

**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 No. IT-03-69-PT

Date: 4 July 2008

Original: English

**IN TRIAL CHAMBER III**

**Before:** Judge Patrick Robinson, Presiding  
Judge Pedro David  
Judge Michèle Picard

**Registrar:** Mr. Hans Holthuis

**Decision of:** 4 July 2008

**PROSECUTOR**

v.

**JOVICA STANIŠIĆ  
AND  
FRANKO SIMATOVIĆ**

***PUBLIC***

**DECISION ON THE PROSECUTION'S MOTION TO  
AMEND THE REVISED SECOND AMENDED  
INDICTMENT**

**The Office of the Prosecutor**

Mr. Dermot Groome  
Ms. Doris Brehmeier-Metz  
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Mr. John Docherty

**Counsel for the Accused**

Mr. Geert-Jan Alexander Knoops and Mr. Wayne Jordash for Jovica Stanišić  
Mr. Zoran Jovanović and Mr. Vladimir Domazet for Franko Simatović

1. **TRIAL CHAMBER III** (“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 (“Tribunal”) is seised of the “Prosecution’s Motion Seeking Leave to Amend its Revised Second Amended Indictment in Compliance with the 4 February 2008 73 *bis*(D) Decision of the Pre-trial Chamber”, filed confidentially on 11 February 2008 (“Motion”).

#### **A. Relevant Procedural History**

2. The operative indictment in the proceedings against Jovica Stanišić and Franko Simatović is the Revised Second Amended Indictment (“Indictment”), filed on 15 May 2006.

3. On 4 February 2008, the Trial Chamber ordered the Prosecution, pursuant to Rule 73*bis* (D) of the Rules of Procedure and Evidence (“Rules”), to reduce the scope of the Indictment and to file an amended indictment to reflect the Trial Chamber’s Decision no later than 11 February 2008 (“Rule 73 *bis* (D) Decision”).<sup>1</sup>

4. On 11 February 2008, the Prosecution filed the Motion and requested in its Motion to be allowed to exceed the prescribed word limit, given the critical nature of the Indictment and the need to provide the Trial Chamber with detailed legal and factual arguments.<sup>2</sup> The Trial Chamber grants the Prosecution’s request to exceed the permitted word limit.

5. The Prosecution in its Motion seeks leave to amend the Indictment as set out in the “Proposed Third Amended Indictment”, attached to the Motion as Annex A (hereinafter “Proposed Indictment”). The Proposed Indictment includes not only the modifications ordered by the Trial Chamber in its Rule 73 *bis* (D) Decision, but also new and further amendments to the Indictment.

6. On 22 February 2008, the Defence of Franko Simatović (“Simatović Defence”) filed confidentially its “Defence Response on ‘Prosecution’s Motion Seeking Leave to Amend its Revised Second Amended Indictment in Compliance with the 4 February 2008 73 *bis*(d) Decision of the Pre-trial Chamber” (“Simatović Response”).

7. On 25 February 2008, the Defence of Jovica Stanišić (“Stanišić Defence”) filed its “Confidential Defence Response to ‘Prosecution’s Motion Seeking Leave to Amend its Revised Second Amended Indictment in Compliance with the 4 February 2008 73 *bis* (D) Decision of the Pre-trial Chamber” (“Stanišić Response”). The Stanišić Defence requested leave to exceed the

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<sup>1</sup> Decision Pursuant to Rule 73*bis* (D), filed 4 February 2008.

<sup>2</sup> Motion, para. 1.

permitted word limit for the filing of its response, “also in view of the size of the Prosecution’s Motion and the importance of the subject”.<sup>3</sup> The Trial Chamber grants the Stanišić Defence’s request to exceed the permitted word limit.

8. On 29 February 2008, the Prosecution filed, and sought leave for, its “Reply to Defence Responses to Prosecution’s Motion Seeking Leave to Amend its Revised Second Amended Indictment” (“Prosecution’s Reply”). The Trial Chamber grants the requested leave.

## **B. Submissions of the Parties**

### **1. Prosecution**

9. In the Motion, the Prosecution submits that it is its understanding that the Trial Chamber, in the Rule 73 *bis* (D) Decision, “while ordering not to proceed on certain crime sites or incidents”, nevertheless does not prohibit the Prosecution to lead evidence in relation to the dropped crime sites or incidents for the purpose of proving “pattern, intent, or knowledge”, pursuant to Rule 93 of the Rules and to support counts 1, 4 and 5 of the Indictment.<sup>4</sup>

10. As to the further proposed amendments, the Prosecution submits, in its general premise, that the Proposed Indictment

- pleads with greater specificity the material facts underlying the charges, as well as the particular acts and conducts of the Accused upon which alleged criminal responsibility under the modes of liability is premised;<sup>5</sup>

- lays no new charges, includes no new theories of liability against the Accused, and contains no new allegations of fact;<sup>6</sup>

- elaborates in greater detail on the facts included in the indictment, rendering the Amended Indictment more refined and focused;<sup>7</sup>

11. It is further recalled in the Motion that the case law of the Tribunal provides for two factors to be considered in determining whether amendment of an indictment would cause unfair prejudice to an accused: whether the accused has been given an adequate opportunity to prepare an effective defence, and whether granting the amendments will result in undue delay.<sup>8</sup>

12. As to the first factor, the Prosecution submits that the notice received by the Defence is to be considered adequate for two reasons. First, the Motion was filed prior to the start of trial and prior

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<sup>3</sup> Stanišić Response, para. 2.

<sup>4</sup> Motion, para. 17 (a).

<sup>5</sup> Motion, para. 4.

<sup>6</sup> Motion, para. 4.

<sup>7</sup> Motion, para. 17 (b).

<sup>8</sup> Motion, para. 7.

to a determination of the date on which the trial would commence, leaving “ample time” for the Accused to be informed of the amendments included in the Proposed Indictment.<sup>9</sup> Second, the Prosecution argues that “all specifications and details included in the proposed amendments were elaborated in the Consolidated Pre-Trial Brief, which thus provided the Accused with detailed notice.”<sup>10</sup>

13. As to the second factor, the Prosecution submits that the proposed amendments to the Indictment will not result in a delay in the proceedings since the Proposed Indictment does not lay any new charge. The Prosecution argues that an amendment to an indictment is more likely to cause undue delay if it includes new charges, as an accused would then be entitled to a further appearance to enter a plea to the new charges and also would have an additional 30 days to file preliminary challenges in respect of the new charges, pursuant to Rule 72.<sup>11</sup>

14. The Prosecution further recalls that, in the relevant case law of the Tribunal, the element of the likelihood of delay in the proceedings has been balanced with the benefits to the Accused and the Trial Chamber as a result of a more specific and detailed indictment.<sup>12</sup> The Prosecution submits that the Proposed Indictment would facilitate the work of the Defence and assist the Trial Chamber, since it pleads material facts, acts and conducts with greater specificity, presents fewer repetitions, ensures logical sequencing and provides clarification on certain issues.<sup>13</sup> The Prosecution also states that the Proposed Indictment, by providing greater specificity, is more in conformity with the Tribunal’s case law, “which has developed since the first indictment was confirmed in 2003”.<sup>14</sup>

15. Furthermore, the Prosecution recalls that the Appeals Chamber found that

it is possible to cure a defective indictment through the information provided in the Prosecution’s pre-trial brief or its opening statement,<sup>15</sup>

and submits in this respect that

if the [...] Indictment was in any way defective, such defect was cured through the material facts provided in the Consolidated Pre-Trial Brief. However, in an abundance of caution, the Prosecution seeks to amend its [...] Indictment to harmonize the Indictment with the Brief to ensure effective and comprehensive pleading.<sup>16</sup>

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<sup>9</sup> Motion, para. 14.

<sup>10</sup> Motion, para. 14. *See also*, Prosecution’s Reply, paras 4 to 8.

<sup>11</sup> Motion, para. 8.

<sup>12</sup> Motion, para. 12.

<sup>13</sup> Motion, paras 4, 15, 16.

<sup>14</sup> Motion, para. 15.

<sup>15</sup> Motion, para. 14, fn 23 (references omitted).

<sup>16</sup> Motion, para. 14, fn 23.

16. The Prosecution refers to the Trial Chamber's "Decision on Defence Motion to Reject Prosecution's Final Pre-Trial Brief of 2 April 2007, filed on 17 July 2007 ("Pre-Trial Brief Decision") and submits in its Reply that

with respect to the Consolidated Pre-Trial Brief, the Pre-Trial Chamber held that 'no new charges have been brought against the Accused' and that 'the Accused were informed promptly of the charges raised against them'. The Pre-Trial Chamber denied the Defence's motions challenging the Consolidated Pre-Trial Brief, and the Defence is now attempting to re-litigate those same issues through its challenge to the proposed amendments to the (...) Indictment.<sup>17</sup>

17. In addition to the general submissions of the Prosecution pertaining to the request for leave to amend the Indictment, the Prosecution also made submissions in respect of individual proposed amendments or groups of such amendments. These detailed submissions will be addressed in the Trial Chamber's discussion of those proposed amendments.

## 2. Defence

18. Both the Stanišić Defence and the Simatović Defence dispute the Prosecution's understanding that "non crime-base evidence" related to the incidents dropped from the Indictment would be still admissible under Rule 93. In particular, it is submitted that the Prosecution's interpretation contradicts both the purpose of Rule 73 *bis* (D), which is to assure the expeditious conduct of the case, and the Rule 73 *bis* (D) Decision itself, which expressly stated that the Prosecution shall not present evidence relating to the dropped incidents.<sup>18</sup>

19. The Stanišić Defence and the Simatović Defence also challenge the Prosecution's position as to the significance of the Pre-trial Brief in relation to amending the Indictment. It is submitted in this respect that:

especially in view of the function of the Pre-Trial Brief pursuant to Rule 65<sup>ter</sup>(E)(i) [of the Rules] as a summary of the evidence that will be introduced to prove the Prosecution case [...] [t]he Prosecutor is [...] violating the [Rules] and the rights of the Accused in using the Pre-trial Brief as an instrument to inform the Accused of new charges that will be brought against him, and thereafter introducing these new allegations of the Pre-trial Brief into the Indictment through the Proposed Third Amended Indictment.<sup>19</sup>

20. The Stanišić Defence and the Simatović Defence further submit that the Proposed Indictment includes new charges, theories and allegations of fact, which would substantially aggravate the position of the Accused by providing a basis for conviction that is factually and/or legally distinct from any charges, theories and allegations already alleged in the Indictment.<sup>20</sup> In

<sup>17</sup> Prosecution's Reply, para 5, referring to the "Decision on Defence Motion to Reject Prosecution's Final Pre-Trial Brief of 2 April 2007, 17 July 2007 ("Pre-Trial Brief Decision"), para. 15.

<sup>18</sup> Stanišić Response, para. 28; Simatović Response, para. 6.

<sup>19</sup> Stanišić Response, para. 23. *See also*, Simatović Response, para. 18.

