



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-04-84-PT

Date: 25 October 2006

Original: English

IN TRIAL CHAMBER II

Before: Judge Carmel Agius, Presiding
Judge O-Gon Kwon, Pre-Trial Judge
Judge Kimberly Prost

Registrar: Mr. Hans Holthuis

Decision of: 25 October 2006

PROSECUTOR

v.

**RAMUSH HARADINAJ
IDRIZ BALAJ
LAHI BRAHIMAJ**

**DECISION ON MOTION TO AMEND THE INDICTMENT AND ON
CHALLENGES TO THE FORM OF THE AMENDED INDICTMENT**

Office of the Prosecutor

Mr. Gilles Dutertre
Ms. Patricia Sellers
Mr. Gramsci di Fazio
Mr. Anees Ahmed

Counsel for Ramush Haradinaj

Mr. Ben Emmerson
Mr. Rodney Dixon
Mr. Michael O'Reilly

Counsel for Idriz Balaj

Mr. Gregor Guy-Smith

Counsel for Lahi Brahimaj

Mr. Richard Harvey
Mr. Paul Troop

TABLE OF CONTENTS

I. PRELIMINARY MATTERS	1
II. AMENDMENT OF THE INDICTMENT.....	5
A. LAW ON AMENDMENT OF THE INDICTMENT	5
B. DISCUSSION	5
III. THE FORM OF THE AMENDED INDICTMENT	10
A. LAW ON THE FORM OF THE INDICTMENT	10
B. DISCUSSION	11
IV. DISPOSITION.....	13

TRIAL CHAMBER II of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991 (“Tribunal”), is seised of the Prosecution’s “Motion to Amend the Indictment in the Case of *The Prosecutor v. Haradinaj [et] al.*”, filed on 26 April 2006 (“Motion”), and hereby renders its decision thereon.

I. PRELIMINARY MATTERS

1. The operative Indictment in this case, confirmed on 4 March 2005 (“Indictment” or “original Indictment”),¹ contains 37 counts charging Ramush Haradinaj, Idriz Balaj, and Lahi Brahimaj (collectively, “Accused”) with crimes against humanity and violations of the laws or customs of war. Along with the Motion, the Prosecution filed a number of annexes, some public and some *ex parte*. Public Annex I contains the “Amended Indictment”, tracking the changes sought to be made to the original Indictment, and public Annex II contains the Amended Indictment as it would appear if leave to amend were granted as requested by the Prosecution. Public Annex III lists the supporting material submitted by the Prosecution purportedly meeting the *prima facie* standard in respect of the proposed amendments, and *ex parte* Annexes V and VI contain such material,² consisting of one witness statement each.³ *Ex parte* Annex IV lists the names and pseudonyms of the two witnesses who gave these statements.

¹ *Prosecutor v. Haradinaj, Balaj, and Brahimaj*, Case No. IT-04-84-PT (“*Haradinaj et al.*”), [Confidential and *Ex Parte*] Decision on Review of the Indictment, 4 March 2005, p. 3.

² See Motion, para. 15 (asserting that the supporting materials in Annexes V and VI satisfy the *prima facie* standard in respect of the proposed amendments).

³ The witness statement that comprises Annex IV purportedly establishes the *prima facie* standard in respect of the proposed additions to the Indictment under Counts 38 and 39. On 27 April 2006, one day after filing the Motion, the Prosecution requested the Trial Chamber to order measures to protect the identity of this witness, including assigning the pseudonym “SST7/38” to be used when referring to him; suspending the Prosecution’s obligation to disclose the witness’s identifying information until no later than 30 days before he testifies; and authorizing the Prosecution to redact the identity and other identifying information of the witness, as well as that of other actual and potential witnesses, from the statement. *Haradinaj et al.*, [Confidential and Partially *Ex Parte*] Prosecution’s Motion for Exceptional Protective Measures for Witness SST7/38, 27 April 2006 (“Protective Measures Motion”), para. 14. Haradinaj responded on 10 May 2006, and the Prosecution replied to this response on 17 May 2006. See *Haradinaj et al.*, Confidential Defence Response to Prosecution’s Motions for Exceptional Protective Measures for Witnesses SST7/38, SST7/49, SST7/50 and SST7/52, 10 May 2006; *Haradinaj et al.*, [Confidential] Reply to Confidential Defence Response to Prosecution’s Motion for Exceptional Protective Measures for Witness SST7/38, 17 May 2006. Considering that “SST7/38 would only give evidence if the amendments to the Indictment ... are granted, and therefore, [the Protective Measures Motion] may become moot if the motion to amend the Indictment is denied”, on 26 May 2006 the Pre-Trial Judge, who at the time was Judge Brydenscholt, suspended consideration of the Protective Measures Motion “pending resolution of the motion to amend the indictment”. *Haradinaj et al.*, [Confidential] Interim Decision on Prosecution Motion for Protective Measures for Witness SST7/38, 26 May 2006, pp. 2–3. At the 13 October 2006 Status Conference, Pre-Trial Judge Kwon ordered the Prosecution to provide, on a provisional basis, a redacted version of this witness statement by no later than 25 October 2006. *Haradinaj et al.*, Transcript of Status Conference, T. 191–193 (13 October 2006). A final decision on the Protective Measures Motion has been issued

