

THE INTERNATIONAL CRIMINAL TRIBUNAL
FOR THE FORMER YUGOSLAVIA

CASE No. IT-05-87-T

IN THE TRIAL CHAMBER

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

Registrar: Mr. Hans Holthuis

Date Filed: 23 July 2007

THE PROSECUTOR

v.

MILAN MILUTINOVIC
NIKOLA SAINOVIC
DRAGOLJUB OJDANIC
NEBOJSA PAVKOVIC
VLADIMIR LAZAREVIC
SRETEN LUKIC

GENERAL OJDANIC'S THIRD
MOTION FOR STAY OF PROCEEDINGS

The Office of the Prosecutor:

Mr. Thomas Hannis
Mr. Chester Stamp
Ms. Christina Moeller

Counsel for General Ojdanic:

Mr. Tomislav Visnjic
Mr. Norman Sepenuk

Mr. Eugene O'Sullivan and Mr. Slobodan Zecevic for Milan Milutinovic
Mr. Toma Fila and Mr. Vladimir Petrovic for Nikola Sainovic
Mr. John Ackerman and Mr. Aleksander Aleksic for Nebojsa Pavkovic
Mr. Mihaljo Bakrac and Mr. Duro Cepic for Vladimir Lazarevic
Mr. Branko Lukic and Mr. Dragan Ivetic for Mr. Sreten Lukic

1. General Dragoljub Ojdanic respectfully moves for a stay of proceedings on the grounds that he cannot presently receive a fair trial as guaranteed in Article 20 of the Tribunal's Statute. Specifically, he contends that since the attack on his defence team in Kosovo on 25 May 2006, his defence has not been able to visit the crime scenes or interview witnesses in Kosovo, depriving him of effective assistance of counsel and equality of arms with the prosecution, which investigates freely in Kosovo and was able to bring many witness from Kosovo.

Procedural History

2. Since 2004, General Ojdanic's defence team has been requesting authorization to travel to Kosovo, view the places where the crimes are alleged to have occurred, and interview witnesses.¹

4. The defence team was referred by the Registry to the United Nations Mission in Kosovo (UNMIK), which was to undertake security for the work in Kosovo.²

5. On 10 March 2005, General Ojdanic's defence team requested UNMIK to arrange for the mission to take place in April 2005.³

6. On 8 April 2005, UNMIK advised the Registrar that due to the dangerous security situation in Kosovo, our visit could not be accommodated at that time.⁴

7. On 19 April 2005, General Ojdanic's defence team requested that UNMIK notify it when it was safe to travel in Kosovo.⁵

8. When the Trial Chamber set a trial date for 10 July 2006 in this case, General Ojdanic's defence team re-contacted UNMIK and requested that a visit be arranged. UNMIK agreed and lead counsel Tomislav Visnjic and an investigator traveled to Kosovo in May 2006.

9. On the second day of their visit, their convoy was ambushed by a large crowd of Kosovar Albanians in the village of Mala Krusa on 25 May 2006. Three UNMIK

¹ See letter to Sebastian Van Vliet of 6 December 2004 attached as Annex "A" to *General Ojdanic's Motion for Stay of Proceedings* (2 June 2006)

² See letter of Registrar attached as Annex "B" to *General Ojdanic's Motion for Stay of Proceedings* (2 June 2006)

³ See letter dated 10 March 2005, attached as Annex "C" to *General Ojdanic's Motion for Stay of Proceedings* (2 June 2006)

⁴ See letter of UNMIK dated 8 April 2005, attached as Annex "D" to *General Ojdanic's Motion for Stay of Proceedings* (2 June 2006)

⁵ See letter dated 19 April 2005 attached as Annex "E" to *General Ojdanic's Motion for Stay of Proceedings* (2 June 2006)

policemen and more than 30 citizens were injured in the attack.⁶ General Ojdanic's defence team narrowly escaped injury, although rocks were thrown at the windows of their vehicle and their interpreter was hospitalized after being injured.

10. As a result of the attack, General Ojdanic's defence team was evacuated from Kosovo and was unable to continue its mission. It had completed less than one-third of its planned work.

11. On 31 May 2006, General Ojdanic's defence team was advised by UNMIK that the visit could not be resumed and that "political clearance for the resumption of the visit had been withdrawn."⁷

12. On 2 June 2006, prior to commencement of the trial, General Ojdanic filed *General Ojdanic's Motion for Stay of Proceedings* (2 June 2006) seeking a stay of proceedings until his defence team was able to safely investigate in Kosovo.

