

IT-03-69-T
D 40791 - D 40785
23 May 2012

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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: 23 May 2012
Original: English

IN TRIAL CHAMBER I

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

Registrar: Mr John Hocking

Decision of: 23 May 2012

PROSECUTOR

v.

**JOVICA STANIŠIĆ
FRANKO SIMATOVIĆ**

PUBLIC

**SECOND DECISION ON STANIŠIĆ DEFENCE BAR TABLE
MOTION OF 17 FEBRUARY 2012**

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

1. On 17 February 2012, the Stanišić Defence (“Defence”) filed the Stanišić Motion for Admission of Documents through the Bar Table, by which it requested the admission into evidence of 674 documents from the bar table (“Motion”).¹ On 23 March 2012, the Prosecution filed a response to the Motion (“Response”).² The Simatović Defence did not respond to the Motion.
2. On 23 May 2012, the Chamber issued the First Decision on the Defence Bar Table Motion of 17 February 2012 (“First Decision”). The Chamber refers to the First Decision for the procedural history and submissions of the parties in respect of the Motion.

II. APPLICABLE LAW

3. The Chamber recalls and refers to the applicable law governing the admission of documents from the bar table as set out in a previous decision.³

III. DISCUSSION

4. The Chamber recalls that by the Motion, the Defence requests the admission into evidence of over 670 documents which amount to more than 12,400 pages in total. These documents, if admitted, would constitute a very substantial part of the trial record. Due to the sheer number and volume of the documents submitted, the Chamber has decided to divide its decision on the Motion into separate decisions so as to afford the Defence sufficient notice of the Chamber’s position with respect to each category of documents as soon as practically possible.⁴
5. In the present Decision, the Chamber will deal with five out of the six categories of documents included in the Second Bar Table Chart, namely (a) Financing, training, arming, supplying and other support by the army of the Republic of Serbia to the Bosnian Serbs (“Category 1”); (b) Paramilitaries and “Red Berets” in Bosnia (“Category 2”); (c) Support by the Federal SUP (“Category 3”); (d) Relationship Leadership RS and Serbia (“Category 5”); and (e) Other (“Category 6”).⁵
6. The Chamber will issue further decisions on the remainder of the Motion.

¹ Stanišić Motion for Admission of Documents through the Bar Table, with Confidential Annexes A, B, and C, 17 February 2012.

² Prosecution Response to Stanišić Motion and Additional Motion for Admission of Documents into Evidence through the Bar Table, with Confidential Annexes A and B, 23 March 2012.

³ First Decision, paras 9-10.

a. Documents in Category 1

7. The Chamber notes that for a number of documents in Category 1 of the Second Bar Table Chart, the Prosecution objects to their admission on grounds of authenticity.⁶ It submits that for documents bearing Rule 65 *ter* nos 1D02251, 1D01998, 1D01999, 1D02221, 1D02224, 1D01986, and 1D02001, it has been provided with insufficient information regarding their origin.⁷ For a number of these documents, the Defence acknowledges that it is in the process of determining their origin, but argues that they are nonetheless sufficiently probative and relevant to be admitted from the bar table.⁸ In this respect, the Chamber recalls its earlier finding that authenticity is one of the factors to be considered when assessing the reliability of evidence to be admitted, and that reliability is a component part of the probative value of a piece of evidence.⁹ It noted that, “[t]o require absolute proof of a document’s authenticity before it could be admitted would be to require a far more stringent test than the standard envisioned by Sub-rule 89 (C)”.¹⁰ In the present instance, the Chamber finds that each of the aforementioned documents in Category 1, on its face, bears sufficient indicia of authenticity and reliability to meet the standard for admission from the bar table. The Chamber further finds that the Defence has shown with sufficient specificity (i) the relevance and probative value of these documents and (ii) how they would fit in the Defence case.

