



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: 23 November 2010
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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: 23 November 2010

THE PROSECUTOR

v.

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

PUBLIC

DECISION ON THE PETKOVIĆ DEFENCE MOTION TO REOPEN THE CASE

The Office of the Prosecutor:

Mr Kenneth Scott
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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

I. INTRODUCTION

1. 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”) is seized of the “Milivoj Petković’s Motion to Admit Evidence in Reopening” filed by Counsel for the Accused Milivoj Petković (“Petković Defence”) on 20 October 2010, to which are attached a public annex and a confidential annex, and in which the Petković Defence moves to admit 20 documents in connection with the reopening of its case, including 19 excerpts from the Diaries of Ratko Mladić (“Mladić Diaries”) and an article entitled “Mladić’s Diaries or a Big Deception?”, published in the Croatian weekly periodical *Globus* on 4 June 2010 (“Motion”).¹

II. PROCEDURAL BACKGROUND

2. On 6 October 2010, the Chamber publicly rendered the “Decision on the Prosecution’s Motion to Reopen its Case” (“Decision of 6 October 2010”), wherein the Chamber partially granted the motion by the Office of the Prosecutor (“Prosecution”) to admit into evidence certain excerpts from the Mladić Diaries,² and indicated that in the event the Defence teams would file requests to reopen their cases, these requests ought to be restricted to refuting the excerpts from the Mladić Diaries admitted under the Decision of 6 October 2010.³

3. On 27 October 2010, the Chamber publicly rendered the “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”, whereby it denied

¹ Motion, paras 2 and 17; see also Annex I of the Motion, in which the Petković Defence lists the exhibits it is seeking to have admitted to the record, namely, Exhibits 4D 02501, 4D 02504, 4D 02505, 4D 02507, 4D 02508, 4D 02509, 4D 02510, 4D 02511, 4D 02512, 4D 02514, 4D 02515, 4D 02516, 4D 02517, 4D 02518, 4D 02519, 4D 02520, 4D 02521, 4D 02524, 4D 02525 and 4D 2529 (“Proposed Exhibits”).

² See in this connection the “Prosecution Motion to Admit Evidence in Reopening”, filed publicly by the Prosecution along with Public Annexes 1 and 3 to 5 and Confidential Annex 2 on 9 July 2010, whereby the Prosecution respectfully requests that the Chamber grant it leave to reopen its case and to admit into evidence 18 exhibits – including 15 excerpts from the Mladić Notebooks and 3 documents likely to attest to the authenticity and the reliability of the said Diaries which were in the custody of the Prosecution while making out its case-in-chief.

³ Decision of 6 October 2010, para. 64 and p. 29, Conclusion.

the request of the Stojić Defence for certification to appeal the Decision of 6 October 2010 and invited the Defence teams to make any requests refuting the exhibits tendered by the Prosecution in connection with their requests to reopen in a time-limit of seven days, to run from the filing of the decision and in keeping with the case-law criteria for reopening.⁴ (“Decision of 27 October 2010”).

4. On 1 November 2010, the Chamber publicly rendered the “Decision on Petković Defence Request for Certification to Appeal the Decision on Prosecution Motion to Reopen its Case”, wherein the Chamber, while denying the request for certification to appeal, recalled that in the Decision of 6 October 2010, it admitted a limited number of exhibits and that this evidence related to statements made by the Accused Jadranko Prlić, Bruno Stojić, Slobodan Praljak and Milivoj Petković relevant in view of the allegations concerning the potential participation of the said Accused in furtherance of the objectives of the alleged joint criminal enterprise (“JCE”)⁵ (“Decision of 1 November 2010”).

5. On 8 November 2010, the Prosecution publicly filed the “Prosecution Consolidated Response to Defence Motions to Reopen their Cases and Tender Evidence per the Trial Chamber Decision of 6 October 2010”, attached to which is a confidential annex, and whereby the Prosecution specifically requests that the Chamber deny the admission into evidence of 8 of the documents tendered for admission by the Petković Defence (“Response”).⁶

III. ARGUMENTS OF THE PARTIES

6. In support of the Motion, the Petković Defence submits that, insofar as concerns the authenticity and the reliability of the excerpts from the Mladić Diaries it is seeking to have admitted into evidence, the Petković Defence bases itself on the Decision of 6 October 2010, wherein the Chamber found that the said excerpts were authentic and reliable.⁷ The Petković Defence adds, nevertheless, that it is contesting the authenticity and the reliability of the Mladić Diaries and that, for this purpose, it is

⁴ Decision of 27 October 2010, pp. 9 and 10.

