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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-00-39-T

Date: 16 August 2006

Original: English

IN TRIAL CHAMBER I

Before: Judge Alphons Orie, Presiding
Judge Joaquín Martín Canivell
Judge Claude Hanoteau

Registrar: Mr Hans Holthuis

Decision of: 16 August 2006

PROSECUTOR

v.

MOMČILO KRAJIŠNIK

# REASONS FOR DECISION DENYING DEFENCE MOTION FOR TIME TO CALL ADDITIONAL WITNESSES

Office of the Prosecutor

Mr Mark Harmon
Mr Alan Tieger

Counsel for the Defence

Mr Nicholas Stewart, QC
Mr David Josse

1. The Chamber was seised of the "Defence motion for time to call further Defence witnesses" ("Motion"), filed on 30 June 2006. On 14 July 2006, the Chamber orally denied the motion and announced that written reasons would follow.[1] The reasons are set out below.

## I. Submissions of the parties

2. In its Motion, the Defence sought a further 57.5 hours for evidence-in-chief in order to call additional Defence witnesses as well as consequential adjustments to the schedule of this case.[2] The witnesses which the Defence wished to call were named in the "List of witnesses the Defence intended to call between 30 June 2006 and end of trial (with summaries under Rule 65 ter (G)(i)(b))" ("List of witnesses") filed on 30 June 2006.

3. The Motion argues that the Defence did not have sufficient time to present its case. It asserts that the time for the Defence case was allocated as 60 per cent of the time taken by the Prosecution case. It submits that the 60 per cent allocation was too low and that it ought to be adjusted upwards to a minimum of 70 per cent.[3] The difference between the hours actually spent on the examination-in-chief of the Defence case (138.5 hours, as calculated by the Defence) and the hours which amount to 70 per cent of the 280 hours taken by the Prosecution case for examination-in-chief (namely, 196 hours) is 57.5 hours. This is the additional time the Defence seeks for the purpose of calling additional witnesses.

4. The Defence submits that an overall time allowance for the Defence case may be imposed, but this should relate to the hours which are actually spent on the examination-in-chief of its witnesses.[4]

5. The Defence asserts that the 60 per cent allocation to the Defence is unreasonable because a large proportion of that time was inevitably consumed by the examination-in-chief of Mr Krajišnik. The Accused was heard last in sequence for the Defence. According to the Defence, the Accused is entitled to call witnesses to follow him for the purpose of corroborating his testimony.[5]

6. The Defence recognizes that there have been numerous failures on its part to meet timetables, deadlines, and other requirements relating to the Defence case. The root cause of this, it claims, has been a policy of the Trial Chamber throughout the trial to set

[1] T. 27214.
[2] Motion, paras 3, 41.
[3] Motion, paras 12-14.
[4] Motion, para. 9.
[5] Motion, para. 12.

unmanageable timetables and inflexible deadlines, especially with regard to the finishing date of the case.[6] It states that "the faltering presentation of the Defence case" was a result of limited resources and insufficient time available to the Defence, which disabled the Defence from calling witnesses even up to the 60 per cent allocation.[7]

7. According to the Defence, the Chamber, in order to expedite the commencement of the Defence case, dispensed with the requirement that the Defence supply to the Chamber and the Prosecution the material set out in Rule 65 ter of the Rules,[8] and thus did "not operate Rule 65 *ter* (G) and 73 *ter* in letter or spirit".[9]

8. The Prosecution responded to the Defence motion on 10 July 2006.[10] The response maintains that the Defence analysis is flawed, as it fails to take into consideration extensions of time allotted to the Defence and the freedom afforded to the Defence to determine how to divide its time between out-of-court preparation and in-court presentation of its case.[11]

9. The Prosecution states that there is no "mathematical formula" according to which time is allotted and evidence is heard, but rather that the Chamber is required to give the Defence a fair opportunity to present its case. According to the Prosecution, the Chamber is entitled to take into account the relevance of evidence received and the negative impact of adjournments on the right to trial of other accused without undue delay.[12]

10. The Prosecution submits that the continuing refusal of the Accused to pay his Defence team his Registry-assessed contribution has kept his team underfunded and has delayed the preparation of the Defence case. This decision undermines the Accused's claims for additional time, according to the Prosecution.[13]

11. The Defence replied to the Prosecution response on 11 July 2006.[14] The reply rejects the argument that the Chamber can take into account the relevance of evidence received when deciding on requests for additional time. It stresses that, despite certain judicial powers of the Chamber in relation to the Prosecution and the Defence cases, it remains the right of the Defence to select witnesses it deems relevant.[15]

[6] Motion, paras 16, 17, 19.
[7] Motion, para. 38.
[8] Motion, paras 34-36.
[9] Motion, para. 32.
[10] Prosecution's response to Defence motion for time to call further defence witnesses ("Prosecution response"), 10 July 2006.
[11] Prosecution response, para. 8.
[12] Prosecution response, para. 20.
[13] Prosecution response, paras 17-19.
[14] Defence Reply to Prosecution's response to defence motion for time to call further defence witnesses ("Defence reply"), 11 July 2006.
[15] Defence reply, para. 1 (f).

