

IT-03-69-T
D 43636 - D 43628
15 August 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: 15 August 2012
Original: English

IN TRIAL CHAMBER I

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

Registrar: Mr John Hocking

Decision of: 15 August 2012

PROSECUTOR

v.

**JOVICA STANIŠIĆ
FRANKO SIMATOVIĆ**

PUBLIC

**DECISION ON DEFENCE MOTION FOR EXCLUSION OF
SPECIFIED EXHIBITS AND ADMISSION OF VARIOUS
OTHER DOCUMENTS**

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 29 May 2012, the Stanišić Defence (“Defence”) filed a motion to exclude certain Prosecution exhibits or, in the alternative, to grant the Defence “other remedies to ensure an effective defence” (“Motion”).¹ On 12 June 2012, the Prosecution filed its Response (“Response”).² On 19 June 2012, the Stanišić Defence filed a request for leave to reply with the reply contained therein (“Reply”).³ The Simatović Defence did not respond to the Motion.

II. SUBMISSIONS OF THE PARTIES

2. The Defence refers to a total of 55 exhibits which it seeks to have excluded.⁴ The Defence did not clearly list these exhibits. Following a review of the parties’ submissions, the Chamber identified 60 such documents.⁵ As detailed below, 19 of these documents have not yet been admitted, and one was withdrawn by the Prosecution.⁶ Accordingly, the Chamber will consider the Defence submissions in the Motion when considering the admission of these 19 documents under Rule 89 (C) of the Tribunal’s Rules of Procedure and Evidence (“Rules”).

3. The Defence submits that the documents should be excluded for the following reasons. First, the Defence contends that the Indictment is “non-specific and non-inclusive” and that the Prosecution, in using the documents in cross-examination, has not explained how they relate to the Indictment.⁷ This, the Defence suggests, causes it prejudice as it is not adequately informed of the nature of the case against the Accused, including the material facts and evidence relied upon by the Prosecution in support of the Indictment.⁸ Secondly, the Defence contends that it suffers prejudice due to the delay by the Prosecution in tendering the documents, which has deprived the Defence of the right to conduct investigations and adequately challenge the Prosecution case.⁹ Thirdly, the Defence argues that the Prosecution should have placed the documents on its Rule 65 *ter* exhibit list as they identify specific perpetrators whom the Prosecution will now seek to rely on in support of

¹ Stanišić Defence Motion for the Exclusion of Specified Prosecution Exhibits Admitted during Cross-Examination or, in the Alternative, Various other Remedies to Ensure an Effective Defence, 29 May 2012.

² Prosecution Response to Stanišić Defence Motion for the Exclusion of Specified Exhibits or other Remedies, 12 June 2012.

³ Stanišić Defence Application for Leave to Reply to the Prosecution’s Response to Stanišić Defence Motion for the Exclusion of Specified Prosecution Exhibits Admitted During Cross-Examination or, in the Alternative, Various other Remedies to Ensure an Effective Defence, 19 June 2012.

⁴ Reply, para. 35.

⁵ P2980, P2984, P2992, P2995-P2997, P3005-P3009, P3021, P3038, P3040-P3042, P3052, P3070-P3071, P3076-P3077, P3083, P3093-P3095, P3121-P3122, P3125-P3157.

⁶ P3157 was withdrawn on 7 June 2012. See T. 201110. P3121-P3122, P3125-P3129, P3131-P3141, and P3143 remained on the MFI list.

⁷ Motion, paras 10-11.

⁸ Motion, paras 20-29.

