



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-05-88/2-PT

Date: 16 December 2009

Original: English

IN TRIAL CHAMBER II

Before: Judge Kimberly Prost, Presiding
Judge Christoph Flügge
Judge Antoine Kesia-Mbe Mindua

Registrar: Mr. John Hocking

Decision of: 16 December 2009

PROSECUTOR

v.

ZDRAVKO TOLIMIR

PUBLIC

**WRITTEN REASONS FOR DECISION ON PROSECUTION MOTION TO
AMEND THE SECOND AMENDED INDICTMENT**

Office of the Prosecutor

Mr. Peter McCloskey

The Accused

Zdravko Tolimir

I. INTRODUCTION

1. What follows are the reasons for the “Decision on Prosecution Motion to Amend the Second Amended Indictment” issued on 9 December 2009 (“Decision”).
2. The Second Amended Indictment (“Indictment”) became operative by decision of the Trial Chamber on 22 December 2008.¹ In the “Prosecution’s Motion to Amend the Second Amended Indictment” filed confidentially on 4 November 2009 (“Motion”) the Prosecution sought leave to replace the Second Amended Indictment with a Third Amended Indictment (“Proposed Indictment”).² On 12 November 2009 a Scheduling Order was issued which confirmed the scheduling of the Pre-Trial Conference for 16 December 2009 and of the Opening Statement from the Prosecution for 17 December 2009.³ On 24 November 2009 the Accused submitted in BCS “Response to the Prosecution’s Motion to Amend the Second Amended Indictment”, which was filed confidentially in English on 2 December 2009 (“Response”).

II. SUBMISSIONS OF THE PARTIES

A. The Motion and the Response

3. The Prosecution submits in the Motion that the Proposed Indictment corrects several typographical and factual errors and clarifies certain potential ambiguities,⁴ particularises two additional executions described under Count 1—the murder of approximately 39 Muslim men at Bišina and the murder of three Muslim leaders from Žepa—and further details the participation of the Accused in the restriction of UNPROFOR and humanitarian aid resupply to the eastern enclaves described under Count 7.⁵ The Prosecution seeks leave to exceed the word limit in order for it to present a discussion of Rule 50 of the Rules of Procedure and Evidence (“Rules”) and associated jurisprudence and to catalogue the proposed amendments.⁶
4. In the Response the Accused requests that:

¹ Decision on Prosecution’s Motion Seeking Leave to File a Second Amended Indictment, 22 December 2008.

² Motion, paras. 1, 63.

³ Scheduling Order, 12 November 2009, p. 1.

⁴ Motion, para. 1.

⁵ Motion, para. 2.

⁶ Motion, para. 4. The Practice Direction on the Length of Briefs and Motions (“Practice Direction”) provides that Motions before a Chamber will not exceed 3,000 words.

- (1) The confidential status of the Response be lifted and the Prosecution be ordered to submit a public version of the Motion;⁷
- (2) The Accused be authorised to exceed the word-limit for the Response;⁸
- (3) The Motion be dismissed;⁹
- (4) If the Motion is granted in part, the Trial Chamber adapt its decision to take account of the opinion of the Registrar in regard to the time allocated for the preparation of the defence or order the Registrar to approve an increase in the time allocated;¹⁰
- (5) The beginning of the trial be postponed and the date of the Pre-Trial Conference and the beginning of the trial be scheduled only after the decision on the Motion has been rendered.¹¹

B. Amendments constituting new charges

5. The Prosecution submits that the addition of the alleged Bišina and Žepa killings would arguably constitute new charges, but that neither would justify additional challenges pursuant to Rule 72 or necessitate a delay of the trial.¹²

6. The Prosecution submits that the Accused has been on notice of the Bišina killings through, *inter alia*, the Rule 65ter witness summaries and the Rule 92ter Application and that the Žepa killings had been set forth in the Prosecution Pre-Trial Brief, Rule 65ter witness summaries and Rule 92ter Application.¹³ The position of the Prosecution is that the Accused has had sufficient opportunity to prepare for this evidence and that the proposed amendments would not unfairly prejudice him.¹⁴ The Prosecution submits that any procedural delay caused by the proposed amendments would be minimal.¹⁵ According to the Prosecution, any delay would be “vastly outweighed, when viewed against this complex case as a whole, by the salutary effect for all of the parties of simplifying the proceedings and clarifying the case against the Accused.”¹⁶

⁷ Response, paras. 1, 77.

