



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-95-5/18-PT

Date: 16 February 2009

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IN THE TRIAL CHAMBER

Before: Judge Iain Bonomy, Presiding
Judge Christoph Flügge
Judge Michèle Picard

Acting Registrar: Mr. John Hocking

Decision of: 16 February 2009

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

**DECISION ON PROSECUTION MOTION TO AMEND
THE FIRST AMENDED INDICTMENT**

The Office of the Prosecutor

Mr. Alan Tieger
Mr. Mark B. Harmon
Ms. Hildegard Uertz-Retzlaff

The Accused

Mr. Radovan Karadžić

THIS TRIAL CHAMBER of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991 (“Tribunal”) is seised of the Prosecution’s “Motion to Amend the First Amended Indictment” filed on 22 September 2008 pursuant to Rule 50 of the Rules of Procedure and Evidence of the Tribunal (“Motion”). The Motion is accompanied by Appendix A, a chart detailing the proposed changes to the Indictment, Appendix B, the Proposed Second Amended Indictment, and Confidential Appendix C, the supporting materials accompanying the Proposed Second Amended Indictment, in CD-ROM form. On 29 September 2008, the Prosecution filed its “Correction to the Proposed Second Amended Indictment,” to add one acronym (“SDS”) and one word (“and”) to the third phrase of the first sentence of paragraph 12 of the Proposed Second Amended Indictment.

I. Relevant Procedural History

A. Indictment history

1. The original Indictment in this case (“BiH Indictment”) was filed on 24 July 1995, with case number IT-95-5-I.¹ This was a joint Indictment against both this Accused and Ratko Mladić. In the BiH Indictment, the two Accused were charged with crimes in Bosnia and Herzegovina in the period from April 1992 through July 1995. The Indictment was confirmed on 25 July 1995 by Judge Jorda.² On 14 November 1995, the Prosecutor filed a separate joint indictment (“Srebrenica Indictment”) against the same two Accused, with case number IT-95-18-I,³ in which the Prosecution alleged crimes said to have occurred in Srebrenica in July 1995. This indictment was reviewed and confirmed by Judge Riad on 16 November 1995.⁴

2. During June and July 1996, a full Trial Chamber examined the two indictments pursuant to Rule 61 of the Rules, and concluded that the two indictments should be joined for that purpose.⁵ In the same decision, the Chamber issued international arrest warrants for the two Accused.

3. On 24 May 2000, the Prosecution submitted an amended Indictment pertaining to the Accused Karadžić only, consolidating the BiH Indictment and the Srebrenica Indictment.⁶ This consolidated indictment was confirmed by Judge Wald on 31 May 2000 (“First Amended

¹ *Prosecutor v. Karadžić and Mladić*, Case No. IT-95-5-I, Indictment, 24 July 1995.

² *Prosecutor v. Karadžić and Mladić*, Case No. IT-95-5-I, Review of the Indictment, 25 July 1995.

³ *Prosecutor v. Karadžić and Mladić*, Case No. IT-95-18-I, Indictment, 15 November 1995.

⁴ *Prosecutor v. Karadžić and Mladić*, Case No. IT-95-18-I, Review of the Indictment, 16 November 1995.

⁵ *Prosecutor v. Karadžić and Mladić*, Case Nos. IT-95-5-R61 and IT-95-18-R61, Review of Indictments Pursuant to Rule 61 of the Rules of Procedure and Evidence, 11 July 1996, pp. 5, 57.

⁶ *Prosecutor v. Karadžić*, Case No. IT-95-5/18-I, Amended Indictment, 24 May 2000.

Indictment”) with case number IT-95-5/18-I.⁷ The First Amended Indictment is currently the operative Indictment against this Accused, and was the basis for the “not guilty” plea entered on the Accused’s behalf at his further Initial Appearance on 29 August 2008.⁸

B. The Motion

4. The Accused was served with a copy of the Motion in B/C/S on 27 October 2008. On 30 October 2008, the Prosecution, pursuant to an order of the pre-trial Judge, filed its “Notice Concerning Provision of Supporting Material for the Proposed Second Amended Indictment”, in which it notified the Trial Chamber that, pursuant to Rule 66(A)(i) of the Rules, all supporting material for the Proposed Second Amended Indictment had been disclosed to the Accused in B/C/S.

