



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

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Case No. IT-08-91-PT
Date: 19 March 2009
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IN TRIAL CHAMBER II

Before: **Judge O-Gon Kwon, Presiding**
Judge Kimberly Prost
Judge Ole Bjørn Støle

Registrar: **Mr John Hocking, Acting Registrar**

Decision: **19 March 2009**

PROSECUTOR

v.

**MIĆO STANIŠIĆ
STOJAN ŽUPLJANIN**

PUBLIC

**DECISION ON MIĆO STANIŠIĆ'S AND STOJAN
ŽUPLJANIN'S MOTIONS ON FORM OF THE INDICTMENT**

The Office of the Prosecutor:

Mr Thomas Hannis
Ms Joanna Korner

Counsel for the Accused:

Mr Slobodan Zečević and Mr Slobodan Cvijetić for Mićo Stanišić
Mr Tomislav Višnjić and Mr Igor Pantelić for Stojan Župljanin

1. This decision of Trial Chamber II (“Chamber”) of the International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991 (“Tribunal”) is in respect of “Mićo Stanišić Defence Motion regarding Form of the Indictment and Request for Additional and Adequate Particulars” filed by Counsel for Mićo Stanišić (“Stanišić Defence”) on 27 October 2008 (“Stanišić Motion”) and “Stojan Župljanin’s Motion Challenging the Consolidated Indictment (and Motion for Exceeding the Prescribed Word Limit)” filed by Counsel for Stojan Župljanin (“Župljanin Defence”) on 17 November 2008 (“Župljanin Motion”). By these Motions the Stanišić Defence and the Župljanin Defence seek an order directed to the Office of the Prosecutor (“Prosecution”) to clarify or withdraw a number of allegations contained in the Indictment and to provide additional particulars in the Indictment.¹ The Prosecution responded on 10 November and 1 December 2008, respectively, opposing the Motions.² On 9 December 2008 the Župljanin Defence filed a request for leave to reply and a reply to the Prosecution’s Response to Župljanin Motion.³

I. BACKGROUND

2. The indictment against Mićo Stanišić was confirmed on 25 February 2005. At his initial appearance on 17 March 2005 Mićo Stanišić entered a plea of not guilty on all charges.

3. On 4 May 2005 the Stanišić Defence filed a preliminary motion raising a number of issues pertaining to the form of the indictment and seeking greater specificity in the allegations relating to Mićo Stanišić’s individual and superior criminal liability.⁴ On 19 July 2005 the Chamber granted partly the motion and ordered the Prosecution to clarify and make a number of amendments to the indictment. An amended indictment was filed by the Prosecution on 22 August 2005 and following an oral order for further clarifications made by the Chamber on 16 September 2005, a revised indictment was filed on 22 September 2005 and confirmed by the Chamber on 11 October 2005.⁵

¹ Included in the Stanišić Motion is a request for leave to exceed by 760 words the word limit provided in the Practice Direction on the Length of Briefs and Motions (“Practice Direction”). The Župljanin Motion also seeks leave to exceed the word limit of the Practice Direction by 791 words.

² *Prosecutor v Mićo Stanišić and Stojan Župljanin*, Case No. IT-08-91-PT, “Prosecution Response to Mićo Stanišić Defence Motion regarding form of the Indictment and Request for Additional and Adequate Particulars”, 10 November 2008, (“Prosecution Response to Stanišić Motion”) and *Prosecutor v Mićo Stanišić and Stojan Župljanin*, Case No. IT-08-91-PT, “Prosecution Response to Stojan Župljanin’s Motion Challenging the Consolidated Indictment (and Motion for Exceeding the Prescribed Word Limit)”, 1 December 2008 (“Prosecution Response to Župljanin Motion”). In the Prosecution Response to Župljanin Motion the Prosecution also seeks leave to exceed the word limit for its response to 3,653 words.

³ *Prosecutor v Mićo Stanišić and Stojan Župljanin*, Case No. IT-08-91-PT, “ Stojan Župljanin’s Reply to the Prosecution’s Response on the 29 September 2008 Indictment”, 9 December 2008 (“Župljanin Reply”).

⁴ *Prosecutor v Mićo Stanišić*, Case No. IT-04-79-PT, “Motion Objecting to the Form of the Indictment”, 4 May 2005.

⁵ *Prosecutor v Mićo Stanišić*, Case No. IT-04-79-PT, “Order Accepting Amendments to the Indictment”, 11 October 2005.

The Prosecution moved for leave to make further amendments to this indictment on 9 May 2007 and 14 February 2008, respectively.⁶ On 4 April 2008 the Chamber invited the Prosecution to consider and propose a reduction of the counts alleged in the indictment and their scope,⁷ to which the Prosecution responded on 24 April 2008.⁸ An invitation pursuant to Rule 73bis(D) was issued by the Chamber on 8 May 2008, to which the Prosecution responded on 20 May 2008.

4. The indictment against Stojan Župljanin was confirmed on 14 March 1999. Stojan Župljanin was arrested on 11 June 2008 and on 21 June 2008 he was transferred to the seat of the Tribunal. At his further appearance on 21 July 2008 Stojan Župljanin entered a plea of not guilty on all charges in the indictment.

5. On 16 July 2008 the Prosecution moved for joinder of the case against Mićo Stanišić with that against Stojan Župljanin and for leave to amend and consolidate the indictments against the two Accused. On 23 September 2008 the Chamber joined the cases against Mićo Stanišić and Stojan Župljanin and granted in part the Prosecution's request to amend and consolidate the two indictments.⁹ On 29 September 2008, as ordered by the Chamber, the Prosecution filed a consolidated indictment against the two Accused, which is the operative indictment in this case ("Indictment").

6. Each of the Accused is charged with 10 counts of crimes against humanity or violations of the laws or customs of war, namely persecutions, extermination, two counts of murder, torture, cruel treatment, two counts of inhumane acts, and deportation, for crimes allegedly committed between 1 April 1992 and 31 December 1992 against Bosnian Muslims and Bosnian Croats. Mićo Stanišić, at the material time Minister of the newly established Serbian Ministry of Internal Affairs in Bosnia and Herzegovina ("RS MUP") is charged with crimes allegedly committed in 19 municipalities¹⁰ of Bosnia and Herzegovina. Stojan Župljanin, at the time Chief of the Regional Security Service Centre ("CSB") of Banja Luka is charged with crimes allegedly committed in

⁶ *Prosecutor v Mićo Stanišić*, Case No. IT-04-79-PT, "Prosecution's Motion for Leave to Amend the Indictment", 9 May 2007; and *Prosecutor v Mićo Stanišić*, Case No. IT-04-79-PT, "Prosecution's Supplement to the Prosecution Motion of 9 May 2007 for Leave to Amend the Indictment, with Confidential Annex", 14 February 2008, respectively. On 4 April 2008 the Chamber adjourned its adjudication of the Prosecution's motion for leave to amend the indictment and invited the Prosecution to consider and propose a reduction of the counts alleged in the indictment and their scope. (*Prosecutor v Mićo Stanišić*, Case No. IT-04-79-PT, "Interim Decision on the Prosecution's Motion and Supplement for Leave to Amend the Indictment", 4 April 2008)

⁷ *Prosecutor v Mićo Stanišić*, Case No. IT-04-79-PT, "Interim Decision on the Prosecution's Motion and Supplement for Leave to Amend the Indictment", 4 April 2008.

⁸ *Prosecutor v Mićo Stanišić*, Case No. IT-04-79-PT, "Prosecution's Response to Trial Chamber's Invitation to Reduce the Scope of its Indictment, with Confidential Annexes", 24 April 2008.

⁹ *Prosecutor v Mićo Stanišić*, Case No. IT-04-79-PT; *Prosecutor v Stojan Župljanin*, Case No. IT-99-36/2-PT, "Decision on Prosecution's Motion for Joinder and for Leave to Consolidate and Amend Indictments", 23 September 2008 ("Decision of 23 September 2008").