⁸ Response, para. 2.

⁹ Response, para. 75.

¹⁰ Response, para. 76.

¹¹ Response, para. 78.

¹² Motion, para. 54.

¹³ Motion, paras. 3, 59; Prosecution Notice of Filing of 65ter Witness List, Witness Summaries and Exhibit List, 15 October 2008, Appendix B, pp. 83 and 88–89; Prosecution’s Motion for Admission of Evidence pursuant to Rule 92ter, 18 March 2009, para. 21, fns. 21, 22 and Appendix A, pp. 15-16.

¹⁴ Motion, para. 3.

¹⁵ Motion, paras. 3, 60.

¹⁶ Motion, para. 61.

7. In regard to what it submits are new charges, the Prosecution submits that the supporting documentation for the amendments satisfies Article 19 of the Statute.¹⁷

8. The Accused submits that not only the addition of the Bišina and Žepa killings but also several of the other proposed amendments amount to new charges.¹⁸

9. In relation to all the proposed amendments which he submits constitute new charges, the Accused argues that the only sensible decision of the Trial Chamber would be either to reject them or to postpone the trial and to implement the procedure set forth in Rules 50(B) and 50(C).¹⁹ The Accused contends that the submission by the Prosecution prior to the Motion of material in connection with the “new charges” cannot be seen as having given the Accused the opportunity, time or means to look into them and to be sufficiently informed about the charges against him.²⁰ The Accused submits that if the Motion were accepted, the pre-trial proceedings would be extended and that during this period he would not have any means at his disposal to prepare an effective defence.²¹ The Accused also submits that he does not have the means necessary to examine the new charges and the proposed amendments on the grounds, *inter alia*, that the Registrar has not allowed remuneration for his expenses even for activities considered necessary and reasonable.²² The Accused submits that in view of the circumstances of the case the presentation of the evidence of the Prosecution should not be scheduled before mid-February or even the first half of March for reasons not depending solely on the outcome of the Motion.²³

C. The Alleged Murder of three Muslim leaders from Žepa

10. The Prosecution seeks to add paragraph 23.1 to the Indictment so as to charge the murder of three Bosnian Muslim leaders from Žepa—Mehmed Hajrić, Amir Imamović and Avdo Palić—under the Joint Criminal Enterprise (“JCE”) III mode of liability as a natural and foreseeable consequence of the JCE to forcibly transfer and deport the Muslim populations from Srebrenica and Žepa.²⁴ The Prosecution first became aware in March 2007 that the remains of Hajrić and Imamović had been located, but it did not consider that this warranted a further amendment of the Indictment;

¹⁷ Motion, para. 62.

¹⁸ Response, paras. 15, 36, 42.

¹⁹ Response, paras. 61-74.

²⁰ Response, paras. 61-62. In support of his position, the Accused cites paragraph 39 of *Prosecutor v. Stanišić and Župljanin*, Case No. IT-08-91-PT, Decision on Motion and Supplementary Motion for Leave to Amend the Indictment, 28 April 2009 (“*Stanišić and Župljanin* Pre-Trial Decision”), which states, *inter alia*: “The Chamber also stresses that the indictment is the primary accusatory instrument. In the circumstances, the mere disclosure of material to the Defence cannot be regarded as adequate notice of a charge against the Accused if that charge is not specifically set out in the Indictment.”

²¹ Response, para. 64.

²² Response, para. 65.

²³ Response, para. 71.

²⁴ Motion, para. 48.

however, the recently received information that Palić's remains were identified in the same mass grave was decisive in leading the Prosecution to conclude that the executions of the three men were targeted and coordinated.²⁵

11. The Prosecution contends that the Žepa killings constitute new charges, on the grounds that the Indictment does not describe them or count their victims among those of the murder operation and the proposed amendments concern a previously uncharged form of responsibility, namely foreseeable targeted killings.²⁶

12. In the Response the Accused submitted that the introduction of the alleged killings in Žepa to the Indictment²⁷ does not fulfil the conditions set forth in Article 19 of the Statute.²⁸ The Accused argues further that:

- (1) the Prosecution describes the murder of the three men as “foreseeable targeted killing of Bosnian Muslim leaders” without offering any proof substantiating this description;²⁹
- (2) the addition of these allegations was the result of outside pressure;³⁰
- (3) a review of certain documents establishes that the Accused has no connection with the death or the fate of Avdo Palić;³¹ and
- (4) if the Trial Chamber were to grant the proposed amendment, the procedure pursuant to Rule 50(C) should be followed.³²

