

IT-03-66-PT
D 1461 - D 1450
13 February 2004

1461
14B.

**UNITED
NATIONS**

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-03-66-PT

Date: 12 February 2004

Original: English

BEFORE THE TRIAL CHAMBER

Before: Judge Alphons Orie, presiding
Judge Amin El Mahdi
Judge Martín Canivell

Registrar: Mr. Hans Holthuis

Decision of: 12 February 2004

PROSECUTOR

v.

**FATMIR LIMAJ
HARADIN BALAJ
ISAK MUSLIU**

DECISION ON PROSECUTION'S MOTION TO AMEND THE AMENDED INDICTMENT**Counsel for the Prosecutor:**

Mr. Andrew Cayley
Mr. Alex Whiting

Counsel for the accused:

Mr. Michael Mansfield for Fatmir Limaj
Mr. Peter Murphy for Haradin Bala
Mr. Steven Powles for Isak Musliu

1. Introduction

1. This Trial Chamber (the "Trial Chamber") of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (the "Tribunal") is seized of the "Prosecutor's Motion to Amend the Amended Indictment" of 6 November 2003 (the "Motion") filed pursuant to Rule 50 of the Rules of Procedure and Evidence of the Tribunal (the "Rules") and to which are attached as Annex A the "Proposed Second Amended Indictment" and as Annex B supporting material. The "Response of Haradin Bala to Motion of Prosecution to Amend Amended Indictment" ("Bala Response") and the "Response to Prosecutor's Motion to Amend the Amended Indictment" by the Accused Musliu ("Musliu Response") were both filed on 20 November 2003. The Accused Fatmir Limaj did not file a response. On 1 December 2003, the Prosecution filed the "Prosecutor's Consolidated Reply Regarding its Motion to Amend the Amended Indictment" (the "Reply").
2. The original indictment against the accused Fatmir Limaj, Haradin Bala and Isak Musliu (the "Accused") was confirmed on 27 January 2003. On 7 March 2003, the Prosecution proposed an amended indictment to "reflect the dismissal of all charges against the person referred to in the original indictment as Agim Murtezi" ("Amended Indictment"). Leave to amend the indictment was granted by the Trial Chamber on 25 March 2003.¹
3. The Amended Indictment is comprised of nine counts charging the Accused with crimes against humanity (4 counts) and violations of the laws or customs of war (5 counts), pursuant to Articles 3 and 5 of the Amended Statute of the Tribunal (the "Statute"). It is alleged that all acts or omissions charged in the Amended Indictment occurred between May and July 1998 in the prison camp of Lapušnik/Llapushnik in Kosovo, for which the accused Limaj incurs criminal responsibility under both Article 7(1) and 7(3) of the Statute and the accused Bala and Musliu incur criminal responsibility under Article 7(1) of the Statute. It is alleged that during the Amended Indictment period, the Accused, acting individually and in concert with others, participated in the crimes alleged in the Amended Indictment.
4. The Prosecution requests leave to make the five following amendments to the Amended Indictment:
 - a) the addition of allegations of joint criminal enterprise liability against all three accused;

¹ Decision to Grant Leave to Amend the Indictment, 25 March 2003.
Case No. IT-03-66-PT

- b) the addition of allegations of superior responsibility under Article 7(3) of the Statute against the Accused Musliu;
 - c) the addition of one count of Inhumane Acts under Article 5 of the Statute based on factual allegations already included in Count 5;
 - d) the addition of one incident of murder to the charges under the existing Counts 6-7; and
 - e) the correction of a small number of errors, as well as some clarification of language, in the current Amended Indictment.
5. The Defence of the Accused Bala object to the amendments a) and c) and the Defence of the Accused Musliu objects to the amendments a) and b). These objections will be discussed in turn after a discussion on the law concerning amendment of indictment.

