



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: 27 April 2009
Original: ENGLISH
French

IN TRIAL CHAMBER III

Before: Judge Jean-Claude Antonetti, presiding
Judge Árpád Prandler
Judge Stefan Trechsel
Reserve Judge Antoine Kesia-Mbe Mindua

Acting Registrar: Mr John Hocking

Decision of: 27 April 2009

THE PROSECUTOR

v.

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

PUBLIC

**DECISION ON PRALJAK DEFENCE NOTICE CONCERNING OPENING
STATEMENTS UNDER RULES 84 AND 84 *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

TRIAL CHAMBER III (“Chamber”) of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (“Tribunal”),

SEIZED of “Slobodan Praljak’s Notice regarding the Upcoming Statements pursuant to Rules 84 and 84 *bis*”, filed by Counsel for the Accused Slobodan Praljak (“Praljak Defence”) on 26 March 2009, in which the Praljak Defence informs the Chamber of its intention to make an opening statement in accordance with Rule 84 of the Rules of Procedure and Evidence (“Rules”), as well as a sworn statement in accordance with Rule 84 *bis* of the Rules, and informs the Chamber that these two opening statements will be made on 6 May 2009, and last for three hours in total (“Notice of 26 March 2009”),

NOTING the Accused Praljak’s opening statement made in accordance with Rule 84 *bis* of the Rules at the hearing of 27 April 2006¹ (“Praljak Statement of 27 April 2006”),

NOTING the Chamber’s oral decision dated 28 January 2008, whereby it ruled that during the presentation of his case the Accused Praljak could make an additional statement pursuant to Rule 84 *bis* of the Rules, as a supplement to the Praljak Statement of 27 April 2006² (“Decision of 28 January 2008”),

NOTING that the Chamber recalled the Decision of 28 January 2008 in the framework of the Decision rendered pursuant to Rule 98 *bis* of the Rules on 20 February 2008,³

NOTING “Slobodan Praljak’s Notice Regarding Making a Statement under Rule 84 *bis*”, filed by the Praljak Defence on 21 March 2008, in which the Praljak Defence confirmed its intention to make an opening statement under Rule 84 and an additional

¹ Transcript in French (“T(F)”) of 27 April 2006, pp. 911-991.

² T(F) of 28 January 2008, pp. 26872-26873. In the framework of the requests for acquittal under Rule 98 *bis*, the Praljak Defence requested that the Accused Praljak be given authorization to take the floor personally. The Chamber refused to grant this request, recalling that the procedure provided for under Rule 98 *bis*, does not permit the Accused to make personal statements. On that occasion, the Chamber nonetheless informed the Accused Praljak that he could make a statement under Rule 84 *bis* prior to the commencement of his defence case.

³ T(F) of 20 February 2008, p. 27202.

statement under Rule 84 *bis* of the Rules for a total period of 3 hours (“Notice of 21 March 2008”),

NOTING the objections by the Office of the Prosecutor (“Prosecution”) to the Notice of 21 March 2008, raised at the hearing of 21 April 2008, in which the Prosecution objected to the Accused Praljak making a second opening statement,⁴

NOTING the intervention of the Presiding Judge in response to the objections raised by the Prosecution on 21 April 2008, in which he informed the Prosecution that the Chamber had already ruled on this issue by its Decision of 28 January 2008,⁵

NOTING the “Prosecution Response to Slobodan Praljak Notice Regarding the Upcoming Statements pursuant to Rules 84 and 84 *bis*”, filed by the Prosecution on 3 April 2009, in which the Prosecution requests that the Chamber refuse to grant the Accused Praljak leave to make a second opening statement under Rule 84 *bis* of the Rules, and consider any sworn statement by the Accused Praljak under Rules 85 (C) and 90 (A), and not Rule 84 *bis* of the Rules (“Response”),

NOTING the discussions at the hearing of 7 April 2009 by the Praljak Defence and the Prosecution following the filing of the Response,⁶

CONSIDERING that in the Notice of 26 March 2009, the Praljak Defence informs the Chamber that it wishes to make an opening statement within the meaning of Rule 84 *bis* of the Rules, and explains that the wording of Rule 84 *bis* of the Rules does not forbid the making of a solemn declaration by an accused during the presentation of his opening statement,⁷

CONSIDERING that in the Response, the Prosecution objects first to the Accused Praljak making a second opening statement pursuant to Rule 84 *bis* of the Rules,⁸

CONSIDERING that in support of that objection, the Prosecution argues in particular that (1) the wording of Rule 84 *bis* makes no provision for the making of

⁴ T(F) of 21 April 2008, p. 27427.

