



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

Case No. IT-05-87/1-PT

Date: 7 July 2008

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IN TRIAL CHAMBER III

Before: Judge Patrick Robinson, Presiding
Judge Tsvetana Kamenova
Judge Frederik Harhoff, Pre-Trial Judge

Registrar: Mr. Hans Holthuis

Decision of: 7 July 2008

PROSECUTOR

v.

VLASTIMIR ĐORĐEVIĆ

PUBLIC

**DECISION ON PROSECUTION MOTION FOR LEAVE TO AMEND
THE THIRD AMENDED JOINDER INDICTMENT**

The Office of the Prosecutor

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1. **Trial Chamber III** 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 Amend the Third Amended Joinder Indictment with Annexes A, B, and C" filed on 2 June 2008 ("Motion").¹ In particular, the Prosecution seeks leave to add a murder incident involving 14 victims that took place in Podujevo on 28 March 1999 and the names of four victims killed during the Suva Reka and Vučitrn murder incidents. The proposed Fourth Amended Indictment with marked changes and the signed version of this Indictment ("Proposed Indictment") are attached to Annexes A and B, respectively.² Annex C contains the supporting material for the amendments regarding the Suva Reka and Vučitrn murder incidents.

2. On 16 June 2008, the Defence filed the "Vlastimir Đorđević's Response to the Prosecution's Motion for Leave to Amend the Third Amended Joinder Indictment" ("Response"), in which the Defence objects to the proposed amendments.

1. Relevant Procedural History

3. The Third Amended Joinder Indictment ("Indictment"), filed on 6 July 2006, serves as the operative indictment in the case of *Prosecutor v. Milan Milutinović et al.* and the case against the Accused Đorđević,³ although they are technically two different indictments.⁴ Considering that the procedural history of the Indictment in the *Đorđević* case is intertwined with that of the Indictment in the *Milutinović et al.* case, the Trial Chamber will also consider the decisions that have been made in relation to the Indictment in the *Milutinović et al.* case.⁵

4. The Accused Đorđević was transferred to the seat of the Tribunal on 17 June 2007. His initial appearance was held on 19 June 2007 and his further initial appearance was held on 16 July 2007. The Accused Đorđević finally entered a plea of Not Guilty to each charge in the Indictment.

¹ See also Corrigendum to Prosecution's Motion for Leave to Amend the Third Amended Joinder Indictment with Annexes A, B, and C, 30 June 2008.

² The Trial Chamber takes note of the typographical errors in Schedule L of the proposed Fourth Amended Indictment referred to in the Corrigendum to Prosecution's Motion for Leave to Amend the Third Amended Joinder Indictment with Annexes A, B, and C, 30 June 2008, para. 2.

³ *Prosecutor v. Milutinović et al.*, IT-05-87-PT, Decision Replacing Third Amended Joinder Indictment and Severing Vlastimir Đorđević from the Trial, 26 June 2006, pp. 2-3.

⁴ See Decision on Form of Indictment, 3 April 2008, para. 1.

⁵ *Ibid.*

5. On 19 October 2007, the Accused Đorđević filed a motion pursuant to Rule 72 of the Rules of Procedure and Evidence (“Rules”), alleging defects in the form of the Indictment.⁶ On 3 April 2008, the Trial Chamber denied the motion in its entirety.⁷

6. At the Status Conference on 22 February 2008, the Prosecution notified the Defence and the Pre-Trial Judge of its intention to seek leave to amend the Indictment.⁸ At the conference of the Parties held pursuant to Rule 65 *ter*(D) of the Rules (“Rule 65 *ter* Conference”) of 28 March 2008, the Prosecution was instructed to file its motion to amend the Indictment by 1 June 2008 and to make available to the Defence the material pertaining to the additional murder incidents that the Prosecution wished to have added to the Indictment within 10 or maximum 14 days from the date of that conference.⁹

2. Applicable law

7. Under Rule 50 of the Rules, a Trial Chamber has wide discretion to allow an indictment to be amended, even in the late stages of pre-trial proceedings, or even after trial has already begun.¹⁰

8. Leave by a Trial Chamber to make a particular amendment to the indictment can be granted when the amendment may help to “ensure that the real issues in the case will be determined” and when such an amendment meets two cumulative criteria: (a) it must not result in unfair prejudice to the accused when viewed in light of the circumstances of the case as a whole;¹¹ and (b) if the proposed amendment is material, it must be supported by documentation or other material meeting the *prima facie* standard set forth in Article 19 of the Statute.¹²

9. The case-law of the Tribunal identifies two factors to be considered, among others, when determining whether granting an amendment would cause unfair prejudice to an accused. First, the amendment must not deprive the accused of an adequate opportunity to prepare an effective

⁶ Vlastimir Đorđević’s Preliminary Motion Alleging Defects in the Form of the Indictment, 19 October 2007.

⁷ Decision on Form of Indictment, 3 April 2008.

