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THE LAW AND JURISPRUDENCE
OF THE INTERNATIONAL
CRIMINAL TRIBUNALS
AND COURTS

Procedure and Human Rights Aspects

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ad hoc Tribunals' jurisprudence related to the indictments will assist those who will be involved in both the application of the ICC law and the development of its jurisprudence.

As to the charging, unlike *ad hoc* Tribunals, the ICC is bound by the principle of speciality. Pursuant to Article 101(1) of the ICC Statute, a person surrendered to the Court shall not be proceeded against, punished or detained for any conduct committed prior to surrender, other than the conduct or course of conduct which forms the basis of the crimes for which that person has been surrendered. Under Article 101(2), the Court may request a waiver of these requirements from the State which surrendered the person to the Court.

It was held in the *Kenyatta et al.* case that the rationale of Article 101(1) is to protect State sovereignty and it does not apply to the cases where the suspects voluntarily appeared before the ICC following a summons to appear. In the view of the pre-trial judge, the application of the rule of speciality is limited to the scenarios in which the person is arrested and is surrendered as a result of a request submitted by the Court to the State.¹¹

2. STATEMENT OF THE FACTS IN THE INDICTMENT

See also Admissibility of Evidence, concerning Evidence Outside the Scope of the Indictment, p. 991.

2.1. ECTHR JURISPRUDENCE

Pursuant to Article 6(3)(a) of the ECHR, everyone charged with a criminal offence has the right to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him.

The adequacy of the information in the indictment must be assessed in relation to Article 6(3)(b), which confers on everyone the right to have adequate time and facilities for the preparation of their defence, and in the light of the more general right to a fair hearing embodied in Article 6(1).¹²

The provisions of Article 6(3)(a) of the ECHR point to the need for special attention to be paid to the notification of the "accusation" to the defendant.

¹¹ *Kenyatta et al.*, Decision on the "Preliminary Motion Alleging Defects in the Documents Containing the Charges (DCC) and List of Evidence (LoE) and Request that the OTP be Ordered to Re-File an Amended DCC & LoE" and the "Defence Request for a Status Conference Concerning the Prosecution's Disclosure of 19th August 2011 and the Document Containing the Charges and Article 101 of the Rome Statute", Case No. ICC-01/09-02/11, Single Judge, 12 September 2011, para. 16.

¹² *Mattoccia v. Italy*, no. 23969/94, 25 July 2000, para. 60.

Particulars of the offence play a crucial role in the criminal process, in that it is from the moment of their service that the suspect is formally put on written notice of the factual and legal basis of the charges against him.¹³

Article 6(3)(a) gives an accused person the right to be informed of the cause of the accusation, *i.e.* the acts with which he is charged and on which his indictment is based, and of the nature of the accusation, *i.e.* the legal classification of the acts in question.¹⁴ In addition, the information about the nature and cause of the accusation must be adequate to enable the accused to prepare his defence accordingly.¹⁵

The accused must be made aware "promptly" and "in detail" of the cause of the accusation, that is, the material facts alleged against him which are at the basis of the accusation, and of the nature of the accusation, namely, the legal qualification of these material facts.¹⁶ While the extent of the "detailed" information referred to in this provision varies depending on the particular circumstances of each case, the accused must at any rate be provided with sufficient information as is necessary to understand fully the extent of the charges against him with a view to preparing an adequate defence.¹⁷

The provision of full, detailed information concerning the charges against a defendant, and consequently the legal characterisation that the court might adopt in the matter, is an essential prerequisite for ensuring that the proceedings are fair.¹⁸ For the purpose of preparing his or her defence, a person charged with a criminal offence is entitled to be informed not only of the material facts on which the accusation is based but also of the precise legal classification given to these facts.¹⁹ As concerns the changes in the accusation, including the changes

¹³ *I.H. and others v. Austria*, no. 42780/98, 20 April 2006, para. 30; *Sipavičius v. Lithuania*, no. 49093/99, 21 February 2002, para. 27; *Sadak and others v. Turkey*, nos. 29900/96, 29901/96, 29902/96, 29903/96, 17 July 2001, para. 48; *Dallos v. Hungary*, no. 29082/95, 1 March 2001, para. 47; *Mattoccia v. Italy*, no. 23969/94, 25 July 2000, para. 59; *Pélissier and Sassi v. France* [GC], no. 25444/94, 25 March 1999, para. 51; *Kamasinski v. Austria*, no. 9783/82, 19 December 1989, para. 79.

¹⁴ *I.H. and others v. Austria*, no. 42780/98, 20 April 2006, para. 30; *Ayçoban and others v. Turkey*, nos. 42208/02, 43491/02, and 43495/02, 22 December 2005, para. 21; *Sipavičius v. Lithuania*, no. 49093/99, 21 February 2002, para. 27; *Sadak and others v. Turkey*, nos. 29900/96, 29901/96, 29902/96, 29903/96, 17 July 2001, para. 48; *Dallos v. Hungary*, no. 29082/95, 1 March 2001, para. 47; *Pélissier and Sassi v. France* [GC], no. 25444/94, 25 March 1999, para. 51.

¹⁵ *Ayçoban and others v. Turkey*, nos. 42208/02, 43491/02, and 43495/02, 22 December 2005, para. 21.

¹⁶ *Mattoccia v. Italy*, no. 23969/94, 25 July 2000, para. 59.

¹⁷ *Ibid.*, para. 60.

¹⁸ *Abramyan v. Russia*, no. 10709/02, 9 October 2008, para. 34; *I.H. and others v. Austria*, no. 42780/98, 20 April 2006, para. 31; *Sipavičius v. Lithuania*, no. 49093/99, 21 February 2002, para. 28; *Sadak and others v. Turkey*, nos. 29900/96, 29901/96, 29902/96, 29903/96, 17 July 2001, para. 49; *Dallos v. Hungary*, no. 29082/95, 1 March 2001, para. 47; *Mattoccia v. Italy*, no. 23969/94, 25 July 2000, para. 59; *Pélissier and Sassi v. France* [GC], no. 25444/94, 25 March 1999, para. 52.

¹⁹ *De Salvador Torres v. Spain*, no. 21525/93, 24 October 1996, para. 28.

in its "cause", the accused must be duly and fully informed thereof and must be provided with adequate time and facilities to react to them and organise his defence on the basis of any new information or allegation.²⁰

In order that the right to defence be exercised in an effective manner, the defence must have at its disposal full, detailed information concerning the charges made, including the legal characterisation that the court might adopt in the matter. This information must either be given before the trial in the bill of indictment or at least in the course of the trial by other means such as formal or implicit extension of the charges. Mere reference to the abstract possibility that a court might arrive at a different conclusion than the prosecution as regards the qualification of an offence is clearly not sufficient.²¹ In this respect it is to be observed that Article 6(3)(a) of the ECHR does not impose any special formal requirement as to the manner in which the accused is to be informed of the nature and cause of the accusation against him.²²

Subparagraphs (a) and (b) of Article 6(3) of the ECHR are connected and the right to be informed of the nature and the cause of the accusation must be considered in the light of the accused's right to prepare his defence.²³

Where the finding of an aggravating circumstance may lead to a heavier sentence being imposed, the applicant should be formally notified that such a finding is possible in his case.²⁴

2.2. GENERAL REQUIREMENTS

Pursuant to Article 18(4) of the ICTY Statute and relevant provisions of other Tribunals, an indictment must contain a concise statement of the facts of the case and the crime or the crimes with which the accused is charged. These provisions should be interpreted in conjunction with the rights of the accused pursuant to Article 21(2) and Article 21(4)(a) and (b) of the Statute, which provide for the right of an accused 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.²⁵ If the prosecution fails to plead the essential

²⁰ *Mattoccia v. Italy*, no. 23969/94, 25 July 2000, para. 61.

²¹ *I.H. and others v. Austria*, no. 42780/98, 20 April 2006, para. 34.

²² *I.H. and others v. Austria*, no. 42780/98, 20 April 2006, para. 31; *Sipavičius v. Lithuania*, no. 49093/99, 21 February 2002, para. 28; *Dallos v. Hungary*, no. 29082/95, 1 March 2001, para. 47; *Pélissier and Sassi v. France* [GC], no. 25444/94, 25 March 1999, para. 53.

²³ *I.H. and others v. Austria*, no. 42780/98, 20 April 2006, para. 31; *Dallos v. Hungary*, no. 29082/95, 1 March 2001, para. 47; *Sipavičius v. Lithuania*, no. 49093/99, 21 February 2002, para. 28; *Sadak and others v. Turkey*, nos. 29900/96, 29901/96, 29902/96, 29903/96, 17 July 2001, para. 50; *Pélissier and Sassi v. France* [GC], no. 25444/94, 25 March 1999, para. 54.

²⁴ *De Salvador Torres v. Spain*, no. 21525/93, 24 October 1996, para. 28.

²⁵ *Rašević and Todović*, Decision on Todović Defence Motion on the Form of the Joint Amended Indictment, Case No. IT-97-25/1-PT, T. Ch., 21 March 2006, para. 11; *Delić*, Decision on

aspects of the prosecution case in the indictment, it will suffer from a material defect.²⁶

An indictment is the primary accusatory instrument, which must plead with sufficient detail the essential aspects of the prosecution case.²⁷ It must not make vague allegations on the basis that they might be clarified when additional evidence is analysed.²⁸ An indictment has to fulfil the fundamental purpose of informing the accused of the charges against him with sufficient particularity to enable him to mount his defence.²⁹ It must be sufficiently clear to enable the accused to fully understand the nature and cause of the charges brought against him to enable him to prepare a defence effectively and efficiently.³⁰ The *nature of the charge* refers to the precise legal qualification of the offence, and the *cause of the charge* refers to the facts underlying it.³¹

Indeed, an indictment need not specify the precise elements of each crime, since all that is required is a concise statement of the facts and the crime or crimes with which the accused is charged under the Statute.³² Although Tribunals' Statutes do not require that the nature and the cause of the charge be communicated to the accused in any particular format, it is clear from the

Defence Motion Alleging Defects in the Form of the Indictment and Order on Prosecution Motion to Amend the Indictment, Case No. IT-04-83-PT, T. Ch., 13 December 2005, para. 6.

²⁶ *Norman et al.*, Decision on the First Accused's Motion for Service and Arraignment on the Consolidated Indictment, Case No. SCSL-04-14-T, T. Ch., 29 November 2004, para. 23; *Ntagerura et al.*, Judgement and Sentence, Case No. ICTR-99-46-T, T. Ch., 25 February 2004, para. 29; *Semanza*, Judgement and Sentence, Case No. ICTR-97-20-1, T. Ch., 15 May 2003, para. 42; *Kupreškić et al.*, Appeal Judgement, Case No. IT-95-16-A, App. Ch., 23 October 2001, para. 114.

²⁷ *Bikindi*, Decision on the Amended Indictment and the Taking of a Plea Based on the Said Indictment, T. Ch., Case No. ICTR-2001-72-PT, 11 May 2005, para. 7; *Kupreškić et al.*, Appeal Judgement, Case No. IT-95-16-A, App. Ch., 23 October 2001, para. 114.

²⁸ *Delić*, Decision on Defence Motion Alleging Defects in the Form of the Indictment and Order on Prosecution Motion to Amend the Indictment, Case No. IT-04-83-PT, T. Ch., 13 December 2005, para. 16.

²⁹ *Ntagerura et al.*, Judgement, Case No. ICTR-99-46-A, App. Ch., 7 July 2006, para. 22; *Ntakirutimana Elizaphan and Ntakirutimana Gerard*, Judgement, Cases No. ICTR-96-10-A and ICTR-96-17-A, App. Ch., 13 December 2004, paras. 25, 470.

³⁰ *Kupreškić et al.*, Appeal Judgement, Case No. IT-95-16-A, App. Ch., 23 October 2001, para. 88; *Karemera*, Decision on the Defence Motion, Pursuant to Rule 72 of Rules of Procedure and Evidence, Pertaining to, *inter alia*, Lack of Jurisdiction and Defects in the Form of the Indictment, Case No. ICTR-98-44-T, T. Ch., 25 April 2001, para. 16; *Kanyabashi*, Decision on Defence Preliminary Motion for Defects in the Form of the Indictment, Case No. ICTR-96-15-I, T. Ch., 31 May 2000, para. 5.1; *Nsengiyumva*, Decision on the Defence Motion Raising Objections on Defects in the Form of the Indictment and to Personal Jurisdiction on the Amended Indictment, Case No. ICTR-96-12-I, T. Ch., 12 May 2000, para. 1.

³¹ *Ntagerura et al.*, Judgement and Sentence, Case No. ICTR-99-46-T, T. Ch., 25 February 2004, para. 29.

³² *Mejakić et al.*, Decision on Predrag Banović's Preliminary Motion on the Form of the Indictment, Case No. IT-02-65-PT, T. Ch., 4 April 2003, p. 1; *Brdanin and Talić*, Decision on Form of Further Amended Indictment and Prosecution Application to Amend, Case No. IT-99-36-PT, T. Ch., 26 June 2001, para. 33; *Kordić and Čerkez*, Decision on Defence Application for Bill of Particulars, Case No. IT-95-14/2-PT, T. Ch., 2 March 1999, para. 8.

Statutes and the Rules that this information should be included in the indictment, which is the only accusatory instrument provided for therein.³³ As to the aggravating factors, as a matter of principle, there is no requirement that the prosecution plead them in an indictment. Such a requirement is not reflected in the Statute or Rules of the Tribunal.³⁴ In certain circumstances it is permissible for an indictment to discuss the relevant conduct of persons not charged therein, including where such conduct is said to have been realised in furtherance of a joint criminal enterprise in which the accused are alleged to have participated.³⁵

The prosecution is expected to know its case before it goes to trial. It is not acceptable for the prosecution to omit the material aspects of its main allegations in the indictment with the aim of moulding the case against the accused in the course of the trial depending on how the evidence unfolds.³⁶ Where the evidence at trial turns out differently than expected, an amendment of the indictment may be required, an adjournment may be granted, or certain evidence may be excluded as being outside the scope of the indictment.³⁷ However, the prosecution cannot intentionally seek to exhaust its opponent's resources by leaving the defence to investigate charges that it has no intent to prosecute. The prosecution should make every effort to ensure not only that the indictment specifically pleads the material facts that the prosecution intends to prove but also that any facts that it does not intend to prove are removed. The same applies to other communications that give specific information regarding the prosecution's intended case, such as the pre-trial brief. It would be a serious breach of ethics for the prosecution to draw the defence into lengthy and

³³ *Ntagerura et al.*, Judgement and Sentence, Case No. ICTR-99-46-T, T. Ch., 25 February 2004, para. 29; *Semanza*, Judgement and Sentence, Case No. ICTR-97-20-1, T. Ch., 15 May 2003, para. 42; *Kupreškić et al.*, Appeal Judgement, Case No. IT-95-16-A, App. Ch., 23 October 2001, para. 88; *Hadžihasanović and Kubura*, Decision on the Form of the Indictment, Case No. IT-01-47-PT, T. Ch., 7 December 2001, para. 8.

