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D 19444 - D 19438  
24 NOVEMBER 2009

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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: 24 November  
2009  
Original: English

**IN TRIAL CHAMBER I**

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

**Registrar:** Mr John Hocking

**Decision of:** 24 November 2009

**PROSECUTOR**

v.

**JOVICA STANIŠIĆ  
FRANKO SIMATOVIĆ**

***PUBLIC***

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**DECISION ON SIMATOVIĆ MOTION REQUESTING  
ISSUANCE OF ORDER TO PROSECUTION REGARDING THE  
ORDER OF WITNESSES**

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**Office of the Prosecutor**

Mr Dermot Groome

**Counsel for Jovica Stanišić**

Mr Geert-Jan Alexander Knoops  
Mr Wayne Jordash

**Counsel for Franko Simatović**

Mr Mihajlo Bakrač  
Mr Vladimir Petrović

## I. PROCEDURAL HISTORY

1. On 13 November 2009, the Simatović Defence filed a confidential “Defence Motion Requesting Issuance of Order to Prosecution Regarding the Order of Witnesses” (“Motion”), wherein it requested that the Chamber order the Prosecution i) to call Witnesses C-001 and JF-005 as well as other linkage witnesses at the earliest during March 2010 and ii) to amend its order of presentation of witnesses so that crime-base witnesses would be the first called until March 2010.<sup>1</sup>
2. On 16 November 2009, the Prosecution filed a confidential “Prosecution Response to Simatović Defence Motion Requesting Issuance of Order Regarding the Order of Witnesses” (“Response”), opposing the Motion.<sup>2</sup>
3. On 17 November 2009, the Simatović Defence filed a confidential “Defence Request for Leave to Reply to Prosecution Response” (“Reply Request”).
4. On 19 November 2009, the Chamber informally communicated the outcome of the present decision to the parties.

## II. SUBMISSIONS

### A. Simatović Defence

5. In the Motion, the Simatović Defence argues that, having been assigned to the defence of Franko Simatović (“Accused”) on 11 September 2009, it is still “in a very early stage of its preparation for the continuation of the proceedings. The classification and analysis of the material, the defining of the defence strategy as well as all other aspects of the Defence preparation are in their rudimentary phase”.<sup>3</sup> The Simatović Defence submits that it has organised its preparations in view of the Prosecution’s “publicly endorsed obligations” and of its interpretation of the Chamber’s decisions relating to the order of witnesses.<sup>4</sup> The Simatović Defence further argues that given the above, the volume of material, and the complexity of the case, it is unable to participate in hearings in which key Prosecution witnesses would be heard.<sup>5</sup> Calling linkage witnesses would therefore

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<sup>1</sup> Motion, paras 26-27.

<sup>2</sup> Response, para. 1. On 16 November 2009, the Chamber had informally requested, given the urgency of the matter and pursuant to Rule 126 *bis* of the Rules of Procedure and Evidence of the Tribunal (“Rules”), that the Prosecution file its response no later than 18 November 2009.

<sup>3</sup> Motion, para. 10.

<sup>4</sup> Motion, para. 11.

<sup>5</sup> Motion, para. 12.

cause “irreversible damage” to the Accused,<sup>6</sup> and would violate his right to prepare his defence guaranteed to him under Article 21 of the Statute of the Tribunal (“Statute”).<sup>7</sup>

6. With regard to Witness C-001, the Simatović Defence submits that the Prosecution does not provide any reason or material to support its claim that the witness would not be able to testify in March 2010. In this respect, the Simatović Defence notes that Witness C-001 was not called when the trial had initially started in 2008 or when the proceedings commenced before this Chamber in 2009. In addition, in the Prosecution’s submission, during Witness C-001’s testimony in the *Gotovina et al.* case in June 2009, no reference to this witness’s poor health was made.<sup>8</sup> The Simatović Defence submits that the same reasoning applies to JF-005 and other linkage witnesses.<sup>9</sup>

