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: 6 July 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: **6 July 2010**

THE PROSECUTOR

v.

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

PUBLIC

DECISION ON THE PROSECUTION MOTION FOR RECONSIDERATION OR CERTIFICATION TO APPEAL CONCERNING *ORDONNANCE RELATIVE À LA DEMANDE DE L'ACCUSATION DE SUSPENDRE LE DÉLAI DE DÉPÔT DE SA DEMANDE DE RÉPLIQUE*

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 Reconsideration or Certification to Appeal Concerning *Ordonnance relative à la demande de l'Accusation de suspendre le délai de dépôt de sa demande de réplique* dated 3 June 2010", brought publicly by the Office of the Prosecutor ("Prosecution") and containing confidential annexes on 10 June 2010 ("Motion"),

NOTING "Slobodan Praljak's Response to the Prosecution's 9 June 2010 Request to Reconsider or Certify for Appeal the Decision of 3 June 2010 Rejecting the Prosecution's 25 May 2010 Request to Reconsider the Order of 21 April 2010", filed publicly on 16 June 2010 by Defence Counsel for Slobodan Praljak ("Praljak Defence"; "Praljak Response"),

NOTING "Jadranko Prlić's Response to Prosecution Motion for Reconsideration or Certification to Appeal Concerning *Ordonnance relative à la demande de l'Accusation de suspendre le délai de dépôt de sa demande de réplique* dated 3 June 2010", filed publicly along with a confidential annex on 18 June 2010 by Defence Counsel for Jadranko Prlić ("Prlić Defence"; "Prlić Response"),

NOTING "Bruno Stojić's Response to Prosecution Motion for Reconsideration or Certification to Appeal Concerning *Ordonnance relative à la demande de l'Accusation de suspendre le délai de dépôt de sa demande de réplique* dated 3 June 2010", filed publicly on 18 June 2010 by Counsel for the Accused Bruno Stojić ("Stojić Defence"; "Stojić Response"),

NOTING "Milivoj Petković's Response to the Prosecution Motion for Reconsideration or Certification to Appeal Concerning *Ordonnance relative à la demande de l'Accusation de suspendre le délai de dépôt de sa demande de réplique* dated 3 June 2010", filed confidentially on 18 June 2010 by Defence Counsel for Milivoj Petković ("Petković Defence"; "Petković Response"),

NOTING "Valentin Ćorić's Response to Prosecution Motion for Reconsideration or Certification to Appeal Concerning *Ordonnance relative à la Demande de l'Accusation de suspendre le délai du dépôt de sa demande de réplique* dated 3 June 2010", filed publicly on 18 June 2010 by Defence Counsel for Valentin Ćorić ("Ćorić Defence"; Ćorić Response"),

NOTING "Berislav Pušić's Motion to Join Slobodan Praljak's Response to the Prosecution's 9 June 2010 Request to Reconsider or Certify for Appeal the Decision of 3 June 2010 Rejecting the Prosecution's 25 May 2010 Request to Reconsider the Order of 21 April 2010", filed publicly on 18 June 2010 by Defence Counsel for Berislav Pušić ("Pušić Defence"), whereby the Pušić Defence joins the Praljak Response,

NOTING the "Prosecution Reply to Defence Responses to Prosecution Motion for Reconsideration or Certification to Appeal Concerning *Ordonnance relative à la Demande de l'Accusation de suspendre le délai du dépôt de sa demande de réplique*", filed publicly by the Prosecution on 23 June 2010 ("Reply"),

NOTING the "Order on Prosecution Motion to Suspend Deadline to File Its Request to Reply", issued publicly on 3 June 2010 ("Order of 3 June 2010"), whereby the Chamber, on the one hand, denied by a majority the Prosecution's motion to suspend the deadline set for 25 May 2010 by the Chamber for filing any replies[1] and, on the other hand, concluded that the Prosecution had not filed any request to reply as of the expiry date of the imposed time-limit,[2]

NOTING the "Scheduling Order for Filing Requests to Reply Pursuant to Rule 85", issued publicly by the Chamber on 21 April 2010, wherein the Chamber ordered the parties to file their requests to reply, if any, no later than 25 May 2010 ("Order of 21 April 2010"),[3]

NOTING the "Order Regarding the Closure of the Presentation of the Defence Cases", issued publicly on 17 May 2010 ("Order of 17 May 2010"), wherein the

[1] See, in this sense, the "Prosecution Motion Concerning Rebuttal Case", filed publicly on 25 May 2010 ("Original Motion").
[2] Order of 3 June 2010, p. 7.
[3] Order of 21 April 2010, p. 3.

