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: 3 June 2010

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: **3 June 2010**

THE PROSECUTOR

v.

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

PUBLIC

DECISION ON REQUEST OF PRLIĆ DEFENCE FOR CERTIFICATION TO APPEAL THE ORDER ADMITTING EVIDENCE REGARDING WITNESS ZVONKO VIDOVIĆ

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 "Jadranko Prlić's Request for Certification to Appeal Under Rule 73 (B) Against the *Ordonnance portant sur l'admission d'éléments de preuve relatifs au témoin Zvonko Vidović*", brought publicly by Counsel for the Accused Prlić ("Prlić Defence") on 14 May 2010 ("Request"),

NOTING the "Prosecution's Response to Jadranko Prlić's Request for Certification to Appeal Under Rule 73 (B) Against the *Ordonnance portant sur l'admission d'éléments de preuve relatifs au témoin Zvonko Vidović*", brought publicly by the Office of the Prosecutor ("Prosecution") on 25 May 2010 ("Prosecution's Response"),

NOTING the "Order to Admit Evidence Regarding Witness Zvonko Vidović", issued publicly on 10 May 2010 ("Order of 10 May 2010"), whereby the Chamber indeed rejected by a majority Exhibit 5D 04152, on grounds that Zvonko Vidović was unable to speak to its authenticity, relevance and probative value, as well as Exhibit 5D 04241, on grounds that the witness was unable to speak to its relevance and probative value,

CONSIDERING that the other Defence teams did not file a response to the Request,

CONSIDERING that by its Request, the Prlić Defence asks the Chamber to certify the Appeal it intends to file against the Order of 10 May 2010 on grounds that the Chamber's decision to exclude Exhibits 5D 04152 and 5D 04241 allegedly violates the right of the Accused Jadranko Prlić ("Accused Prlić") to a fair trial and, in particular, encumbers the right of the said accused, guaranteed under Article 21 (4)(e) of the Statute of the Tribunal, to mount a defence through the presentation of evidence;[1] that the Prlić Defence furthermore submits that the said exhibits display indicia of relevance in view of the Second Amended Indictment of 11 June 2008 and that the fact that Zvonko Vidović may not have seen the exhibits cited above and been able to testify regarding the authenticity of Exhibit 5D 04152 does not attenuate their

probative value and their relevance;[2] that the Prlić Defence argues that the decision by a majority of the Chamber to exclude these two exhibits deemed essential to its case violates the rights of the Accused Prlić to a fair trial and to equality of arms, consequently depriving one of the Judges of the Chamber from using this evidence during deliberations;[3] that the majority in the Chamber allegedly employed a double standard in admitting evidence, favouring the Prosecution;[4] that the issues arising from the consistent divergence in opinion between the majority and the Presiding Judge of the Chamber on the issue of the standard of admission would constitute an additional reason strongly supportive of allowing the request for certification to appeal the Order of 10 May 2010;[5] that lastly, in keeping with the provisions of Rule 73 (B) of the Rules of Procedure and Evidence ("Rules"), the immediate resolution of the matter regarding certain excluded exhibits deemed essential to the case of the Prlić Defence and, as it says, potentially relevant evidence potentially leading to the acquittal of the Accused Prlić, would materially advance the proceedings,[6]

CONSIDERING that in its Response, the Prosecution asks the Chamber to deny the Request on grounds that the criteria of Rule 73 (B) have not been fulfilled;[7] that the Prosecution argues, in particular, that barring Exhibits 5D 04152 and 5D 04241 by a majority does not significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial;[8] that the absence of objections to the admissibility of these exhibits in its IC List[9] does not signal that the Chamber erred in deciding to exclude these two exhibits by a majority;[10] that the Prosecution moreover submits that the understanding of the rules of admissibility advanced by the Prlić Defence in the Request is erroneous, and that the Prlić Defence has not met the standards required for admissibility of the exhibits cited above, in that Zvonko Vidović was unable to attest to their reliability,[11]

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[1] Request, paras 6-9.
[2] Request, paras 8-9.
[3] Request, paras 10-12.
[4] Request, para. 12.
[5] Request, paras 13-18.
[6] Request, para. 19.
[7] Response, paras 2-11.
[8] Response, para. 6.
[9] "Prosecution Objections to Exhibits Tendered by the Ćorić Defence in Connection with the Witness Zvonko Vidović", public document, 12 April 2010.
[10] Response, para. 8.
[11] Response, paras 7-9.

