



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: 19 January 2010
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: 19 January 2010

THE PROSECUTOR

v.

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

PUBLIC

**DECISION ON PROSECUTION REQUEST TO POSTPONE APPEARANCE
OF MILIVOJ PETKOVIĆ, *VIVA VOCE* WITNESS FOR THE PETKOVIĆ
DEFENCE**

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 oral request formulated by the Office of the Prosecutor (“Prosecution”) during the public hearing on 13 January 2010, by way of which the Prosecution requests that the Chamber order the postponement of the testimony of Witness Milivoj Petković, summoned to appear by Counsel for the Accused Petković (“Petković Defence”) from 1 to 16 February 2010, to 11 February 2010 on the ground that the Petković Defence filed the summary of the facts as provided for in Rule 65 *ter* (G) of the Rules of Procedure and Evidence (“Rules”) outside of the prescribed time (“Motion”),¹

NOTING the oral response of the Petković Defence formulated during the public hearing of 13 January 2010, by way of which it informs the Chamber that it has no objection to the postponement of Milivoj Petković’s testimony², but points out nevertheless that should the Chamber decide to order the postponement of the said testimony to commence on 11 February 2010, it would not be able to change its witness schedule and to summon witnesses to appear between 1 and 11 February 2010 (“Petković Defence Response”),³

NOTING the oral response of Counsel for the Accused Praljak (“Praljak Defence”) formulated during the public hearing of 13 January 2010, by way of which the Praljak Defence informs the Chamber that it opposes the postponement of Milivoj Petković’s testimony on the ground that an additional delay would prejudice the right of the accused to an expeditious trial (“Praljak Defence Response”),⁴

CONSIDERING that the other Defence teams did not formulate a response to the Motion during the public hearing on 13 January 2010, or file a written response,

¹ Transcript of the Hearing in French, (T (F)), p. 48332.

² T (F) p. 48335.

³ T (F) pp. 48333 and 48335.

⁴ T (F) p. 48335.

NOTING the “Decision on Motion for Extension of Time for the Commencement of the Defence Case and Adopting a New Schedule”, rendered publicly on 28 January 2008 (“Decision of 28 January 2008”), in which the Chamber ordered the Defence teams to file their lists pursuant to Rule 65 *ter* of the Rules by 31 March 2008 at the latest, lists which include, in accordance with Rule 65 *ter* (G) (i) (b), a summary of the facts on which each witness will testify,⁵

CONSIDERING that in support of its Motion, the Prosecution submits that the Petković Defence did not respect the Decision of 28 January 2008 in that it did not provide the 65 *ter* summary concerning the testimony of Witness Milivoj Petković, identified as Witness Number 16 in its 65 *ter* list filed on 31 March 2008; that the said list only mentions that Milivoj Petković’s testimony will relate to all the counts in the Amended Indictment of 11 June 2008 (“Indictment”) but does not contain either any reference to the relevant paragraphs of the Indictment, or a list of the documents that will be presented through the said Witness,⁶

CONSIDERING that in its Motion the Prosecution notes moreover that, since the commencement of the presentation of the Defence case, it has continually insisted on the importance of filing adequate 65 *ter* summaries that meet the requirements of the Rules and Tribunal jurisprudence and has requested, when necessary, detailed 65 *ter* summaries,⁷

CONSIDERING that more precisely the Prosecution recalls that it has been its practice since the commencement of the presentation of the Defence case to point out the lack of, or inadequate, 65 *ter* summaries submitted by the Defence teams at the time of providing the witness schedules which are filed by the defence teams on a monthly basis in accordance with Guideline No. 4 of the “Decision Adopting Guidelines for the Presentation of Defence Evidence”, rendered publicly on 24 April 2008 and with the “Decision on Prosecution Motion for the Provision of an Adequate Summary for the Forthcoming Testimony of Slobodan Božić”, filed publicly on 22 January 2009,⁸

⁵ Decision of 28 January 2008, pp. 7 and 8.

⁶ T (F) pp. 48327 – 48329 and 48331 and 48332.

⁷ T (F) p. 48329.

⁸ T (F) pp. 48329 and 48330.

