IT-03-67-PT p.22520
D22520-D22505
filed on: 14/09/07
HC

UNITED
NATIONS

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

Case No.: IT-03-67-PT

Date: 14 September 2007

Original: English

IN TRIAL CHAMBER III

Before: **Judge Patrick Robinson, Presiding**
Judge Jean-Claude Antonetti, Pre-Trial Judge
Judge Iain Bonomy

Registrar: **Mr. Hans Holthuis**

Decision of: **14 September 2007**

PROSECUTOR
v.
VOJISLAV ŠEŠELJ

PUBLIC FILING

DECISION ON PROSECUTION'S MOTION FOR LEAVE TO FILE AN AMENDED INDICTMENT

Office of the Prosecutor

Ms. Christine Dahl

The Accused

Mr. Vojislav Šešelj

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

I. PROCEDURAL HISTORY

1. Trial Chamber III ("Trial Chamber") of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991 ("Tribunal") is seised of the "Prosecution's Motion for Leave to File an Amended Indictment" filed by the Office of the Prosecutor ("Prosecution") on 25 June 2007 ("Motion"), wherein the Prosecution seeks leave to amend the Reduced Modified Amended Indictment pending against Vojislav Šešelj ("Accused"), pursuant to Rule 50 of the Rules of Procedure and Evidence of the Tribunal ("Rules").

2. An initial indictment against the Accused was issued on 15 January 2003 and confirmed on 24 February 2003 ("Initial Indictment").[1] Thereafter, on 24 December 2003, the Accused submitted an "Objection to the Indictment", challenging, *inter alia*, a number of alleged defects in the form of the Initial Indictment.[2] The Prosecution responded in two successive stages, ultimately requesting that Trial Chamber II dismiss the Accused's challenges.[3] On 26 May 2004, Trial Chamber II ordered the Prosecution to clarify ambiguities in paragraphs 11 and 12 of the Initial Indictment that pertained, respectively, to the meaning of the term 'committed' and the pleadings in relation to crimes alleged to have been committed in Vojvodina, Serbia, and the issue of armed conflict ("26 May 2004 Decision").[4]

3. On 22 October 2004, the Prosecution sought leave to amend the Initial Indictment so as to comply with the 26 May 2004 Decision and to introduce a number of additional allegations.[5] Although not responding formally, the Accused indicated both in oral and written submissions that he did not oppose amendments or additions to the Initial Indictment as long as the commencement of trial was not impacted.[6] On 27 May 2005, Trial Chamber II granted in principle the Prosecution's request to file its proposed amended indictment, which consisted in the following changes:

---

1 Indictment, 15 January 2003; Confirmation of Indictment and Order for Warrant for Arrest and Surrender, 14 February 2003.

2 Objection to the Indictment, submitted on 24 December 2003 and filed on 15 January 2004, pp. 18–44.

3 Prosecution's Response to the Accused's 'Objection to the Indictment', 29 January 2004; Prosecution's Additional Response to the Accused's 'Objection to the Indictment', 19 February 2004.

4 Decision on Motion by Vojislav Šešelj Challenging Jurisdiction and Form of Indictment, 26 May 2004 (filed on 3 June 2004), para. 62.

5 Prosecution's Motion for Leave to Amend the Indictment with confidential and *ex parte* supporting material, 22 October 2004 (filed 1 November 2004). The proposed amended indictment was attached to this motion.

6 *See* Decision on Prosecution's Motion for Leave to Amend the Indictment, 27 May 2005 ("27 May 2005 Decision"), fn. 4, referring to Status Conference of 31 January 2005, T. 317; Motion by the Accused for Trial Chamber II to issue a subpoena pursuant to Rule 54 of the Rules of Procedure and Evidence (Submission No. 78), 3 March 2005, p. 3.

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

- clarifying the term 'committed' by adding a sentence to paragraph 5,[7] and paragraph 29[8] of the Initial Indictment and by introducing the term 'physically' before the term 'committed' in paragraph 11 of the Initial Indictment;[9]

- specifying the mode of responsibility of 'instigating' by inserting, in paragraph 29 of the Initial Indictment the following sentence: "[a]fter the speech, supporters and associates of the accused, including members of the SRS and the SČP, began a campaign of ethnic cleansing directed at non-Serbs, particularly Croats, in Hrtkovci";[10]

- expanding the geographical scope of the Initial Indictment by adding crimes allegedly committed in the Greater Sarajevo area[11], Bijeljina, Mostar, Nevesinje and Brčko;[12]

- adding a reference to 'children' as victims of extermination in paragraph 17 of the Initial Indictment;[13]

