IT-03-69-T
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4 April 2012

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UNITED NATIONS	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:	17 April 2012
		Original:	English

IN TRIAL CHAMBER I

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

Registrar: **Mr John Hocking**

Decision of: **17 April 2012**

PROSECUTOR

v.

JOVICA STANIŠIĆ
FRANKO SIMATOVIĆ

PUBLIC

REASONS FOR DECISION PARTIALLY GRANTING THE SIMATOVIĆ DEFENCE URGENT REQUEST FOR ADJOURNMENT

Office of the Prosecutor
Mr Dermot Groome

Counsel for Jovica Stanišić
Mr Wayne Jordash
Mr Scott Martin

Counsel for Franko Simatović
Mr Mihajlo Bakrač
Mr Vladimir Petrović

I. PROCEDURAL HISTORY AND SUBMISSIONS

1. On 20 February 2012, the Simatović Defence ("Defence") requested an eight-week adjournment of the proceedings following the conclusion of the testimony of Witnesses DFS-04 and DFS-12 scheduled for the week of 20 February 2012 ("Request").[1] The Defence submitted that it needed to, firstly, consolidate and amend its Rule 65 *ter* witness list, taking into account the development in its case thus far, secondly, to "consolidate the situation with the findings of its experts", and, thirdly, to examine all of the materials disclosed by the Prosecution after 1 October 2011.[2] With a view to the difficulties arising from its late appointment to the case, the Defence submitted that it had reached a point where it could not continue to efficiently present the Defence case and, at the same time, safeguard the right of Franko Simatović ("Accused") to a fair trial.[3]

2. On 22 February 2012, the Chamber instructed the Defence to provide it with detailed information on the timeline and content of the Defence correspondence with two prospective witnesses mentioned in the Request, as well as with the governments of the countries where the prospective witnesses were detained.[4] On the same day, the Defence filed the requested information ("Notification").[5]

3. On 23 February 2012, the Prosecution responded, opposing the adjournment for purposes of witness list consolidation and amendment, and deferring the decision on adjournment on other grounds to the Chamber's discretion.[6] The Prosecution contended that the factors affecting the Defence team's ability to prepare its case had previously been sufficiently considered and accommodated.[7] It further submitted that the Request was premature insofar as it related to the witnesses not yet included in the Defence Rule 65 *ter* witness list, and unreasonable, insofar as it sought additional time to re-investigate the Defence case.[8] In relation to disclosure, the Prosecution submitted that citing the number of pages disclosed was not very helpful when assessing disclosure, as it often resulted in double-counting of documents disclosed in both English and BCS, it ignored

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1 Urgent Defence Request for Adjournment, 20 February 2012 (Confidential), paras 1, 19.
2 Request, paras 7, 9, 17.
3 Request, paras 5, 7, 18.
4 T. 17640-17641; Request, para. 12.
5 Defence Notification pursuant to Trial Chamber's Order of 22 February 2012, 22 February 2012 (Confidential).
6 Prosecution Response to Urgent Simatović Defence Request for Adjournment, 23 February 2012 (Confidential), paras 2, 16-18. Although the Prosecution did not agree with the Defence's arguments concerning the amount of pages disclosed by the Prosecution, it nevertheless deferred to the Chamber's discretion in deciding on this matter (see paras 14-16 of the Response).
7 Response, paras 4-5.
8 Response, paras 3, 6-7.

the fact that often only a portion of a document was relevant, and did not provide any information about the type of documents disclosed.[9]

4. On 24 February 2012, the Stanišić Defence submitted, through an informal communication, that it would not file a response.

5. On 28 February 2012, the Chamber partially granted the Request, with further instructions on the timeline for completion of the Defence tasks and reasons to follow, and announced that, as a result, the proceedings would be adjourned for four weeks in the month of April 2012.[10]

II. APPLICABLE LAW

6. Articles 20 (1) and 21 (4) (c) of the Statute of the Tribunal protect the right of an accused to a fair and expeditious trial. Article 21 (4) (b) of the Statute provides that an accused shall have "adequate time and facilities for the preparation of his defence".

7. Rule 54 of the Rules of Procedure and Evidence ("Rules") provides as follows:

> At the request of either party or *proprio motu*, a Judge or a Trial Chamber may issue such orders, summonses, subpoenas, warrants and transfer orders as may be necessary for the purposes of investigation or for the preparation or conduct of the trial.

8. In deciding whether to grant a motion for adjournment filed by one of the parties, Trial Chambers generally assess if the interests of justice warrant the requested adjournment.[11]

III. DISCUSSION

9. The Chamber considered that the Defence requested an adjournment on three grounds: i) its decision not to call the Accused to testify, the ensuing need to call additional witnesses, and to further proof existing witnesses ("Witnesses Ground"), ii) the need to deal with downsizing the volume of the expert reports of its witnesses Milošević and Borojević ("Expert Reports Ground"), and iii) the need to review the large amount of documents disclosed by the Prosecution ("Disclosed Documents Ground"). The Chamber will address these three grounds in turn.

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9 Response, para. 14.

10 T. 17816-17818.

11 *Prosecutor v. Stanišić and Simatović*, Case No. IT-03-69-T, Reasons for Decision Partially Granting the Stanišić Defence Motion for Suspension of Proceedings after the Summer Recess, 28 September 2011, para. 13. See also *Prosecutor v. Brđanin*, Case No. IT-99-36-T, Decision on Defence Motion for Adjournment, 10 March 2003, p. 2; *Prosecutor v. Krstić*, Case No. IT-98-33-T, Decision on Adjourning the Trial, 15 January 2001, p. 2.

