



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: 26 March 2007
Original: ENGLISH
French

IN TRIAL CHAMBER III

Before: Judge Jean-Claude Antonetti
Judge Árpád Prandler
Judge Stefan Trechsel
Reserve Judge Antoine Kesia-Mbe Mindua

Registrar: Mr Hans Holthuis

Opinion of: 26 March 2007

THE PROSECUTOR

v.

**Jadranko PRLIĆ
Bruno STOJIĆ
Slobodan PRALJAK
Milivoj PETKOVIĆ
Valentin ĆORIĆ
Berislav PUŠIĆ**

**DISSENTING OPINION OF THE PRESIDING JUDGE OF THE TRIAL CHAMBER
TO DECISION ON THE REQUEST FOR CERTIFICATION OF APPEAL
CONCERNING THE TRIAL CHAMBER'S DECISION OF 1 MARCH 2007**

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 Murphy for Bruno Stojić
Mr Božidar Kovačić and Ms Nika Pinter for Slobodan Praljak
Ms Vesna Alaburić and Mr Nicholas Stewart for Milivoj Petković
Ms Dijana Tomašegović-Tomić and Mr Dražen Plavec for Valentin Ćorić
Mr Fahrudin Ibrišimović and Mr Roger Sahota for Berislav Pušić

In its “Decision on the Request for Certification of Appeal Concerning the Trial Chamber's Decision of 1 March 2007” issued on 22 March 2007, the Chamber found by a majority that, principally, the Request for Certification of Appeal was inadmissible because the case was still pending before the Appeals Chamber and, in the alternative, certified the appeal should it transpire that the Appeals Chamber considered itself not seized of the matter in dispute.

Considering that the request was admissible and that there were no grounds to certify the appeal, I wish to explain the reasons why I disagree with the majority of the Trial Chamber Judges.

I – Brief procedural background

On 13 November 2006, the Trial Chamber rendered a decision whereby it reduced by 107 hours the time allocated to the Prosecution for the presentation of its case, setting it at 190 hours. On 6 February 2007, the Appeals Chamber rendered a decision whereby it requested the Trial Chamber to re-assess its decision and determine whether the reduction of time imposed on the Prosecution would be sufficient for a fair presentation of its case in light of the complexity and number of issues that remain in the case. In conformity with the decision of the Appeals Chamber, on 1 March 2007, the Trial Chamber rendered its “Decision Following the Appeals Chamber Decision of 6 February 2007 Concerning Appeal against Reducing Time for the Prosecution Case” (“Decision of 1 March 2007”), whereby it re-assessed and maintained its decision of 13 November 2006. On 7 March 2007, the Prosecution filed its Request for Certification of Appeal Concerning the Trial Chamber's Decision on Remand dated 1 March 2007 (“Request”), considering that the Appeals Chamber was still seized of the issue, as it had rendered “notice of decision on remand”. On 12, 14 and 19 March 2007, the Counsels for the Defence submitted to the Trial Chamber their responses to the Prosecution’s request, stating that they did not oppose the request for certification of the appeal.

II – Discussion on the application of Rule 73(B) of the Rules

In its Request, the Prosecution argues that it is entitled to a fair trial and that it is prejudiced by the imposed reduction of time. Although it falls upon the Appeals Chamber to address this substantive issue, it should be recalled that the notion of a fair trial is incorporated in the spirit of the proper administration of justice. Article 20(1) of the Statute stipulates that a Trial Chamber shall ensure that the trial is fair and expeditious.

As regards the criteria for the certification of an appeal, pursuant to the Tribunal’s jurisprudence, even when the criteria for fairness and expeditiousness stipulated in Rule 73(B) of the Rules of Procedure and Evidence are satisfied, a Trial Chamber reserves its discretionary right to certify an interlocutory appeal.¹ It must endeavour to achieve the right balance between the practical advantage of settling this issue at the very beginning of the trial and the necessity to avoid delays in the trial. By deciding, in the alternative, to pronounce itself with respect to the certification, the Chamber is duty bound to respect the requirement of Rule 73(B) of the Rules. In order for the Chamber to do so, the moving party must prove that the issue would affect the fair and expeditious conduct of the trial or its outcome and show what effect an immediate resolution of the issue would have on the proceedings.²

¹ *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 Blagojevic's Oral Request and Request for the Appointment of an Independent Counsel for This Interlocutory Appeal Should Certification Be Granted, 2 September 2004, p. 2.

