



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-05-88/2-PT

Date: 20 July 2007

Original: English

IN TRIAL CHAMBER II

Before: Judge Carmel Agius, Presiding
Judge O-Gon Kwon
Judge Kimberly Prost, Pre-Trial Judge

Registrar: Mr. Hans Holthuis

Decision of: 20 July 2007

PROSECUTOR
v.
ZDRAVKO TOLIMIR

PUBLIC

DECISION ON MOTION FOR JOINDER

Office of the Prosecutor
Mr. Peter McCloskey

The Accused
Zdravko Tolimir

THIS TRIAL CHAMBER of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991 (“Tribunal”) is seised of the Prosecution’s Motion for Joinder of Accused, filed on 6 June 2007 in the cases *Prosecutor v. Popović et al.* and *Prosecutor v. Zdravko Tolimir* (“Motion”), and hereby renders its decision thereon.

I. PROCEDURAL BACKGROUND

1. The accused Vujadin Popović, Ljubiša Beara, Drago Nikolić, Ljubomir Borovčanin, Radivoje Miletić, Milan Gvero, Zdravko Tolimir, Vinko Pandurević and Milorad Trbić were originally charged with crimes related to the events in Srebrenica and Žepa in July 1995 in six separate indictments.¹
2. The Prosecution filed a motion for joinder of accused on 10 June 2005,² seeking to consolidate the six cases against the above-mentioned accused into one case pursuant to Rule 48 of the Rules of Procedure and Evidence (“Rules”).³
3. By order of the President of the Tribunal a Trial Chamber consisting of Judge Patrick Robinson, Judge Liu Daqun and Judge Carmel Agius was created to determine the Prosecution’s motion for joinder.⁴ By decision of 21 September 2005 (“First Decision on Joinder”), the Trial Chamber granted the motion for joinder, on the grounds that all of the accused’s alleged crimes either occurred in the same transaction or were closely “interlinked”, and that a number of other factors militated in favour of joinder.⁵ The joined case was assigned to Trial Chamber II on 26

¹ *Prosecutor v. Popović*, Case No. IT-02-57-I, Indictment, 28 March 2002; *Prosecutor v. Beara*, Case No. IT-02-58-I, Indictment, 26 March 2002; *Prosecutor v. Nikolić*, Case No. IT-02-63-I, Indictment, 3 September 2002; *Prosecutor v. Borovčanin*, Case No. IT-02-64-I, Indictment, 6 September 2002; *Prosecutor v. Tolimir, Miletić, and Gvero*, Case No. IT-04-80-I, Indictment, 8 February 2005; and *Prosecutor v. Pandurević and Trbić*, Case No. IT-05-86-I, Indictment, 3 March 2005.

² *Prosecutor v. Popović*, Case No. IT-02-57-I, *Prosecutor v. Beara*, Case No. IT-02-58-I, *Prosecutor v. Nikolić*, Case No. IT-02-63-I, *Prosecutor v. Borovčanin*, Case No. IT-02-64-I, *Prosecutor v. Tolimir, Miletić, and Gvero*, Case No. IT-04-80-I, and *Prosecutor v. Pandurević and Trbić*, Case No. IT-05-86-I, Prosecution’s Motion for Joinder of Accused, 10 June 2005.

³ Accused Gvero, Miletić, and Pandurević explicitly opposed the motion. See *Prosecutor v. Tolimir, Miletić and Gvero*, Case No. IT-04-80-PT, General Gvero’s Response to Prosecution’s Motion for Joinder, 5 July 2005; *Prosecutor v. Tolimir, Miletić and Gvero*, Case No. IT-04-80-PT, Response by General Miletić to the Prosecution’s Motion for Joinder of Accused, 13 July 2005; *Prosecutor v. Pandurević and Trbić*, Case No. IT-05-86-PT, Accused Vinko Pandurević Defence’s Response to Prosecution’s Motion for Joinder of Accused, 17 June 2005. See also *Prosecutor v. Nikolić*, Case No. IT-02-63-PT, Response on Behalf of Drago Nikolić to Prosecution Motion for Joinder of Accused Complete Version, 1 July 2005; *Prosecutor v. Popović*, Case No. IT-02-57-PT, Response of Vujadin Popović to Prosecution’s Motion for Joinder of Accused, 23 June 2005.

⁴ *Prosecutor v. Popović*, Case No. IT-02-57-PT, *Prosecutor v. Beara*, Case No. IT-02-58-PT, *Prosecutor v. Nikolić*, Case No. IT-02-63-PT, *Prosecutor v. Borovčanin*, Case No. IT-02-64-PT, *Prosecutor v. Tolimir, Miletić and Gvero*, Case No. IT-04-80-PT and *Prosecutor v. Pandurević and Trbić*, Case No. IT-05-86-PT, Order Referring the Joinder Motion, 29 June 2005.

⁵ *Prosecutor v. Popović*, Case No. IT-02-57-PT, *Prosecutor v. Beara*, Case No. IT-02-58-PT, *Prosecutor v. Nikolić*, Case No. IT-02-63-PT, *Prosecutor v. Borovčanin*, Case No. IT-02-64-PT, *Prosecutor v. Tolimir, Miletić and Gvero*,

September 2005⁶ and Judge Carmel Agius was appointed Pre-Trial Judge on 5 October 2005.⁷ Two separate appeals by accused Pandurević and Miletić against the First Decision on Joinder⁸ were denied on appeal.⁹

4. Meanwhile, on 28 June 2005, the Prosecution filed a motion for amendments to the indictments, which included a proposed “Consolidated Amended Indictment” against the nine accused.¹⁰ Pursuant to an order by Trial Chamber II on 31 October 2005, the Prosecution filed a Consolidated Amended Indictment on 11 November 2005.¹¹ The proposed “Consolidated Amended Indictment” of 28 June 2005 was made the operative indictment for the newly consolidated *Prosecutor v. Popović et al.* case (“*Popović et al.* case”), and was renamed the “Consolidated Amended Indictment”.¹² A Second Consolidated Amended Indictment¹³ was eventually filed on 14 June 2006. The case against the Accused Trbić was severed on 26 June 2006.¹⁴ On 15 August 2006, the Trial Chamber granted leave to the Prosecution to file a corrected Second Consolidated Amended Indictment, which became the operative indictment for the accused in the *Popović et al.* case (“*Popović et al.* Indictment”).¹⁵ On the same day, the case against

Case No. IT-04-80-PT and *Prosecutor v. Pandurević and Trbić*, Case No. IT-05-86-PT, Decision on Motion for Joinder, 21 September 2005 (“First Decision on Joinder”), paras. 14–35.

