after 6 December 1991.”¹⁸ The Trial Chamber accepts this interpretation. The Indictment period may extend beyond the date of the final alleged attack and therefore up to and including 31 December 1991. This Defence argument is rejected.

10. *Additional Facts.* The Defence submits that it is not clear if the Additional Facts form part of the Indictment and they should be omitted or incorporated within the text. Bearing in mind that

¹¹ *Galić* Decision, para. 15 (emphasis added), referring to *Prosecutor v. Radoslav Brđanin and Momir Talić*, Case No. IT-99-36-PT, Decision on Objections by Momir Talić to the Form of the Amended Indictment, 20 February 2001 (“First Talić Decision”), para. 18 and the *Kupreškić* Appeal Judgement, paras. 88 – 90.

¹² *Prosecutor v. Enver Hadžihasanović et al.*, Case No. IT-01-47-PT, Decision on Form of Indictment, 7 December 2001 (“Hadžihasanović Decision”), para. 10; *Prosecutor v. Momčilo Krajišnik and Biljana Plavšić*, Case No. IT-00-39 & 40-PT, Decision on Prosecution’s Motion for Leave to Amend the Consolidated Indictment, 4 March 2002 (the “Second Krajišnik Decision”), para. 9.

¹³ Response of 21 February 2002, para. 10.

¹⁴ The Prosecution relies on decisions in the cases of *Blaškić* and *Krajišnik* and the *Kupreškić* Appeal Judgement. Prosecution Response, paras. 4-5.

¹⁵ See also, *Prosecutor v. Radoslav Brđanin and Momir Talić*, Case No. IT—99-36-PT, Decision on Objections by Radoslav Brđanin to the Form of the Amended Indictment, 23 February 2001, paras. 11 – 13.

¹⁶ Motion, para. 66. Defence Reply, paras. 34 and 35.

¹⁷ Prosecution Response, para. 30.

¹⁸ Response of 21 February 2002, para. 21. The Prosecution refers to the allegations of responsibility under Article 7(3) of the Statute, in paragraph 17 of the Indictment.

the burden of proof remains on the Prosecution to prove the allegations against the Accused,¹⁹ the Trial Chamber considers that the Additional Facts do form part of the Indictment. Should the Prosecution wish to rely on any of the allegations in this section to prove the counts with which the Accused is charged, they must be proven at trial.²⁰ To this extent, the argument is rejected. However, it is preferable, in line with the Defence submissions, that allegations made in the Additional Facts and relied upon to plead the Accused's course of conduct should be incorporated within the main body of the Indictment.

11. *Internationality.* The Defence maintains that the Prosecution has failed to give sufficient information concerning the international character of the conflict.²¹ In this case the Accused is charged with only one count pursuant to Article 2 of the Statute (Grave Breach of the Geneva Conventions of 1949).²² Two issues are relevant: the date when the conflict became international and the parties to the conflict.

12. As to the first, the Indictment alleges (paragraph 13) that at all times relevant to the Indictment, a state of international armed conflict and partial occupation existed in Croatia. Paragraph 12 defines the temporal framework of the Indictment as running from 1 October 1991 to 31 December 1991. Since the Motion was filed, the Prosecution has submitted that, 8 October 1991, in its view is Croatia's effective date of independence and therefore the conflict cannot be regarded as international before that date. It maintains that the Indictment's present date of commencement (1 October 1991) is therefore "anomalous" and that it intends to seek leave to amend.²³ The scope of the Prosecution's proposed request is unclear. At the very least, in light of its assertion regarding Croatia's date of independence, paragraph 13 is inconsistent. The Prosecution is therefore directed to clarify the issue in the new indictment to be filed and to set out its proposed amendments.

¹⁹ See, *The Prosecutor v. Mladen Naletilić and Vinko Martinović*, Case No. IT-98-34-PT, Decision on Preliminary Motion of Mladen Naletilić, 11 May 2000 ("*Naletilić Decision*"): "Considering that the facts in the 'Background', 'General Allegations,' and 'Superior Authority' sections of the indictment, just as in all other sections of the indictment, must ultimately be proven by the Prosecution if they are to be considered in rendering the judgement."

