

IN TRIAL CHAMBER II

Before:

**Judge Carmel Agius, Presiding
Judge Jean Claude Antonetti
Judge Kevin Parker**

Registrar:

Mr. Hans Holthuis

Decision of:

23 January 2004

PROSECUTOR

v.

**MILE MRKSIC
MIROSLAV RADIC
VESELIN SLJIVANCANIN**

**DECISION ON FORM OF CONSOLIDATED AMENDED
INDICTMENT AND ON PROSECUTION APPLICATION TO
AMEND**

The Office of the Prosecutor:

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Mr. Mark J. McKeon**

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Mr. Miroslav Vasic

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**Mr. Borivoje Borovic
Ms. Mira Tapuskovic**

Mr. Novak Lukic

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I. APPLICATIONS AND BACKGROUND

1. The Office of the Prosecutor (“Prosecution”) has applied for leave to amend the indictments against the Accused Mile Mrksic (“Mrksic”), the Accused Miroslav Radic (“Radic”) and the Accused Veselin Sljivancanin (“Sljivancanin”) (collectively : “Accused”).¹ The Prosecution attaches to its application a newly amended and consolidated indictment it seeks to file (“Consolidated Amended Indictment”).
2. The initial indictment against the Accused was confirmed by Judge Fouad Riad on 7 November 1995.² This indictment was amended to include one other co-accused, Slavko Dokmanovic, on 3 April 1996.³ A further amended indictment against all four was filed on 2 December 1997.⁴ Slavko Dokmanovic passed away on 29 June 1998, with the result that trial proceedings against him were terminated.⁵ Mrksic surrendered to the Tribunal on 15 May 2002, and the Prosecution was given leave to file a further amended indictment against him alone.⁶ The Prosecution, somewhat confusingly, termed this indictment the “Second Amended Indictment”.⁷ Mrksic subsequently alleged that it was defective: the Trial Chamber decided on these allegations on 19 June 2003,⁸ and ordered the Prosecution to amend the Second Amended Indictment in the terms set in its decision.
3. In the meantime Radic had been arrested. Sljivancanin was arrested soon thereafter. At their initial appearances on 21 May 2003 and 10 July 2003 respectively, both entered pleas of not guilty to all charges in the 1997 Amended Indictment.⁹ Radic filed a motion alleging defects in the form of the 1997 Amended Indictment which the Trial Chamber dismissed in anticipation of the current Prosecution Application to Amend the Indictments.¹⁰ The Consolidated Amended Indictment concerns all three Accused. The differences between it, the Second Amended Indictment and the 1997 Amended Indictment are explored further below.

4. On the matter of the Consolidated Amended Indictment, the Trial Chamber directed each of the Accused to file any response pursuant to Rule 50(A)(i)(c) of the Rules of Procedure and Evidence (“Rules”)¹¹ to the Prosecution Application to Amend the Indictments together with any preliminary motion pursuant to Rule 72 alleging defects on the form of the Consolidated Amended Indictment.¹² They did so within the deadline set by the Trial Chamber.¹³ Given that the Trial Chamber had already decided upon a preliminary motion from Mrksic on the form of an earlier indictment, it directed him to restrict his submissions to any fresh issues raised in the Consolidated Amended Indictment.¹⁴
5. The Prosecution responded to the Accused in a single document.¹⁵ For that purpose it sought a variation of page-limits at the time it filed the Prosecution Response.¹⁶ The Trial Chamber hereby allows the variation.
6. The Trial Chamber denied requests from Mrksic and Radic respectively to reply to the Prosecution’s Response.¹⁷

II. THE CONSOLIDATED AMENDED INDICTMENT

7. As indicated earlier, the Consolidated Amended Indictment “re-unifies the indictments against all three Accused” in this case.¹⁸
8. The Consolidated Amended Indictment eliminates for Mrksic the charge of imprisonment that was brought against him in the Second Amended Indictment.¹⁹ The Consolidated Amended Indictment eliminates two counts of grave breaches of the Geneva Conventions against Radic and Sljivancanin which were contained in the 1997 Amended Indictment,²⁰ and adds four new charges against them: persecution, extermination and torture, the latter as both a crime against humanity and a violation of the laws and customs of war. These charges were already brought against Mrksic in the Second Amended Indictment. According to the Prosecution, these additional charges against Radic and Sljivancanin “are based on the same operative facts” as the original charges in the 1997 Amended Indictment, and their addition “brings the charges against all three Accused into conformity with one another”.²¹

9. Thus, in the Consolidated Amended Indictment, the Accused are charged with various offences allegedly committed subsequent to the Serb takeover of the city of Vukovar (Republic of Croatia), pursuant to Articles 7(1) and 7(3) of the Statute of the Tribunal (“Statute”),²² which are namely, with the following eight counts:

(a) persecutions,²³ extermination,²⁴ and inhumane acts,²⁵ as crimes against humanity;

(b) cruel treatment²⁶ as a violation of the laws and customs of war;

(c) murder, as both a crime against humanity²⁷ and a violation of the laws and customs of war²⁸ and

(d) torture, as both a crime against humanity²⁹ and a violation of the laws and customs of war.³⁰

III. GENERAL PLEADING PRINCIPLES

10. The Decision on Form of Second Amended Indictment was limited to Mrksic. Nevertheless, it outlined the general pleading principles that may be applicable to the present case.³¹ Because it was issued publicly, the Trial Chamber finds it unnecessary to reproduce those principles here. Those principles apply in full to the present decision as well.

IV. OBJECTIONS TO AMENDING THE INDICTMENTS

11. Sljivancanin is the only Accused to expressly oppose the Prosecution Application to Amend the Indictments. This notwithstanding, all three Accused object to the Prosecution’s attempt to amend the allegations contained in the indictments without producing the evidence to support these amendments.³² The Prosecution responds that the supporting material is sufficient in this regard.³³

12. For the purpose of addressing the objections raised by the Accused, the Trial Chamber finds it convenient to distinguish between the new *charges* brought by the Prosecution against Radic and Sljivancanin in the Consolidated Amended Indictment, and the amended *factual allegations* contained in it.

13. The Prosecution specifies that the new charges against Radic and Sljivancanin in the Consolidated Amended Indictment are “based on the same operative facts” as the original charges.³⁴ The Trial Chamber has verified this statement with the 1997 Amended Indictment and is satisfied that this is the case. Sljivancanin agrees.³⁵ He nonetheless submits that the Prosecution may only be allowed to introduce new charges “upon presentation of new evidence or new factual allegations”.³⁶ Sljivancanin’s submission is ill founded; he misconstrues Rule 47(I), which applies in the event that the reviewing Judge dismisses a count in an indictment at the time of its confirmation, which is not the present case. There is no provision that would prevent the Prosecution from applying to amend the indictment basing amended charges on the same operative facts and without adducing new evidence. Sljivancanin’s objection is rejected.
14. Regarding the amended factual allegations in the Consolidated Amended Indictment, Mrksic submits that the Prosecution must provide an explanation to justify the amendments it seeks, in particular the withdrawal of allegations that appeared in the Second Amended Indictment.³⁷ The Prosecution responds that the fact that it is free to choose how to plead its case has been recognised by this Trial Chamber in its Decision on Form of Second Amended Indictment.³⁸ The Trial Chamber agrees that it is not necessary for the Prosecution to provide a more detailed explanation of its reasons for applying to amend the indictments than that contained in the Prosecution Application for Leave to Amend the Indictments.³⁹ The Prosecution is free to plead its case as it sees fit, as long as it sets out the material facts that will allow the Defence to meet the case. Mrksic’s request for explanation is rejected.
15. The same reasoning applies to Radic’s complaint that the Prosecution has significantly modified the legal qualifications of the acts and the form of the Accused’s criminal participation in the Consolidated Amended Indictment. Nothing prevents the Prosecution at this stage from changing its pleading strategy, a change that may simply reflect practices adopted since on the basis of the evolving jurisprudence of the Tribunal. As addressed in more detail below,⁴⁰ the issue is not whether amendments to the indictment prejudice the Accused, but whether they do so *unfairly*.⁴¹ Radic’s objection is also rejected.

