UNITED
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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-98-32/1-PT
Date: 8 July 2008
Original: English

IN TRIAL CHAMBER III

Before: **Judge Patrick Robinson, Presiding**
Judge Krister Thelin
Judge Pedro David

Registrar: **Mr. Hans Holthuis**

Decision of: **8 July 2008**

PROSECUTOR

v.

MILAN LUKIĆ
SREDOJE LUKIĆ

PUBLIC

DECISION ON PROSECUTION MOTION SEEKING LEAVE TO AMEND THE SECOND AMENDED INDICTMENT AND ON PROSECUTION MOTION TO INCLUDE UN SECURITY COUNCIL RESOLUTION 1820 (2008) AS ADDITIONAL SUPPORTING MATERIAL TO PROPOSED THIRD AMENDED INDICTMENT AS WELL AS ON MILAN LUKIC'S REQUEST FOR RECONSIDERATION OR CERTIFICATION OF THE PRE-TRIAL JUDGE'S ORDER OF 19 JUNE 2008

The Office of the Prosecutor

Mr. Dermot Groome
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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 is seized of the "Prosecution motion seeking leave to amend the second amended indictment", filed on 16 June 2008 ("Motion"), and of the "Prosecution motion to include UN Security Council resolution 1820 (2008) as additional supporting material to proposed third amended indictment", filed on 24 June 2008 ("Supplemental Motion").[1]

I. RELEVANT PROCEDURAL HISTORY

1. On 26 October 1998, the initial indictment against Milan Lukić, Sredoje Lukić and Mitar Vasiljević was confirmed.[2] On 20 July 2001, the Prosecution was granted leave to file an Amended Indictment.[3] On 24 July 2001 and following the arrest of Mitar Vasiljević, the Trial Chamber ordered that Mitar Vasiljević be tried separately from Milan Lukić and Sredoje Lukić.[4] The *Vasiljević* trial commenced on 10 September 2001.[5]

2. On 17 November 2005, the Prosecution filed a motion to amend the Amended Indictment, having reviewed the indictment in view of a motion of the Defence of Sredoje Lukić objecting to the form thereof.[6] On 1 February 2006, the Trial Chamber granted the Prosecution's motion in relation to Sredoje Lukić.[7] On 22 March 2006, the Trial Chamber granted the Prosecution's motion

[1] The Prosecution initially filed the Motion on 12 June 2008, however on 13 June 2008 the Prosecution filed a notice that some of the Motion's annexes "would more appropriately be filed confidentially", "Prosecution notice of withdrawal and refiling of its motion seeking leave to amend the second amended indictment", para. 1. On 16 June 2008, the Prosecution refiled the motion with the relevant annexes filed confidentially. The Prosecution also included with the refiled Motion a revised Annex B containing the proposed Third Amended Indictment with the proposed amendments highlighted because the version of Annex B submitted on 12 June 2008 contained numerous unnecessary corrections of diacritics in view of the fact that the most recently-filed version of the Second Amended Indictment (filed on 27 September 2006) contained most of the diacritics. The Chamber will refer to the motion and annexes filed on 16 June 2008 as "Motion".

[2] *Prosecutor v. Milan Lukić, Sredoje Lukić, Mitar Vasiljević*, Case No. IT-98-32-I, "Review of the indictment", filed confidentially on 26 Oct 1998, confirming the indictment filed confidentially on 21 October 1998.

[3] *Prosecutor v. Mitar Vasiljević*, Case No. IT-98-32-PT, Pre-trial conference, 20 July 2001, T. 60. *Prosecutor v. Milan Lukić, Sredoje Lukić, Mitar Vasiljević*, Case No. IT-98-32-PT, "Amended indictment", filed on 12 July 2001. See also *Prosecutor v. Mitar Vasiljević*, Case No. IT-98-32-PT, "Motion to amend indictment", filed on 12 July 2001.

[4] *Prosecutor v. Mitar Vasiljević*, Case No. IT-98-32-PT, "Order", filed on 24 July 2001.

[5] *Prosecutor v. Mitar Vasiljević*, Case No. IT-98-32-T, "Judgement", 29 November 2002 ("*Vasiljević* Trial Judgement"), p. 117.

[6] "Prosecution's motion to amend indictment", filed on 17 November 2005. See also "Motion objecting to the form of the indictment", filed on 3 November 2005, "Defence counsel's response to Prosecution's motion to amend indictment", filed on 30 November 2005, and "Prosecution's reply to defence response to motion to amend indictment", filed on 7 December 2005. In relation to Milan Lukić, see "Prosecution's motion to amend indictment" and "Second Amended Indictment", both filed on 27 February 2006.

[7] *Prosecutor v. Sredoje Lukić*, Case No. IT-98-32/1-PT, "Decision granting Prosecution's motion to amend indictment and scheduling further appearance", filed on 1 February 2006. On 13 February 2006, a further appearance was held before Judge Bonomy at which Sredoje Lukić pleaded not guilty to the new charges.

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in relation to Milan Lukić.[8] The resulting Second Amended Indictment is the operative indictment in this case ("indictment").

3. On 4 September 2007, the pre-trial Judge, after having heard the parties, adopted a workplan pursuant Rule 65 *ter* (D)(ii) ("workplan").[9] Pursuant to the workplan, any request for leave to amend the indictment was to be filed before 15 November 2007.[10] This deadline was not subsequently amended. As noted above, the Motion was filed on 16 June 2008 and the Supplemental Motion was filed on 24 June 2008. Both the Defence of Milan Lukić and the Defence of Sredoje Lukić responded to the Motion on 26 June 2008 ("Milan Lukić's Response" and "Sredoje Lukić's Response", respectively).[11] On 27 June 2008, the Defence of Sredoje Lukić responded to the Supplementary Motion ("Sredoje Lukić's Supplementary Response") and on 30 June 2008, the Defence of Milan Lukić joined in the response of the Defence of Sredoje Lukić thereto.[12] The Prosecution replied on 3 July 2008 ("Reply").[13] On 3 July 2008, the Open Society Justice Initiative ("OSJI") sent a letter to the Registry of the Tribunal, which was provided to the Chamber on 7 July 2008, whereby the OSJI as purported *amicus curiae* requested leave to file a brief. It is observed that the OSJI has not been invited by the Chamber and that the letter does not state whether it is submitted in relation to an invitation by the Chamber or at the applicant's own initiative. In any event, there is no basis for the Chamber to exercise its discretionary power to grant leave for OSJI to file a brief as an *amicus curiae*. The submission will, therefore, not be considered further.

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[8] *Prosecutor v. Milan Lukić*, Case No. IT-98-32/1-PT, "Decision granting Prosecution's motion to amend indictment with regard to Milan Lukić", filed on 22 March 2006. On 31 March 2006, a further appearance was held before Judge Bonomy at which Milan Lukić pleaded not guilty to the new charges.

[9] Status conference, 4 September 2007, T. 124-126.

[10] *Id*, T. 126.

[11] "Milan Lukić's response to the Prosecution motion seeking leave to amend the second amended indictment and request for reconsideration or certification for leave to appeal", filed confidentially on 26 June 2008, and "Sredoje Lukić's response to 'Prosecution's motion seeking leave to amend the second amended indictment'", filed confidentially on 26 June 2008.

[12] "Sredoje Lukić's response to 'Prosecution motion to include UN Security Council resolution 1820 (2008) as additional supporting material to proposed third amended indictment'", filed on 27 June 2008, and "Milan Lukić's motion joining Sredoje Lukić's response to 'Prosecution motion to include UN Security Council resolution 1820 (2008) as additional supporting material to proposed third amended indictment'", filed on 30 June 2008.

[13] "Prosecution's consolidated reply on amendment to the second amended indictment and Rule 115 motion, and response to Milan Lukić's request for reconsideration or certification to appeal", filed confidentially on 3 July 2008. Attached to the Reply is Annex A, a "Summary chart of references to joint criminal enterprise".

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II. SUBMISSIONS

A. Prosecution

1. Generally

4. As a preliminary point, the Prosecution requests permission to exceed the word limit for the Motion. The Prosecution argues that:

> [a]n indictment is the foundational charging document upon which all proceedings are based, and matters concerning the proposed amendment of the Second Amended Indictment are of crucial importance. In particular, due to the specific circumstances and subject matter of this motion, the Prosecution is obliged to provide detailed legal and factual arguments, which necessitate a filing that exceeds the customary word limit.[14]

5. The Prosecution requests leave to amend the indictment in order to:

a) "plead the language of the [indictment] which asserts that the Accused 'acted in concert' with greater specificity to reflect the current jurisprudence of joint criminal enterprise" ("mode of liability amendment"),[15]

b) "add new charges for rape, enslavement and torture, arising out of approximately 10 rapes directly perpetrated by Milan and Sredoje Lukić against and/or witnesses by prosecution witnesses already scheduled to testify as part of the Prosecution case" ("new counts"),[16] and

c) make minor spelling and grammatical corrections.