⁶ *Prosecutor v. Popović, Beara, Nikolić, Borovčanin, Tolimir, Miletić, Gvero, Pandurević, and Trbić* (“*Popović et al.*”), Case No. IT-05-88-PT, Order Assigning a Case to a Trial Chamber, 26 September 2005. After the joinder, the *Popović et al.* case was assigned to Trial Chamber II, consisting of Judge Carmel Agius (presiding), Judge Kevin Parker, and Judge Jean-Claude Antonetti. *Prosecutor v. Popović et al.*, Case No. IT-05-88-PT, Order Assigning a Case to a Trial Chamber, 26 September 2005.

⁷ *Prosecutor v. Popović et al.*, Case No. IT-05-88-PT, Order Designating a Pre-Trial Judge, 5 October 2005.

⁸ *Prosecutor v. Pandurević and 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; *Prosecutor v. Tolimir, Miletić and Gvero*, Case No. IT-04-80-PT, Radivoje Miletić’s “Appeal Against the Decision for Joinder of Accused Dated 21 September 2005”, 13 October 2005 (the English version was filed on 25 October 2005).

⁹ *Prosecutor v. Pandurević and Trbić*, Case No. IT-05-86-AR73.1, Decision on Vinko Pandurević’s Interlocutory Appeal Against the Trial Chamber’s Decision on Joinder of Accused, 24 January 2006; *Prosecutor v. Tolimir, Miletić and Gvero*, Case No. IT-04-80-AR73.1, Decision on Radivoje Miletić’s Interlocutory Appeal against the Trial Chamber’s Decision on Joinder of Accused, 27 January 2006.

¹⁰ *Prosecutor v. Popović*, Case No. IT-02-57-PT, *Prosecutor v. Beara*, Case No. IT-02-58-PT, *Prosecutor v. Nikolić*, Case No. IT-02-63-PT, *Prosecutor v. Borovčanin*, Case No. IT-02-64-PT, *Prosecutor v. Tolimir, Miletić and Gvero*, Case No. IT-04-80-PT and *Prosecutor v. Pandurević and Trbić*, Case No. IT-05-86-PT, Prosecution’s Motion for Amendments to the Indictments, 28 June 2005.

¹¹ *Prosecutor v. Popović et al.*, Case No. IT-05-88-PT, Prosecution’s Notice of Filing Consolidated Amended Indictment, 11 November 2005.

¹² *Prosecutor v. Popović et al.*, Case No. IT-05-88-PT, Order on the Consolidated Amended Indictment, 31 October 2005. Trial Chamber II declared the Amended Indictment of 28 June 2005 as the operative indictment for *Prosecutor v. Popović et al.* with the caveat that the Accused Popović, Beara, Nikolić, Borovčanin, Miletić, Gvero, Pandurević, and Trbić will have thirty days to file motions against the form of the Consolidated Amended Indictment. *Ibid.* p. 4.

¹³ *Prosecutor v. Popović et al.*, Case No. IT-05-88-PT, Prosecution’s Request for an Extension of Time to File the Second Consolidated Amended Indictment, 7 June 2006.

¹⁴ *Prosecutor v. Popović et al.*, Case No. IT-05-88-PT, Decision on Severance of Case Against Milorad Trbić with Confidential and *Ex Parte* Annex, 26 June 2006.

¹⁵ *Prosecutor v. Popović et al.*, Case No. IT-05-88-T, Order on Operative Indictment and Severance of the Case Against Zdravko Tolimir, 15 August 2006, p. 2.

Zdravko Tolimir was severed from the *Popović et al.* case.¹⁶ The indictment in the case against Tolimir was filed on 28 August 2006.¹⁷ The trial against the accused in the *Popović et al.* case (“Accused”) started on 14 July 2006.

5. Zdravko Tolimir, originally charged with Radivoje Miletić and Milan Gvero in a single indictment¹⁸ which was made public against Tolimir on 25 February 2005,¹⁹ was arrested on 31 May 2007. On 1 June 2007, he was transferred to the seat of the Tribunal. On the same day, by order of the President of the Tribunal, the case against Tolimir (“*Tolimir* case”) was assigned to Trial Chamber II,²⁰ and by order of the Presiding Judge of that Chamber it was decided that the Trial Chamber in the *Tolimir* case would be composed of Judge Carmel Agius (Presiding), Judge O-Gon Kwon and Judge Kimberly Prost.²¹ On 4 June 2007, the initial appearance of Tolimir took place before Judge Prost.²² On that occasion, Tolimir did not enter a plea on the counts in the indictment.²³ On 6 June 2007, the present Motion was filed.

6. On 12 June 2007 the Prosecution filed the “Prosecution’s Submission of Amended Indictment with Attached Annexes A, B and C”,²⁴ in which it sought leave to amend the indictment against Tolimir filed on 28 August 2006. The only substantial change was that the reference to command responsibility under Article 7(3) of the Statute of the Tribunal (“Statute”) had been deleted from the last paragraph of the original indictment. Pursuant to Rule 50(A)(i)(c) of the Rules, leave to amend the indictment was granted, and the Amended Indictment filed on 12 June 2007 became the operative indictment in the *Tolimir* case (“*Tolimir* Indictment”).²⁵

7. By order of 14 June 2007, the Presiding Judge of Trial Chamber II assigned Judge Prost as Pre-Trial Judge for this case.²⁶ A further appearance took place on 3 July 2007. Tolimir refused to enter a plea and, as provided for in Rule 62 of the Rules, the Pre-Trial Judge entered a plea of not guilty on each count of the *Tolimir* Indictment on his behalf.

¹⁶ *Ibid.*

¹⁷ *Prosecutor v. Tolimir*, Case No. IT-05-88/2-I, Indictment, 28 August 2006.

¹⁸ *Prosecutor v. Tolimir, Miletić and Gvero*, Case No. IT-04-80-I, Indictment, 8 February 2005.

¹⁹ *Prosecutor v. Tolimir, Miletić and Gvero*, Case No. IT-04-80-I, Decision on Motion of the Prosecution to Further Vacate the Order for Non-disclosure, 25 February 2005.

²⁰ *Prosecutor v. Tolimir*, Case No. IT-05-88-2/I, Order Assigning a Case to a Trial Chamber, 1 June 2007.

²¹ *Prosecutor v. Tolimir*, Case No. IT-05-88-2/I, Order Regarding Composition of Trial Chamber, 1 June 2007.

²² *Prosecutor v. Tolimir*, Case No. IT-05-88-2/I, Order Designating Judge for Initial Appearance, 1 June 2007.

²³ Initial Appearance, T. 10 (4 June 2007).

²⁴ *Prosecutor v. Tolimir*, Case No. IT-05-88-2/I, Prosecution’s Submission of Amended Indictment with Attached Annexes A, B and C, 12 June 2007.

²⁵ Further Appearance, T. 24 (3 July 2007).

²⁶ *Prosecutor v. Tolimir*, Case No. IT-05-88-2/I, Order Designating a Pre-Trial Judge, 15 June 2007.

