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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 No.	IT-04-74-AR73.2
		Date:	4 July 2006
		Original:	English

IN THE APPEALS CHAMBER

Before: **Judge Fausto Pocar, Presiding**
Judge Mohamed Shahabuddeen
Judge Mehmet Güney
Judge Andrésia Vaz
Judge Theodor Meron

Registrar: **Mr. Hans Holthuis**

Decision: **4 July 2006**

PROSECUTOR

v.

Jadranko PRLIĆ
Bruno STOJIĆ
Slobodan PRALJAK
Milivoj PETKOVIĆ
Valentin ĆORIĆ
Berislav PUŠIĆ

DECISION ON JOINT DEFENCE INTERLOCUTORY APPEAL AGAINST THE TRIAL CHAMBER'S ORAL DECISION OF 8 MAY 2006 RELATING TO CROSS-EXAMINATION BY DEFENCE AND ON ASSOCIATION OF DEFENCE COUNSEL'S REQUEST FOR LEAVE TO FILE AN *AMICUS CURIAE* BRIEF

The Office of the Prosecutor:

Mr. Kenneth Scott
Mr. Daryl Mundis

Counsel for the Accused:

Mr. Michael Karnavas and Ms. Suzana Tomanović for Jadranko Prlić
Ms. Senka Nožica and Mr. Peter Murphy for Bruno Stojić
Mr. Božidar Kovačić and Ms. Nika Pinter for Slobodan Praljak
Ms. Vesna Alaburić for Milivoj Petković
Ms. Dijana Tomašegović-Tomić for Valentin Ćorić
Mr. Fahrudin Ibrišimović and Mr. Roger Sahota for Berislav Pušić

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 ("Tribunal");

BEING SEIZED OF the Interlocutory Appeal filed jointly by counsels for the six Accused ("Appellants") on 15 June 2006;[1]

NOTING the Oral Decision on Cross-Examination by Defence rendered by Trial Chamber III on 8 May 2006[2] and the Decision on Certification of Interlocutory Appeal rendered by Trial Chamber III ("Trial Chamber") on 29 May 2006;[3]

NOTING the Request for Leave to File an *Amicus Curiae* Brief filed by the Association of Defence Counsel on 20 June 2006;[4]

NOTING that the Prosecution responded to the Interlocutory Appeal on 22 June 2006;[5]

NOTING that the Appellants did not reply to the Prosecution's Response;

NOTING that the Request by the Association of Defence Counsel asks the Appeals Chamber to grant it leave to file, no later than 4 July 2006, an *Amicus Curiae* brief that would address the impact of the procedures at issue on the defence function, the rights of the accused and the likely conduct of all current and future trials now pending before the Tribunal;[6]

NOTING that Rule 74 of the Rules of Procedure and Evidence ("Rules") of the Tribunal provides that "a Chamber may, if it considers it desirable for the proper determination of the case, invite or grant leave to a State, organization or person to appear before it and make submission on any issue specified by the Chamber";

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[1] Joint Defence Interlocutory Appeal Against the Trial Chamber's Oral Decision of 8 May 2006 Relating to Cross-Examination by Defence, 15 June 2006 ("Interlocutory Appeal").
[2] Oral Decision on Cross-Examination by Defence, 8 May 2006, T. 1475-1476 and 1485-1486 ("Impugned Decision").
[3] Décision relative à la demande de certification de l'appel déposée conjointement par les six Accusés portant sur la Décision orale du 8 mai relative à la durée du contre-interrogatoire par la Défense, 29 mai 2006.
[4] Association of Defence Counsel's Request for Leave to File an *Amicus Curiae* Brief Regarding Limitations on Cross-Examination by the Defence, 20 June 2006 ("Request by the Association of Defence Counsel").
[5] Prosecution Response to Joint Defence Interlocutory Appeal Against the Trial Chamber's Decision Relating to Cross-Examination by Defence, 22 June 2006 ("Response"); the Prosecution filed a "Corrigendum to Prosecution Response to Joint Defence Interlocutory Appeal Against the Trial Chamber's Decision Relating to Cross-Examination by Defence" on 23 June 2006.

