**THE INTERNATIONAL CRIMINAL TRIBUNAL
FOR THE FORMER YUGOSLAVIA**

Case No. IT-04-74-T

Before: **Judge Jean-Claude Antonetti, Presiding**
Judge Arpad Prandler
Judge Stefan Trechsel
Reserve Judge Antoine Kesia-Mbe Mindua

Registrar: **Mr. John Hocking**

Date filed: **23 July 2010**

THE PROSECUTOR

v.

JADRANKO PRLIĆ
BRUNO STOJIĆ
SLOBODAN PRALJAK
MILIVOJ PETKOVIĆ
VALENTIN ĆORIĆ
BERISLAV PUŠIĆ

PUBLIC WITH CONFIDENTIAL ANNEX

JADRANKO PRLIĆ'S RESPONSE TO PROSECUTION MOTION TO ADMIT EVIDENCE IN REOPENING

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Mr. Fahrudin Ibrišimović and Mr. Roger Sahota for Berislav Pušić

THE INTERNATIONAL CRIMINAL TRIBUNAL
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PROSECUTOR v. JADRANKO PRLIĆ ET AL

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JADRANKO PRLIĆ'S RESPONSE TO PROSECUTION MOTION TO ADMIT EVIDENCE IN REOPENING

Jadranko Prlić, through his Counsel, respectfully responds to the Prosecution Motion to Admit Evidence in Reopening. The Prlić Defence considers the threshold of "fresh evidence" that allows the reopening of the case to be met. However, the repetitive and out of context nature of the evidence for which admission is being sought makes the reopening of the case not necessary. The nature of the evidence in combination with the delay caused to the proceedings violates the fair trial right of the Accused. The conditions set by the jurisprudence of the Tribunal regarding the reopening of a case are therefore not met. The attached Annex specifically responds to the Prosecution's claims as to each exhibit from the Mladić diary sought to be admitted.

I. BACKGROUND

1. On 29 March 2010 the Prosecution was provided in electronic scanned form with the Mladić diary that the Serbian police authorities had seized on 23 February 2010.[1]
2. On 14 April 2010 the Prosecution disclosed to the Defence the scanned notebooks on DVD discs.
3. On 21 April 2010 the Prosecution filed confidentially a Notice of its Intent to Request Reopening of its Case in order to tender into evidence excerpts of the Mladić diary. Therein, the Prosecution stated that translation has immediately

[1] *Prosecutor v. Prlić et al.*, IT-74-04-T, Prosecution Notice of its Intent to Request Reopening of its Case, 21 April 2010 ("Prosecution Notice"), para. 6.

started and that a transcript of the diary in BCS Latin script is being prepared to "facilitate review of the diary materials."[2]

4. On 26 April 2010 the Prosecution re-iterated its intent to request reopening of its case in its Notice Regarding Rebuttal and Reopening of its Case.[3]
5. On 11 May 2010 the Prosecution was provided by the Serbian authorities with the original diary and related seized audiotapes.[4]
6. On 21 May 2010 the Prosecution filed a Motion to Reopen its Case-in-chief, where it stated that in case its Motion is granted, it will request to tender certain items into evidence through a Rule 89(C) motion.
7. On 4 June 2010 the Prlić Defence filed its Response to the First Prosecution Motion ("First Response"). The Prlić Defence, considering the Mladić diary as fresh evidence that could not have been obtained despite exercising all reasonable diligence,[5] has reserved its right of possibly requesting reopening of its case "should it be deemed necessary, equitable and just."[6]
8. On 9 June 2010 the Prosecution filed its Combined Reply to the Defence Responses to the Prosecution Motion to Reopen its Case-in-chief (Mladić Materials) and to Defence Requests to Suspend the Deadline for Response.
9. On 16 June 2010 the Trial Chamber issued the Décision Portant sur la Requête de l' Accusation en Réouverture de sa Cause ("16 June 2010 Decision"), declaring the Prosecution Motion as premature[7] and setting the 9th of July 2010 as a deadline for the Prosecution to file a consolidated motion comprising not only the Mladić diary but also the supplementary documentary evidence that it would wish to tender for admission in the context of the reopening of its case.[8] The deadline for the submission of the Defence

