

**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: 11 March 2011
Original: English

IT-03-69-T
D28796-028787
11 March 2011

28796
SMS

IN TRIAL CHAMBER I

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

Registrar: Mr John Hocking

Decision of: 11 March 2011

PROSECUTOR

v.

**JOVICA STANIŠIĆ
FRANKO SIMATOVIĆ**

PUBLIC

**DECISION ON STANIŠIĆ REQUEST FOR ORDER OF
DISCLOSURE OF MATERIALS RELATED TO THE
ADMISSIBILITY OF THE EXPERT REPORT OF
REYNAUD THEUNENS**

Office of the Prosecutor
Mr Dermot Groome

Counsel for Jovica Stanišić
Mr Wayne Jordash
Mr Geert-Jan Alexander Knoops

Counsel for Franko Simatović
Mr Mihajlo Bakrač
Mr Vladimir Petrović

I. PROCEDURAL HISTORY AND SUBMISSIONS OF THE PARTIES

1. On 15 February 2011, the Stanišić Defence filed a request for a disclosure order regarding materials related to witness Reynaud Theunens (“Request”).¹ On 22 February 2011, the Prosecution responded, asking the Chamber to deny the Request (“Response”).² On 1 March 2011, the Stanišić Defence requested leave to reply to the Response,³ which the Chamber denied.⁴

A. Background

2. On 27 October 2005, the Prosecution disclosed the *curriculum vitae* of proposed expert witness Reynaud Theunens to the Defence. On 2 July 2007, the Prosecution filed Theunens’ expert report (“Report”) pursuant to Rule 94 *bis* (A) of the Rules of Procedure and Evidence (“Rules”).⁵ On 26 July 2007, the Stanišić Defence notified the Chamber and the parties that “it challenges (the relevance of) the report” (“Rule 94 *bis* Notification”).⁶

3. Theunens testified in this case between 26 October and 3 November 2010. During his testimony, the Stanišić Defence made enquiries with the Prosecution for disclosure of additional materials to clarify his involvement in *Stanišić and Simatović* case.⁷ The Chamber deferred its decision on admission of the Report and allowed the Defence to make written submissions regarding its admissibility in light of Theunens’ involvement in the present case beyond preparation of the Report.⁸

¹ Stanišić Request for Order of Disclosure of Materials Related to the Admissibility of the Expert Report of Reynaud Theunens with Confidential Annexes, 15 February 2011. The Request was initially to be filed with public annexes on 14 February 2011. With leave of the Chamber, granted through an informal communication on 15 February 2011, the Stanišić Defence filed the Request the next day with the annexes made confidential at the request of the Prosecution. However, the Chamber has noted that the Request filed on 15 February contains an additional annex and that some annexes are longer than in the Request distributed to the Chamber and the parties on 14 February. Since parts of the annexes to the Request were illegible, the Stanišić Defence filed a corrigendum attaching all annexes. Stanišić Corrigendum to Stanisic Request for Order of Disclosure of Materials Related to the Admissibility of the Expert Report of Reynaud Theunens, 4 March 2011 (Confidential) (“Corrigendum”). For consistency and ease of reference, the Chamber will for all Annexes refer to the ones attached to the Corrigendum.

² Prosecution Response to Stanišić Request for Disclosure Order of Materials Related to Expert Reynaud Theunens and Request to Exceed the Word Limit, 22 February 2011.

³ Stanišić Motion for Leave to Reply to Prosecution Response to Stanišić Request for Disclosure of Materials Related to Expert Reynaud Theunens, 1 March 2011.

⁴ On 20 March 2011 the Chamber informed the parties through an informal communication that the Stanišić Defence request for leave to reply was denied.

⁵ Prosecution’s Submission of the Expert Report of Reynaud Theunens Pursuant to Rule 94bis with Annexes A and B, 2 July 2007.

⁶ Defence Notification Pursuant to Rule 94(B), 26 July 2007 (Confidential).

⁷ See T. 9519-9520, 9529; Confidential Annex A to the Corrigendum; Response, para. 7.

⁸ T. 8057-8058, 8771-8773. The Report was assigned exhibit number P1575 (MFI).

