



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-PT

Date: 16 December 2005

Original: English

IN THE TRIAL CHAMBER

Before: Judge Patrick Robinson, Presiding
Judge O-Gon Kwon
Judge Iain Bonomy

Registrar: Mr. Hans Holthuis

Decision of: 16 December 2005

PROSECUTOR

v.

**JOVICA STANIŠIĆ
FRANKO SIMATOVIĆ**

**DECISION ON PROSECUTION MOTION FOR LEAVE
TO AMEND THE AMENDED INDICTMENT**

Office of the Prosecutor

Ms. Hildegard Uertz-Retzlaff
Mr. Alex Whiting
Mr. David Re
Mr. Marek Michon

Counsel for Jovica Stanišić

Mr. Geert-Jan Alexander Knoops
Mr. Wayne Jordash

Counsel for Franko Simatović

Mr. Zoran Zovanović

THIS TRIAL 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 (“International Tribunal”),

BEING SEIZED of the partly confidential “Prosecution Motion For Leave to Amend the Amended Indictment”, filed on 6 May 2005 (“Motion”), in which the Office of the Prosecutor (“Prosecution”) seeks leave to amend the Indictment against Jovica Stanišić and Franko Simatović (collectively “Accused”) by deleting allegations related to Mrkonjić Grad and Vukovar Hospital and adding allegations related to Srebrenica,¹ and submits that the supporting material provides a *prima facie* case to support the proposed amendment and that no prejudice can accrue to the presentation of the Defence case since no trial date has been set or mentioned,²

NOTING that the Defence of Jovica Stanišić (“Stanišić Defence”) filed a “Request for Leave to File a Response to ‘Prosecution Motion for Leave to Amend the Amended Indictment’ which Exceeds 20 Pages” on 28 June 2005 (“Extension of Pages Request”), in which it requests leave to file a response to the Motion not exceeding 25 pages,

NOTING that the Stanišić Defence filed a confidential “Response to Prosecution Motion to Amend Amended Indictment” on 29 June 2005 (“Stanišić Defence Response”), in which it agrees to the deletions of Mrkonjić Grad and Vukovar Hospital, but opposes the addition of Srebrenica and submits that “the proposed amendment constitutes a violation of procedural fairness by virtue of the delay and the actual timing of the filing and the impact that this will have on the [A]ccused’s right to an expeditious trial, and the ability of the Defence to prepare its case, and further, that the Prosecution material in its entirety fails to establish the requisite *prima facie* case”,³

NOTING that the Defence of Franko Simatović (“Simatović Defence”) filed a “Defence Response to ‘Prosecution’s Motion for Leave to Amend the Amended Indictment’” on 29 June 2005 (“Simatović Defence Response”), in which it agrees to the deletions of Mrkonjić Grad and Vukovar Hospital, but opposes the addition of Srebrenica and submits that the supporting

¹ With respect to Mrkonjić Grad, although the Prosecution states in its Motion that it is requesting leave to delete the reference in counts 2–5, it is evident that the Prosecution’s intention is to also delete the reference in count 1, particularly in light of the confidential annexes attached to the Motion where the proposed amended indictment explicitly deletes the reference. Motion, para. 2; Confidential Annexes B, C, D.

² Motion, paras 7–8.

³ Stanišić Defence Response, paras 3–4, 6. See Confidential Order on Extension of Time to File the Response to the Prosecution Motion for Leave to Amend the Amended Indictment, 19 May 2005. The supporting material which was initially filed *ex parte*, was disclosed to the Defence pursuant to an order of the Trial Chamber. Decision on (1) Defence Motions for Access to *ex parte* Supporting Materials Related to the Prosecution Motion for Leave to Amend the Amended Indictment; and (2) Request From the Defence of Stanišić for Leave to File a Response Exceeding the Page Limit to the Prosecution Motion for Leave to Amend the Amended Indictment, 15 June 2005.

material “*prima facie* does not indicate the Accused acted within the plan of the attack on Srebrenica enclave and does not meet the criteria set forth in Article 19 (1) of the Statute of the ICTY”, and that “the request for amending the Indictment on the basis of evidence acquired in 2003 or earlier, when the possible beginning of the trial has been announced represents the infringement of the rights of the Accused from Article 21 of the Statute”,⁴

