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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-05-87-T

Date: 9 October 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: **9 October 2006**

PROSECUTOR

v.

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

DECISION ON USE OF TIME

Office of the Prosecutor
Mr. Thomas Hannis
Mr. Chester Stamp
Ms. Christina Moeller
Ms. Patricia Fikirini
Mr. Mathias Marcussen

Counsel for the Accused
Mr. Eugene O'Sullivan and Mr. Slobodan Zečević for Mr. Milan Milutinović
Mr. Toma Fila and Mr. Vladimir Petrović for Mr. Nikola Šainović
Mr. Tomislav Višnjić and Mr. Norman Sepenuk for Mr. Dragoljub Ojdanić
Mr. John Ackerman and Mr. Aleksandar 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");

Ex proprio motu;

CONSIDERING that, pursuant to Article 20 of the Statute of the Tribunal, Trial Chambers have the duty to ensure that a trial is both fair and expeditious;

CONSIDERING that Article 21 of the Statute, which sets forth the rights of the Accused before the Tribunal, provides in relevant part:

> 4. In the determination of any charge against the accused pursuant to the present Statute, the accused shall be entitled to the following minimum guarantees, in full equality:
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> [...]
>
> (c) to be tried without undue delay;
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> [...]
>
> (e) to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

CONSIDERING that Rule 90(F) of the Rules of Procedure and Evidence of the Tribunal ("Rules") provides:

> (F) The Trial Chamber shall exercise control over the mode and order of interrogating witnesses and presenting evidence so as to
>
> (i) make the interrogation and presentation effective for the ascertainment of the truth; and
>
> (ii) avoid needless consumption of time[;]

CONSIDERING that, in a recent decision on interlocutory appeal in the *Prlić* case, the Appeals Chamber held that the right of the accused to be tried without undue delay, as recognised in Article 21, extends to all stages of the trial and imposes upon a Trial Chamber an obligation "to ensure ... that the trial is completed within a reasonable time";[1]

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[1] *See Prosecutor v. Prlić, Stojić, Praljak, Petković, Ćorić, and Pušić*, 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, 4 July 2006, p. 4 (noting that this right "is recognized as a fundamental right of due process under international human rights law" and citing international human rights treaties and authoritative interpretations thereof).

CONSIDERING that the Chamber has the power, both before the trial commences[2] and once it is under way,[3] to determine the time available to the parties for the presentation of their respective cases;

NOTING that, although the Chamber decided not to impose time limits upon the parties at the outset of the trial, relying instead upon the professional judgement of counsel,[4] it had always in mind the possibility that it would be necessary to do so and, in that event, wished to so proceed in light of experience gained from the conduct of the trial;

NOTING that the Chamber has indicated in recent court sessions that it was considering setting time limits in order to ensure that the trial is completed within a reasonable time;[5]

NOTING that the Chamber issued a Scheduling Order for the week of trial between 25 and 29 September 2006 actually imposing such limits on the parties on a trial basis;[6]

NOTING that, at the end of that week, the parties made submissions to the Chamber expressing their concerns that the extended sitting schedule had adversely impacted upon their ongoing trial preparations;[7]

NOTING that the Prosecution's initial estimate of the total time required for the presentation of its case, as required by Rule 65 *ter* (E)(ii)(f), was 280 hours;[8]

NOTING that this estimate did not include any time for the examination of witnesses then proposed under Rule 92 *bis*, that the Chamber later ordered that "the Accused shall have an opportunity to cross-examine each witness whose written material is admitted into evidence" pursuant to Rule 92 *bis*,[9] and that the Prosecution has since led hours of oral evidence from witnesses initially scheduled only as Rule 92 *bis* witnesses;

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[2] *See* Rules 73 *bis* (C)(ii), 73 *ter* (E).

[3] *See 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.

[4] *See Prosecutor v. Milutinović, Šainović, Ojdanić, Pavković, Lazarević, and Lukić*, Case No. IT-05-87-T ("*Milutinović et al.*"), T. 359–360 (7 July 2006).

[5] T. 3448 (14 September 2006).

