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

DISSENTING OPINION OF PRESIDING JUDGE JEAN-CLAUDE ANTONETTI REGARDING THE 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

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A majority of the Trial Chamber has decided not to grant the request of the Accused Praljak and Petković.

The Joint Defence submits that the Prosecution, by asking questions on matters not raised in direct examination, is in fact continuing to put its case.

It submits that when the Defence raises matters not addressed in direct examination by the Defence for another Accused, the time spent on this exercise is subtracted from the overall time allocated to the Defence and that, as a result, this constitutes an injustice.

This issue was addressed in the drafting of the Decision Adopting Guidelines for the Presentation of Defence Evidence dated 24 April 2008.

I consider that the issue raised by the Praljak and Petković Defences poses the fundamental problem of equality of arms and the expeditiousness of the trial, as well as the interpretation given to Rule 90 (H) (i), and that the Trial Chamber should have amended its guidelines for the following reasons:

1. Rule 90 (H) (i)

The wording of this rule is particularly precise in the **French version**, which is authoritative under Rule 7 of the Rules.

This rule specifies that 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.

Undoubtedly, the drafters of this rule wanted to limit the scope of cross-examination and prevent things from spinning out of control.

Moreover, the exact scope of this cross-examination has been specified:

- subject matter of the evidence-in-chief

- matters affecting the credibility of the witness;

- evidence relevant to the case of the cross-examining party.

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However, in order to prevent any deviation, the drafters of the Rule took care to indicate "where the witness is able to give evidence relevant".

As a result, it is not possible to venture further than this. The questions asked may concern only the matters raised by the witness.

In the context of this discussion, it is also appropriate to note that the drafters of this rule again limited the scope of cross-examination by obliging the cross-examining party, when raising a matter relevant to its case, "to 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".

Therefore, Rule 90 (H) (ii) is particularly clear: at all times the cross-examining party must **put to the witness** evidence which is in contradiction with the witness's statements.

This element is not borne in mind in practice.

2. The equality of arms

To accept the Prosecution's arguments set forth in paragraphs 9, 11, and 14 of its submission amounts to giving the Prosecution indefinite authority to put its case during the appearance of defence witnesses.

This seriously handicaps the Defence, which might be surprised during cross-examination since it had not understood that its witness was going to be subjected to questions not related to the principal purpose of that witness's appearance.

By proceeding in this manner, the Prosecution in fact has twice the amount of time to put its case (nearly 1,000 hours to present its evidence and just as much during the cross-examination of other Defence witnesses: in other words, more than 2,000 hours in total).

3. The expeditiousness of the trial

The Trial Chamber should have taken appropriate measures after the appearance of the initial witnesses by realizing that **new matters** were being raised.

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The table below unambiguously sets out the Prosecution's position during its cross-examination of Witness **Miroslav Palameta** on 1 October 2008:

Matters raised in direct examination	Matters raised in cross-examination
1. Training and duties of the witness 2. Siege of Sarajevo 3. Problems concerning the name of the Serbo-Croatian language or the Croatian or Serbian language 4. Attack on Stolac (evacuation of the population, handling of refugees) 5. Duties of the witness within the crisis staff 6. Changing the name and curriculum of the University of Mostar and changing the names of primary schools. 7. Presidential transcripts, criticism of the HOS by President Tudjman 8. Official language enshrined in the revised BH constitution and amendments 9. Financing of schools by municipalities of the Croatian community of Herceg-Bosna 10. List of employees at the University of Mostar 11. Language used at the University of Mostar	1. Residence of the witness 2. Financing of schools by municipalities of the Croatian Community of Herceg-Bosna 3. Presidential transcripts, criticism of the HOS by President Tudjman **4. Borders of the independent Croatian State** 5. Territorial aspirations of the HOS 6. History of the HOS 7. April 1992 Serbian attack on Stolac 8. Siege of Sarajevo **9. Detention conditions in the Čapljina and Dretelj camps** **10. The BH currency** 11. The relationship between the Croatian HDZ and the BH HDZ 12. Functioning of the crisis staff in Stolac 13. List of employees at the University of Mostar

The subjects listed at points 4, 9 and 10 are new subjects that were not raised in direct examination.

The Trial Chamber shall **oversee the use of time** in accordance with Rule 90 (F).

It has a duty to exercise permanent control, even if it means amending its guidelines.

After nearly 200 hours of evidence by witnesses for the Prlić Defence (D1), it was not too late to right the ship.

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Other Trial Chambers have rightly exercised this control by limiting the time allocated in cross-examination.

The example of the **Milošević case** is particularly striking since the Prosecution automatically had to submit to being given 2/3 of the time allocated in direct examination,[1] including administrative matters!

I note that administrative matters take up a considerable amount of time (nearly 25%).

Most of the time, this is to settle objections of a technical nature that sometimes challenge the form of questions put by the Prosecution and draw the witness's attention to the forthcoming response. Several examples from the hearing of 17 November 2008 are particularly helpful in this regard.[2]

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[1] *The Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-T, Order Concerning the Time Available to Present the Defence Case, 10 February 2005, p. 2.