5. On 7 November 2008, the Accused filed a “Motion for Full Disclosure of Supporting Material”, in which he stated that the Prosecution had not completed full disclosure of the supporting materials, and asserting, in particular, that witness transcripts disclosed to him had not been transcribed into B/C/S as required by the Trial Chamber’s “Decision on the Accused’s Request that All Materials, including Transcripts, be Disclosed to Him in B/C/S” of 25 September 2008 (“Decision of 25 September 2008”).⁹ The Prosecution filed the “Prosecution Response to Karadžić’s Motion for Full Disclosure of Supporting Material and Prosecution Request for Reconsideration or Clarification of the Chamber’s 25 September 2008 Decision” on 12 November 2008.

6. On 25 November 2008, in its “Decision on Accused Motion for Full Disclosure of Supporting Material”, the Trial Chamber refused the Prosecution’s request for reconsideration of the Decision of 25 September 2008, ordering the Prosecution to comply with its disclosure obligations pursuant to that Decision, and to file a notice informing the Chamber when full disclosure had been completed under Rule 66(A)(i). The Prosecution filed its “Notification Regarding Disclosure” on 14 January 2009, advising the Trial Chamber of completion of Rule 66(A)(i) disclosure.

⁷ *Prosecutor v. Karadžić, Ex Parte* and Under Seal, Case No. IT-95-5/18-I, Order Granting Leave to Amend the Indictment and Confirming the Amended Indictment, 31 May 2000. On 11 October 2002, the Prosecution sought the amendment and consolidation of the original two indictments in respect of the accused Mladić only: *see Prosecutor v. Mladić*, Case No. IT-95-5/18-I, Amended Indictment, 11 October 2002. The amended indictment against Mladić was subsequently confirmed in a decision of 8 November 2002, again with the same case number: *see Prosecutor v. Mladić*, Case No. IT-95-5/18-I, Order Granting Leave to File an Amended Indictment and Confirming the Amended Indictment, 8 November 2002.

⁸ Further Initial Appearance, 29 August 2008, T. 33.

⁹ Decision of 25 September 2008, paras 10–11.

7. The Accused filed his “Response to Motion to Amend the Indictment” (“Response”) on 28 January 2009.

8. Having obtained the leave of the Chamber,¹⁰ the Prosecution filed its “Reply to the Accused’s Response to the Motion to Amend the Indictment” on 4 February 2009 (“Reply”).

II. Submissions

A. Overview of the Prosecution’s proposed amendments to the Indictment

9. The Prosecution submits that the amendments set out in the Proposed Second Amended Indictment fall into four main categories.¹¹ First, the Prosecution submits that it has “updated, clarified, and further particularized its legal and factual allegations relating to the Accused’s individual responsibility.”¹² In this regard, the Trial Chamber notes that the Prosecution has revised the co-perpetration pleadings to reflect case law developments in relation to joint criminal enterprise liability, and that it is pleading four separate joint criminal enterprises in pursuit of distinct but related objectives.¹³ These alleged objectives were: (i) to permanently remove Bosnian Muslims and Bosnian Croats from Bosnian Serb-claimed territory from October 1991 until November 1995;¹⁴ (b) to spread terror among the civilian population of Sarajevo through a campaign of sniping and shelling conducted from April 1992 until November 1995;¹⁵ (c) to eliminate the Bosnian Muslims in Srebrenica commencing immediately prior to 11 July 1995 until 1 November 1995;¹⁶ and (d) to take United Nations personnel hostage in order to compel the North Atlantic Treaty Organization to abstain from conducting air strikes against Bosnian Serb military targets during May and June 1995.¹⁷

10. The Prosecution secondly states that the Proposed Second Amended Indictment narrows the scope of criminal conduct underlying the charges.¹⁸ Specifically, the Prosecution submits that the Proposed Second Amended Indictment would eliminate any criminal conduct in relation to 14 municipalities, reducing the scope of the indictment from 41 to 27 municipalities. Third, the Prosecution avers that by its proposed amendments it has “restructured the counts in the indictment,

¹⁰ See Request for Leave to Reply to the Accused’s Response to the Motion to Amend the Indictment, 30 January 2009; Order on the Prosecution’s Request for Leave to Reply to the Accused’s Response to the Motion to Amend the Indictment, 2 February 2009.

¹¹ Motion, para. 2.

¹² Motion, para. 2.

¹³ Motion, para. 11.

¹⁴ Motion, Appendix B, Proposed Second Amended Indictment, para. 9.

¹⁵ Proposed Second Amended Indictment, para. 15.

¹⁶ Proposed Second Amended Indictment, para. 20.

