

IT-04-84-T
D22183-D22178
05 SEPTEMBER 2007

22183 AT



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

Case No. IT-04-84-T
Date: 5 September 2007
Original: English

IN TRIAL CHAMBER I

Before: Judge Alphons Orie, Presiding
Judge Frank Höpfel
Judge Ole Bjørn Støle

Registrar: Mr Hans Holthuis

Decision of: 5 September 2007

PROSECUTOR

v.

RAMUSH HARADINAJ
IDRIZ BALAJ
LAHI BRAHIMAJ

PUBLIC

DECISION ON PROSECUTION'S MOTION SEEKING LEAVE TO AMEND THE
REVISED SECOND AMENDED INDICTMENT

Office of the Prosecutor

Mr David Re
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Mr Richard Harvey
Mr Paul Troop

1. On 29 May 2007 and 6 June 2007, the Prosecution notified the Trial Chamber and the Defence of the identification of the remains of two victims listed anonymously in the indictment as being those of Sanije Balaj and a sister of Witness 4.¹ The Prosecution also notified the Trial Chamber and the Defence of its intention to seek leave to amend the Revised Second Amended Indictment (“current indictment”) in light of these identifications.²
2. On 13 June 2007, the Prosecution filed a motion, requesting the Trial Chamber to grant leave to amend the current indictment and to treat the proposed Third Amended Indictment as the operative indictment in this case.³ In a filing of 21 June 2007, the Prosecution provided the Trial Chamber and the Defence with additional supporting material.⁴ On 12 July 2007, the Prosecution filed another set of supporting material, consisting of the minutes of the trial against Idriz Gashi in Kosovo and a confidential statement of Dr Thomas Parsons.⁵ On 31 August 2007, the Prosecution filed a corrigendum, correcting an error in paragraphs 49 and 89 of the proposed Third Amended Indictment; these paragraphs should state that *six* bodies, rather than seven, remain unidentified.⁶
3. On 2 July 2007, Mr Haradinaj requested an extension of time in which to file a response to the Motion.⁷ Mr Balaj and Mr Brahimaj joined in this request.⁸ The response to the Motion by all three Accused, conveyed in submissions filed between 18 and 20 July 2007, was that they had no comments to make.⁹
4. The Prosecution seeks to make two substantive changes to the current indictment. These consist of the formal identification of the previously unidentified victims, mentioned above,

¹ Notification of the Identification of an Unnamed Victim in Paragraph 68 of the Indictment, 29 May 2007 (“First Notification”); Notification of the Identification of an Unnamed Victim in Paragraph 89 of the Indictment, 6 June 2007 (“Second Notification”).

² First Notification, para. 7; Second Notification, para. 5.

³ Motion Seeking Leave to Amend the Revised Second Amended Indictment (“Motion”), 13 June 2007, para. 26.

⁴ Explanation of Materials Filed in Support of the Amendment of the Indictment, 21 June 2007.

⁵ Submission of Newly Obtained Supporting Material for Motion to Amend the Revised Second Amended Indictment, dated 12 July 2007, filed 13 July 2007.

⁶ Corrigendum to Prosecution’s Motion Seeking Leave to Amend the Indictment (“Corrigendum”), 31 August 2007.

⁷ Motion on Behalf of Ramush Haradinaj for Extension of Time to Respond to the Prosecution’s Application for Leave to Amend the Indictment, 2 July 2007.

⁸ Idriz Balaj’s Joinder in Ramush Haradinaj’s Motion for Extension of Time to Respond to the Prosecution Application for Leave to Amend the Indictment, 3 July 2007; Lahi Brahimaj’s Joinder in Haradinaj’s Motion for Extension of Time to Respond to the Prosecution’s Application for Leave to Amend the Indictment, 4 July 2007. On 9 July 2007 the Trial Chamber informed the parties by email that the time to file a response was extended to 13 July 2007. Later, the deadline was extended to 17 July 2007.

⁹ Response on Behalf of Ramush Haradinaj to Prosecution Motion Seeking Leave to Amend the Indictment, dated 17 July 2007, filed 18 July 2007; Response on Behalf of 3rd Defendant, Lahi Brahimaj, to Prosecution Motion Seeking Leave to Amend the Indictment, 19 July 2007; Idriz Balaj’s Response to Prosecution Motion Seeking Leave to Amend the Indictment, 20 July 2007.

and the alteration of factual allegations in Counts 13/14 and 21/22.¹⁰ These new factual allegations will be discussed in more detail below.

