IT-04-74-AR73.17
A98-A74
01 July 2010

98
SF

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-AR73.17
		Date:	1 July 2010
		Original:	English

BEFORE THE APPEALS CHAMBER

Before: **Judge Mehmet Güney, Presiding**
Judge Fausto Pocar
Judge Andrésia Vaz
Judge Theodor Meron
Judge Carmel Agius

Registrar: **Mr. John Hocking**

Decision of: **1 July 2010**

PROSECUTOR

v.

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

PUBLIC

DECISION ON SLOBODAN PRALJAK'S APPEAL OF THE TRIAL CHAMBER'S REFUSAL TO DECIDE UPON EVIDENCE TENDERED PURSUANT TO RULE 92 *BIS*

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**

1. The Appeals 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 ("Appeals Chamber" and "Tribunal", respectively) is seised of an appeal filed by Slobodan Praljak ("Praljak") on 7 April 2010 ("Appeal")[1] 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 ("First Impugned Decision")[2] by Trial Chamber III hearing the case of *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-07-74-T ("Trial Chamber" and "*Prlić et al.* case", respectively) and the "Order on Request of Praljak Defence Seeking a Stay on the Time Limit Ordered by the Chamber for Filing 20 Written Statements or Transcripts of Evidence Pursuant to Rule 92*bis* of the Rules" issued by the Trial Chamber on 17 March 2010 ("Second Impugned Decision").[3] The Office of the Prosecutor ("Prosecution") responded on 19 April 2010[4] and Praljak filed his reply on 26 April 2010.[5]

I. BACKGROUND

2. On 31 March 2008, Praljak filed his submission pursuant to Rule 65 *ter* of the Rules of Procedure and Evidence ("Rules"),[6] including a witness list indicating that he would present 156 Rule 92 *bis* witnesses, in addition to 22 *viva voce* witnesses, 37 Rule 92 *ter* witnesses and one Rule 92 *quater* witness.[7] He also requested 110 hours of court time for the presentation of his case.[8] On 25 April 2008, the Trial Chamber allocated 55 hours to the presentation of Praljak's

---

[1] Slobodan Praljak's Appeal of the Trial Chamber's Refusal to Decide Upon Evidence Tendered Pursuant to Rule 92 *bis*, 7 April 2010.
[2] *Prosecutor v. Jadranko 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, 16 February 2010 (confidential) (Original in French. The English translation was filed on 24 February 2010, and the corrected English translation was filed on 1 March 2010).
[3] *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-T, Order on Request of Praljak Defence Seeking a Stay on the Time Limit Ordered by the Chamber for Filing 20 Written Statements or Transcripts of Evidence Pursuant to Rule 92*bis* of the Rules, 17 March 2010 (Original in French. The English translation was filed on 24 March 2010).
[4] Prosecution Response to Slobodan Praljak's Appeal of the Trial Chamber's Refusal to Decide Upon Evidence Tendered Pursuant to Rule 92 *bis*, 19 April 2010 ("Response").
[5] Slobodan Praljak's Reply to the Prosecution Response to the Appeal of the Trial Chamber's Refusal to Decide Upon Evidence Tendered Pursuant to Rule 92 *bis*, 26 April 2010 ("Reply").
[6] *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-T, Slobodan Praljak's Submission Pursuant to Rule 65 *ter*, 31 March 2008 ("Rule 65 *ter* Submission") (public with confidential Annexes A, B, C).
[7] Annex A attached to Rule 65 *ter* Submission.
[8] *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-T, Decision Allocating Time to the Defence to Present its Case, 25 April 2008 (Original in French. The English translation was filed on 6 May 2008) ("*Prlić et al.* Trial Decision of 25 April 2008"), para. 29, also explaining discrepancies between the number of witnesses as counted by Praljak and those as understood by the Trial Chamber, as well as differences between the estimated court time as calculated by Praljak and that as calculated by the Trial Chamber. Praljak subsequently modified his submission in some aspects. The modifications included the change of the number of Rule 92 *bis* witnesses from 156 to 147. He also altered the estimated court time for the presentation of his case from 110 hours to 112 hours and 15 minutes. *See Prlić et al.* Trial Decision of 25 April 2008, para. 30, referring to *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-T, Slobodan Praljak's Submission Pursuant to the Trial Chamber's Order of 9 April 2008 Regarding

case, noting that "an excessive number of witnesses has been called to testify on events that fall outside the frame of the Indictment or that relate only very loosely to them or are totally repetitive".[9] The Appeals Chamber affirmed the Trial Chamber's decision.[10]

3. On 27 January 2009, when another co-accused was still presenting his case, Praljak filed a motion requesting the Trial Chamber to admit written statements of two witnesses pursuant to Rule 92 *bis* of the Rules.[11] On 6 February 2009, the Trial Chamber issued a decision instructing Praljak to re-submit his motion at an advanced stage of the presentation of his own case.[12]

4. On 14 September, 1 October and 16 October 2009, Praljak requested the Trial Chamber to admit into evidence written statements and transcripts of 155 witnesses, in total, pursuant to Rule 92 *bis* of the Rules ("Statements" or, individually, "Statement").[13]

5. On 16 February 2010, the Trial Chamber rendered the First Impugned Decision.[14] The Trial Chamber, by majority, deemed it impossible to rule on the admissibility under Rule 92 *bis* of the Rules of each of the Statements, considering the size of the request, the length of the submitted material, the repetitive nature thereof, the lack of relevance and the lack of adherence to formal requirements in a number of Statements, as well as Praljak's confusion between the acts and conduct of the accused as charged in the Indictment and those not charged in the Indictment.[15] As a result, the Trial Chamber, by majority, sent back the Motion and the Additional Motion (collectively, "Motions") to Praljak, and ordered him to file within three

---

Witnesses Expected to be Called by Multiple Accused, 14 April 2008 (confidential); *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-T, Corrigendum to Slobodan Praljak's Submission Pursuant to the Trial Chamber's Order of 9 April 2008 Regarding Witnesses Expected to be Called by Multiple Accused, 16 April 2008 (confidential).

[9] *Prlić et al.* Trial Decision of 25 April 2008, para. 33.

[10] *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-AR73.7, Decision on Defendants [*sic*] Appeal Against "*Décision portant attribution du temps à la Défense pour la présentation des moyens à décharge*", 1 July 2008 ("*Prlić et al.* Appeal Decision of 1 July 2008"), paras 39, 48, 70.

[11] *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-T, Slobodan Praljak Motion for Admission of Written Statements Pursuant to Rule 92 *bis*, 27 January 2009, para. 1.

[12] *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-T, Decision on Praljak Defence Motion for Admission of Written Statements Pursuant to Rule 92 *bis* of the Rules, 6 February 2009 (Original in French. The English translation was filed on 17 February 2009) ("*Prlić et al.* Trial Decision of 6 February 2009"), p. 4.

[13] *Prosecutor v. Jadranko 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*, 14 September 2009 ("Motion"), paras 1, 34 and Annexes 1-4 (confidential), requesting the admission of 155 witnesses' written statements and transcripts; *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-T, Slobodan Praljak's Addendum to the Motion for Admission of Written Evidence in Lieu of *Viva Voce* Testimony Pursuant to Rule 92 *bis*, 1 October 2009, paras 1, 4-5, withdrawing one witness's written statement; *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-T, Slobodan Praljak's Motion for Admission of Written Evidence in Lieu of Viva Voce Testimony of Vlado Jurić Pursuant to Rule 92 *bis* and Notice Regarding Further Translations, 16 October 2009 (confidential) ("Additional Motion"), paras 1, 5, 32, requesting the admission of one additional witness's written statement. For more detailed procedural background with respect to Praljak's request pursuant to Rule 92 *bis* of the Rules, *see* First Impugned Decision, paras 1, 6, 32.

