UNITED
NATIONS

IT-02-54-T
D 47685 - D 47673
13 DECEMBER 2005

47685

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

Case No.: IT-02-54-T

Date: 12 December 2005

Original: English

IN THE TRIAL CHAMBER

Before: **Judge Patrick Robinson, Presiding**
Judge O-Gon Kwon
Judge Iain Bonomy

Registrar: **Mr. Hans Holthuis**

Decision of: **12 December 2005**

PROSECUTOR

v.

SLOBODAN MILOŠEVIĆ

DECISION IN RELATION TO SEVERANCE, EXTENSION OF TIME AND REST

Office of the Prosecutor:
Ms. Carla Del Ponte
Mr. Geoffrey Nice

The Accused:
Mr. Slobodan Milošević

Court Assigned Counsel:
Mr. Steven Kay, QC
Ms. Gillian Higgins

Amicus Curiae:
Prof. Timothy McCormack

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 ("the International Tribunal"), hereby renders its Decision in relation to applications by the Accused for a period of rest and an extension of the time allotted him in which to conclude the presentation of his defence, and on whether to sever the Kosovo Indictment and conclude that part of the trial.

I. APPLICATION BY THE ACCUSED FOR A PERIOD OF REST

1. The Accused was absent from court on 11 November 2005, Dr. Falke stating that the Accused "appears very tired and I consider that he is unfit to attend court".[1] On 14 November 2005, Dr. Falke submitted a more detailed medical report in which he indicated the Accused's fitness to return to court the following day. In a hearing on 15 November 2005, the Accused referred to the opinion of his experts that a six week rest period was recommended,[2] stating that his intention in presenting these reports was "[n]othing other than asking the Trial Chamber not to ignore what it says in the doctors' report, and that means that they said quite specifically suspension of all physical and mental activities for a minimum period of six weeks".[3] The Trial Chamber by a majority determined that the submission of the Accused amounted to an application for a period of rest and the same day issued an "Order for Expert Medical Reports" directed to the treating cardiologist, Dr. van Dijkman and the treating Ear, Nose and Throat specialist for further expert medical opinion.[4]

2. During the hearing on 16 November, the Accused complained that he was not well enough to continue the hearing. Following the examination of the Accused by the ICTY Doctor, the hearing was adjourned[5] and the trial did not reconvene until 29 November 2005.[6]

3. On 29 November 2005, during a hearing on the question of severance,[7] the Accused made a clear application for a period of rest,[8] which he based on a recommendation by three experts

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[1] Confidential medical report of Dr. Falke, 11 November 2005.

[2] Dr. Shumilina (an Angiologist); Professor Vukašin Andrić (an Otorhinoralygologist), and Professor F. Leclercq (a Cardiologist), whose reports were filed confidentially on 15 November 2005, and who attached to their reports a "Joint Opinion on the Combined Medical Examination...", which concluded, in part, that "the patient should be prescribed a period of rest, *i.e.* the suspension of all physical and mental activities [sic] a minimum of 6 weeks, which will probably reduce – or at least stabilize – the symptoms"

[3] *Milošević*, Transcript, T. 46484 (15 November 2005).

[4] Judge Bonomy issued a Dissenting Opinion, in which he expressed the view that the Accused should, if he wanted the Chamber to act, make a written application setting out the relief he seeks: "Dissenting Opinion of Judge Iain Bonomy in Relation to the Order of the Trial Chamber for Expert Medical Reports", 17 November 2005.

[5] *Milošević*, Transcript, T. 46636 (16 November 2005).

[6] A short procedural hearing took place on 21 November 2005, in the absence of the Accused and at which no evidence was heard.

whose reports the Accused produced to the Trial Chamber,[9] and medical opinion expressed in a report of Dr. van Dijkman, the Accused's treating cardiologist.

