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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 Former Yugoslavia since 1991	Case No.	IT-03-70-PT
		Date:	8 July 2005
		Original:	English

IN THE TRIAL CHAMBER

Before: **Judge Patrick Robinson, Presiding**
Judge O-Gon Kwon
Judge Iain Bonomy

Registrar: **Mr. Hans Holthuis**

Decision of: **8 July 2005**

PROSECUTOR

v.

NEBOJŠA PAVKOVIĆ,
VLADIMIR LAZAREVIĆ,
VLASTIMIR ĐORĐEVIĆ
SRETEN LUKIĆ

DECISION ON VLADIMIR LAZAREVIĆ'S PRELIMINARY MOTION ON FORM OF INDICTMENT

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I. BACKGROUND

1. This Trial Chamber is seized of a "Defence Preliminary Motion" ("Motion"), filed by Vladimir Lazarević ("Accused") on 11 April 2005, by which he challenges the form of the Indictment. Before responding to the Motion, the Prosecution filed a "Prosecution's Request to Hold Decision on Preliminary Motion in Abeyance" on 25 April 2005, asking the Trial Chamber to hold its decision on the Motion in Abeyance and to suspend the time for the Prosecution to respond until a decision has been taken on the Prosecution's Motion for Joinder, filed on 1 April 2005, by which it requests that the accused in this case and the accused in Case IT-99-37-PT be charged and tried under one joint indictment. On 25 April 2005, this Trial Chamber rendered its Decision on Prosecution's Request to Hold Decision on Preliminary Motion in Abeyance, denying the latter. Accordingly, the Prosecution filed its "Prosecution Response to Lazarević Preliminary Motion" ("Response") on 28 April 2005.

2. On 2 October 2003, Judge O-Gon Kwon confirmed the Indictment against the Accused and three co-accused Nebojša Pavković, Vlastimir Đorđević and Sreten Lukić. Vladimir Lazarević was transferred to the Tribunal on 3 February 2005. At his initial appearance before Judge Carmel Agius on 7 February 2005, he entered a plea of "not guilty" to all counts in the Indictment. On 9 March 2005, pursuant to Rule 66 (A) (i) of the Rules of Procedure and Evidence ("Rules"), the Prosecution disclosed to the Accused English and BCS copies of the supporting material which accompanied the Indictment at confirmation.

3. The Accused is charged with various crimes allegedly committed in Kosovo between 1 January 1999 and 20 June 1999 against Kosovo Albanians by forces of the FRY and Serbia. The Accused is specifically charged under Article 7 (1) and 7 (3) of the Tribunal Statute, as follows:

(a) count 1: deportation as a crime against humanity (Article 5 (d) of the Statute);

(b) count 2: other inhumane acts as a crime against humanity (forcible transfer) (Article 5 (i) of the Statute);

(c) count 3 and 4: murder as a crime against humanity (Article 5 (a) of the Statute) and as a violation of the laws and customs of war (Article 3 of the Statute) and recognized by Article 3 (1) (a) of the Geneva Conventions;

(d) count 5: persecutions on political, racial and religious grounds as a crime against humanity (Article 5 (h) of the Statute).

II. APPLICABLE LAW ON PLEADINGS

4. The form of an indictment is governed by Articles 18(4) and, 21(2), 21(4)(a) and (b) of the Statute and Rule 47(C) of the Rules. [1] Pursuant to Article 18(4) of the Statute, the indictment must set out "a concise statement of the facts and the crime or crimes with which the accused is charged", an obligation which must be interpreted in the light of the terms of Article 21 of the Statute, which provide that, in the determination of charges against him, the accused shall be entitled to a fair hearing and, more specifically, 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. Likewise, Rule 47(C) of the Rules provides that the indictment shall set out not only the name and particulars of the suspect but also "a concise statement of the facts of the case".

5. This right translates into an obligation on the Prosecution to plead in the indictment the material facts underpinning the charges.[2] The pleadings in an indictment will, therefore, be sufficiently particular when they concisely set out the material facts of the Prosecution case with enough detail to inform an accused clearly of the nature and cause of the charges against him enabling him to prepare a defence effectively and efficiently.[3] The Prosecution is, of course, not required to plead the evidence by which it intends to prove the material facts.[4] The materiality of a particular fact is dependent on the nature of the Prosecution case.[5]

6. Should the indictment, as the primary accusatory instrument, fail to plead with sufficient specification the material aspects of the Prosecution case, it suffers from a material defect.[6] In applying that principle to challenges to indictments based on the vagueness of their terms, the ICTY and ICTR Appeals Chambers have recently taken a stricter approach than before to the degree of specification of material facts which should be pleaded in an indictment and have applied that strict approach to the averment of the acts and conduct of the accused on which the Prosecution rely as indicating his criminal responsibility.[7] In *Kvočka et al.* the Appeals Chamber took the view that whether or not a fact is material depends upon the proximity of the accused person to the events for which that person is alleged to be criminally responsible. "As the proximity of the accused person

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[1] *Prosecutor v Kupreškić and Others,* Case IT-95-16-A, Appeal Judgement, 23 October 2001 ("*Kupreškić* Appeal Judgment"), para. 88.
[2] *Kupreškić* Appeal Judgment and *Prosecutor v Hadžihasanović, Alagić* (†) *and Kubura,* Case IT-01-47-PT, Decision on Form of Indictment, 7 December 2001 ("*Hadžihasanović* Indictment Decision"), para. 8.
[3] *See Kupreškić* Appeal Judgment, para. 88.
[4] *Ibid,* para. 88.
[5] *Kupreškić* Appeal Judgement, para. 89.
[6] *Kupreškić* Appeal Judgement, para. 114.

to those events becomes more distant, less precision is required in relation to those particular details, and greater emphasis is placed upon the conduct of the accused person himself upon which the Prosecution relies to establish his responsibility as an accessory or a superior to the persons who personally committed the acts giving rise to the charges against him".[8]

7. Where the charge is of individual criminal responsibility under Article 7 (1) of the Statute, the material facts to be pleaded will vary according to the particular head of Article 7(1) averred.[9] Where the accused is alleged to have committed the crimes in question by participating in a joint criminal enterprise (JCE), the existence of the JCE is a material fact which must be pleaded. In addition, the indictment must specify a number of matters which were identified by the Trial Chamber in *Krnojelac* in the following terms:

> In order to know the nature of the case he must meet, the accused must be informed by the indictment of:
>
> (a) the nature or purpose of the joint criminal enterprise (or its "essence", as the accused here has suggested),
>
> (b) the time at which or the period over which the enterprise is said to have existed,
>
> (c) the identity of those engaged in the enterprise –so far as their identity is known, but at least by reference to their category as a group, and
>
> (d) the nature of the participation by the accused in that enterprise.
>
> Where any of these matters is to be established by inference, the Prosecution must identify in the indictment the facts and circumstances from which the inference is sought to be drawn.[10]

This Trial Chamber notes in particular that the nature of the participation by the accused in the JCE must be specified and that, where the nature of the participation is to be established by inference, the Prosecution must identify in the indictment the facts and circumstances from which the inference is sought to be drawn.

