



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: 22 December 2010
Original: ENGLISH
French

IN TRIAL CHAMBER III

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

Registrar: **Mr John Hocking**

Decision of: **22 December 2010**

THE PROSECUTOR

v.

VOJISLAV ŠEŠELJ

PUBLIC DOCUMENT

**DECISION ON PROSECUTION'S MOTION FOR RECONSIDERATION OF
CHAMBER'S DECISION ON MLADIĆ NOTEBOOKS FILED ON 22
OCTOBER 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 of the Motion filed publicly on 19 November 2010 (“Motion”)¹ by the Office of the Prosecutor (“Prosecution”), in which the Prosecution requests, on the one hand, reconsideration of the Decision on the Prosecution Motion for Admission of Evidence Relating to the Mladić Notebooks filed on 22 October 2010 (“Decision of 22 October 2010”)² and, on the other, the addition of five Annexes attached to the Motion that concern the Mladić Notebooks to its *65 ter* Exhibit List, the addition of Tomasz Blaszczyk to its *65 ter* Witness List³ and the admission of two of the five Annexes into evidence.⁴

II. PROCEDURAL BACKGROUND

2. On 11 May 2010, the Chamber rendered an oral decision (“Decision of 11 May 2010”)⁵ requesting that the Prosecution file, no later than on 1 June 2010, all the motions it considered necessary before the procedure set out under Rule 98 *bis* of the Rules of Procedure and Evidence (“Rules”).

3. On 19 May 2010, the Prosecution filed a motion seeking an extension of time to file a motion to add documents to its *65 ter* Exhibit List, including the notebooks belonging to General Mladić.⁶

4. On 27 May 2010, the Chamber issued an order granting the Prosecution an extension of time until 16 July 2010 to file its motion concerning the documents that were seized from the home of General Mladić’s wife in February 2010.⁷

¹ “Prosecution’s Motion for Reconsideration of the Chamber’s Decision on Prosecution’s Motion for Admission of Evidence Relating to Mladić Notebooks dated 22 October 2010”, public with Annexes, 19 November 2010.

² “Decision on Prosecution’s Motion for Admission of Evidence Relating to Mladić Notebooks with a Separate Opinion from Presiding Judge Antonetti Attached”, public, 22 October 2010.

³ Motion, paras 2, 23 (b) i and ii.

⁴ Motion, paras 2, 23 (b) iii and iv.

⁵ Hearing of 11 May 2010, transcript in French (“T (F)”), 15880.

⁶ “Prosecution’s Motion for Extension of Time to Seek Addition of Selected Mladić Materials to Rule *65 ter* Exhibit List”, public, 19 May 2010.

⁷ “Order on Prosecution Motion for Extension of Time to Seek Addition of Materials Belonging to General Mladić to the *65 ter* List of Exhibits”, public, 27 May 2010 (“Order of 27 May 2010”).

5. During the administrative hearing of 14 June 2010, this future motion was mentioned and Vojislav Šešelj (“Accused”) presented his submission.⁸

6. On 19 July 2010, the Prosecution filed a public motion for the admission of evidence relating to the Mladić Notebooks (“Motion of 19 July 2010”).⁹

7. The Accused did not file any written submission to respond to the Motion of 19 July 2010 within the time limit of 14 days from the date of receipt of the BCS translation of the Motion, as was his right under Rule 126 *bis* of the Rules.¹⁰

8. After the expiry of the time limit for filing a response, as provided for by the Rules, the Accused responded orally to the Motion of 19 July 2010 during the administrative hearing of 21 September 2010.¹¹ On that occasion, the Chamber noted that his response was late, yet let him set forth his arguments.¹² The Accused replied to this point by implicitly requesting an extension of the time limit for a response as provided by the Rules.¹³

9. On 22 October 2010, the Chamber rendered a decision ordering an expert assessment to determine the authenticity of the Mladić Notebooks.¹⁴ The Chamber ordered that the appointed expert provide the Chamber with his expert report by no later than 15 December 2010.¹⁵

10. On 12 November 2010, the Chamber issued an order extending the time limit for filing the expert report set in the Decision of 22 October 2010 to 60 days, running from the day the designated expert received access to the documents that he needs to carry out his task.¹⁶

11. On 19 November 2010, the Prosecution filed the Motion publicly.

⁸ Hearing of 14 June 2010, T(F), 16110.