¹⁰ See Indictment, para 11; Indictment, Schedule C, point 19.

seven municipalities of the Autonomous Region of Krajina of Bosnia and Herzegovina (“ARK”).¹¹ Each of the Accused is charged pursuant to Article 7(1) of the Statute of the Tribunal (“Statute”) for his alleged participation in a joint criminal enterprise (“JCE”), the alleged objective of which is to permanently remove Bosnian Muslims, Bosnian Croats and other non-Serbs from the territory of the planned Serbian state by means which included the commission of the crimes charged; alternatively, it is alleged that Mićo Stanišić instigated or aided and abetted the alleged crimes, and that Stojan Župljanin ordered, planned, instigated or aided and abetted the alleged crimes. Superior responsibility pursuant to Article 7(3) of the Statute is also relied on with respect to each of the Accused.

II. GENERAL PLEADING PRINCIPLES

7. Article 18(4) of the Statute of the International Tribunal (“Statute”) and Rule 47(C) of the Rules of Procedure and Evidence (“Rules”) require the Prosecution to prepare an indictment containing a concise statement of the facts and crimes with which the accused is charged. These provisions should be interpreted in accordance with Article 21(2) and Article 21(4)(a) and (b) of the Statute, which afford the accused the right to be informed of the nature and cause of the charges against him and to have adequate time and facilities for the preparation of his defence.¹² An indictment is pleaded with sufficient particularity if it sets out the material facts of the Prosecution case with sufficient detail to inform the accused clearly of the charges against him so that he may prepare his defence.¹³ When evaluating whether an indictment allows the accused to adequately prepare his defence it is necessary to read it as a whole and not “as a series of paragraphs existing in isolation.”¹⁴

8. The Prosecution shall plead in the indictment the specific mode or modes of liability for which the accused is charged, and should only plead the modes of liability on which it intends to rely.¹⁵ The Prosecution is required to plead all material facts substantiating the charges, but is not required to plead the evidence by which the material facts will be proven.¹⁶ Whether a fact is material depends on the nature of the Prosecution case.¹⁷ A decisive factor in this respect is the

¹¹ See Indictment, para 12.

¹² *Prosecutor v. Mladen Naletilić and Vinko Martinović*, Case No. IT-98-34-A, Judgement, 3 May 2006, (“Naletilić Appeals Judgement”), para 23; *Prosecutor v. Blagoje Simić*, Case No. IT-95-9-A, Judgement, 28 November 2006, (“Simić Appeals Judgement”), para 20. See also *Prosecutor v. Zoran Kuprešić et al.*, Case No.: IT-95-16-A, Judgement, 23 October 2001 (“Kuprešić Appeals Judgement”), para 88.

¹³ *Kuprešić Appeals Judgement*, para 88.

¹⁴ *Prosecutor v. Sefer Halilović*, Case No. IT-01-48-A, Judgement, 16 October 2007 (“Halilović Appeals Judgement”), para 86.

¹⁵ *Simić Appeals Judgement*, para 21; See *Prosecutor v. Kvočka et al.*, Case No. IT-98-30/1-A, Judgement, 28 February 2005 (“Kvočka Appeals Judgement”), para 29.

¹⁶ *Naletilić Appeals Judgement*, para 23.

¹⁷ *Halilović Appeals Judgement*, para 86; *Naletilić Appeals Judgement*, para 24.

nature of the alleged criminal conduct charged against the accused, and in particular, the proximity of the accused to the events alleged in the indictment.¹⁸ Each material fact must be pleaded expressly; however, in some circumstances it may suffice if they are stated by necessary implication.¹⁹

9. The Prosecution's classification of the accused's alleged criminal conduct and the proximity of the accused to the crime are crucial factors in determining the degree of specificity required of the indictment.²⁰ As such, the Tribunal has distinguished between pleading requirements when charges are based on (i) individual responsibility under Article 7(1) of the Statute where the accused is alleged to have personally carried out acts underlying the crime; (ii) individual responsibility under Article 7(1) of the Statute where it is not alleged that the accused personally carried out the acts underlying the crime; and (iii) superior responsibility under Article 7(3) of the Statute.²¹

10. Where the Prosecution seeks to show that the accused personally committed the criminal act in question, an indictment should contain details that explain the allegation by stating information "such as the identity of the victim, the time and place of the events, and the means by which the offence was committed."²²

11. Where the Prosecution seeks to show that the accused did not personally carry out the criminal acts alleged, but rather "planned, instigated, ordered, or aided and abetted the planning, preparation or execution of the alleged crimes", an indictment must state the "particular acts" or 'the particular course of conduct' on the part of the Accused which forms the basis for the charges in question."²³

12. When the Prosecution alleges the "commission" of one of the crimes under the Statute within the meaning of Article 7(1), it must specify whether the term refers to physical commission by the Accused, or participation in a joint criminal enterprise ("JCE"), or both.²⁴

¹⁸ *Kupreškić Appeals Judgement*, paras 89-90.

¹⁹ *Halilović Appeals Judgement*, para 86.

²⁰ *Kvočka Appeals Judgement*, para 28. ("As the proximity of the accused person to those events becomes more distant, less precision is required in relation to those particular details, and greater emphasis is placed upon the conduct of the accused person himself upon which the Prosecution relies to establish his responsibility as an accessory or a superior to the persons who personally committed the acts giving rise to the charges against him.") See *Kvočka Appeals Judgement*, para 65.

²¹ *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-A, Judgement, 29 July 2004 ("Blaškić Appeals Judgement"), para 211.

²² *Kvočka Appeals Judgement*, para 28.

²³ *Prosecutor v. Prlić et al.*, Case No. IT-04-74-PT, Decision on Defence Preliminary Motions Alleging Defect in the Form of the Indictment, 22 July 2005, ("Prlić Decision"), para 11; *Blaškić Appeals Judgement*, para 213; *Prosecutor v. Milorad Krnojelac*, Case No. IT-97-25-PT, Decision on Preliminary Motion on Form of Amended Indictment, 11 February 2000 ("Krnojelac First Decision"), paras 18 and 19.

²⁴ *Simić Appeals Judgement*, para 22.

13. Where the Prosecution alleges that the accused's liability is based on the theory of JCE, JCE must be specifically pleaded in the indictment.²⁵ Additionally, the indictment should declare which form of JCE the accused is alleged to have participated in.²⁶ When pleading participation in a JCE the prosecution must plead the following material facts:

- (a) the nature or purpose of the joint criminal enterprise
- (b) the time at which or the period over which the enterprise is said to have existed,
- (c) the identity of those engaged in the enterprise—so far as their identity is known, but at least by reference to their category as a group, and
- (d) the nature of the participation by the accused in that enterprise

Where any of these matters is to be established by inference, the Prosecution must identify in the indictment the facts and circumstances from which the inference is sought to be drawn.²⁷

14. Where the Prosecution alleges that the accused is individually responsible as the superior of the actual perpetrators of a crime under Article 7(3) of the Statute, the material facts which must be pleaded are:²⁸

- (a) that the accused is the superior²⁹ of certain persons sufficiently identified, over whom he had effective control – in the sense of a material ability to prevent or punish criminal conduct – and for whose acts he is alleged to be responsible³⁰;
- (b) the criminal acts of such persons, for which he is alleged to be responsible;
- (c) the conduct of the accused by which he may be found to have known or had reason to know that the crimes were about to be committed or had been committed by his subordinates³¹; and
- (d) the conduct of the accused by which he may be found to have failed to take the necessary and reasonable measures to prevent such acts or to punish the persons who committed them.

15. Where an indictment alleges that an accused exercised effective control over others the manner in which such control was exercised might encompass facts which are not required to be

²⁵ *Simić Appeals Judgement*, para 22.

²⁶ *Simić Appeals Judgement*, para 22; *Prosecutor v. Krnojelac*, Case No.: IT-97-25-A, Judgement, 17 September 2003, para 138.

