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: 27 October 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: **27 October 2010**

THE PROSECUTOR

v.

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

PUBLIC

DECISION ON BRUNO STOJIĆ MOTION FOR CERTIFICATION TO APPEAL THE DECISION ON THE RE-OPENING OF THE PROSECUTION CASE AND CLARIFYING THE DECISION OF 6 OCTOBER 2010

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

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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 "Bruno Stojić Motion for Certification to Appeal the Trial Chamber's Decision Issued on 6 October 2010", filed publicly by Counsel for the Defence of Bruno Stojić ("Accused Stojić"; "Stojić Defence") on 20 October 2010 ("Motion"),

NOTING the "Decision on the Prosecution's Motion to Re-Open Its Case", rendered publicly on 6 October 2010 ("Decision of 6 October 2010"), in which, on the one hand, the Chamber grants in part the motion of the Office of the Prosecutor ("Prosecution") to re-open its case by admitting eight exhibits, six of which come from the Diary of Ratko Mladić ("Mladić Diary")[1] and, on the other hand, decided that any potential motions for re-opening by the Defence teams cannot in any way constitute general motions for re-opening based on excerpts from the Mladić Diary, instead they must be limited, if based on the Mladić Diary, to refuting the excerpts admitted by the Decision of 6 October 2010,[2]

NOTING the "Decision on Request for Extension of Time for Certification to Appeal Two Decisions Rendered by the Chamber on 6 October 2010", rendered publicly on 12 October 2010, in which the Chamber notably authorised the parties to file any request for certification to appeal the Decision of 6 October 2010 by 20 October 2010 at the latest ("Decision of 12 October 2010"),[3]

CONSIDERING that in the Motion, the Stojić Defence requests from the Chamber certification to appeal the Decision of 6 October 2010 pursuant to Rule 73(B) of the Rules of Procedure and Evidence ("Rules"),[4]

CONSIDERING that, in support of its Motion, the Stojić Defence argues that the Decision of 6 October 2010, which limits the scope of a potential motion for the re-opening of the case by the Defence teams to only refuting the excerpts of the Mladić

[1] Decision of 6 October 2010, paras 62 and 63 and p. 28.
[2] Decision of 6 October 2010, para. 64 and p. 29.
[3] Decision of 12 October 2010, p. 4.
[4] Motion, para. 1 and p. 9.

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Diary tendered into evidence by the Prosecution, significantly affects the fair and expeditious conduct of the trial or its outcome with regard to the Accused Stojić,[5]

CONSIDERING that the Stojić Defence considers that the Decision of 6 October 2010 has a direct impact on the right of the Accused Stojić to a fair trial, on his ability to challenge evidence contained in the Indictment amended on 11 June 2008 and to contradict or refute the Prosecution's allegations;[6] that it violates the principle of equality of arms and places the Prosecution at a significant advantage over the Accused Stojić by ensuring that exculpatory evidence on behalf of the Accused Stojić is not admitted,[7]

CONSIDERING that the Stojić Defence moreover alleges that the Chamber committed an error by applying improperly the standard of "reasonable diligence" to the matter of the re-opening of the case, stating in its contested Decision that "(…) In view of the time elapsed between being informed about the contents of the Notebooks and the filing of any request for re-opening, the diligence required, which the Chamber recalled was a fundamental condition for granting leave to a party to re-open its case, would not be satisfied, [8]"[9]

CONSIDERING that the Stojić Defence argues that it had informed the Chamber and the parties in good faith in a Notice filed on 7 September 2010[10] of its intention to file a motion for the re-opening of the case should the Chamber grant the Prosecution's motion for re-opening and that, in so doing, it clearly fulfilled its obligations under the case-law criterion of "reasonable diligence";[11] that, unlike the Chamber, it considers that the excerpts from the Mladić Diary which it wants to have admitted in a motion for re-opening could be qualified as fresh evidence,[12]

CONSIDERING that, according to the Stojić Defence, at the time when the Prosecution filed its motion for re-opening, the Defence teams were not in possession

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[5] Motion, para. 6.
[6] Motion, paras 6 and 17.
[7] Motion, paras 6 and 18.
[8] Decision of 6 October 2010, para. 64.
[9] Motion, paras 7 to 9 and 20.
[10] "Defence Notice on Behalf of Bruno Stojić; Intention to Request Reopening of Defence Case in the Event the Trial Chamber Grants the 'Prosecution Motion to Admit Evidence in Reopening' Dated 8 July 2010", public, 7 September 2010 ("Notice").
[11] Motion, paras 10 and 20.
[12] Motion, para. 20.

