IT-05-87-T
D15468-D15462
27 SEPTEMBER 2007

15468 AT

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: 27 September 2007

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: **27 September 2007**

PROSECUTOR

v.

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

PUBLIC

DECISION ON PAVKOVIĆ MOTION FOR PARTIAL SEVERANCE

Office of the Prosecutor
Mr. Thomas Hannis
Mr. Chester Stamp

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

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

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 "Pavković Motion for Partial Severance," filed 31 August 2007 ("Motion"), and hereby renders its decision thereon.

1. On 8 July 2005, the Trial Chamber granted a Prosecution motion to join the cases against the Accused on the basis that it was in the interests of justice that they be tried in a single trial.[1] On 7 September 2005, the Chamber denied a motion by Pavković to set aside the joinder of the cases or, in the alternative, to grant severance.[2] On 2 December 2005, the Chamber dismissed as premature a motion by Pavković to delay the proposed date for the start of the trial or, in the alternative, to sever him from the Indictment.[3] On 28 April 2006, the Chamber dismissed another motion by Pavković to dismiss the Indictment against him, refer his case to Serbia under the provisions of Rule 11 *bis*, delay the start of the trial, or sever him from the Indictment.[4]

2. In the present Motion, Pavković requests, pursuant to Rule 82, the following relief from the Trial Chamber:

> a. That his case be partially severed; that is, severed during the defence phase of this trial so that the only evidence considered by the Trial Chamber in the case of *Prosecutor v. Pavković* be that presented by the Prosecutor during its case-in-chief or on rebuttal and evidence presented by Pavković in his defence case including Prosecution cross-examination. This would be the case if he were being tried separately.
>
> b. That if, in the interests of justice and expediency[,] Pavković chooses to ask the Chamber to consider testimony of a witness called by a co-accused in his case, then evidence arising from the examination of that witness is effectively part of the Pavković case. In fairness, this election should be made before the testimony of the witness begins.
>
> c. That such an Order be made effective with the opening of the cases for the defence.[5]

---

[1] *Prosecutor v. Milutinović, Šainović, and Ojdanić*, Case No. IT-99-37-PT, Decision on Prosecution Motion for Joinder, 8 July 2005, p. 5; *Prosecutor v. Pavković, Lazarević, Đorđević, and Lukić*, Case No. IT-03-70-PT, Decision on Prosecution Motion for Joinder, 8 July 2005, p. 5.

[2] *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-PT, Decision on Pavković Motion to Set Aside Joinder or in the Alternative to Grant Severance, 7 September 2005, p. 4.

[3] *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-PT, Decision on Nebojša Pavković's Motion to Delay Start of Trial or in the Alternative to Reconsider and Grant Previous Motion for Severance, 2 December 2005, p. 2.

[4] *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-PT, Second Decision on Motions to Delay Proposed Date for Start of Trial, 28 April 2007, paras. 2, 6. Pavković also seemed to request additional resources in order to prepare his defence.

[5] Motion, paras. 4, 21.

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

3. Pavković argues that, now that the Prosecution case-in-chief is closed, the advantages in relation to judicial economy of a joint trial have been reaped and the disadvantages of duplication of witnesses have been forestalled. There is little duplication in witnesses to be called by the different Accused, and thus each Accused is more or less presenting his own, separate defence case: the continued benefits of a joint trial are therefore illusory.[6] The severance would be of the evidence only, would not even require separate hearings,[7] and would reduce the necessity of Pavković cross-examining the witnesses called by his co-Accused.[8] In sum, Pavković argues that, once the goals of joinder have been attained, he should no longer be prejudiced by the decision to join the cases.[9]

4. Moreover, as argued by Pavković, the Prosecution, now that its case is closed, can only adduce additional evidence against him by reopening its case-in-chief, through the procedural mechanism of Rule 90(H), or during rebuttal. The Prosecution should therefore not be permitted—merely because this is a joint trial—to adduce evidence against one of the Accused by cross-examining the witnesses of another co-Accused in the trial.[10] Pavković argues that "[o]ther accused did not call the witness and could not and should not be affected by the Prosecutor's cross-examination of that witness" and "[i]t is only in the context of a joint trial that evidence presented by joint accused would even be available".[11]

