MEMORANDUM FOR THE
OFFICE OF THE PROSECUTOR OF THE
INTERNATIONAL CRIMINAL TRIBUNAL
FOR RWANDA

ISSUE #2
MATERIAL FACTS NOT PLEADED IN THE INDICTMENT

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23. Amended Indictment against Anto Furundzija filed by the Prosecutor of the International Criminal Tribunal for the Former Yugoslavia (June 2, 1998).


25. Amended Indictment against Zoran Kupreskic, Mirjan Kupreskic, Vlatko Kupreskic, Drago Josipovic, Dragan Papic, and Vladimir Santic also known as “Vlado” filed by the Prosecutor of the International Criminal Tribunal for the Former Yugoslavia (February 9, 1998).

### BOOKS & TREATISES


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I. Introduction and Summary of Conclusions

A. Issues Presented

The International Tribunal for the Former Yugoslavia ("ICTY") provides precedent for cases presented to the International Tribunal for Rwanda ("ICTR"). As such, ICTR prosecutors can look to ICTY decisions for guidance on issues presented for which there is inadequate precedent within the ICTR itself. One such issue pertains to questions regarding reliance on material facts not pleaded in the indictment but which are either lead as evidence during trial or are referred to in the pretrial brief. ICTY Appeals Judgements in the cases of Prosecutor v. Furundzija, IT-95-17/1-A, and Prosecutor v. Kupreskic et al., IT-95-16-A, provide ICTR prosecutors with the precedent they need when faced with this issue.1

B. Summary of Conclusions

Foremost, some argue that unless a defendant objects to the adequacy of an indictment before trial, he has waived the right to later raise the issue – particularly on appeal. The prosecution in the Furundzija case argued this point, amongst others, successfully. The Appeals Chamber in Kupreskic, however, disagreed that a defendant who has not raised the issue of an indictment’s inadequacy before trial has waived his right to do so on appeal. Nonetheless, there is a strong argument presented when a

1 Issue #2: Material Facts Not Pleased in the Indictment – Consider and discuss the ICTY decisions in Prosecutor v. Furundzija, IT-95-17/1-A, Appeals Judgement, 21 July 2000 and in Prosecutor v. Zoran Kupreskic et al., IT-95-16-A, Appeal Judgement, 23 October 2001, concerning reliance on material facts not pleaded in the indictment but which are either lead as evidence during trial or are referred to in the pretrial brief. Develop arguments in support of the Prosecutor relying on these decisions.
defendant has never, prior to appeal, complained of the adequacy of the indictment against him.

Secondly, the ICTR Rules of Procedure and Evidence require that an indictment include a “concise statement” of a case’s facts and the charged criminal conduct. Accordingly, a strong argument can be made that the intended function of an indictment is not to plead evidence of the prosecution’s case. The Appeals Chamber in both Furundzija and Kupreskic agree that an indictment only needs to contain material facts underpinning the charges therein and that it does not need to present evidence that will be presented in support of those material facts.

In addition, when evidence that is offered at trial addresses and proves facts that are materially different from those which are alleged in the indictment, unless this variance from the indictment misleads the defendant in preparing his defense, it will not be considered reversible error. In such a circumstance, the variance is immaterial.

Finally, even though generic terms should not be used when presenting a charge in an indictment, the use of statutory language may be acceptable in some circumstances. The prosecution can rely upon statutory language for use in an indictment so long as the wording of the statute clearly indicates each element necessary for committing the offense. If the statutory language is clear, it is reasonable to assume the defense can prepare an adequate defense to the charge stated in the indictment that relies upon such language.
II. **Factual Background**

A. **Material Facts Not Pleased in the Indictment**

There are two ICTY decisions that provide a solid basis for discussion concerning reliance on material facts not pleaded in the indictment but which are either lead as evidence during trial or are referred to in the pretrial brief. The ICTY Appeals Judgment entered on July 21, 2000 in the case of *Prosecutor v. Furundzija*, IT-95-17/1-A, discusses material facts that are referred to in the pretrial brief, while the ICTY Appeals Judgment entered on October 23, 2001 in the case of *Prosecutor v. Zoran Kupreskic et al.*, IT-95-16-A, addresses the issue of material facts that are led as evidence during trial. In both of these cases, the defendants argued that these material facts were not pleaded in the indictment and, therefore, should not have been considered when judgment was rendered.

III. **Legal Discussion**

A. **Comparing Rules of Criminal Procedure**

On November 8, 1994, the United Nations Security Council passed Resolution 955 establishing the International Criminal Tribunal for Rwanda “for the sole purpose of prosecuting persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994.” ² ² Article 14 of the Statute of the International Tribunal for Rwanda dictates that adoption from the ICTY was to be made

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of “the rules of procedure and evidence for the conduct of the pre-trial phase of the proceedings, trials and appeals, the admission of evidence, the protection of victims and witnesses and other appropriate matters.” 3 Moreover, the procedures, processes, and rules of evidence that were developed for the ICTY maintain a close resemblance to their American counterparts. Specifically, “many of the Rules [of the ICTY] may be viewed as counterparts or parallels to U.S. Federal criminal practices.” 4

In the United States criminal justice system, Federal Rule of Criminal Procedure 7(c) dictates that an indictment “shall be a plain, concise and definite written statement of the essential facts constituting the offense charged.” 5 Rule 47 of the ICTY Rules of


4 M. Cherif Bassiouni & Peter Manikas, The Law of the International Tribunal for the Former Yugoslavia, 864 (Transnational Publishers, Inc.1996). [Reproduced in the accompanying notebook at Tab 26.] Bassiouni and Manikas also state that, along with following an American standard, the ICTY rules of procedure and evidence also “reflect contemporary developments in international human rights norms and standards, as well as norms imbedded in the European Convention…There is no doubt that the Rules developed will afford the accused criminal proceedings based upon internationally and regionally recognized human rights norms. These norms are also reflected in many contemporary constitutions and are practiced in many national legal systems. Consequently, in terms of protecting the rights of the accused, the system developed offers the best that many modern criminal justice systems have to offer.” (Bassiouni & Manikas, The Law of the International Tribunal for the Former Yugoslavia at 864-865). [Reproduced in the accompanying notebook at Tab 26.]

5 Fed. R. Crim. Pro. 7(c), Amendments received to 11-10-02. [Reproduced in the accompanying notebook at Tab 6.] There is currently a proposed amendment of Rule 7(c), which would change the word “shall” to the word “must,” in the relevant portion: An indictment “must be a plain, concise, and definite written statement of the essential facts constituting the offense charged.” This amendment, absent any action by Congress to result in the contrary, will be effective December 1, 2002.
Procedure and Evidence addresses the submission of an indictment by the Prosecutor. Specifically, Rule 47(C) indicates that an indictment “shall set forth the name and particulars of the suspect, and a concise statement of the facts of the case and of the crime with which the suspect is charged.” The ICTY rule regarding indictments is similar to the U.S. rule in its focus upon the necessity of pleading material facts in the indictment.

As dictated by Article 14 of the ICTR Statute, the ICTR Rules of Procedure and Evidence adopted similar treatment of indictments as did the ICTY. Rule 47(C) of the ICTR Rules of Procedure and Evidence, therefore, states that an “indictment shall set forth the name and particulars of the suspect, and a concise statement of the facts of the case and of the crime with which the suspect is charged.”

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6 International Criminal Tribunal for the Former Yugoslavia Rules of Procedure and Evidence, Part Five Pre-Trial Proceedings, Section One Indictments, Rule 47. [Reproduced in the accompanying notebook at Tab 5.]