[14] For the procedural background, including submissions by the other accused, *see* First Impugned Decision, paras 2-16.

weeks a maximum of 20 written statements or transcripts meeting the criteria of admissibility under Rule 92 *bis* of the Rules.[16] The Trial Chamber also declared that it would only consider written statements or transcripts "for which the relevant passages have been indicated" and will "not accept written statements exceeding 30 pages".[17] Judge Antonetti appended a dissenting opinion to the First Impugned Decision.[18]

6. On 8 March 2010, Praljak filed a motion requesting certification to appeal the First Impugned Decision and stay of the time-limit set by the Trial Chamber for submission of a maximum of 20 written statements or transcripts.[19] On 17 March 2010, the Trial Chamber, by majority, issued the Second Impugned Decision rejecting Praljak's request to stay the time-limit without prejudice to its anticipated decision on his request for certification to appeal, while instructing him to file no more than 20 written statements or transcripts within three weeks of the filing of the English translations of the First Impugned Decision and Judge Antonetti's First Dissenting Opinion, that is, by 22 March 2010.[20] Judge Antonetti also appended a dissenting opinion to the Second Impugned Decision.[21]

7. On 22 March 2010, Praljak filed another motion seeking certification to appeal the Second Impugned Decision.[22] On 1 April 2010, the Trial Chamber delivered a decision granting both the First and Second Motions for Certification to Appeal.[23] On 7 April 2010, Praljak filed his Appeal requesting the Appeals Chamber (i) to quash the First and Second Impugned

---

[15] First Impugned Decision, para. 47. *See* also First Impugned Decision, paras 35-46.
[16] First Impugned Decision, para. 48 and disposition.
[17] First Impugned Decision, para. 38.
[18] *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-T, Dissenting Opinion to Confidential Decision on Slobodan Praljak's Motion for Admission of Written Evidence Pursuant to Rule 92 *bis*, 16 February 2010 (Original in French. The English translation was filed on 1 March 2010) ("First Dissenting Opinion"); *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-T, Dissenting Opinion on a Confidential Decision on Slobodan Praljak's Motion to Admit Evidence Pursuant to Rule 92 *bis* of the Rules (Corrigendum), 17 February 2010 (Original in French. The English translation was filed on 1 March 2010).
[19] *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-T, Slobodan Praljak's Request for Certification to Appeal the "Decision on Slobodan Praljak's Motion to Admit Evidence Pursuant to Rule 92 *bis* of the Rules", 8 March 2010 ("First Motion for Certification to Appeal"), paras 1, 40.
[20] Second Impugned Decision, p. 4.
[21] Second Impugned Decision, pp. 5-6 ("Second Dissenting Opinion").
[22] *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-T, Slobodan Praljak's Request for Certification to Appeal the "Ordonnance portant sur la demande de la Défense Praljak d'obtenir une suspension du délai ordonné par la Chambre pour déposer 20 déclarations écrites ou comptes rendus de dépositions en vertu de l'article 92 *bis* du règlement", 22 March 2010 ("Second Motion for Certification to Appeal"), paras 1, 40. *See* also *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-T, Jadranko Prlić's Submissions in Support of Accused Praljak's Request for Certification to Appeal the Majority Decision Related to His Submission of 92 *bis* Statements & His Request for a Temporary Adjournment, 26 March 2010.
[23] *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-T, Decision on Praljak Defence Requests for Certification to Appeal the Decisions of 16 February and 17 March 2010, 1 April 2010, p. 8 (Original in French; The English translation was filed on 25 May 2010).

Decisions, (ii) to direct the Trial Chamber to make an "individual, particularised decision on the merits for each of the [Statements] tendered" and (iii) to order any other appropriate remedy.[24]

II. STANDARD OF REVIEW

8. It is well established in the jurisprudence of the Tribunal that Trial Chambers exercise discretion in relation to trial management[25] and admission of evidence.[26] The First and Second Impugned Decisions deal with the admissibility of evidence under Rule 92 *bis* of the Rules and the manner in which such evidence should be tendered and, thus, are discretionary decisions to which the Appeals Chamber accords deference. Such deference is based on the recognition by the Appeals Chamber of "the Trial Chamber's organic familiarity with the day-to-day conduct of the parties and practical demands of the case".[27] The Appeals Chamber's examination is therefore limited to establishing whether the Trial Chamber has abused its discretionary power by committing a discernible error.[28] The Appeals Chamber will only overturn a Trial Chamber's exercise of its discretion where it is found to be "(1) based on an incorrect interpretation of governing law; (2) based on a patently incorrect conclusion of fact; or (3) so unfair or unreasonable as to constitute an abuse of the Trial Chamber's discretion".[29]

---

[24] Appeal, para. 95.

[25] *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-AR73.4, Decision on Beara's and Nikolić's Interlocutory Appeals Against Trial Chamber's Decision of 21 April 2008 Admitting 92 *quater* Evidence, 18 August 2008 (confidential) ("*Popović et al.* Appeal Decision of 18 August 2008"), para. 5 and references therein; *Prlić et al.* Appeal Decision of 1 July 2008, para. 15 and references therein; *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-AR73.2, Decision on Joint Defence Interlocutory Appeal Against the Trial Chamber's Oral Decision of 8 May 2006 Relating to Cross-Examination by Defence and on Association of Defence Counsel's Request for Leave to File an *Amicus Curiae* Brief, 4 July 2006, p. 3.

[26] *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-AR73.6, Decision on Appeals Against Decision Admitting Transcript of Jadranko Prlić's Questioning into Evidence, 23 November 2007 ("*Prlić et al.* Appeal Decision of 23 November 2007"), para. 8 and references therein.

[27] *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-AR73.7, Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defense Counsel, 1 November 2004, para. 9. *See* also *Popović et al.* Appeal Decision of 18 August 2008, para. 5 and references therein; *Prlić et al.* Appeal Decision of 1 July 2008, para. 15 and reference therein.

[28] *Popović et al.* Appeal Decision of 18 August 2008, para. 5 and references therein; *Prlić et al.* Appeal Decision of 1 July 2008, para. 15 and reference therein.

[29] *Popović et al.* Appeal Decision of 18 August 2008, para. 5 and references therein; *Prlić et al.* Appeal Decision of 1 July 2008, para. 15 and reference therein; *Prlić et al.* Appeal Decision of 23 November 2007, para. 8 and references therein.

III. DISCUSSION

A. First Impugned Decision

1. The Trial Chamber's alleged failure to provide a reasoned decision[30]

9. Praljak submits that the Trial Chamber failed to issue a "reasoned, particularized decision" with respect to his Motions, since the First Impugned Decision does not address the admissibility of each particular Statement.[31] He asserts that the Trial Chamber infringed his right to request relief pursuant to Rule 73(A) of the Rules by refusing to issue a decision granting or denying the relief requested.[32] He further contends that the Trial Chamber erroneously held that it was "unable to rule on the admissibility" of the Statements, since Judge Antonetti was able to examine each and every Statement and determine their admissibility by the time the First Impugned Decision was rendered.[33]

10. The Prosecution responds that the Trial Chamber's rulings demonstrate that it thoroughly and extensively considered the submissions of the parties, including those of Praljak, the other co-accused and the Prosecution, and correctly applied the applicable law.[34] The Prosecution contends that the Trial Chamber, on the basis of good reasons and sufficiently particularised analyses, decided to send back the Motions to Praljak without admitting any Statement at that stage.[35] The Prosecution also maintains that the jurisprudence of the Tribunal does not require

---

[30] This section encompasses Grounds 1, 8 in part and 9 in part of Praljak's Appeal, § IV, A.
[31] Appeal, paras 30-31. *See* also Appeal, paras 67-70.
[32] Appeal, para. 30.
[33] Appeal, paras 32-33; Reply, para. 7. In Praljak's view, the Trial Chamber's expected work for individualised determinations should be relatively simple, since (i) the Statements are "on average of moderate length, less than 20 pages"; (ii) many of them are tape-recorded, verbatim statements as opposed to the Prosecution's "heavily processed" statements; (iii) it was suggested by the Trial Chamber that many of the Statements suffered from similar problems; and (iv) the amount of the Statements would be insignificant compared to the amount of evidence tendered during the lengthy trial in the present case, *see* Reply, paras 17, 24. Praljak also maintains that the Trial Chamber's "vague complaints" with respect to the admissibility of certain parts of some Statements do not explain its incapacity, and that it was capable of deciding upon the similar requests previously made by the Prosecution, *see* Appeal, para. 33.
[34] Response, paras 12, 15.
[35] Response, paras 4, 15-16, referring, *inter alia*, to the Trial Chamber's observations on Praljak's usage of allocated hours for the presentation of evidence in court; the relevance of the Statements; the redundant nature thereof; problems concerning the Statements' adherence to formal requirements; as well as mischaracterisation of the evidence going to acts and conduct of Praljak. The Prosecution also points out that instead of denying Praljak's Motions outright, the Trial Chamber afforded him an opportunity to revise and correct his defective submissions, *see* Response, paras 5, 20.

the Trial Chamber to engage in a statement-by-statement analysis, especially in light of the "extensive and fundamental deficiencies" in Praljak's submissions.[36]

11. The Appeals Chamber observes that while the Trial Chamber did not determine the admissibility of each and every Statement, it conducted a comprehensive analysis of the Statements as a whole. As a result, it found that a number of Statements (i) were of a repetitive nature;[37] (ii) had little or no relevance to the charges in the Indictment;[38] (iii) lacked adherence to certain formal requirements as provided in Rule 92 *bis* (B) of the Rules;[39] (iv) exceeded a reasonable number of pages without giving any indication of relevant pages, despite the Trial Chamber's recommendation to do so;[40] (v) were duplications of statements that have already been admitted pursuant to Rule 92 *ter* and 92 *quater* of the Rules;[41] and, (vi) due to Praljak's misunderstanding of the law, contained evidence going to the acts and conduct of Praljak that have a bearing on the charges in the Indictment.[42] In particular, the Appeals Chamber notes that "[a]fter having examined all of the [Statements]", the Trial Chamber concluded that the majority of the evidence described by Praljak as "character evidence" also related to the acts and conduct of Praljak as charged in the Indictment.[43] Having considered all these factors, the Trial Chamber set certain guidelines and restrictions in order to streamline Praljak's Rule 92 *bis* submissions[44] and sent back the Motions to him so that he could re-organise the Statements in accordance with the law and the guidance provided by the Trial Chamber.

