



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: 1 September 2011  
Original: English

**IN TRIAL CHAMBER I**

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

**Registrar:** Mr John Hocking

**Decision of:** 1 September 2011

**PROSECUTOR**

v.

**JOVICA STANIŠIĆ  
FRANKO SIMATOVIĆ**

***PUBLIC***

**DECISION ON PROSECUTION MOTION TO REOPEN  
PROSECUTION CASE AND FOR THE ADMISSION OF A  
DOCUMENT FROM THE BAR TABLE**

**Office of the Prosecutor**  
Mr Dermot Groome

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Mr Wayne Jordash  
Mr Scott Martin

**Counsel for Franko Simatović**  
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## I. PROCEDURAL HISTORY

1. On 4 July 2011, the Prosecution filed the “Prosecution Motion to Reopen Prosecution Case and for the Admission of a Document from the Bar Table” (“Motion”) for the purpose of tendering into evidence a Federal Ministry of Interior (“MUP”) report allegedly signed by Milorad Davidović (“Report”).<sup>1</sup> On 7 July 2011, the Prosecution requested leave to use the Report in its cross-examination of Witness DST-034.<sup>2</sup> Both Defence teams objected to this request.<sup>3</sup> After considering the parties’ submissions, the Chamber allowed the witness to read the Report but ruled that the Prosecution could not put the actual Report to the witness during its cross-examination.<sup>4</sup> On 11 July 2011, the Simatović Defence filed its response to the Motion, opposing it (“Simatović Response”).<sup>5</sup> On 15 July 2011, the Prosecution requested leave to reply to the Simatović Response and any potential response by the Stanišić Defence.<sup>6</sup> On 18 July 2011, the Stanišić Defence filed a response to the Motion (“Stanišić Response”), not objecting to it, but requesting the Chamber to (a) make a specific finding that the Prosecution’s intended use and tendering of the Report during the cross-examination of Witness DST-034 violated the Stanišić Defence’s right to respond under Rule 126 *bis* of the Rules of Procedure and Evidence (“Rules”), (b) order that such practice be avoided in the future, and (c) order the Prosecution to indicate what steps it had taken to discover the Report during its pre-trial investigations (“Stanišić Requests”).<sup>7</sup> On 20 July 2011, the Chamber granted the Prosecution leave to reply.<sup>8</sup> On 25 July 2011, the Prosecution filed its reply, requesting that the Chamber dismiss the Stanišić Requests (“Reply”).<sup>9</sup>

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<sup>1</sup> Motion, paras 1, 8, 14.

<sup>2</sup> T. 12517-12518, 12520-12521.

<sup>3</sup> T. 12519, 12521-12522, 12524-12525.

<sup>4</sup> T. 12526-12528, 12530.

<sup>5</sup> Simatović Response to the Prosecution Motion to Reopen Prosecution Case and for the Admission of a Document from the Bar Table, 11 July 2011, para. 22.

<sup>6</sup> Prosecution Request to Reply to Simatović Response to Prosecution Motion to Reopen Prosecution Case and for the Admission of a Document from the Bar Table, 15 July 2011, paras 1, 3-5.

<sup>7</sup> Stanišić Defence Response to Prosecution Motion to Reopen Prosecution Case and for the Admission of a Document from the Bar Table, 18 July 2011, paras 6-7, 14, 16.

<sup>8</sup> The Chamber informed the parties through an informal communication.

<sup>9</sup> Prosecution Joint Reply to Simatović and Stanišić Responses to Prosecution Motion to Reopen Prosecution Case and for the Admission of a Document from the Bar Table, 25 July 2011.