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of all the information on the circumstances surrounding the discovery of the Mladić Diary;[13] that it recalls that the Prosecution indicated to the Chamber that it would not object to a motion for the re-opening of the case by the Defence teams based on the Mladić Diary under certain conditions, including the Defence teams' acknowledgement that they are authentic and reliable,[14]

CONSIDERING that the Stojić Defence deems that it waited for the Chamber to decide, first of all, on the question of the authenticity of the Mladić Dairy, before filing its own motion for re-opening including excerpts from the Mladić Diary; that it therefore believes that it was right to await authorisation before tendering excerpts from the Mladić Diary that are relevant and have probative value,[15]

CONSIDERING that the Stojić Defence also maintains that by limiting the scope of the re-opening of the case of the Defence teams to only refuting admitted excerpts from the Mladić Diary, the Chamber confounded the terms "re-opening" and "refuting" by *de facto* and prematurely preventing it from filing a motion for the re-opening of its case based on the Mladić Diary,[16]

CONSIDERING, finally, that the Stojić Defence considers that this question should be put to the Appeals Chamber, instead of it being done after the judgement is rendered, since this would materially advance the proceedings,[17]

CONSIDERING that at this late stage of the proceedings, the Chamber does not deem it necessary to wait for any potential response from the Prosecution or the other Defence teams in order to rule on this Motion,

CONSIDERING that pursuant to Rule 73(B) of the Rules "[D]ecisions 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,"

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[13] Motion, para. 11.
[14] Motion, para. 12.
[15] Motion, para. 13.
[16] Motion, paras 14 to 17 and 20.
[17] Motion, para. 19.

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CONSIDERING, consequently, that certification to appeal is a discretionary power of the Chamber, which must, in any case, first verify that the two cumulative conditions set out in Rule 73(B) of the Rules are met in the particular case,[18]

CONSIDERING that the Chamber recalls that in the Decision of 6 October 2010 it concluded, notably, that any potential requests for the re-opening of the case of the Defence teams, seeking to tender excerpts from the Mladić Diary, should be limited solely to refuting fresh evidence admitted in the Decision of 6 October 2010,[19]

CONSIDERING that the Chamber recalls that it had reached this conclusion stating that after the Mladić Diary was received on 11 June 2010, the Defence teams merely expressed their intention to request the re-opening of their case through notices, based on the Mladić Diary, should the Chamber decide to grant the Prosecution's motion for re-opening;[20] that having failed to present a motion for re-opening in due form based on the discovery of the Mladić Diary like the Prosecution, and with regard to case-law criteria in the matter of re-opening, such as "diligence", the Chamber deemed that the Defence teams had themselves *de facto* limited their possibility to request the re-opening of their case based on the Mladić Diary to only the possibility of refuting fresh evidence admitted on behalf of the Prosecution,[21]

CONSIDERING that the Stojić Defence objects to the Chamber's conclusions that the Defence teams had not met the criterion of "due diligence" to be able to seek admission of excerpts from the Mladić Dairy as part of a potential general motion for the re-opening of their case; that in fact, according to the Stojić Defence, it had itself duly informed the Chamber of its intent to file such a motion in its Notice of 7 September 2010 and that it in good faith and legitimately awaited the Chamber's decision on the question of authenticity of the Mladić Diary before itself filing a motion for the re-opening of the case,[22]

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[18] *The Prosecutor v. Pavle Strugar*, Case No. IT-01-42-T, "Decision on Defence Motion for Certification", public, 17 June 2004, para. 2.
[19] Decision of 6 October 2010, para. 64 and p. 29
[20] Decision of 6 October 2010, para. 64.
[21] Decision of 6 October 2010, para. 64.
[22] Motion, paras 7 to 13.

