

IT-03-69-T
D 61601 - D 41597
12 June 2012

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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: 12 June 2012
Original: English

IN TRIAL CHAMBER I

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

Registrar: Mr John Hocking

Decision of: 12 June 2012

PROSECUTOR

v.

**JOVICA STANIŠIĆ
FRANKO SIMATOVIĆ**

PUBLIC

**DECISION ON PROSECUTION MOTION TO COMPEL
DISCLOSURE OF NOTES AND PHOTOGRAPHS FROM
EXAMINATION OF 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 AND SUBMISSIONS OF THE PARTIES

1. On 1 and 2 March 2011, Stanišić Defence expert witness David Browne examined military notebooks, written by General Ratko Mladić, in the presence of a Prosecution investigator for the purpose of preparing a report (“Expert Browne”, “First Examination”, “Notebooks”, and “Browne Expert Report”, respectively).¹ From 31 October to 11 November 2011, Expert Browne conducted an examination during which photographs of the Notebooks were taken (“Second Examination”).² Expert Browne made notes on both occasions.³ On 20 and 21 March 2012, Expert Browne testified and also provided two pages with annotations of the notes he made during the examination of Notebook no. 16. These notes were admitted into evidence as exhibit P3110 (“P3110”).⁴

2. On 8 May 2012, the Prosecution filed a motion, pursuant to Rules 73 (A) and 94 *bis* (A) of the Tribunal’s Rules of Procedure and Evidence (“Rules”), seeking an order to compel the Stanišić Defence to disclose the notes and photographs from Expert Browne’s First and Second Examinations of the Notebooks (“Motion”).⁵ The Prosecution seeks such an order based on the following arguments: 1) the notes should have been included in the Browne Expert Report, since Expert Browne “confirmed” that the expert report was “incomplete”, and therefore merit disclosure under Rule 94 *bis* (A);⁶ 2) to ensure that the Chamber has all the information relevant to its evaluation of the Browne Expert Report;⁷ and 3) in the interests of justice, to allow the Prosecution to maintain as complete a record as possible in relation to the Notebooks.⁸

3. On 22 May 2012, the Stanišić Defence responded, offering to contact Expert Browne to request that he disclose notes related to damage to the Notebooks that may have occurred during his examinations, and requesting that the Chamber deny the remainder of the Motion (“Response”).⁹ The Stanišić Defence submits that, with the exception of any notes related to potential damage to the Notebooks, the remainder of the requested notes and photographs are irrelevant to any issue

¹ Exhibit D769 (Witness David Browne’s Expert Report, dated 15 December 2011), pp. 1, 3.

² Browne Expert Report, p. 1.

³ See, for example, T. 18436, 18438-18439.

⁴ Exhibit P3110 (Handwritten Notes Made by Witness David Browne). See also T. 18435-18440. The Prosecution had already been informed by its Evidence Unit of the possibility of damage to the Notebooks during Expert Browne’s examination. See Motion, para. 11.

⁵ Prosecution Motion to Compel Disclosure of Notes and Photographs from Examination of Mladić Notebooks, 8 May 2012, paras 1, 22.

⁶ Motion, paras 5-6, 15.

⁷ Motion, paras 2, 16-17.

⁸ Motion, paras 2, 18-19.

⁹ Stanišić Defence Response to Prosecution Motion to Compel Disclosure (*sic*) of Notes and Photographs from Examination of Mladić Notebooks, 22 May 2012, para. 7.

before the Chamber.¹⁰ In relation to the Prosecution's third argument, the Defence submits that the unequal treatment and standards in handling the Notebooks as between the Prosecution's own actions and those requested of the Defence suggest that the Prosecution seeks the notes and photographs for purposes other than documenting the chain of custody and that it has not been provided with any documentation of notes and/or protocols in relation to the Notebooks' treatment since they were seized by Serbian Ministry of Interior authorities ("MUP").¹¹

