



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: 19 October
2011
Original: English

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IN TRIAL CHAMBER I

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

Registrar: Mr John Hocking

Decision of: 19 October 2011

PROSECUTOR

v.

**JOVICA STANIŠIĆ
FRANKO SIMATOVIĆ**

PUBLIC

**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**

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Mr Vladimir Petrović

I. PROCEDURAL HISTORY AND SUBMISSIONS OF THE PARTIES

1. On 2 September 2011, the Stanišić Defence requested certification to appeal the 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", filed on 26 August 2011 ("Request" and "Guidance" respectively).¹ The Guidance consists of two parts, first the provision of general guidelines on the use and tendering of Prosecution documents during its cross-examination of defence witnesses after the closure of the Prosecution's case-in-chief and, second, reasons for some of the Chamber's previous decisions admitting such documents.²

2. The Stanišić Defence submits that the ultimate outcome of the trial could be affected by the Guidance.³ Further, the Stanišić Defence states that potential reliance by the Prosecution on newly admitted documents to demonstrate the Accused's individual criminal responsibility in its final submissions will affect the outcome of the trial, in that it may contribute to a finding adverse to the Accused.⁴ Further, the Stanišić Defence submits that the outcome of the trial may be affected if exhibits are used to demonstrate the *actus reus* of the Accused.⁵ The Stanišić Defence also draws similarities with its request and a decision in *Prosecutor v. Gotovina et al.*⁶ in which that Trial Chamber found itself satisfied that the first criterion going to granting certification for leave to appeal had been fulfilled because the new evidence could have a significant bearing on the individual criminal responsibility of the accused.⁷

3. According to the Stanišić Defence, the Prosecution's continued introduction of new documents into evidence through Defence witnesses could cause substantial delays as the Stanišić Defence may need to request an adjournment of proceedings to be able to counter the new evidence,⁸ or additional time for its Defence case.⁹ Further, it submits that if interlocutory appeal is granted by the Chamber, the situation could be avoided whereby the Guidance is appealed upon the final judgement which could risk a re-trial should the Appeals Chamber find at that stage that the

¹ 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 Guidance, para. 9.

³ Request, para. 9.

⁴ *Ibid.*

⁵ Request, paras 10.

⁶ *Prosecutor v. Ante Gotovina et al.*, Case No. IT-06-90-T, Decision on Čermak and Markač Defence Requests for Certification to Appeal the Trial Chamber Decision of 21 April 2010 to Reopen the Prosecution's Case, 10 May 2010.

⁷ Request, para. 11.

⁸ Request, paras 12-13.

⁹ Request, para. 14.

Chamber in fact erred in its Guidance.¹⁰ Finally, according to the Stanišić Defence, an appellate assessment of the “new threshold/regime”, set out by the Guidance, would benefit the administration of justice.¹¹

4. The Prosecution responded to the Request on 19 September 2011 (“Prosecution’s Response”), outside the 14-day time limit to respond prescribed by Rule 126 *bis* of the Tribunal’s Rules of Procedure and Evidence (“Rules”).¹² Thus, the Chamber does not consider the Prosecution’s Response as validly filed and will therefore not consider it further.

II. APPLICABLE LAW

5. Rule 73 (B) of the Rules requires that the Trial Chamber be satisfied of two cumulative criteria in order for it to grant a request for certification to appeal: 1) that the decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and 2) that in finding such an issue exists, it is the opinion of the Trial Chamber that an immediate resolution by the Appeals Chamber may materially advance the proceedings.

6. Rule 73 (C) of the Rules provides that any request for certification for leave to appeal must be filed within seven days of the filing of the impugned decision. If the impugned decision has been rendered orally, the time-limit runs from the date of the oral decision unless, in accordance with Rule 73(C) (ii), “the Trial Chamber has indicated that a written decision will follow, in which case the time-limit shall run from the filing of the written decision”.

III. DISCUSSION

7. The Chamber considers that the Guidance consists of two related but distinct parts. First, the Guidance provides general guidelines on the future use and tendering of documents in the cross-examination of Defence witnesses by the Prosecution after the closure of the Prosecution’s case-in-chief (“General Guidance”). Second, the Guidance sets out the Chamber’s reasons for the previous admission into evidence of such documents (“Reasons”). The Chamber will deal with the arguments put forward by the Request in relation to the two distinct parts of the Guidance and in light of Rule 73 (B) and Rule 73 (C) (ii) respectively.

