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UNITED NATIONS

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

Case No. IT-06-90-PT

Date: 14 February 2008

Original: English

IN TRIAL CHAMBER I

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

Registrar: **Mr. Hans Holthuis**

Decision of: **14 February 2008**

PROSECUTOR

v.

ANTE GOTOVINA
IVAN ČERMAK
MLADEN MARKAČ

PUBLIC

DECISION ON ANTE GOTOVINA'S MOTION PURSUANT TO RULE 73 REQUESTING PRE-TRIAL CHAMBER TO STRIKE PARTS OF PROSECUTION PRE-TRIAL BRIEF CONSTITUTING EFFECTIVE AMENDMENT OF THE JOINDER INDICTMENT, AND ON PROSECUTION'S MOTION TO AMEND THE INDICTMENT

The Office of the Prosecutor

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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 seized of the "Motion pursuant to Rule 73 requesting Pre-Trial Chamber to strike parts of the Prosecution pre-trial brief constituting effective amendment of the joinder indictment", filed by the Defence of Ante Gotovina ("Defence") on 26 March 2007 ("Gotovina Motion"), and of the "Motion to amend the indictment", filed by the Prosecution on 17 May 2007, including as Annex A a "Proposed Amended Joinder Indictment" ("Proposed Indictment") and as Annex B a signed "Amended Indictment" to be filed upon an order by the Trial Chamber ("Prosecution Motion"). The Trial Chamber will deal with the motions in one decision in view of the closely related subject-matter of both motions.

I. RELEVANT PROCEDURAL HISTORY

1. On 14 July 2006, Trial Chamber II granted the Prosecution motion to join the case of *Prosecutor v. Ante Gotovina* (Case No. IT-01-45-PT) with the case of *Prosecutor v. Ivan Čermak and Mladen Markač* (Case No. IT-03-73-PT) pursuant to Rule 48 of the Rules of Procedure and Evidence ("Rules").[1] All three accused appealed the decision but on 25 October 2006 the Appeals Chamber upheld the Trial Chamber's findings.[2] On 21 February 2007, Trial Chamber I, then seised of the joint case, ordered the Prosecution pursuant to Rule 73 *bis*(D) to reduce the indictment.[3] The currently operative Joinder Indictment ("indictment") was subsequently filed on 6 March 2007.

2. On 26 March 2007, the Gotovina Motion was filed, to which the Prosecution responded on 10 April 2007 ("Prosecution Response").[4] On 17 April 2007, the Defence filed a request for leave to reply as well as a reply ("Defence Reply").[5]

3. On 17 May 2007, the Prosecution Motion was filed, to which the Defence responded on 31 May 2007 ("Defence Response").[6] On 7 June 2007, the Prosecution filed a request for leave to reply incorporating a reply ("Prosecution Reply").[7]

[1] *Prosecutor v. Ivan Čermak and Mladen Markač*, Case No. IT-03-73-PT and *Prosecutor v. Ante Gotovina*, Case No. IT-01-45-PT, Decision on Prosecution's consolidated motion to amend the indictment and for joinder, 14 July 2006 ("Joinder Decision").
[2] *Prosecutor v. Ante Gotovina*, Case No. IT-01-45-AR73.1, *Prosecutor v. Ivan Čermak*, Case No. IT-03-73-AR73.1, *Prosecutor v. Mladen Markač*, Case No. IT-03-73-AR73.2, Decision on interlocutory appeals against the Trial Chamber's decision to amend the indictment and for joinder, 25 October 2006.
[3] Order pursuant to Rule 73 *bis* (D) to reduce the indictment, 21 February 2007.
[4] Prosecution response to Defence motion to strike parts of the Prosecution trial brief, 10 April 2007.
[5] Defendant Ante Gotovina's motion for leave to file a reply to Prosecution response to strike parts of pre-trial brief, 17 April 2007, and Defendant Ante Gotovina's reply to Prosecution response to strike parts of pre-trial brief, 17 April 2007. The Trial Chamber grants leave to file the reply.
[6] Defendant Ante Gotovina's response to Prosecution motion to amend the indictment, 31 May 2007.
[7] Prosecution motion seeking leave to reply and reply to Gotovina response to motion to amend indictment, 7 June 2007. The Trial Chamber grants leave to file the reply.

II. SUBMISSIONS

A. Gotovina Motion

1. General

4. The Defence requests the Trial Chamber to "strike" parts of the Prosecution's pre-trial brief ("pre-trial brief"), which it submits constitute "effective amendment of the Joinder Indictment [...] insofar as new factual allegations and new charges imposing additional grounds for the imposition of criminal liability require the Prosecution to seek leave to amend the Indictment in accordance with Rule 50(A)(i)(c) [of the Rules of Procedure and Evidence ("Rules")]."[8] The Defence refers to two parts of the pre-trial brief, paragraph 126 and paragraphs 107-108, as further detailed below. In view of the perceived "unilateral" amendments of the indictment through these paragraphs of the pre-trial brief, the Defence argues that the Prosecution has brought about a "significant expansion of the Prosecution's case [which] seriously prejudices General Gotovina, by not providing him with proper and timely notice of the scope and nature of new grounds for the imposition of criminal liability."[9] As a general submission, the Prosecution argues that the challenged parts of the pre-trial brief "merely [provide] additional notice of the charges against the Accused and enhances his ability to prepare a defence by setting out the main themes of the evidence against him."[10] In reply, the Defence argues that "[t]he addition of the Hague Law charge of 'unlawful attacks' in Count 1 and a new theory of armed conflict beyond the 'Krajina' is a complete departure from the Indictment, and not a mere 'clarification' as the Prosecution suggests."[11]

2. Paragraph 126 of the pre-trial brief

5. The Defence takes issue with paragraph 126 of the pre-trial brief, which is situated under the heading "Count 1: Persecution" and reads in the relevant part "[t]hese persecutions, which constitute a crime of equal gravity to the enumerated Article 5 crimes, included [...] unlawful attacks on civilians and civilian objects".[12] The Defence submits that "the pleading of 'unlawful

