



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: 9 November 2009
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: 9 November 2009

THE PROSECUTOR

v.

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

PUBLIC

**DECISION ON PRALJAK DEFENCE MOTION FOR RECONSIDERATION
OR ALTERNATIVELY FOR CERTIFICATION TO APPEAL ORDER ON
ADMISSION OF EVIDENCE REGARDING WITNESS JOSIP JURČEVIĆ**

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 “Slobodan Praljak’s Request for Reconsideration, or in the alternative, for Certification to Appeal the Trial Chamber’s 6 October 2009 Decision Denying the Admission of Much of the Expert Report of Josip Jurčević (3D 03720)” filed publicly by Counsel for the Accused Slobodan Praljak (“Praljak Defence”) on 12 October 2009, to which public Annexes are attached (“Motion”), in which the Praljak Defence requests that the Chamber primarily clarify and conduct a further consideration of the “Order on Admission of Evidence Regarding Expert Witness Josip Jurčević”, rendered publicly on 6 October 2009 (“Order of 6 October 2009”), and reconsider its decision not to admit certain parts of exhibit 3D 03720, namely the report of expert witness Josip Jurčević (“Report”)¹, or should the Chamber decide to deny that section of the Motion, certify the said Order for appeal pursuant to Rule 73 (B) of the Rules of Procedure and Evidence (“Rules”),² or, as a last resort, reconsider the orders regarding the admission of prosecution evidence, and in particular, the orders on the admission of expert reports submitted by the Office of the Prosecutor (“Prosecution”),³

NOTING the oral decision rendered by the Chamber at the hearing of 12 October 2009 in which it authorised the Praljak Defence, for the purposes of the Motion, to exceed the authorised word limit without surpassing a total of 4,500 words,⁴

NOTING “Milivoj Petković’s Joinder to Slobodan Praljak’s Request for Reconsideration, or in the alternative, for Certification to Appeal the Trial Chamber’s 6 October 2009 Decision Denying the Admission of Much of the Expert Report of Josip Jurčević (3D 03720), submitted publicly by Counsel for the Accused Milivoj Petković (“Petković Defence”), on 19 October 2009 (“Petković Defence Notice of

¹ Motion, paras 1, 2 and 41.

² Motion, paras 1, 18, 33 and 41.

³ Motion, paras 1, 19, 40 and 41.

⁴ Hearing of 12 October 2009, Transcript in French (“T (F)”), pp. 45781 and 45782.

Joinder to the Motion”), in which the Praljak Defence informs the Chamber that it joins the Motion,⁵

NOTING the “Prosecution Response to Various Defence Requests for Reconsideration of the Trial Chamber’s Decision of 6 October 2009 Denying the Admission of Evidence Tendered through Witness Josip Jurčević”, filed publicly by the Prosecution on 22 October 2009 (“Response”), in which the Prosecution informs the Chamber that, on the one hand, it takes no position on the section of the Motion concerning the reconsideration of the Chamber’s Decision not to admit into evidence certain parts of the Report⁶ and, on the other hand, requests that the Chamber deny the request for certification to appeal the Order of 6 October 2009, submitted by the Praljak Defence, on the ground that the requirements of Rule 73 (B) of the Rules governing such a request have not been met,⁷

NOTING the Order of 6 October 2009 in which the Chamber denied the admission into evidence of chapters 1 to 3 of part I and chapters 7 and 8 of part III of the Report, sought for admission by the Praljak Defence, on the grounds that in the “Order on the Qualifications as Expert and Mode of Questioning of Witness Josip Jurčević”, rendered publicly on 22 April 2009 (“Order of 22 April 2009”), the Chamber had already noted that certain portions of the Report, and specifically part I relating to the history of Bosnia and Herzegovina from antiquity to 1989 and events preceding 1991, focus on events which allegedly took place outside of the periods relevant to the Amended Indictment of 11 June 2008 (“Indictment”); that in the Order of 22 April 2009 it had invited the Praljak Defence to concentrate the examination of the witness on those parts of the Report that were relevant to the time frame of the Indictment; that it had found that the Praljak Defence furthermore did not put to the expert witness the contents of chapters 1 to 3 of part I and chapters 7 and 8 of part III of the said Report during his testimony and that, consequently, he was unable to comment on their contents,⁸

CONSIDERING that the Defence teams for the Accused Jadranko Prlić, Bruno Stojić, Valentin Ćorić and Berislav Pušić have not filed a response to the Motion,

⁵ Praljak Defence Notice of Joinder to the Motion, para. 2.

