



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 January 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

Acting Registrar: Mr John Hocking

Decision of: 9 January 2009

THE PROSECUTOR

v.

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

PUBLIC

**DECISION ON JOINT MOTION FOR CERTIFICATION TO APPEAL THE
DECISION ON PRESENTATION OF DOCUMENTS BY THE
PROSECUTION IN CROSS-EXAMINATION OF DEFENCE WITNESSES**

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 the “Joint Motion of Slobodan Praljak, Milivoj Petković, Valentin Ćorić and Berislav Pušić Requesting Rule 73 (B) Certification to Appeal Against the Trial Chamber’s 27 November 2008 ‘*Décision portant sur la présentation de documents par l’Accusation lors du contre-interrogatoire des témoins à décharge*’”, filed by Counsel for the Accused Praljak, Petković, Ćorić and Pušić (“Joint Defence”) on 4 December 2008 (“Motion”) in which the Joint Defence requests leave of the Chamber to appeal against the “Decision on Presentation of Documents by the Prosecution in Cross-Examination of Defence Witnesses”, rendered by the Chamber on 27 November 2008 (“Impugned Decision”), in accordance with Rule 73 (B) of the Rules of Procedure and Evidence (“Rules”),

NOTING the “Prosecution Opposition to Defence Request for Certification to Appeal the Trial Chamber’s 27 November 2008 ‘*Décision portant sur la présentation de documents par l’Accusation lors du contre-interrogatoire des témoins à décharge*’”, filed by the Office of the Prosecutor (“Prosecution”) on 18 December 2008 (“Response”), in which the Prosecution objects to the motion for certification to appeal and requests that the Chamber, in the alternative, in the event it certifies the appeal of the Joint Defence, grant the Prosecution leave to appeal against the Impugned Decision,

CONSIDERING that neither Counsel for the Accused Prlić nor Counsel for the Accused Stojić filed a response to the Motion,

CONSIDERING that, in the Motion, the Joint Defence submits that the Impugned Decision relates to an issue regarding the ability of the Prosecution to introduce, in its cross-examination, further documents which go to proof of the guilt of an Accused, which might affect the fairness of the proceedings or the outcome of the trial,¹

¹ Motion, para. 19 (A).

CONSIDERING that the Joint Defence argues that the resolution of this issue at this stage of the proceedings would have a clear and significant impact on the remainder of the defence cases since it bears on whether or not new documents may be introduced,²

CONSIDERING that in its Response the Prosecution asserts principally that since, at the moment, there exists no actual concrete application of the Impugned Decision, the issue remains hypothetical and that, as a result, at present, there can be no issue which would significantly affect the conduct of the proceedings and would require an immediate resolution by the Appeals Chamber,³

CONSIDERING that, in the alternative, the Prosecution requests, in the event the Chamber certifies the appeal of the Joint Defence, that the Chamber do so for the Impugned Decision in its entirety and that, consequently, it also grant the Prosecution leave to appeal the Impugned Decision,⁴

CONSIDERING that under 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 for which, in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings”,

CONSIDERING that, consequently, certification to appeal is a matter within the discretionary power of the Chamber, which must first verify whether the two cumulative conditions set out in Rule 73 (B) of the Rules have been met in this case,⁵

CONSIDERING first that with respect to the Motion, the Chamber notes that, contrary to what the Prosecution seems to argue, the Joint Defence wishes to appeal the Impugned Decision in its entirety,⁶

² Motion, para. 19 (B).

³ Response, paras. 11 to 13.

⁴ Response, paras. 14 and 15 (b).

⁵ *The Prosecutor v. Pavle Strugar*, Case No. IT-01-42-T, Decision on Defence Motion for Certification, 17 June 2004, para. 2.

⁶ See Motion paras. 1 and 20.

CONSIDERING that the Chamber recalls that in the Impugned Decision it set out the principles relating to the presentation of “new documents”⁷ by the Prosecution in the cross-examination of defence witnesses,

CONSIDERING that in the Impugned Decision, the Chamber held that, in principle, all of the documents essential to a Party’s case must be tendered into evidence during the phase of the presentation of its case-in-chief; that the Prosecution should therefore not need defence witnesses in order to introduce “new documents” with the sole purpose of establishing the guilt of the Accused,⁸

CONSIDERING that the Chamber has held nonetheless that there may be exceptions to this principle that are driven by exceptional circumstances which, in the interests of justice, permit derogation from this principle,⁹

CONSIDERING that the Chamber consequently decided that if after the conclusion of its case the Prosecution sought to tender “new documents” into evidence in order to establish the guilt of one or several Accused, it had to justify its request by providing exceptional reasons in the interests of justice to admit these documents,¹⁰

CONSIDERING finally that the Chamber decided that should it grant the Prosecution leave to present “new documents” as evidence in support of its case, it would decide according to the circumstances of the case on the modalities for safeguarding the rights of the Defence,¹¹

CONSIDERING that the Impugned Decision, in accordance with the modalities determined therein, therefore authorizes the Prosecution to continue to tender “new documents” after the conclusion of its case, which is an issue that would significantly affect the fair and expeditious conduct of the proceedings and the outcome of the trial,

CONSIDERING that the Chamber will continue to hear defence witnesses, that the Prosecution will likely continue to seek to tender documents which may be “new

⁷ In the Impugned Decision (para. 4), the Chamber repeated the term “new documents” which was used by the Defence, according to which “new documents” are those documents that were not admitted during the prosecution or defence cases, regardless of whether they appear on the List of exhibits filed by the Prosecution pursuant to Rule 65 *ter* of the Rules on 19 January 2006.

⁸ Impugned Decision, paras. 10, 15, 16 and 23.

⁹ Impugned Decision, paras. 15 and 17 to 20.

¹⁰ Impugned Decision, para. 23.

¹¹ Impugned Decision, paras. 20, 21 and 26.

documents” and that, consequently, a decision by the Appeals Chamber may materially advance the proceedings,

CONSIDERING that since the Chamber decides to grant the Motion and to certify the appeal against the Impugned Decision, it must also examine the Prosecution’s alternative request,

CONSIDERING in fact that the Prosecution requested leave in the alternative to itself appeal the Impugned Decision as well,

CONSIDERING that the Chamber finds that this request was filed on 18 December 2008, thereby exceeding the time-limit of seven days following the filing of the Impugned Decision, prescribed by Rule 73 (C) of the Rules, to file a request for certification to appeal,¹²

CONSIDERING that the Chamber decides that as a result the Prosecution’s alternative request for certification to appeal is out of time and therefore inadmissible,

¹² The Chamber notes that the deadline for filing a request for certification to appeal the Impugned Decision was 4 December 2008.

FOR THESE REASONS,

IN ACCORDANCE WITH Rule 73 (B) and (C) of the Rules,

FINDS INADMISSIBLE the Prosecution's request in the alternative for certification to appeal the Impugned Decision,

GRANTS the Motion, and

CERTIFIES the appeal of the Joint Defence against the Impugned Decision.

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

/signed/

Jean-Claude Antonetti
Presiding Judge

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

[Seal of the Tribunal]