



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: 12 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: 12 October 2010

THE PROSECUTOR

v.

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

PUBLIC

**DECISION ON JADRANKO PRLIĆ'S MOTIONS ON EVIDENCE
ASSOCIATED WITH VIKTOR ANDREEV AND GENERAL BO PELLNAS**

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 to Disallow Evidence Generated by and/or Associated Directly or Indirectly with UN Civil Affairs Advisor in BiH Viktor Andreev or in the Alternative Find that Said Evidence Shall Be Presumed Unreliable Bearing no Probative Value & Request for a Public Hearing” filed publicly by the Counsel for the Accused Jadranko Prlić (“Prlić Defence”) on 9 August 2010, with two public Annexes and one confidential Annex¹ attached (“Motion of 9 August 2010”), as well as “Jadranko Prlić’s Motion to Disallow Evidence Generated by and/or Associated Directly or Indirectly With General Bo Pellnas or in the Alternative to Find that Said Evidence Shall Be Presumed Unreliable Bearing No Probative Value & Request For A Public Hearing” filed publicly by the Prlić Defence on 12 August 2010, with three public Annexes attached (“Motion of 12 August 2010”, together “Motions”), in which the Prlić Defence seeks 1) that the evidence generated by Viktor Andreev and General Bo Pellnas, and/or associated directly or indirectly with them, be excluded or, in the alternative, that this evidence be presumed unreliable and bearing no probative value² and 2) a public hearing be held in order to elaborate on facts and arguments relevant to this matter,³

NOTING “Slobodan Praljak’s Notice of Joinder in Jadranko Prlić’s Motion to Disallow Evidence Generated by and/or Associated Directly or Indirectly with UN Civil Affairs Advisor in BiH Viktor Andreev or in the Alternative Find that Said Evidence Shall Be Presumed Unreliable Bearing No Probative Value and Request for a Public Hearing” and “Slobodan Praljak’s Notice of Joinder in Jadranko Prlić’s Motion to Disallow Evidence Generated by and/or Associated Directly or Indirectly with General Bo Pellnas or in the Alternative Find that Said Evidence Shall Be Presumed Unreliable Bearing No Probative Value and Request for a Public Hearing” filed publicly by the Counsel for the Accused Slobodan Praljak (“Praljak Defence”)

¹ Confidential Annex II and Public Annex III were filed under separate cover on the same day by the Prlić Defence.

² Motion of 9 August 2010, p. 1, paras 5 to 11; Motion of 12 August 2010, p. 1, paras 5 to 14.

³ Motion of 9 August 2010, p. 2, paras 12 and 13; Motion of 12 August 2010, p. 2, paras 15 and 16.

on 10 and 13 August 2010 respectively (together “Notices”), in which the Praljak Defence informs the Chamber of its intention to join in the Motions and indicates that it will resume in the Notices, *mutatis mutandis*, all arguments presented in support of these Motions,⁴

NOTING the “Prosecution Response to Prlić Motion to Disallow or Discredit Viktor Andreev Evidence” filed confidentially by the Office of the Prosecutor (“Prosecution”) on 20 August 2010 (“Response to the Motion of 9 August 2010”), and the “Prosecution Response to Prlić Motion to Disallow or Discredit Bo Pellnas Evidence” filed publicly by the Prosecution on 20 August 2010 (“Response to the Motion of 12 August 2010”; together “Responses”), in which the Prosecution objects to the Motions,

NOTING the “Decision on the Prosecution’s Motion to Reopen Its Case” rendered publicly by the Chamber on 6 October 2010, in which the Chamber grants in part, by a majority, the Prosecution’s Motion to admit into evidence a number of excerpts from the Ratko Mladić Diary (“Mladić Notebooks”)⁵ and does not admit into evidence, amongst others, Exhibit P 11387 (“Decision on Reopening”),⁶

CONSIDERING that in support of the Motion of 9 August 2010, the Prlić Defence argues that according to some of the excerpts from the Mladić Notebooks, Viktor Andreev covertly collaborated with one of the parties of the conflict, the Bosnian Serbs,⁷ and consequently, 1) his reports to his superiors and colleagues that were used by the United Nations Protection Force (“UNPROFOR”) and which were admitted into evidence should be deemed unreliable and of questionable probative value,⁸ and 2) the witnesses associated with Viktor Andreev or those who relied on reports or information provided by him should be called into question,⁹

⁴ Notices, para. 3. It should be noted that the references are the same in both Notices.

