



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-05-87-T

Date: 15 September 2006

Original: English

IN THE TRIAL CHAMBER

Before: Judge Iain Bonomy, Presiding
Judge Ali Nawaz Chowhan
Judge Tsvetana Kamenova
Judge Janet Nosworthy, Reserve Judge

Registrar: Mr. Hans Holthuis

Decision of: 15 September 2006

PROSECUTOR

v.

**MILAN MILUTINOVIĆ
NIKOLA ŠAINOVIĆ
DRAGOLJUB OJDANIĆ
NEBOJŠA PAVKOVIĆ
VLADIMIR LAZAREVIĆ
SRETEN LUKIĆ**

**SCHEDULING ORDER AND DECISION ON JOINT DEFENCE MOTION TO MODIFY
TRIAL SCHEDULE FOR TRIAL WEEK BEGINNING 25 SEPTEMBER 2006**

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Mr. John Ackerman and Mr. Aleksander Aleksić for Mr. Nebojša Pavković
Mr. Mihajlo Bakrač and Mr. Đuro Čepić for Mr. Vladimir Lazarević
Mr. Branko Lukić and Mr. Dragan Ivetić for Mr. Sreten Lukić

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 ("Tribunal"), is seised of a "Joint Motion to Modify Trial Schedule for Week of 25 through 29 September", filed by the Defence on 12 September 2006 (Motion"), and hereby renders its decision thereon. Moreover, as announced at the oral hearing on this matter, held on 14 September 2006, the Chamber hereby issues, *ex proprio motu*, this scheduling order for the trial week beginning 25 September 2006, which includes temporal restrictions upon both the Prosecution and the Defence.

1. At the pretrial conference, held on 7 July 2006, the Presiding Judge, speaking for the Chamber, stated the following on the use of time in this trial:

I think the history of the Tribunal probably drives you to the conclusion that some limitation on time will be necessary to reach our goal in a reasonable time. However, I've had an opportunity over almost two years now to experience working with the personnel who are involved in this case, and my initial inclination with which I think my colleagues are prepared to go along at my persuasion, is to let it run and see what happens and to trust you, as responsible counsel, to keep this case within bounds. But I recognise it may be necessary, as we move along, to make orders that sort out any kinks that may crop up.

The Appeals Chamber has recently issued a judgement which approves an approach, a broad-brush approach, that allows the Defence en bloc the equivalent time to cross-examine that the Prosecution has. Let's wait and see if it's necessary to take that sort of action in this case and let's see if we can't actually manage to do it in a responsible way that recognises that for some witnesses a bit more -- or maybe even substantially more is required and for other witnesses, not even as much is required.¹

2. The Prosecution, moreover, at the pretrial conference, and at many opportunities since then, has requested that the Chamber set temporal demarcations upon the Defence in respect of cross-examination and has agreed that any such limitation should apply to the Prosecution during the Defence case.²

¹ T. 359–360 (7 July 2006).

² See, e.g., T. 360 (7 July 2006) ("[T]he point I wanted to make, it relates to scheduling of witnesses. If there were - if we had some idea of an outward limit on cross-examination, as a general rule it would help us in determining how many witnesses we should have in hand for each week."); *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-T, Prosecution Provisional List of Witnesses for the Month of October, 6 September 2006, paras. 3–4 ("Uncertainties regarding the length of cross-examination, continue to prevail in this trial For these reasons, the witness scheduling during the past two months has regularly been delayed for days, if not weeks"); *Prosecutor v. Milutinović et al.*, Prosecution Witness Notification for Trial Week Commencing 21 August 2006, 17 August 2006, para. 2 ("Due to the extensive cross-examination of witness Nike Peraj in the week of 14 August 2006, it appears likely that a number of witnesses scheduled for that week will leap over into the week commencing 21 August 2006."); *Prosecutor v. Milutinović et al.*, Prosecution Provisional Indication of Witnesses for the Month of September, 11 August 2006, para. 2 ("Due to the pace of the proceedings so far, in particular the lengthy cross-examination of nearly all witnesses, a large number of witnesses scheduled for the month of August can most likely not be called before September."); *Prosecutor v. Milutinović et al.*, Revised Prosecution Notification of Witnesses

3. With respect to the time allowed the Prosecution for the presentation of its case-in-chief, Rule 73 *bis* (C)(ii) gives the Chamber the authority, at the pretrial conference, to “determine ... the time available to the Prosecutor for presenting evidence”;³ moreover, the Appeals Chamber has held, in the context wherein a Trial Chamber decided to limit the time for the presentation of the Prosecution case after the trial had already commenced, that “every court has the inherent power to control the proceedings *during* the course of the trial”.⁴