12. The Appeals Chamber sees no error in the Trial Chamber's approach. There is nothing wrong in clarifying the law or providing guidelines and directing a party to re-file its submission rather than immediately ruling upon it, insofar as a Chamber provides sound reasons for doing so.[45] Furthermore, the Appeal Chamber recalls that:

---

[36] Response, paras 4, 17-19, referring to *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-AR73.4, Decision on Prosecution Appeal Following Trial Chamber's Decision on Remand and Further Certification, 11 May 2007 ("*Prlić et al.* Appeal Decision of 11 May 2007"), para. 25; *Prlić et al.* Appeal Decision of 1 July 2008, para. 48.
[37] First Impugned Decision, para. 35.
[38] First Impugned Decision, para. 35.
[39] First Impugned Decision, paras 36-37. In particular, *see* First Impugned Decision, fn. 65, where the Trial Chamber notes, providing several specific examples, that a number of Statements are not accompanied by a separate declaration by the person making the Statement that the contents of the Statement are true and accurate.
[40] First Impugned Decision, paras 36, 38.
[41] First Impugned Decision, para. 39.
[42] First Impugned Decision, paras 41-46.
[43] First Impugned Decision, para. 42.
[44] In limiting the number of Rule 92 *bis* Statements to 20, the Trial Chamber clearly indicated which subjects of the Statements listed by Praljak it considers inadmissible, while allowing Praljak to tender, on average, two statements or transcripts per remaining subject in order to prevent excessive redundancy in Rule 92 *bis* evidence, *see* First Impugned Decision, para. 48 and fn. 84.
[45] *See e.g.*, *Prosecutor v. Milan Martić*, Case No. IT-95-11-T, 7 July 2006, T. 5999:12-5999:19 (oral order), directing the accused Milan Martić to re-file more detailed Rule 65 *ter* witness summaries. Based on the re-filed

> [w]hile a Trial Chamber has an obligation to provide reasons for its decision, it is not required to articulate the reasoning in detail. The fact that the Trial Chamber did not mention a particular fact in its written order does not by itself establish that the Chamber has not taken that circumstance into its consideration.[46]

In addition, with respect to the amount of time alloted to a party for the presentation of its case, the Appeals Chamber has held that "although [a] Trial Chamber must justify its reduction in time by indicating the documents and the competing interests it considered, it does not need to specifically 'itemise and justify' all of the bases for this reduction".[47] This principle is also applicable to a Trial Chamber's determination on the number of witnesses. In the present case, the Trial Chamber provided adequate reasoning for placing a limit on the number of Rule 92 *bis* written statements or transcripts that Praljak could tender and sending back the Motions to him without ruling upon the admissibility of each and every Statement, based on a sufficiently particularised and comprehensive analysis of the Statements.

2. The Trial Chamber's alleged violation of the principle of equality of arms[48]

13. Praljak submits that the Trial Chamber violated the principle of equality of arms by breaching the standard of "reasonable proportionality" between the parties with respect to the number of witnesses they can call.[49] In support of this argument, he maintains (i) that by imposing the limit of 20 Statements, the Trial Chamber barred seven out of every eight Statements tendered by him, while it placed no limit on the number of witness statements or transcripts tendered by the Prosecution,[50] and (ii) that the Trial Chamber imposed an "inflexible limit" of 30 pages per Statement, while it placed no limit on the length of witness statements or

---

witness summaries, the Trial Chamber set the time allocated to the presentation of the defence case and the number of witnesses it could call, *see Prosecutor v. Milan Martić*, Case No. IT-95-11-T, Decision on Time Available for the Defence for Presenting Its Evidence, 14 August 2006 (confidential), pp. 2, 4. *See* also *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-PT, Order on Prosecution's Motion to Admit Documentary Evidence with Annexes, 6 June 2006, p. 2, requiring more information on the items that the Prosecution tendered into evidence from the bar table. The Trial Chamber subsequently decided upon their admissibility taking into account the supplemented information, *see Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-T, Decision on Prosecution Motion to Admit Documentary Evidence, 10 October 2006, paras 2-4.

[46] *Prlić et al.* Appeal Decision of 1 July 2008, para. 48, referring to *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-AR73.6, Decision on the Interlocutory Appeal by the *Amici Curiae* Against the Trial Chamber Order Concerning the Presentation and Preparation of the Defence Case, 20 January 2004, para. 7.

[47] *Prlić et al.* Appeal Decision of 1 July 2008, para. 48, referring to *Prlić et al.* Appeal Decision of 11 May 2007, para. 25.

[48] This section encompasses Grounds 2, 5 in part and 6 in part of Praljak's Appeal, § IV, A.

[49] Appeal, paras 34-35, referring to *Prosecutor v. Duško Tadić*, Case No. IT-94-1-A, Judgement, 15 July 1999 ("*Tadić* Appeal Judgement"), para. 44; *Prosecutor v. Naser Orić*, Case No. IT-03-68-AR73.2, Interlocutory Decision on Length of Defence Case, 20 July 2005 ("*Orić* Appeal Decision"), para. 9. Praljak also refers to Article 21(4)(e) of the Statute of the Tribunal ("Statute") guaranteeing an accused the right to "obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him", *see* Appeal, paras 47-48.

[50] Appeal, para. 36.

transcripts tendered by the Prosecution.[51] He further avers that he resorted to Rule 92 *bis* of the Rules as a result of the Trial Chamber's decision to drastically cut the time for the presentation of his case, as the Prosecution did following the Trial Chamber's similar decision concerning time allocated for the Prosecution case.[52]

14. The Prosecution responds that the First Impugned Decision does not violate the principle of equality of arms.[53] The Prosecution submits that the Trial Chamber did not give the Prosecution an unfettered right to file statements under Rule 92 *bis* of the Rules and did in fact deny admission of some of these very statements.[54] The Prosecution also contends that both the Trial Chamber and the Appeals Chamber have denied the suggestion that every party is entitled to numerical equality.[55] The Prosecution further submits that the Trial Chamber did not change the standards for the presentation of evidence depending on the party involved, and that the Trial Chamber's application of the standards to the Rule 92 *bis* submissions generated different results because, *inter alia*, the Prosecution's submissions were substantially better organised.[56]

15. The Appeals Chamber has held that "the principle of equality of arms between the prosecutor and accused in a criminal trial goes to the heart of the fair trial guarantee".[57] However, this does not necessarily mean that an accused is "entitled to precisely the same amount of time or the same number of witnesses as the Prosecution", since the latter bears the burden of proving every element of the crimes charged beyond reasonable doubt.[58] As a result,

---

[51] Appeal, para. 37. Praljak also asserts that his references to the numbers "to record the concrete reality facing [him]" do not mean that he is demanding mathematical equivalency, *see* Reply, para. 12.
[52] Appeal, para. 38, also stating that the First Impugned Decision raises the issue of the time allocated to Praljak to present his case, as the principle of proportionality requires a Chamber to consider various means available for the parties to present evidence. Praljak also claims that the Trial Chamber has changed the rules for the presentation of evidence to penalise Praljak's heavy reliance on Rule 92 *bis* of the Rules, *see* Appeal, para. 8.
[53] Response, para. 25.
[54] Response, para. 22, referring to *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-PT, Decision on the Admission of Rule 92 *bis* Written Statements, 4 April 2006, p. 5; *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-T, Decision on Prosecution Motion for Admission of Evidence Pursuant to Rule 92 bis (Ljubuški Municipality), 30 August 2007 (confidential) (Original in French; The English translation was filed on 19 September 2007).
[55] Response, paras 4, 22-24, referring to, *inter alia*, *Orić* Appeal Decision, para. 7; *Prlić et al.* Appeal Decision of 1 July 2008, para. 39.
[56] Response, paras 4, 22, stating that the Prosecution's submissions were also limited to relevant subjects, respected the criteria for admission of evidence under Rule 92 *bis* and avoided duplications.
[57] *Orić* Appeal Decision, para. 7; *Tadić* Appeal Judgement, para. 44. In this context, the Appeals Chamber recalls that Article 21(4)(e) of the Statute "serves to ensure that the accused is placed in a position of procedural equality in respect of obtaining the attendance and examination of witnesses with that of the Prosecution", *see Prosecutor v. Zoran Kupreškić et al.*, Case No. IT-95-16-AR73.3, Decision on Appeal by Dragan Papić against Ruling to Proceed by Deposition, 15 July 1999 ("*Kupreškić et al.* Appeal Decision"), para. 24.
[58] *Orić* Appeal Decision, para. 7; *Prlić et al.* Appeal Decision of 1 July 2008, para. 39. *See* also *Kupreškić et al.* Appeal Decision, para. 24.