[8] Gotovina Motion, para. 1, referring to the Prosecution's pre-trial brief, filed confidentially on 16 March 2007, and filed in a redacted, public version on 23 March 2007.
[9] Gotovina Motion, para. 3.
[10] Prosecution Response, para. 1.
[11] Gotovina Reply, para. 1.
[12] Pre-trial brief, para. 126. Footnote in the original refers to *Prosecutor v. Dario Kordić and Mario Čerkez*, Case No. IT-95-14/2-A, Judgement, 17 December 2004 ("*Kordić* Appeal Judgement"), paras. 104-105; *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-A, Judgement, 29 July 2004 ("*Blaškić* Appeal Judgement"), paras. 156, 159; *Prosecutor v. Kupreškić et al.*, Case No. IT-95-16-T, Judgement, 14 January 2000 ("*Kupreškić* Trial Judgement"), para. 631.

attacks on civilians and civilian objects' as an *actus reus* of persecutions [...] is not specified in Count 1 or any other Count of the Indictment and therefore constitutes a new charge."[13]

6. The Defence submits that the *Blaškić* and *Kordić* appeal judgements – both of which are cited in paragraph 126 of the pre-trial brief in support of "unlawful attacks on civilians and civilian objects – "leave no doubt that 'unlawful attacks' as an *actus reus* of persecution must be specifically charged in an indictment."[14] The Defence argues that "a general factual allegation of 'shelling civilians', as in the current indictment, cannot be equated with the charge of 'unlawful attack' as a specific violation of humanitarian law."[15] The Defence deduces this from the Appeals Chamber's finding in *Blaškić* that "'unlawful attacks' may constitute persecutions under Article 5(h) [of the Statute]", a finding which the Defence submits the Appeals Chamber based upon Article 51(2) of Additional Protocol I, Article 13(2) of Additional Protocol II, and Article 25 of the 1907 Hague Convention.[16] However, the Defence notes that this "Hague Law is not mentioned anywhere in the Indictment, or even in the Pre-Trial Brief."[17]

7. The Defence further submits that "since the *actus reus* of persecutions is not specified in Count 1, it is reasonable for General Gotovina to assume that it only encompasses crimes charged elsewhere in the Indictment under other subheadings of Article 5 (deportation, forcible transfer, murder, and inhumane acts), or under Article 3 (plunder, wanton destruction, murder, and cruel treatment), when committed as part of a widespread or systematic attack against a civilian population, on discriminatory grounds."[18] For these reasons, the Defence submits that the addition of "unlawful attacks on civilians and civilian objects" in paragraph 126 of the pre-trial brief constitutes "a new charge against General Gotovina" which "should thus be stricken from the Pre-Trial Brief".[19]

8. The Prosecution responds that paragraph 126 of the pre-trial brief "sets out the acts underlying Count 1 (Persecution), and clearly indicates that the Prosecution intends to adduce evidence showing that the Accused used 'unlawful attacks on civilians and civilian objects' to

[13] Gotovina Motion, paras 2-3. The Defence also notes that the term "unlawful attacks on civilians and civilian objects" does not appear anywhere else in the indictment, para. 4.
[14] Gotovina Motion, para. 5, referring to *Blaškić* Appeal Judgement. The Defence further submits that in both *Blaškić* and *Kordić* the indictments specifically charged the accused with "unlawful attacks on civilians and civilian objects" as an *actus reus* of persecutions under Article 5(h) of the Statute and additionally as violations of the laws or customs of war under Article 3 of the Statute, *id.* at para. 6. In this context, the Defence submits that the Prosecution's reference in paragraph 126 of the pre-trial brief to the *Kupreškić* Trial Judgement, para. 631 is "inapposite since it concerns destruction of property and not unlawful attacks against civilians", *id.* at para. 5, fn. 3.
[15] Gotovina Motion, para. 8, referring to paragraph 29 of the indictment.
[16] Gotovina Motion, para. 8, referring to *Blaškić* Appeal Judgement, paras 156-168.
[17] Gotovina Motion, para. 8.
[18] Gotovina Motion, para. 14. See also Gotovina Reply, para. 12, and Gotovina Response, para. 18, where the Defence submits that "[i]t was on this basis that General Gotovina has been preparing his defence over the past several years".
[19] Gotovina Motion, para. 16.

persecute the Serb civilian population of the Krajina."[20] In the Prosecution's view, "[t]his factual allegation is consistent with paragraphs 29 and 35 of the Indictment, which are included in the factual basis for persecutions and allege shelling attacks on civilians."[21] The Prosecution also submits that the Defence has been on notice since 20 February 2006 that the Prosecution proposed to amend paragraph 29 to include the words "shelled civilian areas"[22] and that it "would seek to prove that Ante Gotovina is responsible for persecutions based, in part, on unlawful attacks on civilians and civilian objects".[23] Moreover, the Prosecution submits that the Defence was aware that the Prosecution intended to lead evidence of unlawful attacks on civilians and civilian objects.[24] Lastly, the Prosecution refers to paragraph 60 of the indictment, which explicitly provides that "[t]he acts, practices, omissions, and conduct by which the accused and other persons committed persecutions, as charged in Count 1, included, without limitation, the crimes charged in Counts 2 through 9".[25]

9. In reply, the Defence submits that the Prosecution fails to explain "how a factual pleading of 'shelling' can *ipso facto* constitute a Hague Law charge of 'unlawful attacks against civilians and civilian objects' under Count 1."[26] The Defence stresses the Appeals Chamber's holding in *Kupreškić* that "[p]ersecution cannot, because of its nebulous character, be used as a catch-all charge", that "[p]ursuant to elementary principles of criminal pleading, it is not sufficient for an indictment to charge a crime in generic terms",[27] and that "[w]hat the Prosecution must do, as with any other offence under the Statute, is to particularise the material facts of the alleged criminal conduct of the accused that, in its view, goes to the accused's role in the alleged crime."[28] On the basis of this, the Defence concludes that "while the Prosecution does not need to separately charge each underlying act of persecution, it must sufficiently particularize 'each basic crime that makes up the general charge of persecution'."[29] The Defence further argues that "such factual pleadings ['shelling of civilians'] do not necessarily give rise to a charge of 'unlawful attacks'".[30] In this respect, the Defence refers to the Appeals Chamber's holding in *Blaškić* that "[a] widespread and

