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UNITED
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International Tribunal for the
Prosecution of Persons
Responsible for Serious Violations of
International Humanitarian Law
Committed in the Territory of
Former Yugoslavia since 1991

Case No. IT-02-53-PT
IT-02-56-PT
Date: 17 May 2002
Original: English

TRIAL CHAMBER II

Before: Judge Wolfgang Schomburg, Presiding
Judge Florence Mumba
Judge Carmel Agius

Registrar: Mr. Hans Holthuis

Decision of: 17 May 2002

PROSECUTOR
v.
MOMIR NIKOLIĆ

and

PROSECUTOR
v.
VIDOJE BLAGOJEVIĆ
DRAGAN OBRENOVIĆ
DRAGAN JOKIĆ

DECISION ON PROSECUTION'S MOTION FOR JOINDER

The Office of the Prosecutor:

Mr. Peter McCloskey

Counsel for the Accused:

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



A. Introduction

1. 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 (hereinafter "International Tribunal") is seised of a motion (hereinafter "Motion")¹ filed on 3 April 2002 by the Office of the Prosecutor (hereinafter "Prosecution") for an order that the accused Momir Nikolić, who is charged in an indictment in the case *Prosecutor v. Momir Nikolic*, (Case No. IT-02-56-PT), be charged and tried jointly with the accused Vidoje Blagojević, Dragan Obrenović and Dragan Jokić in the case *Prosecutor v. Blagojević et al.* (Case No. IT-02-53-PT). The Motion is filed pursuant to Rule 48 of the Rules of Procedure and Evidence of the International Tribunal (hereinafter "Rules"). In the Motion, the Prosecution also request that the deadline for the accused Blagojević, Obrenović and Jokić to challenge the indictment in Case No. IT-02-53-PT be stayed pending the resolution of this Motion.

2. On 9 April 2002 the accused Blagojević filed a response to the Motion stating that he does not oppose the joinder of Momir Nikolić, nor will he contest the Prosecution's motion to stay the deadline for the accused to challenge the indictment.² On 1 May 2002, the accused Obrenović filed a response, stating that he does not oppose the joinder of Momir Nikolić.³ None of the other accused filed a response within the requisite time period.

3. The indictment against the accused Momir Nikolić ("Nikolić Indictment")⁴ was confirmed on 28 March 2002. The accused Momir Nikolić was arrested on 31 March 2002 and entered his initial appearance on 3 April 2002 before Judge Schomburg.

4. The accused Obrenović, Blagojević and Jokić were initially charged in separate indictments. By oral decision of 15 January 2002, the Chamber granted the Prosecution leave to file a joint indictment against all three accused.⁵ The joint indictment (hereinafter "Joinder Indictment") was

¹ *Prosecutor v. Momir Nikolić* (Case No. IT-02-56-PT), *Prosecutor v. Blagojević et al.* (Case No. IT-02-53-PT), Prosecution's Motion for Joinder and to Stay the Deadline for the Accused Blagojević, Obrenović and Jokić to Challenge the Joinder Indictment in Case IT-02-53-PT, 3 Apr. 2002.

² *Prosecutor v. Blagojević et al.*, Case No. IT-02-53-PT, Accused Blagojević's Response to the Prosecution's Motion for Joinder and Stay the Deadline for the accused Blagojević, Obrenović and Jokić to Challenge the Joinder Indictment in Case IT-02-53-PT, 9 Apr. 2002

³ *Prosecutor v. Blagojević et al.*, Case No. IT-02-53-PT, Accused Obrenović's Response to Prosecution's Motion to File an Amended Joinder Indictment, 1 May 2002.

⁴ *Prosecutor v. Momir Nikolić*, Case No. IT-02-56-PT, Indictment, 28 Mar. 2002.