"a principle of basic proportionality" governs the time and the number of witnesses allocated between the Prosecution and an accused.[59] The Appeals Chamber also recalls that:

> [i]n a case with multiple accused, the issue of proportionality is affected not only by the burden of proof upon the Prosecution, but also by the circumstance that not all of the evidence presented by the Prosecution is directed to prove the responsibility of one individual Accused.[60]

16. Therefore, as the Trial Chamber correctly concluded,[61] the fact that the Trial Chamber admitted into evidence 101 statements and transcripts tendered by the Prosecution pursuant to Rule 92 *bis* of the Rules does not in and of itself authorise Praljak to have the same or similar number of statements or transcripts admitted under the same Rule. Also, the Trial Chamber did not set a limit on the number and length of Rule 92 *bis* statements and transcripts that the Prosecution could tender. However, it does not follow that the Trial Chamber is prevented from imposing a limit on the amount of Rule 92 *bis* evidence that an accused can tender. Nor does the fact that the Prosecution resorted to Rule 92 *bis* of the Rules as a result of the reduction of its court time by the Trial Chamber, in and of itself, provide Praljak with any justification for tendering the same amount of Rule 92 *bis* evidence on the ground that he was allocated less court time than requested.

17. Apart from the numerical comparison, Praljak has not provided any substantiation as to why the limits on the number and pages of his Rule 92 *bis* written statements or transcripts are disproportionate to the volume of the Prosecution's Rule 92 *bis* evidence. Thus, the Appeals Chamber finds that he has failed to show any discernible error in the Trial Chamber's exercise of its discretion in assessing the proper proportionality between the amount of Rule 92 *bis* evidence presented by the Prosecution and Praljak.

3. The Trial Chamber's alleged violation of the right of an accused in joint trials[62]

18. Praljak asserts that the First Impugned Decision violates Rule 82(A) of the Rules which accords to each accused in joint trials the same rights as if such accused were being tried separately, since the Trial Chamber based its conclusion on a comparison of the amount of

[59] *Orić* Appeal Decision, para. 7.
[60] *Prlić et al.* Appeal Decision of 1 July 2008, para. 39. *See* also *Prlić et al.* Appeal Decision of 1 July 2008, para. 35.
[61] First Impugned Decision, para. 34.
[62] This section encompasses Ground 4 of Praljak's Appeal, § IV, A.

Statements submitted by Praljak with that of the Rule 92 *bis* evidence tendered by other co-accused.[63]

19. The Prosecution responds that the First Impugned Decision does not violate Rule 82 of the Rules and that Praljak has failed to show that he has been unfairly prejudiced by being tried jointly with the other co-accused.[64] The Prosecution contends that it was appropriate for the Trial Chamber to make an assessment of overall circumstances of the case and determine what amount of tendered Rule 92 *bis* evidence would be reasonable and proportional in relation to that afforded to the other parties.[65] The Prosecution also points out that when allocating to Praljak less time than requested, the Trial Chamber took into consideration his intention to submit irrelevant material. The Prosecution therefore argues that any difference in the times granted to Praljak and the other co-accused cannot be used to argue now that Praljak should be allowed to present substantially more Rule 92 *bis* evidence than the other co-accused.[66]

20. Rule 82(A) of the Rules provides that "[i]n joint trials, each accused shall be accorded the same rights as if such accused were being tried separately". However, as the Appeals Chamber previously held, it "does not accept that Rule 82(A) bars *in abstracto* any difference of treatment between accused in a joint trial and those in separate trials".[67] While a Trial Chamber is obliged to ensure the rights of the accused under Article 21 of the Statute, it is not imperative that the protection of such rights be identical in a separate and in a joint trial.[68] Accordingly, Rule 82(A) of the Rules does not prohibit a Trial Chamber from taking into account a proper balance among all the co-accused in managing the trial proceedings of a multiple accused case, insofar as such a consideration does not result in prejudice to one or more co-accused.[69]

21. In the present case, the Trial Chamber took into consideration not only the amount of Rule 92 *bis* evidence tendered by other co-accused in relation to the court time allocated them,[70]

---

[63] Appeal, paras 42-44. Praljak avers that this way, the Trial Chamber erroneously made a *quantitative* analysis, instead of a *qualitative* one, *see* Appeal, para. 44.
[64] Response, para. 39.
[65] Response, para. 40.
[66] Response, para. 40.
[67] *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-AR73.1, Decision on Appeals Against Decision Admitting Material Related to Borovčanin's Questioning, 14 December 2007 ("*Popović et al.* Appeal Decision of 14 December 2007"), para. 45.
[68] *Popović et al.* Appeal Decision of 14 December 2007, para. 43.
[69] *See Popović et al.* Appeal Decision of 14 December 2007, para. 43, referring to *Prosecutor v. Ante Gotovina* and *Prosecutor v. Ivan Čermak and Mladen Markač*, Case Nos. IT-01-45-AR73.1, IT-03-73-AR73.1 and IT-03-73-AR73.2, Decision on Interlocutory Appeals against the Trial Chamber's Decision to Amend the Indictment and for Joinder, 25 October 2006, para. 17. *Cf. Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-AR73.12, Decision on Slobodan Praljak's Appeal of the Trial Chamber's 13 October 2008 Order Limiting the Translation of Defence Evidence, 5 December 2008 ("*Prlić et al.* Appeal Decision of 5 December 2008"), paras 18-20.
[70] First Impugned Decision, para. 35.

but also a number of deficiencies in Praljak's Rule 92 *bis* submissions as well as his usage of court time.[71] The Appeals Chamber also observes that these latter factors related to the specific circumstances surrounding Praljak's Rule 92 *bis* submissions, balanced against his fair trial rights, led to the Trial Chamber's decision to limit the number of statements or transcripts that he could tender.[72] Praljak has not shown that he was prejudiced by the Trial Chamber's consideration of the number of Rule 92 *bis* witness statements or transcripts tendered by other co-accused. Consequently, the Trial Chamber did not violate Rule 82(A) of the Rules.

4. The Trial Chamber's alleged violation of the right of an accused to present his case and alleged errors in its analysis of the Statements[73]

22. Praljak submits that the First Impugned Decision effectively disallowed "the presentation of much of his case".[74] He avers that this unprecedented bar imposed solely on him infringes Article 21(1) of the Statute stipulating equality of all persons before the Tribunal and Article 21(2) of the Statute guaranteeing the fair trial rights of the accused.[75] He also maintains that the limitation upon the time allocated for the presentation of his defence case favours the admission of the Statements.[76]

23. Praljak further contends that the Trial Chamber arbitrarily limited the number of Statements to 20. He maintains that although the Trial Chamber explained that it multiplied by two the number of the topics of the Statements listed by him in Annex 3 to his Motion, it failed to provide any justification for doing so.[77] Moreover, he submits that his Motions (i) provided "extensive links" between the Statements and the Indictment with a page-by-page index;[78] (ii) demonstrated that every Statement was cumulative and that many of the Statements related to pertinent background, his character or factors to be taken into account in determining the sentence;[79] and (iii) showed that there was nothing disfavouring admission of the Statements.[80] He asserts that the Trial Chamber may not engage in a "wholesale rejection" of every Statement on the basis of its disagreement with him as to the relevance of particular passages in a certain

[71] First Impugned Decision, paras 33-46.
[72] First Impugned Decision, paras 35 *et seq.*
[73] This section encompasses Grounds 3, 5 in part, 6 in part, 7, 8 in part and 9 in part of Praljak's Appeal, § IV, A.
[74] Appeal, para. 41; Reply, para. 26. *See* also Appeal, para. 40. As an example, Praljak states that the presentation of Statements related to sentencing was effectively barred, *see* Appeal, para. 40.
[75] Appeal, paras 45-46, 48.
[76] Appeal, para. 61.
[77] Appeal, paras 49-50, 52-53. *See* also Appeal, para. 70.
[78] Appeal, paras 61-62. *See* also Appeal, para. 63, stating that many of the Statements are "highly organized and structured".
[79] Appeal, para. 61.
[80] Appeal, para. 61.

