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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-05-87-T
Date: 27 August 2007
Original: English

IN THE TRIAL CHAMBER

Before: Judge Iain Bonomy, Presiding
Judge Ali Nawaz Chowhan
Judge Tsvetana Kamenova
Judge Janet Nosworthy, Reserve Judge

Registrar: Mr. Hans Holthuis

Decision of: 27 August 2007

PROSECUTOR

v.

**MILAN MILUTINOVIĆ
NIKOLA ŠAINOVIĆ
DRAGOLJUB OJDANIĆ
NEBOJŠA PAVKOVIĆ
VLADIMIR LAZAREVIĆ
SRETEN LUKIĆ**

PUBLIC

DECISION ON OJDANIĆ THIRD MOTION FOR STAY OF PROCEEDINGS

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Mr. Toma Fila and Mr. Vladimir Petrović for Mr. Nikola Šainović
Mr. Tomislav Višnjić and Mr. Norman Sepenuk for Mr. Dragoljub Ojdanić
Mr. John Ackerman and Mr. Aleksandar Aleksić for Mr. Nebojša Pavković
Mr. Mihajlo Bakrač and Mr. Đuro Čepić for Mr. Vladimir Lazarević
Mr. Branko Lukić and Mr. Dragan Ivetić for Mr. Sreten Lukić

THIS TRIAL 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 “General Ojdanić’s Third Motion for Stay of Proceedings,” filed by the Ojdanić Defence (“Defence”) on 23 July 2007 (“Third Motion”), and hereby renders its decision thereon.¹

BACKGROUND

1. This is General Ojdanić’s (“Accused”) third motion to stay the proceedings on the ground that the purported inability of his Defence to conduct investigations of alleged crime sites or to interview witnesses in Kosovo interferes with his right to a fair trial under Articles 20 and 21 of the Statute of the Tribunal (“Statute”). The history of events leading up to this motion is complex, as has been acknowledged by the Defence.² The Trial Chamber therefore finds it appropriate to set out at length the procedural background leading up to the filing of the Motion.

2. On 6 December 2004, the Defence sent a request to the Registry of the Tribunal for the authorisation and arrangement of security for Lead Counsel Tomislav Višnjić and (then) Co-Counsel Peter Robinson to travel to Kosovo in order to view the alleged crime scenes and to interview witnesses.³ The Defence was referred by the Registry to the United Nations Mission in Kosovo (“UNMIK”).⁴ On 10 March 2005, the Defence contacted the Special Representative of the United Nations Secretary-General in Kosovo, Mr. Soren Jessen-Petersen, requesting UNMIK to arrange security for a mission to Kosovo in April 2005 by Defence team members, namely Messrs Višnjić, Robinson, and Isak.⁵ On 8 April 2005, UNMIK advised the Registrar of the Tribunal that, due to the dangerous security situation in Kosovo, a visit could not be accommodated at that time.⁶ This letter was conveyed to the Defence; and, on 19 April 2005, Ojdanić’s defence team requested that UNMIK notify it when it was safe to travel in Kosovo.⁷

3. After a trial date had been set for 10 July 2006, the Defence contacted UNMIK and requested that a visit to Kosovo be arranged.⁸ UNMIK agreed to facilitate this mission and

¹ General Ojdanić’s Third Motion for Stay of Proceedings, 23 July 2007.

² Motion for Leave to File Pleading in Excess of Word Limitations: General Ojdanić’s Third Motion for Stay of Proceedings, 23 July 2007, paras. 3–4.

³ General Ojdanić’s Motion for Stay of Proceedings, 2 June 2006 (“First Motion”), Annex A.

⁴ First Motion, Annex B.

⁵ First Motion, Annex C.

⁶ First Motion, Annex D.

⁷ First Motion, Annex E.

⁸ Third Motion, para. 8.

arranged for Messrs Višnjić and Isak to travel to Kosovo in May 2006. That trip was undertaken. However, during the mission, the Defence team and UNMIK personnel were attacked when their convoy was surrounded by villagers in Mala Kruša/Krushe e Vogël in the Prizren Municipality on 25 May 2006.⁹ Consequently, the mission was aborted.

4. On 31 May 2006, the Defence was advised by Mr. Steven Schook, Principal Deputy Special Representative of the Secretary-General in Kosovo, of the following:

I am certain that you will understand that due to security concerns and the emotional impact of last week events UNMIK will need to be provided with all the necessary information in order to be able to make sound decisions and to ensure the smooth conduct of any similar visits in the future.

Thus, I would ask you to furnish us with the following details:

1. The purpose of the visit;
2. A detailed itinerary for your planned visit;
3. Details of all the delegation members (full names, citizenship, passport numbers);
4. Exact time and location of your entry into and exit out of Kosovo.