²⁷ *Prosecutor v. Vlastimir Đorđević*, Case No. IT-05-87/1-PT, "Decision on From of Indictment", 3 April 2008, ("Đorđević Decision"), para 9. See also *Prosecutor v. Krnojelac*, Case No.: IT-97-25-PT, "Decision on From of Second Amended Indictment", 11 May 2000 ("Krnojelac Second Decision"), para 16; *Simić Appeals Judgement*, para 22; *Kvočka Appeals Judgement*, para 28.

²⁸ *Halilović Appeals Judgement*, para 78; see also *Blaškić Appeals Judgement*, para 218.

²⁹ It is settled jurisprudence that the provisions of Article 7(3) are equally applicable to military commanders as well as to civilian superiors. (See *Prosecutor v. Zejinil Delalić & Hazim Delić*, Case No. IT-96-21-A, Judgement, 20 February 2001, para 195)

³⁰ When declaring that the accused was in a position of authority for the purposes of an allegation under Article 7(3) of the Statute, it is sufficient to state that the accused was a "commander" or set forth the accused's specific military duties. (*Blaškić Appeals Judgement*, para 217)

³¹ The facts relevant to the acts of the subordinates, for whose acts the accused is alleged to be responsible as a superior, will usually be stated with less precision, because the detail of those acts is often unknown, and because the acts themselves are often not very much in issue. (*Blaškić Appeals Judgement*, para 218)

pledaded.³² However, there must be a clear indication that the accused possessed effective control at the time of the crimes.³³

16. Where the state of mind of the accused is relevant to the charges, the indictment must set forth either (i) the specific state of mind as a material fact, in which case the facts by which that material fact is to be established are ordinary matters of evidence and need not be pleaded further; or (ii) the evidentiary facts from which the state of mind is to be inferred.³⁴ Generally, each material fact must be pleaded expressly; however, under some circumstances it is sufficient if they are expressed by necessary implication.³⁵

17. Defects in an indictment may arise at a later stage of the proceedings if the evidence at trial does not conform to the indictment's allegations.³⁶ In such circumstances a Trial Chamber must consider whether a fair trial requires an amendment of the indictment, adjournment, or the exclusion of evidence outside the scope of the indictment.³⁷

III. DISCUSSION

A. Mićo Stanišić's right to challenge the form of the present Indictment

18. The Prosecution opposes the Stanišić Motion as untimely, repetitive of Stanišić's prior challenges and seeking details beyond what the Prosecution is required to plead. In particular, it is submitted that after leave to amend an indictment is granted, Rule 50(C) limits an accused's right to challenge the amended indictment to the new charges; that in its Decision of 23 September 2008 granting in part leave to amend the indictment, the Chamber has identified only two new charges; that the challenges contained in the Stanišić Motion are not limited to these two new charges but instead could have been based on the original indictment; and that many of these challenges were fully litigated by the parties and addressed by the Chamber previously, so that addressing these issues at this stage of the proceedings would be unnecessary and inappropriate.

19. Pursuant to Rule 50(C) of the Rules, if leave to amend an indictment has been granted, the accused may file preliminary motions pursuant to Rule 72 in respect of the new charges within 30 days. Rule 50(C), therefore, limits an accused's right to challenge the form of an amended

³² *Halilović Appeals Judgement*, para 86.

³³ *Halilović Appeals Judgement*, para 86.

³⁴ *Prosecutor v. Mile Mrkšić*, Case No. IT-95-13/1-PT, "Decision on the Form of the Indictment", 19 June 2003 ("Mrkšić Decision"), para 7; see also *Blaškić Appeals Judgement*, para 219, solely addressing the issue of pleading responsibility under Article 7(3).

³⁵ *Blaškić Appeals Judgement*, para 219.

³⁶ *Kvočka Appeals Judgement*, para 31.

³⁷ *Kvočka Appeals Judgement*, para 31.

indictment to the new charges introduced by the amendments. In its decision of 23 September 2008 the Chamber granted leave to the Prosecution to add two crime sites to the allegations against Mićo Stanišić under Counts 1 and Counts 2-4, respectively and two crime sites to the allegations against Stojan Župljanin, under Count 1 and a further allegation against Stojan Župljanin relevant to the charges in Counts 5-8. The challenges to the form of the Indictment raised in the Stanišić Motion are not related to the new charges and, therefore, fall outside the scope of Rule 50(C) of the Rules. The Chamber, therefore, will not adjudicate upon the challenges raised by Stanišić to the indictment against him. The Chamber notes, however, that the Župljanin Defence has “incorporated” the points raised in the Stanišić Motion, submitting that both Accused are alleged to have been members of the same JCE and, therefore, issues relevant to Stanišić are also relevant to Župljanin.³⁸ The Chamber does not agree that the allegation of JCE liability makes all arguments raised by Stanišić relevant to Župljanin. Further, such a broad “incorporation by reference” is not an appropriate means to advance arguments before this Tribunal. However, in the interests of justice, to the extent that arguments are advanced by Stanišić on issues which are general in nature and of direct and apparent relevance to Župljanin, the Trial Chamber has considered those matters in its decision.

B. Challenges to the pleadings related to Article 7(1) of the Statute

1. General issues relevant to modes of liabilities charged under Article 7(1)

(a) Submissions

20. The Župljanin Defence submits that, while the Prosecution seeks to rely primarily on JCE, it has pleaded all forms of liability pursuant to Article 7(1) which leaves Župljanin with insufficient notice of the case he faces. It is submitted that the Prosecution should only charge modes of liability under Article 7(1) supported by specific factual allegations and/or drop those modes of liability which it does not intend to pursue.³⁹ The Župljanin Defence further submits that if it is the Prosecution case that all modes of liability under Article 7(1) are supported, then the Prosecution should identify the material facts in relation to each crime site which support each mode of liability.⁴⁰

21. The Župljanin Defence also submits that paragraph 16 of the Indictment, which sets out allegation relevant to Stojan Župljanin’s alleged liability for aiding and abetting, ordering, planning

³⁸ Župljanin Motion, para 24.

³⁹ Župljanin Motion, paras 15-17.

⁴⁰ Župljanin Motion, paras 15-17.

and instigating, is confusing,⁴¹ and that, with respect to instigation, the instigating acts and persons should be described precisely.⁴²

22. The Prosecution contends that it has the right to charge the Accused in alternative with all modes of liability under Article 7(1) where there is evidence sufficient to support a pleading.⁴³ The Prosecution submits that paragraph 16 of the Indictment specifies which acts by Župljanin are material to each mode of liability.⁴⁴ The Prosecution further submits that the Indictment re-alleges Župljanin's alleged modes of liability under Article 7(1) for each group of counts, and by necessary implication these modes apply to the respective crime incidents and sites charged under the counts.⁴⁵

(b) Discussion

23. While it is a prerogative of the Prosecution to decide with which modes of liability to charge an accused, the Prosecution should only plead the modes of liability on which it intends to rely during the trial. At this stage, the Chamber can only rely on the Prosecution's submissions of its intentions in this respect. A pleading of multiple modes of liability does not in and of itself prejudice the Defence. What is essential is that the requisite pleading requirements are met.

24. With respect to ordering, planning, instigation and aiding and abetting, paragraph 27 of the Indictment sets out the modes of liability with respect to the count of persecutions charged against Župljanin; paragraph 26 alleges the crimes relating to these modes of liability. The other counts and charges in the Indictment are laid out in a similar manner.⁴⁶ In the Chamber's view, the Indictment sets out clearly which crime incidents and sites relate to each mode of liability.

25. Turning next to the Župljanin Defence challenges with respect to paragraph 16 of the Indictment, the Chamber observes that paragraph 16 begins with a collective statement which alleges that by the acts listed in paragraphs 12(a)-(g) Stojan Župljanin is individually criminally responsible for ordering, planning, instigating or aiding and abetting the crimes in the indictment. The paragraph goes on to specify that the acts of aiding and abetting are encompassed by all of the allegations in paragraphs 12(a)-(g) while those relating to ordering, planning and instigation arise from paras 12(d)-(g). The Trial Chamber is satisfied that these allegations are sufficiently clear and specific with respect to the various modes of individual criminal responsibility.

⁴¹ Župljanin Motion, para 18.

