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UNITED NATIONS

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

Case: IT-04-80-AR73.1

Date: 27 January 2006

Original: English

BEFORE THE APPEALS CHAMBER

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

Registrar: **Mr. Hans Holthuis**

Decision of: **27 January 2006**

PROSECUTOR

v.

ZDRAVKO TOLIMIR,
RADIVOJE MILETIĆ &
MILAN GVERO

DECISION ON RADIVOJE MILETIĆ'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
Natacha Fauveau Ivanović for Radivoje Miletić
Dragan Krgović for Milan Gvero

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 the "Appel contre la Decision relative a la jonction d'instances en date 21 septembre 2005" filed by Radivoje Miletić ("Appellant") on 13 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 was 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 applies to him and order that his case be tried separately from the other Accused or, in the alternative, only be tried jointly with the case against his co-Accused, Milan Gvero.[6] The

[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. Tolimir et al.*, Case No. IT-04-80-PT, Request for Certification to Appeal the Decision on Motion for Joinder of 21 September 2005, 27 September 2005.
[5] *Prosecutor v. Tolimir et. al*, Case No. IT-04-80-AR73.1, 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-04-80-PT, Decision on Motion for Certification of Joinder Decision for Interlocutory Appeal, 12 October 2005.
[6] Appeal, para. 63.

Prosecution filed its response on 25 October 2005,[7] and the Appellant filed his reply on 27 October 2005.[8]

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."[9] 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."[10]

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.[11] 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.[12]

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[7] *Prosecutor v. Zdravko Tolimir, Radivoje Miletić & Milan Gvero,* Case No. IT-04-80-AR73.1, *Prosecutor v. Vinko Pandurević & 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. Zdravko Tolimir, Radivoje Miletić & Milan Gvero*, Case No. IT-04-80-AR73.1, Application for Leave to Reply and Reply to the Prosecution Response to the Appeal of the Defence for General Miletić Dated 13 October 2005, 27 October 2005 ("Reply"). The Appeals Chamber notes that the Appellant seeks leave to file his reply pursuant to Rule 126*bis*. *See* Reply, para. 5. However, it was unnecessary for the Appellant to seek leave because in an interlocutory appeal from a decision where certification has been granted by a Trial Chamber, an appellant may file a reply within four days of the filing of the response. *See* Practice Direction on Procedure for the Filing of Written Submissions in Appeal Proceedings Before the International Tribunal, IT/155/Rev. 3, 16 September 2005, para. 11.

[9] *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.

[10] *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.

[11] *Milošević* Decision on Joinder, para. 3.

[12] *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.[13] 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."[14] The party challenging a discretionary decision by the Trial Chamber must demonstrate that the Trial Chamber has committed a "discernible error"[15] resulting in prejudice to that party.[16] 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."[17]

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.[18] 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.[19] The Appeals Chamber agrees with the Trial Chamber that "[i]n deciding whether charges against more than one accused should

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[13] *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.
[14] *Ibid.*
[15] *Ibid.*
[16] *Milošević* Decision on Joinder, para. 6.
[17] *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.*
[18] *Milošević* Decision on Joinder, para. 14.
[19] *Ibid.*

be joined pursuant to Rule 48, the Chamber should base its determination upon the factual allegations contained in the indictments and related submissions."[20]

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 ensure 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.[21]

V. DISCUSSION

9. At the outset, the Appeals Chamber notes that in this Appeal, the Appellant does not challenge the Trial Chamber's determination under Rules 2 and 48 that the charges against him and his co-Accused arose out of the "same transaction."[22] Rather, the Appellant argues that the Trial

[20] 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).
[21] 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.
[22] Appeal, para. 18.

Chamber subsequently erred when considering and weighing specific factors in the exercise of its discretion for determining whether joinder should be granted.