7 Id., 47(C). [Reproduced in the accompanying notebook at Tab 5.]

8 Black’s Law Dictionary defines a material fact as a “fact that is significant or essential to the issue or matter at hand.” Black’s Law Dictionary 611 (Bryan A. Garner ed., 7th ed., West 1999). [Reproduced in the accompanying notebook at Tab 35.]

9 See Gabrielle Kirk McDonald & Olivia Swaak-Goldman, eds., Substantive and Procedural Aspects of International Criminal Law: The Experience of International and National Courts, Volume One 411 ftnt. (Kluwer Law International, 2000) [Reproduced in the accompanying notebook at Tab 28.], discussing the extent of similarities between the ICTY and ICTR Rules of Procedure and Evidence: “The Rules of Procedure and Evidence for the International Criminal Tribunal for Rwanda, revised as of 8 June 1998, are substantially the same as those of the ICTY, despite minor differences. The most substantial differences are that the ICTR Rules do not contain a Rule 65 ter and its Rule 73 ends after the word ‘appeal’ in (B).”

10 International Criminal Tribunal for Rwanda Rules of Procedure and Evidence, Part Five Pre-Trial Proceedings, Section One Indictments, Rule 47(C). [Reproduced in the accompanying notebook at Tab 3.]
B. Rationale of Indictment Requirements

The United States Supreme Court has, on several occasions, addressed the rationale behind the required content of indictments. In the case of Russell v. United States, 369 U.S. 749 (1962), the Court pointed to two protections that an indictment is designed to guarantee. According to the Russell Court, these protections are “reflected by two of the criteria by which the sufficiency of an indictment is to be measured,” which are:

[F]irst, whether the indictment ‘contains the elements of the offense intended to be charged, ‘and sufficiently apprises the defendant of what he must be prepared to meet,” and, secondly, “in case any other proceedings are taken against him for a similar offense whether the record shows with accuracy to what extent he may plead a former acquittal or conviction [for purposes of double jeopardy].’

The first criteria addressed by the Court in Russell is most relevant in considering the issue at hand of reliance upon material facts not pleaded in the indictment, but which are either led as evidence during trial or are referred to in the pretrial brief. A policy

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12 Part of the first criteria stated in Russell, that an indictment “sufficiently apprises the defendant of what he must be prepared to meet” is often referred to as “providing adequate notice” of the charge being presented by the pleading. See also Wayne R. LaFave, Jerold H. Israel & Nancy J. King, Criminal Procedure, Third Edition, 882 (West 2000). [Reproduced in the accompanying notebook at Tab 27.]
concern behind this criterion is that “an amendment or variance at trial [of the indictment] will effectively deprive the defendant of sufficient notice of the charges against him.” 13

An amendment to an indictment is considered per se prejudicial by U.S. Courts because “it directly infringes the defendant’s right to know of the charges against him by effectively allowing the jury to convict the defendant of a different crime than that for which he was charged.” 14 Yet, a variance of an indictment does not carry this same per se prejudicial status. Unless a defendant proves a “prejudicial effect upon his defense,” a variance will not be reversible error. 15 The rationale behind this is that a variance to an indictment “merely permits the prosecution to prove facts to establish the criminal charge materially different from the facts contained in the charging instrument.” 16 Furthermore, the argument has been given in U.S. Courts that unless a variance misleads a defendant in

13 Stephen Saltzburg & Daniel Capra, American Criminal Procedure: Cases and Commentary, 866 (6th ed., West 2000). [Reproduced in the accompanying notebook at Tab 29.] See Gaither v. United States, 413 F.2d 1061, 1071 (D.C.Cir. 1969) [Reproduced in the accompanying notebook at Tab 16.], for difference between amendment and variance of an indictment: “An amendment of the indictment occurs when the charging terms of the indictment are altered, either literally or in effect, by prosecutor or court after the grand jury has last passed upon them. A variance occurs when the charging terms of an indictment are left unaltered, but the evidence offered at trial proves facts materially different from those alleged in the indictment.”

14 Martin v. Kassulke, 970 F.2d 1539, 1542 (6th Cir. 1992) [Reproduced in the accompanying notebook at Tab 17.] citing United States v. Ford, 872 F.2d 1231, 1235 (6th Cir. 1989).

15 Id. [Reproduced in the accompanying notebook at Tab 17.] citing also United States v. Beeler, 587 F.2d 340, 342 (6th Cir. 1978).

16 Id. [Reproduced in the accompanying notebook at Tab 17.]
making his defense, then that variance is not material. Moreover, if a defendant has not been prejudiced by an alleged variance, then his failure to object to the variance at trial will result in waiver of that objection.

The requirement that an indictment plead the essential elements implies that the pleading must allege those fundamental elements, which are required in order for a person to commit the offense that the indictment is charging. If the words of a statute “fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense,” then an indictment will be acceptable if it relies upon the statutory language. Furthermore, the requirement that an indictment provide adequate notice to a defendant of the charge he must be prepared to meet, requires a “sufficient description of the acts he is alleged to have committed.” The amount of factual specificity this requirement entails, however, varies from case to case with some of the relevant factors being:

[T]he nature of the offense, the likely significance of particular factual variations in determining liability, the ability of the prosecution to identify a particular circumstance without a lengthy and basically evidentiary

17 Martin, 970 F.2d at 1542 [Reproduced in the accompanying notebook at Tab 17.] citing Runyon v. Commonwealth, 393 S.W.2d 877, 880 (Ky. 1965), cert. denied, 384 U.S. 906 (1966).

18 41 Am. Jur. 2d Indictments and Informations § 261 (2002). [Reproduced in the accompanying notebook at Tab 36.]

19 LaFave, Israel, & King, Criminal Procedure at 889. [Reproduced in the accompanying notebook at Tab 27.] LaFave, Israel, and King state that generally such fundamental elements include “the elements of mental state, criminal conduct, and resulting harm.”

20 Id. at 890. [Reproduced in the accompanying notebook at Tab 27.]

21 Id. at 891. [Reproduced in the accompanying notebook at Tab 27.]
allegation, and the availability of alternative procedures for obtaining the particular information.  

Yet, even given these relevant factors, the consensus is usually that the question of whether an indictment provides a defendant with adequate notice turns on whether “sufficient particularity” exists to a great enough extent in order that the defendant can “prepare a proper defense.” Whether the indictment could have described the alleged offense with a greater amount of certainty is not at issue. In fact, “[a]n element of a crime very often can be pleaded without providing any specific factual reference.” And, it is important to note that the function of an indictment is not to plead evidence.

