Case No.: IT-01-48-PT

IN THE TRIAL CHAMBER

Declassified to Public
06 September 2012

Before:
Judge Patrick Robinson, Presiding
Judge O-Gon Kwon
Judge Iain Bonomy

Registrar:
Mr. Hans Holthuis

Order of:
17 December 2004

PROSECUTOR

v.

SEFER HALILOVIC

DECISION ON PROSECUTOR'S MOTION SEEKING LEAVE TO AMEND THE INDICTMENT

Office of the Prosecutor:

Mr. Philip Weiner
Ms. Sureta Chana

Counsel for the Accused:

Mr. Peter Morrissey
Mr. Guénaël Mettraux

I. The Current Motions

1. This Trial Chamber is seised of a "Prosecutor's Motion Seeking Leave to Amend the Indictment" ("Motion to Amend"), filed on 29 September 2004. The Defence filed its "Response to Prosecution Motion to Amend the Indictment" ("Response") with a Confidential Annex on 18 October 2004. This filing exceeded the page limit established by the Practice Direction on the Length of Briefs and Motions ("Practice Direction ").[1] The Prosecution filed a "Reply to Defence Response to Prosecution Motion to Amend Indictment" on 22 October 2004 ("Prosecution Reply"). Before attempting to rebut the Defence's arguments, the Prosecution Reply first seeks leave under Rule 126 *bis* to reply to the Response. The Trial Chamber believes that its decision is aided by consideration of all the arguments raised by the parties. The Prosecution is therefore granted leave to reply to the Response, and the Chamber accepts the filing of the over-sized Response by the Defence.

II. The Indictment and Related Procedural Background

2. On 30 July 2001, the Prosecutor filed an indictment, with supporting material, against Sefer Halilovic ("the Accused"). On 10 September 2001, the Prosecutor filed a modified and supplemented indictment ("Current Indictment").[2] On 12 September 2001, the reviewing Judge confirmed the Current Indictment against the Accused, finding that the supporting material produced by the Prosecutor had established a *prima facie* case of a violation of the laws or customs of war.[3] Specifically, the Current Indictment alleged that the Accused was personally liable, as a superior, for the murders of sixty-two civilians and one prisoner of war committed by his subordinates. The key paragraph of the Current Indictment reads as follows:

> 34. Notwithstanding his duties as a commander that have been set out above, Sefer HALILOVIC did not take effective measures to *prevent* the killings of civilians *in Grabovica*. Further, despite the order from Rasim Delic, dated 12 September 1993, Sefer HALILOVIC did not take steps to carry out a proper investigation to identify the perpetrators of the killings *in both Grabovica and Uzdol* and as commander of the Operation to *punish* them accordingly.
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> By these acts and omissions in relation to the killings in Grabovica and Uzdol, Sefer HALILOVIC committed,
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> COUNT 1: Murder, a VIOLATION OF THE LAWS OR CUSTOMS OF WAR punishable under Article 3 of the Statute of the Tribunal and recognised by Article 3(1)(a) of the Geneva Conventions, and Article 7 (3) of the Statute of the [International] Tribunal [(" Statute", "Tribunal Statute")].[4]

3. The Accused appeared before the Tribunal on 27 September 2001, and pleaded not guilty to the single count of the indictment.[5] This Trial Chamber granted him provisional release on 13 December 2001.[6] Pre-trial proceedings have continued since the Accused's provisional release, though he has had several changes of counsel since his initial appearance.

4. On 13 March 2003, the Defence filed a "Defence Motion Pursuant to Rule 65 Ter (K) Requesting the Pre-Trial Judge to Grant Relief From Waiver and to Grant Relief Pursuant to Rule 72" ("Defence Rule 65 *ter*(K) Motion"), in which it made its sole prior challenge to the form of the indictment. In this motion, submitted over fifteen months after the expiration of time for filing preliminary motions, newly-assigned counsel for the Defence argued that the indictment was "vague and lack[ed] sufficient particulars", and requested that the Chamber order the Prosecution to "file an amended indictment, specifying in relation to each alleged murder in the indictment the name, surname and father's name of the victim, the place and date of the alleged murder, the cause of death, and the identity of the alleged perpetrator."[7] The motion was denied by the Trial Chamber on 1 April 2003, because the Chamber found that the Defence had not shown good cause for granting relief from its failure to file preliminary motions within the time limit specified in the Rules of Procedure and Evidence of the International Tribunal ("the Rules").[8]

5. The current Motion to Amend is the first request made by the Prosecution to amend the indictment.

III. The Parties' Submissions

6. The Prosecution's Motion to Amend seeks to modify the key paragraph of the indictment (quoted above) by adding two words to read as follows, with modifications in bold text and underlined:

> Notwithstanding his duties as a commander that have been set out above, Sefer HALILOVIC did not take effective measures to prevent the killings of civilians in Grabovica **and Uzdol**. [...].[9]

7. The Prosecution contends that this amendment does not add to the existing charge of murder, but rather "is proposed in the interests of clarity and seeks to cure what could be seen as vagueness in the indictment as it currently stands."[10] The Prosecution further asserts that "the indictment does allege—and indeed is understood to allege—that the Accused did not take effective measures to prevent the killings of civilians in Uzdol. The elaboration of Count 1 when read with paragraph 43 of the

Indictment clearly shows that the Accused is charged with both failure to prevent and punish the killings in *both* Grabovica and Uzdol."[11]

