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

Case No.: IT-04-83-PT

Date: 30 June 2006

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IN TRIAL CHAMBER III

Before: **Judge Patrick Robinson, Presiding**
Judge Krister Thelin
Judge Frank Höpfel

Registrar: **Mr. Hans Holthuis**

Decision of: **30 June 2006**

PROSECUTOR

v.

RASIM DELIĆ

DECISION ON THE PROSECUTION'S SUBMISSION OF PROPOSED AMENDED INDICTMENT AND DEFENCE MOTION ALLEGING DEFECTS IN AMENDED INDICTMENT

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I. THE CURRENT MOTIONS AND PRELIMINARY MATTERS

1. **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 several filings in relation to the partly confidential "Prosecution's Submission of Consolidated Amended Indictment Pursuant to Trial Chamber Decision of 28 April 2006" with Annexes A, B, C, and D (Annexes C and D are Confidential), filed on 8 May 2004 ("Prosecution Submission of Consolidated Amended Indictment").[1] The Trial Chamber is also seised of a "Defence Response to Prosecution's Submission of Proposed Second Amended Indictment and Application for Leave to Amend and Motion Alleging Defects in Amended Indictment Pursuant to Order of Trial Chamber 28/4/06", filed on 22 May 2006 ("Defence Response" and "Motion Alleging Defects", respectively), in which the Defence both opposes the grant of leave to amend the Indictment and highlights the defects in the form of the Indictment.

2. In particular, the Defence requests the Trial Chamber:

(1) not to grant leave in respect of the addition of liability pursuant to Article 7(1) of the Statute or the three additional new "crime base" incidents contained in the proposed Indictment;

(2) to strike the continued inclusion in the Indictment of the allegation concerning events at Maline in the light of the Judgement in the case of *Prosecutor v. Enver Hadžihasanović and Amir Kubura* ("*Hadžihasanović & Kubura* Trial Judgement");[2]

(3) to strike the continued inclusion of named alleged victims from events at Grabovica (15 victims) and Uzdol (4 victims) in the light of factual findings in the case of *Prosecutor v. Halilović* ("*Halilović* Trial Judgement");[3]

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[1] Annex A contains the proposed Consolidated Amended Indictment, Annex B contains a table describing all proposed changes, confidential Annex C contains a "red-line" version of the proposed Consolidated Amended Indictment, and confidential Annex D contains a table indicating the new tabs (or footnote numbers) of the material cited to in the "red-line" version of the proposed Consolidated Amended Indictment. Prosecution's Submission of Consolidated Amended Indictment, para. 1.

[2] *Prosecutor v. Hadžihasanović and Kubura*, Case No. IT-01-47-T, Judgement, 15 March 2006 ("Hadžihasanović Judgement"); Defence Response, p. 10.

[3] *Prosecutor v. Halilović*, Case No. IT-01-48-T, Judgement 16 November 2005 ("Halilović Judgement"); Defence Response, p. 10.

(4) to order the Prosecution to cure further defects in the Consolidated Amended Indictment, some of which arise from the failure to fulfil the Trial Chamber's Order of 13 December 2005 concerning rectification of defects in the first Amended Indictment.[4]

3. On 29 May 2006, the Prosecution filed a "Prosecution Omnibus" consisting of (1) a "Reply to Defence Response to Prosecution's Submission of Proposed Consolidated Amended Indictment" ("Prosecution Reply"), and (2) a "Response to Defence Motion Alleging Defects in the Form of the Consolidated Amended Indictment" ("Prosecution Response"). On 2 June 2006, the Defence asked for leave to reply and at the same time submitted its reply to the Prosecution Response in its "Reply to Prosecution Response to Defence Motion Alleging Defects in the Form of the Consolidated Indictment" ("Defence Reply").

4. In an Order of 28 April 2006, the Trial Chamber ordered the Prosecution to file a proposed Consolidated Amended Indictment by 5 May 2006. On 5 May 2006, instead of filing the proposed Consolidated Amended Indictment, the Prosecution filed its Motion for Additional Time requesting the Trial Chamber to extend the deadline until 8 May 2006.[5] Following its request, the Prosecution submitted the Consolidated Amended Indictment on 8 May 2006, three days after expiration of the time set by the Trial Chamber in the Order of 28 April 2006.

5. Pursuant to Rule 127 the Trial Chamber hereby extends the deadline for filing of the Proposed Consolidated Amended Indictment for another three days and grants the Prosecution leave to file the Consolidated Amended Indictment and Annexes by 8 May 2006.

6. In its Prosecution Reply, filed on 29 May 2006, the Prosecution requests leave to reply to the Defence Response filed on 22 May 2006. The Trial Chamber notes that the Prosecution Reply was filed within seven days of the filing of the Defence Response and therefore constitutes a timely filed reply in accordance with the Rule 126 *bis*.

7. In its Reply on 2 June 2006, the Defence also sought leave to reply to the Prosecution Response. The Defence Reply was filed within the deadline prescribed by Rule 126 *bis*.

8. The Trial Chamber believes that its decision is aided by consideration of all the arguments raised and information provided by the parties. Pursuant to Rule 126 *bis* the Prosecution and the Defence are thereby granted leave to file their Replies.

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[4] *Prosecutor v. Delić*, Case No. IT-04-83-PT, Defence Response to Prosecution's Submission of Proposed Second Amended Indictment and Application for Leave to Amend and Motion Alleging Defects in Amended Indictment Pursuant to Order of Trial Chamber 28/4/06, 22 May 2006, para. 1.

[5] *Prosecutor v. Delić*, Case No. IT-04-83-PT, Prosecution Request for Additional Time to File its Consolidated Amended Indictment Pursuant to Trial Chamber Decision of 28 April 2006.

9. In its Omnibus Filing of 29 May 2006, the Prosecution requests a variation in the word limits set forth in Practice Direction IT/184/Rev. 2, allowing the Prosecution to file one brief of 7,474–word containing both the Prosecution Reply and the Prosecution Response. The Trial Chamber notes that the Practice Direction on the Length of Briefs and Motions of the Tribunal provides that a response shall not exceed 10 pages or 3,000 words whichever is greater, and that a party seeking authorisation to exceed this limit must do so in advance and "provide an explanation of the exceptional circumstances that necessitate this oversized filing."[6]

10. The Trial Chamber further notes that in its Omnibus Filing the Prosecution replied to the Defence Response and the Motion Alleging Defects, which were filed together following the Order of 28 April 2006. Before filing its response and the motion in one brief, the Defence sought permission to exceed the permitted word limit for one motion in respect of its consolidated Defence Response to Prosecution's Submission of Proposed Second Amended Indictment and Application for Leave to Amend and Motion Alleging Defects in the Form of the Indictment.[7] The Trial Chamber granted the motion.[8]

11. In line with the Trial Chamber's decision granting the Defence leave to exceed the word limit and considering the Order of 28 April 2006, requesting the parties to submit a single, consolidated amended indictment, and a consolidated challenge thereto,[9] the Trial Chamber hereby grants the Prosecution request to exceed the word limit.

12. The Trial Chamber notes that in the Prosecution Submission of Consolidated Amended Indictment the Prosecution failed to apply for leave to amend the Indictment. The Prosecution, however, did seek leave to amend the Indictment in the April 2006 Motion to Amend, which was filed just before the Trial Chamber ordered the Prosecution to file a proposed amended Indictment consolidating all changes proposed in the March 2005 Indictment in the Order of 28 April 2006. In the same Order, the Trial Chamber dismissed the 2006 Motion to Amend. For this reason, the Prosecution should rightly have asked for leave to amend the Indictment in the current motion, but has failed to do so.[10]

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[6] Practice Direction IT/184/Rev. 2 (16 September 2005), para. (C)(5).

[7] Motion to Exceed Word Limit.

[8] *Prosecutor v. Delić*, Case No. IT-04-83-PT, Decision on Motion to Exceed Word Limit, 19 May 2006, p. 2 (considering that, "in a situation such as this, where the Defence has been ordered by the Chamber to consolidate what would ordinarily be several submissions into one, there are exceptional circumstances warranting an extension of the word limit ordinarily imposed for individual motions and responses").

[9] Order of 28 April 2006, p. 3.

[10] In the Prosecution Reply, the Prosecution, however, requested the Trial Chamber to "[g]rant the Prosecution Motion for Leave to Amend." Prosecution Reply, para. 61.

13. However, in light of the history of the case and having regard to the Order of 28 April 2006, in which the Trial Chamber ordered the Prosecution to file a proposed amended indictment consolidating all changes proposed to the March 2005 Indictment,[11] the Trial Chamber considers the Prosecution Submission of Consolidated Amended Indictment to include the request for leave to amend.[12]

14. In the present decision, the Trial Chamber will in the following discuss the Prosecution Submission of Consolidated Amended Indictment regarding Maline, new crime bases, and an additional form of liability in Part II and other issues, including the challenges of the Accused to the form of the Consolidated Amended Indictment, in Part III. The Indictment and the procedural history are to be found in Annex A of this decision.[13]

II. PRPOPOSED AMENDMENTS TO THE MARCH 2005 INDICTMENT

15. This Decision will initially deal with the Prosecution Submission of Consolidated Amended Indictment. Pursuant to the Order of 28 April 2006, the Consolidated Amended Indictment comprises two different types of modifications proposed to the March 2005 Indictment, namely the changes proposed in conformity with the December 2005 Decision and the amendments introduced on the Prosecution's own initiative as reflected in the April 2006 Motion to Amend.[14] The Trial Chamber will discuss the Defence challenges with respect to the Trial Chamber's decision to grant leave to amend the Indictment under the headings as provided in the Defence Response.

A. RELEVANT LEGAL AUTHORITY ON THE AMENDMENT OF AN INDICTMENT

16. Amendment of an indictment is governed by Rule 50, which states in its entirety:

> (A) (i) The Prosecutor may amend an indictment:
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> (a) at any time before its confirmation, without leave;
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> (b) between its confirmation and the assignment of the case to a Trial Chamber, with the leave of the Judge who confirmed the indictment, or a Judge assigned by the President; and
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> (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.

[11] Order of 28 April 2006, p. 3.

[12] This Trial Chamber has already made similar consideration in *Prosecutor v. Me[j]akić et al.*, Case No. IT-02-65-PT, Decision on the Consolidated Indictment, 21 November 2002 ("Mejakić Decision"), p. 2.

[13] The short form titles used in the decision and referred to in the procedural history are also to be found in Annex A.

[14] Order of 28 April 2006, p. 3.

(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.[15]

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

(iv) Rule 47 (G) and Rule 53 *bis* apply *mutatis mutandis* to the amended indictment.[16]

(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.

17. Pursuant to Rule 50(A)(ii), the Trial Chamber has discretion to allow an amendment to an indictment. However, leave to amend an indictment shall not be granted unless the Trial Chamber or Judge is satisfied there is evidence which meets the standard set forth in Article 19, Paragraph 1, of the Statute to support the proposed amendments.

18. Although Rule 50 does not provide specific guidelines to a Trial Chamber for determining whether to allow the amendment of an indictment when leave to amend is sought,[17] this Trial Chamber has previously noted that "the fundamental question to be decided in relation to granting leave to amend an indictment is whether the amendments result in any prejudice to the accused," and "that in determining whether any prejudice to the accused will follow from an amendment to the indictment, regard must be had to the circumstances of the case as a whole".[18]

19. As another Trial Chamber clarified in a pre-trial decision in *Prosecution v. Brđanin and Talić*, the pointed question is whether the amendment will cause *unfair* prejudice to the accused:

> The word "unfairly" is used in order to emphasise that an amendment will not be refused merely because it assists the prosecution quite fairly to obtain a conviction. To be relevant, the prejudice caused to an accused would ordinarily need to relate to the fairness of the trial. Where an amendment is sought in order to ensure that the real issues in the case will be determined, the Trial Chamber will normally exercise its discretion to permit the amendment, provided that the amendment does not cause any injustice to the accused, or does not

[15] Article 19, which governs review of the indictment, states in subparagraph (1) that an indictment should only be confirmed if the Prosecutor has established a *prima facie* case against the Accused.

[16] Rules 47(G) and 53 *bis* govern the certification, translation, and service of an indictment once it has been confirmed.

[17] *Prosecutor v. Šešelj*, Case No. IT-03-67-PT, Decision on Prosecution's Motion for Leave to Amend the Indictment, 2 June 2005 (dated 27 May 2005) ("Šešelj Decision"), para. 5.

[18] Mejakić Decision, p. 3 (citing *Prosecutor v. Naletilić and Martinović*, Case No. IT-98-34-PT, Decision on Vinko Martinović's Objection to the Amended Indictment and Mladen Naletilić's Preliminary Motion to the Amended Indictment, 14 February 2001 ("Naletilić & Martinović Decision"), pp. 4–7.); *Posecutor 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.

> otherwise prejudice the accused unfairly in the conduct of his defence. There should be no injustice caused to the accused if he is given an adequate opportunity to prepare an effective defence to the amended case.[19]

20. This Trial Chamber accepts this clarification and concludes that "the test for whether leave to amend will be granted is whether allowing the amendments would cause unfair prejudice to the accused."[20] Among the factors to consider when determining whether to grant leave to amend an indictment two of them are particularly relevant, namely (1) whether the Accused has been given an adequate opportunity to prepare an effective defence;[21] and (2) whether the Accused's right under Article 21(4)(c) of the Statute to be "tried without undue delay" will be adversely affected.[22]

21. In the course of considering an interlocutory appeal from an ICTR Trial Chamber, the Appeals Chamber noted that Trial Chambers should weigh the likelihood of delay in the proceedings against the advantages to the Accused and the Chamber of an improved indictment:

> In assessing whether delay resulting from the Motion would be undue, the Trial Chamber correctly considered the course of proceedings to date, including the diligence of the Prosecution in advancing the case and timeliness of the Motion. ... [H]owever, a Trial Chamber must also examine the effect that the Amended Indictment would have on the overall proceedings. Although amending an indictment frequently causes delay in the short term, the Appeals Chamber takes the view that this procedure can also have the overall effect of simplifying proceedings ... by improving the Accused's and Tribunal's understanding of the Prosecution's case, or by averting possible challenges to the indictment or the evidence presented at trial. The Appeals Chamber finds that a clearer and more specific indictment benefits the accused ... because the accused can tailor their preparations to an indictment that more accurately reflects the case they will meet, thus resulting in a more effective defence.[23]

22. As held by this Trial Chamber in *Halilović*, "the Trial Chamber's evaluation of whether the proposed amendment would cause unfair prejudice to the Accused is linked to whether the amendment would result in the inclusion of a new charge, because the addition of a new charge would trigger the automatic procedural consequences provided for in Rules 50(B) and 50(C). The requirement of a further appearance and an additional period for filing preliminary motions mean that delay is inevitable if the amendment constitutes a new charge. That delay, when considered

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[19] *Prosecutor v. Brđanin and Talić*, Case No. IT-99-36-PT, "Decision on Form of Further Amended Indictment and Prosecution Application to Amend", 26 June 2001 ("Third Brđanin & Talić Decision"), para. 50 (citing Naletilić & Martinović Decision, pp. 4, 7).