2. The Motion seeks leave pursuant to Rule 50(A) to include two new counts—38 and 39—both based on the factual allegations set forth in paragraphs 96 to 101 of the proposed Amended Indictment. Proposed Count 38 charges the three Accused with persecution, deportation, and inhumane acts as crimes against humanity,⁴ and proposed Count 39 charges them with cruel treatment as a violation of the laws or customs of war. The Motion also seeks leave to incorporate additional factual allegations, set forth in entirely new language contained in paragraphs 91 and 92 of the proposed Amended Indictment, which according to the Prosecution provide further support for the already existing Counts 35, 36, and 37.⁵

3. At 3,652 words, the Motion exceeds the 3,000-word limit prescribed in the Practice Direction on the Length of Briefs and Motions (“Practice Direction”).⁶ The Prosecution asserts that, “due to the inclusion of the relevant details, statutory provisions, and applicable jurisprudence and to the need to address a number of legal considerations arising therefrom”, exceptional circumstances exist for exceeding the word limit set forth in the Practice Direction.⁷ In the interests of justice the Trial Chamber will grant leave, on this occasion, for the Prosecution to exceed the word limit.⁸

4. On 3 May 2006, the Pre-Trial Judge issued a scheduling order in which he directed the Accused to file their respective responses to the Motion by 6 June 2006, and granted leave to the Prosecution under Rule 126 *bis* to file its reply to these responses by 16 June 2006.⁹ The Pre-Trial Judge ordered that these responses and reply consolidate the parties’ submissions pursuant to

simultaneously with this Decision. *See Haradinaj et al.*, Confidential Order on Motion for Protective Measures, 25 October 2006.

⁴ The forms of persecution alleged are destruction of property, deportation, forcible transfer, unlawful detention, and inhumane acts. These are charged as alternatives to deportation and other inhumane acts as crimes against humanity. *See* Amended Indictment, para. 101.

⁵ *See* Motion, paras. 1, 9, 44. While the Accused oppose the incorporation of Counts 38 and 39 in the Amended Indictment, they do not appear to object to the addition of paragraphs 91 and 92 under Counts 35, 36, and 37. *See* Response, para. 2.

⁶ Practice Direction on the Length of Briefs and Motions, IT/184/Rev. 2, 16 September 2005, para. 5. *See also ibid.*, para. 7 (“A party must seek authorization in advance from the Chamber to exceed the word limits in this Practice Direction and must provide an explanation of the exceptional circumstances that necessitate the oversized filing.”).

⁷ Motion, para. 2.

⁸ The Chamber notes, however, that the Motion would have been considerably shorter absent the thoroughly unnecessary block quotation of Rule 50—subparagraphs (B) and (C) of which are actually quoted twice—and the long and only partially relevant quoted passages from the jurisprudence. *See ibid.*, paras. 12, 16–17, 41. The Chamber also recalls the excessive length of another Prosecution motion recently disposed of by the Pre-Trial Judge, in respect of which leave to exceed the word limit in the Practice Direction also had to be granted, and calls upon the Prosecution to maximise the concision and relevance of the arguments in its future filings. *See Haradinaj et al.*, Confidential Order on Motion requesting Protective Measures for Certain Forensic Documents, 12 October 2006, p. 2.

⁹ *Haradinaj et al.*, Scheduling Order Regarding Proposed Amendment of the Indictment, 3 May 2006 (“*Haradinaj et al.* 3 May 2006 Order”), pp. 2–3.

Rule 50(A) on whether leave to amend the Indictment should be granted, and any arguments pursuant to Rule 72(A)(ii) concerning possible defects in the form of the Amended Indictment.¹⁰ Haradinaj filed the “Confidential Defence Response to Prosecution’s Motion for Leave to Amend Indictment” on 6 June 2006 (“Response”). Balaj and Brahimaj filed public motions joining the Response and adopt all the arguments set forth therein, to the extent they are applicable to them.¹¹ The Trial Chamber will accordingly treat the Response as a collective submission by all three Accused. The Prosecution filed its confidential “Reply to Confidential Defence Response to Prosecution’s Motion for Leave to Amend the Indictment” on 16 June 2006 (“Reply”).

5. The Trial Chamber recalls its many statements that Article 20(4) of the Statute of the Tribunal and Rule 78 demand that all proceedings before the Tribunal take place in public, unless good cause can be shown to the contrary.¹² As has been their frequent practice in this case to date, the Accused in the Response and the Prosecution in the Reply have made no apparent attempt to demonstrate good cause for making these respective filings confidentially, and the Chamber’s own examination of the Response and the Reply reveals that neither contains information of a sensitive nature warranting its confidential status.¹³ The Trial Chamber will therefore order the Registry to lift the confidentiality of both the Response and the Reply.¹⁴ The Chamber renews its instruction to the Accused and the Prosecution to do their utmost to maintain, as far as possible, the public and *inter partes* nature of these proceedings.

