



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: 14 December 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

**Order of:** 14 December 2009

**THE PROSECUTOR**

v.

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

***PUBLIC***

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**ORDER ON ADMISSION OF EVIDENCE RELATING TO WITNESS MILAN  
GORJANC**

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**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”),

**NOTING** the request for admission of 37 exhibits presented by Counsel for the Accused Petković (“Petković Defence”),<sup>1</sup> the request for admission of 4 exhibits presented by Counsel for the Accused Praljak (“Praljak Defence”),<sup>2</sup> the request for admission of one exhibit presented by the Office of the Prosecutor (“Prosecution”)<sup>3</sup> (“Proposed Exhibit(s)”), all three requests relating to the testimony of expert witness Milan Gorjanc (“Witness”) who appeared before the Chamber from 26 October to 3 November 2009,

**NOTING** the objections formulated by the Prosecution against the Proposed Exhibits presented by the Praljak Defence<sup>4</sup> and the Petković Defence<sup>5</sup> and the Petković Defence Reply to the objections formulated by the Prosecution,<sup>6</sup>

**NOTING** the objections formulated by the Petković Defence against the Proposed Exhibit of the Prosecution,<sup>7</sup>

**CONSIDERING** that the Prosecution opposes notably the admission of the majority of the Proposed Exhibits presented by the Petković Defence and all the Proposed Exhibits sought for admission by the Praljak Defence, on the ground that the Witness appeared as an expert witness and not as a witness of fact and that, consequently, he did not have sufficient knowledge that would allow him to testify to the veracity of the facts alleged and described by way of the Proposed Exhibits,<sup>8</sup>

**CONSIDERING** that the Prosecution states in this regard that the Witness was not on the territory of Herceg-Bosna during the period covered by the Amended Indictment of 11 June 2008 (“Indictment”), that he had never been a member of either the HVO

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<sup>1</sup> IC 01093.

<sup>2</sup> IC 01094.

<sup>3</sup> IC 01095.

<sup>4</sup> IC 01103.

<sup>5</sup> IC 01102.

<sup>6</sup> IC 01105.

<sup>7</sup> IC 01104.

<sup>8</sup> See in particular, IC 01102, objection to Proposed Exhibit 2D 01379, p. 1; see also IC 01103, objections to Proposed Exhibits 4D 00719 and IC 01090, pp. 1 and 3.

of the HZ H-B, or of the BH Army and that he is not in a position to comment particularly on the conflict between the two warring parties in Mostar,<sup>9</sup>

**CONSIDERING** that the Chamber recalls that it did not authorise the appearance of Milan Gorjanc as a witness of fact but in his capacity as an expert witness on subjects presented by the Petković Defence including 1) the concept of an army formed in wartime; 2) the doctrine of total defence which prevailed in former Yugoslavia and its application in Bosnia and Herzegovina; 3) the potential security problem represented by the presence of Muslim soldiers within the different units of the HVO of the HZ H-B; 4) the strategic importance of central Bosnia and northern Herzegovina; 5) the siege of the town of Mostar; 6) the legitimacy of the HV intervention on R/Republic/BH territory; and 6) the meaning of certain military terms and concepts, for example, resubordination, passive, active and decisive defence,<sup>10</sup>

**CONSIDERING** that the Chamber, which recalls that at this stage of the proceedings it does not make an assessment of the reliability, probative value and relevance of the Proposed Exhibits, will determine the weight to be accorded to each of the Proposed Exhibits tendered into evidence at the end of the trial, in the light of the testimony of this expert,

**CONSIDERING** that the Chamber notes furthermore that the Prosecution argues that it presented Proposed Exhibit P 11082 with the aim of disputing the credibility of Exhibit 4D 00462, sought for admission by the Petković Defence, and thus casting doubt on the Witness's credibility,<sup>11</sup>

**CONSIDERING**, however, that the Chamber notes that, in form and content, Proposed Exhibit P 11082 corresponds to the statement taken by the Prosecution from an individual who testifies to events relating to the Indictment,

**CONSIDERING** that, having said that, the Chamber holds that the admission of this testimony is governed by the provisions of Rule 92 *bis* (B) of the Rules of Procedure and Evidence ("Rules"),

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<sup>9</sup> IC 01102, objection to Proposed Exhibit 2D 01379, p. 1; IC 01103, objections to Proposed Exhibits 4D 00719 and IC 01090, pp. 1 and 3.

