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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: 24 April 2009
Original: English

IN TRIAL CHAMBER I

Before: Judge Alphons Orie, Presiding
Judge Flavia Lattanzi
Judge Michèle Picard

Acting Registrar: Mr John Hocking

Decision of: 24 April 2009

PROSECUTOR

v.

JOVICA STANIŠIĆ
and
FRANKO SIMATOVIĆ

PUBLIC

DECISION ON FIFTH, SIXTH, SEVENTH AND EIGHTH PROSECUTION MOTIONS
FOR LEAVE TO AMEND ITS RULE 65 TER EXHIBIT LIST

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I. PROCEDURAL HISTORY

1. The Prosecution filed its original proposed Rule 65 *ter* Exhibit List on 19 July 2004. Since then the Prosecution filed several motions for leave to amend its exhibit list which were decided by the Trial Chamber.¹ The present decision addresses the following four motions:

- 1) Confidential “Fifth Prosecution Motion for Leave to Amend its Rule 65 *ter* Exhibit List (Spreadsheet and 20 DB Reports) with Confidential Annex”, 22 July 2008 (“Fifth 65 *ter* Motion”);
- 2) Partly Confidential “Sixth Prosecution Motion for Leave to Amend its Rule 65 *ter* Exhibit List with Confidential Annex”, 22 July 2008 (“Sixth 65 *ter* Motion”);
- 3) Partly Confidential “Seventh Prosecution Motion for Leave to Amend its Rule 65 *ter* Exhibit List with Confidential Annex”, 2 October 2008 (“Seventh 65 *ter* Motion”);
- 4) Partly Confidential “Eighth Prosecution Motion for Leave to Amend its Rule 65 *ter* Exhibit List with Confidential Annexes”, 20 January 2009 (“Eighth 65 *ter* Motion”).

2. On 5 August 2008, the Stanišić’s Defence filed its Confidential “Defence Response to ‘Fifth and Sixth Prosecution Motion for Leave to Amend its Rule 65 *ter* Exhibit List with Confidential Annex’” (“Response to Fifth and Sixth 65 *ter* Motion”).² On 15 October 2008, the Stanišić Defence publicly filed its “Defence Response to ‘Seventh Prosecution Motion for Leave to Amend its Rule 65 *ter* Exhibit List with Confidential Annex’” (“Stanišić Response to Seventh 65 *ter* Motion”). On 16 October 2008, the “Response of Simatović Defence to Seventh Prosecution Motion for Leave to Amend its Rule 65 *ter* Exhibit List” was filed publicly (“Simatović Response to Seventh 65 *ter* Motion”). On 3 February 2009, the “Simatović Defence Response to ‘Eight Prosecution Motion for Leave to Amend its Rule 65 *ter* Exhibit List with Confidential Annex’” was filed publicly (“Simatović Response to Eighth 65 *ter* Motion”). On 5 February 2009, the Stanišić Defence

¹ See Prosecution Motion for Leave to Amend its Rule 65 *ter* Exhibit List with Confidential Annex, 26 February 2008 and Decision on Prosecution Motion for Leave to Amend its Rule 65 *ter* Exhibit List, 8 May 2008 (“8 May Decision”); Prosecution Motion for Leave to Amend Rule 65 *ter* List (Documents Relevant to the Evidence of Expert Witness Theunens), 29 May 2008 and Decision on Prosecution Motion for Leave to Amend Rule 65 *ter* List (Documents Relevant to the Evidence of Expert Witness Theunens), 4 July 2008; Second Prosecution Motion for Leave to Amend Rule 65 *ter* List (Documents Tendered Pursuant to Rule 92 *bis/ter/quarter*), 29 May 2008 and Decision on Second Prosecution Motion for Leave to Amend Rule 65 *ter* List (Documents Tendered Pursuant to Rule 92 *bis/ter/quarter*), 7 July 2008; Third Prosecution Motion for Leave to Amend Rule 65 *ter* List (Exhibits that Form Part of a Witness Statement) with Annex, 29 May 2008 and Decision on Prosecution Motion to Add 31 Documents to its Rule 65 *ter* Exhibit List, 7 July 2008; Prosecution Motion for Leave to Add Military Insignia Patch Book to its Rule 65 *ter* List with Annexes A and B, 29 May 2008 and Decision on Prosecution Motion for Leave to Add Military Insignia Patch Book to its Rule 65 *ter* List with Annexes A and B, 3 July 2008.

