

GENERAL SLOBODAN PRALJAK'S HONORABLE DEFIANCE*

In Memory of General Slobodan Praljak

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Having listened to the summary of the Appeal Judgment and having stood up to hear the litany of crimes affirmed by the Appeals Chamber before his sentence of 20 years was upheld, General Slobodan Praljak took his own life by drinking poison – but not before expressing his utter contempt for the Judgment, and by extension, his contempt for the Judges and the ICTY as a judicial institution.

Questions abound. How did General Praljak smuggle the vial of poison into the courtroom? How could he have gotten it through the numerous check-points where he would have been searched? Did he have it on him when he arrived at the ICTY? Did someone smuggle it to him there? Or, was it waiting for him at the ICTY, secretly planted in his cell or in the toilet?

* With permission of the author, we take the text from his blog: <http://michaelgkarnavas.net/blog/2017/12/05/praljaks-defiance/>

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Relevant as these questions are, few are asking what I think is perhaps the more important question: *why did General Praljak take his life?*

General Praljak had spent about a dozen years in the United Nations Detention Unit (UNDU). With credit for the time served, he would have been eligible for early release within two to three years, and would very likely have been released before serving his full sentence.

But detention never troubled General Praljak. Unlike the other accused in his case, he refused to be provisionally released under house arrest. It was a matter of principle. And when it came to his principles, he was stubbornly uncompromising. His argument would be: *if I am presumed innocent, if I voluntarily came to the ICTY upon hearing of my indictment, if the Croatian government was offering a guarantee for my return to the ICTY, if my every movement while on provisional release in Zagreb will be shadowed by the police, and if I have complied with the conditions of my provisional release in the past, then why should I now be under house arrest as a condition of my provisional release?* Of course, he wanted to be in his home with his wife, children, and grandchildren who he adored, and who adored him. But it was the principle of it – a principle he was willing to adhere to, come hell or high water. And for that I admired General Praljak. He un sentimentally walked his talk.

Reflecting on General Praljak's final moments, I believe it was his principles that drove him to take his own life – not fear, not anger, not depression, not desperation, and certainly not any of the other reasons that cause a person to seek peace through suicide.

General Praljak was no romantic fool; he did not harbor illusions that his conviction would be overturned. Any objective observer would have come to the same conclusion. I certainly did. At best, the Appeals Chamber might have reduced the sentences, but the convictions, for the most part, would stand, even though, in my opinion, the evidence does not support the factual findings and legal conclusions made by the Trial Chamber. This is particularly so with the claim in the indictment of an overarching joint criminal enterprise (JCE) to reconstitute the Croatian Banovina within its 1939 borders, so it could either join Croatia or be an independent state within Bosnia and Herzegovina (BiH) with close ties to Croatia – and that this JCE involved permanently removing and ethnically cleansing

Bosnian Muslims and other non-Croats who lived in these areas.

Convicted persons on appeal, generally, are susceptible to irrational hope, unsubstantiated rumors of behind-the-scenes machinations of friendliness and supposed efforts to steer the judges in a favorable direction, or false claims of exoneration (usually couched in language that is sufficiently vague to allow plausible deniability) – claims that are sometimes peddled by charlatans posing as high-powered lawyers seeking to make a quick (and exorbitant) fee.

General Praljak had no patience for any such nonsense. General Praljak was rational, intelligent, and pragmatic. His thinking was shaped by the hard sciences, even though he was equally versed in the soft sciences or liberal arts of philosophy, sociology, history, literature, theater, and cinema. Though I am assuming that General Praljak hoped and perhaps expected (as my client, Dr. Jadranko Prlić, did) that he would get a fair trial at the ICTY, it should have been obvious to him either before arriving at the UNDU, or sometime shortly thereafter, that convictions on most of the alleged crimes were predestined.

