UNITED
NATIONS

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: 17 October 2007

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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 Hans Holthuis**

Decision of: **17 October 2007**

THE PROSECUTOR

v.

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

PUBLIC

DECISION ON PROSECUTION MOTION FOR THE ADMISSION INTO EVIDENCE OF THE TESTIMONY OF MILIVOJ PETKOVIĆ GIVEN IN OTHER CASES BEFORE THE TRIBUNAL

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 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") has been seized of the confidential "Prosecution Motion for the Admission into Evidence of the Testimony of Milivoj Petković in *Prosecutor v. Tihomir Blaškić* and *Prosecutor v. Kordić & Čerkez*" filed on 22 May 2007 ("Motion") by the Office of the Prosecutor ("Prosecution"). In its Motion the Prosecution requests the Chamber to grant, pursuant to Rule 89 (C) of the Rules of Procedure and Evidence ("Rules"), the admission into evidence of the transcripts of the testimony of the Accused Petković (collectively "Testimony") given on 23 June and 24 June 1999 in *The Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-T ("*Blaškić* Case"), and on 13 and 14 November 2000 in *The Prosecutor v. Dario Kordić & Mario Čerkez*, Case No. IT-95-14/2-T ("*Kordić* Case").

II. PROCEDURAL BACKGROUND

2. On 24 May 2007 the Prosecution filed a confidential *Corrigendum* wherein it corrected the error in the Motion regarding the dates of the Accused Petković's testimony in the *Blaškić* Case.[1]

3. At the court hearing on 5 June 2007, the Chamber authorised Counsel for the Accused Petković ("Petković Defence") to exceed the word-limit in its response.[2] On that same day, the Petković Defence filed confidentially the "Response of Milivoj Petković to Prosecution Motion 22 May 2007 for the Admission into Evidence of the Transcripts of Petković's Evidence in the Cases of *Prosecutor v. Blaškić* and *Prosecutor v. Kordić*" ("Petković Response") wherein it objected to the admission into evidence of the Testimony.

4. On 5 June 2007, Counsel for the Accused Prlić, Stojić, Praljak, Ćorić and Pušić ("Joint Defence") filed confidentially the "Response of the Accused Prlić, Stojić, Praljak, Ćorić and Pušić to Prosecution Motion for Admission into Evidence of

[1] "*Corrigendum* to Prosecution Motion for the Admission into Evidence of the Testimony of Milivoj Petković in *Prosecutor v. Tihomir Blaškić* and *Prosecutor v. Kordić & Čerkez*".

Testimony of Milivoj Petković in *Prosecutor v. Tihomir Blaškić* and *Prosecutor v. Kordić and Čerkez*" ("Joint Response") wherein it moved that the Motion be rejected or, alternatively, that the Testimony be admitted as evidence only against the Accused Petković and not against the co-Accused in this case. Furthermore, it requested the Chamber to order the Prosecution not to put any questions to witnesses linked to the Testimony or to use it in any other way against the co-Accused.[3]

5. At the court hearing of 5 June 2007, the Chamber granted the request of the Prosecution to file a reply.[4] On 15 June 2007, the Prosecution filed a motion to extend the time to reply to 20 June 2007,[5] which was granted orally by the Chamber on 18 June 2007.[6] At the court hearing of 20 June 2007, the Prosecution requested to be allowed to exceed the word-limit in its reply, which the Chamber granted.[7]

6. On 20 June 2007, the Prosecution filed confidentially the "Prosecution Reply to the Defence Responses to the Prosecution Motion for the Admission into Evidence of the Testimony of Milivoj Petković in *Prosecutor v. Tihomir Blaškić* and *Prosecutor v. Kordiš & Čerkez*" ("Reply").