10. The Appellant first argues that the Trial Chamber erred in two respects when considering the issue of presentation of evidence in this joint trial. He claims that the Trial Chamber erred as a matter of law when it accepted that evidence of mass killings brought against other Accused would, nonetheless, form part of the evidence brought against him even if he were to be tried separately.[23] He also submits that the Trial Chamber erred by underestimating the risk of prejudice that would result to him from the presentation of evidence to substantiate crimes alleged against other Accused and unrelated to his own, specifically crimes of mass killings.[24] Second, the Appellant argues that the Trial Chamber erred when it failed to attach sufficient weight to the risk of prejudice to his right to an expeditious trial as guaranteed by Article 21(4)(c) of the Statute of the International Tribunal.[25] Finally, the Appellant claims that the Trial Chamber erred in failing to consider and weigh the risk of prejudice to his right to cross-examine the Prosecution's witnesses as guaranteed by Article 21(4)(e) of the Statute.[26]

A. Presentation of Evidence in a Joint Trial

11. First, the Appellant submits that the Trial Chamber committed an error of law in determining that the presentation of evidence to substantiate charges of genocide, conspiracy to commit genocide, and extermination brought against some of the other Accused in this joint trial would not be prejudicial because it would form part of the evidence against him, even if he were tried separately. The Appellant points out that he is not charged with such crimes either in the original or consolidated Indictments,[27] nor are mass killings alleged as a consequence of a criminal enterprise in which he allegedly participated. Thus, he claims that contrary to the Trial Chamber's conclusion, evidence of crimes of mass killings would not be admissible against him under Rule 89(C) because it would be deemed irrelevant.[28] The Appellant relies on the *Brđanin & Talić*, *Kupreškić*, and *Furundžija* cases[29] in support of this argument, stating that they stand for the proposition that the

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[23] *Id.*, paras 21-35.
[24] *Id.*, paras 37-48.
[25] *Id.*, para. 54.
[26] *Id.*, paras 55-58.
[27] *Prosecutor v. Zdravko Tolimir et al.*, Case No. IT-04-80-I, Indictment, 8 February 2005 ("Indictment"); *Prosecutor v. Popović et al.* Case No. IT-05-88-PT, Consolidated Amended Indictment, 28 June 2005 ("Consolidated Indictment"). Because the Consolidated Indictment was not yet confirmed by the Trial Chamber at the time of the Impugned Decision, the Appeals Chamber will consider the Appellant's arguments insofar as they relate to the Trial Chamber's findings on the original Indictment against him.
[28] Rule 89(C) provides that "[a] Chamber may admit any relevant evidence which it deems to have probative value."
[29] *Prosecutor v. Brđanin and Talić*, Case No. IT-99-36-T, 11 September 2002, T. 9763-9764 ("*Brđanin* Oral Decision"); *Prosecutor v. Kupreškić et al.*, Case No. IT-95-16 A, Judgement, 23 October 2001, ("*Kupreškić* Appeal Judgement"); *Prosecutor v Furundžija*, Case No. IT-95-17/1-A, Judgement, 21 July 2000, ("*Furundžija* Appeal Judgement").

right to a fair trial requires that evidence be excluded as inadmissible where it is unrelated to the allegations in the indictment against an accused.[30]

12. Before addressing this argument, the Appeals Chamber first clarifies that in reaching the Impugned Decision on joinder under Rule 48, the Trial Chamber was not deciding, at this stage, whether the evidence to be proffered at trial would in fact be admissible under Rule 89(C). The question of admissibility of evidence is generally determined by the Trial Chamber at a later stage in the proceedings.[31] Rather, the Trial Chamber was considering whether prejudice would result to certain Accused in this joint trial from the presentation of evidence that relates exclusively to other Accused assuming that it was admitted.[32]

13. The Appeals Chamber now turns to the Appellant's argument that the Trial Chamber erred when it found that the presentation of evidence of crimes of mass killings would form part of the evidence against him.[33] The Appellant rightly points out that he was not charged with such crimes. Indeed, the Appeals Chamber notes that the Trial Chamber explicitly stated in the Impugned Decision that there was a disparity in charging against the Appellant and his co-Accused, Milan Gvero, as compared with other Accused[34] in that the Appellant and Gvero were not charged with crimes of mass killings of the able-bodied men of Srebrenica or, in other words, genocide, conspiracy to commit genocide, or extermination.[35] The Trial Chamber also noted that the charges against the Appellant and Gvero were based on "only one of two alleged joint criminal enterprises—the forced removal of the Bosnian Muslim population from Srebrenica and Žepa, but not the killing of the able-bodied men of Srebrenica . . . .",[36] which was alleged against some of the other Accused.[37]

14. However, the Appeals Chamber further notes that the Trial Chamber went on to find that the "factual allegations which relate to the two enterprises are closely interlinked" observing that,