Please note that in order to safeguard proper planning and preparation of future visits, the request for political clearance must be received no later than three full working days before the scheduled entry into Kosovo.¹⁰

5. On 2 June 2006, the Ojdanić Defence filed a motion, asking for a stay of proceedings until the Defence team was able to safely investigate in Kosovo.¹¹ The Accused Milutinović, Pavković, Šainović, and Lazarević joined this motion.¹²

6. On 9 June 2006, the Chamber issued its decision denying the Defence's first motion.¹³ In doing so, the Chamber took into consideration the fact that, "while, during the Defence team's last visit to Kosovo, UNMIK was unable to provide the security necessary for the team to conduct and complete its investigations, this does not mean that UNMIK will continue indefinitely to be unable to do so."¹⁴ The Chamber emphasised that "it is not faced at present with the situation wherein UNMIK has refused the Defence team access to Kosovo or represented to it that it is unable or

⁹ First Motion, paras. 1–11; Third Motion, paras. 9–11.

¹⁰ First Motion, Annex G.

¹¹ First Motion, para. 1.

¹² Mr. Milutinović's Motion to Join General Ojdanić's Motion for Stay of Proceedings, 6 June 2006 (requesting hearing on Motion); Joinder by Nebojša Pavković in General Ojdanić's Motion for Stay of Proceedings, 6 June 2006 (suggesting hearing on Motion); Joint Defence Motion: Joining General Ojdanić's Motion for Stay of Proceedings, 6 June 2006 (Šainović and Lazarević).

¹³ Decision on Ojdanić Motion for Stay of Proceedings, 9 June 2006 ("Decision on First Motion").

¹⁴ Decision on First Motion, para. 4.

unwilling to provide security for future visits.”¹⁵ It was upon this basis that the Chamber denied the first motion to stay the proceedings and requested UNMIK to take “all reasonable and necessary measures, as soon as possible, in order to assist the Defence teams of the Accused in their investigations in Kosovo for the preparation of their defence.”¹⁶

7. Following the Chamber’s first decision on this matter, the Defence resumed its efforts to communicate with UNMIK, in order to conduct investigations of crime sites in Kosovo.¹⁷ In particular, on 14 July 2006, the Defence sent a letter to Mr. Schook stating that the “sole purpose of our visit is to carry out our Investigation of the crime sites.”¹⁸ The letter listed 13 sites and details of the proposed members of the mission, including Mr. Isak. The letter was re-sent by email on 14 July 2006 and again on 17 July 2006, with an urgent notation. On 19 July 2006, a further email was sent repeating the request.¹⁹ On 22 July 2006, the Defence sent a further letter to Mr. Schook, asking UNMIK to facilitate a visit and additionally requesting UNMIK to arrange a meeting with Prime Minister Çeku.²⁰

8. On 26 July 2006, Mr. Schook replied, repeating the request made in the letter of 31 May 2006 for information on the purpose of the visit, the sites to be visited, and information on members of the team who would be visiting.²¹ That same day, Mr. Višnjić responded by email, repeating the request and attaching the previous correspondence sent to UNMIK.²²

9. On 28 July 2006, UNMIK indicated that, before arrangements could be made for the trip, it would require (a) “detailed information on what the intentions of the team are in each of the locations, i.e. are the members of the team intending to walk around the site, take photographs, do they intend to enter any premises, how much time will be spent in each location etc.” and (b) “confirmation that you do not intend to interview any witnesses during this visit.”²³ The letter continued that UNMIK had “begun making the necessary arrangements” and that, once the details of the visit were provided, representatives of UNMIK would be available to meet the Defence in “Pristina or Belgrade” to discuss the details of the visit.²⁴

¹⁵ Decision on First Motion, para. 4.

¹⁶ Decision on First Motion, para. 6.

¹⁷ General Ojdanić’s Second Motion for Stay of Proceedings, 31 July 2006 (“Second Motion”), pp. 2–4; Annexes H, J, L, N, O, P, Q.

¹⁸ Second Motion, Annex H.

¹⁹ Second Motion, Annexes I–J.

²⁰ Second Motion, Annex L.

²¹ Second Motion, Annex N.

²² Second Motion, Annex O.

²³ Second Motion, Annex P.

²⁴ Second Motion, Annex P.