8. On 21 June 2007, the Trial Chamber ordered the Prosecution to provide estimates as to the length of the trial, if the motion for joinder were to be granted or refused.²⁷

II. SUBMISSIONS OF THE PARTIES

A. Motion

9. The Prosecution filed the Motion pursuant to Rule 48 requesting the Trial Chamber to join the *Tolimir* case with the *Popović et al.* case so that the eight accused be jointly charged and tried.²⁸ The Prosecution requests permission to exceed the usual word limit.²⁹ Given the nature of the issues involved in the Motion, this request is granted.

10. The Prosecution submits that there exist compelling reasons for the Trial Chamber to grant joinder of the accused in the two cases. Not only, it is submitted, are the legal requirements of Rule 48 satisfied, but the discretionary factors a Trial Chamber may consider when deciding a motion for joinder militate in favour of granting joinder in the instant matter.³⁰

11. In particular, the Prosecution submits that “[t]he unusual circumstances presented by the apprehension of the Accused Tolimir in the midst of the *Popović et al.* trial will undoubtedly give rise to some duplication of evidence, whether or not joinder is granted”.³¹ However, the Prosecution submits that joining the cases will minimize, to the greatest extent possible, the amount of duplication necessary.³² The Prosecution recognises that, although a substantial portion of the evidence in both cases is the same, since the *Popović et al.* trial has been underway for several months, a large portion of the overlapping crime base and expert-related evidence as well as evidence relating to the military structure has already been heard by the Trial Chamber.³³ It is submitted that should the joinder be granted, Tolimir would be accorded the opportunity to review the testimony previously adduced in the *Popović et al.* trial and to recall those witnesses for whom further cross-examination is deemed necessary, within the discretion of the Trial Chamber, and the Prosecution would facilitate the legitimate exercise of this right of Tolimir.³⁴ The Prosecution further submits that, while a few witnesses in *Popović et al.* have made reference to the acts and

²⁷ *Prosecutor v. Popović et al.*, Case No. IT-05-88-T, Order for Estimates Relating to Length of Trial, 21 June 2007; *Prosecutor v. Tolimir*, Case No. IT-05-88-2/I, Order for Estimates Relating to Length of Trial, 21 June 2007. See more in detail, *infra* para. 13.

²⁸ Motion, paras. 1, 34.

²⁹ Motion, para. 1.

³⁰ Motion, para. 33.

³¹ Motion, para. 18.

³² Motion, para. 18.

³³ Motion, paras. 18–19.

³⁴ Motion, para. 19.

conduct of Tolimir, the bulk of such overlapping evidence has not yet been presented in the trial.³⁵ Numerous witnesses common to both cases remain to be called, and in relation to these witnesses, “joinder completely obviates the presentation of duplicative evidence”.³⁶

12. The Prosecution argues that joinder would promote judicial economy. It submits that if the cases are joined, the remaining witnesses common to both cases will testify once rather than twice, resulting in a substantial conservation of the limited resources of the parties, the Trial Chamber, and the Tribunal’s related administrative services.³⁷ According to the Prosecution, joining the cases would require a four- to five-month delay in order to allow the parties and the Trial Chamber to prepare for the newly-joined case.³⁸ However, the Prosecution argues, this additional time is “reasonable under the circumstances and pales in comparison to that required to fully conduct separate trials”.³⁹ The Prosecution estimates that trying the *Tolimir* case separately would require a minimum of a year to complete, with the vast majority of witnesses scheduled to testify in the *Popović et al.* case having to be recalled.⁴⁰ The Prosecution further submits that, “[a]s a logistical matter, conducting separate trials would not reasonably be feasible within the time frame of the Tribunal’s current mandate.”⁴¹

13. In this respect, on 2 July 2007, pursuant to the “Order for Estimates Relating to Length of Trial”, issued by the Trial Chamber on 21 June 2007, the Prosecution filed its submissions,⁴² in which it estimates that if the Motion were to be granted (1) it would seek to call no additional *viva voce* or Rule 92 *ter* witnesses; (2) 14 witnesses might need to be re-called to give additional evidence and/or be subject to further cross-examination; and (3) for one *viva voce* witness, who is already on the Rule 65 *ter* witness list, an additional half an hour of examination-in-chief would be required.⁴³ Should the Motion not be granted, and should a separate trial for Tolimir take place, the Prosecution submits a preliminary list of 60 *viva voce* witnesses (including 16 pursuant to Rule 92 *ter*) whom it would intend to call, indicating that an estimated total of 163 hours would be required for examination-in-chief.⁴⁴ It is further submitted that, given the scheduling of other trials and the

³⁵ Motion, para. 20.

³⁶ Motion, para. 20.

³⁷ Motion, para. 21.

³⁸ Motion, para. 22.

³⁹ Motion, para. 22.

⁴⁰ Motion, para. 22.

⁴¹ Motion, para. 23.

⁴² *Prosecutor v. Popović et al.*, Case No. IT-05-88-T, Submission Pursuant to “Order for Estimates Relating to Length of Trial”, with Confidential Appendices A and B and Public Appendix C, 2 July 2007 (“Submission on estimates relating to length of trial”); *Prosecutor v. Tolimir*, Case No. IT-05-88-2/I, Submission on estimates relating to length of trial, 3 July 2007.

⁴³ Submission on estimates relating to length of trial, para. 2. *See also* Confidential Appendix A.

⁴⁴ Submission on estimates relating to length of trial, para. 3. *See also*, Confidential Appendix B.

availability of the Prosecution's resources, the Prosecution "would not be in a position to start a separate trial for Tolimir before February 2009 at the earliest".⁴⁵

14. According to the Prosecution, a joint trial would ensure a consistency of approach with respect to the evidence, findings, and verdicts.⁴⁶ Given the nature of the crimes alleged in both cases, separate trials may deprive a new Trial Chamber from being presented with the most complete picture of events relating to Srebrenica and may thus prevent it from "fully appreciating the criminal responsibility of the Accused".⁴⁷

15. The Prosecution submits that at present, no specific grounds exist for alleging a conflict of interests.⁴⁸ In particular the Prosecution submits that, because professional judges preside over the trials of this Tribunal, the "possibility of mutually antagonistic defences' does not constitute a conflict of interests capable of causing serious prejudice".⁴⁹

16. The Prosecution further submits that joinder would protect the interests of justice. In particular, it is submitted that granting joinder would ensure that all of the Accused receive a fair and expeditious trial.⁵⁰ While the Prosecution acknowledges that joinder will necessitate a suspension in the proceedings in the *Popović et al.* case, such a delay does not *per se* violate the right of the Accused in the *Popović et al.* case to be tried without "undue delay".⁵¹ Rather, such a delay would more fully accommodate the interests of the Defence in securing a full and effective opportunity to litigate the merits of their respective cases.⁵² Thus, it is submitted that while joinder would certainly lengthen the trial against the seven Accused in the *Popović et al.* case beyond the time it would take to try them in the absence of the Accused Tolimir, "the additional time is consistent with the interests of justice as to all parties".⁵³ It is further submitted that both the International Criminal Tribunal for Rwanda and European Court of Human Rights have acknowledged that "the fact that an accused might be tried faster should separate trials be conducted does not *per se* render unreasonable the length of the proceedings of a joint trial".⁵⁴ The Prosecution notes that while it is requesting a four- to five-month stay in the court proceedings, the actual delay would be only three to four months in length because the stay overlaps with the

⁴⁵ Submission on estimates relating to length of trial, para. 4. *See also*, Appendix C.