16. Finally, Mrksic submits that, whilst the Prosecution has “significantly altered ” the factual allegations for several counts in the Consolidated Amended Indictment compared to those contained in Second Amended Indictment, it has not supplied any supporting material that would sustain those changes.⁴² These changes are the object of specific challenges and are addressed in more detail below. However, prior to addressing these concerns, it is necessary to dispel the confusion surrounding the information annexed to the Consolidated Amended Indictment, information which the Prosecution has somewhat unfortunately labelled “material in support of the Consolidated Amended Indictment”. Mrksic contends that this material, which consists of only two documents, is insufficient to support the allegations in the Consolidated Amended Indictment. The Trial Chamber notes that this material corresponds to the particulars that the Prosecution was ordered to provide pursuant to the Trial Chamber’s Decision on Form of Second Amended Indictment. It is not the only evidence supporting the allegations therein. The Trial Chamber has received assurances that the supporting material on the basis of which the Initial Indictment was originally confirmed has been provided to the Accused.⁴³

17. In its Decision on Form of Second Amended Indictment, the Trial Chamber established the following:

The jurisprudence is clear that it is not necessary to plead in an indictment the evidence which would tend to support the alleged material facts, and that it is inappropriate at this stage of proceedings for the Defence to challenge the sufficiency of the evidence. The Trial Chamber finds it necessary, however, to distinguish between those material facts which were part of the indictment as originally confirmed, and those added subsequently. Concerning the original charges and facts, it is not at this stage possible for the Defence to challenge the sufficiency of the evidence. However, it is acceptable for the Defence to challenge the sufficiency of the evidence for charges that are newly added (...) and for material facts newly added in support of existing charges.⁴⁴

Accordingly, in examining the specific challenges made by the Accused, this distinction will be applied in determining the validity of their objections.

V. CHALLENGES TO THE FORM OF THE CONSOLIDATED AMENDED INDICTMENT

18. The Accused submit that the form of the Consolidated Amended Indictment is defective, generally alleging that the Prosecution has not set out all of the relevant material facts to allow the Defence to properly prepare its case. The Prosecution generally responds that all relevant material facts have been provided and that the sufficiency of the evidence is a matter for trial. Specific challenges are addressed below.

A. The Nature of the Alleged Responsibility of the Accused

1. Article 7(1)

19. The Appeals Chamber has repeatedly held that “[s]ince Article 7(1) allows for several forms of direct criminal responsibility, a failure to specify in the indictment which form or forms of liability the Prosecution is pleading gives rise to ambiguity (...) such ambiguity should be avoided and (...) where it arises, the Prosecution must identify precisely the form or forms of liability alleged for each count as soon as possible and, in any event, before the start of the trial”.⁴⁵ In accordance with this jurisprudence, the Trial Chamber interprets that the Prosecution in the Consolidated Amended Indictment is pleading the heads of responsibility in Article 7(1) in their entirety with respect to each count and each Accused.⁴⁶
20. The Prosecution also specifies, in paragraph 4 of the Consolidated Amended Indictment, that “[b]y using the word “committed” in this indictment, the Prosecutor does not intend to suggest that any of the [A]ccused physically committed any or all of the crimes charged personally. “Committed” in this indictment includes each of the [A]ccused’s participation in a joint criminal enterprise”. While this specification accords with the Trial Chamber’s preferred manner of pleading, the term “including” could give rise to ambiguity.⁴⁷ The Trial Chamber will therefore direct the Prosecution to replace it with the exhaustive phrase “is limited to”. The same observation applies to paragraph 13 of the Consolidated Amended Indictment, which, in light of what is contained in paragraph 4, could also result in ambiguity. In paragraph 13, the Prosecution alleges that the Accused are individually criminally responsible for the crimes in the Indictment pursuant to Article 7(1) for their participation in a joint criminal enterprise “*in addition to* their responsibility under the same Article for having planned, instigated, ordered, *committed*, or otherwise aided and abetted in the planning,

preparation, execution, and commission of these crimes”.⁴⁸ The Prosecution will be ordered to remove the term “committed” from this phrase, because there is no case pleaded that the Accused “committed” in a way other than by participating in a joint criminal enterprise.

Joint Criminal Enterprise

21. The Accused raise a number of general and specific objections regarding the pleading in the Consolidated Amended Indictment of a joint criminal enterprise (“JCE”).
22. Radic and Sljivancanin submit that the material facts to support their alleged participation in a JCE are lacking in the Consolidated Amended Indictment.⁴⁹ Sljivancanin specifically raises the absence of particulars regarding “any element of SaC common plan”. Sljivancanin also submits that the purpose of the JCE pleaded by the Prosecution is vague.⁵⁰ Radic adds that the Prosecution has failed to plead the exact or the approximate date of the existence of the JCE.⁵¹ The Prosecution responds that, in its Decision on Form of Second Amended Indictment, the Trial Chamber approved of the manner in which the Prosecution had pleaded the JCE.⁵²
23. The Consolidated Amended Indictment identifies the purpose of the JCE as “the persecution of Croats or other non-Serbs who were present in the Vukovar Hospital after the fall of Vukovar, through the commission of crimes in violation of Articles 3 and 5 of the Statute”.⁵³ The Trial Chamber would have preferred that the Prosecution make an explicit reference to the Counts in the Indictment rather than to Articles of the Statute. It is, however, of no consequence since an accused cannot be tried for offences other than those contained in the indictment against him. Sljivancanin argues that the stated purpose of the JCE should be narrowed down and limited to the persecution of the several hundred non-Serbs who were actually removed from Vukovar Hospital, rather than of those who were merely present there. The Trial Chamber does not find this necessary. The Prosecution is free to plead its case as it deems fit within the limits of the respect for the rights of the Accused. The purpose of the JCE as charged is pleaded with enough detail to inform the Accused of the nature and cause of the charges against them thus enabling them to prepare a defence effectively and efficiently.⁵⁴

Sljivancanin's objection is rejected.

