

UNITED  
NATIONS



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

Case Nos. IT-98-33/1-PT  
IT-01-43-PT  
IT-01-44-PT  
Date: 16 January 2002  
Original: English

**IN THE TRIAL CHAMBER**

**Before:** Judge Wolfgang Schomburg, Presiding  
Judge Carmel A. Agius  
Judge O-Gon Kwon

**Registrar:** Mr. Hans Holthuis

**THE PROSECUTOR v. VIDOJE BLAGOJEVIĆ**

**THE PROSECUTOR v. DRAGAN OBRENOVIĆ**

**THE PROSECUTOR v. DRAGAN JOKIĆ**

**WRITTEN REASONS FOLLOWING ORAL DECISION OF 15  
JANUARY 2002 ON THE PROSECUTION'S MOTION FOR  
JOINDER**

**The Office of the Prosecutor:**

Mr. Peter McCloskey  
Mr. Dan Moylan  
Mr. Saleem Naqvi

**Counsel for the Accused:**

Mr. Michael G. Karnavas for Vidoje Blagojević  
Mr. David Eugene Wilson, Mr. Dušan Slijepečević for Dragan Obrenović  
Mr. Miodrag Stojanović for Dragan Jokić

## I. INTRODUCTION

1. 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 ("International Tribunal") is seised of a motion filed on 11 September 2001 by the Office of the Prosecutor ("Prosecution") for an order that the accused Dragan Obrenović, Vidoje Blagojević and Dragan Jokić, who are currently charged in separate indictments in the cases of *Prosecutor v Obrenović* (IT-01-43-PT), *Prosecutor v Blagojević* (IT-98-33/1-PT) and *Prosecutor v Jokić* (IT-01-44-PT), be jointly tried in one unified indictment ("Motion").<sup>1</sup> The Motion is filed pursuant to Rule 48 of the Rules of Procedure and Evidence of the International Tribunal ("Rules").

2. These cases commenced life in different Trial Chambers. Obrenović made his initial appearance on 18 April 2001, and his case was assigned by the President of the International Tribunal to Trial Chamber II. Blagojević's initial appearance was 16 August 2001, and his case assigned to Trial Chamber III. Jokić made his initial appearance on 21 Aug 2001; his case was assigned to Trial Chamber I. The Prosecution originally filed a motion for joinder before Trial Chamber II alone,<sup>2</sup> but on 10 September 2001 it was ordered to file the Motion separately in each of the three cases.<sup>3</sup> The Prosecution complied and refiled the Motion on 11 September 2001, attaching a draft indictment in which the three accused were jointly charged. In order to provide greater specificity as to the factual allegations and consistency with recent case-law, this draft indictment was further revised and updated by the Prosecution in a document filed on 14 December 2001 (the "Proposed Draft Amended Indictment").<sup>4</sup> The Motion was assigned by the President to Trial Chamber II for determination.<sup>5</sup> On 2 October 2001, counsel for Obrenović ("Obrenović Defence") filed his response in which he opposed the Motion ("Obrenović Response").<sup>6</sup> Additionally, he sought leave to file a supplemental memorandum on the issue of joinder; permission to do so was granted on 4 October 2001.<sup>7</sup> On 2 November 2001, counsel for Jokić ("Jokić Defence") filed his response ("Jokić Response"),<sup>8</sup> in which he opposed the Motion. On 5 November 2001, counsel for Blagojević ("Blagojević Defence") filed a response,<sup>9</sup> in which the Motion was opposed. The same

<sup>1</sup> *Prosecutor v Obrenović* (IT-01-43-PT), *Prosecutor v Blagojević* (IT-98-33/1-PT), *Prosecutor v Jokić* (IT-01-44-PT), Prosecution's Motion for Joinder, 11 September 2001.

<sup>2</sup> *Prosecutor v Obrenović*, Case IT-01-43-PT, Prosecution's Motion for Joinder, 6 September 2001.

<sup>3</sup> *Prosecutor v Obrenović*, Case IT-01-43-PT, Direction to the Prosecution, 10 September 2001.

<sup>4</sup> Prosecution's Additional Filing of Updated Proposed Draft Amended Indictment, 14 December 2001.

<sup>5</sup> Order of the President on the Prosecutor's Motions for Joinder of Trial Dated 6 and 11 September, 14 September 2001.

<sup>6</sup> Accused Obrenović's Opposition to Motion for Joinder, 2 October 2001.

