



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: 1 November 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: 1 November 2010

THE PROSECUTOR

v.

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

PUBLIC

**DECISION ON PETKOVIĆ DEFENCE REQUEST FOR CERTIFICATION
TO APPEAL THE DECISION ON PROSECUTION 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 the “Petković Defence Request for Certification to Appeal under Rule 73 (B) against the Trial Chamber’s 6 October 2010 ‘Decision on the Prosecution Motion to Re-Open its Case’”, filed publicly by Counsel for the Accused Milivoj Petković (“Petković Defence”) on 20 October 2010 (“Request”), wherein the Petković Defence asks the Chamber to certify the appeal it intends to lodge against the “Decision on the Prosecution Motion to Re-Open its Case”, rendered publicly on 6 October 2010 (“Decision of 6 October 2010”), pursuant to Rule 73 (B) of the Rules of Procedure and Evidence (“Rules”),¹

NOTING “Slobodan Praljak’s Joinder to Petković Defence Request for Certification to Appeal under Rule 73(B) against the Trial Chamber’s 6 October 2010 Decision on the Prosecution Motion to Re-Open its Case”, filed publicly by Counsel for the Accused Slobodan Praljak (“Praljak Defence”) on 20 October 2010, whereby the Praljak Defence informs the Chamber of its intended joinder to the Request and indicates it is adopting *mutatis mutandis* the arguments set forth in the Request (“Praljak Defence Joinder”),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, whereby the Chamber specifically authorised the parties to file any motions for certification to appeal the Decision of 6 October 2010 on or by 20 October 2010 at the latest (“Decision of 12 October 2010”),³

NOTING the Decision of 6 October 2010, whereby the Chamber, on the one hand, partially granted the motion by the Office of the Prosecutor (“Prosecution”) to reopen its case by admitting 8 exhibits, including 4 from the notebooks of Ratko Mladic⁴

¹ Request, paras 1 and 20.

² Praljak Defence Joinder, paras 1 and 2.

³ Decision of 12 October 2010, p. 4.

⁴ See Exhibits P 11376, P 11380, P 11386 and P 11389.

(“Mladić Notebooks”)⁵ and, on the other, decided that any motions to reopen filed by the Defence teams could not in any case be sweeping motions based on the entries of the Mladić Notebooks, but ought to be limited, if they were based on the Mladić Notebooks, to refuting the entries admitted by the Decision of 6 October 2010,⁶

NOTING the “Decision on the 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”, rendered publicly by the Chamber on 27 October 2010 (“Decision of 27 October 2010”),⁷

CONSIDERING that, in support of the Request, the Petković Defence contends that the Chamber clearly erred in the exercise of its discretion when it (1) granted the Prosecution leave to reopen its case and allowed the admission of fresh evidence related to the Mladić Notebooks,⁸ (2) denied the requests filed by the various Defence teams to cross-examine Manojlo Milovanović,⁹ and (3) restricted any motions to reopen that the Defence teams might wish to file to the refutation of the entries of the Mladić Notebooks admitted by the Decision of 6 October 2010 and nothing more, based on the fact that the Defence teams had not shown diligence in filing their own motions to reopen their cases on the basis of the Mladić Notebooks,¹⁰

CONSIDERING that, in this regard, the Petković Defence submits that the errors committed by the Chamber touch upon issues likely to significantly affect the fairness and expeditiousness of the trial or its outcome,¹¹ and that their immediate resolution by the Appeals Chamber may materially advance the proceedings,¹²

CONSIDERING that, as concerns the first portion of the Request, that is, the admission of fresh evidence in connection with the reopening of the Prosecution’s case, the Petković Defence argues that the Chamber has erred (1) in its assessment of the authenticity and reliability of the Mladić Notebooks,¹³ (2) in its assessment of the

⁵ Decision of 6 October 2010, paras 62 and 63 and p. 28.

⁶ Decision of 6 October 2010, para. 64 and p. 29.

⁷ The Chamber points out that in the Decision of 6 October 2010, it mistakenly mentioned that 6 entries from the Mladić Notebooks, rather than 4, had actually been admitted.

⁸ Request, para. 5.

⁹ Request, para. 10.

¹⁰ Request, para. 14.

¹¹ Request, para. 16.

¹² Request, paras 17-19.

