



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: 12 November 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

Decision of: 12 November 2010

THE PROSECUTOR

v.

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

PUBLIC

**DECISION WARNING COUNSEL FOR THE ACCUSED PRALJAK AND
THE ACCUSED 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

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 “Prosecution Notice Concerning Publication of Confidential Sealed Documents on Slobodan Praljak Website and Motion for Remedial Measures”, filed confidentially by the Office of the Prosecutor (“Prosecution”) along with confidential annexes on 18 October 2010 (“Request”), whereby the Prosecution informs the Chamber regarding the publication of three confidential exhibits on the Website of Slobodan Praljak (“Website”)¹ violating the protective measures ordered by the Chamber and requests that the Chamber take needed measures,²

NOTING the “Praljak Defence Notice and Response to the Prosecution Notice Concerning Publication of Confidential Sealed Documents on Slobodan Praljak Website and Motion for Remedial Measures”, filed confidentially by Counsel for the Accused Slobodan Praljak (“Praljak Defence”; “Accused Praljak”) along with a confidential annex on 1 November 2010 (“Response”), whereby the Praljak Defence, on the one hand, informs the Chamber that it immediately withdrew the three confidential documents published on the Website and relates the circumstances surrounding their unfortunate publication as well as the preventive measures undertaken by it and the Accused Praljak, in order to avoid having such an incident recur and, on the other, asks the Chamber to deny the Request,³

NOTING the “Order for Protective Measures with Respect to Documents Provided Under Rule 70 of the Rules (Humanitarian Organisation)”, issued confidentially and *ex parte* on 21 February 2007 (“Order of 21 February 2007”), whereby the Chamber in fact granted protective measures for Exhibits P 09839 and P 09851, provided by an international organisation under Rule 70 of the Rules of Procedure and Evidence (“Rules”) and determined that the “Prosecution and the Defence shall not disclose the content or the existence of the Exhibits [...]”,⁴

¹ <http://www.slobodanpraljak.com>.

² Request, paras 1 and 28.

³ Response, paras 1, 9, 17, 19-21.

⁴ Order of 21 February 2007, para. 5.

NOTING the “Decision Regarding the Publication of a Confidential Document on the Website of an Accused”, rendered confidentially on 14 January 2009, whereby the Chamber specifically recalled, subsequent to the publication of a confidential document on the Website, that the Praljak Defence had the obligation to protect and to refrain from transmitting the confidential documents in the case file to third parties (“Decision of 14 January 2009”),⁵

NOTING the “Decision Regarding Measures Taken by a Defence Team Following Publication of a Confidential Document on the Website of an Accused”, rendered confidentially on 27 January 2009, whereby the Chamber specifically noted that the lead counsel for the Accused Praljak assumed responsibility for inadvertently transmitting confidential documents to the administrators of the Website and decided in light of the explanations provided and pledges undertaken by the Praljak Defence to not act further to this incident inasmuch as the Praljak Defence had immediately withdrawn the confidential document from the Website and provided assurances that it was taking the necessary measures to prevent such an incident from recurring (“Decision of 27 January 2009”),⁶

CONSIDERING that the Prosecution alleges that on 30 September 2010 it discovered that there were two confidential documents on the Website originating with an international organization that were protected by the Order of 21 February 2007 in accordance with Rule 70, namely Exhibit P 09839, admitted under seal on 14 June 2007,⁷ and Exhibit P 09851, admitted under seal on 23 January 2008;⁸ that the Prosecution likewise says that on 14 October 2010 it discovered that there was a third confidential document from the Website, namely Exhibit 1D 02934 – the preliminary statement of a witness protected by the Chamber,⁹ admitted under seal on 3 July 2008,¹⁰

⁵ Decision of 14 January 2009, p. 3.

⁶ Decision of 27 January 2009, p. 3.

⁷ See Request, paras 2 and 3; Confidential Annex A; “Order to Admit Evidence Regarding Witness BC”, public document, 14 June 2007 (“Order Regarding Witness BC”).

