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**UNITED
NATIONS**



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

Case No. IT-09-92-PT

Date: 13 October 2011

Original: English

IN TRIAL CHAMBER I

Before: Judge Alphons Orie, Presiding
Judge Bakone Justice Moloto
Judge Christoph Flügge

Registrar: Mr John Hocking

Decision of: 13 October 2011

PROSECUTOR

v.

RATKO MLADIĆ

PUBLIC

**DECISION ON CONSOLIDATED PROSECUTION MOTION TO SEVER THE
INDICTMENT, TO CONDUCT SEPARATE TRIALS, AND TO AMEND THE
INDICTMENT**

Office of the Prosecutor

Mr Dermot Groome
Mr Peter McCloskey

Counsel for the Accused

Mr Branko Lukić

I. PROCEDURAL HISTORY

1. On 27 May 2011, a Judge of the Tribunal, acting pursuant to Rule 50(A)(i)(b) of the Rules of Procedure and Evidence (“Rules”), granted, in part, the Prosecution’s request to amend the 11 November 2002 indictment (“First Amended Indictment”) against Ratko Mladić (“Accused”).¹ The Judge denied leave to include the incident described in the proposed indictment in Schedule E, number 12 (“Bišina Crime”) for failing to meet the *prima facie* standard of Article 19 of the Statute of the Tribunal (“Statute”).² On 1 June 2011, the Prosecution filed an amended indictment, without the Bišina Crime, against the Accused (“Second Amended Indictment”).³ On 4 July 2011, the Chamber entered a plea of not guilty to all counts of the Second Amended Indictment for the Accused pursuant to Rule 62 (A)(iv) of the Rules.⁴

2. On 16 August 2011, the Prosecution filed a consolidated motion (“Motion”), requesting leave to: (1) sever the Second Amended Indictment into two indictments (“Srebrenica Indictment” and “Sarajevo, Municipalities, and Hostages Indictment”); (2) have the Srebrenica Indictment tried first; and (3) on the basis of additional supporting materials, to include the Bišina Crime in the Srebrenica Indictment, or (if severance were denied) the Second Amended Indictment (“Proposed Third Amended Indictment”).⁵ On 31 August 2011, the Defence filed its response opposing the Motion (“Response”).⁶ On 7 September 2011, the Prosecution requested leave to reply and simultaneously submitted the reply as Confidential Annex A (“Reply”).⁷ On 8 September 2011, the Chamber granted leave to reply, considering the filing of Confidential Annex A to also be the filing of the Reply, and informed the parties in an informal communication.

¹ *Prosecutor v. Ratko Mladić*, Case no. IT-09-92-I, Decision on Amendment of Indictment, 27 May 2011, paras 17, 20; see also *Prosecutor v. Ratko Mladić*, Case no. IT-09-92-I, Motion to Amend the Amended Indictment and for Orders under Rules 53 (A), 55, and 59 *bis* (A), 10 May 2010; *Prosecutor v. Radovan Karadžić and Ratko Mladić*, Case no. IT-95-5/18-I, Amended Indictment, 11 October 2002; *Prosecutor v. Radovan Karadžić and Ratko Mladić*, Case no. IT-95-5/18-I, Order Granting Leave to File an Amended Indictment and Confirming the Amended Indictment, 11 November 2002; *Prosecutor v. Radovan Karadžić and Ratko Mladić*, Case no. IT-95-5/18-I, Order Severing Ratko Mladić, 15 October 2009.

² Second Amended Indictment Decision, paras 17, 20. On 27 May 2011, the President of the Tribunal issued an order assigning the case to Trial Chamber I and assigned three judges to the Bench. See *Prosecutor v. Ratko Mladić*, IT-09-92-I, Order Assigning Judges to a Case Before a Trial Chamber, 27 May 2011, p. 2.

³ *Prosecutor v. Ratko Mladić*, Case no. IT-09-92-I, Prosecution’s Second Amended Indictment, 1 June 2011.

⁴ T. 45-50.

⁵ Consolidated Motion to Sever Indictment, to Conduct Separate Trials and to Amend Resulting Srebrenica Indictment with Public Annexes A-C and Confidential Annex D, 16 August 2011, paras 1, 30-31.

⁶ Defense Response in Opposition to the Consolidated Prosecution Motion to Sever Indictment, To Conduct Separate Trials and to Amend Resulting Srebrenica Indictment, 31 August 2011 (Confidential); Defense Response in Opposition to the Consolidated Prosecution Motion to Sever Indictment, To Conduct Separate Trials and to Amend Resulting Srebrenica Indictment, 31 August 2011 (Public Redacted Version).

⁷ Prosecution Request to Reply to Defence Response to Prosecution Severance and Bišina Amendment Motion with Confidential Annex A, 7 September 2011.