12. Moreover, the Defence states that many of the limitations on defence work are a result of the inability of the two counsel to keep up with the non-delegable work, and since even the full payment by Mr Krajišnik of his assessed contribution would not have enabled the hiring of a third counsel, the question of the Accused's financial contribution should not be considered.[16]

## II. Case overview

13. The Chamber notes that a detailed procedural history of the scheduling of this case can be found in the Chamber's oral decisions of 27 January 2006,[17] and 23 May 2006,[18] and its written decision of 27 February 2006.[19]

14. Below the Chamber will give a brief overview of the case, including time totals and other important figures relating to the different phases of the case.

15. The Accused made his initial appearance before the Tribunal on 7 April 2000 and has been represented by counsel ever since. The Accused's first defence team was dissolved in the second half of 2003, when the then lead counsel was suspended from practice. The first defence team billed over 26,000 hours for case preparation.[20] On 30 July 2003, a new lead counsel was assigned to the Accused and, on 16 September 2003, a new co-counsel.

16. The trial commenced on 3 February 2004. During the Prosecution phase, 93 witnesses were heard. A total of 280 court hours were spent on examination-in-chief, and a total of 170.4 hours on cross-examination (out of an overall total of 505 testimony hours).

17. There were 189 sitting days during the Prosecution phase and 166 non-sitting days (not counting weekends, public holidays, and court recesses). The relatively high number of non-sitting days was in large part due to the grant of Defence requests to decelerate the pace of the trial in order for the Defence to have more time for preparation.[21]

[16] Defence reply, para. 1(e).
[17] T. 20640.
[18] T. 24599-605.
[19] Decision on defence's Rule 74 motion; amended trial schedule, 27 February 2006.
[20] Decision on (second) Defence motion for adjournment, 4 March 2005, para. 4.
[21] Between the commencement of the Prosecution case on 3 February 2004 and 12 April 2004, there were only 18 instead of the 49 available sitting days. Upon request of the Defence, the Chamber ordered an adjournment of the trial for four weeks, from 26 April to 24 May 2004, which meant 17 extra non-sitting days, during which period the parties were encouraged to explore the possibility of expanding their agreement on facts and other matters (Scheduling order, 23 April 2004). Another adjournment for the same purpose was granted from 28 June 2004 to 12 July 2004, leading to 12 non-sitting days (T. 4427). On 16 July 2004, the Chamber orally denied a Defence motion for adjournment of the trial and ordered a hearing schedule until end of October which included five non-sitting days in August and nine non-sitting days in September 2004 (T. 4515 ff.).

18. The Defence case was set to start on 12 September 2005.[22] This effectively provided the Defence with another 14 non-sitting days after the Rule 98 bis judgement, which was delivered 19 August 2005. Following two further Defence requests for adjournment, the Chamber granted an adjournment of four weeks in total so that the Defence case did not start until 10 October 2005.[23]

19. During the Defence phase, 25 witnesses, including Mr Krajišnik, were heard. A total of 139.1 hours[24] were spent on examination-in-chief, and a total of 88 hours on cross-examination (out of a total of 294 testimony hours). The examination-in-chief of Mr Krajišnik took 59.7 hours and cross-examination 31.8 hours. Another 24.6 hours during Mr Krajišnik's testimony were taken up by judges' questions, re-examination, and re-cross-examination. Overall, 116.1 hours were spent on the testimony of Mr Krajišnik.

20. During the Defence phase, there were 106 sitting days. Forty of these days were spent on the testimony of Mr Krajišnik. Between the commencement of the Defence case on 10 October 2005 and the last day of Mr Krajišnik's testimony, on 22 June 2006, there were 52 non-sitting days (not counting weekends, public holidays and court recesses). If one were to count non-sitting days from the date on which the Defence case was originally scheduled to start (12 September 2005), there were 73 non-sitting days. If one were to count from the end of the Prosecution case, there were 90 non-sittings days.