⁴² Župljanin Motion, para 16.

⁴³ Prosecution Response to Župljanin Motion, para 12.

⁴⁴ Prosecution Response to Župljanin Motion, para 13.

⁴⁵ Prosecution Response to Župljanin Motion, para 14.

⁴⁶ Indictment paras 28-30 (extermination and murder), paras 32, 34-35 (torture, cruel treatment and inhumane acts), paras 38-40 (deportation and inhumane acts).

26. Further, the Chamber notes that the Appeals Chamber has held that when the Prosecution pleads the mode of liability of instigation, “the instigating acts, and the instigated persons or groups of persons, are to be described precisely”.⁴⁷ Paragraph 12 (d)-(g) sets out the factual allegations in support of instigation and includes a description of the acts of instigation and instigated persons or groups such as VRS/RS MUP forces and Serb Forces. The Trial Chamber considers that these allegations, combined with the description of the underlying crimes in the indictment and in the schedules, constitutes a pleading of sufficient clarity as to the instigating acts relied on and the identity of the instigated groups of persons. No amendments in this respect are necessary.

2. Aiding and abetting

(a) Submissions

27. The Župljanin Defence reiterates a submission made by the Stanišić Defence that the Prosecution has failed to specify the alleged contribution of the Accused to crimes he is alleged to have aided or abetted⁴⁸ and to indicate whether it is part of its case that the Accused Stanišić is alleged to have aided and abetted or instigated any of the crimes allegedly committed by the Accused Župljanin.⁴⁹

(b) Discussion

28. The Chamber recalls that the Prosecution is required to plead in the Indictment the “particular acts” or “course of conduct” of the Accused which forms the basis for the charge of aiding and abetting. With respect to the Accused Župljanin, paragraph 12 (a)-(g) of the indictment describes the way in which Stojan Župljanin is alleged to have aided and abetted with reference to the underlying crime base set out in the Indictment. The same allegations form the basis for the alternative modes of liability pleaded as set out in paragraph 16. Similar allegations are made in paragraph 11 (a)-(h) and paragraph 15 with reference to the Accused Stanišić. On this basis, the Chamber is satisfied that the Prosecution has pleaded the acts of each Accused in relation to the allegation of aiding and abetting with sufficient specificity. In the view of the Chamber, whether an accused is alleged specifically to have aided and abetted or instigated a co-accused is a matter of evidence and not a material allegation that must be pleaded in an indictment.

⁴⁷ Blaškić Appeals Judgement, para 226.

⁴⁸ Župljanin Motion, para 24; Stanišić Motion, para 15.

⁴⁹ Župljanin Motion, para 24; Stanišić Motion, para 15.

3. Joint criminal enterprise

(a) Alleged members of the JCE

(i) Submissions

29. The Župljanin Defence further reiterates an argument raised by the Stanišić Defence that the Prosecution has failed to plead with sufficient specificity some of the alleged members of the joint criminal enterprise, in particular who the “other members of the Bosnian Serb leadership and leading members of the Serbian Democratic Party (SDS)”, “leading members of CSBs”, “leading members of Public Security Services (“SJBs”), “leading members of other civilian bodies within BiH” are.⁵⁰ The Prosecution contends that the pleadings conform with the jurisprudence as it has named in the Indictment the principal participants in the JCE, and it has provided the categories of the others.⁵¹

(ii) Discussion

30. An accused must be informed by the Indictment of the identity of those engaged in the joint criminal enterprise – so far as their identity is known.⁵² While key participants in the JCE must be named in light of the criterion of proximity to the accused,⁵³ it is sufficient that other less important participants in the JCE be identified by category as a group,⁵⁴ where their precise identity is not known and it is not possible for the Prosecution to obtain it.⁵⁵

31. In paragraph 8 of the Indictment a number of persons are identified as alleged members of the JCE,⁵⁶ whom the Prosecution alleges to be key participants in the JCE.⁵⁷ Other alleged

⁵⁰ Župljanin Motion, para 24; Stanišić Motion, para 15.

⁵¹ Prosecution Response to Stanišić Motion, para 10 (d).

⁵² See *supra*, paras 13.

⁵³ *Prosecutor v. Gotovina et al*, Case No. IT-06-90-PT, “Decision on Ante Gotovina’s Preliminary Motions Alleging Defects in the Form of the Indictment” (“*Gotovina Decision*”), 19 March 2007, paras 10-14, *see also* fn. 28 referring to *Prlić Decision*, para 34, holding: “in such a case upon criminal responsibility where the proximity between the acts of the accused and the underlying crimes is not great the facts may be stated with less precision and it is sufficient to identify the participants in the JCE by means of the category of the group they belong.” *See also Kvočka Appeals Judgement*, para 65 citing *Prosecutor v. Stanislav Galic*, Case No. IT-98-29-AR72, “Decision on Application by Defence for Leave to Appeal”, 30 November 2001, (“*Galic Decision*”) para 15.

⁵⁴ *Krnojelac Second Decision*, para 16. *See also Prosecutor v. Vidoje Blagojević et al*, Case No. IT-02-60-PT, “Decision on Motions Challenging the Form of the Amended Joinder Indictment”, 1 August 2002, para 26; *Prosecutor v. Mitar Rašević*, Case No. IT-97-25/1-PT, “Decision Regarding Defence Preliminary Motion on the Form of the Indictment”, 28 April 2004, para 47; *Prosecutor v. Milutinović*, Case No. IT-99-37-PT, “Decision on Defence Preliminary Motion Filed by the Defence for Nikola Šainović”, 27 March 2003, fn. 17, referring to *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.

⁵⁵ *Prosecutor v. Ivan Čermak and Mladen Markač*, Case No. IT-03-73-PT, “Decision on Ivan Čermak’s and Mladen Markač’s Motions on Form of Indictment”, 8 March 2005, (“*Čermak and Markač Decision*”), para 54. *See also Prosecutor v. Popović et al*, Case No. IT-05-88-T, “Decision on Motions Challenging the Indictment Pursuant to Rule 72 of the Rules”, 31 May 2006 (“*Popović Decision*”), para 43.

⁵⁶ Indictment, para 8.

members of the JCE may, therefore, be identified with some less precision, although as a minimum they need to be identified as members by category or as a group. In the Chamber's view, in paragraph 8 of the Indictment, the Prosecution has referred to the identity of all alleged members of the JCE by at least indicating to which group they belonged, such as SDS, CSBs, SJBs or civilian bodies in BiH, and provided further detail by referring to them as "leading members" of the identified group. Moreover, with respect to the references to leading members of the Bosnian Serb leadership and of the SDS and to leading members of the SJBs, one or more names have been provided. On this basis, the Chamber is satisfied that these pleadings meet the standard set out in the jurisprudence of this Tribunal, and, finds, therefore, that the Indictment is not defective in this respect.

(b) Alleged physical perpetrators of the crimes charged

(i) Submissions

32. The Župljanin Defence submits that the Prosecution has failed to specify who the "local Bosnian Serbs" listed among the alleged physical perpetrators in paragraph 9 of the Indictment are.⁵⁸ The Župljanin Defence further submits that, in the alternative, this category should be removed from the Indictment.⁵⁹

33. It is further submitted by the Župljanin Defence that the Prosecution conveyed, when submitting the material supporting this allegation, that this was a "non-exhaustive list" of materials, thereby, leaving the door open to add further physical perpetrators at a later stage.⁶⁰ The Prosecution submits that this submission is misplaced as sufficiency of the materials the Prosecution submitted to the Chamber in support of this new allegation is a matter to be dealt with at trial. Moreover, it is submitted that under Article 19(1) of the Statute the Prosecution is not obliged to provide an exhaustive list of evidence supporting this new allegation, but rather to identify sufficient materials to establish a *prima facie* evidence of this material fact. It is submitted that the evidence the Prosecution will use at trial to ultimately prove this allegation is contained within the pre-trial disclosure in the case.⁶¹

(ii) Discussion

⁵⁷ Prosecution Response to Stanišić Motion, para 10 (d).