- in paragraph 22 of the Initial Indictment: deleting the reference to the Novi Izvor Building, reducing the number of individuals killed at the Ciglane Factory to one and inserting a reference to the alleged crimes of murder/extermination taking place in the Drinjača Dom Kulture in Zvornik;[14]

- replacing the time frame of 'May 1992' in paragraph 27 of the Initial Indictment with the time frame of 'between May and August 1992';[15] and

- adding a reference to the destruction of institutions dedicated to religion and education in Zvornik in paragraph 31 of the Initial Indictment.[16]

---

[7] The sentence proposed by the Prosecution and accepted by Trial Chamber II reads as follows: "Physical commitment is pleaded only in relation to the charges of persecutions (Count 1) by direct and public ethnic denigration (paragraphs 15 and 17(k)) with respect to the Accused's speeches in Vukovar, Mali Zvornik, and Hrtkovci, and by deportation and forcible transfer (paragraphs 15 and 17(i)) with respect to the Accused's speeches in Hrtkovci, and in relation to the charges of deportation and inhumane acts (forcible transfer) (Counts 10-11, paragraphs 31-34), with respect to the Accused's speech in Hrtkovci."

[8] The sentence proposed by the Prosecution and accepted by Trial Chamber reads as follows: "As a result of this speech, a number of Croat residents decided to leave Hrtkovci."

[9] 27 May 2005 Decision, para. 10.

[10] *Id.*, para. 12, with the caveat that the Prosecution clarifies the meaning of the acronym 'SČP'.

[11] Greater Sarajevo is said to include the municipalities of Ilijaš, Vogošća, Novo Sarajevo, Ilidža and Rajlovac,

[12] 27 May 2005 Decision, para. 18.

[13] *Ibid.*

[14] *Ibid.*

[15] *Ibid.*

[16] *Ibid.*

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

4. On 3 June 2005, the Prosecution submitted a corrigendum to its proposed amended indictment, which was filed on 7 July 2005.[17] On 8 July 2005, the Trial Chamber granted the corrigendum and ordered the Prosecution to file a "Modified Amended Indictment".[18] The Modified Amended Indictment was filed on 12 July 2005.

5. On 31 August 2006, Trial Chamber I[19] invited the Prosecution pursuant to Rule 73*bis*(D) of the Rules of Procedure and Evidence of the Tribunal ("Rules") to suggest ways in which to reduce the scope of the Modified Amended Indictment by at least one third.[20] After an initial rejection of this invitation,[21] the Prosecution filed its proposal on 21 September 2006, which included dropping certain counts and identifying a number of crime sites in Croatia and Bosnia and Herzegovina in respect of which evidence will not be presented.[22] On 3 November 2006, the Accused orally stated that he did not oppose any modification made to the Modified Amended Indictment as long as these modifications enabled him to have knowledge of the charges against him.[23] On 8 November 2006, Trial Chamber I ordered that:

> a) Counts 2, 3, 5, 6, and 7 are hereby removed from the Indictment;
>
> b) The Prosecution shall not present evidence in respect of crimes allegedly committed in the crime sites of Western Slavonia, Brčko, Bijeljina, Bosanski Šamac, and the crime site of Boračko Jezero/Mt. Borašnica as currently described in paragraph 27 of the Indictment and specified in paragraph 20 of this Decision;
>
> c) The Prosecution may present non-crime base evidence in respect of the crime sites of Western Slavonia, Brčko, Bijeljina, Bosanski Šamac, and the crime site of Boračko Jezero/Mt. Borašnica as currently described in paragraph 27 of the Indictment and specified in paragraph 20 of this Decision [.][24]

---

[17] Corrigendum to the Amended Indictment Annexed to the Prosecution's Motion for Leave to Amend the Indictment, 3 June 2005.

[18] Decision on Corrigendum to the Amended Indictment Annexed to the Prosecution's Motion for Leave to Amend the Indictment, 8 July 2005.

[19] The present case was transferred from Trial Chamber II (constituted of Judges Agius, Parker and Antonetti) to Trial Chamber I (composed of Judges Orie, Robinson and Moloto) on 3 May 2006.

[20] Request to the Prosecutor to Make Proposals to Reduce the Scope of the Indictment, 31 August 2006, p. 2: "**INVITES** the Prosecution to propose means of reducing the scope of the Indictment by at least one third by reducing the number of counts charged in the Indictment and/or crime sites or incidents comprised in one or more of the charges in the Indictment".

