



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: 1 July 2008
Original: ENGLISH
French

IN TRIAL CHAMBER III

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

Registrar: Mr Hans Holthuis

Order of: 1 July 2008

THE PROSECUTOR

v.

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

PUBLIC

**ORDER ON THE MODE OF EXAMINING AN ACCUSED PURSUANT TO
RULE 85 (C) OF THE RULES**

The Office of the Prosecutor:

Mr Kenneth Scott
Mr Douglas Stringer

Counsel for the Accused:

Mr Michael Karnavas and Ms Suzana Tomanović for Jadranko Prlić
Ms Senka Nožica and Mr Karim A.A. Khan 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

TRIAL CHAMBER III (“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 (“Tribunal”);

PROPRIO MOTU,

NOTING the meeting held before the Chamber pursuant to Rule 65 *ter* (G) of the Rules of Procedure and Evidence (“Rules”) on 17 March 2008 (“Meeting of 17 March 2008”) during which the Chamber heard the views of the Parties on various questions related to the presentation of Defence evidence,¹

NOTING “Slobodan Praljak Submission Pursuant to Rule 65 *ter*” filed on 31 March 2008 (“Praljak 65 *ter* (G) Submission”) to which three confidential annexes are attached, in which Counsel for the Accused Praljak (“Praljak Defence”) submits to the Chamber its lists of witnesses and exhibits pursuant to Rule 65 *ter* (G) of the Rules (“65 *ter* List(s)”),

NOTING the “Petković Defence Submission Pursuant to Rule 65 *ter*”, filed partially confidentially on 31 March 2008 (“Petković 65 *ter* (G) Submission”) to which three confidential annexes are attached, in which Counsel for the Accused Petković (“Petković Defence”) submits its 65 *ter* Lists to the Chamber,

NOTING the “Order on the Procedure for the Testimony of an Accused”, rendered by the Chamber on 14 April 2008 (“Order of 14 April 2008”) in which it requests the Office of the Prosecutor (“Prosecution”) and the Defence to present their positions on the issue of the conditions regarding the testimony of an accused,

NOTING “The Accused Praljak and Ćorić’s Submission Pursuant to the Trial Chamber’s Request of 21 April 2008 on the Right of the Accused to Communicate with Counsel”, filed jointly by the Praljak Defence and Counsel for the Accused Ćorić (“Ćorić Defence”) on 28 April 2008 (“Praljak and Ćorić Defence Observations”) in which they present to the Chamber their position on the issue of the conditions regarding the testimony of an accused,

¹ Court Transcript in French (“CT(F)”), pp. 27239-27348.

NOTING “Milivoj Petković’s Position on the Conditions Regarding the Testimony of an Accused (as Requested by Trial Chamber’s Order of 14 April 2008)”, filed by the Petković Defence on 28 April 2008 (“Petković Defence Observations”), in which it informs the Chamber of its position on the issue of conditions regarding the testimony of an accused,

NOTING the “Prosecution Submission Concerning Contact Between an Accused and His Counsel During the Period the Accused Testifies Under Solemn Declaration in His Own Defence”, filed by the Prosecution on 28 April 2008 (“Prosecution Observations”), in which it informs the Chamber of its position on the issue of conditions regarding the testimony of an accused,

CONSIDERING that during the Meeting of 17 March 2008, Counsel for the Accused Prlić (“Prlić Defence”) and the Praljak Defence announced that the Accused Prlić and Praljak would appear as witnesses in their own defence pursuant to Rule 85 (C) of the Rules, and the Petković Defence noted the possibility of the Accused Petković doing the same,²

CONSIDERING that the Praljak and Petković Defence announced on 31 March 2008, in their 65 *ter* Lists, that these two would testify,³

CONSIDERING that during the Meeting of 17 March 2008, Counsel for the Accused Stojić (“Stojić Defence”), the Praljak and Petković Defence and a representative of the Prosecution argued that, according to Tribunal practice, when an accused chooses to testify in his own defence, he must be subjected to the same rules that apply to the witnesses and, consequently, must no longer have any contact with the Counsel of the Party calling him to testify for the duration of his testimony,⁴

CONSIDERING that during the Meeting of 17 March 2008, Mr Kahn, Mr Steward and Mr Kruger also submitted that maintaining contact between Counsel and an accused during the accused’s testimony could lead the other Parties and the Chamber to doubt the veracity and spontaneity of the accused’s responses which would

² Meeting of 17 March 2008 CT(F) pp. 27264, 27781 and 27303.

³ Praljak 65 *ter* (G) Submission, confidential Annex A; Petković 65 *ter* (G) Submission, confidential Annex A.