6. If leave to amend is granted, and the proposed Third Amended Indictment is confirmed,[17] the Prosecution requests leave:

a) to file a "Supplementary Pre-Trial Brief" in relation to the proposed amendments,[18]

b) to amend the Rule 65 *ter* summaries of nine witnesses "to incorporate a summary of the evidence related to the additional sex crimes and to update the numbers of the paragraphs in the Third Amended Indictment to which they will testify",[19] and

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[14] Motion, para. 1. The Prosecution also seeks leave to exceed the word limit for the Reply, Reply, para. 2.
[15] Motion, para. 3(b)(i).
[16] Motion, para. 3(b)(ii).
[17] Motion, para. 3(c), where the Prosecution refers to the Chamber confirming the proposed Third Amended Indictment (see also para. 75(d)). The proposed Third Amended Indictment is attached as Annex A to the Motion. As noted earlier (fn 1), Annex B contains the proposed Third Amended Indictment with the proposed amendments highlighted. Moreover, Annex C contains an annotated version of the proposed Third Amended Indictment.
[18] Motion, para. 3. The Prosecution attaches the proposed supplemental pre-trial brief as Annex E to the Motion.
[19] Motion, para. 3. The proposed amended Rule 65 *ter* summaries of the nine witnesses is attached to the Motion as Annex F.

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c) to amend its Rule 65 *ter* exhibit list "to add three additional exhibits which present independent research related to the overall pattern of sexual crimes perpetrated against Bosnian Muslim women and girls in Višegrad in the spring and summer of 1992".[20]

7. By the Supplemental Motion, the Prosecution seeks "to supplement the [Motion] to include Resolution 1820 (2008) for consideration by the Chamber".[21] The Prosecution requests that the resolution be included as additional supporting material to the proposed Third Amended Indictment.[22]

8. The Prosecution submits that Rule 50 grants Trial Chambers "wide discretion to permit amendments to indictments, 'even in the late stages of a pre-trial proceeding, or indeed even after trial has already begun.'"[23] The Prosecution furthermore argues that "[e]ach motion to amend the indictment is to be considered in light of the circumstances of each individual case"[24] and that amendments which render an indictment "more specific can 'simplify proceedings,' bolster 'the Accused's and the Tribunal's understanding of the Prosecution's case,' and possibly even avoid later 'challenges to the indictment or the evidence presented at trial.'"[25] The Prosecution submits that "[i]n line with this jurisprudence, the *Milutinović* Chamber, the *Haradinaj* Pre-Trial Chamber, and the *Dragomir Milošević* Chamber all granted leave to amend the indictment in order to charge the Accused under a more factually specific indictment."[26]

2. In relation to the mode of liability amendment

9. The Prosecution submits that the proposed amendment "will serve to clarify and more precisely plead the joint criminal enterprise", which the Prosecution argues was pleaded via the words "acting in concert" in the indictment.[27] The Prosecution submits that the purpose of the amendment is to bring the indictment into conformity with the jurisprudence which requires that

[20] Motion, paras 3(c) and 75. T, the proposed, and the proposed amended exhibit list as Annex G.
[21] Supplemental Motion, para. 3. UN Security Council Resolution 1820 (2008) is attached to the Supplemental Motion as Annex A.
[22] Supplemental Motion, para. 6.
[23] Motion, para. 19, referring to *Prosecutor v. Popović et al.*, Case No. IT-05-88-PT & IT-05-88/1-PT, "Decision on further amendment and challenges to the indictment", 13 July 2006 ("*Popović* Decision"), para. 8.
[24] Motion, para. 20, referring to *Prosecutor v. Karemera*, Case No. ICTR-98-44-PT, "Decision on severance of Andre Rwamakuba and for leave to file amended indictment", 14 February 2005 ("*Karemera* First Decision"), para. 35.
[25] Motion, para. 20, referring to *Prosecutor v. Karemera*, 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 2005, para. 15.
[26] Motion, para. 21, referring only to *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-PT, "Decision on motion to amend the indictment", 11 May 2006 ("*Milutinović* Decision"), para. 13. The Prosecution submits that "[i]n *Milutinović*, trial was slated to begin on 22 July 2006. The Prosecution sought leave to amend on 5 April 2006, and the Trial Chamber granted the motion on 11 May", Motion, fn. 26.
[27] Motion, para. 5. See also *id*, para. 27, where the Prosecution submits that the words "acting in concert" were "a clear expression of the Prosecution's theory that the Accused were co-perpetrators of the crimes with which other individuals acting in concert in a joint criminal enterprise."

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"an indictment should plead joint criminal enterprise in an unambiguous manner, and should specify on which form of joint criminal enterprise the Prosecution will rely."[28] In the Prosecution's submission, this language "was first drafted prior to the inclusion of joint criminal enterprise language in indictments."[29]

10. The Prosecution submits that language in its pre-trial brief "foreshadowed the Prosecution's instant motion."[30] In this context, the Prosecution refers to findings of the Appeals Chamber that "the Prosecution's pre-trial brief or its opening statement can correct infirmities in its indictment"[31] and that "the standard is the provision of "timely, clear and consistent information detailing the factual basis underpinning the charges".[32] In its view, "[t]he description of the 'common criminal plan' in the Prosecution Pre-Trial Brief serves as notice to the Accused that the Prosecution intends to charge them as co-perpetrators in a joint criminal enterprise in several of the individual instances."[33]

11. In its Reply, the Prosecution submits, with reference to paragraph 128 of its pre-trial brief, that the violence alleged in the indictment "was part of a common criminal plan".[34] The Prosecution refers to the finding in *Vasiljević* that "the term 'acting in concert' does suggest the theory of 'joint criminal enterprise'."[35] Moreover, it is the Prosecution's submission that "[i]t is difficult to find unfairness to the Accused in having to fully prepare a JCE defence at this point in time when past cases have allowed an allegation of JCE to be clarified in the pre-trial brief, at the pre-trial conference or at the latest during the Prosecution's opening statement."[36] The Prosecution also argues that "the clarification at the *Vasiljević* Pre-Trial Conference serves not only to show that 'acting in concert' can mean JCE, but it also deals with the Prosecution's theory of *this* very same case. The discussion about Vasiljević pertained to the Drina River and Pionirska Street incidents."[37] Lastly, the Prosecution submits that it "has not alleged a widespread JCE to persecute and murder

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[28] Motion, para. 26, referring to *Prosecutor v. Simba*, Case No. ICTR-01-76-T, "Judgment and sentence", 13 December 2005, para. 389, and *Prosecutor v. Kvočka et al.*, Case No. IT-90-30/1-A, "Judgement", 28 February 2005, paras 28-29 and 41-42.
[29] Motion, para. 25.
[30] Motion, paras 28-30, referring to paras 23, 28, 71 and 85 of the pre-trial brief.
[31] Motion, para. 31, with further references.
[32] Motion, para. 31, referring in fn 37 to *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-AR73, "Decision on Aloys Ntabakuze's interlocutory appeal on questions of law raised by the 29 June 2006 Trial Chamber I decision on motion for exclusion of evidence", 18 September 2006, with further references.
[33] Motion, para. 31. See also paras 32-34, where the Prosecution sets out in detail the proposed mode of liability amendments.
[34] Reply, para. 19.
[35] Reply, para. 19.
[36] Reply, para. 23 (footnotes omitted), referring to *Prosecutor v. Radislav Krstić*, Case No. IT-98-33-T, "Judgement", 2 August 2001 ("*Krstić* Trial Judgement"), para. 602, *Prosecutor v. Kvočka et al.*, Case No. IT-90-30/1-T, "Judgement", 2 November 2001, para. 246, *Vasiljević* Trial Judgement, para. 63, and *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-A, "Judgement", filed on 29 July 2004 ("*Blaškić* Appeal Judgement"), para. 242.
[37] Reply, para 24.

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Bosnian Muslims in Višegrad. The scope of the JCEs alleged in this case are far less complex than the one asserted in the Simić case."[38]

3. In relation to the new counts

12. With reference to the deadline set in the workplan that requests to amend the indictment were to be submitted before 15 November 2007, the Prosecution submits that:

> [t]he Prosecutor exercised her discretion not to seek an amendment on [*sic*] the indictment prior to the 15 November 2007, in part, based upon her belief that amending the indictment to include new charges of sex crimes would lengthen the Prosecution's case. She had taken the position that fulfilling her obligations to conclude the work of the Prosecutor in the time frame mandated by the UN Security Council did not permit an amendment to add sex crimes charges which she believed would add to the length of the trial. She directed her staff to prepare the case for trial as expeditiously as possible.[39]

In this respect, the Prosecution notes that "[o]n 12 December 2007, Mr. Groome returned to the Office of the Prosecutor and assumed responsibility for prosecuting the case against Milan and Sredoje Lukić."[40] The Prosecution further submits that its "current team is bound by the discretionary decisions made earlier in the case".[41]

13. The Prosecution states that following the submission by the respective Defence of their alibi notices pursuant Rule 67, it "began a review of its evidentiary collection in an attempt to identify all sightings of the two Accused [which] revealed that some of the witnesses that would be called to rebut the alibi evidence of the Accused implicated them in very serious sex crimes."[42] The Prosecution submits that "the facts are not new, though the charges which emerge from them are".[43] Referring to several sources of information concerning alleged crimes of sexual violence in Višegrad,[44] the Prosecution argues that:

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[38] Reply, para. 25.
[39] Motion, para. 14.
[40] Motion, para. 15.
[41] Motion, para. 17.
[42] Motion, paras 16, 37. See also *id*, para. 18, where the Prosecution states that it "has been working on this matter shortly after the Defence filed their first alibi notices". In paras 41-43, and 67 the Prosecution presents the evidence it claims to have uncovered.
[43] Motion, para. 56.
[44] Motion, para. 60, where the Prosecution submits that:

> [t]he alleged crimes of sexual violence at the hands of Milan and Sredoje Lukić are far from hidden from the public eye. The systemic sexual violence which pervaded the persecutory attack on Višegrad's non-Serb population has been well documented and publicised. The Vasiljevic Trial Judgment describes the mass sexual violence. The UN Commission of Experts report contains a chapter documenting these heinous crimes, specifically citing the Vilina Vlas hotel as the most notorious rape camp. The Bosnian Commission for Collecting Facts on War Crimes Committed in the Territory of the Republic of Bosnia and Herzegovina produced a report on the matter, and journalist have documented these crimes in articles and books.

