



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: 20 September 2012
Original: English

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IN TRIAL CHAMBER I

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

Registrar: Mr John Hocking

Decision of: 20 September 2012

PROSECUTOR

v.

**JOVICA STANIŠIĆ
FRANKO SIMATOVIĆ**

PUBLIC

**DECISION ON PROSECUTION BAR TABLE MOTION
FOR ADMISSION OF REBUTTAL EVIDENCE
REGARDING WITNESS JF-057**

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. In November 2010, Witness JF-057 (“Witness”) gave evidence before this Chamber. On 4 June 2012, Defence Counsel for Franko Simatović (“Simatović Defence”) filed a motion requesting the admission of two letters which the Witness had sent to the Prosecution and Defence Counsel for Jovica Stanišić (“Stanišić Defence”) in March 2012.¹ The letters contain statements made by the Witness that relate to the Witness’s testimony before this Chamber. On 5 July 2012, the Chamber granted the Defence request, and the letters were admitted as D1356 and D1357 (“Letters”).²

2. On 2 August 2012, the Prosecution filed a Motion requesting the admission of rebuttal evidence in relation to the Letters (“Motion”).³ It concerns material that the Prosecution submits shows that the evidence of the Witness in the present case is consistent with notes made by the Witness during the events in relation to which the Witness testified (“Notes”).⁴ The Prosecution further requests the admission of three additional documents which it submits corroborate the Witness’s testimony in the present case (“Documents”).⁵ The Prosecution submits this corroborating evidence is necessary to show that the Witness did not “fabricate” any testimony given before this Chamber in November 2011.⁶

3. On 16 August 2012, the Stanišić Defence filed a response (“Stanišić Response”), opposing the Motion and arguing that the Prosecution has not met the standard for admission for rebuttal evidence from the bar table.⁷ It argues that the Prosecution could have reasonably anticipated in 2010 that the Defence would try to present material during their respective cases to impeach the credibility of the Witness.⁸ It further submits that the Prosecution should not be allowed to tender rebuttal evidence which has the sole purpose of reinforcing evidence presented during Prosecution’s case-in-chief, and refers to the Tribunal’s case law in this respect.⁹

4. On the same day, the Simatović Defence filed its response, also opposing the Motion and similarly arguing that the Prosecution has not met the standard for admission of rebuttal evidence

¹ Simatović Defence Second Bar Table Motion with Confidential Annex, 4 June 2012.

² See First Decision on Simatović Defence Second Bar Table Motion of 4 June 2012, 5 July 2012.

³ Prosecution Motion to Admit Rebuttal Evidence Regarding JF-057 via the Bar Table, 2 August 2012, filed confidentially with Confidential Annexes A, B and C.

⁴ Motion, paras 1-6; Motion, Confidential Annexes A (overview of requested pages of the Notes), Confidential Annex B and C (Notes, discussed individually per page requested).

⁵ Motion, para 7; Motion, Confidential Annex A.

⁶ Motion, paras 2, 4.

⁷ Stanišić Defence Response to Prosecution Motion to Admit Rebuttal Evidence Regarding JF-057 via the Bar Table, 16 August 2012.

⁸ Stanišić Response, para. 6.

⁹ Stanišić Response, para. 5.

from the bar table (“Simatović Response”).¹⁰ In addition to the arguments also raised by the Stanišić Defence,¹¹ the Simatović Defence argues that the materials tendered by the Prosecution “do not constitute a rebuttal of any significant issues arising out of [the Letters]”.¹² It also submits that the Prosecution mischaracterized the position of the Witness during the events to which the Witness testified.¹³ Lastly, it submits that at least one of the Documents is a summary of an intercept by the Government of Croatia, which the Defence submits it knows nothing about and which in any event has not been presented in an admissible form.¹⁴

II. APPLICABLE LAW

5. Under Rule 85 (A) of the Tribunal’s Rules of Procedure and Evidence (“Rules”), unless otherwise directed by the Trial Chamber in the interests of justice, rebuttal evidence shall be presented after the presentation of evidence of the Defence case. The Appeals Chamber has held that rebuttal evidence must be highly probative and must relate to a significant issue arising directly out of Defence evidence which could not have been reasonably anticipated.¹⁵ The Prosecution cannot call additional evidence merely because its case has been met by certain evidence to contradict it.¹⁶

6. The Chamber recalls and refers to the applicable law governing the admission of documents from the bar table as set out in its previous decision.¹⁷

III. DISCUSSION

7. The Prosecution argues that the Notes and Documents relate to a significant issue – the credibility of the Witness – arising directly out of Defence evidence which could not have been reasonably anticipated. The Chamber finds there is merit in the Prosecution argument that it could not reasonably have foreseen that the Witness would send the Letters in March 2012, and what their content would be. It follows that the Prosecution also could not foresee that the Simatović Defence would tender the Letters in evidence during the presentation of its case.

8. By seeking to have the Letters admitted into evidence, the Defence intended to raise serious doubts regarding the credibility of the Witness. The Chamber acknowledges that if the Witness

¹⁰ Simatović Defence Response on Prosecution Motion to Admit Rebuttal Evidence Regarding JF-057 via the Bar Table, 16 August 2012.

¹¹ Simatović Response, paras 3-6, 12-15, 20.

¹² Simatović Response, paras 7-10.

¹³ Simatović Response, para. 11.

¹⁴ Simatović Response, para. 18.

¹⁵ *Prosecutor v. Naletilić and Martinović*, Case No. IT-98-34-A, Judgement, 3 May 2006, para. 258.

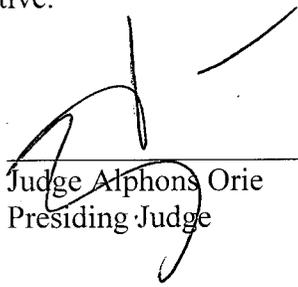
¹⁶ *Ibid.*

¹⁷ First Decision on Stanišić Defence Bar Table Motion of 17 February 2012, 23 May 2012, paras 9-10.

were to be found incredible, that this would constitute a significant issue in this case.¹⁸ The Chamber finds, however, that the rebuttal evidence the Prosecution proffers does not directly address what transpires from the Letters in the Defence's view. The Prosecution seeks to further corroborate the evidence of the Witness by adducing (documentary) evidence which corresponds to the Witness's testimony. It apparently does not seek to challenge the evidence the Defence has presented, namely, that the Witness wrote the Letters in the manner they have been presented to the Chamber, and the accuracy of the Witness's account of the events that the Witness describes therein. The rebuttal evidence proffered by the Prosecution cannot be considered to be highly probative in this context since it addresses only limited portions of the evidence the Witness has given, and does not directly impact on the reasons which makes, as the Defence claims, the Witness's evidence incredible. To the extent, if any, the Letters affect the credibility of the Witness will be considered by the Chamber while evaluating the evidence in its entirety.

For the foregoing reasons, the Chamber **DENIES** the Motion.

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



Judge Alphons Orie
Presiding Judge

Dated this twentieth day of September 2012
At The Hague
The Netherlands

[Seal of the Tribunal]

¹⁸ See also Decisions on Motions for Admission of Additional Evidence of Witness Milan Babić, 20 July 2012, para. 18, where the Chamber held that the credibility of witnesses can constitute a significant issue arising directly out of Defence evidence which the Prosecution could not have reasonably anticipated prior to their testimony.