¹³ Request, para. 6.

relevance and probative value of the evidence tendered for admission by the Prosecution with regard to the participation by the various Accused in the furtherance of the alleged joint criminal enterprise,¹⁴ and (3) in balancing the probative value of the evidence admitted against the possible prejudicial impact of its admission on the rights of the Accused at such a late stage of the proceedings,¹⁵

CONSIDERING that, as concerns the Petković Defence contesting the Chamber's assessment of the relevance and probative value of the evidence admitted by the Decision of 6 October 2010, the Petković Defence likewise submits that the subject-matter of the evidence admitted by the Chamber (1) involves an aspect that is merely peripheral, not fundamental to the Prosecution's case,¹⁶ (2) does not confirm the Prosecution's thesis on the alleged criminal nature of the collaboration between the Bosnian Croats and the Bosnian Serbs, but in fact confirms the theses advanced by various Defence teams whereby the very limited cooperation between HVO units and the Bosnian Serbs was an existential necessity for these units and for the Croat population,¹⁷ and (3) is neither relevant nor possesses enough probative value to establish, as the Prosecution submits, the criminal intent of the Accused in relation to the joint criminal enterprise ("JCE"), as pleaded in paragraphs 15 to 17 of the Second Amended Indictment of 11 June 2008 ("Indictment"),¹⁸

CONSIDERING that, in addition to this, the Petković Defence submits that the opportunity afforded to the Prosecution to reopen its case involves an issue that would significantly affect the fair and expeditious conduct of the trial due to the fact that (1) the fairness of the proceedings is an essential part of the legal test for any motion to reopen, (2) an immediate resolution of the issue by the Appeals Chamber would cause the proceedings to advance, given that the exclusion from the record of fresh evidence would translate into gains of time and resources, and (3) the admission of evidence

¹⁴ Request, para. 6.

¹⁵ Request, para. 6. In relation to this, the Petković Defence also contends that given the fundamental nature of the issue of the participation of the various Accused in the joint criminal enterprise alleged in the Prosecution's case, and that the evidence admitted adds nothing to what has already been admitted to the record, the Chamber did not strike a proper balance between the admission of fresh evidence and compliance with the requirements of ensuring a fair and expeditious trial. (Request, para. 8).

¹⁶ Request, para. 7 (a).

¹⁷ Request, para. 7 (b).

¹⁸ Request, para. 7 (c).

which the Chamber deems relevant and probative, touches upon an issue likely to significantly affect the outcome of the proceedings,¹⁹

CONSIDERING that in respect of the second portion of the Request, namely, the denial of the requests of the various Defence teams to cross-examine Manjolo Milovanović, the Petković Defence puts forward that (1) given the fact that Manjolo Milovanović is the Prosecution's only witness making it possible to confirm the authenticity of the Mladić Notebooks, it is unthinkable that the Chamber would deny Defence requests to cross-examine him, as it would have certainly granted the requests had this involved an expert witness whose report the Prosecution had tendered for admission,²⁰ (2) given the adversarial comments expressed by the various Defence teams as to the authenticity of the Mladić Notebooks, this decision to deny the requests for cross-examination appears "unjust",²¹ (3) the fact that another Chamber of the Tribunal, *e.g.* the Chamber in the *Karadžić* case decided to admit the Mladić Notebooks as evidence cannot serve as justification for a similar decision in the instant case,²² (4) in the *Karadžić* case, the authenticity of the Mladić Notebooks was not challenged by the Defence, and, on the contrary, the fact that the Defence teams in the various Serb leadership cases do not challenge the authenticity of the Mladić Notebooks only serves to confirm the reasonable doubts of the various Defence teams in this case concerning the authenticity of the Mladić Notebooks,²³ and (5) this decision affects an issue likely to significantly affect the fairness and expeditiousness of the trial,²⁴

CONSIDERING that, in respect of the latter point relating to the fairness and expeditiousness of the proceedings, the Petković Defence argues, in relevant part, that (1) the Chamber's decision to disallow cross-examination of Manjolo Milovanović appears to violate the rights of the defence, as spelled out in Articles 21(4)(d) and (e) of the Statute of the Tribunal and would deprive the Chamber of the opportunity to consider evidence that may cast doubt upon the authenticity of the Mladić Notebooks, (2) the resolution of this matter by the Appeals Chamber would make it possible to resolve the problem of the authenticity of the Mladić Notebooks, and (3) the

¹⁹ Request, para. 9.

²⁰ Request, para. 11.

²¹ Request, para. 12.

²² Request, para. 12.

