IT-08-91-PT
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IT-04-79-PT
D17027-D19003
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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 Nos. IT-04-79-PT, IT-99-36/2-PT

Date: 23 September 2008

Original: English

IN TRIAL CHAMBER II

Before: **Judge O-Gon Kwon, Presiding**
Judge Kimberly Prost
Judge Ole Bjørn Støle

Registrar: **Mr Hans Holthuis**

Decision: **23 September 2008**

PROSECUTOR v. MIĆO STANIŠIĆ

PROSECUTOR v. STOJAN ŽUPLJANIN

PUBLIC

DECISION ON PROSECUTION'S MOTION FOR JOINDER AND FOR LEAVE TO CONSOLIDATE AND AMEND INDICTMENTS

The Office of the Prosecutor:

Ms Anna Richterova

Counsel for the Accused:

Mr Slobodan Zečević and Mr Slobodan Cvijetić for Mićo Stanišić
Mr Tomislav Višnjić for Stojan Župljanin

I. BACKGROUND

A. Motion for Joinder and for Leave to Consolidate and Amend Indictments

1. Trial Chamber II ("Chamber") of the International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991 ("Tribunal") is seized of the "Prosecution's Motion for Joinder and for Leave to Consolidate and Amend Indictments, with Confidential Annexes" filed by the Office of the Prosecutor ("Prosecution") on 16 July 2008 before the Chamber in both *Prosecutor v Mićo Stanišić* ("*Stanišić* case") and *Prosecutor v Stojan Župljanin* ("*Župljanin* case") ("Motion for Joinder"). Attached as Confidential Annex A to the Prosecution's Motion for Joinder is a proposed consolidated indictment ("Proposed Consolidated Indictment").

2. By this Motion for Joinder the Prosecution seeks (i) joinder of the trials of Mićo Stanišić and Stojan Župljanin pursuant to Rule 48 of the Rules of Procedure and Evidence ("Rules") and (ii) leave to amend the indictment against Župljanin and to file a consolidated indictment against the two Accused.

3. On 29 July 2008 Counsel for Mićo Stanišić ("Stanišić Defence") responded to the Motion for Joinder,[1] ("Stanišić Response to Motion for Joinder") submitting that should joinder be granted, a number of "necessary safeguards", proposed in the Stanišić Response should be applied. On the same day Counsel for Stojan Župljanin ("Župljanin Defence") filed "Župljanin Response to Joinder Motion" ("Župljanin Response to Motion for Joinder") opposing joinder on the grounds that it will interfere with Župljanin's right to a fair trial. On 4 August 2008, the Prosecution filed a "Motion for Leave to Reply and Proposed Consolidated Reply to Defence Responses to Prosecution's Motion for Joinder and for Leave to Consolidate and Amend Indictments" ("Reply").

B. Indictment against Mićo Stanišić

4. The initial indictment against Mićo Stanišić was confirmed on 25 February 2005. Mićo Stanišić surrendered and was transferred to the seat of the Tribunal on 11 March 2005. At his initial appearance on 17 March 2005 he entered a plea of not guilty on all charges.

5. On 4 May 2005 Mićo Stanišić filed a preliminary motion challenging the form of the Indictment.[2] On 19 July 2005, the Trial Chamber granted partly the motion and in accordance with the Trial Chamber's decision on 22 August 2005, the Prosecution filed an amended indictment

[1] *Prosecutor v Mićo Stanišić*, Case No: IT-04-79-PT, "Defence Response to Prosecution Motion for Joinder and Leave to Consolidate and Amend Indictments", 29 July 2008.

against Stanišić. Following a request for clarification from the Trial Chamber, on 22 September 2005 the Prosecution filed a revised indictment. On 11 October 2005 the Trial Chamber accepted the changes that had been made.[3] The indictment dated 22 September 2005 remains the operative indictment in the *Stanišić* case ("*Stanišić* Indictment").

6. Mićo Stanišić, allegedly Minister of the Serbian Ministry of Internal Affairs in Bosnia and Herzegovina ("RS MUP") at the relevant time, is charged with 10 counts of war crimes and crimes against humanity[4], allegedly committed between 1 April 1992 and 31 December 1992 in the territory of 18 municipalities in Bosnia and Herzegovina.[5] It is alleged that these crimes were committed in execution of a joint criminal enterprise ("JCE") in which Mićo Stanišić participated together with others including Stojan Župljanin, members of the Bosnian Serb leadership, of the Serbian Democratic Party, of the Yugoslav People's Army ("JNA") and RS MUP. It is alleged that the objective of this JCE was "to permanently remove and ethnically cleanse, by force or other means, Bosnian Muslims, Bosnian Croats and other non-Serbs from the territory of the planned Serbian state."[6] It is further alleged that Mićo Stanišić is individually responsible for the crimes charged pursuant to Article 7(1) of the Statute of the Tribunal ("Statute") and that he is criminally responsible as a superior of the direct perpetrators of the alleged acts and omissions, pursuant to Article 7(3) of the Statute.

7. On 9 May 2007 the Prosecution filed "Prosecution's Motion for Leave to Amend the Indictment" seeking leave to amend the indictment against Mićo Stanišić ("Motion to Amend the *Stanišić* Indictment"). On 14 February 2008 the Prosecution filed "Prosecution's Supplement to the Prosecution Motion of 9 May 2007 for Leave to Amend the Indictment, with Confidential Annex" seeking leave to make further amendments to the indictment against Stanišić ("Supplement to the Motion to Amend the *Stanišić* Indictment").

8. By a decision issued on 4 April 2008 the Chamber adjourned its adjudication of the Motion to Amend the *Stanišić* Indictment due to the Prosecution's failure to submit evidentiary material supporting some of the proposed amendments and invited the Prosecution to consider and propose a

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[2] *Prosecutor v Mićo Stanišić*, Case No: IT-04-79-PT, "Motion Objecting to the Form of the Indictment", 4 May 2005.
[3] *Prosecutor v Mićo Stanišić*, Case No: IT-04-79-PT, "Order Accepting Amendments to the Indictment", 11 October 2005.
[4] Namely persecutions, extermination, two counts of murder, two counts of torture, cruel treatment, deportation, and two counts of inhumane acts.
[5] These municipalities are: Prijedor, Kotor Varoš, Sanski Most, Ključ, Teslić, Donji Vakuf, Banja Luka, Bileća, Bosanski Šamac, Brčko, Doboj, Gaćko, Iljijaš, Pale, Vlasenica, Višegrad, Vogošća, and Zvornik. (*Stanišić* Indictment, para 15)
[6] *tanišić* Indictment, para 6.

reduction of the counts alleged in the indictment and their scope.[7] On 24 April 2008, the Prosecution responded to this invitation proposing to remove certain crime sites and incidents from the indictment against Stanišić.[8]

9. The Proposed Consolidated Indictment appended to the present Motion for Joinder incorporates the amendments proposed by the Prosecution in its Motion to Amend the *Stanišić* Indictment and in the Supplement to the Motion to Amend the *Stanišić* Indictment as well as the reductions of the indictment against Stanišić proposed by the Prosecution on 24 April 2008 and 20 May 2008.[9] Since the Chamber will review the Proposed Consolidated Indictment, the Motion to Amend the *Stanišić* Indictment and the Supplement to the Motion to Amend the *Statišić* Indictment have become moot.

C. Indictment against Stojan Župljanin

10. The initial indictment against Stojan Župljanin was confirmed on 14 March 1999. Stojan Župljanin was arrested on 11 June 2008 and on 21 June 2008 he was transferred to the seat of the Tribunal. At his initial appearance on 23 June 2008 he did not enter a plea. At his further appearance on 21 July 2008 Stojan Župljanin entered a plea of not guilty on all charges in the indictment.

