



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 April 2012
Original: English

IN TRIAL CHAMBER I

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

Registrar: Mr John Hocking

Decision of: 24 April 2012

PROSECUTOR

v.

**JOVICA STANIŠIĆ
FRANKO SIMATOVIĆ**

PUBLIC

**DECISION ON SIMATOVIĆ DEFENCE MOTION TO ADD
FIVE WITNESSES TO ITS RULE 65 *TER* WITNESS LIST**

Office of the Prosecutor
Mr Dermot Groome

Counsel for Jovica Stanišić
Mr Wayne Jordash
Mr Scott Martin

Counsel for Franko Simatović
Mr Mihajlo Bakrač
Mr Vladimir Petrović

I. PROCEDURAL HISTORY AND SUBMISSIONS OF THE PARTIES

1. On 20 February 2012, the Simatović Defence (“Defence”) requested an eight-week adjournment of proceedings to, *inter alia*, “consolidate and amend its Rule 65 *ter* witness list” (“Request”).¹ On 22 February 2012, the Chamber instructed the Defence to submit detailed information on the timeline and content of its correspondence with two of the witnesses mentioned in the Request, as well as with the governments of the countries where the prospective witnesses were detained.² On the same date, the Defence filed the requested information.³ On 28 February 2012, the Chamber partially granted the Request with further instructions on the timeline for completion of Defence tasks to follow.⁴ On 29 February 2012, the Chamber instructed the Defence to file any motion to amend its Rule 65 *ter* witness list by 12 March 2012 and to inform the Chamber and the other parties by 20 April 2012 whether it wishes to call any of these prospective additional witnesses.⁵

2. On 12 March 2012, the Defence filed a motion requesting the addition of five witnesses to its Rule 65 *ter* witness list (“Motion”).⁶ The Prosecution filed its response on 26 March 2012 (“Response”).⁷ The Stanišić Defence did not respond to the Motion.

3. The Defence requests the addition of Witnesses DFS-021, DFS-022, DFS-023, DFS-024, and DFS-025 to its Rule 65 *ter* witness list. For each of these witnesses, the Motion provides a summary of their anticipated testimony and an analysis of its potential probative value and *prima facie* relevance.⁸ In light of its perceived inability to start preparing its case earlier, the Defence argues that it could only find and interview these witnesses, as well as trace material relevant to their testimony, to the greatest extent possible, after the conclusion of the Prosecution case.⁹ Nonetheless, it failed to complete this task before filing its lists pursuant to Rule 65 *ter* (G) of the Rules of Procedure and Evidence (“Rules”) on 6 June 2011.¹⁰ The Defence contends that the requested additions to its Rule 65 *ter* witness list should be viewed in light of its decision not to call

¹ Urgent Defence Request for Adjournment, 20 February 2012 (Confidential), paras 1, 7, 9-10.

² T. 17640-17641; Request, para. 12.

³ Defence Notification pursuant to Trial Chamber’s Order of 22 February 2012, 22 February 2012 (Confidential) (“Notification of 22 February 2012”).

⁴ T. 17816-17818.

⁵ T. 17899-17900.

⁶ Defence Motion to Add Witnesses to Rule 65 *ter* Witness list with Confidential Annex, 12 March 2012 (Confidential).

⁷ Prosecution Response to Simatović Defence Motion to Add Witnesses to Rule 65 *ter* Witness List, 26 March 2012 (Confidential).

⁸ Motion, paras 7, 9, 11, 13, 15, Annex.

⁹ Motion, para. 19.

