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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: 5 November 2012
Original: English

IN TRIAL CHAMBER I

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

Registrar: Mr John Hocking

Decision of: 5 November 2012

PROSECUTOR

v.

**JOVICA STANIŠIĆ
FRANKO SIMATOVIĆ**

PUBLIC

**DECISION ON PROSECUTION MOTION
FOR ADMISSION INTO EVIDENCE OF REBUTTAL
MATERIAL FROM THE BAR TABLE: MISCELLANEOUS
DOCUMENTS**

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 24 September, the Prosecution filed three motions requesting the admission of rebuttal material from the bar table.¹ In the present decision, the Chamber will only determine one of these motions, namely the Prosecution request for the admission of “miscellaneous documents” (“Motion”).²

2. The Prosecution submits the material contained in the Motion (“Material”) rebuts the “misleading impression” left by the Defence through the tendering of hundreds of documents from the bar table, most of which were placed out of context and formed part of a larger document, or a range of documents, which support different conclusions than those submitted by the Defence.³ Highlighting different examples where it argues this was the case, the Prosecution submits that it should be permitted to present the Material in rebuttal.⁴ The Prosecution further submits that some documents, which provide the necessary context to documents tendered by the Defence from the bar table, only came into its possession recently.⁵

3. On 3 October 2012, the Defence each requested the Chamber for an extension of time to respond to the Motion.⁶ The Chamber granted this request by means of informal communication on 4 October 2012, and informed the parties accordingly. On 15 October 2012, the Simatović Defence filed its response to the Motion, arguing that it should be denied (“Simatović Response”).⁷ On the same day, the Stanišić Defence filed a response, also opposing the admission of any proposed document by the Prosecution in rebuttal (“Stanišić Response”).⁸ The Stanišić Defence did not provide comments to the individual documents listed in the Annexes to the Motion, but instead provided its arguments related to the documents in the text of its Response. In light of the number of documents tendered by the Prosecution, the Stanišić Defence sought leave to exceed the word limit. That request is hereby granted.

¹ Prosecution Motion for Admission of Rebuttal Evidence: Serbian DB Files, 24 September 2012; Prosecution Motion for Admission of Rebuttal Evidence: Mladić Notebooks, 24 September 2012; Prosecution Motion for Admission of Rebuttal Evidence: Miscellaneous Documents, 24 September 2012.

² Prosecution Motion for Admission of Rebuttal Evidence: Miscellaneous Documents, filed with Confidential Annexes A-E, 24 September 2012.

³ Motion, paras 1-6, 22-30. See also Motion, Confidential Annexes A-E.

⁴ Ibid.

⁵ Motion, para. 11.

⁶ Urgent Stanišić Defence Request for Extension of Time to File Responses to the Prosecution’s Three Rebuttal Motions, 3 October 2012; Defence Request for Additional Time to Respond, 3 October 2012.

⁷ Simatović Defence Response to Prosecution Rebuttal Motions, 15 October 2012, filed with Annexes 1-3 (Confidential).

⁸ Stanišić Defence Response to Prosecution Motion for Admission of Rebuttal Evidence Regarding Miscellaneous Documentary Evidence, 15 October 2012 (Confidential).

II. APPLICABLE LAW

4. The Chamber notes that two tests must be met in order to allow admission of rebuttal material from the bar table.

5. First, the Prosecution must satisfy the test for the admission of rebuttal evidence. The Chamber recalls and refers to the applicable law on the admission of rebuttal evidence as set out in its Decision of 20 September 2012.⁹

6. Second, the Prosecution must satisfy the test for the admission of evidence from the bar table. The Chamber recalls and refers to the applicable law on motions for admission of evidence from the bar table as set out in its Decision of 23 May 2012.¹⁰

7. The Appeals Chamber also held that where rebuttal evidence “could not have been brought as part of the Prosecution case-in-chief because it was not in the hands of the Prosecution at the time, this does not render it admissible as rebuttal evidence. The fact that evidence is newly obtained, if that evidence does not meet the standard for admission of rebuttal evidence, will not render it admissible as rebuttal evidence. It merely puts it into the category of fresh evidence, to which a different basis of admissibility applies”.¹¹ In order for material to qualify as fresh evidence, it must be shown that (i) that was not in the possession of the Prosecution at the time of the conclusion of its case, and (ii) which by the exercise of all reasonable diligence could not have been obtained by the Prosecution during its case-in-chief.¹² In order for fresh evidence to be admitted, the Prosecution must also satisfy the test for admission of evidence from the bar table, to which reference has been made above.