<sup>20</sup> Stanišić Response, paras 11 to 25. Simatović Response, paras 16 and 17.

addition to the general objections of the Stanišić Defence and Simatović Defence pertaining to the request for leave to amend the Indictment, both Counsel also made submissions in respect of individual proposed amendments or groups of such amendments. These general and detailed submissions will be addressed in the Trial Chamber's discussion of those proposed amendments.

### C. Applicable law

21. Rule 50 of the Rules gives a Trial Chamber a wide discretion to allow an amendment of an indictment. As the Prosecution correctly argues in its Motion,<sup>21</sup> amendments can be allowed in the late stages of the pre-trial proceedings, or even after the commencement of the trial.<sup>22</sup>

22. Leave by a Trial Chamber to make a particular amendment to the indictment can be granted when the amendment may help to "ensure that the real issues in the case will be determined"<sup>23</sup> and when such an amendment meets two cumulative criteria: (i) it must not result in unfair prejudice to the accused when viewed in light of the circumstances of the case as a whole,<sup>24</sup> and (ii) if the proposed amendment is material, it must be supported by documentation or other material meeting the *prima facie* standard set forth in Article 19 of the Statute.<sup>25</sup>

23. With respect to the first criterion, that is, whether unfair prejudice would be caused, the pre-trial Chamber in *Brđanin and Talić* discussed the term "unfair" as follows:

The word "unfairly" is used in order to emphasise that an amendment will not be refused merely because it assists the prosecution quite fairly to obtain a conviction. To be relevant, the prejudice caused to an accused would ordinarily need to relate to the fairness of the trial. Where an amendment is sought in order to ensure that the real issue in the case will be determined, the Trial Chamber will normally exercise its discretion to permit the amendment, or does not otherwise prejudice the accused unfairly in the conduct of his defence. There should be no injustice caused to the accused if he is given an adequate opportunity to prepare an effective defence to the amended case.<sup>26</sup>

<sup>21</sup> Motion, para. 6.

<sup>22</sup> *Prosecutor v. Popović et al.*, IT-05-88-PT, Decision on Further Amendments and Challenges to the Indictment, 13 July 2006 ("Popović Decision"), para. 8; *Prosecutor v. Delić*, IT-04-83-PT, Decision on Defence Motion Alleging Defects in the Form of the Indictment and Order on Prosecution Motion to Amend the Indictment, 13 December 2005, para. 62 ("Delić Decision"); *Prosecutor v. Martić*, IT-95-11-PT, Decision on the Prosecution's Motion to Request Leave to File a Corrected Amended Indictment, 13 December 2002, para. 21.

<sup>23</sup> *Prosecutor v. Radoslav Brđanin & Momir Talić*, Decision on Form of Further Amended Indictment and Prosecution Application to Amend, 26 June 2001, IT-99-36-PT, para 50; cited with approval in the *Popović Decision* para. 8.

<sup>24</sup> *Popović Decision*, para. 8; *Prosecutor v. Boškoski and Tarčulovski*, IT-04-82-PT, Decision on Prosecution's Motion to Amend the Indictment and Submission of Proposed Second Amended Indictment and Submission of Amended Pre-Trial Brief, 26 May 2006 ("Boškoski and Tarčulovski Decision"), paras 10, 13 and 14; *Prosecutor v. Milutinović et al.*, IT-05-87-PT, Decision on Motion to Amend the Indictment, 11 May 2006 ("Milutinović Decision") para. 10; *Prosecutor v. Halilović*, IT-01-48-PT, Decision on Prosecutor's Motion Seeking Leave to Amend the Indictment, 17 December 2004 ("Halilović Decision"), para. 22.

<sup>25</sup> *Popović Decision*, para.8; *Boškoski and Tarčulovski Decision*, para. 10; *Prosecutor v. Beara*, IT-02-58-PT, Decision on Prosecution Motion to Amend the Indictment, 24 March 2005 ("Beara Decision"), p. 2.

<sup>26</sup> *Prosecutor v. Brđanin and Talić*, IT-99-36-PT, Decision on Form of Further Amended Indictment and Prosecution Application to Amend, 26 June 2001, para. 50, cited with approval in *Prosecutor v. Sefer Halilović*, IT-01-48-PT, Decision on Prosecutor's Motion Seeking Leave to Amend the Indictment, 17 December 2007, para. 22.

In other words, when the accused is offered an adequate opportunity to prepare an effective defence, an amendment of the indictment need not cause unfair prejudice.<sup>27</sup> In this respect, the closer to trial the Prosecution moves to amend the indictment, the more likely it is that the Trial Chamber will deny the motion on the ground that granting such leave would cause unfair prejudice to the accused by depriving him of an adequate opportunity to prepare an effective defence.<sup>28</sup>

24. In its assessment of the potential of unfair prejudice, a Trial Chamber must consider whether the Accused received prior notice that the proposed amendments formed part of the Prosecution's case. The case law of the Tribunal shows that in order for an Accused to have received such notice, the Prosecution must have provided clear and consistent information that it considered those facts to be material facts it intended to prove at trial.<sup>29</sup>

25. The second factor relevant to a determination of the first criterion is whether granting the proposed amendment would adversely affect the accused's right under Article 21 of the Statute to be tried without undue delay.<sup>30</sup> In assessing whether undue delay would be caused, a Trial Chamber may consider the course of the proceedings thus far, including diligence of the Prosecution in advancing the case and the timeliness of the motion, but also the expected effect of the amendment on the overall proceedings.<sup>31</sup>

26. Undue delay could result if, for example, the amendment constitutes a new charge against the accused, in which case the procedures set out under Rule 50(B) and (C) must be observed.<sup>32</sup> In evaluating what constitutes a new charge for the purposes of Rule 50 of the Rules, the Trial Chamber will be mindful of the standard used by the Trial Chamber in the case of the *Prosecutor v. Sefer Halilović*, according to which chamber,

[w]hen considering whether a proposed amendment results in the inclusion of a "new charge", it is [...] appropriate to focus on the imposition of criminal liability on a basis that was not previously reflected in the indictment. In the opinion of the Trial Chamber the key question is, therefore,

<sup>27</sup> *Prosecutor v. Dragomir Milošević*, IT-98-29/1-PT, Decision on Amendment of the Indictment and Application of Rule 73 bis(D), 12 December 2006 ("Dragomir Milošević Decision"), para. 10; *Popović* Decision, para. 9; *Boškoski and Tarčulovski* Decision, para. 10; *Milutinović* Decision, para. 10; *Halilović* Decision, para. 23.

<sup>28</sup> *Dragomir Milošević* Decision, para. 10; *Delić* Decision, para. 62.

<sup>29</sup> *Prosecutor v. Mladen Naletilić and Vinko Martinović*, IT-98-34-A, Appeal Judgement, 3 May 2006, para. 27; *Prosecutor v. Tinomir Brđanin*, IT-95-14-A, Appeal Judgement, 29 July 2004, para. 237, referring to the Appeal Judgement in *Prosecutor v. Kupreškić*, para. 496.

<sup>30</sup> *Prosecutor v. Édouard Karemera et al.*, ICTR-98-44-AR73, Decision on Prosecutor's Interlocutory Appeal against Trial Chamber III Decision of 8 October 2003 Denying Leave to File an Amended Indictment, 19 December 2003, para. 13 (*Karemera* Decision); *Boškoski and Tarčulovski* Decision, para. 10; *Milutinović* Decision, para. 10; *Beara* Decision, p. 2; *Halilović* Decision, para. 23; *Popović* Decision, para. 10.

<sup>31</sup> *Karemera* Decision para. 15; *Boškoski and Tarčulovski* Decision, para. 10; *Milutinović* Decision, para. 10; *Beara* Decision, p. 2; *Halilović* Decision, para. 23; *Popović* Decision, para. 10.

<sup>32</sup> *Dragomir Milošević* Decision, para. 11; *Popović* Decision, para. 10; *Halilović* decision, para. 24.

whether the indictment introduces a basis for conviction that is factually and/or legally distinct from any already alleged in the indictment.<sup>33</sup>

27. The difference between “charges” and “new facts” was further clarified by the Appeals Chamber in the *Muvunyi* case, which held that

“there is a clear distinction between counts or charges made in an indictment and the material facts which support that count or charge. The count or charge is the legal characterisation of the material facts that underpin that count or charge. In pleading an indictment, the Prosecution is required to specify the alleged legal prohibition infringed (the count or charge) and the acts or omissions of the Accused that give rise to that allegation of infringement of a legal prohibition (material facts)”<sup>34</sup>

28. If the first criterion is met, the Trial Chamber will evaluate whether the proposed amendment is material and if so, whether that amendment is supported by material meeting the *prima facie* standard of Article 19 of the Statute. Minor amendments need not be so supported.<sup>35</sup>

#### **D. Discussion**

##### **1. Prosecution Argument Regarding Evidence of Dropped Incidents**

29. Referring to the cases of the *Prosecutor v. Vojislav Šešelj* and the *Prosecutor v. Ante Gotovina et al.*, the Prosecution submits that the Rule 73 *bis* (D) Decision is to be interpreted as permitting the Prosecution to lead evidence in relation to crime sites or incidents dropped from the Indictment for the purpose of proving elements of the Prosecution’s case other than the crimes base, that is, pattern evidence pursuant to Rule 93 of the Rules.<sup>36</sup> The Prosecution submits that its interpretation of the Rule 73 *bis* (D) Decision “does not frustrate the underlying purpose of Rule 73 *bis*(D)” and argues that “since the Prosecution will not be leading evidence regarding the underlying crimes themselves, the length of the trial will be decreased”.<sup>37</sup>

30. It should be recalled that Rule 73 *bis*(D) of the Rules expressly gives a Trial Chamber discretion to fix the number of crime sites or incidents included in one or more of the charges, reasonably representative of the crimes charged, “in respect of which evidence may be presented by the Prosecution”. It is therefore indisputable that the discretion of the Trial Chamber under Rule 73 *bis* encompasses the possibility to order the Prosecution not to present evidence relating to the crime sites or incidents dropped from the indictment.

<sup>33</sup> *Halilović* Decision, para. 30.

<sup>34</sup> *Prosecutor v. Tharcisse Muvunyi*, ICTR-00-55-AR73, Decision on Prosecution Interlocutory Appeal against Trial Chamber II Decision of 23 February 2005, 12 May 2005, para. 19.

<sup>35</sup> See *Popović* Decision, para. 8, with further references.

<sup>36</sup> Motion, para. 17 (a).

<sup>37</sup> Prosecution’s Reply, para. 14.



31. By ordering the Prosecution to reduce the scope of an indictment pursuant to Rule 73 *bis* (D), a Trial Chamber does not necessarily exclude the possibility that the Prosecution be allowed to present evidence relating to those dropped incidents in order to prove a consistent pattern of conduct. However, the approach of allowing such evidence to be brought is likely to be adopted by a Trial Chamber if it is satisfied that, in light of the scope of the indictment and the estimated length of the Prosecution case, leading such evidence will nevertheless result in a sufficient and fair reduction of the scope of evidence to be presented by the Prosecution. Indeed, Rule 73 *bis* (D) of the Rules does not pursue reduction of an indictment as a goal itself, but allows this to be deployed as a means to ensure expeditious proceedings.