11. Stojan Župljanin was originally indicted with Radoslav Brđanin and Momir Talić. Following the arrests of Brđanin and Talić an amended indictment against them and a separate amended indictment against Župljanin were confirmed on 20 December 1999. On 6 October 2004 with the leave of the Trial Chamber, the Prosecution filed an amended indictment against Župljanin, which is the operative indictment in this case ("*Župljanin* Indictment").

12. Stojan Župljanin, allegedly a commander of a regional security services centre in Banja Luka at the relevant time, is charged with 12 counts of crimes against humanity and violations of the laws or customs of war[10] alleged to have been committed in 13 municipalities of the so-called

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[7] *Prosecutor v Mićo Stanišić*, Case No: IT-04-79-PT, "Interim Decision on the Prosecution's Motion and Supplement for Leave to Amend the Indictment", 4 April 2008. *See* also *infra*, para 53.

[8] *Prosecutor v Mićo Stanišić*, Case No. IT-04-79-PT, "Prosecution's Response to Trial Chamber's Invitation to Reduce the Scope of its Indictment, with Confidential Annexes", 24 April 2008. Following a formal invitation by the Chamber pursuant to Rule 73*bis*(D), on 20 May 2008 the Prosecution filed a response requesting that the Chamber does not order further reductions of the indictment and that it grants the reductions already proposed by the Prosecution.

[9] *Prosecutor v Mićo Stanišić*, Case No. IT-04-79-PT, "Prosecution's Response to Trial Chamber's Invitation pursuant to Rule 73*bis*(D) with Confidential Annexes", 20 May 2008.

[10] Namely, persecutions, extermination, two counts of murder, two counts of torture, cruel treatment, deportation, two counts of inhumane acts, wanton destruction or devastation not justified by military necessity, and destruction or wilful damage to institutions dedicated to religion.

Autonomous Region of Krajina in Bosnia and Herzegovina.[11] It is alleged that Stojan Župljanin is individually responsible for the alleged crimes charged pursuant to Article 7(1) as well as criminally responsible as a superior, pursuant to Article 7(3) of the Statute. A basis for his responsibility under Article 7(1) is his alleged participation in a JCE, the alleged objective of which was "to eliminate and permanently remove, by force or other means, Bosnian Muslims and Bosnian Croats from the territory of the planned Serb state." Alleged members of this JCE include Mićo Stanišić, chiefs of public security services, members of the Bosnian Serb leadership, members of the JNA, and members of RS MUP, among others.

II. JOINDER

A. Submissions

1. Prosecution

13. The Prosecution submits that the requirements of Rule 48 of the Rules are satisfied in the present circumstances. It is submitted, in particular, that the common purpose of the JCE alleged in the *Stanišić* case and the common purpose of the JCE alleged in the *Župljanin* case are the same; that the timeframe of the JCE alleged in both cases is the same;[12] that each Accused is alleged to have been a member of the JCE alleged in each of the two indictments, that the period in which both Accused are alleged to have participated in the JCE is the same, and that both Accused are alleged to have held leadership positions at the RS MUP.[13] The Prosecution further submits that the Proposed Consolidated Indictment brings the charges against Stojan Župljanin further in line with those against Mićo Stanišić, charging Župljanin with the same 10 counts and on the basis of the same crime-base allegations in the same seven municipalities of the Autonomous Region of Krajina.[14]

14. The Prosecution further argues that joinder of the cases against the two Accused would serve the interests of justice by preventing duplication of evidence, by minimizing hardship to witnesses, by leading to judicial economy, and by ensuring consistency in judgements.[15]

15. Further, it is submitted that a joint trial would not interfere with the right of the Accused to be tried without undue delay as no Rule 73*bis* pre-trial conference or trial date have been scheduled in the *Stanišić* case, and as new lead counsel has been recently appointed in this case. It is

[11] These municipalities are: Banja Luka, Bosanska Krupa, Bosanski Novi, Bosanski Petrovac, Čelinac, Donji Vakuf, Ključ, Kotor Varoš, Prijedor, Prnjavor, Sanski Most, Šipovo, and Teslić. (*Župljanin* Indictment, para 5)
[12] Motion for Joinder, para 15.
[13] Motion for Joinder, para 16.
[14] Motion for Joinder, para 18.

submitted further that the Župljanin Defence will benefit from much of the work already accomplished in the *Stanišić* case and that the Prosecution's proposed Rule 65*ter* witness and exhibit lists, and witness protective measures for the two Accused will substantially overlap.[16] The Prosecution further seeks to rely on the fact that Mićo Stanišić is currently on provisional release.[17]

16. It is also argued by the Prosecution that joinder would not significantly increase the length or complexity of the trial, as a joint trial would only add two months to the time estimated by the Prosecution for completion of its case-in-chief in separate trials against each Accused.[18]

17. Finally, the Prosecution submits that it is unaware of any conflict of interest between the Accused that would result from the joinder of their cases.[19]

2. Stanišić Defence

18. The Stanišić Defence submits that it does not, in principle, oppose joinder of the two cases, provided that certain conditions, to be discussed below, are met.

3. Župljanin Defence

19. The Župljanin Defence accepts that the threshold requirements for joinder under Rule 48 are met in that the crimes charged are part of the same transaction but nevertheless opposes joinder on the grounds that it will interfere with Župljanin's right to a fair trial. It is submitted that there will not be enough time for Župljanin to prepare for trial if the two cases are joined.[20]

20. The Župljanin Defence further challenges the Prosecution submission that Župljanin will need less time than the Stanišić Defence to prepare for trial, referring to the Prosecution submissions that evidence against Stanišić alone is also relevant to Župljanin as it goes towards proving the existence of the alleged JCE.[21]

21. Finally, the Župljanin Defence challenges the Prosecution's assertion that there will be no conflict of interest between the defences of the two Accused.[22]

[15] Motion for Joinder, paras 19-30.
[16] Motion for Joinder, paras 31-34.
[17] Motion for Joinder, paras 31-35.
[18] Motion for Joinder, paras 28, 36-38.
[19] Motion for Joinder, paras 39-41.
[20] Župljanin Response to Motion for Joinder, paras 2, 4.
[21] Župljanin Response to Motion for Joinder, para 16.
[22] Župljanin Response to Motion for Joinder, para 17.

4. Reply

22. In its Reply the Prosecution submits that while appropriate time should be allocated for counsel to adequately prepare for trial, the particular circumstances of both cases, including the recent appointment of lead counsel, that no trial date has been set in either case, the work already accomplished in the *Stanišić* case, the more limited charges against Župljanin, and Stanišić's provisional release, suggest that joinder would not unduly delay the trial of either Accused.[23]

B. Law on joinder

23. Pursuant to Rule 48 of the Rules persons accused of the same crime or different crimes committed in the course of the same transaction may be jointly charged and tried. Rule 2 defines the term transaction as "[a] number of acts or omissions whether occurring as one event or a number of events, at the same or different locations and being part of a common scheme, strategy or plan." Neither Rule 2 nor Rule 48 requires that the events constituting the "same transaction" take place at the same time or that they be committed together.[24] The "same transaction" may be found to exist even where the alleged crimes of the relevant accused are different, or are carried out in different geographical areas or over different periods of time.[25] It is not necessary for all the facts to be identical.[26] Further, as held by the Appeals Chamber, the particular role an accused is alleged to have played in the "same transaction" is not determinative and there is no requirement that the accused is alleged to have made a substantial contribution to the alleged joint criminal enterprise.[27]

24. A determination whether the charges against more than one accused should be joined pursuant to Rule 48, should be based upon the factual allegations contained in the indictments and related submissions.[28]

25. If the requirements of Rule 48 are satisfied, the Trial Chamber may determine in the exercise of its discretion whether to grant joinder or leave the cases to be tried separately. This discretion must be exercised in accordance with the provisions of the Statute and the Rules.

