



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: 27 October 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: 27 October 2010

THE PROSECUTOR

v.

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

PUBLIC

**DECISION ON ĆORIĆ DEFENCE REQUEST FOR CERTIFICATION TO
APPEAL THE DECISION ON REOPENING THE PROSECUTION'S CASE**

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 “Valentin Ćorić’s Request for Certification for Appeal Regarding the ‘Decision on the Prosecution’s Motion to Re-open its Case’”, filed publicly by Counsel for the Accused Valentin Ćorić (“Ćorić Defence”; “Accused Ćorić”) on 20 October 2010, in which the Ćorić Defence requests that the Chamber certify the appeal it intends to lodge regarding the “Decision on the Prosecution’s Motion to Reopen its Case”, rendered publicly by the Chamber on 6 October 2010 (“Decision of 6 October 2010”; “Request”),

NOTING the Decision of 6 October 2010 by way of which the Chamber notably partially granted the request for the admission of evidence in connection with reopening the Prosecution’s case filed by the Office of the Prosecutor (“Prosecution”) and admitted into evidence eight exhibits,¹

NOTING the “Decision on Request for Extension of Time for Certification to Appeal Two Decisions Rendered by the Chamber on 6 October 2010”, rendered publicly by the Chamber on 12 October 2010, and by way of which the Chamber notably authorised the parties to file a request for certification to appeal the Decision of 6 October 2010 by Wednesday, 20 October 2010, at the latest (“Decision of 12 October 2010”),²

CONSIDERING that in support of its Request, the Ćorić Defence submits firstly that the extracts from the Mladić Notebooks admitted into evidence by way of the Decision of 6 October 2010, just as, consequently, the other evidence admitted by this decision, do not concern the Accused Ćorić; that as a consequence the effect this decision has on the length of the proceedings violates the Accused Ćorić’s right to a fair and expeditious trial; that in this respect, in its reasoning that led to the Decision of 6 October 2010, the Trial Chamber should have considered the specific situation of the Accused Ćorić and should have made allowances for the impact the said decision would have on the said Accused by taking into account his right to be accorded the

¹ Decision of 6 October 2010, p. 28.

² Decision of 12 October 2010, p. 4.

same rights as if he were being tried separately in accordance with Rule 82 (A) of the Rules of Procedure and Evidence (“Rules”); that in the absence of such reasoning, the Chamber abused its discretionary power when it concluded that a further delay in the proceedings, as a result of the Decision of 6 October 2010, was compatible with the Accused Ćorić’s right to a fair and expeditious trial,³

CONSIDERING, furthermore, that the Ćorić Defence notes that the Accused Ćorić’s specific situation was taken even less into account when the Chamber rejected its Request for Joinder in “Bruno Stojić’s Response to Prosecution Motion to Admit Evidence in Reopening”;⁴ that the Chamber’s dismissal of its Request for Joinder was inappropriate insofar as it did not constitute a response for the purposes of Rule 126 *bis* of the Rules, but a notice;⁵ that the Chamber moreover did not attach proper weight to either the Stojić Response or to the “Dissenting Opinion of the Presiding Judge of the Chamber, Judge Jean-Claude Antonetti, concerning the Decision on the Prosecution’s Motion to Re-open its Case” (“Dissenting Opinion of Judge Antonetti”),⁶

CONSIDERING that the Ćorić Defence submits subsequently that it takes issue with the Chamber’s interpretation as to the authenticity and probative value of the exhibits admitted into evidence by the Decision of 6 October 2010⁷ as well as the Chamber’s assessment of the stage of the proceedings and the delay the trial will suffer as a result of the said decision,⁸

CONSIDERING in conclusion, that the Ćorić Defence submits that its Request satisfies the provisions of Rule 73 (B) of the Rules in that it touches upon an extremely important issue relating to the reopening of the Prosecution’s case after the Defence case has been presented, involving, according to the Ćorić Defence, an eight-to-twelve-month delay in the proceedings; that the resolution of the issue by the Appeals Chamber could enable the proceedings to advance materially and ensure to the Accused Ćorić a trial that is both fair and expeditious,⁹

³ Request, paras 3-5 and 7.

⁴ Request, para. 8; “Bruno Stojić’s Response to Prosecution Motion to Admit Evidence in Reopening”, filed publicly by Counsel for the Accused Stojić on 23 July 2010 (“Stojić Response”); “Joinder of Valentin Ćorić in ‘Bruno Stojić’s Response to Prosecution Motion to Admit Evidence in Reopening’” filed publicly by the Ćorić Defence on 26 July 2010 (“Request for Joinder”).

