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UNITED
NATIONS

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

Case: IT-97-24-PT

Date: 13 November 2001

Original: English

IN THE TRIAL CHAMBER

Before: Judge Almiro Rodrigues, Presiding

Judge Fouad Riad

Judge Patricia Wald

Registrar: Mr. Hans Holthuis

PROSECUTOR

v.

MILOMIR STAKIĆ

DECISION ON THE DEFENCE MOTION OBJECTING TO THE FORM OF THE INDICTMENT

Office of the Prosecutor:

Ms. Susan Somers

Counsel for the Defence:
Mr. Branko Lukić

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I. INTRODUCTION

1. Pending before this Trial Chamber of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 ("International Tribunal") is the Defence "Motion Objecting to the Form of the Second Amended Indictment" ("the Motion"), dated 19 October 2001, a Preliminary Motion filed in accordance with Rule 72 of the Rules of Procedure and Evidence ("the Rules").

THE TRIAL CHAMBER, HAVING CONSIDERED the written submissions of the parties,

HEREBY ISSUES ITS WRITTEN DECISION.

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II. DISCUSSION

2. An indictment against Milomir Stakić et *al.* was confirmed by Judge Elisabeth Odio Benito on 13 March 1997 and charged the defendant with complicity in Genocide for acts committed in Prijedor municipality in 1992. On 1 August 2001, the Prosecution applied for leave to file an Amended Indictment, whereby it sought to add eleven counts to the original indictment. The Chamber granted this request on 2 August 2001. A corrigendum to the First Amended Indictment was filed on 6 August in order to add a reference to Articles 7(1) and 7(3), which was inadvertently omitted. On 31 August 2001, the Prosecution filed an "Application for leave to Amend First Amended Indictment" ("the Prosecution's Application"), whereby the Prosecution sought to add two additional charges, namely inhumane acts, a crime against humanity, and plunder of public or private property, an offence under Article 3 of the Statute. The Prosecution's Application was orally granted at the Status Conference on 5 October 2001 ("the Status Conference") and an additional period of 15 days was granted to the Defence to file preliminary motions. At the Status Conference, the Defence expressed its intention to file a motion on the form of the indictment, which would object to both the first and the second amendments to the original indictment.

3. The Second Amended Indictment charges Milomir Stakić with genocide or complicity in genocide (counts 1 and 2), murder and extermination (counts 3 to 5), persecutions (count 6), torture and cruel treatment (counts 7 to 9), deportation or inhumane acts (counts 10 and 11), as well as wanton destruction or devastation of cities, towns or villages, destruction or wilful damage to institutions dedicated to religion and plunder of public or private property (counts 12 to 14), for the events which took place in the Prijedor municipality between 11 September 1991 and 30 September 1992.

4. The factual background of the indictment can be summarised as follows:

1) the forcible take-over of Prijedor by Bosnian Serb forces on 30 April 1992;
2) the ensuing restrictions on "all aspects life" of non-Serbs, which resulted in their containment in specific areas and villages;
3) large-scale attacks launched by the Bosnian Serb forces upon those areas and villages, from late May 1992 until July 1992;
4) the killings and destruction of property during and in the immediate aftermath of the attacks, including the attack launched against Prijedor on or about 31 May 1992;

5) the detention of non-Serbs in the camps of Omarska, Keraterm and Trnopolje ("the three camps") until August 1992 and their subsequent transfer to Manjača camp in Banja Luka municipality;
6) the forcible transfer, or/and deportation of the non-Serbs out of the Prijedor municipality, from June to September 1992.

5. Counts 1 and 2, genocide and complicity in genocide, are based on the following material facts:

1) the killings that occurred during and in the immediate aftermath of the attacks launched in Prijedor municipality from May 1992 through June and July 1992; the indictment lists ten instances of killings for which the place and date of their occurrence are specified; the number and identity of the victims are not provided (para. 17)
2) the killings and disappearances of hundreds of non-Serbs detained in the three camps; the indictment lists eleven instances of such killings, for which the place and date of their occurrence are specified; the number and identity of the victims are not provided (para. 18)
3) the serious bodily or mental harm, including sexual assaults, torture, beatings and robbery, extortion as well as other forms of mental and physical abuse, which were caused to the detainees in the three camps; no specific instance of such mistreatment is provided (para. 19)
4) the conditions of detention in the three camps, which, in the view of the Prosecution, were calculated to bring about the physical destruction of the detainees; the indictment mentions the grossly insufficient food rations, lack or absence of medical care and grossly inadequate hygienic conditions; further, the mistreatments considered in the previous paragraph are mentioned again under this paragraph, with special emphasis on the sexual abuses suffered by the women detained in the three camps (para. 20)
5) the mass killing of approximately 200 men, which occurred on or about 21 August 1992 in Korićanske stijene, mentioned under both paragraphs 18 and 21 of the Second Amended Indictment. The Chamber notes, however, that paragraph 18 indicates that only part of the men executed were originally detained in Trnopolje, whereas paragraph 21 states that they were all former detainees at Trnopolje.

