



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: 19 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: 19 October 2006

PROSECUTOR

v.

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

DECISION ON SECOND OJDANIĆ MOTION FOR STAY OF PROCEEDINGS

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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”) is seised of a “General Ojdanić’s Second Motion for Stay of Proceedings”, filed by the Ojdanić Defence (“Defence”) on 31 July 2006 (“Motion”), and hereby renders its decision thereon.

1. This is the Defence’s second motion to stay the proceedings on the ground that its purported inability to conduct investigations of alleged crime sites in Kosovo interferes with the Accused’s right under Article 21(4)(b) of the Statute of the Tribunal to have adequate time and facilities for the preparation of his defence.¹ On 9 June 2006, the Chamber denied the Defence’s first motion, and in doing so took into consideration the fact that, “while, during the Defence team’s last visit to Kosovo, UNMIK was unable to provide the security necessary for the team to conduct and complete its investigations, this does not mean that UNMIK will continue indefinitely to be unable to do so.” The Chamber emphasised that “it is not faced at present with the situation wherein UNMIK has refused the Defence team access to Kosovo or represented to it that it is unable or unwilling to provide security for future visits.” It was upon this basis that the Chamber denied the first motion to stay the proceedings and requested UNMIK to take “all reasonable and necessary measures, as soon as possible, in order to assist the Defence teams of the Accused in their investigations in Kosovo for the preparation of their defence.”²

2. In light of the Chamber’s first decision on this matter, the Defence resumed its efforts to communicate with UNMIK in order to conduct investigations of crime sites in Kosovo.³ On 31 July 2006, following the purported failure of these efforts, the Defence decided to file the Motion, stating that “General Ojdanić’s defence team did everything it could to arrange [the] visit [to Kosovo] before the trial recommences” and that “[i]t would be fundamentally unfair to proceed with the testimony of prosecution crime-base witnesses under these circumstances. General Ojdanić is simply unable to effectively cross-examine these witnesses.”⁴

3. On 31 July 2006, UNMIK contacted the Defence, stating that UNMIK stood ready to facilitate the visit and proposing a meeting in Priština to review the list of proposed sites and any other details of the Defence’s potential visit to Kosovo. This meeting took place on 3 August 2006.

¹ It is not necessary to recite herein a comprehensive procedural history of this matter, dating back to 2004 and leading up to the Chamber’s first decision on this matter.

² Decision on Ojdanić Motion for Stay of Proceedings, 9 June 2006, p. 3.

³ General Ojdanić’s Second Motion for Stay of Proceedings, 31 July 2006 (“Motion”), pp. 2–4; Annexes H, J, L, N, O, P, Q.

⁴ Motion, pp. 4–5.

On the following day, on 4 August 2006, UNMIK notified the Defence of its continued readiness to facilitate site visits and requested that a formal amended request, which included changes to the original proposal, be sent to enable UNMIK to carry out further necessary preparations. This revised request was transmitted on 6 August 2006.⁵

4. On 9 August 2006, UNMIK transmitted a more detailed plan of action in relation to the security aspects of the Defence's anticipated visit and expressed its "serious reservations regarding the participation of the Defence's investigator, Mr. Isak Ilija, in the site visits to the crime scenes" due to the fact that Mr. Ilija was an "ex-VJ member of high rank, who was active in Kosovo during the Milošević period [and] the possibility of recognition and negative response in areas where individuals have been traumatised by security personnel cannot be excluded." The letter ended with the statement that "UNMIK will expedite its evaluation of [the] amended request of 6 August" and would "revert with a detailed answer within three weeks."⁶

5. Following these developments, a meeting took place between the Chamber and the Defence, on 11 August 2006, where the Defence's efforts to arrange with UNMIK an investigative trip to Kosovo were discussed.⁷ As a result of this meeting, the Chamber sent UNMIK a letter on 16 August 2006, emphasising the Chamber's readiness to assist in "finalising arrangements that are satisfactory to all to enable the investigations to be carried out."⁸

6. On 30 August 2006, UNMIK informed the Defence and the Chamber that UNMIK would only be able to facilitate site visits to six out of the eleven requested locations. The conditions of these six visits were set out in the letter, including the requirement that Mr. Isak Ilija not be present during three of the site visits and various other constraints such as time limits upon particular locations and prohibitions upon contact with citizens. UNMIK reiterated that it stood ready to facilitate visits during the week of 2 October 2006 to the six sites identified in the letter.⁹ In respect of the sites whither UNMIK informed the Defence that it could not, at that time, facilitate site visits, UNMIK either demonstrated a willingness to continue its efforts to endeavour to arrange the Defence's investigations or "invite[d] [the Defence] to propose an alternative way of obtaining" the

⁵ Supplemental Materials in Support of General Ojdanić's Second Motion for Stay of Proceedings, 7 August 2006, Annexes R, S.

