



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-T
Date: 17 August 2007
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French

IN TRIAL CHAMBER III

Before: Judge Jean-Claude Antonetti, presiding
Judge Árpád Prandler
Judge Stefan Trechsel
Reserve Judge Antoine Kesia-Mbe Mindua

Registrar: Mr Hans Holthuis

Decision of: 17 August 2007

THE PROSECUTOR

v.

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

PUBLIC

DECISION ON JADRANKO PRLIĆ'S MOTION FOR SEVERANCE

The Office of the Prosecutor:

Mr Kenneth Scott
Mr Douglas Stringer

Counsel for the Accused:

Mr Michael Karnavas and Ms Suzana Tomanović for Jadranko Prlić
Ms Senka Nožica and Mr Peter Murphy for Bruno Stojić
Mr Božidar Kovačić and Ms Nika Pinter for Slobodan Praljak
Ms Vesna Alaburić and Mr Nicholas 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

I. INTRODUCTION

1. **TRIAL CHAMBER III** (“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”), seized of “Jadranko Prlić’s Motion for Severance”, filed on 19 June 2007 (“Motion”), by which the Accused Prlić, pursuant to Rule 82 of the Rules of Procedure and Evidence (“Rules”), requests that the Chamber sever the case against him from those against the co-accused.

II. Procedural Background

2. On 1 June 2007, the Accused Prlić applied to the Chamber for severance of the case and for leave to exceed the word limit permitted by the “Practice Direction on the Length of Briefs and Motions” (“Direction”) of 16 September 2005.

3. In its decision of 13 June 2007,¹ the Chamber denied the motion to exceed the word limit permitted because the Accused Prlić did not explain why he was not able to justify his request while respecting the Direction.

4. On 14 June 2007, the Chamber was seized of a motion by the Office of the Prosecutor («Prosecution») requesting an extension of the deadline for filing its response within seven days of the filing of the new motion of the Accused Prlić.

5. On 19 June 2007, the Accused Prlić filed the Motion.

6. In its oral decision of 21 June 2007,² the Chamber, pursuant to Rule 126 *bis* of the Rules, granted the request of the Prosecution, giving it a deadline of seven days beginning on 19 June 2007.

7. On 21 June 2007, the “Prosecution Response to Jadranko Prlić’s Motion for Severance” (“Response”) was filed.

¹ *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-T, Decision on motion of the Accused Prlić for severance, 13 June 2007.

III. Submissions of the Parties

8. In his Motion, the Accused Prlić, pursuant to Rule 82 of the Rules, requests severance on the basis that the six Accused would be obliged to share the total time allotted to them to cross-examine Prosecution witnesses, which allegedly shows that he is not being considered as an individual Accused but as a member of a group of Accused.³

9. The Accused Prlić holds the view that the policy according to which each Counsel shall have one-sixth of the time allocated to the Prosecution, unless Counsel agree differently among themselves, does not enable him fully and effectively to exercise his right to cross-examine the witnesses.⁴

10. The case that the Chamber may exceptionally revise the estimated time for cross-examination in the light of the hearing of witnesses would apparently not be sufficient and would not enable the Defence to plan for cross-examination properly.⁵

11. The Accused Prlić also holds the view that by setting forth that the Defence may introduce evidence during the Defence case which, due to a lack of time, it was not able to adduce through cross-examination, the Chamber is implicitly infringing upon his right to a fair trial,⁶ as guaranteed by numerous international covenants on the protection of human rights,⁷ including the right to cross-examination of Prosecution witnesses.⁸

12. In addition, the Accused Prlić considers that limiting the time allocated for cross-examination, as the Chamber allegedly did for many important witnesses, would lead to an inadmissible constraint forcing him to prove his innocence, thus reversing the burden of proof and hindering him from maintaining silence.⁹

13. In conclusion, the Accused Prlić considers that by dividing the time for cross-examination by six, the Chamber is not taking account of conflicts of interest which

² *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-T, Oral decision of the Chamber on the request for extension of time, 21 June 2007, «T(F)» p. 20271.

³ Motion, para. 9.

⁴ Motion, para. 5.

⁵ Motion, para. 11.

