



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: 10 February
2010
Original: English

IN TRIAL CHAMBER I

Before: Judge Alphons Orie, Presiding
Judge Michèle Picard
Judge Elizabeth Gwaunza

Registrar: Mr John Hocking

Decision of: 10 February 2010

PROSECUTOR

v.

**JOVICA STANIŠIĆ
FRANKO SIMATOVIĆ**

PUBLIC

**DECISION ON ELEVENTH, TWELFTH AND THIRTEENTH
PROSECUTION MOTIONS FOR LEAVE TO AMEND ITS
RULE 65 TER EXHIBIT LIST**

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I. PROCEDURAL HISTORY

1. On 19 July 2004, the Prosecution filed its exhibit list pursuant to Rule 65 *ter* of the Rules of Procedure and Evidence of the Tribunal (“Rule 65 *ter* Exhibit List” and “Rules”, respectively).¹ Since then, the Prosecution filed several motions for leave to amend its Rule 65 *ter* Exhibit List which were decided upon by the Chamber.² The present decision addresses the following three pending motions:

- 1) Partly confidential “Eleventh Prosecution Motion for Leave to Amend its Rule 65 *ter* Exhibit List with Confidential Annex”, 22 July 2009 (“Eleventh 65 *ter* Motion”);
- 2) Partly confidential “Twelfth Prosecution Motion for Leave to Amend its Rule 65 *ter* Exhibit List with Confidential Annex”, 12 August 2009 (“Twelfth 65 *ter* Motion”);
- 3) Confidential “Thirteenth Prosecution Motion for Leave to Amend its Rule 65 *ter* Exhibit List with Confidential Annex”, 12 August 2009 (“Thirteenth 65 *ter* Motion”).

2. On 28 July 2009, the Simatović Defence filed its confidential “Defence Response to ‘Eleventh Prosecution Motion for Leave to Amend its Rule 65 *ter* Exhibit List with Confidential Annex’” (“Simatović Response to the Eleventh 65 *ter* Motion”). On 6 August 2009, the Stanišić

¹ Pre-Trial Brief, Confidential Annex C, Prosecution’s Intended Exhibit List, 19 July 2004.

² 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 (Confidential), 8 May 2008 (“8 May Decision”); Prosecution Motion for Leave to Amend its Rule 65 *ter* Exhibit List with Annex (Category 7), 9 May 2008 and Decision on Prosecution Motion to Amend its Rule 65 *ter* Exhibit List with Annex (Category 7), 18 June 2008; Prosecution Motion for Leave to Add Military Insignia Patch Book to its Rule 65 *ter* Exhibit List with Annexes A and B, 30 May 2008 and Decision on Prosecution Motion for Leave to Add Military Insignia Patch Book to its Rule 65 *ter* Exhibit List with Annexes A and B, 3 July 2008; Second Prosecution Motion to Amend its Rule 65 *ter* Exhibit List (Documents Tendered Pursuant to Rule 92 *bis/ter/quarter*) with Confidential Annex, 30 May 2008 and Decision on Second Prosecution Motion to Amend its Rule 65 *ter* Exhibit List (Documents Tendered Pursuant to Rule 92 *bis/ter/quarter*), 7 July 2008; Third Prosecution Motion for Leave to Amend its Rule 65 *ter* Exhibit List (Exhibits that Form Part of a Witness Statement) with Annex, 30 May 2008 and Decision on Prosecution Motion to Add 31 Documents to its Rule 65 *ter* Exhibit List, 7 July 2008; 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, 30 May 2008 and Decision on Prosecution Motion for Leave to Amend 65 *ter* Exhibit List (Documents Relevant to the Evidence of Expert Witness Theunens), 4 July 2008; Fifth Prosecution Motion for Leave to Amend its Rule 65 *ter* Exhibit List (Spreadsheet and 20 DB Reports) with Confidential Annex, 22 July 2008; Sixth Prosecution Motion for Leave to Amend its Rule 65 *ter* Exhibit List with Confidential Annex, 22 July 2008; Seventh Prosecution Motion for Leave to Amend its Rule 65 *ter* Exhibit List with Confidential Annex, 2 October 2008; Eighth Prosecution Motion for Leave to Amend its Rule 65 *ter* Exhibit List with Confidential Annexes, 20 January 2009 and Decision on Fifth, Sixth, Seventh and Eighth Prosecution Motions for Leave to Amend its Rule 65 *ter* Exhibit List, 24 April 2009; Ninth Prosecution Motion for Leave to Amend its Rule 65 *ter* Exhibit List (Mladić 1995 Notebook) with Confidential Annex, 29 April 2009; Tenth Prosecution Motion for Leave to Amend its Rule 65 *ter* Exhibit List with Confidential Annex, 7 May 2009 and Oral Decision on Ninth and Tenth Prosecution Motions for Leave to Amend its Rule 65 *ter* Exhibit List, 2 June 2009, T. 1405-1409.

