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: 7 December 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: **7 December 2010**

THE PROSECUTOR

v.

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

PUBLIC

DECISION ON PETKOVIĆ DEFENCE MOTION FOR RECONSIDERATION OR, IN THE ALTERNATIVE, FOR CERTIFICATION TO APPEAL THE DECISION ON THE PETKOVIĆ DEFENCE 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 Zoran Ivanišević 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 Motion for Reconsideration of *Décision portant sur la demande de la Défence Petković en réouverture de sa cause* or, in the Alternative, Certification Under Rule 73 (B) for Appeal Against the Non-Admission of Document 4D 02510", filed publicly by Counsel for the Accused Milivoj Petković ("Petković Defence") on 29 November 2010 ("Motion"), wherein the Petković Defence asks the Chamber to reconsider its "Decision on the Petković Defence Motion to Reopen its Case", rendered publicly on 23 November 2010 ("Decision of 23 November 2010") insofar as it denied admission to an excerpt from the Diary of Ratko Mladić ("Mladić Diary"), namely Exhibit 4D 02510, or in the alternative, for certification to appeal,[1]

NOTING the Decision of 23 November 2010, whereby the Chamber refused to admit into evidence various exhibits, including Exhibit 4D 02510, on grounds that these exhibits "do not involve the statements or behaviour of the Accused Petković himself", that they "have no direct tie to the exhibits admitted by the Decision of 6 October 2010" and that "[t]herefore […][they] do not satisfy the criterion of freshness and are therefore inadmissible in connection with a request to reopen the case",[2]

NOTING the "Decision on the Prosecution's Motion to Reopen its Case" rendered publicly on 6 October 2010 ("Decision of 6 October 2010"), wherein the Chamber partly granted the motion by the Office of the Prosecutor ("Prosecution") to admit into evidence various excerpts of the Mladić Diary, and indicated that, in the event the Defence teams filed requests for the reopening of their cases, these requests had to be restricted to refuting the excerpts from the Mladić Diary admitted under the Decision of 6 October 2010,[3]

[1] Motion, paras 8 and 9.
[2] Decision of 23 November 2010, para. 21 and p. 9.
[3] Decision of 6 October 2010, para. 64 and p. 29, Conclusion.

NOTING 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", rendered publicly by the Chamber on 27 October 2010, whereby it invited the Defence teams to supplement any motions rebutting the evidence tendered by the Prosecution in connection with their requests to reopen, following the case-law criteria for reopening ("Decision of 27 October 2010"),[4]

CONSIDERING that the Prosecution informed the Chamber by e-mail that it did not wish to file a response to the Motion,[5]

CONSIDERING that, in support of its Motion, in the part addressing the request for reconsideration of the Decision of 23 November 2010, the Petković Defence (1) recalls that Exhibits P 11380 and P 11386 are especially relevant inasmuch as they directly concern the Accused Petković[6] and that the Chamber had admitted *inter alia* Exhibits P 11376, P 11377, P 11380 and P 11386 based on the fact that it thought these exhibits relevant "in light of the allegations of possible participation of these Accused […] in achieving the purposes of the alleged JCE"[7] and (2) that in light of the fact that Exhibit 4D 02510 relates to a meeting on 29 November 2010, during which, according to the Mladić Diary, the Accused Petković took the floor to comment, it is clear that Exhibit 4D 02510 is directly related to the statements and conduct of the Accused Petković,[8]

CONSIDERING that the Petković Defence therefore asserts that the Chamber committed a clear error in its assessment of Exhibit 4D 02510 and in applying its own criteria which according to the Decision of 6 October 2010 govern the requests for reopening the case filed by the Defence teams,[9]

CONSIDERING that, as concerns the Motion for reconsideration of Exhibit 4D 02510, the Chamber recalls that a Trial Chamber has the inherent power to re-examine its own decisions and that it may hear a request for re-examination if the moving party establishes for the Chamber that the logic of the impugned decision

[4] Decision of 27 October 2010, pp. 9 and 10.
[5] E-mail of 2 December 2010.
[6] Motion, para. 7.
[7] Motion, para. 7, referring to the Decision of 6 October 2010, para. 61.
[8] Motion, paras 12 and 13.
[9] Motion, paras 9, 10, 11 and 14.

contains a clear error or that exceptional circumstances, which may be new arguments or new facts,[10] justify its re-examination in order to prevent injustice,[11]

CONSIDERING that the Chamber observes that it unintentionally omitted to conduct a suitable assessment of Exhibit 4D 02510, and that this situation justifies re-examination in this decision for its exclusion of evidence in the Decision of 23 November 2010,

CONSIDERING that, to this effect, the Chamber recalls the criteria for reopening the case of one party after the presentation of its evidence has closed using a request to admit fresh evidence, as was done in the Decision of 6 October 2010[12] and in the Decision of 12 November 2010,[13]

CONSIDERING that the Chamber likewise recalls the Decision of 27 October 2010, in which it recalled that every request for reopening must satisfy the case-law criteria for reopening,[14]

CONSIDERING that, in this matter, Exhibit 4D 02510 describes a meeting between General Morillon, General Mladić and the Accused Petković on 29 November 1992 at Sarajevo airport, during which the Accused Petković spoke several times about a ceasefire agreement in Bosnia and Herzegovina,

CONSIDERING that, in its Decision of 6 October 2010, the Chamber explained that it would admit the excerpts from the Mladić Diary tendered by the Prosecution inasmuch as they related directly to the alleged participation of certain of the Accused in the joint criminal enterprise ("JCC"), and added, which is of more specific concern to the Accused Petković, that Exhibits P 11380 and P 11386 were relevant in that they described statements made by the Accused at meetings and that they related to the