NOTING that the Prosecution filed a confidential “Reply to Stanišić’s ‘Response to Prosecution Motion to Amend Amended Indictment’” (“Reply to Stanišić Defence Response”) and a “Prosecution Reply to Simatović’s ‘Defence Response to Prosecution’s Motion For Leave to Amend the Amended Indictment’” (“Reply to Simatović Defence Response”) both on 5 July 2005, in which it requests leave to file the replies and makes counter submissions to the arguments raised in the Stanišić Defence Response and Simatović Defence Response,

BEING ALSO SEIZED of the partly confidential “Prosecution’s Submission of Supplementary Supporting Materials to Motion for Leave to Amend the Amended Indictment (“Submission of Supplementary Supporting Material”) filed on 6 July 2005 by the Prosecution, in which the Prosecution requests the Trial Chamber to consider supplementary supporting material (“Supplementary Supporting Material”), which was either only recently obtained or its significance not realised until very recently, in support of the Motion,⁵

NOTING that the Stanišić Defence filed a confidential “Response to Prosecution Submission of Supplementary Supporting Materials to Motion for Leave to Amend the Amended Indictment” on 14 July 2005 (“Stanišić Defence Response to Supplementary Supporting Material”) requesting an order “i) grant[ing] the Defence’s request to file a supplementary response in order to address the new supporting materials submitted by the Prosecution; ii) order[ing] the Prosecution to respond to the Defence requests for Rule 68 materials; and iii) in the event that the above requests are granted, permit[ting] the Defence to file its supplementary response 14 days after receiving the Prosecution response on its request for exculpatory materials”,⁶

NOTING that the Simatović Defence filed a confidential “Defence Response on ‘Prosecution’s Submission of Supplementary Supporting Materials to Motion for Leave to Ammend [sic] the Ammended [sic] Indictment” on 19 July 2005 (“Simatović Defence Response to Supplementary Supporting Material”) requesting an order (i) to the Prosecution to disclose certain Rule 68 material that the Defence requested; (ii) to the Prosecution to disclose the Supplementary

⁴ Simatović Defence Response, paras. 12–13, 24. *See supra* note 3 regarding the disclosure of supporting material to the Defence.

⁵ Submission of Supplementary Supporting Material, para. 2.

⁶ Stanišić Defence Response to Supplementary Supporting Material, p. 7.

Supporting Material in a language which the Accused understands; and (iii) granting the Defence permission to file an additional response relating to the requested Rule 68 material, and, alternatively, arguing that a *prima facie* case does not exist even with the Supplementary Supporting Material,⁷

NOTING that the Prosecution filed a confidential “Prosecution Reply to Stanišić’s ‘Response to Prosecution Submission of Supplementary Materials to Motion for Leave to Amend the Amended Indictment’” on 20 July 2005 (“Reply to Stanišić Defence Response to Supplementary Supporting Material”),⁸ in which it requests leave to file the reply and states that the requested Rule 68 material is publicly available, does not exist, or is in the process of being disclosed,⁹

CONSIDERING that Rule 50(A)(ii) provides that, “[i]ndependently of any other factors relevant to the exercise of the discretion, leave to amend an indictment shall not be granted unless the Trial Chamber or Judge is satisfied there is evidence which satisfies the standard set forth in Article 19, paragraph 1, of the Statute to support the proposed amendment[s]”, *i.e.*, leave to amend shall be denied if the material provided does not meet the *prima facie* standard,¹⁰

CONSIDERING that, although Rule 50 of the Rules does not discuss the relevant factors in the Trial’s Chamber exercise of discretion, the fundamental question in granting leave to amend an indictment is whether the amendments result in any unfair prejudice to the accused,¹¹

(i) Prima facie review

CONSIDERING that a *prima facie* case pursuant to Article 19, paragraph 1, of the Statute has been defined as “a credible case which would (if not contradicted by the Defence) be a sufficient basis to convict the accused on the charge”,¹²

CONSIDERING that the Prosecution’s obligations to disclose to the Defence supporting material in a language which the Accused understands and exculpatory material¹³ are matters

⁷ Simatović Defence Response to Supplementary Supporting Material, paras. 9–16, 21–22, 25–27.

