



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: 17 July 2007

Original: English

**IN THE TRIAL CHAMBER**

**Before:** Judge Patrick Robinson, Presiding  
Judge Krister Thelin  
Judge Frank Höpfel

**Registrar:** Mr. Hans Holthuis

**Decision of:** 17 July 2007

**PROSECUTOR**

v.

**JOVICA STANIŠIĆ  
FRANKO SIMATOVIĆ**

***PUBLIC FILING***

---

**DECISION ON DEFENCE MOTION TO REJECT PROSECUTION'S FINAL PRE-TRIAL  
BRIEF OF 2 APRIL 2007**

---

**The Office of the Prosecutor**

Ms. Doris Brehmeier-Metz  
Mr. Gregory Townsend

**Counsel for Jovica Stanišić**

Mr. Geert-Jan Alexander Knoops  
Mr. Wayne Jordash

**Counsel for Franko Simatović**

Mr. Zoran Jovanović

Trial Chamber III 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 (“Tribunal”) is seised of two Defence motions. On 5 June 2007, counsel for Jovica Stanišić (“Stanišić Defence” and “Accused”, respectively) filed a motion requesting that the Prosecution be ordered to change and re-file its pre-trial brief of 2 April 2007 (“Stanišić Motion”).<sup>1</sup> On 7 June 2007, counsel for Franko Simatović (“Simatović Defence” and “Accused”, respectively) filed a “notice” joining in the Stanišić Motion<sup>2</sup>. This “notice” is more properly defined as a motion (“Simatović Motion”). The Trial Chamber hereby renders a decision on both motions (“Decision”).

### A. PROCEDURAL HISTORY

1. On 19 July 2004, the Office of the Prosecutor (“Prosecution”) filed its Pre-Trial Brief (“Original Pre-Trial Brief”). Subsequently, both defence teams Defence filed their respective Pre-Trial Briefs on 18 January 2005.<sup>3</sup> On 7 April 2006, the Prosecution filed a *supplementary* pre-trial brief including evidence that was not available when it first filed its Original Pre-Trial Brief (“Supplementary Pre-Trial Brief”).<sup>4</sup> The Prosecution added that it would “consolidate” the Original Pre-Trial Brief with the Supplementary Pre-Trial Brief in the future.<sup>5</sup>
2. On 12 April 2006, the Prosecution was granted leave to amend the indictment.<sup>6</sup> On 15 May 2006, the Prosecution filed the Revised Second Amended Indictment (“Revised Indictment”).<sup>7</sup>
3. On 7 June 2006, the Trial Chamber ordered the Prosecution to file a consolidated Pre-Trial Brief within four weeks (“Order of 7 June 2006”).<sup>8</sup> On 19 June 2006, the Prosecution requested that the Order of 7 June 2006 be vacated,<sup>9</sup> submitting that its review of the evidence was incomplete, and that it had recently gained access to certain archives which contained evidence potentially relevant to this case. It proposed to file a “focused” pre-trial brief once it had

<sup>1</sup> Defence Motion to Declare Prosecution Pre-Trial Brief in Violation of Article 21, Rule 65 *ter* E (ii) (Additional Witnesses) and Rule 50 (Amendment of Indictment), and Request for Leave to Exceed Page Limit, 5 June 2007.

<sup>2</sup> Defence Notice Regarding Stanišić ‘Defence motion to Declare Prosecution Pre-Trial Brief in Violation of Article 21, Rule 65ter (E) (ii) (Additional Witnesses) and Rule 50 (Amendment of Indictment)’, 7 June 2007.

<sup>3</sup> Defence Pre-Trial Brief (Stanišić), filed confidentially on 18 January 2005; Defence Pre-Trial Brief (Simatović), 18 January 2005.

<sup>4</sup> Supplementary Pre-Trial Brief – Scorpions Srebrenica Video (with Confidential Annex D), 7 April 2006.

<sup>5</sup> Supplementary Pre-Trial Brief – Scorpions Srebrenica Video (with Confidential Annex D), 7 April 2006, para. 4.

<sup>6</sup> Decision on Defence Motions regarding the Defects in the Form of the Second Amended Indictment, 12 April 2006. Leave was granted to amend the Second Amended Indictment of 20 December 2005.

<sup>7</sup> Prosecution Submission of Revised Second Amended Indictment, 15 May 2006; Revised Second Indictment, 15 May 2006.

<sup>8</sup> Order on Pre-Trial Briefs, 7 June 2007.