⁵ *Ibidem*.

⁶ T(F) of 7 April 2009, pp. 38818-38821.

⁷ Notice of 26 March 2009, paras. 2 and 3.

⁸ Response, paras. 2, 5-11 and 16.

several statements by an accused, and refers to the word “statement” in the singular;⁹ (2) Rule 84 *bis* does not confer discretion on the Chamber to authorize the parties to make several opening statements,¹⁰ and (3) by decision of 12 February 2009, the Chamber already rejected an attempt by Counsel for the Accused Prlić to submit a supplement to the Accused Prlić’s statement under Rule 84 *bis* of the Rules,¹¹

CONSIDERING that the Prosecution further requests that the Chamber order that any sworn statement by Accused Praljak be made solely under Rules 85 (C) and 90 (A), and that any such statement be subject to a cross-examination by all parties and Judges’ questions (“Request”),¹²

CONSIDERING that in support of its position, the Prosecution submits in particular that (1) Rule 84 *bis* of the Rules provides only for the case in which an Accused does not make a solemn declaration;¹³ (2) according to the Rules, only two avenues are available to an Accused who wishes to make a statement, the first being an unsworn statement under Rule 84 *bis*, and the second being sworn testimony, subject to cross-examination and the Judges’ questions, under Rules 85 (C) and 90 (A) of the Rules;¹⁴ and (3) as a result, to permit an accused to make a sworn statement without subjecting it to cross-examination by the parties would be unfair and in complete violation of the intent of Rule 84 *bis* of the Rules,¹⁵

CONSIDERING that the Chamber first wishes to raise a matter with respect to the admissibility of the Response, since it does not take the appropriate form,

CONSIDERING in fact that by the Notice of 26 March 2009, the Praljak Defence informs the Chamber of the date and duration of the two opening statements that it intends to make, that is the statement under Rule 84 and that under Rule 84 *bis*, as well as of the Accused Praljak’s desire to make his opening statement under oath,

CONSIDERING that the Notice of 26 March 2009 follows the authorization given by the Chamber, in its Decision of 28 January 2008, to the Accused Praljak to make an opening statement, and is therefore of an informative nature,

⁹ Response, paras. 5 and 6.

¹⁰ Response, para. 7.

¹¹ Response, paras. 8-10.

¹² Response, paras. 15-16.

¹³ Response, para. 12.

CONSIDERING that, as a result, the Notice of 26 March 2009 did not call for a response from the Prosecution,

CONSIDERING that, consequently, the Prosecution should have submitted a motion in support of its claims and its Request as formulated in the Response,

CONSIDERING nevertheless that, in the interests of judicial economy, and in light of the fact that the Praljak Defence was heard at the hearing of 7 April 2009 subsequent to the filing of the Response, the Chamber decides to rule on the issues raised by the Prosecution in the Response by rendering the present decision,

CONSIDERING that with regard to the first claim of the Prosecution on the Accused Praljak making a second opening statement, it is clear from the procedural background set out above that, by Decision of 28 January 2009, the Chamber has already authorized the Accused Praljak to make an additional opening statement under Rule 84 *bis* of the Rules, as a supplement to the Praljak Statement of 27 April 2006.

CONSIDERING that by so authorizing the Accused Praljak to make a second opening statement, the Chamber used the discretionary power conferred upon it by Rule 84 *bis* of the Rules,

CONSIDERING furthermore that, incidentally, the Appeals Chamber recently affirmed the Chamber's position in the Decision of 28 January 2008 by recognizing the possibility that, in the exercise of its discretionary power, a Trial Chamber may authorize an Accused to make a second opening statement under Rule 84 *bis* of the Rules,¹⁶

¹⁴ Response, para. 12.

¹⁵ Response, para. 13.

¹⁶ In the context of an appeal lodged by the Prlić Defence against the decision on the supplement to the Accused Prlić's 84 *bis* statement, rendered by the Chamber on 12 February 2009; the Appeals Chamber incidentally affirmed the Chamber's position in its Decision of 28 January 2008; *see Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-AR73.15, Decision on Jadranko Prlić's Interlocutory Appeal Against the Decision Regarding Supplement to the Accused Prlić's Rule 84 *bis* Statement, 20 April 2009 ("Prlić Appeal Decision"), para. 16.