²⁰ See for example, *Prosecutor v. Dragoljub Kunarac and Radomir Kovac*, Case No. IT-96-23-PT, Decision on the Form of the Indictment, 4 November 1999 ("*Second Kunarac Decision*"), paras. 8 and 11, referring to the background and general allegations sections of the indictment.

²¹ Motion, paras. 69 – 70. The Defence submits that no international conflict was in place and that it will prove as such at trial. It maintains that there is no mention in the Indictment as to who the international armed conflict was between or who the participants were. It submits that the Prosecution "is bound to provide the Defence with the basic information about the states between which the armed conflict existed. As it was the conflict whose final outcome was the emergence of new states during 1992, the Prosecution is bound to say when independence of the newly emerged states was recognised, when these states become subjects of international law."

²² Count 13: Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.

²³ Prosecution Response, footnote 31.

13. As to the second issue (the parties to the conflict), although the Prosecution may intend to revisit this issue with the former, the context of the Indictment makes it sufficiently clear that: the Accused is charged with crimes committed in the course of an armed conflict between two parties: (1) the Republics of Serbia and Montenegro and (2) the Republic of Croatia (whether or not it was part of the Federal State to which the Republics of Serbia and Montenegro belonged).

14. *Material Regulations.* The defence maintains that the legal nature of the material regulations quoted in paragraph 11 of the Indictment should be clarified²⁴ and raises a query as to why the Prosecution failed to cite the Constitution of the then existing state.²⁵ The Trial Chamber considers that these regulations are cited in order to support the basis upon which the Accused is alleged to have been in a position of command and what was required from him in that position.²⁶ The question of whether the basis on which it is sought to allege that the Accused was in a position of command is pleaded with sufficient specificity is discussed below. Concerning the Constitution of the then existing state, it is within the discretion of the Prosecution to decide whether or not it intends to rely on the Constitution as also regulating the role and responsibilities of the Accused. This argument is rejected.

15. *Responsibility of the Accused.* The Defence submits that the nature of the Accused's individual and superior responsibility for the acts charged in the Indictment should be clarified, including: the material facts on which the Indictment is based and the link between the material facts presented and the Accused; those acts in which the Accused is alleged to have directly participated. It requests specification of the composition of the Accused's *de facto* and *de jure* authority and the names and role of "others" participating with the Accused. It submits that the Prosecution should differentiate between acts alleged to have been committed by the Accused

²⁴ Defence Reply, para. 35. The Defence submits that the Prosecution should clarify whether the Accused is alleged to be in violation of the material regulations governing the role of JNA officers as cited in the paragraph "or he is responsible according to the alleged violation of material law provisions of the Statute." It states that the Prosecution should clearly state which regulation "was designed to constitute criminal responsibility" and was violated by the Accused in this case. Motion, paras. 37 – 38.

²⁵ It claims that this states that it is the army's obligation to engage in protection of the territorial integrity of the state. Motion, para. 37. The Prosecution responds to paragraph 37 by stating that it was unclear what clarification was being sought. It submits that the Accused is properly informed of the charges and that the violations of law allegedly committed by him are sufficiently set out in the Indictment. Regarding the failure to include some other sources of law within the regulations binding the JNA at the time of the events, it relies on a decision in *Kordić*, in which it states that the Trial Chamber found that the question of the legal bases for offences is a matter that is best resolved at trial. Prosecution Response, para. 27.

