



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: 1 November 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: 1 November 2010

THE PROSECUTOR

v.

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

PUBLIC

**DECISION ON PRLIĆ DEFENCE REQUEST FOR CERTIFICATION TO
APPEAL THE DECISION ON THE REOPENING OF THE PROSECUTION'S
CASE OF 6 OCTOBER 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 the Decision on the Prosecution’s Motion to Re-open its Case” filed publicly with a confidential Annex on 20 October 2010 (“Request”; “Confidential Annex”), by Counsel for the Accused Jadranko Prlić (“Prlić Defence”; “Accused Prlić”), in which the Prlić Defence requests that the Chamber certify the appeal it intends to lodge in respect of the “Decision on the Prosecution’s Motion to Re-open its Case”, rendered publicly by the Chamber on 6 October 2010 (“Decision of 6 October 2010”),¹

NOTING “Slobodan Praljak’s Joinder to Jadranko Prlić’s Request for Certification to Appeal the Decision on the Prosecution’s Motion to Re-open its Case” filed publicly by Counsel for the Accused Slobodan Praljak (“Praljak Defence”) on 20 October 2010 (“Joinder”), in which the Praljak Defence informs the Chamber that it joins the Request,²

NOTING the Decision of 6 October 2010, by way of which the Chamber partially grants the motion of the Office of the Prosecutor (“Prosecution”) to reopen its case with the admission of eight exhibits, four of which are from Ratko Mladić’s notebooks (“Mladić Notebooks”)³ and decided that any potential requests for reopening filed by the Defence teams cannot in any way constitute general requests based on entries from the Mladić Notebooks, but must be limited, if they are based on the Mladić Notebooks, to refuting the entries admitted by way of the Decision of 6 October 2010,⁴

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

¹ Request, p. 1.

² Joinder, p. 1.

³ Decision of 6 October 2010, paras 62 and 63 and p. 28. The Chamber notes that an error has slipped into the “Decision on Bruno Stojić Motion for Certification to Appeal the Decision on the Re-opening of the Prosecution Case and Clarifying the Decision of 6 October 2010”, public, 27 October 2010, p. 2, which mentions six instead of four exhibits coming from the Mladić Notebooks.

the Chamber on 12 October 2010, 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 20 October 2010, at the latest (“Decision of 12 October 2010”),⁵

NOTING the “Decision on Bruno Stojić Motion for Certification to Appeal the Decision on the Re-opening of the Prosecution Case and Clarifying the Decision of 6 October 2010”, rendered publicly by the Chamber on 27 October 2010 (“Decision of 27 October 2010”),

CONSIDERING that by way of the Request, the Prlić Defence asks that the Chamber certify the appeal of the Decision of 6 October 2010 pursuant to Rule 73 (B) of the Rules of Procedure and Evidence (“Rules”),⁶

CONSIDERING that in support of its Request, the Prlić Defence submits that the Decision of 6 October 2010, which limits the scope of any potential requests from the Defence teams for reopening their case solely to refuting the entries from the Mladić Notebooks tendered by the Prosecution, significantly affects the fair and expeditious conduct of the proceedings or its outcome with regard to the Accused Prlić,⁷

CONSIDERING that the Prlić Defence advances that the Chamber’s refusal in its Decision of 6 October 2010 to allow it to file a general request for reopening its case violates the principle of equality of arms;⁸ that by way of this refusal the Chamber solely allows the Prosecution – and not the Defence teams – to tender into evidence entries from the Mladić Notebooks;⁹ that it therefore prevents the Prlić Defence from tendering evidence deemed important and relevant for its case;¹⁰ that it equally violated the principle of equality of arms when it rejected the confidential Annex attached to “Jadranko Prlić’s Response to Prosecution Motion to Admit Evidence in Reopening”, filed publicly on 23 July 2010 (“Annex to Prlić Response”),¹¹

⁴ Decision of 6 October 2010, para. 64 and p. 29.

⁵ Decision of 12 October 2010, p. 4.

