



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 No. IT-02-60-PT  
Date: 1 August 2002  
Original: English

**IN TRIAL CHAMBER II**

**Before:** Judge Wolfgang Schomburg, Presiding  
Judge Florence Ndepele Mwachande Mumba  
Judge Carmel Agius

**Registrar:** Mr. Hans Holthuis

**Decision of:** 1 August 2002

**PROSECUTOR**

v.

**VIDOJE BLAGOJEVIĆ  
DRAGAN OBRENOVIĆ  
DRAGAN JOKIĆ  
MOMIR NIKOLIĆ**

**DECISION ON MOTIONS CHALLENGING THE FORM OF  
AMENDED JOINDER INDICTMENT**

**The Office of the Prosecutor:**

Mr. Peter McCloskey

**Counsel for the Accused:**

Mr. Michael Karnavas, for Vidoje Blagojević  
Mr. David Wilson, Mr Dušan Slijepčević, for Dragan Obrenović  
Mr. Miodrag Stojanović, Ms. Cynthia Sinatra for Dragan Jokić  
Mr. Veselin Londrović, Mr. Stefan Kirsch for Momir Nikolić

**TRIAL CHAMBER II** (“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 (“Tribunal”) is seized of four preliminary motions alleging defects in the form of the Amended Joinder Indictment of 27 May 2002 in this case, namely: the “Accused Blagojević’s Motion Challenging the Amended Joinder Indictment Based on Defects in the Form of the Indictment” filed by counsel for the accused, Michael Karnavas (“Blagojević Defence”) on 24 June 2002, the “Accused Obrenović’s Motion on the Form of the Amended Joinder Indictment” filed by counsel for the accused, David Wilson (“Obrenović Defence”) on 2 July 2002, the “Dragan Jokić’s Objections to Joinder and Amendment of Indictments” filed by counsel for the accused, Miodrag Stojanović (“Jokić Defence”) on 21 June 2002 and the “Preliminary Motion by Momir Nikolić” filed by counsel for the accused, Veselin Londrović (“Nikolić Defence”) on 26 June 2002 (collectively: “Defence”), and the subsequent related filings, the “Consolidated Prosecution Response to Defence Motions Challenging Form of Amended Joinder Indictment” filed by the Office of the Prosecutor (“Prosecution”) on 16 July 2002, and the “Accused Nikolić’s Reply to Consolidated Prosecution Response to Defence Motions Challenging Form of Amended Joinder Indictment” filed by the Nikolić Defence on 23 July 2002.

## I. PROCEDURAL BACKGROUND

1. The accused Blagojević was initially indicted together with General Krstić and Colonel Pandurević<sup>1</sup>. Thereafter, the case of accused Blagojević was severed and subsequently joined with those of accused Obrenović and Jokić, all of them being initially assigned to different trial Chambers<sup>2</sup>. In a last step, the accused Nikolić was joined to the proceedings following an order of the Trial Chamber granting the Prosecution’s motion for joinder<sup>3</sup>. On 27 May 2002 the Prosecution filed an Amended Joinder Indictment against all four accused (“Indictment”).

2. In its decision on the Prosecution’s motion for joinder, the Trial Chamber allowed the accused, within a period of thirty-six days after its filing, to “raise preliminary objections in relation to the form of the anticipated Amended Joinder Indictment in its entirety”<sup>4</sup>, thus the Defence not being restricted to file motions only in respect of the “new charges” in the Indictment, as generally foreseen in Rule 50(C) of the Rules of Procedure and Evidence (“Rules”). On 3 July 2002 a

<sup>1</sup> *Prosecutor v. Krstić, Pandurević and Blagojević*, Case No. IT-98-33, Amended Indictment, 27 October 1999.

<sup>2</sup> *Prosecutor v. Blagojević, Obrenović and Jokić*, Case Nos. IT 98-33/1-PT, IT-01-43-PT, IT-01-44-PT, Written Reasons Following Oral Decision of 15 January 2002 on the Prosecution’s Motion for Joinder, 16 January 2002.

