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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-02-57-PT IT-02-58-PT IT-02-63-PT IT-02-64-PT IT-04-80-PT IT-05-86-PT
	Date:	21 September 2005
	Original:	English

IN TRIAL CHAMBER III

Before: **Judge Patrick Robinson, Presiding**
Judge Carmel Agius
Judge Liu Daqun

Registrar: **Mr. Hans Holthuis**

Decision of: **21 September 2005**

THE PROSECUTOR v. VUJADIN POPOVIĆ
THE PROSECUTOR v. LJUBIŠA BEARA
THE PROSECUTOR v. DRAGO NIKOLIĆ
THE PROSECUTOR v. LJUBOMIR BOROVČANIN
THE PROSECUTOR v. ZDRAVKO TOLIMIR, RADIVOJE MILETIĆ & MILAN GVERO
THE PROSECUTOR v. VINKO PANDUREVIĆ & MILORAD TRBIĆ

DECISION ON MOTION FOR JOINDER

The Office of the Prosecutor:

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John Ostojic for Ljubiša Beara
Jelena Nikolić for Drago Nikolić
Alan Newman and Miodrag Stojanović for Ljubomir Borovčanin
Natacha Fauveau Ivanović for Radivoje Miletić
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I. INTRODUCTION

1. On 10 June 2005, the Prosecution filed a "Motion for Joinder of Accused", seeking to join six cases involving nine accused together in one indictment ("Joinder Motion" or "Motion").[1] On 29 June, the President of the Tribunal issued an order appointing Judges Robinson, Agius and Liu to constitute the Trial Chamber "for the purpose of determining the Joinder Motion."[2]
2. Six of the eight accused currently before the Tribunal[3] (from four out of the six cases) filed a response to the Joinder Motion. Three oppose the Motion;[4] two state that they do not oppose it, but mount various arguments against it,[5] and one does not oppose it.[6] Beara and Borovčanin have not responded.
3. On 28 June 2005, the Prosecution filed a Motion for Amendments to the Indictments, along with a proposed amended indictment that includes all nine accused. The amended indictment proposes, among other things, to (i) delete the charge of complicity in genocide against several accused, (ii) add or expand the charges of conspiracy to commit genocide, genocide, extermination, deportation and forcible transfer against others, and (iii) "clarify" other legal charges.[7]
4. On 12 July 2005, the Prosecution filed a consolidated reply to the responses of Miletić and Gvero to the Joinder Motion, along with a request for leave to file the submission on the ground that "it would be in the interests of justice and efficiency to have these arguments before the

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[1] The cases are (1) *Prosecutor v. Popović*, IT-02-57-PT, (2) *Prosecutor v. Beara*, IT-02-58-PT, (3) *Prosecutor v. Nikolić*, IT-02-63-PT, (4) *Prosecutor v. Borovčanin*, IT-02-64-PT (5) *Prosecutor v. Tolimir et al.*, IT-04-80-PT, and (6) *Prosecutor v. Pandurević and Trbić*, IT-05-86-PT. The accused are Vujadin Popović, Ljubiša Beara, Drago Nikolić, Ljubomir Borovčanin, Zdravko Tolimir, Radivoje Miletić, Milan Gvero, Vinko Pandurević and Milorad Trbić. Unless otherwise indicated, each filing referred to was made in each of the six cases.

[2] *See* Order Referring the Joinder Motion, 29 June 2005, and Corrigendum to Order Referring the Joinder Motion, 4 July 2005.

[3] One accused, Zdravko Tolimir, is still at large.

[4] *See* General Gvero's Response to Prosecution Motion for Joinder, 5 July 2005 ("Gvero Response"), Response by General Miletić to the Prosecution's Motion for Joinder of Accused, 5 July 2005 ("Miletić Response") and Accused Vinko Pandurević Defence's Response to Prosecution's Motion for Joinder of Accused, 17 June 2005 ("Pandurević Response").

[5] *See* Response on behalf of Drago Nikolić to Prosecution Motion for Joinder of Accused, 23 June 2005, *re-filed* 1 July 2005 ("Nikolić Response") and Response of Vujadin Popović to Prosecution's Motion for Joinder of Accused, 22 June 2005 ("Popović Response").

[6] *See* Milorad Trbić's Response to Prosecution Motion for Joinder of the Accused, 27 July 2005 ("Trbić Response").

[7] *See* Joinder Motion, para. 4.