⁶ Request, pp. 1 and 9; para. 15.

⁷ Request, p. 1 and paras 15-23.

⁸ Request, p. 1 and para. 20.

⁹ Request, p. 1 and para. 16.

¹⁰ Request, p. 1 and para. 16.

¹¹ Request, paras 21 and 22.

CONSIDERING that the Prlić Defence submits, in particular, that the Chamber erred in finding that the Defence teams had not shown due diligence, required for the admissibility of a potential general request for reopening their case on the basis of the Mladić Notebooks; that it notes, firstly, that a double standard is being used by the Chamber in its assessment of the criteria of “diligence” according to whether it is being applied to the Prosecution or to the Defence teams;¹² that it notes, secondly, that the Prlić Defence took initiatives to enquire of the Chamber about the status of the proceedings and the type of requests that should be presented;¹³ that, moreover, considering the delay the filing of a formal request for reopening would cause, the Prlić Defence recalls that it deliberately made any potential request for reopening its case dependant on the Chamber’s decision to grant the Prosecution’s Motion for reopening¹⁴ and that, as a consequence, it considers that this fact should have been taken into account when the Chamber made its assessment of the criteria of “diligence”,¹⁵

CONSIDERING that the Prlić Defence considers, lastly, that the immediate resolution by the Appeals Chamber of the issue on the refusal to authorise the Prlić Defence to file a general request for reopening its case would materially advance the proceedings;¹⁶ that it puts forward, in particular, that such a refusal deprives the Judges of the possibility to consider the evidence necessary for an objective assessment of the Mladić Notebooks;¹⁷ that it argues, moreover, that if this issue is not resolved immediately by the Appeals Chamber, it will constitute a ground for appeal of the Judgement,¹⁸

CONSIDERING that, owing to the advanced stage of the proceedings, the Chamber does not find it necessary to wait for any potential responses from the Prosecution or from the other Defence teams in order to give a ruling on the Request,

CONSIDERING that pursuant to Rule 73 (B) of the Rules of Procedure and Evidence (“Rules”): “Decisions on all motions are without interlocutory appeal save

¹² Request, paras 17 and 18.

¹³ Request, para. 19 and Confidential Annex.

¹⁴ “Prosecution Motion to Admit Evidence in Reopening”, filed publicly on 9 July 2010 (“Prosecution Motion for Reopening”).

¹⁵ Request, para. 20.

¹⁶ Request, p. 1 and para. 23.

¹⁷ Request, para. 23.

¹⁸ Request, para. 23.

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”,

CONSIDERING, as a consequence, that certification to appeal is 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) of the Rules have been satisfied in this case,¹⁹

CONSIDERING that the Chamber recalls that by way of the Decision of 6 October 2010, it notably found that any potential motion for reopening the case from the Defence teams going to the admission of entries from the Mladić Notebooks must be limited solely to refuting the new evidence admitted by way of the Decision of 6 October 2010,²⁰

CONSIDERING that the Chamber recalls that it reached this conclusion when it noted that following the disclosure of the Mladić Notebooks on 11 June 2010, the Defence teams merely expressed their intention to request the reopening of their case through notices, based on the Mladić Notebooks, should the Chamber decide to grant the Prosecution’s Motion for reopening;²¹ that having failed to present a formal request for reopening based on the Mladić Notebooks, as the Prosecution did, and with regard to case-law criteria in the matter of reopening, such as “diligence”, the Chamber found that the Defence teams had themselves *de facto* restricted their options for requesting the reopening of their cases based on the Mladić Notebooks solely to the possibility of refuting the new evidence admitted as the Prosecution had requested,²²

CONSIDERING that the Prlić Defence takes issue with the Chamber’s findings according to which the Defence teams have not satisfied the criterion of “due diligence” to be able to request the admission of entries from the Mladić Notebooks within the scope of a general request for reopening their cases; that in fact, according

¹⁹ *The Prosecutor v. Pavle Strugar*, Case No. IT-01-42-T, “Decision on Defence Motion for Certification”, public, 17 June 2004, para. 2.

