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NATIONS

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-06-90-PT

Date: 19 March 2007

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IN TRIAL CHAMBER I

Before: **Judge Alphons Orie, Presiding**
Judge Christine Van den Wyngaert
Judge Bakone Justice Moloto

Registrar: **Mr. Hans Holthuis**

Decision of: **19 March 2007**

PROSECUTOR

v.

ANTE GOTOVINA
IVAN ČERMAK
MLADEN MARKAČ

DECISION ON ANTE GOTOVINA'S PRELIMINARY MOTIONS ALLEGING DEFECTS IN THE FORM OF THE JOINDER INDICTMENT

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Mr. Čedo Prodanović and Ms. Jadranka Sloković for Ivan Čermak
Mr. Miroslav Šeparović and Mr. Goran Mikuličić for Mladen Markač

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A. Procedural Background

1. **TRIAL CHAMBER I** ("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 "Preliminary Motion to Dismiss the Proposed Joinder Indictment Pursuant to Rule 72 of the Rules of Procedure and Evidence on the basis of (1) Defects in the Form of the Indictment (Vagueness/Lack of Adequate Notice of Charge) and (2) Lack of Subject Matter Jurisdiction (*Ratione Materiae*)" ("First Motion"), filed by the Defence of the Accused Ante Gotovina ("Defence") on 28 April 2006, and of "Defendant Ante Gotovina's Preliminary Motion Pursuant to Rule 72(A)(ii) of the Rules of Procedure and Evidence Alleging Defects in the Form of the Joinder Indictment" ("Second Motion"), filed on 18 January 2007.

2. The initial Indictment against the Accused Ante Gotovina ("Accused") was filed on 31 May 2001 and confirmed on 8 June 2001 ("*Gotovina* initial Indictment").[1] On 24 February 2004, leave was granted to amend the *Gotovina* initial Indictment and the amended Indictment was confirmed ("*Gotovina* Amended Indictment").[2] On 20 February 2006 the Prosecution filed a consolidated Motion in both the *Čermak and Markač* and the *Gotovina* cases, whereby the Prosecution sought to further amend the *Gotovina* Amended Indictment and the then indictment against the accused Ivan Čermak and the accused Mladen Markač ("*Čermak and Markač* Amended Indictment"), and requested that Ivan Čermak, Mladen Markač and the Accused be jointly charged and tried pursuant to Rule 48 of the Rules of Procedure and Evidence ("Rules").[3] This consolidated Motion contained a proposed Joinder Indictment as "Attachment A" ("Proposed Joinder Indictment").

3. In order to expedite the proceedings, at a Status Conference on 7 April 2006 the Trial Chamber invited the Defence to file preliminary motions pursuant to Rule 72 in relation to the Proposed Joinder Indictment, should the Defence so wish.[4] The First Motion was filed by the Defence on 28 April 2006 in response to this invitation. On 12 May 2006, the Prosecution filed the "Prosecution's Response to Defendant Ante Gotovina's Motion to Dismiss the Proposed Joinder Indictment" ("First Response"). On 19 May 2006, the Defence filed "Defendant Ante Gotovina's Reply Brief in Support of his Preliminary Motion to Dismiss the Proposed Joinder Indictment

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[1] Order on Review of the Indictment Pursuant to Article 19 of the Statute, 8 June 2001.
[2] Decision on Leave to Amend Indictment and on Confirmation of Amended Indictment and Order for Non Disclosure, 24 February 2004.
[3] Prosecution's Consolidated Motion to Amend the Indictment and for Joinder, 20 February 2006.
[4] Status Conference, 7 April 2006, T. 42-45. At the Status Conference, the Trial Chamber ordered to file these motions, if any, by 21 April 2006. On 21 April the Defence filed a Motion for extension of time, which was granted by the Trial Chamber on 26 April 2006. The Trial Chamber then ordered the Defence to file its preliminary motions by 28 April 2006, *see* Decision on Defence Motion for Extension of Time, 26 April 2006.

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Pursuant to Rule 72" ("First Reply"), together with a Motion for leave to file a reply and to exceed the limit of 3,000 words.[5] The Trial Chamber notes that this First Reply exceeds the permitted word limit by more than 1500 words and in that regard recalls that the provisions of the Practice Direction on the Length of Briefs and Motions requires that a party must seek authorisation in advance to exceed the word-limit.[6] However, in the interests of fairness to the Accused, the Trial Chamber will exceptionally allow the filing of the First Reply.

4. On 14 July 2006, the Trial Chamber granted in part the Prosecution's requests to amend the *Gotovina* Amended Indictment and the *Čermak and Markač* Amended Indictment, and ordered the joinder of the *Gotovina* case with the *Čermak and Markač* case ("Decision on Joinder").[7] The Prosecution filed the Joinder Indictment on 24 July 2006, and on 25 October 2006 the Appeals Chamber in its "Decision on Interlocutory Appeals Against the Trial Chamber's Decision to Amend the Indictment and for Joinder", dismissed the Defence's appeals against the Decision on Joinder.

5. On 5 December 2006, a further appearance was held before the Trial Chamber to enable the Accused to enter a plea on the new charges according to Rule 50(B) of the Rules. On the same day, the Trial Chamber ordered the Defence to file preliminary motions pursuant to Rule 72, if any, in accordance with Rule 50(C).[8] On 18 January 2007, the Defence filed the Second Motion. On 1 February 2007, the Prosecution filed the "Prosecution's Response to Gotovina's Second Motion Alleging Defects in the Form of the Joinder Indictment" ("Second Response"). On 8 February 2007, the Defence filed "Defendant Ante Gotovina's Reply to Prosecution's Response to Preliminary Motion Alleging Defects in the Form of the Joinder Indictment Pursuant to Rule 72(A)(ii) of the Rules of Procedure and Evidence" ("Second Reply").[9]

6. The Trial Chamber notes that Rule 50(C), which governs the proceedings for Rule 72 preliminary motions in cases where an indictment is amended, allows the filing of such motions "in respect of the new charges". However, in view of the considerable changes in the wording made to the entire *Gotovina* Amended Indictment as a result of the joinder of the two cases, the Trial Chamber is of the view that, in fairness to the Accused, it should consider all the arguments

[5] Defendant Ante Gotovina's Motion for Leave to File Reply to Prosecution's Response to Defendant Ante Gotovina's Motion to Dismiss the Proposed Joinder Indictment, and for Leave to Exceed the Page Limitation, 19 May 2006. "Prosecution's Response to Ante Gotovina's Motion for Leave to File Reply to Prosecution's Response to His Motion to Dismiss, and to Exceed Page Limitation" was filed on 23 May 2006, whereby the Prosecution opposes the granting of leave to the Defence to reply and exceed the word limit. On 26 May 2006, the Defence filed "Defendant Ante Gotovina's Reply in Support of his Motion Filed on 19 May 2006" as well as "Defendant Ante Gotovina's Motion for Leave to File Reply in Support of his Motion of 19 May 2006".
[6] Practice Direction on the Length of Briefs and Motions, IT-184/Rev.2, 16 September 2005, points 5 and 7.
[7] Decision on Prosecution's Consolidated Motion to Amend the Indictment and for Joinder, 14 July 2006.
[8] Status Conference 5 December 2006, T. 23-26.

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advanced by his Defence in the First and Second Motions, even if some of them may not pertain to the new charges introduced in the Joinder Indictment.

B. General Pleading Principles

7. Article 18(4) of the Statute and Rule 47(C) of the Rules provide that an indictment shall contain a concise statement of the facts and the crimes with which the accused is charged. These provisions are to be interpreted in conjunction with Article 21(2) and Article 21(4)(a) and (b) of the Statute, which provide for the right of an accused to be informed of the nature and cause of the charges against him and to have adequate time and facilities for the preparation of his defence. This translates into an obligation on the part of the Prosecution to plead the material facts underpinning the charges in the indictment, but does not require them to plead the evidence by which such material facts are to be proven. The question whether an indictment is pleaded with sufficient specificity is dependent upon whether it sets out the material facts of the Prosecution case with enough detail to clearly inform the accused of the charges against him so that he may prepare his defence.[10]

8. The materiality of a particular fact depends on the nature of the Prosecution case.[11] A decisive factor in this respect is the nature of the alleged criminal conduct charged against the accused[12] and, in particular, the proximity of the accused to the events alleged in the indictment.[13] The materiality of facts such as the identity of the victims, the place and date of the events, and the description of the events themselves necessarily depend on the alleged proximity of the accused to those events.[14]

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[9] The Trial Chamber notes that in its "Order on Several Defence Motions, Incorporating the Scheduling Order for Oral Arguments" of 23 February 2007, it granted to the Defence leave to file the Second Reply and to exceed the word-limit with respect to this submission.

