



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: IT-05-86-AR73.1
Date: 24 January 2006
Original: English

BEFORE THE APPEALS CHAMBER

Before: Judge Fausto Pocar, Presiding
Judge Mohamed Shahabuddeen
Judge Andréia Vaz
Judge Theodor Meron
Judge Wolfgang Schomburg

Registrar: Mr. Hans Holthuis

Decision of: 24 January 2006

THE PROSECUTOR

v.

**VINKO PANDUREVIĆ &
MILORAD TRBIĆ**

**DECISION ON VINKO PANDUREVIĆ'S INTERLOCUTORY APPEAL AGAINST THE
TRIAL CHAMBER'S DECISION ON JOINDER OF ACCUSED**

Office of the Prosecutor

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Counsel for the Accused

Dorde Sarapa for Vinko Pandurević
Colleen Rohan and Vesna Janjić for Milorad Trbić

1. The Appeals 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 (“Appeals Chamber” and “International Tribunal”, respectively) is seized of “Vinko Pandurević’s Defence Interlocutory Appeal Against the Trial Chamber’s Decision on Motion for Joinder” filed by Vinko Pandurević (“Appellant”) on 11 October 2005 (“Appeal”).

I. PROCEDURAL BACKGROUND

2. On 21 September 2005, the Trial Chamber granted a Prosecution motion seeking to join six cases involving nine Accused (“Impugned Decision”) pursuant to Rule 48 of the Rules of Procedure and Evidence of the International Tribunal (“Rules”).¹ The Trial Chamber found that the requirements of Rule 48 were met because all of the indictments in the six cases relate to the “same transaction” alleged by the Prosecution: that the Accused were involved in a common scheme whose purpose was to ethnically cleanse the Srebrenica and Žepa enclaves in Eastern Bosnia of Bosnian Muslims from March to November 1995.² The Trial Chamber further found that certain factors militated in favour of joinder of these cases in that they served the interests of justice; the rights of the Accused would be better protected in a joint trial; and none of the Accused were likely to suffer prejudice if a joint trial were ordered.³

3. The Appellant, a defendant in one of these six cases joined by the Trial Chamber, requested certification to appeal the Impugned Decision pursuant to Rule 73 (B) of the Rules on 27 September 2005.⁴ The Appellant’s request was granted on 6 October 2005.⁵ The Appellant subsequently filed this Appeal and requests that the Appeals Chamber reverse the Impugned Decision insofar as it

¹*Prosecutor v. Vujadin Popović*, Case No. IT-02-57-PT, *Prosecutor v. Ljubiša Beara*, Case No. IT-02-58-PT, *Prosecutor v. Drago Nikolić*, Case No. IT-02-63-PT, *Prosecutor v. Ljubomir Borovčanin*, Case No. IT-02-64-PT, *Prosecutor v. Zdravko Tolimir, Radivoje Miletić & Milan Gvero*, Case No. IT-04-80-PT, *Prosecutor v. Vinko Pandurević & Milorad Trbić*, Case No. IT-05-86-PT, Decision on Motion for Joinder, 21 September 2005.

² Impugned Decision, paras 14-16, 31.

³ *Id.*, paras 19, 34.

⁴ *Prosecutor v. Vinko Pandurević & Milorad Trbić*, Case No. IT-05-86-PT, Vinko Pandurević’s Defence Request for Certification to File the Interlocutory Appeal Against the Trial Chamber’s Decision on Motion for Joinder, 27 September 2005.

⁵ *Prosecutor v. Vinko Pandurević & Milorad Trbić*, Case No. IT-05-86-PT, Decision on Motion for Certification of Joinder Decision for Interlocutory Appeal, 6 October 2005. The Appellant filed his request for certification in both Trial Chamber II and Trial Chamber III. In light of Trial Chamber III’s decision to grant certification, Trial Chamber II dismissed the request that had been presented to it as moot. See *Prosecutor v. Popović et al.*, Case No. IT-05-88-PT, Decision on Motion for Certification of Joinder Decision for Interlocutory Appeal, 12 October 2005.

applies to him and order that his case be tried separately from the other Accused.⁶ The Prosecution filed its response on 25 October 2005.⁷ The Appellant did not file a reply.

