



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: 17 December 2010
Original: English

IN TRIAL CHAMBER I

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

Registrar: Mr John Hocking

Decision of: 17 December 2010

PROSECUTOR

v.

**JOVICA STANIŠIĆ
FRANKO SIMATOVIĆ**

PUBLIC

**DECISION ON EIGHTEENTH PROSECUTION MOTION FOR
LEAVE TO AMEND ITS RULE 65 TER EXHIBIT LIST**

Office of the Prosecutor
Mr Dermot Groome

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Mr Wayne Jordash
Mr Geert-Jan Alexander Knoops

Counsel for Franko Simatović
Mr Mihajlo Bakrač
Mr Vladimir Petrović

I. PROCEDURAL HISTORY

1. On 23 September 2010, the Prosecution filed a motion seeking leave to add a number of documents (the "Proposed Exhibits") to its Rule 65 *ter* exhibit list ("Motion").¹ On the same day, the Stanišić Defence through an informal communication to the Chamber, made a request for extension of time to respond to the Motion. On 29 September 2010, the Chamber granted the request for extension.² On 21 October 2010, the Stanišić Defence filed its response, requesting that the Chamber deny the Motion ("Response").³ The Simatović Defence did not respond to the Motion. On 27 October 2010, the Prosecution sought leave to reply to the Response.⁴ On 1 November 2010, the Chamber granted leave to the Prosecution to reply by 5 November 2010.⁵ On 5 November 2010, the Prosecution filed its reply to the Response ("Reply").⁶

II. SUBMISSIONS OF THE PARTIES

A. Motion

2. In the Motion, the Prosecution seeks leave to add the Proposed Exhibits to its Rule 65 *ter* exhibit list.⁷ The majority of the Proposed Exhibits are documents selected from Serbian State Security Service ("Serbian DB") and Serbian Ministry of the Interior ("Serbian MUP") personnel files received from the Republic of Serbia ("Serbia") following a number of formal Requests for Assistance ("RFAs").⁸ The remainder are combat reports relating to the attack on the village of Glina in Croatia in July 1991 ("Glina Reports"), received from Croatian authorities pursuant to an RFA.⁹ The Prosecution submits that the Proposed Exhibits are relevant to key issues in the case,¹⁰ and that, in particular, they are relevant to rebutting matters that, based on the proceedings thus far, the Prosecution now anticipates will comprise elements of the Defence case.¹¹ In addition, the Prosecution asserts that the Proposed Exhibits corroborate the testimony of Prosecution witnesses

¹ Eighteenth Prosecution Motion for Leave to Amend its Rule 65 *ter* Exhibit List with Confidential Annexes (Personnel Files and Glina Reports), 23 September 2010 (Confidential with Confidential Annexes).
² T. 7558.
³ Stanišić Defence Response to Eighteenth Prosecution Motion for Leave to Amend its Rule 65 *ter* Exhibit List (Personnel Files and Glina Reports), 21 October 2010.
⁴ Prosecution Motion for Leave to Reply to Stanišić Defence Response to Eighteenth Prosecution Motion for Leave to Amend its Rule 65 *ter* Exhibit List (Personnel Files and Glina Reports), 27 October 2010.
⁵ T. 8475.
⁶ Prosecution Reply to Stanišić Defence Response to Eighteenth Prosecution Motion for Leave to Amend its Rule 65 *ter* Exhibit List with Confidential Annexes A and B, 5 November 2010.
⁷ Motion, paras 1, 30.
⁸ Motion, para. 1.
⁹ Ibid.
¹⁰ Motion, para. 2.
¹¹ Ibid.

whose credibility the Defence has attacked and whose evidence the Prosecution expects the Defence will challenge during the Defence cases.¹² Moreover, the Prosecution submits that the Proposed Exhibits may rebut potential Defence challenges to the authenticity of other documents, including those received from Serbia and coming from the Serbian MUP archives (“MUP archives”).¹³ The Prosecution submits that the Stanišić Defence had previously alleged that one such exhibit, P179, had been “inserted mischievously or maliciously” into the archives.¹⁴

3. Lastly, the Prosecution submits that the addition of the Proposed Exhibits to the Rule 65 *ter* exhibit list can be done without prejudice to the rights of the Accused and that, despite the advanced stage of proceedings, there is still adequate time for the Defence to prepare to meet the evidence contained therein.¹⁵ The Prosecution accordingly proposes that, should the Chamber grant the motion, a certain period of time, during which the Proposed Exhibits may not be tendered into evidence, may be set by the Chamber in order to give the Defence adequate time to prepare.¹⁶