In this respect, the Prosecution refers to the *Vasiljević* Trial Judgement, para. 72, where the Trial Chamber stated that rape was committed by members of Milan Lukić's paramilitary group (Motion, para. 61), to the United Nations Expert

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> the material supporting these amendments [shows] that the acts of sexual violence were such an entrenched and integrated part of the crimes for [*sic*] which the Accused have been charged, that this evidence will inevitably emerge during the course of the trial through the witnesses who will be called.[45]

The Prosecution considers that if the amendments were not to be granted, it would be:

> in the unsatisfactory position of calling [the witnesses] to testify with the possibility that the Trial Chamber may consider as irrelevant the evidence that they were raped and limit their testimony to their simple viewing of the Accused at the time and place in which they were raped.[46]

If the Trial Chamber would allow the evidence of these rapes, then, in the Prosecution submission, the victims are "entitled to an adjudication of the Accused's guilt on these crimes".[47] The Prosecution concludes that "failure to prosecute the Accused for these crimes while prosecuting them for other international criminal law violations emerging from the same fact pattern would result in a miscarriage of justice."[48] In this respect, the Prosecution refers to *Akayesu*, arguing that much of the arguments in that case are directly relevant to the present situation.[49]

14. The Prosecution submits that there will not be unfair prejudice to the Accused to grant the amendments in relation to the new counts because the Prosecution will present the evidence regarding the new counts at the end of its case-in-chief.[50] The Prosecution also argues that the Defence will have "sufficient time prior to the commencement of trial [...] to have notice of these amendments and prepare an effective defence".[51] The Prosecution also states that the fact that it seeks leave to amend "in advance of the start of trial, and in fact in advance of the determination by the Pre-Trial Chamber of a specific date upon which the trial will commence" speaks in favour of there not being unfair prejudice to the Accused.[52] The Prosecution "does not anticipate any need for

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Commission's report, which also was an exhibit for the Prosecution in *Vasiljević* (Motion, para. 62), to a report by the Bosnian Commission for Collecting Facts on War Crimes Committed in the Territory of the Republic of Bosnia and Herzegovina, published on 29 December 1992 (Motion, para. 63), and to a book entitled "Mass rape: the war against women in Bosnia and Herzegovina" (Motion, para. 64).

[45] Motion, para. 65.

[46] Motion, para. 38.

[47] Motion, para. 38. In this respect, the Prosecution argues that "evidence of systemic sexual violence in the context of the other charged persecutory acts will emerge at trial [...] the omission of charges in relation to these crimes will be difficult to explain to the witnesses who survived these crimes, to the victim community, and to the international community more broadly", Motion, para. 56.

[48] Motion, para. 66. The Prosecution submits that in seeking leave to amend the indictment it has "sought to strike an appropriate balance between the justice due victims whose evidence will now unavoidably be part of this trial", *id*, para. Motion, para. 17.

[49] Motion, para. 55, referring to *Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-T.

[50] Motion, para. 45. In this respect, the Prosecution submits that "[i]n light of the fact that this evidence will probably be led sometime in the fall, after the summer break, the Defence will have ample time to become familiar with and prepare to meet these new allegations which are formed on the basis of witnesses the Defence is already aware of and upon material which has in some cases already been disclosed", *id.*

[51] Motion, para. 46.

[52] Motion, para. 46.

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a delay in the proceedings as a result of these amendments" because no trial date has been set.[53] It submits that:

> any delay which might result from this amendment – and there is no reason to believe it would cause delay other than one so ordered by the Pre-Trial Chamber – would be best scheduled earlier rather than later.[54]

In fact, the Prosecution states that there will be a minimal impact on the duration of the Prosecution case because all of the witnesses who would be giving evidence in relation to the new counts are already on the Prosecution's witness list.[55] Thus, the Prosecution is not seeking additional time to present its case.[56]

B. Defence

1. Defence of Milan Lukić

15. In addition to requesting permission to exceed the word limit for its response,[57] the Defence of Milan Lukić requests that:

a) the Motion be denied in its entirety, and

b) the Chamber "[r]econsider the pre-trial conference and trial start date or, in the alternative, grant certification for leave to appeal" ("Defence Request").[58]

16. The Defence of Milan Lukić submits that the late notice of the new charges causes unfair prejudice to the Accused as it denies his right to be informed promptly and in detail of the charges against him.[59] The requested amendments would "prevent [an adequate] opportunity to prepare an effective defence to the amended case and would necessarily lead to an undue delay in proceedings, as it would be necessary to enter a new plea on the charges and subsequent time to investigate and

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[53] Motion, para. 57.
[54] Motion, para. 58.
[55] The Prosecution submits that of the 26 female witnesses on its witness list, "eighteen (18) will testify to some degree to acts of sexual violence in the context of the takeover of Višegrad and as part of their evidence in relation to other crimes charged. Of these eighteen, approximately eight (8) are either direct victims of such crimes at the hands of the Accused or are eye witnesses to crimes of sexual violence involving the Accused", Motion, para. 70. See also para. 39, where the Prosecution submits that in view of the "further review of the evidence of these widespread sex crimes perpetrated against Muslim women and girls in Višegrad it became clear that there were presently on the witness list several women who were the victim of or witness to sex crimes by the Accused and that it was possible to establish, at least in a representative manner, the gravity of the pattern of sex crimes perpetrated against the women of Višegrad without calling any additional witnesses."
[56] Motion, para. 48, where the Prosecution notes that it is seeking to contact one witness, referred to as Witness B, and that if the Prosecution is able to locate this witness, it may seek to add the witness to the witness list. See also para. 40, where it is submitted that "[t]he Prosecutor, after discussions with the Senior Trial Attorney on the case came to the conclusion that the interests of justice required that the Prosecution seek amendment of the indictment to include these charges to the extent they could be established without extending the length of the case."
[57] Milan Lukić's Response, para. 1, where it is argued that the response "addresses the fundamental rights of the Accused in respect to the nature of the case and charges against him" and is in relation to an oversized motion.
[58] Milan Lukić's Response, p. 19.
[59] Milan Lukić's Response, para. 3.

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prepare the Defence case."[60] The filing of a supplementary Prosecution pre-trial brief would "necessitate a Defence pre-trial brief in response" and that this would at least "push the trial start date beyond the summer recess in August".[61]

17. The Defence submits that the jurisprudence allows the amendment of indictment at any point in the proceedings,[62] but argues that in the present case the amendment is sought after a "definite deadline" set by the pre-trial Judge at the status conference on 4 September 2007.[63] The Defence notes that the Prosecution has amended the indictment twice in the past and has "had time to review and propose any charges they felt warranted, most significantly, when redrafting the Second Amended Indictment".[64]

18. With regard to the mode of liability amendment, the Defence of Milan Lukić submits that joint criminal enterprise as alleged in the proposed Third Amended Indictment "constitutes a specific mode of liability not specifically pled earlier".[65] The Defence has therefore not been given adequate notice.[66] The Defence takes issue with the Prosecution submission that the words "acting in concert" in the indictment "were a clear expression of the Prosecution's theory that the Accused were co-perpetrators of the crimes with other individuals acting in concert in a joint criminal enterprise."[67]

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[60] Milan Lukić's Response, para. 3.
[61] Milan Lukić's Response, para. 47.
[62] Milan Lukić's Response, para. 19, referring to *Popović* Decision, para. 8.
[63] Milan Lukić's Response, para. 19, noting that at the status conference counsel for the Prosecution stated that a deadline of 15 November 2007 for any motion to amend the indictment would be "satisfactory", status conference, 4 September 2007, T. 125-126. See further Milan Lukić's Response, paras 20-21. In relation to the "definite deadline", the Defence refers to Rule 65 ter(B), which "entrusts the Pre-Trial Judge with responsibility to 'ensure that the proceedings are not unduly delayed and shall take any measure necessary to prepare the case for a fair and expeditious trial'", and to Rule 65 *ter*(D)(iii).
[64] Milan Lukić's Response, para. 22.
[65] Milan Lukić's Response, para. 24, referring to Motion, para. 25.
[66] Milan Lukić's Response, para. 24, referring to *Prosecutor v. Simić*, Case No. IT-95-9-A, "Appeals Judgement", filed on 28 November 2006 ("*Simić* Appeal Judgement"), paras 21, 22, where the Appeals Chamber held that joint criminal enterprise must be specifically pleaded in an indictment and state the relevant material facts. The Defence also submits that "[c]harges in the alternative or additional legal theories of liability, 'even in the absence of new factual or evidentiary material, are considered new charges'", Milan Lukić's Response, para. 32, referring to *Prosecutor v. Bagaragaza*, Case No. ICTR-2006-86-I, "Decision on Prosecutor's application for leave to amend the indictment", 30 November 2006, para. 10. In this respect, the Defence rejects the Prosecution submission that the use of the term "common criminal plan" in the Prosecution's pre-trial brief put the Defence on notice of the Prosecution's intention to charge joint criminal enterprise, stating that "[w]hile a pre-trial brief can be used to clarify infirmities in an Indictment, it cannot amend the indictment to add a mode of liability", Milan Lukić's Response, para. 29, referring to *Simić* Appeal Judgement, para. 28. The Defence also argues that "the four mentions [of] 'common criminal plan' in the 44 pages of the Prosecution's Pre-Trial Brief were hardly clear or consistent enough to put the Defence on notice of charges under [joint criminal enterprise]", Milan Lukić's Response, para. 29. Moreover, the Defence argues that "[g]iven that the OTP Pre-Trial Brief was filed on 14 March 2008, it was also not timely enough to give the Defence adequate notice of a JCE and begin to build the Defence case in response to this allegation", *id.*
[67] Milan Lukić's Response, para. 28, referring to Motion, para. 27. In this respect, the Defence notes that the same language as used in the indictment, "acting in concert" and "with others", was discussed in *Simić* and submits that it was "determined not to be sufficient to put the Accused on notice of a JCE", Milan Lukić Response, para. 28, referring to *Simić* Appeal Judgement, para. 39.