³⁴ *Stakić*, Judgement, Case No. IT-97-24-A, App. Ch., 22 March 2006, para. 142.

³⁵ *Popović et al.*, Decision on Removal of Charges against Milorad Trbić and Zdravko Tolimir, Case No. IT-05-88-T, T. Ch., 14 September 2006, p. 3.

³⁶ *Naletilić and Martinović*, Judgement, Case No. IT-98-34-A, App. Ch., 3 May 2006, para. 25; *Kvočka et al.*, Judgement, Case No. IT-98-30/1-A, App. Ch., 28 February 2005, para. 29; *Karemera*, Decision on Severance of André Rwamakuba and for Leave to File Amended Indictment, Case No. ICTR-98-44-PT, T. Ch., 14 February 2005, para. 45; *Ntakirutimana Elizaphan and Ntakirutimana Gerard*, Judgement, Cases No. ICTR-96-10-A and ICTR-96-17-A, App. Ch., 13 December 2004, paras. 24-125, 469, 470; *Mrkšić et al.*, Decision on Form of Second Modified Consolidated Amended Indictment, Case No. IT-95-13/1-PT, T. Ch., 29 October 2004, para. 15; *Rutaganda*, Judgement, Case No. ICTR-96-3-A, App. Ch., 26 May 2003, paras. 301-303; *Blaškić*, Judgement, Case No. IT-95-14-A, App. Ch., 29 July 2004, para. 220; *Niyitegeka*, Judgement, Case No. ICTR-96-14-A, App. Ch., 9 July 2004, para. 194; *Kupreškić et al.*, Appeal Judgement, Case No. IT-95-16-A, App. Ch., 23 October 2001, para. 92.

³⁷ *Naletilić and Martinović*, Judgement, Case No. IT-98-34-A, App. Ch., 3 May 2006, para. 25; *Kvočka et al.*, Judgement, Case No. IT-98-30/1-A, App. Ch., 28 February 2005, para. 31; *Blaškić*, Judgement, Case No. IT-95-14-A, App. Ch., 29 July 2004, para. 220; *Kupreškić et al.*, Appeal Judgement, Case No. IT-95-16-A, App. Ch., 23 October 2001, para. 92.

expensive investigations of facts that the prosecution does not intend to prove at trial.³⁸

Whether the allegations of the indictment are true or not is not a matter to be considered at the pre-trial stage, but matter of evidence to be proved during trial.³⁹

2.3. MATERIAL FACTS

2.3.1. Generally

The facts that appraise an accused of the nature, cause and content of the charge, are the "material facts" which must be pleaded in an indictment.⁴⁰ An indictment is pleaded with sufficient particularity when it sets out the material facts of the prosecution case with enough detail to inform the accused clearly of the charges against him, thereby enabling him to prepare a defence effectively and efficiently.⁴¹ An indictment is defective if it does not state the material facts underpinning the charges with enough detail to enable an accused to prepare his or her defence.⁴²

An indictment which merely lists the charges against the accused without pleading the material facts does not constitute adequate notice because it lacks enough detail to inform a defendant clearly of the charges against him so that he may prepare his defence.⁴³ Indeed, where the scale of the crimes or the fallibility

³⁸ *Ntakirutimana Elizaphan and Ntakirutimana Gerard*, Judgement, Cases No. ICTR-96-10-A and ICTR-96-17-A, App. Ch., 13 December 2004, para. 43.

³⁹ *Popović et al.*, Decision on Motions Challenging the Indictment Pursuant to Rule 72 of the Rules, Case No. IT-05-88-PT, T. Ch., 31 May 2006, para. 86.

⁴⁰ *Brdanin and Talić*, Decision on Objections by Radoslav Brdanin to the Form of the Amended Indictment, Case No. IT-99-36-PT, T. Ch., 23 February 2001, para. 13; *Kanyabashi*, Decision on Defence Preliminary Motion for Defects in the Form of the Indictment, Case No. ICTR-96-15-I, T. Ch., 31 May 2000, para. 5.1; *Krnojelac*, Decision on the Defence Preliminary Motion on the Form of the Indictment, Case No. IT-97-25-PT, T. Ch., 24 February 1999, para. 12.

⁴¹ *Sinić Blagoje*, Judgement, Case No. IT-95-9-A, App. Ch., 28 November 2006, para. 20; *Popović et al.*, Decision on Motions Challenging the Indictment Pursuant to Rule 72 of the Rules, Case No. IT-05-88-PT, T. Ch., 31 May 2006, para. 4; *Naletilić and Martinović*, Judgement, Case No. IT-98-34-A, App. Ch., 3 May 2006, para. 23; *Stakić*, Judgement, Case No. IT-97-24-A, App. Ch., 22 March 2006, para. 116; *Semanza*, Judgement, Case No. ICTR-97-20-A, App. Ch., 20 May 2005, para. 85; *Blaškić*, Judgement, Case No. IT-95-14-A, App. Ch., 29 July 2004, para. 209; *Krnojelac*, Judgement, Case No. IT-97-25-A, App. Ch., 17 September 2003, para. 131; *Kupreškić et al.*, Appeal Judgement, Case No. IT-95-16-A, App. Ch., 23 October 2001, para. 88.

⁴² *Ndindabahizi*, Judgement, Case No. ICTR-01-71-A, App. Ch., 16 January 2007, para. 16; *Kamuhanda*, Judgement, Case No. ICTR-99-54A-A, App. Ch., 19 September 2005, para. 17; *Kupreškić et al.*, Appeal Judgement, Case No. IT-95-16-A, App. Ch., 23 October 2001, para. 88.

⁴³ *Kvočka et al.*, Judgement, Case No. IT-98-30/1-A, App. Ch., 28 February 2005, para. 28; *Kupreškić et al.*, Appeal Judgement, Case No. IT-95-16-A, App. Ch., 23 October 2001, para. 88.

of witness recollection prevents the prosecution from providing all the necessary material facts, less information may be acceptable. However, even where it is impracticable or impossible to provide full details of a material fact, the prosecution must indicate its best understanding of the case against the accused and the trial should only proceed where the right of the accused to know the case against him and to prepare his defence has been assured.⁴⁴

Whether a fact is material depends on the nature of the prosecution case.⁴⁵ The Appeals Chambers of both the ICTR and the ICTY have specified several factors that can determine the materiality of facts: for example, if the personal physical commission of criminal acts is charged, the indictment should set forth the victim's identity, the place and time of the events and the means by which the acts were committed.⁴⁶ Such detail, however, need not be pleaded if the sheer scale of the alleged crimes makes it impracticable to require a high degree of specificity in such matters.⁴⁷

If allegedly criminal acts, even those not charged in an indictment, are relied upon to establish responsibility for the crimes charged such that they amount to material allegations, they must be pleaded with sufficient specificity to enable the preparation of a defence.⁴⁸ If the defence is denied the material facts of the accused's alleged criminal activity until the prosecution files its pre-trial brief or until the trial itself, it will be difficult for the defence to conduct a meaningful investigation for trial. A Trial Chamber must be mindful of whether proceeding to trial in such circumstances is fair to the accused.⁴⁹

In order to guarantee a fair trial the prosecution is obliged to plead material facts with a sufficient degree of specificity.⁵⁰ It was observed that any lack of precision or specificity in an indictment interferes with judicial economy, as the Prosecutor also benefits from a clear and unambiguous indictment which

⁴⁴ *Kvočka et al.*, Judgement, Case No. IT-98-30/1-A, App. Ch., 28 February 2005, para. 29.

⁴⁵ *Ndindabahizi*, Judgement, Case No. ICTR-01-71-A, App. Ch., 16 January 2007, para. 16; *Kamuhanda*, Judgement, Case No. ICTR-99-54A-A, App. Ch., 19 September 2005, para. 17; *Kupreškić et al.*, Appeal Judgement, Case No. IT-95-16-A, App. Ch., 23 October 2001, para. 89.

⁴⁶ *Ndindabahizi*, Judgement, Case No. ICTR-01-71-A, App. Ch., 16 January 2007, para. 16; *Ntakirutimana Elizaphan and Ntakirutimana Gerard*, Judgement, Cases No. ICTR-96-10-A and ICTR-96-17-A, App. Ch., 13 December 2004, para. 25.

⁴⁷ *Ndindabahizi*, Judgement, Case No. ICTR-01-71-A, App. Ch., 16 January 2007, para. 16; *Ntakirutimana Elizaphan and Ntakirutimana Gerard*, Judgement, Cases No. ICTR-96-10-A and ICTR-96-17-A, App. Ch., 13 December 2004, para. 25; *Kupreškić et al.*, Appeal Judgement, Case No. IT-95-16-A, App. Ch., 23 October 2001, para. 89.

⁴⁸ *Milutinović et al.*, Decision on Defence Motions Alleging Defects in the Form of the Proposed Amended Joinder Indictment, Case No. IT-05-87-PT, T. Ch., 22 March 2006, para. 16.

⁴⁹ *Kvočka et al.*, Judgement, Case No. IT-98-30/1-A, App. Ch., 28 February 2005, para. 28; *Ntakirutimana Elizaphan and Ntakirutimana Gerard*, Judgement, Cases No. ICTR-96-10-A and ICTR-96-17-A, App. Ch., 13 December 2004, para. 26; *Niyitegeka*, Judgement, Case No. ICTR-96-14-A, App. Ch., 9 July 2004, para. 194.

⁵⁰ *Brima et al.*, Judgement, Case No. SCSL-2004-16-A, App. Ch., 22 February 2008, para. 37; *Kvočka et al.*, Decision on Defence Preliminary Motions on the Form of the Indictment, Case No. IT-98-30-PT, T. Ch., 12 April 1999, para. 14.

enables him to focus his case and hence to allocate his limited resources reasonably. Therefore, a specific and unambiguous indictment is an essential prerequisite to a fair and expeditious trial.⁵¹

The question whether material facts are pleaded with the required degree of specificity depends on the context of the particular case.⁵² A decisive factor in determining the degree of specificity with which the prosecution is required to particularise the facts of its case in the indictment is the nature of the alleged criminal conduct charged to the accused.⁵³ The prosecution's characterisation of the alleged criminal conduct and the proximity of the accused to the underlying crime are decisive factors in determining the degree of specificity with which the prosecution must plead the material facts of its case in the indictment in order to provide the accused with adequate notice. For example, if the prosecution alleges that an accused personally committed the criminal acts in question, the indictment should include details which explain this allegation, such as the identity of the victim, the time and place of the events, and the means by which the offence was committed.⁵⁴

It has been stressed that the pleading principles that apply to indictments at international criminal tribunals differ from those in domestic jurisdictions because of the nature and scale of the crimes when compared with those in domestic jurisdictions. For this reason, there is a narrow exception to the specificity requirement for indictments at international criminal tribunals.⁵⁵

In considering the extent to which there is compliance with the specificity requirement in an indictment, the term specificity should not be understood to have any special meaning. It is to be understood in its ordinary meaning as being

⁵¹ *Taylor*, Decision on Urgent Defence Motion Regarding a Fatal Defect in the Prosecution's Second Amended Indictment Relating to the Pleading of JCE, Case No. SCSL-03-1-T, T. Ch., 27 February 2009, para. 59, with reference to *Zigiranyirazo*, Decision on the Defence Preliminary Motion Objecting to the Form of the Amended Indictment, Case No. ICTR-2001-72-I, T. Ch., 15 July 2004, para. 28.

⁵² *Brima et al.*, Judgement, Case No. SCSL-2004-16-A, App. Ch., 22 February 2008, para. 37; *Kupreškić et al.*, Appeal Judgement, Case No. IT-95-16-A, App. Ch., 23 October 2001, para. 89.

⁵³ *Halilović*, Judgement, Case No. IT-01-48-A, App. Ch., 16 October 2007, para. 86; *Naletilić and Martinović*, Judgement, Case No. IT-98-34-A, App. Ch., 3 May 2006, para. 24; *Karempera*, Decision on Severance of André Rwamakuba and for Leave to File Amended Indictment, Case No. ICTR-98-44-PT, T. Ch., 14 February 2005, para. 45; *Ntakirutimana Elizaphan and Ntakirutimana Gerard*, Judgement, Cases No. ICTR-96-10-A and ICTR-96-17-A, App. Ch., 13 December 2004, para. 24; *Blaškić*, Judgement, Case No. IT-95-14-A, App. Ch., 29 July 2004, para. 210; *Krnojelac*, Judgement, Case No. IT-97-25-A, App. Ch., 17 September 2003, para. 132; *Rutaganda*, Judgement, Case No. ICTR-96-3-A, App. Ch., 26 May 2003, paras. 301-303; *Kupreškić et al.*, Appeal Judgement, Case No. IT-95-16-A, App. Ch., 23 October 2001, para. 89.

⁵⁴ *Naletilić and Martinović*, Judgement, Case No. IT-98-34-A, App. Ch., 3 May 2006, para. 24; *Kvočka et al.*, Judgement, Case No. IT-98-30/1-A, App. Ch., 28 February 2005, para. 28; *Galić*, Decision on Application by Defence for Leave to Appeal, Case: IT-98-29-AR72, Bench of the Appeals Chamber, 30 November 2001, para. 15.

⁵⁵ *Brima et al.*, Judgement, Case No. SCSL-2004-16-A, App. Ch., 22 February 2008, para. 41.

specific in regard to an object or subject matter. An object or subject matter that is particularly named or defined cannot be said to lack specificity.⁵⁶

Before holding that an event charged is immaterial or that there are minor discrepancies between the indictment and the evidence presented at trial, a Chamber must normally satisfy itself that no prejudice shall, as a result, be caused to the accused. An example of such prejudice is the existence of inaccuracies likely to mislead the accused as to the nature of the charges against him. Depending on the specific circumstances of each case, the question to be determined is whether an accused was reasonably able to identify the crime and criminal conduct alleged in each of the paragraphs of the indictment.⁵⁷

Material facts must be pleaded expressly, though in certain limited circumstances, they need not be explicitly mentioned if those facts are *necessarily* implied in the indictment.⁵⁸ The indictment must be read in its entirety when determining whether material facts have been pleaded.⁵⁹ Each paragraph of the indictment should not be read in isolation but rather should be considered in the context of the other paragraphs in the indictment.⁶⁰ If an indictment does not plead the material facts with sufficient detail, this can be remedied in certain circumstances at trial, for instance, by amendment of the indictment.⁶¹

2.3.2. Material Facts and Evidence

A distinction should be drawn between the material facts upon which the prosecution relies, which must be pleaded, and the evidence by which the prosecution intends to prove those material facts at trial, which need not be pleaded and must be provided by way of pre-trial disclosure.⁶² Whether there is

⁵⁶ Ibid., para. 40.