6. At the 13 October 2006 status conference, the Prosecution expressed its intention to file a second motion to amend the Indictment for the purpose of “streamlin[ing] the [I]ndictment”¹⁵—

¹⁰ *Ibid.* p. 2.

¹¹ *Haradinaj et al.*, Motion by Idriz Balaj Requesting Leave to Join the “Confidential Defence Response to Prosecution’s Motion for Leave to Amend Indictment” filed by Ramush Haradinaj pursuant to Rule 50 and 72 Challenging the Prosecution’s Motion for Leave to Amend the Indictment, 6 June 2006 (“Balaj Motion to Join”), para. 3; *Haradinaj et al.*, Motion by Lahi Brahimaj Requesting Leave to Join the “Confidential Defence Response to Prosecution’s Motion for Leave to Amend Indictment” filed by Ramush Haradinaj pursuant to Rule 50 and 72 Challenging the Prosecution’s Motion for Leave to Amend the Indictment, 6 June 2006 (“Brahimaj Motion to Join”), para. 3.

¹² *See, e.g., Haradinaj et al.*, Order Requesting Assistance of UNMIK with Certain Investigations, 19 October 2006, p. 2; *Haradinaj et al.*, Orders Arising from 13 October 2006 Status Conference, 17 October 2006 (“Orders Arising from 13 October 2006 Status Conference”), p. 3; *Haradinaj et al.*, Order on Motions for Access to Confidential Material, 27 September 2006, pp. 5, 7 (considering that none of the relevant filings contained any information of a sensitive nature, and that no good cause had been shown for classifying them as confidential, and consequently ordering the Registry to lift their confidential status); *Prosecutor v. Trbić*, Case No. IT-05-88/1-PT, Order on Defence Motions for Reconsideration of Severance Decision and Time Extensions, 5 July 2006, p. 5 (same).

¹³ The Prosecution appears to agree with the Trial Chamber that the confidentiality of these filings is unwarranted, but nonetheless filed its Reply confidentially, asserting that it did so “to permit the Defence to make any submissions it sees fit as to why these filings should [be] confidential.” Reply, para. 9.

¹⁴ *See infra.* para. 26(c) (Disposition).

¹⁵ *Haradinaj et al.*, Transcript of Status Conference, T. 172 (13 October 2006).

including “substituting some counts for others”¹⁶—but that this further motion would not alter the relief requested in the Motion presently before the Trial Chamber.¹⁷ In light of the approaching start date for trial, the Pre-Trial Judge ordered the Prosecution to file any new motion to amend the Indictment by 25 October 2006.¹⁸ As suggested by Counsel for Haradinaj and Counsel for Balaj,¹⁹ the Chamber has decided to dispose of the current Motion independently of the anticipated new motion to amend the Indictment.²⁰

7. The Trial Chamber has reviewed and considered the submissions of the parties in arriving at the present Decision, and will address specific points raised in them only where necessary for a proper and thorough understanding of the Chamber’s reasoning. Notwithstanding Haradinaj’s proclamations in the Response that he does not intend to file any Rule 72 challenges in respect of the Motion,²¹ upon close inspection it is evident that the Response contains not only arguments objecting to the granting of the proposed amendments to the Indictment,²² but also what is clearly a challenge to the form of the Amended Indictment.²³ Furthermore, the motions of Balaj and Brahimaj joining the Response reveal the belief of those two Accused that the Response which they have joined not only objects to the granting of leave to amend the Indictment pursuant to Rule 50, but also to the form of the proposed Amended Indictment pursuant to Rule 72(A)(ii).²⁴ Accordingly, the Trial Chamber has divided the present Decision into two parts, the first addressing whether the Indictment may be amended as proposed by the Prosecution, and the second addressing whether defects exist in the form of the Amended Indictment.

¹⁶ *Ibid.* T. 176.

¹⁷ *Ibid.* T. 173.

¹⁸ *Ibid.* T. 179–180; Orders Arising from 13 October 2006 Status Conference, *supra* note 12, p. 2.

¹⁹ *Haradinaj et al.*, Transcript of Status Conference, T. 175, 177, 179 (13 October 2006).

²⁰ At the 13 October 2006 status conference, the Pre-Trial Judge suspended the previously established time limits for the parties to file their pre-trial briefs, and stated that guidance concerning new time limits would be provided simultaneously with or shortly after the Trial Chamber’s issuance of its decision on the anticipated further motion to amend the Indictment announced by the Prosecution at that status conference. *Ibid.* T. 180; Orders Arising from 13 October 2006 Status Conference, *supra* note 12, p. 2. The promised guidance concerning the filing of the pre-trial briefs will be provided in the decision on the Prosecution’s further motion to amend, and not in the present Decision.

²¹ Response, para. 7 n. 2; *ibid.* para. 8.

