



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-95-5/18-PT

Date: 26 February 2009

Original: English

IN THE TRIAL CHAMBER

Before: Judge Iain Bonomy, Presiding
Judge Christoph Flügge
Judge Michèle Picard

Acting Registrar: Mr. John Hocking

Decision of: 26 February 2009

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

**DECISION ON PROSECUTION MOTION
TO RECONSIDER THE TRIAL CHAMBER'S DECISION
ON THE MOTION TO AMEND THE FIRST AMENDED INDICTMENT**

Office of the Prosecutor:

Mr. Alan Tieger
Mr. Mark B. Harmon
Ms Hildegard Uertz-Retzlaff

The Accused:

Mr. Radovan Karadžić

THIS TRIAL CHAMBER of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991 (“Tribunal”) is seised of the “Prosecution Motion for Reconsideration of the Trial Chamber’s Decision to Amend the First Amended Indictment and Urgent Request for a Stay of the Trial Chamber’s Order to File a Second Amended Indictment”, filed on 17 February 2009 with Confidential Annex A (“Motion”), and hereby renders its decision thereon.

I. Procedural background

1. On 22 September 2008 the Prosecution filed its “Motion to Amend the First Amended Indictment” (“Motion to Amend”), in which, pursuant to Rule 50 of the Rules of Procedure and Evidence of the Tribunal (“Rules”), it requested leave to make certain amendments to the amended indictment confirmed on 31 May 2000 in respect of the Accused¹ in the form of a “Proposed Second Amended Indictment”.² The Motion to Amend was accompanied by Confidential Appendix C, the supporting materials for the Proposed Second Amended Indictment, in CD-ROM form.

2. The proposed amendments included, *inter alia*, allegations, under several counts, of killing incidents not specifically alleged in the First Amended Indictment.³ One of these additional incidents was the killing of 140 detainees at Sušica camp on or about 30 September 1992 (“Incident 18.2 of Schedule B”).⁴ On 16 February 2008 the Trial Chamber issued its “Decision on the Motion to Amend the First Amended Indictment” (“Indictment Decision”), in which it granted, in large part, the Motion to Amend, but found, after reviewing the material provided by the Prosecution to support the new allegations, that Incident 18.2 was “not adequately supported by the one supporting document provided, which mentions only 9 persons killed in Sušica”, and that “[i]f the Prosecution intends to include that allegation, that incident must be confined to the killing of 9 persons”.⁵ The Trial Chamber ordered the Prosecution to file a Second Amended Indictment to reflect the Indictment Decision by noon on Wednesday 18 February 2009.⁶

¹ *Prosecutor v. Karadžić*, Case No. IT-95-5/18-I, Amended Indictment, 24 May 2000 (“First Amended Indictment”); confirmed by Judge Wald in *Prosecutor v. Karadžić, Ex Parte* and Under Seal, Case No. IT-95-5/18-I, Order Granting Leave to Amend the Indictment and Confirming the Amended Indictment, 31 May 2000.

² Motion to Amend, Appendix B, Proposed Second Amended Indictment.

³ See for example Motion to Amend, para. 28, footnote 14.

⁴ Proposed Second Amended Indictment, Schedule B, para. 18.2; cf First Amended Indictment, para. 22.

⁵ Indictment Decision, para. 43.

⁶ Indictment Decision, para. 54.

3. Two elements of the instant Motion have already been dealt with by the Trial Chamber—namely, the Prosecution’s urgent request to the Trial Chamber “to stay its order to the Prosecution to file a Second Amended Indictment without Incident 18.2 of Schedule B by 18 February 2009 at noon while [the] motion for reconsideration is pending”,⁷ and its additional request for an immediate temporary stay in order to provide the Accused with adequate time to respond to the Prosecution’s request for a stay of the order for the period during which the motion for reconsideration is pending (together, the “Requests for Stay”).⁸ The Requests for Stay were determined on an expedited basis by the Trial Chamber, and were both denied in its “Order on Prosecution Urgent Requests for Stay of the Trial Chamber’s Order to File a Second Amended Indictment” of 18 February 2009 (“Order on Requests for Stay”). Accordingly, the Prosecution filed the Second Amended Indictment in English and B/C/S as originally ordered in the Indictment Decision on Wednesday 18 February 2009.⁹