III. DISCUSSION

8. At the outset, the Chamber notes that both Defence, with the exception of only a few documents,¹³ objects to the introduction of all documents tendered by the Prosecution in rebuttal for various reasons.

⁹ Decision on Prosecution Bar Table Motion for Admission of Rebuttal Evidence Regarding Witness JF-057, 20 September 2012.

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

¹¹ *The Prosecutor v. Delalic et al.*, Case No. IT-96-21-A, Judgement, 20 February 2001, para. 276.

¹² *Ibid.*, para. 283.

¹³ Neither the Stanišić Defence nor the Simatović Defence object to the admission from the bar table of documents bearing Rule 65 *ter* nos 06630, 1D01313.1 and 06631. The Stanišić Defence does not oppose the admission of documents bearing Rule 65 *ter* nos 06625, 06626, and 06627. See *supra*, para. 11.

9. With respect to the documents bearing Rule 65 *ter* numbers 1D01619, 04628, 1D01313.1, 06561, 1D03098, 06610, 06611, 06612, 06613, 06614, 06616, 06615, 06618, 06617, 06619, 06620, 06621, 06622, 06628, 2D00697.2,¹⁴ 06630, and 06631, the Chamber considers that the Prosecution has shown that the documents are highly probative and relate to a significant issue arising directly out of Defence evidence which could not have been reasonably anticipated. Some of these documents are extracts of Defence documents tendered during their respective cases, which the Prosecution submits were extracted in a way that they could provide a false picture of the larger document, or group of documents, to which they belong. Other extracts contain detailed information that very specifically relates to evidence tendered by the Defence during its case. The Chamber observes that in relation to some of the documents, the Prosecution has argued that they show the “real” motives of the Serbian DB when it decided, for example, to monitor the activities of certain “extremist” groups; the Prosecution submits that these motives were different than those presented by the Defence through its bar table motions submissions at the conclusion of the Defence case.¹⁵ In response, the Defence has argued that the alleged link between the Accused and paramilitary or “extremist” groups is an issue that has been of general importance throughout the case, and that it could be reasonably foreseen that the Defence would lead evidence in relation to it.

10. The Chamber, however, disagrees with the Defence that the Prosecution could have reasonably foreseen during the presentation of its case-in-chief that the Defence would present a large number of documents that specifically relate to the monitoring of (persons belonging to) these groups, and anticipate the specific inferences the Defence would draw from these documents. The Chamber considers that the Prosecution could not have reasonably foreseen during the presentation of its case-in-chief that the Defence would present a large number of extracts from certain document collections (such as, for example, the DB annual reports), and anticipate the specific inferences the Defence would draw from these documents. The Prosecution also could not have reasonably foreseen the Defence submissions regarding negative inferences, in other words what the Defence would contend was relevant as a result of its absence from a particular document. The Chamber considers it reasonable that, in going through the collections of documents from which the Defence tendered a large number in order to show certain negative inferences, the Prosecution should be allowed to tender a limited amount of documents from these same collections to rebut the

¹⁴ With respect to document bearing Rule 65 *ter* no. 2D00697.2, the Simatović Defence argued this relates to Defence documents that were not admitted into evidence, see Simatović Response, pp. 44389-44388. The Chamber notes that the documents listed by the Prosecution in its Motion were admitted as a result of a Defence request to have them admitted into evidence from the bar table.

¹⁵ The Chamber notes that the Defence enumerated these documents in its response. Stanišić Response, para. 14, fn. 6. See also Stanišić Response, paras 15-21, 31-40.

inferences made, provided that the Prosecution directly and very specifically indicates which evidence, led by the Defence during its case, it intends to rebut.

