

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-PT

Date: 7 July 2008

Original: English

IN TRIAL CHAMBER III

Before: Judge Patrick Robinson, Presiding
Judge Pedro David
Judge Michèle Picard

Registrar: Mr. Hans Holthuis

Decision of: 7 July 2008

PROSECUTOR

v.

**JOVICA STANIŠIĆ
AND
FRANKO SIMATOVIĆ**

PUBLIC

**DECISION ON PROSECUTION MOTION TO ADD 31
DOCUMENTS TO ITS RULE 65 *TER* EXHIBIT LIST**

The Office of the Prosecutor

Mr. Dermot Groome
Ms. Doris Brehmeier-Metz
Mr. Gregory Townsend
Mr. John Docherty

Counsel for the Accused

Mr. Geert-Jan Alexander Knoops and Mr. Wayne Jordash for Jovica Stanišić
Mr. Zoran Jovanović and Mr. Vladimir Domazet for Franko Simatović

TRIAL CHAMBER III (“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 (“Tribunal”);

BEING SEISED of the “Third Prosecution Motion for Leave to Amend its Rule 65 *ter* Exhibit List (Exhibits that Form Part of a Witness Statement) with Annex”, filed confidentially on 30 May 2008 (“Motion”), whereby the Prosecution requests leave to add to its exhibit list 31 documents consisting of “photographs from video stills” that, according to the Prosecution, form an inseparable part of a witness’ testimony;¹

NOTING that these 31 documents were included in the seventh category of documents that the Prosecution sought to have added to its exhibit list in its motion of 26 February 2008;²

NOTING that on 8 May 2008 the Trial Chamber denied, without prejudice, the Prosecution’s request to add the documents included in Category 7 to its exhibit list, finding that: (i) the Prosecution had failed to show good cause for requesting the addition of these documents at such a late stage in the proceedings and to demonstrate that these documents were of importance for its case; and (ii) the Trial Chamber was unable, based on the Prosecution’s motion of 26 February 2008, to identify in the Prosecution’s proposed exhibit list the documents that were included in Category 7 and was therefore not in a position to examine the relevance, length and nature of these documents; and noting that Category 7 included a very significant number of documents;³

NOTING that, according to the Prosecution, the actual date of the Pre-Trial Conference should be taken into account, rather than the planned one, to evaluate whether the requirements of Rule 65 *ter* (E)(iii) were respected, and thus “no prejudice was caused to the Accused”;⁴

NOTING the Prosecution’s submission that the 31 documents were disclosed to the Defence “as attachments to the witness statement on 12 April 2006” and that, by disclosing them a second time on 22 February 2008, the Prosecution “informed the Defence in a timely manner” that these documents would be used at trial, this being “even more true in light of the recent adjournment, as ordered by the Appeals Chamber on 16 May 2008”;⁵

NOTING that, in its response to the Motion, the Defence for Franko Simatović (“Simatović Defence”) opposes the Prosecution’s request, submitting that in its Motion the Prosecution failed to

¹ Motion, para. 6, 8.

² Prosecution Motion for Leave to Amend its Rule 65 *ter* Exhibit List with Confidential Annex, filed confidentially on 26 February 2008. Category 7 included 267 documents.

³ Decision on Prosecution Motion for Leave to amend its Rule 65 *ter* Exhibit List, 8 May 2008, para. 44.

⁴ Motion, para. 5.

demonstrate the relevance, length and nature of the 31 documents, thereby failing “to accommodate the Trial Chamber’s criteria”, and arguing that it is not sufficient for the Prosecution to indicate in the table attached in the annex to the Motion that these documents “form part of the statement of [the] witness” to show the relevance of these documents;⁶

NOTING, moreover, that according to the Simatović Defence, the Prosecution’s recent requests to add documents to its exhibit list “lead [...] one to conclude that after the pre-trial phase that has lasted for several years, the Prosecution has failed to prepare its case” and have “created an atmosphere of insecurity, lack of precision, and a further state of constant alterations that considerably impedes the adequate defence preparation”;⁷

NOTING the response to the Motion of the Defence for Jovica Stanišić (“Stanišić Defence”), in which it submits that the adjournment of the proceedings ordered by the Appeals Chamber on 16 May 2008 “will not give the Defence additional time for preparation”, as the Stanišić Defence “is unable to receive instructions and the lack of these directives results in the Defence not being able to effectively investigate and prepare for these exhibits”;⁸

NOTING, in addition, that according to the Stanišić Defence, the filing of the Motion at this stage of the proceedings is contrary to the Trial Chamber’s Order of 19 January 2007 which set 2 April 2007 as the deadline for the final submission of the Prosecution witness and exhibit list;⁹

NOTING that the Stanišić Defence specifically objects to the addition of the 31 documents on the basis that the Prosecution “has neglected to once again explain the relevance of this material”;¹⁰

NOTING that on 18 June 2008 the Prosecution requested leave to reply and replied to the Defence responses, submitting that the “adjournment period provides the Defence with three months in addition to an already sufficient amount of time to review the documents”, since the 31 documents were disclosed with the statement of the witness on 28 June 2003,¹¹ and arguing that the deadline

⁵ Motion, paras 8-9.

⁶ Comprehensive Response of Simatović Defence to Second, Third and Fourth Prosecution Motion for Leave to Amend its Rule 65 *ter* Exhibit List (“Simatović Response”), filed confidentially on 12 June 2008, para. 6.

⁷ *Ibid.*, para. 8.

⁸ Defence Response to the Four Prosecution Motions all dated 30 May 2008 and the Related Submission dated 2 June 2008 (Stanišić Response”), filed confidentially on 13 June 2008, para. 6.

⁹ *Ibid.*, para. 10.