II. SUBMISSIONS BY THE PARTIES

A. Motion

3. The Prosecution submits that severing the indictment and holding separate trials is in the interests of justice based on the following five factors: (1) separate trials will maximise the prospect of justice to victims; (2) separate trials could be managed more effectively; (3) separate trials would not prejudice the Accused; (4) severing the Second Amended Indictment would better meet unforeseen contingencies should the Accused's health deteriorate; and (5) that severance is consistent with the Rules, referring to the Trial Chamber's implied and inherent powers and those conferred to it under Rule 54.⁸

4. The Prosecution submits that, if severance were granted, the Srebrenica Indictment should be tried first based on the following considerations: (1) the desirability of an expeditious adjudication of the Srebrenica crimes, due to the Accused's alleged central role and responsibility in these events; (2) the practical benefits of more efficient and expedient case management during all stages of the proceedings, in that the proposed *Srebrenica* case is a more compact case, temporally and geographically; and (3) trying the proposed *Sarajevo, Municipalities and Hostages* case second would allow the Accused more time for pre-trial investigations and aid the planning and organisation of his defence.⁹ The Prosecution estimates that its *Srebrenica* case could be presented within one year.¹⁰ Finally, the Prosecution submitted supporting materials for the Bišina Crime.¹¹

B. Response

5. The Defence submits that: (1) severance of charges and separate trials against a single accused, as proposed by the Prosecution, is not foreseen in the Statute or Rules and is inconsistent with the Tribunal's jurisprudence on statutory construction; (2) the proposed severance violates the principle of legality as it would retroactively apply "new" law when the law in force at the time, the SFRY Criminal Procedure Code ("SFRY Code"), would not have permitted severance; (3) the proper legal standard for severance is if an accused is prejudiced by joinder of the charges and, as

⁸ Motion, paras 2, 3, 15-22.

⁹ Motion, paras 23-25.

¹⁰ Motion, para. 7; See also Motion, paras 11-13 and Annex A for the proposed changes and reductions in the Srebrenica Indictment from the current Second Amended Indictment.

¹¹ Confidential Annex D to the Motion.

applied, the Accused is not prejudiced by the Second Amended Indictment; and (4) severance would prejudice the Accused and violate his right to a fair trial.¹²

6. Specifically on submission (4), the Defence argues that severance would: (a) deny the Accused adequate pre-trial preparation time for the second trial due to the limited resources of the Defence to simultaneously conduct and prepare defences for both trials; (b) deny the Accused the ability to present his defence effectively and reasonably as it is “impossible to understand the events in Srebrenica without understanding the events that precede it”; and (c) make the case more complicated and require the repetition of testimony of witnesses. The Defence also argues that the Accused will be required to engage in pre-trial preparations for the second case while simultaneously working on the first case or an appeal of the first case, giving him less time to prepare his case(s). In this respect, the Defence argues that the Accused’s weakened health will impair his ability to work with counsel and that he will, therefore, require *more* time to prepare his case(s), rather than less.¹³ Further, the Defence submits that conducting two trials would violate the Accused’s right to a presumption of innocence based on the overlap of factual patterns in the two proposed indictments and the potential for factual findings in the first trial being used against the Accused in the second trial.¹⁴

7. Finally, the Defence submits that the supporting materials submitted for adding the Bišina Crime do not meet the *prima facie* standard and that the amendment would prejudice the Accused because it does not provide sufficient detail for the Defence to be able to investigate or mount a defence and would complicate and delay the case.¹⁵

C. Reply

8. The Prosecution reiterates its position that severance would not prejudice the Accused nor undermine the presumption of innocence, that the correct legal standard for severance is whether the proposed severance would prejudice the Accused, that the lateness of the Accused’s arrest is a relevant factor, and that the supporting materials establish a *prima facie* case for the Bišina Crime.¹⁶

9. In response to the Defence’s submissions, the Prosecution further argues that: (1) in addition to the Chamber’s implied and inherent powers and Rule 54, Rule 72 (A)(iii) also provides a basis for the severing of counts and that, while usually brought by the Accused, the Prosecution may also

¹² Response, paras 3-14, Exhibit A.

¹³ Response, paras 16-21.

¹⁴ Response, paras 22-23.

¹⁵ Response, paras 26-29.

¹⁶ Reply, paras 7-8, 10-20.

invoke Rule 72 (A)(iii), and (2) that the principle of legality does not apply to procedural law, only substantive criminal law, and that the SFRY Code does not apply to the Tribunal.¹⁷

III. APPLICABLE LAW

10. Article 20 (1) of the Statute provides that the Trial Chamber shall ensure that a trial is fair and expeditious with full respect for the rights of the accused.