8. The Prosecution also relies on the parties' pre-trial briefs, arguing that "paragraphs 108 to 113 of the Prosecution's Pre-[T]rial Brief ... clearly put [the Accused] on notice that he is charged with failure to prevent the killings in Uzdol. Similarly, paragraphs 108 to 113 of the Defence Pre-[T]rial Brief specifically deal with the allegation of failure to prevent the killings in Uzdol."[12] Finally, the Prosecution submits that the proposed amendment would not prejudice the Accused, ostensibly because the amendment is "based on facts all or most of which were included in the original indictment."[13] As its position is that the amendment does not constitute a new charge, the Prosecution does not believe that a new appearance, or any delay in the current pre-trial or potential trial timetables, would be necessary.[14]

9. In response, the Defence counters that "failure to prevent a crime is a distinct form (and basis) of liability under Article 7(3) ... than failure to punish a crime both in principle and in the facts that must be proven to establish those two bas[e]s of liability. The effect of the amendment is therefore to allege against Mr. Halilovic a whole new basis of liability for the numerous crimes alleged to have been committed in Uzdol."[15] In response to the Prosecution's assertion that the cited paragraphs of the original pre-trial brief put the Accused on notice that he was charged with failure to prevent the murders in Uzdol as part of the general charge of murder in count one, the Defence points to the jurisprudence of this Tribunal and the International Criminal Tribunal for Rwanda (ICTR), which requires that the charges and material underlying facts upon which the prosecution relies must be expressly pleaded in the indictment.[16] The Defence argues that the Current Indictment "does not contain any charge that Mr. Halilovic should be held criminally responsible for failing to prevent murders committed in the village of Uzdol", and that the proposed amendment therefore constitutes a new charge as understood by Rule 50.[17]

10. The Defence strongly disagrees with the Prosecution's assertion that the proposed amendment would not prejudice the Accused.[18] If, nevertheless, the Motion to Amend were to be granted, the Defence disputes the Prosecution's claim that neither a new appearance by the Accused, nor *de novo* confirmation of what the Defence views as a new charge, would be required.[19] The Defence also warns that, under its view of the import of the proposed amendment, further delay in the proceedings would be inevitable, because it would have the right under Article 21(4)(b) of the Statute and Rule 50 (C) to additional time to prepare a defence to the charge of failure to prevent crimes in Uzdol.[20]

11. In the Prosecution Reply, the Prosecution raises the new argument that clear notice of the charge with respect to the murders in Uzdol is contained in paragraph 43 of the Current Indictment "read with all the foregoing paragraphs",[21] including particularly paragraphs 4 and 24.[22] These two paragraphs allege respectively that the Accused was the most senior military commander for the operation that included the attack on Uzdol; and that, prior to the attack on Uzdol, he had been ordered to do everything to prevent the reoccurrence of the crimes committed in Grabovica.

DISCUSSION

IV. The Form of the Current Indictment

12. The Prosecution's primary argument in support of its Motion to Amend is that, because the allegation of failure to prevent crimes in Uzdol is already contained in the Current Indictment, the proposed amendment cannot cause prejudice to the Accused.[23] In order to determine whether the Current Indictment's references to Uzdol are sufficient to allege such an omission on the part of the Accused, the Trial Chamber must first consider the applicable law on the proper form of an indictment.

13. The form of an indictment is governed primarily by Articles 18(4) and 21(4)(a) of the Statute and Rule 47(C) of the Rules.[24] The jurisprudence of the Tribunal is that these provisions impose "an obligation on the part of the Prosecution to state the material facts [but not the evidence] underpinning the charges in the indictment".[25] The pleadings in an indictment, though concise, must be detailed enough "to inform an accused clearly of the nature and cause of the charges against him to enable him to prepare a defence effectively and efficiently."[26] In general, material facts must be pleaded expressly,[27] though in certain limited circumstances, they need not be explicitly mentioned if those facts are "*necessarily* implied in the indictment".[28] The Appeal Judgment in *Kupreskic* further noted that an indictment is "the primary accusatory instrument", which must plead with sufficient detail the essential aspects of the Prosecution case.[29]

14. Where, as here, the Accused's individual criminal responsibility is alleged to arise under Article 7 (3) of the Statute, the minimum material facts that must appear in the indictment have been summarised by another Trial Chamber as follows:

> (a) (i) that the accused is the superior (ii) of subordinates, sufficiently identified, (iii) over whom he had effective control—in the sense of a material ability to prevent or punish criminal conduct—and (iv) for whose acts he is alleged to be responsible ;
>
> (b) (i) *the accused knew or had reason to know that the crimes were about to be or had been committed by those others*, and (ii) the related conduct of those others for whom he is alleged to be responsible. The facts relevant to the acts of those others will usually be stated with less precision, the reasons being that the detail of those acts (by whom and against whom they are done) is often unknown, and, more importantly, because the acts themselves often cannot be greatly in issue; and
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> (c) *the accused failed to take the necessary and reasonable measures to prevent such crimes or to punish the persons who committed them.*[30]

15. All the material facts listed in paragraph (a) quoted above—the superior-subordinate relationship, effective control, and the Accused's responsibility for the crimes of his subordinates—are explicitly included in the Current Indictment.[31] With regard to the Accused's alleged failure to *punish* the crimes in Grabovica, all the material facts listed in paragraphs (b) and (c) above—knowledge, the underlying crimes, and the pertinent omission—are either expressly pleaded in the Current Indictment, or necessarily implied from its allegations.[32] Apart from the explicit charge in paragraph 34, the only factual references to the Accused's alleged failure to *prevent* the murders in Grabovica occur in the last sentence of paragraph 10 of the Current Indictment, which states that "Sefer HALILOVIC voiced his disapproval about the comment [encouraging troops to kill Bosnian Croats who did not co-operate] to Vehbija Karic but said nothing to prevent the soldiers from acting on it"; and paragraph 15, which lists the necessary and reasonable measures that should have been taken to protect the surviving civilians.[33]

