



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: 16 April 2010
Original: English

IN TRIAL CHAMBER I

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

Registrar: Mr John Hocking

Decision of: 16 April 2010

PROSECUTOR

v.

**JOVICA STANIŠIĆ
FRANKO SIMATOVIĆ**

PUBLIC

**DECISION ON FOURTEENTH PROSECUTION MOTION FOR
LEAVE TO AMEND ITS RULE 65 *TER* EXHIBIT LIST**

Office of the Prosecutor

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I. PROCEDURAL HISTORY

1. On 19 July 2004, the Prosecution filed its exhibit list pursuant to Rule 65 *ter* of the Rules of Procedure and Evidence of the Tribunal (“Rules”).¹ Since then, the Prosecution has filed numerous motions for leave to amend its Rule 65 *ter* Exhibit List, which the Chamber has decided upon.² On 7 December 2009, the Prosecution filed its partly confidential “Fourteenth Prosecution Motion for Leave to Amend Rule 65 *ter* Exhibit List with Confidential Annex” (“Motion”).

2. On 21 December 2009, the Stanišić Defence filed its confidential “Defence Response to Fourteenth Prosecution Motion for Leave to Amend Rule 65 *ter* Exhibit List” (“Stanišić Response”). The Simatović Defence did not respond to the Motion.

II. SUBMISSIONS

A. Prosecution

3. In its Motion, the Prosecution seeks leave to add to its Rule 65 *ter* Exhibit List 14 documents (“Proposed 65 *ter* Documents”).³ These documents include excerpts from personnel files of the Unit for Special Operations (“JSO”) of the Serbian State Security Service (“Serbian DB”), financial documents cited in the Nielsen Addendum,⁴ and a Croatian Medical Journal article entitled “Civilian Massacre in Škabrnje and Nadin” relevant to the testimony of proposed Prosecution expert, Davor Strinović.⁵ The Prosecution asserts that the Proposed 65 *ter* Documents have a “critical relevance” to its case,⁶ and that admitting them is in the “interests of justice.”⁷ Furthermore, the Prosecution generally argues that the Defence will not be prejudiced by the admission of these documents as it is still early in the proceedings and the Proposed 65 *ter* Documents are limited in number.⁸

4. More specifically, the Prosecution submits that the excerpts from the JSO personnel files (proposed 65 *ter* numbers 5161 through 5166) demonstrate the existence of the JSO since 1991 and

¹ Pre-Trial Brief, Confidential Annex C, Prosecution’s Intended Exhibit List, 19 July 2004.

² For an exhaustive list, see Decision on Eleventh, Twelfth and Thirteenth Prosecution Motions for Leave to Amend its Rule 65 *ter* Exhibit List with Confidential Annex, 10 February 2010 (“10 February Rule 65 *ter* Decision”), fn. 2. The current exhibit list will hereinafter be referred to as rule 65 *ter* Exhibit List.

³ Motion, para. 1.

⁴ Prosecution Submission Addendum to Expert Report of Christian Nielsen Pursuant to Rule 94 *bis* with Confidential Annex, “The Organisation of Internal Affairs within the Serbian Entities in the Former Yugoslavia (1990-1995), 18 September 2009 (“Nielsen Addendum”).

⁵ Ibid.

⁶ Motion, para. 15.

⁷ Motion, para. 9.

⁸ Motion, para. 15.

throughout the indictment period.⁹ Moreover, the Prosecution asserts that these documents prove the JSO membership of key players in the case, such as Radojca Božović, Zika Ivanović, Vasilije Mijović, and Zvezdan Jovanović.¹⁰ The Prosecution disclosed the complete personnel files, including the excerpts identified in the Motion, to the Stanišić and Simatović Defence teams on 28 October 2009 in both English and BCS.¹¹