<sup>3</sup> *Prosecutor v. Nikolić*, Case No. IT-02-56-PT and *Prosecutor v. Blagojević, Obrenović and Jokić*, Case No. IT-02-53-PT, Decision on Prosecution’s Motion for Joinder, 17 May 2002.

<sup>4</sup> *Ibid.*, para. 19(4).

decision was taken granting the Prosecution's request for leave to file a consolidated response to Defence motions filed pursuant to Rule 50(C) and Rule 72 of the Rules.

3. The Trial Chamber was also seized with a "Request for the Taking of Judicial Notice of Findings of Facts and Request for the Deletion of All Alleged Facts or Omission in the Amended Joinder Indictment that are Inconsistent with Said Findings of Facts" filed by the Blagojević Defence on 24 June 2002 in which the Defence, pursuant to Rule 94(B) of the Rules, requested the taking of judicial notice of findings of certain facts adjudicated in the *Krstić* judgment<sup>5</sup> that were not contested by the Prosecution on appeal. The Prosecution submitted that the motion is not within the scope of Rule 94(B) of the Rules because "adjudicated facts" as stated in that Rule were by definition only those facts proven *beyond a reasonable doubt* at other proceedings. On 19 July 2002, during a Status Conference held in the case, the Trial Chamber decided to reject the motion upholding the Prosecution's submissions.

## II. DISCUSSION

The Defence raises various points as to form and substance of the Indictment.

### A. Vagueness and Imprecision of the Allegations

#### (a) Theory of Genocide

4. The Blagojević Defence argues that the Indictment is flawed because it contains no clear articulation as to how genocide was allegedly committed in concreto. It is argued that the accused is entitled to be provided with the legal theory for the assertion that genocide was committed rather than being left to inference from the Indictment and the *Krstić* trial<sup>6</sup>. The Prosecution, in its reply, believes that an indictment does not need to contain a comprehensive statement of the legal theory on which it intends to rely.

5. To meet the requirement set forth in Article 18(4) of the Amended Statute of the Tribunal ("the Statute") as well as in Rule 47(C) of the Rules, an indictment must contain "a concise statement of the facts and the crime or crimes with which the accused is charged". In the past, this Trial Chamber as well as others have held that

"... the pleadings in an indictment will therefore be sufficiently particular when it concisely sets out the material facts of the Prosecution case with enough detail to inform a defendant

<sup>5</sup> *Prosecutor v. Krstić*, Case No. IT-98-33, Trial Judgment, 2 August 2001.

<sup>6</sup> *Ibid.*

clearly of the nature and cause of the charges against him/her to enable him/her to prepare a defence.”<sup>7</sup>

No mention is made, neither in the laws governing the procedure before this Tribunal nor in its interpretation by the Trial Chambers, of the provision of legal theories in an indictment. Reviewing the relevant paragraphs of the Indictment, the Trial Chamber finds that they provide, as they stand and without further reliance on theories or other proceedings<sup>8</sup>, sufficient detail to clearly inform the accused of the nature and cause of the charges brought against him. It appears that the accused can, on the basis of the information given in the Indictment, proceed to prepare a defence. The objection is therefore rejected.

(b) Forcible Transfer as Element of Genocide Charge

6. The Blagojević Defence contends that the Indictment is unclear as to whether the “forcible transfer of a population”, described in paragraph 39 of the Indictment, should be regarded as an integral part of the genocide charge, and argues that Article 4(2)(e) of the Statute only mentions the forcible transfer of *children*. In contrast, the Prosecution is of the opinion that the question relates to the legal theory of the genocide charge and that it does not need to provide such statements in the Indictment.

7. The Trial Chamber has already found that legal theories do not belong to the essentials that need be pleaded by the Prosecution in its indictment<sup>9</sup>. Noting that the paragraph of the Indictment the Defence refers to is used in order to portray the overall situation and the circumstances in which the alleged crimes took place, the said paragraph does not constitute a separate count of liability, this point of the Blagojević Defence motion is dismissed.