[10] *Prosecutor v. Zoran Kupreškić et al.*, Case No. IT-95-16-A, Judgement, 23 October 2001 (*Kupreškić* Appeal Judgement), para. 88; *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-A, Judgement, 29 July 2004 ("*Blaškić* Appeal Judgement"), para. 209; *Prosecutor v. Mile Mrkšić*, Case No. IT-95-13/1-PT, Decision on the Form of the Indictment, 19 June 2003, ("*Mrkšić* Decision"), para. 7.

[11] *Kupreškić* Appeal Judgement, para. 89; *Blaškić* Appeal Judgment, para. 210; *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-PT, Decision on Motion by Vojislav Šešelj Challenging Jurisdiction and Form of Indictment, 3 June 2004 (dated 26 May 2004), para. 23.

[12] *Kupreškić* Appeal Judgement, para. 89.

[13] *Ibid*, paras 89-90.

[14] *Prosecutor v. Radoslav Brđanin and Momir Talić*, Case No. IT-99-36-PT, Decision on objection by Momir Talić to the form of the amended indictment, 20 February 2001, ("First *Brđanin* and *Talić* Decision"), para. 18; *Prosecutor v. Milorad Krnojelac*, Case No. IT-97-25-PT, Decision on Preliminary Motion on Form of Amended Indictment, 11 February 2000, ("Second *Krnojelac* Decision") para. 18; *Prosecutor v. Krajisnik*, Case No. IT-00-39-PT, Decision concerning Preliminary Motion on the Form of the Indictment, 1 August 2000, ("*Krajisnik* Decision"), para. 9.

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C. Pleadings on Joint Criminal Enterprise ("JCE")

9. Where an indictment cumulatively or alternatively pleads JCE as a mode of liability, the indictment should contain not only a description of the legal pre-requisites which apply to this form of responsibility (namely, a plurality of persons, the existence of a plan and the participation of the accused in the plan), but also other material facts which will assist the Accused in preparing his defence. Among these facts are the nature or the purpose of the JCE, the time at which or the period over which the enterprise is said to have existed, the identity of those engaged in the enterprise so far as their identity is known or at least a general description such as by reference to their category as a group, and the nature of the participation by the accused in that enterprise.[15]

1. Failure to identify the alleged members in the JCE

10. The alleged members of the JCE are pleaded in the Joinder Indictment, as follows:

> 16 Many persons participated with Ante Gotovina, Ivan Čermak and Mladen Markač in this joint criminal enterprise. These persons included: Franko Tuđman (deceased), the President of the Republic of Croatia; Gojko Šušak (deceased), the Minister of Defence of the Republic of Croatia; Janko Bobetko (deceased), the Chief of the Main Staff of the HV until 17 July 1995, when he retired; Zvonimir Červenko (deceased), the chief of the Main Staff of the HV (appointed 17 July 1995).
>
> 17 In the alternative, Ante Gotovina, Ivan Čermak and Mladen Markač participated as members of the joint criminal enterprise together with the named co-perpetrators listed in paragraph 16 above as well as with various officers, officials and members of the Croatian government and political structures, at all levels (including those in municipal governments and local organisations); various leaders and members of the HDZ; various officers and members of the HV, Special Police, civilian police, and other Republic of Croatia security and/or intelligence services ("Croatian forces"); and other persons, both known and unknown.
>
> [...]
>
> 19 Ante Gotovina participated in and furthered the joint criminal enterprise both directly and indirectly, including with and through other members of the joint criminal enterprise and through subordinates over whom he possessed effective control and/or persons whom he could direct or substantially affect, as described in paragraphs 3 and 4 above. [...][16]

11. The Defence submits that the Joinder Indictment does not adequately inform the Accused of the identity of the alleged participants in the JCE.[17] In particular, it argues that the Joinder

[15] *Prosecutor v. Blagoje Simić*, Case No. IT-95-9-A, Judgement, 28 November 2006 (*Simić* Appeal Judgement), para. 22; *Prosecutor v. Miroslav Kvočka et al.*, Case No. IT-98-30/1-A, 29 February 2005, (*Kvočka et al.* Appeal Judgement), para. 28; *Prosecutor v. Jadranko Prlić et al.,* Case No. IT-04-74-PT, Decision on Defence Preliminary Motions Alleging Defect in the Form of the Indictment, 22 July 2005, ("*Prlić et al.* Decision"), para. 11; *Prosecutor v. Milorad Krnojelac*, Case No. IT-97-25-PT, Decision on Form of Second Amended Indictment, 11 May 2000 ("Third *Krnojelac* Decision"), para. 16. *See also Prosecutor v. Milan Milutinović, Nikola Šainović and Dragoljub Ojdanić,* Case No. IT-99-37-PT, Decision on Defence Preliminary Motion Filed by the Defence for Nikola Šainović, 27 March 2003, ("*Milutinović et al.* Decision"), p. 4; *Prosecutor v. Miroslav Kvočka et al.*, Case No. IT-98-30-PT, Decision on Defence Preliminary Motions on the Form of Indictment, 12 April 1999 ("*Kvočka et al.* Decision"), para. 22.
[16] Joinder Indictment, paras 16-17, 19.
[17] First Motion, paras 17-18; Second Motion, paras 4-5.

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Indictment: (i) does not provide the name of a *living* participant in the JCE;[18] (ii) fails to disclose the identity of the "known participants" in the JCE, and for the "unknown participants" it fails to identify groups or categories with sufficient precision;[19] (iii) is vague and ambiguous when it refers to "persons whom [the Accused] could direct or substantially affect",[20] and (iv) fails to explain how the Accused could "substantially affect" them if they are not in his chain of command.[21]

12. The Prosecution responds that: (i) the fact that some alleged participants in the JCE are deceased does not *per se* reflect a defect in the form of the Indictment;[22] (ii) the pleading of the alleged participants in a JCE by way of category or group is very similar to the one originally contained in the *Čermak and Markač* Amended Indictment, which was found by the Pre-Trial Chamber to be sufficiently adequate in putting the Defence on notice as to the identity of the members.[23] The Prosecution also makes it clear that "to the extent that these additional members of the JCE are known or become known [...] these names have been disclosed or will be disclosed to the Defence as pre-trial disclosure continues";[24] (iii) the pleading regarding the subordinates and "the persons whom [the Accused] could direct or substantially affect" adopts a similar and, at times, identical language as to the one used in the *Čermak and Markač* Amended Indictment.[25]

13. The Defence replies that the Pre-Trial Chamber in the *Čermak and Markač* Second Decision allowed the Prosecution to use categories to identify those alleged participants who were unknown to the Prosecution, but not "to withhold from the indictment the identities of alleged JCE participants known to the Prosecution".[26]

14. The Trial Chamber considers that paragraph 16 of the Joinder Indictment sufficiently describes a core group of alleged participants in the JCE by name as well as the role they played during the relevant time. In the Trial Chamber's opinion, there is no requirement that all alleged members of a JCE be alive; thus the fact that some alleged members of a JCE are deceased does not represent a defect in the form of indictment. Nevertheless, the Trial Chamber considers that the alleged participants named by the Prosecution represent a small group as compared to the large

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[18] Second Motion, para. 6.
[19] Second Motion, paras 7-11. The Defence in its replies claims that paragraph 17 of the Joinder Indictment identifies every segment of the Croatian government in 1995 as being part of the JCE, such that it is not possible to identify any part of the Croatian government which is not alleged to be part of the JCE. Second Reply, paras 2-5.
[20] First Motion, para. 17.
[21] First Motion, para. 18. *See also* First Reply, paras 16-18.
[22] Second Response, para. 3.
[23] Second Response, para. 3, *citing Prosecutor v. Ivan Čermak and Mladen Markać*, Case No. IT-03-73-PT, Decision on Prosecution Motion Seeking Leave to Amend the Indictment, 19 October 2005 ("*Čermak and Markać* Second Decision"), which accepted this language.
[24] Second Response, para. 4.
[25] First Response, para. 10 referring to *Čermak and Markač* Amended Indictment, paras 14-15.
[26] Second Reply, para. 4.