## II. SUBMISSIONS OF THE PARTIES

### A. Motion

2. In relation to the Report, the Prosecution requests a reopening of its case, the addition of this document to its Rule 65 *ter* exhibit list, and its admission into evidence from the bar table.<sup>10</sup>
3. The Prosecution asserts that the Report is “fresh evidence” that it could not have obtained before closing its case-in-chief.<sup>11</sup> The Prosecution became aware of the Report on 29 June 2011, when Mr. Karadžić introduced it into evidence in the *Karadžić* case.<sup>12</sup>
4. The Prosecution claims that the Report’s authenticity and overall reliability were implicitly accepted by the *Karadžić* Trial Chamber when it admitted the Report into evidence.<sup>13</sup> The Prosecution requests the Chamber to take judicial notice of the Report’s authenticity pursuant to Rule 94 (B) of the Rules.<sup>14</sup>
5. The Prosecution asserts that the Report is highly relevant as it addresses the area of north-eastern Bosnia where many of the crimes alleged in the Indictment occurred; it identifies paramilitary formations such as the Serbian Volunteer Guards, Captain Dragan’s Red Berets, and members of the Serbian Radical Party as responsible for this violence; and provides relevant evidence of the Serbian State Security’s (“DB”) involvement in the region.<sup>15</sup> Specifically, the Report states that the Serbian MUP was among those responsible for sending paramilitaries to the area.<sup>16</sup>
6. The Prosecution avers that admitting the Report into evidence will not prejudice the Accused since the Prosecution disclosed the Report the day after receiving it, the original version consists of only nine pages, and it does not depart from the case developed by the Prosecution in its case-in-chief.<sup>17</sup> The Prosecution indicates that it will not object to reasonable measures to cure any prejudice that the Chamber may find due to the late admission of the Report.<sup>18</sup>

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<sup>10</sup> Motion, para. 1.

<sup>11</sup> Motion, paras 6-7.

<sup>12</sup> Motion, para. 7.

<sup>13</sup> Motion, para. 8.

<sup>14</sup> Ibid.

<sup>15</sup> Motion, paras 9-10.

<sup>16</sup> Motion, para. 10.

<sup>17</sup> Motion, para. 12.

<sup>18</sup> Ibid.

## **B. Simatović Response**

7. The Simatović Defence contends that the Report has little probative value because the author of the report did not verify the assertions contained in the report, thereby making the content mere hearsay evidence.<sup>19</sup> It further contends that the Report is neither authentic nor reliable because the Prosecution was not asked if it objected to the admission of this Report into evidence in the *Karadžić* case and neither the *Karadžić* Trial Chamber nor the Prosecution inquired how Mr. Karadžić came into possession of this Report.<sup>20</sup> The Simatović Defence argues that Mr. Davidović testified in the *Karadžić* case that he thought that the signature on the Report was his and that this does not in itself establish the authenticity or reliability of the Report.<sup>21</sup> According to the Simatović Defence, the Report is missing a number of official markings that further bring into question its authenticity and reliability.<sup>22</sup>

## **C. Stanišić Response**

8. The Stanišić Defence avers that it has limited options in responding to the Motion because the Prosecution has already substantially elicited the contents of the Report during the cross-examination of Witness DST-034 and, therefore, an objection at this time would be unproductive.<sup>23</sup> Nevertheless, the Stanišić Defence claims that the Prosecution's approach with respect to using the Report in its cross-examination of Witness DST-034 violated Rule 126 *bis* of the Rules.<sup>24</sup> Accordingly, it requests the Chamber to make such a finding and order that such practice be avoided in the future.<sup>25</sup>

9. The Stanišić Defence submits that continued attempts by the Prosecution to reopen its case may create conditions that infringe on the Accused's right to a fair trial.<sup>26</sup> The Stanišić Defence indicates that the Prosecution should follow a process for introducing new evidence during cross-examination of a Defence witness, whereby the Prosecution indicates whether the document is to be used for impeachment purposes or whether it will be used for the truth of its contents.<sup>27</sup> If the document is to be used for the truth of its contents, the Prosecution should specify in writing why the document was not part of the original Prosecution case, how it forms part of the Prosecution's case against the Accused, when the Prosecution came in possession of the document, when it

<sup>19</sup> Simatović Response, paras 7-11.

<sup>20</sup> Simatović Response, paras 12-13, 15.

<sup>21</sup> Simatović Response, para. 14.

<sup>22</sup> Simatović Response, paras 16-19.