⁵ The written reasons for the decision followed on 16 January 2001. See *Prosecutor v. Vidoje Blagojević* (Case No. IT-98-33/1-PT), *Prosecutor v. Dragan Obrenović* (Case No. IT-01-43-PT), *Prosecutor v. Dragan Jokić* (Case No. IT-01-44-PT), Written Reasons Following Oral Decision of 15 January 2002 on the Prosecution's Motion for Joinder, 16 Jan. 2002 (hereinafter "Joinder Decision of 16 January").

filed by the Prosecution on 22 January 2002.⁶ On 26 February 2002, Judge Schomburg issued a Scheduling Order in which he ordered, *inter alia*, (i) that a further initial appearance for each of the accused be scheduled to permit them to enter a plea to each count of the Joinder Indictment, on the basis that there are new charges contained therein, (ii) that the thirty-day time period for the accused to file preliminary motions will commence running from 21 March 2002 and (iii) that the three accused be permitted to raise preliminary objections in relation to the form of the Joinder Indictment "in its totality" and "not be restricted to the parts of the [Joinder Indictment] that constitute 'new charges', as would generally be the case pursuant to Rule 50(C)."⁷

5. On 16 April 2002 the Prosecution filed its notice of filing the draft of an amended Joinder Indictment (hereinafter "Amended Joinder Indictment") in which the accused Momir Nikolić is jointly charged along with the accused Vidoje Blagojević, Dragan Obrenović and Dragan Jokić.⁸

B. Arguments of the Parties

6. The Prosecution submits that, for the same reasons that this Chamber granted its application to join the accused Blagojević, Obrenović and Jokić in one indictment, the Chamber should grant this Motion. It is the Prosecution's case that the murder and forcible transfer of the Muslim population after the fall of the Srebrenica enclave was one large operation conceived by General Mladić and others, and implemented by soldiers and officers of the Drina Corps, the Main Staff and the MUP, including Momir Nikolić, Vidoje Blagojević, Dragan Obrenović and Dragan Jokić, as outlined in the Nikolić Indictment and the Joinder Indictment. The Prosecution submits that, in order for the Trial Chamber to appreciate the criminal responsibility of any individual accused, evidence of the entire operation and factual background must be presented. It argues that, if the accused Momir Nikolić were to be tried separately his trial would cover the same facts and circumstances and would involve much of the same evidence.⁹

7. The Prosecution further submits that the case against Momir Nikolić encompasses "all the criminal acts that are known to have been committed after the fall of the Srebrenica enclave, including those crimes that were committed in the Zvornik Brigade zone of responsibility"; thus the Prosecution in the Nikolić trial would expect to present all the evidence necessary to prove the entire Srebrenica case as outlined in the Joinder Indictment.¹⁰ As the Assistant Commander of Security and Intelligence for the Bratunac Brigade, the accused Momir Nikolić worked directly

⁶ *Prosecutor v. Blagojević et al.*, Case No. IT-02-53-PT, Joinder Indictment, 22 Jan. 2002.

⁷ *See Prosecutor v. Vidoje Blagojević*, Case No. IT-02-53-PT, Scheduling Order, 26 Feb. 2002.

⁸ *See Prosecutor v. Momir Nikolić* (Case No. IT-02-56-PT), *Prosecutor v. Blagojević et al.* (Case No. IT-02-53-PT), Prosecution's Notice of Filing the Amended Joinder Indictment, 16 Apr. 2002.

⁹ Motion, para. 9.

under the accused Vidoje Blagojević, and the facts underlying the charges against these two accused are identical.¹¹

8. The Prosecution submits that the requirement for joinder of accused set forth in Rule 48 of the Rules, namely that the crimes be committed "in the course of the same transaction", is met in this case. The counts in the Nikolić and Joinder Indictments, it is argued, are "founded on the same facts and form part of a series of offences of the same or similar character".¹² In particular, each of the accused is alleged to have been a member of the VRS Drina Corps command structure during the relevant period and their liability for the crimes charged arises out of their participation therein, under the command of General Ratko Mladić and Radislav Krstić.¹³

9. The Prosecution argues that the Chamber should exercise its discretion in favour of granting the Motion, as joinder best serves the interests of justice for the following reasons. Firstly, the Prosecution will present the same or similar evidence at trial on each of the indictments. Joinder will prevent the possibility of different Chambers reaching competing conclusions on the same facts. Secondly, if the joinder were to be granted, victims and witnesses who, due to the common factual matrix in the two cases, would otherwise have to testify in two trials would only be required to testify once, thereby sparing them additional trauma. Thirdly, joinder would contribute to the most efficient use of Tribunal resources. Lastly, it is argued that the considerations set forth in Rule 82 (B), that a joint trial may give rise to a conflict of interest or cause serious prejudice to an accused, carry less weight in a situation where the accused is being tried by professional judges.