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categories of people described in paragraph 17. The Trial Chamber considers that this could result in an inability on the part of the Accused to adequately prepare his defence in relation to the JCE. The Trial Chamber is aware of the jurisprudence requiring the Prosecution to name all the "known" participants.[27] While the Trial Chamber concurs that the Prosecution should reveal the identity of participants in the JCE to the extent they are known, the Trial Chamber considers that in light of the criterion of proximity to the accused, the Prosecution is not required to identify all "known" participants *by name*, but only those who had a key position within the structure of the JCE. Thus, in order to provide the Defence with more accurate and thorough information as to the structure and composition of the alleged JCE, the Prosecution must widen the circle of named participants to include key military or political figures, to the extent they are known by the Prosecution. In relation to other participants, even if they are known to the Prosecution, the Trial Chamber deems it sufficient to identify them by way of category or group to which they belong. This way of pleading is in keeping with the jurisprudential criterion of proximity of the accused person to the events for which that person is criminally responsible.[28]

15. With respect to the Defence argument regarding the vagueness of listed categories and groups of the alleged "unknown participants", in light of the jurisprudence,[29] the Trial Chamber is satisfied that paragraph 17 sufficiently identifies the categories or groups to which the alleged participants in the JCE belong.

16. However, there is one point upon which the Trial Chamber seeks clarification. In the view of the Trial Chamber, it is not clear whether the Joinder Indictment alleges that the participants in the JCE described in paragraph 17 operated *solely* in the southern portions of the Krajina region where Operation Storm allegedly took place or also operated in other portions of that region. The Joinder Indictment alleges the common purpose of the JCE to have been "the permanent removal of the Serb population from *the Krajina region*"[30] through Operation Storm and actions that

[27] *Prosecutor v. Nebojša Pavković et al.*, Case No. IT-03-70-PT, Decision on Vladimr Lazarević's Preliminary Motion on Form of Indictment, 8 July 2005, para. 25; *Prosecutor v. Savo Todović et al.*, Case No. IT-97-25/1-PT, Decision on Todović Defence Motion on the Form of the Joint Amended Indictment, para. 20. *See also, Prosecutor v. Ljube Boškoski and Johan Tarčulovski,* Case No. IT-04-82-PT, Decision on Prosecution Motion for Leave to Amend the Original Indictment and Defence Motions Challenging the Form of the Proposed Indictment, 1 November 2005, para. 47.

[28] *Prlić et al.* Decision, para. 34, holding: "in such a case upon criminal responsibility where the proximity between the acts of the accused and the underlying crimes is not great the facts may be stated with less precision and it is sufficient to identify the participants in the JCE by means of the category of group to which they belong."

[29] *Čermak and Markać* Second Decision, paras 16-18; *Prlić et al.* Decision, para. 47; *Prosecutor v. Mile Mrkšić*, Case No. IT-95-13/1-PT, Decision on Form of the Indictment, 19 June 2003, para. 53; *Milutinović et al.* Decision, p. 4 ;Third *Krnojelac* Decision, paras 16, 18.

[30] Joinder Indictment, para. 12, emphasis added.

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"continued until about November 1995".[31] The Joinder Indictment alleges that the Accused had effective control over the Split Military District and "such other forces as were subordinated to his command and operated and/or were present *in the southern portion of the Krajina region* during Operation Storm".[32] Therefore the Prosecution is requested to clarify whether there were military units or political or civilian authorities, who were allegedly participants in the JCE, operating in areas other than the southern portion of the SAO Krajina.

17. As regards the allegation contained in paragraph 19 which refers to "subordinates over whom [the Accused] possessed effective control and/or persons whom he could direct or substantially affect", the Trial Chamber notes that paragraph 19 refers back to paragraphs 3 and 4 of the Joinder Indictment for a description of this category of participants. In particular, paragraph 4 pleads that the Accused:

> possessed effective control over all units, elements and members of the HV that comprised or were attached to the Split Military District and such other forces as were subordinated to his command and operated and/or were present in the southern portion of the Krajina region during Operation Storm. The main units or elements within and attached to the Split Military District and subordinated to the command of Ante Gotovina during the period relevant to the Joinder Indictment are listed in Annex A.[33]

18. Having regard to paragraph 19 and paragraph 4, the Trial Chamber finds that the Joinder Indictment is thus sufficiently clear in pleading that the Accused allegedly participated in a JCE with and through persons identified in paragraph 4. In this regard, the Trial Chamber finds that the question raised by the Defence as to how the Accused could "substantially affect them [*i.e.* the persons listed in paragraph 4] if they are not in his chain of command" is a matter of evidence and not of pleading.[34]

19. However, the Trial Chamber notes that while paragraph 4 alleges that the Accused "had effective control" over the persons identified therein, paragraph 19, in referring to the relation between the Accused and such persons, adds the formulation "and/or could direct or substantially affect". Paragraph 4 read in conjunction with paragraph 19 therefore shows a discrepancy as to the alleged nature of the relationship between the Accused and the persons identified in paragraph 4. In other words, it is not clear whether the persons identified in paragraph 4 include those whom the Accused "could direct or substantially affect" but over whom he did *not* have "effective control". The Trial Chamber is therefore of the view that the Prosecution must clarify this point.

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[31] Joinder Indictment, para. 28. *See also* Joinder Indictment, para. 19 (a). Para. 13 of the Joinder Indictment states that "the term 'Krajina' throughout the Joinder Indictment refers to a part of the area in Croatia that was self-proclaimed as the 'Republika Srpska Krajina' (RSK) and that was heavily settled by Serbs."
[32] Joinder Indictment, para. 14, emphasis added.

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2. Failure to plead the alleged criminal participation of the Accused in the JCE

20. The Defence submits that the Joinder Indictment fails to plead the nature of the Accused's participation in the alleged JCE with clarity. This submission is based on two arguments: (i) of the five means of participation mentioned in paragraph 19 of the Joinder Indictment, three appear to allege *legal activities* on the part of the Accused, "unless Operation Storm itself was a criminal act";[35] and (ii) paragraph 19(d) of the Joinder Indictment is vague in referring to the Accused's participation "in the reporting of false, incomplete or misleading information regarding crimes committed". In the Defence's view, the Prosecution should explain how the Accused is alleged to have participated in the misreporting of such information.[36]

21. The Prosecution contends that the nature of the participation of the Accused in the JCE is clearly identified.[37] It also argues that the Joinder Indictment does not allege that Operation Storm was an illegal operation and that the Accused is being charged with the events that occurred "during the course of and in the context of Operation Storm".[38] As for the Accused's alleged participation in the reporting of false, incomplete or misleading information regarding crimes, the Prosecution contends that the exact means by which he participated in the reporting of false information is a matter of evidence to be presented at trial.[39]

22. The Defence replies by arguing that if the Prosecution alleges that Operation Storm was legal, then paragraph 19 (a), (b) and (c) should be dismissed because the Prosecution alleges merely that the Accused carried out a military operation lawfully.[40] In the Defence's view, this pleading would be contrary to the Appeals Chamber's holding that, unlike "conspiracy", liability of a member of a JCE will depend "on the commission of criminal acts in furtherance of that enterprise".[41]

23. As stated above, the alleged participation of an accused in a JCE and the nature of the participation are material facts which are to be pleaded. It is also required that the accused should be in a position to determine from the Joinder Indictment by what exact conduct or act he allegedly

[33] Joinder Indictment, para. 4. Annex A provides a list under the heading "HV of the Split MD and other units attached to it for the period of Storm".
[34] First Motion, paras 17-18 ; Second Motion, paras 6-11.
[35] First Motion, para. 16.
[36] First Motion, para. 19.
[37] First Response, para. 8.
[38] First Response, para. 9. The Prosecution recalled the decisions of the Pre-Trial Chamber where it found that the "charges are based on crimes committed in the context of that operation" and that the "issue whether the operation itself was legal is irrelevant". *Ibid citing Prosecutor v. Ivan Čermak and Mladen Markač,* Case No. IT-03-73-PT, Decision on Ivan Čermak and Mladen Markač's Motion on Form of Indictment, 8 March 2005 (*Čermak and Markač* First Decision, para. 18); *Čermak and Markač* Second Decision, para. 53.
[39] First Response, para 11; Second Response, para. 5.
[40] First Reply, para. 12.