⁸ Status Conference of 22 February 2008, T. 31-32.

⁹ Rule 65 *ter* Conference of 28 March 2008, T. 72.

¹⁰ *Prosecutor v. Popović et al.*, IT-05-88-PT, Decision on Further Amendments and Challenges to the Indictment, 13 July 2006 (“Popović Decision”), para. 8; *Prosecutor v. Delić*, IT-04-83-PT, Decision on Defence Motion Alleging Defects in the Form of the Indictment and Order on Prosecution Motion to Amend the Indictment, 13 December 2005, para. 62 (“Delić Decision”); *Prosecutor v. Martić*, IT-95-11-PT, Decision on the Prosecution’s Motion to Request Leave to File a Corrected Amended Indictment, 13 December 2002, para. 21.

¹¹ *Popović Decision*, para. 8; *Prosecutor v. Boškoski and Tarčulovski*, IT-04-82-PT, Decision on Prosecution’s Motion to Amend the Indictment and Submission of Proposed Second Amended Indictment and Submission of Amended Pre-Trial Brief, 26 May 2006 (“Boškoski and Tarčulovski Decision”), paras 10, 13 and 14; *Prosecutor v. Milutinović et al.*, IT-05-87-PT, Decision on Motion to Amend the Indictment, 11 May 2006 (“Milutinović Decision”) para. 10; *Prosecutor v. Halilović*, IT-01-48-PT, Decision on Prosecutor’s Motion Seeking Leave to Amend the Indictment, 17 December 2004 (“Halilović Decision”), para. 22.

¹² *Popović Decision*, para. 8; *Boškoski and Tarčulovski Decision*, para. 10; *Prosecutor v. Beara*, IT-02-58-PT, Decision on Prosecution Motion to Amend the Indictment, 24 March 2005 (“Beara Decision”), p. 2.

defence.¹³ It is settled jurisprudence that the issue of notice is relevant to this assessment.¹⁴ The Trial Chamber will therefore examine, when determining the prejudicial effect of the proposed amendment, whether the accused is provided with sufficient notice of the scope and nature of the new allegations against him.¹⁵ Where an amendment clarifies the Prosecution's case and provides further notice to the Accused of the charges against him, the Trial Chamber will be more likely to hold that the accused has not been deprived of an adequate opportunity to prepare his defence.¹⁶

10. When examining the first factor, the Trial Chamber will look at the time when the amendment was requested: as a general rule, the closer to trial the Prosecution moves to amend the indictment, the more likely it is that the Trial Chamber will deny the motion on the ground that granting such leave would cause unfair prejudice to the accused by depriving him of an adequate opportunity to prepare an effective defence.¹⁷

11. The second factor for the Trial Chamber to consider is whether granting the proposed amendment would adversely affect the accused's right under Article 21 of the Statute to be tried without undue delay.¹⁸ The possibility of delay in proceedings must be weighed against the benefits to the accused and the Trial Chamber that the amendment may bring, such as the simplification of proceedings, a more complete understanding of the Prosecution's case, and the avoidance of possible challenges to the indictment or evidence presented at trial.¹⁹ Moreover, in the case of *Prosecutor v. Édouard Karemera et al.*, the Appeals Chamber of the International Criminal Tribunal for Rwanda considered as a relevant factor, when assessing whether the delay resulting from a request to amend the indictment would be undue, "the course of the proceedings to date, including the diligence of the Prosecution in advancing the case and the timeliness of the [Prosecution's request to amend the indictment]".²⁰

12. Undue delay could result if, for example, the amendment constitutes a new charge against the accused, in which case the procedures set out under Rule 50(B) and (C) must be observed.²¹ The time required to realise these procedures, when considered in the circumstances of a given case,

¹³ *Prosecutor v. Dragomir Milošević*, IT-98-29/1-PT, Decision on Amendment of the Indictment and Application of Rule 73 bis(D), 12 December 2006 ("Dragomir Milošević Decision"), para. 10; *Popović* Decision, para. 9; *Boškoski and Tarčulovski* Decision, para. 10; *Milutinović* Decision, para. 10; *Halilović* Decision, para. 23.

¹⁴ *Halilović* Decision, para. 23; *Boškoski and Tarčulovski* Decision, para. 11.

¹⁵ *Popović* Decision, para. 21.

¹⁶ *Popović* Decision, para. 9.

¹⁷ *Dragomir Milošević* Decision, para. 10; *Delić* Decision, para. 62.

¹⁸ *Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-AR73, Decision on Prosecutor's Interlocutory Appeal Against Trial Chamber III Decision of 8 October 2003 Denying Leave to File an Amended Indictment, 19 December 2003, para. 13 ("Karemera Decision"); *Boškoski and Tarčulovski* Decision, para. 10; *Milutinović* Decision, para. 10; *Beara* Decision, p. 2; *Halilović* Decision, para. 23; *Popović* Decision, para. 10.

¹⁹ *Popović* Decision, para. 10; *Boškoski and Tarčulovski* Decision, para. 12.