Statement.[81] He further contends that the Trial Chamber should have admitted almost all Statements, requiring cross-examination when necessary.[82] In addition, he avers that the Trial Chamber's other generalised assessments of the Statements, such as the lack of formal requirements, would not justify the effective bar of all but 20 of the Statements.[83]

24. Praljak also avers that the Trial Chamber failed to provide any justification for the limit of 30 pages per Statement.[84] He maintains that he asked the Trial Chamber to admit certain Statements in their entirety, as they are relevant in their entirety.[85]

25. Furthermore, Praljak claims that he reasonably relied upon the guidance of the Trial Chamber encouraging him to make use of Rule 92 *bis* of the Rules,[86] and indicated on numerous occasions his intention to make extensive use of this Rule to present his case.[87] He also notes that, in accordance with the Trial Chamber's instruction, he tendered the Statements towards the end of his defence case.[88] He asserts that had the restrictions of the First Impugned Decision been announced in April 2008, that is, before the start of the defence case, or immediately after he indicated his intention to make extensive use of Rule 92 *bis*, he could have structured the presentation of his case differently, by calling as many witnesses as necessary under Rule 92 *ter* of the Rules or modifying the content of Praljak's own testimony.[89] Praljak therefore asserts that the timing and the content of the First Impugned Decision were capricious.[90]

26. The Prosecution responds that Praljak's claims are based on false assumptions that he has an absolute right to tender as much evidence as he wishes and that the Trial Chamber has no authority to control its proceedings and the manner in which evidence is presented.[91] The Prosecution submits that various provisions in the Rules, including Rules 73 *bis* and 73 *ter*, 89(D) and 90(F), empower a Trial Chamber to exercise control over the mode of presenting

---

[81] Appeal, paras 64-65, also stating that the Trial Chamber may not reject a Statement solely on the ground that it contains irrelevant passages. *See* also Appeal, para. 69. Praljak also maintains that the Trial Chamber's assessment that the Statements lack relevance contradicts its finding that they have too much bearing on the acts and conduct of the accused as alleged in the Indictment, *see* Appeal, para. 67.
[82] Appeal, para. 68.
[83] Appeal, para. 69.
[84] Appeal, para. 51.
[85] Appeal, paras 64-65.
[86] Appeal, paras 41, 54.
[87] Appeal, para. 55.
[88] Appeal, paras 4, 61.
[89] Appeal, paras 41, 55. Praljak also seems to present an analogous situation based on the assertion that the Prosecution, Prlić and Petković were given no limit on the time allocated; that each of them was given beforehand clear limits as to the number of Rule 92 *bis* statements they could tender; and that they planned their *viva voce* witnesses accordingly, *see* Reply, para. 18(a).
[90] Appeal, paras 54-55.
[91] Response, paras 26, 34.

evidence.[92] The Prosecution also argues that the jurisprudence of the Tribunal allows a Trial Chamber to consider the repetitive nature of evidence sought to be presented when setting the necessary time allotted to the defence to present its case pursuant to Rule 73 *ter* (E).[93]

27. The Prosecution also contends that the time allocated to Praljak was previously litigated and confirmed by the Appeals Chamber, and that he cannot now argue that the normal rules applicable to Rule 92 *bis* evidence should be relaxed because, *inter alia*, the Trial Chamber and the Appeals Chamber limited the time for his case.[94] The Prosecution submits that nothing prevented Praljak from determining how to utilise the allocated time and make use of Rule 92 *bis* as long as he did so properly in accordance with the Tribunal's jurisprudence and practice, and nothing gave him "license to flood the Tribunal with voluminous amounts of poorly organized, largely irrelevant and often redundant materials".[95] The Prosecution points out that, in determining the time allocated to Praljak, the Trial Chamber indicated that it would not receive evidence on a number of irrelevant topics, and that the Appeals Chamber approved this approach.[96]

28. The Prosecution further alleges that the First Impugned Decision does not constitute an absolute ban on Praljak's opportunity to present Rule 92 *bis* evidence.[97] The Prosecution asserts that the Trial Chamber instead afforded Praljak a further opportunity to make appropriate submissions and provided guidance in that regard. In the Prosecution's view, this way, the Trial Chamber refrained from intervening too much in Praljak's evidentiary decision-making, while ensuring that he would comply with relevant rules and avoid presentation of irrelevant or redundant evidence.[98] The Prosecution submits that the Trial Chamber thoroughly reviewed the voluminous material, considered all the circumstances, and made an informed decision as to what a reasonable number of statements would be, taking into account (i) the removal of the

[92] Response, paras 27-30. In particular, the Prosecution notes that a Trial Chamber may call upon the defence to shorten the estimated length of the examination-in-chief of some witnesses pursuant to Rule 73 *ter* (B) and set the number of defence witnesses pursuant to Rule 73 *ter* (C), Response, para. 29.
[93] Response, para. 30, referring to *Prlić et al.* Appeal Decision of 1 July 2008, para. 25.
[94] Response, para. 35.
[95] Response, para. 35. The Prosecution further submits that although Praljak might have spent considerable time and efforts on its Rule 92 *bis* submissions, such efforts do not show that the Trial Chamber's rulings were erroneous, *see* Response, para. 42. The Prosecution also argues that Praljak has not been prevented from making use of Rule 92 *bis* for the purpose of presenting sentencing evidence, provided he does so properly, *see* Response, para. 38.
[96] Response, paras 36-37, referring to *Prlić et al.* Trial Decision of 25 April 2008; *Prlić et al.* Appeal Decision of 1 July 2008, paras 46-47.
[97] Response, paras 34, 41.
[98] Response, paras 31, 41.

parts of statements related to acts or conduct of an accused; (ii) the removal of irrelevant statements; and (iii) the avoidance of duplication and redundancy.[99]

29. In reply, Praljak submits that the jurisprudence relied upon by the Prosecution concerns the scheduling of *viva voce* witnesses whose testimony takes court time, while Rule 92 *bis* evidence takes no court time.[100] He also contends that Rule 73 *ter* of the Rules does not grant the Trial Chamber unlimited discretion to refuse to consider statements properly listed pursuant to Rule 65 *ter* of the Rules and properly tendered pursuant to Rule 92 *bis* of the Rules.[101] He further maintains that the Trial Chamber's exercise of its discretion with respect to the administration of a trial pursuant to Rule 90(F) of the Rules is subject to the Trial Chamber's obligation to respect the rights of an accused.[102]

30. Although the Trial Chamber only made explicit references to Rules 54 and 92 *bis* of the Rules in the First Impugned Decision, the Appeals Chamber considers that the issues raised by Praljak on appeal concern a Trial Chamber's power over the administration of trials. The Appeals Chamber thus considers that the Trial Chamber's relevant determinations in the First Impugned Decision must be scrutinised in light of the provisions governing such power, including Article 21 of the Statute and Rules 73 *ter* and 90(F) of the Rules, as well as the jurisprudence thereon.

31. The Appeals Chamber recalls that "every court possesses the inherent power to control the proceedings *during* the course of the trial".[103] Rule 73 *ter* of the Rules confers upon Trial Chambers the authority to determine the time allocated to the presentation of the defence case[104] and the number of witnesses the defence may call.[105] The Appeals Chamber does not see any reason why the application of this Rule should be limited to a Trial Chamber's authority to determine the number of *viva voce* witnesses. The application of Rule 73 *ter* of the Rules extends to all categories of witnesses. However, a Trial Chamber's authority to limit the number of witnesses allocated to the defence is "always subject to the general requirement that the rights of the accused pursuant to Article 21 of the Statute [...] be respected".[106] Hence, a Trial

[99] Response, paras 32, 41.
[100] Reply, paras 14, 16-17, 19.
[101] Reply, para. 15.
[102] Reply, para. 21.
[103] *Prlić et al.* Appeal Decision of 11 May 2007, para. 30 (emphasis in the original); *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-AR73.4, Decision on Prosecution Appeal Concerning the Trial Chamber's Ruling Reducing Time for the Prosecution Case, 6 February 2007 ("*Prlić et al.* Appeal Decision of 6 February 2007"), para. 14 (emphasis in the original).
[104] Rule 73 *ter* (E).
[105] Rule 73 *ter* (C). *See* also *Orić* Appeal Decision, para. 8.
[106] *Orić* Appeal Decision, para. 8.