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[7] See para. 9 below.

[8] *Prosecutor v. Kvočka, Radić, Žigić and Prcać*, Case IT-98-30/1-A, Appeals Judgement, 28 February 2005 ("*Kvočka et al.* Appeal Judgement"), para. 65, citing *Prosecutor v. Galić*, Case No. IT-98-29-AR72, Decision on Application by Defence for Leave to Appeal, 30 November 2001 ("*Galić* Decision on Leave to Appeal"). para. 15.

[9] *eg.*, in a case where the Prosecution alleges that an accused personally committed the criminal acts, the material facts, such as the identity of the victim, the time and place of the events and the means by which the acts were committed, have to be pleaded in detail (*Kupreškić* Appeal Judgment, para. 89), whereas, in a JCE case, different material facts would have to be pleaded (*see also Prosecutor Brđanin and Talić*, Case IT-99-36-PT, "Decision on Form of Further Amended Indictment and Prosecution Application to Amend", 26 June 2001 ("Third *Brđanin & Talić* Decision"), paras 21, 22).

[10] *Prosecutor v. Krnojelac*, case IT-97-25-PT, Decision on Form of second Amended Indictment ("*Krnojelac* Decision on Form of second Amended Indictment"), 11 May 2000, para. 16. See also, *Kvočka et al.* Appeal Judgement, para. 42.

8. That clear statement of principle seems at first sight to have been modified, at least in relation to *mens rea*, by the approval by the Appeals Chamber in *Blaškić* of the statement in *Brđanin & Talić* that,

> [w]ith respect to the *mens rea,* 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. Each of the material facts must usually be pleaded expressly, although in some circumstances it may suffice if they are expressed by necessary implication. [11]

Although approval is there given to two ways of pleading *mens rea*, at other places in the same judgement emphasis is placed on pleading the "particular acts" or the "particular course of conduct" on the part of the accused which forms the basis for the charges in question,[12] and of the "conduct of the accused" by which he may be found to possess the *mens rea* required for superior responsibility. [13] Since *mens rea* is almost always a matter of inference from facts and circumstances established by the evidence, the emphasis on pleading the facts on which the Prosecution will rely to establish the requisite *mens rea* signifies the importance attached by the Appeals Chamber to ensuring that the indictment informs the accused clearly of the nature and cause of the charges against him.

9. While the Appeals Chamber has left open the possibility of pleading *mens rea* by simply specifying the relevant state of mind, recent decisions of the Appeals Chamber make it clear that, where that state of mind is to be established by inference from other facts, particularly the acts and conduct of the accused, then the indictment may be defective if it does not include notice of these matters. For example, in the *Kordić and Čerkez* case the Appeals Chamber considered that a meeting which Kordić was alleged at trial to have attended, and which the Appeals Chamber found was a fundamental part of the Prosecution's case against Kordić, constituted a material fact which should have been pleaded in the Indictment.[14] In the *Ntakirutimana* case, the Prosecution had pleaded the specific conduct of the accused in rather general terms in the indictments without describing various aspects of the acts and conduct of the accused to which it was in position to

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[11] *Prosecutor v. Blaškić, Case IT- 95-14-A, Blaškić* Appeal Judgement, 29 July 2004 ("*Blaškić* Appeal Judgement ") , para. 219, referring to *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 ("*Brđanin and Talić* 26 June 2001 Decision"), paras. 33 and 38; *Prosecutor v. Mrkšić et al,* Case No.: IT-95-13/1-PT, Decision on Form of the Indictment, 19 June 2003 ("*Mrkšić* Decision"), paras. 11 and 12.

[12] *Blaškić* Appeal Judgement, para. 213, referring *inter alia* to *Prosecutor v. Krnojelac,* case IT-97-25-PT, Decision on Preliminary Motion on Form of Amended Indictment, 11 February 2000 ("*Krnojelac* 11 February 2000"), para.18 and *Prosecutor Brđanin and Talić*, Case IT-99-36-PT, Decision on Objections by Momir Talić to the Form of the Amended Indictment, 20 February 2001 ("*Brđanin and Talić* 20 February 2001 Decision"), para. 20.

[13] See para. 8 below.

refer. The ICTR Appeals Chamber quashed several of the Trial Chamber's findings of fact relating to specific acts and conduct, such as the finding that Gérard Ntakirutimana "killed a person named "Esdras" during [the] attack" at Mutiti Hill, upon which the Trial Chamber relied to establish the *actus reus* and/or *mens rea* required for committing genocide, on the basis that the indictment was defective due to the failure by the Prosecution to include the relevant factual allegations in it.[15]

10. As far as responsibility pursuant to Article 7 (3) of the Statute is concerned, the Appeals Chamber recently recalled in the *Blaškić* case that: [16]

> 218. In accordance with the jurisprudence of the International Tribunal, the Appeals Chamber considers that in 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:
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> (a) (i) that the accused is the superior[17] of (ii) subordinates sufficiently identified,[18] (iii) over whom he had effective control – in the sense of a material ability to prevent or punish criminal conduct [19]– and (iv) for whose acts he is alleged to be responsible;[20]
>
> (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,[21] and (ii) the related conduct of those others for whom he is alleged to be responsible.[22] 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

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[14] *Prosecutor v. Kordić and Čerkez*, Case IT-95-14/2-A, *Kordić and Čerkez* Appeal Judgement, 17 December 2004 ("*Kordić and Čerkez* Appeal Judgement"), paras. 144 and 147. See also, *Kvočka et al.* Appeals Judgement, para. 29.

[15] *Prosecutor v. Elizaphan and Gérard Ntakirutimana,* ICTR-96-10 A and ICTR-96-17-A ("*Ntakirutimana* Case"), Appeals Judgement, 13 December 2004 ("*Ntakirutimana* Appeal Judgement"), paras. 86, 99 and 555, see also *Prosecutor v. Elizaphan Ntakirutimana & Gérard Ntakirutimana,* ICTR-96-10-T and ICTR-96-17-T, *Ntakirutimana* Trial Judgement, 23 February 2003, paras. 832 and 834. In the same case the Appeals Chamber found that the Trial Chamber erred in basing the conviction of Elizaphan Natkirutimana for aiding and abetting genocide on material facts that had not been pleaded. It accordingly quashed Elizaphan Natkirutimana's conviction under the Mugonero Indictment for conveying attackers to the Mugonero complex, as well as his conviction under the Bisesero Indictment,for his participation in a convoy of vehicles carrying attackers to Kabatwa Hill, where he pointed out Tutsi Refugees at Gitawa Hill, and for transporting attackers to and being present at an attack at Mubuga Primary School in mid-May (*Ntakirutimana* Appeals Judgement, para. 566).

