**UNITED NATIONS**

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

Case No. IT-03-67/PT

Date: 26 May 2004

Original: English

**IN TRIAL CHAMBER II**

**Before:** **Judge Carmel A. Agius, Presiding**
**Judge Jean-Claude Antonetti**
**Judge Kevin Parker**

**Registrar:** **Mr. Hans Holthuis**

**Decision of:** **26 May 2004**

**THE PROSECUTOR**

**v.**

**VOJISLAV ŠEŠELJ**

# DECISION ON MOTION BY VOJISLAV ŠEŠELJ CHALLENGING JURISDICTION AND FORM OF INDICTMENT

**The Office of the Prosecutor:**

Ms. Hildegard Uertz-Retzlaff
Mr. Urlich Mussemeyer
Mr. Daniel Saxon

**The Accused:**

Vojislav Šešelj

**Standby Counsel:**

Mr. Tjaco Eduard van der Spoel

## I. BACKGROUND

1. On 14 February 2003, the initial indictment against Vojislav Šešelj ("Indictment") was reviewed and confirmed by Judge O-Gon Kwon.

2. On 24 December 2003, the Accused filed the "Objection to the Indictment" (the "Motion") which challenged the jurisdiction of the Tribunal and also alleged a number of defects in the form of the Indictment.

3. On 29 January 2004, the Prosecution filed the "Prosecution's Response to the Accused's 'Objection to the Indictment'" ("Prosecution's First Response"), and on 19 February 2004, the Prosecution filed the "Prosecution's Additional Response to the Accused's Objection to the Indictment" (together with the Prosecution's First Response, the "Prosecution's Response") in which it requested that Trial Chamber II ("Trial Chamber") dismiss the Motion.

4. The Accused is charged in the Indictment under Articles 7(1) of the Statute of the International Criminal Tribunal for the Former Yugoslavia ("Statute") with fourteen counts of crimes against humanity and violations of the laws or customs of war. The charges against him allege:

> (a) **Crimes against humanity**, consisting of persecutions on political, racial and religious grounds (Count 1), extermination (Count 2), murder (Count 3), imprisonment (Count 5), torture (Count 6), inhumane acts (Count 7), deportation (Count 10) and inhumane acts (forcible transfer) (Count 11).
>
> (b) **Violations of the laws or customs of war**, consisting of murder (Count 4), torture (Count 8), cruel treatment (Count 9), wanton destruction of villages, or devastation not justified by military necessity (Count 12), destruction or wilful damage done to institutions dedicated to religion or education (Count 13) and plunder of public or private property (Count 14).

5. It must be noted from the outset that the objections contained in the Accused's Motion have been drafted in very unclear and cumbersome language and with many repetitions. This has, in turn, unnecessarily prolonged the efforts of the Trial Chamber to determine precisely all of the objections raised by the Accused. Notwithstanding these obstacles, the Trial Chamber has identified objections in the Accused's Motion in three general areas:

a) the legality of the International Criminal Tribunal for the Former Yugoslavia ("Tribunal") and the competence of the Security Council to establish the Tribunal,

b) the subject-matter jurisdiction of the Tribunal, primarily in connection with crimes against humanity alleged to have occurred in Vojvodina, and

c) the form of the Indictment.

6. The Trial Chamber will consider each of the Accused's main arguments in turn.

## II. THE LEGALITY OF THE TRIBUNAL AND THE COMPETENCE OF THE SECURITY COUNCIL

7. In connection with the establishment of the Tribunal, the Accused's Motion contains three broad arguments:

a) that the Security Council does not have the required power to establish the Tribunal,

b) that the Tribunal has violated the principle of *nullum crimen sine lege* by the application of its jurisdiction over crimes that allegedly occurred prior to 25 May 1993,

c) that the Tribunal and the Statute of the Tribunal is being utilised to selectively prosecute Serbs.

### A. Competence of the Security Council

#### 1. Defence

8. The Accused states that in order to be established validly and by law, the Tribunal should not have been established counter to the provisions of Chapter VII of the Charter of the United Nations (the "Charter") as the Security Council is not empowered to establish a subsidiary body with international legal authority.[1] The Accused relies on a number of assertions to support this position: that a legitimate tribunal may be established only by treaty (the adoption of the Rome Statute of the International Criminal Court is offered as an example);[2] that the Security Council, in view of the Charter, does not have the competence to establish international courts or to delegate a judicial function since it does not possess a judicial function itself;[3] that the principle of the separation of powers does not permit the creation of a legal body by an executive body such as the Security Council since the power of creation of legal entities is reserved solely for a legislative body (similarly, that the International Covenant on Civil and Political Rights precludes such a construct);[4] that the Charter of the United Nations does not allow a United Nations organ to have direct jurisdiction over individuals;[5] that the temporary nature of the Tribunal casts doubt on the Tribunal's independence and impartiality.[6]

[1] Page 4 of the Motion.
[2] Pages 9 and 13 of the Motion.
[3] Pages 6 – 8 of the Motion.
[4] Pages 7 – 8 and 10 of the Motion.
[5] Page 8 of the Motion.
[6] Page 9 of the Motion.

### 2. Prosecution

9. The Prosecution argues in the first place that the Accused's objection falls outside the scope of Rule 72 of the Rules of Procedure and Evidence ("Rules"). However, it contends that if the Trial Chamber would nonetheless wish to discuss these challenges, that the Appeals Chamber Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction in *The Prosecutor v. Duško Tadić*[7] ("*Tadić* Jurisdiction Decision") authoritatively rules against the Accused's challenge to the jurisdiction of the Tribunal.

### 3. Discussion

10. The Trial Chamber needs first to establish whether this part of the Accused's Motion falls within the scope of Rule 72 of the Rules. Rule 72 outlines the subject matter of motions which may be brought before the Trial Chamber. Motions which challenge jurisdiction are allowed subject to the clarification set out in Rule 72 (D), which was included in the Rules by amendment of December 2000. Under Rule 72 (D), a motion challenging jurisdiction must refer *exclusively* to matters that relate to: i) any of the persons indicated in Articles 1, 6, 7 and 9 of the Statute; ii) the territories indicated in Articles 1, 8 and 9 of the Statute; iii) the period indicated in Articles 1, 8 and 9 of the Statute; or, iv) any of the violations indicated in Articles 2, 3, 4, 5, and 7 of the Statute. (emphasis added). These four elements of a valid challenge to jurisdiction cited in Rule 72 (D) are intended to be exhaustive elements and not merely an enumerative list.

