UNITED NATIONS

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: 3 June 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**

Order of: **3 June 2010**

THE PROSECUTOR

v.

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

PUBLIC

ORDER ON PROSECUTION MOTION TO SUSPEND DEADLINE TO FILE ITS REQUEST TO REPLY

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 Motion Concerning Rebuttal Case", filed publicly on 25 May 2010 ("Motion"), in which the Office of the Prosecutor ("Prosecution") asks the Chamber to suspend its 25 May 2010 deadline for the filing of a possible request to reply,[1]

NOTING the "Scheduling Order for Filing Requests to Reply Pursuant to Rule 85", rendered publicly by the Chamber on 21 April 2010, in which the Chamber ordered the parties to file possible requests to reply no later than 25 May 2010 ("Order of 21 April 2010") and the "Decision on Clarification of the Decision of 21 April 2010", rendered publicly by the Chamber on 19 May 2010 ("Clarification of 19 May 2010"),

NOTING the "Order Regarding the Closure of the Presentation of the Defence Cases", rendered publicly on 17 May 2010 ("Order of 17 May 2010"), in which the Chamber noted in particular that "all the Defence teams have therefore ended the presentation of their cases even though some requests and decisions for the admission of evidence are currently pending before the Chamber or the Appeals Court",[2]

CONSIDERING that in support of the Motion, the Prosecution argues that it is unable to file a possible request to reply by 25 May 2010, as required by the Chamber in the Order of 21 April 2010, as it believes that the Defence case, as whole, has not concluded,[3]

CONSIDERING that the Prosecution believes that pursuant to Rule 85 (A) of the Rules of Procedure and Evidence ("Rules") and Tribunal case-law,[4] it cannot be compelled by the Chamber to file a request to reply in advance when the Defence case is still open; that, therefore, it cannot be compelled to guess what evidence might still

[1] Motion, paras 6 and 22.
[2] Order of 17 May 2010, p. 3.
[3] Motion, paras 6, 8, 9, 11-13, 21 and 22.
[4] *The Prosecutor v. Lukić and Lukić*, Case Number IT-98-32/1-AR73.1, "Decision on the Prosecution's Appeal Against the Trial Chamber's Order to Call Alibi Rebuttal Evidence during the Prosecution's Case-in-Chief", 16 October 2008 ("*Lukić* Decision"), paras 11 and 12.

be tendered by the Defence, as this would be unfair and go against the interest of justice,[5]

CONSIDERING that in support of the argument according to which the Defence case has not concluded, the Prosecution argues that the Chamber must still rule on several motions to admit exhibits and that the Appeals Chamber must also rule on the interlocutory appeal lodged by the Praljak Defence against the "Decision on Slobodan Praljak's Motion to Admit Evidence Pursuant to Rule 92 *bis* of the Rules" rendered confidentially on 16 February 2010 ("92 *bis* Decision"); that it argues that, since it does not know what evidence will be tendered and how it might affect the selection of its rebuttal evidence,[6] it is unable to anticipate a request to reply at this stage,[7]

CONSIDERING that, more specifically, according to the Prosecution, the Appeal Chamber's ruling on the 92 *bis* Decision could significantly and materially affect the rebuttal stage; that the attendance of witnesses for cross-examination pursuant to Rule 92 *bis* of the Rules is possible; that this possibility would allow the Defence teams to obtain additional evidence that it is unaware of,[8]

CONSIDERING, finally, that the Prosecution submits that by requiring it to select its rebuttal evidence in advance, the Praljak Defence could be allowed to amend its initial 92 *bis* motion in light of the Prosecution's reply,[9]

CONSIDERING that the Chamber finds it unnecessary to wait for the filing of potential responses from counsel for the six Accused, if the Motion is filed on 25 May 2010, the date on which the deadline set by the Chamber to file a potential request to reply pursuant Rule 85 (A) (iii) of the Rules will expire,[10] and that in the interest of the integrity of the proceedings, it is appropriate to rule on the merits of the Motion as soon as possible,

