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: 17 May 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: **17 May 2010**

THE PROSECUTOR

v.

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

PUBLIC

DECISION ON JADRANKO PRLIĆ MOTION AGAINST THE APPLICATION OF JOINT CRIMINAL ENTERPRISE AND IN FAVOUR OF THE APPLICATION OF CO-PERPETRATION

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 Motion Against the Application of JCE and in Favour of the Application of Co-Perpetration", brought publicly on 20 April 2010 ("Motion"), by Counsel for the Accused Jadranko Prlić ("Prlić Defence"), joined by Counsel for the Accused Slobodan Praljak ("Praljak Defence"),[1]

NOTING the "Prosecution Response to 'Jadranko Prlić's Motion Against the Application of JCE and in Favour of the Application of Co-Perpetration'", filed publicly by the Office of the Prosecutor ("Prosecution") on 4 May 2010 ("Response"),

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

NOTING "Petković's Submission to the Trial Chamber to Order the Prosecution to Strike from the Amended Indictment Certain Parts Alleging Co-Perpetration, Indirect Co-Perpetration, Indirect Perpetration and Aiding and Abetting of JCE", filed publicly by Counsel for the Accused Milivoj Petković, on 12 February 2007 ("Petković Defence"),

NOTING the "Joint Defence Joinder to Petković's Submission to the Trial Chamber to Order the Prosecution to Strike from the Amended Indictment Certain Parts Alleging Co-Perpetration, Indirect Co-Perpetration, Indirect Perpetration and Aiding and Abetting of JCE", filed publicly by the various Counsel for the Accused Jadranko Prlić, Bruno Stojić, Slobodan Praljak, Valentin Ćorić and Berislav Pušić, on 19 February 2007 ("Joinder of 19 February 2007"),

NOTING the "Decision on Defence Motion to Strike from the Amended Indictment Certain Parts Alleging Co-Perpetration, Indirect Co-Perpetration, Indirect Perpetration and Aiding and Abetting of Joint Criminal Enterprise", rendered publicly on 25 April 2007,

[1] "Slobodan Praljak's Joinder to Jadranko Prlić's Motion Against the Application of JCE and in Favour of the Application of Co-Perpetration", public document, 26 April 2010.

NOTING the oral Decision handed down pursuant to Rule 98 *bis* of the Rules of Procedure and Evidence ("Rules") on 20 February 2008,[2]

NOTING the "Decision on Petković's Appeal on Jurisdiction", rendered publicly by the Appeals Chamber on 23 April 2008 ("Decision of 23 April 2008"), in which the Appeals Chamber recalled the jurisprudence of the Tribunal stating that "[c]o-perpetratorship [was dismissed] as a jurisdictionally valid mode of liability"[3] and held that any explicit or implicit reference to such a mode of liability in the Indictment brought against the six Accused in this case should have been struck out,[4]

NOTING the "Order Regarding the Appeals Chamber Decision on Jurisdiction" issued publicly on 22 May 2008, in which the Chamber directed the Prosecution to familiarize itself with the Decision of 23 April 2008 where the Appeals Chamber invited the Prosecution to amend the Indictment as needed, which was done on 11 June 2008,

CONSIDERING that, in the Motion, the Prlić Defence moves that the Chamber depart from the settled jurisprudence of the Tribunal by not applying to this case the concept of joint criminal enterprise as a jurisdictionally valid mode of liability and by instead applying co-perpetration as articulated by the International Criminal Court,[5]

CONSIDERING that the Prlić Defence asserts that the Motion is admissible at this stage of the proceedings insofar as the Prlić Defence argues it is pleading persuasive grounds specifically derived from the jurisprudence of the International Criminal Court,[6] according to which co-perpetration reputedly enjoys broader recognition under customary international law than does the theory of joint criminal enterprise,[7] and that in the interests of justice the Chamber ought, where doubt obtains, to apply the law that is least harsh,[8]

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[2] Transcript of Hearing in French ("T(F)"), pp. 27201-27238 ("98 *bis* Decision").
[3] Decision of 23 April 2008, para. 21, citing, in particular, *The Prosecutor v. Stakić*, Case No. IT-97-A, Judgement, 22 March 2006 ("Stakić Judgement").
[4] Decision of 23 April 2008, paras 21 and 22.
[5] Motion, pp. 1 and 10.
[6] Motion, paras 1 and 2, 11-14.
[7] Motion, p. 1.
[8] Motion, p. 1; paras 19 and 20.