11. Article 21 (4)(b) and (c) of the Statute provide that an accused shall be entitled to the minimum guarantees of adequate time for the preparation of his defence and to be tried without undue delay.

A. Severance of the Indictment and Conducting Two Trials

12. Rule 49 of the Rules provides:

Two or more crimes may be joined in one indictment if the series of acts committed together form the same transaction, and the said crimes were committed by the same accused.

13. Rule 48 of the Rules provides:

Persons accused of the same or different crimes committed in the course of the same transaction may be jointly charged and tried.

14. Rule 82 (B) of the Rules provides:

The Trial Chamber may order that persons accused jointly under Rule 48 be tried separately if it considers it necessary in order to avoid a conflict of interests that might cause serious prejudice to an accused, or to protect the interests of justice.

15. In *Prosecutor v. Slobodan Milošević*, the Appeals Chamber held that under Rule 49, once the “same transactions” test is satisfied, a Trial Chamber exercises its discretion as to whether or not the charges should be joined in one indictment (“*Slobodan Milošević Appeal Decision*”).¹⁸ In exercising its discretion, a Trial Chamber weighs the relevant considerations and facts present in the case at hand.¹⁹ After granting joinder under Rule 49, if it becomes apparent to a Trial Chamber that a trial has become unmanageable, the Trial Chamber may order severance of the charges.²⁰

¹⁷ Reply, paras 4-5, 9.

¹⁸ *Prosecutor v. Slobodan Milošević*, Case no. IT-99-37-AR73, Reasons for Decision on Prosecution Interlocutory Appeal from Refusing to Order Joinder, 18 April 2002, paras 3, 22.

¹⁹ *Slobodan Milošević Appeal Decision*, para. 6.

²⁰ *Slobodan Milošević Appeal Decision*, para. 26.

16. While Rules 48 and 49 apply to two different types of joinder, a Trial Chamber considers similar legal requirements and weighs similar factors under the terms of both Rules.²¹ Under Rule 48, a decision on joinder or severance is discretionary and requires a complex balancing of intangibles in order to properly regulate the proceedings.²² Pursuant to Rule 82 (B), when considering the severance of a case from a previously joint trial, a Trial Chamber assesses whether joint proceedings would give rise to any serious prejudice to the accused and whether severance would protect the interests of justice.²³

17. Rule 72 (A)(iii) of the Rules provides that preliminary motions may be filed seeking the severance of counts joined in one indictment under Rule 49.

B. Amendment of Indictment to Include the Bišina Crime

18. Article 19, paragraph 1 of the Statute provides:

The judge of the Trial Chamber to whom the indictment has been transmitted shall review it. If satisfied that a *prima facie* case has been established by the Prosecutor, he shall confirm the indictment. If not satisfied, the indictment shall be dismissed.

19. Rule 50 (A) of the Rules provides:

(A) (i) the Prosecutor may amend an indictment: [...]

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

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

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

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

20. Even though a Judge or Trial Chamber will generally grant leave to amend an indictment where it ensures “that the real issues in the case will be determined, such leave will not be granted unless the amendment meets both the following conditions: it must not result in unfair prejudice to

²¹ *Prosecutor v. Zdravko Tolimir, Radivoje Miletić and Milan Gvero*, Case no. IT-04-80-AR73.1, Decision on Radivoje Miletić’s Interlocutory Appeal Against the Trial Chamber’s Decision on Joinder of Accused, 27 January 2006, para. 5.

²² *Prosecutor v. Théoneste Bagosora, Aloys Ntabakuze and Anatole Nsengiyumva*, Case no. ICTR-98-41-A, Decision on Aloys Ntabakuze’s Motion For Severance, Retention of the Briefing Schedule and Judicial Bar to the Untimely Filing of the Prosecution’s Response Brief, 24 July 2009, para. 24.

the accused when viewed in light of the circumstances of the case as a whole, and, if the proposed amendment is material, it must be supported by documentation or other materials meeting the *prima facie* standard set forth in Article 19 of the Statute”.²⁴ The Statute does not define the concept of a *prima facie* case.²⁵ It has been defined as “a credible case that would (if not contradicted by the defence) be a sufficient basis to convict the accused on the charge”.²⁶

21. In relation to the requirement that the amendment must not cause unfair prejudice to the accused, two factors are of particular importance: the amendment must not deprive the accused of an adequate opportunity to prepare an effective defence, and the amendment must not adversely affect the accused’s rights under Article 21 of the Statute to be tried without delay.²⁷ When an amendment results in a new charge, the time required to realize the procedures of Rule 50 (B) and (C) could amount to undue delay causing unfair prejudice to the accused.²⁸

IV. DISCUSSION

A. Severance of the Indictment and Conducting Two Trials

1. The Chamber’s Authority to Sever Charges

22. The Chamber has the authority to sever joined charges in an indictment and to conduct separate trials. The Chamber may join charges against a single accused in two ways: 1) by confirmation of or by granting leave to amend a proposed indictment, before or after the accused has made an initial appearance, containing multiple charges or 2) by, upon a motion, joining multiple confirmed indictments against an accused into one indictment. This is demonstrated by how the Rules provide for challenging both types of joinder. Procedurally, joinder under 1), as is the situation in the present case, is challenged by filing a Rule 72 preliminary motion seeking

²³ Ibid.

