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: 4 July 2008

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IN TRIAL CHAMBER III

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

Registrar: **Mr Hans Holthuis**

Decision of: **4 July 2008**

THE PROSECUTOR

v.

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

PUBLIC

DECISION ON PROSECUTION MOTION CONCERNING USE OF LEADING QUESTIONS, THE ATTRIBUTION OF TIME TO THE DEFENCE CASES, THE TIME ALLOWED FOR CROSS-EXAMINATION BY THE PROSECUTION, AND ASSOCIATED NOTICE REQUIREMENTS

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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

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THIS TRIAL 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") is seized of the "Prosecution Motion Concerning Use of Leading Questions, the Attribution of Time to the Defence Cases, the Time Allowed for Cross-Examination by the Prosecution, and Associated Notice Requirements" ("Motion"), filed by the Prosecution on 20 May 2008, and renders its decision thereon.

I. Submissions

1. The Prosecution Motion seeks a ruling from the Chamber modifying the procedures established in the Chamber's Guidelines contained in the Chamber's 24 April 2008 Decision Adopting Guidelines for the Presentation of Defence Evidence ("24 April Decision")[1], particularly with respect to the modalities of examination of Defence witnesses. It seeks four modifications of the Chamber: (a) That a co-accused and their counsel be precluded from using "leading or suggestive questions in the examination of Defence witnesses called by a co-accused where the witness has not given evidence adverse or hostile to the examining co-accused"[2]; (b) That time taken by a co-accused in examining a Defence witness who has not given adverse evidence against the examining co-accused should be counted as part of the time allocated to that accused for presenting his case[3]; (c) That the time allowed for the cross-examination at least equal the total time taken by the various Defence in questioning , "provided that (1) the time taken by a co-accused in examining the witness on evidence given by that witness which is adverse to such co-accused will not be included in calculating the Prosecution's time for cross-examination; and (2) additional flexibility may be shown in calculating the Prosecution's time, which may exceed the total time of all Defence questioning . . ."[4]; and (d) That the Chamber require each accused to give two weeks' notice in the form of a summary pursuant to Rule 65 *ter* of the Rules of Procedure and Evidence ("Rules") when the Defence proposes to examine Defence witnesses on topics or subjects beyond those addressed by the Accused who has called the witness, "provided that no such notice is required

[1] Decision Adopting Guidelines for the Presentation of Defence Evidence, 24 April 2008.
[2] Prosecution Motion, para. A.1.(a).
[3] Prosecution Motion, para. A.1.(b).

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in terms of a co-accused questioning a Defence witness on evidence given by that accused which is adverse to the particular co-accused."[5]

2. On June 4, 2008, the Defences of the Accused Praljak, Ćorić, and Pušić filed a joint response to the Motion[6] , in which the joint defence request that the motion be dismissed, arguing that it was in essence an untimely appeal of the guidelines of the Chamber's 24 April Decision. The Joint Response further submits that the Prosecution's proposed revisions to the 24 April Decision are not supported on the merits by the procedural and evidentiary system of the Tribunal.[7] The Joint Response further submits that the Prosecution mischaracterizes the 24 April Decision[8] and finally argues that the process proposed by the Prosecution would be "unfair to the lay accused permitted to cross-examine in person."[9]

3. Also on June 4, 2008, the Defence of the Accused Petković and Stojić filed a response to the Motion[10] seeking dismissal of the Prosecution motion in its entirety, arguing, essentially, that the Chamber should not "whittle down the freedom of an accused to examine another accused's witness by normal cross-examination techniques," because it would be "dangerous and potentially unfair to equate accused who have not called that witness with the accused who has, in relation to any part of the evidence."[11] The Petković and Stojić Response further submits that the Prosecution's proposals with respect to assignment of time and with respect to time for cross-examination of Defence witnesses are unworkable, not sufficiently clear to be followed, and would be fundamentally unfair.[12] The Petković and Stojić Response finally submits that it should not be required to provide notice of areas of possible examination of a witness of a co-accused which might be outside the direct