24. The relevant period of the existence of the JCE is identified by using the following formula: "the joint criminal enterprise was in existence at the time of the commission of the underlying criminal acts alleged in this indictment and at the time of the participatory acts of each of the accused in furtherance thereof".⁵⁵ The underlying criminal acts present no difficulty, limited as they are to "from or about 18 November 1991 until 21 November 1991".⁵⁶ The reference to the Accused's "participatory acts" necessitates further perusal of the Consolidated Amended Indictment,⁵⁷ but does not detract from the fact that the period of the existence of the JCE is pleaded with enough detail to inform the Accused of the nature and cause of the charges against them thus enabling them to prepare a defence effectively and efficiently. Although the Trial Chamber's preferred manner of pleading would have been for the Prosecution to pin down expressly the date the JCE came into existence, there is no material defect in the way it is currently pleaded. Radic's objection is rejected.
25. The element of a common plan has been designated expressly in various paragraphs of the Consolidated Amended Indictment, such as the allegations that the Accused "worked in concert with or through several individuals in the joint criminal enterprise".⁵⁸ Additional information can be gathered from reading it as a whole. Anything further does not concern the pleading of material facts but concerns the sufficiency of the evidence and is a matter properly resolved at trial. Sljivancanin's complaint about the absence of information regarding a common plan is therefore rejected.
26. Finally, contrary to the submissions from Radic and Sljivancanin,⁵⁹ the ways in which they allegedly participated in the JCE are expressly pleaded in paragraphs 11 and 12 of the Consolidated Amended Indictment, with enough detail to inform them of the nature and cause of the charges against them thus enabling them to prepare a defence effectively and efficiently. Their objection in this respect is rejected.
27. The next objection raised by Radic and Sljivancanin concerns the inclusion in the Consolidated Amended Indictment of a reference to a "wider joint criminal enterprise".⁶⁰ They submit that the

material facts related to this wider JCE have not been pleaded. They question the need for its inclusion altogether and submit that it should be removed.⁶¹ The Prosecution responds that the reference to the wider JCE is included as background information only, since no charges stem from it, and that in accordance with the Trial Chamber's Decision on Form of Second Amended Indictment the Accused are not entitled to further particulars with respect to "background facts of a general nature".⁶²

28. The Trial Chamber agrees with the Prosecution that, in line with the Trial Chamber's previous decision, "it is in relation to material facts dealing with each count rather than the background facts of a general nature only, that the Accused is entitled to proper particularity in the indictment".⁶³ Nevertheless, this statement needs to be placed in its proper context. The Trial Chamber was at the time addressing the allegation that Mrksic was entitled to particularity of pleading with respect to background facts relating to the military operations surrounding the siege of Vukovar, and to the siege itself. The alleged criminal responsibility of the Accused stems only from events which occurred after the end of the siege. On the other hand, the reference to the existence of a wider JCE goes beyond a mere background factual allegation, amongst other reasons because it involves a legal characterisation. Its position in the Consolidated Amended Indictment already provides an indication of its different nature: whilst the background facts mentioned earlier appear under the title "Factual Allegations", the reference to the wider JCE appears in the section dealing with the individual criminal responsibility of the Accused.

29. The reference to a wider JCE could give rise to ambiguity in the Consolidated Amended Indictment. Although the Consolidated Amended Indictment expressly states that, for its purpose, participation in the "[JCE] charged" is limited to the Accused and two other named individuals, doubt must arise as to whether this is so. As recognised by the jurisprudence of this Tribunal, participation in a JCE requires the existence of an arrangement or understanding amounting to an agreement between two or more persons that a particular crime will be committed.⁶⁴ Radic is correct in protesting that the link between the JCE in which the Accused are alleged to have participated and the wider JCE is not pleaded, and that this could give rise to ambiguity.⁶⁵ This ambiguity is already apparent, since the purpose of the wider JCE

differs from that of the JCE charged in the Consolidated Amended Indictment.⁶⁶

30. Although the reference to a wider JCE appeared already in the Second Amended Indictment, it was not challenged and the Trial Chamber did not address it in its Decision on Form of Second Amended Indictment.⁶⁷ That it did not do so is of no consequence because “SiCt is *not* the function of a Trial Chamber to check for itself whether the form of an indictment complies with the pleading principles which have been laid down. It is, of course, entitled *proprio motu* to raise issues as to the form of an indictment but, unless it does so, it waits until a *specific* complaint is made by the accused before ruling upon the compliance with the indictment with those pleading principles”.⁶⁸
31. As noted, the Prosecution maintains that the allegation of a wider JCE has no purpose beyond that of providing the backdrop to the Consolidated Amended Indictment.⁶⁹ The Prosecution provides no reason, let alone a compelling one, for its inclusion. The implications for the Accused of that allegation remaining in the Consolidated Amended Indictment outweigh the considerations put forth by the Prosecution. Consequently, the objection by Radic and Sljivancanin is upheld and the Prosecution will be ordered to remove this reference.
32. The next objection by Radic relates to the manner in which the extended form or third category of JCE has been pleaded in the Consolidated Amended Indictment.⁷⁰ Radic submits generally that the relevant material facts are lacking that would establish that the crimes enumerated in Counts 2 to 8 were the natural and foreseeable consequences of the execution of the JCE. In particular, he maintains that the Accused’s awareness that the crimes enumerated in Counts 2 to 8 were the possible consequence of the execution of the JCE must be “*ab initio* clearly, unambiguously and sufficiently determined in the ? Consolidated Amended Indictment for each of the ? Accused individually”.⁷¹ The Prosecution Response does not expressly address this issue.
33. The Tribunal’s jurisprudence establishes that “it is preferable for an indictment alleging the accused’s responsibility as a participant in a joint criminal enterprise also to refer to the particular form (basic or extended) of joint criminal enterprise

envisaged”.⁷² The Consolidated Amended Indictment complies with this jurisprudence because it pleads in the alternative the basic form of JCE and the extended form of JCE.⁷³ Insofar as the basic form of JCE is concerned, the Trial Chamber interprets that the Prosecution pleads the first category of JCE, but not the second category of JCE.⁷⁴ The Trial Chamber believes it is appropriate to clarify this already at this stage of proceedings to avoid any ambiguity. If the Prosecution considers that the Trial Chamber has misconstrued its intentions on the matter, the Trial Chamber invites it to dispel any ambiguity either by requesting the Trial Chamber to revisit its decision or by seeking leave to further amend the Indictment.⁷⁵

34. The jurisprudence also establishes that, in relation to the relevant state of mind (*mens rea*), either the specific state of mind itself should be pleaded (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 necessarily to be inferred, should be pleaded.⁷⁶ Paragraph 6 of the Consolidated Amended Indictment pleads the specific state of mind required for the third category of JCE in terms where it alleges that “the crimes enumerated in the Counts 2 to 8 were the natural and foreseeable consequences of the execution of the ?JCEg and each of the accused was aware that these crimes were the possible consequence of the execution of the ?JCEg”.⁷⁷ The state of mind is clearly set out with respect to each of the three Accused. Accordingly, Radic’s objection is rejected.

2. Article 7(3)

35. The Accused submit separately that the Consolidated Amended Indictment is defective because it fails to properly plead their alleged superior responsibility. Mrksic also challenges the sufficiency of the supporting materials to substantiate the fresh allegations contained in the Consolidated Amended Indictment. The Trial Chamber deems it appropriate to take these objections in turn.
36. Radic and Sljivancanin each submit that the Consolidated Amended Indictment lacks the material facts relating to their acts as superiors and the acts of their alleged subordinates.⁷⁸ The Prosecution responds that, read as a whole, the Consolidated

Amended Indictment sufficiently pleads the responsibility pursuant to Article 7(3) of the Accused.⁷⁹