### **B. Prosecution**

7. In its Response, the Prosecution opposes the Motion on the basis that i) it lacks merit; ii) the Prosecution has already made significant changes to its witness schedule in order to accommodate the trial preparations of the Simatović Defence; iii) the scheduling of witnesses falls within the discretion of the independent Office of the Prosecutor; and iv) additional changes to the witness schedule risk jeopardising the Prosecution’s ability to prove its case.<sup>10</sup>

8. The Prosecution contends that the Motion includes incorrect allegations and misrepresentations in that

- 19 out of the first 30 witnesses in the Amended Consolidated Witness List dated 5 June 2009 were linkage witnesses;<sup>11</sup>

- 4 out of the first 6 witnesses already called in these proceedings provided linkage evidence;<sup>12</sup>

- in order to assist the Simatović Defence, in the revised witness list provided informally to both Defence teams on 4 November 2009, 20 out of 23 witnesses to be called before March 2010 will give crime-base evidence;<sup>13</sup>

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<sup>6</sup> Motion, para. 13.

<sup>7</sup> Motion, para. 25.

<sup>8</sup> Motion, paras 17-21.

<sup>9</sup> Motion, para. 23.

<sup>10</sup> Response, para. 1.

<sup>11</sup> Response, para. 5.

<sup>12</sup> Response, para. 6.

<sup>13</sup> Response, paras 7-9.

- 2 out of the 3 witnesses who will provide linkage evidence before March 2010 will give evidence that is both crime-base and linkage;<sup>14</sup> and
- the Prosecution has made efforts to facilitate the work of the Simatović Defence by re-disclosing case-related material.<sup>15</sup>

9. The Prosecution further submits that the scheduling of witnesses and presentation of the Prosecution's case falls within its discretion and that a Chamber should only intervene where a fundamental unfairness to an accused would ensue from the exercise of this discretion.<sup>16</sup> It argues that it has already done its utmost to be flexible and to accommodate the Simatović Defence by dramatically reducing the amount of linkage evidence before March 2010 to a minimum.<sup>17</sup>

10. The Prosecution holds that, due to their availability and/or health concerns, three linkage witnesses must be called before March 2010, failing which the Prosecution would risk not being able to present these witnesses at trial.<sup>18</sup> Such a consequence would be contrary to the fairness of trial enshrined in Article 20(1) of the Statute, which also applies to the Prosecution.<sup>19</sup>

11. With regard to material supporting claims that the health of Witness C-001 is poor, the Prosecution submits that it does not have to require any such medical information from the witness and that its representations to the Chamber and the Simatović Defence on this matter are sufficient.<sup>20</sup>

### III. APPLICABLE LAW

12. The Chamber has the duty to ensure that the trial proceedings are conducted fairly and expeditiously in accordance with Article 20 (1) of the Statute. More specifically, Article 21 (4) (b) of the Statute provides that an accused shall have "adequate time and facilities for the preparation of his defence".

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<sup>14</sup> Response, para. 10.

<sup>15</sup> Response, para. 21.

<sup>16</sup> Response, para. 11.

<sup>17</sup> Response, para. 12.

<sup>18</sup> Response, para. 16.

<sup>19</sup> Response, paras 17-18.

<sup>20</sup> Response, para. 24.

13. Furthermore, under Rules 85 (A) and 90 (F) of the Rules of Procedure and Evidence of the Tribunal (“Rules”), the Chamber exercises control over the mode and order of interrogating witnesses and presenting evidence, including matters related to the order of calling witnesses.<sup>21</sup>

#### IV. DISCUSSION

##### A. Reply Request

14. Having carefully examined the Motion and the Response, as well as the arguments proposed to be included in a prospective reply, the Chamber considers that such a reply is not necessary for a determination of the Motion. The Reply Request is therefore denied.

##### B. Motion

15. The Chamber would first wish to reemphasise that it is the Chamber that exercises control over the presentation of the evidence and the manner in which proceedings are conducted. For the present decision, the Chamber has balanced the rights of the Accused and the burden that the proposed scheduling would have on the recently composed Simatović Defence against the Prosecution’s duty to organise and present its case in the most appropriate manner, including by taking into account the health and the general situation of witnesses to be called.

