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:	6 October 2010
		Original:	ENGLISH French

Before:	**Judge Jean-Claude Antonetti** **Judge Árpád Prandler** **Judge Stefan Trechsel** **Judge Antoine Kesia-Mbe Mindua, Reserve Judge**
Registrar:	**Mr John Hocking**
Decision of:	**6 October 2010**

THE PROSECUTOR

v.

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

PUBLIC

PARTIALLY DISSENTING OPINION OF PRESIDING JUDGE JEAN-CLAUDE ANTONETTI ON THE PRALJAK DEFENCE MOTION FOR ADMISSION OF 92 *BIS* STATEMENTS

Office of the Prosecutor:

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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

Partially Dissenting Separate Opinion from Presiding Judge:
Jean-Claude Antonetti

The Trial Chamber decided to admit, in whole or in part, the following six statements:

- Bogoljub Zurovac (paragraph 27 of the Decision)
- Duško Ljuština (paragraph 28 of the Decision)
- Goran Moro (paragraph 29 of the Decision)
- Jadranko Barišić (paragraph 30 of the Decision)
- Witness 3DB (paragraph 31 of the Decision)
- Žarko Pavlović (paragraph 32 of the Decision)

The Trial Chamber decided to stay admission with respect to three witnesses should they appear for cross-examination:

- Mijo Jozić (paragraph 44 of the Decision)
- Željko Rogošić (paragraph 45 of the Decision)
- Mira Ivanišević (paragraph 46 of the Decision)

The Trial Chamber rejected, pure and simple, the following 11 written statements:

- Jacques-Paul Klein (paragraph 33 of the Decision)
- Zdravko Tomac (paragraph 34 of the Decision)
- Nikica Valentić (paragraph 35 of the Decision)
- Slavko Degoricija (paragraph 36 of the Decision)
- Goran Batilija (paragraph 37 of the Decision)
- Witness 3DC (paragraph 38 of the Decision)
- A protected witness (paragraph 39 of the Decision)
- Salih Pehilj (paragraph 40 of the Decision)
- Ivica Tomić (paragraph 41 of the Decision)
- Zlatan Buljko (paragraph 42 of the Decision)
- Jakov Bienenfeld (paragraph 43 of the Decision)

I note that out of the 20 statements, only six have been definitively admitted to date, which comes to 30% of the 20 statements set by the majority of the Chamber.

Before touching upon the reasons that support the admission of the statements that were rejected or subject to conditions, I must raise the preliminary issue of the **time** it has taken the Trial Chamber to render its decision.

The procedural background given in paragraphs 2 to 12 of the decision is indicative of why the Trial Chamber was late in rendering its decision, considering the unforeseen procedural factors that were primarily the result of the decision of the Appeals Chamber, which was seized on 1 April 2010 and rendered its decision on 1 July 2010, that is, three months **after** the case was referred to it.

Aside from these unforeseen factors, mention should also be made of the time taken by the Praljak Defence to file its motion on 23 July 2010 pursuant to the decision of the Appeals Chamber. The submissions of the other parties led the last Defence team (Stojić) to file its written submissions on **5 August 2010**. Unfortunately, when the Chamber was in a position to render a decision a few weeks ago, **the motion for the recusal of Judge Prandler** delayed the filing of the decision until today.

I cannot but lament the time that was taken for various reasons to render this decision because it must be kept in mind that the present Chamber was seized as of **14 September 2009**, meaning that it has been over a year since the filing of this motion requesting the admission of transcripts or statements of **155 witnesses**, regarding which I cannot help but note today that, with respect to this initial motion, the majority has admitted only six statements, which is a ratio of 6/155 = 4% of the statements …

Similarly, I cannot but lament the fact that the Trial Chamber took over a year to eventually admit only 4% of the statements because, had it taken a position earlier, it would have certainly avoided this decision as perhaps the Defence would have eventually called certain witnesses (Richard Herrick for example) by better redistributing the time between the accused and the witnesses; but this issue falls under the exclusive competence of the Praljak Defence because it deals with its defence strategy.