²² *See ibid.* para. 3 (arguing that proposed Counts 38 and 39 “do not add anything of substance to the allegations already made ... in the Indictment”); *ibid.* paras. 4, 9.

²³ *See ibid.* para. 5 (arguing that “the alleged link to Mr. Haradinaj” in proposed Counts 38 and 39 “is ... most tenuous”); *ibid.* para. 7.

²⁴ *See* Balaj Motion to Join, *supra* note 11, para. 2; Brahimaj Motion to Join, *supra* note 11, para. 2.

II. AMENDMENT OF THE INDICTMENT

A. Law on Amendment of the Indictment

8. The Trial Chamber recalls the comprehensive discussion of the Tribunal's jurisprudence on the amendment of an indictment in its "Decision on Further Amendments and Challenges to the Indictment", issued on 13 July 2006 in *Prosecutor v. Popović et al.*²⁵ As the law on this subject has not changed since the issuance of that decision, the Chamber will rely on the legal discussion set forth therein, and sees no need to reproduce it here.

B. Discussion

9. The Trial Chamber has examined the amendments proposed in the Amended Indictment and considers that, on the whole, they serve to clarify the scope of the Prosecution's case against the Accused.²⁶ It is accordingly inclined to grant leave to make such amendments, provided the following two conditions are fulfilled: the inclusion of the amendments must not result in unfair prejudice to the Accused; and those amendments which are material must be supported by documentation meeting the *prima facie* standard in Article 19 of the Statute. The Chamber will proceed to examine the proposed amendments having regard to these two conditions, and will address the question of defects in the form of the Amended Indictment in a subsequent section of this Decision.²⁷

a. Do the proposed amendments result in unfair prejudice to the Accused?

10. One of the two key factors to take into account when determining the possible prejudicial effect of a proposed amendment is whether it provides the accused with sufficient notice of the scope and nature of the new allegations, or whether it provides insufficient notice and thus deprives the accused of an adequate opportunity to prepare an effective defence.²⁸ The closer to trial the Prosecution proposes a given amendment, the more likely it is that the Trial Chamber will reject the

²⁵ See *Prosecutor v. Popović, Beara, Nikolić, Borovčanin, Tolimir, Miletić, Gvero, and Pandurević*, Case No. IT-05-88-PT, Decision on Further Amendments and Challenges to the Indictment, 13 July 2006 ("*Popović et al.* July 2006 Pre-Trial Decision"), paras. 5–11, 20–36.

²⁶ The Trial Chamber accordingly finds force in the Prosecution's arguments at paragraphs 18 and 19 of the Motion.

²⁷ See *infra* paras. 22–25.

²⁸ *Prosecutor v. Čermak and Markač*, Case No. IT-03-73-PT, Decision on Prosecution's Consolidated Motion to Amend the Indictment and for Joinder, 14 July 2006, para. 11; *Popović et al.* July 2006 Pre-Trial Decision, *supra* note 25, para. 20; *Prosecutor v. Boškoski and 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. 10; *Prosecutor v. Milutinović, Šainović, Ojdanić, Pavković, Lazarević, Đorđević, and Lukić*, Case No. IT-05-87-PT, Decision on Motion to Amend the Indictment, 11 May 2006, para. 10; *Prosecutor*

amendment on the ground that its introduction would cause unfair prejudice to the accused by depriving him or her of adequate notice.²⁹

11. The Chamber notes that the Accused have been aware of the proposed amendments to the Indictment for several months—since at least 26 April 2006, when the Prosecution filed the Motion.³⁰ Moreover, the new factual allegations in the Amended Indictment, while undoubtedly of a very grave nature, are relatively limited in scope and will not place a disproportionately heavy additional burden on the Accused in preparing their respective cases. The new facts in paragraphs 91 and 92 enumerate several additional ways in which the alleged mistreatment of Witness SST7/01 is said to have occurred.³¹ Furthermore, while not specifically mentioned in the original Indictment, the allegations in paragraphs 96 to 101 describe a single event in which two persons—Witness SST7/38 and the witness’s father—were mistreated, and a small group of individuals was forcibly displaced.³² Recalling that trial in this case is not expected to begin for at least another three months,³³ the Trial Chamber is of the view that the inclusion of the proposed amendments will not deprive the Accused of their ability to adequately prepare an effective defence.

12. The second key factor to take into account when determining the possible prejudicial effect of a proposed amendment is whether its inclusion will result in undue delay of the proceedings, and particularly whether it risks delaying the start date of trial. This risk is greater where the proposed amendment incorporates a new charge against the accused, as the accused would have to make a further appearance to plead to the new charge and, according to Rule 50(C), would ordinarily have an additional period of 30 days to file preliminary challenges in respect of the new charge pursuant to Rule 72.³⁴

v. *Halilović*, Case No. IT-01-48-PT, Decision on Prosecutor’s Motion Seeking Leave to Amend the Indictment, 17 December 2004 (“*Halilović* Pre-Trial Decision”), para. 23.

