

IT-03-69-T
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26 August 2011

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**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-03-69-T
Date: 26 August 2011
Original: English

IN TRIAL CHAMBER I

Before: Judge Alphons Orie, Presiding
Judge Michèle Picard
Judge Elizabeth Gwaunza

Registrar: Mr John Hocking

Decision of: 26 August 2011

PROSECUTOR

v.

**JOVICA STANIŠIĆ
FRANKO SIMATOVIĆ**

PUBLIC

**GUIDANCE ON THE ADMISSION INTO EVIDENCE OF
DOCUMENTS TENDERED BY THE PROSECUTION DURING
THE DEFENCE CASE
AND
REASONS FOR DECISIONS ON PAST ADMISSIONS OF SUCH
DOCUMENTS**

Office of the Prosecutor
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Counsel for Jovica Stanišić
Mr Wayne Jordash
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Mr Mihajlo Bakrač
Mr Vladimir Petrović

I. BACKGROUND

1. On 29 June 2011, the Stanišić Defence objected to the use of a document during the Prosecution's cross-examination of Witness DST-032, submitting that the Prosecution had failed to tender certain material during its case-in-chief and was now seeking to expand its case during the cross-examinations of Defence witnesses.¹ It submitted that the Defence had been denied many opportunities to deal with such new material and that the approach by the Prosecution violated disclosure rules and the Accused's right to be promptly informed of the nature and cause of the charges, and their factual basis, against him.² On 7, 11, 14, and 20 July 2011, the Stanišić Defence objected to the use and admission of several documents on the same grounds, arguing that the threshold criteria established by the Appeals Chamber in the *Prlić* case ("Prlić Decision")³ in relation to the presentation of Prosecution documents in cross-examinations of Defence witnesses had not been met.⁴ The Simatović Defence joined the position of the Stanišić Defence.⁵

2. The Prosecution stated that it was not improperly seeking to expand its case-in-chief but rather responding to and challenging the evidence of Defence witnesses.⁶ The Prosecution submitted that certain documents in the possession of the Prosecution will only attain direct relevance if a witness gives related testimony.⁷

3. On 18 July 2011, in response to a Prosecution motion to reopen its case, the Stanišić Defence further submitted that the Prlić Decision established a procedure for when the Prosecution intends to tender documents during Defence witness cross-examinations, and that this had not been followed.⁸ The Stanišić Defence argued that the Prosecution has never "specifically justified its request" so as to give the Defence an opportunity to challenge the Prosecution attempts to adjust its case at an advanced stage of the proceedings, thereby failing to meet the threshold established by the Prlić Decision.⁹

¹ T. 12091.

² T. 12091, 12519, 12810.

³ *Prosecutor v. Prlić et al.*, Case no. IT-04-74-AR73.14, Decision on the Interlocutory Appeal Against the Trial Chamber's Decision on Presentation of Documents by the Prosecution in Cross-Examination of Defence Witnesses, 26 February 2009.

⁴ T. 12491-12492, 12494, 12511, 12519, 12588, 12806, 12837, 13095, 13106, 13110, 13112.

⁵ T. 13110.

⁶ T. 12810-12812.

⁷ T. 12813-12814.

⁸ Stanišić Defence Response to Prosecution Motion to Reopen Prosecution Case and for the Admission of a Document from the Bar Table, 18 July 2011 ("Reopening Response"), paras 11-12.

⁹ Reopening Response, paras 11-13.

4. On 14 and 20 July 2011, the Chamber announced that it would give general guidance on the use and admission of Prosecution documents during cross-examinations of Defence witnesses.¹⁰

II. APPLICABLE LAW

5. Rule 85 (A) of the Tribunal's Rules of Procedure and Evidence ("Rules") states:

Each party is entitled to call witnesses and present evidence. Unless otherwise directed by the Trial Chamber in the interests of justice, evidence at the trial shall be presented in the following sequence:

- (i) evidence for the prosecution;
- (ii) evidence for the defence;
- (iii) prosecution evidence in rebuttal;
- (iv) defence evidence in rejoinder;
- (v) evidence ordered by the Trial Chamber pursuant to Rule 98; and
- (vi) any relevant information that may assist the Trial Chamber in determining an appropriate sentence if the accused is found guilty on one or more of the charges in the indictment.

