



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: 24 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: 24 November 2010

THE PROSECUTOR

v.

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

PUBLIC

**DECISION ON JADRANKO PRLIĆ'S MOTION TO ADMIT EVIDENCE
REBUTTING EVIDENCE ADMITTED BY THE DECISION OF 6 OCTOBER 2010**

The Office of the Prosecutor:

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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 “Jadranko Prlić’s Motion to Rebut the Evidence Admitted by the Trial Chamber in the Decision on the Prosecution’s Motion to Re-Open Its Case”, filed publicly with Confidential Annexes by the Counsel for the Accused Jadranko Prlić (“Accused Prlić”; “Prlić Defence”) on 20 October 2010 (“Initial Motion”) and amended by “Jadranko Prlić’s Revised Motion to Rebut the Evidence Admitted by the Trial Chamber in the Decision on the Prosecution’s Motion to Re-Open Its Case” filed publicly with Confidential Annexes on 1 November 2010 by the Prlić Defence (“Motion”), in which the Prlić Defence requests leave of the Chamber to file a rebuttal following the admission of entries of the Radko Mladić Diary (“Mladić Diary”) by the “Decision on the Prosecution’s Motion to Re-Open Its Case Rendered Publicly by the Chamber on 6 October 2010”.¹

II. PROCEDURAL BACKGROUND

2. On 6 October 2010, the Chamber rendered publicly the “Decision on the Prosecution’s Motion to Re-Open Its Case”, in which the Chamber (1) grants in part the Motion of the Office of the Prosecutor (“Prosecution”) to reopen its case by admitting eight exhibits, four of which come from the Mladić Diary,² (2) decided that any requests for reopening filed by the Defence teams might not constitute a general request for reopening based on the entries of the Mladić Diary, but should be limited, if based on the Mladić Diary, to refuting the entries admitted by the Decision of 6 October 2010,³ and (3) orders the Defence teams who wish to do so, to file any requests for reopening of their respective cases in order to refute the entries of the

¹ Initial Motion, p. 1; Motion, p. 1.

² Decision of 6 October 2010, paras 62, 63 and p. 28.

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

Diary admitted into evidence by the present decision within 15 days from the date of filing of this Decision (“Decision of 6 October 2010”).⁴

3. On 27 October 2010, the Chamber rendered publicly 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”, in which the Chamber, on the one hand, rejected the Motion for certification to appeal of the Stojić Defence and, on the other, charges the Defence teams with supplementing, if appropriate, “their motions for re-opening, in accordance with case-law criteria for re-opening,⁵ and this within seven days of the time this Decision is issued,” (“Decision of 27 October 2010”).⁶

4. On 1 November 2010, the Chamber rendered publicly the “Decision on Prlić Defence Request for Certification to Appeal the Decision on the Reopening of the Prosecution’s Case of 6 October 2010”, in which the Chamber rejected the Request for certification to appeal of the Prlić Defence⁷ and recalled the strict criteria applied by the Chamber to any potential reopening of the cases of the Defence teams, as identified in the Decisions of 6 and 27 October 2010 (“Decision of 1 November 2010”).⁸

5. On 8 November 2010, the Prosecution filed publicly the “Prosecution Consolidated Response to Defence Motions to Reopen Their Cases and Tender Evidence per the Trial Chamber Decision of 6 October 2010” with Confidential Annex, in which the Prosecution requests that the Chamber reject a number of exhibits tendered for admission, in particular, by the Prlić Defence and for which it presented objections in its Confidential Annex (“Response”).⁹

⁴ Decision of 6 October 2010, p. 29.

⁵ Decision of 27 October 2010, p. 9 and footnote 41.

⁶ Decision of 27 October 2010, p. 9.

⁷ On 20 October 2010, the Prlić Defence filed publicly “Jadranko Prlić’s Request for Certification to Appeal the Decision on the Prosecution’s Motion to Re-Open Its Case” (“Jadranko Prlić’s Request for Certification to Appeal”) with Confidential Annex.

⁸ Decision of 1 November 2010, pp. 6, 7 and 8.

⁹ Response, para. 19 and Confidential Annex. It should be recalled that on 2 November 2010, the Chamber rendered publicly the “Decision on Prosecution Motion for an Extension of Time to File a Combined Reply to the Requests of Prlić, Stojić, Praljak and Petković Defences to Reopen Their Case”, in which it granted the Prosecution an extension until 8 November at the latest to allow it time to file a consolidated response to the motions for the reopening of their cases filed by the Defence teams.

