

IT-03-69-T
D43287-D43279
26 July 2012

43287 13.

**UNITED
NATIONS**



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: 26 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: 26 July 2012

PROSECUTOR

v.

**JOVICA STANIŠIĆ
FRANKO SIMATOVIĆ**

PUBLIC

**DECISION ON THE STANIŠIĆ AND SIMATOVIĆ DEFENCE
BAR TABLE MOTIONS REGARDING THE MLADIĆ
NOTEBOOKS**

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

A. Stanišić Defence

1. On 17 February 2012, the Stanišić Defence filed a motion requesting the admission of 674 documents from the bar table (“Stanišić Bar Table Motion”).¹ On 23 and 24 May 2012, and 1, 6, and 14 June 2012, the Chamber issued nine decisions on the Stanišić Bar Table Motion (“Bar Table Decisions”), relating to the various categories of documents tendered therein.² On 23 May 2012, the Chamber issued the First Bar Table Decision, in which it denied, without prejudice, the Stanišić Defence request for the admission of 20 notebooks allegedly written by Ratko Mladić (“Mladić Notebooks”).³ In denying the request, the Chamber stressed the importance of the tendering party, when tendering documents from the bar table, to demonstrate with clarity and specificity how each document is relevant and fits into the party’s case.⁴ As the Stanišić Defence had not shown how specific sections of each of the Mladić Notebooks fit into its case, the Chamber held that it was unable to properly assess their relevance and probative value and, thus, found that the Stanišić Defence had failed to fulfil the requirements for admission into evidence.⁵

2. On 5 June 2012, the Stanišić Defence filed a motion requesting the admission from the bar table of excerpts from 17 of the Mladić Notebooks, which had previously been denied without prejudice in the First Bar Table Decision (“Stanišić Motion”).⁶ The Stanišić Defence submits that it has now sufficiently addressed the issues underlying the Chamber’s prior denial of admission without prejudice of these documents by providing “a detailed description of each document and submissions on the relevance and probative value of various excerpts in the document” in the bar table chart contained in the annex to its Motion.⁷ Further, the Stanišić Defence indicates that it now

¹ Stanišić Defence Motion for Admission of Documents through the Bar Table, 17 February 2012 (Public with Confidential Annexes A, B, and C).

² First Decision on Stanišić Defence Bar Table Motion of 17 February 2012, 23 May 2012 (“First Bar Table Decision”); Second Decision on Stanišić Defence Bar Table Motion of 17 February 2012, 23 May 2012 (“Second Bar Table Decision”); T. 19765-19768; Fourth Decision on Stanišić Defence Bar Table Motion of 17 February 2012, 24 May 2012 (“Fourth Bar Table Decision”); Fifth Decision on Stanišić Defence Bar Table Motion of 17 February 2012, 24 May 2012; Sixth Decision on Stanišić Defence Bar Table Motion of 17 February 2012, 1 June 2012; Seventh Decision on Stanišić Defence Bar Table Motion of 17 February 2012, 6 June 2012; Eighth Decision on Stanišić Defence Bar Table Motion of 17 February 2012, 6 June 2012; Ninth Decision on Stanišić Defence Bar Table Motion of 17 February 2012 and Decision on Prosecution Requests for Admission of Rebuttal Evidence, 19 June 2012.

³ First Bar Table Decision, paras 16-21, 30.

⁴ First Bar Table Decision, para. 19.

⁵ First Bar Table Decision, para. 21.

⁶ Stanišić Defence Motion for Admission of Documents into Evidence through the Bar Table of Documents that were Denied Admission without Prejudice, 5 June 2012 (Public with Confidential Annex A).

⁷ Stanišić Motion, para. 6.

seeks to tender excerpts of the Mladić Notebooks, having allocated to them the same Rule 65 *ter* numbers, save for the addition of a “.1” extension, as their counterparts in the Stanišić Bar Table Motion.⁸ On 13 June 2012, the Defence stated, in an informal communication, that the portions of the documents tendered through the Stanišić Motion will eventually be uploaded into the Tribunal’s electronic document system (“eCourt”) and the Prosecution will be advised once the upload is complete.