⁶ Response, paras 3 and 5.

⁷ Response, paras 10 and 11.

⁸ Order of 6 October 2009, p. 3.

CONSIDERING, firstly, that the Praljak Defence submits that the Order of 6 October 2009 is erroneous and incomplete in that it does not mention and seems to exclude the admitted portions of the Report, namely the title page, the table of contents and the introductory remarks, and consequently requests that the Chamber clarify and complete the said Order,⁹

CONSIDERING, secondly, that the Praljak Defence submits that the Chamber committed a discernible error in its reasoning adopted in the Order of 6 October 2009 when it rejected certain parts of the Report on the grounds that certain parts were not put to the expert witness whereas that fact does not constitute a criterion for admissibility;¹⁰ that it claims in particular that nothing in Rule 94 *bis* of the Rules requires a party wishing to admit an expert report to put each section of the said report to the expert witness and notes that the fact that the witness attested that he is the author of the report provides sufficient indicia of authenticity;¹¹ that the witness equally attested to the chapters denied by the Chamber;¹² that it puts forward that an expert report must be considered in its entirety¹³ and that the Chamber has unfairly punished the Praljak Defence for having followed the Chamber's guidance – the effect and consequences of which are described as pernicious, illogical and unfair – by focusing its examination-in-chief of the witness on those parts of the Report that were deemed relevant to the Indictment,¹⁴

CONSIDERING, lastly, that the Praljak Defence claims that the second ground put forward by the Chamber in denying admission, namely the fact that there is an insufficient link of relevance between those parts and chapters of the Report and the Indictment, does not correspond to the criteria of relevance set forth by the Chamber in its orders on the admission of prosecution evidence and, in particular, in its orders with regard to the admission of the expert witness reports of Robert Donia and Nicholas J. Miller which, according to the Praljak Defence, focus primarily on events other than those specifically described in the Indictment;¹⁵ that the Chamber, by way of its Order of 6 October 2009 and for purposes described as punitive by the Praljak

⁹ Motion, paras 2 and 41.

¹⁰ Motion, paras 20-25.

¹¹ Motion, paras 21, 22 and 25.

¹² Motion, paras 26 and 27.

¹³ Motion, paras 23 and 24.

¹⁴ Motion, para. 28. The Praljak Defence mentions that “the manoeuvring *effect* of this guidance followed by the Impugned Decision is both illogical and unjust”.

Defence, has deprived the latter of an opportunity to provide information on the context of the conflict in order “to rebut the witnesses paid by the Prosecution to present essentially untruthful facts, by interpreting wishful thinking as reality.”¹⁶ (Original text in English: to rebut the witnesses paid by the Prosecution to provide what the Praljak Defence respectfully submits was mostly misleading and professionally substandard fulfilment of the Prosecution’s wish-list”),

CONSIDERING that the Praljak Defence submits that the request for reconsideration of the Order of 6 October 2009 meets the criteria set forth by the Chamber with regard to reconsideration in its “Decision Regarding Requests Filed by the Parties for Reconsideration of Decisions by the Chamber” rendered publicly on 26 March 2009 (“Decision of 26 March 2009”), and requests that the Chamber reconsider the said Order in light of the contradiction between the criteria for admission adopted by the Chamber in its orders on the admission of prosecution evidence and those adopted in its impugned order;¹⁷ or, should the Chamber decide not to reconsider the said order, reconsider the orders on the admission of prosecution evidence lest an injustice is done and to avoid the prejudice that would be caused by allowing the Robert Donia expert report and the two reports of expert Nicholas J. Miller into evidence,¹⁸

CONSIDERING that, alternatively, the Praljak Defence requests that the Chamber certify the Order of 6 October 2009 for appeal pursuant to Rule 72 (B) of the Rules¹⁹ and puts forward notably that the refusal of the Chamber to admit certain parts of the Report and the existence of a double standard adopted by the Chamber with regard to the admission of expert reports during the presentation of the Prosecution case and during the presentation of the Defence case, together with a series of other issues on the procedures in use by the Chamber for the presentation of experts reports,²⁰ may

¹⁵ Motion, paras 29-31.

¹⁶ Motion, paras 31-32.

¹⁷ Motion, paras 37-40.

¹⁸ Motion, para. 40.

¹⁹ The Chamber notes that the Praljak Defence refers to Rule 72 (B) of the Rules instead of Rule 73 (B).