II. NATURE OF THE APPEAL

4. The Appeals Chamber has held that Trial Chambers exercise discretion in different types of decisions—“such as when imposing sentence, in determining whether provisional release should be granted, in relation to the admissibility of some types of evidence, in evaluating evidence, and (more frequently) in deciding points of practice or procedure.”⁸ Deference is afforded to the Trial Chamber’s discretion in these decisions because they “draw[] on the Trial Chamber’s organic familiarity with the day-to-day conduct of the parties and practical demands of the case, and require[] a complex balancing of intangibles in crafting a case-specific order to properly regulate a highly variable set of trial proceedings.”⁹

5. In this case, the Appeals Chamber holds that the Trial Chamber’s decision to join two or more persons accused of the same or different crimes under one indictment pursuant to Rule 48 of the Rules constitutes such a discretionary decision. This holding is supported by the Appeals Chamber’s previous ruling that a Trial Chamber’s decision to join two or more crimes under one indictment pursuant to Rule 49 of the Rules falls within the category of a Trial Chamber’s discretionary decisions.¹⁰ Similar to Rule 49, the plain language of Rule 48 stipulates that a Trial Chamber “may” make a joinder decision once the requirements of the Rule are met. Furthermore, while both Rules apply to two different types of joinder, the Trial Chamber considers similar legal requirements and weighs similar factors under the terms of both Rules.¹¹

⁶ Appeal, para. 20.

⁷ *Prosecutor v. Zdravko Tolimir, Radivoje Miletić and Milan Gvero*, Case No. IT-04-80-AR73.1, *Prosecutor v. Vinko Pandurević and Milorad Trbić*, Case No. IT-05-86-AR73.1, Prosecution’s Consolidated Response to Vinko Pandurević’s and Radivoje Miletić’s Interlocutory Appeal Against the Trial Chamber’s Decision on Joinder of Accused, 25 October 2005 (“Response”).

⁸ *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 (“*Milošević* Decision on Joinder”), para. 3.

⁹ *Prosecutor v. Milošević*, Case No. IT-02-54-AR73.7, Decision on Interlocutory Appeal of the Trial Chamber’s Decision on the Assignment of Defense Counsel, 1 November 2004 (“*Milošević* Decision on Defense Counsel”), para. 9.

¹⁰ *Milošević* Decision on Joinder, para. 3.

¹¹ See, e.g., *id.*, paras 13, 22.

III. STANDARD OF REVIEW

6. The Appeals Chamber recalls that an interlocutory appeal is not a *de novo* review of the Trial Chamber's decision.¹² Having established that the Impugned Decision is a discretionary one, the question before the Appeals Chamber is not whether it "agrees with that decision" but "whether the Trial Chamber has correctly exercised its discretion in reaching that decision."¹³ The party challenging a discretionary decision by the Trial Chamber must demonstrate that the Trial Chamber has committed a "discernible error"¹⁴ resulting in prejudice to that party.¹⁵ The Appeals Chamber will overturn a Trial Chamber's exercise of its discretion where it is found to be "(1) based on an incorrect interpretation of governing law; (2) based on a patently incorrect conclusion of fact; or (3) so unfair or unreasonable as to constitute an abuse of the Trial Chamber's discretion."¹⁶

IV. APPLICABLE LAW

7. The Appeals Chamber considers that pursuant to Rule 48 of the Rules, "persons accused of the same or different crimes committed in the course of the same transaction may be jointly charged and tried." Thus, the fundamental question for the Trial Chamber under Rule 48 is whether the two or more persons at issue for possible joinder in one trial are charged with: (1) having committed crimes, regardless of whether those crimes are alleged to be the same crimes, (2) "in the course of the same transaction." A transaction is defined under Rule 2 of the Rules 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." Pursuant to Rule 2 therefore, a common scheme, strategy or plan includes one or a number of events at the same or different locations.¹⁷ Furthermore, there is no requirement under Rules 2 and 48 that the events constituting the "same transaction" take place at the same time or be committed together.¹⁸ The Appeals Chamber agrees with the Trial Chamber that "[i]n deciding whether charges against more than one accused should

¹² Cf. *Prosecutor v. Mico Stanišić*, Case No. IT-04-79-AR65.1, Decision on Prosecution's Interlocutory Appeal of Mićo Stanišić's Provisional Release, 17 October 2005 ("*Stanišić* Provisional Release Decision"), para. 6.