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19. With regard to the new counts, the Defence submits that, as new charges, they will be "subject to procedural consequences under the ICTY Rules and create substantial delays for which a delayed trial start date will need to be set."[68] The Defence argues that the Prosecution has been "on alert of the allegations of rape when they took the statements 10 years ago and could have avoided such a situation by earlier charging."[69] With regard to the Prosecution's reference to the *Akayesu* case, the Defence argues that that case may be distinguished from the present situation, noting that "Akayesu was indicted only in the year prior to his trial's quick start in January 1997, with the new evidence arising in the middle of the OTP's case-in-chief."[70]

20. The Defence submits that the proposed amendments "will necessarily delay the trial start date and diffuse the focus of the present case."[71] In respect of the Prosecution's reliance upon the *Milutinović* Trial Chamber's granting of leave to amend the indictment close to the start of trial,[72] the Defence submits that leave was granted because "the amendments did not present new charges."[73] The Defence submits that even if the evidence concerning the new counts is led at the end of the Prosecution's case, as proposed by the Prosecution, "the Defence would not be free to investigate such a bevy of new charges during the OTP's case-in-chief as the Defence will be making appropriate responses to the witnesses presented, preparing cross-exam, and preparing the Defence case on the already significant existing charges".[74]

21. As noted above, the Defence requests reconsideration of the date for trial, referencing arguments previously made concerning "effective assistance of counsel, equitable due process, and

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[68] Milan Lukić's Response, para. 34, referring to *Prosecutor v. Halilović*, Case No. IT-01-48-T, "Decision on Prosecution's motion seeking leave to amend the indictment", 17 December 2004 ("*Halilović* Decision"), para. 38.

[69] Milan Lukić's Response, para. 36, also submitting that the Prosecution has "had 10 years to amend, most significantly after the *Vasiljević* Judgment and after the relevant Rule 11 *bis* proceedings in 2007", *id.* In this respect, the Defence also notes the Prosecution's submission that the allegations have been "far from hidden from the public eye", *id*, para. 37, referring to Motion, para. 60. See further Motion, para. 39.

[70] Milan Lukić's Response, para. 39. The Defence also submits that *Akayesu* may be distinguished by the fact that the ICTR at the time "was at the beginning of [its] life and not working under the auspices of a Completion Strategy" and that "[a]t this late stage in the life of the Tribunal, the goal is to focus the charges in the Indictment to improve expeditiousness and retain fairness" rather than to add charges, Milan Lukić's Response, para. 40, referring to *Prosecutor v. Stanisić and Simatović*, Case No. IT-03-69-T, "Decision pursuant to Rule 73 *bis* (D)", 4 February 2008, para. 8.

[71] Milan Lukić's Response, para. 42.

[72] See *supra* fn. 26.

[73] Milan Lukić's Response, para. 43, referring to *Milutinović* Decision, para. 13, where it was stated that there would be no "automatic procedural consequences requiring delay" as the amendments did not amount to new charges. The Defence also refers to *Halilović*, where the Trial Chamber rejected amendments on 17 December 2004 as the trial was to start after a long delay on 24 January 2005, and submits that the Trial Chamber held 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 [the] trial", Milan Lukić's Response, para. 44, referring to *Halilović* Decision, para. 41.

[74] Milan Lukić's Response, para. 46, referring to Motion, para. 45. The Defence submits that the Prosecution seeks to add all-in-all "31 new charges for which the Accused could be found guilty. Such excessive increases in the proposed charges and potential liability of the Accused increase the Defence's need for investigation and preparation tenfold", Milan Lukić's Response, para. 45, where the Defence submits that the five new counts are to be counted as ten new charges in view of the fact that two modes of liability are alleged for each count, and that to be added to this is "the new charge of joint criminal enterprise" in relation to each of the existing 21 counts.

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case complexity".[75] The Defence argues that "the pre-trial conference and trial date has [*sic*] been set too soon to meaningfully prepare an effective defence."[76] In the alternative, the Defence requests certification of an interlocutory appeal of the "Order rescheduling pre-trial conference" of 19 June 2008 ("Order of 19 June 2008"), which ordered that pre-trial conference is to be held on 9 July 2008, after which trial would commence immediately.[77] In support of its request for certification, the Defence submits that "expediency must not trample on its partner fairness" and that "[a]s the Defence is being deprived of [an] opportunity to meaningfully prepare its Defence – especially if leave of any of the Proposed Third Amendment [*sic*] were granted – a fair trial has not been maintained."[78]

2. Defence of Sredoje Lukić

22. In addition to requesting permission to exceed the word limit for its response,[79] the Defence of Sredoje Lukić requests that:

a) the Motion be denied, or in the alternative, should the Motion be granted, and

b) postponement of the trial "for at least six months to ensure adequate time for the preparation of the Defence."[80]

23. With regard to the mode of liability amendment, the Defence submits that the Prosecution has not "provided any legitimate reason" for the delay in seeking leave for these amendments after the deadline set.[81] The Defence submits that it has not been given an adequate opportunity to prepare with regard to an allegation of joint criminal enterprise and that its efforts "in preparation of a strong and truthful alibi defence were based on the premise that the Second Amended Indictment charges the Accused with individual criminal responsibility".[82] The Defence argues that the "phrase 'acting in concert' is not identical with the complex notion of joint criminal enterprise", noting that

[75] Milan Lukić's Response, para. 49, referring to "Milan Lukić's response to 'Prosecution's motion for judicial notice of adjudicated facts' with Annex A'", filed on 28 March 2008, "Milan Lukić's notice of compliance with disclosures and clarification of notice pursuant to Rule 67 (A)(i)(a) and motion for extension of time for filing the remainder", dated 16 June 2008, filed 17 June 2008, and "Milan Lukić's notice of compliance with disclosures and clarification of notice pursuant Rule 67(A)(i)(a), and motion for extension of time for filing the remainder", filed confidentially on 17 June 2008.
[76] Milan Lukić's Response, para. 49.
[77] Milan Lukić's Response, para. 49, referring to "Order rescheduling pre-trial conference", filed on 19 June 2008.
[78] Milan Lukić's Response, para. 51.
[79] Sredoje Lukić's Response, para. 1, where it is argued that the "granting of the [Motion] would have a crucial impact on the rights of Sredoje Lukić [...] to a fair trial and would almost nullify the Defence's efforts made and its work done during the last two and a half years."
[80] Sredoje Lukić's Response, para. 58.
[81] Sredoje Lukić's Response, paras 42, 43.
[82] Sredoje Lukić's Response, para. 46.

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it "could also be understood as meaning aiding or abetting".[83] The Defence further submits that it would constitute a grave violation of the Accused's rights:

> if the Prosecution – upon discovery of the strength and truthfulness of the alibi provided by the Defence – could destroy this alibi by simply extending the mode of liability from individual criminal responsibility to joint criminal enterprise less than a month prior to the trial.[84]

In this respect, the Defence submits that an undue delay would result from the granting of the mode of liability amendment as "the preparation of an alibi defence with regard to Counts 1 and 8-17 would not constitute an effective defence against the proposed mode of liability" and the Defence would need further time to prepare.[85]

24. The Defence submits that the Prosecution would obtain "an improper tactical advantage" should leave to add the new counts be granted.[86] Moreover, it is argued that the rights of the accused in Article 21 of the Statute "and Articles 9(2) and 14(3)(a-c) of the International Covenant on Civil and Political Rights" would be violated.[87] In the Defence's opinion, the deadline set in the workplan is binding on all parties.[88] The Defence submits that "by exercising her discretion and deliberately deciding not to seek leave to amend the Indictment prior to the 15 November 2007, the Prosecutor has waived her power to amend or to seek leave to amend the Indictment pursuant to Rule 50(A)."[89]

25. The Defence submits that the facts underlying the new counts "were not new to the Prosecution"[90] and notes that "the Prosecution had possession of all relevant evidence [...] long before the Defence of Accused first raised the alibi defence in December 2007."[91] With respect to the *Akayesu* case, the Defence submits that while the Prosecution in that case had some statements in relation to the new charges prior to trial, the evidence was not sufficient to link the accused to the

