



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: 7 October 2010
Original: English

IN TRIAL CHAMBER I

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

Registrar: Mr John Hocking

Decision of: 7 October 2010

PROSECUTOR

v.

**JOVICA STANIŠIĆ
FRANKO SIMATOVIĆ**

PUBLIC

**DECISION ON SIXTEENTH PROSECUTION MOTION FOR
LEAVE TO AMEND ITS RULE 65 TER EXHIBIT LIST WITH
CONFIDENTIAL ANNEX (MLADIĆ NOTEBOOKS)**

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 14 May 2010, the Prosecution filed a motion seeking leave to add 18 military notebooks (“notebooks”) to its Rule 65 *ter* exhibit list (“Motion”).¹ On 28 May 2010, the Stanišić Defence requested that the Chamber reject the Motion until such time as the notebooks had been translated.² On 11 June 2010, the Prosecution filed a response opposing the request by the Stanišić Defence.³ On 22 June 2010, the Chamber decided to extend the deadline for responses by the Defence to the Motion until four weeks after receipt of the translations of all notebooks and requested that the Prosecution notify the Chamber once all translations had been made available to the Defence.⁴ Through an informal communication on 20 August 2010, the Prosecution informed the Chamber that the translations of the notebooks were complete and had been fully disclosed to the Defence as of 30 July 2010. On 27 August 2010, the Stanišić Defence filed a response requesting that the Chamber deny the Motion (“Response”).⁵ Subsequently, on 3 September 2010, the Prosecution requested leave to reply to the Response.⁶ Through an informal communication on 7 September 2010, the Chamber informed the parties that the Prosecution was granted leave to reply and was expected to file its reply by close of business on 14 September 2010. The Prosecution filed its reply on 13 September 2010 (“Reply”).⁷ Simultaneously, the Prosecution filed its first notification of excerpts from the notebooks (“First Notification”).⁸

II. SUBMISSIONS OF THE PARTIES

A. Motion

2. The Prosecution submits that the notebooks were seized by the Ministry of Internal Affairs of the Republic of Serbia (“Serbia”) on 23 February 2010 from the apartment of General Ratko Mladić’s wife, and are contemporaneous notes taken by Mladić, covering time periods between

¹ Sixteenth Prosecution Motion for Leave to Amend Its Rule 65 *ter* Exhibit List with Confidential Annex (Mladić Notebooks), 14 May 2010 (Public with Confidential Annex).

² Defence Request to Reject the Sixteenth Prosecution Motion for Leave to Amend Its Rule 65 *ter* Exhibit List (alleged Mladić Notebooks), 28 May 2010.

³ Prosecution Response to Stanišić Request to Delay the Addition of the Mladić Notebooks, 11 June 2010 (Confidential).

⁴ T. 5916-5919.

⁵ Stanišić Defence Response to Sixteenth Prosecution Motion for Leave to Amend Its Rule 65 *ter* Exhibit List (Mladić Notebooks), 27 August 2010 (Confidential). The Simatović Defence did not respond to the Motion.

⁶ Prosecution Motion for Leave to Reply to Stanišić Defence Response to Sixteenth Prosecution Motion, 3 September 2010 (Confidential).

⁷ Prosecution Reply to Stanišić Defence Response to Sixteenth Prosecution Motion for Leave to Amend Its Rule 65 *ter* Exhibit List (Mladić Notebooks), 13 September 2010 (Confidential).

⁸ First Prosecution Notification of Excerpts from Mladić Notebooks, 13 September 2010 (Confidential with Confidential Annex).

29 June 1991 and 28 November 1996.⁹ At the time of filing the Motion, the notebooks were not yet fully transcribed and translated. However, the Prosecution submits that it expects the notebooks to be relevant to the case of Jovica Stanišić and Franko Simatović (together “the Accused”).¹⁰ It argues that the testimony of one witness, who recognised the handwriting in all notebooks as that of Mladić, is evidence of the notebooks’ authenticity.¹¹ The Prosecution submits that it expects the notebooks to be probative of its content based on a preliminary analysis; as an example it refers to an entry on 13 and 14 December 1993 describing a meeting attended by Milošević, Stanišić, Badža, Karadžić, Krajišnik, and Mladić.¹² The Prosecution further argues that the notebooks’ probative nature follows from the demonstrated relevance of previously seized notebooks, which allegedly also belong to Mladić and excerpts of which have been admitted into evidence in this case.¹³