> although the joint criminal enterprise for the forcible removal of the population [...] had begun in March 1995, the forced removal of the Bosnian Muslim

[30] Appeal, paras 21-35; Reply, paras 7-23.
[31] *Cf.* Rule 48 and 89 of the Rules. *Cf. also 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. 42 (on the question of admitting evidence pursuant to Rule 92*bis*, the Trial Chamber held that, in its view, "[d]ecisions on whether evidence could be admitted pursuant o Rule 92*bis* are to be taken at a later stage of the pre-trial process, and it is not therefore in a position to give weight to these submissions in the exercise of its discretion in favour or against joinder.").
[32] Impugned Decision, para. 30.
[33] Appeal, paras 28-34, Reply, paras 9-14.
[34] *See, e.g., Prosecutor v. Vinko Pandurević & Milorad Tribić,* Case No. IT-05-86-I, Indictment, 10 February 2005 ("*Pandurević & Trbić* Indictment").
[35] Impugned Decision, para. 31.
[36] *Id.*, para. 16.
[37] *See, e.g., Pandurević & Trbić* Indictment.

> population culminated in the actual physical removal of the population from Srebrenica on 12 and 13 July 1995. The majority of the mass killings subsequently took place between 12 and 17 July and . . . the plan to murder the able bodied men of Srebrenica *began on the afternoon of 12 July with the forcible separation* of the able bodied men in Potocari from their families . . . .[38]

The Trial Chamber concluded that there was a sufficient factual nexus between the two alleged joint criminal enterprises on the basis of each Accused's separate indictment and related submissions such that, under Rule 48, they formed part of the "same transaction" of acts or omissions whose common purpose was the ethnic cleansing of Bosnian Muslims from Eastern Bosnia.[39] It was on the basis of this factual nexus that the Trial Chamber concluded that the "the bulk of the *evidence*" against all of the Accused, including the Appellant and Gvero, would be the same and that evidence of crimes of mass killings would form "part of the evidence" against them even if the Appellant and Gvero were tried separately.[40]

15. The Appeals Chamber finds that the Appellant fails to demonstrate that the Trial Chamber erred in reaching this conclusion. The Trial Chamber noted that the same men who were alleged to be victims of forcible transfer from Srebrenica under one joint criminal enterprise were also alleged to be the victims of mass killings under a second joint criminal enterprise shortly after their forcible transfer. Furthermore, the Trial Chamber found that the alleged perpetrators of the two joint criminal enterprises were alleged to have: (1) been part of or reported to the armed forces of Republika Srpska; (2) committed crimes in the same geographical area; (3) carried out crimes during "substantially the same time period"; and (4) perpetrated crimes with a common purpose.[41]

16. The Appeals Chamber further finds that the Trial Chamber's conclusion with regard to this factual nexus is also supported by the fact that some of the Appellant's co-Accused alleged to have participated in the joint criminal enterprise to kill the able-bodied men of Srebrenica, were also listed as being members of the joint criminal enterprise to forcibly remove the population from Srebrenica as alleged in his Indictment.[42] In addition, the Appellant's Indictment makes reference to mass killings of the able-bodied men from Srebrenica just after the alleged forcible transfer. The Indictment charges him under Count Three with persecutions and under Count Four with inhumane acts (forcible transfer) as crimes against humanity in violation of Article 5 of the Statute of the International Tribunal. In both places, the Indictment charges him for "the forced bussing of the

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[38] Impugned Decision, para. 16 (citing to the Prosecution's argument in its Consolidated Reply)(emphasis in the original).
[39] *Id.*, paras 14-16, 31.
[40] *Id.*, para. 31 (internal citation omitted).
[41] *Id.*, paras. 14-15.
[42] *See* Indictment, Attachment "A" at para. 1 specifically listing Colonel Ljubiša Beara, Colonel Vinko Pandurević, and Ljubiša Borovčanin who were individually charged with genocide, conspiracy to commit genocide, or extermination in a joint criminal enterprise for killing the able-bodied men of Srebrenica. *See also* Impugned Decision, n. 58.

men separated at Potočari or captured or having surrendered from the column up to the Zvornik area, where they were ultimately executed, as described in this Indictment."[43] Earlier in the Indictment in the summary of the factual background, the transportation of these Bosnian Muslim men from Srebrenica, over 7,000 of them, which culminated in execution, is described.[44] In light of all of these statements in the Appellant's Indictment, the Appeals Chamber concludes that Trial Chamber did not err in finding that the evidence of the mass killings of these men would form part of the same evidence brought against the Appellant and Gvero regardless of whether they were tried separately.

