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

Case No. IT-98-34-PT

Date 15 February 2000

Original: English

IN THE TRIAL CHAMBER

Before: **Judge Almiro Rodrigues, Presiding**
Judge Fouad Riad
Judge Patricia Wald

Registrar: **Mr. Jean-Jacques Heintz, Deputy Registrar**

Decision of: **15 February 2000**

THE PROSECUTOR

v.

MLADEN NALETILIĆ
VINKO MARTINOVIĆ

DECISION ON DEFENDANT VINKO MARTINOVIĆ'S OBJECTION TO THE INDICTMENT

The Office of the Prosecutor:

Mr. Franck Terrier

Defence Counsel:

Mr. Branko Šerić

1. **TRIAL CHAMBER I** 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 is seised of "Defendant Vinko Martinović's Objection to the Indictment."

2. Vinko Martinović and Mladen Naletilić were charged in a twenty-two-count indictment with crimes against humanity, grave breaches of the Geneva Conventions, and violations of the laws or customs of war.[1] The charges were based on their alleged command of military units in and around the city of Mostar in Bosnia-Herzegovina in 1993 and 1994. The indictment was confirmed on 21 December 1998.[2] Mr. Martinović was transferred into the custody of the Tribunal on 9 August 1999 and entered a plea of not guilty in his initial appearance before the Trial Chamber three days later. The co-accused, Mr. Naletilić, remains in detention in Croatia.

3. Rule 72(A)(ii) allows for preliminary motions alleging "defects in the form of the indictment," and Mr. Martinović filed such a motion on 4 October 1999. Mr. Martinović's challenges to the indictment fall within four general categories. First, he objects that certain factual allegations in the indictment are "incorrect" or that no evidence has been offered to support them.[3] Second, he contends that he should not have been charged with more than one offence based on the same underlying facts.[4] Third, he argues that those portions of the indictment charging him with responsibility under both Article 7(1) and 7(3) of the Statute are defective because, in his view, Article 7(3) does not provide a separate ground for command responsibility and liability can be based only on Article 7(1).[5] Fourth, he claims that portions of the indictment are unclear and asks for more specific details to enable him to prepare his defence.[6]

4. The Trial Chamber rejects these objections as a basis for dismissing or amending the indictment, and notes that the Defence now has extensive witness statements as well as supporting materials in its possession. We also note that the Defendant, in the unlikely event that he still does not feel he may adequately prepare for trial even after reviewing

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[1] *Prosecutor v. Naletilić and Martinović*, Case IT 98-34-I, Indictment, 18 December 1998.
[2] *Prosecutor v. Naletilić and Martinović*, Case IT 98-34-I, Order Confirming Indictment, 21 December 1998.
[3] Defendant Vinko Martinović's Objection to the Indictment ("Objection to the Indictment"), 4 October 1999, (a), (b), AD-I to AD-VII, AD-XIII, AD-XV to XVII, AD-XXI and AD-XXII.
[4] Objection to the Indictment, AD-X, AD-XI, AD-XII, AD-XIV, AD-XIX, and AD-XX.
[5] Objection to the Indictment, AD-XIX and AD-XX.
[6] Objection to the Indictment, AD-IV to AD-IX, AD-XV, AD-XIX to AD-XXI and XXII.

these materials, may seek further particulars from the Prosecution. In addition, the Trial Chamber notes that the parties will be asked to address the issue of cumulative charging in their final pre-trial briefs.

I. Proof of the Facts Alleged in the Indictment

5. Mr. Martinović objects that certain factual allegations in the indictment are "incorrect" or that no evidence has been offered to support them.[7] Two sections of the Tribunal's Statute provide the starting point for our analysis of this claim. Article 18 states 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"[8] (emphasis added). Article 21 guarantees the accused the right "to be informed *promptly and in detail* in a language which he understands of the nature and cause of the charge against him" as well as the right "to have adequate time and facilities for the preparation of his defence" (emphasis added).