General Praljak (and the other accused) should have been disabused of any thoughts of justice and a fair trial. Maybe because hope springs eternal we all, including General Praljak, clung to some vestige of expectation that the accused would have an opportunity to set the record straight. General Praljak certainly wanted to. He spared no time or expense to bring to light evidence that he believed was contextually relevant for the trial Judges to understand and appreciate, among other things:

- What it was like to be in his shoes;
- what he did and why;
- what he did not do or could not have done;
- what the Croatian Community (and later Republic) of Herceg Bosna was all about;
- the dire predicament the Croats in Bosnia and Herzegovina (BiH) found themselves in and the imperative to react with all deliberate speed and purpose; and
- Croatia's generosity in helping the Muslims of BiH at a time when Croatia was one-third occupied and fending for its very survival against the rump

Yugoslavia and its highly trained and armed Yugoslav People's Army.

General Praljak's expectations – as legitimate as they were – were not met to any degree of satisfaction. I know, because since early 2005 I represented Dr. Prlić in this case. He too harbored expectations of a fair trial – as all accused appearing before any judicial institution should, especially when being tried at a tribunal founded by the United Nations.

Granted, I may not be the most objective observer, and it can be claimed that I have a considerable interest in this case, which consumed over 12 years of my career. Be that as it may, I can say with full responsibility that what I witnessed during the trial was a parody, a charade, theater of the absurd disguised as a trial. Everyone who was at the ICTY saw it. As I repeatedly complained to the Judges during the trial, *none of them, nor any of the Judges at the ICTY, would want to be tried in the way my client was being tried.*

If there is one case, one trial, and now, one appeal that stands out as part of the dark legacy of the ICTY, it is *Prlić et al.* It is a textbook example of how not to try a case, how not to select the panel of trial judges, how not to conduct the trial proceedings, how not to analyze the evidence, and how not to draft a judgment. It is also a textbook example of why convicted persons cannot and should not expect that the errors and sins of the Trial Chamber will be exposed with unrelenting precision, brutal honesty, and unvarnished integrity, especially when to do so would require the Appeals Chamber to reexamine virtually the entire record (in this case, 52,967 pages of trial transcripts, 818 written decisions, and 5,926 exhibits admitted over five years of trial proceedings). But that is exactly what the Appeals Chamber should have done in *Prlić et al.* – especially when the Defense handed them the needles of errors hidden in the massive haystack of a record.

How naïve it was to think that the result of this case would have been any different! The ICTY – as a judicial institution – had already adjudicated many of the alleged major issues confronting the accused in *Prlić et al.*, such as whether the Muslim-Croat conflict in BiH was an international armed conflict, whether Croatian President Tuđman and his government were attempting to carve up BiH, whether the Croats in BiH set up a statelet that would either be autonomous or part of Croatia, and whether there was ethnic cleansing of the Muslims in BiH – all of which was claimed to

have been part of some grand scheme, a master criminal plan, a JCE.

Though I may not be the most objective observer (as I have already noted), I am convinced beyond doubt based on the evidence submitted during the trial that there was no JCE, no statelet, no efforts to carve up BiH, and no ethnic cleansing, etc. I fully recognize that errors were made, that serious crimes were committed against soldiers and citizens, and that there must be accountability. But as far as the prosecution's overarching theory that there was a JCE to reconstitute the Croatian Banovina within its 1939 borders, and that ethnic cleansing occurred to achieve this goal, I simply do not see anything more than, at best, circumstantial evidence that points to this as just one of many inferences that can be drawn.

Others, no doubt, see it differently. Fair enough. But can it honestly be said that the Judges of the Trial Chamber or the Appeals Chamber were not, at least to some degree, predisposed to find the existence of the overarching JCE as claimed by the prosecution, and resultantly, that this would not spill over into a determination of guilt, when the ICTY website, out reach material, and exhibition posters depicted the narrative below (or a variation of it) before, during, and after the trial, and while the appeal was pending:

The republic's [BiH's] strategic position made it subject to both Serbia and Croatia attempting to assert dominance over large chunks of its territory. In fact, the leaders of Croatia and Serbia had in 1991 already met in a secret meeting where they agreed to divide up Bosnia and Herzegovina, leaving a small enclave for Muslims.

... Bosnian Croats soon followed, rejecting the authority of the Bosnian Government and declaring their own republic with the backing of Croatia. The conflict turned into a bloody three-sided fight for territories, with civilians of all ethnicities becoming victims of horrendous crimes.