⁴ Meeting of 17 March 2008 CT(F) pp., 27284, 27286,-89, 27291, 27303, 27312 and 27313.

consequently have a negative impact on the probative value that the Chamber would assign to this testimony,⁵

CONSIDERING that at the hearing before the Chamber on 5 May 2008, the Prlić Defence told the Chamber that the Accused Prlić had decided not to appear as a witness in his own defence,⁶

CONSIDERING that in the Praljak and Ćorić Defence Observations, they indicated to the Chamber that they hold that (1) the right of an accused to communicate with his Counsel is guaranteed by the Statute of the Tribunal (“Statute”) and the Rules, (2) the Tribunal practice allows Counsel to be in contact with the accused he represents when the accused appears as a witness after taking the solemn declaration and (3) there is a fundamental difference between a witness and an accused, the accused being entitled to rights and guarantees granted by the Statute and the Rules, to which a witness is not entitled,⁷

CONSIDERING that in the Petković Defence Observations, it indicates to the Chamber that there should not be any restrictions to the contacts between an accused and his Counsel during the entire time an accused is giving evidence,⁸

CONSIDERING that in the Prosecution Observations, it indicates to the Chamber that the general rule at the Tribunal as well as its practice is that any witness who has made the solemn declaration set out in Rule 90 (A) of the Rules may not talk to anyone, including, if an accused is involved, his co-accused and other detainees in the United Nations Detention Unit, about the testimony he has given, is giving or is about to give⁹ and that this is intended to prevent any influence on the testimony,¹⁰

CONSIDERING also that in the Prosecution Observations, it holds that the Chamber should prohibit all communication between an accused who has begun his testimony and his Counsel, except in exceptional circumstances that justify contact on a point

⁵ Meeting of 17 March 2008 CT(F) pp., 27289, 27303, 27312 and 27313.

⁶ CT(F) pp. 27454 and 27455.

⁷ Praljak and Ćorić Defence Observations, pp. 1-3, paras. 3-10.

⁸ Petković Defence Observations, p. 2, para. 2.

⁹ Prosecution Observations, pp. 1-3, paras. 3, 6 and 7.

¹⁰ Prosecution Observations, p. 2, paras. 4-5.

not related to the testimony and that if an accused decides to testify in his own defence, he should do it during his case-in-chief and not at the end of the trial,¹¹

CONSIDERING furthermore that the Prosecution requests the Chamber for certification to appeal any decision authorising an accused complete liberty to communicate with his Counsel during the time he gives evidence in his own defence,¹²

CONSIDERING first that the Chamber notes that the Praljak and Petković Defence expressed different positions in the Praljak and Ćorić Defence Observations and the Petković Defence Observations than those they had previously defended during the Meeting of 17 March 2008,¹³

CONSIDERING next that the Chamber notes that the Appeals Chamber of the Tribunal (“Appeals Chamber”) found a fundamental difference between an accused who might testify as a witness if he so chooses, and a witness, and that neither the Statute nor the Rules provide the application of the same regulations to a witness and an accused testifying in his own defence who is entitled to rights that grant him specific protection,¹⁴

CONSIDERING that the Chamber finds in particular that Rule 90 (C) of the Rules, providing that a witness who has not yet testified must not be present during the testimony of another witness, is inapplicable to the testimony of an accused present during the testimony of all witnesses pursuant Article 21 (4) (d) of the Statute that guarantees the right of an accused to be tried in his presence,

CONSIDERING also that the Chamber notes that Rule 90 (E) of the Rules that permits it to compel a witness to answer a question that might incriminate him, and Rule 77 (A) (i) of the Rules that allows a Chamber to declare a witness in contempt of the Tribunal if he refuses to answer a question, are not applicable to the testimony of

¹¹ Prosecution Observations, pp. 3-4, para. 9.

¹² Prosecution Observations, pp. 3-4, paras. 8-9.

¹³ Meeting of 17 March 2008, CT(F) pp. 27284, 27286, 27291 and 27303; Praljak and Ćorić Defence Observations, pp. 1-3, paras. 3-10 and Petković Defence Observations, p. 2, para. 2.

¹⁴ *The Prosecutor v. Zjenil Delalić et al.*, Case No. IT-96-21-T, Decision of the President on the Prosecutor’s Motion for the Production of Notes Exchanged Between Zejnil Delalić and Zdravko Mucić, 11 November 1996, p. 18, para. 35; *The Prosecutor v. Miroslav Kvočka et al.*, Case No. IT-98-30/1-A, Judgement, 28 February 2005, p. 44, para. 125; *The Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, Judgement, 30 November 2006, pp. 7-8, para. 17.

an accused who enjoys the fundamental right not to be compelled to testify against himself or to admit guilt, pursuant to Article 21 (4) (g) of the Statute.