[2] "MR. KARNAVAS: I just have a standing objection, as of last week, that anything that goes outside the four corners of the indictment, the period of the indictment, you know, that should prohibit the Prosecution from going into those areas. Again, I just want to make sure that I'm very, very clear, because I think the Prosecution is politicising this trial and now we're prosecuting the implementation of the Dayton Accords. And if that is the case, then I do think that we need to desperately have a hearing about this to determine whether we should file any appropriate motions as a result of the expanding of the indictment with the acquiescence of the Trial Chamber."
"MR. KARNAVAS: Your Honour, I would ask that he be allowed to read the entire passage. If he's going to cherry-pick from this, I would expect that he allow the entire passage of what Mr. Prlic is saying. This is proper procedure, and it should be transferred -- the burden should not be transferred on redirect, especially when you are granting more time to them and you are not granting more time to me within the overall time frame that you have allotted me. This is fundamentally unfair."
"MR. KARNAVAS: Very well. I will continue to objection as long as the Trial Chamber allows the Prosecution to take text out of context. He should be allowed to look at the entire text."
"MR. KARNAVAS: Your Honour, this is 1998. What does this have to do with the indictment? You know, I'm objecting on the grounds of relevance. I would like to hear what the relevance is. Why is this relevant to the indictment? We keep talking about Croats. Now we're vilifying all of the Croats in Bosnia-Herzegovina. He talks about, you know, the Herceg-Bosna leadership. Who are the leaderships? What is the relevance of all this?"
"MR. KARNAVAS: Your Honour, I'm going to object, and it goes back to my fundamental objection at the beginning. He's asked to comment about a conversation that is taking place where the gentleman was not present. Based on that, unless he's being given an opportunity to read the whole transcript, how is he expected to comment, in light of the fact that he said he wasn't there and he doesn't know? So that's the fundamental problem that we have here. I understand that the Trial Chamber doesn't wish for the gentleman to take up valuable court time in reading that, but if we want to be fair to the gentleman, then I suggest that either you instruct the Prosecutor to withdraw the question or rephrase it in a manner in which he can answer. But how can he comment about a meeting at which he wasn't present? He's asked to look at a line here and a line there. None of us would be able to do that, even the members of the Bench."
"MR. KARNAVAS: Well, you have to look at the entire paragraph,Your Honours, and the witness should also look at the very last line, because it would drive the Serbs, you know, into the hands of the Federal Republic of Yugoslavia, that's why, because then that would mean, you know, the carve-up of Bosnia-Herzegovina. That's what it's talking about.
JUDGE TRECHSEL: You're commenting now.
MR. KARNAVAS: You're right. I apologise for that.
JUDGE TRECHSEL: Thank you.

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This time should be automatically subtracted from the Defence time, which would prevent this type of excess.

Likewise, in the **Kupreškić**[3] case, the Trial Chamber, dealing with multiple Accused, prohibited the other Defence teams from cross-examining a witness called by another Defence team, except in cases when the other Accused were calling that witness into question.

The exercise performed since then by the other Defence teams should have led in this regard to a resolution of the problem raised by the Petković and Praljak Defences in the paragraphs of their submissions (*cf.* paragraphs 6-8 of its reply and paragraph 9 of the Trial Chamber's decision).

The excessive drawing out of this trial is due to the methodology employed by both the Prosecution and the Defence in presenting their cases.

In civil law, this would have never happened and the trial would have already been completed.

In the system used by the Tribunal, which is a compromise of the two systems, the mutual excesses of the parties could be better controlled by the effective use of Rule 90 (F) without difficulty, and by the adoption of new guidelines based on the practice followed thus far.

The allocation of equal time between the Defence and the Prosecution is not requisite to guaranteeing a fair trial. Indeed, the jurisprudence of the Tribunal indicates that the allocation of trial time among the two parties is based on "a principle of basic proportionality, rather than a strict principle of mathematical equality".[4] The

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MR. SCOTT: Yes, Your Honours, I'm going to -- there have been relatively few interventions, but I'm going to object to that. I mean, that's Mr. Karnavas testifying. He can state an objection, but it's not for him to argue what he thinks the document says, or means, or what it should mean."
"MR. KARNAVAS: Do what, Your Honour, do what? That's the problem. You allow these sorts of -- going off into this area, and then you limit me my time. It's not enough to say, "You can do -- spend as much time as you want on redirect," if I only have 95 hours out of 150 and say, "Use it on redirect." I don't know how it is that the Trial Chamber can just sit there when he's reading two paragraphs that are commentary. This is an analysis by somebody who wrote this article. How can he then say these are facts? That's my objection, the way he's trying to twist this article into believing that somehow this is Tudjman's position. Why not give all the information to the witness? That's my objection. And to say I can cover it on redirect, I need five to ten hours on redirect to cover everything."

[3] *The Prosecutor v. Kupreškić et al.*, Case No. IT-95-16-A, Scheduling Order, 11 May 2001, para. 3.

[4] *The Prosecutor v. Orić*, Case No. IT-03-68-AR73.2, Interlocutory Decision on Length of Defence Case, 20 July 2005, paras. 7-8.

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Prosecution and Defence cases depend not on the length of an examination but rather on its quality. It often seems that this key principle in criminal law is forgotten.

In the context of this exercise, the Prosecution takes advantage of the situation to come back with its case during this phase in order to strengthen its demonstration, when it should have been completed during the first part of the trial.

Cross-examination must permit the other party to undermine the case put forward, but **only** on the basis of what a witness says.

This is the central issue in the Request presented by the Praljak and Petković Defences.

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]

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