Chamber concluded in pertinent part that "all the Defence teams have … ended the presentation of their cases even though some requests and decisions for the admission of evidence are currently pending before the Chamber or the Appeals [Chamber]",[4]

NOTING the "Decision Regarding Requests Filed by the Parties for Reconsideration of Decisions by the Chamber", rendered publicly on 26 March 2009 ("Decision of 26 March 2009"), wherein the Chamber laid down guidelines for requests for reconsideration filed by the parties and recalled that such requests ought to remain the exception and not the rule,[5]

CONSIDERING that, in the Motion and the Reply, the Prosecution respectfully requests, in its main argument, that the Chamber reconsider the Order of 3 June 2010 and authorise it to bring reply arguments after the deadline of 25 May 2010 and, in the alternative, certify the appeal of the Order of 3 June 2010 pursuant to Rule 73 (B) of the Rules of Procedure and Evidence ("Rules"),[6]

CONSIDERING that in support of the Motion for Reconsideration of the Order of 3 June 2010, the Prosecution submits that, due to an unfortunate misunderstanding, the Chamber concluded there was a lack of clarity in the Prosecution's desire to file a request to reply when it was in good faith that the Prosecution filed the Original Motion on the expiry date fixed by the Chamber for filing replies;[7] that the Chamber did indeed hold that the filing of the Original Motion on 25 May 2010[8] was a fair and equitable solution given the circumstances in the case as well as the various matters still pending as of 25 May 2010; that it points out moreover that by filing the Original Motion that day, the Prosecution caused no prejudice or slowdown in the progress of the trial,[9]

CONSIDERING that, seeking to justify the date on which it filed the Original Motion and the motion for extension of the deadline originally fixed at 25 May 2010 for filing its reply arguments, the Prosecution explains that the abrupt changes in the

[4] Order of 17 May 2010, p. 3.
[5] Decision of 26 March 2009, p. 3.
[6] Motion, p. 1; paras 2, 3, 31, 32, 34, 35 and 44; Reply, para. 1.
[7] Motion, paras 1, 3, and 30.
[8] Motion, paras 21-29.
[9] Motion, para. 36.

hearing schedule caught it by surprise;[10] that the Prosecution had legitimate reason to think that the Defence teams would close presentation of their cases closer to September than May 2010;[11] that while the Prosecution has admittedly worked since the beginning of April to prepare its reply arguments, it nevertheless requires additional time, considering the scale of the case; that the Prosecution also waited until the very last moment to file the Original Motion, specifically so that it could take into account the decision concerning the statements or transcripts pursuant to Rule 92 *bis* of the Rules tendered by the Praljak Defence, which were still pending before the Appeals Chamber,[12]

CONSIDERING that in support of its good faith and unequivocal intention to submit these reply arguments, the Prosecution likewise recalls that as of 27 April 2010,[13] it informed the Chamber of this intent, adding that it was unable to take a decision in this connection while all the evidence had not yet been "received" by the Chamber,[14] that in this respect, it therefore complied with the Order of 21 April 2010, which requested that the parties inform the Chamber of their intention to file or not to file replies of this sort,[15] that the Original Motion, which was made while decisions were yet pending, also sought to file a reply, yet also requested an extension of the deadline of 25 May 2010,[16]

CONSIDERING that the Prosecution submits that Judge Prandler, in his dissenting opinion, attached to the Order of 3 June 2010, did indeed correctly assess the situation, in which it was implied that the Prosecution wished to file reply arguments at a later date,[17]

CONSIDERING that, in addition to this, the Prosecution believes that the Chamber erred by mistakenly concluding that the Prosecution, in its Original Motion, had developed a theoretical argument, whereas in fact the Prosecution identified the requests still pending before the Chamber and the Appeals Chamber and that it regrets

[10] Motion, paras 4-11.
[11] Motion, para. 11.
[12] Motion, paras 13 and 14.
[13] See, e.g., "Prosecution Notice Regarding Rebuttal and Reopening of its Case", filed confidentially on 27 April 2010 ("Notice of 27 April 2010").
[14] Motion, para. 17.
[15] *Id.*
[16] Motion, paras 18-20.
[17] Motion, paras 17 and 38.

the fact that the Chamber completely failed to take into account what is stipulated by Rule 85 (A) of the Rules and of the *Lukić* jurisprudence,[18] according to which the Prosecution is not obliged to submit its reply arguments before all of the parties have finished presenting their cases,[19]

CONSIDERING that the Prosecution further argues that its "27 April and 25 May filings have been entirely proper and timely", further submitting that the Chamber might, in the interest of justice, apply Rule 127 (A)(ii) of the Rules to authorise the Prosecution, following the expiry of the deadline of 25 May 2010, to file its reply arguments promptly, as stated in part in Confidential Annex 2 of the Motion;[20] that latitude of this sort regarding the time-limit granted by the Chamber to the Prosecution would be well received, given the latitude previously demonstrated by the Chamber towards the Praljak Defence,[21]

CONSIDERING, lastly, that the Prosecution posits that the Order of 3 June 2010, in preventing it from filing reply arguments, ostensibly runs contrary to the interests of justice, the victims and the International Community,[22]

CONSIDERING that, as concerns the argumentation in the alternative in the Motion for certification to appeal the Order of 3 June 2010, the Prosecution submits firstly that the impugned decision involves an issue likely to significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial;[23] that the opportunity for the Prosecution to file reply arguments is, in the Prosecution's view, an issue no less important than the admission under Rule 92 *bis* of statements or hearing transcripts of the Praljak Defence, which was certified,[24]

