



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

Case No. IT-03-73-PT  
Date: 19 October 2005  
Original: English

**IN TRIAL CHAMBER II**

**Before:** Judge Carmel Agius, Presiding  
Judge Jean-Claude Antonetti  
Judge Kevin Parker

**Registrar:** Mr. Hans Holthius

**Decision:** 19 October 2005

**PROSECUTOR**

v.

**IVAN ČERMAK AND MLADEN MARKAĆ**

---

**DECISION ON PROSECUTION MOTION SEEKING LEAVE  
TO AMEND THE INDICTMENT**

---

**The Office of the Prosecutor:**

Mr. Alex Whiting  
Ms. Laurie Sartorio  
Ms. Katherine Gallagher

**Counsel for the Accused:**

Mr. Čedo Prodanović and Ms. Jadranka Sloković  
for Ivan Čermak

Mr. Miroslav Šeparović and Mr. Goran Mikuličić  
for Mladen Markačić

## I. BACKGROUND

1. Trial Chamber II (“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 seized of the Prosecution’s Motion to Amend the Indictment (“Motion”) and the Prosecution Submission of Supporting Material Concerning New Factual Allegations in the Proposed Amended Indictment (“Supporting Material”), filed on 6 May 2005, whereby the Prosecution seeks, pursuant to Rule 50 of the Rules of Procedure and Evidence (“Rules”), leave to amend the Indictment against Ivan Čermak and Mladen Markač.

2. The initial Indictment against the Accused was confirmed on 24 February 2004 (“Current Indictment”). Under the Current Indictment, each of the Accused is charged with four counts of crimes against humanity under Article 5 of the Statute of the International Tribunal (“Statute”), namely persecutions, deportation, forcible transfer and other inhumane acts, and with three counts of violations of the laws or customs of war under Article 3 of the Statute, namely plunder of public or private property, murder, and wanton destruction of cities, towns or villages. The offences were allegedly committed in the Krajina Region of the Republic of Croatia between 4 August and 15 November 1995. Knin is the capital of the Krajina region. Ivan Čermak is alleged to have been the Commander of the Knin Garrison between 5 August and 15 November 1995. He is alleged to have had either or both *de jure* and *de facto* authority over Croatian forces operating in the southern portion of the Krajina region at the material time. Mladen Markač is alleged to have been the Commander of the Special Police of the Ministry of the Interior of the Republic of Croatia and in this capacity is alleged to have deployed, issued orders to, and otherwise exercised control over, *inter alia*, the Special Police forces involved in Operation Storm and related continuing operations in the region at the material time. With respect to the form of individual criminal responsibility, both Articles 7(1) and 7(3) are relied upon.

3. On 9 July 2004 the Defence for Mladen Markač filed Mladen Markač’s Preliminary Motion on the Defects in the Form of the Indictment (“Markač Defence Motion”). On 15 July 2004 the Defence for Ivan Čermak filed Ivan Čermak’s Motion on the Form of the Indictment (“Čermak Defence Motion”). The Prosecution responded by jointly opposing both Motions on 22 July 2004 in its Response to the Preliminary Motions on Defects in the Form of the Indictment Filed by Mladen Markač on 9 July 2004 and Ivan Čermak on 15 July 2004 (“Prosecution Response to the Preliminary Motions”).

4. On 8 March 2005 the Chamber issued its Decision on Ivan Čermak's and Mladen Markač's Motions on Form of Indictment ("Decision on the Form of Indictment"), in which, pursuant to Rule 72 of the Rules, it ordered the Prosecution to amend the Indictment. On 6 May 2005 the Prosecution filed its Motion and the Supporting Material. In its Motion, the Prosecution proposes an Amended Indictment which, in its submission, complies with the Orders made by the Chamber in the Decision on the Form of Indictment, and makes new allegations which, it submits, are supported by material that satisfies the standard of a *prima facie* case required by Article 19(1) of the Statute. Then, on 20 May 2005, the Defence jointly filed Ivan Čermak's and Mladen Markač's Opposition to Prosecution's Motion to Amend the Indictment ("Response") in which the Defence submits that the Prosecution has not complied with the Decision on the Form of Indictment. In turn, and with the leave of the Chamber, on 26 May 2005 the Prosecution filed its Reply to Ivan Čermak's and Mladen Markač's Opposition to Prosecution's Motion to Amend the Indictment ("Reply").