²⁰ *Karemera* Decision, para. 15; *Boškoski and Tarčulovski* Decision, para. 10; *Milutinović* Decision, para. 10; *Beara* Decision, p. 2; *Halilović* Decision, para. 23; *Popović* Decision, para. 10.

could amount to undue delay causing unfair prejudice to the accused.²² In evaluating what constitutes a new charge for the purposes of Rule 50 of the Rules, the Trial Chamber will be mindful of the standard used by the Trial Chamber in the case of *Prosecutor v. Sefer Halilović*:

[w]hen considering whether a proposed amendment results in the inclusion of a “new charge”, it is [...] appropriate to focus on the imposition of criminal liability on a basis that was not previously reflected in the indictment. In the opinion of the Trial Chamber the key question is, therefore, whether the indictment introduces a basis for conviction that is factually and/or legally distinct from any already alleged in the indictment.²³

The Trial Chamber in this case added, as an example, that:

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 factual allegations, is a new charge because it could be the sole legal basis for the Accused’s conviction.²⁴

3. Submissions and Discussion

13. The Prosecution proposes that the following amendments be made to the Indictment: (a) the incorporation of the Podujevo murder incident; (b) the addition of the names of four victims killed during the Suva Reka and Vučitrn murder incidents; (c) the withdrawal of four murder incidents as well as two allegations; and (d) the removal of the names of the former co-Accused and other minor amendments.

(a) Podujevo murder incident

The Prosecution

14. The Prosecution requests adding the Podujevo incident, as shown in paragraph 75(1) of the Proposed Indictment.²⁵ It considers that it is in the interests of justice that the Indictment be amended to include this murder incident, as it would “allow the Prosecution to [...] present the fullest case against the Accused”.²⁶ The Prosecution accepts that this incident constitutes a new

²¹ *Dragomir Milošević* Decision, para. 11; *Popović* Decision, para. 10.

²² *Popović* Decision, para. 10; *Halilović* Decision, para. 24.

²³ *Halilović* Decision, paras 24 (holding 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 purposes of Rule 50”), 30; *Beara* Decision, p. 2 (endorsing the *Halilović* decision).

²⁴ *Halilović* Decision, para. 35. See also *Prosecutor v. Haradinaj et al.*, IT-04-84-T, Decision on Prosecution’s Motion Seeking Leave to Amend the Third Amended Indictment, 15 October 2007, para. 6.

²⁵ The Prosecution also requests the addition of Schedule L to the Indictment.

²⁶ Motion, para. 9.

charge but argues that it is “of limited scope, particularly when viewed in the context of the case as a whole”.²⁷

15. The Prosecution submits that “[a]lthough [it] was aware of [this incident] prior to the filing of the Indictment, a *prima facie* case linking this incident to the Accused Đorđević developed after the filing of the Indictment and during the course of the evidence in the *Milutinović* trial”.²⁸ In particular, the Prosecution notes that, in his testimony, witness Goran Stoparić provided details as to the circumstances of the killing of 14 women and children in the town of Podujevo on 28 March 1999 and identified the perpetrators as being members of the Scorpions, a paramilitary group which was deployed to Kosovo in March 1999 and integrated into the MUP special anti-terrorist unit (SAJ).²⁹ The Prosecution adds, in this regard, that the SAJ was one of the special police units of the MUP Public Security Sector (RJB) operating in Kosovo in 1999 and that this unit fell under Đorđević’s authority, as he was the Chief of the RJB in 1999.³⁰

16. The Prosecution contends that the Defence has been given “clear and timely notice of the material facts alleged”, as it disclosed the supporting material for the Podujevo incident on 11 April 2008.³¹ It also argues that the Defence will have “ample opportunity” to prepare an effective defence with regard to this new charge, given that a date for the commencement of the trial of the Accused has not yet been scheduled and that it has withdrawn three other murder incidents.³²

The Defence

17. The Defence objects to the addition of the Podujevo incident to the Indictment.³³ It argues that “there is no reason for the delay in adding such a significant and known event this late in the proceedings”.³⁴ According to the Defence, the Prosecution could have investigated this incident and charged the Accused for it long before it filed its Motion.³⁵ In this regard, it notes that the Prosecution knew of this incident prior to the filing of the Indictment³⁶ and that “[t]he details of that event have been widely reported in the media as a result of domestic proceedings”.³⁷ In addition, the Defence submits that the Prosecution could have sought leave to add this incident to the

²⁷ Motion, para. 7.

²⁸ Motion, para. 8.

²⁹ Motion, para. 8.

³⁰ Motion, para. 8.

³¹ Motion, para. 7.

³² Motion, para. 7.

³³ Response, para. 10.

³⁴ Response, para. 10.

³⁵ Response, para. 14.

³⁶ Response, para. 12.

³⁷ Response, para. 14.