[4] Prosecution Motion, para. A.1.(c).
[5] Prosecution Motion, para. A.1.(d).
[6] Joint Response on Behalf of Praljak, Ćorić and Pušić to Prosecution Motion Concerning Use of Leading Questions, the Attribution of Time to the Defence Case, the Time Allowed for Cross Examination by the Prosecution and Associated Notice Requirements, dated 3 June 2008, but filed on 4 June 2008 ("Joint Response").
[7] Joint Response, paras. 8 – 9.
[8] *Ibid.*, paras. 10 – 18.
[9] *Ibid.*, para 19.
[10] Petković and Stojić Defences' Response to Motion 20 May 2008 Concerning Use of Leading Questions and Other Matters, dated 3 June 2008, and filed on 4 June 2008 ("Petković and Stojić Response").
[11] Petković and Stojić Response, paras. 5 – 20.
[12] *Ibid.*, paras. 21 – 37.

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examination of the accused calling the witness, as to do so would give the Prosecution an advantage which was not afforded to the accused in this case, and would pose "oppressive" and "unfair" requirements on the Defence.[13]

4. On 4 June 2008, the Prlić Defence filed a submission in which it states that it joins the Petković and Stojić Response, as well as the Joint Response, stating that it "adopts all relevant factual and legal arguments."[14]

5. On 5 June 2008, the Chamber authorized the Prosecution to file a reply and set a deadline of 13 June 2008 for the filing of that submission.[15] On 13 June 2008, the Prosecution filed a consolidated reply to the various responses submitted by the Defence.[16]

II. Relevant Sections of Chamber's 24 April 2008 Decision

6. In its 24 April Decision, the Chamber established the following guidelines relevant to the present Prosecution Motion:

> EXAMINATION OF WITNESSES
>
> Guideline 1: The Order of the Examination of Witnesses
>
> 2. The witness shall first be examined by the party presenting that witness. The witness may then be cross-examined. The witness shall first be cross-examined by the other Defence teams and then by the Prosecution. Each witness may then be re-examined by the party presenting that witness. There shall be no further cross-examination, except under exceptional circumstances and with the leave of the Chamber. A Judge may at any stage put any question to the witness.
>
> 3. In the present case, the Accused are represented by Counsel. The witnesses shall first be examined by Counsel for the Accused. Under exceptional circumstances and with the leave of the Chamber, an Accused may address a witness directly and put questions to him or her. Exceptional circumstances relate in particular to the examination of events in which an Accused participated personally, or the examination of issues about which he possesses specific expertise. An Accused who wishes to take the floor shall first explain to the Chamber the reasons why there are such exceptional circumstances.

[13] *Ibid.*, paras. 28 – 42.
[14] Jadranko Prlić's Joinder to the Petković and Stojić Defences' Response to Motion 20 May 2008 and to the Joint Response on Behalf of Praljak, Ćorić and Pušić to Prosecution Motion Concerning Use of Leading Questions, 4 June 2008 ("Prlić Joinder").
[15] Court Transcript ("CT") p. 29242.
[16] Prosecution Consolidated Reply to the Joint Responses of Praljak, Ćorić and Pušić, and of Petković and Stojić, to the Prosecution Motion Concerning Use of Leading Questions, the Attribution of Time to the Defence Cases, the Time Allowed for Cross-Examination by the Prosecution, and Associated Notice Requirements, 13 June 2008 ("Reply").

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Guideline 2: The Nature of the Questions Posed

4. Given the importance of concentrating the evidence on the matters most in dispute, and avoiding delays, the parties shall put clear and concise questions to the witnesses. When presenting a witness with something that he or she has previously stated during their testimony, or in a written statement, the parties should avoid paraphrasing the witness and should rather quote directly from the transcript or prior witness statement, giving relevant page numbers. A prior witness statement may be used to refresh the memory of a witness, whether or not such statement has been admitted into evidence.

