



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-04-74-T
Date: 23 June 2006
Original: ENGLISH
French

TRIAL CHAMBER III

Before: Judge Jean-Claude Antonetti, presiding
Judge Árpád Prandler
Judge Stefan Trechsel

Registrar: Mr Hans Holthuis

Decision of: 23 June 2006

THE PROSECUTOR

v.

Jadranko PRLIĆ
Bruno STOJIC
Slobodan PRALJAK
Milivoj PETKOVIĆ
Valentin ĆORIĆ
Berislav PUŠIĆ

**DISSENTING OPINION OF PRESIDING JUDGE JEAN-CLAUDE
ANTONETTI ON THE 23 JUNE 2006 DECISION ON PROSECUTION'S
REQUEST FOR CERTIFICATION TO APPEAL THE 25 MAY 2006
DECISION ON LEAD COUNSEL'S ASSIGNMENT OF MR ORSAT
MILJENIĆ AS *PRO BONO* CO-COUNSEL FOR THE ACCUSED PETKOVIĆ**

The Office of the Prosecutor:

Mr Kenneth Scott
Mr Daryl Mundis

Counsel for the Accused:

Mr Michael Karnavas and Ms Suzana Tomanović for Jadranko Prlić
Ms Senka Nožica and Mr Peter Murphey for Bruno Stojic
Mr Božidar Kovačić and Ms Nika Pinter for Slobodan Praljak
Ms Vesna Alaburić for Milivoj Petković
Mr Tomislav Jonjić for Valentin Ćorić
Mr Fahrudin Ibrišimović and Mr Roger Sahota for Berislav Pušić

1. I would like to explain the reasons for my disagreement with the majority of the Trial Chamber Judges regarding the Decision of 23 June 2006 granting certification to appeal the Decision on Lead Counsel's Assignment of Mr Orsat Miljenić as *Pro Bono* Co-Counsel for the Accused Petković ("Decision"), rendered confidentially on 25 May 2006 and in which the Chamber found that there was no conflict of interest in assigning Mr Miljenić as Co-Counsel for the Accused.

I. Background

2. The Tribunal must often deal with disputed issues related to Defence Counsel. The Registry, President, Trial Chambers, and the Appeals Chamber all deal with such matters, and the immediate consequence is a slowdown in the Tribunal's activity, as energies are mobilised in search of appropriate solutions.
3. The Prosecution position with respect to its former members or employees has compounded the issue of a conflict of interest, which is one of the matters in dispute. The Tribunal has no commission whose task is to deal with ethical matters, and although Rule 44(D) of the Rules of Procedure and Evidence ("Rules") provides for an advisory panel to deal with matters relating to Defence Counsel, the body does not have specific powers regarding transfers from one post to another, which is accepted practice in the Tribunal. Accordingly, a member of the Prosecution may become a member of the Defence,¹ a Defence Counsel may become a Judge, and even a former *Chef de Cabinet* for the President may become Defence Counsel.
4. The question arising in this case is whether a former diplomat, who implemented orders from his embassy or government and worked with the Prosecution under Article 29 of the Statute, would find himself in the position described in Rule 44(A)(vi) of the Rules and thus be refused assignment as Co-Counsel for the Defence. The question is in fact whether, as a result of his

prior duties, Mr Miljenić could be assigned as Co-Counsel because, in the exercise of his duties, he would negatively affect the proper administration of justice and his assignment might therefore discredit the Tribunal or cause the public to lose faith in its work.

5. When dealing with such issues, a Judge must attentively examine the “evidence” put before him by the Prosecution, and cannot decide on the basis of mere allegations.
6. If the Judges were to limit themselves solely to Prosecution arguments based on mere allegations, it would amount to investing the Prosecution with the power to choose Counsel for the Accused, which would be unacceptable.
7. The Chamber therefore rendered its Decision on the basis of the parties’ written submissions and noted that there was no conflict of interest. In its motion of 1 June 2006, the Prosecution requested review of the decision and certification to appeal it. The Judges ruled unanimously to deny the motion for review, however, as regards the certification to appeal, I disagree with the other Judges of the Chamber for the reasons explained hereinafter.

II. Application of Rule 73(B) of the Rules

Discretionary Power of the Chamber

8. First, we should recall the limited scope for the application of Rule 73(B). Appeals are the exception and not the rule, and even though the conditions for the fair and expeditious conduct of the trial set out in Rule 73(B) may be met, in accordance with Tribunal case law, a Chamber retains the discretionary power to certify a request for interlocutory appeal.² As a result of that

¹ Recently, a former member of the Office of the Prosecutor was assigned as Defence Counsel (Case no. IT-01-45).