D. The Alleged Murder of approximately 39 Muslim men at Bišina

13. The Prosecution seeks to insert in the section on the JCE to murder paragraph 21.15.2 which describes the mass execution and burial on or about 23 July 1995 of approximately 39 Muslim men in Bišina.³³ The Prosecution submits that the evidence of the killings in Bišina, which was adduced as newly-discovered evidence for the first time in the *Popović* case, was not presented in that case at the request of the Defence until all seven Defence cases had been concluded in March 2009 and that, therefore, it was not available to be discussed in the Prosecution's Pre-trial Brief,

²⁵ Motion, para. 48.

²⁶ Motion, para. 57.

²⁷ Motion, paras. 48–51.

²⁸ Response, para. 51.

²⁹ Response, para. 53.

³⁰ Response, para. 55.

³¹ Response, para. 57.

³² Response, para. 60.

³³ Motion, para. 44.

which was filed over three months earlier.³⁴ The Prosecution submits that following the presentation, cross-examination and analysis of the evidence in the *Popović* case it is “fully confident that [the evidence of the Bišina killings] is of sufficient probative value and reliability to warrant its inclusion in the Proposed Indictment.”³⁵

14. The Prosecution contends that while the Bišina killings are neither factually nor legally distinct from the other organised executions set forth in paragraph 21 of the Indictment,³⁶ it is theoretically conceivable that the Trial Chamber could find that the Bišina killings were the Accused’s only contribution to the JCE to murder and convict him solely on the basis of them and, therefore, the Prosecution’s position is that it would be preferable to treat the Bišina killings as a new charge.³⁷

15. The Accused contends in the Response that the Prosecution seeks to introduce new charges relating to the alleged killings in Bišina which require the implementation of the procedure set forth in Rules 50(B) and 50(C).³⁸ The Accused submits that the Prosecution has acted in a procedurally improper way on the grounds that it proposed this amendment after the scheduling of the Pre-Trial Conference and the commencement of the trial, but that it had the knowledge on the basis of which it could have requested an amendment at a time which would have allowed the Accused to prepare his defence³⁹ and it did not seek this amendment until after the evidence had been tested in *Prosecutor v. Popović et al.* and the outcome of this process had been assessed.⁴⁰

E. Other proposed amendments

16. The Prosecution submits that the proposed amendments in regard to the Accused’s role in convoy restrictions do not contain any new allegations⁴¹ and that they merely correct, clarify and add further detail to the Indictment and are, accordingly, not new charges.⁴²

17. The Accused, on the other hand, submits that the proposed addition of paragraph 60(a)(i), which alleges the participation of the Accused in the convoy restrictions, should be considered a

³⁴ Motion, para. 46.

³⁵ Motion, para. 46.

³⁶ Motion, para. 55.

³⁷ Motion, para. 56.

³⁸ Response, para. 46.

³⁹ Response, para. 49.

⁴⁰ Response, para. 50.

⁴¹ Motion, para. 52.

⁴² Motion, para. 58.

new charge with Articles 50(B) and 50(C) applying, on the grounds that it is an act of participation in the alleged JCE and it is not already mentioned in the Indictment.⁴³

18. In paragraphs 11–43 of the Motion, the Prosecution presents what it describes as factual and typographical errors and clarifications made pursuant to a line-by-line review of the Indictment in light of the trial record in *Prosecutor v. Popović et al.* (“*Popović Case*”).⁴⁴ In the Response the Accused rejects this characterisation of these proposed amendments on the grounds that the Trial Chamber has already ruled that the Indictment is clear and does not contain formal defects.⁴⁵ The Accused also makes specific submissions in relation to a number of the proposed amendments.⁴⁶

III. APPLICABLE LAW

19. In accordance with the jurisprudence of the Tribunal,⁴⁷ a Trial Chamber has wide discretion under Rule 50 to allow an indictment to be amended, even in the late stages of pre-trial proceedings, or even after trial has already begun.⁴⁸ It has been held that requests for leave to amend an indictment are to be considered against the circumstances of the particular case in which they are made.⁴⁹

20. A Trial Chamber will generally grant leave to make a particular amendment where it may help to “ensure that the real issues in the case will be determined”.⁵⁰ Yet, such leave will not be granted unless the amendment meets both of the following conditions: (i) it must not result in unfair prejudice to the accused when viewed in light of the circumstances of the case as a whole;⁵¹ and (ii)

⁴³ Response, paras. 42–44. The Prosecution proposes the insertion of “he participated in VRS efforts to restrict humanitarian aid supplies and UNPROFOR supplies and leave; and” as paragraph 60(a)(i) of the Indictment. Motion, para. 38.

