



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 November 2008  
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 Hans Holthuis

**Decision of:** 6 November 2008

**THE PROSECUTOR**

v.

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

*Public*

**DECISION ON REQUESTS FOR CERTIFICATION TO APPEAL TWO  
DECISIONS FILED BY THE PRLIĆ DEFENCE, DATED 6 AND 9 OCTOBER  
2008 RESPECTIVELY**

**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 Ordonnance portant sur l’admission d’éléments de preuve relatifs au témoin Martin Raguž, 6 October 2008, filed by Counsel for the Accused Jadranko Prlić (“Prlić Defence”) on 13 October 2008 (“Request for Certification of the Order of 6 October 2008”), in which the Prlić Defence asks the Chamber to certify the appeal it intends to lodge against the said order pursuant to Rule 73(B) of the Rules of Procedure and Evidence (“Rules”),

**SEIZED** of Jadranko Prlić’s Request for Certification to Appeal the Ordonnance portant sur l’admission d’éléments de preuve relatifs au témoin Zoran Perković, 9 October 2008, regarding 1D 00317 & 1D 00811, filed by the Prlić Defence on 14 October 2008 (“Request for Certification of the Order of 9 October 2008”), in which it asks the Chamber to certify the appeal it intends to lodge against the said order pursuant to Rule 73(B) of the Rules,

**NOTING** the Prosecution Consolidated Response to the Requests of the Accused Prlić for Certification under Rule 73 (B) for Interlocutory Appeal (Witnesses Raguž and Perković), filed by the Office of the Prosecutor (“Prosecution”) on 27 October 2008 (“Response”) in which the Prosecution indicates, on the one hand, that it does not oppose the findings of the Chamber in the two orders dated 6 and 9 October 2008 respectively and requests, on the other hand, that the Chamber not grant the two Prlić Defence requests for certification on the ground that the conditions set out in Rule 73 (B) of the Rules have not been met,

**NOTING** the Corrigendum to Prosecution Consolidated Response to the Requests of the Accused Prlić for Certification under Rule 73 (B) for Interlocutory Appeal (Witnesses Raguž and Perković), filed by the Prosecution on 28 October 2008 (“Corrigendum”) in which the Prosecution indicates that a correction should be made in paragraph 19 of the Response and notes that the number of exhibits mentioned in the said paragraph should be 44 instead of 42,

**NOTING** the Order Admitting Evidence Related to Witness Martin Raguž with a Dissenting Opinion of Presiding Judge Jean-Claude Antonetti, issued by the Chamber on 6 October 2008 (“Order of 6 October 2008”) and the Order on Admission of Evidence Relating to Witness Zoran Perković with a Dissenting Opinion of Judge Jean-Claude Antonetti, issued by the Chamber on 9 October 2008 (“Order of 9 October 2008”),

**CONSIDERING** that the Chamber decides to join the examination of the Request for Certification of the Order of 6 October 2008 and the Request for Certification of the Order of 9 October 2008 on the ground that the two requests raise the same substantive problem elucidated below;

**CONSIDERING** that the other Defence teams have not filed a response to the two requests filed by the Prlić Defence;

**CONSIDERING** that in support of the Request for Certification of the Order of 6 October 2008, the Prlić Defence submits that the Chamber’s refusal to admit 44 documents, of which 18 by majority vote, of the 104 documents presented through Witness Martin Raguž is likely to lead to the exclusion of relevant evidence contradicting certain aspects of the Joint Criminal Enterprise alleged by the Prosecution,<sup>1</sup>

**CONSIDERING** that the Prlić Defence also submits that the exclusion of these 44 documents, of which 18 by majority vote, deprives the Accused Jadranko Prlić of the right to prepare his defence adequately and impacts the right of the Accused Jadranko Prlić to a fair trial,<sup>2</sup>

**CONSIDERING** that the Prlić Defence, relying on the Dissenting Opinion of Judge Antonetti in the Order of 6 October 2008, submits in addition that the decision taken by the majority of the judges to exclude 18 documents also impacts upon the right of the Accused Jadranko Prlić to a fair trial, since it hinders a member of the Chamber, having issued a dissenting opinion, from examining evidence which he finds useful to evaluate before the end of the trial,<sup>3</sup>

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<sup>1</sup> Request for Certification of the Order of 6 October 2008, para. 8; Corrigendum, para 3.

<sup>2</sup> Request for Certification of the Order of 6 October 2008, para. 8; Corrigendum, para 3.

<sup>3</sup> Request for Certification of the Order of 6 October 2008, paras. 9 and 10; *See* Dissenting Opinion of Judge Antonetti, pp. 12 and 13: “If one Judge considers that at the end of the trial he must evaluate evidence that has been brought to his attention, it appears to me that the other judges of the Chamber

**CONSIDERING** that the Prlić Defence holds that the Presiding Judge of the Trial Chamber, Judge Jean Claude Antonetti, indicated in his dissenting opinion to the Order of 6 October 2008 that a decision taken by a majority of judges, such as the majority refusal of 18 exhibits in the case in question, “may result in a miscarriage of justice,”<sup>4</sup>

**CONSIDERING** that the Prlić Defence submits that the Chamber’s order to exclude 44 documents, of which 18 by majority vote, is consequently likely to affect the fair and expeditious conduct of the proceedings or the outcome of the trial within the meaning of Rule 73 (B), and that an immediate resolution of the issue would materially advance the proceedings,<sup>5</sup>

