

IT-03-69-T
D44600-D44595
31 October 2012

44600
MC



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: 31 October 2012
Original: English

IN TRIAL CHAMBER I

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

Registrar: Mr John Hocking

Decision of: 31 October 2012

PROSECUTOR

v.

**JOVICA STANIŠIĆ
FRANKO SIMATOVIĆ**

PUBLIC

**DECISION ON PROSECUTION MOTION FOR ADMISSION
OF REBUTTAL EVIDENCE: MLADIĆ NOTEBOOKS**

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 17 February 2012, the Stanišić Defence filed a motion seeking the admission of a total of 674 documents from the bar table (“Bar Table Motion”).¹ On 23 May 2012, in its first decision on the Bar Table Motion (“First Bar Table Decision”), the Chamber denied without prejudice the admission of the notebooks allegedly written by Ratko Mladić (“Mladić Notebooks”).² On 5 June 2012, the Stanišić Defence filed a motion re-tendering a number of documents previously denied admission, including excerpts from 17 of the Mladić Notebooks (“Bar Table Resubmission Motion”).³ On 4 June 2012, the Simatović Defence, in its second bar table motion, tendered excerpts from 17 of the Mladić Notebooks.⁴ On 26 July 2012, the Chamber issued a decision in relation to the excerpts of the Mladić Notebooks as had been tendered by both the Simatović and Stanišić Defence on 4 and 5 June 2012 respectively.⁵ On 24 September 2012, the Prosecution filed a motion seeking admission of excerpts of the Mladić Notebooks as rebuttal evidence (“Excerpts”) in relation to those excerpts admitted into evidence (“Motion”).⁶ On 3 October 2012, the Defence each requested the Chamber for an extension of time to respond to the Motion.⁷ The Chamber granted this request by means of informal communication on 4 October 2012. On 15 October 2012, the Simatović Defence filed its response (“Simatović Response”),⁸ as did the Stanišić Defence (“Stanišić Response”).⁹

II. SUBMISSIONS OF THE PARTIES

2. The Prosecution submits that a number of the Excerpts that were used in the examination of witness Milovanović, and which it had understood would be tendered by the Stanišić Defence, but were not, ought to now be admitted.¹⁰ In relation to a number of other Excerpts the Prosecution

¹ Stanišić Defence Motion for Admission of Documents through the Bar Table, (Confidential Annexes A, B and C), 17 February 2012.

² First Decision on Stanišić Defence Bar Table Motion of 17 February 2012, 23 May 2012, paras 16-21.

³ Stanišić Defence Motion for Admission of Documents into Evidence through the Bar Table of Documents that were Denied Admission Without Prejudice, (Confidential Annex A), 5 June 2012.

⁴ Simatović Defence Second Bar Table Motion, 4 June 2012.

⁵ Decision on the Stanišić and Simatović Defence Bar Table Motions Regarding the Mladić Notebooks, 26 July 2012.

⁶ Prosecution Motion for Admission of Rebuttal Evidence; Mladić Notebooks, 24 September 2012.

⁷ Urgent Stanišić Defence Request for Extension of Time to File Responses to the Prosecution’s Three Rebuttal Motions, 3 October 2012; Defence Request for Additional Time to Respond, 3 October 2012.

⁸ Simatović Defence Response to Prosecution Rebuttal Motions (Confidential Annexes 1-3), 15 October 2012.

⁹ Stanišić Defence Response to Prosecution Motion for Admission of Rebuttal Evidence: Mladić Notebooks, 15 October 2012.

¹⁰ Motion, paras 2, 14-18.

submits that they rebut negative inferences, which the Defence seeks to draw from the Mladić Notebooks.¹¹ In response, the Simatović Defence contends that the Prosecution has not adequately

3. indicated which specific witness testimony or exhibits the Excerpts rebut and also contests the accuracy of the Prosecution's descriptions of them.¹² The Simatović Defence further suggests that the Prosecution failed to seek admission of the Excerpts previously and is now attempting to have them admitted by way of rebuttal evidence.¹³ The Stanišić Defence argues that in relation to the documents seeking to rebut negative inferences, these relate to matters that were foreseeable and therefore fail to satisfy the legal test for the admission of rebuttal material.¹⁴ The Stanišić Defence also argues that a number of the Excerpts are of limited probative value.¹⁵

III. APPLICABLE LAW

4. The Chamber refers to the law as contained in its decision of 20 September 2012 regarding the admission of rebuttal evidence.¹⁶

IV. DISCUSSION

5. The Chamber considers that the Motion comprises three distinct categories of documents. Category (a) contains Excerpts which relate to the testimony of witness Milovanović ("Milovanović Excerpts") (documents bearing Rule 65 *ter* nos 5599.1, 5600.1, 5600.2, 5600.3, 5601.1, 5606.1, and 5607.1); Category (b) contains Excerpts which purport to rebut negative inferences which both the Stanišić and Simatović Defence seek to draw from the Mladić Notebooks due to the absence of reference to either of the Accused ("Inference Excerpts"), (documents bearing Rule 65 *ter* nos 5595.1, 5595.2, 5595.3, and 5595.4) and; Category (c) consists of documents which purport to rebut negative inferences which the Stanišić Defence seeks to draw from the Mladić Notebooks due to the absence of the Accused Stanišić's phone number in them ("Phone Number Excerpts"), (documents bearing Rule 65 *ter* nos 5595.5, 5596.4, 6523.1, 6523.2, and 6523.3).

¹¹ Motion, paras 19-31.