5. Leading questions shall not be permitted in direct examination, except with the leave of the Chamber.

Guideline 3: Scope of Direct Examination, Cross-Examination, Re-Examination and Further Cross-Examination

6. As a general rule, the party presenting the witness shall limit the direct examination to the matters raised in the summaries prepared in accordance with Rule 65 *ter* (G) of the Rules. That party may expand the scope of its direct examination to include points which are not contained in these summaries but which may have arisen during the proofing of the witness. The party shall inform the Chamber and the other parties of this as soon as possible, so that the other parties may prepare their cross-examination properly and so that the Chamber may be fully informed when ruling on the objections, if any, which might be raised in this connection.

7. As regards the rules governing the scope of cross-examination, the Chamber recalls that pursuant to Rule 90(H)(i), cross-examination may deal with a matter that has not been raised in direct examination.

8. Nonetheless, the cross-examination dealing with a subject not raised in the direct examination is not a cross-examination strictly speaking, but an examination resembling the direct examination. As a result, the rules applying to direct examination must be respected. Consequently, leading questions shall not be permitted in this type of examination.

Guideline 5: Time available for direct examination, cross-examination and reexamination of witnesses

14. For its cross-examination, the Prosecution shall have 100% of the time allocated for the direct examination.

17. The estimated time allocated for the examination of a witness may exceptionally be revised by the Chamber in light of the hearing of the witness in court.

Guideline 6: Time Allocated for the Defence Case

18. The Chamber will render a separate decision regarding the time that the Defence teams will have for the presentation of their respective cases.

19. The time allocated to a Defence team to present its case shall first include the time used for the direct examination and re-examination of its defence witnesses.

20. The time allocated to a Defence team to present its case shall also include the time used by this Defence team to raise in the cross-examination of a witness presented by another Defence team matters other than those raised in the direct examination of that witness.

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III. Defence Request to Dismiss the Motion as Untimely Filed

7. The Joint Response submits that the Prosecution Motion must be dismissed because it is, in essence, an untimely motion to reconsider the Chamber's 24 April 2008 decision.

8. At the Pre-Defence Conference conducted on 21 April 2008, in the course of discussions concerning the treatment of examination of joint witnesses, the Prosecution stated its view of how cross-examination should be undertaken.[17] The Chamber had not, at that time, issued its 24 April Decision, and the Chamber deferred any further discussion of the matters pertaining to the modes of interrogation until guidelines were issued.[18] The English translation of the guidelines was filed on 25 April 2008.[19] The Prosecution filed its Motion on 20 May 2008, one month after first raising their concerns on the record and seventeen days after the English translation was provided on 25 April 2008..

9. Following the issuance of the guidelines, there have been repeated interventions, and administrative time used. Could we say: "The implementation of the guidelines has given rise to repeated interventions and use of administrative time."?

The Chamber intends the guidelines to be dispositive of the issues in the Motion. During one such intervention, on 8 May 2008, the Chamber invited the Prosecution to submit a request for interpretation or clarification regarding the guidelines.[20] The Motion was filed only 12 days later.

10. It is inherently within the authority of the Chamber to issue decisions in writing which will assist in facilitating the orderly process of the trial. The Motion, and the various Defence responses have been of assistance in clarifying the preconceptions under which the parties labour, and it is in the interests of justice for the Chamber to issue a decision which sets out its approach to this evidence to avoid needless interventions and to clarify the criminal procedure to be followed in the remainder of

[17] Court Transcript in English ("CT(E)"), pp. 27409 – 27415.
[18] *Ibid.*, pp. 27408-27409.
[19] Decision Adopting Guidelines for the Presentation of Defence Evidence, 25 April 2008.
[20] CT(E) pp. 27812 – 27815

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the Defence case. Thus, in this instance, the Chamber exercises its authority to consider the Motion, the responses, and the reply, and to issue a decision on this matter.[21]

IV. Prosecution's Request Concerning the Use of Leading Questions

11. The Prosecution submits that the Chamber should preclude the abusive use of inappropriate leading questions, arguing: (a) the Chamber should abandon the labels of "direct-examination" and "cross-examination" and instead adopt a formula that would address the use of leading questions using a formula of "friendly" or "hostile" testimony; (b) that a co-accused and his counsel may only be allowed to use suggestive or leading questions in the examination of Defence witnesses called by a co-accused "on any evidence which the witness has given which is adverse to the particular co-accused."[22] In support of its position, the Prosecution relies upon practices in the United States and in the United Kingdom. However, what the Prosecution's submission fails to address is the Rules of this Tribunal, which govern the admissibility of evidence in this proceeding.

