



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

Decision of: 1 April 2009

THE PROSECUTOR

v.

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

PUBLIC

**DECISION ON 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. 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 the “Motion of Milivoj Petković Requesting Trial Chamber Guidelines to Achieve Effective Implementation of Rights of the Petković Defence in Relation to Evidence Potentially Contrary to His Interests Given by Witnesses for Other Accused (1) Under Examination by Counsel; (2) in Response to Judges’ Questions”, filed by Counsel for the Accused Milivoj Petković (“Petković Defence”) on 11 February 2009 (“Motion”), in which the Petković Defence requests that the Chamber partially modify the guidelines for the presentation of defence evidence (“Guidelines”), as adopted by the Decision Adopting Guidelines for the Presentation of Defence Evidence, rendered by the Chamber on 24 April 2008 (“Decision of 24 April 2008”), based on a model proposed in Annex 1 to the Motion (“Annex”).

II. PROCEDURAL BACKGROUND

2. On 25 February 2009, the Office of the Prosecutor (“Prosecution”) filed the “Prosecution Response to Motion of Milivoj Petković Requesting Guidelines in Relation to Evidence Potentially Contrary to His Interests Given by Witnesses for Other Accused (1) Under Examination by Counsel; (2) in Response to Judges’ Questions” (“Prosecution Response”) in which the Prosecution requests that the Chamber deny the Motion.

3. On the same day, Counsel for the Accused Valentin Ćorić (“Ćorić Defence”) filed “Valentin Ćorić’s Response to ‘Application of Milivoj Petković Requesting Trial Chamber Guidelines to Achieve Effective Implementation of Rights of the Petković Defence in Relation to Evidence Potentially Contrary to His Interests Given by Witnesses for Other Accused (1) Under Examination by Counsel; (2) in Response to Judges’ Questions’” (“Ćorić Defence Response”) in which the Ćorić Defence requests that the Chamber deny the Motion.

4. On the same day, Counsel for the Accused Bruno Stojić (“Stojić Defence”) filed “Bruno Stojić’s Response to Motion of Milivoj Petković Requesting Trial Chamber Guidelines to Achieve Effective Implementation of Rights of the Petković Defence in

Relation to Evidence Potentially Contrary to His Interests Given by Witnesses for Other Accused (1) Under Examination by Counsel; (2) in Response to Judges' Questions" ("Stojić Defence Response") in which the Stojić Defence requests that the Chamber deny the Motion.

5. At the hearing of 25 February 2009, the Petković Defence sought leave to reply to the Prosecution Response; the Chamber granted the request by oral decision.¹

6. On 3 March 2009, the Petković Defence filed "Milivoj Petković's Consolidated Reply to the Prosecution, Stojić Defence and Ćorić Defence Responses to "Motion of Milivoj Petković Requesting Trial Chamber Guidelines to Achieve Effective Implementation of Rights of the Petković Defence in Relation to Evidence Potentially Contrary to his Interests Given by Witnesses for Other Accused 1) under Examination by Counsel; 2) in Response to Judges' Questions" ("Reply") in which the Petković Defence replies to the Prosecution Response, the Stojić Defence Response and the Ćorić Defence Response.

7. On 3 March 2009, the Stojić Defence filed "Bruno Stojić's Request for Leave to Reply to Prosecution Response Motion of Milivoj Petković Requesting Trial Chamber Guidelines to Achieve Effective Implementation of Rights of the Petković Defence in Relation to Evidence Potentially Contrary to his Interests Given by Witnesses for Other Accused 1) under Examination by Counsel; 2) in Response to Judges' Questions" ("Stojić Defence Request for Leave to Reply"), in which the Stojić Defence requests leave of the Chamber to file a reply to the Prosecution Response and submits a reply to the Prosecution Response, should the Chamber grant the request.

III. ARGUMENTS OF THE PARTIES

8. The Petković Defence Motion is based on Articles 20 and 21 of the Statute of the Tribunal ("Statute") and on Rules 54, 65 *ter*, 73, 82 and 90 (F) and (H) of the Rules of Procedure and Evidence ("Rules") and seeks "effective implementation of Petković's rights in relation to evidence potentially against his interests given by witnesses for other accused: (1) under examination by counsel; or (2) in response to Judges' questions".²

¹ Transcript in French ("T(F)") of 25 February 2009, pp. 37481 and 37482.