[20] Prosecution Response, para. 2.
[21] *Ibid.*
[22] Prosecution Response, para. 8, referring to Prosecution's consolidated motion to amend the indictment and for joinder, filed on 20 February 2006, para. 68.
[23] Prosecution Response, para. 7; see also paras 9-14.
[24] Prosecution Response, paras 4-6, referring to Defendant Ante Gotovina's preliminary motion challenging jurisdiction pursuant to Rule 72(A)(i), filed on 18 January 2007 ("Gotovina Jurisdiction Motion"), paras 11, 18, 29.
[25] Prosecution Response, para. 14.
[26] Gotovina Reply, para. 6, further submitting that the Prosecution disregards the Appeals Chamber judgements in *Blaškić*, *Kordić*, and *Kupreškić* (*Prosecutor v. Kupreškić et al.*, Case No. IT-95-16-A, Judgement, 23 October 2001 ("*Kupreškić* Appeal Judgement")) "which it invokes as authority in paragraph 126, footnote 346 of its Brief, which all hold that persecution cannot be used as a 'catch-all charge' without particularization of the underlying crimes", *id.*
[27] Gotovina Reply, para. 9, referring to *Kupreškić* Appeal Judgement, para. 98.
[28] Gotovina Reply, para. 10, referring to *Kupreškić* Appeal Judgement, para. 98.
[29] Gotovina Reply, para. 11.
[30] Gotovina Reply, para. 13.

systematic attack against the civilian population is a *chapeau* requirement for a crime against humanity, but the Prosecution charged attacks on cities, towns, and villages as separate acts of persecution as a crime against humanity in Count 1 of the Indictment."[31] Lastly, and on several occasions in its submissions, the Defence submits that the Prosecution "should have charged under Article 5 with respect to 'shelling of civilians'".[32] The Trial Chamber notes that it dealt with this argument in its decision on jurisdiction of 19 March 2007.[33]

3. Paragraphs 107 and 108 of the pre-trial brief

10. The Defence submits that "the pleading of new facts concerning Eastern Slavonia and Bosnia-Herzegovina in paragraphs 107 and 108 of the Pre-Trial Brief constitutes a new theory on the existence of an armed conflict that is manifestly inconsistent with paragraph 56 of the Indictment which refers exclusively to an armed conflict in 'the Krajina region of the Republic of Croatia.'"[34] The Defence argues that the indictment does not specify any other armed conflict and does not mention Eastern Slavonia or Bosnia and Herzegovina.[35] The submissions in paragraphs 107 and 108 of the pre-trial brief, in the Defence's view, therefore "significantly expands the Prosecution's case".[36]

11. The Prosecution submits that paragraphs 107 and 108 "provide additional consistent notice of the existence of the armed conflict which was pleaded in paragraphs 22, 23, 24, and 56 of the Indictment."[37] In the Prosecution's submission, the "additional information" in paragraphs 107 and 108 "does not present the Accused with a new charge against him", rather the paragraphs "merely provide the Accused and the Trial Chamber with further information detailing the factual basis for the allegations in the Indictment."[38]

12. In reply, the Defence submits that "the new theory of armed conflict under paragraphs 107-108 of the Brief does not explain how the extension of armed conflict to Eastern Slavonia and Bosnia-Herzegovina is compatible with the categorical statement that an armed conflict existed solely in the "Krajina" region of Croatia, as confirmed by the Trial Chamber Decision on Form of

[31] Gotovina Reply, para. 13, referring to *Blaškić* Appeal Judgement, para. 156.
[32] Gotovina Reply, para. 16, referring to Gotovina Jurisdiction Motion, paras 10-18 and fns 20-26. See also Gotovina Reply, paras 3 and 17; Gotovina Motion, para. 11, referring to the Motion Hearing, 28 February 2007, T. 142-143;
[33] Decision on Ante Gotovina's preliminary motions alleging defects in the form of the joinder indictment, filed on 19 March 2007 ("Jurisdiction Decision"), paras 32-34.
[34] Gotovina Motion, para. 2. The Defence notes that paragraph 25 of the indictment defines the "Krajina region" as "the area covered by the UNPA Sector South and UNPA Sector North", *id.* at para. 17.
[35] Gotovina Motion, para. 19.
[36] Gotovina Motion, para. 20.
[37] Prosecution Response, para. 2, see also para. 17, where the Prosecution submits that paragraphs 107 and 108 provide "additional factual information concerning the armed conflict on the territory of the former Yugoslavia pleaded in paragraphs 22 to 24 and 56 of the Indictment".
[38] Prosecution Response, para. 18.

Indictment."[39] The Defence also argues that "[t]he allegation that an armed conflict in Bosnia-Herzegovina amounts to an armed conflict in Croatia is patently unreasonable, as the Prosecution does not explain how hostilities in a neighboring State would transform a state of *debellatio* in Croatia into an armed conflict."[40]

B. Prosecution Motion

13. By the Prosecution Motion, the Prosecution seeks leave to amend the indictment:

1) by pleading joint criminal enterprise ("JCE") in light of the recent *Brđanin* Appeal Judgement, and

2) in order to specifically plead the nature of the persecutory acts in paragraph 49 (Count 1) of the indictment.[41]

The Prosecution submits that the proposed amendments do not add "any new factual or legal charges."[42]

14. The Prosecution argues that in *Brđanin*, "the Appeals Chamber settled an area of uncertainty in the law, holding that crimes resulting from the acts of persons who are not members of the JCE may nevertheless be imputed to the members of the JCE."[43] As a result of this uncertainty, the Prosecution had pleaded "alternative formulations of the JCE in the [indictment]."[44] However, following the *Brđanin* Appeal Judgement "the crimes committed by these persons (who are no longer alleged to be members of the JCE) can be imputed to the JCE members, for example because they were used by or cooperated with the members of the JCE to physically commit or facilitate the commission of crimes within the common purpose."[45] The Prosecution therefore seeks to amend paragraphs 14, 17 and 39 of the indictment (corresponding to paragraphs 16 and 38 of the Proposed Indictment). The Prosecution submits that the new paragraphs 16 and 38 in the Proposed Indictment re-organise information that is already in the indictment and does not introduce new factual allegations.[46] The Prosecution submits that the only difference in this respect between the indictment and the Proposed Indictment is that a specific reference has been added in new

[39] Gotovina Reply, para. 20.
[40] Gotovina Response, para. 22.
[41] Prosecution Motion, para. 7, referring to *Prosecutor v. Radoslav Brđanin*, Case No. IT-99-36-A, Judgement, 3 April 2007 ("*Brđanin* Appeal Judgement").
[42] Prosecution Motion, para. 8.
[43] Prosecution Motion, paras 1, 3-4.
[44] Prosecution Motion, para. 3. The alternative formulation of the joint criminal enterprise is found in paragraph 17 of the indictment, where the Prosecution pleads "that the JCE members included all principal perpetrators [defined as those "who participated in the actus reus of the crimes or physical perpetrators, as *per Brđanin* AJ, para. 362"] and others whose conduct resulted in the commission of crimes", *id.* para. 4.
[45] Prosecution Motion, para. 4.
[46] Prosecution Motion, para. 5.