¹³ *Ibid.*

¹⁴ *Ibid.*

¹⁵ *Milošević* Decision on Joinder, para. 6.

¹⁶ *Stanišić* Provisional Release Decision, para. 6 & n. 10. The Appeals Chamber will also consider whether the Trial Chamber "has given weight to extraneous or irrelevant considerations or that it has failed to give weight or sufficient weight to relevant considerations . . ." *Ibid.*

¹⁷ *Milošević* Decision on Joinder, para. 14.

¹⁸ *Ibid.*

be joined pursuant to Rule 48, the Chamber should base its determination upon the factual allegations contained in the indictments and related submissions.”¹⁹

8. Where a Trial Chamber finds that two or more persons have allegedly committed crimes in the course of the same transaction, it then considers various factors, which it weighs in the exercise of its discretion as to whether joinder should be granted. Rule 82 (A) provides that “[i]n joint trials, each accused shall be accorded the same rights as if such accused were being tried separately.” The rights of an accused at trial are explicitly listed under Article 21 of the Statute of the International Tribunal. Rule 82(B) further provides that a 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.” Therefore, in light of Rule 82, it is appropriate for a Trial Chamber deciding whether to join two or more accused into one case pursuant to Rule 48 to take into consideration and weigh the following: (1) protection of the rights of the accused pursuant to Article 21 of the Statute; (2) avoidance of any conflict of interests that might cause serious prejudice to an accused; and (3) protection of the interests of justice. A Trial Chamber may, of course, look to other factors in its discretion, which it deems important for considering whether joinder under Rule 48 would be appropriate. For example, in this case, in addition to weighing the first two factors mentioned previously, the Trial Chamber also considered that a single trial would better protect the interests of justice by (1) avoiding the duplication of evidence; (2) promoting judicial economy; (3) minimising hardship to witnesses and increasing the likelihood that they will be available to give evidence; and (4) ensuring consistency of verdicts.²⁰

V. DISCUSSION

9. In this Appeal, the Appellant argues that the Trial Chamber erred when it found that the requirement of the existence of the “same transaction” under Rule 48 had been met for joining his

¹⁹ Impugned Decision, para. 8. Cf. *Milošević* Decision on Joinder, paras 19-21 (wherein the Appeals Chamber only looked to facts alleged in the three indictments against the Accused to determine whether the events alleged therein formed part of the same transaction pursuant to Rule 49).

²⁰ Impugned Decision, para. 34. Some, if not all, of these factors have also been considered in other Trial Chamber decisions on joinder under Rule 48. See, e.g., *Prosecutor v. Milan Martić*, Case No. IT-95-11-PT, *Prosecutor v. Jovica Stanišić & Franko Simatović*, Case No. IT-03-69-PT, *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-PT, Decision on Prosecution Motion for Joinder, 10 November 2005, para. 9; *Prosecutor v. Milan Milutinović et al.*, Case No. IT-99-37-PT, *Prosecutor v. Nebojša Pavković et al.*, Case No. IT-03-70-PT, Decision on Prosecution Motion for Joinder; *Prosecutor v. Rahim Ademi*, Case No. IT-01-46-PT, *Prosecutor v. Mirko Norac*, Case No. IT-04-76-I, Decision on Motion for Joinder of Accused, 30 July 2004; *Prosecutor v. Mejakić et al.*, Case No. IT-02-65-PT, Decision on Prosecution’s Motion for Joinder of Accused, 17 September 2002, para. 24; *Prosecutor v. Momir Nikolić et al.*, Case No. IT-02-56-PT, *Prosecutor v. Vidoje Blagojević et al.*, Case No. IT-02-53-PT, Decision on Prosecution’s Motion for Joinder, 17 May 2002, para. 14.