13. On 9 June 2006, the Trial Chamber issued its *Decision on Ojdanic Motion for Stay of Proceedings*. The Trial Chamber denied the motion 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."⁸

14. After the pretrial conference and the first week of trial, on 14 July 2006, the Ojdanic defence team contacted UNMIK by letter and provided them with the information UNMIK had requested in their letter of 31 May 2006. In the letter, the defence team requested that the visit be organized beginning on 29 July and provided a list of 13 sites to be visited. The letter asked UNMIK to consider the request as very urgent and to contact the Ojdanic defence if any additional data was needed.⁹

15. This letter was e-mailed to UNMIK on 14 July 2006 and again on 17 July 2006, with the notation that the request was urgent.¹⁰

⁶ See UNMIK Press Release, attached as Annex "F" to *General Ojdanic's Motion for Stay of Proceedings* (2 June 2006)

⁷ See UNMIK letter of 31 May 2006, attached as Annex "G" to *General Ojdanic's Motion for Stay of Proceedings* (2 June 2006)

⁸ *Decision on Ojdanic Motion for Stay of Proceedings* (9 June 2006) at para. 6

⁹ The letter of 14 July 2006 is attached as Annex "H" to *General Ojdanic's Second Motion for Stay of Proceedings* (31 July 2006)

¹⁰ The e-mails of 14 and 17 July 2006 are attached as Annex "I" to *General Ojdanic's Second Motion for Stay of Proceedings* (31 July 2006)

16. On 19 July 2006, the Ojdanic defence sent another e-mail to UNMIK setting forth the specific dates of travel—31 July through 3 August and included the following:

“I have to emphasize that it is imperative that the visit take place from Monday 31 July 2006. General Ojdanic's trial will resume on the following Monday and go through at least December without a break. Therefore, there will be no other time for us to organize this visit. Given that the Trial Chamber has denied our motion to delay the proceedings and requested that UNMIK facilitate our work in Kosovo, we have to get this done the week of 31 July.”¹¹

17. On 20 July 2006, the Ojdanic defence team sent a letter to the United States Ambassador to Serbia requesting his assistance and a meeting prior to the visit to Kosovo. No response was ever received to this letter.¹²

18. Having received no response from UNMIK, the Ojdanic team sent yet another letter to them, this time directly to the Principal Deputy Special Representative Steven Schook. In the letter, the Ojdanic team indicated:

“We have applied to return on 31 July 2006 and are awaiting approval from UNMIK. I would appreciate it if you could approve this visit as soon as possible, as there is no other time for us to be able to do it. The trial resumes on 7 August and will continue uninterrupted until the end of the year.”¹³

19. The letter was sent directly to Deputy Special Representative Schook by e-mail and included a request for urgent action by UNMIK.¹⁴

20. On 26 July 2006, Mr. Schook replied. He indicated that he was unaware of our request to travel to Kosovo on 31 July and repeated UNMIK's requests for information on the purpose of the visit, the sites to be visited, and information on

¹¹ This e-mail is of 19 July 2006 is attached as Annex “J” to *General Ojdanic's Second Motion for Stay of Proceedings* (31 July 2006).

¹² The letter of 20 July 2006 is attached as Annex “K” to *General Ojdanic's Second Motion for Stay of Proceedings* (31 July 2006)

¹³ The letter of 22 July 2006 is attached as Annex “L” to *General Ojdanic's Second Motion for Stay of Proceedings* (31 July 2006)

¹⁴ The e-mail of 22 July 2006 is attached as Annex “M” to *General Ojdanic's Second Motion for Stay of Proceedings* (31 July 2006)

members of the team who would be visiting. He indicated that the information should be provided at least three working days before the visit.¹⁵

21. On the same day, the Ojdanic team immediately responded to UNMIK that it had already provided the information requested, and again provided the information, as well as copies of its previous correspondence.¹⁶ The e-mail concluded that:

“We never received any replies--thus my letter directly to General Schook. I must emphasize that 31 July is the last week before the trial resumes and we must make our visit at this time. Given that our Trial Chamber has specifically issued a Decision requesting UNMIK to facilitate our visit, I ask that you make every effort to see that it happens on Monday. Please call Mr. Visnjic in Belgrade at 38 111 244 2173 or 38 111 244 0565 as soon as possible if there is any information you are lacking. Thank you for your cooperation and I hope to see you on Monday.”