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[23] Reply, para 7.
[24] *Prosecutor v Ante Gotovina; Prosecutor v Ivan Čermak and Mladen Markač*, Case Nos. IT-01-45-AR73.1; IT-03-73-AR73.1; 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 ("*Gotovina* Appeals Decision on Joinder"), para 16.
[25] *Gotovina* Appeals Decision on Joinder, paras 21, 7; *Prosecutor v Vinko Pandurević and Milorad Trbić*, Case No IT-05-86-AR73.1, "Decision on Vinko Pandurević's Interlocutory Appeal Against the Trial Chamber's Decision on Joinder of Accused", 24 January 2006 ("*Pandurević* Decision on Joinder"), para 17.
[26] *Prosecutor v Ante Gotovina; Prosecutor v Ivan Čermak and Mladen Markač*, Case Nos. IT-01-45-PT; IT-03-73-PT, Decision on Prosecution's Consolidated Motion to Amend the Indictment and for Joinder, 14 July 2006 ("*Gotovina* First Instance Joinder Decision"), para 55.
[27] *Gotovina* Appeals Decision on Joinder, para 22. *See* also *Pandurević* Decision on Joinder, para 18.
[28] *Gotovina* Appeals Decision on Joinder, paras 16. *See* also *Pandurević* Decision on Joinder, para 13; *Gotovina* Appeals Decision on Joinder, para 21.

Relevant in this respect is Rule 82 of the Rules which provides that "(A) [i]n joint trials, each accused shall be accorded the same rights as if such accused were being tried separately" and "(B) [t]he Trial Chamber may order that persons accused jointly under Rule 48 be tried separately if it considers it necessary in order to avoid a conflict of interests that might cause serious prejudice to an accused, or to protect the interests of justice."

26. The jurisprudence of the Tribunal has identified the following factors that may be considered by a Trial Chamber in the exercise of its discretion: (i) protection of the rights of the accused pursuant to Article 21 of the Statute; (ii) avoidance of any conflict of interests that might cause serious prejudice to an accused; (iii) protection of the interests of justice.[29] Factors that a Trial Chamber may look to in assessing the interests of justice requirement include (i) avoiding the duplication of evidence;[30] (ii) promoting judicial economy;[31] (iii) minimising hardship to witnesses and increasing the likelihood that they will be available to give evidence;[32] and (iv) ensuring consistency of verdicts.[33]

C. Discussion

1. Are the acts and omissions charged in the *Stanišić* Indictment and in the *Župljanin* Indictment part of the same transaction?

27. The Prosecution has alleged and neither of the Defences has contested that the acts and omissions alleged in the *Stanišić* Indictment and in the *Župljanin* Indictment were carried out in the course of the same transaction.

28. In the view of the Chamber, the acts and omissions charged in both indictments are alleged to have been carried out in execution of the same common plan, in which both Accused are alleged to have participated, by both indictments. Further, there is a substantial overlap in the allegations supporting the charges in the two indictments. Both indictments relate to the same time period of 1 April 1992 until at least 31 December 1992. Acts and omissions alleged to have taken place in seven of the 18 municipalities charged in the *Stanišić* Indictment are essentially the same or of the

[29] *Gotovina* Appeals Decision on Joinder, para 17.
[30] *Gotovina* Appeals Decision on Joinder, para 17.
[31] *Gotovina* Appeals Decision on Joinder, para 17.
[32] *Pandurević* Decision on Joinder, paras 8, 22. In the *Gotovina* Appeals Decision on Joinder, para 48, the Appeals Chamber dismissed an argument, based on the fact that witnesses would face successive cross-examinations, about potential hardship in a joint trial.
[33] *Gotovina* Appeals Decision on Joinder, para 17; *Prosecutor v Radoslav Brđanin and Momir Talić*, Case No: IT-99-36-PT, "Decision on Motions by Momir Talić for a Separate Trial and for Leave to File a Reply", 9 March 2000 ("*Talić* Separation Decision"), para 31. As noted by the Appeals Chamber in the *Pandurević* Decision on Joinder, "two judges, both acting reasonably, can come to different conclusions on the basis of the same evidence." (quoting *Prosecutor v Duško Tadić*, Case No. IT-94-1-A, Appeals Judgement, 15 July 1999, para 64)

same nature as acts and omissions allegedly committed in seven of the 13 municipalities included in the *Župljanin* Indictment.

29. In view of the above, the Chamber is satisfied that the acts and omissions alleged in the *Stanišić* Indictment and in the *Župljanin* Indictment are part of the same transaction. The requirements of Rule 48, therefore, have been satisfied.

2. Will joinder of the *Stanišić* Indictment and the *Župljanin* Indictment be unfair to the Accused?

(a) Right to adequate time for preparation of the defence and right to trial without undue delay

30. The Stanišić Defence does not oppose joinder *per se* but argues, *inter alia*, that joinder should not result in any undue delay prior to the commencement of trial, while at the same time, it is submitted, appropriate time should be allocated for counsel to adequately prepare for trial. The Župljanin Defence opposes joinder arguing that it will impede on Stojan Župljanin's fair trial rights by forcing him to trial without adequate time for preparation. The essential question for consideration is whether joining the two cases will infringe upon the rights of either Accused in so far as the trial date may have to be significantly delayed or advanced from what would otherwise be expected for separate hearings.

31. It is evident that the *Stanišić* case is well advanced in trial preparations, particularly in contrast to the *Župljanin* case, given the relatively recent arrest of the Accused in the latter case. With reference to Župljanin the pre-trial phase has commenced only recently with counsel having been appointed in June. It is this difference in trial preparation which is at the core of the objections raised by the Župljanin Defence in response to the Motion for Joinder. The Župljanin Defence has indicated that at least a year will be required for full trial preparation. It is argued that joinder will necessarily result in the trial proceedings commencing too soon in prejudice to the Accused right to have adequate time to prepare a defence.

32. Logically as well as practically, joinder may result in a delay of proceedings, if one of the cases proposed to be joined is ready for trial whereas the other one is not. Whether such a delay may be unfair to the accused is a practical question which must be considered in light of the particular circumstances of a case. In contrast, joinder, in and of itself, may not result in an unfair advancement of the proceedings in a case. Unfair or unjust advancement of a trial is an issue not limited to joinder and may arise in any case. Sufficient time to prepare for trial should be allowed for every accused, irrespectively of whether he is tried jointly or in a separate trial. This is a matter of pre-trial management, to be determined by the Chamber at the appropriate stage of the proceedings.

33. With this in mind, it is important to note that in the *Stanišić* case, new lead and co-counsel were appointed only in June and July 2008, respectively. As was evidenced at a status conference held on 1 September 2008, this relatively new defence team is understandably still in the process of receiving and reviewing all the relevant materials and preparing for trial.[34] Thus, while the pre-trial procedures in terms of filings, motions and disclosure have been generally completed, additional time is clearly required for defence preparations. Even in the absence of any joinder, it would be necessary to take this into account in establishing any trial date for the *Stanišić* case.