6. According to Rule 89 (C) of the Rules, a Chamber may admit any relevant evidence which it deems to have probative value. Rule 89 (D) of the Rules clarifies that a Chamber may exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial.

7. Rule 90 (H) of the Rules states:

- (i) 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.
- (ii) In the cross-examination of a witness who is able to give evidence relevant to the case for the cross-examining party, counsel shall 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.
- (iii) The Trial Chamber may, in the exercise of its discretion, permit enquiry into additional matters.

8. The Prlić Decision recalled that "where the accused opposes the admission of evidence during cross-examination due to alleged breach of his right to a fair trial, a Trial Chamber must consider how it intends to strike the appropriate balance between the need to ensure the rights of the accused and its decision to admit such evidence. In doing so, the Trial Chamber will have to consider the mode of disclosure of the documents in question, the purpose of their admission, the

¹⁰ T. 12816, 12838, 13099, 13107.

time elapsed between disclosure and examination of the witness, the languages known to Counsel and the accused, as well as any other relevant factual considerations".¹¹

III. DISCUSSION

9. The Chamber considers that the Defence's arguments focus generally on the use and tendering of documents after the closure of the Prosecution's case-in-chief. The following will give some guidance on this point.

10. The Prlić Decision sets out that the *Prlić* Trial Chamber did not commit an error when it held that the tendering of Prosecution documents during cross-examination of Defence witnesses may be allowed if such need can be justified by providing exceptional reasons in the interests of justice.¹² It follows from the standard of review employed by the Appeals Chamber that while the *Prlić* Trial Chamber's regime was not erroneous, it is not necessarily the only valid regime. The Prlić Decision clarified that material not included in the Prosecution Rule 65 *ter* list and not admitted during the Prosecution's case-in-chief but tendered by the Prosecution when cross-examining Defence witnesses, may be admitted subject to Rules 89 (C) and (D).¹³ It further affirmed that Trial Chambers exercise broad discretion in determining the admissibility of evidence.¹⁴

11. The Chamber notes that the Rules do not provide express guidelines on the use of documents. Rules 85 and 89 of the Rules concern calling of witnesses and tendering of documents, whereas Rule 90 (H) regulates the scope of cross-examination. The Chamber considers that the *use* of documents, as opposed to their tendering, is an intrinsic part of the examination of a witness. Considering that the Prosecution is entitled to elicit information relevant to its own case from Defence witnesses in accordance with Rule 90 (H) (i) of the Rules, the Chamber finds that it may also *use* documents during such examinations without specific limitations. The Chamber is nevertheless mindful of the fact that using a document in court ordinarily leads to its tendering into evidence.

12. While Rule 85 (A) of the Rules provides for the general sequence of the presentation of evidence which can only be varied in the interests of justice, it does not regulate the eliciting of

¹¹ Prlić Decision, para. 25 and references cited therein.

¹² Prlić Decision, paras 3, 24.

¹³ Prlić Decision, paras 15, 23.

¹⁴ Prlić Decision, para. 5.

evidence through cross-examination, which is governed by Rule 90 (H) (i).¹⁵ A teleological interpretation of these two rules demonstrates that evidence elicited from and tendered through a witness in accordance with Rule 90 (H) (i) of the Rules does not require an additional showing of being in the interests of justice.¹⁶ This is irrespective of whether such documents appeared on the Prosecution's Rule 65 *ter* list.¹⁷

13. With regard to possible prejudice to the Defence arising out of the tendering of documents by the Prosecution during cross-examination of Defence witnesses, the Chamber notes at the outset that certain procedural consequences may result from procedural positions the Accused adopts in his Defence. If the Defence calls a witness, the Prosecution has certain rights and obligations under Rule 90 (H) of the Rules.