⁴⁶ Motion, para. 26.

⁴⁷ Motion, para. 27.

⁴⁸ Motion, para. 28.

⁴⁹ Motion, para. 28, referring to *Prosecutor v. Brdanin and Talić*, Case No. IT-99-36-T, Decision on Prosecution's Oral Request for the Separation of Trials, 20 September 2002 ("*Brdanin and Talić* Decision"), para. 21.

⁵⁰ Motion, para. 29.

⁵¹ Motion, para. 30.

⁵² Motion, para. 30.

⁵³ Motion, para. 30.

⁵⁴ Motion, para. 30.

Court's summer recess.⁵⁵ Finally the Prosecution adds that although the health of Tolimir is an important factor when considering the issue of joinder, the Prosecution has no reason to doubt the ability of the Accused Tolimir to stand trial together with the other Accused or to question his stated physical condition.⁵⁶

B. Responses

17. On 18 June 2007, the Pre-Trial Judge issued an order suspending the time-limit for Tolimir to file a response to the Motion "until a further order is issued".⁵⁷

18. The Accused Tolimir's first response to the Motion, dated 19 June 2007, was filed on 26 June 2007 ("Response").⁵⁸ Tolimir requests the Trial Chamber to dismiss the Motion because "joinder would prolong the overall proceedings", and would "render them uncertain and complex [as] the defence teams of all the other [A]ccused would have the right to hear again all the witnesses" and because his state of health may not allow him to prepare "an adequate defence in a short period of time".⁵⁹ Tolimir adds that separate cases and proceedings would allow for an adequate allocation of time for his preparation and submits that "separate proceedings would be ensured in a much shorter period of time".⁶⁰ Tolimir finally submits that additional reasons for dismissing the Motion will be submitted after a permanent counsel has been assigned to him.⁶¹

19. By order of 28 June 2007, the Trial Chamber in the *Popović et al.* case set a deadline for the Accused in that case to file responses to the Motion, if any, by 13 July 2007, and a deadline for the Prosecution to file a reply, if any, by 17 July 2007.⁶²

20. At the further appearance hearing on 3 July 2007 and by order of the same day, the Pre-Trial Judge in the *Tolimir* case ordered the Accused Tolimir to file any additional response to the Motion by 17 July 2007, and informed him that should no further submissions be forthcoming by that date, the Trial Chamber will proceed to deal with the Motion, taking into account the

⁵⁵ Motion, para. 30.

⁵⁶ Motion, para. 31.

⁵⁷ *Prosecutor v. Tolimir*, Case No. IT-05-88-2/I, Order Suspending Time Limit for Filing Response to Prosecution Joinder Motion, 18 June 2007.

⁵⁸ *Prosecutor v. Tolimir*, Case No. IT-05-88/2-I, Request, 26 June 2007 ("Response").

⁵⁹ Response, p. 1.

⁶⁰ *Ibid.*

⁶¹ *Ibid.*

⁶² *Prosecutor v. Popović et al.*, Case No. IT-05-88-T, Order on Filings Regarding Joinder Motion, 28 June 2007, and Corrigendum to Order on Filings Regarding Joinder Motion, 29 June 2007.

submissions he made in the Response.⁶³ The Prosecution was ordered to file a reply, if any, by 19 July 2007.⁶⁴

21. On 12 July 2007, Miletić and Gvero filed their responses, in which they take no position with regard to the joinder.⁶⁵

22. On 13 July, the other Accused in the *Popović et al.* case, except for Popović, filed their responses. Borovčanin does not object to the Motion.⁶⁶ Pandurević does not formally oppose the Motion but clarifies his position *vis-à-vis* some of the assertions of the Prosecution in the Motion, namely when arguing that joinder would not pose any prejudice to him or his fair trial.⁶⁷ In particular, Pandurević indicates two areas of potential prejudice: the possibility that the period of adjournment may be used by the Prosecution as an opportunity to strengthen or expand its case against the Accused; and the possibility that the effect of the delay and the way it is construed by the Registry will be such as to deprive those already on trial of funding and therefore of effective defence.⁶⁸ Pandurević therefore lists a number of requests should the Motion be granted.⁶⁹ In his response filed on 13 July 2007, Beara takes a similar position.⁷⁰ Beara submits that he does not object to the Motion, on the condition, however, that his Defence keeps receiving from the Registry adequate funding during the adjournment that would follow the joinder.

23. In his response filed on 13 July 2007,⁷¹ Nikolić opposes the Motion mainly on the following grounds: the rights of the Accused to be tried without undue delay,⁷² the material prejudice to the Accused which would result from joinder,⁷³ and the interests of justice which do not require joinder in the present circumstances.⁷⁴ In particular, Nikolić submits that the Prosecution

⁶³ *Prosecutor v. Tolimir*, Case No. IT-05-88/2-PT, Order on Filings Regarding Joinder Motion, 3 July 2007; Further Appearance, T. 42 (3 July 2007).

⁶⁴ *Prosecutor v. Tolimir*, Case No. IT-05-88/2-PT, Order on Filings Regarding Joinder Motion, 3 July 2007.

⁶⁵ *Prosecutor v. Popović et. al.*, Case No. IT-05-88-T, *Prosecutor v. Tolimir*, Case No. IT-05-88/2-PT, Response of General Miletić to Prosecution Motion for Joinder of Accused, 12 July 2007, filed in the English version on 13 July 2007 (“Miletić Response”); *Prosecutor v. Popović et. al.*, Case No. IT-05-88-T, Response on Behalf of Milan Gvero to “Prosecution’s Motion for Joinder of Accused”, 12 July 2007 (“Gvero Response”).

⁶⁶ *Prosecutor v. Popović et. al.*, Case No. IT-05-88-T, *Prosecutor v. Tolimir*, Case No. IT-05-88/2-PT, Borovčanin Defence Response to the Prosecution’s Motion for Joinder of Accused, 13 July 2007 (“Borovčanin Response”).

⁶⁷ *Prosecutor v. Popović et. al.*, Case No. IT-05-88-T, *Prosecutor v. Tolimir*, Case No. IT-05-88/2-PT, Response on Behalf of Vinko Pandurević to Prosecution’s Motion for Joinder of Accused with Confidential Annex, 13 July 2007 (“Pandurević Response”), paras. 1–5, 21.

⁶⁸ Pandurević Response, paras. 5–17.

⁶⁹ Pandurević Response, para. 22.