CONSIDERING that the Chamber notes, *in limine*, that in its Notice filed confidentially on 27 April 2010,[11] the Prosecution informed the Chamber of its

[5] Motion, paras 6 to 10 and 14.
[6] Motion, paras 11 and 12.
[7] Motion, paras 3, 8, 11, 14 and 15.
[8] Motion, para. 14.
[9] Motion, para. 10.
[10] Order of 21 April 2010, p. 3.
[11] "Prosecution Notice Regarding Rebuttal and Reopening of its Case", filed confidentially on 27 April 2010 ("Prosecution Notice).

intention to seek general rebuttal following the close of the Defence case, while noting that several motions to admit evidence were still pending before the Chamber and the Appeals Chamber; that this circumstance could delay the filing of its potential rebuttal case; that, according to the Chamber, the Prosecution Notice cannot be considered in the same category as an official motion to suspend a deadline to file a request to reply;[12] that, hence, the Chamber notes that it is seized of a motion by the Prosecution to suspend the deadline for filing a request to reply on the very day when the Prosecution was to file such a request if that was its intention,

CONSIDERING that, notwithstanding this extremely late motion, the Chamber recalls that contrary to what the Prosecution argued in its Motion, the Defence as a whole has indeed concluded with the presentation of its case; that this was recalled by the Chamber on several occasions, notably in the Order of 21 April 2010 and the Order of 17 May 2010, despite the decisions still pending before the Chamber and the Appeals Chamber; that, moreover, the Prosecution never objected to this acknowledgement,

CONSIDERING that, nevertheless, in support of its Motion, the Prosecution chiefly argues that to this day, it does not know the content of the evidence put forth by all of the Defence teams and admitted into evidence because the Chamber must still rule on several motions to admit exhibits and, especially since the Appeals Chamber must still rule on the interlocutory appeal filed by the Praljak Defence against the 92 *bis* Decision; that, therefore, to this date it will be unable to formulate a possible reply; that the Chamber cannot require it to do so in anticipation, as otherwise the sequence of the presentation of evidence as provided for under Rule 85 (A) of the Rules will not be respected,[13]

CONSIDERING that the Chamber deems that the reference to the *Lukić* Decision in the Motion, to stress that the Chamber must respect the sequence of the presentation of evidence, is irrelevant; that the issue in the *Lukić* Decision was to know when the Prosecution should present its witnesses to refute an alibi defence, i.e. during the case in chief or during the rebuttal stage; that contrary to the wording of Rules 85 (A) and 67 (B) (ii) of the Rules, the Trial Chamber requested that the Prosecution present this

[12] See in this respect the oral decision on notices filed by the parties, 15 June 2009, French transcript ("T(F)"), p. 41355, in which the Chamber reminded the parties that it does not consider itself seized of an issue unless a party files a formal motion.

evidence during the case in chief and not during the rebuttal stage;[14] that the Appeals Chamber found that the Trial Chamber erred when it failed to explain why it was in the interest of justice to change the sequence of the presentation of evidence as provided for under Rule 85 (A) of the Rules;[15] that the circumstances are completely different in the present case since the Prosecution and the Defence teams were able to present all their respective evidence according to the sequence provided for under Rule 85 (A) of the Rules, regardless of what status some of the evidence pending before the Chamber may have; that in this case, the Order of 21 April 2010 was not, therefore, requiring the Prosecution to file its request to reply before the Defence had concluded with the presentation of its case but, rather, to request that it file it if so wished, considering all the evidence that it had knowledge of,

CONSIDERING that the Chamber cannot support the Prosecution's argument that it does not know the evidence tendered by the Defence in its entirety, which prevents it from filing a request to reply as, consequently, it would be premature; that in the Chamber's opinion, the Prosecution knows the content of all of the Defence evidence presented before the Chamber; that it had the opportunity to dispute each piece of evidence during cross-examination; more specifically, the Prosecution had an opportunity to file its submissions regarding the Praljak Defence Motion that was the subject of the 92 *bis* Decision before this Chamber,