17. The Appeals Chamber considers that the Appellant's reliance on the *Kupreškić, Furundžija,* and *Brđanin & Talić* cases to challenge this finding by the Trial Chamber is misplaced.[45] In *Kupreškić* and *Furundžija*, the Appeals Chamber found that evidence introduced by the Prosecution could not be used to establish proof of specific events, which had not been adequately pleaded in the respective indictments, and for which the Prosecution sought to attribute criminal responsibility to the respective accused under the charged crimes of persecutions as a crime against humanity and torture and rape as violations of the laws or customs of war.[46] The *Brđanin & Talić* decision addressed the legal effect of a previous decision[47] by the Trial Chamber to refuse the Prosecution leave to amend the indictment to include a reference to a Croatian military prison as a material fact in order to hold Talić criminally responsible for the events that occurred there under specific crimes charged in the indictment.[48] The Trial Chamber held that the legal effect of that refusal was to bar the Prosecution from bringing forward evidence tending to prove facts related to that military prison or events that may have occurred there.[49]

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[43] *See* Indictment, paras 54(d), 55(a).
[44] *Id.*, paras 24-26.
[45] Appeal, paras 29-33, Reply, paras 10-11.
[46] *See Kupreškić* Appeal Judgement, paras 98-100 (finding that the Prosecution failed to plead the material fact of the accused's participation in an attack on a house and its consequences, including the murder of two people, upon which a conviction for the count of persecutions critically depended); *Furundžija* Appeal Judgement, paras 148 - 151 (affirming the Trial Chamber's decision to exclude evidence relating to rapes and sexual assault in Witness A's testimony, which was beyond the scope of the allegations against the accused in paragraph 25 and 26 of the Amended Indictment in support of the charges against the accused of torture and rape as violations of the laws or customs of war).
[47] *Prosecutor v. Brđanin & Talić*, Case No. IT-99-36-PT, Decision on Form of Fourth Amended Indictment, 23 November 2001, para. 17 ("*Brđanin* Decision on Indictment"); *see also*, *Prosecutor v. Brđanin & Talić*, Case No. IT-99-36-PT, Order, 7 December 2001.
[48] *Prosecutor v. Brđanin & Talić*, Case No. IT-99-36-PT, Oral Decision of 11 September 2002 ("*Brđanin* Oral Decision"), T. 9764. The charges in the indictment included genocide; persecution as a crime against humanity; extermination and willful killing as crimes against humanity; and a grave breach of the Geneva Conventions. *See also Brđanin* Decision on Indictment, para. 13.
[49] *Brđanin* Oral Decision, T. 9764. The Trial Chamber's refusal to allow the amendment was based on the Prosecution's failure to have previously pled the fact that the military detention facility was administered by the 1st Krajina Corps of which Talić was the Commander, a material fact essential to establishing Talić's criminal responsibility for the events which occurred in Croatia. *See also Brđanin* Decision on Indictment, paras 11-17.

18. In this case, the Trial Chamber did not decide that evidence of crimes of mass killings would be brought against the Appellant and Gvero at trial for purposes of establishing their criminal responsibility for those crimes even though they had not been charged with them or, if they had, even though material facts with respect to those crimes had not been sufficiently pleaded. Rather, the Trial Chamber found that this evidence would form part of the evidence brought against the Appellant and Gvero as proof of the specific crimes alleged in their indictments due to the close factual nexus between their alleged crimes and participation in a joint criminal enterprise and the alleged crimes and participation in a different joint criminal enterprise by other Accused in this joint trial.