Indictment as early as July 2006, after it heard witness Goran Stoparić's testimony in the *Milutinović et al.* trial, or a year later, when the Accused Đorđević made his initial appearance.³⁸

18. The Defence submits that this addition "will necessarily delay the trial"³⁹ and "unfairly prejudices the Accused in preparation of his case".⁴⁰ In particular, the Defence points out that "any additions to the Indictment at this time will create procedural delays under the ICTY Rules".⁴¹ The Defence also insists on the fact that, "[a]s the proposed amendment[] introduce[s] a new site, a completely new municipality that was not mentioned before in any other paragraphs of the prior Indictment[], investigations will have to begin anew".⁴²

Discussion

(i) Unfair prejudice to the Accused

19. Under Counts 3 and 4 of the Indictment, the Accused is charged with murder as a crime against humanity and a violation of the laws of customs of war. Paragraph 75 of the Indictment lists the "incidents of mass killings" for which the Accused is charged. The Prosecution requests adding one incident to this list, as shown in paragraph 75(l) of the Proposed Indictment:

On or about 28 March 1999, forces of the FRY and Serbia killed at least 14 members of the Bogujevći, Đuriqi and Llugaliu families, all women and children, in the courtyard of a house in the town of Podujevo/Podujeve. A group of 19 women and children were ordered to gather in the courtyard. Fourteen were killed and five children were seriously injured in the shooting (those persons killed who are known by name are set forth in Schedule L, which is attached as an appendix to this indictment).⁴³

20. In its Motion, the Prosecution qualifies the Podujevo incident as a "new charge". The Trial Chamber agrees with this qualification: the event described in paragraph 75(l) of the Proposed Indictment constitutes an entirely new factual situation. The addition of this paragraph to the Indictment introduces a basis for conviction that is factually distinct from any already alleged in the Indictment and therefore results in the inclusion of a new charge.

21. Considering that the Podujevo incident constitutes a new charge, if the addition of this incident to the Indictment is granted, there will be procedural delays: (a) the Accused would have to appear again in accordance with Rule 50(B) and Rule 62 to enter a plea on the new charge; (b) pursuant to Rule 50(C), the Accused would have a further period of thirty days from disclosure of any additional supporting material by the Prosecution to file preliminary motions to respond to the

³⁸ Response, para. 15.

³⁹ Response, para. 10.

⁴⁰ Response, para. 18.

⁴¹ Response, para. 24.

⁴² Response, para. 24.

new charge; and (c) also under Rule 50(C), the current date for trial would be postponed, since such a delay would be necessary even if only to ensure adequate time for the submission and consideration of the preliminary motions envisaged by the Rule.

22. As regards the course of the proceedings to date, including the diligence of the Prosecution in advancing the case and the timeliness of the Motion, the Trial Chamber concurs with the Defence's submission that the Prosecution could have sought leave to add this incident to the Indictment at an earlier stage. At the Status Conference of 22 February 2008, the Prosecution expressed its intention to apply to amend the Indictment.⁴⁴ According to the Prosecution, this amendment appeared necessary in light of "the experience that [it] had in the *Milutinović* case".⁴⁵ However, it considered that it would be better to wait for a determination by the Trial Chamber of the Defence's motion on the form of the Indictment before making such an application.⁴⁶ The Prosecution reiterated at the Rule 65 *ter* Conference in March 2008 that it would be more appropriate to wait until a decision on the form of the Indictment is rendered before filing a motion requesting an amendment to the Indictment, even though it noted that "none of the contemplated amendments [...] involve the issues which are before the Court with respect to the Defence application on the form of the Indictment".⁴⁷ In the view of the Trial Chamber, there were no reasons for the Prosecution to wait until the Trial Chamber's decision on the form of the Indictment to be rendered before seeking leave to add this incident. The Prosecution could have sought leave to add the Podujevo incident to the Indictment in February, namely three months before it filed the Motion.

23. The Trial Chamber also notes that, when Goran Stoparić was interviewed in 2004,⁴⁸ he provided details as to the circumstances of the killing in Podujevo on 28 March 1999 and identified the perpetrators as being members of the Scorpions.⁴⁹ He also made clear that the Scorpions were, at that time, integrated into the MUP special anti-terrorist unit (SAJ).⁵⁰ It appears from the Pre-Trial Brief filed by the Prosecution on 10 May 2006 in the *Milutinović et al.* case that the Prosecution was aware of the links between the Accused Đorđević, the MUP, the SAJ and the Scorpions. Paragraph 174 of the Pre-Trial Brief expressly states that one of the special units included in the MUP was the SAJ. Moreover, according to paragraph 181, "the Scorpions unit [...] was brought in

⁴³ Schedule L includes the names of 14 victims.

⁴⁴ Status Conference of 22 February 2008, T. 31.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Ibid.*, T. 64.

⁴⁸ E-mail of 11 April 2008, Witness statement of Goran Stoparić (6D00005 Eng), Date(s) of Interview(s): 20.02.2004, 23.02.2004, 25.02.2004, 01.03.2004 and 04.05. 2005.

