

UNITED
NATIONS

IT-02-57-PT
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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: 6 October 2005

Original: English

IN TRIAL CHAMBER III

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

Registrar: Mr. Hans Holthuis

Decision of: 6 October 2005

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

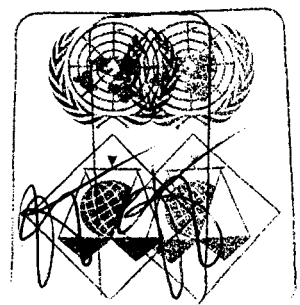
**DECISION ON MOTION FOR CERTIFICATION OF JOINDER
DECISION FOR INTERLOCUTORY APPEAL**

The Office of the Prosecutor:

Mr. Peter McCloskey

Counsel for the Accused:

Zoran Živanović for Vujadin Popović
John Ostojic for Ljubiša Beara
Jelena Nikolić for Drago Nikolić
Alan Newman and Miodrag Stojanović for Ljubomir Borovčanin
Natacha Fauveau Ivanović for Radivoje Miletić
Dragan Krgović for Milan Gvero
Đorđe Sarapa for Vinko Pandurević
Colleen Rohan for Milorad Trbić



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.¹ On 29 June 2005, 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. On 21 September 2005, the Trial Chamber issued a decision granting the motion for joinder (“Decision”). Judge Patrick Robinson appended a Separate Opinion to the Decision.
3. On 27 September 2005, the accused Pandurević and Miletić filed separate motions for certification of the Trial Chamber’s Decision for interlocutory appeal (“Motions”).³ The Prosecution filed a consolidated response to the Motions 3 days later.⁴
4. On 3 October 2005, Miletić filed a reply to the Prosecution’s response, along with a motion for leave to file it.⁵

II. THE STANDARD

5. According to Rule 73 (B) of the Rules of Procedure and Evidence of the Tribunal (“Rules”), “[d]ecisions on all motions are without interlocutory appeal save with certification by the Trial Chamber, which may grant such certification if the decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the

¹ Motion for Joinder of Accused, *Prosecutor v. Popović*, IT-02-57-PT, *Prosecutor v. Beara*, IT-02-58-PT, *Prosecutor v. Nikolić*, IT-02-63-PT, *Prosecutor v. Borovčanin*, IT-02-64-PT, *Prosecutor v. Tolimir et al.*, IT-04-80-PT, *Prosecutor v. Pandurević and Trbić*, IT-05-86-PT, 10 June 2005. The accused are Vujadin Popović, Ljubiša Beara, Drago Nikolić, Ljubomir Borovčanin, Zdravko Tolimir, Radivoje Miletić, Milan Gvero, Vinko Pandurević and Milorad Trbić.

² See Order Referring the Joinder Motion and Corrigendum to Order Referring the Joinder Motion, *Prosecutor v. Popović*, IT-02-57-PT, *Prosecutor v. Beara*, IT-02-58-PT, *Prosecutor v. Nikolić*, IT-02-63-PT, *Prosecutor v. Borovčanin*, IT-02-64-PT, *Prosecutor v. Tolimir et al.*, IT-04-80-PT, *Prosecutor v. Pandurević and Trbić*, IT-05-86-PT, 29 June 2005 and 4 July 2005 respectively.

³ Vinko Pandurević’s Defence Request for Certification to File the Interlocutory Appeal Against the Trial Chamber’s Decision on Motion for Joinder, Case No. IT-04-86-PT, 27 September 2005 (“Pandurević Motion”); Request for Certification to Appeal the Decision on Motion for Joinder of 21 September 2005, *Prosecutor v. Tolimir et al.*, IT-04-80-PT (“Miletić Motion”). Although the Motions were filed before Trial Chamber II, Trial Chamber III, as the Chamber which rendered the Decision, has jurisdiction over applications for its certification. See also Order Referring the Joinder Motion, *supra* n. 2.

