



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 March 2011
Original: English

IN TRIAL CHAMBER I

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

Registrar: Mr John Hocking

Decision of: 24 March 2011

PROSECUTOR

v.

**JOVICA STANIŠIĆ
FRANKO SIMATOVIĆ**

PUBLIC

**DECISION ON THE PROSECUTION SUBMISSION ON
ADDITIONAL VICTIMS AND ON MOTION TO ADD SOME
SOURCE DOCUMENTS TO THE RULE 65TER EXHIBIT LIST
AND TO ADMIT THE REPORT OF DR. EWA TABEAU WITH
THE SOURCE DOCUMENTS**

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Mr Mihajlo Bakrač
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I. PROCEDURAL HISTORY AND SUBMISSIONS OF THE PARTIES

1. On 4 October 2010, the Prosecution filed a proposed expert report on the victims of war by Dr. Ewa Tabeau. It also moved to add a number of documents relating to the report¹ (“Proposed Exhibits”) to its Rule 65*ter* exhibit list² (“Motion”). The Defence did not respond.

2. In the beginning of December 2010, at the close of its examination-in-chief of Dr. Tabeau, the Prosecution moved to admit into evidence her report on victims, and the source material relevant to the report (“Source Material”).³ The Stanišić Defence argued that the admission of fourteen of the documents⁴ (“Challenged Exhibits”) regarding thirteen victims would create “additional liability for the accused” requiring an amendment of the Indictment.⁵ The Source Material which was not challenged will be referred to as “Other Source Material”.⁶ Both the Challenged Exhibits and the Other Source Material include Proposed Exhibits. The expert report, the Challenged Exhibits and the Other Source Material were marked for identification pending a decision on the Challenged Exhibits.⁷

3. On 14 January 2011, the Prosecution filed the “Prosecution Submission on Additional Victims” (“Submission”) in which it rebuts that admission of the Challenged Exhibits would alter the scope of the alleged liability of the Accused.⁸ It submits that the jurisprudence of the Tribunal supports that the identity of each victim is not a material fact that must be pleaded in the Indictment.⁹ The Prosecution further submits that the Challenged Exhibits are admissible.¹⁰

¹ 65*ter* numbers 5657-5745.

² Prosecution Submission of Updated Victims Report of Expert Witness Ewa Tabeau and Motion to Add Proof of Death Documents to Rule 65*ter* Exhibit List, 4 October 2010.

³ T. 9938-9939 (7 December 2010). The Chamber notes that the Prosecution does not proceed to request admission for three documents with 65*ter* numbers 5657, 5665, 5743, which were among the Proposed Exhibits, see, Registry memo dated 9 February 2011. The source material corresponds to the Proposed Exhibits and 65*ter* numbers 1223, 1229, 1231, 2593, 2702-2703, 2706, 2714-2718, 2720-2726, 2728-2735, 2738-2742, 2744-2748, 2750-2757, 2759-2763, 2765-2774, 2777-2780, 4539, 4871, 4873-4888, 4890-4907, which have been given provisional exhibit numbers P2162-P2261.

⁴ 65*ter* numbers 2722, 2724, 2735, 2741, 5715-5722, 4871, 4875

⁵ T. 9921 (7 December 2010).

⁶ 65*ter* numbers 1223, 1229, 1231, 2593, 2702-2703, 2706, 2714-2718, 2720-2721, 2723, 2725-2726, 2728-2734, 2738-2740, 2742, 2744-2748, 2750-2757, 2759-2763, 2765-2774, 2777-2780, 4539, 4873-4874, 4876-4888, 4890-4907, 5658-5664, 5666-5714, 5723-5742, 5744-5745, corresponding to exhibit numbers P2162-P2175, 2177, 2179-P2187, P2189-P2191, P2193-2226, P2228-2229, P2231-2317, 2326-2347.

⁷ T. 9921 (7 December 2010).

⁸ Submission, para. 6.

⁹ Submission, paras 7-9.

¹⁰ Submission, para. 11.