III. ARGUMENTS OF THE PARTIES

6. First, the Prlić Defence indicates that the Motion does not constitute a request for the reopening of its case whose scope would be liable to become the object of an interlocutory appeal should the Chamber decide to grant the request for certification to appeal by the Prlić Defence.¹⁰

7. The Prlić Defence also maintains that it does not have to vouch for the authenticity, reliability or relevance of the entries of the Mladić Diary which it tenders into evidence. It notes in this matter that the Decision of 6 October 2010 of the Chamber did not limit its assessment of the authenticity, reliability and relevance of the Mladić Diary solely to entries presented by the Prosecution and that, consequently, its decision applies *mutatis mutandis* to other entries tendered for admission by the Prlić Defence.¹¹

8. In support of its Motion, the Prlić Defence argues that in the Decision of 6 October 2010, the Chamber had emphasised that in order to rebut the newly admitted evidence, the Defence teams could rely on “fresh” evidence including evidence whose relevance became apparent in light of fresh evidence admitted on behalf of the Prosecution.¹² The Prlić Defence notes in this respect that it is consequently incumbent upon it to explain how the evidence tendered for admission relates to the content of the entries of the Mladić Diary admitted by the Decision of 6 October 2010 and how it rebuts them.¹³

9. Finally, on the matter of the two exhibits that do not come from the Mladić Diary,¹⁴ the Prlić Defence recalls that it had already sought their admission in 2008 and 2009 and that the Chamber decided not to admit them into evidence on the ground that the source had not been revealed in the required time.¹⁵ The Prlić Defence recalls in the Motion the source of the exhibits and, moreover, argues that the impediments to the admission of these exhibits have now been removed with the reopening of the

¹⁰ Motion, pp. 1 and 2; Initial Motion, p. 1.

¹¹ Motion, para. 15.

¹² Motion, para. 16.

¹³ Motion, para. 16.

¹⁴ This concerns exhibits 1D 03193 and 1D 03194.

¹⁵ Motion, para. 17.

Prosecution case to the extent that it conformed to the limitations imposed on the Defence teams in the Decision of 6 October 2010.¹⁶

10. In its Response, the Prosecution alleges that the fact that the Prlić Defence presents entries from the Mladić Diary to rebut fresh evidence admitted into evidence indicates in itself that it acknowledges the authenticity and the probative value of the Mladić Diary.¹⁷

11. The Prosecution maintains that the Defence teams have sought admission for numerous exhibits related to various type of collaboration that existed between the conflicting parties and, more specifically in regard to exhibits tendered by the Prlić Defence, the collaboration between the HVO and the Muslims against the Serbs as proof, according to the Defence, that the Serbs and Croats could not have cooperated with each other against the Muslims.¹⁸ In this respect, the Prosecution first emphasises that it never denied the existence of various forms of collaboration, noting in particular the diversity and complexity of the alliances between the conflicting parties.¹⁹ Second, it maintains that the evidence tendered for admission by the Prlić Defence does not establish in any way that the Accused Prlić had participated in the support that the HVO and/or Croatia had provided to the BH Army in the areas such as Bihac and Posavina.²⁰ Consequently, the Prosecution maintains that the probative value of these exhibits is questionable.²¹

12. The Prosecution, moreover, alleges that the exhibits presented by the Prlić Defence in order to rebut the existence of cooperation between the Serbs and the Croats against the Muslims, notably those that refer to the use of the term “Ustashes” by the Serbs when speaking of Croats and a number of other exhibits explaining the reasons why meetings were organised between the Serbs and the Croats from BH, are of little relevance. The Prosecution argues more specifically that what is relevant are the grounds that led to some of the Accused taking part in these meetings with the

¹⁶ Motion, para. 17

¹⁷ Response, para. 10.

¹⁸ Response, para. 11.

¹⁹ Response, para. 12.

²⁰ Response, para. 12.

²¹ Response, para. 13.

Serbian leadership with the aim of achieving their objective of establishing Hercegovina on the territory of BH.²²

13. Moreover, the Prosecution notes, while indicating that it is not objecting to the admission of these elements based on this ground, that only a few short extracts from the Mladić Diary out of the long extracts for which the Prlić Defence sought admission, are actually tendered in order to rebut the fresh evidence admitted on behalf of the Prosecution.²³

14. Finally, the Prosecution emphasises that the fact that it has not put forward objections to the admission of certain exhibits presented by the Prlić Defence does not mean that it, in fact, subscribes to the arguments or the interpretation provided by the Prlić Defence in support of their admission.²⁴ The Prosecution notes, moreover, that many exhibits are not relevant and have minimal probative value.²⁵

IV. APPLICABLE LAW

15. The Chamber recalls that the reopening of a party's case after the closure of its case is not provided for by the Rules, but has been established as case-law whereby, in exceptional circumstances, the Prosecution may be authorised to reopen its case in order to present fresh evidence to which it did not previously have access.²⁶

16. The Appeals Chamber considered that “the primary consideration in determining an application for reopening a case to allow for the admission of fresh evidence is the

²² Response, para. 14.