8. With respect to document bearing Rule 65 *ter* no. 751, the Defence indicates that it received the document through the Prosecution, whereas the Prosecution indicates it has received the document through another Defence Counsel, and has no information on the origin of the document.¹¹ The Prosecution further submits that this document is a witness statement which should be tendered through Rule 92 *bis* or *ter*, rather than from the bar table. Alternatively, it submits that the Defence should argue why this document should be exceptionally admitted pursuant to Rule 89 (C).¹² The Chamber notes that the document bearing Rule 65 *ter* no. 751 is an official note of an interview by an assistant commander for security affairs of the Odžak Military

⁴ First Decision, para. 14.

⁵ See Motion, Confidential Annex B.

⁶ Motion, Confidential Annex B; Response, Confidential Annex A, pp. 180-250, 287-299.

⁷ See Response, pp. 189, 192-193, 195, 198, 202, 210, 212.

⁸ Motion, para. 12. For documents bearing Rule 65 *ter* nos 1D01999, 1D02224, 1D01986, and 1D02001, the Defence indicated under origin: “to be determined”.

⁹ Decision on Admission into Evidence of P179 and P473, 23 June 2010, para. 4.

¹⁰ *Ibid.*, referring to *Prosecutor v. Zejnir Delalić et al.*, Case No. IT-96-21-AR73.2, Decision on Application of Defendant Zejnir Delalić for Leave to Appeal against the Decision of the Trial Chamber of 19 January 1998 for the Admissibility of Evidence, 4 March 1998, para. 20; *Prosecutor v. Dario Kordić and Mario Čerkez*, Case No. IT-95-14/2-AR73.6, Decision on Appeal Regarding the Admission into Evidence of Seven Affidavits and One formal Statement, 18 September 2000, para. 24; *Georges Anderson Nderubumwe Rutaganda v. Prosecutor*, Case No. ICTR-96-3-A, Judgement, 26 May 2003, paras 33, 266; *Prosecutor v. Popović et al.*, Decision on Joint Defence Interlocutory Appeal concerning the Status of Richard Butler as an Expert Witness, 30 January 2008, para. 22

¹¹ Response, p. 185.

¹² *Ibid.*

Council, which was taken with a view “to get a more detailed view of the state of defences in Novi Grad village and the reasons for the Serbs’ surrender to the Ustashes”.¹³ The official note is an out-of-court statement prepared by non-parties which was not taken for the purposes of these proceedings. Its admission is, therefore, not affected by Rule 92 *bis* or *ter* and may be admitted pursuant to Rule 89 (C).¹⁴ The Chamber finds that the document bearing Rule 65 *ter* no. 751 on its face bears sufficient indicia of authenticity and reliability to meet the standard for its admission from the bar table. It further finds that the Defence has shown with sufficient specificity (i) the relevance and probative value of this document and (ii) how it would fit in the Defence case.

9. Therefore, the Chamber will admit the documents bearing Rule 65 *ter* nos 1D02251, 1D01998, 1D01999, 1D02221, 1D02224, 1D01986, 1D02001, and 751 from the bar table. The Chamber encourages the Defence to provide the parties with information obtained, if any, following its further investigations regarding the origin of these documents.

10. With respect to the Documents bearing Rule 65 *ter* nos 2272, 1841, 2543, 1D02058, 1D02007, 1D01981, 1D01996, 2034, 1D02211, 1D02009, 1D00092, 1D02097, 1D02099, 1D02100, 1D02219, 1D02088, 1D02220, 1D02222, 1D02038, 1D02226, 1D02549, 1D02552, 1D02017, 1D02227, 1D01983, 1D02228, 1D02558, 99, 1D02044, 1D02032, 1D02068, 1D02000, 1D02562, 1D02563, 1D02034, 1D02035, 1D02012, 1D02564, 1D02013, 1D02003, 2361, 2359, 2358, 2357, 2354, 2362, 1D02573, 3621, and 1D02066, the Chamber notes that the Prosecution, while disputing their purported relevance as characterised by the Defence, does not object to their admission.¹⁵ The Chamber finds that the Defence has shown with sufficient specificity (i) the relevance and probative value of these documents and (ii) how they would fit in the Defence case, and will allow their admission into evidence from the bar table.

b. Documents in Categories 2, 3, 5, and 6

11. The Chamber notes that for a number of documents in categories 2, 3, 5, and 6 of the Second Bar Table Chart, the Prosecution objects to their admission on grounds of authenticity. It submits that for these documents, it has been provided with insufficient information regarding their

¹³ Document bearing Rule 65 *ter* no. 751, p. 1.