4. The Trial Chamber has had the benefit of a considerable number of expert medical reports. Apart from the reports of the three experts presented by the Accused, the Trial Chamber has received reports from specialists treating the Accused, namely Dr. van Dijkman (Cardiologist),[10] Dr. Spoelstra (Ear Nose and Throat physician),[11] Dr. de Laat (Physicist-Audiologist),[12] and also from Dr. Aarts (Nerolological radiologist).[13] The medical issues investigated concern the ongoing cardiovascular condition of the Accused, the existence of a cochleovestibular disorder and any link between these two conditions. The medical opinion received indicates that the Accused does have a hearing disorder, but does not establish a conclusive link between that condition and the Accused's cardiovascular condition. The Trial Chamber is satisfied that the Accused is receiving optimal medical advice and treatment in relation to these matters.[14]

5. In relation to the application by the Accused for a period of rest, the Trial Chamber notes the following medical opinion. The joint opinion of the three medical experts produced by the Accused recommends a six week period of rest. Dr. van Dijkman has confirmed his advice that the Accused be given sufficient periods of rest, and explained that the weekly four-day rest period built into the trial sitting regime should be sufficient if used appropriately by the Accused for resting. He also noted the upcoming Christmas recess which, in the Trial Chamber's view, will allow a significant period of rest.

6. The Trial Chamber has considered all this medical advice and concludes that it is appropriate that the Accused should have some period of rest at this time. The Trial Chamber considers that it is important the Accused take account of the advice of Dr. van Dijkman that he should set aside adequate time in the four non-sitting days each week to rest. The winter recess period is

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[7] This issue is dealt with further in paragraphs 7-9 below.

[8] *Milošević*, Transcript, T. 46671 (29 November 2005) ("THE ACCUSED: ...[I]t is my right to demand of you to enable me to have the right to protect my own health, and I think it is your duty to protect that right and support it. And that right is over and above all the other preoccupations for which you have convened these proceedings here this morning ... . So my request is this—I hope it is sufficiently clear—and I request that you enable me to have a pause, that is to say, a period of rest in which to recuperate.").

[9] *Supra* note 2..

[10] Confidential reports dated 18 November, 23 November and 1 December 2005.

[11] Confidential report dated 21 November 2005.

[12] Confidential report dated 28 November 2005.

[13] Confidential report dated 6 December 2005.

[14] For example, Dr. de Laat is making arrangements for an appropriate in-court hearing to ameliorate the Accused's discomfort.

scheduled to commence on 15 December 2005. The Trial Chamber has accordingly ordered that the trial be adjourned until Monday, 23 January 2006.[15]

II. SEVERANCE OF THE KOSOVO INDICTMENT

7. On 22 November 2005, the Trial Chamber issued an "Order Scheduling a Hearing", to "hear the submissions of the parties on severing the Kosovo Indictment and concluding that part of the trial, and further submissions in relation to the medical condition of the Accused".[16] The Trial Chamber noted that it had, in July 2004, already considered "ways in which the trial may be concluded in a fair and expeditious manner, including the possibility of severing one or more of the Indictments".[17] At that time, it considered submissions from the parties on the possibility of severing one or more of the indictments, noted the opposition of the parties and decided not to give further consideration to that matter for the time being, but rather[18] determined that it could endeavour to conclude the trial in a fair and expeditious manner by assigning counsel to the Accused.[19] The Appeals Chamber reversed the Trial Chamber's decision in respect of modalities.[20] Thereafter, the issue of severance was not considered further.

8. The Trial Chamber heard oral submissions on this issue on 29 November 2005. The Prosecution submitted a 50 page filing on the day of the hearing[21] and made lengthy oral submissions. Its position can be summarised as complete opposition to severance of the Kosovo indictment.[22] The Accused also expressed his profound opposition to severing the Kosovo indictment.[23] The Assigned Counsel rebutted some of the Prosecution arguments and focussed on the unmanageability of the trial as caused by the presentation of the Prosecution case.[24] The *Amicus Curiae* submitted that severance was an appropriate mechanism for the Trial Chamber to bring an important aspect of the case to an expeditious conclusion.[25]

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[15] Oral order of the Trial Chamber at the conclusion of the proceedings on 12 December 2005.

[16] *Milošević*, Scheduling Order for a Hearing, 22 November 2005, p. 4.

[17] *Milošević*, Further Order on Future Conduct of the Trial Relating to Severance of One or More Indictments, 21 July 2004 ("July 2004 Order Relating to Severance").

[18] *Milošević*, Scheduling Order Concerning Recommencement of the Trial, 25 August 2004.