²⁴ Second Amended Indictment Decision, para. 13; *Prosecutor v. Popović et al.*, Case no. IT-05-88-PT & IT-05-88/1-PT, Decision on Further Amendment and Challenges to the Indictment, 13 July 2006 (“*Popović* Pre-Trial Decision”), para. 8 (footnotes omitted).

²⁵ Second Amended Indictment Decision, para. 14.

²⁶ *Prosecutor v. Stanišić & Simatović*, Case no. IT-03-69-PT, Decision on Prosecution Motion for Leave to Amend the Amended Indictment, 16 December 2005, p. 3; *Prosecutor v. Kordić et al.*, Case no. IT-95-14-I, Decision on the Review of the Indictment, 10 November 1995, p. 3.

²⁷ Second Amended Indictment Decision, para. 13; *Popović* Pre-Trial Decision, para. 9.

²⁸ *Prosecutor 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. 24; *Prosecutor v. Milan Lukić and Sredoje Lukić*, Case no. IT-98-32/1-PT, Decision on Prosecution Motion Seeking Leave to Amend the Second Amended Indictment and on Prosecution Motion to include UN Security Council resolution 1820 (2008) as Additional Supporting Materials to Proposed Third Indictment as well as on Milan Lukić’s Request for Reconsideration of Certification of the Pre-Trial Judge’s Order of 19 June 2008, 8 July 2008 (“*Lukić and Lukić* Pre-Trial Decision”), para. 32; *Popović* Pre-Trial Decision, para. 10; *Prosecutor v. Zdravko Tolimir*, Case no. IT-05-88/2-PT, Written Reasons for Decision on Prosecution Motion to Amend the Second Amended Indictment, 16 December 2009 (“*Tolimir* Pre-Trial Decision”), para. 24.

severance of the joined counts. Joinder under 2), as occurred in the *Slobodan Milošević* case, is challenged by filing a response to the joinder motion (or otherwise making submissions at the time the Chamber is considering joinder), *not* by filing a separate Rule 72 preliminary motion.²⁹ In further support of this determination, the Chamber notes that if 1) were not a joinder of counts and there was a requirement for a joinder motion pursuant to Rule 49 before the counts could be considered to have been joined, Rule 72 (A)(iii) would never be applicable.

23. In the *Slobodan Milošević* case, the Appeals Chamber held that, after joinder under 2), a Trial Chamber has the authority to later sever the joined charges and conduct separate trials. The Chamber now has to assess whether it has this authority also under 1). In this respect, the Chamber finds that the confirmation of and the granting of leave to amend the Second Amended Indictment containing multiple charges was a joinder, indistinguishable under Rule 49 of the Rules from the joinder of separate existing indictments into one indictment and, therefore, finds that the *Slobodan Milošević* Appeals Chamber's case law applies equally to the present situation (joinder under 1)). The Chamber's finding is supported by Appeals Chamber case law that the same legal requirements should be applied to Rules 48 and 49 and the fact that challenging the Rule 48 joinder of multiple accused under Rule 82 (B) is the same whether joinder was done by the confirmation of an indictment against multiple accused or by joining already indicted accused into one indictment.³⁰

24. The Prosecution asserts that it can and has filed severance motions under Rule 72 (A)(iii) in other proceedings, though not for severance of counts joined in one indictment under Rule 49, but for severance of an accused under Rule 48.³¹ The Chamber considers it unnecessary to determine whether the Prosecution did or may file Rule 72 preliminary motions requesting severance. Since the Chamber can consider severance of the confirmed joined indictment *proprio motu*, it considers that either party may also file a motion asking the Chamber to grant severance of counts. The Chamber is tasked with ensuring that any trial is fair and expeditious and that the trial proceedings are fully consistent with the Accused's rights under Articles 20 and 21 of the Statute. In the Motion, the Prosecution submits that severance will provide additional protections of the Accused's rights under the Statute and make the trials more manageable for the Chamber and the Accused. Therefore, the Chamber will consider the Motion to sever the Second Amended Indictment.

²⁹ See *Prosecutor v. Slobodan Milošević*, Case no. IT-99-37-PT, Amici Curiae Response to the Prosecution Motion on Joinder, 10 December 2001.

