



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: 4 March 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
Acting Registrar: Mr John Hocking

**Separate Opinion
of:** 4 March 2009

THE PROSECUTOR

v.

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

PUBLIC

**Separate Opinion of Presiding Judge Jean-Claude Antonetti on Prlić Defence
Request for Certification to Appeal the Decision of 12 February 2009 Regarding
Supplement to the Accused Prlić's Rule 84 *bis* Statement**

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 Trial Chamber has decided to certify the appeal on the request to admit the Accused Prlić's "supplement" to his Rule 84 *bis* statement.

Since the filing of the Trial Chamber's decision denying the admission of the "supplement" to the statement made pursuant to Rule 84 *bis* of the Rules,¹ the Accused Prlić has not attended hearings and has once again stated that he is being denied the right to a **fair trial**.² Since the arguments presented by the Prlić Defence in its request for certification to appeal the Chamber's decision relate to the issue of a fair and expeditious trial,³ I feel I must present the following matters in this separate opinion.

Firstly, I would like to stress that when time was being allocated to the Prlić Defence, like the other Judges in the Chamber, I took into account all the elements in order to allow the Accused Prlić to give evidence, and this is the reason why he was allocated much more time than the other accused.⁴ I add that the fairness of the trial could have required the Judges not to make a distinction between the Accused, each having available to them the **same amount of time** as the others, since this concerns a trial with multiple accused.

It is true that the Prlić Defence requested 128 hours and that ultimately the Trial Chamber allocated to it **95 hours**, or 33 fewer hours, that is, 25% less time.⁵ However, the Trial Chamber did the same with the Prosecution, which asked for 400 hours and was ultimately allocated 300 hours, or 25% less time.

It is also true that in his opening statement the Accused Prlić mentioned that he was preparing a written document in response to the analysis of expert Witness William Tomljanovich.⁶ The Accused Prlić compiled a **590-page**⁷ document, but the

¹ *The Prosecutor v. Prlić et al.*, IT-04-74-T, "Decision Regarding Supplement to the Accused Prlić's Rule 84 *bis* Statement", 12 February 2009.

² Witness Stipo Buljan, 12 February 2009, Transcript in French ("T(F)"), p. 36855.

³ *The Prosecutor v. Prlić et al.*, IT-04-74-T, "Jadranko Prlić's Request for Certification to Appeal under Rule 73(B) against the *Décision relative au supplément à la déclaration de l'accusé Prlić en vertu de l'article 84 bis du Règlement* 12 February 2009", 13 February 2009, paras. 2 and 6 and footnotes 3 and 4.

⁴ *The Prosecutor v. Prlić et al.*, IT-04-74-T, "Decision Allocating Time to the Defence to Present Its Case", 25 April 2008.

⁵ *The Prosecutor v. Prlić et al.*, IT-04-74-T, "Decision Allocating Time to the Defence to Present Its Case", 25 April 2008, para. 24.

⁶ Opening statement by the Prlić Defence, 6 May 2008, T(F), p. 27559.

⁷ *The Prosecutor v. Prlić et al.*, IT-04-74-T, "Jadranko Prlić Supplement to his Rule 84 *bis* statement", 7 December 2008.

admission of this document was rejected by the Trial Chamber in its decision of 12 February 2009.⁸

In this 95-hour period, it was incumbent on the Accused Prlić to testify. Ultimately, the Accused Prlić did not testify, preferring to call witnesses instead. If the Accused Prlić had testified, he could have referred easily to his document and could then have asked for its admission.

It would also be appropriate to return to the appearance of Witness Tomljanovich.⁹ Witness Tomljanovich's expertise concerned the following points, in particular:

- the framework and functioning of the government organisations and organs of Herceg-Bosna between 1991 and 1994;

- the formation of the HVO;

- **the appointment of Jadranko Prlić as head of the HVO ...**

As a reminder, the Accused Prlić's voluminous document broaches, for its part, the following:

- I. The establishment of the political organisations of Herceg-Bosna and their legal foundation.