19. Second, the Appellant argues that the Trial Chamber abused its discretion when it gave insufficient weight to the risk of prejudice posed to him by the presentation of evidence relating exclusively to other Accused in this joint trial—specifically evidence to establish crimes of mass killings alleged against some of his co-Accused. He distinguishes this case on the basis of its complexity. In doing so, the Appellant notes that all nine Accused are alleged to be involved in the same military operation; the disparity in the crimes charged; the partly different factual basis underpinning these charges; and the differing levels of responsibility of the co-accused. The Appellant submits that, taken together, these factors would make it "difficult, even for professional judges, to make a distinction between evidence that relates to some of the accused but not to others."[50]

20. The Appellant further submits that the obligation of a Trial Chamber in a joint trial to evaluate the charges against each accused in light of the entire body of evidence admitted implies that some of the evidence proffered in this joint trial that is irrelevant as to him, particularly the evidence of crimes of mass killings, could prejudice the assessment of his responsibility for the crimes for which he was charged. Furthermore, the Appellant states that this particular evidence could affect the assessment of the gravity of any crimes for which he is ultimately convicted and be used as an aggravating factor at sentencing.[51] The Appellant concludes by referring to a decision of a Trial Chamber of the International Criminal Tribunal for Rwanda ("ICTR") in *Prosecutor v. Kajelijeli,*[52] which he claims stands for the proposition that in a joint trial where all of the accused are not covered by the same charges, there is a danger of prejudicial effect resulting from the

[50] Appeal, paras 37-39; Reply 29-30.
[51] *Id.*, paras 40-44, 46.
[52] Case No. ICTR-98-44A-PT, Decision on the Defence Motion in Opposition to Joinder and Motion for Severance and Separate Trial for Juvénal Kajelijeli, 6 July 2000 ("*Kajelijeli* Decision on Joinder").

concurrent presentation of unrelated evidence. In such a situation, the Appellant argues, severance of the case into separate trials is appropriate.[53]

21. The Appeals Chamber recalls that the Trial Chamber noted that a common feature of joint trials is that evidence brought relating to one accused may not relate to another. However, the Trial Chamber found that this fact in itself, "unsupported by concrete allegations of specific prejudice that is likely to result," does not mean that prejudice to an accused is an inevitable result of joinders under Rule 48.[54] This is because the Chambers of the International Tribunal consist 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" in a joint trial.[55] The Appeals Chamber affirms that holding.[56]

22. The Appeals Chamber finds that the Appellant has failed to demonstrate that the Trial Chamber erred in finding that there was "no concrete risk of prejudice" to him by the presentation of evidence against all of the Accused in this joint trial, including evidence unrelated to the charges brought against him.[57] First, as noted previously, the Trial Chamber found that "the bulk of the evidence" against all of the Accused would be the same as that brought against the Appellant if he were tried separately.[58] Thus, there would be no prejudice to the Appellant resulting from the presentation of this same evidence in a joint trial. The Appellant fails to challenge this finding. For the evidence brought to establish crimes charged against the other Accused, *i.e.* the evidence brought in support of crimes of mass killings, the Trial Chamber considered and the Appeals Chamber has affirmed[59] that this evidence would still form part of the evidence brought against the Appellant if he were tried separately due to the factual nexus between the Appellant's Indictment and those of the other Accused.[60] Therefore, any risk in bringing this evidence against the Appellant in a joint trial is, as the Trial Chamber found, remote.[61] Furthermore, the Trial Chamber correctly pointed out earlier in the Impugned Decision that, in any event, where evidence in a joint trial is

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[53] Appeal, paras. 47-48.
[54] Impugned Decision, para. 30 (citing *Prosecutor v. Brđanin and Talić*, Case No. IT-99-36-PT, Decision on Motions by Momir Talić for a Separate Trial and for Leave to File a Reply, 9 March 2000, para. 20).
[55] *Ibid.* (citing *Prosecutor v. Mejakić,* Case Nos. IT-95-4-PT, IT-95-8/1-PT, Decision on Prosecution's Motion for Joinder of Accused, 17 September 2002, para. 29).
[56] *Cf. Milošević* Decision on Joinder, para. 29 (affirming an interpretation of the Trial Chamber's statement that if evidence were admitted in a trial against the accused under one indictment, which would be prejudicial to the accused in another trial against him under different indictments, "the members of the Trial Chamber as professional judges would be able to exclude that prejudicial evidence from their minds when they came to determine the issues" in the second trial).
[57] Impugned Decision, para. 31.
[58] *See supra* para. 14.
[59] *See supra* paras 14-16.
[60] Impugned Decision, para. 31.

brought that is exclusive to some of the crimes charged against only some of the accused, this is not inevitably prejudicial to the other accused. Judges of the International Tribunal are capable of excluding extraneous factors from their consideration of the responsibility of each individual accused.[62] The Appellant fails to show that this joint trial is different from other trials before the International Tribunal such that Judges will not be able to exclude any prejudicial evidence from their minds due to its "complexity" or the requirement that Judges consider the entire evidentiary record when determining the culpability of each individual accused. Finally, the Appeals Chamber considers that the *Kajelijeli* Decision on Joinder is distinct from this joint trial because, as the Appellant notes, the Trial Chamber found that "most of the allegations in the Indictment" did not relate to the accused in that joint trial.[63] That is not the situation here given the Trial Chamber's finding of a close nexus between the factual allegations in the indictments against each of the Accused in this case.

