



International Tribunal for the
Prosecution of Persons
Responsible for Serious Violations of
International Humanitarian Law
Committed in the Territory of the
Former Yugoslavia since 1991

Case No.: IT-98-30-PT
IT-95-8-PT
Date: 19 October 1999
Original: ENGLISH

IN THE TRIAL CHAMBER

Before: Judge Richard May, Presiding
Judge Mohamed Bennouna
Judge Patrick Robinson

Registrar: Mrs. Dorothee de Sampayo Garrido-Nijgh

Decision of: 19 October 1999

PROSECUTOR

v.

**MIROSLAV KVOČKA
MILOJICA KOS
MLAĐO RADIĆ
ZORAN ŽIGIĆ**

PROSECUTOR

v.

DRAGAN KOLUNDŽIJA

DECISION ON PROSECUTOR'S MOTION FOR JOINDER

The Office of the Prosecutor:

**Mr. Grant Niemann
Mr. Michael Keegan**

Mr. Kapila Waidyaratne

Counsel for the Accused

**Mr. Krstan Simić, for Miroslav Kvočka
Mr. Žarko Nikolić, for Milojica Kos**

**Mr. Toma Fila, for Mlado Radić
Mr. Simo Tosić, for Zoran Žigić
Mr. Dušan Vučićević, for Dragan
Kolundžija**

THIS TRIAL CHAMBER of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (“the International Tribunal”),

BEING SEISED of a “Motion for Joinder” (“Motion”), filed by the Office of the Prosecutor (“the Prosecution”) on 22 July 1999, and the responses of counsel for Mlado Radić¹, Milojica Kos², Miroslav Kvočka³ and for Dragan Kolundžija⁴,

NOTING the written submissions of the parties and their oral arguments heard on 27 and 29 September 1999,

NOTING that charges against Mlado Radić, Milojica Kos, Miroslav Kvočka, and Zoran Žigić are contained in Indictment IT-98-30 (relating to both the Omarska and Keraterm camps) and the charges against Dragan Kolundžija are contained in Indictment IT-95-8 (relating mostly to the Keraterm camp),

NOTING the request of the Prosecution to sever Dragan Kolundžija from Indictment IT-95-8 and to join him to Indictment IT-98-30 on the following grounds:

- (1) all of the accused named in these two Indictments are alleged to have been participants in the same transaction: an organised effort to “cleanse” the Prijedor area of Muslims and Croats. Joinder of these accused is therefore appropriate under Rule 48 of the Rules of Procedure and Evidence of the International Tribunal (“Rules”);
- (2) all of the acts committed by the five accused form part of the “same transaction”, thus permitting joinder of these crimes into a single Indictment under Rule 49;
- (3) joinder would promote judicial economy, reduce witness trauma, and conserve the resources of the International Tribunal; conversely severance would inevitably cause delay;

¹ Defence Response to Prosecutor’s Request for Leave to Amend Indictments IT-95-8-PT and IT-98-30-PT, 25 June 1999.

² Defence Response to Prosecutor’s Request for Leave to Amend Indictments IT-95-8-PT and IT-98-30-PT, 5 July 1999.

³ Filing, 5 Aug. 1999; Reply to Prosecution’s Motion for Joinder, 18 Aug. 1999; Respond on Prosecution’s Submission of Amended Indictment in Case No. IT-95-8-PT, 20 Sept. 1999; Addition to the Answer on Prosecutor’s Request for Joinder, 30 Sept. 1999.

⁴ Defence Response in Opposition to the Prosecutor’s Request, 16 Aug. 1999.

- (4) joinder would serve the interests of the accused Dragan Kolundžija by expediting the commencement of his trial;
- (5) joint trials before the International Tribunal should be the norm rather than the exception, as international crimes tend to be collective in their nature (Judgement of the Appeals Chamber in *Prosecutor v. Tadić* on “common design”⁵);
- (6) the distinction between Omarska and Keraterm camps is artificial. Both camps were part of a campaign of persecution on a Prijedor-wide basis;

NOTING that the Defence argue as follows:

