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17 September 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: 17 September 2012
Original: English

IN TRIAL CHAMBER I

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

Registrar: Mr John Hocking

Decision of: 17 September 2012

PROSECUTOR

v.

**JOVICA STANIŠIĆ
FRANKO SIMATOVIĆ**

Public

**SECOND DECISION ON SIMATOVIĆ DEFENCE
THIRD BAR TABLE MOTION**

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 10 July 2012, the Simatović Defence (“Defence”) filed its third bar table motion (“Motion”), by which it requested the admission of 259 documents from the bar table, organized into three categories: documents used in the Borojević report (“Borojević documents”), non-admitted documents (“2D documents”), and documents recently received from Croatia (“Croatian documents”).¹ On 31 July 2012, the Prosecution filed its response to the Motion (“Response”).² The Stanišić Defence did not make any submissions, and the Simatović Defence did not seek leave to file a reply to the Response.

2. The Defence submits that each of the documents in the above three categories is relevant, probative and sufficiently reliable to be admitted into evidence from the bar table.³

3. The Prosecution notes that a number of documents are not part of the Defence Rule 65 *ter* exhibit list, and that their addition at such a late stage of the proceedings, for which no good cause has been shown, is not in the interests of justice and judicial economy.⁴ In this respect, it notes that the admission of these documents would cause significant prejudice to the Prosecution and may result in the tendering of additional documents and/or presentation of witnesses in rebuttal.⁵ The Prosecution submits that with the minimum information provided, it is difficult to ascertain the potential relevance of the documents to the Defence case.⁶

4. In relation to the Borojević documents, the Prosecution recalls that the Defence expert Milorad Borojević was never called, and that his expert report was not tendered into evidence. The Prosecution points out that all of the tendered Borojević documents are not on the Defence Rule 65 *ter* exhibit list, and recalls that it opposed their addition to the Defence Rule 65 *ter* List in April 2012.⁷ It submits that the Defence has tendered the Borojević documents in a manner inconsistent with the information contained in the Borojević report.⁸ It submits the Defence draws inferences from these materials that were not made by Borojević, and concludes that the Defence did not call him as a witness as he would have given testimony unfavourable to the Accused.⁹ The Prosecution further submits it is prejudiced by not being able to cross-examine Borojević on these materials, and

¹ Simatović Defence Third Bar Table Motion with Confidential Annex, 10 July 2012, paras 1, 5. The Defence wrongly refers to 303 documents.

² Prosecution Response to Simatović Defence Third Bar Table Motion with Confidential Annex, 31 July 2012.

³ Motion, paras 2, 6-7.

⁴ Response, paras 15-16.

⁵ Response, para. 16.

⁶ Response, para. 14.

⁷ Response, paras 6-7.

⁸ Response, para. 20.

⁹ Response, paras 20-22.

that it had not been given notice by the Defence that it would tender these materials through a bar table motion.¹⁰ Lastly, the Prosecution submits that many of the Borojević Documents are not relevant to the present case, and have been tendered to confuse the Chamber.¹¹ Particularly, it argues that many of these documents deal with “Red Berets” formations, which it submits are not related to the “Red Berets” relevant to the present case.¹² The Prosecution submits that “admission of these non-65ter documents could lead to the tendering of additional documents and the presentation of additional witnesses in rebuttal”.¹³

5. In relation to the Croatian documents, the Prosecution requests that the Chamber denies their admission as they are not on the Defence 65 *ter* exhibit list.¹⁴ The Prosecution also disputes their relevance to the case in general.¹⁵

II. APPLICABLE LAW

6. The Chamber recalls and refers to the applicable law governing the admission of documents from the bar table as set out in a previous decision.¹⁶

III. DISCUSSION

7. On 7 September 2012, the Chamber issued its first Decision on the Motion, which dealt with 99 of the proposed 259 documents (“First Decision of 7 September 2012”).¹⁷ In the present Decision, the Chamber will address the remaining 160 documents of the Motion.

(i) Croatian documents

8. The Chamber notes that the Prosecution objects to the admission of all Croatian documents on the grounds that they were not included on the Defence 65 *ter* exhibit list and that good cause has not been shown for their late addition.¹⁸ The Chamber recalls that the addition of documents to a Rule 65 *ter* exhibit list is a sub-question to that of admitting the documents into evidence.¹⁹ The Prosecution’s concerns will be duly considered under Rule 89 (C) of the Tribunal’s Rules of Procedure and Evidence (“Rules”). For this reason the Prosecution’s objections related to the

¹⁰ Response, paras 23-24.