<sup>10</sup> "Order on Allocation of Time for the Examination of Expert Witness Milan Gorjanc", 12 October 2009, pp. 3 and 4.

<sup>11</sup> IC 01095, para. 10.

**CONSIDERING**, furthermore, that the Chamber notes that the content of Proposed Exhibit P 11082 was extensively read during the hearing of 2 November 2009<sup>12</sup> and is therefore registered in the transcript of the hearing,

**CONSIDERING** that the Chamber considers that references to the content of Proposed Exhibit P 11082, registered in the transcript of the hearing of 2 November 2009, are a sufficient record to assess the credibility of the Witness,<sup>13</sup>

**CONSIDERING**, consequently, that the Chamber cannot admit Proposed Exhibit P 11082 at this stage by way of a procedure for admission of evidence through a witness, and reminds the Prosecution that once it has closed its case it may under certain circumstances request admission, if it regards it as necessary, at the rebuttal stage as set forth in Rule 85 (A) (iii) of the Rules,

**CONSIDERING** that the Chamber examined each of the other Proposed Exhibits on the basis of the admissibility criteria set out in the “Decision on Admission of Evidence” rendered by the Chamber on 13 July 2006 (“Decision of 13 July 2006”), as well as in the “Decision Adopting Guidelines for the Presentation of Defence Evidence”, rendered by the Chamber on 24 April 2008 (“Decision of 24 April 2008”),<sup>14</sup>

**CONSIDERING** that the Chamber decides to admit into evidence the documents marked as “Admitted” in the Annex attached to this decision since they were put to the Witness and bear sufficient indicia of relevance, probative value and reliability,

**CONSIDERING** that the Chamber decides not to admit into evidence the Proposed Exhibits marked as “Not Admitted” in the Annex attached to this decision since they are not consistent with the instructions of the Decisions of 13 July 2006 and 24 April 2008,

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<sup>12</sup> Hearing of 2 November 2009, transcript in French, pp. 46329 to 46342.

<sup>13</sup> See, in particular and for example, Case No. IT 02-54-AR73.2, *The Prosecutor v. Slobodan Milošević*, “Decision on Admissibility of Prosecution Investigator’s Evidence”, 30 September 2002, p. 14, footnote No. 68.

<sup>14</sup> Guideline No. 8 on the Admission of Documentary Evidence through a Witness.

**FOR THE FOREGOING REASONS,**

**PURSUANT TO** Rules 54 and 89 of the Rules,

**PARTIALLY GRANTS** the requests of the Petković Defence and the Praljak Defence,

**DENIES** by a majority the request of the Prosecution,

**DECIDES** that it is appropriate to admit into evidence the documents marked as “Admitted” in the Annex attached to this Decision, **AND**

**DENIES** in all other respects and by a majority certain Proposed Exhibits, the requests for the admission of Proposed Exhibits of the Praljak Defence and the Petković Defence, for the reasons stated in the Annex attached to this Order,

**Presiding Judge Jean-Claude Antonetti attaches a dissenting opinion to this order.**

**Judge Stefan Trechsel attaches a partially dissenting opinion to this order**



Annex

<b>Exhibit Number (preferably in numerical order)</b>	<b>Party Proposing Admission of the Exhibit</b>	<b>Admitted/Not Admitted/Marked for Identification (MFI)</b>
1D 01236 in whole, or alternatively, article 162	Petković Defence	Admitted in whole.
2D 01379	Petković Defence	Admitted.
2D 01389	Petković Defence	Admitted.
3D 00932	Petković Defence	Not admitted (the Proposed Exhibit is not on the Petković Defence 65 <i>ter</i> list and the Petković Defence did not ask for this exhibit to be added to its 65 <i>ter</i> list in accordance with para. 26 of the Decision of 24 April 2008).
3D 00939	Petković Defence	Not admitted (the Proposed Exhibit is not on the Petković Defence 65 <i>ter</i> list and the Petković Defence did not ask for this exhibit to be added to its 65 <i>ter</i> list in accordance with para. 26 of the Decision of 24 April 2008).
4D 00412 in whole, or alternatively, only articles 3, 4 and 60.	Petković Defence	Admitted in whole.
4D 00462	Petković Defence	Admitted.
4D 00625	Petković Defence	Not admitted by a majority (the Witness was unable to comment on the reliability and authenticity of the Proposed Exhibit).
4D 00702	Petković Defence	Admitted.
4D 00719	Petković Defence and Praljak Defence	Admitted.
4D 00768	Petković Defence	Admitted.
4D 00780	Petković Defence	Admitted.
4D 00798	Petković Defence	Admitted.
4D 00910	Petković Defence	Admitted.
4D 00920	Petković Defence	Not admitted by a majority (Reason: the witness did not comment on the reliability, relevance and probative value of the document).
4D 00948	Petković Defence	Admitted.
4D 01164	Petković Defence	Admitted.
4D 01240	Petković Defence	Admitted.
4D 01461	Petković Defence	Admitted.
4D 01470 in whole, or alternatively, only articles 17, 91 and	Petković Defence	Admitted in whole.