## II. COMPLIANCE WITH THE DECISION ON THE FORM OF INDICTMENT

5. In the Decision on the Form of Indictment, the Chamber noted that Article 18(4) of the Statute and Rule 47(C) of the Rules require an indictment to contain a concise statement of the facts and the crimes with which the accused is charged. An indictment is pleaded with sufficient particularity if it sets out the material facts of the Prosecution case with enough detail to inform the accused of the charges against him, allowing him time to prepare his defence.<sup>1</sup> The Decision on the Form of Indictment ordered the Prosecution to amend the Current Indictment to clarify numerous ambiguities.

### **A. Orders to identify adequately the forces alleged to be under the effective control of Ivan Čermak and to clarify the meaning of paragraphs 17 and 18 of the Current Indictment**

6. In the Decision on the Form of Indictment, the Chamber made two Orders for the Prosecution to clarify the command responsibility of the Accused.<sup>2</sup> The Chamber found that the Current Indictment did not outline with sufficient specificity the subordinates allegedly under the command of Ivan Čermak. This lack of detail was aggravated because the alleged relevance of the "civil administration" and "territorial control" (contained in paragraph 15 of the Current

---

<sup>1</sup> Decision on the Form of Indictment, para 3; *Prosecutor v Deronjić*, Decision on Form of the Indictment, Case No IT-02-61-PT (25 October 2002) para 4, referring to *Prosecutor v Kupreškić and Others*, Case IT-95-16-A, Appeals Judgement (23 October 2001) para 88; *Prosecutor v Halilović*, Decision on Prosecutor's Motion Seeking Leave to Amend the Indictment, Case No IT-01-48-PT (17 December 2004) para 13.

<sup>2</sup> Decision on the Form of Indictment, Order No 2(a) and (2)(c).

Indictment) to Ivan Čermak's command responsibility was not made clear.<sup>3</sup> The Chamber also found that the Current Indictment was ambiguous as to the subordinates allegedly under the command of Ivan Čermak and Mladen Markač. Paragraph 18 of the Current Indictment appeared to suggest that each Accused had the power to prevent or punish offences committed by all the Croatian forces participating in Operation Storm.<sup>4</sup>

7. The Amended Indictment in paragraph 3 adds further particulars concerning the subordinates within, and attached to, the Knin Garrison over whom Ivan Čermak allegedly exercised control and responsibility. The terms "civil administration" and "territorial control" have been removed from the Amended Indictment.<sup>5</sup>

8. Paragraph 41 of the Amended Indictment states that, pursuant to Article 7(3) of the Statute, each Accused is charged with, and criminally responsible for, the criminal acts and omissions of his subordinates which he knowingly failed to prevent or punish. Further clarification of paragraphs 17 and 18 of the Current Indictment is contained in paragraphs 2, 3, and 4 of the Amended Indictment.

9. The Chamber is satisfied that the subordinates allegedly under the command of Ivan Čermak have now been adequately identified, and that the ambiguities of paragraphs 17 and 18 of the Current Indictment have been removed.

**B. Order to identify the conduct by which each of the Accused is alleged to have had the means of knowledge that criminal conduct was about to, was being, or had been committed by subordinates of that Accused**

10. In the Decision on the Form of Indictment, the Chamber held that, in relation to the mental element for each offence, the Prosecution must either (i) plead the relevant state of mind itself as a material fact; or (ii) plead the evidentiary facts from which the relevant state of mind may be inferred.<sup>6</sup> The Chamber found that the Current Indictment in a number of respects neither pleaded adequately the relevant state of mind as a material fact, nor the evidentiary facts.<sup>7</sup>

11. Paragraphs 41 and 42 of the Amended Indictment plead each Accused's alleged knowledge of the conduct of his subordinates. Paragraph 41 of the Amended Indictment alleges that "[e]ach accused knew and/or had reason to know that one or more such subordinates was about to commit or had committed such crimes and failed to take necessary and reasonable measures to prevent such

<sup>3</sup> Decision on the Form of Indictment, para 29.

<sup>4</sup> Decision on the Form of Indictment, para 38.

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

<sup>6</sup> Decision on the Form of Indictment, para 12.

<sup>7</sup> Decision on the Form of Indictment, para 37, para 66.

crimes or punish, remove or discipline such persons.” Paragraph 42 of the Amended Indictment specifies the various means by which each Accused is alleged to have had knowledge of the crimes charged in the Indictment. These two paragraphs now plead adequately the alleged state of mind for criminal responsibility under Article 7(3) as a material fact. The Prosecution’s pleading also outlines various factual circumstances which are alleged to give rise to the relevant state of mind for Article 7(3). The Chamber is satisfied, therefore, that the Amended Indictment is in compliance with the Decision on the Form of Indictment in this respect.