6. Previous Tribunal decisions have interpreted these provisions to mean that "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 form."[9] But these decisions have also stressed that a "motion on the form of the indictment is not an appropriate way of challenging the evidence" and that proof of the facts alleged in the indictment is a matter for trial.[10] Many of Mr. Martinović's objections are exactly the sort of challenges to the evidence that can only be decided at trial. For example, he contends that "it is incorrect that a state of international armed conflict existed on the territory of the Republic of Bosnia and Herzegovina."[11] The Trial Chamber in *Blaškić* rejected a similar objection, stating that "the international

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[7] Objection to the Indictment (a), (b), AD-I to AD-VII, AD-XIII, AD-XV to XVII, AD-XXI and AD-XXII.

[8] Rule 47(C) essentially tracks Article 18, stating that "[t]he indictment shall set forth the name and particulars of the suspect, and a concise statement of the facts of the case and of the crime with which the suspect is charged."

[9] *Prosecutor v. Kvočka*, Case No. IT-98-30-PT, Decision on Defence Preliminary Motions on the Form of the Indictment, 12 April 1999, para. 14.

[10] *Prosecutor v. Delalić, et al.*, Decision on Motion by the Accused Esad Landžo Based on Defects in the Form of the Indictment ("*Landžo*"), 15 November 1996, para. 9; *see also, e.g.*, *Prosecutor v. Krnojelac*, Case No. IT-97-25-PT, Decision on the Defence Preliminary Motion on the Form of the Indictment, 24 February 1999, para. 20; *Prosecutor v. Blaškić*, Case No. IT-95-14-PT, Decision on the Defence Motion to Dismiss the Indictment Based on Defects in the Form Thereof, 4 April 1997, para. 20; *Prosecutor v. Delalić, et al.*, Case No. IT-96-21-T, Decision on Motion by the Accused Zejnil Delalić Based on Defects in the Form of the Indictment ("*Delalić*"), 2 October 1996, paras. 7, 11.

characterisation of an armed conflict is an issue intimately involving questions of both law and fact" that must be "discussed at trial."[12] The *Blaškić* decision concluded that the "mere mention of an international character of the conflict, at the stage concerning us here, already allows the accused to comprehend the situation and prepare his defence as soon as the accusation is made."[13]

7. To take another example, Martinović's motion claims that there is "no evidence that members of Vinko Martinović's sub-unit mistreated and tortured imprisoned Bosnian Muslims in [the Heliodrom], nor that they took them to the front-lines, forcing them to labour, and using them as human shields."[14] Again, whether or not the evidence ultimately supports these allegations is a matter for trial.[15]

8. Accordingly, the Trial Chamber rejects those objections of Mr. Martinović that are based on his contention that allegations in the indictment are untrue or that the Prosecution is obliged to offer evidence of their truth at this stage in the proceedings.[16]

II. Cumulative Charges

9. Mr. Martinović also claims that the indictment is defective because it charges him with more than one crime based on the same facts.[17] The Prosecutor points out that the Appeals Chamber and several Trial Chambers have held that any overlap in charges is a matter that may be addressed at the time of conviction and sentencing, and urges this Chamber to leave the issue for the end of trial.[18] The Tribunal's jurisprudence on cumulative charging is still evolving. Previous Tribunal decisions have mentioned several factors that may be relevant to the analysis of cumulative charging, but have not voiced a clear view on how these factors relate to one another: (1) whether each charge requires proof of a legal element not required by the others; (2) whether the offences are

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[11] Objection to the Indictment, AD-II.
[12] *Prosecutor v. Blaškić*, Case No. IT-95-14-PT, Decision on Defence Motion to Dismiss the Indictment Based Upon Defects in the Form Thereof, 4 April 1997, para. 27.
[13] *Id.*
[14] Objection to the Indictment, AD-III.
[15] *See, e.g., Delalić*, para. 11.
[16] Objection to the Indictment (a), (b), AD-I to AD-VII, AD-XIII, AD-XV to XVII, AD-XXI and AD-XXII.
[17] Objection to the Indictment AD-X to AD-XII, AD-XIV, AD-XIX, and AD-XX.
[18] *See, e.g., Prosecutor v. Delić*, Case No. IT-96-21-AR72.5, Appeal Decision, 6 December 1996, paras. 35-36; *Prosecutor v. Krnojelac*, Case No. IT-97-25-PT, Decision on the Defence Preliminary Motion on the Form of the Indictment, 24 February 1999, paras. 5-10; *Landžo*, para. 11.