11. A review of the present Accused's objections clearly demonstrates that they do not fall within any of the four grounds of a motion challenging jurisdiction as set out in Rule 72 (D). As a result, this part of the motion needs therefore to be dismissed.

12. Moreover, the objections raised by the Accused have already been addressed in previous decisions of the Tribunal and in particular by the Appeals Chamber in the *Tadić* Jurisdiction Decision. Even if the Accused's objections might have fallen within the scope of Rule 72, they would be dismissed in view of the established case law of the Tribunal. The Trial Chamber does not see any reason to further discuss this part of the Motion.

[7] *The Prosecutor v. Dusko Tadić*, IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995 ("*Tadić* Jurisdiction Decision").

## B. Jurisdiction of the Tribunal over Crimes Committed Prior to 25 May 1993

### 1. Defence

13. The Accused makes the argument that the Tribunal may only claim jurisdiction for crimes committed from the date of 25 May 1993 when the Security Council established the Tribunal by resolution. A number of related objections are put forward by the Accused. First, it is argued that the Tribunal cannot claim retroactive jurisdiction as it was only established in May 1993.[8] Second, there existed competent courts of the former Yugoslavia during the period of 1991 to May 1993 which were capable of trying an accused charged with any violation of international humanitarian law. Third, persons can only be held criminally responsible for international crimes if such crimes have been laid down in convention, ratified by a state and implemented in domestic law.[9] Fourth, as far as there is concurrent jurisdiction by the Tribunal and national courts to prosecute persons as stipulated in Article 9 of the Statute, the formulation of the elements of crime by national courts on the one hand and the Tribunal on the other means that there will be different formulations or interpretations of elements of crimes for crimes with the same designation.[10] Finally, it is argued that it is against the general principles of law that an accused is charged with violating laws that are foreign and unknown to him and which have never been published in his home state.[11] This would have the effect of depriving him of the opportunity to become acquainted with that which is intended to be forbidden conduct.[12]

### 2. Prosecution

14. In its rebuttal of the Accused's arguments the Prosecution's highlights both Article 8 of the Statute which defines the Tribunal's temporal jurisdiction and the report of the Secretary General which notes that the establishment of the Tribunal would be an effective measure to bring to justice the persons responsible for those crimes that come within the ambit of the Statute of the Tribunal. The Prosecution also cites precedents of the Tribunal which demonstrate that the jurisdiction of the Tribunal over serious violations of international humanitarian law since 1991 fully complies with the principle of *nullum crimen sine lege*.[13] Finally, the Prosecution contends that, as supported by the Tribunal's case law, the United Nations did not criminalise any provisions of international

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[8] Pages 15, 22 – 24 of the Motion.
[9] Page 14 of the Motion.
[10] Page 15 of the Motion.
[11] Page 17 of the Motion.
[12] *Ibid.*
[13] *Prosecutor v. Zlatko Aleksovski*, Judgement, Case No. IT-95-14/1-A, 24 March 2000 ("*Aleksovski* Appeals Judgement"), *Prosecutor v. Delalic and Others*, Judgement, Case No. IT-96-21-A, 20 February 2001 ("*Čelebići* Appeals Judgement"), *Prosecutor v. Zejnil Delalic, et. al.*, Judgement, Case No. IT-96-21-T, 16 November 1998 ("*Delalic* Judgement").

humanitarian law but merely enabled the Tribunal to identify and apply customary international law as it existed at the time the alleged crimes were carried out.

### 3. Discussion

15. Granting retrospective jurisdiction to a legal body is not without precedent in either domestic or international law. The Nuremburg trials for example effectively held trials for offences which had taken place prior to the creation of the military tribunal. What is important to keep in mind, when addressing this objection by the Accused, is whether or not in creating retrospective jurisdiction, jurisdiction is established over acts that constituted crimes at the moment prior to the establishment of that jurisdiction. In this context the Trial Chamber observes that the Statute of the Tribunal has not created any new categories of crimes under international humanitarian law. The Tribunal is merely applying existing customary international law and it is therefore able to adjudicate on crimes committed within its temporal jurisdiction as set out in Article 8 of the Statute (1 January 1991). This position was already clearly laid down by the Secretary General of the United Nations in his report of 3 May 1993 that "in assigning to the International Tribunal the task of prosecuting persons responsible for serious violations of international humanitarian law, the Security Council would not be creating or purporting to "legislate" that law. Rather, the International Tribunal would have the task of applying existing international humanitarian law"[14]. This view has repeatedly been confirmed by the Tribunal itself, such as in the *Čelebići* Appeal judgement, where the Chamber held that it "merely identifies and applies existing customary international law". The view held by the Accused, that the Tribunal has created new international humanitarian law, novel or foreign to the Accused, is therefore untenable. Likewise, the Accused's argument that persons can only be held criminally responsible for international crimes if such crimes have been laid down in convention, ratified by a state, implemented in domestic law and made public, is without merit. The very concept of customary international law is that norms of customary international law are binding *per se* and do not need explicit adoption by states.

16. The Tribunal's application of existing customary international law should not suggest however that the principle of *nullum crimen sine lege* prevents the Tribunal from interpreting and clarifying the elements of a particular crime (as affirmed by the Appeals Chamber in the *Aleksovski* Appeals Judgement).[15]

17. The Accused's objections in relation to the fact that there already existed national courts which could exercise jurisdiction over crimes committed prior to the establishment of the Tribunal

[14] Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), S/25704, 3 May 1993.
[15] *Aleksovski* Appeals Judgement, paras. 126 – 27.

cannot be accepted either. The Tribunal's Statute and already existing case-law are very clear in this respect. First, Article 8 of the Statute states that the Tribunal's temporal jurisdiction shall extend to a period beginning on 1 January 1991. The Accused's objection against such retroactive jurisdiction has already been discussed and dismissed. Second, Article 9 of the Statute clearly recognizes the existence of national courts. Although Article 9 (1) grants concurrent jurisdiction to both the Tribunal and national courts, Article 9 (2) clearly establishes primacy of the Tribunal over national courts. Furthermore, the Appeals Chamber has confirmed with respect to the principle of the primacy of the Tribunal that: "sovereign rights of States cannot and should not take precedence over the right of the international community to act appropriately as they affect the whole of mankind and shock the conscience of all nations of the world. There can therefore be no objection to an international tribunal properly constituted trying these crimes on behalf of the international community."[16]

18. For the aforementioned reasons, the objections of the Accused relating to the jurisdiction of the Tribunal over crimes committed prior to 25 May 1993 are dismissed.

