



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: 11 June 2009
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 John Hocking

Decision of: 11 June 2009

THE PROSECUTOR

v.

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

PUBLIC

**ORDER CLARIFYING THE RELATIONSHIP BETWEEN COUNSEL AND
AN ACCUSED TESTIFYING WITHIN THE MEANING OF 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”);

SEIZED of the oral application by the Office of the Prosecutor (“Prosecution”) made at the hearing of 8 June 2009, in which the Prosecution requested clarification from the Chamber regarding the possibility for the Accused Praljak to communicate, following direct examination, with his Counsel during the phases of questioning by the Judges and cross-examination by the Prosecution and other Defence teams, on the one hand, and to have prior knowledge of the documents that may be used during these phases by the Judges, Prosecution and other Defence teams, on the other hand (“Application”),¹

NOTING the “Order on the Mode of Examining an Accused Pursuant to Rule 85 (C) of the Rules” of 1 July 2008 (“Order of 1 July 2008”), in which the Chamber recalled 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,”²

NOTING the “Decision on Prosecution’s Appeal Against Trial Chamber’s Order on Contact Between the Accused and Counsel During an Accused’s Testimony Pursuant to Rule 85(C)” of 5 September 2008 (“Appeals Chamber Decision”), in which the Appeals Chamber found that “the Trial Chamber has not committed an error when ruling that an accused who testifies as a witness continues to enjoy his rights as an accused guaranteed to him under the Statute, in particular his right to communicate with counsel at any stage of the proceedings”,³

CONSIDERING that in this case the Chamber notes that, in the Application, the Prosecution questions whether or not it is possible for the Accused Praljak to continue to communicate with his Counsel after the completion of the direct examination,⁴

¹ Transcript in French (“T(F)”), pp. 41325 and 41326.

² Order of 1 July 2008, p. 6.

³ Appeals Chamber Decision, para. 19.

⁴ T(F) p. 41326.

CONSIDERING that, in this connection, the Chamber refers to the Order of 1 July 2008 and to the Appeals Chamber Decision, both of which have expressly indicated that an accused who testifies under Rule 85 (C) of the Rules of Procedure and Evidence (“Rules”), and who subsequently may therefore be subject to cross-examination and to questions from the Judges, is entitled to assistance from his counsel throughout his testimony,⁵

CONSIDERING that in this respect, the Chamber cannot make a distinction between the right to be assisted by counsel during the phase of direct examination and during the phase of cross-examination and questions from the Judges,

CONSIDERING that, as further noted by the Appeals Chamber, the Statute of the Tribunal (“Statute”) guarantees the right of every accused to communicate with his counsel at any stage of the proceedings,⁶

CONSIDERING that with respect to the Prosecution’s questions about the possibility for the Accused Praljak to have prior knowledge of the lists of documents that are to be used by the Judges in their questions and by the parties in their cross-examination,⁷ the Chamber understands that the Prosecution is in fact questioning whether it is possible for the Accused Praljak to prepare in advance for the cross-examination and questions from the Judges, by using the lists of documents disclosed by the parties and the Judges,

CONSIDERING that the Chamber finds that Counsel for the Accused Praljak will indeed have knowledge, just like the other parties, of the lists of documents that will be used by the Judges during their questions and by the other parties during their cross-examination,

CONSIDERING that the Chamber, which has already recalled that there may be no interdiction of communications between the Accused and his counsel, nevertheless recalls that if the Prosecution fears that, by having prior knowledge of these lists of documents, the Accused Praljak is preparing his answers, the Prosecution should be in a position, in particular through a “careful”⁸ cross-examination, to identify if the

⁵ Order of 1 July 2008, p. 6.

⁶ Appeals Chamber Decision, para. 19.

⁷ T(F), p. 41326.

⁸ Appeals Chamber Decision, para. 17.

Accused Praljak has indeed prepared his answers in advance or if he has been coached by his counsel, and thereby draw the Chamber's attention to this fact and possibly cast doubt on the reliability and credibility of the statements made by the Accused who is testifying,

CONSIDERING nevertheless that the Chamber, like the Appeals Chamber, presumes that the relationship between the Accused Praljak and his counsel in this respect is "appropriate",⁹

CONSIDERING finally that the Chamber recalls once again that in any event, the probative value that will be attached to the Accused Praljak's testimony in this case will be not be assessed until the final deliberations, in the light of the entire case file,¹⁰

FOR THE FOREGOING REASONS,

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

RECALLS that communications between the Accused and his counsel are authorized at any stage of the proceedings,

RECALLS that the Prosecution will have the opportunity during its cross-examination, to establish whether or not the Accused Praljak had prior knowledge of the lists of documents; that it will also be able to establish whether he prepared his cross-examination in advance and possibly cast doubt on the credibility and reliability of the testimony.

Judge Trechsel attaches a separate opinion to the present decision.

⁹ Appeals Chamber Decision, para. 18.

¹⁰ See in this regard the Order of 1 July 2008, p. 6 and the Appeals Chamber Decision, para. 17.

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

/signed/

Judge Jean-Claude Antonetti

Presiding Judge

Done this eleventh day of June 2009

At The Hague

The Netherlands

[Seal of the Tribunal]

Seperate Opinion of Judge Trechsel

1. The issue raised here has a limited scope: it concerns whether the Accused who is testifying must, in cross-examination, have access to the documents that the other Parties intend to put to him. It is therefore not a question of reconsidering the principle that he must have unfettered access to his counsel.
2. While I agree with the Chamber, which refrains from giving any instructions to the Praljak Defence, I would like to add the following remarks:
3. I turn my attention to the purpose of cross-examination. First, it allows for a light, different than that of the party calling the witness and in particular that of the Accused-witness, to be shed on the facts, and to further elaborate on points requiring clarification. Additionally, and this aspect is no less important, it allows for the testing of the credibility of the witness. This second aspect is mostly what makes cross-examination unique. In the context of the trial, cross-examination is unique in that it allows for surprises. Moreover, this is what can make cross-examination unpleasant for the witness.
4. With regard to the case of an accused who has decided to testify, this reality places the Accused in a dilemma. As he may fear contradicting himself and damaging his own credibility in the course of cross-examination, he may have an interest in being able to prepare thoroughly. Those defending him may therefore prepare him, as is done with witnesses for the purpose of direct examination.
5. However, this could significantly diminish the possibility of seriously testing his credibility. That credibility might be reinforced through a cross-examination that is not properly prepared.
6. Seen in this light, the defence may have an interest in immediately refraining from giving the Accused-witness prior knowledge of the documents which might be put to him in cross-examination.
7. In my view, and I do not believe that there is any disagreement on this issue, only the Defence team in question can decide on the course to take.