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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: IT-00-39-T

Date: 14 August 2006

Original: English

IN TRIAL CHAMBER I

Before: Judge Alphons Orie, presiding
Judge Joaquín Martín Canivell
Judge Claude Hanoteau

Registrar: Mr Hans Holthuis

Decision of: 14 August 2006

PROSECUTOR

v.

MOMČILO KRAJIŠNIK

**REASONS FOR DECISION DENYING DEFENCE MOTION REGARDING
CHAMBER WITNESSES BILJANA PLAVŠIĆ AND BRANKO ĐERIĆ AND
DECISION ON ADMISSION INTO EVIDENCE OF BILJANA PLAVŠIĆ'S
STATEMENT AND BOOK EXTRACTS**

Office of the Prosecutor

Mr Mark Harmon
Mr Alan Tieger

Counsel for the Defence

Mr Nicholas Stewart, QC
Mr David Josse

I. PROCEDURAL BACKGROUND

1. On 30 March 2006, the Chamber announced that it would call Chamber witnesses pursuant to Rule 98 of the Rules of Procedure and Evidence.¹ The Chamber proposed a procedure on calling and examining Chamber witnesses and, on 7 April 2006, provided the parties with a draft order to that effect.² The parties were invited to suggest changes to the draft, which were then partly implemented in the finalized procedure of 24 April 2006 ("Chamber witness procedure").³ According to the procedure, the Chamber was to make a final decision on whether to call persons to give evidence as Chamber witnesses at the close of the Defence case. It also undertook, through Chamber staff, to contact such witnesses, conduct a preliminary interview with each witness based on a list of topics prepared by the judges, compile a witness statement based on the interview, and provide the parties with the statement of each witness.⁴ The Chamber witness procedure also included a section that dealt specifically with uncooperative witnesses and provided as follows:

5. Should the witness refuse to cooperate [...] the Chamber may decide to subpoena the witness to testify before the Chamber. In such a case there will be no preliminary interview, and the remainder of this procedure shall be modified accordingly.

2. On 11 April 2006, the Chamber announced in court the names of four potential Chamber witnesses, two of whom were Biljana Plavšić and Branko Đerić.⁵ The names of all four persons were well known to both parties since they had been listed as potential Defence witnesses and the Defence had supplied the Chamber with 65 ter summaries of their expected testimony.⁶

3. The Chamber witness procedure was followed with Mrs Plavšić, but Mr Đerić refused to cooperate with Chamber staff. He was subpoenaed on 8 June 2006 and refused to comply

¹ T. 22233-4.

² Procedure on calling and examining Chamber witnesses, 7 April 2006.

³ Decision on the finalized procedure on calling and examining Chamber witnesses; decision and orders on several evidentiary and procedural matters, 24 April 2006.

⁴ Chamber witness procedure, Annex.

⁵ T. 22938. The other two were Bogdan Subotić and Velibor Ostojić.

⁶ Defence filing pursuant to Rule 65 ter (G)(i) of the Rules of Procedure and Evidence, 4 October 2005; List of witnesses the Defence intends to call, 8 February 2006; Defence 65 ter summaries for Defence witnesses on February 2006 amended list, 8 February 2006.

with the subpoena.⁷ Contempt proceedings were commenced against him and a warrant for his arrest was issued. Soon thereafter, Mr Đerić got in touch with the Chamber staff and agreed to come to The Hague as a Chamber witness. This meant, however, that a preliminary interview with Mr Đerić could not be conducted and a written statement could not be obtained from him in the time available within the trial schedule.

4. The initial contact with Mrs Plavšić was made through a letter sent to her on 26 April 2006 by a legal officer of the Chamber, indicating that she would be contacted by telephone with a view to setting up a preliminary interview. On 2 May 2006, the Prosecution filed a confidential list of interview records and statements in its possession relating to Mrs Plavšić thereby enabling both the Chamber and the Defence to gather information and prepare for examination-in-chief and cross-examination respectively.⁸ On 10 May 2006, the legal officer contacted Mrs Plavšić. The date of her preliminary interview was agreed upon. The audio recording of this telephone conversation was provided to the parties on 10 May 2006.⁹ In a letter dated 15 May 2006, Mrs Plavšić was informed, through the Swedish authorities, that she had the right to have a lawyer present during the interview. On 29 and 30 May 2006, the legal officer interviewed Mrs Plavšić at Hinseberg prison in Sweden. Present at the interview were also a representative of the Registrar, an interpreter, and a representative of the Swedish Ministry of Justice. Mrs Plavšić spoke in English. The interpreter assisted as needed.