3. On 19 June 2012, the Prosecution filed its response to the Stanišić Motion, providing its comments on the excerpts of the Mladić Notebooks.⁹ The Prosecution incorporates its prior general submissions from its response to the Stanišić Bar Table Motion.¹⁰ In its comments on the individual tendered excerpts contained in the annex to its response, the Prosecution repeats the same position for each excerpt: the Prosecution does not oppose admission of the tendered excerpts, but disputes the conclusions drawn.¹¹ In relation to negative inferences, the Prosecution submits that the probative value is “very low”.¹²

4. On 28 June 2012, the Stanišić Defence filed a corrigendum to its Motion, correcting certain incorrect page references in relation to the tendered excerpts from the Mladić Notebooks.¹³

5. The Simatović Defence did not respond to the Stanišić Motion. On 18 July 2012, the Chamber issued its first and second decisions on the Stanišić Motion, addressing all the other categories of documents.¹⁴

⁸ Stanišić Motion, para. 11. In the Stanišić Bar Table Motion, the Mladić Notebooks bear the following Rule 65 *ter* nos: 5595-5612, 5053, and 5016. See First Bar Table Decision, fn. 39.

⁹ Prosecution Response to Stanišić Defence Motion for Admission of Documents into Evidence through the Bar Table of Documents that were Denied Admission with Prejudice with Confidential Annex A, 19 June 2012 (“Response to Stanišić Motion”). The Chamber notes that the Prosecution submits that it may seek admission of additional excerpts of each of the Mladić Notebooks in rebuttal. See Annex, pp. 151, 153, 166, 171, 173, 179, 185, 188-191, 195-196, 198, 204, 207, 209. Additionally, the Prosecution submits that it refrained from tendering excerpts of the Mladić Notebooks used in court based on the indication by the Stanišić and Simatović Defence that they would tender the Mladić Notebooks in their entirety and, as it has “now become clear for the first time that neither of the Defence teams intends to seek admission of the Mladić notebooks in their entirety”, that it will request the admission of the excerpts it used in court so as to maintain a “clear record” in light of the “changed” Defence position. See paras 11-12. As the Prosecution merely informs the Chamber of its intention, but does not seek admission of any additional excerpts, the Chamber will not further address the Prosecution’s submissions in this regard.

¹⁰ Response to Stanišić Motion, para. 3; Prosecution Response to Stanišić Motion and Additional Motion for Admission of Documents into Evidence through the Bar Table, 23 March 2012 (Public with Confidential Annexes A and B), paras 9-12, 16-17.

¹¹ Response to Stanišić Motion, Annex A, pp. 150, 153, 166, 171-173, 179-180, 185-191, 195-196, 198, 204, 207, 209-210.

¹² *Ibid.*

¹³ Stanišić Corrigendum to “Second Additional Motion for Admission of Documents into Evidence through the Bar Table” and “Motion for Admission of Documents into Evidence through the Bar Table of Documents that were Denied Admission without Prejudice” both Filed on 4 June 2012, 28 June 2012 (“Stanišić Corrigendum”), para. 7.

¹⁴ First Decision on Stanišić Defence Motion for Admission into Evidence Through the Bar Table of Personnel Files that were Denied Admission without Prejudice, 18 July 2012; Second Decision on Stanišić Defence Motion for

B. Simatović Defence

6. On 4 June 2012, the Simatović Defence filed its Second Bar Table Motion (“Simatović Motion”), in which it requests, *inter alia*, the admission into evidence of excerpts from 17 of the Mladić Notebooks.¹⁵ On 18 June 2012, the Prosecution responded, not opposing the admission of the tendered excerpts, but reserving the right to dispute the Simatović Defence’s descriptions of the content of any excerpt and the conclusions and/or inferences drawn from them.¹⁶ The Prosecution did not provide comments on the individual tendered excerpts. The Stanišić Defence did not respond to the Simatović Motion.

7. On 5 July 2012, the Chamber issued its first decision on the Simatović Motion, addressing all the other categories of documents.¹⁷

II. APPLICABLE LAW

8. The Chamber recalls and refers to the applicable law governing the admission of documents from the bar table as set out in its First Bar Table Decision.¹⁸ The Chamber also recalls and refers to its prior holding that a party’s characterisations of documents tendered from the bar table and the final conclusions, if any, to be drawn from them do not affect the test for admission into evidence as set out in Rule 89 (C) of the Tribunal’s Rules of Procedure and Evidence (“Rules”).¹⁹

9. Finally, the Chamber recalls its prior statement that, for a party to be successful in an application for the admission of particular portions of the Mladić Notebooks for which it seeks a negative inference, “it should indicate for each such portion where and why one would expect references to the Accused and/or the Department of State Security (“RDB”), had the Accused been involved in the JCE as alleged, but where such information is in fact absent”.²⁰

Admission into Evidence Through the Bar Table of Documents that were Denied Admission without Prejudice, 18 July 2012.