case with those of the other Accused.²¹ The Appellant also contests the findings of the Trial Chamber when it took into consideration various other factors in the exercise of its discretion and found that on balance, they militated in favour of granting joinder.²²

A. Existence of the “Same Transaction”

10. The Appellant argues that the Trial Chamber erred in finding that his case was part of the “same transaction” as defined under Rule 2 of the Rules.²³ First, he asserts that there is no act or omission allegedly committed by him that could qualify as being part of a common scheme, strategy or plan with the other Accused.²⁴ The Appellant states that his case is “fully isolated in relation to all other cases” and that there is not “a single circumstance that would point to a connection with the other accused and to his participation in any joint action.”²⁵

11. Second, the Appellant claims that there is “no relevant evidence” to establish that he “participated in any agreements that would represent part of a joint plan for any of the accusations” and that one of the examples of his alleged participation actually shows that he opposed military action against the Žepa enclave.²⁶ Furthermore, the Appellant points out that it is evident that he was a “non-standard officer in all respects, who cannot be placed in the context of any type of agreements in connection with the events qualified as the acts” with which he was charged.²⁷ The Appellant claims that he was absent from his brigade during the period between the 6th and 15th of July 1995, as well as between the 4th of August and 15th of September 1995, during which periods he was replaced by the Deputy Chief of Staff.²⁸ He also notes that immediately upon arriving in Zvornik on 15 July 1995, he went to the forward command post and commanded military actions.²⁹

12. Finally, the Appellant argues that certain circumstances actually demonstrate the exclusion of the possibility of the existence of a “same transaction” between him and the other Accused. The Appellant submits that together, all of the Accused consisted of a “wide circle” with a “very broad range” of powers and actions. He claims that the difference in power in that circle was of such intensity that it excluded any connection between him and the other Accused. Furthermore, the

²¹ Appeal, paras 6-12.

²² *Id.*, paras 13-19.

²³ Appeal, para. 6.

²⁴ *Id.*, para. 11.

²⁵ *Id.*, para. 10.

²⁶ *Id.*, para. 11.

²⁷ *Ibid.*

²⁸ *Id.*, para. 12.

²⁹ *Ibid.*

Appellant claims that the actions of the other Accused “both in the formal-legal and objective sense” had no points of contact with him.³⁰

13. The Appeals Chamber recalls that, in reaching a decision on joinder pursuant to Rule 48, the Trial Chamber only looks to the factual allegations against two or more accused in the indictments and related submissions to determine whether the Prosecution has sufficiently alleged that they committed the same or different crimes in the course of the same transaction.³¹ The Appeals Chamber emphasises that the Trial Chamber is not required, at this stage in the proceedings, to determine whether there is sufficient evidence put forward by the Prosecution to support the allegations made against an accused in the indictment.

14. Consequently, at the outset, the Appeals Chamber rejects the Appellant’s latter two arguments insofar as they allege that there is insufficient evidence to demonstrate the existence of the “same transaction” between him and the other Accused. The Appeals Chamber finds that the Trial Chamber did not err in failing to determine whether there was sufficient evidence proffered by the Prosecution to demonstrate the degree of the Appellant’s communication and power vis-à-vis the other Accused in the military structure of the Army of the Republika Srpska. Likewise, the Trial Chamber was not required to assess, at this stage, whether the Prosecution has proven the existence of an alleged agreement between the Appellant and other Accused or whether the Appellant was present at specific periods of time when crimes were allegedly committed. These are questions for the Trial Chamber to consider at trial when judging the Appellant’s alleged culpability.

15. However, the Appeals Chamber will consider the Appellant’s arguments insofar as they claim that the Trial Chamber erred in its determination, on the basis of the factual allegations in the indictments against the Appellant and the other Accused, that he was alleged, through various acts or omissions, to have participated in a common scheme, strategy or plan with the others. The Appeals Chamber recalls that the Trial Chamber found that the following point to the existence of a “same transaction” between all of the Accused, including the Appellant:³² (1) all Accused were allegedly part of or reported to the armed forces of Republika Srpska; (2) all Accused are charged with crimes in the same geographical area, specifically Srebrenica and/or Žepa in Eastern Bosnia; (3) all Accused are alleged to have committed crimes against Bosnian Muslims; (4) all Accused are

³⁰ *Ibid.*

³¹ *See supra* para. 7.