[20] Halilović Decision, para. 22.

[21] In referring to an adequate opportunity for the Accused to prepare effective defence to the amended case, the pre-trial decision in *Brđanin and Talić* identified the issue of notice as relevant to the consideration of whether leave to amend should be granted. *Prosecutor v. Brđanin and Talić*, Case No. IT-99-36-PT, "Decision on Form of Fourth Amended Indictment", 23 November 2001 ("Fourth Brđanin & Talić Decision"), para. 17; Halilović Decision, para. 23.

[22] *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 ("Karemera Decision"), para. 13; *Prosecutor v. Čermak and Markač*, Case No. IT-03-73-PT, Decision on Prosecution Notion Seeking Leave to Amend the Indictment, 19 October 2005, para. 35.

[23] Karemera Decision, para. 15.

against the history of the proceedings to date, could amount to undue delay causing unfair prejudice to the accused."[24]

B. CONSIDERATION

1. Abusing the Process of the Court by Seeking to Obtain Inconsistent Verdict

23. In this part of the decision, the Trial Chamber will discuss the Defence allegations that the Prosecution abused the process of the Tribunal by seeking to obtain an inconsistent verdict in respect of Maline and new crime bases. For the purpose of clarity, the Trial Chamber preliminarily notes that these three locations were included in the proposed Indictment at different times: Maline was a part of the Original Indictment—March 2005 Indictment, whereas Grabovica, Uzdol, and Bugojno were included in October 2005 Indictment. The March 2005 Indictment, including Maline, was confirmed on 23 February 2005, whereas leave has not yet been granted regarding the three new crime bases, namely Grabovica, Uzdol, and Bugojno.

The Parties' Submissions

(1) Maline/Bikoši

24. The Defence submits that the allegations against Hadžihasanović and Kubura in the *Hadžihasanović* case were made "in a like manner for the same alleged crimes at Maline" as described in the paragraphs 26–29 of the proposed Consolidated Amended Indictment.[25] The Defence argues that the indictment of the Accused for murder and cruel treatment for the massacre at Maline/Bikoši must be stricken from the Indictment in the light of the finding in the *Hadžihasanović* case that "the perpetrators of the massacre [at Maline] were foreign and local Mujahedin based in Poljanice camp who, on 8 June 1993, were not under the effective control of the 3rd Corps and 7th Brigade" and that the Trial Chamber was "not satisfied that members of the 306th and 7th Brigades [had] participated in the massacre." Accordingly, the Trial Chamber in the *Hadžihasanović* case found that the accused could not have been held criminally responsible for the murders committed at Maline.[26] The Defence also points out that the Prosecution have chosen not to appeal this finding.[27] For these reasons, the Defence submits that "it is an abuse of the process of the court which manifestly seeks to undermine the integrity of the International Tribunal to seek

[24] Halilović Decision, para. 24.
[25] Defence Response, paras. 13–16.
[26] Defence Response, para. 16 (citing Hadžihasanović Judgement Summary, para. 3).
[27] Prosecution's Notice of Appeal 18/4/2006; Defence Response, para. 17.

a wholly contrary verdict in relation to events at Maline from another Trial Chamber in respect of this Accused."[28]

25. The Prosecution submits that the Defence motion to strike the Maline massacre from the Indictment constitutes a new challenge to the Maline/Binkoši massacre which is filed untimely.[29] The Prosecution argues that, pursuant to Rule 72 of the Rules, the Defence must file any motion challenging defects in the form of the Indictment within 30 days after disclosure by the Prosecutor to the Defence of all material and statements referred to in Rule 66(A)(i) and such motions must be disposed of not later than sixty days after they were filed. Pursuant to Rule 127(A)(i), the Trial Chamber can grant an extension of time to file any motion on good cause being shown by motion. The Prosecution relies on reasoning in *Prosecutor v. Krnojelac* in which Trial Chamber II held *inter alia* that "the opportunity given by Rule 50(C) to file a preliminary motion alleging defects in the form of an amended indictment is directed to material added by way of an amendment" and that "[t]hat opportunity cannot be used to raise issues in relation to the amended indictment which could have been raised in relation to the original indictment but were not."[30]

26. The Prosecution submits that the first Indictment ("Initial Indictment") against Delić was confirmed on 13 February 2005, and that the Defence filed its Motion Alleging Defects in the Form of the Indictment on 27 July 2005—30 days after Mrs. Vidović was appointed to represent him. In that motion, the Defence made challenges to language throughout the Indictment, including the paragraphs devoted to the Maline/Bikoši crime base. The Trial Chamber ruled on this Defence Motion in its decision of 13 December 2005 and thereby disposed of the preliminary motion alleging defects in the form of the Indictment.[31]

27. The Prosecution contends that the Defence "now seeks to exploit the leave granted under Rule 50 (to be heard on the Prosecution motion to amend the Indictment) to reargue its original Rule 72 motion and challenge the language in the Initial Indictment. .This challenge comes 15 months after the Initial Indictment was filed, 10 months after the first Defence Motion Alleging Defects in the Form of the Indictment was filed and five months after the Trial Chamber disposed of the matter [in its Decision of 13 December 2005]."[32] The new challenge is according to the Prosecution untimely and should therefore be rejected.

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[28] Defence Response, para. 17.

[29] Prosecution Reply, para. 10.

[30] Prosecution Reply, para. 8 (citing *Prosecutor v. Krnojelac*, Case No. IT-97-25-PT, Decision on Preliminary Motion on Form of Amended Indictment, 11 February 2000 ("Third Krnojelac Decision"), para. 15.

[31] Prosecution Reply, para. 9.

[32] Prosecution Reply, para. 10.

28. Referring to the Decision of 13 December 2005, in which the Trial Chamber held that "... the acquittal of the Accused in Hadžihasanović and Kubura on the factual basis of that case has no bearing on the Indictment in the present case,"[33] the Prosecution argues that the Trial Chamber should also reject as unfounded other issues raised by the Defence concerning the charges related to Maline/Bikoši.[34] Moreover, the fact that the Prosecution did not appeal this finding has no bearing on this issue as the Prosecution does not necessarily appeal in every instance in which the Prosecutor considers a Chamber to have erred.[35]

29. The Prosecution finally contends that "the allegations of Murder and Cruel Treatment at Maline/Bikoši have been confirmed, and challenges thereto have been raised and resolved. There is a *prima facie* case for the Accused to answer with respect to these crimes .... [but] no legal bases for removing these allegations from the Consolidated Amended Indictment at the pre-trial stage ... [and] no abuse of process by the Prosecution with respect to these allegations."[36]

(2) Grabovica and Uzdol

30. The Defence submits that Sefer Halilović stood trial on the allegations which are identical to allegations regarding killings in Grabovica provided for in paragraph 41 of the proposed Consolidated Amended Indictment,[37] and allegations regarding killings in Uzdol provided for in paragraph 50 of the proposed Consolidated Amended Indictment."[38] The Defence submits that the indictment of the Accused for the killings at Grabovica and Uzdol must be stricken from the Indictment in the light of the factual finding in *Halilović* case,[39] in which the Trial Chamber held that the Prosecution had failed to prove that fifteen of the persons named in Annex C of the proposed Consolidated Indictment had been killed by members of the ARBiH in Grabovica at the time relevant to the indictment,[40] and that the Prosecution had failed to prove that two of the alleged victims were not taking any active part in hostilities at the time of their death and that two further victims had been killed by members of the ARBiH who attacked Uzdol at the relevant

[33] Decision of 13 December 2005, para. 21.

[34] Prosecution Reply, para. 11.

[35] Prosecution Reply, para. 11 (citing the Prosecution Response to the Defence Motion Alleging Defects in the Form of the Indictment, *Prosecutor v. Delić*, Case No. IT-04-83-PT, 5 August 2005, para. 10).

[36] Prosecution Reply, para. 12.

[37] Paragraph 41 alleges that at "at least 27 Bosnian Croat civilians were killed in Grabovica." Defence Response, para. 18.

[38] Paragraph 50 of the proposed Consolidated Amended Indictment alleges that at "[n]one of the 29 Bosnian Croat civilians murdered in Uzdol on 14 September 2003 was participating in the hostilities ... The names of the victims are set forth in Annex D of the Indictment." Defence Response, para. 19.

[39] Defence Response, para. 18.

[40] Defence Response, para. 18, footnote 15 (citing Halilović Judgement, para. 729).

time.[41] The Defence argues that the continued inclusion in the Indictment of these alleged victims is an abuse of the process of the court.[42]

31. The Prosecution contends that "the fact that the Prosecution failed to prove certain deaths in the *Halilović* case does not necessarily mean that the Prosecution cannot prove these deaths in this case. The issue at hand is whether the material submitted in support of the proposed charges establishes *prima facie* case. The evidence presented before this Trial Chamber might be different than the evidence package available to *Halilović* Trial Chamber ... [and] even if the evidence is the same, each Trial Chamber has an obligation to reach its own conclusions." Furthermore, "the fact that the Prosecution elected not to appeal these finding in *Halilović* is irrelevant for the present purposes."[43]

Discussion

a.) The question of timely objection

32. This Trial Chamber endorses the proposition of the Trial Chamber II, as set forth in *Krnojelac*, establishing that the Defence "... cannot ... raise issues in relation to the amended indictment which could have been raised in relation to the original indictment but were not", and that "in an appropriate case, an extension of time to complain of a particular defect may be granted."[44]

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[41] Defence Response, para. 19, footnote 16 (citing Halilović Judgement, paras. 731–732).
[42] Defence Response, para. 20.
[43] Prosecution Reply, para. 19.
[44] Third Krnojelac Decision, para. 15.

33. Following the Tribunal's jurisprudence,[45] the Trial Chamber considers that the Defence challenges in respect of the alleged crimes in Maline/Bikoši constitute new challenges directed against the Prosecution pleadings already contained in the March 2005 Indictment. On 27 July 2005, the Defence filed its First Defence Motion Alleging Defects challenging the form of the March 2005 Indictment which had been examined by the Trial Chamber in its Decision of 13 December 2005. The Trial Chamber therefore agrees with the Prosecution argument that the Trial Chamber ruled on the Defence motion challenging the language throughout the Indictment, including the paragraphs devoted to the Maline/Bikoši crime, and thereby disposed of the preliminary motion alleging defects in the form of the Indictment.[46]

34. The Trial Chamber considers that Pursuant to Rule 72, the Defence challenges in respect of the alleged crimes at Maline/Bikoši could have been raised in relation to the March 2005 Indictment in the preliminary motion, and not only at this stage of the proceedings. Accordingly, at the present, pursuant to Rule 50, the Defence is allowed to raise the challenges only in relation to the arguments which are directed against the amendments or against the changes incorporated in the Indictment as ordered by the Trial Chamber in its Decision of 13 December 2005. The Defence is therefore precluded from raising for the first time the challenges directed to the allegations contained in the Original Indictment that could have been raised in the preliminary motion.

35. However, as established in the Tribunal's jurisprudence and correctly pointed out by the Prosecution, the Trial Chamber can, pursuant to Rule 127, grant an extension of time to object to the form of the original indictment on good cause being shown by motion.[47] A Trial Chamber has

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[45] In *Brđanin & Talić* the same Trial Chamber based its decision on its previous ruling in *Krnojelac* and held that "alleged defects which are raised for the first time would not be permitted in a fresh preliminary motion, unless an extension of time to object to the form of the original indictment were granted [citation omitted]." On this basis, the Trial Chamber considered that two out of the three of the alleged defects raised for the first time "[were] not of such a nature as to warrant an extension of time," but it considered that "[t]he third [alleged defect] [did] raise an issue "of some possible significance", and thereby granted to Talić an extension of the time to raise it out of time. *Prosecutor v. Brđanin and Talić*, Case No. IT-99-36-PT, Decision on Filing of Replies, 7 June 2001 ("Brđanin Decision on Filing Replies"), para. 7. In *Prosecutor v. Boškovski and Tračulovski,* Trial Chamber II considered the arguments directed against allegations already included in the original indictment, in other words, the issues relating to the Prosecution pleadings already contained in the original indictment—arguments which were neither directed against the amendments nor the continuation of matters requested by the Trial Chamber to be changed—to be *res judicata* because the Trial Chamber has already examined and confirmed that part of the indictment in its previous decision. Trial Chamber II further held that because "[the Accused] did not challenge the form of the Original Indictment by filing a preliminary motion within the statutory period as stipulated in Rule 72 of the Rules, he may no longer challenge the form of the Prosecution pleadings contained in the original indictment. *Prosecutor v. Boškovski and Tračulovski*, Case No. IT-04-82-PT, Decision on Prosecution Motion for Leave to Amend the Original Indictment and Defence Motions Challenging the Form of the Proposed Amended Indictment, 1 November 2005 ("Boškovski Decision"), paras. 45–46. The Trial Chamber II, however, considered *proprio motu* some of the issues raised and ordered the Prosecution to include them in their pre-trial brief. Boškovski Decision, para. 47.

[46] Prosecution Reply, para. 9.

