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05 December 2012

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**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: 5 December 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 December 2012

PROSECUTOR

v.

**JOVICA STANIŠIĆ
FRANKO SIMATOVIĆ**

PUBLIC

**DECISION ON STANISIC DEFENCE MOTION
FOR ADMISSION INTO EVIDENCE OF REJOINER
MATERIAL FROM THE BAR TABLE**

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

PROCEDURAL HISTORY

1. On 24 September 2012, the Prosecution filed three motions requesting the admission of rebuttal material from the bar table.¹ On 31 October 2012 and on 5 November 2012, the Chamber issued its decisions on the motions.² In its 5 November 2012 decision, the Chamber ordered the Defence, within one week of its decision, to (i) file a reasoned request for a rejoinder case, if any, containing all documentary evidence that the Defence intends to present in rejoinder, and/or (ii) other motions resulting from the Chamber's decisions on the three Prosecution rebuttal motions, if any.³ On 7 and 8 November 2012, the Defence filed a motion for extension to file a rejoinder motion, which the Chamber partially granted on 9 November 2012, with reasons to follow.⁴

2. On 15 November 2012, the Defence for the Accused Stanišić ("Stanišić Defence") filed its rejoinder Motion ("Motion").⁵ On 16 November 2012, the Chamber informed the Parties through an informal communication that the Prosecution and the Defence for the Accused Simatović ("Simatović Defence") should file its responses, if any, to the Motion by 26 November 2012. On 26 November 2012, the Prosecution responded to the Motion.⁶ On 27 November 2012, the Stanišić Defence requested leave to reply, and attached its reply to the request ("Stanišić Reply").⁷ Leave to reply is hereby granted.

SUBMISSIONS OF THE PARTIES

3. The Stanišić Defence first argues that it cannot respond to some of the evidence admitted during the Prosecution's rebuttal case, namely, the Serbian DB annual reports, as it had no time to investigate these documents before the deadline set by the Chamber for the submission of rejoinder motions.⁸ For this reason, the Stanišić Defence requests the Chamber for an additional week to

¹ Prosecution Motion for Admission of Rebuttal Evidence: Serbian DB Files, 24 September 2012; Prosecution Motion for Admission of Rebuttal Evidence: Mladić Notebooks, 24 September 2012; Prosecution Motion for Admission of Rebuttal Evidence: Miscellaneous Documents, 24 September 2012.

² Decision on Prosecution Motion for Admission of Rebuttal Evidence: Mladić Notebooks, 31 December 2012; Decision on Prosecution Motion for Admission of Rebuttal Evidence: Serbian DB Personnel Files, 31 December 2012; Decision on Prosecution Motion for Admission into Evidence of Rebuttal Material from the Bar Table: Miscellaneous Documents, 5 November 2012.

³ Decision on Prosecution Motion for Admission into Evidence of Rebuttal Material from the Bar Table: Miscellaneous Documents, 5 November 2012, para. 25 (xiii).

⁴ Urgent Defence Request for Additional Time to file Request for Rejoinder Case or Request for Reconsideration, 7 November 2012; Urgent Stanišić Defence Request for Extension of Time to File Rejoinder, 8 November 2012; Decision on Defence Motions for Extension of Time to File Rejoinder Motions, 9 November 2012.

⁵ Stanišić Defence Motion Admission of Rejoinder Evidence and Request to file Supplemental Rejoinder Motion, 15 November 2012.

⁶ Prosecution Response to Stanišić Defence Motion for Admission of Rejoinder Evidence and Request to File Supplemental Rejoinder Motion (Confidential), 26 November 2012.

⁷ Stanišić Defence Application for Leave to Reply to the Prosecution Response to Stanišić Defence Motion for Admission of Rejoinder Evidence and Request to File Supplemental Rejoinder Motion, 27 November 2012.