2. Rule 50 of the Rules

6. Rule 50 of the Rules of Procedure and Evidence governs the amendment of indictments. Rule 50 (A) provides modalities concerning the competent judge and time at which an indictment may be amended. Rule 50 (B) expressly addresses the issue of new charges, without specifying whether new charges can only be based upon new facts, and Rule 50 (C) contemplates that the accused may require additional time to prepare for trial as a result of an amendment that involves adding a further count.²
7. The first substantive question the rule is concerned with is the type of amendment which may be made to an indictment. In the instant case, the Prosecution proposes to include two new forms of liability (joint criminal enterprise and command responsibility), a new incident based on new facts and evidentiary material under existing charges in current counts 6 and 7, a new charge based on existing facts and evidentiary material (proposed count 5), and some corrections to the language and annexes of the Amended Indictment.

² (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) After the assignment of the case to a Trial Chamber it shall not be necessary for the amended indictment to be confirmed.

(iii) Rule 47 (C) and Rule 53 *bis* apply *mutatis mutandis* to the amended indictment.

(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.

458

8. There is no doubt that new factual or evidentiary material may result in an amendment if such material constitutes *prima facie* evidence. The Defence of the Accused Bala argues that new evidentiary material supporting amendments to the indictment must be put to scrutiny by a confirmation judge.³ Rule 50 (A)(ii) which sets out that "after the assignment of the case to a Trial Chamber it shall not be necessary for the amended indictment to be confirmed" must be interpreted in fairness to the Accused and with due regard to the spirit of the rule, as giving the Trial Chamber, *and not the original confirming judge*, the duty to act as confirming judge when examining new evidentiary material brought in support of an amendment to an indictment.⁴ In relation to the addition of new charges even in the absence of new factual or evidentiary material, this has been accepted in other cases before the ICTY and the ICTR.⁵ For instance, in the *Naletilić and Martinović* case, the Trial Chamber agreed to add a new charge of "Dangerous or Humiliating Labour" in the absence of new evidence.⁶ In the *Musema* case, the Trial Chamber allowed a new charge of complicity in genocide as an alternative to the existing charge of genocide rather than as an additional count.⁷ Also, in the *Niyitegeka* case, the Trial Chamber said that new charges could be added to an indictment to "allege an additional legal theory of liability with no new acts".⁸ In sum, although the case-law of the ICTY and the ICTR on the exercise of the discretion contained in Rule 50 demonstrates that a decision to accept an amendment will normally be forthcoming unless prejudice can be shown to the accused, it still remains understood that amendments prompted by newly discovered evidence must be supported by *prima facie* evidence.
9. The second substantive question the rule is concerned with and which is the second key consideration for the Trial Chamber in granting leave to amend the indictment, is to ensure that the accused is not prejudiced by an amendment of the indictment against him in the conduct of his defence. Therefore, although there are no express limits on the exercise of the discretion contained in Rule 50, when viewing the Statute and Rules as a whole, that discretion must be exercised with regard to the right of the accused to a fair trial. In particular, depending on the circumstances of the case, the right of the accused

³ Bala Response, para. 5.

⁴ Rule 50 (A)(ii) was amended during the July 2000 Plenary of judges to ensure that applications for amendment of indictment be filed before the Trial Chamber seized of the case, when this was the case, and not before the original confirming judge or another judge acting as the original confirming judge.

⁵ See *Prosecutor v Krstić*, Case No. IT-98-33-PT, "Amended Indictment", 27 October 1999.

⁶ *Prosecutor v Naletilić and Martinović* ("Naletilić case"), Case No. IT-98-34-PT, Decision on Prosecution Motion to Amend Count 5 of the Indictment, 28 November 2000.

⁷ See *Prosecutor v Musema*, Case No. ICTR-96-13-T, Decision on the Prosecutor's Request for Leave to Amend the Indictment, 18 November 1998.

⁸ See *Prosecutor v Niyitegeka*, Case No. ICTR-96-14-I, Decision on Prosecutor's Request for Leave to File an Amended Indictment, 21 June 2000.