⁵ See in this respect, the “Prosecution Motion to Admit Evidence in Reopening” filed publicly by the Prosecution with public Annexes 1 and 3 to 5 and confidential Annex 2 on 9 July 2010, in which the Prosecution asks the Chamber for leave to reopen its case and to admit into evidence 18 exhibits – including 15 excerpts from the Mladić Notebooks and three documents likely to support the authenticity and the reliability of the said Diary, which the Prosecution had during the presentation of its case (“Prosecution Motion to Admit Evidence”).

⁶ Decision on Reopening, p. 29.

⁷ Motion of 9 August 2010, p. 1, para. 7.

⁸ Motion of 9 August 2010, p. 1, paras 5 to 7 and 9.

⁹ Motion of 9 August 2010, p. 1.

CONSIDERING that the Prlić Defence submits that all the evidence should therefore be rejected by the Chamber pursuant to Rules 89 (B), (C) and (D), and 95 of the Rules of Procedure and Evidence (“Rules”),¹⁰ or in the alternative, should be considered by the Chamber as unreliable and without probative value,¹¹

CONSIDERING, moreover, that in support of its Motion of 12 August 2010, the Prlić Defence argues that according to some excerpts from the Mladić Notebooks, General Bo Pellnas, who had UNPROFOR secret information, provided advice to Ratko Mladić and other Serb military leaders,¹² and consequently, 1) the accuracy and reliability of General Bo Pellnas’s information should be called into question;¹³ 2) the reports he sent to his superior and colleagues that were used by UNPROFOR and which were admitted into evidence were unreliable and of questionable probative value,¹⁴ and 3) the witnesses associated with General Bo Pellnas or who relied on reports or information produced by him should be called into question,¹⁵

CONSIDERING that the Prlić Defence submits that all evidence should therefore be rejected by the Chamber pursuant to Rules 89 (B), (C) and (D) and 95 of the Rules,¹⁶ or in the alternative, be considered by the Chamber as unreliable and without probative value,¹⁷

CONSIDERING that in the Responses, the Prosecution submits that 1) there is no procedure before the Tribunal through which the Chamber can disallow simply on motion the evidence of a witness on the basis of one party calling into question the weight given to it or its credibility, but that it should, at the end of the trial, assess the probative value of this evidence and the weight given to it;¹⁸ 2) the excerpts from the Mladić Notebooks which the Prlić Defence uses in support have not been admitted as evidence and have not been tendered in a motion pursuant to Rule 89 (C) of the Rules;¹⁹ 3) that the Motions are primarily based on arguments put forward in the

¹⁰ Motion of 9 August 2010, p. 1, paras 5 to 9.

¹¹ Motion of 9 August 2010, p. 1, paras 9 to 11.

¹² Motion of 12 August 2010, p. 1, paras 5 to 8.

¹³ Motion of 12 August 2010, p. 1.

¹⁴ Motion of 12 August 2010, p. 1, paras 10 to 11.

¹⁵ Motion of 12 August 2010, p. 1.

¹⁶ Motion of 12 August 2010, p. 1, para. 12.

¹⁷ Motion of 12 August 2010, p. 1, paras 13 and 14.

¹⁸ Responses, paras 2(a), 3 to 5. It should be noted that the references are the same in both Responses.

¹⁹ Responses, paras 2(b), 6 to 9. It should be noted that the references are the same in both Responses.

Annex, in violation of the “Practice Direction on the Length of Briefs and Motions”²⁰ (“Direction”);²¹ 4) that the arguments put forward by the Prlić Defence were the result of wrong interpretation, speculation and innuendo which, for the majority, are not supported by any admitted evidence,²² and 5) that the reports written by Viktor Andreev and admitted into evidence, as well as the evidence generated by General Bo Pellnas, is reliable and corroborated by other admitted evidence,²³