designed to protect different values; (3) whether it is necessary to record a conviction for both offences in order fully to describe what the accused did.[19]

10. The recent *Kupreškić* judgement provides the most in-depth analysis of the issue to date.[20] After an extensive analysis of the practice in both civil and common law countries, the *Kupreškić* judgement concluded that an accused may be found guilty of two offences for a single act if each offence contains an element not required by the other.[21] The Trial Chamber also recognised that cumulative charges may be justified when the provisions at stake protect different values, but found that this test was seldom used as an independent ground for upholding more than one charge based on the same facts if the elements test was not satisfied as well.

11. Were this analysis to be applied to Martinović's objections, some of the cumulative charging, particularly in counts 2-8 and in counts 13-17, might appear problematic. The Prosecution commendably conceded at argument that in the ordinary meaning of the term as used in the *Kupreškić* decision, many of the Article 3 counts appear to be cumulative with the Article 2 and Article 5 counts, but offered that they might still be justified as advancing different interests.[22] The Prosecution also indicated that its position on the *Kupreškić* decision was not yet final.

12. Since the Tribunal's jurisprudence on cumulative charging is still evolving, this Trial Chamber does not see a reason at this juncture for departing from the Trial Chambers' past practice of declining to decide the issue at the indictment stage, since the defendant will not be prejudiced if cumulativeness is decided after the evidence has been presented.[23] As the Trial Chamber indicated at oral argument, however, it may be helpful if the parties organise their trial presentation in terms of the offences which have the greatest requirements, such as persecution and the Article 2 offences requiring proof of international armed conflict, especially when other offences may be seen as lesser

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[19] *See, e.g., Prosecutor v. Kvočka*, Case No. IT-98-30-PT, Decision on Defence Preliminary Motions on the Form of the Indictment, 12 April 1999, para. 47 (mentioning factors (1) and (2) with conjunctive phrasing); *Prosecutor v. Kupreškić*, Case No. IT-95-16-PT, Decision on Defence Challenges to Form of the Indictment, 15 May 1998, p. 3 (same); *see also* the decision of the ICTR in *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, 2 September 1998, para. 468 (mentioning factors (1), (2) and (3) with disjunctive phrasing).

[20] *See Prosecutor v. Kupreškić*, Case No. IT-95-16-T, Judgement, 14 January 2000.

[21] *Id.*, para. 718; *see also id.*, paras. 680-688 (comparing the separate-elements test followed in many common law jurisdictions and set out in *Blockburger v. United States*, 284 U.S. 299 (1932) and the common law doctrine of "lesser included offences", with the civil law concepts of reciprocal speciality and consumption).

[22] *See* Transcript of Status Conference, 3 February 2000, pp. 130-131.

[23] *See, e.g., Prosecutor v. Krstić*, Case No. It-98-33-PT, Decision on the Form of the Indictment, 28 January 2000, pp. 5-7.

included offences which require some but not all of the elements of the greater offence. To that end, the parties will be asked to address the issue of cumulativeness in greater depth in their final pre-trial briefs.

III. Individual Criminal Responsibility

13. Each count of the indictment charges Mr. Martinović with liability under both Article 7(1) and 7(3). Mr. Martinović contends that "the only foundation for someone to be held responsible for a criminal act is Article 7(1), since Article 7(3) simply says that a person is not exempt from a responsibility if such an act was committed by his subordinate."[24] The Trial Chamber does not think this is a correct statement of the law. The Trial Chamber agrees with those decisions of the Tribunal interpreting the Statute to allow a commanding officer to be held liable either on the basis of his own acts pursuant to Article 7(1), or on the basis of his failure to prevent or punish the illegal actions of his subordinates pursuant to Article 7(3), or, where appropriate, both.[25] Mr. Martinović's objection is, therefore, rejected.