1457

to an expeditious trial, to be promptly informed of the charges against him, and to have adequate time and facilities for the preparation of his defence, potentially arise when considering objections to an amended indictment.⁹ Also, when deciding the question of whether the amendment results in any prejudice to the accused, due consideration must be given to the "Prosecutor's unfettered responsibility to prosecute the accused to the full extent of the law and to present all relevant evidence before the Trial Chamber".¹⁰

10. Thus, 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. If additional time to prepare the conduct of the defence is given to the accused, an amendment does not need to result in prejudice to the accused.¹¹ Such a decision is taken in light of all aspects of the case. The delay to the trial of the accused resulting from the amendment should not be unreasonable in light of the complexity of the case and when considering the crimes contained in the existing indictment at the time of his arrest, so that his right to be promptly informed of the charges against him is not violated by the amendment.

3. The Amendments Proposed by the Prosecution

11. The Prosecution makes the general argument that the proposed amendments will not cause prejudicial delay and should be allowed in view of the fact that the indictment against the Accused, by Tribunal's standards, is narrow in scope - it covers a short period of time (four months), a small part of Kosovo and a clearly identified set of events.¹²
12. The Defence of the Accused Musliu also makes a preliminary argument concerning the lack of sufficient explanations regarding the tardiness (the amendments are sought eight months after the Accused Musliu has been held in custody) with which the Prosecution is making the present application.¹³ The Prosecution replies to Musliu's argument concerning the tardiness of the Motion that it has waited to make the application to

⁹ See *Naletilić case*.

¹⁰ See for example, *Prosecutor v Musema*, Case No. ICTR096-13-T, Decision on the Prosecutor's Request for Leave to Amend the Indictment, 6 May 1999. In *Prosecutor v Kabiligi and Ntabakuze*, Case No. ICTR-97-34-1/ICTR-97-30-1, Decision on the Prosecutor's Motion to Amend the Indictment, 8 October 1999.

¹¹ See *Prosecutor v Kovačević*, Case No. IT-97-24-PT, Decision Stating Reasons for Appeals Chamber's Order of 29 May 1998, 2 July 1998.

¹² Reply, para. 24.

¹³ Musliu Response, paras. 9-12.

amend the Amended Indictment until it believed, based on additional investigation, that the charges could be proven beyond reasonable doubt.¹⁴

13. The Trial Chamber recalls that the showing of whether amendments to an indictment are brought forward in a timely manner must be "measured within the framework of the overall requirement of the fairness of the proceedings."¹⁵ The Trial Chamber is satisfied with the Prosecution's explanations in relation to the delay of the application to amend the Amended Indictment. In the present case, there is no suggestion that the Prosecution seeks an improper tactical advantage by filing the Motion. Furthermore, the amendments sought are not such in scope, having had due regard to the case as a whole, that, at the outset and even with additional time to prepare the conduct of the Defence, the Accused's right to a fair trial would be prejudiced following the amendments.

14. The Trial Chamber turns now to examine each of the proposed amendments to the Amended Indictment.

a) The addition of allegations of Joint Criminal Enterprise ("JCE") liability against all three accused

15. The Prosecution submits that the purpose of this amendment is to reflect the existence of a JCE among the Accused and other individuals involved in the detention, mistreatment and murder of persons detained at the Lapušnik/Ljapushnik Prison Camp in the summer of 1998.¹⁶ The Prosecution argues on the one hand that it was "abundantly clear" from the current indictment, and particularly the many witness statements, summaries and interview transcripts disclosed to the Defence that the Accused were acting in concert with one another and with others. On the other hand, the Prosecution argues that the proposed amendment is "the result of investigative work, post-indictment, which has revealed that the role of the three accused can be most accurately characterised as participation in a joint criminal enterprise".¹⁷

16. The Defence of the Accused Bala and Musliu objects to the addition of JCE allegations in the Amended Indictment on the grounds that these allegations are not supported by any facts not known to the Prosecution at the time of the original Indictment, that the

¹⁴ Reply, paras 5, 7.