11. With regard to documents bearing Rule 65 *ter* nos 06630 and 06631, the Chamber notes that neither the Stanišić Defence nor the Simatović Defence objects to their admission into evidence from the bar table.¹⁶ With regard to documents bearing Rule 65 *ter* nos 06616 and 06618, the Chamber observes that they are relatively lengthy. While the Chamber has generally encouraged the parties to submit extracts of large documents where possible, it also considers that extracting the relevant pages from these two documents may not sufficiently contextualize them. Lastly, the Chamber has considered the observations by the Stanišić Defence that document bearing Rule 65 *ter* no. 1D01313.1 contains information that is also present, although not in the same words, in D279.¹⁷ It does not, however, consider that this should bar its admission into evidence, particularly since the text of the document differs from the Defence document with which it shows overlap.

12. The Chamber further finds that the Prosecution has shown with sufficient specificity (i) the relevance and probative value of these documents and (ii) how they fit in the Prosecution case. For these reasons, the Chamber will allow the admission of documents into evidence of documents bearing Rule 65 *ter* nos 1D01619, 04628, 1D01313.1, 06561, 1D03098, 06610, 06611, 06612, 06613, 06614, 06616, 06615, 06618, 06617, 06619, 06620, 06621, 06622, 06628, 06630, and 06631. The Chamber further requests the Registry to attach the English translation of the document bearing Rule 65 *ter* no. 1D01313.1, uploaded into eCourt as document bearing Rule 65 *ter* no. 06562, to the B/C/S original in eCourt.

13. The document bearing Rule 65 *ter* no. 2D00712 is an official note of the RDB regarding the meetings of Vojislav Šešelj. The Chamber considers that 2D00712 is highly probative of a significant issue, namely the extent of the information available to the Accused in relation to activities under the purview of the third department of the SDB administration, which could not have been reasonably anticipated. The Chamber further finds that the Prosecution has shown with sufficient specificity the relevance of these documents and how they fit in the Prosecution case.

14. On the other hand, regarding documents bearing Rule 65 *ter* nos 06568, 06625, 06626, 06627, 00567, 2D00695.2, 04934, and 06632, the Chamber finds there is merit in the Defence argument that the Prosecution has not shown how they relate to a significant issue arising directly

¹⁶ Stanišić Response, para. 30; Simatović Response, pp. 44414, 44412.

¹⁷ Stanišić Response, para. 7.

out of Defence evidence which could not have been reasonably anticipated.¹⁸ These documents each relate to issues that are of general importance to the Prosecution case, and which do not specifically rebut evidence led by the Defence case during their respective cases and/or relate to a significant issue in the case. With regard to documents bearing Rule 65 *ter* nos 06568 and 06626, the Chamber finds that the Prosecution failed to sufficiently specify which portions of these voluminous documents are relevant to the Prosecution case. Therefore, and in accordance with its earlier practice in determining bar table motions, the Chamber will deny their admission into evidence from the bar table.

15. The Chamber observes that documents bearing Rule 65 *ter* nos 1D01976, 1D01593, 1D01786, 1D01882, 1D01883, 1D01389, and 1D01433 contain substantial redactions, and that unredacted versions have not been provided thus far. The Chamber has previously provided general guidance regarding the tendering of redacted documents.¹⁹ As such, it is the duty of the tendering party to explain in its tendering motion (i) why it is submitting the redacted version and (ii) the nature and extent of the redactions, if known.²⁰ While the Prosecution indicated that it has received these materials from the Stanišić Defence, it has not indicated the nature and extent of the redactions, and what steps it has undertaken to obtain unredacted versions of these documents. The Chamber notes the Prosecution request to the Stanišić Defence to provide unredacted versions of these documents,²¹ but also considers that it is not the duty of the Stanišić Defence to attempt to obtain these documents if they are not in its possession. For these reasons, the Chamber is not satisfied that these documents can be admitted in their current, redacted, form, and will deny their admission into evidence from the bar table.