[10] *The Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, "Decision on Defence's Request for Reconsideration", 16 July 2004 ("*Galić* Decision"), pp. 3 and 4, citing *The Prosecutor v. Laurent Semanza*, Case No. ICTR-97-20-T, Trial Chamber III, "Decision on Defence Motion to Reconsider Decision Denying Leave to Call Rejoinder Witnesses", 9 May 2002, para. 8.
[11] *Galić* Decision, pp. 3 and 4, citing in particular *The Prosecutor v. Zdravko Mucić et al.*, Case No. IT-96-21A*bis*, "Judgment on Sentence Appeal", 8 April 2003, para. 49; *The Prosecutor v. Popović et al.*, Case No. IT-05-88-T, "Decision on Defence Motion for Certification to Appeal Decision Admitting Written Evidence Pursuant to Rule 92 *bis*", 19 October 2006, p. 4.
[12] Decision of 6 October 2010, paras 31 to 34.
[13] Decision of 23 November 2010, paras 12 to 15.
[14] Decision of 27 October 2010, p. 9.

allegations concerning potential participation of the said Accused in furtherance of the purposes of the JCE,[15]

CONSIDERING that in the Decision of 27 October 2010, the Chamber likewise added that the Defence teams could, in connection with any future request to reopen their cases, request the admission of excerpts of the Mladić Diary insofar as they might be directly associated with what was admitted on the Prosecution's behalf as, otherwise they would lack a "fresh" aspect,[16]

CONSIDERING that the Chamber holds the view that Exhibit 4D 02510 is directly associated with Exhibits P 11380 and P11386, admitted in connection with the reopening of the Prosecution's case, and therefore demonstrate a "fresh" aspect within the meaning of the case-law criteria,

CONSIDERING that, as concerns the authenticity of Exhibit 4D 02510, the Chamber recalls that in the Decision of 6 October 2010, it found that the Mladić Diary displayed sufficient indicia of authenticity,[17] and thus, it found that Exhibit 4D 02510 likewise contained sufficient indicia of authenticity,

CONSIDERING, moreover, that the Chamber finds that Exhibit 4D 02510 is relevant and bears probative value inasmuch as it goes to refuting the Prosecution's allegations supported by Exhibits P 11380 and P 11386, admitted in connection with the reopening of the latter's case,

CONSIDERING, in addition, that given the limited number of exhibits admitted in connection with the reopening of the case of the Accused Petković and the fact that they relate solely to the alleged participation of the said Accused in the JCE, the admission of Exhibit 4D 02510 at this late stage of the proceedings would not impair the rapidity of the trial nor the right of the fellow Accused to a fair trial,

CONSIDERING that, as a consequence, the Chamber decides to admit into evidence Exhibit 4D 02510,

[15] Decision of 6 October 2010, paras 58, 59 and 61. See also Decision of 23 November 2010, para. 17.
[16] Decision of 27 October 2010, p. 9, specifically footnote 42. See also Decision of 23 November 2010, para. 17.
[17] Decision of 6 October, para. 51.

CONSIDERING, finally, that the Chamber is not called to rule upon the request for certification to appeal the Decision of 23 November insofar as it concerns the exclusion from evidence of Exhibit 4D 02510, which is now moot,

FOR THE FOREGOING REASONS,

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

GRANTS the Motion,

DECIDES to admit Exhibit 4D 02510 as evidence,

AND

DECLARES MOOT the Motion for Certification to Appeal the Decision of 23 November 2010.

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

Judge Antonetti, Presiding Judge of the Chamber, is including a separate opinion with this Decision.

/signed/

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Jean-Claude Antonetti
Presiding Judge

Done this seventh day of December 2010
At The Hague
The Netherlands

[Seal of the Tribunal]

Separate Opinion by Jean-Claude Antonetti,
the Presiding Judge of the Chamber

Ignoring my original posture, previously expressed in an opinion, here I will only comment upon the Petković Defence motion regarding Exhibit 4D 025 10.

This exhibit concerns a meeting on 29 November 1992 between Generals Morillon, Mladić and Petković at Sarajevo airport. This meeting is not a new fact because it has already been mentioned during witness interviews, with papers to support this.

As far as I am concerned, this admission contributes nothing to the context, and, at this stage, I have difficulty seeing where this document fits in the Accused Petković's participation in the JCE. On this point, the Prosecution's and Defences' upcoming submissions will certainly enable me to obtain a clearer view.

I am bound to recall that, in my prior opinion, I said that if the Prosecution had not delayed, if the Mladić Notebooks are authentic, I would not have had any problem admitting this exhibit, because I had written that "[o]n the other hand, regarding the other exhibits not admitted, I point out that they are exhibits originating in the entries from the Mladić Notebooks; for this reason, why should we admit some and bar others when each exhibit, in order to be properly understood, must be associated with other exhibits?"

For this reason, the sudden turn of the judges of the Chamber cannot be attributed to me, as there was no error on my part. Likewise, I have some difficulty understanding this sudden turn, because there is nothing new from last week, except for the new submissions of the Petković Defence stating that the Chamber (by a majority, to be exact) committed clear error in its assessment of Exhibit 4D 025 10.

Taking into account the ramifications of its error, the majority is changing its position, which is the customary response to avoid injustice, but which ought to have been avoided in the first place, by better understanding this document.

This document is undoubtedly relevant and carries probative value, to be determined during closing deliberations, to the extent that it is clearly of interest, which will undoubtedly be discussed in the forthcoming submissions.

/signed/

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Jean-Claude Antonetti
Presiding Judge

This seventh day of December 2010
At The Hague
The Netherlands

[Seal of the Tribunal]