16. In relation to the adequate time required by the Simatović Defence to further prepare its case, the Chamber refers to its “Decision on Motion for Adjournment of Proceedings by the Simatović Defence” issued on 15 October 2009.<sup>22</sup> In that decision, the Chamber had carefully considered all circumstances related to the formation of a new Simatović Defence team, the difficulties faced by the Simatović Defence in obtaining case-related material, as well as the particular trial modalities and will not repeat them here.

17. The Chamber accepts that, because of the complexity of their evidence, preparing for the testimony of so-called linkage witnesses constitutes a heavier burden on the Simatović Defence than preparing for the examination of crime-base witnesses. With regard to Witness C-001, the Chamber notes that, as a former “KOS” agent, he is scheduled to testify, *inter alia*, about the presence and the involvement of the Accused, and his co-accused, Jovica Stanišić, in the Krajina,

<sup>21</sup> See *Prosecutor v. Momčilo Krajišnik*, Case No. IT-00-39-T, Decision on Defence’s Rule 74 *bis* Motion: Amended Trial Schedule, 27 February 2006, para. 26; see also *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-T, Scheduling Order and Decision on Joint Defence Motion to Modify Trial Schedule for Trial Week beginning 25 September 2006, 15 September 2006, para. 3, referring to *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-AR73, Reasons for Refusal to Leave to Appeal from Decision to Impose Time Limits, 17 May 2002, para. 10.

<sup>22</sup> Decision on Motion for Adjournment of Proceedings by the Simatović Defence, 15 October 2009, paras 23-27.

the close relationship between Stanišić and the police in the Krajina, the structure of the Krajina police, including its state security department that was directly responsible to the state security of Serbia, as well as about the presence of the KOS and the Serbian DB in the RSK until August 1995 and their reporting procedure to Belgrade.<sup>23</sup>

18. The Chamber further finds that the Prosecution does not substantiate the submission that the health of Witness C-001 necessitates that he be called immediately on 30 November 2009, or that health and availability concerns prevent Witnesses JF-005 from being called after the winter recess.

19. In order to prevent the risk of witnesses having to be recalled later in these proceedings and to ensure the full respect of the fair trial right of the Accused, who would bear an additional burden by Witnesses C-001 and JF-005 being called before the winter recess, the Chamber considers that it is in the interests of justice and of ensuring that the presentation of the evidence is effective for the ascertainment of the truth that Witnesses C-001 and JF-005 be called after the winter recess, at a date to be determined by the Prosecution and to be communicated to both defence teams and to the Chamber at the earliest possible time. The Chamber further considers that it is necessary that only those linkage witnesses already identified for this period by the Prosecution in its "Prosecution Updated Witness List" filed on 13 November 2009 ("Prosecution's Updated Witness List") be called before March 2010.

## V. DISPOSITION

20. For the foregoing reasons, pursuant to Articles 20 (1) and 20 (4) (b) of the Statute and to Rules 85(A), 90 (F), and 126 *bis* of the Rules, the Chamber

**DENIES** the Reply Request,

**GRANTS** the Motion in part,

**ORDERS** that

- i) no linkage witness, including Witnesses C-001 and JF-005, be called before the winter recess scheduled in this case between 21 December 2009 and 18 January 2010; and

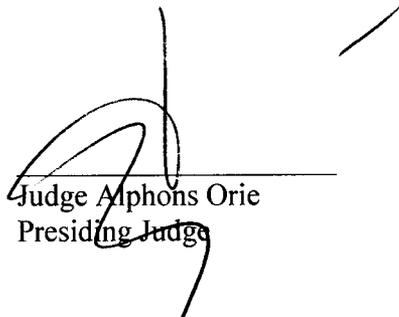
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<sup>23</sup> Prosecution List of Witnesses Pursuant to Rule 65 *ter* (E) (II), 2 April 2007, confidential, Witness Summaries, pp. 17-21.

- ii) no other linkage witness be called before March 2010, apart from those identified as such for this period in the Prosecution's Updated Witness List, and

**DENIES** the remainder of the Motion.

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



Judge Alphons Ori  
Presiding Judge

Dated this twenty-fourth day of November 2009  
At The Hague  
The Netherlands

**[Seal of the Tribunal]**