Defence filed its “Defence Response to the 11th Prosecution Motion for Leave to Amend its Rule 65 *ter* Exhibit List” (“Stanišić Response to the Eleventh 65 *ter* Motion”).

3. The Chamber notes that the Stanišić Response to the Eleventh 65 *ter* Motion was filed after the fourteen day time limit prescribed by Rule 126 *bis* had expired. Taking into account, however, the technical problems experienced by the Stanišić Defence in filing its response,³ the Chamber will exceptionally consider the Stanišić Response to the Eleventh 65 *ter* Motion.

4. On 26 August 2009, the Stanišić Defence filed a “Defence Response to the 12th and 13th Prosecution Motion for Leave to Amend its Rule 65 *ter* Exhibit List” (“Stanišić Defence Response to the Twelfth and Thirteenth 65 *ter* Motions”).

5. On 15 October 2009, the Chamber granted the Simatović Defence until 15 November 2009 to respond to the Twelfth 65 *ter* Motion and the Thirteenth 65 *ter* Motion.⁴ On 16 November 2009, the Simatović Defence joined the Stanišić Defence Response to the Twelfth and Thirteenth 65 *ter* Motions adopting all the arguments contained therein (“Simatović Joinder Motion”).⁵ The Chamber notes that the Simatović Joinder Motion was filed after the deadline imposed by the Chamber but considers that it was validly filed in accordance with Rule 126 (B) of the Rules.

6. On 13 November 2009, the Prosecution filed its “Prosecution Submission on 92 *ter* and 92 *bis* Witnesses” (“92 *ter* and 92 *bis* Submission”).⁶ The Stanišić Defence and the Simatović Defence did not respond to the 92 *ter* and 92 *bis* Submission.

II. SUBMISSIONS

A. Eleventh 65 *ter* Motion

7. In its Eleventh 65 *ter* Motion, the Prosecution seeks leave to add to its Rule 65 *ter* Exhibit List specific clips and excerpts of two videos and two diaries (“the Proposed Eleventh 65 *ter* Exhibit List”).

³ Stanišić Response to the Eleventh 65 *ter* Motion, para. 3.

⁴ Decision on Motion for Adjournment of Proceedings by the Simatović Defence, 15 October 2009, paras 29(ii) - (iii), 30(iv) (d) - (e).

⁵ Defence Joinder to “Defence Response to the 12th and 13th Prosecution Motion for Leave to Amend its Rule 65 *ter* Exhibit List”, 16 November 2009.

⁶ Prosecution Submission on 92 *ter* and 92 *bis* Witnesses, 13 November 2009.

Motion Exhibits”),⁷ which have been identified by the Prosecution as highly relevant,⁸ and the addition of which, it states, is in the interests of justice.⁹

8. The Prosecution submits that in both videos, the identified excerpts contain evidence relating to the “common criminal plan to create an ethnically pure Serb state”¹⁰ and that video 65 *ter* number 5052 contains “evidence of cooperation between key members of the joint criminal enterprise [“the JCE”]”.¹¹ The Prosecution further submits that it received both videos from the Office of the War Crimes Prosecutor of the Republic of Serbia on 7 April 2009.¹²

9. The Prosecution also argues that the diary bearing 65 *ter* number 5053 contains entries that demonstrate “cooperation between the State Security Service of Serbia and the Bosnian Serb Army (VRS)”¹³ and that the diary bearing 65 *ter* number 5054 contains entries evidencing “close cooperation between the state security organs of the RSK [(Republic of Serbian Krajina)] and the Republic of Serbia”.¹⁴ The Prosecution states that it received the former document from the Office of the War Crimes Prosecutor of the Republic of Serbia on 27 March 2009 and the latter document from the Department of Cooperation of the Republic of Croatia on 2 October 2008.¹⁵

10. The Simatović Defence opposes the addition of the Proposed Eleventh 65 *ter* Motion Exhibits and submits that the Prosecution’s late disclosure and proposed amendment of the Rule 65 *ter* Exhibit List “annuls” the substance of Rule 65 *ter* (E) which guarantees, in this context, Simatović’s right to adequate time and conditions for defence preparation.¹⁶ Further, the Simatović Defence states that late disclosure and addition of new documents to the Rule 65 *ter* Exhibit List is causing it “irreparable damage”, especially as the trial has now started and some important witnesses have testified.¹⁷

11. In particular, the Simatović Defence questions the relevance of the two videos and emphasises that the Prosecution was in possession of these videos for more than three months prior to disclosing them.¹⁸ The Simatović Defence also calls into question the reliability of one of the

⁷ Eleventh 65 *ter* Motion, Annex A, p. 2. The videos bear proposed 65 *ter* numbers 5051 and 5052 and the diaries bear proposed 65 *ter* numbers 5053 and 5054, respectively.