Trial Chamber."[8] In response, on 28 July Miletić filed an "addendum" to his original response to the Joinder Motion, along with a motion for leave to file it.[9]

5. On 2 September 2005, the Trial Chamber issued an order *proprio motu* requiring the Prosecution to address the Chamber regarding the number of witnesses it expects to call and the expected length of the trial (i) in the event of a joint trial and (ii) if the cases were tried separately.[10]

6. On 5 September 2005, the Prosecution filed a response to this order,[11] and the accused Gvero and Miletić filed replies on 12 and 16 September respectively.[12]

II. THE STANDARD

7. Rule 48 of the Rules of Procedure and Evidence of the Tribunal ("Rules") provides that "[p]ersons accused of the same or different crimes committed in the course of the same transaction may be jointly charged and tried." A "transaction" is defined in Rule 2 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."

8. If the Chamber decides that the requirements of Rule 48 have been met, it may, based on an evaluation of various factors, decide either to grant joinder or leave the cases to be tried separately.[13] The case law of the Tribunal suggests that the following factors may properly be taken into account in making this determination: (i) avoiding the duplication of evidence, (ii) promoting judicial economy, (iii) minimising hardship to witnesses, (iv) ensuring the consistency of verdicts, (v) avoiding a conflict of interests that might cause serious prejudice to an accused and (vi) protecting the interests of justice.[14] In deciding whether charges against more than one accused should be joined pursuant to Rule 48, the Chamber should base its

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[8] Prosecution Consolidated Reply to Defence Response to Prosecution Motion for Joinder of Accused, Case No. IT-04-80-PT, 12 July 2005 ("Prosecution Consolidated Reply"), para. 1.

[9] Application for Leave to File an Addendum to the Response by General Miletić dated 5 July 2005, Case No. IT-04-80-PT, 4 August 2005.

[10] Order, 2 September 2005.

[11] Prosecution's Response to Trial Chamber's Order of 2 September 2005, 5 September 2005.

[12] *Prosecutor v. Tolimir et al.*, *supra* n. 1, General Gvero's Defence Response to Prosecution's Response to Trial Chamber's Order of 2 September 2005, 12 September 2005; Response by General Miletic to the Prosecution Response of 5 September 2005, 16 September 2005.

[13] *See Prosecutor v. Mejakić et al.*, Case No. IT-95-4-PT, IT-95-8/1-PT, Decision on Prosecution's Motion for Joinder of Accused, 17 September 2002, para. 24 and *Prosecutor v. Brđanin and Talić*, Case No. IT-99-36-A, Decision on Defence Request to Appeal, 16 May 2000.

[14] *Id.* and Rule 82 of the Rules. *See also* Articles 20-22 of the Statute (right to fair and expeditious trial) and Rule 75 of the Rules (protection of victims and witnesses).

determination upon the factual allegations contained in the indictments and related submissions.[15]

III. THE MOTION

9. According to the Prosecution's Joinder Motion, the requirements of Rule 48 are met because all the indictments relate to the same "transaction": a common scheme whose purpose was to ethnically cleanse the Eastern Bosnian enclaves. Specifically, the scheme consisted of two interrelated joint criminal enterprises: one to "force the Muslim population from the Srebrenica and Žepa enclaves" and the second "to murder all the able-bodied men captured from the Srebrenica enclave."[16]

10. The Prosecution states that "[t]he crime base allegations against all of the ... Accused *are identical.*"[17] All of the accused "were working together with other VRS [Bosnian Serb Army] and MUP [Bosnian Serb Interior Ministry] officers ... that knowingly participated in the joint criminal enterprise."[18] Their "common purpose" was to "ethnically cleanse the Bosnian Muslim population from the Srebrenica and Žepa areas" and they are all charged with criminal responsibility under Article 7(1) and with crimes under Articles 4 and 5 of the Tribunal's Statute.[19]

11. The Prosecution admits that only the most recent indictment—against Tolimir, Miletić and Gvero—charges the accused with ethnic cleansing in Žepa, as opposed to Srebrenica alone, but, it argues, "the present Indictments nevertheless allege that ridding Žepa of the Bosnian Muslim population was part of the greater plan to rid the Eastern Bosnia region of the Bosnian Muslim population."[20] The Prosecution also acknowledges that not all of the accused are charged with the same crimes (for instance some are not charged with genocide, extermination or forcible transfer, and only two of the nine are charged with command responsibility under Article 7(3)), but, it stresses, they are all charged with crimes committed "in the course of one campaign pursuant to a common scheme, which was to rid Srebrenica of the Bosnian Muslim population, within the same time frame and locations, and hence satisfies the 'same transaction'

[15] *Prosecutor v. Mejakić et al., supra* n. 13, para. 23.
[16] Prosecution's Motion for Amendments to the Indictments, 28 June 2005, para. 15.
[17] Joinder Motion, para. 34 (emphasis in original). *See also* Prosecution's Motion for Amendments to the Indictments, *supra* n. 16, at para. 15 ("This is a case that largely involves the same crime base witnesses and evidence of the same military structure.").
[18] Joinder Motion, at para. 6.
[19] *Id.* at para. 34.
[20] *Id.* at para. 36 (emphasis removed).