<sup>9</sup> Motion to Vacate Order to File Consolidated Pre-trial brief, 19 June 2006, paras 3-10, 14-16.

completed its review of such evidence.<sup>10</sup> On 14 July 2006, the Trial Chamber vacated its Order of 7 June 2006.<sup>11</sup>

4. On 19 January 2007, the Trial Chamber issued an order<sup>12</sup> to which a work plan was attached (“Work Plan”). According to the Work Plan, the Prosecution was to file a “consolidated pre-trial brief” by 2 April 2007.
5. On 2 April 2007, the Prosecution filed a consolidated pre-trial brief (“Final Pre-Trial Brief”).<sup>13</sup> On 15 May 2007, it filed a corrigendum to its Final Pre-Trial Brief.<sup>14</sup>

## B. ARGUMENTS OF THE PARTIES

### (i) Stanišić Motion

6. The Stanišić Defence submits in its Motion that in support of its Final Pre-Trial Brief, the Prosecution impermissibly used new exhibits and new witnesses and substantially departed from its case as set out in the Original and Supplemental Pre-Trial Briefs. Therefore, it submits, the Accused Stanišić was not promptly informed of the charges against him, as required by Article 21 (4) (a) of the Statute of the Tribunal (“Statute”).<sup>15</sup>
7. The Stanišić Defence also argues that by means of its Final Pre-Trial Brief, the Prosecution impermissibly expanded the charges and modes of liability set out in the Revised Indictment, and that such expansions require a Prosecution motion to amend the Revised Indictment.<sup>16</sup>
8. The Stanišić Defence submits that the Final Pre-Trial Brief is not a “consolidated” version of the prior pre-trial briefs (Original Pre-Trial Brief and Supplementary Brief), but that it is a new pre-trial brief altogether. Therefore, it argues, the Final Pre-Trial Brief violates the Trial Chamber’s Order of 7 June 2006 (which held that the Prosecution should file a *consolidated* pre-trial brief).
9. The Stanišić Defence therefore requests that the Prosecution be ordered to re-file a pre-trial brief which presents the Prosecution case as set out in the Original and Supplementary Pre-Trial Brief. If this request is granted, the Stanišić Defence requests that it be allowed to file its

<sup>10</sup> Motion to Vacate Order to File Consolidated Pre-trial brief, 19 June 2006.

<sup>11</sup> Order on Prosecution to Vacate Order to File Consolidated Pre-Trial Brief, 14 July 2007.

<sup>12</sup> Order Establishing a Work Plan, 19 January 2007.

<sup>13</sup> Despite the reference in the cover note of 2 April 2007 entitled “Prosecution’s Consolidated Pre-Trial Brief”, the actual pre-trial brief filed on 2 April 2007 is entitled “Prosecution Pre-Trial brief”.

<sup>14</sup> “Corrigendum and Supplementary Annex E to Prosecution Consolidated Pre-Trial Brief”, 15 May 2007.

<sup>15</sup> Stanišić Motion, paras 9-11.

<sup>16</sup> Stanišić Motion, para. 6.

Defence Pre-Trial Brief, currently scheduled to be filed on 16 July 2007<sup>17</sup>, after the re-filed Prosecution Pre-Trial Brief. Lastly, the Stanišić Defence requests leave to exceed the page limit for its Motion.<sup>18</sup>

(ii) Simatović Motion

10. On 7 June 2007, the Simatović Defence filed its Motion, joining in the relief requested in the Stanišić Motion. The Simatović Defence points out differences in the various Prosecution pre-trial briefs and submits that “for the reasons indicated in the [Stanišić Motion]”, these differences are in violation of the Trial Chamber’s Order of 7 June 2006. The Simatović Defence proposes an alternative remedy, namely that the Prosecution be ordered to re-file its pre-trial brief “with *deletion* of the mentioned portions [in the Simatović Motion], in that the Prosecution is not allowed to found and present its case on the basis of the [Final] Pre-Trial Brief as far as it deviates from the [Original] Pre-Trial Brief (...)”.<sup>19</sup>

(iii) Prosecution Response

11. On 19 June 2007, the Prosecution responded to the Defence Motions (“Prosecution Response”).<sup>20</sup> In its Response, the Prosecution argues that the Defence Motions are inadmissible in that Rule 65 *ter* (E) of the Rules “does not provide for objections to a pre-trial brief”.<sup>21</sup> It further submits that the Motions “may show dilatory intent”.<sup>22</sup> It notes that although the Defence now alleges deficiencies in all three pre-trial briefs, neither the Original Pre-Trial Brief nor the Supplementary Brief was previously challenged by the Defence.<sup>23</sup> The Prosecution further submits that the “new” proposed witnesses and exhibits, which the Prosecution uses to support certain allegations in its Final Pre-Trial Brief, were disclosed to the Defence in a timely fashion.<sup>24</sup> It rebuts the arguments raised by the Defence regarding alleged “new” facts, theories or modes of liability and requests that the Chamber deny the Defence Motions.

<sup>17</sup> Decision on Several Applications to Modify Terms of the Work Plan and Order Following a Rule 65 *ter* Conference, 31 May 2007.

<sup>18</sup> Stanišić Motion, para. 12.

<sup>19</sup> Simatović Motion, para. 10 (a), (*emphasis added*).

<sup>20</sup> Prosecution Response to Defence Motions Challenging the Prosecution Consolidated Pre-Trial Brief with Confidential Annex, 19 June 2007.

<sup>21</sup> Prosecution Response, para. 4.

<sup>22</sup> Prosecution Response, para. 22, fn. 33.

<sup>23</sup> Prosecution Response, paras 13, 14, 22.

<sup>24</sup> Prosecution Response, paras 18, 20, Confidential Annex A to Prosecution Response.