CONSIDERING furthermore that the Chamber recalled the content of the Decision of 28 January 2009 on two occasions, in particular to the Prosecution on 20 February 2008 and 21 April 2008,¹⁷

CONSIDERING as a result that the Decision of 28 January 2009 is *res judicata*, and accordingly the Prosecution's first claim must be rejected,

CONSIDERING that with regard to the Prosecution's second claim on the sworn nature of the Accused Praljak's forthcoming opening statement, the Prosecution argues that Rule 84 *bis* of the Rules provides only for the case in which an accused does not make a solemn declaration,¹⁸ that it would be unfair to permit an accused to make a sworn statement without subjecting that statement to cross-examination,¹⁹ and that should an accused take the oath before making an opening statement, such statement must be subjected to cross-examination and considered as testimony within the meaning of Rules 85 (C) and 90 (A) of the Rules,²⁰

CONSIDERING that the arguments raised by the Prosecution require that the relevant provisions in this regard be recalled,

CONSIDERING that Rule 84 of the Rules entitled "Opening Statements" provides as follows:

"Before presentation of evidence by the Prosecutor, each party may make an opening statement. The defence may, however, elect to make its statement after the conclusion of the Prosecutor's presentation of evidence and before the presentation of evidence for the defence."

CONSIDERING that Rule 84 *bis* of the Rules entitled "Statements of the Accused" stipulates that:

"(A) After the opening statements of the parties or, if the defence elects to defer its opening statement pursuant to Rule 84, after the opening statement of the Prosecutor, if any, the accused may, if he or she so wishes, and the Trial Chamber so decides, make a statement under the control of the Trial Chamber. The accused shall not be compelled to make a solemn declaration and shall not be examined about the content of the statement.

(B) The Trial Chamber shall decide on the probative value, if any, of the statement."

¹⁷ T(F) of 20 February 2008, p. 27202 and T(F) of 21 April 2008, p. 27427.

¹⁸ Response, para. 12.

¹⁹ Response, para. 13.

²⁰ Response, para. 15.

CONSIDERING that paragraph (C) of Rule 85 of the Rules, related to the presentation of evidence, indicates that “if the accused so desires, the accused may appear as a witness in his or her own defence”,

CONSIDERING that paragraph (A) of Rule 90 of the Rules entitled “Testimony of Witnesses” provides that “every witness shall, before giving evidence, make the following solemn declaration: "I solemnly declare that I will speak the truth, the whole truth and nothing but the truth"”,

CONSIDERING that as a result, if the accused wishes to be heard during the course of the trial, two procedural avenues are available to him for this purpose,

CONSIDERING that, on the one hand, he may decide to be heard as a witness in his own defence under Rule 85 (C) of the Rules,

CONSIDERING that, in this case, he shall be subjected to the restrictions and obligations that are incumbent upon a witness, namely (1) the accused must take an oath before giving evidence²¹ and may be prosecuted for failing to tell the truth,²² (2) he will be examined by the party calling him, (3) he will be cross-examined by the other parties, and (4) the Judges of a Trial Chamber may ask him questions,²³

CONSIDERING that, on the other hand, the accused, if he so wishes, may make an opening statement in his defence in accordance with Rule 84 *bis* of the Rules,

CONSIDERING that, in this case, the Accused must receive the prior authorization of the Trial Chamber, and such a statement shall be made under the control of the Trial Chamber,

CONSIDERING that, in contrast to testimony, the Accused is not obligated to take an oath prior to making his opening statement,

CONSIDERING that contrary to the Prosecution’s assertion, the wording of Rule 84 *bis* of the Rules does not however rule out the possibility that the Accused may make a solemn declaration before making his opening statement,

²¹ Rule 90 (A) of the Rules.

²² Rule 91 of the Rules.

²³ Rule 85 (B) of the Rules.

CONSIDERING that the relevant part of this Rule in fact provides that “the accused shall not be compelled to make a solemn declaration [...],”

CONSIDERING that according to a literal interpretation of this text, the Trial Chamber may not compel the accused to take an oath before making his opening statement, and that the only logical conclusion this interpretation leads to is that the Trial Chamber may authorize the Accused to take an oath before making his opening statement if he so wishes,²⁴

CONSIDERING further that, contrary to the testimony of the accused, the accused’s statement within the meaning of Rule 84 *bis* of the Rules does not give rise to a cross-examination or to questions from the Judges of the Trial Chamber,

CONSIDERING that this finding is quite clear from the very wording of Rule 84 *bis* of the Rules which provides that “[the accused] shall not be examined about the content of the statement”,²⁵