requirement of Rule 48."[21] It adds that the proposed amended indictment, if confirmed, would further streamline the charges.[22]

12. In addition, the Prosecution argues that the Chamber should exercise its discretion to grant joinder because doing so would (i) avoid the duplication of evidence such as evidence relating to the crime base and the structure of the VRS army; (ii) promote judicial economy, especially since the Tribunal does not have time to try two or more Srebrenica cases within the dates of its current mandate; (iii) minimise the hardship to victims and witnesses, many of whom would otherwise be required to give testimony in six separate trials, and (iv) ensure a consistent approach regarding verdicts and the evaluation of evidence.[23] It adds that joining the six indictments would not cause prejudice to any of the accused because all the cases are "procedurally at the same pre-trial stage within a few months apart" and none of the accused would suffer a significant delay by having their case joined to the other five.[24]

IV. THE RESPONSES

13. The six accused who have responded to the Joinder Motion raise objections to it on the following grounds:

Rule 48 [25]

- The acts of the accused alleged by the Prosecution do not constitute one "transaction" because they relate to two distinct joint criminal enterprises which occurred during distinct time periods. The first—forced removal of Bosnian Muslims from Srebrenica and Žepa—took place from 11 July to 1 November 1995; the second, mass killings of the able-bodied men of Srebrenica, took place from 8 March to 12 August of that year.[26]

- The acts of the accused alleged by the Prosecution do not constitute one "transaction" because "some of the accused ... allegedly conceived the joint criminal enterprise while others allegedly had a role to play of lesser importance in the execution of the joint criminal enterprise."[27]

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[21] *Id.* at para. 35 (emphasis removed).
[22] *Id.*
[23] *Id.* at paras. 39-45.
[24] *Id.* at para. 44.
[25] Only Pandurević explicitly challenges the Prosecution's assertion that the requirements of Rule 48 have been met. *Compare* Pandurević Response, paras. 1-10 *with, e.g.,* Miletić Response, para. 7 and Gvero Response, para. 3. However, certain statements in the responses of other accused can be read as challenging the Prosecution's argument that the charges against the accused are based on a single "transaction" under Rule 48. *See* Popović Response, para. B, Nikolić Response, para. 9 and Miletić Response, para. 4.
[26] Miletić Response, para. 14.
[27] Nikolić Response, para. 9. *See also* Popović Response, para. B.

Discretionary Factors

- *Judicial Economy*: Joinder may well extend the length of the trial for each accused because it will take longer to examine witnesses and decide the case, and because the need of one accused for an adjournment will result in a delay for each co-accused.[28] Delay is all the more likely since (i) one of the accused has still not been transferred to the Tribunal[29] and (ii) a joint trial will require a new courtroom to be built.[30] The Tribunal's "completion strategy" should not influence its determination of the Joinder Motion or be allowed to infringe the right of an accused to a speedy trial.[31]

- *Protection of witnesses*: Witnesses are likely to be more traumatised by cross-examination by multiple counsel consecutively in one trial than by cross-examination in six separate trials.[32]

- *Conflicts of Interest*: It is inevitable that certain accused will have a conflict of interest.[33]

- *Prejudice to the accused*: Certain of the accused have only minor roles in the alleged joint criminal enterprise.[34] Many of the allegations do not relate to these accused and it would be unjust for their trial to be joined to the others.[35]

- *Irrelevance of consistency in verdicts*: Consistency of verdicts should not be a consideration that justifies joinder.[36]

V. DISCUSSION

Rule 48

14. The Prosecution has charged all the accused with crimes committed in the course of the same "transaction", as required by Rule 48. Only one of the accused, Pandurević, explicitly disputes

[28] *Id.* at para. 18; Miletić Response, para. 10; Pandurević Response, para. 17.
[29] Nikolić Response, para. 18; Miletić Response, para. 18.
[30] Nikolić Response, para. 19; Gvero Response, para. 10.
[31] Gvero Response, para. 11.
[32] Miletić Response, para. 21; Nikolić Response, para. 16. Nikolić also argues that "[t]he testimony of *viva voce* witnesses may very likely be influenced by the presence of nine accused. It may very well be that a witness knows of significant exculpatory evidence for one accused but that such evidence will not come out due to the presence of other accused." *Id.* at para. 15.
[33] Pandurević Response, para. 18 (alleging there are "undoubtedly existing conflict[s] of interest[] between Vinko Pandurević and the other accused").
[34] *See esp.* Gvero Response, para. 4. *See also id.* at para. 7 (alleging that joinder would result in "a mega-trial in which he had only a cameo role").
[35] Miletić Response, paras. 16 and 21; Gvero Response, para. 7; Pandurević Response, paras. 7 and 9. Nikolić also argues that "the presence of nine accused will influence the selection of the evidence which will be presented at trial by all parties" and that, as a result, the Trial Chamber will be "deprived of significant pieces of evidence." Nikolić Response, para. 14.
[36] Pandurević Response, para. 12. One accused also questions the ripeness of the motion, suggesting that "the proper time to address the Prosecution Motion will be after the adjudication of the Prosecution's request to amend the six indictments." Nikolić Response, para. 30.