IV. Vagueness

14. Mr. Martinović objects that several portions of the indictment are not specific enough. The touchstones for the analysis are once again Articles 18 and 21 of the Statute.[26] The Trial Chambers have expressed a range of views on how specific an indictment must be to satisfy these provisions. A number of decisions have suggested that "[a]n indictment

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[24] Objection to the Indictment, AD-XIX and XX.

[25] *See Prosecutor v. Kvočka, et al.*, Case No. IT-98-30-PT, Decision on the Defence Preliminary Motions on the Form of the Indictment, 12 April 1999, para. 50 ("an accused may be charged either alternatively or cumulatively under Article 7, paragraph 1, and paragraph 3"); *Prosecutor v. Delalić, et al.*, Case No. IT-96-21-T, Judgement, para. 333 (holding that it is a "well-established norm of customary and conventional international law" that "a superior may be held criminally responsible not only for ordering, instigating or planning criminal acts carried out by his subordinates, but also for failing to take measures to prevent or repress the unlawful conduct of his subordinates"); see also *id.*, para. 1222 ("in practice there are factual situations rendering the charging and convicting of the same person under both Articles 7(1) and 7(3) perfectly appropriate").

[26] As noted earlier, Article 18 requires the indictment to contain a "concise statement of the facts." *See also* Rule 47(C) ("The indictment shall set forth the name and particulars of the suspect, and a concise statement of the facts of the case and of the crime."). Article 21 says the accused must be "informed promptly and in detail . . . of the nature and cause of the charge against him" and must "have adequate time and facilities for the preparation of his defence."

must contain information as to the identity of the victim, the place and the approximate date of the alleged offence and the means by which the offence was committed."[27] Other Trial Chambers, however, have taken the view that the "massive scale of the crimes with which the International Tribunal has to deal makes it impracticable to require a high degree of specificity in such matters as the identity of the victims and the dates for the commission of the crimes."[28]

15. The Trial Chambers have also expressed a variety of views on the significance of the materials disclosed in discovery in deciding if an indictment is specific enough. Some chambers have stated that "neither the supporting material nor the witness statements made available to an accused under Rule 66 of the Rules of Procedure and Evidence . . . can be used to fill in any gaps in the indictment."[29] Other chambers have intimated a slightly broader view of the role of discovery materials, stating that the guarantees of Article 21 (to be informed of the charges and to put be in a position to prepare a defence) have different meanings at different stages in the proceedings since "the preparation of

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[27] *Prosecutor v. Krnojelac*, Case No. IT-97-25-PT, Decision on the Defence Preliminary Motion on the Form of the Indictment, 24 February 1999, para. 12; *see also, e.g., Prosecutor v. Kunarac,* Case No. IT-96-23-PT, Decision on the Form of the Indictment, 4 November 1999, para. 6 ("[T]he capacity in which the accused allegedly committed the charged offence must be clearly defined. The indictment must also leave no doubt as to what the accused is alleged to have done at a particular venue on a particular date during a particular time period, with whom, to whom, or to what purpose. It must describe the full conduct complained of which amounts to the crime(s) charged. It must identify with reasonable clarity other persons involved, or affected, where necessary."); *Prosecutor v. Blaškić*, Case No. IT- 95-14-PT, Decision on Defence Motion to Dismiss the Indictment Based Upon Defects in the Form Thereof, 4 April 1997, para. 20 ("[T]he indictment must contain certain information which permits the accused to prepare his defence (namely, the identity of the victim, the place and approximate date of the alleged crime and the means used to perpetrate it) in order to avoid prejudicial surprise."); *Prosecutor v. Landžo*, Case No. IT-96-21-T, Decision on Motion By the Accused Based on Defects in the Form of the Indictment, 15 November 1996, para. 5 ("The Indictment before the Trial Chamber contains all the necessary information for the Defence to prepare its defence: the identity of the victim, the place and approximate time of the alleged crime and the means by which it was committed.").

