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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-T
Date: 20 July 2012
Original: English

IN TRIAL CHAMBER I

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

Registrar: Mr John Hocking

Decision of: 20 July 2012

PROSECUTOR

v.

**JOVICA STANIŠIĆ
FRANKO SIMATOVIĆ**

PUBLIC

**DECISION ON MOTIONS FOR ADMISSION OF ADDITIONAL
EVIDENCE OF WITNESS MILAN BABIĆ**

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

1. On 16 December 2010, the Chamber admitted into evidence portions of the transcripts of the testimony of deceased Prosecution witness Milan Babić in the *Milošević, Krajišnik, and Martić* cases pursuant to Rule 92 *quater* of the Rules of Procedure and Evidence (“Rules”).¹

2. On 8 May 2012, the Prosecution sought leave to tender as rebuttal evidence two additional pages of Babić’s testimony in the *Krajišnik* case (“Prosecution Request”).² On 21 May 2012, the Simatović Defence responded, opposing the Prosecution Request.³ In informal communications, on 21 May 2012 the Stanišić Defence requested an additional two weeks to respond to the Prosecution Request, which the Chamber granted on 22 May 2012. On 5 June 2012, the Stanišić Defence responded, not opposing the Prosecution Request (“Stanišić Response”).⁴

3. The Stanišić Defence further requested admission of an additional approximately 80 pages of Babić’s testimony from the *Milošević, Krajišnik, and Martić* cases (“Stanišić Request”).⁵ In informal communications, on 8 June 2012 the Prosecution sought leave to submit a consolidated filing containing a request for leave to reply and a response to the Stanišić Request by 15 June 2012, which the Chamber granted on 12 June 2012. On 15 June 2012, the Prosecution responded, not opposing the Stanišić Request, but requesting that all pages tendered be admitted in their entirety, including complete questions and answers.⁶

4. The Prosecution further requested leave to reply to the Stanišić Response.⁷ On 27 June 2012, through an informal communication, the Chamber granted the Prosecution leave to reply by 29 June 2012. On 28 June 2012, the Prosecution replied to the Stanišić Response.⁸

¹ Decision on Prosecution’s Motion for Admission of Evidence of Witness Milan Babić Pursuant to Rule 92 *quater*, 16 December 2010, para. 50.

² Prosecution Motion to Admit Rebuttal Evidence of Milan Babić via 92 *quater*, 8 May 2012 (Confidential), paras 1, 8, 12, Confidential Annex A.

³ Defence Response to Prosecution Motion to Admit Rebuttal Evidence of Milan Babić via 92*quater*, 21 May 2012 (Confidential) (“Simatović Response”).

⁴ Stanišić Defence Response to Prosecution Motion to Admit Rebuttal Evidence of Milan Babić via 92*quater* and Motion to Admit Evidence of Other Transcripts of Testimony of Babić, 5 June 2012 (“Stanišić Response and Motion”), para. 14.

⁵ Stanišić Response and Motion, paras 15-17, Annex A.

⁶ Prosecution Request for Leave to Reply and Response to Stanišić Defence Motion for Admission of Additional Testimony of Milan Babić, 15 June 2012 (“Prosecution Response to Stanišić Request”), paras 8, 12-13.

⁷ Prosecution Response to Stanišić Request, paras 3-7.

⁸ Prosecution Reply to Stanišić Defence Response to Prosecution Motion to Admit Rebuttal Evidence of Milan Babić via 92*quater*, 28 June 2012 (“Prosecution Reply”).