5. During the interview the legal officer announced the Chamber's interest in Mrs Plavšić's book and asked her to write down the pages relating to the Accused, which she did. The audio recording of the interview was provided to the parties on 2 June 2006.¹⁰ The transcripts of the interview were completed on 20 June 2006 and, on the same day, provided to the parties.¹¹ The Chamber proceeded to prepare a witness statement which was completed and filed on 26 June 2006.¹² The witness statement made reference to the pages (a total of

⁷ See also Correspondence from state, filed 8 June 2006, where the Ministry of the Interior of Republika Srpska provides an account of Mr Đerić's conduct when attempts were made to deliver subpoena documents to him.

⁸ Prosecution's list relating to prospective Chamber witnesses; Attachment to Prosecution's list relating to prospective Chamber witnesses, both filed on 2 May 2006. On 10 May 2006, the Chamber inquired about a 2004 Prosecution interview with Mrs Plavšić. On 11 May 2006, the Prosecution informed the Chamber via email that the 2004 interview was inadvertently omitted from the list of materials. On the same day the Chamber requested all Prosecution material relating to Mrs Plavšić (including the undisclosed 2004 interview), T. 23862. On 12 May 2006, the remaining material was provided in court by the Prosecution.

⁹ T. 23818.

¹⁰ T. 25154.

¹¹ T. 26032.

¹² Plavšić witness statement, 26 June 2006.

forty) from Mrs Plavšić's book which, according to her, related to the Accused. Once the witness statement was translated, on 28 June 2006, it was faxed to Hinseberg prison for delivery to Mrs Plavšić. In the meantime, also on 28 June 2006, Mrs Plavšić announced through a lawyer that she wished to be assisted by a lawyer and, on 29 June 2006, OLAD formally appointed a counsel of her choice. The lawyer was immediately provided with the transcripts of the legal officer's interview with Mrs Plavšić and the Chamber's draft of the witness statement in English and in Serbo-Croatian. Mrs Plavšić announced through her lawyer that she would not come to The Hague to testify voluntarily. Consequently, on 28 June 2006, the Trial Chamber issued a subpoena to be served on her. Mrs Plavšić then stated that she would comply with the order of the court.¹³

6. On 30 June 2006, an English translation of the selected pages from Mrs Plavšić's book was provided to the parties. Mrs Plavšić testified from 5 to 7 July 2006 in presence of her lawyer. On 5 July 2006, during her testimony, Mrs Plavšić made a number of corrections to the Chamber's draft of her witness statement.¹⁴ She added six new page references to her book, which she believed related to the Accused, and deleted one of the old page references she had announced earlier. After court that day, an updated witness statement was produced by the legal officer of the Chamber. This statement was provided to the parties and to Mrs Plavšić in the United Nations Detention Unit. On 6 July 2006, the parties were provided with a translation of the additional pages from Mrs Plavšić's book.¹⁵ On 7 July 2006, Mrs Plavšić made some minor changes to the updated witness statement and signed it.¹⁶ The Prosecution did not oppose admission of the witness statement or the pages from Mrs Plavšić's book into evidence. The Defence announced that it intended to make submissions.¹⁷

7. On 11 July 2006, shortly before Mr Đerić was to be brought in to the courtroom to testify, the Defence filed the motion presently under consideration, seeking to exclude the evidence of Mrs Plavšić in its entirety and asking that Mr Đerić not be called as a witness. On the same day, without having heard from the Prosecution, the Chamber orally denied the motion as it related to Mr Đerić, stating that written reasons would follow.¹⁸ On 14 July 2006, the Chamber denied the other part of the motion, relating to Mrs Plavšić, again stating that

¹³ Memorandum of Service, filed on 28 June 2006.

¹⁴ T. 26784-809.

¹⁵ Per email of the legal officer to parties, 6 July 2006.

¹⁶ T. 26971-2.

¹⁷ T. 26972-3.

written reasons would follow.¹⁹ There were no submissions by the Prosecution in the short time available.²⁰ The reasons for denying the Defence motion are set out below.

II. DEFENCE ARGUMENTS

8. With respect to Mrs Plavšić, the Defence argues in its motion that her evidence was inadequately prepared, inadequately presented, and that the Defence was given an inadequate opportunity to prepare and conduct cross-examination. The Defence notes that Mrs Plavšić was initially charged together with the Accused pursuant to a joint indictment and, as such, asserts that she is the “number 1 insider” to appear at trial.²¹

9. The Defence then goes on to list the alleged deficiencies in the preparation of the evidence. First, Mrs Plavšić’s interview in Sweden was conducted almost entirely in English, which is not Mrs Plavšić’s native tongue, by an interviewer who is not a native speaker of English. This, according to the Defence, severely affected the quality and the comprehensibility of the interview. Second, Mrs Plavšić was effectively refused access to the transcript of her interview, despite expressly requesting it. Third, the Chamber’s draft of the witness statement was unreasonably short and bare in relation to the length of the interview, the availability of previous interviews, and the range of matters which must have been actually or potentially within Mrs Plavšić’s knowledge. Finally, Mrs Plavšić was invited to approve that statement without access to documents, without the transcript of the interview, and without her being able to make any useful contact with a lawyer who would assist her.²² The Chamber views this last argument as a Defence submission against the admission of Mrs Plavšić’s statement.