**C. Order to clarify the meaning of paragraph 13 of the Current Indictment**

12. Paragraph 13 of the Current Indictment states that the crimes in Count 2 (Murder under Article 3 of the Statute) and Count 7 (Inhumane Acts under Article 5(i) of the Statute) are the natural and foreseeable consequences of the execution of the alleged Joint Criminal Enterprise (“JCE”) and that each Accused was aware of these consequences. The Chamber noted in the Decision on the Form of Indictment that, while it appears the Prosecution relied on the existence of a JCE for these two Counts, Article 7(1) was not mentioned in either Count 2 or Count 7 of the Current Indictment.<sup>8</sup> Participation in a JCE, however, is a mode of individual criminal responsibility under Article 7(1). The Chamber therefore required the Prosecution to clarify whether JCE liability is relied upon in respect of Counts 2 and 7.<sup>9</sup>

13. Paragraph 13 of the Current Indictment has been clarified in Counts 6, 7, 8, and 9 of the Amended Indictment, which now charges Article 7(1) as the basis for JCE liability. Paragraph 36 of the Amended Indictment states that the crimes charged in Counts 1 to 5 were intended, and were within the purpose or objectives of the JCE, and were committed in the course of the JCE.<sup>10</sup> Paragraph 39 of the Amended Indictment effectively states that the extended form of JCE, according to which the crime committed was the natural and foreseeable consequence of the JCE and of implementing or attempting to implement the JCE,<sup>11</sup> is pleaded “in addition or in the alternative” to any crime pleaded in the indictment which is not within the common purpose of the JCE.<sup>12</sup> Article 7(1) is now pleaded as a basis for criminal responsibility for each Count.

14. The Chamber is satisfied that the Prosecution has complied with the Decision on the Form of Indictment in this respect.

---

<sup>8</sup> Decision on the Form of Indictment, para 44.

<sup>9</sup> Decision on the Form of Indictment, para 44.

<sup>10</sup> Amended Indictment, para 36.

<sup>11</sup> Amended Indictment, para 39.

<sup>12</sup> Amended Indictment, para 39.

**D. Order to provide a more detailed identification of the alleged participants in the JCE by name or, if this is not possible, by some adequate categorization or grouping**

15. The Chamber has held that a sufficient pleading of JCE liability requires identification of the participants, either by name or category.<sup>13</sup> The Current Indictment identified members of the JCE unhelpfully as “others.” In the Decision on the Form of Indictment, the Chamber emphasised that this did not provide sufficient information as to the identity of individuals alleged to have taken part in the JCE.<sup>14</sup> The Chamber also found that the Current Indictment failed to reflect the Prosecution’s contention that the purpose of the JCE was executed by Croatian forces under the respective command of the members of the JCE.<sup>15</sup>

16. Paragraphs 12, 14 and 15 of the Amended Indictment specify in more detail those individuals allegedly involved in the execution of the JCE. Paragraph 12 of the Amended Indictment identifies, as members of the JCE, along with Ivan Čermak and Mladen Markač: Franjo Tudjman, Gojko Šušak, Janko Bobetko, Zvonimir Červenko, Ante Gotovina and

various officers, officials and members of the Croatian government and political structures, at all levels (including in municipal governments and local organizations); various leaders and members of the HDZ; various officers and members of the armed forces of the Republic of Croatia, including the Army (“HV”) and Air Force (“HRZ”), the Special Police, the civilian police, and other Republic of Croatia security and/or intelligence services (“Croatian forces”); and other persons, both known and unknown.<sup>16</sup>

17. The alleged members of the JCE are also identified in paragraphs 2, 3 and 4 of the Amended Indictment, by reference to the Croatian Army forces alleged to be under the command of Ivan Čermak as Commander of the Knin Garrison, and the Special Police units alleged to be under the command of Mladen Markač.

18. While some individuals alleged to be participants in the JCE remain unspecified in the Amended Indictment, and the categorisation which is now pleaded is broad, the Chamber is satisfied, contrary to the Defence’s submission, that the identification of further JCE participants by category is reasonable in the circumstances and will not prejudice each Accused’s ability to prepare an adequate defence.<sup>17</sup>

19. Paragraph 10 of the Amended Indictment, however, requires further clarification. That paragraph states that, in the course of Operation Storm, “Croatian forces and members of the joint criminal enterprise committed crimes against the Serb civilian population and civilian property as

<sup>13</sup> Decision on the Form of Indictment, para 54.

<sup>14</sup> Decision on the Form of Indictment, para 55.

<sup>15</sup> Decision on the Form of Indictment, para 55.