[19] *See Milošević*, Reasons for Decision on Assignment of Defence Counsel, 22 September 2004 ("Assignment of Counsel Decision").

[20] *Milošević*, "Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defence Counsel", 1 November 2004.

[21] *Milošević*, Prosecution Submission in Response to the Trial Chamber's 22 November 2005 "Scheduling Order for a Hearing" on Severing the Kosovo Indictment, 29 November 2005 ("Prosecution November 2005 Submission on Severance").

[22] *Ibid.*, paras. 42 *et seq.*; *Milošević*, Transcript, T. 46640–T. 46641 (29 November 2005).

[23] *Milošević*, Transcript, T. 46696 (29 November 2005).

[24] *Milošević*, Transcript, T. 46697–T. 46711 (29 November 2005).

[25] *Milošević*, Transcript, T. 46714–T. 46715 (29 November 2005).

9. The question of severance is closely related to the time that is likely to be necessary for the conclusion of the whole trial. The Trial Chamber will therefore consider the question of an extension of time before concluding on this matter.

III. APPLICATION BY ACCUSED FOR AN EXTENSION OF TIME

A. Background

10. On 5 October 2005, the Trial Chamber, considering that the Accused had exceeded two-thirds of his allotted 360 hours for the presentation of his defence case-in-chief,[26] decided that it was appropriate for the Accused to provide specific information concerning the witnesses he intended to call in the time remaining to him, and ordered him to provide the following information:

    1. The witnesses he intends to call during the remainder of his allotted time;
    2. Which remaining witnesses he intends to introduce by way of written evidence, whether by way of Rule 92 *bis* or Rule 89 (F); and
    3. The time he estimates each witness will take.[27]

11. On 17 October 2005, the Accused produced a list of 199 witnesses, additional to the 39 witnesses already called by that time, which amounted to over 450 hours of estimated evidence-in-chief, and none of whom were listed as witnesses to be presented pursuant to Rules 89(F) or Rule 92bis of the Rules of Procedure and Evidence ("Rules").[28]

B. Application for extension

12. In a Status Conference held on 20 October 2005, the Accused made an application for an extension of time.[29] The application was resisted by the Prosecution, which argued that the Accused had been repeatedly warned about the running of time, the failure to use testimony in written form, the leading of irrelevant evidence, as well as non-or insufficient-use of assigned

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[26] *Milošević*, Order Re-Scheduling and Setting the Time Available to Present the Defence Case, 25 February 2004 ("Order Setting Time") (Trial Chamber ordered that "the Accused should have the same time as the Prosecution had to present his case in chief", being 360 hours).

[27] *Milošević*, Order to the Accused to Produce the List of Witnesses He Intends to Call for the Remainder of His Case, 5 October 2005 ("October 2005 Order to Produce Witness List").

[28] The list was produced as an *ex parte* and confidential list, a redacted version of which was later provided to the Prosecution and Assigned Counsel. At a hearing on 18 October 2005, the Accused asserted that the estimated evidence-in-chief amounted to only 422 hours. *Milošević*, Transcript, T. 45315 (18 October 2005). The Trial Chamber notes this is inaccurate and that the estimate does not include time four named "hostile witnesses" on the list.

[29] *Milošević*, Transcript, T. 45531 (20 October 2005) ("JUDGE ROBINSON: Mr. Milosevic, you say it's reasonable and fair that more time should be accorded. Are you making an application for an extension of the time that was allocated to you? THE ACCUSED: [Interpretation] Well, I hope, Mr. Robinson, that that is quite obvious.").

counsel and other available resources. The Trial Chamber determined an application for an extension at that time to be premature,[30] and stated that the Accused would be required to organise his defence to enable him to present his witnesses in the time allocated to him, including using written evidence and the resources available to him.[31]