³⁰ See e.g. *Prosecutor v. Zejnil Delalić, Zdravko Mucić, Hazim Delić and Esad Landžo*, Case no. IT-96-21, Indictment, 20 March 1996; *Prosecutor v. Zejnil Delalić, Zdravko Mucić, Hazim Delić and Esad Landžo*, Case no. IT-96-21, Review of Indictment, 21 March 1996; *Prosecutor v. Zejnil Delalić, Zdravko Mucić, Hazim Delić and Esad Landžo*, Case no. IT-96-21, Decision on Motions for Separate Trial Filed by the Accused Zejnil Delalić and the Accused Zdravko Mucić, 26 September 1996. Though no joinder motion was ever filed under Rule 48, the

2. The Legal Standard for Severance of Charges

25. The Chamber notes that no Rule addresses the legal test for severance of joined counts against a single accused. The Chamber considers the tests of Rules 48, 49, and 82 to be relevant to informing its decision in the case at hand. In the *Slobodan Milošević* Appeal Decision, the Appeals Chamber considered the following factors: 1) prejudice to the accused's rights under Article 21 of the Statute; 2) the interests of justice, particularly whether the length of one trial would make it less manageable than two; 3) whether the joint trial would be personally onerous to the accused; and 4) whether there was possible prejudice to the accused in relation to evidence relevant to certain crimes and not others in the joint trial.³² The Chamber notes that the context of the *Slobodan Milošević* Appeals Chamber statement that "if it becomes apparent to a Trial Chamber that a trial has become unmanageable, the Trial Chamber may order a severance of the charges" was in direct reference to its discussion of the discretionary factors it considered in granting joinder.³³ Further, the word "unmanageable" was within the context of the 'interests of justice' discretionary factor considered by both the *Slobodan Milošević* Trial and Appeals Chambers. Read in the context of the Appeals Chamber's discussion, the Chamber considers that the legal test for severance of joined charges is the balancing factor test of Rule 49. In so finding, the Chamber clarifies that it is not reconsidering whether the confirmation or amendment of the indictment containing joint counts, the original joinders under Rule 49, were correct. Rather, the Chamber will consider whether severance is warranted under the balancing test of Rule 49 as applied at the current time in proceedings, not at the time of the original joinders.

26. The Prosecution argues that any prejudice to the Accused should be analyzed in relation to the proposed severed indictments, while the Defence argues that it should apply in relation to the Second Amended Indictment. The Chamber notes that, under Appeals Chamber case law on Rules 48 and 82 (B), Rule 82 (B) requires applying the two considerations to both "joint proceedings" and "a severance".³⁴ Further, the parties have argued different approaches to a finding of prejudice when granting or denying severance. The Prosecution submits that, in order to *deny* severance, the Chamber must find that the Accused is prejudiced by severance of the indictment. The Defence

Delalić Chamber stated, "[t]he accused properly have been jointly charged with a variety of crimes in the one indictment in accordance with Rule 48", *ibid.*, para. 2.

³¹ See Reply, para. 4.

³² *Slobodan Milošević* Appeal Decision, para. 22.

³³ *Slobodan Milošević* Appeal Decision, paras 22-26. The Appeals Chamber considered, under its discretionary authority, the same three factors as the Trial Chamber, while not being bound by the reasoning or conclusions of the Trial Chamber, *ibid.*, paras 22, 30.

³⁴ *Supra* fn. 23; see also *Prosecutor v. Milutinović et al.*, Case no. IT-05-87-PT, Prosecution Motion Requesting Leave to Replace the Third Amended Joinder Indictment and Leave to Sever Vlastimir Đorđević from the Trial in the Present Case, 21 June 2006. The Prosecution, under Rules 48 and 82 (B), sought to sever the accused due to the

submits that, in order to *grant* severance, the Chamber must find that the Accused is prejudiced by the Second Amended Indictment. The Chamber finds that these interpretations impermissibly impose limitations on the discretionary authority of the Chamber to consider *all* relevant factors. Therefore, the Chamber will consider prejudice to the Accused as a factor, but not the only factor, with regard to both the Second Amended Indictment and the proposed severed indictments.

27. There is no Tribunal case law on preliminary motions under Rule 72 (A)(iii) seeking severance of counts that would provide guidance on interpreting the Rule.³⁵ However, the Chamber sees no logic to there being a different standard for severance under Rule 72 (A)(iii) from that of Rules 48, 49, and 82 (B).