22. On 28 July 2006, the Friday afternoon before the visit was supposed to take place, the Ojdanic team received an e-mail from UNMIK indicating that “the visit cannot proceed as you have proposed in your email of 19 July.”

23. The communication from UNMIK indicated that:

“You may recall that in our 7 July letter, we wrote that we understand that the sole purpose of your visit is to carry out an investigation on crime sites and that you are not seeking assistance in meeting with witnesses. In this context, we would appreciate if you could confirm That this is the precise purpose of your visit. We have not received any information from your team on the purpose and scope of visiting each site on your list.”¹⁷

24. However, in the letter of 14 July 2006, the Ojdanic team had specifically answered this question, stating: “Thank you on your letter of July 7, 2006. I would like to confirm you that sole purpose of our visit is to carry out our Investigation of the crime sites.”

¹⁵ The letter of Mr. Schook is attached as Annex “N” to *General Ojdanic’s Second Motion for Stay of Proceedings* (31 July 2006).

¹⁶ The e-mails of 26 July 2006 are attached as Annex “O” to *General Ojdanic’s Second Motion for Stay of Proceedings* (31 July 2006).

¹⁷ This e-mail of 28 July 2006 is attached as Annex “P” to *General Ojdanic’s Second Motion for Stay of Proceedings* (31 July 2006).

25. The e-mail of 28 July 2006 from UNMIK requested new information for the first time:

“UNMIK will require 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 on the site, take photographs, do they intend to enter any premises, how much time will be spent in each location etc. Note: we would like to have your confirmation that you do not intend to interview any witnesses during this visit.”

26. The e-mail from UNMIK also indicated that, prior to providing the clearance for a visit to Kosovo, UNMIK would require a meeting with the defence team after this information was provided to “discuss the proposed visit in detail.”

27. General Ojdanic’s defence team responded to this e-mail on Saturday, 29 July 2006.¹⁸ However, because of these new conditions imposed by UNMIK, the defence team of General Ojdanic was unable to visit the crime scenes or conduct any investigation in Kosovo before the trial recommenced on 7 August 2006.

28. General Ojdanic therefore filed *General Ojdanic’s Second Motion for Stay of Proceedings* on 31 July 2006.

29. On 31 July 2006, UNMIK responded to General Ojdanic’s defence team by requesting a meeting to discuss the proposed visit.¹⁹

30. On 3 August 2006, Lead Counsel Tomislav Visnjic met with UNMIK officials and provided the details that they had requested.²⁰

31. After this meeting, on 4 August 2006, UNMIK responded by letter, requesting an amended request from the defence, and indicating they could respond to such a request in three weeks.²¹

32. By letter of 6 August 2006, the defence again provided the detailed information UNMIK had requested.²²

¹⁸ This e-mail of 29 July 2006 is attached as Annex “Q” to *General Ojdanic’s Second Motion for Stay of Proceedings* (31 July 2006)

¹⁹ UNMIK’s e-mail is attached as Annex “R” to *Supplemental Materials in Support of General Ojdanic’s Second Motion for Stay of Proceedings* (7 August 2006)

²⁰ *Supplemental Materials in Support of General Ojdanic’s Second Motion for Stay of Proceedings* (7 August 2006) at para. 2

²¹ UNMIK’s letter is attached as Annex “S” to *Supplemental Materials in Support of General Ojdanic’s Second Motion for Stay of Proceedings* (7 August 2006)

33. On 7 August 2006, General Ojdanic filed his *Supplemental Materials in Support of General Ojdanic's Second Motion for Stay of Proceedings* (7 August 2006). The trial recommenced on that day, making a further visit to Kosovo by defence counsel impossible.