¹¹ Response, para. 25.

¹² Ibid.

¹³ Response, Confidential Annex A, p. 2.

¹⁴ Response, para. 27; Response, Confidential Annex A, p. 160.

¹⁵ Response, Confidential Annex A, pp. 160-167.

¹⁶ First Decision on Stanišić Defence Bar Table Motion of 17 February 2012, 23 May 2012, paras 9-10.

¹⁷ First Decision on the Third Simatović Defence Table Motion, 7 September 2012.

¹⁸ Response, Confidential Annex A, p. 160.

¹⁹ Decision on Prosecution Motion to Reopen Prosecution Case and for the Admission of Documents from the Bar Table, 7 June 2011, para. 14, fn. 42.

Defence Rule 65 *ter* exhibit list do not require explicit discussion. The Chamber decides, *proprio motu*, to add the Croatian Documents to the Defence Rule 65 *ter* exhibit list.

9. With respect to the documents bearing the Rule 65 *ter* nos 2D01695, 2D01719, 2D01721, 2D01728, 2D01729, 2D01730, 2D01731, 2D01736, 2D01737, 2D01741, and 2D01745, the Chamber finds that the Defence has shown (i) the relevance and probative value of these documents and (ii) how they would fit into the Defence case, and will allow their admission into evidence from the bar table.

10. Regarding document bearing the Rule 65 *ter* no. 2D01696, the Defence does not provide any indication of its relevance.²⁰ Therefore the Defence has failed to show (i) the relevance of this document and (ii) how it fits into the Defence case. Accordingly, the Chamber denies admission of this document into evidence.

11. The Defence submits that the document bearing Rule 65 *ter* no. 2D01723 is relevant because it shows that important decisions were made “above the level of Franko Simatović” in the Socialist Federal Republic of Yugoslavia without his knowledge and participation.²¹ It is unclear from the face of this document how it supports the inferences made by the Defence regarding the Accused’s level of knowledge of the issues discussed at this meeting and the relation between those issues and the crimes alleged. The Chamber finds that the Defence has not shown (i) the relevance and probative value of this document and (ii) how it fits into the Defence case, and denies its admission into evidence from the bar table.

(ii) Borojević documents

12. The Chamber notes that the Prosecution objects to the admission of all Borojević Documents, and that it has presented extensive submissions in both the Response and in Confidential Annex A to the Response in this regard. Particularly, the Chamber observes that the Defence has tendered a number of documents regarding “Red Berets” units that it submits were “attached” or under the command of the Bratunac Brigade during an unspecified period of time. These documents are documents bearing Rule 65 *ter* nos 2D01350, 2D01359, 2D01375, 2D01524, 2D01525, 2D01526, 2D01534, 2D01535, 2D01536, 2D01537, 2D01540, 2D01541, 2D01542,²² 2D01543, 2D01545, 2D01549, 2D01550, 2D01552, 2D01553, 2D01569, 2D01572, 2D01574, 2D01575, 2D01576, 2D01577, 2D01578, 2D01581, 2D01583, 2D01584, 2D01586, 2D01599, 2D01600, 2D01602, 2D01604, 2D01606, 2D01609, 2D01610, 2D01612, 2D01613, 2D01614,

²⁰ Motion, pp. 42571-42570.

²¹ Motion, pp. 42570-42569.

2D01617, 2D01619, 2D01620, 2D01621, 2D01623, 2D01624, 2D01625, 2D01626, 2D01627, 2D01629, 2D01630, 2D01631, 2D01632.1, 2D01632, 2D01635, 2D01643, 2D01646, 2D01649, 2D01650, 2D01652, 2D01655, 2D01656, 2D01658, 2D01659, 2D01660, 2D01664, 2D00120, and 2D00108.²³ With respect to these documents, the Chamber has considered the following. For nearly all of these documents, the Defence only provides a brief description of the information contained in these documents, but it does *not* provide the required information of how these documents fit into the Defence case. The documents relate to issues that appear to have been discussed by Defence witnesses; at least one of these documents was even authored by a Prosecution witness (who twice appeared before the Chamber due to a recall of the witness).²⁴ Moreover, there are clear indications from the Prosecution's Response and Confidential Annex A to the Response that many of these documents were taken out of a larger context, and that larger context is presently unclear to the Chamber.²⁵ The Chamber notes that the Defence did not seek to reply to the Response. Lastly, these documents were not included on the Defence 65 *ter* exhibit list, and the Defence did not attempt to show good cause for their late addition; what is more, a request for their addition to the Defence Rule 65 *ter* exhibit list is not part of the Motion. The Chamber indicated earlier that the addition of documents to a Rule 65 *ter* exhibit list is a sub-question to that of admitting the documents into evidence, but that the Prosecution's concerns will be considered under the Rule 89 (C).²⁶ While the Chamber, in the recent flurry of documents presented by both Defence teams at the very last moment, has been less strict to apply the basic principle that a party must file a timely request for the addition of documents to the Rule 65 *ter* exhibit list, the Chamber considers it relevant to highlight the context in which the aforementioned documents have been tendered. The Defence has had ample opportunity to present these documents through witnesses in order to provide the Chamber with the necessary context, but chose not to do so. As such, the Chamber is left to guess how to interpret or contextualise these documents when determining their admission into evidence. Therefore, the Chamber is unable to determine the probative value of these documents. For these reasons, the Chamber denies their admission into evidence from the bar table.