⁵⁷ *Hadžihasanović and Kubura*, Decision on Motion of the Accused Hadžihasanović Regarding the Prosecution's Examination of Witnesses on Alleged Violations not Covered by the Indictment, Case No. IT-01-47-T, T. Ch., 16 March 2004, p. 5; *Rutaganda*, Judgement, Case No. ICTR-96-3-A, App. Ch., 26 May 2003, para. 133.

⁵⁸ *Halilović*, Decision on Prosecutor's Motion Seeking Leave to Amend the Indictment, Case No. IT-01-48-PT, T. Ch., 17 December 2004, para. 13; *Brđanin and Talić*, Decision on Form of Fourth Amended Indictment, Case No. IT-99-36-PT, T. Ch., 23 November 2001, para. 12.

⁵⁹ *Stakić*, Judgement, Case No. IT-97-24-A, App. Ch., 22 March 2006, para. 117.

⁶⁰ *Rašević and Todović*, Decision on Todović Defence Motion on the Form of the Joint Amended Indictment, Case No. IT-97-25/1-PT, T. Ch., 21 March 2006, para. 10; *Dragomir Milošević*, Decision on Defence Preliminary Motion Under Rule 72(A)(ii), Case No. IT-98-29/1-PT, T. Ch., 18 July 2005, para. 21; *Rutaganda*, Judgement, Case No. ICTR-96-3-A, App. Ch., 26 May 2003, para. 304.

⁶¹ *Nyiramasuhuko*, Decision on Pauline Nyiramasuhuko's Request for Reconsideration, Case No. ICTR-98-42-AR73, App. Ch., 27 September 2004, para. 11.

⁶² *Stakić*, Judgement, Case No. IT-97-24-A, App. Ch., 22 March 2006, para. 116; *Norman et al.*, Decision on the First Accused's Motion for Service and Arraignment on the Consolidated Indictment, Case No. SCSL-04-14-T, T. Ch., 29 November 2004, para. 24; *Blaškić*, Judgement, Case No. IT-95-14-A, App. Ch., 29 July 2004, para. 210; *Galić*, Decision on Application by Defence for Leave to Appeal, Case: IT-98-29-AR72, Bench of the Appeals Chamber, 30 November 2001, para. 15; *Kupreškić et al.*, Appeal Judgement, Case No. IT-95-16-A,

evidence to support any charge pleaded in an indictment is an issue to be determined by the Trial Chamber at the conclusion of the trial or, if the issue is raised, at the close of the prosecution case.⁶³ The Prosecutor has an obligation to plead all material facts with sufficient detail so that the accused can prepare his defence,⁶⁴ but not the evidence by which the material facts are to be proven.⁶⁵

There is no requirement that the evidence to be used by the prosecution in support of the alleged facts need be included in the indictment. Rather, the requirement is that the prosecution provide a concise statement of the alleged facts underpinning the charges in order to give adequate notice to the accused of the charges against him.⁶⁶ Accordingly, an accused may not challenge the sufficiency of the supporting material in his motion challenging the form of the indictment. The indictment was confirmed, which is the process that requires the existence of adequate supporting material to be verified.⁶⁷

2.4. MATERIAL FACTS RELATED TO THE NATURE OF THE CRIMINAL RESPONSIBILITY OF THE ACCUSED

2.4.1. Generally

An indictment that pleads modes of responsibility for which no corresponding material facts are pleaded, is vague and is therefore defective.⁶⁸ Indeed, the mode and extent of an accused's participation in an alleged crime are always material

App. Ch., 23 October 2001, para. 88; *Krajišnik and Plavšić*, Decision on Application for Leave to Appeal the Trial Chamber's Decision Concerning Preliminary Motion on the Form of the Indictment, Case No. IT-00-39-AR72, Bench of the Appeals Chamber, 13 September 2000, p. 3; *Furundžija*, Judgement, Case No. IT-95-17/1-A, App. Ch., 21 July 2000, para. 147.

⁶³ *Brđanin and Talić*, Decision on Motion to Dismiss Indictment, Case No. IT-99-36-PT, T. Ch., 5 October 1999, para. 15.

⁶⁴ *Kamuhanda*, Judgement, Case No. ICTR-99-54A-A, App. Ch., 19 September 2005, para. 17; *Semanza*, Judgement, Case No. ICTR-97-20-A, App. Ch., 20 May 2005, para. 85; *Kvočka et al.*, Judgement, Case No. IT-98-30/1-A, App. Ch., 28 February 2005, para. 27; *Ntakirutimana Elizaphan and Ntakirutimana Gerard*, Judgement, Cases No. ICTR-96-10-A and ICTR-96-17-A, App. Ch., 13 December 2004, para. 25; *Blaškić*, Judgement, Case No. IT-95-14-A, App. Ch., 29 July 2004, para. 209; *Niyitegeka*, Judgement, Case No. ICTR-96-14-A, App. Ch., 9 July 2004, para. 193; *Krnojelac*, Judgement, Case No. IT-97-25-A, App. Ch., 17 September 2003, paras. 130-131; *Kupreškić et al.*, Appeal Judgement, Case No. IT-95-16-A, App. Ch., 23 October 2001, paras. 88, 92.

⁶⁵ *Simić Blagoje*, Judgement, Case No. IT-95-9-A, App. Ch., 28 November 2006, para. 20; *Naletilić and Martinović*, Judgement, Case No. IT-98-34-A, App. Ch., 3 May 2006, para. 23; *Kvočka et al.*, Judgement, Case No. IT-98-30/1-A, App. Ch., 28 February 2005, para. 27; *Kupreškić et al.*, Appeal Judgement, Case No. IT-95-16-A, App. Ch., 23 October 2001, para. 88.

⁶⁶ *Kordić and Čerkez*, Judgement, Case No. IT-95-14/2-A, App. Ch., 17 December 2004, para. 135.

⁶⁷ *Lukić M. and Lukić S.*, Decision on the Form of the Indictment, Case No. IT-98-32/1-PT, T. Ch., 11 May 2006, para. 8.

⁶⁸ *Kvočka et al.*, Judgement, Case No. IT-98-30/1-A, App. Ch., 28 February 2005, para. 41.

facts that must be clearly set forth in the indictment.⁶⁹ The practice of the International Tribunals requires that the prosecution plead the specific mode or modes of liability for which the accused is being charged.⁷⁰ Indeed, the prosecution should only plead the modes of responsibility on which it intends to rely.⁷¹

Whereas the prosecution is entitled to charge an accused with all modes of liability provided for in the Statute, it may not rely on the Chamber's authority to choose the appropriate legal characterisation of the accused's conduct to justify its failure to only plead the mode(s) of liability which reflects the accused's conduct and on which it intends to adduce evidence.⁷²

Since an individual cannot be both the principal perpetrator of a particular act and the accomplice thereto, it is well recognised that the complicity must be pleaded as an alternative form of responsibility.⁷³

Whereas genocide is the crime, joint criminal enterprise and complicity in genocide are two modes of liability, two methods by which the crime of genocide can be committed and individuals held responsible for this crime. It is therefore impossible to plead that complicity in genocide has been committed by means of a joint criminal enterprise. Complicity can only be pleaded as a form of liability for the crime of genocide.⁷⁴

2.4.2. Pleading Relevant Acts and Conducts

The acts and conduct of the accused on which the prosecution relies to establish criminal responsibility are material facts to be pleaded in an indictment.⁷⁵ The accused must be informed not only of his own alleged conduct giving rise to criminal responsibility but also of the acts and crimes of his alleged subordinates or accomplices.⁷⁶ However, pleading accomplice or superior responsibility does

⁶⁹ *Ntagerura et al.*, Judgement and Sentence, Case No. ICTR-99-46-T, T. Ch., 25 February 2004, para. 31; *Krnjelac*, Judgement, Case No. IT-97-25-A, App. Ch., 17 September 2003, para. 138.

⁷⁰ *Simić Blagoje*, Judgement, Case No. IT-95-9-A, App. Ch., 28 November 2006, para. 21; *Semanza*, Judgement, Case No. ICTR-97-20-A, App. Ch., 20 May 2005, para. 357; *Blaškić*, Judgement, Case No. IT-95-14-A, App. Ch., 29 July 2004, para. 215.

⁷¹ *Simić Blagoje*, Judgement, Case No. IT-95-9-A, App. Ch., 28 November 2006, para. 21; *Kvočka et al.*, Judgement, Case No. IT-98-30/1-A, App. Ch., 28 February 2005, para. 41.

⁷² *Bikindi*, Judgement, Case No. ICTR-01-72-T, T. Ch., 2 December 2008, para. 403.

⁷³ *Karemera et al.*, Decision on Defence Motions Challenging the Pleading of a Joint Criminal Enterprise in a Count of Complicity in Genocide in the Amended Indictment, Case No. ICTR-98-44-T, T. Ch., 18 May 2006, para. 9.

⁷⁴ *Karemera et al.*, Decision on Defence Motions Challenging the Pleading of a Joint Criminal Enterprise in a Count of Complicity in Genocide in the Amended Indictment, Case No. ICTR-98-44-T, T. Ch., 18 May 2006, para. 8.

⁷⁵ *Kordić and Čerkez*, Judgement, Case No. IT-95-14/2-A, App. Ch., 17 December 2004, paras. 144, 147; *Kvočka et al.*, Judgement, Case No. IT-98-30/1-A, App. Ch., 28 February 2005, para. 42.

⁷⁶ *Ntagerura et al.*, Judgement and Sentence, Case No. ICTR-99-46-T, T. Ch., 25 February 2004, para. 35; *Strugar et al.*, Decision on Defence Preliminary Motion Concerning the Form of the Indictment, Case No. IT-01-42-PT, T. Ch., 28 June 2002.

not obviate the prosecution's obligation to particularise the underlying criminal events for which it seeks to hold the accused responsible, particularly where the accused was allegedly in close proximity to the events.⁷⁷

The ICTY and ICTR Appeals Chambers have taken a stricter approach than before to the degree of specification of material facts which should be pleaded in an indictment and have applied that strict approach to the averment of the acts and conduct of the accused on which the prosecution rely as indicating his criminal responsibility.⁷⁸

2.5. MATERIAL FACTS RELATED TO STATE OF MIND (MENS REA)

The prosecution must provide satisfactory detail as to the mental element allegedly possessed by the accused for each particular offence and each mode of criminal responsibility. Sufficient elaboration of the requisite *mens rea* reflects the requirement of the Rules that the accused be informed of the nature and cause of the charges against him.⁷⁹ There are two ways in which the relevant state of mind may be pleaded: (i) either the specific state of mind itself should be pleaded as a material fact, in which case, the facts by which that material fact is to be established are ordinarily matters of evidence, and need not be pleaded; or (ii) the facts from which the state of mind is to be inferred, should be pleaded. Each of the material facts must usually be pleaded expressly, although in some circumstances it may suffice if they are expressed by necessary implication.⁸⁰

Since *mens rea* is almost always a matter of inference from facts and circumstances established by the evidence, the emphasis on pleading the facts on which the prosecution will rely to establish the requisite *mens rea* signifies the importance attached to ensuring that the indictment informs the accused clearly of the nature and cause of the charges against him.⁸¹ However, the prosecution is not required to plead in the indictment the *evidence* by which it intends to establish that the accused possessed the state of mind required for each of the various forms of responsibility alleged pursuant to Article 7(1) and 7(3) of the

⁷⁷ *Ntagerura et al.*, Judgement and Sentence, Case No. ICTR-99-46-T, T. Ch., 25 February 2004, para. 35; *Strugar et al.*, Decision on Defence Preliminary Motion Concerning the Form of the Indictment, Case No. IT-01-42-PT, T. Ch., 28 June 2002; *Brdanin and Talić*, Decision on Objections by Momir Talić to the Form of the Amended Indictment, Case No. IT-99-36-PT, T. Ch., 20 February 2001, paras. 19-20.

⁷⁸ *Pavković et al.*, Decision on Vladimir Lazarević's Preliminary Motion on Form of Indictment, Case No. IT-03-70-PT, T. Ch., 8 July 2005, para. 6.

⁷⁹ *Čermak and Markač*, Decision on Prosecution Motion Seeking Leave to Amend the Indictment, Case No. IT-03-73-PT, T. Ch., 19 October 2005, para. 23.

⁸⁰ *Blaškić*, Judgement, Case No. IT-95-14-A, App. Ch., 29 July 2004, para. 219.

⁸¹ *Pavković et al.*, Decision on Vladimir Lazarević's Preliminary Motion on Form of Indictment, Case No. IT-03-70-PT, T. Ch., 8 July 2005, para. 8.

Statute and the failure to act required to establish his superior responsibility with regard to the crimes charged, but rather the material facts, including the conduct of the accused from which these elements are to be inferred. Doing so will assist the prosecution in focusing on those allegations which support its theory of the means by which crimes were committed, and provide the defence proper notice of these material facts, while having no impact on the need to call additional witnesses to support each allegation, and thus would not adversely affect the fair and expeditious conduct of proceedings or the outcome of the trial.⁸²

Where that state of mind is to be established by inference from other facts, particularly the acts and conduct of the accused, then the indictment may be defective if it does not include notice of these matters. For example, a meeting which the accused is alleged to have attended, and which is a fundamental part of the prosecution's case against the accused, constitutes a material fact which should be pleaded in the indictment.⁸³

The prosecution shall plead as a material fact that the accused had the relevant state of mind required (*mens rea*) for each crime alleged to fall within the object of the joint criminal enterprise.⁸⁴ While the required *actus reus* is identical in all three forms of joint criminal enterprise, the required *mens rea* differs according to the category of JCE under consideration.⁸⁵

2.6. LEGAL PREREQUISITES AS MATERIAL FACTS

The legal prerequisites which apply to offences charged (such as existence of a state of armed conflict, civilian status of victims, *etc.*) are material facts and must be pleaded in an indictment.⁸⁶

If the prosecution wishes to rely upon an international armed conflict, even if only in the alternative, it must plead as a material fact that the armed conflict was international in character and state the basis upon which such an assertion

⁸² *Milutinović et al.*, Decision on Prosecution's Request for Certification for Appeal of Decision on Vladimir Lazarević's and Sreten Lukić's Preliminary Motions on Form of Indictment, Case No. IT-05-87-PT, T. Ch., 19 August 2005, para. 5.

⁸³ *Pavković et al.*, Decision on Vladimir Lazarević's Preliminary Motion on Form of Indictment, Case No. IT-03-70-PT, T. Ch., 8 July 2005, para. 9.

⁸⁴ *Brđanin and Talić*, Decision on Form of Third Amended Indictment, Case No. IT-99-36-PT, T. Ch., 21 September 2001, para. 24(2).