[16] For an application of the said principles, see also, *Blaškić* Appeal Judgement, para. 228 and 245 where the Appeals Chamber found that, while the Second Amended Indictment clearly identified the command position of the Appellant, it did not set out the individuals and units subordinated to him, or the material facts regarding the acts committed and the individuals who committed them. However, the Appeals Chamber was not persuaded by the arguments put forward by the Appellant in support of his claim that defects in the Second Amended Indictment hampered his ability to prepare his defence and thus rendered his trial unfair.

[17] *Deronjić* Decision, para. 15 (ordering the Prosecution to clearly plead the position forming the basis of the superior responsibility charges).

[18] *Deronjić* Decision, para. 19.

[19] *Čelebići* Appeal Judgement, para. 256.

[20] *Krnojelac* 11 February 2000 Decision, para. 18; *Brđanin and Talić* 20 February 2001 Decision, para. 19; *Krajišnik,* Decision, para. 9; *Hadžihasanović* 7 December 2001 Decision, paras 11, 17; *Mrkšić* Decision, para. 10.

[21] *Krnojelac* 11 February 2000 Decision, para. 18; *Krajišnik* Decision, para. 9; *Brđanin and Talić,* 20 February 2001 Decision, para. 19; *Hadžihasanović* 7 December 2001 Decision, para. 11; *Mrkšić* Decision, para. 10.

[22] *Krnojelac* 24 February 1999 Decision, para. 38; *Hadžihasanović* 7 December 2001 Decision, para. 11; *Mrkšić* Decision, para. 10.

give, will usually be stated with less precision,[23] because the detail of those acts are often unknown, and because the acts themselves are often not very much in issue;[24] 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.[25]

III. DISCUSSION

General objection to the form of the indictment

11. The Defence submits that the Indictment is generally defective in that it does not include the elements indispensable for the appropriate mounting of its defence, that is the material facts on which the indictment is based and "the type of connection between the material facts and the Accused and/or his position and his acts or omissions."[26] In other words, it challenges the vagueness of the Indictment. It requests the Trial Chamber to order the Prosecution to amend the Indictment and remove its defects.[27] The Prosecution responds that it is disingenuous for the Defence to claim that it is not possible to establish a connection between the material facts presented and the Accused and/or his position and his acts or omissions.[28] According to the Prosecution, in a case of this nature the material facts include "such matters as the time period for the crimes, the underlying conduct to establish each count, some identifying information about the perpetrators of the crimes which, due to the widespread nature of the criminal conduct, could include reference to the category of persons to which the perpetrators belong, and the place names, to the extent known, where the crimes were committed." [29] The Prosecution then points to various paragraphs of the Indictment where material facts are pleaded, including facts relating to the basis of the Accused's alleged responsibility.[30]

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[23] *Krnojelac* 11 February 2000 Decision, para. 18; *Brđanin and Talić* 20 February 2001 Decision, para. 19; *Hadžihasanović* 7 December 2001 Decision, para. 11; *Mrkšić* Decision, para. 10.
[24] *Krnojelac* 11 February 2000 Decision, para. 18; *Brđanin and Talić* 20 February 2001 Decision, para. 19; *Prosecutor v. Kvočka et al,* Case No.: IT-98-30-PT, Decision on Defence Preliminary Motions on the Form of the Indictment, 12 Apr. 1999, para. 17; *Krajišnik* Decision, para. 9; *Hadžihasanović* 7 December 2001 Decision, para. 11; *Mrkšić* Decision, para. 10.
[25] *Brđanin and Talić* 20 February 2001 Decision, para. 19; *Krnojelac* 11 February 2000 Decision, para.18; *Krajišnik* Decision, para. 9; *Hadžihasanović* 7 December 2001 Decision, para. 11; *Deronjić* Decision, para. 7; *Mrkšić* Decision, para. 10.
[26] Motion, para. 11.
[27] Motion, para. 46.
[28] Response, para. 9.
[29] Response, para. 6.
[30] Response, paras. 7 and 8.

12. The Prosecution also argues that the fact that almost identical indictments are currently before the Tribunal in the *Miloševic* and *Milutinović* et al. cases[31] demonstrates that the instant Indictment conforms to the standards of specificity.[32] In this respect, the Trial Chamber observes that the form of the indictment was not challenged in the *Milošević* case. It observes further that, while a co-accused of Milutinović, namely Šainović, did unsuccessfully challenge the form of the indictment,[33] raising arguments similar in part to the ones raised by this Accused, each separate challenge must be addressed on its own merits in the light of the law prevailing when the challenge is raised. In assessing the merits of each objection raised by the Defence, the Trial Chamber must apply the standards set recently by the Appeals Chamber in determining whether in the indictments in the *Blaškić*, *Kordić & Čerkez*, *Kvočka* et al. and *Ntakirutimana* cases the Prosecution set out the material facts of its cases in sufficient detail to inform the accused clearly of the nature and cause of the charges against them enabling them to prepare their defence effectively and efficiently.[34]

13. In support of its general allegation of vagueness of the indictment the defence raises specific objections falling under five headings, namely 1) the alleged individual responsibility of the Accused pursuant to Article 7 (1) of the Statute; 2) his alleged superior responsibility; 3) the crimes of deportation and forcible transfer; 4) the crimes of murder as a crime against humanity and murder as a violation of the laws or customs of war and; 5) the crime of persecution. The Trial Chamber will examine them in turn.

1. Objections related to the alleged individual responsibility of the Accused pursuant to Article 7 (1) of the Statute

14. The Defence raises three distinct arguments in support of its submission that the Indictment is defective in relation to the alleged individual responsibility of the Accused pursuant to Article 7 (1) of the Statute.