(iv) Defence Replies

12. On 26 and 28 June 2007, the Simatović and Stanišić Defence respectively sought leave to reply and replied to the Prosecution Response (“Simatović Reply” and “Stanišić Reply”, respectively).<sup>25</sup> The Trial Chamber notes that the Stanišić Reply was filed after the deadline set out in Rule 126 *bis* of the Rules, and that no arguments were offered constituting “good cause” for an untimely filing.<sup>26</sup> Consequently, leave to file the Stanišić Reply is denied.
13. In its Reply, the Simatović Defence reiterates that the Prosecution has “abused the Tribunal’s orders issued up to date, which understood the joining of the two parts of the Prosecutor’s [Pre-Trial Brief], and presented completely new facts which, actually, represent new charges”.<sup>27</sup> Regarding the Prosecution’s allegation that the Defence Motions “may show dilatory intent”, the Simatović Defence submits that “after more than four years of Pre-Trial Phase duration, after new disclosure of the material already disclosed, and the disclosure of new material short time ahead of the date scheduled for this case readiness for the trial, defence can in no way be held responsible for further postponements.”<sup>28</sup>

**C. DISCUSSION****1. Preliminary procedural findings**(i) Defects in Simatović Motion and Simatović Reply

14. As noted *supra*, the Simatović Defence filed a Motion joining in the relief requested by the Stanišić Defence. The Simatović Defence submits that it “only wishes to point out additional differences” in the various Prosecution pre-trial briefs and argues that “for the reasons indicated in the [Stanišić Motion]”, the Prosecution “violated” the Trial Chamber’s Order of 7 June 2006.<sup>29</sup>
15. First, the Simatović Motion only indicates differences in the various Prosecution pre-trial briefs. It does not provide reasons why such differences would be impermissible or would “violate” the order of 7 June 2006. Instead, the reasoning provided in the Simatović Motion consists of a general reference to reasons provided in the Stanišić Motion. However, the Stanišić Motion is

<sup>25</sup> Defence request to File a Reply and Defence Reply on the Prosecution Response to the Defence Motions Challenging the Prosecution Consolidated Pre-Trial Brief, 26 June 2007; Defence Reply to Prosecution Response to Defence Motion to Declare the Prosecution Pre-Trial Brief in Violation with Article 21, Rule 65 *ter* E (ii) (Additional Witnesses) and Rule 50 (Amendment of Indictment), dated 27 June 2007 and filed on 28 June 2007.

<sup>26</sup> See Rule 127 of the Rules.

<sup>27</sup> Simatović Reply, para. 10.

<sup>28</sup> Simatović Reply, para. 14.

<sup>29</sup> Simatović Motion, paras 4, 9.

very lengthy and contains many different arguments. By its general reference to the Stanišić Motion, the Simatović Defence left it to the Trial Chamber to define why the indicated differences in the pre-trial briefs would be impermissible.

16. Second, as will be discussed below, the Final Pre-Trial Brief cannot be in violation of the Order of 7 June 2006, as that order was vacated. For these reasons, the arguments raised by the Simatović Defence in paragraphs 3 to 9 of its Motion will be disregarded for the purposes of this Decision.
17. Lastly, in paragraphs 11 to 13 of its Reply, the Simatović Defence raises a new argument to which the Prosecution has not had an opportunity to respond. Consequently, this argument will be disregarded for the purposes of this Decision.

(ii) Relief requested by the Defence is unnecessary

18. Both the Stanišić and the Simatović Defence have requested either deletion or replacement of parts of the Final Pre-Trial Brief. The relief requested is, however, unnecessary. The Indictment is the primary accusatory instrument. Any other accusatory instrument cannot add charges or material facts amounting to charges that were not pleaded in the Indictment. The pre-trial brief addresses the factual and legal issues by developing the Prosecution strategy at trial. It is therefore relevant to the case only as far as it develops such strategy in accordance with the Indictment. The relief sought in the Motion – an exclusion of parts of the pre-trial brief – is therefore unnecessary.<sup>30</sup>
19. However, in the interests of the overall expeditiousness of trial, the Trial Chamber will consider whether the Prosecution in its Final Pre-Trial Brief raises new material facts and forms of liability not pleaded in the Revised Indictment. Whenever those are not pleaded in the Revised Indictment, they are irrelevant to the case even if contained in the Pre-Trial Brief.<sup>31</sup> Clearly, a pre-trial brief may not be used to fill any gaps which may exist in the material facts pleaded in an indictment.<sup>32</sup>

<sup>30</sup> *Prosecutor v. Protais Zigiranyirazo*, Case No. ICTR-2001-73-PT, Decision on Defence urgent motion to exclude some parts of the prosecution pre-trial brief, 30 September 2005, para. 2.

<sup>31</sup> *Prosecutor v. Protais Zigiranyirazo*, Case No. ICTR-2001-73-PT, Decision on Defence urgent motion to exclude some parts of the prosecution pre-trial brief 30 September 2005, para. 2.

<sup>32</sup> *Prosecutor v. Miroslav Deronjić*, Case No. IT-02-61-PT, Decision on Form of the Indictment, 25 October 2002, para. 10; *Prosecutor v. Momčilo Krajišnik and Biljana Plavšić*, Case No. IT-00-39 & 40-PT, Decision on Prosecution's Motion for Leave to Amend the Consolidated Indictment, 4 March 2002, para. 10; *Prosecutor v. Radislav Brđanin and Momir Talić*, Case No. IT-99-36-PT, Decision on Motion to Dismiss Indictment, 5 October 1999, para. 13; *Prosecutor v. Milorad Krnojelac*, Case No. IT-97-25-PT, Decision on the Defence Preliminary Motion on the Form of the Indictment, paras 12, 14, 15.