<sup>16</sup> Amended Indictment, para 12.

part of and in furtherance of the joint criminal enterprise.” It is not clear whether it is alleged that all Croatian forces involved in Operation Storm committed the crimes in furtherance of the JCE, or whether this allegation is confined to those Croatian forces that were under the command or effective control of the two Accused and other members of the JCE. Perhaps some other allegation is intended by the reference to “Croatian forces.” The words are not clear and a reading of the Amended Indictment in its entirety does not clarify what is intended.

20. By virtue of the above, the Chamber orders the Prosecution to amend paragraph 10 of the Amended Indictment to clarify the scope of its allegations therein.

**E. Order to clarify the nature of the alleged participation of each of the Accused in the JCE**

21. In the Decision on the Form of Indictment the Chamber found that paragraph 11 of the Current Indictment did not specify the particular conduct by which each Accused is alleged to have participated in the JCE.<sup>18</sup> It was unclear in the Current Indictment whether the allegations were in support of the Accused’s personal liability or in support of the allegation of participation in the JCE, or both.<sup>19</sup>

22. The Amended Indictment contains a revised section concerning JCE liability and the means by which each Accused is alleged to have participated in it, shared its purpose and furthered its aims. Paragraphs 2, 3, and 4 of the Amended Indictment provide the factual background of Ivan Čermak’s alleged command over units in the Knin Garrison.<sup>20</sup> Paragraphs 6, 7, and 8 of the Amended Indictment allege Mladen Markač’s command as Commander of the Special Police. Paragraph 13 alleges the general activities of those in the JCE and the ways in which the aims of the JCE were furthered, and paragraphs 14 and 15 of the Amended Indictment identify the alleged steps each Accused took to participate in the JCE, both directly and indirectly. The Chamber’s concerns have been addressed.

**F. Order to plead adequately, whether expressly or implicitly, the states of mind relied on**

23. The Current Indictment did not adequately specify the state of mind relied upon for each charge and each form of liability.<sup>21</sup> The Prosecution must provide satisfactory detail as to the mental element allegedly possessed by the Accused for each particular offence and each mode of criminal responsibility. Sufficient elaboration of the requisite *mens rea* reflects the requirement of

---

<sup>17</sup> Response, para 12(b).

<sup>18</sup> Decision on the Form of Indictment, para 60.

<sup>19</sup> Decision on the Form of Indictment, para 58.

<sup>20</sup> Motion, para 8.

<sup>21</sup> Decision on the Form of Indictment, para 66.

the Rules that the accused be informed of the nature and cause of the charges against him. As the Chamber stated in the Decision on the Form of Indictment, “it is necessary for the Prosecution to sufficiently plead the respective states of mind which are relevant to each charge and each form of liability. The only alternative to this is to plead sufficient facts from which the states of mind could be inferred.”<sup>22</sup>

24. With respect to the state of mind required for criminal responsibility under Article 7(3) of the Statute, the Chamber has already found that it has been sufficiently pleaded in the Amended Indictment in paragraphs 41 and 42.<sup>23</sup>

25. Paragraph 32 of the Amended Indictment states that each Accused acted with the state of mind required for the commission of each crime charged in the Indictment. Paragraph 32 of the Amended Indictment further states that each Accused was “aware of the substantial likelihood that the execution of plans and orders, and the carrying out of the crimes and conduct which he instigated, would involve or result in the crimes charged in this indictment.”<sup>24</sup> Paragraph 33 of the Amended Indictment then specifies expressly the state of mind for each of the crimes charged in Counts 1 to 9, and alleges that each Accused possessed the relevant *mens rea* for commission of the crimes pleaded in each Count. Count 1, for example, which charges each Accused with persecutions on political, racial and religious grounds punishable under Article 5(h) of the Statute, specifies that the Accused or the perpetrator, or both, acted with discriminatory intent, with the intention to discriminate on political, racial or religious grounds.<sup>25</sup> For each crime alleged, the Prosecution has expressly set out the state of mind with which each Accused is alleged to have acted. The Chamber is satisfied that the alleged state of mind of each Accused for Counts 1 to 9 has been pleaded adequately as a material fact.

26. Paragraph 34 of the Amended Indictment alleges, pursuant to Article 7(1), that each accused is criminally responsible for aiding and abetting the crimes charged in the Indictment. Paragraph 34 of the Amended Indictment specifies the relevant *mens rea* by noting that “[e]ach accused was aware that he was assisting the commission of the crimes charged in this indictment or was aware that one or a number of crimes would probably be committed and was aware that his acts or omissions would assist the commission of such crime or crimes.”<sup>26</sup> The Chamber considers that this sufficiently pleads the relevant state of mind for aiding and abetting.

---

<sup>22</sup> Decision on the Form of Indictment, para 66.

<sup>23</sup> *Supra*, para 11.

<sup>24</sup> Amended Indictment, para 32.