3. Application of the Legal Standard for Severance to the Present Case

(a) Introduction

28. In determining whether to sever the Second Amended Indictment, the Chamber considers that the following factors are relevant: (1) the potential prejudice to the Accused's rights under Articles 20 and 21 of the Statute; (2) other factors relevant to the interests of justice, particularly the relative manageability for the Chamber and the parties of a single trial versus separate trials; and (3) the potential burden on witnesses.

29. Before discussing these factors, the Chamber will briefly address those issues raised by the parties that the Chamber will not consider as factors. The Chamber considers the Defence's argument as to the principle of legality to be unfounded because the prohibition on the retroactive application of 'new' law under this principle relates to substantive criminal law, not procedural law as in the present situation of whether the Rules provide for severance of counts.³⁶ Rule 6(D) of the Rules contains the Tribunal's procedural principle of legality and, under this Rule, the prohibition on retroactive application of an amendment to the Rules relates to the time the amendment was issued and entered into force, not to the time of the commission of an alleged crime for which an

risk of prejudice from the joined indictment to the other accused, para. 5. The Chamber also notes that in its Reply the Prosecution submits that this motion was filed as a preliminary motion under Rule 72 (A)(iii), Reply, fn. 9.

³⁵ The Chamber notes that the text of Rule 72 contains an ambiguous adverb phrase (due to the lack of commas), "joined in one indictment under Rule 49", that can be interpreted in two different ways. To illustrate, the Chamber will insert commas into the text of the Rule. "Preliminary motions, being motions which seek the severance of counts, joined in one indictment under Rule 49" or "preliminary motions, being motions which seek the severance of counts, joined in one indictment, under Rule 49". The Chamber also notes that the rest of Rule 72 states "or seek separate trials under Rule 82 (B)". Read together under interpretation one, Rule 72 provides for severance of counts, but is silent as to the legal standard to be applied, and provides for separate trials under the legal standard of Rule 82 (B). Read together under the second interpretation, Rule 72 preliminary motion can be filed 1) seeking severance of joined counts under the legal standard of Rule 49 or 2) seeking separate trials for multiple accused under the legal standard of Rule 82 (B). The Chamber considers that the second interpretation is correct for the reasons stated in the Decision.

accused is charged. Further, The Appeals Chamber has held that while a Trial Chamber should “take into account” sentencing practices in the Former Yugoslavia, the Tribunal is not bound by SFRY legislation for sentencing.³⁷ The Tribunal is equally not bound by the provisions of the SFRY legislation as it relates to procedures for severing of counts.

30. The Chamber does not consider the Accused’s health to be a factor because the Chamber has had no information properly presented to it on this subject. The Chamber has received no medical reports to review and considers the parties’ submissions in this respect to be speculative and unsubstantiated. The Chamber also does not consider public interest in a speedy resolution on one aspect of the charges against the Accused over others to be relevant to its consideration. The Chamber does recognize that there is considerable interest within both the victim and international community in expeditiously having a judgement issued on the crimes alleged in the Second Amended Indictment, especially considering that the Accused remained a fugitive until 2011. The Chamber considers that the Prosecution references to “unforeseen circumstances” suggest that there is a concern that a trial based on the Second Amended Indictment may not be concluded, leaving the question of accountability of the Accused for the crimes allegedly committed unresolved.³⁸ If the argument is that justice is better served by concluding with a judgement, whether in a conviction or acquittal, of *at least* one smaller trial on some portion of the current counts, the Chamber stresses that the parties must argue this clearly and directly in their submissions. If the basis underlying the Motion is the health situation of the Accused, the Chamber would have expected the parties to make detailed submissions in this respect, supported by medical documentation, and stresses that it cannot base its findings on media reports or other such sources. Again, no such medical documentation has been provided to the Chamber. Furthermore, the Chamber acknowledges that the Motion envisions a second trial based on the proposed *Sarajevo, Municipalities and Hostages* Indictment, but notes that it does not address how a second trial also could be impacted by “unforeseen circumstances”. Nor does the Motion address how, if the second trial could not be concluded due to these “unforeseen circumstances”, a decision to sever could also impact justice for the victims of the crimes alleged in the proposed *Sarajevo, Municipalities and Hostages* Indictment.

(b) The Factors considered by the Chamber

31. The Chamber considers that severance and the conducting of two trials could prejudice the Accused, in particular the ability to personally participate in preparing his defence for the second

³⁶ See *Prosecutor v. Delalić et al.*, Case no. IT-96-21-A, Judgement, 20 February 2001, paras 810-817.

³⁷ Ibid.

³⁸ Motion, paras 2, 16, 20, 24; Reply para. 11.

trial. The Chamber considers that participating in the pre-trial preparations of one case while simultaneously participating in the judgement or appeal stage of the first trial could unfairly overburden the Accused and limit his ability to participate effectively in either. The Chamber considers that the division of time and attention that would be required of the Accused to participate in his defence to both cases could render his participation less effective and also necessitate a slower pace of proceedings for both trials. Finally, the Chamber considers that the practical considerations of two trials, such as a need to potentially retain and coordinate between two Defence teams, would also complicate the Accused's ability to participate in the preparation of his defence in each trial and further slow the severed trial proceedings.

