



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: 21 October 2009
Original: ENGLISH
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: 21 October 2009

THE PROSECUTOR

v.

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

PUBLIC

**DECISION ON PETKOVIĆ DEFENCE MOTION TO ADD 37 EXHIBITS TO
ITS RULE 65 *TER* LIST (MILAN GORJANC)**

The Office of the Prosecutor:

Mr Kenneth Scott
Mr Douglas Stringer

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

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"),

SEIZED of the "Motion of Milivoj Petković to Amend his Rule 65 *ter* (G) (ii) List of Exhibits filed 31 March 2008 by Adding Items Referred to in the Expert Report of Milan Gorjanc", publicly filed by the Counsel for Milivoj Petković ("Petković Defence") on 7 October 2009 ("Motion"), in which the Petković Defence requests that the Chamber authorise the addition of 37 documents ("Proposed Exhibits")¹ to the list of exhibits filed under Rule 65 *ter* of the Rules of Procedure and Evidence ("65 *ter* List", "Rules"), all listed in the Annex attached to the Motion,

NOTING the electronic mail from the Chamber dated 7 October 2009 in which it invites the parties to present any responses to the Motion by 14 October 2009 at the latest,

NOTING the "Prosecution's Response to the 'Motion of Milivoj Petković to Amend His Rule 65 *ter* (G) (ii) List of Exhibits Filed 31 March 2008 by Adding Items Referred to in the Expert Report of Milan Gorjanc'", publicly filed by the Office of the Prosecutor ("Prosecution") on 14 October 2009 ("Response"), in which the Prosecution says that in the spirit of fair play, and after much soul-searching and despite the comments made in court on 10 September 2009 by the Petković Defence,² it does not oppose the Motion, while reserving the rights to object to the admission into evidence of the Proposed Exhibits,³

NOTING the "Petković Defence Notice Concerning Prosecution's Supportive Response of 14 October 2009" filed publicly by the Petković Defence on 15 October

¹ 1D 01236, 1D 01240, 2D 01379, 2D 01389, 4D 01240, 4D 01330, 4D 01461, 4D 01470, 4D 01471, 4D 01472, 4D 01473, 4D 01474, 4D 01475, 4D 01476, 4D 01477, 4D 01478, 4D 01479, 4D 01481, 4D 01482, 4D 01483, 4D 01484, 4D 01485, 4D 01486, 4D 01487, 4D 01488, 4D 01489, 4D 01490, 4D 01491, 4D 01492, 4D 01493, 4D 01494, 4D 01727, 4D 01730, IC 01005, IC 01006, P 02231 and P 08632.

² Response, para. 2 citing the transcript of 10 September 2009, pp. 44704 and 44705.

³ Response, paras 3 and 4.

2009 ("Notice"), in which it takes note of the Prosecution's readiness not to object to the Motion and regrets that some of its remarks upset the Prosecution,⁴

CONSIDERING that the other parties have not filed any response to the Motion,

CONSIDERING first of all that the Petković Defence submits that the Proposed Exhibits were used by the expert witness Milan Gorjanc ("Witness"), who is scheduled to testify from 26 October 2009 to 5 November 2009, in the preparation of his report "The Doctrine of All-people's Defence and Other Military Topics Relevant for Military Actions in Bosnia and Herzegovina" ("Expert Report") and that the said Proposed Exhibits therefore should be admitted to the 65 *ter* List,⁵

CONSIDERING that the Petković Defence also claims that the Proposed Exhibits *prima facie* have a degree of probative value and a degree of relevance with regard to the presentation of the Defence case of the Accused Milivoj Petković,⁶

CONSIDERING that the Petković Defence furthermore notes that it was not able to add the Proposed Exhibits to the 65 *ter* List filed on 31 March 2008, because it was only when the Witness examined the 65 *ter* List that this became necessary,⁷

CONSIDERING that the Petković Defence moreover notes that it is in the interest of justice to allow the Proposed Exhibits to be added to the 65 *ter* List to the extent that the Witness concluded that the Proposed Exhibits in question were relevant and were linked to his testimony,⁸

CONSIDERING, finally, that the Petković Defence submits that adding the Proposed Exhibits to the 65 *ter* List would not cause the Prosecution any prejudice to the extent that 1) the Witness testimony will start on 26 October 2009 and 2) the examination of the Proposed Exhibits (including public documents, military maps, short extracts, military reports and orders) is not of a nature to burden considerably the work of the Prosecution with regard to the testimony of the said Witness,⁹

⁴ Notice, paras. 2 and 3.

⁵ Motion, paras 2 and 3.