⁴⁹ *Ibid.*, paras 29-40.

⁵⁰ *Ibid.*, paras 14, 18.

as a reserve unit of the MUP's SAJ on 25 March 1999". At paragraph 335, the Prosecution alleges that "[Đorđević] approved the notorious unit of the Scorpions to be incorporated into the RJB's most elite unit, the SAJ" and at paragraph 138, the Prosecution submits that "[o]n 24 March 1999, the 'Scorpions' were re-activated and a unit of 128 members was deployed to Kosovo as reserve formation of the SAJ with approval of Đorđević and Lukić." Finally, the Trial Chamber takes note of the Prosecution's allegation at paragraph 351: "Lukić approved the integration of 128 members of the 'Scorpions' into the SAJ as reservists in March 1999, who upon their arrival in Podujevo executed a group of women and children."

24. In light of the Prosecution's allegations in the Pre-Trial Brief filed on 10 May 2006 in the *Milutinović et al.* case, the Trial Chamber considers that the Prosecution was already aware, at that time, of the link between the Podujevo incident of 28 March 1999 and the Accused Đorđević. Had the Prosecution been diligent in advancing the case, it would have sought leave to add the Podujevo incident to the Indictment before the Accused Đorđević made his first initial appearance in June 2007.

25. However, the Trial Chamber finds that granting the addition of the Podujevo incident to the Indictment, when viewed in light of the circumstances of the case as a whole, will not result in unfair prejudice to the Accused. The trial is not expected to start until mid-October 2008.⁵¹ Therefore, if the amendment is granted, the Defence will have a period of approximately three months to prepare an effective defence against this new charge. The Trial Chamber is mindful of the scope of the Indictment and takes into consideration the fact that the Defence has to prepare an effective defence against *all* the charges and allegations included in the Indictment. However, the Trial Chamber notes that, although the Podujevo incident relates to a municipality in Kosovo that is not mentioned in any other paragraphs in the Indictment, it is of comparatively limited scope in respect to trial preparation, although a serious charge, of course. Moreover, four murder incidents will be removed from the Indictment, as explained in paragraphs 47 to 49 of this decision, and this further ameliorates the affect of adding an additional murder charge to the Indictment.

26. Finally, the Trial Chamber concurs with the Prosecution's submission that it is in the interests of justice to include the Podujevo murder incident in the Indictment. The Prosecution should be allowed to present the fullest case against the Accused. It is in the interest of the alleged victims that the Podujevo incident be prosecuted.

27. When viewed in light of the circumstances of the case as a whole, the Trial Chamber is satisfied that, although a date for the commencement of the trial has been suggested at the Status

Conference of 20 June 2008, granting leave to add the Podujevo incident to the Indictment will not deprive the Accused of an adequate opportunity to prepare an effective defence against the charges and allegations included in the Indictment and will not result in undue delay causing unfair prejudice to the Accused.

(ii) Material supporting the amendment: the *prima facie* standard

28. Under the jurisprudence of the Tribunal, the test for determining whether a *prima facie* case has been established by the Prosecution in accordance with Article 19(1) of the Statute and Rule 50(A)(ii) of the Rules obliges the Trial Chamber to examine the supporting material submitted with the indictment in order to determine whether it provides “a credible case which would (if not contradicted by the Defence) be a sufficient basis to convict the accused on the charge”.⁵² The Trial Chamber has reviewed the evidence contained in the supporting material and finds that the Prosecution has established a *prima facie* case with regard to the Podujevo incident.

29. Considering that the requirements of Article 19 of the Statute and Rule 50 of the Rules have been met, the Trial Chamber grants leave to add the Podujevo incident and Schedule L to the Indictment.⁵³ Pursuant to Rule 50(B) of the Rules, a further appearance shall be held to enable the Accused to enter a plea on the new charge. In addition, the Accused shall have a period of 30 days from this decision in which to file preliminary motions pursuant to Rule 72 in respect of the new charge.

(b) Suva Reka and Vučitrn murder incidents

The Prosecution

30. The Prosecution seeks leave (a) to modify from 44 to 47, at paragraph 75(d) of the Indictment, the number of victims who were killed in the massacre committed in the coffee shop in Suva Reka on 26 March 1999, and subsequently, to add the names of three victims to Schedule D, which lists the names of the persons killed in this massacre; and (b) to modify from 104 to 105, at paragraph 75(i) of the Indictment, the number of victims who were killed in the Vučitrn convoy

⁵¹ Status Conference of 20 June 2008, T. 52.

⁵² *Popović* Decision, para. 36; *Prosecutor v. Kordić et al.*, IT-95-14-I, Decision on the Review of the Indictment, 10 November 1995, p. 3; *Prosecutor v. Stanišić and Simatović*, IT-03-69-PT, Decision on Defence Requests for Certification to Appeal Decision Granting Prosecution Leave to Amend the Amended Indictment, 8 February 2006, p. 3; *Prosecutor v. Rasim Delić*, IT-04-83-PT, Decision on the Prosecution’s Submission of Proposed Amended Indictment and Defence Motion Alleging Defects in Amended Indictment, para. 76.