¹⁰ Stanišić Response, para. 12.

¹¹ Prosecution Request for Leave to Reply and Reply to Defence Responses to Prosecution Motions for Leave to Amend its 65 *ter* Exhibit List”, (“Reply”), filed on 18 June 2008, para. 5.

for the submission of its final witness and exhibit list ordered by this Trial Chamber was not “absolute”;¹²

NOTING further that, on 16 May 2008, the Prosecution filed confidentially a revised Rule 65 *ter* Exhibit List in compliance with the Trial Chamber’s Decision of 8 May 2008 (“Revised Rule 65 *ter* Exhibit List”)¹³ and that, in the Motion, the Prosecution provides the Trial Chamber with the Rule 65 *ter* numbers of the 31 documents, thereby facilitating their identification in this new list;¹⁴

CONSIDERING that in its decision of 8 May 2008 the Trial Chamber set out the law that is applicable to variations of Rule 65 *ter* exhibits lists and that the law as stated in that decision applies in the present decision;¹⁵

CONSIDERING that, as already found in the decision of the Pre-Trial Judge of 7 May 2007, the work plan established on 19 January 2007 was not intended to be an inflexible document;¹⁶

CONSIDERING that, although the date for the commencement of the case was postponed several times and the proceedings were adjourned for a minimum of three months on 16 May 2008,¹⁷ the present case was initially scheduled to start on 27 February 2008¹⁸ and the Prosecution was under the obligation, pursuant to Rule 65 *ter*(E)(iii) of the Rules, to file its list of exhibits no later than six weeks before this date;

CONSIDERING that the Prosecution’s obligation to disclose material to the Defence is separate from its obligation to add them to its list of exhibits and that by simply disclosing the 31 documents together with the witness in June 2003 and April 2006 to the Defence, the Prosecution did not fulfil its obligation under Rule 65 *ter*(E)(iii) of the Rules¹⁹ and did not put the Defence on notice that these documents were likely to become part of its case against the Accused;

CONSIDERING in addition that, the witness being a *viva voce* witness, the Trial Chamber does not possess his statement and is therefore not in a position to determine whether the 31 documents form an inseparable and indispensable part of the statement;

¹² Prosecution Reply, para. 12

¹³ Prosecution’s Submission of its Rule 65 *ter* Exhibit List in Compliance with the Trial Chamber’s Decision of 8 May 2008 with Confidential Annex, partly confidential, 16 May 2008.

¹⁴ The relevant 65 *ter* numbers are 4493, 4494, 4627, 4628, 4637 (in the Corrigendum, the Prosecution indicates that, in the Motion, it has erroneously referred to entry 4638 instead of 4637), 4678, 4657, 4705, 4718, 4719 and 4733.

¹⁵ Decision on Prosecution Motion for Leave to amend its Rule 65 *ter* Exhibit List, 8 May 2008, paras 5-7.

¹⁶ Decision on Prosecution Motion for Adjustment of Work Plan, 7 May 2007, para. 8.

¹⁷ Decision on Defence Appeal of the Decision on Future Course of Proceedings, 16 May 2008, para. 22.

¹⁸ Scheduling Order and Termination of Provisional Release, 6 February 2008.

¹⁹ Decision on Prosecution Motion for Leave to amend its Rule 65 *ter* Exhibit List, 8 May 2008, para. 30.

CONSIDERING, however, that by submitting its witness list, which included the witness, on 2 April 2007²⁰ and on 11 February 2008,²¹ and by disclosing the 31 documents again to the Defence on 22 February 2008, the Prosecution put the Stanišić Defence and the Simatović Defence on notice that this witness would have been called upon to identify persons appearing on these documents;

CONSIDERING, moreover, that, in light of the description of these documents provided in the Revised Rule 65 *ter* Exhibit List,²² 28 documents are photo stills, supposed to be used in order to identify persons and 3 documents²³ are documents limited in nature that do not require ample time in order to be prepared;

CONSIDERING that the documents appear to be of *prima facie* relevance and of sufficient importance for the Prosecution case;

CONSIDERING that the Trial Chamber has an overriding objective under Article 20(1) of the Statute to “ensure that a trial is fair and expeditious and that proceedings are conducted [...] with full respect of the rights of the accused”;

CONSIDERING that the Stanišić Defence and the Simatović Defence should be given sufficient time to examine these important documents;

CONSIDERING in addition that the trial of the Accused Stanišić may not commence before a re-assessment of the Accused Stanišić’s health condition is undertaken;²⁴

CONSIDERING therefore that, upon the commencement of the trial for both Accused, the Trial Chamber will ensure, in its management of the case, that the Defence is not prejudiced by the timing of the presentation and use of the 31 documents at trial;

²⁰ Prosecution List of Witnesses Pursuant to Rule 65 *ter* (E)(ii), 2 April 2007. The witness appears as a *Viva Voce* witness (No. 40) on the Witness List.

²¹ Prosecution Motion for Leave to Amend its Rule 65 *ter* Witness List with Confidential Annex, 11 February 2008. The witness appears as a *Viva Voce* witness (No. 39) on the Witness List.

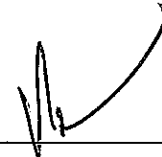
²² See also the description of the documents in the table included in the Annex to the Motion.

²³ Documents appearing as entries 4484, 4554 and 4568.

²⁴ Decision on Defence Appeal of the Decision on Future Course of Proceedings, 16 May 2008, para. 22.

FOR THE FOREGOING REASON, the Trial Chamber **GRANTS** the Prosecution's request for leave to reply, and **GRANTS** the Motion.

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



Judge Patrick Robinson
Presiding

Dated this seventh day of July 2008
At The Hague
The Netherlands

[Seal of the Tribunal]