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[83] Sredoje Lukić's Response, para. 47.
[84] Sredoje Lukić's Response, para. 48.
[85] Sredoje Lukić's Response, para. 50. The Defence also makes arguments based on the "principle of equality of arms", referring to contacts between the Defence and the Prosecution concerning photospreads and one particular Prosecution witness who has subsequently been removed from the Prosecution's witness list, *id*, paras 51-57.
[86] Sredoje Lukić's Response, para. 25.
[87] Sredoje Lukić's Response, para. 25. In this context, the Defence takes issue with the Prosecution's submission that the Defence may prepare while the trial is ongoing, *id*, para. 39. The Defence also objects to the Supplementary Motion on the grounds laid down in its response to the Motion, Sredoje Lukić's Supplementary Response, paras 5-7.
[88] Sredoje Lukić's Response, para. 27.
[89] Sredoje Lukić's Response, para. 29, where the Defence also submits that "[t]his waiver is not only binding the particular Prosecutor or his/her senior trial attorney, but the Office of the Prosecutor as such as well as all future Prosecutors and senior trial attorneys in this case". The Defence refers in this respect to the Prosecution's submission that the current Prosecution team is bound by discretionary decisions made earlier in the case, *ibid.*
[90] Sredoje Lukić's Response, para. 30, referring to the statement of counsel for the Prosecution at the 12 June 2008 status conference (T. 172-175) that some of the statements were taken over a decade ago but that the evidence "came to light" in connection with the filing of the Defence notices of alibi.
[91] Sredoje Lukić's Response, paras 34, 36. The Defence also submits that the Prosecution had considered the adding of allegations of crimes of sexual violence at the stage when the Prosecution's application pursuant to Rule 11 *bis* to refer the case to the authorities of Bosnia and Herzegovina was pending, *id*, para. 33, referring to Motion, para. 12. The

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crimes.[92] The Defence refers to the submission of the former counsel for the Prosecution at the status conference on 4 September, who indicated a "possibility of amending this indictment to add some additional charges in respect of Milan Lukić".[93] Based on this, the Defence argues that Sredoje Lukić has not been afforded an adequate opportunity to prepare an effective defence against the new counts, were they to be added at this point in time.[94]

III. DISCUSSION

A. Word limit

26. With regard to the several requests to exceed the word limit, the Chamber recalls that "[m]otions, responses and replies before a Chamber will not exceed 3,000 words".[95] The Chamber further recalls that in order to make written submissions exceeding this limit, the moving party "must seek authorization *in advance* from the Chamber to exceed the word limits in this Practice Direction and must provide an explanation of the *exceptional* circumstances that necessitate the oversized filing" (emphasis added).[96]

27. The Chamber notes that the Motion contains 10,062 words, Milan Lukić's Response contains 6,405 words, Sredoje Lukić's Response contains 9,376 words and the Reply contains 11,016 words.[97] These submissions are drastically longer than permitted. The Chamber is not aware of any reason preventing requests in advance to exceed the word limit. It considers in this respect that the projected length of the Motion could not have been unknown to the Prosecution. Moreover, counsel for the Defence could have made oral applications at the status conference on 12 June 2008. Furthermore, the Prosecution could, in light of the responses, have made a prompt submission in the days following their filing. The Chamber urges the parties to exercise diligence in this respect in the future. The Chamber is mindful of the subject-matter of the Motion and takes particular note of the advanced stage of the proceedings at which the Prosecution has chosen to move for amendment of the indictment. The Chamber therefore considers that there are exceptional circumstances in this case. The requests to exceed the word limit are, therefore, granted. Leave to reply should also be granted.

Defence also refers to the specific dates of several of the proposed evidence, referred to by the Prosecution in the Motion, Sredoje Lukić's Response, para. 33.

[92] Sredoje Lukić's Response, para. 36.

[93] Sredoje Lukić's Response, para. 38, referring to status conference, 4 September 2008, T. 126.

[94] Sredoje Lukić's Response, para. 38, referring not the previous amendments of the indictment and submitting that the Prosecution could have included these counts earlier.

[95] "Practice direction on the length of briefs and motions", IT/184/Rev.2, 16 September 2005, para. 5.

[96] *Id*, para. 7.

[97] Motion, p. 34.

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B. Law on amendment of an indictment

28. It is established that Rule 50 provides a Trial Chamber with a wide discretion to grant the amendment of an indictment.[98] The rule provides in the relevant part:

> (A) (i) The Prosecutor may amend an indictment:
>
> [...]
>
> (c) after the assignment of the case to a Trial Chamber, with the leave of that Trial Chamber or a Judge of that Chamber, after having heard the parties.
>
> (ii) Independently of any other factors relevant to the exercise of the discretion, leave to amend an indictment shall not be granted unless the Trial Chamber or Judge is satisfied there is evidence which satisfies the standard set forth in Article 19, paragraph 1, of the Statute to support the proposed amendment.
>
> [...]
>
> (B) If the amended indictment includes new charges and the accused has already appeared before a Trial Chamber in accordance with Rule 62, a further appearance shall be held as soon as practicable to enable the accused to enter a plea on the new charges.
>
> (C) The accused shall have a further period of thirty days in which to file preliminary motions pursuant to Rule 72 in respect of the new charges and, where necessary, the date for trial may be postponed to ensure adequate time for the preparation of the defence.

29. Pursuant to Article 18(4) of the Statute, the indictment shall contain a concise statement of the facts of the case and of the crime or crimes with which the accused is charged. The Chamber recalls the Appeals Chamber's holding that "the question of whether an indictment is pleaded with adequate particularity is dependent upon whether it sets out the material facts of the Prosecution case with enough detail to inform a defendant clearly of the charges against him so that he may prepare his defence."[99]

30. While the Chamber's discretion to grant leave to amend an indictment is wide, leave to amend will not be granted unless the amendment meets both of the following conditions:

1) it must not result in unfair prejudice to the accused when viewed in light of the circumstances of the case as a whole, and

2) 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.[100]

31. With regard to the first condition, the Chamber endorses the holding of the *Brđanin and Talić* Trial Chamber that:

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[98] *Prosecutor v. Milan Martić*, Case No. IT-95-11-PT, "Decision on the Prosecution's motion to request leave to file a Corrected Amended Indictment", 13 December 2002, para. 21, where it was held that "Rule 50 [...] neither provides any parameters as to the exercise of discretion by a Chamber when seized [of] a Motion to grant leave to amend an indictment nor does it contain any express limits of such discretion." See also *Popović* Decision, para. 8.
[99] *Blaškić* Appeal Judgement, para. 209.
[100] *Popović* Decision, para. 8, with further references.

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> 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 cause 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.[101]

The jurisprudence holds that in order not to cause unfair prejudice to the accused, two further, intertwined elements must be fulfilled. First, the amendment must not deprive the accused of an adequate opportunity to prepare an effective defence.[102] In other words, the question is whether the Defence has been given insufficient notice of the amendment.[103] Secondly, the amendment must not adversely affect the accused's right under Article 21 of the Statute to be tried without undue delay.[104] The Chamber notes that amendment of the indictment is permissible also in the late stages of pre-trial proceedings.[105] However, the closer to trial the Prosecution seeks leave to amend the indictment, the more likely it is that the Trial Chamber will deny the motion on the ground that the accused will be deprived of an adequate opportunity to prepare his defence.[106]

32. Leave to amend the indictment is more likely to be granted where amendments do not result in the addition of new charges, as the addition of such risks delaying the start of trial in view of the procedural requirements of Rule 50(B) and (C), thus adversely affecting the accused's right to a trial without undue delay.[107] The key question in relation to whether an amendment results in a "new charge", is whether the proposed amendment introduces "a basis for conviction that is factually and/or legally distinct from any already alleged in the indictment."[108]

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[101] *Prosecutor v. Brđanin and Talić*, Case No. IT-99-36-T, "Decision on form of further amended indictment and Prosecution application to amend", filed on 26 June 2001, para. 50. See also *Popović* Decision, para. 8.
[102] *Popović* Decision, para. 9, with further references
[103] *Halilović* Decision, paras 23, 36.
[104] *Popović* Decision, para. 9, with further references.
[105] *Popović* Decision, para. 8. See also *Prosecutor v. Dragomir Milošević*, Case No. IT-98-29/1-PT, "Decision on amendment of the indictment and application of Rule 73 *bis* (D)", filed on 12 December 2006 ("*Milošević* Decision"), para. 10.
[106] *Milošević* Decision, para. 10.
[107] *Popović* Decision, para. 10, fns 24 and 25, with further references. In *Halilović*, the Trial Chamber held that if new charges are added "there would be three direct procedural consequences under the Rules, each of which would entail some delay [...] (1) the Accused would have to appear again in accordance with Rules 50(B) and 62 to enter a plea on the new charge; (2) 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 new charge; and (3) 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", *Halilović* Decision, para. 38.
[108] *Halilović* Decision, para. 30. See also *id*, paras 27-28 where an overview is given of what constitutes a new charge, in particular that the amendment alleges a different crime under the Statute, involves the addition of an underlying offence without changing the crime that is alleged under the Statute, or entails the inclusion of treaty provisions which recognise the same conduct as a violation of international law, but without additional factual allegations, reliance on an additional provision of the Statute, or other alteration of the affected count. This Trial Chamber notes that a proposed amendment which alleges "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", *id*, para. 35.