CONSIDERING, more specifically, that the Chamber notes that regarding the issue of the 92 *bis* Decision that is still to be ruled on by the Appeals Chamber, it seems somewhat paradoxical that the Prosecution deems it necessary to wait for the outcome of this issue before it files a possible request to reply, all the while maintaining that much of the proposed Praljak Rule 92 *bis* evidence is irrelevant and redundant;[16] that the Chamber recalls that two of the three criteria for a rebuttal are that it must relate to a significant issue and that the Prosecution could not have reasonably anticipated the issue; this obviously does not seem to be the case according to the Prosecution itself;[17]

CONSIDERING that, subsequently, with regard to the Prosecution's assertion that, following a ruling on the 92 *bis* Decision, the Chamber could decide to call the

---

[13] Motion, paras 6 to 9.
[14] *Lukić* Decision, paras 11 and 12.
[15] *Lukić* Decision, para. 23.
[16] Motion, para. 15.

witnesses for cross-examination pursuant to Rule 92 *bis* (C) of the Rules, which would allow the Defence to collect new evidence that would emerge from the testimony, the Chamber deems that in case a testimony or an excerpt of a testimony transcript in another case deals with a controversial or primordial issue between the parties,[18] the Chamber could decide, in application of its discretionary power, to allow a party to conduct cross-examination pursuant to Rule 92 *bis* (C) of the Rules;[19] that, nevertheless, this cross-examination must be limited to the disputed issues raised in the written statement or the transcript; that this cross-examination cannot extend to other subjects or serve as an opportunity for a party to introduce new documents in an attempt to fill out its case; that if the Chamber ordered a cross-examination under Rule 92 *bis* of the Rules, the parties could not take advantage of it to continue to fill out their respective cases because, as the Chamber recalled above, both the Prosecution and the Defence, as a whole, have closed their cases,

CONSIDERING finally, that in any case, the Chamber notes that in its Motion, the Prosecution conducted a theoretical debate, without arguing any specific fact presented by the Defence that was not settled by the Chamber or the Appeals Chamber and that would be important enough to affect the Prosecution argument if it were to be tendered into evidence, and regarding which the Prosecution might file a request to reply that meets the strict criteria of rebuttal, namely that the rebuttal must deal with 1) a significant issue, 2) an issue raised in the Defence case and 3) an issue that the Prosecution could not have reasonably anticipated,[20]

---

[17] Motion, para. 15; "Prosecution Preliminary Response to Praljak's Motion for Admission of Written Evidence in lieu of *Viva Voce* Testimony Pursuant to Rule 92 *bis*", 22 September 2009, p. 5.

[18] *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, paras 24 and 25; *See* also "Decision on the Prosecution Motion for Admission of Transcript of Evidence Pursuant to Rule 92 *bis* of the Rules", 28 September 2006, para. 23 ("Decision of 28 September 2006")

[19] *See* for example Decision of 28 September 2006, para. 35 and the "Decision on Prosecution Motion for Admission of Eleven Pieces of Evidence Pursuant to Rule 92 *bis* of the Rules", 14 February 2007, para. 47.

[20] Clarification of 21 April 2010, pp. 3 and 4, and footnote 8 citing relevant case-law in the matter: *The Prosecutor v. Zejnil Delalić, Zdravko Mucić, alias Pavo, Hazim Delić and Esad Landžo, alias Zenga*, Case No. IT-96-21-A, "Judgement", 20 February 2001, paras 273, 275 and 276. This standard was applied in *The Prosecutor v. Stanislav Galić,* Case No. IT-96-23-T, "Decision on Rejoinder Evidence", 2 April 2003, p. 2.; *The Prosecutor v. Pavle Strugar*, Case No. IT-01-42-T, "Decision III on the Admissibility of Certain Documents", 10 September 2004, para. 5; *The Prosecutor v. Stanislav Galić*, Case No. IT-98-29-T, "Decision on Rebuttal Evidence", 2 April 2003, para. 5; *The Prosecutor v. Mladen Naletilić & Vinko Martinović*, Case No. IT-98-34-T, "Decision on the Admission of Exhibits Tendered during the Rejoinder Case", 23 October 2002, p. 2; *The Prosecutor v. Radislav Krstić*, Case No. IT-98-33-T, "Decision on the Defence Motions to Exclude Exhibits in Rebuttal and Motion for Continuance", 2 May 2001, para. 11.