¹⁵ Simatović Defence Second Bar Table Motion, 4 June 2012 (Public with Confidential Annex).

¹⁶ Prosecution Response to Simatović Second Bar Table Motion, 18 June 2012 (Confidential) (“Response to Simatović Motion”), para. 2. The Chamber notes that the Prosecution reiterates the submissions made in its Response to Stanišić Motion in relation to its intention to possibly tender excerpts in rebuttal and others it used in court, but did not tender due to the Stanišić and Simatović Defence’s indication that they would tender the Mladić Notebooks in their entirety. See paras 2-4. See also *supra* fn. 9.

¹⁷ First Decision on Simatović Defence Second Bar Table Motion of 4 June 2012, 5 July 2012.

¹⁸ First Bar Table Decision, paras 9-10.

¹⁹ Fourth Bar Table Decision, paras 8-9.

²⁰ First Bar Table Decision, para. 20.

III. DISCUSSION

10. The Chamber notes that the Stanišić and Simatović Defence have taken different approaches with regard to allocating Rule 65 *ter* numbers to the tendered excerpts in their Motions and that neither Defence team has uploaded its respective tendered excerpts into eCourt at this time. The Stanišić Defence has added “.1” or a similar extension to the Rule 65 *ter* number already assigned in eCourt to the entire Mladić Notebook to indicate that it is an excerpt thereof, whereas the Simatović Motion refers to the Rule 65 *ter* number of the entire Mladić Notebook currently in eCourt from which the excerpt is taken. In order to avoid any later confusion between the complete Mladić Notebooks already in eCourt and the excerpts therefrom, it would be preferable for the Stanišić and Simatović Defence to allocate unique Rule 65 *ter* numbers to any excerpts. In this respect, the Chamber considers that the Stanišić Defence’s addition of an extension to the existing Rule 65 *ter* numbers is sufficient.²¹ The Chamber leaves it to the Simatović Defence to choose its own designation when uploading its excerpts.

11. Additionally, the Motions overlap to the extent that they both seek to tender excerpts from the Mladić Notebooks. In certain situations, there is also an overlap of the excerpts themselves. As the tendering party need not necessarily be that which uploads the admitted documents into eCourt, the Chamber considers that the Stanišić and Simatović Defence should coordinate the uploading of any excerpts admitted in the present decision between themselves in order to avoid any duplication of pages or portions therein of the Mladić Notebooks being admitted into evidence. In the interest of clarity, the Chamber notes that the Stanišić Motion refers to the page numbers as marked on the handwritten Mladić Notebooks, whereas the Simatović Motion refers to the BCS typed version page number.

12. Finally, the Chamber notes that, in some cases, the date of the entry being tendered is contained as a heading in the annexes to the Motions, but is not found on the pages actually tendered for admission into evidence.²² The Chamber recalls that the Mladić Notebooks are not in evidence in their entirety. The Chamber may then have no reference date when reviewing certain admitted excerpts, which could impact its evaluation thereof. The Chamber therefore directs the Stanišić and Simatović Defence to carefully review their respective tendered excerpts and ensure that where they refer to a date in the annex, that date is actually on at least one of the pages of the

²¹ The Chamber notes that not all excerpts have the “.1” extension, but rather contain various extension numbers, such as “.2” and “.4”. See, for example, Stanišić Motion, Annex A, pp. 153, 189. These extension numbers are equally sufficient.

²² For example, the document bearing 65 *ter* no. 5595.1 includes pages 63-64 and has the heading “15 July 1991”. While these pages are a part of the 15 July 1991 entry, the date of the entry is found on page 61, which is not being tendered into evidence. See Stanišić Motion, Annex A. p. 150.

excerpt they are tendering. If the date is found on a different page of a Mladić Notebook, the Stanišić and Simatović Defence are instructed to upload an additional blank page containing only the date of the admitted excerpt and to insert this page in front of the relevant admitted excerpt.

Excerpts from Mladić Notebook bearing Rule 65 *ter* nos 5595-5605, 5607-5611, 5016, 5053

13. In relation to all of the excerpts tendered by the Stanišić and Simatović Defence except those specified in paragraphs 14 and 15 below, the Chamber considers that the Stanišić and Simatović Defence have pointed either to how a relevant negative inference could be drawn or to information and contextualization regarding various military, paramilitary, and political groups, and individuals therein. This information pertains to, *inter alia*, command structures, activities, and training camps of such groups, and coordination between them. The Chamber considers that the Stanišić and Simatović Defence have not in relation to all portions shown “where and why one would expect references to the Accused and/or the RDB” in accordance with its previous instruction regarding admission of particular excerpts of the Mladić Notebooks with a view to establishing a negative inference, or otherwise have not provided the information needed in relation to the negative inference argued. However, in view of the other information and contextualization in the excerpts and the related submissions of the parties, and in the absence of objections of the Prosecution, the Chamber finds that the excerpts are probative and relevant. In conclusion, with the exclusion of the exceptions specified below, the Chamber finds that the Stanišić and Simatović Motions show (i) the relevance and probative value of the tendered excerpts, as required by Rule 89 (C) of the Rules, and (ii) how the excerpts fit into their respective cases, and thus have fulfilled the requirements for admission of documents from the bar table.