²⁰ In support of the reasons submitted in its request for certification to appeal the Order of 6 October 2009, the Praljak Defence also mentions the issue of knowing whether every section of an expert report must be specifically cited in court to be admitted; whether an expert report must be limited to the events alleged in the Indictment or whether such a report can provide a context that bears upon the motivations of the individuals involved in the conflict; whether an expert report presented by the Defence may be used to rebut another report from the Prosecution; whether a party may rely upon the guidance and instructions of a Trial Chamber and whether the limited resources of the Praljak Defence have been indirectly and unjustly limited by the Trial Chamber’s variable standards; Motion para. 34.

infringe upon the right of the Accused Praljak to a fair and expeditious trial or affect the outcome;²¹ that it submits moreover, relying notably on the dissenting opinion of Presiding Judge Jean-Claude Antonetti,²² that the resolution of these issues and, in particular, a clarification on the standards applied with regard to the procedures for the admission of expert reports, could materially advance the proceedings by clarifying the principles relating to the admission of those types of documents,²³

CONSIDERING that in the Response, the Prosecution takes no position on the Motion concerning the Report,²⁴ but notes that the subject of the Motion for reconsideration of the Chamber's decision not to admit into evidence certain parts of the Report does not appear to meet the admissibility criteria for requests for reconsideration as set forth by the Chamber in its Decision of 26 March 2009;²⁵ that it also submits that the Chamber had explicitly invited the Praljak Defence to focus on those parts of the Report that were to a certain degree relevant to the Indictment,²⁶

CONSIDERING that alternatively, the Prosecution formulates an objection to the Praljak Defence's request for certification to appeal on the ground that a party may only formulate a request for certification to appeal a decision rendered by a Trial Chamber in exceptional circumstances, and that this type of request does not constitute a right and must meet the criteria set forth in Rule 73 (B) of the Rules;²⁷ that the Prosecution recalls moreover that the Appeals Chamber found that a Trial Chamber may decide on the relevance, probative value and authenticity of a document during the trial and may consequently rule on its admissibility; that it also considers that an Accused cannot claim a violation of his right to a fair trial and request certification to appeal a decision solely on the ground that a minority judge drew up a dissenting opinion on a decision taken by the majority who did not find it unreasonable and erroneous;²⁸ that the fair and expeditious conduct of the proceedings or the outcome of the trial are not endangered by the refusal of the Chamber to admit into evidence certain parts of the Report, as identified in the Motion and that the

²¹ Motion, paras 34 and 35.

²² The dissenting opinion of the Presiding Judge of the Trial Chamber on the "Order on Admission of Evidence Regarding Expert Witness Josip Jurčević" of 6 October 2006, rendered publicly on 7 October 2009.

²³ Motion, para. 35.

²⁴ Response, para. 3.

²⁵ Response, para. 3; Decision of 26 March 2009.

²⁶ Response, para. 3.

²⁷ Response, paras 6-8.

immediate resolution of this issue by the Appeals Chamber would not materially advance the proceedings,²⁹

CONSIDERING that a Trial Chamber has the inherent power to reconsider its own decisions and that it may allow a request for reconsideration if the requesting party demonstrates to the Chamber that the impugned decision contains a clear error of reasoning or that particular circumstances, which can be new facts or arguments,³⁰ justify its reconsideration in order to avoid injustice,³¹

CONSIDERING that the Chamber recalls the Decision of 26 March 2009, in which, in order to guarantee the proper administration of the trial, it clarifies the requirements with which requests for reconsideration must comply,

CONSIDERING as a preliminary matter that having examined the Report in the light of the observations made by the Praljak Defence, the Chamber notes that a mistake has slipped into the Order of 6 October 2009, in which there is no mention of the title page, the table of contents and the introductory remarks of the Report; that it is appropriate consequently, and in the interests of justice, to rectify this omission and subsequently amend page 7 of the Order of 6 October 2009 and to word the reasons with regard to the partial admission of exhibit 3D 03720 as follows:

“Admitted with regard to the title page, the table of contents and the introductory remarks, chapter 4 of part I, part II and chapters 1-6 of part III. Not admitted by a majority with regard to chapters 1 to 3 of part I and chapters 7 and 8 of part III. (Reason: the Praljak Defence did not present the contents of these chapters to Witness Josip Jurčević and did not establish sufficient relevance between these parts and the chapters of the Expert Report and the Indictment)”

CONSIDERING, firstly, with regard to the section of the Motion for reconsideration of the decision not to admit certain parts of the Report, that the Chamber recalls as a

²⁸ Response, paras 9 and 10.

