



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-AR73.5
Date: 24 August 2007
Original: English

IN THE APPEALS CHAMBER

Before: Judge Fausto Pocar, Presiding
Judge Mohamed Shahabuddeen
Judge Mehmet Güney
Judge Andrézia Vaz
Judge Wolfgang Schomburg

Registrar: Mr. Hans Holthuis

Order of: 24 August 2007

PROSECUTOR

v.

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

Public

**DECISION ON PRALJAK'S APPEAL OF THE TRIAL CHAMBER'S 10 MAY 2007
DECISION ON THE MODE OF INTERROGATING WITNESSES**

Office of the Prosecutor

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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. Nicolas 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

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1. The Appeals 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 (“Appeals Chamber” and “International Tribunal”, respectively) is seized of an appeal of Slobodan Praljak (“Appellant”)¹ against the Trial Chamber’s “Decision on the Mode of Interrogating Witnesses” (“Impugned Decision”). The Prosecution has not filed a response to the Appeal.

Background

2. The Impugned Decision² of the Trial Chamber was rendered on 10 May 2007, and certified by the Trial Chamber on 28 June 2007 for appeal.³ The part of the Impugned Decision appealed by the Appellant concerns the Appellant’s participation in the questioning of witnesses. In the Impugned Decision, the Trial Chamber recalled Guideline C of the “Decision Adopting Guidelines on Conduct of Trial Proceedings” in its revised version of 28 April 2006, which states as follows:

Article 21(e) of the Statute reiterates the right of the accused to examine, or have examined, the witnesses against him. In the present case, the Accused are represented by counsel. Witnesses shall primarily be questioned by counsel for the Accused. In exceptional circumstances and after authorisation of the Chamber, an Accused may directly address a witness and put questions to him or her.⁴

3. Having recalled Guideline C, the Trial Chamber considered that it had been very flexible in its application and in particular, had allowed the Appellant “to speak and question witnesses about all issues and even, at least in part, to conduct the cross examination himself”.⁵ The Trial Chamber considered that while it was not in principle opposed to allowing an accused to speak, “[t]he experience of previous months...has shown that the complexity of this trial compels the Chamber to strictly control the modes of witness interrogation”.⁶ Accordingly, it determined that Guideline C would be applied more strictly and that the Appellant would no longer be permitted to ask questions without the prior approval of the Chamber. “Consequently, witnesses shall first be cross-examined by Counsel for the Accused. In exceptional circumstances and with the authorisation of the Chamber, an Accused may directly address a witness and put questions to him or her”.⁷

¹ Slobodan Praljak’s Appeal of the Trial Chamber’s 10 May 2007 “Decision on the Mode of Interrogating Witnesses”, 4 July 2007 (“Appeal”).

² Decision on the Mode of Interrogating Witnesses, 10 May 2007.

³ Decision on Certification to Appeal the Decision on the Mode of Interrogating Witnesses, 28 June 2007.

⁴ Impugned Decision, para. 8, citing Revised Version of the Decision Adopting Guidelines on Conduct of Trial Proceedings, 28 April 2006 (“Decision of 28 April 2006”).

⁵ *Ibid.*, para. 9.

⁶ *Ibid.*, para. 10.

⁷ *Ibid.*

4. In his Appeal, the Appellant complains that the Impugned Decision of the Trial Chamber places unreasonable restrictions on his right to participate in the proceedings.⁸ The Appellant claims that under the Guidelines laid down by the Trial Chamber in the Decision of 28 April 2006, he was granted a right to “directly address a witness and put questions to him or her” with a proviso (a) that a “witness shall primarily be questioned by counsel”, (b) that there exist “exceptional circumstances”, and (c) “after authorisation of the Chamber”.⁹ He argues that prior to the issuing of the Impugned Decision, the Trial Chamber was “implementing the guidelines wisely and with flexibility”, allowing him to “cross-examine all the witnesses he wished to”.¹⁰ He alleges that the Impugned Decision “imposes additional and unjustified constraints” on his right to “personally interrogate the witnesses” and “unnecessarily and unreasonably restricts his right to personally cross-examine the witnesses to such an extent that it effectively amounts to a violation of his right of confrontation”.¹¹ Further, he claims that to change his right to participate in his defence at this “late stage of the proceedings results in manifest prejudice and injustice” to him.¹² He requests the Appeals Chamber to overturn the Impugned Decision with respect to his right to directly cross-examine those witnesses that he wishes to cross-examine.¹³

Standard of Review

5. It is well-established in the jurisprudence of the International Tribunal that Trial Chambers exercise discretion in relation to the conduct of proceedings before them.¹⁴ In the present case, the Impugned Decision’s holding to more strictly apply Guideline C is a discretionary decision of the Trial Chamber, to which the Appeals Chamber accords deference. This deference is based on the Appeals Chamber’s recognition of the Trial Chamber’s familiarity with the day-to-day conduct of the parties and practical demands of the case.¹⁵ The Appeals Chamber’s examination is therefore

⁸ Appeal, para. 5.