II. SUBMISSIONS OF THE PARTIES

(i) Prosecution Request

5. The Prosecution seeks to tender Babić's testimony regarding (i) destroyed and abandoned villages in Croatia in November 1991, (ii) abandoned villages between Doboje and Bijeljina, and (iii) Ratko Mladić's involvement in the efforts to forcibly remove the non-Serb population from Croatia ("Proffered Rebuttal Evidence").⁹ In tendering the Proffered Rebuttal Evidence, the Prosecution seeks to challenge the credibility of Defence witnesses Vatroslav Staničić and Aco Drača ("Defence Witnesses") and to rebut their evidence regarding Mladić's intent in relation to the military operations in 1991.¹⁰ The Prosecution submits that, when shown portions of Mladić's notebooks in court, Staničić testified that Mladić's intention in relation to Croatia in 1991 was only a desire to preserve the Yugoslav state.¹¹ Similarly, Drača testified concerning an entry in Mladić's notebooks regarding an armoured battalion moving towards Škabrnja and Nadin, that he understood the intention to be to "frighten them a bit".¹²

6. The Prosecution argues that the credibility of Defence witnesses is a significant issue.¹³ The Prosecution further points out that the Staničić Defence's pre-trial brief strongly suggests that the Defence's case is that the JNA, the SVK, the VRS, and Mladić in particular, were responsible for most of the crimes with which the Accused are charged.¹⁴ The Prosecution argues that as a result, it could not reasonably have anticipated that the Defence would seek to challenge Mladić's criminal intent.¹⁵ The Prosecution further argues that it led a sufficient amount of evidence in its case-in-chief regarding Mladić's criminal intent to carry its burden in light of its reasonable expectation that this intent would not be challenged by Defence evidence.¹⁶ Given that the Defence has challenged this intent, the Prosecution argues it may appropriately tender a small amount of evidence in rebuttal.¹⁷

7. The Staničić Defence submits that the issues the Prosecution seeks to address in tendering the Proffered Rebuttal Evidence were foreseeable to the Prosecution throughout the trial.¹⁸ The Staničić Defence argues that the forcible transfer and deportation from the SAO Krajina by Joint

⁹ Prosecution Request, para. 8.

¹⁰ Prosecution Request, paras 4-5, 10.

¹¹ Prosecution Request, paras 4, 6.

¹² Prosecution Request, paras 4, 7.

¹³ Prosecution Request, para. 10.

¹⁴ Prosecution Reply, paras 3-4.

¹⁵ Prosecution Reply, paras 3-5.

¹⁶ Prosecution Reply, paras 6-7.

¹⁷ Ibid.

¹⁸ Staničić Response and Motion, para. 10.

Criminal Enterprise (“JCE”) members, including Mladić, as alleged in the Indictment, is a central part of the Prosecution’s case.¹⁹ The Stanišić Defence argues that Babić’s description of abandoned villages between Doboaj and Bijeljina does not relate to the testimony of the Defence Witnesses.²⁰

8. The Simatović Defence submits that the Prosecution misinterpreted Drača’s testimony, which, in their understanding, confirmed the decisive role of the JNA and Mladić in the events in Škabrnja in 1991.²¹ The Simatović Defence argues that Babić’s testimony has limited probative value, as it does not mention the Škabrnja events.²²

(ii) Stanišić Request

9. The Stanišić Defence submits that the Prosecution has selectively chosen those portions of Babić’s testimony which contain incriminatory assertions, thereby creating a misleading impression of the totality of the witness’s evidence.²³ The Stanišić Defence argues that the Accused’s ability to challenge evidence admitted under Rule 92 *quater* of the Rules is restricted.²⁴ The Stanišić Defence seeks to tender additional portions of Babić’s testimony, which it submits contextualize the portions already in evidence or are relevant to the credibility or reliability of Babić’s testimony.²⁵

10. The Prosecution submits that it tendered portions of Babić’s testimony that are relevant to the case and not duplicative.²⁶ The Prosecution argues that the Chamber has sufficient evidence to ascertain the reliability of Babić’s testimony and that there is significant corroboration thereof.²⁷ The Prosecution submits that it would not have opposed the admission of Babić’s entire testimony, nor a Defence request for additional portions to be admitted at the time of its admission, and so does not oppose the Stanišić Request, despite it being made at the end of the case.²⁸

III. APPLICABLE LAW

11. Under Rule 85 (A) of the Rules, unless otherwise directed by the Trial Chamber in the interests of justice, rebuttal evidence shall be presented after the presentation of evidence of the Defence case. The Appeals Chamber has held that rebuttal evidence must be highly probative and must relate to a significant issue arising directly out of Defence evidence which could not have been

¹⁹ Stanišić Response and Motion, paras 11-12.

