



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-PT
Date: 15 June 2005
Original: English

IN THE TRIAL CHAMBER

Before: Judge Patrick Robinson, Presiding
Judge O-Gon Kwon
Judge Iain Bonomy

Registrar: Mr. Hans Holthuis

Decision of: 15 June 2005

PROSECUTOR

v.

**JOVICA STANIŠIĆ
FRANKO SIMATOVIĆ**

DECISION ON

- (1) DEFENCE MOTIONS FOR ACCESS TO *EX PARTE* SUPPORTING MATERIALS RELATED TO THE PROSECUTION MOTION FOR LEAVE TO AMEND THE AMENDED INDICTMENT; AND**
- (2) REQUEST FROM THE DEFENCE OF STANIŠIĆ FOR LEAVE TO FILE A RESPONSE EXCEEDING THE PAGE LIMIT TO THE PROSECUTION MOTION FOR LEAVE TO AMEND THE AMENDED INDICTMENT**

The Office of the Prosecutor
Mr. David Re

Counsel for the Jovica Stanišić
Mr. Geert-Jan Alexander Knoops
Mr. Wayne Jordash

Counsel for the Franko Simatović
Mr. Zoran Jovanović

THIS TRIAL CHAMBER of the 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 (“International Tribunal”),

Access to Ex Parte Materials

BEING SEISED of a (i) confidential “Request for Access to *Ex Parte* Materials filed by the Prosecution with the Prosecution Motion for Leave to Amend the Amended Indictment, in Conjunction with Extension of Time Limit to File Defence Response”, filed on 11 May 2005 by the Defence of Jovica Stanišić; and a (ii) confidential “Defence Motion to Disclose *Ex Parte* Supporting Materials and for Extension of Time”, filed on 18 May 2005 by the Defence of Franko Simatović (“Stanišić Motion” and “Simatović Motion”, respectively),

NOTING the confidential “Prosecution Response to Defence Request for Access to *Ex Parte* Materials Filed with the Motion to Amend the Amended Indictment”, filed on 20 May 2005 (“Prosecution Response”) by the Office of the Prosecutor (“Prosecution”),

NOTING the (i) “Defence Reply on Prosecution Response to Defence Request for Access to *Ex Parte* Materials Filed with the Motion to Amend the Amended Indictment”, filed on 25 May 2005 by the Defence of Franko Simatović; and the (ii) confidential “Reply to Prosecution Response to Defence Request for Access to *Ex Parte* Materials Filed with the Motion to Amend the Amended Indictment”, filed on 26 May 2005 by the Defence of Jovica Stanišić (“Simatović Reply” and “Stanišić Reply”, respectively), in which both Defence teams request leave to file their replies,¹

NOTING that the Prosecution filed a partly confidential and *ex parte* “Prosecution Motion for Leave to Amend the Amended Indictment” on 6 May 2005 (“Prosecution Motion”), and that the Defence teams request the disclosure of the *ex parte* supporting materials of the Prosecution Motion (“Supporting Materials”),

NOTING that the Trial Chamber has granted the Defence teams’ request for an extension of time to file their response to the Prosecution Motion,²

NOTING the Defence teams argue that (i) the Defence has a right to the Supporting Materials in light of, *inter alia*, Rule 50(A)(i)(c) of the Rules of Procedure and Evidence of the International Tribunal (“Rules”), which provides for a party’s right to be heard in a review of an amendment to

¹ Stanišić Reply, para. 3 and Simatović Reply, para. 2.

² The Trial Chamber ordered the Defence teams to file their response to the Prosecution Motion within 14 days of the Trial Chamber’s determination on the request for the Supporting Materials. See Confidential “Order on Extension of Time to File the Response to the Prosecution Motion for Leave to Amend the Amended Indictment”, 19 May 2005.

an indictment; and (ii) the disclosure of the Supporting Materials is necessary for the Defence to respond to the Prosecution Motion,³

NOTING the Prosecution argues that (i) the Defence has no right to the Supporting Materials “until the amendment is confirmed” and that the right to be heard in relation to the Defence, as prescribed in Rule 50 (A)(i)(c), “must be confined to procedural issues such as any potential prejudice to the Defence, as opposed to addressing the substance of the proposed amendment”; and, (ii) the Defence already has all the necessary information to respond to the Prosecution Motion,⁴

CONSIDERING that a large number of the witness statements, which form the Supporting Materials, already fall under the disclosure obligations of the Prosecution pursuant to Rule 66(A)(ii) of the Rules, and that the remaining witness statements are of witnesses whose identities have been disclosed to the Defence teams in a confidential annex to the Prosecution Motion,⁵