⁶ Motion, para. 8.

⁷ Motion, para. 9.

⁸ Motion, para. 9.

⁹ Motion, paras 10, 11 and 12.

CONSIDERING that the Chamber considers that the Proposed Exhibits have already been uploaded on to the E-court system, a source of confusion both for the Parties and for the Chamber; that the Chamber draws the attention of the Petković Defence, as well as of the other parties in the trial, that they should not upload on to the E-court system documents that have not been included on the 65 *ter* Lists and to provide in future, when requesting the addition of exhibits to the 65 *ter* List, the original and the translated documents exclusively on a CD,

CONSIDERING that, on the merits of the Motion, the Chamber recalls that in order to consider favourably a request to add exhibits to the 65 *ter* List, these exhibits must be submitted to the Parties sufficiently in advance of them being put to the witness at the trial in order not to hinder the preparation of their cross-examination,

CONSIDERING that the Chamber also recalls the "Decision Adopting Guidelines for the Presentation of Defence Evidence" rendered on 24 April 2008 ("Decision of 24 April 2008") and more specifically Guideline 8 which stipulates that in order to consider favourably a request to add exhibits to the 65 *ter* List, the Parties concerned must file, prior to the appearance of the witness to whom they want to put these exhibits, a motion with the Chamber to add this or other exhibits to the 65 *ter* (G) List, to show the essential nature of the exhibit or exhibits to the case and the reasons why it or they are not on the list filed pursuant to Rule 65 *ter* (G) of the Rules,

CONSIDERING, moreover, during a request to add an exhibit to the 65 *ter* List, that the Chamber always starts with a *prima facie* evaluation of the reliability, relevance and probative value of the documents that are presented,

CONSIDERING, first that the Chamber finds that, *prima facie*, Proposed Exhibit P 02231 does not guarantee sufficient reliability to the extent that it is an almost illegible manuscript that has neither stamp, signature nor official heading,

CONSIDERING, second, that the Chamber considers that the English translations of Proposed Exhibits 4D 01470,¹⁰ 4D 01471¹¹ and 4D01472¹² do not correspond to the

¹⁰ It is worthy of note that the original has 36 pages, while the translation has 136 pages and the original has a heading that has not been reproduced in the translation.

¹¹ The original Proposed Exhibit has 22 pages, while the translation only has three.

original documents in BCS and that, for this reason and *prima facie*, do not guarantee sufficient reliability,

CONSIDERING that as a result the Chamber finds that Proposed Exhibits 4D 01470, 4D 01471, 4D 01472 and P 02231 do not guarantee sufficient reliability to warrant adding them to the 65 *ter* List,

CONSIDERING that with regard to the other Proposed Exhibits and primarily Proposed Exhibits 4D 01482, 4D 01483, 4D 01484, 4D 01485, 4D 01486 and 4D 01491, the Chamber agrees to add them at this stage to the 65 *ter* List as they are *prima facie* relevant, reliable and have a degree of probative value, but wishes to draw the attention of the Petković Defence to the need to examine the Witness, during his testimony, on these Proposed Exhibits in order to establish their authenticity, probative value and reliability, in the event of any request for admission,

CONSIDERING that, with regard Proposed Exhibit 4D 01479, if the Chamber allows the Petković Defence to add it to the 65 *ter* List because it is *prima facie* reliable, relevant and has a degree of probative value, it does so subject to the Defence uploading the cover page of the Proposed Exhibit on to the E-court system, pursuant to the Decision of 24 April 2008 and, more specifically, to Guideline 8,¹³

CONSIDERING that the Chamber finds, moreover, that with the exception of the Proposed Exhibits whose addition to 65 *ter* List it does not approve, the citing of all Proposed Exhibits in the Expert Report that was disclosed to the other parties on 2 September 2009 renders it necessary to add them to the 65 *ter* List,

CONSIDERING, finally, that the Chamber finds that none of the other parties claims any prejudice resulting from this addition, that the Proposed Exhibits¹⁴ are *prima facie*

¹² The Chamber finds that the heading of the original does not correspond to the heading reproduced in the translation and that numerous articles were not translated (*see* for example page 57 of the English Proposed Exhibit which mentions "Missing articles 155 to 532").

¹³ Decision of 24 April 2008, para. 30.