3. The Prosecution submits that the notebooks constitute a significant volume of new evidence, being approximately 3,500 handwritten pages, and that reasonable steps should therefore be taken to ensure that the Defence has adequate time to examine and investigate the contents of the portions the Prosecution will rely on.¹⁴ The Prosecution proposes that it identify the portions of the notebooks on which it will seek to rely in its case on an ongoing basis and requests that the Chamber determine the amount of time that must pass following this notice before a given portion is used in court or tendered into evidence (“Proposed Procedure”).¹⁵

4. Finally, the Prosecution submits that it has shown good cause to permit the amendment of the Rule 65 *ter* exhibit list.¹⁶ The Prosecution argues that it acted with all possible diligence by disclosing electronic versions of the notebooks shortly after receiving them, and by filing the Motion three days after the original notebooks had arrived at the Tribunal in The Hague.¹⁷

B. Response

5. The Stanišić Defence submits that the addition of the notebooks to the Prosecution’s Rule 65 *ter* exhibit list would violate the Accused’s right to a fair trial.¹⁸ More specifically, it submits that the Prosecution has failed to identify the relevant or probative portions of the notebooks and to include any meaningful analysis of them in the Motion.¹⁹ The Stanišić Defence

⁹ Motion, paras 1, 4-5.

¹⁰ Motion, para. 6.

¹¹ Motion, para. 7, Confidential Annex, para. 1.

¹² Motion, para. 11.

¹³ Motion, paras 9-10.

¹⁴ Motion, paras 4, 12.

¹⁵ Motion, para. 14.

¹⁶ Motion, paras 15-16.

¹⁷ Motion, paras 13, 15-16.

¹⁸ Response, paras 2, 16.

¹⁹ Response, paras 5-6.

argues that, especially given the lack of such information and taking into consideration the volume of the notebooks, reviewing them and analysing their potential implication for the trial and impact on the rights of the Accused would be time-consuming.²⁰ According to the Stanišić Defence, adding the notebooks to the Prosecution's Rule 65 *ter* exhibit list would be "but one small step" from adding a "massive volume of new evidence", leading inevitably to a substantial delay in the proceedings.²¹

6. The Stanišić Defence also submits that the interests of justice in granting the Motion are circumscribed by its timing, since the majority of important Prosecution witnesses have already testified and admission of the notebooks will inevitably necessitate recalling many of them.²² Finally, the Stanišić Defence submits that as a result of the Prosecution's constant requests for additions to its Rule 65 *ter* exhibit and witness lists, including its request in relation to the notebooks, it is transforming the factual basis of the case against the Accused, thereby running the risk of jeopardising the principle of prompt disclosure of factual material and accordingly violating the Accused's right to have adequate time and facilities for the preparation of his defence.²³

C. Reply

7. The Prosecution submits that the notebooks are highly probative evidence.²⁴ It argues that Mladić was uniquely well-placed to observe the interactions among the various members of the alleged Joint Criminal Enterprise ("JCE"), and was unique among individuals at his level in terms of the detail of his recordings.²⁵ The Prosecution submits that the Proposed Procedure safeguards the Accused's rights to adequate time for preparation of their defence and is more time-efficient than filing a motion to amend the Prosecution's exhibit list each time a relevant portion is identified.²⁶

8. The Prosecution denies that the Motion is part of a Prosecution strategy to overwhelm the Defence with new evidence as the trial unfolds, arguing that it received the original notebooks on 11 May 2010 and filed the Motion three days later.²⁷ Lastly, the Prosecution argues that, should leave to add the notebooks to its exhibit list be denied, the Chamber would only be in a position to

²⁰ Response, para. 7.

²¹ Response, paras 9-12.

²² Response, para. 13.

²³ Response, paras 14-16.

²⁴ Reply, paras 3-5.

²⁵ Reply, paras 3-4.

²⁶ Reply, paras 6-7. See also First Prosecution Notification of Excerpts from Mladić Notebooks, 13 September 2010 (Confidential), which the Prosecution filed to exemplify the suggested approach and lists a set of excerpts from the Notebooks on which the Prosecution would rely if the Motion were granted.

²⁷ Reply, para. 8.

consider those portions of the notebooks which the Defence selects for addition to their own exhibit lists, with the risk of creating a skewed picture of the evidence.²⁸

D. First Notification

9. The Prosecution submits that it filed the First Notification as it may assist the Chamber in its decision on the Motion as a concrete example of the Proposed Procedure. Confidential Annex A to the First Notification lists an initial set of excerpts from the notebooks that the Prosecution would seek to use as evidence if the Motion were granted.

