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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: 28 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: 28 August 2012

PROSECUTOR

v.

**JOVICA STANIŠIĆ
FRANKO SIMATOVIĆ**

PUBLIC

**FIRST DECISION ON STANIŠIĆ DEFENCE SECOND
ADDITIONAL MOTION FOR ADMISSION OF DOCUMENTS
INTO EVIDENCE FROM THE BAR TABLE**

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 OF THE PARTIES

1. On 24 May 2012, the Chamber set 4 June 2012 at noon as the deadline for submitting any further evidentiary motions for the Defence case.¹ On 4 June 2012 at 1:24 p.m., the Stanišić Defence filed its Second Additional Motion for Admission of Documents into Evidence from the Bar Table, requesting the admission of 152 documents (“Motion”). On 7 June 2012, the Chamber summarily dismissed the Motion (“Oral Decision”).² On 11 June 2012, the Stanišić Defence filed a motion for reconsideration of the Oral Decision or, in the alternative, certification for leave to appeal it.³ On 26 June 2012, by means of an informal communication, the Chamber reconsidered the Oral Decision and reinstated the Motion. On 28 June 2012, the Defence filed a corrigendum correcting the confidential status of certain documents as well as the description of another document, and withdrawing the request for the admission of three documents contained in the Motion (“Corrigendum”).⁴ On 10 July 2012, the Prosecution filed its Response (“Response”).⁵ The Simatović Defence did not respond to the Motion.

2. In the Motion, the Stanišić Defence (“Defence”) tenders 152 documents from the bar table, and submits that as the Simatović Defence case has come to an end, it was able to further assess whether there were any outstanding issues which could be addressed by documents in its possession.⁶ The Defence tenders 23 documents related to Prosecution witness Stevan Todorović, mostly consisting of statements and transcripts of testimony of witnesses in other cases before this Tribunal which the Defence submits describe Todorović’s cruel treatment of prisoners and other individuals.⁷ The Defence submits that the “ICTY statements and previous testimony” sought to be tendered in relation to Todorović are tendered under Rule 92 *bis* of the Rules of Procedure and Evidence (“Rules”).⁸ One of these documents, bearing Rule 65 *ter* no. 1D04685, has already been admitted into evidence as exhibit P183, and will therefore not be addressed in this decision.⁹ The Defence submits that these documents impeach Todorović’s credibility and the reliability of his

¹ T. 19805.

² T. 20138-20139.

³ Urgent Stanišić Defence Motion for Reconsideration or in the Alternative Request for Leave to Appeal the Trial Chamber’s Decision of Stanišić Second Additional Motion for Admission of Documents into Evidence Through the Bar Table, 11 June 2012.

⁴ Stanišić Corrigendum to “Second Additional Motion for Admission of Documents into Evidence through the Bar Table” and “Motion for Admission of Documents into Evidence through the Bar Table of Documents that were Denied Admission Without Prejudice” both filed on 4 June 2012, 28 June 2012, paras 3-5. The documents withdrawn by the Defence are: 1D05527, 1D05506, and 1D05553.

⁵ Prosecution Response to Stanišić Additional Motion for Admission of Documents into Evidence Through the Bar Table with Confidential Annex A, 10 July 2012.

⁶ Motion, para. 6.

⁷ These are documents bearing Rule 65 *ter* nos 1D05503, 1D04594, 1D04600, 1D04602, 1D04604, 1D04605, 1D04607, 1D04608, 1D04614, 1D04616, 1D04620, 1D04638, 1D04640, 1D04644, 1D04660, 1D04685, 1D04686, 1D04693, 1D04730, 1D04732, 1D04736, 1D04781, and 1D04791.

⁸ Motion, Confidential Annex A, p. 17.

⁹ T. 3258.

evidence.¹⁰ The Defence likewise incorporates by reference its arguments in its Response to the Prosecution Motion seeking the admission of Todorović's evidence in this case under Rule 92 *quater*.¹¹ It further tenders four transcripts of testimony given in the *Karadžić* case by Prosecution witnesses who had previously given testimony in the present case, along with two interviews of Prosecution witnesses, one of whom testified in the present case, and another whose evidence was admitted under Rule 92 *quater*.¹² As with its previous decisions on bar table motions, the Chamber will deal with the various categories of documents subject of the Motion through separate decisions. The Chamber will therefore address these 28 documents through the present decision, and the remainder of the Motion through another decision.

