



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-03-67-T
Date: 16 March 2011
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French

IN TRIAL CHAMBER III

Before: Judge Jean-Claude Antonetti, Presiding
Judge Frederik Harhoff
Judge Flavia Lattanzi

Registrar: Mr John Hocking

Decision of: 16 March 2011

THE PROSECUTOR

v.

VOJISLAV ŠEŠELJ

PUBLIC DOCUMENT

**DECISION ON PROSECUTION'S MOTION FOR RECONSIDERATION OF
THE DECISION ON THE SECOND BAR TABLE MOTION FILED 23
DECEMBER 2010**

The Office of the Prosecutor

Mr Mathias Marcussen

The Accused

Mr Vojislav Šešelj

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, on the one hand of a motion filed publicly on 21 January 2011 (“Motion”)¹ by the Office of the Prosecutor (“Prosecution”) and, on the other hand, of its supplement, filed publicly with a confidential annex on 4 February 2011 (“Supplement”),² seeking reconsideration in part of a decision rendered publicly by the Chamber on 23 December 2010 (“Decision of 23 December 2010”),³ which denied the admission into evidence of the documents with the 65 *ter* numbers 795 and 1098 (“Documents”) and the video recording assigned 65 *ter* number 6004 (“Video”).

II. PROCEDURAL BACKGROUND

2. On 17 May 2010, the Prosecution publicly filed a motion seeking the admission into evidence in this case of 180 documents, which include the Documents and the Video (“Motion of 17 May 2010”).⁴

3. During the administrative hearing of 21 September 2010, Vojislav Šešelj (“Accused”) contested the allowance of the Motion of 17 May 2010.⁵

4. On 26 August 2010, the Chamber, acting through the Legal Officer in Chambers, sent an e-mail asking the Prosecution *inter alia* to provide further evidence

¹ “Prosecution’s Motion for Partial Reconsideration of the 23 December 2010 Decision on Prosecution’s Second Motion for Admission of Evidence from the Bar Table”, public document, 21 January 2011 (“Motion”).

² “Prosecution’s Supplement to Motion for Partial Reconsideration of the 23 December 2010 Decision on Prosecution’s Second Motion for Admission of Evidence from the Bar Table”, public document with confidential annex, 4 February 2011 (“Supplement”).

³ “Decision on Prosecution’s Second Motion for Admission of Evidence from the Bar Table and for an Amendment to the 65 *ter* Exhibit List” with an annex and the partly dissenting opinion of Judge Lattanzi, public document, 23 December 2010 (“Decision of 23 December 2010”), with Judge Lattanzi dissenting as to the admission into evidence of the following 65 *ter* documents: 210, 213, 458, 653, 997, 1024, 1083, 1084, 1132, 1305, 1358, 1766, 1996, 1998, 2021, 2025, 2024 and 2158.

⁴ “Prosecution’s Second Motion for Admission of Evidence from the Bar Table”, public document, 17 May 2010 (“Motion of 17 May 2010”).

⁵ Hearing of 21 September 2010, transcript in French (“T(F)”). 16411-16412. As in the Decision of 23 December 2010, the Chamber notes that the Accused indeed refers to the Motion of 17 May 2010, although the Accused cites “the OTP’s submission on the 26th of March 2010”, the Motion of 17 May 2010 does in fact have, on its cover page, the legend “Date filed: 26 March 2010” but its date of filing was 17 May 2010.

attesting that the stenographic transcripts and minutes from the Serbian Parliament tendered for admission were indeed truly official minutes certified by the Serbian National Assembly (“E-Mail of 26 August 2010”).

5. In the submission filed publicly on 17 September 2010, the Prosecution responded partially to the questions put to the Chamber (“Notice”).⁶

6. The Accused did not respond to the Notice within the time-limit of 14 days, running from receipt of the BCS version, as allotted to him under Rule 126 *bis* of the Rules of Procedure and Evidence (“Rules”).⁷

7. In its submission filed publicly on 22 October 2010, the Prosecution introduced information supplementing the responses previously supplied in the Notice (“Supplement to the Notice”).⁸ This information did not concern the Documents.