⁵³ The Trial Chamber grants leave to add Schedule L of the proposed Fourth Amended Indictment, as corrected in the Corrigendum to Prosecution’s Motion for Leave to Amend the Third Amended Joinder Indictment with Annexes A, B, and C, 30 June 2008.

massacre of 1 May 1999, and subsequently, to add the name of one victim to Schedule I, which lists the names of the persons killed in this convoy.

31. According to the Prosecution, the evidence presented in the course of the *Milutinović et al.* trial revealed that three additional victims were killed in the massacre committed in the Suva Reka coffee shop massacre on 26 March 1999.⁵⁴ The Prosecution submits, based on the evidence obtained during this trial, that one of these three victims was brought to the coffee shop, where some of his family members had been killed, and was shot dead.⁵⁵ As a result, the Prosecution proposes to add at paragraph 75(d) of the Indictment the following allegation: “An additional family member was later also brought to the coffee shop and shot dead”.⁵⁶ The Prosecution points out that the remains of these three victims were identified among the bodies found in the mass grave at Batajnica, where the bodies of 20 victims already identified in Schedule D were found, and recalls that the Accused “is alleged to have been one of the masterminds behind the concealments of crimes committed by forces of the FRY and Serbia in Kosovo and the transfer of bodies to Serbia”.⁵⁷ It submits that adding the names of these three additional victims to Schedule D is in the interest of justice, as it “will allow the Prosecution to provide the Chamber with a fuller picture of the scale of the operation to transfer bodies [from Kosovo to Serbia]”.⁵⁸

32. As regards the Vučitrn murder incident, the Prosecution submits that the evidence provided by a witness who testified in the *Milutinović et al.* trial demonstrates that an additional victim was killed in the Vučitrn convoy massacre.⁵⁹

33. The Prosecution notes that, while “new evidence obtained during the course of the *Milutinović* case has shed new light on the relevance of these killings in the case of the Accused”, the circumstances of these killings “were already referred to in statements in possession of the Prosecution prior to the filing of the Indictment”.⁶⁰ Moreover, the Prosecution argues that, by adding the names of three victims to Schedules D and I, it does not add any new charges but provides “greater specificity to the factual allegations already pleaded in paragraphs 75(d) and (i) [of the Indictment]”⁶¹ and “enhanced notice to the Accused of the nature of existing charges against

⁵⁴ Motion, para. 6(m).

⁵⁵ Motion, para. 14.

⁵⁶ Motion, para. 6(m).

⁵⁷ Motion, paras 13-14.

⁵⁸ Motion, paras 13-14.

⁵⁹ Motion, para. 17. This additional victim was the father of the witness.

⁶⁰ Motion, para. 11.

⁶¹ Motion, para. 3.

him”.⁶² Finally, the Prosecution points out that the witness statements and transcripts of the relevant witnesses were disclosed to the Defence on 11 December 2007.⁶³

The Defence

34. The Defence objects to the addition of the names of the four victims to Schedules D and I.⁶⁴ It contests the Prosecution’s submission that the evidence in the *Milutinović et al.* trial “shed[s] light on the relevance” of these killings in the case of the Accused, pointing out, with regard to the Suva Reka incident, that “the core of evidence [the Prosecution] rel[ies] on in relation to these additions was taken from statements in [its] possession prior to the start of *Milutinović et al.*, in particular the evidence of [several witnesses], whose statements were taken long before their testimonies in the *Milutinović et al.* trial”.⁶⁵ According to the Defence, even if the evidence in the *Milutinović* trial had shed light on the relevance of the killings of these four victims in the case of the Accused, the Prosecution had “ample time to make amendment[s]” to the Indictment before it filed its Motion.⁶⁶ Finally, the Defence argues that the addition of these names to Schedules D and I “creates further work for the Defence to investigate the circumstances relating to these four individuals to be able to respond to the charges”.⁶⁷

Discussion

(i) Suva Reka murder incident

35. Paragraph 75(d) of the Indictment reads as follows:

On or about 26 March 1999, in the morning hours, forces of the FRY and Serbia surrounded the vicinity of the Berisha family compound in the town of Suva Reka/Suharekë (Suva Reka/Suharekë municipality). Tanks were positioned close to, and pointing in the direction of, the houses. The forces of the FRY and Serbia ordered the occupants out of one of the houses. Men were separated from women and children and six members of the family were killed. The remaining family members were herded towards a coffee shop by forces of the FRY and Serbia. Those family members were herded, along with three extended Berisha family groups, into the coffee shop. Forces and Serbia then opened fire on the persons inside. Explosives were also thrown into the shop. At least 44 civilians were killed and others seriously wounded during this action. The bodies of the victims were placed in the rear of a truck, which was then driven in the direction of Prizren. Three injured persons, thrown in among the dead bodies, jumped out of the truck *en route* to Prizren. Human remains of the Berisha killings have since been recovered at two locations; the first at a firing range site in Prizren municipality and the second being a mass grave site at the SAJ training centre at Batajnica, near Belgrade, Serbia. (Those persons killed who are known by name are set forth in Schedule D, which is attached as an appendix to this indictment.)

