



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
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TRIAL CHAMBER III

Before: Judge Jean-Claude Antonetti
Judge Árpád Prandler
Judge Stefan Trechsel
Reserve Judge Antoine Kesia-Mbe Mindua

Registrar: Mr Hans Holthuis

Decision of: 24 April 2008

THE PROSECUTOR

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

PUBLIC

Decision Adopting Guidelines for the Presentation of Defence Evidence

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Ms Vesna Alaburić and Mr Nicholas Stewart for Milivoj Petković
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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”) will hear the evidence for the Defence in the case of *The Prosecutor v. Jadranko Prlić, Bruno Stojić, Slobodan Praljak, Milivoj Petković, Valentin Ćorić and Berislav Pušić* beginning on 5 May 2008. In accordance with the provisions of the Statute of the Tribunal and the Rules of Procedure and Evidence of the Tribunal (“Rules”), the Chamber has a duty to ensure that the trial is fair and expeditious with full respect for the rights of the Accused and due regard for the protection of victims and witnesses. The Trial Chamber also has a duty to exercise control over the mode and order of examining witnesses and presenting evidence, as well as the order in which they appear. Accordingly, the Chamber recalls the orders and decisions which have governed the proceedings heretofore and which continue to apply. In this decision, the Chamber will incorporate some of these guidelines by adapting them to the requirements of the presentation of defence evidence. It should be noted that by adopting the guidelines set out below, the Chamber has duly considered the submissions made by the Parties during the 17 March 2008 meeting held with the Parties pursuant to Rule 65 *ter* (G) of the Rules and during the pre-defence conference of 21 April 2008.

II. Examination of witnesses

Guideline 1: The Order of the Examination of Witnesses

2. The witness shall first be examined by the party presenting that witness.¹ The witness may then be cross-examined. The witness shall first be cross-examined by the other Defence teams and then by the Prosecution. Each witness may then be re-examined by the party presenting that witness. There shall be no further cross-examination, except under exceptional circumstances and with the leave of the Chamber. A Judge may at any stage put any question to the witness.

3. In the present case the Accused are represented by Counsel. The witnesses shall first be examined by Counsel for the Accused.² Under exceptional circumstances and with the

¹ In the case where the witness is presented by several parties, the terms “the party presenting the witness” shall include all of the parties presenting that witness.

² Revised Version of the Decision Adopting Guidelines on Conduct of Trial Proceedings, 28 April 2006, p. 7, para. (c); Decision on the Mode of Interrogating Witnesses, 10 May 2007, para. 11, upheld by the Appeals

leave of the Chamber, an Accused may address a witness directly and put questions to him or her.³ Exceptional circumstances relate in particular to the examination of events in which an Accused participated personally, or the examination of issues about which he possesses specific expertise.⁴ An Accused who wishes to take the floor shall first explain to the Chamber the reasons why there are such exceptional circumstances.⁵

Guideline 2: The Nature of the Questions Posed

4. Given the importance of concentrating the evidence on the matters most in dispute, and avoiding delays, the parties shall put clear and concise questions to the witnesses. When presenting a witness with something that he or she has previously stated during their testimony, or in a written statement, the parties should avoid paraphrasing the witness and should rather quote directly from the transcript or prior witness statement, giving relevant page numbers. A prior witness statement may be used to refresh the memory of a witness, whether or not such statement has been admitted into evidence.⁶

5. Leading questions shall not be permitted in direct examination, except with the leave of the Chamber.

Guideline 3: Scope of Direct Examination, Cross-Examination, Re-Examination and Further Cross-Examination

6. As a general rule, the party presenting the witness shall limit the direct examination to the matters raised in the summaries prepared in accordance with Rule 65 *ter* (G) of the Rules. That party may expand the scope of its direct examination to include points which are not contained in these summaries but which may have arisen during the proofing of the witness. The party shall inform the Chamber and the other parties of this as soon as possible, so that the

Chamber in *The Prosecutor v. Prlić et al.*, Case No. IT-04-74-AR73.5, Decision on Praljak's Appeal of the Trial Chamber's 10 May 2007 Decision on the Mode of Interrogating Witnesses, 24 August 2007.

