



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: 12 January 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

Order of: 12 January 2010

THE PROSECUTOR

v.

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

PUBLIC

ORDER CLARIFYING DECISION OF 27 NOVEMBER 2008

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 “Prosecution Motion for Clarification on the Use of ‘New’ Documents During Cross-Examination”, filed publicly by the Office of the Prosecutor (“Prosecution”) on 30 November 2009 (“Motion”), in which the Prosecution asks the Chamber to clarify the manner of application of the “Decision on Presentation of Documents by the Prosecution in Cross-Examination of Defence Witnesses” of 27 November 2008 (“Decision of 27 November 2008”), and in particular the procedure related to the use of “new documents” during the cross-examination of defence witnesses,¹

NOTING the “Joint Response of Accused Stojić, Praljak, Petković, Ćorić and Pušić to the Prosecution’s 30 November 2009 Motion for Clarification on the Use of “New” Documents During Cross-Examination”, filed jointly and publicly by the Defence teams for the Accused Bruno Stojić, Slobodan Praljak, Milivoj Petković, Valentin Ćorić and Berislav Pušić (“Joint Defence”²) on 8 December 2009 (“Joint Response”), in which the Joint Defence requests that the Chamber reject the Prosecution Motion,³

CONSIDERING that the Prlić Defence did not file a response to the Motion,

NOTING the “Decision on the Interlocutory Appeal Against the Trial Chamber’s Decision on Presentation of Documents by the Prosecution in Cross-Examination of Defence Witnesses”, rendered publicly by the Appeals Chamber on 26 February 2009, in which the Appeals Chamber upheld the Decision of 27 November 2008,⁴

CONSIDERING as a preliminary matter that the Chamber notes that the Joint Defence filed its Joint Response on 8 December 2009, which is one day after the

¹ Motion, paras 1, 5, 10 and 22 and footnote 3.

² Since the Stojić, Praljak, Petković, Ćorić and Pušić Defence teams filed a Joint Response to the Prosecution Motion, the Chamber will refer to the “Joint Defence” as an entity for this Decision.

³ Response, paras 5 and 6.

⁴ *The Prosecutor v. Prlić et al.* Case No. IT-04-74-AR73.14, “Decision on the Interlocutory Appeal Against the Trial Chamber’s Decision on Presentation of Documents by the Prosecution in Cross-Examination of Defence Witnesses”, public, 26 February 2009 (“Appeals Chamber Decision of 26 February 2009”), paras 23 to 31.

deadline set by the Chamber;⁵ that it decides, however, as an exception and in keeping with the subject of the Motion, that it is in the interest of justice to admit the Joint Response; that the Chamber nevertheless orders the Parties, in the future, to adhere strictly to set deadlines,

CONSIDERING that the Chamber notes that in its Motion, the Prosecution argues that when it wishes to use “new documents” during the cross-examination of a Defence witness, it is not required in advance to state its intention, or to give an explanation or seek permission of the Trial Chamber before using it;⁶ that if it later wishes to tender these “new documents” for admission, it will have to adhere to the Chamber's admissibility criteria defined in the Decision of 27 November 2008;⁷ that, furthermore, the defence teams were unable to prove that the Prosecution use of the “new documents” in court caused any specific prejudice and that like the approach adopted by the Chamber for the cross-examination of Prosecution witnesses by Defence teams, there can be no limitation on the presentation of “new documents” by the Prosecution;⁸

CONSIDERING that in the Joint Response, the Joint Defence argues firstly that the Prosecution is using the Motion to dispute the Decision of 27 November 2008 under the pretext of seeking clarification;⁹ that secondly, a clarification of the Decision of 27 November 2008 is unnecessary since the said Decision clearly stipulates that the Prosecution may present “new documents” during the cross-examination for the purpose of testing a Defence witness's credibility or refreshing his memory but that the Prosecution presentation of “new documents” must be justified by exceptional reasons and requires the prior permission of the Chamber,¹⁰

CONSIDERING that like the argument put forth by the Prosecution, the Chamber recognises that the use of “new documents” during the cross-examination of a Defence witness and a request by the Prosecution to tender the “new documents” into evidence constitute two separate stages regulated by different procedures,

⁵ Chamber's email addressed to the Parties setting a deadline for filing the Prosecution Motion and responses from the parties, 23 November 2009.

⁶ Motion, paras 5, 11-15 and 22.

⁷ Motion, paras 5, 19 and 22.

⁸ Motion, paras 7 and 8.

⁹ Joint Response, para. 5 (i).

¹⁰ Joint Response, paras 5 (ii) to (iv).

CONSIDERING that the Chamber further notes that this distinction between the procedure for using and the procedure for tendering "new documents" also applies to the Defence Teams whose cases have ended,

CONSIDERING that the Chamber recalls that while using "new documents" during the cross-examination of a Defence witness, whether the "new document" is used for the purpose of testing the credibility of that witness, refreshing his memory or establishing the guilt of one or more accused, the Prosecution and the Defence teams who have concluded their cases are not obliged to disclose their strategy; that consequently, they do not have to specify at that stage whether or not they wish subsequently to tender these "new documents"; that while using these "new documents" during the cross-examination of a Defence witness, the Prosecution and the Defence teams who have concluded their cases are not required to provide justifications regarding the use of the said documents,

CONSIDERING that the Chamber recalls that the Prosecution and the Defence teams who have concluded their cases and wish subsequently to tender "new documents" are required, when filing their respective IC lists, to specify their purpose for tendering these "new documents"; that when a party that has concluded its case requests the admission of "new documents" for the establishing the guilt of one or more Accused, it must at that moment specify the exceptional circumstances justifying the admission of these "new documents", namely the date of the documents and their source, the date when they were disclosed to the Defence teams and the reasons why these documents are being presented after the close of their respective cases;¹¹ that, in the spirit of clarification, the Chamber recalls that the an *inter partes* hearing will take place at this stage, namely during the motion for admission and that the objections related notably to the nature of the documents presented and formulated in court are therefore premature,

¹¹ "Decision of 27 November 2008," paras 20, 21, 23 and 24; "Appeals Chamber Decision of 26 February 2009," paras 24 and 30.

FOR THE FOREGOING REASONS,

PURSUANT TO Articles 20 and 21 of the Statute of the Tribunal and Rules 54 and 85 (A), 89 (B) and 90 (H) of the Rules of Procedure and Evidence,

RECALLS that the parties who have concluded the presentation of their case do not have to justify the use of “new documents” in court when they are cross-examining a Defence witness, **AND**

INVITES the parties not to raise objections in court on the nature of the “new documents” and to reserve such objections for when these "new documents" are the subject of a request for admission,

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

/signed/

Judge Jean-Claude Antonetti

Presiding Judge

Done this 12 January 2010

At The Hague

The Netherlands

[Seal of the Tribunal]