¹² Simatović Response, Confidential Annex 1, p. 1.

¹³ Ibid.

¹⁴ Stanišić Response, paras 13-17.

¹⁵ Stanišić Response, para. 18.

¹⁶ Decision on Prosecution Motion for Admission of Rebuttal Evidence Regarding Witness JF-057, 20 September 2012, paras 5-6.

Category (a): Milovanović Excerpts

6. The Chamber considers that the Milovanović Excerpts do not constitute rebuttal material. Rather, they are tendered in what the Prosecution describe as a “housekeeping matter” in order to have a “complete record” of witness Milovanović’s evidence.¹⁷ The Chamber notes that the Prosecution, rather than risking duplication of exhibits by tendering the Milovanović Excerpts during witness Milovanović’s testimony, relied upon a submission by the Stanišić Defence to the effect that it would tender the entirety of the Mladić Notebooks.¹⁸ On 12 December 2011, the Prosecution filed a submission attaching the Excerpts referred to during the testimony of witness Milovanović, although it did not formally tender them.¹⁹ Thereafter, the Stanišić Defence tendered the notebooks in their entirety, including the Milovanović Excerpts, in the Bar Table Motion and their admission was subsequently denied by the Chamber in its First Bar Table Decision.²⁰ While, the preferred format would have been a Prosecution bar table motion re-tendering just the Milovanović Excerpts, the Chamber considers that there is merit in the Prosecution’s request and will consider the admissibility of the Milovanović Excerpts. The Chamber also notes that neither the Stanišić nor Simatović Defence object to their admission into evidence from the bar table.²¹ The Chamber further considers that even if it would amount to varying the order of presentation of the evidence, it is in the interests of justice to permit the Prosecution to tender the Milovanović Excerpts at this stage of the proceedings.

7. The Chamber considers that each of the Milovanović Excerpts is probative and relevant. Furthermore, the documents have a sufficient connection to Milovanović’s testimony to be tendered at this stage of the proceedings. The Chamber will therefore admit them into evidence.

Category (b): Inference Rebuttal Excerpts

8. The Chamber considers that the Inference Rebuttal Excerpts are highly probative of a significant issue that arises directly out of Defence Evidence, namely the potential negative inference due to the absence of references to the Accused in certain portions of the Mladić Notebooks. Furthermore, the Chamber considers the Prosecution could not have reasonably foreseen that the Defence would tender a substantial amount of portions from the Mladić Notebooks

¹⁷ Motion, para. 16.

¹⁸ T. 15358-15359; Motion, para. 14.

¹⁹ Prosecution Submission of Mladić Notebook Excerpts Referenced During Recent Examination of Manojlo Milovanović, 12 December 2011.

²⁰ First Bar Table Decision, paras, 21, 30.

²¹ Stanišić Defence Response, para. 6.

in order to show a number of negative inferences. The Chamber considers it reasonable that, in going through voluminous Mladić Notebooks from which the Defence tendered a large number of extracts, the Prosecution should be allowed to tender a limited amount of extracts to rebut the inferences sought. Lastly, the Chamber finds that the Inference Rebuttal Excerpts satisfy the test under Rule 89 (C) and that the Prosecution has demonstrated how they fit into its case. The Chamber will therefore admit them into evidence.

Category (c): Phone Number Excerpts

9. The Prosecution tenders the Excerpts in this category in order to rebut the assertion by the Stanišić Defence that the phone number of the Accused Stanišić did not appear in the Mladić Notebooks.²² The Chamber considers that the material tendered by the Prosecution is highly probative of a significant issue, namely the potential negative inference due to the absence of the inclusion of the phone number of the Accused Stanišić in certain portions of the Mladić Notebooks. The Chamber further considers that the use of portions of the Mladić Notebooks in order to draw negative inferences is not something that the Prosecution could have reasonably anticipated. The Chamber further considers that the Phone Inference Rebuttal Excerpts satisfy the test under Rule 89 (C) and that the Prosecution has demonstrated how they fit into its case.

10. The Chamber notes however, that a translation has not been uploaded into eCourt in relation to the document bearing Rule 65 *ter* no. 6523.1. In the absence of a translation of this Excerpt, the Chamber is not in a position to properly assess its probative value, and will deny its admission into evidence from the bar table.

11. Therefore, each of the Phone Number Excerpts, save for the document bearing Rule 65 *ter* no. 6523.1, will be admitted into evidence.

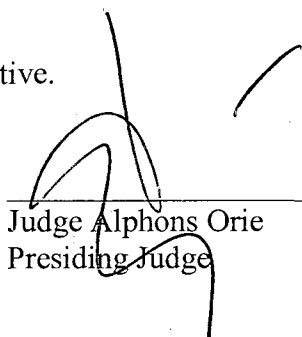
V. DISPOSITION

12. For the foregoing reasons, the Chamber **GRANTS** the Motion **IN PART**, and

²² Bar Table Resubmission Motion, Confidential Annex A, pp. 179, 185, 190, 206.

- (i) **ADMITS** the documents bearing Rule 65 *ter* nos 5599.1, 5600.1, 5600.2, 5600.3, 5601.1, 5606.1, 5607.1, 5595.1, 5595.2, 5595.3, 5595.4 5595.5, 5596.4, 6523.2, and 6523.3;
- (ii) **DENIES** the admission of the document bearing Rule 65 *ter* no. 6523.1; and
- (iii) **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.

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



Judge Alphons Orié
Presiding Judge

Dated this thirty-first day of October 2012
At The Hague
The Netherlands

[Seal of the Tribunal]