16. The reference in paragraph 24 to an alleged order from Rasim Delic to the Accused "to do everything to prevent such events in the future" is the only hint in the Current Indictment that the Prosecution intended to charge the Accused with failure to *prevent* the killings in Uzdol. No mention is made of any particular omission by the Accused in this regard, and the only clear allegation of criminal liability for actions in Uzdol is in paragraph 34's allegation that the Accused "did not take steps to carry out a proper investigation to identify the perpetrators of the killings in ... Uzdol and as commander of the Operation to *punish* them accordingly."[34]

17. Paragraph 43 of the Current Indictment does not support the Prosecution's argument that the indictment currently alleges a failure to prevent crimes in Uzdol. Instead, this paragraph generally alleges that the Accused is liable as a superior and restates the law of superior responsibility, but mentions neither Grabovica nor Uzdol. In its entirety, the paragraph reads:

Sefer HALILOVIC, whilst holding the position of superior authority as set out in the foregoing paragraphs, is criminally responsible for the acts of his subordinates, pursuant to Article 7(3) of the Tribunal Statute.

A superior is responsible for the acts of his subordinate(s) if he knew or had reason to know that his subordinate(s) were about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.

18. That paragraph 43's general discussion of superior responsibility is insufficient notice of a specific allegation of the failure to prevent crimes[35] is evident from the manner in which another Trial Chamber and the Appeals Chamber have treated previous indictments. In the second of four decisions rendered on the form of the indictment in *Brdjanin and Talic*, Trial Chamber II held that "[a]n indictment must fairly apprise the accused of the nature of the case against him, and place him in possession of its broad outlines and the facts which constitute his responsibility. ... *The true nature of the responsibility* of the accused for the events pleaded is an essential material fact [that] must be made unambiguously clear in the indictment."[36] In *Krnojelac*, that Trial Chamber stated that "[w]hat must be clearly identified by the prosecution so far as the individual responsibility of the accused ... is concerned are the particular acts of the accused himself or *the particular course of conduct* on his part which are alleged to constitute that responsibility."[37] As early as 1996, the Appeals Chamber cautioned the Prosecutor that although the inclusion of both "failed to prevent" and "failed to punish" as alternative formulations of guilt did not render an indictment fatally vague, "wherever possible, the Prosecutor should make clear the precise line of conduct and mental element alleged."[38]

19. Applying the decisions cited above, it is clear that the Current Indictment's discussion of the Accused's responsibility for crimes in Uzdol cannot be read as including a specific allegation of a failure to prevent murders in Uzdol. Although the Prosecution's reference to paragraphs 4 and 24 in its Reply slightly strengthens its argument, the fact remains that only one paragraph in the Current Indictment—paragraph 34— clearly and specifically sets out the omissions underlying the Accused's alleged criminal responsibility for the crimes of his subordinates. That paragraph, so far as it relates to Uzdol, makes no mention of a failure to prevent crimes, but is restricted to a failure to punish the perpetrators. Guided by these decisions on the form of indictments, the Trial Chamber concludes that none of the paragraphs cited by the prosecution—4, 24, and 43—either in isolation or read together, satisfy the requirement that the precise and particular course of conduct of the Accused with regard to the failure to prevent crimes in Uzdol be expressly pleaded in the indictment.[39]

20. Despite the Prosecution's averments in its submissions to this Chamber, therefore, the proposed amendment is not merely a clarification, but is in fact a new allegation of a material fact that must be pleaded in the indictment if the Prosecution is to lead evidence about it at trial.

V. Amendment of an Indictment

21. Amendment of an indictment is governed by Rule 50, which states in 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.[40]

(iii) Further confirmation is not required where an indictment is amended by leave.

[...]

(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.

22. Although the Rule does not discuss the "factors relevant to the exercise of the discretion" of the Trial Chamber, this Chamber has previously noted that "the fundamental question to be decided in relation to granting leave to amend an indictment is whether the amendments result in any prejudice to the accused," and "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".[41] As another Trial Chamber clarified in a pre-trial decision in *Prosecutor v. Brdjanin and Talic*, the pointed question is whether the amendment will cause *unfair* prejudice to the accused:

> 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 caused to an accused would ordinarily need to relate to the fairness of the trial. Where an amendment is sought in order to ensure that the real issues in the case will be determined, the Trial Chamber will normally exercise its discretion to permit the amendment, provided that the amendment does not cause any injustice to the accused, or does not otherwise prejudice the accused unfairly in the conduct of his defence. There should be no injustice caused to the accused if he is given an adequate opportunity to prepare an effective defence to the amended case.[42]

This Chamber adopts this clarification, and concludes that the test for whether leave to amend will be granted is whether allowing the amendments would cause unfair prejudice to the accused.

23. In referring to an adequate opportunity for the Accused to prepare an effective defence to the amended case, the pre-trial decision in *Brdjanin and Talic* identified the issue of notice as relevant to the consideration of whether leave to amend should be granted. Another factor to consider, when determining whether allowing an amendment would cause unfair prejudice to the accused, is whether his right under Article 21(4)(c) of the Statute to be "tried without undue delay" will be adversely affected.[43] In the course of considering an interlocutory appeal from an ICTR Trial Chamber, the Appeals Chamber noted that Trial Chambers should weigh the likelihood of delay in the proceedings against the advantages to the Accused and the Chamber of an improved indictment:

> In assessing whether delay resulting from the Motion would be undue, the Trial Chamber correctly considered the course of proceedings to date, including the diligence of the Prosecution in advancing the case and timeliness of the Motion. ... [H]owever, a Trial Chamber must also examine the effect that the Amended Indictment would have on the overall proceedings. Although amending an indictment frequently causes delay in the short term, the Appeals Chamber takes the view that this procedure can also have the overall effect of simplifying proceedings ... by improving the Accused's and Tribunal's understanding of the Prosecution's case, or by averting possible challenges to the indictment or the evidence presented at trial. The Appeals Chamber finds that a clearer and more specific indictment benefits the accused, ... because the accused can tailor their preparations to an indictment that more accurately reflects the case they will meet, thus resulting in a more effective defence.[44]