118.		
4D 01471 in whole, or alternatively, only articles 47, 48 and 69	Petković Defence	Admitted in part (pages 1-3 of the English version on e-court corresponding to the cover page and articles 47, 48 and 69. Denied in all other respects, the document not being translated).
4D 01473	Petković Defence	Admitted.
4D 01475	Petković Defence	Admitted.
4D 00476	Petković Defence	Admitted.
4D 01483	Petković Defence	Not admitted by a majority (the witness did not comment on the Proposed Exhibit).
4D 01484	Petković Defence	Not admitted by a majority (the witness did not comment on the Proposed Exhibit).
4D 01485	Petković Defence	Admitted.
4D 01486	Petković Defence	Not admitted (the witness did not comment on the Proposed Exhibit).
4D 01491	Petković Defence	Not admitted by a majority (the witness did not comment on the Proposed Exhibit).
4D 01492	Petković Defence	Admitted.
4D 01727	Petković Defence	Admitted.
4D 01730	Petković Defence	Admitted.
4D 01731	Petković Defence	Admitted.
4D 01733	Petković Defence	Admitted.
P 02562	Petković Defence	Admitted.
P 03383	Petković Defence	Admitted.
P 11082	Prosecution	Not admitted by a majority (the admission of this type of evidence is regulated by Rule 92 <i>bis</i> of the Rules of Procedure and Evidence and the Chamber considers that the reading given at the hearing is sufficient to assess the credibility of the witness).
IC 01087	Petković Defence	Admitted.
IC 01090	Praljak Defence	Admitted.
IC 01091	Praljak Defence	Admitted.
IC 01092	Praljak Defence	Admitted.

**DISSENTING OPINION OF PRESIDING JUDGE JEAN-CLAUDE  
ANTONETTI**

Given that the majority of the Chamber Judges decided not to admit into evidence several documents including document **4D 00625**, I consider it necessary to give a dissenting opinion hereinafter with regard to this document.

This document is a map of the Mostar region where the warring forces of the HVO, the BH Army and the VRS were positioned in the coloured areas.

On this map were shown seven places relevant to the Indictment 1.) North Camp; 2.) Raštani; 3.) Vrapčići; 4.) Bijelo Polje; 5.) Potoci; 6.) Blagaj; 7.) Buna.

During the appearance of expert witness **Milan Gorjanc**, this witness was questioned with regard to the said map as follows:

“Let's first look at 4D 625. This is a map of the territory of East Mostar in mid-July 1993. Here we can see an area from East Mostar southwards and northward.

Q. From East Mostar to Jablanica, how far is that? What's the distance, do you remember?

A. About 50 kilometres.

Q. And in the direction of Blagaj and Buna?

A. About 10 to 12 kilometres.”

The expert witness therefore formally confirmed that this is a map of the territory of Mostar in mid-July 1993 and that the strip of land between **Mostar** and **Jablanica** covered a distance of 50 kilometres.

The key issue raised by this map is its connection to paragraph 113 of the pre-trial brief:

“In the early part of the East Mostar siege, from approximately late June 1993 to late August 1993, international organisations and humanitarian agencies were completely or substantially blocked from entering East Mostar, which caused increasing hardships for the Bosnian Muslims in East Mostar, who were cut off from outside aid.”

That being the case, a reasonable trier of fact must ask the question of whether, as the Prosecution alleges, East Mostar was totally blocked and that therefore the international and humanitarian organisations were unable to access the town.

Similarly, this map throws light on the situation of the civilian population of East Mostar and the likelihood of them being able to reach Jablanica, a town under BH Army control since the month of June 1993.