5. The Prosecution submits that the proposed amendments assist in determining the issues in this case and cause no unfair prejudice to the Accused.¹¹ It is the Prosecution's view that the proposed amendments do not constitute new charges, because they do not carry an additional risk of conviction.¹² The Prosecution submits that if the Trial Chamber determines that the proposed amendments do constitute new charges, undue delay need not result, because the amendments are minor in scope.¹³ The Prosecution submits that, if the proposed amendments are granted, it will seek leave to add four partly *viva voce* witnesses to the Prosecution's witness list. The Prosecution contends that since it no longer intends to rely on the evidence of about eight witnesses on the existing list, there will be no overall increase in the time required for its case.¹⁴ The Prosecution further submits that the proposed amendments meet the *prima facie* standard set forth in Article 19 of Tribunal's Statute.¹⁵

6. Rule 50 of the Tribunal's Rules governs the amendment of an indictment and reads, in relevant part:

(A) (i) The Prosecutor may amend an indictment:

(a)...

(b)...

(c) after the assignment of the case to a Trial Chamber, with the leave of that Trial Chamber or a Judge of that Chamber, after having heard the parties.

(ii) Independently of any other factors relevant to the exercise of the discretion, leave to amend an indictment shall not be granted unless the Trial Chamber or Judge is satisfied there is evidence which satisfies the standard set forth in Article 19, paragraph 1, of the Statute to support the proposed amendment.

(iii) Further confirmation is not required where an indictment is amended by leave.

(iv)...

(B) If the amended indictment includes new charges and the accused has already appeared before a Trial Chamber in accordance with Rule 62, a further appearance shall be held as soon as practicable to enable the accused to enter a plea on the new charges.

(C) The accused shall have a further period of thirty days in which to file preliminary motions pursuant to Rule 72 in respect of the new charges and, where necessary, the date for trial may be postponed to ensure adequate time for the preparation of the defence.

¹⁰ Motion, paras 2, 4-5, 8, 11.

¹¹ Motion, paras 3, 17.

¹² Motion, paras 12-13.

¹³ Motion, paras 14-15, 17.

¹⁴ Motion, para. 20.

¹⁵ Motion, para. 23.

7. Under Rule 50, a Trial Chamber has wide discretion to grant leave to amend an indictment, even after trial has begun.¹⁶ Such leave will normally be granted where (i) the proposed amendment will facilitate the determination of the issues in the case,¹⁷ (ii) the proposed amendment is supported by material meeting the *prima facie* standard,¹⁸ and (iii) the proposed amendment does not result in unfair prejudice to the accused when viewed in light of the circumstances of the case as a whole.¹⁹

8. The Trial Chamber has examined the proposed amendments and considers that they do facilitate the determination of the issues in this case. They provide greater specificity to the allegations contained in the current indictment by naming previously unidentified victims.

9. Also, the Trial Chamber has examined the supporting material submitted by the Prosecution and finds that it establishes a *prima facie* case for the proposed amendments.

10. In examining whether a proposed amendment will cause unfair prejudice to an accused, two factors are particularly important. First, the proposed amendment may not deprive the accused of an adequate opportunity to prepare his or her defence.²⁰ Since the Accused in this case have not presented any objection to the Motion, and the Trial Chamber sees no reason to find that the proposed amendments may deprive them of an adequate opportunity to prepare their defence, it will not further consider this question.

11. Second, the proposed amendment may not negatively affect an accused's right under Article 21 of the Statute to be tried without undue delay.²¹ It follows that a Trial Chamber will have fewer hesitations to grant leave to amend an indictment where the amendment does not result in the addition of a new charge against the accused, because the addition of a new charge may give rise to the potentially time-consuming procedural consequences outlined in Rules 50 (B) and 50 (C).²²

¹⁶ *Prosecutor v. Popović et al.*, Decision on Further Amendments and Challenges to the Indictment, 13 July 2006 ("Popović Decision"), para. 8; *Prosecutor v. Haradinaj et al.*, Decision on Motion to Amend the Amended Indictment, 12 January 2007 ("Haradinaj Decision"), para. 12.

¹⁷ *Prosecutor v. Brđanin and Talić*, Decision on Form of Further Amended Indictment and Prosecution Application to Amend, 26 June 2001, para. 50; Haradinaj Decision, para. 12.