32. In the Rule 73 *bis* (D) Decision, the Trial Chamber expressly ordered that the Prosecution “*will not present evidence* in respect of the second incident described in paragraph 24 of the Indictment and the incidents described in paragraphs 26, 30, 31, 37, 38, 40, 41, 42, 46 and 50 of the Indictment.”<sup>38</sup> The reasoning and conclusions of the Trial Chamber set out in paragraphs 23 to 29 of the Rule 73 *bis* Decision make it clear that this Trial Chamber explicitly took into consideration the Prosecution submissions regarding allowing it to lead evidence on dropped incidents in its assessment of the possibility of reducing the Indictment and still found that a reduced Indictment would remain reasonably representative of the Prosecution case against the two Accused. In reaching that conclusion, it carefully evaluated the Prosecution’s argument that its case “inherently requires evidence of a sufficient number of crime sites and incidents to prove the modes of liability alleged”, and found that

There is no legal requirement for proof of a certain number of incidents in order to prove the crimes charged in the Indictment. Each case has to be judged on its own merits. Circumstantial evidence going to the alleged existence of a JCE or other modes of liability can be led from any number of incidents. The proposed reduction consists of the removal of ten incidents. It leaves intact another 18 incidents as well as the wider allegations in counts one, four and five. The remaining incidents are reasonably representative of both the geographical areas covered in the Indictment, and of the three key phases of the wars in Croatia and BiH. In other words, the circumstantial evidence would be reduced in quantity but not in quality.<sup>39</sup>

33. Having thus considered the Prosecution’s specific submissions about the need to rely on the events relating to any crime sites dropped from the indictment as pattern evidence the Trial Chamber declined to include in its ruling language similar to that in the Šešelj Decision. Had the Trial Chamber intended the Prosecution to lead evidence in this manner, it would have stated this clearly in the Rule 73 *bis* Decision.

34. The Trial Chamber finds therefore that the Rule 73 *bis* (D) Decision does not leave any room for the interpretation, as suggested by the Prosecution, that “non crime-base evidence” can

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<sup>38</sup> Rule 73 *bis*(D) Decision, p. 9 (emphasis added).

still be presented in relation to the dropped incidents. In the circumstances of this case, such an interpretation would run contrary to the Rule 73 *bis* (D) Decision.

35. Finally, the Prosecution did not file a request for certification on this point, an option that would have been open to it when the Rule 73 *bis* Decision was first issued. The submissions of the Prosecution on its interpretation of the Rule 73 *bis* Decision are improperly placed in the Motion to Amend the Indictment and, if left unanswered, could cause delays in the case due to continued arguments on this matter.

## 2. The Proposed Amendments

36. On 17 July 2007, the Trial Chamber issued its Pre-Trial Brief Decision. In this decision, and after finding that a pre-trial brief can not add charges or material facts amounting to charges, the Trial Chamber considered whether the Pre-Trial Brief introduced new material facts and forms of liability not pleaded in the Indictment. The Prosecution relies on the Chamber's finding that there were no such facts or forms of liability and argues that the proposed amendments all reflect the content of the Pre-Trial Brief. However, as was found in the decision of 17 July 2007, the Indictment is the primary accusatory instrument. Amendments to such instruments should be evaluated carefully. Also, the proposed amendments reflected in the Proposed Indictment are high in number, complex and very detailed. Therefore, the Trial Chamber will make its own assessment of the proposed amendments.

37. The Prosecution identified five categories in the requested amendments, namely (a) "reductions pursuant to Rule 73*bis* (D)"; (b) "specificity"; (c) "particularity of material facts"; (d) "JCE members clarified"; and (e) "sequences of paragraphs and other formatting and stylistic amendments." For the purposes of this decision, the Trial Chamber will use the same categories. Also, the Defence for both Accused have brought some objections that warrant separate discussion.

38. In light of the case law of the Tribunal, set out in the section on the Applicable Law above, the Trial Chamber has considered 1) whether any of the proposed amendments constitutes a new allegation of fact and, if so, whether that new allegation constitutes a new charge; 2) whether granting leave to amend would cause unfair prejudice to the Accused when viewed in light of the circumstances of the case as a whole; and 3) if the previous question is answered negatively, should the Prosecution provide documentation or other material for those proposed amendments.

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<sup>39</sup> Rule 73 *bis* (D) Decision, para. 28.

(a) Reductions Pursuant to Rule 73bis (D)

39. In compliance with the Rule 73 bis (D) Decision, the Proposed Indictment does not include 10 of the incidents previously charged in the Indictment.<sup>40</sup> The amendment of the Indictment with respect to the removal of these incidents is granted.

(b) Specificity

(i) Relationship Between the Two Accused

40. The Prosecution submits that in paragraphs 2, 3 and 7 of the Proposed Indictment “the authority relationship between the two Accused is clarified” in comparison to the Indictment.<sup>41</sup> The Stanišić Defence objects to paragraph 2 of the Proposed Indictment, which states that “[t]hroughout the Indictment period, Franko Simatović functioned under the authority of Jovica Stanišić”. It submits that “this increases the weight of crimes alleged against the Accused and is legally distinct from the previous allegations”.<sup>42</sup>

41. The Indictment does not include any general statement as to the relationship of authority between the two Accused. However, paragraph 4 of the Indictment, in relation to a specific allegation of fact, states that “Franko Simatović, under the authority of Jovica Stanišić, helped to establish [...]”. Further, the respective roles of the two Accused in the Republic of Serbia DB, as described in paragraphs 1 and 2 of the Indictment, already imply a relationship of authority between them. Therefore, the Trial Chamber concludes that the requested amendment contained in paragraph 2 of the Proposed Indictment does not introduce a new allegation of fact, but clarifies the Indictment and thus assists in ensuring that the real issues in the case are determined.

42. Paragraph 3 of the Proposed Indictment largely corresponds with paragraph 4 of the Indictment, which paragraph has been divided into paragraphs 3 to 5 of the Proposed Indictment. As the requested amendments describe more than the relationship of the two Accused alone, the Trial Chamber will discuss the requested amendments in paragraphs 51 and 65 of this decision.

43. Paragraph 7 of the Proposed Indictment reads that “Jovica Stanišić and Franko Simatović had responsibility for the special units of the Republic of Serbia DB and they organised, supplied, financed, supported and directed their involvement in particular operations in Croatia and BiH”.

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<sup>40</sup> In particular, the second incident described in paragraph 24 of the Indictment (corresponding to para. 27 of the Proposed Indictment) and the incidents described in paragraphs 26, 30, 31, 37, 38, 40, 41, 42, 46 and 50 of the Indictment (corresponding to paragraphs 29, 33, 34, 40, 41, 43, 44, 45, 49 and 50 of the Proposed Indictment respectively), are no longer included.

<sup>41</sup> Motion, para. 17(b)(i).

<sup>42</sup> Stanišić Response, para. 13.

Differently, the corresponding paragraph 5 of the Indictment reads that “Franko Simatović had responsibility for these special units of the Republic of Serbia DB, and directed their involvement in particular operations in Croatia and BiH”.

44. The first amendment requested in paragraph 7 of the Proposed Indictment is the inclusion of the Accused Jovica Stanišić as having responsibility for “special units of the Republic of Serbia DB”. The Indictment contains several allegations as to Jovica Stanišić’s involvement with and responsibility for special units of the Serbian DB. For example, paragraph 4 of the Indictment reads that Franko Simatović acted “under the authority of Jovica Stanišić” when he allegedly “helped to establish a training centre in Golubić”. Paragraph 7 of the Indictment contains the allegation that special units of the Serbian DB, “organised, trained and financed in part through Jovica Stanišić and Franko Simatović”. Moreover, paragraph 13 of the Indictment, in describing the contribution of the two Accused to the alleged joint criminal enterprise (“JCE”), does not make any distinction between the two Accused in terms of their responsibility for special units of the Serbian DB. Therefore, the Indictment contains several passages at which Jovica Stanišić is alleged to have had responsibility for special units of the Serbian DB. The Trial Chamber finds that the Proposed Indictment provides greater specificity on the role of Jovica Stanišić, rather than introducing a new allegation of fact.

45. The Prosecution also seeks the inclusion, in paragraph 7 of the Proposed Indictment, of the phrase “they organised, supplied, financed [and] supported” in the description of the conduct of the Accused in respect of the DB special units, whereas paragraph 5 of the Indictment only mentions direction of these units on the part of Franko Simatović. Paragraph 13 of the Indictment includes the allegation that the two Accused “participated in the formation, financing, supply and support of special units of the Republic of Serbia DB”, “directed members and agents of the DB” and “provided arms, funds, training, logistical support and other substantial assistance or support to special units of the Republic of Serbia DB”. The description of the conduct of both Accused in paragraph 7 of the Proposed Indictment is already contained in paragraph 13 of the Indictment. In addition, paragraphs 6 and 7 of the Indictment also state that Serb forces and special units of the Republic of Serbia DB were “organised, trained and financed in part” through both Accused. Therefore, the Trial Chamber finds that the description of the conduct of both Accused in paragraph 7 of the Proposed Indictment was already contained in paragraphs 6, 7 and 13 of the Indictment and does not introduce a new allegation of fact. Instead, the amendment provides greater specificity and thus assists in ensuring that the real issues in the case will be determined.

(ii) Definition of Serb Forces

46. Paragraph 6 of the Proposed Indictment provides a definition of the term “Serb Forces” used in subsequent paragraphs. The Indictment does not include any general definition of the term “Serb Forces”, although the term is further specified in paragraph 20 of the Indictment. The Trial Chamber finds that paragraph 6 of the Proposed Indictment clarifies the Indictment by limiting the interpretation of that term to a certain definition, rather than introducing a new allegation of fact.

47. As regards Jovica Stanišić’s alleged responsibility for Serb Forces, the Stanišić Defence objects to paragraph 23 of the Proposed Indictment, which reads that “throughout this period, special units of the Republic of the Serbia DB, acting alone or in conjunction with other Serb Forces, took control of towns”. The Stanišić Defence submits that the new language of this paragraph concerns a “substantial change by the Prosecution [that] alters the meaning of the allegation, because in the [c]urrent Indictment the Accused can not be held accountable for crimes not being incorporated into the ‘Serb Forces’”.<sup>43</sup>

48. The argument of the Stanišić Defence is not sufficiently clearly developed to allow the Trial Chamber to appreciate how there has been a “substantial change” that “alters the meaning of the allegation”. The relevant text of the corresponding paragraph 20 of the Indictment reads that “throughout this period, Serb forces comprised of special units of the Republic of Serbia DB, acting alone or in conjunction with other Serb forces including: Serbian MUP, the JNA [...]; local TO units; Republika Srpska police forces; and other paramilitary units took control of towns and villages in these territories”. In that context, the Trial Chamber sees no alteration in the allegation as a result of the proposed wording. The Defence argument is dismissed. The Trial Chamber finds that the amendment does not introduce a new allegation of fact, but clarifies the Indictment. As such, it will assist in ensuring that the real issues in the case will be determined.