6. Counts 3 to 5, murder and extermination, are based, in addition to the material facts presented under counts 1 and 2, on the following facts:

1) the killings which occurred during and in the immediate aftermath of the attacks launched on about 23 May through the end of July 1992; special emphasis is given to the first attacks, which were conducted against the villages of Hambarine and Kozarac (para. 25) and the final large scale attack on Brdo (para. 26)

2) the mass murder of 150 men from Brdo who were detained in Room 3 of the Keraterm camp; this mass murder is already referred to under the counts of genocide or complicity in genocide, as one of the eleven instances of mass killings which occurred in the detention camps (see *supra* para. 5 (2)) (para. 26).

7. Count 6, persecutions, is based, in addition to the facts previously mentioned under counts 1 to 5, and the facts listed under counts 7 to 9, torture and cruel treatment, on the following material facts:

1) the fact that, from 30 April 1992, the non-Serbs were expelled from their jobs in the municipal administration as well as in business and economic organisations; that private and commercial property of Bosnian Muslims and Bosnian Croats was looted and plundered; no specific instances are given (para. 30)
2) the restriction on movement resulting from roadblocks and checkpoints set up throughout the municipality (para. 31)
3) the verbal and physical assault suffered by the non-Serbs while they were transferred to the three camps; in particular, some of them were taken to police stations or military barracks where they were abused, before they were transferred to one of the three camps (para. 32)
4) the mistreatments, including torture and murder, committed in the three camps by Bosnian Serb police, military or civilians, who were given access thereto and the lack of judicial process for the detainees (para. 33)

8. Counts 7 to 9, torture and cruel treatment, is based, in addition to the material facts exposed under counts 1 and 2 (see *supra* para. 5 of this decision), and 6 (see *supra* para. 7 of this decision), on the following facts:

1) paragraph 37 repeats *verbatim* paragraph 32, previously summarised under count 6, except for a reference to the fact that some men were shot in the process of being transferred to the detention camps
2) paragraph 38 mentions the inhumane conditions of detention, torture and other forms of physical violence, constant humiliation, degradation and fear of death; no specific instance is listed and it is unclear whether the facts referred to in paragraph 38 are distinct from those mentioned under paragraph 33 previously summarised, or whether those two paragraphs fully or partly overlap.

9. Counts 10 and 11 (deportation and inhumane acts) are based, in addition to the facts described under counts 1 and 2 (see *supra* para. 5 of this decision), and 6 (see *supra* para. 7 of this

decision), on the forced transfers and deportations of non-Serbs from early June 1992 through September 1992.

10. Counts 11 to 14, wanton destruction or devastation of cities, towns or villages, destruction or wilful damage to institutions dedicated to religion and plunder of public or private property, are based on the systematic looting and destruction of Bosnian Muslim and Bosnian Croat villages and property, including homes, businesses and religious edifices; a list of eleven mosques destroyed between 30 April and 30 September 1992 is provided.

11. Milomir Stakić is charged with criminal responsibility under both Articles 7(1) and 7(3) for his involvement, as the President of the "Crisis staff" and of the "Council for National Defence" of Prijedor, in those events. The basis for his responsibility under each count is exactly the same.[1] For each count, the Second Amended Indictment alleges that Milomir Stakić, as the Vice-President of the SDS Municipal Board in Prijedor and then President of the Prijedor "Crisis staff" or its successor bodies, "planned, organised, co-ordinated, assisted or otherwise aided and abetted in the planning and preparation of a campaign to permanently remove the Bosnian Muslims and Bosnian Croats from Prijedor through a campaign of persecutions" from 11 September 1991 until 30 September 1992; that between 30 April 1992 and 30 September 1992, he, in concert with other members of the "Crisis Staff" or its successor bodies, "ordered, instigated, and implemented, or otherwise aided and abetted in the execution of [the] campaign [of persecutions] in Prijedor municipality". The charges of murder and extermination (para. 27), persecutions (para. 34), torture and cruel treatment (para. 39), forcible transfer deportation (para. 43), attacks on public, private and religious property (para. 37), are alleged to be "part of this campaign". As for counts 1 and 2, the Second Amended Indictment adds that, from about 22 May 1992, the "campaign escalated to include the destruction, in part, of the Bosnian Muslims and Bosnian Croats in Prijedor, as such, in particular their leadership".