²⁶ Paragraph 11 alleges that the Accused, as an officer in a command function in the JNA, was "bound by the regulations of the JNA [as listed]....These regulations governed the roles and responsibilities of JNA officers, set out their positions in the chain of command and obligated those officers, and their subordinates, to observe the laws of war."

pursuant to Article 7(1) and (3) of the Statute.²⁷ A related submission is that there are insufficient facts in connection with the “Dubrovnik Republic” and the Prosecution is unspecific regarding who formulates and determines political and military objectives²⁸; the Prosecution should decide if it considers the Accused as a man formulating the latter programme, that is, the “Dubrovnik Republic” program and “who commences its implementation on the basis of his own initiative.”²⁹

16. A three fold distinction has been established concerning the material facts that should be pleaded in an indictment: cases based on superior responsibility; cases based upon individual responsibility where it is not alleged that the accused personally did the acts for which he is to be held responsible; cases based upon individual responsibility where the accused is alleged to have personally done the acts pleaded.³⁰ With regard to the last category, the Prosecution has ambiguously stated that the Accused “is not necessarily charged with having *himself* physically perpetrated all crimes alleged in the Indictment.”³¹ This position is vague. As far as the Indictment currently stands, the Trial Chamber understands that it is not alleged that the Accused directly participated in the crimes charged. If this is not the Prosecution case, then it is obliged to seek leave to amend the Indictment and plead appropriately, the acts alleged.³² The Trial Chamber will proceed on the understanding that the Prosecution does not intend to so allege.

17. The Indictment must make clear the nature of the responsibility alleged against the Accused and the material facts by which that responsibility will be established³³:

In a case based upon superior responsibility, what is most material is the relationship between the accused and the others who did the acts for which he is alleged to be responsible, and the conduct of the accused by which he may be found to have known or had reason to know that the acts were about to be done, or had been done, by those others, and to have failed to take the necessary and reasonable measures to prevent such acts or to punish the persons who did them. However, so far

²⁷ Defence Reply, para. 35; Motion, para. 63. The Defence refers to the “precise distinction as to where the prosecution sees the responsibility pursuant to 7(1), and where pursuant to 7(3) of the Statute.” Defence Reply, para. 33.

²⁸ Motion, para. 39.

²⁹ Motion, para. 41.

³⁰ First *Talić* Decision, paras. 19 – 22; *Prosecutor v. Milorad Krnojelac*, Case No. IT-97-25-PT, Decision on Preliminary Motion on Form of Amended Indictment, 11 February 2000 (“Second *Krnojelac* Decision”), para. 18.

³¹ Prosecution Response, para. 12. Also, para. 20. Response of 21 February 2002, para. 15. In asserting that it does not “necessarily” charge the Accused with having himself physically perpetrated all crimes alleged, the Prosecution states that “[t]heories of liability will be discussed in the pre-trial brief.” Prosecution Response, footnote 14.

³² Second *Krnojelac* Decision, para. 18: “In a case where it is alleged that the accused personally did the acts in question (which may more conveniently be described in general terms as ‘personal’ responsibility), the material facts must be stated with the greatest precision – the information pleaded as material facts must, so far as it is possible to do so, include the identity of the victim, the place and the approximate date of those acts and the means by which the offence was committed.” See also, First *Talić* Decision, para. 22; *Prosecutor v. Radoslav Brđanin and Momir Talić*, Case No. IT-99-36-PT, Decision on Form of Further Amended Indictment and Prosecution Application to Amend, 26 June 2001 (“Second *Talić* Decision”), para. 13; *Kupreškić* Appeal Judgement, para. 89.

³³ Second *Kunarac* Decision, para. 6; First *Krnojelac* Decision, para. 7. Trial Chamber II has stated that “it is preferable that an indictment indicate precisely and expressly the particular nature of the responsibility alleged in relation to each individual count.” First *Talić* Decision, para. 28. Also, Second *Talić* Decision, para. 5; Second *Krnojelac* Decision, para. 60.

as those acts of the other persons are concerned, although the prosecution remains under an obligation to give all the particulars which it is able to give, the relevant facts will usually be stated with less precision, and that is because the detail of those acts (by whom and against whom they are done) is often unknown – and because the acts themselves often cannot be greatly in issue.