13. On 8 December 2005, a hearing took place on the question of an extension of time for the presentation of the defence case.[32] The Trial Chamber had already heard considerable argument from the Accused, Prosecution and Assigned Counsel during the 29 November hearing on severance. At the 8 December hearing, the Accused made an application for an additional 380 hours of time for questioning witnesses.[33] In doing so, he stated that this contemplated an average of two hours per witness for his proposed remaining 190 witnesses.[34] Assigned counsel buttressed the Accused's arguments by submitting that there was an "inequality in strength" between the Prosecution and Accused, and that this inequality had to be taken into account in determining the question of time allocated to the Accused to present his case.[35] The Prosecution argued that there should be no extension of the time allotted, unless the Trial Chamber concluded that the Accused were "disabled...because he *cannot* apply his intelligence and reason to the forensic situation in which he finds himself".[36] The Prosecution also argued that the Accused's estimate of 2 hours per witness was inconsistent with the reality of Defence witnesses to date, which averaged around six hours. The Prosecution also reiterated its arguments that the Accused has been put on considerable notice of the time limitations imposed, ordered to bring his evidence within that time and to use the facilities and resources available to him to achieve this.[37]

14. The Trial Chamber notes that 380 hours is 20 more than the 360 hours already allotted him to present his case. Taking into account time for examination, cross-examination and re-examination, as well as administrative matters, this would amount to an addition of a period approaching 18 months.

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[30] Transcript, T. 45537–45538 (20 October 2005).

[31] *Ibid.*

[32] This followed an oral order scheduling the hearing: *Milošević*, Transcript, T. 47050 (7 December 2005).

[33] *Milošević*, Transcript, T. 47223 (7 December 2005).

[34] Ibid.

[35] *Milošević*, Transcript, T. 47230.

[36] *Milošević*, Prosecution November 2005 Submission on Severance, *supra* note 21, para. 21 (*see* also paras. 24, 27); Transcript, T. 47231-47232.

[37] *See Milošević*, Submissions by the Prosecution on 29 November 2005 and 8 December 2005; Prosecution November 2005 Submission on Severance, *supra* note 21.

C. Calculation of time

15. The Trial Chamber determined as far back as February 2004 that the Accused should have the same time as the Prosecution was given to present his case in chief.[38] The Trial Chamber repeatedly emphasised the time allocated to the Accused to present and conclude his case, and regularly issued details of the use by the parties of the time allocated and provided for them to challenge any aspect of this calculation.[39] In its "Third Order on the Use of Time in the Defence Case and Decision on Prosecution's Further Submissions on the Recording and Use of Time During the Defence Case", issued on 19 May 2005, the Trial Chamber, while maintaining the period of 360 hours allocated to the Accused for the presentation of his defence case, revised the system for the allocation of time used in the Defence case, ordering:

> 1. The 360 hours, or 90 sitting days, allotted to the Accused in the ["Order Re-Scheduling and Setting the Time Available to Present the Defence Case" of 25 February 2004] for the presentation of his case-in-chief, i.e. for examination-in-chief and re-examination of Defence witnesses and which includes procedural issues arising directly therefrom, such as discussion of the admissibility of exhibits, remains unchanged.
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> 2. The revised Prosecution allocation is 216 hours or 54 sitting days, being 60 percent of the time allotted to the Accused, for cross-examination of Defence witnesses and procedural issues arising directly therefrom, such as discussion of the admissibility of exhibits.
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> 3. A separate record of time spent on administrative matters shall be kept, but shall not be counted against the time allotted to either Party. Administrative matters are those which do not fall into the category of procedural issues arising from the examination-in-chief, cross-examination or re-examination of Defence witnesses, including discussion of the admissibility of exhibits and other matters as determined by the Trial Chamber.

16. As at 30 November 2005, the Accused had used 75.35% of the 360 hours allotted to him. In that time, he has led almost entirely Kosovo-related evidence. The Trial Chamber has repeatedly had cause to warn the Accused not to waste time and that he needed to use the time

[38] Order Setting Time, *supra* note 26.