²⁹ *Popović et al.* July 2006 Pre-Trial Decision, *supra* note 25, para. 21. *Accord Prosecutor v. Delić*, Case No. IT-04-83-PT, Decision on the Prosecution’s Submission of Proposed Amended Indictment and Defence Motion Alleging Defects in Amended Indictment, 30 June 2006 (“*Delić* May 2006 Pre-Trial Decision”), para. 62; *Prosecutor v. Šešelj*, Case No. IT-03-67-PT, Decision on Prosecution’s Motion for Leave to Amend the Indictment, 27 May 2005, para. 5.

³⁰ The Prosecution asserts that the Accused have known of the proposed amendments since February 2006, when it sent a letter to them “explaining ... the possible different new counts.” Motion, para. 32.

³¹ *See* Amended Indictment, paras. 91–92.

³² *See ibid.* paras. 96–101.

³³ *Haradinaj et al.*, Transcript of Status Conference, T. 187 (Pre-Trial Judge estimating that trial may begin in February or March 2007).

³⁴ *Popović et al.* July 2006 Pre-Trial Decision, *supra* note 25, para. 10; *Halilović* Pre-Trial Decision, *supra* note 28, para. 24.

13. The Trial Chamber reaffirms its endorsement of the holding of the *Halilović* Trial Chamber, consistently relied upon in subsequent decisions of this Tribunal,³⁵ as to what constitutes a “new charge” for purposes of Rule 50:

When considering whether a proposed amendment results in the inclusion of a “new charge”, it is ... appropriate to focus on the imposition of criminal liability on a basis that was not previously reflected in the indictment. In the opinion of the Trial Chamber the key question is, therefore, whether the indictment introduces a basis for conviction that is *factually and/or legally distinct* from any already alleged in the indictment.³⁶

As this Chamber has observed, it is each charge that holds the potential of exposing the accused to individual criminal liability. The counts in an indictment, by contrast, merely reflect the way in which the Prosecution chose to organise the charges in relation to the crimes allegedly committed.³⁷

14. The Trial Chamber finds that the proposed amendments to the Indictment do contain new charges against the Accused. Proposed Counts 38 and 39 and the factual allegations underpinning them are entirely novel, and introduce several bases for conviction that are both factually and legally distinct from any other alleged in the original Indictment.³⁸ The Accused are charged with responsibility for several additional statutory crimes³⁹ committed against Witness SST7/38, that witness’s father, and an unspecified number of individuals in a group of displaced persons of which Witness SST7/38 formed part.⁴⁰ Since the Trial Chamber could conceivably acquit a given Accused of all previously existing charges, but convict him under Count 38 if the Prosecution establishes his responsibility for the persecution or deportation of any of the victims listed in paragraphs 96 to 101 of the Amended Indictment, there are several new charges incorporated within Count 38.⁴¹ In the same vein, since the Chamber could acquit a given Accused of all previously existing charges, but

³⁵ See *Popović et al.* July 2006 Pre-Trial Decision, *supra* note 25, para. 11; *Delić* May 2006 Pre-Trial Decision, *supra* note 29, para. 54; *Prosecutor v. Milutinović, Šainović, Ojdanić, Pavković, Lazarević, Đorđević, and Lukić*, Case No. IT-05-87-PT, Decision on Defence Motions Alleging Defects in the Form of the Proposed Amended Joinder Indictment, 22 March 2006, para. 24; *Prosecutor v. Beara*, Case No. IT-02-58-PT, Decision on Prosecution Motion to Amend the Indictment, 24 March 2005, p. 2.

³⁶ *Halilović* Pre-Trial Decision, *supra* note 28, para. 30 (emphasis added). See also *ibid.*, para. 34 (holding that “where the new allegation could be the sole action or omission of the Accused that justifies his conviction, that amendment is a ‘new charge’ for purposes of Rule 50”).

³⁷ *Popović et al.* July 2006 Pre-Trial Decision, *supra* note 25, para. 11 n. 26.

³⁸ See Amended Indictment, paras. 96–101.

³⁹ Destruction of property, deportation, forcible transfer, unlawful detention, and inhumane acts as forms of persecution as a crime against humanity; deportation as a crime against humanity (as an alternative to persecution); other inhumane acts as a crime against humanity (as an alternative to persecution); and cruel treatment as a violation of the laws or customs of war.