paragraph 16 to the "military police", which is specifically referred to in paragraphs 18(a) and 20(b) of the indictment.[47]

15. In relation to the proposed pleading of the nature of the persecutory acts, the Prosecution proposes to amend paragraph 49 of the indictment (corresponding to paragraph 48 of the Proposed Indictment) as follows:

> Ante GOTOVINA, Ivan Čermak and Mladen MARKAČ are responsible for acts of persecution against the Krajina Serbs including: deportation and forcible transfer; destruction and burning of Serb homes and businesses; plunder and looting of public or private Serb property; murder; other inhumane acts, including the shelling of civilians and cruel treatment; unlawful attacks on civilians and civilian objects; imposition of restrictive and discriminatory measures, including the imposition of discriminatory laws; discriminatory expropriation of property; unlawful detention; disappearances.

The Prosecution submits that all of the acts of persecution pleaded are present in the indictment and, therefore, have met the *prima facie* standard under Article 19 of the Statute.[48] Specifically, the Prosecution submits that paragraph 49 of the indictment "alleges that Count 1 charging persecution rests on the 'acts and omissions (including those alleged in paragraphs 12-21 and 28-48)'".[49] Moreover, the Prosecution makes reference to paragraph 60 of the indictment, cited earlier.[50]

16. In response, the Defence submits that "the addition of the new charges of 'unlawful attacks on civilians and civilian objects' [...], 'imposition of restrictive and discriminatory measures', 'unlawful detentions', and 'disappearances' constitute new charges in the indictment which cause unfair prejudice to General Gotovina" in view of the "late stage of pre-trial proceedings".[51] With respect to the proposed amendment of the pleading of JCE, the Defence argues that if the Prosecution "seeks to drop its alternative JCE theory based on 'physical perpetrators', paragraph 17 of the Indictment should simply be struck. Beyond that, there is no need for detailed elaboration of JCE liability theory as proposed by the Prosecution, in what amounts to an academic exercise rather than adequate notice to General Gotovina."[52]

17. The Defence further argues that "[w]hen considering whether a proposed amendment results in the inclusion of a 'new charge', this Tribunal has focused on the imposition of criminal liability on a basis that was not previously reflected in the indictment. The key question is, therefore, whether the amendment introduces a basis for conviction that is factually and/or legally distinct from any already alleged in the indictment."[53] The Defence continues that "[s]ince General

[47] Prosecution Motion, para. 5.
[48] Prosecution Motion, para. 8.
[49] Prosecution Motion, para. 9.
[50] Prosecution Motion, para. 10. See *supra* para. 8.
[51] Gotovina Response, para. 1; see also paras 2, 15-28.
[52] Gotovina Response, paras 3, 32.
[53] Gotovina Response, para. 8, referring to *Prosecutor v. Sefer Halilović*, Case No. IT-01-48-T, Decision on Prosecutor's motion seeking leave to amend the indictment, 17 December 2004 ("*Halilović* Decision"), para. 30. See

Gotovina could be convicted for persecutions solely on the basis of 'unlawful attacks', and acquitted of all other crimes alleged in the Indictment, the proposed amendment introduces a basis for conviction that is factually and legally distinct from any already alleged in the Indictment. Therefore, the addition of 'unlawful attacks' under Count 1 of the Indictment constitutes a 'new charge' under Rule 50."[54] In the Defence's opinion, "the same applies to the new charges of 'imposition of restrictive and discriminatory measures', 'unlawful detentions', and 'disappearances'".[55]

18. In reply, the Prosecution submits that "Gotovina's 'presumption' that persecution is restricted to the crimes alleged in other counts of the [indictment] is incorrect. The underlying acts are pled in Count 1 of the Current Indictment by referring to factual paragraphs, alleging that persecution was carried out 'By these acts and omissions (including those alleged in paragraphs 12-21 and 28-48)'."[56] The Prosecution argues that Count 1 does not contain a new charge; rather "[o]n the basis of the Current Indictment, the Accused could be convicted for Count 1-Persecutions based, for example, on the shelling of civilian areas as pled in paragraphs 29 and 35 of the Current Indictment."[57] In the Prosecution's view, the same applies to the charges of "imposition of restrictive and discriminatory measures", "unlawful detentions", and "disappearances", all of which, according to the Prosecution, "are based entirely on the acts pleaded in the factual section of the Current Indictment".[58]

III. DISCUSSION

A. Law on amendment of an indictment

19. As a preliminary remark, the Trial Chamber leaves it open to what extent an excursion in a pre-trial brief could have the effect of adding or overruling what is written in the indictment and therefore also whether there is any need to strike from the pre-trial brief any passage that would not be in full accordance with the indictment. Although a negative answer to that question could have resulted in a rejection of the Gotovina Motion, the Trial Chamber prefers to deal with the substance,

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also Gotovina Motion, paras 25, 26; Gotovina Reply, paras 23, 26, where the Defence submits that this also applies to the "pleading of new factual allegations on armed conflict not previously reflected in the Indictment [as a]lthough additional crimes are not alleged in paragraphs 107-108 of the Pre-Trial Brief, expanding the definition of armed conflict to include Eastern Slavonia and Bosnia-Herzegovina has the effect of creating 'new and different ways in which the physical perpetration of the crimes charged in those counts were committed", Gotovina Motion, para. 27.

[54] Gotovina Response, para. 13.

[55] Gotovina Response, para. 14.

[56] Prosecution Reply, para. 3. In support of its contention that the indictment specifically pleads that persecution was carried out through "unlawful attacks on civilians and civilian objects", the Prosecution refers to paragraphs 29 and 35 of the indictment, *id.* at para. 4.

[57] Prosecution Reply, para. 5.

rather than the form. This practical approach of the Trial Chamber can assist the parties in better understanding how the Trial Chamber interprets the indictment. For these reasons, the Trial Chamber deals with the substance as if the Defence was right in the manner it procedurally approached the matter; that is, that through the pre-trial brief charges were added to the indictment which would require leave to amend it.

