



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: 28 June 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:** 28 June 2007

**THE PROSECUTOR**

v.

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

***PUBLIC***

**SEPARATE OPINION OF JEAN-CLAUDE ANTONETTI, PRESIDING  
JUDGE OF THE TRIAL CHAMBER, REGARDING THE DECISION ON  
CERTIFICATION TO APPEAL THE DECISION ON THE MODE OF  
INTERROGATING WITNESSES**

**The Office of the Prosecutor:**

Mr Kenneth Scott

**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

1. I would like to express my complete approval of the “Decision on Certification to Appeal the Decision on the Mode of Interrogating Witnesses” adopted by the Chamber on 25 June 2007. Nevertheless, I feel I should explain my motives since they differ from those of the majority of the Chamber Judges. In my opinion, the fundamental question is whether judges may limit the right of an accused, represented by counsel, to put questions to a witness.

## **I. Background**

2. In its “Decision on the Mode of Interrogating Witnesses” of 10 May 2007 (“Decision of 10 May 2007”), the Trial Chamber recalled Guideline C, which resulted from a compromise between the Judges reached in the Chamber, of the “Decision Adopting Guidelines on Conduct of Trial Proceedings”, in its revised version of 28 April 2006. This guideline is in accordance with Article 21 (e) of the Statute that recognizes the right of an accused to examine or have examined the witnesses against him. In this case, the *Prlić* Trial, the Accused are represented by Counsel who cross-examine the witnesses. In exceptional circumstances and by authorisation of the Chamber, an Accused may also directly address a witness and put questions to him or her. The “exceptional circumstances” mentioned in guideline C are connected either to the examination of events in which the Accused personally took part or the examination of matters of which the Accused has specific competence. The Chamber has furthermore decided that “an Accused who wishes to take the floor will explain to the Chamber the reasons why exceptional circumstances are involved.”

3. The Decision of 10 May 2007 was intended as a call in order to manage the course of the Accused’s cross-examination. During the Prosecution phase of the proceedings, the Accused Praljak often took the lead in the cross-examination of witnesses, while his Counsel intervened as needed. Nevertheless, even when frequently invited by the Judges to rephrase his questions, the Chamber noted that many of the questions put by the Accused Praljak lacked relevance or were focussed on a *tu quoque* defence.

4. On 17 May 2007, Counsel for the Accused Praljak filed “Slobodan Praljak’s Request for Certification to Appeal the Trial Chamber’s 10 May 2007 Decision on the Modalities of Examination of Witnesses”. In their Request, the Praljak Defence submits that the contested Decision violates the right to a fair trial insofar as the Chamber restricts the right of an Accused to participate in the proceedings and to directly question the witnesses.

## **II. Application of Article 21-4 (d) and (e) of the Tribunal Statute**

5. I consider the Statute to be particularly clear with regard to the role of the accused in the proceedings. It makes provisions for an accused to defend himself or have legal assistance of his own choosing. In addition, the Statute guarantees that an accused may examine or have examined the witnesses.

6. The issue in the present case is whether the term “or” prevents an accused from putting questions when he is assisted by counsel. In my opinion, an accused has the right to intervene in the proceedings in person, independent of the presence of his counsel, particularly since several tried cases at times gave evidence of a “divorce” between the accused and his counsel.

### III. Jurisprudence of the Tribunal

7. It should be recalled that several decisions crystallized this approach in parallel. In the case *Prosecutor v. Slobodan Milošević*, the Trial Chamber Judges' "Order on the Modalities to be Followed by Court Assigned Counsel" dated 3 September 2004, noted that an accused may, with the leave of the Chamber, "continue to participate actively in the conduct of his case, including, where appropriate, examining witnesses, following examination by court assigned counsel."<sup>1</sup> The accused thus maintained the right to take the floor to testify, examine or cross-examine witnesses with the leave of the Chamber, to select and produce documentary evidence and present his final conclusions on the evidence. Furthermore, the Milošević Chamber affirmed in the decision "Reasons for Decision on Assignment of Defence Counsel"<sup>2</sup> rendered 22 September 2004, that the Chamber should be open to order counsel to conduct the defence in its entirety or the majority of the defence case, while permitting the accused also to participate.

8. Thus, even in the presence of counsel assigned to represent an accused, the Trial Chamber may authorise the accused to continue to actively participate in his defence by examining and cross-examining witnesses on particular issues, if he satisfies the Judges that it will be appropriate for him to put questions on these issues in addition to those put by assigned counsel.