<sup>23</sup> Stanišić Response, paras 6-7, 9.

<sup>24</sup> Stanišić Response, para. 7.

<sup>25</sup> Stanišić Response, paras 7-9, 16.

<sup>26</sup> Stanišić Response, para. 10.

disclosed the document to the Defence, and why the document does not unduly infringe upon the Accused's right to a fair trial.<sup>28</sup>

10. As the Report did not originate from Mr. Karadžić's personal files but from the Federal MUP, the Stanišić Defence requests a detailed explanation of what steps the Prosecution had taken during its pre-trial investigation to obtain the Report.<sup>29</sup>

**D. Reply**

11. The Prosecution submits that evidence already admitted in this case, such as exhibits P478 and P489, supports the probative value of the Report.<sup>30</sup> Furthermore, the Prosecution emphasizes that under Rule 94 (B) of the Rules the Chamber may take judicial notice of the authenticity of documentary evidence admitted in other Tribunal proceedings.<sup>31</sup> According to the Prosecution, the lack of objection by the Prosecution in the *Karadžić* case illustrates its acceptance of the evidence's reliability and authenticity.<sup>32</sup> The Prosecution also points to other factors that support the authenticity and reliability of the Report, such as Witness DST-034's testimony that indicates he was aware of many of the facts described in the Report and that the Federal MUP maintained such documents.<sup>33</sup>

12. The Prosecution claims that the Stanišić Defence has no basis for requesting the details of the Prosecution's pre-trial investigation since the Stanišić Defence does not oppose the Motion and the Prosecution has already informed the parties about how the Report came to be in its possession.<sup>34</sup> The Prosecution states that it took reasonable steps to discover the Report by requesting information about and negotiating access to the Serbian DB and MUP archives over many years.<sup>35</sup> The Prosecution contends that the Stanišić Requests should be dismissed.<sup>36</sup>

**III. APPLICABLE LAW**

13. Rule 85 (A) of the Rules states:

Each party is entitled to call witnesses and present evidence. Unless otherwise directed by the Trial Chamber in the interests of justice, evidence at the trial shall be presented in the following sequence:

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<sup>27</sup> Stanišić Response, para. 12.  
<sup>28</sup> Ibid.  
<sup>29</sup> Stanišić Response, paras 14, 16.  
<sup>30</sup> Reply, para. 4.  
<sup>31</sup> Reply, para. 5.  
<sup>32</sup> Ibid.  
<sup>33</sup> Reply, para. 6.  
<sup>34</sup> Reply, para. 9.  
<sup>35</sup> Ibid.  
<sup>36</sup> Reply, para. 14.

- i. evidence for the prosecution;
- ii. evidence for the defence;
- iii. prosecution evidence in rebuttal;
- iv. defence evidence in rejoinder;
- v. evidence ordered by the Trial Chamber pursuant to Rule 98; and
- vi. any relevant information that may assist the Trial Chamber in determining an appropriate sentence if the accused is found guilty on one or more of the charges in the indictment.

14. In considering an application for reopening a case with a view to admitting “fresh evidence”, the Chamber will first determine whether the evidence could, with reasonable diligence, have been identified and presented during the case-in-chief of the party making the application.<sup>37</sup> If not, the Chamber has the discretion to admit this “fresh evidence”, and will consider whether its probative value is substantially outweighed by the need to ensure a fair trial.<sup>38</sup> In making this determination, the Chamber will consider the stage of the trial at which the evidence is sought to be adduced and any potential delay that would be caused to the trial.<sup>39</sup>

15. The Chamber recalls and refers to the law applicable to the admission of evidence through the bar table as set out in its previous decisions.<sup>40</sup>

#### IV. DISCUSSION

16. A party’s right to re-open its case is not explicitly provided for in the Rules. However, the Tribunal’s case-law provides for a clear test when determining whether a re-opening is warranted. In addition, a re-opening needs to satisfy the requirements of Rule 85 (A) of the Rules, if it offsets the sequence of presentation of evidence envisaged by that rule.<sup>41</sup>

