



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: 23 January 2008
Original: ENGLISH
French

IN TRIAL CHAMBER III

Before: Judge Jean-Claude Antonetti
Judge Árpád Prandler
Judge Stefan Trechsel
Reserve Judge Antoine Kesia-Mbe Mindua

Registrar: Mr Hans Holthuis

Decision of: 23 January 2008

THE PROSECUTOR

v.

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

Public

DECISION ON ADMISSION OF EVIDENCE PURSUANT TO RULE 92 *BIS*
(A) OF THE RULES (BRIX-ANDERSEN)

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

I. INTRODUCTION AND PROCEDURAL BACKGROUND

1. 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"), is seized of the "Prosecution Motion for Admission of Evidence Pursuant to Rule 92 *bis* (A) and (B) (Brix-Andersen)", filed on 7 December 2007 ("Motion") by the Office of the Prosecutor ("Prosecution"), in which the Prosecution asks the Chamber to admit the transcript of evidence of Mr Brix-Andersen who appeared in the *Kordić and Čerkez*¹ case on 30 November and 1 December 1999 ("Testimony"), as well as some related documents, to which four Annexes are attached.

2. On 19 December 2007, Counsel for the six Accused in this case ("Defence") filed confidentially the "*Joint Defence Response to Prosecution Motion for Admission of Evidence Pursuant to Rule 92 bis (A) and (B) (Brix-Andersen)*", ("Response"), in which the Defence asks, principally, that the Motion be denied, and alternatively, that certain passages of the transcript of evidence be redacted. It responds to each of the requests for the admission of documents separately.

3. On 22 December 2007, the Prosecution filed confidentially the "*Prosecution Request for Leave to Reply to Joint Defence Response to Prosecution Motion for Admission of Evidence Pursuant to Rule 92 bis (A) and (B) (Brix-Andersen)*" ("Request for Leave to Reply"), in which the Prosecution asks the Chamber for leave to file a reply to the Response.

4. The same day, the Prosecution filed confidentially the "*Prosecution Reply to Joint Defence Response to Prosecution Motion for Admission of Evidence Pursuant to Rule 92 bis (A) and (B) (Brix-Andersen)*", ("Reply") in which it replies to the objections raised by the Defence in the Response.

II. ARGUMENTS OF THE PARTIES

5. In the Motion, the Prosecution asks the Chamber, in accordance with Rule 92 *bis* (A) of the Rules of Procedure and Evidence ("Rules"), to admit the Testimony and 56 exhibits, and asks the Chamber to deny the Defence the right to cross-examine the witness². In support of the Motion, the Prosecution argues that the witness gave a statement under oath before the Trial Chamber of the Tribunal in charge of the *Kordić and Čerkez* case and was subjected to cross-examination by Counsel who had similar interests as those of the Defence Counsel in this case³. It argues that the *Kordić and Čerkez* Chamber determined that the witness was credible and his statement probative, and cited his evidence regarding specific issues in the trial.⁴

6. The Prosecution further maintains that the Testimony is relevant, *inter alia*, to the overall policy and objectives of Herceg-Bosna and the HVO and to the events leading up to the Croatian-Muslim conflict or occurring during this conflict⁵;

¹ *The Prosecutor v. Dario Kordić and Mario Čerkez*, Case No. IT-95-14/2-T.

² Motion, para. 17.

³ Motion, para. 4.

⁴ Motion, para. 7.

⁵ Motion, para. 4.

that it does not go to the acts and conduct of the Accused⁶; that it is corroborated by or relates to similar statements by witnesses who were already heard, cross-examined by the Defence and questioned by the Judges, and to exhibits already admitted by the Chamber,⁷ and finally, that the Testimony relates to the political, military or historical context⁸. Furthermore, the Prosecution alleges that should the Defence consider that the Testimony goes to the acts and conduct of the Accused, it is up to the Defence to indicate the pages concerned and to show how these pages go to the acts and conduct of the Accused within the meaning of the Tribunal's jurisprudence⁹. Finally, the Prosecution maintains that the witness was subjected to thorough cross-examination concerning the issues which are identical to those in this case by a party sharing the interests of the Accused to challenge the Testimony¹⁰. In this respect, it notes that the transcript of the examination-in-chief by the Prosecution covers 79 pages, whereas that of the cross-examination by Defence Counsel 84¹¹.