23. In sum, the Appeals Chamber finds that the Appellant has failed to show that the Trial Chamber erred in finding that any risk of prejudice to the Accused from the presentation of all of the evidence against each of them in one joint trial was remote and in giving it little weight when balancing it with other factors.

B. Right to be Tried Without Undue Delay

24. The Appellant also submits that the Trial Chamber erred by failing to consider and give weight to the fact that a joint trial would prejudice his right to an expeditious trial as guaranteed by Article 21(4)(c)[64] of the Statute of the International Tribunal.[65] The Appellant argues that in light of Article 21(4)(c), a joint trial should not "significantly exceed the duration"[66] of his own separate trial. He further submits that in the *Ngirumpatse* case before the ICTR,[67] a group of experts concluded that "there is no guarantee that joinder will shorten the proceeding; [rather] it may actually lengthen it, since any adjournment of the trial requested and granted in respect of any one suspect in the case will result in the adjournment of the trial as a whole."[68] Finally, the Appellant argues that the Trial Chamber erred by giving too much weight to the interests of judicial economy

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[61] The Appeals Chamber notes that therefore the Trial Chamber will be able consider whether the evidence of crimes of mass killings may go towards assessing the gravity of the crimes for which the Appellant may be convicted regardless of whether he is tried jointly or separately.
[62] Impugned Decision, para. 30.
[63] Appeal, para. 47 (internal citation omitted).
[64] Article 21(4)(c) states: "In the determination of any charges against the accused pursuant to the present Statute, the accused shall be entitled to the following minimum guarantees, in full equality: [...] to be tried without undue delay".
[65] Appeal, paras 49-54.
[66] Appeal, para. 51.
[67] Case No. ICTR-98-44-I.
[68] Appeal, para. 53 (internal citation omitted). *See also generally* Appeal, paras 49-54.

and also submits that the "cumulative duration of six separate trials is of no relevance"[69] to his individual right to an expeditious trial.

25. The Appeals Chamber does not agree that the Trial Chamber erred in this regard. First, there was no evidence before the Trial Chamber that a joint trial would significantly exceed the duration a single trial of one of the Accused. The Prosecution estimated before the Trial Chamber that the Appellant's separate trial would last 14 months[70] while this joint trial would last 18-24 months.[71] While an extension of 4-10 months of the Appellant's trial in this joint case undoubtedly results in some prejudice to his right to an expedient trial, the Appeals Chamber does not agree that it qualifies as excessive. Furthermore, 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 could commence at the same time as this joint trial. Finally, the Trial Chamber did note that there has been disagreement between Trial Chambers in the past as to whether joinder would speed up proceedings or actually slow them down.[72] While it did not address the specific issue of a joint trial being possibly delayed by adjournments caused by one accused, it did note that any significant delay could be averted by the Trial Chamber exercising its discretion to sever the trial.[73]

26. Second, the Trial Chamber considered the fact that the "crime base" evidence against each of the Accused in this case is largely the same and that there are approximately 100 witnesses common to all of the Accused. Thus, one joint trial would avoid these 100 witnesses having to duplicate their evidence six times. Furthermore, the Trial Chamber took into account the fact that, if each of the Accused's trials were held separately, all of the trials would take a total of 93-95 months to complete, while a joint trial would only last for 18-24 months. The Appeals Chamber finds that the Appellant has failed to show that the Trial Chamber erred in giving weight to these significant factors militating in favour of joinder in spite of the fact that joinder would probably result in an extension of his trial by 4-10 months. The Appellant is correct that the total amount of time saved by joining all six of the trials in this case into one trial has no relevance for his right to an expedient trial. Nevertheless, that consideration does not have significant relevance for the Trial Chamber's consideration of judicial economy as balanced with the Appellant's rights. It is well within the Trial Chamber's discretion to take into consideration judicial economy when determining whether joinder

[69] *Id.*, para. 51.
[70] *See* Response, para. 29 at n. 32.
[71] Impugned Decision, para. 21.
[72] *Id.*, para. 20.
[73] *Id.*, para. 23.

would be appropriate. Thus, the Appeals Chamber finds that the Appellant fails to establish that the Trial Chamber erred by not considering that his right to be tried without undue delay would be prejudiced in this joint trial or by giving weight to the fact that certain circumstances would promote judicial economy and that this militates in favour of joinder.