12. The Rules are silent as to the concept of "leading questions". The Parties have, throughout these proceedings, each argued that the opposing party should not be permitted to use "leading questions," without referring to any binding authority. It would seem that the Parties have relied generally upon the reference in Rule 85(B), which states:

> Examination-in-chief, cross-examination and re-examination shall be allowed in each case. It shall be for the party calling a witness to examine such witness in chief, but a Judge may at any stage put any question to the witness.

It is apparently from the use of the term "cross-examination" that the Parties have attempted to apply domestic rules of procedure pertaining to "cross-examination" which are not applicable to this Tribunal.

13. In analyzing the question posed in the Prosecution's motion, however, it is important to examine the precise language of Rule 90(H) of the Rules of Procedure and Evidence. That Rule states:

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[21] Rule 127 (A), Rules of Procedure and Evidence.

[22] Motion, paras. 13 – 14.

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(i) Cross-examination shall be limited to the subject-matter of the evidence-in-chief and matters affecting the credibility of the witness, **and where the witness is able to give evidence relevant to the case for the cross-examining party, to the subject-matter of that case.** [Emphasis added.]

(ii) In the cross-examination of a witness who is able to give evidence relevant to the case for the cross-examining party, counsel shall put to that witness the nature of the case of the party for whom that counsel appears which is in contradiction of the evidence given by the witness.

(iii) The Trial Chamber may, in the exercise of its discretion, permit enquiry into additional matters.[23]

The Rule is silent as to the form of questions which may be put to a witness when the Chamber exercises its discretion to allow a party to exceed the scope of the direct examination, permitting enquiry into additional matters. It is important to note that this Rule is markedly different from the rules of evidence or criminal procedure relied upon by the Parties in their various submissions, particularly in that it specifically authorizes inquiry into matters beyond direct examination by virtue of the expression ". . . and where the witness is able to give evidence relevant to the case for the cross-examining party, to the subject matter of that case," within the ambit of cross-examination.

14. The Chamber has considered the purposes and scope of cross-examination, including the treatment of cross-examination in various jurisdictions. A sample of the authorities follows:

a. "Cross-examination is the process whereby a party seeks: (a) to test the veracity and accuracy of evidence in chief given by a witness called for another party; and (b) to elicit from that witness any relevant facts which may be favorable to the case for the cross-examiner".[24]

b. "The object of cross-examination is twofold: first, to elicit information concerning the facts in issue or relevant to the issue that is favourable to the party on whose behalf the cross-examination is conducted; second, to cast doubt upon the

[23] Rules of Procedure and Evidence, 13 September 2006.
[24] HHJ Peter Murphy, *Murphy on Evidence*, 10th Edition (2007), p. 560..

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accuracy of the evidence in chief given against such party"[25] and "Leading questions may be employed in cross-examination, but whether this is directed to the issue or the credit of the witness, the judge has a discretion under which he may disallow questions that he considers to be improper or oppressive ...".[26]

c. "The object of cross-examination is:

(a) to destroy or weaken the effect of the evidence given by the witness in chief; and

(b) to elicit from the witness information favourable to the cross-examining party"[27] and

"... Leading questions may be asked. However, questions should not be asked in the form of a comment or invitation to argument, since the purpose of cross-examination should be to elicit matters of fact."[28]

d. Cross-Examination: "The questioning of a witness at a trial or hearing by the party opposed to the party who called the witness to testify. The purpose of cross-examination is to discredit a witness before the fact-finder in any of several ways, as by bringing out contradictions and improbabilities in earlier testimony, by suggesting doubts to the witness, and by trapping the witness into admissions that weaken the testimony. The cross-examiner is typically allowed to ask leading questions but it is traditionally limited to matters covered on direct examination and to credibility issues".[29]

e. Cross-Examination: "The opposite side's examination of a witness which usually follows examination in chief. It is used to weaken the effect of the witness's testimony, to discredit the witness and to elicit evidence in favour of the cross-examining party".[30]

f. "Cross-examination is the examination of a witness by questions by the adversary against whom the witness has testified. The object of cross-examination is twofold, first to elicit information concerning facts in issue, or relevant to the issue that is favourable to the party on whose behalf the cross-examination is conducted, and secondly, to cast doubt upon the accuracy of the evidence in-chief given against