24. In the circumstances of this case, the Trial Chamber's evaluation of whether the proposed amendment would cause unfair prejudice to the Accused is linked to whether the amendment would result in the inclusion of a new charge, because the addition of a new charge would trigger the automatic procedural consequences provided for in Rules 50(B) and 50(C). The requirements of a further appearance and an additional period for filing preliminary motions mean that delay is inevitable if the amendment constitutes a new charge. That delay, when considered against the history of the proceedings to date, could amount to undue delay causing unfair prejudice to the accused. In the course of deciding whether to grant the Motion to Amend, the Trial Chamber has therefore

considered three distinct questions:

(1) Does the proposed amendment constitute a new charge?

(2) Could granting the amendment cause unfair prejudice to the Accused, due to a lack of notice of the allegation, or because it would lead to undue delay in the proceedings?

(3) If the answer to the second question is affirmative, would the lack of notice or undue delay outweigh any benefit that would result from amending the Current Indictment, and thus amount to unfair prejudice to the Accused?

A. The Definition of "New Charge"

25. While it is clear that a failure to prevent crimes and a failure to punish crimes are separate and distinct material facts, which must each be pleaded in an indictment if they are both aspects of the Prosecution's case, it is less certain whether the new allegation of the Accused's failure to prevent killings in Uzdol constitutes the addition of a new charge, thereby incurring the procedural consequences of Rules 50(B), 50(C), and 62.

26. The Prosecution's citation of authority for its arguments is confined to three related references in the Motion to Amend to a decision of this Chamber in *Prosecutor v. Mejakic et al*, which are used to support the proposition that "where new charges or amendments are based on facts all or most of which were included in the original indictment, it is generally accepted that there will be no prejudice to the Accused."[45] The Trial Chamber notes that the Prosecution appears to concede that a failure to prevent crimes is a "charge", and instead focuses its efforts on arguing that the charge of failure to prevent crimes in Uzdol is not "new" because it is already contained in the indictment, and thus that the automatic procedural consequences of adding a "new charge" do not apply to this case.[46] The Chamber has already rejected the assertion that the Current Indictment alleges a failure to prevent crimes in Uzdol,[47] and considers that neither the Prosecution's apparent concession nor its reliance on *Mejakic* can aid the Chamber's consideration of whether the proposed amendment is a "new charge" for the purposes of Rule 50. Although the consolidated indictment in *Mejakic* did bring new charges against most of the Accused in that case, those new charges were included as new and separate counts in the consolidated indictment, and added three different crimes as recognised by different Articles of the Statute.[48] The *Mejakic* decision did not discuss, and therefore cannot answer, the question the Trial Chamber now faces: is a new allegation that neither adds a count to the indictment nor relies on a different Article of the Statute, but instead alleges an alternative omission within a mode of liability, nevertheless a "new charge" for the purposes of Rule 50?

27. There is little guidance in this Tribunal's jurisprudence on the test as to whether a new allegation in a proposed amended indictment constitutes a new charge for the purposes of Rules 50(B) and 50 (C). In *Prosecutor v. Niyitegeka*, an ICTR Trial Chamber viewed "new charges in an amended indictment as an application to *[inter alia]*allege an additional legal theory of liability with no new acts ", but the example given immediately after that definition distinguished between direct responsibility pursuant to the equivalent of Article 7(1) and superior responsibility under the parallel provision to Article 7(3).[49] Similarly, most of the other decisions of this Tribunal that discuss new charges or the bases of liability pleaded in an indictment either focus exclusively on the differences between direct and superior responsibility, the addition of new counts based on the same facts, or the addition of new charges or counts based on the inclusion of new alleged facts.[50]

28. The concept of a "new charge" has been held to include (a) an amendment alleging a different crime under the Statute,[51] (b) the addition of an underlying offence without changing the crime that is alleged under the Statute,[52] and (c) the addition of treaty provisions also recognising the same conduct as a violation of international law, with no additional factual allegations, no reliance on an

additional Article of the Statute, and no other alteration of the affected count.[53]

29. Since in this case the Prosecution has formally charged the Accused with only one crime under the Statute (murder in violation of Common Article 3 of the Geneva Conventions); has alleged only one kind of individual liability (superior responsibility as recognised in Article 7(3) of the Statute); and does not seek to add allegations of any new underlying offences, the proposed amendment does not fall into any of the categories, listed above, of new allegations that have been viewed as constituting new charges.

30. Yet nothing in Rule 50, or in the decisions of this and other Trial Chambers, requires that the concept of a "new charge" be restricted to the categories listed above. All that is clear from the text of the Rule is that the accused will have to make a further appearance pursuant to Rule 50(B) for the purpose of entering a plea.[54] That must be because the accused now faces an indictment that contains a new basis for conviction. As the European Court of Human Rights has noted, albeit in a different context, the term "charge" is very wide in scope, and the fundamental nature of the right to a fair trial should prompt courts to prefer a "substantive, rather than formal, conception" of the term.[55] When considering whether a proposed amendment results in the inclusion of a "new charge", it is therefore 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 amendment introduces a basis for conviction that is factually and/or legally distinct from any already alleged in the indictment.