³ Revised Version of the Decision Adopting Guidelines on Conduct of Trial Proceedings, 28 April 2006, p. 7, para. (c); Decision on the Mode of Interrogating Witnesses, 10 May 2007, para. 11, upheld by the Appeals Chamber in *The Prosecutor v. Prlić et al.*, Case No. IT-04-74-AR73.5, Decision on Praljak's Appeal of the Trial Chamber's 10 May 2007 Decision on the Mode of Interrogating Witnesses, 24 August 2007.

⁴ Decision on the Mode of Interrogating Witnesses, 10 May 2007, para. 12, upheld by the Appeals Chamber in *The Prosecutor v. Prlić et al.*, Case No. IT-04-74-AR73.5, Decision on Praljak's Appeal of the Trial Chamber's 10 May 2007 Decision on the Mode of Interrogating Witnesses, 24 August 2007; Oral Decision, transcript in French ("T(F)") of 28 November 2007, pp. 25298 and 25299.

⁵ Decision on the Mode of Interrogating Witnesses, 10 May 2007, para. 12, upheld by the Appeals Chamber in *The Prosecutor v. Prlić et al.*, Case No. IT-04-74-AR73.5, Decision on Praljak's Appeal of the Trial Chamber's 10 May 2007 Decision on the Mode of Interrogating Witnesses, 24 August 2007.

⁶ Revised Version of the Decision Adopting Guidelines on Conduct of Trial Proceedings, 28 April 2006, p. 7, para. (d).

other parties may prepare their cross-examination properly and so that the Chamber may be fully informed when ruling on the objections, if any, which might be raised in this connection.⁷

7. As regards the rules governing the scope of cross-examination, the Chamber recalls that pursuant to Rule 90 (H) (i), cross-examination may deal with a matter that has not been raised in direct examination.⁸

8. Nonetheless, the cross-examination dealing with a subject not raised in the direct examination is not a cross-examination strictly speaking, but an examination resembling the direct examination.⁹ As a result, the rules applying to direct examination must be respected. Consequently, leading questions shall not be permitted in this type of examination.¹⁰

9. The re-examination of a witness shall be limited to matters raised in cross-examination.¹¹ Before re-examining, the party shall specify the points in the cross-examination to which its re-examination relates, so as to avoid any needless consumption of time and unfounded objections.

10. In the exceptional case where the Chamber authorizes a party to conduct a further cross-examination, that examination shall be limited to matters determined by the Chamber.

Guideline 4: Trial Scheduling

11. In order to facilitate arrangements for the examination of witnesses, the party presenting its case shall submit to the Chamber and the other parties a schedule of the witnesses it intends to call for one month. The party shall specify the duration of the examination of each witness. When establishing this schedule, the party shall take into account the time necessary for the cross-examination of the witnesses, in accordance with the principles set out in paragraphs 14 and 15 below. This schedule must be filed 15 days before the first day of the month to which it refers. This rule shall begin to apply on 15 May 2008 with respect to the schedule of witnesses for the month of June. The schedule for May 2008 must be filed promptly and no later than 28 April 2008.

⁷ Oral decision of 3 July 2006, T(F) p. 4249; Oral decision of 24 August 2006, T(F) pp. 5502 and 5503.

⁸ Decision on the Mode of Interrogating Witnesses, 10 May 2007, para. 13.

⁹ Decision on the Mode of Interrogating Witnesses, 10 May 2007, para. 13.

¹⁰ Decision on the Mode of Interrogating Witnesses, 10 May 2007, para. 13.

¹¹ Revised Version of the Decision Adopting Guidelines on Conduct of Trial Proceedings, 28 April 2006, p. 7, para. (g).

12. When the party presenting its case wishes to request protective measures, it shall file a written motion for this purpose. The party shall file this motion at the latest at the same time as the schedule for the month concerned. The other parties shall have one week after the filing of the said motion to respond in writing, if need be.