⁹ *Ibid.*

¹⁰ *Ibid.*

¹¹ *Ibid.*, para. 6.

¹² *Ibid.*

¹³ *Ibid.*, para. 23.

¹⁴ *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-AR73.2, Decision on Prosecution Appeal Concerning the Trial Chamber’s Ruling Reducing Time for the Prosecution Case, 6 February 2007 (“*Prlić* Decision on Reduction of Time”) para. 8, referring to 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 (“*Prlić* Decision on Cross-Examination”), p. 3; *Prosecutor v. Zdravko Tolimir et al.*, Case No. IT-04-80-AR73.1, Decision on *Radivoje Miletic’s* Interlocutory Appeal Against the Trial Chamber’s Decision on Joinder of Accused, 27 January 2006 (“*Decision on Radivoje Miletic’s* Interlocutory Appeal”) para. 4; *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-AR73.7, Decision on Interlocutory Appeal of the Trial Chamber’s Decision on the Assignment of Defence Counsel, 1 November 2004 (*Milošević* Decision on the Assignment of Defence Counsel”), para. 9; *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-AR73, Reasons for Refusal of Leave to Appeal from Decision to Impose Time Limit, 16 May 2002 (“*Milošević* Decision to Impose Time Limit”), para. 14.

¹⁵ *Prlić* Decision on Reduction of Time, para. 8, which refers to Decision on *Radivoje Miletic’s* Interlocutory Appeal, para. 4; *Milošević* Decision on Defence Counsel, para. 9.

limited to establishing whether the Trial Chamber abused its discretion by committing a discernible error.¹⁶ The Appeals Chamber will only overturn a Trial Chamber's exercise of its discretion where it is found to be (1) based on an incorrect interpretation of governing law; (2) based on a patently incorrect conclusion of fact; or (3) so unfair or unreasonable as to constitute an abuse of discretion.¹⁷

Alleged Violation of the Appellant's Right to Participate in the Proceedings

6. In his Appeal, the Appellant argues that the Impugned Decision unacceptably restricts his ability to cross-examine witnesses.¹⁸ The Appellant claims that while the Impugned Decision does not "unequivocally" prevent him from cross examining witnesses, it places "additional severe restrictions on his right to participate in the proceedings" and that these restrictions have the effect of vitiating that right. He claims that the restrictions imposed go beyond the proper exercise of discretion and "may substantially and unacceptably exclude" him from participation in his own defence.¹⁹

7. The restrictions complained of by the Appellant are that Defence Counsel must cross-examine witnesses first; the Appellant is only entitled to directly address the witness with the prior authorisation of the Trial Chamber; the Appellant is only permitted to cross examine with respect to events that he directly participated in or has special knowledge of; and prior to being permitted to directly examine a witness, the Appellant must explain to the Trial Chamber the special circumstances that warrant his permission to do so.²⁰

8. In the Impugned Decision, the Trial Chamber made abundantly clear why the adoption of a stricter approach to the application of Guideline C of the Decision of 28 April 2006 was warranted. Namely, it considered that the lee-way it had given to the Appellant was impacting upon the rights

¹⁶ *Prlić* Decision on Cross-Examination, p. 3 citing *Prosecutor v. Milošević*, Case Nos. IT-99-37-AR73, IT-01-50-AR73, and IT-01-51-AR73, Reasons for Decision on Prosecution Interlocutory Appeal from Refusal to Order Joinder, 18 April 2002, para. 4: "Where an appeal is brought from a discretionary decision of a Trial Chamber, the issue in that appeal is not whether the decision was correct, in the sense that the Appeals Chamber agrees with that decision, but rather whether the Trial Chamber has correctly exercised its discretion in reaching that decision", see also paras. 5-6; see also *Milošević* Decision on the Assignment of Defence Counsel, para. 10; Decision on *Radivoje Miletić's* Interlocutory Appeal, para. 6 citing *Prosecutor v. Mićo Stanišić*, Case No. IT-04-79-AR65.1, Decision on Prosecution's Interlocutory Appeal of *Miće Stanišić's* Provisional Release, 17 October 2005 ("*Stanišić* Provisional Release Decision"), para. 6.

¹⁷ Decision on *Radivoje Miletić's* Interlocutory Appeal, para. 6 citing *Stanišić* Provisional Release Decision, para. 6 and n. 10. The Appeals Chamber will also consider whether the Trial Chamber "has given weight to extraneous or irrelevant considerations or that it has failed to give weight or sufficient weight to relevant considerations" *Ibid*'.

¹⁸ *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-AR73.5, Slobodan Praljak's Appeal of the Trial Chamber's 10 May 2007 "Decision on the Mode of Interrogating Witnesses", 4 July 2007 ("*Praljak* Appeal").

¹⁹ Appeal, para. 7.