The wording of ICTR Rule 47(C), concerning indictment content, also indicates a necessity for a defendant to be able to prepare a proper defense, considering that the rule demands “a concise statement of the facts of the case and of the crime with which the suspect is charged.” Despite the fact that ICTR Rule 47(C) differs in its exact language from that of its American counterpart, U.S. Federal Rule of Criminal Procedure 7(c), the implications of both are incredibly similar. In drawing a comparison, it is important to remember that international and national instruments “do not use identical language and drafting styles, if for no other reason than the fact that national constitutions reflect

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22 Id. [Reproduced in the accompanying notebook at Tab 27.]
23 Id. [Reproduced in the accompanying notebook at Tab 27.]
24 Id. [Reproduced in the accompanying notebook at Tab 27.]
25 Id. at 890. [Reproduced in the accompanying notebook at Tab 27.]
27 ICTR Rule 47(C). [Reproduced in the accompanying notebook at Tab 3.]
different legal systems and drafting approaches as well as different cultures and languages.” 28

In addition to American procedural rules regarding indictment content, there are other instruments that reflect values similar to those of the ICTR when it comes to a defendant’s right to adequate notice. A defendant’s right to be informed of the charges against him is also protected by each of the following instruments addressing human rights: International Covenant on Civil and Political Rights (“ICCPR”), African Charter on Human and Peoples’ Rights (“Banjul Charter”), European Convention for the Protection of Human Rights and Fundamental Freedoms (“Fundamental Freedoms”), and American Convention on Human Rights (“AMCHR”). 29 Moreover, this right is also protected in “at least forty-seven national constitutions.” 30


29 Id. at 276. [Reproduced in the accompanying notebook at Tab 31.]

30 Id. at 277. [Reproduced in the accompanying notebook at Tab 31.] Of the 139 national constitutions surveyed by Bassiouni, those that protected a defendant’s right to notice of the charges against him were from these countries: Antigua and Barbuda, Bahrain, Bangladesh, Barbados, Belize, Botswana, Canada, Dominica, Ecuador, Egypt, Fiji, Gambia, Grenada, Guyana, Jamaica, Kenya, Kiribati, Liberia, Malaysia, Malta, Mauritius, Mexico, Nauru, Nicaragua, Nigeria, Pakistan, Papua-New Guinea, Peru, Philippines, Portugal, Romania, St. Christopher-Nevis, Sierra Leone, Singapore, Solomon Islands, Somalia, Spain, Swaziland, Tonga, Trinidad and Tobago, Turkey, Tuvalu, Uganda, United States, Venezuela, Zambia, Zimbabwe. Of note, included among those remaining national constitutions that did not specifically protect a defendant’s right to notice of the charges against him were Australia, France, Germany, and Rwanda.
C. Prosecutor v. Furundzija

On November 2, 1995, the Prosecutor of the ICTY filed an indictment against Anto Furundzija. In this original indictment, Counts 12, 13, and 14 charged Furundzija with three counts. Count 12 alleged “a grave breach of the Geneva Conventions of 1949 under Article 2(b) of the Statute relating to torture and inhumane treatment.” Count 13 alleged “a violation of the laws or customs of war under Article 3 of the Statute

31 Indictment against Anto Furundzija filed by the Prosecutor of the International Criminal Tribunal for the Former Yugoslavia (November 2, 1995). [Reproduced in the accompanying notebook at Tab 22.]

32 Id. [Reproduced in the accompanying notebook at Tab 22.]

33 Prosecutor v. Furundzija, IT-95-17/1-A, Appeals Judgment, 21 July 2000, para. 1. [Reproduced in the accompanying notebook at Tab 9.] See also Statute of the International Tribunal for the Former Yugoslavia, Article 2 [Reproduced in the accompanying notebook at Tab 4.] addressing Grave breaches of the Geneva Conventions of 1949, which states:

The International Tribunal shall have the power to prosecute persons committing or ordering to be committed grave breaches of the Geneva Conventions of 12 August 1949, namely the following acts against persons or property protected under the provisions of the relevant Geneva Convention:

(a) willful killing;
(b) torture or inhuman treatment, including biological experiments;
(c) wilfully causing great suffering or serious injury to body or health;
(d) extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;
(e) compelling a prisoner of war or a civilian to serve in the forces of a hostile power;
(f) wilfully depriving a prisoner of war or a civilian of the rights of fair and regular trial;
(g) unlawful deportation or transfer or unlawful confinement of a civilian;
(h) taking civilians as hostages.
relating to torture.” 34 And, Count 14 alleged “a violation of the laws or customs of war under Article 3 of the Statute relating to outrages upon personal dignity including rape.” 35 Furundzija pleaded not guilty to each count of the indictment. 36

On June 2, 1998, the Prosecutor filed an amended indictment, which withdrew Count 12 of the original indictment. 37 Furundzija’s trial began on June 8, 1998. He stood “charged with serious violations of international humanitarian law namely, torture as a Violation of the Laws or Customs of War, and outrages upon personal dignity,

34 Id. [Reproduced in the accompanying notebook at Tab 9.] See also Statute of the International Tribunal for the Former Yugoslavia, Article 3 [Reproduced in the accompanying notebook at Tab 4.] addressing Violations of the laws or customs of war, which states:

The International Tribunal shall have the power to prosecute persons violating the laws or customs of war. Such violations shall include, but not be limited to:

(a) employment of poisonous weapons or other weapons calculated to cause unnecessary suffering;
(b) wanton destruction of cities, towns or villages, or devastation not justified by military necessity;
(c) attack, or bombardment, by whatever means, of undefined towns, villages, dwellings, or buildings;
(d) seizure of, destruction or willful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science;
(e) plunder of public or private property.

35 Id. [Reproduced in the accompanying notebook at Tab 9.]

36 Prosecutor v. Furundzija, IT-95-17/1-A, Summary of Appeals Chamber Judgement, 21 July 2000. [Reproduced in the accompanying notebook at Tab 8.]

37 Amended Indictment against Anto Furundzija filed by the Prosecutor of the International Criminal Tribunal for the Former Yugoslavia (June 2, 1998). [Reproduced in the accompanying notebook at Tab 23.]
including rape, as a Violation of the Laws or Customs of War.” 38  The charges against Furundzija were based upon paragraphs 25 and 26 of the amended indictment, which presented the following factual allegations against him:

25. On or about 15 May 1993, at the Jokers Headquarters in Nadioci (the “Bungalow”), Anto FURUNDZIJA the local commander of the Jokers, [REDACTED] and another soldier interrogated Witness A. While being questioned by FURUNDZIJA, [REDACTED] rubbed his knife against Witness A’s inner thigh and lower stomach and threatened to put his knife inside Witness A’s vagina should she not tell the truth.

26. Then Witness A and Victim B, a Bosnian Croat who had previously assisted Witness A’s family, were taken to another room in the “Bungalow”. Victim B had been badly beaten prior to this time. While FURUNDZIJA continued to interrogate Witness A and Victim B, [REDACTED] beat Witness A and Victim B on the feet with a baton. Then [REDACTED] forced Witnesses A to have oral and vaginal sexual intercourse with him, FURUNDZIJA was present during this entire incident and did nothing to stop or curtail [REDACTED] actions. 39

On June 12, 1998, Furundzija filed a motion seeking to exclude a portion of Witness A’s testimony. 40  Arguing that it fell outside the scope of the amended indictment, Furundzija wanted to prevent consideration of Witness A’s testimony relating to his presence during the sexual assaults upon her. 41  The Trial Chamber ruled that evidence would be inadmissible if it related to sexual assault and rape perpetrated, in the presence of

38 Prosecutor v. Furundzija, IT-95-17/1-T, Statement of the Trial Chamber at the Judgement Hearing, 10 December 1998. [Reproduced in the accompanying notebook at Tab 7.]

39 Amended Indictment against Anto Furundzija filed by the Prosecutor of the International Criminal Tribunal for the Former Yugoslavia (June 2, 1998). [Reproduced in the accompanying notebook at Tab 23.]

40 Prosecutor v. Furundzija, IT-95-17/1-A, Appeals Judgement, para. 6. [Reproduced in the accompanying notebook at Tab 9.]