⁸ Motion, paras 9-13.

review these documents so that it can file an additional rejoinder motion.⁹ Furthermore, the Stanišić Defence submits the material contained in Annex A to the Motion counters the evidence admitted during the Prosecution rebuttal case, and accordingly requests its admission into evidence from the bar table.¹⁰

4. In its Response, the Prosecution opposes admission of all but the “Kaptaen Dragan Fund” materials tendered by the Stanišić Defence in rejoinder.¹¹ The Prosecution submits that the remainder of the documents are not rejoinder evidence as they do not seek to challenge any issue arising directly from the Prosecution’s rebuttal evidence.¹² The Prosecution recalls the history in relation to the documents tendered by the Prosecution in rebuttal and by the Stanišić Defence in rejoinder, and generally argues that the Defence had been put on notice of the Prosecution’s intentions to tender the rebuttal material well in advance.¹³

5. In its Reply, the Stanišić Defence disputes the Prosecution’s argument that it “should investigate evidence tendered in rebuttal before it is actually admitted into evidence”, arguing, *inter alia*, that the Tribunal’s Office of Legal Aid and Detention Matters (“OLAD”) would not finance “such a speculative investigative mission”.¹⁴

APPLICABLE LAW

6. The Chamber notes that two tests must be met in order to allow admission of rejoinder material from the bar table.

7.– First, the Defence must satisfy the test for the admission of rejoinder evidence, which has been set out in the Tribunal’s case law. The Defence may lead rejoinder evidence only with respect to issues directly arising from rebuttal evidence, and which could not be expected to have been addressed during the Defence case.¹⁵

⁹ Motion, para. 15.

¹⁰ Motion, paras 7, 8, 15.

¹¹ Response, para. 6.

¹² Response, para. 7.

¹³ Response, paras 12-25.

¹⁴ Stanišić Reply, paras 6-12.

¹⁵ *Prosecutor v Stanislav Galić*, Case No: IT-98-29-T, Decision on Rejoinder Evidence, 2 April 2003. See also *Prosecutor v Pavle Strugar*, Case No: IT-01-42-T, Decision III on the Admissibility of Certain Documents, 10 September 2004, para 5; *Prosecutor v Mladen Naletilić and Vinko Martinović*, Case No: IT-98-34-T, Decision on the Admission of Exhibits Tendered during the Rejoinder Case, 23 October 2002; *Prosecutor v Dragoljub Kunarac and Radomir Kovač*, Case No: IT-96-23-T & IT-96-23/1-T, Decision on Defence Motion for Rejoinder, 31 October 2000, para 14.

8. Second, the Defence must satisfy the test for the admission of evidence from the bar table. The Chamber recalls and refers to the applicable law on motions for admission of evidence from the bar table as set out in a previous decision.¹⁶

DISCUSSION

A. Request for additional time

9. The Chamber first turns to the Stanišić Defence request for an additional week to review the Serbian DB annual reports so that it can file an additional rejoinder motion.¹⁷ The Stanišić Defence argues that it cannot respond to the Serbian DB annual reports tendered by the Prosecution, as it submits it had no time to investigate these documents before the deadline set by the Chamber for the submission of rejoinder motions.¹⁸ In this respect, the Chamber also notes the Stanišić Defence argument that it had not investigated certain material noticed by the Prosecution as possible rebuttal material as OLAD “would not finance such a speculative investigative mission”.¹⁹ The Chamber recalls that on 8 November 2012, the Stanišić Defence already submitted that it did not have sufficient time to investigate the rebuttal documents as, *inter alia*, the basis for its request for an extension of time to file a rejoinder motion, on which the Chamber gave a decision on 9 November 2012, with reasons to follow.²⁰ The Chamber considers that the Stanišić Defence effectively seeks reconsideration of the Chamber’s 9 November decision. As the Chamber has yet to issue the reasons for that Decision, it considers the request for reconsideration to be premature and therefore denies this part of the Motion.