⁹ “Prosecution’s Motion for Admission of Evidence Relating to Mladić Notebooks and for Leave to Amend its Rule 65 *ter* Witness and Exhibit Lists”, public with Annexes, submitted on 16 July 2010 and filed on 19 July 2010 (redistributed on 20 July 2010 due to a pagination error).

¹⁰ The Accused received the BCS translation of the Motion on 1 September 2010 (*see* record of receipt filed on 6 September 2010), and had until 15 September 2010 to respond.

¹¹ Hearing of 21 September 2010, T(F), 16381-16400.

¹² Hearing of 21 September 2010, T(F), 16398.

¹³ Hearing of 21 September 2010, T(F), 16398.

¹⁴ Decision of 22 October 2010, p. 9.

¹⁵ Decision of 22 October 2010, p. 10.

12. During the hearing of 1 December 2010 and within the time limit granted to him under Rule 126 *bis* of the Rules, the Accused objected to the admission of the documents annexed to the Motion.¹⁷

III. ARGUMENTS OF THE PARTIES

A. Arguments of the Prosecution

13. The Prosecution requests reconsideration of the Decision of 22 October 2010, arguing that the Chamber made an error of reasoning in finding that General Milovanović had identified, in one of the notebooks, seven pages which had been written by someone other than General Mladić.¹⁸ The Prosecution maintains that the Chamber's error lies in the fact that the seven pages in question are not part of the Mladić Notebooks.¹⁹

14. The Prosecution also requests the addition to the 65 *ter* Exhibit List of the five Annexes attached to the Motion, which concern the Mladić Notebooks and consist of the following documents ("Annexes"):²⁰

- Annex 1: the seven pages for which General Milovanović did not recognise Mladić's handwriting, namely the documents bearing the numbers ERN 0668-1136, 0668-1137, 0668-1138, 0668-1139, 0668-1140, 0668-1141, 0668-1142;
- Annex 2: 1) two charts, "A" and "B", providing references for the five Mladić Notebooks seized in 2008 and the 17 Mladić Notebooks seized in 2010; 2) seizure receipts of the Serbian MUP dated 4, 10, 11, 12, 15 and 16 December 2008; 3) a Serbian MUP report dated 3 February 2009 and signed by Aleksandar Kostić, referring to the CDs seized on 4 December 2008 containing video footage; 4) letters confirming the sending of the report, one sent on 4 February 2009 by Rodoljub Milović to the Office of the Prosecutor

¹⁶ "Order Extending Time-Limit for Filing the Expert Report regarding the Mladić Notebooks by 60 Days", public, 12 November 2010.

¹⁷ Hearing of 1 December 2010, T (F), 16522-16529. The Accused received the BCS version of the Motion on 30 November 2010 (*see* record of receipt filed on 3 December 2010).

¹⁸ Motion, para. 1 (a).

¹⁹ Motion, paras 5-7.