this.[37] The charges in the indictments relate to acts carried out by the same people, against the same people, during one period of time and in the same area, and this is all that is required.[38] It is not necessary for all the facts to be identical.[39] Indeed, the acts of the accused can form part of the same transaction even if they were carried out in different areas and over different periods of time, provided that there is a sufficient nexus between the acts committed.[40]

15. Here, all nine accused were part of the armed forces of the Republika Srpska[41] and all accused are charged with crimes in the same geographical area (eastern Bosnia, specifically Srebrenica and/or Žepa) during substantially the same time period (either March to August 1995 or July to November 1995).[42] Many of the accused are also charged with the same crimes.[43] This clearly satisfies the requirements of Rule 48, which explicitly states that joined accused may be charged with "*different* crimes", and Rule 2, which contemplates that the acts constituting a single "transaction" may take place in "different locations" so long as they form part of a common plan.

16. And, as the Prosecution stresses, although the charges against certain accused are based on only one of the two alleged joint criminal enterprises—the forced removal of the Bosnian Muslim population from Srebrenica and Žepa, but not the killing of the able-bodied men of

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[37] Pandurević argues that he was not involved in the common plan alleged by the Prosecution (a question of fact to be determined at trial) and objects to the addition of charges in the new proposed indictment (an argument relevant only to the motion to amend the indictment). Pandurević Response, paras. 9 and 10. *See also* footnote 25, *supra*.

[38] *See also Prosecutor v. Brđanin and Talić,* Case No. IT-99-36-PT, Decision on Motions by Momir Talić for a Separate Trial and for Leave to File a Reply, 9 March 2000, para. 21.

[39] *See also id.* at para. 20 (internal citations omitted).

[40] *Cf. Prosecutor v. Ntakirutimana et al.*, ICTR 96-10-I and ICTR 96-17-T, Decision on the Prosecutor's Motion to Join the Indictments, February 22, 2001.

[41] According to the proposed Amended Indictment, the Armed Forces of the Republika Srpska consisted of the Army of the Republic Srpska and the units of the Ministry of the Interior of the Republica Srpska. Prosecution's Motion for Amendments to the Indictment, *supra* n. 16, Annex A, at Attachment B, para. 1. Eight of the nine accused worked as staff at the VRS (at different levels of seniority) and Borovčanin was a Deputy Commander in the Republika Srpska Ministry of Interior (MUP) who reported to the Chief of Staff of the VRS Drina Corps.

[42] The *Tolimir* indictment contains charges that span March to August 1995 whereas the other five indictments are based on the time period July to November 1995. *But see* Pandurević Response, para. 9(d).

[43] All the accused are charged with murder as a crime against humanity; all but one are charged with murder as a war crime and persecutions; seven out of nine are charged with inhumane acts (forcible transfer); five out of nine are charged with genocide and/or complicity in or conspiracy to commit genocide; and five are charged with extermination. All are charged under Article 7(1) and two (Borovčanin and Pandurević) are charged under Article 7(3) as well. The charges are even more streamlined in the Proposed Amended Indictment.

Srebrenica[44]—the factual allegations which relate to the two enterprises are closely interlinked.[45] Thus

> although the joint criminal enterprise for the forcible removal of the population ... had begun in March 1995, the forced removal of the Bosnian Muslim population culminated in the actual physical removal of the population from Srebrenica on 12 and 13 July 1995. The majority of the mass killings subsequently took place between 12 and 17 July and ... the plan to murder the able bodied men of Srebrenica *began on the afternoon of 12 July with the forcible separation* of the able bodied men in Potocari from their families . . . .[46]

17. Moreover, as the Appeals Chamber has made clear in defining the "same transaction" for purposes of Rule 49, the various acts of the accused can be found to have a common purpose even if they do not overlap in time or place. Thus in the *Milošević* case the Appeals Chamber granted joinder of the three—Kosovo, Croatia and Bosnia—indictments even though (i) there was a gap of more than three years between the last events in Bosnia and the first events in Kosovo, (ii) the conflicts in Croatia and Bosnia took place in neighbouring states to the Federal Republic of Yugoslavia whereas those in Kosovo took place in the FRY itself, and (iii) the accused was alleged to have acted indirectly in relation to Croatia and Bosnia but directly (as the commander of the armed forces of the FRY) in relation to Kosovo. For the Appeals Chamber it was sufficient that

