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International Tribunal for the Prosecution of
Persons Responsible for Serious Violations of
International Humanitarian Law Committed in
the Territory of Former Yugoslavia since 1991

Case No. IT-04-81-T

Date: 4 November 2010

Original: English

IN TRIAL CHAMBER I

Before: Judge Bakone Justice Moloto, Presiding
Judge Pedro David
Judge Michèle Picard

Registrar: Mr. John Hocking

Decision of: 4 November 2010

PROSECUTOR

v.

MOMČILO PERIŠIĆ

PUBLIC

**DECISION ON MOTION TO REOPEN
THE PROSECUTION CASE AND TENDER
DOCUMENTS THROUGH THE BAR TABLE**

The Office of the Prosecutor

Mr. Mark Harmon

Counsel for the Accused

Mr. Novak Lukić
Mr. Gregor Guy-Smith

TRIAL CHAMBER I (“Trial 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 seised of the Prosecution “Motion to Reopen Prosecution Case and Tender Documents Through the Bar Table” filed publicly with public Annex A and confidential Annex B on 1 October 2010 (“Motion”) and hereby renders its Decision.

I. SUBMISSION OF THE PARTIES

A. Prosecution

1. In its Motion, the Prosecution seeks to re-open its case-in-chief for the purpose of tendering excerpts from the military diaries of Ratko Mladić listed in Annex A (XN447, XN441, XN442, XN448, XN443, XN449, XN444, XN445 and XN450) (“Mladić Diaries” and “Proffered Mladić Diaries” respectively) into evidence through the bar table.¹ The Prosecution argues that the Proffered Mladić Diaries constitute “fresh evidence” which despite the exercise of reasonable diligence could not have been obtained prior to or during its case-in-chief.² In this respect, the Prosecution recalls that it entered into possession of the Mladić Diaries only on 29 March 2010, as a result of a house search conducted on 23 February 2010 by the Government of Serbia at the premises of the family of Ratko Mladić.³ Further, the Prosecution submits that it disclosed the Mladić Diaries to the Defence on 9 April 2010 and, after a lengthy process of translation and evidential review, it now seeks to tender into evidence the Proffered Mladić Diaries, which it identified as most relevant to its case.⁴

2. The Prosecution submits that the Proffered Mladić Diaries are of high probative value and of most relevance to the Prosecution case.⁵ The Prosecution contends that this evidence is relevant because it relates to significant contested issues in the case, including that regular meetings between the Accused and Mladić took place,⁶ the discriminatory arming of the Bosnian Serbs by the JNA,⁷ the Accused’s knowledge of the strategic objectives of the Republika Srpska,⁸ the provision of important personnel and logistical assistance by the VJ to the VRS under the Accused’s instructions⁹, the fact that SVK Commander Čeleketić considered himself to be part of one Serbian

¹ Motion, paras 1, 10, 11; Annex A. The Prosecution closed its case in chief on 25 January 2010, T. 9801.

² Motion, para. 6.

³ Motion, para. 7 referring to Decision on Defence Motion for Reconsideration of the Trial Chamber’s Oral Decisions of 15 and 16 July 2010 on Admission of “Fresh Evidence”, 17 September 2010, fn. 39.

⁴ Motion, para. 7.

⁵ Motion, para. 8.

⁶ Motion, para. 8; Annex A, pp. 1-3, 5, 7-8.

⁷ Motion, para. 8; Annex A, p. 1.

⁸ Motion, para. 8; Annex A, pp. 2, 6.

⁹ Motion, para. 8; Annex A, p. 5.

army,¹⁰ and the direct involvement of the VJ in VRS military operations in Bosnia and Herzegovina.¹¹ Further, the Prosecution argues that their probative value is not outweighed by the need to ensure a fair trial.¹²

3. The Prosecution further avers that the probative value of the Proffered Mladić Diaries is not outweighed by prejudice to the Defence.¹³ The Prosecution submits that the Proffered Mladić Diaries are concise and few in number.¹⁴ The Prosecution further submits that the Defence has sufficient time to investigate evidence to the contrary and present it to the Trial Chamber, even by calling an additional witness¹⁵ to challenge the content of the Proffered Mladić Diaries.¹⁶