(i) Acts by which acts the Accused is alleged to have concretely participated in the various forms of responsibility alleged pursuant to Article 7 (1) of the Statute

15. The Defence appears to submit that the indictment fails to inform the Accused of the acts by which he is alleged to have concretely participated in planning, instigating or ordering each

[31] *Prosecutor v. Milošević,* IT-02-54-T ("*Milošević* case") and *Prosecutor v. Milutinović, Ojdanic* and *Šainović,* IT,-99-37-PT ("*Milutinović* et al. case").
[32] Response, para. 5.
[33] *Milutinović* et al case,, Decision on Defence Preliminary Motion Filed by the Defence for Nikola Šainović, 27 March 2003.
[34] *Blaškić* Appeal Judgement, para. 226; *Kordić and Čerkez* Appeal Judgement, paras. 144 and 147; *Kvočka et al.* Appeals Judgement, paras. 29, 41and 42; *Ntakirutimana* Appeal Judgement, para. 86 and 555.

individual crime, whether directly or as part of the JCE, or aiding and abetting their planning, preparation or execution.[35] The Prosecution merely confirms its intent to rely on each mode of liability charged for all counts as alleged in paragraph 5 of the Indictment,[36] without specifically addressing the Defence argument which also relates to forms of responsibility other than participation in the JCE. The Prosecution simply states that the Indictment specifies the nature of the participation of each accused in the JCE, and refers specifically to paragraphs 2, and 12 through 14 as being the relevant ones as regards the Accused.[37]

16. The Appeals Chamber has said that the Prosecution may charge all modes of Article 7 (1) responsibility, provided that the material facts relevant to each of these modes are pleaded in the Indictment.[38] Recently, in the *Blaškić* case, where the Prosecution merely repeated the wording of Article 7 (1) of the Statute without providing further details about the acts alleged in respect of the type of responsibility incurred, the Appeals Chamber considered that "[t]his manner of pleading does not clearly inform the accused of the exact nature and cause of the specific allegations against him", and that the Prosecution "should have pleaded the particular forms of participation under Article 7 (1) with respect to each incident under each count".[39] With respect to "instigation" in particular, the Appeals Chamber further considered that it is a distinct form of participation under Article 7 (1) and thus, when the Prosecution pleads such a case, the instigating acts, and the instigated persons or groups of persons, have to be described precisely.[40] Similarly in the *Kvočka* et al. case, where the final version of the indictment specifically indicated that the Accused were individually responsible for the crimes charged in the Indictment pursuant to Article 7(1) of the Statute, which "is intended to incorporate any and all forms of individual criminal responsibility as set forth in Article 7(1)", the Appeals Chamber considered that "the Prosecution [...] failed to plead the material facts necessary to support each of these modes. For example, despite pleading "ordering" as a mode of responsibility, the Indictment d[id] not include any material facts which allege[d] that any Accused ordered the commission of any particular crime on any occasion".[41] The Appeals Chamber found that, "in pleading modes of responsibility for which no corresponding material facts [were] pleaded, the Indictment [was] vague and [was] therefore defective".[42]

17. The Trial Chamber notes that, in pleading the participation of this accused in the various forms of responsibility alleged pursuant to Article 7 (1) of the Statute, paragraph 5 of the Indictment

[35] Motion, paras. 13 and 14.
[36] Response, para. 12.
[37] Response, para. 16 and fn. 34.
[38] *Kvočka* et al. Appeals Judgement, para. 29.
[39] *Prosecutor v Blaškić*, Case IT-95-14-A, 29 July 2004, *Blaškić* Appeal Judgement, para. 226.
[40] *Blaškić* Appeal Judgement, para. 226.
[41] *Kvočka* et al. Appeals Judgement, para. 41.

merely reproduces the wording of that Article, with one exception. The Prosecution explains that, by using the word "committed", it does not intend to suggest that any of the accused physically perpetrated any of the crimes charged personally, and that "Committing" in this Indictment refers to participation in a JCE as a co-perpetrator.[43]

18. In relation to the specific acts and conduct of the Accused, very little more is averred. The relevant averments are as follows. Paragraph 2, and paragraphs 12 through 14 of the Indictment merely describe the official functions of the Accused during the period relevant to the Indictment and allege in particular that:

> (...) He bore full responsibility for operations conducted by units of the VJ Pristina Corps, units attached to the Pristina Corps, and for the work of the Pristina Corps Command Staff. Colonel Vladimir Lazarević exercised his authority as commander of the Pristina Corps in relation to events in Kosovo from January 1999 to June 1999, inclusive.[44]
>
> Under the FRY Law on Defence, and through joint command and coordination structures and mechanisms, as Commander of the Pristina Corps of the VJ 3rd Army, Colonel Vladimir Lazarević also exercised command authority or control over republic police units subordinated to, or operating in co-operation or co-ordination with, the Pristina Corps of the VJ 3rd Army as well as military-territorial units, civil defence units and other armed groups.[45]

At paragraphs 6 and 29 of the Indictment, it is alleged that "[t]o fulfil this criminal purpose, each of the accused, acting individually or in concert with each other and with others known and unknown, significantly contributed to the joint criminal enterprise using the *de jure* and *de facto* powers available to him."[46] This contribution and the allegation that the Accused "planned, instigated, ordered" or otherwise "aided and abetted in the planning, preparation, or execution of the crimes"[47] must also be read in conjunction with the averment in relation to each specific count that "forces of the FRY and Serbia are alleged to have been acting at the direction, with the encouragement, or with the support of [the accused]".[48]

19. However, these vague, general allegations, made in relation to each accused without distinction, fail to plead the specific conduct that supports the bare averment that the accused acted in each or any of the ways in which individual criminal responsibility may be attributable to him under Article 7 (1) of the Statute. If the Prosecution does not intend to rely upon specific conduct, but proposes to invite the Trial Chamber to infer that the Accused acted in one or more of the ways set out in Article 7(1), and that he participated in the JCE, from the conduct of the forces over

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[42] *Kvočka* et al. Appeals Judgement, para. 41.
[43] Indictment, para. 5.
[44] Indictment, para. 12.
[45] Indictment, para. 13.
[46] Indictment para. 5.
[47] Indictment, para. 5.
[48] Indictment, paras. 29 (count 1) ; 30 (by incorporation, count 2); 32 (count 3-4) and 34 (count 5).

whom he exercised authority, his position in the military hierarchy and his relationship to others, in the military, police or political hierarchy, then it should say so. There is no averment that that is the Prosecution case.

20. Furthermore, since the Prosecution does not appear to have pleaded in the Indictment the specific state of mind required for each of these various forms of responsibility under Article 7 (1) of the Statute, it should at least have pleaded the facts by which this material fact is to be established.

21. Therefore, the Trial Chamber considers that the indictment does not clearly inform the Accused of the nature and cause of the specific allegations against him under this form of responsibility, acting either as an individual or as part of a JCE. The objection is upheld and the Prosecution is ordered to: 1) identify either the specific conduct that supports the averment that the accused acted in each or any of the ways whereby individual criminal responsibility may be attributable to him under Article 7 (1) of the Statute; or, state that it does not intend to rely upon specific conduct but proposes to invite the Trial Chamber to infer that the Accused acted in one or more of the ways set out in Article 7(1) from the conduct of the forces over whom he exercised authority, his position in the military hierarchy and his relationship to others, in the military, police or political hierarchy and; 2) specify the state of mind required for each of the various forms of responsibility alleged pursuant to Article 7 (1) of the Statute and the facts by which this material fact is to be established.