⁵ Request, para. 8.

⁶ Request, para. 6.

⁷ Request, para. 6.

⁸ Request, para. 6.

⁹ Request, para. 9.

CONSIDERING that the Chamber finds that it does not need to wait for any possible responses of the other parties before rendering this decision, given the advanced stage of the proceedings and since the request pertains to the specific situation of the Accused Ćorić with regard to the Decision of 6 October 2010,

CONSIDERING that Rule 73 (B) of the Rules sets forth that: “Decisions 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”. Certification to appeal is consequently a matter for the discretion of the Chamber which must, in any event, ascertain that the two cumulative conditions set out in Rule 73 (B) have been satisfied in this case,¹⁰

CONSIDERING that the Chamber notes that in its Request, the Ćorić Defence seems to start with the premise according to which the Chamber did not take into account the specific situation of the Accused Ćorić, notably when it dismissed its Request for Joinder and when it did not make sufficient allowance for the arguments set out in the Stojić Response, which the Ćorić Defence wished to join, and had consequently come to a decision that was incompatible with the right of the said Accused to a fair and expeditious trial,¹¹

CONSIDERING that in this respect the Chamber recalls that, in its Decision of 6 October 2010, it dismissed the Request for Joinder on the ground that it was not timely filed;¹² that even were it to subscribe to the Ćorić Defence’s arguments, *quod*

¹⁰ *The Prosecutor v. Pavle Strugar*, Case No. IT-01-42-T, “Decision on Defence Motion for Certification”, public, 17 June 2004, para. 2.

¹¹ Request, paras 3, 5, 6 and 8.

¹² Decision of 6 October 2010, para. 36.

non, the Chamber recalls that the Chamber is not seized of notices,¹³

CONSIDERING that the Chamber recalls that in any event, the Chamber did indeed take into consideration the arguments submitted in the Stojić Defence's Response in order to render the Decision of 6 October 2010¹⁴ and that, as a consequence, *de facto*, the admission of the Request for Joinder would not have changed the reasoning or the decision of the Chamber, notably with regard to the criteria for reopening and the discretionary power of the Chamber whether or not to admit new evidence by assessing the impact their admission would have on the right of those Accused to a fair trial,¹⁵

CONSIDERING subsequently, that contrary to what was submitted by the Ćorić Defence in its Request,¹⁶ the Chamber did not find in the Decision of 6 October 2010 that an eight-to-twelve-month delay in the proceedings caused by the admission of new evidence would be compatible with the rights of the Accused Ćorić, insofar as this delay does not result from the said Decision but from the Dissenting Opinion of Judge Antonetti;¹⁷ that this delay cannot, therefore, be considered as being brought about by the Chamber,¹⁸

CONSIDERING that contrary to the arguments of the Ćorić Defence, the Chamber has, within the scope of its discretionary powers and in the interest of justice, taken due consideration of the consequences the admission of further evidence against an accused might have on the fairness of the trial against his co-accused¹⁹ and endeavoured to limit as much as possible the prejudice to all the accused and the possible delay of the proceedings due to the admission of this evidence,²⁰

¹³ See in this regard, the oral decision on the notices filed by the parties, Hearing of 15 June 2010, Transcript of Hearing in French, p. 41355; the "Order on Prosecution Motion to Suspend Deadline to File its Request to Reply", public, 3 June 2010, p. 4; the "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*", public, 6 July 2010, p. 10.

¹⁴ Decision of 6 October 2010, paras 3, 16-19, 39, 41, 46, 52, 53, 55 and 60.

¹⁵ Decision of 6 October 2010, paras 38-44, 54 et seq.

¹⁶ Request, paras 2, 3, 7 and 9.

¹⁷ Request, para. 2 referring to the Dissenting Opinion of Judge Antonetti, p. 48 and Annex II.

¹⁸ On the validity of dissenting opinions, see the Decision of 12 October 2010, p. 4.

¹⁹ Decision of 6 October 2010, para. 33 and footnote No. 102; *The Prosecutor v. Zejnil Delalić et al.*, Case no. IT-96-21-A, public, 20 February 2001, paras 280 and 290; *The Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-AR73.5, "Decision on Vujadin Popović's Interlocutory Appeal Against the Decision on the Prosecution's Motion to Reopen its Case-in-Chief", public, 24 September 2008, para. 27; *The Prosecutor v. Ante Gotovina et al.*, Case No. IT-06-90-AR73.6, "Decision on Ivan Čermak and Mladen Markač Interlocutory Appeals Against Trial Chamber's Decision to Reopen the Prosecution Case", public, 1 July 2010, para. 31.