⁵⁸ Župljanin Motion, para 13. See also Stanišić Motion, para 15.

⁵⁹ Župljanin Motion, para 13.

⁶⁰ Župljanin Motion, para 13.

⁶¹ Prosecution Response to Župljanin Motion, para 11.

34. With respect to the Župljanin Defence submission referred to in the preceding paragraph the Chamber recalls that the Prosecution was ordered to either identify to the Chamber and the Defence where the evidence can be found within the existing supporting material to support the addition of the phrase “local Bosnian Serbs” in the Indictment or to submit additional material in support.⁶² In response, the Prosecution filed a list of documents, the majority of which had been included as supporting material for the confirmation of the indictments against Stanišić and Župljanin.⁶³ The sufficiency of this material has been dealt with at the confirmation of the indictments and is not a subject of a motion challenging the form of the indictment.

35. The jurisprudence of this Tribunal has held that the detail by which the physical perpetrators have to be identified depends, in particular, on the proximity of the accused to the crimes. Their identity is not a material fact to be pleaded, but rather a matter of evidence, where the accused person is remote in proximity from the crimes charged.⁶⁴ The reference to “local Bosnian Serbs” is very general. The crimes alleged to have been perpetrated by them are numerous and widespread over a period of many months. The Chamber accepts that in the circumstances it is possible that the affiliation of some of the alleged perpetrators may not be known to the Prosecution. In light of the remoteness of both Accused from the alleged crimes, and considering that “local Bosnian Serbs” may be a common denominator of the alleged perpetrators, the Chamber is of the view that the Prosecution is not required to provide further identification of “local Bosnian Serbs” for the purposes of the Indictment.

(c) Alleged participation of the Accused in the JCE

(i) Submissions

36. The Župljanin Defence contends that the Indictment has failed to sufficiently specify the contribution of each of the Accused to the alleged JCE.⁶⁵ It is submitted that, while a lesser degree of specificity is required for participation in the JCE than for crimes committed personally by the Accused, paragraph 12 of the Indictment should be far more detailed, and include details and dates

⁶² Decision of 23 September 2008, para 66.

⁶³ *Prosecutor v Mićo Stanišić and Stojan Župljanin*, Case No. IT-08-91-PT, “Reply to Trial Chamber Decision on Prosecution’s Motion for Joinder and for Leave to Consolidate and Amend Indictments with a Confidential Annex”, 29 September 2008; *Prosecutor v Mićo Stanišić and Stojan Župljanin*, Case No. IT-08-91-PT, “Corrigendum to Reply to Trial Chamber Decision on Prosecution’s Motion for Joinder and for Leave to Consolidate and Amend Indictments with a Confidential Annex”, 3 October 2008.

⁶⁴ *Prosecutor v. Radoslav Brđanin and Momir Talić*, Case No., IT-00-36-PT, “Decision on Objections by Momir Talić to the Form of the Amended Indictment”, 20 February 2001, para 18. See also *Prosecutor v. Radoslav Brđanin and Momir Talić*, Case No. IT-99-36-PT, “Decision on Form of Further Amended Indictment and Prosecution Application to Amend”, 26 June 2001, para 59; *Popović Decision*, para 40. See also *Kvočka Appeals Judgement*, para 65 citing *Galić Decision*, para 15.

⁶⁵ Župljanin Motion, paras 11.

of meetings or key criminal orders where these are known.⁶⁶ The Prosecution responds that by specifying seven distinct ways in which Župljanin participated in the JCE, as well as how and when he participated, paragraph 12 satisfies the relevant pleading requirements.⁶⁷ The Prosecution submits that the further details requested by the Defence are a demand for evidence which has been dealt with through pre-trial disclosure and will be addressed in the pre-trial brief.⁶⁸

37. The Župljanin Defence also submits that paragraph 12 (f) and (g) of the Indictment is incoherent, *inter alia*, because it alleges acts of the Accused that in fact relate to his alleged liability under Article 7(3),⁶⁹ and, further, in its Reply, that it is not permissible to plead participation in a JCE by omission.⁷⁰ The Prosecution argues that these subparagraphs are purposefully pleaded in the Article 7(1) section of the Indictment because they are material to these modes of liability.⁷¹ Further, the Prosecution submits that the jurisprudence of this Tribunal has held that cumulative charging is permissible,⁷² as well as pleading participation in a joint criminal enterprise by omission.⁷³

(ii) Discussion

38. The Chamber recalls that the nature of the participation by an accused in a JCE must be pleaded in an indictment.⁷⁴

39. The Chamber considers, taking into account the nature of this case and specifically the alleged role of the Accused Župljanin, the Indictment is not impermissibly vague in its pleading of the ways in which the Accused Župljanin allegedly participated in the JCE.⁷⁵ The more detailed information underpinning these pleadings will be a matter of evidence to be presented at trial. Therefore, the Chamber is satisfied that paragraph 12 of the Indictment is sufficiently specific. Further, it is also made clear in paragraph 16 of the Indictment that the alleged acts in subparagraphs 12(f) and (g) relate to the alleged participation in the JCE. Whether these alleged acts could also support a conviction under another form of liability is not relevant for present purposes. The Župljanin Defence submission that the Prosecution cannot plead participation in a joint criminal enterprise by omission is not supported by the jurisprudence of this Tribunal. As held

⁶⁶ Župljanin Motion, para 11.

⁶⁷ Prosecution Response to Župljanin Motion, paras 7 and 8.

⁶⁸ Prosecution Response to Župljanin Motion, para 8.

⁶⁹ Župljanin Motion, para 12.

⁷⁰ Župljanin Defence Reply, para 12.

⁷¹ Prosecution Response to Župljanin Motion, para 9.

⁷² Prosecution Response to Župljanin Motion, para 9.

⁷³ Prosecution Response to Župljanin Motion, para 10.

⁷⁴ *Krnojelac* Second Decision, para 16.

⁷⁵ See Indictment, para 12.

by the Appeals Chamber, an accused can be held responsible for participation in a JCE by committing an act or omission which contributes to the common criminal purpose.⁷⁶

(d) Relationship between the two Accused in the alleged JCE

(i) Submissions

40. The Stanišić Defence submits that the Prosecution has failed to specify the nature of the relationship between the two Accused as regards the allegation of a JCE linking the two of them.⁷⁷ The Župljanin Defence supports this argument.⁷⁸

(ii) Discussion

41. The Indictment alleges that both Accused, together with others, were members of a JCE,⁷⁹ that they each acted “in concert” with other members of the JCE,⁸⁰ and that each Accused participated in the JCE as specified in paragraph 11 (Stanišić) and paragraph 12 (Župljanin) of the Indictment. More detail as to how the various members in a JCE interacted, however, is a matter of evidence⁸¹.

4. Mens rea regarding Article 7(1)

(a) Submissions

42. The Župljanin Defence submits that the Prosecution has failed to specify the state of mind for each mode of liability and how that state of mind can be proved.⁸² The Prosecution responds that paragraphs 13 and 14 of the Indictment sufficiently meet the specific *mens rea* requirements for JCE liability,⁸³ and that how the Prosecution intends to prove the state of mind is a matter of evidence.⁸⁴ However, it indicates that contemporaneously with the filing of its Response it is also filing a motion to amend the pleading of the *mens rea* in the Indictment in order to align this pleading with the current pleading practices of the Office of the Prosecutor.⁸⁵

⁷⁶ *Prosecutor v. Miroslav Kvočka*, Case No. IT-98-30/1-A, Judgement, 28 February 2005, para 187. See also *Prosecutor v Milutinović et al*, Case No. IT-05-87-T, Oral Decision on Motions for Acquittal pursuant to Rule 98bis, 18 May 2007, T 12776; *Prosecutor v. Jean Mpambara*, Case No. ICTR-01-65-T, Judgement, 11 September 2006, para 24.

⁷⁷ Stanišić Motion, para 15.

⁷⁸ Župljanin Motion, para 24.

⁷⁹ Indictment, para 8.

⁸⁰ Indictment, para 9.

⁸¹ See Popović Decision, para 117.