<sup>25</sup> Amended Indictment, para 33(a).

<sup>26</sup> Amended Indictment, para 34.



27. Paragraph 39 alleges the extended form of JCE liability for any crime not falling within the purpose or objectives of the JCE. As the Chamber noted in the Decision on the Form of Indictment, the extended form of JCE liability requires the Prosecution to demonstrate the Accused's intent to participate in and further the purpose or objectives of the JCE, and also that it was foreseeable that each crime charged might be perpetrated by one or other members of the group, and that the Accused accepted that risk.<sup>27</sup> The Prosecution must, therefore, plead that each Accused was aware that each crime alleged in Counts 6 to 9 was a possible consequence of the execution of the JCE's purpose or objectives and that, with that awareness, each Accused participated in the JCE. Paragraph 39 of the Amended Indictment fulfils this requirement by stating that any crimes not falling within the purpose or objectives of the JCE were the natural and foreseeable consequences of attempting to execute the JCE, and that each Accused was aware of these consequences. The Chamber is satisfied that paragraph 39 of the Amended Indictment adequately pleads the state of mind for this form of JCE liability.

28. Paragraph 35 of the Amended Indictment states that, in addition or in the alternative, pursuant to Article 7(1), each Accused is criminally responsible for committing the crimes as a member of, or participant in, the JCE. Paragraph 35 of the Amended Indictment also notes that, as part of his responsibility, each Accused is charged as a co-perpetrator and an indirect perpetrator.<sup>28</sup> Paragraph 37 of the Amended Indictment states that each Accused "possessed and/or shared the requisite state of mind concerning each of the crimes which were committed as part of the joint criminal enterprise."<sup>29</sup> As the Chamber noted in the Decision on the Form of Indictment, if the crimes are alleged to fall within the purpose or objectives of the joint criminal enterprise, the Prosecution must plead the Accused's intent to perpetrate a particular crime that falls within that common purpose or objective.<sup>30</sup> Paragraph 36 of the Amended Indictment states that the crimes alleged in Counts 1 to 5 were committed within the purpose or objectives of the JCE, and paragraph 33 of the Amended Indictment enumerates the relevant states of mind for the crimes specified in each Count. The Chamber is therefore satisfied that the relevant state of mind has been adequately pleaded.

29. Paragraph 40 of the Amended Indictment states that each Accused is alleged to be criminally responsible for aiding and abetting the JCE "with the requisite state of mind."<sup>31</sup> This attempt at shorthand pleading, however, does not adequately address the mental element. In the case of aiding and abetting, the requisite mental element to be pleaded by the Prosecution is that the

---

<sup>27</sup> Decision on the Form of Indictment, para 64.

<sup>28</sup> Amended Indictment, para 35.

<sup>29</sup> Amended Indictment, para 37.

<sup>30</sup> Decision on the Form of Indictment, para 64-65.

aider and abettor had knowledge that his acts assisted the commission of a specific crime by the perpetrator.<sup>32</sup> The Prosecution has pleaded the mental element for aiding and abetting adequately in paragraph 34 of the Amended Indictment; it will be ordered to do so in paragraph 40 of the Amended Indictment.

30. The Chamber orders the Prosecution to plead satisfactorily, either explicitly or implicitly, the states of mind relied upon in paragraph 40 of the Amended Indictment.

#### **G. Order to clarify the language used in paragraphs 40 and 46 of the Current Indictment**

31. In the Decision on the Form of Indictment, the Chamber found that some of the language used in the Current Indictment to describe each of the Accused's alleged command responsibility was unclear, and ordered this language to be standardised. The Chamber also ordered that particulars be inserted in Count 7 (Inhumane Acts) of the Current Indictment.

32. The language relating to command responsibility has been standardised. Paragraphs 28 and 49 of the Amended Indictment now specify particulars of the Inhumane Acts alleged.<sup>33</sup> These changes have satisfactorily addressed the Chamber's concerns.

### **III. NEW CHARGES IN THE AMENDED INDICTMENT**

#### **A. Law**

33. In its Motion the Prosecution proposes a number of amendments which go beyond those ordered by the Chamber in its Decision on the Form of Indictment.

34. Pursuant to Rule 50(A)(i)(c) of the Rules, once a case has been assigned to a Trial Chamber, the Prosecution may only amend the indictment with the leave of that Chamber. Rule 50(A)(ii) provides that leave to amend an indictment shall not be granted unless the Chamber is satisfied that there is evidence which satisfies the standard set out in Article 19(1) of the Statute.

35. Although not stated in Rule 50, also relevant to the exercise of the Chamber's discretion is whether the amendments result in prejudice to the accused.<sup>34</sup> In determining whether any prejudice

<sup>31</sup> Amended Indictment, para 40.

