



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 PETKOVIĆ 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 the “Motion of Milivoj Petković for Reconsideration of Trial Chamber 6 October 2009 *ordonnance portant sur l’admission d’éléments de preuve relatifs au témoin expert Josip Jurčević* so as to Admit into Evidence 5 further Exhibits Tendered by the Petković Defence, alternatively for Certification under Rule 73 (B) for Appeal against the Non-Admission of those 5 Exhibits” filed publicly by Counsel for the Accused Milivoj Petković (“Petković Defence”) on 13 October 2009 (“Motion”), in which the Petković Defence requests primarily that the Chamber 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 exhibits 4D 01359, 4D 01360, 4D 01361, 4D 01052 and 4D 01453;¹ or alternatively, should the Chamber decide to deny the request, certify the said Order to appeal pursuant to Rule 73 (B) of the Rules of Procedure and Evidence (“Rules”),²

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 Office of the Prosecutor (“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 exhibit 4D 01052, but opposes the Motion with regard to the reconsideration of the Chamber’s decision not to admit into evidence exhibits 4D 01359, 4D 01360, 4D 01361 and 4D 01453;³ and, on the other hand, requests that the Chamber deny the request for certification to appeal the Order of 6

¹ Motion, paras 1 and 21. The Chamber notes that the Petković Defence requests amongst others that the Chamber reconsider its decision not to admit Proposed Exhibit 4D 01502; Motion, paras 1 and 21. The Chamber finds that this is an error and that the Petković Defence request relates amongst others to the decision not to admit into evidence proposed Exhibit 4D 01052; Motion, paras 5 and 10-12.

² Motion, paras 1 and 16-21.

³ Response, paras 3-5.

October 2009 submitted by the Petković Defence on the ground that the requirements of Rule 73 (B) of the Rules have not been met,⁴

NOTING the Order of 6 October 2009 in which the Chamber denied the admission into evidence of exhibits 4D 01359, 4D 01360 and 4D 01361, sought for admission by the Petković Defence, on the ground that the witness did not attest to the relevance and probative value of these three documents;⁵ denied the admission of exhibit 4D 01052 on the ground that the Petković Defence, by way of witness Josip Jurčević, failed to establish a sufficient link of relevance between the document and the Amended Indictment of 11 June 2008 (“Indictment”), and denied the admission of exhibit 4D 01453, a compilation of excerpts of transcripts from hearings in which witness Smilja Avramov gave testimony in the *Slobodan Milošević* case, on the ground that the admission of transcripts is governed by Rule 92 *bis* of the Rules,

CONSIDERING that the other Defence teams have not filed a response to the Motion,

CONSIDERING, firstly, that in respect of the section of the Motion for reconsideration of the Chamber’s decision not to admit into evidence exhibits 4D 01359, 4D 01360 and 4D 01361, the Petković Defence, by relying on the dissenting opinion of Presiding Judge Jean-Claude Antonetti,⁶ submits that the Chamber committed a discernible error in its reasoning applied to the Order of 6 October 2009;⁷ it submits in particular that the remarks made by Presiding Judge Jean-Claude Antonetti during the hearing of 15 September 2009 on these three exhibits and the absence of any disagreement or other comment by the other judges in some way led the Petković Defence to believe that the Chamber considered that these documents were relevant and that consequently there was no need to take time exploring the matter further with the witness Josip Jurčević,⁸

⁴ Response, paras 10 and 11.

⁵ Order of 6 October 2009.

⁶ 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.

⁷ Motion, paras 8, 9 and 15.

⁸ Motion, paras 8 and 9.

CONSIDERING, secondly, that with regard to the section of the Motion on reconsideration of the Chamber's decision not to admit into evidence exhibit 4D 01052, the Petković Defence submits that the Chamber committed a discernible error in its reasoning adopted in the Order of 6 October 2009, and puts forward in particular that exhibit 4D 01052 is relevant with regard to the allegations of a joint criminal enterprise made in the Indictment;⁹ that the relevance of the said document consists specifically in the fact that it serves to substantiate the argument of reverse ethnic cleansing by casting doubt on the motives of the RBH Presidency and notably their intention of working towards a peaceful solution of the conflict;¹⁰ that the Prosecution did not object to the admission of the said exhibit¹¹ and that it would moreover be dangerous for the Chamber not to admit into evidence exhibit 4D 01052 due to its lack of relevance in relation to the allegations in the Indictment when the Chamber is not in a position to determine exactly in which way the Petković Defence intends to fit that document into the presentation of its case,¹²

CONSIDERING, lastly, that with regard to the section of the Motion on the reconsideration of the Chamber's decision not to admit into evidence exhibit 4D 01453, the Petković Defence submits that the Chamber committed a discernible error in its reasoning adopted in the Order of 6 October 2009; it submits in particular that the Chamber in its arguments cited in the impugned Order¹³ did not take into account the Defence's response to the Prosecution's objections; that it notes finally that the Prosecution had no objection to the contents of the said exhibit and that the witness commented on the contents of the said exhibit during his appearance in court;¹⁴