⁸² Župljanin Motion, para 23.

⁸³ Prosecution Response to Župljanin Motion, para 19.

⁸⁴ Prosecution Response to Župljanin Motion, para 20.

⁸⁵ Prosecution Response to Župljanin Motion, para 21.

(b) Discussion

43. The Prosecution has to plead the specific state of mind for each charge and for each form of responsibility under Article 7(1), and it may in this respect plead (i) the specific state of mind as a material fact; or (ii) the evidentiary facts from which the state of mind is to be inferred.⁸⁶ The means by which an accused acquired such knowledge, in other words how the Prosecution is to prove the *mens rea*, is a matter of evidence to be dealt with at trial.

44. In the Chamber's view, the Prosecution has not expressly pleaded the specific state of mind required for each of the various forms of responsibility under Article 7(1) as a material fact in the Indictment. The question is, therefore, whether the evidentiary facts by which the state of mind can be inferred in relation to the various forms of responsibility under Article 7(1) are set forth in the Indictment with respect to the Accused Župljanin. The Accused Župljanin is charged with participation in a JCE to "permanently remove Bosnian Muslims, Bosnian Croats and other non-Serbs from the territory of the planned Serbian state by means which included the commission of crimes alleged in Counts 1-10."⁸⁷ The Indictment further alleges that the Accused Župljanin and other members of the JCE "shared a common purpose which amounted to or involved the commission of the charged crimes,"⁸⁸ and that Župljanin participated in the JCE by, *inter alia*, "ordering, commanding and directing members and agents of the RS MUP who were acting in co-ordination with crisis staffs, the VRS, and other Serb Forces in implementing the objective of the JCE". "assisting in the co-ordination of joint VRS/RS MUP operations in support of the implementation of the objective of the JCE" and "facilitating, establishing and/or operating camps and detention facilities in which Serb Forces beat, killed and sexually assaulted non-Serb detainees".⁸⁹ In the Chamber's view, these allegations may all serve, directly or indirectly, as evidentiary facts which go to establish the requisite *mens rea* for Župljanin's alleged participation in the JCE.

45. The abovementioned pleadings in paragraph 12 of the Indictment, pleading acts and conduct of the Accused Župljanin by which he is said to have aided and abetted the crimes charged,⁹⁰ may also serve as evidentiary facts that go to establish the requisite *mens rea* in relation to this liability with respect to Župljanin.

46. In the Chamber's view, while the Prosecution has not expressly pleaded the specific state of mind required for each of the various forms of responsibility as a material fact, the Indictment does

⁸⁶ *Mrkšić* Decision, para 7; *Čermak and Markač* Decision, para 66.

⁸⁷ Indictment, paras 7 and 10.

⁸⁸ Indictment, para 13.

⁸⁹ Indictment, para 12 (b), (d), (e).

detail the factual allegations underpinning membership in the JCE, and the alternative forms of individual criminal responsibility. By example, the Accused Župljanin is charged with participation in a JCE to “permanently remove Bosnian Muslims, Bosnian Croats and other non-Serbs from the territory of the planned Serbian state by means which included the commission of crimes alleged in Counts 1-10.”⁹¹ The Indictment further alleges that the Accused Župljanin and other members of the JCE “shared a common purpose which amounted to or involved the commission of the charged crimes”,⁹² and that Župljanin participated in the JCE by, *inter alia*, “ordering, commanding and directing members and agents of the RS MUP who were acting in co-ordination with crisis staffs, the VRS, and other Serb Forces in implementing the objective of the JCE”, “assisting in the co-ordination of joint VRS/RS MUP operations in support of the implementation of the objective of the JCE” and “facilitating, establishing and/or operating camps and detention facilities in which Serb Forces beat, killed and sexually assaulted non-Serb detainees”.⁹³ In the Chamber’s view, these allegations and the others detailed in paragraphs 12-23 of the indictment, when linked to the description of the specific acts set out under the relevant counts of the indictment all serve, directly or indirectly, as evidentiary facts which go to establish the requisite *mens rea* for Župljanin’s Article 7(1) responsibility. The Chamber, therefore, is of the view that the pleading of *mens rea* with respect to the allegations under Article 7(1) meets the requirements of the jurisprudence.

C. Challenges to the pleadings related to Article 7(3) of the Statute

47. Both Defences raise a number of issues related to each Accused’s alleged responsibility as a superior pursuant to Article 7(3) of the Statute.

1. Identification of the alleged perpetrators and their relationship with the Accused

(a) Submissions

48. The Župljanin Defence submits that the phrase “members and agents” of the RS MUP within the ARK in paragraphs 18, 20, 21, 22, and 23 of the Indictment is vague and demands more particulars regarding the identity of these agents and how they were subordinated to Župljanin.⁹⁴ The Prosecution responds that this Trial Chamber previously has held that the phrase “members and agents of the RS MUP” describing Mićo Stanišić’s subordinates in the Indictment is sufficiently

⁹⁰ Indictment, para 16.

⁹¹ Indictment, paras 7 and 10.

⁹² Indictment, para 13.

⁹³ Indictment, para 12 (b), (d), (e).

⁹⁴ Župljanin Motion, para 20. See also Župljanin Reply, para 17.

precise, that this pleading is consistent with the Tribunal's jurisprudence and that the additional details sought can be found in the pre-trial disclosure.⁹⁵

49. The Župljanin Defence further submits that the Prosecution must clarify the sites at which Stojan Župljanin's subordinates are alleged to have committed crimes.⁹⁶ It is submitted that the Prosecution's allegations of responsibility pursuant to Article 7(1) and Article 7(3) of the Statute for every count and every crime site impose an enormous investigatory obligation upon the Župljanin Defence and that the lack of evidence to support such allegations may render the trial unfair.⁹⁷ The Prosecution responds that the Chamber has already resolved this issue by holding that it understands the indictment as alleging responsibility under both Article 7(1) and Article 7(3) for each incident mentioned in the indictment or listed in one of the indictment's schedules and that as in the case against Stanišić, the Prosecution seeks to rely on both Article 7(1) and Article 7(3) with respect to Stojan Župljanin.⁹⁸

(b) Discussion

50. The Indictment alleges that the Accused Mićo Stanišić was a superior to "all members and agents of RS MUP" and that the Accused Stojan Župljanin had "overall authority and responsibility for the functioning of the members and agents of RS MUP within ARK."⁹⁹ The Indictment alleges further that the crimes charged were carried out by physical perpetrators which included "members of RS MUP".¹⁰⁰ The Accused are held responsible, *inter alia*, for their participation in a JCE, the objective of which was carried out by physical perpetrators who included their subordinates, as well as under the theory of command responsibility as superiors of the alleged perpetrators.

51. Where the Prosecution alleges that the Accused is individually responsible as a superior of the actual perpetrators of a crime under Article 7(3) of the Statute, the Indictment must plead as a material fact that the Accused is "the superior of certain persons sufficiently identified" and "the criminal acts of such persons, for which he is alleged to be responsible".¹⁰¹ In the jurisprudence of the Tribunal "in a case based on superior responsibility, it is sufficient to identify the persons who committed [the] alleged crimes [...] by means of the category or group to which they belonged."¹⁰²

⁹⁵ Prosecution Response to Župljanin Motion, para 16. See also Prosecution Response to Stanišić Motion, para 10.

⁹⁶ Župljanin Motion, para 22.

⁹⁷ Župljanin Reply, para 18.

⁹⁸ Prosecution Response to Župljanin Motion, para 18.

⁹⁹ Indictment, paras 17 and 18.

¹⁰⁰ Indictment, para 9.

¹⁰¹ See *supra*, para 14.

¹⁰² *Prosecutor v Ivica Rajić*, Case No. IT-95-12-PT, "Decision on the Defence Motion on the Form of the Amended Indictment", 27 April 2004, para 13; *Prosecutor v Milutinović et al*, Case No. IT-05-87-PT, "Decision on Defence

52. The Chamber has previously found that the pleading of “members and agents of the RS MUP” is sufficiently precise in the context of the present case.¹⁰³ The Chamber accepts that the specific units of the RS MUP alleged to have been involved in each of the incidents alleged in the Indictment is a matter of evidence and not a material fact that must be pleaded in the Indictment.