31. On this approach, since the bases for the imposition of criminal liability under Article 7(3) are two alternative omissions, the addition of an allegation of a new omission would logically be seen as including a new charge in the indictment. It is well-established in the Tribunal's jurisprudence that the disjunctive "or" in the last phrase of Article 7(3)—"the superior failed to take the necessary and reasonable measures to prevent such acts *or* to punish the perpetrators thereof "—reflects the fact that the duty to prevent crimes and the duty to punish the perpetrators are distinct and separate responsibilities under international law. For example, in an interlocutory appeal in *Prosecutor v. Hadzihasanovic, Alagic, and Kubura* , the Appeals Chamber noted that the duty to prevent and the duty to punish are separable.[56] In a decision on the form of the indictment in the same case, Trial Chamber II held that there was "no ambiguity in the use of the disjunctive formulation [of the bases of superior responsibility]—the Prosecution is entitled to plead both versions and the Defence is sufficiently and clearly put on notice that it has to prepare its case to answer both versions."[57] In a decision rejecting a joint defence motion to dismiss portions of an indictment for lack of jurisdiction, the Trial Chamber seised of *Prosecutor v. Kordic and Cerkez* concluded that failure to prevent crimes and failure to punish crimes are independent bases for criminal liability.[58] Recently, the Appeals Chamber in *Prosecutor v. Blaskic* rejected the Appellant's argument that failure to punish is merely another form of failure to prevent, noted that these failures "involve different crimes committed at different times", and concluded that each is a separate head of responsibility.[59]

32. The failure to punish and the failure to prevent are not only legally distinct, but are factually distinct in terms of the type of knowledge that is involved in each basis of superior responsibility. Failure to prevent presumes prior knowledge ("knew or had reason to know") that crimes were being, or were about to be, committed, while failure to punish presumes subsequent knowledge ("knew or had reason to know") that crimes had already been committed.[60]

33. The disjunctive nature of the bases of superior responsibility, combined with the distinguishing factor of the type of knowledge involved for each basis, means that an accused can be convicted on the basis of one omission even if the other is not proved. For example, if the Prosecution proves that the Accused knew that his subordinates had committed crimes in Uzdol, then if all the other elements of the crime are established, the Accused may be convicted based on his failure to punish those crimes, even if he had no prior knowledge and therefore lacked the ability to prevent their

commission. If, however, the Prosecution proves that the Accused knew that his subordinates were going to commit crimes in Uzdol, then if all the other elements of the crime are established, the Accused may be convicted based on his failure to prevent those crimes, even if he were no longer their superior after the crimes and therefore lacked the ability to punish their commission.[61]

34. The Trial Chamber considers that, where the new allegation could be the sole action or omission of the Accused that justifies his conviction, that amendment is a "new charge" for the purposes of Rule 50. There are three distinct bases in the Current Indictment for a possible finding of guilt: (1) failure to prevent crimes in Grabovica ; (2) failure to punish crimes in Grabovica; and (3) failure to punish crimes in Uzdol. If the Prosecution were allowed to add this new allegation, there would be a fourth, failure to prevent crimes in Uzdol. If the Prosecution fails to ascribe any of the first three omissions to the Accused, yet proves the fourth, the Accused may still be found guilty of the crime of murder under Articles 3 and 7(3) of the Statute. As a result of the proposed amendment, therefore, the indictment would include a "new charge" for the purposes of Rule 50 because the Accused would be exposed to conviction based on conduct that is a basis for criminal liability not presently reflected in the Current Indictment, and which is sufficient on its own to support a conviction of murder under Article 3 of the Statute.[62]

35. This understanding of "new charge", which is not limited by the particular technicalities of pleading before the Tribunal, is consistent with the concern for fairness to the Accused that animates the jurisprudence construing Rule 50 referred to earlier in this Decision. Moreover, it is neither overbroad nor underinclusive: it would not make new charges out of new allegations that carry no additional risk of conviction by themselves, and would include new allegations that are clearly new charges based on the prior practice of this Tribunal. For example, an amendment seeking to replace a vague reference to an unknown number of victims with a specific number of victims is merely a new factual allegation, not a new charge, because it does not expose the Accused to an additional risk of conviction. On the other hand, an amendment that alleges a different crime under the Statute or a different underlying offence, even without additional factual allegations, is a new charge because it could be the sole legal basis for the Accused's conviction.

B. Unfair prejudice

36. As discussed above in paragraphs 22 and 23, in prior decisions on motions to amend indictments, two factors have been highlighted as relevant to the consideration of unfair prejudice: (1) insufficient notice to the Accused, or alternatively phrased, the lack of "an adequate opportunity to prepare an effective defence to the amended case";[63] and (2) undue delay in the proceedings.[64] Either factor may be sufficient to ground a finding of unfair prejudice and result in the denial of a motion to amend the indictment.

37. In this case, however, the issue of notice to the Accused is of minor significance. Given the procedural history of this matter, the Defence cannot assert that it had no notice whatsoever of the Prosecution's intention to allege that the Accused failed to prevent crimes in Uzdol. Six paragraphs in the Prosecution's original pre-trial brief, and the corresponding six paragraphs in the Defence pre-trial brief, discuss the alleged omission in question.[65] Furthermore, despite the current defence team's vehement objections to the proposed amendment, they recently notified the Chamber that they are adopting the original pre-trial brief as their final submission.[66] No mention is made in that notification of the six paragraphs that ostensibly accept, and respond to, the Prosecution's intention to charge the Accused with failure to prevent crimes in Uzdol.[67]

38. Since the proposed amendment is a new charge, if it were granted, there would be three direct procedural consequences under the Rules, each of which would entail some delay. These three consequences are: (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.[68]

39. The trial in this case was previously scheduled to begin in January 2004, almost a full year ago. As the case is currently set to start trial on 24 January 2005, any significant delay in pre-trial preparation at this stage would have the practical effect of an additional wait of several months before the Accused's trial actually begins, because another case awaiting trial would take its place. The resultant deferral of trial for at least several months, after an extended pre-trial period of more than three years, could constitute undue delay amounting to unfair prejudice to the Accused.[69]