⁸ See Request, para. 4; Confidential Annex C; “Order Admitting Evidence Relating to Witness BB”, public document, 23 January 2008 (“Order Relating to Witness BB”).

⁹ See “Order on Protective Measures for One Witness of the Prlić Defence”, confidential document, 6 May 2008 (“Order of 6 May 2008”).

¹⁰ See Request, para. 5; Confidential Annex E; “*Ordonnance portant admission d’éléments de preuve relatifs au témoin 1D-AA*”, public document, 3 July 2008 (“Order Regarding Witness 4D-AA”).

CONSIDERING that the Prosecution has signalled to the Chamber that after discovering the publication on the Website of the three confidential documents as well as a list describing the contents of the documents, it immediately asked the Praljak Defence to contact the administrator of the Website in order to effect the immediate withdrawal of the said documents and the descriptive list,¹¹ which was done after much correspondence back and forth between the Prosecution and the Praljak Defence,¹²

CONSIDERING that according to the Prosecution, publication on the Website of three documents in violation of the protective measures ordered by the Tribunal understandably leads to concerns regarding the security of the confidential documents in the trial¹³ that the Prosecution alleges that it is therefore imperative to address the question of how documents placed under seal were published on the Website,¹⁴

CONSIDERING that in this regard the Prosecution indicates that the information known to the Registry¹⁵ and the review by the Prosecution of the aforementioned exhibits¹⁶ allow one to conclude that the documents published on the Website could only have been disclosed either by a party to the trial or by an unauthorised source,¹⁷

CONSIDERING that the Prosecution points out that the Praljak Defence denies being behind the disclosure of the confidential documents to the administrators of the Website;¹⁸ that, in addition, the Prosecution observes that the Praljak Defence states that it is not responsible for monitoring the contents of the Website;¹⁹ that the Prosecution points out, in particular, that the Praljak Defence disputes any link to the administrators of the Website,²⁰ contrary to what was customarily done between the Praljak Defence and the administrators of the Website at the start of 2009,²¹ at which

¹¹ Request, paras 6, 9, 11, 14, 17 and 20.

¹² Request, paras 6-21.

¹³ Request, p. 27.

¹⁴ Request, para. 28 (a).

¹⁵ Request, para. 27 (g).

¹⁶ Request, paras 27 (d) and (f).

¹⁷ Request, paras 27 (d), (f) and (g).

¹⁸ Request, para. 27 (c).

¹⁹ Request, para. 27 (b).

²⁰ Request, paras 7, 12, 16 and 21.

²¹ Request, para. 27 (a), citing "Slobodan Praljak's Submission Pursuant to the 14 January 2009 Decision Regarding the Publication of a Confidential Document on the Website of the Associates of an Accused", confidential document, 23 January 2009 ("Submission by the Praljak Defence on 23 January 2009"), paras 6-8, 10, 11, 13-15.

date the Praljak Defence notified the Chamber that they had introduced a secure internal mechanism for transmitting documents to the administrators of the Website, which, they said, would ensure non-disclosure of confidential documents,²²

CONSIDERING that the Prosecution contends that the Praljak Defence has not merely the duty to monitor the contents of the Website, but also to take up with the administrators of the Website any potential malfunction involving the posting of confidential documents,²³

CONSIDERING that the Prosecution thus expressly moves that the Chamber (1) order the Praljak Defence and the Accused Praljak to explain the circumstances surrounding the publication of three confidential documents as well as the practices observed with respect to the publication of documents on the Website, (2) to direct them to ensure that the Website is not presently publishing confidential evidence admitted to the record, material subject to protective measures or excerpts from hearings held in private session, (3) to rule on either prohibiting the Praljak Defence and the Accused Praljak in his personal capacity from sending to the administrators of the Website additional evidence or documents sent to them, or designating a person who shall be responsible for ensuring that no confidential information is disclosed on the Website and (4) to order a further investigation, and to take any measures deemed appropriate, including possible instigation of a proceeding for contempt under Rule 77 of the Rules,