CONSIDERING that the absence of cross-examination and questions from the Judges can be explained by the desire, initially manifested with the adoption of this Rule in July 1999, to allow for a more active participation by the accused in the judicial debate, and thereby lay the foundation for approximating the procedure for statements by the accused, not provided for in the Rules at that time, to the approach established in most civil law systems,²⁶ on the one hand, while completely preserving the accused’s right to remain silent, on the other,

²⁴ See in this regard *The Prosecutor v. Blagojević and Jokić*, Case No. IT-02-60-T (“*Blagojević case*”), transcript in English (“T(E)”) of 17 June 2004, pp. 10922-10925 and Judgement, 17 January 2005, para. 907. The Chamber notes conversely that in the cases of *The Prosecutor v. Martić* and *The Prosecutor v. Stakić*, the Trial Chambers seized ruled out the possibility of the accused making an opening statement under oath. In these two cases, the accused in question did not seek to have recourse to this possibility: see *The Prosecutor v. Martić*, Case No. IT-95-11-T (“*Martić case*”), T(E) 13 December 2005, p. 296; *The Prosecutor v. Stakić*, Case No. IT-97-24-PT (“*Stakić case*”), T(F) of 10 April 2002, p. 1562.

²⁵ See in this regard the *Stakić case*, T(F) of 10 April 2002, pp. 1562 and 1563; *Blagojević case*, Decision on Vidoje Blagojević’s Oral Request, 30 July 2004, p. 9. *The Prosecutor v. Hadžihasanović and Kubura*, Case No. IT-01-47-T, (“*Hadžihasanović case*”), T(F) of 18 October 2004, p. 10245.

²⁶ J.R.W.D Jones and S. Powles, *International Criminal Practice: the International Criminal Tribunal for the former Yugoslavia, the International Criminal Tribunal for Rwanda, the International Criminal Court, the Special Court for Sierra Leone, the East Timor Special Panel for Serious Crimes, War Crimes Prosecution in Kosovo*, Transnational Publishers, Inc., New York, 2003, p. 717. See also in this regard: *Prlić Appeal Decision*, para. 29.

CONSIDERING that while the wording of Rule 84 *bis* of the Rules does not rule out the possibility that the Accused may make a sworn statement and provides that the Accused shall not be examined on his statement, the question arises nonetheless as to which consequences may result from the Accused being given authorization to make a solemn declaration, if he so wishes, under this Rule,

CONSIDERING that the Chamber has identified no precedent in the tribunal jurisprudence where an accused has given an opening statement under oath under Rule 84 *bis* of the Rules,²⁷

CONSIDERING that under Rule 84 *bis* (B) of the Rules, the Trial Chamber shall decide on the probative value, if any, of the accused's statement,

CONSIDERING that this provision means that the Trial Chamber shall decide, in the exercise of its discretionary power, whether or not it is appropriate to attach probative value to the opening statement of the accused,²⁸

CONSIDERING that even if the Trial Chamber were to attach probative value to the accused's opening statement, the question remains as to whether it is appropriate to distinguish, in terms of their probative value, between the opening statements that are given under oath and the opening statements that are not,

CONSIDERING that a solemn declaration before a statement is given is significant, in terms of its possible probative value, only if it is accompanied by sanctions for false testimony, and that only in cases where there is provision for this sanction could such a statement have more probative value than an unsworn statement,

²⁷ The Chamber notes that on one occasion, in the *Haraqija and Morina* case, counsel for one accused sought the leave of a Trial Chamber to permit the accused to make an opening statement under oath under Rule 84 *bis* of the Rules, with the dual objective of having more weight accorded to the statement and to serve judicial economy. The Chamber, after noting that there was no precedent in the Tribunal jurisprudence as to the existence of an opening statement by an accused under oath, ruled that if the accused decided to make an opening statement under oath, the Prosecution would have the opportunity to cross-examine the accused on the fact in his statement. Following that decision, the accused made an unsworn opening statement: *see* Case No. IT-04-84-R77.4 (contempt of the Tribunal), T(F) of 8 September 2008, pp. 18-22 and 27.

²⁸ *See* for example *Prlić* Appeal Decision, para. 28; *Blagojević* case, T(F) of 27 March 2003, p. 185. The Chamber notes that while in certain cases Trial Chambers have concluded that the opening statement of the accused offered a degree of probative value (*see* for example the Judgement in the *Hadžihasanović* case, 15 March 2004, p. 537), in other cases they have held that they offered none (*see* for example the Judgement in the *Martić* case, 12 June 2007, para. 23.)