34. The question of how much time is needed for adequate trial preparation on the part of the Župljanin Defence is a separate and distinct matter, to be determined during the pre-trial proceedings. Irrespectively of whether joinder is granted the Accused Župljanin should be allowed sufficient time to prepare for trial. The Chamber observes in this respect that while the two cases relate to the same transaction, the *Stanišić* case is broader in scope and complexity. This obviously impacts on the time required by counsel in each case to become properly aware of the case to meet and to prepare accordingly.

35. Therefore, while there is a difference in terms of the time that might be needed for adequate defence preparations in each case, overall that difference is not particularly notable.

36. Taking all these factors into account, the Chamber is of the view that joinder would not result in any significant delay or advancement of the trial date for either case. Therefore, the Chamber is of the opinion that joinder would not prejudice the rights of either Accused to a trial within a reasonable time or to have adequate opportunity to prepare a defence.

(b) Conflict of interests

37. The Župljanin Defence challenges the Prosecution's submission that it is unaware of any conflict of interest between the Accused that would result from the joinder, but it submits, that at this time it is in no position to assess whether conflict of interest may arise.

38. When conflict of interest is alleged the burden rests on the accused to demonstrate its existence and the fact that it might cause the accused serious prejudice.[35] In this case the Župljanin Defence has put forward no substantive arguments to that effect nor pointed to any circumstances that would evidence a conflict of interest. A general proposition advanced by the Župljanin Defence that joinder may result in a conflict of interests is not sufficient. In addition, nothing in the

[34] Status conference, 1 September 2008, T 144-145.
[35] *Gotovina* First Instance Joinder Decision, para 64.

facts before the Chamber would suggest such a conflict. Therefore, there is no basis for denial of joinder on this ground.

(c) Other considerations

39. The Stanišić Defence seeks to introduce a number of conditions to be imposed by the Chamber if joinder is granted. It is submitted, in particular, that joinder should not result in any increase in the size or the nature of the case against Mićo Stanišić, that Mićo Stanišić should not be faced with more or different evidence (than proposed evidence already included in the Prosecution Rule 65*ter* lists) and that evidence that may be proposed by the Prosecution in relation to the case against Župljanin should not be taken into account by the Chamber in respect of Stanišić.

40. At the outset the Chamber observes that the joinder of the cases against the two Accused *per se* cannot logically amount to any change in the size or nature of the case against either of the Accused, in so far as it simply involves merging together the allegations contained in the existing indictments. As a result, no further consideration need be given to this issue under the topic of joinder.

41. A similar conclusion is reached regarding the submission as to the impact of defence evidence adduced by either of the Accused with reference to the other. The jurisprudence of the Tribunal is long settled that a joint trial does not require a joint defence and necessarily envisages the case where each accused may seek to blame the other.[36] As held by the Appeals Chamber, the mere possibility of mutually antagonistic defences does not in and of itself constitute a conflict of interests capable of causing serious prejudice.[37]

42. In so far as the Stanišić Defence seeks to introduce limitations on amendments to the Prosecution's Rule 65*ter* lists or on the use which can be made of the evidence adduced with reference to the Accused Župljanin, the Chamber sees no basis to these submissions. In particular, at this stage of the proceedings the list of witnesses and evidence remains open to amendment through the application of the appropriate Rules. Further, nothing in the jurisprudence of the Tribunal would support the wide ranging restrictions proposed as to the use that can be made of evidence adduced against Župljanin with reference to the Accused Stanišić. The nature of every joinder case is such that evidence will be tendered and assessed with respect to admissibility and

[36] *Talić* Separation Decision, para 29. *See* also *Prosecutor v Vujadin Popović*, Case No. IT-02-57-PT; *Prosecutor v Ljubiša Beara*, Case No. IT-02-58-PT; *Prosecutor v Drago Nikolić*, Case No. IT-02-63-PT, *Prosecutor v Ljubomir Borovčanin*, Case No. IT-02-64-PT, *Prosecutor v Zdravko Tolimir, Radivoje Miletić and Milan Gvero*, Case No. IT-04-80-PT; *Prosecutor v Vinko Pandurević and Milorad Trbić*, Case No. IT-05-86-PT, Decision on Motion for Joinder, 21 September 2005, ("*Popović et al.* Joinder Decision"), para 33.

[37] *Gotovina* Appeals Decision on Joinder, para 37.

weight in relation to each Accused in accordance with the Rules of Procedure and Evidence. In the circumstances no such blanket restrictions on admissibility or use of evidence with reference to one of the Accused can be justified.

43. The Stanišić Defence submits that should joinder be granted the time allowed for cross-examination of Prosecution witnesses by the Stanišić Defence should not be reduced by reason of the involvement of a co-accused in the proceedings. Considerations such as these have no place at the stage of joinder. It is for the Trial Chamber to consider such issues as part of management at trial.

44. Finally, the Stanišić Defence submits that insofar as the Prosecution is now alleging a relationship of subordination between Mićo Stanišić and Stojan Župljanin and joint involvement in a JCE, the Prosecution should be ordered to provide full and clear particulars as regards the nature and scope of this alleged relationship. In the view of the Chamber, this issue raised by the Stanišić Defence does not pertain to any potential prejudice to the Accused that may result from joinder.

45. In view of the above, the Chamber is satisfied that joinder would not cause prejudice to the Accused.

3. Is joinder in the interests of justice?

(a) Judicial economy

46. As discussed earlier, a review of the *Stanišić* Indictment and of the *Župljanin* Indictment reveals that a number of factual allegations are common to the two indictments. No witness list has been submitted by the Prosecution in the *Župljanin* case. The Prosecution has identified, however, some 11 expert witnesses, 31 linkage witnesses and 12 crime-base witnesses, who, it is submitted, are common to both cases, and whose evidence may have to be called twice if two separate trials are conducted. The Chamber accepts that conducting a joint trial is likely to avoid repetition of at least part of this evidence.

47. Further, while a joint trial may be expected to last longer, it is likely to be completed in a much shorter time than two separate trials.

(b) Minimizing hardship to witnesses

48. While no witness list has been submitted by the Prosecution in the *Župljanin* case, it appears from the commonalities between the two indictments and from the Prosecution's submissions outlined above that a number of witnesses may be expected to be called to give evidence in both

cases. Conducting one joint trial instead of two separate trials, therefore, would lessen the hardship associated with these witnesses giving evidence before the Tribunal.

(c) Other considerations

49. The jurisprudence of the Tribunal has recognized that there is a fundamental and essential public interest in ensuring consistency in verdicts.[38] A joint trial can help to ensure a consistent approach regarding the evaluation of evidence, factual findings and sentences.[39] Unless there is a conflict of interests or separate trials are otherwise necessary to protect the interests of justice such consistency is best achieved with all accused charged with acts committed in the same transaction being tried before the same Trial Chamber and on the same evidence.[40] The Chamber is satisfied that in the specific circumstances there is a significant overlap between the two cases and that a joint trial would help to achieve consistency in the evaluation of evidence and in verdicts.

D. Conclusion

50. In view of the above, the Chamber is satisfied that the requirements of Rule 48 have been satisfied. The Chamber is further satisfied that a joint trial will be fair to the Accused and that it will be in the interests of justice.

III. PROSECUTION REQUEST FOR LEAVE TO CONSOLIDATE AND AMEND INDICTMENTS

51. The Prosecution submits that if joinder is granted it will seek leave pursuant to Rule 50(A) of the Rules to submit the Proposed Consolidated Indictment, appended to the Motion.

