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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-04-81-PT

Date: 23 November 2007

Original: English

IN THE TRIAL CHAMBER

Before: **Judge Patrick Robinson, Presiding**
Judge Krister Thelin
Judge Frank Höpfel

Registrar: **Mr. Hans Holthuis**

Decision of: **23 November 2007**

THE PROSECUTOR

v.

MOMČILO PERIŠIĆ

PUBLIC FILING

DECISION ON MOTION FOR SANCTIONS FOR FAILURE TO BRING THE ACCUSED TO TRIAL WITHOUT UNDUE DELAY

Office of the Prosecutor
Mr. Mark Harmon

Counsel for the Accused
Mr. James Castle
Mr. Novak Lukić

I. PROCEDURAL BACKGROUND

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") is seised of the "Motion for Sanctions for Failure to Bring the Accused to Trial Without Undue Delay" filed by Counsel for Momčilo Perišić ("Defence" and "Accused", respectively) on 10 August 2007 ("Motion"), wherein the Defence submits that the Accused has suffered prejudice from delays in the proceedings both before and after the indictment against him was filed, and therefore requests "the imposition of specific remedial sanctions designed to address the prejudice suffered by the [A]ccused".[1]

2. The Office of the Prosecutor ("Prosecution") filed its "Prosecution's Response to Defence Motion for Sanctions for Failure to Bring the Accused to Trial Without Undue Delay" on 23 August 2007 ("Response"), in which its contends that the Defence failed to establish any prejudice to the Accused and further submits that any delay in the proceedings, both prior to and after issuance of the indictment against the Accused, was necessary to safeguard his rights.[2]

II. SUBMISSIONS OF THE PARTIES

3. In particular the Defence argues that a cumulative analysis of the following factors demonstrates that the trial against the Accused has been unduly delayed: i) length of the delay; ii) complexity of the proceedings; iii) conduct of the Parties; iv) conduct of the relevant authorities; and v) prejudice to the Accused.[3]

4. Although the Defence does not specify the date from which it alleges the delay begins, it submits, variously, that "[t]he factual basis of the indictment occurred 13 – 15 years ago"[4], that "the prosecution has known about the basis for the indictment since 1996, eleven years ago,"[5] and notes that the indictment "was issued on 22 February 2005, two months after the Completion Strategy's limitation on the termination of investigations".[6] The Defence submits that the Accused cannot

[1] Motion for Sanctions for Failure to Bring the Accused to Trial Without Undue Delay, 10 August 2007 (submitted on 9 August 2007) ("Motion"), para. 30; *see also Id.*, paras 23-27.

[2] Prosecution's Response to Defence Motion for Sanctions for Failure to Bring the Accused to Trial Without Undue Delay, 23 August 2007 ("Response"), paras 1, 11.

[3] Motion, paras 13-27.

[4] Motion, para. 13.

[5] *Id.*

[6] *Id.*, para 1.

receive a fair trial "at this point in time" due to: i) the delay in filing the indictment and ii) the delay in the post-indictment progress of this case towards trial.[7]

5. The Defence requests the following relief from the Trial Chamber: i) that a hearing on the cause of such 'undue delay' be conducted;[8] ii) that the Prosecution be precluded from using prior testimony or statements of deceased witnesses whom the Defence lost the ability to cross-examine;[9] iii) that the Prosecution be precluded from tendering transcripts or minutes of the Federal Republic of Yugoslavia Supreme Defence Council;[10] iv) that the Prosecution be precluded from using adjudicated facts as well as statements obtained pursuant to Rule 92*bis* of the Rules of Procedure and Evidence of the Tribunal ("Rules");[11] v) that the Trial Chamber consider the delay and prejudice suffered by the Accused in assessing the facts presented at trial;[12] and ultimately vi) that the Trial Chamber apply the 'abuse of process' doctrine to assess whether the delay in bringing the Accused to trial makes it impossible to give him a fair trial and, if that is the case, to dismiss the case against him with prejudice.[13]

6. While the Prosecution agrees that the five factors set forth by the Defence should indeed be examined when conducting an 'undue delay' assessment,[14] it first contends that on the length of the delay, it was within its prosecutorial duty to gather a *prima facie* case against the Accused before issuing an indictment against him and adds that the lack of State co-operation in this case contributed to such delay.[15]

7. Second, as regards the complexity of the proceedings, the Prosecution argues that given the broad geographical and temporal scope of the indictment against the Accused as well as the number of proposed witnesses and volume of documents, any delay in the proceedings both prior to and after issuance of the indictment was necessary to protect the right of the Accused to a fair trial.[16]

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[7] *Id.*, para 28.
[8] *Id.*, para. 20.
[9] *Id.*, para. 30(a).
[10] *Id.*, para. 30(b).
[11] *Id.*, para. 30(c).
[12] *Id.*, para. 31.
[13] *Id.*, para. 32.
[14] Response, para. 7.
[15] *Id.*, paras 11-14.
[16] *Id.*, paras 15-16.