[39] *See* Order Setting Time, *supra* note 26; *Milošević*, Order Concerning the Time Available to Present the Defence Case, 10 February 2005 ("February 2005 Order on Time Available") (time used as of 24 January 2005); *Milošević*, Order Recording Use of Time Used In The Defence Case, 1 March 2005 ("First Use of Time Order") (confirming time used as of 24 January 2005); *Milošević*, Second Order Recording Use of Time in the Defence Case, 22 March 2005 ("Second Use of Time Order") (time used as of 10 March 2005); *Milošević*, Third Order on the Use of Time in the Defence Case and Decision on Prosecution's Further Submissions on the Recording and Use of Time During the Defence Case, 19 May 2005 ("Third Use of Time Order") (time used as of 18 May 2005); *Milošević*, Fourth Order Recording Use of Time in the Defence Case, 1 July 2005 ("Fourth Use of Time Order") (time used as of 30 June 2005); *Milošević*, "Use of Time During Defence Case; Period Ending 20 July 2005" (Internal Memorandum from Senior Legal Officer to Parties), 21 July 2005; *Milošević*, "Use of Time During Defence Case; Period Ending 31 August 2005" (Internal Memorandum from Senior Legal Officer to Parties), 6 September 2005; *Milošević*, "Use of Time During Defence Case; Period Ending 30 September 2005" (Internal Memorandum from Senior Legal Officer to Parties), 4 October 2005; *Milošević*, "Use of Time During Defence Case; Period Ending 31 October 2005" (Internal Memorandum from Senior Legal Officer to Parties), 1 November 2005; *Milošević*, "Use of Time During

available to address evidence in relation to all three indictments against him.[40] It has also repeatedly counselled and warned the Accused that he should make use of the facility of written testimony, pursuant to Rules 89(F) and 92*bis*, to enable him to lead a reasonable amount of evidence in the time allotted to him.[41]

D. Challenge to calculation of time

17. The Accused has orally challenged the calculation of the time that was provided to the Prosecution to lead its case, persistently referring to the Prosecution having 300 days in which to lead its case. At the hearing on 20 October 2005, the Chamber felt obliged to caution the Accused that he well knew the basis upon which the calculation was made and describe the

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Defence Case; Period Ending 30 November 2005" (Internal Memorandum from Senior Legal Officer to Parties), 8 December 2005.

[40] *See Milošević*, Transcript, T. 46975, T. 46991–T. 46995, T. 46700, T. 47003, T. 47005–T. 47006, T. 47018–T. 47020, T. 47033, T. 47039, T. 47041, T. 47045 (6 December 2005); T. 46020–T. 46022 (31 October 2005); T. 45529–T. 45538 (20 October 2005); T. 45314–T. 45320, T. 45330 (18 October 2005); T. 43335 (30 August 2005); T. 41938 (6 July 2005); T. 41741–41742, T. 41745 (5 July 2005); T. 41654, T. 41659–T. 41661 (1 July 2005); T. 41400–T. 41408 (29 June 2005); T. 41291, T. 41295–T. 41296 (22 June 2005); T. 41194 (21 June 2005); T. 40763 (15 June 2005); T. 40679 (8 June 2005); T. 39826–T. 39838, T. 39872–T. 39873, T. 39880 (25 May 2005); T. 39782–T. 39783 (19 May 2005); T. 39604, T. 39625– T. 39626, T. 39630 (18 May 2005); T. 39491–T. 39492 (17 May 2005); T. 38932 (4 May 2005); T. 38898 (27 April 2005); T. 38830–38836 (26 April 2005); T. 38445–T. 38448, T. 38450–T. 38452, T. 38464–T. 38467, T. 38476–38479 (14 April 2005); T. 38144–T. 38148 (8 April 2005); T. 37726–T. 37738 (23 March 2005); T. 37288–T. 37291 (14 March 2005); T. 37167 (9 March 2005); T. 37054–T. 37055 (8 March 2005); T. 36813–T. 3814 (28 February 2005); T. 36506–T. 36508, T. 36509–T. 36514 (23 February 2005); T. 36277–T. 36282, T. 36345–T. 36347 (16 February 2005); T. 36166–T. 36167 (15 February 2005); T. 36060–T. 36061 (14 February 2005); T. 35751–T. 35752, T. 35807 (26 January 2005); T. 35396 (20 January 2005); T. 35200–T. 35201 (18 January 2005); T. 35103–T. 35106 (13 January 2005); T. 34644–T. 34648 (16 December 2004); T. 34178 (2 December 2004); T. 34011 (1 December 2004); T. 33786 (24 November 2004); T. 33732–T. 33733 (23 November 2004); T. 33591–T. 33593, T. 33608–T. 33610 (22 November 2004); T. 33367–T. 33368 (16 November 2004); T. 33354–33358, T. 33360–T. 33364 (11 November 2004); T. 33040–T. 33050, T. 33053–T. 33057 (13 October 2004); T. 32837–T. 32839, T. 32883–T. 32884 (15 September 2004); T. 32724–T. 32725 (9 September 2004); T. 32356–T. 32359 (2 September 2004); T. 32128–T. 32133 (17 June 2004); T. 25941–T. 25942, T. 25959 (2 September 2003); T. 20788 (20 May 2003); T. 2506–2507 (8 April 2002). *See also Milošević*, List of Witnesses, 17 October 2005 (Defence Filing); October 2005 Order to Produce Witness List, *supra* note 27; *Milošević*, Third Use of Time Order, *supra* note 39; *Milošević*, Omnibus Order of Matters Arising out of Status Conference on the Defence Case, 22 April 2005; February 2005 Order on Time Available, *supra* note 39; *Milošević*, Order to Accused to Produce a List of his Next 50 Witnesses and Finalise Compliance with Rule 65*ter* Obligations Regarding Exhibits, 7 December 2004; *Milošević*, Order on Application by the Accused to add Four Witnesses to his Witness List, 3 December 2004; Assignment of Counsel Decision, *supra* note 19; *Milošević*, Order on the Modalities to be Followed by Court Assigned Counsel, 3 September 2004; *Milošević*, Further Order on Future Conduct of the Trial Concerning Assignment of Defence Counsel, 6 August 2004; *Milošević*, Order on *Amici Curiae* Motion in relation to Accused's Disclosure Obligations and Request for Additional Time, 28 July 2004; July 2004 Order Relating to Severance; *Milošević*, Order on Future Conduct of the Trial, 6 July 2004; *Milošević*, Order to the Accused on Compliance with Disclosure Obligations, 6 July 2004; *Milošević*, Order to the Accused Concerning Applications for Safe Conduct, 17 June 2004; *Milošević*, Omnibus Order on Matters Dealt with at the Pre–Defence Conference, 17 June 2004 ("Pre-Defence Omnibus Order"); *Milošević*, Order to the Accused on Protective Measures for Defence Witnesses, 27 May 2004; Order Setting Time, *supra* note 26; *Milošević*, Order of Further Instruction to the *Amici Curiae*, 6 October 2003; *Milošević*, Order Concerning the Preparation and Presentation of the Defence Case, 17 September 2003 ("Order on Defence Presentation").