14. The Stanišić Defence submits that pages 311-312 of the Mladić Notebook excerpts bearing Rule 65 *ter* no. 5598.1 are relevant and probative in that they lack any reference by Mr Mladić to Mr Stanišić (“Stanišić Role Negative Inference”).²³ The Chamber considers that the Stanišić Defence has not demonstrated with sufficient clarity how a relevant negative inference could be drawn from these pages of the aforementioned excerpts. These pages do not otherwise contain information of sufficient relevance and probative value. The Chamber therefore denies the Stanišić Motion in relation to these two pages of the excerpts.

15. The Stanišić Defence also argues a Stanišić Role Negative Inference in relation to pages 29-30 and 34 of the Mladić Notebook excerpts bearing Rule 65 *ter* no. 5599.1.²⁴ Pages 30 and 34 are included in an excerpt tendered by the Simatović Defence from the Mladić Notebook bearing Rule

²³ Stanišić Motion, Annex A, p. 171.

²⁴ Stanišić Motion, Annex A, p. 173; Stanišić Corrigendum, para. 7.

65 *ter* no. 5599.²⁵ This excerpt tendered by the Simatović Defence meets the standard for admission as set out in paragraph 13 above. Page 29 as referenced in the Stanišić Motion is not included in the Simatović Defence excerpt. The Chamber considers that the Stanišić Defence has not demonstrated with sufficient clarity how a relevant negative inference could be drawn from pages 29-30 and 34 of the excerpt. Page 29 does not otherwise contain information of sufficient relevance and probative value. The Chamber therefore denies the Stanišić Motion in relation to this page.

16. The Stanišić Defence submits that the Mladić Notebook excerpts bearing Rule 65 *ter* no. 5053.2 are relevant and probative in that they demonstrate a negative inference that “Stanišić had nothing to do with Operation Udar and is not mentioned in this context”.²⁶ The Chamber considers that, in relation to the entries of 24 February 1993 and 25 March 1993²⁷ at pages 134-135,²⁸ the Stanišić Defence has not demonstrated with sufficient clarity how a relevant negative inference could be drawn from this portion of the aforementioned excerpt. This portion does not otherwise contain information of sufficient relevance and probative value. The Chamber therefore denies admission of these two pages of the excerpt.

17. With regard to the portions admitted, the Chamber again observes that the Stanišić and Simatović Defence seek to draw various conclusions from the absence of references in the excerpts of the Mladić Notebooks to the Accused Stanišić or Simatović or the Serbian DB. The Chamber reiterates its exhortation that the Defence provide clear references to such excerpts in their final brief, and to elaborate on the conclusions it invites to draw from them, including, if appropriate, an explanation of how they refute the Prosecution evidence relating to the same issues.²⁹

IV. DISPOSITION

18. For the foregoing reasons, the Chamber **GRANTS** the Simatović Motion and the Stanišić Motion **IN PART**, and

ADMITS into evidence the documents, as referenced in the Stanišić Motion and footnote 27 of this decision, bearing Rule 65 *ter* nos: **5595.1**; **5596.4**; **5597.1**; the portion of **5598.1** contained at pages 364 and 366-368; the portion of **5599.1** contained at pages 40, 42, 44-45, 65-68, 79, 81, 143-145,

²⁵ Hand-written page numbers 30 and 34 as tendered by the Stanišić Defence are included in BCS typed version page numbers 31 through 51 as tendered by the Simatović Defence, see Simatović Motion, Annex, pp. 41126-41124.

²⁶ Stanišić Motion, Annex A, p. 195.

²⁷ The Chamber notes that the entry referred to as “25 March 1993” by the Stanišić Defence and in the English translation version is preceded by an entry for 24 February 1993 and followed by an entry for 26 February 1993.