¹⁴ 1D 01236, 1D 01240, 2D 01379, 2D 01389, 4D 01240, 4D 01330, 4D 01461, 4D 01473, 4D 01474, 4D 01475, 4D 01476, 4D 01477, 4D 01478, 4D 01479, 4D 01481, 4D 01482, 4D 01483, 4D 01484, 4D 01485, 4D 01486, 4D 01487, 4D 01488, 4D 01489, 4D 01490, 4D 01491, 4D 01492, 4D 01493, 4D 01494, 4D 01727, 4D 01730, IC 01005, IC 01006 and P 08632.

reliable, relevant and have a degree of probative value and that it is in the interest of justice to add them¹⁵ to the 65 *ter* List,

CONSIDERING that, consequently, the Chamber decides to grant the Motion partially and authorises the Petković Defence to add Exhibits 1D 01236, 1D 01240, 2D 01379, 2D 01389, 4D 01240, 4D 01330, 4D 01461, 4D 01473, 4D 01474, 4D 01475, 4D 01476, 4D 01477, 4D 01478, 4D 01479, 4D 01481, 4D 01482, 4D 01483, 4D 01484, 4D 01485, 4D 01486, 4D 01487, 4D 01488, 4D 01489, 4D 01490, 4D 01491, 4D 01492, 4D 01493, 4D 01494, 4D 01727, 4D 01730, IC 01005, IC 01006 and P 08632 to the 65 *ter* List.

FOR THE FOREGOING REASONS,

PURSUANT TO Rules 54, 65 *ter* and 89 (C) of the Rules,

PARTIALLY GRANTS the Motion,

ORDERS the Petković Defence to upload on to the E-court system the cover page of Proposed Exhibit 4D 01479,

AUTHORISES the addition of Proposed Exhibits 1D 01236, 1D 01240, 2D 01379, 2D 01389, 4D 01240, 4D 01330, 4D 01461, 4D 01473, 4D 01474, 4D 01475, 4D 01476, 4D 01477, 4D 01478, 4D 01479, 4D 01481, 4D 01482, 4D 01483, 4D 01484, 4D 01485, 4D 01486, 4D 01487, 4D 01488, 4D 01489, 4D 01490, 4D 01491, 4D 01492, 4D 01493, 4D 01494, 4D 01727, 4D 01730, IC 01005, IC 01006 and P 08632 to the 65 *ter* List of the Petković Defence,

AND,

REJECTS BY A MAJORITY the request to add Proposed Exhibits 4D 01470, 4D 01471, 4D 01472 and P 02231 to the 65 *ter* List of the Petković Defence,

¹⁵ 1D 01236, 1D 01240, 2D 01379, 2D 01389, 4D 01240, 4D 01330, 4D 01461, 4D 01473, 4D 01474, 4D 01475, 4D 01476, 4D 01477, 4D 01478, 4D 01479, 4D 01481, 4D 01482, 4D 01483, 4D 01484, 4D 01485, 4D 01486, 4D 01487, 4D 01488, 4D 01489, 4D 01490, 4D 01491, 4D 01492, 4D 01493, 4D 01494, 4D 01727, 4D 01730, IC 01005, IC 01006 and P 08632.

Presiding Judge Jean-Claude Antonetti encloses a dissenting opinion to this Decision.

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

/signed/

Jean-Claude Antonetti
Presiding Judge

Done this twenty-first October 2009
At The Hague
The Netherlands

[Seal of the Tribunal]

The Dissenting Opinion of the Presiding Judge Jean-Claude Antonetti

Concerning the documents published in official gazettes in former Yugoslavia, these documents need to be translated into **English** or into **French** (the two working languages of the Tribunal).

Since this concerns relevant documents (legal texts) that have a degree of probative value, they should already have been given an MFI number at the point of admission and consequently should now be added provisionally to the 65 *ter* List.

Concerning document no. P02231 whose **authentic nature** is doubted by the majority of the Trial Chamber, I find that **at this stage** the Trial Chamber is not in the position to assess whether this document is fake or whether it has sufficient indicia of reliability.

The hearing will allow it to appreciate more clearly, if need be, the point of view of the Expert Witness on the merits of the document.

If after the hearing neither party (and notably the Prosecution) objects to the admission of this document, I do not see why it should not be added at this stage to the 65 *ter* List.

Furthermore, I notice that these documents were definitely admitted in other cases in view of their contents.

It is up to the Defence to do their work and ask for official translations for these documents. It would be paradoxical to conclude that after so many years of our Tribunal's work, documents of this nature have not been used in cases.

If for reasons related to the Defence, it does not do its work properly, it is up to the Chamber to recall the order, since an accused should not suffer any prejudice because his attorney has not done his work, and in this type of situation it is up to the Judges to intervene by giving a provisional number to this document.

/signed/

Jean-Claude Antonetti
Presiding Judge

Done this twenty-first October 2009
At The Hague
The Netherlands

[Seal of the Tribunal]