²³ Response, para. 15, citing notably exhibits 1D 03122, 1D 03191 and 1D 03195.

²⁴ Response, para. 16.

²⁵ Response, para. 16.

²⁶ See the Decision of 6 October 2010, para. 31, referring to “Decision on Presentation of Documents by the Prosecution in Cross-Examination of Defence Witnesses”, public, 27 November 2008, para. 18, citing relevant case-law: *The Prosecutor v. Enver Hadžihasanović et al.*, Case No. IT-01-47-T, “Decision on the Prosecution’s Application to Re-Open Its Case”, public, 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, 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 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, 19 August 1998, para. 26 (“*Čelebići Decision*”).

question of whether, with reasonable diligence, the evidence could have been identified and presented in the case in chief of the party making the application”.²⁷ According to the Appeals Chamber, this analysis depends on the factual circumstances of each case and is therefore done on a case-by-case basis.²⁸

17. According to Tribunal case-law, when a Trial Chamber is satisfied that the requesting party has shown diligence, it can, pursuant to Rule 89 (D) of the Rules, refuse to reopen the case if the probative value of the proposed evidence is substantially outweighed by the need to ensure a fair trial.²⁹ The Chamber therefore must exercise its discretionary power whether to admit the fresh evidence, by weighing the probative value against the prejudices it might cause to the co-Accused, if it were admitted at this late stage.³⁰

18. The Appeals Chamber is more specific in the characterisation of “fresh evidence”: 1) evidence which was not in the 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 by the closure of its case; and 2) evidence it had in its possession, but the importance of which was revealed only in light of fresh evidence.³¹

V. DISCUSSION

1. Applying criteria for Reopening

19. The Chamber recalls that in the Decisions of 6 and 27 October 2010 it indicated that any motions for reopening that may be filed by the Defence teams

²⁷ See the Decision of 6 October 2010, para. 32, referring to *The Prosecutor v. Zejnil Delalić et al.*, Case No. IT-96-21-A, 20 February 2001 (“*Čelebići* Judgement”), para. 283.

²⁸ See the Decision of 6 October 2010, para. 32, referring to *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, 1 July 2010, para. 24 (“*Gotovina* Decision of 1 July 2010”).

²⁹ See the Decision of 6 October 2010, para. 33, referring to the *Čelebići* Judgement, para. 283.

³⁰ See the Decision of 6 October 2010, para. 33, referring to the *Čelebići* Judgement, para. 283; *Hadžihasanović* Decision, para. 35.

³¹ See Decision of 6 October 2010, para. 34, referring to *Čelebići* Judgement, paras 282 and 283; *Popović* Decision of 24 September 2008, para. 11.

should comply with the case-law governing the matter of reopening.³² In this respect, the Chamber notes that the Prlić Defence had first of all indicated in its Motion that it does not constitute a request for the reopening of the case, which is likely to be the subject of an interlocutory appeal, should the Chamber decide to grant the motion for certification to appeal the Decision of 6 October 2010 filed by the Prlić Defence.³³

20. Nevertheless, the Chamber equally finds that in the Motion, the Prlić Defence referred to the applicable law for the reopening of a case, notably to the interpretation of the nature of “fresh” evidence for which admission was sought, as well as the general admissibility requirements for evidence.³⁴ Moreover, the Chamber recalls that in its Decision of 1 November 2010, it rejected the Motion for certification to appeal of the Prlić Defence.³⁵ Consequently, the Chamber deems that the Initial Motion and the Motion should be treated as motions for the reopening of the case that must conform to criteria for reopening as established in case-law and recalled in the Decisions of 6 and 27 October 2010.

2. Criteria for Reopening

(i) “Fresh” Nature of Evidence Tendered for Admission

21. In the Decision of 27 October 2010, the Chamber recalled that the Defence teams wishing to file a motion for the reopening of their case had to put forward “fresh evidence” in response to the reopening of the Prosecution case. It also recalled that any requests for reopening should respect the case-law criteria for reopening.³⁶

22. Moreover, in the Decision of 6 October 2010, the Chamber clearly explained that it would not admit the entries of the Mladić Diary tendered by the Prosecution, unless they pertained directly to the alleged involvement of some of the Accused in a joint criminal enterprise (“JCE”).³⁷ More specifically, with regard to the Accused Prlić, the Chamber specified that Exhibits P 11376, P 11380 and P 11389 were relevant in that they described the statements made by the Accused during the meetings and were in keeping with the allegations that the aforementioned Accused

³² Decision of 6 October 2010, p. 29; Decision of 27 October 2010, pp. 9 and 10.