⁶ Motion, para. 12.

⁷ Motion, para. 3.

⁸ Motion, para. 12.

⁹ *ibidem*.

might arise among the six Accused. Indeed, the Accused Prlić wishes to note that the six Accused held and exercised different functions, had different links to the crimes charged in the Indictment, do not have the same interests in cross-examining the witnesses, often cannot come to a satisfactory agreement on the division of time allocated for cross-examination, and do not have the same defence theories, strategies and tactics.¹⁰ In this connection, however, the Accused Prlić would like to point out that he does not assert the existence of “mutually antagonistic defences”¹¹ to justify severance, but simply maintain that the six Accused often do not have the same interest in cross-examining certain witnesses on particular points and, as a result, the one-sixth division of the time allocated for cross-examination does not satisfy the individual interests of each of the Accused.¹²

14. For all these reasons, the Accused Prlić requests severance for his case and, alternatively, to be treated as if he were being tried separately. He also asks the Chamber to order several witnesses to reappear for a more extensive cross-examination.¹³

15. In its Response, the Prosecution recalls that the issue of time allocated for cross-examination has already been dealt with by the Chamber in its oral decision of 8 May 2006 and by the Appeals Chamber, ruling on an interlocutory appeal, on 4 July 2006, against this decision.¹⁴ In this regard, the Appeals Chamber noted in its decision dismissing the interlocutory appeal that the challenged decision of the Chamber did not rigidly set forth the length of cross-interrogation of Prosecution witnesses, in particular because the Chamber was able, if necessary, to modify the time allocated and permitted the Accused to come to an agreement on the division of time among themselves.¹⁵

16. The Prosecution considers that the method currently employed to divide the time for cross-examination is sufficiently flexible to enable the Defence to conduct an effective cross-examination. Thus, the Prosecution notes in particular that the Chamber often grants more time to those Accused who are most concerned by a

¹⁰ Motion, para. 14.

¹¹ Motion, footnote no. 22, p. 7.

¹² *ibidem*.

¹³ Motion, p. 7 and 8 (no paragraph number given).

¹⁴ Response, paras. 5 and 6.

¹⁵ Response, para. 6.

particular testimony, that it lets the Defence teams divide the time allocated for cross-examination among themselves, which, according to the Prosecution, enables them to deal more effectively with issues of common concern to the Accused and avoids each one of them having to deal with the same points, and that it gives each of the Accused the right to apply for more time for cross-examination, if convincing reasons are given.¹⁶

17. The Prosecution holds the view that even if the existence of a conflict of interest among the Accused were raised in the Motion, the Accused Prlić has not made a showing that such a conflict among the Accused would cause serious prejudice to him and justify severance.¹⁷

IV. DISCUSSION

21. The Chamber notes that the Accused Prlić has requested severance under Rule 82 (B) of the Rules.¹⁸ The Accused Prlić considers that if the Accused are forced to share the total time allocated to them for cross-examination, by dividing it by six, his right to cross-examine the witnesses and, more generally, his right to a fair trial would be affected.

22. As a preliminary observation, the Chamber wishes to recall that despite the provisions of Rule 72 of the Rules,¹⁹ Rule 82 (B) of the Rules may be invoked at any stage of the proceedings.²⁰

¹⁶ Response, para. 9.

¹⁷ Response, para.13.

¹⁸ Rule 82 (B) of the Rules sets forth that:

The 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.

¹⁹ Rule 72 of the Rules, which deals with preliminary motions, sets forth that:

A. Preliminary motions, being motions which:

(...)

iii. seek the severance of counts joined in one indictment under Rule 49 or seek separate trials under Rule 82 (B) (...),

shall be in writing and be brought not later than thirty days after disclosure by the Prosecutor to the defence of all material and statements referred to in Rule 66 (A)(i) and shall be disposed of not later than sixty days after they were filed and before the commencement of the opening statements provided for in Rule 84.

²⁰ *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-PT, Decision on severance of case against Milorad Trbić, 26 June 2006, p. 2.