[21] Prosecution's Response to Trial Chamber's "Request to the Prosecutor to Make Proposals to Reduce the Scope of the Indictment", 12 September 2006; *see also* Status Conference of 14 September 2006, T. 585-590.

[22] Prosecution's Submission on Proposals to Reduce the Scope of the Indictment, 21 September 2006.

[23] Rule 65*ter* Conference of 20 October 2006, T. 666-688.

[24] Decision on the Application of Rule 73*bis*, 8 November 2006, pp. 9-10 ("Rule 73*bis* Decision").

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

6. Implementing the 73*bis* Decision and upon instruction of the Pre-Trial Judge, the Prosecution filed a redacted version of the Reduced Modified Amended on 30 March 2007 ("Indictment").[25] This Indictment is still the operative indictment in the instant case.

7. The Accused responded to the Motion on 30 July 2007.[26] On 6 August 2007, the Prosecution sought leave to reply and filed its reply thereon.[27]

II. SUBMISSIONS OF THE PARTIES

A. Prosecution's Submissions

8. The Prosecution seeks leave pursuant to Rule 50(A)(i)(c) of the Rules to amend the Indictment as follows:

> a. Remove several references to crimes and crime bases that mistakenly remained in the indictment following the Decision of the Trial Chamber pursuant to Rule 73 bis [sic], dated 8 November 2006. These corrections appear in paragraph 17(a), 18, 24, 26 and 27.
>
> b. Amend paragraph 4 of the indictment to conform to the Pre-Trial Brief regarding the Accused's activities in connection with the Serbian Chetnik Movement and the Serbian Radical party.
>
> c. Amend paragraph 5 to remove legal argument that appears in the Pre-Trial Brief.
>
> d. Amend paragraph 8(a) to identify Milan Babić and Radmilo Bogdanović as members of the joint criminal enterprise.
>
> e. Amend paragraph 8(a) to define expressly "Serb forces" as a collective term for use in the indictment.
>
> f. Amend the indictment to conform to the language used in relation to joint criminal enterprise in the *Brdanin* Appeal Judgement. These changes appear in the paragraphs describing the Accused's participation in the joint criminal enterprise (paragraphs 7, 8(a), 8(b), 8(c), and 10) and in the first paragraph for each count (paragraphs 15, 28, 31, and 34).
>
> g. Amend paragraph 14 to allege expressly that in connection with a crime against humanity, the Accused acted with the requisite awareness of the context of his conduct.
>
> h. Amend paragraph 34 with regard to plunder to make express that plunder took place in the named towns and villages.
>
> i. Amend paragraphs 17(d), 17(e), 17(f), 22, 32, and 33 to improve the syntax, clarity and coherence of the allegation.[28]

---

[25] Prosecution's Submission of Reduced Modified Amended Indictment with Redactions Removed, 30 March 2007; *see also* Redacted Version of the Reduced Modified Amended Indictment, 10 November 2006; Status Conference of 13 March 2007, T. 956.

[26] Response by Professor Vojislav Šešelj to the Prosecution's Motion for Leave to File an Amended Indictment of 25 June 2007 (Submission 304), 30 July 2007 (submitted on 17 July 2007). In light of the arguments put forth by the Accused in his Response asking for an extension of the time-limit until 17 July 2007 in which to respond, the Trial Chamber wishes to remind the Accused that under Rules 126*bis*, he had 14 days after service on him of the BCS translation of the Motion. The Response was therefore submitted within the 14-day deadline of 23 July 2007.

[27] Prosecution's Reply to Response by Professor Vojislav Šešelj to the Prosecution's Motion for Leave to File an Amended Indictment of 25 June 2007, 6 August 2007.

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

9. The Prosecution submits that each of the proposed amendments improves the clarity of the Indictment and that none adds a new charge, whether factual or legal. The Prosecution further contends that the proposed amendments in relation to paragraph 9 of the Indictment are made to comply with the position taken by the Appeals Chamber of the Tribunal ("Appeals Chamber") in the *Brđanin* case.[29] In sum, the Prosecution submits, none of the proposed changes will be prejudicial to the fairness or expeditiousness of the proceedings.[30]

10. In its Reply, the Prosecution declares that it wishes to withdraw the amendment it sought in relation to paragraph 5 of the Amended Indictment.[31] This part of the Motion is therefore moot.