34. On 9 August 2006, UNMIK acknowledged receipt of General Ojdanic's letter and promised to respond within three weeks.²³

35. On 30 August 2006, UNMIK finally provided a substantive response, agreeing to facilitate visits to 6 of the 11 sites requested but with stringent restrictions on alighting from the vehicle and prohibitions on contact with citizens.²⁴

36. After careful deliberations, on 6 September 2006, General Ojdanic's defence team responded to UNMIK that these restrictions made such a visit of little value, and did not justify the substantial risk to the safety of defence team members.²⁵

37. On 15 September 2006, General Ojdanic filed his *Final Submissions in Support of General Ojdanic's Third Motion for Stay of Proceedings* (14 September 2006), informing the Trial Chamber that while appreciated the Trial Chamber's efforts to encourage UNMIK to facilitate the work of his defence team in Kosovo and appreciated UNMIK's efforts to accommodate the needs of his defence team, the reality was that it was not possible for a Serbian accused to conduct investigation in Kosovo at that time.²⁶

38. On 19 October 2006, the Trial Chamber issued its *Decision on Ojdanic Second Motion for Stay of Proceedings*. The Trial Chamber denied the motion and urged the defence to reopen communication with UNMIK to resume its investigations in Kosovo.²⁷

39. Because the trial continued throughout the period from 7 August through 23 March 2007, there was no practical opportunity for the Ojdanic defence team to visit

²² This letter is Annex "T" to the *Supplemental Materials in Support of General Ojdanic's Second Motion for Stay of Proceedings* (7 August 2006)

²³ The UNMIK letter is Annex "U" to the *Final Submissions in Support of General Ojdanic's Third Motion for Stay of Proceedings* (14 September 2006)

²⁴ The UNMIK letter is Annex "V" to the *Final Submissions in Support of General Ojdanic's Third Motion for Stay of Proceedings* (14 September 2006)

²⁵ The letter from the Ojdanic defence team is Annex "W" to the *Final Submissions in Support of General Ojdanic's Third Motion for Stay of Proceedings* (14 September 2006)

²⁶ *Final Submissions in Support of General Ojdanic's Third Motion for Stay of Proceedings* (14 September 2006) at para. 6

²⁷ *Decision on Ojdanic Second Motion for Stay of Proceedings* (19 October 2006) at para. 11

Kosovo during the prosecution case. On 15 March 2007, anticipating a break in the trial upon the scheduled conclusion of the prosecution's case in late March 2007, the Ojdanic defence team contacted UNMIK and requested to be able to visit numerous specified locations in Kosovo to "contact 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."²⁸

40. On 23 March 2007, UNMIK once again requested further information.²⁹

41. On 26 March 2007, General Ojdanic's defence team provided the further information that had been requested.³⁰

42. On 30 March 2007, UNMIK responded, indicating it was willing to facilitate investigation by the Ojdanic team in Kosovo, but under conditions that prohibited the defence investigator from coming, and prohibited spontaneous contact between the defence team members and the people sought to be interviewed.³¹

43. On 10 April 2007, the Ojdanic team responded to UNMIK that "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."³²

44. On 9 May 2007, UNMIK responded that they were open to further suggestions by the Ojdanic defence team on ways to safely facilitate investigation in Kosovo.³³ However, given the continuing violence against Serbs in Kosovo, and tensions over the unresolved status of Kosovo, General Ojdanic's team considered that the security risk was too great to return to Kosovo at this time.

Argument

45. During the prosecution's case, its "crime base" witnesses testified extensively on crimes committed by "forces of the FRY and government of Serbia". In their

²⁸ The letter from the Ojdanic defence is attached to this Motion as Annex "X"

²⁹ The letter from UNMIK is attached to this Motion as Annex "Y"

³⁰ The letter from the Ojdanic defence is attached to this Motion as Annex "Z"

³¹ The letter from UNMIK is attached to this Motion as Annex "AA"

³² The letter from the Ojdanic defence team is attached to this Motion as Annex "BB".

³³ The letter from UNMIK is attached to this Motion as Annex "CC"

statements admitted pursuant to Rule 92 *ter*, and their live testimony, the witnesses identified other persons who they claimed witnessed these same events.

46. General Ojdanic's defence team considers it a necessary and standard practice in providing effective assistance of counsel for its team to contact these persons to either confirm or contradict the accounts given by the prosecution witnesses, or to better identify the affiliation of the perpetrators.

47. General Ojdanic's team compiled a list of such persons it wished to contact. Virtually all of them reside in Kosovo. In many cases, the potential witnesses were identified only as relatives of the prosecution witness, or not fully identified, requiring further investigation in the field to adequately identify those persons so they could be contacted. The list of witnesses General Ojdanic's team wished to locate and interview in Kosovo is attached as Annex "DD" to this Motion.