4. Having notified the parties in the Order on Requests for Stay that the remaining element of the Motion (“Motion for Reconsideration”) would be addressed during the Status Conference on Friday 20 February 2009, the Pre-Trial Judge at that Status Conference asked the Accused whether he opposed the Motion for Reconsideration.¹⁰ The Accused responded affirmatively.¹¹ The Pre-Trial Judge, considering that the Motion for Reconsideration “procedurally is fairly minor in the overall context of the process so far and, in particular, in the overall context of the Motion to Amend the Indictment”, restricted the time limit for the Accused’s response to the Motion for Reconsideration to the 25 February 2009.¹² The Accused’s further appearance on the Indictment was then adjourned pending determination of the Motion for Reconsideration.

5. In his “Motion for Extention [sic] of Time to File Response to Prosecution Motion for Reconsideration”, filed on 24 February 2009 (“Motion for Extension of Time”), the Accused stated that he would like to consult with his legal associate on whether to raise the issue that a lack of diligence on the part of the Prosecution may constitute grounds for objecting to further amendments to the indictment, and requested an extension of the time limit to respond to the Motion for Reconsideration. The Trial Chamber denied this Motion for Extension of Time in its “Decision on Accused Motion for Extension of Time to File Response to Prosecution Motion for Reconsideration”, filed on 25 February 2009.

⁷ Motion, paras 6, 7.

⁸ Motion, paras 6, 7.

⁹ Prosecution’s Second Amended Indictment, 18 February 2009.

¹⁰ Status Conference, 20 February 2009, T. 110.

¹¹ Status Conference, 20 February 2009, T. 110.

¹² Status Conference, 20 February 2009, T. 110.

II. Submissions

6. In the Motion for Reconsideration, the Prosecution requests the Trial Chamber “to reconsider its finding that Incident 18.2 of Schedule B of the Proposed Second Amended Indictment was not adequately supported”.¹³ It explains that, although supporting material for this alleged incident exists, “the Prosecution failed to provide [it] due to a clerical mistake”. Instead, the Prosecution linked the same transcript extract it had used in support of Incident 18.1 of Schedule B—alleging the killing of approximately 9 men from Sušica camp—to Incident 18.2 of Schedule B, whereas “a different transcript should have been linked to Incident 18.2”.¹⁴ In Confidential Annex A to the Motion, the Prosecution attaches the relevant supporting document, which should originally have been provided with the Motion to Amend. The Prosecution requests the Chamber to allow inclusion of Incident 18.2 of Schedule B in the Second Amended Indictment, on the basis of this newly-provided material.¹⁵

7. The Prosecution, submitting that “Incident 18.2 is an important scheduled killing”,¹⁶ avers that it has satisfied the test for reconsideration, since “allowing the Prosecution to rectify this oversight would prevent injustice”, in that “[t]he Chamber should not be deprived of determining the Accused’s responsibility, if any, for this scheduled killing on account of a clerical mistake by the Prosecution”, and that “allowing the Prosecution to correct this mistake would prevent injustice towards the many victims of this incident who deserve an accounting of the Accused’s responsibility, if any, for this incident”.¹⁷ The Prosecution further submits that reconsideration “would not cause any unfair prejudice to the Accused” and that “[a]ny resulting delay would be short, and, in the context of these proceedings as a whole, negligible”.¹⁸

8. Following the denial of his Motion for Extension of Time, the Accused made no written submissions in response to the Motion for Reconsideration.

III. Applicable law

9. The Appeals Chamber has definitively articulated the legal standard for reconsideration of a decision as follows: “a Chamber has inherent discretionary power to reconsider a previous

¹³ Motion, paras 1, 7.

¹⁴ Motion, para 2.

¹⁵ Motion, para. 7.

¹⁶ Motion, para. 3.

¹⁷ Motion, para. 4.

¹⁸ Motion, para. 5.

interlocutory decision in exceptional cases ‘if a clear error of reasoning has been demonstrated or if it is necessary to do so to prevent injustice.’¹⁹

10. The Trial Chamber also refers to Rule 50, which provides in relevant part:

(A)(i) The Prosecutor may amend an indictment:

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

(ii) Independently of 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.