⁹ Motion, para. 5

its arguments relating to the existence of a Joint Criminal Enterprise (“JCE”).¹⁰ Fourthly, the Defence suggests that the Prosecution could have achieved the same purpose by using documents already in evidence.¹¹ Fifthly, it suggests that if the Prosecution had tendered the documents during its case-in-chief, the Defence could have used them during cross examination, or in its own case-in-chief.¹² Sixthly, the Defence requests, as an alternative to exclusion, that the Prosecution be compelled to explain the significance of the documents in detail and that the Defence be given an additional four months to investigate the impact of the documents on its case.¹³ Finally, the Defence also requests leave to exceed the word limit.¹⁴

4. In response, the Prosecution contends that the Indictment is sufficiently clear and that it has pleaded the material facts.¹⁵ It underlines that the Defence contentions regarding the Indictment have already been litigated, referring to the Chamber’s previous decision on the form of the Indictment.¹⁶ It further suggests that it has tendered the documents in accordance with the Chamber’s related guidance on this issue.¹⁷ It contends that the issue of prejudice has already been considered by the Chamber in relation to the admitted documents, and was dismissed.¹⁸ The Prosecution submits that the Defence has not shown a sufficient basis for requesting additional time, and that it has had sufficient time to review the documents which were disclosed in advance of the commencement of the Defence case.¹⁹ The Prosecution further submits that the Defence essentially seeks reconsideration, and that the test for reconsideration should therefore be applied by the Chamber when addressing the Motion.²⁰ The Prosecution also requests leave to exceed the word limit.²¹

III. APPLICABLE LAW

5. According to Rule 89 (C) of the Rules, a Chamber may admit any relevant evidence which it deems to have probative value. Rule 89 (D) of the Rules clarifies that a Chamber may exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial.

¹⁰ Motion, paras 12-15.

¹¹ Reply, para. 26.

¹² Motion, para. 22.

¹³ Motion, para. 63.

¹⁴ Motion, para. 71.

¹⁵ Response, paras 7-13.

¹⁶ Response, para. 6; Decision on Stanišić Defence Motion on the Form of the Indictment, 29 March 2010 (“Decision on the Form of the Indictment”).

¹⁷ Response, para. 14; Guidance on the Admission into Evidence of Documents Tendered by the Prosecution during the Defence Case and the Reasons for Decisions on Past Admissions of Such Documents, 26 August 2011.

¹⁸ Response, paras 22-24.

¹⁹ Response, para. 29.

²⁰ Response, para. 4.

²¹ Response, para. 5.

6. Rule 90 (H) of the Rules states:

- (i) 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.
- (ii) In the cross-examination of a witness who is able to give evidence relevant to the case for the cross-examining party, counsel shall put to that witness the nature of the case of the party for whom that counsel appears which is in contradiction of the evidence given by the witness.
- (iii) The Trial Chamber may, in the exercise of its discretion, permit enquiry into additional matters.

7. The Chamber refers to its previous guidance on the admission into evidence of documents tendered by the Prosecution during the defence case (“Guidance”).²² The Guidance held that while generally the Prosecution evidence is received during its case-in-chief, given the huge volume of evidence available in cases of this complexity and length, it would be impossible for the Prosecution to present anticipatory and pre-emptive responses during its case-in-chief.²³

8. The Guidance also refers to the *Prlić* Decision which recalled that “where the accused opposes the admission of evidence during cross-examination due to an alleged breach of his right to a fair trial, a Trial Chamber must consider how it intends to strike the appropriate balance between the need to ensure the rights of the accused and its decision to admit such evidence. In doing so, the Trial Chamber will have to consider the mode of disclosure of the documents in question, the purpose of their admission, the time elapsed between disclosure and examination of the witness, the languages known to Counsel and the accused, as well as any other relevant factual considerations”.²⁴

9. The test for reconsideration is that the Applicant must “satisfy the Chamber of the existence of a clear error of reasoning in the [impugned decision], or of particular circumstances justifying its reconsideration in order to avoid injustice. Particular circumstances include new facts or new

²² Guidance on the Admission into Evidence of Documents Tendered by the Prosecution during the Defence Case and the Reasons for Decisions on Past Admissions of Such Documents, 26 August 2011.

²³ Guidance, para. 14.