13. With respect to documents bearing Rule 65 *ter* nos 2D01222, 2D01223, 2D01225, 2D01226, 2D01227, 2D01228, 2D01229, 2D01275, 2D01276, 2D01277, 2D01278, 2D01294,

²² The Chamber notes that the English translations of the documents bearing the Rule 65 *ter* 2D01542 is incomplete.

²³ The Chamber notes that document bearing the Rule 65 *ter* number 2D00108 is an excerpt from document bearing the Rule 65 *ter* number 2D00120. It further notes that the original version of document bearing the Rule 65 *ter* number 2D00120 includes a list of names which has not been replicated in its English translation.

²⁴ See 2D01572 (authored by Prosecution witness Manojlo Milovanović).

²⁵ Response, paras 19-26; Response, Confidential Annex A, see pp. 30-109.

²⁶ *Supra*, para. 8; see also First Decision of 7 September 2012, para 16.

2D01297, 2D01300, 2D01301, 2D01306, 2D01340, 2D01341, 2D01342, 2D01349,²⁷ 2D01381, 2D01382, 2D01383, 2D01385, 2D01362, 2D01657, 2D01661, 2D01296, 2D01386, 2D01391, 2D01392, 2D01394, and 2D01397, the Chamber notes that while the descriptions of the documents are often very short, it finds that the Defence has shown (i) the relevance and probative value of these documents and (ii) how they fit into the Defence case. The Chamber *proprio motu* decides to add these documents to the Rule 65 *ter* exhibit list, and admits them into evidence from the bar table.

14. With respect to documents 2D001273, 2D001274, and 2D01398, the Chamber notes that these are documents authored by Defence witness Osman Selak, and considers that they should have been put to the witness when he gave evidence before the Chamber. The Chamber denies their admission into evidence from the bar table.

15. The Chamber notes that 2D01390 lacks a B/C/S original, and that document bearing 65 *ter* no. 2D01267 is an undated attachment to a document, which was not submitted to the Chamber. The Chamber denies their admission into evidence from the bar table

(iii) Documents previously admitted

16. The documents bearing the following Rule 65 *ter* numbers have already been admitted into evidence: 2D01224 (admitted as P1086),²⁸ 2D01538 (admitted as D82), 2D01603 (admitted as P3124), 2D01638 (admitted as D860), 2D01639 (admitted as D859), 2D00043 (admitted as D14), 2D00185.2 (admitted as P1120), 2D00237 (admitted as P2740), 2D00242 (admitted as D1198), 2D00243 (admitted as D11), 2D00251 (admitted as P1127), 2D00280 (admitted as P418), 2D00314 (admitted as P1756), 2D00368²⁹ (an extract from the document admitted as D212), 2D00766.2 (admitted as D398), 2D00777.2 (admitted as D204), and 2D01727 (admitted as P1991). The Chambers therefore declares the request for admission of these documents moot.

(iv) Documents previously denied

17. The documents bearing the Rule 65 *ter* nos 2D00649 and 2D00656 were denied admission into evidence in Court on 7 June 2012 due to lack of sufficient indicia of reliability.³⁰ The Defence

²⁷ The Chamber notes that 2D01580 is a duplicate of document 2D1349. It therefore considers its request for admission into evidence as moot.

²⁸ The Chamber notes that the Defence included the English translation of P1088 in its English translation of 2D01224. It observes, however, that the B/C/S version of 2D01224 does not include the B/C/S version of P1088.