[28] *Prosecutor v. Kvočka*, Case No. IT-98-30-PT, Decision on Defence Preliminary Motions on the Form of the Indictment, 12 April 1999, para.1; *see also, e.g., Prosecutor v. Aleksovski*, Case No. IT-95-14/1-PT, Decision on the Defence Motion in Respect of Defects in the Form of the Indictment, 25 September 1997, para.16 ("in a case of this sort, the specific identification of each victim and perpetrator is neither possible nor necessary"); *Prosecutor v. Krstić*, Case No. IT-98-33-PT, Decision on the Defence Preliminary Motion on the Form of the Indictment, 6 May 1999, p. 3 ("the nature and very scope of the crimes being prosecuted as well as the type of responsibility charged are sufficient to justify the fact that when they began and when they ended cannot be precisely identified"); *Prosecutor v. Blaškić*, para. 37 ("at the indictment stage an exhaustive list of plundered public or private property cannot be demanded because wars characteristically bring in their wake massive and large scale destruction"); *Prosecutor v. Kvočka*, para. 23 ("the massive scale of the crimes alleged before this International Tribunal does not allow for specific naming of victims").

[29] *Prosecutor v. Kunarac, et al.*, Case No. IT-96-23-PT, Decision on the Form of the Indictment, 4 November 1999, para. 7; *see also, e.g., Prosecutor v. Brđanin*, Case No. IT-99-36-PT, Decision on Motion to Dismiss Indictment, 5 October 1999, para.13 ("the supporting material may not be used to fill in any gaps which may exist in the material facts so pleaded when determining whether a *prima facie* case exists in accordance with Article 19.1 of the Statute"); *Krnojelac*, para.15 ("this Trial Chamber does not accept any interpretation . . . which suggests that the supporting material given during the discovery process can be used by the prosecution to fill any gaps in the material facts pleaded in the indictment").

his defence by the accused assumes a more detailed level of information which may not be available at the time the indictment is framed."[30] However, even those Chambers adhering to the view that the supporting materials provided by the Prosecutor in discovery cannot be used to fill in gaps in the indictment have nevertheless concluded that

> in a limited class of case, less emphasis may be placed upon the need for precision in the indictment where complete pre-trial discovery has been given. For example, if all of the witness statements identify uniformly and with precision the circumstances in which the offence charged is alleged to have occurred, it would be a pointless technicality to insist upon the indictment being amended to reflect that information. That is, however, a rare situation.[31]

And there is a general consensus that a distinction may be drawn "between the material facts upon which the prosecution relies (which must be pleaded) and the evidence by which those material facts will be proved (which must be provided by way of pre-trial discovery)."[32]

16. This Trial Chamber's view is that any confusion about the proper role of supporting materials diminishes when the focus is turned on the fact that two separate statutory provisions are in play. By its terms, Article 18(4) pertains only to the indictment, which it says shall contain a "concise statement of the facts and the crime." But the guarantees of Article 21 have broader application. Article 21(4)(a) says the accused must "be informed promptly and in detail in a language which he understands of the nature and cause of the charges against him," while Article 21(4)(b) says that the accused must "have adequate time and facilities for the preparation of his defence." The supporting materials certainly cannot be used to satisfy Article 18's requirement that the *indictment* contain a concise statement of the facts and crime. But the discovery materials do play a role in fulfilling the defendant's right to be informed of the "nature and cause" of the charges against him, which at least one Trial Chamber has found is "a concept which includes not only the acts but also the evidence in support of the indictment."[33] And they obviously contribute to ensuring that the accused has an adequate opportunity to prepare his defence. *See, e.g.*, Rule 69 (C) ("the identity of the victim or witness shall be

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[30] *Prosecutor v. Blaškić*, Case No. IT-95-14-PT, Decision on the Defence Motion to Dismiss the Indictment Based Upon Defects in the Form Thereof, 4 April 1997, paras.10-11.
[31] *Prosecutor v. Krnojelac*, Case No. IT-97-25-PT, Decision on the Defence Preliminary Motion on the Form of the Indictment, 24 February 1999, para. 15.
[32] *Krnojelac*, para. 12; *see, e g., Kvočka*, para. 14 (disagreeing with portions of *Kronojelac* but recognising this distinction as "valid").
[33] *Blaškić*, para. 11.

disclosed in sufficient time prior to the trial to allow adequate time for preparation of the defence").