CONSIDERING that the Prosecution then contends that the immediate resolution of this issue by the Appeals Chamber may materially advance the proceedings inasmuch as this would avoid having the issue raised before the Appeals Chamber later on, after

[18] *The Prosecutor v. Lukić et Lukić*, Case No. IT-98-32/1-AR73.1, "Decision on the Prosecution's Appeal Against the Trial Chamber's Order to Call Alibi Rebuttal Evidence During the Prosecution's Case in Chief", 16 October 2008 ("Lukić Decision"), paras 11 and 12.
[19] Motion, paras 21-30.
[20] Motion, paras 33 and 34.
[21] Motion, para. 37.
[22] Motion, para. 39.
[23] Motion, paras 41 and 42.
[24] Motion, para. 42.

judgement on the merits has come, which would produce consequences more difficult to resolve at that stage,[25]

CONSIDERING that the Defences, excepting the Prlić Defence, are opposed to the Motion;[26] that the Prlić Defence in fact yields to the discretion of the Chamber regarding whether the Motion ought to be granted insofar as it touches upon the reconsideration or certification to appeal the impugned decision, while contesting, like the Petković Defence,[27] the filing of reply arguments that fail to comply with the criteria established under Tribunal case-law, in the event that the Chamber were to decide to reconsider the Order of 3 June 2010,[28]

CONSIDERING that the Praljak Defence raises the point that the Motion exceeds the authorised limit of 3000 words without any explanation offered by the Prosecution that would justify it going over the word limit, unless of course the Praljak Defence is simply unaware that such authorisation was provided by the Chamber,[29]

CONSIDERING that the Praljak and Ćorić Defences contend that the Motion is out of time inasmuch as it seeks to definitively overturn the Order of 21 April 2010 whereby the Chamber set the date of 25 May 2010 as the latest possible date for filing any requests to reply; that the Prosecution ought to have contested this Order setting the date for 25 May 2010 within the lawful time-limit of 7 days, that is by 28 April 2010, or even to have filed the Original Motion promptly instead of waiting for the expiry of the 25 May 2010 deadline to do so,[30]

CONSIDERING that the majority of the Defence teams argue that the Prosecution has not established there was an error in the reasoning of the Order of 3 June 2010, or particular circumstances, which might include new facts or new arguments, and which might justify reconsideration of the Order of 3 June 2010 to avoid injustice, and authorise the Prosecution to bring its reply arguments;[31] that the Defence teams find that the Prosecution has likewise failed to establish how it is that the immediate

[25] Motion, para. 43.
[26] Stojić Response, paras 1-8 and 11; Praljak Response, paras 2, 24 and 30; Petković Response, para. 1, Ćorić Response, para. 1.
[27] Prlić Response, p. 1, paras 1-3; Petković Response, paras 1-23.
[28] Prlić Response, p. 1, paras 5 and 6.
[29] Praljak Response, paras 2, 21-33.
[30] Praljak Response, paras 2, 14-16; Ćorić Response, paras 4 and 5.

resolution of this issue by the Appeals Chamber would materially advance the proceedings and submit that the Prosecution, by bringing its Motion, is permanently impeding the progress of the trial,[32]

CONSIDERING that, more particularly, as concerns the portion of the Motion regarding reconsideration, the Stojić Defence underscores that the Prosecution is more than anything else merely reiterating and fleshing out the arguments it brought in the Original Motion;[33] that the Prosecution has not established that the Chamber erred in its reasoning when it found that the Prosecution was capable of submitting its reply arguments within the time-limit set down while certain decisions on the admission of evidence were still pending; that the Chamber's decision does not deviate from the practice of the other Chambers at the Tribunal and that the Prosecution thus could not have been unaware of the relevant jurisprudence in this area,[34]

CONSIDERING that the Prlić, Stojić, Praljak et Petković Defences add that nothing prevented the Prosecution from submitting its reply arguments within the prescribed time-limit, given the Defence evidence already admitted;[35] that several Defence teams add further that the Prosecution might also have submitted its reply arguments on the basis of the evidence proffered to the Chamber, the status of which remained pending, inasmuch as the Prosecution already knew the essence of all of the Defence evidence,[36]

CONSIDERING that the Prlić Defence underscores further that the Prosecution knew that the Chamber had declared the presentation of defence evidence closed on 17 May 2010, which the Prosecution, moreover, did not contest,[37]

CONSIDERING moreover that the Stojić, Petković and Ćorić Defences submit that the Prosecution has not shown valid circumstances for leave to bring reply arguments beyond the time-limit afforded,[38]

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[31] Stojić Response, paras 1-8 and 11; Praljak Response, paras 2, 24 and 30; Petković Response, paras 2-5; Ćorić Response, paras 4 and 5.
[32] Stojić Response, para. 12; Petković Response, paras 6 and 7; Ćorić Response, paras 13-18.
[33] Stojić Response, paras 2 and 3.
[34] Stojić Response, paras 4-8.
[35] Prlić Response, paras 5 and 6; Stojić Response, para. 8; Praljak Defence, paras 17 et 28; Petković Response, para. 3.
[36] Prlić Response, paras 5 and 6; Stojić Response, para. 5; Petković Response, para. 3.
[37] Prlić Response, paras 5 and 6.