(iii) Date clarification

49. The Prosecution submits in its Motion that the dates mentioned in the Indictment “have been clarified with greater specificity in paragraphs 3, 4, 8, 11, 22, 26, 61 and 64” of the Proposed Indictment.<sup>44</sup>

50. The Simatović Defence objects to the requested changes in respect of the dates and argues that these constitute a change in time frame of the existence of the alleged JCE.<sup>45</sup>

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<sup>43</sup> Stanišić Response, para. 21.

<sup>44</sup> Motion, para. 17 (b)(iii).

51. Paragraph 3 of the Proposed Indictment contains the same time frame as the first part of paragraph 4 of the Indictment, namely “in or about April 1991”. As such, there is no amendment to speak of and the objection of the Simatović Defence fails.

52. With respect to paragraph 8 of the Proposed Indictment, the Prosecution seeks to amend the time frame by introducing the language “[f]rom no later than April 1991 through to the end of 1991” in the Proposed Indictment, rather than the time frame described in paragraph 6 of the Indictment, which runs “[f]rom April 1991 through to the end of 1991”.<sup>46</sup> Considering that paragraph 6 of the Indictment fixes a precise point in time at which the criminal conduct alleged in that paragraph starts, the Trial Chamber finds that the proposed amendment, that is, the addition of the words “no later than”, broadens the temporal scope of this allegation indefinitely. Notwithstanding the Pre-Trial Brief Decision, having given fresh consideration to the Motion and the arguments of the Parties, the Trial Chamber now finds that the amendment proposed by the Prosecution amounts to a new allegation of fact. When assessed in light of the definition of a new charge, as given the Appeals Chamber in Muvunyi, the proposed change in time frame does not amount to a new charge.

53. Paragraph 11 of the Proposed Indictment states that “the JCE came into existence *no later than April 1991* and continued in existence until at least 31<sup>st</sup> December 1995”, while paragraph 11 of the Indictment reads that “the JCE came into existence *no later than 1 August 1991* and continued in existence until at least 31<sup>st</sup> December 1995”. The Trial Chamber agrees with the Prosecution<sup>47</sup> that the use of the expression “no later than” in paragraph 11 of the Indictment implies that the allegation that the JCE came into existence prior to 1 August 1991 is already included in the Indictment. Therefore, the Trial Chamber finds that paragraph 11 of the Proposed Indictment, in reading that the JCE came into existence no later than April 1991, does not constitute any new allegation but clarifies the Indictment. The same reasoning and conclusion applies to the amendment of dates included in paragraph 4 of the Proposed Indictment. That paragraph contains the words “from no later than April 1991 and continued through the period described in the Indictment”, whereas paragraph 3 of the Indictment, describing the same allegations, reads in relation to the time frame “[f]rom no later than May 1991 and at other times during the period relevant to this Indictment”. The amendments reflected in paragraph 4 of the Proposed Indictment do not constitute a new allegation of fact, but will assist in ensuring that the real issues in the case will be determined.

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<sup>45</sup> Simatović Response, para. 15.

<sup>46</sup> Para. 8 of the Proposed Indictment, corresponding to para. 6 of the Indictment.

<sup>47</sup> Prosecution’s Reply, para. 9 (a).

54. The Prosecution also proposed the following amendments: the expression “on or about 1 April 1991” included in paragraph 19 of the Indictment to be amended to “no later than 1 April 1991” in paragraph 22 of the Proposed Indictment; the expression “[f]rom on or about May 1991” in paragraph 23 of the Indictment to be replaced by the phrase “from no later than April 1991” in paragraph 26 of the Proposed Indictment; the expression “[f]rom on or about May 1991” in paragraph 62 of the Indictment to be replaced by the expression “from no later than April 1991” in paragraph 64 of the Proposed Indictment; and the phrase “between about 12 July and about 25 July 1995” in paragraph 58 of the Indictment to be replaced by the words “in July” in paragraph 61 of the Proposed Indictment. The Trial Chamber finds that this new language does not introduce new allegations of fact but will assist in ensuring that the real issues in the case will be determined by providing clarifying the time frame.

55. In addition to objecting to the change in time frame in other paragraphs,<sup>48</sup> the Simatović Defence refers to paragraph 13 of the Indictment in support of its argument that, with the proposed amendments in time frame, the Prosecution seeks to amend the time frame of the alleged JCE and, thus, the time frame of the Accused’s alleged conduct in relation to the JCE.<sup>49</sup> Paragraph 13 of the Indictment, in describing the modes of participation of the Accused in the alleged JCE, reads that the Accused provided “assistance or support to special units of the Republic of Serbia DB that were involved in the commission of crimes in Croatia and BiH *between 1 August 1991 and 31 December 1995*”. This language fixes a precise temporal starting point in relation to the commission of crimes in Croatia and BiH. Corresponding paragraph 15 of the Proposed Indictment sets a different time frame regarding the commission of crimes, namely “during the Indictment period”. Notwithstanding the Pre-Trial Brief Decision, having given fresh consideration to the Motion as well as the arguments of the Parties, the Trial Chamber now finds that the proposed time frame, contained in paragraphs 15(a), 15(b) and 15(c), constitutes a new allegation of fact. It does not amount to a new charge.

(iv) Clarifications as to Locations

56. The location of Trnovo has been included in paragraph 9 of the Proposed Indictment. The Stanišić Defence and the Simatović Defence did not raise specific objections to this requested amendment. Paragraphs 55 to 59 of the Indictment and their corresponding paragraphs 58 to 61 of the Proposed Indictment concern allegations of crimes having been committed in Trnovo. Thus, these allegations form part of the Prosecution case and have done so at least since the filing of the

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<sup>48</sup> The Simatović Defence also objects to the changes in time frame in paragraphs 3, 4, 8, 11, 22, 26, 61 and 64 of the Proposed Indictment.

<sup>49</sup> Simatović Response, para. 15.

Indictment. This amendment makes paragraph 9 of the Proposed Indictment consistent with the facts outlined in the remainder of the Proposed Indictment as well as the Indictment,<sup>50</sup> and the Trial Chamber finds that no new allegation would be introduced as a result of the inclusion of Trnovo in that paragraph. Rather, the amendment clarifies the Indictment and thus will assist in ensuring that the real issues in the case will be determined.

(v) Mens Rea for JCE

57. The Prosecution submits in its Motion that “the particular *mens rea* requirements for culpability pursuant to a joint criminal enterprise are more specifically clarified in paragraphs 14 and 17” of the Proposed Indictment.<sup>51</sup> Neither the Stanišić Defence nor the Simatović Defence specifically addresses this issue in their Responses. Based on a comparison of the text of paragraphs 10 and 14 of the Indictment and the text of corresponding paragraphs 14 and 17 of the Proposed Indictment, the Trial Chamber finds that the amendments in paragraphs 14 and 17 of the Proposed Indictment do not constitute a new allegation of fact or introduce any new theory of liability. Rather, it provides greater specificity as regards the alleged conduct of the Accused and thus will assist in ensuring that the real issues in the case will be determined.

(vi) “Committed” through JCE

58. The Prosecution submits that in paragraph 10, 12 and 13 of the Proposed Indictment, it has clarified that the mode of liability of “committed” in the Indictment refers exclusively to the participation of the Accused as co-perpetrators in the JCE.<sup>52</sup> The last sentence of paragraph 10 of the Proposed Indictment reads that “‘Committed’ in this Indictment refers to the participation of Jovica Stanišić and Franko Simatović as co-perpetrators in a joint criminal enterprise.” In the Indictment, the corresponding sentence, found in paragraph 8 of that Indictment, reads that “‘Committed’ in this Indictment includes participation in a joint criminal enterprise.” Paragraph 9 of the Indictment reads that “Jovica Stanišić and Franko Simatović participated in the joint criminal enterprise as co-perpetrators or as aiders and abettors”. In the corresponding paragraph 13 of the Proposed Indictment the words “or as aiders and abettors” have been deleted. The Trial Chamber finds that the proposed amendments reduce the basis for the attachment of criminal liability, thereby assisting in ensuring that the real issues in the case will be determined.

59. Paragraph 12 of the Proposed Indictment, which list individuals “who participated in this JCE, thereby significantly furthering the objective of the enterprise”, reads in its final part that

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<sup>50</sup> Motion, para. 17 (b)(iv).

<sup>51</sup> Motion, para. 17 (b)(v).

<sup>52</sup> Motion, para. 17 (b)(vi).



“[a]lternatively, the individuals named in this paragraph, participated in a JCE and implemented its objective through the use of members or groups of the Serb Forces”. This language was not included in the corresponding paragraph of the Indictment. The Prosecution submits that this amendment has been introduced in light of recent Tribunal jurisprudence, in particular the *Brdanin* Appeal Judgement, and that it represents “a further explanation of participation in the JCE ‘through use’ of others to carry out the common criminal purpose”.<sup>53</sup> The Trial Chamber finds that the proposed amendment does not introduce a new allegation of fact, but rather specifies the contours of joint criminal enterprise liability and thus will assist in ensuring that the real issues in the case will be determined. In this respect, the Trial Chamber agrees with the Trial Chamber in the case of *the Prosecutor v Milutinović et al.*, that “[l]ike challenges relating to the contours of a substantive crime, challenges concerning the contours of a form of responsibility are matters to be addressed at trial”.<sup>54</sup>

(vii) Clarification of the Term “Prisoners” and “Citizens”

60. The Prosecution proposes to substitute the word “prisoners” with either “detainees”, “Muslim civilians” or “civilian detainees” in paragraphs 22, 26 and 61 of the Proposed Indictment. In addition, it seeks to be allowed to delete the word “citizens” from paragraph 27 of the Proposed Indictment. The Stanišić Defence and the Simatović Defence did not raise objections with respect to these requested amendments. The Trial Chamber agrees with the Prosecution’s submission that these amendments will clarify the Indictment<sup>55</sup> and finds that they do not introduce any new allegation. Rather, the amendments will assist in ensuring that the real issues in the case will be determined.

(viii) Definition of the Crime of Persecutions

61. The Prosecution submits that the definition of the crime of persecutions has been clarified in paragraph 24 of the Proposed Indictment “according to [...] the *Kordić and Čerkez* Appeal Judgement.”<sup>56</sup> While the corresponding paragraph 21 of the Indictment reads that “[t]hese persecutions were committed on the discriminatory grounds of political affiliation, race or religion”, paragraph 24 of the Proposed Indictment reads that “[t]hese persecutions were committed through discrimination on the grounds of race, religion or politics”. Neither the Stanišić Defence nor the Simatović Defence address this issue in their Responses. The Trial Chamber finds that the proposed

<sup>53</sup> Motion, para. 17 (b)(vi), referring, in a footnote, to the *Brdanin* Appeal Judgement of 3 April 2007.

