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: 16 February 2010

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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: **16 February 2010**

THE PROSECUTOR

v.

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

PUBLIC

DISSENTING OPINION TO CONFIDENTIAL DECISION ON SLOBODAN PRALJAK'S MOTION FOR ADMISSION OF WRITTEN EVIDENCE PURSUANT TO RULE 92 *BIS*

The Office of the Prosecutor:
Mr Kenneth Scott
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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 decided **by a majority** to deny the motion and the additional motion and ordered the Praljak Defence to file a maximum of 20 written statements or transcripts that are consistent with the admissibility criteria.

I do not share the point of view of the majority and I wished to express my dissenting opinion publicly without mentioning any names that may be confidential.

The main reason for the denial is explained in paragraph 47 of the Decision.

The majority believe that the size, length of submitted exhibits, the repetitive nature, the lack of relevance, the noted formal requirements, confusion between the acts and conduct of the Accused as charged in the Indictment and those not charged in the Indictment prevent the Chamber from making a case-by-case analysis. I do not agree with this reasoning.

It is quite enough just to read a statement and make a selection on a case-by-case basis.

For example, statement 3D 03639 is four pages long.

This witness explains that he was a reporter for the magazine *GLOBUS* and that he went to Gabela and Dretelj.

He explains that his magazine is independent and that in September 1993 he wrote an article on Dretelj with photographs, specifying that 1,478 Bosnians were being detained in inhuman conditions, that he had interviewed soldiers from the HVO army and met with General Praljak in order to obtain authorisation which, to his great surprise, was given to him, and he specified that, during their conversation, General Praljak expressed his clear objection to the existence of the camps and to the inhumane conditions.

Consequently, why were these four pages included in the reasoning set out in paragraph 42?

It is not necessary to perform this exercise with the other statements that the Judges have had for five months.

With regard to the list of **20** statements, I cannot see on what basis this number has been specified.

I notice that when the Prosecution prepared its requests, no limit had been fixed and the Trial Chamber had admitted over **100** statements or transcripts.

One might have wondered about the need for these 100 statements in view of the criteria defined in paragraph 47 of the present Decision.

It is also dangerous to set limitations before deliberating on the Defence case.

The Defence case must be presented by its witnesses and its documents until the presentation of its final brief.

This case will be examined during the deliberation by checking it against Prosecution witnesses and documents (over 5,000).

Therefore, I cannot see why the figure of **20** should be fixed *ex abrupto*.

I would like to recall that the Praljak Defence file its Motion on 14 September 2009 and that the Chamber had **five months** at its disposal to read the statements and carry out the work related to the criteria under paragraph 47 ...

According to the **orders** issued by the majority, the Defence will have to make a selection from the 15 statements in order to keep only 20, which will require additional time for the Defence to examine the situation.

The Motion of the **Praljak Defence** pursuant to Rule 92 *bis* must be examined in accordance with the criteria defined hereinafter:

- the content of the statement is **cumulative** in relation to similar facts

that have already been given by other witnesses (92 *bis* (A)(i)(a))
- the content of the statement relates to the historical, political or **military** background (92 *bis* (A)(i)(b))
- the content goes to the character of the Accused (92 *bis* (A)(i)(e))
- the content relates to factors to be taken into account in determining sentence (92 *bis* (A)(i)(f)).

The case law of the Chambers and, in particular, the Appeals Chamber has expanded the scope of this Rule[1] by specifying the broad lines of its application, without being exhaustive.

The **Praljak** Defence submitted **156 statements** to the Trial Chamber, which involved considerable work **on my part** to assess on a case-by-case basis the statements with respect to the factors against admitting the written statements into evidence (acts and conduct of the Accused and factors defined in Rule 92 *bis* (A)(ii)).

Each statement must therefore be examined from this perspective.