8. On 17 December 2010, the Chamber rendered a public decision denying the request to admit the document bearing 65 *ter* number 6004a,⁹ marked for identification as MFI P326,¹⁰ which was the Video (“Decision of 17 December 2010”).¹¹

9. In the Decision of 23 December 2010, the Chamber unanimously denied admission into evidence for the documents bearing 65 *ter* numbers 795 and 1098, and upheld the denial of admission to the document bearing 65 *ter* number 6004, on grounds identical to those in the Decision of 17 December 2010.¹²

10. On 21 January 2011, the Prosecution publicly submitted the Motion, seeking partial reconsideration of the Decision of 23 December 2010.¹³

⁶ “Prosecution’s Notice of Response to Trial Chamber’s 26 August 2010 Inquiries”, public document, 17 September 2010 (“Notice”).

⁷ The Accused received the BCS translation of the Notice on 4 October 2010 (see Procès-verbal of reception filed on 7 October 2010).

⁸ “Supplement to Prosecution’s Notice of Response to Trial Chamber’s 26 August 2010 Inquiries”, public document, 22 October 2010 (“Supplement to the Notice”).

⁹ “Motion to Admit MFI P00019, MFI P00326, MFI P00327 and MFI P00328”, public document, 21 January 2010.

¹⁰ Hearing of 3 April 2008, T(F) 5728.

¹¹ “Decision on Request for Admission into Evidence of MFI P293, MFI P297, MFI P326, MFI P327 and MFI P328”, public document, 17 December 2010.

¹² Decision of 23 December 2010, paras 24-25.

¹³ See note 1, *supra*.

11. The Accused did not respond to the Motion within the time-limit of 14 days, running from the date of receipt of the BCS version, as allotted to him under Rule 126 *bis* of the Rules.¹⁴

12. On 4 February 2011, the Prosecution filed the Supplement, confidentially in part.¹⁵

13. The Accused did not respond to the Supplement within the time-limit of 14 days, running from the date of receipt of the BCS version, granted to him under Rule 126 *bis* of the Rules.¹⁶

III. ARGUMENTS OF THE PARTIES

A. Arguments of the Prosecution

14. The Prosecution is seeking partial reconsideration of the Decision of 23 December 2010 on grounds that the Chamber erred in denying admission to the Documents and the Video.¹⁷

1. Concerning the Documents

15. As concerns the 65 *ter* Documents 795 and 1098, which are the minutes of the closed sessions of the Serbian National Assembly dating from 13 December 1991 and 8 April 1992, respectively, the Prosecution contends that the Chamber committed an error by basing its denial of their admission on the ground that the Documents were not certified as true copies of the original.¹⁸

16. The Prosecution contends that it sent to the Chamber, by way of the Supplement to the Notice dated 22 October 2010, the supplemental information received from the Republic of Serbia National Council for Cooperation with the Tribunal in a letter dated 30 September 2010 (“Letter of 30 September 2010”), which described the method used to certify all of the minutes of the sessions of the Serbian

¹⁴ The Accused received a BCS translation of the Motion on 27 January 2011 (see procès-verbal of reception of the BCS translation filed on 1 February 2011).

¹⁵ See note 2, *supra*.

¹⁶ The Accused received a BCS translation of the Supplement on 8 February 2011 (see procès-verbal of reception filed on 14 February 2011).

¹⁷ Motion, paras 8, 13.