10. In the Prosecution's submission, the joinder of the accused Momir Nikolić to the Joinder Indictment and the consequent delay in starting the trial, would not contravene the rights of the accused Blagojević, Obrenović and Jokić to a fair trial or to be tried without undue delay.¹⁴ In this regard, the Prosecution notes that the accused on the Joinder Indictment have "indicated their agreement to a trial date of Fall 2002 at the earliest, and indeed a suggestion by the Trial Chamber that the case could proceed earlier than Fall 2002 was met by strong opposition from each of these three accused."¹⁵

11. In relation to its request to stay the deadline for the accused Blagojević, Obrenović and Jokić to challenge the Joinder Indictment, the Prosecution submits that while the amended Joinder

¹⁰ Motion, para. 10.

¹¹ Motion, para. 10.

¹² Motion, para. 13.

¹³ Motion, para. 13.

¹⁴ Motion, para. 20.

¹⁵ Motion, para. 21.

Indictment will not change the substance of any existing charges, the format of those charges will change. Accordingly, it is submitted, the accused on the Joinder Indictment should be given additional time in which to challenge the amended Joinder Indictment.

C. Discussion

1. The Law

12. Rule 48 governs the joinder of accused, and provides:

Persons accused of the same or different crimes committed in the course of the same transaction may be jointly charged and tried.

Therefore, before accused may be legally joined in one indictment, the Prosecution must demonstrate that the crimes with which they are charged were committed "in the course of the same transaction". Once this legal requirement has been met, the grant of joinder remains at the discretion of the Trial Chamber. In exercising its discretion, the Chamber should consider, *inter alia*, Rule 82(B), which deals with joint and separate trials. It provides:

The 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.

13. As discussed in the Joinder Decision of 16 January,¹⁶ in determining whether accused should be joined pursuant to Rule 48, the Trial Chamber must rely upon the factual allegations contained in the indictment.¹⁷

14. Once the legal prerequisites set out in Rule 48 have been met, the Trial Chamber retains a discretionary power in relation to the grant of joinder. In determining whether to exercise its discretion in favour of joinder, the Trial Chamber should consider, in addition to the aforementioned considerations set out in Rule 82(B) of the Rules, *inter alia*, the following factors: the avoidance of duplication of evidence, minimising hardship to witnesses and promoting judicial economy.¹⁸

2. Analysis and Conclusions

15. As a preliminary matter, the Chamber observes that the allegations set out the Nikolić Indictment and the Joinder Indictment will form the basis for its determination on the issue of joinder.

¹⁶ *Supra*, note 5.

¹⁷ Joinder Decision of 16 January, para. 17.

¹⁸ See Joinder Decision of 16 January, para. 20.

16. The first issue that falls for consideration is whether the crimes, as alleged in the two indictments were "committed in the course of the same transaction". In this regard, the Chamber observes that paragraph 17 of the Nikolić Indictment and paragraph 15 of the Joinder Indictment allege that the accused Nikolić, and Blagojević, Obrenović, and Jokić, respectively, were members of and "knowingly participated in a Joint Criminal Enterprise, the common purpose of which was: to forcibly transfer the women and children from the Srebrenica enclave to Kladanj, on 12 July and 13 July 1995; and to capture, detain, summarily execute by firing squad, bury [...] thousands of Bosnian Muslim men and boys aged 16 to 60 from the Srebrenica enclave from 12 July 1995 until and about 19 July 1995." According to the standard identified by the Appeals Chamber in *Milošević*, crimes committed "pursuant to a common scheme, strategy or plan" may form part of "the same transaction".¹⁹ Moreover, in this instance, the crimes are alleged to have been committed over the same time period (11 July – 1 November 1995)²⁰ and in the same location, that is, the enclave of Srebrenica. For these reasons, the Trial Chamber is satisfied that the requirements of Rule 48 have been met.