A. Procedural background regarding the proposed amendments

52. As indicated, on 9 May 2007 the Prosecution filed its Motion to Amend the *Stanišić* Indictment.[41] On 14 February 2008 the Prosecution filed a Supplement to the Motion to Amend the *Stanišić* Indictment. By these submissions, the Prosecution seeks leave to amend the *Stanišić* Indictment. On 7 June 2007 and 20 February 2008, the Stanišić Defence filed responses to these submissions,[42] to which the Prosecution replied on 14 June 2007 and 25 February 2008.[43] The

[38] *Talić* Separation Decision, para 31. *See* also Gotovina First Instance Joinder Decision, para 79.
[39] *Gotovina* First Instance Joinder Decision, para 79.
[40] *Gotovina* First Instance Joinder Decision, para 79.
[41] Attached to the Motion to Amend the *Stanišić* Indictment is a proposed Second Amended Indictment.
[42] *Prosecutor v Mićo Stanišić*, Case No.: IT-04-79-PT, "Defence Response to Prosecution's Motion for Leave to Amend the Indictment", 7 June 2007, filed confidentially ("Response to the Motion to Amend the *Stanišić* Indictment"), and *Prosecutor v Mićo Stanišić*, Case No.: IT-04-79-PT, "Defence Response to Prosecution's Supplement to the Prosecution's Motion of 9 May 2007 for Leave to Amend the Indictment", 20 February 2008.

Proposed Consolidated Indictment reflects all amendments proposed in the Motion to Amend the *Stanišić* Indictment and the Supplement to it. The Chamber will review these amendments on the basis of the Proposed Consolidated Indictment.

53. By its decision of 4 April 2008 ("Interim Decision"),[44] the Chamber held that it was not in a position to make an assessment of the amendments sought by the Prosecution because the Prosecution had not submitted with the Motion to Amend the *Stanišić* Indictment, or the Supplement to it, evidentiary material supporting some of the proposed amendments and had not indicated which of the supporting material already disclosed to the Defence was relevant to other amendments.[45] The Chamber, therefore, adjourned its consideration of the Motion to Amend the *Stanišić* Indictment and the Supplement. By this decision the Chamber also suggested that the Prosecution propose means of reducing the scope of the *Stanišić* Indictment.[46] On 25 April 2008, the Prosecution filed confidentially its "Response to Trial Chamber's Invitation to Reduce the Scope of Its Indictment, with Confidential Annexes" ("Prosecution Response regarding the *Stanišić* Indictment"), which included material to support the amendments concerning a detention facility in Batković and an alleged killing in Kotlina, in the Gacko region.[47] The Prosecution also proposed measures to reduce the scope of the *Stanišić* Indictment.

B. Submissions regarding the proposed amendments

1. Prosecution

54. In its Motion to Amend the *Stanišić* Indictment the Prosecution submits that it seeks leave to clarify "the forms of responsibility charged in the Indictment" by:

(a) ceasing to allege that the members of the JCE alleged in the *Stanišić* Indictment included all physical perpetrators and "others whose conduct resulted in the commission of crimes", in light of the *Brđanin* Appeals Judgement;[48]

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[43] *Prosecutor v Mićo Stanišić*, Case No.: IT-04-79-PT, "Prosecution Request for Leave to Reply and Reply to Defence Response to Prosecution's Motion for Leave to Amend the Indictment", 14 June 2007 and "Prosecution's Motion for Leave to Reply and Proposed Reply to Defence Response to Prosecution's Supplement to the Prosecution's Motion of 9 May 2007 for Leave to Amend the Indictment", 25 February 2008.

[44] *Prosecutor v Mićo Stanišić*, Case No.: IT-04-79-PT, "Interim Decision on Prosecution's Motion and Supplement for Leave to Amend the Indictment", filed confidentially on 4 April 2008.

[45] Interim Decision, paras 9-11.

[46] Interim Decision, para 14.

[47] In relation to this Response the Defence filed confidentially, on 2 May 2008, its "Submission Regarding Prosecution's Response to Trial Chamber's Invitation to Reduce the Scope of Its Indictment, with Confidential Annexes". On 5 May 2008, the Prosecution filed confidentially a "Prosecution's Motion for Leave to Reply and Proposed Reply to Defence's Submission Regarding Prosecution's Response to Trial Chamber's Invitation to Reduce the Scope of Its Indictment, with Confidential Annexes".

[48] Motion to Amend the *Stanišić* Indictment, para 7.

(b) removing the second form of JCE liability alleged in paragraph 11 of the *Stanišić* Indictment;[49]

(c) clarifying the date at which the Accused Stanišić became a member of the alleged JCE;[50]

(d) adding a paragraph "detailing the specific acts of the Accused" which the Prosecution alleges constitute his participation in the alleged JCE, as well as instigating and/or aiding and abetting;[51] and

(e) adding explicit references to Mićo Stanišić's command responsibility in relation to each count[52] and specifying that the alleged commission of crimes by his subordinates, within the context of Article 7(3) of the Statute, includes all modes by which a crime may be carried out.[53]

55. The Prosecution also seeks to add a detention facility in Batković, claiming to have accidentally left it off the appropriate Schedule of the *Stanišić* Indictment, but to have included it in the Prosecution's Pre-Trial Brief.[54] The Prosecution also seeks the addition of "a mass killing" alleged to have occurred in Kotlina in Gaćko Municipality on 13 August 1992.[55] The Prosecution maintains that evidence on this incident came to light after the submission of the Motion to Amend the *Stanišić* Indictment.[56] It contends that the new allegations are a continuation of events at the Gaćko public security station charged in Counts 1 and 5 to 8 of the *Stanišić* Indictment, notice of which Mićo Stanišić already received.[57] The Prosecution submits that "the additional factual allegations result in no new theories of liability."[58]

[49] Motion to Amend the *Stanišić* Indictment, para 8.
[50] Motion to Amend the *Stanišić* Indictment, para 9.
[51] Motion to Amend the *Stanišić* Indictment, paras 11 and 16.
[52] Motion to Amend the *Stanišić* Indictment, para 13.
[53] Motion to Amend the *Stanišić* Indictment, para 14, referring to: *Prosecutor v. Ljube Boškoski and Johan Tarčulovski*, Case No.: IT-04-82-PT, "Decision on Prosecution's motion to amend the indictment and submission of proposed second amended indictment and submission of amended pre-trial brief", 26 May 2006, para 46; *Prosecutor v. Naser Orić*, Case No.: IT-03-68-T, Judgement, 30 June 2006, paras 299-301; *Prosecutor v. Vidoje Blagojević and Dragan Jokić*, Case No.: IT-02-60-A, Appeals Judgement, 9 May 2007 ("*Blagojević* Appeals Judgement"), para 280.
[54] Motion to Amend the *Stanišić* Indictment, para 17.
[55] Supplement to the Motion to Amend the *Stanišić* Indictment, para 8.
[56] Supplement to the Motion to Amend the *Stanišić* Indictment, para 8.
[57] Supplement to the Motion to Amend the *Stanišić* Indictment, para 12.
[58] Supplement to the Motion to Amend the *Stanišić* Indictment, para 12.

56. Lastly, the Prosecution seeks to correct "minor typographical errors or mistakes" in the indictment[59] and in Schedules B and C,[60] as well as in the confidential list of victims of the charged crimes, appended to the *Stanišić* Indictment.[61]

57. The Prosecution's stated position is that none of its amendments constitutes a new charge and that they clarify and re-organise information already in the indictment.[62] In particular, it is submitted that no new allegation is made which "could be the sole action or omission of the Accused that justifies his conviction".[63] In the alternative, it is submitted that, even if any change amounted to a new charge, it is far in advance of any trial commencement date.[64] As indicated earlier, these amendments are reflected in the Proposed Consolidated Indictment, appended to the Motion for Joinder.