10. The Stanišić Defence requests the admission into evidence of a number of documents, which the Chamber has divided into four categories,

B. Documents regarding the Bratunac Brigade

11. The Chamber notes that documents bearing Rule 65 *ter* nos 2D00108, 2D01525, 2D01609, 2D01610, and 2D01617, were part of a bar table motion filed by the Simatović Defence, and that the Chamber denied the admission of these documents into evidence.²¹ The Chamber notes that the Stanišić Defence tendered the documents bearing Rule 65 *ter* nos 2D00065, 2D00106, 2D00109,

¹⁶ First Decision on Stanišić Defence Bar Table Motion of 17 February 2012, 23 May 2012, paras 9-10.

¹⁷ Motion, para. 15. The Chamber notes that the Chamber did not issue a decision on the Defence request to file an additional rejoinder motion within one week of the Motion, and that the Defence did not file an additional rejoinder motion within one week of the Motion.

¹⁸ Motion, paras 9-13.

¹⁹ Stanišić Reply, paras 6-12.

²⁰ Urgent Stanišić Defence Request for Extension of Time to File Rejoinder, 8 November 2012; Decision on Defence Motions for Extension of Time to File Rejoinder Motions, 9 November 2012.

2D00110, 2D00296, 2D00298, 2D00299, 2D00300, 2D00301, 2D00302, 2D00304, 2D00305, and 2D00312, for the same purpose as documents bearing Rule 65 *ter* nos 2D00108, 2D001525, D001609, 2D01610, and 2D001617.

12. The Chamber notes the Prosecution's request of 19 November 2012 to the Defence, by means of an informal communication, for information regarding the origin of documents bearing Rule 65 *ter* nos 2D00065, 2D00106, 2D00108, 2D00109, 2D00110, 2D00296, 2D00298, 2D00299, 2D00300, 2D00301, 2D00302, 2D00304, and 2D00305. This request is hereby put on the record.

13. The Chamber considers that the Stanišić Defence rejoinder request for admission of the documents in this category is problematic for several reasons, which are set out below.

(i) *Prior decisions of the Chamber*

14. Specifically in relation to documents bearing Rule 65 *ter* nos 2D00108, 2D01525, 2D01609, 2D01610, and 2D01617, the Chamber recalls the relevant findings in paragraph 12 of its decision on that motion.²² The Chamber observed that these are documents regarding "Red Beret" units that the Simatović Defence submitted were "attached" or under the command of the Bratunac Brigade during an unspecified period of time. The Chamber considered that (i) the Simatović Defence did not provide the required information of how these documents fit into the Simatović Defence case (ii) they relate to issues that appear to have been discussed by Defence witnesses, and (iii) there were clear indications that many of these documents were taken out of a larger context, which remained unclear to the Chamber. The Chamber also noted in relation to these documents that (a) they were not on the Simatović Defence Rule 65 *ter* exhibit list, (b) the Simatović Defence did not attempt to show good cause for their late addition, and (c) the Simatović Defence did not request their addition to its Rule 65 *ter* exhibit list. Highlighting the context in which these documents were tendered, as well as the ample opportunities to present these documents through witnesses in order to provide the Chamber with the necessary context, the Chamber concluded that it was unable to determine the probative value of these documents, and accordingly denied their admission into evidence from the bar table.²³

15. The Chamber notes that the documents tendered in this category suffer from the same problems as when the Simatović Defence requested their admission into evidence. Furthermore, the Chamber considers that, since it has already decided on the admission of these documents, the Stanišić Defence should have either (i) sought leave to appeal the Chamber's decision denying

²¹ Second Decision on Simatović Defence Third Bar Table Motion, 17 September 2012.

²² *Ibid.*, para. 12.

admission of these documents into evidence from the bar table, or (ii) requested reconsideration of the Chamber's decision on these documents.