<sup>32</sup> *Prosecutor v Duško Tadić*, Case No IT-94-1-A, Appeals Judgement (15 July 1999) para 229.

<sup>33</sup> Amended Indictment, para 28, 49.

<sup>34</sup> *Prosecutor v Sefer Halilović*, Decision on Prosecutor's Motion Seeking Leave to Amend the Indictment, Case No IT-01-48-PT (17 December 2004) para 22, citing *Prosecutor v Mejakić et al.*, Decision on the Consolidated Indictment, Case No IT-02-65 (21 November 2002) p. 3.

to the Accused arises, “regard must be had to the circumstances of the case as a whole.”<sup>35</sup> The touchstone is fairness; there will be no injustice to the Accused if he is provided with an adequate opportunity to prepare an effective defence to the Amended Indictment. Two factors particularly are relevant in determining whether amendment of an indictment would cause unfair prejudice: (1) notice, i.e., whether the Accused has been given an adequate opportunity to prepare an effective defence; and (2) whether granting the amendments will result in undue delay.<sup>36</sup>

## **B. The Proposed Amendments**

36. The Prosecution submits that the Amended Indictment charges fundamentally the same case as the Current Indictment.<sup>37</sup> The Prosecution further submits that the two new counts (Count 6, murder, charged as a crime against humanity under Article 5 of the Statute and Count 9, cruel treatment, a violation of the laws and customs of war under Article 3 of the Statute) arise out of the same factual matrix.

37. A proposed amendment results in the inclusion of a new charge if it introduces “a basis for conviction that is factually and/or legally distinct from any already alleged in the indictment.”<sup>38</sup> It is apparent that new charges have been added to the Amended Indictment.

38. The Amended Indictment reduces the geographic scope of the crimes charged: the number of municipalities has been reduced from eleven to seven.<sup>39</sup> Further, the Amended Indictment modifies the dates for the alleged beginning of Operation Storm. Instead of 4 August, as stated in the Current Indictment, the Amended Indictment states that the Operation was underway from “at least July 1995.” The Chamber accepts the Prosecution’s submission that this does not represent a substantial change in the Prosecution’s case.<sup>40</sup>

39. Paragraph 2 of the Amended Indictment provides further allegations of the personal relationship between Ivan Čermak and Franjo Tudjman, contending that Ivan Čermak acted as a representative of the Croatian Government in dealing with members of the international community and media concerning Operation Storm in areas that extended beyond the boundaries of the Knin

---

<sup>35</sup> *Prosecutor v Sefer Halilović*, Decision on Prosecutor’s Motion Seeking Leave to Amend the Indictment, Case No IT-01-48-PT (17 December 2004) para 22, citing *Prosecutor v Mejakić et al.*, Decision on the Consolidated Indictment, Case No IT-02-65 (21 November 2002) p 3.

<sup>36</sup> *Prosecutor v Vojislav Šešelj*, Decision on Prosecution’s Motion for Leave to Amend the Indictment, Case No IT-03-67-PT (27 May 2005) para 5; (*Prosecutor v Sefer Halilović*, Decision on Prosecutor’s Motion Seeking Leave to Amend the Indictment, Case No IT-01-48-PT (17 December 2004) para 23.

<sup>37</sup> Motion, para 3.

<sup>38</sup> *Prosecutor v Sefer Halilović*, Decision on Prosecutor’s Motion Seeking Leave to Amend the Indictment, Case No IT-01-48-PT (17 December 2004) para 30.

<sup>39</sup> Motion, para 13.

<sup>40</sup> Motion, para 13.

Garrison command. Paragraph 3 of the Amended Indictment provides detail of the Croatian forces allegedly under Ivan Čermak's command. Paragraph 4 of the Amended Indictment outlines the alleged functions and responsibilities of Ivan Čermak, and the alleged powers of discipline he possessed over his alleged subordinates.

40. Paragraph 8 of the Amended Indictment is new. It details the various structures of power and responsibility Mladen Markač is alleged to have possessed over members of the Special Police involved in Operation Storm, and lists the various units comprising the alleged participating Special Police forces.

41. Paragraph 10 of the Amended Indictment outlines the purposes of the alleged Joint Criminal Enterprise in a general manner; these allegations are amplified in Counts 1 to 9. Paragraph 12 of the Amended Indictment lists the various people who allegedly took part in the Joint Criminal Enterprise, and paragraph 13 of the Amended Indictment describes how the alleged participants allegedly furthered the Joint Criminal Enterprise. Paragraph 14 of the Amended Indictment focuses on Ivan Čermak's alleged operations in furtherance of the Joint Criminal Enterprise. Paragraph 15 of the Amended Indictment describes Mladen Markač's alleged various activities in furtherance of the Joint Criminal Enterprise.