20. Rule 50 provides in the relevant part:

> (A) (i) The Prosecutor may amend an indictment:
>
> [...]
>
> (c) after the assignment of the case to a Trial Chamber, with the leave of that Trial Chamber or a Judge of that Chamber, after having heard the parties.
>
> (ii) Independently of any other factors relevant to the exercise of the discretion, leave to amend an indictment shall not be granted unless the Trial Chamber or Judge is satisfied there is evidence which satisfies the standard set forth in Article 19, paragraph 1, of the Statute to support the proposed amendment.
>
> [...]
>
> (B) If the amended indictment includes new charges and the accused has already appeared before a Trial Chamber in accordance with Rule 62, a further appearance shall be held as soon as practicable to enable the accused to enter a plea on the new charges.
>
> (C) The accused shall have a further period of thirty days in which to file preliminary motions pursuant to Rule 72 in respect of the new charges and, where necessary, the date for trial may be postponed to ensure adequate time for the preparation of the defence.

Under this rule, the Trial Chamber has a wide discretion to allow the amendment of an indictment, including late in the pre-trial proceedings.[59] This Trial Chamber considers in particular that "a clearer and more specific indictment benefits the accused [...] because the accused can tailor their preparations to an indictment that more accurately reflects the case they will meet, thus resulting in a more effective defence."[60] While the Trial Chamber will generally grant leave to amend the indictment where it ensures "that the real issues in the case will be determined, such leave will not be granted unless the amendment meets both of the following conditions: it must not result in unfair prejudice to the accused when viewed in light of the circumstances of the case as a whole, and, if the proposed amendment is material, it must be supported by documentation or other material meeting the *prima facie* standard set forth in Article 19 of the Statute."[61] In relation to the

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[58] Prosecution Reply, paras 3 (which refers to paras 12-21 and 28-48 of the indictment) and 6.

[59] *Prosecutor v. Milan Martić*, Case No. IT-95-11-PT, Decision on the Prosecution's motion to request leave to file a Corrected Amended Indictment, 13 December 2002, para. 21, where it was held that "Rule 50 [...] neither provides any parameters as to the exercise of discretion by a Chamber when seized [of] a Motion to grant leave to amend an indictment nor does it contain any express limits of such discretion." See also *Prosecutor v. Popović et al.*, Case No. IT-05-88-PT & IT-05-88/1-PT, Decision on further amendment and challenges to the indictment,13 July 2006 ("*Popović* Decision"), para. 8.

[60] *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-AR73, Decision on Prosecutor's interlocutory appeal against Trial Chamber III decision of 8 October 2003 denying leave to file an amended indictment, 19 December 2003, para. 13.

[61] *Popović* Decision, para. 8 (footnotes omitted), with further references.

requirement that the amendment must not cause unfair prejudice to the accused, two factors are of particular importance: the amendment must not deprive the accused of an adequate opportunity to prepare an effective defence, and the amendment must not adversely affect the accused's right under Article 21 of the Statute to be tried without delay.[62]

21. Leave to amend the indictment is more likely to be granted where amendments do not result in the addition of new charges against the accused, as the addition of such risks delaying the start of trial in view of the procedural requirements of Rule 50(B) and (C).[63] On the issue of "new charge", the Trial Chamber considers that the key question is whether the proposed amendment introduces "a basis for conviction that is factually and/or legally distinct from any already alleged in the indictment."[64] The Trial Chamber is mindful of the fact that a proposed amendment which alleges "a different underlying offence, even without additional factual allegations, is a new charge because it could be the sole legal basis for the Accused's conviction."[65]

B. Gotovina Motion – Paragraph 126 of the pre-trial brief

22. A reading of Count 1 of the indictment makes it abundantly clear that the Prosecution pleads the *actus reus* thereof – just as it does for each and every count in the indictment – by reference to the "Factual description of the joint criminal enterprise" and "Statement of facts" sections of the indictment.[66] The Trial Chamber also notes in this respect that paragraph 60 of the indictment, cited earlier, specifically addresses Count 1.[67] It is therefore not possible to claim, as does the Defence, that "since the *actus reus* of persecutions is not specified in Count 1, it is reasonable for General Gotovina to assume that it only encompasses crimes charged elsewhere in the Indictment under other subheadings of Article 5 (deportation, forcible transfer, murder, and inhumane acts), or under Article 3 (plunder, wanton destruction, murder, and cruel treatment), when committed as part of a widespread or systematic attack against a civilian population, on discriminatory grounds."[68] In this context, the Trial Chamber notes that a proven attack on civilians which does not form part of a widespread or systematic attack against a civilian population but which is carried out on discriminatory grounds could not result in a conviction under Count 1, as will be explained below.

[62] *Popović* Decision, para. 9, with further references.
[63] *Popović* Decision, para. 10, fns 24 and 25, with further references.
[64] *Halilović* Decision, para. 30. See also *id*, paras 27-28 where an overview is given of what constitutes a new charge, in particular that the amendment alleges a different crime under the Statute, involves the addition of an underlying offence without changing the crime that is alleged under the Statute, or entails the inclusion of treaty provisions which recognise the same conduct as a violation of international law, but without additional factual allegations, reliance on an additional provision of the Statute, or other alteration of the affected count.
[65] *Halilović* Decision, para. 35.
[66] Count 1, Persecutions, para. 49, reads "By these acts and omissions (including those alleged in paragraphs 12-21 and 28-48), Ante Gotovina, Ivan Čermak and Mladen Markač are responsible for the following crime(s): Count 1: Persecutions [...]." This construction is used in all counts.
[67] See *supra* para. 8.
[68] Gotovina Motion, para. 14; see *supra* para. 7.