[6] *Milutinović et al.*, Scheduling Order and Decision on Joint Defence Motion to Modify Trial Schedule for Trial Week Beginning 25 September 2006, 15 September 2006 ("Scheduling Order"), para. 12.

[7] *Milutinović et al.*, T. 4429–4441 (29 September 2006).

[8] *Milutinović et al.*, Case No. IT-05-87-PT, T. 253 (17 May 2006); *see also* Prosecution's Submissions Pursuant to Rule 65*ter*(E), 10 May 2006.

[9] *Milutinović et al.*, Decision on Prosecution's Rule 92 *bis* Motion, 4 July 2006, para. 23(4). The evidence of such witnesses is now tendered under new Rule 92 *ter*, which codifies the existing jurisprudence on admission of evidence

NOTING that, as of the adjournment on 29 September 2006, the evidence of 48 witnesses had already been heard by the Chamber;[10]

NOTING that the Chamber's Order on Procedure and Evidence decided, *inter alia*, that "[t]he Chamber shall continually monitor the use of time, and may make further orders, as it considers necessary, concerning time used by the Prosecution or the Defence";[11]

CONSIDERING that, according to the recently received finalised records of the Registry, the use of time in the trial between its commencement on 10 July 2006 and the adjournment on 29 September 2006 was as follows:

Total time elapsed:	173 hours, 52 minutes [10,432 minutes]
Prosecution examination in chief and re-examination:	40 hours, 39 minutes [2,439 minutes]
Defence cross-examination:	90 hours, 33 minutes [5,433 minutes]
Questioning by Chamber, administrative time, and procedural and other matters:	42 hours, 40 minutes [2,560 minutes]

CONSIDERING that, if current trends in the use of time continue, even if the Chamber imposes general time limits on the oral testimony adduced from all future Rule 92 *ter* witnesses identical to those imposed for the week commencing 25 September 2006,[12] the Prosecution's total use of time will exceed its original estimate of 280 hours;[13]

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under Rule 89(F). *See* IT/250, 15 September 2006 (announcing most recent amendments to Rules); *Milutinović et al.*, Decision on Evidence Adduced Through Sandra Mitchell and Frederick Abrahams, 1 September 2006, paras. 8–16 (explaining previous jurisprudence on Rules 89(F) and 92 *bis*).

[10] This number includes the Rule 92 *bis* (C) (now Rule 92 *quater*) statement of Antonio Russo, but not the incomplete testimony of Shefqet Zogaj.

[11] *Milutinović et al.*, Order on Procedure and Evidence, 11 July 2006, para. 2.

[12] *See* Scheduling Order, *supra* note 6, para. 12(c) ("For witnesses whose evidence is brought pursuant to Rule[] 92 *ter*, the Prosecution shall have a maximum of 30 minutes to conduct both direct examination and re-examination.... The Defence collectively shall have a maximum of 90 minutes for cross-examination for such witnesses.").

[13] This conclusion is based upon the estimates for the Prosecution's *viva voce* witnesses still to be called, as provided in the current Rule 65 *ter* witness list. *Milutinović et al.*, Notice of Filing of Revised 65 *ter* Witness List, 6 July 2006. To this total (just over 235 hours) is added time for the remaining Rule 92 *ter* witnesses (just over 16 hours), bringing the total time for Prosecution examination of its remaining witnesses to approximately 251 hours. Added to the elapsed total Prosecution time of 40 hours and 39 minutes, this would mean that the total time for the presentation of the Prosecution's case would be almost 292 hours. The distinction between this total and the Prosecution's original estimate of 280 hours is not insignificant: it translates to over three days of sitting time when the Chamber sits for half-days, and does not include time for cross-examination, questions by the Chamber, procedural discussions, and administrative matters, which could significantly increase the additional time such overrun would cause.