(ii) "others known and unknown" with whom the Accused is alleged to have participated in the JCE

22. At various places throughout the Indictment reference is made to "other persons, known and unknown". The Defence argues that the Indictment fails to specify who are the "others known" referred to in paragraphs 5 to 7 of the Indictment. It also argues that the use of the expression "others known" necessarily implies that the Prosecution knows names which have not been disclosed.[49] In relation to those who are "unknown", the Defence argues that, if the Prosecution is unable to provide names, it should "at least approximately indicate the category to which such persons belong so that the Accused can adequately organize his defence".[50] The Prosecution responds that it has fulfilled its obligation by specifying "the identity of those engaged in the enterprise, including the names of some of the known persons participating in the enterprise and the

[49] Motion, para. 15.

category to which other participants belonged".[51] According to the Prosecution, "[t]o include an exhaustive list of all persons who participated in the joint criminal enterprise would be impractical and, in the Prosecution's submission, goes beyond what is necessary to provide the Accused with a concise statement of the facts of the case against the Accused, such that he is able to prepare a defence to the case against him."[52]

23. The Trial Chamber considers that the problem is even greater than that identified by the Defence. In paragraphs 5-7, referred to by the Defence, the JCE is said to include "others known and unknown".[53] When the Prosecution submits that it has specified the category to which other participants in the JCE belong, it can only be referring to the phrase frequently repeated throughout the Indictment, "forces of the FRY and Serbia" and to the individual forces mentioned in specific paragraphs. However, when specifying the parties to the JCE, the Indictment repeatedly refers to the forces of the FRY and Serbia acting at the direction, with the encouragement, or with the support of the Accused and the eight others named in the Indictment "and others known and unknown". The phrase "forces of the FRY and Serbia" is thus used throughout the charges to refer to personnel who fall outside the definition of "others known and unknown". The expression "others known and unknown" is, therefore, used in a confusing and misleading way throughout the Indictment.

24. The Prosecution response that they have pleaded the categories to which unspecified personnel belong appears to relate to both those known and unknown. In light of the confusion in the pleadings highlighted in the previous paragraph, it cannot be said that the categories into which those persons fall are pleaded with any degree of clarity whatsoever.

25. Separately, the Trial Chamber finds the averment "others known" to be a wholly inappropriate form of pleading. While it is submitted in the Prosecution response that it is impractical to name all known persons, no explanation has been given for saying so. The Trial Chamber does not accept the further Prosecution submission that to name those known "goes beyond what is necessary to provide the Accused with a concise statement of the facts of the case". In order to know the nature of the case he must meet, the accused must be informed by the indictment of the identity of those engaged in the enterprise, so far as their identity is known to the Prosecution. If the identity of other participants to the JCE is known to the Prosecution, as the use

[50] Motion, para. 16.
[51] Response, para.16.
[52] Response para. 16, referring to *Prosecutor v Vidoje Blagojević, Dragan Obrenović, Dragan Nikolić and Momir Nikolić*, Case IT-02-60-PT, Decision on Motions Challenging the Form of Amended Joinder Indictment ("*Blagojević* et al. Decision on Form of Amended Indictment"), 1 August 2002, para. 26.
[53] Indictment, paras. 6, 20, 29, 32 and 34.

of the expression "others known" suggests, the Trial Chamber is of the view that these identities constitute material facts to be pleaded in the Indictment.

26. This objection is accordingly upheld. The Prosecution should clarify to whom the expression "others known and unknown" refers. It should further state the identity of those participants in the JCE whose identities are known. If the identity of participants is not known, then the category to which they belonged should be specified.

(iii) Common criminal purpose of the JCE

27. The Defence argues that the Indictment fails to specify any facts to support the Prosecution's allegation that the crimes enumerated in counts 1 to 5 were "within the object of" the JCE and that the Accused and his co-perpetrators "shared the joint criminal object".[54] In response, the Prosecution argues that it has specified the purpose of the JCE in the Indictment,[55] and that the Accused's request for the "facts" in support of the allegation that he participated in a joint criminal enterprise to, *inter alia*, expel a substantial portion of the Kosovo Albanian population from Kosovo, is misconceived. According to the Prosecution, *how* it will establish that the members of the JCE shared the "joint criminal object" and related allegations is a matter of evidence.

28. The common criminal purpose of the alleged JCE constitutes a material fact which must be pleaded in the indictment.[56] The definition of the common criminal purpose of the alleged JCE at paragraph 5 of the Indictment as "*inter alia,* the expulsion of a substantial portion of the Kosovo Albanian population from the territory of the province of Kosovo in an effort to ensure continued Serbian control over the province" could, read in isolation, give rise to some ambiguity as to the exact extent of the criminal purpose of the alleged JCE pleaded in the Indictment. However, read together with paragraph 7 of the Indictment, it is clear that the Indictment pleads a JCE whose common criminal purpose involves the commission of crimes enumerated in Counts 1 to 5 of this Indictment. The Trial Chamber understands from the wording of the second sentence of paragraph 7 of the Indictment, according to which "[a]lternatively, the crimes enumerated in Counts 3 to 5 were natural and foreseeable consequences of the [JCE] and the accused were aware that such crimes were the likely outcome of the [JCE]", that the Indictment pleads in the alternative an extended form of JCE.[57] The Trial Chamber considers, however, that the facts on which the Prosecution's

[54] Motion para. 18.
[55] Response, para. 16.
[56] Response, para. 16.
[57] *See* in particular *Prosecutor v. Duško Tadić,* Case No. IT-94-1-A, Judgement, 15 July 1999 ("*Tadić* Appeal Judgement"), paras 195-226, describing three categories of cases following a review of the relevant case-law, relating primarily to many war crimes cases tried after the Second World War. *See* also *Prosecutor v. Milorad Krnojelac*, Case

allegation is based that the crimes enumerated in counts 1 to 5 were "within the object of" the JCE, are not material facts to be pleaded in the Indictment, but rather a matter of evidence.

29. In relation to the allegation that the Accused "share[d] the joint criminal object", the Indictment is confusing. Although the first sentence of paragraph 7 of the Indictment alleges that the crimes enumerated in Counts 1 to 5 were within the object of the joint criminal enterprise, the Indictment fails to plead as a material fact the requisite *mens rea* for this form of JCE.[58] The Trial Chamber considers that the further allegation, that "[e]ach of the accused and other participants in the joint criminal enterprise shared the intent and state of mind required for the commission of each of the crimes charged in Counts 1 to 5",[59] does not clarify what the requisite *mens rea* is, that is the intent to perpetrate the crimes enumerated in Counts 1 to 5. The Indictment is, therefore, defective in this respect. There is no averment that the Accused was aware of the existence of the JCE, nor is there reference to material facts from which knowledge may be inferred. As far as the Indictment pleads an extended form of JCE in the alternative,[60] the Trial Chamber notes that the Prosecution pleads in an appropriate way that the Accused possessed the *mens rea* required to establish his responsibility for crimes exceeding the common criminal purpose of the JCE : "the crimes enumerated in Counts 3 to 5 were natural and foreseeable consequences of the [JCE]. Despite their awareness of the foreseeable consequences, [the accused] and others known and unknown, knowingly and wilfully participated in the [JCE]." However, the Trial Chamber notes that, again, the Indictment fails under this alternative to plead the requisite *mens rea* required to establish the Accused's responsibility for crimes within the JCE, that is the intent to commit the crimes charged under Counts 1 and 2.