²⁸ In relation to this Notebook, the page numbers referred to by the Stanišić Defence (namely, pages 131-138) do not appear to correspond with the pages in the handwritten Notebook, but do correspond with the English translation pages (though the page numbers are different by 1 to 2 pages from that indicated by the Stanišić Defence). For this Notebook, the Chamber refers to the English translation pages of the relevant entries (namely, pages 134-141).

156, 178, 190-193, 205, 211-212, 215, and 218-222; **5600.1**; **5601.1**; **5602.1**; **5603.2**; **5604.1**; **5605.1**; **5607.1**; **5608.1**; **5609.1**; **5611.1**; **5016.2**; and the portion of **5053.2** contained at pages 135-141, once these have been uploaded into eCourt;

ADMITS into evidence the excerpts, as referenced in the Simatović Motion, contained at pages 150-153, 176-182, and 182-185 from the document bearing **Rule 65 ter no. 5595**; the excerpts contained at pages 57-63, 66, 68-69, 78-80, 84, 120-122, 136-146, 149-150, 155-157, 161-163, 167-170, 256-260, 277, 286-292, 303-312, 337-349, 353-357, 359-367, and 372-373 from the document bearing **Rule 65 ter no. 5596**; the excerpts contained at pages 18-23, 40-43, 65-101, 175, and 201 from the document bearing **Rule 65 ter no. 5597**; the excerpts contained at pages 12-14 and 126-136 from the document bearing **Rule 65 ter no. 5598**; the excerpts contained at pages 17-22, 31-51, 81-86, 205-210, 213-232, 250-260, 262-267, 274-286, and 304-317 from the document bearing **Rule 65 ter no. 5599**; the excerpts contained at pages 53-67, 116-128, 145-150, 244-255, 262-270, 284-294, 297-300, 340-353, and 374-378 from the document bearing **Rule 65 ter no. 5600**; the excerpts contained at pages 16-44, 51-54, 78-80, 95-97, 111-120, 159, and 167-175 from the document bearing **Rule 65 ter no. 5601**; the excerpts contained at pages 8-12, 39-61, 91-95, and 247-248 from the document bearing **Rule 65 ter no. 5603**; the excerpts contained at pages 39-58, 61-66, and 77-83 from the document bearing **Rule 65 ter no. 5604**; the excerpts contained at pages 212-217, 224-237, 336-350, and 383-387 from the document bearing **Rule 65 ter no. 5605**; the excerpts contained at pages 34-35, 97-99, 101-105, 112-116, 145, 166-181, and 185-190 from the document bearing **Rule 65 ter no. 5607**; the excerpts contained at pages 99-101, 119-135, 188-196, 216-230, and 276-286 from the document bearing **Rule 65 ter no. 5608**; the excerpts contained at pages 2-4, 34-52, 57-59, 81-101, 114-122, and 157 from the document bearing **Rule 65 ter no. 5609**; the excerpt contained at pages 2-4 from the document bearing **Rule 65 ter no. 5610**; the excerpts contained at pages 1-7, 28-29, 31-34, 43-47, 72, 78, 88, 91-104, 126-133, 143-144, 158-160, and 217-231 from the document bearing **Rule 65 ter no. 5611**; and the excerpts contained at pages 13-16, 34-38, 211-216, and 232-233 from the document bearing **Rule 65 ter no. 5016**, once these have been uploaded into eCourt;

DENIES the Stanišić Motion for admission into evidence in relation to pages 311-312 of the document bearing **Rule 65 ter no. 5598.1**; page 29 of the document bearing **Rule 65 ter no. 5599.1**; and pages 134-135 of the document bearing **Rule 65 ter no. 5053.2**;

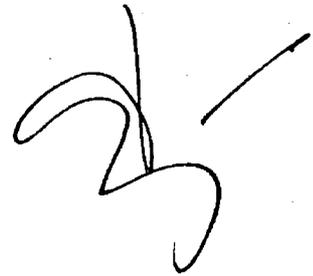
FURTHER INSTRUCTS the Stanišić and Simatović Defence to include the date of any admitted excerpt in accordance with the instructions given in paragraph 12 of this decision;

²⁹ Second Bar Table Decision, para. 16.

DIRECTS the Stanišić and Simatović Defence, in coordination with each other so as to avoid duplication, to upload the admitted documents with corresponding translations into eCourt within three weeks of the issue of this decision, and to advise the Chamber, the Registry and the parties once these have been uploaded; and

REQUESTS the Registry to assign exhibit numbers to the documents admitted and inform the parties and the Chamber of the numbers so assigned.

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



Judge Alphons Orié
Presiding Judge

Dated this twenty-sixth day of July 2012
At The Hague
The Netherlands

[Seal of the Tribunal]