CONSIDERING that, as concerns that portion of the Motion touching upon certification to appeal the impugned decision, the Defence teams contend that the Motion does not meet the criteria of Rule 73 (B) of the Rules,[39]

CONSIDERING that, in particular, the Praljak Defence deems the matter of enforcing a clearly established time-limit unworthy of appellate review[40] and the Petković Defence adds that the Prosecution's delay in filing reply arguments within a specified span of time cannot be allowed to constitute a basis for requesting leave to appeal the impugned decision,[41]

CONSIDERING furthermore that the Stojić Defence underscores the fact that the Prosecution has not established how the immediate resolution of the issue by the Appeals Chamber would materially advance the proceedings, and that the right to bring reply arguments is not automatic; that the Petković and Ćorić Defences argue that the Prosecution's failure to comply with the Order of 3 June 2010 delays the progress of the trial rather than causing the proceedings to advance,[42]

CONSIDERING that the Chamber recalls at the outset that in an e-mail dated 8 June 2010, the Chamber informed all of the parties, including the Praljak Defence,[43] that it was granting the Prosecution's e-mail request to exceed the total authorised limit of 3,000 words for filing a Motion, and, in an e-mail dated 22 June 2010, the Chamber authorised the Prosecution to submit the Reply,

CONSIDERING firstly that the Chamber holds the Motion lawful in that it pertains to the Order of 3 June 2010, whereby the Chamber rejected the Original Reply seeking to suspend the time-limit of 25 May 2010 set by the Order of 21 April 2010, and in the same document concluded that the Prosecution had not filed any request to reply, and not to the Order of 21 April 2010, which fixed the time-limit of 25 May 2010 for submitting reply arguments,

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[38] Stojić Response, para. 11; Petković Response, para. 8; Ćorić Response, paras 6-12.
[39] Stojić Response, para. 12; Praljak Response, para. 29; Petković Response, paras 6 and 7; Ćorić Response, paras 13-18.
[40] Praljak Response, para. 29.
[41] Petković Response, paras 6 and 7.
[42] Petković Response, paras 6 and 7; Ćorić Response, paras 13 and 14.
[43] The Chamber points out, however, that due to a technical issue, Mr Pinter, Co-Counsel for the Accused Slobodan Praljak, did not receive the e-mail sent by the Chamber to the parties, which Mr Kovačić, also co-counsel for the Accused Slobodan Praljak, did in fact receive.

CONSIDERING that, with regard to that portion of the Motion addressing reconsideration of the Order of 3 June 2010, the Chamber points out that the Prosecution, acting through its Motion, has neither placed new facts or particular circumstances into evidence, nor established that the Chamber committed a clear error in its reasoning to reject the Original Motion,

CONSIDERING that the Chamber observes that the Prosecution does nothing more than explore arguments concerning the circumstances surrounding the Original Motion and that it calls into question the decision taken by the Chamber by repeating generally the same arguments as those submitted in the Original Motion or in providing further details that should have been filed in support of the Original Motion,

CONSIDERING that although the Chamber may be entirely sympathetic to the change of schedule as the trial unfolded that forced the Prosecution to prepare for the prospect of filing its reply arguments more rapidly than first thought, the Chamber remains no less persuaded that this did not relieve the Prosecution of its duty to seize the Chamber as of 21 April 2010 or within a reasonable time, by a request moving to suspend a time-limit or to extend it; that, in the view of the Chamber, the Prosecution's omission allowed the Chamber to reasonably expect that on 25 May 2010, the expiry date for filing requests to reply, the Prosecution would submit a proper and timely request to reply, instead of a motion to suspend the deadline that fell upon the same day as the expiry date thereof,

CONSIDERING, moreover, that the Chamber fully understood what was contained in the Notice of 27 April 2010, which simply informed the Chamber of the Prosecution's desire to file a request to reply generally after the close of the Defences' case, while remarking that several requests to admit exhibits remained pending before the Chamber and the Appeals Chamber; that, nevertheless, as the Chamber previously recalled in the Decision of 3 June 2010, following the established practice of the Chamber in this proceeding with respect to notices, the Notice of 27 April 2010 could not and cannot now in any way be likened to a request, let alone a request to suspend the deadline of 25 May 2010,[44]

[44] Order of 3 June 2010, p. 5; see in this regard, the Oral Decision on the Notices Filed by the Parties, 15 June 2009, T(F), p. 41355, in which the Chamber reminded the parties that it can only be seized of a matter when a party properly and timely files a request.