<sup>54</sup> *Prosecutor v. Milutinović et al.*, IT-05-87-PT, Decision on Ojdanić’s Motion Challenging Jurisdiction: Indirect Co-Perpetration, 22 March 2006, para. 23. See also, *Milutinović* Decision, paras 17 and 19.

<sup>55</sup> Motion, para. 17 (b)(vii).

<sup>56</sup> Motion, para. 17 (b)(vii).

amendment does not include any new allegation of fact, but rather will assist in ensuring that the real issues in the case will be determined.

(ix) Definition of Deportation and Inhumane Acts (Forcible Transfer)

62. The Prosecution submits that in paragraph 23 of the Proposed Indictment “the terminology used has been standardised to conform strictly to the legal definitions of the crimes of Deportation and Forcible Transfer”.<sup>57</sup> While paragraph 23 of the Proposed Indictment reads that Serb Forces “established a regime of persecutions designed to force Croats, Bosnian Muslims, Bosnian Croats and other non-Serbs to leave these territories”, the corresponding paragraph 20 of the Indictment reads that Serb Forces “established a regime of persecutions designed to drive the Croats, Bosnian Muslims, Bosnian Croats and other non-Serbs from these territories”. Neither the Stanišić Defence nor the Simatović Defence addresses this issue in their Responses. The Trial Chamber finds that the proposed amendment does not include a new factual allegation. By providing greater clarity on the charges, the amendment will assist in the Trial Chamber in ensuring that the real issues in the case will be determined.

(c) Particularity of Material Facts

(i) Material Facts of the Acts and Conduct as Basis for Article 7 (1) Liability

63. The Prosecution submits that through the amendments in paragraphs 3-5, 7-9, 15 and 16 it outlines in greater detail the acts and conduct that form the bases for the charges against the Accused under Article 7(1) of the Statute “as specified in the Consolidated Pre-Trial Brief.”<sup>58</sup>

64. The Stanišić Defence submits that the proposed changes in paragraph sequence and structure reflected in paragraphs 3 to 5 in the Proposed Indictment “are illogical and do not rectify ambiguities.”<sup>59</sup>

65. The Trial Chamber notes that part of paragraph 3 of the Proposed Indictment reproduces the language of paragraph 4 of the Indictment, and that the remaining part of paragraph 3 of the Proposed Indictment reads that, at the Golubić centre, the Accused “organised, supplied, financed, supported and directed the training of 'Serb Forces' as defined below by members of the Republic of Serbia DB”. Paragraph 4 of the Indictment reads that the Accused “helped to establish a training center in Golubić” and paragraph 13 of the Indictment reads that the Accused “participated in the formation [...] of special units of the Republic of Serbia DB”. The Trial Chamber finds that the new

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<sup>57</sup> Motion, para. 17(b)(ix).

<sup>58</sup> Motion, para. 17 (c)(i)

<sup>59</sup> Stanišić Response, para. 8.

sentence included in paragraph 3 of the Proposed Indictment does not introduce any new allegation of fact, in that it only describes in greater specificity the conduct of “help[ing] to establish a training center in Golubić”, already included in the Indictment.

66. The definition of “special units of the Republic of Serbia DB” in paragraph 4 of the Proposed Indictment differs from the definition in the corresponding paragraph 3 of the Indictment, in two respects. First, the definition in paragraph 4 of the Proposed Indictment includes the “Special Purpose Unit of the MUP Serbia”, which was not mentioned in the previous wording. Second, “Arkan’s men” and “Arkan’s Tigers” are considered as two separate units, while in paragraph 3 of the Indictment these names are presented as synonyms. However, the definition of said troops in paragraph 3 of the Indictment is introduced by the sentence “[t]hese units [...] included, but were not limited to, groups known by the following names”. The Trial Chamber finds, therefore, that the definition of “special units of the Republic of Serbia DB” in paragraph 4 of the Proposed Indictment does not introduce any new allegation of fact. Rather, by clarifying the Indictment, the amendment will assist in ensuring that the real issues in the case will be determined. The remaining parts of paragraph 4 of Proposed Indictment constitute a rephrasing of allegations already included in paragraphs 3 and 4 of the Indictment. While rephrasing of allegations would generally not warrant an amendment of the Indictment, the Trial Chamber finds it to be in the interest of a fair and expeditious trial to decide on the proposed amendments and assess their prejudicial effect, if any, in the relevant section of this Decision, below.

67. The last sentence of paragraph 5 of the Proposed Indictment exactly reproduces the language of paragraph 15(c) thereof, which language is discussed in paragraphs 55 and 70 to 72 of this decision. The remaining parts of paragraph 5 of the Proposed Indictment constitute a rephrasing of allegations already included in paragraph 4 of the Indictment.

68. Paragraphs 7 to 9 of the Proposed Indictment correspond to paragraphs 5 to 7 of the Indictment. However, the Prosecution proposes a number of amendments in the text of these paragraphs. The amendments in paragraph 7 of the Proposed Indictment are discussed in paragraphs 43 to 45 of this decision. The Trial Chamber has already decided that the addition of the phrase “no later than” in paragraph 8 of the Proposed Indictment is a new allegation of fact.<sup>60</sup>

69. The requested amendment to paragraph 9 of the Proposed Indictment concerns the deletion of the alleged conduct of the two Accused and the addition of the location of Trnovo. The addition of the location of Trnovo is discussed in paragraph 56 of this decision. The deletion of the alleged conduct of the Accused is due to other amendments in this category, as the conduct described in

paragraphs 6 and 13 of the Indictment is now reflected in paragraphs 15(b) and 15(c) of the Proposed Indictment. The remaining text of paragraph 6 of the Indictment is contained in paragraph 9 of the Proposed Indictment; no new factual allegations are pleaded in the latter paragraph. Rather, the amendments provide greater specificity and thus will assist in ensuring that the real issues in the case will be determined.

70. Paragraph 15(a) of the Proposed Indictment differs from the corresponding paragraph 13 of the Indictment, in that it adds that the Accused “provided channels of communication between and among the core members of the JCE in Belgrade, in the specific regions, and locally throughout the Indictment period”,<sup>61</sup> and paragraph 15(c) differs in that it alleges that the Accused “continued to send forces and provide support over an extended period of time, failed to instruct them to refrain from committing unlawful acts, and failed to stop replenishing the forces on the ground who were committing unlawful acts”.<sup>62</sup>

71. The Stanišić Defence submits that paragraphs 15(a) and 15(c) of the Proposed Indictment introduce new factual and legal allegations, as they add new modes of participation of the Accused in the alleged JCE.<sup>63</sup> In relation to paragraph 15(a), the Prosecution replies that “the functioning of a joint criminal enterprise always involves communication between its members, and that has always been an important element of the Prosecution case.”<sup>64</sup>

72. The Trial Chamber notes that the alleged participation in the JCE as described in paragraph 13 of the Indictment includes conduct of the Accused “in concert with other members of the JCE” and involves participation in the formation, supply and support of special units, and the provision of arms, funds, logistical support and other substantial assistance to units that were involved in the commission of crimes between August 1991 and December 1995. Similar language can also be found in paragraph 6 of the Indictment. Logically, the conduct described in paragraphs 6 and 13 of the Indictment would also include conduct as described in paragraph 15(c) of the Proposed Indictment. Therefore, that addition is a clarification of the conduct of the Accused only and thus will assist in ensuring that the real issues in the case will be determined.

73. As for the conduct sought to be included in proposed paragraph 15(a), that is, the provision of “channels of communication between and among core members of the JCE in Belgrade, the specific regions, and locally throughout the Indictment period”, this conduct is not described in any way in the Indictment as being part of the criminal conduct of the Accused in relation to the JCE.

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<sup>60</sup> See *supra*, para. 52.

<sup>61</sup> Proposed Indictment, para. 15 (a).

<sup>62</sup> Proposed Indictment, para. 15 (c), second sentence.

<sup>63</sup> Stanišić Response, paras 15 and 16.

Notwithstanding the Pre-Trial Brief Decision, having given fresh consideration to the Motion and the arguments of the Parties, the Trial Chamber now finds that while such evidence may be used to establish the existence of the alleged JCE, it constitutes, for the purposes of the Indictment, a new allegation of fact, but not a new charge.

74. Paragraph 16 of the Proposed Indictment does not have any corresponding paragraph in the Indictment. The addition proposed by the Prosecution reads as follows:

In addition, Jovica Stanišić and Franko Simatović participated in the design of these crimes. Moreover, Jovica Stanišić and Franko Simatović were in a position of authority, which they used to instruct others to commit offences. Jovica Stanišić and Franko Simatović intended the commission of the crimes charged in this Indictment or were aware of the substantial likelihood that such crimes would be committed in the execution of the plan or the order. Furthermore, Jovica Stanišić and Franko Simatović gave practical assistance, encouragement or moral support to the persons who carried out the crimes of persecution, deportation, forcible transfer and murder, which had a substantial effect on the commission of the crimes; they did so with the knowledge required. The acts described in this Indictment as contributions to the JCE also amount to acts of planning, ordering, and/or aiding and abetting.<sup>65</sup>

75. The Simatović Response addresses the part of paragraph 16 of the Proposed Indictment which reads that the Accused “participated in the design of these crimes”, and submits that “irrespective of what the Prosecution understands under the term ‘design of crimes’” the Indictment does not contain such allegation.<sup>66</sup>

76. Paragraph 16 of the Proposed Indictment is part of the section of the Proposed Indictment concerning the individual criminal responsibility of the Accused under Article 7(1) of the Statute. Paragraph 8 of the Indictment reads that “Jovica Stanišić and Franko Simatović are individually criminally responsible for the crimes referred to in Articles 3 and 5 of the Statute of the Tribunal as described in this Indictment, which they planned, ordered, committed or in whose planning, preparation or execution they otherwise aided and abetted”.<sup>67</sup> The term “design of crimes” is a term which, in the view of the Trial Chamber, is encompassed in the described conduct of planning crimes. Therefore, the first sentence of paragraph 16 of the Proposed Indictment does not introduce any new allegation, as it reiterates allegations of fact already included elsewhere in the Indictment. The remaining sentences in paragraph 16 do not introduce any new allegations of fact; rather, they specify the conduct of commission, through JCE, planning, ordering and aiding and abetting already contained in the Indictment. Consequently, these amendments will assist in ensuring that the real issues in the case will be determined.

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<sup>64</sup> Prosecution’s Reply, para. 8 (a).

<sup>65</sup> Proposed Indictment, para. 16.

<sup>66</sup> Simatović Response, para. 14.

<sup>67</sup> This language is also reproduced in paragraph 10 of the Proposed Indictment.