16. Lastly, the Chamber recalls that on 1 April 2011, it denied, without prejudice, the admission into evidence of documents bearing Rule 65 *ter* nos 2D00296 and 2D00298 clarifying that it required further information on their provenance.²⁴ With regard to document bearing Rule 65 *ter* no. 2D00065, the Chamber had requested the Defence to withdraw this document until such time that it could provide further information regarding its provenance; accordingly, the document was marked not admitted.²⁵ The Chamber observes that the Stanišić Defence has also not provided such information regarding the documents bearing Rule 65 *ter* nos 2D00296, 2D00298, and 2D00065.

(ii) *Standard for admission of rejoinder material*

17. The Chamber recalls that, in its First Bar Table Motion of 17 February 2012, the Stanišić Defence requested the admission into evidence of approximately 60 extracts of DB personnel files. It further requested the admission of documents bearing Rule 65 *ter* nos 1D03507 (admitted as D693) and 1D03746 (admitted as D1224) to show that Mijović and his unit in Bratunac were part of the VRS Bratunac Brigade, and that they were not affiliated with the Serbian DB or the Accused Stanišić.²⁶ The Chamber considers that the documents regarding the Bratunac Brigade have been presented to reinforce the Defence submissions made in relation to exhibits D693 and D1224. The Chamber finds that the documents do not rebut issues directly arising from rebuttal evidence.

18. The Chamber notes that the Stanišić Defence suggests that the documents in this category are documents which could not have expected to have been addressed during the Defence case.²⁷ In this respect, the Chamber notes that in March 2012, in its response to this motion, the Prosecution indicated that it may seek to tender materials to rebut the Stanišić Defence claims regarding this issue.²⁸ It recalls that on 8 May 2012, the Prosecution indicated its intention to seek admission of excerpts of a number of personnel files during a possible rebuttal case.²⁹ Lastly, the Chamber recalls that a number of the files that the Prosecution sought to have admitted in rebuttal were

²³ Ibid.

²⁴ Decision on the Admission of the Proposed Expert Report by Reynaud Theunens and the Admission of Theunens Related Documents, 1 April 2011, paras 53-54.

²⁵ Ibid, para. 27, referring to T. 11158-11161.

²⁶ Stanišić First Motion for Admission of Exhibits Through the Bar Table, filed with Confidential Annex A, 2 February 2012 ("Stanišić First Bar Table Motion"), pp. 29, 141.

²⁷ Motion, paras 6-8.

²⁸ Prosecution Response to Stanišić Motion and Additional Motion for Admission of Documents Through the Bar Table, 23 March 2012, Confidential Annex A, p. 457.

²⁹ Prosecution Notification Regarding Rebuttal Evidence, 8 May 2012. The personnel files in question include documents bearing Rule 65 *ter* nos 06573, 06574, 06577, 06578, 06579, 06580, 06581, 06584, 06587, 06588, 06589, 06591, 06593, 06595, 06596, 06597, 06598, 06599, 06601, 06602, 06603, and 06604.

extracts from the same personnel files from which the Stanišić Defence tendered excerpts in February 2012.³⁰ Specifically, the Chamber notes that the documents regarding the Bratunac Brigade are tendered to counter Prosecution rebuttal documents bearing Rule 65 *ter* nos 06569 (admitted as P3172), 06603 (admitted as P3199), 06604 (admitted as P3187), 06577 (admitted as P3174), 06580 (admitted as P3192), 06587 (admitted as P3178), 06588 (admitted as P3195), 06589 (admitted as P3179), 06590 (admitted as P3196), 06593 (admitted as P3197), 06595 (admitted as P3181), 06598 (admitted as P3183), and 06599 (admitted as P3184).³¹ The Chamber observes, however, that in relation to all but two of these documents (documents 06569 and 06590), the Defence was put on notice on 8 May 2012 by the Prosecution that the latter would tender these documents in rebuttal.³² The Stanišić Defence therefore could have foreseen that the Prosecution would tender these documents in rebuttal.