4. With respect to the time allowed for cross-examination, Article 21(4)(e) of the Statute of the International Tribunal guarantees accused before the Tribunal the right, as recognised under international human rights law, to examine or have examined witnesses against them;⁵ and, Rule 90(F) of the Rules of Procedure and Evidence requires that a Chamber “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”. The Chamber also notes that the Appeals Chamber, in the *Prlić* case, has recently stated the following:

- a. a Chamber “enjoys ... considerable discretion in setting the parameters of cross-examination and in outlining the exercise of this right by the Defence”;⁶
- b. “time and resource constraints exist in all judicial institutions and ... 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,

for August 2006, 14 July 2006, para. 2 (“Due to the existing uncertainties regarding ... the time that will be allowed for cross-examination by the Defence, in general and, in particular, for Rule 92*bis* witnesses, it is extremely difficult to anticipate for the Prosecution the appropriate number of Prosecution evidence hours per week at this stage.”); T. 1210 (8 August 2006) (Mr. Hannis: “Your Honour, if that were the end of the two minutes, I wanted to take 30 seconds to renew my previous request that the Court consider setting some kind of limitations on cross-examination. This plays real havoc with our attempts to schedule witnesses.”); *Prosecutor v. Milutinović et al.*, Prosecution Witness Notification for Trial Week Commencing 14 August 2006 with Confidential Annex A, 10 August 2006, para. 5 (“In compliance with Judge Bonomy’s oral instructions on 8 August 2006 and in the interest of efficient witness scheduling, the Prosecution requests the Defence to indicate to the Prosecution the anticipated total time of cross-examination for each respective witness.”).

³ See, e.g., *Prosecutor v. Prlić et al.*, Case No. IT-04-74-T, Decision Adopting Guidelines on Conduct of Trial Proceedings, 26 April 2006, paras. 4–6, 9.

⁴ *Prosecutor v. Milošević*, Case No. IT-02-54-AR73, Reasons for Refusal of Leave to Appeal from Decision to Impose Time Limits, 17 May 2002, para. 10.

⁵ See Article 14(3)(e) of the International Covenant on Civil and Political Rights.

⁶ *Prosecutor v. Prlić et al.*, Case No. IT-04-74-AR73.2, 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 (“*Prlić* Appeal Decision”), 4 July 2006, p. 3.

which is recognized as a fundamental right of due process under international human rights law”;⁷ and

- c. the temporal scheme erected by the *Prlić* Chamber—whereby each Defence team in a six-accused trial was allocated one sixth of the time used by the Prosecution, while allowing for variations and extensions on a case-by-case basis—conformed with “well-established practice of the Tribunal”.⁸

5. The Trial Chamber notes that, since the pretrial conference and the commencement of the trial on 10 July 2006, it has on several occasions commented upon the inadequate progress of the proceedings, both in respect of the Prosecution’s presentation of its case-in-chief⁹ and the Defence’s use of time during cross-examination.¹⁰ The Chamber also notes that, thus far, it has in general refrained from temporally circumscribing the cross-examination of the Defence, and has instead sought to assist the Defence in increasing the efficiency thereof.¹¹

6. The Chamber recalls its duty under Article 20 to ensure that the trial is conducted in a fair and expeditious manner. The trial is scheduled to continue during the week beginning 25 September 2006, from 9:00 a.m. to 5:30 p.m., Monday through Friday. In the Motion and during the oral argument, the Defence requested that this schedule be reduced to half-day hearings so that they may have more time to prepare to cross-examine the witnesses that the Prosecution intends to call.

7. Among other contentions, the Defence argues that their preparation is made more cumbersome by the fact that the Prosecution, in re-interviewing witnesses when they arrive in The Hague to give evidence in the trial, procure new information, which, when disclosed to the Defence, augments and compounds both the amount of time they need to prepare for cross-examination and the time taken to conduct that cross-examination. During the hearing, although the Prosecution, in general, did not oppose the Motion, it did submit that much of the supplementary information obtained from witnesses shortly before they testify, in fact, clarifies matters in respect of the witnesses’ evidence, rather than complicating them, and thus should have the exact opposite effect than that advanced by the Defence.

⁷ *Prlić* Appeal Decision, p. 4 (footnotes omitted).

⁸ *Prlić* Appeal Decision, pp. 3–4 (footnotes omitted).

⁹ See, e.g., T. 1116–1117 (8 August 2006); T. 2691–2692 (31 August 2006).