5. The Prosecution opposes the Motion, arguing that Pavković is being accorded the same rights as if he were being tried separately and has failed to demonstrate any serious risk of prejudice arising from the joint trial. Specifically, Pavković's right to a fair trial is safeguarded by his having the opportunity to cross-examine witnesses through whom the Prosecution—or even the Chamber—adduce evidence during cross-examination.[12] Moreover, given the Accused's joint involvement in the crimes charged in the Indictment, "the testimony of a witness called by one accused may implicate a co-accused" and "the mere fact that evidence presented in a joint trial may be more damaging to one accused than to others does not in itself constitute a serious prejudice within the meaning of Rule 82(B)".[13] Professional judges, not a jury, will be able to weigh the

[6] Motion, paras. 6–12, 16.
[7] Motion, para. 17.
[8] Motion, para. 20.
[9] Motion, para. 16.
[10] Motion, paras. 13–16.
[11] Motion, paras. 15–16.
[12] Prosecution's Response to Pavković's Motion for Partial Severance, 13 September 2007 ("Response"), para. 4.
[13] Response, para. 6.

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

evidence adduced in the trial in a fair manner in order to determine the potential individual criminal responsibility of each Accused.[14]

6. Finally, the Prosecution points out that the pre-defence conference was the appropriate opportunity to have sought the requested relief and that it would be contrary to the interests of justice to partially sever Pavković from the trial, which is presently hearing the evidence led by the third Accused.[15]

7. Rule 82, entitled "Joint and Separate Trials," provides that (a) "[i]n joint trials, each accused shall be accorded the same rights as if such accused were being tried separately"; and (b) "[t]he Trial Chamber may order that persons accused jointly under Rule 48 be tried separately if it considers it necessary in order to avoid a conflict of interests that might cause serious prejudice to an accused, or to protect the interests of justice." This rule can be invoked at any stage of the proceedings and is permissive in that the decision to sever is within the discretion of the Chamber seised of the matter.[16]

8. This is not the first multi-accused trial ever to be heard by the Tribunal. For many years, the Tribunal has conducted the trials of accused on a joint basis, where it has been found to be in the interests of justice. For example, the Trial Chamber in *Kupreškić et al.* decided that the order of the presentation of evidence, pursuant to Rule 85(B), would be examination-in-chief by Defence counsel for Kupreškić, cross-examination (if any) by other Defence counsel, cross-examination by the Prosecution, and re-examination by Kupreškić's Defence counsel. In so ordering, the Chamber noted that "this has been the approach adopted and consistently applied by this Trial Chamber." The Chamber retained discretion to permit re-cross-examination where new material was raised.[17]

9. In *Kvočka et al.*, Kvočka requested that the Trial Chamber (a) limit the Prosecution's cross-examination of a witness called by the co-accused of Kvočka to issues concerning that particular accused only and (b) prohibit cross-examination by the co-accused. The Trial Chamber refused the motion, holding that it went against the plain wording of Rule 90(H) to limit the scope of Prosecution cross-examination in such a manner, especially where the accused were jointly held responsible for the crimes alleged in the indictment. It was further held that a witness presented by

[14] Response, paras. 6–7.

[15] Response, para. 8.

[16] *Prosecutor v. Prlić et al.*, Case No. IT-04-74-T, Decision on Jadranko Prlić's Motion for Severance, 17 August 2007, para. 22; *Prosecutor v. Popović et al.*, Case No. IT-05-88-PT, Decision on Severance of Case Against Milorad Trbić, 26 June 2006, p. 2 (citations therein); *Prosecutor v. Brđanin and Talić*, Case No. IT-99-36-T, Decision on Prosecution's Oral Request for the Separation of Trials, 20 September 2002, para. 19.

[17] *Prosecutor v. Kupreškić et al.*, Case No. IT-95-16-T, Decision on Order of Presentation of Evidence, 21 January 1999, pp. 2–4 (citing *Prosecutor v. Delalić et al.*, Case No. IT-96-21-T, Decision on the Motion on Presentation of Evidence by the Accused, Esad Landžo, 1 May 1997, paras. 24, 30).

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

an accused may give evidence against one of his or her co-accused and that, in these circumstances, the co-accused has a right to cross-examine that witness. The Chamber therefore ordered that, when a witness presented by the defence of one accused mentioned another accused, the defence of that co-accused would be entitled to cross-examine the witness; and, in other circumstances, co-accused wishing to cross-examine the witness could make an application to the Chamber explaining the relevance of the proposed questioning.[18]

10. The issue of severance arose in trials before the Nuremberg Military Tribunal during the *Krupp* case, which was the third and last of the industrialist cases tried in Nuremberg; however, the motion was rejected by the Tribunal. In that case, a motion was submitted on behalf of all the defendants requesting a separate trial for each. The Tribunal dismissed the motion for separate trials.[19] Following this ruling, the defence renewed the request for separate trials for each of the defendants in response to a ruling to admit affidavits of the co-defendants. In the renewed motion for severance, the defence argued that the affidavits frequently expressed antagonistic interests or contained charges against the co-defendants, thus necessitating separate trials. The Tribunal once again dismissed the defence motion for severance.[20]

