



International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of former Yugoslavia since 1991	Case No. IT-04-81-PT Date: 18 June 2007 Original: English
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IN THE TRIAL CHAMBER

Before: Judge Patrick Robinson, presiding
Judge Krister Thelin
Judge Frank Höpfel

Registrar: Mr. Hans Holthuis

Decision: 18 June 2007

PROSECUTOR

v.

MOMČILO PERISIĆ

PUBLIC FILING

**DECISION ON MOTION TO APPOINT *AMICUS CURIAE* TO
INVESTIGATE EQUALITY OF ARMS**

The Office of the Prosecutor:

Mr. Mark B. Harmon
Ms. Susan L. Somers

Counsel for the Accused:

Mr. James Castle
Mr. Novak Lukić

1. Trial Chamber III 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 motion filed by counsel for Momčilo Perišić (“Counsel”) seeking the imposition of an *amicus curiae* to investigate, evaluate and report to the Chamber on whether there exists an inequality of arms between the Office of the Prosecutor (“Prosecution”) and the Defence and hereby renders a decision (“Decision”) thereon.

Motion and Response

2. On 1 February 2007, Counsel filed a “Motion for appointment of amicus counsel to report to Chamber on equality of arms afforded the Defence” (*sic*) (“Motion”). The Motion essentially contains two requests. First, Counsel requests the Trial Chamber, pursuant to Rule 74 of the Rules of Procedure and Evidence (“Rules”), to appoint an *amicus* counsel to investigate, evaluate and report to the Chamber on the issue of whether an inequality of arms exists in this case.¹ Secondly, Counsel requests the Chamber to “increase the defence resources to a level which allows the defence team to continue working on the case during the remainder of the Pre-Trial period”.²

3. On 14 February 2007, the Prosecution filed a response to the Motion (“Response”).³ The Prosecution takes no position on the Motion, but filed its Response in order to correct what the Prosecution argues are two ‘factual inaccuracies’ contained in the Motion.⁴

4. Counsel’s principal argument is that there is a fundamental inequality of resources between the Prosecution and the Defence. Counsel submits he was afforded a budget which amounted to 9.5 months of work for lead counsel and five support staff,⁵ while the Prosecution has allegedly had more⁶ and better paid⁷ staff, whose work does not appear to be limited in time or subject to restricted resources. For example, Counsel submits that when the pre-trial phase has ended and where no trial date has been set, the Prosecution can continue to work on the case,⁸ while the Defence “will need to be terminated and the defence of Momcilo Perisic will come to a grinding

¹ Counsel requests that such amicus counsel should be selected from counsel who has defended criminally accused and is familiar with the costs associated with such. Furthermore, such amicus counsel should be an attorney independent of other obligations to the Tribunal so his or her findings, in addition to being fair and unbiased, are regarded as such. The defence requests both parties be ordered to cooperate in the investigation of the amicus counsel and open their books for inspection, Motion, para. 6.

² Motion, para. 7.

³ Prosecution’s Response to Defence Motion for Appointment of Amicus Counsel to Report to Chamber on Equality of Arms Afforded to Defence, 14 February 2007.

⁴ Response, para. 3-7.

⁵ Motion, para. 4.a.

⁶ Motion, para. 4.e.

⁷ Motion, para. 4.d.

⁸ Motion, para. 4.b.

halt.”⁹ Furthermore, Counsel alleges that the limitation of resources and staff has a serious impact on Counsel and his staff’s ability to examine, review and summarise the great volume of materials in this case submitted to him by the Prosecution.¹⁰ Counsel’s alleged lack of resources has also affected his ability to generate the same amount and quality of expert reports that were proffered by the Prosecution.¹¹ In short, the Counsel claims he “has no realistic opportunity to meet the efforts of [his] adversary.”¹²