⁶ Letter from the UNMIK Acting Special Representative of the Secretary-General, Mr. Steven P. Schook, to Lead Counsel for General Ojdanić, Mr. Tomislav Višnjić, 9 August 2006.

⁷ Internal Memorandum, 11 August 2006.

⁸ E-mail from the Chamber's Acting Senior Legal Officer, Mr. Gideon Boas, to the UNMIK Acting Special Representative of the Secretary-General, Mr. Steven P. Schook, 16 August 2006.

⁹ Final Submissions in Support of General Ojdanić's Second Motion for Stay of Proceedings, 14 September 2006, Annex V.

information it sought in respect of each site.¹⁰ The Defence replied that the conditions were “such that the visit would not be meaningful” and that the Defence “would simply not be able to accomplish [its] duties to investigate the allegations against General Ojdanić.”¹¹

7. A meeting concerning UNMIK’s letter of 30 August 2006 was held between the Chamber and the Defence on 11 September 2006, during which the Defence stated that the conditions of the visit outlined by UNMIK were “unacceptable” and that “it would be akin to a tourist visit and not yield the results they were after.” When asked by the Chamber several times “whether it would not be helpful for further appropriate intervention from the Chamber with UNMIK ... so as to yield a more favourable outcome with UNMIK on the issue,” the Defence responded “with gratitude but made it clear [the Defence] now wished to proceed on the record.”¹²

8. On 14 September 2006, the Defence filed further submissions, pressing the Motion and arguing, *inter alia*, that it had come to the conclusion that the restrictions imposed by UNMIK upon the investigation of the alleged crime sites made such a visit “of little value, and [did] not justify the substantial risk to the safety of defence team members.”¹³ On 4 October 2006, UNMIK sent a letter to the Chamber informing it that the Defence had cancelled its trip to Kosovo. In the letter, UNMIK states,

... In accordance with our letter of 30 August and within the time-frame indicated by your acting senior legal officer, UNMIK was ready to facilitate an initial visit by the defence team to at least six sites in Kosovo, which was planned to take place from 3 to 6 October....

As you are aware, UNMIK has asked the Ojdanic defence team to suggest alternatives to the participation of their consultant Mr. Isak Ilija in visits to crimes scenes in Kosovo. We have also invited the defence team to propose alternative ways of obtaining the relevant material regarding those sites to which UNMIK cannot facilitate visits at this time....

In accordance with its mandate under UN Security Council [sic] resolution 1244 (1999), and its obligations towards the ICTY, in particular the Trial Chamber’s Request as set out in the Decision of 9 June 2006, UNMIK went through great effort to facilitate the requested visit. The preparations involved systematic coordination at central and local levels, including, but not limited to: both UNMIK and Kosovo Police; KFOR; UNMIK Civil Administration; the Office of the Prime Minister of Kosovo; local municipalities and village leaders. Detailed assessments of sites were made from numerous perspectives, including the security perspective, by experts in relevant fields. Moreover, the Prime Minister of Kosovo assigned a senior political advisor to work with the local

¹⁰ *Ibid.*

¹¹ *Ibid.*, Annex W.

¹² E-mail from the Chamber’s Acting Senior Legal Officer, Mr. Gideon Boas, to Judge Iain Bonomy (Presiding), 11 September 2006.

¹³ Final Submissions in Support of General Ojdanić’s Second Motion for Stay of Proceedings, 14 September 2006, paras. 4–5, 7; Annex X.

leadership at the sites to be visited, in order to advance their cooperation with the visit of the Ojdanic defence team.