³² *See Impugned Decision*, paras 14, 15.

alleged to have committed crimes during “substantially the same time period”;³³ and (5) many of the Accused are charged with the same crimes.³⁴

16. Furthermore, the Trial Chamber took into consideration the fact that certain Accused, including the Appellant, are charged with participating in the same joint criminal enterprise as a mode of individual responsibility under Article 7(1) of the Statute, namely, “the killing of the able-bodied men of Srebrenica” while other Accused were charged with a separate joint criminal enterprise under Article 7(1): “the forced removal of the Bosnian Muslim population from Srebrenica and Žepa.”³⁵ The Trial Chamber found that the factual allegations underpinning the two joint criminal enterprises were closely interlinked: the Prosecution alleged that the forcible separation of the able-bodied men from their families, which took place in the course of executing the physical removal plan beginning on 12 July 1995, was the first step in carrying out the mass killings.³⁶

17. The Appeals Chamber finds that the Appellant has failed to demonstrate how, in light of all of these factual allegations considered by the Trial Chamber in his indictment as compared to the indictments against the other Accused, the Trial Chamber erred in its conclusion that all of the Accused participated in the same transaction. It was reasonable for the Trial Chamber to conclude that these circumstances provide for a sufficient nexus between the alleged acts and omissions of each of the Accused pointing to a common scheme, strategy or plan between them whose purpose was to ethnically cleanse the Eastern Bosnian enclaves of Srebrenica and Žepa. The Trial Chamber correctly noted that “the same transaction” may be found to exist even where the alleged crimes of the relevant accused are different, or are carried out in different geographical areas or over different periods of time.³⁷ The Appeals Chamber affirms this statement and emphasises that this is the case so long as there are other factual allegations in the indictments that are sufficient to support a finding that the alleged acts or omissions form part of a common scheme, strategy or plan.

18. Furthermore, the Appeals Chamber finds that the Appellant has failed to show that the Trial Chamber erred in stating that there is no requirement under Rules 2 and 48 of the Rules that the

³³ The Trial Chamber noted that the indictment against three of the Accused contains charges spanning from March to August 1995 while the other five indictments are based on the time period from July to November 1995. *See Impugned Decision* at n. 42.

³⁴ The Trial Chamber noted that all 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. *See Impugned Decision* at n. 43.

³⁵ *Impugned Decision*, para. 16.

³⁶ *Id.*, para. 16.

Prosecution allege that the Accused played a particular role in the common plan at issue, such as being of a particular status within the hierarchy of a military structure or wielding a particular amount of actual authority vis-à-vis the other Accused.³⁸ All that is required is that there are factual allegations that he participated in that common plan.

B. Factors in Favour of Granting Joinder

19. The Appellant also argues that the Trial Chamber erred in the exercise of its discretion when considering and weighing the following factors, which it found to militate in favour of granting joinder of the Appellant's case with the other Accused: (1) avoiding duplication of evidence and promoting judicial economy; (2) protection of witnesses; (3) consistency of verdicts; (4) prejudice to the Appellant (5) presentation of prejudicial evidence; and (6) conflicts of interest.³⁹ The Appeals Chamber now considers each of the Appellant's arguments with regard to these factors in turn.

20. First, the Appellant submits that the Trial Chamber erred in finding that joinder of the Appellant's trial with the other Accused is in the interests of judicial economy.⁴⁰ The Trial Chamber found that a joint trial would avoid 100 witnesses giving the same evidence six times over. The Trial Chamber also found that a single trial of all of the Accused will last 18-24 months (one to two years) rather than six separate trials lasting in total 93-95 months (seven to eight years).⁴¹ The Appellant argues that the Trial Chamber erred in its assessment because if he "were not tried with others, it would not prolong the proceedings to the extent mentioned by the Trial Chamber."⁴² Furthermore, the Appellant claims that joining his trial with that of the other Accused is in contradiction with his interests in an expedient trial.⁴³

21. The Appeals Chamber does not agree. The Trial Chamber noted that there are approximately 100 witnesses common to all of the Accused, including the Appellant.⁴⁴ The Appellant's separate trial would therefore require that these 100 witnesses duplicate their evidence. Furthermore, while the Appellant is correct that proceedings would not be prolonged by seven to eight years if his case were tried separately from the others, he has failed to show that the Trial Chamber erred in finding that the interests of judicial economy are served by joining his case to the

³⁷ See *supra* para. 7.