⁴⁰ *Ibid.*

⁴¹ The actual number of new charges cannot be quantified with precision because of the unspecified number of victims referred to in paragraphs 96 to 101 of the Amended Indictment.

find him responsible for the cruel treatment of any of the victims listed in paragraphs 96 to 101, Count 39 likewise encompasses a number of new charges.⁴²

15. Counts 35 and 37, as proposed to be amended, also incorporate new charges by virtue of the new factual allegations underpinning them in paragraphs 91 and 92 of the Amended Indictment. Although no new additional statutory crimes are alleged under these counts through any additional form of responsibility, these paragraphs allege new and different ways in which the physical perpetration of the crimes charged in those counts were realised. Paragraph 91, for example, describes how a witness was made to dig trenches, and paragraph 92 describes his use as a human shield. Conversely, the previously existing paragraphs under Counts 35 and 37 describe other acts of mistreatment of this witness, including that he was tied against a metal bed frame and beaten, and that Balaj threatened him with decapitation. Again, since the Trial Chamber could conceivably acquit any of the Accused of all previously charged criminal conduct, but find the Accused responsible under Count 35 or Count 37 for this witness's use as a human shield or as a trench-digger, new charges exist under both of these counts. Count 36, by contrast, contains no new charges: as this count exclusively charges rape as a violation of the laws or customs of war, it is quite obvious that the new factual allegations in paragraphs 91 and 92 of the Amended Indictment are not related to this count.⁴³

16. Accordingly, Counts 35, 37, 38, and 39 would all contain new charges if the Trial Chamber were to grant the Prosecution leave to make the proposed amendments to the Indictment. If such leave were granted, a further appearance would have to be held pursuant to Rule 50(B), in order for the Accused to enter pleas in respect of Counts 38 and 39, and re-enter their pleas in respect of Counts 35 and 37. In addition, the Accused would ordinarily have a further period of 30 days in which to file preliminary motions pursuant to Rule 72 in respect of the new charges. As discussed above,⁴⁴ these two procedural consequences hold the potential of unduly delaying the proceedings, with the effect that the Accused may be unfairly prejudiced.

17. In the present circumstances, however, the delaying effect of these procedural consequences has been significantly mitigated and, in the Trial Chamber's view, the Accused will consequently suffer no unfair prejudice. The Accused have already been given the opportunity to file challenges

⁴² The Prosecution is accordingly correct in asserting that "[n]ew charges [have been] added" under Counts 38 and 39. Motion, para. 9.

⁴³ The Prosecution is therefore only partially correct in stating that "[n]o new charges [have been] added [under Counts 35, 36, and 37] as the facts narrated are covered by existing charges, more precisely, Cruel Treatment in Count 37." *Ibid.*

under Rule 72(A)(ii) in respect of any new charges that may have been included in the Amended Indictment, and have availed themselves of this opportunity.⁴⁵ Furthermore, the Trial Chamber does not expect that the convening of a further appearance will result in significant delay in the circumstances. Such appearance may take place at the next status conference, which the Pre-Trial Judge has indicated will occur in December 2006 or January 2007.⁴⁶

18. In light of this holding and the holding above that none of the proposed amendments will deprive any of the Accused of his right to prepare an effective defence,⁴⁷ the Trial Chamber concludes that the Accused would not be unfairly prejudiced by the inclusion of all the proposed amendments in the Amended Indictment. The Chamber will now examine whether the Prosecution has provided documentation in support of these proposed amendments satisfying the *prima facie* standard of Article 19 of the Statute.

b. Are the proposed amendments supported by documentation meeting the *prima facie* standard?

19. Under the jurisprudence of this Tribunal, the test for determining whether a *prima facie* case has been established by the Prosecution in accordance with Article 19(1) of the Statute and Rule 50(A)(ii) obliges the Trial Chamber to inspect the supporting documentation submitted with the indictment in order to determine whether it provides “a credible case which would (if not contradicted by the Defence) be a sufficient basis to convict the accused on the charge.”⁴⁸

20. The Trial Chamber has examined the proposed amendments in the Amended Indictment having regard to the supporting documentation that accompanied the original Indictment, as well as the two additional witness statements submitted by the Prosecution in Annexes V and VI of the Motion, and finds that they establish a *prima facie* case for the proposed amendments.⁴⁹ The requirements of Article 19 of the Statute and Rule 50 have therefore been met. Bearing in mind the

⁴⁴ See *supra* para. 12.

⁴⁵ See *supra* para. 4 (discussing *Haradinaj et al.* 3 May 2006 Order, *supra* note 9, in which the Pre-Trial Judge ordered that the Accused consolidate their challenges to the granting of leave to amend the Indictment with their Rule 72(A)(ii) challenges).

⁴⁶ *Haradinaj et al.*, Transcript of Status Conference, T. 229 (13 October 2006) (Pre-Trial Judge expressing his intention to hold the next status conference “just before or just after the winter recess”).

⁴⁷ See *supra* para. 11.

⁴⁸ *Popović et al.* July 2006 Pre-Trial Decision, *supra* note 25, para. 36 (quoting *Prosecutor v. Kordić, Blaškić, Čerkez, Šantić, Skopljak, and Aleksovski*, Case No. IT-95-14-I, 10 November 1995, p. 3). *Accord Prosecutor v. Stanišić and Simatović*, Case No. IT-03-69-PT, Decision on Defence Requests for Certification to Appeal Decision Granting Prosecution Leave to Amend the Amended Indictment, 8 February 2006, p. 3.

⁴⁹ The Accused are therefore incorrect to the extent that they argue that the evidence supporting Counts 38 and 39 of the Amended Indictment is insufficient. See Response, para. 7.

