

**THE INTERNATIONAL CRIMINAL TRIBUNAL
FOR THE FORMER YUGOSLAVIA**

Case No. IT-04-74-T

**Before: Judge Jean-Claude Antonetti, Presiding
Judge Arpad Prandler
Judge Stefan Trechsel
Reserve Judge Antoine Kesia-Mbe Mindua**

Registrar: Mr. John Hocking

Date filed: 29 November 2010

THE PROSECUTOR

v.

**JADRANKO PRLIĆ
BRUNO STOJIĆ
SLOBODAN PRALJAK
MILIVOJ PETKOVIĆ
VALENTIN ĆORIĆ
BERISLAV PUŠIĆ**

PUBLIC

**JADRANKO PRLIĆ'S REQUEST FOR CERTIFICATION TO APPEAL
DÉCISION PORTANT SUR LA DEMANDE DE JADRANKO PRLIĆ AUX FINS
D'ADMISSION D'ÉLÉMENTS DE PREUVE CEUX ADMIS PAR LA DÉCISION
DU 6 OCTOBRE 2010**

Office of the Prosecutor:

**Mr. Kenneth Scott
Mr. Douglas Stringer**

Counsel for the Accused:

**Mr. Michael G. 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 Tomašević-Tomić and Mr. Dražen Plavec for Valentin Ćorić
Mr. Fahrudin Ibrišimović and Mr. Roger Sahota for Berislav Pušić**

**THE INTERNATIONAL CRIMINAL TRIBUNAL
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CASE NO. IT-04-74-T

PROSECUTOR v. JADRANKO PRLIĆ ET AL

PUBLIC

**JADRANKO PRLIĆ'S REQUEST FOR CERTIFICATION TO APPEAL
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DÉCISION DU 6 OCTOBRE 2010**

Jadranko Prlić, through his Counsel, respectfully requests pursuant to Rule 73(B) of the Rules of Procedure and Evidence ("Rules") certification to appeal the Décision Portant sur la Demande de Jadranko Prlić aux Fins d'Admission d'Éléments de Preuve Ceux Admis par la Décision du 6 Octobre 2010 ("Impugned Decision").¹

I. BACKGROUND

1. On 21 April 2010, the Prosecution filed a confidential Notice of its Intent to Request Reopening of its Case.
2. On 26 April 2010, the Prosecution re-iterated its intent to request the reopening of its case in its Notice Regarding Rebuttal and Reopening of its Case.
3. On 21 May 2010, the Prosecution filed a Motion to Reopen its Case-in-chief ("First Motion") in order to tender into evidence excerpts from the Mladić diary.² The Prosecution attached as Annexes the transcribed excerpts, their translation and the relevant scanned pages. It also provided a Confidential Annex with a statement allegedly verifying the authenticity of the Mladić diary.
4. On 4 June 2010, the Prlić Defence filed its Response to the Prosecution Motion to Reopen its Case-in-chief ("First Response"). The Prlić Defence informed the Trial Chamber that it was reserving its right of possibly

¹ Issued 24 November 2010. No official translation available yet.

² First Motion, para. 1.

requesting the reopening of its case “should it be deemed necessary, equitable and just.”³