⁵ Decision of 1 November 2010, p. 7.

⁶ The Prosecution opposes the admission of the following documents: 4D 02504, 4D 02511, 4D 02516, 4D 02520, 4D 02521, 4D 02524, 4D 02525, 4D 02529, Response, para. 19, Confidential Annex to the Response.

⁷ Motion, para. 9, citing to the Decision of 6 October 2010, paras 51, 61 and 63.

requesting the admission of Exhibit 4D 02529, an article published in a Croatian weekly *Globus*, entitled “Mladić’s diaries or a big deception?”⁸

7. As concerns the relevance and the probative value of the excerpts from the Mladić Diaries it is requesting to have admitted into evidence, the Petković Defence argues that the excerpts in question make it possible to disprove the Prosecution’s theory of the case, according to which the documents admitted by the Chamber in connection with the reopening of the case by the Prosecution⁹ prove that the various Accused “had the intent to commit crimes in furtherance of their project to create a Croat-dominated Herceg-Bosna”.¹⁰

8. More specifically, the Petković Defence argues that the exhibits whose admission it is seeking refute (1) that the Croats of Bosnia-Herzegovina (“BH”) were cooperating with the Serbs from BH against the Muslims from BH and, for this purpose, show that Radovan Karadžić declared that no agreement could be reached with the Croats, that the Army of BH (“BH Army”) and the Army of the Serbs of BH (“VRS”) cooperated against the Croats from BH, that the Serbs from BH made concerted efforts to intensify the conflict between the Croats and the Muslims and that the Croatian Defence Council (“HVO”) and the VRS fought one another during the period covered by the Amended Indictment of 11 June 2008 (“Indictment”)¹¹ and (2) that the Croats from BH had the intent of committing crimes in furtherance of their project to create a Herceg-Bosna dominated by the Croats and, for this purpose, to show that in January 1993, the Croat leaders accepted the Vance-Owen Peace Plan, that the BH Army launched several attacks against the HVO, and that Milivoj Petković supported every attempt at peace.¹²

⁸ Motion, para. 10.

⁹ See generally Decision of 6 October 2010, p. 28, admitting to the record Exhibits P 11376, P 11377, P11380, P 11386, P 11388, P 11389, P 11391 and P 11392. Likewise see Motion, paras 11 (i)-(vi).

¹⁰ Motion, paras 12-14.

¹¹ Motion, paras 14 (i), (v), (vi), (vii) and (viii), citing Exhibits 4D 02501, 4D 02504, 4D 02505, 4D 02507, 4D 02508, 4D 02512, 4D 02514, 4D 02515, 4D 02516, 4D 02517, 4D 02519, 4D 02520, 4D 02521, 4D 02524 and 4D 02525.

¹² Motion, paras 14 (ii), (iii), (iv), and (ix), citing Exhibits 4D 02509, 4D 02510, 4D 02512, 4D 02517 and 4D 02518.

9. Lastly, the Petković Defence submits that the exhibits whose admission it seeks are essential¹³ and that the Chamber's conclusions as to the probative value of the exhibits concerning the Mladić Diaries that were already admitted in connection with the Decision of 6 October 2010, apply *mutatis mutandis* to these exhibits.¹⁴

10. In the Response, the Prosecution reiterates its position stating that the action of requesting the admission to the record of the excerpts from the Mladić Diaries amount to a recognition by the Petković Defence, as well as by the other Defence teams, of the authenticity and the reliability of the Mladić Diaries.¹⁵ The Prosecution also puts forward the fact that it has never denied that the cooperation alleged between the differing parties to the conflict existed.¹⁶

11. The Prosecution then argues that it is opposed to the admission of certain of the exhibits tendered by the Petković Defence, namely, Exhibits 4D 02504, 4D 02511, 4D 02516, 4D 02520, 4D 02521, 4D 02524, 4D 02525 and 4D 02529,¹⁷ either because the Prosecution considers that they are not relevant,¹⁸ or because it challenges the Petković Defence's interpretation of them.¹⁹ Moreover, the Prosecution is opposed to the admission of Exhibit 4D 02529, on grounds that the Chamber has already concluded that the Mladić Diaries are authentic and by requesting their admission, the Petković Defence seeks to get around Rule 94 *bis* of the Rules and the rules it lays down for testimony by expert witnesses.²⁰