23. The Trial Chamber considers that the Defence is misreading the Appeals Chamber in *Blaškić*. The *Blaškić* indictment charged that the "persecution was perpetrated through the following:

> Attacks on cities, towns and villages:
>
> 6.1. The widespread and systematic attack of cities, towns and villages, inhabited by Bosnian Muslims, in the municipalities of Vitez, Busovaca, Kiseljak, and Zenica.[69]

The Appeals Chamber considered "whether or not an attack on cities, towns, and villages may constitute an act of persecution", an issue on which the Trial Chamber had not made a legal finding.[70] As a preliminary matter, the Appeals Chamber held that it was not permissible to charge the general requirement for applicability of Article 5 of the Statute – that is, widespread and systematic attack – as the *actus reus* of persecutions, as had been done in paragraph 6.1 of the *Blaškić* indictment.[71] However, the Appeals Chamber nevertheless found that the persecution count was correctly charged in the indictment as it charged "[a]ttacks on cities, towns and villages".[72]

24. The Defence refers to this preliminary finding of the Appeals Chamber, but seeks to extrapolate from the Appeals Chamber's subsequent references to Additional Protocol I, Additional Protocol II and the Fourth Hague Convention of 1907 that unlawful attacks on civilians and civilian objects as an *actus reus* of persecutions must be specifically charged in an indictment.[73] This Trial Chamber notes that the Defence has not in any of its submissions in relation to either the Gotovina Motion or the Prosecution Motion referenced paragraph 159 of the *Blaškić* Appeal Judgement, which contains the Appeals Chamber's conclusion on this issue.[74] The 'issue', as defined by the Appeals Chamber, should be recalled: "whether or not *an attack on cities, towns, and villages* may constitute an act of persecution".[75] The Appeals Chamber found, "[i]n light of the customary rules on the issue, [...] that attacks in which civilians are targeted, as well as indiscriminate attacks on cities, towns, and villages, may constitute persecutions as a crime against humanity."[76] The Appeals Chamber repeated this finding in *Kordić*.[77] The Trial Chamber notes that at this juncture of the *Blaškić* judgement the Appeals Chamber referenced, but made nothing conditioned upon, the fact that "unlawful attacks on civilians and civilian objects are also charged later in the Indictment in

[69] *Blaškić*, Second Amended Indictment, 25 April 1997, para. 6.
[70] *Blaškić* Appeal Judgement, para. 156.
[71] *Blaškić* Appeal Judgement, para. 156.
[72] *Blaškić* Appeal Judgement, para. 156, where the Appeals Chamber stated "a widespread and systematic attack against the civilian population is a chapeau requirement for a crime against humanity, but the Prosecution charged attacks on cities, towns, and villages as separate acts of persecution as a crime against humanity in Count 1 of the Indictment" (emphasis added), *ibid.*
[73] Gotovina Motion, paras 5-6; see also para. 8.
[74] Gotovina Motion, paras 5-8; Gotovina Reply, paras 8, 13, 15; Gotovina Response, para. 10.
[75] *Blaškić* Appeal Judgement, para. 156, first sentence, emphasis added. Thus, the Appeals Chamber referred to the heading above paragraph 6.1. of the *Blaškić* indictment.
[76] *Blaškić* Appeal Judgement, para. 159.
[77] *Kordić* Appeal Judgement, paras 104 (referring to *Blaškić* Appeal Judgement, paras 157-159) and 672.

Counts 2-4, as violations of the laws or customs of war."[78] In this Trial Chamber's opinion, therefore, there is no doubt that the issue which the Appeals Chamber was considering was solely whether the *actus reus* of persecution may also be constituted by "attacks on cities, towns, and villages". On this basis, the Trial Chamber rejects the Defence argument "that ['unlawful attacks on civilians and civilian objects]' as an *actus reus* of persecution must be specifically charged in an indictment."[79]

25. The Trial Chamber now turns to the issue whether the *actus reus* of persecution under Count 1 of the indictment is correctly reflected in paragraph 126 of the pre-trial brief. The Trial Chamber considers that while the term "unlawful attacks on civilians and civilian objects" does not correspond to the terms used in the indictment, and may in fact be confusing in that it reminds of the crime under Article 3 of the Statute, there is no doubt that the Prosecution does not intend to charge anything under Count 1 but persecutions as a crime against humanity pursuant to Article 5(h) of the Statute. This is clear from the Prosecution's own stipulations that it equates "unlawful attacks on civilians and civilian objects", as stated in its pre-trial brief, with "shelling", as pleaded in the indictment.[80] While the pre-trial brief rather inelegantly makes use of this term, in view of the Prosecution's stipulations the pre-trial brief need not be corrected. The use of the term "unlawful attacks on civilians and civilian objects" in the pre-trial brief does not include, and clearly is not intended to include, a charge of unlawful attacks as punishable under Article 3.[81] The Trial Chamber leaves it open to which extent it would accept defences which would have been appropriate in relation to such a charge, had it existed within the indictment.

26. As a consequence, it is not required for the Prosecution to reference, to use the Defence's term, "Hague Law" in order to charge "unlawful attacks on civilians and civilian objects" as a factual allegation or a 'modality' of the *actus reus* of persecution under Count 1. It is clear that the Trial Chamber could not convict under Count 1 for unlawful attacks on civilians and civilian objects, a violation of the laws and customs of war pursuant to Article 3 of the Statute and Article 51(2) of Additional Protocol I to the Geneva Conventions, but only for the crime of persecutions pursuant to Article 5(d) of the Statute. The Trial Chamber finds that the use of this term in the pre-trial brief does not amount to a new charge and that the Prosecution would not on this basis be required to seek leave to amend the indictment to include one or several counts based on Article 3 of the Statute. In this context, the Trial Chamber considers that the Prosecution's oral submissions at the motion hearing concerning jurisdiction on 28 February 2007 were correct, that is "[t]he fact that the Prosecutor has not charged the shelling, for example, as a separate war crime does not mean

[78] *Blaškić* Appeal Judgement, paras 156, fn. 323, and 159.
[79] Gotovina Motion, para. 5. See *supra*, para. 6.
[80] Prosecution Response, para. 14; Motion Hearing, 28 February 2007, T. 150.

that the acts were legal. Whether or not the shelling caused deportation, forcible transfer, or formed part of a persecutory campaign is a matter of fact which must be determined at the trial on the basis of the evidence presented."[82]

27. The Trial Chamber now turns to the Defence's submission, which it bases on the *Kupreškić* Appeal Judgement, that "while the Prosecution does not need to separately charge each underlying act of persecution, it must sufficiently particularize 'each basic crime that makes up the general charge of persecution'."[83] The Trial Chamber considers that the Defence misreads *Kupreškić* on this point. What the Appeals Chamber said was that while "it is not sufficient for an indictment to charge a crime in generic terms [...] the Prosecution must [...] particularise the material facts of *the alleged criminal conduct of the accused* that, in its view, goes to the accused's role in the alleged crime."[84] The Trial Chamber recalls its holding that:

> The materiality of a particular fact depends on the nature of the Prosecution case. A decisive factor in this respect is the nature of the alleged criminal conduct charged against the accused and, in particular, the proximity of the accused to the events alleged in the indictment. 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.[85]

The Trial Chamber does not find any reason to divert from this view and considers that it is not incumbent upon the Prosecution, as incorrectly paraphrased by the Defence, to particularise "*each basic charge* that makes up the general charge of persecution".[86] The jurisprudence does not require this. Rather, the Prosecution is required to plead the material facts of the accused's alleged criminal conduct in relation to the crime charged "with enough detail to inform a defendant clearly of the charges against him so that he may prepare his defence".[87] The Defence's arguments are therefore rejected.