² *The Prosecutor v. Vidoje Blagojević and Dragan Jokić*, IT-02-60-T, Decision on Request for Certification to Appeal the Trial Chamber's Decision on Vidoje Blagojević's Oral Request & Request for the Appointment of an Independent Counsel for this Interlocutory Appeal Should Certification be Granted, 2 September 2004, p. 2.

restriction, the Chamber must strike a correct balance between the practical advantage of dealing with the issue at the beginning of proceedings and the need to avoid delays in the proceedings.³

9. Secondly, a Chamber deciding on certification must ensure compliance with the requirements set out in Rule 73(B) of the Rules, rather than consider the merits of the case or the general interests of justice. The Applicant must therefore prove that the issue affects the fair and expeditious conduct of the proceedings or the outcome of the trial, **and** must show how an immediate resolution of the issue may affect the proceedings.⁴

Fair and Expeditious Conduct of the Trial and Advancement of the Proceedings

10. In this case, the Prosecution argues that Defence Counsel's participation would be improper and that it might cause prejudice which would be difficult to remedy after the event, and that the Chamber's decision may compromise the fair and expeditious conduct of the proceedings, and that an immediate resolution of the issue would materially advance the proceedings.
11. In my opinion, the Prosecution motion clearly fails to demonstrate that the two cumulative criteria under Rule 73(B) have been satisfied, namely that the issue affects the "fair and expeditious conduct of the proceedings" and that its resolution may "materially advance the proceedings", criteria which must be met for the Prosecution to exercise its right to appeal the decision. Instead, the motion deals with the merits of the case, matters of general interest, and the distribution of competences amongst the different organs of the Tribunal.

³ International Criminal Court, *Situation in Uganda*, ICC-02/04-01/05, 19 August 2005, para. 19 ("ICC Decision").

⁴ *The Prosecutor v. Slobodan Milosević*, IT-02-54-T, Decision on Prosecution Motion for Certification of Trial Chamber Decision on Prosecution Motion for *Voir Dire* Proceedings, 20 June 2005, para. 2.

Dual Condition of a Fair and Expeditious Trial⁵

12. In its motion, the Prosecution submits that the issue of the existence or absence of a conflict of interest which would block Counsel's assignment is a matter which relates to the fair and expeditious conduct of the trial. Be it a question of fairness or swiftness, the Prosecution in fact re-argued the merits of the case, but failed to demonstrate the negative consequences the Chamber's decision could have on those two cumulative criteria.
13. It is fitting to note that the concept of a fair trial is linked to that of the equality of arms between the parties during the proceedings,⁶ and in this case that equality was preserved with respect to the Prosecution. Indeed, before ruling on the oral motion to assign Mr Miljenić as *pro bono* Co-Counsel for the Defence, the Chamber, *proprio motu*, asked the Prosecution to provide written submissions regarding a possible conflict of interest, thereby taking into account the Prosecution's point of view before making its determination on the matter.
14. The Prosecution also failed to demonstrate how the issue might have a noticeable impact on the expeditious conduct of the proceedings. That standard may be considered to be met if the issue at hand creates a risk that the long and costly trial phase of the proceedings would be invalidated at a later stage, after a Trial Chamber has rendered its judgement.⁷ The Prosecution fails however to specifically show that such a risk exists, and a decision cannot be made solely on the basis of allegations not substantiated by specific information that Mr Miljenić's assignment would have a significant impact on the expeditious conduct of the proceedings.

⁵ *The Prosecutor v. Slobodan Milošević*, IT-02-54-T, Decision on Prosecution's Application for Certification under Rule 73 (B) Concerning Rule 70. ("Milosević Decision of 22 August 2002).

⁶ See for example *The Prosecutor v. Dusko Tadić*, IT-94-1 A, Appeals Chamber Decision of 15 July 1999, para. 48.

⁷ *The Prosecutor v. Théoneste Bagosora et al.*, ICTR-98-41-T, Decision of 11 September 2003, para 9.

Outcome of the Trial

15. An analysis of whether the matter “affects the outcome of the trial” presupposes a necessary examination of how the decision bears on the determination of the Accused’s guilt or innocence.⁸ In this case, the Prosecution has failed to demonstrate the potential effects of that issue, in other words how it would affect the very result of the trial.

An Immediate Resolution May Materially Advance the Proceedings

16. The Prosecution also failed to demonstrate in this case how an immediate resolution to the issue could impact the ongoing or future proceedings.⁹

17. Moreover, to date, the Registrar still has not made a determination as to Mr Miljenić’s qualifications as Co-Counsel under Rule 44 of the Rules. Accordingly, it does not appear to me that an immediate resolution of the issue by the Appeals Chamber would materially advance the proceedings. On the contrary, there is a serious risk of wasting time, which could negatively impact the efficient conduct of the proceedings, to the extent that this issue would take up all of the Defence’s time, in a case with a considerable number of hearings requiring constant and sustained attention.

18. For the foregoing reasons, I believe that the Prosecution failed to comply with the requirements of Rule 73(B) of the Rules in its motion, and my position therefore differs from that taken by a majority of the Judges of the Chamber.

⁸ See ICC Decision, para. 48 and *The Prosecutor v. Casimir Bizimungu et al.*, ICTR-99-50-T, Decision on Bicomupaka’s Request Pursuant to Rule 73 for Certification to Appeal the 1 December 2004 “Decision on the Motion of Bicomupaka and Mugenzi for Disclosure of Relevant Material,” 4 February 2005, para. 26.

⁹ Milosević Decision, 29 August 2002, p. 2.

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

/signed/ _____
Jean-Claude Antonetti
Presiding Judge

Done this twenty-third day of June 2006
At The Hague
The Netherlands