10. The Defence also lists the following alleged deficiencies in the way Mrs Plavšić’s testimony was managed and presented in court. First, the Defence claims that there were glitches in the first part of her testimony which effectively rendered useless the first of the three days allocated for her testimony. Second, it asserts that the allocated three days were in any case insufficient for a witness of her significance. In support of this argument the Defence

¹⁸ T. 27044-27045.

¹⁹ T. 27215.

²⁰ T. 27215.

²¹ Motion, para. 5.

²² Ibid., para. 6.

provides a list of, what it calls, “minor witnesses” whose testimonies lasted longer than that of Mrs Plavšić. Third, the Defence claims that the loss of the first day resulted in the Chamber significantly reducing its questioning and imposing “excessively tight time limits for cross-examination”.²³ Fourth, the Chamber then “so mishandled the progress of Mrs Plavšić’s evidence that even the tight time limits imposed by the Trial Chamber’s direction on Thursday 6 July had to be severely cut”.²⁴ Fifth, the Defence submits that the whole examination of Mrs Plavšić was “artificially cut off and the timetable was driven unreasonably by targets and deadlines rather than by the fair requirements that her evidence should not be rushed and arbitrarily truncated”.²⁵ Finally, the Defence argues that the purported wholesale incorporation of passages of Mrs Plavšić’s book as part of her evidence placed the Defence in a difficult position, as there was no time for cross-examination on that material. The Chamber considers this argument to be a submission opposing the admission of the excerpts of Mrs Plavšić’s book.

11. In conclusion, the Defence argues that it effectively had less than two hours for its cross-examination of a witness whose resentment at being brought to The Hague was clearly visible and who, as a result, behaved in a manner that slowed down her evidence. The Defence also submits that the protection of the Accused and his rights in relation to a Chamber witness of Mrs Plavšić’s significance is extremely important.²⁶

12. As far as Mr Đerić is concerned, the Defence asserts that he is a very close associate of Mrs Plavšić and, as such, is the second most important insider witness, for whose evidence the same essential considerations of fairness and protection of the Accused apply.²⁷ While acknowledging that the Chamber cannot force a witness to cooperate, the Defence argues that it was not fair to the Accused to call Mr Đerić as a witness at all costs, not least because no one knew what Mr Đerić was likely to say. The Defence notes that Mr Đerić is not known to have given any statement or interview to the Tribunal or to a defence team in relation to events relevant to the indictment in this case. Moreover, the Chamber did not provide the parties with any indication of areas it intended to explore in its examination of the witness.²⁸

²³ Ibid., para. 7.

²⁴ Ibid., para. 7.

²⁵ Ibid., paras 8-10.

²⁶ Ibid., para. 12.

²⁷ Ibid., para. 14.

²⁸ Ibid., paras 16-18.

Therefore, according to the Defence, Mr Đerić should not have been called to the witness stand.

III. DISCUSSION

13. Rule 98 of the Rules allows a Chamber to summon such witnesses as it decides it needs to hear. The Defence’s assertion that Mrs Plavšić and Mr Đerić are two very important insiders, and were thus witnesses of high potential significance, is correct. This is precisely the reason why the Chamber decided to exercise its Rule 98 powers to call the two persons as Chamber witnesses. The Chamber and the parties in an adversarial system have different interests, and once it became clear to the Chamber that the parties were not going to call these two important insiders, and once the Chamber had made the additional determination that their potential testimony might assist in the search for the truth, it would have been quite inexcusable for the Chamber not to call them. It is the Chamber’s opinion that it was in the interests of justice to hear the evidence of Mrs Plavšić and Mr Đerić.

14. The fact that the Defence decided not to call these witnesses meant that it relinquished a certain amount of control over their testimony leaving it to the Chamber to focus on what it considered to be the most relevant issues. This is an inevitable procedural consequence of the priorities the parties have set for the presentation of their cases.