4. After the conclusion of Theunens' testimony, the Stanišić Defence made further disclosure requests to the Prosecution.⁹ After discussion of the matter in Court on 25 November 2010, the Chamber encouraged the parties, to the extent possible, to come to an agreement.¹⁰ It also invited the Stanišić Defence to file a written motion seeking further disclosure regarding any issues that could not be resolved by way of agreement.¹¹ Thereafter the parties continued to communicate on the matter.¹² On 28 January 2011, the Stanišić Defence informed the Chamber by informal communication that the Stanišić Defence and Prosecution had reached an impasse, and that it intended to file a motion seeking an order for disclosure of Theunens related materials. The Chamber set the deadline for the filing of such motion at 14 February 2011.¹³

B. Request

5. The Stanišić Defence requests the Chamber to order the Prosecution to disclose certain materials related to Theunens. It submits these materials are relevant in order to assess to what extent Theunens' involvement in this case has affected his impartiality, and therefore the reliability of his conclusions, the admissibility of the Report and weight, if any, to be given to the Report if admitted.¹⁴ The Stanišić Defence requests disclosure of the following materials (collectively, "Requested Materials") for the reasons set out below:

(a) The draft table of contents of the Report sent in spring 2007 by Theunens to Ms. Brehmeier (then Acting Senior Trial Attorney), specifically to show that Theunens had a settled – and thus biased – view when starting work on the Report.

(b) All personal drafts of the Report that Theunens saved on the Prosecution network at different stages of preparing the Report, specifically to obtain insight in the methodology used in preparing it, the influence of others on the drafting of the Report, and how quickly Theunens reached his conclusions as further evidence of his bias.

(c) All Requests for Assistance ("RFAs") that Theunens drafted for the case, specifically to understand his involvement in this case and his approach to preparing the Report.

(d) All emails sent by Theunens regarding evidence admitted in this case, specifically to assess the extent of Theunens' involvement in this case.¹⁵

⁹ T. 9516-9521; Request, paras 2-3; Confidential Annexes A and B to the Corrigendum; Response, paras 7-9.

¹⁰ T. 9540-9542.

¹¹ T. 9541.

¹² Request, paras 3-4; Confidential Annexes C-G to the Corrigendum; Response, paras 11-15.

¹³ T. 11077-11079.

¹⁴ Request, paras 12-14.

¹⁵ Request, paras 14-15.

6. The Stanišić Defence submits that the Requested Materials fall within the Prosecution's disclosure obligations under Rule 66(B).¹⁶ They are within the custody or control of the Prosecution, and are material to the preparation of the Defence case since they impact "upon the reliability and credibility of a witness (heavily) relied upon by the Prosecution".¹⁷

7. The Stanišić Defence further argues that the Requested Materials are exculpatory within the definition of Rule 68 since they may affect the credibility of Theunens' opinions.¹⁸ Therefore, the Requested Materials are also subject to disclosure under this Rule.¹⁹

C. Response

8. The Prosecution requests leave to exceed the word limit.²⁰ It further opposes any order for disclosure of additional materials related to Theunens for the following three reasons.²¹

9. First, the Prosecution submits that it is too late for the Stanišić Defence to challenge the qualifications of Theunens as an expert and make the related requests for disclosure.²² The Rule 94 *bis* Notification did not indicate a challenge to Theunens' qualifications pursuant to Rule 94 *bis* (B)(iii), although at the time of filing the Stanišić Defence was familiar with Theunens' employment with the Prosecution and his earlier expert reports admitted in other cases.²³ The Stanišić Defence at no point prior to Theunens' testimony in this sought leave to amend its Rule 94 *bis* Notification.²⁴ Notwithstanding the lack of notice, concerns relating to Theunens' independence or impartiality do not go to the admissibility of the Report pursuant to Rule 94 *bis* but to its weight.²⁵ The Stanišić Defence had ample opportunity to address these matters during cross-examination.²⁶

10. Second, the Prosecution argues that the Requested Materials do not fall within its disclosure obligations.²⁷ The Prosecution submits that disclosure of expert materials is in principle governed by Rule 94 *bis*. Since Rule 94 *bis* (A) does not require disclosure of draft(s) of an expert report and communication between the expert and the tendering party, the Prosecution is under no obligation

¹⁶ Request, para. 14.

¹⁷ Ibid.

¹⁸ Ibid.

¹⁹ Ibid.

²⁰ Response, para. 2.

²¹ Response, para. 1.

²² Response, paras 17-25.

²³ Response, paras 22-24.

²⁴ Response, paras 21-24.

²⁵ Response, para. 24.

²⁶ Ibid.