11. Thus, a Trial Chamber has wide discretion to allow an indictment to be amended,²⁰ but will not grant leave to amend unless the 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; and (b) if the proposed amendment is material,²¹ it must be supported by documentation or other evidence meeting the *prima facie* standard set forth in Article 19 of the Statute.²²

12. 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

¹⁹ *Prosecutor v. Milošević*, Case No. IT-02-54-AR108bis.3, Confidential Decision on Request of Serbia and Montenegro for Review of the Trial Chamber’s Decision of 6 December 2005, para. 25, note 40 (quoting *Kajelijeli v. Prosecutor*, Case No. ICTR-98-44A-A, Judgement, 23 May 2005, paras. 203–204); see also *Ndindabahizi v. Prosecutor*, Case No. ICTR-01-71-A, Decision on Defence “Requête de l’Appelant en Reconsidération de la Décision du 4 avril 2006 en Raison d’une Erreur Matérielle”, 14 June 2006, para. 2.

²⁰ *Prosecutor v. Popović et al.*, Case No. IT-05-88-PT, Decision on Further Amendments and Challenges to the Indictment, 13 July 2006 (“Popović Decision”), para. 8; *Prosecutor v. Delić*, Case No. IT-04-83-PT, Decision on Defence Motion Alleging Defects in the Form of the Indictment and Order on Prosecution Motion to Amend the Indictment, 13 December 2005, para. 62 (“Delić Decision”); *Prosecutor v. 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.

²¹ *Prosecutor v. Delić*, Case No. IT-04-83-PT, Decision on the Prosecution’s Submission of Proposed Amended Indictment and Defence Motion Alleging Defects in Amended Indictment, 30 June 2006, para. 30, holding that “it would be inaccurate to say that supporting material must in all cases be provided for every single proposed amendment, no matter how minor”, and requiring supporting material only for “every material proposed amendment”.

²² *Popović Decision*, para. 8; *Boškoski and Tarčulovski Decision*, paras 10, 13–14; *Milutinović et al. Decision*, para. 10; *Prosecutor v. Halilović*, Case No. IT-01-48-PT, Decision on Prosecutor’s Motion Seeking Leave to Amend the Indictment, 17 December 2004 (“Halilović Decision”), para. 22; *Prosecutor v. Beara*, Case No. IT-02-58-PT, Decision on Prosecution Motion to Amend the Indictment, 24 March 2005 (“Beara Decision”), p. 2.

would (if not contradicted by the Defence) be a sufficient basis to convict the accused on the charge”.²³

13. The case law of the Tribunal identifies two key 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 defence, and second, it must not adversely affect the accused’s right under Article 21 of the Statute to be tried without undue delay.²⁴

14. It is settled jurisprudence that the issue of notice is relevant to the assessment of whether leave to amend should be granted.²⁵ Therefore, when assessing the prejudicial effect, if any, of proposed amendments, the Trial Chamber will examine whether the accused is provided with sufficient notice of the scope and nature of the new allegations against him.²⁶ 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.²⁷ The Trial Chamber will also 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.²⁸

15. In considering the second factor, the possibility of delay in proceedings must be weighed against the benefits the amendment may bring to both the accused and the Trial Chamber, 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.²⁹ Moreover, in the case of *Prosecutor v. Karemera et al.*, the Appeals Chamber 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

²³ *Popović* Decision, 13 July 2006, para. 36; *Prosecutor v. Stanišić and Simatović*, Case No. 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.

²⁴ *Popović* Decision, paras 9–10; *Boškoski and Tarčulovski* Decision, para. 10; *Milutinović et al.* Decision, para. 10; *Halilović* Decision, para. 23; *Beara* Decision, p. 2; *Prosecutor v. Dragomir Milošević*, Case No. IT-98-29/1-PT, Decision on Amendment of the Indictment and Application of Rule 73 bis(D), 12 December 2006 (“*Dragomir Milošević* Decision”), paras 10–11; *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-AR73, Decision on Prosecutor’s Interlocutory Appeal Against Trial Chamber III Decision of 8 October 2003 Denying Leave to File an Amended Indictment, 19 December 2003, para. 13 (“*Karemera* Decision”).

