

IT-03-69-T
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05 December 2012

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**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: 5 December 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 December 2012

PROSECUTOR

v.

**JOVICA STANIŠIĆ
FRANKO SIMATOVIĆ**

PUBLIC

**DECISION ON SIMATOVIĆ DEFENCE MOTION
FOR ADMISSION INTO EVIDENCE OF REJOINDER
MATERIAL**

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

1. On 24 September 2012, the Prosecution filed three motions seeking admission of rebuttal evidence (“Rebuttal Motions”).¹ On 31 October and 5 November, the Chamber issued three decisions in relation to the Rebuttal Motions (“Rebuttal Decisions”).² In its 5 November 2012 decision, the Chamber ordered the Defence, within one week of its 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.³ On 7 November 2012, the Simatović Defence filed a request for a three-week extension of time to file evidence in rejoinder.⁴ On 9 November 2012, the Chamber partially granted the request with reasons to follow.⁵

2. On 15 November 2012, the Simatović Defence filed a motion seeking to admit evidence in rejoinder (“Motion”).⁶ On 16 November 2012, by informal communication, the Chamber shortened the Response time to the motion to 26 November 2012. On 26 November 2012, the Prosecution filed its response (“Response”).⁷ On the same day, the Stanišić Defence filed a joinder to the Motion.⁸ On 29 November 2012, the Simatović Defence filed an application for leave to reply to the Response.⁹ Leave to reply is hereby granted.

II. SUBMISSIONS OF THE PARTIES

3. The Simatović Defence submits that it has not had sufficient time to prepare the Motion, citing in particular an alleged delay by the Prosecution in disclosing the entirety of the annual work reports of the SDB.¹⁰ The Simatović Defence contends that the Prosecution has raised a number of

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

² Decision on Prosecution Motion for Admission of Rebuttal Evidence: Serbian DB Personnel Files, 31 October 2012; Decision on Prosecution Motion for Admission of Rebuttal Evidence; Mladić Notebooks, 31 October 2012; Decision on Prosecution Motion for Admission into Evidence of Rebuttal Material from the Bar Table: Miscellaneous Documents, 5 November 2012.

³ Decision on Prosecution Motion for Admission into Evidence of Rebuttal Material from the Bar Table: Miscellaneous Documents, 5 November 2012, para. 25 (xiii).

⁴ Urgent Defence Request for Additional Time to file Request for Rejoinder Case or Request for Reconsideration, 7 November 2012.

⁵ Decision on Defence Motions for Extension of Time to file Rejoinder Motions, 9 November 2012.

⁶ Defence Motion for Admission of Evidence in Rejoinder with Annexes, 15 November 2012.

⁷ Prosecution Response to Simatović Defence Motion for Admission of Evidence in Rejoinder, 26 November 2012.

⁸ Stanišić Defence Partial Joinder to Simatović Defence Motion for Admission of Evidence in Rejoinder with Annexes, 26 November 2012 (“Stanišić Joinder”).

⁹ Simatović Defence Application for Leave to Reply to the Prosecution Response to Simatović Defence Motion for Admission of Rejoinder Evidence, 29 November 2012.

¹⁰ Motion, para. 4.

new issues in the Rebuttal Motions and consequently it should be permitted to tender evidence in the form of both documents and live witness testimony by three witnesses in rejoinder.¹¹ In particular, the Simatović Defence contests the Prosecution contention that the Accused Simatović was involved in co-ordinating the activities recorded in the Mladić Notebooks or that he was part of the reporting structure and seeks to have admitted a number of newspaper articles in rejoinder.¹² It further contends that it should be permitted to have admitted into evidence further documents regarding the Accused Simatović's alleged trip to Greece in 1995 and in relation to the actions of Milan Babić.¹³ The Stanišić Defence supports the proposal to call Witness JF-094 to give evidence submitting that the witness's evidence would provide further insight into the personnel files, and particularly those admitted in rebuttal.¹⁴

4. The Prosecution does not object to the admission of the newspaper articles in rejoinder to the Mladić Notebook excerpts admitted in rebuttal, but it submits that they are of low probative value.¹⁵ It submits that the documents in relation to Milan Babić do not relate to a new issue arising from the Prosecution's rebuttal evidence.¹⁶ As to the documents tendered in relation to the Accused Simatović's passport and alleged trip to Greece, the Prosecution contends that the issue does not have high probative value and the material ought not to be admitted.¹⁷ As regards the proposal to call additional witnesses, the Prosecution suggests that this is not rejoinder evidence as it does not seek to challenge any issue arising directly from the Prosecution's rebuttal evidence.¹⁸

III. APPLICABLE LAW

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

6. First, the Defence must satisfy the test for the admission of rejoinder evidence, which has been set out in the Tribunal's case law. The Defence may lead rejoinder evidence only with respect to issues directly arising from rebuttal evidence, and which could not be expected to have been

¹¹ Ibid.