20. The Chamber will also consider whether, whilst relying in the Final Pre-Trial Brief on witnesses and exhibits that were not mentioned in the Prosecution's Rule 65 *ter* witness and exhibit lists of 2004, the Prosecution impermissibly changed its case against the Accused. Lastly, the Trial Chamber will consider whether the Prosecution breached any order of this Trial Chamber, and whether the Accused's right under Article 21 of the Statute to be promptly informed of the charges against them was violated.

(iii) Word limit

21. The Stanišić Defence requests leave to exceed the word limit of its Motion as it "is responding in this Motion to a prosecution pre-trial brief of 61 pages".<sup>33</sup> The Practice Direction on the Length of Briefs and Motions stipulates that motions and replies shall not exceed 3,000 words. A party must seek authorisation in advance from the Chamber to exceed the word limits providing an explanation of the exceptional circumstances that necessitate the oversized filing. Although authorisation was not sought in advance, good cause has been shown to allow for the requested extension of the word limit.

**2. Procedural Defence challenges to Final Pre-Trial Brief**

(i) Whether the Final Pre-Trial Brief violates the Order of 7 June 2006

22. The Trial Chamber first turns to the Defence argument that the Final Pre-Trial Brief is "in clear violation" of "the text as well as the nature and purpose of the pre-trial Judge's Order of 7 June 2006".<sup>34</sup> This Order states that the Prosecution should file a "consolidated" Pre-Trial Brief, rather than, as the Defence argues, a new pre-trial brief.

23. The Defence is reminded that on 14 July 2007, the Order of 7 June 2006 was vacated.<sup>35</sup> Therefore, the Final Pre-Trial Brief could not "violate" the Order of 7 June 2006 as it was no longer in force. Although, as noted above, the Work Plan of 19 January 2007 does mention that the Prosecution should file a "consolidated Pre-Trial Brief", the Pre-Trial Judge considered on 30 June 2006 that

---

<sup>33</sup> Stanišić Motion, para. 12.

<sup>34</sup> Stanišić Motion, para. 41.

<sup>35</sup> Order on Prosecution to Vacate Order to file Consolidated Pre-Trial Brief, 14 July 2007.

the recently received access of the Prosecution to the VRS archive *could* justify the vacation of the order of 7 June 2006, *as the results of a search of this archive could necessitate yet another additional Pre-trial Brief that would need to be consolidated with the existing Pre-trial Brief.*<sup>36</sup>

24. The Pre-Trial Judge specifically anticipated that there was a distinct possibility that the Prosecution case could evolve with the reception of new materials from previously inaccessible archives. Moreover, the Prosecution had repeatedly stated that its review of the evidence was incomplete and that testimony of ongoing cases could potentially be introduced in this case.<sup>37</sup> As such, it was foreseeable that the Prosecution case would evolve in the face of new information. The argument raised in the Stanišić Motion in this respect is therefore dismissed.

(ii) Whether the Prosecution was allowed to use the evidence of “new” witnesses and exhibits

25. The Stanišić Defence asserts that in the absence of an “application to add witnesses”, the Prosecution “circumvented” Rule 65 *ter* (E) (ii) of the Rules by referring to witnesses and exhibits in its Final Pre-Trial Brief which were not used to support the Prosecution’s allegations stated in the Original Pre-Trial Brief and Supplementary Pre-Trial Brief.<sup>38</sup>

26. In order to establish whether the Accused suffered any unfair prejudice from the Prosecution’s alleged reliance on “new” witnesses, the following is of relevance. On 19 January 2007, the Work Plan ordered the Prosecution to provide its (final) Rule 65 *ter* witness list by 2 April 2007. On 2 April 2007, the Prosecution filed its Rule 65 *ter* witness list,<sup>39</sup> containing all the “new” witnesses now challenged by the Defence. On 16 April 2007, the Prosecution filed a motion to amend its witness list.<sup>40</sup> The Defence did not at any time oppose the introduction of the “new” witnesses; neither when the statements of these “new” witnesses were disclosed to the Defence in a timely manner on or before 1 March 2007,<sup>41</sup> nor when the Prosecution filed its (final) witness list, or when the Prosecution filed a motion to amend its (final) witness list. It is only when the Prosecution filed its Final Pre-Trial Brief, which evidently is based on information provided by witnesses on its (final) Rule 65 *ter* list, that the Defence challenged the

<sup>36</sup> Decision on Prosecution Motion to Vacate Order to File Consolidated Pre-Trial Briefs, 30 June 2006, p. 2 (*emphasis added*).

<sup>37</sup> The Stanišić Motion refers to one of the statements made by the Prosecution to this effect, *see* Stanišić Motion, para. 45, referring to the Prosecution’s Motion to Vacate Order to File Consolidated Pre-trial brief of 19 June 2006. The aforementioned motion specifically mentions the Prosecution’s incomplete evidence review, and the fact that the Prosecution has recently gained access to certain archives.