5. On 9 June 2010, the Prosecution filed its Combined Reply to the Defence Responses to the Prosecution Motion to Reopen its Case-in-chief (Mladić Materials) and to Defence Requests to Suspend the Deadline for Response (“Reply”). The Prosecution noted that “[i]f the Trial Chamber declines to permit a party to reopen its case for the purpose of seeking to add relevant parts of the Mladić Notebooks, this issue is likely to arise later during the Appeal proceedings.”⁴
6. On 16 June 2010, the Trial Chamber issued the *Décision Portant sur la Requête de l’Accusation en Réouverture de sa Cause* (“16 June 2010 Decision”), declaring the Prosecution’s request as premature.⁵ The Trial Chamber scheduled the deadline for the Defence responses to 14 days after the submission of the Prosecution’s motion.⁶
7. On 8 July 2010, the Prosecution filed its Motion to Admit Evidence in Reopening (“Second Motion”), requesting the admission of excerpts from the Mladić diary, as well as other material it allegedly deemed relevant in supporting the authenticity and reliability of the Mladić diary. The Prosecution attached an Annex, wherein it *inter alia* argued the relevance and significance of each document in proving various aspects of its case as set out in the Indictment.
8. On 14 July 2010, the Prlić Defence filed Jadranko Prlić’s Notice of his Intent to Request Reopening of his Case Should the Trial Chamber Grant the Prosecution Motion to Admit Evidence in Reopening (“Notice”). The Prlić Defence identified “several excerpts from the Mladić diary ...which are deemed relevant and of probative value for [its] Defence case”⁷ and notified the Trial Chamber and the Parties that “[s]hould the Prosecution’s motion to admit evidence through the reopening of its case-in-chief be granted, Dr. Prlić

³ First Response, p. 6.

⁴ Reply, para. 45.

⁵ 16 June 2010 Decision, p. 6.

⁶ *Id.*

⁷ Notice, para. 11.

will move to have his case reopened in order to have evidence from the Mladić diary admitted, as well as any other supplementary evidence and *viva voce* testimony deemed necessary as a result of the admission of evidence from the Mladić diary,” pursuant to the principle of equality of arms. An Annex of 58 pages was attached, providing the contextual bases and relevance to the Prlić Defence case of the excerpts tentatively identified to be tendered for admission.

9. On 21 July 2010, the Prosecution filed its Response to Jadranko Prlić’s Notice of his Intent to Request Reopening of his Case Should the Trial Chamber Grant the Prosecution Motion to Admit Evidence in Reopening (“Prosecution’s Response to Notice”), wherein it notified the Trial Chamber that it “would not object to the Trial Chamber’s granting the Defence an equal opportunity to tender Mladić-related exhibits into evidence... .”⁸
10. On 23 July 2010, the Prlić Defence filed Jadranko Prlić’s Response to Prosecution Motion to Admit Evidence in Reopening. The Prlić Defence attached a Confidential Annex of 108 pages, in reply to the allegations made in the Prosecution’s Annex. The Annex tracked the Prosecution’s documents tendered for admission with a comprehensive response as to why each document should not be admitted.
11. On 28 July 2010, the Prosecution filed a Combined Reply to the Defence Responses to the Prosecution Motion to Admit Evidence in Reopening.
12. On 6 October 2010, the Trial Chamber issued the Decision on the Prosecution’s Motion to Re-open its case (“6 October 2010 Decision”). The Majority: **(a)** admitted Exhibits P 11376, P 11377, P 11380, P 11386, P 11388, P 11389, P 11391 and P 11392; **(b)** rejected the Annex attached to the Prlić Defence’s Response; **(c)** decided to limit the Defence requests for reopening only to refuting the entries admitted with the Impugned Decision, considering the Defence no longer diligent for filing a general request for reopening. Presiding Judge Antonetti attached a 53-page Dissenting

⁸ Prosecution’s Response to Notice, para. 3.

Opinion,⁹ wherein he notes that “My subsequent review of the Defence’s submissions, taking into account the issue of the declared “authenticity” of the Notebooks, of the potential added value of the documents in relation to the exhibits already admitted and especially of the effects on the speed of the trial, brought me to the conclusion that they ought to be excluded from evidence.”¹⁰