<sup>37</sup> Decision on Prosecution Motion to Reopen Prosecution Case and for the Admission of Documents from the Bar Table, 7 June 2011, para. 10; *Prosecutor v. Perišić*, Case No. IT-04-81-T, Decision on Motion to Reopen the Prosecution Case and Tender Documents Through the Bar Table, 4 November 2010, para. 5; *Prosecutor v. Gotovina et al.*, Case No. IT-06-90-AR73.6, Decision on Ivan Čermak and Mladen Markač Interlocutory Appeals Against Trial Chamber’s Decision to Reopen the Prosecution Case, 1 July 2010, paras 23-24; *Prosecutor v. Popović et al.*, Case No. IT-05-88-T, Decision on Motion to Reopen the Prosecution Case, 9 May 2008, paras 23-25; *Prosecutor v. Delalić et al.*, Case No. IT-96-21-A, Judgement, 20 February 2001, para 283, with reference to Rule 89 (D) of the Rules.

<sup>38</sup> Ibid.

<sup>39</sup> Ibid.

<sup>40</sup> See Decision on the Prosecution’s Revised First Motion for Admission of Exhibits from the Bar Table, 3 February 2011, paras 10-11.

<sup>41</sup> For example, a re-opening after the closure of the Prosecution’s case, but before the commencement of the Defence case would not formally require satisfying the interests of justice test of Rule 85 (A) of the Rules; see Decision on Prosecution Motion to Reopen Prosecution Case and for the Admission of Documents from the Bar Table, 7 June 2011; *Prosecutor v. Gotovina et al.*, Case No. IT-06-90-T, Decision on Prosecution Motion to Recall Marko Rajčić, 24 April 2009, para. 17.

17. In relation to reasonable diligence, the Chamber accepts that the Prosecution only became aware of the Report once it was disclosed by Mr. Karadžić. Furthermore, the Chamber is satisfied that the Prosecution has requested information from the Serbian DB and MUP archives over many years but that these investigations did not lead to the production of the Report. The Chamber notes that the Simatović Response does not argue that an exercise of reasonable diligence by the Prosecution would have allowed it to identify and present the Report during its case-in-chief. The Stanišić Defence requests more information on the Prosecution's pre-trial investigations but ultimately does not oppose the Motion. Therefore, the Chamber is satisfied that in this instance the Prosecution did employ reasonable diligence to identify and present the Report before the end of its case-in-chief and, hence, the Chamber considers the Report fresh evidence.

18. In relation to relevance, the Chamber finds that the evidence in the Report, taken together with Witness DST-034's testimony and other evidence presented in this case, is relevant to the Indictment's allegations that the Accused directed, organised, and provided support to special units of the Republic of Serbia DB and other Serb Forces who were involved in the commission of crimes in Bosnia-Herzegovina.<sup>42</sup>

19. The Chamber will now address the challenge by the Simatović Defence to the authenticity and reliability of the Report. If there were to be an insufficient basis to accept the authenticity of the Report, this would affect its probative value and oppose admission. The Prosecution suggested that the Chamber take judicial notice of the authenticity of the Report in accordance with Rule 94 (B). The Chamber notes that by admitting the Report into evidence in its case, the *Karadžić* Trial Chamber implicitly accepted the Report's authenticity. The Chamber is nevertheless hesitant to take judicial notice of the authenticity of the document in this situation and prefers to make its own determination on the challenges to the authenticity of the Report. The parties do not dispute that Mr. Davidović testified in the *Karadžić* case that he believed to have signed the Report and the Chamber accepts this submission. Rule 89 (E) allows the Chamber to request verification of the authenticity of documents obtained out of court.