23. The Chamber also recalls that, though Rule 48 of the Rules²¹ sets forth the general conditions for joinder, Rule 82 (B) of the Rules enables the Chamber to redress any prejudicial effect of the application of Rule 48 of the Rules by authorizing severance. Thus, it is the Chamber's duty to determine whether, despite the advantages of a joint trial, the need to "avoid a conflict of interests that might cause serious prejudice to an accused, or to protect the interests of justice," calls for separate trials²².

24. In its "Oral decision on the cross-examination of Prosecution witnesses"²³ of 8 May 2006 ("Oral Decision"), the Chamber allotted each of the Counsels one-sixth of the time allocated to the Prosecution, unless the various Counsels agreed to have certain ones among them carry out the cross-examination of witnesses on behalf of all of them. The Chamber also stated in its Oral Decision that if a witness testimony related to the responsibility of one of the Accused in particular, the time allocated for cross-examination could be divided differently so that the Defence for the Accused in question could lead the cross-examination or be allocated most of the time available.

25. The Chamber notes that this Oral Decision was confirmed by the Appeals Chamber in its decision of 4 July 2006²⁴ ("Appeals Decision").

26. Initially, the Appeals Chamber recalled that, pursuant to Rule 90 (F) of the Rules, the Trial Chamber "shall exercise control over the mode and order of interrogating witnesses so as to make the interrogation and presentation effective for the ascertainment of truth; and avoid needless consumption of time."²⁵

27. The Appeals Chamber then noted that the Chamber had considerable leeway in defining the parameters of cross-examination and how the Defence exercised its right to cross-examine witnesses²⁶. It also noted that the Chamber had adopted a

²¹ Rule 48 sets forth that:

Persons accused of the same or different crimes committed in the course of the same transaction may be jointly charged and tried.

²² On this issue, cf. in particular, *Prosecutor v. Brđanin and Talić*, Case No. IT-99-36, Decision on the prosecution's oral request for a severance of trials, 20 September 2002, paras. 18-22.

²³ *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-T, Oral decision of Trial Chamber III on the cross-examination of Prosecution witnesses, 8 May 2006, T(F) pp. 1475-1476.

²⁴ *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-AR73.2, Decision on the joint Defence interlocutory appeal against the Trial Chamber's oral decision rendered on 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.

²⁵ Appeals Decision, p. 3.

²⁶ *ibidem*.

sufficiently flexible approach by retaining the right of each of the Defence Counsels to cross-examine witnesses and that this solution was also in line with the provisions of Article 21 (4) (e) of the Statute.²⁷

28. The Chamber also notes that the principles of cross-examination were reiterated in its decision of 12 July 2006²⁸ and that in order to assure the proper administration of justice and facilitate the organisation of witness testimony, at the start of every month, the Prosecution has to submit to the Chamber and to the Defence the list of witnesses it intends to call for the month in question and to set forth the length of testimony time for each witness.²⁹ On receipt of the lists, the Chamber estimates the time to be allocated to the Defence for cross-examination and informs the Parties thereof as soon as possible.

29. On this point, the Chamber wishes to note that in making its estimation, it takes several factors into consideration, including the length of time estimated by the Prosecution for its examinations and the fact that one or more of the Accused may be particularly concerned by the testimony of these witnesses.³⁰ The Chamber recalls that in order to determine which of the Accused is/are particularly concerned, it examines the witness statements provided in advance to the pre-trial Judge during the pre-trial phase and the summaries prepared in accordance with Rule 65 *ter* of the Rules.³¹

30. Finally, the Chamber recalls that on 17 January 2007,³² it also rendered an oral decision in which it reiterated that the Chamber sets forth the length of time for examination and cross-examination for each witness based on the estimates made by the Prosecution, that it allocates a supplementary time period for each Accused should the witness have mentioned them either in the course of his oral testimony or in evidence adduced by the Prosecution during examination-in-chief, but that the supplementary time allocated to an Accused by the Chamber may only be used for cross-examination by the Accused to whom the time has been allocated and not by another Accused.

²⁷ Appeal Decision, p. 5.

²⁸ *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-T, Decision on the implementation of the Decision of 8 May 2006 on time allocated for cross-examination by Defence, 12 July 2006 ("Decision of 12 July 2006").