²⁰ Motion, para. 23 (i).

for War Crimes in the Republic of Serbia, the other sent on 4 February 2009 by Vladimir Vukčević to the Tribunal's Liaison Office in Belgrade ("Documents Relating to the 2008 Seizure");

- Annex 3: documents regarding the search of 23 February 2010: 1) a search order dated 22 February 2010; 2) a Serbian MUP seizure receipt dated 23 February 2010; 3) a Serbian MUP report dated 30 April 2010 on the items seized on 23 February 2010; 4) a letter from the Serbian MUP entitled "Request for Assistance of the Trial Division of the Office of the Prosecutor of the ICTY dated 29 July 2010 – Forwarding Report" of 13 August 2010 ("Documents Relating to the 2010 Seizure");
- Annex 4: 1) Declaration of Tomasz Blaszczyk dated 30 July 2010 ("Blaszczyk Declaration"); 2) the transcript of the hearing in English in Case No. IT-95-5/18-T, *The Prosecutor v. Radovan Karadžić* ("Karadžić Case") of the testimony of Tomasz Blaszczyk on 20 August 2010 ("Blaszczyk Testimony") and exhibits referred to and admitted in the *Karadžić* Case ("Blaszczyk Exhibits");
- Annex 5: a corroboration chart and documents referred to in the chart.²¹

15. The Prosecution also requests the inclusion of Prosecution investigator Tomasz Blaszczyk on its 65 *ter* Witness List.²²

16. At the same time, the Prosecution requests the admission of Annex 3 into evidence pursuant to Rule 89 (C) of the Rules.²³ The Prosecution submits that the Documents Relating to the 2010 Seizure establish the legal basis for the search conducted at the home of Bosiljka Mladić.²⁴

17. The Prosecution also requests the admission of Annex 4, pursuant to Rules 92 *bis*, 94 (B) and 89 (C) of the Rules.²⁵ The Prosecution maintains that the Blaszczyk Declaration, Blaszczyk Testimony and Blaszczyk Exhibits will assist the Chamber in

²¹ Motion, para. 17. The Chamber notes that, according to the Prosecution, the chart was made by Tomasz Blaszczyk, but there is no indication in the document of its author.

²² Motion, para. 23 (ii).

²³ Motion, para. 23 (b) iv.

²⁴ Motion, para. 11.

establishing the chain of custody, the authenticity and the reliability of the Mladić Notebooks and corroborate evidence already admitted by the Chamber.²⁶ With regard to the Blaszczyk Declaration, the Prosecution argues that it has satisfied all the conditions set out under Rule 92 *bis* of the Rules.²⁷

18. Finally, in support of its request to tender Annexes 3 and 4 for admission, the Prosecution requests an extension of the time limit set by the Chamber in its Decision of 11 May 2010.²⁸

19. The Prosecution justifies the late filing of the requests for addition to the 65 *ter* Exhibit List and the 65 *ter* Witness List, as well as the late filing of the request for admission of two of the five Annexes, by its diligence, in its previous Motion of 19 July 2010, to limit the number of documents tendered.²⁹ The Prosecution also indicates that it was not aware of the Chamber's interest in the documents attached to the Motion.³⁰

B. Arguments of the Accused

20. During the administrative hearing of 1 December 2010, the Accused reiterated his objection to the admission of documents related to the Mladić Notebooks coming from the Serbian police³¹ and argued the lack of relevance³² or reliability³³ of the documents presented by the Prosecution.

IV. APPLICABLE LAW

21. A Trial Chamber has an inherent power to reconsider its own decisions and it may allow a request for reconsideration if the moving party demonstrates to the Chamber that the impugned decision contains a clear error of reasoning or that

²⁵ Motion, paras 3, 23 (b) iii and iv.

²⁶ Motion, paras 12-14.

²⁷ Motion, para. 15.

²⁸ Motion, para. 3.

²⁹ Motion, para. 1 (b).

³⁰ Motion, para. 3.

³¹ Hearing of 1 December 2010, T (F), 16523.

³² Hearing of 1 December 2010, T (F), 16524, 16528.