National Assembly.¹⁹ The Prosecution for this reason contends that all of the documents whose admission was sought under the Motion of 17 May 2010 were certified to be true and faithful copies of the original, based on this methodology.²⁰

17. The Prosecution indicates that it likewise sent to the Chamber by means of the Notice additional correspondence from the Government of Serbia and Montenegro on 8 August 2003 (“Letter of 8 August 2003”).²¹

18. The Prosecution adds, however, that it had in its possession two other letters from the Government of Serbia and Montenegro dated 17 June 2003 and 5 February 2003 – “Letter of 17 June 2003” and “Letter of 5 February 2003”²² – but that it neglected to send them to the Chamber due to a misunderstanding with regard to the further evidence requested by the Chamber in the E-Mail of 26 August 2010.²³ The Prosecution signals that it understood the Chamber’s request to exclude the Documents.²⁴ The Prosecution says the Letter of 17 June 2003 and the Letter of 5 February 2003, attesting to the authenticity of the Documents, were thus in existence at the time of the Decision of 23 December 2010 and that they would have been passed on to the Chamber if the Chamber had requested them.²⁵

19. The Prosecution considers itself to have provided the supplemental evidence requested by the Chamber attesting to the authenticity of the Documents and therefore considers that the Chamber had in its possession sufficient evidence attesting to the authenticity of the Documents.²⁶

20. In support of its Motion, the Prosecution likewise indicates that the supplement exhibits it is providing constitute new facts which justify reconsideration of the Decision of 23 December 2010.²⁷ According to the Prosecution, they are, on the

¹⁸ Motion, para. 8.

¹⁹ Motion, para. 7.

²⁰ *Ibid.*

²¹ Motion, paras 4, 8; Notice, Annex B.

²² Motion, para. 9.

²³ Motion, paras 3, 5; the Prosecution admits that it committed an error by interpreting the Chamber’s request to provide further evidence in this manner, but observes that this error of comprehension was not pointed out by the Chamber in the Decision of 23 December 2010.

²⁴ Motion, paras 3, 5.

²⁵ Motion, para. 9.

²⁶ Motion, paras 7-8.

²⁷ Motion, para. 11.

one hand, the Letter of 5 February 2003 which the Prosecution is annexing to the Motion²⁸ and, on the other, supplemental information submitted to the Prosecution by the Serbian Government on 25 January 2011 in response to a new request for assistance (“RFA”) in relation to the authenticity of the Documents (“Letter of 25 January 2011”).²⁹ This information is provided to the Chamber in annex to the Supplement.³⁰

21. The Chamber recalls that the Prosecution previously argued, in its Motion of 17 May 2010, that the admission into evidence of the Documents would make it possible to prove the existence,³¹ the implementation and the participation³² by the Accused in a joint criminal enterprise seeking to establish a new State dominated by the Serbs.

2. Concerning the Video

22. As concerns the Video, which is a recording of a speech made by the Accused, the Prosecution contends that this is a recording of a speech made by the Accused on 4 September 1989 in Hamilton, Canada.³³ The Prosecution contends that the Accused contests neither the date of the speech nor that he did make the statements recorded in the Video.³⁴

23. The Prosecution contends that the Accused did not contest the admission into evidence of the Video, contrary to what the Chamber asserted in its Decision of 23 December 2010.³⁵ The Prosecution emphasizes, moreover, that the Accused stated at the hearing that he was not as a general proposition opposed to the admission into evidence of video sequences where he is seen speaking.³⁶

²⁸ Motion, para. 11 and Annex.

²⁹ Motion, paras 9-10.

³⁰ Supplement, para. 4 and Confidential Annex. A new letter from the Serbian government dated 28 January 2011 authorized the Prosecution to disclose this new exhibit to the Chamber.

³¹ Motion of 17 May 2010, para. 14 and note 20.

³² Motion of 17 May 2010, para. 24 and note 40; Motion of 17 May 2010, para. 32 and note 60.

³³ Motion, para. 12.

³⁴ Motion, para. 13.