In a case based upon individual responsibility where it is not alleged that the accused personally did the acts for which he is to be held responsible – where the accused is being placed in greater proximity to the acts of other persons for which he is alleged to be responsible than he is for superior responsibility – again what is most material is the conduct of the accused by which he may be found to have planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of those acts. But more precision is required in relation to the material facts relating to those acts of other persons than is required for an allegation of superior responsibility. In those circumstances, what the accused needs to know as to the case he has to meet is not only what is alleged to have been his own conduct but also in somewhat more detail than for superior responsibility what are alleged to have been the acts for which he is to be held responsible, subject of course to the prosecution's ability to provide such particulars. But the precision required in relation to those acts is not as great as where the accused is alleged to have personally done the acts in question.³⁴

18. Based on the Indictment as it now stands, the Trial Chamber considers that the material facts pleaded in relation to the conduct of the Accused are insufficient. The paragraphs in which the Indictment purports to set out the Accused's conduct are general in nature and provide insufficient detail as to what his role really was. Concerning the request for details of the Accused's *de jure* and *de facto* authority, precise details of such material facts are generally a matter of evidence and therefore pre-trial discovery. Nevertheless, the material facts must be pleaded.

19. The Prosecution is accordingly directed to clearly plead the facts that underlie the Accused's criminal responsibility under Article 7(3) and to clearly define which alternative(s) under Article 7(1) it pleads and to set out the relevant facts.

20. Concerning the arguments raised regarding the "Dubrovnik Republic," the Trial Chamber understands that it is not alleged that the Accused was involved in development of the concept of the "Dubrovnik Republic." The charges concentrate on the military actions that could be considered part of the implementation of this concept. In view of this understanding of the Indictment, no further detail in respect of the creation of this concept must be pleaded. These arguments are accordingly rejected.

21. The Defence also requests specification of the names and the role of "others" who participated with the Accused in committing the alleged crimes, comparing the instant Indictment to that in *Milošević*, which it submits is more detailed.³⁵ The Prosecution submits that paragraphs 9

³⁴ First *Talić* Decision, paras. 19 – 20. See also, Second *Krnjelac* Decision, para. 18; *Prosecutor v. Momčilo Krajišnik*, Case No. IT-00-39-PT, Decision Concerning Preliminary Motion on the Form of the Indictment, 1 August 2000 ("First *Krajišnik* Decision"), para. 9; Second *Krajišnik* Decision, para. 11.

³⁵ Defence Reply, paras. 35 and 23; Motion, paras. 49 and 54.

and 10 describing the military chain of command provide sufficient information and that further evidence will be adduced at trial.³⁶ During the hearing, it stated that it,

would like to focus on the fact that this is a military case in which four co-accused within the same chain of command are charged with having jointly committed the crimes alleged. On the contrary, the names given in the Milošević indictment are the names of the members of a joint criminal enterprise. In the instant case, joint criminal enterprise, on the contrary, is not a mode of liability pleaded by the Prosecution.³⁷

22. It is alleged that the Accused acted “individually or in concert with others.” Four co-accused are named in the Indictment. The Prosecution is directed to clarify if reference to “others” relates only to the four co-accused and their subordinates or others in that chain of command. If not, the “others” should be identified (to the extent possible and without being in violation of obligations of confidentiality, if any) together with their relation to the Accused in respect of the acts charged in the Indictment.

23. *Military units.* The Defence requests clarification of the military units participating in the campaign, their role and relation to the Accused,³⁸ including specification in each case as to the units participating in specific incidents.³⁹ The Prosecution maintains that paragraphs 10 and 20 of the Indictment are sufficiently specific concerning the units participating and under the Accused’s command.⁴⁰ The primary components of the Second Operational Group are listed in paragraph 10. The position of the forces listed in paragraph 20 within the overall structure is unclear. In short, when read together, paragraphs 9, 10 and 20 of the Indictment are unclear, both in terms of the forces alleged to make up the Second Operational Group and the overall structure. Consequently, the Prosecution is directed to specify, where possible, by way of schedule, the overall structure and those units under the command of the Accused and who carried out the acts alleged in the

³⁶ Prosecution Response, para. 24. The Prosecution relies on the case of *Kordić*. It states that in that case, “where accomplices were merely identified as members, leaders and agents of the HDZ-BiH and HVO, the Trial Chamber held that failure to identify with specificity the accused’s alleged accomplices does not result in vagueness of an indictment” (footnote omitted). The Defence replied, “that there is not a single piece of information about the military chain.” It stated that it “is only seeking a material fact of this chain, rather than evidence of who makes it. Otherwise, the Defence can only make guesses.” Defence Reply, para. 32.