[47] Prosecution Reply, para. 8 (citing Third Krnojelac Decision, para. 15).

previously considered granting the extension of time to complain of a particular defect "in an appropriate case",[48] or when the issue raised was "of some possible significance."[49]

36. The Trial Chamber recalls that on 18 November 2005 the Prosecution submitted a Prosecution Stay Motion requesting the Trial Chamber to suspend consideration of the October 2005 Proposed Amended Indictment until 30 days after the *Hadžihasanović & Kubura* Trial Judgement or permit the Prosecution to withdraw the October 2005 Proposed Amended Indictment. In its Decision of 13 December 2005, the Trial Chamber granted the Prosecution leave to withdraw the October 2005 Proposed Amended Indictment, but ordered it to re-submit any new motion seeking leave to amend the indictment within 30 days of the rendering of the *Hadžihasanović & Kubura* Trial Judgement.[50]

37. On 2 March 2006, at the Status Conference, both parties expressed their assent to the Pre-Trial Judge's proposal for the Trial Chamber to suspend the consideration of all indictment-related filings until 30 days after the *Hadžihasanović & Kubura* Trial Judgement with a view to considering together any and all challenges to the January 2006 Proposed Amended Indictment on the one hand, and the further amended indictment anticipated to follow *Hadžihasanović & Kubura* on the other.[51] The Trial Chamber, in the interest of judicial economy, in its Order of 28 April 2006 ordered the Prosecution to file a single consolidated amended indictment and the Defence to submit all its arguments in one motion, and not to incorporate by reference the arguments made in the February 2006 Defence Challenge and the April 2006 Defence Challenge.[52]

38. The Trial Chamber further notes that the Defence arguments from the current Defence Response relating to the alleged crimes at Maline were first raised by the Defence after rendering of the *Hadžihasanović & Kubura* Trial Judgement on 15 March 2006, and included in the April 2006 Defence Challenge. Given the content of the challenges referring to the outcome of the *Hadžihasanović & Kubura* Trial Judgement, it is clear that the Defence could raise them only after this judgement was rendered and not before as suggested by the Prosecution. In addition, as mentioned above, the Order of the 28 April 2006, explicitly ordered the Defence to include the

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[48] Third Krnojelac Decision, para. 15.

[49] Brđanin Decision on Filing of Replies, para. 7.

[50] Decision of 13 December 2005, para. 65.

[51] *Prosecutor v. Delić*, Case No. IT-04-83-PT, Status Conference, T. 67 (2 March 2006); Order of 28 April 2006, p. 2.

[52] The Order of 28 April 2006 provides that "[i]f the Defence intends to challenge this consolidated indictment, it shall do so no later than 22 May 2006. The Defence shall include *all its arguments* in this motion, and shall not incorporate by reference the arguments made in the February 2006 Defence Challenge and the April 2006 Defence Challenge." Order of 28 April 2006, p. 3 (emphasis added). It should be pointed out that the Trial Chamber did not intend to allow the parties to raise the challenges to the March 2005 Indictment, namely the challenges that should have been raised already in the preliminary motion, but only the challenges to the amendments to the March 2005 Indictment.

challenges from the April 2006 Defence Challenge (and also February 2006 Defence Challenge) *de novo* in the motion, and not merely incorporate them by reference.

39. In the light of the foregoing arguments, namely the history of the case as partly described above, and in particular the Order of the Trial Chamber of 28 April 2006, in which the Trial Chamber ordered the Defence "to include all challenges in [one] motion,"[53] the Trial Chamber will, pursuant to Rule 127, construe the Defence motion regarding Maline/Bikoši as establishing good cause for the Chamber to consider those challenges as validly filed, notwithstanding the provisions of Rules 50 and 72 with regard to the time for filing the challenges to the original indictment. The Trial Chamber will therefore consider the Defence objections as timely filed.

b.) The impact of the Halilović and Hadžihasanović & Kubura Trial Judgements

40. The Defence first argument relating to Maline, Grabovica, and Uzdol is that the findings in *Hadžihasanović & Kubura* and *Halilović* case preclude the Prosecution from including certain allegations concerning the crimes allegedly committed in these three locations in the Consolidated Amended Indictment, and that the Trial Chamber is obliged to follow the factual findings in these two Judgements, and should therefore strike out the respective allegations.

41. The Trial Chamber rejects the Defence argument contending that the continued inclusion of the respective allegations is an abuse of the process of the court. The Trial Chamber reiterates the Appeals Judgement in *Aleksovski* holding that "[t]he Appeals Chamber considers that decisions of Trial Chambers, which are bodies with coordinate jurisdiction, have no binding force on each decision, although a Trial Chamber is free to follow the decision of another Trial Chamber if it finds that decision persuasive."[54]

42. The Trial Chamber therefore considers that it is not bound by the factual findings in *Hadžihasanović & Kubura* and *Halilović* case. Despite certain factual similarities the case at hand, which is against another accused, is different. The principle *res judicata* applies only to the accused in a particular case, and does not extend to accused in other cases. The fact that the Prosecution has not appealed these two judgements has therefore no bearing on the case at hand.

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[53] Order of 28 April 2006, p. 3. The Trial Chamber also notes that it had allowed the Prosecution to withdraw the October 2005 Indictment so that the Prosecution would have an opportunity to assess the potential impact of the findings in the *Hadžihasanović & Kubura* Trial Judgement, and ordered the Prosecution to submit a new proposed amended indictment within 30 days of the rendering of that judgement. Therefore, it would not be in accordance with the principle of equality of arms incorporated in the principle of fair trial, if the Trial Chamber decided not to consider the arguments raised by the Defence with respect to the challenges related to *Hadžihasanović & Kubura* Trial Judgement.

[54] *Prosecutor v. Aleksovski*, IT-95-14/I-A, Appeal Judgement ("Aleksovski Appeal Judgement"), 24 March 2000, para. 114.

Additionally, in its Decision of 13 December 2005, this Trial Chamber has already held that "the acquittal of the Accused in *Hadžihasanović and Kubura* on the factual basis of that case has no bearing on the Indictment in the present case."[55]

43. Furthermore, as pointed out by the Prosecution, the Prosecution in this case might present different evidence than the evidence submitted in *Hadžihasanović & Kubura* and *Halilović* cases, and that even if the evidence is the same, each Trial Chamber has an obligation to reach its own conclusion. The Trial Chamber's conclusion might hypothetically differ from the conclusions reached by other Trial Chambers in other cases, even if the Prosecution builds its case upon the same evidence. As confirmed by the Appeals Chamber in *Aleksovski*, the Tribunal has not adopted the doctrine of "stare decisis" or "precedent", under which it is necessary for a court to follow earlier judicial decision when the same points arise again in litigation.[56]

44. Pursuant to Rule 47, the Prosecutor is entitled to submit an indictment if it is satisfied in the course of an investigation that there is sufficient evidence to provide reasonable grounds for believing that a suspect has committed a crime within the jurisdiction of the Tribunal. Pursuant to Rule 50, the Prosecution is entitled to amend an indictment, which can be done anytime; however, at this stage of the proceedings only with the leave of the Trial Chamber.

45. The Trial Chamber notes that at this stage of the proceedings it merely needs to be satisfied that there exists a *prima facie* case against the Accused with respect to the allegations concerning Maline, Uzdol, and Grabovica. The allegations of murder and cruel treatment in Maline/Bikoši have been confirmed by the reviewing judge and the challenges to the March 2005 Indictment have been resolved in the Decision of 13 December 2005. However, the allegations concerning the events in Grabovica and Uzdol were included in the October 2005 Indictment and would therefore still need to be assessed according to the *prima facie* test should the Trial Chamber decide not to reject the amendments on any other ground.

46. For the foregoing reasons, the Trial Chamber rejects the Defence request to strike out the allegations concerning the events of Maline/Bikoši, Grabovica and Uzdol on the basis of the findings in *Hadžihasanović & Kubura* and *Halilović* Trial Judgements. The question whether leave should be given to include these new crime bases will be dealt with in the following part of the decision.

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[55] Decision of 13 December 2005, para. 21.
[56] Black's Law Dictionary (B. A. Garner ed., 2000), p. 1137.

2. Unfair Prejudice to the Accused caused by addition of liability pursuant to Article 7(1) of the Statute and inclusion of the new crime bases (Grabovica, Uzdol, and Bugojno)

The Parties' Submissions

47. The Defence submits that the addition of an entirely new form of criminal liability, namely that pursuant to Article 7(1) of the Statute for the crimes alleged at Grabovica in September 1993 (paras. 35–43) and for those alleged at Kamenica Camp, Livade, and Kesten in July 1995 and September 1995, respectively (paras. 65–81), and addition of allegations relating to the three new crime bases at this stage will cause serious and irremediable unfair prejudice to the Accused which substantially impacts upon his ability to adequately prepare his defence while being tried without undue delay.[57]

48. The Defence argues that the addition of criminal liability under Article 7(1) of the Statute and the three new crime bases necessitates reconsideration of the entire Defence Strategy pursuant to which for the past year the Accused has sought to prepare for his trial, and greatly extend the ambit of their investigations, and, thereby, require that substantially additional funds are sought from the Registry.[58] It would further significantly increase the length of the Accused's trial and make it highly unlikely that the Completion Strategy target of completing trials by the end of 2008 could be met by the International Tribunal.[59]

49. The Defence also argues that the Prosecution has not explained nor justified why they failed to include these new allegations in the Original Indictment. The Prosecution possessed evidence with respect to the offences concerning the three new crime bases as the events in Grabovica and Uzdol were fully pleaded in the indictment against *Halilović* and the issue of the detention facilities at Bugujno formed part of the allegations against *Hadžihasanović & Kubura*.[60]

50. The Defence further contends that the imposition of Article 7(1) liability was not foreshadowed by the reasoning put forward by the Prosecution when they sought to persuade the court to exercise its discretion in their favour by allowing them to withdraw their proposed Amended Indictment which related exclusively to their purported desire to harmonize the Indictment with the *Halilović & Hadžihasanović* Trial Judgements. The Defence submits that the addition of Article 7(1) liability has precisely the opposite effect to that which the Prosecution

[57] Defence Response, paras. 21–22.
[58] Defence Response, paras. 22, 24. 26–27.
[59] Defence Response, para. 23. *See also* S/RES/1503(2003).
[60] Defence Response, para. 28. *See* paras. 61(d), 62(g), 63(c)–(d) of Hadžihasanović Indictment.

initially contended would be the position if the court granted their Motion, namely 'focusing the case and narrowing the issues for trial'."[61]

51. The Prosecution argues that "the Defence has been on notice for nearly a year that the Prosecution intended to amend the Indictment" and that three of these "new" crime bases, namely Grabovica, Uzdol, and Bugujno, alleged in the Consolidated Amended Indictment also appeared in the October 2005 Indictment, filed on 31 October 2005 and withdrawn in December with leave of the Trial Chamber.[62]

52. The Prosecution further argues that the Defence has failed to show how the addition of these crimes, and the allegations of liability under Article 7(1) of the Statute, will result in undue delay for a case that is not yet scheduled for trial. In the view of the Prosecution, the addition of these crime bases will not cause significant delay to these proceedings; they have been to a certain extent subject to litigation in the *Halilović* and *Hadžihasanović & Kubura* cases, respectively; and the Prosecution intends to rely upon Rules 92 *bis* and 94(B) to limit the duration of the trial to a manageable length.[63]

Discussion

53. In accordance with the Rules and the Tribunal's jurisprudence as described above (paras. 16–22), the Trial Chamber will grant leave to amend the Consolidated Amended Indictment only if it is satisfied that the amendments *would not cause unfair prejudice* to the Accused.[64] Following the test established in *Halilović* the Trial Chamber will first consider if the proposed amendment constitutes a new charge. Secondly, the Trial Chamber will consider if granting the amendment could cause unfair prejudice to the Accused due to factors relevant to the consideration of unfair prejudice, such as a lack of notice of the allegations, or because it would lead to undue delay in the proceedings."[65]

a.) New charge

54. The Trial Chamber notes that "[w]hen considering whether a proposed amendment results in the inclusion of a 'new charge', it is therefore appropriate to focus on the imposition of criminal

[61] Defence Response, para. 25.
[62] Prosecution Reply, para. 17.
[63] Prosecution Reply, para. 18.
[64] Halilović Decision, para. 22 (emphasis added).
[65] According to the *Halilović* test, if the answer to the second question is affirmative, the Trial Chamber shall consider if the lack of notice or undue delay outweighs any benefit that would result form amending the current Indictment and thus amount to unfair prejudice to the Accused. Halilović Decision, para. 24 (emphasis added).

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 amendment introduces a basis for conviction that is factually and/or legally distinct from any already alleged in the indictment."[66]

55. The Trial Chamber observes that the wording of the four Counts in the Consolidated Amended Indictment remains the same. The Trial Chamber, however, considers that the inclusion of three entirely new factual situations—Grabovica, Uzdol, and Bugojno—in support of the existing Counts, results in the inclusion of new charges forming a new basis for conviction not previously included in the March 2005 Indictment.

56. The Trial Chamber also considers that the inclusion of a new form of liability under Article 7(1) of the Statute generates new charges for the purpose of Rule 50 because, if the Trial Chamber grants leave to the amendments, the Accused would be exposed to conviction based on conduct that is a basis for criminal liability not presently reflected in the March 2005 Indictment. The addition of the new form of criminal liability under Article 7(1) of the Statute therefore produces new charges in respect to the factual allegations already contained in the March 2005 Indictment.[67]

b.) Insufficient notice or lack of an adequate opportunity to prepare effective defence to the amended case

57. As discussed above, one of the two factors highlighted as relevant to the consideration of unfair prejudice to the Accused is "insufficient notice, or alternatively phrased, the lack of 'an adequate opportunity to prepare an effective defence to the amended case'."[68]

58. The Defence submits that the first time that it became aware that the Accused potentially faced an entirely new form of criminal liability pursuant to Article 7(1) was on 18 April 2006, when the Prosecution filed the April 2006 Proposed Amended Indictment.[69] The Prosecution does raise objections to this argument, but it merely focuses on the time when the Defence was informed of the intent of the Prosecution to include the three new crime bases to the March 2005 Indictment.

59. The Trial Chamber confirms the Prosecution allegations that it had mentioned the possibility of amending the Indictment in the 65 *ter* conference on 20 June 2005, and that nine days later, at a Status Conference, the Prosecution explicitly specified that it intended to add three

[66] Halilović Decision, para. 30.
[67] These are allegations relating to Kamenica Camp: Livade, Kesten, and rape and cruel treatment allegations.
[68] Halilović Decision, para. 36; Third Brđanin & Talić Decision, para. 50.
[69] Defence Response, para. 8.

additional crime bases to the Indictment as it existed at that time.[70] However, the Prosecution did not name these three locations but merely referred to them as "three additional crime bases".[71] The Prosecution has subsequently included the three new crime locations in the October 2005 Indictment.

60. The Trial Chamber therefore notes that the Defence has been aware of the intention of the Prosecution to include the three new crime bases since 31 October 2005, when the Prosecution filed its October 2005 Indictment—approximately eight months and a half after the Original Indictment had been confirmed. The Defence learnt about the inclusion of the new form of the criminal liability pursuant to Article 7(1) of the Statute on 18 April 2006—more than a year after confirmation of the Original Indictment, when the Prosecution filed its April 2006 Proposed Amended Indictment.