12. Further to these bases for the defendant's responsibilty under Article 7(1), paragraph 56 of the Second Amended Indictment alleges a theory of common purpose in which the defendant played "a leading role", in concert with other Bosnian Serb leaders in Prijedor. The Prosecution submits that the common purpose of the joint criminal enterprise was originally to "permanently remove the Bosnian Muslims and the Bosnian Croats from the area". It then changed from about 22 May 1992 and escalated to include the destruction, in part, of the Bosnian Muslims and Bosnian Croats in Prijedor, as such. The Second Amended Indictment alleges that Milomir Stakić

"knowingly and wilfully participated in the joint criminal enterprise" and that he "shared the state of mind required for the commission of each of the crimes charged". The Second Amended Indictment adds that "if any of the crimes charged in this Second Amended Indictment were not part of the common purpose [...], they were natural and foreseeable consequences of the execution of the common purpose" and the defendant was aware of it. The Prosecution concludes that Milomir Stakić "bears individual criminal responsibility for these crimes under Article 7(1) in addition to his responsibility under the same Article for having planned, instigated, ordered or otherwise aided and abetted in the planning, preparation or execution of these crimes".[2]

13. The Chamber notes however that an additional paragraph on the accused's responsibility is found under the section entitled "General Allegations". Paragraph 62 lists all forms of responsibility under Article 7(1) without specifically referring to common purpose.

14. For all the counts, the Second Amended Indictment additionally alleges that Milomir Stakić is responsible under Article 7(3). A distinction must however be drawn between counts 1 and 2 and the other counts. Under counts 1 and 2, the accused is alleged to be responsible under Article 7(3) from 23 May 1992 until 30 September 1992 (para. 28). For all the other counts, the defendant is alleged to be responsible under Article 7(3) from 30 April 1992 until 30 September 1992 (paras. 35, 40, 44, 48, 55).[3]

A. Arguments of the Parties

15. The Motion objects to the Second Amended Indictment on the ground that it is too vague and does not permit the defendant to prepare an adequate defence, hence infringing his right to a fair trial under Article 21 of the Statute. The defence requests that further details be given with respect to the facts alleged in the Second Amended Indictment and the role of the defendant in each of those facts.

16. The Prosecution replies that the Second Amended Indictment contains all details required by Article 18(4) of the Statute and Rule 47(C) of the Rules, as interpreted in the Tribunal's case law.[4]

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[1] The Chamber notes in this respect that two paragraphs (paras. 15 and 22) are devoted to the defendant's criminal responsibility under counts 1 and 2. These paragraphs are very similar, in both form and content.
[2] para. 56(d).
[3] See also paragraph 63 under the Section entitled "General Allegations".
[4] Prosecution's Response to "Defendant's Preliminary Motion Objecting to the Form of the Second Amended Indictment".

B. Analysis

17. Article 18(4) of the Statute provides that "the Prosecution shall prepare an indictment containing a concise statement of the facts and the crime or crimes with which the accused is charged under the Statute". Rule 47(C) of the Rules of Procedure and Evidence further states that "the 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".

18. The obligation for the Prosecution to provide a concise statement of the facts and crime(s) with which the defendant is charged stems from the right of the accused to "be informed promptly and in detail in a language he understands of the nature and cause of the charge against him" (Article 21(4)(a)) and "to have adequate time and facilities for the preparation of his defence" (Article 21 (4)(b)).

19. As recently expressed in the *Kupreškić* Appeals Chamber Judgement, "[i]n the jurisprudence of the Tribunal, this translates into an obligation on the part of the Prosecution to state the material facts underpinning the charges in the indictment, but not the evidence by which such material facts are to be proven. Hence, the question whether an indictment is pleaded with sufficient particularity is dependent upon whether it sets out the material facts of the Prosecution case with enough detail to inform a defendant clearly of the charges against him so that he may prepare his defence".[5]

20. While the *Kupreškić* Appeal Chamber Judgement emphasised that "the materiality of a particular fact cannot be decided in the abstract",[6] both the *Decision on Form of Further Amended Indictment and Prosecution Application to Amend* rendered on 26 June 2001 in the case against Brđanin and Talić[7] and the *Kupreškić* Appeals Chamber Judgement[8] took special account of the degree of proximity of the defendant to the crime alleged and the scale of the crime alleged. Where the defendant is charged with having committed the crime personally, "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".[9] On the other hand, those elements may not be material