4. The Stanišić Defence responded to the Submission on 28 January 2011 (“Response”).¹¹ The Simatović Defence did not respond. The Stanišić Defence maintains that the Prosecution’s request to admit the documents in relation to the thirteen victims require a formal amendment of the Indictment as it creates an additional liability of the Accused and that it was clearly possible and practical to have provided names of the victims “prior to the case commencing at the time when the Indictment was drafted” and refers to Tribunal case-law.¹² Following leave from the Chamber,¹³ the Prosecution replied on 11 February 2011 (“Reply”).¹⁴

5. In an informal meeting on 18 February 2011 between the parties and the Chamber staff, the Simatović Defence confirmed that it does not object to the admission of the Other Source Material and the Stanišić Defence confirmed that its objection is limited to the Challenged Exhibits.

II. APPLICABLE LAW

6. The Chamber recalls the applicable law governing amendments to the Rule 65*ter* exhibit list¹⁵ and admission of evidence¹⁶ as it has previously set out and refers to it.

7. The Appeals Chamber has found that “since the identity of the victims is information that is valuable to the preparation of the defence case, if the Prosecution is in the position to name the victims, it should do so.”¹⁷ This applies even in cases where a high degree of specificity is impractical or where the accused is relatively remote in proximity from the events for which he is alleged to be responsible.

¹¹ Stanišić Defence Response to Prosecution Motion for Submission on Additional Victims, 28 January 2011.

¹² Reponse, para. 3.

¹³ The Prosecution requested leave to reply to the Response in its Prosecution Motion for Leave to Reply to Stanišić Defence Response to Prosecution Submission on Additional Victims, 3 February 2011, which the Chamber granted on 9 February 2011 through an informal communication.

¹⁴ Prosecution Reply to Stanišić Defence Response to Prosecution Submission on Additional Victims, 11 February 2011.

¹⁵ See Decision on Sixteenth Prosecution Motion for Leave to Amend Its Rule 65 *ter* Exhibit List, 7 October 2010, paras 10-12.

¹⁶ See Decision on Prosecution Second Motion for Admission of Exhibits from the Bar Table, 10 March 2001, paras 10-11.

¹⁷ *Prosecutor v. Kupreškić et al.*, Case No. 95-16-A, Appeal Judgement, 23 October 2001, para. 90. See also *Prosecutor v. Kvočka et al.* Appeal Judgement, Case No. 98-30/1-A, 28 February 2005, para. 62; *Prosecutor v. Gotovina et al.*, Case No. IT-06-90-AR73.3, Decision on Joint Defence Interlocutory Appeal Against Trial Chamber’s Decision on Joint Defence Motion to Strike the Prosecution’s Further Clarification of Identity of Victims, 9 May 2009, para. 18.

III. DISCUSSION

(i) Request to add the Proposed Exhibits to the Rule 65ter exhibit list.

8. The Prosecution's request to add the Proposed Exhibits to the Rule 65ter exhibit list includes some of the Challenged Exhibits (65ter numbers 5715-5722).¹⁸ Neither the Stanišić Defence nor the Simatović Defence responded.

9. The Proposed Exhibits were received by the Prosecution on 30 July 2010 and disclosed to the Defence on 20 August 2010.¹⁹ The Defence was notified on 23 June 2010 of the Prosecution's request to the Bosnian authorities and that the material would be included in Dr. Tabeau's report.²⁰ The Chamber finds that the Prosecution has shown good cause in seeking to add the Proposed Exhibits at this stage of the proceedings.

10. The Proposed Exhibits are relevant as it is source material for Dr. Tabeau's report on victims showing the cause of death of alleged victims in the Indictment. The Chamber is satisfied that the Proposed Exhibits are *prima facie* relevant.

11. The Proposed Exhibits are different protocols of identification and handover of mortal remains; medical forensic reports; a note from an investigation by the Ministry of Interior in Bosnia and Herzegovina, and certificates from the Institute for Missing Persons in Bosnia and Herzegovina. The Trial Chamber finds them to have *prima facie* probative value.

12. The material was disclosed in August 2010 and Dr. Tabeau testified in December, giving the Defence time to prepare, thereby not resulting in any prejudice. 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 65ter exhibit list.

(ii) Whether admission requires an amendment to the Indictment.