CONSIDERING that the Chamber therefore held without error of law that it was seized of the Original Motion alone, which was no more than a request to suspend the deadline for the submission of reply arguments without specifying whether there was any concrete exculpatory evidence, already admitted or awaiting admission but known to the Prosecution and likely to support a request to reply subject to the strict criteria that govern replies,[45]

CONSIDERING that, contrary to what is alleged in the Motion,[46] the act of listing in the Original Motion (which the Chamber once more recalls to have been filed on the expiry date of the deadline for submitting reply arguments) the requests still pending before the Chamber[47] and the Appeals Chamber does not constitute an adequate approach for seeking to have the deadline of 25 May 2010 suspended for the purpose of later submitting reply arguments,

CONSIDERING moreover, that in the Motion, the Prosecution does not factor in the the Chamber's findings that the Prosecution possessed sufficient knowledge of what was generally contained in all of the Defence evidence tendered to the Chamber to be capable of bringing a request to reply within the time-limit imposed,[48] that the Chamber is left to conclude that, in the Motion and in the Reply, the Prosecution reiterates its original arguments, contending little else beyond the fact that the Defence teams as a whole had not yet finished arguing their defence cases and that the Chamber could not consequently force the Prosecution to submit a motion for reply argument prematurely,[49] yet without drawing attention to one error of law in the reasoning of the Order of 3 June 2010 or in the Order of 17 May 2010, which the Prosecution does not contest and by which the Chamber declared the presentation of defence evidence closed,

CONSIDERING, finally, that the Prosecution offers no valid reason why the Chamber should now authorise it to file reply arguments subsequent to expiry of the time-limit; that the simple fact that the hearing schedule was turned upside down

[45] Order of 3 June 2010, pp. 6 and 7.
[46] Motion, paras 21 and 22.
[47] In this regard, the Chamber points out that, contrary to what is alleged in paragraph 25 of the Motion, the "Order to Admit Evidence Regarding Expert Witness Slobodan Janković and Expert Witness Heinrich Pichler", was issued by the Chamber and distributed to the parties, including the Prosecution, on 25 May 2010 and not 1 June 2010.
[48] Order of 3 June 2010, p. 5.
[49] Motion, paras 27-30; Reply, para. 5.

cannot in and of itself justify extending the date for filing reply arguments, especially insofar as this argument was never previously submitted by the Prosecution; that the fact of requests still pending before the Chamber or the Appeals Chamber does not constitute an argument to justify extension either, inasmuch as the Prosecution had been made aware of all of the exculpatory materials tendered by the Defence teams; that the Chamber is not persuaded by the explanation that "[w]hen some Defence evidence has not yet been presented, and where it is not known which Defence evidence has been admitted and which has been refused, the Prosecution is substantially disadvantaged in making informed decisions in how to invest and direct its limited rebuttal efforts";[50] that the Prosecution was capable of identifying from those few pending decisions and especially from the evidence already admitted which important issues were raised in the Defence arguments and likely to meet the criteria for a reply,

CONSIDERING that the Chamber consequently decides to deny the Motion as to its first part,

CONSIDERING moreover that, as concerns that portion of the Motion addressing the request for certification to appeal the Order of 3 June 2010, the Chamber is persuaded of the lawfulness of the said order but nevertheless finds that the Prosecution has shown that the sum and substance of the Motion constitutes an important issue for the Prosecution; that this issue is likely to materially affect the fair and expeditious conduct of the trial or its outcome and that the immediate resolution of this issue by the Appeals Chamber would significantly advance the proceedings,

[50] Motion, para. 23.

FOR THE FOREGOING REASONS,

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

DECIDES by a majority to **GRANT** the Motion **PARTIALLY**,

CERTIFIES the Prosecution's Appeal concerning the Order of 3 June 2010, and

DENIES by a majority the request for reconsideration of the Order of 3 June 2010.

Judges Antonetti and Trechsel each join an individual opinion to the Decision.

Judge Prandler joins a partially dissenting opinion to the Decision.

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

/signed/

Jean-Claude Antonetti
Presiding Judge

Done this sixth day of July 2010
At The Hague
The Netherlands

[Seal of the Tribunal]

Individual Opinion of the Presiding Judge: Jean-Claude Antonetti

The Trial Chamber has decided by a majority not to reconsider its Decision of 3 June 2010, however, it decided unanimously to certify the Prosecution's appeal.

The issue regarding the Prosecution's hypothetical opportunity to reply once the presentation of Defence evidence closed was exhaustively considered by the Chamber as it invited the parties, on 21 April 2010, to inform the Chamber whether they intended to exercise the option contemplated under Rule 85 (A) (iii) of the Rules.

Subject to these conditions, the Trial Chamber had fixed 25 May 2010 as the latest date for filing submissions, thereby leaving the Prosecution over a month to draft its submissions. The Prosecution had ample time until then to achieve this task, especially as the Ćorić Defence's final witness testified on 1 April 2010.

If the Prosecution, after several years of proceedings, is unable to inform us within one month whether it is requesting leave to reply, then there is truly a problem whose causes I cannot fathom.

The principal argument developed in paragraphs 10, 11, 12, 13, 24, 25, 26, 27 and 28 of the Prosecution's submission is to say that there is currently a request pending in the Appeals Chamber and that there are forthcoming decisions concerning certain requests for admission of evidence.