III. SUBMISSIONS OF THE PARTIES

7. In support of its Motion, the Prosecution submits that the Accused Petković's testimony in the *Blaškić* Case was voluntary and knowing; that the topics of his testimony were approved beforehand in consultation with the Government of the Republic of Croatia; that the Accused Petković was able to consult a representative of the Republic of Croatia and prepare in advance; that he had prior approval of his then superiors in the Ministry of Defence of Croatia; that two representatives of the Republic of Croatia were in attendance during his testimony and that the Accused Petković did not have to answer any question which was not on the list of topics

[2] French Transcript ("FT"), pp. 19455-19457.
[3] Joint Response, paras. 2 and 27.
[4] FT, pp. 19456-19457.
[5] "Prosecution Motion for Extension of Time to Reply to the Defense Responses to the Prosecution Motion for the Admission into Evidence of Petković Testimony".
[6] FT. p. 19963.
[7] FT. p. 20248.

which had been submitted to him beforehand.[8] Furthermore, the Prosecution submits that the Testimony is relevant and probative.[9]

8. In the Petković Response, the Petković Defence submits that the admission of the Testimony would violate the right of an accused not to be compelled to testify against himself and the rights of a suspect during investigation pursuant to Rule 42 of the Rules.[10] It argues that the Accused Petković should be considered a suspect within the meaning of Rule 42 of the Rules and that he did not receive the assistance of counsel either prior to or during his testimony before the Tribunal.[11] According to the Petković Defence, the role of the representatives of the Croatian Government in attendance at the hearing was to protect the interests of the Republic of Croatia and not those of the Accused Petković.[12] The Petković Defence's answer to the Prosecution was that the list of topics prepared in advance was neither approved by the Accused Petković nor by the Croatian Government on his behalf.[13] It argues that the Accused Petković was not informed of his right to remain silent pursuant to Rule 90 (E) of the Rules.[14]

10. In the Joint Response, the Joint Defence argues that the Prosecution presents the Testimony as a confession and that its admission would be in violation of the provisions of Rule 42 of the Rules. It argues that the use of the Testimony against the co-Accused would make the Accused Petković a Prosecution witness, which would be in violation of the general principle of law prohibiting an accused from giving evidence against his co-accused. Moreover, the Joint Defence maintains that the admission of the Testimony would be in violation of the rights of the co-Accused to examine or to have examined Prosecution witnesses, as well as of the provisions of Rule 92 *bis* of the Rules. In conclusion, the Joint Defence submits that the Testimony should not be admitted pursuant to Rule 89 (D) of the Rules.[15]

11. In its Reply, the Prosecution recalls that, pursuant to Rule 89 (C) of the Rules, the Tribunal jurisprudence allows the admission of prior statements of an accused in

[8] Motion, para. 3.
[9] Motion, para. 5.
[10] Petković Response, para. 7.
[11] Petković Response, paras. 22 and 27.
[12] Petković Response, para. 27.
[13] Petković Response, para. 27.
[14] Petković Response, paras. 28 and 31.
[15] Joint Response, para. 2.

his own trial.[16] It rejects the qualification of the Testimony as "suspect interview", arguing that the Testimony was given voluntarily, *viva voce* in court before professional judges and that, under the circumstances, there is no suggestion that the Accused Petković was under any form of compulsion.[17] According to the Prosecution, the provisions of Rule 90 (E) of the Rules are not an obstacle to the admission of the Testimony either. It submits that Rule 90 (E) of the Rules does not regulate the subsequent use of a statement given voluntarily by a witness, rather that of a statement given under duress.[18] The provisions of Rule 90 (E) of the Rules do not apply since the Accused Petković never claimed to have been compelled to answer questions in the *Blaškić* and *Kordić* Cases.[19] According to the Prosecution, a Trial Chamber is not required to caution a witness that his statement may be used against him and that he has the right to remain silent.[20] Moreover, the Prosecution submits that the circumstances of the Croatian Government's alleged encouragement of the Accused Petković to testify would not be viewed as any form of duress or unfairness which would justify the non-admission of the testimony.[21] The Prosecution also raises arguments on the use of the Testimony with respect to the co-Accused in this case, which will not be dealt with here as they have no incidence on the decision taken by the Chamber.[22] The Prosecution again moves for the Testimony to be admitted in respect of all the Accused and, alternatively, its admission except for passages going to the acts and conduct of the co-Accused within the meaning of Rule 92 *bis* of the Rules.[23]

IV. DISCUSSION

12. The Chamber is seized of the issue as to whether and under what conditions the transcripts of the Accused Petković when he testified previously as a witness in the *Blaškić* and *Kordić* Cases are admissible in this case. As already concluded in the Praljak Decision, the provisions of the Rules do not address specifically the admission

