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05 July 2012

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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: 5 July 2012
Original: English

IN TRIAL CHAMBER I

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

Registrar: Mr John Hocking

Decision of: 5 July 2012

PROSECUTOR

v.

**JOVICA STANIŠIĆ
FRANKO SIMATOVIĆ**

PUBLIC

**FIRST DECISION ON SIMATOVIĆ DEFENCE SECOND BAR
TABLE MOTION OF 4 JUNE 2012**

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

1. On 4 June 2012, the Simatović Defence (“Defence”) filed its Second Bar Table Motion (“Motion”).¹ On 5 June 2012, the Prosecution requested, through an informal communication to the Defence, to inspect the original version of the document bearing Rule 65 *ter* no. 2D01712, the passport of Franko Simatović (“Accused”), so that it could consider its response to the Motion. On 18 June 2012, the Prosecution responded (“Response”).² On 21 June 2012, the Defence filed a request to reply to the Response (“Request to Reply”), and informed the Prosecution in an informal communication that the original passport would be available for inspection by the Prosecution during the following week.³ On 22 June 2012, in an informal communication, the Defence advised that it had uploaded a complete version of the passport, including a translation of pages 30 and 31, as document bearing Rule 65 *ter* no. 2D01718. On 29 June 2012, the Prosecution confirmed through an informal communication that it had received the original passport. On 4 July 2012, the Prosecution noted in an informal communication that it will not be supplementing its Response.

2. In the present Decision, the Chamber will deal with the documents bearing Rule 65 *ter* nos 2D01716, 2D01717, and 2D01718. The Chamber will issue a further decision on the remainder of the Motion in due course.

II. SUBMISSIONS OF THE PARTIES

3. The documents bearing Rule 65 *ter* nos 2D01716 and 2D01717 are informal communications received by the Stanišić Defence and the Prosecution respectively, purportedly from witness JF-057.⁴ The Defence submits that these documents are relevant to the credibility of witness JF-057.⁵ While the Prosecution does not oppose the admission of these documents, it submits that the witness’s evidence is substantially corroborated by other evidence on the trial record and therefore these documents do not undermine the witness’s testimony.⁶

4. The document bearing Rule 65 *ter* no. 2D01718 is a copy of the passport of Franko Simatović (“Accused”). The Defence submits that this document is relevant because it demonstrates that the Accused was in Greece from 14 July 1995 to 2 August 1995 and therefore did not play a

¹ Simatović Defence Second Bar Table Motion with Confidential Annex, 4 June 2012.

² Confidential Prosecution Response to Simatović Second Bar Table Motion, 18 June 2012.

³ Confidential Defence Request to File a Reply to Prosecution Response to Simatović Second Bar Table Motion with Annexes, 21 June 2012.

⁴ Confidential Annex to the Motion, p. 41088-41087.

⁵ *Ibid.*

⁶ Response, para. 5.

role in the events in Bosnia and Herzegovina or Croatia during this period.⁷ The Defence submits that only after witness Dejan Plahuta testified did the Accused remember that he had travelled to Greece during the second half of July 1995.⁸ The Accused then informed his Counsel of this fact and that a copy of his passport was available.⁹ Thereafter the Defence sought and found a copy of the Accused's passport.¹⁰

5. The Defence submits that it does not seek to use this document as a defence of alibi as per Rule 67 (B)(i)(a), but that instead it wishes to use this document to challenge the evidence of witness Goran Stoparić and witness JF-024 in relation to the whereabouts of the Accused in the second half of July 1995.¹¹ The Defence submits that if the Chamber finds that the exhibit could be treated as a defence of alibi, Rule 67 (D) was complied with by the Defence.¹²

6. The Prosecution opposes the admission of this document pursuant to Rules 65 *ter* (G) and 67 of the Rules of Procedure and Evidence ("Rules").¹³ The Prosecution notes that the document is not included on the Simatović Defence Rule 65 *ter* (G) exhibit list filed on 6 June 2011, and that it received notice of the document on 4 June 2012, which was the last day of the Defence case.¹⁴ They assert that there is no good cause for amending the 65 *ter* exhibit list to include the document because the source of the document is the Accused, who would have had access to the document throughout the proceedings.¹⁵

7. The Prosecution submits that the Defence failed to notify the Prosecution of its intent to offer a defence of alibi, nor has it sought to lead evidence in relation to this document or on the actions of the Accused whilst abroad.¹⁶ The Prosecution also notes that there is no mention of the Accused travelling abroad during the indictment period in the Simatović Defence Pre-Trial Brief.¹⁷ Finally, the Prosecution submits that the relevance of the document is unclear.¹⁸ Since the document is an official diplomatic passport, there is no reason to suggest that the travel was not related to the official duties of the Accused.¹⁹

III. APPLICABLE LAW

⁷ Confidential Annex to the Motion, p. 41087.