² The Trial Chamber notes that Simatović Defence did not file any responses to the Fifth and Sixth 65 *ter* Motions.

publicly filed its “Defence Response to the Eighth Prosecution Motion for Leave to Amend its Rule 65 *ter* Exhibit List” (“Stanišić Response to Eighth 65 *ter* Motion”).

3. The Trial Chamber notes that the Stanišić Response to Eighth 65 *ter* Motion was filed after expiration of the 14 days prescribed by the Rules to do so. However, taking into account the technical problems the Defence was experiencing with electronic filing at the time³ (see Stanišić Response to Eighth 65 *ter* Motion, para. 1), the Trial Chamber will exceptionally consider the Stanišić Response to Eighth 65 *ter* Motion.

4. On 22 October 2008, the “Prosecution Request for Leave to Reply and Consolidated Reply to Defence Responses to Prosecution Seventh Motion for Leave to Amend its Rule 65 *ter* Exhibit List” was filed (“October 2008 Reply”). On 10 February 2009, the “Prosecution Request for Leave to Reply and Consolidated Reply to Defence Responses to Prosecution Eighth Motion for Leave to Amend its Rule 65 *ter* Exhibit List with Confidential Annex” was filed partly-confidentially (“February 2009 Reply”).

II. APPLICABLE LAW

5. Rule 65 *ter*(E)(iii) of the Tribunal’s Rules of Procedure and Evidence (“Rules”) provides, *inter alia*, that the Prosecution shall file its list of exhibits no later than six weeks before the Pre-Trial Conference. The primary purpose of Rule 65 *ter* (E)(iii) of the Rules is to ensure that the presentation of evidence during the trial is efficiently prepared and to allow the Defence to prepare its case.⁴ Indeed, pursuant to Articles 20(1) and 21(4)(b) of the Statute, an accused is entitled to a fair and expeditious trial, and to have adequate time and facilities for the preparation of his defence. As it was already stated by the Chamber in its 8 May Decision, if the Prosecution requests the addition of some documents to its exhibit list later than six weeks before the Pre-Trial Conference, the Trial Chamber may authorise this addition in the exercise of its inherent discretion in managing the trial proceedings and if satisfied that this is in the interests of justice.⁵

6. When exercising its discretion, the Trial Chamber must balance the Prosecution’s duty to present the available evidence to prove its case with the right of the accused to a fair and expeditious trial and the right to have adequate time and facilities for the preparation of the

³ See Stanišić Response to Eighth 65 *ter* Motion, para. 1.

⁴ See, *inter alia*, *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-94-T, Decision on Prosecution Motion to Add to the Exhibits List (Confidential), 18 September 2007, p. 5.

⁵ 8 May 2008 Decision, para. 5. See also *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-AR73.1, Decision on Appeals Against Decision Admitting Material related to Borovčanin’s Questioning, 14 December 2007 (“*Popović et al.* Appeal Decision”), para. 37.

defence.⁶ In this respect, the Trial Chamber will consider whether the proposed evidence is *prima facie* relevant and probative, whether it is of sufficient importance to justify a late addition, whether the Prosecution has shown good cause to add the documents at this stage of the proceedings, and the extent to which the new documents create an additional burden on the Defence.⁷

III. SUBMISSIONS

A. Fifth and Sixth 65 ter Motion

7. In its Fifth 65 *ter* Motion, the Prosecution seeks to add to its Rule 65 *ter* Exhibit List the spreadsheet of 28 Serbian Security (“DB”) reports as well as 20 of the reports listed therein (“V-Proffered Reports”).⁸ In support of its motion, the Prosecution submits that all these reports were obtained from the State Security Agency Archives in Belgrade. Moreover, all of the reports are signed by a person who was a DB employee at the time the reports were written, and that they are addressed to Mr Simatović, either by name or by title. As a consequence, the Prosecution argues that the V-Proffered Reports bear substantial guarantees of reliability and authenticity.