20. The Simatović Defence invokes the lack of a number of official markings on the Report. It also refers in its submissions to the fact that Mr. Davidović testified in the *Karadžić* case that he believed to have signed the Report. The Simatović Defence submits that Mr. Davidović's comments on the Report in the *Karadžić* case do not in itself establish the authenticity or reliability of the Report. Based on this submission, the Chamber is not convinced that Mr. Davidović's alleged uncertainty about signing the Report should have an impact on the determination of the Report's

authenticity. The absence of markings is not a sufficiently convincing challenge to the authenticity of the Report. In this context the Chamber has also considered that the absence of markings is far from unique in the body of evidence the Chamber has admitted, and that no indicia for a lack of authenticity or reliability were found in other evidence, more specifically not in the testimony of Witness DST-034 or exhibits P478 and P489, which are relevant in this context.

21. The Chamber therefore finds no reason to request verification of the authenticity of the Report and rejects the objection to the admission on the grounds raised by the Simatović Defence. The Chamber is satisfied that the Report is of sufficient probative value for admission into evidence.

22. With respect to the impact of reopening the Prosecution's case for the purpose of admitting one document from the bar table on the Accused's right to a fair trial, the Chamber notes that the Report is relatively short and the evidence put forth by the Report fits within the case advanced by the Prosecution. Further, the Motion was filed shortly after the beginning of the Defence case. The Chamber, therefore, considers that the Report's admission into evidence will not place a significant additional burden on the Defence. The Chamber will consider any motion by the Defence to recall certain witnesses as a result of the Report's admission. The Chamber finds that the admission of the Report into evidence and reopening of the Prosecution's case is warranted since the Report's probative value is not substantially outweighed by the need to ensure a fair trial.

23. The Chamber further considers that in this situation, after having carefully analyzed the prejudice suffered by the Defence, granting the Motion is also in the interests of justice.

24. With regard to the Stanišić Requests, the Prosecution intended to use the Report during its cross-examination of Witness DST-034<sup>42</sup> and, with the leave of the Chamber, gave the witness an opportunity to familiarise himself with the Report's content. Notably, the Prosecution did not tender the Report in court. However, if the Prosecution had tendered the Report in court, the Defence would have had the opportunity to voice its position. Accordingly, the Chamber finds that there was no violation of the Stanišić Defence's right to respond and does not consider it necessary to give orders to avoid such situations in the future. The Chamber accepts that the Prosecution questioned the witness on certain matters that were also mentioned in the Report but considers that this was within the scope of the instructions given by the Chamber.

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<sup>42</sup> Third Amended Indictment, 10 July 2008, paras 4, 15.

<sup>43</sup> See also the Chamber's guidance on the use of documents during cross-examination contained in paragraph 11 of the Chamber's "Guidance on the Admission into Evidence of Documents Tendered by the Prosecution During the Defence Case and Reasons for Decisions on Past Admissions of Such Documents" filed on 26 August 2011.

25. In relation to the Stanišić Defence request for further information of the Prosecution's pre-trial investigations about the Report, the Chamber considers that the matter does not need to be decided in light of the Stanišić Defence's position on the Motion, the Prosecution's provision of further information in its Reply, and the Chamber's finding above.

## V. DISPOSITION

26. For the reasons set out above, and pursuant to Rules 85 and 89 of the Rules, the Chamber hereby

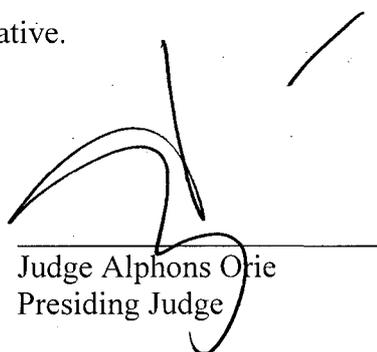
**GRANTS** the Motion;

**ADMITS** into evidence the Report bearing Rule 65 *ter* number 6213;<sup>44</sup>

**REQUESTS** the Registry to assign an exhibit number and inform the parties and the Chamber of the number so assigned; and

**DENIES** the Stanišić Requests.

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



Judge Alphons Orie  
Presiding Judge

Dated this first of September 2011  
At The Hague  
The Netherlands

[Seal of the Tribunal]

<sup>44</sup> The Chamber notes that the document's addition to the Prosecution Rule 65 *ter* exhibit list is a sub-question to that of admitting the document into evidence and thus does not require an explicit discussion or finding.