[2] *Id*., para. 7.
[3] *Prosecutor v. Prlić et al.*, IT-04-74-T, Prosecution Notice Regarding Rebuttal and Reopening of its Case, 26 April 2010.
[4] *Prosecutor v. Prlić et al.*, IT-74-04-T, Prosecution Motion to Reopen its Case-in-chief, 21 May 2010 ("Prosecution Motion"), paras. 4, 5.
[5] First Response, para. 12.
[6] *Id.*, p. 6.
[7] 16 June 2010 Decision, p. 6. No official translation available yet.
[8] *Id*., p. 4.

responses was set at 14 days after the submission of the Prosecution's motion.[9]

10. On 8 July 2010 the Prosecution filed its Motion to Admit Evidence in Reopening ("Second Prosecution Motion") with which it requested that 15 excerpts from the Mladić diary, as well as 3 previous witness testimonies and documentary evidence and 2 Rule 92*bis* statements, allegedly supporting the authenticity and reliability of the excerpts, be tendered into evidence.
11. On 14 July 2010 the Prlić Defence filed Jadranko Prlić's Notice of his Intent to Request Reopening of his Case Should the Trial Chamber Grant the Prosecution Motion to Admit Evidence in Reopening ("Notice").
12. On 21 July 2010 the Prosecution filed its Response to Jadranko Prlić's Notice of his Intent to Request Reopening of his Case Should the Trial Chamber Grant the Prosecution Motion to Admit Evidence in Reopening.

II. LAW

A. Admission of evidence in reopening

13. Reopening a case is not explicitly provided in the Rules of Procedure and Evidence, though it is recognized in the Tribunal's jurisprudence.[10] The moving party can be either the Prosecution[11] or the Defence.[12]
14. Reopening a case is generally permissible when fresh evidence is discovered, which, despite diligent efforts, was not known to or was not available to the moving party at the time it was presenting its evidence.[13] Fresh evidence is not just evidence that was not in the possession of the moving party at the

[9] *Id.*, p. 6. The starting date was indicated by the Trial Chamber as being the 9th of July, on which the Second Prosecution Motion was circulated.
[10] *Prosecutor v. Prlić et al.*, IT-04-74-T, Decision on Prlić Defence Motion to Reopen its Case, 3 July 2009 ("Decision on Prlić Defence Motion to Reopen its Case"), p. 5; *Prosecutor v. Popović et al*., IT-05-88-T, Decision on Motion to Re-open the Prosecution Case, 9 May 2008 ("*Popović* Decision"), para. 23; *Prosecutor v. Hadžihasanović & Kubura*, IT-01-47-T, Decision on the Prosecution's Application to Reopen its Case, 1 June 2005 ("*Hadžihasanović* Decision"), para. 31.
[11] *See* generally *Prosecutor v. Delalić at al*., IT-96-21-T, Decision on the Prosecution's Alternative Request to Reopen the Prosecution's Case, 19 August 1998 ("*Čelebići* Decision"); *Hadžihasanović* Decision; *Popović* Decision.
[12] *See* generally *Prosecutor v. Krstić*, IT-98-33-A, Decision on Applications for Admission of Additional Evidence on Appeal, 5 August 2003; *Prosecutor v. Kordić & Čerkez*, IT-95-14/2-A, Decision on Appellant Mario Čerkez's Motion for Additional Evidence Pursuant to Rule 115, 26 March 2004.
[13] *Čelebići* Decision, para. 26. *See also Popović* Decision, para. 23; *Hadžihasanović* Decision, para. 33.

time of the conclusion of its case, but also evidence which by the exercise of reasonable diligence could not have been obtained by the party at that time.[14]

15. The burden of establishing that the evidence sought to be adduced is "fresh" [15] and that reasonable diligence could not have led to the discovery of the evidence earlier rests on the moving party.[16] The 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 for reopening a case is the primary consideration in determining the application.[17] Reasonable diligence must be understood with regard to the realities facing the parties; it must not be measured by what a party with infinite time and limitless investigative resources might have discovered or understood.[18]

16. Evidence proposed after the close of the moving party's case should still meet the general admissibility requirements, being relevant and having probative value.[19] Pursuant to Rule 89(C), the Trial Chamber has discretion to admit any relevant evidence that it deems to have probative value. Both the probative value[20] and the relevance[21] of the evidence are to be decided at the end of the proceedings.[22]