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participated in the JCE.[42] In the present case, the Accused's participation in the JCE is pleaded by listing five forms of participation specifically attributable to him. This paragraph on the forms of participation should be read in conjunction with paragraph 12, which describes the crimes alleged to have been part of the JCE, or a natural or foreseeable consequence of the furthering of the JCE. In so doing, it is clear that the Joinder Indictment pleads that the Accused's alleged participation is ultimately linked to criminal acts and not – as the Defence submits – to lawful ones. In this regard, the issue as to whether Operation Storm was legal *per se* is irrelevant.[43]

24. As for the Defence's submission concerning the Accused's participation in the reporting of false, incomplete or misleading information regarding crimes, the Trial Chamber is of the view that the modalities by which the Accused allegedly participated in the misreporting of such information are clearly a matter of evidence and not a material fact to be pleaded in the Joinder Indictment. At this stage, it is sufficient that the Defence is put on notice that the Accused, by participating in the reporting of false, incomplete or misleading information regarding crimes is alleged to have contributed to the furthering of the common purpose of the JCE.

25. In conclusion, the Trial Chamber finds the Joinder Indictment pleads the nature of the Accused's participation in the JCE with sufficient clarity.

D. Pleadings on command responsibility (Article 7(3))

26. Where an indictment includes charges based on superior responsibility pursuant to Article 7(3) of the Statute, the indictment must plead not only the accused's alleged conduct which forms the basis of his responsibility as a superior, but also the conduct of those for whom the accused is allegedly responsible, subject to the Prosecution's ability to provide those particulars.[44]

27. When superior responsibility is alleged, the following material facts should be pleaded:[45]

a. (i) that the accused is the superior of (ii) subordinates sufficiently identified,[46] (iii) over whom he had effective control – in the sense of a material ability to prevent or punish criminal conduct – and (iv) for whose acts he is alleged to be responsible;

[41] First Reply, paras 14-15.
[42] *Prlić et al.* Decision, paras 24, 27; *Kvočka et al.* Decision, para. 32.
[43] *See Čermak and Markač* First Decision para. 18; *Čermak and Markač* Second Decision, para. 23.
[44] Second *Krnojelac* Decision, para. 18; *Prosecutor v. Milorad Krnojelac*, Case No. IT-97-25, PT, Decision on the Defence Preliminary Motion on the Form of the Indictment, 24 February 1999 ("First *Krnojelac* Decision"), para. 40; *Blaškić* Appeal Judgment, para. 216.
[45] *Blaškic* Appeal Judgement, para. 218 (footnotes omitted). *See also* Second *Krnojelac* Decision, para. 18.
[46] "[T]he identification of subordinates who allegedly committed the criminal acts by their 'category' or 'group' was sufficient if the Prosecution was unable to identify those directly participating in the alleged crimes by name," *Blaškić* Appeal Judgement, para 216, with reference to First *Krnojelac* Decision, para. 46.

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b. the conduct of the accused by which he may be found to (i) have known or had reason to know that the crimes were about to be committed or had been committed by his subordinates, and (ii) the related conduct of those others for whom he is alleged to be responsible. The facts relevant to the acts of those others for whose acts the accused is alleged to be responsible as a superior, although the Prosecution remains obliged to give the particulars which it is able to give, will usually be stated with less precision, because the detail of those acts are often unknown, and because the acts themselves are often not very much in issue; and

c. the conduct of the accused by which he may be found to have failed to take the necessary and reasonable measures to prevent such acts or to punish the persons who committed them.

28. A reference in an indictment to the accused as a "commander" of a camp may be sufficient to ground the charges of command responsibility, where the alleged crimes were said to have been committed in that camp.[47] Furthermore, a reference to an accused's specific military duties has been found to be sufficient to identify the basis of his alleged command responsibility.[48] Whether the accused in fact had the material ability to prevent or punish crimes about to be committed or committed by his subordinates, and whether he failed to do so, is a matter to be determined at trial.[49]

1. Failure to plead the Accused's authority to punish

29. Relying for the most part on the wording of paragraph 4 of the Joinder Indictment, the Defence submits that while "the [...] Joinder Indictment does not allege that General Gotovina had the authority as the Commander of the Split Military District to investigate or punish subordinates, the Prosecution proceeds to charge him for failure to investigate and punish subordinates for crimes committed."[50] The Defence bases this assertion on its understanding of Croatian military law, which allegedly differentiates the authority of a commander to "discipline" his subordinates from his ability to criminally "punish" them.[51]

30. The Prosecution alleges that paragraph 4 of the Joinder Indictment "is not intended as an exhaustive list of Gotovina's responsibilities" and that "inherent in its description of Gotovina's

[47] *Blaškić* Appeal Judgment, para. 217, referring to First *Krnojelac* Decision, para. 19.
[48] *Blaškić* Appeal Judgement, para. 217, referring to *Prosecution v. Radoslav Brđanin and Momir Talić*, Case No. IT-99-36-PT, Decision on Form of Further Amended Indictment and Prosecution Application to Amend, 26 June 2001 ("Second *Brđanin* and *Talić* Decision"), para. 19. *See also, Prosecutor v. Zejnil Delalić et al.*, Case No. IT-96-21-T, Decision on Motion by the Accused Zejnil Delalić Based on Defects in the Form of the Indictment, 4 October 1996 (dated 2 October 2006), para. 19.
[49] *Prosecutor v. Miroslav Deronjić*, Case No. IT-02-61-PT, 25 October 2002, Decision on Form of the Indictment, paras 17-18; *Prosecutor v. Ljube Boškoski* and *Johan Tarčulovski*, Case No. IT-04-82-PT, Decision on Ljube Boškoski's Motion Challenging the Form of the Indictment, 22 August 2005 ("*Boškoski* and *Tarčulovski* August Decision"), paras 24-26; *Prosecutor v. Savo Todović* and *Mitar Pašević*, Case No. IT-97-25/1-PT, Decision on Todović Defence Motion on the Form of the Joint Amended Indictment, 21 March 2006, para. 14.
[50] First Motion, para. 8.
[51] First Motion, footnote 5; First Reply, para. 2.

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responsibility to *discipline* subordinates is the fact that he had the authority to investigate, and subsequently punish them for their criminal activities."[52]

31. Paragraph 4 of the Joinder Indictment pleads that the Accused "possessed effective control over" all units of the Split Military District and other forces subordinated to his command during Operation Storm, and that "[a]s Commander of the Split Military District, [he] was responsible for, *inter alia*, maintaining order among, and *disciplining* and supervising the conduct of, his subordinate personnel."[53]

32. Paragraph 18(e) of the Joinder Indictment pleads that the Accused together with other members of the JCE, furthered the JCE by "failing to report and/or investigate crimes or alleged crimes against them, to follow up on such allegations and/or investigations, and/or to punish or discipline subordinates [...]." Paragraph 19 of the Joinder Indictment further alleges that the Accused participated in the JCE by "exercising command and control" over relevant units that were subordinated to his command (subparagraph (b)) and by "failing to establish and maintain law and order among, and discipline of, his subordinates, and neither preventing nor punishing crimes committed against the Krajina Serbs" (subparagraph (e)).