¹⁵ *Prosecutor v Kovačević*, Case No. IT-97-24-AR73, Decision Stating Reasons for Appeals Chamber's Order of 29 May 1998, 2 July 1998, para. 31.

¹⁶ Motion, para. 10.

¹⁷ Motion, para. 11. Paragraphs 10-12 of the proposed Second Amended Indictment set forth the individual responsibility of each of the Accused in the JCE, Motion, para. 12.

proposed amendment lacks necessary specificity (there is no details concerning the beginning, the end or the other members of the JCE according to the Defence) and that it expands the scope of the case against the Accused to an unknown extent.¹⁸ The Defence of both Accused emphasises that since the Prosecution argues that the current Amended Indictment already makes it "abundantly clear" that the three accused were acting in concert with one another, such amendment is not necessary.¹⁹

17. The Prosecution explains that the principal effect of the newly obtained evidence has not been to reveal additional criminal acts by the accused but rather to persuade itself that the Accused's participation in crimes at the camp was done in furtherance of a JCE in which they shared a common purpose.²⁰ The Prosecution acknowledges that the inclusion of the legal liability may require the Defence of the Accused to undertake additional investigation but emphasises that the scope of such work is exaggerated by the Defence.²¹ Finally, the Prosecution argues that allegations of JCE are sufficiently specified in the proposed Amended Indictment. It contends that the time, the geographical extent and participants of the JCE are described in the Amended Indictment and in the supporting material with sufficient detail to put the Accused on notice.²²

18. The Trial Chamber is satisfied with the explanations provided by the Prosecution. It further recalls one of the Appeals Chamber's conclusions in the *Karemara* case, which it endorses, that "the specific allegation of a joint and criminal enterprise gives the Accused clear notice that the Prosecution intends to argue this theory of commission of crimes. Particularized notice in advance of trial of the Prosecution's theory of the case does not render proceedings unfair; on the contrary, it enhances the ability of the Accused to prepare to meet that case".²³ The Trial Chamber acknowledges that in the present case, there may indeed be a need for the accused to conduct new inquiries, approach new witnesses, or expend some additional resources if allegations of JCE are added to the Amended Indictment. These new investigations do not appear so extensive in scope however that even with an additional period of time to prepare, the conduct of

¹⁸ Bala Response, paras 2, 4, 5 : Bala Defence argues that statements and summaries of witnesses L-01, L02, L-05, L-10, L-11 and Shefqet Gashi simply re-state the allegations that Bala personally committed certain offences during the indictment period and that the interview with Ramiz Qeriqi provides no evidence against Bala; Musliu Response, paras 16-18.

¹⁹ *Ibid.*

²⁰ Reply, paras 6, 7

²¹ Reply, para. 21.

²² Reply, paras 11-14.

²³ *Prosecutor v. Karemara 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 (AC), 19 December 2003, para. 27.

the Defence would be irretrievably hindered following the proposed amendment. The trial of the Accused is not yet scheduled to begin, nor is the case ready for trial. The Trial Chamber sees no prejudice to the Accused's right to a fair trial in granting leave to amend the Amended Indictment in respect of JCE liability if additional time to prepare for trial is available to the Defence.

19. Accordingly, the Trial Chamber grants leave to the Prosecution to amend the Amended Indictment to include allegations of JCE.