³³ Initial Motion, p. 1. *See also* Motion, p. 2.

³⁴ Motion, paras 9 to 14.

³⁵ Decision of 1 November, p. 8.

³⁶ Decision of 27 October 2010, p. 8.

had participated in achieving the objectives of the JCE.³⁸ The Chamber equally specified in its Decision of 27 October 2010 that, as part of a possible motion for the reopening of their case, the Defence teams could tender entries of the Mladić Diary, as long as they were directly linked to those admitted on behalf of the Prosecution because, otherwise, they would not be of a “fresh” nature.³⁹ The Chamber equally recalled that the Defence teams could, moreover, tender other evidence relevant and of probative value, whose importance was only revealed in light of the fresh evidence tendered by the Prosecution.⁴⁰ Consequently, the Chamber cannot admit fresh evidence unless it goes to refute the alleged participation of the Accused in achieving the objectives of the JCE and, in particular, in the case of the Accused Prlić.

23. The Chamber notes that 38 of the 40 exhibits tendered for admission by the Prlić Defence are entries of the Mladić Diary⁴¹ and that the Prlić Defence intends to tender the entries of the Mladić Diary since they go to refute the Prosecution’s arguments on the cooperation between the Serbs and the Croats of BH against the Muslims of BH, the Croatian ambition to reinstate a Croatian Banovina and the participation of Mate Boban and the Accused Prlić in these two objectives.⁴²

24. Having analysed each of the entries of the Mladić Diary in light of the explanations provided by the Prlić Defence and the objections of the Prosecution, the Chamber finds that none of the exhibits deal with the statement or actions of the Accused Prlić himself. The Chamber deems that the entries of the Mladić Diary tendered for admission by the Prlić Defence therefore do not contain any direct link with the exhibits admitted by the Decision of 6 October 2010. Consequently, the Chamber is of the opinion that the entries do not satisfy the criteria of being “fresh” and are therefore not admissible as part of a motion for the reopening of the case.

25. With regard to the two other exhibits tendered for admission by the Prlić Defence, Exhibits 1D 03193 and 1D 03194, the Chamber notes that the Prlić Defence

³⁷ Decision of 6 October 2010, paras 58 and 59.

³⁸ Decision of 6 October 2010, para. 61.

³⁹ Decision of 27 October 2010, p. 9 and, more specifically, footnote 42.

⁴⁰ Decision of 27 October 2010, p. 9.

⁴¹ P 11375, 1D 03157, 1D 03158, 1D 03159, 1D 03160, 1D 03161, 1D 03162, 1D 03163, 1D 03164, 1D 03165, 1D 03166, 1D 03167, 1D 03168, 1D 03169, 1D 03170, 1D 03171, 1D 03172, 1D 03173, 1D 03174, 1D 03175, 1D 03176, 1D 03178, 1D 03179, 1D 03180, 1D 03181, 1D 03182, 1D 03183, 1D 03184, 1D 03185, 1D 03187, 1D 03188, 1D 03190, 1D 03191, 1D 03192, 1D 03195, 1D 03197, 1D 03198 and 1D 03199.

had them in their possession at least since December 2008. The Prlić Defence, moreover, recalls that the Chamber had rejected the admission several times of these two documents because the Defence had not revealed their source in the required time. The Prlić Defence simply alleges that at this stage of the reopening, there are no longer any impediments to the admission of these two documents, without providing any explanation for this.⁴³

26. The Chamber consequently deems that by omitting to explain in what way these two exhibits that had been in the possession of the Prlić Defence for almost two years are of a “fresh” nature⁴⁴ and could therefore be admitted as part of the reopening of the case, the Prlić Defence has not demonstrated that Exhibits 1D 03193 and 1D 03194 satisfy the criteria of being fresh required by case-law for their admission as part of the reopening of the Defence case and is of the opinion that they should therefore be rejected.

VI. CONCLUSION

FOR THE FOREGOING REASONS,

PURSUANT to Rules 54, 85, 89 of the Rules,

DENIES by a majority the Motion and the Initial Motion.

Presiding Judge Jean-Claude Antonetti will subsequently attach a dissenting opinion to the present Decision.

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

⁴² Annex to the Initial Motion.

⁴³ Motion, para. 17.

⁴⁴ See in this sense *mutatis mutandis* the Decision of 6 October 2010, paras 34 and 41.

/signed/

Jean-Claude Antonetti
Presiding Judge

Done this twenty-fourth Day of November 2010
At The Hague
The Netherlands

[Seal of the Tribunal]