CONSIDERING that the Prosecution mentions that in this case, it had an electronic exchange of correspondence with the Petković Defence on 18 September and 16 November 2009 and it was not informed until 1 January 2010, the date on which the Petković Defence filed the schedule for the month of February 2010, that the Accused Milivoj Petković would testify during the month of February;⁹ that it emerged from its correspondence with the Petković Defence that it would receive the 65 *ter* summary concerning Milivoj Petković's testimony no later than 30 days before he would commence his testimony,¹⁰

CONSIDERING that the Prosecution notes furthermore that it informed the Petković Defence by letter dated 4 January 2010 of its intention to request postponement of Milivoj Petković's testimony and that in its Response, the Petković Defence submitted that it had never given its agreement to provide a 65 *ter* summary concerning the said Witness 30 days before his appearance in court,¹¹

CONSIDERING that its Response, the Petković Defence denies having made any agreement with the Prosecution with regard to Witness Milivoj Petković's 65 *ter* summary;¹² that it submits moreover that the Praljak Defence provided a 65 *ter* summary concerning Slobodan Praljak's testimony less than 20 days before his appearance to testify,¹³ but that it has no objection, all the same, to the postponement of the appearance of Witness Milivoj Petković,¹⁴

CONSIDERING that the Prosecution, with regard to the reference made by the Petković Defence to the disclosure of the 65 *ter* summary of the Praljak Defence, notes that it was a different situation insofar as the parties were informed several weeks before the commencement of Witness Slobodan Praljak's testimony that his direct examination would continue for quite some time and that consequently it had sufficient time in which to prepare its cross-examination,¹⁵

CONSIDERING that the Chamber recalls that pursuant to Rule 65 *ter* (G) (i) (b) of the Rules, at the end of the presentation of the Prosecution case and before the

⁹ T (F) pp. 48330 and 48331.

¹⁰ T (F) pp. 48330 and 48331.

¹¹ T (F) p. 48331.

¹² T (F) pp. 48333 and 48334.

¹³ T (F) p. 48334.

¹⁴ T (F) p. 48335.

¹⁵ T (F) pp. 48338 and 48339.

presentation of the Defence case, the Defence teams are obliged to file a list of witnesses that they respectively intend to summon to appear and that this list must include amongst others, a summary of the facts on which the witness will testify,

CONSIDERING that the Chamber notes that the witness 65 *ter* list filed by the Petković Defence on 31 March 2008 identifies Milivoj Petković, Witness Number 16, as a witness of the Petković Defence, but contrary to the requirements of Rule 65 *ter* of the Rules does not contain any summary concerning the testimony of the said witness,

CONSIDERING that the Chamber notes furthermore that according to the Petković Defence's witness schedule for the month of February 2010 filed on 1 January 2010, Witness Milivoj Petković should testify from 1 to 16 February 2010,

CONSIDERING that the Chamber takes note of the fact that since 18 September 2009 the Prosecution and the Petković Defence have exchanged correspondence regarding the absence of the 65 *ter* summary concerning Milivoj Petković's testimony, without however reaching a clear agreement, and also notes that the Petković Defence has no objection to the postponement of Milivoj Petković's testimony to the date requested by the Prosecution, namely 11 February 2010,

CONSIDERING that the Chamber finds, as set forth by the Prosecution,¹⁶ that the Petković Defence did not respect its obligation to provide a 65 *ter* summary concerning Milivoj Petković's testimony by 31 March 2008, in accordance with the Decision of 28 January 2008, and only provided the 65 *ter* summary on 11 January 2010,

CONSIDERING that the Chamber notes that the deadline for filing a 65 *ter* summary as referred to by the Prosecution in its Motion, that is 30 days before the appearance in court of the witness concerned, corresponds to the filing date for the schedule of the Petković Defence's witnesses for the month of February 2010, and this also emerges from the exchanges that took place between the Prosecution and the Petković Defence; but it notes however that such a deadline is neither set out by the Rules nor by Tribunal jurisprudence and that only the deadline prescribed in the Decision of 28 January 2008, namely 31 March 2008, has force of law in this case,

CONSIDERING that the Chamber acknowledges that its activities and decisions must be guided by time constraints and an abiding concern to ensure that the trial is expeditious with regard to the right of the accused to a trial held within a reasonable time limit,

CONSIDERING that the Chamber recalls however that such concerns for the expeditious conduct of the trial must always be examined in light of the principle of the fair conduct of the trial,

CONSIDERING that in this case the Chamber finds that, taking into account the Petković Defence's late filing of the 65 *ter* summary and the Prosecution's reasonable request to postpone the commencement of Milivoj Petković's testimony by 11 days, it is appropriate, in the interests of fairness, to grant the Motion and postpone the appearance of Witness Milivoj Petković to 11 February 2010, an extension that should, thus, give the Prosecution time to prepare its cross-examination adequately,

FOR THE FOREGOING REASONS,

PURSUANT TO Articles 20 and 21 of the Statute and Rules 54 and 65 *ter* of the Rules,

GRANTS the Motion of the Prosecution,

ORDERS that the appearance of Witness Milivoj Petković be postponed until 11 February 2010,

AND

ORDERS the Petković Defence to call Witness 4D-AA, initially scheduled for 14 January 2010, between 1 and 11 February 2010, for cross-examination in his capacity as a *viva voce* witness for the Petković Defence and a 92 *bis* witness for the Praljak Defence.