58. In the Motion for Joinder the Prosecution makes submissions regarding the proposed amendments to the *Župljanin* Indictment. It submits that the Proposed Consolidated Indictment seeks to incorporate the charges against Župljanin in the text of the proposed Second Amended Indictment against Mićo Stanišić and to render them consistent with the relevant allegations against Stanišić.[65] It is submitted that the Proposed Consolidated Indictment charges Stojan Župljanin only with crimes committed in municipalities that overlap with municipalities charged in the *Stanišić* Indictment,[66] and that two counts previously charged against Župljanin have been removed.[67] The Prosecution submits further that the allegations concerning Župljanin's participation in the second type of JCE have been removed, that it has provided more information regarding Župljanin's participation in the JCE, and that the JCE allegations have been modified in light of the Appeals Chamber's jurisprudence.[68] It is submitted that the Proposed Consolidated Indictment also corrects some "minor typographical errors"[69], that the proposed amendments do not constitute new charges and will not cause unfair prejudice to the Accused.[70]

2. Stanišić Defence

59. In its Response to the Motion to Amend the *Stanišić* Indictment, the Stanišić Defence argues that the changes proposed by the Prosecution amount to new charges, thus requiring the submission

[59] Motion to Amend the *Stanišić* Indictment, para 18.
[60] Supplement to the Motion to Amend the *Stanišić* Indictment, para 6.
[61] Motion to Amend the *Stanišić* Indictment, para 19.
[62] Motion to Amend the *Stanišić* Indictment, para 22.
[63] Motion to Amend the *Stanišić* Indictment, para 23.
[64] Motion to Amend the *Stanišić* Indictment, para 26.
[65] Motion for Joinder, para 43.
[66] Motion for Joinder, paras 44, 49.
[67] Motion for Joinder, para 48.
[68] Motion for Joinder, paras 45-47.
[69] Motion for Joinder, para 50.

of additional supporting material and that they would result in unfair prejudice to Mićo Stanišić.[71] With regard to the proposed amendments to include further information on Mićo Stanišić's alleged participation in and contribution to the JCE, the Stanišić Defence submits that the additional allegations are different from those included in the *Stanišić* Indictment and introduce a distinct basis for conviction.[72] The Stanišić Defence's interpretation of the Prosecution's intention to explicitly allege command responsibility in relation to every count is that it expands Mićo Stanišić's responsibility under Article 7(3) of the Statute to also cover acts committed by non-subordinates.[73] The Stanišić Defence submits that the inclusion of an alleged detention facility at Batković in the proposed indictment, in connection with the alleged crime of persecutions constitutes a new charge, which could be a sole basis of conviction,[74] as do the new factual allegations about Kotlina.

60. In response to the Motion for Joinder, the Stanišić Defence submits that the references to "their subordinates" in paragraphs 23, 27, 30, 35, and 40 of the Proposed Consolidated Indictment should be changed to "their respective subordinates" to avoid ambiguity[75] and that the allegations in paragraphs 18 and 55 (that Stojan Župljanin was subordinated only to Mićo Stanišić or that he was a direct subordinate of Mićo Stanišić) do not form part of the case against Mićo Stanišić and that these allegations should be amended to reflect the current Prosecution case against Mićo Stanišić.[76]

3. Župljanin Defence

61. The Župljanin Defence does not make submissions on the Proposed Consolidated Indictment.

C. Law on amendment of indictment

62. Pursuant to Rule 50 of the Rules, the Prosecutor may amend an indictment at various stages of the proceedings. After the assignment of the case to a Trial Chamber, that Chamber's or its Judge's leave to amend the indictment is required. Pursuant to the Rule such leave shall not be granted unless the Trial Chamber or Judge is satisfied there is evidence which satisfies the *prima facie* standard.[77] A Trial Chamber will normally exercise its discretion to permit amendment where the proposed amendment will facilitate the determination of the issues in the case[78] and not result in

[70] Motion for Joinder, paras 51-53.
[71] Response to the Motion to Amend the *Stanišić* Indictment, para 4.
[72] Response to the Motion to Amend the *Stanišić* Indictment, para 17.
[73] Response to the Motion to Amend the *Stanišić* Indictment, para 21.
[74] Response to the Motion to Amend the *Stanišić* Indictment, para 23.
[75] Response, para 13.
[76] Response, para 14.
[77] Rule 50(A)(ii) of the Rules, in conjunction with Article 19(1) of the Statute.
[78] *Prosecutor 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 ("*Brđanin* Decision"), para 50; *Prosecutor v. Ljube*

unfair prejudice to the accused when viewed in light of the circumstances of the case as a whole.[79] The right of the accused to be informed promptly of the charge against him and the right to be tried without undue delay constitute two relevant factors to be taken into consideration in this context.[80] Leave to amend the indictment is more likely to be granted where amendments do not result in the addition of new charges, as the addition of such charges risks delaying the start of trial by triggering the procedural consequences of Rules 50(B) and (C).[81] The key question in the determination of whether an amendment results in a "new charge" is whether the proposed amendment introduces "a basis for conviction that is factually and/or legally distinct from any already alleged in the indictment."[82]

D. Discussion

1. Joint criminal enterprise

(a) Members of the alleged JCE

63. The Prosecution proposes an amendment to 'narrow' the pleading of JCE in light of the *Brđanin* Appeals Judgement.[83] Distinction is made between JCE members and persons perpetrating crimes in furtherance of the alleged JCE who are not alleged to be members of this JCE. Such distinction is consistent with the Appeals Chamber's ruling that the perpetrators carrying out the *actus reus* of the crimes charged in the indictment, which are alleged to have been committed in furtherance of a JCE, do not have to be members of that JCE.[84] This judgement was delivered after the *Stanišić* and *Župljanin* Indictments were filed.

64. The Stanišić Defence contends that this is a new form of responsibility in the jurisprudence of the Tribunal and that, accordingly, the proposed amendments constitute new charges.[85] The Chamber is of the view that the proposed amendment does not constitute a new legally distinct

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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 Amended Indictment", 1 November 2005, para 7.

[79] *Brđanin* Decision, para 50; *Prosecutor v. Sefer Halilović*, Case No.: IT-01-48-PT, "Decision on Prosecutor's Motion Seeking Leave to Amend the Indictment", 17 December 2004 ("*Halilović* Decision"), para 22.

[80] *Gotovina* Appeals Decision on Joinder, para 8.

[81] *Prosecutor v. Vujadin Popović et al.*, Case Nos.: IT-05-88-PT, IT-05-88/1-PT, Decision on Further Amendments and Challenges to the Indictment, 13 July 2006, para 10. *See* also *Halilović* Decision, para 24; *Prosecutor v. Ante Gotovina et. al.*, Case No.: IT-06-90-PT, Decision on Ante Gotovina's Motion Pursuant to Rule 73 Requesting Pre-Trial Chamber to Strike Parts of Prosecution's Pre-Trial Brief Constituting Effective Amendment of the Joinder Indictment, and on Prosecution's Motion to Amend the Indictment, 14 February 2008 ("*Gotovina* Decision"), para 21.

[82] *Halilović* Decision, para 30; *Gotovina* Decision, para 21.

[83] Motion to Amend the *Stanišić* Indictment, para 7; Motion for Joinder, para 46.

[84] *Prosecutor v. Radoslav Brđanin*, Case No.: IT-99-36-A, Appeals Judgement, 3 April 2007 ("*Brđanin* Appeals Judgement"), paras 410, 418.