III. APPLICABLE LAW

10. Rule 65 *ter* (E)(iii) of the Rules of Procedure and Evidence (“Rules”) provides, *inter alia*, that the Prosecution shall file its list of exhibits no later than six weeks before the Pre-Trial Conference. The purpose of Rule 65 *ter* (E)(iii) is first, to allow the Defence to prepare its case and secondly, to ensure that the presentation of evidence during the trial is efficiently prepared.²⁹ The Chamber recalls that, in the exercise of its inherent discretion in managing the trial proceedings, it may authorise requested additions to the exhibit list submitted pursuant to Rule 65 *ter* (E)(iii) if it is satisfied that it is in the interests of justice to do so.³⁰

11. When exercising its discretion, the Chamber must balance the Prosecution’s duty to present the available evidence to prove its case with the rights of the accused to a fair and expeditious trial and to have adequate time and facilities for the preparation of the defence as set forth in Articles 20(1) and 21(4)(b) of the Tribunal’s Statute (“Statute”).³¹ The Chamber will consider whether the documents sought to be added are *prima facie* relevant to and probative of issues raised in the indictment in order to justify their addition to the Rule 65 *ter* exhibit list at this stage of the

²⁸ Reply, paras 9-10.

²⁹ *Prosecutor v. Jadranko Prlić, Bruno Stojić, Slobodan Praljak, Milivoj Petković, Valentin Cović and Berislav Pušić*, Case No. IT-04-74-T, Decision on Prosecution Motion to Add to Exhibits List (Confidential), 18 September 2007, p. 5.

³⁰ Decision on Fourteenth Prosecution Motion for Leave to Amend Its Rule 65 *ter* Exhibit List, 16 April 2010, paras 14-15. See also *Prosecutor v. Vujadin Popović, Ljubiša Beara, Drago Nikolić, Ljubomir Borovčanin, Radivoje Miletić, Milan Gvero and Vinko Pandurević*, Case No. IT-05-88-AR73.1, Decision on Appeals Against Decision Admitting Material related to Borovčanin’s Questioning, 14 December 2007 (“*Popović* Appeal Decision”), para. 37.

³¹ Decision on Fourteenth Prosecution Motion for Leave to Amend Its Rule 65 *ter* Exhibit List, 16 April 2010 (“16 April 2010 Decision”), para. 15. See also *Popović* Appeal Decision, para. 37; *Prosecutor v. Ante Gotovina, Ivan Čermak and Mladen Markač*, Case No. IT-06-90-T, Decision on the Prosecution’s Motion to Admit Documents into Evidence and Add Two Documents to the Prosecution’s Rule 65 *ter* Exhibit List, 25 November 2008 (“*Gotovina* Decision”), para. 9.

proceedings.³² The Chamber recalls that it will not grant the Prosecution leave to add to its Rule 65 *ter* exhibit list “documents that are obviously irrelevant”.³³ In its determination as to whether it is in the interests of justice to add the requested documents to the Rule 65 *ter* exhibit list, the Chamber will also consider whether the Prosecution has shown good cause for adding the documents to the list at this stage and the extent to which the new documents create an additional burden on the Defence.³⁴

12. The Chamber recalls the difference between the addition of a document to the Rule 65 *ter* exhibit list and the admission of a document into evidence as an exhibit. By adding a document to the Rule 65 *ter* exhibit list, the Prosecution simply gives notice to the Defence that it intends to rely on the document at trial.³⁵

IV. DISCUSSION

13. The notebooks are purportedly authored by General Ratko Mladić, a high-ranking officer and member of the JCE alleged in this case.³⁶ In this regard, the Chamber considers the fact that the notebooks were found in Mladić’s wife’s residence and the evidence of one witness who recognised the handwriting in the notebooks, positive indications that Mladić may be the author of the notebooks. Evidence heard so far indicates that Mladić was in a unique position to observe interactions between different members of the alleged JCE across functional areas and across geographical and political entities. The notebooks appear to contain contemporaneous notes of and references to a large number of military, political and private meetings with countless persons, allegedly including the Accused. Therefore, the Chamber is satisfied that the notebooks are *prima facie* relevant and probative.

14. The Chamber does not share the concern expressed by the Defence that granting the Motion would result in a change of the factual basis of the case against the Accused. The Accused may only be found guilty of the charges as contained in the Indictment against them. Evidence to prove these charges may be discovered after the start of trial proceeding and added to the Prosecution Rule 65

³² *Gotovina* Decision, para. 9; *Prosecutor v. Vujadin Popović, Ljubiša Beara, Drago Nikolić, Ljubomir Borovčanin, Radivoje Miletić, Milan Gvero and Vinko Pandurević*, Case No. IT-05-88-T, Decision on Prosecution’s Motions for Leave to Amend Rule 65 *ter* Witness List and Rule 65 *ter* Exhibit List, 6 December 2006 (Confidential), p. 7.