13. On 20 October 2010, the Prlić Defence filed a Request for the Certification to Appeal the Decision on the Prosecution’s Motion to Reopen its Case (“20 October 2010 Request”).
14. On the same day, the Prlić Defence filed a Motion to Rebut the Evidence Admitted by the Trial Chamber in the Decision on the Prosecution’s Motion to Re-open its Case (“Initial Motion”). Three Annexes were attached: one showing how each excerpt for which admission is sought “is connected with admitted excerpts and reasons why Prlić Defence considers this document important,” one setting out previous testimonial and documentary evidence related to the indicated paragraphs of the Amended Indictment, and a CD with scanned pages of the excerpts from the Mladić diary tendered into evidence.
15. On 1 November 2010, the Trial Chamber issued the Decision on Prlić Defence Request for Certification to Appeal the Decision on the Reopening of the Prosecution’s Case of 6 October 2010 rejecting the 20 October 2010 Request.
16. On the same day, the Prlić Defence filed, upon invitation by the Trial Chamber,¹¹ its Revised Motion to Rebut the Evidence Admitted by the Trial Chamber in the Decision on the Prosecution’s Motion to Reopen its Case (“Revised Motion”).
17. On 8 November 2010, the Prosecution filed its Consolidated Response to Defence Motions to Reopen their Cases and Tender Evidence per the Trial Chamber Decision of 6 October 2010 (“Consolidated Response”). The

⁹ Opinion Dissidente du Président de la Chambre, le Juge Jean-Claude Antonetti, Relative à la Décision Portant sur la Demande de l’Accusation de Réouverture de sa Cause, 6 October 2010 (“Dissenting Opinion”). No official translation available yet.

¹⁰ *Id.*, p. 2.

¹¹ Décision Relative à la Demande de la Défense Stojić de Certifier l’Appel de la Décision sur la Réouverture de la Cause de la Accusation et Portant Clarification de la Décision du 6 Octobre 2010, 27 October 2010, p. 10.

Prosecution did not raise any objections in relation to 24 out of the 40 documents for which the Prlić Defence sought admission, namely: 1D 03195, 1D 03159, 1D 03165, 1D 03164, 1D 03171, 1D 03174, 1D 03168, 1D 03169, 1D 03170, 1D 03172, 1D 03158, 1D 03160, 1D 03163, 1D 03166, 1D 03176, 1D 03179, 1D 03181, 1D 03185, 1D 03157, 1D 03161, 1D 03162, 1D 03180, 1D 03173 and 1D03198.¹²

18. On 24 November 2010, the Trial Chamber issued the Impugned Decision. The Majority held that “the excerpts from the Mladić Diary for which the Prlić Defence sought admission do not relate directly to the evidence admitted by the Decision of 6 October 2010” and therefore they “do not meet the criterion of novelty.”¹³ The Majority also held that regarding documents 1D 03193 and 1D 03194, which were already in the Prlić Defence’s possession during the presentation of its Defence case, “the Prlić Defence did not show that [these documents] meet the required criterion of novelty.”¹⁴ Presiding Judge Antonetti issued a Dissenting Opinion.¹⁵ Judge Antonetti stated that the 38 excerpts from the Mladić diary could have been admitted “because they are relevant and of probative value which cannot be discussed at the moment of a secret deliberation.”¹⁶

II. BASES FOR CERTIFICATION

A. The issue significantly affects the fair and expeditious conduct of the proceedings or the outcome of the trial

19. The Majority rejected the documents tendered by the Prlić Defence having found that the documents did not meet the necessary criterion of being “new

¹² Confidential Annex to Consolidated Response.

¹³ Impugned Decision, para. 24.

¹⁴ *Id.*, para. 26.

¹⁵ Opinion Dissidente du Juge Jean-Claude Antonetti, Président de la Chambre, Relative a la Décision Portant sur la Demande de Jadranko Prlić d’Admission d’Éléments de Preuve Réfutant Ceux Admis par la Décision du 6 Octobre, 25 November 2010 (“Dissenting Opinion”). No official translation available yet.

¹⁶ *Id.* p. 2.

evidence.” These findings seem to follow a pattern of rejecting the admission of exculpatory evidence in favor of the Defence.¹⁷