53. Turning to the second challenge raised by the Župljanin Defence the Chamber notes that the Prosecution is entitled to plead both Article 7(1) and Article 7(3) responsibility for the same acts alleged in the Indictment. The Indictment should plead, however, with sufficient specificity the elements of each mode of liability. Each of the Accused is charged on the basis of both Article 7(1) and Article 7(3) of the Statute for all counts alleged in the Indictment. Further, it is alleged that the acts charged against each of the Accused were carried out by “Serb forces” which included “members of RS MUP”¹⁰⁴ who are alleged subordinates of the Accused. Therefore, it is clearly pleaded in the Indictment that subordinates of the Accused are alleged to have participated in all crime sites charged respectively against each of the Accused. This pleading is consistent with the jurisprudence of the Tribunal. Further, the Prosecution has confirmed that it alleges both Article 7(1) and Article 7(3) responsibility under each count and for each crime site and incident charged against Župljanin.

2. Pleadings related to the Accused’s effective control

(a) Submissions

54. The Župljanin Defence submits that the Indictment uses broad and imprecise phrases to describe Župljanin’s liability pursuant to Article 7(3), such as “overall authority” and “operational control”.¹⁰⁵ The Prosecution responds that paragraphs 18 to 22 of the Indictment provide a more precise pleading of Župljanin’s authority over his subordinates than “the more generic expression effective control”, but indicates that in order to avoid any future dispute over the issue it is filing contemporaneously a motion to amend the Indictment so that the pleading of “effective control” is included in paragraph 22 of the Indictment.¹⁰⁶

Motions Alleging Defects in the Form of the Proposed Amended Joinder Indictment”, 22 March 2006, (“*Milutinović Decision*”) para 9.

¹⁰³ *Prosecutor v Mićo Stanišić*, Case No. IT-04-79-PT, “Decision on Defence Preliminary Motion on the Form of the Indictment”, 19 July 2005, para 30.

¹⁰⁴ Indictment, para 9. Other group of participants alleged as part of the Serb forces in para 9 of the indictment are “Army of Republika Srpska (“VRS”), Yugoslav People’s Army (“JNA”), Yugoslav Army (“VJ”), Territorial Defence (“TO”), Serbian MUP and crisis staffs not identified above, Serbian and Bosnian Serb paramilitary forces and volunteer units, and local Bosnian Serbs acting under their instruction or pursuant to the direction of the aforementioned forces.” See also Indictment, paras 25, 28, 29, 31, 37, 39.

¹⁰⁵ Župljanin Motion, para 21.

¹⁰⁶ Prosecution Response to Župljanin Motion, para 17. See also Prosecution Response to Stanišić Motion, para 10.

(b) Discussion

55. Where the Prosecution case is that the Accused is individually responsible as the superior of the actual perpetrators of the alleged crimes pursuant to Article 7(3) of the Statute, the Indictment must plead as a material fact, *inter alia*, that the Accused had effective control over the perpetrators, in the sense of the material ability to prevent or punish criminal conduct.¹⁰⁷ While in certain circumstances the exercise of effective control by the Accused may be pleaded implicitly, the Appeals Chamber has held that a pleading of exercise of *de jure* and *de facto* power does not amount to pleading of effective control for the purposes of criminal responsibility as a superior.¹⁰⁸ However, the manner in which effective control was exercised might encompass facts which are not required to be alleged in the Indictment, as long as there is a clear indication that the Accused possessed effective control at the material time.¹⁰⁹

56. The Indictment alleges that Stojan Župljanin had “overall authority and responsibility for the functioning of the members and agents of the RS MUP within the ARK”, that he was “responsible for planning and directing all operations of the police and for monitoring the activities of all subordinate officers and units to ensure that his orders were implemented”, that he had “authority to appoint and dismiss subordinate individuals from duty” and that he “exercised command and control of the RS MUP in the ARK.”¹¹⁰ Further, it is alleged that Stojan Župljanin had “operational control over the subordinated municipal and regional members and agents of the RS MUP in the ARK, including those responsible for the operation of the detention facilities”, that he made decisions for the subordinate units, assigned tasks, issued orders and ensured their implementation.¹¹¹ It is alleged further that Stojan Župljanin had “the authority and the duty to punish or initiate disciplinary proceedings against subordinate members and agents of the RS MUP” and that in his capacity as the Chief of the Banja Luka CSB and the police representative on the ARK Crisis Staff he “exercised *de jure* and *de facto* command and control over the members and agents of RS MUP in the ARK [...].”¹¹² Paragraph 23 of the Indictment alleges that each of the Accused had “an obligation to investigate and establish the facts of the crimes, to put an end to the criminal activity, to impose appropriate punitive measures on the perpetrator, and to take measures to prevent or deter further criminal acts committed by members and agents of the RS MUP.”

¹⁰⁷ See *supra*, para 14.

¹⁰⁸ Halilović Appeals Judgement, para 85. See also *Prosecutor v Hadžihasanović et al*, Case No. IT-01-47-PT, “Decision on Form of Indictment”, 7 December 2001, (“Hadžihasanović Decision”), para 17.

¹⁰⁹ Halilović Appeals Judgement, para 86, citing *Prosecutor v Rasim Delić*, Case No. IT-04-83-AR72, “Decision on Interlocutory Appeal Challenging the Jurisdiction of the Tribunal”, 8 December 2005, para 10.

¹¹⁰ Indictment, para 18.

¹¹¹ Indictment, para 19.

¹¹² Indictment, paras 21, 22.

57. The pleadings with respect to Mićo Stanišić are set out in a similar manner.¹¹³

58. The Chamber is of the view that the Indictment meets the requirements of the jurisprudence with respect to the pleading of “effective control”. The Prosecution must explicitly allege “effective control”. However, this can be accomplished by setting out a combination of clear factual allegations and not just by using a particular phraseology. In fact, such an approach is more helpful in that it provides the details for the allegation of effective control. In the view of the Chamber, the pleadings discussed in paragraph 56 above meet the threshold of the jurisprudence.

3. Pleading of the mental element of Article 7(3)

(a) Submissions

59. The Župljanin Defence submits that the Indictment fails to adequately specify Župljanin’s state of mind for each mode of liability (including his alleged liability pursuant to Article 7(3) of the Statute) or to indicate whether and how his state of mind can be inferred.¹¹⁴ The Prosecution responds that the material facts pleaded in paragraph 23 of the Indictment satisfy the pleading requirements and that the Chamber has previously held that the basis for the allegation that the Accused knew or had reason to know about the alleged crimes is not a material fact which must be pleaded.¹¹⁵

(b) Discussion

60. When the Prosecution seeks to rely on superior responsibility pursuant to Article 7(3) of the Statute, the conduct of the Accused by which he may be found to have known or had reason to know that the crimes were about to be committed or had been committed by his subordinates is a material fact that must be pleaded in the Indictment.¹¹⁶ Paragraph 23 of the Indictment states that each Accused knew or had reason to know that crimes alleged in the Indictment were about to be or had been committed by their subordinates. Considering this pleading and the pleadings in the section on Article 7(3) of the Statute in the Indictment, the Chamber is satisfied that the pleading of the mental element for Article 7(3) is in conformity with the jurisprudence of the Tribunal.

¹¹³ It is alleged in the Indictment that Mićo Stanišić in his capacity as Minister of the RS MUP had “overall authority and responsibility for the functioning of the members and agents of the RS MUP”, that “all members and agents of the RS MUP were subordinated to him”, and that he had “authority to appoint and dismiss from duty the heads of the units into which the RS MUP was organised [...]” (Indictment, para 17); that he had “the authority and the duty to punish or initiate disciplinary proceedings against subordinate members and agents of the RS MUP” (Indictment, para 21); and further that he “exercised *de jure* and *de facto* command and control over the members and agents of the RS MUP” who participated in crimes alleged in the Indictment (Indictment, para 22).