¹⁷ Proposed Second Amended Indictment, para. 25.

and legally re-characterized certain underlying criminal conduct which was already charged in the [First Amended Indictment].”¹⁹

11. With respect to the fourth main category of amendments, the Prosecution states that it has provided “more precise notice” of the charges against the Accused, both in the factual pleadings and in the seven schedules to the Proposed Second Amended Indictment.²⁰ The Prosecution further explains that, in addition to these four main areas of amendment, it has, throughout the Proposed Second Amended Indictment, more concisely pled the material facts underlying the charges, and made minor corrections to a number of factual allegations, as set out in table form in Appendix A to the Motion.²¹

(i) Proposed new counts and charges

12. The Prosecution explains that the total number of counts in the Proposed Second Amended Indictment remains at eleven, but that these eleven counts are not the same as in the First Amended Indictment. The Proposed Second Amended Indictment would eliminate two counts (Counts 2 and 6 of the First Amended Indictment), add two counts (Counts 2 and 10 of the Proposed Second Amended Indictment), and would re-characterise existing allegations of criminal conduct underlying certain of the charges in the First Amended Indictment.²²

13. In particular, the Prosecution has re-characterised certain criminal conduct which is now pleaded under two new counts. The Prosecution seeks to restructure the genocide counts, which it submits results in the removal of the charge of complicity in genocide, and to divide the single count of genocide in two (Counts 1 and 2 of the Proposed Second Amended Indictment), each new count representing a distinct time period and location.²³ The previous charge of unlawful infliction of terror on civilians in Sarajevo has been re-cast in the Proposed Second Amended Indictment in Count 9, which charges acts of violence, the primary purpose of which is to spread terror among the civilian population. Count 10, which is a separate charge of unlawful attacks, has been added.²⁴ The Prosecution concedes that this “re-characterisation” results in “new charges” against the Accused, but argues that it is “merely a legal re-characterisation of criminal conduct already alleged

¹⁸ Motion, para. 2.

¹⁹ Motion, para. 2.

²⁰ Motion, para. 2.

²¹ Motion, para. 7.

²² Motion, para. 23.

²³ Motion, para. 25.

²⁴ Motion, para 26, footnote 13.

in the First Amended Indictment”, which would not increase the length or complexity of the Prosecution case if it were allowed.²⁵

14. Also significant is the amendment alleging killings in 13 municipalities in respect of which the First Amended Indictment already included crimes other than killings, namely Banja Luka, Bosanska Krupa, Bosanski Novi, Bosanski Petrovac, Čajnice, Donji Vakuf, Hadžici, Ilidža, Kalinovik, Novo Sarajevo, Pale, Sokolac, and Vogošća. Thus, while the number of municipalities has been reduced overall, the Proposed Second Amended Indictment would increase the criminal liability of the Accused with respect to the additional killings alleged in these municipalities.²⁶

15. The Prosecution submits that the addition of these killings is necessary to rectify “an anomaly in the [First Amended Indictment], which distinguishes between killings and other crimes in the municipalities.”²⁷ The Prosecution concedes that, if its Motion is granted with respect to these additional killings, this will constitute a “new charge” in relation to counts 3, 4, 5 and 6 of the Proposed Second Amended Indictment.²⁸

16. Additionally, the Motion requests that three underlying acts of persecution—namely, unlawful detention, forced labour, and appropriation or plunder of property—be added to Count 3.²⁹ The Prosecution again concedes that these modifications, if granted, constitute a “new charge” in respect of Count 3.

17. With respect to these additional killings and underlying acts of persecution, the Prosecution argues that the Accused will not be subjected to unfair prejudice because alleged crimes in those 13 municipalities were already included in the First Amended Indictment. It further submits that the Accused was already charged with extermination and murder in other municipalities, and that these added allegations follow the same pattern of conduct and do not alter the nature of the charges; and further that the Accused was already charged with persecutory acts, deportation and forcible transfer in the 13 municipalities.³⁰ The Prosecution further submits that 14 of the 15 alleged killing incidents contained in the 13 municipalities listed have already been the subject of judgements by one or more Trial Chambers and could be established by way of adjudicated facts. Therefore, it is suggested by the Prosecution that any additional time needed to present evidence of these killings

²⁵ Motion, paras 25–27.

²⁶ Motion, para. 18.

²⁷ Motion, para. 18.

²⁸ Motion, para. 19.

²⁹ Motion, para. 20.