Unless proof to the contrary is produced, this map establishes that between the HVO and the VRS there was a strip of land starting from East Mostar and running up to Jablanica.

I wish to add furthermore that this is an **expert witness** of the Petković Defence who compiled his report from evidence already admitted or to be admitted. Moreover, he himself prepared a whole series of maps (4D 1486, 4D 1485, 4D 1484, 4D 1491 and 4D 1481, transcript of 28.10.2009) which gave rise to extremely specific questions regarding the strategic importance of roads; he said “because that was the basic communication of the former state from north to south, from Posavina down to the Adriatic coast.”

Under these circumstances how could this map, which was prepared for the requirements of the Petković Defence, not be admitted given that it relates to the roads providing access to Mostar?

In my opinion, this is a **relevant** document illustrating, where appropriate, the real situation at the end of June 1993. I think that the non-admission of this document for the simple reason mentioned by the majority of the judges, I quote, “Not admitted by a majority (Reason: the Witness was unable to testify as to the reliability and authenticity of the Proposed Exhibit)”, is, therefore, unwarranted.

I am attaching in the Annex to my opinion the said document for a better understanding of the issue it has raised.

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# MOSTAR

SITUATION  
13 July 1993

**KEY:**

HVO

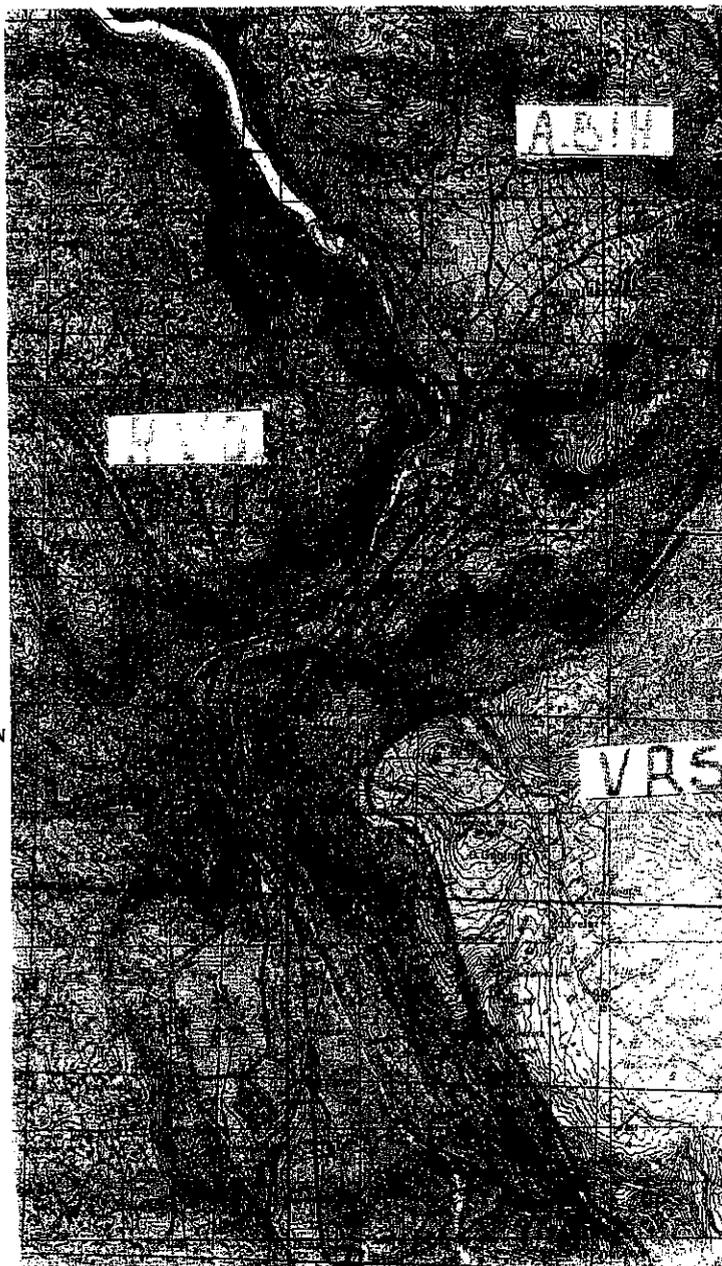
ABiH

VRS

DIRECTION  
OF OPERATION

DIRECTION  
OF PLANNED  
OPERATION

- 1 North Camp
- 2 Raštani
- 3 Vrapčići
- 4 Bijelo Polje
- 5 Potoci
- 6 Blagaj
- 7 Buna