[41] *See* T. 45530, T. 45535–T. 45537 (20 October 2005); T. 45314–T. 45319 (18 October 2005); T. 41654 (1 July 2005); T. 41295–T. 41296 (22 June 2005); T. 38445–T. 38448, T. 38450–T. 38452, T. 38464–T. 38467, T. 38476–T. 38482 (14 April 2005); T. 36813–T. 36814 (28 February 2005); T. 36509–T. 36514 (23 February 2005);

"continued reference to 300 days [as] mischievous if not malicious".[42] The Chamber ordered the Registry to provide the Accused with the same calculations upon which the Chamber based its determination that the Accused would have 360 hours to present his case.[43]

18. The Accused has, since receiving these calculations, twice asserted that he has been allocated some 70 days less than the Prosecution.[44] On the first occasion this was raised, the Chamber invited the Accused to put any application in writing. None was received. On the second occasion, it asked the Accused to explain what he meant. His response did not clarify the basis for his assertion. The Trial Chamber has again reviewed the figures provided to the Accused and has identified a few omissions in time taken in Prosecution witness testimony. Any shortfall will be a matter of a minor adjustment, which the Chamber will itself make to the time allotted to the Accused.

19. The Chamber has repeatedly explained to the Accused the methodology for calculating the allocation and use of time. The reasons for there being a greater number of witnesses led by the Prosecution and a greater number of actual court days being used during the Prosecution case, while the amount of time taken in evidence-in-chief remains the same, are that: (1) the Prosecution led a significant quantity of its evidence in writing; and, (2) the Accused and *Amici* used up approximately 55% of the overall time in cross-examination of Prosecution witnesses, whereas the Prosecution is allocated 37.5% of the overall time to cross-examine Defence witnesses.