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C. Mode of liability amendment

33. With regard to the first condition noted above, and in that respect, with regard to whether the amendment will deprive the accused of an adequate opportunity to prepare an effective defence, the Chamber notes the Prosecution's acknowledgement that the language used in the indictment "does not reflect the specificity called for" in the jurisprudence of this Tribunal or of the ICTR for the pleading of joint criminal enterprise.[109]

34. The Chamber recalls that according to well established jurisprudence, the Prosecution is required to plead the specific mode or modes of liability with which the accused is being charged.[110] This means that the Prosecution must specifically plead joint criminal enterprise, should it desire to rely upon this mode of liability.[111] Accordingly, the Prosecution must plead the following material facts of joint criminal enterprise: "the nature and purpose of the enterprise, the period over which the enterprise is said to have existed, the identity of the participants in the enterprise, and the nature of the accused's participation in the enterprise."[112] Moreover, in view of the fact that there are several forms of joint criminal enterprise, the Prosecution is required specifically to indicate which form it alleges.[113] To be certain, the required specificity flows from Article 18(4) of the Statute which requires that the Accused be given adequate notice of the charges against him.

35. In this context, the Prosecution submits, firstly, that the words "acting in concert" in paragraphs 3 and 9 of the indictment, in and of themselves and when seen in the context of count 1, persecution, which "encompasses in its sub-paragraphs all of the incidents charged in the indictment", are a clear expression of the Prosecution's theory that the Accused were co-perpetrators in a joint criminal enterprise.[114] In the alternative, the Prosecution submits that "the Prosecution's pre-trial brief or its opening statement can correct infirmities in its indictment".[115] To this end, the Prosecution refers to certain paragraphs of its pre-trial brief in order to establish that any deficiency in the indictment in this respect is cured. The Chamber will consider these submissions in turn.

36. With regard to the first submission, in view of the unambiguous requirements of the jurisprudence concerning the pleading of joint criminal enterprise, the Chamber cannot agree that

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[109] Motion, para. 25.
[110] *Simić* Appeal Judgement, para. 21, with further references.
[111] *Simić* Appeal Judgement, para. 22, with further references, also holding that "it is insufficient for an indictment to merely make broad reference to Article 7(1) of the Statute" as it would not provide sufficient notice to the Defence of the Prosecution's intentions.
[112] *Simić* Appeal Judgement, para. 22, with further references.
[113] *Simić* Appeal Judgement, para. 22, with further references.
[114] Motion, para. 27, and Reply, para. 19 and Annex A to the Reply.
[115] Motion, para. 31, Reply, para. 23.

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the words "acting in concert" are a clear expression of a theory of joint criminal enterprise. The Chamber notes the lack of specific pleading of the nature and purpose of the one or several joint criminal enterprise(s) to which the Prosecution refers in the Motion.[116] Neither does the indictment plead the period over which the enterprise or enterprises is alleged to have existed, nor does it plead the nature of the alleged participation of the Accused. Importantly, there is no mention at all in the indictment of the specific forms of joint criminal enterprise which the Prosecution is charging.

37. The Prosecution submits that the term "acting in concert" was accepted as pleading joint criminal enterprise in *Vasiljević*.[117] Moreover, the Prosecution submits that the fact that in other cases the clarification of pleadings of joint criminal enterprise have been permitted in the pre-trial brief, at the pre-trial conference or during the Prosecution's opening statement are arguments in favour of granting such an amendment at in the present case.[118] In view of the history of the present case as having previously been joined with the *Vasiljević* case, the Prosecution submits that the clarification at the pre-trial conference in *Vasiljević* "[dealt] with the Prosecution's theory of *this* very same case".[119]

38. Requests for leave to amend an indictment are to be considered against the circumstances of the particular case in which they are made.[120] In fact, the Prosecution also recognises this.[121] It is consequently not an argument in favour of a request for leave to amend an indictment that similar amendments have been granted in other cases. The same applies in a situation where a case has previously been joined with another case where an amendment has been granted. In this respect, the Chamber takes particular note of the time that has passed since the severance of the present case from the *Vasiljević* case and the amendments that the Prosecution has sought and been granted previously in both the present case and in the *Vasiljević* case. These arguments of the Prosecution will therefore be disregarded.

39. The Chamber is sensitive to the Defence submission that the phrase "acting in concert" could also be thought to refer to other forms of accessorial liability, such as aiding or abetting. The Chamber notes that the phrase in question is used in paragraphs 3 and 9 of the indictment and, thus, in contexts where the Prosecution also charges aiding and abetting.[122] While the Chamber agrees with the Prosecution that there is no requirement that the phrase "joint criminal enterprise" be used

[116] Motion, paras 32-34.
[117] Reply, para. 19.
[118] Reply, paras 23.
[119] Reply, para. 24.
[120] *Karemera* First Decision, para. 35. In *Halilović*, the Trial Chamber held 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", *Halilović* Decision, para. 22, with further references.
[121] Motion, para. 20.
[122] Indictment, paras 3, 9, 10.

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in order to plead responsibility pursuant to that mode of liability, the Chamber considers that the relevant question is whether the Accused have been meaningfully informed of the nature of the charges so as to be able to prepare an effective defence.[123] In this respect, the Chamber recalls that in *Simić* the Appeals Chamber, "mindful of the jurisprudence [concerning the pleading of joint criminal enterprise]",[124] endorsed the holding in the *Gacumbitsi* Appeal Judgement that "because today ICTY and ICTR cases routinely employ the phrase 'joint criminal enterprise', that phrase should for the sake of maximum clarity preferably be included in future indictments where [joint criminal enterprise] is being charged."[125] The indictment in the present case is not new, in the sense of recently having been confirmed. However, the Chamber considers that the Appeals Chamber's statement must be seen from a practical viewpoint, that is, in the interest of clarity of pleading. It is, therefore, relevant to any request to amend an indictment to include a pleading based on joint criminal enterprise. Fundamentally, an accused should not have to guess as to the specific mode or modes of liability with which the Prosecution is charging him.

40. Turning now to the second and alternative submission of the Prosecution, the Chamber will examine whether the parts of the pre-trial brief to which the Prosecution refers cure the deficiencies in the indictment with respect to a purported pleading of responsibility pursuant to the doctrine of joint criminal enterprise in such a way as to give the Defence adequate notice. However, the Chamber notes the Appeals Chamber's holding in *Kupreškić* that:

> in some instances, a defective indictment 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. Nevertheless, in light of the factual and legal complexities normally associated with the crimes within the jurisdiction of this Tribunal, there can only be a limited number of cases that fall within that category.[126]

Thus, in view of the indictment's serious deficiencies in respect of a purported pleading of joint criminal enterprise, it would be required that the pre-trial brief convincingly establishes the Prosecution's intention to charge the Accused also pursuant to this mode of liability.

41. Paragraph 23 of the pre-trial brief provides that "[b]y 'committed', the Prosecution means that Milan Lukić and Sredoje Lukić acted individually, and in concert with others, in carrying out the acts as alleged in the [indictment]". The Chamber considers that this paragraph does not add any information beyond what is already in the indictment.

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[123] *Simić* Appeal Judgement, referring to Sylvestre *Prosecutor v. Gacumbitsi*, Case No. ICTR-2001-64-A, "Judgement", 7 July 2006 ("*Gacumbitsi* Appeal Judgement") para. 165, and *Prosecutor v. Elizaphan Ntakirutimana and Gérard Ntakirutimana*, Cases Nos. ICTR-96-10-A and ICTR-96-17-A, "Appeal Judgement", 13 December 2004, para. 470.
[124] Here, the Appeals Chamber referenced the jurisprudence referred to in *Simić* Appeal Judgement, paras 21 and 22, which is reproduced *supra* in para. 34, to the extent relevant to the present case.
[125] *Simić* Appeal Judgement, fn. 119, referring to *Gacumbitsi* Appeal Judgement, fn. 380.
[126] *Kupreškić* Appeal Judgement, para. 114.

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42. Paragraph 28 of the pre-trial brief reads (original footnotes included):

> "Committing" covers physically perpetrating a crime or engendering a culpable omission in violation of criminal law," whether alone and/or jointly with coperpetrators.[127] Several perpetrators may "commit" the same crime if each individual fulfils the requisite elements of the substantive offence.[128] The principles enshrined in Article 7(1) thus reflect the basic understanding that individual criminal responsibility for the offences under the Statute is not limited to persons who directly commit the crimes in question.[129]

A plain reading of this paragraph shows that individual criminal responsibility under Article 7(1) may attach both to persons who commit a crime directly and to persons who do not physically commit the crime in question, but who nevertheless fulfil the elements of the substantive offence. However, the paragraph is plainly not restricted to individual criminal responsibility based on the doctrine of joint criminal enterprise. The Chamber therefore concludes that the paragraph does not indicate that the Prosecution intends to charge the Accused pursuant to this mode of liability. Moreover, the Chamber notes that in the following paragraph of the pre-trial brief, the Prosecution restricts itself to submitting that:

> [t]he Second Amended Indictment alleges, inter alia, that Milan LUKIĆ and Sredoje LUKIĆ are criminally responsible under Article 7(1) of the Statute for committing, either alone and/or in concert with others, the crimes charged.

The Prosecution does not provide any further information that the words "acting in concert" would specifically refer to joint criminal enterprise.

43. The judgements referred to in paragraph 28 must be reviewed in order to assess whether the Defence is given notice of a pleading of joint criminal enterprise. The referenced paragraph in *Krstić* canvasses the elements of the various modes of liability under Article 7(1) of the Statute. While joint criminal enterprise is included, the paragraph also describes the several other modes of liability covered by the article, including "committing", in the sense of physically committing a crime, and aiding and abetting. The Chamber considers that this reference is understandable in view of the subject-matter of paragraph 28. However, it does not specifically support a purported plea of joint criminal enterprise.