Chamber's holding that the proposed amendments will not cause unfair prejudice to the Accused,⁵⁰ and subject to the considerations expressed below regarding the defects in the form of the Amended Indictment,⁵¹ the Chamber accordingly grants leave to the Prosecution to make the amendments proposed.

c. The question of the "futility" of paragraphs 96 to 101 of the Amended Indictment

21. The Accused object to the granting of leave to amend the Indictment on the specific ground that the proposed addition of Counts 38 and 39, along with paragraphs 96 to 101, "do[es] not add anything of substance to the allegations already made against [the Accused] in the Indictment."⁵² The Accused cite jurisprudence holding that, "[w]here ... the proposed amended case is so futile that it would be struck out if it had appeared in the original indictment, the Trial Chamber will not normally exercise its discretion to permit the amendment",⁵³ and submit that the futility of Counts 38 and 39 warrants the denial leave to amend the Indictment to include them.⁵⁴ The Prosecution responds that, although paragraphs 96 to 101 of the Amended Indictment "provide more examples of criminal behaviour already charged, the seriousness of the conduct alleged in the proposed counts 38 and 39 justifies their inclusion".⁵⁵ The Trial Chamber finds force in the Prosecution's argument: while the conduct described in paragraphs 96 to 101 is similar to that already alleged in other paragraphs of the Indictment, these paragraphs introduce new instances of grave criminal conduct committed against different victims. Conduct of this nature cannot be regarded as futile, and would not have been stricken from the original Indictment had it appeared there. This contention of the Accused is accordingly dismissed.

III. THE FORM OF THE AMENDED INDICTMENT

A. Law on the Form of the Indictment

22. Article 18(4) of the Statute and Rule 47 provide that an indictment shall contain a concise statement of the facts of the case and the crimes with which the accused is charged under the Statute. Article 18(4) and Rule 47 should be interpreted together with the rights of the accused set out in Articles 21(2), (4)(a), and (4)(b) of the Statute, which entitle the accused to a fair and public

⁵⁰ See *supra* para. 18.

⁵¹ See *infra*. paras. 22–25.

⁵² Response, para. 3.

⁵³ *Prosecutor v. Brđanin and Talić*, Case No. IT-99-36-PT, Decision on Filing of Replies, 7 June 2001, para. 3 (citing no authority).

⁵⁴ Response, para. 4.

hearing, to be informed of the nature and cause of the charges against him in a language he understands, and to have adequate time and facilities for the preparation of his defence.⁵⁶ These provisions translate into an obligation on the part of the Prosecution to plead the material facts underpinning the charges with enough detail to inform the accused clearly of the charges against him or her so that he or she may prepare an effective defence.⁵⁷

23. The materiality of a particular fact cannot be determined in the abstract, and depends upon the nature of the Prosecution case and the alleged criminal conduct with which the accused is charged.⁵⁸ The materiality of facts such as the identity of the victims, the time and place of the events alleged in the indictment, and the description of those events depends upon the proximity of the accused to those events and, therefore, the form of responsibility with which the accused is charged.⁵⁹ The Tribunal's jurisprudence has established that the precise details to be pleaded as material facts is the conduct of the accused, not the acts of those persons for whose conduct he or she is alleged to be responsible.⁶⁰ Furthermore, where the scale of the crimes renders it impractical to require a high degree of specificity regarding, for example, the identity of the victims, the Prosecution does not need to identify every victim in the indictment in order to meet its obligation of specifying the material facts of the case.⁶¹

B. Discussion

24. Rule 50(C) allows the filing of further preliminary motions pursuant to Rule 72 only in respect of new charges that have been inserted into an indictment and approved by the Trial Chamber.⁶² Considering "the necessity to expedite the proceedings", on 3 May 2006 the Pre-Trial Judge ordered the Accused to file any Rule 72(A)(ii) preliminary motions alleging defects in the

⁵⁵ Reply, para. 3.

⁵⁶ *Prosecutor v. Popović, Beara, Nikolić, Borovčanin, Tolimir, Miletić, Gvero, Pandurević, and Trbić*, Case No. IT-05-88-PT, Decision on Motions Challenging the Indictment Pursuant to Rule 72 of the Rules, 31 May 2006 ("*Popović et al.* May 2006 Pre-Trial Decision"), para. 4.

⁵⁷ *Prosecutor v. Blaškić*, Case No. IT-95-14-A, Judgement, 29 July 2004 ("*Blaškić Appeal Judgement*"), para. 209 (citing *Prosecutor v. Kupreškić, Kupreškić, Kupreškić, Josipović, and Šantić*, Case No. IT-95-16-A, Judgement, 23 October 2001 ("*Kupreškić et al. Appeal Judgement*"), para. 88). *Accord Prosecutor v. Zelenović*, Case No. IT-96-23/2-PT, Decision on Defence Preliminary Motion, 11 October 2006 ("*Zelenović Pre-Trial Decision*"), para. 7; *Prosecutor v. Čermak and Markač*, Case No. IT-03-73-PT, Decision on Ivan Čermak's and Mladen Markač's Motion on Form of Indictment, 8 March 2005, para. 5.