(c) Complicity in Genocide

8. As concerns the heading before Counts 1A-1B in paragraph 34 of the Indictment, which reads “Complicity to Commit Genocide”, the Blagojević Defence argues that it is unclear with what crime the accused is actually charged, given that Article 4(3) of the Statute provides for either “complicity in genocide” under lit. (e) or “conspiracy to commit genocide” under lit. (b). In view of the opening paragraph of the Indictment, which reads “Complicity in Genocide”, and a subsequent

<sup>7</sup> See, e.g., *Prosecutor v. Hadžihasanović*, Case No. IT-01-47, Decision on Form of Indictment, 7 December 2001, para. 8.

<sup>8</sup> The request made by the *Blagojević* Defence to take judicial notice of facts adjudicated in the *Krstić* trial (see supra note 4) has been rejected, supra para. 3.

<sup>9</sup> Supra II.A.(a).

citation of Article 4(e) of the Statute, the Prosecution believes that the charging is clear; however, it is willing to change the heading before Counts 1A-1B to read “Complicity in Genocide”.

9. The Trial Chamber finds the argument made by the Defence rather formalistic. For the reasons that have been rightly outlined in the Prosecution’s Response, it can not be subject to any doubt that the accused is charged with “Complicity in Genocide”. The conceded changing of the heading before Counts 1A-1B, that is apt to create ambiguity only when read in isolation, is therefore purely editorial and makes further ruling by the Trial Chamber redundant.

(d) Amendment of Statement of Facts

10. Furthermore, the Blagojević Defence alleges that paragraphs 18 – 26 of the Indictment (“Statement of Facts”) give a misleading and wrong impression of the background events to the alleged crimes because, as it says, no mention is made of crimes committed by the Muslim population. Therefore, it is suggested that the relevant section of the Indictment be either amended or deleted in its entirety. The Prosecution considers those allegations against the Muslim population completely irrelevant for the accused’s culpability.

11. Notwithstanding a potential lack of completeness in providing all background facts, the Trial Chamber endorses the Prosecution’s argument that the relevance of alleged crimes committed by the Muslim population for the case at hand has not been demonstrated. Moreover, it should be borne in mind that the principal function of an indictment is to inform the accused about the nature and cause of the charges brought against him, rather than to provide a final overview of events. The complaint of the Defence must accordingly be rejected.

(e) Specificity of Killings

12. The Obrenović Defence complains that the accusations set forth in paragraphs 45(f) and 48 of the Indictment are impermissibly vague as concerns names and numbers of the victims as well as the dates and locations of the alleged criminal acts. In reply, the Prosecution states that it cannot provide more details since they are simply not known.

13. There can be no doubt that the Prosecution, when it draws up an indictment, in order to meet the pleading requirements as outlined above<sup>10</sup> is obliged to provide proper particulars of the alleged acts and omissions of the accused. Failure to do so can, in some instances, prejudice an accused and even render a trial unfair<sup>11</sup>. However, these requirements do find their limits in that the Prosecution

<sup>10</sup> Supra II.A.(a).

<sup>11</sup> *Prosecutor v. Krnojelac*, Case No. IT-97-25-PT, Decision on the Defence Preliminary Motion on the Form of the Indictment, 24 February 1999, para. 40.

cannot be expected to perform the impossible<sup>12</sup>. There may be objective reasons why the Prosecution is not able to provide more particulars than a classification of the group the victims belonged to or a time-frame as to when the acts in question were committed. One such reason can be the massive scale of the alleged crimes<sup>13</sup> that does not always permit the Prosecutor to identify many of the victims with precision<sup>14</sup>. As a consequence, the inability of the Prosecution to provide each and every detail need not necessarily lead to the dismissal of the particular allegation. With regard to these findings, and considering the information given in the relevant paragraphs, it appears that the level of specificity of the allegations in the Indictment does not result in prejudice to the accused. The objection is therefore rejected.

(f) Vagueness of Alleged Criminal Acts

14. The Jokić Defence contends that the Indictment is vague in describing the criminal acts for which the accused is held responsible, in particular that no nexus between the acts of others and the position of the accused as duty officer at headquarters is shown. Furthermore, it asserts that the persecution charge is imprecise. The Prosecution points the Defence to paragraphs 31, 36 and 59 of the Indictment, believing that the respective passages contain all the relevant information.