E. Use by the Accused of Rules 89(F) and 92*bis*

20. The Accused had, until 18 October 2005, always maintained that the use of written statements in lieu of oral testimony was contrary to the principle of a public trial.[45] At the hearings on 18 October, 20 October and 8 December, the Accused made it clear that he also challenges his ability to prepare written testimony pursuant to Rules 89(F) and 92*bis* because he has insufficient time and resources to prepare such evidence. Assigned Counsel, at the hearing on 8 December, supported this argument, stating that all Defence teams find it difficult in relation to

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Milošević, Omnibus Order of Matters Arising out of Status Conference on the Defence Case, 22 April 2005; Pre-Defence Omnibus Order, *supra* note 40; Order on Defence Presentation, *supra* note 40.

[42] *Milošević*, Transcript, T. 45536 (20 October 2005).

[43] *Milošević*, Transcript, T. 45529 (20 October 2005).

[44] *Milošević*, Transcript, T. 47223–T. 47224 (8 December 2005); T. 45754 (26 October 2005).

[45] *See, e.g.*, *Milošević*, Transcript, T. 38477 (14 April 2005) ("In the total, as you yourself said, only one-third of the witnesses testified live, viva voce [in the Prosecution's case in chief]. I think that that goes to the detriment of the principle of the public nature of the trial and greatly so. ... However, the general public doesn't use that type of information, and it is only what is going on here live and what is stated here viva voce can truly be considered to be

the resources available to them to avail themselves of this form of evidence.[46] The Prosecution, on the other hand, argues that the Accused has the resources and, if at any time he considered that this was not the case, he could have requested assistance from the Chamber.[47]

21. The Chamber has stated above that it has repeatedly counselled and warned the Accused to make use of the facility of written testimony, pursuant to Rules 89(F) and 92*bis*.[48] The Prosecution used extensive written testimony in its case, as follows:

> Total number of Prosecution witnesses: **352**
> Total number of viva voce witnesses: **114 (32.4%)**
> Total number of Rule 92bis witnesses: **189 (53.7%)**
> With Cross-examination: 135 (38.4%)
> Without Cross-examination: 54 (15.3%)
> Total number of Rule 94bis witnesses: **20 (5.7%)**
> Total number of Rule 89(F) witnesses: **26 (7.4%)**
> Total number of Rules 92bis/89(F) witnesses: **3 (0.9%)**

Furthermore, the Accused has considerable resources at his disposal. As the Chamber stated, in its Assignment of Counsel Decision:

> This Trial Chamber, and the International Tribunal as a whole, has gone to great lengths to accommodate the right of this Accused to represent himself. The Chamber, for its part, has upheld his strongly expressed desire to represent himself, even in circumstances where his health required substantial adjournments. The Chamber accommodated the assignment of three legal associates to assist the Accused outside of the courtroom in the preparation of his cross-examination of Prosecution witnesses, and preparations for the presentation of his defence; it also expanded the role of *Amici Curiae* to undertake substantial work in the character of defence counsel of which the Accused has clearly availed himself. The Chamber ordered the Registrar to provide the Accused with adequate facilities to conduct his defence.[49] The Registrar has, in response, fully implemented these orders, making substantial facilities and resources available to the Accused so that he may have every opportunity to prepare and present his defence. Wide-ranging efforts have been made to assist the Accused. In the view of the Chamber, the time had come, however, to take further steps to ensure the fair and expeditious conclusion to this trial.[50]

To be added to the list of resources set out in the footnote [49], two Counsel and their team have been assigned to assist the Accused in the preparation and presentation of his case, and

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public and open to the public. So that you know my position full well. I would like witnesses who testify here to testify publicly.")

[46] *Milošević*, Transcript, T. 47227-47228.

[47] *Milošević*, Transcript, T. 47235-47236.

[48] *See supra* note 41 and accompanying text.

[49] With regard to facilities at UNDU, the Registry reported that the Accused is, *inter alia*, entitled to: receive and send uncensored mail and facsimile messages from and to his legal associates on weekdays; conduct unmonitored communications by telephone with his legal associates during all days of the week; receive scheduled visits of his legal associates during weekdays; make use of the photocopying facility of UNDU; review video evidence on VCR at UNDU; use his own portable computer in UNDU and, if he so wishes, install a printer to it. While appearing in court, the Accused is also allowed to access a privileged phone line during the trial breaks. The Accused is also able to send facsimiles and use photocopying facilities if urgently needed.

the Registry has also created a *Pro Se* Legal Liaison Office, staffed by several people to assist the Accused in preparing and presenting his defence.