⁷⁰ *Prosecutor v. Popović et. al.*, Case No. IT-05-88-T, *Prosecutor v. Tolimir*, Case No. IT-05-88/2-PT, Accused Ljubiša Beara’s Response to Prosecution’s Motion for Joinder of Accused, 13 July 2007 (“Beara Response”).

⁷¹ *Prosecutor v. Popović et. al.*, Case No. IT-05-88-T, *Prosecutor v. Tolimir*, Case No. IT-05-88/2-PT, Response on Behalf of Drago Nikolić to Prosecution’s Motion for Joinder of Accused, 13 July 2007 (“Nikolić Response”).

⁷² Nikolić Response, paras. 2, 6–15.

⁷³ Nikolić Response, paras. 2, 16–26.

⁷⁴ Nikolić Response, paras. 2, 27–35.

erroneously minimizes the delay likely to result from the joinder,⁷⁵ and estimates that the delay arising from the joint trial “could easily slip to more than 12 months”.⁷⁶ Nikolić further submits that joinder would cause prejudice to the Accused mainly because it is very likely that the Prosecution, which is still conducting investigations on the case, would seek leave to amend its Rule 65 *ter* lists adding witnesses and exhibits, and that the Trial Chamber would very likely grant leave to amend those lists.⁷⁷ Moreover, it is submitted that the Registry has not confirmed what legal aid resources would be available to the Defence during the adjournment following the joinder. The possible reduction of the level of resources to the Defence would allegedly constitute a breach of the equality of arms principle as well as an infringement of the right of the Accused to have adequate time and facilities for the preparation of the case.⁷⁸ This situation, in combination with the length of the trial that would result as a consequence of the joinder could further result in members of the Defence teams having to leave because of, among other things, “commitments or employments secured elsewhere”.⁷⁹

24. On 17 July 2007, Tolimir submitted his “Motion of the Accused Against the Prosecution’s Motion for Joinder of Accused” (“Additional Response”),⁸⁰ in which he reiterates his objection to the Motion referring to the reasons indicated in his Response.⁸¹ Tolimir stressed that the Registry has not yet assigned counsel to him⁸² and added that joinder should be denied as “there has already been a conflict of interests in the joined proceedings up to now”.⁸³

C. Replies

25. On 17 July 2007, the Prosecution filed its request for leave to reply and reply to the Defence responses to the Motion (“Reply to Accused’s Responses”).⁸⁴ With regard to the Nikolić Response, the Prosecution reiterates that (1) “joinder would not lead to a significantly longer trial”;⁸⁵ (2) there would be no prejudice to the Accused, in that the consequence of on-going investigative work is not to change the case against the Accused, and the Prosecution supports the Accused’s request to

⁷⁵ Nikolić Response, para. 9.

⁷⁶ Nikolić Response, para. 15. *See also* paras. 10–14.

⁷⁷ Nikolić Response, paras. 16–19.

⁷⁸ Nikolić Response, paras. 20–24.

⁷⁹ Nikolić Response, para. 25.

⁸⁰ *Prosecutor v. Popović et. al.*, Case No. IT-05-88-T, *Prosecutor v. Tolimir*, Case No. IT-05-88/2-PT, Motion of the Accused Against the Prosecution’s Motion for Joinder of Accused, filed on 18 July 2007 (“Additional Response”).

⁸¹ Additional Response, para. 1.

⁸² Additional Response, para. 2.

⁸³ Additional Response, paras. 3–5.

⁸⁴ *Prosecutor v. Popović et. al.*, Case No. IT-05-88-T, *Prosecutor v. Tolimir*, Case No. IT-05-88/2-PT, Prosecution’s Request for Leave to Reply and Reply to the Defence Responses to Motion for Joinder, 17 July 2007 (“Reply to Accused’s Responses”).

⁸⁵ Reply to Accused’s Responses, para. 6.

the Registry for providing on-going funding to their Defence teams during any break;⁸⁶ and (3) joinder is in the interests of justice.⁸⁷ The Prosecution adds that “[i]f for any reason such as his behaviour or health Tolimir causes a disruption to the current trial, the Prosecution will move for severance and will be prepared to try him separately.”⁸⁸

26. On 19 July 2007, the Prosecution filed its request for leave to reply and reply to Tolimir’s Response (“Reply to Tolimir’s Response”).⁸⁹ The Prosecution submits that Tolimir’s current lack of representation should be given little weight in determining the issue of joinder.⁹⁰ It further submits that the argument that joinder should be refused since the joint trial of Accused from different levels of command could give rise to conflicts of interests is without merit, in view of the “successful conduct to date of the *Popović et al.* trial, involving Accused from all levels of command”.⁹¹

III. APPLICABLE LAW

27. The joinder of the Accused is governed by Rule 48, which 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.” In deciding whether charges against more than one accused should be joined pursuant to Rule 48, the Trial Chamber should base its determination upon the factual allegations contained in the indictments and related submissions.⁹²

28. If the Trial Chamber is satisfied that the requirements of Rule 48 have been met, it may determine in the exercise of its discretion, whether to grant or refuse the joinder sought.⁹³ In this determination, a number of factors are relevant for consideration, including those listed in Rule 82(B) of the Rules. Rule 82(B) provides that “[t]he Trial Chamber may order that persons accused

⁸⁶ Reply to Accused’s Responses, paras. 7–8.

⁸⁷ Reply to Accused’s Responses, paras. 9–11.

⁸⁸ Reply to Accused’s Responses, para. 11.

⁸⁹ *Prosecutor v. Popović et al.*, Case No. IT-05-88-T, *Prosecutor v. Tolimir*, Case No. IT-05-88/2-PT, Prosecution’s Request for Leave to Reply and Reply to Accused’s Response to Joinder Motion, 19 July 2007 (“Reply to Tolimir’s Response”).

⁹⁰ Reply to Tolimir’s Response, para. 3.

⁹¹ Reply to Tolimir’s Response, para. 4.

⁹² See e.g., *Prosecutor v. Meakić, Gruban and Knežević*, Case No. IT-95-4-PT, *Prosecutor v. Fuštar, Banović and Knežević*, Case No. IT-95-8/1-PT, Decision on Prosecution’s Motion for Joinder of Accused, 17 September 2002, (“*Meakić et al.* Decision”), para. 23.

⁹³ See e.g., *Meakić et al.* Decision, para. 24; First Decision on Joinder, para. 8; *Prosecutor v. Martić*, Case No. IT-95-11-PT, *Prosecutor v. Stanišić and Simatović*, Case No. IT-03-69-PT, *Prosecutor v. Šešelj*, Case No. IT-03-67-PT, Decision on Prosecution Motion for Joinder, 10 November 2005 (“*Martić et al.* Decision”), para. 9.

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.”