²⁰ Decision of 6 October 2010, para. 64 and p. 29; *see also* the Decision of 27 October 2010, p. 5.

²¹ Decision of 6 October 2010, para. 64; Decision of 27 October 2010, p. 5.

²² Decision of 6 October 2010, para. 64; Decision of 27 October 2010, p. 5.

to the Prlić Defence, it had duly informed the Chamber of its intention to file such a motion by way of its Notice of 14 July 2010,²³ on condition that the Prosecution's case were to be reopened, as well as through further correspondence with the Chamber,²⁴

CONSIDERING that the Chamber recalls again that it is only seized of an issue when a party files a formal request;²⁵ that this has been reiterated on several occasions and notably in the Decisions of 3 June and 6 July 2010²⁶ as well as in the Decisions of 6 and 27 October 2010,²⁷

CONSIDERING, as a consequence, that the presentation of the Prlić Defence's Notice of 14 July 2010 could not be considered a request for reopening its case able to satisfy case-law criteria for reopening,²⁸

CONSIDERING that the Chamber recalls in this respect that the Prlić Defence indicated that it would take the decision on whether to reopen its case once it was in possession of all the Mladić material;²⁹ that the Chamber notes, consequently, that since the months of June and July 2010 it was ready, should the need arise, to "draw up a motion for the reopening of its case on time, based on the discovery of the Mladić notebooks"³⁰ and that it refrained from doing so,

CONSIDERING, furthermore, that the Chamber cannot accept the Prlić Defence argument according to which it demonstrated due diligence by suggesting to the Chamber, by means of a letter sent to the Chamber on 2 July 2010,³¹ that it organise a status hearing with the aim of discussing the status and future development of the proceedings; that the Chamber recalls that there was no mention in the said letter of

²³ "Jadranko Prlić's Notice of his Intent to Request Reopening of his Case should the Trial Chamber Grant the Prosecution Motion to Admit Evidence in Reopening", filed publicly on 14 July 2010 ("Notice of 14 July 2010").

²⁴ Request, paras 8, 18-20, and Confidential Annex.

²⁵ Oral decision on notices filed by the parties, 15 June 2009, T(F), p. 41355.

²⁶ "Order on Prosecution Motion to Suspend Deadline to File its Requests to Reply", public, 3 June 2010, p. 5; "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*", p. 10.

²⁷ Decision of 6 October 2010, para. 64, footnote page 145; Decision of 27 October 2010, p. 6.

²⁸ Decision of 6 October 2010, para. 64; Decision of 27 October 2010, p. 6.

²⁹ Response of 4 June 2010, paras 15, 18, pp. 6 and 7; see also the Notice of 14 July 2010, para. 10.

³⁰ See Decision of 27 October 2010, p. 6.

³¹ Letter from Mr Karnavas addressed to Trial Chamber III, dated 2 July 2010, relating to holding a status hearing in the Prlić Case ("Letter of 2 July 2010").

the Defence teams reopening their cases;³² that even had this issue been marginally touched upon in the various exchanges that followed on from the Letter of 2 July 2010 between the Chamber and the Prlić Defence,³³ that would not attest to the “necessary diligence” of the Prlić Defence,

CONSIDERING, moreover, that the Chamber is not satisfied with the argument put forward by the Prlić Defence according to which it conditioned its potential request for reopening on whether the Chamber decided to grant or deny the Motion to Reopen,³⁴

CONSIDERING that the Chamber finds that it has not committed an error by noting the lack of diligence on the part of the Prlić Defence³⁵ since the latter could have drawn up a request for the re-opening of its case on time, based on the discovery of the Mladić Notebooks and following case-law criteria for the re-opening of a case, if that had been its intention, without conditioning its request on whether or not entries from the said Notebooks were admitted on behalf of the Prosecution;³⁶ that, furthermore, the Rules of Procedure in force before the Tribunal do not allow a Chamber to be seized of requests for re-opening that are drawn up on condition that a later event occurs,³⁷

CONSIDERING that the Chamber can only refute the allegation of the Prlić Defence according to which the Decision of 6 October 2010 violates the principle of equality of arms and places the Prosecution at a clear advantage over the Prlić Defence³⁸ as it was incumbent upon the Prlić Defence, if that had been its intention, to file a general motion for the reopening of its case based on the discovery of the Mladić Notebooks,

³² Confidential Annex and Letter of 2 July 2010.