44. The paragraph referred to from the *Kunarac* Trial Judgement provides that:

> [a]n individual can be said to have "committed" a crime when he or she physically perpetrates the relevant criminal act or engenders a culpable omission in violation of a rule of criminal law. There

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[127] *Krstić* Trial Judgement, para. 601; *Prosecutor v. Dragoljub Kunarac et al*, "Judgement", Case Nos. IT-96-23-T &IT-96-23/1-T, "Judgement", 22 February 2001 ("*Kunarac* Trial Judgement") [paragraph unspecified].
[128] *Kunarac* Trial Judgement, para. 390.
[129] *Prosecutor v. Delalić et al.*, Case No. IT-96-21-T, "Judgment", 16 November 1998 ("*Delalić* Trial Judgement"), para. 328, *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-T, "Judgement", 3 March 2000, para. 286.

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> can be several perpetrators in relation to the same crime where the conduct of each one of them fulfills the requisite elements of the definition of the substantive offence.[130]

This paragraph closely mirrors paragraph 28 itself and does not add any new information in respect of a purported pleading of joint criminal enterprise.

45. The paragraph referenced in the *Delalić* Trial Judgement is situated in the section which generally concerns "individual criminal responsibility under Article 7(1)"[131], specifically "degrees of involvement in a crime under the Tribunal's jurisdiction which do not constitute a direct performance of the acts which make up the offence".[132] The paragraph discusses the *mens rea* of participation as an aider and abettor[133] and provides, *inter alia*, that it is not "required that the Trial Chamber find that there was a pre-existing plan to engage in the criminal conduct in question". The paragraph further provides that:

> where such a plan exists, or where there otherwise is evidence that members of a group are acting with a common criminal purpose, all those who knowingly participate in, and directly and substantially contribute to, the realisation of this purpose may be held criminally responsible under Article 7(1) for the resulting criminal conduct.

The paragraph concludes by stating that "[d]epending on the facts of any given situation, the culpable individual may, under such circumstances, be held criminally responsible either as a direct perpetrator of, or as an aider and abettor to, the crime in question." While the paragraph does refer to "common criminal purpose" and "pre-existing plan", it does not exclusively deal with that mode of liability. In terms of providing notice of a purported pleading of joint criminal enterprise, the Chamber considers this paragraph to be insufficient.

46. Paragraphs 71 and 85 of the pre-trial brief each contains a mention of "common criminal plan". However, the Prosecution does not give further information concerning what the alleged "common criminal plan" encompassed, something which would have been logical to do, in view of the jurisprudence on joint criminal enterprise, had the Prosecution intended to plead this mode of liability. The Chamber therefore considers that also these paragraphs are insufficient to give notice of a pleading of joint criminal enterprise.

47. In the Reply, the Prosecution also refers to paragraph 128 of the pre-trial brief, where the Prosecution stated that "in this case, the violence perpetrated against the civilian population by the Accused was part of a common criminal plan."[134] The Chamber notes that this paragraph is situated

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[130] *Kunarac* Trial Judgement, para. 390. In view of the substance of this paragraph, the Chamber considers it likely that the Prosecution intended to refer also to this paragraph in the unspecified reference to *Kunarac* in paragraph 28 of the pre-trial brief.
[131] *Delalić* Trial Judgement, heading III.F.
[132] *Delalić* Trial Judgement, para. 326.
[133] *Delalić* Trial Judgement, para. 327.
[134] Reply, para. 19.

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under the heading "Crimes against humanity". In paragraph 127, the Prosecution refers to the general requirement of Article 5 of the Statute that the crimes charged must have formed part of a widespread or systematic attack directed against a civilian population. In paragraph 128, the Prosecution states that "Bosnian Muslims and other non-Serbs civilians were murdered and subjected to cruel and inhumane treatment on a widespread and systematic basis" and that the Accused "knowingly committed, alone and/or in concert with others, or aided and abetted the commission of the crimes as part of this large scale attack against Bosnia's non-Serb civilian population." In the sections following this section, the Prosecution makes submissions on the law in relation to each crime against humanity charged in the indictment. The Chamber considers that this paragraph, while it refers to a "common criminal plan", is concerned with the general requirements for applicability of Article 5 of the Statute. As such, it does not provide sufficient notice of a pleading of joint criminal enterprise.

48. For the above reasons, the Chamber holds that the paragraphs referred to in the Prosecution's pre-trial brief do not provide "timely, clear and consistent information" of a purported pleading of joint criminal enterprise in such a way as to put the Defence on notice. The paragraphs in question are thus insufficient to cure the deficiencies in the indictment in this respect.

49. Essentially, this means that by the Motion the Prosecution seeks to include a new mode of liability. As a preliminary point, the Chamber considers that the inclusion of a new mode of liability constitutes a basis for conviction that is legally distinct from any already alleged in the indictment.[135] It is therefore a new charge within the meaning of Rule 50(C).

50. With regard to whether the amendment of the indictment at this point of the proceedings causes unfair prejudice to the Accused, specifically whether the amendment will deprive the accused of an adequate opportunity to prepare an effective defence, the Chamber recalls that the Motion was initially filed on 12 June 2008, thus just under a month prior to the start of trial. It follows from the Chamber's findings above, that the Defence has not been given adequate notice by the indictment or by the pre-trial brief, when considered in light of the indictment. While the Chamber would be persuaded on this basis alone that granting the amendment would deprive the Accused of an adequate opportunity to prepare an effective defence against the new charge of joint criminal enterprise, it will consider to which extent the Defence may have been on notice based on past events.

51. The Motion was filed several months after the deadline in the workplan, a deadline to which former lead counsel for the Prosecution, Mr. Mark Harmon, agreed at the status conference on 4

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September 2007 upon the pre-trial Judge's specific question.[136] On the same occasion, Mr. Harmon indicated that he had raised with the Defence the possibility of an amendment of the indictment.[137] However, in view of the fact that Mr. Harmon due to restaffing would not be lead counsel in this case, he would consult with his successor, concerning *inter alia* "the possibility of amending this indictment to add some additional charges in respect of Milan Lukic".[138] While the Defence is correct in submitting that deadlines set in a workplan adopted pursuant to Rule 65 *ter*(D)(ii) are binding upon the parties, there is nothing to prevent a party from seeking and being granted an extension of a particular deadline upon a showing good cause. The Chamber notes in this respect the Prosecution's submission that Mr. Groome, the current lead counsel and Mr. Harmon's successor, returned to the Tribunal on 12 December 2007. In the Chamber's view, it would have constituted good cause for an extension of the deadline that a meaningful consultation could not be carried out until Mr. Groome had taken up his duties after the expiration of the deadline. The Prosecution should, thus, have requested an extension of the deadline if this became apparent.[139]

52. The Prosecution submits that the reason it did not request an amendment prior to the set deadline was that the Prosecutor in the exercise of her discretion decided that amendments which would add to the length of the trial should not be sought.[140] Thus, amendment of the indictment, generally speaking, was being considered prior to the deadline. The Prosecution also submits that the Proposed Third Amended Indictment "does not contain any additional material facts to support the joint criminal enterprise and relies on the same evidence submitted in support of the original indictment".[141] It is therefore difficult to understand why the Prosecution did not seek leave to amend the indictment prior to the deadline in order to properly plead joint criminal enterprise as such an amendment was perceived as not lengthening the trial.

53. Several status conferences and Rule 65 *ter* conferences were held subsequent to the expiration of the 15 November 2007 deadline and prior to the filing of the Motion. However, the Prosecution did not refer to a possible amendment of the indictment at any of these status

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[135] *Halilović* Decision, para. 30.
[136] Status conference, 4 September 2007, T. 126.
[137] Status conference, 4 September 2007, T. 126.
[138] Status conference, 4 September 2007, T. 125.
[139] The Chamber notes the Prosecution's submission that "[t]he deadlines that are set pursuant to Rule 65*ter* (D)(ii) should not foreclose the Prosecution from asking the pre-trial chamber to consider any matters that are permitted under the rules, in this case Rule 50. Rather, Rule 65*ter* considered in its entirety, contemplates that the process will be fluid and adaptions will necessarily arise given the circumstances of each case", Reply, para. 7. In this respect, the Prosecution draws attention to the language of Rule 65 *ter* (D)(ii) that a workplan shall be established "indicating, *in general terms*, the obligations that the parties are required to meet". From this, the Prosecution concludes that "by its very nature, Rule 65*ter* anticipates that issues will arise that may require modifications to the work plan", Reply, para. 8. As noted above, the Chamber considers that a workplan may be amended upon showing on good cause. Thus, where a workplan has been adopted and sets deadlines affecting parties' obligations under the Rules of Procedure and Evidence, those deadlines are to be adhered to.
[140] Motion, para. 14.

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conferences or Rule 65 *ter* conferences.[142] Furthermore, as noted above, the pre-trial brief does not contain sufficient reference to a pleading of joint criminal enterprise. Thus, not even in that brief did the Prosecution state its intention to charge the Accused with participation in a joint criminal enterprise.