### C. Prosecution of Serbs

#### 1. Defence

19. The Accused maintains in his Motion that the Statute has been drafted to isolate Serbs for prosecution by the Tribunal and that criminal proceedings are being conducted against him because he is a Serb.[17]

#### 2. Prosecution

20. The Prosecution responds that Articles 16 and 18 of the Statute clearly entrust responsibility to the Prosecutor to investigate and prosecute any persons alleged to have committed serious violations of international humanitarian law. Furthermore, the Prosecution states that as specified in the *Čelebići* Appeals Judgement, the burden of proof to prove the existence of selective prosecution rests on the Accused, which he has failed to do in the present instance.

#### 3. Discussion

21. The Appeals Chamber in the *Čelebići* Appeals Judgement has previously decided that the Prosecutor has a broad discretion in relation to the initiation of investigations and in the preparation

[16] *Tadić* Jurisdiction Decision, para. 59.
[17] Page 16 of the Motion.

of indictments.[18] This power is found in Article 18 (1) of the Statute. It is clear however that such discretion is not unlimited.[19] The test adopted in the *Čelebići* Appeals Judgement may be applied in the present case which would require the Accused to establish i) improper (including discriminatory) or unlawful motive for prosecution, and, ii) that other similarly situated persons have not been prosecuted. However, the Accused has not provided any supporting reasons with respect to his assertion that he is being prosecuted only because of his nationality. Furthermore, as the practice of the Tribunal has clearly shown, persons from all relevant different ethnic backgrounds have been and are being prosecuted. As a result, the Trial Chamber dismisses this objection by the Accused.

## III. PRELIMINARY COMMENTS ON GENERAL PLEADING PRINCIPLES

22. The Trial Chamber has established the following **general pleading principles** that may be applicable in the present case.[20]

23. Article 21(4)(a) of the Statute sets out the minimum guarantees to which an accused shall be entitled. Briefly, an accused must be informed in detail of the "nature and cause of the charge against him".[21] This provision also applies to the form of indictments.[22] It is incumbent upon the Prosecution to plead the material facts supporting the charges in an indictment, but not the evidence by which such material facts are to be proven.[23] The pleadings in an indictment are sufficiently particular when they set out the material facts of the Prosecution's 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.[24]

24. The Appeals Chamber in the *Kupreškić* Appeals Judgement has clearly stated that "the materiality of a particular fact cannot be decided in the abstract" but rather "it is dependent on the nature of the Prosecution's case."[25] Furthermore, the Appeals Chamber has decided that a decisive factor in determining the degree of specificity with which the Prosecution must particularise the

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[18] *Čelebići* Appeals Judgement, paras. 596 – 619.
[19] As cited in the *Čelebići* Appeals Judgement at para. 603, "The Prosecutor is required by Article 16(2) of the Statute to 'act independently as a separate organ of the International Tribunal', and is prevented from seeking or receiving instructions from an government or any other source".
[20] *The Prosecutor v. Mile Mrksić*, Case No. IT-95-13/1-PT, Decision on Form of the Indictment, 19 June 2003 ("*Mrksić* Decision"), paras. 6 – 14.
[21] Statute, Article 21 (4)(a).
[22] *The Prosecutor v. Kupreškić and Others*, Case No. IT-95-16-A, Judgement, 23 October 2001 ("*Kupreškić* Appeals Judgement"), para.. 88.
[23] *Kupreškić* Appeals Judgement (with reference to Arts. 18(4), 21(2) and 21(4)(a) and (b) of the Statute and Rule 47(C) of the Rules); and *The Prosecutor v. Hadžihasanović, Alagić and Kubura*, Case No. IT-01-47-PT, Decision on Form of Indictment, 7 December 2001 ("*Hadžihasanović* Indictment Decision"), para. 8.
[24] *The Prosecutor v. Milorad Krnojelac*, Case No. 97-25-A, Judgement, 17 September 2003 ("*Krnojelac* Appeals Judgement"); *Kupreškić* Appeals Judgement, para. 88; Arts. 18(4), 21(2) and 21(4)(a) and (b) of the Statute; and Rule 47(C) of the Rules, which essentially restates Art. 18(4).
[25] *Kupreškić* Appeals Judgement, para. 89.

facts of its case in an indictment is the nature of the alleged criminal conduct charged,[26] which includes the proximity of the accused to the relevant events.[27] The precise details to be pleaded as material facts are those regarding the acts of the accused, rather than those persons for whose acts he is alleged to be responsible.[28]

25. In an Article 7(1) case the Prosecution may be required, depending on the circumstances of the case, to "indicate in relation to each individual count precisely and expressly the particular nature of the responsibility alleged," in other words, to indicate the particular head or heads of liability.[29] This may be necessary in order to avoid ambiguity with respect to the exact nature and cause of the charges against the accused[30] and to enable the accused to effectively and efficiently prepare his defence. The material facts to be pleaded in an indictment may vary depending on the particular head of Article 7(1) responsibility.[31]

26. When an accused is charged with "commission" of a crime under Article 7(1), the indictment must specify whether such "commission" is a physical commission by the accused or participation by the accused in a joint criminal enterprise ("JCE").[32]

27. In connection with pleadings concerning JCE liability, the Trial Chamber recalls the decision of the Appeals Chamber with respect to the *actus reus* of JCE liability:

> (a) *A plurality of persons*. There not need be an organised military, political or administrative structure, as is clearly shown by the *Essen Lynching* and the *Kurt Goebell* cases.
>
> (b) *The existence of a common plan, design or purpose which amounts to or involves the commission of a crime provided for in the Statute.* There is no necessity for this plan, design or purpose to have been previously arranged or formulated. The common plan or purpose may materialise extemporaneously and be inferred from the fact that a plurality of persons acts in unison to put into effect a joint criminal enterprise.