37. Radic submits that the material facts regarding the acts of his subordinates, for which he is allegedly responsible, are insufficiently pleaded and that, in effect, his responsibility stems solely from his position in the JNA and specifically in the 1st Battalion of the 1st Guards Motorised Brigade. The Trial Chamber finds that the material facts regarding the acts committed, the individuals who committed them and their relationship to Radic are set out throughout the Consolidated Amended Indictment with enough detail to inform him of the nature and cause of the charges against him thus enabling him to prepare a defence effectively and efficiently.⁸⁰ Radic's objection is without merit and is rejected.
38. Sljivancanin submits that there is "no information whatsoever" in the Consolidated Amended Indictment (a) that the individuals who were his *de facto* subordinates committed *any* crimes and (b) that he had effective control over those who allegedly committed the crimes.⁸¹ Sljivancanin also submits that the Prosecution's submissions are contradictory with respect to his position of superiority, because whilst paragraph 18 of the Consolidated Amended Indictment alleges that he was *de facto* in charge of a military police battalion, paragraph 19 alleges that all three Accused "exercised both *de jure* and *de facto* power over the forces under their command". The Trial Chamber finds that the Consolidated Amended Indictment identifies the "physical" perpetrators of the underlying acts for which the Accused are charged with enough detail to inform them of the nature and cause of the charges against them thus enabling them to prepare a defence effectively and efficiently. Whether it is true that the alleged "physical" perpetrators were Sljivancanin's *de facto* subordinates because he had effective control over them in the sense of a material ability to prevent the offences or punish the perpetrators is a matter to be resolved at trial.
39. On the other hand, the Trial Chamber upholds the objection regarding the nature of Sljivancanin's alleged position of superiority over his subordinates. The Trial Chamber's order to the Prosecution is in the following terms. If it *is* the Prosecution's case that Sljivancanin exercised both *de jure* and *de facto* power over the forces under his command, the Prosecution needs to plead this expressly by identifying those forces over which he

held a *de jure* position of superiority, as it has done for Mrksic and Radic. In the event that this is *not* the Prosecution's case, it needs to amend paragraph 19 of the Consolidated Amended Indictment accordingly.

40. The next set of objections relate to the Prosecution's obligation to plead, in a case of superior responsibility, that the Accused must have known, or had reason to know, that his subordinates were about to commit the crimes alleged or had done so, and failed to take the necessary and reasonable measures to prevent these crimes or to punish the perpetrators thereof. Mrksic and Radic submit that these material facts have been insufficiently pleaded.⁸² Mrksic emphasises that the Prosecution has failed to comply with the Trial Chamber's earlier order that the Prosecution plead these as material facts.⁸³ The Prosecution responds that the relevant material facts are fully pleaded.⁸⁴
41. The Trial Chamber agrees that these material facts are pleaded with enough detail in the Consolidated Amended Indictment to inform the Accused of the nature and cause of the charges against them thus enabling them to prepare a defence effectively and efficiently.⁸⁵ Mrksic's and Radic's objections are rejected. Radic's request that further particulars be pleaded in the Consolidated Amended Indictment is also refused.⁸⁶ While the Prosecution is under an obligation to provide the best particulars that it can in presenting its case, this does not affect the form of the Consolidated Amended Indictment.⁸⁷
42. As an additional challenge, Mrksic submits that the Prosecution did not provide any supplementary evidence to support these material facts, and in particular the fresh allegations contained in paragraph 32 of the Consolidated Amended Indictment.⁸⁸ The Prosecution responds that the supporting material is sufficient in this regard. Should the Trial Chamber find that it is insufficient, the Prosecution proposes to augment it with two statements previously disclosed to the Accused: the statements of Bogdan Vujic and Sljivancanin respectively to the Belgrade Military Tribunal.⁸⁹ In order for the Trial Chamber to determine whether the material which supported the indictments as originally confirmed is sufficient to substantiate material facts not previously pleaded, it must examine the relevant portions.⁹⁰ Accordingly, the Prosecution is directed to provide that material

that it believes supports the newly pleaded material facts contained in the second and third sentence of paragraph 32 of the Consolidated Amended Indictment.

43. Radic also complains that the allegation in paragraphs 16 and 17 of the Consolidated Amended Indictment that Miroljub Vukanovic and Stanko Vujanovic were subordinate to Mrksic and Radic does not provide enough information to distinguish the area of responsibility of each within the JNA.⁹¹ The Trial Chamber finds that this submission does not concern the sufficiency of pleading of material facts in the Consolidated Amended Indictment, but concerns instead the sufficiency of the evidence, and is an issue properly resolved at trial. Radic's objection is rejected.
44. Similarly, Mrksic's submission at paragraph 15 of his Motion, regarding conclusions to be drawn from the "Decision of the Great People's Assembly of the Serb province of Slavonija, Baranja and Western Srem", does not concern the sufficiency of pleading of material facts in the Consolidated Amended Indictment, but concerns instead an issue properly resolved at trial. The same applies to his submission that paragraph 32 of the Consolidated Amended Indictment is unclear about whether the "TO, volunteer and paramilitary soldiers [...] torturing and killing non-Serb prisoners being held at the Velepomet" were, if at all, subordinated to Mrksic.⁹² Mrksic's objections are rejected.

B. Other Alleged Deficiencies in Particularity of Pleading

1. Relevance of Factual Allegation

45. Mrksic questions the significance of the allegation contained in paragraph 35 of the Consolidated Amended Indictment regarding the "meeting of the so-called government of the SAO SBWS" that was being held on 20 November 1991 at the Velepomet building, "a short distance away from the JNA barracks" where the detainees from Vukovar Hospital were being kept.⁹³ In addition, Mrksic complains about the omission of the material facts regarding this meeting that appeared in the Second Amended Indictment.⁹⁴ Paragraph 25 of the Second Amended Indictment stated that "[a]t this meeting, the JNA agreed to transfer the detainees to Ovcara farm, located about four kilometres southeast of Vukovar, and thereafter to relinquish custody of them to the local Serbs".⁹⁵ The Prosecution responds that in the Consolidated Amended Indictment this event is

included as background information only and that no charges stem from it, so that the Prosecution “is under no obligation to prove any facts related to this meeting”.⁹⁶ The Trial Chamber reiterates that the Prosecution is free to choose how to plead its case, as long as it sets out the material facts that will allow the Defence to meet the case. However, the Trial Chamber agrees with Mrksic that it is not apparent what the reference to the “meeting of the so-called government of the SAO SBWS”, in paragraph 35 of the Consolidated Amended Indictment, was designed to achieve or how it is relevant. This paragraph could give rise to ambiguity, particularly in light of the material facts that were pleaded in the Second Amended Indictment. The Prosecution will be ordered to supplement its pleadings in the Consolidated Amended Indictment regarding the said meeting so that its relevance to the allegations contained therein becomes evident.

2. Designation of “Serb Forces” and Related Terms

46. The Accused challenge the Prosecution’s use of the term “Serb forces” in the Consolidated Amended Indictment, on the grounds that it is imprecise.⁹⁷ The Prosecution responds that, in compliance with the Trial Chamber’s previous order, the term “Serb forces” is designated in paragraph 7 of the Consolidated Amended Indictment and used consistently throughout, with the exception of those sections of it “where the term seemed over-inclusive”; there, the Prosecution has “specifically identified the subset of these Serb forces that participated in the events in question ”.⁹⁸
47. Mrksic raises a number of objections at paragraphs 6, 7, 8 and 16 of his Motion regarding the use of the term “Serb forces” in the Consolidated Amended Indictment. It is unnecessary to reproduce these objections here. The Trial Chamber agrees with the Prosecution that these submissions do not concern the sufficiency of pleading of material facts, but concern instead the sufficiency of the evidence and are issues properly resolved at trial.⁹⁹
48. Sljivancanin submits that the reference to the category of “radical local Serbs ” which appears in paragraph 12(f) of the Consolidated Amended Indictment is not designated as part of the “Serb forces” in paragraph 7 and is unclear.¹⁰⁰ The Trial Chamber upholds Sljivancanin’s objection to the extent that the

Prosecution must plead this category with a higher degree of specificity. If the Prosecution was referring to radical local Serb civilians, it should plead so in terms.