² Motion, para. 1.

9. In support of the Motion, the Petković Defence first argues that the Accused Petković's right to cross-examine witnesses called by other accused who give evidence potentially against his interests cannot be guaranteed and effectively implemented unless three requirements are fulfilled.³

10. As to the first requirement, the Petković Defence alleges that it must be informed in advance of the specific prospective evidence from each witness that is potentially against the interests of the Accused Petković.⁴ In this respect, the Petković Defence considers that the Guidelines must be amended and proposes in particular that the party presenting its case shall henceforth submit to the Chamber and the other parties a written summary of the evidence that is potentially detrimental to the case of another accused and identify the documents that will be referred to in direct examination supporting or relating to such facts.⁵

11. As to the second requirement, the Petković Defence submits that it must have sufficient time to prepare for cross-examination.⁶ It states that this issue must be dealt with on a case-by-case basis and that the more notice is given in advance of the written summary proposed in the first requirement, the less likely it is that the Petković Defence will need additional time to prepare cross-examination.⁷

12. As to the third requirement, the Petković Defence explains that it must have sufficient time to conduct cross-examination.⁸ The Petković Defence considers that the Guidelines must be amended and proposes that henceforth, whenever the Chamber examines a request, in accordance with paragraph 16 of the Decision of 24 April 2008, for additional time to cross-examine a witness, it shall take into account the written summary proposed in the first requirement and adopt a flexible approach in granting sufficient time for cross-examination that shall be independent of the time allocated to the Defence teams under paragraph 15 of the Decision of 24 April 2008, that is independent of the 50 % of time that is allocated for direct examination.⁹ The

³ Motion, para. 10.

⁴ Motion, para. 10.

⁵ Motion, para. 16 and Annex, para. 1.

⁶ Motion, para. 10.

⁷ Motion, para.12.

⁸ Motion, para. 10.

⁹ Motion, para. 16 and Annex, para. 3.

Petković Defence further requests that the additional time so allocated to a Defence team for cross-examination of a witness not be deducted from its overall time.¹⁰

13. In support of the Motion, the Petković Defence next submits that the parties should always be given the opportunity of asking questions arising out of questions from the Judges.¹¹ It considers that the Guidelines must be amended and proposes an amendment in this regard.¹² The Petković Defence adds that the time taken to ask a witness questions arising out of questions from the Judges should not be deducted from the overall time allocated to an accused for the presentation of his case.¹³

14. In its Response, the Prosecution, recognizing that the issues raised in the Motion concern primarily the Accused and the Chamber, makes a certain number of observations in support of denying the Motion.¹⁴ First, the Prosecution objects to the Motion insofar as the Petković Defence seeks more than a summary filed in accordance with Rule 65 *ter* (G) of the Rules (“65 *ter* Summary”), on the following three grounds: 1) if the Accused discharged their obligation to disclose adequate 65 *ter* Summaries, it would be unnecessary to identify the evidence that is potentially adverse to the case of a Co-Accused; 2) the obligation to identify evidence that is allegedly adverse to the case of a Co-Accused should not fall upon the party calling a witness; and 3) the determination of the prejudicial nature of the evidence in question would result in more procedural debates and unnecessary disputes.¹⁵

15. The Prosecution further recalls that, in response to one of its motions presented during its case-in-chief, the Chamber ruled on 4 July 2008 that the Defence teams other than the Defence teams calling the witness were under no obligation to give notice in the form of a 65 *ter*-type Summary whenever they seek supportive evidence from friendly witnesses. The Prosecution concludes that it would be unfair for the Defence to be granted such relief when the same was previously denied to the Prosecution.¹⁶

¹⁰ Motion, para. 15 and Annex, para. 4.

¹¹ Motion, para. 18.

¹² Motion, para. 24 and Annex, para. 5.

¹³ Motion, para. 22 and Annex, para. 7.

¹⁴ Prosecution Response, para. 1.

¹⁵ Prosecution Response, para. 13.

¹⁶ Prosecution Response, para. 14.