³³ Following the Letter of 2 July 2010, the Chamber sent a memorandum to the Prlić Defence on 9 July 2010, in which the issue of reopening the Defence teams cases was not mentioned. Following this memorandum, the Prlić Defence sent an email on 19 July 2010 asking the Chamber for clarification of the term “request” as used in the memorandum of 9 July 2010. It also asked in this email whether it could draw up a potential request for the reopening of its case for 23 July 2010 whilst recalling that its potential request was conditional on the Chamber’s decision on the Prosecution’s Motion for Reopening. On 20 July 2010, the Chamber responded by email specifying that 23 July 2010 was the date on which the Defence teams should respond to the Prosecution’s Motion for Reopening.

³⁴ Request, para. 20.

³⁵ Decision of 6 October 2010, para. 64.

³⁶ See the Decision of 27 October 2010, pp. 6 and 7.

³⁷ Decision of 27 October 2010, p. 6.

³⁸ Request, paras 6 and 18.

as the Prosecution did, from the time it became aware of their existence and that there was nothing to prevent it from proceeding in this way,³⁹

CONSIDERING that the Chamber recalls that in its Decision of 6 October 2010 it nevertheless authorised the Defence teams who wished to refute the entries of the Mladić Notebooks admitted by way of the said Decision to do so within the framework of a request for reopening; that in order to do this, they too could notably use the entries from the Mladić Notebooks;⁴⁰ that the Chamber also recalled in its Decision of 27 October 2010 that this possibility was not exclusive to a request for a general reopening of the case of the Defence teams provided it is based on evidence that has just been discovered;⁴¹ that the Chamber finds that these different options guarantee as such the right of the Prlić Defence to a fair trial,⁴²

CONSIDERING, subsequently, that the Chamber finds that it was reasonable in its decision to deny in the impugned decision the Annex to the Prlić Response consisting of almost 108 pages and recalls again, in this respect, the explicit instructions of the Tribunal's Practice Direction concerning the format and in particular the length of briefs and motions submitted to the Chamber;⁴³ that, as a consequence, on this point it refers the Prlić Defence to the arguments set out in the Decision of 6 October 2010,⁴⁴

CONSIDERING, as a consequence, that the Chamber is satisfied with the reasoning of the Decision of 6 October 2010 and finds that the Prlić Defence has not shown that the subject of the Request, namely, according to the Defence, the existence of a violation of the right to a fair trial and of the principle of equality of arms due to the Chamber's refusal to authorise the Defence to file a general request for the reopening of its case, constitutes an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial and that the immediate resolution of this issue by the Appeals Chamber would materially advance the proceedings,

³⁹ See Decision of 27 October 2010, p. 8.

⁴⁰ Decision of 27 October 2010, p. 8.

⁴¹ Decision of 27 October 2010, p. 8.

⁴² Decision of 6 October 2010, para. 64 and Decision of 27 October 2010, pp. 7 and 8.

⁴³ See Decision of 6 October 2010, para. 35 in which the Chamber mentions that it had already invited the parties to comply with the Practice Direction in its "Decision on Prosecution Motion to Re-open its Case-in-Chief", public, 16 June 2010, p. 5.

⁴⁴ Decision of 6 October 2010, para. 35 and p. 29.

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

FOR THE FOREGOING REASONS,

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

DENIES the request for certification to appeal the Decision of 6 October 2010 filed by the Prlić Defence for the reasons set forth in this Decision

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

/signed/

Jean-Claude Antonetti
Presiding Judge

Done this first day of November 2010
At The Hague
The Netherlands

[Seal of the Tribunal]