⁴⁴ Motion, para. 10.

⁴⁵ Response, para. 6. Cf. Motion, para. 1.

⁴⁶ Response, paras. 10–45.

⁴⁷ See, e.g., *Prosecutor v. Popović et al.*, Case No. IT-05-88-PT, Decision on Further Amendments and Challenges to the Indictment, 13 July 2006 (“*Popović et al. Pre-Trial Decision*”), paras. 5–11, 20–36.

⁴⁸ *Popović et al. Pre-Trial Decision*, para. 8. Rule 50(A) provides, in relevant part, as follows: “(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. [...]”

⁴⁹ *Prosecutor v. Lukić and Lukić*, Case No. IT-98-32/1-PT, 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 Lukić’s Request for Reconsideration of Certification of the Pre-Trial Judge’s Order of 19 June 2008, 8 July 2008 (*Lukić and Lukić Pre-Trial Decision*), para. 38.

⁵⁰ *Popović et al. Pre-Trial Decision*, para. 8.

⁵¹ *Prosecutor v. Međjakić et al.*, Case No. IT-02-65, Decision on the Consolidated Indictment, 21 November 2002, p. 3 (citing *Prosecutor v. Naletilić and Martinović*, Case No. IT-98-34-PT, Decision on Vinko Martinović’s Objection

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 of the Tribunal.⁵²

21. In assessing whether a given amendment will cause unfair prejudice to the accused, it has been found necessary to consider the following two crucial elements: (i) the amendment must not deprive the accused of an adequate opportunity to prepare an effective defence;⁵³ and (ii) the amendment must not adversely affect the accused's right to be tried without undue delay.⁵⁴

22. It has been held that when determining the prejudicial effect of a proposed amendment on an accused, the Chamber may examine whether the accused received prior notice that the Prosecution considered the facts added by the proposed amendment to be material facts it intended to prove at trial.⁵⁵ However, it was also held in the same decision that in the circumstances mere disclosure cannot be regarded as adequate notice of a charge against the accused if that charge is not specifically set out in the indictment.⁵⁶

23. The possibility of delay in proceedings must be weighed against the benefits to the accused and the Trial Chamber that the amendment may bring, such as the simplification of proceedings, a more complete understanding of the Prosecution's case, and the avoidance of possible challenges to the indictment or evidence presented at trial.⁵⁷ It has also been held that in assessing whether undue delay would be caused, a Trial Chamber may consider the course of the proceedings thus far, including the diligence of the Prosecution in advancing the case and the timeliness of the motion, but also the expected effect of the amendment on the overall proceedings.⁵⁸

24. Rules 50(B) and 50(C) provide as follows:

(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.

to the Amended Indictment and Mladen Naletilić's Preliminary Motion to the Amended Indictment, 14 February 2001, pp. 4–7).

⁵² *Popović et al.* Pre-Trial Decision, para. 8. Article 19 ("Review of the indictment"), paragraph 1 reads: "The judge of the Trial Chamber to whom the indictment has been transmitted shall review it. If satisfied that a *prima facie* case has been established by the Prosecutor, he shall confirm the indictment. If not so satisfied, the indictment shall be dismissed."

⁵³ *Popović et al.* Pre-Trial Decision, para. 9.

⁵⁴ *Popović et al.* Pre-Trial Decision, para. 10.

⁵⁵ *Prosecutor v. Stanišić and Župljanin*, Case No. IT-08-91-PT, Decision on Motion and Supplementary Motion for Leave to Amend the Indictment, 28 April 2009 (*Stanišić and Župljanin* Pre-Trial Decision), para. 12.

⁵⁶ *Stanišić and Župljanin* Pre-Trial Decision, para. 39.

⁵⁷ *Popović et al.* Pre-Trial Decision, para. 10.

⁵⁸ *Stanišić and Župljanin* Pre-Trial Decision, para. 13.

(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.