[5] *Kupreškić* Appeals Chamber Judgement, 23 October 2001, para. 88.
[6] *Kupreškić* Appeals Chamber Judgement, para. 89.
[7] IT-99-36-PT, para. 59 (hereinafter "*Brđanin and Talić* Decision").
[8] Para. 89.
[9] *Kupreškić* Appeals Chamber Judgement, para. 89.

facts which had to be pleaded when the accused was considerably more remote from the crimes alleged.[10]

21. The Chamber now turns to the specific arguments of the Defence.

22. The Defence alleges that paragraph 16 of the Second Amended Indictment, under the count of genocide or complicity in genocide, is too vague regarding the allegations of restrictions on movement and actions of non-Serbs in the area and requests that each action intended to restrict the movement of the non-Serbs and the role of the defendant with respect to each of these actions be specified.

23. The Chamber agrees that the reference to the restriction on movement in paragraph 16 is vague. Further, it is not presented as a material fact underpinning the charge of genocide or complicity in genocide. But, as it appears from the description of the Second Amended Indictment presented above, restriction on movement is one of the material facts underpinning the charge of persecution and is detailed, under count 6, in paragraph 31 of the Second Amended Indictment. The latter explains that restriction on movement of the non-Serbs resulted from roadblocks and checkpoints set up throughout the municipality. On that basis, the Chamber finds that the allegation of restriction on movement is sufficiently detailed under the count of persecutions.

24. The Defence further requests that, for each of the attacks alleged in the Second Amended Indictment, the units involved, the orders or initiatives taken by the "Crisis Staff" and the exact role of the defendant, be specified.

25. Regarding the listing of each of the attacks alleged, the Chamber stresses that the structure of the Second Amended Indictment does not permit an easy reading of the events that are referred to. The Chamber notes in this respect that whereas paragraph 17 of the Second Amended Indictment indicates that the attacks were launched from May 1992 through June and July 1992, paragraph 25 is more specific and places the attacks within the time period of 23 May to the end of July 1992.

26. The Chamber however notes that paragraph 16 lists the forces involved in those attacks. It further acknowledges that the attacks *per se* are not presented as the material facts underpinning any charge. Rather, the Prosecution posits criminal charges on the basis of the killings, plunder and persecution which were committed in the context of those attacks. In this respect, paragraph 17 lists

[10] *Brđanin and Talić* Decision, para. 59.

a series of particular instances of killings that are specific enough to permit the Defence to adequately prepare its defence.

27. Paragraph 17, under the count of genocide or complicity in genocide, lists a series of killings. Likewise, paragraph 18 lists a series of mass killings which allegedly occurred during the operation of the three camps. The Defence requests that the name of each victim and the role of the defendant for each of those killings be specified.[11] The *Kupreškić* Appeals Chamber Judgement however specified that where an accused is charged "with having participated [...] in an extensive number of attacks against civilians that took place over a prolonged period of time and resulted in large number of killings and forced removals [...] the Prosecution need not specify every single victim that has been killed or expelled in order to meet its obligation of specifying material facts of the case in the indictment". The Appeals Chamber nevertheless indicated that "since the identity of the victim is information that is valuable to the preparation of the defence case, if the Prosecution is in a position to name the victims, it should do so".[12] On this basis, the information provided in paragraph 17 is specific enough. The Prosecution should however provide, in an annex to the Second Amended Indictment, the identity of the victims when possible or at least the approximate number of victims for each instance of killings listed.

28. The Defence also requests that further particulars be given with respect to the counts of murder and extermination (counts 3 to 5).[13] The section devoted to those charges however incorporates the lists of killings provided under counts 1 and 2. For the reasons previously set out, the Chamber thus finds that no further particulars are needed. The Chamber however points out several inconsistencies. The facts in support of counts 3 to 5 are presented by the Prosecution as additional facts specific to counts 3 to 5. Yet, they refer to three specific attacks and one specific mass killing at Keraterm which are already listed under counts 1 and 2. The Chamber does not see any justification for this and requires the Prosecution to gather counts 1 to 5 into a single section. The Chamber also notes that the section devoted to counts 3 to 5 is more specific as to the time period when the attacks took place than the section on counts 1 and 2. Those details should be kept consistent between counts.