**CONSIDERING** that, in support of the Request for Certification of the Order of 9 October 2008, the Prlić Defence, relying on the dissenting opinion of Judge Antonetti in the Order of 9 October 2008, submits for the same reasons as those elaborated in the Request for Certification of the Order of 6 October 2008, that the Chamber’s order to exclude exhibits 1D 00317 and 1D 00811 by majority vote would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial within the meaning of Rule 73 (B), and that an immediate resolution of the issue would materially advances the proceedings,<sup>6</sup>

**CONSIDERING** that in the Response, the Prosecution first notes that it does not oppose the Chamber’s findings in the two orders dated respectively 6 and 9 October 2008,<sup>7</sup>

**CONSIDERING** that in the Response, as amended by the Corrigendum, the Prosecution second formulates an objection to the two requests for certification presented by the Prlić Defence pursuant to Rule 73 (B) of the Rules on the ground that the fair and expeditious conduct of the proceedings or the outcome of the trial are not

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may not oppose this. [...] In the case of a dissenting opinion on Judgement, the Judge would then be able to refer to that exhibit when providing the reasons for his opinion because, otherwise, should the exhibit not be admitted, he would not be able to refer to it.” *See also* p. 12: “To make a determination, a Judge must have as much available information as possible, and that right must not be restricted by anyone.”

<sup>4</sup> Request for Certification of the Order of 6 October 2008, para. 6; *See* Dissenting Opinion of Judge Antonetti, p. 13: “The strict application of the rule as interpreted by the majority may result in a miscarriage of justice, if, for example, an exhibit which has been rejected turns out to be essential for the assessment of the guilt or innocence of an Accused.”

<sup>5</sup> Request for Certification of the Order of 6 October 2008, paras. 8 and 10; Corrigendum, para. 3.

<sup>6</sup> Request for Certification of the Order of 9 October 2008, paras. 11 and 12.

endangered by the Chamber's refusal to admit the 44 exhibits identified in the Request for Certification of the Order of 6 October 2008 and the two exhibits identified in the Request for Certification of the Order of 9 October 2008, and that the immediate resolution of this issue by the Appeals Chamber would not materially advance the proceedings,<sup>8</sup>

**CONSIDERING** that in the Response, the Prosecution notes that the Chamber's exclusion of 44 documents in the Order of 6 October 2008 and of two documents in the Order of 9 October 2008 results from the Chamber's application of its guidelines and does not affect the fair conduct of the proceedings or the outcome of the trial,<sup>9</sup>

**CONSIDERING** that in the Response, the Prosecution furthermore recalls that the Prlić Defence has other means at its disposal to request admission of the documents refused by the Chamber, such as admission by means of a written request filed pursuant to Rule 89 (C) of the Rules and the guidelines provided by the Chamber, and that consequently it would be premature at this stage of the proceedings to refer the resolution of the issue raised in the two Prlić Defence requests to the Appeals Chamber,<sup>10</sup>

**CONSIDERING** that pursuant to Rule 73 (B) of the Rules "[d]ecisions on all motions are without interlocutory appeal save 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** consequently that certification to appeal is a matter within the discretionary power of the Chamber which must, in any case, first verify that the two cumulative conditions set out in Rule 73 (B) of the Rules have been met in this case,<sup>11</sup>

**CONSIDERING** that the Chamber finds that it is essential to guarantee a clearly identifiable, coherent practice in the matter of the admissibility of documents and that

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<sup>7</sup> Response, para. 5.

<sup>8</sup> Response, paras. 5, 14, 18-19; Corrigendum para. 3.

<sup>9</sup> Response, paras. 9-14; Corrigendum, para. 3.

<sup>10</sup> Response, para. 16.

<sup>11</sup> *The Prosecutor v. Pavle Strugar*, Case No. IT-01-42-T, Decision on Defence Motion for Certification, 17 June 2004, para. 2.

there is a need to know whether a minority judge may have a document admitted against the wishes of the majority and, as appropriate, the mode thereof,

**CONSIDERING** that the Chamber consequently finds that the Prlić Defence has shown that the mode of admitting 18 exhibits in the Order of 6 October 2008 and two exhibits in the Order of 9 October 2008 involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial,

**CONSIDERING** that the Chamber finds that the immediate resolution of this issue by the Appeals Chamber may materially advance the proceedings and would cause no prejudice to the Prosecution and the Defence,

**CONSIDERING** that the Chamber finds that the grounds advanced by the Prlić Defence make a showing of specific circumstances that justify certification to appeal in order to avoid an injustice,<sup>12</sup> and that consequently the Chamber decides to grant the two requests by the Prlić Defence,

**FOR THE FOREGOING REASONS,**

**PURSUANT TO** Rule 73 (B) of the Rules,

**DECIDES** to join the examination of the Request for Certification of the Order of 6 October 2008 and the Request for Certification of the Order of 9 October 2008, filed by the Prlić Defence on 13 and 14 October 2008, respectively, for the reasons set out in the present Decision,

**GRANTS** the Request for Certification of the Order of 6 October 2008 and the Request for Certification of the Order of 9 October 2008 filed by the Prlić Defence on 13 and 14 October 2008, respectively, for the reasons set out in the present Decision.

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<sup>12</sup> *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 in particular *The Prosecution v. Zdravko Mucić et al*, Case No. IT-96-21A<sup>bis</sup>, Appeals Judgment on Sentence, 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.

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

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Judge Jean-Claude Antonetti  
Presiding Judge

Done this sixth day of November 2008  
At The Hague  
The Netherlands

**[Seal of the Tribunal]**