⁸ Eleventh 65 *ter* Motion, para. 5.

⁹ Eleventh 65 *ter* Motion, para. 2.

¹⁰ Eleventh 65 *ter* Motion, paras 6-7.

¹¹ Eleventh 65 *ter* Motion, para. 7.

¹² Eleventh 65 *ter* Motion, paras 6-7.

¹³ Eleventh 65 *ter* Motion, para. 8.

¹⁴ Eleventh 65 *ter* Motion, para. 9.

¹⁵ Eleventh 65 *ter* Motion, paras 8-9.

¹⁶ Simatović Response to Eleventh 65 *ter* Motion, paras 1, 3.

¹⁷ Ibid.

¹⁸ Simatović Response to Eleventh 65 *ter* Motion, para. 4.

diaries (65 *ter* number 5053),¹⁹ noting in particular the Prosecution's own admission that the notes contained therein are "likely from Mladić".²⁰ Thus, the Simatović Defence suggests that the Prosecution did not demonstrate that this document fulfils the requirements for addition to the Rule 65 *ter* Exhibit List.²¹ Further, although the Simatović Defence admits that it was aware of the existence of the second diary, it declares that it was not aware of the other Eleventh 65 *ter* Motion Proposed Exhibits, or of the Prosecution's intention to use them.²² The Simatović Defence also questions the origin and reliability of the second diary (65 *ter* number 5054) and emphasises that the Prosecution had this item in its possession for nine months prior to seeking leave for its addition to the Rule 65 *ter* Exhibit List.²³

12. The Stanišić Defence opposes the Eleventh 65 *ter* Motion and submits that by the Prosecution being allowed to continually change its "[t]heory and materials", the Stanišić Defence is faced with a case that now differs substantially from the case proposed in 2007, which makes a fair trial impossible.²⁴ The Stanišić Defence highlights that the Proposed Eleventh 65 *ter* Motion Exhibits have been in the possession of the Prosecution for several months. The Stanišić Defence states that no good cause has been shown by the Prosecution as to why the materials were not disclosed earlier.²⁵

13. The Stanišić Defence submits that one of the diaries (proposed 65 *ter* number 5053) has not yet been authenticated and that there are no "reliable indicia" which assist in establishing the origin and author of the document. The Stanišić Defence concludes that, as a consequence, the diary cannot be added to the Prosecution's 65 *ter* Exhibit List as being "likely authored by Mr. Mladić".²⁶

B. Twelfth 65 *ter* Motion

14. In its Twelfth 65 *ter* Motion, the Prosecution seeks to add to its Rule 65 *ter* Exhibit List 17 documents ("the Proposed Twelfth 65 *ter* Motion Exhibits") which it states are intelligence reports prepared by the VRS and the Army of the Republika Srpska Krajina ("SVK").²⁷ These reports have been identified by the Prosecution as constituting "critically important evidence"²⁸ in this case and it is stressed that the Proposed Twelfth 65 *ter* Motion Exhibits have been selected from a total of

¹⁹ Simatović Response to Eleventh 65 *ter* Motion, para. 5.

²⁰ Eleventh 65 *ter* Motion, Annex A, p. 2.

²¹ Simatović Response to Eleventh 65 *ter* Motion, para. 5.

²² Simatović Response to Eleventh 65 *ter* Motion, para. 3.

²³ Simatović Response to Eleventh 65 *ter* Motion, para. 6.

²⁴ Stanišić Response to Eleventh 65 *ter* Motion, paras 2, 7.

²⁵ Stanišić Response to Eleventh 65 *ter* Motion, para. 8.

²⁶ Stanišić Response to Eleventh 65 *ter* Motion, para. 10.

²⁷ Twelfth 65 *ter* Motion, para. 1.

over 400 documents received by the Prosecution in March 2007.²⁹ The Prosecution submits that it was only upon reviewing the documents that the significance of the handwritten remarks on many of the documents was detected.³⁰ The Prosecution submits that due to the early stage of the proceedings, the addition of the Proposed Twelfth 65 *ter* Motion Exhibits to the Rule 65 *ter* Exhibit List will not prejudice the Defence.³¹ The Proposed Twelfth 65 *ter* Motion Exhibits were disclosed to the Defence in BCS on 15 July 2009.³²

15. The Prosecution has divided the Proposed Twelfth 65 *ter* Motion Exhibits into two categories. The first contains seven documents that the Prosecution seeks to have added to its Rule 65 *ter* Exhibit List on the basis of the recipients mentioned in those documents alone.³³ The second category contains ten documents which the Prosecution seeks to have added to its Rule 65 *ter* Exhibit list on the basis of their contents and recipients.³⁴