¹² Motion, para. 6.

¹³ Motion, paras 13-17; Simatović Defence Application for Leave to Reply to the Prosecution Response to Simatović Defence Motion Admission of Rejoinder Evidence, paras 3-7.

¹⁴ Stanišić Joinder, paras 4-7.

¹⁵ Response, paras 7-8.

¹⁶ Response, para. 9.

¹⁷ Response, paras 10-14.

¹⁸ Response, paras 10, 15, 19.

addressed during the Defence case.¹⁹ The Chamber recalls that Rule 85(A) (iv) does not create an absolute entitlement to lead evidence in rejoinder.²⁰

7. Second, in relation to the documentary material, the Defence must satisfy the test for the admission of evidence from the bar table. The Chamber refers to the applicable law on motions for admission of evidence from the bar table as set out in its Decision of 23 May 2012.²¹

IV. DISCUSSION

8. The Simatović Defence seeks the admission of a total of 18 documents and also requests permission to call three witnesses to testify.

a. Request for admission of 18 documents

9. The documentary evidence falls into three categories: (i) Documents relating to the notebooks allegedly authored by Ratko Mladić (“Mladić Notebook Documents”); (ii) Miscellaneous documents regarding Milan Babić (“Babić Documents”) and (iii) Miscellaneous documents regarding the Accused Simatović’s passport entry for an alleged trip to Greece in 1995 (“Passport Documents”).

(i) Mladić Notebook Documents

10. The Simatović Defence seeks to have a series of articles published in the newspaper Politika admitted into evidence. It contends that they rebut the rebuttal evidence upon which the Prosecution makes assertions regarding the role of, and level of information available to, the Accused Simatović.²² In particular, the Simatović Defence submits that the information contained in briefing reports to the Accused Simatović, as mirrored in excerpts of the Mladić Notebooks, was already disseminated in the public domain by having appeared in Politika articles.²³ This, it suggests,

¹⁹ *Prosecutor v Stanislav Galić*, Case No: IT-98-29-T, Decision on Rejoinder Evidence, 2 April 2003. See also *Prosecutor v Pavle Strugar*, Case No: IT-01-42-T, Decision III on the Admissibility of Certain Documents, 10 September 2004, para 5; *Prosecutor v Naletilić and Martinović*, Case No: IT-98-34-T, Decision on the Admission of Exhibits Tendered during the Rejoinder Case, 23 October 2002.

²⁰ *Prosecutor v Dragoljub Kunarac and Radomir Kovač*, Case No: IT-96-23-T & IT-96-23/1-T, Decision on Defence Motion for Rejoinder, 31 October 2000, para 14; See also *Prosecutor v Pavle Strugar*, Case No: IT-01-42-T, Decision III on the Admissibility of Certain Documents, 10 September 2004, para 5.

²¹ First Decision on Stanišić Defence Bar Table Motion of 17 February 2012, 23 May 2012, (“First Decision on Stanišić Bar Table Motion”) paras 9-10.

²² Motion, paras 8-12.

²³ Motion, paras 7-11.

undermines the proposition that the Accused Simatović was particularly well informed of, or coordinating, the activities referred to in the briefing reports and Mladić Notebooks.²⁴

11. The Chamber recalls that the Simatović Defence initially sought the admission of the entirety of the Mladić Notebooks.²⁵ The Chamber subsequently denied their admission.²⁶ The Chamber then granted the Simatović Defence request seeking the admission of a number of extracts from the Mladić Notebooks for the purpose of showing an alleged absence of references to the Accused in certain sections of them.²⁷ The Chamber admitted into evidence a limited number of excerpts tendered by the Prosecution from the Mladić Notebooks in rebuttal of the negative inferences sought by the Simatović Defence.²⁸

12. The Prosecution's rebuttal material has not raised any issue that the Simatović Defence could not be expected to have addressed as part of its own case. Furthermore the Chamber considers that these newspaper articles could have been tendered at an earlier stage in the proceedings.

