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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: 6 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: 6 December 2012

PROSECUTOR

v.

**JOVICA STANIŠIĆ
FRANKO SIMATOVIĆ**

PUBLIC

**DECISION ON STANIŠIĆ DEFENCE REQUEST FOR
CERTIFICATION TO APPEAL THREE TRIAL CHAMBER
DECISIONS ON PROSECUTION MOTIONS FOR ADMISSION
OF REBUTTAL EVIDENCE**

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 31 October 2012, the Chamber issued two decisions, which granted two Prosecution motions for the admission of rebuttal evidence.¹ The Chamber admitted most of the tendered documents into evidence.² On 5 November 2012, the Chamber issued a decision granting another Prosecution motion for admission of rebuttal evidence.³ On 7 November 2012, the Stanišić Defence (“Defence”) filed a motion (“Motion”) requesting certification to appeal the three above-mentioned decisions (“Decisions”).⁴ On 21 November 2012, the Prosecution filed its response (“Response”).⁵ The Simatović Defence did not respond to the Motion.

II. SUBMISSIONS OF THE PARTIES

2. The Defence submits that the Chamber used an incorrect standard to admit documents into evidence in the rebuttal phase of the proceedings, which has consequently introduced an unprecedented amount of fresh evidence that “highly prejudices the Accused’s fair trial rights”.⁶ It further submits that since the admission of the documents into evidence could lead to “individual criminal responsibility” being attributed to the Accused, the Decisions significantly affect both the conduct of the proceedings and, potentially, the trial outcome.⁷ The Defence relies on a decision to grant certification to appeal in the case of *Gotovina et al.* (“Gotovina Certification Decision”) in support of its contention.⁸ The Defence also submits that an appellate assessment of the Decisions at an interlocutory level would assist by avoiding the need to order a re-trial.⁹

3. The Prosecution contends that the Motion fails to meet the criteria for certification.¹⁰ It submits that since proceedings have almost concluded, an interlocutory appeal of the Decisions will not significantly affect the fair and expeditious conduct of the proceedings nor materially advance

¹ Decision on Prosecution Motion for Admission of Rebuttal Evidence: Mladić Notebooks, 31 October 2012 (“Mladić Notebooks Decision”); Decision on Prosecution Motion for Admission of Rebuttal Evidence: Serbian DB Personnel Files, 31 October 2012 (“Personnel Files Decision”).

² Mladić Notebooks Decision, para. 12; Personnel Files Decision, para. 12.

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

⁴ Stanišić Defence Request for Certification to Appeal Three Trial Chamber Decisions on Prosecution Motions for Admission of Rebuttal Evidence, 7 November 2012.

⁵ Prosecution Response to Stanišić Defence Request for Certification to Appeal Three Trial Chamber Decisions on Prosecution Motions for Admission of Rebuttal Evidence, 21 November 2012.

⁶ Motion, paras 7-8.

⁷ Motion, paras 5-6, 8.

⁸ Motion, paras 5, 9; *Prosecutor v. Gotovina et al.*, Case No. IT-06-90-T, Decision on Čermak and Markač Defence Requests for Certification to Appeal the Trial Chamber Decision of 21 April 2010 to Reopen the Prosecution’s Case, 10 May 2010, para. 9.

⁹ Motion, para. 10.

¹⁰ Response, para. 1.

the proceedings.¹¹ It contends that the impact of the rebuttal evidence on the individual criminal responsibility of the Accused will only be known at the conclusion of the proceedings.¹² In regard to the Defence's submission that the Chamber applied an incorrect standard, the Prosecution suggests that the argument falls outside the scope of an application for certification.¹³ It further undermines the Defence's reliance on the Gotovina Certification Decision by suggesting that the underlying decision in relation to which certification was granted differs considerably from the Decisions.¹⁴ In addition, the Prosecution relies on the Chamber's previous decision to deny certification to appeal.¹⁵

III. APPLICABLE LAW

4. Rule 73 (B) of the Rules of Procedure and Evidence ("Rules") requires that the Trial Chamber be satisfied of two cumulative criteria in order for it to grant a request for certification to appeal: (1) that the decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and (2) that in finding such an issue exists, it is the opinion of the Trial Chamber that an immediate resolution by the Appeals Chamber may materially advance the proceedings.

IV. DISCUSSION

5. As a preliminary matter, the Chamber notes that the Defence incorrectly premises one argument for certification to appeal on the alleged judicial error concerning the standard for admitting rebuttal evidence.¹⁶ The appropriate forum for arguments on judicial errors is the appeal itself, not the request for certification to appeal. Accordingly, the portions of the Motion concerned with alleged judicial errors will not be further considered in isolation.

6. The Chamber notes the Defence submission that the admission of the documents "could lead to individual criminal responsibility for the Accused, particularly since the Trial Chamber found that they are of high probative value".¹⁷ This submission suggests that the first criterion of Rule 73 (B) is satisfied by the high probative value of the rebuttal evidence admitted and the

¹¹ Response, paras 2-3, 9.

¹² Response, paras 5-6.

¹³ Response, para. 4.

¹⁴ Response, para. 8.

¹⁵ Response, para. 7; Decision on Stanišić Request for Certification to Appeal the Trial Chamber's Decision on Defence Motion for Exclusion of Specified Exhibits and Admission of Various Other Documents, 3 October 2012, para. 7.

¹⁶ Motion, paras 7-8. For example, the Defence argues at paragraph 7 that the Chamber used "the incorrect standard in admitting documents", having "used the same standard as it has during trial proceedings".

¹⁷ Motion, para. 6.

significance of the issue from which it arises. However, the probative value of evidence must be understood in the context of its subject matter and the procedural circumstances from which the rebuttal evidence is submitted. To find that evidence is of high probative value does not necessarily mean that it will be given a significant weight when assessed against the totality of the evidence.

7. The Defence fails to demonstrate how these documents specifically impact upon the individual criminal responsibility of the Accused in light of the context mentioned above and the totality of evidence presented until now. The Chamber, having analysed the documents, and noting that, *inter alia*, they include personnel files and extracts from the Mladić Notebooks, considers that their admission neither significantly affects the outcome of the trial, nor the fair and expeditious conduct of the proceedings.

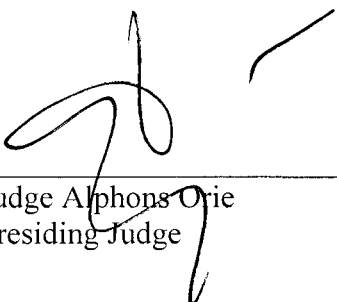
8. For the foregoing reasons, the Chamber considers that the first criterion of Rule 73 (B) has not been met.

9. In light of the Chamber having determined that the first criterion of Rule 73 (B) has not been satisfied, and considering that the two criteria are cumulative in nature, the Chamber will not address the Defence arguments in relation to the second criterion of Rule 73 (B).

V. DISPOSITION

10. For the foregoing reasons, pursuant to Rule 73 (B) of the Rules, the Chamber **DENIES** the Motion.

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



Judge Alphons Orie
Presiding Judge

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

[Seal of the Tribunal]