29. The Defence requests further particulars with respect to the charge of bodily or mental harm inflicted upon the detainees of the three camps, the conditions of detentions, under the counts of

[11] Defence Motion, paras 6 and 7.
[12] *Kupreškić* Appeals Chamber Judgement, para. 90.
[13] Defence Motion, para. 10.

genocide or complicity in genocide.[14] According to the Defence, the Second Amended Indictment should list specific instances of mistreatment indicating the date and place of each such instance, the role played by the accused therein and the name of the other persons involved. The Defence claims that counts 6 through 11 should be more specific regarding the acts of persecution, torture or cruel treatment alleged. In particular, the Defence claims that paragraphs 32 to 37, relating to count 6, are too imprecise when they use terms like "many men", "many Bosnian Muslim and Croat prisoners" or "many of the detainees".[15]

30. The Chamber however finds that such degree of specificity is impracticable in view of the scale of the crimes charged with respect to the operation of the camps. Further, the defendant is not charged with having directly committed those crimes. To the contrary, he is charged for his role as the President of the "Crisis Staff" and the Second Amended Indictment indicates, in paragraph 53, that this organ "established detention facilities" and "prohibited the release of detainees and their return to Prijedor". The Second Amended Indictment specifies that bodily or mental harm inflicted on the detainees included sexual assault, torture, beatings and robbery, extortion, as well as other forms of mental and physical abuse.[16] It also alleges, with respect to the conditions of detention, that rations of food, hygiene and medical care were grossly insufficient.[17] Further particulars regarding specific instances of mistreatment and the specific role of the accused therein must thus be viewed as evidentiary material.

31. However, the Chamber has previously noted several inconsistencies among the paragraphs devoted to the three camps. In particular, paragraph 37, under the section on torture and cruel treatment, takes almost *verbatim* paragraph 32, under the section on persecution.[18] The Chamber alleges that this must be an error and requires the Prosecution to correct it. It is also unclear whether the Prosecution understands that paragraph 33[19] and paragraph 38[20] cover different sets of facts, or whether they fully or partly overlap. The Chamber requires the Prosecution to clarify this point.[21]

[14] Paras. 19, 20, 21 of the Second Amended Indictment. Paras 8 and 9 of the Defence Motion.
[15] Defence Motion, para. 28.
[16] Para. 19 of the Second Amended Indictment.
[17] para. 20 of the Second Amended Indictment.
[18] Para. 36 of the Second Amended Indictment.
[19] which concern mistreatments committed in the three camps by outsiders who were given access to the camps.
[20] devoted to inhumane conditions of detention, torture and other forms of violence in the three camps.
[21] See also *supra*, paras. 7(4) and 8(2).

32. The Defence also alleges that the terminology used in paragraphs 8 and 10 of the Second Amended Indictment is too imprecise.[22] Although vague, these statements are not presented as material facts in support of any of the charges and should rather be interpreted as providing a general background to the charges alleged.

33. The Chamber takes this opportunity to emphasise that the material facts must be given in support of each specific count alleged, and that general factual allegations not specifically linked to any of the charges do not permit the Defence, nor the Chamber, to prepare adequately for trial. In particular, the Chamber finds that, while a general factual background can be provided at the beginning of an indictment, an introductory section named "charges" or a final section on "additional factual allegations" give rise to confusion as to their purpose, use and meaning. Consequently, the Chamber requires the Prosecution to indicate expressly whether the information found under these sections is intended to provide an introductory factual background or additional material facts in support of the appropriate charge(s).

34. Further, the Chamber notes that virtually all charges in the Second Amended Indictment either fully or partly overlap. As it is, several paragraphs in the Second Amended Indictment are devoted to the same factual allegations. Minor differences existing between those paragraphs create confusion. In order to avoid such confusion, the factual allegations in the similar paragraphs should be dealt within one paragraph and reference to this single paragraph should be made under each count which relies on the material facts contained within it.

35. The Defence also raises several objections with respect to the individual criminal responsibility of the defendant. As previously indicated, the defendant is charged on all counts under both Articles 7(1), including joint criminal enterprise, and 7(3). The Defence's objections concern the allegations based on Article 7(3) and on the Article 7(1) theory of joint criminal enterprise.

36. The Defence requests further particulars on the role and powers of the "Crisis Staff" and the exact role of the defendant therein.[23] The Chamber notes again that the information on the accused's

[22] Para. 8 provides that "Subsequent to the period relevant to this Second Amended Indictment, Milomir Stakić continued to occupy positions of leadership, either de facto or de jure, in Prijedor municipality"; para. 10 refers to "severe restrictions on all aspects of life for non-Serbs".