¹⁸ Popović Decision, para. 8; Haradinaj Decision, para. 12.

¹⁹ *Prosecutor v. Halilović*, Decision on Prosecutor's Motion Seeking Leave to Amend the Indictment, 17 December 2004 ("Halilović Decision"), para. 22; Popović Decision, para. 8.

²⁰ Popović Decision, para. 9; Haradinaj Decision, para. 13.

²¹ Popović Decision, para. 10; Haradinaj Decision, para. 15.

²² Popović Decision, para. 10.

12. When considering the question of whether a proposed amendment results in the addition of a new charge, the key question is whether the proposed amendment introduces a basis for conviction that is factually or legally distinct from any already present in the indictment.²³

13. The Prosecution proposes to add to Counts 13/14 the allegation that a sister of Witness 4, mentioned in the current indictment at paragraph 68 as having been abducted and not heard from since, was killed while in KLA custody and that her remains were found in the Lake Radonjić/Radoniq canal area in September 1998.²⁴ In addition, the Prosecution seeks to include in Counts 21/22 a paragraph alleging that Sanije Balaj was abducted and killed, and that her remains were found in the Lake Radonjić/Radoniq canal area in September 1998.²⁵

14. In the current indictment, while there is no explicit reference to the killing of either of the aforementioned persons, there is a reference in paragraph 89 to eight²⁶ unnamed persons whose remains were found in the Lake Radonjić/Radoniq canal area, allegedly killed while in KLA custody. One of the eight sets of remains reportedly was labelled “R1”; another set reportedly was labelled “R12”.²⁷ The Prosecution now alleges that the set R1 represents the remains of Sanije Balaj and R12 the remains of the aforementioned sister of Witness 4.²⁸ Six sets of remains found in the Lake Radonjić/Radoniq canal area remain unidentified.²⁹

15. The Trial Chamber finds that the proposed amendments merely seek to identify two persons from among the unidentified victims allegedly killed while in KLA custody. The proposed amendments therefore do not provide a legally or factually different basis for conviction and do not amount to new charges in the indictment.

16. The Trial Chamber notes that the Prosecution intends to add four partly *viva voce* witnesses to its witness list.³⁰ Given the fact that the Prosecution has not requested more time in which to present its case, the Trial Chamber considers it unlikely that a significant delay will result from adding these new witnesses to the Prosecution’s case.

²³ Halilović Decision, para. 30; Popović Decision, para. 11; Haradinaj Decision, para. 16.

²⁴ Motion, para. 8.

²⁵ Motion, para. 11.

²⁶ Paragraph 89 of the current indictment makes apparent reference to ten unidentified victims. However, in paragraph 2 of the Prosecution’s Notification of Clarification of Paragraph 89 of the Indictment and Request for leave to Add a Clarification to the Pre-Trial Brief, filed on 2 March 2007, the Prosecution corrected this number to eight.

²⁷ Prosecution’s Notification of Clarification of Paragraph 89 of the Indictment and Request for leave to Add a Clarification to the Pre-Trial Brief, 2 March 2007, Annex II.

²⁸ First Notification, para. 5; Second Notification, para. 2; Motion, para. 1.

²⁹ Second Notification, para. 3; Corrigendum paras 1-3.

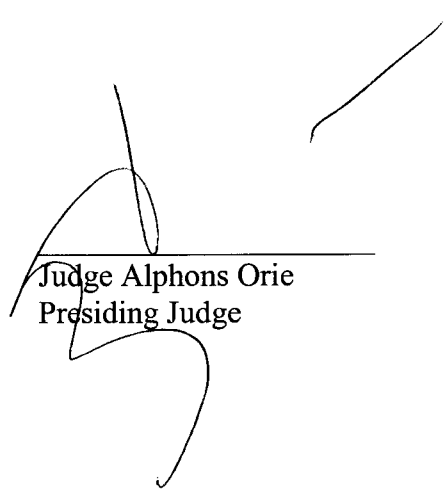
³⁰ Motion, para. 20.

17. The Trial Chamber finds that the requirements of Rule 50 have been met. Therefore, pursuant to Article 19 of the Statute and Rule 50 of the Rules:

The Trial Chamber **GRANTS** the Motion;

The Revised Third Amended Indictment shall henceforth be the operative indictment in this case.

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



Judge Alphons Orié
Presiding Judge

Dated this 5th day of September 2007
At The Hague
The Netherlands

[Seal of the Tribunal]