14. While generally the Prosecution's evidence is received during its case-in-chief, the dimensions of proceedings before this Tribunal require certain adaptations. The Rules require the Prosecution to streamline its case in the interests of expediency and efficiency. It is inevitable that the Prosecution limits the presentation of its evidence due to the huge volume of material available to it. The Prosecution is not expected to flood the Chamber with material during its case-in-chief with a view to anticipating and pre-emptively responding to all possible Defence evidence, convincing or not, contradicting its case or evidence presented in its case-in-chief. Apart from the undesirability of such a system from a point of view of judicial economy, cases before the Tribunal are of such complexity and sources of evidence are so vast that it would also be practically impossible to require the Prosecution to present such anticipatory and pre-emptive responses during its case-in-chief. Further, the Prosecution's burden to prove its case does not require the tendering of all the evidence available to it. If Defence evidence, being announced only after the closure of the Prosecution's case, directly contradicts Prosecution evidence, it is in the interest of an effective ascertainment of the truth that all contextualization is put before the Chamber at this stage.¹⁸ Tendering such documents, for the purpose of witness impeachment or for relying on the truth of their contents, is then in line with the *rationale* of cross-examination, namely to challenge and/or contextualize evidence given by the witness. Moreover, it is consonant with the spirit of Rule 90

¹⁵ See also *Prosecutor v. Prlić et al.*, Case no. IT-04-74-T, Decision on Scope of Cross-Examination under Rule 90 (H) of the Rules, 13 January 2009 (original French version filed on 27 November 2008), para. 12 and *Prosecutor v. Prlić et al.*, Case no. IT-04-74-T, Decision on Presentation of Documents by the Prosecution in Cross-Examination of Defence Witnesses, 13 January 2009 (original French version filed on 27 November 2008) ("Prlić Trial Decision"), para. 15.

¹⁶ See Prlić Decision, para. 23, where the "interests of justice" requirement is solely attached to variations of the sequence of presenting evidence.

¹⁷ This is especially true for documents tendered during Defence cross-examinations as there is no Defence Rule 65 *ter* list during the Prosecution's case.

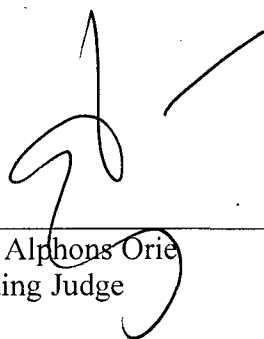
¹⁸ The Chamber notes that such evidence could be introduced during the rebuttal phase of the case but is of the view that it is more practical and effective to receive such contextualization during cross-examination.

(H) (i) that eliciting of evidence relevant to the subject-matter of the cross-examining party's case can also include tendering of documents if those documents are sufficiently connected to the witness's testimony.

15. Nevertheless, prejudice may arise due to the nature and/or amount of admitted documents that had only recently been disclosed. Generally, the Chamber is of the view that it is upon the Defence to argue and demonstrate any prejudice resulting from the admission of Prosecution documents during cross-examination of Defence witnesses. The Chamber will consider any such submissions, as well as submissions by the Prosecution in response,¹⁹ in order to make an assessment of whether any probative value of the document in question is substantially outweighed by the need to ensure a fair trial. This assessment may lead to the document's exclusion from the body of evidence or to other measures, such as additional time for examination of the witness, an adjournment, or a recall of the witness, to cure any Defence prejudice. If the Defence can demonstrate any prejudice in this regard, the Chamber will consider granting appropriate relief.

16. In relation to past Defence objections to the tendering of such documents which were denied, the Chamber clarifies that it was satisfied that the admissibility criteria of Rule 89 (C) of the Rules were met and that the Defence's submissions were not such as to exclude the evidence or grant other forms of relief at this stage.

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



Judge Alphons Orie
Presiding Judge

Dated this twenty-sixth of August 2011
At The Hague
The Netherlands

[Seal of the Tribunal]

¹⁹ The Prosecution's submissions in response should elaborate on when and by which means it obtained the document, when the document was disclosed, why the document was not tendered during the Prosecution's case, and for what purpose admission is sought; see Prlić Trial Decision, para. 20 and Prlić Decision, para. 25.