



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: 3 July 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: 3 July 2009

THE PROSECUTOR

v.

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

PUBLIC

DECISION ON PRLIĆ DEFENCE MOTION TO REOPEN ITS CASE

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 a motion by Counsel for the Accused Prlić (“Prlić Defence”) (“Jadranko Prlić’s Motion to Re-open his Defence Case to Adduce *Viva Voce* Testimony from Expert Witness Dr. John R. Schindler, Professor of Strategy, U.S Naval War College & Author of *Unholy Terror: Bosnia, Al-Qa’ida, and the Rise of Global Jihad*”), to which two annexes are attached, filed publicly on 2 June 2009 (“Motion”), in which the Prlić Defence requests that the chamber grant it leave to reopen its case in order to present the *viva voce* testimony of an expert witness, Doctor John R. Schindler, author of the book *Unholy Terror: Bosnia, Al-Qa’ida, and the Rise of Global Jihad* (“Doctor Schindler’s Book”),

NOTING the motion filed publicly by Counsel for the Accused Praljak (“Praljak Defence”) (“Slobodan Praljak’s Joinder of Jadranko Prlić’s Motion to Re-open Jadranko Prlić’s Defence Case”) on 4 June 2009 (“Joinder Motion”), in which the Praljak Defence joins the Prlić Defence Motion,

NOTING the oral decision rendered by the Chamber at the hearing of 8 June 2009, in which it reminded the parties that they must respond to the Motion no later than 16 June 2009,¹

NOTING the oral decision rendered by the Chamber at the hearing of 16 June 2009, authorising the Office of the Prosecutor (“Prosecution”) to exceed the word-limit in its response to the Motion,²

NOTING the response filed publicly by the Prosecution (“Prosecution Response to Prlić Motion to Reopen Defence Case and Allow Schindler Evidence”), on 16 June 2009 (“Response”), in which the Prosecution objects to the reopening of the Prlić Defence case,

¹ Transcript in French (“T(F)”), 8 June 2009, pp. 41254 and 41255.

² T(F), 16 June 2009, pp. 41530 and 41531.

NOTING the oral decision rendered by the Chamber at the hearing of 17 June 2009 granting leave to the Prlić Defence to file a reply³ and the “Jadranko Prlić’s Reply to Prosecution Response to Prlić Motion to Reopen Defence Case and Allow Schindler Evidence”, filed publicly by the Prlić Defence on 24 June 2009 (“Reply”), in which the Prlić Defence rejects the arguments raised in the Response and sets out its reasoning in favour of reopening its case,

CONSIDERING that in the Motion, the Prlić Defence seeks, on the one hand, leave to introduce Doctor Schindler’s Book and a brief report containing, relevant documents, according to the Prlić Defence, and on the other hand, five additional hours in addition to the 95 hours already allotted to it by the Chamber for the presentation of its case,⁴

CONSIDERING that the Prlić Defence argues that Doctor Schindler’s evidence is relevant and probative since it provides a context to the events alleged in the Amended Indictment of 11 June 2008 (“Indictment”) and contradicts the allegations of the existence of a joint criminal enterprise put forward by the Prosecution,⁵

CONSIDERING that the Prlić Defence argues that Doctor Schindler’s evidence will provide an alternative to the allegation of a joint criminal enterprise, notably by giving evidence about an influx of Mujahedin in Bosnia, the policy of President Izetbegović and the importance of his Islamic Declaration and that, as such, it will not prejudice the other Accused, but may well benefit them; that similarly, this evidence should not prejudice the Prosecution, which will have the possibility of cross-examining the witness,⁶

CONSIDERING that in its Motion, the Prlić Defence describes the additional time requested, namely 5 hours, as insignificant; considers that this request for additional times does not infringe on the rights of the other Accused to a fair and expeditious trial, and argues that the stage of the trial does not prohibit the reopening of its case,⁷

³ T(F), 17 June 2009, pp. 41550 and 41551.

⁴ Motion, p. 1.

⁵ Motion, paras 9-11.

⁶ Motion, paras 9-13.

⁷ Motion, paras 14 and 15.

CONSIDERING that in support of the Motion, the Prlić Defence argues that, despite its due diligence, it only became aware of the existence of Doctor Schindler's Book in March 2009, after it had finished presenting its evidence;⁸ that as soon as it learned of the book, it immediately took the necessary measures to obtain a copy thereof, analyse it, locate and contact its author and consider the possibility of presenting him as a Defence witness,⁹

CONSIDERING that the Prlić Defence argues that if it had had prior knowledge of the existence of Doctor Schindler's Book, it would have made reference to it during the Prosecution case and during its own case,¹⁰

CONSIDERING that in its Joint Motion, the Praljak Defence argues that Doctor Schindler's evidence would be relevant as it would contradict the theory of a joint criminal enterprise advanced by the Prosecution,¹¹

CONSIDERING that in the Response, the Prosecution objects to the Prlić Defence Motion on the ground that it has not presented any facts that would justify reopening its case as required by Tribunal case-law,¹²

CONSIDERING firstly that the Prosecution argues that the Prlić Defence had a more than adequate opportunity to prepare and present its defence as it relates to the involvement of foreign Muslim fighters in the war in Bosnia and Herzegovina, and that this therefore does not constitute a new subject,¹³

CONSIDERING that the Prosecution argues that Doctor Schindler's Book was published in 2007 and that the Prlić Defence cannot claim that it exercised due diligence in its research of evidence relating to the topics raised in the book, and has not established that this book is essential to its case,¹⁴

⁸ Motion, paras 3 and 16.

