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: 6 December 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: **6 December 2010**

THE PROSECUTOR

v.

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

PUBLIC

DISSENTING OPINION OF PRESIDING JUDGE JEAN-CLAUDE ANTONETTI ON THE SECOND AMENDED SCHEDULING ORDER (FINAL BRIEFS, CLOSING ARGUMENTS FOR THE PROSECUTION AND THE DEFENCE)

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 Zoran Ivanišević for Milivoj Petković
Ms Dijana Tomašegović-Tomić and Mr Dražen Plavec for Valentin Ćorić
Mr Fahrudin Ibrišimović and Mr Roger Sahota for Berislav Pušić

The majority of the Chamber decided in part to grant the requests filed by the Defence teams with regard to the schedule by granting them an additional week to prepare their closing arguments.

My dissenting position is not based on the question whether an additional week should be granted to the Defence, but on a fundamental problem involving the rendering of a decision by the Chamber and its possible reconsideration in case of an error.

I cannot subscribe to the "weather vane" type of approach by the majority because, when rendering a decision, a judge renders it with full knowledge of the case, having incorporated all the relevant elements. When the Trial Chamber rendered its first decision on the schedule,[1] it met, discussed and considered all the potential arguments that could be alleged by both sides (the Prosecution and the Defence) and, moreover, considered the practices applied by other Chambers before specifying in detail all the aspects of its decision.

A while later, while this decision was still in the process of being finalised, the Prosecution filed a submission with the Chamber[2] wrongly thinking that the Judges of the Chamber were waiting to be enlightened by the Prosecution … Of course, the un-warranted and un-solicited submission was compared to the judges' deliberations, and a decision was rendered encompassing this parameter of the Prosecution. This decision did not seem popular and was objected to by the parties.[3] A second decision on the schedule was issued, fixing a new number of pages for the brief.[4] For this second decision, there was a complete consideration of the situation and the arguments of the parties were taken into account.

Following this, the Stojić and Ćorić Defence teams seized the Chamber once more of requests for reconsideration or certification to appeal this second order.[5] The majority reversed its decision for the second time, granting this request, of which I disapprove completely because it gives the impression to the outside world of incompetent judges, incapable of understanding the conduct of the trial and, in order to avoid giving the impression of upsetting either side, grants their request. I wish to reiterate that this is not the conception I have of my assignment as a professional judge, which has nothing to do with some sort of "diplomatic judiciary", rendering justice on an *ad hoc* basis in order to avoid ultimately displeasing.

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[1] *The Prosecutor v. Prlić et al.* (IT-04-74-T), "Scheduling Order (Final Briefs, Closing Arguments for the Prosecution and the Defence)", public, 1 November 2010.
[2] *The Prosecutor v. Prlić et al.* (IT-04-74-T), "Prosecution Motion for Variation or Words Limit and Request for Status Conference on Modalities and Filing of Final Trial Briefs", confidential, 28 October 2010.
[3] *The Prosecutor v. Prlić et al.* (IT-04-74-T), "Prosecution Motion for Reconsideration of Scheduling Order, or in the Alternative, Certification to Appeal:, public, 8 November 2010.
[4] *The Prosecutor v. Prlić et al.* (IT-04-74-T), "Amended Scheduling Order (Final Trial Briefs, Closing Arguments for the Prosecution and the Defence)", public, 22 November 2010.
[5] *The Prosecutor v. Prlić et al.* (IT-04-74-T), "Valentin Ćorić's Request for Reconsideration of the 22 November 2010 Scheduling Order, or in the Alternative, Certification to Appeal", public, 24 November 2010; "Bruno Stojić's Motion for Reconsideration, or in the Alternative, for Certification to Appeal the *Ordonnance portant modification du calendrier (mémoires de clôture, réquisitoire et plaidoiries finales)* Issued 22 November 2010", public, 25 November 2010.

To render justice is to be efficient, to resolve problems and to accept the consequences of one's choices.

A very careful examination of the submission of the Stojić Defence may leave an attentive reader, who has thorough knowledge of the procedure before the Tribunal, thinking that the Judges of the Chamber could have committed **an error** by increasing the number of pages allocated to the Prosecution, while reducing the time limit between the filing of the final briefs and the closing arguments of the Prosecution and of the Defence. A quick and superficial examination could therefore rightly lead one to conclude that an error has occurred.

However, the reality is very different since, as I explained above, before rendering its **first decision** the Chamber has taken into account, during its work meetings, discussions, internal exchanges, **all** the necessary parameters based, notably on examples provided by other Chambers, even though cases in other Chambers are not of the same nature as ours.

Therefore, I considered, in my soul and conscience, based on my own in-depth knowledge gained through my involvement in other trials, that both the Prosecution and the Defence needed enough time to prepare. Moreover, I included another factor which seems to be ignored by many … the date of **1 April 2010**, the date when the **last witness** came to testify. Any conscientious attorney, any reasonable judge worthy of his name knew **since 2 April 2010** that everyone (the Prosecution, the Defence, the Accused) had entered the final stretch of the proceedings and should have, on 2 April, started preparing the drafting of their final briefs and, of course, the **closing arguments of the Prosecution and of the Defence**, which were due to follow (while being aware that there would be a time gap between the Prosecution closing arguments and the Defence closing arguments, which is only observed in Continental Law, the Defence closing argument **immediately** following the Prosecution closing argument …).

Of course, unforeseen events intervened, such as the Mladić Notebooks and the disqualification of a Judge, but these events in themselves could not have had any direct impact on the start of the final work that should have started on 2 April 2010. We are now in December, **eight months later**; who are we now trying to persuade that the Stojić Defence or the Ćorić Defence will not have enough time between the filing of the Prosecution's submissions and its own oral intervention to defend its client's case effectively?

Of course, the Prosecution's brief may, in this case, broach points that were not included in the previous brief, but considering the past four years, the Defence does not have to stand at attention and wait for the Prosecution submission before determining its strategy (this should have been done a while back). The time limit set out in the **first decision** could have been enough. If in the second order the time was reduced, it is because I, perhaps, overestimated the ability of the Defence to react to the Prosecution's submission, but I am nevertheless certain that the Defence attorneys for the Accused Stojić and the Accused Ćorić are very skilled, and are capable of dealing with the time limit provided for the completion of their task.

I cannot therefore subscribe to the decision rendered by the majority of the Chamber, since a new change would give the impression that the judges are incompetent. This is primarily a matter of appearances, to which I am very sensitive. I have never been involved in such a maelstrom of decisions contradicting earlier decisions - in the present case there have been three decisions on the same subject!

In addition to this question of one week more or one week less, which is minor, there is another much more important problem which concerns the **court management** of the trial. I believe, and I have already put this in writing, that it is incumbent upon the Presiding Judge **alone**, who manages the work of the Chamber in accordance with the Statute, to issue an order setting the schedule and the practical arrangements, and not upon the "bench". Otherwise, why would there be a Presiding Judge? We must not confuse the "**court management**" and the "**legal function**". The **court management** is a concern for the Presiding Judge and the **legal function** for the "bench". This is why decisions involving court management are called "**orders**" and those dealing with the legal functions are "**decisions**"; to my mind, this is not the same thing and the two terms perfectly define the different remit of the Presiding Judge and the other judges. It is regrettable that the Rules did not focus on this problem, which is an actual problem for a professional judge, since the ambiguity that exists is the cause of many of the troubles arising in the management of trials …

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

/signed/

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Jean-Claude Antonetti
Presiding Judge

Done this sixth day of December 2010
At The Hague
The Netherlands

[Seal of the Tribunal]