³⁰ Motion, para. 19.

would be more than offset by the time saved as the result of the substantial reduction in the overall number of municipalities in the indictment.³¹

(ii) Proposed reductions

18. As noted above, the Prosecution seeks leave to reduce the overall number of municipalities in the Indictment from 41 to 27,³² to remove the count alleging grave breaches of the Geneva Conventions (Count 6 of the First Amended Indictment)³³ and to remove the charge of complicity in genocide (Count 2 of the First Amended Indictment).³⁴

B. Accused's Response

19. In his Response, the Accused "does not oppose, in principle", the amendment of the First Amended Indictment.³⁵

20. However, he "suggests that the Trial Chamber grant leave to amend only parts of the proposed amended indictment at this time, reserving its decision on the other parts until after final judgement".³⁶ The Accused contends that the Proposed Second Amended Indictment "joins four distinct events".³⁷ He submits that preparing for and conducting a trial "on such wide-ranging charges will take years and years",³⁸ and refers to the length of a number of previous trials related to some of these events. The Accused notes in particular the joinder of three indictments relating to events in Bosnia, Croatia and Kosovo against Slobodan Milošević, submitting that "participants in the *Milošević* trial from all corners have recognised the dangers and unfairness of proceeding to trial on an amorphous indictment".³⁹ The Accused petitions the Trial Chamber to "demonstrate that it has learned the lessons" of that trial by "limiting the charges in the proposed amended indictment".⁴⁰

21. The Accused submits that the Trial Chamber has the power under Rule 50 of the Rules to order "that the new indictment contain only one of the four components of the proposed amended indictment".⁴¹ While acknowledging that this proposal "would represent the most extensive use of

³¹ Motion, para. 19.

³² Motion, para. 17.

³³ Motion, para. 24.

³⁴ Motion, para. 25.

³⁵ Response, para. 5.

³⁶ Response, para. 5. The Accused does not specify the "parts" of the Indictment to which he is referring.

³⁷ Response, para. 7.

³⁸ Response, para. 5.

³⁹ Response, para. 18.

⁴⁰ Response, para. 36, 20.

⁴¹ Response, para. 24.

the Trial Chamber's powers under Rule 50 at the ICTY", the Accused argues that "the Trial Chamber's power to organise a manageable trial is at its greatest when exercising its discretion on the indictment under Rule 50".⁴² In relation to the evaluation of prejudice to an accused, he submits that "[a]mendments by the prosecution which would complicate the trial and thus delay its completion should be denied".⁴³ In support of his suggestion, the Accused refers to a decision from *Prosecutor v. Milutinović et al.* in which he claims "the Trial Chamber granted leave to amend a proposed indictment while ordering that the new indictment be modified from the proposed indictment of the prosecution".⁴⁴

22. The Accused further contends that, given the structure of the Proposed Second Amended Indictment and the language of the Rules, other mechanisms for "managing the trial", including Rule 73 *bis* (D), Rule 73 *bis* (E) and Rule 49, "are not sufficient to significantly reduce its scope".⁴⁵

23. The Accused additionally "requests that should the Trial Chamber grant the prosecution's motion, it fix a date for [preliminary] motions to be filed within 30 days from his initial appearance on the new indictment", noting in a footnote that there is "some ambiguity" in relation to the timeframe for preliminary motions.⁴⁶

C. Prosecution's Reply

24. In the Reply, the Prosecution requests the Trial Chamber to deny the relief requested in the Response, and to allow the Prosecution to amend the First Amended Indictment as sought in the Motion.⁴⁷ The Prosecution submits that "to challenge a proposed amendment on the basis of unfair prejudice, it is incumbent upon the Accused to point to the specific amendment, and show how it would cause him unfair prejudice", and that "[t]he Accused has failed to do this".⁴⁸

25. The Prosecution refutes the analogy drawn by the Accused between the scope of the Proposed Second Amended Indictment and that of the joinder indictment in the *Milošević* case, submitting that the Proposed Second Amended Indictment is "in terms of its crime-base ... comparable to the component of the Slobodan Milošević case covering BiH".⁴⁹ The Prosecution

⁴² Response, para. 7.

⁴³ Response, para. 22.

⁴⁴ Response, para 23, citing *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-PT, Decision on Defence Motions Alleging Defects in the Form of the Proposed Amended Joinder Indictment, 22 March 2006 ("*Milutinović et al.* Decision").

⁴⁵ Response, para. 25.

⁴⁶ Response, para. 4.

⁴⁷ Reply, para. 8.

⁴⁸ Reply, para. 4.