10. On 29 July 2006, the Defence responded, indicating its disappointment that the visit was not arranged and stating that “we are now not in a position to provide you with an alternate date for our visit, since, as we repeatedly informed UNMIK, the trial will recommence on 7 August and there is no recess planned until Christmas. Winter conditions in Kosovo will not permit us to adequately view the crime scenes at that time.”²⁵ The letter informed UNMIK of the Defence’s intent to file for a stay of the proceedings until UNMIK would be able to facilitate the visit. In order to place UNMIK “in a position to act quickly” if the Trial Chamber were to order relief, the Defence provided further detail of its intentions for the mission, namely to “walk around the sites visited, to take photographs of the sites, and to seek permission to enter premises on the sites if criminal activity is alleged to have taken place inside those premises.”²⁶ In the letter, the Defence confirmed that it did not intend to interview witnesses, but stated that the plan was to “arrive at the site, enlist the help of local citizens in pointing out the exact places where the events occurred, walk around those areas, photograph them, and leave.”²⁷

11. On 31 July 2006, the Defence filed a second motion on the matter.²⁸ The motion stated that “General Ojdanić’s defence team did everything it could to arrange [the] visit [to Kosovo] before the trial recommences” and that “[i]t would be fundamentally unfair to proceed with the testimony of prosecution crime-base witnesses under these circumstances. General Ojdanić is simply unable to effectively cross-examine these witnesses.”²⁹

12. On 31 July 2006, UNMIK re-contacted the Defence, stating that it remained willing to facilitate the visit and proposing to meet in Priština/Prishtinë to review the list of proposed sites and any additional details of the Defence team’s potential visit to Kosovo.³⁰ This meeting occurred on 3 August 2006 in Priština/Prishtinë. The next day, on 4 August 2006, UNMIK notified the Defence of its continued readiness to facilitate site visits. UNMIK noted changes to the proposed itinerary, including the fact that “four sites have been cancelled and several others added” and the requests for “interaction with the local population and unrestricted movement at some of the sites.”³¹ On that basis, UNMIK requested a formal amended request, “as agreed during the meeting”, in order to carry out the further necessary preparations. UNMIK indicated that it had engaged in preliminary

²⁵ Second Motion, Annex Q.

²⁶ Second Motion, Annex Q.

²⁷ Second Motion, Annex Q.

²⁸ General Ojdanić’s Second Motion for Stay of Proceedings, 31 July 2006.

²⁹ Second Motion, pp. 4–5.

³⁰ Supplemental Materials in Support of General Ojdanić’s Second Motion for Stay of Proceedings, 7 August 2006, Annex R.

³¹ Supplemental Materials in Support of General Ojdanić’s Second Motion for Stay of Proceedings, 7 August 2006, Annex S.

preparations, including “consultations with the Kosovo authorities at the local and central level.” A revised request outlining the intended activities at the sites on the new list was transmitted by the Defence to UNMIK on 6 August 2006.³²

13. On 9 August 2006, UNMIK transmitted a more detailed plan of action in relation to the security aspects of the Defence team’s anticipated visit, emphasising that “the reason for the detailed correspondence and recent face-to-face meeting on the issue of the site visits is mainly to ensure that security considerations, not only your personal security, but also UNMIK’s responsibilities for general security and the maintenance of public order, are properly and effectively addressed.”³³ UNMIK further stated:

Accordingly, UNMIK would like to reiterate its general parameters for the requested visit, as pointed out during the 3 August meeting:

1. At this stage, we believe that the requested visit to eleven localities should be divided into two or three separate visits, each involving a limited number of sites, with an appropriate intervening time between each visit. This is advisable for operational and security reasons.
2. UNMIK has serious reservations regarding the participation of the Team’s investigator, Mr. Isak Ilija, in the site visits to the crime scenes. As an ex-VJ member of high rank, who was active in Kosovo during the Milosevic period, the possibility of recognition and negative response in areas where individuals have been traumatized by security personnel cannot be excluded.
3. UNMIK will not be able to facilitate spontaneous or unplanned interaction with the local population, in the manner described in the amended request as “speak to residents and find out their version of what happened there”. Anyone familiar with Kosovo and the atrocities committed at the sites in question will understand that it is insensitive and provocative to randomly speak to residents about events related to the violent conflict. However, UNMIK stands ready to facilitate and arrange for meetings between you and specific individuals, provided that the person concerned is in agreement. Such meetings will have to be formally requested prior to any visit.
4. UNMIK will follow a very careful media policy. UNMIK will take a reactive approach, meaning that there will be no media announcement, in advance, of an impending visit, although we will have a press-line ready to use if asked. We expect you to take the same approach, in the interest of ensuring a smooth visit.

14. The letter ended with the statement that “UNMIK will expedite its evaluation of [the] amended request of 6 August” and would “revert with a detailed answer within three weeks.”

³² Supplemental Materials in Support of General Ojdanić’s Second Motion for Stay of Proceedings, 7 August 2006, Annex T.

³³ Letter from the UNMIK Acting Special Representative of the Secretary-General, Mr. Steven P. Schook, to Lead Counsel for General Ojdanić, Mr. Tomislav Višnjić, 9 August 2006; Final Submissions in Support of General Ojdanić’s Second Motion for Stay of Proceedings, 14 September 2006, Annex U.