13. The Indictment has no schedules of named victims. The Prosecution has provided a list of victims in an annex to the Pre-Trial Brief and updated it in 2009. The Stanišić Defence filed several motions to the form of the Indictment.²¹ None of these led to an inclusion of the names of the

¹⁸ Exhibit numbers P2318-P2325.

¹⁹ Motion, para. 6.

²⁰ Ibid.

²¹ *Prosecutor v. Stanišić and Simatović*, Case, No. IT-03-69-PT, Defence Motion on the Form of the Indictment, 3 November 2009; *Prosecutor v. Stanišić and Simatović*, Case, No. IT-03-69-PT, Defence Preliminary Motion on the Form of the Indictment, 3 September 2003; *Prosecutor v. Stanišić and Simatović*, Case, No. IT-03-69-PT, Motion on Defect in the Amended Indictment, Case No, 7 January 2004; *Prosecutor v. Stanišić and Simatović*,

victims into the Indictment. In a pre-trial Chamber decision of 2003, the Defence argument relating to the “lack of specification of the identities of the victims” was dismissed²² and the pre-trial Chamber considered “that neither accused, who held high level positions in the DB, is being held responsible for physically committing the crimes charged”.²³ The pre-trial Chamber also dismissed the Defence’s argument relating to the Pre-Trial Brief, and stated that no prejudice to the Accused could result from a pre-trial brief containing new facts since the Pre-Trial Brief does not substitute the indictment in identifying the charges or set out the material facts.²⁴ The Stanišić Defence did not request certification of any of the Trial Chamber’s decisions on the form of the Indictment.²⁵

14. The Chamber will not revisit arguments relating to the specificity of the Indictment. However, even though the Accused are remote from the killings in that they are not alleged physical perpetrators the Prosecution has an obligation to provide the defence with the identity of the victims when it is in a position to do so.

15. Paragraph 54 of the Indictment provides in relation to Doboij that:

On or about July 12, 1992, Serb Forces, in particular special units of the Republic of Serbia DB, used non-Serb detainees as human shields and approximately twenty-seven of these civilians were killed.

16. In 2007, the Prosecution filed a list with 21 named victims in Annex E of its Pre-Trial Brief. Under the list of named victims it stated “plus other unidentified persons” in relation to this incident.²⁶ This list included the name of Omer Delić, born in 1958. In this filing the Prosecution stated that “a number of victims remain unidentified, so that consequently the Annex may remain incomprehensive. However, the Prosecution will continue to update the list and ask for leave to supplement it if the need so arises”.²⁷

17. In July 2009, the Prosecution submitted an updated list of victims following receipt of updated reports from their experts. It also stated that “updates to the victim lists might be required

Case, No. IT-03-69-PT, Defence Motion Regarding Defects in the Form of the Second Amended Indictment with Confidential Annex, 9 March 2006.

²² *Prosecutor v. Stanišić and Simatović*, Case, No. IT-03-69-PT, Decision on Defence Preliminary Motions, 14 November 2003.

²³ *Ibid*, p. 3.

²⁴ *Prosecutor v. Stanišić and Simatović*, Case, No. IT-03-69-PT, Decision on the Prosecution’s Motion to Amend the Revised Second Amended Indictment, 4 July 2008, para. 108. *See also Prosecutor v. Stanišić and Simatović*, Case, No. IT-03-69-PT, Decision on Defence Motion to Reject Prosecution’s Final Pre-Trial Brief of 2 April 2007, 17 July 2007.

²⁵ The pre-trial Chamber denied certification to appeal a decision on amendment to the Indictment but set out the time-line for filing preliminary motions on the Amended Indictment, *see Prosecutor v. Stanišić and Simatović*, Case, No. IT-03-69-PT, Decision on Defence Requests for Certification to Appeal Decision Granting Prosecution Leave to Amend the Amended Indictment, 8 February 2006.