³⁷ T, 12 March 2002, p. 108. See also Response of 21 February 2002, para. 13, where the Prosecution states *inter alia*, that “joint criminal enterprise is not the theory of liability in this Indictment.”

³⁸ Defence Reply, para. 35. See also, Motion paras. 43 – 45. The Defence submits that paragraph 9 of the Indictment states that various components of JNA forces were incorporated in the Dubrovnik campaign. It maintains that the Indictment is not specific as to which were organised in the Second Operational Group but mentions only the primary components. It submits that the Prosecution is obliged to list the components participating in the campaign, “so that the accused could mount his defence and know about the units that the Prosecutor ascertains as those under his command and for which he was allegedly responsible.” Motion, para. 43. It submits that it is also important to make these determinations “having in mind that the Indictment mentions the role of the Air Force and the Navy, as well.” Motion, para. 44.

³⁹ It submits that “in the absence of such identification it is impossible to discern whether the unit participating in the said incident was under the alleged control of the accused.” Motion, para. 45. He relies on what he submits was the standard put forward in the *Talić* indictment, in which he states, can be found the precisely stated units allegedly subordinated to the accused and the precisely determined zone of responsibility. Motion, para. 46

Indictment. The Prosecution does not have to specify which units of the forces involved were responsible for which specific actions, such as shelling mentioned in paragraphs 25, 26 and 27 of the Indictment. Which unit exactly fired the shells is not necessarily material to the allegations made against the Accused, given it is not alleged that the Accused was *personally* responsible (see paragraph 16 above regarding the Accused's direct participation). It is however material that they were fired by a unit or units that fall within the structure of the armed forces in which the Accused could carry out the alleged crimes or at least were under the command of the Accused.

24. *Further specification regarding shellings.* The Defence requests further details, including dates, regarding the allegations of wounding; buildings damaged or destroyed; plunder; the measures taken to track and maintain looted property. The Trial Chamber has proceeded on the basis that the Prosecution does not allege that the Accused directly participated in any of the crimes alleged. As seen above, the degree of particularity required in an Indictment depends on the proximity of the Accused to the crimes alleged. However, an accused must know not only his own conduct giving rise to his responsibility as a superior, but also the conduct of those for whom he is responsible.⁴¹ As the Accused becomes more distant to the events alleged, more emphasis is placed on his or her conduct.⁴² Therefore, deciding when more precise details of the acts of subordinates are required will depend on the circumstances of the case. In this case, the Trial Chamber considers that the Indictment must *identify* the incidents alleged⁴³ and their approximate consequences.

25. Counts 1 – 9⁴⁴ allege that the Accused was responsible for the killings of 43 civilians and the wounding of numerous others. Schedule I lists the names of those victims killed (and dates of birth), the location and date. The Prosecution stated in its second filing that as it has indicated its intention to apply for leave to amend the Indictment, it “may at that time revisit the issue of specificity with regard to the wounded.”⁴⁵ The Trial Chamber considers that it should “revisit” this issue. Although it may apply for leave to amend in relation to other issues, it is directed in particular to provide further information, where possible, regarding the approximate number of wounded, where they were wounded and when.

⁴⁰ Prosecution Response, para. 16.

⁴¹ First *Krnjelac* Decision, para. 38.

⁴² That is, “the conduct of the accused person himself upon which the prosecution relies to establish his responsibility as an accessory or as a superior to the persons who personally committed the acts giving rise to the charges against him.” *Galic* Decision, para. 15, referring to First *Talić* decision, paras. 19 -20.

⁴³ See for example, Second *Talić* Decision, paras. 59, 66 and 73.

⁴⁴ Murder, cruel treatment and attacks on civilians.