(ii) Material Facts in Relation to Deportation and Inhumane Acts

77. The Prosecution submits that it has pleaded with greater specificity the material facts upon which the charges of deportation and inhumane acts (forcible transfer) are based. According to the Prosecution, this greater specificity is provided by the addition of paragraph 65 of the Proposed Indictment.<sup>68</sup> The proposed paragraph reads as follows:

The attacks, killings, arbitrary arrest and detention, burnings of Catholic churches and mosques, forced labour, torture, harassment, use of human shields, looting, rape and other forms of sexual abuse, as well as the threat of further persecutory acts which targeted non-Serb civilians in SAO Krajina, SAO SBWS, Bijeljina, Bosanski Šamac, Doboj, Sanski Most and Zvornik caused the non-Serb population to flee from these areas in which they were lawfully present to other parts of Croatia and BiH and to other countries. The forcible transfer and/or deportation took different forms, including forced expulsion.

78. The Stanišić Defence submits that “it is an attempt by the Prosecution to bundle all possible crimes against the Accused and circumvent the rules and procedure of the Chambers” since “not only does this paragraph add new factual information but also suggests legal responsibility for crimes not previously mentioned”.<sup>69</sup>

79. The Trial Chamber notes that none of the acts and conducts included in Paragraph 65 of the Proposed Indictment are mentioned or referred to in the Indictment. Notwithstanding the Pre-Trial Brief Decision, having given fresh consideration to the Motion as well as the arguments of the Parties, the Trial Chamber now finds that paragraph 65 of the Proposed Indictment introduces new material facts underpinning the charges of Deportation and Forcible Transfer. When assessed in light of the definition provided by the Appeals Chamber in *Muvunyi*, the paragraph does not amount to a new charge, as the legal categorisation of the facts remains the same.

80. The Prosecution also proposed a number of changes to other paragraphs pertaining to the charges of deportation and inhumane acts (forcible transfer). Paragraph 62 of the Indictment has been subject to amendments in the corresponding paragraph 64 of the Proposed Indictment. The Trial Chamber finds that the substitution of the words “from their legal domiciles” with the words “from locations in which they were lawfully present”, and the substitution of the words “to other countries or other areas outside their home municipalities” with the words “to other countries or other areas inside the country”, constitute mere clarifications and do not amount to new allegations of fact. Therefore, the amendments will assist in ensuring that the real issues in the case will be determined.

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<sup>68</sup> Motion, para. 17 (c) (ii)

<sup>69</sup> Stanišić Response, para. 20.

81. The Trial Chamber further notes that in paragraph 64 of the Proposed Indictment the allegation that the Accused “acting in concert with other members of the joint criminal enterprise committed unlawful forcible transfer or deportation”, and the allegation that the Accused “planned, ordered, and/or otherwise aided and abetted the planning, preparation and/or execution of unlawful forcible transfer or deportation” have been separated into two different sentences, while in the corresponding paragraph 62 of the Indictment they were set out one sentence. The Trial Chamber finds therefore that the proposed amendment does not introduce any new allegation. However, paragraph 62 of the Indictment reads, in relevant part, “planned, committed, or otherwise aided and abetted”, while paragraph 64 of the Proposed Indictment reads “planned, *ordered*, and/or otherwise aided and abetted”.<sup>70</sup> In evaluating whether the introduction of the word “ordered” amounts to a new allegation, the Trial Chamber notes that paragraph 8 of the Indictment includes “ordering” as one of the modes of liability the Accused are charged with for the crimes of deportation and forcible transfer, in that it reads that the Accused “are individually criminally responsible for the crimes referred to in Articles 3 and 5 of the Statute of the Tribunal *as described in this Indictment*, which they planned, ordered, committed [...]”.<sup>71</sup> As such, the Trial Chamber finds that the amendment at issue does not introduce any new allegation of fact, but clarifies the Indictment. Consequently, it will assist in ensuring that the real issues in the case will be determined.

82. A further amendment in this category is contained in paragraph 28 of the Proposed Indictment. The Prosecution proposes that paragraph 28 of the Proposed Indictment should read that “these attacking forces killed *or forcibly transferred or deported* all remaining non-Serb inhabitants of the villages (...)”<sup>72</sup> whereas the last sentence of paragraph 25 of the Indictment, which alleges incidents occurred in the villages of Saborsko, Poljanak and Lipovača, reads that “these attacking forces killed all remaining non-Serb inhabitants of the villages [...]”. The Trial Chamber recalls that paragraph 62 of the Indictment charges the Accused with forcible transfer and deportation of non-Serb civilians in, among others, SAO Krajina. Considering that the villages of Saborsko, Poljanak and Lipovača are located in SAO Krajina and the crimes allegedly committed in those villages are already included in the charges under Counts 4 and 5, the Trial Chamber finds that the amendment at issue provides greater specificity on charges already included in the Indictment. As a result, the proposed amendment will assist in ensuring that the real issues in the case will be determined.

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<sup>70</sup> Emphasis added.

<sup>71</sup> Emphasis added.

<sup>72</sup> Emphasis added.

(iii) Material Facts in Relation to Bosanski Šamac

83. Paragraph 48 of the Proposed Indictment reads that “on several occasions [...] members of the special units of the Republic of Serbia DB beat and/or otherwise mistreated the non-Serb detainees”. The corresponding paragraph 45 of the Indictment reads that “on several occasions [...] members of the special units of the Republic of Serbia DB beat the non-Serb detainees”, therefore lacking the words “and/or otherwise mistreated”. The Stanišić Defence objected to this amendment, arguing that the amendment is an example of how the Prosecution, with this Motion, seeks to “completely alter the meaning of the allegations against Stanišić”.<sup>73</sup> The Trial Chamber notes that mistreatment may include, but is not limited to, acts of beating, and finds that the inclusion of mistreatment of detainees could be relevant under Count 1 of the Indictment, which charges the Accused with Persecution. In this respect, paragraph 21 of the Indictment, which lists the persecutory acts alleged under Count 1, reads that the acts of persecution “include” murders and covers, *inter alia*, the allegations contained in paragraph 45 of the Indictment. The allegations under persecutions would therefore be expanded to include other mistreatment. For this reason, notwithstanding the Pre-Trial Brief Decision, having given fresh consideration to the Motion and the arguments of the Parties, the Trial Chamber now finds that the proposed amendment would introduce a new allegation of fact. However, this does not constitute a new charge.

(iv) Material Facts in Relation to Sanski Most

84. The Stanišić Defence submits in its Response that paragraph 54 of the Indictment reads that “a group of non-Serb civilians were forcibly taken to Sasina” while the corresponding paragraph 57 of the Proposed Indictment alleges that “members of Arkan’s SDG abducted and detained a group of non-Serb civilians in Sanski Most, moving them to Sasina”.<sup>74</sup> According to the Stanišić Defence, this “is not simply a structural change or clarification of previous allegations” and it cites this change as an example of how the amendments “alter the meaning of the charges being laid.”<sup>75</sup> However, the Trial Chamber finds that the wording “forcibly taken” includes the notion of these non-Serb civilians being held against their will during their transfer to another location, thus including the notion of abduction and detention. Therefore, this is not a new factual allegation. Rather, the amendment provides greater specificity in relation to the charges pertaining to Sanski Most. In addition, the description that these civilians were taken from Sanski Most provides greater specificity in relation to the victims, particularly in light of the circumstance that this paragraph is

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<sup>73</sup> Stanišić Response, para. 22 b.

<sup>74</sup> Stanišić Response, para. 22 (c).

<sup>75</sup> Stanišić Response, para. 22.



included in the section pertaining to crimes allegedly committed in Sanski Most. The proposed amendments will assist in ensuring that the real issues in the case will be determined.

(v) Material Facts in Relation to the Incident of 11 November 1991

85. A further objection of the Stanišić Defence pertains to amendments in relation to an incident that allegedly took place on 11 November 1991. Paragraph 36 of the Indictment reads that on 11 November 1991, seven non-Serb civilians were arrested in the village of Klisa. Paragraph 39 of the Proposed Indictment reads that, on the same date, five non-Serb civilians were arrested in the village of Klisa and two were arrested in Dalj and Bijedo Brdo. The Stanišić Defence submits that the village of Bijelo Brdo was not previously included as a location of a crime in the corresponding paragraph of the Indictment.<sup>76</sup> The Prosecution submits in its Reply that “none of the key features of the crime, including the identity and number of victims, the identity of the perpetrators, or the location of the killings, has changed”, and concludes that “as this allegation supports the *murder* charges, the location of a kidnapping is not a material fact, but such a detail provides greater specificity”.<sup>77</sup> The Trial Chamber observes that in paragraph 36 of the Indictment the non-Serb civilian victims are identified through a number of factors, including the location where they were arrested. In the Proposed Indictment that location is altered for two victims. Notwithstanding the Pre-Trial Brief Decision, having given fresh consideration to the Motion as well as the arguments of the Parties, the Trial Chamber now finds that this amounts to a new material fact underpinning the charge, but does not amount to a new charge.

86. Furthermore, paragraph 36 of the Indictment reads that “two of the detainees who had Serb relatives were released. The remaining five civilians were taken to the TO training centre in Erdut”. In contrast, paragraph 39 of the Proposed Indictment reads that “[t]hey took the civilian detainees to a house in Erdut where they beat and interrogated them. Later that night, Arkan’s men took them to the TO training centre in Erdut, where they were further interrogated”. Notwithstanding the Pre-Trial Brief Decision, having given fresh consideration to the Motion as well as the arguments of the Parties, the Trial Chamber now finds that this amendment proposed in paragraph 39 of the Proposed Indictment – namely the location of the alleged interrogations and the allegation of beating at that location –introduce material facts underpinning the murder charge. The amendments do not amount to a new charge.

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<sup>76</sup> Stanišić Response, para. 18.

<sup>77</sup> Prosecution’s Reply, para 8 (d).

(d) Clarification of Members of the Alleged JCE

87. Paragraph 12 of the Proposed Indictment includes four additional members in the list of participants in the alleged JCE, namely: Goran Hadžić, Milan Babić, Momčilo Krajišnik and Mičo Stanišić. The Prosecution submits that the list of JCE members included in the Indictment is not exhaustive and exclusive, as demonstrated by the language “[i]ndividuals who participated in this joint criminal enterprise, thereby significantly furthering the objective of the enterprise, included [...]”.<sup>78</sup> The Prosecution also submits that all of the additionally listed alleged members of the JCE have been charged in indictments before the Tribunal, and that all these indictments include both Accused as members of the alleged JCE.

88. The Trial Chamber accepts the Prosecution’s first argument and finds that paragraph 12 of the Indictment clearly indicates that the list of participants in the alleged JCE is non-exhaustive, as evidenced by the use of the term “included” and by the conclusive phrase “and *other members* of the JNA [...], the VRS [...], and the army of the Republic of Serbian Krajina [...]; the Serb TO of Croatia, BiH, Serbia and Montenegro; local police forces and Serbian MUP [...]; and members of Serbian, Montenegrin and Bosnian Serb paramilitary forces units”. The Trial Chamber finds, therefore, that the Prosecution’s proposed amendment does not introduce any new allegation of fact.<sup>79</sup> Rather, it provides clarification as to the identity of the alleged members of the JCE, thereby assisting in ensuring that the real issues in the case will be determined.