(iii) *Standard for admission of material from the bar table*

19. For documents tendered from the bar table, a party has to show (i) the relevance and probative value of each document tendered and (ii) how it fits into its case. For each of the documents tendered in this category, the Stanišić Defence specified that “This document is relevant to show that the Red Berets in Bratunac were under the VRS in [year]”, as well as three paragraphs common to all documents which, in general terms, argue that the Red Berets was not a continuous unit from 1991 to 1995, and that the Accused Stanišić was not affiliated to it.

20. The Chamber finds that the Stanišić Defence failed to provide any specific references to the content of the documents tendered in this category. By doing so, it failed to meet the standard for admission from the bar table.

21. In conclusion, the Chamber finds that the documents in this category (i) do not rebut issues directly arising from rebuttal evidence and; (ii) failed to meet the test for admission of documents from the bar table. For these reasons, the Chamber will deny their admission into evidence from the bar table.

C. Documents regarding Captain Dragan (Category 2)

22. The Chamber notes that the documents bearing Rule 65 *ter* nos 2D00423, 2D00426, 2D00429, 2D00431, 2D00445, and 2D00446, are tendered to counter evidence tendered in rebuttal

³⁰ See e.g. Stanišić First Bar Table Motion, Confidential Annex C, pp. 131 and 134, in relation to Prosecution rebuttal documents bearing Rule 65 *ter* nos 06607 (admitted as P3201), 06608 (admitted as P3202) and 06609 (admitted as P3203).

³¹ Motion, Confidential Annex A, pp. 1-10, 14-16.

³² Prosecution Notification Regarding Rebuttal Evidence, 8 May 2012.

regarding the relationship of Captain Dragan to the Serbian DB and the Accused. The Chamber notes that all of these documents have already been admitted into evidence, and considers the request for their admission into evidence moot. These are documents bearing Rule 65 *ter* nos 2D00423 (admitted as D576), 2D00426 (admitted as D579), 2D00429 (admitted as D582), 2D00431 (admitted as D584), and 2D00445 (admitted as D594). The Chamber notes that the document bearing Rule 65 *ter* no. 2D00446 is the redacted version of the same (unredacted) document it intends to counter, namely the document bearing Rule 65 *ter* no. 2D00446.2, which was admitted as rebuttal evidence.³³

D. Personnel files

23. Documents bearing Rule 65 *ter* nos 1D10081, 1D10082, 1D10083, 1D10084, 1D10085, and 1D10086, are personnel files. The Stanišić Defence indicates these documents were disclosed to it on 17 May 2012. While the Stanišić Defence originally had not provided English translations for any of these documents, it informed the Parties and the Chamber on 25 November 2012 by means of an informal communication that it had uploaded translations for these documents in eCourt. The Chamber notes that, indeed, (draft) English translations were uploaded for documents bearing Rule 65 *ter* nos 1D10082 through 1D10086, but not for the document bearing Rule 65 *ter* no. 1D10081. In relation to the latter personnel file, the Prosecution argues that the Defence only uploaded a partial document, and that a crucial part was missing which shows that it deals with a different individual than the person indicated by the Defence.³⁴ In its Response, the Prosecution also clarified that the documents in this category had already been disclosed to the Defence on 12 November 2010, albeit under a different ERN number and (some of them) with redactions.³⁵ The Prosecution submits the documents were re-disclosed on 17 May 2012.³⁶

24. The Chamber considers that the document bearing Rule 65 *ter* no. 1D10082 has been tendered for a similar purpose as the documents relating to the Bratunac brigade, and that it deals with a similar subject matter. The Chamber further considers that the personnel files, similar to the documents relating to the Bratunac Brigade, have been tendered to counter documents for which the Prosecution, during the Defence case, had indicated that it may tender them in rebuttal, and why.³⁷ The Stanišić Defence could therefore have foreseen that the Prosecution would tender these documents in rebuttal. More importantly, the Chamber considers that these documents do not rebut

³³ Motion, Confidential Annex, pp. 13-14. See also Decision on Prosecution Motion for Admission into Evidence of Rebuttal Material from the Bar Table: Miscellaneous Documents, 5 November 2012, paras 20-21, 25.