16. Finally, the Prosecution requests the denial of the Petković Defence request to confer on the Accused the right to put questions to a witness following questions from the Judges, and argues that the issue of prejudice to the parties as a result of answers provided by a witness must be assessed on a case-by-case basis.¹⁷

17. In support of their request to dismiss the Motion, the Ćorić Defence and the Stojić Defence put forward arguments similar to those submitted by the Prosecution. Accordingly, they first argue that the Guidelines sufficiently guarantee the rights of the Accused in cases of testimony that is adverse to their own interests, such that an amendment to them is unjustified.¹⁸ Indeed, the Guidelines provide that the duration of witnesses' appearances may be reconsidered in light of their testimony, that further cross-examination may be authorized under exceptional circumstances¹⁹ and that additional time may be granted for cross-examination.²⁰

18. Secondly, according to the Ćorić Defence, the Petković Defence request that it be informed in advance whenever a witness for a Defence team may give evidence adverse to its case is not grounded in Tribunal jurisprudence.²¹ Furthermore, according to the Stojić Defence, neither the jurisprudence nor the Tribunal's Statute or Rules provide for an obligation on the part of the Defence teams to disclose summaries of their witnesses' statements to the co-accused.²²

19. Thirdly, the Ćorić Defence and Stojić Defence submit that the amendments proposed by the Petković Defence would be impossible to implement in practice.²³ In particular, they note that a Defence team cannot reasonably be expected to analyze the aspects of the prospective evidence of its witness that would be potentially adverse to the interests of another Defence team, when it is unaware of the strategy of that Defence team and cannot predict the precise nature of the witness's testimony.²⁴ Both of them recall that the Defence teams are masters of their own defence strategy.²⁵

¹⁷ Prosecution Response, paras. 17-18.

¹⁸ Ćorić Defence Response, paras. 3-7; Stojić Defence Response, paras. 4-7.

¹⁹ Ćorić Defence Response, paras. 3-6.

²⁰ Stojić Defence Response, para. 6.

²¹ Ćorić Defence Response, para. 7.

²² Stojić Defence Response, para. 2.

²³ Ćorić Defence Response, paras. 14-17; Stojić Defence Response, paras. 8-10.

²⁴ Ćorić Defence Response, paras. 15-16; Stojić Defence Response, paras. 8-10.

²⁵ Ćorić Defence Response, para. 17; Stojić Defence Response, para. 9.

20. Fourthly, they explain that the proposed amendments would unduly delay the trial in violation of the right to an expeditious trial.²⁶ The Stojić Defence adds that these amendments would bring about undefined limits for cross-examination and further cross-examination, which would run counter to the objective of efficiency pursued by the Chamber through the Guidelines.²⁷

21. Fifthly, and finally, according to the Ćorić Defence and Stojić Defence, the adoption of the new rules proposed by the Petković Defence would have the effect of prejudicing the fundamental rights of the other Accused.²⁸ In support of this argument, they submit in particular that beyond the obligations to disclose the 65 *ter* Summaries, a Defence team cannot be ordered to reveal in advance evidence that is potentially incriminating for another Accused, as this would amount to revealing its Defence strategy.²⁹ Lastly, they note that the implementation of the amendments proposed by the Petković Defence would raise problems regarding equal treatment between the Defence teams since the Prlić Defence has concluded its case while other Defence teams have not yet begun to present theirs.³⁰

22. In its Reply, the Petković Defence first argues that while the Guidelines provide for the possibility of a further cross-examination under “exceptional circumstances” and with the leave of the Chamber, the existence of evidence adverse to the interests of another Accused cannot be characterized as an “exceptional circumstance” since the existence of such evidence has either already been established in the course of the trial or is to be expected in future.³¹

23. In the Reply, the Petković Defence clarifies its Initial Motion and states that in situations where a conflict of interest arises or may arise, a co-accused calling a witness to testify about the Accused Petković and/or the HVO Main Staff should specifically identify the evidence concerning the Accused Petković and/or the HVO Main Staff and notify the Petković Defence of this evidence. The Petković Defence notes that in so doing, the Defence team calling this witness must not assess whether

²⁶ Ćorić Defence Response, paras. 3 and 14; Stojić Defence Response, paras. 11-13.

²⁷ Stojić Defence Response, para. 13.