[23] Para. 5 II of the Defence Motion requests that the orders or initiatives taken by the "Crisis Staff" in each attack be specified; para. 21 of the Defence Motion contends that the term used in paragraph 7 of the indictment is too imprecise. This paragraph alleges that paragraph 7 of the indictment alleges that Milomir Stakić, as the President of the "Crisis Staff", "had extraordinary executive and legislative power within Prijedor Municipality during the time period relevant

role is to be found spread out and scattered in bits and pieces throughout the Second Amended Indictment; this renders the reading and understanding of the Second Amended Indictment as a whole extremely difficult.[24] To the extent possible, all information relating to the role and power of the "Crisis Staff" should be gathered together into one single section. In its present form the information provided in the Second Amended Indictment on the "Crisis Staff" is specific enough once it is all pieced together but in its present form it does not make for an efficient reference or working document on which to conduct the trial. Paragraph 72, for instance, explains that the "Crisis Staff" was modelled on similar entities of the former Yugoslavia designed to take over the functions of municipal and other assemblies in time of war or emergency. Paragraph 51 indicates that the "Crisis Staff" was created to exercise executive and legislative power in the municipality and a list of specific actions taken by this organ is provided in paragraph 53. In view of the generality of the offences charged and the high-ranking position of the defendant, the Chamber finds that the information given in respect of the "Crisis Staff" is sufficiently detailed but not coherently structured. The Chamber thus requires the Prosecution to restructure the Second Amended Indictment in this respect. The Chamber further notes that the defendant is also alleged to have been the President of the "National Council of Defence of the Prijedor Municipality".[25] The information provided in the Second Amended Indictment does not allow the Chamber to distinguish the allocation of power and duties shared by these two institutions. The Chamber requires that the Prosecution specifies the relationships existing between the Municipal Assembly, the Crisis Staff and the Municipal Council for National Defence, the exact mission of the Municipal Council and to further specify the duties of the defendant in all three entities. The Prosecution should also provide, to the extent that it is in a position to do so, particulars on the specific troops and units involved in each of the events listed in the Second Amended Indictment.

37. Notably, the Defence claims that the Second Amended Indictment should specify which body or authority ordered the closure of the three camps, as opposed to referring to the generic term of "Serbian authorities".[26] The Chamber notes that paragraph 53 of the Second Amended Indictment specifies that the detention facilities were established by the "Crisis Staff". To further specify the authority that ordered the closure of the camps would not substantially change the nature of the charges held against Milomir Stakić, nor the scope of his alleged responsibility. The

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to this Second Amended Indictment". Paragraph 33 of the Defence Motion submits that the term "leader of Prijedor SDS" used in paragraph 50 of the Indictment is too vague.

[24] Information on the "Crisis Staff" can be found in paras. 6, 7, 12, 13, 49 to 53, 67, 68, 72, 73.

[25] Paras. 6, 49, 55.

[26] Defence Motion, para. 24.

Chamber, however, admits that such an indication could be useful to the Defence in the preparation of its case and urges the Prosecution to provide the information if possible.

38. With respect to the defendant's criminal responsibility under Article 7(3), the Defence claims that the following elements constitute material facts in support of his responsibility under Article 7(3): the specific acts for which he is alleged to be responsible, the time and place of the alleged crimes, the persons who committed those acts, the names of the victims, the relationship between the defendant and the actual perpetrators, as well as the specific conduct of the defendant that shows he knew or had reasons to know that the acts were about to be done or had been done and he failed to take the necessary and reasonable measures to prevent or punish such conduct. The Defence claims that these particulars are needed because the defendant was himself an inferior authority, subject to the superior authority of others. In particular, the Defence submits that the Second Amended Indictment "falsely attributes to the Prijedor Crisis Staff an authority and control that, *de facto* or *de jure*, it did not have and did not exercise".[27]

39. The Defence further claims that the Second Amended Indictment is not specific enough when it refers to the "effective control" exercised by the defendant over the persons having committed the offences. The Defence requests that the Second Amended Indictment specify the kind of orders issued by the defendant, to whom they were issued and whether he had the authority to punish persons committing offences. The Defence also requests that more particulars be provided in respect of the forces over which the "Crisis Staff" allegedly had authority and control.[28]

40. The Chamber previously found that information on the role of the "Crisis Staff", although scattered about, was sufficiently detailed. In particular, the Second Amended Indictment specifies that the "Crisis Staff" "assumed authority over local armed forces"[29] and "included military, police and territorial defence leaders among its members". The Chamber also notes that the status of Milomir Stakić in the "Crisis Staff" is sufficiently described in the Second Amended Indictment. As the President of the "Crisis Staff", his responsibility can be alleged for all actions taken by the "Crisis Staff" and a description of the roles and powers of this body suffices in itself to provide the defendant with sufficient information to understand the charges against him. In view of the scale of the crimes and the rank of the defendant as alleged in the Second Amended Indictment, further information relating to the type of order issued by the defendant or his ability to punish offenders must be viewed as evidentiary matters. The Chamber reminds in this respect that a motion on the

[27] Defence Motion, para. 318.
[28] Defence Motion, paras. 25 to 27, 29, 34.
[29] Second Amended Indictment, para. 52.

form of the Second Amended Indictment is not the proper forum in which to challenge the substance of what is contained in the Second Amended Indictment. The question as to whether Milomir Stakić was a high-ranking authority or a mid-level authority is a matter to be debated at trial. It is enough for the Defence to know, at this stage of the proceedings, that the defendant is charged with the crimes under article 7(3) for his role as the President of the "Crisis Staff" and the "Municipal Council for National Defence". Consequently, the Chamber finds that the information provided as to these matters in the indictment is sufficient.