61. In its Decision of 13 December 2005, the Trial Chamber observed that neither the Rules nor the jurisprudence of the Tribunal requires an express time limit within which the Prosecution must file a motion for leave to amend the indictment. Pursuant to Rule 50(A)(i)(c), after a case has been assigned to a Trial Chamber, the Prosecution may amend the indictment, at any time, with leave of that Trial Chamber. "Nevertheless, the test for whether leave to amend will be granted is whether allowing the amendments would cause unfair prejudice to the accused, and one of the key factors to be taken into consideration in determining unfair prejudice is the stage of the proceedings at which the motion seeking leave to amend is made."[72]

62. As established in the jurisprudence of the Tribunal and confirmed by this Trial Chamber, "the closer to the trial the Prosecution makes its motion seeking leave to amend, the more likely it is that the Trial Chamber will deny the motion on the ground that to grant the leave to amend would cause unfair prejudice to the accused by, for example, depriving him of an adequate opportunity to prepare an effective defence."[73]

63. The Trial Chamber considers that (1) informing the Defence of the inclusion of a new form of liability only on 18 April 2006, by adding it to the April 2006 Proposed Amended Indictment—less than a month before the submission of the Consolidated Amended Indictment and more than a year after the confirmation of the Original Indictment; and (2) informing the Defence of its final decision of adding the three new crime bases in the April 2006 Indictment constitutes late notice,

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[70] *Prosecutor v. Delić*, Case No. IT-04-83-PT, Rule 65 *ter* Conference, T. 13 (20 June 2005).
[71] *Prosecutor v. Delić*, Case No. IT-04-83-PT, Status Conference, T. 33–34 (29 June 2005).
[72] Decision of 13 December 2005, para. 62.
[73] Šešelj Decision, para. 5; Halilović Decision, paras. 22–23; Fourth Brđanin & Talić Decision, para. 50.

which might have some adverse affect on the Accused's opportunity to prepare an effective defence to the amended case.[74]

c.) Undue delay of the proceedings

64. As held by this Trial Chamber in *Halilović*, there are three direct procedural consequences of allowing the proposed amendment which result in a new charge: (1) the Accused would have to appear again in accordance with Rules 50(B) and 62 to enter pleas on the new charge; (2) pursuant to Rule 50(C), the Accused would have a further period of thirty days to file preliminary motions to respond to the new charge, though the Chamber could reduce that period under Rule 127(A)(i) if good cause is shown, which may require further motion by the Prosecution;[75] and (3) the date for trial may be postponed if the Chamber determines such a delay necessary to ensure adequate time for the preparation of the defence.[76]

65. The Trial Chamber therefore notes that the requirement of a further appearance and an additional period for filing preliminary motions means that delay is inevitable in the present case, because the amendments in the Consolidated Amended Indictment constitute new charges. On the other hand, as the trial date has not been yet determined, the inclusion of new charges does not result in postponing the trial at this stage. Nevertheless, the Trial Chamber has to consider whether a delay caused by a further appearance and a period for filing preliminary motions amounts to undue delay causing unfair prejudice to the Accused which would be a sufficient reason to deny leave to amendments.[77]

66. For example, in *Prosecutor v. Brđanin & Talić* decision, rendered on 23 November 2001, Trial Chamber II refused to grant leave to amend the indictment because the trial was due to commence in January 2002—in less than two months.[78] In *Prosecutor v. Halilović* this Trial Chamber also rejected the proposed amendments which in the Trial Chamber's view would result in the inclusion of new charges. The Trial Chamber held that

> [a]s the case is currently set to start trial on 24 January 2005[only approximately a month after the decision was delivered by the Trial Chamber on 17 December 2004], any significant delay in pre-trial preparation at this stage would have the practical effect of an additional wait for

[74] As mentioned, the Prosecution first included Bugojno in the October 2005 Indictment, however it decided later to withdraw the October 2005 Indictment. Subsequently, it submitted its January 2006 Indictment without adding the allegations pertaining to Bugojno. Only in April 2006 did the Prosecution again include the charges relating to Bugojno in the April 2006 Indictment together with a new form of criminal liability pursuant to Article 7(1) of the Statute.

[75] *See, e.g.*, Fourth Brđanin & Talić Decision, Schedule 2, pp. 12–13, paras. 3–4.

[76] *See* Rule 50(C).

[77] Halilović Decision, para. 24; *see also* Fourth Brđanin & Talić Decision, para. 17.

[78] Fourth Brđanin & Talić Decision, para. 17.

> several months before the Accused's trial actually begins, because another case awaiting trial would take its place. The resultant deferral of trial for at least several months, after an extended pre-trial period of more than *three years*, could constitute undue delay amounting to unfair prejudice to the Accused.[79]

In its final assessment, the Trial Chamber concluded that "any benefit of allowing the amendment to the indictment could not outweigh the significant and unfair prejudice that would result from the further postponement of this trial ..."[80]

67. On the other hand, as pointed out by the Prosecution, Trial Chamber II in *Prosecutor v. Šešelj* noted that "some of the proposed amendments would result in the inclusion of new charges," but that the inclusion of new charges "would not constitute an unfair prejudice to the [a]ccused" as "a date for the commencement of the trial of the [a]ccused has not been yet scheduled, and it appears that the [a]ccused will have ample opportunity to prepare a defence with regard to the new charges."[81] Similarly, the Trial Chamber in *Prosecutor v. Naletilić & Martinović* stated that "the amendments have certainly not delayed the trial of the accused, which is not yet scheduled to begin."[82]

68. The Appeals Chamber of ICTR noted in *Prosecutor v. Karemera* that "[i]n assessing whether delay resulting from the [m]otion would be undue, the Trial Chamber correctly considered the course of proceedings to date, including the diligence of the Prosecution in advancing the case and timeliness of the [m]otion.[83] The Trial Chamber recalls that on 18 November 2005, in its Stay Motion, the Prosecution petitioned the Trial Chamber for permission to withdraw the October 2005 Indictment in order to assess (1) the implications of *Halilović* Trial Judgement for the allegations concerning Grabovica and Uzdol; and (2) the impact of *Hadžihasanović & Kubura* Trial Judgement on the part of the Indictment concerning detention facilities at Bugojno.[84] The Trial Chamber

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[79] Halilović Decision, para. 39 (emphasis added).

[80] Halilović Decision, para. 41.

[81] Šešelj Decision, paras. 15–16.

[82] Naletilić Decision, p. 7. Relying on this finding, this Trial Chamber in *Prosecutor v. Lukić* held that "considering that pre-trial proceedings in this case have just begun, so [that] amending the indictment at this stage, even if it should include new charges, will neither deny the Accused an adequate opportunity to prepare his defence nor cause undue delay." *Prosecutor v. Lukić*, Case No. IT-98-31/1-PT, Decision Granting Prosecution's Motion to Amend Indictment and Scheduling Further Appearance, 1 February 2006, para. 20 (citing *Prosecutor v. Beara*, Case No. IT-02-58-PT, Decision on Prosecution Motion to Amend the Indictment ("Beara Decision"), 24 March 2005, p. 2).

[83] Karemera Decision, para. 15.

[84] Stay Motion, paras. 1, 6, 10.The main rationale for this motion, as submitted by the Prosecution, was "to avoid unnecessary litigation on the form of the Indictment and the Tribunal's jurisdiction." In addition, the Prosecution advance other public-policy reasons for attempting to harmonise findings of the Chambers with indictments in cases in which different accused are charged with the same crimes in difference cases, including "minimising the likelihood of inconsistent findings and expediting the proceedings by reducing surplus elements in the Indictment, thus focusing the case and narrowing the issues for trial." Main practical purpose is to prevent further motions purporting to amend the Indictment and therefore help the Prosecution to finalise the Indictment. Stay Motion, paras. 3–4.

granted the motion and the Prosecution in its January 2006 Indictment decided to omit the charges relating to Grabovica, Uzdol, and Bugojno. After rendering of the Trial Judgement on *Hadžihasanović & Kubura*, the Prosecution decided to resubmit the allegations relating to these three new crime bases in the April 2006 Indictment in almost identical language as in the October 2005 Indictment.[85]

69. One of the issues in determining whether there has been undue delay is whether the Prosecution pursued a particular course of action in order to seek improper tactical advantages which resulted in unfair prejudice to the Accused.[86]

70. The Trial Chamber finds that the Prosecution, by this course of action, delayed the pre-trial proceedings for some four months and therefore has not contributed to the benefit of the overall proceedings. However, the Trial Chamber considers that the Prosecution strategy was accepted and confirmed by this Trial Chamber in its December 2005 Decision. With respect to the abuse of powers argument, the Trial Chamber notes in its Stay Motion the Prosecution merely expressed its intention to review the Indictment in the light of the two judgements. The Prosecution has never explicitly stated which allegations it was to amend given the specific findings in the *Halilović* and *Hadžihasanović & Kubura* Trial Judgements.[87]

71. For the foregoing reasons, the Trial Chamber concludes that allowing new amendments, with regard to three new crime bases and the new form of liability, would cause procedural consequences requiring delay in the pre-trial proceedings. These amendments would inevitably increase the length of the Accused's trial. The new charges do not impact on the actual trial date as it has not been yet determined, but they would delay the possible beginning of the trial and lengthen the trial itself. Granting leave to the amendments would therefore have effects opposite to what this Trial Chamber has been trying to accomplish, namely to simplify the proceedings in the interest of a fair and expeditious trial.

72. On the basis of the above described jurisprudence creating standards for the determination of insufficient notice and undue delay, the Trial Chamber is not able to conclude that the late notice results in insufficient notice and that the delay results in undue delay causing unfair prejudice to the Accused. As mentioned, the trial date has not been yet determined in the present proceedings, so

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[85] Compare paras. 44–73 of the October 2005 Indictment with paras. 30–59 of the April 2006 Indictment.

[86] The Appeals Chamber in *Kovačević* recognized that "[i]f the Prosecutor has sought an improper tactical advantage, that is a matter determining whether there has been undue delay in violation of the right of the accused to a fair trial." Kovačević Appeal Chamber Decision, para. 32.

[87] The Prosecution did not try to foresee the outcome of the review and therefore did not create expectation misleading the Defence and resulting to abuse of the powers of the Prosecution.

granting the amendments would neither deny the Accused an adequate opportunity to prepare his defence nor cause undue delay pursuant to aforementioned practice of the Tribunal.

73. The Trial Chamber endorses the proposition that "[a]lthough there are no express limits on the exercise of the discretion contained in Rule 50, when viewing the Statute and Rules as a whole, it is obvious that it must be exercised with regard to *the right of the accused to fair trial.*"[88] Insufficient notice and undue delay are not the only factors to establish whether the amendments would adversely affect the fairness of the proceedings.[89] When determining whether to grant leave to amend an indictment regard must be paid to the circumstances of the case as a whole.[90] "In particular, depending on the circumstances of the case, *the right of the accused to an expeditious trial* ... potentially arise when considering objections to an amended indictment."[91]

74. Considering therefore all the circumstances of the case as described in the foregoing paragraphs, which (1) contributed to delaying the pre-trial proceedings for a considerable period of time; (2) would potentially delay the eventual start of the trial; and (3) would potentially increase the length of the future trial, the Trial Chamber finds that granting the amendments would adversely affect the overall proceedings and run contrary to the interests of a fair and expeditious trial.[92] The Trial Chamber therefore concludes that any possible benefit of allowing the amendments to the Indictment with regard to the addition of the liability pursuant to Article 7(1) of the Statute and the new crime base Bugujno does not outweigh the negative consequences affecting the overall proceedings and thereby denies leave to these amendments.

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[88] Naletilić Decision, p. 4 (emphasis added).

[89] As already pointed out under the Chapter "Relevant Legal Authority", "the prejudice caused to an accused would ordinarily need to relate to the *fairness of the trial.* Where an amendment is sought in order to ensure that the real issues in the case will be determined, the Trial Chamber will normally exercise its discretion to permit the amendment, provided that the amendment does not cause any injustice to the accused ..." Third Brđanin & Talić Decision, para. 50 (emphasis added).

[90] *See* Mejakić Decision, p. 3; Naletilić Decision, pp. 4–7.

[91] Naletilić Decision, p. 4 (emphasis added).

[92] The Appeals Chamber in *Karemera* noted that "[a]lthough amending an indictment frequently causes delay in the short term, the Appeals Chamber takes the view that this procedure can also have the overall effect of simplifying proceedings ... by improving the Accused's and Tribunal's understanding of the Prosecution case, or by averting possible challenges to the indictment or the evidence presented at trial." Karemera Decision, para. 15.

III. ADDITIONAL AMENDMENTS AND CHALLENGES TO THE FORM OF THE PROPOSED AMENDED INDICTMENT

A. OTHER PROPOSED AMENDMENTS

75. Pursuant to Rule 50(A)(ii), "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[s]", *i.e.*, leave to amend shall be denied if the material provided does not meet the *prima facie* standard.[93]

76. A *prima facie* case is "a credible case which would (if not contradicted by the Defence) be a sufficient basis to convict the accused on the charge."[94] "The review of the indictment to determine whether it established a *prima facie* case has two distinct components: (1) "an assessment of whether, from the face of the indictment, it is alleged that the accused committed acts which, if proven beyond reasonable doubt, are crimes as charged and are within the subject matter jurisdiction of the International Tribunal"; and (2) "an examination of the accompanying material to ensure that it supports the allegations in the indictment."[95]

77. The Trial Chamber has reviewed the evidence in support of the material facts pleaded in other substantive amendments to the March 2005 Indictment.[96] The Trial Chamber considers that they are sufficiently supported by the evidence provided in the supporting materials and thereby satisfy the *prima facie* standard as provided in Rule 50(A)(ii). The Trial Chamber grants leave to these amendments.

78. The submission of the Consolidated Amended Indictment also provides for some technical changes and linguistic corrections, mostly resulting from editing and redacting the text of the Indictment for the purpose of greater clarity. The Trial Chamber considers that these proposed amendments are small, and they do not alter the Amended Indictment in any substantial manner. The Trial Chamber has no objection to them being implemented. Further allegations on defects in the form of the Consolidated Amended Indictment submitted by the Defence will be discussed in the following paragraphs of the decision.

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[93] Beara Decision, p. 2.

[94] *Prosecutor v. Kordić et al.*, Case No. IT-95-14-I, Decision on the Review of the Indictment, 10 November 1995, p. 3.

[95] *Id.*

[96] In particular, the material facts related to the allegations of crimes committed in Kamenica Camp (paras. 72–84).