(e) Sequence of Paragraphs and other Formatting and Stylistic Amendments

(i) Sequence of Paragraphs

89. The Trial Chamber accepts the Prosecution’s submission that the alteration of the sequence of sections and paragraphs in the Indictment constitutes a mere re-configuration, rather than a substantive amendment. While such amendments in general would not warrant an amendment of an Indictment, the Trial Chamber finds it to be in the interests of a fair and expeditious trial to consider these proposed amendments and to assess their prejudicial effect, if any, in the relevant section of this Decision, below.

(ii) Wording Alteration

90. The Prosecution submits that “minor wording alterations have been proposed for the purposes of clarity and consistency”.<sup>80</sup>

91. The Prosecution submits that all the remaining amendments introduced in the Proposed Indictment consist of mere “stylistic and numerical standardisation” or “typographic corrections”.<sup>81</sup> The Stanišić Defence challenges the Prosecution’s submission that the other amendments included in the Proposed Indictment are “purely cosmetic”, and provides some examples to demonstrate its submission that, by changing individual words or phrases, the Prosecution has altered the meaning of the charges.<sup>82</sup>

92. The Stanišić Response submits that the proposed amendments included in paragraphs 5, 23, 42, 48 and 57 of the Proposed Indictment do not constitute a simple clarification of previous allegations, but that they introduce new factual and legal allegations, increase the scope of the alleged criminal liability of the Accused and reduce the standard of proof required of the Prosecution.<sup>83</sup> The Trial Chamber has already considered the amendments of paragraph 23, 48 and 57 of the Proposed Indictment elsewhere in this Decision.<sup>84</sup>

93. As regards paragraph 4 of the Proposed Indictment, the Stanišić Defence submits that there is a substantial difference between that paragraph and the corresponding paragraph 4 of the Indictment, in that

The current Indictment alleges that “volunteers and conscripts were deployed to locations in Croatia”, however, in the Proposed Indictment the Prosecution has inserted the word “Some”. The use of the word “some” minimises the standard of proof required of the [P]rosecution because it only needs to be able to establish [that] “some” and not all volunteers and conscripts were deployed.<sup>85</sup>

94. The Trial Chamber notes that the Stanišić Defence’s argument is founded on an interpretation of the Indictment that is not supported by the actual text of the paragraph. Indeed, paragraph 4 of the Indictment reads that “volunteers and conscripts [...] were deployed to special units of the Republic of Serbia DB or were deployed to locations to Croatia”. However, nothing in that language suggests that this would result in an obligation to the Prosecution to prove that “all” volunteers and conscripts” were deployed to locations in Croatia. There is no inconsistency,

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<sup>78</sup> Motion, para. 17 (d)

<sup>79</sup> See, on a similar issue, *Šešelj* Decision, para. 24.

<sup>80</sup> Motion, para. 17 (e) (i) and (ii)

<sup>81</sup> Motion, para. 17 (e).(v) and (vi).

<sup>82</sup> Stanišić Response, para. 22.

<sup>83</sup> Stanišić Response, para. 22.

<sup>84</sup> See *supra*, paras 62, 83 and 84 of this Decision, respectively.

therefore, with paragraph 4 of the Proposed Indictment, which reads, in its relevant part, that “volunteers and conscripts were trained at these centres. Some were subsequently deployed to the special units of the Serbian DB”, nor with paragraph 5 of the Proposed Indictment, which reads, in its relevant part, that “as well as being deployed to the special units of the Serbian DB, those trained at the training centres were deployed to locations in Croatia”. The Stanišić Defence’s submission is, therefore, rejected. The Trial Chamber finds that the amendment does not introduce a new allegation of fact, but clarifies the Indictment and will assist in ensuring that the real issues in the case will be determined.

95. The Stanišić Defence also adverts to the proposal to replace the word “subordinated” in paragraph 5 of the Indictment, with the word “coordinated”. The Trial Chamber, more accurately notes that the phrase “or operated in coordination with” has been *added* to the word “subordinated” in paragraph 5 of the Proposed Indictment. The Prosecution submits in its Reply that such amendment would not affect the Accused’s criminal liability, since “the Accused are alleged to be responsible for the crimes committed by the units mentioned regardless of whether those units were formally subordinated to other Serb Forces or merely operated in coordination with them”.<sup>86</sup> The Trial Chamber accepts the Prosecution’s argument and finds that the proposed amendments do not introduce any new allegation of fact.

96. As to the amendments in paragraphs 22 and 26 of the Proposed Indictment, the Trial Chamber considers that the same reasoning is to be applied and similar conclusions reached as are discussed in paragraph 81 of this Decision; the separation of modes of liability and the inclusion of the word “ordered” proposed by the Prosecution in paragraphs 22 and 26 of the Proposed Indictment do not introduce any new allegations. The Trial Chamber also accepts the Prosecution’s submission that “for consistency paragraphs 17, 25, 63 and 66 have been slightly altered accordingly”,<sup>87</sup> and finds that no new allegation has been introduced as a consequence of these amendments.

97. As for the amendments contained in paragraph 42 of the Proposed Indictment, the difference is found in the description of the alleged perpetrators. Where the Indictment reads that “members of the TO of the SAO SBWS led by Željko Ražnatović and members of the Militia of the SAO SBWS” arrested non-Serbs, the Proposed Indictment reads that “Serb Forces, particularly the SAO SBWS TO, SAO SBWS MUP Forces and members of Arkan’s SDG led by Željko Ražnatović” did so. The amendment in the definition of “Serb Forces” was already addressed by the Trial Chamber

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<sup>85</sup> Stanišić Response, para. 22(a).

<sup>86</sup> Prosecution’s Reply, para. 11, fn. 29.

<sup>87</sup> Motion, para. 17 (e) (iii)

in paragraphs 46 to 48 of this Decision. If the amendment were to be read as reflecting a difference in command relationship between the forces and Željko Ražnatović, the Trial Chamber finds that this would not constitute a new allegation of fact. Rather, the amendments serve to clarify the Indictment.

98. The Prosecution submits that “the modes of liability have been separated consistently by the words 'and/or' in paragraphs 10, 16, 17, 22, 25, 26, 63, 64 and 66”,<sup>88</sup> “to make it clear that the Prosecution seeks to prove the Accused’s criminal responsibility on all modes of liability charged”.<sup>89</sup> The Trial Chamber finds that the amendments do not introduce new allegations of fact and, although not strictly necessary to achieve the goal declared by the Prosecution, will assist in ensuring that the real issues in the case will be determined.

(f) Superior Responsibility as a New Mode of Criminal Liability

99. The Stanišić Defence argues in its Response that, throughout the Proposed Indictment, the Prosecution is “covertly seeking to introduce aspects of 'superior responsibility'” by including in paragraph 2 of the Proposed Indictment that “throughout the Indictment period, Franko Simatović functioned under the authority of Jovica Stanišić”, and by adding at paragraph 16 of the Proposed Indictment that “Jovica Stanišić and Franko Simatović were in a position of authority, which they used to instruct others to commit offences.”<sup>90</sup> The Stanišić Defence further submits that a confirmation of the Prosecution’s attempt to introduce superior responsibility as an alternative form of responsibility can be found in the new language introduced at paragraph 15 of the Proposed Indictment,<sup>91</sup> as well as in a passage of the Motion where the Prosecution stresses the importance for the Accused to know “what is alleged to have been his own conduct giving rise to his responsibility *as a superior*”.<sup>92</sup> The Prosecution replies that the liability under Article 7(3) has not been charged, and “explicitly disavows any allegations of liability on that basis”.<sup>93</sup>

100. The Trial Chamber finds that the Prosecution does not charge the Accused with superior responsibility as a new form of liability. Indeed, the section of the Proposed Indictment entitled “Individual Criminal Responsibility” contains only one sub-heading, which reads “Article 7(1) of the Statute of the Tribunal”.<sup>94</sup> The Proposed Indictment makes no reference to Article 7(3) of the

<sup>88</sup> Motion, para. 17 (e) (iv)

<sup>89</sup> Motion, para. 17 (e).(iv)

<sup>90</sup> Proposed Indictment, para. 16, quoted in Stanišić Response, para. 13.

<sup>91</sup> Stanišić Response, para 16. Para. 15 (c) of the Proposed Indictment reads that “[the Accused] continued to send forces and provide support over an extended period of time, failed to instruct them to refrain committing unlawful acts, and failed to stop replenishing the forces on the ground who were committing unlawful acts”.

<sup>92</sup> Stanišić Response, para. 13, referring to the Motion, para 11 (emphasis added).

<sup>93</sup> Prosecution’s Reply, para. 8 (b).

<sup>94</sup> Proposed Indictment, paras 10 to 17.

Statute, nor does it address anywhere the constitutive elements of superior responsibility under Article 7(3) of the Statute. This is confirmed by the Prosecution's submission that it "explicitly disavows any allegations of liability on that basis".<sup>95</sup> Finally, the Trial Chamber recalls that a position as a superior can be a relevant factor for criminal liability under Article 7(1) of the Statute. In conclusion, the proposed amendments do not amount to new allegations of fact, but clarify the Indictment in relation to the Accused Stanišić's role and conduct as a superior. Thus, the amendments will assist in determining that the real issues in the case will be determined.

### 3. Evaluation of the Prejudice for the Accused

101. As regards those amendments which do not introduce any new allegation of fact or new charge, the Trial Chamber finds that the Accused would suffer no prejudice as a result of those amendments. Indeed, some of the amendments simply specify the allegations of fact already included into the Indictment. Therefore, far from hindering the Defence, they will assist the Defence in preparing its case, by narrowing the scope of the issues to be considered, and advancing the Defence's understanding of the allegations contained in the Indictment. In short, these amendments will assist in ensuring that the real issues in this case are determined. Some of the others proposed amendments are structural, terminological or typographical, and rectify minor and non-substantive errors or ambiguities: they also will assist the Defence, as well as the Trial Chamber, by increasing the specificity of the Indictment. While on their own, these amendments may not warrant an amendment of the Indictment, when viewed as a whole, they will also assist the Trial Chamber in ensuring that the real issues in this case are determined.

102. The Trial Chamber has found that certain amendments proposed by the Prosecution in the Proposed Indictment, namely the addition of the words "from no later than April 1991" in paragraph 8,<sup>96</sup> the amendments contained in paragraph 15(a),<sup>97</sup> the amendment of the time frame contained in paragraphs 15(a), 15(b) and 15(c),<sup>98</sup> the amendments contained in paragraph 39,<sup>99</sup> the addition of the words "and/or otherwise mistreated" in paragraph 48<sup>100</sup> and, finally, the addition of paragraph 65,<sup>101</sup> introduce new allegations of fact, while the remaining proposed amendments do not introduce new allegations of fact or new charges.