The time required to realize the procedures provided for under these Rules, when considered in the circumstances of a given case, could amount to undue delay causing unfair prejudice to the accused.⁵⁹

25. In relation to whether an amendment results in a “new charge”, the key question is whether the proposed amendment introduces “a basis for conviction that is factually and/or legally distinct from any already alleged in the indictment.”⁶⁰ It has been held that the introduction of a factual allegation not previously reflected in the indictment also amounts to the inclusion of a new charge, but only where such allegation exposes the accused to an additional basis for conviction and that, therefore, where an amended indictment alleges, for example, that the accused bears liability for the murder of a certain victim that is nowhere alleged in the original indictment, such murder constitutes a new charge and the accused must be permitted to enter a plea on it pursuant to Rule 50(B).⁶¹

IV. DISCUSSION

A. Proposed amendments that constitute new charges

26. As a starting point, the Trial Chamber acknowledges that any amendments resulting in new charges would necessitate a further appearance pursuant to Rule 50(B) as soon as practicable to enable the accused to enter a plea and for the Accused to be given an opportunity to file preliminary motions pursuant to Rule 50(C). In the circumstances of the case, this latter requirement would lead to a postponement of the date of the trial and this must be taken into consideration in determining whether the amendments would affect the Accused’s right to a trial without undue delay. Postponement of the date of trial is only one factor to be considered in assessing whether to grant a request to amend the indictment. While delays in proceedings should be minimized as far as possible, the Trial Chamber considers that in the present case postponement of the date of trial as a consequence of the addition of the proposed new charges would not be sufficient on its own to

⁵⁹ *Popović et al.* Pre-Trial Decision, para. 10; *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. 22; *Prosecutor v. Halilović*, Case No. IT-01-48-PT, Decision on Prosecutor’s Motion Seeking Leave to Amend the Indictment, 17 December 2004 (“*Halilović* Pre-Trial Decision”), para. 24.

⁶⁰ *Halilović* Pre-Trial Decision, para. 30; *Lukić and Lukić* Pre-Trial Decision, para. 32.

establish unfair prejudice to the Accused or to justify a finding that the proposed new charges should not be allowed.

27. Furthermore, the Trial Chamber broadly accepts the position of the Accused who contends that the submission by the Prosecution prior to the Motion of material in connection with the “new charges” cannot be seen as having given the Accused the opportunity, time or means to look into them and to be sufficiently informed about the charges against him.⁶² The Trial Chamber endorses paragraph 39 of the *Stanišić and Župljanin* Pre-trial Decision in which it was held that the indictment is the primary accusatory instrument and that the mere disclosure of material to the Defence cannot be regarded as adequate notice of a charge against the Accused if that charge is not specifically set out in the indictment.⁶³

28. The proposed addition of paragraph 23.1 to the Indictment so as to charge the murder of three Bosnian Muslim leaders from Žepa under the JCE III mode of liability amounts to a new charge, because it is factually distinct from the other incidents of killing alleged in the Indictment and indeed, as the Prosecution points out, the victims are not otherwise included in the murder operation alleged in the Indictment.⁶⁴

29. The Prosecution states that the identification of Avdo Palić’s remains in the same mass grave as those of Mehmed Hajrić and Amir Imamović was decisive to its conclusion that all three men were executed at or about the same time and that the executions were targeted and coordinated.⁶⁵ The Trial Chamber also notes that the Prosecution did not receive the ICMP matching report containing Palić’s identification until October 2009. The Trial Chamber finds that the Prosecution did act with due diligence in seeking the addition of paragraph 23.1, albeit the amendment objectively comes at a very late stage of the pre-trial process.

30. The Trial Chamber is of the view that the allegations regarding the killing of the three Bosnian Muslim leaders are of such a nature that the proposed amendment would be helpful to ensure a full consideration of the relevant issues in the case. On this basis, the Trial Chamber considers it appropriate to grant this amendment, provided the conditions precluding unfair prejudice to the Accused and the submission of *prima facie* material have been met.

⁶¹ *Popović et al.* Pre-Trial Decision, para. 11.

⁶² Response, paras. 61-62.

⁶³ *Stanišić and Župljanin* Pre-Trial Decision, para. 39.

⁶⁴ See Motion, para. 57.

⁶⁵ Motion, para. 51.