32. While the Chamber acknowledges the Prosecution's submission that the timing of the second trial could be adjusted to protect the right of the Accused to have adequate time to prepare his defence, the Chamber considers that this argument of delaying the second trial based on the events of the first equally risks prejudicing the Accused's right to a trial without undue delay. The Defence has made clear in its submissions that the Accused is prepared to answer to the entirety of the charges he faces now. In the case of a lengthy appeals process, the potential delay of the second trial could be substantial. The rights to have enough time to prepare an adequate defence and to a trial without undue delay are both positive rights of the Accused. The Chamber does not agree that these rights should be placed in conflict with each other if it can be avoided and considers that severance and the conducting of two trials could create such a conflict that does not presently exist.

33. The Chamber does not consider that a trial on the Second Amended Indictment is unmanageable. Further, any potential management concerns related to the Second Amended Indictment are not ameliorated by the suggested remedy of severance. The Chamber notes, as an example, that there is no time savings in the pre-trial disclosure process as the review to be conducted by the Prosecution would not be shortened by only reviewing for the proposed *Srebrenica* case, since the process requires reviewing all documents to determine if they are relevant or exculpatory. While the actual number of documents determined to be disclosed for the *Srebrenica* case may be less than that under the Second Amended Indictment, the review process would, from the Chamber's understanding, be identical to the current review and actually have to be conducted a second time for the *Sarajevo, Municipalities and Hostages* trial, making the disclosure process longer overall for two trials than one.

34. The Chamber considers that severance and conducting of two trials instead of one could also be considerably less efficient. The Chamber interprets the Defence's submissions to mean that the Defence is preparing its defence of the *Srebrenica* charges by including the preceding events. The

Chamber does not see the advantage of two trials if the defence to the charges in the first envisions presenting evidence on the events to be taken up in the second trial. This would seem to frustrate the point of having two smaller trials and could result in the Defence case in the first trial alone being closer in size to that of the original combined trial before even taking into account the second trial. The Chamber further notes that the time limits and response times set out in the Rules would also result in an overall longer process for two trials than for one trial. Another concern from a trial management perspective is the arranging of testimony of witnesses for the second trial after they have testified in the first and the repetition of evidence and testimony. Certain evidence, for example with regard to the position and powers of the Accused, would need to be presented, considered, and decided by the Chamber in each trial. Particularly, witness evidence relating to the acts and conduct of the Accused presented in the first trial in many instances could not be introduced into the second trial without allowing the opposing party a right to cross-examine that witness.³⁹ This would mean that certain witnesses would be required to travel to the Tribunal to give testimony for a second time. Another concern applies to litigation of procedural issues that would need to be decided on twice, rather than only once. These concerns apply equally whether the Chamber hearing the second case is the same as the Chamber hearing the first or a different Trial Chamber. There are additional managerial concerns if a different Trial Chamber were to hear the second case. For example, it is normal for parties and a Chamber to develop, over the period of a case, certain routines and manners of operating that often result in more efficient and expeditious proceedings. A different second Chamber would be unaware and could not fall back on routines developed in the first trial, but would instead have to develop them anew.

35. Further, if the indictment were severed and there were two trials, the Chamber and bench of judges assigned to the current case may also be assigned to the second case (the *Sarajevo, Municipalities and Hostages* case). The Chamber considers that there are significant legal and managerial concerns under this scenario. The partiality and appearance of partiality of the Chamber could be raised if the same Chamber were to hear both cases. Another concern is if the writing of the judgement in the first case were taking place during the pre-trial period or start of the second case, this could negatively affect the pace of the second case.

36. Finally, if the Prosecution is of the view that a trial on the Second Amended Indictment is or will become unmanageable for the Accused, nothing in the present Decision prevents the Prosecution from filing proposals to make the trial, in its view, more manageable. For example, at the 25 August 2011 First Status Conference, the Chamber instructed the Prosecution to address, in its 73bis (D) submissions, why incidents and municipalities removed from the *Karadžić* case

³⁹ See in particular Rules 92 bis, ter, and quater of the Rules.

remain in the Second Amended Indictment.⁴⁰ At the 6 October 2011 Second Status Conference, the Chamber further instructed the Prosecution to address which municipalities could, in its opinion, be taken out of the Second Amended Indictment.⁴¹ In addition, irrespective of the procedure to be followed under Rule 73bis (D), other possible Prosecution proposals could include an application to limit the Second Amended Indictment in size and scope. Such a remedy, unlike the proposed severance, could reduce any potential case management concerns with a trial on the Second Amended Indictment.