²⁶ *Prosecutor v. Stanišić and Simatović*, Case, No. IT-03-69-PT, Corrigendum and Supplementary Annex E to Prosecution Consolidated Pre-Trial Brief, 15 May 2007, pp 15-16.

in the future.”²⁸ In this filing the Prosecution lists 20 named victims in relation to paragraph 54 and adds “plus other additional victims”. On this list the names of Omer Delić and Drago Kale were removed and the name of Hasan Ahmić was added. The Stanišić Defence did not at this time raise any arguments relating to the change in the victims list.

18. The Chamber finds that the Prosecution’s submission that Omer Delić is one of the named victims of this incident is not a material fact requiring an amendment of the Indictment. Neither does the Chamber consider that it alters the alleged criminal liability of the accused as argued by the Stanišić Defence.

19. The Chamber considers that the Prosecution should identify the victims to the extent possible as early as possible. The Prosecution could have provided more specificity to the list of victims earlier since it had the information relating to Omer Delić at least in May 2007, when he was on the Prosecution’s list of named victims. Further, the two Challenged Documents (65*ter* numbers 4871, 4875) were on its Rule 65*ter* exhibit list in May 2009. However, the Defence was put on notice that Omer Delić was a named victim at least from on 4 October 2010, two months before the cross-examination of Dr. Tabeau. The Chamber considers it sufficient time for the Defence to review the disclosed documents.

20. Further, the Chamber does not consider that specifying Omer Delić as one of the victims would be prejudicial to the Accused. Rather, the Chamber considers that to have a named victim instead of an unnamed victim assists the Defence. However, should the Defence have an issue or require a need for further investigations triggered by the identification of Omer Delić, it may address the Chamber to resolve such issue.

21. Paragraph 57 of the Indictment reads:

On or about 21 September 1995, members of Arkan’s SDG abducted and detained a group of non-Serb civilians in Sanski Most, moving them to Sasina. In Sasina, they removed the non-Serb civilians from the vehicles at the western base of the hill near the village church. At this spot, members of Arkan’s SDG shot the group, killing approximately sixty-five of them

22. In 2007, the Prosecution listed 62 named victims in Annex E to the Prosecution Pre-trial Brief in relation to this incident. Under the list of named victims it stated “plus other unidentified persons”. The Stanišić Defence did not at this time raise any arguments relating to the change in the victims list.

²⁷ Ibid, para. 36.

²⁸ Prosecution Submission of Revised Victim Lists with Confidential Annex, 15 July 2009, para. 1.

23. In 2009, the Prosecution submitted a list of 64 named victims, adding the names of Mehmed Hasonović and Ibrahim Sinanović and stated “plus one additional victim”. The Stanišić Defence did not at this time raise any arguments relating to the change in the victims list.

24. Neither of the Prosecution’s previous victims lists includes the names of Stjepan Buha; Franjo Cavlović or Mustafa Sadić. The Chamber finds that the Prosecution’s submission that Stjepan Buha, Franjo Cavlović and Mustafa Sadić are the named victims of the incident alleged in paragraph 57 of the Indictment is not a material fact that requires an amendment of the Indictment. Neither does the Chamber consider that it alters the alleged criminal liability of the accused as argued by the Stanišić Defence. The Accused can be held liable for the death of “approximately sixty-five” persons in Sasina in September 1995 as set out in the Indictment.

25. The Prosecution could have provided more specificity to the list of victims earlier. It had the information relating to Stjepan Buha, Franjo Cavlović or Mustafa Sadić at least on 1 May 2009, when the three relevant documents (65ter numbers 2722, 2724, 2741) were on the Rule 65ter exhibit list. However, the Defence was put on notice that Stjepan Buha; Franjo Cavlović and Mustafa Sadić were named victims on 4 October 2010, two months before the cross-examination of Dr. Tabeau. The Chamber considers it sufficient time for the Defence to review the disclosed documents.

26. Further, the Chamber does not consider that specifying Stjepan Buha, Franjo Cavlović and Mustafa Sadić as victims would be prejudicial to the Accused. Rather, it is of assistance to have a named victim instead of an unnamed victim.

27. With regard to the evidence relating to nine of the victims,²⁹ the Defence was put on notice of the Prosecution’s intention to use these documents on 4 October 2010, apart from the document with 65ter number 2735, which the Defence received notice of on 1 May 2009.