4. On 29 May 2012, the Stanišić Defence informed the Chamber and the parties that it had contacted Expert Browne the day before.¹² The Prosecution initially requested that the Motion be held in abeyance until Expert Browne responded.¹³ On 31 May 2012, the Stanišić Defence informed the Chamber and the parties that Expert Browne had responded, after reviewing his notes, that no other Notebooks had been damaged outside of Notebook no. 16, regarding which the Prosecution had all his relevant notes.¹⁴ The same day, the parties made further submissions in court.¹⁵

II. APPLICABLE LAW

5. Rule 54 of the Rules provides, in relevant part, that, at the request of either party or *proprio motu*, a Trial Chamber may issue such orders as may be necessary for the conduct of the trial.

6. Rule 73 (A) of the Rules provides that either party may at any time move before a Trial Chamber by way of a motion, not being a preliminary motion, for appropriate ruling or relief.

7. Rule 94 *bis* (A) of the Rules provides that the full report of any expert witness to be called by a party shall be disclosed within the time-limit prescribed by the Trial Chamber.

¹⁰ Response, para. 6.

¹¹ Response, paras 2-6; T. 20035, 20040. In court on 31 May 2012, the Prosecution agreed to disclose any notes and any protocols related to the seizure and/or handling of the Notebooks not already disclosed to the Stanišić Defence. The Chamber therefore considers this aspect of the Response and the oral submissions in relation thereof to be moot and will not further address the matter in this decision. See T. 20042-20044.

¹² T. 19855. Upon this statement being made, the Prosecution initially requested that the Motion be held in abeyance until Expert Browne responded. T. 19856. However, that same day, in an informal communication, the Prosecution notified the Chamber that, upon review of the Response, it wished to clarify that it still requests that the Chamber decide on the Motion, and that it wished to make a further submission in court on the matter. Later that day, also through an informal communication, the Chamber granted the Prosecution's request to make a further submission. That decision is hereby put on the record.

¹³ T. 19856.

¹⁴ T. 20033.

¹⁵ T. 20034-20048. The Chamber notes that the Prosecution, in response to an informal exchange between the parties, preemptively argued that the notes and photographs do not constitute work-product and are therefore not privileged from disclosure. See Motion, paras 20-21. In the Response, the Stanišić Defence did not assert work-product privilege in relation to either the notes or photographs. However, on 31 May 2012, the Stanišić Defence did make an oral submission asserting that the notes and photographs were covered by work-product privilege. See T. 20036-20037. For the reasons discussed in this decision, the Chamber considers this issue to be irrelevant to the disposition of this decision.

8. This Chamber has held that an expert witness is required to give his or her evidence in full transparency of the established or assumed facts that he or she relied upon, and the methods used to form his or her expert opinion.¹⁶ During the examination of an expert, parties may broach any issues that may arise with regard to documents drafted in preparation of such a report.¹⁷ Rule 94 *bis* (A) of the Rules requires the disclosure of expert reports in full, but does not entail any obligation to disclose “documents drafted in preparation of such a report or early drafts thereof”.¹⁸

III. DISCUSSION

A. Whether the Notes and/or Photographs are Subject to Disclosure Under Rule 94 *bis* (A) of the Rules

9. In relation to the argument that the notes are a part of the Browne Expert Report, the Chamber notes that the expert report was admitted into evidence without objection by the Prosecution, notwithstanding its knowledge of the existence of the notes. Further, the statement relied upon by the Prosecution in its Motion as a “confirmation” has been taken out of context, given that it related to the comparison of misaligned or missing pages with specific pages of the Notebooks, potentially important to the parties based on the substance therein, a topic which Expert Browne did not evaluate.¹⁹ The Chamber does not consider that the notes form a part of the Browne Expert Report. Rather Expert Browne’s notes and photographs were created in preparation of the drafting of his expert report. Based on this Chamber’s prior decision, the Chamber considers that the notes and photographs are not subject to disclosure under Rule 94 *bis* (A) of the Rules.