⁶² Motion, para. 12.

⁶³ Motion, para. 18.

⁶⁴ Response, para. 19.

⁶⁵ Response, para. 20.

⁶⁶ Response, para. 21.

⁶⁷ Response, para. 22.

36. Paragraph 75(d) of the Indictment does not refer to a precise number of victims killed during the massacre committed at the coffee shop in Suva Reka on 26 March 2008. Rather, according to this paragraph, “at least 44 civilians” were killed. In light of the finding in *Halilović*,⁶⁸ the Trial Chamber considers that the Prosecution’s request to modify the number of victims from 44 to 47 in this paragraph of the Indictment and to add the names of three additional victims in Schedule D does not amount to introducing a new charge in the Indictment. In the view of the Trial Chamber, the Prosecution merely seeks to identify three persons from among the unidentified victims killed in the Suva Reka massacre. Therefore, granting these amendments will not result in procedural delays under Rules 50(B) and (C) of the Rules.

37. Moreover, the Trial Chamber considers that adding the allegation—“An additional family member was later also brought to the coffee shop and shot dead”—to paragraph 75(d) of the Indictment provides greater specificity as to the circumstances of the death of one of the three additional victims and does not constitute a new charge.

38. Considering that the three additional victims listed in Schedule D are members of the family killed during the massacre committed in the coffee shop in Suva Reka on 26 March 2008, granting the Prosecution leave to amend the Indictment as requested in paragraph 75(d) of the Proposed Indictment will not require the Defence to conduct further investigations. Moreover, as noted above, there will be no procedural delays under Rules 50(B) and (C) of the Rules if the requested amendments are granted. There is no need for the Trial Chamber to examine whether the Prosecution’s request to add the names of the three additional victims to the Indictment was filed in a timely manner, as this addition will not cause any discernible delays in the proceedings.

39. The Trial Chamber considers that granting the amendments requested in paragraph 75(d) of the Proposed Indictment will not deprive the Accused of an opportunity to prepare an effective defence and will not result in undue delay of the proceedings. Therefore, the Trial Chamber finds that these amendments, when viewed in light of the circumstances of the case as a whole, will not cause unfair prejudice to the Accused.

40. Finally, the Trial Chamber finds, based on the material submitted in support of the amendments, that the Prosecution has established a *prima facie* case with regard to the death of the three additional victims listed in Schedule D. Leave to amend the Indictment as requested in paragraph 75(d) of the Proposed Indictment and to add the names of three additional victims to Schedule D is granted.

⁶⁸ An amendment seeking to replace a vague reference to an unknown number of victims with a specific number of

(ii) Vučitrn murder incident

41. Paragraph 75(i) of the Indictment reads as follows:

On or about 2 May 1999, forces of the FRY and Serbia attacked several villages north-east of the town of Vučitrn/Vushtrri including Skrovna/Skromë, Slakovce/Sllakofc, Ceceli/Cecelija and Gornja Sudimlja/Studime e Epërme. The villagers were forced out of their homes, and many of their houses, shops and religious sites were completely burnt. They were subsequently forced into a convoy of approximately 20,000 people travelling on the "Studime Gorge" road, in the direction of the town of Vučitrn/Vushtrri. In the course of these actions, forces of the FRY and Serbia harassed, beat and robbed Kosovo Albanians travelling in the convoy and killed approximately 104 Kosovo Albanians. (Those persons killed who are known by name are set forth in Schedule I, which is attached as an appendix to this indictment.)

42. Paragraph 75(i) of the Indictment states that "*approximately* 104 Kosovo Albanians" were killed in the Vučitrn convoy massacre at the beginning of May 1999. By proposing to modify the number of victims from 104 to 105 in this paragraph of the Indictment and to add the name of one additional victim to Schedule I, the Prosecution merely seeks to identify a person from among the unidentified victims killed in the convoy massacre. In the Trial Chamber's view, these amendments will provide greater specificity to the charge contained in paragraph 75(i) of the Indictment. Considering that these amendments do not introduce a new basis for conviction and do not amount to a new charge in the Indictment, the procedural consequences of Rules 50(B) and (C) of the Rules will not be triggered if they were granted.

43. Allowing the addition of the name of the additional victim to Schedule I will not create further investigative work for the Defence, as this additional victim was killed during the Vučitrn convoy and came from the villages that were attacked at the beginning of May 1999. Moreover, this addition will not cause any discernible delays in the proceedings. Therefore, the Trial Chamber considers that granting the requested amendments will not deprive the Accused of an opportunity to prepare an effective defence and will not result in undue delay of the proceedings. The Trial Chamber finds that these amendments, when viewed in light of the circumstances of the case as a whole, will not cause unfair prejudice to the Accused.