79. Further Defence objections arising from alleged failure to fulfil the Trial Chamber's Decision of 13 December 2005 to provide particulars and other Defence challenges addressing defects in the form of the Consolidated Amended Indictment will be discussed below.

B. RELEVANT LEGAL AUTHORITY ON THE FORM OF THE INDICTMENT

80. The form of an indictment is governed primarily by Articles 18(4) and 21(4)(a) of the Statute and Rule 47(C).[97]

81. Article 18(4) provides:

> Upon a determination that a *prima facie* case exists, the Prosecutor shall prepare an indictment containing a concise statement of the facts and the crime or crimes with which the accused is charged under the Statute.

82. Article 21(4)(a) of the Statute provides:

> In the determination of any charge against the accused pursuant to the present Statute, the accused shall be entitled to the following minimum guarantees, in full equality: ... to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him[.][98]

83. Rule 47(C) provides:

> The indictment shall set forth the name and particulars of the suspect, and a concise statement of the facts of the case and of the crime with which the suspect is charged.

84. The jurisprudence of the Tribunal interpreting these provisions "translates [them] into an obligation on the part of the Prosecution to state the material facts [but not the evidence] underpinning the charges in the indictment".[99] The pleadings in an indictment, though concise, must be detailed enough "to inform an accused clearly of the nature and cause of the charges

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[97] The Appeals Chamber has also held that the guarantees in Articles 21(2) and 21(4)(b) to "a fair and public hearing" and "adequate time and facilities for the preparation of his defence" are basic rights of the Accused that apply equally to the issue of notice of the crimes with which he is charged, and therefore are relevant to consideration of the form of the indictment. *See Prosecutor v. Kupreškić*, Case No. IT-95-16-A, Appeal Judgement, ("Kupreškić Appeal Judgement") 23 October 2001, para. 88.

[98] Although at least one Trial Chamber initially held that Article 21(4) governed the disclosure of evidence under Rule 66 *et seq.*, not the form of the indictment, *see Prosecutor v. Blaškić*, Case No. IT-95-14-PT, "Decision on the Defence Motion to Dismiss the Indictment Based Upon Defects in the Form Thereof (Vagueness/Lack of Adequate Notice of Charges)", 4 April 1997 ("Blaškić Decision"), para. 11, the Appeals Chamber has since held that Article 21(4)(a)'s guarantees do apply to the form of the indictment, *see* Kupreškić Appeal Judgement, para. 88.

[99] Kupreškić Appeal Judgement, para. 88, citing *inter alia Prosecutor v. Krnojelac*, Case No. IT-97-25-PT, Decision on the Defence Preliminary Motion on the Form of the Indictment, 24 February 1999 ("First Krnojelac Decision"), paras. 7, 12; Third Krnojelac Decision, paras. 17, 18; and *Prosecutor v. Brđanin and Talić*, Case No. IT-99-36-PT, Decision on Objections by Momir Talić to the Form of the Amended Indictment, 20 February 2001 ("First Brđanin & Talić Decision"), para.18. *See also Prosecutor v. Deronjić*, Case No. IT-02-61-PT, Decision on Form of the Indictment, 25 October 2002 ("Deronjić Decision"), para. 4; *Prosecutor v. Hadžihasanović, Alagić, and Kubura*, Case No. IT-01-47-PT, Decision on Form of Indictment, 7 December 2001 ("Hadžihasanović Decision"), para. 8.

against him to enable him to prepare a defence effectively and efficiently."[100] In general, material facts must be pleaded expressly,[101] though in certain limited circumstances, they need not be explicitly mentioned if those facts are "*necessarily* implied in the indictment".[102] The *Kupreškić* Appeal Judgement further noted that an indictment is "the primary accusatory instrument"; if it "fails to [plead with sufficient detail the essential aspects of the Prosecution case], it suffers from a material defect."[103] The Appeals Chamber held that in the situation where an indictment does not plead the material facts with the requisite degree of specificity because the necessary information is not in the possession of the Prosecution, doubt must arise as to whether it is fair to the accused for the trial to proceed.[104]

85. This Trial Chamber has previously confirmed the jurisprudence of the Tribunal that the materiality of a particular fact—such as the identity of the victim, the time and place of the offence, and the means by which the offence was committed—depends on the nature of the Prosecution case. A decisive factor is the nature of the alleged criminal conduct charged against the accused and, in particular, the proximity of the accused to the events alleged in the indictment.[105] As the Appeals Chamber has held:

> [as] the proximity of the accused person to those events become more distant, less precision is required in relation to those particular details, and greater emphasis is placed upon the conduct of the accused person himself upon which the Prosecution relies to establish his responsibility

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[100] Deronjić Decision, para. 4.

[101] Deronjić Decision, para. 9, citing Hadžihasanović Decision, para. 10; Fourth Brđanin & Talić Decision, para. 12; First Brđanin & Talić Decision, para. 48.

[102] Fourth Brđanin & Talić Decision, para. 12. The Chamber found that "it would be an unnecessary technicality to require [such a fact] to be pleaded expressly, as the accused could never argue that he had not been made aware by the indictment of the case he had to meet." *Ibid.* It went on to hold that the contested fact was *not* "necessarily implied" in the indictment in that case, given the general terms in which that document was framed. *See id.*, paras. 14–16. *See also* Deronjić Decision, para. 9, noting that "[t]his fundamental rule of pleading is ... not complied with if the pleading merely assumes the existence of the [legal] prerequisite [to the application of the offences]", such as the existence of an armed conflict.

[103] Kupreškić Appeal Judgement, para. 114. Nevertheless, the Appeals Chamber has held that even a material defect in an indictment, caused by the Prosecution's failure to allege an underlying incident or plead an essential element of the crime, can be cured "if the Prosecution provides the accused with timely, clear and consistent information detailing the factual basis underpinning the charges against him or her." *Id. See also Prosecutor v. Niyitegeka*, Case No. ICTR-96-14-A, Judgement, 9 July 2004, paras. 195, 225, in which the Appeals Chamber specifically held that the Prosecution's failure to include an incident involving criminal conduct (of which the Accused was convicted) was cured by the Prosecution's expression of clear intent in the Pre-Trial Brief to (a) charge the Appellant with active participation in the incident, and (b) adduce testimony supporting such a charge. These decisions seem to overrule the earlier holdings of ICTY Trial Chambers in which the lower chambers decided that the Prosecution could not cure a defective indictment with supporting material or its pre-trial brief. *See, e.g.*, Hadžihasanović Decision, para. 12; Second Brđanin & Talić Decision, paras. 11–13.

[104] Kupreskić Appeal Judgement, para. 88.

[105] *Prosecutor v. Perišić*, Case No. IT-04-81-PT, Decision on Preliminary Motions, 29 August 2005 ("Perišić Decision"), para. 6 (citing Kupreškić Appeal Judgement, para. 89)).

> as an accessory or as a superior to the persons who personally committed the acts giving rise to the charges against him.[106]

If the accused is alleged to be in a senior leadership position and is not alleged to have personally perpetrated any of the underlying substantive crimes in the indictment as in the case at hand, then less precision is required in an indictment's description of them.[107]

86. Where the accused's individual criminal responsibility is alleged to arise under Article 7(3) of the Statute, the minimum material facts that must appear in the indictment are as follows:

> (a) (i) that the accused is the superior (ii) of subordinates, sufficiently identified, (iii) over whom he had effective control—in the sense of a material ability to prevent or punish criminal conduct—and (iv) for whose acts he is alleged to be responsible;
>
> (b) (i) the accused knew or had reason to know that the crimes were about to be or had been committed by those others, and (ii) the related conduct of those others for whom he is alleged to be responsible. The facts relevant to the acts of those others will usually be stated with less precision, the reasons being that the detail of those acts (by whom and against whom they are done) is often unknown, and, more importantly, because the acts themselves often cannot be greatly in issue; and
>
> (c) the accused failed to take the necessary and reasonable measures to prevent such crimes or to punish the persons who committed them.[108]

87. Where the state of mind with which the accused carried out his alleged acts is relevant, the Prosecution must plead either (i) the relevant state of mind as a material fact, in which case the facts by which that state of mind is to be established are ordinary matters of evidence, and need not be pleaded, or (ii) the facts from which the relevant state of mind is to be inferred.[109] In either case the Prosecutor may not simply presume that the legal prerequisites are met.[110]

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[106] *Prosecutor v. Galić*, Case No. IT-98-29-AR72, Decision on Application by Defence for Leave to Appeal, 30 November 2001, ("Galić Decision"), para. 15.

[107] Peršić Decision, para. 6 (citing *Prosecutor v. Kvočka, Radić, Žigić, and Prcać*, Case No. IT-98-30/1-A, Judgement, 28 February 2005 (Kvočka Appeal Judgement"), para. 65).

[108] Deronjić Decision, para. 7, citing *Prosecutor v. Delalić, Mucić, Delić, and Landžo*, Case No. IT-96-21-A, Appeal Judgement, 20 February 2001 ("Čelebići Conviction Appeal Judgement"), paras. 196–198, 256, 266; Hadžihasanović Decision, paras. 11, 17; First Brđanin & Talić Decision, para. 19; *Prosecutor v. Krajišnik*, Case No. IT-00-39-PT, Decision Concerning Preliminary Motion on the Form of the Indictment, 1 August 2000 ("Krajišnik Decision"), para. 9; First Krnojelac Decision, paras. 9, 38; *Prosecutor v Kvočka*, Case No. IT-99-30-PT, Decision on Defence Preliminary Motions on the Form of the Indictment, 12 April 1999 ("Kvočka Decision"), para. 17; Third Krnojelac Decision, para. 18(A).

[109] Peršić Trial Decision, para. 9 (citing *Prosecutor v. Pavković, Lazarević, Đorđević, and Lukić*, Case No. IT-03-70-PT, Decision on Vladimir Lazarević's Preliminary Motion on Form of Indictment, 8 July 2005 ("Lazarević Trial Decision"), paras. 8–9.)

[110] Deronjić Decision, para. 9.

C. CONSIDERATION

1. Defects in Provision of Material Particulars Preventing the Accused from Knowing the Case He has to Answer

(1) Paragraphs 13–16, 18, and 25 of the Consolidated Amended Indictment

The Parties' Submissions

88. Paragraph 13 of the Indictment pleads:

> After its formation on 19 November 1992, the 7th Muslim Mountain Brigade of the ARBiH 3rd Corps incorporated and subordinated "Mujahedin" within its structure, as did other units of the ARBiH 3rd Corps. The "Mujahedin" were involved in the combat activities of units of the ARBiH 3rd Corps, including the 7th Muslim Mountain Brigade, and occasionally spearheaded ARBiH 3rd Corps combat operations. By early June 1993, at least 60 Bosnian Muslim males had joined a group of foreign Mujahedin commanded by Abu HARIS aka Abul HARIS aka Dr. Abul HARITH al Liby at their base near Poljanice, Travnik Municipality.[111]

89. The Defence submits that "the Prosecution should plead the specific units of the 3rd Corps that they allege that the "Mujahedin" were involved in the combat activities of. Further, the Prosecutions should plead what precise control structure is being alleged by the term 'spearheaded' and which combat operations the 'Mujahedin' are alleged to have participated in."[112]

90. Paragraph 14 of the Indictment pleads:

> "[t]he detachment was subordinated to the ARBiH 3rd Corps, whose commander ordered its subordination to units under his command for specific combat operations."

91. The Defence submits that "the Prosecution should be required to plead which units the "Mujahedin" are alleged to have been subordinated to and for which specific combat operations and the date at which those combat operations are alleged to have taken place."[113]

92. Paragraph 15 of the Indictment alleges that the Accused was "[the] Commander of the Main Staff" and that "[h]e exercised command and control through the ARBiH Main Staff, Supreme Command Staff and, during 1995, the General Staff." By paragraph 16 of the Indictment it is also alleged that the Accused was "[the] Commander of the Main Staff."

93. The Defence submits the following:

> "the Prosecution should identify with further particularity whether the Accused is alleged to have exercised command and control through (i) the Main Staff[,] (ii) the Supreme Command

[111] Proposed Consolidated Amended Indictment, para. 13.
[112] Motion Alleging Defects, para. 34.
[113] Motion Alleging Defects, para. 35.

> Staff[,] and (iii) the General Staff by reason of his position as Commander of the Main Staff or whether it is alleged that he was the Commander of each of the three bodies, stating precisely the periods during which he is alleged to have exercised command and control over each of the three bodies in particular the period when it is alleged he was Commander of the Main Staff and identifying whether he is alleged to have exercised command and control over each body sequentially or contemporaneously."

94. Paragraph 18 of the Consolidated Amended Indictment pleads that "[b]y virtue of his authority as set out in military regulations and instructions, Rasim DELIĆ controlled the work in the Main Staff ... "

95. The Defence submits that "the term 'military regulations and instructions' is impermissibly imprecise failing to identify even which military authority has purported to issue the said regulations and instructions," and thereby argues "that the Prosecution should be required to plead as a material fact which military instructions and regulations (including which military authority issued the said regulations and instructions) they allege the Accused derived his authority from."[114]

96. Paragraph 25 of the Indictment pleads:

> "Rasim Delić was obliged by superior order to initiate proceedings for legal sanctions against individuals under his command and effective control..."

97. The Defence submits that "the Prosecution must plead the precise 'superior order' which they allege created the said obligation."[115]

98. The Prosecution generally contends that "the Defence cannot, at this late stage, raise original challenges to confirmed language in the Initial Indictment where it could have challenged this language in its original Motion Alleging Defects in the form of the Indictment. Thus, the Defence Response must be limited to the added language in the Consolidated Amended Indictment, and any challenges to language that appeared in the Initial Indictment and thus subject to the prior Defence Motion must be rejected."[116] According to the Prosecution, the Defence challenges made to the paragraphs above relates to language already pleaded in the Initial Indictment and should therefore be stricken.[117] In addition, the Prosecution reasserts, that "the Indictment must be read as a whole and all of its provisions considered together" in order to provide sufficient information to the Accused about the nature of the charges he faces.[118]

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[114] Motion Alleging Defects, para. 38.
[115] Motion Alleging Defects, para. 40.
[116] Prosecution Response, paras. 21–22.
[117] Prosecution Response, para. 24. *See also* para. 22.
[118] Prosecution Response, para. 23.