C. Right to Cross-Examine the Prosecution's Witnesses

27. The Appellant's final argument in this Appeal arises from specific statements made by the Trial Chamber pertaining to cross-examination of witnesses in a joint trial.[74] In the Impugned Decision, the Trial Chamber found that any potential burden caused to witnesses by consecutive cross-examination by multiple accused in a joint trial could be regulated by the Trial Chamber "for instance by prohibiting repetitive questions by consecutive counsel for the accused."[75] The Trial Chamber also stated that in a joint trial, "each individual cross-examination [...] may take less time than in single trials because some questions that one accused's counsel seeks to ask may be covered by another accused's counsel."[76]

28. The Appellant claims that the Trial Chamber erred by failing to consider and weigh that in a joint trial, his right to cross-examine witnesses protected under Article 21(4)(e)[77] of the Statute will potentially be prejudiced. The Appellant notes that under Rule 82 (A) of the Rules, in "joint trials, each accused shall be accorded the same rights as if such accused were being tried separately."[78] The Appellant argues that:

> [t]he right of an accused to examine Prosecution witnesses will not be protected if his Counsel cannot ask any questions she deems fit to ask, simply because another accused's Counsel has already asked these questions. It is well know that two Counsel may obtain different answers to the same question depending on how—and in what context—it has been asked [...] an accused must [...] have the right to examine Prosecution witnesses in a way that is suitable for his defence. Counsel for an accused cannot be responsible for the defence of another accused since, in other respects, the interests of two accused may be incompatible.[79]

29. The Appeals Chamber agrees with the Appellant that Counsel may obtain different answers to the same questions in cross-examination. However, he fails to show that the Trial Chamber erred in failing to consider potential prejudice to the Appellant with regard to cross-examination of witnesses in this joint trial as a factor militating against joinder. The Trial Chamber was correct to

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[74] *See generally* Appeal, paras. 55-58; Reply, paras 26-28.
[75] Impugned Decision, para. 25.
[76] *Id.*, n. 50.
[77] Article 21(4)(e) provides in pertinent part: "In 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: [...] to examine, or have examined, the witnesses against him [...]".
[78] Appeal, para. 56.

note that in a joint trial, a Trial Chamber has discretion to regulate the examination of witnesses so as to avoid repetitive questioning during cross-examination. Rule 90(F) specifically provides that "[t]he Trial Chamber shall exercise control over the mode and order of interrogating witnesses and presenting evidence so as to (i) make the interrogation and presentation effective for the ascertainment of the truth; and (ii) avoid needless consumption of time." Of course, this power is subject to Trial Chamber's obligation to respect the rights of an accused, including the right to cross-examine witnesses under Article 21(4)(e) of the Statute.[80] The Appellant fails to show how the Trial Chamber's regulation of the cross-examination of witnesses in this joint trial by, for example, avoiding repetitive questioning, would result in prejudice to him. Rather, the Trial Chamber's regulation should mitigate any potential prejudice to him. At trial, the Appellant will have the opportunity to object where he feels that the Trial Chamber has erred in finding that another Accused's cross-examination of a witness is sufficient to cover his defence such that he does not need to also engage in cross-examination of that same witness. The Trial Chamber will consider each objection carefully under its obligation to respect norms of due process and the rights of the Appellant.

VI. DISPOSITION

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

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

Dated this 27th day of January 2006,

At The Hague,

The Netherlands.

Judge Fausto Pocar

Presiding Judge

[Seal of the International Tribunal]

[79] *Id.*, para. 57.

[80] Article 20(1) of the Statute requires that "[t]he Trial Chambers *shall* ensure that a trial is fair and expeditious and that proceedings are conducted in accordance with the rules of procedure and evidence, *with full respect for the rights of the accused* [...]" (emphasis added).