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

Given the fact that the criteria applying to the certification of an appeal are of a cumulative rather than alternative nature, I find that the Trial Chamber should not have certified the appeal for at least one reason, namely, the fact that the challenged decision cannot affect the outcome of the trial because the Trial Chamber states, in the Impugned Decision, that it might review its decision to reduce the time allocated to the Prosecution should the circumstances change.³

As regards the criterion of the fairness of the trial, although the Appeals Chamber requested that the Trial Chamber provide further reasoning for its decision of 13 November 2006, specifying that it had taken into account the fact that the reduction of time still made it possible for the Prosecution to present its case in a fair manner in view of the complexity and number of remaining issues, it should nevertheless be recalled that, in its Request, the Prosecution did not discharge its burden of proof. Indeed, in order to move for the certification of an appeal, the moving party must present some elements that support its allegations. However, apart from the fact that it called the decision rendered by the Trial Chamber “arbitrary and capricious”,⁴ the Prosecution did not offer any element that could support its claim that it was prejudiced by the reduction of time imposed on it by the Trial Chamber. In its request, the Prosecution did not prove that its right to present its case, and consequently the possible fairness of the trial, were affected.

In fact, the Chamber finds that the Prosecution is able to present its case within the time-limits imposed on it at present. The end of the Prosecution case has not yet been set and the Trial Chamber clearly indicated that it could review its decision to reduce the time in the event of new circumstances. To date, however, the Prosecution has failed to show that it will not be able to present its case within the period of time allocated to it. Actually, despite repeated requests, the Trial Chamber has still not received an updated witness list from the Prosecution, which would enable it to see which witnesses the Prosecution has decided not to call to appear, as well as those who will be called to appear and for whom it may request that the time limit be extended. Thus, in the absence of any information of this kind, I find that the Prosecution has not proved how the reduction of its time might prejudice it. Consequently, the Chamber should not have certified the appeal.

Finally, as I already stated in my separate opinion of 1 March 2007,⁵ the Prosecution seems to ignore the crucial fact that the Rules of Procedure and Evidence clearly state that the Trial Chamber determines and checks the number of witnesses that the Prosecution may call and the time available to it for presenting its case. In this sense, I find it my duty to recall once again that the Chamber has adopted a number of provisions aimed at saving trial time and has, moreover, allowed the Prosecution to use numerous procedural facilities to optimise the use of its time.

The Prosecution seems to forget that it also has an essential role in assuring the expeditiousness of the trial and that it should not extend the trial’s duration without good reason. In view of the fact that the Indictment in this case is the most extensive in the Tribunal’s history due to the number of the Accused, the places of the crimes and the crimes

³ Decision of 1 March 2007, p. 5.

⁴ Request, para. 3.

⁵ *Prosecutor v. Jadranko Prlić et al.*, IT-04-74-T, Separate Opinion of Judge Jean-Claude Antonetti, Presiding Judge of the Trial Chamber, Regarding the Decision Following the Appeals Chamber Decision of 6 February 2007 Concerning Appeal against Reducing Time for the Prosecution Case, 1 March 2007.

charged, as well as the number of charges, the Prosecution also has the duty to be more diligent in informing the Chamber about the presentation of its future evidence. By claiming in its submissions that it had at its disposal only 31% of the time of 512 hours and 41 minutes of the 122 hearing days, the Prosecution forgot to note that procedural questions and questions asked by the Judges arise for the needs of the trial and that it would be inappropriate to suppose that this necessary time would be useless and likely to prejudice the Prosecution in the presentation of its case.

In my opinion, it is indisputable that, in its Request, the Prosecution failed to show that the cumulative double criteria of Rule 73(B), namely, “the fair and expeditious conduct of the proceedings or the outcome of the trial” and “may advance the proceedings”, have been satisfied and that it may consequently exercise its right to lodge an appeal against the Decision. Given the fact that the Prosecution has not presented any elements that show that the reduction of the time allocated to it for the presentation of its case affects the fair conduct of the trial, and that the Trial Chamber has always said that it was prepared to review its decision should the circumstances so require it and that the trial would suffer no delay, the Chamber should not have granted the request for certification of the appeal.

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

/signed/

Judge Jean-Claude Antonetti
Presiding Judge

Done this twenty-sixth day of March 2007
At The Hague
The Netherlands

[Seal of the Tribunal]