¹⁴ See *Prosecutor v. Galic*, Case No. IT-98-29-AR73.2, Decision on Interlocutory Appeal Concerning Rule 92*bis*(C), 7 June 2002, para. 31, cited with approval by the Appeals Chamber in *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-AR73.4, Decision on Interlocutory Appeal on the Admissibility of Evidence-in-Chief in the Form of Written Statements, 30 September 2003, at paras 12-13. See also *Prosecutor v. Gotovina et al*, Case No. IT-06-90-T, Decision on Admission of MUP official Notes and reasons for the Decision to Deny the Admission of the Official Note of Ivan Čermak, 30 January 2009, para. 10.

¹⁵ The Chamber notes that the Prosecution, in relation to documents bearing Rule 65 *ter* nos 1D03507, 1D02002, 1D02238, 1837, and 1831, has argued that it should be allowed to introduce document bearing ERN 0426-4356-0426-4356 in rebuttal, Response, Confidential Annex A, pp. 228-229, 240-244.

origin. These are documents bearing Rule 65 *ter nos* 3810, 763, 3811, 1D01605, and 1D02209.¹⁶ For one of these documents, the Defence acknowledges that it is in the process of determining their origin, but argues that it is nonetheless sufficiently probative and relevant to be admitted from the bar table.¹⁷ The Chamber agrees with the Defence that documents bearing Rule 65 *ter nos* 3810, 3811, 1D01605, and 1D02209 on their face bear sufficient indicia of authenticity and reliability to meet the standard for admission from the bar table. The Chamber further finds that the Defence has shown with sufficient specificity (i) the relevance and probative value of these documents and (ii) how they would fit in the Defence case. However, the Chamber is not satisfied that the document bearing Rule 65 *ter no.* 763, an un-authored “report” on paramilitaries in Doboij which bears no signature, stamp, or date, is sufficiently probative for its admission into evidence from the bar table.

12. Therefore, the Chamber will admit documents bearing Rule 65 *ter nos* 3810, 3811, 1D01605, and 1D02209 from the bar table. The Chamber encourages the Defence to provide the parties with information obtained following its further investigations regarding the origin of these documents, if any.

13. With respect to document bearing Rule 65 *ter no.* 4082, the Chamber notes that it is a 30-page compilation of documents, of which the Defence has only discussed two documents. The Prosecution has objected to exactly this discrepancy.¹⁸ The Chamber further notes that the Defence has uploaded the document bearing Rule 65 *ter no.* 4082.1 into eCourt, which extracts the two aforementioned documents from the compilation. As the Defence has only provided arguments for the admission of the two documents contained in 65 *ter no.* 4082.1, the Chamber understands the Defence to seek the admission of this item into evidence instead.

14. With respect to documents bearing Rule 65 *ter nos* 2500, 2277, 1D01655, 4687, 4053, 1D03507, 1763, 1813, 2329, 4082.1, 4083, 2100,¹⁹ 2086, 2096, 2099, 2068, 1861, 4702, 1666, 2111, 1D01367, 2416, 1560, 1D02002, 1D00228, 4561, 1D02238, 1837, 1D01611, 1831, 2217, 1527, 572, 2469, 1507, 2403, 2323, 1476, 1477, 1479, 1480, 1D02061, 1D02574, 2235, 2102, 1735, 2345, 1757, 568, 1201, 1D01708, 4229, and 1D00227, the Chamber notes that the Prosecution, while disputing their purported relevance as characterised by the Defence, does not object to their admission. The Chamber finds that the Defence has shown with sufficient specificity

¹⁶ Prosecution Response, Confidential Annex A, pp. 231, 233, 237-238, 242, 245, 248.

¹⁷ Motion, para. 12. For document bearing Rule 65 *ter no.* 1D02209, the Defence indicated under origin: “to be determined”.