[25] Colin Tapper, *Cross and Tapper on Evidence*, 11th Edition (2007), p. 336.
[26] *Ibid.*, p. 338.
[27] Richard May and Steven Powles, *Criminal Evidence*, 5th Edition (2004), p. 611..
[28] *Ibid.*, p. 612.
[29] *Black's Law Dictionary* (United States), 8th Edition (2004), p. 405.
[30] *Dictionary of Canadian Law*, 2nd Edition (1995), p. 280..

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such party (*Prosecutor v. Delalić et al.*, Case No. IT-96-21-T, Decision on the Motion on presentation of Evidence by the Accused, Esad Landžo, 1 May 1997, para. 22). It is the practice of the Tribunal not to allow leading questions on matters in dispute (*Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2-PT, Decision on Prosecutor's Motion on Trial Procedure, 19 March 1999)".[31]

15. There is clearly no specific prohibition within the Rules which dictates the use of a particular form of questioning to be used in the process of a cross-examination. In the Appeals Chamber decision in the *Popović et al.* case of 1 February 2008, it has recognized that "Trial Chambers exercise broad discretion in relation to trial management, the admissibility of evidence, and in defining the modalities of cross-examination."[32] It indicated that a determination by the Trial Chamber regarding the modalities of cross-examination will only be reversed when it is found to be "(i) based on an incorrect interpretation of governing law; (ii) based on a patently incorrect conclusion of fact; or (iii) so unfair or unreasonable as to constitute an abuse of the Trial Chamber's discretion."[33]

16. While the Appeals Chamber Decision provides some guidance in the context of the permissibility of a Party being permitted to impeach its "own" witness,[34] to include the requirement that the Party must first obtain leave of the Chamber to impeach its own witness,[35] this Tribunal has not squarely addressed the issue raised in the Motion, where it is requested that the Trial Chamber apply rules for cross-examination which preclude the use of leading questions, or to allow them only in the case of "hostile" evidence. In the case of *Prosecutor v. Limaj, et al.*, the Trial Chamber issued a decision which authorized the admission of prior statements of two witnesses who the Chamber had determined were "hostile" to the Prosecution who

[31] Vladimir Tochikosy, *Charges, Evidence, and Legal Assistance in International Jurisdictions*, (2005), p. 184.
[32] *Prosecutor v. Popović, et al.*, Case No. IT-05-88-AR73.3, Decision on Appeals Against Decision on Impeachment of A Party's Own Witness, 1 February 2008 ("*Popović* Decision"), para. 12.
[33] *Ibid.*, at para. 13.
[34] The Appeals Chamber has held that "Witnesses to a crime are the property of neither the Prosecution nor the Defence. . .". *Prosecutor v. Mile Mrkšić*, Case No. IT-95-13/1AR73, Decision on Defence Interlocutory Appeal on Communication with Potential Witnesses of the Opposite Party, 30 July 2003.
[35] *Prosecutor v. Popović, et al.*, Case No. IT-05-88-AR73.3, Decision on Appeals Against Decision on Impeachment of A Party's Own Witness, 1 February 2008, Disposition.

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had called these witnesses.[36] This decision, however, dealt not with the ability to use leading questions, but rather the admissibility of prior statements to impeach the witness called by one's own party. The *Limaj* Decision certainly supports that the Chamber may authorize the party calling a witness to impeach its own witness where hostility of the witness has been established, but it does not address the circumstance of this case where a co-accused who does not call that witness is afforded the opportunity of cross-examination, nor does it establish whether, in a similar case, this co-accused must establish the hostility of the witness before being permitted to use leading questions in the cross-examination.