Chamber is required to ensure that the number of witnesses it sets for the presentation of the defence case is sufficient to allow the accused a fair opportunity to present his case.[107] The Appeals Chamber also recalls that it has previously held in this case that the Trial Chamber's duty to ensure the fairness and expeditiousness of proceedings will often entail a delicate balancing of interests, particularly in a trial of this scope and complexity.[108] Therefore, in the instant case, the Trial Chamber was required to consider, in light of the complexity and number of issues to be litigated, whether an appropriate balance was struck in reducing the number of Rule 92 *bis* witnesses that Praljak was allowed to present.

32. The Appeals Chamber observes that the same consideration applies to a Trial Chamber's power to control the volume and length of Rule 92 *bis* material that a party can tender. A Trial Chamber is not inherently prohibited from exerting such control while exercising its discretion over the administration of trials. This is in line with Rule 90(F) of the Rules which confers upon Trial Chambers the authority to control the mode of presenting evidence.[109] However, as stated by the Appeals Chamber, a Trial Chamber's discretion in this regard is subject to its "obligation to respect the rights of an accused"[110] and "must [...] be exercised with caution, as it is, in principle, for both parties to structure their cases themselves"[111]

33. As Praljak maintains, the Trial Chamber has strongly recommended that the parties use the mechanism under Rule 92 *bis* of the Rules.[112] It should also be noted that since the filing of his Rule 65 *ter* Submission, Praljak has indicated his intention to tender more than 150 Rule 92 *bis* written statements and transcripts.[113] However, based on the information provided in his Rule 65 *ter* Submission concerning all of his proposed *viva voce* and Rule 92 *bis*, *ter* and *quater* witnesses,[114] the Trial Chamber initially set the court time available for each accused without determining the number of witnesses that each accused could call. The Trial Chamber granted Praljak 55 hours,[115] which was approved by the Appeals Chamber.[116] Although the Trial

[107] *Orić* Appeal Decision, paras 8-9. *See* also *Prlić et al.* Appeal Decision of 1 July 2008, para. 16; *Prlić et al.* Appeal Decision of 11 May 2007, para. 29; *Prlić et al.* Appeal Decision of 6 February 2007, paras 14, 16.
[108] *Prlić et al.* Appeal Decision of 5 December 2008, para. 28; *Prlić et al.* Appeal Decision of 6 February 2007, para. 16.
[109] *Cf. Prlić et al.* Appeal Decision of 5 December 2008, para. 28, confirming the Trial Chamber's application of Rule 90(F) of the Rules to its limitation on resources for translation available to Praljak.
[110] *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, Judgement, 30 November 2006 ("*Galić* Appeal Judgement"), para. 18, referring to *Prosecutor v. Zdravko Tolimir, Radivoje Miletić & Milan Gvero*, Case No. IT-04-80-AR73.1, Decision on Radivoje Miletić's Interlocutory Appeal Against the Trial Chamber's Decision on Joinder of Accused, 27 January 2006, para. 29.
[111] *Galić* Appeal Judgement, para. 20.
[112] Annex A to the Appeal, pp. 1-2.
[113] Rule 65 *ter* Submission; Annex A to the Appeal, pp. 5-7.
[114] *Prlić et al.* Trial Decision of 25 April 2008, paras 29-30.
[115] *Prlić et al.* Trial Decision of 25 April 2008, para. 33.

Chamber did not set the number of witnesses that he could call, let alone the number of Rule 92 *bis* witnesses, it indicated its view regarding which subjects of the proposed evidence it considered repetitive or irrelevant.[117] It assessed that a number of proposed *viva voce* and Rule 92 *ter* witnesses were planned to testify about such subjects and granted him only about a half of the time initially requested.[118]

34. The Trial Chamber also instructed Praljak to tender Rule 92 *bis* written statements or transcripts at an advanced stage of the presentation of his case, considering that one of the factors justifying their admission is the need for the organisation of the trial,[119] and that it would be necessary to hear the *viva voce* testimony, including Praljak's own, in order to identify which Rule 92 *bis* written statements or transcripts would corroborate such *viva voce* testimony.[120]

35. The Trial Chamber's decision to grant Praljak 55 hours – approximately half of the time requested – was based on the information about all categories of witnesses, including Rule 92 *bis* witnesses. This assessment – later confirmed by the Appeals Chamber – meant that of all the evidence Praljak planned to present, the evidence which needed to be provided live could be presented within 55 hours. Therefore, in planning how to use these 55 hours, he should have duly taken into account, in light of the criteria provided in the relevant provisions of the Rules and clarified in the Tribunal's jurisprudence, which evidence was required to be presented live and which evidence could be presented without cross-examination under Rule 92 *bis* of the Rules. If Praljak places in his Rule 92 *bis* submissions – as he indeed did – a large amount of evidence which would obviously require cross-examination or is patently irrelevant and exceedingly redundant, while using up the court time for irrelevant or scarcely relevant evidence, it simply amounts to mismanagement of the presentation of evidence. Praljak cannot properly blame the Trial Chamber for not accommodating the needs arising from such mismanagement by its refusal to admit the otherwise inadmissible evidence in his Rule 92 *bis* submissions. Nor was the Trial Chamber obliged to assist him in avoiding such mismanagement by announcing the inadmissibility of this evidence prior to the live presentation of his case.

36. Furthermore, the fact that Praljak was not granted the entire requested time does not in and of itself allow him to tender as many Rule 92 *bis* written statements or transcripts as he wishes. Although the Trial Chamber did not explicitly announce its intention to set a limit on the

[116] *Prlić et al.* Appeal Decision of 1 July 2008, paras 39, 48.
[117] *Prlić et al.* Trial Decision of 25 April 2008, para. 31.
[118] *Prlić et al.* Trial Decision of 25 April 2008, para. 31-33.
[119] *Prlić et al.* Trial Decision of 6 February 2009, p. 3.
[120] T(F). 36718:19-36718:22.

number of Rule 92 *bis* written statements or transcripts at an early stage of the proceedings, it had shown its concern about their volume by asking Praljak whether they were all necessary[121] and had indicated its view as to which evidence would be of little or no relevance.[122] The Trial Chamber took the approach to wait until the completion of the presentation of his *viva voce* and Rule 92 *ter* witnesses, giving him an opportunity to, upon his own initiative, streamline his tendered Rule 92 *bis* evidence in light of the evidence already brought through live testimony. This way, the Trial Chamber attempted to avoid unnecessary intervention in Praljak's organisation of his case. Moreover, the timing of the Trial Chamber's determination concerning Praljak's tendered Rule 92 *bis* evidence would not have prevented the Trial Chamber from amending the court time allocated to Praljak had he so requested, upon a showing of good cause. The Appeals Chamber therefore considers that the Trial Chamber's approach did not cause any prejudice to Praljak.

37. The Trial Chamber's conclusion that it would allow Praljak to tender only up to 20 Rule 92 *bis* written statements or transcripts is based on its observation that the 155 Statements initially tendered by Praljak contain (i) some duplications;[123] (ii) a considerable amount of repetitive and irrelevant portions;[124] and (iii) many portions relating to his acts and conduct as charged in the Indictment, which are inadmissible pursuant to Rule 92 *bis* of the Rules.[125] In particular, the Trial Chamber considered that out of 14 subjects in the Statements listed by Praljak, four subjects in their entirety and one subject in part were inadmissible since they had bearings on his acts and conduct as charged in the Indictment.[126] It then set the limit of 20 written statements or transcripts so that Praljak could select at least two statements or transcripts per remaining subject.[127] In doing so, the Trial Chamber left open the possibility for Praljak to tender Rule 92 *bis* evidence concerning all the remaining subjects, despite its observation that a