Discussion

5. The right of an accused to a fair trial implies the principle of equality of arms between the Prosecution and the Defence.¹³ The Appeals Chamber has held on several occasions that the principle of equality of arms, taken from the jurisprudence of the Human Rights Committee (HRC) under Article 14 of the International Covenant on Civil and Political Rights (ICCPR) and the European Court of Human Rights under the Article 6 of the European Convention on Human Rights, is laid down in the fair trial guarantee provided in Article 21 of the Statute of the Tribunal (“Statute”).¹⁴

6. In deciding on the scope of the principle of equality of arms, the Appeals Chamber in *Tadić* held that “equality of arms obligates a judicial body to ensure that neither party is put at a disadvantage when presenting its case.”¹⁵ The principle also must be viewed with respect to the

⁹ Motion, para. 4.b.

¹⁰ Motion, paras 4.f. and 4.g.

¹¹ Motion, para. 4.g.

¹² Motion, para. 4.g.

¹³ *Prosecutor v. Tadić*, Case No. 94-I-A, Appeal Judgement, 15 July 1999 (“*Tadić* Appeal Judgement”), para. 48.

¹⁴ See e.g. *Tadić* Appeal Judgement, para. 48-52; *Prosecutor v. Kayishema and Ruzindana*, Case No. ICTR-95-1-A, Appeal Judgement, para. 67; *Prosecutor v. Milutinović et al.*, Case No. IT-99-37-AR73.2, Decision on interlocutory appeal on motion for additional funds, paras 23 and 24; *Prosecutor v. Aleksovski*, Case IT-95-14/1-AR73, Decision on Prosecutor’s Appeal on Admissibility of Evidence, 16 February 1999, par 23.; *Prosecutor v. Dusko Tadić*, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (AC), 2 October 1995, para. 46; *Prosecutor v. Kordić and Čerkez*, Case: IT-95-14/2-A Appeal Judgement, para. 175; *Prosecutor v. Kordić and Čerkez*, Case: IT-95-14/2-A, Decision on Application by Mario Čerkez for Extension of Time to File his Respondent’s Brief, 11 September 2001, para. 5; *Prosecutor v. Kayishema and Ruzindana*, Case No. ICTR-95-1-A, Appeal Judgement, para. 67, referring to *Prosecutor v. Kayishema and Ruzindana*, Case No. ICTR-95-1-T, Judgement, para. 55; In his report (S/25704), the UN Secretary-General noted that it was axiomatic that the Tribunal must fully respect internationally recognised standards regarding the rights of the suspect or accused at all stages of its proceedings. In the view of the Secretary-General, such internationally recognized standards are, in particular, contained in article 14 of the ICCPR, S/25704, 1993, paras 23 and 106; In his first annual report of 1994 to the General Assembly and the Security Council, the President of the Tribunal stated that “there is absolute respect for the principle of ‘equality of arms’ (...) [as derived from] Article 14 of the International Covenant on Civil and Political Rights, art. 14, paras. 1 and 3”, annual report 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, report of 1994, para. 23; see also CCPR Commentary by Manfred Nowak, 1993, at article 14 (1) of the ICCPR: “[t]he most important criterion of a fair trial is the principle of ‘equality of arms’ between (...) the prosecutor and defendant”, p.246.

¹⁵ *Tadić* Appeal Judgement, para. 48, referring to several cases brought before the European Commission on Human Rights.

different functions which the parties have in various systems. The Trial chamber recalls what was said by the European Commission of Human Rights in the case of *Jespers v. Belgium*:

“[i]n any criminal proceedings brought by a state authority, the prosecution has at its disposal, to back the accusation, facilities deriving from its powers of investigation supported by judicial and police machinery with considerable technical resources and means of coercion. It is in order to establish equality, as far as possible, between the prosecution and the defence that national legislation in most countries entrusts the preliminary investigation to a member of the judiciary or, if it entrusts the investigation to the Public Prosecutor’s Department, instructs the latter to gather evidence in favour of the accused as well as evidence against him. It is also, and above all, to establish that same equality that the ‘rights of the Defence’ . . . have been instituted.”¹⁶