41 Id. [Reproduced in the accompanying notebook at Tab 9.]
Furundzija, on Witness A by Accused B “in the ‘large room’ apart from the evidence of sexual assault alleged in paragraph 25 of the Indictment.” 42

On December 10, 1998, the Trial Chamber found Furundzija “guilty on Count 13, as a co-perpetrator of torture as a violation of the laws or customs of war, and guilty on Count 14, as an aider and abettor of outrages upon personal dignity, including rape, as a violation of the laws or customs of war.” 43 He was sentenced to eighteen years in prison, with ten years under Count 13 and eight years under Count 14 to be served concurrently, inter se. 44

Furundzija appealed his conviction on December 22, 1998. 45 He submitted the following five grounds of appeal against the judgment rendered by the Trial Chamber:

Ground (1): That the Appellant [Furundzija] was denied the right to a fair trial in violation of the Statute; 46

42 Id., para. 7 [Reproduced in the accompanying notebook at Tab 9.] quoting Prosecutor v. Furundzija, IT-95-17/1-T, Confidential Decision, 15 June 1998, p.2.

43 Id., para. 13. [Reproduced in the accompanying notebook at Tab 9.]

44 Prosecutor v. Furundzija, IT-95-17/1-T, Statement of the Trial Chamber at the Judgement Hearing. [Reproduced in the accompanying notebook at Tab 7.]

45 Prosecutor v. Furundzija, IT-95-17/1-A, Appeals Judgement, para.14. [Reproduced in the accompanying notebook at Tab 9.]

46 See Statute of the International Tribunal for the Former Yugoslavia, Article 21 [Reproduced in the accompanying notebook at Tab 4.] addressing Rights of the accused, which states:

1. All persons shall be equal before the International Tribunal.
2. In the determination of charges against him, the accused shall be entitled to a fair and public hearing, subject to article 22 of the Statute.
3. The accused shall be presumed innocent until proved guilty according to the provisions of the present Statute.
4. In the determination of any charge against the accused pursuant to the present Statute, the accused shall be entitled to the following minimum guarantees, in full equality:
Ground (2): That the evidence was insufficient to convict him on either count;

Ground (3): That the Defence was prejudiced by the Trial Chamber’s improper reliance on evidence of acts that were not charged in the indictment and which the Prosecutor never identified prior to the trial as part of the charges against the Appellant;

Ground (4): That presiding Judge Mumba should have been disqualified; and

Ground (5): That the sentence imposed upon him was excessive. 47

Furundzija’s appeal was denied on each of the five grounds. Specifically, the Appeals Chamber held that the first ground was rejected because Furundzija was not denied the right to a fair trial. 48 Furthermore, the Appeals Chamber rejected the third ground of

(a) to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
(b) to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;
(c) to be tried without undue delay;
(d) to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;
(e) to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
(f) to have the free assistance of an interpreter if he cannot understand or speak the language used in the International Tribunal;
(g) not to be compelled to testify against himself or to confess guilt.

47 Prosecutor v. Furundzija, IT-95-17/1-A, Appeals Judgement, para.25 [Reproduced in the accompanying notebook at Tab 9.] citing Appellant’s Amended Brief, pp. 1-3 and T. 9-10 (2 March 2000).

48 Prosecutor v. Furundzija, IT-95-17/1-A, Summary of Appeals Chamber Judgement. [Reproduced in the accompanying notebook at Tab 8.]
appeal after finding that “there is no requirement that the actual evidence on which the Prosecutor relies has to be included in the indictment, and that the Defence was not prejudiced by the Trial Chamber’s admission during the trial of evidence in support of facts not alleged in the Amended Indictment.” 49 The Appeals Chamber, upon rejecting each ground of Furundzija’s appeal, affirmed both his convictions and sentences. 50

D. Precedent Set By the ICTY: Furundzija Appeals Judgement

In the ICTY Appeals Judgment of Prosecutor v. Furundzija, IT-95-17/1-A, Furundzija argued that “he did not receive fair notice of the charges to be proven against him.” 51 The ICTY Appeals Chamber presented the following standard of measurement for Furundzija’s claim:

Article 18(4) of the Statute and Rule 47(C) of the Rules require that an indictment contain a concise statement of the facts of the case and of the crime with which the suspect is charged. That requirement does not include an obligation to state in the indictment the evidence on which the Prosecution has relied. Where evidence is presented at trial which, in the view of the accused, falls outside the scope of the indictment, an objection as to lack of fair notice may be raised and an appropriate remedy may be provided by the Trial Chamber, either by way of an adjournment of the proceedings, allowing the Defence adequate time to respond to the additional allegations, or by excluding the challenged evidence. 52

As the Appeals Chamber points out in its judgment, Furundzija’s trial proceeded based upon the charges set forth in the amended indictment because he did not raise any

49 Id. [Reproduced in the accompanying notebook at Tab 8.]

50 Id. [Reproduced in the accompanying notebook at Tab 8.]

51 Prosecutor v. Furundzija, IT-95-17/1-A, Appeals Judgment, para. 59. [Reproduced in the accompanying notebook at Tab 9.]

52 Id., para. 61. [Reproduced in the accompanying notebook at Tab 9.]
objections to the pleading when it was filed. 53 Had Furundzija, during the trial, objected to the raising of material facts not pleaded in the indictment, the Trial Chamber could have granted him a remedy by recessing the trial to allow the defense to investigate the facts in question. 54 Though he opted not to object, Furundzija nonetheless claimed that the Trial Chamber had erred in admitting and relying upon evidence of acts that were not charged in the amended indictment. 55

The Prosecutor in Furundzija stated that ICTY case law demonstrates a requirement that indictments must contain information sufficient enough to allow a defendant to prepare his defense. 56 Yet, the prosecution also noted that in two other ICTY decisions, a distinction had “been drawn between the material facts underpinning

53 Id., para. 60. [Reproduced in the accompanying notebook at Tab 9.]


The Trial Chamber addressed the vagueness of the charges brought against the Defendant in its Judgment in the Tadic case [Prosecutor v. Tadic, IT-94-1-T, Opinion and Judgment, May 7, 1997], emphasizing that the Court adjourned the proceedings for three weeks after the Prosecution’s case in order to allow the defense additional time for the preparation of its case. In doing so, the Trial Chamber somewhat diminished the prejudicial effect any variance in the indictment would have upon Tadic.

See also Michael P. Scharf, Balkan Justice: The Story Behind the First International War Crimes Trial Since Nuremberg 172-173 (Carolina Academic Press 1997). [Reproduced in the accompanying notebook at Tab 30.]

55 Prosecutor v. Furundzija, IT-95-17/1-A, Appeals Judgment, para. 128. [Reproduced in the accompanying notebook at Tab 9.] Furundzija, in further support of his claims, also argued that the Prosecution never identified these acts before trial as part of the charges against him.

56 Id., para. 135. [Reproduced in the accompanying notebook at Tab 9.]
the charges and the evidence that goes to prove those facts.” 57 In one of these cases, 

Prosecutor v. Krnojelac, IT-97-25-PT, the Trial Chamber states that:

An indictment must contain information as to the identity of the victim, 
the place and the approximate date of the alleged offence and the means 
by which the offence was committed. However, these obligations in 
relation to what must be pleaded in the indictment are not to be seen as a 
substitute for the prosecution’s obligation to give pre-trial discovery 
(which is provided by Rule 66 of the [ICTY] Rules) or the names of 
witnesses (which is provided by Rule 67 of the Rules). There is thus a 
clear distinction drawn between the material facts upon which the 
prosecution relies (which must be pleaded) and the evidence by which 
those material facts will be proved (which must be provided by way of 
pre-trial discovery). 58

57 Id. [Reproduced in the accompanying notebook at Tab 9.] citing Prosecutor v. 
Krnojelac, IT-97-25-PT, Decision on the Defence Preliminary Motion on the Form of the 
Indictment, 24 February 1999, para. 12 [Reproduced in the accompanying notebook at 
Tab 13.]; Prosecutor v. Kvocka et al., IT-98-30-PT, Decision on Defence Preliminary 
Motions on the Form of the Indictment, 12 April 1999 [Reproduced in the accompanying 
notebook at Tab 14.]; and also Prosecutor v. Tadic, IT-94-1-PT, Decision on the Defence 
Motion on the Form of the Indictment, 14 November 1995, paras. 6-8.