21. In the period 23 June 2006 through 14 July 2006, six Chamber witnesses were heard. The examination-in-chief by the Judges took 20.8 hours, cross-examination by the Prosecution took 5.4 hours, and cross-examination by the Defence took 6.7 hours. In this phase of the case, there were 13 sitting days and 3 non-sitting days.

22. In total, 124 witnesses testified in this case. A total of 831 hours was spent on their testimony. There were, in addition, 97 witnesses whose evidence was introduced through Rule 92 bis of the Rules without cross-examination.

23. Furthermore, more than 3,800 Prosecution exhibits,[25] more than 330 Defence exhibits,[26] and 27 Chamber exhibits are admitted into evidence.

[22] Scheduling order (period April 2005 to delivery of judgement), 26 April 2005.
[23] Order pursuant to Rule 65 ter (G) with consequential variation of trial schedule, 26 August 2005; Decision on Defence motion to further delay the commencement of Defence case, 28 September 2005.
[24] A total of 139.1 hours was spent on examination-in-chief in the Defence case, not 138.5 hours as calculated by the Defence.
[25] By 14 August 2006, 5 Prosecution exhibits were still pending admission.
[26] By 14 August 2006, 6 Defence exhibits were still pending admission.

24. From the commencement of the Prosecution phase on 3 February 2004 until the end of the Chamber-witness phase on 14 July 2006, there were 308 sitting days and 259 non-sitting days (not counting weekends, public holidays and court recesses).

25. The Chamber has received a vast amount of evidence presented by both the Prosecution and the Defence, as well as evidence called by the Chamber pursuant to Rule 98 of the Rules. Witnesses included experts, members of the Bosnian-Serb leadership, members of the Bosnia-Herzegovina authorities, members of international organizations, and witnesses of different nationalities testifying about the events in indictment and non-indictment municipalities. The documentary evidence is comprehensive in its breadth, covering the operations of Republika Srpska as well as of other organizations and entities interacting with Republika Srpska during the indictment period and beyond.

## III. Legal framework

26. The Defence submits its present motion pursuant to Rule 73 ter (E) of the Rules and argues that the Chamber did not follow Rule 73 ter in letter or spirit. The Defence asserts that the decisions and orders of the Chamber relating to scheduling and time allocation have not provided the Defence with adequate time to present its case and have produced an unfair result.

27. Article 20(1) of the Tribunal's Statute reads:

> The Trial Chamber shall ensure that the trial is fair and expeditious and that proceedings are conducted in accordance with the rules of evidence and procedure, with full respect of the rights of the Accused and due regard for the protection of victims and witnesses.

28. Article 21(2) of the Statute provides that "in the determination of charges against him, the accused shall be entitled to a fair and public hearing, subject to Article 22 of the Statute."

29. Moreover, Article 21(4)(b) of the Statute provides that the Accused should be entitled to minimum guarantees, among them "to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing."

30. Rule 73 ter of the Rules reads:

> A) Prior to the commencement by the defence of its case the Trial Chamber may hold a Conference.

(B) In the light of the file submitted to the Trial Chamber by the pre-trial Judge pursuant to Rule 65 ter (L)(ii), the Trial Chamber may call upon the defence to shorten the estimated length of the examination-in-chief for some witnesses.

(C) In the light of the file submitted to the Trial Chamber by the pre-trial Judge pursuant to Rule 65 ter (L)(ii), the Trial Chamber, after having heard the defence, shall set the number of witnesses the defence may call.

(D) After commencement of the defence case, the defence may, if it considers it to be in the interests of justice, file a motion to reinstate the list of witnesses or to vary the decision as to which witnesses are to be called.

(E) After having heard the defence, the Trial Chamber shall determine the time available to the defence for presenting evidence.

(F) During a trial, the Trial Chamber may grant a defence request for additional time to present evidence if this is in the interests of justice.

## IV. Discussion

31. The principle of fairness is reflected in Article 20(1) and Article 21(2) of the Statute, but also in the guarantee, laid down in Article 21(4)(b) of the Statute, that the Accused has adequate time and facilities to prepare his case. When seised with a request for time additional to that allotted to the party, the Chamber must consider whether the time allocation gave the party a fair opportunity to prepare and present its case. If the Chamber comes to the conclusion that a fair opportunity was not given, the Chamber must grant the Defence's request for additional time.

32. The adequacy of time allocation is not a question of finding the correct mathematical formula. The fact that a defence case took 60 or 70 or a greater percentage of the time taken by the Prosecution does not of itself answer the question whether time was adequately allocated to the Defence.