FINDING that in the determination of this Interlocutory Appeal, it is not necessary for the Appeals Chamber to receive submissions from the Association of Defence Counsel;

NOTING that in their Interlocutory Appeal, the Appellants argue that "the Trial Chamber abused its discretion and committed discernible errors by:

(a) severely restricting the fundamental right of the Accused to cross-examine the witnesses against them;

(b) applying rigid time-constraints in preference to using less restrictive methods of control;

(c) effectively requiring the Accused to exercise the right of cross-examination as a group rather than individually, regardless of conflicts of interest, and to bargain with each other for time to cross-examine;

(d) preventing Defence Counsel from affording effective assistance of counsel to the Accused; and

(e) failing to exercise judicial independence by subjugating the right of the Accused to a fair trial to the political and economic pressures imposed upon the Trial Chamber by the UN Security Council through the Completion Strategy."[7]

NOTING that in its Response, the Prosecution opposes the Interlocutory Appeal, arguing that the Decision by the Trial Chamber establishes "a practical and flexible guideline that ensures a fair and expeditious trial, discourages unfocused and irrelevant cross-examination, and facilitates the scheduling of witnesses who must travel internationally to testify before the International Tribunal",[8] that thus far, the application of the rule has been fair and functional and that the Trial Chamber has in fact granted additional time to the Appellants where good cause was shown;[9]

CONSIDERING that the right to cross-examine witnesses is a fundamental right recognized under international human rights law[10] and restated in Article 21(4) of the Statute of this Tribunal;

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[6] Request by the Association of Defence Councel, para. 19.
[7] Interlocutory Appeal, para. 1.
[8] Response, para. 1.1.
[9] *Ibid.*, para. 1.3.
[10] Article 14(3)(e) International Covenant on Civil and Political Rights; article 6(3)(d) European Convention on Human Rights; article 8(2)(f) American Convention on Human Rights; *see* also *e.g.* Human Rights Committee General Comment No.13 of 1984, para. 12; *Peart and Peart v. Jamaica*, Human Rights Committee, Communication No. 482/1991, UN Doc. CCPR/C/54/D/482/1991, 24 July 1995, paras 11.4-11.5; *Saïdi v. France*, European Court of Human Rights, Application No. 1933/1992, Judgement, 23 August 1993, paras 43-44; *van Mechelen v. The Netherlands*, European Court of Human Rights, Application No. 55/1996, Judgement, 18 March 1997, para. 51; *Krasniki v. The Czech Republic*, European Court of Human Rights, Application No. 51277/99, Judgement, 28 February 2006, para. 75; *Kostovski v. The Netherlands*, European Court of Human Rights, Application No. 1145/85, Judgement, 20 November

CONSIDERING however, that the Trial Chamber "shall exercise control over the mode and order of interrogating witnesses" in order to facilitate the "ascertainment of truth" and to "avoid needless consumption of time";[11]

CONSIDERING that the Trial Chamber enjoys therefore considerable discretion in setting the parameters of cross-examination and in outlining the exercise of this right by the Defence;[12]

CONSIDERING therefore, that in interlocutory appeals dealing with trial management rulings, the Appeals Chamber shall afford deference to the Trial Chamber's discretion[13] and the examination by the Appeals Chamber shall be limited to establishing whether the Trial Chamber has fallen into error or has abused its discretionary power;[14]

NOTING that in the Impugned Decision, the Trial Chamber has 1) allocated to each of the Defence counsels one sixth of the time allocated to the Prosecution unless the Defence reaches an agreement according to which some of its members will put questions on behalf of the others;[15] and 2) ruled that, if a witness' testimony bears specifically on the responsibility of one accused, the time for cross-examination may be allocated differently, and the counsel for that accused should lead that cross-examination or use up the majority of the time allotted to Defence, while the other Defence counsels will share among them the remaining time;[16]

1989, para. 41; *P.S. v. Germany*, European Court of Human Rights, Application No. 33900/96, Judgement, 20 December 2001, para. 21.

[11] *See* Rule 90(F) of the Rules.

[12] *Milošević v. Prosecutor*, Case No. IT-02-54-AR73.7, Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defence Counsel, 1 November 2004 ("*Milošević* Decision on the Assignment of Defence Counsel") para. 9; *Prosecutor v. Zdravko Tolimir, Radivoje Miletić & Milan Gvero*, Case No. IT-04-80-AR73.1, Decision on Radivoje Miletić's Interlocutory Appeal Against the Trial Chamber's Decision on Joinder of Accused, 27 January 2006 ("Decision on Radivoje Miletić's Interlocutory Appeal") para. 4.

[13] Decision on Radivoje Miletić's Interlocutory Appeal, para. 4: "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.'", *citing Milošević* Decision on the Assignment of Defence Counsel, para. 9.