CONSIDERING that the Praljak Defence alleges that the disclosure of the three confidential documents on the Website constitutes an unfortunate, unintended error and that it could only have happened inadvertently;²⁴ that when it learned of the publication of these three confidential documents, it immediately proceeded to withdraw them from the Website;²⁵ that it likewise indicates that the Accused Praljak supplied thorough explanations concerning this incident,²⁶

CONSIDERING that the Praljak Defence contends that after the accidental publication of a confidential document in December 2008, the Praljak Defence had

²² Request, para. 27 (a), citing Submission by the Praljak Defence on 23 January 2009, para. 7.

²³ Request, paras 27 (b) and (c).

²⁴ Response, paras 1, 2 and 20.

²⁵ Response, paras 7-9.

²⁶ Response, para. 19 and Confidential Annex.

already introduced measures to ensure that this kind of incident would not recur, measures of which the Chamber has taken note, yet without requiring that communications between the Praljak Defence and the Praljak Office in Zagreb (“Office in Zagreb”) end;²⁷ that, moreover, at or about the end of April 2009, concerned to ensure the confidentiality of the documents in the case, the Praljak Defence decided to simplify the procedure for transmitting the documents that would appear on the Website by making the procedure dependent upon the Accused Praljak, who has borne sole responsibility since that time for selecting, checking and publishing documents on the Website,²⁸

CONSIDERING that the Praljak Defence has now informed the Chamber of its decision to refrain henceforth from sending any documents to the Office in Zagreb in order to ensure to the extent possible, that confidential documents are not disclosed and that the Accused Praljak has now committed to checking all of the documents published on the Website;²⁹ that, in this manner, it says, the situation has been resolved,³⁰

CONSIDERING, moreover, that the Praljak Defence contends that the Accused Praljak is personally and completely responsible for his Website and therefore bears full responsibility for the involuntary publication of the three confidential documents on his Website;³¹ that the Praljak Defence, for its part, is in no position whatsoever to monitor the contents of the Website or the actions of its administrators,³²

CONSIDERING moreover, that the Praljak Defence argues that the Prosecution’s request concerning monitoring of the publication on the Website of exhibits tendered into evidence, namely, either to prohibit the Praljak Defence and the Accused Praljak in his individual capacity from disclosing evidence admitted to the record or to designate a person responsible for ensuring that no confidential information is published on the Website, is questionable and does not apply here; that it is pleading,

²⁷ Response, para. 3.

²⁸ Response, paras 4 and 13.

²⁹ Response, paras 5 and 6.

³⁰ Response, paras 5 and 20.

³¹ Response, paras 11, 12 and Confidential Annex.

³² Response, para. 12.

more specifically, that the Accused Praljak enjoy the presumption of innocence and the right to inform the public of his views concerning the current proceedings,³³

CONSIDERING lastly then that the Praljak Defence embraces the view that proceedings for contempt of the Tribunal, it would seem, could not actually be instigated by the Chamber under Rule 77 of the Rules, as the publication of the three confidential documents on the Website arose from an unintended error that did not purposefully violate the decisions of the Chamber regarding the confidentiality of the exhibits cited above; that it recalls in this respect that intent is an underlying element of any act of contempt and that the Prosecution has not introduced evidence that the Defence *knowingly* and *willfully* violated an Order of the Chamber subject to confidentiality,³⁴

CONSIDERING that the Chamber observes that, three confidential documents admitted under seal in this same case (P 09839, P 09851 and 1D 02934) were published on the Website in violation of the orders of the Chamber concerning protective measures;³⁵ that, in particular, two of these exhibits were specifically protected pursuant to Rule 70 of the Rules,

CONSIDERING that in the matter before us the Chamber points out that the Praljak Defence disclaims all responsibility and that the Accused Praljak acknowledges sole responsibility for the disclosure of confidential documents on his Internet site, a disclosure which he characterizes as an error and which he vouches was not intentional; that the Chamber likewise points out that the Praljak Defence and the Accused Praljak have each taken adequate measures to ensure that the said documents would be withdrawn as quickly as possible from the Website and to confirm that no confidential document presently appeared on the Website; that the Chamber points out, moreover, that the Praljak Defence has committed itself to refraining from disclosure of any of the exhibits admitted into evidence to the Office in Zagreb, which, it says, would constitute adequate assurance, particularly taking into account the Accused Praljak's contemporaneously restated promises to effectively monitor the documents published on his Website,

³³ Response, para. 18.

