



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: 27 November 2008
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 Hans Holthuis

Decision of: 27 November 2008

THE PROSECUTOR

v.

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

PUBLIC

**PARTIALLY DISSENTING OPINION OF PRESIDING JUDGE JEAN-CLAUDE
ANTONETTI REGARDING THE DECISION ON PRESENTATION OF
DOCUMENTS BY THE PROSECUTION IN CROSS-EXAMINATION OF
DEFENCE WITNESSES**

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 Čorić
Mr Fahrudin Ibrišimović and Mr Roger Sahota for Berislav Pušić

The Trial Chamber has rendered a decision permitting the Prosecution to present a new document during the proceedings and, when applicable, to allow that document to be admitted.

The argumentation set out by a majority of the Trial Chamber in that decision fails to take into account a fundamental aspect of a criminal trial: evidence must be gathered by the Prosecution **before** the commencement of the trial, not **during** the trial.

Before the trial, the Accused must be in a position to know on which evidence the Prosecution's case against him is based.

Accordingly, Rules 66 and 68 of the Rules provide for the disclosure of prosecution and defence evidence.

The list of prosecution exhibits is prepared pursuant to Rule 65 *ter* (E) (iii).

Only in exceptional cases may exhibits be added to this list.

The Office of the Prosecutor's practice has been to continue conducting an investigation during the pre-trial and even trial phase.

This is a trend that should have been thoroughly penalized, based on the principle that during the proceedings everything is clear, since Rule 73 *bis* of the Rules provides that the Trial Chamber shall determine the number of witnesses and the time available to the Prosecutor, while remaining mindful of the list of documents that may be presented in court.

On this basis, the Defence is then able to prepare its cross-examination of Prosecution witnesses and also to prepare the arrival of its own witnesses.

To introduce a new document during the proceedings and in particular during the defence phase, would amount to profoundly altering the system that is based on the Rules.

I would further remark that the Prosecution has had years to prepare its case.

Therefore, it would be surprising, to say the least, for a new document so crucial to the Prosecution case to appear in the case after so many years.

Of course, no case is ever truly complete, but at some point a decision must be made to stop building it, lest the result be an ever-evolving trial.

According to the Rules, the day of the pre-trial conference marks the date to stop.

What other purpose would establishing this pre-trial conference serve, other than to end the case-building phase for good?

Allowing this possibility amounts to nothing less than changing the rules during the course of the trial.

Through its motion, the Defence raises a substantive problem which can be summarized as follows:

“Can the Prosecution, after the conclusion of its case, put to a Defence witness a new document that has not been admitted?”

The majority of the Trial Chamber finds a contradiction in the Rules resulting from Rule 85 (A) and Rule 90 (H) (i).

I believe that no such contradiction exists, because the majority of the Trial Chamber wrongly interprets Rule 90 (H) (i).

This rule must be read in conjunction with paragraph (ii), which indicates that the Party shall put to that witness the nature of the case of the party for whom that counsel appears which is in contradiction of the evidence given by the witness.

The evidence in question is that which is contained in the 65 *ter* List, and not evidence produced at the last minute.

As provided for in the Rules, the criminal trial has been organized under Rule 85 according to a specific order:

- evidence for the Prosecution;
- evidence for the Defence;
- Prosecution evidence in rebuttal;
- Defence evidence in rejoinder;

- evidence admitted by the Chamber.

The rules of evidence are framed by Rule 65 *ter* which requires production of the list of exhibits the Prosecution intends to present.

The Accused must be in a position to be informed of the nature and cause of the Prosecution's case and, as a result, of the evidence which forms the basis of the Indictment.

Consequently, from the very beginning of the trial, the Defence must be aware of all of the evidence; it may come to pass, **for example**, that evidence is adduced at the last minute by the Prosecution in court. In this event, however, the Trial Chamber must verify at which stage that evidence was transmitted to the Prosecution.

While Tribunal jurisprudence has provided that the Prosecution may request to reopen its case, that reopening must be subject to very strict conditions.

A witness's credibility may be tested on the basis of a document obtained by the Prosecution after it has reviewed the list of defence witnesses. The perfect example is a witness's criminal history.

The Prosecution may then request the witness's State to provide it with any information relevant to this matter.

In this event, the document may be used when the Prosecution asks questions in cross-examination, but it cannot be admitted because it does not constitute evidence in support of the Indictment.

As a result, I partially dissent from the view expressed in paragraph 24 of the present decision.

In conclusion, I believe that a new document may be used only in the context of testing the credibility of a witness, without however requesting the admission of that document.

Any other document must be rejected and not be used in court.

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

/signed/

Jean-Claude Antonetti
Presiding Judge

Done this twenty-seventh day of November 2008
At The Hague
The Netherlands

[Seal of the Tribunal]