

IT-03-69-T
D38775-D38771
21 March 2012

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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: 21 March 2012
Original: English

IN TRIAL CHAMBER I

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

Registrar: Mr John Hocking

Decision of: 21 March 2012

PROSECUTOR

v.

**JOVICA STANIŠIĆ
FRANKO SIMATOVIĆ**

PUBLIC

**DECISION ON STANIŠIĆ DEFENCE REQUEST FOR
RECONSIDERATION OF DECISION ON STANIŠIĆ DEFENCE
REQUEST FOR CERTIFICATION TO APPEAL THE TRIAL
CHAMBER'S 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
Mr Dermot Groome

Counsel for Jovica Stanišić
Mr Wayne Jordash
Mr Scott Martin

Counsel for Franko Simatović
Mr Mihajlo Bakrač
Mr Vladimir Petrović

I. PROCEDURAL HISTORY AND SUBMISSIONS OF THE PARTIES

1. On 19 October 2011, the Chamber issued its “Decision on Stanišić Defence Request for Certification to Appeal the Trial Chamber’s 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” (“Certification Decision”), denying the aforementioned request for certification to appeal, filed on 2 September 2011.¹

2. On 22 November 2011, the Stanišić Defence requested that the Chamber reconsider its Certification Decision (“Reconsideration Request”) arguing that the Chamber was incorrect in finding that since “the General Guidance does not rule on any existing and concrete dispute, it cannot be the subject of an appeal”.² According to the Stanišić Defence, unless the Chamber has introduced a new threshold against which new evidence is to be admitted, the general guidance contained in the Chamber’s Decision of 26 August 2011 (“Guidance and Reasons”)³ was applied to the admission of evidence prior to the Chamber’s issuance of its Certification Decision and could therefore be appealed.⁴

3. Second, the Stanišić Defence submits that the Chamber erred in its interpretation of Rule 73 (B) of the Tribunal’s Rules of Procedure and Evidence (“Rules”) in that the Chamber’s requirement of a “dispositive and immediate demonstration that the new evidence *will* significantly affect the outcome of the trial undermines the object and purpose of Rule 73(B)”.⁵

4. Third, the Stanišić Defence submits that the Chamber erred in calculating the total number of Defence objections based on the threshold criteria established by the Appeals Chamber in *Prosecutor v. Prlić et al.* (“Prlić Threshold Objection”).⁶

¹ Decision on Stanišić Defence Request for Certification to Appeal the Trial Chamber’s 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, 19 October 2011; Stanišić Defence Request for Certification to Appeal the Trial Chamber’s 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, 2 September 2011.

² Reconsideration Request, para. 7.

³ 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, 26 August 2011.

⁴ Reconsideration Request, para. 8.

⁵ Reconsideration Request, para. 12.

⁶ Reconsideration Request, para. 13. *Prosecutor v. Prlić et al.*, Case No. IT-04-74-AR73.14, Decision on Interlocutory Appeal Against the Trial Chamber’s Decision on Presentation of Documents by the Prosecution in Cross-Examination of Defence Witnesses, 26 February 2009.

5. On 6 December 2011, the Prosecution responded (“Prosecution Response”)⁷ to the Reconsideration Request taking no position but requesting that the Chamber consider the submissions contained in the Prosecution Response in its deliberations.⁸ *Inter alia*, the Prosecution submits that the Stanišić Defence is, in essence, challenging the decisions of the Chamber admitting the documents into evidence, as opposed to challenging the Chamber’s denial of certification for leave to appeal those decisions on admission. In such an instance the Prosecution submits that the more appropriate avenue to seek relief would be to submit “a motion for reconsideration of the decisions admitting the particular documents challenged, along with an articulation of the prejudice occasioned by the admission of each document”.⁹

II. APPLICABLE LAW

6. A Trial Chamber has a discretionary power to reconsider a previous decision if a clear error of reasoning has been demonstrated or if particular circumstances justify reconsideration in order to prevent an injustice. Such circumstances include new facts or new arguments.¹⁰

III. DISCUSSION

7. The Stanišić Defence submits that the Chamber has made three clear errors of reasoning.¹¹ First, the Stanišić Defence disputes the Chamber’s finding that since the general guidance, contained in the Guidance and Reasons, did not rule on any existing and concrete dispute, it cannot be subject to an appeal.¹² The Chamber notes that the Guidance and Reasons consisted of two parts. The first part provided general guidance for the parties concerning the Prosecution’s tendering of evidence during cross-examination of Defence witnesses (“General Guidance”).¹³ The second part gave reasons for past decisions on admission into evidence of documents to which the Defence had objected based on the *Prlić* Threshold Objection and for which the Chamber had announced that reasons would follow (“Reasons”).¹⁴ This distinction between the General Guidance and the Reasons was further clarified in the Certification Decision where it was stated, *inter alia*, that “the

⁷ Prosecution Response to Stanišić Defence Motion for Reconsideration of the Chamber’s Decision Denying Leave to Appeal the Chamber’s Guidance and Reasons Regarding the Use and Admission of Documents During the Defence Case, 6 December 2011.

⁸ Prosecution Response, para. 2.

⁹ Prosecution Response, para. 8.