<sup>7</sup> *Prosecutor v Obrenović* (IT-01-43-PT), *Prosecutor v Blagojević* (IT-98-33/1-PT), *Prosecutor v Jokić* (IT-01-44-PT), Order Granting an Extension of Time, 4 October 2001.

<sup>8</sup> Document entitled "Prosecutor v Dragan Jokić", 2 November 2001.

<sup>9</sup> Accused's Supplemental Response to the Prosecutor's Motion for Joinder, 5 November 2001.

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day, the Obrenović Defence filed its supplemental memorandum.<sup>10</sup> On 16 November 2001, the Prosecution filed a confidential reply to the responses of the accused ("Prosecution Reply").<sup>11</sup>

3. All parties were heard by the Trial Chamber on 15 January 2002 ("Hearing"), and a decision was rendered orally. The Trial Chamber now deals with the arguments raised by the parties in their filings and at the Hearing on the Motion, and sets forth the written reasons for the oral decision.

## II. THE ARGUMENTS OF THE PARTIES

4. It is the Prosecution's case that the murder and forcible transfer of the Muslim population after the fall of the Srebrenica enclave was one large operation conceived by General Mladić, who is indicted separately and still at large, together with others. This plan was subsequently implemented by soldiers and officers of the Drina Corps, the Main Staff and the Republika Srpska Ministry of the Interior Police ("MUP"), including Blagojević, Obrenović and Jokić.<sup>12</sup> It asserts that from 12 to 16 July 1995 over 7500 Muslim men and boys were systematically murdered by the Army of Republika Srpska ("VRS").<sup>13</sup> It argues that, in order for the Trial Chamber to appreciate the criminal responsibility of each of the individual accused, the Prosecution must present evidence of the entire operation and factual background as alleged in the Proposed Draft Amended Indictment. If the accused were tried separately, each trial would cover the same facts and circumstances, and involve many of the same witnesses and exhibits.<sup>14</sup>

5. As to Blagojević, who is charged with criminal responsibility for all the known criminal acts occurring after the fall of Srebrenica, including crimes committed in the Zvornik Brigade zone of responsibility, the Prosecution intends to present "all the witnesses and exhibits necessary to prove the entire Srebrenica case".<sup>15</sup> Obrenović and Jokić are charged with criminal acts occurring in the Zvornik Brigade zone of responsibility. The Prosecution would, however, still have to present evidence of what occurred in the Bratunac area, and the background facts leading up to the VRS

<sup>10</sup> Supplemental Memorandum of Accused Obrenović in Opposition to Motion for Joinder, 5 November 2001.

<sup>11</sup> Prosecution's Reply to Oppositions of the Accused Regarding Joinder, *Confidential*, 16 November 2001. A public, redacted version was also filed the same day.

<sup>12</sup> Motion, para. 7.

<sup>13</sup> Hearing Transcript, p. 12.

<sup>14</sup> Motion, para. 7.

<sup>15</sup> *Ibid*, para. 8.

attack on the Srebrenica enclave, for the conduct of the accused in the Zvornik Brigade zone of responsibility to be fully understood.<sup>16</sup>

6. The Prosecution argues that Rule 48's requirement that the crimes be committed "in the course of the same transaction" is met for the following reasons. The counts charged against all three accused "are founded on the same facts and form part of a series of offences of the same or similar character".<sup>17</sup> Each accused is alleged to have been a member of the VRS Drina Corps command structure during the period of 11 July 1995 and 1 November 1995.<sup>18</sup> Each accused is liable for the crimes alleged based on their participation in the actions of the Drina Corps, under the command of Generals Ratko Mladić and Radislav Krstić.<sup>19</sup> The crimes were committed in the same systematic manner in that the victims were assembled and transported to the killing-sites, murdered by execution squads, and buried by excavation equipment.<sup>20</sup>

7. The Prosecution advances a number of reasons to argue that it is in the interests of justice to join the cases. It estimates that 30 to 40 witnesses would have to be called live to testify during the Prosecution case, and this number would be approximately the same whether the accused are tried jointly or separately. Of those witnesses, almost all of them are common to the three cases.<sup>21</sup> If the cases remain separate, those witnesses would have to be called as Prosecution witnesses three times.<sup>22</sup> This would increase the amount of time required by the International Tribunal to hear the witnesses. It is desirable that the same verdict and the same treatment be returned against all persons concerned in the same offence; if the accused were tried separately, inconsistencies might arise.<sup>23</sup> A joint trial would be the most efficient use of scarce judicial, prosecutorial and support resources.<sup>24</sup>

8. The Obrenović Defence advances two main arguments against the joining of the indictments. First, while accepting that, ordinarily, it might be expected that Jokić and Obrenović would be tried in a joint trial,<sup>25</sup> an "extraordinary" situation exists which requires a separate trial for the two accused due to the "inappropriate representation" of both accused during interview by the lawyer, Krstan Simić. The Defence suggests that there is a "glaring conflict of interest" because

<sup>16</sup> *Ibid*, para. 9.