<sup>38</sup> Stanišić Motion, paras 6, 40.

<sup>39</sup> Prosecution's list of witnesses pursuant to Rule 65 *ter* (E) (ii), confidential, 2 April 2007.

<sup>40</sup> Corrigendum to Prosecution List of Witnesses pursuant to Rule 65 *ter* E (ii), filed confidentially on 16 April 2007. This Motion is pending before the Trial Chamber.

<sup>41</sup> *See* Order Establishing a Work Plan, p. 1: “[...] the Prosecution shall, no later than 1 March 2007, disclose all witness statements in its possession which fall within the scope of Rule 66(A)(ii)”.



Prosecution's right to use that evidence to establish its case. In these circumstances, the Trial Chamber fails to see how a violation of Rule 65 *ter* (E) (ii) has occurred.

27. Similarly, the Defence on numerous occasions refers to "new" exhibits on which the Prosecution relied in its Final Pre-Trial Brief.<sup>42</sup> As mentioned *supra*, the Prosecution already in 2006 mentioned that its evidence review was incomplete and revealed that it had recently gained access to certain archives which were potentially relevant to this case. Thus, the Defence was properly put on notice and, as the last of the *limited* number of "new" exhibits<sup>43</sup> in question was disclosed to the Defence on 7 April 2007, the Prosecution's use of these exhibits in the Final Pre-Trial Brief has not resulted in any unfair prejudice to the Accused.

(iii) Whether the Prosecution "circumvented" Rule 94 *bis* of the Rules

28. The Stanišić Defence argues that the Prosecution "circumvents" Rule 94 *bis* by introducing, through a "new" expert, Ms. Nena Tromp, "evidence which is clearly not produced by the expert herself, such as the contents of the book of D. Glisic (who has been dropped as an expert by the OTP)".<sup>44</sup>

29. First, the Trial Chamber recalls that the Prosecution's proposal to file all outstanding expert reports by 1 July 2007 was accepted.<sup>45</sup> Neither the Prosecution's proposal nor the Trial Chamber's order pertaining thereto was challenged by the Defence.<sup>46</sup> What is more, the Pre-Trial Judge *proprio motu* postponed the filing of the Defence Pre-Trial Brief by four weeks so that the Defence would be able to respond to the contents of the Prosecution's proposed Rule 94 *bis* expert reports in their respective pre-trial briefs.<sup>47</sup> Second, the question as to which expert witnesses will be called pursuant to Rule 94 *bis* and which evidence can be introduced through such experts is something which is to be decided by the Trial Chamber that will hear the case. The Defence argument in this respect is therefore dismissed.

30. Lastly, the Stanišić Defence challenges the Prosecution's ability to rely on the report of an expert witness in its Final Pre-Trial Brief, while the witness is not listed on the Prosecution's Rule 65 *ter* list.<sup>48</sup> In its Response, the Prosecution submits that before the commencement of

<sup>42</sup> Stanišić Motion, para. 27, fn. 19, 23, 24, 31.

<sup>43</sup> In total, the Prosecution in its Final Pre-Trial Brief relied on ten "new" exhibits, *see* Confidential Annex A to Prosecution Response.

<sup>44</sup> Stanišić Motion, paras 38, 39.

<sup>45</sup> Decision on Several Applications to Modify Terms of the Work Plan and Order Following a Rule 65 *ter* Conference, 31 May 2007, para. 13 ; *see also* Decision on prosecution request for extension of time to file expert report, 2 July 2007.

<sup>46</sup> Status Conference (21 March 2007), T. 624; Rule 65 *ter* Conference (8 May 2007), p. 375.

<sup>47</sup> Decision on Several Applications to Modify Terms of the Work Plan and Order Following a Rule 65 *ter* Conference, 31 May 2007, para. 14.

<sup>48</sup> Stanišić Motion, para. 27; Prosecution's list of witnesses pursuant to Rule 65ter (E) (ii), 2 April 2007.

trial, it need not file for an application to amend the Rule 65 *ter* witness list and it submits that “a notice (not a motion) of changes in a witness list [is] legally sufficient”. It argues that amendments of its Rule 65 *ter* witness list are governed by Rule 73 *bis* (F), which provides that “[a]fter commencement of the trial, the Prosecutor may file a motion to vary the decision as to [...] the number of witnesses that are to be called”.<sup>49</sup> The Prosecution is misconceived. This rule refers to a Prosecution motion for variation of the Trial Chamber’s decision pursuant to Rule 73 *bis* (C) of the Rules which enables the Chamber to reduce the number of witnesses the Prosecutor may call. What is more, the Prosecution previously did find it necessary to file two applications to amend its witness list while the case was in pre-trial, one of which is currently pending before the Chamber.<sup>50</sup>

31. However, in accordance with the Chamber’s orders of 31 May 2007, the Prosecution was not obliged to provide the expert report in question before 1 July 2007.<sup>51</sup> Moreover, as the expert report was disclosed in a timely manner,<sup>52</sup> no unfair prejudice was caused to the Defence. Nonetheless, in the absence of a Prosecution Motion to amend its witness list, it remains unclear whether the Prosecution wishes to include the expert in question as a potential witness at trial. If so, the Prosecution must seek leave to amend its Rule 65 *ter* witness list accordingly.