49. Sljivancanin further submits that the Consolidated Amended Indictment contains no definition of the category of “JNA forces” which appears in paragraphs 12(d) and 33.¹⁰¹ The Trial Chamber understands this reference to mean JNA soldiers (or, as they appear in paragraph 7, members of the JNA). If its understanding is correct, the Trial Chamber invites the Prosecution to amend the Consolidated Amended Indictment accordingly. If it is not correct, the Prosecution must plead this category with a higher degree of specificity. To this extent, Sljivancanin’s objection is upheld.
50. Sljivancanin’s final challenge to paragraph 7 of the Consolidated Amended Indictment consists of the submission that “the epithet “Serb forces” is completely inappropriate when it comes to StheC JNA”, because according to him it is “undisputable” that in the period relevant to the Consolidated Amended Indictment, a “significant number of JNA members were of all nationalities and that its constitutional function was to protect StheC territorial integrity of SFRY”.¹⁰² The Trial Chamber reiterates that it is for the Prosecution to choose how to plead its case. If the Defence wishes to make a specific challenge to the way in which the Prosecution has done so, it can do this at trial. Sljivancanin’s objection is rejected.
51. Sljivancanin also raises an objection to other terms employed in the Consolidated Amended Indictment. He submits that the Prosecution uses inconsistently the terms “individuals in a joint criminal enterprise” and “members of a joint criminal enterprise”. Whilst the Trial Chamber’s preferred term is “members of a joint criminal enterprise”, nevertheless the Consolidated Amended Indictment is already sufficiently clear in this respect. Sljivancanin’s objection is rejected.

3. Discrepancy in the Number of Victims

52. Mrksic notes the discrepancy in the Consolidated Amended Indictment between the number of victims alleged in paragraphs 39 and 45.¹⁰³ The Prosecution responds that Mrksic has failed to show that this discrepancy would prejudice the Accused; both paragraphs employ the phrase “at least”, “thus

giving the Accused adequate notice of the scope of the victims of the crimes charged”, and the Annex to the Consolidated Amended Indictment specifies the victims’ particulars.¹⁰⁴ For the sake of consistency, the Trial Chamber upholds Mrksic’s objection and directs the Prosecution to harmonise these two paragraphs.

4. Requests for Further Particulars

53. The Trial Chamber has previously recognised that, while the Prosecution is under an obligation to provide the best particulars that it can in presenting its case, this does not affect the form of the Consolidated Amended Indictment.¹⁰⁵ It is inappropriate at this stage for the Accused to challenge the sufficiency of the evidence. If the information the Accused seek is not apparent from the witness statements made available by the Prosecution in accordance with Rule 66(A), the Accused’s remedy lies in requesting the Prosecution to supply particulars of the statements upon which it relies to prove the specific material facts in question. If the Prosecution’s response to that request is unsatisfactory, then and only then, the Accused may seek an order from the Trial Chamber that such particulars be supplied.¹⁰⁶
54. The Trial Chamber finds that Sljivancanin’s request for the Prosecution to plead more details with respect to the approximate time when he allegedly became aware that the crimes had been committed and what steps, if any, he took to conceal these crimes is a request effectively seeking particulars regarding material facts.¹⁰⁷ The same applies to his objection that “it is unclear how and by what means [he] personally prevented international observers from reaching the Vukovar Hospital”.¹⁰⁸ The Trial Chamber agrees with the Prosecution that it is not required to plead evidence.¹⁰⁹ As stated above, Sljivancanin’s remedy does not lie with the Trial Chamber at this time.¹¹⁰ Sljivancanin’s request is refused and his objection rejected.
55. In its Decision on Form of Second Indictment, the Trial Chamber ordered the Prosecution to disclose the identities of as many of the sick and wounded detainees referred to as were available to it.¹¹¹ Mrksic claims that the Prosecution has failed to comply with the Trial Chamber’s order.¹¹² The Prosecution describes the measures it has taken to comply with this order and claims that it

has done so to the best of its ability.¹¹³ The Trial Chamber urges it to continue in its efforts to supplement them as best it can and provide them to the Accused.

56. Sljivancanin also raises the objection that the material facts regarding his alleged participation in negotiations over the evacuation of patients at Vukovar Hospital, and his subsequent disregard of the agreements reached are insufficiently pleaded in the Consolidated Amended Indictment.¹¹⁴ The Prosecution responds that these material facts have been sufficiently pleaded and are substantiated by the supporting materials. It claims that Sljivancanin has failed to read the Consolidated Amended Indictment as a whole.¹¹⁵ The Consolidated Amended Indictment specifies in paragraph 29 that the evacuation of Vukovar Hospital in the presence of international observers was agreed upon in Zagreb in negotiations between the JNA and the Croatian government on 18 November 1991. The Prosecution further maintains that paragraph 31 shows that Sljivancanin “was assigned the task of organising and executing the evacuation pursuant to this agreement”.¹¹⁶ The Trial Chamber disagrees that the allegation that he was acting pursuant to this agreement is apparent from paragraph 31; if this is the Prosecution’s case then it should plead it in terms. Moreover, the allegation that Sljivancanin was acting pursuant to an agreement is a far cry from the claim that he himself “participated in negotiations over the evacuation of patients at Vukovar Hospital”.¹¹⁷ Sljivancanin’s objection is upheld. The Prosecution is ordered to plead its case more specifically as regards the alleged participation, if any, of Sljivancanin, and also of Mrksic,¹¹⁸ in the negotiations between the JNA and the Croatian government on 18 November 1991 in Zagreb, if necessary by amending paragraphs 10(b), 12 (b), 29 and 31 of the Consolidated Amended Indictment.

5. Standard of Form of the Indictment

57. Radic and Sljivancanin contend that an indictment is required to satisfy the standard that the accused himself will understand its contents, whether factual or legal.¹¹⁹ To enable him to do so, Radic requests that the Prosecution reorganise the Consolidated Amended Indictment.¹²⁰ The Prosecution resists this call for reorganisation and disputes the assertion that the legal standard required for the form of an indictment is that the indictment be presented “in a specific form understandable to every accused

person, irrespective of the accused's general culture and level of education".¹²¹ The Prosecution does not identify the relevant standard, but submits instead that "the Consolidated Amended Indictment is clear with respect to the charges against the Accused and the material facts supporting these charges".¹²²

58. Indeed, the Appeals Chamber did not envisage the standard put forward by Radic and Sljivancanin when it held that:

An indictment shall, pursuant to Article 18(4) of the Statute, contain "a concise statement of the facts and the crime or crimes with which the accused is charged ". Similarly, Rule 47(C) of the Rules provides that an indictment, apart from the name and particulars of the suspect, shall set forth "a concise statement of the facts of the case". The Prosecution's obligation to set out concisely the facts of its case in the indictment must be interpreted in conjunction with Articles 21 (2) and (4)(a) and (b) of the Statute. These provisions state that, in the determination of any charges against him, an accused is entitled to a fair hearing and, more particularly, to be informed of the nature and cause of the charges against him and to have adequate time and facilities for the preparation of his defence. In the jurisprudence of the Tribunal, this translates into an obligation on the part of the Prosecution to state the material facts underpinning the charges in the indictment, but not the evidence by which such material facts are to be proven. Hence, the question whether an indictment is pleaded with sufficient particularity is dependent upon whether it sets out the material facts of the Prosecution case with enough detail to inform a defendant clearly of the charges against him so that he may prepare his defence.¹²³

Radic's and Sljivancanin's objection is rejected and Radic's request refused.