16. In support of the Twelfth 65 *ter* Motion, the Prosecution submits that the intelligence reports are highly relevant to its case in relation to proving the nature and extent of the JCE as alleged in the Indictment.³⁵ First, the Prosecution alleges that the fact that the intelligence reports were sent to the Serbian DB, and, regularly, to Stanišić, is important for establishing cooperation between the RSK and the Republic of Serbia.³⁶ Second, many of the documents bear a handwritten reference to “Jovica’s Folder” as well as Simatović’s signature, thus clearly indicating, in the Prosecution’s opinion, that both Accused received and were aware of the contents of these documents.³⁷ Third, the content of the reports documents the “close cooperation between the VRS, the SVK, the National Defence of the Autonomous Region of Western Bosnia, and the Army of Yugoslavia ”.³⁸

17. The Stanišić Defence opposes the addition of the Proposed Twelfth 65 *ter* Motion Exhibits to the Rule 65 *ter* List and emphasises that the Prosecution had the documents in its possession for over two years prior to the filing of the Twelfth 65 *ter* Motion and did not provide an explanation for the delay in disclosure.³⁹ The Stanišić Defence states that the combined effect of disclosure of the documents on 15 July 2009 and their omission from the Rule 65 *ter* Exhibit List of 1 May 2009

²⁸ Twelfth 65 *ter* Motion, para. 1.

²⁹ Twelfth 65 *ter* Motion, para. 10.

³⁰ Ibid.

³¹ Twelfth 65 *ter* Motion, para. 11.

³² Twelfth 65 *ter* Motion, para. 12.

³³ Twelfth 65 *ter* Motion, para. 7.

³⁴ Twelfth 65 *ter* Motion, para. 8.

³⁵ Twelfth 65 *ter* Motion, para. 4.

³⁶ Twelfth 65 *ter* Motion, para. 5.

³⁷ Ibid.

³⁸ Ibid.

³⁹ Stanišić Defence Response to the Twelfth and Thirteen 65 *ter* Motions, para. 7.

gives the Prosecution a considerable “forensic advantage” and is prejudicial to the Stanišić Defence.⁴⁰

18. The Stanišić Defence further submits that although the Prosecution states that “the Defence will not be prejudiced by the addition of the Proposed Exhibits, because these proceedings are still at an early stage”,⁴¹ the purpose of Rule 65 *ter* E (iii) of the Rules is to provide the Defence “with sufficient time to adequately prepare for and meet the Prosecution’s case”.⁴² The Stanišić Defence highlights the Prosecution’s opinion that the Proposed Twelfth 65 *ter* Motion Exhibits are “critically important evidence in this case”⁴³ and, as such, argues that “the facilities that must be employed to meet the new material will need to be correspondingly extensive”.⁴⁴ The Stanišić Defence submits that the volume of new critical material that the Prosecution is seeking leave to add to its Rule 65 *ter* Exhibit List may result in “hundreds of additional hours of preparation”.⁴⁵

C. Thirteenth 65 *ter* Motion

19. In its Thirteenth 65 *ter* Motion, the Prosecution seeks to add to its Rule 65 *ter* Exhibit List a total of 47 documents (“the Proposed Thirteenth 65 *ter* Motion Exhibits”) which comprise, amongst others, DB members’ personnel files, funding requests from the State Security Department of Serbia’s Ministry of the Interior Department for Material-Financial Affairs (“RDB”), expense lists of the Eighth Administration of the RDB, and handwritten RDB accounts of total expenses.⁴⁶

20. The Prosecution states that the addition of the Proposed Thirteenth 65 *ter* Motion Exhibits onto its Rule 65 *ter* Exhibit List is necessary due to a recent addendum (“the Addendum”) prepared by its expert witness, Christian Nielsen, to an earlier “corrected report” authored by him and submitted by the Prosecution on 27 July 2007 (“the 2007 Nielsen Report”).⁴⁷ The Addendum covers documentation not available at the time the 2007 Nielsen Report was compiled, including the Proposed Thirteenth 65 *ter* Motion Exhibits⁴⁸ and was filed by the Prosecution on 18 September 2009.⁴⁹

⁴⁰ Stanišić Defence Response to the Twelfth and Thirteen 65 *ter* Motions, para. 7.

⁴¹ Twelfth 65 *ter* Motion, para. 11.

⁴² Stanišić Defence Response to the Twelfth and Thirteen 65 *ter* Motions, para. 7(iii).

⁴³ Twelfth 65 *ter* Motion, para. 1.

⁴⁴ Stanišić Defence Response to the Twelfth and Thirteen 65 *ter* Motions, para. 7(iii).

⁴⁵ *Ibid.*

⁴⁶ Thirteenth 65 *ter* Motion, para. 1.