³⁴ Response, para. 16.

³⁵ Order of 21 February 2007; Order of 6 May 2008; Order Regarding Witness BB; Order Relating To Witness BC; Order Regarding Witness 1D-AA.

CONSIDERING that the Chamber recalls that this is not the first time that confidential information has been disclosed on the Website in violation of orders issued by the Chamber;³⁶ that it is forced to conclude that the recommendations it made in the Decisions of 14 January and 27 January 2009 have gone unheeded; that the Chamber had nevertheless underscored in the Decision of 14 January 2009 that the “Praljak Defence, just like the other parties to the trial, has an obligation to protect and not to transmit to third parties the confidential documents of the case”,³⁷ that the Chamber therefore recalls that the parties in the trial are subject not merely to the duty to avoid transmitting confidential documents, but also to the duty to “protect” these documents,

CONSIDERING in effect that, following upon the Submission by the Praljak Defence on 23 January 2009 in which it acknowledged having a duty to verify and pledged to change its working methods from that time forward by transmitting any document intended for the Website by safe channels only and by explaining the contents thereof,³⁸ the Chamber took note of these measures, which made it possible to prevent the recurrence of an incident of that kind and to ensure “better protection of the documents in its possession”,³⁹ and thus decided to refrain from further action in response to this initial incident,

CONSIDERING that in light of the explanations supplied by the Praljak Defence and the Accused Praljak in the Response, the Chamber, while lacking complete information concerning the circumstances surrounding the publication of the said documents on the Website, observes that, since April 2009, the Praljak Defence has had no further direct contact with the administrators of the Website⁴⁰ but that it forwarded documents to the Office in Zagreb until this new incident occurred;⁴¹ that in the matter at hand the confidential documents seem in fact to have gone to the Office in Zagreb, where they were then uploaded to the Website by the site administrator,⁴²

³⁶ See “Prosecution Motion Concerning Sealed Document on an Accused Website”, confidential document, 9 December 2008.

³⁷ Decision of 14 January 2009, p. 3.

³⁸ Submission by the Praljak Defence on 23 January 2009, paras 13-15.

³⁹ Decision of 27 January 2009, p. 3.

⁴⁰ Response, paras 11 and 12.

⁴¹ Response, paras 5 and 20.

⁴² Response, paras 5 and 20.

CONSIDERING that the Chamber will not accept the disclaimer from responsibility given by the Praljak Defence with regard to monitoring of the destination of the evidence, namely those documents protected by the Chamber, transferring sole responsibility to the Accused Praljak, and not simply because of the Chamber's orders, which are binding upon the Praljak Defence and impart a duty of non-disclosure, but also due to the Praljak Defence's own admission before the Chamber in January 2009 that it had the obligation to monitor,⁴³

CONSIDERING that the Chamber can only conclude that since the end of April 2009, the Praljak Defence has done little else besides listen to assurances from the Accused Praljak, as manager of his Website, that he would effectively monitor the documents published on his Website⁴⁴ and to inform the Praljak Defence from time to time of the existence of measures ensuring confidentiality,⁴⁵ thereby substantially dissociating itself from the actions of its client, the Accused Praljak, while yet affecting the use of exhibits, some of which are covered by protective measures,

CONSIDERING thus that the Chamber finds that the approach adopted by the Praljak Defence since April 2009⁴⁶ evinces a worrisome departure from the promises formerly made to the Chamber to "protect [...] the confidential documents of the case",⁴⁷

CONSIDERING that, in the opinion of the Chamber, the Praljak Defence and the Accused Praljak, who lays claim to personal responsibility in this matter, have displayed negligence, by failing to take all of the measures that would ensure the security of confidential data, thereby complying with the orders of the Chamber, a duty nevertheless acknowledged by the Praljak Defence itself in its submission, when it informed the Chamber of the measures undertaken to ensure the confidentiality of the documents published,⁴⁸

⁴³ Submission by the Praljak Defence on 23 January 2009, paras 13 and 15.