IV. APPLICABLE LAW

12. The Chamber recalls that the reopening of the case by a party after the close of its case in chief is not contemplated by the Rules but has been recognized in case-law, whereby under exceptional circumstances, the Prosecution may be authorized to

¹³ Motion, para. 15. In this regard, the Petković Defence contends that the Chamber held that the exhibits admitted under the Decision of 6 October 2010 were essential to the case at bar, that is, they had direct bearing upon the alleged participation of certain of the Accused in the joint criminal enterprise (Motion, para. 13, citing the Decision of 6 October 2010, para. 59).

¹⁴ Motion, para. 16, citing the Decision of 6 October 2010, paras 61 and 62.

¹⁵ Response, para. 10.

¹⁶ Response, paras 11 and 12.

¹⁷ Confidential Annex to the Response.

¹⁸ Likewise see the Response, para. 15, citing Exhibit 4D 02504, para. 16, and Confidential Annex, pp. 1, 4, 5, 6 and 7.

¹⁹ Response, Confidential Annex, pp. 6-7.

²⁰ Response, para. 17.

recommence the presentation of its case to present fresh evidence to which it did not previously have access.²¹

13. The Appeals Chamber has found that “the primary consideration in determining an application for reopening a case to allow for the admission of fresh evidence is the question of whether, with reasonable diligence, the evidence could have been identified and presented in the case in chief of the party making the applications”.²² According to the Appeals Chamber, this analysis is beholden to the factual circumstances of each case and is thus conducted on a case by case basis.²³

14. In the Tribunal’s case-law, when the Trial Chamber is convinced of the diligence of the requesting party, it has the authority, by virtue of Rule 89 (D) of the Rules, to refuse to allow recommencing the presentation of evidence if the requirement of a fair trial materially outweighs the probative value of the exhibits sought to be adduced.²⁴ The Chamber must therefore exercise its discretion concerning whether to authorize the production of this fresh evidence, weighing together its probative value and the injustice that may be done, in this case, to their fellow Accused, by admitting this evidence at such a late stage.²⁵

²¹ See the “Decision on Presentation of Documents by the Prosecution in Cross-Examination of Defence Witnesses”, public document, 27 November 2008, para. 18 citing the relevant case-law in the field: *The Prosecutor v. Enver Hadžihasanović et al.*, Case No. IT-01-47-T, “Decision on the Prosecution’s Motion to Reopen its Case”, public document, 1 June 2005, para. 31 (“*Hadžihasanović Decision*”) and *The Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-AR73.5, “Decision on Motion to Reopen the Prosecution Case”, public document, 9 May 2008, para. 23 (“*Popović Decision of 9 May 2008*”). See also *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”, public document with confidential annex, 13 December 2005, para. 12 (“*Milošević Decision*”) and *The Prosecutor v. Zejnil Delalić et al.*, Case No. IT-96-21-T, “Decision on the Prosecution’s Alternative Request to Reopen the Prosecution’s Case”, public document, 19 August 1998, para. 26 (“*Čelebići Decision*”); Decision of 6 October 2010, para. 31.

²² *The Prosecutor v. Zejnil Delalić et al.*, Case No. IT-96-21-A, 20 February 2001 (“*Čelebići Appeals Judgement*”), para. 283. See also Decision of 6 October 2010, para. 32.

²³ *The Prosecutor v. Vujadin Popović et al.*, Case No. IT -05-88-AR73.5, “Decision on Vujadin Popović’s Interlocutory Appeal Against the Decision on the Prosecution’s Motion to Reopen its Case-in-Chief”, 24 September 2008, para. 10 (“*Popović Decision of 24 September 2008*”); *The Prosecutor v. Ante Gotovina et al.*, Case No. IT-06-90-AR73.6, “Decision on Ivan Čermak and Mladen Markač Interlocutory Appeals Against Trial Chamber’s Decision to Reopen the Prosecution Case”, public document, 1 July 2010, para. 24 (“*Gotovina Decision of 1 July 2010*”). See also Decision of 6 October 2010, para. 32.

²⁴ *Čelebići Appeals Judgement*, para. 283. See also Decision of 6 October 2010, para. 33.

²⁵ See in this connection, *mutatis mutandis*, *Čelebići Appeals Judgement*, para. 283; *Hadžihasanović Decision*, para. 35. See also Decision of 6 October 2010, para. 33.