⁴⁷ Thirteenth 65 *ter* Motion, paras 4-5.

⁴⁸ Thirteenth 65 *ter* Motion, para. 5.

⁴⁹ Prosecution Submission of Addendum to Expert Report of Christian Nielsen Pursuant to Rule 94 *bis* with Confidential Annex, 18 September 2009.

21. In support of its Thirteenth 65 *ter* Motion, the Prosecution submits that the Proposed Thirteenth 65 *ter* Motion Exhibits will assist in proving the “continuance” of the special purpose units of the DB throughout the conflict.⁵⁰ The documents, it is proposed, also establish that financial support was given to such special purpose units by the Serbian MUP in general, and by the RDB in particular. The Prosecution states that such evidence of financial support is highly relevant to its case as “one of the principle ways in which the Accused are charged with participating in the joint criminal enterprise is by financing and otherwise supporting the special units of the Republic of Serbia DB”.⁵¹

22. The Stanišić Defence opposes the Thirteenth 65 *ter* Motion arguing that the Proposed Thirteenth 65 *ter* Motion Exhibits, as the underlying documents of an Addendum to the 2007 Nielsen Report, are part of an ongoing process involving the constant amendment of Nielsen’s theories throughout the course of trial.⁵² It submits that this process hampers its ability to prepare its own expert reports and that its capacity to challenge Nielsen’s theories is being prejudiced.⁵³

23. The Stanišić Defence also highlights the delayed disclosure of the Proposed Thirteenth 65 *ter* Motion Exhibits and states that no explanation has been provided by the Prosecution as to why there was such a delay.⁵⁴

D. 92 *ter* and 92 *bis* Submission

24. In its 92 *ter* and 92 *bis* Submission, the Prosecution, *inter alia*, requests the Chamber’s “authorisation to assign 65 *ter* numbers to any documents which, in spite of being part of the 92 *bis* and *ter* applications, have not thus far been formally assigned 65 *ter* numbers”.⁵⁵ The Prosecution states that some of the exhibits that have been listed as related exhibits have not yet been assigned 65 *ter* numbers and that they fall into five categories: (1) Statements and transcripts which have never been assigned 65 *ter* numbers; (2) Documents included in the original 92 *ter* applications as part of a witness’s Tribunal statement; (3) New statements, transcripts, or related exhibits which originated after the date of the filing of the original 92 *ter* or 92 *bis* application; (4) Documents which were originally listed as related exhibits in the original 92 *ter* and 92 *bis* application but to which the Prosecution never sought leave to assign 65 *ter* numbers; and (5) Documents which are

⁵⁰ Thirteenth 65 *ter* Motion, para. 6.

⁵¹ Ibid.

⁵² Stanišić Defence Response to the Twelfth and Thirteen 65 *ter* Motions, para. 8(i).

⁵³ Ibid.

⁵⁴ Stanišić Defence Response to the Twelfth and Thirteen 65 *ter* Motions, para. 8(iii).

⁵⁵ 92 *ter* and 92 *bis* Submission, Section V.

related exhibits (discussed by the witness in their statement or testimony), but which were not included in the original 92 *bis* or 92 *ter* application.

III. APPLICABLE LAW

25. Rule 65 *ter* (E) (iii) of the 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) is to allow the Defence to prepare its case and to ensure that the presentation of evidence during the trial is efficiently prepared.⁵⁶ The Chamber recalls that, in the exercise of its inherent discretion in managing the trial proceedings, it may authorise requested additions to the exhibit list submitted pursuant to Rule 65 *ter* (E) (iii) if it is satisfied that it is in the interests of justice to do so.⁵⁷

26. When exercising its discretion, the 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 to have adequate time and facilities for the preparation of the defence as set forth in Articles 20 (1) and 21 (4) (b) of the Tribunal's Statute ("Statute").⁵⁸ The Chamber will consider whether the documents sought to be added are *prima facie* relevant and likely to be of probative value in order to justify their addition to the Rule 65 *ter* Exhibit List at this stage of the proceedings.⁵⁹ The Chamber recalls that it will not grant the Prosecution leave to add to its Rule 65 *ter* List "documents that are obviously irrelevant".⁶⁰ In its determination as to whether it is in the interests of justice to add the requested documents to the Rule 65 *ter* Exhibit List, the Chamber will also consider whether the Prosecution has shown good cause and the extent to which the new documents create an additional burden on the Defence.⁶¹

27. The Chamber recalls the difference between the addition of a document to the Rule 65 *ter* Exhibit List and the admission of a document into evidence as an exhibit. By adding a document to

⁵⁶ *Prosecutor v. Jadranko Prlić, Bruno Stojić, Slobodan Praljak, Milivoj Petković, Valentin Cović and Berislav Pušić*, Case No. IT-04-74-T, Decision on Prosecution Motion to Add to Exhibits List (Confidential), 18 September 2007, p. 5.