8. Third, as to the conduct of the Parties, the Prosecution submits that "[n]o evidence in the record shows that the prosecution acted inappropriately or deliberately delayed the submission of the indictment".[17]

9. Fourth, on the conduct of relevant authorities, the Prosecution opines that this case is progressing at the same speed as other cases before the Tribunal of similar complexity.[18]

10. Finally, as to the prejudice to the Accused, the Prosecution submits that the Defence failed to establish the following:

i) that the deceased witnesses referred to by the Defence possessed exculpatory information other witnesses would not have had;
ii) that potentially exculpatory documents were lost or destroyed; and
iii) how the filing of Prosecution motions to admit evidence pursuant to Rules 92*bis*, 92*quater* and 94(B) were not in conformity with the work plan established by the Pre-Trial Judge on 22 October 2006 pursuant to Rule 65*ter*(D)(ii) ("Work Plan") but rather were used to benefit from the alleged delay in the proceedings.

Furthermore, the Prosecution submits that the issue of the alleged unequal access of the Defence to the processes of the Tribunal has already been decided by a decision of the Chamber of 18 June 2007.[19]

III. APPLICABLE LAW

11. The obligation to ensure that proceedings are conducted expeditiously and without undue delay is incumbent upon the Chamber pursuant the Statute of the Tribunal ("Statute") and the Rules.[20]

12. While the issue of 'undue delay' has not yet been examined in the case law of the Tribunal, the Appeals Chamber of the International Criminal Tribunal for Rwanda ("ICTR") has held that

[17] *Id.*, para. 18; *see also Id.*, paras 17-19.
[18] *Id.*, para. 21.
[19] *Id.*, paras 22-33.
[20] Article 20(1) of the Statute provides: "The Trial Chambers shall ensure that a trial is fair and expeditious [...]"; Article 21(4) of the Statute provides: "In the determination of any charge against the accused pursuant to the present Statute, the accused shall be entitled to the following minimum guarantees, in full equality: (c) to be tried without undue delay". *See also* Rule 65*ter*(B) of the Rules, according to which "[t]he pre-trial Judge shall ensure that the proceedings are not unduly delayed and shall take any measure necessary to prepare the case for a fair and expeditious trial."

it is necessary to consider, inter alia, the following factors when determining whether there has been a violation of the right to be tried without undue delay:

(1) The length of the delay;
(2) The complexity of the proceedings, such as the number of charges, the number of accused, the number of witnesses, the volume of evidence, the complexity of facts and law;
(3) The conduct of the parties;
(4) The conduct of the relevant authorities; and
(5) The prejudice to the accused; if any

[...]
[and] that the Trial Chamber, by stating, "(t)hat there is no need to inquire into any role that the Prosecutor might have played about the alleged undue delay", has failed to conduct a full enquiry and thus failed to take into account a necessary factor to determine whether there has been undue delay.[21]

13. Examining the *Mugiraneza* case, it is clear that the circumstances are closely related to the present case, and thus the Chamber considers that the standard set forth by the ICTR Appeals Chamber is helpful in analysing the instant case. Specifically, as recounted in the decision of the Trial Chamber, the Accused, Mugiraneza, was arrested in Cameroon on 6 April 1999 pursuant to a request by the Prosecutor for the ICTR.[22] The indictment was confirmed on 13 May 1999, and the Accused was transferred to the United Nations Detention Facilities on 31 July 1999.[23] The Indictment alleges offenses which occurred between 1 January and 31 December 1994.[24] The Defence filed its motion to dismiss on 2 August 2003, nearly four years after the indictment was confirmed,[25] and nearly nine years after the offenses allegedly occurred. Prior to filing its motion, the Defence in the *Mugiraneza* case also submitted that it had "called for a speedy trial on several occasions".[26] The Appeals Chamber, in reviewing the Trial Chamber's decision denying the motion, established the five factors above, indicating the analysis of the motion turns on these five

[21] *Prosecutor v. Prosper Mugiraneza*, Case No. ICTR 99-50-AR73, Decision on Prosper Mugiraneza's Interlocutory Appeal from Trial Chamber II Decision of 2 October 2003 Denying the Motion to Dismiss the Indictment, Demand Speedy Trial and for Appropriate Relief, 27 February 2004, p. 2.