7. The Appeals Chamber, in the context of discussing the concept of “equality of arms”, specifically described the Prosecution’s role as acting “on behalf of and in the interests of the [international] community, including the interests of the victims of the offence charged.”¹⁷ In order to fulfil that role, the Security Council vested the Prosecution with certain important powers and resources. A balance was created in both the Statute and the Rules to grant the parties to the proceedings procedural equality before the Court. In accordance with internationally recognised human rights instruments, substantial rights were accorded to accused persons that protect accused persons before the Tribunal against a powerful Prosecutor. In this context, the *Prlić* Trial Chamber correctly pointed out that “‘equality’ of arms must not be taken literally, evidenced by the fact that a person accused before the Tribunal is presumed innocent whereas the Prosecution must prove that person’s guilt beyond reasonable doubt.”¹⁸ Another such example can be found in Rule 68 of the Rules, which places an extensive burden on the Prosecution for discovery and disclosure of *exculpatory* material to the Defence. Finally, as mentioned above, both the Statute and the Rules were designed to ensure that the proceedings adhere to internationally recognised principles of fair trial, such as, *inter alia*, the legal aid programme which provides counsel for indigent defendants at the expense of the Tribunal, the right to be tried without undue delay and the right to examine adverse witnesses.

8. The rights of the accused and equality between the parties should however not be confused with the equality of means and resources.¹⁹ The Trial Chamber endorses the view expressed by the

¹⁶ *Jespers v. Belgium*, No. 8493, Report of the European Commission of Human Rights, 27 D.R [1981] 61 at 87, quoted in *The Prosecutor v. Tadić*, Case No. IT-94-1-T, Separate Opinion of Judge Vohrah on Prosecution Motion for Production of Defence Witness Statements, 27 November 1996, pp. 4 to 5.

¹⁷ *Prosecutor v. Aleksovski*, Case IT-95-14/1-AR73, Decision on Prosecutor’s Appeal on Admissibility of Evidence, 16 February 1999, para. 25.

¹⁸ *Prosecutor v. Prlić et al.*, Case No. IT-04-74-T, Decision on the Oral Request of the Accused Jadranko Prlić for Authorisation to Use a Laptop Computer at Hearings or to Be Seated Next to his Counsel, 29 June 2006, pp. 3 and 4.

¹⁹ *Prosecutor v. Kayishema and Ruzindana*, Case No. ICTR-95-1-T, Judgement, para. 20, referring to *Prosecutor v. Kayishema and Ruzindana*, Order on the Motion by the Defence Counsel for Application of Article 20 (2) and (4) (b) of

Appeals Chamber that equality of arms between the Defence and the Prosecution does not necessarily amount to the material equality of possessing the same financial and/or personal resources.²⁰ The Appeals Chamber in *Kordić* expressly stated that the right of an accused to have ‘adequate time and facilities for the preparation of his Defence’, as laid down in Article 21 (4) of the Statute, “does not imply that the Chambers are charged to ensure parity of resources between the Prosecutor and the Defence, such as the material equality of financial or personal resources”.²¹ Rather, as was held by the Human Rights committee, the principle of equality of arms was designed to provide the parties rights and guarantees that are *procedural* in nature.²²

9. The Trial Chamber concludes that, although the right to a fair trial encompasses an equality of arms between the parties, there is no support in either customary international law, the case law of the HRC or that of the ECHR which supports the proposition that the principle of equality of arms affords a party a right to receive resources that are similar to his opponent.