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<sup>95</sup> Prosecution's Reply, para. 8 (b).

<sup>96</sup> See *supra*, para. 52.

<sup>97</sup> See *supra*, para. 73.

<sup>98</sup> See *supra*, para. 55.

<sup>99</sup> See *supra*, paras 85 and 86.

<sup>100</sup> See *supra*, para. 83.

<sup>101</sup> See *supra*, para. 79.

103. As to the amendments that introduce new allegations of fact, listed in the paragraph above, the Trial Chamber has found that none of the new allegations of fact give rise to new charges against the Accused. In evaluating whether the Defence has had adequate opportunity to prepare its case, the question whether the Defence had sufficient notice of the new allegations becomes relevant. The Trial Chamber recalls the Prosecution's submission that the Defence already received adequate notice, through the Prosecution's Consolidated Pre-Trial Brief, of all allegations newly included in the Proposed Indictment.<sup>102</sup>

104. The Appeals Chamber has allowed for the possibility of a defective indictment being cured through the information provided in the Prosecution's pre-trial brief or its opening statement.<sup>103</sup> However, the Trial Chamber also recalls that, as clearly stressed by the Appeals Chamber, such a possibility is exceptional in nature, so that it should not be confused with the normal course of the proceedings. The *Simić* Appeal Judgement, for instance, stresses in this regard that

[w]hen challenges to an indictment are raised on appeal, the indictment can no longer be amended; the Appeals Chamber must thus determine whether the error of having tried the accused on a defective indictment "invalidat[ed] the decision." In making this determination, the Appeals Chamber *does not exclude the possibility* that, in certain instances, the prejudicial effect of a defective indictment may be "remedied" if the Prosecution provided the accused with clear, timely and consistent information that resolves the ambiguity or clarifies the vagueness, thereby compensating for the failure of the indictment to give proper notice of the charges. Nevertheless, in light of the factual and legal complexities normally associated with the crimes within the jurisdiction of the International Tribunal, *there can only be a limited number of cases that fall within this category.*<sup>104</sup>

105. The Trial Chamber recalls that an indictment represents the primary accusatory instrument,<sup>105</sup> while the pre-trial brief serves the purpose of addressing the relevant factual and legal issues by developing the Prosecution strategy at trial.<sup>106</sup> The pre-trial brief, therefore, is relevant to the case only insofar as it develops such strategy in accordance with the indictment.<sup>107</sup>

106. The Trial Chamber further recalls that the Prosecution submits in its Reply that

with respect to the Consolidated Pre-Trial Brief, the Pre-Trial Chamber held that 'no new charges have been brought against the Accused' and that 'the Accused were informed promptly of the charges raised against them'. The Pre-Trial Chamber denied the Defence's motions challenging the

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<sup>102</sup> Motion, paras 4 and 14; Prosecution's Reply, paras 4-5, 8-10.

<sup>103</sup> Motion, para.14, fn. 15, referring, among others, to *Prosecutor v. Simić*, IT-95-9-A, Judgement, 28 November 2006 (*Simić* Appeal Judgement), para 24; *Prosecutor v. Naletilić and Martinović*, IT-98-34-A, Judgement, 3 May 2006, para. 27.

<sup>104</sup> *Simić* Appeal Judgement, para. 23, emphasis added.

<sup>105</sup> See Rules 47 to 53 *bis*.

<sup>106</sup> Rule 65 *ter*(E)(i).

<sup>107</sup> Pre-Trial Brief Decision, para. 18; *Prosecutor v. Protais Zigiranyrazo*, Case No. ICTR-2001-73-PT, Decision on Defence Urgent Motion to Exclude Some Parts of the Prosecution Pre-Trial Brief, 30 September 2005, para. 2; *Prosecutor v. Miroslav Deronjić*, Case No. IT-02-61-PT, Decision on Form of the Indictment, 25 October 2002, para 10.

Consolidated Pre-Trial Brief, and the Defence is now attempting to re-litigate those same issues through its challenge to the proposed amendments to the [...] Indictment.<sup>108</sup>

107. In referring to the Pre-Trial Brief Decision, the Prosecution omitted to reflect the primary reason why the Pre-Trial Chamber rejected the Defence Motions, in which the Defence for both Accused had requested either deletion or replacement of parts of the Consolidated Pre-Trial Brief on the ground that “it impermissibly expanded the charges and modes of liability set out in the [...] Indictment”.<sup>109</sup> Indeed the Pre-Trial Brief Decision reads that

[b]oth the Stanišić and the Simatović Defence have requested either deletion or replacement of parts of the Final Pre-Trial Brief. The relief requested, however, is unnecessary. The indictment represents the primary accusatory instrument. [...] The pre-trial brief addresses the factual and legal issues by developing the Prosecution strategy at trial. The pre-trial brief, therefore, is relevant to the case only as far as it develops such strategy in accordance with the indictment. The relief sought in the Motion – an exclusion of parts of the pre-trial brief - is therefore unnecessary. [...] Clearly, a pre-trial brief may not be used to fill any gaps which may exist in the material facts pleaded in an indictment.<sup>110</sup>

108. Therefore, the reason why the Defence’s Motions were dismissed was that no prejudice to the Accused could result from a pre-trial brief detailing new facts since a pre-trial brief does not substitute for an indictment in identifying the charges against an accused or the material facts underpinning the charges. Finally, the Trial Chamber emphasised that a pre-trial brief may not be used to fill any gaps that may exist in the material facts pleaded in an indictment.<sup>111</sup>

109. It would appear that the Prosecution is currently seeking to amend the Indictment so as to make it in accordance with the Pre-Trial Brief, rather than that Brief being in accordance with the Indictment. Obviously, this is not the normal course of the proceedings. It would have been proper for the Prosecution to file a motion for leave to amend the Indictment before, along with, or at the very least shortly after, filing the Consolidated Pre-Trial Brief. On the other hand, if the Prosecution, some time after filing its pre-trial brief, seeks to remove ambiguity or vagueness from the Indictment, it could assist in bringing a more focused case before the Tribunal.

110. In light of the case law pertaining to the question whether an accused has had prior notice of the Prosecution’s charges against him, that is, whether the Prosecution has provided clear, timely and consistent information that resolves the ambiguities or clarifies the vagueness, the Trial

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<sup>108</sup> Prosecution’s Reply, para 5, referring to the Pre-Trial Brief Decision, para 15.

<sup>109</sup> Pre-Trial Brief Decision, para. 7, referring to Defence Motion to Declare Prosecution Pre-Trial Brief in Violation of Article 21, Rule 65 *ter* E (ii) (Additional Witnesses) and Rule 50 (Amendment of Indictment), and Request for Leave to Exceed Page Limit, 5 June 2007, para 6. *See also*, Pre-Trial Brief Decision, paras 6 to 10.

<sup>110</sup> Pre-Trial Brief Decision, paras 18-19.

<sup>111</sup> Indeed, after having found that, for the reasons recalled above, “the relief sought in the Motion –an exclusion of parts of the pre-trial brief- is therefore unnecessary”, the Pre-Trial Chamber states that “[h]owever, in the interest of the overall expeditiousness of the trial, the Trial Chamber will consider whether the Prosecution in its Final Pre-Trial Brief raises new material facts and forms of liability not pleaded in the Revised Indictment”, Pre-Trial Brief Decision, paras 18-19.



Chamber cannot ignore the Consolidated Pre-Trial Brief. In the present case, that Brief was filed on 2 April 2007. However, only when the Trial Chamber issued its Pre-Trial Brief Decision did the case of the Prosecution become certain to the Defence for both Accused. Therefore, the Trial Chamber will take 17 July 2007 as the date at which both Accused were given clear notice of the factual and legal issues in the case against them.

111. A further factor that is of relevance to an assessment of potential prejudice to the Accused is whether the Defence will have adequate time to prepare if amendments to the Indictment are permitted. In this respect, the Trial Chamber finds relevant the timing of the filing of this Motion, that is, sixteen days before the case was initially scheduled to commence on 27 February 2008. The subsequent delays in the proceedings were not something that the Prosecution could have anticipated. The fact that the Motion was filed at such a late stage of the pre-trial proceedings increased the risk of undue delay if these amendments were granted. The Trial Chamber is also conscious of the fact that this Motion was filed some time ago. Due to the level of detail of the proposed amendments, it is only now in a position to provide a ruling on this matter. Although the Defence may have been aware of the proposed amendments as of the moment that the Motion was filed, the time between the filing of that Motion and this decision cannot be seen as time in which the Defence had time to adequately prepare for its case. After all, it is only when a determination on a matter is made by a Trial Chamber that the Parties can be certain of a need to amend their preparations for a case.

112. A review of that Prosecution's Consolidated Pre-Trial Brief showed that the limited number of new allegations of fact that the Prosecution now seeks to introduce in the Proposed Indictment were already mentioned in that document. Therefore, when the Prosecution filed this Motion, the Defence had prior notice of these allegations for nearly eight months. The Accused were in a position to provide their counsel with instructions as to these new allegations as of July 2007. In addition, at present, the trial stands adjourned.<sup>112</sup> The case is not envisaged to commence before 18 August 2008, approximately one month and a half from the filing of this decision. Therefore, if the trial were to proceed immediately after the three-month adjournment, the Defence for both Accused will have had a minimum of nine months in which to prepare their cases with respect to the new allegations in accordance with instructions of their clients. A delay of the proceedings to provide the Defence with additional time in order to prepare their cases in accordance with the limited number of new allegations of fact will not be necessary. The remainder of the requested amendments would not require any time for the preparation of their defence, as they concern amendments that remove ambiguities, vagueness and help to streamline the case.

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<sup>112</sup> Appeals Chamber's Decision on Defence Appeal of the Decision on Future Course of Proceedings, 16 May 2008.

4. Provision of Documentation Supporting New Allegations of Fact

113. With respect to the new allegations of fact, the Trial Chamber recalls that they were already contained in the Pre-Trial Brief, which document contained clear references to their sources of information. The Defence have thus been on notice of that information at least since the decision of 17 July 2007. In addition, the new allegations are not of such a level that it would require a Trial Chamber to conduct an assessment whether they would meet the *prima facie* standard of Article 19 of the Statute.

**E. Disposition**

114. For the reasons above, pursuant to Rules 50 and 54 of the Rules, the Trial Chamber

1. **GRANTS** the Prosecution's Application for Leave to Reply;
2. **GRANTS** the applications of the Parties to exceed the word limits;
3. **GRANTS** the Motion; and
4. **ORDERS** the Prosecution to file, within seven days of this Decision, a final copy of the Indictment that reflects the findings set out in this decision. That final copy will serve as the operative indictment in this case.

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



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Judge Patrick Robinson  
Presiding

Dated this fourth day of July 2008

At The Hague

The Netherlands

**[Seal of the Tribunal]**