15. The Trial Chamber observes that paragraph 31 of the Indictment links itself, *inter alia*, with paragraph 36. Therein, it is alleged that the accused “assisted in the planning, monitoring, organising and carrying out” of certain acts, and “transmitted reports and updates to superiors on the progress of the overall murder operation”. The allegation of vagueness as to acts personally committed by the accused is therefore untenable. The same is true for the persecution count, for it ensues from paragraph 59 of the Indictment that it has to be read in conjunction with the foregoing paragraphs containing concrete allegations, all of which of course will have to be proved at trial. In sum, all arguments of the Jokić Defence concerning vagueness of the Indictment are rejected.

(g) Heading before paragraph 10

16. The Nikolić Defence suggests that the heading before paragraph 10, that presently reads “Superior Authority/Position of the Accused” be changed to “Position of the Accused”, given that the accused is not charged with superior responsibility. The Prosecution has indicated that it would

<sup>12</sup> Ibid.

<sup>13</sup> *Prosecutor v. Kvočka et al.*, Case No. IT-98-30-PT, Decision on the Defence Preliminary Motions on the Form of the Indictment, 12 April 1999, para. 17; see also *Prosecutor v. Kupreškić et al.*, Case IT-95-16-A, Appeals Judgment, 23 October 2001, para. 89.

<sup>14</sup> *Prosecutor v. Blaškić*, Case No. IT-95-14, Decision on the Defence Motion to Dismiss the Indictment based upon Defects in the Form thereof, 4 April 1997, para. 24.

be amenable to that change. The Trial Chamber, therefore, invites the Prosecution to change the heading in the requested way.

## **B. Multiple Heads of Criminal Responsibility**

17. The Blagojević and Nikolić Defence claim they cannot adequately prepare a defence in view of the fact that the Indictment, in paragraphs 27 and 31, alleges that the accused “committed, planned, instigated, ordered, and otherwise aided and abetted in the planning, preparation and execution of these charged crimes”, thus relying on multiple heads of individual criminal responsibility pursuant to Article 7(1) of the Statute. It is furthermore argued that the conjunctive “*and otherwise aiding...*” is not in line with the wording of that Article and is therefore impermissible. In its response, the Prosecution maintains that it is not confined to plead only a single head of responsibility since it is left to the discretion of the Trial Chamber to convict the accused under the appropriate head. As concerns the conjunctive form, the Prosecution is amenable to a substitution reading “*and/or otherwise aiding...*”

18. Although it is preferable that the Prosecution confines itself to a single head of responsibility under Article 7(1) of the Statute, the pleading of multiple forms of liability does not *per se* make an Indictment defective<sup>15</sup>. In the present case, the acts and omissions ascribed to all of the accused are described in paragraphs 34 – 59 of the Indictment. The Trial Chamber re-emphasises that an indictment must be read as a whole. To that end, the paragraphs that allege different forms of criminal responsibility in the alternative, i.e. paragraphs 27 and 31, are substantiated by the subsequent allegations in the Indictment. The Trial Chamber finds it reasonable for the accused to prepare a defence facing the allegations in their concrete form as provided by the Prosecution. Notwithstanding the editorial change to which the Prosecution is amenable, the objection of the Defence is dismissed.

## **C. Joinder of Proceedings**

18. The Jokić Defence objects to the joinder of the case to the other proceedings and asks for a separate trial, asserting the existence of a conflict of interest pursuant to Rule 82(B) of the Rules. It complains furthermore that facts were added to the present Indictment that would “amount to a new level of charges”. The Prosecution, while remaining silent as concerns the first objection, submits that not new charges, but rather additional facts were added in order to meet the requirement of specificity in pleading.

<sup>15</sup> See *Prosecutor v. Furundžija*, Case No. IT-95-17, Trial Judgment, 10 December 1998, para. 189; *Prosecutor v. Krajišnik*, Case No. IT-00-39, Decision Concerning Preliminary Motion on the Form of Indictment, 1 August 2000, para. 10.