30. This objection is therefore upheld. The Trial Chamber, orders the Prosecution to identify the material facts upon which it intends to rely at trial to establish that the Accused was aware of the existence of the JCE and possessed the requisite *mens rea*.

2. Objections related to the alleged superior responsibility of the accused

31. The Defence raises three arguments with respect to the alleged superior responsibility of the Accused which the Trial Chamber will examine in turn.

No. IT-97-25-A, Appeal Judgement, signed 17 September 2003, filed 5 November 2003 ("*Krnojelac* Appeal Judgement"), paras. 83-84.

[58] While the required *actus reus* is identical in all three forms of JCE, the required *mens rea* differs according to the category of JCE under consideration; see *Krnojelac* Appeal Judgement, para. 31 and *Prosecutor v. Mitar Vasiljević*, Case No. IT-98-32-A, Appeal Judgement, 25 February 2004 ("*Vasiljević* Appeal Judgement"), paras. 100 and 101).

[59] Indictment, para. 7.

32. First, the Defence submits that the Prosecution fails to plead sufficient details about which subordinate structures and individuals in his line of command perpetrated the crimes with which he is charged as a superior.[61] It argues that the part of the Indictment dealing with the concrete counts refers generally to "FRY and Serbia forces", with the exception of point 1, paragraph 29 (g) which refers to Serbian police forces.[62] The Defence requests that the Prosecution should be required to indicate the person or persons, or, if the Prosecution is not able to do so, at least the category of persons alleged to have committed the crimes charged.[63] The Prosecution acknowledges that, in a case based upon superior responsibility, subordinates must be sufficiently identified.[64] It responds that paragraphs 5 through 18 of the Indictment describe the subordinate units or formations for which each accused is responsible.[65] It responds further that, under each count, the Indictment provides detailed accounts of the underlying criminal conduct, including the allegation that the crimes were committed by "forces of the FRY and Serbia". According to the Prosecution, with such a massive crime-base, it would be impossible to allege the concrete persons and/or categories of persons responsible for the perpetration of "each individual crime" as the Defence requests.[66]

33. The Trial Chamber notes that paragraphs 21-29, 32 and 34 of the Indictment do indeed provide a detailed account of the facts relating to the crimes which it alleges were perpetrated by FRY and Serbia forces in the various municipalities identified. However, as far as the alleged perpetrators of the crimes in question are concerned, the Indictment refers essentially to "forces of the FRY and Serbia". The Trial Chamber considers that the Defence properly concedes that the Prosecution cannot be required to identify the persons involved if it is not in position to do so. The Chamber also agrees with the Defence submission that at least the category of persons alleged to have committed the crimes charged should be pleaded. In this respect, in spite of the massive crime-base in question, the Trial Chamber is satisfied that mere reference in the Indictment to "forces of the FRY and Serbia" does not constitute a sufficient description of the categories of forces in question. The Indictment provides some description of the corps, units and groups allegedly subordinated to the Accused.[67] However, the Prosecution fails to explain why it would be impracticable to plead in the Indictment which of the units in questions were allegedly involved in the events in each municipality. In addition, where specific forces are referred to, it is not clear

[60] Indictment para. 7.
[61] Motion, para. 22.
[62] Motion, para. 23.
[63] Motion, para. 24.
[64] Response, para. 20.
[65] Response, para. 7 and fn. 12.
[66] Response. Para. 7 and fn.15 referring to Motion, para. 26.
[67] See para. 34 below.

whether the Prosecution pleads that only those forces and units were involved in the commission of the crimes charged.[68]

34. The objection is therefore upheld. The Prosecution should specify the category of persons alleged to have committed the crimes charged by indicating which of the forces and units allegedly subordinated to the Accused were involved in the events in each municipality and specify whether it is the Prosecution's case that it is only those forces and units that were involved in the commission of the crimes charged.

35. Second, the Defence appears to argue that the Indictment is defective because it fails to plead the relationship between the Accused and the perpetrators of the crimes alleged to be his subordinates.[69] The Prosecution responds that the Indictment sets out the legal and factual basis for the allegation that the Accused was, in fact, the superior of the VJ Priština Corps, as well as those units attached to it, and therefore had *de jure* and/or *de facto* authority over these subordinates.[70] It argues that paragraph 12 of the Indictment specifically and clearly alleges that the Accused "commanded all units of the Priština Corps and units attached to it in the Corps's area of responsibility; that he bore full responsibility for operations conducted by units of the VJ Priština Corps, units attached to the Priština Corps, and for the work of the Priština Corps Command Staff".[71] It further argues that paragraph 13 of the Indictment alleges that "[u]nder the FRY Law on Defense, and through joint command and coordination structures and mechanisms, [...] Lazarević also exercised command authority or control over republic police units subordinated to, or operating in co-operation or co-ordination with, the Priština Corps of the VJ 3rd Army as well as military-territorial units, civil defence units and other armed groups".[72] The Prosecution also specifically refers to paragraphs 14 and 66 through 67 of the Indictment, and maintains that *how* it will establish that the Accused had such authority is a question of evidence and not a material fact which must be pleaded in the indictment.[73]

36. The Trial Chamber observes that these paragraphs of the Indictment do not specify 1) which units attached to the VJ Priština Corps of the VJ 3rd Army, in the area of responsibility of the Corps, were commanded by the Accused, nor 2) the republic police units subordinated to, or operating in co-operation or co-ordination with, the Priština Corps of the VJ 3rd Army or military-territorial units, civil defence units and other armed groups, over which it alleges that the Accused

[68] Indictment, para. 29 (g).
[69] Motion, para. 27, referring to *Krnojelac* 11 February 2000 Decision, para. 18.
[70] Response, para. 21.
[71] Response, para. 8 and fn. 17 which also refers to Indictment, para. 2.
[72] Response, para. 8 and fn. 18.
[73] Response, fn. 46.

exercised command authority or control. The Trial Chamber is of the view that such particulars constitute material facts which the Prosecution should plead in the Indictment if it is in a position to do so.

37. Third, the Defence alleges that the Indictment fails to plead the conduct of the Accused by which he may be found to have known or had reason to know that crimes were about to be committed or had been committed by his subordinates and/or to have failed to take necessary and reasonable measures to prevent such crimes or to punish their perpetrators.[74] The Prosecution does not specifically address this argument in its Response.