<sup>17</sup> *Ibid*, para. 12.

<sup>18</sup> *Ibid*, para. 12.

<sup>19</sup> *Ibid*, para. 12.

<sup>20</sup> Hearing Transcript, pp. 13-14.

<sup>21</sup> Hearing Transcript, p. 22.

<sup>22</sup> Hearing Transcript, p. 21.

<sup>23</sup> *Ibid*, para. 15.

<sup>24</sup> *Ibid*, para. 17.

Jokić, presumably under the advice of Simić, made a number of statements harmful to the interests of Obrenović.<sup>26</sup>

9. Secondly, it argues that Blagojević is the only accused alleged to have been involved in all the offences occurring after the fall of Srebrenica, whereas Obrenović and Jokić involvement is limited to events in the Zvornik Brigade zone of responsibility.<sup>27</sup> Obrenović does not intend to greatly dispute the events in the Srebrenica and/or Bratunac areas, or much of the events preceding the arrival of the Muslim prisoners in Zvornik.<sup>28</sup> Much if not most of the “background” evidence has nothing to do with Obrenović, thus the argument that the cases must be joined to avoid lengthy, repetitious trials is not compelling.<sup>29</sup>

10. The Jokić Defence argues that the requirement of Rule 48, that the crimes are committed in the course of one transaction, is not met. Comparing the Blagojević and Jokić indictments, there is no causal link; there is no link between the offences in space or time; Blagojević is charged with events occurring in the Bratunac Brigade area of responsibility, whereas Jokić is only charged for those in the Zvornik Brigade area of responsibility.<sup>30</sup>

11. As to the interviewing of Jokić and Obrenović, the Prosecution should have stopped the process and warned them about the conflict of interest arising from Mr Simić representing the two of them.<sup>31</sup> The Prosecution must not be allowed to use “unethical behaviour” during the interviewing of the accused to join the indictments.

12. The Blagojević Defence concurs with the arguments put forward by the Obrenović Defence.

13. In its Prosecution Reply, the Prosecution addresses the two main issues raised in the responses. In relation to the argument that there is no link between the Obrenović and Jokić cases with the Blagojević case, it argues that this reasoning ignores the fundamental nature of the Srebrenica as a single transaction; that each accused participated in a joint criminal enterprise with the same common purpose and design, namely the forcible transfer to Kladanj of Bosnian Muslim

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<sup>25</sup> Obrenović Response, p. 2.

<sup>26</sup> Obrenović Response, p. 3.

<sup>27</sup> Obrenović Response, p. 4.

<sup>28</sup> Hearing Transcript, p. 2; also Obrenović Response, p. 5.

<sup>29</sup> Obrenović Response, p. 6.

<sup>30</sup> Jokić Response, p. 1.

<sup>31</sup> Jokić Response, p. 2.

women and children from the Srebrenica enclave, and the capture, detention and summary execution of thousands of Bosnian Muslim men and boys from the Srebrenica enclave.

14. Secondly, as to the alleged conflict of interest and purported error of the Prosecution, it argues that the allegations of unethical conduct are unsupportable.<sup>32</sup> It was evident that Jokić and Obrenović were communicating with each other and Simić had “orchestrated their statements to align with each other”. It does not recognise a duty on the part of the Prosecution to ensure that suspects’ rights are protected from unethical or unknowing defence counsel who may ignore or not see an infringement of their basic rights. In this case, any potential conflict had been neutralised prior to Obrenović being interviewed in Jokić’s second interview, in which Jokić changed his original story to lessen Obrenović’s culpability.

### III. THE LAW

15. The joinder of accused is governed by Rule 48, which provides:

#### Joinder of Accused

Persons accused of the same or different crimes committed in the course of the same transaction may be jointly charged and tried.

Furthermore, Rule 82(B) of the Rules is pertinent; it provides that the

Trial Chamber may order that persons accused jointly under Rule 48 be tried separately if it considers it necessary in order to avoid a conflict of interests that might cause serious prejudice to an accused, or to protect the interests of justice.