> [t]he purpose behind the events in each of the three areas for which the accused is alleged to be criminally responsible was the forcible removal of the majority of the non-Serb civilian population from areas which the Serb authorities wished to establish or to maintain as Serbian-controlled areas by the commission of the crimes charged. The fact that some events occurred within a province of Serbia and others within neighbouring states does not alter the fact that, in each case, the accused is alleged to have acted in order to establish or maintain Serbian control over areas which were or were once part of the former Yugoslavia.[47]

18. Some of the responses to the Joinder Motion appear to acknowledge that the charges in the six indictments are based on a common campaign or plan but suggest that because certain accused played subordinate roles in the campaign or were very low down in the chain of command

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[44] The proposed amended indictment refers to a third joint criminal enterprise relating to "opportunistic killings" but it is later defined as being *part of* the broader "joint criminal enterprise and operation to forcibly transfer and deport the populations of the Srebrenica and Žepa enclaves." Proposed Amended Indictment, Motion for Amendments to the Indictment, *supra* n. 16, Annex A, at para. 83.

[45] Prosecution Consolidated Reply, *supra* n. 8, at para. 6.

[46] *Id.* at para. 14 (emphasis in original).

[47] *Prosecutor v. Milošević*, Case Nos. IT-99-37-AR73, IT-01-50-AR73, IT-01-51-AR73, Reasons for Decision on Prosecution Interlocutory Appeal from Refusal to Order Joinder, 18 April 2002, para. 20 (internal citations omitted).

compared to other accused, joinder under Rule 48 is precluded. This is not correct because, as several Trial Chambers have held, it "does not matter what part the particular accused played provided that he participated in [the] common plan."[48] Indeed, as the Prosecution points out, the fact that the accused were all part of the same army and "intimately linked in the hierarchical structure" may even support the argument that they acted in concert pursuant to a common scheme.[49] Thus the accused are eligible for joinder under Rule 48.

Discretionary Factors

19. The discretionary factors militate in favour of granting the Joinder Motion.

Avoiding Duplication of Evidence and Promoting Judicial Economy

20. Based on the pre-trial material produced to date, the Chamber finds that a single trial is likely to take less time than six separate ones and that it is therefore in the interest of judicial economy to try the accused together. In the past some Trial Chambers have assumed that joinder would speed up proceedings, while others have predicted that it would slow them down. Here, the scales tip in favour of a single trial because the "crime base" evidence is the same for each accused and could be presented once in a joint trial instead of six times in separate ones.[50]

21. The Prosecution estimates that there are approximately 100 witnesses common to all accused, so that if the six trials were to take place separately, the Prosecution would have to call a total of 685 witnesses, whereas if there was a joint trial, the prosecution would only call 135 witnesses (35 witnesses being specific to particular accused). In addition they posit that if the six cases were tried separately, the trials would likely last 93-95 months (7-8 years), whereas a joint trial

[48] *See Prosecutor v. Kordić and Čerkez,* Case No. IT-95-14/2, Decision on Accused Mario Cerkez's Application for a Separate Trial, 7 December 1998, para. 10. *Cf. Prosecutor v. Kupreškić et al.,* Case No. IT-95-16-PT, Decision on Defence Motion for Separate Trials, 15 May 1998 (crimes charged against six co-accused "consist of the attack on the Muslim population of Ahmici ... and are thus part of the same transaction" under Rule 48).

[49] Prosecution Consolidated Reply, *supra* n. 8, at para. 9. The Prosecution states that Miletić, Gvero and Tolimir all formed part of the "upper echelon of the limitary hierarchy" who reported directly to Ratko Mladić. The other accused were subordinate to them. For example Beara, Chief of Security of the Main Staff, was directly subordinate to Tolimir, and Popović, a member of the Drina Corps, was in turn subordinate to the VRS Main Staff. *Id.*

[50] In addition, since there are, according to the Prosecution, many common witnesses, each individual cross-examination in a joint trial may take less time than in single trials because some questions that one accused's counsel seeks to ask may by covered by another accused's counsel.

would take only 18-24 months (1-2 years).[51] So the Prosecution suggests that approximately 6 years would be saved by joining the trials.