38. The Trial Chamber is of the view that such facts constitute material facts which must be pleaded in the Indictment. There are no such averments. Therefore, the Trial Chamber will require the Prosecution to identify the specific aspects of the conduct of the Accused upon which it intends to rely at trial to plead the knowledge and failure to act required to establish the superior responsibility of the Accused with regard to the crimes charged.

3. Deportation and forcible transfer (Counts 1 and 2)

39. The Defence submits that the Indictment is contradictory in that it charges the Accused in paragraphs 19 through 30 with deportation and forcible transfer without identifying who the concrete perpetrators of the crimes were, while at the same time paragraph 61 acknowledges that the civilian population fled the area in question, where KLA forces were active, in view of the fighting and destruction.[75] Referring to paragraphs 25 and 61 of the Indictment, the Defence argues that it is contradictory to allege that thousands of Kosovo Albanians "fled" their homes and were "in that way forcibly displaced" because of the actions of forces of the FRY and Serbia.[76] It argues further that the Accused is entitled to be informed about the concrete cases in which Kosovo Albanians fled the areas where the KLA was active and fighting was taking place, and of the concrete cases where Kosovo Albanians were forcibly displaced by forces of the FRY and Serbia and/or of the cases where they "fled" because of the activities of the FRY and Serbia forces.[77] The Prosecution responds that the Indictment clearly alleges that the Accused is responsible for the deportation and forcible transfer of approximately 800, 000 Kosovo Albanian civilians, perpetrated by forces of the FRY and Serbia. The Prosecution responds further that paragraph 61 of the Indictment sets out the parameters of the armed conflict in Kosovo, refers to forces of the FRY and

[74] Motion para. 27, referring to *Krnojelac* 11 February 2000 Decision, para. 18.
[75] Motion, paras. 31-33.
[76] Motion, para. 34.
[77] Motion, para. 35.

Serbia engaging in "expulsions of the civilian population from areas in which the KLA was active", and sets out that in 1998 "many residents fled the territory as a result of the fighting and destruction or were forced to move to other areas within Kosovo". According to the Prosecution, nowhere in the Indictment is it alleged, directly or indirectly, that anybody else but the FRY and Serb forces bear criminal responsibility for the deportation and forcible transfer of approximately 800, 000 Kosovo Albanian civilians.[78]

40. The Trial Chamber notes that paragraph 61 of the Indictment sets out the parameters of the conflict between the KLA and forces of the FRY and Serbia *between February and October 1998* and states that forces of the FRY and Serbia engaged in "expulsions of the civilian population from areas in which the KLA was active", that "many residents fled the territory as a result of the fighting and destruction or were forced to move to other areas within Kosovo" and that, by the end of October 1998, approximately 285, 500 persons, roughly fifteen percent of the population, had been internally displaced within Kosovo or had left the province.

41. The Trial Chamber sees no contradiction between the above factual allegation related to the situation of the civilian population of Kosovo up to October 1998 and the factual allegations supporting the charges for the underlying crimes alleged to have been committed by forces of the FRY and Serbia between 1 January and 20 June 1999. The Trial Chamber is of the view that the Indictment clearly charges the deportation and forcible transfer of Kosovo Albanian civilians, who were either "directly forcibly expelled from their communities" by forces of the FRY and Serbia,[79] or who "fled as a result of the climate of terror"[80] created by these forces across the province. It also alleges that, at times, the Kosovo Albanians who fled their homes as a result of the conduct of forces of the FRY and Serbia joined convoys of persons that moved towards Kosovo's borders with Albania and Macedonia, while, at other times, these forces escorted groups of expelled Kosovo Albanians to the borders.[81] In addition, the Indictment alleges that thousands of Kosovo Albanians, who fled as a result of the conduct of the forces of the FRY and Serbia and the deliberate climate of terror that prevailed on the territory, were forced to seek shelter throughout the province; that some of these "internally displaced persons remained inside the province throughout the time relevant to the indictment"; that many died; and that others eventually crossed over one of the Kosovo borders into Albania, Macedonia, Montenegro, or crossed the provincial boundary between Kosovo and Serbia.[82] It alleges further that forces of the FRY and Serbia controlled and coordinated the

[78] Response, para. 23.
[79] Indictment, para. 23.
[80] Indictment, para. 23.
[81] Indictment, para. 24.
[82] Indictment, para. 25.

movements of many internally displaced Kosovo Albanians until they were finally expelled from Kosovo.[83] For the aforegoing reasons the objection is dismissed.

4. Murder (Counts 3 and 4)

42. Paragraph 32 of the Indictment alleges that the Accused and his co-accused are responsible for the murders of hundreds of Kosovo Albanian civilians which constitute counts 3 and 4. The Defence argues that the Indictment fails to specify a) which forces of the FRY and Serbia were allegedly involved in the concrete cases of killings;[84] b) the exact number of the persons killed by illegal conduct of a concrete group within forces of the FRY and Serbia;[85] and c) the factual allegations supporting the allegation that the killings occurred in a widespread and systematic manner.[86] The Prosecution does not specifically respond to any of these. The Trial Chamber will examine them in turn.

43. The Defence submits that, with the exception of sub-paragraphs (a) and (b) of paragraph 32 of the Indictment which refers to a uniformed person in the prison compound of Dubrava, the Prosecution fails to specify which forces of the FRY and Serbia were allegedly involved in the cases of killings enumerated.[87] Paragraph 32 details the specific incidents upon which the allegation of murder of hundreds of Kosovo Albanian civilians is based. Some of the victims are identified in Schedules A through L. These murders are alleged to have been committed by forces of FRY and Serbia. In light of the amount of detail set out in relation to each of the incidents, the Trial Chamber is of the view that the Prosecution should specify which forces of the FRY and Serbia were allegedly involved in each of the enumerated incidents. Such facts, if known by the Prosecution, constitute material facts which must be pleaded in the Indictment. The objection is, therefore, upheld. The Prosecution is ordered to specify which forces of the FRY and Serbia were allegedly involved in each of the enumerated incidents of murder.

44. The Defence further submits that the Indictment fails to specify "the exact number of the persons killed by illegal conduct of a concrete group within forces of the FRY and Serbia".[88] In light of the statement in paragraph 32 of the Indictment that hundreds of Kosovo Albanian civilians have been murdered and that those persons killed who are known by name are set forth in Schedules A through L, the Trial Chamber considers that the Prosecution has pleaded adequately the number of alleged victims of murder. This objection is, therefore, without merit.

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[83] Indictment, para. 25.
[84] Motion, para. 37.
[85] Motion, para. 38.
[86] Motion, para. 39.
[87] Motion, para. 37.
[88] Motion, para. 38.