[22] *Prosecutor v. Prosper Mugiraneza*, Case No. ICTR 99-50-I, Decision on Propser Mugiraneza's Motion to Dismiss the Indictment for Violation of Article 20(4)(C) of the Statute, Demand for Speedy Trial and for Appropriate Relief, 2 October 2003, para. 1.

[23] *Id.*

[24] *Prosecutor v. Prosper Mugiraneza*, Case No. ICTR 99-50-I, Indictment, para. 2.1.

[25] *Id.* at preamble paragraph.

[26] *Id.*, at para. 4.

criteria.[27] As the cases contain very similar arguments and the facts are closely related, the Chamber finds it useful to use the analysis set out by the Appeals Chamber in this case, and will proceed to such an analysis below.

14. The Defence suggests that a period of 11 years must be taken into account in the instant case, arguing that the time for which the Prosecution must be held accountable begins at the point at which it became aware of the Accused's alleged offences.[28] The indictment against the Accused was issued on 22 February 2005, and the Accused surrendered to the Tribunal on 7 March 2005.[29] In the instant case, the Accused was granted provisional release on 9 June 2005.[30]

15. According to the Work Plan, adopted on 22 October 2006, the case against the Accused was to be trial ready on 30 April 2007. The period between the issuance of the indictment and the adoption of a Work Plan to complete pre-trial is less than two years, and the period between the adoption of the Work Plan and the case achieving a status of trial readiness was, therefore, only six months. In addition, the Defence concedes in its motion that this is a complex case.[31]

16. In *Case of W. v. Switzerland* heard before the European Court of Human Rights ("ECHR"),[32] the Accused, a Swiss businessman, was prosecuted along with eleven accomplices for a series of economic offences, including frauds in the management of some sixty companies.[33] The first complaints were made to the criminal police concerning the conduct of the Accused in 1982, and investigation revealed that the conduct which eventually led to charges against the Accused began as far back as 1977.[34] The Accused remained under investigation until 1986.[35] In 1985 and 1987, money and valuables belonging to the Accused and his co-accused were seized following orders or searches.[36] The Accused was arrested on 27 March 1985 and placed in pre-trial detention, where he remained until he was eventually convicted and sentenced to eleven years' imprisonment on 30

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[27] *Prosecutor v. Prosper Mugiraneza*, Case No. ICTR 99-50-AR73, Decision on Prosper Mugiraneza's Interlocutory Appeal from Trial Chamber II Decision of 2 October 2003 Denying the Motion to Dismiss the Indictment, Demand Speedy Trial and for Appropriate Relief, 27 February 2004, p. 2.

[28] Motion, para. 13.

[29] Motion, para. 2

[30] *Prosecutor v. Momčilo Perišić*, Case No. IT-04-81-PT, Decision on Momčilo Perišić's Motion for Provisional Release, 9 June 2005.

[31] Motion, para. 14, "The case against the Accused is extremely complex."

[32] Application No. 14379/88, European Court HR, 26 January 1993.

[33] *Id.*, para. 7.

[34] *Id.*, para. 9.

[35] *Id.*, paras. 7, 9.

[36] *Id.*, para. 9.

March 1989.[37] During his pre-trial detention, the Accused and his co-accused submitted some 25 applications for release, eight of which were made by the Accused, W.[38]

17. Claiming a violation of Article 5, paragraph 3 of the European Convention on Human Rights ("Article 5-3"), the Accused W argued that the period between his arrest and his conviction, which spanned four years and three days, constituted an unreasonable delay.[39] The Accused W also complained that he was held unreasonably in pre-trial detention for an excessive period.[40]

18. Article 5-3 states:

> Everyone arrested or detained in accordance with the provisions of paragraph 1.c of this article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

19. In its determination that there had been no violation of Article 5-3, the ECHR held that the Prosecution's responsibility for delay began on the date of the Accused, W's, arrest.[41] The Court reasoned that, among other factors, the difficulty of a case is an appropriate consideration when determining whether pre-trial detention is unreasonable. In the case of W., pre-trial detention exceeded five years. The Court also noted that the presence of "intensive continuous review" of the case ensured that the rights of the Accused were respected. The Court went on to state, "the right of an accused in detention to have his case examined with particular expedition must not hinder the efforts of the courts to carry out their tasks with proper care."[42]

IV. DISCUSSION

20. Against the backdrop of this ECHR decision, an examination of the five factors outlined in *Mugiraneza* is appropriate here.