¹⁸ Prosecution Response, Confidential Annex A, p. 231.

¹⁹ With respect to document bearing Rule 65 *ter no.* 2100, the Chamber notes that two translations have been uploaded into eCourt, namely a “draft English translation” as well as an “English translation”. The Chamber has considered the “English translation” as authoritative for the purposes of admission into evidence of this document.

(i) the relevance and probative value of these documents and (ii) how they would fit in the Defence case, and will allow their admission into evidence from the bar table.

15. With respect to the document bearing Rule 65 *ter* no. 531, the Chamber considers that the references provided by the Defence regarding its relevance to its case are only just sufficient for its admission from the bar table. It further notes that the Prosecution, while disputing the document's purported relevance as characterised by the Defence, does not object its admission into evidence. While the Chamber is generally strict when it comes to the tendering of large documents from the bar table without clear guidance from the tendering party on which portions of a document are relevant to its case, considering the purported relevance of this document to the Accused's case, the Chamber decides to exceptionally allow its admission into evidence from the bar table.

16. Lastly, the Chamber observes the following. A number of documents admitted have been introduced in order to show a *negative*, i.e. that something did *not* occur because the document made no reference to it. When such documents are tendered from the bar table, if viewed in isolation and without context provided by a tendering witness, there is a risk that less weight will ultimately be ascribed to them by the Chamber. In order to properly determine the weight of documents for which a negative inference is sought, the Chamber encourages the Defence, by providing clear references to these documents in its final brief, to elaborate on the conclusions, if any; it invites the Chamber to draw from them (collectively and/or individually), including, if appropriate, an explanation of how they refute the Prosecution evidence regarding the same issues.

IV. DISPOSITION

17. For the foregoing reasons, the Chamber **GRANTS** the Motion **IN PART**, and

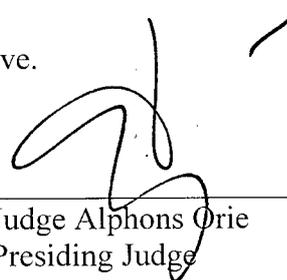
- (i) **ADMITS** into evidence the documents bearing Rule 65 *ter* nos 2272, 1841, 2543, 1D02058, 1D02007, 1D01981, 1D01996, 2034, 1D02211, 1D02009, 1D00092, 1D02097, 1D02099, 1D02100, 1D02219, 1D02088, 1D02220, 1D02222, 1D02038, 1D02226, 1D02549, 1D02552, 1D02017, 1D02227, 1D01983, 1D02228, 1D02558, 99, 1D02044, 1D02032, 1D02068, 1D02000, 1D02562, 1D02563, 1D02034, 1D02035, 1D02012, 1D02564, 1D02013, 1D02003, 2361, 2359, 2358, 2357, 2354, 2362, 1D02573, 3621, 1D02066, 1D02251, 1D01998, 1D01999, 1D02221, 1D02224, 1D01986, 1D02001, 751, 2500, 2277, 1D01655, 4687, 4053, 1D03507, 1763, 1813, 2329, 4082.1, 4083, 2100, 2086, 2096, 2099, 2068, 1861, 4702, 1666, 2111, 1D01367, 2416, 1560, 1D02002, 1D00228, 4561, 1D02238, 1837, 1D01611, 1831, 2217, 1527, 572, 2469, 1507, 2403, 2323, 1476, 1477, 1479, 1480, 1D02061, 1D02574, 2235, 2102,

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1735, 2345, 1757, 568, 1201, 1D01708, 4229, 1D00227, 3810, 3811, 1D01605, 1D02209, and 531;

- (ii) **DENIES** the admission into evidence of the document bearing Rule 65 *ter* no. 763; and
- (iii) **REQUESTS** the Registry to assign exhibit numbers to the documents admitted and inform the parties and the Chamber of the number so assigned.

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



Judge Alphons Orie
Presiding Judge

Dated this twenty-third day of May 2012
At The Hague
The Netherlands

[Seal of the Tribunal]