16. The first issue for the Trial Chamber is whether the offences with which the accused are charged were “committed in the course of the same transaction”. Rule 2 of the Rules defines “transaction” in the following way:

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.

17. In deciding this issue, a Trial Chamber must base its determination upon the factual allegations contained in the indictment. This principle was set forth in the International Criminal Tribunal for Rwanda Trial Chamber decision of *Kabiligi, Ntabake*, where it was held that “in the absence of evidence to the contrary, the Trial Chamber shall act upon the Prosecutor’s factual

<sup>32</sup> Prosecution Reply, p. 1.

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allegations as contained in the indictment and related submissions”.<sup>33</sup> Similarly, in *Brđanin & Talić* the Trial Chamber held, in relation to a defence motion for a separate trial, that “what must be looked at in this application are the allegations made in the indictment”.<sup>34</sup>

### “Same Transaction”

18. The legal prerequisites for joinder of accused have been considered in the earlier jurisprudence of the International Tribunal. In *Kordić & Cerkez*, the defence filed an application before the Trial Chamber for separate trials. In holding that the accused were properly joined in the same indictment, the Trial Chamber held that

To justify joinder [of accused under Rule 48] what has to be proved is that (a) there was a common scheme or plan, and (b) that the accused committed crimes during the course of it. It does not matter what part the particular accused played provided that he participated in a common plan. It is not necessary to prove a conspiracy between the accused in the sense of direct coordination or agreement. The transaction referred to in Rule 48 does not reflect the law of conspiracy found in some national jurisdictions.<sup>35</sup>

In *Brđanin & Talić*, it was held that it was proper to have the charged the two accused jointly as “the case pleaded ... clearly asserts the existence of the one campaign (for the execution of which both accused are charged with criminal responsibility), carried out by the same people, during the same period of time and in the same area”.<sup>36</sup> More recently, Trial Chamber III ordered that the trials of the two accused, Krajišnik and Plavšić, be joined in circumstances where they were “accused of identical crimes committed in the course of the same transaction within the same time frame and in the same locations”.<sup>37</sup>

19. Where a Trial Chamber finds that an indictment demonstrates prima facie that crimes have been committed in the course of the same transaction by different accused, in the sense that there was a common scheme, strategy or plan, and the accused committed crimes during the course of it, then legally it is possible to join accused in one indictment.

<sup>33</sup> *Prosecutor v. Ntabakuze, Kabiligi*, Case No. ICTR-97-34-I, Decision on the Defence Motion Requesting an Order for Separate Trials, 30 September 1998, p. 2; upheld in *Prosecutor v. Bagosora*, Case No. ICTR-96-7, Decision on the Prosecutor’s Motion for Joinder, 29 June 2000, para. 120.

<sup>34</sup> *Prosecutor v. Brđanin & Talić*, Decision on Motion by Momir Talić for a Separate Trial and for Leave to File a Reply, 9 March 2000, para. 22.

<sup>35</sup> *Prosecutor v. Kordić & Cerkez*, Case IT-95-14/2-PT, Decision on Accused Mario Cerkez’s Application for Separate Trial, 7 December 1998, para. 10.

<sup>36</sup> *Prosecutor v. Brđanin & Talić*, Decision on Motion by Momir Talić for a Separate Trial and for Leave to File a Reply, 9 March 2000, para. 21. The decision cited with approval similar criteria set forth in *Prosecutor v. Kovačević*, Case No. IT-97-24-AR73, Decision Stating Reasons for Appeals Chamber’s Order of 28 May 1998, 2 July 1998, Separate Opinion of Judge Shahabuddeen, p. 3.

<sup>37</sup> *Prosecutor v. Krajišnik* (IT-00-39-PT); *Prosecutor v. Plavšić* (IT-00-40-PT), Decision on Motion for Joinder, 23 February 2001, para. 4, p. 2.

"Conflict of Interests"

20. Whether or not a Trial Chamber decides to do so requires an exercise of its discretion. Some of the salient factors that have previously influenced a Trial Chamber's decision to join accused are the avoidance of duplication of evidence, minimisation of hardship to witnesses, and being generally in the interests of judicial economy.<sup>38</sup>

21. Before exercising its discretion, the Trial Chamber must pay close attention to Rule 82(B), so that joinder will not be ordered in circumstances where separate trials are considered necessary "to avoid a conflict of interests that might cause serious prejudice to an accused, or to protect the interests of justice".