42. There is new material forming part of the background facts. Paragraph 21 of the Amended Indictment refers to the existence of other Croatian military operations, such as Operation Flash, in Western Slavonia in May 1995, and Operation Ljeto (or "Summer"), in the Dinaric Alps in the area of Bosnia and Herzegovina adjacent to the Knin Municipality and the surrounding areas, in July 1995.

43. Paragraph 23 of the Amended Indictment alleges the use of informational and propagandistic techniques by, presumably, members of the Joint Criminal Enterprise designed to intimidate psychologically the Krajina Serbs. Paragraph 26 of the Amended Indictment alleges the existence of a campaign of wanton destruction in the Krajina region. Paragraph 29 of the Amended Indictment alleges the implementation of a "demographic policy", pursuant to which the Krajina region was to be "urgently colonised with Croats." According to this policy, Croatian forces and other Croats were allegedly moved into many of the abandoned Serb houses that survived.

44. Paragraphs 31 to 43 of the Amended Indictment particularise the various forms of criminal responsibility the Prosecution alleges, and paragraphs 44 to 49 of the Amended Indictment list Counts 1 to 9, which provide greater factual detail of the alleged crimes.

45. The Schedule to the Amended Indictment removes two killing incidents and adds two new killing incidents. Killing incident 1 alleges three killings in Kovačić; killing incident 10 alleges four killings in Oraovac.

**C. Has the Prosecution satisfied Article 19(1) of the Statute?**

46. Before turning to Article 19(1), the Chamber feels compelled to comment upon the Prosecution's poor organisation of the supporting material accompanying the Motion, which has made the task of determining whether a *prima facie* case exists unusually laborious. This material has been supplied to the Chamber in seemingly random order, and many of the documents included appear a number of times. The documentation numbers provided in the Prosecution's list of supporting materials are not always correct. Towards the end of its list, a large amount of apparently relevant documentation has been included without any indication by the Prosecution which paragraphs in the Amended Indictment this documentation is enlisted to support.

47. Having reviewed this voluminous material, the Chamber is satisfied that the evidence meets the standard of a *prima facie* case required for Article 19(1) of the Statute and supports the amendments sought by the Prosecution.

**D. The Defence's arguments**

48. As a preliminary matter, the Defence submits that the Prosecution was obliged to seek leave of the Chamber to amend the Indictment under Rule 50(A)(i)(c) before submitting the Amended Indictment.<sup>41</sup> The Defence argues that the Chamber is obliged to provide each Accused with the opportunity to present arguments as to the proposed amendments sought by the Prosecution *before* the proposed Amended Indictment is submitted to the Chamber. The Defence points out that this procedure has not been followed in the present instance because the Amended Indictment has been filed simultaneously with the Motion.

49. The Chamber refers to its Order in Relation to a Request for Clarification submitted by the Defence, in which the Chamber stated that the Motion is considered as a request to obtain leave to amend the Indictment and that the Indictment attached to the Motion has no legal value unless and until such leave is granted.<sup>42</sup> The Chamber further notes that it is common practice for the Prosecution to file a proposed Amended Indictment with a motion seeking leave to amend.<sup>43</sup> This practice has the considerable advantage of allowing the Chamber to review the proposed

---

<sup>41</sup> Response, para 11.

<sup>42</sup> Order in Relation to the Accused Mladen Markač's Opposition to Prosecution's Motion and Request for Clarification of the Procedural Status, 12 May 2005.

<sup>43</sup> Reply, para 11.

amendments to the indictment that the Prosecution seeks in its motion to amend. The Chamber rejects the Defence's submission.

50. The Defence raises four further objections to the proposed amendments. First, the Defence contends that the extension of time granted to the Prosecution has been used to alter the Indictment to an extent neither contemplated by the Decision on the Form of Indictment nor proposed in the Prosecution's "Motion for an Extension of Time to Amend the Indictment," filed on 19 February 2004.<sup>44</sup> Secondly, the Defence submits that the Prosecution's allegations of a joint criminal enterprise allege the participation of so many individuals that the preparation of an adequate defence is rendered impossible.<sup>45</sup> Third, the Defence argues that the Prosecution has indiscriminately characterised the entirety of Operation Storm as a criminal endeavour, and suggests that this violates the fundamental principle of individual criminal responsibility.<sup>46</sup> Fourth, the Defence asserts that the Amended Indictment "flagrantly violates" international law by failing to take account of a UN General Assembly Resolution of 9 December 1994 acknowledging Croatia's status as an internationally recognised State with sovereign power over its territory.<sup>47</sup>

51. Regarding the first objection, the Chamber accepts that the Amended Indictment contains new allegations which go beyond the amendments ordered by the Chamber in its Decision on the Form of Indictment. However, the Chamber accepts the Prosecution's submission that it may properly conduct ongoing investigations against an Accused after an Indictment has been confirmed.<sup>48</sup> In this case this has led the Prosecution to seek to amend the indictment by requesting leave of the Chamber to amend pursuant to Rule 50(A)(i)(c) of the Rules.