²⁹ Decision of 12 July 2006, p. 3.

³⁰ *ibidem*.

³¹ *ibid.*

31. The Chamber notes that in the Motion, the Accused Prlić made no reference to any circumstances that would enable the Chamber to conclude that the implementation of the division of time for cross-examination, as decided by the Chamber in its oral Decision and confirmed in appeal by the Appeal Decision, would cause serious prejudice to him and justify severance. Moreover, in examining the procedure in its entirety, the Chamber does not see any circumstances giving rise to doubt as to the fairness of the procedure as a whole. On the other hand, the Chamber notes that on 9 August 2007, the Counsel for the Accused Prlić was given 61 hours and 17 minutes of time to cross-examine Prosecution witnesses, out of a total of 279 hours and 6 minutes allocated to the defence of the six Accused, i.e. 22 per cent of the time allocated for cross-examination.³³

32. The Chamber also notes that in the Motion, the Accused Prlić stipulates that he is not asserting the existence of “mutually antagonistic defences” to justify the granting of severance, but rather maintains that there are often competing interests in cross-examining certain witnesses.³⁴

33. In this connection, the Chamber recalls that as the mere possibility of mutually antagonistic defences does not constitute a conflict of interest capable of causing serious prejudice pursuant to Rule 82 (B) of the Rules,³⁵ this would apply all the more to the existence of often competing interests in cross-examining certain witnesses.

34. Indeed, the presentation of evidence in a joint trial concerning all the Accused or only one of them does not in itself constitute serious prejudice to one of the Accused.³⁶ The mere fact that all the evidence presented allegedly does not correspond to all the charges raised against each of the Accused or that certain evidence presented might cause prejudice to one of them, would not suffice to prove the existence of prejudice.³⁷ In addition, the Chamber recalls that a joinder does not

³² *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-T, Oral decision on supplementary time allocated to the Accused for cross-examination, 17 January 2007, T(F), pp. 12398 and 12399.

³³ *Prosecutor v. Prlić et al.*, Case No. IT-04-74-T, *Time-monitoring; Period ending 09 August 2007*, Internal Memorandum, 9 August 2007.

³⁴ Motion, footnote, no. 22, p. 7.

³⁵ *Prosecutor v. Vujadin Popović et al.*, Case No. IT-02-57-PT, IT-02-58-PT, IT-02-63-PT, IT-02-64-PT, IT-04-80-PT, IT-05-86-PT, Decision on the Motion for Joinder, 21 September 2005, para. 33.

³⁶ *Prosecutor v. Ivan Čermak and Mladen Markač, Prosecutor v. Ante Gotovina*, Case No. IT-03-73-PT, IT-01-45-PT, Decision on the consolidated motion of the Prosecution to amend the Indictment and to join the cases (Ivan Čermak, Mladen Markač and Ante Gotovina Decision), para. 70.

³⁷ Ivan Čermak, Mladen Markač and Ante Gotovina Decision, para. 70.

necessarily mean joint defence³⁸ and that, in any event, the trials before this Tribunal are conducted by professional judges who, as a matter of course, are able to determine the portion of responsibility to be borne by each of the Accused.³⁹

35. The Chamber wishes to stress that even though the presentation of evidence not concerning all the Accused equally does not constitute serious prejudice justifying severance, all the modes taken for cross-examination, as discussed above, make it possible to bear this reality in mind and guarantee the individual interests of each of the Accused.

FOR THE FOREGOING REASONS,

PURSUANT TO Rule 82 (B),

DENIES the Motion.

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

/signed/

Judge Jean-Claude Antonetti
Presiding Judge

Done this seventeenth day of August 2007

At The Hague

The Netherlands

³⁸ Ivan Čermak, Mladen Markač and Ante Gotovina Decision, para. 68.

³⁹ *Prosecutor v. Brđanin and Talić*, Case No. IT-99-36-T, Decision on the Prosecution's oral request for a severance of trials, 20 September 2002, para. 21, quoting *Prosecutor v. Simić et al.*, Case No. IT-95-9-PT, Decision on Defence Motion to Sever Defendants and Counts, 15 March 1999.

[Seal of the Tribunal]