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CONSIDERING that the Chamber recalls once more that it is not seized of a question until a party files a formal motion;[23] that this was recalled several times notably in the Decisions of 3 June and 6 July 2010,[24] and in the Decision of 6 October 2010,[25]

CONSIDERING that the Chamber could not consider the Notice of 7 September 2010 as a motion and even less as a motion for the re-opening of the case able to meet the case-law criteria for reopening,[26]

CONSIDERING, moreover, that the Chamber cannot accept the Stojić Defence argument that, on the one hand, it was first waiting for the Chamber to rule on the authenticity of the Mladić Diary[27] and, on the other hand, that it conditioned its potential motion for re-opening on the potential admission of excerpts from the Mladić Diary sought by the Prosecution in its motion for re-opening, before being able to draft, if need be, its own motion for re-opening;[28] that the Chamber notes, in particular, that the Rules of Procedure in force before the Tribunal do not allow a Chamber to be seized of motions for re-opening to be drawn up on condition that a later event occurs; that it would have been enough for the Stojic Defence to specify in its potential motion for re-opening that it remained valid solely if the Chamber confirmed the authentic nature of the Mladić Diary,

CONSIDERING that the Chamber deems that it has not made an error by noting the lack of diligence on the part of the Stojić Defence,[29] since it could have drawn up a motion for the re-opening of its case on time, based on the discovery of the Mladić Diary and following case-law criteria for the re-opening of a case, if that had been its intention, without conditioning its motion on the question of the authenticity of the Mladić Diary or on whether excerpts from the said Diary are admitted on behalf of the Prosecution,

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[23] Oral decision on the notices filed by the parties, 15 June 2009, French transcript, p. 41355.
[24] "Order on Prosecution Motion to Suspend Deadline to File Its Request to Reply", public, 3 June 2010, p. 5; "Decision on the Prosecution Motion for Reconsideration or Certification to Appeal Concerning *Ordonnance relative à la demande de l'accusation de suspendre le délai de dépôt de sa demande de réplique*", p. 10.
[25] Decision of 6 October 2010, para. 64, footnote 145.
[26] Decision of 6 October 2010, para. 64.
[27] Motion, paras 11 to 13.
[28] Motion, para. 2.
[29] Decision, para. 64.

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CONSIDERING that, at the time of issuing the Decision of 6 October 2010 and despite the filing of the various notices, the Chamber could therefore do no other than find that none of the Defence teams had yet filed a motion for the re-opening of their case based on the discovery of the Mladić Diary and in accordance with case-law criteria applicable in this matter, and conclude that any potential motion for re-opening based on the Mladić Diary could therefore only be limited to refuting the admitted fresh evidence,[30]

CONSIDERING, consequently, that the Chamber can only refute the Stojić Defence allegation that the Decision of 6 October 2010 violated the principle of equality of arms and placed the Prosecution at a significant advantage over the Stojić Defence,[31] because it was up to the Stojić Defence to file, if that was its intention, a general motion for the re-opening of its case based on the discovery of the Mladić Diary, like the Prosecution did, as soon as it found out about it, and that there was nothing to prevent it from proceeding in this way,

CONSIDERING, moreover, that with regard to the argument that by confounding the terms "re-opening" and "refuting" after admitting some excerpts from the Mladić Diary in the Decision of 6 October 2010, the Chamber had prematurely limited the possibility of the Stojić Defence drawing up a motion for the re-opening of its case,[32] the Chamber recalls that it rightly deemed that the Stojić Defence, like the other Defence teams, had lacked diligence by failing to draft a general motion for the re-opening of its case based on the entire Mladić Diary as soon as possible; that the Chamber had reminded the Defence teams in the Decision of 6 October 2010 that they could not tender for admission excerpts from the Mladić Diary except for the purpose of refuting the evidence admitted by the Chamber, these excerpts therefore not losing their fresh nature in the motion for re-opening drafted by the Defence teams,

CONSIDERING that the Chamber recalls that the Appeals Chamber qualifies as "fresh evidence" not only evidence that was not in possession of a party at the conclusion of its case and which it could not obtain despite all its diligence by the close of its case (which was the case with the excerpts from the Mladić Diary

[30] Decision of 6 October 2010, para. 64 and p. 29.
[31] Motion, paras 6 and 18.
[32] Motion, paras 14 to 16.