B. Defence Submissions

11. The Accused challenges the Motion for two principal reasons. First, the Accused submits that the filing of the Motion more than four years and five months after the issuance of the Initial Indictment was unduly delayed and thus violated his right to an expeditious trial as protected by Articles 20 and 21(4)(c) of the Statute of the Tribunal ("Statute"). Under this heading, the Accused submits, *inter alia*, that:

i) the proposed amendments are so extensive that a new indictment against the Accused is created;[32]

ii) the rendering of the Appeals Judgement in the *Brđanin* case should not have an impact on the charges against the Accused;[33]

iii) the Prosecution cannot request that the indictment against the Accused be modified after the confirmation of the indictment against him;[34] and

iv) the Accused's right to know the nature of the charges against him is constantly encroached upon by the Prosecution's successive requests to amend the Initial Indictment;[35]

12. Second, the Accused alleges that the Prosecution proposed second amended indictment, as attached to the Motion, is "sloppy" and "untidy". In this regard, the Accused submits that the

---

[28] Motion, para. 2.
[29] *Id.*, paras. 3-4.
[30] *Id.*, para. 5.
[31] Reply, para. 2; *see* Motion, para. 2(c).
[32] Response, p. 14.
[33] *Id.*, pp. 14-15.
[34] *Id.*, p. 15.

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

numbering of the paragraphs should be adapted to the paragraphs removed thus far, instead of having the term "removed" inserted in lieu of these paragraphs.[36]

III. LAW

13. Amendments to indictments are governed by Rule 50 of the Rules, which state in relevant part:

> (A) (i) The Prosecutor may amend an indictment:
>
> [...]
>
> (c) after the assignment of a case to a Trial Chamber, with the leave of that Trial Chamber or a Judge of that Chamber, after having heard the parties.
>
> (ii) Independently of 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.[37]
>
> (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.
>
> (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.

14. While Rule 50 is silent as to the factors a Trial Chamber must consider in exercising its discretion to grant indictment amendment proposals, it is consistent practice that a Trial Chamber will grant the amendment proposal provided it does not cause an *unfair prejudice* to the accused.[38] Therefore, the issue is not, as the Accused contends[39] whether the Prosecution can modify an indictment after its confirmation, but rather whether the amendments proposed by the Prosecution cause an *unfair prejudice* to the Accused. The Trial Chamber in the *Brđanin* case clarified this notion of *unfair prejudice* as follows

---

[35] *Id.*, pp. 16-17.

[36] *Id.*, pp. 20-21.

[37] Article 19(1) of the Statute provides that "[t]he judge of the Trial Chamber to whom the indictment has been transmitted shall review it. If satisfied that a prima facie case has been established by the Prosecutor, he shall confirm the indictment. If not so satisfied, the indictment shall be dismissed." (footnote added).

[38] *Prosecutor v. Radoslav Brđanin and Momir Talić*, Case No. IT-99-36-PT, Decision on Form of Further Amended Indictment and Prosecution Application to Amend, 26 June 2001 ("*Brđanin* Decision"), para. 50; *Prosecutor v. Mladen Naletilić and Vinko Martinović*, Case No. IT-98-34-PT, Decision on Vinko Martinović's Objection to the

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

> [t]he 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 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.[40]

15. The case law has identified two factors as relevant to the consideration of unfair prejudice: i) insufficient notice to the accused, or ii) undue delay in the proceedings.[41] In sum, an accused must be given the opportunity to effectively and efficiently prepare his defence. Therefore, when examining below whether each amendment proposed by the Prosecution causes an unfair prejudice to the Accused, the Trial Chamber assessed both factors cumulatively, in light of the circumstances of the case. In particular, when assessing whether of each of the amendments proposed by the Prosecution caused an undue delay to the proceedings, the Trial Chamber also gave due consideration to the findings of the Appeals Chamber of the International Criminal Tribunal for Rwanda ("ICTR") in the *Karemera* case, pursuant to which

> 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.[42]

16. Trial Chamber I recalled that in the jurisprudence of the Tribunal,

> [t]he concept of a 'new charge' has been held to include (a) an amendment alleging a different crime under the Statute, (b) the addition of an underlying offence without changing the crime that is alleged under the Statute, and (c) the addition of treaty provisions also recognising the same conduct as a violation of international law, with no additional factual allegations, no reliance on an additional Article of the Statute, and no other alteration of the affected count.[43] (footnotes omitted)

Amended Indictment and Mladen Naletilić's Preliminary Motion to the Amended Indictment, 14 February 2001, p. 7.

[39] *See* para. 11(iii) *supra*.

[40] *Brđanin* Decision, para. 50.