⁴⁹ Reply, para. 6.

contests the Accused's "implicit suggestion" that "the duration of his trial will encompass the duration of ... related trials" as "not properly informed",⁵⁰ submitting that the duration of the Prosecution's case-in-chief will be determined in part by other mechanisms available at a later stage of proceedings, including the exercise by the Trial Chamber of its powers under Rule 73 *bis*, and also the extent to which the Prosecution will be permitted to rely upon adjudicated facts.⁵¹

26. The Prosecution further argues that "the relief sought by the Accused does not fall within the ambit of Rule 50",⁵² which, "[c]ontrary to the Accused's suggestion ... is not the appropriate mechanism to achieve a reduction in the scope of the Proposed Indictment".⁵³ The Prosecution submits that the *Milutinović et al.* Decision relied on by the Accused provides no authority for imposing limits on the scope of an indictment, and further that the Accused's Response "mischaracterises the basis" of that decision, since "[t]he modifications ordered by the Trial Chamber [therein] were responsive to issues relating to the form of the indictment, not challenges to its scope".⁵⁴

27. Finally, the Prosecution submits that "[t]he relief which the Accused seeks to obtain through Rule 50 is inconsistent with the principle of a fair trial", as it would "deny justice to victims of the crimes charged and unduly intrude upon the Prosecution's authority under Articles 16(1) and 16(2) of the Statute to determine the case which the Accused must answer".⁵⁵

III. Applicable law

28. Rule 50 provides, in relevant part:

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

...

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

...

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

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

⁵⁰ Reply, para. 6.

⁵¹ Reply, para 6, footnote 13.

⁵² Reply, para. 6.

⁵³ Reply, para. 5.

⁵⁴ Reply, para. 5.

⁵⁵ Reply, para. 7.

29. Thus, a Trial Chamber has wide discretion to allow an indictment to be amended.⁵⁶ While a Trial Chamber will usually grant leave to make a particular amendment where it may help to “ensure that the real issues in the case will be determined”, such leave will not be granted unless the amendment meets two cumulative criteria: (a) it must not result in unfair prejudice to the accused when viewed in light of the circumstances of the case as a whole; and (b) if the proposed amendment is material,⁵⁷ it must be supported by documentation or other evidence meeting the *prima facie* standard set forth in Article 19 of the Statute.⁵⁸

30. The case law of the Tribunal identifies two key factors to be considered, among others, when determining whether granting an amendment would cause unfair prejudice to an accused. First, the amendment must not deprive the accused of an adequate opportunity to prepare an effective defence, and second, it must not adversely affect the accused’s right under Article 21 of the Statute to be tried without undue delay.⁵⁹

31. It is settled jurisprudence that the issue of notice is relevant to the assessment of whether leave to amend should be granted.⁶⁰ Therefore, when assessing the prejudicial effect, if any, of proposed amendments, the Trial Chamber will examine whether the accused is provided with sufficient notice of the scope and nature of the new allegations against him.⁶¹ Where an amendment clarifies the Prosecution’s case and provides further notice to the Accused of the charges against him, the Trial Chamber will be more likely to hold that the accused has not been deprived of an adequate opportunity to prepare his defence.⁶² The Trial Chamber will also look at the time when the amendment was requested: as a general rule, the closer to trial the Prosecution moves to amend

⁵⁶ *Prosecutor v. Popović et al.*, Case No. IT-05-88-PT, Decision on Further Amendments and Challenges to the Indictment, 13 July 2006 (“Popović Decision”), para. 8; *Prosecutor v. Delić*, Case No. IT-04-83-PT, Decision on Defence Motion Alleging Defects in the Form of the Indictment and Order on Prosecution Motion to Amend the Indictment, 13 December 2005, para. 62 (“Delić Decision”); *Prosecutor v. Martić*, Case No. IT-95-11-PT, Decision on the Prosecution’s Motion to Request Leave to File a Corrected Amended Indictment, 13 December 2002, para. 21.

⁵⁷ *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, para. 30, holding that “it would be inaccurate to say that supporting material must in all cases be provided for every single proposed amendment, no matter how minor”, and requiring supporting material only for “every material proposed amendment”.

⁵⁸ *Popović Decision*, para. 8; *Boškoski and Tarčulovski Decision*, paras 10, 13–14; *Milutinović et al. Decision*, para. 10; *Prosecutor v. 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; *Prosecutor v. Beara*, Case No. IT-02-58-PT, Decision on Prosecution Motion to Amend the Indictment, 24 March 2005 (“Beara Decision”), p. 2.