²⁸ Ćorić Defence Response, paras. 3 and 8.

²⁹ Ćorić Defence Response, paras. 8-9; Stojić Defence Response, paras. 14-16.

³⁰ Ćorić Defence Response, para. 12; Stojić Defence Response, para. 16.

³¹ Reply, paras. 6-7.

or not the evidence in question is adverse to the interests of the Petković Defence, as this task belongs to the Petković Defence alone.³²

24. Furthermore, in response to the arguments put forward by the Ćorić Defence and Stojić Defence, the Petković Defence argues in particular that these Defence teams are not in a position to determine whether the basic rights of the Accused Petković are sufficiently protected by the Guidelines since, to date, the Chamber has never had to rule in a context where there has been a conflict of interests.³³ Finally, in response to the argument that the proposed amendments would cause procedural debates and significant delays in violation of the right to an expeditious trial, the Petković Defence notes that, on the contrary, the changes sought would save time since, on the basis of the summaries requested in the Motion, it will be in a better position to prepare its defence and to evaluate the time it will need to conduct cross-examination.³⁴

25. Finally, in its Request for Leave to Reply, the Stojić Defence states that compelling circumstances justify this filing because the Prosecution Response raises issues which fall outside the framework of the Motion and concern it directly.³⁵ As such, the Stojić Defence objects to the Prosecution Response because, in reality, it merely repeats its objections concerning the insufficiency of the 65 *ter* Summaries transmitted by the Defence teams, when in fact this issue falls outside the scope of the Motion.³⁶ By raising arguments that are unrelated to the Motion and by deliberately misconstruing the purpose of the Motion, the Prosecution has infringed on the rules related to the filing of submissions in response.³⁷ The Stojić Defence concludes that the Chamber should not take into account the Prosecution arguments related to the insufficiency of the 65 *ter* Summaries.³⁸

³² Reply, para. 8.

³³ Reply, paras. 11 and 12.

³⁴ Reply, paras. 8 and 16.

³⁵ Stojić Defence Reply, para. 1.

³⁶ Stojić Defence Reply, paras. 2-4.

³⁷ Stojić Defence Reply, paras. 3-7.

³⁸ Stojić Defence Reply, para. 7.

IV. DISCUSSION

1. Examination of Admissibility

26. As a preliminary matter, the Chamber recalls that by oral decision of 25 February 2009, it granted leave for the Petković Defence to file its Reply.³⁹ Furthermore, the Chamber decides not to grant the Stojić Defence Request for Leave to Reply. Indeed, this Stojić Defence filing amounts to a rejoinder or filing supplementary to the Stojić Defence Response. However, there is no provision for such filings in the guidelines related to the conduct of the trial adopted by the Chamber on 28 April 2006.⁴⁰ Consequently, the Chamber denies the Stojić Defence Request for Leave to Reply.

2. Review of the Merits

27. The Petković Defence argues that the Guidelines fail to guarantee the effective exercise of the basic rights of the Accused Petković as enshrined in Articles 20 and 21 of the Statute, whenever a witness called by a co-accused gives evidence that is potentially adverse to the interests of the Accused Petković.⁴¹ On this ground, the Petković Defence requests amendments to the Guidelines, in three principal areas: 1) the party presenting its case shall henceforth provide the Chamber and the parties with a written summary of the evidence that is potentially adverse to the case of another accused and must identify the documents that will be referred to in the direct examination in support of such evidence; 2) in considering a request for additional time to cross-examine a witness under paragraph 16 of the Decision of 24 April 2008, the Chamber shall have regard to the written summary of the evidence in question and shall be flexible in granting sufficient additional time for cross-examination; and finally 3) following the questions of the Judges, the parties who have already completed the examination or cross-examination of a witness shall always be entitled to ask questions arising out of those questions put by the Judges.⁴²

28. From the outset, the Chamber observes that in support of its Motion, the Petković Defence makes little or no reference to the Guidelines that it proposes be amended,

³⁹ *See supra*, para. 5.

⁴⁰ Revised Version of the Decision Adopting Guidelines on Conduct of Trial Proceedings, 28 April 2006, p. 9.

⁴¹ Motion, paras. 1, 4-6, 9-10, 16 and 24-25.