33. Moreover, paragraph 47 of the Joinder Indictment reads in the relevant part:[54]

> Pursuant to Article 7(3), each accused is charged with and criminally responsible for the criminal acts and/or omissions of his subordinates which he knowingly failed to prevent or punish. Each accused was a superior to subordinates over whom he possessed effective control (that is, the material ability to prevent or punish), who were involved in the commission of crimes charged in this Joinder Indictment. [...]

34. Paragraph 4 of the Joinder Indictment, read in conjunction with paragraphs 18 (e), 19(b) and (e) and paragraph 47, clearly indicates that the Prosecution is pleading that the Accused had effective control in the sense of a material ability to prevent *or punish* his subordinates, and that his responsibility for disciplining them is one of the factors that embodied such a material ability. Therefore, the Trial Chamber finds no defect in the Joinder Indictment in this regard. The Defence's assertion regarding the distinction between the authority to "discipline" and the authority to "punish" based on Croatian military law is irrelevant insofar as it relates to a challenge to the form of indictment. Such an argument, insofar as it may have any merit, may only relate to the question

[52] First Response, para. 4 (Emphasis original).
[53] Emphasis added.
[54] Formally paragraph 48 in the proposed Joinder Indictment.

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to what extent the Accused in fact had the authority to punish his subordinates, which is a matter to be determined at trial on the basis of the evidence and should not be dealt with at this stage.[55]

2. Failure to clarify the relationship between the Accused Ante Gotovina and the Accused Ivan Čermak

35. The Defence submits that the Joinder Indictment "fails to identify whether the Prosecution is charging General Gotovina with Article 7(3) liability as Cermak's alleged superior" and is "deliberately vague" "concerning the position of General Cermak vis a vis General Gotovina".[56] The Defence adds that the vagueness pertains to Ivan Čermak's role as "'a representative of the Croatian Government' whose authority 'extended beyond the boundaries of the Garrison command'", and his alleged effective control over the "civilian police", including the "RH MUP", and "members of the Zadar Knin and Kotar Knin Police Administrations", which are not included in Annex A to the Joinder Indictment as units attached to the Split Military District under the command of the Accused.[57]

36. The Prosecution contends that the description of the Joinder Indictment regarding Ante Gotovina's position as the Commander of the Split Military District and Ivan Čermak's position as the Commander of the Knin Garrison "clearly identifies Gotovina as being superior to Čermak in military chain of command."[58]

37. With respect to the relationship between the Accused and Ivan Čermak, as the Commander of the Knin Garrison and units comprising or operating in the Garrison, the Trial Chamber is of the opinion that the language of the Joinder Indictment, in particular, paragraphs 4, 6 and 7,[59] read

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[55] In particular, the Trial Chamber notes the *Boškoski* and *Tarčulovski* August Decision, paras 24-26, holding that the Defence's arguments regarding "the material possibilities of the Accused to act, given the laws of the [Former Yugoslav Republic of Macedonia], the scope of his duties, and the implementation of an amnesty law" were "factual issues to be determined at trial."

[56] First Motion, paras 10-11 (Emphasis original).

[57] First Reply, paras 5-8.

[58] First Reponse, para. 6.

[59] Relevant part of paragraph 4 of the Joinder Indictment is quoted in para. 17 of this Decision. Paragraphs 6 and 7 of the Joinder Indictment regarding Ivan Čermak read in the relevant part:

> 6. On 5 August 1995, President TUĐMAN personally appointed Ivan ČERMAK Commander of the Knin Garrison [...]. Ivan ČERMAK [...] continued as Garrison Commander until approximately 15 November 1995. In addition to acting in military and administrative roles as the Garrison Commander, 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 Garrison command.
>
> 7. In his combined capacities, Ivan ČERMAK participated in various structures of power and responsibility, and possessed effective control over members of Croatian Army units or elements who comprised or were attached to, or operated in the Knin Garrison, and also over civilian police who operated in the Garrison area and areas adjacent to it. The HV units comprising or operating in the Garrison and adjacent areas included, without limitation: the 4th and 7th HV Brigades; the 1st Croatian Guards Brigade (1 *Hrvatski Gardijski Zdrug*); the 113th Infantry Brigade; 142nd

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together with its Annex A, which includes the Knin Garrison, clearly indicates that Ivan Čermak, as the Commander of the Knin Garrison, is alleged to have been a subordinate of the Accused, as the Commander of the Split Military District, to which the Knin Garrison was subordinated. It is therefore evident that the Prosecution pleads that the Accused was superior to Ivan Čermak in the military structure. However, it is not clear whether it is the Prosecution's allegation that the Accused was also a superior to Ivan Čermak when the latter acted as a representative of the Croatian Government and as a superior of the "civilian police" and "members of the Zadar Knin and Kotar Knin Police Administrations".[60] The Joinder Indictment pleads that the Accused Gotovina was "the overall operation commander of Operation Storm" and had effective control not only over units attached to the Split Military District but also over "such other forces as were subordinated to his command and operated [...] in the southern portions of the Krajina region during Operation Storm."[61] Furthermore, the language of paragraph 4 of the Joinder Indictment indicates that Annex A is not exhaustive. However, the Joinder Indictment does not clarify whether "civilian police" and "members of the Zadar Knin and Kotar Knin Police Administrations" fall under the category of "such other forces as were subordinated to [the Accused Gotovina's] command [...] during Operation Storm" or unidentified units attached to the Split Military District.

38. As stated above, the Prosecution is required to sufficiently identify subordinates of the accused and to indicate, to the extent possible, the conduct of those persons for whom the accused is allegedly responsible. The Trial Chamber is therefore of the view that clarification by the Prosecution is necessary as to whether the Accused is alleged to have been in a superior position *vis-à-vis* Ivan Čermak when the latter allegedly acted as a representative of the Croatian Government and as a superior of the "civilian police" and "members of the Zadar Knin and Kotar Knin Police Administrations".[62]

Infantry Brigade; 144th Infantry Brigade; 126th Home Guard Regiment ("126 *domobranska pukovnija*, 126 dp") ("HGR"); the 6th HGR; the 7th HGR; the 134th HGR; and a combined Military Police company (consisting of units from the 72nd and 73rd Military Police battalions). Members of the Zadar Knin and Kotar Knin Police Administrations (including various stations and posts) also operated in the same area as the Garrison. [...]

[60] The Trial Chamber notes that in the Joinder Indictment, the "civilian police" and "members of the Zadar Knin and Kotar Knin Police Administrations" are neither explicitly included in Annex A, nor described as units attached to the Knin Garrison.

[61] Joinder Indictment, para. 4.

[62] As the Prosecution argues in its First Response, the Pre-Trial Chamber in *Čermak* and *Markač* has already decided upon a similar issue and concluded that the initial *Čermak* and *Markač* Indictment clearly alleged "that Ante Gotovina was the superior of Ivan Čermak," *Čermak and Markač* First Decision, para. 36. However, it should be noted that the initial Indictment in the *Čermak* and *Markač* case had different wording: "Ivan ČERMAK exercised *de jure* and/or *de facto* control over some of the Croatian forces operating in the southern portion of the Krajina region during Operation Storm from the time of his appointment, and in the Operation's aftermath," para. 15 of the *Čermak* and *Markač* initial Indictment; "Ante GOTOVINA was the overall operation commander of the Croatian forces that were deployed as part of Operation Storm in the southern portion of the Krajina regions," para. 56 of the *Čermak* and *Markač* initial Indictment.