8. The Prosecution submits that all V-Proffered Reports are relevant as they show that the DB had a reporting mechanism in place by which the Accused Simatović was informed, frequently and in detail, about events occurring in the Krajina during the indictment period.⁹ Finally, all of them were disclosed to the Defence between 6 June 2007 and 26 February 2008.¹⁰

9. In its Sixth 65 *ter* Motion, the Prosecution seeks to add 89 documents to its 65 *ter* Exhibit Lists (“VI-Proffered Documents”).¹¹ In support of its motion, it argues that the V-Proffered Documents are relevant to the case and were disclosed to the Defence between 19 July 2004 and 18 July 2008 (the vast majority being disclosed on 22 February 2008).¹²

10. The Stanišić Defence objects to the addition of both V-Proffered Reports and VI-Proffered Documents.¹³ In support of its objection, it submits that, due to his state of health, the Accused

⁶ *Popović et al.* Appeal Decision, para. 37; *Prosecutor v. Ante Gotovina et al.*, Case No. IT-06-90-T, Decision on Prosecution’s Motion to Admit Documents into Evidence and Add Two Documents to the Prosecution’s Rule 65 *ter* Exhibit List, 25 November 2008 (“Gotovina Decision”), para. 9.

⁷ *Popović et al.* Appeal Decision, para. 37; Gotovina Decision, para. 9.

⁸ Fifth 65 *ter* Motion, paras 3, 12. The Prosecution notes that the remaining reports are already on the Prosecution 65 *ter* Exhibit List.

⁹ Fifth 65 *ter* Motion, para. 7.

¹⁰ Fifth 65 *ter* Motion, para. 11, Annex.

¹¹ Sixth 65 *ter* Motion, paras 7, 11.

¹² Sixth 65 *ter* Motion, Annex. See the detailed submissions as to the relevance of the particular documents in the Annex.

¹³ Response to Sixth 65 *ter* Motion, paras 2, 7.

Stanišić is unable to give adequate instructions to his counsel and as a consequence the Defence is not able to effectively investigate and prepare for additional exhibits.¹⁴ Furthermore, the Defence argues that the continued addition of material to the Rule 65 *ter* Exhibit List forces the Defence to restart its investigation and thus prevents the Defence from preparing its case.¹⁵

B. Seventh 65 *ter* Motion

11. In its Seventh 65 *ter* Motion, the Prosecution seeks to add to its Rule 65 *ter* Exhibit List 70 additional documents (“VII-Proffered Documents”).¹⁶ Forty of them relate to proof of death and the identity of the victims from the Doboje crime base and an additional 12 are reports submitted to the Serb leadership in the Croatian Krajina and copied to “Frenki”.¹⁷

12. In support of its motion, the Prosecution submits that all the VII-Proffered Documents are highly relevant to the crimes charged in the Indictment¹⁸ and were disclosed to the Defence in B/C/S no later than 15 September 2008.¹⁹

13. The Stanišić Defence in support of its objection to the Seventh 65 *ter* Motion, repeats that the Defence is still extremely handicapped by not receiving instructions from of the Accused Stanišić.²⁰ It further submits that the addition of the VII-Preferred Documents would once again see a reorganisation in the factual case of the Prosecution and the Defence would be prejudiced as its own investigation to a large extent would have to be restarted.²¹

14. The Simatović Defence in support of its objection to the Seventh 65 *ter* Motion, submits that the constant addition of new documents creates an atmosphere of unreliability and unpredictability to the process of the Defence preparation.²²

15. In its October 2008 Reply, the Prosecution argues that since the case is in the pre-trial phase again, there are no current deadlines in the Rules other than Rule 65ter (E) that requires the Prosecution to present its witness and exhibit lists no later than six weeks prior to the pre-trial

¹⁴ Response to Sixth 65 *ter* Motion, para. 4.

¹⁵ Response to Sixth 65 *ter* Motion, paras 5-6.

¹⁶ Sixth 65 *ter* Motion, paras 1, 7.

¹⁷ Sixth 65 *ter* Motion, para. 5.

¹⁸ See Sixth 65 *ter* Motion, Annex.

¹⁹ Sixth 65 *ter* Motion, para. 4. The Trial Chamber notes that during the last status conference on 11 March 2009, the Defence did not raise any problems with pending translations.

²⁰ Stanišić Response to Seventh 65 *ter* Motion, para. 7.

²¹ Stanišić Response to Seventh 65 *ter* Motion, para. 9.