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[14] *Popović* Decision, para. 23; *Čelebići* Decision, para. 26; *Hadžihasanović* Decision, para. 33.
[15] *Čelebići* Decision, para. 26.
[16] *Popović* Decision, para. 24.
[17] Decision on Prlić Defence Motion to Reopen its Case, p. 5, *citing Čelebići* Appeal Judgement, para. 283; *Popović* Decision, para. 24. *See also Hadžihasanović* Decision, para. 33, *Čelebići* Decision, para. 26; *Prosecutor v. Blagojević*, IT-02-60-T, Decision on Prosecution's Motion to Admit Evidence in Rebuttal and Incorporated Motion to Admit Evidence Under Rule 92*bis* in its Case on Rebuttal and to Re-open its Case for a Limited Purpose, 13 September 2004 ("*Blagojević* Decision"), para. 8; *Mrkšić* Decision, para. 4.
[18] *Popović* Decision, para. 31.
[19] *Prosecutor v. Mrkšić et al.*, IT-95-13/1-T, Decision on Motion to Reopen Prosecution Case, 23 February 2007, para. 5.
[20] *See*, for example, *Prosecutor v. Prlić et al.*, IT-04-74-T, Decision on Praljak Defence Motion for Admission of Documentary Evidence, Dissenting Opinion of the President of the Chamber, Judge Jean-Claude Antonetti, 1 April 2010, p. 48, where Judge Antonetti states: "This probative value is decided only at the end of the trial '*when all inculpatory and exculpatory evidence has been admitted into evidence*.'"
[21] *Prosecutor v. Kupreškić at al.*, IT-95-16-T, Trial Transcipt, 20 August 1998, p. 482.
[22] Judge Antonetti, in one of his Dissenting Opinions, noted: "The final assessment of a document with regard to its relevance and probative value can only be made at the end of proceedings and by comparing the said document with other documents and, in particular, those that are currently unknown to the Judges of the Trial Chamber and will be presented in the coming months by other Defence Counsels." *Prosecutor v. Prlić et al.*, IT-04-74-T, Order on Admission of Evidence Relating to Witness Zoran Perković, Dissenting Opinion of Presiding Judge Jean-Claude Antonetti, 9 October 2008, p. 8.

17. Once a Trial Chamber is satisfied that the moving party has acted with diligence, "it must then exercise its discretion as to whether to admit the new evidence by weighing its probative value against the prejudice that might be caused to the accused by admitting it at such a late stage."[23] Rule 89 (D) allows a Chamber to exclude relevant evidence, where the probative value of the evidence is outweighed by the need to ensure a fair trial.[24] "In such a determination the following factors are relevant: (1) the advanced stage of the trial; (2) the delay likely to be caused by the re-opening of the […] case and the suitability of an adjournment in the overall context of the trial; (3) the effect of bringing evidence against one of the Accused on the fairness of the trial of another Accused in a multi-accused case and (4) the probative value of the evidence to be presented."[25]

B. Fair trial right

18. Article 20(1) of the ICTY Statute states in part that "[t]he Trial Chambers shall ensure that a trial is fair and expeditious… ."

19. Article 21 of the ICTY Statute states in part:

> 4. In the determination of any charge against the accused pursuant to the present Statute, the accused shall be entitled to the following minimum guarantees, in full equality:
> …
> (c) to be tried without undue delay…

III. ARGUMENT

A. The evidence for which admission is sought has no probative value

20. The Prosecution submits that the evidence for which it now seeks admission is "highly relevant to allegations of joint criminal enterprise and the lengths to

[23] Decision on Prlić Defence Motion to Reopen its Case, p. 6, citing *Čelebići* Appeal Judgment, para. 283; *Hadžihasanović* Decision, para. 35 (emphasis added). *See* also *Blagojević* Decision, para. 8.
[24] *Popović* Decision, para. 25; *Hadžihasanović* Decision, para. 47.
[25] *Popović* Decision, para. 25, *citing Blagojević* Decision, para. 10-11; *Prosecutor v. Milošević*, IT-02-54-T, Decision on Application for a Limited Re-opening of the Bosnia and Kosovo Components of the Prosecution Case with Confidential Annex, 13 December 2005, para. 13; *Prosecutor v. Delalić et al.*, IT-96-21-A, Judgement, 20 February 2001, paras. 280, 290; *Čelebići* Decision, para. 27.

which the Accused would go to achieve the objectives of the JCE."[26] However, the Prosecution concedes that in relation to the additional documentary evidence for which it seeks admission, it "has tendered other documents during its case relating to the issue of collaboration between the Serbs and the HVO."[27]