¹⁰ *Prosecutor v. Prlić et al.*, Case No. IT-04-74-AR73.16, Decision on Jadranko Prlić’s Interlocutory Appeal against the Decision on Prlić Defence Motion for Reconsideration of the Decision on Admission of Documentary Evidence, 3 November 2009, para. 18; *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, Decision on Defence’s Request for Reconsideration, 16 July 2004, p. 2.

¹¹ Reconsideration Request, para. 6.

¹² Reconsideration Request, para. 7.

¹³ Guidance and Reasons, paras 7-15.

¹⁴ Guidance and Reasons, para. 16; See also Certification Decision, para. 10; T. 13099.

inherent nature of guidelines is that they relate to the future use and tendering of documents”.¹⁵ Thus, the intention was to assist the parties’ understanding of the Chamber’s approach to the Prosecution’s tendering of evidence, during the cross-examination of defence witnesses, after the closure of its case. For the foregoing reasons the Chamber finds no clear error of reasoning in its conclusion and, based on the submissions of the Stanišić Defence, the Chamber does not see any particular circumstances which justify reconsideration in order to prevent an injustice.

8. Second, the Stanišić Defence submits that the Chamber committed a clear error of reasoning in its interpretation of Rule 73 (B) of the Rules. The Stanišić Defence argues that whilst the threshold for Rule 73 (B) of the Rules when deciding on whether to grant certification to appeal revolves around whether the decision in question involves an issue that *would* significantly affect the outcome of the trial, the Chamber appeared to conclude that the criterion had not been met as it could not determine whether the documents in question “*will* significantly affect the outcome of the trial”.¹⁶ The Chamber highlights that the full text of Rule 73 (B) was set out in paragraph 5 of the Certification Decision. Further, the Chamber explained that it was unable to assess what weight will be given to the documents subject of the Reasons until the final evaluation of the totality of the evidence. Therefore, the Chamber concluded that in respect of the three documents covered by the Reasons, the first criterion of Rule 73 (B) had not been fulfilled.¹⁷ Whether the admission into evidence of the documents will, or whether it would, significantly affect the outcome of the trial is equally impossible to forecast. The Chamber came to its conclusion having fully considered the first criterion of Rule 73 (B) of the Rules and finds no clear error of reasoning in its interpretation of this Rule. Further the Chamber does not see any particular circumstances which justify reconsideration in order to prevent an injustice.

9. Third, the Stanišić Defence submits that the Chamber made a clear error of reasoning in calculating that it had objected to only three documents using the *Prlić* Threshold Objection. In essence, the Stanišić Defence argues that if the Chamber had not made the distinction between those documents admitted into evidence and those documents marked for identification, the total number of documents concerned would have been far higher.¹⁸ No clear error in reasoning can be

¹⁵ Certification Decision, para. 9.

¹⁶ Reconsideration Request, para. 10, emphasis added; Certification Decision, para. 12(a). The Chamber notes the typographical error in its Certification Decision whereby two paragraphs were numbered “12”. The Chamber will therefore refer to these paragraphs chronologically as “12(a)” and “12(b)”.

¹⁷ Certification Decision, para. 12(a).

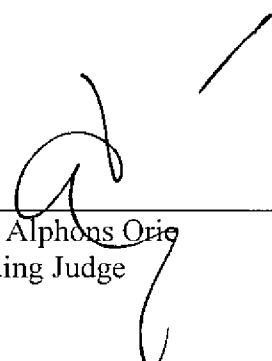
¹⁸ Reconsideration Request, para. 18. The Chamber notes that both Annexes A and B contain lists of documents which were, at the time of the Certification Decision, marked for identification, apart from four documents which had at that time been admitted into evidence. Three of those documents were the subject of the Reasons in the Guidance and Reasons (P3005, P3006 and P3007), and the fourth document (P2985) was initially objected to by the Stanišić Defence, however the objection to the admission of this document into evidence was later dropped (T. 12094).

found in the Chamber's Certification Decision in making a distinction between those documents admitted into evidence and those marked for identification. The Stanišić Defence argues that, in the present case, "MFI documents are, almost without exception, admitted into evidence".¹⁹ The Chamber considers this to be irrelevant as marking a document for identification necessarily requires a decision to be taken by the Chamber at a later stage in order for that document to be admitted into evidence. No decisions on admission had been taken on those documents marked for identification at the time of issuing the Certification Decision. The Certification Decision only addressed the decisions to admit documents into evidence despite the Defence's *Prlić* Threshold Objection and where the Chamber had announced that reasons would follow. This applied to three decisions.²⁰ For the foregoing reasons the Chamber finds no clear error of reasoning in calculating the documents which were objected to on the basis of the *Prlić* Threshold Objection. Further, based on the submissions of the Stanišić Defence, the Chamber does not see any particular circumstances which justify reconsideration in order to prevent an injustice.

IV. DISPOSITION

10. For the foregoing reasons, the Chamber **DENIES** the Reconsideration Request.

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



Judge Alphons Orić
Presiding Judge

Dated this Twenty-first of March 2012
At The Hague
The Netherlands

[Seal of the Tribunal]

¹⁹ Reconsideration Request, para. 13.

²⁰ The Chamber accepts that the Stanišić Defence may have raised a 'standing objection' to all documents tendered by the Prosecution during the examination of Defence witnesses (T. 13112), however this does not alter the Chamber's opinion that the Reasons only applied to the three documents specified in the Certification Decision, as the Chamber only announced reasons to follow for these decisions.