¹⁰ See, e.g., T. 776 (13 July 2006); T. 1640 (14 August 2006); T. 1925 (18 August 2006); T. 2282 (24 August 2006); T. 2404 (25 August 2006); T. 3030–3031 (8 September 2006); T. 3028–3029 (8 September 2006).

¹¹ See, e.g., T. 552 (11 July 2006); T. 2194 (23 August 2006); T. 2615–2616 (31 August 2006).

8. The Chamber has dealt with the above matters, set out in the above paragraph, on a case-by-case basis; and, due to their highly fact-dependent nature, the Chamber considers that this is the most appropriate manner in which to proceed at the present time. There may come a time, however, when it decides to set more rigid guidelines upon the provision of supplementary information shortly before the testimony of a witness.

9. For the purposes of the present Motion and Scheduling Order, the Chamber does not accept the Defence submission that they have inadequate time to prepare for and conduct cross-examination, and the Chamber will continue to monitor the situation to ensure that the proceedings are conducted in as efficient a manner as possible, while still ensuring the fairness of the proceedings to all the parties. The Chamber notes the following breaks in the trial: (1) there is no hearing today, 15 September 2006, as a result of witness scheduling issues; (2) the discretionary week of recess is being used so that the trial is not sitting during the week of 2 October 2006; and (3) the trial will not be sitting on Friday, 20 October and Monday–Tuesday, 23–24 October, due to an appeal hearing and the United Nations holiday. The Defence have not demonstrated that the schedule for the week beginning 25 September 2006 unduly prejudices the rights of the accused to a fair trial. Finally, the Chamber acknowledges the impact that its initial decision not to impose time limits upon cross-examination has had upon the proceedings and, in particular, upon the certainty of witness scheduling; in its order below, the Chamber will regulate the time for cross-examination of the witnesses to be called during the week beginning 25 September 2006. Thereafter, the Chamber will review the position for future witnesses and continue to monitor the progress of the trial to ensure that none of the six accused is unduly prejudiced by a lack of time to either prepare his defence or cross-examine witnesses.

10. Having regard to the manner in which time has been used thus far by both the Prosecution and the Defence in examining witnesses whose evidence has been admitted in writing, either in part or as a whole, the Chamber has devised a method by which the time for the examination of such witnesses may be limited and distributed between the parties. This method is set forth in the order below.

11. The Chamber also recalls that, on 22 August 2006, the Defence noted that “[t]he accused and most of their counsel are of the Orthodox faith” and “Orthodox Christmas is on 7 January 2007 and Orthodox New Year is on 14 January 2007”, and have therefore requested that the winter recess be extended beyond the Orthodox New Year and the trial resume on 16 January 2007.¹² The Chamber replied via email on the following day, on notice to the Prosecution, that it would give

¹² Email, dated 22 August 2006.

consideration to the request nearer the time of the recess, having regard to the amount of progress made in the trial.¹³ The Chamber notes that the Prosecution does not oppose this request.

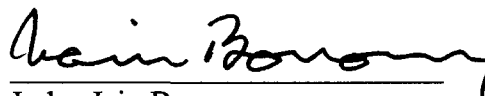
12. The Chamber, therefore, pursuant to Rules 54 and 90(F), hereby ORDERS as follows:

- a. The schedule for the trial week beginning 25 September 2006, shall be Monday–Friday, 25–29 September 2006, from 9:00 a.m. to 5:30 p.m. For this week, the following temporal guidelines shall apply.
- b. For *viva voce* witnesses, the Defence collectively shall have the same amount of time as the Prosecution has taken for the cross-examination of a witness. The Defence shall consult amongst themselves to decide upon the apportionment of this time.
- c. For witnesses whose evidence is brought pursuant to Rules 92 *bis* or 92 *ter*,¹⁴ the Prosecution shall have a maximum of 30 minutes to conduct both direct examination and re-examination; the Prosecution may decide how to apportion this time between direct examination and re-examination. The Defence collectively shall have a maximum of 90 minutes for cross-examination for such witnesses. The Defence shall consult amongst themselves to decide upon the apportionment of this time.
- d. The winter recess shall begin on Monday, 18 December 2006, and the trial shall resume on Tuesday, 16 January 2007.
- e. The Trial Chamber may alter any of the orders set out above on a case-by-case basis, on good cause having been shown by the parties, and will issue additional orders in due course, as it deems appropriate.

¹³ Email, dated 23 August 2006.

¹⁴ See IT/250, 15 September 2006.

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



Judge Iain Bonomy
Presiding

Dated this fifteenth day of September 2006
At The Hague
The Netherlands

[Seal of the Tribunal]