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E. Pleadings on victims

39. As stated above, the materiality of facts to be pleaded, such as the identity of the victims, the place and date of the events and the description of the events themselves, depends on the alleged proximity of the accused to the events.[63]

40. In a case based on the mode of liability under Article 7(1) where it is *not* alleged that the accused personally committed the acts for which he is held responsible, what is most material is the conduct of the accused by which he may be found to have planned, instigated, ordered, committed or otherwise aided and abetted.[64] The degree of the precision required for the material facts relating to those acts of other persons is higher than that required for an allegation of superior responsibility, but lower than where the accused is alleged to have personally done the acts in question.[65] According to the Trial Chamber in *Prlić*:

> [W]hen the accused is remote in proximity from the crimes allegedly committed, the exact identity of perpetrators and victims may not be material so as to require specific identification. [...] The victims listed in annex to the Indictment should be identified in a way which allows the Defence to challenge them to be victims of the crimes alleged. However, it is not vital to name the victims.[66]

41. According to the jurisprudence, in certain cases "the sheer scale of the alleged crimes 'makes it impracticable to require a high degree of specificity in such matters as the identity of the victims and the dates for the commission of the crimes'".[67] In such cases, each and every victim need not be identified in the indictment.[68] Where the precise identification of a victim or victims is not possible, "a reference to their category or position as a group" may be sufficient.[69] However, if the Prosecution is in a position to be able to name the victims, it should do so, since such information is valuable for the preparation of the defence case.[70]

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[63] First *Brđanin* and *Talić* Decision, para. 18; Second *Krnojelac* Decision, para. 18; *Krajišnik* Decision, para. 9.

[64] Second *Krnojelac* Decision, para. 18; *Prosecutor v. Mladen Naletilić and Vinko Martinović*, Case No. IT-98-34-A, Judgement (*Naletilić and Martinović* Appeal Judgement), para. 24; *Kvočka et al.* Appeal Judgment, para. 28 (regarding pleading principles of JCE).

[65] Second *Krnojelac* Decision, para. 18. Regarding cases where the accused is alleged to have personally committed the criminal acts, *see Kupreškić et al.* Appeal Judgement, para. 89; *Kvočka et al.* Appeal Judgment, para. 28; *Naletilić and Martinović* Appeal Judgement, para. 24.

[66] *Prlić et al.* Decision, para. 46. In this Decision, the Trial Chamber accepted the Indictment which lists in its annex one or a couple of "representative" victims per incident where alleged crimes, including killings, were committed against "hundreds of" or "a number of" victims." *See also Prosecutor v. Stanislav Galić,* Case No. IT-98-29-I, *Indictment*, listing approximately 30 victims in Schedule 1 to the Indictment "by way of representative allegations" in relation to "a large number of civilians" who the Indictment alleges to have been killed or wounded under Counts 3 to 5; *Prosecutor v. Stanislav Galić,* Case No. IT-98-29-I, Decision on the Defence Motion for Indicating that the First and Second Schedule to the Indictment Dated 10th October 2001 Should Be Considered as the Amended Indictment, paras 11-17, discussing the pleading requirements and accepts this way of pleading.

[67] *Kupreškić et al.* Appeal Judgement, para. 89, referring to *Kvočka et al.* Decision; Second *Brđanin* and *Talić* Decision, para. 61.

[68] *Kupreškić et al.* Appeal Judgement, para. 90.

[69] First *Brđanin* and *Talić* Decision, para. 22.

[70] *Kupreškić et al.* Appeal Judgement, para. 90, referring to *Kvočka et al.* Decision, para. 23.

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1. Failure to identify victims

42. The Defence objects to the form of the pleading in paragraph 61 of the Joinder Indictment[71] and its Schedule listing 30 identified and 7 unidentified victims of alleged killings, "because it amounts to a failure by the Prosecution to provide sufficient information to General Gotovina to enable him to conduct his own investigation into the alleged murders." The Defence alleges that the Prosecution identifies "only a 'small number' of the alleged murder 'victims', while it charges the Accused "with all alleged murders committed by Croatian forces, even those not identified by the Prosecution,"[72] and while it has "the capacity to identify with some particularity the individuals" who were allegedly killed.[73] In supporting this argument, the Defence refers to the initial Indictment against the Accused which pleaded that "Croatian forces" killed "at least 150 Krajina Serbs" and listed 97 identified and unidentified victims of killings in its Schedule.[74]

43. The Prosecution alleges that in light of the position of the Accused and the scale of the alleged crimes, the Joinder Indictment meets the pleading requirements as set out by the jurisprudence of the Tribunal.[75] The Prosecution also submits that "[k]nown victims are currently listed in the Schedule, and where the identity of the victim is unknown, they have been categorized by the date and the place they were killed."[76]

44. The Joinder Indictment charges the Accused and the other two co-accused Ivan Čermak and Mladen Markač as participants in a JCE "at a very high level" and with command responsibility for crimes committed by subordinates.[77] The Trial Chamber also notes the Prosecution's submission that the scale of the crimes alleged in the Joinder Indictment renders it impossible for the Prosecution to provide a comprehensive list of all victims by name.[78] These factors would lead the Trial Chamber to conclude that the Prosecution is not obliged to name every single victim of killings with which it charges the Accused. The way the Prosecution pleads killings in the Joinder Indictment with the 37 representative victims in the Schedule does not in itself violate the pleading principles.

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[71] Formerly paragraph 62 in the Proposed Joinder Indictment. Paragraph 61 of the Joinder Indictment, which is identical to paragraph 62 in the Proposed Joinder Indictment, reads:

> The allegations and counts charging or involving murder or killing include all murders and killings which were committed by members of the Croatian forces in the course of the conduct outlined in this Joinder Indictment. The Schedule concerning these allegations sets forth only a small number of particular incidents for the purposes of specificity in pleading.

[72] First Motion, para. 24.
[73] First Motion, para. 25.
[74] First Motion, para. 25; First Reply, paras 22-23.
[75] First Response, paras 12-13.
[76] First Response, para. 13.
[77] First Response, para. 12.
[78] First Response, para. 13.

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45. However, the Trial Chamber recalls that the jurisprudence of the Tribunal has also urged the Prosecution to identify victims to the extent possible. In this respect, it is noteworthy that the Prosecution listed 97 identified and unidentified victims in the Schedule of the initial Indictment against the Accused. Even taking into account the possible constant alteration of the information available to the Prosecution due to on-going investigation, the radical change of the numbers of the listed victims casts a certain doubt on the Prosecution's implicit assertion that it does not currently possess the information regarding victims once listed but later excluded from the Schedule. Omission of such information would render the Joinder Indictment defective unless the omission is satisfactorily explained. The Trial Chamber is therefore of the view that with respect to the victims once listed in the *Gotovina* initial Indictment and/or Amended Indictment and later excluded from the Joinder Indictment, save those who were allegedly victims of killings in municipalities regarding which the Prosecution has been ordered not to proceed, the Prosecution is required to clarify whether it has information regarding them, and if so, it is required to disclose the identification of those victims regarding whom it has information.

2. Failure to identify the location of mass graves

46. In relation to paragraph 34 of the Joinder Indictment which mentions "mass grave excavations", the Defence alleges that the Joinder Indictment "fails to identify the number and location of any such 'mass graves.'"[79]

47. The Prosecution responds that "[t]he Joinder Indictment does not make any allegation against the Accused in relation to the mass graves themselves", and that "the reference to mass graves in paragraph 34 of the Joinder Indictment is only as a description of the means of disposal of the bodies of persons unlawfully killed during Operation Storm, and is essentially a matter of evidence to be presented at trial."[80]

48. The Trial Chamber is of the view that details of mass graves, if mentioned in the Joinder Indictment, would be of assistance to the Defence in its preparation. In this regard, the Trial Chamber observes that the Prosecution's reference to "mass grave excavations" suggests that it is in possession of information relating to mass graves. Failing to include such information in the Joinder Indictment would unfairly hinder the Defence's preparation of its case. The Trial Chamber is therefore of the view that the Joinder Indictment must provide details regarding mass graves to the extent known to the Prosecution.

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[79] First Motion, para. 20.
[80] First Reponse, para. 14.