11. Pavković presents the Chamber in his Motion with a false dilemma: partially sever him from the trial or violate his right to a fair trial. There is a third way, which has been applied in other cases before the Tribunal, as can be seen above. At the pre-defence conference in this case,

---

[18] *Prosecutor v. Kvočka et al.*, Case No. IT-98-30/1-T, Decision on the "Request to the Trial Chamber to Issue a Decision on Use of Rule 90H", 11 January 2001, pp. 1–3; *cf. Prosecutor v. Prlić et al.*, Case No. IT-04-74-T, Decision on Jadranko Prlić's Motion for Severance, 17 August 2007, para. 35 (noting that presentation of evidence not related to some accused did not constitute serious prejudice due to modes for cross-examination established by Chamber to guarantee individual interests of each accused).

[19] *United States v. Alfried Krupp von Bohlen und Halbach et al.*, Case 10, Official Record, volume 36, pp. 370–371 (in *Trial of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10*, volume 15, Nuernberg, October 1946–April 1949, William S. Hein & Co., Inc., Buffalo, New York, 1997, pp. 238–240). In the written motion, Defence counsel advanced five arguments as grounds to grant the severance: (1) the defence of each of the defendants was mutually antagonistic to that of the co-defendants; (2) the evidence as to each of the co-defendants would prejudice the defence of each defendant, particularly in view of the liberal rules of evidence that permitted the admission of evidence not generally admissible in the trial of criminal cases; (3) each of the defendants wished to avail himself in his trial of the testimony of each of the co-defendants, alleging that they were in possession of certain facts and knowledge material and essential to the proper presentation of his defence and that, as to certain parts of such evidence, no other witness or witnesses were available; (4) each of the defendants would be prejudiced by the evidence in the trial of each of the co-defendants; and (5) each of the defendants urged that a separate trial would better secure the defendants a fair trial and assist in the administration of justice. *Ibid.*

[20] *Ibid.*, p. 242. *Cf. Prosecutor v. Prlić et al.*, Case No. IT-04-74-T, Decision on Request for Admission of the Statement of Jadranko Prlić, 22 August 2007, para. 28 (holding that statement of accused may be used against other co-accused without cross-examination, even when such statement goes to acts and conduct of those other co-accused, but noting that "it will take into account the possible lack of cross-examination when determining the probative value to be accorded to the statement and will demand corroborative elements before giving it any weight"). The Chamber notes that, in *Milutinović et al.*, the Prosecution has stated that "the statements [of an accused given to the Prosecution] are to be used in their entirety as evidence against the proponent of the statement, and against the co-accused except portions that address the acts and conduct or mental state or other accused". *See Prosecutor v. Milutinović et al.*, Case No. IT-05-87-PT, Prosecutor's Reply to Defence Responses to Motion for Admission of Documentary Evidence and Motion for Variation of Word Limit, 18 August 2006, paras. 20–23, 44.

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

the Chamber, in consultation with the parties, including the Pavković Defence, established the following procedure in relation to the examination of witnesses during the defence case: examination by the Accused calling the witness, cross-examination by co-Accused, cross-examination by the Prosecution, and re-examination by the Accused who called the witness.[21] It should be noted that this approach is even less restrictive than the one adopted in the *Kvočka* trial, in that Pavković may (a) cross-examine a witness called by one of his co-Accused as of right, even if that witness has not mentioned Pavković during his evidence, and (b) adduce positive evidence from such a witness pursuant to Rule 90. The Chamber has also permitted Pavković to cross-examine a witness called by one of his co-Accused, after the Prosecution had adduced, on cross-examination, evidence that Pavković deemed prejudicial to his case;[22] and, this avenue remains open to Pavković throughout the remainder of the trial.