⁴ Prosecution’s Consolidated Response to Vinko Pandurević’s and Radivoje Miletić’s Application for Certification of Decision on Motion for Joinder, Case No. IT-04-80 and IT-04-86, 30 September 2005 (“Prosecution Response”).

⁵ Application for Leave to Reply and Reply to the Response of the Prosecutor concerning the Motion for Certification of the Appeal dated 27 September 2005, *Prosecutor v. Tolimir et al.*, IT-04-80-PT, 3 October 2005 (“Miletić Reply”).

trial, and for which, in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.”

6. In other words, a Trial Chamber can only exercise its discretion to certify a decision for interlocutory appeal if two criteria are satisfied: (1) the decision involves an issue which would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, *and* (2) an immediate resolution of this issue may, in the opinion of the Trial Chamber, materially advance the proceedings. These two criteria are cumulative: they must both be satisfied if certification is to be granted.⁶

III. ARGUMENTS

7. The accused Miletic makes the following arguments in favour of certification:

- The Trial Chamber “did not correctly interpret the right to present evidence” when it accepted the Prosecution’s claim that, even though Miletic is not charged with crimes relating to the alleged mass killings, there would be a considerable overlap between the evidence presented against him and the evidence presented against the other accused;⁷
- The Trial Chamber “did not correctly assess” the potential prejudice that Miletic could suffer in a joint trial as a result of the presentation in his trial of evidence which is not relevant to the charges against him;⁸
- This issue “is extremely important for the conduct of the trial and for its outcome” and “directly affects the right of the accused guaranteed by the Tribunal’s Statute”;⁹
- “Since a joinder could prejudice the rights of the accused and the fairness of the trial in an irreversible and irreparable manner, this matter must be disposed of once and for all prior to the commencement of the trial”¹⁰, and

⁶ See, e.g., *Prosecutor v. Mejakic et al.*, Case No. IT-02-65-PT, Decision on Knezevic's Motion for Certification for Interlocutory Appeal of ‘Decision on Prosecution’s Motion to Amend Consolidated Indictment Schedules A through F, the Rule 65 Ter Witness Summaries, and the Pre-Trial Brief Incident Summaries’, 25 January 2005.

⁷ Miletic Motion, paras. 8-12.

⁸ *Id.* at para. 6. Miletic argues that the Trial Chamber’s conclusions (a) that prejudice to the rights of each accused was not an “inevitable consequence” of joinder and (b) that in the present case, the risk of such prejudice was remote, were both wrong. *Id.* at para. 13. Miletic goes on to argue that the Decision itself “shows that there is a genuine risk of prejudice” when it states that a Trial Chamber in a joint trial could regulate cross-examination by prohibiting repetitive questions by consecutive counsel for the accused. Such regulation would, according to Miletic, violate the right of an accused to be accorded the same rights in a joint trial as he would have had if he were tried separately (Rule 82(A)) and his right to cross-examine witnesses through his own counsel (Article 21 of the Statute). *Id.* at paras. 19-21.

- An “immediate resolution may materially advance the proceedings” because although the defence could at a later stage file a motion seeking separate trials, “such a step would cause delays in the proceedings”¹¹, and “should an error of law be committed in the decision on joinder ... a new trial might be necessary.”¹²

8. The accused Pandurević makes the following arguments in favour of certification:

- “[T]he case of Vinko Pandurević differs substantially from the cases of all other accused persons. Accordingly there is no same transaction for the purpose of the provisions of Rule 48 of the Rules of Procedure and Evidence as a base [sic] for joinder”;¹³
- Because “the case of Vinko Pandurević [is] different from all the other accused ... [a] joint trial with other accused would not be fair for him for the purpose of the provisions of Article 20 of the Statute”¹⁴, and
- The conditions in Rule 73(B) are satisfied and “the filing of the appeal is in the interest of justice.”¹⁵

9. The Prosecution, in its consolidated response, argues that:

- The Motions fail to identify an error of law or fact in the Trial Chamber’s Decision and in large part simply reiterate the arguments set out in earlier pleadings opposing joinder;¹⁶
- Pandurević reiterates the argument that there is no “same transaction” for purposes of joinder under Rule 48 but points out no error of law or fact in respect of this conclusion by the Trial Chamber; indeed, such a conclusion is clearly supported by the Tribunal’s jurisprudence;¹⁷
- Miletić reiterates the argument that he would be prejudiced by joinder because in a joint trial the Prosecution could present evidence regarding the commission of mass murders which is not relevant to him, but establishes no error of law in respect of the

⁹ Miletić Reply, para. 10.