⁵⁷ 8 May Decision, paras 5-7. See also *Prosecutor v. Vujadin Popović, Ljubiša Beara, Drago Nikolić, Ljubomir Borovčanin, Radivoje Miletić, Milan Gvero and Vinko Pandurević*, Case No. IT-05-88-AR73.1, Decision on Appeals Against Decision Admitting Material related to Borovčanin's Questioning, 14 December 2007 ("Popović Appeal Decision"), para. 37; *Prosecutor v. Vojislav Šešelj* Case No. IT-03-67-T, Decision on Amending the List of Exhibits Relative to the Report of Reynaud Theunens, 18 February 2008, para. 7.

⁵⁸ *Popović Appeal Decision*, para. 37; *Prosecutor v. Ante Gotovina, Ivan Čermak and Mladen Markač*, Case No. IT-06-90-T, Decision on the 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.

⁵⁹ *Popović Appeal Decision*, para. 37.

⁶⁰ Decision on Prosecution Motion for Leave to Amend its Rule 65 *ter* Exhibit List, 8 May 2008, confidential, para. 7.

⁶¹ *Ibid.*; see also *Gotovina Decision*, para. 9.

the Rule 65 *ter* Exhibit List, the Prosecution simply gives notice to the Defence that it intends to rely on the document at trial.⁶²

IV. DISCUSSION

28. The Chamber notes that the Defence was not provided with English translations of all the Proposed Eleventh 65 *ter* Motion Exhibits, Proposed Twelfth 65 *ter* Motion Exhibits or Proposed Thirteenth 65 *ter* Motion Exhibits at the time the respective motions were filed. These translations have in the meantime been provided. This issue, as raised by the Stanišić Defence,⁶³ is therefore moot.

29. The Chamber further notes, more generally, the number and high frequency of Prosecution requests to add exhibits to its Rule 65 *ter* Exhibit List. In the Chamber's opinion, this succession of motions and the proposed exhibits contained therein have the potential of unduly burdening the Stanišić Defence and the Simatović Defence. The Chamber has kept this factor in mind when considering whether it was in the interests of justice to allow the Eleventh, Twelfth and Thirteenth Prosecution Motions to Amend its Rule 65 *ter* Exhibit List.

A. Eleventh 65 *ter* Motion

30. The Prosecution seeks leave to add to its Rule 65 *ter* Exhibit List one video (proposed 65 *ter* number 5051) consisting of three clips, and one video (proposed 65 *ter* number 5052) consisting of one clip. The Chamber finds both videos to be *prima facie* relevant and likely to be of probative value in that they portray individuals which the Indictment presents as having participated in the alleged JCE with Stanišić and Simatović.⁶⁴

31. Further, the Prosecution seeks leave to add to its Rule 65 *ter* Exhibit List one diary (proposed 65 *ter* number 5053), of which it wishes to use two entries at trial. In respect of the submission by both the Simatović Defence and the Stanišić Defence, that the diary is not sufficiently reliable to be added to the Rule 65 *ter* Exhibit List, the Chamber refers to its Oral Decision on the Ninth and Tenth Prosecution Motions for Leave to Amend its Rule 65 *ter* Exhibit List, of 2 June 2009. There, the Chamber granted the Prosecution leave to add to its Rule 65 *ter*

⁶² *Prosecutor v. Rasim Delić*, Case No. IT-04-83-T, Decision on Urgent Prosecution Motion for Leave to Amend its Exhibit List, 17 October 2007, p. 4; *Prosecutor v. Ljube Bošković and Johan Tarčulovski*, Case No. IT-04-82-T, Decision on Prosecution's Fifth Motion to Amend its Exhibit List and on its Second Motion to Remove Witnesses from Witness List (Confidential), 20 April 2007, para. 3.

⁶³ Stanišić Defence Response to the Eleventh 65 *ter* Motion, para. 9; Stanišić Defence Response to the Twelfth and Thirteenth Motions, para. 7 (iii).

⁶⁴ Third Amended Indictment, 11 February 2008, para. 12.

Exhibit List a notebook from 1995 which “likely belong[ed] to Ratko Mladić” on the basis that the document was *prima facie* relevant.⁶⁵ Upon inspection of the relevant entries sought to be used by the Prosecution from the now-proposed diary (65 *ter* number 5053), the Chamber finds that, as it pertains to the cooperation between the DB of Serbia and the VRS, the diary is *prima facie* relevant and likely to be of probative value.

32. Finally, the Prosecution seeks leave to add to its Rule 65 *ter* Exhibit List diary 65 *ter* number 5054. The Chamber notes that the entries that the Prosecution seeks to use from this diary pertain to the close cooperation between the state security organs of the RSK and the Republic of Serbia and therefore finds that this document is *prima facie* relevant and likely to be of probative value.