41. The Defence also raises several objections with respect to the theory of joint criminal enterprise alleged by the Prosecution.

42. The Defence claims that, when the accused is charged with acting in concert with others, the indictment should indicate the name of those with whom he allegedly committed the crimes. The Prosecution replies that, by referring to the accused's associates as "members or supporters of Prijedor SDA", the Second Amended Indictment gives sufficient information.[30] The Chamber notes in that respect that Trial Chamber II has stated that, when liability is charged on the basis of the theory of joint criminal enterprise, "the indictment must inform the accused of the nature or purpose of the joint criminal enterprise (or its 'essence'), the time at which or the period over which the enterprise is said to have existed, the identity of those engaged in the enterprise- so far as their identity is known, but at least by reference to their category as a group – and the nature of the participation *by the accused* in that enterprise".[31] In view of the information provided by the Second Amended Indictment on the various Bosnian Serb institutions that were operating in the area at the time and in view of the high ranking position allegedly held by the defendant, the Chamber finds that reference to the "members or supporters of Prijedor SDS" is sufficient for the accused to understand the charges against him.

43. The Defence further objects to paragraph 56, which alleges that genocide was part of a common criminal purpose that "escalated to include the destruction, in part, of the Bosnian Muslims and Bosnian Croats in Prijedor". According to the Defence, to claim that genocide "can be a part of a common criminal purpose and that the objective of a common criminal purpose may change and evolve over time" is tantamount to an objective or, presumably, a group responsibility as contrasted to personal responsibility in criminal law and should be rejected.[32]

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[30] Prosecution's Response to "Defendant's Preliminary Motion Objecting to the Form of the Second Amended Indictment", 2 November 2001, para. 18.
[31] *Prosecutor v. Brdanin and Talić,* Decision on Objections by Momir Talić to the Form of the Amended Indictmnet, IT-99-36-PT, 20 February 2001, para. 21.
[32] Defence Motion, para. 35.

44. The Second Amended Indictment dates the joint criminal enterprise from 11 September 1991 until 30 September 1992. As presented in the Second Amended Indictment, the first objective of the joint criminal enterprise was to "permanently remove the majority of the Bosnian Muslims and Bosnian Croats from Prijedor Municipality" through a campaign of persecutions,[33] which included killings,[34] acts of persecution as described in paragraphs 29-33,[35] as well as torture and/or cruel treatment as described under counts 7-9.[36] According to paragraphs 15, 22 and 56, the initial common purpose to permanently remove the non-Serb population escalated, from about 22 May 1992, to include the destruction, in part, of the Bosnian Muslims and Bosnian Croats in Prijedor. Paragraph 56 further alleges that "if any of the crimes charged in this Second Amended Indictment were not part of the common purpose described above, they were natural and foreseeable consequences of the execution of the common purpose".[37] In other words, all the crimes alleged in the Second Amended Indictment are alleged to fall within a joint criminal enterprise aimed at ethnically cleansing the municipality and escalated, from about 22 May 1992, to include the physical destruction of part of the group as such. Alternatively, the Prosecution pleads that all the crimes were natural and foreseeable consequences of the joint criminal enterprise to permanently remove the non-Serbs from the area.

45. Although not expressly mentioned in the Statute, it is now well established that Article 7(1) includes joint criminal enterprise.[38] The Prosecution is therefore entitled to plead this theory. The question of its scope and applicability to the present case is an issue to be debated at trial. Three categories of joint criminal enterprise were identified in the *Tadić* Appeals Chamber Judgement: co-perpetration, the concentration camp cases and cases where one of the participants commits a crime which falls outside the original plan but is nevertheless the natural and foreseeable consequence of executing the common purpose. Both the first and the third categories are alternatively alleged for all counts in the Second Amended Indictment. As previously pointed out by Trial Chamber II, it is open to the Prosecution to plead the crimes in the alternative: "that they either fell *within* the agreed object of the joint criminal enterprise or went *beyond* that enterprise but were nevertheless a natural and foreseeable consequence of that enterprise".[39] In such case, however, Trial Chamber II

