



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: 24 August 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: 24 August 2010

THE PROSECUTOR

v.

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

PUBLIC

**DECISION ON PRLIĆ DEFENSE REQUEST FOR CERTIFICATION TO
APPEAL THE DECISION OF 26 JULY 2010**

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 Request for Certification to Appeal Under Rule 73(B) Against the *Décision portant sur la Demande de la Défense Prlić de (1) clarification sur le lien entre le Juge Prandler et Viktor Andreev et (2) relative à la tenue d’une audience publique, 26 juillet 2010*”, filed publicly by Counsel for the Accused Jadranko Prlić (“Prlić Defence”; “Accused Prlić”) on 2 August 2010 (“Request”), whereby the Prlić Defence respectfully asks the Chamber to certify the appeal it intends to lodge against the “Decision on Jadranko Prlić’s Request for 1) Clarification of Judge Prandler’s Association With Victor Andreev and 2) Public Hearing”, rendered publicly on 26 July 2010 (“Decision of 26 July 2010”),¹

NOTING the Decision of 26 July 2010 whereby the Chamber denied the motion of the Prlić Defence seeking clarification concerning the association between Judge Prandler and V. Andreev during his employment at UN Headquarters in New York and concerning whether to convene a public hearing on this,

NOTING the “Corrigendum to the Decision on Jadranko Prlić’s Request for 1) Clarification of Judge Prandler’s Association with Victor Andreev and 2) Public Hearing”, issued publicly on 30 July 2010,

NOTING the “Prosecution Response to Jadranko Prlić’s Request for Certification to Appeal Under Rule 73 (B) against the *Décision portant sur la Demande de la Défense Prlić de (1) clarification sur le lien entre le Juge Prandler et Viktor Andreev et (2) relative à la tenue d’une audience publique, 26 juillet 2010*”, filed confidentially along with four Confidential Annexes by the Office of the Prosecutor (“Prosecution”) on 16 August 2010 (“Response”), whereby the Prosecution respectfully asks the Chamber to deny the Request on the basis that the criteria of Rule 73 (B) of the Rules of Procedure and Evidence (“Rules”) have not been satisfied,²

¹ Request, pp. 1 and 9.

² Response, paras 2 and 28-31.

NOTING “Jadranko Prlić’s Request for Leave to Reply to Prosecution Response to Jadranko Prlić’s Request for Clarification to Appeal the *Décision portant sur la Demande de la Défense Prlić de (1) clarification sur le lien entre le Juge Prandler et Viktor Andreev et (2) relative à la tenue d’une audience publique, 26 juillet 2010*”, brought publicly by the Prlić Defence on 17 August 2010 (“Request for Leave to Reply”),

NOTING the “Decision on Prlić Defence Request to File a Reply to the Prosecution Response to Its Request for Certification to Appeal the Decision of 26 July 2010”, rendered publicly on 18 August 2010, whereby the Chamber denied the Prlić Defence’s Request for Leave to Reply,

NOTING “Jadranko Prlić’s Motion for Clarification of the *Décision relative à la Demande de la Défense Prlić portant dépôt d’une réplique à la réponse de l’Accusation à la Demande de la Défense Prlić de certification d’appel de la Décision du 26 juillet 2010*”, filed publicly along with a confidential Annex by the Prlić Defence on 23 August 2010 (“Motion for Clarification”),

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

CONSIDERING that, in support of its Request, the Prlić Defence asserts that the Chamber’s refusal, in its Decision of 26 July 2010, to provide clarification concerning the nature of the association between Judge Prandler and V. Andreev and to hold a public hearing concerning this violates the Accused Prlić’s right to a fair trial and deprives him of data essential to the remainder of the trial and its outcome;³ that the Prlić Defence argues more specifically that the Decision of 26 July 2010 significantly affects the fair and expeditious conduct of the trial or its outcome inasmuch as, without the additional information, it is impossible for the Prlić Defence to pinpoint the nature of the association between Judge Prandler and V. Andreev;⁴ that it was Judge Prandler’s responsibility to indicate whether, in the course of his career, he had ever known witnesses or persons who had generated UN-published documents;⁵ that in light of his association with V. Andreev, Judge Prandler would be inclined to assign undue weight to documents produced by his close associate or friend, and that,

³ Request, p. 1.

⁴ Request, para. 8.b.

lacking information concerning the precise nature of the association between Judge Prandler and V. Andreev, the Accused Prlić stands deprived of information that speaks to the independence or impartiality of Judge Prandler;⁶ that the scope and the significance of the “appearance of bias” on the part of Judge Prandler only became evident after the discovery of the Diary of Ratko Mladić (“Diary”), which would explain the date on which the Prlić Defence seized the Chamber of this issue;⁷ that it was in any event incumbent upon the Prlić Defence to act with utmost diligence and that the Chamber’s refusal to disclose information on this point deprives the Prlić Defence of the opportunity to assess whether it needs to file a motion for disqualification of Judge Prandler under Rule 15 (B) of the Rules and to discharge its ethical and professional obligations towards the Accused Prlić for purposes of his defence;⁸ that it submits, lastly, that the immediate resolution of the issue by the Appeals Chamber would materially advance the proceedings and would provide a ruling on the issue of Judge Prandler’s “appearance of bias” and thereby avoid any prejudice to the parties,⁹