Concerning the motion filed by the Praljak Defence for the admission of ten or so written statements,[1] I indicated in a previous opinion[2] that I was in favour of admitting these statements, with the exception of a few that touched upon individual responsibility.

I deemed therefore that during **deliberation**, the judges would, in all conscience, make **a selection** and retain the evidence that was relevant to the resolution of the case.

The majority of the Chamber did not follow my approach and as the decision rendered by a majority[3] was then upheld by the Appeals Chamber, I acknowledged this decision.[4]

The question currently pending before the Chamber is whether it should admit the proposed **20 statements** in case they meet the strict criteria set out in Rule 92 *bis* of the Rules.

Consideration of the Praljak Defence motion comes after a long procedure marked by multiple written submissions, the referral to the Appeals Chamber and further written submissions from all the parties.

As my personal position was already expressed in a previous opinion, I see no reason to change my point of view which consists of admitting all of the 20 statements.

Consequently, I **dissent** with respect to the rejection by a majority of the statements of **Mr Zdravko Tomac, Mr Ivica Tomić, Mr Jacques-Paul Klein and Mr Zlatan Buljko**.

At the moment of deliberation, the Judges will have the opportunity to render a decision by considering whether or not there is evidence that could fall within the scope of Rule 92 *bis*. I will discuss these statements in more details:

According to the written submissions of the Praljak Defence, **Zdravko Tomac** is supposed to refute the contents of paragraph 15 of the Indictment and refute the facts that were the subject of a judicial notice in the decisions of 14 March 2006 and 7 September 2006. Similarly, his statement is of interest with respect to paragraphs 15 to 17, 23 and 232 of the Indictment.

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[1] *The Prosecutor v. Prlić et al.*, Case no. IT- 04-74-T, "Slobodan Praljak's Motion for Admission of Written Evidence in Lieu of *Viva Voce* Testimony Pursuant to Rule 92 *bis*", PUBLIC with Confidential Annexes, 14 September 2009.

[2] "Dissenting Opinion to Confidential Decision on Slobodan Praljak's Motion for Admission of Written Evidence Pursuant to Rule 92 *bis* of the Rules".

[3] *The Prosecutor v. Prlić et al.*, Case No. IT- 04-74-T, "Decision on Slobodan Praljak's Motion to Admit Evidence Pursuant to Rule 92 *bis* of the Rules", CONFIDENTIAL, 16 February 2010.

[4] *The Prosecutor v. Prlić et al.*, Case No. IT- 04-74-T, "Decision on Slobodan Praljak's Appeal of the Trial Chamber's Refusal to Decide Upon Evidence Tendered Pursuant to Rule 92 *bis*", PUBLIC, 1 July 2010.

Without going into details, a reasonable trier of fact could deem that everything that relates to the Joint Criminal Enterprise could also be considered in a historical context. Were there individuals at the time who had a specific project, on a political level, vis-à-vis the other political parties? I cannot help but point out, moreover, that the Prosecution called 23 witnesses and tendered **107** documents for admission with regard to paragraph 15 of the Indictment.

According to the Praljak Defence written submissions, **Ivica Tomić**, a Rule 92 *bis* witness, would testify on all the charges in the Indictment and on the character of the accused. At least one part of the testimony relates to the Accused's character.

According to the Praljak Defence written submissions, Witness **Jacques-Paul Klein** would corroborate the fact that **President Tudman** refused Izetbegović's offer regarding Herzegovina; similarly, the testimony would relate to the facts admitted by several decisions and also to several paragraphs of the Indictment. It is up to the Judges to consider, at the moment of deliberation, the content in connection with the historical context (the Tudjman/Izetbegović meetings are not disputed).

According to the Praljak Defence written submissions, Witness **Zlatan Buljko** would testify on charges in the Indictment and the character of the Accused. This witness is part of the same logic as Witness Ivica Tomić.