15. On 11 August 2006, a meeting took place between the Chamber and the Defence, during which the Defence's efforts to arrange with UNMIK an investigative trip to Kosovo were discussed.³⁴ Following this meeting, on 16 August 2006, the Senior Legal Officer of the Chamber wrote to UNMIK, emphasising the Chamber's readiness to assist in "finalising arrangements that are satisfactory to all to enable the investigations to be carried out."³⁵ The communication conveyed the representations of the Defence in the previous meeting with the Chamber, to the effect that Mr. Isak was an important member of the team, required to identify particular localities within Kosovo, and that the Defence team had no intentions of engaging in interactions which could provoke reactions.

16. On 30 August 2006, UNMIK indicated to the Defence and the Chamber that it would be able to facilitate visits to six out of the eleven requested locations. UNMIK set out specific conditions in relation to the six visits, including the requirement that Mr. Isak not be present during three of the site visits, along with time limits upon particular locations. UNMIK reiterated that it was willing to facilitate visits during the week of 2 October 2006 to the six sites.³⁶ With regard to four of the sites listed by the Defence, UNMIK indicated that it was unable, at that time, to facilitate visits and invited the Defence to propose alternative means of obtaining the information it sought in respect of each site.

17. On 6 September 2006, the Defence replied that the conditions surrounding the proposed visit were "such that the visit would not be meaningful" and that the Defence "would simply not be able to accomplish [its] duties to investigate the allegations against General Ojdanić."³⁷

18. On 11 September 2006, a meeting was held between the Senior Legal Officer of the Chamber and the Defence concerning UNMIK's letter of 30 August 2006. At this meeting, the Defence stated that the conditions outlined by UNMIK for the visit were unacceptable and that it would be akin to a tourist visit and not yield the results they were after.³⁸ The Chamber asked several times whether it would not be helpful for further appropriate intervention from the Chamber with UNMIK, so as to yield a more favourable outcome with UNMIK on the issue. However, the

³⁴ Internal Memorandum, 11 August 2006.

³⁵ Letter from the Chamber's Acting Senior Legal Officer, Mr. Gideon Boas, to the UNMIK Acting Special Representative of the Secretary-General, Mr. Steven P. Schook, 16 August 2006.

³⁶ Final Submissions in Support of General Ojdanić's Second Motion for Stay of Proceedings, 14 September 2006, Annex V.

³⁷ Final Submissions in Support of General Ojdanić's Second Motion for Stay of Proceedings, 14 September 2006, Annex W.

³⁸ E-mail from the Chamber's Acting Senior Legal Officer, Mr. Gideon Boas, to Judge Iain Bonomy (Presiding), 11 September 2006.

Chamber was told by the Defence that, although it appreciated the offer, it now wished to proceed on the record.

19. On 14 September 2006, the Defence filed further submissions in support of the second motion to stay proceedings, arguing, *inter alia*, that it had come to the conclusion that the restrictions imposed by UNMIK upon the investigation of the alleged crime sites made such a visit “of little value, and [did] not justify the substantial risk to the safety of defence team members.”³⁹

20. On 4 October 2006, UNMIK sent a letter to the Chamber, informing it that the Defence had cancelled its trip to Kosovo. In the letter, UNMIK stated:

In accordance with our letter of 30 August and within the time-frame indicated by your acting senior legal officer, UNMIK was ready to facilitate an initial visit by the defence team to at least six sites in Kosovo, which was planned to take place from 3 to 6 October....

As you are aware, UNMIK has asked the Ojdanic defence team to suggest alternatives to the participation of their consultant Mr. Isak Ilija in visits to crimes scenes in Kosovo. We have also invited the defence team to propose alternative ways of obtaining the relevant material regarding those sites to which UNMIK cannot facilitate visits at this time....

In accordance with its mandate under UN Security Council [sic] resolution 1244 (1999), and its obligations towards the ICTY, in particular the Trial Chamber’s Request as set out in the Decision of 9 June 2006, UNMIK went through great effort to facilitate the requested visit. The preparations involved systematic coordination at central and local levels, including, but not limited to: both UNMIK and Kosovo Police; KFOR; UNMIK Civil Administration; the Office of the Prime Minister of Kosovo; local municipalities and village leaders. Detailed assessments of sites were made from numerous perspectives, including the security perspective, by experts in relevant fields. Moreover, the Prime Minister of Kosovo assigned a senior political advisor to work with the local leadership at the sites to be visited, in order to advance their cooperation with the visit of the Ojdanic defence team.