¹⁰ Miletić Motion, para. 7.

¹¹ *Id.* at para. 25.

¹² Miletić Reply, para. 15.

¹³ Pandurević Motion, para. 6.

¹⁴ *Id.* at para. 7.

¹⁵ *Id.* at para. 9.

¹⁶ Prosecution Response, para. 7.

¹⁷ *Id.* at paras. 8-11.

conclusions of the Trial Chamber; indeed, “the Indictment clearly alleges that Miletić was a named member of the joint criminal enterprise which includes the mass murders of the able-bodied men of Srebrenica. Therefore, the Prosecution is entitled in law ... to lead evidence of the mass murders which are relevant to the proof of the joint criminal enterprise”;¹⁸

- The Motions fail to demonstrate that the Decision would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and
- The Motions fail to demonstrate that an immediate resolution of this issue by the Appeals Chamber may materially advance the proceedings.¹⁹

IV. DISCUSSION

10. The Trial Chamber is satisfied that the cumulative requirements of Rule 73 (B) have been met.²⁰
11. The first requirement of Rule 73(B) is met because the Decision involves an issue – the right of an accused to be accorded the same rights in a joint trial as he would have if tried separately – which significantly affects the fair and expeditious conduct of the proceedings.
12. The second requirement of Rule 73(B) is also met because if the Appeals Chamber were to find the Decision flawed, it may be necessary to conduct new trials in which one or more accused are severed from the rest, an outcome which would be prejudicial to the accused, to witnesses and to the interests of justice and judicial economy. Therefore an immediate resolution of this issue by way of interlocutory appeal may, in the Trial Chamber’s view, materially advance the proceedings.
13. Finally, the Trial Chamber believes that its decision on certification is aided by consideration of all the arguments raised by the parties and therefore grants Miletić’s motion for leave to file his

¹⁸ *Id.* at para. 15. See also *id.* at para. 16. But see Miletić Reply, para. 11.

¹⁹ Prosecution Response, para. 17.

²⁰ The Trial Chamber notes that many of the arguments in the Motions concern the merits of the arguments to be made on appeal, as opposed to the merit of the request to have that appeal heard on an *interlocutory* basis. As another Trial Chamber has recently held, a “request for certification is not concerned with whether a decision was correctly reasoned or not. That is a matter for appeal, be it an interlocutory appeal or one after final Judgement has been rendered. Rule 73(B) concerns the fulfilment of two criteria, after which the Trial Chamber may decide to certify an interlocutory appeal. If it does, then the reasoning of the appealed decision immediately will be assessed by the Appeals Chamber. If it does not, the reasoning may be challenged by the Prosecution after the rendering of the final Judgement, and the Appeals Chamber, at that time, will assess the reasoning of the decision.” *Prosecutor v. Milošević*, Case No. IT-02-54-T, Decision on Prosecution Motion for Certification of Trial Chamber Decision on Prosecution Motion for Voir Dire Proceeding, 20 June 2005, para. 4. For these reasons, only the arguments relevant to the two criteria in Rule 73(B) have been considered in reaching this decision.

Reply to the Response of the Prosecutor concerning the Motion for Certification of the Appeal dated 27 September 2005.

V. DISPOSITION

14. For these reasons, pursuant to Rule 73 of the Rules, this Trial Chamber hereby GRANTS the motions for certification and GRANTS Miletic's motion for leave to file the Reply to the Response of the Prosecutor concerning the Motion for Certification of the Appeal dated 27 September 2005.