²³ Request, para. 12.

admission of the statement by Manjolo Milovanović pursuant to Rule 92 *bis* without giving the Defence teams an opportunity to cross-examine the witness would affect the outcome of the trial,²⁵

CONSIDERING that, in respect of the third portion of the Request, that is, the restriction placed by the Chamber on any motions to reopen brought by the Defence teams, the Petković Defence puts forward that the Chamber has erred in the exercise of its discretion by limiting any motions to reopen to the refutation of the entries from the Mladić Notebooks that have been admitted, on grounds that the Defence teams failed to exercise diligence in filing their own motions to reopen based on the Mladić Notebooks;²⁶ that this decision would touch upon an issue likely to affect the fair and expeditious conduct of the proceedings;²⁷

CONSIDERING that, given the late stage of the proceedings at which the trial stands, the Chamber does not find it necessary to wait for a possible response by the Prosecution or by the other Defence teams in order to rule upon this Request,

CONSIDERING that, by virtue of Rule 73 (B) “[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”,

²⁴ Request, para. 13.

²⁵ Request, para. 13.

²⁶ Request, paras 14 and 15. In this regard, the Petković Defence submits that in light of the responses filed by the Defence teams to the Prosecution’s motion to reopen, in which the authenticity and reliability of the Notebooks were disputed, it supposed in good faith that the Chamber did not expect it to file a motion to reopen the case based on the Notebooks before the Chamber ruled on the issues of authenticity and reliability (Request, para. 15).

²⁷ Request, para. 16. In this regard, the Petković Defence contends that the impugned decision (1) involves the fundamental right of the Accused to present exculpatory evidence as well as his right to a fair trial, (2) impacts the Accused’s ability to present evidence which might provide a proper context and overall picture of the case to the Chamber, and (3) deprives the Chamber of the ability to consider relevant evidence. The Petković Defence also asserts that the resolution of the matter by the Appeals Chamber would avoid delay in the proceedings and, lastly, that the Chamber’s inability to take into consideration all relevant evidence may significantly affect the outcome of the trial.

CONSIDERING that certification of an appeal falls within the scope of discretion of the Chamber, which must, in any case, initially verify that the two cumulative conditions set forth in Rule 73 (B) are met in the case at bar,²⁸

CONSIDERING that, as concerns the first portion of the Request, namely that the Chamber committed an error of judgement in its assessment of the authenticity, relevance and probative value of the evidence admitted under the Decision of 6 October 2010, the Chamber points out that the Petković Defence has contented itself with questioning the Chamber's assessment and decision and does not supply supporting facts for the arguments it set forth in its response to the request for the reopening of the case made by the Prosecution,²⁹

CONSIDERING nevertheless, despite this observation, that the Chamber is compelled to remind the Petković Defence that, in proceeding to its assessment of the authenticity, relevance and probative value of the evidence, it did duly take into account the impact their admission might have upon the speed of the trial and upon the right of the Accused to a fair trial³⁰ and has been careful to limit as much as possible the prejudice to which the Accused might be subjected as well as any potential delay in the progress of the trial due to the admission of this evidence,³¹

CONSIDERING that the Chamber recalls that it was for the purpose of taking into account these two imperatives – avoiding prejudice as much as possible and keeping any potential delays in the progress of the trial as short as possible – that it adopted a very restrictive approach to the admission of evidence in connection with the reopening of the Prosecution case; that the exhibits tendered for admission must, without adding new counts not alleged in the Indictment, directly pertain to the criminal responsibility of the Accused in relation to their involvement in furtherance of the objectives of the JCE alleged in the Indictment,³²

CONSIDERING that by means of this very restrictive approach, the Chamber has thus admitted only a small quantity of evidence in which it pointed out statements

²⁸ *The Prosecutor v. Pavel Strugar*, Case No. IT-01-42-T, "Decision on Defence Motion for Certification", public document, 17 June 2004, para. 2.

²⁹ "Petković Defence Response to the Prosecution Motion to Admit Evidence in Reopening", public document, 22 July 2010, paras 10 *et seq.*, and Decision of 6 October 2010, para. 12.

³⁰ Decision of 6 October 2010, paras 54-56.

³¹ Decision of 6 October 2010, para. 57.

made by the Accused Prlić, the Accused Stojić, the Accused Praljak and the Accused Petković which it deemed relevant in light of the allegations made concerning the possible involvement of each of the said Accused in furtherance of the purposes of the alleged JCE;³³ that is has, on the other hand, specifically denied admission to the exhibits proposed concerning the nature of the relationship between the Bosnian Serbs and the Bosnian Croats, which were held to lack relevance in light of the allegations of the involvement of the Accused in furtherance of the purposes of the JCE,³⁴

CONSIDERING that in any case the Chamber, in the Decision of 6 October 2010, reminded the parties that, at the stage of admission, it was not obligated to conduct a final assessment of the relevance, reliability and probative value of the evidence, and that it would only proceed to do this at the conclusion of the trial when all evidence for the Prosecution and the Defence has been admitted to the record,³⁵