17. It remains for the Chamber to determine whether or not to exercise its discretion in favour of joinder. There are several factors that weigh in that direction. Considering that, on each of the indictments, the Prosecution would present much the same evidence at trial, joinder will permit the Tribunal to proceed with the matter more efficiently (by avoiding duplication of evidence), while minimising hardship to witnesses (who would otherwise be called to testify in two separate trials). The Defence has not sought to challenge the joinder under Rule 82(B) and the Trial Chamber is satisfied that, in this case, it is not necessary to maintain separate trials "in order to avoid a conflict of interests that might cause serious prejudice to an accused, or to protect the interests of justice".

18. In view of the fact that the format of the Joinder Indictment will change once it has been amended to incorporate the charges relating to Momir Nikolić, and considering that the thirty-day period, in which the accused Blagojević, Obrenović and Jokić were to file preliminary motions in relation to the Joinder Indictment, including raising objections to the form of that indictment in its entirety,²¹ has elapsed, the Chamber considers that the accused should be given additional time in which to file any objections to the Joinder Indictment, as amended.²²

¹⁹ *Prosecutor v. Slobodan Milošević*, Case No. 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 Apr. 2002, para. 20. While the Decision of the Appeals Chamber in *Milošević* ultimately dealt with Rule 49, the identity of the language "the same transaction" in Rules 48 and 49 was noted in the context of a discussion as to the proper interpretation of that phrase. See *id.*, para. 13.

²⁰ See paragraph 22 of the Nikolić Indictment and paragraph 19 of the Joinder Indictment.

²¹ See Trial Chamber's Scheduling Order of 26 February 2002, *supra* note 7.

²² In this regard, the Trial Chamber observes that on 15 April 2002, the Defence for Dragan Jokić filed a request to extend the time period within which any Rule 72 motions in relation to the Joinder Indictment, as amended, could be

D. Disposition

19. For the foregoing reasons this Chamber

GRANTS the Motion insofar as it relates to joinder of the accused Momir Nikolić, Vidoje Blagojević, Dragan Obrenović, and Dragan Jokić,

FINDS that the Prosecution's request to stay the deadline for the accused Blagojević, Obrenović, and Jokić to challenge the Joinder Indictment of 22 January 2002 is moot,

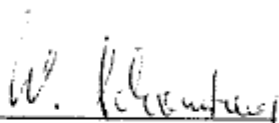
and **ORDERS** that:

1. The accused Vidoje Blagojević, Dragan Obrenović, Dragan Jokić (Case No. IT-02-53-PT) and Momir Nikolić (Case No. IT-02-56-PT) be jointly charged and tried;
2. The Registry designate one unified case number to the joined case forthwith;
3. The Prosecution file immediately an Amended Joinder Indictment, incorporating the charges against Momir Nikolić. If the anticipated Amended Joinder Indictment contains amendments other than those relating to the aforementioned incorporation, the Prosecution, within 5 working days of this Decision, must file a motion seeking leave to amend the Nikolić and the Joinder Indictments pursuant to Rule 50(A)(i)(c). The motion should identify with particularity any differences (other than those relating strictly to format) between those indictments and the anticipated Amended Joinder Indictment;

filed. As this Request relates to the Joinder Indictment it is moot by virtue of this Decision. See *Prosecutor v. Vidoje Blagojević*, Case No. IT-02-53-PT, Dragan Jokić's Request for Extension of Time to File Objections to Joinder of Indictments, 15 Apr. 2002.

4. If no motion seeking leave to amend is filed within the prescribed time period (see paragraph 3), the accused Vidoje Blagojević, Dragan Obrenović, Dragan Jokić and Momir Nikolić shall have a period of thirty-six days, from the date of the filing of the anticipated Amended Joinder Indictment, in which to file preliminary motions pursuant to Rule 50(C) and Rule 72. In the circumstances of this case, the accused may raise preliminary objections in relation to the form of the anticipated Amended Joinder Indictment in its entirety and will not be restricted to those parts that constitute "new charges", as would generally be the case pursuant to Rule 50(C).

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


Judge Wolfgang Schomburg
Presiding

Done this seventeenth day of May 2002
At The Hague
The Netherlands

[Seal of the Tribunal]