³⁵ *Ibid.*

³⁶ *Ibid.*

24. The Prosecution likewise contends that the uncertainties relating to the date of or the time of recording of the Video should not affect its admission into evidence inasmuch as the speech is relevant for determining the Accused's intention to participate in the joint criminal enterprise as well as his involvement therein.³⁷ According to the Prosecution, the Accused, in this speech, clearly favours the creation of a Serb State through force, which will later become the common purpose of the joint criminal enterprise targeted by the Indictment.³⁸

B. Arguments of the Accused

25. During the hearing of 3 April 2008, the Accused raised objections with regard to the authenticity of the Video, due to the unknown place of its making and the fact that his voice was distorted,³⁹ but he did not contest that he gave this speech in Canada in 1989.⁴⁰

26. During the administrative hearing of 27 January 2010, the Accused repeated his objections with regard to the admission into evidence of the Video.⁴¹

27. During the administrative hearing of 21 September 2010, the Accused informed the Chamber that he was opposed the Motion of 17 May 2010 and to evidence tendered from the bar table.⁴²

IV. CONCERNING RECONSIDERATION

A. Applicable Law

28. A Trial Chamber enjoys the inherent authority to reconsider its own decisions and it may allow a request for reconsideration if the requesting party establishes for the Chamber that the reasoning of the impugned decision contains a clear error or the

³⁷ Motion, para. 14.

³⁸ *Ibid.*; *The Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67, Third Amended Indictment, filed on 7 December 2007 ("Indictment").

³⁹ Hearing of 3 April 2008, T(F) 5726-5728.

⁴⁰ Hearing of 3 April 2008, T(F) 5726-5727.

⁴¹ Status Conference of 27 January 2010, T(F) 15272.

⁴² Hearing of 21 September 2010, T(F) 16411-16412. The Chamber notes that the Accused actually refers to the Motion, although the Accused cites "the OTP's submission on the 26th of March 2010"; the Motion indeed displays on its cover page the legend "Date filed: 26 March 2010" yet its date of filing was 17 May 2010.

particular circumstances, which may be new facts or new arguments, justify its reconsideration in order to avoid injustice.⁴³

B. Discussion

1) 65 ter Documents 795 and 1098

29. Insofar as the Prosecution's argument that the Documents have been certified as true and faithful copies by the Serbian Government following the Letter of 30 September 2010⁴⁴, the Chamber notes that this communiqué only explained in general terms what was the method for certification of the minutes of the sessions of the Serbian National Assembly. The Chamber recalls on the other hand that the six documents admitted by the Decision of 23 December 2010 relating to the session minutes from the Serbian National Assembly were specifically certified by the Letter of 8 August 2003.⁴⁵ The Chamber therefore decided to admit into evidence these six documents solely on the basis of the Letter of 8 August 2003. The Chamber recalls that the Documents were not listed in the Letter of 8 August 2003, that they were given no such certification⁴⁶ and that they were for this reason not admitted into evidence in the Decision of 23 December 2010.

30. The Chamber as a result observes that the Prosecution did not provide the supplemental evidence sought by the Chamber to attest to the authenticity of the Documents, even if, as the Prosecution contends, these exhibits were in its custody at the time of the Decision of 23 December 2010. The Prosecution has therefore exhibited negligence in this respect.

⁴³ *The Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-73.16, "Decision on Jadranko Prlić's Interlocutory Appeal Against the *Decision on Prlić Defence Motion for Reconsideration of the Decision on Admission of Documentary Evidence*", public document, 3 November 2009, para. 18; *The Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, "Decision on Defence's Request for Reconsideration", 16 July 2004, public document, 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, public document, 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 92bis of the Rules (Ashdown)", confidential document, 19 October 2006, p. 4.

⁴⁴ Supplement to the Notice, Annex A.

⁴⁵ Letter from the Republic of Serbia National Council for Cooperation with the Tribunal dated 8 August 2003.

⁴⁶ The Letter dated 8 August lists just 6 documents and does not include the Documents.

31. For this reason, the Chamber finds that it made no error in the Decision of 23 December 2010 in denying admission to these Documents.

32. However, after careful examination of the Letter of 5 February 2003, the Chamber observes that this supplemental exhibit certifies the Documents to be faithful and true copies of the original. Moreover, after careful examination of the Letter of 25 January 2011, specifying as it does the means of certifying the minutes of the sessions of the Serbian National Assembly, the Chamber finds that this supplemental information attests even more explicitly to the authenticity of the Documents.