- (1) the Prosecution interprets the phrase “same transaction” so widely as to implicate all accused of Serb ethnicity in the “ethnic cleansing” of the Prijedor municipality. This is a theory of collective guilt, which violates the principle of individual criminal responsibility;
- (2) there is no connection between the events that occurred in the Omarska and Keraterm camps. Those accused indicted for acts allegedly committed in the Omarska camp have nothing to do with acts said to have been committed at Keraterm;
- (3) the conditions of Rule 48 are not met and Rule 49 is inapplicable ;
- (4) the two cases are at completely different phases of preparation for trial (one is ready for trial whereas the other is just commencing the pre-trial phase). Joinder would inevitably violate the rights of the accused Miroslav Kvočka, Milošica Kos, Mlado Radić and Zoran Žigić to an expeditious trial;
- (5) future arrests could lead to even further delays in the trial of the accused Miroslav Kvočka, Milošica Kos, Mlado Radić and Zoran Žigić;
- (6) Defence counsel for Dragan Kolundžija argues that he is in any case entitled to an expeditious trial and the Prosecution cannot argue this as an incentive;

⁵ Judgement, *Prosecutor v. Duško Tadić*, IT-94-1-A, A.Ch, 15 July 1999:“(Para. 191) The above interpretation is not only dictated by the object and purpose of the Statute but is also warranted by the very nature of many international crimes which are committed most commonly in wartime situations. Most of the time these crimes do not result from the criminal propensity of single individuals but constitute manifestations of collective criminality: the crimes are often carried out by groups of individuals acting in pursuance of a common criminal design . . . (Para. 193) This interpretation, based on the Statute and the inherent characteristics of many crimes perpetrated in wartime, warrants the conclusion that international criminal responsibility embraces actions perpetrated by a collectivity of persons in furtherance of a common criminal design . . . (Para. 232) Accordingly, the only possible inference to be drawn is that the Appellant had the intention to further the criminal purpose to rid the Prijedor region of the non-Serb population, by committing inhumane acts against them. That non-Serbs might be killed in the effecting of this common aim was, in the circumstances of the present case, foreseeable”

- (7) Defence counsel for Mlado Radić argues that joinder would make it impossible to proceed at this stage with the proposal to take evidence by way of deposition;
- (8) Defence counsel for Mlado Radić and Milojica Kos propose that the proceedings against Zoran Žigić and Dragan Kolundžija be severed from the rest and that separate trials relating to the Omarska and Keraterm camps should take place;
- (9) Defence counsel for the accused Dragan Kolundžija argues that joinder would lead to a conflict of interests and possible antagonistic defences which would prejudice the rights of the accused;

NOTING that Rule 48 deals with joinder of accused, stating that “persons accused of the same or different crimes committed in the course of the same transaction may be jointly charged and tried”⁶,

NOTING that Rule 49 deals with joinder of crimes committed by the same accused, stating that “two or more crimes may be joined in one indictment if the series of acts committed together form part of the same transaction, and the said crimes were committed by the same accused”,

CONSIDERING that it is Rule 48 which applies in this case since the application seeks to join Dragan Kolundžija to those currently accused under Indictment IT-98-30,

CONSIDERING that in an earlier Decision in this case the Trial Chamber found that “the crimes alleged in the Amended Indictment that were committed in and around the municipality of Prijedor in Bosnia and Herzegovina from approximately 1 April 1992 to 30 August 1992 were committed in the course of the same transaction”⁷,

CONSIDERING that, even in the case of a single transaction, a joint trial is not mandatory under Rule 48 but that joinder is a matter for the discretion of the Trial Chamber,

⁶ Rule 2 defines “transaction” as: “A number of acts or omissions whether occurring as one event or a number of events, at the same or different locations and being part of a common scheme, strategy or plan”.

⁷ Decision on Defence Preliminary Motions on the Form of the Indictment, 12 Apr. 1999.

CONSIDERING that, in the Decision referred to above, the Trial Chamber noted the existence of such discretion but found that the relevant accused had presented no evidence to support a finding that a joint trial would cause him prejudice,

CONSIDERING that pursuant to Rule 82 (B), the Trial Chamber may order separate trials “to avoid a conflict of interests that might cause serious prejudice to an accused” or “to protect the interests of justice”,

CONSIDERING, however, that joining the accused Dragan Kolundžija to Indictment IT-98-30 is not in the interests of justice as it would delay the proceedings against the other accused charged in that Indictment,

CONSIDERING the fundamental obligation of the Trial Chamber, pursuant to Article 20 of the Statute of the International Tribunal, to ensure fair and expeditious trials,

FOR THE FOREGOING REASONS

PURSUANT TO Rule 82 of the Rules of Procedure and Evidence,

HEREBY DISMISSES THE MOTION.

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



Richard May
Presiding Judge

Dated this nineteenth day of October 1999
At The Hague
The Netherlands

[Seal of the Tribunal]