Please be assured that UNMIK will continue to take all reasonable and necessary measures to assist the defence team. We stand ready to facilitate a visit in the event that defence counsel renews his request.⁴⁰

21. On 19 October 2006, the Trial Chamber issued its “Decision on General Ojdanić’s Second Motion for Stay of Proceedings”, denying the motion.⁴¹ The Trial Chamber noted:

9. ... the efforts that have been made by UNMIK to take all reasonable and necessary measures, as soon as possible, in order to assist the Defence in its investigations in Kosovo; however, the Chamber also acknowledges that UNMIK must

³⁹ Final Submissions in Support of General Ojdanić’s Second Motion for Stay of Proceedings, 14 September 2006, paras. 4–5, 7; Annex X.

⁴⁰ Letter from the UNMIK Principal Deputy Special Representative of the Secretary-General, Mr. Steven P. Schook, to Judge Iain Bonomy (Presiding), 4 October 2006.

⁴¹ Decision on Second Ojdanić Motion for Stay of Proceedings, 19 October 2006.

balance the needs of the Defence with its overall mission in connection with the administration of Kosovo. ...

10. In this regard, the Chamber considers that UNMIK, in its last communication with the Chamber on 4 October 2006, explained the extensive measures it took, and was continuing to take, in order to facilitate the investigations of the Defence in Kosovo As is plain from the letter of 9 August 2006, UNMIK was continuing to make arrangements to satisfy some of the outstanding requests and sought from the Defence proposals of alternative methods of accomplishing those visits that UNMIK stated it could not facilitate at that time. The Defence was not satisfied with the arrangements that were made; and, instead of accepting UNMIK's offer to continue to discuss how its outstanding requests might be satisfied and the Chamber's offer to intercede with a view to finding ways of satisfying these requests, the Defence has unilaterally broken off cooperative efforts with UNMIK in this matter, and has opted for the course of attempting to bring these criminal proceedings to a halt. The fact that the Ojdanić Defence is not satisfied with the arrangements for its visit to Kosovo does not necessarily lead to the conclusion that the Accused's rights under Article 21 are being violated. The cooperation between UNMIK, the Tribunal, and the Defence is a developing, dynamic process whence the Defence has withdrawn, despite UNMIK's continued participation in trying to make the investigations come to fruition.⁴²

22. On this basis, the Chamber found that UNMIK's efforts had been sufficient to provide the Defence with adequate time and facilities for the preparation of its case and had not caused undue prejudice to the Accused's right to a fair trial.⁴³ The Chamber urged the Defence to reopen communications with UNMIK on the matter.

23. On 15 March 2007, the Ojdanić Defence contacted UNMIK asking it to make preparations for a visit of the Defence team in April 2007, with the stated purpose of "contact[ing] various people who have been mentioned in the testimony to date and ask them about the incidents in which they had been named, and to speak with other people whose names we would get as 'leads' and who also participated in or witnessed the same events."⁴⁴ The letter contained a list of sites, including a number of sites that had not been mentioned in either of the previous lists of sites provided to UNMIK.

24. On 23 March 2007, UNMIK responded by letter indicating that it remained ready to organise a visit to Kosovo, but requested the following information in order to make the necessary preparations:

1. The identity of each person whom you would like to contact so that we can assist in locating the individuals and ask if they are willing to speak with members of the Ojdanic defence team.

⁴² Decision on Second Ojdanić Motion for Stay of Proceedings, 19 October 2006, paras. 9–10.

⁴³ Decision on Second Ojdanić Motion for Stay of Proceedings, 19 October 2006, para. 11.

⁴⁴ Third Motion, Annex X. The previous lists are those included in the letter to UNMIK of 6 August 2006. Supplemental Materials in Support of General Ojdanić's Second Motion for Stay of Proceedings, 7 August 2006, Annex T (letter to UNMIK of 14 July 2006); Second Motion, Annex H. The letter of 15 March also contained a request concerning documents in the KLA archives, which is not relevant to the Motion.

2. The identity of each site that you would like to visit, and the purpose of visiting each site, so that we can begin making security and logistical arrangements.

3. Details of the members of the Ojdanic defence team that would visit Kosovo, including full names, citizenship, passport numbers, and any relevant background.⁴⁵

25. On 26 March 2007, the Defence wrote to UNMIK, changing the dates of the proposed visit to the week of 14 May and stating in relation to the preparations for the mission that the team did not want UNMIK representatives contacting the people the team intended to interview as “[t]hat would be counterproductive to obtaining their consent to speak with us and to the spontaneity and truthfulness of the information we receive... Instead, we want to knock on doors and interview people spontaneously.” The Defence team clarified that the sites proposed had altered as the opportunity for cross-examination had passed and that the new ones were intended to allow for the location of potential witnesses. The letter listed the people travelling as Messrs Višnjić, Robinson, and Isak.⁴⁶

26. On 30 March 2007, UNMIK responded by letter to the Defence request, repeating its security concerns and the parameters for the proposed trip, which it had detailed in its letter to the Defence of 9 August 2006.⁴⁷ UNMIK expressed its continued reservations regarding the inclusion of Mr. Isak in visits to sites in Kosovo, and asked the Defence to propose an alternate investigator. UNMIK further stated that it was unable to facilitate spontaneous interactions by members of the Defence team with the local population. As an alternative, UNMIK offered to organise secure locations in each of the municipalities and/or villages listed by the Defence and to provide police transport for the team members to and from the secure locations, so as to facilitate the Defence team speaking with relevant persons within Kosovo.