33. Therefore, in light of the supplemental information provided by the Prosecution in the Motion, the Supplement and the annexes attached thereto, the Chamber finds that, although in support of its Motion of 17 May 2010 the Prosecution did not provide the supplemental information passed on by the Serbian government through the Letter of 5 February 2003, and that, on the other hand, the Prosecution, subsequent to the Decision of 23 December 2010, sent an RFA to the Serbian government, which answered in the Letter of 25 January 2011, these further exhibits may be considered as new circumstances which warrant reconsideration of the Decision of 23 December 2003 in order to avoid injustice.

2) The Video

34. As an initial matter, the Chamber notes that, contrary to what the Prosecution asserts,⁴⁷ it did not base its denial of admission into evidence of the Video on the Accused's opposition thereto. The objections raised by the Accused at the hearing of 3 April 2008 with regard to the authenticity of the Video⁴⁸ merely had the effect of raising questions to which the Prosecution was required to respond by providing further evidence, in order to make it possible for the Chamber to perhaps draw conclusions as to the *prima facie* reliability of the Video. The Chamber observed,

⁴⁷ Motion, para. 13.

⁴⁸ Although the Accused is not generally opposed to the admission into evidence of video sequences where he is seen speaking (Hearing of 3 April 2008, T(F) 5733), the Accused is opposed to the admission of evidence tendered directly from the bar table (Hearing of 21 September 2010, T(F) 16411). In addition, the Accused raised objections with regard to the place where the Video was recorded (Hearing of 3 April 2008, T(F) 5726-5727, Hearing of 27 January 2010, T(F) 15272) and with regard to the fact that his voice was distorted by the process of recording the Video (Hearing of 3 April 2008, T(F) 5726-5727). The Accused reiterated these objections with regard to the reliability of the Video during the Hearing of 27 January 2010 (T(F) 15272-15273).

during the hearing of 3 April 2008,⁴⁹ and later in its Decision of 17 December 2010⁵⁰ that there were doubts as to the Prosecution's statement whereby the Accused made the speech recorded in the Video on 4 September 1989 in Hamilton, Canada.

35. For this reason, the Chamber considers itself to have made no error when in its Decision of 23 December 2010 it denied the request to admit the Video for lack of reliability.

36. Insofar as concerns the Prosecution's argument whereby the uncertainties around the date and the place of the recording of the Video ought not to affect whether this exhibit can be admitted as the speech is relevant for determining the intent of the Accused to participate in the joint criminal enterprise,⁵¹ the Chamber does not share the Prosecution's view. The Chamber considers that, on the contrary, these exhibits constitute objective data needed in order to draw conclusions regarding the authenticity and the *prima facie* reliability of exhibits, especially insofar as such exhibits relate to a document alleging the responsibility of the Accused. The Prosecution ought therefore at least to have provided this evidence in support of the Motion.

37. Notwithstanding the fact that there is no error on which to base reconsideration of the Decision of 23 December 2010, the Chamber, after a fresh, careful examination of the hearing transcripts, believes that it is fundamental for reconsideration that the Accused did not contest the substance of the speech,⁵² or the year in which it was given in Canada.⁵³

38. The Chamber therefore agrees to reconsider its Decision of 23 December 2010 in order to avoid injustice.

⁴⁹ Hearing of 3 April 2008, T(F) 5728.

⁵⁰ Decision of 17 December 2010, para. 19.

⁵¹ Motion, para. 14.

⁵² Hearing of 3 April 2008, T(F) 5726-5727.

⁵³ *Ibid.*

V. CONCERNING THE ADMISSION INTO EVIDENCE OF THE DOCUMENTS AND OF THE VIDEO

A. Applicable Law

39. According to Rule 89 (C) of the Rules, the Chamber may admit any evidence it deems to have probative value.⁵⁴ Moreover, the Chamber may, pursuant to Rule 89 (D) of the Rules, exclude any exhibit whose probative value is substantially outweighed by the need to ensure a fair trial. Further to this, the Chamber recalls that, although an exhibit must be reliable to be probative, it nevertheless suffices to establish its *prima facie* reliability.⁵⁵ As concerns the condition of relevance, the requesting party must be able to explain clearly and precisely how each document fits into the record on its behalf.⁵⁶

40. At the present stage of the proceedings, the Chamber recalls that it is not conducting any definitive assessment of the relevance, the reliability or the probative value of the exhibits concerned. That determination will only take place at the close of the trial and in light of all of the exhibits introduced by the parties, both Prosecution and Defence.