Guideline 5: Time available for direct examination, cross-examination and re-examination of witnesses

13. The Chamber shall determine the amount of time the party presenting the witness shall have for examination and re-examination on the basis of the information provided in accordance with Guideline 4 mentioned above and of the lists filed in accordance with Rule 65 *ter* (G) of the Rules.

14. For its cross-examination, the Prosecution shall have 100% of the time allocated for the direct examination.

15. 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. Unless the Chamber decides otherwise, the teams shall agree among themselves on the allocation of time and inform the Chamber of this in advance. In the event of a disagreement among the Defence teams, this time shall be divided equally among them. These principles shall be implemented with flexibility if the circumstances so require.

16. If a Defence team would like additional time to cross-examine a witness, it must justify this request in writing within 7 days of the filing of the monthly schedule, indicating which matters it wishes to raise with the witness. The Chamber shall determine the time for the cross-examination on the basis of this request and the lists submitted in accordance with Rule

65 *ter* (G) of the Rules. Should the Chamber grant such a request, the additional time allocated to that Defence team may not be yielded to another Defence team.¹²

17. The estimated time allocated for the examination of a witness may exceptionally be revised by the Chamber in light of the hearing of the witness in court.¹³

Guideline 6: Time Allocated for the Defence Case

18. The Chamber will render a separate decision regarding the time that the Defence teams will have for the presentation of their respective cases.

19. The time allocated to a Defence team to present its case shall first include the time used for the direct examination and re-examination of its defence witnesses.

20. The time allocated to a Defence team to present its case shall also include the time used by this Defence team to raise in the cross-examination of a witness presented by another Defence team matters other than those raised in the direct examination of that witness.¹⁴

Guideline 7: Principles to Follow for Recording Time During Hearings

21. The Registry shall be responsible for recording the time spent as follows:

- (a) by the Defence team that presents the witness for direct examination,
- (b) by each Defence team for cross-examination strictly speaking,¹⁵
- (c) by each Defence team to deal in cross-examination with matters other than those raised in direct examination,¹⁶
- (d) by all of the Defence teams for cross-examination (sum total of points (b) and (c))
- (e) by the Prosecution for cross-examination,
- (f) by the Defence team presenting the witness for re-examination,

¹² Oral decision regarding additional time allocated to an Accused for cross-examination, transcript in French of 17 January 2007, pp. 12398 and 12399.

¹³ Decision on the Implementation of the Decision of 8 May 2006 on Time Allocated for Cross-Examination by Defence, 12 July 2007, p. 3.

¹⁴ *Supra*, paras. 7 and 8.

¹⁵ Rule 90 (H) (i) first and second alternative in the Rule.

¹⁶ Rule 90 (H) (i), third alternative in the Rule; *supra*, paras. 7 and 8.

- (g) by the Judges to put questions to the witnesses,
- (h) for procedural issues arising from the examination of a witness, and
- (i) for any other matter.

22. The time referred to in points (a)-(f) above shall include only the time used for the questioning of the witness and not that used to deal with objections. The time used by the Defence teams includes both the time used by Counsel for the Accused and by the Accused themselves.

23. The time referred to in point (h) above shall also include the time used to deal with objections.

24. The time used for any other matter, as referred to in point (i) above, shall include the time used for issues other than those arising from the examination of a witness, including issues related to: representation of the Accused by their Counsel; the health of the Accused; the filing of submissions by the parties; the system for monitoring the schedule; the calculation and recording of time; the trial schedule and arrangements for the examination of witnesses; the time required to implement protective measures, and significant technical problems.

25. The Registry shall regularly count the trial time in accordance with the above-mentioned guidelines. The Registry shall provide this tally each month to the Chamber and to the parties.¹⁷ This tally shall reflect the trial time used during the month in question as well as the amount of trial time already used over the entire length of the Defence case.