27. On 10 April 2007, the Defence wrote to UNMIK, stating in relation to the mission to Kosovo that:

[W]e appreciate your suggestions but continue to find the conditions too restrictive to enable us to accomplish our work. We need Mr. Isak with us because he has the best knowledge of what happened on the ground and is in the best position to conduct the interviews. We also need to meet the witnesses under conditions that will allow them to speak to us freely, and your proposal, while interesting, doesn't allow us to do that.

Therefore, while we appreciate very much your willingness to assist us, it seems that the conditions in Kosovo remain too dangerous for our defence team to travel there at this

⁴⁵ Third Motion, Annex Y.

⁴⁶ Third Motion, Annex Z.

⁴⁷ General Ojdanić's Supplemental Filing of Annex AA to General Ojdanić's Third Motion for Stay of Proceedings, (10 August 2007).

time. We are not willing to risk our lives for very little prospect of success in actually obtaining any potential witnesses.⁴⁸

28. On 9 May 2007, UNMIK wrote to the Defence stating, “we regret your assessment that what we proposed is not to your satisfaction. We therefore invite you to propose an alternate solution, albeit within the security parameters as carefully developed by UNMIK.... We are open to your suggestions and look forward to your response.”⁴⁹ This opportunity was not taken up by the Defence, for the stated reason that “given the continuing violence against Serbs in Kosovo, and tensions over the unresolved status of Kosovo, General Ojdanić’s team considered that the security risk was too great to return to Kosovo at this time.”⁵⁰

29. Subsequently, on 23 July 2007, the Defence filed this Third Motion.

SUBMISSIONS

30. The Ojdanić Defence considers it a necessary and standard practice in providing effective assistance of counsel to contact people identified in the written statements and oral testimony of the witnesses of the Office of the Prosecutor of the Tribunal (“Prosecution”), in order to either confirm or contradict the accounts given by the witnesses called by the Prosecution, or to better identify the affiliation of the perpetrators.⁵¹ On this basis, the Defence has prepared a list of 730 persons that it desires to contact.⁵² The Defence submits that virtually all of these people reside in Kosovo and that a number of these people were only partially identified, thus necessitating further investigations in the field.⁵³

31. However, the Defence considers that the security situation has not improved since its last abortive mission to Kosovo. It thus fears for the safety of its members if a further mission to Kosovo is carried out under the current conditions. Consequently, the Defence submits that it has been prevented from investigating its case in Kosovo and from obtaining defence witnesses, and that this violates the Accused’s right to a fair trial, right to equality of arms, right to adequate

⁴⁸ Third Motion, Annex BB.

⁴⁹ Third Motion, Annex CC.

⁵⁰ Third Motion, para. 44.

⁵¹ Third Motion, paras. 45–46.

⁵² Prosecution Response to General Ojdanić’s Third Motion for Stay of Proceedings, 1 August 2007, (“Prosecution Response”), para. 5.

⁵³ Third Motion, para. 47. The list of people that the Defence wishes to contact is contained is attached as Annex DD to the Third Motion.

facilities for the preparation of his defence, and right to effective assistance of counsel, under Articles 20 and 21 of the Statute.⁵⁴

32. With regard to the right of equality of arms, the Defence submits that, in contrast with the Prosecution's "unhindered" opportunity to investigate within Kosovo, the Defence has been subjected to "life-threatening physical attack" when it has sought to "view the scenes of the crimes and to locate and interview eyewitnesses" and "prevented from returning to Kosovo to locate and interview potential witnesses identified in the prosecution's case as having relevant information to the events which form the 'crime base' in his case" and consequently "will not even be in a position to call such witnesses, let alone in proportion to the number of witnesses called by the prosecution."⁵⁵