7. In its Response, the Defence is opposed to the admission of the Testimony on the grounds that it is not useful and that the documents relevant to this case which are attached to it could be examined and presented through Witness BF who is to testify in court¹². Moreover, it maintains that the Testimony and related documents should not be admitted under Rule 92 *bis* insofar as they go to the acts and conduct of the Accused¹³. It then argues that the questions which interested the Defence in the *Kordić and Čerkez* case are not the same as those which Counsel in this case must ask, insofar as the indictment in *Kordić and Čerkez* case did not contain any allegation of participation in a joint criminal enterprise and covered in particular the area of central Bosnia¹⁴. Alternatively, the Defence asks that the passages referring to the acts and conduct of the Accused be removed¹⁵. As regards the documents requested for admission, it notes that they are connected to the Testimony, that their admission is governed by Rule 92 *bis* of the Rules and thus they may not be admitted when they go to the acts and conduct of the Accused¹⁶.

8. In support of the Request for Leave to Reply, the Prosecution notes the need to respond to the Defence allegations concerning the interpretation of the Testimony¹⁷.

III. DISCUSSION

9. The Chamber recalls that the replies are not accepted by the Chamber, unless the circumstances so require, and that any party wishing to present a reply must seek the leave of the Chamber, specifying why the circumstances are sufficiently

⁶ Motion, paras. 10-12.

⁷ Motion, para. 8.

⁸ Motion, para. 8.

⁹ Motion, para. 12.

¹⁰ Motion, para. 15.

¹¹ Motion, para. 15.

¹² Motion, paras. 2 and 4-10.

¹³ Response, paras. 2 and 11-14.

¹⁴ Response, para. 16.

¹⁵ Response, para. 19.

¹⁶ Response, para. 14.

¹⁷ Request for Leave to Reply.

compelling for the Chamber to grant leave¹⁸. The Chamber does not consider that the arguments raised in the Request for Reply meet these conditions and thus decides to deny it.

10. Rule 92 *bis* (A) of the Rules allows a Trial Chamber to admit, in lieu of oral testimony, totally or in part, written statements or transcripts of evidence when they can demonstrate a point other than the acts and conduct of the Accused as alleged in the indictment.

11. With regard to the applicable law, the Chamber refers to its previous decisions, specifically the "Decision on the Prosecution Motion for Admission of Transcript of Evidence Pursuant to Rule 92 *bis* of the Rules", rendered by the Chamber on 28 September 2006; the "Decision on Prosecution Motion for Admission of Eleven Pieces of Evidence Pursuant to Rule 92 *bis* of the Rules", rendered confidentially on 14 February 2007; the "Decision on Prosecution Motion for Admission of Evidence Pursuant to Rule 92 *bis* of the Rules (Ljubuški Municipality)", rendered confidentially on 30 August 2007; and finally the "Decision on Prosecution Motion for Admission of Evidence Pursuant to Rule 92 *bis* (A) and (B) of the Rules (Stolac and Čapljina Municipalities)", filed confidentially by the Chamber on 5 November 2007.

12. Next, the Chamber notes that, contrary to what the Defence alleges, the admission of documents other than written statements or transcripts of evidence is governed by Rule 89 (C) of the Rules. In this way, the Chamber may receive any relevant evidence which it considers to have probative value. The fact that a document mentions the name of an Accused, or even the acts and conduct of an Accused, is not an argument against its admission under Rule 89 (C) of the Rules. On the other hand, the Chamber recalls that a Trial Chamber cannot base a sentence solely or to a substantive degree on evidence which has not been subjected to contradictory examination¹⁹.

13. The Chamber will now consider the merits of the written submissions of the Parties. First it notes that the Testimony is relevant insofar as it specifically mentions the implementation of the Vance-Owen plan by the Herceg-Bosna and HVO authorities and the ties which existed between the Republic of Croatia and the Croats in the Republic of Bosnia and Herzegovina. As the Prosecution notes, the Testimony is cumulative in the sense that other witnesses testified on similar facts, such as Christopher Beese, Peter Hauenstein, Herbert Okun, Bo Pelnäs and Klaus Nissen.