- II. The HVO and the HZ-HB in operations between August 1992 and August 1993.

- III. The Croatian Republic of Herceg-Bosna (HR H-B).

Was the Prlić Defence prevented from cross-examining expert Witness Tomljanovich? A detailed examination of the transcript shows that Mr Karnavas questioned Witness Tomljanovich for 2 hours and 45 minutes.¹⁰ The Prlić Defence,

⁸ *The Prosecutor v. Prlić et al.*, IT-04-74-T, "Decision Regarding Supplement to the Accused Prlić's Rule 84 bis Statement", 12 February 2009.

⁹ Witness William Tomljanovich, 18 September 2006, T(F), p. 6723, line 15 to p. 6855, line 17.

¹⁰ Witness William Tomljanovich, 19 September 2006.

moreover, requested the admission of seven documents in support of its arguments, with the Trial Chamber admitting five of these documents.¹¹

This argumentation should be placed within the time framework.

The Prlić Defence was in possession of the report of expert Witness Tomljanovich before his appearance, since 10 May 2006 or almost four months earlier.¹² It was therefore possible for it at the time to ask for a postponement of the testimony of this expert, if necessary, while awaiting the written report by the Accused Prlić; this was not done.

During the Prosecution's presentation of evidence phase, the Prlić Defence cross-examined Prosecution witnesses for more than **81 hours**.¹³ The Prlić Defence then had almost **95 hours** to present its case.¹⁴

I therefore note that to date, the Prlić Defence had available to it more than **176 hours** to ask its questions, without taking into account the time dedicated to so-called administrative matters relating to the trial, in which the Attorney for the Accused Prlić was primarily involved. It should be said in this connection that Registry reports mention that between 20% and 23% of the trial time was taken up by administrative matters.¹⁵ On 28 January 2009, 71 hours and 43 minutes had been taken up by administrative matters since the start of the Defence phase on 5 May 2008.¹⁶

¹¹ *The Prosecutor v. Prlić et al.*, IT-04-74-T, "Order to Admit Evidence Relative to Witness William Tomljanovich", 2 October 2006.

¹² *The Prosecutor v. Prlić et al.*, IT-04-74-T, "Prosecution Submission of Statement of Expert Witness Pursuant to Rule 94 bis", 10 May 2006.

¹³ *The Prosecutor v. Prlić et al.*, IT-04-74-T, internal memorandum, Time-monitoring, period ending 24 January 2008, 5 February 2008.

¹⁴ *The Prosecutor v. Prlić et al.*, IT-04-74-T, internal memorandum, Time-monitoring, period ending 28 January 2009, 13 February 2009.

¹⁵ *The Prosecutor v. Prlić et al.*, IT-04-74-T, internal memorandum, Time-monitoring, period ending 28 January 2009, 13 February 2009; *The Prosecutor v. Prlić et al.*, IT-04-74-T, internal memorandum, Time-monitoring, period ending 26 November 2008, 7 January 2009; *The Prosecutor v. Prlić et al.*, IT-04-74-T, internal memorandum, Time-monitoring, period ending 24 September 2008, 2 October 2008; *The Prosecutor v. Prlić et al.*, IT-04-74-T, internal memorandum, Time-monitoring, period ending 1 July 2008, 11 July 2008.

¹⁶ *The Prosecutor v. Prlić et al.*, IT-04-74-T, internal memorandum, Time-monitoring, period ending 28 January 2009, 13 February 2009.

A general and approximate breakdown shows that the Prlić Defence alone has taken up almost **62 trial days**, due to the fact that there were four working-hours per trial day.¹⁷

The Prlić Defence now requests the admission of a 590-page document, claiming that this document is a supplement to the statement presented by the Accused Prlić pursuant to Rule 84 *bis*.