⁸⁵ *Krnojelac*, Judgement, Case No. IT-97-25-A, App. Ch., 17 September 2003, para. 31; *Vasiljević*, Judgement, Case No. IT-98-32-A, App. Ch., 25 February 2004, paras. 100-101.

⁸⁶ *Martić*, Decision on Preliminary Motion against the Amended Indictment, Case No. IT-95-11-PT, T. Ch., 2 June 2003, para. 5; *Deronjić*, Decision on Form of the Indictment, Case No. IT-02-61-PT, T. Ch., 25 October 2002, para. 8; *Strugar et al.*, Decision on Defence Preliminary Motion Concerning the Form of the Indictment, Case No. IT-01-42-PT, T. Ch., 28 June 2002, para. 7; *Krajišnik and Plavšić*, Decision on Prosecution's Motion for Leave to Amend the Consolidated Indictment, Case No. IT-00-39 & 40-PT, T. Ch., 4 March 2002, para. 9; *Hadžihasanović and Kubura*, Decision on the Form of the Indictment, Case No. IT-01-47-PT, T. Ch., 7 December 2001, para. 10.

is made. The prosecution should not be permitted to rely upon the imprecision of its current pleading in order to put forward a case that the armed conflict was international in character without a further amendment to its indictment to make this expressly clear.⁸⁷ However, where there is no claim of an international armed conflict and the alleged armed conflict is internal in nature, the jurisprudence of the Tribunals has established no equivalent requirement.⁸⁸

If the prosecution seeks to allege violations of the laws or customs of war pursuant to Article 3 of the ICTY Statute, the character of which requires under customary international law – as a general element – that the conflict be international, then the prosecution would be required to plead internationality.⁸⁹

Establishing and interpreting customary international law is a legal question, and no party has a burden to establish or interpret legal norms; rather it is for the Chamber to set out and interpret the law.⁹⁰

2.7. ADDITIONAL FACTS IN THE INDICTMENT

According to Rule 47(C), the indictment shall set forth a concise statement of the facts of the case and of the crime with which the suspect is charged. Thus, the prosecution may include in an indictment allegations that are not strictly related to the elements of the crimes themselves. Here, it is important to distinguish between the word “crime” and “case” as they appear in Rule 47(C). The “crime” means any of the offences enumerated in Articles of the Statute. The “case” has a broader meaning and includes relevant allegations of facts or circumstances that relate to the prosecution's entire theory of a case that paint a more full picture of the events of a given case for other purposes, including *inter alia*, providing context, showing relationships, demonstrating the large-scale nature of the crimes. Under Rule 47(C) the prosecution may allege facts of its case which go beyond the more limited scope (temporal or otherwise) of the crimes.⁹¹

⁸⁷ *Dragomir Milošević*, Decision on Defence Preliminary Motion Under Rule 72(A)(ii), Case No. IT-98-29/1-PT, T. Ch., 18 July 2005, para. 17; *Hadžihasanović et al.*, Decision Pursuant to Rule 72(E) as to Validity of Appeal, Case No. IT-01-47-AR72, Bench of the Appeals Chamber, 21 February 2003, paras. 11-12; *Brđanin and Talić*, Decision on Objections by Momir Talić to the Form of the Amended Indictment, Case No. IT-99-36-PT, T. Ch., 20 February 2001, para. 52.

⁸⁸ *Dragomir Milošević*, Decision on Defence Preliminary Motion Under Rule 72(A)(ii), Case No. IT-98-29/1-PT, T. Ch., 18 July 2005, para. 17.

⁸⁹ *Delić*, Decision on Defence Motion Alleging Defects in the Form of the Indictment and Order on Prosecution Motion to Amend the Indictment, Case No. IT-04-83-PT, T. Ch., 13 December 2005, para. 42.

⁹⁰ *Boškoski and Tarčulovski*, Decision on Boškoski Defence Motion for Admission of Exhibits from the Bar Table – “Armed Conflict” And Related Requirements under Article 3 of the Statute, Case No. IT-04-82-T, T. Ch., 27 February 2008, para. 7.

⁹¹ *Niyitegeka*, Decision on Prosecutor's Request for Leave to File an Amended Indictment, Case No. ICTR-96-14-I, T. Ch., 21 June 2000, p. 11; *Nsengiyuma*, Decision on the Defence Motions

A detailed indictment that includes historical background of the offences, and other useful information in connection to the crimes charged could provide a greater degree of specificity and clarity to the allegations against an accused, and is therefore favourable to the accused.⁹² However, the allegations which are relied upon to plead the accused course of conduct should be incorporated within the main body of the indictment since such allegations need to be proven at trial.⁹³

The *Additional Facts* section in the indictment serves to sketch the context in which the alleged crimes charged were committed.⁹⁴ The additional facts may include the general historical facts that inform the judges about the situation in which the crimes occurred, showing relationships, and demonstrating the large-scale nature of the crimes.⁹⁵

3. CHARGES IN THE INDICTMENT

As a rule, the indictment should articulate each charge specifically and separately, and identify the particular acts in a satisfactory manner in order to inform the accused of the charges against which he has to defend himself.⁹⁶ There is a clear distinction between counts or charges made in an indictment and the material facts that underpin that charge or count. The count or charge is the legal characterisation of the material facts which support that count or charge. In pleading an indictment, the prosecution is required to specify the alleged legal prohibition infringed (the count or charge) and the acts or

Objecting to the Jurisdiction of the Trial Chamber on the Amended Indictment, Case No. ICTR-96-12-I, T. Ch., 13 April 2000, para. 24.

⁹² *Niyitegeka*, Decision on Prosecutor's Request for Leave to File an Amended Indictment, Case No. ICTR-96-14-I, T. Ch., 21 June 2000, p. 11.

⁹³ *Stanković*, Decision on the Defence Preliminary Motion on the Form of the Indictment, Case No. IT-96-23/2-PT, T. Ch., 15 November 2002, para. 11; *Strugar et al.*, Decision on Defence Preliminary Motion Concerning the Form of the Indictment, Case No. IT-01-42-PT, T. Ch., 28 June 2002, para. 10; *Kunarac*, Decision on the Form of the Indictment, Case No. IT-96-23-PT, T. Ch., 4 November 1999, para. 8.

⁹⁴ *Stanković*, Decision on the Defence Preliminary Motion on the Form of the Indictment, Case No. IT-96-23/2-PT, T. Ch., 15 November 2002, para. 11; *Krnjelac*, Decision on the Defence Preliminary Motion on the Form of the Indictment, Case No. IT-97-25-PT, T. Ch., 24 February 1999, para. 24; *Kunarac*, Decision on Defence Preliminary Motion on the Form of the Amended Indictment, Case No. IT-96-23-PT, T. Ch., 21 October 1998, p. 1.

⁹⁵ *Kabiligi and Ntabakuze*, Decision on The Defence Motions Objecting to a Lack of Jurisdiction and Seeking to Declare the Indictment void *ab initio*, Case No. ICTR-96-34-I, T. Ch., 13 April 2000, para. 33.

⁹⁶ *Nsengiyumva*, Decision on the Defence Motion Raising Objections on Defects in the Form of the Indictment and to Personal Jurisdiction on the Amended Indictment, Case No. ICTR-96-12-I, T. Ch., 12 May 2000; *Delalić et al.*, Decision on Motion by the Accused Hazim Delić Based on Defects in the Form of the Indictment, Case No. IT-96-21-T, T. Ch., 15 November 1996, para. 14.

omissions of the accused that give rise to that allegation of infringement of a legal prohibition (material facts).⁹⁷

Pursuant to Article 74(2) of the ICC Statute, the decision of the Trial Chamber shall not exceed the facts and circumstances described in the charges and any amendments to the charges. Therefore, as it was noted, the charging document shall be composed of the facts and circumstances,⁹⁸ and their legal characterisation.⁹⁹ Accordingly, it is incumbent on the Prosecutor to clearly define in the document containing the charges all the facts and circumstances and to propose therein their legal characterisation.¹⁰⁰

A pre-trial brief does not substitute for an indictment in identifying the charges against an accused.¹⁰¹

3.1. COUNTS

Although no rule specifies the content of the "count", it is evident from the context of Rule 47 that this term refers to the legal characterisation or qualification of the crime alleged in the concise statement of facts of the crime. This legal qualification must include both the crime alleged and the mode of the accused's alleged participation. Thus, a "count" defines the *nature of the charge* referred to in Article 20(4)(a) of the Statute.¹⁰²

The prosecution's failure to expressly state that a paragraph in the indictment supports a particular count in the indictment is indicative that the allegation is not charged as a crime.¹⁰³ The same may be said where a particular allegation is charged under a particular count only.¹⁰⁴

⁹⁷ *Muvunyi*, Decision on Prosecution Interlocutory Appeal against Trial Chamber II Decision of 23 February 2005, Case No. ICTR-2000-55A-AR73, App. Ch., 12 May 2005, para. 19.

⁹⁸ *Gbagbo*, Decision Adjourning the Hearing on the Confirmation of Charges pursuant to Article 61(7)(c)(i) of the Rome Statute, Case No. ICC-02/11-01/11, PTC, 3 June 2013, para. 19.

⁹⁹ *Gbagbo*, Decision Adjourning the Hearing on the Confirmation of Charges pursuant to Article 61(7)(c)(i) of the Rome Statute, Case No. ICC-02/11-01/11, PTC, 3 June 2013, para. 19, with reference to *Muthaura et al.*, Decision on the Confirmation of Charges pursuant to Article 61(7)(a) and (b) of the Rome Statute, Case No. ICC-01/09-02/11, PTC, 23 January 2012, para. 56.

¹⁰⁰ *Gbagbo*, Decision Adjourning the Hearing on the Confirmation of Charges pursuant to Article 61(7)(c)(i) of the Rome Statute, Case No. ICC-02/11-01/11, PTC, 3 June 2013, para. 19, with reference to Regulation 52 of the Regulations of the Court.

¹⁰¹ *Župljanin and Stanišić*, Decision on Motion and Supplementary Motion for Leave to Amend the Indictment, Case No. IT-08-91-PT, T. Ch., 28 April 2009, para. 40, with reference to *Stanišić and Simatović*, Decision on the Prosecution's Motion to Amend the Revised Second Amended Indictment, Case No. IT-03-69-PT, T. Ch., 4 July 2008, para. 108; *Ntagerura et al.*, Judgement, Case No. ICTR-99-46-A, App. Ch., 7 July 2006, para. 32.

¹⁰² *Ntagerura et al.*, Judgement and Sentence, Case No. ICTR-99-46-T, T. Ch., 25 February 2004, para. 36.

¹⁰³ *Karera*, Judgement, Case No. ICTR-01-74-A, App. Ch., 2 February 2009, para. 365, citing *Muvunyi*, Judgement, Case No. ICTR-2000-55A-A, App. Ch., 29 August 2008, para. 156.

¹⁰⁴ *Župljanin and Stanišić*, Decision on Motion and Supplementary Motion for Leave to Amend the Indictment, Case No. IT-08-91-PT, T. Ch., 28 April 2009, para. 40.

Each count in the indictment should indicate the precise legal qualification of the crime charged which should be based on the material facts alleged in the indictment.¹⁰⁵ The count must also indicate which paragraphs of the concise statement of the facts of the crime support the charge. When a count charges the accused with accomplice liability, then it must refer to the paragraphs describing the relevant conduct of the accused and of the principal perpetrator. When a count charges superior responsibility, then it is essential for the count to refer to the paragraphs describing the relationship between the accused and the alleged subordinates, the basis for the alleged knowledge of the accused, and the alleged failure to prevent the crime or to punish the subordinate. Nevertheless, in principle, defects in legal qualification may not be fatal because the Chamber can apply the correct material law to the factual findings regardless of the qualification indicated by the prosecution, provided that the concise statement of facts of the crime adequately describes the accused's role in the crime.¹⁰⁶

It has been noted that common-law jurisdictions developed the rule against duplicity, *i.e.* charging two offences in the same count, in order to ensure precision and certainty in charging.¹⁰⁷ This rule applies also to international criminal tribunals such that the charging of two separate offences in a single count renders the count defective, although a single count may charge different means of committing the same offence.¹⁰⁸ The remedies available to the Trial Chamber included: (i) quashing the count; (ii) ordering that the indictment be amended; (iii) directing the prosecution to elect to proceed on the basis of one of the two offences in the duplicitous count; (iv) upon a review of the entire case, determining which of the two offences charged in the count the accused had defended fully, having regard to the manner in which the defence case had been conducted; and (v) refusing to consider evidence of one of the two charges so as to eliminate the duplicity. Each case is to be considered on its own merits.¹⁰⁹

¹⁰⁵ *Nchamihigo*, Decision on Defence Motion on Defects in the Form of the Indictment, Case No. ICTR-2001-63-R50, T. Ch., 27 September 2006, para. 6; *Ntagerurwa et al.*, Judgement and Sentence, Case No. ICTR-99-46-T, T. Ch., 25 February 2004, para. 37; *Semanza*, Judgement and Sentence, Case No. ICTR-97-20-1, T. Ch., 15 May 2003, para. 59; *Krnjelac*, Judgement, Case No. IT-97-25-A, App. Ch., 17 September 2003, para. 138; *Delalić et al.*, Judgement, Case No. IT-96-21-A, App. Ch., 20 February 2001, para. 350.

¹⁰⁶ *Nchamihigo*, Decision on Defence Motion on Defects in the Form of the Indictment, Case No. ICTR-2001-63-R50, T. Ch., 27 September 2006, para. 6; *Ntagerurwa et al.*, Judgement and Sentence, Case No. ICTR-99-46-T, T. Ch., 25 February 2004, para. 38; *Semanza*, Judgement and Sentence, Case No. ICTR-97-20-1, T. Ch., 15 May 2003, para. 59.

¹⁰⁷ *Naletilić and Martinović*, Decision on Prosecution Motion to Amend Count 5 of the Indictment, Case No. IT-98-34-PT, T. Ch., 28 November 2000, n. 2.

¹⁰⁸ *Brima et al.*, Judgement, Case No. SCSL-2004-16-A, App. Ch., 22 February 2008, para. 103.

¹⁰⁹ *Ibid.*, para. 108.

3.2. CUMULATIVE AND ALTERNATIVE CHARGING (AD HOC TRIBUNALS)

See also Amendment of the Charges and Changing the Legal Characterisation of Facts (ICC), p. 74; Cumulative Conviction, p. 1055.