B. Discussion

1) The Documents

41. Insofar as the reliability and the relevance of the Documents is concerned, the Chamber observes that the supplemental exhibits tendered by the Prosecution, namely, the Letter of 5 February 2003 and the Letter of 25 January 2011, certify the Documents as true and faithful to the original. They attest therefore that the Accused made the statements transcribed in the Documents before the Serbian National Assembly on the dates indicated therein. Moreover, the Chamber observes that these speeches relate to the creation of a “Greater Serbia” and to dispatching SDS

⁵⁴ *The Prosecutor v. Rasim Delić*, Case No. IT-04-83-T, “Decision on Prosecution Motion to Admit Documents in Evidence”, public document, 9 May 2008 (“*Delić* Decision”), para. 8.

⁵⁵ *Delić* Decision, para. 8.

⁵⁶ *Ibid.*

volunteers in Bosnia and Herzegovina and, it is for this reason that the Chamber considers that they related to the charges found in the Indictment.

42. In light of these considerations, the Chamber finds that the Documents display sufficient indicia of *prima facie* relevance, reliability and probative value to be admitted into evidence.

2) The Video

43. Insofar as the Video is concerned, the Chamber observes that, on the one hand, the Accused did recognize his voice there, despite it being distorted,⁵⁷ and that, on the other hand, he did not contest the fact of having made the speech recorded in the Video in Canada⁵⁸ and admitted that he was in Canada in 1989.⁵⁹ Furthermore, the Chamber observes, notwithstanding the objections relating to the date and the defective recording raised by the Accused, he did not contest their substance.⁶⁰

44. The Chamber points out that the speech relating to the creation of a Greater Serbia which the Accused made in the Video is one of the fundamental issues in the Indictment.

45. On the basis of a more careful review of the hearing transcripts,⁶¹ the Chamber is of the opinion that, as the Accused does not contest the substance of the speech, the Video displays sufficient indicia of *prima facie* relevance, reliability and probative value to be admitted into evidence with the proviso that a version of the BCS transcription and its English translation – corresponding to the contents of the Video passed on to the Chamber by the Prosecution – be uploaded onto *e-Court*, that is to say, deleting the last 71 lines of text of the BCS version and its English translation as they currently appear on *e-Court*.⁶²

⁵⁷ Hearing of 3 April 2008, T(F) 5727.

⁵⁸ Hearing of 3 April 2008, T(F) 5726-5727.

⁵⁹ *Ibid.*

⁶⁰ Hearing of 3 April 2008, T(F) 5726-5727.

⁶¹ Hearing of 3 April 2008, T(F) 5724-5727.

⁶² It is appropriate to delete the sentences appearing after the sentence: “Isto tako smatram da [...] u tom odmjeraivanju videćemo.”, BCS Transcript at p. 2 and following the sentence: “I also think there is no threat [...] God hold for us in this test.”, p. 1.

VI. DISPOSITION

46. **FOR THE FOREGOING REASONS** and pursuant to Rules 54, 73(A) and 89 (C) of the Rules,

GRANTS the Motion.

ORDERS the admission into evidence of the documents bearing *65 ter* numbers 795, 1098 and 6004, provided that they are translated by the official translation service of the Tribunal.

ORDERS the Registry to assign to each of these documents an exhibit number.

ORDERS the Prosecution to upload onto *e-Court*, for the document admitted bearing *65 ter* number 6004, a BCS version of the transcript and the English translation matching the contents of the Video sent by the Prosecution to the Chamber, as indicated in the body of this Decision.

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

/signed/
Jean-Claude Antonetti
Presiding Judge

Done this sixteenth day of March 2011
At The Hague
The Netherlands

[Seal of the Tribunal]