17. Moreover, it must be kept in mind that the defendant has other avenues besides a motion challenging the form of the indictment for seeking additional particulars. Some Trial Chambers have endorsed the use of a motion for particulars where the indictment is not so vague as to be defective on its face, but where a defendant needs more information to prepare for trial.[34] These cases have held that, before submitting a motion for particulars, the defence must first make a direct request to the Prosecution for the information, specifying the counts in question, the reasons that the material already in the defence's possession is not sufficient, and the specific information that will remedy the inadequacy.[35] If the Prosecution fails to provide sufficient information, the Defence may then file a motion in the trial chamber, which will then consider whether the requested particulars are necessary "in order for the accused to prepare his defence and to avoid prejudicial surprise."[36] A motion for particulars is only properly directed at the indictment and is not to be used to obtain the discovery of evidentiary material.[37] But the extent of discovery already obtained is relevant to the issue of whether a defendant has enough information to prepare for trial and avoid prejudicial surprise.[38]

18. To sum up, the defendant's preparation for trial may begin with the indictment, but it does not end there. While it is clear that "the indictment must contain certain information which permits the accused to prepare his defence,"[39] it need not contain *all* of the information to which the accused will ultimately be entitled under the Rules. The primary focus at this stage must be on whether the indictment contains a concise, but complete, statement of the facts on which the charges are based.

19. With this in mind, the Trial Chamber will now address Mr. Martinović's objections. With regard to all of these objections, it is important to note that, in the time since this motion was filed, the Defence has received extensive discovery, including 137 witness statements. Defence counsel conceded at oral argument that he has not read all of the

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[34] *See, e.g., Prosecutor v. Delalić*, Case No. IT-96-21-T, Decision on Motion by the Accused Zejnil Delalić Based on Defects in the Form of the Indictment ("*Delalić*"), 2 October 1996, para. 21; *Prosecutor v. Delalić*, Case No. IT-96-21-T, Decision on the Accused Mucić's Motion for Particulars ("*Mucić*"), para. 7; *Prosecutor v. Tadić*, Case No. IT-94-1-T, Decision on Defence Motion on Form of Indictment, 14 Nov. 1995, para. 8.
[35] *See Tadić*, para. 8.
[36] *Mucić*, para. 9.
[37] *See id.*
[38] *See id.*
[39] *Blaškić*, para. 20,

witness statements yet (partly due to translation problems), and therefore could not argue that he remained in the dark about the specifics of the Prosecution's case even in light of those statements.

(a) Objections to Counts 2-8 (Unlawful Labour and Human Shields as Inhuman Treatment and Wilful Killing)

20. Objections AD-VIII, AD-IX, and AD-XV appear to refer to paragraphs 35, 36, and 44 of the indictment. Mr. Martinović contends that these portions of the indictment "fail to accurately list the alleged victims, as well as the time and the place of the occurrence of the criminal act" and that they lack "clarity," and contain only "generalisations."[40]

21. The Prosecution responds that paragraphs 35 through 44, when read together, are sufficiently concrete. In addition, the Prosecution argues that the supporting materials and additional witness statements provided in discovery give more details, and that the "widespread practice of using detainees for force labour and as human shields prevents the Prosecutor from being in a position to identify each and every victim of this conduct, and the specific time and place at which it occurred."