### 3. Substantial Defence challenges to Final Pre-Trial Brief

#### (i) Whether the Prosecution raises new charges<sup>53</sup> against the Accused in its Final Pre-Trial Brief

32. The Defence argues that the Prosecution in its Final Pre-Trial brief has added: (a) a new form of liability, (b) new material facts (c) a new Prosecution theory and (d) new allegations necessitating an amendment to the Revised Indictment. These arguments will be discussed below.

<sup>49</sup> Prosecution Response, para. 20.

<sup>50</sup> See Report to Trial Chamber pursuant to “Decision on Confidential Prosecution Motions for Protective Measures” of 26 October 2004 and Application to Amend Witness List, 18 November 2004; Corrigendum to Prosecution list of witnesses pursuant to Rule 65 *ter* E (ii), 16 April 2007 (*see supra* fn 38).

<sup>51</sup> Decision on Several Applications to Modify Terms of the Work Plan and Order Following a Rule 65 *ter* Conference, paras 12, 13; *See also* Decision on prosecution request for extension of time to file expert report, 2 July 2007.

<sup>52</sup> *See* Confidential Annex A to Prosecution Motion (exhibit 2891).

<sup>53</sup> In their submissions, the Stanišić and Simatović Defence argue that the Prosecution raises “new facts” and “new charges” against the accused by means of its Pre-Trial Brief. In this respect, the Appeals Chamber in the *Muvunyi* case clarified that “[t]here is a clear distinction between counts or charges made in an indictment and the material facts that underpin that charge or count. The count or charge is the legal characterisation of the material facts which support that count or charge. In pleading an indictment, the Prosecution is required to specify the alleged legal prohibition infringed (the count or charge) and the acts or omissions of the Accused that give rise to that allegation of infringement of a legal prohibition (material facts)”, *Prosecutor v. Tharcisse Muvunyi*, Case No. ICTR-00-55-AR73, Decision on Prosecution interlocutory appeal against Trial Chamber II decision of 23 February 2005, 12 May 2005, para. 19.

(a) *New form of liability: omission*

33. In its Final Pre-Trial Brief, the Prosecution asserts that “the Accused’s acts and omissions in furtherance of the JCE’s criminal purpose included: [...] continuing to send forces and providing support to them over an extended period of time, *thereby failing to instruct them to refrain from committing unlawful acts and failing to stop replenishing the forces on the ground*”. The Stanišić Defence submits that “this new allegation seeks to create a liability akin to the doctrine of Command Responsibility pursuant to Article 7 (3) of the Statute which clearly falls outside the scope of the Indictment”.<sup>54</sup>
34. Although not pleaded with great specificity, paragraphs 12 and 13 of the Revised Indictment state that “each participant [to the JCE], by acts or *omissions*, contributed to achieving the objective of the enterprise. [...] Jovica Stanišić and Franko Simatović, acting individually an/or in concert with other members of the [JCE] participated in the [JCE] the following way: [...] they provided [...] logistical support and other substantial assistance or support to special units of the Republic of Serbia DB that were involved in the commission of crimes in Croatia and BiH [...]”.<sup>55</sup> The Trial Chamber further notes that reference to omissions of the Accused is made in paragraphs 12, 15, 18, 22, 61, 63 of the Revised Indictment.
35. The Appeals Chamber has recently re-affirmed that “omission proper may lead to individual criminal responsibility under Article 7(1) of the Statute where there is a legal duty to act.”<sup>56</sup> In *Milutinović et al*, the Trial Chamber in its oral ruling on motions filed pursuant to Rule 98 *bis* considered that:

[t]he Appeals Chamber has affirmed that an omission may lead to individual criminal responsibility under Article 7(1) where there is a legal duty to act. The authority for that is the Galic appeal judgement. In addition, in the Kvočka appeal judgement, the Appeals Chamber stated that such omission may occur in the context of a Joint Criminal Enterprise finding that such omission must have contributed to the common criminal purpose of the JCE. Moreover, in Brđjanin, the Appeals Chamber found that the contribution of the accused to the common plan should at least be significant. Therefore, in the present case where the evidence points to a legal duty and failure to act on the part of one or some of the accused,

<sup>54</sup> Stanišić Motion, para. 15.

<sup>55</sup> Paras 12 and 13 of the Revised Indictment (*emphasis added*).

<sup>56</sup> *Prosecutor v. Radoslav Brđjanin*, Case No. IT-99-36-A, Appeal Judgement (“*Brđjanin Appeal Judgement*”), para. 274, referring to *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, Judgement, 30 November 2006, para. 175; *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-A, Judgement, 29 July 2004, para. 663; *Prosecutor v. André Ntagerura, Emmanuel Bagambiki and Samuel Imanishimwe*, Case No. ICTR-99-46-A, Appeal Judgement, para. 334; *Prosecutor v. Duško Tadić aka “Dule”*, Case No. IT-94-1-A, Judgement, 15 July 1999, para. 188.

this may be considered sufficient evidence of participation in a Joint Criminal Enterprise for liability under Article 7(1) if, by such omission, a significant contribution to the JCE is made.<sup>57</sup>

36. The Trial Chamber considers that the Prosecution's reference in its Final Pre-Trial Brief to the Accused's alleged failure to instruct forces to refrain from committing unlawful acts and to stop replenishing them on the ground, provides proper notice of the culpable omissions for which the Accused might incur individual criminal responsibility pursuant to Article 7 (1) of the Statute. The Defence argument that the aforementioned reference falls outside the scope of the Revised Indictment is therefore dismissed.