19. As to the second complaint, the Trial Chamber observes that in the Indictment, as compared to the initial indictment<sup>16</sup>, no new counts were added, the argument of the Jokić Defence therefore being moot. Considering the objection to the joinder of proceedings and the request to sever his trial from that of the three co-accused, the Trial Chamber notes that the accused has neither provided evidence nor proffered argument as to why he should be entitled to severance under Sub-rule 82(B). Considering that the crimes alleged in the Indictment were committed in the second half of 1995 in and around the municipality of Srebrenica in Bosnia and Herzegovina and in the course of the same transaction, severance would be contrary to the interests of justice as the evidence presented will be relevant to the case against each of the four accused, and hence multiple production of evidence can be avoided by a joint trial<sup>17</sup>. The Trial Chamber has already decided on the merits of a joinder/severance recently. Nothing new has been submitted. Accordingly, the request must be rejected.

20. The Trial Chamber nevertheless takes this opportunity to express its dissatisfaction with the lodging of claims that fail to meet even a basic test of substantiation, as this may be regarded as conduct which is prejudicial to the proper administration of justice before the Tribunal and result in appropriate action in future instances.

#### **D. Theory of and Specificity in the Pleading of Joint Criminal Enterprise**

##### **(a) Violation of the Principle of *Nullum Crimen Sine Lege***

21. The Nikolić Defence challenges the legality of the concept of “Joint Criminal Enterprise” for the conviction of the accused, arguing that it was not beyond any doubt part of international customary law at the time the alleged acts were committed, and that it, therefore, violates the principle of *nullum crimen sine lege*. The Prosecution takes the opposite position and finds that the arguments of the Defence are ill-founded. In its reply to the Prosecution’s response, the Nikolić Defence upholds its concerns.

22. The Trial Chamber observes that the concept of “Joint Criminal Enterprise” is well recognised in the jurisprudence of the Tribunal<sup>18</sup>. With regard to the establishment of the doctrine in national jurisdictions, and its consequent recognition in customary international law, the Trial Chamber does not share the arguments brought forward by the Nikolić Defence. Firstly, what is required for a rule

<sup>16</sup> *Prosecutor v. Jokić*, Case No. IT-01-44, Indictment, 31 May 2001.

<sup>17</sup> *Prosecutor v. Delalić et al.*, Case No. IT-96-21, Decision on Motions for Separate Trial, 25 September 1996, para. 6.

<sup>18</sup> See, e.g., the recent ruling in *Prosecutor v. Brđanin and Talić*, Case No. IT-99-36-PT, Decision on Form of Further Amended Indictment and Prosecution Application To Amend, 26 June 2001, para. 24.



to become part of customary international law, is not rigorous conformity in state practice<sup>19</sup>, but a comparable approach among States based on a similar concept. In the light of this, the Trial Chamber notes the findings of the Appeals Chamber in the *Tadić* case<sup>20</sup>:

“... the doctrine of acting in pursuance of a common purpose is rooted in the national law of many states. Some countries act upon the principle that where multiple persons participate in a common purpose or common design, all are responsible for the ensuing criminal conduct, whatever their degree or form of participation, provided all had the intent to perpetrate the crime envisaged in the common purpose. ... Other countries also uphold the principle whereby if persons take part in a common plan or common design to commit a crime, all of them are criminally responsible for the crime, whatever the role played by each of them.”

— This Trial Chamber cannot depart from the binding decision of the Appeals Chamber in this regard<sup>21</sup> and considers that the underlying question has been settled. The complaint is accordingly rejected.

(b) Vagueness as Concerns Participation

23. The Blagojević, Obrenović and Nikolić Defence claim that the Indictment does not specify the way in which the accused allegedly participated in the joint criminal enterprise, and neither does it give information and evidence on the necessary criminal intent. The Prosecution, in contrast, argues it has provided all necessary material facts and that there is no obligation to present evidence prior to the trial.