20. Despite the fact that the 38 excerpts from the Mladić diary for which admission was sought are directly linked to the Indictment (including the alleged JCE which Dr. Prlić is claimed to have been a member)¹⁸ and to the evidence admitted in favor of the Prosecution by the 6 October 2010 Decision, the Majority found to the contrary.¹⁹ By claiming that none of the 38 excerpts directly relate to Dr. Prlić, the Majority excluded evidence directly related in negating the alleged JCE, and, axiomatically, directly impacting on Dr. Prlić’s right to have evidence admitted in his defence. Thus, the beneficiary of the Majority’s findings in the Impugned Decision can be none other than the Prosecution.
21. The Majority’s findings lack merit, lending to a sustained perception that it inappropriately controls the admission of evidence in furtherance of effectuating a pre-determined result. This is particularly manifested when considering the alleged JCE and the unequal treatment in liberally admitting evidence from the Mladić diary in favor of the Prosecution, while denying, for spurious reasons, the admission of all Mladić diary excerpts submitted in support of Dr. Prlić’s defence.
22. While the Majority’s decision to disallow the re-opening of the Prlić Defence case was manifestly unjust and biased,²⁰ the Impugned Decision goes even further: it seems to display a callous disregard for Dr. Prlić’s right to adduce any evidence from the Mladić diary (assuming it is ultimately proved to be authentic and reliable)²¹ which directly militates against the interpretive spin alleged by the Prosecution and which concomitantly provides the requisite

¹⁷ See the latest Decisions, i.e. Impugned Decision; *Décision Portant sur la Rêquete de la Défense Praljak en Réouverture de sa Cause*, 23 November 2010; *Décision Portant sur la Rêquete de la Défense Stojić en Réouverture de sa Cause*, 25 November 2010.

¹⁸ See *inter alia* paras. 16, 17 and 17.1 of the Indictment.

¹⁹ Impugned Decision, para. 24.

²⁰ 6 October 2010 Decision.

²¹ The authenticity of the Mladić diary is currently being examined in the *Šešelj* case; the issue will not be resolved before 15 December 2010 and the outcome may give rise to further challenges on the admissibility of this evidence. See ICTY Weekly Briefing, 3 November 2010.

context to fully appreciating the circumstances. If the events and circumstances are viewed *only* from the Prosecution's perspective – a matter which is the likely outcome of the Impugned Decision - then, assuredly, this will be to the detriment of Dr. Prlić's right to a fair trial adjudicated by an unbiased Chamber.

23. The Prosecution alleges that Dr. Prlić participated in a JCE. The Mladić diary excerpts selected by the Defence are probative of the lack of a JCE. Considering relevant excerpts *only* referring specifically to Dr. Prlić's role gives the impression that the Majority has *already* found the alleged JCE to exist, with the individual participation of Dr. Prlić and the other Accused to be the *sole remaining issue* to be determined. This effectively amounts to a pre-judgement of the case; a clear violation of the express fair trial rights guaranteed to all Accused before the ICTY.²²
24. Annex I, attached both to the Initial and to the Revised Motion, includes a column where each document is explicitly linked to one of the documents admitted in favor of the Prosecution, as related to the Indictment. Notably, Presiding Judge Antonetti, through a detailed analysis, articulates how and why he finds the admission of all the proposed Mladić diary excerpts to be admissible.²³ Even the Prosecution acknowledges that more than half of these excerpts were relevant and probative for admission;²⁴ a further indicator of the Majority's clear error and abuse of discretion.
25. Regarding documents 1D 03193 and 1D 03194, which were already in the possession of the Defence during the presentation of its case, the Majority found that the Prlić Defence did not show why they constitute new evidence.²⁵ Both documents are directly linked to document P 11389, which was admitted by the 6 October 2010 Decision.²⁶ The importance of these documents is elevated after the discovery of the Mladić diary. Curiously, the Majority

²² Article 20(1) of the ICTY Statute states: "The Trial Chambers shall ensure that a trial is fair and expeditious and that proceedings are conducted in accordance with the rules of procedure and evidence, with full respect for the rights of the accused..."

²³ Dissenting Opinion, pp. 2-8.

²⁴ See para. 17 above.

²⁵ Impugned Decision, para. 26.