We cannot embrace this logic for, as regards the decision currently pending before the Appeals Chamber, it concerns only the statements taken pursuant to Rule 92 *bis* of the Rules, with which the Prosecution is quite familiar, seeing that the Prosecution asserts with great clarity that it is opposed to the admission of certain exhibits.[51]

In its submissions, the Prosecution appears to indicate that it may perhaps need to cross-examine the 92 *bis* witnesses. The issue this raises is whether these 92 *bis* witnesses fall in any way within the ambit of the Čelebići jurisprudence regarding whether this is an important issue, an issue raised by Defence evidence or an issue which the Prosecution could not have reasonably foreseen.[52]

[51] In the "Prosecution Combined Response to Slobodan Praljak's Two Motions for Admission of Written Evidence in Lieu of Viva Voce Testimony Pursuant to Rule 92 *bis* and Motion for Admission of Evidence Pursuant to Rule 92 *quarter*", dated as of 28 October 2009, the Prosecution asserts its objections concerning the said documents. The Prosecution opposed the admission of these statements on different grounds, including specifically the fact that it was up to the Defence to delete any references to "acts and conduct of the Accused", as alleged in the Amended Indictment of 11 June 2008, in the said written statements or hearing transcripts in light of their inadmissibility, based on the Tribunal's jurisprudence, of the passages touching upon the "acts and conduct of the Accused as alleged in the Indictment". The Prosecution adds in this respect that the exhibits relating to the state of mind and the participation in a joint criminal enterprise concern the "acts and conducts of the Accused as alleged in the Indictment" and cannot therefore be admitted, in accordance with Rule 92 *bis* (A) of the Rules.

[52] Case No. IT-96-21-T, Judgement, *The Prosecutor v. Zejnil Delalić, Zdravko Mucić, alias Pavo, Hazim Delić and Esad Landžo, alias Zenga,* 20 February 2001.

The very terms of Rule 92 *bis* of the Rules enumerate the factors favouring admission (cumulative, context, analysis of ethnic make-up, effects of the crimes on the victims, character of the accused).

It is rather obvious that almost all of the 92 *bis* witnesses for the Praljak Defence have been proffered to evoke the "character of the Accused".[53] There was no other outcome possible, as the same article provides that certain factors weigh against admission (acts and conduct).

In these circumstances, I observe no trace of any important issue because here we do not have witnesses of acts and conduct alleged in the Indictment, but rather, character witnesses.

The character of the Accused was not raised only when Defence evidence was tendered, because the Prosecution had been informed regarding the "character" of the Accused at the time of its **preliminary statement**.[54]

Concerning the forthcoming decisions about certain exhibits in the process of being admitted, the Prosecution also asserts its point of view on these exhibits.[55]

I have questions concerning the sentence appearing in paragraph 17: "In an international organization involving a mixture of languages, cultures and legal systems, it may be that these factors occasionally contribute to misunderstandings or misperception, where different persons may look at a given situation and see or hear different things . . . ."

Although it is true that there are idiosyncrasies resulting from varying legal systems, all parties are responsible for equipping themselves with competent people who can resolve this issue; this is what the Chamber itself has done by surrounding itself with assistants and interns who have exceptionally in-depth knowledge of the Common Law system (e.g., we were consulting several weeks ago, as we had done for several months, with a former US prosecutor in a large American city . . .). It was the Prosecution's responsibility to address the issue it thought it observed independently, given the considerable means at its disposal for including within its team a competent francophone lawyer excelling in knowledge of the continental system.

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[53] The Praljak Defence brought 68 witnesses in order to evoke the "character of the Accused" and particularly the fact that Praljak "maintained high moral and ethical standards throughout his entire life, including, before, during and after the conflict" (Annexes 1-3 to Slobodan Praljak's Motion for Admission of Written Evidence in Lieu of *Viva Voce* Testimony Pursuant to Rule 92 *bis*).

[54] "The only thing to do was either to flee or to get immersed into this with full energy, working 18, 19 hours a day, courageously, and see what could be done. We were ashamed of what we were unable to do, but I don't think that I ever attended a meeting or a gathering where with any of the people I met I heard anything that would be against my moral values, and I think that my moral values are fully proper, and I followed them throughout my life". Excerpts from the Preliminary Statement of Slobodan Praljak, 27 April 2006, p. 990.

[55] In its Response of 29 April 2010 to the Valentin Ćorić's Request for the Admission of Documentary Evidence, the Prosecution was able to convey its objections concerning all of the exhibits proffered. For example, the Prosecution spoke thus to Exhibit 5D00269: "The Prosecution objects to this document on the basis that it bears insufficient indicia of authenticity. This is an anonymous, unsigned, undated document typed on unheaded paper with no identifying stamps other than one to show that it was found in the Croatian Archives".

The Motion offers no persuasive reason, within the meaning of Rule 127 of the Rules, for thinking that the Prosecution could conveniently declare its independence from the criterion imposed.[56]

The Prosecution has personal responsibility for the expeditious conduct of the trial. It must act so as to avoid needlessly prolonging hearings. To go down the road suggested by the Prosecution would be, in my point of view, to act contrary to the requirement for expeditious conduct of the trial. I observe in this respect that it is the Prosecution that has, in addition, seized the Chamber of a request for re-opening its case-in-chief in light of the "unexpected"(?) discovery of documents belonging to fugitive Mladić.