The practice of cumulative and alternative charging has been accepted by the Chamber of the *ad hoc* Tribunals. This practice was endorsed by the Trial Chamber in the very first ICTY *Tadić* case¹¹⁰ and then in the *Delalić et al.* case.¹¹¹ Later, the same approach was accepted by the ICTR Trial Chamber in the *Akayesu* case.¹¹²

The Trial Chamber in the *Brđanin and Talić* case opined that there is no prejudice to an accused in permitting cumulative charging, when the issues arising from an accumulation of offences are determined after all of the evidence has been presented, whereas the very real possibilities of prejudice to the prosecution in restricting such charging are manifest. From a practical point of view, therefore, the argument for permitting cumulative charging to continue is an overwhelming one.¹¹³

It was held in the *Kvočka et al.* case that both alternative and cumulative charging are permissible in certain circumstances. The defence will have to prepare their cases in respect of all the charges, irrespective of whether they are charged in the alternative or cumulatively.¹¹⁴

The Trial Chamber in the *Krnjelac* case noted that it is permissible to include in the indictment different charges arising out of the same or substantially the same facts.¹¹⁵ According to the Chamber, the prosecution must be allowed to frame charges within the one indictment on the basis that the court may not accept a particular element of one charge which does not have to be established for the other charges, and in any event in order to reflect the totality of the accused's criminal conduct, so that the punishment imposed will do the same.¹¹⁶

For instance, in the *Tadić* case, the accused was charged *cumulatively* for the same acts (beating victims to death) with grave breaches of the Geneva

¹¹⁰ *Tadić*, Decision on the Defence Motion on the Form of the Indictment, IT-94-1-T, T. Ch., 14 November 1995, para. 17.

¹¹¹ *Delalić et al.*, Decision Application for Leave to Appeal by Hazim Delić (Defects in the Form of the Indictment), Case No. IT-96-21-AR72.5, Bench of the Appeals Chamber, 6 December 1996, para. 35.

¹¹² *Akayesu*, Judgement, Case No. ICTR-96-4-T, T. Ch., 2 September 1998, para. 468.

¹¹³ *Brđanin and Talić*, Decision on Objections by Momir Talić to the Form of the Amended Indictment, Case No. IT-99-36-PT, T. Ch., 20 February 2001, para. 40.

¹¹⁴ *Kvočka et al.*, Decision on Defence Preliminary Motions on the Form of the Indictment, Case No. IT-98-30-PT, T. Ch., 12 April 1999, para. 25.

¹¹⁵ *Krnjelac*, Decision on the Defence Preliminary Motion on the Form of the Indictment, Case No. IT-97-25-PT, T. Ch., 24 February 1999, para. 10.

¹¹⁶ *Ibid.*

Conventions (wilful killing), violation of the laws or customs of war (murder), a crime against humanity (murder). On the basis of the evidence presented at trial, the Trial Chamber concluded that the armed conflict in the area in question at the relevant time was not international and, therefore, victims were not protected under the Geneva Conventions. Accordingly, the Chamber found the accused not guilty of all counts which relied upon grave breaches.¹¹⁷

In the *Delalić et al.* case, accused Landžo was charged for the same acts *cumulatively* with a grave breach of the Geneva Conventions (torture) and a violation of the laws or customs of war (torture). *Alternatively*, the accused was charged for the same acts with violation of the laws or customs of war (cruel treatment). Upon the trial, the Trial Chamber found the accused guilty of torture and dismissed charge of cruel treatment as being charged in the alternative.¹¹⁸

The Trial Chamber in the *Krstić* case opined that there are good reasons for considering the matter of cumulative versus alternative charging at the beginning. If the issues are clarified and narrowed at the outset, it may help in making the proceedings more focused and efficient.¹¹⁹ In addition, it may aid the defendant in the preparation of his case to know which charges will ultimately be considered to cover the same “offence” for purposes of conviction and sentencing.¹²⁰

In the *Kupreškić et al.* case, the Trial Chamber found that the approach adopted by the prosecution creates an onerous situation for the defence, on the grounds that the same facts are often cumulatively classified under different headings.¹²¹ The Chamber accepted that if, in the Prosecutor’s view, the alleged facts simultaneously infringe more than one provision of the Statute, the Prosecutor should present cumulative charges under each relevant provision.¹²² At the same time, the Chamber recognised that in practice the Prosecutor may legitimately fear that, if she fails to prove the required legal and factual elements necessary to substantiate a charge, the count may be dismissed even if in the course of the trial it has turned out that other elements were present supporting a different and perhaps even a lesser charge. This eventuality might result in a dismissal of the charge.¹²³

The ICTY Appeals Chamber in the *Delalić et al.* case held that cumulative charging is to be allowed in light of the fact that, prior to the presentation of all of the evidence, it is not possible to determine to a certainty which of the charges

¹¹⁷ *Tadić*, Opinion and Judgement, Case No. IT-94-1-T, T. Ch., 7 May 1997, para. 608.

¹¹⁸ *Delalić et al.*, Judgement, Case No. IT-96-21-T, T. Ch., 16 November 1998, para. 924.

¹¹⁹ *Krstić*, Decision on Defence Preliminary Motion on the Form of the Amended Indictment Count 7-8, Case No. IT-98-33-PT, T. Ch., 28 January 2000, p. 5.

¹²⁰ *Ibid.*

¹²¹ *Kupreškić et al.*, Judgement, Case No. IT-95-16-T, T. Ch., 14 January 2000, para. 721.

¹²² *Ibid.*, para. 722.

¹²³ *Ibid.*, para. 723.

brought against an accused will be proven.¹²⁴ In the Appeals Chamber’s view, the Trial Chamber is better poised, after the parties’ presentation of the evidence, to evaluate which of the charges may be retained, based upon the sufficiency of the evidence.¹²⁵ The Appeals Chamber noted that cumulative charging constitutes the usual practice of both the ICTY and the ICTR.¹²⁶ The same reasoning, according to the Appeals Chamber, allows for alternative charging.¹²⁷

The Trial Chamber in the *Krstić* case opined that there are good reasons for considering the matter of cumulative versus alternative charging at the beginning. If the issues are clarified and narrowed at the outset, it may help in making the proceedings more focused and efficient.¹²⁸ In addition, it may aid the defendant in the preparation of his case to know which charges will ultimately be considered to cover the same “offence” for purposes of conviction and sentencing.¹²⁹

In the *Brđanin and Talić* case, the Trial Chamber caution that there may be specific examples of obviously duplicative charging, where there is no reason in the particular circumstances that the prosecution needs to see how the evidence turns out before selecting the most appropriate charge. In those circumstances, according to the Chamber, it may be oppressive to allow cumulative charging.¹³⁰ A few months later, the same presiding judge reiterated this approach in another case in the following words:

“Judge Hunt: ... Nobody can actually stop the Prosecution ... multiplying unnecessarily the counts in the indictment unless it produces an injustice, but I do suggest that somebody might like to look to see just now necessary 80 counts really are in this case. ... So it may be that the Prosecution... can look at it sensibly as to how the trial is going to be conducted, and it may like to slightly reduce them at some stage.”¹³¹

It was accepted that the prosecution may plead alternative forms of criminal responsibility,¹³² so that, if the Trial Chamber does not accept its principal case, the prosecution relies in the alternative upon a case.¹³³ For instance, the

¹²⁴ *Delalić et al.*, Judgement, Case No. IT-96-21-A, App. Ch., 20 February 2001, para. 400. See also *Naletilić and Martinović*, Judgement, Case No. IT-98-34-A, App. Ch., 3 May 2006, para. 103.

¹²⁵ *Delalić et al.*, Judgement, Case No. IT-96-21-A, App. Ch., 20 February 2001, para. 400.

¹²⁶ *Ibid.* See also *Bagilishema*, Judgement, Case No. ICTR-95-1A-T, T. Ch., 7 June 2001, para. 109.

¹²⁷ *Naletilić and Martinović*, Judgement, Case No. IT-98-34-A, App. Ch., 3 May 2006, para. 103.

¹²⁸ *Krstić*, Decision on Defence Preliminary Motion on the Form of the Amended Indictment Count 7-8, Case No. IT-98-33-PT, T. Ch., 28 January 2000, p. 5.

¹²⁹ *Ibid.*

¹³⁰ *Brđanin and Talić*, Decision on Objections by Momir Talić to the Form of the Amended Indictment, Case No. IT-99-36-PT, T. Ch., 20 February 2001, n. 105.

¹³¹ *Nikolić*, Tr. Transcr., Case No. IT-94-2, 30 March 2001, pp. 42-43.

¹³² *Stanišić Mićo*, Decision on Defence Preliminary Motion on the Form of the Indictment, Case No. IT-04-79-PT, T. Ch., 19 July 2005, para. 6; *Brđanin and Talić*, Decision on Form of Third Amended Indictment, Case No. IT-99-36-PT, T. Ch., 21 September 2001, para. 22.

¹³³ *Brđanin and Talić*, Decision on Form of Third Amended Indictment, Case No. IT-99-36-PT, T. Ch., 21 September 2001, para. 22.

prosecution may plead an alternative responsibility, personal and superior. However, the factual allegations must be sufficiently precise to permit the accused to prepare his defence against both alternatives.¹³⁴ In this regard, the Trial Chamber in the case *Krnojelac* emphasised that it is not sufficient that an accused is made aware of the case to be established upon only one of the alternative bases pleaded.¹³⁵ The Chamber added that the prosecution must clearly identify, so far as the individual responsibility of the accused is concerned, the particular acts of the accused himself or the particular course of conduct on his part which are alleged to constitute that responsibility.¹³⁶

It was noted that, while it is open to the prosecution to plead forms of liability in the alternative and it is for the Trial Chamber to determine at the end of the trial what (if any) liability is made out, the prosecution is not thereby absolved from the responsibility of stating in the pre-trial brief how they allege that the accused is guilty of the crimes with which he is charged.¹³⁷

The judges with a civil law background felt uncomfortable with the practice of alternative charging as one case see from the following excerpt from the trial transcript:

“Judge Schomburg: When I started and learned as a public Prosecutor, I learned that the word ‘or’ in an indictment is always wrong because one has to be quite clear and the other side has to know what it’s all about ... When it comes to the charges, it should be at least clear that charges excluding itself, they are eliminated from the indictment. It can be only either a direct influence of the person or an omission.”¹³⁸

4. PARTICULARS IN THE INDICTMENT

4.1. GENERAL PROVISIONS

The accused is entitled to particulars necessary in order for the accused to prepare his defence and to avoid prejudicial surprise.¹³⁹ An indictment may be

¹³⁴ *Stanišić Mićo*, Decision on Defence Preliminary Motion on the Form of the Indictment, Case No. IT-04-79-PT, T. Ch., 19 July 2005, para. 6; *Blaškić*, Decision on the Defence Motion to Dismiss the Indictment Based on Defects in the Form Thereof (Vagueness/Lack of Adequate Notice of Charges), Case No. IT-95-14-PT, T. Ch., 4 April 1997, para. 32; *Krnojelac*, Decision on the Defence Preliminary Motion on the Form of the Indictment, Case No. IT-97-25-PT, T. Ch., 24 February 1999, para. 13 and n. 21.

¹³⁵ *Krnojelac*, Decision on the Defence Preliminary Motion on the Form of the Indictment, Case No. IT-97-25-PT, T. Ch., 24 February 1999, para. 13.

¹³⁶ *Ibid.*

¹³⁷ *Krajišnik and Plavšić*, Decision Concerning Preliminary Motion on the Form of the Indictment, Case No. IT-00-39 & 40-PT, T. Ch., 1 August 2000, para. 13.

¹³⁸ *Stakić*, Tr. Transcr., Case No. IT-97-24, 18 February 2002, pp. 1515-1516.

¹³⁹ *Krajišnik and Plavšić*, Decision Concerning Preliminary Motion on the Form of the Indictment, Case No. IT-00-39 & 40-PT, T. Ch., 1 August 2000; *Brđanin and Talić*, Decision on Motion to Dismiss Indictment, Case No. IT-99-36-PT, T. Ch., 5 October 1999.

defective when the material facts are pleaded without sufficient specificity, such as, unless there are special circumstances, when the times refer to broad date ranges, the places are only generally indicated, and the victims are only generally identified.¹⁴⁰ The information pleaded as material facts must, so far as it is possible to do so, include the identity of the victim, the place and the approximate date of those acts and the means by which the offence was committed.¹⁴¹

In framing an indictment, the degree of specificity required must necessarily depend upon such variables as (i) the nature of the allegations, (ii) the nature of the specific crimes charged, (iii) the scale or magnitude on which the acts or events allegedly took place, (iv) the circumstances under which the crimes were allegedly committed, (v) the duration of time over which the acts or events constituting the crimes occurred, (vi) the time span between the occurrence of the events and the filing of the indictment, (vii) the totality of the circumstances surrounding the commission of the alleged crimes.¹⁴²

With regard to particulars, the degree of detail that is required presents a special difficulty. The massive scale of the crimes alleged to have occurred – and in a time of armed conflict in which there was a breakdown of the ordinary social structures of the community – limits the capacity of the prosecution to provide particulars to the same degree as would be usual in a domestic criminal law system. For example, it may not be possible to give particulars of all persons alleged to have been killed during a particular incident even though there is credible evidence of the incident and that many were killed during the incident. The fact that there may be difficulties, however, does not excuse the prosecution from making due efforts to provide particulars of the crimes it alleges, to the extent at least that it is in a position to do so. For example, while it may not be in a position to provide exhaustive lists of such matters as the names of all towns and villages allegedly attacked, or the details of all alleged victims, and the exact total number, it may be reasonable to expect that the prosecution is able to provide some particulars of such matters. Just what can be provided by way of particulars would depend greatly on the circumstances of each incident.¹⁴³

¹⁴⁰ *Kvočka et al.*, Judgement, Case No. IT-98-30/1-A, App. Ch., 28 February 2005, para. 31.

¹⁴¹ *Deronjić*, Decision on Form of the Indictment, Case No. IT-02-61-PT, T. Ch., 25 October 2002, para. 25; *Galić*, Decision on Application by Defence for Leave to Appeal, Case: IT-98-29-AR72, Bench of the Appeals Chamber, 30 November 2001, para. 15; *Brđanin and Talić*, Decision on Objections by Momir Talić to the Form of the Amended Indictment, Case No. IT-99-36-PT, T. Ch., 20 February 2001, para. 22; *Krnojelac*, Decision on the Defence Preliminary Motion on the Form of the Indictment, Case No. IT-97-25-PT, T. Ch., 24 February 1999, para. 18.

¹⁴² *Sesay et al.*, Decision and Order on Defence Preliminary Motion for Defects in the Form of the Indictment, Case No. SCSL-04-15-PT, T. Ch., 13 October 2003, para. 8.

¹⁴³ *Stanišić Mico*, Decision on Defence Preliminary Motion on the Form of the Indictment, Case No. IT-04-79-PT, T. Ch., 19 July 2005, para. 21.