10. In relation to the Witnesses Ground, the Chamber considered that the need of the Defence for additional time to prepare was in direct correlation with its decision not to call the Accused to testify and the ensuing need to call additional witnesses.[12] Nonetheless, the Chamber noted that the Defence had not argued that considerable time had already been spent on the preparation of the Accused for his testimony, leaving open the possibility to use the time initially allocated for the preparation of the Accused to testify, to prepare the additional witnesses. The Chamber further found it difficult to accept that two of the prospective witnesses who, in the view of the Defence, qualified as "of decisive importance in this trial" only came to the Defence horizon as potential witnesses at such a late stage of the Defence case. In particular, they had appeared prominently throughout the case, and their whereabouts had been known for a long period of time. In addition, it was not clear from the Defence submissions whether the initial contact with these witnesses was pursued without undue delay.[13] On the other hand, however, the Chamber considered that the Defence should not, unless necessary, be denied a certain degree of flexibility in the presentation of its case, allowing it to adapt the presentation of evidence to developments during trial. Therefore, although the arguments raised left doubt as to whether the development of the Defence case thus far justified the request for its further preparation, the Chamber nevertheless weighed this aspect against those militating against granting the Request. Also, the Chamber accepted that a decision to refrain from calling an accused as a witness required careful consideration and could not be taken easily.[14] The Chamber further acknowledged that the failure to earlier consider and, consequently, prepare for the possibility of not calling the Accused to testify left the Defence with no choice but to ask for additional time. Even though the Chamber was not of the view, for the reasons set out above, that denying the Request on the Witnesses Ground would impair the exercise of the right of the Accused to have adequate time and facilities to prepare his defence, or of his right to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him, it sought to accommodate, within limits, the Defence in its perception of what the exercise of its fundamental rights demanded. The Chamber further considered that an adjournment would give the Prosecution and the Stanišić Defence the opportunity to prepare for the testimony of the prospective witnesses, if finally called.

11. In relation to the Expert Reports Ground, the Chamber acknowledged the difficulties that the expert reports – in the form that the Defence had submitted them – presented to the parties. With respect to the expert report of Mr. Borojević ("Borojević Expert Report"), the Chamber considered

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12 Request, para. 10.
13 Request, paras 10, 12; Notification.
14 Request, para. 10.

that its length, untimely disclosure, and the form in which it had been presented would create a considerable amount of work for the Prosecution at a very late stage of the proceedings. In setting deadlines for "consolidation" of the two expert reports, the Chamber considered the time-consuming task, undertaken by the Defence, of reducing the volume of the Borojević Expert Report, and in particular of identifying and redacting such portions of the report on which the parties could agree. In addition, the Chamber prepared a timeline with a view to facilitating communication on contents of the reports between the parties at the earliest stage possible, which would also permit the Prosecution and the Stanišić Defence to use the adjournment to prepare their Rule 94 *bis* notices in relation to the Borojević Expert Report. However, the Chamber also considered that the Defence had itself significantly contributed to the problems encountered by the parties, as it had failed to ensure timely disclosure of the finalised reports, as required by Rule 94 *bis* of the Rules. Namely, in respect of the Borojević Expert Report, the Chamber noted that the Defence submitted it to CLSS for translation on 4 August 2011.[15] Only after the English version of the report was made available to the Prosecution on 9 February 2012, did the Defence begin revising the Expert Report with a view to deducting the parts of lesser importance to the case.[16] In respect of the expert report of Mr. Milošević ("Milošević Expert Report"), the Chamber noted that the Defence had repeatedly failed to provide the Prosecution with the requested source material.[17] In addition, the Defence informed the Prosecution, through an informal communication, that it had identified the parts of the Milošević Expert Report on which it would not rely or which were "of very limited relevance", only on 18 January 2012.[18] In balancing the considerations which militate against granting the Request on the Expert Reports Ground with the Defence submissions, the Chamber attached greater weight to ensuring that the Defence had adequate time needed to reduce the volume of its Expert Reports, particularly in light of the difficulties which the expert reports in their original form presented to the other parties.

12. The Chamber partly accepted the factual representations made by the Defence regarding the Disclosed Documents Ground. In particular, the Chamber considered the probability that a substantial number of the documents, encompassed in the estimated 143.000 pages, included both English and BCS versions of the same documents. Therefore, the amount of materials which would still need to be examined by the Defence would be considerably lower. Moreover, the Chamber received no information on the nature of these documents. Nevertheless, it considered that the

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15 T. 17497.
16 T. 17497, 17507.
17 T. 17493.
18 T. 17494.

Defence submissions on this Ground, particularly when assessed jointly with other factors discussed above, had some merit.

13. On balance, the Chamber found that the interests of justice warranted an adjournment of proceedings. Taking into account the factors discussed above, including the significant contribution of the Defence to the difficulties it had encountered, the Chamber concluded that a four-week adjournment was sufficient to allow the Defence the time needed to adequately prepare and present the remainder of its case, in particular to explore the practical possibility of calling the witnesses who were sought to be added to its Rule 65 *ter* list, if any, to determine the witnesses it intended to call, and to file the revised Expert Reports of two of its witnesses. As for the timing of the adjournment, given the availability of expert witnesses David Browne and Sir Ivor Roberts to testify in the month of March, the Chamber considered it appropriate to adjourn the proceedings only after the testimony of these witnesses.

IV. DISPOSITION

14. For the foregoing reasons, the Chamber **GRANTED** the Request in part and **ORDERED** a four-week adjournment of the proceedings.

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

Judge Alphons Orie
Presiding Judge

Dated this Seventeenth of April 2012
At The Hague
The Netherlands

[Seal of the Tribunal]