28. Dr. Tabeau submits that these documents identify nine victims as named victims of incidents in the Indictment. The Prosecution however submits that it “is not satisfied that it can meet its burden of proof”³⁰ but “emphasizes that whether there is sufficient evidence to indicate a relationship to the charged crimes is a matter for the Chamber to decide in weighing the totality of the evidence”.³¹ It further submits that the evidence pertaining to the nine victims “should be admitted because it is relevant to other important issues in this trial”,³² for example “the widespread

²⁹ 65ter numbers 2735, 5715-5722.

³⁰ Submission, para. 4.

³¹ Ibid.

³² Submission, para. 5.

and systematic nature of the attack on the civilian population”³³ and the ethnicity of victims relevant to a determination that the violence was targeted against non-Serbs.³⁴

29. The Chamber finds that this evidence does not require an amendment of the Indictment or extend the alleged criminal liability of the Accused. The Chamber emphasize that the Accused can only be held responsible for killings which are charged in the Indictment. Whether the Challenged Documents should be admitted is discussed below.

30. The Chamber finds that the Prosecution’s request to admit the Other Source Material and the Challenged Exhibits does not require an amendment to the Indictment.

(iii) Admission of the report of Dr. Tabeau, the Challenged Documents and the Other Source Material.

31. Having found above that the admission of the Challenged Exhibits does not require an amendment to the Indictment, and no other objections remaining, the Chamber will admit Dr. Tabeau’s report on victims (P1658).

32. The Chamber finds the documents relating to Omer Delić, Stjepan Buha, Franjo Cavlović and Mustafa Sadić (65ter numbers 2722, 2724, 2741, 4871, 4875) to be relevant and of probative value. The Chamber considers that the Defence has been on notice of the Prosecution’s intention to rely on this evidence since at least May 2009 and that its admission into evidence would not be prejudicial to the Defence. The Chamber will admit the documents into evidence.

33. With regard to the evidence of the nine victims (65ter numbers 2735, 5715-5722) the evidence is relevant and of probative value. The Chamber does not consider that the admission of this evidence would be prejudicial to the Defence. However, should the Defence have an issue or require a need for further investigations triggered by this evidence, it may address the Chamber to resolve such issue. The Chamber will admit the Challenged Documents into evidence.

34. The Other Source Material was not objected to by the Defence. The Chamber finds them relevant and of probative value. The Chamber will therefore admit the Other Source Material into evidence.

³³ Submission, para. 12.

³⁴ Ibid.

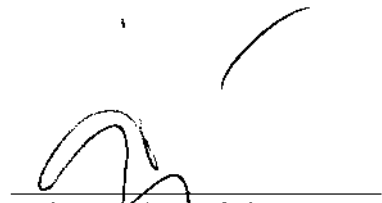
IV. DISPOSITION

For the foregoing reasons, pursuant to Rules 65*ter*, 89 and 94*bis* of the Rules, the Chamber

GRANTS the Motion and allows Proposed Documents with 65*ter* numbers 5657-5745 to be added to the Prosecution's Rule 65*ter* exhibit list;

ADMITS into evidence the Challenged Exhibits (65*ter* numbers 2722, 2724, 2735, 2741, 4871, 4875, 5715-5722 corresponding to exhibit numbers P2176, P2178, P2188, P2192, P2227, P2230, P2318-2325); the Other Source Material (65*ter* numbers 1223, 1229, 1231, 2593, 2702-2703, 2706, 2714-2718, 2720-2721, 2723, 2725-2726, 2728-2734, 2738-2740, 2742, 2744-2748, 2750-2757, 2759-2763, 2765-2774, 2777-2780, 4539, 4873-4874, 4876-4888, 4890-4907, 5658-5664, 5666-5714, 5723-5742, 5744-5745, corresponding to exhibit numbers P2162-P2175, 2177, 2179-P2187, P2189-P2191, P2193-2226, P2228-2229, P2231-2317, 2326-2347) and the report on victims of Dr. Tabeau (exhibit number P1658).

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



Judge Alphons Oric
Presiding Judge

Dated this twenty-fourth day of March 2011
At The Hague
The Netherlands

[Seal of the Tribunal]