³⁸ See Impugned Decision, para. 18.

³⁹ Appeal, para. 13.

⁴⁰ *Id.*, para. 14.

⁴¹ Impugned Decision, paras 20-24.

⁴² Appeal, para. 14.

⁴³ *Ibid.*

⁴⁴ Impugned Decision, para. 21.

others. The Prosecution estimated before the Trial Chamber that the Appellant's separate trial would last 14 months.⁴⁵ Thus, 14 months would be added onto the 18-24 months required for the joint trial of the other Accused. Finally, the Appellant has failed to demonstrate that the Trial Chamber abused its discretion by giving weight to interests of judicial economy even though an additional four to ten months that would be added on to the 14 months for the Appellant's separate trial if he were tried jointly. The Appeals Chamber considers that the right to be tried without undue delay includes the period of time between the arrest of an accused and the commencement of his trial. It is possible that if the Appellant were tried separately from the other Accused, further delay would result as it is not obvious that his separate trial would be able to commence at the same time as this joint trial. The Appeals Chamber does not find that the Trial Chamber unduly prejudiced his right to be tried without undue delay.⁴⁶

22. Second, the Appellant claims that the Trial Chamber erred by finding that witnesses would be better protected in a joint trial of the Accused⁴⁷ on grounds that "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."⁴⁸ Again, the Appeals Chamber does not agree. The Appellant fails to substantiate this claim, merely stating, without support, that his separate trial would not "represent a major difficulty" for the 100 witnesses that would have to duplicate their evidence and that the "interests of the accused are more dominant than interests of witnesses."⁴⁹ It is evident that requiring witnesses to travel a second time to The Hague to give testimony and be examined a second time could pose some hardship to witnesses. Furthermore, the Appeals Chamber considers that under the Statute and Rules of the International Tribunal, it is within the discretion of the Trial Chamber to balance the rights of an accused against its obligation to provide for the protection of witnesses.⁵⁰ It is true that the rights of an accused have to be respected.⁵¹ Nevertheless, the Appeals Chamber finds that the Appellant has failed to show that the Trial Chamber abused its discretion in giving weight to the interests of 100 witnesses in this case. The Appeals Chamber finds that the Trial Chamber did not unduly prejudice his right to be tried without undue delay in doing so.

⁴⁵ See Response, para. 29 at n. 32.

⁴⁶ See Art. 21(4)(c) of the Statute.

⁴⁷ Appeal, para. 15.

⁴⁸ Impugned Decision, para. 25.

⁴⁹ Appeal, para. 15.

⁵⁰ See, e.g., Arts. 20-22 of the Statute; Rule 75 of the Rules. Cf. *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-A, Decision on Appellants Dario Kordić and Mario Čerkez's Request for Assistance of the Appeals Chambers in Gaining Access to Appellate Briefs and Non-Public Post Appeal Pleadings and Hearing Transcripts filed in the *Prosecutor v. Tihomir Blaškić*, 16 May 2002, para. 14, ("[i]t is . . . within the discretion of the Appeals Chamber to strike a balance between the right of a party to have access to material to prepare his case and guaranteeing the protection of witnesses and the integrity of confidential information.").

23. Third, the Appellant submits that, contrary to the Trial Chamber's finding, consistency of verdicts will not be brought into question where his trial is held separately. The Appellant claims that due to the "high level of experience of the Judges" at the Tribunal, "Trial Chambers could not assess the evidence differently which could result in conflicting rulings and judgements."⁵² The Appeals Chamber rejects this unsubstantiated argument by the Appellant. The Trial Chamber reasonably concluded that one joint trial would ensure that the same evidence is available and assessed with regard to each Accused and thus result in a greater likelihood of consistent evaluation of the evidence, findings and verdicts on the basis of the same facts.⁵³ While it is true that Judges at the Tribunal are experienced, "two judges, both acting reasonably, can come to different conclusions on the basis of the same evidence."⁵⁴ The Appellant fails to demonstrate that the Trial Chamber erred in finding that there is a greater likelihood of consistent results if just one bench of Judges hears the cases of each of the Accused in a joint trial where all of the same evidence is considered simultaneously.