5. The Prosecution argues the significance of proposed exhibit 65 *ter* 5055, which is a document from Colonel Siniša Borović of the Yugoslav Army (VJ), addressed to the military office of the President of the Republic of Serbia, outlining the Serbian MUP's criteria for sending military conscripts to the Republika Srpska ("RS") and the Republika Srpska Krajina ("RSK").¹² Specifically, the Prosecution asserts that this document demonstrates close cooperation between military and police organs in arresting and forcibly sending Serbian refugees and deserters to the front lines in the RS and RSK.¹³ Furthermore, the Prosecution states that this document corroborates the testimony of several of its witnesses who testified to this conscription policy and the role that both the Serbian MUP and Arkan played in it.¹⁴ This document was disclosed to the Defence on 29 July 2009, but the Prosecution has not informed the Chamber of the language in which it was disclosed.¹⁵

6. The Prosecution asserts that proposed 65 *ter* numbers 5170 and 5171 are relevant to the charge of persecution of non-Serb civilians in Bosanski Šamac in 1992 and corroborate the testimony of Prosecution witnesses in this respect.¹⁶ The Prosecution further submits that 65 *ter* number 5171 demonstrates the involvement of Srećko Radovanović (a.k.a. Debeli) in this persecution policy during the relevant time period.¹⁷ Proposed 65 *ter* number 5170 was disclosed to the Defence on 27 February 2009 and proposed 65 *ter* number 5171 was disclosed on 2 June 2009.¹⁸ However, the Prosecution has not informed the Chamber of the language in which these documents were disclosed.

⁹ Motion, paras 1, 6.

¹⁰ Ibid.

¹¹ Motion, paras 7-8, fn. 7.

¹² Motion, para. 11, Annex A, p. 2.

¹³ Ibid.

¹⁴ Ibid.

¹⁵ Motion, para. 11.

¹⁶ Motion, para. 12, Annex A, p. 3.

¹⁷ Ibid.

¹⁸ Motion, para. 12.

7. The Prosecution contends that proposed 65 *ter* numbers 5179 through 5182 should be admitted because they are referenced in and are the underlying basis for the Nielsen Addendum.¹⁹ These proposed exhibits were disclosed to the Defence in BCS on 4 November 2008²⁰ and in English on 23 December 2009.²¹

8. The Prosecution submits that the admission of proposed 65 *ter* number 5183, a Croatian Medical Journal article entitled “Civilian Massacre in Škabrnje and Nadin,” will be instrumental in the presentation of forensic evidence related to the Škabrnja massacre during the testimony of proposed Prosecution expert, Davor Strinović.²² The Prosecution received this article on 29 November 2009 and disclosed it to the Defence, in English, on that same day.²³

B. Stanišić Defence

9. The Stanišić Defence opposes the addition of the Proposed 65 *ter* Documents primarily on the basis of the Accused Stanišić’s right under Article 21 (4) (a) of the Statute of the Tribunal (“Statute”) “to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him.”²⁴ It asserts that “[i]t is impossible to know the nature *and* cause of the charge” due to the numerous additions to the Prosecution’s original 65 *ter* Exhibit List.²⁵

10. The Stanišić Defence argues that, as the trial is currently ongoing, granting the Prosecution’s motion would violate the Accused Stanišić’s right to adequate time for defence preparation under Article 21 (4) (b) of the Statute.²⁶ Similarly, it purports that admitting the Proposed 65 *ter* Documents would undermine the very purpose for requiring, under Rule 65 *ter* (E) (iii), that the Prosecution file its exhibit list no less than six weeks prior to the Pre-Trial Conference, namely that the Defence has sufficient time to adequately prepare for the Prosecution’s case.²⁷ The Stanišić Defence further submits that Stanišić’s ill-health and the resulting limited time periods he is able to

¹⁹ Motion, para. 13, Annex A, pp. 3-4.

²⁰ Motion, para. 13.

²¹ Prosecution Letter to Stanišić and Simatović Defence Teams and Associated Spreadsheet, Re: Disclosure in *Prosecutor v. Stanišić & Simatović*, Case No. IT-03-69-T, 23 December 2009 (“23 December Disclosure Letter”) (unfiled).

²² Motion, para. 14.

²³ *Ibid.*; 23 December Disclosure Letter.

²⁴ Stanišić Response, paras 4-7.

²⁵ Stanišić Response, para. 4.

²⁶ Stanišić Response, para. 5.