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3. Failure to identify status of victims

49. Referring to the descriptions of victims of alleged killings and inhumane acts in paragraphs 34 and 35 of the Joinder Indictment,[81] the Defence alleges that "[i]t is not clear (i) what the Prosecutor means by men 'not of military status', and (ii) whether it is making a distinction between civilians and non-combatants."[82] The Defence presents this argument in light of its allegation that "many Serb 'civilians', or rather, persons not wearing military uniforms, were bearing arms in the 'Krajina' as part of the Yugoslav civil defence system".[83] The Defence then requests the Prosecutor "to specify whether it alleges that all 'civilians' to whom it refers were also non-combatants",[84] since it is necessary for the Accused to "know whether the Prosecution is contending that armed civilians who are combatants could nevertheless be 'civilians' for purposes of being a victim of a crime against humanity."[85]

50. The Prosecution contends that the status of the victims is sufficiently pleaded in the Joinder Indictment.[86] As regards (i), the Prosecution submits that the terminology "men not of military status and unarmed" in paragraph 34 of the Indictment describes "one category of the Serb civilians who were unlawfully killed."[87] As regards (ii), the Prosecution asserts that the Joinder Indictment specifies that "civilian victims included those members of the armed forces who were *hors de combat*."[88] The Prosecution further alleges that "[w]hether or not a particular victim is ultimately determined to be a civilian is a question to be answered at trial on the basis of the evidence."[89]

51. In addition to paragraphs 34 and 35 of the Joinder Indictment, the Trial Chamber notes paragraph 53 of the Joinder Indictment relevant to Counts 6 and 7 (Murder), which describes the alleged victims as "Krajina Serb civilians and persons taking no part in hostilities, including members of Serb armed forces who had laid down their arms and those placed *hors de combat*", and paragraph 54 of the Joinder Indictment relevant to Counts 8 and 9 (Inhumane Acts and Cruel

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[81] Paragraph 34 of the Joinder Indictment reads:

> Many Serb civilians who remained in the area rather than fleeing, including men not of military status and unarmed, elderly, women and invalids, were unlawfully killed during Operation Storm and the continuing related operations and/or actions [...]

Paragraph 35 of the Joinder Indictment reads:

> In the course of Operation Storm and the continuing related operations and/or actions, participants in the joint criminal enterprise and their subordinates inflicted inhumane acts on Serb civilians and persons taking no part in hostilities, including persons placed *hors de combat* [...]

[82] Second Motion, para. 14.
[83] Second Motion, para. 14.
[84] Second Motion, para. 15.
[85] Second Reply, para. 7.
[86] Second Response, para. 7.
[87] Second Response, para. 10.
[88] Second Response, para. 12.
[89] Second Response, para. 11.

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Treatment), which describes alleged victims in the very similar wording as paragraph 53. Read together, these paragraphs specifically plead that alleged victims were "civilians", whose category encompasses "men not of military status and unarmed", and "persons taking no part in hostilities", whose category includes "members of Serb armed forces who had laid down their arms and those placed *hors de combat*". The Trial Chamber is therefore of the view that the Joinder Indictment is sufficiently specific as to the status of victims. The question relating to the legal definition of "civilians", as well as the question whether or not a particular victim ultimately falls under one or both of these categories, are matters to be resolved at trial.

F. Pleadings on the armed conflict

52. The Defence submits that the Joinder Indictment is "impermissibly vague as to the circumstances establishing the existence of an armed conflict".[90] In particular, the Defence notes that the Prosecution alleges that "[a]t all relevant times, a state of armed conflict existed in the Krajina region of the Republic of Croatia in or on the territory of the former Yugoslavia".[91] However, the Defence notes that paragraph 33 of the Joinder Indictment alleges that during Operation Storm the SVK resistance was minimal and in many instances non-existent, and that on 7 August 1995, Operation Storm "had been successfully completed".[92] Furthermore, the Defence recalls its challenges to jurisdiction and submits that the Joinder Indictment is defective as it fails to plead any material facts in support of the allegation that an armed conflict existed "between Croatian and SVK armed forces during Operation Storm, and upon its successful completion".[93]

53. The Prosecution contends that the Joinder Indictment pleads that the armed conflict existed from July 1995 to 15 November 1995.[94] The Prosecution observes that paragraphs 12, 14, 15, 19, 28-30 and 31-37 of the Joinder Indictment clearly allege the existence of an armed conflict in the Krajina region during the period relevant to the case.[95]

54. The Prosecution also argues that material facts concerning the continuation of armed conflict beyond the purported completion on the main part of Operation Storm are already

[90] Second Motion, paras 22, *citing* para. 56 of the Joinder Indictment.
[91] Second Motion, paras 22.
[92] Second Motion, para. 22.
[93] Second Motion, para. 22, referring to First Motion, paras 32-37; Defendant Ante Gotovina's Preliminary Motion Challenging Jurisdiction Pursuant to Rule 72(A)(i) of the Rules of Procedure and Evidence, 18 January 2007 ("Second Motion on Jurisdiction"). The Defence recalls also the holding in First *Brđanin* and *Talić* Decision, para. 48.
[94] Second Response, paras 19.
[95] Second Response, paras 19.

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contained in the Joinder Indictment, which for example clearly indicates that follow-up military actions to Operation Storm continued until 15 November 1995.[96]

55. The Defence replies by claiming that the Prosecution does not offer specific facts to support the assertion that an armed conflict existed on the relevant areas from 4 August 1995 through 15 November 1995.[97] In particular, the Defence argues that: (i) the Prosecution "is unable to identify a single fact in the Joinder Indictment that would explain what these 'follow-up operations' refer to";[98] (ii) the averment "related operations and/or actions in the region" that took place after 7 August 1995 (*i.e.* after "Operation Storm had been successfully completed") is vague and insufficient to plead the existence of an armed conflict.[99]

56. To assess whether the existence of an armed conflict is adequately pleaded, the Trial Chamber deems it sufficient to verify whether the accused is charged with crimes committed in the course of an armed conflict between two parties, that the temporal framework of the conflict is sufficiently set out and that the territory where the armed conflict took place is sufficiently detailed. In line with the jurisprudence of the Tribunal, the Trial Chamber notes that facts to support those allegations are matters for trial determination.[100]

57. The Joinder Indictment alleges at paragraph 56 that "at all relevant times, a state of armed conflict existed in the Krajina region of the Republic of Croatia in or on the territory of the former Yugoslavia". The relevant time period is set out in each Count as from "at least July 1995 to November 1995". In support of this pleading, the Joinder Indictment alleges that the armed conflict erupted in 1991 (paragraph 22) and continued until 1995 (paragraphs 23-27). Paragraph 28 of the Joinder Indictment then alleges that "by at least July and early 1995" Croatian leaders, officials and forces (including members of the joint criminal enterprise) conceived, planned, established and implemented Operation Storm". That operation allegedly "began *in full* on 4 August 1995".[101] The Joinder Indictment then provides that on 7 August 1995, "the Croatian government announced that the Operation had been successfully completed". It further alleges that "follow-up actions continued

[96] Second Response, para. 20.
[97] Second Reply, paras 13-23.
[98] Second Reply, para. 13.
[99] Second Reply, para. 14-17.
[100] *Prlić et al.* Decision, paras 70. *See also Prosecutor v. Milan Martić*, Case No. IT-95-11-PT, Decision on Preliminary Motion against the Amended Indictment, 2 June 2003 ("*Martić* Decision"), para. 23; *Boškoski and Tarčulovski* August Decision , para. 29. The Defence relies on the *Brđanin* Decision to argue that the Joinder Indictment is defective. However, the Trial Chamber notes that in that case the issue was quite different, namely whether the *mere* assumption of the existence of an international armed conflict (in order to charge Article 2 offences) could be considered as a sufficient pleading. The Trial Chamber held that the basis upon which such an assertion is made (i.e. the existence of an international armed conflict) is a "material fact which must be pleaded to enable the accused to know the nature of the case against them". In the present case, the international nature of the armed conflict has not been pleaded by the Prosecution. Therefore, the finding in *Brđanin* cannot be of any assistance in assessing whether the current Indictment has been sufficiently pleaded.

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until about 15 November 1995". Similarly, paragraphs 34 and 35 refer to "Operation Storm and the continuing related operations and/or actions".

58. In light of these factual allegations, the Trial Chamber is of the view that the Prosecution pleads that an armed conflict existed between, on the one hand, Croatian forces and, on the other hand, Serbian forces in Croatia from at least July 1995 to November 1995. The above pleading is sufficient to put the Defence on notice of the alleged existence of an armed conflict. The fact that "the SVK resistance was minimal and in many instances non existent" did not contradict the pleading of the Prosecution. It will be the burden of the Prosecution to prove these allegations at trial.