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

Presiding Judge, Jean-Claude Antonetti, attaches a separate opinion to this decision.

¹⁶ T (F) pp. 48329 and 48332.

/signed/

Jean-Claude Antonetti
Presiding Judge

Done this nineteenth day of January 2010
At The Hague
The Netherlands

[Seal of the Tribunal]

**SEPARATE OPINION OF PRESIDING JUDGE, JEAN-CLAUDE
ANTONETTI**

During the hearing of Thursday, 15 January 2010, **Mr Scott**, acting for the Office of the Prosecutor, requested the postponement of the hearing of the Accused Petković initially scheduled to commence on 1 February 2010. This request raises several issues that should be addressed.

A) The delayed formulation of the request

The Prosecution has been in possession of information **since 31 March 2008** that the Accused Petković had agreed to testify.

In accordance with the guidelines rendered on 24 April 2008 and amended on 20 October 2008, the Defence ought to have filed its schedule before 1 January if the Accused Petković was going to testify; the schedule was provided on 4 January 2010 which seems to be acceptable given the court recess.

The principle reason is based on the absence of a **Summary** which should have been provided on 4 January or some time before then, and that this summary was provided on 11 January, that is, 10 days late with respect to the guidelines.

However, it is obvious that the Prosecution has known since 31 March 2008 that it did not have this summary.

I think, therefore, that to raise this issue on 15 January 2010, when it has been known of since 31 March 2008, constitutes a delay that should normally lead to the dismissal of the request on the grounds of **protraction**.

B) The obligation to provide a Summary

Is the Accused under obligation to provide a **summary**?

Answering this question involves examining the Articles and Rules of the Statute and the Rules.

Article 21 (4) (g) sets out that an accused may not be compelled to testify against himself or to confess guilt.

Providing a summary, however brief, before his hearing when he has the right to remain silent and not make any statement may, according to a Judge's reading, be interpreted as evidence against him, indeed even a **statement of guilt**.

For this reason, I do not believe that there is any specific obligation mentioned in the Statute to provide such a document.

With regard to the **Rules**, Rule 62 allows the accused to speak during his initial appearance to enter a plea.

Rule 63 of the same Rules specifies that the questioning of an accused, including after the initial appearance, may not take place without the presence of counsel. It should be noted that no mention is made of how the questioning is to be conducted.

The accused may express himself again during the opening statements since Rule 84 *bis* allows him to make a statement **without being examined** about the content of his testimony.

At this stage, the Rules do not specify the obligation to deal before his statement, with the contents thereof ...

Rule 85 (C) states regarding this, **“If the accused so desires, the accused may appear as a witness in his or her own defence”**

Therefore, after taking the oath, the accused will have a double role: **accused** and **witness**. He is therefore obliged from that moment on to tell the truth.

I do not think it is necessary at this stage to provide a summary, even one compiled under the supervision of the accused, as there is no Rule in the Rules requiring a summary for the accused himself, and even though Rule 65 *ter* (G) states that a witness is obliged to provide a summary, in the present case we have a situation where the individual is both a **witness** and an **accused**.

Consequently, for want of a Rule specifying otherwise, I do not agree with the Prosecution's point of view as mentioned in the Motion which notes that the Decision on Adopting Guidelines of 24 April 2008 is silent with regard to an **accused-witness**.

C) Adequate time

According to the Prosecution, it needs more time (until 11 February 2010) to prepare for the hearing.

This is surprising when one considers that the Prosecution has had several years to prepare and that furthermore the Accused Petković was already examined on two occasions by the Office of the Prosecutor in relation to other cases.

If the Prosecution needs a month between the date on which it receives the summary and the date on which the Accused's hearing commences, one must wonder as to how best interpret Article 16 of the Statute regarding the Prosecutor, “The Office of the Prosecutor shall be composed of a Prosecutor and such other **qualified staff** as may be required.”

I completely understand that staff at the Office of the Prosecutor perform a gruelling task due to the numerous Defence and Prosecution requests and the many decisions from the Chamber (notably concerning the admission of documents) and that, therefore, they may have a **legitimate** reason for requiring more time, but if so, I would have preferred this to be stated clearly rather than to be brought up as a procedural point in order to postpone until 11 February 2010.

Under these circumstances, I think, as do the other judges of the Trial Chamber, that the hearing of the Accused Petković will not commence until 11 February 2010 for the simple reason that the Prosecutor needs more time, and not for the procedural reason regarding the Summary or the 30-day deadline mentioned in the amended guidelines.

/signed/

Jean-Claude Antonetti
Presiding Judge

Done this nineteenth day of January 2010
At The Hague
The Netherlands

[Seal of the Tribunal]