B. Whether the Notes and/or Photographs are Necessary for the Conduct of the Trial Pursuant to Rules 54 and 73 (A) of the Rules

10. The Prosecution brings its Motion pursuant to Rule 73 (A) of the Rules. In order for the Chamber to grant the specific relief requested, i.e. to order the disclosure of the requested materials, the Chamber must consider whether it can grant the order under Rule 54 of the Rules.

¹⁶ Decision on Stanišić Request for Order of Disclosure of Materials Related to the Admissibility of the Expert Report of Reynaud Theunens, 11 March 2011 (“*Stanišić and Simatović* Disclosure Decision”), para. 19, citing *Prosecutor v. Ante Gotovina et al.*, Case No. IT-06-90, Decision on Disclosure of Expert Materials, 27 August 2009 (“*Gotovina* Decision”), para. 10.

¹⁷ *Stanišić and Simatović* Disclosure Decision, para. 20; *Gotovina* Decision, paras 10-11.

¹⁸ *Stanišić and Simatović* Disclosure Decision, para. 20.

¹⁹ T. 18412. In this respect, the Browne Expert Report makes clear that Expert Browne did not evaluate the Notebooks in relation to any of the used or admitted excerpts, but rather reviewed each as a distinct, comprehensive document. There is no indication that Expert Browne was aware of the portions of the Notebooks that contain alleged statements or activities of the Accused, nor are any of his conclusions based on an evaluation of the content of the Notebooks in any way. See Browne Expert Report, Sections 2-5.

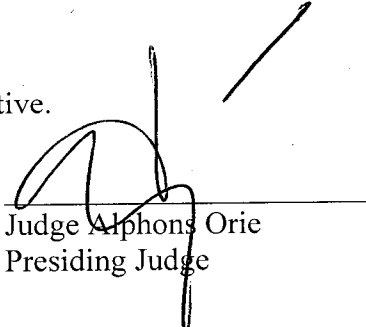
11. In relation to the present trial, the Chamber recalls that Expert Browne has already testified and was cross-examined by the Prosecution on his notes and the photographs in relation to his expert report,²⁰ and that all of his notes in relation to Notebook no. 16 were admitted into evidence. The Chamber also notes that Expert Browne brought his notes with him to court,²¹ that he complied with all requests that he consult his notes during breaks between court sessions,²² and that, on his second day of testimony and at the request of the Prosecution, he provided the Prosecution with the original notes related to Notebook no. 16 with annotations in red ink that he had added the night before.²³ The words “detached during exam” are clearly visible on the notes given by Expert Browne.²⁴ The Chamber therefore does not find that the production of the notes or the photographs is necessary for its evaluation of the Browne Expert Report and even to a lesser extent for the conduct of the trial.

12. In relation to the argument that documentation of the handling and the disclosure of Expert Browne’s notes and/or photographs are relevant to, or may serve a forensic purpose in, *other* trials before this Tribunal, the Chamber considers that this argument does not meet the requirement of Rule 54 in that it is irrelevant to the *present* trial. In this respect, the Chamber is not empowered under Rule 54 to order the disclosure of materials unnecessary to the conduct of its trial, even if they could be considered necessary in another trial. This same reasoning applies to the Prosecution’s submission that its request be granted in “the interests of justice”, in relation to the Prosecution maintaining a complete record regarding the Notebooks’ condition and handling.

IV. DISPOSITION

13. For the foregoing reasons, pursuant to Rules 54, 73 (A), and 94 *bis* (A), the Chamber **DENIES** the Motion.

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



Judge Alphons Orie
Presiding Judge

Dated this twelfth of June 2012
At The Hague
The Netherlands

[Seal of the Tribunal]

²⁰ See, for example, T. 18403-18408 and T. 18426.

²¹ T. 18357-18358.

²² See T. 18358, 18402.

²³ T. 18435. In relation to the red ink having been added by Expert Browne on the evening of 20 March 2012, see T. 18438.

²⁴ P3110.