²⁷ Response, paras 26-38.

to disclose the Requested Materials.²⁸ The Request also falls outside Rule 66(B) disclosure obligations since it fails to meet the test of ‘materiality’ required under that rule.²⁹ The Prosecution acknowledges that Rule 68 would require disclosure of any material which in the actual knowledge of the Prosecutor affects the credibility of Prosecution evidence.³⁰ However, it submits that in the absence of “indications of undue influence on the contents of Mr. Theunens’ report”, it is not obliged pursuant to Rule 68 to conduct any further searches or disclosures of archived materials.³¹

11. Third, the Prosecution submits that the Request is unreasonable since the Prosecution “undertook reasonable efforts in the interest of transparency to provide information to the Defence despite no clear obligation under the Rules and the untimely nature of the requests”.³² The information obtained by the Defence during or after cross-examination does not justify an order to the Prosecution to further explore archived materials.³³

II. APPLICABLE LAW

12. Rule 66(B) of the Rules provides that the Prosecutor shall, on request, permit the Defence to inspect any documents in the Prosecutor’s custody or control, which are material to the preparation of the defence. The material requested pursuant to Rule 66(B) must (1) be relevant or possibly relevant to an issue in the case; (2) raise or possibly raise a new issue the existence of which is not apparent from the evidence the Prosecution proposes to use; (3) hold out a real, as opposed to fanciful, prospect of providing a lead on evidence which goes to (1) or (2).³⁴

13. According to Rule 68(i) of the Rules, the Prosecution shall disclose to the Defence any material which in the actual knowledge of the Prosecutor may suggest the innocence or mitigate the guilt of the accused or affect the credibility of Prosecution evidence. The determination of which materials are subject to disclosure under this provision, is a fact-based judgement made by the Prosecution.³⁵ A Trial Chamber will only intervene in case of proof that the Prosecution abused its judgement.³⁶

²⁸ Response, paras 26-32.

²⁹ Response, paras 33-36.

³⁰ Response, para. 37.

³¹ Response, paras 37-38.

³² Response, para. 40 (footnote omitted). See also Response, paras. 39, 41-48.

³³ Response, para. 48.

³⁴ *Prosecutor v. Zejnil Delalić et al.*, Case No. IT-96-21-T, Decision on Motion by the Accused Zejnil Delalić for the Disclosure of Evidence, 27 September 1996, paras 6-8.

³⁵ *The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-AR73.13, Decision on Joseph Nzirorera’s Appeal from Decision on Tenth Rule 68 Motion, 14 May 2008, para. 9; *Ferdinand Nahimana et al. v. The Prosecutor*, Case No. ICTR-99-52-A, Decision on Appellant Jean-Bosco Barayagwiza’s Motions for Leave to Present Additional Evidence pursuant to Rule 115 of the Rules of Procedure and Evidence, 8 December 2006, para. 34, referring to, *inter alia*, *Ferdinand Nahimana et al. v. The Prosecutor*, Case No. ICTR-99-52-A, Decision

14. The Appeals Chamber has held that, in relation to Defence requests for disclosure of evidence pursuant to Rules 66 and 68, the Defence carries the burden of proof and is required to cumulatively (i) prove that the document requested is in the Prosecution's custody or control, (ii) set forth a *prima facie* case for its relevance to the presentation of the Defence case, and (iii) specifically identify the requested documents.³⁷

15. Rule 94 *bis* of the Rules governs the testimony of expert witnesses:

(A) The full statement and/or report of any expert witness to be called by a party shall be disclosed within the time-limit prescribed by the Trial Chamber or by the pre-trial Judge.

(B) Within thirty days of disclosure of the statement and/or report of the expert witness, or such other time prescribed by the Trial Chamber or pre-trial Judge, the opposing party shall file a notice indicating whether:

(i) it accepts the expert witness statement and/or report; or

(ii) it wishes to cross-examine the expert witness; and

(iii) it challenges the qualifications of the witness as an expert or the relevance of all or parts of the statement and/or report and, if so, which parts.

III. DISCUSSION

A. Preliminary Issue

16. Considering the background of the issue as well as the length of the Request and its annexes, the Trial Chamber grants leave to the Prosecution to exceed the word limit in its Response.

B. Request

17. The issue before the Chamber is whether the Stanišić Defence is entitled to disclosure of the Requested Materials.

on Appellant Jean-Bosco Barayagwiza's Motion Requesting that the Prosecution Disclosure of the Interview of Michel Bagaragaza Be Expunged from the Record, 30 October 2006, para. 6; *The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-AR73.6, Decision on Joseph Nzirorera's Interlocutory Appeal, 28 April 2006, para. 16.