⁴⁴ Response, para. 4.

⁴⁵ Response, paras 13 and 14.

⁴⁶ See Response, para. 13 and the rationale provided by the Praljak Defence for the decision to amend internal procedures for posting documents on the Website.

⁴⁷ Decision of 14 January 2009, p. 3.

⁴⁸ See "Slobodan Praljak's Notice on the Prosecution Motion Concerning Sealed Document on an Accused Website", confidential document, 10 December 2008, p. 2; "Slobodan Praljak's Response on the Prosecution Motion Concerning Sealed Document on an Accused Website", confidential document,

CONSIDERING, nonetheless, that the Chamber finds that no grounds exist for granting the Prosecution's Request concerning specific recommended verification measures⁴⁹ and possible measures to implement in the context of a proceeding for contempt, inasmuch as (1) the documents were immediately withdrawn from the Website, (2) the error appears to have been produced inadvertently and without the Prosecution even establishing an element of intent and (3) the Praljak Defence and the Accused Praljak have individually demonstrated their determination to ensure the future security of confidential exhibits tendered into the record,

CONSIDERING, however, that the Chamber cannot be satisfied with merely noting the decision taken independently by the Praljak Defence to refrain from transmitting documents to the Office in Zagreb for publication on the Website and issues a formal request to the Praljak Defence and the Accused Praljak to cease transmitting confidential documents in the case to the Office in Zagreb and verify the contents of the Website in order to ensure that no confidential material appears there,

CONSIDERING that the Chamber will continue to remain vigilant and to follow with interest the measures of confidentiality it has ordered and is compelled thereby to issue a warning from the bench to the Praljak Defence and to the Accused Praljak pursuant to Rules 46 (A) and 54 of the Rules; that, as a consequence, the Chamber specifically calls upon the Praljak Defence and the Accused Praljak to take all necessary preventive measures for ensuring that henceforth no confidential information is published on the Website,

CONSIDERING that the Chamber will not hesitate in the future to take any decision it deems appropriate, if it observes a breach of the duties of the Praljak Defence and the Accused Praljak, recalled again above; that it may notably rule on the opportunity to restructure, in cooperation with the Registrar, the means of communication governing the rights of the Accused Praljak while in detention, on the basis of Rule 81

11 December 2008, para. 6; Submission by the Praljak Defence on 23 January 2009, paras 6-9, 14, 15; Response, para. 20; Decision of 14 January 2009, p. 3; Decision of 27 January 2009, pp. 2 and 3.

⁴⁹ Request, para. 28.

(C) of the Rules⁵⁰ and Rules 6 and 8 of the regulations to govern the supervision of visits and communications with detainees,⁵¹

FOR THE FOREGOING REASONS,

PURSUANT TO Rules 46 (A), 54, 70 and 75 of the Rules,

ISSUES A WARNING TO Counsel Božidar Kovačić and Counsel Nika Pinter, as well as to the Accused Praljak,

DIRECTS the Praljak Defence and the Accused Praljak to cease disclosing confidential documents produced in the case to the Office in Zagreb and to check on a regular basis the contents of the Website to ensure that it contains no confidential material, **AND**

DECIDES in all other respects not to grant the Request,

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

/signed/

Jean-Claude Antonetti
Presiding Judge

Done this twelfth day of November 2010
At The Hague
The Netherlands

[Seal of the Tribunal]

⁵⁰ Rule 81 (C) of the Rules.

⁵¹ “United Nations Detention Unit Regulations to Govern the Supervision of Visits and Communications with Detainees”, as amended, August 2009 (IT/98/REV.4.).