15. The procedure that was eventually followed with respect to all Chamber witnesses was as much as possible in conformity with the Chamber witness procedure. The fact that Mrs Plavšić’s interview was conducted in English is irrelevant as Mrs Plavšić does speak adequate English, which made it possible to extract a clear statement. Furthermore, according to the Chamber witness procedure, provision of the transcript of the interview to the witness was not considered necessary, nor is it a standard practice in statement preparation generally. As for the way in which Mrs Plavšić’s statement was drafted, and the Defence’s assertion that it was unreasonably short given the length of the interview, the fact is that Mrs Plavšić is a Chamber witness and, as such, it was for the Chamber to decide the topics of her evidence in line with what it considered important. Furthermore, the length of Mrs Plavšić’s interview was the result of her propensity to provide broad and general answers to specific questions asked by the legal officer. This ultimately resulted in hours of audio recording which were irrelevant for the Chamber’s purposes and therefore discarded during the preparation of Mrs Plavšić’s

witness statement. The witness statement, nevertheless, fulfilled its purpose by giving the parties an opportunity to anticipate what the testimony would be about. Finally, having reviewed her statement carefully,²⁹ Mrs Plavšić signed it, and this without complaint regarding access to supporting documents. As a result, the Chamber sees no merit in the Defence arguments regarding the preparation of Mrs Plavšić's evidence.

16. As far as the actual testimony of Mrs Plavšić is concerned, the main concerns of the Defence seem to be the scope of examination-in-chief and the time that was given to the parties for cross-examination. With regard to the former, when questioning Mrs Plavšić, the Chamber relied only on material already in evidence or material provided by the witness herself. In both cases the material was available to the parties in advance. The material included the witness statement, the interview transcript, the book excerpts, as well as a number of Prosecution interviews with Mrs Plavšić. Accordingly, not only did the Defence know in advance what the scope of examination-in-chief would be, it was also able to anticipate and prepare the potential topics to be covered in cross-examination. As for the lost day, this was caused by Mrs Plavšić's ill health. The Chamber tailored its examination-in-chief to fit the new circumstances.

17. With regard to the time allotted for cross-examination, the Defence was informed on 20 June 2006 that Mrs Plavšić's testimony would last three days.³⁰ The Chamber then allocated to the Prosecution one hour and twenty minutes for questioning, whereas the Defence was given two hours and forty minutes.³¹ Ultimately, the Chamber used two hours and forty minutes, the Prosecution used half an hour, and the Defence used two hours. The Defence thus enjoyed 75 percent of the Chamber's time, which is well above the 60 percent the Chamber used as guidance for the parties in this case. In light of the fact that the Defence had earlier been provided with all the material relevant to cross-examination, including Mrs Plavšić's statement and the translated book excerpts, the Defence had the opportunity to apportion the allocated time as it saw fit and put to Mrs Plavšić the questions it considered most important.

²⁹ T. 26777, 26784-809, 26833, 26838, 26971-2. Mrs Plavšić reviewed her statement in detail in court before finalising it.

³⁰ T. 26031.

³¹ T. 26831, 26871.

18. Finally, with respect to the allegation that Mrs Plavšić's evidence is unfairly damaging to the Accused, the Defence has failed to identify a concrete example of such injustice and, instead, makes abstract allegations of general unfairness resulting from this witness's testimony. However, as stated earlier, both parties were in a position to anticipate the topics on which Mrs Plavšić would be testifying and both had a chance to cross-examine her accordingly. The Chamber, in its effort to strike a fair balance and because it was aware of the potential impact of Mrs Plavšić's testimony on the cases of both parties, gave the Defence twice the amount of time that was available to the Prosecution.³² (As it turned out, the Defence used four times the amount of time used by the Prosecution.) Ultimately, the question is whether the parties had an adequate opportunity to cross-examine the witness, taking all circumstances into account. The Chamber is satisfied that, for all the reasons mentioned above, the parties did have such an opportunity.

19. Accordingly, the Chamber decided that the Defence submissions relating to Mrs Plavšić are without merit and, as a result, denied the motion to exclude her evidence. Mrs Plavšić's statement and the book excerpts, marked C7 and C8 respectively, are hereby admitted into evidence.

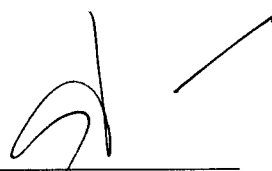
20. As for Mr Đerić, while it is correct that he did not give the Chamber a statement in advance to his testimony, the parties knew that the examination-in-chief would be based on material already in evidence. Accordingly, the parties could anticipate the topics on which the Chamber would examine this witness. Mr Đerić, like Mrs Plavšić, was on the Defence list of witnesses until February 2006. Accordingly, the Defence has not given a valid reason for disallowing his testimony in advance of hearing it.

21. For these reasons, the Defence's motion relating to Mr Đerić was denied.

³² T. 26871.

FOR THE FOREGOING REASONS the Chamber **DENIED** the motion in its entirety and now **ADMITS** into evidence Mrs Plavšić's statement and relevant extracts from her book.

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



Judge Alphons Orié
Presiding Judge

Dated this 14th day of August 2006
At The Hague
The Netherlands

[Seal of the Tribunal]