31. The Accused submits that the proposed addition does not fulfil the conditions set forth in Article 19 of the Statute with respect to the establishment of a *prima facie* case.⁶⁶ The Trial Chamber has examined the material presented by the Prosecution and finds that it establishes a *prima facie* case pursuant to Article 19(1) of the Statute and Rule 50(A)(ii). The submissions of the Accused⁶⁷ do not undermine the *prima facie* case established by the Prosecution. Rather, such submissions are more properly matters to be raised during the course of trial.

32. In terms of the Accused's preparation of a defence, for the reasons given in paragraph 27 above the Trial Chamber does not accept the Prosecution submission that the addition of the alleged Žepa killings would not unfairly prejudice the Accused, because the Prosecution Pre-Trial Brief, Rule 65ter witness summaries and Rule 92ter Application detail evidence in relation to them.⁶⁸ However, the Trial Chamber considers that because material relating to the alleged Žepa killings was provided to the Accused before the Motion was filed, the additional amount of time required by the Accused to prepare his defence in relation to these new allegations would be quite limited given the nature of the allegations. Further, the overall additional time required as a result of this proposed amendment, which would include time required for the procedures under Rules 50(B) and 50(C), would be relatively minor and would not affect the right of the Accused to be tried without undue delay.

33. The Trial Chamber therefore finds that the proposed addition of paragraph 23.1 would not result in unfair prejudice to the Accused, when viewed in light of the circumstances of the case as a whole.

34. Since the proposed addition meets both the conditions of not resulting in unfair prejudice to the Accused when viewed in light of the circumstances of the case as a whole⁶⁹ and being supported by documentation or other material meeting the *prima facie* standard set forth in Article 19 of the Statute,⁷⁰ it is allowed, provided that the start of the trial is postponed.

⁶⁶ Response, para. 51.

⁶⁷ Response, paras. 51–57.

⁶⁸ Motion, paras. 3, 59.

⁶⁹ *Prosecutor v. Međjakić et al.*, Case No. IT-02-65, Decision on the Consolidated Indictment, 21 November 2002, p. 3 (citing *Prosecutor v. Naletilić and Martinović*, Case No. IT-98-34-PT, Decision on Vinko Martinović's Objection to the Amended Indictment and Mladen Naletilić's Preliminary Motion to the Amended Indictment, 14 February 2001, pp. 4–7).

⁷⁰ *Popović et al.* Pre-Trial Decision, para. 8. Article 19 ("Review of the indictment"), paragraph 1 reads: "The judge of the Trial Chamber to whom the indictment has been transmitted shall review it. If satisfied that a *prima facie* case has been established by the Prosecutor, he shall confirm the indictment. If not so satisfied, the indictment shall be dismissed."

35. With respect to the proposed new paragraph 21.15.2 specifying the mass execution and burial in Bišina,⁷¹ the Trial Chamber finds that the allegation concerns a discrete incident which, albeit alleged as related, is factually distinct from the other incidents of large-scale and systematic murder of Bosnian Muslim men from Srebrenica already alleged in paragraph 21 of the Indictment.⁷² The Trial Chamber finds, therefore, that the proposed addition results in the inclusion of a new charge because it introduces a basis for conviction that is factually distinct from any already alleged in the Indictment.⁷³ As the Prosecution points out, the Trial Chamber could find that the Bišina killings were the Accused's only contribution to the JCE to murder and convict him solely on the basis of these killings.⁷⁴

36. When on 7 April 2008 it sought to reopen its case in *Prosecutor v. Popović et al.* to present evidence related to the Bišina killings, the Prosecution was already in possession of the evidence of three witnesses and ten related documents.⁷⁵ The Trial Chamber does not accept the claim of the Prosecution that this evidence was not available to be discussed in the Prosecution's Pre-Trial Brief which was filed on 28 November 2008 because at that time the evidence had not been presented during the trial in *Prosecutor v. Popović et al.*⁷⁶ Alleged facts do not need to be tested at trial before they can be presented in an indictment. The Chamber, therefore, finds that the Prosecution has not acted diligently in this matter. The Trial Chamber also notes the very late stage in the pre-trial proceedings at which this amendment is proposed.

37. For the reasons given in paragraph 27 above the Trial Chamber does not find persuasive the submission of the Prosecution that the addition of the alleged Bišina killings would not unfairly prejudice to the Accused, on the grounds that summaries of the supporting evidence were provided to him in the Rule 65 *ter* witness summaries and the Rule 92 *ter* application.⁷⁷ However, the allegation of these further killings is a matter which, if added to the indictment, would help to ensure that the relevant issues in the case are fully before the Trial Chamber for determination. In addition, while related to a distinct incident, the allegation is similar in nature to other alleged killings and the Prosecution evidence relating to it is limited in scope. Thus, any additional time that the Accused would require to prepare his defence would be modest.