[41] *Prosecutor v. Sefer Halilović*, Case No. IT-01-48-PT, Decision on Prosecutor's Motion Seeking Leave to Amend the Indictment, 17 December 2004 ("*Halilović* Decision"), para. 36; *Prosecutor v. Radoslav Brđanin and Momir Talić*, Case No. IT-99-36-PT, Decision on Form of Fourth Amended Indictment, 23 November 2001, para. 17; *Prosecutor v. Karemera et al.*, Case 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* Interlocutory Decision"), para. 13.

[42] *Karemera* Interlocutory Decision, para. 15. For an in-depth analysis of the general principle of the "right of an accused to be tried without undue delay", *see also Prosecutor v. Mugiraneza*, Case ICTR-99-50-AR73, Decision on Prosper Mugiraneza's Interlocutory Appeal from Trial Chamber II Decision of 2 October 2003 Denying the Motion to Dismiss the Indictment, Demand Speedy Trial and for Appropriate Relief, 27 February 2004, p. 3.

[43] *Halilović* Decision, para. 28.

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

17. In addition, the *Halilović* Decision held that "where the new allegation could be the sole action or omission of the Accused that justifies his conviction, that amendment is a 'new charge' for the purposes of Rule 50."[44]

IV. DISCUSSION

A. Preliminary Considerations

18. With a total of 6,346 words, the Response is more than twice than the 3,000 word limit imposed on parties by the Practice Direction on the Lengths of Briefs and Motions ("Practice Direction"). The Trial Chamber warns the Accused that by regularly exceeding the word limit set forth in the Practice Direction, he runs the risk that the Trial Chamber will not examine his filings beyond the said word limit. However, in light of the crucial nature of the issues raised in the Motion and the Response pertaining to the Accused's right to a fair and expeditious trial, the Trial Chamber, in this instance, will consider the arguments set forth in the Response.

19. Within the seven-day time period prescribed by Rule 126*bis* of the Rules, the Prosecution sought leave to file a reply. In view of the significance of its contents, the Trial Chamber grants the Prosecution's request to file the Reply.

B. Proposed Amendments

(i) Remove several references in paragraphs 17(a), 18, 24, 26 and 27 to crimes and crime bases that mistakenly remained in the Indictment following the Decision of the Trial Chamber pursuant to Rule 73 *bis*, dated 8 November 2006.

20. The amendments proposed by the Prosecution at paragraphs 17(a), 18, 24, 26 and 27 solely implement the removal of the crime of "extermination" as ordered by Trial Chamber II in the Rule 73*bis* Decision.[45] As no prejudice to the Accused arises out of these amendments, the Trial Chamber will grant this part of the Motion.

(ii) Amend paragraph 4 of the Indictment to conform to the Prosecution's Final Pre-Trial Brief regarding the Accused's activities in connection with the Serbian Chetnik Movement and the Serbian Radical party.

[44] *Id.*, para. 34. The Trial Chamber further explains that "[f]or example, an amendment seeking to replace a vague reference to an unknown number of victims with a specific number of victims is merely a new factual allegation, not a new charge, because it does not expose the Accused to an additional risk of conviction. On the other hand, an amendment that alleges a different crime under the Statute or a different underlying offence, even without additional

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

21. The Prosecution seeks to add the following sentence to paragraph 4 of the Indictment: "He remained leader of the SČP, and the SČP continued to exist operating in parallel to or incorporated within the SRS." As indicated by the Prosecution in its Motion, this sentence in substance stems from the Prosecution Final Pre-Trial Brief.[46] The Trial Chamber notes that no time-frame is specified for the duration of the allegations contained in the sentence the Prosecution intends to add.[47]

22. The Trial Chamber cannot therefore accept the proposed amendment unless the Prosecution indicates a time-frame for the relevant sentence that is comprised within the temporal scope of the Indictment.

(iii) Identify Milan Babić and Radmilo Bogdanović as members of the joint criminal enterprise in paragraph 8(a).

23. In paragraph 8(a) of the Indictment, the Prosecution seeks to add to the list of participants in the alleged joint criminal enterprise, the names of Milan Babić and Radmilo Bogdanović.

24. The Trial Chamber first notes that from as early as the Initial Indictment, the term 'include' and the phrase "and other political figures from the (S)FRY, the Republic of Serbia, the Republic of Montenegro and the Bosnian and Croatian Serb leadership" in paragraph 8(a) clearly indicate that the list of participants in the alleged joint criminal enterprise against the Accused was intended to be non-exhaustive. Therefore, from the outset, the Accused was put on notice that the alleged criminal enterprise could include other participants not named individually. In addition, as the Prosecution rightly points out in the Motion, the initial pre-trial brief filed by the Prosecution in 2004 already mentioned the names of Milan Babić and Radmilo Bogdanović as having participated in the implementation in Croatia of the joint criminal enterprise alleged against the Accused.[48] As no prejudice to the Accused arises out of these amendments, the Trial Chamber will grant this part of the Motion.