CONSIDERING, consequently, that the Chamber decides to reject the Motion and also notes that the Prosecution has not filed a request to reply on 25 May 2010,

FOR THE FOREGOING REASONS,

PURSUANT TO Rules 54 and 85 (A) of the Rules,

REJECTS the Motion by a majority.

Judges Jean-Claude Antonetti and Stefan Trechsel each attach a concurring separate opinion. Judge Árpád Prandler attaches a dissenting opinion.

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

/signed/

Judge Jean-Claude Antonetti
Presiding Judge

Done this third day of June 2010
At The Hague
The Netherlands

[Seal of the Tribunal]

Separate Concurring Opinion of Presiding Judge Jean-Claude Antonetti

The majority of the Chamber that I belong to has decided to reject the Prosecution's motion. Considering the importance of this decision, I believe that I must personally state a number of arguments that were not mentioned in the decision.

The Prosecution motion should be rejected for **lateness** as it was filed on 25 May 2010 while the Chamber had set **21 April 2010** as the deadline.

It argues principally that the Defence case is still open as the Chamber must rule on several requests for admission of exhibits and because of the fact that the Appeals Chamber has yet to render its decision on the Praljak Defence appeal that is still pending.

I would like to point out that the Chamber specified that the Defence case had concluded on both 21 April 2010 and on 17 May 2010. This issue was already dealt with and will not be called into question. The decisions to be made regarding the admission of exhibits are decisions of a technical nature, concerning the admission of some dozen exhibits amongst the thousands that have already been admitted. The Prosecution had the opportunity to give its point of view on both the relevance and probative value of these exhibits; therefore, there is no reason to delay the proceedings by pleading the issue of the admissibility of the exhibits.

In particular regard to the issue of witnesses that are likely to be called pursuant to Rule 92 *bis*, whose fate depends on the decision to be rendered by the Appeals Chamber, which has not been rendered to date, I have the following observations:

It would be appropriate, firstly, for the Prosecution to indicate the **factor** that justifies the witness's appearance for cross-examination pursuant to Rule 92 (A) (ii) (c). In my opinion, this factor can only be assessed **by taking into account** the thousands of exhibits already admitted and the overall documents. Therefore, this factor must be decisive!

Aside from this element, I would also like to specify that the Praljak Defence was given 55 hours for its witnesses (the Accused's testimony, *viva voce*, 92 *ter* and 92 *bis* witnesses).

By filing its motion for admission of 92 *bis* witnesses at the last minute, it risked not having any available time since it has used up almost all of it (53 hours and 27 minutes).

Moreover, it is appropriate to note that the time allotted to the defence (55 hours) took into consideration that the Prosecution would have the same time available to cross-examine the witnesses; therefore, calling 92 *bis* witnesses for cross-examination at this time poses a real problem with respect to time.

Regarding the overall time used by the Defence, it had 971 hours and 49 minutes, with practically equivalent time being allotted to the Prosecution for cross-examination. The Statute requires **us** to be **fast**. A notable issue that is raised is whether we should do everything we can to meet this requirement. It is reasonable therefore to inquire whether, after more than four years of trial, there is still a need to

question a 92 *bis* witness? Having examined the statements of these witnesses, I do not believe that there is.

Furthermore, it is appropriate to recall that the party requesting the admission of **92 *bis*** witnesses may recall these witnesses at any time, which is what the Prosecution did by not calling two witnesses whose testimonies it had requested for admission, and who the Chamber decided would be cross-examined.

There has been a delay since the end of the testimony of the Defence witnesses, which has been exacerbated by the issue of General Mladić's notebooks, which has not been resolved to date.

I also bear in mind that the parties will need several months to prepare their closing briefs and that the Chamber will take several months to deliberate.