²⁹ Response, para. 11.

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 Prosecutor 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 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 Prosecutor 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.

preliminary matter that, contrary to the allegations made by the Praljak Defence,³² the authenticity of the Report was not questioned by the Chamber in its Order of 6 October 2009 and notes, in this respect, that the authenticity of the Report does not constitute a ground for the inadmissibility of certain parts of the said Report in the impugned Order,

CONSIDERING that the Chamber recalls that one of the reasons for not admitting certain parts of the Report relates to the fact that those parts of the Report of the witness, authorised to testify in his capacity as an expert historian on issues relating to the political and social context of the Republic of Bosnia and Herzegovina between 1990 and 1995 and on political relations and humanitarian and logistical cooperation between the Republic of Croatia and Bosnia and Herzegovina between 1991 and 1995,³³ bore no relevance to the allegations made in the Indictment, such as the chapters on the history of Bosnia and Herzegovina from antiquity to 1989 (chapters 1 to 3 of part I), the chapter on the extraterritorial education system of the Republic of Croatia in Bosnia and Herzegovina between 1992 and 1994 (chapter 7 of part III) and the chapter on the cooperation between the Republic of Croatia and the Republic of Bosnia and Herzegovina in the fields of culture and sport (chapter 8 of part III),

CONSIDERING moreover that the Praljak Defence had been explicitly informed by way of the Order of 22 April 2009 that several parts of the Report, corresponding to approximately 43 pages, related to events which allegedly took place outside the scope of the Indictment; that in the interests of judicial economy the Chamber had furthermore requested that it focus on the parts of the Report relevant to the time frame of the Indictment; that the Praljak Defence therefore clearly knew that the issue of their relevance would arise with regard to those parts; that the Praljak Defence nevertheless did not take issue with the Order of 22 April 2009 or attempt in court to demonstrate the existence of any form of link or relevance between these parts of the Report and the Indictment; that this is all the more true given that the Praljak Defence never raised the issue in court nor put a single question concerning the disputed parts of the Report to the witness during his appearance in court which might and could have served to demonstrate to the Chamber that these parts actually had a certain relevance; that, in this respect, it is appropriate to remind the Praljak Defence that, in

³² Motion, paras 22 and 25.

³³ Order of 22 April 2009, p. 3.

accordance with the “Revised Version of the Decision Adopting Guidelines on Conduct of Trial Proceedings”, rendered publicly by the Chamber on 28 April 2006, “when an expert witness produces a report, that report may be admitted into evidence, subject to the requirements of relevance and probative value.”

CONSIDERING, moreover, that with regard to the arguments of the Praljak Defence concerning the reports of expert witnesses Robert Donia and Nicholas J. Miller admitted by the Chamber on 15 May 2006 and 1 November 2007 respectively,³⁴ the Chamber recalls that during the appearance in court of expert witness Robert Donia on 10 and 11 May 2007, the Prosecution put to the witness extracts from each chapter of the report in order to establish their relevance to the Indictment;³⁵ that it notes furthermore that the greater part of the said report related to events which took place in Bosnia and Herzegovina between 1990 and 1992, with the exception of 5 pages dedicated to events prior to 1990, but that the Prosecution nevertheless put in part to the witness;³⁶ that the Chamber notes secondly that with regard to the two reports of expert witness Nicholas J. Miller, the first entitled “Characteristics and patterns of the Balkan conflict as widely-known and report by the latter part of 1992”, on events that occurred between 1991 and 1992, and the second entitled “The persistence of Herzeg-Bosnia after the Washington Agreement and Dayton”, the Prosecution also endeavoured to put extracts of these two reports to the witness during its examination-in-chief of the witness on 24 September 2007 and during its re-examination on 26 September 2007 in order to establish their relevance to the Indictment,³⁷

CONSIDERING that the Chamber considers that the Praljak Defence has not therefore shown that the Chamber committed a discernible error in its reasoning which would require the reconsideration of the Order of 6 October 2009; that the Chamber concludes that the Praljak Defence, by way of the Motion, is simply challenging the Chamber’s decision in the Order of 6 October 2009 and that

³⁴ See the oral decision on the admission of the report of expert Donia, hearing of 15 May 2006, T (F) p. 2004 and “Order to Admit Evidence regarding Witness Nicholas J. Miller”, public, 1 November 2007. The report of expert witness Robert Donia bears the classification mark P 09536 and the reports of expert witness Nicholas J. Miller bear the classification marks P 10239 (first report) and P 10240 (second report).