---

factual allegations, is a new charge because it could be the sole basis for the Accused's conviction." *Halilović* Decision, para. 35.

[45] Rule 73*bis* Decision, p. 9.

[46] Motion, para. 2(b); Prosecution Final Pre-Trial Brief, 25 June 2006, para. 60.

[47] It is noted however that this sentence is placed in paragraph 4 between two sentences pertaining to events having occurred between 23 February 1991 and June 1991.

[48] Prosecution's Notice of Filing of Public Version of Prosecution's Pre-Trial Brief and Prosecution's Addendum to Pre-Trial Brief, 26 July 2007 (consisting in the public versions of the Prosecution Pre-Trial Brief of 28 October 2004 ("Prosecution Initial Pre-Trial Brief") and of the Addendum to the Prosecution Pre-Trial Brief of 3 February 2006.) With regards Milan Babić, *see* Prosecution Initial Pre-Trial Brief, paras. 27-29. With regards Radmilo Bogdanović, *see Id.*, para. 36.

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

(iv) Amend paragraph 8(a) to define expressly "Serb forces" as a collective term for use in the indictment.

25. The Prosecution further contends that it wishes to amend paragraph 8(a) of the Indictment so as to define expressly "Serb forces" as a collective term for use in the indictment.

26. The Trial Chamber first notes that the Prosecution has not indicated with track changes in Annex A to the Motion every amendment it proposed and such is the case in paragraph 8(a) of the Indictment where it appears that the location of a passage has been moved. Second, while the term 'Serb forces' was already mentioned in the Amended Indictment, the Trial Chamber acknowledges that the Prosecution's proposed amendments to paragraph 8(a), in so far as they relate to the definition of 'Serb forces', indeed clarify the understanding of this paragraph. As no prejudice to the Accused arises out of these amendments, the Trial Chamber will grant this part of the Motion.

(v) Amend the indictment to conform to the language used in relation to joint criminal enterprise in the *Brđanin* Appeal Judgement.

27. The Prosecution proposes that a number of paragraphs of the Indictment be changed to reflect the language used by the Appeals Chamber in the *Brđanin* Appeal Judgement with regard to the theory of joint criminal enterprise.[49]

28. On 3 April 2007, the Appeals Chamber in the *Brđanin* case found that the Trial Chamber had erred in its findings on joint criminal enterprise.[50] It held, in parts relevant to the amendments sought by the Prosecution, that

> the Appeals Chamber is of the view that what matters in a first category JCE is not whether the person who carried out the *actus reus* of a particular crime is a member of the JCE, but whether the crime in question forms part of the common purpose.[51] [...]
>
> When the accused, or any other members of the JCE, in order to further the common criminal purpose, used persons who, in addition to (or instead of) carrying out the *actus reus* of the crimes forming part of the common purpose, commit crimes going beyond that purpose, the accused may be found responsible for such crimes provided that he participated in the common criminal purpose with the requisite intent and that, in the circumstances of the case, (i) it was foreseeable that such a crime might be perpetrated by one or more of the persons used by him (or by any other member of the JCE) in order to carry out the *actus reus* of the crimes forming part of the common purpose; and (ii) the accused willingly took that risk–that is the accused, with the awareness that such a crime was a possible consequence of the implementation of that enterprise, decided to participate in that enterprise.[52]

[49] Motion, para. 2(f).
[50] *Prosecutor v. Radoslav Brđanin*, Case No. IT-99-36-A, Judgement, 3 April 2007 ("*Brđanin* Appeal Judgement").
[51] *Brđanin* Appeal Judgement, para. 410.
[52] *Id.*, para. 411.

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

29. The proposed amendments regarding the language used in relation to joint criminal enterprise in paragraphs 7, 8(a), 10, 15, 28, 31 and 34, consist of terminological changes made to conform to the *Brdanin* Appeals Judgement. As no prejudice to the Accused arises out of these amendments, the Trial Chamber will grant this part of the Motion.

30. With regards the introduction of paragraphs 8(b) and 8(c), the Trial Chamber considers that the inclusion of such language does not prejudice the Accused. In fact, these two paragraphs benefit the Accused as he is now put on notice, within a reasonable time before the commencement of the trial proceedings, of the theory of joint criminal enterprise the Prosecution pledges to establish. The Trial Chamber will therefore grant this part of the Motion.