Conducting a trial is a **subtle art** that falls within the framework of the procedural rules, but within which the Judges have broad discretionary powers. I have shown above that these four rejections could have been avoided without prejudice to anyone: the Prosecution argued its point of view in its written submissions concerning these witnesses as did the Defence teams. How would a few lines of text stemming from these four witnesses disturb the general structure of this trial, characterised by thousands of pages of transcript and thousands of documents? In any case, the parties will have an opportunity to expand on this theory in their final submissions.

Certainly, the Praljak Defence could be criticized for not having chosen its witnesses well. The Prosecution remarks rightly in paragraph 3 of its written submissions of 5 August 2010, that the Accused Praljak personally used 41h 54min of his time. Similarly, the Prosecution also remarks rightly in paragraph 4 that the Praljak Defence should have **scrupulously** respected the provisions of Rule 92 *bis* and the relevant case-law. I am in full agreement with this point of view expressed in paragraphs 3 and 4 of its written submissions.

Taking these considerations into account, the issue could have been resolved easily at the time of deliberation without running the risk of excessively censuring the Praljak Defence by rejecting these four statements.

I must therefore consider, as a reasonable trier of fact, **the other 16 statements** on a **case-by-case** basis in order to make a decision at this point, taking into account the decision of the Appeals Chamber.

The main purpose of Rule 92 *bis* of the Rules is to allow the admission of written statements that meet certain conditions in order to save time and judicial resources.

The Prosecution recalled this purpose in the **Milošević case**, and its position was mentioned in paragraph 12 of the Decision of 21 March 2002 regarding the Prosecution's request to have written statements admitted under Rule 92 *bis*.[5]

The key question concerning these 16 statements, therefore, relates to the **cross-examination** of the 92 *bis* witnesses.

In his separate opinion to the aforementioned decision, **Judge Robinson**, a member of the **Milošević Chamber**, argued that the accused has the right to cross-examine a 92 *bis* witness when his individual responsibility is subject to Article 7.1 of the Statute.

Should these statements pursuant to Rule 92 *bis* (A) **take the place of** oral testimony, in my opinion there is no reason to allow cross-examination if these statements meet the strict conditions under Rule 92 *bis*, set out in paragraph (i) of Rule 92 *bis* (A) and do not concern individual responsibility.

Paragraph (C) of the rule provides a solution to the problem of requiring a witness to appear because in that case, the provisions under Rule 92 *ter* apply. This is understandable because the moment a Chamber decides to allocate a certain number of hours to the parties, it must make a selection by setting forth, for example, that a witness initially expected to be a 92 *ter* or 92 *bis* witness appear *viva voce*. If the Trial Chamber says nothing, this means that it is in **implicit** agreement with the allocation of the witness categories proposed by the party.

In its written submissions regarding its witness list pursuant to Rule 65 *ter* (G), the Praljak Defence indicated that it had:

- 22 *viva voce* witnesses requiring 78h 25min.

It should be noted that there were three witnesses who were expected to appear *viva voce* and who are now 92 *bis* witnesses:

- no. 10 3DB (the Praljak Defence anticipated two hours)
- no. 12 Goran Moro (the Praljak Defence anticipated one hour)
- no. 14 3DC (the Praljak Defence anticipated two hours)

- 38 92 *ter* and *quater* witnesses requiring 18h 30min.

It should be noted that there were five witnesses who are now 92 *bis* witnesses:

- no. 3 Goran Batalija (the Praljak Defence anticipated 30min)
- no. 4 Jakov Bienenfeld (the Praljak Defence anticipated 30min)
- no. 10 Slavko Degoricija (the Praljak Defence anticipated 20 min)
- no. 21 Mijo Jozić (the Praljak Defence anticipated 40 min)
- no. 35 Zdravko Tomac (the Praljak Defence anticipated 30min)

- 156 92 *bis* witnesses requiring **53 hours**.

With respect to these initial 156 witnesses, who are 92 *bis*, we find the following 12 witnesses:

- no. 5 Jadranko Barišić
- no. 44 (protected witness)
- no. 52 Mira Ivanišević
- no. 62 Jacques-Paul Klein
- no. 78 Duško Ljuština
- no. 99 Žarko Pavlović
- no. 102 Salih Pehilj
- no. 116 Željko Rogošić

[5] *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, §12.