15. The Appeals Chamber specifically defines “fresh evidence” as: (1) evidence which was not in possession of a party at the conclusion of its case and which by the exercise of all diligence could not have been obtained by the party at the close of its case, as well as (2) evidence that it had in its possession but whose importance was revealed only in the light of fresh evidence.²⁶

V. DISCUSSION

(i) “Fresh” Aspect of the Evidence Tendered for Admission

16. In the Decision of 27 October 2010, the Chamber recalled that any Defence teams wishing to file a request to reopen their case needed to make a case for “fresh evidence” in response to the reopening of the Prosecution. The Chamber likewise recalled that any request to reopen needed to comply with the case-law criteria for reopening.²⁷

17. Moreover, in the Decision of 6 October 2010, the Chamber clearly explained that it was admitting the excerpts from the Mladić Diaries requested by the Prosecution insofar as they related directly to the alleged participation by some of the Accused in the JCE.²⁸ Specifically concerning the Accused Petković, the Chamber added that Exhibits P 11380 and P 11386 were relevant in that they described the statements made by the Accused at meetings and in that they related to the allegations concerning the possible participation of the said Accused in furthering the objectives of the JCE.²⁹ The Chamber likewise added, in the Decision of 27 October 2010, that the Defence teams could, in connection with a possible request to reopen the case, request admission of the excerpts from the Mladić Diaries inasmuch as they were directly related to what was admitted on the Prosecution’s behalf, because otherwise, they would not have a “fresh” aspect.³⁰ The Chamber likewise recalled that the Defence teams could moreover tender any other relevant, probative evidence whose importance became apparent in light of the fresh evidence tendered by the

²⁶ *Čelebići* Appeals Judgement, paras 282 and 283; *Popović* Decision of 24 September 2008, para. 11. See also Decision of 6 October 2010, para. 34.

²⁷ Decision of 27 October 2010, p. 9.

²⁸ Decision of 6 October 2010, paras 58 and 59.

²⁹ Decision of 6 October 2010, para. 61.

³⁰ Decision of 27 October 2010, p. 9, and specifically, footnote 42.

Prosecution.³¹ As a consequence, the Chamber can only admit fresh evidence insofar as it goes to refute the alleged participation of the various Accused in furthering the objectives of the JCE and, particularly, in this instance, that of the Accused Petković.

18. Based on the foregoing, and although the Chamber notes that the Petković Defence provides no explanatory information concerning the fresh aspect of the exhibits it is seeking to have admitted, the Chamber will consider the said evidence, assessing whether it has a “fresh” aspect.

19. The Chamber notes firstly that 19 out of the 20 Proposed Exhibits³² are excerpts from the Mladić Diaries. The Petković Defence submits that these Proposed Exhibits are relevant and carry probative value inasmuch as they disprove the Prosecution’s theory of the case and the documents admitted in support of that theory by the Decision of 6 October 2010, specifically as it relates to the allegations concerning the territorial ambitions of the Croats of BH, concerning the launch by the Croat authorities of BH of an armed conflict against the Muslims, concerning the forcible transfer of the Muslim population by the Croat authorities of BH and concerning the cooperation between the Serbs and the Croats of BH against the Muslims.³³

20. The Chamber observes that only Exhibits 4D 02508, 4D 02512 and 4D 02518 relate directly to the Accused Petković. In this case, Exhibit 4D 02508 reports the statements of General Morillon informing General Mladić of the fact that President Tudman agreed to meet with the Accused Petković in connection with the peace talks. Exhibits 4D 02512 and 4D 02518 relate statements allegedly made by the Accused Petković when participating in meetings with Serb representatives and international mediators in connection with the peace negotiations. The Chamber holds the view that these three exhibits are directly linked to Exhibits P 11380 and P 11386, which were admitted in connection with the reopening of the Prosecution’s case and thus have a “fresh” aspect when the criteria of case-law are applied. Exhibit P 11380 is an excerpt from the Mladić Diaries which reproduces, *inter alia*, the statements of the Accused

³¹ Decision of 27 October 2010, p. 9.

³² 4D 02501, 4D 2504, 4D 02505, 4D 02507, 4D 02508, 4D 02509, 4D 025010, 4D 025011, 4D 02512, 4D 02514, 4D 02515, 4D 02516, 4D 02517, 4D 02518, 4D 02519, 4D 02520, 4D 02521, 4D 02524, 4D 02525.