28. The Trial Chamber considers that the description in paragraph 126 of the pre-trial brief does not amount to an amendment of the indictment. In particular, and in addition to paragraphs 29 and 35 of the indictment where reference is made to shelling of civilian areas, the Trial Chamber notes

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[81] See *supra* para. 6, referring to Gotovina Motion, para. 8.
[82] Motion Hearing, 28 February 2007, T. 150, cited in the Gotovina Motion, para. 12.
[83] Gotovina Reply, para. 11 which incorrectly paraphrases the *Kupreškić* Appeal Judgement, para. 98. See also *supra* para. 9.
[84] *Kupreškić* Appeal Judgement, para. 98 (emphasis added), also quoted in the Gotovina Reply, para. 10.
[85] Jurisdiction Decision para. 8 (footnotes omitted refer to *Kupreškić* Appeal Judgement, paras 89-90; *Blaškić* Appeal Judgement, para. 210; *Prosecutor v. Milorad Krnojelac*, Case No. IT-97-25-PT, Decision on preliminary motion on form of amended indictment, filed on 11 February 2000, para. 18; *Prosecutor v. Momčilo Krajišnik*, Case No. IT-00-39-PT, Decision concerning preliminary motion on the form of the indictment, filed on 1 August 2000, para. 9; *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, filed on 20 February 2001, para. 18; *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-PT, Decision on motion by Vojislav Šešelj challenging jurisdiction and form of indictment, filed on 3 June 2004, para. 23).
[86] Gotovina Reply, para. 11 (emphasis added).
[87] Jurisdiction Decision, para. 7, referring, *inter alia*, to *Kupreškić* Appeal Judgement, para. 88, and *Blaškić* Appeal Judgement, para. 209, with further references.

that paragraphs 12, 14, 18(a), 19(d), 20(c), 32, 33, and 34 also make references to acts which may, depending on the evidence to be adduced at trial, be considered as "unlawful attacks on civilians and civilian objects".[88] As noted earlier, while this term may be confusing due to its resemblance to the crime under Article 3 of the Statute, the Trial Chamber considers that the acts described in the mentioned paragraphs fall within the term.[89] These paragraphs are referred to in Count 1 (paragraph 49). The Defence submissions in this respect are therefore rejected.

29. To conclude, the Trial Chamber does not accept the Defence's submission that the inclusion of "unlawful attacks on civilians and civilian objects" in the pre-trial brief amounts to a new charge in the indictment.

C. Gotovina Motion – Paragraphs 107-108 of the pre-trial brief

30. The Trial Chamber recalls its previous finding that:

> 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.[90]

The Trial Chamber also recalls its finding that:

> In light of [the factual allegations in paragraphs 22-28, 34-35, and 56 of the indictment], 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.[91]

31. The Trial Chamber notes that the Defence repeats its earlier arguments concerning a state of *debellatio* in Croatia subsequent to the conclusion of Operation Storm.[92] The Trial Chamber will not again address these arguments but refers to its previous finding that "[t]he arguments of both the

[88] In this respect, the Trial Chamber considers that the Defence is incorrect in submitting that the Prosecution's reference in paragraph 126 of the pre-trial brief to paragraph 631 of the *Kupreškić* Trial Judgement is "inapposite since it concerns destruction of property and not unlawful attacks against civilians", Gotovina Motion, para. 5, fn. 3. The Trial Chamber notes that the *Kupreškić* Trial Chamber held in that paragraph that that case concerned "the comprehensive destruction of homes and property [in Ahmići]. Such an attack on property in fact constitutes a destruction of the livelihood of a certain population. This may have the same inhumane consequences as a forced transfer or deportation. Moreover, the burning of a residential property may often be committed with a recklessness towards the lives of its inhabitants". The *Kupreškić* Trial Chamber had previously found that there had been intense shelling of homes and civilian property in Ahmići on 16 April 1993 (see for instance paras 163, 228, 241) and that the purpose of the attack on Ahmići was "to destroy as many Muslim houses as possible, to kill all the men of military age, and thereby prompt all the others to leave the village and move elsewhere. The burning of the Muslim houses and the killing of the livestock were clearly intended to deprive the people living there of their most precious assets", para. 631.

[89] The Trial Chamber notes that "shelling of civilians" is also listed in paragraph 126 of the pre-trial brief as an "other inhumane act" under persecution. This does not affect the Trial Chamber's findings in relation to the Defence's submissions regarding paragraph 126.

[90] Decision on Ante Gotovina's preliminary motions alleging defects in the form of the Joinder Indictment, 19 March 2007 ("Form of the indictment decision"), para. 56, with further references.

[91] Form of the indictment decision, para. 58.

[92] Gotovina Response, para. 22, see *supra* para. 12.

Gotovina, and Čermak and Markač Defence concerning the conduct of hostilities at the time of the alleged crimes relate to the question of when the alleged armed conflict ceased to exist. As noted above, this is an issue to be dealt with at trial, as is the question of the intensity of the conflict."[93]

32. It is true, as the Defence submits, that paragraph 107 of the pre-trial brief refers to Bosnia and Herzegovina and in particular to two military offensives carried out in the western parts thereof during September and October 1995.[94] However, the Trial Chamber does not consider this to contradict or to expand the indictment's pleading of the existence of an armed conflict in Croatia. Rather, by including such information in the pre-trial brief, the Prosecution has complied with Rule 65 *ter*(E)(i) of the Rules. These offensives are described against the background that the "[Army of the RSK] continued to pose a threat to the borders of Croatia".[95] The fact that the pre-trial brief states that Croatian forces co-operated with Bosnian-Muslim forces during these offensives in order to secure the borders of Croatia and even to capture Serb-held territory in the relevant areas of Bosnia and Herzegovina does not disturb this finding or the pleading of armed conflict.[96] With respect to the Defence's submissions concerning Eastern Slavonia, the Trial Chamber holds that paragraph 108 of the pre-trial brief makes reference to this area in connection with peace negotiations carried out in late 1995. As such, this does not affect the pleading of armed conflict. The Trial Chamber recalls in this connection that paragraph 13 of the indictment defines the "Krajina region" for the purposes of the indictment as "a part of the area in Croatia that was self-proclaimed as the 'Republika Srpska Krajina' (RSK) and that was heavily settled by Serbs" and that paragraph 56 of the indictment pleads 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." The Trial Chamber also recalls that each count contains the same temporal restriction: "[f]rom at least July 1995 to about 30 September 1995".