Judge Liu appends a Partially Dissenting Opinion to this Decision.

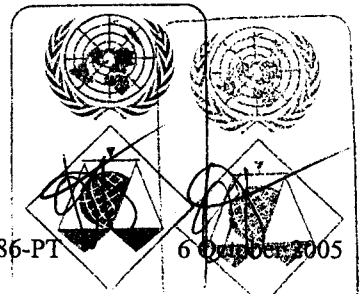
Done in English and French, the English version being authoritative.



Judge Patrick Robinson
Presiding

Dated this 6th day of October 2005
At The Hague
The Netherlands

[Seal of the Tribunal]



PARTIALLY DISSENTING OPINION OF JUDGE LIU DAQUN

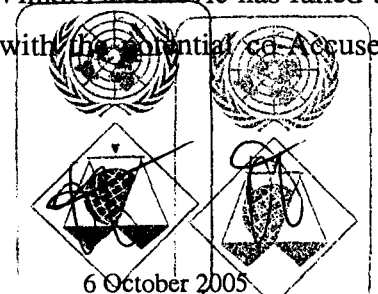
1. The issue presented to the Trial Chamber is whether the Trial Chamber should grant certification for an interlocutory appeal of the Joinder Decision of 21 September 2005 for two of the accused, namely Vinko Pandurević and Radivoje Miletić. The majority of the Trial Chamber has decided that the motions for certification of both accused should be granted. In respect of Radivoje Miletić, I fully agree with the majority of the Trial Chamber that certification should be granted. As regards the accused Vinko Pandurević, however, I respectfully dissent from the majority opinion, for the following reasons.

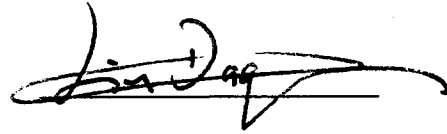
2. In my opinion, the Defence for Vinko Pandurević (“Defence”) has failed to meet the standard set out in Rule 73(B) of the Rules of Procedure and Evidence (“Rules”), in particular the first criterion of that Rule.

3. Rule 73(B) establishes, as its starting point, that Decisions on all Motions are *without* interlocutory appeal, but the Rule then goes on to say that leave to appeal *may* be granted if the Trial Chamber finds that the Decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial. The relation between the first and the second part of this provision would seem to imply that leave to appeal should *only* be granted if there is a risk that the Decision, if it were allowed to stand, would significantly impair the fairness (or expeditiousness) of the trial. This is the test that the Applicant must pass.

4. For an Applicant to do so, in my view, it is not enough to merely refer to the fact that the Decision somehow “involves an issue that would significantly affect” the fairness of the trial; he also has to demonstrate just how the Trial Chamber’s Decision, if it were allowed to stand, would have a significant negative impact on the fairness of the trial. The obvious way of illustrating this is to show that the Trial Chamber erred in its application of the law or misinterpreted the facts laid out in the Parties’ submissions .

5. Pandurević, however, has done neither. Although he is charged with crimes that are related to the crimes for which the potential co-Accused have been indicted, he claims that his case differs substantially from their cases, but he does not explain why or how. Nor does he point to any error in law or fact which the Trial Chamber may have made. In my view, therefore, Vinko Pandurević has failed to show that the fairness of his trial will be affected by joining his case with the potential co-Accused persons.

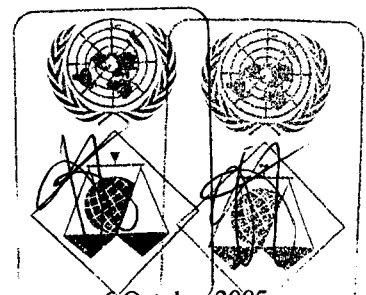




Judge Daqun Liu

Dated this sixth day of October 2005,
At The Hague,
The Netherlands

[Seal of the Tribunal]



6 October 2005