²⁹ With regard to 2D00368, the Chamber notes that the Defence did not provide an English translation corresponding to the B/C/S excerpt that it submits for admission into evidence.

³⁰ T. 20093.

has not provided additional information regarding the reliability of these documents. Accordingly, the Chamber denies their admission into evidence from the bar table.

(v) Voluminous documents and evidence given by witnesses

18. The documents bearing the Rule 65 *ter* nos 2D01233, 2D01234, 2D01255, 2D00061, 2D00068, 2D00100, 2D00121, and 2D00706.2 are voluminous. Together their English translations comprise nearly 1000 pages, yet the Defence gives almost no indication as to which portions of these documents are relevant to its case. Their descriptions of these documents are general and brief.³¹ One description includes a single page reference; the others have no page citations at all.³² Thus, the Chamber is unable to properly assess the relevance and probative value of these documents. Furthermore, the Chamber observes that documents bearing Rule 65 *ter* nos 2D00061, 2D00068, 2D00100, and 2D00121 include statements, testimony and interviews of witnesses – two of whom gave evidence in the present case (Milan Milovanović and JF-010) – for which the Defence should have sought admission under Rules 92 *bis*, *ter*, or *quater* in conjunction with Rule 73 *ter* (D) of the Rules.³³ The admission of the above documents from the bar table under Rule 89 (C) of the Rules, would allow the Defence to circumvent the stringent requirements of Rules 92 *bis* to *quater* of the Rules.

19. For these reasons, the Chamber denies admission into evidence from the bar table of documents bearing the Rule 65 *ter* nos 2D01233, 2D01234, 2D01255, 2D00061, 2D00068, 2D00100, 2D00121, and 2D00706.2.

(vi) Documents with incomplete or missing translations

20. The documents bearing the Rule 65 *ter* nos 2D00140.2, 2D00181.2, 2D00696.2, 2D00701.2, 2D00703.2, 2D00714.2, and 2D00221.2 are original versions of documents which have also been compiled into books. The book versions of these documents and their English translations have been uploaded into eCourt, but translations of the original versions have not. The Prosecution does not object to the admission of these documents if translations of the original versions are provided.³⁴ Having compared the translations of the book reproductions of these documents against the original B/C/S versions, the Chamber is in a position to determine the admissibility of the originals. The Chamber considers that the Defence has shown (i) the relevance and probative value

³¹ Motion, pp. 42631, 42630, 42601, 42600, 42598, 42579.

³² Motion, p. 42630. The description of the document bearing the Rule 65 *ter* number 2D01255 cites p. 114.

³³ See, Decision on Stanišić Defence Motion for Admission of Testimony in the Case of *Prosecutor v. Slobodan Milošević* and Excerpts of Prosecution Interview, 6 July 2012, paras 6-8; See also First Decision of 7 September 2012, para. 15.

³⁴ Response, Confidential Annex A, pp. 125, 127, 148, 149, 151.

of these documents and (ii) how they fit into the Defence case. The Chamber *proprio motu* decides to add these documents to the Rule 65 *ter* exhibit list, and admits them into evidence from the bar table. Further, the Chamber instructs the Defence to upload complete translations of these six documents into eCourt within two weeks of the date of issue of this decision.

21. The Chamber notes that the English translations of the documents bearing the Rule 65 *ter* numbers are incomplete: 2D01254, 2D01299, 2D00161.2, 2D00191.2, and 2D00611.2. The omissions in the English translations of these documents are substantial and prevent the Chamber from being able to accurately assess their probative value. The Chamber is unable to assess the probative value or relevance of the document bearing the Rule 65 *ter* no. 2D01694 because it has no English translation. The Chamber denies admission of these documents into evidence from the bar table.

(vii) Status of admitted documents

22. The Chamber notes that the Defence has not indicated the status (public or confidential) of any of the documents contained in the Motion. Therefore, the status of all documents admitted through the present Decision will be provisionally under seal. Furthermore, the Chamber converts the public status of all documents admitted through the First Decision of 7 September 2012 to provisionally under seal. The Chamber instructs the Defence to provide Chamber and the parties with the necessary information on the status of the admitted exhibits within one week of the issue of this Decision.