58 Prosecutor v. Krnojelac, Decision on the Defence Preliminary Motion on the 
Form of the Indictment, IT-97-25-PT, para. 12 [Reproduced in the accompanying 
notebook at Tab 13.] citing to Prosecutor v. Blaskic, IT-95-14-PT, Decision on the 
Defence Motion to Dismiss the Indictment Based upon Defects in the Form Thereof, 4 
April 1997, para. 20; also citing Prosecutor v. Delalic, IT-96-21-T, Decision on the 
Accused Mucic’s Motion for Particulars, 26 June 1996, paras. 9-10. The Trial Chamber 
in Prosecutor v. Krnojelac also refers to several common law jurisdiction cases regarding 
the particularity with which a criminal offense must be pleaded. The Trial Chamber 
quotes, as an “oft quoted statement,” Isaacs J. in R. v. Associated Northern Collieries, 11 
CLR 738, 740-741 (1910):

I take the fundamental principle to be that the opposite party shall always 
be fairly apprised of the nature of the case he is called upon to meet, shall 
be placed in possession of its broad outlines and the constitutive facts 
which are said to raise his legal liability. He is to receive sufficient 
information to ensure a fair trial and to guard against what the law terms 
‘surprise’, but he is not entitled to be told the mode by which the case is to 
be proved against him.

The Krnojelac Trial Chamber looks to several other common law jurisdiction cases in 
identifying which particulars must be included within an indictment:
The Appeals Chamber in Furundzija agreed with the distinction drawn in Krnojelac ruling that an indictment only needs to contain the material facts underpinning the charges and it does not need to present the evidence that will be presented in support of those material facts. 59 The Appeals Chamber also pointed out that it would be logistically “unworkable for an indictment to contain all the evidence that the Prosecutor proposes to introduce at trial.” 60 Yet, as the second of the two cases referred to by the Furundzija prosecution indicates it is important to remember that there is “a minimum level of information that must be provided by the indictment,” even when taking into account the distinction drawn by the Trial Chamber in Krnojelac. 61 To summarize, looking to the Statute and Rules of the ICTY, along with precedent of the Tribunal, the

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A valid indictment must identify the essential factual ingredients of the offence charged; it must specify the approximate time, place and manner of the acts or omissions of the accused upon which the prosecution relies, and it must provide fair information and reasonable particularity as to the nature of the offence charged.

The common law jurisdiction cases cited here are Smith v. Moody, 1 KB 56 at 60, 61, 63 (1903) [Reproduced in the accompanying notebook at Tab 19.]; Johnson v. Miller, 59 CLR 467 at 486-487, 501 (1937) [Reproduced in the accompanying notebook at Tab 20.]; John L Pty Ltd v. Attorney General (NSW), 163 CLR 508 at 519-520 (1987) [Reproduced in the accompanying notebook at Tab 21.]; R v. Saffron, 17 NSWLR 395 at 445 (1988). [This decision is unpublished.]

59 Prosecutor v. Furundzija, IT-95-17/1-A, Appeals Judgment, para. 153. [Reproduced in the accompanying notebook at Tab 9.]

60 Id. [Reproduced in the accompanying notebook at Tab 9.]

61 Prosecutor v. Kvocka et al., IT-98-30-PT, Decision on Defence Preliminary Motions on the Form of the Indictment, para. 14. [Reproduced in the accompanying notebook at Tab 14.]
Appeals Chamber in Furundzija held that “there is no requirement that the actual evidence on which the Prosecutor relies has to be included in the indictment.” 62

E. Prosecutor v. Kupreskic et al.

On November 10, 1995, the Prosecutor of the ICTY filed an indictment against Zoran Kupreskic, Mirjan Kupreskic, Vlatko Kupreskic, Vladimir Santic, Stipo Alilovid, Drago Josipovic, Marinko Katava, and Dragan Papic. 63 The Prosecution filed this original indictment in the case of Prosecutor v. Kupreskic et al., in response to a surprise attack on the village of Ahmici, Bosnia on the morning of April 16, 1993. 64 Bosnian Croat forces attacked the Bosnian Muslim inhabitants of Ahmici, killing an excess of 100 Muslim civilians in addition to destroying 169 Muslim homes and two mosques. 65 The assessment has been made that “what happened on 16 April 1993 in Ahmici has gone down in history as comprising one of the most vicious illustrations of man’s inhumanity to man.” 66

On February 9, 1998, the Prosecutor filed an amended indictment against Zoran Kupreskic, Mirjan Kupreskic, Vlatko Kupreskic, Drago Josipovic, Dragan Papic, and

62 Prosecutor v. Furundzija, IT-95-17/1-A, Appeals Judgment, para. 145. [Reproduced in the accompanying notebook at Tab 9.]

63 Indictment against Zoran Kupreskic, Mirjan Kupreskic, Vlatko Kupreskic, Vladimir Santic also known as “Vlado,” Stipo Alilovid also known as “Brko,” Drago Josipovic, Marinko Katava, and Dragan Papic filed by the Prosecutor of the International Criminal Tribunal for the Former Yugoslavia (November 10, 1995). [Reproduced in the accompanying notebook at Tab 24.]

64 Id. [Reproduced in the accompanying notebook at Tab 24.]

65 Prosecutor v. Kupreskic et al., IT-95-16-T, Summary of Trial Chamber Judgement, 14 January 2000. [Reproduced in the accompanying notebook at Tab 10.]

66 Id. [Reproduced in the accompanying notebook at Tab 10.]
Vladimir Santic also known as “Vlado.” 67  Both Stipo Alilovic and Marinko Katava had been dropped as defendants in the case.  The 19-count amended indictment charged the remaining six defendants with crimes against humanity and violations of the laws or customs of war. 68  In particular, they were charged with “murder and cruel treatment under Article 3 of the Tribunal Statute and murder, inhumane acts and persecution under Article 5 of the Statute.” 69

Dragan Papic was the only defendant to be acquitted of all charges against him. 70  The Trial Chamber convicted each of the remaining five defendants of persecution as a

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67 Amended Indictment against Zoran Kupreskic, Mirjan Kupreskic, Vlatko Kupreskic, Drago Josipovic, Dragan Papic, and Vladimir Santic also known as “Vlado” filed by the Prosecutor of the International Criminal Tribunal for the Former Yugoslavia (February 9, 1998). [Reproduced in the accompanying notebook at Tab 25.]

68 Id. [Reproduced in the accompanying notebook at Tab 25.]

69 Prosecutor v. Kupreskic et al., IT-95-16-T, Summary of Trial Chamber Judgement. [Reproduced in the accompanying notebook at Tab 10.] See also Statute of the International Tribunal for the Former Yugoslavia, Article 5 [Reproduced in the accompanying notebook at Tab 4.] addressing Crimes against humanity, which states:

The International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population:

(a) murder;
(b) extermination;
(c) enslavement;
(d) deportation;
(e) imprisonment;
(f) torture;
(g) rape;
(h) persecutions on political, racial and religious grounds;
(i) other inhumane acts.