— 24. It has been noted before that paragraphs 34 – 59 of the Indictment contain detailed allegations as to the acts underlying the charges; there is no need to reiterate that this information meets the general standard required. Trial Chambers have consistently held that beyond the pleading of material facts, in principle, there is no duty for the Prosecution to present evidence it wants to rely on during the trial<sup>22</sup>. Finally, paragraphs 30 – 33 allege the interaction of the accused pursuant to a common design and with the relevant state of mind. The assessment of evidence in support of this allegation is a distinct issue which is reserved for the Trial Chamber at the end of the trial. Accordingly, the objections must be dismissed.

<sup>19</sup> *Nicaragua v. USA*, ICJ Reports, 1986(98), para. 186; see also *Villinger*, Customary International Law and Treaties, 2<sup>nd</sup> edition (1997), para. 56.

<sup>20</sup> *Prosecutor v. Tadić*, Case No. IT-94-1-A, Appeals Chamber Judgment, 15 July 1999, para. 224.

<sup>21</sup> *Prosecutor v. Aleksovski*, Case No. IT-95-14/1-A, Appeals Judgment, 24 March 2000, para. 2.

<sup>22</sup> See, e.g., *Prosecutor v. Hadžihasanović*, Case No. IT-01-47, Decision on Form of Indictment, 7 December 2001, para. 8.

(c) Vagueness as Concerns Other Participants

25. Both the Blagojević and the Obrenović Defence argue that the Indictment does not provide sufficient detail as to the identity of all members of the joint criminal enterprise. The Prosecution contends that, in view of the nature and size of the alleged enterprise, it is not possible to provide an exhaustive list of the participants, nor is there an obligation to do so.

26. The Trial Chamber notes that paragraph 33 of the Indictment lists nine persons by name who are alleged to have participated in the joint criminal enterprise, as well as an unspecified list of military and police units. Although an indictment should avoid ambiguity, it is by its very nature and at this stage of the proceedings inevitably concise and succinct<sup>23</sup>. When alleging the commitment of a Joint Criminal Enterprise, an open approach as to the identities of the members is inherent. The Trial Chamber can see no reason why this circumstance should affect the preparation of a defence for the accused to his detriment. Therefore, the objections of the Defence are rejected.

(d) Classification of participants

27. The Jokić Defence complains that the Prosecution seeks to classify a participant in the alleged joint criminal enterprise who was not a principal offender as perpetrator rather than an aider and abettor and cites the *Krnojelac* judgment<sup>24</sup> in support. The Prosecution denies that the judgment stands for this conclusion.

28. The Trial Chamber notes that the above-mentioned judgment contains a statement saying that a participant in a joint criminal enterprise may, in certain circumstances, deserve greater punishment than the principal offender<sup>25</sup>. However, it appears that the conclusion made by the Defence can not be inferred. Therefore, the objection is dismissed.

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<sup>23</sup> *Prosecutor v. Blaškić*, Case No. IT-95-14, Decision on the Defence Motion to Dismiss the Indictment based upon Defects in the Form thereof, 4 April 1997, para. 21.

<sup>24</sup> *Prosecutor v. Krnojelac*, Case No. IT-97-25, Trial Judgment, 15 March 2002, para. 74.

<sup>25</sup> *Ibid.*, para. 77.

### III. DISPOSITION

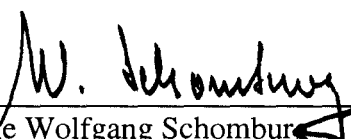
29. For the foregoing reasons,

**PURSUANT TO RULE 72 OF THE RULES,**

**THE TRIAL CHAMBER HEREBY REJECTS** – notwithstanding mere editorial issues mentioned above – the accused Blagojević's Motion Challenging the Amended Joinder Indictment Based on Defects in the Form of the Indictment of 24 June 2002, the accused Obrenović's Motion on the Form of the Amended Joinder Indictment of 2 July 2002, the accused Jokić's Objections to Joinder and Amendment of Indictments of 21 June 2002, and the Preliminary Motion by accused Nikolić of 26 June 2002.

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

Dated this first day of August 2002  
At The Hague  
The Netherlands

  
\_\_\_\_\_  
Judge Wolfgang Schomburg  
Presiding

[Seal of the Tribunal]