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[1] *The Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-T, "Decision on Prosecution's Request to Have Written Statements Admitted under Rule 92 *bis*", 21 March 2002 ("Milošević Decision"), paras 8, 22 and 27.
Decision of the Appeals Chamber in *Galić*, paras 9, 10, 11 and 14-15.
The Prosecution v. Ante Gotovina et al., Case No. IT-06-90-T, "Decision on Defendant Ivan Čermak's Motion for Admission of Evidence of Two Witnesses Pursuant to Rule 92 *bis* and Decision on Defendant Čermak's Third Motion for Protective Measures for Witnesses IC-12 and IC-16", public, 11 November 2009 ("*Gotovina* Decision"), paras 8 and 11.
The Prosecutor v. Radoslav Brđanin and Momir Talić, Case No. IT-99-36-T, "Decision on 'Objection and/or Consent to Rule 92 *bis* Admission of Witness Statements Number One' Filed by Brđanin on 16 January 2002 and '*Opposition du Général Talić à l'admission des dépositions recueillies en application de l'article 92 bis du Règlement*' Filed by Talić on 21 January 2002", 30 January 2002, confidential ("*Brđanin* Decision"), paras 16, 28 and 30.
The Prosecution v. Vujadin Popović et al., Case No. IT-05-88-T, "Decision on Nikolić's Motion Pursuant to Rule 92 *bis*", 28 July 2008, public, paras 8-9; *The Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-T, "Decision on Pandurević's Motion for Admission of Written Evidence Pursuant to Rules 92 *bis* and 92 *ter*", 17 December 2008, public, p. 4.
The Prosecutor v. Astrit Haraqija and Bajrush Morina, Case No. IT-04-84-R77.4, "Decision on Astrit Haraqija's Motion to Admit Evidence Pursuant to Rule 92 *bis*", 5 September 2008, confidential, *see* in particular para. 15.
The Prosecutor v. Ljube Boškoski and John Tarčulovski, Case No. IT-04-82-T, "Decision on Tarčulovski Defence's Motion Pursuant to Rule 92 *bis*", 22 February 2008, confidential para. 15.
The Prosecutor v. Milan Babić, Case No. IT-03-72-A, "Judgement on Sentencing Appeal", 18 July 2005, public ("*Babić* Decision"), para. 43.
Babić Decision, para. 55: "Even when personal factors or circumstances – including prior good character – have been considered as mitigating circumstances, they have been given little weight in mitigation."

After **personally examining** each statement, I have come to the conclusion that I should reject the following statements: 3D 0370, 3D 03681, 3D 03688, 3D 03692, 3D 0364, 3D 03650.

On the other hand, I am in favour of admitting all the other statements since they have evidence that is, either cumulative with facts already presented by other witnesses (in particular, testimony from the Accused himself), or relates to the historical, political or military background at the time (as an example, all the statements that refer to the SUNJA area relate to the military background at the time, namely, the Croatian and Muslim joint defence against the Serbian offensive), or attests to the character of the Accused (it is not necessary to expand on this point because the character of the Accused can be deduced from the evaluation made by an informed witness), or relates to evidence to be taken into account when determining sentence.

This last case deserves a more detailed explanation to be able to understand the benefit of having this type of statement at one's disposal.

Of course, this evidence can only be taken into account if the Accused has been found guilty, which is not the case since the trial is ongoing and the Judges have not, among the **three** of them, discussed the criminal responsibility of the Accused.

I note that the present Chamber has accepted, without a moment's hesitation, the Prosecution's **103** 92 *bis* **statements** in addition to **158** *viva voce* witnesses ...

In these circumstance, how can we not treat the two parties **fairly**, even if it means making a selection at the time of deliberations.

I do not subscribe to the reference in paragraph 32 of the Decision: " ... The Chamber immediately notes that the figure of 155 is *prima facie* disproportionate and excessive." The same comment could have been applied to the Prosecution's requests, but this was not the case. Why should there be two weights, and two measures? In fact, are the 103 92 *bis* statements from the Prosecution not a little disproportionate and excessive?