22. It is apparent that the Accused has sufficient resources to make use of written testimony. The fact is that he has made no effort to do so. His submissions are not that he would like to present evidence in writing but has experienced the difficulties alluded to by Assigned Counsel. On the contrary, he relies on the misguided view of what is required for a trial to be public. Evidence presented in writing, subject to public scrutiny, is no less public than *viva voce* evidence.[51]

F. Is fairness achieved by equality of time?

23. Assigned counsel rightly submit that "[t]he question of the fairness of the time allocated to [the Accused] ... should be to enable him to present an effective defence".[52] The Chamber put to the Prosecution this argument that equality of time does not necessarily add up to fairness. The Prosecution response was that, if the Accused had made genuine efforts to lead his evidence in the time allocated then it would be possible to determine whether that equated to fairness or, as might be the case, the Accused should be entitled to some additional time to be given a fair opportunity to lead his case.[53]

24. Equality of time is one basis on which fair and equal treatment of parties in the presentation of their respective cases can be achieved. Had the Accused made a genuine effort to present his defence in the time allotted to him, by using the resources available and the means of presenting evidence available within the Rules, he might be able to demonstrate that equality of time does not in this instance achieve fairness. However, he has presented no basis on which the Trial Chamber could conclude that this is unfair or that some other allocation of time or other arrangement for the presentation of the Defence case is necessary to achieve fairness. The Trial Chamber is satisfied, on its experience of the Accused in this case,[54] that he has deliberately used the time available to him so that at the end of that time he would have led little or virtually no evidence on the Croatia and Bosnia parts of the case, thus seeking to provide a foundation for a request for additional time.

25. The proper test must be whether the Accused has been given a reasonable and adequate opportunity to present his case. The Trial Chamber considers, for all the reasons set out above,

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[50] Assignment of Counsel Decision, *supra* note 19, para. 65.

[51] As with *viva voce* testimony, written testimony may be subject to privacy to, for example, protect victims and witnesses.

[52] *Milošević*, Transcript, T. 47230 (8 December 2005).

[53] *Milošević*, Transcript, T. 47234ff (8 December 2005).

[54] *Supra* note 40.

that the Accused has failed to take a reasonable approach to the presentation of his case. The Chamber considered equality of time to be an appropriate measure of fairness when it allocated the time and continually reviewed the time used and counselled the Accused accordingly. On the basis of the present circumstances, that remains the position. On 12 February 2006, this trial will have been running for four years. The conclusion of the Accused's allotted time will take the trial well into March 2006. Once rebuttal and rejoinder cases are heard and concluding arguments made, it is likely the trial hearings would still not conclude until the middle of 2006. Judgement drafting will occupy a further substantial period. The Trial Chamber's fundamental obligation is to bring this trial to a fair and expeditious conclusion.

26. The Trial Chamber will therefore not allow the Accused any additional time, other than that to deal with minor adjustments to its initial calculation, and the Accused's application for additional time is denied. He is strenuously urged to move on to deal with his case on the Croatia and Bosnia indictments forthwith. The position might have been different had the Accused shown a willingness to act reasonably in the presentation of his case. Should there be a clear indication in the future that he makes proper and efficient use of time the Chamber might reconsider the position.

G. Conclusion on severance

27. In light of the foregoing decision, which should lead to the conclusion of the trial within the anticipated time scale, the Trial Chamber does not consider it appropriate to sever the Kosovo indictment.

PURSUANT TO Rules 54 and 73 *ter* of the Rules

HEREBY ORDERS AS FOLLOWS:

(1) The application of the Accused for a period of rest will be **GRANTED**. The trial, having adjourned on 12 December 2005, will recommence on 23 January 2006;

(2) The application of the Accused for an extension of the allotted time is **DENIED**.

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

Judge Robinson
Presiding

Dated this twelfth day of December 2005
At The Hague
The Netherlands

[Seal of the Tribunal]