[85] Response to the Motion to Amend the *Stanišić* Indictment, para 16.

basis for conviction. Nor will this amendment affect the Accused's preparation of his defence, as no new factual allegations are made. The Chamber notes that apart from one group of persons, to be discussed shortly, the alleged perpetrators of crimes remain the same.

65. The composition of the two groups, JCE members and perpetrators of crimes who are not members, identified in the Proposed Consolidated Indictment[86], corresponds roughly with the composition of the group of members of the alleged JCE originally identified in the *Stanišić* and *Župljanin* Indictments. Further, the Chamber is of the view that the addition of two individuals to the list of members of the JCE Stojan Župljanin is alleged to have participated in does not expand the alleged responsibility of this Accused. The Chamber finds that the advantage of the proposed amendment is that it brings the charges against Stojan Župljanin into line with those against Mićo Stanišić, which will facilitate the examination of the joint case.

(b) Addition of "local Bosnian Serbs" to the alleged perpetrators of crimes

66. The Chamber further observes that among the physical perpetrators of crimes, through whom members of the alleged JCE implemented its objective, the Proposed Consolidated Indictment lists "local Bosnian Serbs acting under [(presumably) the "Serb Forces" and "Serbian and Bosnian Serb paramilitary forces and volunteers units"'] instruction or pursuant to the direction of [these] forces".[87] No such group is mentioned among the members of the alleged JCE listed in the *Stanišić* and *Župljanin* Indictments. This proposed amendment introduces a new, distinct group of perpetrators, for whose acts the Accused are alleged to bear responsibility under Article 7(1) of the Statute. Such an amendment should be supported by evidence that satisfies the *prima facie* standard, as required by Rule 50(A)(ii) of the Rules. Therefore, the Prosecution should either identify to the Chamber and the Defence where the evidence can be found within the existing supporting material or submit additional material in support.

(c) Removal of the second form of JCE liability

67. The Prosecution proposes to remove from the *Stanišić* and *Župljanin* Indictments the allegation of the second form of JCE liability.[88] Viewed in the light of other allegations in the Indictment, the proposed amendment makes the cases against both Accused more specific.

[86] *See* Proposed Consolidated Indictment, paras 8 and 9, respectively.
[87] Proposed Consolidated Indictment, para 9.
[88] Motion to Amend the *Stanišić* Indictment, para 8; Motion for Joinder, para 45; *Stanišić* Indictment, para 11; *Župljanin* Indictment, para 26.

(d) Period of the Accused's alleged participation in the JCE

68. The Prosecution further proposes an amendment, which, it submits, clarifies the date when the Accused allegedly became members of the JCE.[89] The Chamber observes that the Prosecution seeks to make a distinction between the date of the Accused's accession to the alleged JCE[90] and the date from which they incur responsibility for the commission of crimes in furtherance of that JCE.[91] In the *Stanišić* and *Župljanin* Indictments no such distinction is made and thus the Accused are charged with crimes committed during the entire time of their participation in the alleged JCE. The Stanišić Defence suggests that the allegation that Mićo Stanišić became a member of the JCE already on 21 December 1991 amounts to a new charge.[92] The Prosecution contends that the newly proposed indication of the time of the Accused's accession to the alleged JCE is a mere clarification of the forms of criminal responsibility.[93]

69. The proposed distinction between the time of participation in the alleged JCE and the time of criminal responsibility is a very confusing one which will not facilitate the determination of the Accused's contribution to the alleged crimes. Further, the Chamber cannot accept the contention that the amendment constitutes a clarification only. It is proposed that already in the period of 21 December 1991 to 1 April 1992 the Accused took actions by which they participated in and, presumably, contributed to the alleged JCE. The Chamber recalls the Appeals Chamber's ruling that, amongst other requirements for a conviction under the JCE doctrine, the contribution of the accused in the common plan of the alleged JCE must be characterised and that it should be at least a significant contribution to the crimes for which the accused is to be found responsible.[94] The Chamber notes that the proposed amendment allows for the possibility that crimes were committed in the period from 1 April 1992 to 31 December 1992, to the commission of which the Accused significantly contributed in the period of 21 December 1991 to 1 April 1992. As the *Stanišić* and *Župljanin* Indictments do not allege the Accused's participation in the JCE in the latter period, it becomes open on the Proposed Consolidated Indictment to convict the Accused for additional crimes. The Chamber finds that the introduction of such a material change to the pleading of criminal responsibility at this stage of the pre-trial proceeding would cause unfair prejudice to the Accused. For these reasons, the Chamber will not allow this proposed amendment.

[89] Motion to Amend the *Stanišić* Indictment, para 9; Proposed Consolidated Indictment, para 10.
[90] Proposed Consolidated Indictment, para 10.
[91] Proposed Consolidated Indictment, para 11.
[92] Response to the Motion to Amend the *Stanišić* Indictment, para 16.
[93] Motion to Amend the *Stanišić* Indictment, para 9.
[94] *Brđanin* Appeals Judgement, para 430.

(e) Modes of participation in the JCE

70. The Prosecution proposes to add paragraphs detailing the specific acts and omissions of the Accused which constitute their participation in the alleged JCE, or, alternatively, by which Stanišić is alleged to be responsible for instigation and/or aiding and abetting, and Župljanin is alleged to be responsible for ordering, planning and instigation, and/or aiding and abetting.[95] These alleged acts and omissions of Mićo Stanišić include, *inter alia*: "participating in the formation of the Bosnian Serb bodies and forces that implemented the forcible takeovers of the Municipalities and participated in the crimes listed in [the Proposed Consolidated] Indictment", "communicating and co-ordinating with Bosnian Serb political figures [...] in order to facilitate the implementation of the objective of the JCE" and "participating in sham inquiries".[96] The Proposed Consolidated Indictment also introduces more specific means of Stojan Župljanin's alleged participation in the JCE, such as: "facilitating, establishing and/or operating camps and detention facilities" and "failing [...] to protect the entire civilian population within the areas in the ARK Municipalities".[97] The Chamber finds that these amendments add clarity to the charges against the Accused under Article 7(1) of the Statute. These proposed amendments do not constitute new factual allegations as they clarify allegations already included in the two Indictments.

(f) Third form of JCE liability

71. The Chamber notes that the Proposed Consolidated Indictment reduces the number of counts for which Stojan Župljanin is alleged to be responsible under the third form of JCE. The *Župljanin* Indictment alleges this type of responsibility, alternatively to the basic form of JCE, in respect of all the counts of that Indictment.[98] The Proposed Consolidated Indictment only alleges this form of responsibility in respect of Counts 1 to 8.[99] This brings the charges against Stojan Župljanin into line with those against Mićo Stanišić.

2. Other modes of liability charged under Article 7(1) of the Statute

72. The Chamber notes that the Proposed Consolidated Indictment sets out the modes of criminal responsibility under Article 7(1) of the Statute differently from the *Stanišić* and *Župljanin* Indictments. While the two Indictments set out the alleged responsibility in a disjunctive fashion,[100] the Proposed Consolidated Indictment charges both Accused with other modes of responsibility

[95] Proposed Consolidated Indictment, paras 11, 12, 15, 16.
[96] Proposed Consolidated Indictment, para 11(a), (c), (h).
[97] Proposed Consolidated Indictment, para 12 (e), (f).
[98] *Župljanin* Indictment, para 27.
[99] Proposed Consolidated Indictment, para 14.
[100] *Stanišić* Indictment, para 5; *Župljanin* Indictment, para 20.

under Article 7(1) of the Statute "in the alternative", only if either of the Accused "was not responsible as a member of the JCE".[101] The Stanišić Defence contends that this newly proposed way of pleading creates confusion and makes it difficult for the Accused to understand the nature of the charges against him.[102] The Chamber does not agree with this contention and finds that the proposed formulation enhances the clarity of pleading.