In light of these claimed facts on the ICTY website, can it be said that the accused in *Prlić et al.* truly enjoyed the presumption of innocence? For years this text has been part of the ICTY narrative for public consumption. It was not drafted by accident. Nor is it likely that it was posted and paraded about without the express approval of the presidents of the ICTY. Incidentally, sitting on the Appeals Chamber in *Prlić et al.* were two former presidents (Judge

Theodor Meron and Judge Fausto Pocar) and the current president, Judge Carmel Agius.

This narrative invariably served as the subtext during the trial. How could it not? When reflecting on how the trial was conducted and how some of the accused were treated (especially General Praljak, who was not shy in expressing his opinion), it is clear as crystal from day one that none of the accused in *Prlić et al.* stood much chance of a fair trial and a just outcome. Questions or comments that came from some of the Judges displayed a pro-prosecution bias, such as calling the Croatian Defence Council the “Catholic army.” Occasionally, the Judges commented on the evidence, prejudging it based on their supposed personal knowledge.¹ The list goes on.

In our Appeal Brief filed on behalf of Dr. Prlić, Ms. Suzana Tomanović and I argued that Dr. Prlić was denied a fair trial and that the Trial Judgment was profoundly flawed with legal and factual errors, because the Trial Chamber facilitated a confirmation bias by:

- failing to consider and assess all relevant evidence admitted into the record, instead opting to systematically rely on selective evidence that distorted the truth and led to false conclusions (Ground 1);
- disregarding the testimony of virtually all of Dr. Prlić’s witnesses, sprinkling the names of his witnesses throughout the Trial Judgment and citing them on inconsequential matters to create an appearance of having considered them (Ground 2);
- failing to make specific findings on documentary evidence it purported to assess, for example, claiming to have considered all documentary evidence admitted by written motion in the context of the evidence submitted, without specifying which documents it gave little or no weight and the reasons as to why it did so (Ground 3);
- relying on uncorroborated hearsay from the Mladić Diaries, while denying Dr. Prlić the opportunity to tender excerpts from the Mladić Diaries and/or present *vivavoce* testimony in response to the hearsay admitted (Ground 5);

¹ See, e.g. *Prosecutor v. Prlić et al.*, IT-04-74-T, Transcript, 10 May 2006, pp. 1757-58

- failing to properly assess prosecution lay and expert witnesses and failing to provide a reasoned opinion as to their credibility; (Grounds 4 and 6); and
- systematically denying Dr. Prlić adequate time and facilities to question critical witnesses and present essential evidence by applying a *one-sixth-solution*: all six defense teams would collectively have the same time for cross-examination as the prosecution would have for direct examination for each witness (Ground 7).

And so, it was deeply disappointing, indeed shocking, to hear Judge Agius read the summary that was carefully crafted for public consumption (since few, if any, will read the 1400-page Appeal Judgment) stating that Dr. Prlić's sole fair trial right claim was that he was "systematically denied adequate time and facilities to question witnesses." Whoever wrote that summary for his Honor was clearly ignorant of the details of the appeal.

These mischaracterizations of the fair trial errors raised by Dr. Prlić in his brief are simply propaganda. They lead to the intended consequence of facilitating a fictitious perception in the public's mind that, save for this belly-aching claim of not having enough time to present his case – something that is too amorphous and imperceptible for the public to fully appreciate – Dr. Prlić was content with how the evidence he presented was assessed.

The Appeals Chamber's summary remarks concerning the Mladić Diaries are equally as hollow, reflecting an economical use of the facts. The Appeals Chamber claims that:

Prlić never unconditionally requested that his case be reopened and, in any event, the Trial Chamber expressly permitted him to admit evidence to rebut these diary extracts, which he did. General Praljak was likewise offered an opportunity to challenge these extracts.