CONSIDERING alternatively that, by relying notably on the dissenting opinion of Presiding Judge Jean-Claude Antonetti in the Order of 6 October 2009 which, according to the Petković Defence, constitutes the only reasonable approach to the admission of documents, the Petković Defence submits that the decision of the Chamber not to admit into evidence a document which, according to the Defence, directly refutes the Prosecution's arguments, infringes the right of the Accused to a fair trial and his right to present all relevant evidence during the trial and at any

⁹ Motion, paras 10 and 15.

¹⁰ Motion, paras 10 and 11.

¹¹ Motion, paras 3, 5, 10 and 12.

¹² Motion, para. 12.

¹³ IC 01051; Motion, paras 13-15.

possible appeal;¹⁵ that the differences of view between Presiding Judge Jean-Claude Antonetti and the majority of the Chamber on the requirements governing the admission of evidence during the testimony of a witness are sufficiently important ones whose resolution by the Appeals Chamber may materially advance the proceedings by clarifying the requirements for the admission of documents;¹⁶ that the error committed by the Chamber, namely its decision not to admit into evidence the Proposed Exhibits, may affect the fair and expeditious conduct of the proceedings or the outcome of the trial,¹⁷

CONSIDERING that in the Response, the Prosecution, while informing the Chamber that it takes no position on the section of the Motion concerning the exhibit 4D 01052,¹⁸ notes nevertheless that the subject of the said Motion, namely the request for reconsideration of the Chamber's decision not to admit into evidence exhibit 4D 01052, does not appear to meet the admissibility criteria for requests on reconsideration as set forth by the Chamber 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"),¹⁹

CONSIDERING secondly that, the Prosecution does not oppose the Motion with regard to reconsideration of the Chamber's decision not to admit into evidence exhibits 4D 01359, 4D 01360 and 4D 01361 on the ground that the criteria for admissibility for reconsideration set forth by the Chamber in its Decision of 26 March 2009 have not been met,²⁰ and that the Petković Defence will have the opportunity to present these documents by way of another witness or by way of a motion for the admission of documentary evidence pursuant to Rule 89 (C) of the Rules insofar as these documents do not have any particular link to witness Josip Jurčević,²¹

CONSIDERING thirdly that, the Prosecution opposes the Motion with regard to reconsideration of the Chamber's decision not to admit into evidence exhibit 4D 01453 and reiterates notably the argument it had put forward in support of its

¹⁴ Motion, para. 13.

¹⁵ Motion, paras 17 and 20.

¹⁶ Motion, paras 17-19.

¹⁷ Motion, para. 20.

¹⁸ Response, para. 3.

¹⁹ Response, paras 2 and 3.

²⁰ Response, para. 4.

²¹ Response, para. 4.

objection formulated against the request for the admission of the said exhibit submitted by the Petković Defence, namely that the admission of a document of this kind is governed by Rules 92 *bis* and 92 *ter* of the Rules,²²

CONSIDERING, finally, that alternatively the Prosecution opposes the request for certification submitted by the Petković Defence pursuant to Rule 73 (B) of the Rules by noting that a request for certification to appeal a Chamber's decision does not constitute a right and may only be submitted in exceptional circumstances and that the request must meet the criteria set forth in Rule 73 (B) of the Rules;²³ that moreover 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 and that it has equally already found 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 that was not unreasonable and erroneous;²⁴ that finally 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 the five exhibits, as identified in the Motion, and that the immediate resolution of this issue by the Appeals Chamber would not materially advance the proceedings,²⁵

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,²⁶ justify its reconsideration in order to avoid injustice,²⁷

²² Response, para. 5; List IC 01049.

²³ Response, paras 6 and 7.

²⁴ Response, paras 9 and 10.

²⁵ Response, para. 11.

²⁶ *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.

²⁷ *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.

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 that, with regard to the section of the Motion for the reconsideration of the decision not to admit into evidence exhibits 4D 01359, 4D 01360 and 4D 01361, the Chamber notes, as a preliminary observation, that in its Motion, the Petković Defence included speculations on the Chamber's conduct²⁸ which have no place within the argumentative body of a motion in this case; that furthermore the Chamber takes note of the Petković Defence's comments on the three above-mentioned exhibits, but recalls that the assessment of the criteria for admissibility of an exhibit is made at the stage of admission and that it is erroneous on the part of the Petković Defence to consider a reading of an exhibit's content or an absence of a reaction to such a reading as a steadfast and definitive acknowledgment of the relevance of the said exhibit; that it notes moreover that the Petković Defence has not shown that the Chamber for its part committed a discernible error in its reasoning which would require the reconsideration of the Order of 6 October 2009; that the Chamber thus considers that the Petković Defence, by way of its Motion, is simply challenging the Chamber's decision in the Order of 6 October 2009 and that consequently it is appropriate to dismiss the Motion with regard to the section of the motion on the reconsideration of the Chamber's decision not to admit into evidence exhibits 4D 01359, 4D 01360 and 4D 01361,