CONSIDERING that, in its Response, the Prosecution first raises the issue that Viktor Andreev is not a witness in the case presently before us and underscores that he authored only four documents admitted into evidence;¹⁰ that it then recalls that, to-date, not one excerpt of the Diary has been admitted into evidence and asserts in this regard that the Prlić Defence is therefore basing its Request on documents that have not been tendered into evidence and does so to obtain information that would permit it to file a motion to disqualify Judge Prandler pursuant to Rule 15 (B) of the Rules;¹¹ that allegations of bias on the part of Judge Prandler are devoid of any basis and that they were not raised by any counsel for Defence at the hearing of 8 March 2010;¹² that the four reports prepared by Viktor Andreev that were admitted into evidence are moreover corroborated by other exhibits that were also admitted into evidence and that their contents are thus reliable;¹³ that the criteria of Rule 73 (B) of the Rules have therefore not been met insofar as the fact that Judge Prandler may have known the

⁵ Request, para. 8.b.

⁶ Request, para. 8.b.

⁷ Request, para. 8.c.

⁸ Request, para. 8.e.

⁹ Request, para. 9.

¹⁰ Response, paras 8, 27 and 28.

¹¹ Response, paras 9 and 10.

¹² Response, para. 11.

author of four exhibits admitted into evidence is unlikely to give rise to an “appearance of bias” likely to significantly affect the fair and expeditious conduct of the trial or its outcome and that the Prlić Defence obtaining information concerning the specific nature of the association between Judge Prandler and V. Andreev would not materially advance the proceedings,¹⁴

CONSIDERING that the Chamber points out that in its Request, the Prlić Defence does nothing more than reiterate and expound upon the arguments set forth in “Jadranko Prlić’s Request for Clarification and Full Disclosure of Judge Prandler’s Association with UN Civil Affairs Advisor in BiH, Viktor Andreev & Request for a Public Hearing”, filed publicly on 20 July 2010 and to which the Chamber replied in its Decision of 26 July 2010; that the Chamber is persuaded of the reasonable basis in law of its Decision of 26 July 2010 and that it finds that the Prlić Defence did not establish that the sum and substance of the Request constituted an issue likely to significantly affect the fair and expeditious conduct of the trial or its outcome and that the immediate resolution of the issue by the Appeals Chamber would materially advance the proceedings,

¹³ Response, paras 12-28.

¹⁴ Response, para. 30.

FOR THE FOREGOING REASONS,

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

DENIES the Motion for Clarification, AND

DENIES the Request, for the reasons set forth in this Decision,

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

The Presiding Judge of the Chamber, Judge Jean-Claude Antonetti, attaches a concurring opinion to this Decision.

/signed/

Jean-Claude Antonetti
Presiding Judge

Done this twenty-fourth day of August 2010
At The Hague
The Netherlands

[Seal of the Tribunal]

Separate Concurring Opinion of the Chamber's Presiding Judge, Jean-Claude Antonetti

I concur with the analysis herein undergirding the Trial Chamber's refusal to certify the request for leave to appeal that was brought by Mr Jadranko Prlić's Defence.

Bearing in mind the "sensitivity" of this subject, I should like to introduce the following factors to the analysis:

There are no domestic or international courts anywhere where judges can be summoned to appear to explain their prior professional activities or their professional relationships with certain persons who may happen to be referenced in documentation.

The Statute and the Rules have instituted a specific mechanism for preventing any "taint" from being cast upon the trial due to the presence of judicial bias.

In the first place, the judge must, pursuant to the provisions of Article 13 of the Statute, be "**of high moral character, impartiality and integrity**".

It therefore follows that a judge is, by definition, **presumed to be impartial**.

Nevertheless, in certain instances, it can occur that a judge discovers that he or she cannot hear a case because the judge had some tie that would affect his or her impartiality. It thus falls to **the judge alone** to weigh, in due course, whether he or she can or should continue to participate in the trial.

Speaking on my own behalf, I have found myself in this situation in the Ante Gotovina case, having formerly adjudicated the party in question in my own country. On that occasion, I seized the President of the Tribunal in order to avoid being seated with the Chamber that would decide the case. Similarly, in this very case, during the Pre-Trial Conference, I raised *sua sponte* the fact that I sat as one of the judges during the confirmation of the Indictment.

On the other hand, outside of these two conditions, which do resolve the problem (impartiality is presumed and no association exists), if a party does indeed believe that a judge must be removed from a case, **the only possible way forward** is that envisaged in Rule 15 (B)(i) of the Rules: the party in question must file a request with the Presiding Judge of the Chamber in order for the judge to be removed from the case.

The Presiding Judge of the Chamber, having conferred with the judge in question by asking him or her, as needed, for any helpful clarification concerning any possible association, will provide a report regarding the situation to the Presiding Judge of the Tribunal, giving **his opinion** as needed.

The procedure is thus quite specific and that is the procedure a party is obliged to follow.

/signed/

Jean-Claude Antonetti
Presiding Judge

24 August 2010
At The Hague
The Netherlands

[Seal of the Tribunal]