This mischaracterizes the record. After the close of evidence, the prosecution sought to reopen its case to tender into evidence excerpts from the Mladić Diaries, which were found in Mladić's residence in Belgrade by the Serbian authorities. In response, Ms. Suzana Tomanović and I argued that the prosecution's case should not be reopened, but if reopened, Dr. Prlić should be afforded an equal right to reopen his case and have admitted excerpts of the Mladić Diaries relevant to his defense. It would have been contrary

to logic and common sense for us to open the door and move for the Mladić Diaries to be admitted without the prosecution's motion being granted. But, seeing as how the prosecution's excerpts were coming in (the Mladić Diaries were newly discovered evidence), we requested the Trial Chamber on several occasions to admit excerpts relevant to Dr. Prlić's defense. How many times should the same request be made before it can be considered "unconditional"?

This was only one of the issues raised by Dr. Prlić. Not that I wish to relitigate the point, but some sunshine on one particular entry in the Mladić Diaries is worth examining. You be the judge as to whether this is how a reasonable trier of fact should admit, assess, and rely on uncorroborated hearsay evidence.

The Majority admitted and relied on excerpts from the Mladić Diaries, which contained quoted remarks purportedly attributed to General Praljak, in making JCE findings – excerpts that directly implicated Dr. Prlić. General Praljak's statements are uncorroborated hearsay. Mladić did not testify. No prior testimony had been elicited concerning these meetings, and no witnesses testified to the meetings. General Praljak's request to reopen his case and testify concerning the meetings with Mladić and the statements attributed to him in these extracts was denied. In denying his request, the Majority's suggestion that General Praljak's counsel vouch for General Praljak in the closing brief and testify during closing arguments in lieu of *vivavoce* testimony from General Praljak was absurd. Even law students know that counsel cannot testify and representations by counsel in closing briefs and closing arguments are not evidence. And what of Dr. Prlić's right of confrontation, his right to question General Praljak on what he purportedly said or meant?

These points may seem inconsequential, but I think not. Here is why. Even if the Appeal Judgment addresses all the fair trial right challenges raised by Dr. Prlić, that is beside the point. What is relevant is the false perception these segments of the summary read to the public created – intentions aside.

And speaking of perceptions, anyone who witnessed the trial would attest to just how dysfunctional the Trial Chamber was, with two of the Judges often publicly quarrelling with the Presiding Judge, who seemed incapable of managing the trial proceedings. None of the Judges were up to the task, and it was obvious. Their rampant intervention while

the parties were conducting their examinations led me to invite the Judges to either conduct the proceedings properly and in accordance with the letter and spirit of the ICTY Statute and the Rules of Procedure and Evidence (and refrain from inappropriately interfering as they had been doing), or to pack their bags and go home. And since they seemed clueless on how the proceedings should be conducted, I further requested that the Judges allow the prosecution and the defense one hour each to lecture them – since both the prosecution and defense had considerable experience in trying cases at the ICTY.² Cheeky as this may seem, my request was granted, and submissions were made.³ The proceedings improved somewhat after this intervention and training session, but overall, I can safely say that in my 35 years as a lawyer, the *Prlić et al.* trial was the absolute worst experience I've ever had as a lawyer.

But why should this matter and how does it account for General Praljak taking his own life?

It matters because, had the Trial Chamber been balanced and measured in their treatment of the defense, had they not adopted the unreasonable approach of allowing the six accused to have only a combined amount of time equal to the time allotted to the prosecution for every witness, had the Judges been more patient with General Praljak and allowed him greater latitude in questioning witnesses (after all he was *in situ* on the matters on which he wanted to confront the witnesses), had they not virtually wholesale ignored the defense evidence, and had they drafted a judgment that represented the evidence submitted during the five-year trial, then, perhaps he may have accepted the findings and conclusions. Perhaps, General Praljak might have accepted that he may have erred during the fog of war as he tried his best to command and control a citizen-soldier army led by a few professional officers of ranks that exceeded their experience and competence.

I say this because of the time I spent getting to know General Praljak before the trial and observing him for over a decade as the case progressed through the trial, all the way up to his last day. General Praljak was fearless. He was not afraid to be held accountable for any acts of commission or omission – so long as the evidence bore out his

2 *Prosecutor v. Prlić et al.* ICTY-04-74-T, Transcript, 14 March 2007, pp. 15628-33.