¹⁰ *Ibid.*

Franco Simatović (“Accused”) and three other witnesses to testify in its case.¹¹ In addition, the Defence argues that the Prosecution will have sufficient time for preparing the cross examination of the prospective witnesses.¹²

4. The Prosecution defers the addition of Witnesses DFS-021 and DFS-023 to the Chamber’s discretion, and opposes the additions of Witnesses DFS-022, DFS-024, and DFS-025 to the Defence’s Rule 65 *ter* witness list.¹³ Although it does not contest that the evidence of the five proposed witnesses is relevant, the Prosecution submits that there is no good cause to allow for an amendment of the Defence Rule 65 *ter* witness list at this stage of proceedings, particularly in respect of Witnesses DFS-022, DFS-024, and DFS-025.¹⁴ In addition, the Defence should have been prepared for the possibility of not calling the Accused to testify.¹⁵ Given the apparent relevance of Witnesses DFS-024 and DFS-025 to the present case, the Prosecution asserts that there is no justification for them not having been included in, or added to, the Defence Rule 65 *ter* witness list at an earlier stage.¹⁶

5. In its Response, the Prosecution also requests an opportunity to be heard on the scheduling of the remaining Defence witnesses once the Motion is decided.¹⁷ Further, the Prosecution requests that, if the Motion is granted, the Chamber instructs the Defence to comply with any disclosure obligations, in particular in relation to witness statements, by 20 April 2012.¹⁸ Lastly, the Prosecution requests the Chamber to order the Defence to specify the time period in which the events, described in the summary for Witness DFS-023, are alleged to have occurred.¹⁹

6. On 28 March 2012, the Chamber instructed the Defence to provide the Prosecution with any witness statements or other materials which it possesses relating to the proposed witnesses.²⁰

7. On 30 March 2012, the Chamber decided to grant the Motion and informed the parties through an informal communication. However, the Chamber emphasised that, if the Defence decided that it wished to call these witnesses, the Chamber might impose further conditions, such as a time frame for calling them. In this respect, the Chamber urged the Defence to make all necessary arrangements to ensure that the witnesses would be in a position to testify before the Tribunal

¹¹ Motion, para. 21.

¹² Motion, para. 16.

¹³ Response, paras 1, 21.

¹⁴ Response, para. 6.

¹⁵ Response, paras 8-9, 11.

¹⁶ Response, paras 8, 12.

¹⁷ Response, para. 16.

¹⁸ Response, paras 18-19.

¹⁹ Response, para. 20.

without delay.²¹ The Chamber's Decision of 30 March 2012 is put on the record with the present decision.

II. APPLICABLE LAW

8. The Chamber recalls the applicable law governing amendments to the Rule 65 *ter* witness list, as previously set out by this Chamber, and refers to it.²²

III. DISCUSSION

9. There is no dispute between the parties concerning the *prima facie* relevance and probative value of the anticipated evidence of the five prospective witnesses. The Chamber considers that the anticipated testimonies of Witnesses DFS-021, DFS-022, and DFS-023 are relevant to, and probative of, issues regarding the Unit for Anti-Terrorist Effects and, in particular, the alleged links between this unit and the Serbian State Security Service; the functioning of the Tara and Lipovica training centres; the nature of the Accused's engagement in the operation of the DB Belgrade centre; and the nature of his activities in Pajžos, Petrova Gora, and Magarčevac. All of these issues are important to the alleged participation of the Accused in the joint criminal enterprise charged in the Indictment. With regard to Witnesses DFS-024 and DFS-025, the Chamber takes into consideration the Defence position that these persons may be "of decisive importance in this trial", and acknowledges the numerous references to their activities made by the parties in this case thus far.²³ For these reasons, the Chamber considers that the anticipated evidence of the proposed witnesses is *prima facie* relevant and probative.

10. It is not clear from the Defence submissions whether the initial contact with any of the proposed witnesses was pursued without undue delay.²⁴ The Chamber finds it difficult to accept that the two persons who, in the view of the Defence, are "of decisive importance in this trial", only came to the Defence's attention as potential witnesses at such a late stage of the proceedings. Considering that the Defence made its first attempt to contact Witness DFS-024 through the relevant authorities in September 2011, and Witness DFS-025 as early as May 2011, the Chamber is

²⁰ T. 18681-18684.

²¹ On 10 April 2012, the Defence requested through an informal communication a five day extension for notifying the Chamber and the Prosecution whether it intends to call Witness DFS-024. The request was granted on 12 April 2012 and the Decision was conveyed to the Parties by informal communication.