33. The argument of the Defence that only time actually spent by the Defence on examination-in-chief may be considered when assessing the adequacy of allocated time is without merit. The actual consumption of time in court is one factor to consider. Other factors to consider are the overall allocations of time to the Defence in which to prepare and present its case, and the actual time spent out of court on the preparation of the Defence case.

34. The Chamber must also consider the relevance of the additional evidence that the Defence wishes to present. In particular, it must consider whether the evidence is of such relevance as to support a grant of additional time.

35. Furthermore, when considering a Defence's application for more time, the Chamber must take into consideration the interests of the proper administration of justice, which is not served by excessive postponements of the proceedings. The Chamber shall not allow unnecessary further time at the expense of other accused awaiting trial.

36. The Chamber may also take into account the Accused's failure to pay his assessed contribution to his Defence team, although this is of relatively minor significance in the present context.

37. The Chamber considers that it has given the Defence a fair opportunity to prepare and present its case and that it is not necessary to grant additional time. There are four main considerations which will be explained in detail below: (1) The Chamber showed great flexibility on time issues and accommodated several Defence requests. It granted the Defence a large amount of time in which to prepare and present the case. (2) The Chamber was lenient in the enforcement of Rule 65 ter of the Rules, especially in relieving the Defence of some of its Rule 65 ter obligations. (3) The fact that the Accused's testimony consumed a considerable proportion of the actual time spent in court, does not affect the principle of adequacy of allocated time for the Defence. (4) The Chamber finds that it has heard and received a sufficient amount of evidence to decide this case fairly.

*1. Flexible time management by the Chamber*

38. During the Rule 65 ter conference on 23 August 2005, the Chamber allotted to the Defence an amount of time it deemed appropriate for a fair presentation of its case. The Chamber explained that, in its experience, an allocation of time to the Defence of 60 per cent of the time taken by the Prosecution was a reasonable guideline.[27] Nethertheless, the Chamber proceeded to allot an amount of time closer to 70 per cent of the time taken by Prosecution.[28]

39. As mentioned above, on 26 April 2005, the Chamber initially ordered that the Defence case should start on 12 September 2005. The Chamber then decided to postpone the commencement of the Defence case to 3 October 2005 because the Defence had informed the Chamber that it needed more time for preparation.[29] On 26 September 2005, the Defence filed

[27] Rule 65 ter conference, 23 August 2005, T. 193-5.
[28] Rule 65 ter conference, 23 August 2005, T. 194.
[29] Order pursuant to Rule 65 ter (G) with consequential variation of trial schedule, 26 August 2005.

another motion for further postponement of the commencement of the Defence case. The Chamber granted this motion in part and postponed the commencement of the Defence case for another week.[30] Due to these postponements the Defence was provided with four additional weeks for the preparation of its case.

40. After the commencement of the Defence case, the Defence submitted numerous requests for postponement and adjournment in order to have more time for the preparation of its case. The Chamber recalls its decision of 18 November 2005 which granted the Defence seven additional weeks to prepare and present its case.[31] The Chamber left it to the Defence to decide how to divide this additional time between preparation and presentation of evidence, on the condition that the Defence case would in any event close by 28 April 2006. The Defence decided to spend a big proportion of the additional time on the preparation of its case.

41. At a hearing on 23 February 2006, the Defence informed the Chamber that the Defence was unable to meet the deadline of 28 April 2006 for closing the defence case and requested an uninterrupted block of out-of-court time until 1 May 2006 for further preparation.[32] On 27 February 2006, the Chamber granted a one-month extension of the deadline as a "final extension"[33] for the Defence.

42. The Chamber, moreover, recalls its decision of 24 March 2006 in which it granted the Defence four additional days for the preparation of the examination-in-chief of Mr Krajišnik.[34]

43. The closing date of the Defence case was eventually pushed back 15 weeks, from the original deadline 10 March 2006 to 22 June 2006.

44. In summary, the Chamber showed flexibility as to the date of commencement of the Defence case, the actual proportion of time allotted to the Defence, and the finishing date of the Defence case. It granted the Defence a large amount of time in which to prepare and present its case and allowed the Defence to determine how to allocate this time. The Defence opted to spent a considerable amount of the time allotted on out-of-court preparation, as the above-mentioned high number of non-sitting days shows (73 non-sitting days, if calculated from the scheduled start of the Defence case, or 90 non-sittings days, if calculated from the end of the Prosecution case, not counting weekends, public holidays and court recesses).

[30] Decision on Defence motion to further delay the commencement of the Defence case, 28 September 2005.
[31] T. 18799-800.
[32] T. 20885-6.
[33] Decision on defence's rule 74 bis motion; amended trial schedule, p. 11.
[34] New trial schedule and decision on Bjelica, 24 March 2006.