²⁷ Stanišić Response, para. 6.

work with counsel diminishes its ability to sufficiently incorporate the Prosecution's many evidentiary changes into its defence strategy.²⁸

11. The Stanišić Defence contends that the Prosecution has not sufficiently justified or explained its failure to include the documents relating to the Nielsen Addendum with similar documents contained in its Thirteenth Prosecution Motion for Leave to Amend its Rule 65 *ter* Exhibit List with Confidential Annex of 12 August 2009 ("Thirteenth Motion"), and its four-month delay in filing the current motion for admission of these documents.²⁹

12. In support of its Stanišić Response, the Stanišić Defence asserts that because the Prosecution has not provided it with English translations for proposed 65 *ter* numbers 5179 through 5182, the Prosecution has "a considerable forensic advantage" over it and the Chamber is deprived of the ability to fully assess the prejudice that it will suffer from the admission of these documents.³⁰

13. The Stanišić Defence contends that the Prosecution's submission that it "inadvertently" failed to include proposed 65 *ter* numbers 5161 through 5166 in its original exhibit list is inadequate to justify the addition of these documents to the Rule 65 *ter* Exhibit List.³¹ Furthermore, the Stanišić Defence submits that the Prosecution improperly seeks to add proposed 65 *ter* numbers 5161 through 5166 to its Rule 65 *ter* Exhibit List because they will lead to the addition of new charges arising from alleged military activity, without the requisite amendment to the indictment.³² The Stanišić Defence identifies proposed 65 *ter* numbers 5161 through 5163 as particularly problematic by way of example because they refer to military entities (i.e. "MUP reserve," "JPN," and "ATDD's active and reserve force," respectively) that it has not previously been made aware of.³³ The Stanišić Defence thereby concludes that the Prosecution should have applied to amend the indictment rather than to amend its 65 *ter* Exhibit List with respect to these documents in order to provide proper notice to the Stanišić Defence about potential new charges.³⁴

III. APPLICABLE LAW

14. Rule 65 *ter* (E) (iii) of the Rules provides, *inter alia*, that the Prosecution shall file its list of exhibits no later than six weeks before the Pre-Trial Conference. The primary purpose of Rule 65 *ter* (E) (iii) is to allow the Defence to prepare its case and to ensure that the presentation of evidence

²⁸ Stanišić Response, para. 7.

²⁹ Stanišić Response, para. 9.

³⁰ Stanišić Response, paras 10-11.

³¹ Stanišić Response, para. 12.

³² Stanišić Response, paras 14-15.

³³ Stanišić Response, para. 14.

during the trial is efficient.³⁵ The Chamber recalls that, in the exercise of its inherent discretion in managing the trial proceedings, it may authorise requested additions to the exhibit list submitted pursuant to Rule 65 *ter* (E) (iii) if it is satisfied that it is in the interests of justice to do so.³⁶

15. When exercising its discretion, the Chamber must balance the Prosecution's duty to present the available evidence to prove its case with the rights of the accused to a fair and expeditious trial and adequate time and facilities for the preparation of his defence (as set forth in Articles 20(1) and 21(4)(b) of the Statute, respectively).³⁷ The Chamber will consider whether the documents sought to be added are *prima facie* relevant and likely to be of probative value when deciding whether or not to allow additions to the Rule 65 *ter* Exhibit List at this stage of the proceedings.³⁸ The Chamber recalls that it will not grant the Prosecution leave to add "documents that are obviously irrelevant" to its Rule 65 *ter* List.³⁹ In its determination as to whether it is in the interests of justice to add the requested documents to the Rule 65 *ter* Exhibit List, the Chamber will also consider whether the Prosecution has shown good cause and the extent to which the new documents create an additional burden on the Defence.⁴⁰

16. The Chamber recalls the difference between the addition of a document to the Rule 65 *ter* Exhibit List and the admission of a document into evidence as an exhibit. By adding a document to the Rule 65 *ter* Exhibit List, the Prosecution simply gives notice to the Defence that it intends to rely on the document at trial.⁴¹

³⁴ Stanišić Response, para. 15.

³⁵ *Prosecutor v. Jadranko Prlić, Bruno Stojić, Slobodan Praljak, Milivoj Petković, Valentin Cović and Berislav Pušić*, Case No. IT-04-74-T, Decision on Prosecution Motion to Add to Exhibits List (Confidential), 18 September 2007, p. 5.