⁵⁹ *Popović Decision*, paras 9–10; *Boškoski and Tarčulovski Decision*, para. 10; *Milutinović et al. Decision*, para. 10; *Halilović Decision*, para. 23; *Beara Decision*, p. 2; *Prosecutor v. Dragomir Milošević*, Case No. IT-98-29/1-PT, Decision on Amendment of the Indictment and Application of Rule 73 bis(D), 12 December 2006 (“Dragomir Milošević Decision”), paras 10–11; *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-AR73, Decision on Prosecutor’s Interlocutory Appeal Against Trial Chamber III Decision of 8 October 2003 Denying Leave to File an Amended Indictment, 19 December 2003, para. 13 (“Karemera Decision”).

⁶⁰ *Halilović Decision*, para. 23; *Boškoski and Tarčulovski Decision*, para. 11.

⁶¹ *Popović Decision*, para. 21.

⁶² *Popović Decision*, para. 9.

the indictment, the more likely it is that the Trial Chamber will deny the motion on the ground that granting such leave would cause unfair prejudice to the accused by depriving him of an adequate opportunity to prepare an effective defence.⁶³

32. In considering the second factor, the possibility of delay in proceedings must be weighed against the benefits the amendment may bring to both the accused and the Trial Chamber, such as the simplification of proceedings, a more complete understanding of the Prosecution's case, and the avoidance of possible challenges to the indictment or evidence presented at trial.⁶⁴ Moreover, in the case of *Prosecutor v. Karemera et al.*, the Appeals Chamber considered as a relevant factor, when assessing whether the delay resulting from a request to amend the indictment would be undue, "the course of the proceedings to date, including the diligence of the Prosecution in advancing the case and the timeliness of the [Prosecution's request to amend the indictment]".⁶⁵

33. Undue delay could result if, for example, the amendment constitutes a new charge against the accused, in which case the procedures governing a further plea to the charges as set out under Rule 50(B) and (C) must be observed. The time required to realise these procedures, when considered in the circumstances of a given case, could amount to undue delay causing unfair prejudice to the accused.⁶⁶

34. In evaluating what constitutes a new charge for the purposes of Rule 50 of the Rules, the Trial Chamber will be mindful of the standard used by the Trial Chamber in the case of *Prosecutor v. Halilović*:

[w]hen 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.⁶⁷

35. Under the jurisprudence of the 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) of the Rules obliges the Trial Chamber to examine the supporting material submitted with

⁶³ *Dragomir Milošević* Decision, para. 10; *Delić* Decision, para. 62.

⁶⁴ *Popović* Decision, para. 10; *Boškoski and Tarčulovski* Decision, para. 12.

⁶⁵ *Karemera* Decision, para. 15; *Boškoski and Tarčulovski* Decision, para. 10; *Milutinović et al.* Decision, para. 10; *Beara* Decision, p. 2; *Halilović* Decision, para. 23; *Popović* Decision, para. 10.

⁶⁶ *Dragomir Milošević* Decision, para. 11; *Popović* Decision, para. 10; *Halilović* Decision, para. 24.

⁶⁷ *Halilović* Decision, para. 30; *Beara* Decision, p. 2.

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”.⁶⁸

V. Discussion

A. The Accused’s proposal to restrict the Indictment

36. Before considering the Motion on its merits, the Trial Chamber will address the Accused’s proposal to amend only selected parts of the Indictment at this time.

37. According to a plain reading, Rule 50 authorises the Prosecutor, not the Trial Chamber, to amend an indictment. The Trial Chamber may, once it has heard the parties, exercise its discretion in granting or denying such leave, subject to the conditions outlined above. This Trial Chamber considers that an attempt to act pursuant to Rule 50 to impose its will to effect wholesale restriction of an indictment would exceed the scope of this discretion.

38. It should also be noted that, in the *Milutinović et al.* Decision relied on by the Accused, the Trial Chamber was not only deciding on a request by the Prosecution for leave to amend the indictment, but was also determining preliminary motions by two of the accused pursuant to Rule 72(A) alleging defects in the form of the indictment. In making that determination, the Trial Chamber ordered clarification and provision of further details in relation to certain sections of the indictment.⁶⁹ Likewise, this Trial Chamber considers that a clear distinction should be maintained between the amendment of an indictment pursuant to Rule 50 and the modification of an indictment following a successful defence motion pursuant to Rule 72, including a motion under Rule 72(A)(iii) seeking the severance of counts, or action of the Trial Chamber pursuant to Rule 73 *bis*.