B. Response

4. The Stanišić Defence submits that the propriety of allowing the Prosecution to add new documents to its Rule 65 *ter* exhibit list should be viewed cumulatively, and argues that the trial is now at the point where further additions to the exhibit list represent an unjustified incursion into the Defence’s ability to know and respond to the Prosecution case.¹⁷ In this respect, the Defence submits that any potential impact on trial fairness must be assessed not only in respect of the individual Motion, but also in view of the cumulative effect of all of the Prosecution’s Rule 65 *ter* motions.¹⁸

5. The Stanišić Defence further submits that all of the Proposed Exhibits address matters that were entirely foreseeable from the beginning of the Prosecution case and which fall within the scope of the Prosecution’s burden of proof; in particular, that it was not only foreseeable, but obvious that the Defence would challenge the credibility of Prosecution witnesses.¹⁹ The Defence accordingly submits that all of the documents could have been requested and disclosed “years ago”, and that the Prosecution’s failure to do so is no justification for further encroachments upon the

¹² Ibid.

¹³ Motion, paras 2, 6, 10-13.

¹⁴ Motion, para. 10, referring to Stanišić Defence Submissions on the Authenticity of P179, 5 March 2010 (“Defence Submissions on P179”), para. 8.

¹⁵ Motion, para. 27.

¹⁶ Motion, para. 28.

¹⁷ Response, paras 1-2.

¹⁸ Response, para. 5.

¹⁹ Response, paras 1, 12-13.

Defence's right to notice of the evidentiary basis its case must meet.²⁰ The Defence argues that although the Prosecution's practice appears to provide the Chamber with more information on which to make its findings, the Defence is effectively deprived of its main opportunity of testing the information through the testimony of the witnesses who have knowledge thereof.²¹

6. Finally, the Stanišić Defence disputes the reliability of the Proposed Exhibits, and challenges the Prosecution's assertion that they are from the Serbian DB and Serbian MUP and "were received from the Republic of Serbia [...] pursuant to a number of Requests for Assistance".²² The Defence thus seeks explanations from the Prosecution on the late submission of the Proposed Exhibits, as well as their precise origin and the reasons for which the Prosecution considers them sufficiently important to warrant such late addition to the Rule 65 *ter* exhibit list.²³ The Defence also questions the authenticity of the Glina Reports, stating that the Prosecution's assertions that they were received from Croatian authorities in response to an RFA are insufficient to determine their authenticity, especially given that they are hand-written and lack a signature, stamp or any other indicia of authenticity.²⁴

C. Reply

7. The Prosecution submits that the Stanišić Defence's attack on the overall integrity of the MUP archives, in which the Proposed Exhibits were found, was unforeseeable.²⁵ The Prosecution also submits that the Defence's allegations of an existence of a conspiracy to implicate the Accused, first raised in the Defence Submissions on P179,²⁶ and maintained in the Response,²⁷ rendered the line of defence even less foreseeable.²⁸ On the other hand, the Prosecution asserts that the addition of the Proposed Exhibits actually meets the Defence's concerns: that the Proposed Exhibits, in conjunction with other documents already on the Rule 65 *ter* exhibit list and in evidence, demonstrate convincingly that the archives from which the documents are drawn are large, complex, and internally consistent archives that could not have been created by a conspiracy of forgers.²⁹

²⁰ Response, para. 13.

²¹ Response, paras 11, 13.

²² Response, para. 14.

²³ Response, para. 15.

²⁴ Response, para. 16.

²⁵ Reply, paras 2-3.

²⁶ Reply, para. 4, referring to Defence Submissions on P179, paras 9-10.

²⁷ The Stanišić Defence makes reference to "the interests of many in implicating the Accused". Response, para. 14.

²⁸ Reply, para. 4.

²⁹ Reply, para. 6.

8. The Prosecution submits that the Stanišić Defence's allegations that the evidence of several Prosecution witnesses was fabricated *in its totality* were impossible to foresee until the challenges were actually made.³⁰ The Prosecution asserts that these challenges make relevant a great deal of evidence which may otherwise be of limited probative value, since such evidence may corroborate the witnesses' evidence and thus prove their credibility.³¹

9. The Prosecution submits that the Proposed Exhibits should be seen as having indicia of reliability, as they were received pursuant to RFAs from the governments of Croatia and Serbia, and that this in itself is sufficient for their addition to the Rule 65 *ter* exhibit list.³² The Prosecution also submits that the great majority of the Proposed Exhibits include formal indicia of authenticity such as signatures or stamps.³³

III. APPLICABLE LAW

10. The Chamber recalls the applicable law governing amendments to the Rule 65 *ter* exhibit list as it has previously set out, and refers to it.³⁴