³³ Hearing of 1 December 2010, T (F), 16525, 16527.

particular circumstances, which can be new facts or arguments, justify its reconsideration in order to avoid injustice.³⁴

22. In order to grant a request to add exhibits to the *65 ter* list, the Chamber must be satisfied that this amendment is in the interest of justice. To that end, the Chamber must (1) in accordance with Articles 20 (1) and 21 (4)(b) of the Statute of the Tribunal (“Statute”), make sure that the rights of the Defence are respected by ensuring that all exhibits are disclosed sufficiently in advance and will not hinder the Accused in the preparation of his defence³⁵ and (2) verify the *prima facie* relevance, reliability and probative value of the exhibits with regard to the Indictment, or that there is another reason that might justify their addition to the *65 ter* Exhibit List. The Chamber may also take into account any other factor that it deems valid, such as the complexity of the case or the date on which the Prosecution obtained the said documents in order to assess a request for addition.³⁶

23. In order to grant a request to amend the *65 ter* Witness List, the Chamber must verify that it is in the interest of justice to do so and that the Accused will not be prejudiced as a result of this addition.³⁷

24. In accordance with Rule 89 (C) of the Rules, the Chamber may admit any relevant evidence which it deems to have probative value. Furthermore, the Chamber may, pursuant to Rule 89 (D) of the Rules, exclude any evidence whose probative value is substantially outweighed by the need to ensure a fair trial. In addition, the Chamber recalls that, if evidence must be reliable to be probative, it is nevertheless sufficient to establish its *prima facie* reliability.

³⁴ *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, 3 November 2009, para. 18. *The Prosecutor v. Stanislav Galic*, Case No. IT-98-29-A, “Decision on Defence’s Request for Reconsideration”, 16 July 2004, pp. 3 and 4 citing in particular *The Prosecutor v. Zdravko Mucić et al.*, Case No. IT-96-21Abis, “Judgement 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.

³⁵ *The Prosecutor v. Milan Martić*, Case No. IT-95-11-PT, “Decision on Prosecution’s Motion to Amend its Rule 65 ter Exhibit List”, 15 December 2005, p. 3.

³⁶ *Idem*.

³⁷ See *The Prosecutor v. Lukić and Lukić*, Case No. IT-98-32/1-PT, “Decision on Prosecution’s Motion to Amend Rule 65 ter Witness List and on Related Submissions”, 22 April 2008, para. 9.

25. The Chamber recalls that in accordance with the “Order Setting out the Guidelines for the Presentation of Evidence and the Conduct of the Parties during the Trial” (“Guidelines”), unless so required by exceptional circumstances, documents shall be presented through witnesses.³⁸ However, the Chamber notes that the case-law of the Tribunal accepts the presentation of evidence directly rather than through witnesses, if the requirements of Rule 89 of the Rules are satisfied, but the Chamber nevertheless retains its discretionary power to admit the evidence in question.³⁹

26. The Chamber notes that Rule 92 *bis* of the Rules authorises the presentation of written evidence provided that the said exhibits have probative value and are reliable and “go[es] to proof of a matter other than the acts and conduct of the accused as charged in the indictment”. The Chamber exercises its discretionary power to determine whether it is fair to allow this evidence in written form or, if appropriate, whether the witness should be called for cross-examination.

27. A Trial Chamber may, in accordance with Rule 94 (B) of the Rules, take judicial notice of documentary evidence admitted in other proceedings of the Tribunal relating to this matter. Judicial notice taken pursuant to Rule 94 (B) of the Rules is consequently a discretionary prerogative of the Chamber, which also assesses the appropriateness of that notice, preserving the balance between two fundamental and guiding principles of the trial: the rights of the Accused and judicial economy.⁴⁰

28. Two cumulative criteria must be satisfied before a Trial Chamber decides to exercise its discretionary power with a view to taking judicial notice of documentary evidence in accordance with Rule 94 (B) of the Rules: the document in question must

³⁸ Guidelines, Annex, para. 1.

³⁹ See, for example, *The Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, “Decision on Second Prosecution Bar Table Motion for the Admission of Bosnian Serb Assembly Records”, public, 5 October 2010, para. 6; *The Prosecutor v. Milan Lukić and Sredoje Lukić*, Case No. IT-98-32/1-T, “Decision on Milan Lukić Fourth Bar Table Motion”, public, 5 May 2009, p. 1.