37. Finally, the Chamber finds that conducting two trials could be more burdensome for witnesses. Unlike when multiple accused are severed into separate trials, a number of witnesses – who, for instance, provide evidence that goes directly to the acts and conduct of the Accused – called in the second trial would be testifying to the same matters with regard to the same Accused as they did in the first trial. The calling of witnesses in multiple trials is a trial management concern, but is also a concern as to the witnesses themselves, particularly when the potential period of time between the first and the second calling could be extensive and the practical considerations of the disruption to witnesses' daily lives caused by having to travel and possibly taking time away from work and family matters are taken into account. The Chamber considers the potential burden to witnesses in testifying twice rather than once to be a relevant and important factor.

38. Based on the above factors, the Chamber considers that there is no reason to sever the Second Amended Indictment and further considers that severance could prejudice the Accused, could render the trials less manageable and less efficient, and risk unduly burdening witnesses. Therefore, the Chamber denies the proposed severance of the Second Amended Indictment.

B. Amendment of Indictment to Include the Bišina Crime

39. The Chamber considers that amending the Second Amended Indictment to include the Bišina Crime will ensure that the real issues in the case will be determined. Before granting leave to amend, the Chamber must also consider whether the proposed amendment meets the *prima facie* standard of Article 19 and whether it would result in unfair prejudice to the Accused in light of the circumstances of the case as a whole. First, the Chamber has carefully reviewed the additional supporting materials and finds that they meet the *prima facie* standard of Article 19 of the Statute.

40. To determine whether the amendment would result in unfair prejudice, the Chamber must determine the status of the amendment. The Chamber endorses the holdings of the Trial Chambers

⁴⁰ T. 64-65.

⁴¹ T. 83.

in *Halilović, Popović, Lukić and Lukić*, and *Tolimir* that the key question of whether an amendment results in a “new charge” is whether the proposed amendment introduces “a basis for conviction that is factually and/or legally distinct from any already alleged in the indictment”.⁴² The Bišina Crime was excluded from the Second Amended Indictment.⁴³ Through the Motion, the Prosecution seeks to reintroduce it into the indictment. Under these circumstances, the Chamber finds that the Bišina Crime constitutes a new basis for conviction of the Accused that is factually distinct from those currently alleged in the Second Amended Indictment.

41. The Chamber considers that this amendment has been proposed at a relatively early point in the pre-trial proceedings and within three months of the filing of the Second Amended Indictment. Further, the supporting materials related to the Bišina Crime are limited in scope. Therefore, the Chamber considers that the Defence has adequate time to prepare a defence without necessitating a delay in proceedings and that the time required to realize the procedures of Rule 50 (B) and (C) would not result in undue delay. Therefore, the Chamber considers that granting the amendment would not result in unfair prejudice to the Accused in light of the circumstances of the case as a whole and, as the supporting materials meet the *prima facie* standard, grants leave to amend the indictment and add the Bišina Crime.

V. DISPOSITION

42. For the foregoing reasons, the Chamber

DENIES the Prosecution’s request to sever the Second Amended Indictment;

DECLARES moot the Motion in respect to the Prosecution’s request to conduct two trials;

GRANTS the Prosecution’s request to amend the Second Amended Indictment to include the Bišina Crime as a new charge;

INSTRUCTS the Prosecution to file the Third Amended Indictment within seven days of the filing of this decision;

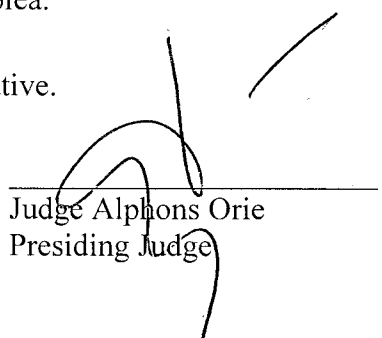
ORDERS that a further appearance be held at the next Status Conference following the filing of the Third Amended Indictment to enable the Accused to enter a plea on the new charge; and

⁴² See *Halilović* Pre-Trial Decision, para. 30; *Lukić and Lukić* Pre-Trial Decision, para. 32; *Popović* Pre-Trial Decision, para. 11; *Tolimir* Pre-Trial Decision, para. 25

⁴³ Second Amended Indictment Decision, paras 17, 20.

SETS the deadline for the Defence to file preliminary motions pursuant to Rule 72, if any, in respect to the new charge to 30 days from the Accused entering a plea.

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



Judge Alphons Orié
Presiding Judge

Dated this thirteenth day of October 2011
At The Hague
The Netherlands

[Seal of the Tribunal]