17. However, in the case of *The Prosecutor v. Bagosora*, Trial Chamber I of the International Criminal Tribunal for Rwanda, applying nearly identical provisions in its Rules of Evidence and Procedure, issued a decision on modalities for examination of defence witnesses which addressed examination outside the scope of direct, and modalities of interrogation under such new areas of examination as are authorized as part of the cross-examination process.[37] The issue was addressed specifically in the context of determining how to handle cross-examination of witnesses called by one accused in a multi-accused trial, by other accused. In that decision, the Chamber concluded in paragraph 6:

> "In conformity with established practice, this Chamber will apply the principles in Rule 90(G)[38] when deciding whether a party shall be allowed to go outside the examination-in-chief during cross-examination. To some extent, Defence teams other than the one calling a witness will be allowed to elicit evidence in its favour, even if this is

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[36] *Prosecutor v. Fatmir Limaj, Haradin Bala and Isak Musliu,* Case No. IT 03-66-T, Decision on the Prosecution's Motion to Admit Prior Statements as Substantive Evidence, 25 April 2005 ("*Limaj* Decision").

[37] *Prosecutor v Bagosora*, Case No. ICTR-98-41-T, Decision on Modalities for Examination of Defence Witnesses, 26 April 2005 ("*Bagosora* Decision").

[38] Rule 90(G) of the Rules for the Rwanda Tribunal reads in the pertinent part as follows:

> (G) (i) Cross-examination shall be limited to the subject-matter of the evidence-in-chief and matters affecting the credibility of the witness and, where the witness is able to give evidence relevant to the case for the cross-examining party, to the subject matter of the case.
> (ii) In the cross-examination of a witness who is able to give evidence relevant to the case for the cross-examining party, counsel shall put to that witness the nature of the case of the party for whom that counsel appears which is in contradiction of the evidence given by the witness.
> (iii) The Trial Chamber may, in the exercise of its discretion, permit enquiry into additional matters.

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> not "cross-examination" in the narrow sense of the word. However, such evidence will only be admitted if it is relevant, contributes to the ascertainment of the truth and does not lead to needless consumption of time, as required by Rule 89(C) and 90(F). **It is expected that when eliciting such evidence, Defence Counsel will avoid asking leading questions to the witness as this will undermine the credibility of such testimony,** and avoid repetitive questions. The exact extent and manner of questioning permitted by other Co-Accused will depend on the nature of the testimony which has been given by the witness and the purpose of the questioning. This will be decided on a case-by-case basis." [Emphasis added.][39]

18. Ultimately, the use of a leading or suggestive question principally impacts the determination of the credibility of the witness. The Prosecution would have the Chamber adopt a rule from the jurisprudence of the Common Law, where the decision of credibility is principally decided by juries, and not by Judges. As the Appeals Chamber stated in the *Popović,* Decision, ". . . The Tribunal's professional Judges . . . are competent to assess the truthfulness and to accord the proper weight to a witness' evidence."[40] Additionally, as is stated in the Petković and Stojić Response, citing the *Bagosora* Trial Chamber decision, "competent counsel will be judicious in the use of leading questions precisely because of their tendency to undermine the value of the answers: "It is expected that when eliciting such evidence, Defence counsel will avoid asking such leading questions to the witness as this will undermine the credibility of such testimony."[41]

19. The Chamber concludes that it is in the best position to determine the credibility of the witnesses, and is well able to ascertain when a witness has been led into testifying by merely affirming or denying statements made by a counsel. When a counsel chooses to use this line of questioning, its tactical or strategic decision in doing so impacts the assessment of the credibility of the witness, as the witness has not told the story in his or her own words, but has, merely, affirmed or rejected, statements of the party conducting such questioning. The existing Guideline 2, paragraph 5, and Guideline 3, paragraphs 7 and 8, adequately deal with the issue of modality of questioning, and should be followed to the letter. The Guidelines, when read in conjunction with one another, clearly indicate that leading questions will not

[39] *Bogosora* Decision..
[40] *Popović* Decision, para. 12.
[41] Petković and Stojić Response, para. 16. Internal citations omitted, but citing the *Bogosora* Decision.

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be permitted on direct examination of a witness, and that the cross-examination dealing with a subject not raised in the direct examination is not a cross-examination strictly speaking, but an examination resembling the direct examination. Consequently, the rules of direct examination apply and leading questions are not permitted in this type of examination.

