



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: 9 January 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:** 9 January 2009

**THE PROSECUTOR**

v.

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

***PUBLIC***

**DECISION ON PRALJAK AND PETKOVIĆ DEFENCE REQUEST FOR  
CERTIFICATION TO APPEAL 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

**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”),

**SEIZED** of “Slobodan Praljak and Milivoj Petković’s Request for Certification to Appeal the Trial Chamber’s 27 November 2008 Decision on the Prosecution’s Further Examination-in-Chief”, filed by Counsel for the Accused Praljak and the Accused Petković (“Praljak and Petković Defences”) on 4 December 2008 (“Request”) in which the Praljak and Petković Defences request leave of the Chamber to appeal the “Decision on Scope of Cross-Examination under Rule 90 (H) of the Rules, rendered by the Chamber on 27 November 2008 (“Impugned Decision”) in accordance with Rule 73 (B) of the Rules of Procedure and Evidence (“Rules”),

**NOTING** the “Prosecution Response to Slobodan Praljak and Milivoj Petković’s Request for Certification to Appeal the Trial Chamber’s 27 November 2008 Decision on the Prosecution’s Further Examination-in-Chief”, filed by the Office of the Prosecutor (“Prosecution”) on 18 December 2008 (“Response”), in which the Prosecution requests that the Chamber dismiss the Request on the ground that it fails to satisfy the requirements of Rule 73 (B) of the Rules,

**CONSIDERING** that Counsel for the Accused Prlić, Stojić, Čorić and Pušić did not file a response to the Request,

**CONSIDERING** that in the Request, the Praljak and Petković Defences submit that the Impugned Decision is unfair in that it puts into place a procedure whereby an Accused could be convicted on the basis of untested evidence, in violation of the right of equality of arms and in violation of the right of an Accused to be accorded the same rights as if he were being tried separately,<sup>1</sup>

**CONSIDERING** that the Praljak and Petković Defences further submit that this system implemented by the Impugned Decision does ensure an expeditious trial to the extent that it permits the Prosecution to continue to put its case in the cross-examination of a Defence witness,<sup>2</sup>

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<sup>1</sup> Request, paras. 30, 31, 34 and 35.

<sup>2</sup> Request, paras. 24-27 and 36.

**CONSIDERING** finally that the Praljak and Petković Defences argue that the resolution of this matter by the Appeals Chamber would materially advance the proceedings since it would allow the Defence to know how it “should respond to the Prosecution tactics in court”,<sup>3</sup>

**CONSIDERING** that the Prosecution argues that the Request is general, hypothetical and imprecise with respect to the alleged prejudice the Impugned Decision has caused to the Accused,<sup>4</sup>

**CONSIDERING** that the Prosecution submits that the Chamber has made no error in applying Rule 90 (H) and that it has taken the rights of the Accused into account, contrary to the assertions by the Praljak and Petković Defences,<sup>5</sup>

**CONSIDERING** finally that the Prosecution argues that the appeal of the Impugned Decision would have no chance to succeed since this would amount to rendering Rule 90 (H) (i) meaningless, and that as a result an appeal of the Impugned Decision would not materially advance the proceedings,<sup>6</sup>

**CONSIDERING** that under Rule 73 (B) of the Rules, “decisions on all motions are without interlocutory appeal save with certification by the Trial Chamber, which may grant such certification if the decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings”,

**CONSIDERING** that consequently, certification to appeal is a matter within the discretionary power of the Chamber, which must first verify whether the two cumulative conditions set out in Rule 73 (B) of the Rules have been met in this case,<sup>7</sup>

**CONSIDERING** that in this case the Chamber would first point out that the Impugned Decision merely recalls and specifies the Chamber’s consistent interpretation of Rule 90 (H) (i), according to which the cross-examining party may

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<sup>3</sup> Request, para. 39.

<sup>4</sup> Response, paras. 7-11.

<sup>5</sup> Response, paras. 12-20.

<sup>6</sup> Response, paras. 21-25.

<sup>7</sup> *The Prosecutor v. Pavle Strugar*, Case No. IT-01-42-T, Decision on Defence Motion for Certification, 17 June 2004, para. 2.

ask questions which go beyond the scope of the direct examination and which relate to its own case,<sup>8</sup>

**CONSIDERING** that the Chamber next recalls that this possibility should not be considered as violating the adversarial principle, the fairness of the proceedings or the right of the Accused to be accorded the same rights as if he were being tried separately, since during the Prosecution case, the Defence teams too had the opportunity to cross-examine on matters outside the framework of direct examination and which relate to their case<sup>9</sup> and, in addition, the Chamber adopted a provision permitting further cross-examination in “exceptional circumstances”,<sup>10</sup>

**CONSIDERING** that the Chamber finally notes that the Praljak and Petković Defences never appealed the main decisions of the Chamber as regards the application of Rule 90 (H); that in particular, when the Petković Defence requested leave to appeal the Decision of 24 April 2008, it only raised questions relating to the time allocated to the Prosecution for its cross-examination and to the admission of exhibits,<sup>11</sup>

**CONSIDERING** that the Chamber is therefore of the opinion that in the Request, the Praljak and Petković Defences have in no way demonstrated that the conditions of Rule 73 (B) were met, as the Impugned Decision merely recalls and specifies a practice well-established by the Chamber,

**CONSIDERING** that in addition the Chamber deems that the immediate resolution of the issue by the Appeals Chamber at this stage would not materially advance the proceedings but could, conversely, create a serious risk of obstructing the proper conduct of the trial in view of the Chamber’s consistent practice as regards the application of Rule 90 (H) of the Rules,

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<sup>8</sup> Impugned Decision, para. 14. *See also* the “Decision on the Mode of Interrogating Witnesses”, rendered by the Chamber on 10 May 2007, para. 13; the “Decision Adopting Guidelines for the Presentation of Defence Evidence”, rendered by the Chamber on 24 April 2008 (“Decision of 24 April 2008”), para. 7 and 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”, rendered by the Chamber on 4 July 2008, para. 13.

<sup>9</sup> Impugned Decision, para. 15.

<sup>10</sup> Decision of 24 April 2008, Guideline 1, para. 2. *See also* the Impugned Decision, para. 16.

<sup>11</sup> “Application of Petković Defence for Certification Under Rule 73(B) for Appeal Against Points in the Trial Chamber’s 24 April 2008 *Decision Adopting Guidelines For The Presentation Of Defence Evidence*”, filed by Counsel for the Accused Petković on 1 May 2008.

**FOR THESE REASONS,**

**IN ACCORDANCE WITH** Rule 73 (B) of the Rules,

**DENIES** the Request for certification to appeal.

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

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Jean-Claude Antonetti  
Presiding Judge

Done this ninth day of January 2009  
At The Hague  
The Netherlands

**[Seal of the Tribunal]**