It is true that the Rules of Procedure and Evidence state in Rule 84 that the parties may make an opening statement, and in Rule 84 *bis* that the Accused may make a statement.

Rule 84 of the Rules states that the opening statement may be made by the parties either before the presentation of evidence by the Prosecution, or after the Prosecutor's presentation of evidence, and before the presentation of evidence for the Defence.

This opening statement is made by the Accused's Attorney if the Accused has an attorney. This is an **oral statement**, and there has never been a case of a written statement.

Rule 84 *bis* allows for the possibility for the Accused himself to make a statement with the agreement and under the control of the Chamber,.

Under this Rule, the Accused Prlić made a statement on 5 and 6 May 2008 to the Trial Chamber for almost one hour and 20 minutes.¹⁸ **This statement can only be oral**, especially since the Rule takes care to add that "the accused shall not be compelled to make a solemn declaration and shall not be examined about the content of the statement."

The Trial Chamber has rejected the request by the Prlić Defence for the admission of the supplement to the statement made by the Accused Prlić pursuant to Rule 84 *bis*, since this document does not fall within the ambit of Rule 84 *bis* or that of Rule 84.

¹⁷ Approximate results (81 hours of cross-examination in the Prosecution phase + 95 hours of examination while presenting its case + 71 hours taken up by administrative matters (time counted only since the start of the Defence phase) = 247 hours / four hours a day = approximately 62 days.)

¹⁸ Opening statement by the Prlić Defence, 5 and 6 May 2008, T(F), p. 27456, line 24 to p. 27577, line 14.

The fact that the interested party clearly announced through his Attorney at 1615 hours during the hearing of 12 February 2008¹⁹ that he would not come back to court because of the Trial Chamber's decision filed at 1113 hours on 12 February 2009,²⁰ cannot in any way be **a means of putting pressure** on the Judges.

A more careful and less hasty reading of the Decision by the Chamber would have allowed the Accused Prlić and his Counsel, after the English translation of the French version, to conclude that the Trial Chamber had indicated that "the procedure laid down in Rule 84 *bis* is not the appropriate avenue for the presentation of the Supplement" and **therefore** decided to reject the Prlić Defence request.²¹

Therefore, in my point of view, during the appearance of a witness of the other Accused or during the testimony of another Accused, there is nothing to prevent the Prlić Defence from cross-examining either the witness or the accused on the basis of this document and to ask for its admission; especially since this document has been in the possession of the Prosecution and the Trial Chamber since 7 December 2008.²²

Finally, I recall that pursuant to Rule 98, the Trial Chamber may "order either party to produce additional evidence".

Accordingly, the Prlić Defence has numerous procedural possibilities to have this document admitted.

Nevertheless, given that the Prlić Defence requests the certification to Appeal, believing that the Decision of the Trial Chamber infringes on the right of the Accused Prlić to a fair trial,²³ I held that this Appeal should be certified.

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

/signed/

Jean-Claude Antonetti

¹⁹ Witness Stipo Buljan, 12 February 2009, "T(F)", p. 36854.

²⁰ The time when the Registry sent the e-mail to all the parties.

²¹ *The Prosecutor v. Prlić et al.*, IT-04-74-T, "Decision regarding Supplement to the Accused Prlić's Rule 84 *bis* Statement", 12 February 2009, para. 21.

²² *The Prosecutor v. Prlić et al.*, IT-04-74-T, "Jadranko Prlić Supplement to his Rule 84 *bis* Statement", 7 December 2008.

²³ *The Prosecutor v. Prlić et al.*, IT-04-74-T, "Jadranko Prlić's Request for Certification to Appeal under Rule 73(B) against the *Décision relative au supplément à la déclaration de l'accusé Prlić en vertu de l'article 84 bis du Règlement* 12 February 2009", 13 February 2009.

Presiding Judge

Done this fourth day of March 2009

At The Hague

The Netherlands

[Seal of the Tribunal]