99. With respect to paragraph 13, the Prosecution adds that it had only replaced the word "frequently" with the word "occasionally", a change in favour of the Accused.[119]

Discussion

100. The Trial Chamber agrees with the Prosecution that the Defence challenges referring to paragraphs 13, 14, 15, 18, and 25 of the Consolidated Amended Indictment are challenges to pleadings already contained in the March 2005 Indictment. None of the arguments is directed against the proposed amendments to the Original Indictment; instead they are directed against the Prosecution allegations that have already existed in the Original Indictment. Pursuant to Rules 50 and 72 the Defence should, given the nature of the challenges, have raised these challenges in its preliminary motion which has been ruled on by the Trial Chamber in the Decision of 13 December 2005. The Defence may therefore no longer challenge the form of the Prosecution pleadings contained in the March 2005 Indictment.

101. Having established that the Defence failed to show good cause for additional time to object to the form of the Original Indictment, the abovementioned challenges by the Defence relating to the pleadings in the Original Indictment are dismissed. The Trial Chamber grants leave for the replacement of the word "frequently" with the word "occasionally".

(2) Paragraph 17 of the Consolidated Amended Indictment

The Parties' Submissions

102. Paragraph 17 of the Consolidated Amended Indictment pleads that the units listed therein were "under the subordination of the ARBiH corps, which were subordinate formations under the command and effective control of the Accused."

103. The Defence submits that "the Prosecution should plead with further precision what is being alleged by the term 'subordinate formations'."[120]

104. The Prosecution responds that "this language could not be more precise, under a common understanding of the meanings of these two words." It refers to the Webster's New World Dictionary which defines the word "subordinate" as "under the authority of another" and

[119] Prosecution Response, para. 24.
[120] Motion Alleging Defects, para. 37.

"formation" as "an arrangement or positioning, as of troops" and concludes that "no other meaning is possible".[121]

Discussion

105. The Trial Chamber is satisfied with the Prosecution explanation and considers that the expression "subordinate formations" is clear and precise enough for the Accused to understand the allegation, especially when the expression is considered in the context of the Indictment as a whole and not merely read in isolation.[122] The Defence request is dismissed.

(3) Paragraphs 61 & 62 of the Consolidated Amended Indictment

The Parties' Submissions

106. Paragraph 61 of the Consolidated Amended indictment alleges that "the 3rd Corps in late 1994 ordered the transfer of part of the El Mujahed Detachment to the wider Mount Ozren-Vozuća region" and paragraph 62 of the same indictment alleges that the Accused "knew that the El Mujahed Detachment had a reputation for criminal and uncontrolled behaviour."

107. The Defence submits that "the Prosecution should identify whether it is alleged that the Accused knew that that part of the El Mujahed [D]etachment which it is alleged were ordered to be transferred had a 'reputation for criminal and uncontrolled behaviour' and if so, it is submitted that the allegation should be amended in the interest of consistency to [read] 'Rasim Delić knew that the part of the El Mujahed referred to in paragraph 61 had a reputation for criminal and uncontrolled behaviour'."[123]

108. The Prosecution argues that the reference to criminal and uncontrolled behaviour of soldiers of the El Mujahedin Detachment was referred to also in the paragraphs 20, 70, 80, and 84 of the Consolidated Amended Indictment, and paragraphs 70, 80, and 84 of the Consolidated Amended Indictment list two particular categories of criminal behaviour typical for this unit.[124] It further contends that the offending unit is described throughout the Indictment as the "El Mujahedin Detachment" and that "evidence to be led at trial will show that, as a unit, this El Mujahedin Detachment was, throughout its existence during the war, comprised of fewer than 1,000 men."

[121] Prosecution Response, para. 26.

[122] In its Omnibus Reply, the Prosecution made a general observation reasserting that "the Indictment must be read as a whole and all of its provisions considered together. That is, individual words or phrases read in isolation might not be sufficient to inform the Accused of the nature of the charges he faces, but when the Consolidated Amended Indictment is read as a whole, any uncertainty that results from such a disaggregate approach vanishes." Prosecution Reply, para. 23.

[123] Motion Alleging Defects, para. 45.

[124] Prosecution Response, para. 34.

The Prosecution asserts that "this group of soldiers, which had a propensity of criminal and uncontrolled behaviour, is sufficiently defined in the Consolidated Amended Indictment."[125]

Discussion

109. Paragraph 62 of the Consolidated Amended Indictment alleges that the Accused knew that the El Mujahed Detachment had a reputation for criminal and uncontrolled behaviour without explicitly stating that that part of the El Mujahed Detachment referred to in paragraph 61 which was allegedly ordered to be transferred to wider Mount Ozren-Vozuća region had a "reputation for criminal and uncontrolled behaviour". However, the Trial Chamber is satisfied that this allegation is further referred to and specified in paragraphs 70, 80, and 84 of the Consolidated Amended Indictment and therefore, read in the context of the entire Indictment, meets the standard of sufficient specificity for the Accused to be able to understand the nature and the charges against him. The Defence argument is dismissed.

(4) Paragraphs 20, 32, 34, 42, 55, and 57 of the Consolidated Amended Indictment

110. In line with the Trial Chamber's decision to reject the proposed inclusion of the new form of liability pursuant to Article 7(1) and the three new crimes bases, namely Grabovica, Uzdol, and Bugojno, the Trial Chamber will not consider the Defence challenges directed against paragraphs 20, 34, 42, 55, and 57 of the Consolidated Amended Indictment as they contain the amendments in respect of which leave has not been granted.[126]

(5) Objections arising from failure to fulfil Trial Chamber's Decision of 13 December 2005 to provide particulars:

(i.) Paragraphs 65–81 of the Consolidated Amended Indictment

The Parties' Submissions

111. Paragraphs 35 and 36 of the March 2005 Indictment provided:

> 35. On 11 September 1995, approximately 60 soldiers of the VRS were captured along with civilians, including three females, who had remained after Vozuća was taken. The captured group was briefly taken to Kesten, Zavidovići Municipality, and was then transferred to the Kamenica Camp.
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> 36. With the exception of three female civilians, all of the approximately 60 VRS soldiers that were captured in Vozuća and subsequently taken to Kesten and then to Kamenica are missing and presumed dead. Those victims whose identities are known are set forth in Annex C in this Indictment.

[125] Prosecution Response, para. 35.

[126] In particular, paragraph 20 refers to Article 7(1), paragraph 32 and 34 to Operation Neretva, paragraph 43 to Grabovica, paragraph 55 and 57 to Bugojno.

112. In its December 2005 Decision the Trial Chamber held that "[t]he allegation related to these VRS soldiers is not pleaded with sufficient particularity to inform the Accused clearly of the nature and case against him, enabling him to prepare defence effectively and efficiently."[127] It therefore ordered the Prosecution as follows:

> "to provide the material facts pertaining to the death of these VRS soldiers, including whether it is the Prosecution's case that these soldiers were murdered and, if so, how they were murdered, the identity of the alleged perpetrators, and their relationship with the Accused. Additionally, the Prosecution should include details as to approximately where and when these VRS soldiers were murdered. If the Prosecution is not in a position to provide the aforementioned material facts, it should remove the allegation from the Indictment."[128]

113. The Defence argues that the Prosecution failed to sufficiently particularise the Amended Indictment as described in the following paragraphs.[129]

114. Paragraph 74 of the Consolidated Amended Indictment pleads:

> "Between 11 and 17 September 1995, El Mujahed soldiers murdered most of the approximately 52 captured VRS soldiers. By 17 September 1995, fewer than a dozen of the VRS soldiers remained alive. Al least some of these men were shot; the rest were murdered in other ways. Each was murdered in or around the Kamenica Camp. Some of the names of the murdered men were read out over the camp's internal loudspeaker system."

115. The Defence submits that the Prosecution failed to comply with the Trial Chamber's order that they must provide details as to how the VRS soldiers were murdered and details as to approximately when and where they were killed. In order for the Accused to know the case he has to meet, the Prosecution should identify which VRS soldiers were killed between 11 and 17 September, how they were killed and what geographical location they assert is encompassed within the phrase "around Kamenica Camp"; the Prosecution should identify those soldiers that they assert were alive on 17 September and the names of the men that it is alleged were read out on the camp's internal loudspeaker system which they assert were subsequently murdered.[130]

116. Paragraph 77 of the Consolidated Amended Indictment pleads that "[o]n or about 18 September 1995, soldiers from the El Mujahed Detachment beat and then took away approximately seven of the surviving 52 captures VRS soldiers." The Defence argues that in order for the Accused to know the case he has to meet, the Prosecution should identify the seven soldiers that it is alleged were taken away at this stage.[131]

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[127] December 2005 Decision, para. 15.
[128] December 2005 Decision, para. 17.
[129] Defence Response, para. 50.
[130] Defence Response, para. 52.
[131] Defence Response, para. 53.

117. Paragraph 79 of the Consolidated Amended Indictment pleads that "only three or four of the approximately 52 VRS soldiers captured on 11 September remained alive in the Kamenica Camp" and "[t]hese three or four soldiers subsequently went missing and are presumed dead." The Defence submits that in order for the Accused to know the case he has to meet at trial and in order to comply with the order of the Trial Chamber, the Prosecution should be required to provide the identities of the three or four soldiers believed to be alive on 18 September, how they were killed, when and where they were killed, the identity of the perpetrators and their relationship to the Accused.[132]

118. Prosecution opposes the Defence request for more particularities regarding the events at Kamenica Camp. With respect to the challenges related to *location* of the alleged crimes the Prosecution argues that when all allegations set forth in the Consolidated Amended Indictment are read together, it becomes sufficiently clear where the murders took place.[133] The allegation that "[e]ach was murdered in and around the Kamenica Camp" in paragraph 74 read in combination with paragraphs 65 and 66 provides sufficient details concerning the geographic relationship between the Kamenica Camp and the town of Zavidovići, the exact location of the Kamenica Camp, installations within the camp and the close proximity of the Camp to river Gostović. Paragraph 77 of the Consolidate Amended Indictment alleges that sounds of gunfire came "from the direction of the camp's football field" which is referred to in paragraph 66 of the Consolidated Amended Indictment.[134] With regard to the use of the phrase "around the camp" the Prosecution submits that the identical language has been used in other ICTY indictments which have been confirmed and that in light of the totality of the allegations set forth in the Consolidated Amended Indictment this description is sufficient.[135]

119. With respect to challenges made to paragraph 74 the Consolidated Amended Indictment relating to the *mode* of the alleged killings, the Prosecution submits that the Indictment pleads that the victims brought to the Kamenica Camp in September 1995 were usually beaten and subjected to other forms of mistreatment before they were taken to be killed. The mode of killing is further defined in the fourth sentence of paragraph 74 of the Consolidated Amended Indictment where it is alleged that the victims were "shot" or "murdered in other ways".[136]

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[132] Defence Response, para. 54.
[133] Prosecution Reply, para. 38.
[134] Prosecution Reply, para. 39.
[135] Prosecution Reply, para. 40.
[136] Prosecution Reply, para. 41.

120. With regard to *when* the victims allegedly captured on 11 September 1995 were killed, the Prosecution argues that paragraphs 73–74, 77, and 79 of the Consolidated Amended Indictment should be read together to have a clear picture of the timeframe of the killings and disappearances of the approximately 60 victims. While the majority of the killings occurred between 11 and 18 September 1995, four different periods—each affecting a different number of victims—may be distinguished after a careful reading of the Indictment.[137] Prosecution submits that the request for additional information containing more particulars on time of death of the victims is a question of evidence and is properly left for resolution at trial.[138]

121. With respect to Prosecution arguments relating to how specific the Prosecution needs to plead *information on victims* in the indictment, the Prosecution refers to *Kvočka* decision establishing that "the massive scale of crimes alleged before this Tribunal does not allow for specific naming of the victims, but if a Prosecution is in a position to do so, it should."[139] The Prosecution submits that it has provided sufficient details by listing the names of all 52 Bosnian Serb murder victims who were transferred to Kamenica Camp on 11 September 1995 in Annex F of the Consolidated Amended Indictment, including their year and place of birth. The names of the victims who were transferred to Kamenica Camp on or about 17 September 1995 are listed with a similar degree of detail in Annex G.[140]

122. The Prosecution submits that "Defence request for *further specifics* clearly goes beyond the degree of detail for material facts required at the Indictment stage. With the detailed material facts currently pleaded in relation to the Kamenica Camp, the Defence is in a position to prepare for trial and to distinguish the alleged acts of murder and cruel treatment as charged in the Indictment from *any other acts* or omission which might have occurred at or near the location concerned in the relevant period."[141]

123. The Prosecution further asserts that the fact that the Accused is responsible as superior for the crimes alleged impacts upon the degree of specificity that the Prosecution must plead in the

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[137] Prosecution Reply, para. 44.

[138] The Prosecution further explains that evidence will be adduced at trial that a second group of 10 VRS soldiers who had surrendered on 17 September 1995 were taken to Kamenica Camp, where they remained until 29 September 1995; from 17–29 September 1995, there was some intermingling in Kamenica Camp between this group of soldiers and the few remaining survivors from the group of 52 VRS soldiers captured on 11 September 1995. However, because the witness who will testify at trial from the 17 September 1995 group did not know the names of the few remaining survivors from the 11 September 1995 group, it is not possible at this time to specify the identity of the three or four soldiers from the 11 September 1995 group who were still alive when the 17 September group were taken out of the Kamenica Camp on 29 September 1995. Prosecution Reply, para. 45.

[139] Prosecution Reply, para. 46 (citing Kvočka Decision, paras. 17, 23)

[140] Prosecution Reply, para. 47.

[141] Prosecution Reply, para. 48.