B. Defence

4. On 15 October 2010, the Defence confidentially filed its “Response to Motion to Reopen Prosecution Case and Tender Documents through the Bar Table” (“Response”). The Defence does not object to the Prosecution being granted leave to reopen its case. It also takes no position with regard to the admission into evidence of excerpts of the Mladić Diaries through the bar table. It, however, makes some observations in relation to the Prosecution’s submissions as to their purported relevance and probative value.¹⁷ The Defence, in particular, submits that it is concerned that the “Prosecution submissions use the guise of ‘relevance’ to obfuscate both central factual issues and important legal concepts” that form the core of this case.¹⁸

II. APPLICABLE LAW

5. According to the jurisprudence of the Tribunal, in considering an application for reopening of the Prosecution case with a view to admitting “fresh evidence”, a Trial Chamber should first determine whether the evidence could, with reasonable diligence, have been identified and presented in its case-in-chief.¹⁹ In exercising its discretion to admit this “fresh evidence”, the Trial

¹⁰ Motion, para. 8; Annex A, p. 8.

¹¹ Motion, para. 8; Annex A, p. 8.

¹² Motion, para. 10.

¹³ Motion, para. 9.

¹⁴ Motion, para. 9.

¹⁵ Motion, para. 9.

¹⁶ Motion, para. 9.

¹⁷ Response, paras 3-8.

¹⁸ Response, para. 4.

¹⁹ *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-AR73.5, “Decision on Motion to Reopen the Prosecution Case”, public, 9 May 2008, para. 23. See also *Prosecutor v. Ante Gotovina et al.*, Case No. IT-06-90-AR73.6, “Decision on Cermak and Mladen Markac Interlocutory Appeals Against Trial Chamber’s Decision to Reopen the Prosecution Case”, public, 1 July 2010, para. 5; *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 with a confidential annex, 13 December 2005, para. 12 (“Milosevic Decision”) and *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, 19 August 1998, para. 26 (“Celebići Decision”).

Chamber should also consider whether its probative value is substantially outweighed by the need to ensure a fair trial.²⁰ When making this determination, the Trial Chamber should consider the stage in the trial at which the evidence is sought to be adduced and any potential delay that would arise as a result of the Trial Chamber's decision.²¹

6. The Trial Chamber recalls the law applicable to the admission of evidence through the bar table as set out in previous decisions of this Trial Chamber.²²

III. DISCUSSION

A. Reasonable Diligence

7. The Trial Chamber recalls that it already found that the Mladić Diaries constitute "fresh evidence".²³ The Trial Chamber is also satisfied that the Prosecution could not, with reasonable diligence, have identified and presented the Proffered Mladić Diaries in its case-in-chief.

8. In the exercise of its discretion, the Trial Chamber must now weigh the probative value of the "fresh evidence" tendered for admission against the Accused's right to a fair trial.²⁴

B. Probative Value and Accused's Right to a Fair Trial

9. As a preliminary point, the Trial Chamber notes that the Defence does not object to the admission of the Proffered Mladić Diaries into evidence nor does it submit any observations regarding the following excerpts: documents XN441, XN442, XN443, XN448 and XN449. Having analysed these undisputed documents, the Trial Chamber is satisfied that those documents are relevant and have sufficient indicia of probative value.

10. The Trial Chamber will now turn to documents XN444, XN445, XN447 and XN450.

11. As concerns XN444, the Defence challenges the Prosecution submission that the document is "probative to the allegation of Perišić's direct role in the provision of assistance to the VRS".²⁵

²⁰ *Prosecutor v. Zejnil Delalić et al.*, Case No. IT-96-21A, Judgement, 20 February 2001 ("Čelebići Appeals Judgement"), para. 283, with reference to Rule 89 (D) of the Tribunal's Rules of Procedure and Evidence.

²¹ Čelebići Appeals Judgement, paras 280, 283, 290

²² Decision on Prosecution's First Bar Table Motion, paras 19-20; Decision on Prosecution's Second and Third Bar Table Motions, paras 12-14; Decision on Prosecution's Fourth Bar Table Motion, paras 9-11. See also *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-T, Decision on Prosecution Motion to Admit Documentary Evidence, 10 October 2006, para. 18; *Prosecutor v. Rasim Delić*, Case No. IT-04-83-T, Decision on Prosecution Submission on the Admission of Documentary Evidence, 16 January 2008, para. 9.