²⁰ Stanišić Response and Motion, para. 13.

²¹ Simatović Response, p. 1.

²² Simatović Response, p. 2.

²³ Stanišić Response and Motion, para. 15.

²⁴ *Ibid.*

²⁵ Stanišić Response and Motion, para. 16.

²⁶ Prosecution Response to Stanišić Request, para. 9.

²⁷ Prosecution Response to Stanišić Request, para. 10.

²⁸ Prosecution Response to Stanišić Request, para. 9.

reasonably anticipated.²⁹ The Prosecution cannot call additional evidence merely because its case has been met by certain evidence to contradict it.³⁰

12. Under Rule 90 (H)(i) of the Rules, cross-examination shall be limited to the subject-matter of the evidence-in-chief and matters affecting the credibility of the witness and, where the witness is able to give evidence relevant to the case for the cross-examining party, to the subject-matter of that case. In determining whether there are sufficient grounds to recall a witness, the Chamber will consider whether the requesting party has demonstrated good cause to recall the witness.³¹ In assessing good cause, a Chamber will consider the purpose of recalling the witness and the applicant's justification for not eliciting the relevant evidence from the witness when he or she originally testified.³²

13. Under Rule 92 *quater* of the Rules, evidence in the form of a transcript of a person who has subsequently died may be admitted if the Chamber is satisfied of the person's unavailability and finds from the circumstances in which the statement was made and recorded that it is reliable.

IV. DISCUSSION

(i) Prosecution Request

14. The Prosecution identifies three topics in relation to which it seeks to tender the Proffered Rebuttal Evidence. First, the Prosecution refers to Babić's description of abandoned villages between Doboje and Bijeljina. The portion of Babić's testimony the Prosecution has tendered does not address this topic.³³ Babić testified about this in another portion of the *Krajišnik* transcript.³⁴ As the Prosecution has not tendered the latter portion, the Chamber will not further consider this topic.

²⁹ *Prosecutor v. Naletilić and Martinović*, Case No. IT-98-34-A, Judgement, 3 May 2006, para. 258.

³⁰ *Ibid.*

³¹ *Prosecutor v. Gotovina et al.*, Case No. IT-06-90-T, Decision on Prosecution Motion to Recall Marjo Rajčić, 24 April 2009 ("*Gotovina Decision*"), para. 10; *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, Decision on Defence Motion to Recall Prosecution Witness OAB for Cross-Examination, 19 September 2005 ("*Bagosora 2005 Decision*"), para. 2; *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, Decision on the Prosecution Motion to Recall Witness Nyanjwa, 29 September 2004 ("*Bagosora 2004 Decision*"), para. 6.

³² *Prosecutor v. Šešelj*, Case No. IT-03-67-T, Decision on Prosecution Motion to Recall Witness VS-1033 or, in the Alternative, Admit the Witness's Written Statement, 14 October 2010, para. 7; *Gotovina Decision*, para. 10; *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-T, Decision on Joseph Nzirorera's Motion to Recall Prosecution Witness Ahmed Mbonnyunkiza, 25 September 2007, para. 5; *Bagosora 2005 Decision*, para. 2; *Bagosora 2004 Decision*, para. 6.

³³ Prosecution Request, Confidential Annex A; *Prosecutor v. Momčilo Krajišnik*, Case No. IT-00-39-T, Transcript of 3 June 2004, T. 3390-3391.

³⁴ *Prosecutor v. Momčilo Krajišnik*, Case No. IT-00-39-T, Transcript of 3 June 2004, T. 3411.