*(b) New material fact : Joint Criminal Enterprise ("JCE")*

37. The Stanišić Defence argues that the common purpose in the pre-trial brief is different from the common purpose formulated in the Revised Indictment.<sup>58</sup> The Revised Indictment provides that "[t]he objective of this joint criminal enterprise was the forcible and permanent removal of the majority of non-Serbs, principally Croats, Bosnian Muslims and Bosnian Croats, from large areas of Croatia and BiH, through the commission of the crimes of Persecutions, Murder, Deportations and Inhumane Acts (Forcible Transfers)".<sup>59</sup> However, paragraph 9 of the Final Pre-Trial Brief states that "the common criminal purpose included all of the crimes committed by the Accused; alternatively, the common criminal purpose was to forcibly remove the majority of the Croats, Muslims and other non-Serbs in Bosnia and Croatia, and the crimes of persecution and murder were reasonably foreseeable to the Accused as a possible consequence of the execution of the enterprise and with that awareness, decided to participate in that enterprise".<sup>60</sup>

38. The parties are reminded that the Revised Indictment is the primary accusatory instrument; any change in the charges regarding the purpose of the alleged JCE requires an amendment of the Revised Indictment. In the current instance, however, the Chamber is of the view that paragraph 9 of the Final Pre-Trial Brief does not conflict with the manner in which JCE is pleaded in paragraphs 9 and 10 of the Revised Indictment. The Defence argument in this respect is dismissed.

39. Finally, the Stanišić Defence argues that the Prosecution's theory on the first form of JCE set out in the Final Pre-Trial Brief is substantially different from the one set out in the Original Pre-

<sup>57</sup> *Prosecutor v. Milutinović et al*, Case No. IT-05-87-T, T. 12776-12777 (18 May 2007).

<sup>58</sup> Stanišić Motion, paras 18, 19.

<sup>59</sup> Revised Indictment, para. 9.

<sup>60</sup> Final Pre-Trial brief, para. 9; read in conjunction with Corrigendum and Supplementary Annex E to Prosecution Consolidated Pre-Trial Brief, 15 May 2007, para. 5.

Trial Brief.<sup>61</sup> On this particular issue, the Prosecution noted that “[t]he concept of members of a JCE carrying out crimes through others who are not members of the JCE will be addressed in the *Brđanin* Appeal Judgement to be rendered 3 April 2007. In light of that Appeal Judgement, the Prosecution may need to seek leave to amend its Indictment to provide further clarification on this mode of liability.”<sup>62</sup>

40. The Trial Chamber fails to see how the Final Pre-Trial Brief substantially conflicts with the Revised Indictment on this particular matter.<sup>63</sup> The Defence is argument in this respect is therefore dismissed.

*(c) New Prosecution theory based on new material facts*

41. The Stanišić Defence alleges that the Prosecution “materially alters the factual basis through which it was alleged that Mr. Stanišić and the DB [State Security Service] were involved in the alleged JCE”.<sup>64</sup> The Trial Chamber disagrees. It considers that the Prosecution merely altered the particulars supporting the material facts pleaded in the Indictment. Such particulars were either provided because the Prosecution recently gained access to previously inaccessible materials, or because a number of witnesses provided evidence after the filing of the Original Pre-Trial Brief, which, as described *supra*, the Prosecution permissibly used to support the allegations in its Final Pre-Trial Brief.

42. The Defence also alleges that “the Prosecution factual case concerning the accused’s relationship to the Scorpion’s (*sic*) has altered considerably”.<sup>65</sup> It makes a similar argument for the Accused’s involvement with “Martić’s police”<sup>66</sup> and the “Red Berets”.<sup>67</sup> Again, the Trial Chamber disagrees. The Prosecution based itself largely on the Original and Supplementary Pre-Trial Brief, and to some extent on “new evidence” which was disclosed to the Defence in a timely fashion. As such, the Prosecution, at best, merely altered the particulars supporting the material facts pleaded in the Indictment. The Defence argument in this respect is dismissed.

43. Lastly, the Stanišić Defence submits that the aforementioned alleged involvement of the Accused in the DB and Accused’s relationship to “Martić’s police”, “the Scorpions” and “the

<sup>61</sup> Stanišić Motion, paras 16, 17.

<sup>62</sup> Final Pre-Trial Brief, para. 7, fn. 8.

<sup>63</sup> Final Pre-Trial Brief, para. 7, Revised Indictment, para. 12, 13. *See also, inter alia, Brđanin* Appeal Judgement, paras 389-432.

<sup>64</sup> Stanišić Motion, para. 20.

<sup>65</sup> Stanišić Motion, para. 23.

<sup>66</sup> Stanišić Motion, para. 24.

<sup>67</sup> Stanišić Motion, para. 33.