(vi) Amend paragraph 14 to further detail the *actus reus* required for a crime against humanity

31. In paragraph 14 of the Indictment, the Prosecution seeks to add the following to this paragraph that deals with the definition of crimes against humanity:

> With regard to conduct as a crime against humanity, Vojislav Šešelj acted knowing that the civilian population was being attacked and that his acts comprised part of those attacks. Alternatively, Vojislav Šešelj took the risk that his acts were part of those attacks.[53]

32. This proposed amendment purports to define the *mens rea* required for crimes against humanity. The Trial Chamber rejects the definition proposed by the Prosecution and wishes to recall the Appeals Judgement in the *Blaškić* case, according to which

> [i]n relation to the *mens rea* applicable to crimes against humanity, the Appeals Chamber reiterates its case law pursuant to which knowledge on the part of the accused that there is an attack on the civilian population, as well as knowledge that his act is part thereof, is required. The Trial Chamber, in stating that is "suffices that he knowingly took the risk of participating in the implementation of the ideology, policy or plan," did not correctly articulate the *mens rea* applicable to crimes against humanity.[54] (footnotes omitted)

33. Accordingly, the Trial Chamber welcomes the Prosecution's attempt to define the intent required for crimes against humanity in the proposed amended indictment. However, it cannot accept that the sentence "[a]lternatively, Vojislav Šešelj took the risk that his acts were part of those attacks" be introduced in paragraph 14 of the Indictment, as it does not reflect the current state of the law.

(vii) Amend paragraph 34 to state expressly that plunder took place in the named towns and villages.

---

[53] Motion, Annex A, para. 14.

[54] *Prosecutor. Tihomir Blaškić*, Case No. IT-95-14-A, Judgement, 29 July 2004, para. 126.

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

34. The Prosecution seeks to clarify in paragraph 34 of the Indictment, which relates to Counts 12 to 14, that the locations mentioned also pertain to crimes charged under Count 14 (plunder of public or private property) and not only under Count 12 (wanton destruction of villages, or devastation not justified by military necessity) and Count 13 (destruction or wilful damage done to institutions dedicated to religion or education).

35. By adding the term "plunder", the Prosecution merely seeks to render paragraph 34 consistent with Count 12 charged against the Accused. As no prejudice to the Accused arises out of these amendments, the Trial Chamber will also grant this part of the Motion.

36. However, the Trial Chamber is of the view that the use in paragraph 34 of the terms 'and' and 'or' in the alternative does not sufficiently put the Accused on notice of the crimes with which he is charged. While the Trial Chamber acknowledges that the Prosecution is not required to specify every incident of destruction or plunder in the indictment, at a minimum the Prosecution should specify which of these three different crimes is charged in the municipalities referred to in paragraph 34. Further, the cumulative use of 'and' and 'or' is not consistent with the first part of paragraph 34 where Counts 12, 13, and 14 are charged cumulatively and not alternatively. The Trial Chamber therefore instructs the Prosecution to clarify the municipalities in which plunder solely is charged, the municipalities in which destructions are charged and finally the locations where plunder and destructions are both charged.

(viii) Amend paragraphs 17(d), 17(e), 17(f), 22, 32 and 33 to improve the syntax, clarity and coherence of the allegation.

37. Having examined each of the amendments proposed under this sub-section, the Trial Chamber is of the opinion that no prejudice to the Accused arises out of these amendments and therefore that it will grant this part of the Motion.

(ix) Minor linguistic amendments proposed by the Prosecution

38. The Trial Chamber notes the Prosecution's request to make minor linguistic and grammatical changes in paragraphs 7, 8(a), 10, 14, 21, 24, 26, 27, 31 and the title between paragraphs 11 and 12. It is of the opinion that no prejudice to the Accused arises out of these amendments and therefore that it will grant this part of the Motion.

C. Amendments ordered by the Trial Chamber *proprio motu*

39. For the sake of clarity, the Prosecution should remove either the term 'this' or 'the' in the second sentence of paragraph 7.

