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: 1 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**

Opinion of: **1 April 2009**

THE PROSECUTOR

v.

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

PUBLIC

SEPARATE OPINION OF PRESIDING JUDGE JEAN-CLAUDE ANTONETTI REGARDING MOTION OF MILIVOJ PETKOVIĆ FOR NEW GUIDELINES

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 **fully** agree with the position of the Judges to deny the Motion.

Nevertheless, I should like to set out a **separate opinion** on the specific issue of questions from the Judges, raised in the Petković Defence submissions and in paragraph 13 of this decision.

The Petković Defence submits that the time taken to put questions to a witness which arise from the response to questions asked by the Judges should not be subtracted from the overall time allocated for the presentation of its case.

I cannot share this view, since a question from a Judge can only concern an element of the case, that is a question related to a document put to a witness, a question put to a witness to shed light on an answer, or a question put to a witness to fill a void on a specific point.

Inevitably, the response to be given by a witness may be favourable to the Prosecution or to the Defence, or might have no effect at all on the parties.

Following the Petković Defence argument, additional time would also have to be given to the Prosecution and other Defence teams, which would render the trial unmanageable since, depending on the answer, each party could consider itself entitled to ask other questions while disregarding time considerations, which would seriously adversely affect the expeditious conduct of the trial.

The Petković Defence prejudges that a question from a Judge might place the Accused in a difficult position, which would therefore require a **counter-question**.

To go down this path would amount to suggesting that the Judges, when asking questions, have an unfair bias against the Accused.

This is certainly not the conception I have of International Justice.

If the common-law inspired Rules provide in Rule 85 (B) that a Judge may at any stage put any question to a witness, it is because the Judges do not have a **passive role** in the trial since under Rule 90 (F) of the Rules, it is incumbent upon them to exercise control over the mode of interrogating witnesses to make the interrogation effective for the ascertainment of the **truth** and to avoid **needless consumption of time**.

The requirement for the truth requires the intervention of the Judges, such that they must intervene to avoid the needless consumption of time, and this is why at times a question from a Judge on a given matter, by the formulation of the question, may be useful to refocus the issue and thus avoid the needless consumption of time.

The issue of time is important in this long trial.

In my view, the guidelines should have been amended **at the beginning** of the trial, in light of the experience gathered during the hearings of the first witnesses, such that the allocation of time for the appearance of a witness would be divided in two: half of the time for the **Prosecution**, half of the time for the **Defence**; on the understanding that procedural or administrative matters should be part of the time allocated to either of the parties and that, as a result, the party raising the matter would be considered to be charged for the time spent on it.

In this framework, the time taken by a Judge's question in my view must be counted as part of the time of the party examining the witness at that time.

Indeed, if a Judge finds it necessary to ask a question at that point in time, it is because he considers that this question normally should have been asked by the party examining or cross-examining the witness and that because there are uncertainties or lacunae, the Judge intervenes to fill these gaps since *in fine* he must assess the **probative value** of the document put to the witness and the probative value of the responses given to the questions of the parties.

The Judge, faced with an ambiguous document or obscure responses, has a duty to ask questions, failing which he cannot appropriately consider the weight of the evidence produced by the parties.

If the work between the party and its witness is done properly and proactively at the proofing stage, the responses provided should be clear and not prompt questions from the Judges.

Conversely, if for various reasons this work is not done, the Judge must intervene through complementary questions, and there is no reason for the parties to have additional time to ask other questions **after** the Judges.

Since D1 has completed its case and D2 is in the process of completing its evidence, it is regrettably too late to change the rules at the current stage of the trial.

Accordingly, the motion must be denied for the reasons set out in paragraph 27 *et seq.* of the decision.

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

/signed/

Jean-Claude Antonetti
Presiding Judge

Done this first day of April 2009
At The Hague
The Netherlands

[Seal of the Tribunal]