VI. THE APPLICATION TO AMEND

59. As stated earlier, the Prosecution Application for Leave to Amend the Indictments specifies that the Consolidated Amended Indictment "re-unifies the indictments against all three Accused".¹²⁴ It eliminates counts from previous indictments against the Accused and contains additional counts against Radic and Sljivancanin. These additional charges are, according to the Prosecution, "based on the same operative facts" as the original charges.¹²⁵ Furthermore, the Prosecution submits that the Consolidated Amended Indictment includes the information required by the Trial Chamber in its Decision on Form of Second Amended Indictment. Finally, the Prosecution claims that it

“provides greater detail as to the nature of the individual criminal responsibility of all of the Accused, including their participation in the joint criminal enterprise”.[126](#)

60. As noted earlier, only Slijivancanin expressly opposes the Prosecution’s application to amend the existing indictments, and calls upon the Trial Chamber to “completely and thoroughly assess whether the Prosecution has given relevant argumentation in support of its request”.[127](#) His grounds for opposing it have been explained throughout the present decision.[128](#)

61. The Tribunal’s jurisprudence establishes as follows:

The fundamental issue in relation to granting leave to amend an indictment is whether the amendment will prejudice the Accused unfairly. The word “unfairly” is used in order to emphasise that an amendment will not be refused merely because it assists the prosecution quite fairly to obtain a conviction. To be relevant, the prejudice caused to an accused would ordinarily need to relate to the fairness of the trial. Where an amendment is sought in order to ensure that the real issues in the case will be determined, the Trial Chamber will normally exercise its discretion to permit the amendment, provided that the amendment does not cause any injustice to the accused, or does not otherwise prejudice the accused unfairly in the conduct of his defence. There should be no injustice caused to the accused if he is given an adequate opportunity to prepare an effective defence to the amended case.[129](#)

62. There is nothing that in the belief of the Trial Chamber would indicate that the requested amendments could in any way prejudice the Accused unfairly.

63. The Trial Chamber has accepted that the Consolidated Amended Indictment contains certain deficiencies that need to be addressed and will order the Prosecution to amend it accordingly. Provided these defects are remedied, the Trial Chamber sees no reason to prevent the Prosecution from amending the existing indictments. Consolidating the charges against the Accused under a single indictment will ensure that the real issues in the case will be determined. Leave will accordingly be granted subject to the condition that the defects upheld by the Trial Chamber are cured. Radic and Slijivancanin will be allowed to enter a plea on the new charges as soon as practicable thereafter.

VII. DISPOSITION

For the foregoing reasons,

PURSUANT TO Rule 50(A)(i)(c) and Rule 72 (A)(ii),

TRIAL CHAMBER II HEREBY

1. **ALLOWS** a variation of page-limits regarding the Prosecution Response;
2. **ORDERS** the Prosecution to modify the Consolidated Amended Indictment attached to the Prosecution Application to Amend the Indictment in the terms set out in paragraphs 20, 31, 39, 45, 48, 52 and 56 of this decision and **INVITES** it to modify it in the terms set out in paragraph 49 of this decision;
3. **ORDERS** the Prosecution to provide the Trial Chamber with the supporting material referred to in paragraph 42 of this decision;
4. **GRANTS** the Prosecution leave to amend the 1997 Amended Indictment and the Second Amended Indictment as proposed in the Consolidated Amended Indictment subject to its modification pursuant to the order in number 2 above;
5. **DECIDES** that the modified Consolidated Amended Indictment shall replace the 1997 Amended Indictment and the Second Amended Indictment with respect to all charges against Mrksic, Radic and Sljivancanin;
6. **ORDERS** the Prosecution to file the modified Consolidated Amended Indictment within 14 days of the filing of this decision, *i.e.* by no later than 6 February 2004;
7. **DECIDES** that a further appearance of Radic and Sljivancanin will be scheduled by the Trial Chamber to be held as soon as practicable thereafter to allow them to enter a plea on the new charges contained in the Consolidated Amended Indictment;
8. **DECIDES** that Mrksic, Radic and Sljivancanin shall have a further period of 30 days, *i.e.* until no later than 8 March 2004, in which to file preliminary motions pursuant to Rule 72 in respect of the new aspects of the Consolidated Amended Indictment.

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

Dated this twenty-third day of January 2004,

Carmel Agius
Presiding Judge

[Seal of the Tribunal]

- 1 - Prosecution's Motion for Leave to File a Consolidated Amended Indictment, 21 July 2003 ("Prosecution Application to Amend the Indictments").
- 2 - *Prosecutor v Mrksic, Radic and Sljivancanin*, Case IT-95-13-I, Indictment, 7 Nov 1995 ("Initial Indictment").
- 3 - *Prosecutor v Mrksic, Radic, Sljivancanin and Dokmanovic* (†), Case IT-95-13a-I, Indictment, 1 Apr 1996 ("1996 Amended Indictment"); see also *Prosecutor v Mrksic, Radic, Sljivancanin and Dokmanovic* (†), Case IT-95-13a-I, Amendement de l'acte d'accusation, 3 Apr 1996.
- 4 - *Prosecutor v Mrksic, Radic, Sljivancanin and Dokmanovic* (†), Case IT-95-13a-PT, Amended Indictment, 2 Dec 1997 ("1997 Amended Indictment").
- 5 - *Prosecutor v Mrksic, Radic, Sljivancanin and Dokmanovic* (†), Case IT-95-13-a-T, Order Terminating Proceedings against Slavko Dokmanovic, 15 July 1998.
- 6 - *Prosecutor v Mrksic*, Case IT-95-13/1, Decision on Leave to File Amended Indictment, 1 Nov 2002.
- 7 - *Prosecutor v Mrksic*, Case IT-95-13/1, Second Amended Indictment, 29 Aug 2002 ("Second Amended Indictment"). The Trial Chamber will adopt this term for the sake of consistency and in order to avoid further confusion.
- 8 - *Prosecutor v Mrksic*, Case IT-95-13/1-PT, Decision on Form of the Indictment, 19 June 2003 ("Decision on Form of Second Amended Indictment").
- 9 - Sljivancanin initially appeared before a Judge of the Tribunal on 3 July 2003, but did not enter a plea until his further initial appearance on 10 July 2003.
- 10 - In this connection, Radic cautions that his current preliminary motion may repeat some of his earlier submissions contained in his "Defence Preliminary Motion" filed on 17 June 2003. This was to be expected to an extent. The Trial Chamber recalls that Radic's previous motion was dismissed because the alleged defects pertain to an earlier indictment which the Prosecution is presently seeking to amend. See Decision Dismissing Miroslav Radic's Preliminary Motion, 25 June 2003.
- 11 - Rules of Procedure and Evidence, IT/32/Rev.28, 28 July 2003.
- 12 - Scheduling Order for Filings, 25 July 2003. The deadline of 25 August 2003 established in the said "Scheduling Order for Filings" was postponed until 30 days after Sljivancanin was assigned defence counsel, which in practice turned out to be 31 October 2003. See Decision to Postpone the Deadline Established in the Scheduling Order for Filings, 1 Aug 2003; Second Scheduling Order for Filings, 7 Oct 2003.
- 13 - Defence Preliminary Motion, 8 Aug 2003 ("Mrksic Motion"); Preliminary Motion of the Accused Radic pursuant the Rule 72(A)(ii), 23 Oct 2003 ("Radic Motion"); Defendant Veselin Sljivancanin's Preliminary Motion, 31 Oct 2003 ("Sljivancanin Motion").
- 14 - Scheduling Order for Filings, 25 July 2003.
- 15 - Prosecution's Consolidated Response to Motions by Accused Mile Mrksic, Miroslav

Radic and Veselin Sljivancanin Alleging Defects in the Form of the Consolidated Amended Indictment, 13 Nov 2003 (“Prosecution Response”).