21. If the alleged JCE between the Serbs and the Croats is - according to the Prosecution's own view - supported by other documents, then the evidence from the Mladić diary does not offer anything new. Repetitive evidence is not admitted, being considered "with no probative value" and "unnecessary."[28] The Trial Chamber has distinguished a "reasonable degree of repetitive" evidence from unduly repetitive evidence, in that the first expedites the proceedings without infringing the rights of the Accused, while the latter, prolongs them.[29] In this case, the efforts of the Prosecution to admit this evidence have resulted in the prolongation of the trial. Admission of this evidence is not necessary.
22. The probative value of the evidence submitted by the Prosecution is further undermined by the fact that the Prosecution seeks admission of only certain excerpts taking them out of context. The Prlić Defence shows in the attached Annex, in addition to the annexes attached to its First Response and its Notice, that several excerpts for which the Prosecution does not seek admission, support its Defence case.[30]
23. The Prosecution seeks to admit into evidence exhibits P11266, P11377, P11388, claiming that it could not have identified their significance in the

[26] Second Prosecution Motion, para. 22.
[27] *Id*., para. 31.
[28] *Prosecutor v. Karadžić*, IT-95-5/18-PT, Decision on Prosecution's Motion for Admission of Evidence of KDZ290 (Mirsad Kučanin) Pursuant to Rule 92*quat*er, 25 September 2009, paras. 12, 23.
[29] *See Prosecutor v. Naletilić and Martinović*, IT-98-34-T, Decision on Prosecutor's Motion, to Take Additional Depositions for Use at Trial, 5 June 2001. See also *Prosecutor v. Prlić et al*., IT-04-74-AR73.17, Decision on Slobodan Praljak's Appeal of the Trial Chamber's Refusal to Decide Upon Evidence Tendered Pursuant to Rule 92*bis*, 1 July 2010, para. 37, where the Appeals Chamber endorses the Trial Chamber's view that statements containing duplications and repetitive or irrelevant portions had to be excluded.
[30] The Prlić Defence submits that the translation into English of the whole Mladić diary has been completed only on 21 July 2010 and therefore time for careful review is necessary before all the relevant for its Defence case parts can be identified.

absence of the Mladić diary.[31] Given the substance of what is contained in this evidence, which the Prosecution had in its possession all along, it is difficult to imagine that such a talented pool of lawyers could not have figured out the importance, if any, of these documents, and could not have attempted to introduce them in their Case-in-chief. To attempt to do so at this stage gives the impression that the Prosecution actually attempted to introduce rebuttal evidence. Fresh evidence is distinct from rebuttal evidence.[32] Suffice it to say, when examining these documents, it is clear that they are repetitive in nature, and as such inadmissible.

B. The need to ensure a fair trial militates against the admission of evidence

24. The Prosecution submits that the fair trial right of the Accused is not violated, because "[t]he probative value of the Mladić materials is high and the volume of materials for which the Prosecution seeks reopening very limited."[33] and "the fresh evidence does not modify the charges."[34] Even if that was true, an expeditious trial is an important aspect of the fair trial right.

25. The last hearing took place on 1 April 2010. The Prosecution disclosed the material to the Defence on 14 April 2010. Since then, numerous submissions in relation to reopening have been filed by both the Prosecution and the Defence. The time allocated to the Defence teams for cross-examination was substantially reduced in order to ensure a speedy trial.[35] Now, and for almost 4 months, the proceedings are stalled.

26. The right to an expeditious trial should be applied to the benefit of the Accused. It is reasonably expected that time considerations are made now. The significant delay caused by the Prosecution's request to reopen its case infringes the Accused's right to an expeditious trial. Taking into consideration that the Accused are incarcerated and effectively serving prison

[31] Second Prosecution Motion, para. 21.
[32] *Čelebići* Decision, para. 23.
[33] Second Prosecution Motion, para. 26. *See also* First Prosecution Motion, para. 28.
[34] Second Prosecution Motion, para. 26.
[35] *Prosecutor v. Prlić et al*., IT-04-74-T, Decision Allocating Time to the Defence to Present its Case, 25 April 2008, paras. 24, 28, 33, 37, 41.

time, the uncertainty in which they find themselves while waiting for the final judgement for more than four years is unjustifiably prolonged.

IV. RELIEF SOUGHT

WHEREFORE, for all the reasons set forth herein the Prlić Defence the Trial Chamber should **DENY** the Prosecution Motion to Admit Evidence in Reopening.

Dated: 23 July 2010
The Hague, The Netherlands

Respectfully submitted,

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