20. The Defence also raise the issue of lack of specificity of allegations of JCE. This issue is legitimately raised here by the Defence as a preliminary objection on the form of the proposed second amended indictment – pursuant to Rule 72 of the Rules – insofar as it relates to the new allegations of JCE. The Trial Chamber recalls that what is required to be pleaded by the Prosecution with respect to added allegations of JCE, and in addition to the underlying offences committed in the JCE, is the purpose and period of the enterprise, the identity of the participants in the enterprise, and the nature of the participation of the accused in that enterprise.²⁴ The Trial Chamber is satisfied that the Prosecution has discharged its obligation to specify the relevant aspects of JCE in the proposed second amended indictment in a satisfactory manner.²⁵

21. The Trial Chamber dismisses the Defence's objections concerning the form of the indictment insofar as they relate to allegations of JCE.

b) The addition of allegations of superior responsibility under Article 7(3) of the Statute against the Accused Musliu

22. The Prosecution submits that evidence obtained since the filing of the Amended Indictment has persuaded the Prosecution that the Accused Musliu's position was such that he should be held responsible for his knowing failure to prevent or punish the charged crimes, as well as for his individual participation therein.²⁶ The Prosecution argues that the addition of these charges will not prejudice the Accused Musliu because the majority of the evidence supporting these charges of superior responsibility will be offered into evidence in any event since it is relevant to other charges in the case.²⁷

²⁴ See *Prosecutor v Krnojelac*, Case No. IT-97-25-PT, Decision on Preliminary Motion on the Form of Amended Indictment, 11 February 2000.

²⁵ See Annex A to the Motion (proposed second amended indictment), paras 6 to 13.

²⁶ Motion, para. 13.

²⁷ *Ibid.*

23. The Accused Musliu objects to that amendment on the grounds that the inclusion of allegations of command responsibility will necessitate investigations of all the factual allegations in the Indictment because the preparation of the Defence only concentrated on those incidents where the Accused Musliu's direct participation was alleged.²⁸ The Prosecution replies that Musliu fails to identify any unfair prejudice resulting from the amendment²⁹ and notes that the issue of Musliu's command responsibility is not completely new because it was raised in connection with Musliu's application for provisional release and furthermore, such a charge would not require extensive investigation beyond that required by the other charges.³⁰

24. The Trial Chamber sees no reasons to deny the Prosecution the possibility to prosecute the Accused Musliu to the full extent of the law. It is persuaded that the inclusion of command responsibility liability is based on *prima facie* evidence contained in the supporting material attached to the Motion. The Trial Chamber acknowledges that the inclusion of such liability may require the Defence to approach new witnesses and conduct new inquiries. Such work would indeed necessitate additional time for the Defence to prepare. However, as mentioned above, the trial of the Accused is not scheduled to start soon. The Defence of the Accused has not shown any other prejudice which could not be prevented or cured by additional time to prepare.

25. Accordingly, the Trial Chamber grants leave to amend the Amended Indictment to include command responsibility liability against the Accused Musliu.

c) The addition of one count of Inhumane Acts under Article 5 of the Statute based on factual allegations already included in Count 5

26. The Prosecution submits that one count of "Inhumane Acts" under Article 5 of the Statute is added to complement the existing Count 5 ("Cruel Treatment" under Article 3 of the Statute) in order to maintain a consistent charging practice throughout the indictment whereby the alleged crimes are charged under both Articles 3 and 5 of the Statute.³¹ The Defence of the Accused Bala objects to the addition of this new count of "Inhumane Acts" on the ground that the offence of "Inhumane Acts" under article 5 of

²⁸ Musliu Response, paras 16-18.

²⁹ Reply, para. 15.

³⁰ Reply, para. 22.

³¹ Motion, para. 9.

the Statute is identical to the offence of "Cruel Treatment" as currently charged under Article 3 of the Statute in count 5. It adds that it is unclear whether the proposed new count is to be cumulative or alternative to the proposed counts 3, 4 and 6.³² The Prosecution replies that because offences under Articles 3 and 5 of the Statute require different chapeau requirements, counts 5 and 6, as amended in the proposed second Amended Indictment (Annex A of the Motion), are pleaded cumulatively and in accordance with the jurisprudence of the Tribunal.³³

