



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-04-74-AR73.8
Date: 18 July 2008
Original: English

IN THE APPEALS CHAMBER

Before: Judge Fausto Pocar, Presiding
Judge Mohamed Shahabuddeen
Judge Mehmet Güney
Judge Andréia Vaz
Judge Theodor Meron

Registrar: Mr. Hans Holthuis

Decision: 18 July 2008

PROSECUTOR

v.

Jadranko PRLIĆ
Bruno STOJIĆ
Slobodan PRALJAK
Milivoj PETKOVIĆ
Valentin ĆORIĆ
and Berislav PUŠIĆ

PUBLIC

**DECISION ON PETKOVIĆ'S AND PRALJAK'S APPEALS AGAINST
THE TRIAL CHAMBER'S DECISION ADOPTING GUIDELINES FOR
THE PRESENTATION OF DEFENCE EVIDENCE**

The Office of the Prosecutor:

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Ms. Senka Nožica and Mr. Karim Khan for Bruno Stojić
Mr. Božidar Kovačić and Ms. Nika Pinter for Slobodan Praljak
Ms. Vesna Alaburić and Mr. Nicolas Stewart for Milivoj Petković
Ms. Dijana Tomašegović-Tomić and Mr. Dražen Plavec for Valentin Ćorić
Mr. Fahrudin Ibrišimović and Mr. Roger Sahota for Berislav Pušić

1. The Appeals 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 (“Appeals Chamber” and “Tribunal”, respectively), is seized of an appeal by the Milivoj Petković (“Petković Defence” or “Appellant”)¹ against a decision rendered by Trial Chamber III (“Trial Chamber”) on 24 April 2008,² in which the Trial Chamber established guidelines for the presentation of the Defence case. Slobodan Praljak (“Praljak Defence”) seeks to join the Petković Appeal.³

I. BACKGROUND

2. On 24 April 2008, the Trial Chamber rendered the Impugned Decision, adopting guidelines for the presentation of the Defence case. In the fifth guideline of the Impugned Decision (“Fifth Guideline”), the Trial Chamber addressed the issue of allocation of time to the Defence teams and to the Prosecution for the direct examination, cross-examination and re-examination of Defence witnesses.⁴ In particular, paragraph 14 of the Impugned Decision provides that the Prosecution is allowed for its cross-examination 100% of the time allocated for the examination-in-chief.⁵

3. On 29 May 2008, the Trial Chamber, pursuant to Rule 73(B) of the Rules of Procedure and Evidence of the Tribunal (“Rules”), granted the Petković Defence application for certification to appeal paragraph 14 of the Impugned Decision.⁶ In its Appeal, the Petković Defence requests that the Appeals Chamber set aside the Trial Chamber’s determination to allocate 100% of the time used for the examination-in-chief for the Prosecution’s cross-examination.⁷

4. On 1 May 2008, the Praljak Defence filed a motion requesting the Trial Chamber to reconsider paragraph 35 of the Impugned Decision or, in the alternative, to grant certification to lodge an appeal against it.⁸ On 29 May 2008, the Trial Chamber dismissed the Praljak Motion of 1 May 2008, declaring it moot in light of the corrections made to the English translation of the

¹ Petković Defence Appeal Against Guideline 5, Paragraph 14, in the 24 April 2008 Trial Chamber Decision Adopting Guidelines for the Presentation of the Defence Evidence, 5 June 2008 (“Petković Appeal”).

² *Prosecutor v. Prlić et al*, Case No. IT-04-74-T, *Décision portant adoption de lignes directrices pour la présentation des éléments de preuve à décharge*, 24 April 2008 (“Impugned Decision”).

³ Slobodan Praljak’s Joinder to Petković Defence’s Appeal Against Guideline 5, Paragraph 14, in the 24 April 2008 Trial Chamber Decision Adopting Guidelines for the Presentation of the Defence Case, 6 June 2008 (“Praljak Request for Joinder”).

⁴ Impugned Decision, paras 13-17.

⁵ Impugned Decision, para. 14.

⁶ *Prosecutor v. Prlić et al*, Case No. IT-04-74-T, *Décision relative à la demande de certification d’appel de la Décision du 24 avril 2008, déposée par la Défense Petković*, 29 May 2008.