44. Finally, the Trial Chamber has examined the material submitted in support of the amendments. It finds that the Prosecution has established a *prima facie* case with regard to the death of the additional victim listed in Schedule I. Leave to modify the number of victims from 104 to 105 in paragraph 75(i) of the Indictment and to add the name of the additional victim to Schedule I is granted.

victims is merely a new factual allegation, not a new charge, because it does not expose the accused to an additional risk of conviction. *See, supra*, para. 12.

(c) Withdrawal of incidents and allegations

45. The Prosecution proposes to withdraw the murder incidents mentioned in paragraphs 75(a), (e), (j) and (k)(iii) of the Indictment as well as two allegations in paragraphs 72(e) and 72(f) of the Indictment, namely: “a number of people were shot” and “Kosovo Albanian women were sexually assaulted”.⁶⁹ The Defence points out that the four murder incidents “were removed from the scope of [the *Milutinović et al.*] trial pursuant to Rule 73 bis(D)” and that allowing these withdrawals “will create an equal indictment”.⁷⁰

46. As stated above, on 11 July 2006, the Trial Chamber in the *Milutinović et al.* case decided pursuant to Rule 73 bis(D) that the Prosecution shall not present evidence in relation to the Račak/Rečëk, Padalište/Padaliste, and Dubrava/Dubravë Prison incidents.⁷¹ These murder incidents were listed in paragraph 75(a), (e), and (j) of the Indictment.

47. The Trial Chamber is satisfied that the removal of the murder incidents mentioned in paragraphs 75(a), (e), (j) and (k)(iii) of the Indictment as well as the two allegations in paragraphs 72(e) and 72(f) of the Indictment will not cause unfair prejudice to the Accused. Leave to withdraw these incidents and the two allegations from the Indictment is therefore granted.

(d) Other minor amendments

48. The Prosecution requests minor amendments to the Indictment in paragraph 6 of the Motion. For instance, the Prosecution proposes to remove the names of the former co-Accused as well as paragraphs that concerned them.⁷² The Prosecution submits that these amendments are “intended to streamline and improve the clarity of the Indictment”.⁷³ It adds that these amendments neither constitute new charges nor cause conceivable prejudice to the Accused.⁷⁴

49. The Trial Chamber notes that, in paragraph 6(i) of the Motion, the Prosecution requests amending several paragraphs of the Indictment “to correct the cross-references to other paragraphs of the Indictment”. The Prosecution proposes, *inter alia*, to add three cross-references in the paragraphs pertaining to Count 5, which charge the Accused with the crime of persecutions as a crime against humanity: (a) a cross-reference to paragraph 72 of the Indictment, which lists the deportation sites, at paragraphs 76 and 77(a) of the Indictment; (b) a cross-reference to paragraph

⁶⁹ Motion, para. 23.

⁷⁰ Response, para. 27.

⁷¹ *Prosecutor v. Milan Milutinović et al.*, IT-05-87-T, Decision on Application of Rule 73 bis, 11 July 2006.

⁷² Motion, para. 19.

⁷³ Motion, para. 4. *See also* para. 22: according to the Prosecution, the amendments “will ease the work of the Defence and assist the Trial Chamber”.

⁷⁴ Motion, para. 22.

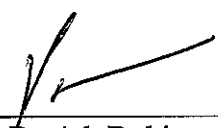
75 of the Indictment, which lists the murder incidents, at paragraph 77(b) of the Indictment; and (c) a cross-reference to paragraph 26 of the Indictment, which describes the campaign of destruction of property owned by Kosovo Albanian civilians and the widespread shelling of towns and villages, at paragraph 77(d) of the Indictment.

50. After having carefully reviewed the amendments requested in paragraph 6 of the Motion, and in particular the three cross-references in the paragraphs pertaining to Count 5, the Trial Chamber considers that they will not cause unfair prejudice to the Accused if they are allowed. Leave to amend the Indictment as requested in paragraphs 6(a)-(l) and 6(p)-(r) of the Motion is granted.⁷⁵

4. Disposition

51. The Trial Chamber, pursuant to Rules 50 of the Rules and Article 19 of the Statute, hereby **GRANTS** the Prosecution leave to amend the Third Amended Joinder Indictment as requested in Motion and reflected in the Proposed Indictment; **ORDERS** the Prosecution to file the Fourth Amended Indictment by Wednesday, 9 July 2008; and **SCHEDULES** a further appearance for 17 July 2008.

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


 Judge Patrick Robinson
 Presiding

Done this seventh day of July 2008
 At The Hague
 The Netherlands

[Seal of the Tribunal]

⁷⁵ Paragraphs 6(m)-(o) and (s)-(t) of the Motion pertain to the Podujevo, Suva Reka and Vučitrn incidents.