IT-03-69-T
D 44798 - D 44796
21 November 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:	21 November 2012
		Original:	English

IN TRIAL CHAMBER I

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

Registrar: **Mr John Hocking**

Decision of: **21 November 2012**

PROSECUTOR

v.

JOVICA STANIŠIĆ
FRANKO SIMATOVIĆ

PUBLIC

DECISION ON PROSECUTION MOTION FOR RECONSIDERATION OF THE DECISION DENYING ADMISSION OF D456

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 19 October 2011, the Simatović Defence tendered Dušan Momčilović's personnel file, 2D882, which was assigned exhibit number D456 and was marked for identification due to redactions in the original document and the lack of a full translation.[1] On 12 June 2012, the Chamber denied admission of D456, as the unredacted original and a full translation were still missing.[2] On 24 September 2012, the Prosecution filed the "Prosecution Notice of Upload of Unredacted Personnel File of Dušan Momčilović" seeking admission of the unredacted personnel file, which had been uploaded on e-court, bearing Rule 65*ter* number 6629.[3] Following the Stanišić Defence's response of 2 October 2012, indicating that the matter should be dealt with through a motion for reconsideration,[4] the Prosecution withdrew the notice and filed the "Prosecution Motion for Reconsideration of the Decision Denying Admission of D456" ("Motion") on 9 October 2012.[5] The Stanišić Defence filed a response seeking dismissal of the Motion on 23 October 2012.[6] The Simatović Defence did not file a response.

II. SUBMISSIONS OF THE PARTIES

2. The Prosecution submits that the Chamber should reconsider its decision denying admission of D456, and should admit the unredacted personnel file because there has been a change in circumstances – the lack of an unredacted version of the document and its complete translation has been remedied.[7] The Prosecution also points out that the document was introduced by the Simatović Defence, and has now, after being discussed at some length and used with several witnesses, become a necessary part of the record.[8]

3. The Stanišić Defence submits that the Prosecution has not indicated the relevance of D456 to its case and therefore the Accused is unaware how the evidence will be used by the Prosecution.[9] The Stanišić Defence further submits that by seeking the admission of D456 the Prosecution is

1 T. 14574-14575.
2 T. 20145-20147.
3 Prosecution Notice of Upload of Unredacted Personnel File of Dušan Momčilović, 24 September 2012 (Confidential).
4 Stanišić Defence's Response to Prosecution's Notice of Upload of Unredacted Personnel File of Dušan Momčilović, 2 October 2012 (Confidential).
5 Prosecution Motion for Reconsideration of the Decision Denying Admission of D456, 9 October 2012 (Confidential).
6 Stanišić Defence Response to Prosecution Motion for Reconsideration of the Decision Denying Admission of D456, 23 October 2012 (Confidential) ("Response").
7 Motion, paras 4-8.
8 Motion, para. 9.
9 Response, paras 4-7.

trying to introduce new evidence after the close of the proceedings, thereby denying the Accused the notice necessary to guarantee his right to a fair trial.[10]

III. APPLICABLE LAW

4. The Chamber recalls and refers to the applicable law on the reconsideration of the Chamber's decisions as set out in its Decision of 14 September 2012.[11]

5. According to Rule 89 (C) of the Tribunal's Rules of Procedure and Evidence ("Rules"), a Chamber may admit any relevant evidence which it deems to have probative value, whereas Rule 89 (D) states that a Chamber may exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial.

IV. DISCUSSION

6. The admission of D456 was denied due to problems with the provision of unredacted versions of the original and the translation of the document.[12] The Prosecution has now uploaded an unredacted original and a full translation of the Dušan Momčilović personnel file. The Chamber considers that the provision of the unredacted version and revised translation of the document amounts to a new fact justifying reconsideration of the decision to deny admission of D456 in order to avoid an injustice. Accordingly, the conditions for reconsideration have been met.

7. D456 was tendered by the Simatović Defence through witness Dragoslav Krsmanović.[13] It was subsequently used with Simatović Defence witnesses Gvozden Gagić[14] and Dejan Plahuta.[15] At the time the personnel file was tendered the Prosecution indicated that it did not contest the authenticity or relevance of the document,[16] whereas the Stanišić Defence was silent on the matter. The Chamber finds the document relevant and of probative value and, therefore, considers that D456 meets requirements of admission defined under Rule 89 (C) of the Rules.

8. The Chamber will consider next whether the admission of D456 infringes on the Accused's right to a fair trial thus weighing in favour of excluding it under Rule 89 (D) of the Rules. The Stanišić Defence argues that the Prosecution is altering its case without providing adequate notice

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10 Response , paras 8-13.
11 Decision on Stanišić Defence Request for Reconsideration of Documents Previously Denied Admission through the Bar Table, 14 September 2012, para. 4.
12 T. 20145-20147.
13 T. 14544-14547.
14 T. 17164-17166, 17168, 17256-17259, 17314-17316.
15 T. 19543.
16 T. 14575.

to the Accused and, due to the late stage of proceedings, thereby deprives the Stanišić Defence of the possibility to properly investigate the impugned evidence. The Stanišić Defence refers to the obligation of the offering party to demonstrate where and how each document fits into its case, and to the principles the Chamber has set out in the Guidance of 26 August 2011.[17]

9. The Chamber notes that the duty of the offering party to demonstrate, with clarity and specificity, where and how each document fits into its case has been developed by the Tribunal's case law specifically in relation to documents that are tendered from the bar table in order to establish their relevance.[18] This duty does not extend as such to documents tendered through witnesses, as their relevance is meant to be clarified by the witnesses through whom they are tendered. D456 has been tendered through Dragoslav Krsmanović, and the Chamber considers that its relevance has been sufficiently clarified in the course of Krsmanović's testimony and during the testimonies of other witnesses with whom the document was subsequently used.

10. The Chamber further notes that the Guidance of 26 August 2011 does not apply to this situation either, as it concerns presentation of new evidence by the Prosecution during the Defence case. In this instance the Prosecution is not tendering new evidence but seeks reconsideration of a decision to deny admission, on technical grounds, of a document tendered by the Simatović Defence. Furthermore, admission of D456 at the present stage of the proceedings cannot be regarded as depriving the Accused of the ability to conduct investigations on the basis of this document and properly prepare his defence, as D456 has been used in the proceedings as from October 2011 in the examination of three witnesses.

11. For the above reasons, the Chamber finds that no reason for excluding D456 on grounds of maintaining the fairness of the proceedings and the need to ensure fair trial has been demonstrated and therefore D456 should be admitted into evidence.

V. DISPOSITION

12. For the foregoing reasons, pursuant to Rule 89 of the Rules, the Chamber **GRANTS** the Motion and

(i) **REQUESTS** the Registry to replace D456 with Rule 65*ter* number 6629; and

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[17] Guidance on the Admission into Evidence of Documents Tendered by the Prosecution During the Defence Case and Reasons for Decision on Past Admissions of Such Documents, 26 August 2011.

[18] See Decision on the Prosecution's Revised First Motion for Admission of Exhibits from the Bar Table, 3 February 2011, para. 11; *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-T, Decision on Prosecution Motion to Admit Documentary Evidence, 10 October 2006, para. 18; *Prosecutor v. Rasim Delić*, Case No. IT-04-83-T, Decision on Prosecution Submission on the Admission of Documentary Evidence, 16 January 2008, para. 9.

(ii) **ADMITS** D456 into evidence under seal.

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

Judge Alphons Orie
Presiding Judge

Dated this twenty first day of November 2012
At The Hague
The Netherlands

[Seal of the Tribunal]