4D02-0294  
4D00625

**SEPARATE OPINION, PARTIALLY DISSENTING OF JUDGE STEFAN**

**TRECHSEL**

Whereas I agree with the majority of the Chamber with all the other factors of this decision, I am of a different opinion with regard to document P 11082. The Chamber did not admit this document; in my opinion it should have been admitted with the text, “only for the purposes of disproving the witness’s credibility”. Here are my reasons:

This Chamber’s “Decision on Presentation of Documentary Evidence by the Prosecution in Cross-examination of Defence Witnesses” of 27 November 2008 regulates the use of new documents during the Prosecution’s cross-examination in paragraph 24 with these words: “... *the Prosecution may present 'new documents' for the purpose of impeaching a witness’s credibility or refreshing his/her memory. The Chamber will then decide on a case-by-case basis whether or not it is appropriate to admit the document in question pursuant to Rule 89 (C) of the Rules.*” This Rule answers an issue that may be formulated in the most abstract of ways: Does the Chamber allow a document, which as evidence would not be admitted, to be, nonetheless, used to cast doubt on a witness’s credibility? The answer is, yes it does.

The Chamber admits a document when it is used solely for the purposes of assessing the witness’s reliability, but “solely in that it goes to disprove the credibility of the witness”.<sup>15</sup> The majority of the Chamber did not apply this rule to document P 11082 since it is a statement given by an individual who could be considered a witness. According to the Chamber, the admission of this statement is regulated by Rule 92 *bis* of the Rules and it concludes that the conditions of this Rule have not been met.

I find it difficult, in fact impossible, to see the difference between this case and that of the new document which was presented late. I think that it would have been equally justifiable to decide not to admit document P 05580 mentioned in the quoted Beneta Decision. In any case, I do not think that the phrase “admitted solely in that it goes to disprove the credibility of the witness” is an appropriate choice as it gives rise, as the example demonstrates, to misunderstandings. Instead of the word “admitted”, it would be better to say, for example, “retained”. In fact, a document “admitted” solely to disprove a witness’s credibility is not truly admitted. For the Chamber, the pseudo-admission serves merely as an *aide-mémoire* which gives the Chamber the possibility

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<sup>15</sup> See for example “Order to Admit Evidence Regarding Witness Ivan Beneta”, (“Beneta Decision”), 7 December 2009, p. 7, table in the Annex showing admission of evidence P 05580.

of rightly using it to verify whether the current witness's testimonies are credible. It goes without saying, yet it could nevertheless be useful to recall that such verification cannot be made on the basis that the "admitted" document is presumably credible. It cannot be a question of allowing the contents of this document to come in "through the back door". As such, the Chamber will not examine the entire document, but will verify, at the very most, the parts used by the party who conducted the cross-examination.

The rules governing the admission of evidence must principally take into account two factors: *on the one hand*, it must be verified that the document may serve to establish the truth. That means that it must be reliable, at the time of admission, and without any convincing reasons that would cast doubt on its reliability. A document which is most likely false will be instantly dismissed, as will a document that has no clear connection to the case that must be judged. *On the other hand*, the rights of the Defence must be ensured; it must be allowed to express its views on all evidence. These rules apply only to those exhibits which may and must be examined by the Chamber when it begins *establishing the facts* of the case. Documents "admitted solely in that they go to disprove the credibility of the witness" will not be rightly taken into consideration at this stage of the proceedings, be they documents that appear after the close of the Prosecution case or the testimony of a witness who has not been cross-examined. The *ratio legis* of the rules which govern the admission of evidence only comes into play when an exhibit is taken into consideration in order to determine whether or not the accused are guilty. Document P 11082, therefore, should have been admitted, it would be more precise to say "retained", but only for the purposes of testing the witness's credibility.

To conclude my argument, I realise that there is another solution: that of not admitting documents whose use was authorised during the hearing for the sole purpose of assessing the witness's credibility. Indeed, I cannot be persuaded by the argument that the Chamber, at the stage of determining the facts of the case, might need the document in question. This document in fact has no value beyond and above what was read or otherwise put to the witness. I recognise that until now the Chamber's practice was different, but I do not see how the proposed change could be disadvantageous to a party, and having said that, I do not believe that the fact that an error – albeit slight – was committed constitutes a sufficient reason to persist in this error.