CONSIDERING that, in support of the Response, the Prosecution attacks the Motion and submits in pertinent part that the Motion is inadmissible in the sense that this is a preliminary motion, as laid out in Rule 72 (A)(i) of the Rules, that is not timely brought and that the Prlić Defence did not show good cause for granting the Motion, irrespective of its lateness,[9]

CONSIDERING, moreover, that the Prosecution disputes the arguments advanced by the Prlić Defence concerning co-perpetration and recalls the jurisprudence established by the Tribunal, specifically in the case of *Prlić et al.*, whereby the notion of co-perpetration was set aside in favour of the concept of joint criminal enterprise as a jurisdictionally valid mode of liability in proceedings before the Tribunal,[10]

CONSIDERING that the Prosecution likewise recalls that the Defence, acting in unison through the Joinder of 19 February 2007, advocated a position contrary to this Motion,[11]

CONSIDERING that the Chamber is of the opinion that the Motion introduces a challenge to jurisdiction, as contemplated under Rule 72 (A) of the Rules, and that this issue has already been raised by the Prlić Defence itself through its Joinder of 19 February 2007, and was also mentioned by the Petković Defence during the Rule 98 *bis* proceedings and finally adjudicated by the Appeals Chamber in its Decision of 23 April 2008,

CONSIDERING that the Chamber notes that, to justify the Motion's admissibility and basis in law, the Prlić Defence essentially relies upon two decisions rendered by Pre-Trial Chamber I of the International Criminal Court, respectively, in the *Lubanga* case on 29 January 2007[12] and the *Katanga* case on 30 September 2008,[13] as well as upon Article 25 (3) of the Rome Statute of the International Criminal Court,[14]

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[9] Response, paras 1-3.
[10] Response, paras 1, 4-5, 8-11, citing the governing jurisprudence. *See* in particular *The Prosecutor v. Duško Tadić*, Case No. IT-94-1-A, Judgement, 15 July 1999, paras 188, 220, 226-228; *The Prosecutor v. Milomir Stakić*, Case No. IT-97-A, Judgement, 22 March 2006, para. 62; *The Prosecutor v. Milan Martić*, Case No. IT-95-11-A, Judgement, 8 October 2008, para. 80 or *see also The Prosecutor v. Momčilo Krajišnik*, Case No. IT-00-39-A, Judgement, 17 March 2009, paras 650-672.
[11] Response, para. 6.
[12] *The Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, "Decision on the confirmation of charges", public version, 29 January 2007 ("*Lubanga* Decision").

CONSIDERING that the Chamber points out that the Prlić Defence carefully declines reference in the Motion to the change of mind from its initial position submitted in the Joinder of 19 February 2007; that the Chamber observes that the said Joinder was filed one month after the *Lubanga* Decision of the International Criminal Court and that therefore the Prlić Defence, particular to the jurisprudence of the International Criminal Court, quite certainly must have already known at the time of filing the Joinder of 19 February 2007; that notwithstanding, in this notice, the Prlić Defence requested that co-perpetration not be applied to this case,[15]

CONSIDERING indeed that in the Joinder of 19 February 2007, the Defence teams, including the Prlić Defence, submitted in pertinent part that "the Defence joins Petković's Submission that co-perpetration, indirect co-perpetration and indirect perpetration are not recognized modes of liability in ICTY jurisprudence and therefore must be struck from the Amended Indictment ....",[16]

CONSIDERING that the Chamber points out that the Appeals Chamber has affirmed this position in its Decision of 23 April 2008[17] resulting in an amendment to the Indictment in which any reference to co-perpetration in particular was deleted, and that has been in effect since 11 June 2008,