14. The Chamber finds that certain passages of the Testimony refer to the acts and conduct of the Accused and must therefore be redacted. These are: page 10825, line 18, to page 10826, line 5; page 10802, lines 11 to 21; page 10810, line 23, to page

¹⁸ Revised Version of the Decision Adopting Guidelines on Conduct of Trial Proceedings, 28 April 2006, para. 9 p).

¹⁹ *The Prosecutor v. Martić*, Case No. IT-95-11-AR73.2, *Decision on Appeal Against Trial Chamber's Decision on the Evidence of Witness Milan Babić*, 14 September 2006, para. 20; *The Prosecutor v. Prlić et al.*, IT-04-74-AR73.6, *Decision on Appeal Against Decision Admitting Transcript of Jadranko Prlić's Questioning Into Evidence*, 23 November 2007, para. 53.

10811, line 5; page 10819, lines 23 and 24, the words "*Brigadier Petković for the HVO*".

15. The Chamber finds, furthermore, that the Prosecution has redacted certain sections of the Testimony. The Chamber notes that the Prosecution should have indicated contentious passages by proposing that they be removed, instead of redacting them on its own initiative. In this way, the Chamber could have assessed whether the passages in question were really likely to go to the acts and conduct of the Accused. This concerns, *inter alia*, page 10841, lines 17 to 22, which the Defence alleges relate to the acts and conduct of the Accused Praljak²⁰, and page 10737, line 13, to page 10738, line 6, which the Defence notes refer to the acts and conduct of the Accused Petković²¹. Insofar as the admission of these passages is not contentious, the Chamber accepts the redactions.

16. Thus, the Testimony is admitted after redacting the above passages.

17. Secondly, in the Motion, the Prosecution requests the admission of 56 exhibits relating to the Testimony²². The Chamber notes first of all that the Prosecution omitted to indicate the pages in the transcripts of evidence corresponding to the discussion of the exhibits in court. As a result, the Chamber was unable to pinpoint some of them and check whether they were indeed discussed with a witness. The Chamber considers that the exhibits which it was unable to find in the transcripts of evidence were never presented in court and decides to deny them.

18. The Chamber then notes that the Prosecution requests the admission of documents whose admission was denied by the Chamber in the "Order Concerning Status of Exhibits Marked for Identification", rendered on 17 January 2008 ("Order of 17 January 2008"). The Chamber recalls that these documents come from the ECMM which had been marked for identification on 13 July 2006 by the "Decision on Admission of Evidence ("Decision of 13 July 2006"). In the Decision of 13 July 2006, the Chamber asked the Prosecution to submit a written motion, again requesting the admission of ECMM exhibits in keeping with the guidelines attached to that decision. Insofar as the Prosecution never filed such a motion, the Chamber denied the request for admission in the Order of 17 January 2008. It does not consider that in this case there are any special circumstances justifying reconsideration of the Order of 17 January 2008.

19. The Chamber then notes that some of the exhibits were presented to Witness BF when he appeared from 7 to 10 January 2008. Since the Chamber prefers to examine the documents requested for admission in the light of the testimony of a witness who appears before it, the Chamber asks the Parties to refer to the "Order on Requests to Admit Evidence Relative to Witness BF", rendered on 23 January 2008.

20. Finally, the Chamber notes that the Prosecution showed lack of due diligence by filing the Motion. Many of the documents requested for admission through the Motion (Annexes 2 and 3) were only partly downloaded to the e-court system. The Chamber asks the Prosecution to correct its mistakes, as indicated in the disposition of this Decision.

²⁰ Response, para. 13.

²¹ Response, para. 13.

²² Motion, para. 2.

21. Having examined the objections of the Defence to the admission of the exhibits²³, the Chamber decides to admit the exhibits which were discussed in court and present a certain degree of relevance, reliability and probative value in the Annex attached to the Decision.

