



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: 4 July 2008
Original: English

IN TRIAL CHAMBER III

Before: Judge Patrick Robinson, Presiding
Judge Pedro David
Judge Michèle Picard

Registrar: Mr. Hans Holthuis

Decision of: 4 July 2008

PROSECUTOR

v.

**JOVICA STANIŠIĆ
AND
FRANKO SIMATOVIĆ**

PUBLIC

**DECISION ON PROSECUTION MOTION FOR LEAVE
TO AMEND 65 *TER* LIST (DOCUMENTS RELEVANT
TO THE EVIDENCE OF EXPERT WITNESS
THEUNENS)**

The Office of the Prosecutor:

Mr. Dermot Groome
Ms. Doris Brehmeier-Metz
Mr. John Docherty
Mr. Gregory Townsend

Counsel for the Accused:

Mr. Geert-Jan Alexander Knoops and Mr. Wayne Jordash for Jovica Stanišić
Mr. Zoran Jovanović and Mr. Vladimir Domazet for Franko Simatović

1. **TRIAL CHAMBER III** (“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 (“Tribunal”) is seised of the “Fourth Prosecution Motion for Leave to Amend its Rule 65 *ter* Exhibit List (Documents Relevant to the Evidence of Expert Witness Theunens) with Confidential Annex” filed on 30 May 2008 (“Prosecution Motion”). In its Motion, the Prosecution requested that it be allowed to add 22 documents to its exhibit list that it intends to introduce through expert witness Reynaud Theunens.¹

Procedural History

2. On 26 February 2008, the Prosecution filed its “Prosecution Motion for Leave to Amend its Rule 65*ter* Exhibit List with Confidential Annex” (“26 February Motion”) in which it requested permission to add a number of documents, grouped into nine categories, to its Rule 65*ter* exhibit list. In its 8 May 2008 Decision,² the Trial Chamber granted the Prosecution’s 26 February Motion in part only, denying without prejudice, the Prosecution’s request to add those documents classified as Category 7 and Category 8 exhibits. With regard to the former category, the Trial Chamber determined, *inter alia*, that the Prosecution had failed to show good cause as to why the documents should have been added to its exhibit list and to demonstrate that these documents were of importance for its case.³ Moreover, the Trial Chamber was unable, based on the Prosecution’s motion of 26 February 2008, to identify in the Prosecution’s proposed exhibit list the documents that were included in Category 7 and was therefore not in a position to examine the relevance, length and nature of these documents.⁴ Finally, the Trial Chamber noted that Category 7 included a very significant number of documents.⁵

3. The 26 February Motion was followed by four Prosecution motions: one, filed confidentially on 9 May 2008; the remaining three being filed on 30 May 2008. The Prosecution requested in each of those motions that it be allowed to add a number of the above-mentioned Category 7 documents to its Rule 65*ter* exhibit list. In addition to the three 30 May 2008 motions, the Prosecution also filed on that date a motion for leave to add a military insignia patch book to its Rule 65*ter* Exhibit List.⁶

¹ . The term “document” is used in this Decision in a general sense, in that it includes all types of documents, including for instance videos and photographs

² Decision on Prosecution Motion for Leave to Amend its Rule 65*ter* Exhibit List, 8 May 2008.

³ *Ibid.*, para. 44.

⁴ *Ibid.*, para. 44.

⁵ *Ibid.*, paras 44 and 45.

⁶ Prosecution Motion for Leave to Add Military Insignia Patch Book to its Rule 65*ter* Exhibit List with Annexes A and B, filed on 30 May 2008.

4. On 12 June 2008, the Defence for Franko Simatović (“Simatović Defence”) responded to the Prosecution Motion (“Simatović Response”).⁷ On 13 June 2008, the Defence for Jovica Stanišić (“Stanišić Defence”) responded to the Prosecution Motion (“Stanišić Response”).⁸ The Prosecution requested leave to reply and replied to both Defence Responses on 18 June 2008 (“Prosecution Reply”).⁹ Leave to reply is hereby granted.

Arguments of the Parties

(a) Prosecution Motion

5. The Prosecution submitted that each of the 22 proposed exhibits appears on the Prosecution’s exhibit list of 26 February 2008. The Prosecution further noted that Rule 65 *ter*(E)(iii) requires that the final exhibit list is to be tendered 6 weeks before the pre-trial conference. Rather than looking at the planned date of the pre-trial conference, it argued that the Trial Chamber should take account of the actual date of said conference, namely 28 and 29 April 2008. This means that the witness list of 26 February 2008 was filed well within the time period envisaged by Rule 65 *ter*(E)(iii), giving the Defence ample notice of the exhibits that would be used by the Prosecution.

6. In response to the Trial Chamber’s concerns expressed in its Decision of 8 May 2008 that it was unable to examine their relevance, length and nature,¹⁰ the Prosecution has briefly outlined the relevance and nature of the proposed documents in confidential annex A to the Prosecution Motion.

(b) Stanišić Response

7. Although the Stanišić Defence did not raise any specific objections to the Prosecution Motion, it dealt globally with all four of the Prosecution’s 30 May 2008 Motions. Citing Articles 20(1) and 21(4) of the Statute of the Tribunal, the Stanišić Defence emphasised the Accused’s right to adequate time and facilities for the preparation of his Defence as a precursor to arguing that “the adjournment of the trial phase does not mean that the Defence has sufficient time to investigate and prepare for the proposed exhibits”.¹¹

⁷ Comprehensive Response of Simatović Defence to Second, Third and Fourth Prosecution Motion for Leave to Amend its Rule 65 *ter* Exhibit List, filed confidentially on 12 June 2008.