29. Other factors that the jurisprudence of the Tribunal suggests a Trial Chamber may take into account in making this determination include considerations of judicial economy, avoidance of the duplication of evidence, minimising hardship to witnesses, and ensuring consistency of verdicts.⁹⁴

30. Rule 48 must be interpreted in light of the entitlement of the accused to a fair trial under Articles 20 and 21 of the Statute. In particular, Article 20(1) of the Statute provides that “[t]he Trial Chambers shall ensure that a trial is fair and expeditious [...]”, and Article 21(4) of the Statute reads in its relevant part that “[i]n the determination of any charge against the accused pursuant to the present Statute, the accused shall be entitled to the following minimum guarantees, in full equality: [...] (b) to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing; (c) to be tried without undue delay; (d) to be tried in his presence [...]; (e) to examine, or have examined, the witnesses against him [...]”.

IV. DISCUSSION

A. Rule 48 requirements

31. The Trial Chamber which issued the First Decision on Joinder found that the requirements under Rule 48 were met in relation to Tolimir and the Accused currently charged and being tried in the *Popović et al.* case.⁹⁵ The Trial Chamber notes that the charges in the *Popović et al.* Indictment and in the *Tolimir* Indictment remain the same as those previously considered by the Trial Chamber issuing the First Decision on Joinder. The Trial Chamber in the present case reiterates that the crimes alleged in the two Indictments were committed in the course of the “same transaction” under Rule 2 and Rule 48 and the accused in the two cases are therefore eligible to be “jointly charged and tried”.⁹⁶

⁹⁴ *Ibid.*

⁹⁵ The Trial Chamber in its Decision of 21 September 2005 on the motion for joinder found that “all nine accused were part of the armed forces of the Republika Srpska [...] and all accused are charged with crimes in the same geographical area [...] during substantially the same time period [...]” and that “[m]any of the accused are also charged with the same crimes.” See First Decision on Joinder, para. 15 (footnotes omitted).

⁹⁶ First Decision on Joinder, para. 18.

B. Interests of Justice

1. General Considerations

32. In the First Decision on Joinder it was further held that the discretionary factors to be taken into consideration when deciding the question of joinder militated in favour of granting the motion.⁹⁷ However, at the time of the First Decision on Joinder Tolimir was at large and no trial proceedings had commenced. Therefore, the discretionary factors need to be examined and evaluated in light of the situation at this time. The Trial Chamber needs to determine whether joinder of accused in the present circumstances of these two cases would be in the interests of justice, including whether it would cause any prejudice to Tolimir and any of the Accused.

33. This is the first time that a motion for joinder is filed before a Trial Chamber of the Tribunal while the Prosecution case is at an advanced stage. Joinder of accused is generally considered during pre-trial proceedings.⁹⁸ Although in the *Kvočka et al.* case, referred to by the Prosecution,⁹⁹ a motion for joinder was filed after the trial had begun, this was in fact only less than two weeks from the beginning of trial. All that had happened during this period of time was that the accused Kvočka and Radić testified in their own defence.¹⁰⁰ Furthermore, all accused concerned by the joinder agreed to it.¹⁰¹ The present case clearly differs from the *Kvočka et al.* case. The trial against *Popović et al.* had been proceeding for a year with numerous witnesses having been heard,¹⁰² and a considerable amount of documents admitted. The *Tolimir* case, on the other hand, is at its very initial stage of the pre-trial proceedings. Tolimir was arrested on 31 May 2007, and transferred to the seat of the Tribunal on 1 June 2007. At the time of the filing of the Motion, he had appeared before the Pre-Trial Judge on one occasion, in order to enter a plea on the charges against him.¹⁰³

⁹⁷ First Decision on Joinder, para. 19. In particular, the Trial Chamber held that “a single trial—by avoiding the duplication of evidence [paras. 20–22], promoting judicial economy [paras. 20–23], safeguarding the rights and 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. 29–33].” See First Decision on Joinder, para. 34.

⁹⁸ The jurisprudence of the Tribunal shows a number of instances where Trial Chambers have allowed accused in separate cases to be charged and tried together. See e.g., *Prosecutor v. Kvočka, Kos, Radić, Zigić and Prcać*, Case No. IT-98-30-T, IT-95-4-PT, Decision on Prosecution Motion to Join Trials, 14 April 2000 (“*Kvočka et al.* Decision”); *Prosecutor v. Nikolić*, Case No. IT-02-53-PT, *Prosecutor v. Blagojević, Obrenović and Jokić*, Case No. IT-02-56-PT, Decision on Prosecution’s Motion for Joinder, 17 May 2002; *Meakić et al.* Decision, *supra* note 92; *Martić et al.* Decision, *supra* note 93.

⁹⁹ Motion, paras. 15–17. The Prosecution refers to *Kvočka et al.* Decision.

¹⁰⁰ *Kvočka et al.* case, Case No. IT-98-30-T, T. 676 (29 February 2000) – T. 1070 (6 March 2000).

¹⁰¹ *Prosecutor v. Kvočka, Kos, Radić, Zigić and Prcać*, Case No. IT-98-30-T, T. 1076–1078 (6 March 2000), and T.1082–1106 (7 March 2000). See also *Kvočka et al.* Decision.

¹⁰² More in particular, 109 Prosecution witnesses and one Defence witness.

¹⁰³ See *supra* paras. 5, 7.

Furthermore, while the Prosecution requests the joinder, Tolimir and one of the seven Accused in the *Popović et al.* case, Drago Nikolić, oppose the Motion. The other accused in the *Popović et al.* case have not taken any position.¹⁰⁴

34. Pursuant to Article 20 of the Statute, Trial Chambers have the primary responsibility to ensure that trials are fair and conducted in accordance with the Rules and with respect for the rights of the accused. Each accused before the Tribunal is entitled, pursuant to Article 21 of the Statute, to a number of minimum guarantees, which include the right to have adequate time and facilities for the preparation of his or her defence and to communicate with counsel of his or her own choosing; the right to be tried without undue delay; the right to be tried in his or her presence; and the right to examine, or have examined, the witnesses against him or her. Even in a situation in which an accused decides to waive one of his rights, the Trial Chamber has the responsibility to ensure that the accused receives a fair and expeditious trial as set out in Articles 20 and 21 of the Statute.

(a) Rights of the Accused – Tolimir

(i) Right to be tried in his or her presence and right to examine, or have examined, the witnesses against him or her

35. The accused has the right to be tried in his or her presence. In the present case, the *Popović et al.* trial started a year ago. Since then, decisions have been taken to admit witness statements under Rule 92 *bis* and to take judicial notice of adjudicated facts. 109 witnesses have been called by the Prosecution, a Defence witness has testified and a considerable amount of documentary evidence has been tendered and admitted. As a result, should the Motion be granted, Tolimir would be joined to a case in which a substantial portion of the trial has been conducted in his absence. The Trial Chamber recognizes that the right to be present at trial is not an unlimited one. Similarly it may be that measures could be adopted in order to negate any prejudice to the accused arising from his or absence during a portion of the proceedings. Finally, it may be a right which the accused him or herself may waive and in particular circumstances it would not affect the overall fairness of the trial process. However, in this instance, Tolimir's objection to the joinder negates any suggestion of a waiver of the right to be present during trial. Further, given the advanced stage of the proceedings and the significant amount of evidence that has been adduced, nothing short of a full re-trial or at least the reconsideration of key decisions and the recalling of most or all of the

¹⁰⁴ See Miletić Response, Gvero Response, Beara Response, Borovčanin Response and Pandurević Response. As mentioned above, the Accused Popović did not file a response.

witness evidence, would appear sufficient to remedy the breach of the right of the accused to have the trial conducted in his presence.