Please be assured that UNMIK will continue to take all reasonable and necessary measures to assist the defence team. We stand ready to facilitate a visit in the event that defence counsel renews his request.¹⁴

9. As already stated in the Chamber's first decision on this matter, UNMIK was established pursuant to United Nations Security Council Resolution 1244, which "[d]emands full cooperation by all concerned, including the international security presence, with the International Tribunal for the Former Yugoslavia." The Chamber considers that this cooperation includes efforts by UNMIK to endeavour to provide assistance to Defence teams of accused before the Tribunal in respect of investigations inside of Kosovo for the preparation of their defences.¹⁵ The Chamber notes the efforts that have been made by UNMIK to take all reasonable and necessary measures, as soon as possible, in order to assist the Defence in its investigations in Kosovo; however, the Chamber also acknowledges that UNMIK must balance the needs of the Defence with its overall mission in connection with the administration of Kosovo.¹⁶

10. In this regard, the Chamber considers that UNMIK, in its last communication with the Chamber on 4 October 2006, explained the extensive measures it took, and was continuing to take, in order to facilitate the investigations of the Defence in Kosovo (quoted in paragraph 8 above). As is plain from the letter of 9 August 2006, UNMIK was continuing to make arrangements to satisfy some of the outstanding requests and sought from the Defence proposals of alternative methods of accomplishing those visits that UNMIK stated it could not facilitate at that time. The Defence was not satisfied with the arrangements that were made; and, instead of accepting UNMIK's offer to continue to discuss how its outstanding requests might be satisfied and the Chamber's offer to intercede with a view to finding ways of satisfying these requests, the Defence has unilaterally broken off cooperative efforts with UNMIK in this matter, and has opted for the course of attempting to bring these criminal proceedings to a halt. The fact that the Ojdanić Defence is not satisfied with the arrangements for its visit to Kosovo does not necessarily lead to the conclusion

¹⁴ Letter from the UNMIK Principal Deputy Special Representative of the Secretary-General, Mr. Steven P. Schook, to Judge Iain Bonomy (Presiding), 4 October 2006.

¹⁵ Decision on Ojdanić Motion for Stay of Proceedings, 9 June 2006, para. 3 (citing S.C. Res. 1244, U.N. Doc. S/RES/1244 (1999), para. 14; *Prosecutor v. Haradinaj et al.*, Case No. IT-04-84-AR65.1, Decision on Ramush Haradinaj's Modified Provisional Release, 10 March 2006, para. 14).

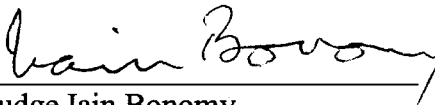
¹⁶ See Final Submissions in Support of General Ojdanić's Second Motion for Stay of Proceedings, 14 September 2006, Annex V (Letter from the UNMIK Acting Special Representative of the Secretary General, Mr. Steven P. Schook, to Lead Counsel for General Ojdanić, Mr. Tomislav Višnjić, 30 August 2006 (stating the following: "We have striven to achieve a careful balance between UNMIK's obligations toward the ICTY and the proper administration of international justice, and UNMIK's mandate under UN Security Council resolution 1244 (1999) to maintain a stable and safe security environment in Kosovo in light of the current political climate in Kosovo, as well as the local sensitivities in the specific locations that you request to visit.")).

that the Accused's rights under Article 21 are being violated. The cooperation between UNMIK, the Tribunal, and the Defence is a developing, dynamic process whence the Defence has withdrawn, despite UNMIK's continued participation in trying to make the investigations come to fruition.

11. In the view of the Chamber, UNMIK's efforts have been sufficient to enable the Defence, under Article 21(4)(b), "to have adequate time and facilities for the preparation of [its] defence," should the Defence decide to avail itself of those efforts. The current position of UNMIK in relation to this matter, in conjunction with the ongoing trial of the Accused, does not cause undue prejudice to the Accused's right to a fair trial, and it is unfortunate that the Ojdanić Defence has chosen the course it has, especially in circumstances wherein the Chamber has been, and continues to be, willing to intercede directly on the behalf of the Defence with UNMIK. The Chamber urges the Defence to reopen communication with UNMIK in order to resume its investigations in Kosovo.

12. The Chamber recalls its duty pursuant to Article 20 to ensure that these proceedings are conducted in a fair *and* expeditious manner,¹⁷ and considers that staying the trial in the present circumstances would undermine, rather than advance, these twin goals. Pursuant to Articles 20 and 21 of the Statute and Rule 54 of the Rules of Procedure and Evidence, the Chamber hereby DENIES the Motion.

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



Judge Iain Bony
Presiding

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

[Seal of the Tribunal]

¹⁷ See *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, 4 July 2006, p. 4 (stating that "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, which is recognized as a fundamental right of due process under international human rights law") (footnotes omitted).