⁴⁰ “Decision on Prosecution Motions for Judicial Notice of Documents pursuant to Rule 94 (B)”, public, 16 June 2008, para. 29 (“Decision of 16 June 2008”). See also *The Prosecutor v. Momir Nikolić*, Case No. IT-02-60/1-A, “Decision on Appellant’s Motion for Judicial Notice”, 1 April 2005, para. 12 (“Nikolić Decision on Appeal”).

have been admitted in another case before the Tribunal⁴¹ and the document must be relevant to the current case.⁴²

29. As the Chamber has already emphasized in its Order of 5 February 2008, the procedure for judicial notice remains an exception to the usual procedure for the admission of documentary evidence, according to which it is incumbent upon the requesting party to establish that the criteria under Rule 89 (C) of the Rules have effectively been met, namely that the document in question bears, *prima facie*, sufficient relevance, reliability and probative value to be admitted as evidence in the current proceedings.⁴³

30. The Chamber also recalls that there is a fundamental distinction between the admissibility of evidence and the weight given to it in the determination of the Accused's guilt.⁴⁴ At the present stage of the proceedings, the Chamber has not made a definitive assessment of the relevance, reliability or probative value of the evidence in question. Such an assessment will be made only at the end of the trial in light of all the evidence tendered by the parties, both the Prosecution and the Defence.

V. DISCUSSION

A. The request for reconsideration of the Decision of 22 October 2010

31. The Chamber recalls that in its Decision of 22 October 2010 it specified that if Milovanović stated that he recognised Mladić's handwriting in the 18 Mladić Notebooks which were shown to him,⁴⁵ Milovanović indicated that he did not recognise Mladić's handwriting on seven pages of Mladić Notebook No. 18, which

⁴¹ The Chamber recalls that unlike facts, judicially noticed documentary evidence does not need to be admitted in proceedings which have been brought to completion with a final judgement (Decision of 16 June 2008), para. 27 (compare footnote 35, citing the *Nikolić* Decision on Appeal, para. 45).

⁴² Decision of 16 June 2008, para. 27. *Nikolić* Decision on Appeal, para. 45. The Chamber underlines in this respect that the moving party has to demonstrate that the documentary evidence sought for judicial notice has a more than tenuous link to the case at hand, it must indicate clearly and precisely the paragraphs or passages of each document sought for judicial notice and it must specify how the documents are relevant to the matters at issue in the current proceedings (*Nikolić* Decision on Appeal, para. 11 and "Order for Clarification of Two Prosecution Motions for Judicial Notice of Documentary Evidence", public, 5 February 2008, p. 1 ("Order of 5 February 2008").

⁴³ Order of 5 February 2008, p. 2, making reference to the case of *The Prosecutor v. Rasim Delić*, Case No. IT-04-83, "Decision on Prosecution's Motion for Admission of Documentary Evidence Pursuant to Rule 94 (B)", public, 9 July 2007, p. 4.

⁴⁴ Guidelines, Annex, para. 2.

⁴⁵ See Milovanović Statement, para. 5.

are notes that were taken between 16 January 1996 and 28 November 1996 and bear ERN numbers 0668-1136, 1137, 1138, 1139, 1140, 1141, 1142.

32. Although in its Motion of 19 July 2010 the Prosecution does not request the admission into evidence of these seven pages, the Chamber notes that the Prosecution requests the admission of other extracts from the same Notebook No. 18.⁴⁶ The Chamber considers that doubts exist as to the identity of the writer of these documents and, as a consequence, as to the authenticity of all the Mladić Notebooks.⁴⁷

33. The Chamber therefore deems that it did not commit any clear error of reasoning in light of the documents that the Prosecution had disclosed to it at the time of the Decision of 22 October 2010, namely the statement of General Milovanović, the statement of General Gallagher and the thirteen extracts from the Mladić Notebooks which it sought to admit into evidence.⁴⁸

34. Consequently, the Chamber considers that the conditions justifying reconsideration of its Decision of 22 October 2010 have not been met.