⁸ The Prosecution did not file a reply to the Simatović Defence Response to Supplementary Supporting Material.

⁹ Reply to Stanišić Defence Response to Supplementary Supporting Material, paras. 3–6.

¹⁰ *Prosecutor v. Beara*, Case No. IT-02-58-PT, Decision on Prosecution Motion to Amend the Indictment, IT-02-58-PT, 24 March 2005 (“Beara Decision”), p. 2.

¹¹ *Prosecutor v. Halilović*, Case No. IT-01-48-PT, Decision on Prosecutor’s Motion Seeking Leave to Amend the Indictment, 17 Dec. 2004 (“Halilović Decision”), para. 22.

¹² *Prosecutor v. Kordić et al.*, Case No. IT-95-14-I, Decision on the Review of the Indictment, 10 November 1995, at p. 3.

¹³ See Rules 66 and 68, respectively.

separate from a Trial Chamber's *prima facie* review of supporting material in a request for leave to amend an indictment,

CONSIDERING that the supporting material, including the Supplementary Supporting Material, establishes a *prima facie* case against the Accused in relation to the proposed amendments,

(ii) Unfair Prejudice

CONSIDERING that the amendment to the Indictment results in a new charge since it introduces "a new basis for conviction...not previously reflected in the indictment...that is factually and/or legally distinct from any already alleged",¹⁴

NOTING that the Accused have been provisionally released,¹⁵

CONSIDERING that, in the determination of whether amending an indictment would cause unfair prejudice, regard must be had to the circumstances of the case as a whole and appropriate weight given to the exceptional character of criminal proceedings involving war crimes, including the general complexity and difficulties necessarily inherent in the investigation of such crimes,¹⁶

CONSIDERING that two factors in particular are considered when determining whether amending an indictment would cause unfair prejudice: (1) notice, or whether the Accused is given an adequate opportunity to prepare an effective defence; and (2) whether granting the amendments will result in undue delay,¹⁷

CONSIDERING that, even though amending the Indictment results in a new charge, the Accused will be given an adequate opportunity to prepare an effective defence and undue delay will not be caused since a date for the commencement of the trial of the Accused has not been scheduled,

CONSIDERING that Rule 50(B) provides that, "[i]f the amended indictment includes new charges and the accused has already appeared before a Trial Chamber..., a further appearance shall be held as soon as practicable to enable the accused to enter a plea on the new charges",

¹⁴ Beara Decision, p. 2 quoting Halilović Decision, para. 30.

¹⁵ Decision on Provision Release, 28 July 2004.

¹⁶ Beara Decision, p. 2 quoting *Prosecutor v. Međjakić et al.*, Case No. IT-02-65-PT, Decision on the Consolidated Indictment, 21 November 2002, p. 3 and *Prosecutor v. Brđanin & Talić*, Case No. IT-99-35-PT, Decision on Filing of Replies, 7 June 2001, para. 3.

NOTING that Rule 50(C) provides that “[t]he accused shall have a further period of thirty days in which to file preliminary motions pursuant to Rule 72 in respect of the new charges”,

PURSUANT TO Rules 50, 54, and 126 *bis* of the Rules of Procedure and Evidence of the International Tribunal,

HEREBY ORDERS as follows:

- (1) Extension of Pages Request is **GRANTED**;
- (2) Submission of Supplementary Supporting Material is **GRANTED**;
- (3) Requests contained in the Stanišić Defence Response to Supplementary Supporting Material and Simatović Defence Response to Supplementary Supporting Material are **DENIED**;
- (4) Requests for leave to file the Reply to Stanišić Defence Response, Reply to Simatović Defence Response, and Reply to Stanišić Defence Response to Supplementary Supporting Material are **GRANTED**; and
- (5) Motion is **GRANTED** and the Prosecution shall file a public version of the amended indictment no later than Friday, 23 December 2005.

The Trial Chamber shall schedule a further appearance of the Accused with respect to the new charge in due course.

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



Judge O-Gon Kwon

Dated this sixteenth day of December 2005
At The Hague
The Netherlands

[Seal of the Tribunal]

¹⁷ Beara Decision, p. 2 quoting Halilović Decision, para. 23.