²⁶ See Annex I to Initial Motion and Revised Motion.

found no obstacle for the admission of documents by the Prosecution under analogous circumstances.²⁷ This disparate treatment in the admission of “fresh” evidence is yet another example of the double-standard applied by the Majority; a refrain which the Presiding Judge has explicitly noted in the past.²⁸

26. The principle of equality of arms, recognized “as being only one feature of the wider concept of a fair trial,”²⁹ with each party being “afforded a reasonable opportunity to present his or her case under conditions that do not place him at an appreciable disadvantage *vis-à-vis* his opponent,”³⁰ is not being adhered to by the Majority. Effectively, the Majority is not “provid[ing] every practicable facility it is capable of granting under the Rules and Statute when faced with a request by a party for assistance in presenting its case.”³¹ This failure by the Majority is aptly noted by Judge Antonetti in his Dissenting Opinion: “**the principle of equality of arms and the requirement of an equitable procedure impose upon the Judges the obligation to respect the equitable balance between the parties regarding the admission of documents, provided that they are directly or indirectly related to the Indictment.**”³²
27. The discernable errors committed by the Majority by applying an arbitrary and capricious standard in its assessment of the evidence at this advanced stage of the proceedings significantly affect Dr. Prlić’s fair trial rights,

²⁷ 6 October 2010 Decision, para. 41.

²⁸ E.g. Dissenting Opinion of the Presiding Judge of the Chamber, Jean-Claude Antonetti, Concerning the Decision on the Prosecution’s Motion to Re-open its Case, 6 October 2010, p. 58; Dissenting Opinion to Confidential Decision on Slobodan Praljak’s Motion for Admission of Written Evidence Pursuant to Rule 92*bis*, 16 February 2010, p. 5.

²⁹ *Prosecutor v. Kordić*, IT-95-14/2-A, Decision on the Application by Mario Čerkez for Extension of Time to File his Respondent’s Brief, 11 September 2001, para. 5.

³⁰ *Prosecutor v. Brđanin & Talić*, IT-99-36-T, Public Version of the Confidential Decision on the Alleged Illegality of Rule 70 of 6 May 2002, 23 May 2002, para. 22.

³¹ *Prosecutor v. Tadić*, IT- 94-1-A, Judgement, 15 June 1999, para. 52. Judge Trechsel, a member of the Majority, in his academic writings echoes this articulation of what, in practice, *equality of arms* consists of:

The defence must be given a fair chance to challenge evidence against the accused and to bring its own evidence. This must be granted under the same conditions as those applicable to the prosecution, which serves the general principle of equality of arms.

See STEFAN TRECHSEL, HUMAN RIGHTS IN CRIMINAL PROCEEDINGS 292 (Oxford University Press, 2005) (emphasis added).

³² Dissenting Opinion, p. 2 (emphasis added).

including the principle of equality of arms and his right to an effective defence,³³ as well as the outcome of the trial. Simply, Dr. Prlić is being deprived of likely exculpatory evidence that would allow him an effective defence.

B. An immediate resolution of the issue may materially advance the proceedings

28. An immediate resolution of this issue materially advances the proceedings for the following reasons:

- a. Excluding the documents tendered by the Prlić Defence deprives the Judges of the possibility to consider evidence that gives another context to the Mladić diary than the one attached to it by the Prosecution. A full assessment of their relevance and probative value can only occur during the final deliberations.
- b. If not settled at this point, then this issue can constitute a ground for appeal against the Judgement that the Trial Chamber will soon have to render. Should the Appeals Chamber then find that by rejecting these documents, the Judges erred, the Appeals Chamber may be required to order that Dr. Prlić, pursuant to Rule 117(C) of the Rules, “be retried according to law.” The Prosecution has recognized this possibility.³⁴

III. RELIEF SOUGHT

WHEREFORE, for all the reasons set forth herein the Prlić Defence respectfully requests certification to appeal the Impugned Decision.

Dated: 29 November 2010
The Hague, The Netherlands

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Respectfully submitted,



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³³ *Prosecutor v. Stanišić & Simatović*, IT-03-69-PT, Decision on Defence Request for Certification to Appeal Decision granting Prosecution leave to amend the Amended Indictment, 8 February 2006, p. 3.

³⁴ *Supra* note 4.