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tendered for admission by the Prosecution),[33] but equally, evidence it had in its possession, the importance of which was revealed only in the light of fresh evidence (which was also the case with three document for which the Prosecution sought admission as part of the re-opening of its case and which were in its possession during the presentation of its case[34]),[35]

CONSIDERING that the Chamber deems that with regard to any potential excerpts from the Mladić Diary that are not linked to what has been admitted as part of the re-opening of the Prosecution case, these excerpts have lost their fresh nature when one takes into account the date when this Diary was discovered and the date when the Defence teams found out about it;[36] that, on the other hand, the excerpts having a link with what has been admitted in the Decision of 6 October 2010, have not in themselves lost their fresh nature to the extent that it is possible to consider that their importance became apparent in light of what was admitted on behalf of the Prosecution,

CONSIDERING that this statement also applies to exhibits, other than the excerpts from the Mladić Diary, which the Defence teams already have in their possession,[37]

CONSIDERING that this possibility for the Defence teams to present new evidence in order to refute the excerpts from the Mladić Diary admitted in the Decision of 6 October 2010 is not exclusive to a motion for re-opening dealing with evidence that the Defence teams have just discovered and that meet the case-law requirements for a re-opening,[38]

CONSIDERING that the Chamber is aware that in the *Milošević* Decision the Trial Chamber informed the Defence that it had the right to reply to evidence admitted in a motion for the re-opening of the Prosecution case[39] and that the Stojić Defence in the

[33] Decision of 6 October 2010, para. 40.
[34] Decision of 6 October 2010, para. 41.
[35] Decision of 6 October 2010, para. 34, citing the *Čelebići* Appeals Judgement, paras 282 and 283.
[36] Decision of 6 October 2010, para. 64.
[37] *See* in this respect the Decision of 6 October 2010, para. 34.
[38] *See* on this matter the Decision of 6 October 2010 and paras 31 to 33.
[39] *The Prosecutor v. Slobodan Milošević*, IT-02-54-T, "Decision on Application for a Limited Re-Opening of the Bosnia and Kosovo Components of the Prosecution Case with Confidential Annex", public, 13 December 2005 ("Decision Milošević"), para. 35.

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present case has relied on this decision to deem that it had the right not only to respond, but also to the re-opening of its case,[40]

CONSIDERING that the Chamber deems that the "right to respond", which is no different to the one envisaged by the Chamber for the re-opening of the cases of the Defence teams, falls within the procedural context of Rule 85 of the Rules, which, after hearing the arguments of the Prosecution, allows those of the Defence teams to be heard,

CONSIDERING, consequently, that the Defence teams can put forward "fresh evidence" as part of a motion for re-opening in response to the re-opening of the Prosecution case and that the "fresh evidence" can come from the Mladić Diary, as long as it is directly linked to what was admitted on behalf of the Prosecution (otherwise it would not be of a "fresh" nature) or any other relevant and probative evidence whose importance was revealed in the light of fresh evidence tendered by the Prosecution,[41]

CONSIDERING that the Chamber, moreover, wishes to specify to the Defence teams that, if appropriate, they should supplement their motion by refuting the evidence tendered by the Prosecution in their motions for re-opening, in accordance with case-law criteria for re-opening,[42] and this within seven days of the time this Decision is issued,

CONSIDERING, finally, that in allowing the Defence teams to file their motion for refuting fresh evidence admitted in the Decision of 6 October 2010, stemming, if appropriate, from the Mladić Diary,[43] the Chamber deems that the contested Decision does not affect either the fairness or the outcome of the trial,

CONSIDERING, consequently, that the Chamber is convinced of the reasonable nature of the said Decision and deems that the Stojić Defence has not shown that the aim of the Motion contains an issue that is likely to affect significantly the fairness

[40] Motion, paras 15 and 16.
[41] Decision, para. 34.
[42] On this point the Defence teams should explain, if they wish to tender excerpts from the Mladić Diary, how the evidence that they wish to have admitted into evidence is evidence whose fresh nature came to light as a result of what was admitted as part of the re-opening of the Prosecution case.
[43] Decision, para. 64 and p. 29.

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and expeditiousness of the trial or its outcome, nor precisely how an immediate ruling on the question by the Appeals Chamber could materially advance the proceedings,

CONSIDERING, consequently, that the Chamber deems that the Motion does not meet the criteria under Rule 73(B) of the Rules,

FOR THE FOREGOING REASONS,

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

DENIES the Motion, **AND**

INVITES the Defence teams to supplement their motion, if need be, by refuting the evidence tendered by the Prosecution in their motions for re-opening, in accordance with the case-law criteria for re-opening and to do this within seven days of the day the present Decision is issued in its original version.

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

/signed/

Jean-Claude Antonetti
Presiding Judge

Done this twenty-seventh day of October 2010
At The Hague
The Netherlands

[Seal of the Tribunal]

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