40. Against this delay, the Trial Chamber must weigh the benefit, if any, of amending the indictment. Allowing the proposed amendment would be of no benefit to the Accused, because it would increase his chances of conviction. The Current Indictment already affords the Prosecutor three distinct bases on which to prove the Accused's culpability for the actions of his subordinates. Amending the indictment would not be of benefit to the Trial Chamber that will hear the case, at least not under the rationale expressed by the ICTR Appeals Chamber in *Karemera*,[70] because its understanding of the Prosecution's case *as expressed in the Current Indictment*—which specifically alleges only three omissions by the Accused—would not be improved by allowing the amendment. So far as the impact on the proceedings overall is concerned,[71] there would plainly be no benefit, bearing in mind the further delay that would be caused to proceedings which have exceeded three years.

41. The Trial Chamber concludes 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 this trial, and therefore finds that the circumstances of this case require the denial of the Motion to Amend.[72]

VI. Disposition

For these reasons, pursuant to Rules 50, 54, and 126 *bis* of the Rules and paragraph (C)(7) of the Practice Direction, this Trial Chamber hereby orders as follows:

(a) The Defence is granted leave to file the oversized Response;

(b) The Prosecution is granted leave to file the Prosecution Reply to the Response;

(c) The Prosecution's Motion to Amend is denied.

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

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Patrick Robinson
Presiding

Dated this seventeenth day of December 2004
At The Hague
The Netherlands

[Seal of the Tribunal]

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1. IT/184/Rev.1 (5 March 2002), at para . (C)(5).
2. *Prosecutor v. Halilovic*, Case No. IT-01-48-I, "Indictment", 10 September 2001 ("Current Indictment").
3. *Halilovic*, "Order on Review of the Indictment Pursuant to Article 19 of the Statute and Order for Non-Disclosure ", 12

September 2001.
4. Current Indictment, *supra* n. 2, at para. 34 (emphasis added).
5. *Halilovic*, Transcript, 27 September 2001, at p. 3.
6. *Halilovic*, "Decision on Request for Pre-Trial Provisional Release", 13 December 2001.
7. Defence Rule 65 *ter*(K) Motion , at paras. 3 and 1, respectively.
8. *Halilovic*, "Decision on Defence Motion Pursuant to Rule 65 Ter (K) Requesting the Pre-Trial Judge to Grant Relief From Waiver and to Grant Relief Pursuant to Rule 72", 1 April 2003.
9. Motion to Amend, at para. 7 (emphasis added).
10. *Id.*, para. 2.
11. *Id.*, para. 8 (emphasis in original).
12. *Id.*, para. 9, referring to *Halilovic*, "Submission of Prosecution Pre-Trial Brief, Witness List and Exhibit List Pursuant to the Direction of the Pre-Trial Judge", 17 June 2002 ("Prosecution's original pre-trial brief"). This brief has since been superseded by a final pre -trial brief, "Prosecutor's Pre-Trial Brief Pursuant to Rule *65ter*(E)(i)", filed on 13 October 2004 ("Prosecution's final pre-trial brief"). On 27 October 2004, the Defence filed its notice that its initial pre-trial brief, filed on 22 March 2003, shall stand as its final pre-trial brief ("Defence pre-trial brief").
13. Motion to Amend, paras. 5, 10.
14. *Id.*, paras. 2, 10.
15. Response, at para. 5.
16. *Id.*, para. 9, citing *Prosecutor v. Brdjanin and Talic*, Case No. IT-99-36-PT, "Decision on Objections by Radoslav Brdjanin to the Form of the Amended Indictment", 23 February 2001 ("Second Brdjanin & Talic Decision"), at para. 11; *Prosecutor v. Nyiramasuhuko*, Case No. ICTR-97-21-I, "Decision on the Preliminary Motion by Defence Counsel on Defects in the Form of the Indictment", 4 September 1998, at para. 13; *Prosecutor v. Krnojelac*, Case No. IT-97-25-PT, "Decision on the Defence Preliminary Motion on the Form of the Indictment", 24 February 1999 ("First Krnojelac Decision"), at para. 12.
17. Response, at para. 11.
18. *Id.*, paras. 12–25; 26–31 .
19. *Id.*, paras. 32–40.
20. *Id.*, paras. 41–45. The Defence also notes that it is nevertheless "unwilling to waive Mr. Halilovic's right to be tried without undue delay." *Id.*, para. 45.
21. Prosecution Reply, at para. 4.
22. The Reply refers to this latter paragraph as 23, but based on the contents of the paragraph as described (and relied upon) by the Reply, the correct reference should be 24. The Prosecution's error is probably caused by the fact that paragraph 25 of the current indictment is mis -numbered as paragraph 24, a typographical error that is repeated in the proposed amended indictment.
23. Motion to Amend, at para. 8; Prosecution Reply, at paras. 4–5.
24. The Appeals Chamber has also held that the guarantees in Articles 21(2) and 21(4)(b) to "a fair and public hearing " and "adequate time and facilities for the preparation of his defence" are basic rights of the Accused that apply equally to the issue of notice of the crimes with which he is charged, and therefore are relevant to consideration of the form of the indictment. *See Prosecutor v. Kupreskic*, Case No. IT-95-16-A, "Appeal Judgement", 23 October 2001 ("Kupreskic Appeal Judgment"), at para. 88.
25. Kupreskic Appeal Judgment, *supra* n. 24, at para. 88. *See also Prosecutor v. Deronjic*, Case No. IT-02- 61-PT, "Decision on Form of the Indictment", 25 October 2002 ("Deronjic Decision "), at para. 4; *Prosecutor v. Hadzihasanovic, Alagic, and Kubura*, Case No . IT-01-47-PT, "Decision on Form of Indictment", 7 December 2001 ("Hadzihasanovic Decision"), at para. 8.
26. Deronjic Decision, *supra* n. 25, at para. 4.
27. Deronjic Decision, *supra* n. 25, at para. 9, citing Hadzihasanovic Decision, *supra* n. 25, at para. 10; *Prosecutor v. Brdjanin and Talic*, Case No. IT-99-36-PT, "Decision on Form of Fourth Amended Indictment", 23 November 2001 ("Fourth Brdjanin & Talic Decision "), at para. 12; *Prosecutor v. Brdjanin and Talic*, Case No. IT-99-36-PT, " Decision on Objections by Momir Talic to the Form of the Amended Indictment", 20 February 2001 ("First Brdjanin & Talic Decision"), at para. 48.
28. Fourth Brdjanin & Talic Decision , *supra* n. 27, at para. 12 (emphasis in original). The Chamber found that "it would be an unnecessary technicality to require [such a fact] to be pleaded expressly, as the accused could never argue that he had not been made aware by the indictment of the case he had to meet." *Ibid.* It went on to hold that the contested fact was *not* "necessarily implied" in the indictment in that case , given the general terms in which that document was framed. *See id.*, paras . 14–16. *See also* Deronjic Decision, *supra* n. 25, at para. 9, noting that "[t]his fundamental rule of pleading is ... not complied with if the pleading merely assumes the existence of the [legal] prerequisite [to the application of the offences]", such as the existence of an armed conflict.
29. Kupreskic Appeal Judgment, *supra* n. 24, at para. 114.
30. Deronjic Decision, *supra* n. 25, at para. 7 (emphasis added).
31. *See* Current Indictment, *supra* n. 2, at paras. 1, 3–5, 35–39, 43.
32. *See id.*, paras. 15, 19, 22–24.
33. Paragraph 15, however, does not explicitly state that the Accused failed to carry out these measures, but rather implies such a conclusion by its use of the past conditional tense. The explicit charge of failure to prevent the killings in Grabovica occurs only in paragraph 34. *See ibid.*
34. Emphasis added.
35. As distinct from the failure to punish crimes in Uzdol that is currently explicitly mentioned in paragraph 34 of the