33. The Prosecution’s explanation for seeking leave to add the Proposed Eleventh 65 *ter* Motion Exhibits at this stage of the trial is that they were received “relatively recently”.⁶⁶ The proposed video exhibits (65 *ter* numbers 5051 and 5052) were received by the Prosecution on 7 April 2009. The proposed diary exhibits (65 *ter* numbers 5053 and 5054) were received by the Prosecution on 27 March 2009 and 2 October 2008, respectively. The two videos were disclosed on 15 July 2009 and the two diaries were disclosed on 2 June 2008 and 27 February 2009, respectively.⁶⁷ The Chamber notes that despite the length of the diaries that the Prosecution wishes to add to its Rule 65 *ter* Exhibit List, being 186 and 152 pages long respectively, the Prosecution has specifically identified the excerpts it wishes to use which, given that the trial has now commenced, is an important factor for the Chamber in deciding whether the addition of the Proposed Eleventh 65 *ter* Motion Exhibits at this stage of the trial will place an undue burden on the Stanišić Defence and the Simatović Defence. The Chamber finds that the Prosecution, having been in possession of these proposed exhibits for a number of months, falls short of properly establishing good cause in seeking to add the relevant documents to its Rule 65 *ter* Exhibit List at this stage of the trial. The Chamber does not find, however, that the addition of the Proposed Eleventh 65 *ter* Motion Exhibits creates an undue additional burden on the Stanišić Defence and the Simatović Defence as sufficient time has been available to them since the disclosure and the Eleventh 65 *ter* Motion to examine both the clearly identified excerpts and the remaining portions of the Proposed Eleventh 65 *ter* Motion Exhibits.

⁶⁵ Decision on the Prosecution’s Ninth and Tenth Motions for Leave to Amend its Rule 65 *ter* Exhibit List, 2 June 2009 T. 1405-1409, at T. 1407.

⁶⁶ Eleventh 65 *ter* Motion, para. 2.

⁶⁷ Eleventh 65 *ter* Motion, footnotes 7, 9-10, 13.

34. 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 their right to have adequate time and facilities for the preparation of the defence, the Chamber is satisfied that it is in the interests of justice to grant the Prosecution leave to add the Proposed Eleventh 65 *ter* Motion Exhibits to its Rule 65 *ter* Exhibit List.

B. Twelfth 65 *ter* Motion

35. The Prosecution submits that it wishes to use the Proposed Twelfth 65 *ter* Motion Exhibits to demonstrate cooperation between various members of the JCE.⁶⁸ The Chamber finds that the Proposed Twelfth 65 *ter* Motion Exhibits are *prima facie* relevant and likely to be of probative value.

36. In its Twelfth 65 *ter* Motion, the Prosecution states that the 17 Proposed Twelfth 65 *ter* Motion Exhibits have been selected from a total of over 400 documents received by the Prosecution in March 2007.⁶⁹ The Prosecution submits that it was only upon review of the documents that the significance of "handwritten remarks" on the documents was detected. Although the Chamber finds that the Prosecution has shown due diligence in proposing the addition of only a limited number of documents, the Chamber notes that the Prosecution has had the documents in its possession for over two years. The Chamber finds that the Prosecution falls short in properly establishing good cause for seeking to add the relevant documents to its Rule 65 *ter* Exhibit List at this stage of the proceedings. The Chamber does not find that the addition of the Proposed Twelfth 65 *ter* Motion Exhibits will create an undue additional burden on the Defence due to the relatively low number of exhibits.

37. 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 their right to have adequate time and facilities for the preparation of the defence, the Chamber is satisfied that it is in the interests of justice to grant the Prosecution leave to add the Proposed Twelfth 65 *ter* Motion Exhibits to its Rule 65 *ter* Exhibit List.

C. Thirteenth 65 *ter* Motion

38. In its Thirteenth 65 *ter* Motion, the Prosecution seeks leave to add proposed exhibits which include "(1) personnel files of members of the DB, (2) requests for funds sent by the RDB to MUP

⁶⁸ Twelfth 65 *ter* Motion, para. 1.

⁶⁹ Twelfth 65 *ter* Motion, para. 10.

Serbia's Department for Material-Financial Affairs; (3) lists of expenses of the 8th Administration of the RDB; (4) RDB handwritten accounts of total expenses and (5) other documents".⁷⁰ The Prosecution states that it will tender the Addendum "when it is completed" and therefore seeks leave to add these documents, being the underlying documents of the Addendum.⁷¹ The Chamber notes that, on 18 September 2009, the Prosecution submitted the Addendum to the 2007 Nielsen Report.⁷² The Chamber finds that these documents are *prima facie* relevant and likely to be of probative value as they are presented as being the underlying documents in support of the Addendum.