CONSIDERING, upon review of the request for certification to appeal the Order of 10 May 2010, that the Chamber is persuaded of the reasonableness of the said Order and finds that the Prlić Defence did not establish that the theme of the Request, which it characterizes as the occurrence of a violation of the right of the Accused Prlić to a fair trial and to equality of arms in light of the majority's exclusion of Exhibits 5D 04152 and 5D 04241 under the Order of 10 May 2010, would constitute an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which an immediate resolution by the Appeals Chamber would materially advance the proceedings,

CONSIDERING furthermore that the Chamber recalls that the matter of the prejudice alleged and of the injury to the fairness of the proceedings due to the exclusion of exhibits by the majority already lay before the Appeals Chamber in its decision of 12 January 2009, to which the Chamber hereby refers the Prlić Defence,[12]

FOR THE FOREGOING REASONS,

PURSUANT TO Rules 54, 73 (B) and 89 of the Rules,

DENIES by a majority the request for certification to appeal the Order of 10 May 2010 filed by the Prlić Defence, for the reasons set forth herein.

The Presiding Judge has attached a dissenting opinion to this decision.

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

/signed/

Jean-Claude Antonetti
Presiding Judge

Done this third day of June 2010
At The Hague
The Netherlands

[Seal of the Tribunal]

[12] "Decision on Jadranko Prlić's Consolidated Interlocutory Appeal Against the Trial Chamber's Orders of 6 and 9 October 2008 on Admission of Evidence", public document, 12 January 2009.

Dissenting Opinion of Jean-Claude Antonetti, Presiding Judge of the Chamber

In my opinion, the request for certification to appeal filed by the Prlić Defence satisfies the strict conditions laid down by Rule 73 (B).

This is a **majority decision** of the Chamber, bearing upon an issue likely to significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial and for which an immediate resolution by the Appeals Chamber would materially advance the proceedings.

The two **desiderata** of the majority decision fail to provide a basis for denying the request for certification to appeal with regard to the criteria set forth in Rule 73 (B), concerning:

- fairness
- expeditiousness
- the outcome of the trial
- and the immediacy of resolution

Hence, there is an **obvious flaw in legal reasoning**. The majority merely refers the Prlić Defence to the Decision of the Appeals Chamber dated 12 January 2009.

Numerous times, I have had occasion to state, in writing or orally, that when a Chamber has decided to render a decision, there is no excuse for going back upon that decision.

This was stated in writing and orally during the trial; further appearances by witnesses would have allowed a defence that considered itself prejudiced by the decision to put these non-admitted documents to other witnesses. Now that the Defence's case has closed, it no longer enjoys this technical option, and that forms the basis for my new position.

As to fairness, it is a requirement that the parties enjoy identical rights to the admission of documents. Although it is correct that, on several occasions, various documents of the Prosecution were excluded, one is bound to concede that almost all of the Prosecution's documents were admitted. The same should also be true for the Defence – and so, we ought, as I see it, to adopt a broad view of the documents proffered by the Defence, as the fate of the accused may play out within their shadow.

As to expeditiousness, the majority does not explain why this appeals proceeding would prejudice the expeditious conduct of the trial; by contrast, as a result of the Mladić notebooks, the Trial Chamber now finds itself paralyzed, waiting for all of the translations, and furthermore, waiting for a decision by the Appeals Chamber involving a motion by the Praljak Defence.

As to the outcome of the trial, which constitutes a fundamental issue in my view, the majority has not said how it is that the two excluded documents were useless for the

Defence's case and why it is that they were neither relevant nor carried probative value.

As to immediate resolution, although it is true that the Appeals Chamber takes time to render its decisions, as the matter currently pending regarding the Praljak Defence motion demonstrates, the Appeals Chamber, nevertheless, could opt to work expeditiously on this request of the Prlić Defence, given the urgency of the matter.

The majority bases itself upon the decision rendered by the Appeals Chamber on 12 January 2009.

There, the Appeals Chamber rightly recalled the **discretion** of the Chamber except in cases of manifest error. I am fully persuaded of this principle.

In that decision, the Appeals Chamber recalled that a decision was rendered by the Chamber, unanimously or by majority, and it deduced therefrom that the contested exhibits in the case before it did not fulfil the criteria set forth in Guideline 8.

In fact, at no time did the Appeals Chamber adjudicate the legality of the exhibits to determine if these exhibits were capable of affecting the **outcome of the trial**. The Appeals Chamber ought then to have acquainted itself with the full range of exhibits admitted and examined the contested exhibits one by one. In the matter presently considered, the Appeals Chamber can only examine two exhibits.