Indictment. As Commander of the Supreme Command Staff of the ARBiH, whose headquarters was in Sarajevo, the Accused held the senior leadership position in the ARBiH. The required degree of specificity therefore is not as high as would be the case if the Prosecution were alleging that the Accused personally committed the acts in question.[142]

Discussion

124. The Appeals Chamber has made clear that "[t]he precise details to be pleaded as material facts [in an indictment] are the facts of the accused, not the acts of those persons for whose acts he is alleged to be responsible."[143] This is especially true in cases, such as this, in which "the large scale on which the crimes are alleged to have occurred, and the [remote] role and conduct alleged against ... the Accused" make it difficult for the Prosecution to provide specific details about the crimes of a commander's subordinates.[144] The Trial Chamber reiterates that the materiality of a particular fact depends on the nature of the Prosecution case and that one of the decisive factors is the proximity of the accused to the events alleged in the indictment. As the proximity of the Accused to the events at Kamenica Camp, including Livade and Kesten, is more distant, less precision is required in relation to those particular details and greater emphasis is placed upon the conduct of the Accused himself upon which the Prosecution relies to establish his responsibility as a superior to the persons who personally committed the acts giving rise to the charges against him.[145]

125. In line with this standard, the Trial Chamber concludes that paragraphs 65–81 of the Consolidated Amended Indictment describing the events in and around Kamnica Camp provide sufficient particulars to inform the Accused clearly of the nature and cause of charges against him, enabling him to prepare a defence effectively and efficiently. The Trial Chamber is satisfied that the Prosecution provided sufficient additional material facts pertaining to the death of the 52 VRS soldiers as ordered by the Trial Chamber Decision of 13 December 2005. These material facts are pleaded in the paragraphs 73 and 74 of the Consolidated Amended Indictment replacing paragraphs 35 and 36 of the March 2005 Indictment as follows:

> 73. On 11 September 1995, the 2nd Company of the 5th Battalion of the ARBiH 328th Mountain Brigade captured approximately 60 people, primarily VRS soldiers and a few civilians, including three females, who had remained after Vozuća was taken. ARBiH soldiers took the group to be briefly detained in a hall in the nearby village of Kesten, Zavidovići Municipality. Soldiers of the El Mujahed Detachment killed two of the

[142] Prosecution Reply, paras. 50–51.

[143] *Prosecutor v. Blaškić*, Case No. IT-95-14-A, Appeal Judgement, 29 July 2004, para. 218 (citations omitted).

[144] *Prosecutor v. Čermak and Makrac*, Case No. IT-03-73-PT, Decision on Motions on Form of Indictment, 8 March 2005, para. 23. *See also* Perišić Decision, para. 36.

[145] *See supra* Chapter B, "Relevant Legal Authority on the Form of the Indictment", namely para. 88.

> captured soldiers on the road near Kesten; Zivinko TODOROVIĆ was shot and Milenko STANIĆ, was shot or killed with a knife. Soldiers from the same detachment took away four others. The women and about 52 captured VRS soldiers were then delivered to the Kamenica Camp. As described in the following paragraphs, each of these approximately 52 captured VRS soldiers is missing and presumed dead. Their names are set forth in Annex F.
>
> 74. With the exception of three female civilians, all of the approximately 60 VRS soldiers that were captured in Vozuća and subsequently taken to Kesten and then to Kamenica Camp are missing and presumed dead. Those victims whose identities are known are set forth in Annex C to this Indictment. Beginning on the evening of 11 September 1995, soldiers from the ARBiH El Mujahed Detachment beat and otherwise mistreated the detainees. Between 11 and 17 September, El Mujahed soldiers murdered most of the approximately 52 captured VRS soldiers. By 17 September 1995, fewer than a dozen of the VRS soldiers remained alive. At least some of these men were shot; the rest were murdered in other ways. Each was murdered in or around the Kamenica Camp. Some of the names of the murdered men were read out over the camp's internal loudspeaker system.

126. The Trial Chamber considers that the two amended paragraphs sufficiently clarify the Prosecution case that these soldiers were allegedly murdered by the soldiers of the El Mujahed Detachment. Reading the Indictment as a whole the Trial Chamber finds that the Prosecution provided sufficient information about perpetrators—El Mujahed Detachment and explained their relationship with the Accused. Taking into consideration the remoteness of the Accused from the events alleged in the Indictment, the Trial Chamber considers that the Indictment pleads sufficient material facts underpinning the charges in the Indictment with respect to the killings of 52 captured VRS soldiers.[146]

127. The Trial Chamber agrees with the Prosecution that is had satisfactorily particularised the timeframe during which these murders allegedly occurred and the location of the alleged crimes.[147] The location and the area of Kamenica Camp are sufficiently described in paragraphs 65 and 66 of the Consolidated Amended Indictment. Paragraph 74 containing the phrase "around the Kamenica Camp" and paragraph 77 referring to "camp's football filed" should therefore be read together with these two paragraphs. In view of the large scale on which the crimes are alleged to have occurred, and the role of the Accused, the Trial Chamber considers that the mode of the killings and mistreatments of these 52 captured soldiers have been sufficiently pleaded in the circumstances of the case. Trial Chamber is also satisfied with the Prosecution explanation regarding the timeframe of killings and the disappearance of the 52 captured VRS soldiers: the first killings or disappearance allegedly occurred in or around Kesten on 11 September 1995 and involved 6

[146] As held by the Appeals Chamber in *Kupreškić* the materiality of a particular fact—such as identity of the victim, the time and place of the offence and the means by which the offence was committed—depends on the nature of the Prosecution case. A decisive factor is the nature of the alleged criminal conduct charged against the accused, and in particular, the proximity of the accused person to those events alleged in the indictment. Kupreškić Appeal Judgement, paras. 88–90. *See also* Galić Decision, para. 15.

[147] With respect to timeframe it is sufficient if the Indictment contains information as to the approximate date of the alleged offence. First Krnojelac Decision, para. 12.

victims; the second killings allegedly commenced in the evening of 11 September 1995 and ended before 18 September 1995 involving the majority of the 40 victims captured near Kesten on 11 September 1995; the third killings concerned on or about 18 September 1995 and allegedly involved approximately seven victims; the three or four of the remaining victims of the group arrested on 11 September 1995 went missing on or after 29 September 1995, when the fourth time period begins.[148] A sufficiently clear picture of the sequence of these killings appears when paragraphs 73–74 are read together with paragraphs 77 and 79 of the Consolidated Amended Indictment. Furthermore, the Prosecution satisfactorily supplemented its original list of the names of these captured soldiers in Annex F by listing the identities of all the 52 VRS soldiers allegedly captured on or about 11 September 1995 and killed in the Kamenica Camp and therefore provided sufficient information with regard to the identities of the victims at this stage of the proceedings.

128. For these reasons, the Trial Chamber rejects the Defence complaint that the Prosecution has not complied with the Decision of 13 December 2005. All the allegations concerning Kamenica Camp in paragraphs 65–81 must be read together and in the context of the entire Indictment. The Prosecution is not required to prove every allegation and assertion in the Indictment; it must simply provide an adequate evidentiary base from which the allegation can be proven at trial.[149] The Trial Chamber finds that the Prosecution has done so in this case. The Trial Chamber therefore dismisses the Defence request for more specificity regarding the events at Kamenica Camp and grants leave to the amendments incorporated in paragraphs 65–81.

(ii.) Paragraph 73 of the Consolidated Amended Indictment

The Parties' Submissions

129. With respect to paragraph 73 of the Consolidated Amended Indictment, the Defence further submits that if the Prosecution alleges that there were approximately 60 persons initially, of whom at least three were female civilians, there ought only to be approximately 51 VRS soldiers remaining after two soldiers were killed and four other soldiers were taken away.[150]

130. The Prosecution opposes arguing that the pleading of the material fact that "approximately 60 people" were captured by the ARBiH is adequate and sufficiently precise.[151]

Discussion

[148] Prosecution Reply, para. 44, footnote 55.

[149] *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-PT, Decision on Motion to Amend the Indictment, 11 May 2006, para. 20.

[150] Defence Response, para. 51.

[151] Prosecution Reply, para. 37.

131. The Defence correctly points out that after deducting from the group of 60 persons three female civilians, two soldiers that were allegedly killed, and four soldiers allegedly taken away, there ought to be only approximately 51 VRS soldiers left. The Indictment however pleads that there were "52 captured VRS soldiers" and three women remaining after two soldiers were allegedly killed and four others taken away.

132. The Trial Chamber agrees with the Prosecution argument that the pleading of the material fact that "approximately 60 people were captured by the ARBiH" and the pleading that "about/approximately 52 captured VRS soldiers" is sufficiently precise to inform the Accused of the nature and cause of the charges. The usage of the word "approximately" and "about" grants the Prosecution leeway to plead the numbers which could be more or less than 60 and 52 respectively. The Defence request is dismissed.

2. Defect in Legal Content of Pleadings

(1) Paragraphs 19, 20, 55, and 57 of the Consolidated Amended Indictment

133. In line with the decision of the Trial Chamber rejecting the proposed inclusion of the new form of liability pursuant to Article 7(1) of the Statute, and the three new crimes bases, namely Grabovica, Uzdol, and Bugojno, the Trial Chamber will not consider Defence challenges directed against paragraphs 19, 20, 55, and 57 of the Consolidated Amended Indictment. Paragraphs 19 and 20 of the Consolidated Amended Indictment allege the Accused's individual criminal responsibility pursuant to Article 7(1) of the Statute and paragraphs 55 and 57 relate to the crime locations Bugojno. All four paragraphs incorporate the amendments in respect of which leave has not been granted by the Trial Chamber and thereby do not constitute part of the Indictment.

(2) Paragraph 84 of the Consolidated Amended Indictment

134. By paragraph 84 of the Consolidated Amended Indictment it is alleged that "[a]lternatively, through his acts and omissions, Rasim DELIĆ otherwise aided and abetted the commission of the crimes by his subordinates."

The Parties' Submissions

135. The Defence submits that by this allegation the Prosecution are purporting to allege a form of liability consistent only with Article 7(1) of the Statute and yet the Accused is charged in Count

3 and Count 4 in relation to these events with liability only pursuant to Article 7(3). The Defence further submits that the aforementioned sentence should be struck from the Indictment.[152]

136. The Prosecution agrees with the Defence challenge that it added a form of liability consistent only with Article 7(1) of the Statute, yet the Accused is charged on Counts 3 and 4 in relation to these events with liability pursuant to Article 7(3). The Prosecution admits that this was an oversight on its part and to remedy this oversight, it proposes adding 7(1) before the "and 7(3)" of the Statute of the Tribunal as to counts 3 and 4.[153]

137. In Defence Reply, the Defence opposes the Prosecution proposal to add 7(1) before the "and 7(3)" arguing as follows:

> "by paragraphs 58 and 59 of their Response, the Prosecution are not, as they claim in the filing, seeking to respond to the Defence Motion alleging defects in the form of the Indictment pursuant to Rule 72(A)(ii). Rather they are wholly improperly seeking to apply to further re-amend the Indictment faced by the Accused, in breach of the Trial Chamber's previous order and in an attempt to deny the Accused the right to challenge further amendment at this stage. It is submitted that as such it is wholly improper filing and the language which the Prosecution concede does not relate to the allegations with which this Accused is charged must be struck from the Indictment. Any application to further amend the Indictment must be made i[n] the proper form and the Defence is entitled to fully respond thereto."[154]

Discussion

138. In line with the Trial Chamber's decision rejecting the proposed inclusion of the new form of liability pursuant to Article 7(1), the Trial Chamber dismisses the Prosecution proposal to add 7(1) before "and 7(3)" of the Statute of the Tribunal as to Counts 3 and 4, and orders the Prosecution to strike from paragraph 84 of the Proposed Consolidated Amended Indictment the following sentence:

> "Alternatively, through his acts and omission, Rasim DELIĆ otherwise aided and abetted the commission of the crimes by his subordinates."[155]

[152] Defence Response, para. 58.
[153] Prosecution Reply, para. 58.
[154] Defence Reply, para. 3; for detailed explanation of Defence arguments *see* paras. 4–7.
[155] Consolidated Amended Indictment, p. 27, para. 84.

IV. DISPOSITION

139. With respect to amendments to the Original Indictment, for the foregoing reasons and pursuant to **Rule 50, 54, 73 *bis*, 126 *bis*, and 127 of the Rules and paragraph (C)(7) of the Practice Direction**, this Trial Chamber **GRANTS** the Prosecution motion **IN PART** and hereby **ORDERS** as follows:

(1) The Prosecution Application for Leave to Reply is **GRANTED** and the Chamber accepts the Reply as filed;

(2) The Prosecution Motion for Additional Time is **GRANTED**;

(3) The Prosecution is **GRANTED** leave to exceed the word limit in its Omnibus Filing as requested;

(4) The Defence Application for Leave to Reply is **GRANTED** and the Trial Chamber accepts the Reply as filed;

(5) The amendments relating to the three new crime bases, namely Grabovica, Uzdol, and Bugojno, and the amendments relating to the new form of criminal liability pursuant to Article 7(1) of the Statute are **REJECTED**;

(6) The Motion to Amend the Indictment is **GRANTED** in all other respects, which include all other substantive amendments, technical changes and linguistic corrections.

140. With respect to the Accused's challenges to the form of the proposed Amended Indictment, for the foregoing reasons and pursuant to **Rule 72, 73 *bis* of the Rules**, the Trial Chamber **GRANTS** the Defence motion **IN PART** and hereby **ORDERS** as follows:

(1) The Prosecution is **ORDERED** to strike out the sentence in paragraph 84 of the Consolidated Amended Indictment pleading that "[a]lternatively, through his acts and omissions, Rasim DELIĆ otherwise added and abetted the commission of the crimes by his subordinates."

(2) The remainder of the challenges by the Defence is **DISMISSED.**

141. The Trial Chamber further **ORDERS** the Prosecution to file an updated and corrected Consolidated Amended Indictment by 14 July 2006 incorporating this decision and reflecting the above orders.

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

Judge Patrick Robinson
Presiding

Dated this thirtieth day of June 2006
At The Hague
The Netherlands

[Seal of the Tribunal]

ANNEX A

THE INDICTMENT AND PROCEDURAL HISTORY

On 15 February 2005, the Office of the Prosecutor ("Prosecution") filed the Indictment against Rasim Delić ("the Accused") confidentially and ex parte. On 16 February 2005, the Indictment was confirmed by Judge Agius,[156] and unsealed on 23 February 2005.[157] At his initial appearance before the Tribunal on 3 March 2005, the Accused pleaded not guilty to all four counts in the Indictment.[158] On 25 February 2005, the President of the Tribunal assigned the case to this Trial Chamber.[159] On 17 March 2005, the Prosecutor filed a public version of the Indictment ("March 2005 Indictment", also referred to as the "Original Indictment"). On 8 July 2005, the Pre-Trial Judge ordered the Prosecution to file its motion for leave to amend the Indictment against the Accused no later than 30 September 2005.[160]

The March 2005 Indictment charges the Accused with four counts of crimes constituting violations of the law or customs of war—murder, rape, and cruel treatment—under Article 3 of the Statute of the International Tribunal ("Statute"). The Accused is charged on the basis of his superior or command responsibility, pursuant to Article 7(3) of the Statute, as the Commander of the Main Staff of the Army of the Republic of Bosnia and Herzegovina ("ARBiH").[161]

On 27 July 2005, the Defence filed a "Defence Motion Alleging Defects in the Form of the 17 March 2005 Indictment" ("First Defence Motion Alleging Defects") in which it brought up a number of defects in the form of the indictment, namely defects related to Counts 1, 2, 3, and 4; defects related to legal pleadings; and defects related to factual allegations. The Defence requested that (1) certain allegations be removed from the Indictment, (2) that counts be charged in the alternative, and (3) that language in the Indictment be supplemented or amended.[162] On 5 August 2005, the Prosecution submitted a "Prosecution Response to the Defence Motion Alleging Defects

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[156] *Prosecutor v. Delić*, Case No. IT-04-83-I, [*Ex Parte* and Under Seal] Decision on Review of Indictment and Order for Non-Disclosure, 16 February 2005.