16 - See Prosecution Motion Requesting Variation of Page Limit for the Prosecution’s Consolidated Response to Defence Motions Alleging Defects in the Form of the Indictment, 13 Nov 2003. See also Practice Direction on the Length of Briefs and Motions, IT/ 184 Rev.1, 5 Mar 2002, par C.5: “Motions and replies and responses before a Chamber will not exceed 10 pages or 3000 words, whichever is greater”.

17 - See Defense Request to File a Reply to Prosecution’s Response to Motions by Accused Mile Mrksic, Miroslav Radic and Veselin Sljivancanin Alleging Defects in the Form of the Consolidated Amended Indictment dated 13 November 2003, 17 Nov 2003; Request by the Accused Radic’s Defence to Trial Chamber to Grant Leave to File a Reply to Prosecution’s Consolidated Response to Motions by Accused Mile Mrksic, Miroslav Radic and Veselin Sljivancanin Alleging Defects in the Form of the Consolidated Amended Indictment Filed 13.11.2003, 20 Nov 2003; See also Decision Denying Mrksic’s Request for Leave to File a Reply, 21 Nov 2003; Decision Denying Radic’s Request for Leave to File a Reply, 28 Nov 2003.

18 - Prosecution Application to Amend the Indictment, par 7.

19 - Second Amended Indictment, Count 5. See also fn 7 above.

20 - 1997 Amended Indictment, Count 1 (“wilfully causing great suffering”) and Count 4 (“wilful killing”). See also n 4 above.

21 - Prosecution Application to Amend the Indictments, pars 7 and 14.

22 - Statute of the International Criminal Tribunal for the former Yugoslavia (“Statute”), as amended by SRES/1481 (19 May 2003). Hereinafter, “Article” or “Articles” refer to an Article or Articles of the Statute.

23 - Count 1, Article 5(h) of the Statute.

24 - Count 2, Article 5(b) of the Statute.

25 - Count 6, Article 5(i) of the Statute.

26 - Count 8, recognised by Common Article 3(1)(a) of the Geneva Conventions and punishable under Article 3 of the Statute.

27 - Count 3, Article 5(a) of the Statute.

28 - Count 4, recognised by Common Article 3(1)(a) of the Geneva Conventions and punishable under Article 3 of the Statute.

29 - Count 5, Article 5(f) of the Statute.

30 - Count 7, recognised by Common Article 3(1)(a) of the Geneva Conventions and punishable under Article 3 of the Statute.

31 - Decision on Form of Second Amended Indictment, pars 7-14.

32 - Mrksic Motion, par 5; Radic Motion, par 46; Sljivancanin Motion, par 6.

33 - Prosecution Response, par 29.

34 - Prosecution Application for Leave to Amend the Indictments, pars 7 and 14.

35 - Sljivancanin Motion, pars 6 and 8.

36 - Sljivancanin Motion, par 14.

37 - Mrksic Motion, pars 5, 10.

38 - Prosecution Response, par 25.

39 - See par 59 below.

40 - See pars 61-62 below.

41 - Decision on Form of Second Amended Indictment, par 24; *Prosecutor v Brdanin and Talic*, Case IT-99-36-PT, Decision on Form of Further Amended Indictment and Prosecution Application to Amend, 26 June 2001, par 50.

42 - Mrksic Motion, par 5.

43 - Transcript of the Status Conference of Mrksic and Radic on 2 July 2003, at page 80; *See also* Transcript of the initial appearance of Sljivancanin on 3 July 2003, at page 110.

44 - Decision on Form of Second Amended Indictment, par 18 (footnotes omitted). In support of this conclusion, the Trial Chamber quoted from a decision in the case of *Prosecutor v Brdanin and Talic* which established as follows: "Although it is no longer necessary for an amended indictment to be "confirmed" after the case has been assigned to a Trial Chamber, leave will not be granted to add *new* allegations to an indictment unless the prosecution is able to demonstrate that it has material to support these new allegations -unless, of course, the evidence has already been given and the indictment is being amended merely to accord with the case which has been presented". *Prosecutor v Brdanin and Talic*, Case IT-99-36-PT, Decision on Form of Fourth Amended Indictment, 23 Nov 2001, par 21.

45 - *Prosecutor v Krnojelac*, Case IT-97-25-A, Judgement, 17 Sept 2003 ("*Krnojelac* Appeals Judgement"), par 138.

46 - See Consolidated Amended Indictment, pars 4, 13 and Counts 1-8.

47 - See *Prosecutor v Blaskic*, IT 95-14, Decision on the Defence Motion to Dismiss the Indictment Based Upon Defects in the Form Thereof (Vagueness/Lack of Adequate Notice of Charges), 4 Apr 1997, par 22.

48 - Emphasis added.

49 - Radic Motion, pars 16-17; Sljivancanin Motion, pars 48-49.

50 - Sljivancanin Motion, pars 40-44.

51 - Radic Motion, pars 18 and 21.

52 - Prosecution Response, par 17.

53 - Consolidated Amended Indictment, par 5.

54 - See *Prosecutor v Kupreskic et al*, IT-95-16-A, Appeal Judgement, 23 Oct 2001 ("*Kupreskic* Appeal Judgment"), par 88; Articles 18(4), 21(2) and 21(4)(a) and (b) and Rule 47(C), which essentially restates Article 18(4).

55 - Consolidated Amended Indictment, par 7.

56 - See Consolidated Amended Indictment, pars 41, 44 and 47.

57 - See Consolidated Amended Indictment, pars 10, 11 and 12.

58 - Consolidated Amended Indictment, par 9. *See also ibid*, pars 7, 10-12.

59 - Radic adds the submission that "[p]aragraph 11 (a) of the Indictment is in direct disagreement with the paragraph 7(c) of the Indictment" (Radic Motion, par 16). There is no paragraph 7 (c) in the Consolidated Amended Indictment. The Trial Chamber has understood Radic to mean paragraph 9 (c) instead, but fails to appreciate any inconsistency between the two said paragraphs.

60 - Paragraph 8 of the Consolidated Amended Indictment provides as follows:

"[a]lthough this joint criminal enterprise was part of a wider joint criminal enterprise whose purpose was the forcible removal of a majority of the Croat, Muslim and other non-Serb population from approximately one-third of the territory of Croatia through the commission of crimes in violation of Articles 3 and 5 of the Statute of the Tribunal, including those who were present in the Vukovar Hospital after the fall of Vukovar, for the purpose of this indictment participation in the joint criminal enterprise charged in this indictment is limited to Mile MRKSIC, Miroslav RADIC, Veselin SLJIVANCANIN, Miroljub VUJOVIC and Stanko VUJANOVIC, and their subordinates".

61 - Radic Motion, pars 22-29; Sljivancanin Motion, pars 45-47.

62 - Prosecution Response, par 15.

63 - Decision on Form of Second Amended Indictment, par 33.

64 - *Prosecutor v Vasiljevic*, Case IT-98-32-T, Judgment, 29 Nov 2002 (“*Vasiljevic* Trial Judgement”), par 66.