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

40. In the Indictment, the third category of joint criminal enterprise was only charged with regard to Counts 1, 4, 8, 9, and 12 to 14.[55] The Prosecution now proposes to remove Counts 1, 4, 8, 9 and 12 to 14 from paragraph 7 for the relevant sentence to read: "Alternatively, the crimes in this the [sic] indictment were the natural and foreseeable consequences of the execution of the object of the joint criminal enterprise". Therefore, by using the collective phrase 'the crimes in this the [sic] indictment', the Prosecution now alleges that the Accused is also charged with Counts 10 and 11 pursuant to the third category of joint criminal enterprise. Pursuant to Rule 50(A)(ii), any amendment to the indictment shall only be granted if there is evidence establishing a *prima facie* case pursuant to Article 19 of the Statute. At a minimum, the Prosecution should have indicated to the Trial Chamber which evidence it used to charge the Accused with the third category of joint criminal enterprise for Counts 10 and 11. The Trial Chamber therefore rejects the amendment sought by the Prosecution in paragraph 7 of the Indictment in relation to the crimes for which the third category of joint criminal enterprise is charged, unless and until the Prosecution provides the Trial Chamber with material supporting this new allegation.

41. The Prosecution attempted to amend paragraph 18 of the Indictment in light of the Rule 73*bis* Decision and the charges and crime bases removed therein. However, in conducting this exercise, the Prosecution has omitted to include paragraph 22 in the list of paragraphs concerning the murder of Croat, Muslim and other non-Serb civilians. The Prosecution should correct this omission as follows "[...] murder of Croat, Muslim and other non-Serb civilians as specified in paragraphs 20-22, 24, 26, and 27."

42. A typographical error in paragraphs 26 and 27 should be corrected on the first line of each of these paragraphs to read "including volunteers know<u>n</u> as 'Šešelj's men'".

V. DISPOSITION

43. For these reasons, pursuant to Article 19 of the Statute and Rule 50 of the Rules, the Trial Chamber grants the Motion in part, and orders the Prosecution to file its Second Amended Indictment with the following amendments:

(i) Remove several references in paragraphs 17(a), 18, 24, 26 and 27 to crimes and crime bases that mistakenly remained in the Indictment following the Rule 73*bis* Decision;

[55] Indictment, para. 7: "Alternatively, the crimes enumerated in Counts 1, 4, 8, 9 and 12 to 14 of the indictment were the natural and foreseeable consequences of the execution of the object of the joint criminal enterprise [...]". The Prosecution removed Counts 2, 3, 5, 6 and 7 from the Indictment to comply with the Rule 73*bis* Decision.

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

(ii) Add Milan Babić and Radmilo Bogdanović as specified members of the joint criminal enterprise in paragraph 8(a);

(iii) Amend paragraph 8(a) to define expressly "Serb forces" as a collective term for use in the Indictment;

(iv) Amend the indictment to conform to the language used in relation to joint criminal enterprise in the *Brđanin* Appeal Judgement in paragraphs 7, 8(a), 10, 15, 28, 31 and 34 of the Indictment;

(v) Amend paragraph 14 to further detail the *actus reus* required for a crime against humanity with the caveat that the last proposed sentence, "[a]lternatively, Vojislav Šešelj took the risk that his acts were part of those attacks", not be included.

(vi) In paragraph 34, to state expressly that plunder took place in the named towns and villages by clarifying the municipalities in which only plunder is charged, the municipalities in which only destructions are charged and finally the locations where plunder and destructions are both charged.

(vii) Amend paragraphs 17(d), 17(e), 17(f), 22, 32 and 33 to improve the syntax, clarity and coherence of the allegation as detailed in the Motion.

(viii) Make the minor linguistic amendments proposed by the Prosecution in paragraphs 7, 8(a), 10, 14, 21, 24, 26, 27, 31 and the title between paragraphs 11 and 12.

(ix) Remove either the term 'this' or 'the' in the second sentence of paragraph 7.

(x) Add paragraph 22 to the list of paragraphs concerning the murder of Croat, Muslim and other non-Serb civilians so that it reads "[...] murder of Croat, Muslim and other non-Serb civilians as specified in paragraphs 20-22, 24, 26, and 27."

(xi) Correct the typographical error in paragraphs 26 and 27 to read "including volunteers know<u>n</u> as 'Šešelj's men'".

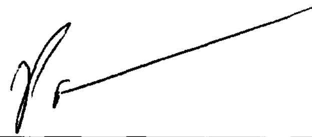
44. The Trial Chamber rejects the following amendments proposed by the Prosecution:

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

(i) the proposed amendment in paragraph 7 of the Indictment that pertains to the crimes charged pursuant to the third category of joint criminal enterprise unless further supporting material is adduced;

(ii) the proposed amendment in paragraph 4 that relates to the Accused's activities in connection with the Serbian Chetnik Movement and the Serbian Radical party unless the Prosecution indicates a time-frame for the relevant sentence that is comprised within the temporal scope of the Indictment.

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



Patrick Robinson
Presiding

Dated this thirteenth day of September 2007
At The Hague
The Netherlands

[Seal of the Tribunal]

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm