

**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: 15 August 2012
Original: English

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D 43644 - D 43638
15 August 2012

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IN TRIAL CHAMBER I

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

Registrar: Mr John Hocking

Decision of: 15 August 2012

PROSECUTOR

v.

**JOVICA STANIŠIĆ
FRANKO SIMATOVIĆ**

PUBLIC

**DECISION ON STANIŠIĆ DEFENCE THIRD ADDITIONAL
MOTION FOR ADMISSION OF DOCUMENTS INTO
EVIDENCE FROM THE BAR TABLE AND ADMISSION OF
OTHER DOCUMENT**

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 Stanišić Defence (“Defence”) filed its third additional motion for admission of documents into evidence from the bar table (“Motion”) requesting the admission into evidence of 13 excerpts of annual reports of the DB (“Excerpts”).¹
2. On 22 June 2012, the Prosecution filed its response to the Motion (“Response”), opposing the admission of the Excerpts.² Through an informal communication on 3 July 2012, the Chamber granted the Prosecution until 20 July 2012 to file a further response. On 20 July 2012, the Prosecution filed its further response, elaborating on its reasons for opposing the admission of the Excerpts (“Further Response”).³ On 30 July 2012, the Defence filed a request for leave to reply to the Further Response, which included the reply itself (“Reply”).⁴ Leave is hereby granted and the Reply has been taken into consideration. The Simatović Defence did not respond to the Motion.
3. The document that has been marked for identification under the number D277 (“MFI D277”) was tendered in court by the Defence on 30 June 2011.⁵ Given that it is an excerpt from DB reports which are similar in nature to those referenced in the Motion, the Chamber will decide upon its admission in the present decision.⁶

II. SUBMISSIONS OF THE PARTIES

4. The Defence submits that whilst it had previously requested the admission of a number of excerpts from annual progress and programme orientation reports of the DB and several of its centres for the time period 1991-1995, the Defence only received the Excerpts from the National Council at the beginning of February 2012.⁷ This was subsequent to the Rule 54 *bis* hearing of 21 November 2011, whereby an agreement was concluded with the Serbian Government that both parties would be permitted to review the documents as a whole and select specific portions.⁸ The

¹ Stanišić Third Additional Motion for Admission of Documents into Evidence Through the Bar Table, 4 June 2012 (Confidential with Confidential Annex), para. 1.

² Prosecution Response to Stanišić Third Additional Motion for Admission of Documents into Evidence Through the Bar Table with Confidential Annex A, 22 June 2012 (Confidential with Confidential Annex), para. 1. At the Housekeeping Session on 12 June 2012, the Trial Chamber indicated that the Prosecution Response would be due by 22 June, see T. 20154.

³ Prosecution Further Response Regarding Stanišić Third Additional Motion for Admission of Documents into Evidence through the Bar Table, 20 July 2012 (Confidential).

⁴ Stanišić Defence Application for Leave to Reply to the Prosecution Further Response Regarding Stanišić Third Additional Motion for Admission of Documents into Evidence through the Bar Table, 27 July 2012.

⁵ T. 1244.

⁶ T. 20115. MFI D277 is excerpted from the same report as five of the Excerpts which are the subject of the Motion, namely those bearing Rule 65 *ter* nos 1D00377.1-1D00377.5.

⁷ Stanišić Motion for Admission of Documents from the Bar Table, 17 February 2012 (“Bar Table Motion”), Confidential Annex A: First Bar Table Chart (DB), pp. 1, 3-4, 7-10, 12-13, 89, 100, 144-146; Motion, para. 5.

⁸ Motion, para. 7.

Defence submits that it is under no obligation to acquire the entire document from which excerpts have been taken and disclose them to the Prosecution, especially in light of the fact that the Serbian Government did not permit the Defence to take possession of the full records.⁹

5. The Defence submits that the Excerpts are relevant, probative, and sufficiently reliable for their admission into evidence.¹⁰ The Defence states that it has selected only the most relevant sections that contain additional and highly probative information and has precisely indicated the exact information contained in each document upon which the Defence seeks to rely, together with the documents' place within the Defence case.¹¹ In relation to MFI D277, as to provenance, the Defence submits that it received the document from the Serbian Government and that the document meets the standard of reliability.¹² It also submits that the possible existence of contextualising or additionally relevant information in the larger report does not affect the relevance or reliability of the excerpt itself as far as its admission into evidence is concerned.¹³

6. The Prosecution objects to the Motion, stating that the Excerpts are not on the Defence Rule 65 *ter* exhibit list and that they originate from larger reports which have not been disclosed to the Prosecution.¹⁴ The Prosecution submits that whilst the Defence received the Excerpts on 31 January 2012, it did not disclose them until June 2012, thus depriving the Prosecution of the ability to use or contextualise them with Defence witnesses that testified after January 2012.¹⁵ The Prosecution argues that the Serbian Security Information Agency was not reluctant to produce the entire documents, and that it was the Defence which selected what it felt was relevant instead of requesting the complete documents.¹⁶ Further, the Prosecution argues that by not requesting the entire documents, the Defence has sought to avoid its disclosure obligations and the potential negative consequences of its procedural choices.¹⁷ The Prosecution criticises the selections made by the Defence as creating a misleading impression, since they consist of paragraphs taken from various pages.¹⁸ In relation to MFI D277, the Prosecution objects to admission, arguing that although it has received information as to provenance, such excerpted material is potentially misleading, is of low probative value, and is not reliable.¹⁹ The Prosecution requests that the Defence should acquire the entire document from which it had been taken in order for the

⁹ Motion, paras 6-10.

¹⁰ Motion, paras 1, 5, 12-13.

¹¹ Motion, para. 12.

¹² T. 15141-15142, 18708.

¹³ T. 18703-18706

¹⁴ Response, para. 1, Confidential Annex A, pp.

¹⁵ Response, paras 13-14; Confidential Annex A, pp.

¹⁶ Response paras 15-16.

¹⁷ Response, para. 18.

¹⁸ Response, para. 19, Confidential Annex A, pp. 1-30; Further Response, paras 4-6.

¹⁹ T. 18702-18703.

Prosecution to review the document and select additional excerpts to contextualise those tendered by the Defence.²⁰

III. APPLICABLE LAW

7. 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.²¹

IV. DISCUSSION

Excerpts

8. Through the Motion, the Defence seeks the admission of 13 excerpts from annual progress and programme reports of the DB for the period from 1991-1995.²² The Chamber has previously determined that excerpts may be admissible, provided the parties have access to the source document for purposes of contextualisation.²³ This is of particular importance when the tendering party seeks to draw a negative inference from the excerpt.²⁴ An excerpt should be sufficiently autonomous to be intelligible, independent of its source document.²⁵

9. The Prosecution objects to the admission of the Excerpts given that the Defence has tendered them at this late stage of the proceedings.²⁶ The Chamber notes that the Defence failed to request addition of the Excerpts to the 65 *ter* list upon receipt in January 2012. However, the Prosecution acknowledges that it has been on notice since January 2012 that the Defence had not requested the full report from the Serbian Government, but instead had sought further excerpts which it would seek to tender.²⁷ The Defence also stated in a bar table motion of 17 February 2012 that it was in the process of having documents translated which may lead to further bar table

²⁰ T. 18702-18703.

²¹ First Decision on Stanišić Defence Bar Table Motion of 17 February 2012, 23 May 2012, paras 9-10.

²² Motion, para. 5. While the Defence refers to 17 excerpts in the Motion, there are in fact only 13 excerpts listed in the annex to the Motion.

²³ T. 20150-20151.

²⁴ T. 20151.

²⁵ Decision on the Prosecution's Revised First Motion for Admission of Exhibits From the Bar Table, 3 February 2011, para. 15.

²⁶ Response, paras 13-14.

²⁷ Response, para. 5.

motions for the tendering of excerpts.²⁸ In light of the above, the Prosecution submissions regarding lack of notice do not warrant the relief sought.

10. Pursuant to the agreement reached at the Rule 54 *bis* hearing between Serbia and the parties, both parties had equal access to the source documents of the Excerpts and the Prosecution has seen them in the meantime.²⁹ The Prosecution is entitled to seek admission of further portions, following review of the documents, in order to contextualise those excerpts if it so wishes.³⁰ While the Prosecution also submits that the conclusions that the Defence seeks to draw from the Excerpts are not supported by the information contained in them,³¹ the Chamber considers that these submissions relate to the Defence's interpretation of the Excerpts and the inferences it wishes to draw from them. Consequently, they do not affect the documents' admissibility, but instead go to the weight to be afforded to them following their admission into evidence.³²

11. The Chamber further considers that although the Defence has selected non-sequential sections from the source document, they are sufficiently autonomous to be intelligible. The Defence has also indicated the specific purpose for which it seeks admission.³³ The Chamber considers that the Defence has shown with sufficient specificity (i) the relevance and probative value of each of the Excerpts and (ii) how each of the documents fits into its case. The Excerpts are therefore admitted into evidence pursuant to Rule 89 (C) of the Tribunal's Rules of Procedure and Evidence ("Rules").