NOTING that, in the Scheduling Order referenced above, the Chamber noted that

> 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-chief and the Defence's use of time during cross-examination. 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 [;][14]

CONSIDERING that, although the parties have since endeavoured to tailor their examination of witnesses to be more efficient, the Chamber is of the view that fixing temporal limitations based upon its experience of the trial so far would be conducive to ensuring that the conduct of the case is both fair and expeditious;

CONSIDERING that, when there are six trials proceeding concurrently before the Tribunal, this Trial Chamber can sit for only half of each sitting day, sitting effectively between three and three-quarter hours and four hours, and that it is appropriate to sit longer when courtroom availability permits;

CONSIDERING that the Chamber is of the view that 220 hours is a reasonable estimate for the total time for presentation of the remainder of the Prosecution's case in chief from 9 October 2006, having regard to the original estimate of 280 hours, but also taking account of the Chamber's decision restricting the scope of the Prosecution's case-in-chief,[15] recent submissions by the Prosecution clarifying the precise charges against the Accused, and a subsequent decision by the Chamber not to hear evidence that does not go to those precise charges;[16] and bearing in mind recent changes to the Rules, which now explicitly permit the presentation of evidence in writing that goes to the acts and conduct of the Accused;[17]

CONSIDERING that, although the Chamber has previously ordered that certain trial delays would be counted against the Prosecution's time,[18] it now considers it appropriate, in light of its decision to impose general time limits upon the parties, to wipe the slate clean; as such, the time records set forth above do not include any such "lost" time, as counted against a party;

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[14] Scheduling Order, *supra* note 6, para. 5 (footnotes omitted).

[15] *Milutinović et al.*, Decision on Application of Rule 73 *bis*, 11 July 2006.

[16] *Milutinović et al.*, T. 3513 (19 September 2006); Decision on Evidence Tendered Through Witness K82, 3 October 2006.

[17] *See* IT/250, 15 September 2006 (setting forth text of new Rule 92 *ter*, which provides, in subparagraph (B): "Evidence admitted under [the Rule] may include evidence that goes to proof of the acts and conduct of the accused as charged in the indictment.").

[18] *See, e.g.*, *Milutinović et al.*, T. 3443 (14 September 2006).

CONSIDERING that the experience of the trial week between 25 and 29 September 2006 has shown that it is unnecessary to have a maximum collective time limit of 90 minutes for cross-examination of Rule 92 *ter* witnesses by the Defence, and that a 60-minute limit would be sufficient, bearing in mind that the Chamber will allow the Defence to request more time for the cross-examination of particular witnesses on a case-by-case basis and on good cause having been shown;

CONSIDERING also that it is not always necessary to put the defence case, in all its detail, to each and every witness called by the Prosecution, because such an approach risks being the "needless consumption of time" censured by Rule 90(F)(ii);

PURSUANT TO Articles 20 and 21 of the Statute and Rules 54 and 90(F) of the Rules;

HEREBY ORDERS AS FOLLOWS:

1. If the parties dispute the calculations or time records set forth in this Decision, which are based upon the records kept by the Registry, they shall file any such challenge in the form of a written application to the Chamber within fourteen days of this Decision.

2. The Prosecution shall have 220 hours in total for the presentation of the remainder of its case, which shall be counted from 9 October 2006.

3. For *viva voce* witnesses, the Defence shall have collectively 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.

4. For witnesses whose evidence primarily and in accordance with the practice of the Prosecution followed in the trial so far is brought pursuant to Rule 92 *ter*, the Prosecution shall have a maximum of 30 minutes to conduct both direct examination and re-examination, and may decide how to apportion this time between direct examination and re-examination. The Defence collectively shall have a maximum of 60 minutes for cross-examination of such witnesses. The Defence shall consult amongst themselves to decide upon the apportionment of this time.

5. The Chamber will sit longer hours when courtroom availability permits and the Chamber deems it appropriate, but such sittings will generally not exceed five hours per day, and any period of extended hours normally will be followed by an equivalent period when the Chamber sits only half-days.

6. As ordered in the Order on Procedure and Evidence, regular reports on the use of time shall by compiled by the Registry in conjunction with the Chamber, and shall be provided periodically to the parties. Any challenge to the information contained within the report shall be filed in the form of a written application to the Chamber within seven days of the provision of the report.

7. 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 a party, and will issue additional orders in due course, as it deems appropriate. In deciding on such an application, the Trial Chamber may take account of the effectiveness of the moving party's previous use of time.

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

Judge Iain Bonomy
Presiding

Dated this ninth day of October 2006
At The Hague
The Netherlands

[Seal of the Tribunal]