⁷ Petković Appeal, paras 4 and 20.

⁸ *Prosecutor v. Prlić et al*, Case No. IT-04-74-T, *Demande de Slobodan Praljak en vue du réexamen de la décision rendue le 24 avril 2008 par la Chambre de première instance concernant la présentation des moyens à décharge ou, à défaut, de la certification de l’appel qu’il envisage d’interjeter contre cette décision*, 1 May 2008 (“Praljak Motion of 1 May 2008”).

Impugned Decision.⁹ On 6 June 2008, the Praljak Defence requested to join the Petković Appeal, stating that “the Petković Defence arguments should be interpreted *mutatis mutandis* to the Praljak Defence”.¹⁰

5. The Prosecution filed its Response on 16 June 2008.¹¹ The Petković Defence filed its Reply on 23 June 2008.¹²

II. PRELIMINARY ISSUE

6. The Appeals Chamber notes that the Trial Chamber did not grant certification to appeal the Impugned Decision to the Praljak Defence.¹³ Therefore, pursuant to Rule 73(B) of the Rules, the Appeals Chamber finds that the Praljak Request for Joinder is inadmissible.

III. STANDARD OF REVIEW

7. It is well established in the jurisprudence of the Tribunal that Trial Chambers exercise discretion in relation to trial management.¹⁴ The Trial Chamber’s decision in this case to allocate time for cross-examination during the presentation of the Defence case was a discretionary decision to which the Appeals Chamber accords deference. Such deference is based on the recognition by the Appeals Chamber of “the Trial Chamber’s organic familiarity with the day-to-day conduct of the parties and practical demands of the case”.¹⁵ The Appeals Chamber’s examination is therefore limited to establishing whether the Trial Chamber has abused its discretionary power by committing

⁹ *Prosecutor v. Prlić et al*, Case No. IT-04-74-T, *Décision relative à la demande de certification d’appel de la Décision du 24 avril 2008, déposée par la Défense Praljak*, 29 May 2008, filed on 3 June 2008.

¹⁰ Praljak Request for Joinder, p. 1.

¹¹ Prosecution Response to the Petković Defence Appeal Against Guideline 5, Paragraph 14, in the 24 April 2008 Trial Chamber Decision Adopting Guidelines for the Presentation of the Defence Case, 16 June 2008 (“Response”).

¹² Petković Defence Reply to the Prosecution Response to the Petković Defence Appeal Against Guideline 5, Paragraph 14, in the 24 April 2008 Trial Chamber Decision Adopting Guidelines for the Presentation of the Defence Case, 23 June 2008 (“Petković Reply”).

¹³ *Supra*, para. 4.

¹⁴ *Prosecutor v. Prlić et al.*, Case No. IT-04-74-AR73.7, Decision on Defendant’s Appeal against “*Décision portant attribution du temps à la Défense pour la présentation des moyens à décharge*,” 1 July 2008 (“Prlić Decision on Allocation of Time for Defence Case-in-Chief”), para. 15; *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 (“Prlić Decision on Cross-Examination”), p. 3; *Prosecutor v. Tolimir et al.*, Case No. IT-04-80-AR73.1, Decision on Radivoje Miletić’s Interlocutory Appeal Against the Trial Chamber’s Decision on Joinder of Accused, 27 January 2006 (“Decision on Radivoje Miletić’s Interlocutory Appeal”), para. 4; *Prosecutor v. Milošević*, Case No. IT-02-54-AR73.7, Decision on Interlocutory Appeal of the Trial Chamber’s Decision on the Assignment of Defence Counsel, 1 November 2004 (“Milošević Decision on the Assignment of Defence Counsel”), para. 9; *Prosecutor v. Milošević*, Case No. IT-02-54-AR73, Reasons for Refusal of Leave to Appeal from Decision to Impose Time Limit, 16 May 2002, para. 14.