Where possible, the prosecution has a duty to provide information as to the time and place of the crime, the identity of the victims and the means by which the crime was perpetrated.¹⁴⁴

The prosecution cannot be required to perform the impossible. Obviously, some witnesses may not know by which guards they were mistreated, and in some cases the number of victims cannot possibly be known due to the long period over which the alleged mistreatments took place. An inability to provide better particulars, rather than such terms as “unidentified soldiers” or “an unknown number of detainees”, will inevitably reduce the value of the evidence of the witnesses who are unable to be more specific, but it does not affect the form of the indictment.¹⁴⁵

A distinction has been drawn in the Tribunals’ jurisprudence between the level of specificity required when pleading an act where it is alleged that the accused had (i) individual responsibility by personally carrying out the acts underlying the crimes charged; (ii) individual responsibility where the accused did not personally carry out the acts underlying the crimes charged; and (iii) superior responsibility for the acts underlying the crimes charged.¹⁴⁶

A decisive factor in determining the degree of specificity with which the prosecution is required to particularise the facts of its case in an indictment is the nature of the alleged criminal conduct charged to the accused, which includes the proximity of the accused to the relevant events.¹⁴⁷ It is essential for the accused to know from the indictment just what the alleged proximity is.¹⁴⁸ 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.¹⁴⁹

¹⁴⁴ *Došen and Kolundžija*, Decision on Preliminary Motions, Case No. IT-95-8-PT, T. Ch., 10 February 2000, para. 8; *Krnojelac*, Decision on the Defence Preliminary Motion on the Form of the Indictment, Case No. IT-97-25-PT, T. Ch., 24 February 1999, para. 12.

¹⁴⁵ *Rašević and Todović*, Decision on Todović Defence Motion on the Form of the Joint Amended Indictment, Case No. IT-97-25/1-PT, T. Ch., 21 March 2006, para. 17.

¹⁴⁶ *Ntakirutimana Elizaphan and Ntakirutimana Gerard*, Judgement, Cases No. ICTR-96-10-A and ICTR-96-17-A, App. Ch., 13 December 2004, para. 74; *Ntagerura et al.*, Judgement and Sentence, Case No. ICTR-99-46-T, T. Ch., 25 February 2004, para. 35.

¹⁴⁷ *Ntagerura et al.*, Judgement and Sentence, Case No. ICTR-99-46-T, T. Ch., 25 February 2004, para. 31; *Galić*, Decision on Application by Defence for Leave to Appeal, Case: IT-98-29-AR72, Bench of the Appeals Chamber, 30 November 2001, para. 15; *Kupreškić et al.*, Appeal Judgement, Case No. IT-95-16-A, App. Ch., 23 October 2001, para. 89.

¹⁴⁸ *Brđanin and Talić*, Decision on Objections by Radoslav Brđanin to the Form of the Amended Indictment, Case No. IT-99-36-PT, T. Ch., 23 February 2001, para. 13.

¹⁴⁹ *Kvočka et al.*, Judgement, Case No. IT-98-30/1-A, App. Ch., 28 February 2005, para. 65; *Galić*, Decision on Application by Defence for Leave to Appeal, Case: IT-98-29-AR72, Bench of the Appeals Chamber, 30 November 2001, para. 15.

If the accused is alleged to be in a senior leadership position and is not alleged to have personally perpetrated any of the underlying substantive crimes in the indictment, then less precision is required in the indictment’s description of them.¹⁵⁰

The prosecution’s obligation to provide particulars in the indictment is at its highest when it seeks to prove that the accused killed or harmed a specific individual.¹⁵¹

In a case based upon superior responsibility, if the prosecution is unable to identify those directly participating in the alleged criminal acts by name, it will be sufficient for it to identify them at least by reference to their ‘category’ (or their official position) as a group.¹⁵² The group of those who directly participated in the alleged crimes may be sufficiently identified by their status and presence at a specific location at the indicated time.¹⁵³

In relation to complaints of the defence as to erroneous personal data of the accused in the indictment, such as his date of birth, a Trial Chamber may instruct the defence to provide the prosecution with the personal data of the accused whose personal data is not correct, in order to have those data included in the amended indictment.¹⁵⁴

4.2. PARTICULARS RELATED TO THE NATURE OF THE CRIMINAL RESPONSIBILITY OF THE ACCUSED

The alleged mode of liability of the accused in a crime pursuant to Article 7(1) should be clearly laid out in an indictment.¹⁵⁵ Indeed, the prosecution is not required to choose between the different forms of responsibility under Article 7(1), but is instead entitled to plead all of them.¹⁵⁶

¹⁵⁰ *Delić*, Decision on the Prosecution’s Submission of Proposed Amended Indictment and Defence Motion Alleging Defects in Amended Indictment, Case No. IT-04-83-PT, T. Ch., 30 June 2006, para. 85.

¹⁵¹ *Ntakirutimana Elizaphan and Ntakirutimana Gerard*, Judgement, Cases No. ICTR-96-10-A and ICTR-96-17-A, App. Ch., 13 December 2004, para. 74.

¹⁵² *Kvočka et al.*, Decision on Defence Preliminary Motions on the Form of the Indictment, Case No. IT-98-30-PT, T. Ch., 12 April 1999, para. 22; *Krnojelac*, Decision on the Defence Preliminary Motion on the Form of the Indictment, Case No. IT-97-25-PT, T. Ch., 24 February 1999, para. 46.

¹⁵³ *Zigiranyirazo*, Decision on Defence Motions (i) Objecting to the Form of the Third Amended Indictment and (ii) Requesting the Harmonisation or Reconsideration of the Decision of 2 March 2005, Case No. ICTR-2001-73-R72, T. Ch., 22 September 2005, p. 11.

¹⁵⁴ *Prljić et al.*, Decision on Prosecution Application for Leave to Amend the Indictment and on Defence Complaints on Form of Proposed Amended Indictment, Case No. IT-04-74-PT, T. Ch., 18 October 2005, para. 75.

¹⁵⁵ *Kordić and Čerkez*, Judgement, Case No. IT-95-14/2-A, App. Ch., 17 December 2004, para. 129.

¹⁵⁶ *Popović et al.*, Decision on Motions Challenging the Indictment Pursuant to Rule 72 of the Rules, Case No. IT-05-88-PT, T. Ch., 31 May 2006, para. 25.

When the prosecution is intending to rely on all modes of responsibility in Article 7(1), then the material facts relevant to each of those modes must be pleaded in the indictment. Otherwise, the indictment will be defective either because it pleads modes of responsibility which do not form part of the prosecution's case, or because the prosecution has failed to plead material facts for the modes of responsibility it is alleging.¹⁵⁷ The prosecution must identify the particular course of conduct of the accused which are alleged to constitute his or her criminal responsibility.¹⁵⁸ The accused is entitled to a specific statement in the indictment of the nature and extent of his participation in the several courses of conduct alleged. Pleading individual responsibility by reference merely to all the form of liability under Article 7(1) of the ICTY Statute (Article 6(1) of the ICTR and SCSL Statutes) in the indictment is likely to cause ambiguity.¹⁵⁹

If the prosecution intends to rely upon each of the different forms of personal responsibility, it is appropriate for the indictment to define individual responsibility in such extensive terms.¹⁶⁰ In order to avoid an ambiguity, where the nature of the responsibility differs, it is preferable that an indictment indicates in relation to each individual count precisely and expressly the particular nature of the responsibility alleged (particular head or heads of liability).¹⁶¹ When an accused is charged both with personal and superior criminal responsibility, the indictment must separate these acts clearly since the same facts cannot simultaneously give rise to the two types of responsibility.¹⁶²

¹⁵⁷ *Kvočka et al.*, Judgement, Case No. IT-98-30/1-A, App. Ch., 28 February 2005, para. 29.

¹⁵⁸ *Kordić and Čerkez*, Judgement, Case No. IT-95-14/2-A, App. Ch., 17 December 2004, para. 129; *Kupreškić et al.*, Appeal Judgement, Case No. IT-95-16-A, App. Ch., 23 October 2001, paras. 95, 98; *Aleksovski*, Judgement, Case No. IT-95-14/1-A, App. Ch., 24 March 2000, para. 171.

¹⁵⁹ *Kvočka et al.*, Judgement, Case No. IT-98-30/1-A, App. Ch., 28 February 2005, para. 29; *Karemera*, Decision on Severance of André Rwamakuba and for Leave to File Amended Indictment, Case No. ICTR-98-44-PT, T. Ch., 14 February 2005, para. 45; *Kordić and Čerkez*, Judgement, Case No. IT-95-14/2-A, App. Ch., 17 December 2004, para. 129; *Blaškić*, Judgement, Case No. IT-95-14-A, App. Ch., 29 July 2004, para. 215; *Ntagerura et al.*, Judgement and Sentence, Case No. ICTR-99-46-T, T. Ch., 25 February 2004, para. 37; *Semanza*, Judgement and Sentence, Case No. ICTR-97-20-1, T. Ch., 15 May 2003, para. 59; *Krnojelac*, Judgement, Case No. IT-97-25-A, App. Ch., 17 September 2003, paras. 138-144; *Aleksovski*, Judgement, Case No. IT-95-14/1-A, App. Ch., 24 March 2000, n. 319; *Delalić et al.*, Judgement, Case No. IT-96-21-A, App. Ch., 20 February 2001, para. 351.

¹⁶⁰ *Stanković*, Decision on the Defence Preliminary Motion on the Form of the Indictment, Case No. IT-96-23/2-PT, T. Ch., 15 November 2002, para. 13; *Blagojević et al.*, Decision on Motions Challenging the Form of Amended Joinder Indictment, Case No. IT-02-60-PT, T. Ch., 1 August 2002, para. 18; *Furundžija*, Judgement, Case No. IT-95-17/1-T, T. Ch., 10 December 1998, para. 189.

¹⁶¹ *Ntagerura et al.*, Judgement and Sentence, Case No. ICTR-99-46-T, T. Ch., 25 February 2004, para. 31; *Semanza*, Judgement and Sentence, Case No. ICTR-97-20-1, T. Ch., 15 May 2003, para. 59; *Krnojelac*, Judgement, Case No. IT-97-25-A, App. Ch., 17 September 2003, para. 138; *Delalić et al.*, Judgement, Case No. IT-96-21-A, App. Ch., 20 February 2001, para. 350.

¹⁶² *Kupreškić et al.*, Appeal Judgement, Case No. IT-95-16-A, App. Ch., 23 October 2001, para. 21; *Kanyabashi*, Decision on Defence Preliminary Motion for Defects in the Form of the Indictment, Case No. ICTR-96-15-I, T. Ch., 31 May 2000, paras. 5.8-5.11.

The material facts to be pleaded in an indictment may vary depending on the particular head of Article 7(1) responsibility.¹⁶³

Where an indictment is based on personal criminal responsibility under Article 7(1) of the ICTY Statute, the prosecution may be required to indicate in relation to each individual count the particular nature of the responsibility alleged, *i.e.* to indicate the particular form of participation.¹⁶⁴

If a count consists of more than one incident, the prosecution shall clearly plead with respect to each incident under the count, whether its case is one of personal or superior responsibility.¹⁶⁵

The accused's formal position in the police hierarchy as commander or deputy commander is immaterial to his responsibility pursuant to Article 7(1) of the ICTY Statute (Article 6(1) of the ICTR and SCSL Statutes): a person does not need to hold a formal position in a hierarchy to incur liability under Article 7(1). The allegation that the accused was commander or deputy commander of the camp is not a material fact in relation to his liability under Article 7(1). It is for the same reason unnecessary for the prosecution to plead the fact that the accused held a *de facto* position of authority and influence in the camp.¹⁶⁶

The prosecution does not have to identify precise conversations or actions taken by the accused. However, the accused is entitled to know the manner in which he is to be held responsible – for example, whether it is alleged that he ordered the persecution, torture, and killings, or whether he merely assisted in some other identified way.¹⁶⁷

It is critical for the accused to know exactly from which date he is alleged to be criminally responsible for the acts of his subordinates and at which date that alleged superior responsibility ended.¹⁶⁸

¹⁶³ *Boškoski and Tarčulovski*, Decision on Prosecution Motion for Leave to Amend the Original Indictment and Defence Motions Challenging the Form of the Proposed Amended Indictment, Case No. IT-04-82-PT, T. Ch., 1 November 2005, para. 28.

¹⁶⁴ *Blaškić*, Judgement, Case No. IT-95-14-A, App. Ch., 29 July 2004, para. 219; *Krnojelac*, Judgement, Case No. IT-97-25-A, App. Ch., 17 September 2003, para. 138; *Delalić et al.*, Judgement, Case No. IT-96-21-A, App. Ch., 20 February 2001, para. 350.

¹⁶⁵ *Stanišić Mičo*, Decision on Defence Preliminary Motion on the Form of the Indictment, Case No. IT-04-79-PT, T. Ch., 19 July 2005, para. 6; *Deronjić*, Decision on Form of the Indictment, Case No. IT-02-61-PT, T. Ch., 25 October 2002, paras. 25-26.

¹⁶⁶ *Kvočka et al.*, Judgement, Case No. IT-98-30/1-A, App. Ch., 28 February 2005, para. 177.

¹⁶⁷ *Krnojelac*, Decision on Preliminary Motion on Form of Amended Indictment, Case No. IT-97-25-PT, T. Ch., 11 February 2000, para. 22; *Đukić*, Decision on Preliminary Motion of the Accused, Case No. IT-96-20-T, T. Ch., 26 April 1996, para. 18; *Tadić*, Decision on the Defence Motion on the Form of the Indictment, IT-94-1-T, T. Ch., 14 November 1995, para. 12.

¹⁶⁸ *Rašević and Todović*, Decision on Todović Defence Motion on the Form of the Joint Amended Indictment, Case No. IT-97-25/1-PT, T. Ch., 21 March 2006, para. 19.

4.3. OTHER PARTICULARS

The nature or scale of the crimes, the fallibility of witnesses' recollections, or witness protection concerns may prevent the prosecution from fulfilling its legal obligations to provide prompt and detailed notice to the accused.¹⁶⁹ It has been emphasised that less detail may be acceptable if the sheer scale of the alleged crimes makes it impracticable to require a high degree of specificity in such matters as the identity of the victims and the dates for the commission of the crimes.¹⁷⁰

4.3.1. Particulars Related to Victims

As an exception to the general rule, where it is alleged that an accused personally committed criminal acts, the indictment must plead with particularity the identity of the victims, in cases of mass criminality the sheer scale of the offences may make it impossible to identify the victims.¹⁷¹ Given the massive scale of many of the alleged crimes, it may be impracticable to require a high degree of specificity in such matters as the identity of the victims and the dates for the commission of the crimes. The nature of such a case would not demand that each and every victim be identified. The prosecution need not specify every single victim in order to meet its obligation of specifying the material facts of the case in the indictment.¹⁷² Although in most cases the massive scale of the alleged crimes may prevent the prosecution from identifying many of the victims with precision, if the prosecution is in a position to do so, it should.¹⁷³

¹⁶⁹ *Ntagerura et al.*, Judgement and Sentence, Case No. ICTR-99-46-T, T. Ch., 25 February 2004, para. 32; *Semanza*, Judgement and Sentence, Case No. ICTR-97-20-1, T. Ch., 15 May 2003, paras. 55, 57-58; *Kupreškić et al.*, Appeal Judgement, Case No. IT-95-16-A, App. Ch., 23 October 2001, para. 89.