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[26] *Ibid.*
[27] *Hadžihasanović* Indictment Decision, para. 10; *The Prosecutor v. Brđanin and Talić*, Case No. IT-99-36-PT, Decision on Objections by Momir Talić to the Form of the Amended Indictment, 20 February 2001 ("First *Brđanin & Talić* Decision"), para. 18. It is essential for the accused to know from the indictment just what that alleged proximity is: *The Prosecutor v. Brđanin and Talić*, Case No. IT-99-36-PT, Decision on Objections by Radoslav Brđanin to the Form of the Amended Indictment, 23 February 2001 ("Second *Brđanin & Talić* Decision"), para. 13.
[28] Second *Brđanin & Talić* Decision, para. 10.
[29] *Čelebići* Appeals Judgement, para. 350. *See also The Prosecutor v. Deronjić*, Case No. IT-02-61-PT, Decision on Form of the Indictment, 25 October 2002 ("*Deronjić* Decision"), para. 31.
[30] See *Čelebići* Appeals Judgement, para. 351; *Aleksovski* Appeals Judgement, para. 171, fn. 319 (with reference to *The Prosecutor v. Krnojelac*, Case No. IT-97-25-PT, Decision on Preliminary Motion on Form of Amended Indictment, 11 February 2000 ("First *Krnojelac* Decision"), paras. 59 – 60).
[31] For example, 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, must be pleaded in detail (*Kupreškić* Appeals Judgement, para. 89), whereas, in a JCE case, different material facts would have to be pleaded (*see also The Prosecutor Brđanin and Talić*, Case No. 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).
[32] *See Aleksovski* Appeals Judgement, fn. 319 (citing and upholding First *Krnojelac* Decision, paras. 59 – 60).

> (c) *Participation of the accused in the common design* involving the perpetration of one of the crimes provided for in the Statute. This participation need not involve commission of a specific crime under one of those provisions (for example murder, extermination, torture, rape, etc.), but may take the form of assistance in, or contribution to, the execution of the common plan or purpose.[33]

28. The following four elements must also be present in an indictment charging an accused with JCE:

> (a) the nature or purpose of the JCE;
>
> (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;
>
> (d) the nature of the participation by the accused in that enterprise.[34]

29. All legal prerequisites to the application of the offences charged constitute material facts and must be pleaded in the indictment.[35] With respect to the relevant state of mind (*mens rea*), either the specific state of mind itself (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 the evidentiary facts from which the state of mind is to be inferred should be pleaded.[36]

30. Each of the material facts must usually be pleaded expressly, although it may be sufficient in some circumstances if it is pleaded by necessary implication.[37] However, if a pleading merely assumes the existence of the pre-requisite, this fundamental rule of pleading has not been met.[38]

31. Generally, an indictment, as the primary accusatory instrument, must plead with sufficient particularity the material aspects of the Prosecution's case, failing which it suffers from a material defect.[39] In the light of the primary importance of the indictment, the Prosecution cannot cure a defective indictment via its supporting material and pre-trial brief.[40] In the situation where an

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[33] *The Prosecutor v. Duško Tadić*, Case No. IT-94-1-A, Judgement, 15 July 1999 ("*Tadić* Appeals Judgement"), para. 227. Emphasis in original.
[34] *The Prosecutor v. Milorad Krnojelac*, Case No. IT-97-25-PT, Decision on the Form of the Second Amended Indictment, 11 May 2000 ("Third *Krnojelac* Decision"), para. 16. See *The Prosecutor v. Milutinović, Nikola Šainović & Dragoljub Ojdanić*, Case No. IT-99-37-PT, Decision on Defence Preliminary Motion Filed by the Defence for Nikola Šainović, 27 March 2003 ("*Milutinović* Decision"), p. 4, for a similar presentation as to pleading requirements for a JCE.
[35] *Hadžihasanović* Indictment Decision, para. 10.
[36] Third *Brđanin & Talić* Decision, para. 33.
[37] *Hadžihasanović* Indictment Decision, para. 10; *The Prosecutor v. Brđanin and Talić*, Case No. IT-99-36-PT, Decision on Form of Fourth Amended Indictment, 23 November 2001, para. 12; First *Brđanin & Talić* Decision, para. 48.
[38] *Hadžihasanović* Indictment Decision, para. 10; First *Brđanin & Talić* Decision, para. 48.
[39] *Kupreškić* Appeals Judgement, para. 114.
[40] If the Defence is denied the material facts as to the nature of the accused's responsibility for the events pleaded until the pre-trial brief is filed, it is almost entirely incapacitated from conducting any meaningful investigation for trial until then (*see* Second *Brđanin & Talić* Decision, paras. 11 – 13).

indictment does not plead the material facts with the requisite degree of specificity because the necessary information is not in the Prosecution's possession, doubt must arise as to whether it is fair to the accused to proceed with the trial.[41] The Prosecution is expected to inform the accused of the nature and cause of the case, as set out above, before it goes to trial. It is unacceptable for the Prosecution to omit the material facts in the indictment with the aim of moulding the case against the accused as the trial proceeds, depending on how the evidence unfolds.[42] Where evidence at trial turns out differently than expected, the indictment may be required to be amended, an adjournment may be granted, or certain evidence may be excluded as not being within the scope of the indictment.[43]

32. The Prosecution is not required to plead the evidence by which such material facts are to be proven.[44]

## IV. SUBJECT-MATTER JURISDICTION

### 1. Defence

33. The Accused argues that the references to Vojvodina in Counts 1, 10, and 11 should be removed from the Indictment on the basis that the Prosecution has not shown in the Indictment a number of the required elements for the application of charges brought under Article 5, crimes against humanity.[45] First, it is argued that there was no state of armed conflict in Vojvodina (and even if there was a state of armed conflict the Vance Owen Plan is said to have ended all such hostilities).[46] Second, that if a state of armed conflict existed, the civilian population was not a victim of such armed conflict. Third, that if there were attacks on the civilian population, that such attacks were not systematic or collective in nature and that there was no nexus between such attacks and the armed conflict as pleaded in the Indictment.[47] In addition to the arguments related to the required pre-requisites for application of Article 5, the Accused also argues that Vojvodina was not part of the territory under the jurisdiction of the Tribunal as defined in Articles 1 and 8 of the Statute as the Statute of the Tribunal was only adopted in 1993 and the crimes of which the Accused is charged were allegedly committed a year earlier.[48] As such, the Tribunal would not have jurisdiction over alleged crimes committed in the Vojvodina region prior to its establishment.