²⁴ *Prosecutor v. Prlić et al.*, Case no. IT-04-74-AR73.14, Decision on the Interlocutory Appeal Against the Trial Chamber’s Decision on Presentation of Documents by the Prosecution in Cross-Examination of Defence Witnesses, 26 February 2009, para. 25 and references cited therein.

arguments. However, to succeed on this basis, an applicant must demonstrate how any new facts or arguments in a request for reconsideration justify reconsideration".²⁵

IV. DISCUSSION

10. At the outset, the Chamber grants the Defence request for leave to reply as well as the requests for word limit extensions in respect of the Motion, Response, and Reply. The Defence submissions in the Reply have been taken into account in the present decision.

11. The Chamber refers to its previous synopsis of litigation in relation to the form of the Indictment²⁶ and notes that the Defence arguments in the Motion are very similar to the arguments contained in previous motions.²⁷ As far back as 14 November 2003, a previous Trial Chamber issued a decision in which it concluded that, apart from one minor amendment, the Indictment was not defective.²⁸ Furthermore, the operative indictment in this case, the Third Amended Indictment, was filed over 4 years ago on 10 July 2008.²⁹ The Chamber has also previously dismissed a Defence motion requesting that the Chamber order the Prosecution to further particularise the nature of the case against the Accused, noting that the Defence had failed to file a preliminary motion alleging any defects in the form of the Third Amended Indictment, or show good cause as to why its motion could not have been filed within the requisite time period.³⁰ As such, the arguments regarding the form of the indictment have already been fully litigated.

Documents already admitted

12. The Chamber considers that for the arguments relating to the 40 documents³¹ which have already been admitted into evidence,³² the correct standard to be applied to the Defence arguments

²⁵ *Prosecutor v Prlić et al.*, Case no. IT-04-74-AR73.14, Decision on Jadranko Prlić's Interlocutory Appeal Against the Decision on Prlić Defence Motion for Reconsideration of the Decision on Admission of Documentary Evidence, 3 November 2009, para. 18.

²⁶ Decision on the Form of the Indictment, para. 9.

²⁷ Decision on the Form of the Indictment, para. 9; Stanišić Defence Motion on the Form of the Indictment, 3 November 2009.

²⁸ Decision on Defence Preliminary Motions, 14 November 2003. The Chamber ordered the Prosecution to clarify the use of "including but not limited" contained in paragraphs 7, 19, 23, and 59 of the Indictment.

²⁹ Prosecution Notice of Filing of Third Amended Indictment, 10 July 2008.

³⁰ Decision on the Form of the Indictment, 29 March 2010.

³¹ There were in fact 41 documents but P3157 was withdrawn by the Prosecution, see *Supra* footnote 6.

³² The documents bearing exhibit nos P2992, P2980, P2984, P2996, and P2997 were admitted by the Chamber on 24 November 2011, see T. 151119, 15121, 15123-15124; The document bearing exhibit no. P3076 was admitted into evidence on 7 February 2012, see T. 16958; The documents bearing exhibit nos P3146-P3156, P3077, and P3130 were admitted into evidence at the Housekeeping session on 7 June 2012, see T. 20109, 20141, 20098; The documents bearing exhibit nos P3093-P3095 were admitted into evidence on 29 February 2012, see T. 17877-17879; The documents bearing exhibit nos P3005-P3007 were admitted into evidence on 20 July 2012, see T. 13107; The documents bearing exhibit nos P3008, P3009 and P3083 were admitted into evidence on 28 March 2012, see T. 18687, 18692; The document bearing exhibit no. P2995 was admitted into evidence by the Chamber on 12 June 2012, see T. 20148; The documents bearing exhibit nos P3040-P3042 were admitted into evidence on

is that of reconsideration. Consequently, the Defence must show a clear error of reasoning or that reconsideration is necessary in order to avoid injustice. In relation to the 40 admitted documents, the Defence states that if it had been provided with them at an earlier stage, it would have had the opportunity to put them to additional Prosecution and/or Defence witnesses.³³ The Defence also submits it could have sought out additional witnesses to give evidence regarding those documents.³⁴