¹⁷⁰ *Naletilić and Martinović*, Judgement, Case No. IT-98-34-A, App. Ch., 3 May 2006, para. 24; *Kupreškić et al.*, Appeal Judgement, Case No. IT-95-16-A, App. Ch., 23 October 2001, paras. 89-90; *Ntakirutimana Elizaphan and Ntakirutimana Gerard*, Judgement, Cases No. ICTR-96-10-A and ICTR-96-17-A, App. Ch., 13 December 2004, paras. 73-74.

¹⁷¹ *Brima et al.*, Decision and Order on Defence Preliminary Motion on Defects in the Form of the Indictment, Case No. SCSL-04-16-PT, T. Ch., 1 April, 2004, para. 46; *Kanu*, Decision and Order on Defence Preliminary Motion for Defects in the Form of the Indictment, Case No. SCSL-2003-13-PT, T. Ch., 19 November 2003, para. 21; *Sesay et al.*, Decision and Order on Defence Preliminary Motion for Defects in the Form of the Indictment, Case No. SCSL-04-15-PT, T. Ch., 13 October 2003, para. 20.

¹⁷² *Zelenović*, Decision on Defence Preliminary Motion, Case No. IT-96-23/2-PT, T. Ch., 11 October 2006, para. 9; *Dragomir Milošević*, Decision on Defence Preliminary Motion Under Rule 72(A)(ii), Case No. IT-98-29/1-PT, T. Ch., 18 July 2005, para. 9.

¹⁷³ *Kupreškić et al.*, Appeal Judgement, Case No. IT-95-16-A, App. Ch., 23 October 2001, paras. 89-90. See also *Karera*, Judgement, Case No. ICTR-01-74-A, App. Ch., 2 February 2009, para. 365, citing *Ntakirutimana Elizaphan and Ntakirutimana Gerard*, Judgement, Cases No. ICTR-96-10-A and ICTR-96-17-A, App. Ch., 13 December 2004, para. 25.

Although the prosecution is not required to identify each individual who has been the victim of rape or sexual violence in order to meet its obligations, the prosecution must give notice of details to the extent that those details are within its knowledge. Such a notice may be contained in the witness statements disclosed to the defence. If the prosecution has information regarding the names and details of witnesses and victims of rape or sexual violence upon which evidence will be led at trial and which is not contained in the witness statements that have already been disclosed to the defence, then that information must be disclosed. In addition, for the fairness of the Trial, it is in the best interests of the prosecution to assist with the preparation of the defence through timely disclosure of details in a witness statement.¹⁷⁴ The prosecution must provide some identification of the victims at least by reference to their category or position as a group.¹⁷⁵ If the prosecution case is to be that the victims whom it identifies died, and also that a number of other persons died whom it is unable to identify, the charge would nevertheless be sufficiently pleaded once those particulars have been included in the indictment.¹⁷⁶

4.3.2. Particulars Related to Physical Perpetrators and Subordinates

Failure to plead the identity of the physical perpetrators prejudices the accused's ability to prepare a defence. To put the accused on adequate notice, the prosecution must identify either the particular forces involved or the facts from which it reasonably can be inferred that the physical perpetrators were the subordinates of the accused.¹⁷⁷ In general, whether or not the identity of the direct perpetrators is a material fact that needs to be pleaded depends on the proximity of the accused to the crimes. The more remote the accused is from the alleged crimes, the more the identity of the physical perpetrator is a matter of evidence.¹⁷⁸

¹⁷⁴ *Karemera et al.*, Decision on Oral Motion for a Bill of Particulars, Case No. ICTR-98-44-T, T. Ch., 8 June 2006, para. 9.

¹⁷⁵ *Ntagerura et al.*, Judgement and Sentence, Case No. ICTR-99-46-T, T. Ch., 25 February 2004, para. 32; *Brdanin and Talić*, Decision on Objections by Momir Talić to the Form of the Amended Indictment, Case No. IT-99-36-PT, T. Ch., 20 February 2001, para. 22; *Krnojelac*, Decision on Form of Second Amended Indictment, Case: IT-97-25-PT, T. Ch., 11 May 2000, para. 18; *Krnojelac*, Decision on the Defence Preliminary Motion on the Form of the Indictment, Case No. IT-97-25-PT, T. Ch., 24 February 1999, para. 58.

¹⁷⁶ *Krnojelac*, Decision on the Defence Preliminary Motion on the Form of the Indictment, Case No. IT-97-25-PT, T. Ch., 24 February 1999, para. 58.

¹⁷⁷ *Milutinović et al.*, Decision on Defence Motions Alleging Defects in the Form of the Proposed Amended Joinder Indictment, Case No. IT-05-87-PT, T. Ch., 22 March 2006, para. 10.

¹⁷⁸ *Popović et al.*, Decision on Motions Challenging the Indictment Pursuant to Rule 72 of the Rules, Case No. IT-05-88-PT, T. Ch., 31 May 2006, para. 40; *Brdanin*, Judgement, Case No. IT-99-36-T, T. Ch., 1 September 2004, para. 346; *Simić et al.*, Judgement, Case No. IT-95-9-T, T. Ch., 17 October 2003, para. 145.

The identification of subordinates who allegedly committed the criminal acts by their category or as a group is sufficient, if the prosecution is unable to identify those participating in the alleged crimes by name.¹⁷⁹ Nonetheless, where the prosecution is in a position to identify physical perpetrators by name, it is obliged to do so.¹⁸⁰

The identity of the officers subordinate to the accused who committed acts relevant to the charges in the indictment under Article 7(3) constitute material facts to be pleaded in the indictment and the prosecution is under an obligation to give all the particulars which it is able to give. If the identity and/or role of certain subordinate officers is not known, then the category to which they belong should be specified.¹⁸¹

4.3.3. Particulars Related to Co-Conspirators

With respect to the word “others” in regard to co-conspirators, the prosecution must identify the “others” mentioned in the charge, if their identity is known, without prejudice to the right of the prosecution to move for non-disclosure where permitted by the Rules. If the identity of the “others” is unknown, the prosecution must specify this fact in the indictment by using the term “other persons.”¹⁸²

The expression “others known and unknown” is inappropriate for identification of those with whom the accused participated in the joint criminal enterprise. The prosecution should clarify to whom the expression “others known and unknown” refers. It should state the identity of those participants in the JCE whose identities are known. If the identity of participants is not known, then the category to which they belonged should be specified.¹⁸³

The phrases “many unnamed others” and “many others” for identification of those with whom the accused is alleged to be in a joint criminal enterprise are ambiguous. The Chamber may direct the prosecution clarify these statements by indicating if more names are known, and if not, that these individuals are unknown.¹⁸⁴

¹⁷⁹ *Blaškić*, Judgement, Case No. IT-95-14-A, App. Ch., 29 July 2004, para. 217.

¹⁸⁰ *Ibid.*

¹⁸¹ *Meakić et al.*, Decision on Duško Knežević’s Preliminary Motion on the Form of the Indictment, Case No. IT-02-65-PT, T. Ch., 4 April 2003, para. 35.

¹⁸² *Kabiligi and Ntabakuze*, Decision on the Prosecutor’s Motion to Amend the Indictment, 8 October 1999, Case No. ICTR-97-34-I & ICTR-97-30-I, T. Ch., para. 55.

¹⁸³ *Rašević and Todović*, Decision on Todović Defence Motion on the Form of the Joint Amended Indictment, Case No. IT-97-25/1-PT, T. Ch., 21 March 2006, para. 20; *Pavković et al.*, Decision on Vladimir Lazarević’s Preliminary Motion on Form of Indictment, Case No. IT-03-70-PT, T. Ch., 8 July 2005, paras. 25-26.

¹⁸⁴ *Karemera et al.*, Decision on Defects in the Form of the Indictment, Case No. ICTR-98-44-R72, T. Ch., 5 August 2005, para. 20.

4.3.4. Particularity of Other Information

Such details as the exact address of the property destroyed, or the name of its owner, are not necessary to provide in an indictment which covers a small area with a vast amount of property allegedly destroyed in that area. It is sufficient to indicate the name of the villages, hamlets or areas where the houses or barns concerned were located.¹⁸⁵

To assess whether the existence of an armed conflict is adequately pleaded, it is sufficient for the Chamber to verify whether the accused is charged with crimes committed in the course of an armed conflict between two parties, that the temporal framework of the conflict is sufficiently set out and that the territory where the armed conflict took place is sufficiently detailed. The facts to support those allegations are matters for trial determination.¹⁸⁶ It is sufficient to allege in the indictment that there was a nexus between the conflict and the crimes charged. The nature of this nexus is to be proven at trial by the prosecution; this will allow the Chamber to establish whether under the laws or customs of war the operations qualify as war crimes or rather as legitimate belligerent conduct.¹⁸⁷

Where the prosecution is in a position to provide details as to the means by which the crime is perpetrated, it should identify the method of commission of the crime, or the manner in which it was committed.¹⁸⁸

Where negotiations or agreements entered into by an accused are acts which are alleged to have formed the basis for the individual criminal responsibility of the accused under Article 7(1), the identity of the negotiating or contracting parties would constitute a material fact which must be pleaded.¹⁸⁹

If a date is found to constitute a material fact, it must be pleaded with sufficient specificity.¹⁹⁰ In particular in light of the events like those occurred in Rwanda in 1994, it is not always possible to be precise as to the specific date on which the crimes charged were committed. Nevertheless, these considerations have to be balanced with the accused’s right to be informed in detail about the

¹⁸⁵ *Ademi*, Decision on the Second Defence Motion on the Form of the Indictment, Case No. IT-01-46-PT, T. Ch., 21 January 2002, p. 4.

¹⁸⁶ *Gotovina et al.*, Decision on Ante Gotovina’s Preliminary Motions Alleging Defects in the Form of the Joinder Indictment, Case No. IT-06-90-PT, T. Ch., 19 March 2007, para. 56; *Prlić et al.*, Decision on Defence Preliminary Motions Alleging Defect in the Form of the Indictment, Case No. IT-04-74-PT, T. Ch., 22 July 2005, para. 70.

¹⁸⁷ *Martić*, Decision on Preliminary Motion against the Amended Indictment, Case No. IT-95-11-PT, T. Ch., 2 June 2003, para. 41.

¹⁸⁸ *Kvočka et al.*, Decision on Defence Preliminary Motions on the Form of the Indictment, Case No. IT-98-30-PT, T. Ch., 12 April 1999, para. 24.

¹⁸⁹ *Dragomir Milošević*, Decision on Defence Preliminary Motion Under Rule 72(A)(ii), Case No. IT-98-29/1-PT, T. Ch., 18 July 2005, para. 23; *Mrkšić*, Decision on Form of Modified Consolidated Amended Indictment, Case No. IT-95-13/1-PT, T. Ch., 20 July 2004, para. 17.

¹⁹⁰ *Ndindabahizi*, Judgement, Case No. ICTR-01-71-A, App. Ch., 16 January 2007, paras. 19-20.

nature and cause of the charge against him in order to allow a comprehensive defence to be raised.¹⁹¹

An indictment may be defective when, unless there are special circumstances, the times refer to broad date ranges.¹⁹² The precision with which dates have to be charged varies from case to case.¹⁹³ If a precise date cannot be specified, a reasonable range of dates should be provided.¹⁹⁴

The charges of the grave breach of the Geneva Conventions require the prosecution to establish particular consequences of the conduct in question.¹⁹⁵

If the prosecution pleads a case of "instigation", the instigating acts, the instigated persons or group of persons that are not yet prepared to commit the crime (as opposed to an *omnimodo facturus*), are to be described precisely.¹⁹⁶

"Instigation" is a distinct form of participation under Article 7(1) and thus, when the prosecution pleads such a case, the instigating acts, and the instigated persons or groups of persons, have to be described precisely.¹⁹⁷

Where an accused is charged with the commission of contempt of the Tribunal, the indictment shall contain the material facts which form the basis of the charge against the accused of having "otherwise interfered with the witness" under Rule 77(A)(iv). Although it is possible to conclude that, owing to the fact that the witness's identity and testimony was protected, publication of such identity and testimony would constitute interference with the witness's testimony, the prosecution shall provide the factual basis setting out the manner in which the accused's alleged publications have interfered with the witness.¹⁹⁸

Details of mass graves, if mentioned in the indictment, would be of assistance to the defence in its preparation. In this regard, failing to include such details to the extent known to the prosecution in the indictment would unfairly hinder the defence's preparation of its case.¹⁹⁹

¹⁹¹ *Ibid.*, para. 20.

¹⁹² *Ndindabahizi*, Judgement, Case No. ICTR-01-71-A, App. Ch., 16 January 2007, para. 19; *Kvočka et al.*, Judgement, Case No. IT-98-30/1-A, App. Ch., 28 February 2005, para. 31.

¹⁹³ *Ndindabahizi*, Judgement, Case No. ICTR-01-71-A, App. Ch., 16 January 2007, para. 20; *Gacumbitsi*, Judgement, Case No. ICTR-01-64-A, App. Ch., 7 July 2006, para. 9.

¹⁹⁴ *Ntagerura et al.*, Judgement and Sentence, Case No. ICTR-99-46-T, T. Ch., 25 February 2004, para. 32; *Brdanin and Talić*, Decision on Objections by Momir Talić to the Form of the Amended Indictment, Case No. IT-99-36-PT, T. Ch., 20 February 2001, para. 22; *Krnojelac*, Decision on the Defence Preliminary Motion on the Form of the Indictment, Case No. IT-97-25-PT, T. Ch., 24 February 1999, para. 42.

¹⁹⁵ *Krnojelac*, Decision on Preliminary Motion on Form of Amended Indictment, Case No. IT-97-25-PT, T. Ch., 11 February 2000, para. 31.

¹⁹⁶ *Deronjić*, Decision on Form of the Indictment, Case No. IT-02-61-PT, T. Ch., 25 October 2002, para. 31.

¹⁹⁷ *Blaškić*, Judgement, Case No. IT-95-14-A, App. Ch., 29 July 2004, para. 226.

¹⁹⁸ *Jović*, Decision to Deny the Accused Josip Jović's Preliminary Motion to Dismiss the Indictment on the Grounds of Lack of Jurisdiction and Defects in the Form of the Indictment, Case No. IT-95-14 & 14/2-R77, T. Ch., 21 December 2005, para. 26.

¹⁹⁹ *Gotovina et al.*, Decision on Ante Gotovina's Preliminary Motions Alleging Defects in the Form of the Joinder Indictment, Case No. IT-06-90-PT, T. Ch., 19 March 2007, para. 48.