3 *Prosecutor v. Prlić et al.* ICTY-04-74-T, Transcript, 22 March 2007, pp. 16139-85.

responsibility. He took the stand and testified for over three months. He did not equivocate, did not feign an absence of memory, and he certainly did not try to shift the blame.

General Praljak did not suffer fools, perhaps because his intellect was off the charts, not because of a superiority complex or arrogance. At times, however, he could be contentious, vociferous, and cantankerous. He had an overwhelming presence bursting with energy and determination to expose what he knew, what he saw, and what he felt about the events he had experienced. Sometimes his exuberance to get to the truth or to set the record straight got the best of him as he would stray or get carried away, depending on the topic being discussed. Occasionally, he had difficulty seeing the trees for the forest. And yes, occasionally, he could be exasperatingly difficult to contain, just as he exasperatingly had difficulty containing himself when hearing nonsense masquerading as facts.

If I have learned anything in representing accused in highly contentious and stressful trials, unless the judges are courteous, considerate, patient, and solicitous, an accused will be hard pressed to accept a ruling or final judgment, irrespective of the quality or sufficiency of the evidence. But when also factoring in how the case was tried, the way two of the Judges interacted with General Praljak, the way they often condescended to him, and of course, their ultimate findings and conclusions in the judgment and how these were reached, is it any wonder that General Praljak would challenge the even-handedness of the proceedings, or that he would reject the Trial and Appeal Judgments with contempt?

General Praljak's final act casts a long shadow over the factual findings and legal conclusions made by the Trial Chamber and upheld by the Appeals Chamber. The evidence, for the most part, is available for scrutiny for anyone interested in judging the Judgments. Of course, few, if any, will take the time to go over this material to see what is proved, what is speculative, what is true, and what is false. But no one should be gulled into imagining that General Praljak exited the field as a concession to and acceptance of the findings of his guilt, or because he feared continued incarceration. Rather, his sacrifice was the ultimate repudiation of the injustice with which he was tried and judged.

Some will look at the Judgments in *Prlić et al.* and find vindication and perhaps even solace. Others no doubt will

reject them as General Praljak did, perhaps with an equal amount of contempt. But what is for sure is that these Judgments will not foster reconciliation any more than it can be claimed that they represent the historical truths of what happened in BiH during the Muslim-Croat conflict.

I have profound respect for the Judges of the Appeals Chamber who rendered the Judgment. I also accept, as all must, that their Judgment is final. However, in good conscience, I cannot respect most of the findings and conclusions in the Appeal Judgment made by these esteemed Judges. My critique is not an attack on the ICTY as an institution; it is an indictment on the way the Trial Chamber conducted the proceedings in *Prlić et al.*, resulting in a miscarriage of justice, which, regrettably, the Appeals Chamber failed to cure. And while it is claimed that counsel at the ICTY have “a positive obligation to protect the reputation of the Tribunal,”⁴ it would be cowardly of me and an affront to General Praljak’s memory to pretend the proceedings were fair, that there was no predisposition shown by the Judges during the trial or that the Trial and Appeal Judgments are not flawed. Some may try to twist these words as an assault on the ICTY’s reputation and legacy, but in the words of Voltaire, “*To the living we owe respect, but to the dead we owe only the truth.*”

General Praljak’s suicide was an act of defiance that has shed light on the ICTY’s legacy. No amount of spin will erase the tragic event that occurred in Courtroom 1 on 29 November 2017. What was expected to be the ICTY’s swan song – ending by reaffirming the convictions in *Prlić et al.* just days after the Mladić trial verdict – turned into a sad and confusing sight. General Praljak preferred to take his life, rather than validate the result of the trial and appeal proceedings – proceedings that in his view produced a false narrative based, in part, on the Judges’ unwillingness or inability to look beyond the settled orthodoxies that were touted on the ICTY website and peddled by its Outreach Program, even as the proceedings were ongoing.

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<http://michaelgkarnavas.net/blog/2017/12/05/praljaks-defiance/2017-12-05>

4 *In the Matter of Mr Toma Fila*, IT-13-93-Misc.1, Decision of the Disciplinary Panel, 23 October 2012, para. 70.