- no. 137 Ivica Tomić
- no. 142 Nikica Valentić
- no. 155 Bogoljub Zurovac

Consideration of the motion led to the conclusion that, in case all the witnesses appeared, the Praljak Defence should have been allotted the following time:

78h 25min + 18h 30min + 53h = 149h 55min which is almost 150 hours!

After studying this, the Chamber **set** the time available for **all** the witnesses on the list to **55 hours**, which includes, if necessary, the testimony of the Accused, and requested that the Accused make a selection amongst the witnesses. **He alone** could decide which witnesses would appear *viva voce* and which would be 92 *ter* considering the fact that the Chamber did not play a part in the classification and because the Praljak Defence should have taken into account the fact that the Accused would testify for several hours (which is what he did).[6] Therefore, at this stage, the Praljak Defence knew perfectly well that the witnesses it classified as 92 *bis* witnesses in the end could not be cross-examined due to the time constraints. Similarly, the other judges of the Chamber knew perfectly well what my position was with regard to the 92 *bis* witnesses because in an **internal memo** I pointed out that there would not be enough time for some of the 92 *bis* witnesses (cross-examination by the parties and the Prosecution). Furthermore, they should have known that, in any case, the 92 *bis* witnesses could not be considered crucial because otherwise they would have appeared as *viva voce* or 92 *ter* witnesses.

It should be noted with interest that the mayor of Prozor, Mr Mijo Jozić, was initially expected to appear as a 92 *ter* witness and not *viva voce* since the Defence estimated that it would need 40 minutes and it had decided on its own to designate this witness as 92 *bis*. At that stage, it had not found it useful to consider this witness as crucial, more so because it later changed this witness's classification. The Defence did not deem it necessary to classify this witness as *viva voce* and it eventually classified him as 92 *bis*.

Therefore, it seems to me that the Praljak Defence should have chosen amongst its witnesses those who would appear and **use up the time** for the *viva voce* and 92 *ter* witnesses, and those who would not appear (92 *bis*) and would not use up time within the allotted 55 hours.

Consequently, it is not a question for me now to call for the appearance of a witness who would use up time because the other defence teams would want to intervene and the Prosecution would use up time for cross-examination, all the more so because these can only be character witnesses or those who would refer to the historical context pursuant to Rule 92 *bis* of the Rules.

The parties and the Judges must keep in mind that **any witness** who testifies orally must have a direct link to the Indictment and must be **crucial**.

We should not have to find out now, after four years of proceedings, that a witness is crucial. This is the reason why I cannot accept that Witness **Mijo Jozić** appear for cross-examination because it was up to the Praljak Defence, if it deemed him to be a crucial witness, to call him as either a *viva voce* or a 92 *ter* witness, which the Praljak Defence did not deem necessary at the time, nor did the Judges who had a summary of the testimony at their disposal.

As the proceedings are approaching conclusion, it does not seem opportune to me to allow these witnesses to appear in order to make up for a possible lapse by the Praljak Defence in assessing its choice of witnesses, or to enable the judges to make up for their lack of attention in allotting 55

[6] The Accused Slobodan Praljak testified for about 50 hours before the Chamber.

hours to the Praljak Defence. If they deemed that the testimony of the former mayor of Prozor was crucial, they should have said so.

Moreover, I must also consider possible **prejudice** to the Praljak Defence, which could, during the stage of the presentation of its case, plead, as appropriate, for some other prejudice if the testimony was not taken into consideration.

With respect to Witness **Miro Jozić**, he was supposed to testify about paragraphs 15 to 17, 26, 28, 39a, b, c, 43, 46 and 50 of the Indictment. The events in Prozor were mentioned in documents P 02305, 3D 02186, 2D 03003, P 00382, P 00607, P 00608, P 00628, 3D 02188, 5D 02078 and in the testimonies gathered from Witnesses Kvesić, Ćurić, Bagarić and Slobodan Praljak himself.