²⁰ *Ibid.*, para. 7

of his co-accused to an expeditious and fair trial.²¹ Additionally, it did not consider that the flexibility it had accorded the Appellant was of benefit to his defence. As it stated:

The Accused Praljak, although full of good intentions, had repeatedly proved to lack both the legal expertise and the experience required to interrogate witnesses in conformity with the Rules and the jurisprudence of the Tribunal. It is true that some of his questions were interesting and pertinent. Nevertheless, most of the questions were irrelevant and frequently concentrated on *tu quoque*. Many times the questions were not put to the appropriate Witness. Moreover, the Chamber has observed that the Accused Praljak sometimes makes a habit of substituting his own thoughts or elements of defence for witnesses' answers. Rather than ask true questions, he regularly invited the witnesses to share his opinions. The Chamber cannot but find that interventions of this type entail a useless waste of time.²²

9. In light of the above reasoning, the Appeals Chamber is satisfied that there was good reason for the Trial Chamber to determine that a stricter application of Guideline C was justified in order to protect the rights of the Appellant's co-accused to a fair and expeditious trial, as well as the rights of the Appellant. The Trial Chamber's experience of the Appellant's direct participation in the proceedings satisfied it that such interventions were a waste of time. Accordingly, the Appeals Chamber is not satisfied that the Appellant has identified an error in the exercise of the Trial Chamber's discretion or justified his claim that the Trial Chamber abused its discretion by restricting his examination of witnesses in the Impugned Decision.

Alleged Right of the Appellant to Participate in the Proceedings

10. The Appellant next claims that, while he recognises that he is represented by Counsel, he has always maintained that he wants to participate directly in the proceedings through cross-examination of the witnesses. He argues that prior to the rendering of the Impugned Decision his wish was respected by the Trial Chamber and he was permitted to cross-examine witnesses whenever he requested to do so. However, "it remains to be seen" whether he will be so permitted following the Impugned Decision.²³ He claims that it is well established that he "has a right to self-representation or a right to legal counsel, as well as a right to examine or have examined witnesses against him" and refers in this respect to Article 21(4) of the Statute.²⁴ The Appellant relies upon various decisions of this International Tribunal to argue that the right to counsel and the right to self-representation are not mutually exclusive and that the assignment of counsel does not negate the right of the accused to also participate directly in the proceedings.²⁵ He notes that while these authorities dealt with situations where accused refused to recognise counsel assigned, to limit the

²¹ *Ibid.*, para. 10.

²² *Ibid.*

²³ *Ibid.*, para. 9.

²⁴ *Ibid.*, para. 10.

²⁵ *Ibid.*, paras. 11-17.

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right to participate directly in proceedings to those accused who refused counsel and obstruct proceedings would penalise accused who have cooperated with the International Tribunal and accepted assigned counsel.²⁶

11. The Appeals Chambers finds that the Appellant's arguments in this regard are misguided. In the Impugned Decision, the Trial Chamber did not hold that the Appellant did not have a right to participate in the proceedings.²⁷ Rather, the Impugned Decision held that in the interests of a fair and expeditious trial for the Appellant and his co-accused, the right of the Appellant to participate directly would be subject to the restrictions it identified to avoid the Appellant wasting court time. Accordingly, the Trial Chamber has not removed the right of the Appellant to participate directly in the proceedings alongside his counsel. It has merely placed reasonable restrictions on that right to prevent the Appellant's needless waste of court time and to protect the rights of all accused to a fair and expeditious trial.

Alleged Prejudice Shown to Appellant as a Result of the Impugned Decision

12. The Appellant argues that his trial has been proceeding for over one year and that during that time a practice has evolved whereby he has been permitted to directly participate in the proceedings by the cross examination of witnesses. He argues that this practice "has formed a fundamental component" in his defence and "has shaped the preparation and strategy for trial".²⁸ He claims that to fundamentally change this practice at this late stage of the proceedings "would be highly prejudicial and severely disruptive" to him and his defence team in the conduct of his case and "would result in manifest unfairness [...] thereby violating his right to a fair trial as outlined in Article 21 of the Statute".²⁹

13. The Appeals Chamber is not satisfied that the Appellant's argument has any merit. The Impugned Decision in fact highlights the right to a fair trial as a prime consideration of the Trial Chamber in deciding to place limits upon the Appellant's ability to cross-examine witnesses.³⁰ The Trial Chamber made quite clear that the Appellant's lack of legal experience meant that his interventions were of little or no value to his defence.³¹ Therefore, far from jeopardizing fair trial rights, the Impugned Decision was made in direct response to a perceived threat to these very same rights resulting from the actions of the Appellant.

²⁶ *Ibid.*, para. 18.

²⁷ Impugned Decision, para. 8.

²⁸ Appeal., para. 19.

²⁹ *Ibid.*, paras. 19-20.

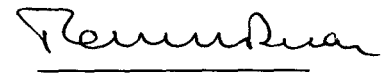
³⁰ Impugned Decision., para. 10.

Disposition

On the basis of the foregoing, the Appeals Chamber **DISMISSES** the Appeal.

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

Done this 24th day of August 2007
At The Hague,
The Netherlands.


Judge Fausto Pocar
Presiding Judge

[Seal of the International Tribunal]

³¹ *Ibid.*