22. On the basis of these submissions and the arguments of the parties, the Chamber finds that multiple trials are thus likely to increase the length of the trial because

> separate trials would result in a fair amount of 'linkage (overlapping) evidence' which would have to be adduced in [each of the] trials. Considering that the Prosecution would be presenting much of the same evidence in each trial, joinder will permit the Trial Chamber to proceed with the case more efficiently....[52]

23. In addition, the Chamber notes that the cases are currently all at a similar stage in the pre-trial proceedings, so there is no danger that one case will significantly delay the others from going to trial. It is true that one of the accused remains at large, but the Chamber finds that this is not likely to lead to any significant delay because the Chamber can at any time exercise its discretion to sever his trial from that of his co-accused.[53]

24. Thus, avoiding the duplication of evidence and promoting judicial economy are both factors that militate in favour of granting joinder.

Protection of Witnesses and Consistency of Verdicts

25. Witnesses would be better protected in a single trial. The issue of protecting witnesses, like the issue of delay, may or may not favour joinder depending on the circumstances of the case, but in this case it supports the single-trial outcome. This is because having a single trial means that witnesses will not need to travel to The Hague, give direct testimony, and answer questions from judges multiple times. Several of the accused suggest that it would be more traumatic for a witness to be exposed to eight or nine consecutive cross-examinations in one case than to undergo cross-examinations in six separate trials. On balance, however, it would seem that the need for a witness to give potentially traumatic (direct) testimony on six separate occasions over a period of several years would be more burdensome than consecutive cross-examinations in a single trial. Furthermore, the cross-examination of witnesses is a matter which can be regulated

[51] Prosecution's Response to Trial Chamber's Order of 2 September 2005, 5 September 2005, paras. 2-6.
[52] *Prosecutor v. Mejakić, supra* n. 13, at para. 30.
[53] *See also* Prosecution Consolidated Reply, *supra* n. 8, at para. 18. The other Defence allegation on this point—that joinder would result in delay because a new courtroom would need to be built—is unfounded. Alterations to the existing courtrooms are in progress so that at least one courtroom will, if necessary, be able to accommodate nine accused.

by the Trial Chamber, for instance by prohibiting repetitive questions by consecutive counsel for the accused.

26. The Trial Chamber also notes that witnesses are more likely to be available if called to testify once during the course of the next 1-2 years (the time the Prosecution estimates a joint trial would take) than if they were expected to come to the Tribunal six times during the course of the next 7-8 years (the time the Prosecution estimates six separate trials would take). The availability of witnesses for trial benefits both parties, either because they are interested in the witness' direct evidence, or because they will have the opportunity to engage in cross-examination. The increased likelihood that witnesses will be available also serves the interests of justice more generally, because if different Trial Chambers dealing with the same subject-matter have different witnesses available to them there is a risk that their subsequent evaluation of the evidence, and ultimately their findings, will be inconsistent.

27. Contrary to the argument of one of the accused, consistency in the treatment of evidence and in verdicts is also a relevant and important factor in the evaluation of joinder motions. This is due to the "fundamental and essential public interest in ensuring consistency in verdicts."[54] Here a joint trial heard by one bench assessing the same evidence and witnesses is more likely to lead to a consistent assessment of the evidence, and ultimately to consistent verdicts, than if the accused were tried separately.[55]

28. Thus, protecting witnesses and ensuring the consistency of verdicts are both factors that militate in favour of granting joinder.

Prejudice to the Accused

29. These factors must, of course, be balanced against the possibility that joinder may adversely affect the rights of one or more of the accused.

Presentation of Prejudicial Evidence

30. Several responses to the Joinder Motion assert that, in a joint trial, prejudice to the accused may generally result from the presentation—in his trial—of evidence that relates exclusively to other

[54] *Prosecutor v. Brđanin and Talić, supra* n. 38, at para. 31.

[55] *Cf. id.* ("Nothing could be more destructive of the pursuit of justice than to have inconsistent results in separate trials based upon the same facts. The only sure way of achieving such consistency is to have both accused tried before the same Trial Chamber and on the same evidence — unless (as Rule 82(B) requires) there is a conflict of interests which might cause serious prejudice to an accused, or separate trials are otherwise necessary to protect the interests of justice.")

accused. The Chamber holds that prejudice to an accused is not an inevitable consequence of joinders under Rule 48, and that therefore blanket a priori statements alleging that an accused could be prejudiced by the presentation of evidence relating to events in which he never took part, unsupported by concrete allegations of specific prejudice that is likely to result, are not compelling. This is because Chambers of the Tribunal, unlike certain domestic criminal courts, are made up of "'professional judges [who are] able to exclude that prejudicial evidence from their minds'" when it comes to determining the guilt of a particular accused.[56] Thus in the *Brđanin* case, for instance, the Trial Chamber concluded that:

> [t]he fact that evidence will be brought relating to one accused (and not to another) is a common feature of joint trials. On the basis of the submissions and the allegations in the indictment the Trial Chamber is of the view that this *in itself* will not cause serious prejudice to [the accused].[57]