CONSIDERING that, with regard to the section of the Motion on the decision not to admit into evidence exhibit 4D 01052, the Chamber finds that, in its Motion, the Petković Defence is merely elaborating upon arguments on the relevance of the said exhibit to the Indictment that it had not raised during the presentation of the said exhibit to the witness Josip Jurčević or in its written submissions relating to the Order of 6 October 2009;²⁹ that the Chamber notes that the Petković Defence has not shown that it was unable to put forward these arguments in its written submissions relating to the Order of 6 October 2009³⁰ or to submit them during the presentation of the said exhibit to the witness Josip Jurčević; that the Chamber recalls, in this respect, that a

²⁸ Motion, para. 9, footnote page No. 6: "Moreover, the Trial Chamber would obviously have disapproved, and probably would have expressed exasperation, if she had proceeded to do so".

²⁹ Motion, paras 10-12; IC 01044.

new fact within the meaning of the Decision of 26 March 2009 that would justify the reconsideration of a decision is a fact that the party requesting reconsideration could not, on reasonable grounds, present during its initial request for admission or in its reply;³¹ that the Chamber considers that such an instance did not occur in the case in point,

CONSIDERING that the Chamber notes finally that the Petković Defence has not shown that the Chamber committed a clear error in its reasoning in deciding not to admit into evidence exhibit 4D 01052 that would require reconsideration of the Order of 6 October 2009,

CONSIDERING that the Chamber considers consequently that, by way of its Motion, the Petković Defence is simply challenging the Chamber's decision in its Order of 6 October 2009 and decides as a consequence to dismiss the Motion with regard to the request for reconsideration of the Chamber's decision not to admit into evidence exhibit 4D 01052,

CONSIDERING furthermore that the Chamber takes note of the explanations provided by the Petković Defence in support of its Motion on the subject of exhibit 4D 01453; that it recalls however that the decision not to admit exhibit 4D 01453 was based on the fact that the admission of transcripts of hearings, whether entire or in part, is governed by Rule 92 *bis* of the Rules and that the relevance of the said exhibit and its presentation to the witness Josip Jurčević were not factors taken into consideration by the Chamber in its decision not to admit into evidence exhibit 4D 01453; that it notes that the Petković Defence has not shown that the Chamber committed a clear error in its reasoning that would require the reconsideration of the Order of 6 October 2009; that the Chamber considers that, by way of its Motion, the Petković Defence is merely challenging the Chamber's decision in its Order of 6 October 2009 and that consequently it is appropriate to dismiss the Motion with regard to the request for reconsideration of the decision not to admit into evidence exhibit 4D 01453,

³⁰ IC 01044.

³¹ See notably "Decision on Stojić Defence Motion for Reconsideration of the Order on Admission of Evidence Regarding Witness Dragutin Čehulić", rendered publicly on 11 June 2009, p. 4.

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, consequently, 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,³²

CONSIDERING that the Chamber considers that it is crucial to ensure a consistent and clearly distinguishable practice as regards the admissibility of documents and takes this opportunity to draw the attention of the Petković Defence to the Appeals Chamber’s Decision of 12 January 2009 in which the Appeals Chamber recalled that, according to established Tribunal jurisprudence, a decision or a judgement rendered by the majority has the same binding effect as those rendered unanimously, provided that the decision is not shown to be erroneous, and that an Accused may not submit a request for certification to appeal a decision rendered by a Trial Chamber on the ground that a judge issued a dissenting opinion on the said decision,³³

CONSIDERING that the Chamber is satisfied with the fairness of the Order of 6 October 2009 and that it considers that the Petković Defence has not shown that the subject of the Motion, namely the Chamber’s decision not to admit into evidence the aforementioned five exhibits presented by way of witness Josip Jurčević and the existence of a difference in opinion between the Presiding Judge Jean-Claude Antonetti and the majority of the Chamber with regard to the principles governing the admission of evidence during the testimony of a witness, constitutes 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

³² *The Prosecutor v. Pavle Strugar*, Case No. IT-01-42-T, “Decision on Defence Motion for Certification”, 17 June 2004, para. 2.

³³ “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.

Chamber would materially advance the proceedings, and recalls in this respect that the issue has been dealt with by the Appeals Chamber in its Decision of 12 January 2009,

FOR THE FOREGOING REASONS,

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

DENIES the request for reconsideration of the Order of 6 October 2009 filed by the Petković 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 Petković 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

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

[Seal of the Tribunal]