22. The Trial Chamber agrees with the Prosecutor that paragraphs 35 to 44 should be read together. While paragraphs 35, 36 and 44 contain fairly general allegations that Bosnian Muslim detainees were used for unlawful labour and as human shields, some of the other paragraphs provide more concrete examples. Paragraph 41 describes a particular incident

[40] The relevant paragraphs read as follows:

> 35. Between about April 1993 and at least through January 1994, MLADEN NALETILLIĆ VINKO MARTINOVIĆ and their subordinates forced Bosnian Muslim detainees from the various detention centres under the authority of the HVO to perform labour in military operations and to be used as human shields on the Bulevar and Šantićeva streets; Raštani, Stotina, and other locations along the front line in the municipality of Mostar.
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> 36. Following the HV and HVO attack on the city of Mostar on 9 May 1993, the confrontation line with the ABiH was settled along the Bulevar and Šantićeva streets. From May 1993 to February 1994, the KB was engaged in fighting along the Bulevar and Šantićeva streets and had control over particular sections of this confrontation line. This confrontation line was both the scene of intense small arms fire and artillery exchanges between the opposing factions and it was the main site to which Bosnian Muslim prisoners were taken to perform forced labour and to be used as human shields.
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> 44. Throughout this period, MLADEN NALETILIĆ and VINKO MARTINOVIĆ and their subordinates also forced Bosnian Muslim detainees to perform labour in locations other than the front lines. The Bosnian Muslim detainees were forced, *inter alia*, to engage and participate in the following works: building, maintenance and reparation works in private properties of the members and commanders of the KB; digging trenches, building defences in the positions of the KB or other HV and HVO forces; and assisting the KB members in the process of looting houses and properties of Bosnian Muslims.

on 17 September 1993 in which, pursuant to Mr. Martinović's orders, several detainees were allegedly given imitation rifles and military clothing and forced to walk alongside a tank in combat. Paragraph 42 describes the alleged use of detainees as human shields on the same day, and lists by name three of the approximately ten detainees who were killed. Because the Prosecution intends to prove that these types of activities took place *regularly* throughout the relevant time period, the Prosecution cannot be expected to list each and every instance in the indictment. The allegation of regularity itself, combined with the specific examples given, puts the defendant on notice of the sort of case he will be called to answer and satisfies the requirement that the indictment contain a "concise" statement of the facts.

23. The witness statements and other discovery materials now in the Defence's possession are meant to contain the details of any other specific events during this time period that the Prosecution intends to present at trial.

(b) Objections to Counts 13 to 17 (Murder, Wilful Killing and Wilfully Causing Great Suffering of Nenad Harmandžic)

24. Counts 13 to 17 are based on the alleged torture and killing of Nenad Harmandžic by troops under Mr. Martinović's command in July 1993. In objections XIX and XX, Mr. Martinović objects that Counts 16 and 17 (cruel treatment, a violation of the Laws or Customs of War, and wilfully causing great suffering or serious injury, a Grave Breach of the Geneva Conventions) are charged in the alternative with counts 13, 14 and 15 (murder, a Crime Against Humanity, wilful killing, a Grave Breach of the Geneva Conventions, and murder, a Violation of the Laws and Customs of War). He argues that this deprives him of the right to know what he is charged with and inhibits the preparation of his defence. But we agree with the Trial Chamber in *Prosecutor v. Kvočka*, which held that alternative charging was permissible.[41] It is clear from the indictment that the Prosecution will attempt to prove Mr. Martinović responsible for the death of Harmandžic, but, if it is unable to prove that, then it will try to prove at least that Martinović was responsible for his subordinates' torture of the victim. The indictment is sufficient to put Mr. Martinović on notice of the nature of the Prosecution's case.

[41] *See Kvočka,* Decision on the Defence Preliminary Motion of the Form of the Indictment, Case No. IT-98-30-PT, 12 April 1999, para. 50; *see also Prosecutor v. Musema*, Decision on Prosecutor's Request for Leave to Amend the Indictment, Case No. ICTR-96-13-I, 18 November 1998, para. 7.