³⁶ *Prosecutor v. Mladen Naletilić and Vinko Martinović*, Case No. IT-98-34-T, Decision on Joint Motions for Order Allowing Defence Counsel to Inspect Documents in the Possession of the Prosecution, 16 September 2002, p. 3; *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-A, Decision on the Appellant's Motions for the Production of Material, Suspension or Extension of the Briefing Schedule, and Additional Filings, 26 September 2000, para. 39.

³⁷ *Édouard Karemera et al. v. The Prosecutor*, Case No. ICTR-98-44-AR73.18, Decision on Joseph Nzirorera's Appeal from Decision on Alleged Rule 66 Violation, 17 May 2010, paras 12-13 and 32, citing *Jean de Dieu Kamuhanda v. The Prosecutor*, Case No. ICTR-98-54A-R68, Decision on Motion for Disclosure, 4 March 2010, para. 14; *Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-AR73.11, Decision on Prosecution's Interlocutory Appeal Concerning Disclosure Obligations, 23 January 2008, para. 12. See also *Prosecutor v. Ljube Bošković and Johan Tarčulovski*, Case No. IT-04-82-T, Decision on Bošković Defence Urgent Motion for an Order to Disclose Material pursuant to Rule 66(B), 31 January 2008, para. 7.

18. At the outset, before determining whether the Requested Materials fall within the system of disclosure under the Rules, the Chamber notes that the Prosecution appears to have made significant efforts to meet the Stanišić Defence's requests for disclosure of certain Theunens related materials.³⁸ The Prosecution offered to discuss with the Stanišić Defence the possibility of coming to a stipulation and to organise a conference call for the Stanišić Defence with Theunens, which the Chamber encouraged.³⁹ Based on the submissions the Chamber has before it, it appears that the Stanišić Defence decided not to take up these offers.⁴⁰

19. A proposed expert witness is required to give his or her evidence in full transparency of the established or assumed facts that he or she relies upon, and of the methods used when applying his or her knowledge, experience, or skills to form his or her expert opinion.⁴¹ During the examination of an expert, parties may broach any issues that may arise with regard to communication between a party and its expert witness, early drafts of an expert report, or draft tables of content for such a report.⁴² The Chamber will now examine whether – under the specific circumstances of the Request

20. Rule 94 *bis* (A) requires the disclosure of expert reports in full. The Chamber considers that the Rule does not entail any obligation to disclose communication or documents drafted in preparation of such a report or early drafts thereof. To find otherwise would be an unreasonable broadening of the rule.

21. The Chamber finds that the Requested Materials are also not subject to disclosure pursuant to Rule 66(B) of the Rules. During his examination, Theunens provided evidence under oath regarding his prior involvement in this case in general and the preparation of the Report in particular.⁴³ Further to the testimony, the Stanišić Defence put questions regarding Theunens' involvement in the *Stanišić and Simatović* case and the drafting of the Report and RFAs to

³⁸ T. 9519-9520, 9532; Confidential Annexes A and G to the Corrigendum; Response, paras 7, 10-13, 15, 40.

³⁹ T. 9528-9529, 9538-9542; Confidential Annexes A and G to the Corrigendum; Response, paras 10, 40.

⁴⁰ Response, paras 41-43.

⁴¹ *Prosecutor v. Ante Gotovina et al.*, Case No. IT-06-90-T, Decision on Disclosure of Expert Materials, 27 August 2009 ("Gotovina Decision"), para. 10; *Prosecutor v. Vidoje Blagojević and Dragan Jokić*, Case No. IT-02-60-T, Decision on Prosecution's Motion for Admission of Expert Statements, 7 November 2003, para. 19; *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-T, Decision on the Expert Witness Statements Submitted by the Defence, 27 January 2003, p. 3; *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-T, Decision Concerning the Expert Witnesses Ewa Tabeau and Richard Philipps, 3 July 2002, p. 2.

⁴² See Gotovina Decision, para. 11.

⁴³ See T. 8052-8053, 8056, 8146-8162, 8170-8171.

Theunens as well as two former Prosecution staff members.⁴⁴ All three responded to the Stanišić Defence's questions.⁴⁵

22. The information provided consistently confirms that Theunens only received very general guidance from the side of the Prosecution and that any conclusions reached in the Report were his own.⁴⁶ Feedback received by Theunens on the Report was mainly limited to linguistic comments.⁴⁷ With regard to the table of contents, Theunens testified and confirmed post-testimony that the first draft largely corresponded to the table included in the Report.⁴⁸ Any changes were made only at Theunens' own initiative and without the input of others.⁴⁹ Therefore, the Chamber finds the draft table of contents and early personal drafts of the Report are not material within the definition of Rule 66(B).