⁴⁵ Response of 21 February 2002, para. 12.

26. Counts 10 – 12,⁴⁶ allege that JNA forces “engaged in unlawful shelling of civilian targets in Dubrovnik” including three specified groups of attacks. The Indictment refers to, *inter alia*, damage or destruction of hotels housing refugees and other civilian structures and destruction of six buildings in the Old Town. The Prosecution is directed to identify where possible, the six buildings referred to and the location of the hotels housing refugees.

27. Paragraph 35 of the Indictment alleges that troops under the Accused’s command, “systematically plundered” property following which the property was transported to Montenegro “and the army thereafter instituted measures to track and maintain the looted property.” The Defence requests details of the latter measures,⁴⁷ while the Prosecution maintains that this is a matter for determination at trial.⁴⁸ The Trial Chamber considers that this information is not a material fact that should be pleaded in the indictment. However, the Prosecution is directed to clarify if the list in paragraph 36 of the Indictment applies equally to paragraph 35 of the Indictment and if not, it is directed to indicate where possible, the towns or villages in which the public, private and commercial property was allegedly plundered and approximately when this occurred.

28. Paragraph 36 of the Indictment alleges the systematic destruction of “public, commercial, and religious buildings as well as private dwellings in the areas around Dubrovnik” by JNA troops. It includes the aforementioned list, being a non-exhaustive list of names of villages that it alleges “were extensively damaged or were totally destroyed” and dates (“on or about”) of their occupation by the JNA. Given the fact that religious buildings are specifically mentioned in paragraph 36 and specifically charged in count 15,⁴⁹ the Prosecution is directed to identify, with regard to those villages listed in paragraph 36: those villages destroyed in which religious buildings were situated; those villages in which religious buildings were damaged.

THEREFORE PURSUANT TO Rule 72 of the Rules;

HEREBY

1. Grants the Motion in respect of the Defence’s challenge to the form of the Indictment to the extent set out in the terms of this decision;
2. Orders the Prosecution to file a new indictment within fourteen days of the filing of this decision in which it should (a) indicate in italics those changes made pursuant to the terms

⁴⁶ Devastation not justified by military necessity; unlawful attacks on civilian objects; destruction or wilful damage done to institutions dedicated to religion and to historic monuments.

⁴⁷ Motion, para. 57. It states that it “deems it important to have the type of instituted measures specified, the date of their instituting, who instituted them and the results they produced.”

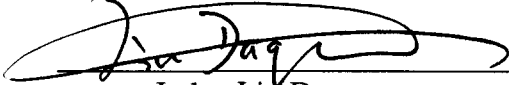
⁴⁸ Prosecution Response, para. 17 and footnote 24.

⁴⁹ Destruction or wilful damage done to institutions dedicated to education or religion.

of this decision (b) indicate in bold those amendments for which leave is sought (if any).⁵⁰ In respect of the latter, the Prosecution should set out its arguments in support of the amendments in an accompanying application for leave to amend the Indictment filed pursuant to Rule 50 of the Rules;

3. Orders that further filings in respect of the above shall be as follows:
- a. the Defence and the accused Miodrag Jokić may each file, within fourteen days of filing of the new Indictment and Prosecution application for leave to amend the Indictment, if any, one document containing:
 - (i) a preliminary motion filed in relation to the new indictment; and
 - (ii) a response to the Prosecution application for leave to amend the Indictment (if any);
 - b. the Prosecution may file, within fourteen days of filing of the last of the documents in 3(a) above, one document containing:
 - (i) its response in relation to any preliminary motions; and
 - (ii) its reply in relation to any responses to its application for leave to amend the Indictment, if any;
 - c. the Defence and the accused Miodrag Jokić may each file, within seven days of filing of the document in 3(b) above, a reply in respect of any response referred to in 3(b)(i) above.

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


Judge Liu Daqun

Dated this twenty-eighth day of June 2002
At The Hague,
The Netherlands.

[Seal of the Tribunal]

⁵⁰ As a result, the same passage in the amended indictment may be both italics and bold.