²² Decision on Stanišić Defence Motion to Add Witness DST-081 to its Rule 65 *ter* Witness List, 20 October 2011, para. 4.

²³ Request, para. 12; Notification of 22 February 2012.

²⁴ Request, paras 10, 12; Motion, para. 20; Notification of 22 February 2012. This aspect is discussed in greater detail in Reasons for Decision Partially Granting the Simatović Defence Urgent Request for Adjournment, 17 April 2012, para. 10.

of the view that the request for addition of these witnesses to the Defence Rule 65 *ter* witness list could have been made at an earlier date.²⁵ Nevertheless, the Chamber allows the Defence a certain degree of flexibility in the presentation of its case, so that it can adequately adapt its presentation of evidence to the developments during trial. The Chamber acknowledges that the failure to consider earlier and, consequently, to prepare for the possibility of not calling the Accused to testify, left the Defence with no choice but to request additions to its Rule 65 *ter* witness list at this late stage of the Defence case.

11. The Chamber considers that the substance of the anticipated evidence of the proposed witnesses is significant and may consequently pose an additional burden on the other parties to prepare for their testimonies. In particular, the Chamber acknowledges that an additional amount of material will need to be processed by the Prosecution in order to prepare for the cross-examination of these witnesses in court. Nevertheless, the parties could make use of the four-week adjournment of the proceedings in April to prepare for the anticipated testimony of the proposed witnesses.²⁶

12. On balance, the Chamber finds that it is in the interests of justice to add the proposed witnesses to the Defence Rule 65 *ter* witness list. Nonetheless, in respect of Witnesses DFS-024 and DFS-025, the Chamber anticipates that several practical and legal problems may arise if the Defence decides to call them. In light of this possibility, the Chamber reiterates and emphasises that the inability of the Defence to fulfil further conditions that may be imposed with a view to avoiding a considerable delay in the proceedings, may lead the Chamber to conclude that the Defence cannot call Witnesses DFS-024 and DFS-025.

13. With regard to the requests made by the Prosecution in its Response, the Chamber has instructed the Defence to provide the Prosecution with witness statements and other relevant material, and to inform the other parties and the Chamber by 20 April 2012 of the proposed order of the witnesses it wishes to call following the adjournment.²⁷ On 20 April 2012, the Defence filed the requested order of witnesses it wishes to call.²⁸ In addition, the Chamber accepts the Prosecution's assertion that the summary for Witness DFS-023, as included in the Motion, does not sufficiently specify the various dates of the events described.

²⁵ Notification of 22 February 2012.

²⁶ Reasons for Decision Partially Granting the Simatović Defence Urgent Request for Adjournment, 17 April 2012, para. 10.

²⁷ T. 18681-18684; Informal communication of 13 April 2012.

²⁸ On 21 and 23 April 2012, the Prosecution and the Stanišić Defence have made submissions with regard to the order of the remaining Defence witnesses to be called, through informal communications.

IV. DISPOSITION

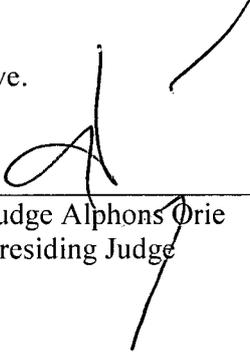
14. For the foregoing reasons, pursuant to Rule 73 *ter* (D) of the Rules, the Chamber

GRANTS the Motion;

DECLARES moot the Prosecution's requests concerning the opportunity to be heard on the scheduling of the remaining Defence witnesses and the disclosure of materials or statements pursuant to Rule 67 (A) of the Rules; and

REQUESTS the Defence to specify the time periods of the events as described in the summary for Witness DFS-023 through a notification filing to be made no later than 27 April 2012.

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



Judge Alphons Orie
Presiding Judge

Dated this Twenty-Fourth of April 2012
At The Hague
The Netherlands

Seal of the Tribunal