⁴² Motion, Annex 1.

that with the exception of the part of the Motion dealing with the Judges' questions, it cites no jurisprudence in support of its request, and that it fails to mention the practice established by the Chamber in the course of the trial.

29. Nevertheless, it must be recognized that in the Guidelines the Chamber expressly took into account the possibility of a conflict of interests between an accused calling a witness and the other accused, which the Petković Defence fails to mention in the Motion. Accordingly, in paragraph 15, Guideline 5 related to the time available for direct examination, cross-examination and re-examination of witnesses provides as follows:

“With regard to the amount of time that should be allocated to the Defence teams for cross-examination, the Chamber considers that in total, that is, for the cross-examining Defence teams as a whole, they should have 50% of the time allocated for the direct examination. The Chamber recalls that the main purpose of cross-examination of Defence witnesses by the other Defence teams is to safeguard their right to a fair trial, should the witness give incriminating evidence. Unlike the Prosecution, upon which the burden of proof rests and which, as a result, must prove all of the necessary facts to establish the guilt of the Accused, the other Defence teams are not adversaries of the party presenting the witness, even though they may pursue a different defence strategy which may possibly come into conflict with that of the party presenting the witness. [...]”

In doing so, the Chamber explicitly considered the scenario in which an accused must deal with incriminating evidence adduced by a co-accused, alongside the incriminating evidence introduced by the Prosecution, and recalls that an accused's right to a fair trial in this situation is guaranteed by the fact that he is entitled to cross-examine witnesses called by his co-accused.

30. Furthermore, the Guidelines implement several measures which are intended to reconcile the safeguarding of the Accused's right to a fair trial with the right to a reasonably expeditious trial, which measures may apply in the event a witness called by an accused gives evidence incriminating a co-accused.

31. Accordingly, the Chamber will apply the principles for allocating the time available for direct examination, cross-examination and re-examination of witnesses “with flexibility if the circumstances so require”.⁴³ The Defence teams may then request additional time to cross-examine a witness, provided they meet certain conditions.⁴⁴ In addition, the Chamber may exceptionally reconsider the duration of the witness' hearing, which is estimated before the witness appears, in light of the

⁴³ Guideline 5, paragraph 15.

⁴⁴ Guideline 5, paragraph 16.

witness' testimony.⁴⁵ Among these reasons is also the fact that the Chamber may also authorize a further cross-examination under exceptional circumstances.⁴⁶

32. The flexibility of the system implemented by the Chamber for the allocation of trial time was noted by the Appeals Chamber in a decision rendered on 18 July 2008, following the Petković Defence and Praljak Defence appeal against the Decision of 24 April 2008. Accordingly, the Appeals Chamber considered that Guideline 5 rather "provides a basic framework for the proceedings, which the Trial Chamber has explicitly left open to revision (...) [the Trial Chamber] therefore, establishes a flexible approach to the allocation of time that accords with the well-established practice of the Tribunal."⁴⁷

33. The Chamber further applied the principles established in its Guidelines with flexibility and fairness, in particular in cases where the testimony of a witness called by an accused was in potential conflict with the interests of a co-accused. For example, the Petković Defence was itself granted additional time on several occasions to cross-examine a witness after providing convincing reasons, in particular on the ground that the witness in question was giving evidence that could be adverse to the interests of the Accused Petković.⁴⁸

34. In view of the foregoing, the Chamber is convinced that the adopted Guidelines sufficiently ensure the right of the Accused Petković to a fair trial and guarantee that the individual interests of the Accused Petković are respected when a witness called by another accused gives evidence that is adverse to the interests of the Accused Petković.

⁴⁵ Guideline 5, paragraph 17.

⁴⁶ Guideline 1, para. 2 and Guideline 3, para. 10.

⁴⁷ *The Prosecutor v. Prlić et al.*, Case no. IT-04-74-AR73.8, Decision on Petković's and Praljak's Appeals Against the Trial Chamber's Decision Adopting Guidelines for the Presentation of Defence Evidence, 18 July 2008 ("Decision of 18 July 2008"), para. 21.