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[41] *Kupreškić* Appeals Judgement, para. 92.
[42] *Ibid.*
[43] *Ibid.*
[44] *Ibid*, para. 88.
[45] Pages 19 – 21 of the Motion.
[46] *Ibid.*
[47] *Ibid.*
[48] Page 22 of the Motion.

### 2. Prosecution

34. The Prosecution requests that the objection based on the state of armed conflict be dismissed for three reasons. First, it is argued that proof of armed conflict is a matter for trial and that in any event the acts of the Accused are linked geographically and temporally with such armed conflict. Furthermore, the Appeals Chamber is said to have clarified the definition of armed conflict by stating that international humanitarian law applies from the initiation of such armed conflict and extends beyond the cessation of hostilities until general peace is achieved. Until that moment, international humanitarian law applies to the whole territory of the warring states, whether or not actual combat takes place in a particular region.[49] Second, the Prosecution points to the interviews conducted with the Accused which they maintain demonstrate that the Accused has admitted to the existence of armed conflict.[50] Third, the Prosecution denies that the Vance Owen Plan diminished the state of armed conflict in 1992 as it is argued that a general conclusion of peace was only reached upon agreement of the Dayton Accords in December 1995.

35. The Prosecution requests that the remaining objections of the Accused relating to subject-matter jurisdiction be dismissed as the Trial Chamber is only bound to examine and dispose of defects in the Indictment in form only. Furthermore, it is argued that the *Kunarac* Appeal Judgement highlights that "the attack in the context of a crime against humanity is not limited to the use of armed force; it encompasses any mistreatment of the civilian population".[51] Finally, in response to the Accused's assertion that attacks were not systematic or collective in nature, the Prosecution maintains that paragraph 14 of the Indictment properly pleads the legal element of systematic attack and that evidence of this can only be produced at trial.

### 3. Discussion

36. The Prosecution has pleaded in the Indictment that "a state of armed conflict existed in Croatia and Bosnia and Herzegovina" and that "a nexus existed between this state of armed conflict and the alleged crimes in Croatia, Bosnia and Herzegovina, and parts of Vojvodina, Serbia".[52] Under Count 1 (Persecutions), paragraph 17 (g), the Prosecution has charged the Accused with the "imposing of restrictive and discriminatory measures against the Croat, Muslim and other non-Serb civilian populations" in various geographic areas including "parts of Vojvodina, Serbia". Similarly, under Count 1, paragraph 17 (i), the Accused has been charged with the deportation or forcible

[49] *Tadić* Jurisdiction Decision, para. 70.
[50] Interviews are highlighted in the *Prosecution's Additional Response* dated 19 February 2004.
[51] *Prosecutor v. Dragoljub Kunarac et al.*, Case No. IT-96-23 and IT-96-23/1-A, 12 June 2002, para. 86.
[52] Indictment, para. 12.

transfer of civilians from various territories including "parts of Vojvodina, Serbia". The Indictment, however, does not explicitly plead that there existed an armed conflict in Vojvodina.

37. In its Additional Response to the Accused's Motion the Prosecution is rather vague about the situation in Vojvodina. Sometimes, reference is made to an "ongoing armed conflict *in* the former Yugoslavia"[53] while at other instances reference is made to "a nexus...between the conduct of the Accused in Hrtkovci [Vojvodina]" and the 'ongoing armed conflict *in other parts* of the former Yugoslavia'.[54] The Accused is therefore left with uncertainty as to whether the Prosecution alleges that there is a state of armed conflict in the entire region of the former Yugoslavia, including Vojvodina, Serbia, or a state of armed conflict in Croatia and Bosnia and Herzegovina.

38. The Trial Chamber recalls the relevant pleading principles set out in Section III above and that the pleadings in an indictment have to be sufficiently particular when it concisely sets out the material facts of the Prosecution case with enough detail to inform the Accused clearly of the nature and cause of the charges against him/her to enable him/her to prepare a defence.[55] As stated above, although the Indictment pleads that a state of armed conflict existed in Croatia and Bosnia and Herzegovina, it fails to plead whether a state of armed conflict existed in Vojvodina, Serbia.

39. There are certain requirements for a crime to fall under Article 5 of the Statute. Article 5 imposes a jurisdictional requirement limiting the Tribunal's jurisdiction to crimes against humanity "when committed in armed conflict, whether international or internal in character". According to standard case-law, as reflected for example in the *Kunarac* Appeal Judgement, the "requirement contained in Article 5 of the Statute is a purely jurisdictional prerequisite which is satisfied by proof that there was an armed conflict and that objectively the acts of the accused are linked geographically as well as temporally with the armed conflict".[56] It is clear that the applicability of the crimes alleged by the Prosecution to have occurred in Vojvodina under Article 5 is subject to whether, at the relevant time of the indictment, an armed conflict existed in Vojvodina.[57]

40. The Prosecution is accordingly ordered to clarify the ambiguity in the pleadings (and the allegations and the charges or parts of charges based thereon) in relation to Vojvodina, Serbia, and the issue of armed conflict. It is for the Prosecution to decide, whether or not to keep the charges against the Accused in relation to Vojvodina, Serbia, in the Indictment. If the Prosecution decides

[53] Para. 6 of the Prosecution's Additional Response. Emphasis added.
[54] *Ibid*, Para 7 and 9. Emphasis added.
[55] *Supra*, para. 23 of this Decision.
[56] *Kunarac* Appeal Judgement, para. 83.
[57] It is interesting to note that in discussing Article 3 requirements, the Trial Chamber in the *Prosecution v. Milomir Stakić* case ("*Stakić* Judgement") has stated that "the Tribunal has jurisdiction over violations of the laws or customs of war, *a pre-condition of which is the existence of an armed conflict in the territory where the crimes are alleged to have occurred*". Emphasis added. *Prosecution v. Milomir Stakić*, IT-97-24-T, Judgement, 31 July 2003, para. 566.

not to plead the existence of an armed conflict in Vojvodina then, as a consequence, all charges relating to Vojvodina will have to be deleted from the Indictment. If the Prosecution insists on keeping these charges, the existence of an armed conflict at the time the crimes were allegedly committed has to be pleaded.

