



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: 23 February 2010
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

Order of: 23 February 2010

THE PROSECUTOR

v.

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

PUBLIC

**DISSENTING OPINION OF THE PRESIDING JUDGE ON THE PUBLIC
DECISION ON THE ORDER TO ADMIT EVIDENCE RELATING TO THE
TESTIMONY OF SLOBODAN PRALJAK**

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

The majority of the Chamber rejected scores of documents whose admission was sought by the Praljak Defence.

Among the documents that were not admitted, there was a large number put forward by the Praljak Defence (3D), yet there were also documents coming from the Prosecution (P 05366, P 00336, P 00524, P 09538, P 10936, P 10980, P 00598) or from the other Defence teams (1D 02252, 1D 3137, 1D 03139, 1D 03141, 1D 03142, 1D 03145, 2D 00197, 2D 00960, 2D 01251, 2D 1541, 2D 01542, 2D 1543, 2D 1544, 2D 1545, 2D 01546, 2D 01547, 2D 01548, 2D 01549, 2D 01550, 2D 01551, 2D 01552, 2D 01553, 2D 01554, 2D 01555, 2D 01556, 2D 01557, 2D 01558, 2D 01559, 2D 01560, 2D 01561, 2D 03036, 2D 03041, 2D 03042, 2D 03043, 3D 01870, 4D 01297, 4D 01299).

In its Annex, the majority of the Trial Chamber gives the reasons for which they were not admitted: Not admitted (Reason: the Praljak Defence failed to establish through Slobodan Praljak's testimony a sufficiently relevant link between this document and the Indictment).

With regard to document 3D 00897, for example, I fail to see why a sufficiently relevant link was not established between this document and the Indictment.

If the Praljak Defence considered that it had to present this document so that it could be discussed in court, it is normally because it must have thought that there was a relevant link.

The non-admission of over 100 documents may lead one, therefore, to question **the professional competence** of the Accused's attorneys who seem to be defending their client any old how, which is something I find hard to believe knowing how much experience these attorneys have in international trials.

If this is not the case, why then were **so many documents** rejected?

The reply may be obvious: the majority performed a selective sorting of the documents in order to admit only the **most** relevant ones and reject the others.

To take an example, document **3D 00443** which was admitted must be more relevant than document **3D 00903** ...

I cannot get into this way of reasoning because at this stage of the proceedings, I am unable to **assess** all the documents in order to determine those **most** relevant and reject the **least** relevant documents by taking into account the “**sufficiently relevant link**” specification.

In the manner of an investigator at a crime scene photographing it from all angles and collecting all possible material clues, **the criminal Judge** also has a duty to get a comprehensive view of all the evidence, and especially that put forward by the Defence, in order to reach definitive conclusions at the time of the deliberation.

Judges have no way of knowing everything and may make mistakes during this delicate phase as the parties present their evidence.

If the Judges do not admit a document which may form the basis of the Defence’s argumentation, they must do so **at the time of the judgement** providing a detailed motivation.

Refusing a document **before** Judgement should require an **extremely** detailed motivation and not the simple **all-purpose** comment used to reject a document.

I am not going to examine all the documents to explain why in my point of view, they are relevant but I am going to take two typical examples which are documents 3D 01077 and 3D 01078.

These documents are comparative analyses showing the losses that occurred in the Republic of Bosnia and Herzegovina correlated to French and American population numbers.

It appears that the same events, if they had taken place in France or in the United States, would have resulted in a significant **collective trauma** for the populations involved.

That being the case, a **reasonable trier of fact** could come to that conclusion by relying on these two documents that the population of the Republic of Bosnia and Herzegovina, be it Croat, Serb or Muslim, was profoundly affected by the conflicts.

Similarly, it would be important to consider that this trauma could have influenced the civil or military leaders in their way of managing difficulties because they had to face extremely delicate situations where the pure and simple application of the rule of law does not always resolve the situation.

International justice has a duty to **understand** situations, and in order to understand, it has to have the means to do so ...

The issue of producing evidence before international jurisdictions was raised before the ICJ in the opinion of Judge MAHIU on the *Bosnia and Herzegovina v. Serbia and Montenegro* Case. This leading magistrate wrote: /unofficial translation/ “One can, therefore, only note or deplore the faintheartedness and the refusal of the Court to give itself, quite legally and fairly, a means amongst others to ensure the truthfulness of an allegation in a case where the search for truth is particularly expected and necessary. An excessively rigid position in this domain can only lead to unreasonable and unfair results ...”

This reasoning may be applied **here** in its totality.

This eminent jurist, in the circumstances of his case, also specified: /unofficial translation/ “... By not intervening, either to the request from another party or by *proprio motu* when the search for truth requires such an intervention, the Court risks creating a disturbing and worrying precedent”.

Here, by rejecting scores of these documents we are facing the same situation.

One party has requested their admission because it considers that the search for truth requires this admission, and so in the name of what principle should these documents be rejected? The notion of **relevance** is raised in Rule 89 (C) of the Rules: “A Chamber may admit any relevant evidence which it deems to have probative value.”

It can be concluded, therefore, that the proffered evidence must also have **probative value**.

Is this to be found in the reasoning of the Chamber's majority in this respect?

At no point in the Annex is there any mention of **probative value**.

In certain cases, there may be situations where the link to the Indictment may not be sufficient whereas the document may have **an extremely high probative value**, which on account of this might reinforce the issue of a "sufficient link" to the Indictment.

The "bulletins of the Croatian soldier" (3D 01278, 3D 01281, 3D 01283, 3D 01284, 3D 01286, 3D 01289, 3D 01240, 3D 01291 etc.) were not admitted on the ground that there is not a sufficiently relevant link to the Indictment. This is difficult to understand because the Indictment mentions an international armed conflict with the intervention of the Croatian Army in the Republic of Bosnia and Herzegovina and at least the arrival of Croatian Army "volunteers" into the HVO.

This "bulletin of the Croatian soldier" may explain the military context, indeed, the **motivation** of the volunteers, as well as the real threat from Serbian forces.

I do not understand this logic.

/signed/

Jean-Claude Antonetti
Presiding Judge

Done this twenty-third day of February 2010
At The Hague
The Netherlands

[Seal of the Tribunal]