#### IV. DISCUSSION

22. In determining this Motion, the Trial Chamber relies upon the allegations as contained in the Prosecution's Draft Proposed Amended Indictment of 14 December 2001. It was not disputed that this document should not form the basis of the Trial Chamber's deliberations.

23. As to the first issue for consideration, whether the crimes alleged against each accused were committed "in the course of the same transaction", the Trial Chamber is satisfied that this requirement is fulfilled, and that the Prosecution has demonstrated on a prima facie basis that the crimes alleged against the accused were committed as part of a common scheme, strategy or plan. The reasons for this finding are as follows. The offences with which the accused are charged all occurred over the same, narrow time period (from 11 to 19 July 1995), and that there are a number of overlapping, core issues. Further, the accused were all military commanders of the VRS; Blagojević was, at the relevant time, ranked as a Colonel and in command of the Bratunac Brigade; Obrenović was a Major, and Chief of Staff of the Zvornik Brigade; Jokić held the rank of Major and was Chief of Engineering of the Zvornik Brigade. The victims of the alleged offences were the same in that they were all Bosnian Muslims from the Srebrenica area. The Prosecution pleads its case on the basis that there was a joint criminal enterprise with the same common purpose and design, namely the forcible transfer to Kladanj of Bosnian Muslim women and children from the Srebrenica enclave, and the capture, detention and summary execution of thousands of Bosnian Muslim men and boys from the Srebrenica enclave, and the accused all participated in that common enterprise, albeit that the contributions of the accused differed.

<sup>38</sup> *Prosecutor v. Simić et al*, Case No. IT-95-9-PT, Decision on Motion for Separate Trial for Simo Zarić, 3 February 2000, p. 4.



24. Having satisfied itself that it is legally possible to join the accused under Rule 48, the Trial Chamber must exercise its discretion as to whether to join the crimes or not. The Trial Chamber finds that there are several factors in favour of joint proceedings. First, with regard to the large number of overlapping issues in the three cases, if three separate trials were held, civilian and expert witnesses would be required to travel to The Hague on more than one occasion. It was contended, and the Trial Chamber heard no submissions to the contrary, that almost 30 to 40 witness would have to be called three times, if the trials proceeded separately. Court time would also be taken up in going over the same issues in different trials, and it is noted that six to eight months of hearing time could be saved if the cases proceed jointly. The Trial Chamber considers it to be in the interests of the international community that the time and resources of the International Tribunal are expended in the most efficient manner possible. Finally, it was undisputed that the Prosecution case would last three to four months whether it proceed jointly or separately.

25. As to the arguments of the Defence for opposing the Motion, that separate trials of, at least, Jokić and Obrenović are "necessary in order to avoid a conflict of interests that might cause serious prejudice to an accused" under Rule 82(B), the Trial Chamber is not satisfied that any prejudice would be caused to the accused by a joint trial, nor that the interests of justice require separate ones. The Trial Chamber is not required at this stage of the proceedings to go into the merits of any argument that Jokić and Obrenović should not have been represented at interview by the same lawyer, and that a conflict of interests exists between them. The proper determination for these issues is at trial, where the admissibility of the interviews as evidence will have to be considered by the Trial Chamber.

## V. DISPOSITION

Thus, for the foregoing reasons, and as declared at the Hearing, the Trial Chamber **GRANTED** the Motion and **ORDERED** that:

1. Indictments *Prosecutor v Obrenović* (IT-01-43-PT), *Prosecutor v Blagojević* (IT-98-33/1-PT) and *Prosecutor v Jokić* (IT-01-44-PT) be jointly charged and tried;
2. The Registry designate one unified case number to the joined case forthwith; and
3. The Prosecution files a joint indictment immediately, and no later than 7 days from the date of the Hearing.

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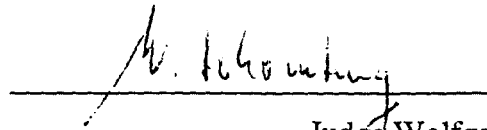
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Done in both English and French, the English text being authoritative.



Judge Wolfgang Schomburg

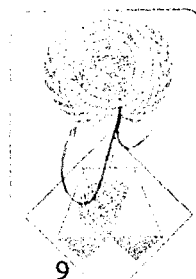
Presiding

Done this sixteenth day of January 2002

At The Hague,

The Netherlands.

[Seal of the Tribunal]



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