45. The Defence also submits that the Indictment fails to state the facts supporting the allegation that the killings occurred in a widespread and systematic manner.[89] The general allegation at paragraph 36 of the Indictment that "[a]ll acts and omissions charged as crimes against humanity were part of a widespread or systematic attack directed against the Kosovo Albanian civilian population of Kosovo in the FRY" must be read in light of *inter alia* the further allegations in the Indictment, that there was a "deliberate and widespread or systematic campaign of terror and violence directed at the Kosovo Albanian population",[90] and that the way by which forces of the FRY and Serbia, acted in a deliberate and widespread or systematic manner, included "forcibly expell[ing] and internally displac[ing] hundreds of thousands of Kosovo Albanians from their homes across the entire province of Kosovo" by creating "an atmosphere of fear and oppression through the use of force, threats of force, and acts of violence";[91] "engag[ing] in a deliberate and widespread or systematic campaign of destruction of property owned by Kosovo Albanian civilians";[92] "committ[ing] widespread or systematic acts of brutality and violence against Kosovo Albanian civilians in order to perpetuate the climate of fear, create chaos and a pervading fear for life. Forces of the FRY and Serbia went from village to village and, in the towns and cities, from area to area, threatening and expelling the Kosovo Albanian population. Kosovo Albanians were frequently intimidated, assaulted or killed in public view to enforce the departure of their families and neighbours. Many Kosovo Albanians who were not directly forcibly expelled from their communities fled as a result of the climate of terror created by the widespread or systematic beatings, harassment, sexual assaults, unlawful arrests, killings, shelling and looting carried out across the province [...]. All sectors of Kosovo Albanian society were displaced, including women, children, the elderly and the infirm."[93] Review of the above material facts pleaded reveals that this objection is also without merit. The evidence upon which the Prosecution intends to rely to establish that the killings occurred in a widespread and systematic manner is a matter for disclosure, and the weight to be given to the evidence in question is a matter to be determined at trial.

5. Persecutions (Count 5)

46. The Defence argues that the Indictment fails to provide 1) the facts that would point to discriminatory intent required to establish the crime of persecution,[94] and 2) the concrete cases and

[89] Motion, para. 39.
[90] Indictment, para. 20.
[91] Indictment, para. 21.
[92] Indictment, para. 22.
[93] Indictment para. 23.
[94] Motion, para. 41.

facts of sexual assaults on Kosovo Albanians, in particular women.[95] The Prosecution does not respond to the first argument.

47. The Trial Chamber notes that paragraph 7 of the Indictment alleges that the Accused shared the intent and state of mind required for each of the crimes charged in Counts 1 to 5. It also notes that paragraph 34 further alleges that forces of the FRY and Serbia, acting at the direction, with the encouragement, or with the support of the accused, executed a campaign of persecution against the Kosovo Albanian civilian population based on political, racial, or religious grounds, without specifying the requisite *mens rea* for the crime of persecution and the facts from which the necessary state of mind of the Accused is to be inferred. The first objection is, therefore, upheld.

48. In relation to the second argument, under reference specifically to paragraphs 29 (b)(f)(g) and (l) of the Indictment, the Prosecution responds that, based on the nature of this case, and particularly the proximity of the Accused to the crimes, the Indictment sets out in sufficient detail the allegations of sexual assault it intends to prove at trial.[96]

49. The Trial Chamber notes that the Indictment alleges three specific incidents of sexual assault of Albanian women by forces of FRY and Serbia, from 28 March 1999, en route from Prizren to the Albanian border;[97] over a three-week period in Kosovka Mitrovica/Mitrovicë;[98] beginning on or about 24 March 1999 and continuing through the end of May 1999, during the course of forced expulsion in Priština/Pristinë;[99] and, on or about 29 March 1999, during the night in Decani/Deçan municipality in the village of Beleg in a house (at least three women).[100] The Trial Chamber is of the view that the Prosecution has set out in the Indictment, in the light of the nature and scale of this case, sufficient details regarding the allegation of sexual assault which it intends to prove at trial. Given that the Prosecution does not allege that the Accused physically perpetrated any of these crimes, the Indictment is not defective in this respect.

6. General review of the Indictment

50. Because the defects identified in this decision in the context of the objections raised by the Accused also affect the Indictment in relation to his co-accused, the Trial Chamber is of the view that the Prosecution should undertake a general review of the Indictment regarding all accused.

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[95] Motion para. 42.
[96] Response, para. 28 and fn. 53.
[97] Indictment, para. 29 (b).
[98] Indictment, para. 29 (f).

Disposition

For the foregoing reasons, pursuant to Rule 72,

1) The Motion is hereby partially granted as follows:

(a) The Prosecution is ordered to amend the Indictment as follows:

- Identify either a) the specific conduct that supports the averment that the accused acted in each or any of the ways whereby individual criminal responsibility may be attributable to him under Article 7 (1) of the Statute; or, b) state that it does not intend to rely upon specific conduct but proposes to invite the Trial Chamber to infer that the Accused acted in one or more of the ways set out in Article 7(1) from the conduct of the forces over whom he exercised authority, his position in the military hierarchy and his relationship to others, in the military, police or political hierarchy;

- Specify the state of mind required for each of the various forms of responsibility alleged pursuant to Article 7 (1) of the Statute, including participation in the various forms of JCE alleged, and how these material facts are to be established;

- Clarify to whom the expression "others known and unknown" refers and further state the identity of those participants in the JCE whose identities are known. If the identity of participants is not known, then specify the category to which they belonged;

- Specify the category of persons alleged to have committed the crimes charged by indicating which of the forces and units allegedly subordinated to the Accused were involved in the events in each municipality and specify whether it is the Prosecution's case that only those forces and units were involved in the commission of the crimes charged;

- Specify, if the Prosecution is in a position to do so, 1) the units attached to the VJ Priština Corps of the VJ 3rd Army, in the Corps' area of responsibility, the Prosecution alleges were commanded by the Accused and 2) the republic police units subordinated to, or operating in co-operation or co-ordination with, the Priština Corps of the VJ 3rd Army or military-

[99] Indictment, para. 29 (g).

territorial units, civil defence units and other armed groups over which it alleges that the Accused exercised command authority or control;

- Identify specific aspects of the conduct of the accused, from which the knowledge and failure to act required to establish his superior responsibility with regard to the crimes charged may be inferred;

- Specify the forces of the FRY and Serbia that were allegedly involved in each of the enumerated incidents of murder.

- Specify the state of mind required for the crime of persecution.

(b) The amended indictment is to be filed no later than 15 August 2005. A table indicating all the amendments and changes made to the indictment shall be filed by the same time (reorganisation table).

(c) The Defence is to file complaints, if any, resulting from the amendments made in accordance with the above directions within fifteen days of the filing of the amended indictment;

2) The Prosecution is invited to undertake a general review of the Indictment in relation to all co-accused;

3) The remainder of the Motion is denied.

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

Judge Patrick Robinson

Presiding

[Seal of the Tribunal]

Dated this 8th day of July 2005.
At The Hague,
The Netherlands.

[100] Indictment, para. 29 (l)