[16] Reply, para. 2.
[17] Reply, paras. 6-8.
[18] Reply, paras. 9 and 10.
[19] Reply, para. 10.
[20] Reply, para. 9.
[21] Reply, para. 12.
[22] Reply, paras. 13-27.
[23] Reply, paras. 27 and 29.

of such evidence.[24] Consequently, when applying Rules 89 (C), (D) and 90 (E) of the Rules, the Chamber should examine whether the Testimony offers sufficient indicia of reliability, probative value and relevance, and whether all the appropriate procedural guarantees and protections were respected at the time the evidence was given.[25] Once these conditions have been satisfied, the Chamber will exercise its discretionary power to admit or not admit that evidence.[26]

13. In this case, it is up to the Chamber to determine whether the rights of the Accused Petković were sufficiently protected when he gave evidence in the *Blaškić* and *Kordić* Cases so that the admission of his Testimony in his own trial would not violate his right to a fair trial as guaranteed in Articles 20 and 21 of the Statute of the Tribunal ("Statute").

14. The minimum guarantee enjoyed by a witness appearing before a Trial Chamber can be found in Rule 90 (E) of the Rules, which provides that a witness may object to making any statement which might tend to incriminate the witness. If the Trial Chamber compels the witness to answer a question which might incriminate him, the testimony may not be used as evidence in a subsequent prosecution against the witness for any offence other than false testimony.[27]

15. The Chamber recalls, in line with the conclusions in the Praljak Decision, that a Trial Chamber is not under a strict obligation to inform a witness of the right to remain silent.[28] However, in order to be able to determine whether a witness has voluntarily waived the right to remain silent if there is a risk of self-incrimination, it is not sufficient to establish that the witness gave evidence voluntarily, without duress.[29] The witness would have to know of the existence of this right and the consequences deriving from waiving it.[30] As the Chamber concluded in the Praljak Decision:

> "[. . .] the right to remain silent if something he says could be incriminating is to be interpreted as a minimum guarantee which a witness called to testify before a Chamber enjoys. In addition, however, for this right to be not merely theoretical but truly effective, the witness must know not only that, should this be necessary, he may refuse to answer the questions if his answers might

[24] "Decision on the Admission into Evidence of Slobodan Praljak's Evidence in the Case of Naletelić and Martinović", 5 September 2007 ("Praljak Decision"), para. 11.
[25] Praljak Decision, para. 12.
[26] Praljak Decision, para. 12.
[27] Praljak Decision, para. 16.
[28] Praljak Decision, para. 18.
[29] Praljak Decision, para. 20.
[30] Praljak Decision, para. 20.

> incriminate but also that, if despite everything, he chooses to answer such questions voluntarily, his statements might, depending on the case, be used against him. Only in this last scenario, that is, when a witness is aware of the existence of this right and the consequences deriving from a possible waiver of this right, can the waiver be valid."[31]

16. The Chamber considered that the only way it can be certain that the witness expressly waived his right to remain silent is to have a guarantee that he was duly informed of and cautioned about that right at the time of his testimony.[32]

17. The Chamber first notes that the Accused Petković testified in closed session in the *Blaškić* Case on 23 and 24 June 1999 by video-conference link[33] and that two representatives of the Republic of Croatia were present during the hearing in the Tribunal in The Hague.[34]

18. Then, the Chamber concludes that Witness Petković was not informed of his right not to give statements which might incriminate him and consequently to remain silent when he testified in the *Blaškić* Case.[35] Besides, the Prosecution does not challenge this fact. It argues, however, that the Accused Petković had the possibility of consulting counsel and preparing his statement beforehand. It notes that the topics and questions were set beforehand and that he could refuse to answer any question that was not listed.