This request[57] has had the notable effect of slowing down the proceedings because the Prosecution will definitely not make its statement prior to the 9 July 2010, which will ultimately postpone the Chamber's ruling until after 24 July, taking into consideration the Defence's time-limits for a response.

The Prosecution cannot plead that it has somehow been prejudiced after spending over 200 hours in hearings where it has been permitted to present its arguments.

Annexed thereto, the Prosecution offers a table of 10 potential witnesses for the reply (*cf.* paragraph 44 (c) in the Prosecution's submissions). I must, however, mention the topics on which these persons will ostensibly testify, while recalling chiefly the jurisprudence of the Appeals Chamber, which the Prosecution is obliged to follow in this instance.

The Čelebići jurisprudence places 3 conditions on replies:

- the reply must touch upon an important issue;
- the reply must touch upon an issue raised by the Defence evidence; and
- the reply must touch upon an issue that the Prosecution or the Defence's team could not have reasonably foreseen.

[56] The criterion imposed by case-law is that of good cause, as we are reminded in a decision of the Appeals Chamber dated 9 January 2007 in the case of *Prosecutor v. Miroslav Bralo*: "The Appeals Chamber recalls that the concept of "good cause" applicable to amendments to a notice of appeal encompasses both good reason for including the new amended grounds of appeal sought and good reason showing why those grounds were not included (or were not correctly phrased) in the original notice of appeal. Where an appellant seeks a substantive amendment broadening the scope of the appeal, "good cause" might also, under some circumstances, be established. In such instances, each amendment is to be considered in light of the particular circumstances of the case. The Appeals Chamber is of the view that the same logic may be applied while examining applications to supplement an appellant's brief. At the same time, the jurisprudence of the Tribunal establishes that the "good cause" requirement must be interpreted restrictively at late stages in appeal proceedings when amendments would necessitate a substantial slowdown in the progress of the appeal – for instance, when they would require briefs already filed to be revised and resubmitted".

[57] Case No. IT-04-74, Appeals Judgement, *The Prosecutor v. Prlić et al.*, "Prosecution Motion to Re-Open Its Case-in-Chief (Mladić Materials)", 21 May 2010.

In what respect do the themes broached by these witnesses fall within the scope of this jurisprudence?

- Witness No 1 would appear to testify about the road running from the "Bijelo Bridge" to "Donkey Path". This issue, relating to the possibility that the inhabitants of East Mostar blocked the road has been covered at length and Ms West, the Prosecution's representative, placed specific emphasis on this issue.[58]

- Witness No 2, a member of the Bosnian War Presidency, would come to speak primarily to the operations of the Sarajevo government and the legality of the decisions taken by it, as well as concerning the fact that there had been a plan to create an HVO – BH Army joint command under the authority of Martin Špegelj, which was rejected by Tudjman.

These issues have been debated on multiple occasions and do not rise to the level of issues not reasonably foreseeable for the Prosecution at this stage of the proceedings.

- Two other witnesses (No 3 and No 6) would come to speak to the issue of the Old Bridge of Mostar. This is not a new subject inasmuch as the Prosecution knew from the outset, through the Praljak Defence's addition to its 65 *ter* List of his book "Kako Je Srušen Stari Most" (3D 00374), that there had been a debate over the destruction of the Old Bridge.

- Witness No 4 would come to supplement the comments of Witness Jeremy Bowen, specifically as they touch upon the video that was shot (P 06365). The Prosecution could have requested the admission of a 92 *bis* statement from this witness, which it did not do when the opportunity presented itself.

- Witness No 5 would come to speak about the logistical issue of MTSs. This theme has been covered in-depth – it is not a new and unforeseeable theme.

- Witness No 7 would come to speak about the meeting held in Hungary at Pécs on 5 October 1992 between the HZ-HB delegation, with Messrs Prlić, Stojić and Praljak and the Serb delegation. This event is part of the Mladić notebook. The Prlić Defence has responded concerning the entire meeting and its circumstances.[59] This is an item that falls under the request to reopen the case and not under a reply as such.

- Two witnesses (Nos 8 and 9) would come to speak of the talks in Karadjordjevo between Milošević and Tudjman. This theme was addressed in-depth during previous hearings. This is not an issue falling within the scope of the Čelebići jurisprudence.

[58] Case No. IT-04-74, Appeals Judgement, *The Prosecutor v. Prlić et al.*, see, for example, the hearing transcripts from 2 and 3 November 2009.
[59] Case No. IT-04-74, Appeals Judgement, *The Prosecutor v. Prlić et al.*, "Jadranko Prlić's Response to Prosecution Motion to Re-Open Its Case-in-Chief (Mladić Materials)", 4 June 2010, pp. 10-11.

- Witness No 10 would ostensibly contribute information on the topic relating to the Kostana hospital. This theme was also broached at length on many occasions and the Prosecution has had this statement in its possession since 2001; the witness died in 2003. The Prosecution could have brought a 92 *quarter* request for the statement during its stage for presentation, but it did not do so.