24. Fourth, the Appellant argues that his arguments with regard to these three factors considered by the Trial Chamber demonstrate that joinder of his case with the other Accused would adversely affect his rights.⁵⁵ The Appeals Chamber notes that it has already rejected those arguments and, in any event, finds that the Appellant has failed to demonstrate that the Trial Chamber erred in its balancing of the factors of judicial economy, protection of witnesses; and consistency of verdicts with his right to be tried without undue delay.

25. Fifth, the Appellant claims that the Trial Chamber erred in granting joinder because in a joint trial, prejudice may result to him from the presentation of evidence relating to other accused.⁵⁶ Again, the Appeals Chamber finds that the Appellant has failed to substantiate this argument, merely repeating what was argued before the Trial Chamber. The Appellant fails to show that the Trial Chamber erred in concluding that:

[p]rejudice 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

⁵¹ See, e.g., Rule 75(A) of the Rules which states, "A Judge or a Chamber may . . . order appropriate measures for the privacy and protection of victims and witnesses, provided that the measures are consistent with the rights of the accused."

⁵² *Ibid.*

⁵³ Impugned Decision, paras 26-27.

⁵⁴ *Prosecutor v. Tadić*, Case No. IT-94-1-A, Judgement, 15 July 1999, para. 64.

⁵⁵ Appeal, para. 16.

⁵⁶ *Id.*, para. 17.

Tribunal . . . 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.⁵⁷

Because the Appellant failed to make a specific argument regarding any concrete risk of prejudice to him on this basis, the Trial Chamber rejected this argument. In this Appeal, the Appellant likewise fails to allege any concrete risk of prejudice to himself due to the presentation of evidence relevant to another Accused's case and therefore, the Appeals Chamber also rejects his claim.

26. Sixth, the Appellant argues that the Trial Chamber erred in finding that joinder of his case with the other Accused was permissible due to the fact that "no convincing argument had been advanced by any of the accused as to the possibility of any conflict of interest that would prohibit joinder."⁵⁸ Because the Appellant merely states, without substantiation, that it is "evident" that joinder of his case with that of the other Accused will result in a conflict of interest, the Appeals Chamber rejects this argument as manifestly unfounded.

27. Finally, the Appellant claims that the Trial Chamber erred in granting joinder because doing so violates the principle of fairness to accused protected under Article 20 of the Statute of the International Tribunal.⁵⁹ The Appellant argues that "fairness may be accomplished only when all circumstances and specific aspects of a concrete case are fully taken into consideration."⁶⁰ The Appeals Chamber reemphasizes that a joint trial is the best guarantee that identical evidence with regard to each accused is fully considered.⁶¹ Furthermore, again, the Appeals Chamber finds that the Appellant fails to substantiate how it is "evident" that his right to a fair trial will not be upheld if he is tried jointly with the other Accused. As noted by the Trial Chamber, the International Tribunal is made up of professional Judges capable of fully taking into consideration the circumstances and specific aspects of each concrete case before them when determining whether the individual criminal responsibility of each accused is established and, if so, individualizing each sentence. The fact that a trial is a joint one does not preclude their ability to do so for each case that has been joined.

⁵⁷ Impugned Decision, para. 30 (internal quotations omitted).

⁵⁸ *Id.*, para. 33. *See also* Appeal, para. 18.

⁵⁹ Appeal, para. 19.

⁶⁰ *Ibid.*

⁶¹ *See supra* para. 23.

DISPOSITION

28. On the basis of the foregoing, this Appeal is hereby **DISMISSED**.

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

Dated this 24th day of January 2006,
At The Hague,
The Netherlands.



Judge Fausto Pocar
Presiding Judge

[Seal of the International Tribunal]