G. Pleadings on deportation and forcible transfer

1. Failure to plead material facts in support of the allegations of deportation and forcible transfer or the perceived allegation on "colonisation"

59. Paragraph 36 of the Joinder Indictment reads:

> A demographic policy was also implemented whereby much of the Serb Krajina was to be colonized with Croats, whereby Croatian forces and other Croats were moved into many of the abandoned Serb houses that survived. Homes belonging to Serbs were expropriated. [...]

60. Referring to paragraph 36 of the Joinder Indictment, the Defence contends that the Joinder Indictment fails to present any "material fact" supporting the perceived allegation of the Prosecution that the Croats were settling in Krajina unlawfully.[102] In the view of the Defence, to the extent that the Croats settling in the Krajina region were among those previously deported or forcibly transferred, their return would be lawful.[103] Therefore, the Defence requests that the Prosecution be required to specify how many of the Croat civilians settling in the Krajina had previously been deported by the SVK forces.[104]

61. In its Second Response, the Prosecution submits that the Defence's argument amounts to the allegation of additional facts concerning the lawfulness of the colonization of the Krajina region by Croats, and that it is not required to plead a response to what is essentially a factual issue for trial.[105] It further alleges that it has adequately pleaded all material facts concerning deportation and forcible transfer.[106]

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[101] Emphasis added.
[102] Second Motion, para. 17.
[103] Second Motion, para. 17.
[104] Second Motion, para. 18.
[105] Second Response, paras 15-16.
[106] Second Response, para. 14.

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62. The Defence in its Second Reply reiterates its argument from its Second Motion on Jurisdiction of 18 January 2007 that the Tribunal does not have jurisdiction over the "crime" of "colonization" of the Serb Krajina because Croatia could not "occupy" its own territory for the purposes of Article 49(6) of Geneva Convention IV.[107] Alternatively, the Defence argues that the Prosecution has not pleaded material facts sufficient to establish "colonization" for the purposes of Article 49(6) of Geneva Convention IV.[108] According to the Defence, the material facts include "the origin of 'Croat settlers'".[109]

63. The facts mentioned in paragraph 36 of the Joinder Indictment are not the only material facts supporting the charges of deportation and forcible transfer. Paragraphs 12 to 21, 28 to 47 and 50 of the Joinder Indictment explain with sufficient detail how the alleged deportation and forcible transfer took place and the time frame of these crimes.[110] As regards the results of these crimes, the Joinder Indictment alleges that in connection with the devastation of Serb properties that was committed in the course of the "orchestrated campaign" to drive the Serbs from the Krajina region, "the Krajina Serb community and habitat were virtually destroyed" by 15 November 1995.[111] The Trial Chamber finds that the allegations of facts in these paragraphs are sufficient to provide the Accused with adequate information on the alleged deportation and forcible transfer.[112] The argument of the Defence that the Joinder Indictment fails to state how many of the Croats that settled in the Krajina region had been previously deported by SVK forces is without merit. Information about the people who settled in the relevant region after the Serb population was expelled is not a material fact relevant to deportation or forcible transfer. It would merely provide further particulars of facts surrounding the removal of the Serbs, which should be introduced at trial. Moreover, the Prosecution does not charge the Accused with a "crime" of "colonization".[113] Therefore, material elements of such an "offence" are irrelevant. The Trial Chamber also notes that whether the settlement of Croats in Krajina was lawful or not is a factual issue to be dealt with at trial.

[107] Second Reply, para. 8.
[108] Second Reply, para. 9.
[109] Second Reply, para. 10.
[110] Paragraph 50 alleges that the crimes of deportation and forcible transfer occurred in the period "from at least July 1995 to about November 1995". Paragraph 29 indicates that "the orchestrated campaign to drive the Serbs from the Krajina region began *before* the major military operation commenced on 4 August 1995" (emphasis added). Paragraph 33 alleges that "by 15 November 1995, the devastation of Serb properties in the southern Krajina region was so extensive that the Krajina Serb community and habitat were virtually destroyed".
[111] Joinder Indictment, para. 33.
[112] *Martić* Decision, paras 36-38, accepting the similar language in the pleading on the crimes of deportation and forcible transfer.
[113] Prosecution Response to Allegations of Concession Pursuant to Trial Chamber Order of 23 February 2007, 26 February 2007, paras 15-17.

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2. Failure to plead approximate numbers or portion of the Serbian population who fled before or after the conclusion of Operation Storm

64. Paragraph 29 of the Joinder Indictment pleads that "the orchestrated campaign to drive the Serbs from the Krajina region began before the major military operation commenced on 4 August 1995." Paragraph 30 of the Joinder Indictment also mentions "those Serbs who fled just prior to or at the beginning of the Operation, whether in response to actions of RSK leadership or for other reasons".

65. The Defence claims in its Second Motion that such allegations are impermissibly vague. The Defence bases its argument on its theory that the Joinder Indictment does not charge the Accused with violating the "Hague Law", and that the crime of deportation and forcible transfer under the "Geneva Law" can only apply to actions that took place after Croatian forces exercised authority over the region at issue. Based on this understanding, the Defence asserts that in order for the Accused to be adequately informed of his alleged responsibility for the displacement of the Krajina Serbian civilian population, it is necessary for the Prosecution to specify an approximation of the numbers or proportion of that population that left *before* Operation Storm ended and the Croatian Government took over control of the area.[114]

66. The Prosecution asserts in its Second Response that the number of Serb civilians that fled the Krajina region prior to the conclusion of Operation Storm is not a material fact of the crimes of deportation or forcible transfer as charged in the Joinder Indictment.[115] Furthermore, the Prosecution states that it has disclosed "information relating to the large numbers of Krajina Serbs who fled after the commencement of Operation Storm" to the Defence in various documents and witness statement. Therefore, the Prosecution submits that the Defence is on notice of the Prosecution's case on this issue.[116]

67. In its Second Reply, the Defence reiterates its allegation on the applicability of the "Geneva Law", and argues that the number of Serbs who remained in Krajina (and subsequently removed from the region) *after* Croatian forces took control over the territory is a material element of the crimes of deportation and forcible transfer that needs to be pleaded.[117] In contradiction to its own

[114] Second Motion, para. 20.
[115] Second Response, para. 17.
[116] Second Response, para. 17.
[117] Second Reply, paras 11-12.

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assertion in the Second Motion, the Defence alleges that "[t]he number of Serbs who fled *before* they were in the hands of Croatian authorities is [...] immaterial."[118]

68. As stated earlier, the Joinder Indictment clearly sets out the time period during which the alleged crimes of deportation and forcible transfer took place. Details on how the crimes of deportation and forcible transfer were allegedly committed are provided for the period before Operation Storm (paragraph 29); for the period during that Operation (paragraph 30) and in the following and related events (paragraphs 33-36). Finally, paragraph 37 in conjunction with paragraph 50 clearly links the above events to the alleged individual criminal responsibility of the Accused. The Trial Chamber finds that these allegations of fact are sufficient to put the Accused on notice on the alleged commission of those crimes throughout the indictment period.

69. The Trial Chamber also finds that the number of Serb civilians that fled the Krajina region prior to or after the conclusion of Operation Storm is a matter of evidence and not a material fact of the crimes of deportation or forcible transfer as charged in the Joinder Indictment. Further, it is of the view that the issue whether the "law of Geneva" is applicable to the crime of Deportation is a matter of substantive law which is inappropriate to be resolved in a decision on the *form* of the indictment.

[118] Second Reply, para. 12 (Emphasis added).

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H. Disposition

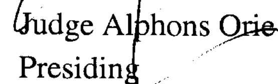
The Trial Chamber, for the reasons explained above and after having considered the arguments of the Parties, pursuant to Rule 72 of the Rules:

GRANTS in part the First and Second Motions;

ORDERS the Prosecution to submit clarifications in relation to the defects of the Joinder Indictment established in paragraphs 14, 16, 19, 38, 45 and 48 of this Decision, by 26 March 2007; and

REJECTS the First and Second Motions in all other respects.

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



Judge Alphons Orie
Presiding

Dated this nineteenth day of March 2007
At The Hague
The Netherlands

[Seal of the Tribunal]

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