III. Admission of Documentary Evidence

Guideline 8: The Admission of Documentary Evidence through a Witness

26. As a general rule, the party presenting its case may only request the admission of exhibits that have been included on the list of exhibits it filed in accordance with Rule 65 *ter* (G) of the Rules. Should the party intend to present an exhibit that is not on this list, it must request, prior to the appearance of the witness, the leave of the Chamber by way of a written motion to add that exhibit to the said list. The party must provide the reasons why this exhibit

¹⁷ Decision on the Principles for Recording the Use of Time During Hearings, 13 July 2006.

is essential to the case and the reasons why this exhibit was not on the list filed pursuant to Rule 65 *ter* (G) of the Rules.

27. The party wishing to tender an exhibit into evidence shall, in principle, do so through a witness who can attest to its reliability, relevance or probative value. The exhibit must be put to the witness in court.¹⁸

28. The party presenting the witness must disclose to the other parties and the Chamber a list of all of the evidence it intends to present in connection with this witness's testimony, two weeks before the said witness appears. The documents must be translated into one of the official languages of the Tribunal and into the language of the Accused.¹⁹ The Chamber has recognized the possibility that the proofing of a witness may lead the party presenting the witness to amend the list of exhibits it has disclosed. The party must inform the other parties and the Chamber of this as soon as possible so that the other parties may prepare their cross-examination properly and so that the Chamber may be fully informed when ruling on the objections, if any, which might be raised in this connection.²⁰

29. Each cross-examining party shall disclose to the other parties a list of the evidence it intends to tender into the record during the cross-examination, before beginning the cross-examination of the witness in question. This evidence must be translated into one of the official languages of the Tribunal and into the language of the Accused.²¹

30. When a party presents only an excerpt of an exhibit in court, it must limit itself to requesting the admission of that excerpt alone and the pages that will permit the Chamber to rule on the authenticity of the exhibit, such as the cover page. The party must provide the Chamber with the page and/or paragraph numbers of the exhibit corresponding to the excerpt it intends to request for admission. This party has a duty to provide the required translations of this excerpt. The Chamber shall invite the said party to provide it with a brief explanation in court of the context within which the excerpt is framed, in order to facilitate the determination of its relevance and probative value.²²

31. If a party wishes to challenge the admission of an excerpt of an exhibit, it has a duty to provide the Chamber with the reasons why it disputes the relevance, authenticity or probative

¹⁸ Decision on Admission of Evidence, 13 July 2006.

¹⁹ Decision on Admission of Evidence, 13 July 2006.

²⁰ Oral decision of 3 July 2006, T(F) pp. 4248 and 4249.

²¹ Decision on Admission of Evidence, 13 July 2006.

²² Decision on Admission of Evidence, 13 July 2006.

value of this excerpt. The admission of an excerpt shall not be denied solely on the grounds that the entire document has not been tendered into the record. When a party submits that the excerpt takes on a different meaning in the context of the document as a whole, it must demonstrate this. Should the party wish to discuss other excerpts of the same exhibit in court, it must provide the required translations. Should the party seek the admission of these excerpts, it must provide the Chamber with the page and/or paragraph numbers of the exhibit corresponding to the excerpt it intends to request for admission and the pages that will permit the Chamber to rule on the authenticity of the exhibit, such as the cover page.²³

32. A party seeking to admit into the record an exhibit that has been put to a witness in court shall do so by way of a list filed in court under the following conditions:²⁴

- a. Once the last day of the appearance of the witness concerned has ended ("Day 1"), each Party must file in court a written list requesting the admission of documents which have been put to that witness in court and whose admission it is seeking ("Requests for admission"), at the latest by the beginning of the first hearing day following Day 1 ("Day 2");
- b. The objections to the documents in the Requests for admission must be filed in writing at the latest by the beginning of the first hearing day following Day 2 ("Day 3");
- c. Any response to such objections must be filed in writing at the latest by the beginning of the first hearing day following Day 3 ("Day 4");
- d. At the beginning of each hearing, the Parties shall file with the Court Officer the written submissions to which reference is made in the above-mentioned points, on the understanding that these written submissions shall then be assigned IC ("in court") numbers.