Red Berets” brought about a “new Prosecution theory”.<sup>68</sup> As stated above, the Final Pre-Trial brief is relevant to the case only insofar as it is in accordance with the Revised Indictment.<sup>69</sup> This does not mean that the Prosecution is strictly bound to what is included in the Final Pre-Trial Brief during its presentation of the evidence, as long as the charges against the Accused and the material facts underlying those charges remain unchanged. The Defence argument in this respect is dismissed.

*(d) New allegations necessitating an amendment to the Revised Indictment*

44. The Stanišić Defence alleges that the Final Pre-Trial Brief “introduces new allegations and new distinct bases for convictions.”<sup>70</sup> With respect to the Accused’s arguments relating to the crimes allegedly committed in Bosanski Šamac, the Trial Chamber reiterates that the “new” evidence on which the Prosecution relied in this respect was disclosed to the Defence in a timely manner and, at best, merely alters the particulars (namely, the date of the establishment of a Crisis Staff) supporting the material facts pleaded in the Indictment.
45. Equally, the Stanišić Defence alleges that the Final Pre-Trial Brief contains “new allegations” regarding the events in Srebrenica and Zvornik, opening up “the back door route to achieving a conviction for the alleged aiding and abetting of a genocide”, and “[introducing] a form of destruction of property”.<sup>71</sup> It is noted that the Prosecution has not charged the accused in this case either with the destruction of property or with aiding and abetting genocide. Contrary to the Defence’s allegations, the Chamber believes that the Prosecution merely presented the circumstances surrounding the alleged crimes in Srebrenica and Zvornik. The inclusion of facts relevant to the background and the context of the specific allegations brought against the Accused in the pre-trial brief, even if they are not in the Revised Indictment, does not affect the rights of the Accused.<sup>72</sup> The arguments raised by the Stanišić Defence are dismissed.
46. Lastly, the Stanišić Defence argues that, in its Original and Final Pre-Trial Brief, the Prosecution alleges that subordinates of the Accused were involved in the siege of Sarajevo, while Sarajevo is not pleaded in the Revised Indictment as a crime base.<sup>73</sup> Even though this allegation was already included in the Original Pre-Trial Brief of 2004, there is merit in the Defence argument that Sarajevo is not included in the Indictment as a separate crime base.

<sup>68</sup> Stanišić Motion, paras 21, 23, 24, 34.

<sup>69</sup> Decision, para. 18.

<sup>70</sup> Stanišić Motion, para. 25.

<sup>71</sup> Stanišić Motion, paras 26, 27, 30-32.

<sup>72</sup> *Prosecutor v. Zigiranyirazo*, Case No. ICTR-2001-73-PT, Decision on Defence urgent motion to exclude some parts of the Prosecution Pre-Trial Brief, 30 September 2005, para. 18.

<sup>73</sup> Stanišić Motion, paras 35-37.

Therefore, in the absence of a Prosecution request to amend the Revised Indictment, the Prosecution's allegation regarding the DB's alleged involvement in the siege of Sarajevo is irrelevant to the existing charges. This observation would however not warrant a re-filing of the Final Pre-Trial Brief.

#### **4. Conclusion: whether the Accused were 'promptly' informed of the charges against them**

47. The Stanišić Defence argues that the Accused were not promptly informed of the charges against them, as required by Article 21 of the Statute of the Tribunal.<sup>74</sup> It refers to the Trial Chamber in *Delić*, which indicated that "at some point, the Accused must be able to proceed with preparing his case in full knowledge of all the charges that have been or will be brought against him".<sup>75</sup>
48. As noted above, no new charges have been brought against the Accused, and no additional charges *could* have been brought against the Accused by means of a Pre-Trial Brief. Moreover, the Defence was provided with the evidence underlying the charges in the Revised Indictment in a timely fashion; in fact, most disclosure material had been provided in 2005.<sup>76</sup> Only a limited number of documents originating from previously inaccessible archives was recently disclosed to the Defence.<sup>77</sup> The Accused was granted timely access to those documents and was timely informed of witnesses that the Prosecution intends to call.<sup>78</sup>
49. For these reasons, the Trial Chamber concludes that the Accused were informed promptly of the charges raised against them.

---

<sup>74</sup> Stanišić Motion, paras 9-11.

<sup>75</sup> Stanišić Motion, para. 10 and fn. 10.

<sup>76</sup> Prosecution Response to Defence Motions Challenging the Prosecution Consolidated Pre-Trial Brief with Confidential Annex, 19 June 2007.

<sup>77</sup> *Ibid.*

<sup>78</sup> Prosecution Response to Defence Motions Challenging the Prosecution Consolidated Pre-Trial Brief with Confidential Annex, 19 June 2007; *see supra* paras 24-26.

**PURSUANT TO** Rules 54, 65, 73, 126 *bis* and 127 of the Rules,

For the foregoing reasons, the Trial Chamber **GRANTS** leave to file the Simatović Reply, **DENIES** leave to file the Stanišić Reply, **GRANTS** the Stanišić Defence leave to exceed the word limit for the Stanišić Motion, and **DENIES** the Defence Motions.

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



---

Judge Patrick Robinson  
Presiding

Dated this seventeenth day of July 2007  
At The Hague  
The Netherlands

**[Seal of the Tribunal]**