⁴⁸ See in particular the Decision on Submission of the Expert Report of Davor Marijan Pursuant to Rule 94 bis (a) and (b) and on Motions for Additional Time to Cross-Examine Davor Marijan, 11 December 2008: Oral Decision of the Chamber rendered on 17 March 2009, T(F), pp. 38069-38071. In the case of these two witnesses, Mr Davor Marijan and Mr Ivan Bandić, the Petković Defence requested additional time from the Chamber to cross-examine them, on the ground that the issues addressed dealt essentially with the HVO Main Staff and the Accused Petković. In both cases, the Chamber partially granted the Petković Defence request, granting it additional time as appropriate.

35. While the Chamber considers that these grounds alone are sufficient to deny the Motion, the Chamber will further consider one by one the requests and proposals of the Petković Defence to amend the Guidelines.

36. Firstly, as regards the Petković Defence request for the disclosure of a written summary, the Chamber notes as a preliminary matter that this request is unclear. Indeed, in the Motion the Petković Defence requests that the party presenting its case henceforth provide a written summary of the evidence that is potentially adverse to the case of another accused and that it identify the documents related to such evidence whenever it calls a witness to testify thereupon in particular.⁴⁹ In the Reply, the Petković Defence nonetheless seems to go back to its initial request by explaining that it would be sufficient for the party presenting its case to specifically identify the evidence concerning the Accused Petković and/or the HVO Main Staff and give the Petković Defence notice of such evidence.⁵⁰ Nevertheless, in the Reply the Petković Defence does not request that its initial motion be amended in regards to this point. In light of this ambiguity, the Chamber will limit itself to a consideration of the request as formulated in the disposition of the Motion. In any event, with respect to the request formulated in the Reply, it is entirely out of the question for the Chamber to formulate guidelines that concern only one Defence team.

37. The Chamber recalls that in accordance with Tribunal jurisprudence, Defence teams are not obligated to obtain written statements from witnesses that they intend to call into court.⁵¹ Furthermore, it is clearly established that Rule 65 *ter* (G) of the Rules requires that 65 *ter* Summaries be sufficiently detailed in order to allow the Prosecution to prepare its cross-examination. Accordingly, the 65 *ter* Summary must contain, beyond simply mentioning the matters to be addressed, a summary of what the witness will say during his/her testimony.⁵² Neither the Rules nor the jurisprudence of the Tribunal additionally require a 65 *ter* Summary to expressly mention the evidence that is potentially adverse to the interests of the other accused. Such a requirement would in some cases require the Defence teams to reveal their

⁴⁹ Motion, para. 11 and Annex 1.

⁵⁰ Reply, para. 8.

⁵¹ Decision on Prosecution Motion for the Provision of an Adequate Summary for the Forthcoming Testimony of Slobodan Božić, 22 January 2009, p. 5.

⁵² *Ibidem*.

defence strategy, which belongs independently to the accused and his counsel alone. Consequently, the Chamber denies the Petković Defence request on this point.

38. Secondly, the Chamber will consider the Petković Defence request for additional time to cross-examine the witness of a co-accused and the request for further cross-examination. In relation to these issues, the proposals, as set forth in the Motion to amend the Guidelines, can be understood, on the one hand, as conferring upon each accused the right to additional time, that is time beyond that for cross-examination allocated to the Defence teams under paragraph 15 of the Guidelines, and a right for the parties who have completed their direct examination or cross-examination to ask questions arising from the Judges' questions, on the other hand, in cases of mutually antagonistic defences.

39. The Chamber first recalls that the right to cross-examine witnesses is a basic right recognized in international human rights law and enshrined in Article 21 (4) (e) of the Statute. Nevertheless, as already indicated by the Appeals Chamber in a decision of 4 July 2006, the Trial Chamber shall "exercise control over the mode and order of interrogating witnesses" in order to facilitate the "ascertainment of truth" and to "avoid needless consumption of time",⁵³ in accordance with Rule 90 (F) of the Rules.⁵⁴ The Appeals Chamber noted that the Chamber therefore enjoys considerable discretion in setting the parameters of cross-examination and in outlining the exercise of this right by the Defence.⁵⁵ Furthermore, as indicated above, the Appeals Chamber also considered in its Decision of 18 July 2008 that the Guidelines on the allocation of trial time, which includes the time for cross-examination, do not strictly set the available trial time, in accordance with Tribunal practice, and that in this connection, the Chamber exercised its discretionary power appropriately.⁵⁶

40. It follows that the Petković Defence does not have an absolute right to additional time and that, as mentioned above, Guideline 5 allows the Chamber to sufficiently

⁵³ *The Prosecutor v. Jadranko Prlić et al.*, Case no. IT-04-74-AR73.2, Decision on Joint Defence Interlocutory Appeal Against the Trial Chamber's Oral Decision of 8 May 2006 Relating to Cross-Examination by Defence and on Association of Defence Counsel's Request for Leave to File an Amicus Curiae Brief, 4 July 2006.