33. The party requesting the admission of a document has a duty to indicate if the document must be admitted under seal.

34. Each party has a duty to ensure that the documents it is requesting for admission have been registered in the *e-court* database, prior to requesting their admission.

Guideline 9: The Admission of Documentary Evidence By Way of Written Motion

²³ Decision on Admission of Evidence, 13 July 2006.

²⁴ Decision on the Admission into the Record of Documents Presented at the Hearing, 13 December 2006.

35. Under the following conditions, the Defence team presenting its case may seize the Chamber of a written motion requesting the admission of exhibits which have not been put to a witness in court. The Defence team shall file this motion promptly, after the end of the presentation of evidence in respect of a given municipality or subject.

- a. The said motion, providing sufficient reasons, must contain the following information, failing which it may be denied:
 - i. Number, title, and description of the exhibit,
 - ii. Source of the exhibit and a description of its indicia of reliability,
 - iii. References to the relevant paragraphs of the Indictment,
 - iv. References to the witnesses who have already appeared before the Chamber and to the exhibits admitted as evidence dealing with the same paragraphs of the Indictment,
 - v. Reasons why the exhibit is not introduced through a witness,
 - vi. Reasons why the party considers the document important for the determination of the case.

The other parties shall have 14 days to respond in writing and, where appropriate, make their objections in respect of each of the exhibits proposed for admission in this manner.²⁵

36. Before requesting the admission of an exhibit, the Defence team shall ensure that the exhibit has been uploaded onto the *e-court* system. The Defence team also has a duty to indicate if the document must be admitted under seal.

Guideline 10: The Application of Rule 92 *ter* of the Rules

37. The Chamber may admit, in whole or in part, evidence presented by a witness in the form of a written statement or transcript of testimony given in another case before the Tribunal, under the conditions set out in Rule 92 *ter* of the Rules.

38. The party presenting the witness pursuant to Rule 92 *ter* of the Rules may put questions to the witness in court in order to seek clarification about matters mentioned in the

²⁵ Decision Amending the Decision on Admission of Evidence of 13 July 2006, 29 November 2006.

written statement or in the transcript of testimony.²⁶ As soon as possible and at the latest after the proofing of the witness, the party shall inform the other parties and the Chamber of the parts of the written statement or transcript of testimony about which it wishes to ask additional questions in court.²⁷

39. The party may also examine the witness about matters that do not appear in the written statement or transcript of testimony, but which the witness may have raised while being proofed. The party shall inform the Chamber and the other parties of this as soon as possible so that the other parties may prepare for the cross-examination properly and so that the Chamber may be fully informed when ruling on the objections, if any, which might be raised in this connection.²⁸

40. The party presenting the witness pursuant to Rule 92 *ter* of the Rules may put documents to the witness regarding the reliability, probative value or relevance of which the witness is in a position to testify and examine the witness in court about the said documents.²⁹ The admission of these documents shall be governed by the conditions set out in Guideline 8 above.³⁰

FOR THESE REASONS,

IN ACCORDANCE with Rules 89, 90 and 92 *ter* of the Rules,

ADOPTS the guidelines defined above.

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

²⁶ Decision on the Application of Rule 92 *ter* of the Rules, 25 June 2007, p. 2.

²⁷ Decision on the Application of Rule 92 *ter* of the Rules, 25 June 2007, p. 4.

²⁸ Decision on the Application of Rule 92 *ter* of the Rules, 25 June 2007, pp. 2 and 3.

²⁹ Decision on the Application of Rule 92 *ter* of the Rules, 25 June 2007, p. 3.

³⁰ Decision on the Application of Rule 92 *ter* of the Rules, 25 June 2007, pp. 4 and 5.

/signed/

Jean-Claude Antonetti
Presiding Judge

Done this twenty-fourth day of April 2008
At The Hague
The Netherlands

[Seal of the Tribunal]