16. With respect to documents bearing Rule 65 *ter* nos 1D01406, 1D01594, 1D01595, 1D01427, 1D01797,²² 1D01884, 1D01885, and 1D01572.1, the Chamber notes that the extent of the redactions is very limited, and no objections have been made by the parties in this respect. The Chamber recalls that in the past, it has admitted redacted documents where there have been no objections to the redactions.²³ The Chamber finds these redactions are not such that they impact

¹⁸ Stanišić Response, paras 22-25 (65 *ter* 06568), 43-47 (65 *ter* 04934), 50 (65 *ter* 00567), and 51 (65 *ter* 2D00695.2). Simatović Defence Response, Annexes 2-3. The Chamber notes that the Stanišić Defence does not oppose the tendering of documents bearing Rule 65 *ter* nos 06625, 06626 and 06627, but that the Simatović Defence does. Stanišić Defence Response, para. 52; Simatović Defence Response, pp. 44392-44390.

¹⁹ Fifth Decision on Stanišić Defence Bar Table Motion of 17 February 2012, 24 May 2012, para. 9.

²⁰ Seventh Decision on Stanišić Defence Bar Table Motion, 6 June 2012, para. 23.

²¹ The Prosecution requests to the Defence to provide unredacted versions of documents are contained in the individual comments related to each document listed in Confidential Annexes A to E of the Motion.

²² The Chamber notes the Stanišić Defence objection to the submission of the Prosecution that document bearing Rule 65 *ter* nos 1D01594, 1D01595 and 1D01797 rebut, *inter alia*, D1344, and that the latter was not admitted into evidence. See Stanišić Response, para. 6. The Chamber also notes, however, that the Prosecution also argued these documents rebut Defence documents D1294, D1295, and D1296.

²³ See for example the admission of D647, T. 18754-18755.

upon the Chamber's ability to properly consider the probative value of the documents concerned. The Chamber has considered the observations made by the Stanišić Defence that documents bearing Rule 65 *ter* nos 1D01406, 1D01594, 01787, and 1D01882, provide information that is already contained in other Defence documents that are in evidence, although not in the same words.²⁴ The Chamber considers that the Prosecution has shown that the documents are highly probative and relate to a significant issue arising directly out of Defence evidence which could not have been reasonably anticipated. The Chamber also finds that the Prosecution has shown with sufficient specificity the relevance of these two documents and how they fit in the Prosecution case. While the Chamber acknowledges that some of these documents contain overlap with Defence documents that are already in evidence, the Chamber does not consider this should bar their admission into evidence, particularly since the text of these documents differs from the Defence documents with which they show some overlap. For these reasons, the Chamber will allow admission into evidence of documents bearing Rule 65 *ter* nos 1D01406, 1D01594, 1D01595, 1D01427, 1D01433, 1D01797, 1D01884, 1D01885, and 1D01572.1.

17. With respect to document bearing Rule 65 *ter* no. 1D01566.1, the Chamber considers that the Prosecution has shown that it is highly probative and relates to a significant issue arising directly out of Defence evidence which could not have been reasonably anticipated. The Chamber also finds that the Prosecution has shown with sufficient specificity the relevance of this document and how it fits in the Prosecution case. The Chamber notes that while the full original B/C/S version of this document is uploaded in eCourt, the English translation attached in eCourt is of the redacted B/C/S original, 1D01566.²⁵ Having analysed the nature and extent of the redactions contained in 1D01566, the Chamber has found that these do not oppose the admission of the unredacted original. The Chamber will therefore admit the document bearing Rule 65 *ter* no. 1D01566.1 into evidence, and instructs the Prosecution to attach an English translation of this document into eCourt within two weeks of the date of issue of this decision.

18. With respect to document bearing Rule 65 *ter* no. 1D03411, the Chamber notes that the original B/C/S version of this document is in fact comprised of 4 separate documents. The Prosecution seeks to rely on only one of those documents, the English translation of which has been uploaded into eCourt. Translations of the three remaining documents have not been so uploaded. The Chamber considers that the Prosecution has shown that the document is highly probative and relates to a significant issue arising directly out of Defence evidence, which could not have been

²⁴ Stanišić Response, paras 8-13.

²⁵ The Chamber notes the submission by the Stanišić Defence that document bearing Rule 65 *ter* no. 06564 is not a translation of 1D01566.1, Stanišić Response, para. 29, referring to the Prosecution's comment in relation to this document in Annex A to the Motion.

reasonably anticipated. The Chamber also finds that the Prosecution has shown with sufficient specificity the relevance of this document and how it fits in the Prosecution case. The Chamber will therefore admit it into evidence. The Chamber further instructs the Prosecution to remove the three remaining documents upon which it does not seek to rely from eCourt.