⁵⁸ *Blaškić Appeal Judgement*, *supra* note 57, para. 210; *Kupreškić et al. Appeal Judgement*, *supra* note 57, para. 89; *Zelenović Pre-Trial Decision*, *supra* note 57, para. 8.

⁵⁹ *Popović et al. May 2006 Pre-Trial Decision*, *supra* note 56, para. 5.

⁶⁰ *See Blaškić Appeal Judgement*, *supra* note 57, para. 210; *Zelenović Pre-Trial Decision*, *supra* note 57, para. 8; *Popović et al. May 2006 Pre-Trial Decision*, *supra* note 56, para. 5.

⁶¹ *Kupreškić et al. Appeal Judgement*, *supra* note 57, paras. 89–90. *Accord Zelenović Pre-Trial Decision*, *supra* note 57, para. 9; *Popović et al. May 2006 Pre-Trial Decision*, *supra* note 56, para. 5.

form of the Amended Indictment by 6 June 2006.⁶³ As indicated in paragraphs 14 to 16 above, the Trial Chamber's analysis of the changes made to the original Indictment has led it to conclude that there are new charges contained in paragraphs 91 to 92 and 96 to 101 of the Amended Indictment. The Trial Chamber is of the view that the language in these paragraphs complies with the general pleading principles set forth above, including that the Prosecution has adequately described the membership of the group of persons allegedly displaced from the town of Junik, in light of the nature and scale of the crimes alleged in Counts 38 and 39. The Chamber will therefore turn to the only specific challenge to the form of the Amended Indictment raised by the Accused.

25. Haradinaj, with the other Accused joining, argue that the alleged link to Haradinaj in paragraphs 96 to 101 is "most tenuous":⁶⁴ the Amended Indictment describes his presence in the area in question on 28 May 1998 "for a very brief time",⁶⁵ and "Haradinaj was not present nor was he giving any orders in respect of any of the alleged offences in the time and days that followed (28–30 May 1998)."⁶⁶ The Chamber recalls that Haradinaj, along with Balaj and Brahimaj, is charged pursuant to Article 7(1) of the Statute not only with the physical commission of crimes, but also with planning, instigating, ordering, and aiding and abetting, and with participating in a joint criminal enterprise ("JCE").⁶⁷ None of these forms of responsibility contains an element requiring that the Accused be present when the crime for which he is charged with responsibility is physically perpetrated.⁶⁸ When read in conjunction with paragraph 23 to 29 of the Amended Indictment, which describe the alleged JCE and the Accused's respective actions in furtherance of it, the Trial Chamber considers that paragraphs 96 to 101 plead the responsibility of the Accused in sufficient detail to inform them of the charges against them. The Trial Chamber also notes that this submission of the Accused appears to relate to a matter to be determined on the evidence at trial, and not in pre-trial proceedings on the amendment or form of the indictment. The submission is therefore dismissed.

⁶² See *supra* para. 12.

⁶³ *Haradinaj et al.* 3 May 2006 Order, *supra* note 9, p. 2.

⁶⁴ Response, para. 5.

⁶⁵ *Ibid.* para. 6.

⁶⁶ *Ibid.* para. 5.

⁶⁷ Amended Indictment, paras. 20, 22.

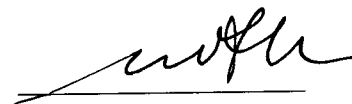
⁶⁸ See *Blaškić* Appeal Judgement, *supra* note 57, para. 48 (holding that an accused aider and abettor need not be present when the crime for which he is charged with responsibility is physically perpetrated); *Prosecutor v. Strugar*, Case No. IT-01-42-T, Judgement, 31 January 2005, para. 349 (same); *Prosecutor v. Krajišnik*, Case No. IT-00-39-T, Judgement, 27 September 2006, paras. 1126, 1182 (convicting the accused of persecution, extermination, murder, deportation, and inhumane acts as crimes against humanity pursuant to the first category of JCE notwithstanding his apparent absence, at least in most instances, from the scene of the crime in question); *Prosecutor v. Aleksovski*, Case No. IT-95-14/1-T, Judgement, 25 June 1999, para. 62 (holding that none of the forms of accomplice liability in Article 7(1) requires the presence of the accused during the commission of the crime).

IV. DISPOSITION

26. For the reasons discussed above, pursuant to Article 19 of the Statute and Rules 50, 54, and 72 of the Rules, the Trial Chamber hereby orders as follows:

- a. The Prosecution is granted leave to exceed the word limit set forth in the Practice Direction.
- b. The Prosecution is granted leave to make all amendments as proposed in the Amended Indictment, and the Amended Indictment shall henceforth be the operative one in this case.
- c. The Registry shall lift the confidentiality of the Response and the Reply.

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



Carmel Agius
Presiding

Dated this twenty-fifth day of October 2006
At The Hague
The Netherlands

[Seal of the Tribunal]