From my perspective, when a contentious matter is sent for review by a Chamber of second resort, that Chamber must examine each exhibit as it relates to the Indictment to determine if the exhibit is relevant and carries probative value.

In the matter presently considered, the majority is satisfied to say that the Witness, in the case of Exhibit **5D 04241**, could not speak to its relevance and probative value.

As the Prlić Defence rightly states, the Trial Chamber admitted documents in the past when the witness was unable to speak to their relevance and probative value. This is perfectly acceptable, for the **Manifestation of Truth** must not be left to depend on witnesses, because, otherwise, missing witnesses would bring international justice to a standstill.

It is incumbent upon the **Professional Judge** to intercept a document in court as it is put to a witness, as happened here, and to indicate immediately that the document is not relevant and carries no probative value, a duty assigned to him or her by Rule 90 (F).

When the lawyer showed this document and presented it in detailed fashion (*cf.* page 51542), no judge intervened to say that the document was not relevant, especially in that this was an official document of the Mostar Prosecutor involving a crime report from 20 October 1993.

This document would have allowed a **reasonable trier of fact** to conclude on the spot that there had been an investigation by a legal authority.

The query that followed from the lawyer for the Accused Prlić afforded the witness the opportunity to answer that he knew the document's author, having had a professional relationship with him.

Concerning document **5D 04152**, mentioned in pages 51540 and 51541, it seems that it is a document of a similar kind, as this is an indictment drafted on 25 October 1994 by the Mostar Prosecutor.

The fact that the Witness may have indicated that he was unaware of the document is not sufficient to warrant its exclusion, as it is independently relevant and carries probative value *in se*. If the Appeals Chamber stated that these two documents were not at all relevant and carry no probative value whatsoever, I might contest that; at the moment, however, as I carry out my present duties, it does appear to me that these two documents are authentic and are linked to the Indictment.

These two documents are directly linked to the allegations found in paragraph 17 (k) of the Indictment: "[...] by failing to report and/or investigate crimes or alleged crimes against them, and/or to follow up on such investigations, and/or to punish or discipline subordinates and others in the Herceg-Bosna/HVO authorities and forces for crimes committed against Bosnian Muslims and other non-Croats [...]".

Likewise the role of the Accused Prlić, raised in Paragraph 17.1 (x), can be measured by the standard of what is to be gleaned through the examination of these two documents, as the following is stated: "JADRANKO PRLIĆ participated in, facilitated and/or supported the promotion and dissemination of false, inaccurate and misleading information about the occurrence and commission of crimes, by pretending, for example, that crimes committed by the Herceg-Bosna/HVO authorities and forces were the actions of uncontrolled elements, and giving or supporting false information about the existence and effect of investigations and corrective measures allegedly taken."

As anyone can see without being an expert in criminal law, both documents are relevant and carry probative value with respect to Paragraphs 17 (k) and 17.1 (x) of the Indictment.

To close my argument, I must point out that Guideline 8 on the admission of documentary evidence never stated that a document absolutely must be recognized by a witness if it is to be admitted.

Paragraph 27 of Guideline 8 states as follows: "[t]he party wishing to tender an exhibit into evidence shall, in principle, do so through a witness who can attest to its reliability, relevance or probative value. The exhibit must be put to the witness in court."

The lone requirement concerning the document, it seems, is that the witness must merely be capable of testifying to its reliability, its relevance or its probative value. If the witness cannot recognize the document, this does not implicitly entail the absence of a link between the witness and the document.

By way of example, it is known that the witness was unaware that the Bosnian indictment existed (5D 04152), however, in contrast to that, the witness knew about the criminal proceedings (investigation, indictment, judgment).

What was important for the Chamber was to obtain confirmation through this witness of the existence of criminal proceedings and **not confirmation of their substance**.

It should also be mentioned that the French language is a very precise language with regard to legal terminology. In the French version of the Guidelines, the term **may** (*"peut")* was employed, which does not give rise to a duty; otherwise, we would have employed **shall** (*"doit"*).

Finally, as emphasized by the Prlić Defence in Paragraph 18 of its submission, this matter must be submitted to the Appeals Chamber.

/signed/

Jean-Claude Antonetti
Presiding Judge

Done this third day of June 2010
At The Hague
The Netherlands

[Seal of the Tribunal]