9. Furthermore, it should be noted that the Prosecution submitted in the Milošević case that defence counsel should be appointed while also allowing the accused to participate in the trial by putting questions to witnesses and presenting conclusions according to certain rules.<sup>3</sup>

10. In its "Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defence Counsel" dated 1 November 2004, the Appeals Chamber affirmed the decision of the Trial Chamber on certain points while going even further. It considered, for example, that the working regime should minimize the practical impact of the formal assignment of counsel, except to the extent required by the interests of justice.<sup>4</sup> The Appeals Chamber thus considered that the "Order on the Modalities to be Followed by Court Assigned Counsel" of 3 September 2004 relegated the Accused to a secondary role in his own trial and put forward respect of the basic proportionality principle to support its arguments, whereby any restriction of

<sup>1</sup> *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54, Order on the Modalities to be Followed by Court Assigned Counsel, 3 September 2004, p. 3.

<sup>2</sup> *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54, Reasons for Decision on Assignment of Defence Counsel, 22 September 2004, para. 36.

<sup>3</sup> *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54, Prosecution's Response to the "Confidential Observations by the *Amici Curiae* on the Health of the Accused and the Future Conduct of the Trial", 18 November 2002, paragraph 15 : "...a way in which defence counsel could be appointed while allowing the Accused to participate in the trial (...) cross-examination of the Prosecution would be undertaken by defence counsel in the first instance. It would be for the Accused and his defence counsel to liaise in order to divide cross-examination between them on the understanding that the Accused would not be allowed to repeat questions already asked by his counsel. Also, the cross-examination by the Accused and his defence counsel would have a combined time-limit. This system would encourage the Accused to share the responsibility with his defence counsel and thereby lessen the burden on him"

<sup>4</sup> *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54, "Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defence Counsel", para. 19.

a fundamental right must be in the service of “a sufficiently important objective” and must “impair the right ... no more than is necessary to accomplish the objective.”<sup>5</sup>

11. It should also be noted that in the Krajišnik Appeal, Judge Schomburg deplored the fact that the right to defend oneself was considered to contradict or negate the right to be assisted by counsel and that this situation was a false dichotomy.<sup>6</sup> Judge Schomburg also considered it regrettable that once counsel is appointed, an accused only has limited influence on his defence, which could appear to be an obstacle to an accused wanting to be represented by counsel.<sup>7</sup>

#### **IV. Expedite proceedings appreciably by settling the matter immediately**

12. I hold that it is up to the Trial Chamber to consider the modalities of the Accused Praljak’s Defence presentation and bear in mind all the circumstances, including those in which the proceedings are conducted and the personal situation of the Accused.

13. The Chamber is in charge of the conduct of proceedings, the course of the debate and of the fairness and expeditiousness of the proceedings. It goes without saying, in my opinion, that the Accused Praljak’s request is legitimate since it touches on fundamental rights. Owing to this, the Trial Chamber should perhaps soften its control of interventions by the accused.

14. Finally, in the conduct of the proceedings, the Judges should make sure that the accused is not in conflict with his counsel so that he is able to take the floor in agreement with his counsel and thus guarantee a fair trial. Indeed, in the Blagojević case, where the accused disagreed with his counsel, Judge Shahabuddeen wrote in a partially dissenting opinion in the appeal judgement that the accused “*was unlawfully prevented from telling his story, that this meant that he did not have a fair trial and that, in all the circumstances, his case should be remanded for retrial.*”<sup>8</sup>

15. Bearing in mind the interest of this issue and its importance in exercising the rights of defence, I feel that the Appeals Chamber should take a look at it. This is why I certified the appeal.

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<sup>5</sup> *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54, Decision on Interlocutory Appeal of the Trial Chamber’s Decision on the Assignment of Defence Counsel, paras. 16 and 17.

<sup>6</sup> *Decision on Momčilo Krajišnik’s request to self-represent, on counsel’s motion in relation to appointment of Amicus Curiae, and on the prosecution motion of 16 February 2007*, 11 May 2007, Dissenting opinion Judge Schomburg, “the right to defend oneself negates the right to be assisted by a counsel”, point 2.

<sup>7</sup> *Decision on Momčilo Krajišnik’s request to self-represent, on counsel’s motion in relation to appointment of Amicus Curiae, and on the prosecution motion of 16 February 2007*, 11 May 2007, Dissenting opinion Judge Schomburg, « the right to defend oneself negates the right to be assisted by a counsel », point 3.

<sup>8</sup> *Prosecutor v. Vidoje Blagojević and Dragan Jokić*, Case No. IT-02-60-A, Appeals Chamber, 9 May 2007, Dissenting opinion Judge Shahabuddeen, point 1

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

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Judge Jean-Claude Antonetti  
Presiding Judge

Done this twenty-eighth day of June 2007  
At The Hague  
The Netherlands