39. For these reasons, the Trial Chamber concurs with the Prosecution that Rule 50 is not the appropriate mechanism to achieve any such reduction and declines, at this stage of the proceedings, to act as requested by the Accused.

B. Material supporting the amendments: the *prima facie* standard

40. The first and third categories of amendments as proposed by the Prosecution are the only material additions in respect of which leave is sought, and the Chamber will therefore restrict its discussion of the supporting materials to these categories.

⁶⁸ *Popović* Decision, para. 36; *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

41. The Trial Chamber has reviewed the evidence contained in the supporting material relating to the first category of amendments sought, the alleged joint criminal enterprises, and finds that the Prosecution has met the *prima facie* standard in relation to each such allegation. In respect of the third category of amendments, relating to the re-characterisation of the underlying acts of genocide against the Muslim population of Srebrenica charged under Count 2 and the unlawful attacks which appear now in Count 10 of the Proposed Second Amended Indictment, the Chamber has reviewed the supporting materials provided and finds that the Prosecution has established a *prima facie* case. The Chamber is also satisfied that the supporting material contains *prima facie* evidence for the modified terror charge under Count 9 of the Proposed Second Amended Indictment, which the Prosecution has revised in order to reflect recent jurisprudence.

42. With regards to the alleged killings which the Prosecution seeks to add in Counts 3, 4, 5 and 6 of the Proposed Second Amended Indictment, the Trial Chamber finds that the evidence submitted by the Prosecution constitutes *prima facie* evidence in support of all but three of the alleged incidents. The supporting material for the additional alleged killings referred to in paragraphs 3.1, 13.2 and 18.2 of Schedule B to the Proposed Second Amended Indictment has been found not to meet the *prima facie* standard.

43. The alleged incident referred to in paragraph 3.1 of Schedule B—the killing of at least 11 men during detention in Petar Kočić elementary school in or around May 1992—is not adequately supported by the supporting documents. The first supporting document provided supports the killing of 11 men in Petar Kočić elementary school, but on a different date, namely between 1–10 August 1992. The second supporting document provided does not mention any killings during detention at the school. The alleged incident referred to in paragraph 13.2 of Schedule B—the killing of 37 men from Kasindolska Street who were taken away from KP Dom Butmir (Kula) in mid-May 1992—is not sufficiently supported by the first supporting document provided, which mentions that the 37 men were still in the Kula detention facility on 21 May 1992 but does not contain any evidence of killings. Also the second supporting document provided merely mentions the arrest but not the killing of 38 men from Kasindolska Street on 14 May 1992. The alleged incident referred to in paragraph 18.2 of Schedule B—the killing of up to 140 detainees in Sušica camp on or about 30 September 1992—is not adequately supported by the one supporting document provided, which mentions only 9 persons killed in Sušica. That alleged incident is therefore only

February 2006, p. 3.

⁶⁹ See *Milutinović et al.* Decision.

supported in relation to the killing of 9 detainees. If the Prosecution intends to include that allegation, that incident must be confined to the killing of 9 persons.

44. The Trial Chamber further finds that the evidence contained in the supporting material satisfies the *prima facie* standard with respect to the addition of arbitrary searches and unlawful arrest as components of an underlying act of persecution,⁷⁰ as well as the addition of three underlying acts of persecution, namely, unlawful detention, forced labour and appropriation or plunder of property under Count 3 of the Proposed Second Amended Indictment.⁷¹

C. Unfair prejudice to the Accused

45. Having found the majority of the proposed amendments to be properly supported, the Trial Chamber now considers whether granting the amendments would cause unfair prejudice to the Accused. It is clear that the proposed reduction in the overall number of municipalities, and the removal of Counts 2 and 6 of the First Amended Indictment, will not prejudice the Accused. Additionally, the Trial Chamber notes that the reduction in the number of municipalities will, in fact, serve to reduce the work the Accused will have to undertake in order to prepare an effective defence against *all* the charges and allegations included in the Indictment.

46. In addressing the other amendments, the Trial Chamber deals first with the question of whether, in all the circumstances, granting leave to amend the Indictment will result in undue delay in the proceedings. Reviewing the course of the proceedings to date, the Chamber is surprised and disappointed that, after allowing this Indictment to lie dormant for eight years without seeking to modify, clarify, or narrow it, the Prosecution, as well as seeking to narrow and clarify the counts in the Indictment, now seeks to add counts and to expand the alleged criminal responsibility of the Accused, thereby running the risk of further delay. As to the potential for delay in the trial itself, the Trial Chamber, having noted the Prosecution's submissions, considers it inconceivable that the potential prejudice to the Accused would somehow be mitigated by the mere possibility that the Prosecution could seek the admission of "adjudicated facts" to prove allegations which go to the acts and conduct of the Accused and which clearly would increase his culpability if these amendments were to be granted.