3. Removal of charges against Stojan Župljanin

73. The Prosecution proposes to remove the counts of wanton destruction and wilful damage done to religious institutions (Counts 11 and 12) charged against Stojan Župljanin.[103] The Chamber finds that this amendment brings the charges against Stojan Župljanin into line with those against Mićo Stanišić. The removal of charges against Stojan Župljanin will not cause unfair prejudice to this Accused.

4. Schedules and list of victims

74. The Prosecution proposes to add an alleged detention facility in Batković[104] and a factual allegation regarding an alleged mass killing on a bridge in Kotlina, in the Gacko region, on 13 August 1992.[105] The Chamber recalls that in the Interim Decision it held that it was unable to make an assessment of these proposed amendments because the Prosecution had not submitted the necessary documentation for review under Rule 50(A)(ii) of the Rules and Article 19 of the Statute.[106] The Prosecution has since provided material to support the proposed additions.[107] Having reviewed the material, the Chamber finds that the proposed evidence meets the required *prima facie* standard.

75. The alleged crimes committed at the detention facility in Batković are charged against Mićo Stanišić under Count 1 (persecutions).[108] The alleged killings on the bridge in Kotlina are charged against Mićo Stanišić under Counts 1 (persecutions), 2, 3 and 4 (extermination and murder).[109] These amendments introduce a legally distinct basis for conviction under Count 1 (Batković[110]) and

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[101] Proposed Consolidated Indictment, paras 15, 16.
[102] Response to the Motion to Amend the *Stanišić* Indictment, para 8.
[103] Motion for Joinder, para 48.
[104] Schedule C to the Proposed Consolidated Indictment, item 19.
[105] Schedule B to the Proposed Consolidated Indictment, item 15.2.
[106] Interim Decision, para 13.
[107] Prosecution Response regarding the *Stanišić* Indictment, Annex E.
[108] Proposed Consolidated Indictment, paras 25(e), (f).
[109] Proposed Consolidated Indictment, paras 25(b), 28.
[110] The Chamber recalls the jurisprudence of the Tribunal to the effect that "although persecution often refers to a series of acts, a single act may be sufficient", as long as the necessary requirements are met. (*Prosecutor v. Mitar Vasiljević*, Case No.: IT-98-32-A, Appeals Judgement, 25 February 2004, para 113; *Prosecutor v. Milan Martić*, Case No.: IT-95-11-T, Judgement, 12 June 2007, para 117)

under Counts 1, 2, 3, and 4 (Kotlina) against Mićo Stanišić. These amendments will result in new charges.

76. The Proposed Consolidated Indictment restricts the number of municipalities charged in respect of Stojan Župljanin from 13 to seven. The Prosecution proposes to harmonise the content of the Schedules to the Proposed Consolidated Indictment so that the incidents allegedly occurring in the municipalities which are common to both Accused are the same.[111] To achieve this goal, the Prosecution has additionally removed from the Schedules to the *Župljanin* Indictment a number of incidents charged against Stojan Župljanin. The Chamber notes, however, that the Proposed Consolidated Indictment also includes incidents which were not previously charged against Stojan Župljanin. Schedule C to the Proposed Consolidated Indictment includes the detention facility of Ljubija football stadium in Prijedor[112] and the prison in Sanski Most[113] among the detention facilities supporting the allegations of unlawful detention and perpetuation of inhumane living conditions in detention facilities, whereas the *Župljanin* Indictment does not include these detention facilities among the crime sites charged. Further, the alleged beatings at Ljubija football stadium[114] were also not previously included in the *Župljanin* Indictment.

77. The allegations relating to these detention facilities and incidents are new in respect of Stojan Župljanin. They are charged under Counts 1 (persecutions),[115] 5, 6, 7 and 8 (torture, cruel treatment, inhumane acts).[116] For the reasons given with regard to the addition of the alleged detention facility of Batković and the alleged killings at Kotlina, the Chamber finds that the addition of facilities and incidents that results from the harmonisation of the Schedules to the *Župljanin* Indictment with those to the *Stanišić* Indictment introduces a legally distinct basis for conviction. These amendments will result in new charges. The Chamber notes that no supporting material has been provided in relation to these amendments. However, while the allegations at issue are new to the *Župljanin* Indictment, they have been included in the *Stanišić* Indictment when confirmation of that indictment was sought so that the Chamber has been able to be satisfied that the *prima facie* standard with respect to these allegations has been met.

[111] Motion for Joinder, para 49.
[112] Schedule C to the Proposed Consolidated Indictment, item 5.6.
[113] Schedule C to the Proposed Consolidated Indictment, item 6.1, second proposition.
[114] Schedule D to the Proposed Consolidated Indictment, item 5.6.
[115] Proposed Consolidated Indictment, para 26(d), (e), (f), (i).
[116] Proposed Consolidated Indictment, para 34.

5. Conclusion

78. The Chamber finds that all the amendments sought by the Prosecution, save one, discussed earlier,[117] will facilitate the determination of the issues in the case. They harmonise the charges against both Accused, which will facilitate the consideration of evidence adduced during the joint trial of the Accused. These amendments also enhance the clarity of pleading of the charges. Some of the proposed amendments bring the Proposed Consolidated Indictment into line with the most recent jurisprudence of the Tribunal. The Chamber is satisfied that the proposed amendments will not result in unfair prejudice to the Accused, as the vast majority of them introduce no new factual allegations and those that do, including the amendments resulting in new charges, will not require a substantial preparation on the part of the Defence for either of the Accused, as they only concern a relatively small number of incidents. The Chamber is also satisfied that these amendments will not adversely affect the Accused's right to be tried without undue delay. The commencement date of trial has not yet been set and the procedure following the introduction of new charges, pursuant to Rule 50(B) and (C) of the Rules, will not affect that date.

E. Reduction of the scope of the indictment

79. The Chamber will not address the scope of the indictment at this time.

IV. DISPOSITION

For the foregoing reasons and pursuant to Rules 48, 50, 54, 82, and 126*bis* of the Rules and Article 19(1) of the Statute, the Chamber:

(1) **GRANTS LEAVE** to the Prosecution to file a Reply;

(2) **GRANTS** the Motion for Joinder **IN PART** and **ORDERS** that the case of *Prosecutor v Mićo Stanišić*, Case No: IT-04-79-PT and the case of *Prosecutor v Župljanin*, Case No: IT-99-36/2-PT be joined;

(3) **INSTRUCTS** the Registrar to assign a common case number;

(4) **ORDERS** the Prosecution to file the amended consolidated indictment as authorised in this Decision within seven days of the filing of this Decision; and

(5) **DISMISSES** the Motion to Amend the *Stanišić* Indictment and the Supplement to the Motion to Amend the *Stanišić* Indictment as moot.

IT-08-91-PT 1
IT-04-79-PT 1703
IT-99-36/2-PT 144

80. Pursuant to Rule 50(B), Mićo Stanišić and Stojan Župljanin shall be given the opportunity to enter a plea on the new charges in due course in a further initial appearance.

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

Dated this twenty-third day of September 2008
At The Hague
The Netherlands

Judge Ole Bjørn Støle
Pre-Trial Judge

[Seal of the Tribunal]

[117] *See supra*, para 69.