³³ Decision on Prosecution Motion for Leave to Amend Its Rule 65 *ter* Exhibit List, 8 May 2008 (Confidential), para. 7; *Prosecutor v. Rasim Delić*, Case No. IT-04-83-T, Decision on Urgent Prosecution Motion for Leave to Amend its Exhibit List, 17 October 2007 (“*Delić* Decision”), p. 4; *Prosecutor v. Ljube Bošković and Johan Tarčulovski*, Case No. IT-04-82-T, Decision on Prosecution’s Fifth Motion to Amend its Exhibit List and on its Second Motion to Remove Witnesses from Witness List (Confidential), 20 April 2007 (“*Bošković and Tarčulovski* Decision”), para. 3.

³⁴ 16 April 2010 Decision, para. 15; *Gotovina* Decision, para. 9; *Popović* Appeal Decision, para. 37.

³⁵ 16 April 2010 Decision, para. 16; *Delić* Decision, p. 4; *Bošković and Tarčulovski* Decision, para. 3.

³⁶ Third Amended Indictment, 10 July 2008, para. 12 (“Indictment”).

ter exhibit list if the requisite conditions are met. In this regard, the Prosecution submits that the notebooks were only discovered recently and that it has subsequently acted with diligence in its disclosure.³⁷ The notebooks were seized on 23 February 2010. Electronic versions of the notebooks were disclosed to the Defence on 13 April 2010, shortly after they were received by the Prosecution. On 14 May 2010, three days after the original notebooks arrived at the seat of this Tribunal, the Prosecution filed the Motion. Accordingly, the Chamber finds that the Prosecution has shown good cause in seeking to add the notebooks to its Rule 65 *ter* exhibit list at this stage in the trial.

15. In considering the addition of the notebooks to the Prosecution's Rule 65 *ter* exhibit list, the Chamber must be satisfied that the rights of the Accused to a fair trial and to adequate time and facilities for the preparation of their defence are guaranteed. Taking into consideration the notebooks' volume, the Chamber acknowledges the risk that granting the Motion may impose an additional burden on the Defence. However, the Chamber considers that the Accused's rights will be guaranteed by adopting an approach whereby the Prosecution notifies the Defence on an ongoing basis of the portions of the notebooks on which it intends to rely. The Chamber will allow adequate time from the moment of notification for the Defence to prepare before these portions may be used in court. The Chamber will determine the specific interval between notice and use of newly identified relevant portions of the notebooks on a case by case basis, taking into consideration, *inter alia*, the time period between notifications and the size of specific portions. The Chamber however urges the Prosecution to complete the process of identification and notification as soon as possible.

16. Balancing all of the foregoing, the Trial Chamber is satisfied that it is in the interests of justice to grant the Prosecution leave to add the notebooks to its Rule 65 *ter* exhibit list.

17. With regard to the First Notification, the Chamber notes it includes references to 21 portions of the notebooks. The portions total less than 120 pages of the English translations of the notebooks and refer mainly to a number of meetings and conversations. Considering the relatively limited size of the identified portions and the fact that the Defence teams have been on notice of these portions since 13 September 2010, the Chamber finds that three weeks from the date of filing of the First Notification provides the Defence with adequate time for preparation. As such, the Chamber finds that the relevant portions may be used in court from the date of filing of this decision.

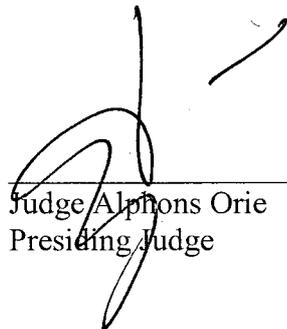
³⁷ Motion, paras 15-16.

V. DISPOSITION

18. For the foregoing reasons, pursuant to Articles 20 (1) and 21 (4)(b) of the Statute and Rule 54 and 65 *ter* (E)(iii) of the Rules, the Chamber

- **GRANTS** the Motion;
- **DECIDES** that the Prosecution shall notify the Chamber and the Defence on an ongoing basis of the portions of the notebooks on which it intends to rely, if any. The Chamber will decide on a case by case basis the appropriate interval between such notifications and the use of the portions concerned in court;
- **DECIDES** that the portions identified in the First Notification may be used in court from the date of filing of this decision.

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



Judge Alphons Orie
Presiding Judge

Dated this seventh of October 2010
At The Hague
The Netherlands