31. In this case Miletić and Gvero are the only accused who make a specific argument regarding the risk of prejudice. They—unlike some of the other accused[58]—are not charged with genocide, conspiracy to commit genocide, or extermination for killing the able-bodied men of Srebrenica and as a result, they argue, all the evidence presented to substantiate the allegation that their co-accused committed these crimes would prejudicially affect their trial. The Chamber notes this disparity in charging but finds that in this case the risk of prejudice is still remote because all the accused, including Miletić and Gvero, are nevertheless charged with acts whose purpose was to ethnically cleanse the Bosnian Muslim population of Srebrenica. Thus the Trial Chamber accepts the Prosecution's representation that the bulk of the *evidence* against them will be the same:

> The only component of the joint criminal enterprise with which Gvero and Miletić have not been charged ... [is] the mass killings of the able-bodied men. These are, however, the *same* men that Gvero and Miletić participated in forcibly removing from the enclave, and their organised murders, while not part of the actual charges against Gvero and Miletić, will form part of the evidence against them *even if they are tried separately from the other named co-accused.*[59]

As a result the Trial Chamber sees no concrete risk of prejudice to any accused on this ground.

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[56] *Prosecutor v. Mejakić, supra* n. 13, para. 29, citing *Prosecutor v. Milošević, supra* n. 47, at para. 29.
[57] *Prosecutor v. Brđanin and Talić, supra* n. 38, at para. 20 (emphasis added).
[58] Popović, Pandurević, Beara, Nikolić, and Borovčanin are currently charged with one or more of these crimes, whereas Tolimir, Trbić, as well as Miletić and Gvero, are not. Under the terms of the Proposed Amended Indictment, Miletić and Gvero are the only accused not charged with these crimes.

Conflicts of Interest

32. Closely related to the issue of the prejudice to an accused that can result from the presentation of evidence in a joint trial is the issue of conflicts of interest that may arise *between the accused themselves* during the course of such a trial. The Prosecution alludes to "one conflict between Accused Trbić and some of the other accused wherein Trbić in statements to the OTP and in testimony at the *Blagojević/Jokić* trial, implicated several of his current co-accused in the Srebrenica crimes."[60] No further details are provided, however, and Trbić, in his response to the Joinder Motion, does not allege that any conflict exists.[61] Thus the allegation by some accused that a joint trial would result in a conflict of interest has not been substantiated.[62]

33. Trial Chambers have in the past held that conducting joint trials where co-accused may testify against each other does not *per se* constitute a conflict of interests between accused[63] and that the mere "'*possibility* of mutually antagonistic defences' does not constitute a conflict of interests capable of causing serious prejudice"[64] because "trials in this Tribunal are conducted by professional judges who are necessarily capable of determining the guilt of each accused individually."[65] In the Trial Chamber's view, then, no convincing argument has been advanced by any of the accused as to the possibility of any conflict of interest that would prohibit joinder.[66]

34. In sum, the Trial Chamber believes that a single trial—by avoiding the duplication of evidence (paras. 20-22), promoting judicial economy (paras. 20-23), safeguarding the rights and

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[59] Prosecution's Consolidated Reply to Defence, *supra* n. 8, at para. 6.
[60] Joinder Motion, para. 43.
[61] Trbić does point out, however, that he reserves the right— "should an actual conflict of interest develop during the course of this case in the future" —to bring a motion for severance or take other appropriate action at that time. Trbić Response, para. 6.
[62] Miletić and Gvero also argue that there would be a conflict of interest in a joint trial because they are lower in the hierarchy than certain of their co-accused. However, as the *Brđanin* Trial Chamber has held, the "fact that the [co]-accused played different roles in the hierarchy of command ... does not matter." *Prosecutor v. Brđanin and Talić*, *supra* n. 38, at para. 23.
[63] *Cf. Prosecutor v. Ndayambaje*, Case No. ICTR-96-8-T, Decision on the Defence Motion for a Separate Trial, 25 April 2001, para. 11.
[64] *Prosecutor v. Brđanin and Talić,* Case No. IT-99-36-T, Decision on Prosecution's Oral Request for the Separation of Trials, 20 September 2002, para. 21 (emphasis added), citing *Prosecutor v. Simić et al.*, Case No. IT-95-9-PT, Decision on Defence Motion to Sever Defendant and Counts, 15 March 1999. *See also* Joinder Motion, para. 43 n. 37.
[65] *Prosecutor v. Brđanin and Talić*, *supra* n. 38, at para. 32.
[66] *See also id.* at para. 29 ("[T]he Trial Chamber [does not] see any possibility of serious prejudice resulting from the prospect that [one accused] may give evidence which incriminates [another accused] or that [an accused] will be unable, without fear of contradiction, to blame [his co-accused] for the orders which the prosecution may establish that he followed.").

availability of witnesses (paras. 25-26), and ensuring consistency of verdicts (para. 27)—will better protect the interests of justice. The rights of the accused will also, in the Chamber's view, be better protected in a joint trial which is likely to (i) be more expeditious (paras. 21-23) and (ii) have a fuller evidentiary record (para. 26) than if the six cases were to proceed independently. Moreover, the Chamber is not convinced that the accused are likely to suffer prejudice if a joint trial is ordered (paras. 30-33).