V. DISPOSITION

FOR THE FOREGOING REASONS,

PURSUANT TO Rules 89 (C) and (D), 92 *bis* (A) and 126 *bis* of the Rules,

DENIES the Request for Leave to Reply,

PARTLY GRANTS the Motion,

ADMITS the transcript of evidence of Mr Brix-Andersen who appeared in the *Kordić and Čerkez* case on 30 November and 1 December 1999 (P 10356), in the version from which the following pages are redacted: page 10825, line 18, to page 10826, line 5; page 10802, lines 11 to 21; page 10810, line 23, to page 10811, line 5; page 10819, lines 23 et 24: the words "*Brigadier Petković for the HVO*"; page 10841, lines 17 to 22; page 10737, line 13, to page 10738, line 6,

ADMITS the exhibits as indicated in the Annex attached to this Decision,

DENIES the Motion in all other requests, and

REQUESTS that the Registrar download to the e-court system Exhibit P 10356 in its redacted version, as indicated above,

REQUESTS that the Registrar download to the e-court system Exhibits P 01926, P 02090, P 02627 and P 02787.

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

/signed/

Jean-Claude Antonetti
Presiding Judge

Done this twenty-third day of January 2008
At The Hague
The Netherlands

[Seal of the Tribunal]

²³ Response, paras. 19-41.

ANNEX

Exhibit No.	Admitted/Not admitted
P 10356	Admitted in its redacted version
P 01045	Not admitted by the Order of 17 January 2008
P 01232	Not admitted by the Order of 17 January 2008
P 01799	Not admitted by the Order of 17 January 2008
P 01813	Not admitted by the Order of 17 January 2008
P 01822	Not admitted, the exhibit was not presented to the witness in court
P 01835	Not admitted by the Order of 17 January 2008
P 01840	Not admitted by the Order of 17 January 2008
P 01856	Not admitted, the exhibit was not presented to the witness in court
P 01857	Not admitted by the Order of 17 January 2008
P 01861	Not admitted, the exhibit was not presented to the witness in court
P 01878	Not admitted by the Order of 17 January 2008
P 01912	Not admitted by the Order of 17 January 2008
P 01926	Admitted
P 01950	Admitted through Witness BF on 23 January 2008
P 02023	Not admitted by the Order of 17 January 2008
P 02041	Not admitted by the Order of 17 January 2008
P 02090	Admitted
P 02103	Not admitted by the Order of 17 January 2008
P 02136	Not admitted by the Order of 17 January 2008
P 02237	Not admitted by the Order of 17 January 2008
P 02303	Not admitted by the Order of 17 January 2008

P 02312	Not admitted, the exhibit was not presented to the witness in court
P 02327	Admitted through Witness BF on 23 January 2008
P 02370	Not admitted by the Order of 17 January 2008
P 02407	Not admitted (document Z936-3 filed with the Motion does not correspond to document P 02407)
P 02427	Not admitted by the Order of 17 January 2008
P 02430	Not admitted by the Order of 17 January 2008
P 02431	Not admitted (the document has 73 pages and the Prosecution did not specify the pages which it requested for admission)
P 02442	Not admitted (a document entitled "project", which contains neither a heading, a stamp nor a signature; neither the document nor the witness indicate the source or the author of the document; indicia of authenticity are missing)
P 02462	Admitted
P 02495	Not admitted by the Order of 17 January 2008
P 02504	Not admitted by the Order of 17 January 2008
P 02513	Not admitted, the exhibit was not presented to the witness in court
P 02556	Not admitted by the Order of 17 January 2008
P 02603	Admitted
P 02626	Admitted
P 02627	Admitted
P 02681	Not admitted by the Order of 17 January 2008
P 02696	Not admitted, the exhibit was not presented to the witness in court
P 02716	Not admitted by the Order of 17 January 2008
P 02738	Admitted
P 02742	Not admitted by the Order of 17 January 2008

P 02743	Not admitted by the Order of 17 January 2008
P 02787	Admitted
P 02798	Not admitted by the Order of 17 January 2008
P 02803	Admitted
P 02845	Admitted
P 02892	Not admitted (illegible copy)
P 02908	Not admitted by the Order of 17 January 2008
P 02989	Not admitted by the Order of 17 January 2008
P 02990	Not admitted by the Order of 17 January 2008
P 03022	Not admitted by the Order of 17 January 2008
P 04419	Not admitted, the exhibit was not presented to the witness in court
P 04945	Not admitted by the Order of 17 January 2008
P 08977	Not admitted (a list of documents shown to the witness by the Prosecution; insofar as only some of these documents were presented and discussed in court, the Chamber denies the request for admission)