CONSIDERING that, first of all, the Chamber considers, by a majority, that the two public Annexes I attached to the Motions, as well as the confidential Annex II attached to the Motion of 9 August 2010 (together “Annexes”) contain arguments presented by the Prlić Defence in support of its Motions and that, therefore, these Annexes go against the Direction which stipulates that “[a]n appendix or book of authorities will not contain legal or factual arguments, but rather references, source materials, items from the record, exhibits, and other relevant, non-argumentative material”;²⁴ that consequently, the Chamber, by a majority, will not take into consideration the three Annexes for the purposes of the present Decision,

CONSIDERING that the Chamber notes that in the Motions, the Prlić Defence mainly refers in general to the “Mladić Notebooks” and sometimes mentions some excerpts²⁵ to support that Viktor Andreev and General Bo Pellnas covertly collaborated with the Bosnian Serbs in order to give them an advantage in the field and for purposes of circumventing the negotiating process in which the UN and the European Community were engaged,²⁶ and that the reporting by Viktor Andreev and

²⁰ “Practice Direction on the Length of Briefs and Motions”, Case No. IT/184, Rev. 2, 16 September 2005.

²¹ Responses, paras 2(c) and 10. It should be noted that the references are the same in both Responses.

²² Response to the Motion of 9 August 2010, paras 2(d), 11; Response to the Motion of 12 August 2010, paras 2(d), 11 to 20.

²³ Response to the Motion of 9 August 2010, paras 2(e), 12 to 25; Response to the Motion of 12 August 2010, paras 2(c), 21.

²⁴ Direction, item 6.

²⁵ In this respect, *see* the Motion of 9 August 2010, para. 7; the Chamber notes that the Prlić Defence refers to several excerpts from the Mladić Notebooks in the part of the Motion of 9 August 2010 entitled “Background” (in this respect, *see* the Motion of 9 August 2010, footnotes 8 to 14). *See* also the Motion of 12 August 2010, para. 5; the Chamber notes that in the case of the Motion of 12 August 2010, the Prlić Defence refers more precisely to several excerpts from the Mladić Notebooks and notably to Exhibit P 11387 (in this respect, *see* the Motion of 12 August 2010, footnotes 5 to 7 and 13 to 16).

²⁶ Motions, para. 7. It should be noted that the references are the same in both Motions.

General Bo Pellnas to their superiors and their colleagues, as well as the reports that they generated, were therefore “highly suspect and unreliable”,²⁷

CONSIDERING that the Chamber notes that on this basis, the Prlić Defence seeks that, first of all, the evidence generated by Viktor Andreev and General Bo Pellnas and/or evidence directly or indirectly associated with them be “rejected”,²⁸ and in the alternative, that it be considered unreliable and without probative value,²⁹

CONSIDERING that with regard to the first part of the Motions, namely the exclusion of evidence, the Chamber finds that the Prlić Defence does not list the documents that it seeks to be “rejected” and therefore formulates a general and vague motion,

CONSIDERING that the Chamber, nevertheless, understands that the Motions relate to requests to re-examine the decisions to admit documents rendered by the Chamber,

CONSIDERING that, in this respect, the Chamber can only note the incomplete nature of these Motions; that supposing that the Motions do relate to requests to re-examine the decisions to admit documents already admitted into evidence, the Chamber recalls that, although it has the intrinsic power to re-examine its own decisions and grant a request for re-examination, the requesting party must nevertheless demonstrate to the Chamber that the reasoning in the contested decision contains a clear error or special circumstances, which could be either new facts or arguments,³⁰ justifying its re-examination in order to avoid an injustice,³¹

CONSIDERING that in this case, the Chamber notes that the Motions do not refer to any decision to admit or to any exhibit already admitted for which the Prlić Defence

²⁷ Motion of 9 August 2010, para. 7; Motion of 12 August 2010, para. 10.

²⁸ Motions, p. 1. It should be noted that the references are the same in both Motions.

²⁹ Motion of 9 August 2010, paras 10 and 11; Motion of 12 August 2010, paras 13 and 14.

³⁰ *The Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, “Decision on Defence’s Request for Reconsideration”, 16 July 2004, pp. 3 and 4, citing *The Prosecution v. Laurent Semanza*, Case No. ICTR-97-20-T, Trial Chamber III, “Decision on Defence Motion to Reconsider Decision Denying Leave to Call Rejoinder Witnesses”, 9 May 2002, para. 8.