²⁵ *Halilović* Decision, para. 23; *Boškoski and Tarčulovski* Decision, para. 11.

²⁶ *Popović* Decision, para. 21.

²⁷ *Popović* Decision, para. 9.

²⁸ *Dragomir Milošević* Decision, para. 10; *Delić* Decision, para. 62.

Prosecution in advancing the case and the timeliness of the [Prosecution's request to amend the indictment]”.³⁰

16. Undue delay could result if, for example, the amendment constitutes a new charge against the accused, in which case the procedures governing a further plea to the charges as set out under Rule 50(B) and (C) must be observed. The time required to realise these procedures, when considered in the circumstances of a given case, could amount to undue delay causing unfair prejudice to the accused.³¹

17. 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 set out in the case of *Prosecutor v. 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.³²

IV. Discussion

18. Before determining the Motion for Reconsideration, the Trial Chamber must examine whether the Prosecution has now established a *prima facie* case in relation to Incident 18.2 of Schedule B, and whether its inclusion would unfairly prejudice the Accused.

19. The Trial Chamber has examined the supporting document provided in Confidential Appendix A to the Motion, and concludes that it establishes a *prima facie* case in relation to Incident 18.2 of Schedule B.

20. Further, the Trial Chamber notes that the additional material in support of Incident 18.2 of Schedule B consists of one witness statement, and considers that the inclusion of this material would not have a significant impact threatening the adequacy of the Accused's opportunity to prepare a defence. The Trial Chamber is naturally concerned that the Prosecution made such a mistake when dealing with crucially important material. However, the Trial Chamber recognises the difficulties that the parties face in dealing with such a complex case, that immediate steps were taken to try to rectify the problem, and that the Prosecution has provided an apology in its Motion for Reconsideration.

²⁹ *Popović* Decision, para. 10; *Boškoski and Tarčulovski* Decision, para. 12.

³⁰ *Karemera* Decision, para. 15; *Boškoski and Tarčulovski* Decision, para. 10; *Milutinović et al.* Decision, para. 10; *Beara* Decision, p. 2; *Halilović* Decision, para. 23; *Popović* Decision, para. 10.

³¹ *Dragomir Milošević* Decision, para. 11; *Popović* Decision, para. 10; *Halilović* Decision, para. 24.

³² *Halilović* Decision, para. 30; *Beara* Decision, p. 2.

21. The Trial Chamber considers that exclusion of the new incident from the Indictment, an incident which the Prosecution intended to include as an “important” event, could result in injustice. However, the new incident does constitute a new charge under the *Halilović* test, which means that failure to deal with it in the context of the reconsideration of the Indictment Decision would have a significant impact upon the trial schedule. Another motion to amend the indictment would have to be tendered and the Accused would have to be given an opportunity to respond to that motion. This could give rise to a further series of preliminary motions. More importantly, this outcome would not be conducive to the good management of the case and could cause confusion and uncertainty, were there to be two different timescales for the filing of preliminary motions. The Indictment should at this stage be dealt with as a unity within a single time scale, in order to avoid procedural confusion. Against this background, the Trial Chamber considers it necessary to reconsider its Indictment Decision to prevent injustice.

22. Under these circumstances, the Trial Chamber will exercise its discretion to reconsider the Indictment Decision, and will order the Prosecution to file a Third Amended Indictment including Incident 18.2 of Schedule B. As that Indictment will contain a new charge, the Trial Chamber will schedule a further appearance of the Accused pursuant to Rule 50(B) so that he may have the opportunity to enter a plea on that charge, as well as to all other charges in the Third Amended Indictment.

V. Disposition

23. Accordingly, the Trial Chamber, pursuant to Rules 54 and 73 of the Rules, hereby:
- a. **GRANTS** the Prosecution's Motion for Reconsideration of the Indictment Decision;
 - b. **ORDERS** the Prosecution to file a Third Amended Indictment including Incident 18.2 of Schedule B by Friday, 27 February 2009 at noon; and
 - c. **SCHEDULES** a further appearance of the Accused for Tuesday, 3 March 2009 at 2.15 p.m.

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



Judge Iain Bonomy
Presiding

Dated this twenty-sixth February 2009
At The Hague
The Netherlands

[Seal of the Tribunal]