41. Apart from the question of the pleading of an armed conflict in Vojvodina, Serbia, all other complaints of the Accused discussed here are of an evidentiary character. Whether or not there existed a state of armed conflict in any of the territories mentioned in the Indictment or in Vojvodina, Serbia (if it continues to be pleaded) is a matter of evidence. Whether or not, assuming that there was an armed conflict, the civilian population was a victim of the armed conflict is a matter of evidence. Whether or not any attacks against the civilian population were systematic or collective in nature is a matter of evidence. And whether or not there was a nexus between such attacks and the armed conflict is also a matter of evidence. The Trial Chamber considers in relation to each of these complaints that these are not appropriate issues to be resolved in a decision on the *form* of the indictment, but that these should be left for determination at trial. These objections are dismissed.

42. The Accused finally argues that Vojvodina was not a part of the territory under the jurisdiction of the Tribunal (as defined in Articles 1 and 8 of the Statute) as the Statute of the Tribunal was adopted only in 1993 and the alleged crimes were committed in 1992. The issue of retroactivity has already been discussed above[58] and does not require repetition here. This objection is also dismissed.

## V. FORM OF INDICTMENT

43. The Accused has made a number of objections to the form of the Indictment. For sake of clarity, the objections relating to the pleadings in connection with joint criminal enterprise will be examined separately from the general objections to the form of Indictment.

### A. Objections to the Form of Indictment

#### 1. Defence

44. The Accused makes the general argument that there is not enough evidence or facts contained within the Indictment to support the Prosecutions pleadings and highlights various areas

[58] *Supra*, paras. 15 – 18 of this Decision.

of the Indictment which he maintains are flawed and should be struck out.[59] The Motion relies on a number of arguments identified below to support this position.

a) The Accused argues that the Indictment fails to plead the factual elements associated with each charge as there is an absence of facts and evidence on *inter alia*:

i) a list of persons deported or a list of persons who were ordered to carry out deportations,[60]

ii) how and where deported persons were sent,[61]

iii) a list of victims affected by the alleged crimes;[62]

b) the Indictment does not identify where or when the Accused gave instructions to his associates to threaten civilian populations;[63]

c) the Prosecution has not provided any facts to show a temporal or geographic connection between the Accused's words or actions with the crimes with which he is charged;[64]

d) the Indictment does not demonstrate the existence of armed conflict in Vojvodina;[65]

e) the Indictment does not offer proof for attacks directed at civilian populations;[66]

f) the Indictment does not demonstrate the existence of intent on the part of the Accused;[67]

g) the charge of deportation appears twice in the Indictment: in Count 1 (paragraph 17 (i) of the Indictment) and Count 10 (paragraph 30 of the Indictment);[68]

h) the Indictment does not provide details of what the Accused planned, committed, ordered and to whom such orders were issued;[69]

i) the Indictment does not state how the Accused aided and abetted in planning, preparation or execution of crimes and details of speeches and communications referred in the Indictment.[70]

### 2. Prosecution

45. The Prosecution responds that the Tribunal's jurisprudence has established that the Prosecutor need not provide, in the Indictment, any evidence or summary of the evidence it intends to rely upon to prove its case, including the provision of lists of any kind cited by the Accused.

[59] For example, page 30 of the Motion. The objections related to the form of Indictment generally appear in pages 26 – 42.
[60] Page 31 of the Motion.
[61] *Ibid.*
[62] *Ibid.*
[63] Pages 32 – 33 of the Motion.
[64] Page 34 of the Motion.
[65] Pages 25 and 31 of the Motion.
[66] Pages 19 – 21 of the Motion.
[67] Page 40 of the Motion.
[68] Pages 30 – 31 of the Motion.
[69] Pages 29 – 31 and 34 – 37 of the Motion.

According to the Prosecution, the Defence's argument should be rejected as irrelevant at this stage of the proceedings.

### 3. Discussion

46. As has been stated before, and has been recalled in the relevant pleading principles, set out in Section III above, the Prosecution need not include in an indictment the evidence on which it will rely at trial. The Trial Chamber finds that with respect to most of the arguments raised by the Accused and summarised above in paragraph 44, the Indictment has sufficiently pleaded the legal and factual elements necessary for the Accused to be informed of the nature and cause of the charges against him and to enable him to prepare a defence effectively and efficiently.

47. With respect to the Accused's argument relating to intent, the Trial Chamber observes that paragraphs 5 through 11 (and paragraph 7 in particular) of the Indictment properly plead the Accused's alleged relevant state of mind and intent. In paragraph 7 for example, the Indictment stated that the Accused "had the knowledge and intention necessary for the commission of each of the crimes." And in paragraph 10, various examples are given of activities by the Accused that are also reflective of the intent of the Accused. The evidence or "demonstration" of such intent is a matter to be reviewed at the trial and the assessment of such evidence is a distinct issue reserved for the Trial Chamber at the end of the trial. With respect to the alleged repetition of the charge of deportation in Count 1 and Count 10, the Indictment is properly pleaded as the charge of persecution under Article 5 (h) of the Statute may also include the allegation of deportation as constituting a form of persecution under Article 5 (h). The *Vasiljević* Judgement stated that an "act or omission constituting the crime of persecutions may assume various forms. There is no comprehensive list of the acts that may amount to persecution. Persecution may encompass acts that are or are not enumerated in the Statute".[71] The Prosecution is entitled to charge crimes as a separate crime and as an act constituting the crime of persecution. Finally, in connection with the Accused's arguments summarised in paragraph 44 (h) and (i) of this Decision, the Trial Chamber finds that the Indictment is satisfactorily pleaded with respect to what the Accused allegedly planned, committed, ordered or otherwise aided and abetted. To highlight a few pleadings by way of example, paragraph 10 (e) to 10 (g) of the Indictment sufficiently pleads that the Accused participated in the "planning and preparation of the take-over of villages", in the "provision of financial, material, logistical and political support", in the recruitment of "Serbian volunteers" who then engaged "in the forcible removal of" non-Serb population. Paragraph 15 of the Indictment pleads that the Accused "planned, ordered, instigated, committed or otherwise aided and abetted" in

[70] Pages 28, 37 and 39 of the Motion.
[71] *Prosecutor v. Mitar Vasiljević*, Case No. IT-98-32-T, Judgement, 29 November 2002, para. 246.