⁸ Defence Response to the Four Prosecution Motions All Dated 30 May 2008 and the Related Submission Dated 2 June 2008, filed confidentially on 13 June 2008.

⁹ Prosecution Request for Leave to Reply and Reply to Defence Responses to Prosecution Motions for Leave to Amend its 65 *ter* Exhibit List, 18 June 2008.

¹⁰ See Decision on Prosecution Motion for Leave to Amend its Rule 65*ter* Exhibit List, 8 May 2008, para. 44.

¹¹ Stanišić Response, para. 6.

8. In support of this submission, the Defence for Stanišić cited the 16 May Appeals Chamber Decision and argued that the Appeals Chamber “clearly envisioned” that the minimum three-month adjournment period should allow for the improvement of his health condition. The Stanišić Defence thereby argued that the Defence’s difficulty in obtaining instructions from its client due to his current state of health rendered the Defence unable to properly investigate and prepare its case in respect of the exhibits, submitting that this problem is further compounded by the large amount of material which the Prosecution seeks to have admitted.¹² Having further submitted that “[t]he addition of these exhibits would once again see a reorganisation of the factual case of the Prosecution”, the Defence pleaded undue prejudice arising from its being compelled to re-start its investigations to a “large extent”.¹³

(c) Stanišić Response

9. With respect to the four Prosecution motions, the Simatović Defence generally asserted that: “[i]n respect to the documents whose admission is sought by the Prosecution Requests, the Trial Chamber has already decided and thus rendered its confidential [8 May 2008 Decision] whereby the request in respect of this category of documents was denied. The Trial Chamber has stated that the Prosecution failed to show good cause for requesting the addition of the documents that fall within [Category 7] to the Rule 65ter list. The Trial Chamber has further stated that the Prosecution has failed to demonstrate that these documents are of importance for its case.”¹⁴ The Simatović Defence does not provide any further specific objections to the current Prosecution Motion.

(d) Prosecution Reply

10. With respect to all four Prosecution motions, the Prosecution reiterated that the Defence had ample time to examine the proposed 22 documents, each of which were known to the Defence since at least 25 February 2008.¹⁵ It stressed that it did not change its case against the Accused, nor did it add charges or material facts merely by its introduction of the requested documents. Hence, the Defence need not “restart its investigation”, as the Stanišić Defence contended.¹⁶

¹² *Ibid.*

¹³ *Ibid.*, paras 3 and 8.

¹⁴ Simatović Response, para. 3.

¹⁵ Prosecution Reply, para. 5.

¹⁶ Prosecution Reply, para. 10 and 6, referring to para. 8 of the Stanišić Response which stated that “The Defence would be prejudiced as its own investigation to a large extent would have to be restarted [...]”.

Discussion

11. The Trial Chamber refers to its 8 May 2008 Decision in which it stated the applicable law regarding applications for the amendment of the Prosecution's Rule 65*ter* exhibit list. The Trial Chamber finds that the statement of law in that Decision is the applicable law for the present Decision.

12. Having reviewed the Prosecution's submissions, the Trial Chamber finds that the Prosecution failed to show good cause for requesting the addition of the documents in question to its exhibit list at the current stage of the proceedings. That notwithstanding, the Chamber has considered the confidential annex to the Prosecution Motion setting out in detail the relevance of the 22 documents to the Prosecution case, four of which are specifically referenced in the expert report of Theunens. The Trial Chamber finds that the documents are *prima facie* relevant and of sufficient importance to the proceedings against both Accused to allow for its addition at the current stage of proceedings.

13. The Trial Chamber notes that, apart from 3 documents that were provided to the Defence in 2007, the documents were disclosed in February 2008. The Trial Chamber is mindful that the Accused should be afforded adequate time within which to examine the 22 documents with a view to preparing their respective defences. In this respect, the Trial Chamber takes into consideration its overriding objective under Article 20(1) of the Statute to "ensure that a trial is fair and expeditious and that proceedings are conducted [...] with full respect for the rights of the accused". Furthermore, the trial of the Accused will not commence until such time as a re-assessment of the Accused Stanišić's health condition is undertaken.¹⁷ In light of the foregoing the Trial Chamber will therefore ensure, in its management of the trial proceedings, that the Defence will not be prejudiced by the timing and use of the 22 documents at trial, whether they are introduced through expert witness Theunens or another witness. With this in mind, the Chamber notes that the Prosecution has yet to disclose the English translation of the transcript of the two videos bearing 65 *ter* numbers 4787 and 4490, or parts of this translation; it expects that full transcripts will be provided to the Defence as soon as practically possible.

¹⁷ Prosecutor v. Stanišić and Simatović, IT-03-69-AR73.2, Decision on Defence Appeal of the Decision on Future Course of Proceedings, 16 May 2008, para. 22.

Disposition

14. For the foregoing reasons the Trial Chamber hereby **GRANTS** leave to reply to the Simatović Response and the Stanišić response, **GRANTS** the Prosecution Motion, and **ORDERS** that the English translation of the transcript of the two videos bearing 65 *ter* numbers 4787 and 4490 be disclosed to the Defence as soon as practicable.

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



Judge Patrick Robinson
Presiding

Dated this fourth day of July 2008
At The Hague
The Netherlands

[Seal of the Tribunal]