Current Indictment.
36. Second Brdjanin & Talic Decision , *supra* n. 16, at paras. 13, 14 (emphasis added).
37. First Krnojelac Decision, *supra* n. 16, at para. 13 (emphasis added); *see also Krnojelac*, "Decision on Preliminary Motion on the Form of Amended Indictment", 11 February 2000 ("Third Krnojelac Decision"), at para. 19, repeating this holding and emphasising that the "particular course of conduct" of the accused is especially relevant to cases based on superior responsibility.
38. *Prosecutor v. Delalic et al.,* Case No. IT-96-21-AR72.5, "Decision on Application for Leave to Appeal by Hazim Delic (Defects in the Form of the Indictment)", 6 December 1996, at para. 31. *See also* Kupreskic Appeal Judgment, *supra* n. 24, at para. 98:
What the Prosecution must do ... is to *particularise the material facts of the alleged criminal conduct* of the accused that ... goes to [his] role in the alleged crime. Failure to do so results in the indictment being unacceptably vague since such an omission would impact negatively on the ability of the accused to prepare his defence.
39. The Chamber also notes that in both versions of the indictment, paragraph 34 omits at least one term-of-art phrase usually encountered in similar paragraphs in other indictments: it does not allege that Mr. Halilovic "knew or had reason to know" of his subordinates' criminal activities in either Grabovica or Uzdol. *Compare* Current Indictment, *supra* n . 2, at para. 34, *with Prosecutor v. Me[j]akic et al.,* Case No. IT-02-65, "Consolidated Indictment (Omarska and Keraterm Camps)", 21 November 2002 ("Mejakic Consolidated Indictment"), at paras. 27, 42.
40. Article 19, which governs review of the indictment, states in subparagraph (1) that an indictment should only be confirmed if the Prosecutor has established a *prima facie* case against the Accused..
41. *Me[j]akic et al.,* "Decision on the Consolidated Indictment," 21 November 2002 ("Mejakic Decision"), at p. 3, citing *Prosecutor v. Naletilic and Martinovic*, Case No. IT-98-34-PT, "Decision on Vinko Martinovic's Objection to the Amended Indictment and Mladen Naletilic's Preliminary Motion to the Amended Indictment", 14 February 2001 ("Naletilic & Martinovic Decision"), at pp. 4–7.
42. *Prosecutor v. Brdjanin and Talic* , Case No. IT-99-36-PT, "Decision on Form of Further Amended Indictment and Prosecution Application to Amend", 26 June 2001 ("Third Brdjanin & Talic Decision "), at para. 50, citing Naletilic & Martinovic Decision, *supra* n. 41, at pp. 4, 7.
43. Fourth Brdjanin & Talic Decision , *supra* n. 27, at para. 17; *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 ("Karemera Interlocutory Appeal Decision"), at para. 13.
44. Karemera Interlocutory Appeal Decision , *supra* n. 43, at para. 15.
45. Motion to Amend, at para. 5, citing Mejakic Decision, *supra* n. 41.
46. *See* Motion to Amend, at para. 8; Prosecution Reply, at paras. 4–5.
47. *See supra*, paras. 12–20.
48. *See* Mejakic Decision, *supra* n. 41, at p. 4 n.12, noting that the Consolidated Indictment added a count of persecution (under Article 5(h)) against the Accused Mejakic, Gruban and Kneževic ; and two counts of inhumane acts (under Article 5(i)) and cruel treatment (under Article 3) against the Accused Gruban. *See* Mejakic Consolidated Indictment , *supra* n. 39.
49. *Prosecutor v. Niyitegeka* , Case No. ICTR-96-14-I, "Decision on Prosecutor's Request for Leave to File an Amended Indictment", 21 June 2000, at para. 33(1)(a)(ii), *cited with approval in* Naletilic & Martinovic Decision, *supra* n. 41, at p. 6.
50. The manner in which "charge" is used elsewhere in the Rules is inconclusive on this issue. Rules 40 *bis*(A) and 40 *bis* (C) discuss the "provisional charge" provided by the Prosecutor to support a request for the transfer and provisional detention of a suspect, but this document is more appropriately described as a preliminary accusatory instrument , and can include several allegations of different crimes. Rules 87(B) and 87(C) deal with the Trial Chamber's deliberations and findings of guilt or innocence on each "charge" in the indictment, which suggests that "charge" is synonymous with "count", but the practice of Trial Chambers is not so restrictive. *See, e.g., infra* nn. 51–53 and accompanying text.
51. In *Mejakic*, for example, the new charges were new counts in the indictment and new crimes under the Statute . *See supra* n. 48 and accompanying text.
52. At least one Trial Chamber applying Rule 50 has required an Accused to enter a new plea of guilty or not guilty to respond to new allegations of underlying offences, where the amendment of the indictment did not alter the counts involved. *Prosecutor v. Hadzihasanovic, Alagic, and Kubura*, Case No. IT-01-47-I, Transcript, 28 November 2003 ("Kubura New Plea Hearing"), at 261–263.
53. *See* Naletilic & Martinovic Decision, *supra* n. 41, at pp. 2, 4. Moreover, yet another Trial Chamber has previously found that the presence or absence of new counts does not determine whether the Prosecution has sought to add new charges. *Krnojelac*, "Decision on Prosecutor's Response to Decision of 24 February 1999", 20 May 1999 ("Second Krnojelac Decision") at para. 19:
[T]he Trial Chamber has obtained the impression that the prosecution may have taken the opportunity to add new charges .... It is true, as the prosecution says, that no new counts have been added to the indictment. But that is only because of the pleading style adopted by the prosecution in this case; each count has been pleaded only in the terms of the Statute, and thus in terms of absolute generality, leaving it to the material facts pleaded in respect of that count to reveal the specific details which are required ... and which should, strictly, have been pleaded in the count itself.
54. Rule 50(C) addresses the novelty of the charge, because its provision for a further period of thirty days to respond to the new charge(s) implies that the Accused had not had a previous opportunity to file preliminary motions on the issue(s).
55. *Deweer v. Belgium*, (1979 –80) 2 E.H.R.R. 439, at paras. 42, 44.
56. Case No. IT-01-47-AR72, "Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility ", 16 July 2003 ("Hadzihasanovic Interlocutory Appeal Decision"), at para. 55