¹⁵ Decision on Radivoje Miletić’s Interlocutory Appeal, para. 4; *Milošević* Decision on the Assignment of Defence Counsel, para. 9.

a discernible error.¹⁶ The Appeals Chamber will only overturn a Trial Chamber's exercise of its discretion where it is found to be "(1) based on an incorrect interpretation of governing law; (2) based on a patently incorrect conclusion of fact; or (3) so unfair or unreasonable as to constitute an abuse of the Trial Chamber's discretion".¹⁷ The Appeals Chamber will also consider whether the Trial Chamber has given weight to extraneous or irrelevant considerations or has failed to give weight or sufficient weight to relevant considerations in reaching its decision.¹⁸

IV. DISCUSSION

A. Arguments of the Parties

8. The Petković Defence submits that the Trial Chamber committed discernable errors in paragraph 14 of the Impugned Decision because: (i) it violated the Accused's right to a fair trial under Article 21 of the Statute, specifically the principle of equality of arms;¹⁹ (ii) it violated the provision in Rule 82(A) of the Rules that co-accused in the same trial be accorded the same rights as if they were being tried separately.²⁰ In light of these errors, the Petković Defence requests that the Appeals Chamber set aside the Impugned Decision and direct the Trial Chamber to reconsider its Fifth Guideline in accordance with such directions as the Appeals Chamber deems appropriate to ensure the rights of the Accused are fully respected.²¹

9. With respect to its claim that the time allocated to the Prosecution constitutes a violation of the principle of equality or arms, the Petković Defence recalls that the time granted by the Trial Chamber to each of the six accused for cross-examination of Prosecution witnesses during the Prosecution case was only one sixth of the time used by the Prosecution for its examination-in-chief of those witnesses.²² Thus, the Petković Defence claims that the Prosecution will enjoy a much longer time to cross-examine Defence witnesses than each of the Defence teams had during the Prosecution case to cross-examine Prosecution witnesses, i.e., five times more.²³ The Petković Defence further submits that, in a number of cases, the time allotted to it for cross-examining

¹⁶ *Prlić* Decision on Cross-Examination, p. 3, citing *Prosecutor v. Milošević*, Case Nos. IT-99-37-AR73, IT-01-50-AR73, and IT-01-51-AR73, Reasons for Decision on Prosecution Interlocutory Appeal from Refusal to Order Joinder, 18 April 2002, para. 4: "Where an appeal is brought from a discretionary decision of a Trial Chamber, the issue in that appeal is not whether the decision was correct, in the sense that the Appeals Chamber agrees with that decision, but rather whether the Trial Chamber has correctly exercised its discretion in reaching that decision", see also paras 5-6; see also *Milošević* Decision on the Assignment of Defence Counsel, para. 10.

¹⁷ *Prlić* Decision on Allocation of Time for Defence Case-in-Chief, para. 15; Decision on Radivoje Miletić's Interlocutory Appeal, para. 6.

¹⁸ *Prlić* Decision on Allocation of Time for Defence Case-in-Chief, para. 15.

¹⁹ Petković Appeal, paras 6 and 8-19; see also Petković Response, paras 9-13.

²⁰ Petković Appeal, paras 14, 16-17 and 19; see also Petković Response, para. 6.

²¹ Petković Appeal, para. 20.

²² Petković Appeal, para. 6.

²³ Petković Appeal, paras 8-10, 14-15 and 17.

Prosecution witnesses was actually inadequate, and it had been compelled to cut short its cross-examination because of the imposed time limits.²⁴

10. The Petković Defence argues that Article 21(4)(e) of the Statute, which guarantees the accused's right to examine witnesses on his behalf "under the same conditions as witnesses against him", implies that each individual accused will be given the same opportunity to cross-examine witnesses as has been provided to the Prosecution.²⁵ It submits that, although a strict arithmetical equality of the time allocated to each party is not required, it is impossible to see how the Prosecution cross-examination needs to be six times as long as the time which the Trial Chamber regarded as generally sufficient for the cross-examination of Prosecution witnesses by each individual Accused.²⁶

11. The Petković Defence also contends that the allocation of time violates Rule 82(A) of the Rules, which provides that, in joint trials, each accused enjoys the same right as if he were being tried separately.²⁷ The Petković Defence submits that, for the purposes of cross-examination during the Prosecution's case, the Accused were treated as a "composite group" – each being allocated one sixth of the time allotted to the Prosecution for examination-in-chief.²⁸ It argues that, by contrast, the Prosecution was accorded time for cross-examination pursuant to the Impugned Decision *vis-a-vis* each individual accused.²⁹ The Petković Defence argues that there is no objective justification for this differentiation in treatment.³⁰