19. Even though the Parties did not refer to the material filed in the *Blaškić* Case, it is evident that the presence of the representatives of the Republic of Croatia at the Tribunal during the testimony of Witness Petković by video-conference link was not intended to protect his interests but those of the Republic of Croatia.[36] Thus, Mr David R. Rivkin, legal advisor to the Republic of Croatia in the *Blaškić* Case, in his letter requesting to have Witness Petković testify in closed session, wrote: "This request is based upon Croatia's concern that, during his testimony, General Petković may discuss matters that are of national concern to Croatia" and "Croatia understands, of course, that General Petković has been called to testify in his private capacity, and

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[31] Praljak Decision, para. 19 (our emphasis).
[32] Praljak Decision, para. 20.
[33] *Blaškić* Case, English Transcript ("ET") of 23 June 1999, pp. 23996-23997.
[34] *Blaškić* Case, ET of 23 June 1999, pp. 23996-23997.
[35] See in *Blaškić* Case, ET of 23 June 1999, pp. 23996-24001.
[36] *Blaškić* Case, "Decision (2) of Trial Chamber I in Respect of Protective Measures for General Milivoj Petković", 23 June 1999; *Blaškić* Case, "Decision of Trial Chamber I in Respect of Protective Measures for General Milivoj Petković", 22 June 1999; *Blaškić* Case, Letter from Mr Rivkin addressed to the Legal Officer of the Chamber, Mr Olivier Fourmy, 18 June 1999; *Blaškić* Case, Letter from Mr Šeparović addressed to Judge Jorda, 8 June 1999.

that he will be questioned about his service in Bosnia and Herzegovina as an officer of the HVO, rather than about his current duties as a general officer in the HV. However, the fact remains that General Petković is a very high ranking officer in the Croatian Armed Forces, and that he is privy to information that is classified as of national security concern under Croatian law".[37] In another letter, the Croatian Minister of Justice and President of the Council for Cooperation with the Tribunal informed Judge Jorda that two representatives of the Republic of Croatia would be present at the testimony of General Petković on behalf of the Republic of Croatia.[38] Consequently, the protective measures ordered by the Chamber, that is that the hearing be held in closed session and that two representatives of the Republic of Croatia be present, were intended to protect solely the interests of the Republic of Croatia. The submissions before the Chamber do not indicate who established the list of questions. Given the contents of the letters between the representatives of Croatia and the Tribunal, the Chamber is convinced that the protective measures were intended once again to protect the interests of Croatia's national security.

19. The Chamber notes that the Accused Petković later testified in closed session on 13 and 14 November 2000 in the *Kordić* Case in the presence of two representatives of the Republic of Croatia.[39] The Accused Petković was not informed of the right not to make statements which might incriminate him.[40] The Chamber is satisfied that the role of the two persons present at the hearing during the testimony, as representatives of Croatia, was to protect the interests of Croatia and not those of Witness Petković.

20. Consequently, since Witness Petković was not duly cautioned of the possibility of not making statements which might incriminate him and thus remaining silent, the Chamber considers that it does not have the guarantee that Witness Petković waived his right to remain silent when he gave testimony. Therefore, the Chamber holds that the minimum rights of the now Accused were not sufficiently protected to allow the admission of the Testimony in this case. Under the

[37] *Blaškić* Case, Letter from Mr Rivkin addressed to the Legal Officer of the Chamber, Mr Olivier Fourmy, 18 June 1999.
[38] *Blaškić* Case, Letter from Mr Šeparović addressed to Judge Jorda, 8 June 1999.
[39] *Kordić* Case, ET of 13 November 2000, pp. 26671-26672; *Kordić* Case, "Order on Protective Measures", 13 November 2000.
[40] See *Kordić* Case, ET of 13 November 2000, pp. 26672-26673.

circumstances, the Chamber considers that the admission of the Testimony would be a serious violation of the right of the Accused Petković to a fair trial.

21. Given the conclusion set out in the previous paragraph, the Chamber does not consider it necessary to express its opinion on whether the fact that an accused is informed of his right to remain silent within the meaning of Rule 90 (E) prior to giving evidence is sufficient to later allow the admission of such testimony in his own trial. Neither does the Chamber consider it necessary to express its opinion on the applicability of Rules 42 and 43 of the Rules, nor on the issue as to whether the Testimony satisfies the other conditions for admission pursuant to Rule 89 (C) of the Rules. The same applies to the question of its use in the trial against the co- Accused.

FOR THE FOREGOING REASONS,

PURSUANT TO Rules 89 (C), 89 (D) and 95 of the Rules,

HEREBY DENIES the Motion.

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

/signed/

Judge Jean-Claude Antonetti
Presiding Judge

Done this seventeenth day of October 2007
At The Hague
The Netherlands

[Seal of the Tribunal]