10. In the instant case the Chamber is of the view that the Motion of the Accused does not amount to anything more than a complaint that he does not have the same material resources than the Prosecution. In this regard, the Chamber endorses the dictum of Judge Hunt that the purpose of the principle of equality of arms is “[t]o give to each party equal access to the processes of the Tribunal, or an equal opportunity to seek procedural relief where relief is needed.”²³ The 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. If he is not satisfied with the decision of the Registrar, he can appeal that decision with the President.²⁴

the Statute of the International Tribunal for Rwanda, 5 May 1997, p. 3; *Prosecutor v. Milutinović et al.*, Case No. IT-99-37-AR73.2, Decision on interlocutory appeal on motion for additional funds, paras 23 and 24, where the Appeals Chamber found that “[t]he principle of equality of arms would be violated only if either party is put at a disadvantage when presenting its case. In the circumstances of this case, the Appeals Chamber finds that the Appellant cannot rely on the alleged inadequacy of funds during the pre-trial stage to establish such a disadvantage”.

²⁰ *Prosecutor v. Kayishema and Ruzindana*, Case No. ICTR-95-1-A, para. 69, referring to *Hentrich v. France*, Eur. Court H. R., Judgement of 22 September 1994, para. 56 ; see also *Prosecutor v. Prlić et al.*, Case No. IT-04-74-T, Decision on the Oral Request of the Accused Jadranko Prlić for Authorisation to Use a Laptop Computer at Hearings or to Be Seated Next to his Counsel, 29 June 2006, pp. 3 and 4: “(...) the term “equality of arms” does not require that the parties to the trial have the same financial or technical resources.”

²¹ *Prosecutor v. Kordić and Čerkez*, Case: IT-95-14/2-A Appeal Judgement, para. 176.

²² *Tadić* Appeal Judgement, para.50, referring to, *inter alia*, *B. d. B et al. v. The Netherlands*, Communication No. 273/1989, 30 March 1989, U.N. Doc. A/44/40, 442 and *Nqalula Mpandanjila et al. v. Zaire*, Communication No 138/1983, 26 March 1986, U.N. Doc. A/41/40, 121.

²³ *Prosecutor v. Kordić and Čerkez*, Case: IT-95-14/2-A, Decision on Application by Mario Čerkez for Extension of Time to File his Respondent’s Brief, 11 September 2001, para. 5 (*emphasis added*).

²⁴ Directive on the Assignment of Defence Counsel, Article 31 (c).

11. The Chamber now turns to Counsel's second request, namely, for the Chamber to "increase the defence resources to a level which allows the defence team to continue working on the case during the remainder of the Pre-Trial period". By this, the Trial Chamber understands Counsel to mean that, when his pre-trial funding has been depleted by or after 30 April 2007 and no date is yet set for trial, he will require additional funding in order to maintain a minimum of defence staff to work on this case until the start of trial. Such a request for additional funding should however be put before the Registrar, who has the primary responsibility to determine matters relating to remuneration of counsel under the legal aid system of the International Tribunal.²⁵ If an issue of fair trial arises from the Registrar's decision, Counsel may request the Trial Chamber to review it.²⁶

Disposition

For the reasons stated above,

The Trial Chamber **DENIES** the Motion.

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



Patrick Robinson
Presiding

Dated this eighteenth day of June 2007
At The Hague
The Netherlands

[Seal of the Tribunal]

²⁵ *Prosecutor v. Hadžihasanović et al.*, Case No. IT-01-47-PT, Decision on Urgent Motion for *Ex Parte* Oral Hearing on Allocation of Resources to the Defence and Consequences Thereof for the Rights of the Accused to a Fair Trial, 17 June 2003, p. 2.

²⁶ *Prosecutor v. Blagojević*, Case No. IT-02-60-AR73.4, Public and Redacted Reasons for Decision on Appeal by Vidoje Blagojević to Replace his Defence Team, 7 November 2003, para. 7 and footnote 23; For review of administrative decisions, *see Prosecutor v. Kvočka et al.*, Case No. IT-98-30/1-A, Decision on Review of Registrar's Decision to Withdraw Legal Aid from Zoran Žigić, 7 February 2003, para. 13.