CONSIDERING that the Chamber, as a result, does not believe that circumstances exist which might allow one to affirm that the Chamber has committed any error affecting the fairness or the outcome of the trial in its assessment of the relevance and probative value of the evidence admitted,

CONSIDERING that, in respect of the second portion of the Request, namely the denial of the requests of the various Defence teams to cross-examine Manjolo Milovanović, the Chamber recalls that in the Decision of 6 October 2010, it took into consideration the objections of the Defence teams in assessing the authenticity of the Mladić Notebooks and considered the objections in the light of (1) the two statements the Prosecution sought to have admitted pursuant to Rule 92 *bis* of the Rules, as well as the three documents in the custody of the Prosecution during its case which the Prosecution alleged confirmed the authenticity and the reliability of the Mladić Notebooks, (2) the argument of the Stojić, Praljak and Petković Defence teams which allegedly informed the Chamber of their intention to possibly file a motion to reopen the case, in order to request, *inter alia*, the admission of Mladić Notebooks entries for the purpose of refuting any entries admitted to the record,³⁶ and (3) the decision taken

³² Decision of 6 October 2010, paras 58, 59 and 61.

³³ Decision of 6 October 2010, paras 61-63.

³⁴ Decision of 6 October 2010, paras 60 and 62.

³⁵ Decision of 6 October 2010, para. 59.

³⁶ Decision of 6 October 2010, para. 46.

by the *Karadžić* Chamber to authorize admission to the record of nearly all of the Mladić Notebooks,³⁷

CONSIDERING that, further to this, the Chamber observes that the Petković Defence is merely making assumptions regarding the decisions the Chamber would have taken in the event it were seized of a request to admit an expert report into evidence – not the statement of Manjolo Milovanović – but does not explain how it is that the Chamber’s alleged error in admitting the said statement of Manjolo Milovanović pursuant to Rule 92 *bis* of the Rules affects the fairness or outcome of the trial,³⁸

CONSIDERING that the Chamber likewise observes that by merely pleading the “unjust” nature of the decision taken by the Chamber to admit the statement of Manjolo Milovanović and stating that the Chamber’s citation to the decision of the *Karadžić* Chamber to admit the Mladić Notebooks did not suffice,³⁹ the Petković Defence fails to establish precisely how the Chamber’s decision compromises the fairness and the outcome of the trial,

CONSIDERING that, in respect of the third portion of the Request, namely the Chamber’s restriction on any motions to reopen by the Defence teams, the Chamber recalls the Decision of 27 October 2010, wherein it held that it was unable to embrace the arguments brought by Counsel for the Accused Bruno Stojić (“Stojić Defence”), inasmuch as the Stojić Defence “could have drawn up a motion for the re-opening of its case on time, based on the discovery of the Mladić Notebooks and following case-law criteria for the re-opening of the case, if that had been its intention, without conditioning its motion on the question of the authenticity of the Mladić Notebooks or on whether excerpts from the said Notebooks are admitted on behalf of the Prosecution”,⁴⁰

³⁷ Decision of 6 October 2010, para. 47.

³⁸ See footnote 20, *supra*.

³⁹ See footnotes 21, 22 and 23, *supra*.

⁴⁰ Decision of 27 October 2010, p. 6. See also the prior “Considering” on the same page, where the Chamber likewise stated “[...] that the Rules of Procedures 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 Stojić 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 Notebooks [...]”.

CONSIDERING that the Chamber holds that the very same logic applies to the arguments elaborated in the Request by the Petković Defence, and that, as a result, the Petković Defence has not established how it is that the impugned decision, by requiring that motions to reopen by the Defence teams be limited to the refutation of the Mladić Notebooks, on grounds that the Defence teams failed to exercise diligence, has affected the fairness or the outcome of the trial,

CONSIDERING that the Chamber is persuaded of the reasonable basis in law for the said decision with regard to the three portions of the Request and finds that the Petković Defence has not established that the purview of the Request constitutes an issue likely to significantly affect the fairness and expeditiousness of the trial or its outcome, nor how the immediate resolution of the issue by the Appeals Chamber would materially advance the proceedings,

CONSIDERING, therefore, that the Chamber finds that the Request does not meet the criteria of Rule 73 (B) of the Rules,

FOR THE FOREGOING REASONS,

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

DENIES the Request,

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

/signed/

Jean-Claude Antonetti
Presiding Judge for the Chamber

Done this first day of November 2010
At The Hague
The Netherlands

[Seal of the Tribunal]