12. Subject to the general provisions of Rule 89(C) and (D), so long as an accused has the opportunity to cross-examine witnesses called by his or her co-accused during their defence cases, the evidence of such a witness may be considered in relation to a co-accused.[23] This practice of the Tribunal does not place an accused in a multi-accused trial in a position worse than if he or she were tried separately because, if that were the case, the Prosecution would have had the option of calling these witnesses in each of the separate cases against the accused.[24] Moreover, an accused who has "additional" evidence adduced against him or her in a multi-accused trial—evidence that the Prosecution could in any event have adduced from calling the witness during a separate trial—is able to cross-examine that witness; it is in this way that his or her right to a fair trial is clinched. As was cogently reasoned by Trial Chamber II in its pre-trial decision in the *Brđanin and Talić* case,

> [a] joint trial does not require a joint defence, and necessarily envisages the case where each accused may seek to blame the other. The Trial Chamber will be very alive to the "personal interest" which each accused has in such a case. Any prejudice which may flow to either accused from the loss of the "right" asserted by [the accused] here to be tried without incriminating evidence being given against him by his co-accused is not ordinarily the type of serious prejudice to which Rule 82(C) is directed. The Trial Chamber recognises that there could possibly exist a case in which the circumstances of

[21] Pre-defence conference, T. 12822–12823 (22 June 2007).

[22] *See, e.g.*, T. 15129 (6 September 2007) (Judge Bonomy: "This is one of these situations in which it's possible that there would be a miscarriage of justice were we not to modify the normal rule and allow cross-examination in view of the way in which the Prosecution have cross-examined the witness.").

[23] *Prosecutor v. Kvočka et al.*, Case No. IT-98-30/1-T, Decision on the "Request to the Trial Chamber to Issue a Decision on Use of Rule 90H", 11 January 2001, pp. 2–3.

[24] *Prosecutor v. Simić et al.*, Case No. IT-95-9-PT, Decision on Defence Motion to Sever Defendants and Counts, 15 March 1999, p. 3 (considering "that the possibility of such 'mutually antagonistic defences' does not constitute a conflict of interests capable of causing serious prejudice and that, in any case, separate trials would not eliminate the possibility of an accused testifying against another accused").

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm

> the conflict between the two accused are such as to render unfair a joint trial against one of them, but the circumstances would have to be extraordinary.[25]

13. It should also be noted that the Chamber is composed of "professional judges who are necessarily capable of determining the guilt of each accused individually and in accordance with their obligations under the Statute of the Tribunal to ensure that the rights of each accused are respected."[26]

14. The Chamber acknowledges the argument of the Prosecution that the alleged, joint involvement of the Accused in the crimes set forth in the Indictment militates in favour of a joint trial of the Accused. This is not to say that this added feature of the trial is determinative of the Motion currently before the Chamber, but it does reinforce the Chamber's decision that a joint trial of the Accused is appropriate in the present circumstances and that Pavković is in no way unduly prejudiced by being tried along with his co-Accused.

15. Finally, the Chamber considers that the Motion should have been brought long before this stage of the trial. To move the goalposts now would not be in the interests of justice and would not be fair to the parties who have planned the presentation of their cases—both the Prosecution and the co-Accused—based upon Pavković being joined to the case.

16. For all of the foregoing reasons and pursuant to Articles 20 and 21 of the Statute and Rules 54 and 82 of the Rules of Procedure and Evidence of the Tribunal, the Trial Chamber hereby DENIES the Motion.

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

Judge Iain Bonomy
Presiding

Dated this twenty-seventh day of September 2007
At The Hague
The Netherlands

[Seal of the Tribunal]

---

[25] *Prosecutor v. Brđanin and Talić*, Case No. IT-99-36-PT, Decision on Motions by Momir Talić for a Separate Trial and for Leave to File a Reply, 9 March 2000, para. 29. The Chamber seems to have intended to cite paragraph (B), rather than (C), which neither existed at the time of that decision, nor presently in the Rules of Procedure and Evidence of the Tribunal. *See also Prosecutor v. Brđanin and Talić*, Case No. IT-99-36-T, Decision on Prosecution's Oral Request for the Separation of Trials, 20 September 2002, para. 21; *Prosecutor v. Prlić et al.*, Case No. IT-04-74-PT, Decision on Defence's Motions for Separate Trials and Severance of Counts, 1 July 2005, para. 18.

[26] *Prosecutor v. Brđanin and Talić*, Case No. IT-99-36-PT, Decision on Motions by Momir Talić for a Separate Trial and for Leave to File a Reply, 9 March 2000, para. 32; *see Prosecutor v. Simić et al.*, Case No. IT-95-9-PT, Decision on Defence Motion to Sever Defendants and Counts, 15 March 1999, p. 3 (considering "that a Trial Chamber of the International Tribunal, composed of professional Judges, is able to assess the evidence in a case involving conflicting defences in a fair and just manner, without prejudice to any of the accused, and that such a case is best tried by the same Trial Chamber rather than a number of different Chambers").

Downloaded from worldcourts.com. Use is subject to terms and conditions. See worldcourts.com/terms.htm