[157] *Prosecutor v. Delić*, Case No. IT-04-83-I, Confidential and *Ex Parte* Order to Vacate in Part the Order for Non-Disclosure, 23 February 2005, pp. 2–3; *Prosecutor v. Delić*, Case No. IT-04-83-I, Order Lifting the Confidentiality of the Order to Vacate in Part the Order for Non-Disclosure, 28 February 2005, p. 2.

[158] Initial Appearance (3 March 2006), T. 5–7.

[159] *Prosecutor v. Delić*, Case No. IT-04-83-I, Order Assigning the Case to a Trial Chamber, 25 February 2005, p. 2.

[160] *Prosecutor v. Delić*, Case No. IT-04-83-PT, Order of Pre-Trial Judge Arising From Status Conference, 8 July 2005, p. 2.

[161] *Prosecutor v. Delić*, Case No. IT-04-83-PT, the Indictment, 17 March 2005; *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. 4.

[162] *Prosecutor v. Delić*, Case No. IT-04-83-PT, Defence Motion Alleging Defects in the Form of the 17 March 2005 Indictment, 27 July 2005, p. 3–9.

in the Form of the Indictment", in which the Prosecution (1) informed the Trial Chamber of its willingness to take certain corrective steps with respect to the Indictment, (2) requested the Trial Chamber to defer ruling on the Motion as it relates to Count 1, and (3) otherwise opposed to the Motion of 27 July 2005. On 10 August 2005, the Prosecution filed a Prosecution Corrigendum to Response to the First Defence Motion Alleging Defects.[163] On 15 August 2005, the Defence filed a "Defence Motion Seeking Leave to Reply to the Prosecution Response to the Defence Motion Alleging Defects in the Form of the Indictment and Request for Variation of Time Limits Pursuant to Rule 127(A)(ii)", in which the Defence requested the Trial Chamber to order the Prosecution to make the necessary changes and to file an amended Indictment without delay.

On 14 September 2005, the Prosecution submitted a "Prosecution's Request for Additional Time to Seek Leave to Amend the Indictment", in which it requested an extension of time until 1 December 2005 to file its motion for leave to amend the Indictment. On 27 September 2005, the Defence filed "Defence Response to Prosecution's Request for Additional Time to Seek Leave to Amend the Indictment", in which it opposed the Prosecution's request for additional time on the basis of the resulting prejudice to the Accused. In its "Decision on Prosecution's Request for Additional Time to Seek Leave to Amend the Indictment", the Trial Chamber ordered the Prosecution to file the Amendment Motion no later than 31 October 2005.

On 31 October 2005, the Prosecution filed a "Prosecution's Submission on Proposed Amended Indictment and Application for Leave to Amend" ("Prosecution Motion to Amend") removing some of the defects in the form of the indictment requested by the Defence and alleging new crime bases, namely Doljani village, Grabovica, Uzdol, and Bugojno town. On 11 November 2005, the Prosecution submitted "Prosecution's Submission of Proposed Corrected Amended Indictment, Red-Line Proposed Amended Indictment and Corresponding Tables" following the request of the Pre-Trial Judge at a status conference on 3 November 2005 for a more comprehensive "red-line" version of the Amended Indictment ("the October 2005 Proposed Amended Indictment").

On 18 November 2005, the Prosecution filed a "Prosecution Motion Concerning Proposed Amended Indictment and Pre-Trial Scheduling Matter" ("Prosecution Stay Motion"), in which it requested an opportunity to assess the impact of the findings in the recent *Halilović* Trial Judgement of 16 November 2005 and the upcoming *Hadžihasanović & Kubura* Trial Judgement on

[163] In the corrigendum, the Prosecution expressed its willingness to correct the indictment to reflect the fact that Čelić was located in Lopare municipality at the time of the Accused's birth. *Prosecutor v. Delić*, Case No. IT-04-83-PT, Prosecution Corrigendum to Response to the Defence Motion Alleging Defects in the Form of the Indictment, 10 August 2005, para. 3.

the allegations in the proposed Amended Indictment.[164] To this end, the Prosecution requested the Trial Chamber either (1) to suspends consideration of the October 2005 Proposed Amended Indictment until 30 days after the *Hadžihasanović & Kubura* Trial Judgement, or (2) to permit the Prosecution to withdraw the October 2005 Proposed Amended Indictment without prejudice.[165]

On 21 November 2005, the Defence submitted a "Defence Response to Prosecution's Submission of Proposed Amended Indictment and Application for Leave to Amend", in which the Defence challenged *inter alia* the inclusion of four additional new crime base incidents contained in the proposed Indictment. The Defence argued that the proposed amended Indictment does not establish a *prima facie* case against the Accused for the four new crime base incidents alleged and unfairly prejudices the Accused. On 28 November 2005, the Prosecution filed a "Prosecution Application to Reply to and Reply to Defence Response to Prosecution's Submission of Proposed Amended Indictment and Application for Leave to Amend" rejecting the Defence allegations.

On 2 December 2005, the Defence submitted a "Defence Motion to Prosecution Motion Concerning Amended Indictment and Pre-Trial Scheduling Matter" ("Defence Response to Stay Motion"), in which it requested the Trial Chamber to dismiss the Prosecution Stay Motion and to proceed without delay to the adjudication of the Prosecution Motion to Amend (the motion containing "the October 2005 Proposed Amended Indictment"). The Defence argued that the Prosecution Stay Motion confirms the arguments of the Defence in support of denying the Prosecution Motion to Amend; that there are no reasons to stay the pending litigations concerning the proposed Amended Indictment filed on 31 October 2005; and thereby requested the Trial Chamber to dismiss the Prosecution Motion to Amend and the Prosecution Stay Motion or grant them leave to withdraw the proposed Amended Indictment with prejudice.[166]

On 13 December 2005, the Trial Chamber issued a "Decision on Defence Motion Alleging Defects in the Form of the Indictment and Order on Prosecution Motion to Amend the Indictment" ("December 2005 Decision"). In its decision, the Trial Chamber (1) ordered the Prosecution to amend the March 2005 Indictment to cure a number of defects correctly identified by the Defence in its 27 July 2005 challenge; and (2) granted the Prosecution leave to withdraw the October 2005 Proposed Amended Indictment, but ordered it to re-submit any new motion seeking leave to amend

[164] Prosecution Stay Motion, paras. 6, 8, 10.

[165] According to the Prosecution, Maline/Bikoši, Bugojno and the issue of command and control of the Mujahedin and the El Mujahed Detachment have been the subject in *Hadžihasanović & Kubura* case; Uzdol and Grabovica have been the subject of *Halilović* case. *v. Delić*, Case No. IT-04-83-PT, Prosecution Motion Concerning Proposed Amended Indictment and Pre-Trial Scheduling Matters, 18 November 2005, p. 2.

[166] *Prosecutor v. Delić*, Case No. IT-04-83-PT, Defence Motion to Prosecution Motion Concerning Amended Indictment and Pre-Trial Scheduling Matter, p. 1, paras. 36–36.

the indictment within 30 days of the rendering of the *Hadžihasanović & Kubura* Trial Judgement.[167]

On 20 January 2006, the Prosecution filed a "Prosecution's Submission of Amended Indictment Pursuant to Trial Chamber Decision of 13 December 2005" ("January 2006 Motion to Amend"), in which the Prosecution submitted an amended Indictment ("January 2006 Proposed Amended Indictment") purporting to implement the changes ordered in the December 2005 Decision. In addition, the Prosecution allegedly made some further particularisations and minor corrections, and proposed to replace the word "torture" with "mistreated".[168] On 23 January 2006, the Prosecution filed a "Corrigendum to Prosecution's Submission of Amended Indictment pursuant to Trial Chamber Decision of 13 December 2005" ("January 2006 Corrigendum"), in which the Prosecution proposed to correct an "unintentionally misleading sentence in the January 2006 Motion to Amend."[169]

On 17 February 2006, the Defence submitted a "Second Defence Motion Alleging Defects in the Form of the Indictment" ("the February 2006 Defence Challenge"), in which the Defence challenged the January 2006 Amended Indictment and claimed that the Prosecution failed to properly implement certain of the changes ordered in December 2005 Decision. The Defence therefore requested that the Prosecution should be ordered to cure the defects and accordingly file a further Amended Indictment.[170] On 28 February 2006, the Prosecution filed "Prosecution Response to the Second Defence Motion Alleging Defects in the Form of the Indictment" together with a Confidential Annex ("the February 2006 Prosecution Response"), challenging the Second Defect Motion in its entirety.

On 2 March 2006, at the status conference, the Pre-Trial Judge proposed that the Trial Chamber suspend consideration of all indictment-related filings until 30 days after the *Hadžihasanović & Kubura* Trial Judgement, with a view to considering all motions and challenges together if the Prosecution did ultimately submit another proposed amended indictment. The parties agreed that

[167] *Prosecutor v. Delić*, Case No. IT-04-83-PT, Decision on Defence Motion Alleging Defects in the Form of the Indictment and Order in Prosecution Motion to Amend the Indictment, paras. 64–66.

[168] *Prosecutor v. Delić*, Case No. IT-04-83-PT, Prosecution's Submission of Amended Indictment Pursuant to Trial Chamber Decision of 13 December 2005, paras. 3–5.

[169] *Prosecutor v. Delić*, Case No. IT-04-83-PT, Corrigendum to Prosecution's Submission of Amended Indictment pursuant to Trial Chamber Decision of 13 December 2005, p. 1.

[170] *Prosecutor v. Delić*, Case No. IT-04-83-PT, Second Defence Motion Alleging Defects in the Form of the Indictment, 17 February 2006, p. 2.

this was a wise course of action.[171] On 15 March 2006, Trial Chamber II rendered the *Hadžihasanović & Kubura* Trial Judgement.

On 18 April 2006, the Prosecution filed a "Prosecution's Submission of Proposed Second Amended Indictment and Application for Leave to Amend" ("April 2006 Motion to Amend"), in which the Prosecution submitted another amended Indictment ("April 2006 Proposed Amended Indictment") seeking leave to amend the January 2006 Proposed Amended Indictment to include allegations concerning the additional crime bases originally proposed in the October 2005 Proposed Amended Indictment (Bugujno, Grabovica, and Uzdol), and to charge certain crimes not only pursuant to Article 7(3) of the Statute, but also Article 7(1).[172] On 26 April 2006, the Defence submitted "Defence Response to Prosecution's Submission of Proposed Second Amended Indictment and Application for Leave to Amend" ("the April 2006 Defence Challenge", opposing (a) the addition of liability pursuant to Article 7(1) of the Statute, (b) the addition of the three additional new crime base incidents, and (c) to continued inclusion in the Indictment of the allegation concerning the events at Maline in the light of the *Hadžihasanović & Kubura* Judgement.[173]

On 28 April 2006, the Trial Chamber issued an "Order on Amended Indictments and Challenges Thereto" ("Order of 28 April 2006"), in which the Trial Chamber (a) ordered the Prosecution to file, no later than 5 May 2006, a proposed amended indictment consolidating all changes proposed to the March 2005 Indictment, both on the Prosecution's own initiative as reflected in the April 2006 Motion to Amend and in response to the December 2005 Decision, (b) ordered the Defence to challenge this consolidated amended indictment no later than 22 May 2006, and (c) dismisses without prejudice the January 2006 Motion to Amend, the January 2006 Corrigendum, the February 2006 Defence Challenge, the February 2006 Prosecution Response, the April 2006 Motion to Amend, and the April 2006 Defence Challenge.[174]

On 5 May 2006, the Prosecution requested additional time to file its Consolidated Amended Indictment pursuant to the Trial Chamber Order of 28 April 2006 and thereby asked the Trial Chamber to extend the deadline until 8 May 2006 ("the Prosecution Motion for Additional

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[171] *Prosecutor v. Delić*, Case No. IT-04-83-PT, Status Conference, T. 67 (2 March 2006).

[172] *Prosecutor v. Delić*, Case No. IT-04-83-PT, Prosecution's Submission of Proposed Second Amended Indictment and Application for Leave to Amend, 18 April 2006, paras. 8–10.

[173] *Prosecutor v. Delić*, Case No. IT-04-83-PT, Defence Response to Prosecution's Submission of Proposed Second Amended Indictment and Application for Leave to Amend, 26 April 2006, para. 1.

[174] *Prosecutor v. Delić*, Case No. IT-04-83-PT, Order on Amended Indictments and Challenges Thereto, 28 April 2006, p. 3.

Time").[175] On 8 May 2006, the Prosecution filed the current motion submitting the Consolidated Amended Indictment. On 17 May 2006, the Defence filed a "Defence Motion to Exceed Word Limit in Consolidated Defence Response to Prosecution's Submission of Proposed Second Amended Indictment and Application for Leave to Amend and Motion Alleging Defects in Amended Indictment Pursuant to Order of Trial Chamber" ("Defence Motion to Exceed Word Limit"), in which it requested permission from the Trial Chamber to exceed the permitted word limit of 3,000 words (by 5,500 words) for one Motion in respect of its consolidated Defence Response to Prosecution's Submission of Proposed Second Amended Indictment and Application for Leave to Amend and Motion Alleging Defects in the form of the Indictment. On 19 May 2006, the Trial Chamber granted this motion.[176] On 22 May 2006, the Defence filed the Defence Response and Motion Alleging Defects. Seven days later, on 29 May 2006, the Prosecution filed the Reply to Defence Response and the Prosecution Response. The Defence replied to the Prosecution Response on 2 June 2006.

[175] *Prosecutor v. Delić*, Case No. IT-04-83-PT, Prosecution Request for Additional Time to File its Consolidated Amended Indictment Pursuant to Trial Chamber Decision of 28 April 2006.

[176] *Prosecutor v. Delić*, Case No. IT-04-83-PT, Decision on Motion to Exceed the Word Limit, 19 May 2006, p. 3.