33. The Trial Chamber considers in this respect that the armed conflict pleaded in the indictment was not an isolated event and that viewing it in a broader context does not amount to a change of the geographical or temporal scope of the crimes charged. The Trial Chamber recalls its order to the Prosecution pursuant to Rule 73 *bis*(D) to reduce the indictment, whereby the Trial

[93] Jurisdiction Decision, para. 75, referring to *Prosecutor v. Fatmir Limaj, Haradin Bala and Isak Musliu,* Case No. IT-03-66-T, Judgement, 30 November 2005, para. 90, where it was held that "[c]onsistently with decisions of other chambers of the Tribunal and of the ICTR, the determination of the intensity of a conflict and the organisation of the parties are factual matters which need to be decided in light of the particular evidence and on a case-by-case basis".

[94] The offensives referred to are "the large scale Maestral offensive from 8 to 15 September 1995 to secure the borders and to captuire [*sic*] Serb-held areas in Western BiH" and "the Junzi Potez (Southern Sweep) offensive, which was conducted from 8 to 15 October 1995 in western BiH".

[95] Pre-trial brief, para. 107.

[96] The Trial Chamber also notes that paragraph 27 of the indictment refers to BiH and to the western areas thereof adjacent to the Knin municipality in Croatia where Operation *Lijeto* was carried out "from spring 1995 onwards". In this context, the Trial Chamber notes that the Defence is incorrect to submit that "[t]he indictment [...] makes no mention whatsoever of [...] Bosnia-Herzegovina", Gotovina Motion, para. 18.

Chamber ordered the Prosecution not to lead evidence on allegations relating to October and November 1995, with the exception of relevant evidence relating to pattern, intent or knowledge under Rule 93.[97] In this respect, the Trial Chamber accepted that the Prosecution could lead evidence "concerning, for example: (i) crimes in August and September 1995 that *continued* into October and November [...] or (iii) evidence that an accused was aware of continuing crimes".[98] The Trial Chamber therefore disagrees with the Defence that paragraphs 107 and 108 amount to "a new theory on the existence of an armed conflict"[99] and concludes that these paragraphs are within what the Trial Chamber has considered as the indictment's pleading on the existence of an armed conflict. Thus, the crimes with which the accused are charged are pleaded with sufficient clarity as having been committed in the course of an armed conflict between Croatian forces and forces of the Republika Srpska Krajina in the Krajina region of the Republic of Croatia "[f]rom at least July 1995 to about 30 September 1995".[100]

D. Prosecution Motion – Pleading of joint criminal enterprise

34. The Trial Chamber agrees with the Prosecution that the proposed amendments in relation to joint criminal enterprise do not add any new factual or legal charges or allegations. Rather, the amendments serve to clarify the indictment against the background of the caselaw that has meanwhile developed. With regard to the proposed added reference to the "military police", the Trial Chamber considers that this does not add anything which is not elsewhere pleaded in the indictment. The Trial Chamber further considers the Defence's argument that the proposed amendments are "an academic exercise rather than adequate notice to General Gotovina" to be irrelevant. The requested amendments are thus granted.

E. Prosecution Motion – Pleading of the nature of the persecutory acts

35. The Trial Chamber considers that the inclusion of "unlawful attacks on civilians and civilian objects" in proposed paragraph 49 will not amount to a new basis for conviction. Even if only the acts charged as "unlawful attacks against civilians and civilian objects" were proved under Count 1, together with the requisite discriminatory intent, the Trial Chamber would not be able to enter a conviction under Article 3 of the Statute and Article 51(2) of Additional Protocol I, but only for the

[97] Order pursuant to Rule 73 *bis*(D) to reduce the indictment, 21 February 2007, p. 2.
[98] *Id*, p. 3 (emphasis added).
[99] Gotovina Motion, para. 2, see *supra* para. 10.
[100] Indictment, para. 56. The Trial Chamber recalls that paragraph 15 of the indictment pleads that the joint criminal enterprise with which the accused are charged "was in the process of being conceived, planned and prepared by at least July 1995 and was fully implemented in August 1995 and thereafter." The indictment also pleads in paragraph 12 that the accused participated in the alleged joint criminal enterprise "[f]rom at least July 1995 to September 1995". See further paragraph 28 in relation to the planning and implementation of Operation Storm.

crime of persecutions under Article 5(h) of the Statute.[101] The Trial Chamber therefore finds that it does not constitute a "new charge" to plead "unlawful attacks on civilians and civilian objects" as proposed by the Prosecution.

36. With regard to the proposed amendment to include references to the "imposition of restrictive and discriminatory measures", "unlawful detentions", and "disappearances", the Trial Chamber notes that such acts are included in paragraphs 18(b), 32, 34 and 36 of the indictment. These are therefore not new charges and the Trial Chamber grants the amendments.

37. The Trial Chamber finds that it would not result in unfair prejudice to the Accused to grant the proposed amendments to the indictment. As explained, the amendments do not bring anything new to the indictment but amount only to a restructuring of what is already present in the indictment in order to further improve the understanding thereof for the Defence. As the Trial Chamber has found that none of the proposed amendments amounts to the addition of a new charge in the indictment, it does not fall to consider whether the amendments meet the *prima facie* standard of Article 19 of the Statute.

[101] In this respect, the situation is different from that described in *Halilović* Decision, para. 35. See *supra* para. 21.

IV. DISPOSITION

38. The Trial Chamber **DENIES** the Gotovina Motion. The Trial Chamber **GRANTS** the Prosecution Motion and **ORDERS** the Prosecution to file the Proposed Indictment within one week of the filing of this decision.

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

Judge Alphons Orie
Presiding

Dated this fourteenth day of February 2008
At The Hague
The Netherlands

[Seal of the Tribunal]