[14] *Prosecutor v. Milošević*, Case Nos. IT-99-37-AR73, IT-01-50-AR73, and IT-01-51-AR73, Reasons for Decision on Prosecution Interlocutory Appeal from Refusal to Order Joinder, 18 April 2002, para. 4: "Where an appeal is brought from a discretionary decision of a Trial Chamber, the issue in that appeal is not whether the decision was correct, in the sense that the Appeals Chamber agrees with that decision, but rather whether the Trial Chamber has correctly exercised its discretion in reaching that decision.", *see* also paras 5-6; *see* also *Milošević* Decision on the Assignment of Defence Counsel, para. 10; Decision on Radivoje Miletić's Interlocutory Appeal, para. 6 citing *Prosecutor v. Mićo Stanišić*, Case No. IT-04-79-AR65.1, Decision on Prosecution's Interlocutory Appeal of Mićo Stanišić's Provisional Release, 17 October 2005, para. 6.

[15] Impugned Decision, T. 1474-1476.

[16] *Ibid.*, T. 1485.

CONSIDERING that the Impugned Decision does not impose rigid time limits on the cross-examination of witnesses and conforms with well-established practice of the Tribunal, in particular, since the Trial Chamber reserves its power to modify the time allowed for cross-examination as necessary and allows the Appellants to adjust the specified time allocation by agreement among themselves;[17]

FINDING therefore that the Trial Chamber adopted a sufficiently flexible approach, which preserves the right of cross-examination by each of the Defence counsels and complies with the right to cross-examine witnesses as stipulated under Article 21(4) of the Statute;

CONSIDERING furthermore, that time and resource constraints exist in all judicial institutions and that a legitimate concern in this trial, which involves six accused, is to ensure that the proceedings do not suffer undue delays and that the trial is completed within a reasonable time, which is recognized as a fundamental right of due process under international human rights law;[18]

FINDING in this respect, that the Impugned Decision complies with Rule 90(F) of the Rules;

FINDING therefore that the existence of a discernible error or of an abuse of its discretionary power by the Trial Chamber has not been established;

ON THE BASIS OF THE FOREGOING,

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[17] *Prosecutor v. Milan Martić*, Case No. IT-95-11-T, Decision Adopting Guidelines on the Standards Governing the Presentation of Evidence and The Conduct of Counsel in Court, 13 April 2006, Annex A, para. 11: "In the interest of ensuring fair and expeditious conduct of the trial proceedings, the parties are requested to adhere to the principle that the time for cross-examination of a witness should not exceed the time allotted for the examination-in-chief of that witness, unless there are particular circumstances requiring that the cross-examination be extended"; *see* also *Prosecutor v. Goran Jelisić*, Case No. IT-95-10-T, T. 1063, 7 September 1999; *Prosecutor v. Mladen Naletilić and Vinko Martinović*, Case No. IT-98-34-T, T. 12248, 10 June 2002 (closed session); *Prosecutor v. Momcilo Krajisnik*, Case No. IT-00-39-T, T. 2652, 23 April 2004, where the Trial Chamber indicated as a guideline that the cross-examination of witnesses should take approximately 60 percent of the time allocated for the examination-in-chief; *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-T, 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, p. 1, where the judges ordered that 60 percent of the time allocated to the Accused to present his case-in-chief would be allocated to the Prosecution for cross-examination during the Defence case.

[18] Article 14(3)(c) International Covenant on Civil and Political Rights; Article 6.1 European Convention on Human Rights; Article 8(1) American Convention on Human Rights; *see* Human Rights Committee General Comment No.13 of 1984 para. 10: "Subparagraph 3(c) provides that the accused shall be tried without undue delay. This guarantee relates not only to the time by which trial should commence, but also the time by which it should end and judgement be rendered: all stages must take place 'without undue delay'. To make this right effective, a procedure must be available in order to ensure that the trial will proceed 'without undue delay', both in first instance and on appeal."; *Moreira de Avezedo v. Portugal*, European Court of Human Rights, Application No. 11296/90, Judgement, 23 October 1990, para. 74: "By requiring that cases be heard 'within a reasonable time', the Convention stresses the importance of

DENIES the Request by the Association of Defence's Counsel and,

DISMISSES the Interlocutory Appeal.

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

Done this 4th day of July 2006,
At The Hague,
The Netherlands.

Fausto Pocar,
Presiding Judge

[Seal of the International Tribunal]

administering justice without delays which might jeopardise its effectiveness and credibility"; *see* also *H. v. France*, European Convention on Human Rights, Application No. 10073/82, Judgement, 24 October 1989, para. 58.