12. While the Prosecution further contends that it has not had the opportunity to put the Excerpts to Defence witnesses which has resulted in prejudice,³⁴ the documents containing the Excerpts have been available to both parties since the Rule 54 *bis* hearing in November 2011. In particular, the Prosecution refers to its being deprived of the opportunity to use the Excerpts with expert Milan Milošević who testified in May 2012, that is, 5 months after the Rule 54 *bis* hearing.³⁵ The Prosecution could therefore have gained access to the documents at an earlier stage and put them to Mr Milošević and/or other Defence witnesses had it so wished. The Chamber does not consider in these circumstances that the Prosecution has suffered any prejudice such as to warrant exclusion.

²⁸ Bar Table Motion, 17 February 2012, para. 14.

²⁹ T. 20062-20063, 20150-20151.

³⁰ Decision on the Prosecution's Revised First Motion for Admission of Exhibits from the Bar Table, 3 February 2011, para. 15.

³¹ Response, Confidential Annex A.

³² Fourth Decision on Stanišić Defence Bar Table Motion of 17 February 2012, 24 May 2012, para. 8.

³³ Motion, Confidential Annex A.

³⁴ Response, para. 13.

³⁵ *ibid.*

13. The Chamber notes that, given the highly selective nature of the Excerpts, their probative value and the weight afforded to them will be limited to their specific content. The Chamber also observes that the Defence seeks to draw various conclusions from the absence of references to the activities of the DB in the Reports.³⁶ In relation to documents tendered to establish facts by negative inference, the Chamber reiterates that the Defence should provide clear references to such documents in its final brief, and elaborate on the conclusions it invites the Chamber to draw from them, including, if appropriate, an explanation of how they refute the Prosecution evidence relating to the same issues.³⁷

14. The Prosecution also submits that the translation provided by the Defence for 1D00378.1 is at odds with previous versions of the same excerpt provided by the Serbian Authorities on another occasion.³⁸ The Chamber therefore instructs the Defence to obtain a verified translation of the document and upload it into e-Court.

MFI D277

15. While the Chamber lacks detailed submissions from the Defence in relation to the exact purpose of admission of the document,³⁹ it considers, having reviewed the document and noting that it is a series of excerpts similar to those which are the subject of the Motion, that its purpose is clear on the face of the document. Furthermore, the document is sufficiently autonomous to be intelligible independent of its source documents. The Chamber also considers that the relevance and probative value of the document is sufficiently clear. It is therefore admitted into evidence.

V. DISPOSITION

16. For the foregoing reasons, pursuant to Rule 89 (C) of the Rules, the Chamber **GRANTS** the Motion and

- (i) **ADMITS** into evidence, provisionally under seal, the documents bearing Rule 65 *ter* nos 1D00379.1, 1D00378.1, 1D00377.1, 1D00372.1, 1D00377.2, 1D0377.3,

³⁶ Motion, Confidential Annex A.

³⁷ Second Decision on Stanišić Defence Bar Table Motion of 17 February 2012, 23 May 2012, para. 16.

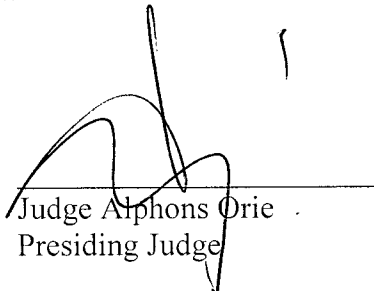
³⁸ Response, Confidential Annex A, p. 4.

³⁹ For submissions regarding MFI D277, see T.12207-12209, T. 18702-18709.

1D00373.1, 1D00370.1, 1D00377.4, 1D00374.1, 1D00375.1, 1D00377.5, and 1D00376.1;

- (ii) **ADMITS** into evidence MFI D277;
- (iii) **INSTRUCTS** the Defence to obtain a verified translation of the document bearing Rule 65 *ter* no. 1D00378.1 and to upload it into e-Court;
- (iv) **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 Orie
Presiding Judge

Dated this 15th day of August 2012
At The Hague
The Netherlands

[Seal of the Tribunal]