³¹ *The Prosecution v. Stanislav Galić*, Case No. IT-98-29-A, “Decision on Defence’s Request for Reconsideration”, 16 July 2004, pp. 3 and 4, citing, notably, *The Prosecution v. Zdravko Mucić et al.*, Case No. IT-96-21A*bis*, “Judgement on Sentence Appeal”, 8 April 2003, para. 49; *The Prosecutor v. Popović et al.*, Case No. IT-05-88-T, “Decision on Defence Motion for Certification to Appeal Decision Admitting Written Evidence Pursuant to Rule 92 bis”, 19 October 2006, p. 4; *The Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-AR73(C), “Decision on Motions for Reconsideration”, para. 6.

specifically requested a re-examination; that the Prlić Defence itself notes that it is “virtually impossible to fully identify and isolate the evidence contaminated by” the actions of Viktor Andreev and Bo Pellnas;³² that the Chamber concludes that the Prlić Defence consequently most probably considers that it does not need to list the evidence already admitted or the decisions to admit for which it seeks re-examination,

CONSIDERING, moreover, that the simple act of referring in general to the Mladić Notebooks or only citing some of the said notebooks without establishing the link with what was sought for admission by the Prosecution in the Prosecution Motion to Admit Evidence – with the exception of Exhibit P 11387, which was rejected in the Decision on Reopening – cannot constitute a new fact likely to justify a re-examination,

CONSIDERING that the Chamber could not in any way rule on a general request to re-examine its decisions to admit evidence without any reference or precision that would allow it to assess the merit of these Motions,

CONSIDERING with regard to the alternative part of the Motions, namely to consider the evidence generated by Viktor Andreev and General Bo Pellnas and/or associated directly or indirectly with them as unreliable and without probative value, the Chamber recalls that at this stage it is not for the Chamber to make a final assessment of the relevance, reliability and probative value of evidence; that this assessment will not be made until the final deliberations with regard to all the evidence; it is only at that point that the Chamber will decide on the weight and final probative value to be attributed to the evidence,

CONSIDERING, consequently, that the Chamber deems that for the aforementioned reasons, it should not grant the Motions,

CONSIDERING that the Chamber holds, consequently, that it should not rule on the Motions with respect to the request made by the Prlić Defence to hold a public audience,

³² Motion of 9 August 2010, para. 9; Motion of 12 August 2010, para. 11.

FOR THE FOREGOING REASONS,

PURSUANT TO Rules 54 and 89 of the Rules,

DECIDES, by a majority, not to take into consideration the Annexes, and

DENIES the Motions.

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

Presiding Judge Jean-Claude Antonetti attaches a partially dissenting opinion to the present Decision.

/signed/

Jean-Claude Antonetti
Presiding Judge

Done this twelfth day of October 2010
At The Hague
The Netherlands

[Seal of the Tribunal]

Partially Dissenting Opinion of Presiding Judge Jean-Claude Antonetti

The Trial Chamber **unanimously** denied the Prlić Defence Motions on the evidence concerning **Viktor Andreev** and **Bob Pellnas**.

I fully subscribe to the arguments set out in the present Decision.

On the other hand, the Chamber first of all deemed that it should not take into account the three Annexes attached to the Motions.

The **majority** accepted the arguments from the Practical Direction which stipulate that “[a]n appendix or book of authorities will not contain legal or factual arguments, but rather references, source materials, items from the record, exhibits, and other relevant, non-argumentative material (...)”

These arguments of the majority raise two problems for me:

The first is whether a direction, which is by definition of an administrative nature, can have an impact on the rights envisaged by the Statute in Article 21 and on the precise interpretation of the fact that the Annexes, according to the Direction, should not contain arguments, even though it is possible to refer to items from the record, exhibits and other relevant material.

Undoubtedly, the references in the notebooks to Viktor Andreev’s written reports indicate that these exhibits are relevant within the meaning of the Direction. In addition, this is also true for the evidence because some of it containing Viktor Andreev’s name has already been admitted.

It is very difficult to make a distinction between an argument that concerns the merit and recalling exhibits already admitted into evidence.

In conclusion, I think that it is possible to render the Decision as it is, **without mentioning the first “Considering”** on page 5 of the Decision.

/signed/

Jean-Claude Antonetti
Presiding Judge

Done this twelfth day of October 2010
At The Hague
The Netherlands

[Seal of the Tribunal]