[121] T(F.) 27339:25-27.
[122] *Prlić et al.* Trial Decision of 25 April 2008, para. 31.
[123] First Impugned Decision, para. 39.
[124] First Impugned Decision, para. 35.
[125] First Impugned Decision, paras 41-46.
[126] First Impugned Decision, para. 48 and fn. 84, referring to Annex 3 to the Motion, Subject 2 "Praljak's efforts to calm down the situation and to build a joint defence"; Subject 4 "Evidence of Accused's Consistent Pattern of Conduct (Rule 93), character and mens rea"; Paragraph 1 of Subject 6 "Praljak, in the capacity of sector commander, ordered physical protection of the Old Bridge from JNA shelling"; Subject 13 "Praljak pushed for examination and publicity regarding detention camps"; and Subject 14 "Praljak at Bokševica". Although para. 48 of the First Impugned Decision refers back to para. 40 of the same decision, the Appeals Chamber understands this to be an inadvertent mistake: it is para. 42 which mentions these subjects as dealing with both the acts and conduct of the accused as charged in the Indictment and character evidence or other evidence that could be admissible pursuant to Rule 92 *bis* of the Rules. As noted by the Trial Chamber, Praljak listed 68 written statements and transcripts under Subject 4 "Evidence of Accused's Consistent Pattern of Conduct (Rule 93)", *see* First Impugned Decision, fn. 63; Annex 3 to the Motion, Subject 4. The Trial Chamber further noted that the contents of the statements and transcripts listed under Subject 4 (Rule 93 evidence) overlapped with the evidence provided by two Rule 92 *quater* witnesses and two *viva voce* witnesses, *see* First Impugned Decision, para. 48 and fn. 85.

number of them were of a redundant nature or devoid of sufficient relevance to the charges of the Indictment.[128] It should also be noted that by sending back to Praljak the Statements lacking formal requirements rather than immediately rejecting them,[129] the Trial Chamber gave him an opportunity to rectify such deficiencies and tender them again, had he considered that they should be included in his reduced Rule 92 *bis* submissions. Moreover, when written statements or transcripts containing an accused's acts and conduct as charged in an indictment are tendered pursuant to Rule 92 *bis* of the Rules, Trial Chambers are not obliged to admit them pursuant to Rule 92 *ter* of the Rules requiring cross-examination.[130] Taking this course of action is within a Trial Chamber's discretion as long as the rights of the accused are protected. Therefore, the Appeals Chamber does not find that the Trial Chamber's determination to limit the maximum number of Rule 92 *bis* written statements and transcripts amounts to a denial of Praljak's right to present evidence. This determination was within the Trial Chamber's discretion, based on its knowledge of the case as well as its detailed analysis of the Statements, and strikes an appropriate balance of various interests, including Praljak's right to a fair trial.[131]

38. With respect to the length of the proposed Rule 92 *bis* evidence, the Appeals Chamber considers the Trial Chamber's reasons for imposing the 30-page limit. The Trial Chamber adopted this method as a result of Praljak's failure to diligently follow its recommendations that he submit for possible admission only a restricted number of pages with clear indications of relevant passages.[132] The Trial Chamber has not provided any explanation as to why it chose 30

---

[127] First Impugned Decision, para. 48.

[128] First Impugned Decision, paras 35, 47-48. As examples of subjects which have little or no relevance, the Trial Chamber refers to those concerning humanitarian aid supplied to Muslims; cooperation between Croats and Muslims in 1991 and 1992; Serbian aggression; and the Mujahidin, *see* First Impugned Decision, para. 35. As Praljak has not substantiated his claim that the Trial Chamber's assessment of the relevance of the Statements, including those subjects, was erroneous, the Appeals Chamber defers to the Trial Chamber's knowledge of the case in this regard, *see*, in particular, Appeal, paras 61, 66.

[129] First Impugned Decision, paras 36-37, 47.

[130] Rule 92 *bis* of the Rules provides in relevant part:

> (A) A Trial Chamber *may* dispense with the attendance of a witness in person, and instead admit, in whole or in part, the evidence of a witness in the form of a written statement or a transcript of evidence, which was given by a witness in proceedings before the Tribunal, in lieu of oral testimony which goes to proof of a matter other than the acts and conduct of the accused as charged in the indictment [...]
>
> (C) The Trial Chamber shall decide, after hearing the parties, whether to require the witness to appear for cross-examination; *if it does so decide*, the provisions of Rule 92 *ter* shall apply (emphasis added).

Rule 92 *ter* of the Rules provides, in relevant part:

> (A) A Trial Chamber *may* admit, in whole or in part, the evidence of a witness in the form of a written statement or transcript of evidence given by a witness in proceedings before the Tribunal, under the following conditions:
>
> (i) the witness is present in court;
>
> (ii) the witness is available for cross-examination and any questioning by the Judges [...] (emphasis added).

[131] It follows that the Trial Chamber did not violate Article 21(1) of the Statute stipulating equality of all persons before the Tribunal. This provision does not mean that the treatment of every accused ought to be identical. The accused can be treated differently in light of their respective circumstances insofar as their rights are guaranteed.

[132] First Impugned Decision, para. 38.

pages as the page limit and why this limit must uniformly apply to every document in his Rule 92 *bis* submissions, even though the formats of the documents and the fonts of letters therein considerably vary.[133] Thus, the Appeals Chamber is not satisfied that the Trial Chamber reasonably exercised its discretion in imposing this page limit. The Trial Chamber committed a discernible error in setting this limit without sufficient justification, in particular by not balancing Praljak's rights with other interests. In addition, the Appeals Chamber observes that the First Impugned Decision is unclear as to whether this page limit is imposed only on written statements, or whether it also applies to transcripts.[134] Moreover, in cases where B/C/S originals are accompanied by their English translations, it is not apparent to which version, B/C/S or English, the page limit applies.[135] The Trial Chamber's order in this regard is not sufficiently clear for Praljak to be able to properly prepare his Rule 92 *bis* submissions.

5. The Trial Chamber's alleged error in punishing Praljak instead of his counsel[136]

39. Finally, Praljak submits that even if the Trial Chamber's refusal to issue a decision on the substance of the Motions had any merit, it should not result in sanctioning him in violation of his rights, since it is his counsel's actions that should be punished.[137]

40. The Prosecution responds that the issues raised by the Trial Chamber cannot be avoided by counsel saying that they are at fault, since a represented accused acts through counsel and there is no evidence that Praljak's counsel acted contrary to Praljak's instruction.[138]

41. The Appeals Chamber considers that counsel representing an accused acts on behalf of the accused. Unless it is shown that Praljak's counsel acted beyond their mandate or in contravention of Praljak's instructions, submissions made by his counsel are attributable to Praljak.[139] Given that such a showing has not been made, Praljak's argument has no merit.

---

[133] It should be noted that some documents are considerably longer than 30 pages (*e.g.*, 3D03715 (192 pages in English only), 3D03726 (103 pages in B/C/S and 101 pages in English)), while others are only a few pages longer than 30 pages (*e.g.*, 3D03245 (32 pages in B/C/S and 23 pages in English), 3D3246 (33 pages in B/C/S and 31 pages in English), 3D3691 (31 pages in B/C/S and 32 pages in English)).

[134] The Trial Chamber noted "that some of the *written statements* exceed[ed] a reasonable number of pages without any indication of the relevant passages", while citing in footnotes to this sentence a few *transcripts*. In particular, one of them is a transcript of another case at the Tribunal, *see* First Impugned Decision, para. 38 (footnotes omitted and emphasis added). The Trial Chamber then stated that it would "only consider those *statements* whose length is reasonable and, in any case, the Chamber [would] not accept *written statements* exceeding 30 pages (emphasis added)", *see* First Impugned Decision, para. 38 (emphasis added).

[135] *See* First Impugned Decision, para. 38 and disposition.

[136] This section encompasses Ground 10 of Praljak's Appeal, § IV, A.

[137] Appeal, para. 71.

[138] Response, para. 45.

[139] In this context, the Appeals Chamber agrees with the finding of the ICTR Appeals Chamber that only in "exceptional cases [... do] the interests of justice require that an appellant not be held responsible for the failures of

B. Second Impugned Decision

1. The Trial Chamber's alleged error in forcing Praljak to brand Statements as comparatively marginal[140]

42. The Second Impugned Decision denied Praljak's request for a stay of the time-limit set by the First Impugned Decision for his submission of a maximum of 20 written statements or transcripts. Praljak submits that the Second Impugned Decision effectively forced him to choose a small number of the Statements and brand the vast majority of them as "comparatively marginal" before the Trial Chamber ruled upon his First Motion for Certification to Appeal, causing prejudice to his request for certification and his subsequent appeal.[141]

43. The Prosecution responds that the Trial Chamber did not ask Praljak to determine what statements were irrelevant, but set out which topics were relevant and advised him that he could select two witnesses on each relevant topic.[142]

44. The Appeals Chamber observes that while the Trial Chamber indicated which subjects it considered irrelevant or scarcely relevant,[143] it did not force Praljak to select only statements or transcripts it regarded as relevant. Instead, it merely set a limit on the number of statements or transcripts, allowing him to select and tender even those which it considered irrelevant or hardly relevant, if he so wished.[144] Therefore, the Second Impugned Decision did not coerce Praljak into branding the majority of the Statements as "comparatively marginal" before the Trial Chamber ruled on the First Motion for Certification to Appeal. Praljak mischaracterises the Trial Chamber's orders. Furthermore, the fact that an appellant has complied with a Trial Chamber's decision does not militate against granting certification to appeal that decision[145] or granting an appeal from that decision.[146] Therefore, Praljak's submission of a maximum of 20 written statements or transcripts would not have caused any prejudice to his request for certification and his subsequent appeal.