27. As noted by the Prosecution, the practice of cumulative charging was endorsed by the Appeals Chamber of the Tribunal which has set this matter.³⁴ In the present case, it is not entirely clear why the Prosecution did not bring the proposed amendment at an earliest stage, for example when the original indictment was amended in March 2003. Indeed, the purpose of the amendment is to maintain a consistent charging practice throughout the indictment whereby the alleged crimes are charged under both Articles 3 and 5 of the Statute. However, the Trial Chamber does not disregard the fact that the Prosecution is entitled to prosecute to the full extent of the law within certain limits. Having due regard to the case as a whole, the Trial Chamber is not convinced that the inclusion of a new count 5 of Inhumane Acts would cause prejudice to the preparation of the Accused's defence.

28. Accordingly, the Trial Chamber grants leave to amend the Amended Indictment to add a new count 5 of "Inhumane Acts".

d) The addition of one incident of murder to the charges under existing Counts 6-7

29. The Prosecution argues that little additional investigative work would be required by the inclusion of the new incident of murder of Ajet Gashi (proposed paragraph 29).³⁵ The Defence of the Accused expresses no views on these proposed amendments.

30. The Trial Chamber is satisfied that the proposed new incident is prompted and based on *prima facie* evidence. The Defence does not identify any prejudice from the inclusion of the new incident of murder under existing charges. The Trial Chamber sees no reasons

³² Bala Response, para. 2. The Accused Musliu does not object to this proposed amendment and the Accused Limaj did not file a response to the Motion.

³³ Reply, paras 19-20.

³⁴ See *Prosecutor v. Delalić et al, Judgement*, Case No. IT-96-21-A, 20 February 2001, para. 400.

³⁵ See Motion, para. 8 and Reply, para. 21.

to deny the Prosecution's request to include a new incident of murder to charges under existing counts 6-7 if sufficient time is available to the Defence to prepare for trial.

31. Accordingly, the Prosecution's request to include one incident of murder to the charges under existing counts 6-7 of the Amended Indictment is granted.

f) Corrections of errors, as well as some clarification of language, in the current Amended Indictment

32. The Prosecution argues that these corrections include changes to some of the victims listed in Annex I and Annex II to the Amended Indictment, based on new evidence obtained during the ongoing investigations into these crimes.³⁶ The Prosecution adds that little additional investigative work would be required by the changes in Annex I (proposed paragraph 30).³⁷ The Defence of the Accused does not oppose these "corrections and clarifications". The Trial Chamber finds that the changes made to Annex I and Annex II of the Amended Indictment are sufficiently supported by evidence contained in Annex B of the Motion. The Trial Chamber sees no prejudice to the Accused's right to a fair trial in accepting these proposed amendments if additional time is granted to the Defence to prepare for trial.

33. Accordingly, the Trial Chamber grants the Prosecution's request to amend the Amended Indictment to include the proposed corrections and clarifications.

34. In sum, the Trial Chamber finds that the amendments sought by the Prosecution are acceptable and do not cause unfair prejudice to the Accused's right to a fair trial if sufficient time to prepare the conduct of the Defence is granted to the Defence.

FOR THE FOREGOING REASONS, pursuant to Rules 50 and 72 of the Rules of Procedure and Evidence,

GRANTS the Motion,

ORDERS that the Accused Fatmir Limaj, Haradin Bala and Isak Musliu enter a plea to the charges under Count 5 of the second Amended Indictment, and to the new allegation of Joint Criminal Enterprise liability and that the Accused Isak Musliu enter a plea to the new allegation of command responsibility liability at a hearing to be held on 27 February 2004;

DISMISSES the objections of the Defence of the Accused Bala and Musliu on the form of the amendments to the Amended Indictment.

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



Judge Alphons Oric, presiding

Dated this 12th day of February 2004
At The Hague,
The Netherlands.

[Seal of the Tribunal]

³⁶ Motion, para. 7.

³⁷ See Reply, para. 21.