³³ Motion, para. 14.

Petković while at a meeting, on 26 October 1992 with other representatives of the HVO and Serb representatives, during which they discussed a common posture against the Muslims of BH. As for Exhibit P 11836, it reports the statements the Accused Petković made at a meeting with Ratko Mladić on 8 July 1993, during which they likewise discussed Croato-Serb cooperation against the Muslims in BH.

21. Concerning the other Proposed Exhibits taken from the Mladić Diaries,³⁴ the Chamber observes that they do not involve the statements or behaviour of the Accused Petković himself. The Chamber finds that they therefore have no direct tie to the exhibits admitted by the Decision of 6 October 2010. Therefore, the Chamber is persuaded that they do not satisfy the criterion of freshness and are therefore inadmissible in connection with a request to reopen the case.

22. As concerns Exhibit 4D 02529, the Chamber observes that this is an article from the media published in the Croatian periodical *Globus* on 4 June 2010 which reports a handwriting evaluation of the Mladić Diaries by two expert graphologists questioning the reliability of the Diaries. The Chamber points out that the Petković Defence means to tender this exhibit in order to contest the authenticity and the reliability of the excerpts from the Mladić Diaries admitted under the Decision of 6 October 2010. The Prosecution, for its part, opposes admitting this exhibit on grounds that the Petković Defence would be attempting thereby to admit expert evaluations in violation of the procedure under Rule 94 *bis* of the Rules.³⁵

23. The Chamber, just like the Prosecution, holds to the view that Rule 94 *bis* is the applicable procedure for introducing expert reports. As a result, if the Petković Defence wanted to contest the authenticity of the Mladić Diaries through the use of experts, it ought to have requested the admission of their report pursuant to this rule. The Chamber thus finds that it is proper to exclude Exhibit 4D 02529.

(ii) The Exercise of the Chamber's Discretion

24. In the exercise of its discretion, the Chamber will henceforth analyze the probative value of the "fresh" evidence tendered for admission and submitted in virtue

³⁴ That is, Exhibits 4D 02501, 4D 02504, 4D 02505, 4D 02507, 4D 02509, 4D 025010, 4D 025011, 4D 02514, 4D 02515, 4D 02516, 4D 02517, 4D 02519, 4D 02520, 4D 02521, 4D 02524, 4D 02525.

³⁵ Response, para. 17 and Annex, p. 8.

of the right of the Accused to a fair trial and bearing in mind that, as recalled in the Decision of 6 October 2010, “it is only in exceptional circumstances where the justice of the case so demands that a party should be permitted to re-open its case to present new evidence”.³⁶

a. Authenticity

25. The Chamber recalls that in the Decision of 6 October 2010 it found that the Mladić Diaries possessed sufficient indicia of authenticity.³⁷ Thus, it finds that Exhibits 4D 02508, 4D 02512 and 4D 02518 also possess sufficient indicia of authenticity.

b. Relevance and Probative Value

26. The Chamber finds that Exhibits 4D 02508, 4D 02512 and 4D 02518 are relevant and carry probative value inasmuch as they go to refuting the Prosecution’s allegations founded upon Exhibits P 11380 and P 11386, admitted in connection with the reopening of its case, such as the Chamber has described above.

27. Moreover, the Chamber is of the opinion that, given the small number of exhibits involved and the fact that they concern solely the alleged participation of the Accused Petković in the JCE, their admission at this late stage of the proceedings would be unlikely to prejudice either the speed of the trial or the right of the remaining fellow Accused to a fair trial.

³⁶ Decision of 6 October 2010, para. 44.

³⁷ Decision of 6 October 2010, para. 51.

VI. CONCLUSION

FOR THE FOREGOING REASONS,

PURSUANT TO Rules 54, 85 and 89 of the Rules,

PARTIALLY GRANTS the Motion **by a majority,**

DECIDES by a majority that Exhibits 4D 02508, 4D 02512 and 4D 02518 ought to be admitted **AND**

DENIES by a majority the Motion in all other respects on the grounds set forth in this Decision,

The Presiding Judge in the Chamber, Judge Jean-Claude Antonetti dissents from paragraphs 20 to 27 of this Decision and will later annex a dissenting opinion hereto.

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

/signed/

Jean-Claude Antonetti
Presiding Judge

Done this 23 November 2010
At The Hague
The Netherlands

[Seal of the Tribunal]