48. Unfortunately, the security situation in Kosovo has not improved since the period before the trial when General Ojdanic's defence team was attacked in Kosovo while being protected by UNAMIR. UNAMIR Chief Joaquim Ruecker was recently quoted in a letter to the United Nations Secretary General as reporting that the situation in Kosovo is "getting out of control".³⁴

49. The attached compilation of news articles demonstrate that attacks against Serbs have continued in 2007 and that General Ojdanic's Serbian lead counsel and investigator are justified in fearing for their safety should they return to Kosovo to conduct the necessary investigation needed on behalf of General Ojdanic.³⁵

50. Because the international community has not been able to resolve the status of Kosovo as of the time General Ojdanic is required to begin his defence, it is respectfully requested that the trial be stayed until such time as the security situation in Kosovo allows adequate security for defence investigation there.

51. Article 20 (1) of the Tribunal's Statute provides that:

"The Trial Chambers shall ensure that a trial is fair and expeditious and that proceedings are conducted in accordance with the rules of procedure and evidence, with full respect for the rights of the accused and due regard for the protection of victims and witnesses."

³⁴ B92 news of 3 July 2007, attached as Annex "EE" to this Motion.

³⁵ See Annex "FF" to this Motion

52. This right to a fair trial is also enshrined in Article 21(2) which provides that:

“In the determination of charges against him, the accused shall be entitled to a fair and public hearing, subject to article 22 of the Statute.”

53. Article 21 also provides for a number of specific rights embodied within the concept of a fair trial, such as:

- (1) All persons shall be equal before the International Tribunal
- (4) “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:
 - (b) to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;
 - (d) to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it.”

54. The present situation in which General Ojdanic’s defence has been prevented from investigating his case in Kosovo and obtaining defence witnesses there violates his right to a fair trial, his right to equality of arms with the prosecution, his right to adequate facilities for the preparation of his defence, and his right to effective assistance of counsel.

Equality of Arms

55. The Appeals Chamber has held that the principle of equality of arms between the accused and the prosecution is a component of the right to a fair trial. This obligates a judicial body to ensure that neither party is put at a disadvantage when presenting its case.³⁶

³⁶ *Prosecutor v Kordic & Cerkez*, No. IT-65-14/2-A, *Judgement* (17 December 2004) at paras 175-76; *Prosecutor v Milutinovic et al*, No. IT-99-37-AR73.2, *Decision on Interlocutory Appeal on Motion for Additional Funds* (13 November 2003) at para. 23

56. In assessing an equality of arms challenge by an accused, a judicial body must ask two basic questions: (1) was the Defence put at a disadvantage *vis-à-vis* the Prosecution, taking into account the “principle of basic proportionality” and (2) was the accused permitted a fair opportunity to present his case.³⁷

57. In the present case, the defence is clearly disadvantaged *vis-à-vis* the prosecution. The prosecution has been to all of the crime scenes, interviewed hundreds of witnesses in Kosovo, and been unhindered in its opportunity to investigate the crimes there. On the other hand, General Ojdanic’s defence team has been attacked when it tried to conduct the most basic of trial preparation—to view the scenes of the crimes and to locate and interview eyewitnesses. It has been 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.

58. As a result, General Ojdanic does not have the opportunity to fairly present his case—the second inquiry of the “equality of arms” analysis.

59. In the *Oric* case, the Appeals Chamber held that the principle of equality of arms was violated by restrictions imposed by the Trial Chamber on the number of witnesses and time allowed to the defence.³⁸ The violation of equality of arms is more serious in this case, where General Ojdanic is prevented from identifying and locating witnesses to the crimes in the first place. He will not even be in a position to call such witnesses, let alone in proportion to the number of witnesses called by the prosecution.

60. The issue of the scope of the doctrine of equality of arms was addressed by the Appeals Chamber in the *Tadic* case. There, the accused claimed that his right to a fair trial was abridged by the failure of the government of Republika Srpska to cooperate with the defence.³⁹

61. The Appeals Chamber acknowledged that it “can conceive of situations where a fair trial is not possible because witnesses central to the defence case do not appear due to the obstructionist efforts of a State. In such circumstances, the defence, after exhausting all the other measures mentioned above, has the option of submitting a motion

³⁷ *Prosecutor v Stakic*, No. IT-97-24-A, *Judgement* (22 March 2006) at para. 149

³⁸ *Prosecutor v Oric*, No. IT-03-68-AR73.2, *Interlocutory Decision on Length of Defence Case* (20 July 2005) at para. 9