19. With respect to document bearing Rule 65 *ter* no. 06565, the Chamber notes that this is a 65-page document of which the Prosecution only specified relevance in relation to four pages. The Prosecution only provided a very general reference to the tendering of SDC minutes by the Defence and failed to indicate which portions of this voluminous document rebut specific Defence evidence. Furthermore, the Prosecution contends that the document “may very well refer to Stanišić or the RDB indirectly”.²⁶ The Chamber does not consider that, on the basis of this possible indirect reference, that the Prosecution has adequately shown the probative value of the document. For these reasons, the Chamber will deny its admission into evidence.

20. With respect to the documents bearing 1D02278 and 2D00446.2, the Chamber notes that the Prosecution has not specifically indicated which Defence documents these materials rebut, but rather, has argued that these documents relate to the alleged relationship between the Serbian DB and Captain Dragan, as well as the extensive monitoring by the former of the latter.²⁷ The Chamber finds the Prosecution references sufficiently clear and recalls the evidence given by, *inter alia*, Defence witness Dejan Lučić, and the large number of documents tendered by the Defence through this witness which all relate to the monitoring by the Serbian DB of Captain Dragan.

21. The Chamber further notes the Prosecution’s submission that these documents were not in the possession of the Prosecution at the time of the conclusion of its case. The Prosecution discovered these documents when they were uploaded into eCourt by the Defence, and notes that they were not on any Defence Rule 65 *ter* exhibit list. No request for assistance accompanied these documents, and the Stanišić Defence did not provide information on how they were obtained. The Chamber is satisfied that these two documents could not have reasonably been obtained by the Prosecution during its case-in-chief. Consequently, the Chamber is satisfied that these documents constitute fresh evidence. While, in tendering fresh evidence, the Prosecution need not fulfil the criteria that apply to rebuttal evidence, the Chamber nonetheless considers that the Prosecution has shown that these documents are highly probative and relate to a significant issue arising directly out of Defence evidence which could not have been reasonably anticipated, specifically in relation to the body of evidence led by the Defence regarding the monitoring of Captain Dragan by the Serbian

²⁶ Motion, Confidential Annex A, p. 17.

²⁷ Prosecution Motion, Confidential Annex E.

DB. Finally, the Chamber finds that the Prosecution has shown with sufficient specificity the relevance of these two documents and how they fit in the Prosecution case. Accordingly, the Chamber will admit documents bearing Rule 65 *ter* nos 1D02278 and 2D00446.2 as rebuttal evidence from the bar table. The Chamber requests the Registry to attach the English translation of 2D00446.2, uploaded into eCourt as document bearing Rule 65 *ter* no. 06633, to the B/C/S original in eCourt.

22. The Chamber notes the objection by the Stanišić Defence to the listing of the document bearing Rule 65 *ter* no. 1D01788 as a document for admission into evidence from the bar table by the Prosecution.²⁸ The Chamber further notes that this document indeed appears in a comment related to document bearing Rule 65 *ter* no. 1D01593,²⁹ but also observes that the Prosecution did not specifically list this document as one for which it seeks its admission into evidence. The Chamber has therefore not considered a request for admission into evidence of document bearing Rule 65 *ter* no. 1D01788.

23. Lastly, the Chamber observes that document bearing Rule 65 *ter* no. 06623 has been admitted as D01161, which the Stanišić Defence also pointed out in its response.³⁰ 2D00740 is a reproduction, as contained in a book, of an excerpt from an RDB agent's report, the original of which has already been admitted as D206. Accordingly, the Chamber considers that the request for admission into evidence of these documents is moot.

24. This Decision concludes the Chamber's decisions on the Prosecution Motions requesting admission of rebuttal material. The Chamber considers that, for the purposes of Rule 85 (iii) of the Rules, the Prosecution rebuttal case is hereby closed.