4.3.5. Schedules to the Indictment

In order to avoid muddling the text of the indictment, some details of the incidents can be placed in the schedules.²⁰⁰ Indeed, an indictment must necessarily, in the absence of a special order, consist of one document. Schedules to an indictment form an integral part of the indictment, and they can contain essential material facts omitted from the body of the indictment.²⁰¹

At the pre-trial phase of the proceedings, the interests of justice demand that the required particulars be included in the indictment rather than in a bill of particulars.²⁰² Schedules to an indictment may complete the indictment by giving further information which was sufficiently specific to give notice to the accused of the nature of the case they had to meet.²⁰³

The schedules may contain such details as the identity of victims, the nature of the injury or the cause of death, and the area in which the incident occurred, a list of properties destroyed or damaged, *etc.*²⁰⁴

4.4. USE OF SOME TERMS IN THE INDICTMENT

Whether the use of a term or expression in an indictment is too vague and therefore unacceptable cannot be assessed *per se*, but only in the context of the indictment.²⁰⁵

With regard to the location of alleged events, expressions such as "*including, but not limited to*" or "*among others*" are vague and should not be used in an indictment.²⁰⁶

²⁰⁰ *Krnojelac*, Decision on Preliminary Motion on Form of Amended Indictment, Case No. IT-97-25-PT, T. Ch., 11 February 2000, para. 54.

²⁰¹ *Kvočka et al.*, Judgement, Case No. IT-98-30/1-A, App. Ch., 28 February 2005, para. 67; *Galić*, Decision on Application by Defence for Leave to Appeal, Case: IT-98-29-AR72, Bench of the Appeals Chamber, 30 November 2001, paras. 15-16.

²⁰² *Bikindi*, Decision on the Amended Indictment and the Taking of a Plea Based on the Said Indictment, T. Ch., Case No. ICTR-2001-72-PT, 11 May 2005, para. 7.

²⁰³ *Kvočka et al.*, Judgement, Case No. IT-98-30/1-A, App. Ch., 28 February 2005, para. 65.

²⁰⁴ *Galić*, Decision on Application by Defence for Leave to Appeal, Case: IT-98-29-AR72, Bench of the Appeals Chamber, 30 November 2001, para. 16.

²⁰⁵ *Popović et al.*, Decision on Motions Challenging the Indictment Pursuant to Rule 72 of the Rules, Case No. IT-05-88-PT, T. Ch., 31 May 2006, para. 73; *Kvočka et al.*, Decision on Defence Preliminary Motions on the Form of the Indictment, Case No. IT-98-30-PT, T. Ch., 12 April 1999, para. 26; *Delalić et al.*, Decision on the Accused Mucić's Motion for Particulars, Case No. IT-96-21-T, T. Ch., 26 June 1996, para. 14.

²⁰⁶ *Brima et al.*, Decision and Order on Defence Preliminary Motion on Defects in the Form of the Indictment, Case No. SCSL-04-16-PT, T. Ch., 1 April 2004, paras. 40-42; *Kanu*, Decision and Order on Defence Preliminary Motion for Defects in the Form of the Indictment, Case No. SCSL-2003-13-PT, T. Ch., 19 November 2003, para. 17; *Sesay et al.*, Decision and Order on Defence Preliminary Motion for Defects in the Form of the Indictment, Case No. SCSL-04-15-PT, T. Ch., 13 October 2003, para. 33; *Kvočka et al.*, Decision on Defence Preliminary

There might be certain situations in which use of the term “including” is acceptable and others in which it will not be. In particular, the prosecution should, in respect of those parts of an indictment where the term is used to signify some of the victims of a crime, to list, to the extent possible, additional names of victims.²⁰⁷

The use of the word “particularly” is ambiguous in the context of members of the groups for which the accused is alleged to have responsibility as it does not indicate whether the accused is alleged to have responsibility for all of the groups stated, or just the subsections of the groups stated. In this context, the use of the phrases “among others” and “such as” is also unclear and could indicate either that the prosecution is in possession of these identities or that the names mentioned are the only ones about whom evidence will be led at trial.²⁰⁸

With regard to the time of alleged events, the term “about” in the phrases “from about (month, year) to about (month, year)” and “between about” is vague and should not be used in an indictment.²⁰⁹

The date need only be identified where it is a material element of the offence and, where it is such a necessary element, the precision with which such dates need be identified varies from case to case. Accordingly, the words “between about” and “about” to denote a time frame of the commission of the alleged crimes may be permissible in the context of alleged widespread and mass criminality where dates or times are not material elements of the alleged offences.²¹⁰

The prosecution may use the term “and/or” in an indictment. This is an evidentiary matter and it is best left to be determined at trial, on the basis of the evidence presented.²¹¹

Such terms as “external authorities”, “external military authorities”, and “outside authorities” in an indictment are very general allegations. If they reflect all that is known to the prosecution, then the references to these “authorities”

Motions on the Form of the Indictment, Case No. IT-98-30-PT, T. Ch., 12 April 1999, para. 26.

²⁰⁷ *Kvočka et al.*, Decision on Defence Preliminary Motions on the Form of the Indictment, Case No. IT-98-30-PT, T. Ch., 12 April 1999, para. 26.

²⁰⁸ *Karemera et al.*, Decision on Defects in the Form of the Indictment, Case No. ICTR-98-44-R72, T. Ch., 5 August 2005, para. 23.

²⁰⁹ *Brđanin and Talić*, Decision on Objections by Momir Talić to the Form of the Amended Indictment, Case No. IT-99-36-PT, T. Ch., 20 February 2001, para. 22; *Kvočka et al.*, Decision on Defence Preliminary Motions on the Form of the Indictment, Case No. IT-98-30-PT, T. Ch., 12 April 1999, para. 19; *Blaškić*, Decision on the Defence Motion to Dismiss the Indictment Based upon Defects in the Form Thereof (Vagueness/Lack of Adequate Notice of Charges), Case No. IT-95-14-PT, T. Ch., 4 April 1997, para. 23.

²¹⁰ *Brima et al.*, Decision and Order on Defence Preliminary Motion on Defects in the Form of the Indictment, Case No. SCSL-04-16-PT, T. Ch., 1 April, 2004, para. 38; *Kayishema and Ruzindana*, Judgement, Case No. ICTR-95-1-T, T. Ch., 21 May 1999, para. 86; *Tadić*, Opinion and Judgement, Case No. IT-94-1-T, T. Ch., 7 May 1997, para. 534.

²¹¹ *Kvočka et al.*, Decision on Defence Preliminary Motions on the Form of the Indictment, Case No. IT-98-30-PT, T. Ch., 12 April 1999, para. 26.

can be accepted as providing sufficient particularity for the accused to adequately prepare his case. However, if the prosecution is in possession of more detailed information about any of the aforementioned “authorities”, fairness and the efficient conduct of the trial would be better served by amendment to provide further specificity in the indictment. Accordingly, the Chamber may direct the prosecution either provide further specificity, or confirm that it is not in a position to do so, in respect of each of the alleged “authorities”.²¹²

5. ADDITIONAL PARTICULARS REGARDING THE OFFENCES CHARGED

While the indictment must contain certain information which permits the accused to prepare his defence, it need not contain *all* of the information to which the accused will ultimately be entitled under the Rules.²¹³

Where the indictment is not so vague as to be defective and the information the accused seek is not apparent from the witness statements disclosed 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 may the accused seek an order from the Trial Chamber that such particulars be supplied.²¹⁴

The statutory basis of the accused’s right to additional particulars regarding the offences charged can be found in Article 21(2) of the ICTY Statute (Article 20(2) of the ICTR Statute and Article 17(4) of the SCSL Statute), which provides that the accused has the right to “a fair and public hearing” and in Article 21(4) of the ICTY Statute (Article 20(4) of the ICTR Statute and Article 17(4) of the SCSL Statute) which gives the accused the right to “adequate time and facilities for the preparation of his defence”.²¹⁵

²¹² *Rašević and Todović*, Decision on Todović Defence Motion on the Form of the Joint Amended Indictment, Case No. IT-97-25/1-PT, T. Ch., 21 March 2006, para. 16.

²¹³ *Naletilić and Martinović*, Decision on Defendant Vinko Martinović’s Objection to the Indictment, Case No. IT-98-34-PT, T. Ch., 15 February 2000, para. 18.

²¹⁴ *Mrkšić et al.*, Decision on Form of Second Modified Consolidated Amended Indictment, Case No. IT-95-13/1-PT, T. Ch., 29 October 2004, para. 22; *Halilović*, Decision on Defence Motion for Particulars, Case No. IT-01-48-PT, T. Ch., 16 December 2003, p. 3; *Brđanin and Talić*, Decision on Form of Third Amended Indictment, Case No. IT-99-36-PT, T. Ch., 21 September 2001, para. 8; *Naletilić and Martinović*, Decision on Defendant Vinko Martinović’s Objection to the Indictment, Case No. IT-98-34-PT, T. Ch., 15 February 2000, para. 17; *Delalić et al.*, Decision on Motion by the Accused Zejnil Delalić Based on Defects in the Form of the Indictment, Case No. IT-96-21-T, T. Ch., 2 October 1996, para. 21; *Tadić*, Decision on the Defence Motion on the Form of the Indictment, IT-94-1-T, T. Ch., 14 November 1995, para. 8.

²¹⁵ *Delalić et al.*, Decision on the Accused Mucić’s Motion for Particulars, Case No. IT-96-21-T, T. Ch., 26 June 1996, para. 7.

The discovery materials play a role in fulfilling the defendant's right to be informed of the "nature and cause" of the charges against him and they contribute to ensuring that the accused has an adequate opportunity to prepare his defence.²¹⁶

An accused has other avenues besides a motion challenging the form of the indictment for seeking additional particulars. A motion for further particulars, where the indictment is not so vague as to be defective, can be filed in accordance with Rule 54 of the ICTY, ICTR, and SCSL Rules.²¹⁷ When a motion for particulars is reviewed, the materials already in the possession of the defence, including discovery materials, will be considered by the Trial Chamber in order to determine whether the requested particulars are necessary for the accused to prepare his defence and to avoid prejudicial surprise.²¹⁸

6. CONFIRMATION AND AMENDMENT OF THE INDICTMENT

6.1. PROSECUTOR'S DISCRETION TO INVESTIGATE AND PROSECUTE

See also Plea Agreements, p. 377; Directing the Prosecutor to Reduce the Scope of the Indictment, p. 684.

It was noted that in many criminal justice systems, the entity responsible for prosecutions has finite financial and human resources and cannot realistically be expected to prosecute every offender which may fall within the strict terms of its jurisdiction. It must of necessity make decisions as to the nature of the crimes and the offenders to be prosecuted. Indeed, the Prosecutor has a broad discretion in relation to the initiation of investigations and in the preparation of indictments.²¹⁹ However, a discretion of this nature is not unlimited. A number of limitations on the discretion entrusted to the Prosecutor are evident in the Tribunal's Statute and Rules.²²⁰ In particular, Article 21 and the principle it embodies prohibits discrimination in the application of the law based on impermissible motives such

²¹⁶ *Naletilić and Martinović*, Decision on Defendant Vinko Martinović's Objection to the Indictment, Case No. IT-98-34-PT, T. Ch., 15 February 2000, para. 16.

²¹⁷ *Halilović*, Decision on Defence Motion for Particulars, Case No. IT-01-48-PT, T. Ch., 16 December 2003, p. 3; *Delalić et al.*, Decision on Motion by the Accused Zejnil Delalić Based on Defects in the Form of the Indictment, Case No. IT-96-21-T, T. Ch., 2 October 1996, para. 21; *Tadić*, Decision on the Defence Motion on the Form of the Indictment, IT-94-1-T, T. Ch., 14 November 1995, para. 8.

²¹⁸ *Halilović*, Decision on Defence Motion for Particulars, Case No. IT-01-48-PT, T. Ch., 16 December 2003, p. 4.

²¹⁹ *Delalić et al.*, Judgement, Case No. IT-96-21-A, App. Ch., 20 February 2001, para. 602.

²²⁰ *Ibid.*

as, *inter alia*, race, colour, religion, opinion, national or ethnic origin. The Prosecutor, in exercising her discretion under the Statute in the investigation and indictment of accused before the Tribunal, is subject to the principle of equality before the law and to this requirement of non-discrimination.²²¹

A decision, made by the prosecution in the context of a need to concentrate prosecutorial resources, to identify a person for prosecution on the basis that they are believed to have committed exceptionally brutal offences can in no way be described as a discriminatory or otherwise impermissible motive.²²² The burden of the proof rests on applicant, as the one alleging that the Prosecutor has improperly exercised prosecutorial discretion, to demonstrate that the discretion was improperly exercised in relation to him. The applicant must therefore demonstrate that the decision to prosecute him or to continue his prosecution was based on impermissible motives, such as race or religion, and that the prosecution failed to prosecute similarly situated defendants.²²³

It was emphasised that one should not confuse the two distinct notions of jurisdiction and prosecutorial discretion. The scope of the substantive jurisdiction of the Tribunal is entirely contingent upon the constitutive instrument of the Tribunal itself, that is, its Statute. On a different level, in systems of criminal law not based on the rule of compulsory prosecution, like that of the Tribunal, prosecutors possess the discretion not to bring before the court cases that theoretically fall within the court's jurisdiction. In other words, the fact that the prosecution may decide not to prosecute an individual does not necessarily mean that, had the prosecution decided to prosecute that individual, the Tribunal would not have jurisdiction over him or her. Jurisdiction and prosecutorial discretion are two independent issues.²²⁴

Pursuant to Rule 51 of the *ad hoc* Tribunals' Rules, the prosecution may withdraw an indictment before its confirmation without leave, and after the confirmation of the indictment only with the leave of a judge or a Trial Chamber. Indeed, while the Prosecutor's discretion on whether or not to continue with proceedings on a confirmed indictment is not entirely unfettered, the role of a judge or a Trial Chamber in this process is limited.²²⁵

It was noted that the Statutes of the *ad hoc* Tribunals contain no provisions limiting the Prosecutor's discretion under Article 1 to investigate and/or prosecute persons responsible for serious violations of international humanitarian law.²²⁶ In contrast, Article 16 of the ICC Statute allows for deferral

²²¹ *Ibid.*, para. 605.

²²² *Ibid.*, para. 614.

²²³ *Ibid.*, para. 607. See also *Karemera et al.*, Decision on Joseph Nzirorera's Motion for Selective Prosecution Documents, Case No. ICTR-98-44-T, T. Ch., 30 September 2009.

²²⁴ *Karadžić*, Decision on Karadžić's Appeal of Trial Chamber's Decision on Alleged Holbrooke Agreement, Case No. IT-95-5/18-AR73.4, App. Ch., 12 October 2009, para. 39.

²²⁵ *Ibid.*, para. 53.

²²⁶ *Karadžić*, Decision on the Accused's Holbrooke Agreement Motion, Case No. IT-95-5/18-PT, T. Ch., 8 July 2009, para. 57.