20. The Chamber declines to adopt the requested formula offered by the Prosecution which would require that it decide whether a witness' testimony is "friendly" or "hostile" before determining whether leading questions can be used in examining a witness. By deciding thusly, the Chamber has also borne in mind the difficulties that might arise when determining the nature of the evidence. Pursuant to Rule 90 (F) of the Rules, its decision should *inter alia* make the examination effective to avoid the needless consumption of time.

V. Prosecution Request to Attribute Time in Cross-Examination of Other Witnesses to the Co-Accused's Time in the Case-in-Chief

21. The Prosecution requests that where a co-accused cross-examines a Defence witness who has "not given adverse evidence against the examining co-accused", that the time for such examination be assessed against the accused's time for presentation of its Defence case-in-chief.[42] The Prosecution cites no authority for its request.

22 The issue as to calculation of times for questions in cross-examination which fall beyond the scope of the evidence in chief is already adequately addressed in the Chamber's 24 April Decision, at Guideline 6, paragraph 20. There, the Chamber has already stated that the time allocated to a Defence team to present its case includes the time used to raise in cross-examination of a witness matters other than those raised in direct examination. No further modification of the Guidelines is required.

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VI. Prosecution Request that the Cross-examination Be at Least Equal to the Total Time Taken by the Defence

[42] Motion, para. A.1.(b).

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23. The Prosecution requests that the Prosecution's cross-examination of a Defence witness should at least equal the total time taken by the various accused in questioning Defence witnesses, allowing that cross-examination on evidence adverse to such co-accused would not be added to the Prosecution's time for cross-examination.

24. The 24 April Decision grants the Prosecution 100 per cent of the time allocated for the direct examination for its cross-examination time.[43] The Prosecution's request now asks that the Chamber define "100 per cent of the time allocated for the direct examination" to include the time which is used by co-accused in cross-examination. Again, the Prosecution cites no authority in support of its request.

25. As in the case of its previous request, this request of the Prosecution would have the Chamber ignore the plain language of Rule 90(H)(i) of the Rules, which expands the Common Law definition of cross-examination to include additional evidence relevant to the case for the cross-examining party. The Chamber rejects this request by the Prosecution. However, the Chamber notes that, as has been the case throughout the Prosecution's case-in-chief, it will, in appropriate cases, exercise its discretion to extend additional time to any cross-examining party where the Chamber finds that further time would be useful in achieving the objective of a fair trial and where such further time would assist the Chamber in establishing the facts in this case[44].

VII. Request to Establish Notice Requirements for "Supportive Evidence from Friendly Witnesses"

26. The Prosecution requests that the Chamber order each accused to give two weeks' notice in the form of a "Rule 65 *ter*-type summary" when that accused proposes to cross-examine any Defence witness on any topics or subjects beyond those addressed by the accused who has called the witness where the evidence is not adverse to that co-accused.[45]

27. Again, the Prosecution has asked this Chamber to interpret the cross-examination process in a way which is inconsistent with the express language of Rule 90(H)(i) of the Rules. The co-accused who choose to exercise the full scope of cross-examination

[43] 24 April Decision, para. 14.
[44] 24 April Decision, para. 17.

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are not required to provide notice except in those cases where the co-accused has also indicated it intends to call that witness as its own witness.

28. Similarly, the Prosecution is not required to submit such a notice where a Defence witness may appear on any Defence Rule 65 *ter* list and where, in its cross-examination, it intends to use the full scope of cross-examination by soliciting additional evidence relevant to the case for the cross-examining party.

29. The Chamber, therefore, rejects this request by the Prosecution.

VIII. Disposition

Accordingly, the Trial Chamber by majority, pursuant to Rules 85, 89, and 90, of the Rules, hereby **DENIES** the Motion , Judge Antonetti dissenting.

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

/signed/

Judge Jean-Claude Antonetti
Presiding

Done this fourth day of July 2008
At The Hague
The Netherlands

[Seal of the Tribunal]

[45] Motion, para. A.1.(d).

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