³⁶ Decision on Prosecution Motion for Leave to Amend its Rule 65 *ter* Exhibit List, 8 May 2008 (confidential) ("8 May Decision"), paras 5-7. See also *Prosecutor v. Vujadin Popović, Ljubiša Beara, Drago Nikolić, Ljubomir Borovčanin, Radivoje Miletić, Milan Gvero and Vinko Pandurević*, Case No. IT-05-88-AR73.1, Decision on Appeals Against Decision Admitting Material related to Borovčanin's Questioning, 14 December 2007 ("*Popović* Appeal Decision"), para. 37; *Prosecutor v. Vojislav Šešelj* Case No. IT-03-67-T, Decision on Amending the List of Exhibits Relative to the Report of Reynaud Theunens, 18 February 2008, para. 7.

³⁷ *Popović* Appeal Decision, para. 37; *Prosecutor v. Ante Gotovina, Ivan Čermak and Mladen Markač*, Case No. IT-06-90-T, Decision on the Prosecution's Motion to Admit Documents into Evidence and Add Two Documents to the Prosecution's Rule 65 *ter* Exhibit List, 25 November 2008 ("*Gotovina* Decision"), para. 9.

³⁸ *Popović* Appeal Decision, para. 37.

³⁹ 8 May Decision, para. 7.

⁴⁰ *Ibid.*; see also *Gotovina* Decision, para. 9.

⁴¹ *Prosecutor v. Rasim Delić*, Case No. IT-04-83-T, Decision on Urgent Prosecution Motion for Leave to Amend its Exhibit List, 17 October 2007, p. 4; *Prosecutor v. Ljube Bošković and Johan Tarčulovski*, Case No. IT-04-82-T, Decision on Prosecution's Fifth Motion to Amend its Exhibit List and on its Second Motion to Remove Witnesses from Witness List (confidential), 20 April 2007, para. 3.

IV. DISCUSSION

17. The Chamber notes, once again, the number and high frequency of Prosecution requests to add exhibits to its Rule 65 *ter* Exhibit List. In the Chamber's opinion, this succession of motions and the proposed exhibits contained therein have the potential of unduly burdening the Defence. The Chamber has kept this factor in mind when considering whether it is in the interests of justice to grant the Motion.

18. The Chamber further notes that since the Motion was filed, proposed 65 *ter* numbers 5170 and 5171 have been admitted into evidence as P125 and P135, respectively. The Motion insofar as it relates to these proposed documents is therefore moot.

19. The Prosecution seeks leave to add to its Rule 65 *ter* Exhibit List six excerpts from JSO personnel files (proposed 65 *ter* numbers 5161 to 5166). The Chamber finds these documents *prima facie* relevant and likely to be of probative value as they provide information about the JSO, which is alleged to have been "established by or with the assistance of the Serbian DB [...] for the purpose of undertaking special military actions in Croatia and BiH" during the indictment period.⁴² The Prosecution concedes that it fails to show good cause in seeking to add these exhibits, as it has possessed the documents for a significant amount of time and only "inadvertently" excluded them from its original exhibit list. The Chamber urges the Prosecution to exercise due diligence in the future to prevent further oversights. The Chamber notes that the fact that the Prosecution has selected excerpts, totalling a mere seven pages, from larger documents is a significant factor in assessing whether the addition of the Proposed 65 *ter* Documents will place an undue burden on the Defence at this stage of the trial proceedings.⁴³ The Chamber finds that the addition of proposed 65 *ter* numbers 5161 to 5166 to the Prosecution's Rule 65 *ter* Exhibit List will not unduly burden the Defence as it has had sufficient time to examine the identified excerpts and the documents in their entirety since they were disclosed.

20. The Prosecution seeks leave to add to its Rule 65 *ter* Exhibit List a document written by Colonel Siniša Borović of the VJ (proposed 65 *ter* number 5055). The Chamber finds this document *prima facie* relevant and likely to be of probative value as the Prosecution submits that it demonstrates the involvement of the Serbian MUP in forcibly sending Serb refugees and deserters to the front lines.⁴⁴ The Prosecution does not indicate when it received this document in its Motion.