54. Against this background, the Chamber cannot but conclude that the Prosecution has not acted diligently in approaching this matter and that the Defence as a result has not been given adequate notice. In this regard, it is pertinent for the Chamber to recall Mr. Harmon's statement on 4 September 2007 that the deadline of 15 November 2007 for the filing of a motion to amend the indictment was "satisfactory".[143]

55. As the Chamber holds that granting of this amendment would deprive the Accused of an adequate opportunity to prepare an effective defence, the Chamber need not consider the second element, that is whether the amendment would adversely affect the accused's right under Article 21 of the Statute to be tried without undue delay.[144] However, it is implicit in the above finding, when seen in the light of the fact that the trial will start shortly – and rarely could that description be more appropriate – that also this element is not met.

56. The motion to amend the indictment to include a pleading of joint criminal enterprise will consequently be denied.

D. New counts

57. With regard to whether the amendment will deprive the Accused of an adequate opportunity to prepare an effective defence, the Chamber will first consider whether sufficient notice has been given in the past by the Prosecution.

58. The Chamber notes that the only previous reference by the Prosecution to the effect that it was considering the addition of new counts was made at the status conference on 4 September 2007 and then solely in respect of Milan Lukić.[145] As noted above, the Chamber considers that by not acting in pursuance of the Prosecution's statement, the Defence was right to expect that further amendments of the indictment would not be requested by the Prosecution.

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[141] Motion, para. 31. See also Reply, para. 25.
[142] Status conferences were held on 11 December 2007, that is the day before Mr. Groome returned, on 12 March 2008 and on 12 Jun 2008. At the status conference on 12 June 2008, it was noted that the Motion had been filed (T. 172). Rule 65 *ter* conferences were held on 10 December 2007, on 11 March 2008, on 21 May 2008, on 23 May 2008, and on 28 May 2008.
[143] Status conference, 4 September 2007, T. 126. See also *supra* para. 51.
[144] *Halilović* Decision, para. 36.
[145] Status conference, 4 September 2007, T. 126.

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59. The Prosecution hinges its request for leave to amend the indictment in this respect predominantly upon the protracted submission of the Defence alibi notices. In this respect, the Prosecution submits that as soon as it received indications of the Defence alibis, it began to review its evidence collection for sightings of the Accused.[146] This analysis of the Prosecution's evidence collection, it is submitted, "revealed that some of the witnesses that would be called to rebut the alibi evidence of the Accused implicated them in very serious sex crimes."[147]

60. According to the Prosecution's own submission, the "facts are not new"[148] and many of the sources of information to which the Prosecution refers date several years back.[149] The Chamber notes that most of the material referred to has been in the Prosecution's possession for a significant time.[150] The Chamber further notes that on two occasions the Prosecutor herself considered to amend the indictment in this case to include new charges of sexual violence.[151] Significantly, prior to the expiry of the deadline on 15 November 2007, the Prosecutor:

> exercised her discretion not to seek an amendment on [*sic*] the indictment prior to the 15 November 2007, in part, based upon her belief that amending the indictment to include new charges of sex crimes would lengthen the Prosecution's case. She had taken the position that fulfilling her obligations to conclude the work of the Prosecutor in the time frame mandated by the UN Security Council did not permit an amendment to add sex crimes charges which she believed would add to the length of the trial. She directed her staff to prepare the case for trial as expeditiously as possible.[152]

61. In the Chamber's opinion, the fact that the Prosecutor at that point in time decided not to seek leave to amend the indictment would not, as a matter of principle, prevent the Prosecution from seeking leave to amend at a subsequent point in time. However, the fact the Prosecutor considered whether to seek leave to amend the indictment in this particular case prior to the expiry of the applicable deadline means that the Prosecution was considering to amend the indictment in view of evidence which the Prosecution already had in its collection of evidence. Thus, contrary to the Prosecution's submission, it is clear that the Prosecution did not need the information contained in the Defence alibi notices in order to seek leave to amend the indictment. The Chamber would have been more sympathetic to the Prosecution's request had the Prosecution diligently informed the Chamber and the Defence of the possibility of a potential amendment as and when it was carrying out its evidence review in connection with the submitted alibi notices. It would have been

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[146] Motion, para. 16, Reply, para. 37, where the Prosecution submits that it "returned to its evidence body with the aim of including evidence to refute the vague hints of alibi defences".
[147] Motion, para. 16.
[148] Motion, para. 56.
[149] See *supra* para. 13.
[150] Motion, paras 60-64, 68-71. See also status conference, 12 June 2008, T. 173-175, where Mr. Groome confirmed that the evidence concerning the new counts had been in the Prosecution's possession prior to the submission of the Defence alibi notices and that the evidence "came to light" in the course of the Prosecution's investigation into the alibi notices.
[151] Motion, paras 12, 14.
[152] Motion, para. 14.

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incumbent upon the Prosecution to do so also in view of the fact that it had previously alerted the Chamber to a possibility of a future amendment to include new counts, yet not acted accordingly, and that at every status conference since the setting of the workplan the parties had been told that the case could likely to go trial from mid-2008.[153] However, at no point in time from the expiry of the deadline until the submission of the motion did the Prosecution provide information in this respect. The Prosecution's reason for not seeking leave to amend, when considering such action, was related to the expediency of the trial.[154]

62. Based on the above, the Chamber concludes that the Prosecution has not acted with the required diligence in submitting the Motion timely in such a way as to provide adequate notice of the requested amendment to the Defence. Moreover, the Chamber recalls that the addition of new counts amounts to the inclusion of new charges in an indictment and, thus, triggers the procedural requirements of Rule 50.[155] In view of the imminent start of the trial, the granting of the amendment would adversely affect the Accused's right under Article 21 of the Statute to be tried without undue delay.

63. The Chamber notes the Prosecution submission that it has sought to strike an appropriate balance "between the justice due victims whose evidence will now unavoidably be part of this trial and the right to a fair trial which the Accused are entitled to under the Statute of this Tribunal and international law".[156] Moreover, the Chamber notes the submission, that were the amendment to be denied, the Prosecution would be in the:

> unsatisfactory position of calling [the witnesses] to testify with the possibility that the Trial Chamber may consider as irrelevant the evidence that they were raped and limit their testimony to their simple viewing of the Accused at the time and place in which they were raped.[157]

In this respect, the Prosecution argues that the victims of the alleged crimes with which the Prosecution seeks to charge the Accused "are entitled to an adjudication of the Accused's guilt on these crimes"[158] and that "failure to prosecute the Accused for these crimes while prosecuting them for other international criminal law violations emerging from the same fact pattern would result in a miscarriage of justice."[159] There is no miscarriage of justice in the present circumstances. But in any event, the Chamber is constrained to point out that the standard to be applied in assessing whether to grant requested amendments is not whether not doing so would result in a miscarriage of justice;

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[153] Status conference, 9 September 2007, T. 123, Status conference, 11 December 2007, T. 141, Status conference, T. 154, 166, 169.
[154] Motion, para. 14; see *supra* para. 12.
[155] See *supra* para. 32 and *Halilović* Decision, para. 38.
[156] Motion, para. 17.
[157] Motion, para. 38.
[158] Motion, para. 38.
[159] Motion, para. 66.

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rather, it is whether the amendment results in unfair prejudice to the accused when viewed in light of the circumstances of the case as a whole.

64. The Chamber will therefore deny the proposed inclusion of the five new counts.

E. Defence Request

65. Insofar as the Defence Request pertains to a reconsideration of the Order of 19 June 2008, the Chamber recalls that:

> a Chamber has inherent discretionary power to reconsider a previous interlocutory decision in exceptional circumstances if "a clear error of reasoning has been demonstrated or if it is necessary to do so to prevent injustice".[160]

The Chamber finds that the Defence of Milan Lukić has not established a clear error of reasoning on the part of the Chamber or that it would be necessary to reconsider the decision in order to prevent an injustice. The Defence Request will therefore be denied in this respect.

66. Insofar as the Defence Request concerns a request for certification to appeal the Order of 19 June 2008, the Chamber recalls that pursuant to Rule 73(B) decisions on all motions:

> are without interlocutory appeal save with certification by the Trial Chamber, which may grant such certification if the decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

The purpose of a request for certification to appeal is not to show that an impugned decision is incorrectly reasoned but rather to demonstrate that the two cumulative conditions set out in Rule 73 (B) have been met. The Chamber notes that the Defence makes its request contingent particularly upon the granting of any part of the Motion, which, as noted above, will be denied in its entirety. However, even if the Motion or parts thereof were not denied, the Chamber finds, in view of the fact that the trial will commence shortly, that an immediate resolution by the Appeals Chamber would not materially advance the proceedings.

67. The Chamber will therefore deny Defence Request for certification.

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[160] *Prosecutor v. Juvénal Kajelijeli*, Case No. ICTR-98-44A, "Judgement", 23 May 2005, paras 203-204. See further *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-*AR108bis*.3, "Decision on request of Serbia and Montenegro for review of the Trial Chamber's decision of 6 December 2005", filed confidentially on 6 April 2006, para. 25, n. 40; *Prosecutor v. Rasim Delić*, Case No. IT-04-83-PT, Decision on the Prosecution Motion for Reconsideration, 23 August 2006, pp 3-4.

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IV. DISPOSITION

68. For the foregoing reasons, the Chamber **GRANTS** leave to exceed the word limit and to file the Reply, and **DENIES** the Motion, the Supplemental Motion and the Defence Request in their entirety.

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

Judge Patrick Robinson
Presiding

Dated this eighth day of July 2008
At The Hague
The Netherlands

[Seal of the Tribunal]

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