A reasonable trier of fact who is conscious of **time,** the **length of the proceedings** and of **the rights of the accused who have been provisionally detained for years**, must ask himself whether the former mayor of Prozor can or could have contributed new facts during cross-examination with respect to the facts already gathered. The facts that he was supposed to contribute are contained in the 28 pages of the document in which he responded to questions.

Therefore, with regard to the question about **volunteers**:

Were they mobilised or came as volunteers?

"They were mobilized volunteers. When I say mobilized, I mean in a way that you had a person in every village in charge of registering and making registration lists. That is how it was all done. A company would be formed of defenders from one or several villages, whereas of several companies Rama brigade would be formed".

The question of volunteers was raised at length during the trial. In what way does the reply of this witness call for cross-examination?

Another example: in the 28 pages presented, the Defence seeks admission of questions and answers that appear on pages 21 to 26. As part of these questions and answers, he was asked, notably, the question of how humanitarian aid was distributed. He replies by referring to the distribution by the Red Cross. Why would the Prosecution need a cross-examination?

In this particular case, I cannot see that the witness would bring additional value if he were cross-examined.

With regard to Witnesses **Željko Rogošić** and **Mira Ivanišević** whose testimony bears on the detention centres, I note first of all that the Accused Praljak himself obscured the question of detention centres because he had not attached to his file a single exhibit relating to detention centres.

When he testified, I personally asked questions about the detention centres, reminding him of the content of the Indictment.[7]

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[7] Judge Antonetti's questions and the Accused's replies during the examination of the Accused Slobodan Praljak, p. 41615, 17 June 2009.
Q: (Interpretation) "General Praljak, the Prosecution states as follows: You contributed to a system of mistreatment by controlling it, conducting it, assisting it and/or taking part in this. This system included a network of prisons, of concentration camps, and other detention centres used for the purpose of arresting, detaining, and incarcerating thousands of Muslims from Bosnia in -- in illegal and harsh conditions. There they were killed, mistreated, beaten, and brutalised. The Muslim detainees were automatically taken away from these detention centres by the forces of the HVO and forced to perform forced labour during which a great number of them were injured or killed. There is what -- this is how the Prosecution describes your participation in the joint criminal enterprise."

In all honesty, I did not think it necessary to broach this question earlier, considering the reply given by the Accused, since in the Accused's version, the detention centres were not under his authority, especially since he did not have an official position as military commander of the HVO until July 1993.

It was only during the cross-examination that the Prosecution returned to the subject.[8] The Accused Praljak issued a permit, as he had done for others in the same context. At the beginning of 1993, Witness **Mira Ivanišević** wanted to enter the Gabela camp. With General Praljak's permission, the Witness had no trouble getting into the camp.

As for the other witness, **Željko Rogošić**, he was not able to enter Dretelj because a soldier at the camp entrance claimed Praljak had no authority in that place and that his signature was not valid. Later the same Witness approached General Žarko Tole who gave him a permit that would allow him to enter the Dretelj camp on 7 September 1993, however without being able to enter Gabela.

I would like to know why these witnesses need to be called to confirm that they received without any difficulty permission from General Praljak and that, equipped with this permit, they were able to get into the Gabela or Dretelj camps?

The coming of these two witnesses is therefore not likely to bring any **new information**. To call these witnesses to come in order to confirm the reality of these facts would not introduce any information that would allow the Chamber to determine whether or not General Praljak had authority over the detention camps because the act of issuing a permit does not bring with it, for someone who is not a lawyer (like the Accused Praljak), the certainty that he had a specific competence in the matter.

In addition, the question of HVO prisons is an extremely complex matter, to the extent that we know from testimony and documents that, at a particular time, there was, considering the situation, a "transfer" from civil prisons to military prisons (as in the case of Heliodrom). Was there a transfer of responsibility to the military authorities, and to which one? It is up to the judges to look into this question during their deliberations.