47. Nevertheless, the Trial Chamber equally notes that the Accused does not in principle oppose the amendments and that the Response contains no specific submissions on the question of undue delay arising from the proposed amendments. The Trial Chamber is satisfied that, in all the

⁷⁰ Proposed Second Amended Indictment, para. 60 (k) (iii) and (iv).

circumstances, and when weighed against the benefits of an improved indictment, granting the amendments will not have an impact that could be considered significant upon the Accused's right to be tried without undue delay.

48. As set out above, the other part of the test to be applied is whether amendment will deprive the accused of an adequate opportunity to prepare an effective defence. Having carefully considered the Prosecution's submissions in this regard, and noting that the Accused does not specifically address the question of impairment of his ability to prepare a defence as a result of the amendments, and confines his submission to a plea for adequate time to prepare for trial, the Chamber concludes that granting the amendments would not deprive the Accused of this opportunity in light of the circumstances of the case as a whole. The Accused has been on notice of most of the allegations through the First Amended Indictment for some time now. If amendment is granted, the Accused will have sufficient time over the coming months before the trial commences in which to prepare an effective defence against the additional charges in the amended indictment. Further, the Chamber concludes that allowing the amendment to include these additional alleged killings may help to ensure that the "real issues" in the case will be determined.

49. The Trial Chamber finds that granting the Motion, when viewed in light of the case as a whole, will not result in unfair prejudice to the Accused.

50. Therefore, and insofar as the requirements of Article 19 of the Statute and Rule 50 of the Rules have been met, the Trial Chamber will grant leave to amend the Indictment. The Trial Chamber will order that the Prosecution file a Second Amended Indictment, in which it should take account of the Trial Chamber's rulings above. As the Second Amended Indictment will include new charges under Counts 2, 3, 4, 5, 6 and 10, the Trial Chamber shall, pursuant to Rule 50(B), schedule a further appearance to enable the Accused to enter a plea on those charges.

D. Time for preliminary motions

51. The Trial Chamber recalls that, on 23 October 2008, the pre-trial Judge extended the time allowed for filing of preliminary motions by the Accused under Rule 72 until after the instant Motion had been determined, but that no specific period of extension was determined at that stage.⁷¹

52. The Trial Chamber notes the provisions of Rule 72(A), which provide that preliminary motions shall be brought "no later than thirty days after disclosure by the Prosecutor to the defence

⁷¹ Proposed Second Amended Indictment, paras 60 (g)-(i).

⁷² Decision on Accused Motion for Extension of Time to File Preliminary Motions, 23 October 2008, p. 3.

of all material and statements referred to in Rule 66(A)(i)", as well as Rule 50(C), which provides that, in a case where an amendment to an indictment results in new charges, the accused shall have a period of thirty days following his further appearance in which to file preliminary motions pursuant to Rule 72 in respect of those new charges.

53. The Trial Chamber concludes that it is appropriate in all the circumstances to allow the Accused thirty days from the date of his further appearance to file preliminary motions pursuant to Rule 72. For the avoidance of doubt, the Trial Chamber makes clear that this deadline will apply to the filing of preliminary motions in relation to any and all counts in the Second Amended Indictment.

VI. Disposition

54. The Trial Chamber, pursuant to Rules 50 and 127(A) of the Rules and Article 19 of the Statute, hereby:

- a. **GRANTS** the Prosecution leave to amend the First Amended Indictment as set out in the Proposed Second Amended Indictment, with the exception of those incidents which are not adequately supported by evidence as described in paragraphs 42 and 43 of this Decision;
- b. **DENIES** the Accused's request to limit the charges in the Proposed Second Amended Indictment at this stage;
- c. **ORDERS** the Prosecution to file a Second Amended Indictment to reflect this Decision in English and B/C/S by Wednesday 18 February 2009 at noon;

- d. **SCHEDULES** a further appearance for Friday 20 February 2009 at 2.15 p.m. in Courtroom 1; and
- e. **ORDERS** that the Accused shall have until Monday 23 March 2009 to file any preliminary motions.

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

Judge Iain Bony
Presiding

Done this sixteenth day of February 2009
At The Hague
The Netherlands

[Seal of the Tribunal]