²² Simatović Response to Seventh 65 *ter* Motion, paras 3-4.

conference.²³ Moreover, the Prosecutor argues that it has presented new exhibits, but no new charges.²⁴

16. The Prosecution also recalls that the VII-Proffered Documents are of high relevance and importance to the case and that it applied due diligence when reviewing them in a timely manner.²⁵

C. Eighth 65 ter Motion

17. In its Eighth 65 *ter* Motion, the Prosecution seeks to add to its Rule 65 *ter* Exhibit List 83 additional documents (“VIII-Proffered Documents”).²⁶ 74 of them concern lists of certain *per diem* payments made by the DB between 1990 and 1995 to members of the Special Units.²⁷ According to the Prosecution, they are relevant to the case as they prove the close relationship between the Serbian DB and special units such as JADT (Unit for Anti-Terrorist Operations of the State Security Service), PJM (Special Police Unit) and JPN (Special Purpose Unit).²⁸ They were disclosed to the Defence in B/C/S on 4 November 2008.²⁹ The Prosecution further submits that the remaining nine documents are relevant and were disclosed to the Defence between 31 October 2008 and 16 January 2009.³⁰

18. The Simatović Defence in support of its objection to the Eighth 65 *ter* Motion, recalls its argument that the constant addition of new documents creates an atmosphere of insecurity and uncertainty in regard of the core of the Prosecution’s case against the Accused.³¹ As a consequence, the adjustment, as proposed by the Prosecution, requires new analyses of the case, a new strategy as well as new and additional investigation on the part of the Defence.³² Moreover, the Defence points out that the Prosecution did not show a good cause as to why the disclosure of the VIII-Proffered Documents was carried out almost one year after the Prosecution had obtained them.³³

19. The Stanišić Defence in support of its objection to the Eighth 65 *ter* Motion, recalls its submission that “the suggestion [...] that the Accused is able to provide a meaningful analysis of

²³ October 2008 Reply, para. 7.

²⁴ October 2008 Reply, para. 8.

²⁵ October 2008 Reply, para. 10.

²⁶ Eighth 65 *ter* Motion, paras 1, 10.

²⁷ Eighth 65 *ter* Motion, para. 7.

²⁸ Eighth 65 *ter* Motion, para. 7.

²⁹ The Trial Chamber notes that during the last status conference on 11 March 2009, the Defence did not raise any problems with regard to pending translations.

³⁰ Eighth 65 *ter* Motion, para. 8, Annex II.

³¹ Simatović Response to Eighth 65 *ter* Motion, paras 4-5.

³² Simatović Response to Eighth 65 *ter* Motion, paras 4-5.

³³ Simatović Response to Eighth 65 *ter* Motion, paras 6-7.

the reports, provide instructions or even read them, stretches the bounds of incredulity”.³⁴ The Defence further points out that the proposed amendments to the Rule 65 *ter* Exhibit List would place a correspondingly heavy analytical and time-consuming burden on the Defence.³⁵ Moreover, the Defence argues that the Prosecution failed to show a good cause for seeking addition of the VIII-Proffered Documents after approximately one year after obtaining them.³⁶

20. In its February 2009 Reply, the Prosecution, while addressing the Stanišić Response to Eighth 65 *ter* Motion points out that the addition of the documents to the Rule 65 *ter* Exhibit List does not change the essence of the case or create uncertainty of the core of the Prosecution’s case, nor do the documents add new allegations against the Accused.³⁷ Moreover, it argues that it has handled the documents with due diligence and had filed its Eighth 65 *ter* Motion in due time.³⁸

IV. DISCUSSION

21. At the outset, the Trial Chamber recalls that it already addressed the issue whether the Accused Stanišić has been legally found unfit to instruct his counsel. Accordingly, the Trial Chamber noted that it “views the current situation in light of the Defence experiencing practical inconvenience rather than inability to receive instructions from its client”.³⁹

22. The Trial Chamber is convinced, based on the arguments of the Prosecution which were not challenged by the Defence, that the documents referred to in the four 65 *ter* motions are *prima facie* relevant and probative and of sufficient importance to justify an amendment of the Rule 65 *ter* Exhibit List.