*2. Flexible management of Rule 65 ter obligations*

45. During the Rule 65 ter conference of 23 August 2005, the Defence counsel informed the Chamber that it would not be able to submit a list of witnesses and exhibits before the end of September 2005.[35] On 26 August 2005 the Chamber accommodated the Defence's request and ordered the Defence to meet its Rule 65 ter obligations no later than 26 September 2005.[36] The Defence, however, was not able to meet its obligations by that day, and filed a motion for extension of time for filing the Rule 65 ter material. The Chamber set a new deadline (3 October 2005) for the submission of a witness list and ordered the Defence to file this material in as complete a form as possible. It also ordered that Defence exhibits which could not be provided to the Prosecution by 3 October 2005 in accordance with the Rules should be provided to the Prosecution at the earliest opportunity thereafter.[37] The Defence submitted a list of witnesses on 4 October 2005,[38] five days before the Defence case started on 10 October 2005. The list was inadequate with regard to the large number of witnesses (more than 200 witnesses). It contained largely inadequate summaries of expected witness testimony and was unrealistic and unhelpful as a planning instrument.

46. On 27 January 2006, the Chamber again expressed its concerns with regard to the witness list and advised the Defence to shorten it.[39] The Defence neither sufficiently shortened its list of witnesses, nor did it inform the Chamber about when the Accused would be scheduled to testify as a witness. As late as 8 February 2006, the Defence filed an amended list which still contained as many as 69 witnesses.[40] Since the number of witnesses that the Defence wished to call according to the amended list amounted to an estimated time of 531 hours examination-in-chief, going far beyond the time frame allotted to the Defence case, the Chamber ordered the Defence to file a witness list arranged in the order of preference, according to the importance and relevance of each witness.[41] On 27 February 2006, the Chamber ordered the Defence to call its witnesses, beginning with its ten priority witnesses. It also ordered the Defence to reduce the estimated times it had allotted to each of its witnesses and to disclose the revised Rule 65 ter summaries and exhibit lists.[42] These orders left it entirely up to the Defence to decide the importance and relevance of the witnesses.

[35] Rule 65 ter conference, 23 August 2005, T. 209.
[36] Order pursuant to Rule 65 ter (G) with consequential variation of trial schedule, 26 August 2005.
[37] Decision on Defence motion to further delay the commencement of the Defence case, 28 September 2005.
[38] Defence filing pursuant to Rule 65 ter (G)(i) of the Rules of Procedure and Evidence, 4 October 2005.
[39] T. 20640.
[40] Defence 65 ter summaries for Defence Witnesses on February 2006. Amended list, 8 February 2006.
[41] Order on prioritizing Defence witnesses, 9 February 2006.
[42] Decision on Defence's rule 74 bis motion; amended trial schedule, 27 February 2006.

47. In summary, the Chamber showed flexibility with regard to the management of Rule 65 ter obligations and granted the Defence "unprecedented and ample leeway",[43] considering that the Defence had not provided the Chamber with the necessary information about the order of the presentation of the Defence case.

### *3. The Accused's testimony*

48. The Defence decided to call the Accused as a witness and to spend a large number of court days on his testimony. Under Rule 85(C) of the Rules, an accused who appears as a witness in his own case is considered a Defence witness. The examination of the Accused was therefore a part of the Defence case, and is not considered a separate phase of the trial requiring a separate allocation of time.

49. The Chamber does not find any merit in the assertion that the Accused must be given a reasonable opportunity for corroborative evidence, in effect that he is entitled not to testify as the last Defence witness. Rule 85(C) of the Rules does not specify at what stage of the Defence case an accused may appear. It is the task of the Defence to organize the presentation of the evidence during the Defence phase. Had the Defence considered it necessary to present evidence corroborating the testimony of the Accused, it should have called the Accused to testify earlier than it did.

### *4. Comprehensiveness of evidence*

50. The Chamber has carefully analysed the summaries annexed to the List of witnesses. It finds that they do not reveal any significant field of evidence which has not already been covered or without which it would be unfair to decide the case. The persons named in the list can be expected to give more evidence on topics on which the Chamber has already received a large amount of evidence.

51. Since the summaries do not reveal unexplored fields of evidence or evidence of high relevance, the Chamber finds that they do not support a grant of additional time.

52. For the reasons given above, the Chamber denied the motion.

[43] T. 24600.

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

Judge Alphons Orie
Presiding Judge

Dated this 16h day of August 2006
At The Hague,
The Netherlands

**[Seal of Tribunal]**