3. With regard to the documents the Defence seeks to tender pursuant to Rule 92 *bis*, the Prosecution notes that the Defence has not articulated the basis for the admission of said documents under Rule 92 *bis*, and argues that the Defence failed to provide notice as required by Rules 65 *ter* (G) and 67(A)(ii).¹³ The Prosecution further points out that the Defence has not requested the addition of these witnesses to its witness list under Rule 73 *ter* (D).¹⁴ Furthermore, the Prosecution objects to the admission of transcripts of testimony given in the *Karadžić* case by witnesses who had previously testified in the present case.¹⁵ The Prosecution further notes that the Defence appears to be tendering the testimony of a Prosecution witness given in the *Karadžić* case as a previous inconsistent statement, albeit made subsequent to the testimony that the Defence seeks to challenge.¹⁶ The Prosecution recalls the Tribunal's case law on confronting witnesses with inconsistent statements.¹⁷ The Prosecution does not object to the admission of five documents, those bearing Rule 65 *ter* nos 1D04686, 1D04730, 1D04736, 1D05503, and 1D05539.¹⁸ Finally, the Prosecution seeks to exceed the word limit in its Response, citing the size and complexity of the Motion.¹⁹

¹⁰ Motion, Confidential Annex A, pp. 15-26.

¹¹ Motion, Confidential Annex A, p. 16, referring to Further Defence Response to Prosecution Motion for Admission of Evidence of Witness B-1244 pursuant to Rule 92 *quater* with Confidential Annexes A and B, 13 July 2010.

¹² These are documents bearing Rule 65 *ter* nos 1D05539, 1D05563, 1505547, 1D05549, 1D05550, and 1D05551.

¹³ Response, paras 18, 20.

¹⁴ Response, paras 18, 22.

¹⁵ Response, para. 21.

¹⁶ Response, para. 23.

¹⁷ Response, paras 23-25.

¹⁸ Response, Confidential Annex A, pp. 16, 26-30, 72.

¹⁹ Response, paras 27-28.

II. APPLICABLE LAW

4. The Chamber recalls and refers to the applicable law governing Rule 92 *bis* and the admission of evidence from the bar table under Rule 89 (C) as set out in previous decisions.²⁰ Rule 92 *ter* is another avenue by which a written statement or transcript of testimony may be admitted into evidence, provided the witness is: (1) present in court, (2) available for cross-examination and any questioning by the Judges; and (3) the witness attests that the written statement or transcript accurately reflects that witness's declaration and what the witness would say if examined. Unlike Rule 92 *bis*, Rule 92 *ter* allows the admission of evidence that goes to the acts and conduct of the accused as charged in the indictment. Rules 92 *bis* and 92 *ter* are *leges specialis* for the admission of written statements and transcripts of testimony of prospective witnesses taken by the parties for the purpose of these proceedings, and the requirements of Rule 92 *bis* or Rule 92 *ter* cannot be circumvented by resorting to the *lex generalis* of Rule 89 (C).²¹ A previous inconsistent statement of a witness may be tendered and admitted under Rule 89 (C) for the purpose of assessing that witness's credibility or for the truth of the contents thereof.²² The witness, however, should be confronted with such statement so as to enable the Chamber to evaluate the probative value of the inconsistent statement.²³ The Chamber further recalls and refers to the applicable law governing the recall of a witness.²⁴

III. DISCUSSION

5. At the outset, the Chamber grants the Prosecution request to exceed the word limit in its Response, considering the size and complexity of the Motion.