---

counsel", *Ferdinand Nahimana et al. v. The Prosecutor*, Case No. ICTR-99-52-A, Decision on Appellant Jean-Bosco Barayagwiza's Motions for Leave to Present Additional Evidence Pursuant to Rule 115 of the Rules of Procedure and Evidence, 8 December 2006, para. 31. Praljak has not shown any such exceptional circumstances in the present case.

[140] This section encompasses Ground 1 of Praljak's Appeal, § IV, B.

[141] Appeal, paras 72-76. *See* also Appeal, paras 77-79, stating that as a result, Article 21(2) and 21(4)(e) of the Statute and Rule 73(A) of the Rules were violated.

[142] Response, paras 48-49.

[143] First Impugned Decision, para. 35.

[144] First Impugned Decision, paras 47-48. *See supra,* para. 37.

[145] *See* Rule 73(B) of the Rules.

[146] *See supra*, para. 8 (Section II, Standard of Review).

2. The Trial Chamber's alleged failure to consider Praljak's arguments and the lack of finality of the matter in question[147]

45. Praljak contends that the Trial Chamber erred in concluding that he had "not brought forth any argument in support of [his] request to stay the time limit other than the need to wait for a ruling on the issue of the certification to appeal or, possibly of the appeal", since each of the grounds listed in the First Motion for Certification to Appeal supports his request.[148] He argues that if any of the errors he alleges in the First Impugned Decision are found to have been committed, a stay should have been granted.[149] He also maintains that another Trial Chamber or any court in national jurisdictions would have granted a stay solely on the ground that the interlocutory appeal process was not completed, as decisions that are final on appeal and those that remain in dispute need to be distinguished.[150]

46. The Prosecution responds that it does not necessarily follow that appealing the First Impugned Decision necessitates a stay while the appeal is pending.[151] The Prosecution maintains that a stay of proceedings is an exceptional measure, and that Praljak has failed to provide any cogent reason why the time limit must be stayed or why he could not have tendered 20 written statements or transcripts while the Appeal is being determined, thereby allowing the trial to move forward.[152] The Prosecution asserts that Praljak would not be prejudiced, since he can have an opportunity to file additional written statements or transcripts if the Appeals Chamber decides that he should be allowed to do so.[153]

47. An order of a Trial Chamber may be stayed if the objective of an appeal against the order would be significantly impaired should the order be already given effect.[154] In determining whether to stay the enforcement of an order pending an appeal, a Chamber must balance the potential of harm to the accused by enforcement of the order with the potential of harm to a

[147] This section encompasses Grounds 2 and 3 of Praljak's Appeal, § IV, B.
[148] Appeal, paras 80, referring to Second Impugned Decision, p. 3.
[149] Appeal, paras 81, 83. Praljak also contends that the request for certification to appeal and the request to stay the time limit form "an undivided whole", *see* Appeal, para. 82.
[150] Appeal, paras 84-85. Praljak further avers that the Second Impugned Decision fails to establish why the apparent urgency outweighs the prejudice entailed, *see* Appeal, para. 87.
[151] Response, para. 50.
[152] Response, paras 47, 51-52.
[153] Response, paras 47, 52.
[154] *Prosecutor v. Momčilo Perišić*, Case No. IT-04-81-AR108*bis*.4, Order Suspending the Execution of the Trial Chamber's Decision of 15 February 2010 Pursuant to Rule 108*bis* of the Rules, 23 March 2010, p. 1; *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-AR65.1, Order on the Prosecution's Motion for a Stay, 10 August 2004, p. 3.

legally protected interest by suspension of the order.[155] Praljak's submission of a maximum of 20 written statements or transcripts in accordance with the order in the Second Impugned Decision would have enabled the Trial Chamber to examine their admissibility while waiting for the outcome of his appeal. Should the Appeals Chamber overturn the Trial Chamber's decisions, he would be allowed to tender additional written statements or transcripts, as appropriate, which the Trial Chamber would further process. Therefore, the objective of Praljak's appeal would not have been significantly impaired had the order in the Second Impugned Decision been enforced. The implementation of the order would not harm Praljak's interests, while contributing to the expeditiousness of the proceedings. Thus, the Trial Chamber did not err in finding that Praljak had not shown any good cause for staying its order pending the appeal.

3. The Trial Chamber's alleged waste of time and resources[156]

48. Praljak contends that the Second Impugned Decision resulted in wasting time and resources because if his Appeal is granted, the efforts he would have taken pursuant to the Second Impugned Decision would have been in vain.[157] He also asserts that the Second Impugned Decision leads to no gains in judicial economy.[158]

49. The Prosecution responds that Praljak's argument is "utterly without foundation", since, had he filed 20 written statements or transcripts, the Trial Chamber could have already started processing them, and matters could have moved forward.[159]

50. The Appeals Chamber agrees with the Prosecution. As stated above, had Praljak tendered a maximum of 20 written statements or transcripts, the Trial Chamber could have started to examine their admissibility pending his appeal. This would have contributed to expediting the proceedings rather than wasting time and resources, as it would have resulted in reducing the number of written statements or transcripts that the Trial Chamber would have to examine should the Appeals Chamber overturn the Trial Chamber's decisions.

---

[155] *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-R77.2-A, Decision on Urgent Motions to Remove or Redact Documents Pertaining to Protected Witnesses, 16 December 2009 (confidential), p. 4.
[156] This section encompasses Ground 4 of Praljak's Appeal, § IV, B.
[157] Appeal, para. 88.
[158] Appeal, para. 89.
[159] Response, para. 53.

4. Alleged insufficiency of the time granted by the Trial Chamber[160]

51. Praljak argues that the Second Impugned Decision fails to provide any "positive justification" for imposing the 22 March 2010 deadline for the submission of 20 written statements or transcripts.[161] Furthermore, he contends that "three business days" granted by the Second Impugned Decision were insufficient for him to make "extremely difficult decisions" as to which Statement could be abandoned.[162]

52. The Prosecution responds that the deadline of three weeks to file a maximum of 20 written statements or transcripts was not unreasonable, given that the Prosecution filed its pre-trial brief more than four years ago; that the trial has been ongoing since 26 April 2006; that Praljak filed his Rule 65 *ter* witness lists and summaries on 31 March 2008; and that Praljak's defence team has been preparing his case for some months prior to its commencement on 4 May 2009.[163]

53. The Appeals Chamber observes that Praljak was given three weeks, not three days, from the date of the filing of the English translations of the First Impugned Decision and Judge Antonetti's First Dissenting Opinion to select a maximum of 20 written statements or transcripts.[164] From the moment Praljak received the English translations, he and his counsel were expected to coordinate their work to comply with the order in the First Impugned Decision regardless of the fact that he filed a request for stay of the time-limit and certification to appeal. Furthermore, the Appeals Chamber does not find the deadline of three weeks unreasonable given that Praljak is familiar with the Statements, and has worked on them at least since he filed his Rule 65 *ter* Submission on 31 March 2008, *i.e.* more than two years ago.

IV. DISPOSITION

54. For the foregoing reasons, the Appeals Chamber

GRANTS the Appeal **IN PART** with respect to the page limit imposed by the Trial Chamber on a maximum of 20 documents meeting the criteria of admissibility under Rule 92 *bis* of the Rules;

[160] This section encompasses Grounds 5 and 6 of Praljak's Appeal, § IV, B.
[161] Appeal, paras 90-91.
[162] Appeal, paras 92-93.
[163] Response, para. 55.
[164] Second Impugned Decision, pp. 3-4.

REMANDS the First and Second Impugned Decisions to the Trial Chamber for reconsideration and clarification of its determination on the page limit in light of the errors identified by the Appeals Chamber;[165] and

DISMISSES the Appeal in all other respects.

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

Dated this first day of July 2010,
At The Hague
The Netherlands

Judge Mehmet Güney
Presiding

[Seal of the Tribunal]

[165] *Supra*, para. 38.