36. The accused also has a right to examine or have examined the witnesses against him or her. Again while not an unlimited right, in this instance 109 Prosecution witnesses have been called and Tolimir has had no opportunity to cross-examine them. In these particular circumstances, even taking into account the rules which permit the introduction of evidence without cross-examination, in order to safeguard this right Tolimir would be entitled to recall a considerable number of these witnesses.

(ii) Right to have adequate time and facilities for the preparation of his or her defence and to communicate with counsel of his or her own choosing

37. One of the rights of each accused is to have adequate time and facilities for the preparation of his or her case. The meaning of “adequate time” depends on the circumstances of each case and can be affected by a number of factors, including the complexity of the case.¹⁰⁵

38. As mentioned above, the Prosecution estimates that if the Motion were to be granted, an adjournment of the on-going trial of a maximum of four to five months would be sufficient for the parties to familiarise themselves with the newly-joined case. In response to the Motion, Tolimir states that he would be unable to prepare an adequate defence “in a short period of time”.¹⁰⁶

39. At present, Tolimir has not yet been assigned a permanent counsel. This not only is precluding the time-limit to file preliminary motions pursuant to Rule 72 of the Rules from running,¹⁰⁷ but it has also prevented the Accused from starting to prepare his defence. Further, while the Trial Chamber has not had access to medical material, it cannot neglect Tolimir’s own submissions on his state of health. At his initial and further appearance, Tolimir identified several health issues,¹⁰⁸ and in his Response he stressed that his state of health is such that it could have an impact on “the possibility of preparing an adequate defence in a short period of time”.¹⁰⁹

¹⁰⁵ The Trial Chamber in the *Delalić et al.* case stated that “[i]t is impossible to set a standard of what constitutes adequate time to prepare a defence because this is something which can be affected by a number of factors, including the complexity of the case, and the competing forces and claims at play, such as consideration of the interests of other accused persons.” See *Prosecutor v. Delalić, Mucić, Delić, and Landžo*, Case No. IT-96-21-T, Decision on the Applications for Adjournment of the Trial Date, 3 February 1997, para. 19.

¹⁰⁶ See *supra*, para. 18.

¹⁰⁷ See Further Appearance, T. 44 (3 July 2007).

¹⁰⁸ See Initial Appearance, T. 1–19 (4 June 2007), in particular T. 18; Further Appearance, T. 45–47 (3 July 2007) (private session).

¹⁰⁹ See *supra* para. 18.

40. In light of the charges laid out in the Indictment against Tolimir,¹¹⁰ the gravity of the crimes that he is alleged to have committed and the complexity of the case, as well as the fact that he is not yet represented by counsel and his health issues, it is clear that Tolimir will need considerable time for the preparation of his defence. The Trial Chamber is of the view that if the cases were to be joined, the resulting significant time pressures might adversely affect the ability of Tolimir to properly get ready for trial, thereby seriously impairing his right to adequately prepare a defence.

(b) Rights of the Accused in the *Popović et al.* case

41. Should joinder be granted, the Trial Chamber would need to be vigilant to ensure that the rights of Tolimir, dealt with above, are respected. This in turn raises substantial concerns as to possible resulting prejudice to the rights of the Accused in *Popovic et al.* to a fair and expeditious trial.

42. Should joinder be granted, Tolimir would be entitled to examine, or have examined, the witnesses against him. The Prosecution estimates that 14 witnesses might need to be recalled, only one of whom would require additional examination in chief. Further only one future *viva voce* witness, would require an additional half an hour of examination-in-chief.¹¹¹ According to the Prosecution's submission joinder would therefore result in only two additional hours of examination-in-chief.

43. The Trial Chamber notes that the 110 witnesses who have testified to date in the *Popović et al.* case have given evidence on background information, crime-base evidence, details on military

¹¹⁰ Tolimir is charged with two counts of genocide under Article 4 of the Statute, namely genocide and conspiracy to commit genocide; five counts of crimes against humanity under Article 5 of the Statute, namely, extermination, murder, persecutions on political, racial and religious grounds, inhumane acts (forcible transfer) and deportation, and one count of violations of the laws or customs of war under Article 3 of the Statute, namely murder. The Indictment alleges that Tolimir is individually responsible for the crimes charged against him pursuant to Article 7(1) of the Statute. The Indictment states that during the time period relevant to the events described in the indictment, Tolimir was the Assistant Commander for Intelligence and Security of the Main Staff of the Army of Republika Srpska. See *Tolimir* Indictment, 12 June 2007, para. 2. The Indictment alleges that between 11 July 1995 and 1 November 1995, Tolimir and others with intent to destroy a part of the Bosnian Muslim people as a national, ethnical, or religious group killed members of the group by summary execution, including both planned and opportunistic summary executions, and caused serious bodily or mental harm to both female and male members of the Bosnian Muslim population of Srebrenica and Žepa. The Indictment also alleges that Tolimir and others entered into a conspiracy to commit genocide. According to the Indictment, Tolimir and others agreed to kill the able-bodied Bosnian Muslim men from Srebrenica who were captured or surrendered after the fall of Srebrenica on 11 July 1995, and to remove the remaining Bosnian Muslim population of Srebrenica and Žepa from the Republika Srpska, with the intent to destroy those Bosnian Muslims. See *Tolimir* Indictment, para. 25. The Indictment further states that Tolimir and others were members of and knowingly participated in a Joint Criminal Enterprise, the common purpose of which was to summarily execute and bury the able-bodied Bosnian Muslim men from Srebrenica, and in a Joint Criminal Enterprise, the common purpose of which was to force the Bosnian Muslim population out of the Srebrenica and Žepa enclaves to areas outside the control of the Republika Srpska from about 8 March 1995 through the end of August 1995. See *Tolimir* Indictment, para. 35.

¹¹¹ *Prosecutor v. Popović et al.*, Case No. IT-05-88-T, Submission on estimates relating to length of trial, para. 2. See also, Confidential Appendix A.

and police structure, involvements of units in the events described in the Indictment and evidence that allegedly links the Accused to the crimes charged. The 14 witnesses whom the Prosecution estimates might need to be recalled in a joint trial cover a limited part of this evidence. In particular, it appears that the evidence of these witnesses is mainly covering crimes allegedly committed in Žepa and Tolimir's role and participation in the events that allegedly took place in Žepa. In this respect, the Trial Chamber notes that Tolimir is charged for his role and actions in furtherance of both the joint criminal enterprise and conspiracy to summarily execute and bury the able-bodied Bosnian Muslim men from Srebrenica and for the joint criminal enterprise to forcibly transfer and deport the Srebrenica and Žepa Bosnian Muslim population.