15. Second, the Prosecution refers to Babić's testimony concerning destroyed and abandoned Croatian villages he observed in the Krajina in November 1991.³⁵ The Indictment in this case charges the Accused with committing deportation and forcible transfer of non-Serb civilians from locations in the SAO Krajina.³⁶ This topic thus relates directly to the crime base charged in the Indictment and as such forms a part of the Prosecution's case. The Prosecution has failed to demonstrate that the Proffered Rebuttal Evidence on this topic relates to a significant issue arising directly out of Defence evidence which the Prosecution could not have reasonably anticipated.

16. Third, the Prosecution refers to Babić's testimony concerning Mladić's involvement, as Chief of Staff of the JNA 9th Corps, in military operations expelling the Croatian population from the Knin Corps's area of activity from August to October 1991.³⁷ Rebuttal evidence must relate to a significant issue arising directly out of Defence evidence which could not have been reasonably anticipated. However, the issue of Mladić's criminal intent clearly forms a part of the Prosecution's case. The Indictment alleges that the Accused committed crimes as co-perpetrators in a JCE in which Mladić participated.³⁸ The topic of Mladić's participation in this JCE and his criminal intent relate directly to the mode of criminal responsibility charged in the Indictment. In these circumstances, the issue of Mladić's criminal intent cannot be considered to arise directly out of Defence evidence.

17. The Prosecution concedes that it has led evidence in its case-in-chief regarding Mladić's criminal intent, but argues that it could not have anticipated this challenge based on its understanding of the Stanišić Defence's pre-trial briefs. The Prosecution cannot call additional evidence merely because its case has been met by certain evidence to contradict it. In this respect, the Chamber considers that the parties did not submit agreed facts regarding Mladić's criminal intent. Further, the relevant portions of the Stanišić Defence's pre-trial briefs cited by the Prosecution do not unequivocally state that the Defence's case concedes Mladić's criminal intent. The cited portions allege that all local and Serbian Territorial Defence ("TO") forces and volunteer and paramilitary units acted under the command of and/or with the material assistance of the Yugoslav Army.³⁹ They refer specifically to anticipated evidence indicating that Mladić was involved in providing material assistance to the Krajina TO, the Krajina Ministry of the Interior,

³⁵ Prosecution Request, Confidential Annex A; *Prosecutor v. Momčilo Krajišnik*, Case No. IT-00-39-T, Transcript of 3 June 2004, T. 3390.

³⁶ Third Amended Indictment, 10 July 2008 ("Indictment"), paras 10, 64-66.

³⁷ Prosecution request, Confidential Annex A; *Prosecutor v. Momčilo Krajišnik*, Case No. IT-00-39-T, Transcript of 3 June 2004, T. 3391.

³⁸ Indictment, para. 12.

³⁹ Defence Consolidated Pre-Trial Brief, 16 July 2007 ("Stanišić Pre-Trial Brief"), paras 195, 205-206, 208, 211, 213, 220-222, 225-228, 230-232, 239.

and the Army of the Bosnian-Serb Republic.⁴⁰ These portions do not establish that the issue of Mladić's alleged criminal intent was not in dispute between the parties and would not be challenged by the Defence. Under these circumstances, the Chamber concludes that the Prosecution has failed to demonstrate that the Proffered Rebuttal Evidence on this topic relates to a significant issue arising directly out of Defence evidence which the Prosecution could not have reasonably anticipated.

18. Finally, the Prosecution argues that, by means of the Proffered Rebuttal Evidence, it seeks to challenge the credibility of two Defence Witnesses who testified about Mladić's intent. The credibility of Defence witnesses can constitute a significant issue arising directly out of Defence evidence which the Prosecution could not have reasonably anticipated prior to their testimony. In this instance, the Defence Witnesses testified that Mladić's intention in relation to Croatia in 1991 was a desire to preserve the Yugoslav state and that the intention behind an armoured battalion moving towards two villages in Croatia was to "frighten them a bit". The portion of Babić's testimony tendered by the Prosecution alleges that Mladić was in charge of military operations whereby the Croatian population was expelled from the area of the Knin Corps's activity. While Babić's testimony may differ materially from that of the Defence witnesses, it does not immediately assist the Chamber in assessing the credibility of these witnesses. It does not, for instance, call into question their sources of knowledge, motives for testifying, or character. In this instance, the Prosecution has failed to establish that the Proffered Rebuttal Evidence relates to the credibility of the Defence Witnesses and consequently has failed to demonstrate that it relates to a significant issue arising directly out of Defence evidence which the Prosecution could not have reasonably anticipated.