IV. DISCUSSION

11. The Proposed Exhibits comprise 189 documents of between one and six pages each. They appear to be relevant as a rebuttal to the Defence challenges to the credibility of three Prosecution witnesses who have already testified – Dejan Slišković, Witness JF-039, and Witness JF-048 – and to the authenticity of documents coming from the Serbian MUP archives pursuant to RFAs. The Proposed Exhibits appear to show the affiliation of various individuals with the Serbian DB, the Unit for Anti-Terrorist Activities (“JATD”) and other groups. A number of the documents appear to have been signed by either Jovica Stanišić or Franko Simatović, and many more documents otherwise contain the names or initials of the Accused. The Chamber notes that the majority of the Proposed Exhibits bear stamps, signatures and/or initials, including Serbian MUP employment decisions signed by one Jovica Stanišić. At the same time, the Chamber notes that the Glina Reports are in a handwritten form without any further visible indicia of authenticity. The Chamber considers, however, that the fact that the Proposed Exhibits, including the Glina Reports, were received from the respective governments pursuant to RFAs serves as a sufficient indication of their

³⁰ Reply, para. 10.

³¹ Reply, paras 10, 12.

³² Reply, para. 13.

³³ Reply, paras 14, 16.

³⁴ See e.g. Decision on Sixteenth Prosecution Motion for Leave to Amend Its Rule 65 *ter* Exhibit List, 7 October 2010, paras 10-12.

prima facie authenticity for the purpose of adding them to the Rule 65 *ter* exhibit list. Accordingly, the Chamber is satisfied that the Proposed Exhibits are *prima facie* relevant and of probative value.

12. The Chamber has considered the Stanišić Defence's submissions in relation to the cumulative effect of the large number of Rule 65 *ter* motions put forward to date. The Chamber emphasises that, in contrast to its previous Rule 65 *ter* motions, in the instant case the Prosecution is seeking to add rebuttal evidence in response to arguments raised by the Stanišić Defence. The Prosecution submits that it seeks to use the Proposed Exhibits to rebut unforeseen Defence challenges to the overall credibility of its witnesses and the authenticity of other evidence. The Chamber accepts that some of these challenges may not have been foreseeable. In particular, while it was foreseeable that the Defence would raise challenges to the credibility of Prosecution evidence, the Chamber accepts that the Prosecution may not have foreseen the Stanišić Defence's attack on the overall integrity of the Serbian MUP archives, with its allegations that evidence had been maliciously inserted therein. In light of this conclusion, the Chamber considers that the Prosecution was not in a position to request addition of the Proposed Exhibits to its Rule 65 *ter* exhibit list at an earlier stage. The Chamber therefore finds that the Prosecution has established good cause in seeking addition of the Proposed Exhibits at this stage of the trial.

13. In considering the impact of addition of the Proposed Exhibits to the Prosecution's Rule 65 *ter* exhibit list on the rights of the Accused to a fair trial, the Chamber acknowledges that granting the Motion may result in an additional burden on the Defence. However, the Chamber notes that the Prosecution disclosed the BCS versions of the Proposed Exhibits to the Defence on 30 July 2010, with English translations having been provided on an ongoing basis after that date. The Chamber notes additionally that the Motion was filed on 23 September 2010 and that the Defence teams have been in possession of all of the Proposed Exhibits at least since that time. Further, although relatively voluminous, the material contained within the Proposed Exhibits does not appear to be overly complex. In these circumstances, the Chamber concludes that while the addition of the Proposed Exhibits would place some burden on the Defence, the burden is limited. Furthermore, in order to ensure that the Stanišić Defence is not deprived of the opportunity of testing the new material during the testimony of witnesses who have knowledge thereof,³⁵ the Chamber will consider any motion by the Defence to recall certain witnesses, provided there is a proper showing of sufficient reasons for such recall.

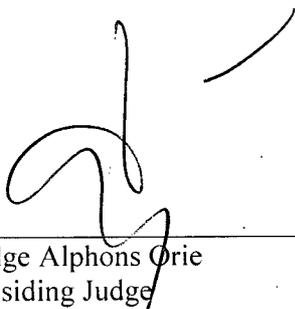
14. Balancing all of the foregoing, the Trial Chamber is satisfied that it is in the interests of justice to grant the Prosecution leave to add the Proposed Exhibits to its Rule 65 *ter* exhibit list.

³⁵ Response, para. 13.

V. DISPOSITION

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

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



Judge Alphons Orie
Presiding Judge

Dated this seventeenth day of December 2010
At The Hague
The Netherlands