B. The requests for addition to the 65 ter lists of exhibits and witnesses and the request for admission into evidence of Annexes 3 and 4

35. The Chamber deems that the Motion provides elements of response to questions raised by the Chamber in its Decision of 22 October 2010, notably concerning the chain of custody of the Mladić Notebooks and the intervention of Prosecution investigator Tomasz Blaszczyk.⁴⁹

36. The Chamber notes, furthermore, that the documents which the Prosecution requests to be added to the 65 ter Exhibit List or to be admitted into evidence were disclosed to the Accused, who was able to put forward his submissions during the hearing of 1 December 2010. Consequently, the Chamber deems that the Motion does not cause prejudice to the rights of the Accused.

⁴⁶ In its Motion of 19 July 2010, the Prosecution seeks the admission of the pages of Notebook No. 18 bearing the ERN number 0668-2082 to 2177.

⁴⁷ Decision of 22 October 2010, paras 32-34.

⁴⁸ Motion of 19 July 2010, Annex 1.

⁴⁹ Decision of 22 October 2010, paras 35-37.

1. The request to add the documents referred to in Annexes 1 to 5 of the Motion to the 65 *ter* Exhibit List

37. After careful assessment of the documents and written submissions disclosed to the Chamber in these proceedings, it would seem that:

- (1) the addition to the 65 *ter* Exhibit List of documents referred to in Annexes 1 to 5 would not cause prejudice to the Accused who did receive a copy of these documents on 30 November 2010;⁵⁰ and that
- (2) these documents seem *prima facie* to be reliable and to be linked to issues raised in the Indictment.

38. The Chamber considers that it is, therefore, in the interest of justice to add these documents to the 65 *ter* Exhibit List.

2. The request to add Tomasz Blaszczyk to the 65 *ter* Witness List

39. The Chamber considers that the requirements have been satisfied for Witness Tomasz Blaszczyk to be added to the Prosecution's 65 *ter* Witness List, since his declaration has been admitted on the 65 *ter* Exhibit List.

40. The Chamber considers that it is, therefore, in the interest of justice that Tomasz Blaszczyk be added to the 65 *ter* Witness List.

3. The request for admission of Annexes 3 and 4

41. In its Decision of 22 October 2010, the Chamber noted that there was, at that stage, some doubt as to the reliability and probative value of the Mladić Notebooks and held that it was in the interest of justice to defer ruling on the request for the admission of extracts from the Mladić Notebooks and to order the appointment of an independent expert to resolve the issue of the authenticity of the Mladić Notebooks.

⁵⁰ The Accused received the BCS translation of the Motion on 30 November 2010 (*see* record of receipt filed on 3 December 2010).

42. The Chamber considers, consequently, that it is also appropriate, pending the filing of the expert report ordered by the Decision of 22 October 2010, to defer ruling on the request for admission of Annexes 3 and 4.

VI. DISPOSITION

43. **FOR THE FOREGOING REASONS** and pursuant to Rule 54 of the Rules,

DENIES the Prosecution request for reconsideration of the Decision of 22 October 2010.

Pursuant to Rule 65 *ter* of the Rules,

GRANTS the Prosecution request to add the documents referred to in Annexes 1 to 5 of the Motion to the 65 *ter* Exhibit List.

GRANTS the Prosecution request to add Tomasz Blaszczyk to the 65 *ter* Witness List.

DEFERS the ruling on the request for admission of Annexes 3 and 4.

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

 /signed/

Jean-Claude Antonetti

Presiding Judge

Done this twenty-second day of December 2010
At The Hague (The Netherlands)

[Seal of the Tribunal]