65 - Radic Motion, pars 23-24.

66 - In this connection Radic raises the concern as to whether the crimes alleged in the Consolidated Amended Indictment were also natural and foreseeable consequences of the execution of the wider JCE: Radic Motion, par 27.

67 - See Second Amended Indictment, par 6.

68 - “This is fundamental to the primarily adversarial system adopted for the Tribunal by its Statute.” *Prosecutor v Brdanin and Talic*, Case IT-99-36-PT, Decision on Objections by Momir Talic to the Form of the Amended Indictment, 20 Feb 2001, par 23 (footnotes omitted).

69 - The Prosecution concedes that “[t]he description of a wider joint criminal enterprise is included as background information only” and that “[n]one of the Accused face charges in connection with the wider joint criminal enterprise”. Prosecution Response, par 15.

70 - For the different categories of JCE, see *Prosecutor v Tadic*, Case IT-94-1-A, Judgment, 15 July 1999 (“Tadic” Appeals Judgement), pars 185-229; see also *Prosecutor v Brdanin and Talic*, Case IT-99-36-PT, Decision on Form of Further Amended Indictment and Prosecution Application to Amend, 26 June 2001, pars 24-32.

71 - Radic Motion, par 15.

72 - *Krnojelac* Appeals Judgement, par 138.

73 - Consolidated Amended Indictment, pars 4 and 6.

74 - Consolidated Amended Indictment, par 6, because it does not plead that the Accused were acting in furtherance of a particular system in which the crime is committed by reason of the Accused’s position of authority or function, and with knowledge of the nature of that system and intent to further that system. See *Krnojelac* Appeal Judgement, par 80; See also *Vasiljevic* Trial Judgement, par 64.

75 - See *Krnojelac* Appeals Judgement, par 141.

76 - Third *Brdjanin & Talic* Decision, par 33.

77 - Consolidated Amended Indictment, par 6. See *Prosecutor v Brdanin and Talic*, IT-99-36-T, Decision on Form of Further Amended Indictment and Prosecution Application to Amend, 26 June 2001, par 30; See also *Prosecutor v Milutinovic, Sainovic and Ojdanic*, IT-99-37-AR72, Separate Opinion of Judge David Hunt on Challenge by Ojdanic to Jurisdiction – Joint Criminal Enterprise, 21 May 2003, par 11.

78 - Radic Motion, par 36; Sljivancanin Motion, par 35.

79 - Prosecution Response, pars 19 and 21.

80 - See Consolidated Amended Indictment, pars 7, 17, 18, 34-41.

81 - Sljivancanin Motion, par 35.

82 - Mrksic Motion, par 12; Radic Motion, pars 40, 42 and 45.

83 - Mrksic Motion, par 12. See also Decision on Form of Second Amended Indictment, par 65.

84 - Prosecution Response, par 19.

85 - See e.g.: Consolidated Amended Indictment, pars 20 and 32.

86 - Radic Motion, par 45.

87 - See par 53 below.

88 - “By no later than the onset of the evacuation operation, Mile MRKSIC, Veselin SLJIVANCANIN and Miroslav RADIC knew or had reason to know of the serious threat radical elements of Serb forces comprised of JNA, TO, volunteer and paramilitary soldiers posed to the security of the patients and other people evacuated from the

hospital, and the desire of these elements of Serb forces for revenge against the evacuees. In November 1991 before the fall of Vukovar, Miroslav RADIC was present with Stanko VUJANOVIC and others when Vojislav SESELJ visited the house of Stanko VUJANOVIC and publicly pronounced "Not one Ustasha must leave Vukovar alive". On the evening of 19 November 1991, reports reached Mile MRKSIC and Veselin SLJIVANCANIN that certain TO, volunteer and paramilitary soldiers were torturing and killing non-Serb prisoners being held at the Velepromet". Consolidated Amended Indictment, par 32. Mrksic also alleges that the material *annexed* to the Consolidated Amended Indictment fails to support the Prosecution's allegation that Vukovar TO units, volunteers and paramilitaries were subordinated to the Accused (Mrksic Motion, par 13). The difficulties that stem from calling these documents "Material in Support of the Consolidated Amended Indictment" have already been indicated, and also that it is the Trial Chamber's understanding that this is not the sole supporting material has already been indicated in par 16 above.

89 - Prosecution Response, par 29.

90 - According to the Prosecution, besides the supporting material it submitted with the Initial Indictment, the Prosecution submitted additional material for the confirmation of the 1997 Amended Indictment. See Prosecution Application to Amend, par 4.

91 - Radic Motion, par 35.

92 - Mrksic Motion, par 14.

93 - Mrksic Motion, par 10. See Consolidated Amended Indictment, par 35.

94 - Mrksic Motion, par 10.

95 - Second Amended Indictment, par 25.

96 - Prosecution Response, par 25.

97 - Mrksic Motion, pars 6-7; Radic Motion, par 36; Sljivancanin Motion, pars 58-59.

98 - Prosecution Response, par 14. See also Consolidated Amended Indictment, e.g.: pars 34, 35 and 37.

99 - Prosecution Response, pars 12 and 23.

100 - Sljivancanin Motion, par 58.

101 - Sljivancanin Motion, par 59.

102 - Sljivancanin Motion, par 57.

103 - Mrksic Motion, par 10. Par 39 of the Consolidated Amended Indictment alleges that "at least two hundred and sixty-seven Croats and other non-Serbs from Vukovar Hospital" were killed, whilst par 45 alleges that "at least two-hundred and fifty-five Croats and other non-Serbs were taken in groups and executed".

104 - Prosecution Response, par 26. The Trial Chamber notes that the Annex contains the names of 277 victims, including around 82 persons missing whose remains have not yet been identified.

105 - Decision on Form of Second Amended Indictment, par 48.

106 - *Prosecutor v Brdanin and Talic*, Case IT-99-36-PT, Decision on Form of Third Amended Indictment, 21 Sept 2001, par 8.

107 - Sljivancanin Motion, pars 54-55.

108 - Sljivancanin Motion, par 53.

109 - Prosecution Response, par 32.

110 - See par 53 above.

111 - Decision on Form of Second Amended Indictment, par 48.

112 - Mrksic Motion, par 18. See Decision on Form of Second Amended Indictment, par 48.

- 113 - Prosecution Response, pars 27-28.
- 114 - Sljivancanin Motion, pars 50-51.
- 115 - Prosecution Response, par 31.
- 116 - Prosecution Response, par 31.
- 117 - Consolidated Amended Indictment, par 12(b).
- 118 - *See* Consolidated Amended Indictment, par 10(b).
- 119 - Radic Motion, pars 28, 47-50. Sljivancanin Motion, par 24.
- 120 - Radic Motion, pars 49-50.
- 121 - Prosecution Motion, par 34.
- 122 - Prosecution Motion, par 34.
- 123 - *Kupreskic* Appeal Judgement, par 88 (footnotes omitted).
- 124 - Prosecution Application for Leave to Amend the Indictments, par 7.
- 125 - Prosecution Application for Leave to Amend the Indictments, pars 7 and 14.
- 126 - Prosecution Application for Leave to Amend the Indictments, par 7.
- 127 - Sljivancanin Motion, pars 11 and 15.
- 128 - See pars 11 and 13 above.
- 129 - *Prosecutor v Brdanin and Talic*, Case IT-99-36-PT, Decision on Form of Further Amended Indictment and Prosecution Application to Amend, 26 June 2001, par 50 (footnotes omitted).