"persecutions of Croat, Muslim and other non-Serb civilian populations" in certain territories. Paragraph 16 of the Indictment states how various organisations, including volunteer and paramilitary units "recruited and/or instigated by Vojislav Šešelj" attacked and took "control of towns and villages". Paragraph 17 of the Indictment outlines the nature of the persecutions that were allegedly committed. Similarly, paragraphs 19 to 21 of the Indictment plead the nature of the crimes alleged as well as allegations of the Accused's participation in such crimes.

48. Accordingly, these objections are dismissed.

### B. Insufficient Pleadings for Joint Criminal Enterprise

#### 1. Defence

49. The Accused argues that the Statute of the Tribunal does not permit the concept of "joint criminal enterprise" and that by pleading the participation of the Accused in a joint criminal enterprise the Prosecution is misinterpreting the provisions of Article 7 of the Statute.[72] The Accused also complains that a complete list of identifiable members associated with the joint criminal enterprise has not been presented by the Prosecution and that the individuals mentioned in the Indictment as participating in the joint criminal enterprise are unknown to the Accused.[73] Finally, it is argued that the Indictment makes an unreasonable implied claim that there are millions of Serbs who are co-participants in the joint criminal enterprise.[74]

#### 2. Prosecution

50. Citing the jurisprudence of the Tribunal, the Prosecution submits that it has properly pleaded the theory of joint criminal enterprise.[75] According to the Prosecution, the Defence's argument should be rejected as irrelevant at this stage of the pre-trial proceedings.

#### 3. Discussion

51. Although the Defence does not raise any specific objection with respect to the following, a comment must be made in connection with the wording in paragraph 11 of the Indictment regarding the Accused's individual criminal responsibility under Article 7(1) for his participation in a joint criminal enterprise: "in addition to his responsibility under the same Article for having planned,

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[72] Pages 37 – 39 of the Motion.
[73] For example, pages 26, 29 and 37 of the Motion.
[74] Page 28 of the Indictment.
[75] *Krnojelac* Appeals Judgement, paras. 64 – 123; *Tadić* Appeals Judgement, para. 185 – 229; *Prosecutor v. Miroslave Kvočka, et. al.*, Case No. IT-98-30/1-T, Judgement, 2 November 2001, paras. 319 – 321, 398 – 408, 419, 459 – 464, 468 – 470, 497 – 500, 503 – 504, 562 – 566, 571 – 578, 682 – 688; *Prosecutor v. Radislav Krstić*, Case No. IT-98-33-T, Judgement, 2 August 2001, paras. 621 – 646; *Prosecutor v. Blagoje Simić, et. al.*, Case No. IT-95-9-T, Judgement, 17 October 2003, paras. 983 – 992 and 994 – 1053.

instigated, ordered, *committed*, or otherwise aided and abetted in the planning, preparation, and execution of those crimes". The Trial Chamber finds this to be ambiguous, as the Indictment previously restricted the meaning of "committed" to participation in a joint criminal enterprise. The Trial Chamber therefore directs the Prosecution to resolve this ambiguity.

52. It must be remembered that the Appeals Chamber has held that the concept of a joint criminal enterprise "as a form of accomplice liability" was firmly established in customary international law prior to the establishment of the Tribunal, and that additionally, it was available under the Tribunal's Statute.[76] The Accused has not advanced any new arguments that have not already been addressed in the *Tadić* Jurisdiction Decision or the *Ojdanić* Appeals Decision that could persuade the Trial Chamber to deviate from the Tribunal's established case law.[77] As such, the objection based on the argument that the doctrine of joint criminal enterprise is novel and unsupported in international humanitarian law is rejected by the Trial Chamber.

53. The Trial Chamber recalls the relevant pleading principles, set out in Section III above, in connection with the objections of the Accused with respect to the requirements for the proper pleading of a joint criminal enterprise. The materiality of the facts pleaded depends on the proximity of an accused to the events for which he is alleged to be criminally responsible[78] and in the present case the Accused is not alleged to have personally committed the alleged crimes.

***Joint Criminal Enterprise Pleadings***

54. The Trial Chamber will now turn to the Prosecution's pleadings in the Indictment with regard to each of the four *Krnojelac* elements highlighted in the pleading principles set out in Section III above in order to assess whether the Prosecution has properly pleaded the theory of joint criminal enterprise.

55. The first *Krnojelac* element concerns the nature or purpose of the joint criminal enterprise. Paragraph 6 of the Indictment identifies the purpose of the joint criminal enterprise as the "permanent forcible removal…of a majority of the Croat, Muslim and other non-Serb populations from approximately one-third of the territory of the Republic of Croatia and large parts of Bosnia and Herzegovina and from parts of Vojvodina…in order to make these areas part of a new Serb-dominated state". The Trial Chamber is satisfied that the charges alleged fall within the stated

[76] *Tadić* Jurisdiction Decision, paras. 220 and 226, and reaffirmed in *The Prosecutor v. Milutinović, Nikola Šainović & Dragoljub Ojdanić*, Case No. IT-99-37-AR72, Decision on Dragoljub Ojdanić's motion challenging Jurisdiction – Joint Criminal Enterprise, 21 May 2003 ("*Ojdanić* Appeals Decision"), p. 4.
[77] *Aleksovski* Appeals Judgement, para. 2.
[78] *Prosecutor v. Stanislav Galić*, Decision on Application by Defence for Leave to Appeal, Case No. IT-98-29-AR72, 30 November 2001, para. 15 ("*Galić* Decision").

purpose of the joint criminal enterprise and that the relevant actions may be considered as natural and foreseeable consequences of the execution of this purpose.