²³ See Decision on Defence Motion for Reconsideration of the Trial Chamber's Oral Decisions of 15 and 16 July 2010 on Admission of "Fresh Evidence", 17 September 2010, para. 23.

²⁴ Milošević Decision, para. 33, citing the Čelebići Decision, para. 7.

²⁵ Response, para. 6.

The Defence submits that there has been no evidence in this trial that Abdić's forces were part of the VRS and that, in fact, there is evidence submitted by the Prosecution to the contrary. According to the Defence, XN444 can therefore not be relevant or probative to the allegation of Perišić's direct role in the provision of assistance to the VRS.²⁶ The Defence advances similar arguments as regards XN445.²⁷ Upon a careful examination of XN444 and XX445, the Trial Chamber finds that both documents relate to VJ assistance to military entities outside the FRY, including the SVK and Fikret Abdić's forces. Thus, irrespective of the Parties' assertions as to whether Abdić's forces are to be considered as being part of the VRS or not, and without prejudging this issue, XN444 and XN445 are otherwise *prima facie* sufficiently relevant and of probative value to the allegations set out in the Indictment.

12. The Defence also challenges the Prosecution's submission that XN447 "evidences Perišić's knowledge of the discriminatory arming of the Bosnian Serbs by the JNA".²⁸ The Defence submits that, as clearly identifiable from the entries related to 11 May 1992, Mladić attended several meetings on that day and there is no indication that Perišić was present at the meeting, during which Mr. Kovačević purportedly made certain comments relating to the JNA arming the Bosnian Serbs prior to its withdrawal from the territory of Bosnia and Heržegovina.²⁹ The Trial Chamber notes that the statements allegedly made by Mr. Kovačević and recounted in the Mladić Diaries are *prima facie* relevant and of probative value, leaving aside the issue as to whether the Accused was present at the meeting, on which the Trial Chamber will make its final determination at the end of the case based on the entire trial record. The Trial Chamber also notes that the remaining part of the document XN447 is relevant to the Prosecution allegation regarding close cooperation between Perišić and the political and military leadership of Republika Srpska.

13. In the case of XN450, the Defence submits that the Prosecution's assertion of corroborated evidence is mistaken since a witness's statement corroborating his previous testimony before the Trial Chamber does not make that opinion a fact.³⁰ The Trial Chamber notes this argument and finds that irrespective of the Parties' assertions whether a previous statement attributed to a witness who later testifies to the same subject matter constitutes corroboration or not, XN450 is relevant and probative to the evidence before the Trial Chamber relating to the VJ, VRS and SVK being one army.

²⁶ Response, para. 6.

²⁷ Response, para. 7.

²⁸ Response, para. 5.

²⁹ Response, para. 5.

³⁰ Response, para. 8.

14. The Trial Chamber finally considers that even if the Proffered Mladić Diaries are admitted into evidence at this late stage of the proceedings, since the Defence case is still ongoing and given the present gaps in the trial schedule, the Defence should be in a position to properly investigate and adduce evidence to the contrary. Subsequently, if need be, the Defence can seek leave to amend its *65 ter* witness list in order to call a particular witness and/or make submissions as to the potential need to recall certain witnesses to address the issues raised by the “fresh evidence”. The Chamber therefore finds that allowing the Prosecution to reopen its case insofar as the admission of the Proffered Mladić Diaries is concerned is warranted.

IV. DISPOSITION

15. For the reasons set out above, and pursuant to Rules 54, 85 and 89 (C) of the Rules, the Trial Chamber hereby

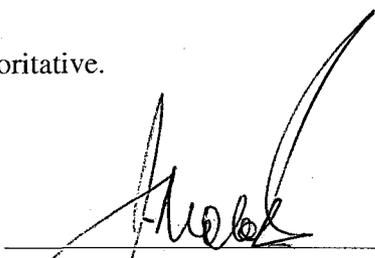
GRANTS the Motion

ADMITS the following Proposed Exhibits into evidence:

XN441, XN442, XN443, XN444, XN445, XN447, XN448, XN449 and XN450.

REQUESTS the Registry to assign exhibit numbers to the Proposed Exhibits admitted into evidence.

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



Judge Bakone Justice Moloto
Presiding Judge

Dated this fourth day of November 2010

At The Hague

The Netherlands

[Seal of the Tribunal]