UNITED NATIONS

International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991

Case No.: IT-04-74-T

Date: 27 November 2008

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

Registrar: **Mr Hans Holthuis**

Decision of: **27 November 2008**

THE PROSECUTOR

v.

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

PUBLIC

DECISION ON SCOPE OF CROSS-EXAMINATION UNDER RULE 90 (H) OF THE RULES

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

I. INTRODUCTION

1. 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") is seized of "Slobodan Praljak and Milivoj Petković's Request for Clarification, or in the Alternative, for Reconsideration of the 4 September 2008 Ruling Allowing Continued Direct Examination By the Prosecution", filed by Counsel for the Accused Praljak and Counsel for the Accused Petković ("Joint Defence") on 11 September 2008 ("Request"), in which the Joint Defence requests the Chamber to clarify, or in the alternative, reconsider its oral decision of 4 September 2008 granting the Office of the Prosecutor ("Prosecution") leave to examine defence witnesses on matters that were not raised in the direct examination led by the Defence.

II. PROCEDURAL BACKGROUND

2. On 25 September 2008, the Prosecution filed the "Prosecution Response to Slobodan Praljak and Milivoj Petković's Request for Clarification, or in the Alternative, for Reconsideration of the 4 September 2008 Ruling" ("Response"), in which the Prosecution requests the Chamber to deny the Request of the Joint Defence.

3. At the hearing of 29 September 2008, the Chamber granted Counsel for the Accused Praljak ("Praljak Defence") leave to file a reply.[1] On the same day, the Praljak Defence filed "Slobodan Praljak's Reply to the Prosecution Response to the Joint Request for Clarification, or in the Alternative, for Reconsideration of the 4 September 2008 Ruling" ("Reply").

III. ARGUMENTS OF THE PARTIES

4. In support of the Request, the Joint Defence submits that by putting questions to witnesses in cross-examination regarding issues not raised in direct examination, the Prosecution is in fact continuing to present its case.[2] The Joint Defence relies

[1] Transcript in French ("T(F)"), 29 September 2008, pp. 32749-32750.
[2] Request, para. 22.

on the "Decision Adopting Guidelines for the Presentation of Defence Evidence", rendered by the Chamber on 24 April 2008 ("Decision of 24 April 2008"), according to which "the cross-examination dealing with a subject not raised in the direct examination is not a cross-examination strictly speaking" and "as a result, the rules applying to direct examination must be respected".[3] The Joint Defence objects to the Prosecution continuing to put its case and to the fact that the time used for this is not taken into account. The Joint Defence considers this unjust. Indeed, when a cross-examining Defence team examines a witness on an issue not addressed in direct examination, the time spent on this new matter is subtracted from the time allocated to that team for the presentation of its case. The Joint Defence considers that it would be unfair for the Prosecution to be able to cross-examine the witness on an issue falling outside the scope of direct examination and not have the time thus spent subtracted from the time allocated to it for the presentation of its case.[4] The Joint Defence also submits that the Prosecution has already used all of time allocated to it by the Chamber for the presentation of its case.[5]

5. Finally, the Joint Defence argues that Rule 90 (H) of the Rules of Procedure and Evidence ("Rules") must be read as a whole and in the light of the decisions and orders rendered by the Chamber, in that it does not give the Prosecution a blanket authorization to ask questions on matters that were not raised in the direct examination conducted by the Defence if the Chamber has not expressly given its authorization.[6]

6. In the Response, the Prosecution submits that the oral decision of 4 September 2008 is the most recent decision reiterating the settled jurisprudence of the Chamber according to which the cross-examining party may ask questions which go beyond the scope of the direct examination, as is authorized by Rule 90 (H) (i) of the Rules.[7] In this regard, the Prosecution refers to Guideline 3 of the aforementioned Decision of 24 April 2008, which provides that "pursuant to Rule 90 (H) (i), cross-examination may deal with a matter that has not been raised in

[3] Decision of 24 April 2008, Guideline 3, para. 8.
[4] Request, paras. 22-26.
[5] Request, paras. 27-29.
[6] Request, paras. 34-38.
[7] Response, para. 5.

direct examination".[8] The Prosecution submits that Rule 90 (H) (i) of the Rules applies to the Defence as well as the Prosecution, and that to subscribe to the interpretation proposed by the Joint Defence in its Request would amount to considering that only the Defence may invoke that Rule, which would adversely affect the principle of equality of arms and the quest for the truth.[9] In addition, the Prosecution considers that it made only limited and fully justified use of Rule 90 (H) (i) of the Rules.[10]

7. The Prosecution asserts that according to the principle of judicial economy and the quest for the truth, there is a need to continue to scrutinize the evidence of a witness when that witness appears before the Tribunal.[11]

8. Finally, the Prosecution asserts that it is not continuing to put its case since it does not choose the witnesses who are heard, nor does it call the Defence witnesses who are to appear before the Tribunal.[12]

9. In the Reply, the Praljak Defence asserts that allowing the Prosecution in cross-examination to obtain testimony and documentary evidence aimed at supporting its case runs counter to one of the most basic rights of the Accused, namely the right to rebut evidence against them.[13] Accordingly, since the Prosecution's cross-examination comes after that of the Defence Counsel, the Defence Counsel would not be able test the inculpatory evidence obtained by the Prosecution through its cross-examination.