IV. DISPOSITION

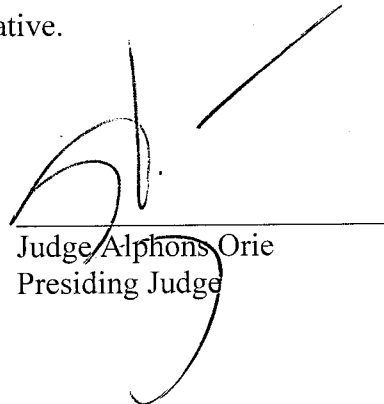
23. For the foregoing reasons, pursuant to Rule 89 of the Rules, the Chamber

- (i) **PROPRIO MOTU DECIDES** to add the following documents to the Defence Rule 65 *ter* exhibit list, bearing Rule 65 *ter* nos 2D01695, 2D01719, 2D01721, 2D01728, 2D01729, 2D01730, 2D01731, 2D01736, 2D01737, 2D01741, 2D01745, 2D01222, 2D01223, 2D01225, 2D01226, 2D01227, 2D01228, 2D01229, 2D01275, 2D01276, 2D01277, 2D01278, 2D01294, 2D01297, 2D01300, 2D01301, 2D01306, 2D01340, 2D01341, 2D01342, 2D01349, 2D01381, 2D01382, 2D01383, 2D01385, 2D01362, 2D01657, 2D01661, 2D01296, 2D01386, 2D01391, 2D01392, 2D01394, 2D01397; and **ADMITS** these documents into evidence, provisionally under seal;

- (ii) **ADMITS** into evidence the documents bearing 65 *ter* nos 2D00140.2, 2D00181.2, 2D00696.2, 2D00701.2, 2D00703.2, 2D00714.2, and 2D00221.2, provisionally under seal;
- (iii) **DENIES** the admission of the documents bearing Rule 65 *ter* nos 2D01696, 2D01723, 2D01350, 2D01359, 2D01375, 2D01524, 2D01525, 2D01526, 2D01534, 2D01535, 2D01536, 2D01537, 2D01540, 2D01541, 2D01542, 2D01543, 2D01545, 2D01549, 2D01550, 2D01552, 2D01553, 2D01569, 2D01572, 2D01574, 2D01575, 2D01576, 2D01577, 2D01578, 2D01581, 2D01583, 2D01584, 2D01586, 2D01599, 2D01600, 2D01602, 2D01604, 2D01606, 2D01609, 2D01610, 2D01612, 2D01613, 2D01614, 2D01617, 2D01619, 2D01620, 2D01621, 2D01623, 2D01624, 2D01625, 2D01626, 2D01627, 2D01629, 2D01630, 2D01631, 2D01632.1, 2D01632, 2D01635, 2D01643, 2D01646, 2D01649, 2D01650, 2D01652, 2D01655, 2D01656, 2D01658, 2D01659, 2D01660, 2D01664, 2D00120, 2D00108, 2D01273, 2D01274, 2D01398, 2D01390, 2D01267, 2D00649, 2D00656, 2D01233, 2D01234, 2D01255, 2D00061, 2D00068, 2D00100, 2D00121, 2D00706.2, 2D01254, 2D01299, 2D00161.2, 2D00191.2, 2D00611.2, 2D01694;
- (iv) **DECLARES** the Motion **MOOT** in relation to the documents bearing Rule 65 *ter* nos 2D01580, 2D01224, 2D01538, 2D01603, 2D01638, 2D01639, 2D00043, 2D00185.2, 2D00237, 2D00242, 2D00243, 2D00251, 2D00280, 2D00314, 2D00368, 2D00766.2, 2D00777.2, and 2D01727;
- (v) **INSTRUCTS** the Defence to upload into eCourt complete English translations of the documents bearing Rule 65 *ter* nos 2D00140.2, 2D00181.2, 2D00696.2, 2D00701.2, 2D00703.2, and 2D00714.2 within one week of the date of issue of this decision;
- (vi) **INSTRUCTS** the Registry, once (v) has been completed, to attach the uploaded English versions of the documents bearing Rule 65 *ter* nos 2D00140.2, 2D00181.2, 2D00696.2, 2D00701.2, 2D00703.2, and 2D00714.2 to the respective B/C/S originals;
- (vii) **INSTRUCTS** the Registry to convert the public status of all documents admitted through the First Decision of 7 September 2012 to provisionally under seal;

- (viii) **INSTRUCTS** the Defence to indicate to the Chamber and the parties, within one week of the issue of this Decision, which exhibits admitted through the First Decision of 7 September 2012 and the present Decision should be under seal;
- (ix) **REQUESTS** the Registry to assign exhibit numbers to the documents admitted and inform the parties and the Chamber of the numbers so assigned.

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



Judge Alphons Orie
Presiding Judge

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

[Seal of the Tribunal]