⁹ Motion, para. 16.

¹⁰ Motion, para. 17.

¹¹ Joinder Motion, para. 3.

¹² Response, paras 1 and 4.

¹³ Response, paras 5-11.

¹⁴ Response, para. 12.

CONSIDERING furthermore that the Prosecution argues that the Prlić Defence failed to demonstrate the probative value of this document, as well as the absence of the prejudice that a reopening of the case would cause the Prosecution,¹⁵

CONSIDERING finally that the Prosecution believes that the Prlić Defence request to be granted an additional five hours must be evaluated within the context of this specific trial and would in fact require, taking into account the time allotted for the cross-examinations, more than a week and a half of additional trial time,¹⁶

CONSIDERING that the Prlić Defence argues in its Reply that it has demonstrated the absence of prejudice to the Prosecution should its case be reopened and that it has adequately justified its Motion by recalling that: (a) through Doctor Schindler's testimony, it intends to adduce evidence relating to President Izetbegović's true objectives for Bosnia and Herzegovina, which led to the establishment of the HZ/HR H-B as an auto-defensive reaction;¹⁷ (b) that it could not, even by exercising due diligence, have discovered Doctor Schindler's Book earlier;¹⁸ (c) that Doctor Schindler's Book and evidence are relevant and have probative value as they contradict the allegations of a joint criminal enterprise put forward by the Prosecution,¹⁹

CONSIDERING that the Chamber recalls that the reopening of a party's case after its case has closed is not provided for in the Rules of Procedure and Evidence ("Rules"), but has been recognised in the case-law,

CONSIDERING that the Appeals Chamber has held that "the primary consideration in determining an application for reopening a case to allow for the admission of fresh evidence is the question of whether, with reasonable diligence, the evidence could have been identified and presented in the case-in-chief of the party making the application",²⁰

¹⁵ Response, paras 14-18.

¹⁶ Response, p. 20.

¹⁷ Response, paras 3 and 4.

¹⁸ Reply, paras 5 and 6.

¹⁹ Reply, paras 7-9.

²⁰ *The Prosecutor v. Zejnir Delalić et al.*, Case No. IT-96-21-A, 20 February 2001 ("Čelebići Appeal Judgment"), para. 283.

CONSIDERING that in accordance with the Tribunal's case-law, when a Trial Chamber is satisfied that the party making the application has exercised diligence, it must then exercise its discretion as to whether to admit the new evidence by weighing its probative value against the prejudice that might be caused to the accused by admitting it at such a late stage,²¹

CONSIDERING that the Chamber must first determine if by exercising all due diligence the Prlić Defence could have identified and produced Doctor Schindler's Book and had the author testify during the presentation of its case,

CONSIDERING that the Chamber notes that the Prlić Defence argues that, despite all its efforts, it only learned of the publication of Doctor Schindler's Book in March 2009²² and that, from this date on, it made all the necessary efforts to obtain a copy of the book, analyse it, locate and contact the author in order to consider having him testify as an expert witness,²³

CONSIDERING that the Prosecution notes that the book in question was published in 2007 and that the Prlić Defence has not provided any proof that it exercised the due diligence necessary in locating Doctor Schindler's book,²⁴

CONSIDERING that the Chamber notes that in its Reply, the Prlić Defence does not provide any additional facts to explain the late discovery of Doctor Schindler's Book,²⁵

CONSIDERING that the Chamber notes that the book *Unholy Terror: Bosnia, Al-Qa'ida, and the Rise of Global Jihad* was published by Zenith Press in 2007, as acknowledged by the Prlić Defence in footnote 1 of its Motion,²⁶

CONSIDERING that the Chamber recalls that the Prlić Defence presented its case between 5 May 2008 and 15 January 2009,

²¹ *Čelebići* Appeal Judgment, para. 283; *The Prosecutor v. Enver Hadžihasanović*, Case No. IT-01-47-T, Decision on the Prosecution's Application to Reopen its Case, 1 June 2005, para. 35.

²² Motion, para. 3.

²³ Motion, para. 16.

²⁴ Response, para. 12.

²⁵ Reply, paras 5 and 6.

²⁶ Motion, p. 1.

CONSIDERING that the Chamber recalls that it is up to the requesting party to prove that, despite all its diligence, it was unable to identify and produce the evidence in the context of its case,

CONSIDERING that the Chamber deems that the explanation according to which, the Prlić Defence would have made reference to this book during the Prosecution case and during its own case had it known of this book,²⁷ in no way demonstrates the due diligence exercised by the Prlić Defence to discover the existence of this book,

CONSIDERING that the Chamber finds that in light of the explanations provided by the Prlić Defence, it did not exercise the necessary due diligence in order to identify and produce in the context of its case a book that was published in 2007, therefore well before the start of its case.

CONSIDERING that in the absence of evidence of such diligence, the Chamber decides to deny the Motion and will not consider the questions related to the probative value and relevance of Doctor Schindler's Book or the appropriateness of having him testify in court,

FOR THE FOREGOING REASONS,

PURSUANT TO Rules 54 and 89 of the Rules,

DENIES the Motion,

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

/signed/

Jean-Claude Antonetti
Presiding Judge

Done this third day of July 2009
At The Hague
The Netherlands

[Seal of the Tribunal]

²⁷ Motion, para. 17.