23. The Chamber further considers that the requested RFAs also fail to meet the standard of 'materiality' under Rule 66(B). Theunens stated that he drafted a limited number of RFAs.⁵⁰ This was part of his work as a military analyst for the Prosecution.⁵¹ Upon the request of the Stanišić Defence, the Prosecution has searched its RFA database and found three RFAs listing Theunens as requestor.⁵² One of these was specifically for the current case and the remaining two concerned other cases.⁵³ These three RFAs have been provided to the Stanišić Defence and are before the Chamber as a confidential annex to the Request.⁵⁴ The Prosecution did not find any RFAs drafted by Theunens that were sent during the period in which he worked on writing the Report.⁵⁵ Theunens testified that he had full access to all materials in the possession of the Prosecution for the preparation of the Report.⁵⁶ The fact that he prepared RFAs to request certain information would at best give an indication of what information the Prosecution – and Theunens – did not have at a certain moment in time. Apart from the question whether the Prosecution has in its possession any further RFAs drafted by Theunens, the Chamber fails to see how such information, without further context could hold out a real lead relevant to challenges regarding admissibility or weight of the

⁴⁴ Confidential Annexes C-E to the Corrigendum. The two former Prosecution staff members concerned Theunens' superior at the time and the then acting Senior Trial Attorney.

⁴⁵ Confidential Annexes C-E to the Corrigendum.

⁴⁶ T. 8056, 8158-8160; Confidential Annexes C-E to the Corrigendum.

⁴⁷ T. 8158-8160; Confidential Annexes C-E to the Corrigendum.

⁴⁸ T. 8053, 8157-8159; Confidential Annex E to the Corrigendum.

⁴⁹ Confidential Annex E to the Corrigendum.

⁵⁰ T. 8170-8171; Confidential Annex E to the Corrigendum.

⁵¹ T. 8170-8171; Confidential Annexes D and E to the Corrigendum.

⁵² T. 9520; Confidential Annex G to the Corrigendum; Response, paras 15, 46.

⁵³ Confidential Annex G to the Corrigendum.

⁵⁴ Ibid.

⁵⁵ Ibid.

⁵⁶ T. 8053.

Report or could raise a new issue not apparent from the evidence already proposed by the Prosecution.

24. Finally, the Chamber finds that the requested emails are not subject to disclosure pursuant to Rule 66(B). The Stanišić Defence's request in this respect is phrased too broadly. Under oath, Theunens provided information as to his involvement in the current case to the best of his recollection. The Chamber finds that the broad request, in view of his answers during testimony and in combination with the information provided post-testimony, is without justification.

25. The Stanišić Defence argues that the Requested Materials may affect the credibility of Theunens' opinion and therefore subject to disclosure pursuant to Rule 68 as exculpatory. The Chamber disagrees. Rule 68(i) confers upon the Prosecution an obligation to disclose any material which "in the actual knowledge" of the Prosecution may be exculpatory or affect the credibility of the Prosecution evidence. The Chamber notes that based on Theunens' testimony and the information received post-testimony, there are no indications of undue influence on Theunens in the preparation of the Report. In the absence thereof, the Chamber finds the Prosecution is under no obligation to conduct further searches or disclosures of archived materials pursuant to Rule 68(i) of the Rules.

IV. DISPOSITION

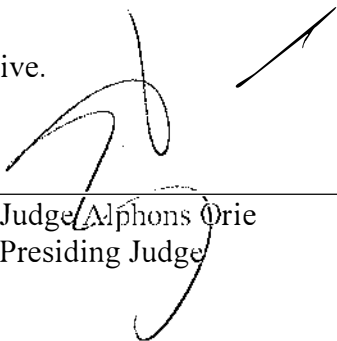
26. For the reasons set out above and pursuant to Rules 94 *bis* (A), 66(B) and 68(i) of the Rules, the Chamber:

GRANTS the Prosecution leave to exceed the word limit in the Response;

DENIES the Request, and

INVITES the parties Stanišić Defence to file submissions regarding the admissibility of the Report no later than Friday, 18 March 2011.

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



Judge Alphons Orie
Presiding Judge

Dated this eleventh of March 2011
At The Hague
The Netherlands

[Seal of the Tribunal]