³⁹ *Prosecutor v Tadic*, No. IT-94-1-A, *Judgement* (10 July 1999) at paras. 29-36

for a stay of proceedings.” It ruled that the failure of the defence to request this remedy precluded relief on appeal.⁴⁰

62. The Appeals Chamber also considered the fact that the Tribunal had limited authority to compel a State to cooperate with it, and that the principle of equality of arms did not extend to “an external, independent entity” not subject to the control of the court.⁴¹

63. At the ICTR, the Appeals Chamber likewise held in the *Kayishema & Ruzindana* case that the failure of the government of Rwanda to cooperate with the defence was not sufficient to establish inequality of arms.⁴²

64. However, these cases are distinguishable from the situation here because, unlike Republika Srpska and Rwanda, the territory of Kosovo is administered by the United Nations, the same body which administers this Tribunal. Here, the same United Nations which proposes to put General Ojdanic on trial is responsible for security in the areas to which his defence team needs access. Under the circumstances, the Trial Chamber cannot shift the responsibility for a fair trial away from its own institution--the United Nations. Instead, given UNMIK’s inability to guarantee security for basic defence investigation, it must stay the trial until the conditions for a fair trial are in place.

65. Therefore, General Ojdanic has demonstrated that his inability to investigate in Kosovo comes within the scope of a cognizable violation his right to equality of arms.

Effective Assistance of Counsel

66. The Appeals Chamber has held that the accused not only has a right to counsel, but a right to competent counsel.⁴³ Under the circumstances, General Ojdanic’s counsel cannot render effective assistance to him at trial because they cannot observe the scene of the crimes and access witnesses to the events which are the subject of the indictment.

67. Such a handicap has prevented counsel from effectively cross examining prosecution witnesses, who testified to having observed events from various positions at

⁴⁰ *Prosecutor v Tadic*, No. IT-94-1-A, *Judgement* (10 July 1999) at para. 55

⁴¹ *Prosecutor v Tadic*, No. IT-94-1-A, *Judgement* (10 July 1999) at paras. 49-50

⁴² *Prosecutor v Kayishema & Ruzindana*, No. ICTR-95-1-A, *Judgement* (1 June 2001) at paras. 72-73

⁴³ *Prosecutor v Akayesu*, No. ICTR-96-4-A, *Judgement* (1 June 2001) at para. 76; *Prosecutor v Muvunyi*, No. ICTR-2000-55^a-T, *Decision on Muvunyi’s Additional Objections to the Deposition Testimony of Witness QX* (31 May 2006) at para. 10

or near the scene. Not only was counsel be unable to adequately know the physical layout of the crime scene, but had no accesses to witnesses who can contradict the accounts given by prosecution witnesses. Therefore, he lacked the basic tools to conduct a competent cross examination.

68. In addition, by lack of access to potential defence witnesses in Kosovo, defence counsel will now be unable to bring witnesses during the defence case who could contradict the witnesses of the prosecution.

Stay of Proceeding

69. To continue a trial under these circumstances, where the accused cannot be adequately defended, would be an abuse of process. The Appeals Chamber has held that the Tribunal has an inherent power to stay proceedings which are an abuse of process.⁴⁴

70. The Appeals Chamber has further held that a Trial Chamber should use its discretion under the circumstances of a case to decline to exercise jurisdiction “where to exercise that jurisdiction in light of serious and egregious violations of the accused’s rights would prove detrimental to the court’s integrity.”⁴⁵ Such is the case here.

Conclusion

71. Despite its best efforts, including being subjected to a life-threatening physical attack in the course of its duties, the defence team of General Ojdanic is presently unable to provide him with effective assistance at his trial. Because of the inequities of access to witnesses in Kosovo, the Trial Chamber is unable to provide General Ojdanic with the equality of arms he is entitled to when defending himself in an international tribunal. The situation renders continuing the trial at this juncture fundamentally unfair.

72. Therefore, General Ojdanic respectfully requests that the Trial Chamber order a Stay of Proceedings until such time as the security situation in Kosovo allows for adequate defence investigation.

Word count: 3965

Respectfully submitted.

⁴⁴ *Prosecutor v Bobetko*, No. IT-02-62-AR54 bis, *Decision on Challenge by Croatia to Decision and Orders of Confirming Judge* (29 November 2002) at para. 15

⁴⁵ *Kajelijeli v Prosecutor*, No. ICTR-98-44A-A, *Judgement* (23 May 2005) at para. 207

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