57. Hadzihasanovic Decision, *supra* n. 25, at para. 23.
58. Case No. IT-95-14/2-PT, "Decision on the Joint Defence Motion to Dismiss for Lack of Jurisdiction Portions of the Amended Indictment Alleging 'Failure to Punish' Liability", 2 March 1999, at paras . 13–14.
59. Case No. IT-95-14-A, "Judgement ", 29 July 2004 ("Blaskic Appeal Judgement"), at paras. 78–85.
60. *See, e.g., Prosecutor v. Delalic et al.,* Case No. IT-96-21-A, "Judgement", 20 February 2001 ("Celibici Appeal Judgement"), at paras. 223, 234–235, 238, 241; Blaskic Appeal Judgement, *supra* n. 59, at para. 62; *Prosecutor v. Galic*, Case No. IT-98-29-T, "Judgement and Opinion", 5 December 2003, at paras. 173, 176, 702, 720–721, 723.
61. *See* Hadzihasanovic Interlocutory Appeal Decision, *supra* n. 56, at para. 55: "Although the duty to prevent and the duty to punish are separable, each is coterminous with the commander's tenure ."
62. *See Hadzihasanovic and Kubura* , "Decision on Form of Indictment", 17 September 2003, at paras. 24–26, where Trial Chamber II noted that whether a new allegation was actually a new charge or not was immaterial, because the Prosecution emphasised that it would not seek criminal responsibility for that allegation. The Accused did not have to enter a new plea on that new allegation, again suggesting that the test for a "new charge" is whether criminal responsibility could arise therefrom. *See* Kubura New Plea Hearing , *supra* n. 52.
63. Third Brdjanin & Talic Decision, *supra* n. 42, at para. 50.
64. *See supra* nn. 43–44 and accompanying text.
65. *See supra* n. 12 and accompanying text.
66. *Halilovic*, "Defence Notice Concerning its Pre-Trial Brief", 27 October 2004, at para. 3.
67. Since the Accused has been on provisional release since December 2001, *see supra* n. 6, the Chamber need not consider the length of any pre-trial detention in determining any potential prejudice to the Accused.
68. Although Rule 72(A) requires the Chamber to dispose of any such motion not later than sixty days after filing, that period itself extends beyond the anticipated start of trial.
69. *See, e.g.,* Fourth Brdjanin & Talic Decision, *supra* n. 27, at para. 17.
70. *See supra*, para. 23.
71. *See* Karemera Interlocutory Appeal Decision, *supra* nn. 43–44 and accompanying text.
72. Since the Trial Chamber has decided to deny the Motion to Amend, it need not reach the issue of whether the supporting material used by the Prosecutor for the confirmation of the Current Indictment would establish a *prima facie* case against the Accused on this new charge. *See* Rule 50(A)(ii); Article 19(1).