12. The Petković Defence further argues that this alleged disparity cannot be remedied by paragraph 17 of the Impugned Decision, which provides that the time allocated for the examination of witnesses may exceptionally be revised by the Trial Chamber, because it is expressly stated to be an exceptional power, which does not modify the basic entitlement of the Prosecution.³¹

13. The Prosecution responds that the allocation of time in the Impugned Decision is not disproportionate to the time afforded to the Defence to conduct cross-examination of Prosecution witnesses and that the Trial Chamber's determination does not violate the rights of the accused under Article 21 of the Statute.³² The Prosecution further submits that the Appellant has failed to

²⁴ Petković Appeal, para. 11.

²⁵ Petković Appeal, paras 12-13 and 16.

²⁶ Petković Appeal, paras 8 and 17.

²⁷ Petković Appeal, paras 14, 16-17 and 19.

²⁸ Petković Appeal, paras 16(2) and 17.

²⁹ Petković Appeal, paras 16(3) and 17.

³⁰ Petković Appeal, paras 16-17; Petković Response, para. 10.

³¹ Petković Appeal, para. 18.

³² Response, paras 2 and 23.

demonstrate an abuse of the Trial Chamber's discretion under Rule 90(F) of the Rules or that it committed a discernable error.³³

14. In particular, the Prosecution argues that the Appellant's comparison to the allocation of time during the Prosecution case is inapposite, given that the guidelines established by the Trial Chamber in that phase of the proceedings were upheld by the Appeals Chamber.³⁴ The Prosecution further submits that the Trial Chamber has in fact applied the guidelines in a flexible way and favoured the Defence, given that at the end of the Prosecution case, the accused collectively used five hours of cross-examination for every four hours of Prosecution examination-in-chief.³⁵ According to the Prosecution, this suggests that the Trial Chamber will continue to exercise its discretion so as to ensure the parties' right to a fair trial.³⁶

15. The Prosecution also argues that its own right to equality of arms would actually suffer if the Petković Appeal is allowed and if the Prosecution is only granted one sixth of the time used for its examination-in-chief for its cross-examination of defence witnesses.³⁷ According to its calculations, this approach would result in approximately 336.5 hours for examination-in-chief by the six accused compared with only 56.1 hours in total for the Prosecution to conduct cross-examinations.³⁸ The Prosecution submits that this "manifestly unfair" result would not only violate the well-established practice of the Tribunal that the Prosecution and the Defence collectively are to be accorded roughly equal time but it would also fail to take into account the different burden placed on the Prosecution by the Statute and the Rules.³⁹

16. In its Reply, the Petković Defence acknowledges the Prosecution's right to a fair trial but argues that this cannot be applied to the detriment of an individual accused.⁴⁰ In particular, the Petković Defence contends that the Prosecution's submissions are based on an erroneous premise, namely, that individual accused can be treated as a composite group for the purposes of the allocation of time.⁴¹

17. The Petković Defence further points to other multi-accused proceedings before the Tribunal to argue that the present case is the only one in which the defence time for cross-examination was

³³ Response, paras 2 and 23.

³⁴ Response, para 9, referring to *Prlić* Decision on Cross-Examination.

³⁵ Response, para. 11.

³⁶ Response, para. 12.

³⁷ Response, paras 19-22.

³⁸ Response, para. 17.

³⁹ Response, paras 13 and 17.

⁴⁰ Petković Reply, paras 8-10.

⁴¹ Petković Reply, para. 18.

predetermined and was set to be significantly less than the time accorded to the Prosecution.⁴² Further, the Petković Defence argues that although the allocation of time for defence cross-examination during the Prosecution's case was upheld on appeal, the Trial Chamber failed to exercise its discretion in order to ensure that the Appellant's right to cross-examine was effective during the proceedings.⁴³ As such, the only remedy for the disparity in treatment is for the Prosecution's time for cross-examination to be adjusted accordingly.⁴⁴

B. Analysis

18. The Appeals Chamber observes that, under Rules 73*bis* and 73*ter* of the Rules, the Trial Chamber is required to establish the number of witnesses each party may call and the amount of time allotted to each party. In exercising its discretionary power to allocate time and to ensure that the principle of equality of arms is respected, the Trial Chamber is obliged to ensure that "neither party is put at a disadvantage when presenting its case".⁴⁵