⁸ Request to Reply, paras 7-8.

⁹ Request to Reply, paras 7-8.

¹⁰ Request to Reply, para. 8.

¹¹ Request to Reply, para. 9.

¹² Request to Reply, para. 10.

¹³ Response, para. 6.

¹⁴ Response, para. 8.

¹⁵ Response, para. 10.

¹⁶ Response, paras 8, 10-11.

¹⁷ Response, para. 12.

8. The Chamber recalls and refers to the applicable law governing the admission of documents from the bar table as set out in a previous decision.²⁰ It further recalls and refers to the applicable law governing 65 *ter* exhibit list amendments as set out in a previous decision.²¹ While that decision addresses an amendment to the Prosecution's 65 *ter* list under Rule 65 *ter* (E)(iii), the Chamber considers that the applicable law for the amendment of the Defence's 65 *ter* list under Rule 65 *ter* (G)(ii) is substantially the same.

IV. DISCUSSION

9. The Chamber grants the Defence leave to reply in respect of new issues raised in the Response. As the Request to Reply contains the content of the requested reply, the Chamber considers the reply as validly filed.

10. The documents bearing Rule 65 *ter* nos 2D01716 and 2D01717 meet the standard for admission as set out in Rule 89 (C) of the Rules, and the Defence has demonstrated with clarity and specificity where and how each of these documents fit into its case. The Chamber will therefore admit these documents into evidence.

11. The document bearing Rule 65 *ter* no. 2D01718 concerns the whereabouts of the Accused during the time of his alleged crimes. It is therefore *prima facie* relevant to and probative of issues raised in this case. The Defence has shown good cause for adding the documents to its exhibit list at this stage, namely that it was not aware of the document's existence until the testimony of witness Dejan Plahuta. Finally, the document creates a negligible burden on the Prosecution. Being a copy of a passport, the document is short and contains little text. For these reasons the Chamber allows the amendment of Defence's 65 *ter* exhibit list to include 2D01718.

12. Document 2D01718 cannot form a defence of alibi by itself, as the Prosecutor does not allege that the Accused physically and personally committed any of the crimes he has been charged with.²² In other words, it is not necessary for the Accused to have been physically present in the region where the crimes were committed in order to be criminally responsible for them. The document is relevant, however, as it contradicts the evidence given by witness Goran Stoparić and witness JF-024 regarding the presence of the Accused in Jahorina in late July and early August

¹⁸ Response, para. 13.

¹⁹ Ibid.

²⁰ First Decision on Stanišić Defence Bar Table Motion, 23 May 2012, paras 9-10.

²¹ Decision on Sixteenth Prosecution Motion for Leave to Amend its Rule 65 *ter* Exhibit List with Confidential Annex, 7 October 2010, paras 10-11.

²² Third Amended Indictment, 9 July 2008, para. 10.

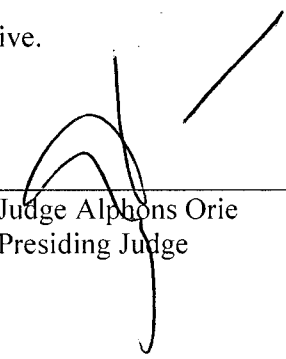
1995. The document meets the standard for admission as set out in Rule 89 (C) of the Rules, and the Defence has demonstrated with clarity and specificity how this document fits into its case. The Chamber will therefore admit this document into evidence.

V. DISPOSITION

13. For the foregoing reasons, the Chamber **GRANTS** the Motion in relation to the documents discussed in this decision,

- (i) **GRANTS** the Request to Reply;
- (ii) **DECLARES** moot the Prosecution's request to inspect the document bearing Rule 65 *ter* no. 2D01712;
- (iii) **ADMITS** into evidence the documents bearing Rule 65 *ter* nos 2D01716, 2D01717, and 2D01718;
- (iv) **REQUESTS** the Registry to assign exhibit numbers to the documents admitted and inform the parties and the Chamber of the number so assigned; and
- (v) **DECIDES** to issue further decisions on this Motion in due course.

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



Judge Alphons Orié
Presiding Judge

Dated this the Fifth day of July 2012
At The Hague
The Netherlands

[Seal of the Tribunal]