I considered it necessary to elaborate upon the ten witnesses in the Reply in order to weigh in precise detail whether they fell within the scope of the Reply as the Appeals Chamber has defined it. To me, the answer is clearly **no**.

I gave my consent to the request for certification to appeal because the Prosecution alleges in its submissions that its request satisfies the criteria of Rule 73 (B), as the issue does possibly concern "fairness" insofar as the Prosecution raises this issue in paragraph 42 of its submissions, but says only that the Prosecution represents the International Community and the multiple victims of the crimes committed in Herzegovina.

The issue could be addressed by the Appeals Chamber but this must also be interpreted in light of Rule 90 (F) of the Rules, which appears to be often overlooked by the parties, which says that it is for the Chamber **alone** to **monitor** the presentation of evidence so that evidence may be effective and so that any needless waste of time can be avoided.

After 51,761 pages of transcripts, 145 *viva voce* Prosecution witnesses, 64 *viva voce* Defence witnesses, 1,979 hours of hearings, and almost 10,000 documents admitted, is there really any need to extend the proceedings by reviewing the warp and woof of issues already raised? It is for the Appeals Chamber to say so, and for this reason, I fully support the request for Certification to Appeal.

/signed/

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Jean-Claude Antonetti
Presiding Judge

6 July 2010
At The Hague
The Netherlands

[Seal of the Tribunal]

Decision on the "Prosecution Motion for Reconsideration or Certification to Appeal Concerning *Ordonnance relative à la demande de l'Accusation de suspendre le délai de dépôt de sa demande de réplique*"

Separate Opinion of Judge Trechsel

Though I am in agreement with the Chamber's decision to deny the request for reconsideration, I differ somewhat as to rationale.

Permit me to recall that I annexed a separate opinion to the Order during the Motion to reject suspension of the time-limit for filing replies. In my view, the Prosecution should have at least brought, within the time allowed (e.g. before 25 May), a motion to suspend the time-limit on the basis of all known evidence, that is, evidence fully admitted as of that date. The request for reconsideration now before us in fact demonstrates that the Prosecution could have done this.

This request, it turns out, also touches upon the Janković Expert Witness Report, admitted by the Chamber in its decision of 25 May 2010. Following the rationale of my separate opinion, I am forced to conclude that one could not reasonably expect the Prosecution to react to a decision taken by the Chamber on the very last day of time allotted.

Now to the merits of this request. It would constitute an exercise in futility, prohibited by the principle of judicial self-restraint. Moreover, it does not seem opportune to issue an opinion now that concerns a question of law inasmuch as the Appeals Chamber will be required to issue a ruling that concerns solely the impugned decision.

/signed/

Judge Stefan Trechsel

6 July 2010
At The Hague
The Netherlands

[Seal of the Tribunal]

Opinion partiellement dissidente du Juge Árpád Prandler

1. Je souhaite tout d'abord rappeler que j'ai voté contre l'ordonnance rendue le 3 juin à la majorité des membres composant la présente Chambre. J'ai voté en ce sens car je suis convaincu que le droit de présenter une réplique et le droit de présenter une duplique en vertu de l'article 85 A) du Règlement de procédure et de preuve constituent, sous réserve des conditions bien définies auxquelles ils sont assujetties, des droits fondamentaux de l'Accusation et de la Défense respectivement, qui ne sauraient être écartés uniquement pour des raisons de procédure.

2. De plus, j'ai notamment souligné que la demande de l'Accusation portant sur la présentation de moyens en réplique indiquait son intention de produire des éléments de preuve supplémentaires en réfutation [voir p. D60016 à D6008, 25 mai 2010]. Cette intention avait déjà été exprimée dans la notification de l'Accusation concernant la réouverture de la présentation de ses moyens et la présentation de moyens en réplique (p. D59463 à D59460, 27 avril 2010) où elle déclarait que « *[l]'Accusation informe par la présente la Défense et la Chambre de première instance de son intention générale de demander à cette dernière l'autorisation de présenter, après la clôture de la présentation de l'ensemble des moyens à décharge, des moyens en réplique au titre de l'article 85 A) iii) du Règlement de procédure et de preuve* » [p. 1]. C'est pourquoi j'avais alors conclu dans mon opinion dissidente qu'« il aurait fallu enjoindre à l'Accusation de formuler ses intentions de manière précise et à une date raisonnable ».

3. Dans l'état actuel des choses, toutefois, j'ai voté en faveur de la certification de l'appel de l'Accusation à l'encontre de l'ordonnance attaquée. J'ai agi en ce sens même si la voie du réexamen me semblait préférable, afin de me conformer à la pratique habituelle et par égard pour mes collègues, et j'ai accepté de souscrire à la certification de l'appel de l'Accusation contre la « décision du 3 juin ».

4. Enfin, et surtout, j'aurais souhaité voir dans cette décision une présentation plus équilibrée des arguments militant pour et contre le réexamen ou la certification, et présentés par les équipes de la Défense et l'Accusation.

/*signé*/
Árpád Prandler

Le 6 juillet 2010
La Haye (Pays-Bas)

[Sceau du Tribunal]