¹¹⁴ Župljanin Motion, para 23.

¹¹⁵ Prosecution Response to Župljanin Motion, paras 19, 20. See also Prosecution Response to Stanišić Motion, para 10.

¹¹⁶ See *supra*, para 14.

4. Pleading of “necessary and reasonable measures”

(a) Submissions

61. The Stanišić Defence submits that the Indictment fails to specify whether Mićo Stanišić has failed to take measures against Stojan Župljanin and what measures he has failed to take, whether it is alleged that Stanišić had a duty to punish other than through the initiation of disciplinary proceedings and which of the duties alleged in paragraph 23 of the Indictment Mićo Stanišić is alleged to have breached and how.¹¹⁷

62. The Prosecution responds that the material facts pleaded in paragraphs 17, 21 and 22 of the Indictment meet the pleading requirements and submits that a request to specify the measures an accused should have taken against his subordinates is “more a search for the Prosecution’s view of the applicable law than a solicitation of particular facts in the Prosecution’s possession.”¹¹⁸

(b) Discussion

63. Where the Prosecution seeks to rely on command responsibility pursuant to Article 7(3) of the Statute the Prosecution is required to plead as a material fact the conduct of the accused by which he may be found to have failed to take the necessary and reasonable measures to prevent such acts or to punish the persons who committed them. Paragraph 21 of the Indictment alleges that each of the Accused had “the authority and the duty to punish or initiate disciplinary proceedings against subordinate members and agents of the RS MUP”. Paragraph 23 of the Indictment alleges that each of the Accused failed to take the necessary and reasonable measures to prevent the crimes alleged in the Indictment or to punish the perpetrators thereof. It is further alleged that the duties of each of the Accused “included an obligation to investigate and establish the facts of the crime, to put an end to the criminal activity, to impose appropriate punitive measures on the perpetrator, and to take measures to prevent or deter further criminal acts committed by members and agents of RS MUP.”¹¹⁹ In the view of the Chamber, the Indictment pleads with sufficient clarity the conduct of each of the Accused by which he is alleged to have failed to take the necessary and reasonable measures to punish the alleged perpetrators. Contrary to the submissions of the Stanišić Defence, the Indictment alleges that Stojan Župljanin was subordinated to Mićo Stanišić and that Mićo Stanišić had the duty to punish or initiate disciplinary proceedings against subordinates (including Stojan Župljanin). The Prosecution is entitled to plead both that the Accused failed to take the necessary and reasonable measures to prevent the crimes

¹¹⁷ Stanišić Motion, para 15.

¹¹⁸ Prosecution Response to Stanišić Motion, para 10.

¹¹⁹ Indictment, para 23.

and to punish the perpetrators.¹²⁰ The facts which may be relied upon to establish that the Accused has failed to take the necessary and reasonable measures to prevent the crimes charged or to punish the perpetrators are a matter of evidence and need not be pleaded in the Indictment.

D. Request for additional and adequate particulars

1. Submissions

64. The Stanišić Defence submits that to the extent that the Chamber would take the view that the challenges to the Indictment raised in the Stanišić Motion do not constitute “new charges” in the sense of Rule 50(C), it requests the Chamber to consider the same challenges, in the alternative, in the context of a motion for particulars.¹²¹ It is submitted that such particulars are necessary so that the Defence may promptly and adequately prepare its case.¹²² It is submitted that providing such particulars will ensure the expeditiousness of the proceedings by avoiding litigation on irrelevant issues and reducing the number of witnesses and the time for cross-examination.¹²³ Where the Prosecution is unwilling to specify the above facts by providing additional and adequate particulars, the Stanišić Defence submits that the Trial Chamber should dismiss those charges that remain uncertain or inadequately specified.¹²⁴

65. The Prosecution submits that the Stanišić Defence request for particulars should be denied. It is submitted that to the extent that the particulars sought by the Stanišić Defence are not contained in the Indictment, they can be found in the Prosecution’s pre-trial brief and pre-trial disclosure and that it had provided aids to the Defence in locating the particulars it seeks, including its pre-trial brief, Rule 65ter summaries of facts on which each witness will testify, its Rule 65ter witness list, and its motion of 21 May 2008 to amend its Rule 65ter exhibit list. It is submitted that the Prosecution is under no obligation to identify where in the pre-trial disclosure the Defence could find the particulars sought or to state its position on each matter.

66. The Župljanin Defence incorporates in its Motion all points raised by the Stanišić Defence and submits further that the mere presence of a material fact somewhere in the Prosecution’s disclosure, or in witness statements, or in the Prosecution’s pre-trial brief, does not put the Defence on notice of material facts which the Prosecution intends to prove at trial.¹²⁵ The Prosecution responds that the Župljanin Defence confuses a motion challenging the form of an indictment,

¹²⁰ See *Hadžihasanović Decision*, para 23.

¹²¹ Stanišić Motion, para 23.

¹²² Stanišić Motion, para 21.

¹²³ Stanišić Motion, para 21.

¹²⁴ Stanišić Motion, para 20.

¹²⁵ Župljanin Motion, para 27.

which contends that the indictment is defective because material facts are not pleaded with enough detail, with a motion for particulars which seeks additional particulars where the indictment is not so vague as to be defective on its face but an accused needs more information to prepare for trial. It is submitted that only where the Prosecution's pre-trial disclosure and brief do not sufficiently identify the evidence upon which the Prosecution relies to establish material facts pleaded in the indictment is it appropriate for an accused to seek an order for such particulars.¹²⁶

2. Discussion

67. Earlier jurisprudence has held that where a Chamber does not find an indictment to be vague, the accused may nevertheless be entitled to seek further particulars regarding the offences charged, basing this right on Articles 21(2) and 21(4)(b) of the Statute of the Tribunal.¹²⁷ Such a motion for particulars would be granted if the particulars sought are "necessary in order for the accused to prepare his defence and to avoid prejudicial surprise."¹²⁸ The jurisprudence has accepted that a request for particulars "is not, and may not be used as a device to obtain discovery of evidentiary matters" and that it may only be directed "to the sufficiency of the indictment and is not a substitute for pre-trial discovery".¹²⁹ The amount of pre-trial discovery, however, is relevant in deciding whether to grant such a request.¹³⁰

68. A motion for particulars is directed to the Indictment only and should not be understood as means to oblige the Prosecution to present the evidence it intends to lead with respect to each count of the Indictment. In the view of the Chamber the request for particulars made by the Stanišić Defence is in fact an attempt to challenge the form of the Indictment. The Chamber recalls that a motion challenging the form of the indictment was filed by the Stanišić Defence on 4 May 2005 and was disposed of by the Chamber on 19 July 2005. There is nothing in the Stanišić Motion suggesting that the challenges raised in the request for particulars could not have been raised at that stage. The request for particulars, therefore, must be denied.

IV. DISPOSITION

For the foregoing reasons and pursuant to Rules 54 and 72 of the Rules the Chamber:

(1) GRANTS leave to the Stanišić Defence and the Župljanin Defence to exceed the word limit of the Practice Direction for the purposes of the Stanišić Motion and Župljanin Motion,

¹²⁶ Prosecution Response to Župljanin Motion, para 24.

¹²⁷ *Prosecutor v Delalić et al*, Case No. IT-96-21-T, "Decision on the Accused's Mucić's Motion for Particulars", 26 June 1996, ("Čelebić Decision"), para 7.

¹²⁸ Čelebić Decision, para 9.

¹²⁹ Čelebić Decision, para 9.

respectively and **GRANTS** leave to the Prosecution to exceed the word limit of the Practice Direction for the Prosecution Response to the Župljanin Motion;

- (2) **GRANTS** leave to the Župljanin Defence to file a reply and takes note of the content of the reply;
- (3) **DENIES** the Stanišić Motion and the Župljanin Motion.

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

Dated this nineteenth day of March 2009
At The Hague
The Netherlands



Judge O-Gon Kwon
Presiding

[Seal of the Tribunal]

¹³⁰ *Čelebići* Decision, para 9.