70 Id. [Reproduced in the accompanying notebook at Tab 10.]
crime against humanity under Count 1 of the amended indictment, which falls under Article 5(h) of the Statute of the Tribunal. 71 Specifically, Count 1 of the Prosecution’s amended indictment charged the defendants under the facts of paragraphs 20 and 21:

20. From October 1992 until April 1993, ZORAN KUPRESKIC, MIRJAN KUPRESKIC, VLATKO KUPRESKIC, DRAGO JOSIPOVIC, DRAGAN PAPIC, and VLADIMIR SANTIC persecuted the Bosnian Muslim inhabitants of Ahmici-Santici and its environs on political, racial or religious grounds by planning, organising and implementing an attack which was designed to remove or “cleanse” all Bosnian Muslims from the village and surrounding areas.

21. As part of the persecution, ZORAN KUPRESKIC, MIRJAN KUPRESKIC, VLATKO KUPRESKIC, DRAGO JOSIPOVIC, DRAGAN PAPIC and VLADIMIR SANTIC participated in or aided and abetted:

(a) the deliberate and systematic killing of Bosnian Muslim civilians;

(b) the comprehensive destruction of Bosnian Muslim homes and property; and

(c) the organised detention and expulsion of the Bosnian Muslims from Ahmici-Santici and its environs. 72

Only the cases against Zoran Kupreskic, Mirjan Kupreskic, and Drago Josipovic are of relevance in consideration of material facts not pleaded in the indictment.

71 Prosecutor v. Kupreskic et al., IT-95-16-A, Summary of Judgement in the Kupreskic Appeal, 23 October 2001 [Reproduced in the accompanying notebook at Tab 11.]; see also Amended Indictment against Zoran Kupreskic, Mirjan Kupreskic, Vlatko Kupreskic, Drago Josipovic, Dragan Pantic, and Vladimir Santic also known as “Vlado” filed by the Prosecutor of the International Criminal Tribunal for the Former Yugoslavia (February 9, 1998). [Reproduced in the accompanying notebook at Tab 25.]

72 Amended Indictment against Zoran Kupreskic, Mirjan Kupreskic, Vlatko Kupreskic, Drago Josipovic, Dragan Pantic, and Vladimir Santic also known as “Vlado” filed by the Prosecutor of the International Criminal Tribunal for the Former Yugoslavia (February 9, 1998). [Reproduced in the accompanying notebook at Tab 25.]
The Trial Chamber stated the following facts regarding defendant Zoran Kupreskic:

[T]he Trial Chamber finds that you [Zoran Kupreskic] participated in the attack on Ahmici on 16 April 1993 as a soldier in the HVO. We find that you, together with your brother Mirjan, were present as an attacker on that day and that you were actively involved in these events. The Trial Chamber finds also that you attacked your Muslim neighbours solely because of their ethnicity and with the aim of cleansing the village of any Muslim inhabitants. We find that you acted as a co-perpetrator, together with your brother Mirjan, within the meaning of Article 7(1) of the Statute, because you adhered to a common plan for the execution of the cleansing campaign in the village. This by necessity was a highly coordinated effort and required full prior knowledge on your part of the intended activities. We find, in addition, that you played a leading role as a local commander.

Accordingly, Zoran Kupreskic was found guilty, under Article 5(h) of the Statute under Count 1 of the amended indictment, of persecution as a crime against humanity. He was found not guilty with respect to the other remaining counts against him. The Trial Chamber sentenced Zoran Kupreskic to ten years in prison based on their finding of guilt with regards to Count 1.

As the Trial Chamber found defendant Mirjan Kupreskic to be a co-perpetrator in the above acts, he was also found to be guilty on Count 1 of the amended indictment and

73 “HVO” refers to the Croatian Defence Council, or the HZ-HB armed forces.

74 Prosecutor v. Kupreskic et al., IT-95-16-T, Summary of Trial Chamber Judgement. [Reproduced in the accompanying notebook at Tab 10.]

75 Id. [Reproduced in the accompanying notebook at Tab 10.]

76 Id. [Reproduced in the accompanying notebook at Tab 10.]

77 Id. [Reproduced in the accompanying notebook at Tab 10.]
to be not guilty regarding the other counts brought against him. 78 Yet, the Trial Chamber found Mirjan Kupreskic to have played a lesser role in the commission of these acts than his brother, and as such, sentenced him to eight years in prison for persecution as a crime against humanity under Article 5(h) of the Statute – as compared with Zoran Kupreskic’s sentence of ten years. 79

The Trial Chamber stated the following facts regarding defendant Drago Josipovic:

The Trial Chamber finds that you, Drago Josipovic, participated in the murder of Musafer Puscul, that you took part in the attack on the house of Nazif Ahmic and that you were actively involved in the burning of private property. The Trial Chamber finds that you, together with Vladimir Santic, were part of a group that went to the Ahmic house with the common intent to kill and/or expel its inhabitants and set it on fire and that you were present at the scene of the crime. We find that you did so purely because the victims were Muslims, for the same reason set out above with respect to Zoran and Mirjan Kupreskic. We find, further, that you were aware that you would be attacking unarmed and helpless civilians and that this attack was part of the beginning of a large-scale campaign of ethnic cleansing of Muslims from the Lasva River Valley. 80

In accordance with these findings, the Trial Chamber found Drago Josipovic guilty on Count 1 for persecution as a crime against humanity under Article 5(h) of the Statute. 81

In addition to a guilty conviction under Count 1 of the amended indictment, Drago Josipovic was also found guilty for the murder of Musafer Puscul under Count 16, committing a crime against humanity under Article 5(h) of the Statute, and for

78 Id. [Reproduced in the accompanying notebook at Tab 10.]
79 Id. [Reproduced in the accompanying notebook at Tab 10.]
80 Id. [Reproduced in the accompanying notebook at Tab 10.]
81 Id. [Reproduced in the accompanying notebook at Tab 10.]
committing inhumane acts and cruel treatment under Count 18, constituting a crime against humanity under Article 5(i) of the Statute. \(^{82}\) Counts 16 and 18 charged these two defendants under the facts of paragraphs 32 through 34 of the amended indictment:

32. On 16 April 1993 numerous HVO soldiers, including DRAGO JOSIPOVIC and VLADIMIR SANTIC attacked the home of Musafer and Suhreta Puscul, while the family, which included two young daughters, was sleeping.

33. During the attack, DRAGO JOSIPOVIC, VLADIMIR SANTIC and other HVO soldiers, aiding and abetting one another, forcibly removed the family from their home and then killed Musafer Puscul.

34. As part of the attack, the HVO soldiers, including DRAGO JOSIPOVIC and VLADIMIR SANTIC, vandalised the home and then burned it to the ground. \(^{83}\)

The Trial Chamber found that even though Drago Josipovic may not have personally murdered Musafer Puscul, his active presence in the group of soldiers made them co-perpetrators of the crime. \(^{84}\) Likewise, he was found guilty of committing inhumane acts by forcing the Puscul family to witness the murder of Musafer Puscul and by forcing the family out of their home only to then have it be destroyed. \(^{85}\) For his guilt under Counts

\(^{82}\) Id. [Reproduced in the accompanying notebook at Tab; see also Amended Indictment against Zoran Kupreskic, Mirjan Kupreskic, Vlatko Kupreskic, Drago Josipovic, Dragan Papic, and Vladimir Santic also known as “Vlado” filed by the Prosecutor of the International Criminal Tribunal for the Former Yugoslavia (February 9, 1998). [Reproduced in the accompanying notebook at Tab 25.]