It is something of a surprise to note that the majority ventures to state the following in paragraph 34: "... The Chamber recalls in this respect that although the Chamber has definitely admitted 101 statements or transcripts of testimonies for the Prosecution, pursuant to Rule 92 *bis* of the Rules, this does not justify the Defence teams seeking the admission of the same number of witnesses under this measure, or indeed more as the Praljak Defence requests ..."

The majority relies on an interpretation of a Decision of the Appeal's Chamber in which the Accused does not necessarily have the right "to the same amount of time and the same number of witnesses and that a principle of proportionality should therefore be applied ..."

This principle of proportionality must be applied strictly here. Would there be proportionality if in relation to 92 *bis* witnesses we had:

Prosecution – 101 statements or transcripts
Defence – 0 statements or transcript

Taking into account that the **six accused** would normally have the right to a **separate trial** rather than a joint trial, the principle of proportionality would require at least that all the accused have the same number or approximately the same number of 92 *bis* witnesses as the Prosecution.

This is not an insignificant issue, as it is tied to the question of the overall time allocated to the Prosecution.

The Prosecution requested initially a disproportionate amount of time in order to present its case; considering the allocated time, the Prosecution then resorted to Rule 92 *ter* and to Rule 92 *bis*.

Consequently, the **principle of proportionality** must take into account all the factors.

It is true that, when deciding on the amount of time to be allocated to the Praljak Defence, the Chamber took into account the list of witnesses in order to allocate **55 hours**.

This period included, to my mind, the time potentially dedicated to the testimony of **all** the witnesses on the list (*viva voce*, 92 *ter*, witnesses contested under Rule 92 *bis*).

Therefore, if it turns out that a 92 *bis* witness needs to be cross-examined, I would be inclined to reject a statement by this witness since the Praljak Defence should have known in advance if this witness was likely to be subject to cross-examination, and I completely agree with paragraphs 33 and 34 of the Prosecution's submission quoted in footnote 23.

Because of their position or their closeness to the Accused, witnesses should not testify through written statements.

The redundant nature of some testimonies does not in itself justify its rejection, since the Rule itself envisages this possibility by mentioning the term "cumulative" in Rule 92 *bis* (A)(i)(a).

During a deliberation it would be enough to keep one or several cumulative items of evidence and to mention the others for the record in a footnote, or even not mention them at all, because a Judge does not have to refer in a Judgement to **all** the evidence; it is incumbent upon him to make a selection to support his decision. Of course, if a 92 *bis* statement is explicitly mentioned in support of their case in the submissions of the Prosecution and the Defence in their final brief, the Trial Chamber must refer to it in its Judgement.

I do not at all agree with the following sentence in paragraph 35: "... In this respect, the Chamber stated in its Decision of 25 April 2008 that both witnesses that the Praljak Defence wished to call under Rule 93 of the Rules and those called to testify on humanitarian aid supplied to Muslims, on the cooperation between Croats and Muslims in 1991 and 1992, on Serbian aggression, on the mujahidin, and many subjects taken up by the Praljak Defence in Annex 3 of the Motion, were concerned

by the redundant nature, the insufficient relevance or even an absence of a link to the Indictment."

I believe that all these subjects could enlighten the Chamber on the Joint Criminal Enterprise and should only be raised during the deliberation, that is, after the closing arguments and not **before**, as mentioned above.

In conclusion, the denial of the Motion after **five months** seems to me to go against our obligation to consider motions **personally** and conscientiously.

I find that, in any case, the Trial Chamber had at its disposal all the necessary factors to take a final decision and could have done so a long time ago.

This dissenting opinion was filed with a slight delay due to technical difficulties.

/signed/

Jean-Claude Antonetti
Presiding Judge

Done this sixteenth day of February 2010
At The Hague
The Netherlands

[Seal of the Tribunal]