CONSIDERING that while Rule 84 *bis* does not provide for any sanction against the accused for false testimony, it is not impossible that the Accused could be prosecuted for false testimony under Rule 77 of the Rules,²⁹

CONSIDERING that, notwithstanding that case, several arguments however militate in favour of attaching only slightly more probative value, if any, to a sworn statement under Rule 84 *bis* of the Rules compared to that attached to an unsworn opening statement made in accordance with the same provision,

CONSIDERING in fact that, as indicated previously, just like an unsworn opening statement, a statement under oath does not give rise to cross-examination or to questions from the Judges, such that it is not possible to examine the accused and check his statements against other evidence or against the statements by witnesses who have appeared,

CONSIDERING as a result that, in any event, such a sworn statement offers significantly less probative value than testimony given in accordance with Rule 85 (C) of the Rules,

CONSIDERING that an opening statement given under Rule 84 *bis*, whether or not it is given under oath, may not be considered as evidence either, unless the Trial Chamber, in the exercise of its discretionary power, decides to attach a degree of probative value to it,

CONSIDERING that the foregoing observations demonstrate that the value of taking an oath is low,

²⁹ Rule 77 of the Rules entitled “Contempt of the Tribunal” provides as follows in paragraph (A):
“The Tribunal in the exercise of its inherent power may hold in contempt those who knowingly and wilfully interfere with its administration of justice, including any person who:

- (i) being a witness before a Chamber, contumaciously refuses or fails to answer a question;
- (ii) discloses information relating to those proceedings in knowing violation of an order of a Chamber;
- (iii) without just excuse fails to comply with an order to attend before or produce documents before a Chamber;
- (iv) threatens, intimidates, causes any injury or offers a bribe to, or otherwise interferes with, a witness who is giving, has given, or is about to give evidence in proceedings before a Chamber, or a potential witness; or
- (v) threatens, intimidates, offers a bribe to, or otherwise seeks to coerce any other person, with the intention of preventing that other person from complying with an obligation under an order of a Judge or Chamber. (emphasis added).

The Chamber notes that this list is not exhaustive and the Chamber does not exclude the possibility that a false statement may be considered as evidence of knowing and wilful interference with the administration of justice within the meaning of Rule 77 (A) of the Rules.

CONSIDERING as a result that, assuming the Chamber decides to attach a degree of probative value to the Accused Praljak's forthcoming sworn opening statement, that probative value could not surpass, in any significant way, that of an unsworn statement, for the reasons set out above,

CONSIDERING that the concerns expressed by the Prosecution are therefore not founded and that, as a result, its second claim and its Request need not be granted,

CONSIDERING that the Chamber grants the Accused Praljak leave to take an oath prior to giving his opening statement in accordance with Rule 84 *bis*,

CONSIDERING that the Chamber notes that the Praljak Defence requests three hours to make the statements under Rules 84 and 84 *bis* of the Rules, without however specifying how this time will be divided between the two statements,

CONSIDERING that in the exercise of its discretionary power, the Chamber decides that the Accused Praljak's statement under Rule 84 *bis* shall not exceed 90 minutes,

CONSIDERING that this limitation is justified since, on the one hand, the Accused Praljak has already given a statement under Rule 84 *bis* at the commencement of the trial³⁰ and, on the other hand, the Accused Praljak will be heard by the Chamber as a witness for nearly two months,

CONSIDERING that Counsel for the Accused Praljak shall have 90 minutes, and even more should the Accused Praljak not use the full 90 minutes accorded to him to make his opening statement under Rule 84 *bis*, on the understanding that the total time for the opening statements under Rules 84 and 84 *bis* shall not exceed three hours,

FOR THESE REASONS,

IN ACCORDANCE WITH Rules 84 and 84 *bis* of the Rules,

TAKES NOTE of the Notice of 26 March 2009,

TAKES NOTE of the fact that Counsel for the Accused Praljak will make an opening statement within the meaning of Rule 84 of the Rules,

GRANTS the Accused Praljak leave to take an oath prior to making his opening statement in accordance with Rule 84 *bis* of the Rules,

DECIDES that the Accused Praljak's opening statement shall not exceed 90 minutes,

DECIDES that Counsel for the Accused Praljak shall have 90 minutes to make their opening statement under Rule 84 of the Rules, and even more time should the Accused Praljak not use the full 90 minutes accorded to him, on the understanding that the total time for the opening statements under Rules 84 and 84 *bis* shall not exceed three hours, **AND**

DENIES the Prosecution's Request.

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

/signed/

Jean-Claude Antonetti
Presiding Judge

Done this twenty-seventh day of April 2009
At The Hague
The Netherlands

[Seal of the Tribunal]

³⁰ Praljak Statement of 27 April 2006.