35. Finally, the Trial Chamber believes that its decision on the Joinder Motion is aided by consideration of all the arguments raised by the parties and therefore grants (i) the Prosecution motion for leave to file its consolidated reply and (ii) Miletić's motion for leave to file the "addendum" to his initial response to the Joinder Motion.

VI. DISPOSITION

36. For these reasons, pursuant to Rules 48 and 126 *bis* of the Rules, this Trial Chamber hereby orders as follows:

(a) The Prosecution is granted leave to file the Prosecution Consolidated Reply to Defence Response to Prosecution Motion for Joinder of Accused;

(b) The accused Miletić is granted leave to file the Addendum to Response to the Joinder Motion of 5 July, and

(c) The Prosecution's Joinder Motion is granted.

37. The Trial Chamber requests the Registry to designate one unified case number to the joined case forthwith.

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

Judge Patrick Robinson
Presiding

Judge Robinson appends a Separate Opinion to this Decision.

Dated this 21st day of September 2005
At The Hague
The Netherlands

[Seal of the Tribunal]

SEPARATE OPINION OF JUDGE PATRICK ROBINSON

1. The accused Gvero in his response states that the Completion Strategy should not influence the Trial Chamber in its determination of the joinder motion or be allowed to influence the right of an accused to a speedy trial.[1] By the "Completion Strategy" I take it he is referring to the decision of the Security Council that the Tribunal should adopt all possible measures to complete investigations by the end of 2004, all trial activities at first instance by the end of 2008 and all work in 2010.[2] In view of the heavy workload[3] of the Tribunal, it is clear that special efforts would have to be made to meet these targets.

2. In principle, the Security Council resolution does not impose an obligation on the Tribunal to do anything other than adopt all reasonable measures to meet the deadlines set. Certainly, it is not to be interpreted as requiring the Chambers to exercise their judicial function in a manner that enables the Tribunal to meet the deadline, but breaches the fundamental principle of fairness in the trial process.

3. When, therefore, at this stage of the Tribunal's life, a Trial Chamber grants a motion for joinder of accused, and one of the factors favouring joinder is that it promotes judicial economy, this does not mean that the Chamber grants the motion because of the Completion Strategy. It accedes to the motion and is influenced by the judicial economy factor in the same way as it would have been influenced if the motion been made much earlier in the life of the Tribunal, say in the year 2000. If, in the year 2000, I dismissed a joinder motion, I would not grant it now because of the Completion Strategy. The dismissal of the motion in 2000 would have been for the reason that there was no legal basis for granting it. Granting the same motion today would clearly be wrong if the reason for doing so was the Completion Strategy.

4. I consider it important to make this statement in order to clarify the factors that, in the context of the Completion Strategy, may properly move a Chamber in its determination of a joinder motion. While it would be quite proper for the Prosecutor to be influenced by the Completion Strategy in determining her prosecutorial strategy, including the joinder of

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[1] *Prosecutor v. Tolimir et al.*, IT-04-80-PT, General Gvero's Response to Prosecution Motion for Joinder, 5 July 2005, para. 11.
[2] *See* S/RES/1503 (2003). *See also* S/RES/1534 (2004).
[3] Since October 2004, 24 indictees have been transferred to the Tribunal and this has obviously increased the Tribunal's workload.

accused, the Completion Strategy would, as the Appeals Chamber has held, be an "improper consideration" in the decision of a Trial Chamber.[4] This is true even though the implementation of the Strategy may have implications for factors (such as judicial economy) of which a Trial Chamber may properly and quite independently take account.

Judge Patrick Robinson
Presiding

Dated this 21st day of September 2005
At The Hague
The Netherlands

[Seal of the Tribunal]

[4] *See Prosecutor v. Milosevic,* Case No. IT-02-54-AR73.6, Decision on the Interlocutory Appeal by the Amici Curiae against the Trial Chamber Order concerning the Presentation and Preparation of the Defence Case, 20 January 2004, para. 18 (referring to the "completion target for the Tribunal's work" as being an "inappropriate consideration[]" in a Trial Chamber's decision).