13. The Chamber notes that while the Defence raised these specific arguments in relation to seven of the documents prior to their admission, it did not do so in relation to the remaining 33.³⁵ For those seven documents in relation to which these arguments have previously been made, the Chamber does not consider that the Defence has identified any error of reasoning that would justify reconsideration. In relation to the remaining 33 documents, the Chamber considers that these are not new arguments as they could have been raised prior to the decisions on admission being made. In any event, the mere fact that the Defence could have put the documents to additional witnesses, or that it could have sought to locate further witnesses is insufficient to establish that reconsideration of the Chamber's decision on the admission of these documents into evidence is necessary to avoid an injustice. As such, the documents remain in evidence. Equally, the Chamber does not consider that their admission warrants any adjournment, and therefore, the Defence alternative request for additional time is also denied.³⁶

Contextualisation documents

14. In relation to exhibits P3008 and P3009, admitted into evidence on 28 March 2012, the Stanišić Defence had earlier filed a notice seeking admission of further excerpts for purposes of contextualisation ("Notice").³⁷ Thereafter, the Prosecution filed its response to the Notice.³⁸ As these excerpts are closely related to the personnel files which are the subject of this decision, the Chamber will now decide upon their admission. The Chamber considers that the excerpts from the personnel files set out in the Notice provide contextualisation to P3008 and P3009, and are,

20 October 2011, see T. 14720- 14721, 14801; The document bearing exhibit no. P3052 was admitted into evidence on 8 December 2011, see T.15543-T.15544, 15554; The documents bearing exhibit nos P3142, P3144, and P3145 were admitted into evidence during the testimony of Witness Dejan Plahuta, T. 19509, 19518. The document bearing exhibit no. P3021 was admitted on 6 October 2011, T. 14134; The document bearing exhibit no. P3038 was admitted on 19 October 2011, T. 14621; The documents bearing exhibit nos P3070-P3071 were admitted on 31 January 2012, T. 16659.

³³ Motion, para. 22.

³⁴ Ibid.

³⁵ P3077, see T. 16976; P3008-P3009, see Notice para. 6; P3040-P3042, see T. 14720; P3052, see T. 15544.

³⁶ The Defence further requested that the Prosecution be compelled to explain the factual and legal significance of the documents in question (see also Stanišić Defence Notification of the Defence Position in Relation to Exhibits P3008 and P3009, 1 December 2011, for a similar request). The Chamber considers that the Defence has not demonstrated or even argued a legal basis for such a request and thus denies it.

³⁷ Stanišić Defence Notification of the Defence Position in Relation to Exhibits P3008 and P3009, 1 December 2011.

³⁸ Prosecution Response to Stanišić Defence Notification regarding Exhibits P3008 and P3009, 15 December 2011.

therefore, relevant and of probative value. The Chamber therefore admits these excerpts into evidence.³⁹

Documents marked for identification

15. The Defence contends that the personnel files identify a number of alleged perpetrators⁴⁰ and suggests that the Prosecution should have informed it of the identity of those perpetrators at an earlier stage in the proceedings.⁴¹ The Defence further submits that the Prosecution will seek to argue that these perpetrators formed part of a JCE with the Accused, and asks that the files be excluded on this basis.⁴² However, the Prosecution has not suggested that the individuals identified in the personnel files are perpetrators or that it will seek to rely on them for this purpose. The Defence submissions are therefore speculative and do not constitute a reason to exclude the documents. As to the Defence contention that the Prosecution could have used documents already in evidence rather than documents which are the subject of this decision in order to achieve its purpose, the Chamber considers that the fact that another document could have been used in cross-examination cannot constitute a bar to the admission of an equally valid but different document, and has no bearing on the admissibility test under Rule 89 (C).