33. The Defence submits that the restrictions on its abilities to conduct its defence are due to the inability of UNMIK to provide secure conditions within Kosovo. It argues that, as UNMIK is administered by the same body as the Tribunal, namely the United Nations, the Chamber is obliged to stay the trial until such time as UNMIK is able to provide secure conditions within Kosovo.⁵⁶ The Defence further submits that its inability to observe the scenes of the alleged crimes and its lack of access to potential witnesses, prevents it from providing effective assistance to Ojdanić, in particular by limiting its ability to effectively cross-examine witnesses called by the Prosecution and by limiting its ability to identify witnesses able to contradict these witnesses.⁵⁷ On this basis, the Defence submits that the Chamber should invoke its inherent power to order a stay of the proceedings "until such time as the security situation in Kosovo allows for adequate defence investigation."⁵⁸

34. The Prosecution urges the Chamber to deny the Third Motion due to the lack of an adequate and sufficiently detailed showing in support of a stay of the proceedings.⁵⁹

35. The Prosecution submits that the Defence has failed to avail itself of the alternative means available for the conduct of Ojdanić's defence. The Prosecution argues that the Defence:

[Has] access to numerous former VJ and MUP witnesses who served in Kosovo during the events in question. In addition they have access to the archives of those agencies as well as to public sources of maps, photographs and video footage of the relevant areas.

⁵⁴ Third Motion, paras 50–54.

⁵⁵ Third Motion, paras. 57–59, 71.

⁵⁶ Third Motion, para. 64.

⁵⁷ Third Motion, paras. 66–67.

⁵⁸ Third Motion, para. 71.

⁵⁹ Prosecution Response, para. 5.

Finally, it seems that the Ojdanić Defence at this stage no longer desires or needs to visit the crime sites.⁶⁰

36. In relation to the list of persons that the Defence has prepared, the Prosecution submits that the Defence has failed to assess the relevance, importance, or necessity of contacting these individuals. The Prosecution points out that the list includes “witnesses who already testified in this case; children who were under the age of five at the time of the events; individuals now living in Western Europe or Canada; and even some deceased persons listed in the Schedules to the Indictment.”⁶¹ The Prosecution submits that the Defence has failed to enquire into alternate means of contacting those people, such as by mail or by telephone.

37. In relation to the Defence team’s intended activities during its prior proposed mission to Kosovo, including by spontaneous door-to-door investigations, the Prosecution submits that this would not be an effective or professional way to proceed, and in fact would be “counterproductive”.⁶² On this basis, the Prosecution urges the Chamber to deny the motion.

DISCUSSION

38. As noted in its previous decisions on Ojdanić’s first and second motions to stay the proceedings, the Trial Chamber considers that United Nations Security Council Resolution 1244 (“UNSC Resolution 1244”) obliges UNMIK to cooperate with the Tribunal, including through efforts to provide assistance to Defence teams of accused before the Tribunal in respect of investigations inside of Kosovo for the preparation of their defences.⁶³ However, the Chamber acknowledges that UNMIK must balance the needs of the Defence with its overall mission in connection with the administration of Kosovo, which includes “[m]aintaining civil law and order”.⁶⁴

39. In its Decision on the Second Motion, the Chamber noted the extensive measures undertaken by UNMIK to arrange a further mission by the Defence team to Kosovo, and UNMIK’s continued willingness to enter into dialogue with the Defence team to explore alternative means of accommodating the visit within the required security parameters.⁶⁵ The Chamber detailed the efforts made by UNMIK to take all reasonable and necessary measures, in order to assist the

⁶⁰ Prosecution Response, para. 4.

⁶¹ Prosecution Response, para. 4.

⁶² Prosecution Response, para. 11.

⁶³ Decision on Ojdanić Motion for Stay of Proceedings, 9 June 2006, para. 3 (citing S.C. Res. 1244, U.N. Doc. S/RES/1244 (1999), para. 14; *Prosecutor v. Haradinaj et al.*, Case No. IT-04-84-AR65.1, Decision on Ramush Haradinaj’s Modified Provisional Release, 10 March 2006, para. 14).

⁶⁴ United Nations Security Council Resolution 1244, Clause 11(i).

⁶⁵ Decision on Second Ojdanić Motion for Stay of Proceedings, 19 October 2006, para. 10.

Defence in its investigations in Kosovo.⁶⁶ The Chamber's decision on the Second Motion on 19 October 2006 urged the Defence to reopen communications with UNMIK.