¹⁰ *Ibid.*

¹¹ Request, para. 16.

8. In respect of the first criterion of Rule 73 (B), the Chamber emphasises that in order to grant certification, the decision in question must involve an issue that would *significantly* affect the outcome of the trial. However, the Request instead proposes that the ultimate outcome of the Trial *may* be affected by the General Guidance and the Reasons. Despite the lower threshold argued in the Request, the Chamber will nevertheless assess the arguments raised in relation to the first criterion of Rule 73 (B) and determine whether the General Guidance and Reasons would significantly affect the outcome of the trial.

9. Regarding the General Guidance, the Chamber emphasises that the inherent nature of the guidelines is that they relate to the future use and tendering of documents by the Prosecution during its cross-examination of defence witnesses. The Chamber therefore considers that the General Guidance cannot be subject to an appeal in itself since it does not rule on any existing and concrete dispute.

10. With regard to the Reasons, the Chamber notes that between 14 June 2011, the start of the Defence case, and 26 August 2011, the date of the Guidance, a total of 32 documents were tendered by the Prosecution in its cross-examination of Defence witnesses. Of these documents, 20 were admitted into evidence while the remaining 12 were marked for identification. Out of the 20 documents admitted into evidence only three were objected to by the Stanišić Defence on the basis that the threshold on tendering evidence, set by the Appeals Chamber in *Prosecutor v. Prlić et. al.*, had not been met.¹³ And it was only in relation to these three documents that the Chamber indicated at the time of their admission that it would elaborate its reasons for denying the Stanišić Defence's objection thereto, such reasons ultimately forming the Reasons in the Guidance. Therefore, the Chamber considers that the Reasons provided in the Guidance relate only the Chamber's decisions to admit exhibits P3005, P3006 and P3007 and it is in relation to these three documents that the first criterion of Rule 73 (B) will be assessed.

12. The Reasons concern three documents in the context of a case in which many thousands of exhibits have been admitted into evidence. Further, the Chamber highlights the fundamental distinction between the legal admissibility of documentary evidence and the weight which the Chamber gives to it in the light of the entire record.¹⁴ At this time the Chamber cannot know the

¹² Prosecution Response to Stanišić Defence Request for Certification to Appeal the Trial Chamber's Guidance on the Admission of Evidence during the Defence Case, 19 September 2011.

¹³ *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; T. 13106-T13107; Exhibit Numbers P3005; P3006; P3007.

¹⁴ Decision on Simatović Defence Request for Certification to Appeal (Babić), 17 February 2011, para. 9; Decision on Simatović Defence Request for Certification to Appeal (Todorović), 31 January 2011, para. 9; Decision on


weight which could eventually be attributed to the documents. In accordance with Rule 87 of the Rules the Trial Chamber will deliberate after the Parties have completed their presentation of the case, and it is at this stage that the appropriate weight will be given to the evidence admitted during the trial in context of the trial record in its entirety. Thus, the Chamber cannot determine at this stage of the proceedings whether the admission into evidence of the documents subject of the Reasons will significantly affect the outcome of the trial. The Chamber has reached the conclusion that, *in respect of the Reasons*, the first criterion of Rule 73 (B) has not been fulfilled with regard to either the General Guidance or the Reasons.

11. In light of the Chamber's conclusion that the first criterion of Rule 73 (B) has not been satisfied, and with the two criteria being cumulative in nature, there is no need for the Chamber to address the arguments of the Stanišić Defence in relation to the second criterion of Rule 73 (B).

IV. DISPOSITION

12. For the foregoing reasons, pursuant to Rule 73 (B) of the Rules, the Chamber **DENIES** the Request.

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



Judge Alphons Orie
Presiding Judge

Dated this nineteenth day of October 2011
At The Hague
The Netherlands

[Seal of the Tribunal]

Admission into Evidence of Prior Testimony, Statement, and Related Documents Concerning Witness JF-052, 28 January 2011, para. 11.