\(^{83}\) Amended Indictment against Zoran Kupreskic, Mirjan Kupreskic, Vlatko Kupreskic, Drago Josipovic, Dragan Papic, and Vladimir Santic also known as “Vlado” filed by the Prosecutor of the International Criminal Tribunal for the Former Yugoslavia (February 9, 1998). [Reproduced in the accompanying notebook at Tab 25.]

\(^{84}\) Prosecutor v. Kupreskic et al., IT-95-16-T, Summary of Trial Chamber Judgement. [Reproduced in the accompanying notebook at Tab 10.]

\(^{85}\) Id. [Reproduced in the accompanying notebook at Tab 10.]
1, 16, and 18 of the amended indictment, Drago Josipovic was sentenced to fifteen years in prison. 86

The appeals of Zoran Kupreskic, Mirjan Kupreskic, and Drago Josipovic contained arguments that their respective convictions were based, unjustly, upon material facts not pleaded in the amended indictment. 87 With regards to the appeal of Zoran and Mirjan Kupreskic, the Appeals Chamber held that “the Amended Indictment failed to plead the material facts of the Prosecution case against Zoran and Mirjan Kupreskic with the requisite detail.” 88 As such, the Appeals Chamber ruled that the Trial Chamber “erred in law” by using such material facts as the basis for a conviction under Count 1 of the amended indictment. 89 The Appeals Chamber reversed the convictions against both Zoran and Mirjan Kupreskic. 90 This decision marked the first time in the history of the ICTY “that the Appeals Chamber acquitted defendants on appeal.” 91

The Appeals Chamber also ruled that the Trial Chamber erred in relying upon material facts not pleaded in the amended indictment when convicting Drago Josipovic

86 Id. [Reproduced in the accompanying notebook at Tab 10.]; see also Prosecutor v. Kupreskic et al., IT-95-16-A, Summary of Judgement in the Kupreskic Appeal. [Reproduced in the accompanying notebook at Tab 11.]

87 Prosecutor v. Zoran Kupreskic et al., IT-95-16-A, Appeal Judgement, paras.79 and 306. [Reproduced in the accompanying notebook at Tab 12.]

88 Id., para. 124. [Reproduced in the accompanying notebook at Tab 12.]

89 Id. [Reproduced in the accompanying notebook at Tab 12.]

90 Id., para. 246. [Reproduced in the accompanying notebook at Tab 12.]

for persecution under Count 1 of the amended indictment. 92 In particular, the Appeals Chamber found that “the Amended Indictment was defective in its failure to plead the attack on the home of Nazif Ahmic.” 93 As a result, the Appeals Chamber reduced the basis for Drago Josipovic’s conviction of persecution. 94 His overall sentence was thereby reduced from fifteen to twelve years in prison. 95

F. Precedent Set By the ICTY: Kupreskic Appeals Judgment

In the ICTY Appeals Judgment of Prosecutor v. Kupreskic et al., IT-95-16-A, Zoran Kupreskic, Mirjan Kupreskic, and Drago Josipovic claimed that the Trial Chamber erred in law by convicting each of them based upon material facts not pleaded in the amended indictment. 96 The defendants claimed that this led to unfair notice of the charges against them. 97 The Appeals Chamber, relying upon the finding in Prosecutor v. Furundzija stated that:

[There is] an obligation on the part of the Prosecution to state the material facts underpinning the charges in the indictment, but not the evidence by which such material facts are to be proven. Hence, the question whether an indictment is pleaded with sufficient particularity is dependent upon whether it sets out that material facts of the Prosecution case with enough

92 Prosecutor v. Zoran Kupreskic et al., IT-95-16-A, Appeal Judgment, para.361. [Reproduced in the accompanying notebook at Tab 12.]

93 Id., para. 438. [Reproduced in the accompanying notebook at Tab 12.]

94 Id. [Reproduced in the accompanying notebook at Tab 12.]

95 Id. [Reproduced in the accompanying notebook at Tab 12.]

96 Id., paras. 79 and 306. [Reproduced in the accompanying notebook at Tab 12.]

97 Id. [Reproduced in the accompanying notebook at Tab 12.]
detail to inform a defendant clearly of the charges against him so that he may prepare his defence.  

The Appeals Chamber states that “the materiality of a particular fact cannot be decided in the abstract.” Instead, fact materiality depends upon the character of the prosecution’s case. One key factor in determining the requisite degree of fact specificity to be included within the indictment is the nature of the criminal conduct to which the defendant is accused of having committed.

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98 Id., para. 88 [Reproduced in the accompanying notebook at Tab 12.] citing Furundzija Appeals Judgement, para. 147 [Reproduced in the accompanying notebook at Tab 9.]; Krnojelac Decision of 24 February 1999, paras. 7 and 12; Krnojelac Decision of 11 February 2000, paras. 17 and 18; and Brdanin Decision of 20 February 2001, para. 18.

99 Id., para. 89. [Reproduced in the accompanying notebook at Tab 12.]

100 Id. [Reproduced in the accompanying notebook at Tab 12.]

101 Id. [Reproduced in the accompanying notebook at Tab 12.] The Appeals Chamber in Kupreski gives examples to help illustrate this point:

[I]n a case where the Prosecution alleges that an accused personally committed the criminal acts, the material facts, such as the identity of the victim, the time and place of the events and the means by which the acts were committed, have to be pleaded in detail. Obviously, there may be instances where 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”. Such would be the case where the Prosecution alleges that an accused participated, as a member of an execution squad, in the killing of hundreds of men. The nature of such a case would not demand that each and every victim be identified in the indictment. Similarly, an accused may be charged with having participated as a member of a military force in an extensive number of attacks on civilians that took place over a prolonged period of time and resulted in large numbers of killings and forced removals. In such a case the Prosecution need not specify every single victim that has been killed or expelled in order to meet its obligation of specifying the material facts of the case in the indictment.

The Appeals Chamber did not find the cases against Zoran Kupreskic, Mirjan Kupreskic, or Drago Josipovic to be situations where the large scale of alleged crimes would prevent the prosecution from pleading specific details of the criminal conduct which was alleged. 102 Conversely, the cases against these men presented situations where the Appeals Chamber thought it perfectly reasonable for the prosecution to be able to plead the identity of the victims, along with the dates when the crimes were committed, with specificity. 103 The Kupreskic Appeals Chamber emphasized the point that it is unacceptable “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.” 104

In particular, the Appeals Chamber addressed the charge of persecution, stating that it could not be used “as a catch-all charge.” 105 It is not enough for an indictment to simply use generic terms when charging a crime. 106 Yet, while an indictment must present particulars of criminal conduct, it is not necessary for a separate charge to be given for every basic crime that entails persecution, as a more general offense. 107 When

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102 Id., para. 91. [Reproduced in the accompanying notebook at Tab 12.]
103 Id. [Reproduced in the accompanying notebook at Tab 12.]
104 Id., para. 92 [Reproduced in the accompanying notebook at Tab 12.] citing Krnojelac Decision of 11 February 2000, para. 23.
105 Id., para. 98. [Reproduced in the accompanying notebook at Tab 12.]
106 Id. [Reproduced in the accompanying notebook at Tab 12.]
107 Id. [Reproduced in the accompanying notebook at Tab 12.] citing Brdanin Decision of 26 June 2001, para. 61.
charging persecution, the prosecution must “particularize the material facts of the alleged
criminal conduct of the accused that, in its view, goes to the accused’s role in the alleged
crime.” 108