CONSIDERING moreover that the Chamber finds that the aforementioned examples of situations where some of the Rules relative to the testimony of a witness are inapplicable to the testimony of an accused are not exhaustive and only illustrate the fundamental difference established by the Statute and the Rules, and recognized by the Appeals Chamber, between the status of a witness and that of an accused,¹⁵

CONSIDERING consequently that the Chamber finds that an accused appearing in his own defence must not be treated in the same ways as a witness, since he continues to enjoy the rights granted by the Statute and the Rules to the Defence; that even though some of the rules applicable to the appearance of a witness may be applied to the testimony of an accused, the entirety of these rules may not be extended to cover the testimony of an accused,¹⁶

CONSIDERING that the Chamber thus finds that the fundamental right of an accused to be entitled to legal assistance of his own choosing provided by Article 21 (4) (d) of the Statute applies throughout the testimony of an accused who chooses to appear pursuant to Rule 85 (C) of the Rules,

CONSIDERING next that the Chamber notes that the weight to be assigned to evidence is determined when deliberating the overall first instance case-file and consequently the probative value of a testimony may not be determined in advance according to the mode by which it is presented,

CONSIDERING thus that the Chamber finds that the probative value to be assigned to the testimony of an accused who chooses to appear as a witness in his own defence will be evaluated during deliberations in view of the overall first instance case-file and may not be determined in advance according to the severance of contact between an accused and his Counsel for the duration of the accused's testimony,

¹⁵ *The Prosecutor v. Zjenil Delalić et al.*, Case No. IT-96-21-T, Decision of the President on the Prosecutor's Motion for the Production of Notes Exchanged Between Zjenil Delalić and Zdravko Mucić, 11 November 1996, p. 18, para. 35.

¹⁶ *The Prosecutor v. Miroslav Kvočka et al.*, Case No. IT-98-30/1-A, Judgement, 28 February 2005, p. 44, para. 127.

CONSIDERING next that the Chamber holds that matters, on the one hand, relative to communication between an accused who has chosen to testify in his own defence and his co-accused or other detainees in the United Nations Detention Unit and, on the other, relative to those which, at the time an accused is to make his testimony, were not anticipated by the Order of 14 April 2008 and the Defence has not presented any position in their regard, the Chamber considers that it should not decide on such matters in the present Order,

CONSIDERING finally that pursuant to Rule 73 (B) of the Rules, “[d]ecisions on all motions are without interlocutory appeal save with certification by the Trial Chamber, which may grant such certification if the decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings”,

CONSIDERING consequently that certification to appeal is a matter within the discretionary power of the Chamber that must, in any case, first verify that the two cumulative conditions set out in Rule 73 (B) of the Rules have been met in this case,¹⁷

CONSIDERING that Article 21 (4) (d) of the Statute that guarantees the rights of an accused to legal assistance of his choice, which is the basis for the present Order, touches on an essential aspect of the right to a fair trial,

CONSIDERING also that the Chamber bases the present Order in particular on Rule 90 (F) of the Rules whereby the Chamber exercises control over the mode of the presentation of evidence so as to guarantee its effectiveness for the ascertainment of the truth and to avoid the needless consumption of time, and this provision directly concerns the expeditiousness of the trial,

CONSIDERING consequently that the Chamber finds that the present Order involves an issue that would significantly affect the fairness of the trial, that the conditions of Rule 73 (B) of the Rules have been met and that an immediate resolution by the Appeals Chamber may materially advance the proceedings,

¹⁷ *The Prosecutor v. Pavle Strugar*, Case No. IT-01-42-T, Decision on Defence Motion for Certification, 17 June 2004, para. 2.

FOR THE FOREGOING REASONS,

PURSUANT TO Article 21 (4) of the Statute and Rules 54, 85 (C) and 90 (F) of the Rules,

NOTES the positions set out by the Parties during the Meeting of 17 March 2008,

DECLARES that an accused who wishes to appear as a witness in his own defence pursuant to Rule 85 (C) of the Rules will not be deprived of the assistance of his counsel during his testimony,

GRANTS the Prosecution request for certification of the appeal it intends to lodge against the present Order.

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

/signed/

Jean-Claude Antonetti
Presiding Judge

Done this first day of July 2008
At The Hague
The Netherlands

[Seal of the Tribunal]