21. First, the Chamber rejects the contention of the Defence that the Prosecution should be held to account for time prior to the Accused's surrender to the Tribunal on 7 March 2005. While *Case of W.* serves as only persuasive, and not controlling authority, the Chamber agrees with the reasoning, that it is from the date of arrest or surrender forward that the obligation to proceed with a fair and expeditious trial begins. To adopt any other date on which the Prosecution is accountable would, in

[37] *Id.*, paras. 7, 24.
[38] *Id.*, para. 14.
[39] *Id.*, para. 29.
[40] *Id.*, para. 28.
[41] *Id.*, para. 29.

the Chamber's view, be unreasonable. Using this reasoning, therefore, the length of the delay has extended now to two years and seven months from the date of the surrender.

22. With respect to the complexity of the proceedings, as noted above, the case is accepted by all parties and the Chamber, to be of great complexity. The Chamber notes that, in addition to the concession of the Defence in its Motion, acknowledging the complexity of the case[43], the Registry of the Tribunal informed the Defence, by letter of 25 August 2005, that the case against the Accused would be ranked at the highest level of complexity for the purposes of payment during the pre-trial stage. Therefore, the Chamber accepts for purposes of determining this motion that this case is amongst the most complex cases before the Tribunal.[44]

23. With respect to the conduct of the parties, the Chamber first notes that the period of time from the adoption of the Work Plan on 22 October 2006, until the case was placed in a trial ready state on 30 April 2007, was only six months. Clearly, under the terms of *Mugiraneza*, as well as under the standards applied in *Case of W.*, this is not an unreasonable delay, particularly in light of the agreed level of complexity of the case.

24. Further with respect to the conduct of the parties, the Chamber is of the view that the parties, both Prosecution and Defence have, to date, exercised due diligence in their respective obligations to prepare this case in the pre-trial phase.

25. The Chamber also notes one factor considered in *Case of W.* was the "intensive and continuous review" of the Accused W's pre-trial detention when the Court concluded there had not been a violation of Article 5-3.[45] In each case of an accused appearing before the Tribunal, there is a Status Conference at least every 120 days, where a Pre-Trial Judge ensures a case is moved expeditiously toward trial.[46] As in the *Case of W.*, the Chamber concludes that the active involvement in the present case has served to ensure that the proceedings move forward in as expeditiously as is possible.

26. The Chamber is mindful that one of the allegations of harm submitted by the Defence in its motion is that it suffers a lack of funding. The Chamber notes that while the Prosecution has no role to play in determining the funding level of the Defence, the relief sought by the motion is a request

[42] *Id.*, paras. 41, 42.
[43] Motion, para. 14.
[44] Pursuant to Article 1 of the Statute, the mandate of the Tribunal is to try already complex cases of "persons responsible for serious violations of international humanitarian law".
[45] *Case of W. v. Switzerland*, para. 42.
[46] Rule 65 *bis*(A), Rules of Procedure and Evidence.

for sanction against the Prosecution.[47] Where the harm which is alleged is not capable of remedy by the Prosecution, such as in the case of a complaint of inadequate funding, the sanction requested against the Prosecution is not well-founded. This matter has been previously raised by this Defence, and the Chamber has previously dealt with it.[48]

27. Further, as to the Defence claim of prejudice to the Accused, the Chamber merely recalls its previous finding that

> [t]he Accused has not demonstrated any equal lack of access to the processes of the Tribunal or opportunity to seek procedural relief. In fact, if the Accused is aggrieved by the level of his payment made by the Registrar in respect of this case, he can take this matter up with the Registrar [...][49]

28. The Chamber also takes note of the various sources of alleged prejudice to the Accused and acknowledges the difficulties encountered by the Defence. However, the Chamber does not consider that the Defence Motion successfully demonstrated that exculpatory material was irreparably lost due to a delay in the proceedings.

29. Therefore, the Chamber, which does not see the need for a hearing on the matter, holds that the Defence has not established the existence of a failure to bring the Accused to trial without undue delay.

V. DISPOSITION

30. For the foregoing reasons and pursuant to Articles 20(1) and 21(4)(c) of the Statute and Rule 65*ter*(B) of the Rules, the Chamber **DENIES** the Motion.

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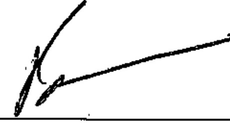
[47] Motion, paras. 28 – 31.

[48] Decision on Motion to Appoint *Amicus Curiae* to Investigate Equality of Arms, 18 June 2007.

[49] Decision on Motion to Appoint *Amicus Curiae* to Investigate Equality of Arms, 18 June 2007, para. 10.

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



Patrick Robinson
Presiding

Dated this twenty-third day of November 2007
At The Hague
The Netherlands

[Seal of the Tribunal]