In order to establish any link of responsibility, a **reasonable trier of fact** should first of all rely on legal texts of the time and orders that may have been issued, and not on the testimony of two people

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A: "And as far as the detention centres are concerned, besides Heliodrom I was fully convinced that those were prisons. I did not have any control over the prisons. The prisoners did not have anything to do with the Main Staff or the army, when it came to their setting up control, investigations. And this is clear from the fact that we issued passes to the journalists. How -- somebody would have to be mad to do what is implied and then provide the journalists with passes to see what kind of a criminal he was".

[8] Cross-examination of the Accused Slobodan Praljak, p. 43781, 25 August 2009.
Q: "I'm asking you at the time that you were present down in Herceg-Bosna during July and August of 1993, weren't you aware that that's what was taking place? All the Muslim military-aged men were being arrested and **detained**?"
A: "No, sir. From the 24th until – well, I spent a lot of that time, and I did things according to a procedure that I described for you. You can see what I did every single day, and you know very well what information I had available to me. I did not have either the time or information as to who was where. Very well. Go on then. Ask me questions."
"My General."
"Go on then. Ask me questions."
"It's a yes or no answer, I think. Weren't you aware - ?"
"No."
"You were not aware?"
A. "No. **I was aware of the existence of the prisons.** I was aware of their existence. I even sent offenders there, as you could see from some documents, and that's the end of that."

who had said that that they had asked for permission to enter the camps and that they got it. In its submissions the Prlić Defence rightly objects to the statement of Witness **Željko Rogošić.**[9]

It therefore seems to me, when the time came, both at the level of the Prosecution and the Defence, that the question of the detention centres should have called for the witnesses to come *ad hoc* in order to establish precisely which was the true function of these centres and who was responsible for them. During its forthcoming deliberation, the Trial Chamber will have a number of statements and documents on the matter. Moreover, it will certainly be enlightened by the forthcoming submissions from the Prosecution and the Defence.

I could provide countless examples of this sort. In conclusion, I would like to put forward the fact that the **provisional detention** of the accused (presumed innocent) can only be extended, since one should bear in mind the fact that the Defence should be able to benefit, between the end of the last testimony and the closing arguments of the Defence and of the Prosecution, from several months of preparation. This is the rule in force for trials at the Tribunal.

Of course, the Defence could have prepared itself since May 2010, but it was still waiting because of the Prosecution Motion concerning the reopening of the trial and the Praljak Defence Motion concerning Rule 92 *bis*. A reasonable trier of fact should know how to end a trial, unless there is a crucial witness; as far as I'm concerned, these two witnesses are not crucial.

In this dissenting opinion, I must also present another argument for **rejecting the cross-examination**:

We are currently in the **Defence evidentiary** phase which should bring evidence in support of its argument.

The purpose of cross-examination, in these conditions, for the opposing party (here, the Prosecution) would be to undermine the argument of the other party, and also for the other parties to disprove the position of the Accused Praljak.

In this context, which elements of these statements could be undermined: the historical context or the character of the Accused?

This set-up should not allow one party to profit from cross-examination not to object to the witness statement relating to the historical context or character of the Accused but in order to bring the focus back to its original argumentation.

With regard to a previous Motion by the Prosecution compiled pursuant to Rule 92 *bis*, the present Chamber had the opportunity to admit the testimony of two witnesses who were former German mercenaries detained in the Federal Republic subject to cross-examination.[10] In the same way, it had asked for the cross-examination of Mr Mesić, President of the Republic of Croatia. Unlike the witnesses mentioned above, he had already testified before the ICTY and his involvement in the events was very different to the witnesses mentioned above. I noted that, in the final analysis, the Prosecution did not bring any witnesses who were subject to cross-examination …

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[9] "The Prlić Defence respectfully requests that Rule 92 *bis* Witnesses Željko Rogošić, Mira Ivanišević and Ivica Tomić be called for cross-examination. In the alternative, i.e. should the Trial Chamber decide against this request, the Prlić Defence moves to have Željko Rogošić's statement excluded from admission," "Jadranko Prlić's Response to Slobodan Praljak's Second Motion for Admission of Written Evidence in Lieu of *Viva Voce* Testimony pursuant to Rule 92 *bis*", p. 5.