IV. DISCUSSION

10. Rule 90 (H) (i) of the Rules, which determines the scope of cross-examination, as interpreted clearly and consistently in the jurisprudence, leaves no room for ambiguity. This provision does not limit the scope of cross-examination solely to matters raised in direct examination or going to the credibility of the witness. It authorizes the cross-examining party to ask questions relevant to its own case, even if those questions deal with matters not raised in the context of direct

[8] Decision of 24 April 2008, Guideline 3, para. 7.
[9] Response, para. 9.
[10] Response, paras. 11-14.
[11] Response, paras. 11 and 14.
[12] Response, para. 9.
[13] Reply, paras. 6-8.

examination.[14] Indeed, the third part of Rule 90 (H) (i), according to which cross-examination relates, "where the witness is able to give evidence relevant to the case for the cross-examining party, to the subject-matter of that case", aims to apply the principle of judicial economy, whereby a witness called by one party, but who is also able to give evidence relevant to the case of the cross-examining party, shall not be called twice.

11. In addition, the aforementioned third part of Rule 90 (H) (i) should not be interpreted as limiting the cross-examining party's right, when asking questions relevant to its case, to those matters raised in direct examination alone. Indeed, such an interpretation would undercut the purpose and scope of this third part, in that it would merely reaffirm the first part of Rule 90 (H) (i). Consequently, Rule 90 (H) (i) should be interpreted broadly as authorizing the cross-examining party to ask questions relevant to its own case, even when those questions go to matters that were not raised in direct examination.

12. The formulation of Rule 90 (H) (i) makes it clear that the Rule applies equally to the Defence teams and to the Prosecution, since these terms do not expressly limit its application to the Defence teams alone. In addition, a systematic interpretation of the Rules through a combined reading of Rules 85 (A) and 90 (H) (i) enshrines the recognized right of each party to ask questions in cross-examination which relate to its case even though that party has concluded its case. Indeed, Rule 85 (A) provides that the presentation of evidence for the Prosecution precedes the presentation of evidence for the Defence. The presentation of evidence in this order necessarily implies that the Prosecution has already closed its case when it is cross-examining witnesses called by the Defence. Accordingly, by stipulating that the scope of cross-examination includes matters relevant to the case of the cross-examining party, the drafters of Rule 90 (H) (i) intended to authorize the Prosecution to ask questions in cross-examination which relate to its case, even though it has concluded its case.

[14] *The Prosecutor v. Ante Gotovina et al.,* Case No. IT-06-90-T, Decision on Prosecution's Motion to Limit the Scope of Testimony for Witness 116, 12 June 2008, para. 10; *The Prosecutor v. Hadžihasanović and Kubura,* Case No. IT-01-47-T, Decision on Defence Motion for Clarification of the Oral Decision of 17 December 2003 Regarding the Scope of Cross-Examination Pursuant to Rule 90(H) of the Rules, 28 January 2004, p. 3.

13. There is no provision in Rule 90 (H) (i) requiring a party to first obtain the leave of the Chamber when, in cross-examination, it seeks to ask questions relevant to its case on matters which have not been raised in direct examination. Only Rule 90 (H) (iii) expressly requires a positive decision by the Chamber which may "in the exercise of its discretion, permit enquiry into additional matters". A comprehensive reading of Rule 90 (H) shows that the cross-examining party is not obliged to obtain the leave of the Chamber before asking questions aimed at promoting its case, about matters not raised in the direct examination. That party must obtain such leave only when it wants to ask questions relevant to matters other than those referred to in Rule 90 (H) (i).

14. The Chamber wishes to draw the attention of the parties to the consistency of its interpretation of Rule 90 (H) (i). The Chamber adopted the Decision of 24 April 2008 in which it "recalls that pursuant to Rule 90 (H) (i), cross-examination may deal with a matter that has not been raised in direct examination".[15] This decision forms part of a consistent interpretation, in accordance with Rule 90 (H) (i), which began as soon as the Prosecution commenced the presentation of its case. In fact, on 10 May 2007 the Chamber adopted the "Decision on the Mode of Interrogating Witnesses" according to which the Chamber "recalls that pursuant to Rule 90 (H) of the Rules, cross-examination may refer to an issue that was not raised during the examination-in-chief".[16] Likewise, on 4 July 2008, the Chamber adopted the "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" ("Decision of 4 July 2008"). In this decision, the Chamber found that Rule 90 (H) of the Rules "specifically authorizes inquiry into matters beyond direct examination [...] within the ambit of cross-examination."[17]

15. Furthermore, the Chamber notes that it is no way unfair for the Prosecution to be authorized to cross-examine the witness on a matter falling outside the scope of direct examination, without subtracting the time used for this purpose from the time allocated to it for the presentation of its case. The Defence teams were treated

[15] Decision of 24 April 2008, Guideline 3, para. 7.
[16] Decision on the Mode of Interrogating Witnesses, 10 May 2007, para. 13.
[17] Decision of 4 July 2008, para. 13, *cf.* also para. 25.

in the same way during the Prosecution phase. Indeed, during the Prosecution case, the time used by the Defence teams to cross-examine on matters not raised in the direct examination was not subtracted from the time allocated to them for the presentation of their cases.[18]

16. Finally, the recognized right of each party to cross-examine on matters relevant to their case which were not raised in direct examination should not be considered as potentially infringing upon the recognized basic right of every accused to rebut the evidence against them. In this regard, the Chamber wishes to remind the parties that it adopted a provision to permit the testing of the inculpatory evidence obtained by the Prosecution as a result of its cross-examination. Indeed, in accordance with the Decision of 24 April 2008, "under exceptional circumstances" further cross-examination may be authorized by the Chamber.[19]

FOR THESE REASONS

IN ACCORDANCE WITH Rule 90 (H) of the Rules,

DENIES the Request by a majority, Judge Jean-Claude Antonetti appending a dissenting opinion.

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

/signed/

Jean-Claude Antonetti
Presiding Judge

Done this twenty-seventh day of November 2008
At The Hague
The Netherlands

[Seal of the Tribunal]

[18] Decision on the Principles for Recording the Use of Time During Hearings, 13 July 2006.
[19] Decision of 24 April 2008, Guideline 1, para. 2.