⁷¹ Motion, para. 44.

⁷² Cf. *Stanišić and Župljanin* Pre-Trial Decision, para. 40.

⁷³ Cf. *Stanišić and Župljanin* Pre-Trial Decision, para. 40.

⁷⁴ Motion, para. 56. Cf. *Prosecutor v. Haradinaj et al.*, Case No. IT-04-84-PT, Decision on Motion to Amend the Amended Indictment, 12 January 2007, para. 19.

⁷⁵ *Prosecutor v. Popović et al.*, Case No. IT-05-88-T, Decision on Prosecution Motion to reopen the Prosecution case, 9 May 2008, paras. 5–9.

⁷⁶ Motion, para. 46.

⁷⁷ Motion, paras. 3, 59.

38. Considering all these factors with reference to the applicable criteria, the Trial Chamber does not consider that either the lack of diligence shown by the Prosecution in this instance or the stage of the pre-trial proceedings results in such prejudice to the Accused so as to justify a denial of the proposed amendment. The Trial Chamber is further of the view that provided he is given sufficient time, the introduction of the new allegation would not deprive the Accused of an adequate opportunity to prepare his defence. Finally, the Trial Chamber considers that, given the nature and context of the proposed addition and the conclusion reached on the proposed addition of paragraph 23.1 and the extra time needed for the further appearance and plea as a result, the additional time resulting solely from this amendment is not such that it would adversely affect the Accused's right to be tried without undue delay. It therefore finds that the addition of the paragraph related to the alleged Bišina killings would not result in unfair prejudice to the Accused, when viewed in light of the circumstances of the case as a whole.

39. The Trial Chamber has examined the material presented by the Prosecution in support of the alleged Bišina killings and finds that it establishes a *prima facie* case pursuant to Article 19(1) of the Statute and Rule 50(A)(ii) .

40. Since the proposed addition of paragraph 21.15.2 meets both the conditions of not resulting in unfair prejudice to the accused when viewed in light of the circumstances of the case as a whole and being supported by documentation or other material meeting the *prima facie* standard set forth in Article 19 of the Statute, it is allowed,⁷⁸ provided that the start of the trial is postponed.

B. Other proposed amendments

41. The proposed addition of the words “he participated in VRS efforts to restrict humanitarian aid supplies and UNPROFOR supplies and leave; and” as a new paragraph 60(a)(i)⁷⁹ gives rise to an allegation of an additional act by the Accused in order to make life unbearable for the inhabitants of the Žepa enclave as part of the JCE to forcibly transfer. The allegation that the Accused “participated in VRS efforts to restrict humanitarian aid supplies and UNPROFOR supplies and leave” is not factually or legally distinct from the allegation that the Accused made life unbearable for the inhabitants of the Žepa enclave,⁸⁰ but rather it gives the allegation more precision. The Trial

⁷⁸ *Popović et al.* Pre-Trial Decision, para. 8. Article 19 (“Review of the indictment”), paragraph 1 reads: “The judge of the Trial Chamber to whom the indictment has been transmitted shall review it. If satisfied that a *prima facie* case has been established by the Prosecutor, he shall confirm the indictment. If not so satisfied, the indictment shall be dismissed.”

⁷⁹ Motion, para. 38.

⁸⁰ *Cf. Stanišić and Župljanin* Pre-Trial Decision, para. 40.

Chamber finds that it would not result either in the inclusion of a new charge⁸¹ or in unfair prejudice to the Accused. The proposed amendment is therefore allowed.

42. The proposed addition of the words “and Žepa” in paragraph 60(d)(ii)⁸² does not give rise to a factually or legally distinct basis for conviction and it does not alter the overarching allegation in paragraph 60(d) that the Accused controlled the movement of the Muslim population out of the enclaves. Therefore the Trial Chamber does not consider that it gives rise to a new charge. It does nevertheless broaden the alleged contribution of the Accused to the JCE to forcibly transfer and the Accused will require a relatively small amount of additional time to prepare his defence as a result. However the Accused will have additional time before the start of the trial as a consequence of the amendments that constitute new charges and the Trial Chamber considers that in light of this the Accused will have adequate time to prepare and that the proposed addition would not result in unfair prejudice to the Accused. The proposed amendment is therefore allowed.