39. The Prosecution states that it seeks leave to add these proposed exhibits to its Rule 65 *ter* Exhibit List because "they are included in a forthcoming addendum to the report of Prosecution expert witness Christian Nielsen".⁷³ The Prosecution submits that it was only notified "recently" that Nielsen had prepared an addendum to the 2007 Nielsen Report which "covers relevant documentation not available at the time of the completion of the original Report".⁷⁴ The Prosecution disclosed the financial documents in BCS on 4 November 2008 and the personnel files and other documents on 29 July 2009 and 4 August 2009, with English translations where available.⁷⁵ The Stanišić Defence submits that the reason for the late disclosure of these documents has not been explained by the Prosecution.⁷⁶ As the Prosecution has not informed the Chamber as to the date it received notification from Nielsen regarding the Addendum, the Chamber cannot gauge whether the Prosecution has good cause for the submission of these documents at this stage of the trial or whether this could have been done at an earlier stage. In the absence of any such information, the Chamber is unable to find that good cause was shown for the Prosecution's request to have the documents added to the Rule 65 *ter* Exhibit List at this stage of the proceedings. The Chamber will, however, consider whether it is nevertheless in the interests of justice to allow the request.

40. The Chamber finds that the *prima facie* relevance and likely probative value of the Proposed Thirteenth 65 *ter* Exhibits, being the underlying documents of the Addendum, are factors in favour of granting of this Motion. The Chamber further finds that as Nielsen has not been scheduled by the Prosecution to testify in the immediate future, that the addition of these documents

⁷⁰ Thirteenth 65 *ter* Motion, para. 1.

⁷¹ Thirteenth 65 *ter* Motion, para. 5.

⁷² Prosecution Submission of Addendum to Expert Report of Christian Nielsen Pursuant to Rule 94 *bis* with Confidential Annex, 18 September 2009.

⁷³ Thirteenth 65 *ter* Motion, para. 1.

⁷⁴ Thirteenth 65 *ter* Motion, paras 4-5.

⁷⁵ Thirteenth 65 *ter* Motion, para. 7.

⁷⁶ Stanišić Defence Response to the Twelfth and Thirteen 65 *ter* Motions, para. 8(iii).

to the Rule 65 *ter* Exhibit List will therefore not create an undue burden on the Stanišić Defence or the Simatović Defence.

41. 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 their right to have adequate time and facilities for the preparation of the defence, the Chamber is satisfied that it is in the interests of justice to grant the Prosecution leave to add the Proposed Thirteenth 65 *ter* Motion Exhibits to its Rule 65 *ter* Exhibit List.

D. 92 *ter* and 92 *bis* Submission

42. In its 92 *ter* and 92 *bis* Submission, the Prosecution requests the Chamber's permission to assign 65 *ter* numbers to documents which fall into five categories, as described above in paragraph 24.

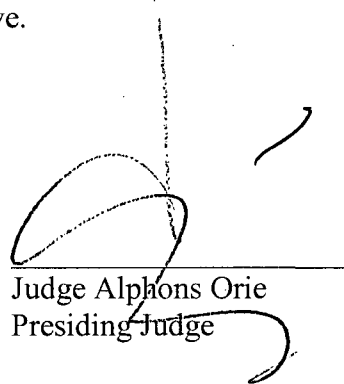
43. The Prosecution emphasises that the relevant documents are "not new documents nor new exhibits" and that "in most cases formed part of the original applications and were disclosed years ago".⁷⁷ Given the time that has elapsed since the disclosure of these documents, that they are relatively few in number, and that the Stanišić Defence and Simatović Defence do not oppose the Prosecution's 92 *ter* and 92 *bis* Submission in this respect, the Chamber grants the Prosecution leave to assign 65 *ter* numbers to the categories of documents mentioned above in paragraph 24.

V. DISPOSITION

44. For the foregoing reasons, pursuant to Articles 20 (1) and 21 (4) (b) of the Statute and Rule 65 *ter* (E) (iii) of the Rules, the Chamber **GRANTS**

- i) the Prosecution's Eleventh 65 *ter* Motion;
- ii) the Prosecution's Twelfth 65 *ter* Motion;
- iii) the Prosecution's Thirteenth 65 *ter* Motion; and
- iv) leave to assign 65 *ter* numbers to the documents identified in the Rule 92 *ter* and 92 *bis* Submission, to the limited extent discussed in paragraph 43 above.

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



Judge Alphons Orie
Presiding Judge

Dated this tenth day of February 2010
At The Hague
The Netherlands

[Seal of the Tribunal]

⁷⁷ 92 *ter* and 92 *bis* Submission, para. 16.