²⁰ Decision of 6 October 2010, para. 57.

CONSIDERING that the Chamber recalls that it is in order to take into account these two imperatives – prejudice as limited as possible and any possible delay in the proceedings as short as possible – that it adopted a strict approach regarding the admission of evidence within the scope of reopening the Prosecution’s case,²¹

CONSIDERING that the Chamber, therefore, took into consideration the interests of all the accused and ensured that no injustice was caused to them, including to the Accused Ćorić,

CONSIDERING, as a consequence, that the Chamber finds that the Ćorić Defence, when it erroneously claims that the Chamber did not make an allowance for the distinctive situation of the Accused Ćorić, did not, therefore, demonstrate in its Request that the Decision of 6 October 2010 was likely to effect the fairness and expeditiousness of the trial or its outcome, nor in what way the immediate resolution of this issue by the Appeals Chamber would materially advance the proceedings,

CONSIDERING, as a consequence, that the Chamber finds that the Request does not satisfy the provisions of Rule 73 (B) of the Rules,

²¹ Decision of 6 October 2010, para. 58.

FOR THE FOREGOING REASONS,

PURSUANT TO Rule 73 (B) of the Rules,

DISMISSES the Request.

The Presiding Judge attaches a concurring separate opinion to this decision.

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

/signed/

Jean-Claude Antonetti
Presiding Judge

Done this twenty-seventh day of October 2010
At The Hague
The Netherlands

[Seal of the Tribunal]

**Concurring separate opinion of the Presiding Judge Jean-Claude
Antonetti**

The Trial Chamber, **unanimously**, denied the Ćorić Defence request for certification to appeal the decision rendered by the Chamber on 6 October 2010. Taking into account the importance of the issue raised by the Ćorić Defence, I must, nevertheless, write a **concurring separate opinion** to explain my position.

In a previous opinion, I had the opportunity of stating that **contrary to the majority**, I considered that the Accused Ćorić's request for joinder could have been taken into account. Furthermore, I clearly remember the arguments of the Ćorić Defence according to which it should not suffer the consequences resulting from the Prosecution's request for reopening the case with regard to the Mladić Notebooks as the Accused Ćorić claims that these notebooks do not concern him.

If it is true that the exhibits admitted into evidence do not directly concern him, he is alleged to have been a member of a joint criminal enterprise which could logically raise the issue that the admission of this evidence does concern him. It does not seem to me in this regard that the Ćorić Defence's argument should be taken into consideration.

On the other hand, the Ćorić Defence raises an issue that has never been directly dealt with by a Trial Chamber or by the Appeals Chamber which is that of **taking into account the specific situation of an accused in a trial of multiple accused**. The Rules of Procedure and Evidence recognise the possibility that an accused might be tried in an individual trial whilst also being tried with multiple accused.

It is nevertheless clear that, had the Accused Ćorić been tried alone, he would already have been judged definitively as the Prosecution would not have had so many hours in which to present its case and the Defence case for the Accused Ćorić would also have been reduced. With this in mind, a reasonable trier of fact must also take into account **the potential consequences of a decision on each of the accused** when dealing with trials with multiple accused and, above all, if a single accused is not directly involved by new evidence in the event of reopening the case. Indeed, it would be paradoxical if an accused were to experience this sort of inconvenience when he is not, in the main, concerned by the request for reopening the case.

The procedure of reopening the case is **long and complex** and can take **several months**, as we have seen, and that in this regard, any prejudice to each of the accused must be avoided.

To summarise, a reasonable trier of fact must always keep in mind the consequences of a decision affecting other accused with regard to one accused. Not taking into account this essential factor creates a **serious injustice**. I must note at the end of the day that the certification of the appeal as drawn up by the Ćorić Defence would have a consequence on the length of the trial in respect notably of the Accused Ćorić and that, therefore, bringing the appeal before the consideration of the Appeals Chamber would be likely to cause him more serious prejudice. This is the main reason why I **denied** his request considering also, as did my other colleagues, that the provisions under Rule 73 (B) of the Rules have not been satisfied.

/signed/

Jean-Claude Antonetti
Presiding Judge

Done this twenty-seventh day of October 2010
At The Hague
The Netherlands

[Seal of the Tribunal]