19. As is well established in the jurisprudence of this Tribunal, this does not mean that a Trial Chamber must accord an equal amount of time to the accused and to the Prosecution in the presentation of their cases.⁴⁶ As such, an accused is not "necessarily entitled to precisely the same amount of time or the same number of witnesses as the Prosecution", which has the burden of proving every element of the crimes charged beyond a reasonable doubt.⁴⁷ As the Appeals Chamber has held previously, "basic proportionality, rather than a strict principle of mathematical equality", governs the allocation of time between the two sides.⁴⁸

20. In the present case, the Prosecution has the burden of proving its case beyond reasonable doubt against six different co-accused. Each Accused, on the other hand, needs only to undermine the Prosecution's case with respect to the case it presents against him. As already stated by the Appeals Chamber, "in a case with multiple accused, the issue of proportionality is affected not only by the burden of proof upon the Prosecution, but also by the circumstance that not all of the evidence presented by the Prosecution is directed to prove the responsibility of one individual Accused".⁴⁹ This principle holds true to the allocation of time to the Prosecution for cross-

⁴² Petković Reply, paras 11-12.

⁴³ Petković Reply, para. 16.

⁴⁴ Petković Reply, paras 7 and 13.

⁴⁵ *Prosecutor v. Orić*, Case No. IT-03-68-AR73.2, Interlocutory decision on Length of Defence Case, 20 July 2005 ("Orić Decision"), para 7; *see also Prosecutor v. Prlić et al.*, Case No. IT-04-74-AR73.2, Decision on Prosecution Appeal Concerning the Trial Chamber's Ruling Reducing Time for the Prosecution Case, 6 February 2007, para. 23; *Prlić Decision on Cross-Examination*, p. 4.

⁴⁶ *Prlić Decision on Allocation of Time for Defence Case-in-Chief*, para. 39; *see also Orić Decision*, para. 7.

⁴⁷ *Orić Decision*, para. 7.

⁴⁸ *Orić Decision*, paras 7 and 8.

⁴⁹ *Prlić Decision on Allocation of Time for Defence Case-in-Chief*, para. 39.

examination of Defence witnesses. Indeed, while during the cross-examination of Prosecution witnesses each accused will only challenge the Prosecution evidence in relation to his own individual criminal responsibility, the Prosecution during its cross-examination of Defence witnesses will generally aim at undermining all of the evidence presented by those witnesses. This is indeed the logical outcome of the circumstance that the Prosecution represents the only adversary of each individual accused in a joint trial. Therefore, the Appeals Chamber considers that it was not unreasonable for the Trial Chamber to conclude that the Prosecution would need an equal amount of time in cross-examination as taken by each Accused in direct examination.

21. The Appeals Chamber further considers that the Fifth Guideline adopted by the Trial Chamber does not create an absolute entitlement to the time allocations provided therein, as the Petković Defence suggests. Rather, the Fifth Guideline provides a basic framework for the proceedings, which the Trial Chamber has explicitly left open to revision.⁵⁰ The Impugned Decision, therefore, establishes a flexible approach to the allocation of time that accords with the well-established practice of the Tribunal.⁵¹

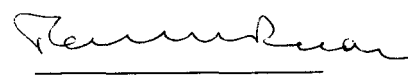
22. Therefore, the Appeals Chamber finds that the allocation of time to the Prosecution was a reasonable exercise of the Trial Chamber's discretion and that the Petković Defence has not established that the Trial Chamber committed any discernable errors in paragraph 14 of the Impugned Decision.

V. DISPOSITION

23. On the basis of the foregoing, the Praljak Appeal is declared **INADMISSIBLE** and the Petković Appeal is **DISMISSED**.

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

Done this 18th day of July 2008,
At The Hague,
The Netherlands.



Judge Fausto Pocar
Presiding Judge

[Seal of the International Tribunal]

⁵⁰ See Impugned Decision, para. 17.

⁵¹ *Prlić* Decision on Cross-Examination, p. 4; *Prlić* Decision on Allocation of Time for Defence Case-in-Chief, para. 25.