[33] Para. 22 of the Indictment
[34] Para. 27.
[35] para. 34.
[36] para. 39.
[37] Second Amended Indictment, para. 56(c).
[38] See *Tadić* Appeal Chamber Judgement, 15 July 1999, paras. 185-229, esp. para. 220; *Kordić & Čerkez* Trial Chamber Judgement, 26 February 2001, paras. 389 and ss.; *Krstić* Trial Chamber Judgement, 2 August 2001, paras. 610 and ss., *Kvočka et al.* Trial Chamber Judgement, 2 November 2001, paras. 265 and ss.
[39] *Brđanin & Talić* Decision, 6 June 2001, para. 40.

specified that the Prosecution would have "to plead that the accused had the state of mind required for those crimes".[40] Trial Chamber II indicated that this requirement is satisfied:
"(i) by pleading the evidentiary facts from which the state of mind is necessarily to be inferred, or (ii) by pleading the relevant state of mind itself as the material fact".[41]

46. In the view of the Chamber, the high-ranking positions allegedly held by the defendant during the period covered by the Second Amended Indictment constitute an evidentiary basis from which the state of mind could be inferred. The Chamber thus concludes that the Second Amended Indictment is sufficiently detailed with respect to the state of mind of the defendant.

47. The Chamber notes, however, that several paragraphs relating to the defendant's responsibility under Article 7(1) are scattered about at different places in the Second Amended Indictment, although the factual basis on which his responsibility is pleaded is exactly the same for all the charges alleged against him. If read together, it appears that the defendant is alleged to be responsible for all charges not only on the basis of a joint criminal enterprise, but also on all the other forms of responsibility included in Article 7(1) of the Statute.[42] The Tribunal's case law has repeatedly specified that individual responsibility by reference merely to all terms of Article 7(1) is likely to cause ambiguity and that "it is preferable that the Prosecution indicate, in relation to each individual count, precisely and expressly the particular nature of the responsibility alleged".[43] The Appeals Chamber nevertheless found that "failure to identify expressly the exact mode of participation is not necessarily fatal to an indictment if it nevertheless makes clear to the accused the 'nature and cause of the charge against him'".[44] The Chamber believes that the latter standard is met here although it believes it would be preferable for the Prosecution to indicate specifically which theory it is pursuing with reference to each count.

48. Finally, the Defence objects to the fact that the defendant is simultaneously charged for all counts under Article 7(1) and Article 7(3). The Defence contends that the two forms of liability are exclusive of one another and claims that "where the ground exists for application of Article 7(1) identity of the perpetrator and the accused must be the same".[45] The Prosecution submits that charging with Articles 7(1) and 7(3) is appropriate, although, with regard to *conviction* based on the

[40] *Brđanin & Talić* Decision, 6 June 2001, para. 41.
[41] *Brđanin & Talić* Decision, 6 June 2001, para. 33.
[42] See para. 62 of the Second Amended Indictment.
[43] *Aleksovski* Appeal Chamber Judgement, para. 171 fn. 319; see also *Prosecutor v. Krnojelac,* Decision on Preliminary Motion on Form of Amended Indictment, 11 February 2000, para. 60;, *Čelebići* Appeal Chamber Judgement, para. 351; *Prosecutor v. Brđanin & Talić*, Decision on Objections by Momir Talić to the Form of the Amended Indictment, 20 February 2001, para.10.
[44] *Čelebići* Appeal Chamber Judgement, para. 351.

same underlying acts, Article 7(3) liability is subsumed under Article 7(1). The Chamber finds that the Prosecution is entitled to plead both forms of responsibility as long as it provides evidence to prove both grounds of responsibility which are conceptually distinct, although in most cases it would expect those two grounds of responsibility would be more appropriately charged alternatively instead of cumulatively. Whether the Chamber will eventually find the defendant guilty or not guilty on either of those grounds is a different matter that has no bearing on what the Prosecution is entitled to plead at this stage.

[45] Defence Motion, para. 36.

III- DISPOSITION

For the foregoing reasons,

PURSUANT TO Articles 18(4) and 21 of the Statute and Rules 72(A) of the Rules of Procedure and Evidence ("the Rules");

THE TRIAL CHAMBER HEREBY

ORDERS the Prosecution reorganises the Second Amended Indictment along the guidelines provided in this decision by 27 November 2001;

AND THEREFORE DISMISSES the Defence Motion.

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

Almiro Rodrigues
Presiding Judge

Done this 13 November 2001
At The Hague,
The Netherlands.

[Seal of the Tribunal]