⁴² Third Amended Indictment, 10 July 2008 ("Indictment"), para. 4.

⁴³ See 10 February 2010 Rule 65 *ter* Decision.

⁴⁴ Motion, Annex A, p. 2.

Nonetheless, even without being able to pronounce upon existence of good cause, the Chamber will assess whether it is in the interests of justice to allow proposed 65 *ter* number 5055 to be added to the Rule 65 *ter* Exhibit List. As the Prosecution disclosed it on 29 July 2009 and there have been three adjournments since then, the Chamber finds that the Defence has had adequate time to examine it. Thus, the Chamber concludes that the addition of this document to the Prosecution's Rule 65 *ter* Exhibit List does not impose an undue burden upon the Defence.

21. The Prosecution seeks leave to add to its Rule 65 *ter* Exhibit List four documents (proposed 65 *ter* numbers 5179 to 5182) that expert witness Christian Nielsen cites and relies upon in the Nielsen Addendum.⁴⁵ The Chamber finds these documents to be *prima facie* relevant and likely probative as they are purported to be underlying documents of the Nielsen Addendum. The Prosecution fails to demonstrate good cause for its request to add these documents to its 65 *ter* Exhibit List because it was aware of them for at least four months prior to filing the Motion and neglected to include them with the other Nielsen Addendum documents it sought to admit in its Thirteenth Motion. However, as the Prosecution has not yet scheduled witness Nielsen to testify in the immediate future, the Chamber finds that the addition of these documents to the Rule 65 *ter* Exhibit List will not create an undue burden on the Defence. Lastly, the Chamber notes that the Stanišić Defence's contention that it did not receive English translations of proposed 65 *ter* numbers 5179 to 5182 has become moot, as it was provided with these translations on 23 December 2009.⁴⁶

22. The Prosecution seeks leave to add to its Rule 65 *ter* Exhibit List the Croatian Medical Journal article entitled "Civilian Massacre in Škabrnje and Nadin" (proposed 65 *ter* number 5183). The Chamber defers its ruling with regard to this document because it appears to qualify as an expert report, and its author is not on the Prosecution's 65 *ter* Witness List. Accordingly, the Chamber considers it appropriate to invite the Prosecution to elaborate on its intended use of proposed 65 *ter* number 5183 and to indicate whether it intends to submit it pursuant to Rule 94 *bis* of the Rules.

23. Balancing the Prosecution's duty to present the available evidence to prove its case with the Accused's rights to a fair and expeditious trial and to adequate time and facilities for defence preparation, the Chamber is satisfied, with the exceptions referred to in paragraphs 18 and 22 above, that it is in the interests of justice to grant the Prosecution leave to add the Proposed 65 *ter* Documents to its Rule 65 *ter* Exhibit List.

V. DISPOSITION

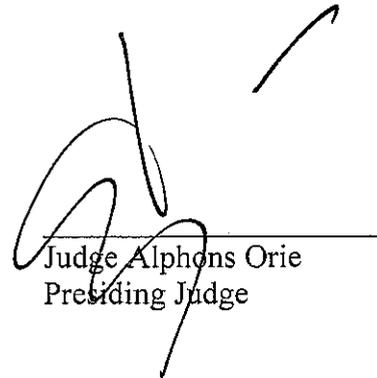
24. For the foregoing reasons, pursuant to Articles 20 (1) and 21 (4) of the Statute and Rule 65 *ter* (E) (iii) of the Rules, the Chamber

DECLARES the Motion moot with respect to proposed 65 *ter* numbers 5170 and 5171;

DEFERS its ruling with respect to proposed 65 *ter* number 5183;

INVITES the Prosecution to elaborate on its intended use of proposed 65 *ter* number 5183 and to indicate whether it intends to submit it pursuant to Rule 94 *bis* of the Rules;

GRANTS the Motion in all other respects.



Judge Alphons Orie
Presiding Judge

Dated this sixteenth day of April 2010
At The Hague
The Netherlands

[Seal of the Tribunal]

⁴⁵ Nielsen Addendum.

⁴⁶ 23 December Disclosure Letter.