³⁵ Hearing of 10 May 2009, T (F) pp. 1736 to 1739 and 1743. See, amongst others, the presentation of excerpts of chapters on the Banovina of Croatia, the SDS, the HDZ BH, the HZ H-B, the Cutiliero Plan and the HVO, hearing of 10 May 2009 T (F) pp. 1759, 1783, 1785, 1820, 1825 and 1828, respectively..

³⁶ Hearing of 10 May 2007, T (F) pp. 1743-1759.

³⁷ See notably for the presentation of the second report, hearing of 24 September 2007, T (F) pp. 22617 and 22646 and hearing of 26 September 2007, T (F) pp. 22800-22803.

consequently it is appropriate to dismiss the Motion with regard to the request for reconsideration of the non-admission of certain parts of the Report,

CONSIDERING that pursuant to Rule 73 (B) of the Rules “Decisions 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 that an immediate resolution by the Appeals Chamber may materially advance the proceedings”;

CONSIDERING, therefore, that certification to appeal is a matter for the discretion of the Chamber which must, in any event, make a preliminary assessment that the two cumulative requirements set forth in Rule 73 (B) of the Rules have been met in the case in point,³⁸

CONSIDERING as a preliminary matter that the Chamber notes that the Praljak Defence bases its request for certification to appeal the Order of 6 October 2009 on Rule 73 (B) of the Rules³⁹, and finds that, in all likelihood, the Praljak Defence has erred and recalls, nevertheless, in this respect, that Rule 73 (B) of the Rules and not Rule 72 (B) governs the procedures with regard to the certification for interlocutory appeal of a decision rendered by a Trial Chamber,

CONSIDERING that the Chamber finds it necessary to draw attention again, in response to the doubts raised by the Praljak Defence as to the existence of a standard applied with regard to the admissibility of documents by the Chamber,⁴⁰ to the Appeals Chamber’s Decision of 12 January 2009 in which the latter recalled that, according to established Tribunal jurisprudence, a decision or a judgement rendered by majority has the same binding effect as those rendered unanimously, provided that the decision is not shown to be erroneous, and that a dissenting opinion attached to a decision or judgement rendered by the Chamber has no effect on the binding nature of

³⁸ *The Prosecutor v. Pavle Strugar*, Case No. IT-01-43-T, “Decision on Defence Motion for Certification” 17 June 2004, para. 2.

³⁹ Motion, paras 12, 33 and 41.

⁴⁰ Motion, para. 35.

that decision or judgement and may not constitute a reason for certification to appeal under Rule 73 (B) of the Rules,⁴¹

CONSIDERING that the Chamber is satisfied with the reasonableness of the Order of 6 October 2009 and that it considers that the Praljak Defence has not shown that the subject of the Motion, namely the decision not to admit into evidence certain parts of the Report on the ground that they bear no relevance to the allegations made in the Indictment, constitutes at this stage 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,

FOR THE FOREGOING REASONS,

PURSUANT TO Rules 54, 73 (B) and 89 of the Rules of Procedure and Evidence,

ORDERS page 7 of the Order of 6 October 2009, with reference to exhibit 3D 03720, to be worded as follows:

“Admitted with regard to the title page, the table of contents and the introductory remarks, chapter 4 of part I, part II and chapters 1-6 of part III. Not admitted by a majority with regard to chapters 1 to 3 of part I and chapters 7 and 8 of part III. (Reason: the Praljak Defence did not present the contents of these chapters to Witness Josip Jurčević and did not establish sufficient relevance between these parts and the chapters of the Expert Report and the Indictment)”

DENIES the request for reconsideration of the Order of 6 October 2009 filed by the Praljak Defence for the reasons set forth in this decision **AND,**

DENIES the request for certification to appeal the Order of 6 October 2009 filed by the Praljak 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

⁴¹ “Decision on Jadranko Prlić’s Consolidated Interlocutory Appeal against the Trial Chamber’s Orders of 6 and 9 October on Admission of Evidence”, public, 12 January 2009 (“Decision of 12 January 2009”), para. 27.

Done this ninth day of November 2009
At The Hague
The Netherlands

[Seal of the Tribunal]