(ii) Stanišić Request

19. The Chamber admitted into evidence portions of the transcripts of the testimony of deceased Prosecution witness Milan Babić in three previous cases pursuant to Rule 92 *quater* of the Rules on 16 December 2010. The Prosecution had filed a motion tendering these portions on 21 May 2007. On 5 June 2012, the Stanišić Defence tendered additional portions of Babić's testimony in the same previous cases. The Stanišić Defence has not included witness Babić in its Rule 65 *ter* witness list as a Rule 92 *quater* witness, nor has it sought leave to add him to this list.⁴¹

⁴⁰ Stanišić Pre-Trial Brief, paras 220, 225.

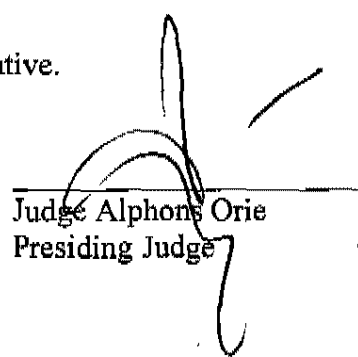
⁴¹ Stanišić Defence Filing of Amended Rule 65 *ter* (G)(i) Witness List, 24 June 2011 (Confidential). Rule 65 *ter* (G) lists serve to provide advance notice to the other parties of the witnesses the Defence intends to call and the exhibits the Defence intends to offer in its case. Even if one were to argue that a deceased witness need not be placed on the Rule 65 *ter* (G) witness list, the Chamber notes that the Defence did not place the relevant portions of Babić's

20. Under Rule 90 (H)(i) of the Rules, where a witness is able to give evidence relevant to the case for the cross-examining party, a party may cross-examine the witness on the subject-matter of its case. Further, a requesting party must demonstrate good cause to recall a witness. In reality, a deceased Prosecution witness whose evidence is admitted pursuant to Rule 92 *quater* of the Rules cannot be cross-examined by the Defence, nor can the witness be recalled in the same manner as witnesses who testified in court. Nonetheless, the Chamber considers that the appropriate time for the Defence to challenge the Rule 92 *quater* evidence of Prosecution witness Babić with additional evidence from this witness was either upon the Prosecution's tendering thereof or shortly after its admission, during the Prosecution case. When a party has tendered parts of statements, transcripts, or documents, the Chamber has regularly invited the other parties to review and consider tendering any other portions of the tendered materials for contextualization.⁴² The Chamber considers that in order to tender such contextualizing evidence 5 years after the Prosecution's motion tendering portions of Babić's testimony, 1,5 years after the Chamber's decision on admission of Babić's evidence, and at the very end of its Defence case, the Stanišić Defence must show good cause as to why it did not tender the evidence before. The Stanišić Defence has not presented any arguments demonstrating good cause in this respect. Consequently, the Chamber finds that the Stanišić Request should be denied.

V. DISPOSITION

21. For the foregoing reasons, pursuant to Rules 85 and 90 (H)(i) of the Rules, the Chamber **DENIES** the Prosecution Request and the Stanišić Request.

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



Judge Alphons Orié
Presiding Judge

Dated this Twentieth day of July 2012
At The Hague
The Netherlands

[Seal of the Tribunal]

testimony on its Rule 65 *ter* G (ii) exhibit list either (see Corrigendum to Stanišić Defence Submission Pursuant to Rule 65 *ter* (G)(ii), 14 June 2011).

⁴² See for instance T. 3823, 7816, 15126, 15198, 18622.