23. The Prosecution offers several statements of a rather general nature concerning the on-going review of the evidence available and justifications that it acted with due diligence in the process of reviewing the exhibits and frequent delays in this process were due to the problems with losing a priority case status after the case was moved back to the pre-trial stage. The Trial Chamber finds that the Prosecution falls short in properly establishing a good cause for seeking the sought material to be added to the Rule 65 *ter* Exhibit List with such delays. However, the Trial Chamber will

³⁴ Stanišić Response to Eighth 65 *ter* Motion, paras 12-14.

³⁵ Stanišić Response to Eighth 65 *ter* Motion, paras 15-16.

³⁶ Stanišić Response to Eighth 65 *ter* Motion, paras 5, 17-20.

³⁷ February 2009 Reply, paras 9-10.

³⁸ February 2009 Reply, paras 11-19.

³⁹ Decision on Defence Request for Extension of Time to Respond to Second Prosecution Motion for Judicial Notice of Adjudicated Facts, 23 April 2009, para. 11. See also “Defence Response to Prosecution Motion of Revocation of Jovica Stanišić’s Provisional Release and Re-Assessment of his Health, 20 April 2009, para. 7, where Stanišić Defence held that “[i]t is quite correct that the Accused has not been judged legally unfit to stand trial: this we know – and the parties are at liberty to repeat this *ad infinitum*”.

consider whether it is nevertheless in the interests of justice to grant the Prosecution leave to add the documents to its Rule 65 *ter* Exhibit List.

24. A primary consideration for the Trial Chamber is the extent to which the addition will create an additional burden on the Defence. The number of documents that the Prosecution seeks to add is relatively high. By a way of filing the four 65 *ter* motions, the Prosecution put the Defence on notice between 3 and 9 months ago that it seeks addition of this material to its Rule 65 *ter* Exhibit List.⁴⁰ As mentioned above, according to Rule 65 *ter* E(iii), the Prosecution is obliged to present its Rule 65 *ter* Exhibit List to the Defence not later than six weeks before the pre-trial conference. The present case is at the moment again in its pre-trial stage,⁴¹ however, the pre-trial conference has been already scheduled for 18 May 2009.⁴² The Trial Chamber considers that, although the Defence has been aware of the Prosecution's intention to add the exhibits in question to its Rule 65 *ter* Exhibit List since some time, in order to fully accommodate the Defence, the Prosecution should not use the sought material until after six weeks after rendering of the present Decision, or if there are some still pending translations due, after six weeks from receiving such translations by the Defence.

25. For the foregoing reasons, and balancing the Prosecution's duty to present the available evidence to prove its case with the right of the accused to a fair and expeditious trial and the right to have adequate time and facilities for the preparation of the defence, the Trial Chamber is satisfied that it is in the interests of justice to add the material sought by the Prosecution in its Fifth, Sixth, Seventh and Eighth 65 *ter* Motions to the Rule 65 *ter* Exhibit List.

⁴⁰ The Trial Chamber recalls that the Fifth and Sixth 65 *ter* Motions were filed approximately 9 months ago, the Seventh – 7 months and the Eighth – 3 months ago.

⁴¹ See e.g. Decision on Provisional Release, 26 May 2008, para. 63.

⁴² Order Scheduling the Commencement of Trial, 24 April 2009.

V. DISPOSITION

26. For the foregoing reasons and pursuant to Rules 54 and 65 *ter* of the Rules, the Trial Chamber

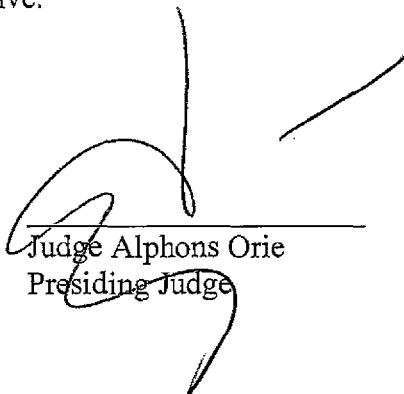
GRANTS the Prosecution's request to file October 2008 Reply;

GRANTS the Prosecution's request to file February 2009 Reply;

GRANTS the Fifth, Sixth, Seventh and Eighth 65 *ter* Motions;

ORDERS the Prosecution to file a revised exhibit list within seven days after rendering of the present decision.

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



Judge Alphons Orie
Presiding Judge

Dated this twenty-fourth day of April 2009
At The Hague
The Netherlands

[Seal of the Tribunal]