44. Tolimir has not provided the Trial Chamber with any clear indication of the number of witnesses that he would seek to recall. However, Tolimir opposed the Motion, and in his response he stated that should joinder be granted the Accused would have the right "to hear again *all* the witnesses".¹¹² Furthermore, Tolimir is charged with crimes committed also in Srebrenica because of his alleged participation in the two above-mentioned joint criminal enterprises. In light of this, it is reasonable to expect that Tolimir might seek to recall a large number of witnesses who have already come to testify in the trial against the Accused and require that they give evidence again, either in examination-in-chief or cross-examination or both. Although it would be for the Trial Chamber to make the final determination as to the number of witnesses to recall and the time to allocate for direct examination and/or cross-examination, again the Trial Chamber would need to ensure that the rights of Tolimir are fully respected. Considering this, the Trial Chamber finds that the potential number of witnesses to be recalled may be considerably higher than the estimates made by the Prosecution.

45. Furthermore, additional time would result from Tolimir conducting his own defence strategy. As all the Accused in the *Popović et al.* case, Tolimir would be entitled to call witnesses to challenge the evidence presented by the Prosecution, as well as to request that additional documentary evidence be admitted.

46. Finally, the time necessary for preparation, including the time needed for him and his assigned counsel to familiarise themselves with the case, might be significantly longer than the four- to five-month delay estimated by the Prosecution. This is particularly the case given the delays in the appointment of counsel to date, as well the continuing questions surrounding Tolimir's health.

¹¹² See *supra* para. 18 (emphasis added).

47. Considering, as mentioned above, the Trial Chamber's responsibility to ensure that Tolimir's rights are respected, the Trial Chamber is of the opinion that, should the Motion be granted, it is reasonable to expect that the additional time to be granted for Tolimir's legitimate exercise of his rights to a fair trial (namely, for the preparation of his defence, for cross-examining witnesses who have already testified and challenging written evidence already admitted, as well as for conducting his own defence strategy), would considerably delay the trial against the Accused in the *Popović et al.* case, thereby impinging upon their right to an expeditious trial envisaged by Articles 20(1) and 21(4)(c) of the Statute.

48. Further, the Trial Chamber, although it is not in possession of any medical records confirming Tolimir's statements about his state of health, acknowledges that possible delays resulting from his state of health may further affect the rights of the seven Accused to a fair and expeditious trial.¹¹³

(c) Judicial economy and other factors

49. Should the Motion not be granted, the Prosecution submits that a separate trial for the Accused Tolimir could be completed in 12 months.¹¹⁴ In particular, the Prosecution indicated 60 *viva voce* witnesses (including 16 pursuant to Rule 92 *ter*) whom it would intend to call, which would require an estimated total of 163 hours for examination-in-chief.¹¹⁵ According to its own estimates, the Prosecution would rely extensively on evidence admitted pursuant to Rule 92 *bis*.¹¹⁶

50. As far as the *Popović et al.* case is concerned, to date 110 witnesses have testified on a total of 160 court days. A further 41 witnesses are due to testify. The Prosecution estimates that the total time required for the examination-in-chief of the 41 remaining witnesses is 94 hours.

51. Based on the estimates of the Prosecution and those of the Defence, the Trial Chamber is not convinced that a joint trial would take less time than two separate ones nor that it would be in the interest of judicial economy to try the accused together.

¹¹³ Other Trial Chambers have recognised that health problems of one of the accused may obstruct the proper and expeditious conduct of a trial. *See, for example, Prosecutor v. Popović et al.*, Case No. IT-05-88-PT, Decision on Severance of Case Against Milorad Trbić with Confidential and *Ex Parte* Annex, 26 June 2006. The Trial Chamber also notes that the Prosecution in its Reply to Defence responses, stated that "[i]f for any reason such as his behaviour or health Tolimir causes a disruption to the current trial, the Prosecution will move for severance and will be prepared to try him separately." *See* Reply to Accused's responses, para. 11.

¹¹⁴ Motion, para. 22.

¹¹⁵ *See supra*, para. 18, referring to Submission on estimates relating to length of trial, para. 3. *See also* Confidential Appendix B.

¹¹⁶ *Ibid.*

52. Based on the submissions of the parties, the Trial Chamber is of the view that the gain resulting from joinder in terms of avoiding duplication of evidence, minimising the hardship caused to the victims and witnesses, and ensuring consistency of verdicts would be minimal and that, in any case, factors weighing in favour of joinder must be balanced against the possibility that joinder will prejudice the rights of any one of the accused.

C. Conclusions

53. There are strong grounds to conclude that joinder would adversely affect the rights of Tolimir and the Accused in the *Popović et al.* case to a fair trial. Further, the Trial Chamber is not satisfied that the interests of judicial economy would be better served in any significant way by a joinder of these two cases. The Trial Chamber concludes that any possible advantage resulting from joinder does not outweigh the adverse effect that it would have on other rights of Tolimir, as well as on the Accused in the *Popović et al.* case in that it will unduly prolong the length of their trial. The protection of the rights of all the accused involved, therefore, militates against joining the two cases.

54. For the reasons above, the Trial Chamber is of the view that the trials in the *Popović et al.* case and in the *Tolimir* case be conducted separately. The interests of justice, in the opinion of the Trial Chamber, are best served by denying the joinder.

D. Certification

55. The Trial Chamber envisages the possibility that a party might wish to file a request for certification pursuant to Rule 73. Rule 73(B) provides that “[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 trial, and for which, in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings”. Being satisfied that both these requirements are met and given the importance of the issue involved in this decision, the Trial Chamber will be granting certification.

V. DISPOSITION

For these reasons, pursuant to Articles 20 and 21 of the Statute and Rules 48, 73 and 126 *bis* of the Rules, the Trial Chamber hereby

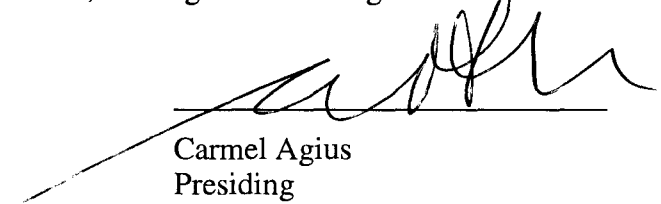
GRANTS leave to exceed the word limit of the Motion,

GRANTS leave to file the Reply to Defence's Responses and Reply to Tolimir's Response,

DENIES the Motion, and

GRANTS certification to file an interlocutory appeal against the present decision within seven days of the filing of this decision, as provided for in Rule 73(C).

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



Carmel Agius
Presiding

Dated this twentieth day of July 2007
At The Hague
The Netherlands

[Seal of the Tribunal]