CONSIDERING that, after the confirmation of the Indictment, there are no provisions in the Rules or Statute of the International Tribunal that require or permit the Supporting Materials to be filed *ex parte*, while Rule 50(A)(i)(c) explicitly provides that the parties shall be heard,⁶

CONSIDERING FURTHER that, to give efficacy to the right of the Defence to be heard under Rule 50(A)(i)(c) by enabling it to consider whether the proposed amendment might cause unfair prejudice to the Accused, it must be furnished with all the material supporting the proposed amendment and that, should there be a need for any such material to be given protection, the Prosecution may apply for such protection,

Confidentiality of the Filings

NOTING ALSO that the Prosecution requests the confidentiality of the Stanišić Motion be lifted in its entirety; the Simatović Motion be re-filed with portions pertaining to the substance of the

³ Stanišić Motion, paras 3-6; Simatović Motion, paras 2, 4, and 7 ; Stanišić Reply, paras 8-9, 13-15, and 19-20; Simatović Reply, para. 6.

⁴ Prosecution Response, paras 4-8.

⁵ See Confidential Annex A of the Prosecution Motion.

⁶ Rule 50 - Amendment of Indictment

- A) (i) The Prosecutor may amend an indictment:
- (a) at any time before its confirmation, without leave;
 - (b) between its confirmation and the assignment of the case to a Trial Chamber, with the leave of the Judge who confirmed the indictment, or a Judge assigned by the President; and
 - (c) after the assignment of the case to a Trial Chamber, with the leave of that Trial Chamber or a Judge of that Chamber, after having heard the parties.
- (ii) Independently of any other factors relevant to the exercise of the discretion, leave to amend an indictment shall not be granted unless the Trial Chamber or Judge is satisfied there is evidence which satisfies the standard set forth in Article 19, paragraph 1, of the Statute to support the proposed amendment.

confidential part of the Prosecution Motion redacted; and, the confidentiality of the Prosecution Response be lifted in its entirety,⁷

NOTING that the Defence teams do not oppose this request,⁸

NOTING that the Stanišić Reply was filed confidentially, and the Simatović Reply was filed publicly,

CONSIDERING that filings of the parties should be public unless there are exceptional reasons for keeping them confidential,⁹ and that there are no such reasons in respect of the Stanišić Motion, the Prosecution Response, and the Stanišić Reply,

CONSIDERING HOWEVER that there are portions of the Simatović Motion pertaining to the substance of the confidential part of the Prosecution Motion,

Extension of the Page Limit for the Response to the Prosecution Motion

BEING ALSO SEISED of a “Request for Leave to File a Response to Prosecution Motion for Leave to Amend the Amended Indictment Which Exceeds the Page Limit”, filed on 11 May 2005 (“Extension of Page Limit Motion”) by the Defence of Jovica Stanišić requesting leave to file a response to the Prosecution Motion that exceeds the 10 page limit (or 3000 words) by no more than 10 additional pages,

NOTING that the Prosecution did not file a response,

NOTING that the Practice Direction on the Length of Briefs and Motions of the International Tribunal (“Practice Directions”) provides that a response shall not exceed 10 pages or 3,000 words, whichever is greater, and that a party must seek authorisation in advance to exceed the page limit and “must provide an explanation of the exceptional circumstances that necessitate the oversized filing,”¹⁰

CONSIDERING that there are exceptional circumstances that demonstrate the need for the response to exceed the page limit,

PURSUANT TO Rules 50 and 54 of the Rules,

⁷ Prosecution Response, paras 10-12.

⁸ Stanišić Reply, para. 5; Rule 65 *ter* Conference of 31 May 2005, T. 187.

⁹ See “Decision on Vinko Martinović’s Withdrawal of Confidential Status of Appeal Brief”, *Prosecution v. Naletilić et al*, Case No. IT-98-34-A, 4 May 2005, p. 3.

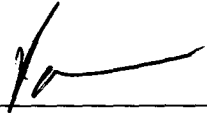
¹⁰ Practice Directions, paras 5 and 7.

HEREBY GRANTS the Stanišić Motion, Simatović Motion, and the Extension of Page Limit Motion, and **ORDERS** as follows:

- (1) Prosecution shall immediately disclose the parts of the Supporting Materials that have not already been disclosed to the Defence;
- (2) Defence teams shall file their response to the Prosecution Motion by Wednesday, 29 June 2005;
- (3) Defence of Franko Simatovic shall re-file the Simatović Motion in redacted form by Monday, 20 June 2005; and

REQUESTS the Registrar of the International Tribunal to lift the confidentiality of the Stanišić Motion, the Prosecution Response, and the Stanišić Reply.

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



Patrick Robinson
Presiding

Dated this fifteenth day of June 2005
At The Hague
The Netherlands

[Seal of the Tribunal]