/signed/

Judge Jean-Claude Antonetti
Presiding Judge

Done this third day of June 2010
At The Hague
The Netherlands

Separate Concurring Opinion of Judge Treschel

I join in the disposition of this order, but with a slightly different reasoning. I am not entirely oblivious to the Prosecution's worry. While it is entirely accurate, as stated in our order, that the Defence teams have formally concluded the presentation of their cases, it is also true that the Chamber has still not admitted or rejected certain exhibits. Of course, these exhibits are not necessarily essential – to put it in gastronomic terms, I am referring to the crumbs left over after the meal. In my experience, trials are scattered with surprises and I would not instantly exclude the possibility, even if it seems unlikely, that during the possible cross-examination of a Rule 92 *bis* witness something emerges that could lead the Prosecution to request a reply.

Supposing that this probability exists, the manner in which the Prosecution proceeded is unacceptable. It had two appropriate options that were available to it: on the one hand, instead of sending the Chamber a simple Notice referring to the difficulties that it cites in its motion, it could have seized the Chamber immediately of a request to extend the deadline. Instead, it waited to do so until the last day of the deadline that was imposed, thereby putting the Chamber before a *fait accompli*. In the alternative, it could have, if appropriate, filed a timely request to reply on the basis of the evidence admitted in full before 25 May 2010, even if that would mean reserving the possibility of coming back to the case against the accused in the unlikely event that the evidence admitted after this date so justifies. Yet, it chose a third option that was, however, not available to it.

It did not, therefore, take the opportunity to request a reply and the motion for an extension of the deadline must be rejected.

/signed/

Judge Stephan Trechsel

Done this third day of June 2010
At The Hague
The Netherlands

Opinion dissidente du Juge Árpád Prandler

1. Je ne suis pas d'accord avec la présente ordonnance, car j'estime que le droit qu'ont l'Accusation et la Défense de présenter respectivement des moyens en réplique et en duplique, consacré par l'article 85 A) du Règlement de procédure et de preuve, est un droit fondamental qui ne peut leur être refusé pour des motifs d'ordre procédural.

2. Dans le dernier Attendu de l'Ordonnance, « la Chambre décide de rejeter la Demande et constate par la même que l'Accusation n'a déposé aucune demande de réplique à la date du 25 mai 2010 ». Il est vrai que, dans sa Requête concernant la présentation de moyens en réplique, l'Accusation ne demande pas expressément de présenter des moyens en réplique ; cela étant, au paragraphe 22 (Conclusion), « [elle] prie la Chambre de première instance de suspendre le délai fixé à l'Accusation pour répertorier ses moyens en réplique tant que la Défense n'aura pas achevé la présentation de ses moyens ». À mon avis, cela signifie que l'Accusation souhaitait une prorogation de délai pour répertorier ses moyens en réplique, mais, en même temps, semblait indiquer qu'elle soumettrait des propositions concrètes ultérieurement. L'Accusation a en outre fait valoir qu'elle ne devrait pas être tenue d'exposer ses moyens en réplique plusieurs mois avant la clôture du dossier de la Défense. À ce sujet, elle a cité la décision de la Chambre d'appel selon laquelle « on ne peut demander à l'Accusation de présenter des moyens en réfutation d'une défense d'alibi pendant l'exposé principal de ses moyens, simplement parce que la Défense a fait part de son intention d'en invoquer une », etc. (*Le Procureur c/ Lukić*, affaire n° IT-98-32/1-AR73.1).

3. Au vu de ce qui précède, je ne puis me ranger à l'opinion de la majorité des Juges, à savoir que « la Chambre [...] constate [...] que l'Accusation n'a déposé aucune demande de réplique ». Comme je l'ai indiqué ci-dessus, j'estime que, dans sa Requête concernant la présentation des moyens en réplique, l'Accusation annonce en fait qu'elle entend présenter des moyens de preuve supplémentaires en réfutation. Par conséquent, dans l'intérêt de la justice, la Chambre aurait dû lui ordonner de faire connaître ses intentions clairement dans un laps de temps raisonnable.

/signé/
Le Juge Árpád Prandler

Le 3 juin 2010
La Haye (Pays-Bas)