6. The Prosecution does not object to the admission of the documents bearing Rule 65 *ter* nos 1D05503, 1D04686, 1D04730, and 1D04736. The Chamber notes that these are not witness statements or transcripts of evidence given by a witness to a party for the purpose of Tribunal

²⁰ First Decision on Stanišić Defence Bar Table Motion of 17 February 2012, 23 May 2012, paras 9-10; Decision on Prosecution's Motions for Admission of Written Evidence pursuant to Rule 92 *bis*, 7 October 2010, paras 29-36.

²¹ *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-AR73.2, Decision on Interlocutory Appeal concerning Rule 92*bis*(C), 7 June 2002, para. 31. Rule 92 *ter* had not yet been introduced at the time of this Appeals Decision.

²² *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88AR73.3, Decision on Appeals against Decision on Impeachment of a Party's Own Witness, 1 February 2008, paras 29-32, citing with approval *Prosecutor v. Fatmir Limaj et al.*, Decision on the Prosecution's Motions to Admit Prior Statements as Substantive Evidence, 25 April 2005, paras 18, 21; See also Decision on Admission into Evidence of Prior Testimony Statement, and Related Documents Concerning Witness JF-052, 28 January 2011, paras 5-6.

²³ See e.g. *Prosecutor v. Halilović*, Case No. IT-01-48-T, Decision on Admission into Evidence of Prior Statement of a Witness, 5 July 2005, p. 3, where the Chamber held that: "confronting a witness with material passages of his or her prior statement allows the witness to explain, comment or elucidate on the existence of the alleged inconsistencies and therefore is respectful of the witness's integrity and enhances the reliability of the testimony"; See also *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88AR73.3, Decision on Appeals against Decision on Impeachment of a Party's Own Witness, 1 February 2008, para. 28 and fn. 28.

²⁴ Decision on Motions for Admission of Additional Evidence of Witness Milan Babić, 20 July 2012, para. 12.

proceedings. These documents therefore do not fall within the ambit of Rules 92 *bis* or 92 *ter*. The Chamber considers that the Defence explains (i) the relevance and probative value of each of these documents, and (ii) how they fit into its case. The Chamber therefore admits these documents into evidence.

7. The Prosecution likewise does not object to the admission of the document bearing Rule 65 *ter* no. 1D05539, which is an interview of Prosecution witness Miroslav Deronjić, whose testimony in the *Slobodan Milošević* and *Krajišnik* cases before this Tribunal, along with his 25 November 2003 statement, were admitted into evidence in this case under Rule 92 *quater*.²⁵ The Chamber considers that the appropriate time for the Defence to challenge or contextualise the Rule 92 *quater* evidence of Deronjić with additional evidence from this witness would have been either upon the Prosecution’s tendering thereof or shortly after its admission on 1 March 2011, during the Prosecution case.²⁶ The Chamber notes that the document in question was disclosed to the Defence on 28 December 2008.²⁷ The Defence has not shown good cause for only tendering this document now. The Chamber therefore denies admission into evidence of the document bearing Rule 65 *ter* no. 1D05539.

8. The document bearing Rule 65 *ter* no. 1D05563 is a record of an interview conducted on 24 May 2001 by the Prosecution of one of its witnesses in the present case, Manojlo Milovanović. The Defence tenders this document to contextualize the evidence the witness previously gave.²⁸ The Prosecution submits that this was originally disclosed to the Defence pursuant to Rule 66(A)(ii) and the Defence could have put the document’s contents to Milovanović when he testified in April 2010, or when he returned in December 2011 for further cross-examination.²⁹ The Defence does not explain why, despite ample opportunity to do so in both April 2010 and December 2011, it did not confront Milovanović with this document. Furthermore, the Defence tenders the document bearing Rule 65 *ter* no. 1D05547, which is the transcript of a Prosecution witness’s testimony in the *Karadžić* case, as a statement inconsistent with his prior testimony in the present case.³⁰ The Chamber considers that the appropriate avenue for introducing the documents bearing Rule 65 *ter* nos 1D05563 and 1D05547 would have been through a Defence request to recall them for further cross-examination, and have them attest to their prior statements pursuant to Rule 92 *ter* or confront them with and question them on any inconsistencies so as to establish probative value for tendering

²⁵ T. 10234; Reasons for Decision on Prosecution’s Motion for Admission of Evidence of Witness Miroslav Deronjić pursuant to Rule 92 *quater*, 1 March 2011.