56. As noted by the *Krnojelac* Trial Chamber, a joint criminal enterprise exists where there is an understanding or arrangement amounting to an agreement between two or more persons: "The understanding or arrangement need not be express, and its existence may be inferred from all the circumstances. It need not have been reached at any time before the crime is committed."[79] The Prosecution has set out such an arrangement in, *inter alia*, the following paragraphs of the Indictment: in general terms in paragraph 6, quoted above and in paragraph 8 ("each participant or co-perpetrator within the joint criminal enterprise played his or her role or roles that significantly contributed to the overall objective of this enterprise"). Further details are provided in various subsequent paragraphs, such as on the "persecutions of Croat, Muslim and other non-Serb civilian populations in the territories of the SAO Western Slavonia and the SAO SBWS..." in paragraph 15; on the "extermination and murder of Croat, Muslim and other non-Serb civilians as specified in paragraphs 19 – 23 [of the Indictment]", in paragraph 18; on the "imprisonment under inhuman conditions of Muslim, Croat and other non-Serb civilians in the territories [listed earlier in the Indictment]" in paragraph 24; on the "deportation or forcible transfer of the Croat, Muslim and other non-Serb civilian populations from their legal domiciles, in Vukovar in November 1991 and in Vocin in November and December 1991, in the municipality of Zvornik in Bosnia and Herzegovina between March 1992 and September 1993..." in paragraph 27; and on the "destruction and plunder of public and private property of the Croat, Muslim and other non-Serb populations... in [SAO SBWS, SAO Western Slavonia and various villages in] Bosnia and Herzegovina" in paragraph 31. Furthermore, in each of the above cited allegations the Prosecution has pleaded that the Accused was "acting individually or in concert with other known and unknown members of the joint criminal enterprise".

57. The Trial Chamber is thus satisfied that the nature and purpose of the joint criminal enterprise have been sufficiently pleaded.

58. The second *Krnojelac* element concerns the timeframe of the joint criminal enterprise. Paragraph 8 of the Indictment sufficiently pleads the timeframe by stating that the joint criminal enterprise "came into existence before 1 August 1991 and continued at least until December 1995". Although this is a rather broad timeframe, the Trial Chamber does not see any material defect in this pleading as such. The Trial Chamber is also satisfied that all of the crimes alleged in the Indictment were committed in the timeframe pleaded by the Prosecution in the Indictment.

[79] Third *Krnojelac* Decision, para. 15.

59. The third *Krnojelac* element concerns the identity of the participants. The Prosecution has pleaded generally that the Accused was "acting individually or in concert with other known and unknown members of the joint criminal enterprise". In addition, the Indictment contains the names of a number of alleged participants in the joint criminal enterprise such as Slobodan Milosevic, General Veljko Kadijevic, General Blagoje Adzic, Colonel Ratko Mladic, Jovica Stanisic and others. The Indictment also identifies other alleged participants in the joint criminal enterprise by category.[80] As noted by the *Krnojelac* Trial Chamber, such a practice is acceptable if the precise identity of the perpetrator is not known.[81] Examples of participants in the joint criminal enterprise by category include the army of the *Republika Srpska Krajina*, the army of the *Republika Srpska*, local Serb, Republic of Serbia and Republika Srpska police forces, the State Security/*Drzavna bezebednost*/ Branch of the Ministry of Interior of the Republic of Serbia and others. The Trial Chamber finds that the requirement that the identity of the participants be sufficiently pleaded is satisfied. Any further details requested by the Accused in relation to names of members of the joint criminal enterprise are matters of evidence which the prosecution is not bound to plead in the Indictment.[82] Also, the Accused's argument that the Indictment includes by implication a "few million participants" in a joint criminal enterprise is totally groundless and therefore rejected.

60. The final *Krnojelac* element has to do with the nature of the Accused's participation in the joint criminal enterprise. The Prosecution pleads the nature of the Accused's participation in, *inter alia*, paragraph 10 (a) – (g) and paragraph 29 of the Indictment. Paragraph 10 sets out, among other things, allegations of the Accused conduct relating to: "inflammatory speeches in the media", instigation of Serb forces to "commit crimes in violation of … the Statute of the Tribunal", the "planning and preparation of the take-over of villages", the participation in the "provision of financial, material, logistical and political support", the recruitment of "Serbian volunteers" and the indoctrination of "extreme rhetoric" in such volunteers, the "recruitment, formation, supply, support and direction of Serbian volunteers connected to the Serbian Radical Party, commonly known as 'Chetniks', or 'Seseljevci'". These descriptions of the Accused's alleged participation in the joint criminal enterprise have been sufficiently pleaded and suitably related to each count in the Indictment. The Trial Chamber is satisfied that the nature of the Accused's participation in the alleged joint criminal enterprise has been sufficiently pleaded.

61. For the above stated reasons, and with the exception of the Trial Chambers direction in paragraph 51 above, the Accused's objections in connection with the pleadings relating to joint criminal enterprise are dismissed.

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[80] Para. 8 of the Indictment.
[81] Third *Krnojelac* Decision, para. 18.
[82] *Milutinović* Decision, fn. 17 (citing *The Prosecutor v. Strugar, Jokić, et al.*, Case No. IT-01-42-PT, Decision on the Defence Preliminary Motion Concerning the Form of the Indictment, 28 June 2002, para. 18).

## VI. DISPOSITION

62. For the foregoing reasons the Trial Chamber hereby makes the following orders:

(1) The Prosecution is ordered to clarify the ambiguity in paragraph 12 of the Indictment – and the allegations and the charges or parts of charges based thereon – in relation to Vojvodina, Serbia and the issue of armed conflict.[83] In case the Prosecution chooses to allege that there was an armed conflict in Vojvodina, Serbia, it will have to identify and show existing or new material to support such an allegation.

(2) The Prosecution is ordered to clarify the ambiguity in paragraph 11 of the Indictment with respect to the meaning of "committed".[84]

Otherwise, the Trial Chamber dismisses the complaints made in the Motion.

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

Done this 26 day of May 2004,
At The Hague,
The Netherlands

Judge Carmel A. Agius
Presiding

**[Seal of the Tribunal]**

[83] *Supra*. para. 40 of this Decision.
[84] *Supra*. para. 51 of this Decision.