16. Documents bearing MFI nos P3121 and P3122 are excerpts of personnel files that were tendered through Witness Dejan Plahuta.⁴³ The Prosecution has shown with sufficient specificity the relevance and probative value of the documents. Furthermore, the documents have a sufficient connection to the witness's testimony to be tendered at this stage of the proceedings. The Chamber does not consider that the Defence has shown prejudice such as to warrant their exclusion or any adjournment.

17. Documents bearing MFI nos P3125-P3129, P3131-P3141, and P3143 are personnel files also tendered through Witness Dejan Plahuta. The Prosecution sought to have the files admitted in order to contextualise and rebut the Defence assertion that a DB unit was not formed or operational in 1991.⁴⁴ In addition, the Simatović Defence had requested the admission of the entire file as opposed to the excerpts of it which formed MFI no. P3141.⁴⁵ The Prosecution did not object and

³⁹ The Chamber notes that the excerpt with ERN number ERN 0704-2161 is not uploaded into eCourt. However, based on the description provided in the Notice, and bearing in mind that the Prosecution does not object to admission, the Chamber considers that the excerpt satisfies the test set out in Rule 89 (C).

⁴⁰ Motion, para. 12.

⁴¹ Ibid.

⁴² Motion, para. 67; Reply, para. 10.

⁴³ T. 19642.

⁴⁴ Annex A to Response.

⁴⁵ T. 19503.

proposed that the entire file be admitted following it being uploaded into e-Court.⁴⁶ The Chamber notes that the BCS version of the file has now been uploaded into e-Court. In relation to each of the above documents, the Prosecution has shown with sufficient specificity the relevance and probative value of the files. Furthermore, the documents have a sufficient connection to the witness's testimony to be tendered at this stage of the proceedings. The Chamber does not consider that the Defence has shown prejudice such as to warrant their exclusion or any adjournment.

V. DISPOSITION

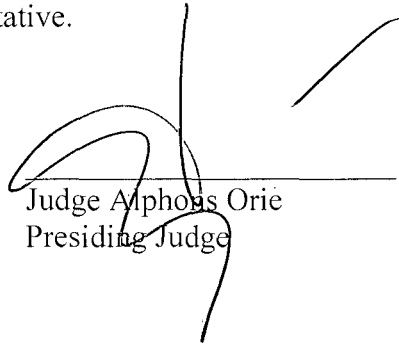
18. For the foregoing reasons, the Chamber

- (i) **GRANTS** the Prosecution and Defence Requests to exceed the word limit;
- (ii) **GRANTS** the Defence request for leave to reply;
- (iii) **ADMITS** into evidence, in addition to the excerpts admitted in relation to Exhibit P3008 and from the same personnel file, the documents with the following ERN: 0558-7766-0558-7768; 0558-7769; 0558-7770; 0558-7771; 0558-7772;
- (iv) **ADMITS** into evidence, in addition to the excerpts admitted in relation to Exhibit P3009 and from the same personnel file, the documents with the following ERN: 0704-2161; 0704-2164-0704-2167; 0704-2170; 0704-2171; 0704-2172; 0704-2177; 0704-2179; 0704-2180; 0704-2183; 0704-2184; 0704-2185; 0704-2193; 0704-2194-0704-2196; 0704-2199; 0704-2200; and 0704-2210;
- (v) **INSTRUCTS** the Stanišić Defence to upload each of the above into eCourt;
- (vi) **ADMITS** into evidence documents bearing MFI nos P3121-P3122, P3125-P3129, P3131-P3140, and P3143;
- (vii) **ADMITS** into evidence 65 ter no. 6496.1 with corresponding translation, once uploaded;
- (viii) **INSTRUCTS** the Registry to replace MFI no. P3141 with 65 ter no. 6496.1;

⁴⁶ Ibid.

- (ix) **REQUESTS** the Registry to assign exhibit numbers to the documents admitted above and to inform the Chamber and the parties of the numbers so assigned; and
- (x) **DENIES** the Motion and all other requests.

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



Judge Alphons Orié
Presiding Judge

Dated this 15th day of August 2012
At The Hague
The Netherlands

[Seal of the Tribunal]