CONSIDERING that the Chamber may allow a party to change its opinion during the proceedings if done on valid grounds; provided, nevertheless, that such party explains its change of mind and does not attempt to maintain silence over contradictions in its requests; that, in this case, the Chamber observes that the Prlić Defence did not set forth the rationale for the change of mind between the position it argued in the Joinder of 19 February 2007 and the Motion,

CONSIDERING that, moreover, the Chamber points out that on 29 January 2007, the Prlić Defence had the opportunity to acquaint itself with the existing jurisprudence of the International Criminal Court, upon which it for the most part bases the Motion; that, in the Chamber's view, the Prlić Defence could, especially in light of the

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[13] *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Case No. ICC-01/04-01/07, "Decision on the confirmation of charges", public redacted version, 30 September 2008, ("*Katanga* Decision").
[14] Motion, p. 1.
[15] Joinder of 19 February 2007, paras 1, 2 and 15.
[16] Joinder of 19 February 2007, para. 1.

procedure in Rule 98 *bis* of the Rules, have raised this before the presentation of defence evidence that started on 20 February 2008, which was more than one year after the *Lubanga* Decision was rendered;[18] that despite this, the Prlić Defence did not raise this topic at that time, nor did it appeal the 98 *bis* Decision, nor still did it file a motion of any sort when the Amended Indictment entered into force on 11 June 2008; that, in addition, the Prlić Defence waited more than thirteen months after the presentation of its defence evidence concluded on 15 January 2009[19] to submit this Motion without explaining to the Chamber why it waited more than two years after the *Lubanga* Decision and more than eighteen months after the *Katanga* Decision to submit this Motion,

CONSIDERING that the Chamber finds that the Prlić Defence did not advance persuasive grounds that would enable the Motion to be granted at this stage of the proceedings and therefore declares the Motion inadmissible,

[17] Decision of 23 April 2008, para. 21.
[18] *See* in this connection the "Decision on Defence Motion to Strike From the Amended Indictment Certain Parts Alleging Co-Perpetration, Indirect Co-Perpetration, Indirect Perpetration and Aiding and Abetting of Joint Criminal Enterprise", public document, 25 March 2007; 98 *bis* Decision, T(F) pp. 27201-27238; Decision of 23 April 2008, paras 21 and 22.
[19] Hearing of 15 January 2009, T(F) p. 35537.

FOR THE FOREGOING REASONS,

PURSUANT TO Rules 54, 72 and 127 (ii) of the Rules of Procedure and Evidence,

DECLARES the Motion inadmissible **and,**

DENIES the Motion.

The Presiding Judge is including an individual opinion with this decision.

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

/signed/

Jean-Claude Antonetti
Presiding Judge

Done this seventeenth day of May 2010
At The Hague
The Netherlands

[Seal of the Tribunal]

Concurring Individual Opinion of the Presiding Judge:
Jean-Claude Antonetti

I am led to issue a concurring individual opinion with regard to the inadmissibility of the Motion by Jadranko Prlić requesting that we disregard the theory of joint criminal enterprise and apply the concept of co-perpetration but for reasons that differ from those cited in the reasons underlying the decision.

From my perspective, the legal arguments of the Prlić Defence involving the inapplicability of the theory of joint criminal enterprise parsed from the Tadić case and its replacement by the concept of co-perpetration as derived from the jurisprudence of the International Criminal Court are premature, as this may not be considered prior to the time that closing submissions are filed.

At the proper time, the Prlić Defence will need to raise this issue, but not at this stage, when the Chamber has not yet set the time-limit for filing closing submissions.

As regards the challenges to jurisdiction, upon reading Rule 72, one notes it provides that such motions must be brought "not later than thirty days after disclosure by the Prosecutor to the defence of all material and statements referred to in Rule 66 (A)(i)".

The spirit and the letter of Rule 72 do not authorise parties to bring preliminary motions mid-way through the proceedings.

For this reason, I conclude that the Motion is inadmissible, and withhold further judgment until my review of the closing submissions enables me to uphold or invalidate the argument of the Prlić Defence in respect of joint criminal enterprise or co-perpetration.