An indictment is defective, according to the Appeals Chamber in Kupreskic, if it fails to plead the essential aspect of the prosecution’s case with sufficient detail. 109 Yet, if the prosecution provides the defendant with “timely, clear and consistent information detailing the factual basis underpinning the charges against him or her,” then a defective indictment can be fixed. 110 Including such details in a pre-trial brief could allow the prosecution to fix its defective indictment. Yet, in the Kupreskic case, the information contained in the Prosecution Pre-Trial Brief was too general in its nature to have actually aided the defendants in their preparation. 111

G. Implications of Furundzija and Kupreskic

Both the ICTY and the ICTR, given their status as international tribunals, are confronted with challenges unique from those of the national court systems. One commentator, Bernard Oxman, has noted that:

International criminal cases typically arise out of large-scale attacks on whole communities, and the ensuing chaos makes adjudication difficult. Witnesses may be confused, traumatized, or reluctant to testify. Physical evidence may be lacking or may become available late in the litigation. Suspects may be hard to locate or impossible to arrest. Those who do

108 Id. [Reproduced in the accompanying notebook at Tab 12.]

109 Id., para. 114. [Reproduced in the accompanying notebook at Tab 12.]

110 Id. [Reproduced in the accompanying notebook at Tab 12.]

111 Id., para. 117. [Reproduced in the accompanying notebook at Tab 12.]
come into custody face infamous charges, for crimes sometimes described imprecisely. 112

As both the Yugoslavia and Rwanda tribunals have received criticism regarding the manner in which they handle the rights of those accused, the ability of the ICTY and the ICTR to give each defendant a fair trial is becoming increasingly important. 113 As Oxman indicates, the Kupreskic Appeals Chamber’s decision to overturn the convictions of Zoran Kupreskic, Mirjan Kupreskic, and Drago Josipovic, is “notable.” 114

In the case of Prosecutor v. Kupreskic, the Appeals Chamber held that the indictment was inadequate, thereby rendering an unfair trial for the defendants. This result, while based upon common notions of pleading requirements and the rationales behind them, is nonetheless an unfamiliar result. 115 The Kupreskic appellate ruling combined both enforcement of the prosecution’s duty to provide adequate notice in order that the accused can prepare a suitable defense and the duty of the Trial Chamber in ensuring the prosecution fulfills this duty. 116


113 Id. [Reproduced in the accompanying notebook at Tab 33.]

114 Id. [Reproduced in the accompanying notebook at Tab 33.]

115 Id. at 445. [Reproduced in the accompanying notebook at Tab 33.]

116 Id. [Reproduced in the accompanying notebook at Tab 33.] Oxman notes that “[p]inpointing material facts will not only provide an essential aid to the unavoidably difficult task of gathering evidence, but also give needed precision to those crimes that international criminal statutes define in ‘nebulous’ fashion.” Id. [Reproduced in the accompanying notebook at Tab 33.]
indictment is adequate will be seen as waived if it is not raised before trial. 117 This was one of the prosecution’s successful arguments in the Furundzija appeal. 118 In addition, in the United States, a defendant waives his objection to a variance between proof at trial and the allegations set forth in an indictment, if it is not raised during trial, nor is it prejudicial to the defendant. 119

Another strong prosecutorial argument regarding material facts not pleaded in the indictment, as previously noted, is that “[i]t is not the function of the indictment to plead evidence.” 120 According to Rule 47(C) of the ICTR Rules, the prosecution need only include “the name and particulars of the suspect, and a concise statement of the facts of the case and of the crime with which the suspect is charged.” 121 This “concise statement” is not intended to be a presentation of the prosecution’s evidence to be presented at trial. There are other methods in which the defense can gather this information before trial, i.e. pre-trial discovery. The Furundzija court itself held that it is possible for the prosecution to rely upon evidence not included in the indictment, and for a Trial Chamber to admit such evidence in support of facts that have not been alleged in

117 LaFave, Israel & King, *Criminal Procedure* at 892. [Reproduced in the accompanying notebook at Tab 27.] In the U.S., when this issues is properly raised on appellate review, “the courts will look to discovery that was given (or could have been requested), and ask whether the defendant was actually taken by surprise, and if so, whether prejudice resulted.” Id. [Reproduced in the accompanying notebook at Tab 27.]

118 Prosecutor v. Furundzija, IT-95-17/1-A, Appeals Judgment, para. 133. [Reproduced in the accompanying notebook at Tab 9.]

119 41 Am Jur. 2d § 261. [Reproduced in the accompanying notebook at Tab 36.]

120 Carroll, 332 F.Supp. at 1302. [Reproduced in the accompanying notebook at Tab 18.] *See also* footnote 84.

121 ICTR Rule 47(C). [Reproduced in the accompanying notebook at Tab 3.]
the indictment, without prejudicing the defendant.\footnote{Prosecutor v. Furundzija, IT-95-17/1-A, Summary of Appeals Chamber Judgement, 21 July 2000. [Reproduced in the accompanying notebook at Tab 8.]} The Appeals Chamber in both Furundzija and Kupreskic look to the Trial Chamber ruling in Krnojelac, which dictates that an indictment only needs to contain the material facts underpinning the charges.\footnote{Prosecutor v. Furundzija, IT-95-17/1-A, Appeals Judgement, para. 147 [Reproduced in the accompanying notebook at Tab 9.]; Prosecutor v. Kupreskic et al., IT-95-16-A, Appeals Judgement, paras. 79 and 306. [Reproduced in the accompanying notebook at Tab 12.]} An indictment does not need to present evidence that will be presented in support of those material facts.\footnote{Id. [Reproduced in the accompanying notebook at Tab 9.]}  

As dictated by the Court in the U.S. case of\footnote{Gaither, 413 F.2d at 1071. [Reproduced in the accompanying notebook at Tab 16.] See footnote 72.} Gaither v. United States, a variance “occurs when the charging terms of an indictment are left unaltered, but the evidence offered at trial proves facts materially different from those alleged in the indictment.”\footnote{Martin, 970 F.2d at 1542 [Reproduced in the accompanying notebook at Tab 17.] citing United States v. Ford, 872 F.2d 1231, 1235 (6th Cir. 1989).} A strong argument can be made in stating that unless a variance misleads a defendant in preparing his defense, then it should not be considered material. And, unless a variance is material, it should not be considered reversible error. As previously noted, a variance to an indictment “merely permits the prosecution to prove facts to establish the criminal charge materially different from the facts contained in the charging instrument.”\footnote{Martin, 970 F.2d at 1542 [Reproduced in the accompanying notebook at Tab 17.] citing United States v. Ford, 872 F.2d 1231, 1235 (6th Cir. 1989).}
Finally, while the Appeals Chamber in *Kupreskic* finds that it is not sufficient for an indictment to merely utilize generic terms when presenting a charge, it is important to note that, on occasion, the use of statutory language when presenting a charge in an indictment is acceptable. Again, if the wording of a statute clearly dictates all of the necessary elements to constitute an offense, then an indictment that relies upon this language should be acceptable. 127 Yet, as the *Kupreskic* Appeals Chamber judgment indicates, the crime of persecution cannot be used as a “catch-all charge.” 128

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127 LaFave, Israel & King, *Criminal Procedure* at 890. [Reproduced in the accompanying notebook at Tab 27.]

128 Prosecutor v. Zoran Kupreskic et al., IT-95-16-A, Appeals Judgement, para. 98. [Reproduced in the accompanying notebook at Tab 12.]