[10] *The Prosecutor v. Prlić et al.*, Case No. IT- 04-74-T, "Decision on Prosecution Motion to Admit Testimonies pursuant to Rule 92 *bis* of the Rules (Jablanica)", 12 July 2007.

That is to say that the use of Rule 92 *bis* is only used moderately for non-essential witnesses, because witnesses that are considered **crucial** must testify *viva voce,* according to the procedure under Rule 92 *bis* (C), that is to say, Rule 92 *ter.* For me, the presentation of the Praljak Defence case ended several months ago. It would be paradoxical for witnesses to testify after the other Defence teams have finished their presentation, in accordance with the order chosen freely by the Defence: D1, D2, D3, D4, D5 and D6, because this would challenge the logical order of presenting Defence evidence.

In its submissions, the Prosecution systematically rejected these 20 statements and also indicated that it wanted to cross-examine the witnesses. This position of the Prosecution is not a surprise, since it was expressed throughout the trial.

The burden of proof falls exclusively on the Prosecution. Because of this, it has benefited from more time than necessary in its presentation of evidence.

In the forthcoming cross-examination, notably of the aforementioned witnesses, the Prosecution must not be prohibited from calling into question the credibility of the witnesses, but rather from being allowed to introduce additional evidence through the cross-examination; in a way, this would be to favour the Prosecution beyond any reason.

The Judge must be vigilant about the procedure and the rights of everyone. He must be able to assess the reach of a decision in any case and not take a decision having examined only one aspect of the problem …

The wish to bring over three witnesses, with the financial and temporal consequences involved at this stage of the proceedings, causes for me an important problem concerning the extension of the trial.

I acknowledge that, in principle, there should not be a relation between a trial and time, but we cannot ignore the fact that the Statute has imposed on judges the **obligation to expedite trials**. I have the distinct impression that we seem to have lost sight of this obligation.

The Plenary Meeting, consisting of permanent and *ad litem* Judges, but with only permanent Judges making decisions with regard to the Rules, adopted Rule 90 (F) which states that "the Trial Chamber exercises control over [the efficiency of] the mode of interrogating witnesses and presenting evidence [necessary for] the ascertainment of the truth, and [to] avoid needless consumption of time."

I would say that the witnesses, whom the majority of Judges wish to have cross-examined, would not bring anything to the ascertainment of the truth, considering the 51,761 pages of transcript and almost 10,000 documents already admitted.

This for me is, therefore, a clear **waste of time** which should also be assessed with regard to the criticism expressed by some states during the presentation of the report by the President of the Tribunal at the United Nations headquarters in New York.[11]

[11] Summary of replies to questions put by members of the Security Council following the presentation of the report by the President of the ICTY before the Security Council, June 2010; Intervention by Great Britain: "The Ambassador asked for further explanation for the slippages in the *Prlić et al.* case. He notes that, while some of the delays were unforeseen, there was nothing specific to explain the seven month delay in that case. The Ambassador questioned whether it was justifiable for the Tribunal just to refer to the fact that the case was complicated, because surely that was foreseen. In response, the President stressed that of course it was foreseen, but that, while that case was taking longer, the joinder of the case - which made it so complicated - was also a factor that was resulting in considerable time savings. If those accused had been tried separately, it would have taken a much longer time than it is taking now. (…)

In the same spirit, the Security Council had hesitations regarding the extension of the Judges' mandates, notably the *ad litem* Judges who were initially engaged for a **period of less than three years**. In this case, the mandate of the *ad litem* Judges was extended[12] and, as Presiding Judge of the Chamber in charge of managing work within the provisions of the Statute, I have to say that on the matter of the closing arguments of the Defence and the Prosecution, the Judgement cannot be rendered for several months, considering the complexity of the case, the 80-page long Indictment, the 26 charges which the Judges must consider, and any accumulated delay will undoubtedly have an impact on the date of the Judgement, with a direct consequence on the provisional detention of the Accused and a new extension of the mandates of the Judges, which by all accounts should be extended until at least 31 December 2011, unless other unforeseen factors arise after the re-opening of the Prosecution case (see on this subject my dissenting opinion).