(c) Objections to Counts 18 and 19 (Forcible Transfer and Destruction and Plunder of Property)

25. Objections XXI and XXII appear to address paragraphs 54 and 57. Mr. Martinović objects that these charges are "indefinite" and "general," and that "the names of the victims are not stated, nor the time and place of the commission of the criminal act" making it "impossible" for the defence to prepare for trial. [42]

26. The Prosecution responds that it "is not in a position to provide the Defence with the names of all victims and the dates of forcible transfer and plunder by MARTINOVIĆ's units." In support of its position, the Prosecution cites the decision of the Trial Chamber in *Prosecutor v. Blaškić* that "at the indictment stage an exhaustive list of plundered public or private property cannot be demanded because wars characteristically bring in their wake massive and large scale destruction."[43]

27. The Trial Chamber is of the view that this portion of the indictment, while close to the line, is not so vague as to render the indictment defective. The specific date (9 May 1993) on which the forced expulsions allegedly began is given, and they are said to have continued over the next six months. The indictment further specifies that two large waves of transfers occurred in May and July 1993. The events are all said to have occurred in a confined geographic area, in and around the city of Mostar. This is a very "concise statement of the facts," and while it is not vague, the Trial Chamber is not convinced that,

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[42] The relevant paragraphs provide as follows:

> 54. In the municipality of Mostar, MLADEN NALETILIĆ and VINKO MARTINOVIĆ were responsible for and ordered the forcible transfer of Bosnian Muslim civilians that started on the 9 May 1993 and continued until at least January 1994. The KB members under their command were prominent in the eviction, arrest and forcible transfers of Bosnian Muslim civilians throughout the relevant period, and particularly during the two large waves of forcible transfers that took place in May and July 1993. Once KB and other HVO units had identified persons of Muslim ethnic background, they arrested them, evicted them, plundered their homes and forcibly transferred them across the confrontation lines to the territories under ABiH control. The ABiH held a portion of the city which was under siege by HV and HVO forces, who were shelling intensely the area and preventing the arrival of humanitarian and basic supplies. MLADEN NALETELIĆ and VINKO MARTINOVIĆ commanded operations for this purpose and gave orders to their subordinates to proceed with the forcible transfers.
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> 57. Following the HV and HVO attack on Mostar of 9 May 1993 and in the context of the subsequent campaign of persecution against the Bosnian Muslim population, the units under the command of MLADEN NALETILIĆ and VINKO MARTINOVIĆ plundered systematically the Bosnian Muslim houses and properties.

[43] *Blaškić*, para. 37.

standing alone, it would be sufficient to allow the defendant to prepare for trial: no specific examples of plunder or expulsion are provided, and not much indication is given as to the facts on which the Prosecution rests its theory of Mr. Martinovićs command responsibility. The Defence does not contend, however, that the witness statements and other material in its possession do not provide sufficient particulars to prepare its case. Accordingly, the logical next step is that the Defence review those materials.

(d) Challenges to Count I of the Indictment (Persecutions)

28. Although it is not crystal clear, it appears that the objections headed AD-IV, V, VI, and VII are concerned with the paragraphs supporting the persecution count, paragraphs 30, 32, 33, and 34. Paragraph 34, however, refers to paragraphs 35-58 – basically the rest of the indictment. Mr. Martinović contends in this set of objections that the indictment lacks "precise definition," is "quite general," and does not contain sufficient factual details.

29. The Prosecution counters that the indictment "need not contain the detailed information sought by the Defence."

30. The matters addressed in Paragraphs 30, 32, and 34 have largely been covered in the preceding discussion of the allegations of forced labour, illegal use of detainees as human shields, plunder, expulsion, and the torture and murder of Harmandžic. The indictment specifies the types of actions that are said to have made up the persecution, as well as the time period and geographic area in which these events are said to have occurred. Once again, the accused does not contend that he cannot prepare for trial even if the witness statements and other materials now in his possession are taken into account.

V. Conclusion

For the foregoing reasons,

TRIAL CHAMBER I,

PURSUANT to Rule 72,

HEREBY DENIES the Defendant Vinko Martinović's Objection to the Indictment.

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

Done this fifteenth day of February 2000,
At The Hague,
The Netherlands.

Almiro Rodrigues
Presiding Judge, Trial Chamber I

(Seal of the Tribunal)