43. The proposed amendments of the words “approximately 500 Muslim males” to read “over 1,000 Muslim males” in the first sentence of paragraph 21.8.1 and of the words “about 500” to read “over 1,000” in paragraph 21.10 would increase the number of the alleged victims in each instance. However, they do not give rise to a factually or legally distinct basis for conviction and therefore the Trial Chamber does not accept the submission of the Accused that they are equivalent to new charges.⁸³ Further the Trial Chamber considers that in the context of the already existing allegations as to the number of victims, the proposed increase, while significant, does not alter the nature of the underlying charges so that the Accused would require additional time in order to prepare his defence. Thus the proposed amendments are allowed.

44. In the context of the Indictment as a whole, the proposed addition of the words “the separation of the men in Potočari and the execution of the men from Srebrenica” in paragraph 24⁸⁴ does not alter the nature of the allegations against the Accused. The separation of the men in Potočari and the execution of the men from Srebrenica are alleged elsewhere in the Indictment.⁸⁵ The reference to them in paragraph 24 would clarify the Prosecution’s case with regard to the conditions that allegedly contributed to the destruction of the entire Muslim population of Eastern Bosnia and the Accused’s alleged knowledge of those conditions. The proposed amendment does not contain any allegation that is not evident from the Indictment taken in its entirety. The proposed amendment is therefore allowed.

⁸¹ Cf. *Stanišić and Župljanin* Pre-Trial Decision, para. 40.

⁸² Motion, para. 41.

⁸³ Response, para. 36.

⁸⁴ Motion, para. 30.

⁸⁵ Indictment, paras.19, 21.

45. The other proposed amendments in paragraphs 5, 8, 10, 10(b), 19, 21.3, 21.3.1, the Note before paragraph 21.6, 21.6–21.13, 22.4, 21.8.1, 21.9, 21.13, 21.14, 21.15, 21.16, 22, 22.1(a), 22.3, 23, 25, 27, 35, 36, 37, 40, 59(a), 60 and 69 are formal changes, clarifications or minor factual amendments and as such would not result in unfair prejudice to the Accused. They are therefore allowed.

C. Requests in the Response

46. The request of the Accused in regard to taking account of the position of the Registrar on time allocation and remuneration⁸⁶ was not properly made in the Response. Such a request should be the subject of a separate motion by the Accused and not be submitted as part of a response to a motion that relates to a different issue and it should only be directed to the Trial Chamber following the correct procedure after a decision of the Registrar.

47. The Trial Chamber will not decide upon the request of the Accused in regard to the confidential status of the Response and the submission of a public version of the Motion by the Prosecution, until the Prosecution has been heard on the matter.⁸⁷

V. CONCLUSION

48. For the reasons given above, the Trial Chamber issued the following orders in the Decision:

- (1) That the Motion be granted and the Proposed Indictment be the Operative Indictment;
- (2) That the hearing scheduled as a Pre-Trial Conference for Wednesday 16 December 2009⁸⁸ be redesignated as a Status Conference and a further appearance be held at this Status Conference to enable the Accused to enter a plea on the new charges;
- (3) That the Accused may file preliminary motions pursuant to Rule 72 in respect of the new charges within 30 days of the service of the translation of the Decision on the Accused;
- (4) That the Pre-Trial Conference scheduled for Wednesday 16 December 2009⁸⁹ and the Opening Statement of the Prosecution scheduled for 17 December 2009⁹⁰ be postponed for a period of at least two months until a date to be decided.

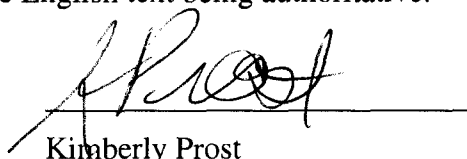
⁸⁶ Response, paras. 65, 76.

⁸⁷ Response, paras. 1, 77.

⁸⁸ Scheduling Order, 12 November 2009, p. 1.

⁸⁹ *Ibid.*

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

A handwritten signature in black ink, appearing to read 'K. Prost', is written over a horizontal line.

Kimberly Prost
Presiding Judge

Dated this 16th day of December 2009
At The Hague
The Netherlands

[Seal of the Tribunal]

⁹⁰ *Ibid.*