52. The Chamber has addressed the adequacy of the Prosecution's pleading of the joint criminal enterprise earlier in this Decision.<sup>49</sup> The Prosecution has identified the alleged participants in the JCE either by name or by category, which is sufficient for the purpose of the pleadings. The Chamber believes that the further particularisation and elaboration of material facts in the Amended Indictment should benefit rather than hinder each Accused in the preparation of his defence; each Accused now knows, in greater detail, the nature of the charges against him. It is correct that the participants in the alleged JCE are large in number. The nature of the case, however, is not one which makes it essential for the Defence to know the identity of each alleged participant. The bulk of the participants are alleged by way of category and an effective defence may be presented in this case by dealing with each category.

---

<sup>44</sup> Response, para 12.

<sup>45</sup> Response, para 12.

<sup>46</sup> Response, para 12.

<sup>47</sup> Response, para 12.

53. As to the Defence's third contention, the Chamber has already stated its concerns about paragraph 10 of the Amended Indictment. The Prosecution will be ordered to clarify it. However, it is at least premature to suggest, as does the Defence, that the Prosecution "considers the whole [of] Operation Storm as [a] criminal endeavour and every participant as [a] war criminal." Further, while the charges against each Accused arise in the context of Operation Storm, the issue whether that operation itself was illegal is irrelevant.<sup>50</sup>

54. The Defence's fourth contention – that the Amended Indictment fails to respect Croatia's internationally recognised status as a State with territorial sovereignty – is dismissed. As the Chamber noted in the Decision on the Form of Indictment, such references in the Indictment are of a purely descriptive nature and do not constitute a legal recognition of parts of the territory of Croatia as a State or a challenge to the recognition of Croatia as a State.<sup>51</sup>

**E. Is there any prejudice to the Accused as a result of the addition of new charges?**

55. In determining whether the inclusion of new factual allegations and the new counts unfairly prejudice the Accused, the Chamber notes that a date for the commencement of the trial of the Accused has not yet been scheduled. The Chamber further notes that the fundamental basis of the Prosecution's case against each Accused is unchanged in the Amended Indictment, but significantly more information is provided as to the allegations made. The Chamber also recognises the responsibility of the Prosecution to prosecute each Accused to the extent of the law and to present all relevant evidence before the Chamber.<sup>52</sup> In light of these considerations, the Chamber is satisfied that the Accused will have ample opportunity to prepare an adequate defence to the new charges, and that acceptance of the amendments will not result in undue delay. Consequently, the Chamber is satisfied that no prejudice will result from the addition of new charges to the Amended Indictment.

#### **IV. DISPOSITION**

56. For the foregoing reasons and pursuant to Rule 50 of the Rules, the Chamber **GRANTS** the Motion and **ORDERS** the Prosecution:

---

<sup>48</sup> Reply, para 3.

<sup>49</sup> See *supra*, para 18.

<sup>50</sup> Decision on the Form of Indictment, para 18.

<sup>51</sup> Decision on the Form of Indictment, para 19.

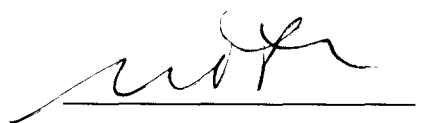
<sup>52</sup> *Prosecutor v Niyitegeka*, Decision on Prosecutor's Request for Leave to File an Amended Indictment, Case No ICTR-96-14-I (21 June 2000) para 27.

- (1) To clarify paragraph 10 of the Amended Indictment, so as to avoid ambiguity and to elucidate the scope of its allegations therein;
- (2) To plead adequately, whether expressly or implicitly, the state of mind alleged in paragraph 40 of the Amended Indictment; and
- (3) To file the further Amended Indictment within twenty-one days of the filing of this Decision.

57. Pursuant to Rule 50(B), each Accused shall be given the opportunity to enter a plea on the new charges in due course in a further initial appearance.

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

Dated this nineteenth day of October 2005  
At The Hague  
The Netherlands



Carmel Agius  
Presiding Judge

**[Seal of the Tribunal]**