⁵⁴ Rule 90 (F) of the Rules provides: "The Trial Chamber shall exercise control over the mode and order of interrogating witnesses and presenting evidence so as to (i) make the interrogation and presentation effective for the ascertainment of the truth; (ii) avoid needless consumption of time."

⁵⁵ *Ibidem*.

⁵⁶ Decision of 18 July 2009, paras. 21 and 22.

protect the exercise of each Defence Counsel's right to cross-examine witnesses, in accordance with the provisions of Article 21 (4) (e) of the Statute, in particular when the positions of the Defence are potentially mutually antagonistic.

41. Additionally, by advocating an absolute right for the parties to obtain additional time for cross-examination, the Petković Defence proposals for new guidelines could result in considerable delays in the proceedings. Contrary to the Petković Defence assertion, such a proposal would therefore run counter to the right of the accused to be tried expeditiously and without undue delay, as required under Article 21 (4) (c) of the Statute.

42. Consequently, the Chamber sees no reason to depart from the principles laid down in paragraph 6 of Guideline 5 relating to the allocation of additional time and to provide for an exception to these principles in the situation described by the Petković Defence. The Chamber therefore denies the Petković Defence request in this connection.

43. With respect to the Petković Defence request regarding the right of the parties who have completed their direct examination or cross-examination to ask questions arising from the answers to questions asked by the Judges, the Chamber notes that in its submissions the Petković Defence relies on a decision rendered on 1 May 1997 in the *Čelebići* case.⁵⁷

44. Having examined the Tribunal jurisprudence in regards to further cross-examination, the Chamber notes that the approach adopted in cases with multiple accused concerning the possibility of a further cross-examination is restrictive and does not enshrine an absolute right in this respect. Accordingly, the general rule is that a witness' evidence concludes with the re-examination of the party calling the witness, in accordance with Rule 85 (B) of the Rules. Nevertheless, the established practice of the Tribunal, including in the *Čelebići* case, provides that when new subjects are raised – be it in re-examination or during questions asked by the Trial Chamber – the Trial Chamber may allow for further cross-examination.⁵⁸

⁵⁷ Motion, para. 19.

⁵⁸ *The 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, paras. 28-31; *The Prosecutor v. Kupreškić et al.*, Case no. IT-95-16-T, Decision on Order of Presentation of Evidence, 21 January 1999, p. 4; *The*

45. The Chamber is of the opinion that the Guidelines providing for further cross-examination on an exceptional basis and with the leave of the Chamber⁵⁹ are consistent with Tribunal practice and considers, as a result, that they need not be amended in this respect.

46. Finally, the Chamber notes that the proposals put forward by the Defence disregard the realities in respect of the advanced stage of the trial, insofar as the Prlić Defence has already completed the presentation of its case and the Stojić Defence is in the process of presenting its evidence, such that in any event, the adoption of new guidelines as proposed by the Petković Defence would immediately result in unequal treatment among the accused.

47. For all of the foregoing reasons, the Chamber considers that the Motion is without foundation and that, consequently, the Guidelines need not be amended.

Prosecutor v. Kvočka et al., Case no. IT-98-30/1-T, hearing of 4 July 2000 (status conference), transcript p. 3524.

⁵⁹ Guideline 1, para. 2 and Guideline 3, para. 10 of the Decision of 24 April 2008.

FOR THESE REASONS,

IN ACCORDANCE with Article 21 (4) of the Statute and Rules 54, 65 *ter*, and 90 (F) of the Rules,

DENIES the Stojić Defence Request for Leave to Reply, **AND**

DENIES the Motion,

Judge Jean–Claude Antonetti attaches a separate opinion to the present 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]