Dawdling and calling for the witnesses who are not crucial to be cross-examined, even though the content of their statements taken under the strict criteria of Rule 92 *bis* is sufficient in itself, would only give the impression to those outside the courtroom that the judges have preoccupations other than the expeditiousness of the trial …

In conclusion, to reject **11 statements** and make three witnesses come at this stage of the trial seems to me a **serious error** since this majority decision gives the impression that the Judges are not capable of finishing the trial.

To be a judge is to have the courage to say both to the Prosecution and to the Defence: "**I have sufficient information.**"

Does an examination of the contents of the statements giving rise to the cross-examination provide a revelation of any fact that is currently not known by a judge?

Cross-examination is not an absolute right, it is controlled by the Trial Chamber.

Should we, on the contrary, by this majority decision, cause problems for the Praljak Defence, by having cut off 90% of its 92 *bis* witnesses, while allowing three witnesses to come for cross-examination, just to be able to say that the Judges are flexible and to avoid any criticism? I do not know! But I do know that all this has an effect on the **length of trial** and not on the merits of the case, since all the subjects in these statements have already been broached at length.

The Prosecution indicates in its submissions that the Praljak Defence filed its motion almost a year ago. It is completely right and during this time the Praljak Defence could have made use of the unequivocal terms in Rule 92 *bis* of the Rules. But what applies to the Defence in the eyes of the Prosecution, also applies to the Judges who have had all the exhibits at their disposal, since the 65 *ter* List.

Why come forward only now, when the Judges could have notified the Praljak Defence that a problem existed? It would have been enough to have read the documents at the time and not now in

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The Ambassador requested information about the recommendations of the Working Group on Speeding-Up on Trials, and the President undertook to send him the recommendations made."
Intervention by France: "France note that the Tribunal was the Rolls Royce of Justice, reference was made to the Tadić trial, which took over one year a low-level perpetrator, and observed that the sentence passed was not dissimilar to the sentence that would be given in France for the same crimes. In France, the trials would not take years, but rather three or four weeks. France noted that this was due to the common law procedure adopted. The President explained that, since the time of the Tadić case, the procedures had been advanced significantly. France expresses its understanding that the Karadžić trial was complicated, but still noted the length of trials overall."

[12] Security Council of the United Nations, Resolution 1931 (2010), 29 June 2010.

order to reject and authorise cross-examination, thus creating **procedural** disorder, when after the D3 Witnesses, other Defence teams intervened in the trial.

Judges rendering international justice do not have a right to err on the procedural level. A trial should not be conducted in a haphazard way, depending on one's mood, but in a **professional** manner.

Judges must guarantee a **fair and expeditious trial**. In its submissions on the reopening of the trial, the Stojić Defence explains, on this subject, that exhibits must have exceptional probative strength and that the exhibits that have a dual purpose with evidence that has already been admitted, do not justify a reopening. I apply in full all the reasoning presented in paragraph 18 of its submission on the matter of Rule 92 *bis* since we are at an advanced stage of the trial.

In his statement attached to the Milošević decision on the admission of statements pursuant to Rule 92 *bis* of the Rules, **Judge Kwon** said that the general rules of admissibility set out in Rules 89 (C) and 89 (D) suggest a more **flexible** approach, especially since the Accused appear before professional judges and not before a jury. He added that it is practice in the Romano-Germanic system of law to admit witness statements.

This point of view illustrates perfectly the problem that this Chamber has in this particular case. The present Chamber should have had a flexible approach during the admission of these statements and not have rejected them or submitted them to cross-examination. So, why are we acting differently?

/signed/

Jean-Claude Antonetti

Done this sixth day of October 2010
The Hague (The Netherlands)

[Seal of the Tribunal]