³⁴ Prosecution Response, Confidential Annex A, pp. 25-26.

³⁵ Prosecution Response, Confidential Annex A, pp. 25-29.

³⁶ Ibid.

³⁷ See *supra*, para. 18.

issues directly arising from rebuttal evidence; rather, it considers the documents in this category have been presented to reinforce the Defence submissions made during its case. The Chamber will deny their admission into evidence from the bar table.

E. Other documents

25. The Chamber notes that documents bearing Rule 65 *ter* nos 1D10077, 1D10078, 1D10079, 1D10080, are files from the “Kaptaen Dragan Fund” (“KDF”). Documents bearing Rule 65 *ter* nos 01428 and 1D03617 are minutes of the Supreme Defence Council. The Stanišić Defence submits the KDF files were disclosed to it on 17 May 2012, approximately three weeks before the final deadline was set for the Defence to file any further evidentiary motions in the Defence case.³⁸ The Supreme Defence Council minutes are tendered, *inter alia*, to “counter the new Prosecution claim that the Serbian DB was engaged in cryptographic data protection for the Republika Srpska and the RS for any military purposes”.³⁹

26. The Chamber is satisfied that the documents in this category could not be expected to have been addressed during the Stanišić Defence case, which relate to issues directly arising out of rebuttal evidence. The Chamber further finds that the Stanišić Defence has shown with sufficient specificity (i) the relevance and probative value of these documents and (ii) how they fit in the Stanišić case. The Chamber will therefore allow admission into evidence from the bar table of documents bearing Rule 65 *ter* nos 1D10077, 1D10078, 1D10079, 1D10080, 01428, and 1D03617.

DISPOSITION

27. For the foregoing reasons, pursuant to Rules 85 and 89 (C) of the Tribunal’s Rules of Procedure and Evidence, the Chamber

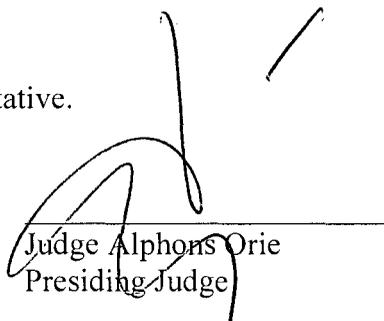
- i. **DENIES** the Stanišić Defence request to file an additional rejoinder motion;
- ii. **GRANTS** the Stanišić Defence request for leave to reply;
- iii. **GRANTS** the Motion in part;
- iv. **ADMITS** into evidence documents bearing Rule 65 *ter* nos 1D10077, 1D10078, 1D10079, 1D10080, 01428, and 1D03617;

³⁸ Motion, Confidential Annex A, pp. 17-18; Notice of Communication with the Parties Regarding Reasons for Chamber’s Reconsideration of its Decision of 1 and 7 June 2012 on the Stanišić and Simatović Bar Table Submissions, 18 July 2012.

³⁹ Motion, Confidential Annex A, pp. 30-31.

- v. **DECLARES** the Motion **MOOT** in relation to documents bearing Rule 65 *ter* nos. 2D00423, 2D00426, 2D00429, 2D00431, 2D00445, and 2D00446;
- vi. **REQUESTS** the Registry to assign exhibit numbers to the documents admitted and inform the parties and the Chamber of the numbers so assigned; and
- vii. **DENIES** the remainder of the Motion.

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



Judge Alphons Orie
Presiding Judge

Dated this fifth day of December 2012
At The Hague
The Netherlands

[Seal of the Tribunal]