²⁶ See also Decision on Motions for Admission of Additional Evidence of Witness Milan Babić, 20 July 2012, para. 20.

²⁷ Motion, Confidential Annex A, p. 72.

²⁸ Motion, Confidential Annex A, pp. 61-62.

²⁹ Response, Confidential Annex A, pp. 73-74.

³⁰ Response, Confidential Annex A, pp. 78-79.

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the documents as previous inconsistent statements under Rule 89 (C) of the Rules. The Chamber therefore denies admission into evidence of the documents bearing Rule 65 *ter* nos 1D05563 and 1D05547.

9. The Chamber observes that the remaining 21 documents subject of this Decision³¹ are all transcripts of evidence given by witnesses in proceedings before this Tribunal or witness statements given for the purpose of Tribunal proceedings which the Defence submits impugn the credibility of Prosecution Rule 92 *quater* witness Todorović. The Defence should have sought these documents' admission under Rule 92 *bis* or 92 *ter* in conjunction with Rule 73 *ter* (D). The Defence therefore should not be permitted to seek the admission of these documents into evidence through a bar table motion filed under the *lex generalis* of Rule 89 (C), and circumvent the stringent requirements of Rules 92 *bis* or 92 *ter*.³² For these reasons, the Chamber denies admission of the remaining 21 documents subject of this decision.

IV. DISPOSITION

10. For the foregoing reasons, the Chamber

- (i) **GRANTS** the Prosecution request to exceed the word limit in its Response;
- (ii) **DECLARES** the Motion moot in relation to the tendering of the document bearing Rule 65 *ter* no. 1D04685;
- (iii) **GRANTS** the Motion in part;
- (iv) **ADMITS** into evidence the documents bearing Rule 65 *ter* nos 1D05503, 1D04686, 1D04730 (provisionally under seal), and 1D04736 (provisionally under seal);
- (v) **REQUESTS** the Registry to assign exhibit numbers to the documents admitted and inform the parties and the Chamber of the numbers so assigned;
- (vi) **DENIES** the admission into evidence of the documents bearing Rule 65 *ter* nos 1D04594, 1D04600, 1D04602, 1D04604, 1D04605, 1D04607, 1D04608, 1D04614, 1D04616, 1D04620, 1D04638, 1D04640, 1D04644, 1D04660, 1D04693, 1D04732,

³¹ These are documents bearing Rule 65 *ter* nos, 1D04594, 1D04600, 1D04602, 1D04604, 1D04605, 1D04607, 1D04608, 1D04614, 1D04616, 1D04620, 1D04638, 1D04640, 1D04644, 1D04660, 1D04693, 1D04732, 1D04781, 1D04791, 1D05549, 1D05550, and 1D05551.

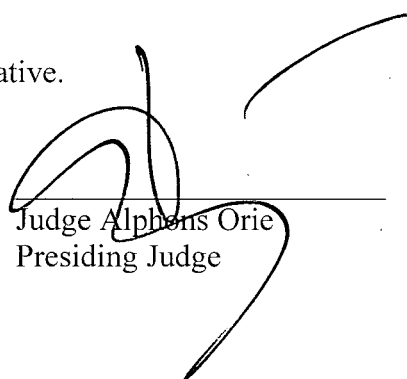
³² The Chamber notes that the Defence explicitly tenders these documents under Rule 92 *bis*, however the fact remains that such an application should not be hidden in the annex of a bar table motion, which is filed under Rule 89 (C) of the Rules. Even more so, the Defence simply included the documents in its bar table chart without specifically arguing the requirements of Rule 92 *bis*, let alone requesting addition to its witness list.

WJL

1D04781, 1D04791, 1D05539, 1D05563, 1505547, 1D05549, 1D05550, and
1D05551; and

(vii) **DECIDES** to issue a further decision on the Motion.

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



Judge Alphons Orie
Presiding Judge

Dated this twenty-eighth day of August 2012
At The Hague
The Netherlands

[Seal of the Tribunal]