40. Upon the Defence's renewed request to visit Kosovo, on 15 March 2007, the Chamber considers that UNMIK continued to endeavour to make all necessary and reasonable efforts to facilitate the visit.⁶⁷ Noting its concerns over the Defence's stated intent to engage in spontaneous interactions with the local population, UNMIK prepared and presented an alternative plan to the Defence team, whereby it would provide secure facilities and police escorts in the sites which the Defence sought to visit.⁶⁸ When this proposal was turned down, UNMIK again offered to explore alternative means to accommodate visits by the Defence team to the various sites within Kosovo.⁶⁹ In contrast, the Defence, rather than suggest alternative means of conducting the visits, discontinued the communications. The Defence determined of its own accord that the "security risk was too great to return to Kosovo at this time."⁷⁰

41. In the view of the Chamber, UNMIK has made sufficient efforts to provide the Defence with adequate time and facilities for the preparation of its defence. In response to the Chamber's efforts to intercede directly on the behalf of the Defence, UNMIK has been willing to enter into constructive dialogue.⁷¹ Its efforts to accommodate the mission by the Defence team have been extensively listed within this decision. The obligation of UNMIK to cooperate with the Tribunal, including by endeavouring to provide assistance to Defence teams, is not absolute or unqualified, but rather stands alongside its other obligations under UNSC Resolution 1244. Reasonable efforts have been made to accommodate the requests of the Defence, taking into account the security parameters repeatedly outlined by UNMIK; and, alternative proposals have not been forthcoming from the Defence. Thus, the Chamber considers that sufficient efforts have been made by UNMIK to provide assistance, should the Defence decide to avail itself of those efforts.

⁶⁶ See Final Submissions in Support of General Ojdanić's Second Motion for Stay of Proceedings, 14 September 2006, Annex V (letter from the UNMIK Acting Special Representative of the Secretary General, Mr. Steven P. Schook, to Lead Counsel for General Ojdanić, Mr. Tomislav Višnjić, 30 August 2006 ("We have striven to achieve a careful balance between UNMIK's obligations toward the ICTY and the proper administration of international justice, and UNMIK's mandate under UN Security Council resolution 1244 (1999) to maintain a stable and safe security environment in Kosovo in light of the current political climate in Kosovo, as well as the local sensitivities in the specific locations that you request to visit.")).

⁶⁷ Third Motion, Annex X.

⁶⁸ General Ojdanić's Supplemental Filing of Annex AA to General Ojdanić's Third Motion for Stay of Proceedings, 10 August 2007, Annex AA.

⁶⁹ Third Motion, Annex CC.

⁷⁰ Third Motion, para. 44.

⁷¹ Letter of 30 August 2006 from UNMIK, Final Submissions in Support of General Ojdanić's Second Motion for Stay of Proceedings, 14 September 2006, Annex V; Letter from the UNMIK Principal Deputy Special Representative of the Secretary-General, Mr. Steven P. Schook, to Judge Iain Bonomy (Presiding), 4 October 2006; Letter of 9 May 2007 from UNMIK to the Defence, Third Motion, Annex CC.

42. The Chamber does not consider that the list of names prepared by the Defence, indicating persons that it intends to contact within Kosovo, adds any significant weight to the claimed violations of the Accused's fair trial rights. The list appears to contain a number of individuals that may be contacted by means other than entering Kosovo, such as persons apparently residing outside of Kosovo at this point in time, as well as a number of individuals whom it would not be appropriate to contact, such as children who were under the age of five at the time of the events and deceased persons listed in the Schedules to the Indictment. The Chamber considers that the Defence has failed to indicate with sufficient specificity the relevance of these individuals to the ongoing proceedings and the necessity of undertaking a mission to Kosovo in order to contact them. Indeed, the very list itself demonstrates that means other than entering Kosovo are available to the Defence in order to carry out its investigations.

43. In light of the detailed background of interactions between UNMIK and the Defence, the Chamber considers that the Accused has failed to demonstrate how his rights to equality of arms, to adequate facilities for the preparation of his defence, and to effective assistance of counsel have been specifically prejudiced by the actions of UNMIK. On this basis, the Chamber considers that the Accused's allegations that his fair trial rights have been violated are without foundation.

DISPOSITION

44. The Chamber again recalls its duty pursuant to Article 20 to ensure that these proceedings are conducted in both a fair *and* expeditious manner.⁷² The Chamber considers that, in light of all the circumstances, particularly the history of the current and previous motions to stay the trial and the refusal of the Defence to engage in further dialogue with UNMIK about alternate arrangements for carrying out investigations, the Defence has not demonstrated a sufficient basis for the requested relief to be granted. Accordingly, the Trial Chamber, pursuant to Articles 20 and 21 of the Statute and Rule 54 of the Rules of Procedure and Evidence of the Tribunal, hereby DENIES the Motion.

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

Judge Iain Bony
Presiding

Dated this twenty-seventh day of August 2007
At The Hague
The Netherlands

[Seal of the Tribunal]

⁷² See Decision on Second Ojdanić Motion for Stay of Proceedings, 19 October 2006 (citing *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, p. 4 (stating that "time and resource constraints exist in all judicial institutions and ... a legitimate concern in this trial, which involves six accused, is to ensure that the proceedings do not suffer undue delays and that the trial is completed within a reasonable time, which is recognized as a fundamental right of due process under international human rights law") (footnotes omitted)).