IV. DISPOSITION

25. For the foregoing reasons, pursuant to Rules 85 and 89 (C) of the Tribunal's Rules of Procedure and Evidence, the Chamber **GRANTS** the Motion **IN PART**, and

- i. **GRANTS** the Stanišić Defence request to exceed the word limit for its Response;
- ii. **ADMITS** into evidence documents bearing Rule 65 *ter* nos 1D01619 (under seal), 04628 (under seal), 1D01313.1, 06561 (under seal), 1D03098 (under seal), 06610, 06611 (under seal), 06612 (under seal), 06613 (under seal), 06614 (under seal),

²⁸ Stanišić Response, para. 6.

²⁹ Motion, Confidential Annex A, p. 6.

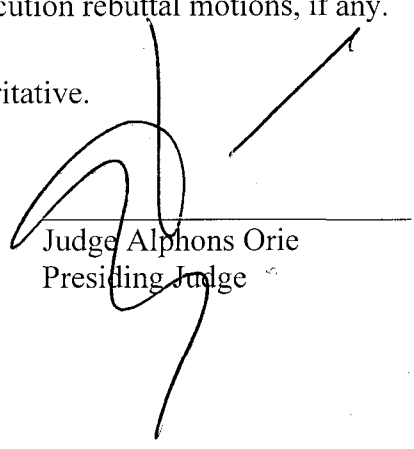
³⁰ Stanišić Response, paras 48-49.

06616 (under seal), 06615 (under seal), 06618 (under seal), 06617 (under seal), 06619 (under seal), 06620 (under seal), 06621 (under seal), 06622 (under seal), 06628, 06630, 06631, 2D00697.2, 2D00712, 1D01406, 1D01594, 1D01595, 1D01427, 1D01797, 1D01884, 1D01885, 1D03411, 1D01572.1, 1D02278. and 2D00446.2;

- iii. **INSTRUCTS** the Prosecution, in accordance with paragraph 15 of this Decision, to upload into eCourt document bearing Rule 65 *ter* no. 1D01566.1 within two weeks of the issue of this Decision, and to advise the Registry and the parties once it has been uploaded;
- iv. **ADMITS** into evidence document bearing Rule 65 *ter* no. 1D01566.1, once the correct English translation of this document has been uploaded and attached in eCourt;
- v. **INSTRUCTS** the Prosecution, in accordance with paragraph 18 of this Decision, to upload into eCourt document bearing Rule 65 *ter* no. 1D03411 within two weeks of the issue of this Decision, and to advise the Registry and the parties once it has been uploaded;
- vi. **ADMITS** into evidence document bearing Rule 65 *ter* no. 1D03411, once the new B/C/S version and corresponding English translation of this document have been uploaded and attached in eCourt;
- vii. **DENIES** admission into evidence of documents bearing Rule 65 *ter* nos 06568, 06625, 06626, 06627, 00567, 2D00695.2, 04934, 06632, 1D1976, 1D01593, 1D01786, 1D01882, 1D01883, 1D01389, 06565, and 1D01433;
- viii. **DECLARES** the Motion **MOOT** in relation to document bearing Rule 65 *ter* nos 06623 and 2D00740;
- ix. **REQUESTS** the Registry to attach the English translation currently uploaded as document bearing Rule 65 *ter* no. 06562 to the document bearing Rule 65 *ter* no. 1D01313.1;
- x. **REQUESTS** the Registry to attach the English translation currently uploaded as document bearing Rule 65 *ter* no. 06533 to the document bearing Rule 65 *ter* no. 2D00446.2;

- x. **REQUESTS** the Registry to assign exhibit numbers to the documents admitted and inform the parties and the Chamber of the numbers so assigned;
- xii. **DECIDES** that for the purposes of Rule 85 (iii) of the Rules, the Prosecution rebuttal case is hereby closed; and
- xiii. **ORDERS** the Defence, within one week of the issue of this Decision, to (i) file a reasoned request for a rejoinder case, if any, containing all documentary evidence that the Defence intends to present in rejoinder, and/or (ii) other motions resulting from the Chamber's decisions on the three Prosecution rebuttal motions, if any.

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



Judge Alphons Orie
Presiding Judge

Dated this fifth day of November 2012
At The Hague
The Netherlands

[Seal of the Tribunal]