13. In addition, the Chamber does not consider the newspaper articles to be probative. The Accused Simatović was copied on briefing notes which appear to include relevant operational information that is also to be found in the Mladić Notebooks. The availability of similar information in the public domain in the form of newspaper articles does not, in the view of the Chamber, affect the potential significance of the Accused Simatović having been copied on the relevant briefing notes. As such, the Chamber will deny the request for admission of this evidence in rejoinder.

(ii) Babić Documents

14. The Simatović Defence seeks the admission of the documents bearing Rule 65 *ter* nos 2D01871, 2D01873 and 2D01878 in rejoinder to the document bearing Rule 65 *ter* no. 2D00697.2, as previously admitted by the Chamber in rebuttal of Simatović Defence documents purporting to show the true purpose of Milan Babić.²⁹ The admission of the document bearing Rule 65 *ter* no. 2D00697.2 in rebuttal did not raise any new issue beyond that already raised by the Simatović Defence. The Motion simply seeks to have admitted further documents in support of the Simatović Defence's position regarding the actions of Babić, which could have been submitted as part of its

²⁴ Motions, paras 6-12.

²⁵ T. 15362.

²⁶ First Decision on Stanišić Bar Table Motion.

²⁷ Simatović Defence Second Bar Table Motion, 4 June 2012 (Public with Confidential Annex); Decision on the Stanišić and Simatović Defence Bar Table Motions regarding the Mladić Notebooks, 26 July 2012.

²⁸ Decision on Prosecution Motion for Admission of Rebuttal Evidence; Mladić Notebooks, 31 October 2012, para. 8.

²⁹ Decision on Prosecution Motion for Admission into Evidence of Rebuttal Material from the Bar Table: Miscellaneous Documents, 5 November 2012, Annex B, pp. 25-28.

original bar table motion. As such, the Chamber does not consider that these documents relate to an issue that the Defence could not be expected to have addressed as part of its own case, and consequently, will deny their admission into evidence.

(iii) Passport Documents

15. The Simatović Defence requests the admission of the documents bearing Rule 65 *ter* nos 2D01875, 2D01876 and 2D01877 in rejoinder to the document bearing Rule 65 *ter* no. 06628, a document from the Greek authorities which states that they do not possess any records confirming the Accused Simatović as having travelled to Greece in 1995. The Chamber recalls that the Simatović Defence sought the admission of one page of the Accused Simatović's passport as the document bearing Rule 65 *ter* no. 2D01718 in its second bar table motion in order to contradict the evidence of Witnesses Goran Stoparić and Witness JF-024.³⁰ The Chamber admitted that document.³¹ As such, the Chamber does not consider that, in seeking to rebut evidence of the Accused Simatović's trip to Greece, the Prosecution has raised a new issue which the Defence could not be expected to have addressed as part of its case. Furthermore, the Chamber does not consider that the documents are probative of the issue at hand as interpreted by the Chamber.³² The Chamber will therefore deny their admission into evidence.

16. The Simatović Defence also seeks admission of any reply from the Government of Greece to its letter of 7 November 2012.³³ The Chamber notes that as matters currently stand, no reply has been provided from the Government of Greece. There is therefore no document before the Chamber upon which it can make a decision on admission. Consequently, the Chamber considers the request to be without substance and will deny it.

b. Request to call witnesses

17. The Simatović Defence requests that the proposed witness referred to at paragraphs 19-26 of the Motion ("Proposed Witness One") be permitted to testify in rejoinder of Prosecution evidence presented in rebuttal, relating to Slobodan Miljković.³⁴ The Prosecution tendered the documents bearing Rule 65 *ter* nos 1D01313.1 and 1D01406 in order to rebut Defence evidence³⁵ regarding the intent behind the actions of the DB in relation to Miljković. With regard to exhibit P3189, the

³⁰ Defence Request to File a Reply to Prosecution Response to Simatović Second Bar table Motion with Annexes, 21 June 2012, para. 5-9.

³¹ First Decision on Simatović Defence Second Bar Table Motion of 4 June 2012, 5 July 2012.

³² First Decision on Simatović Defence Second Bar Table Motion of 4 June 2012, 5 July 2012, para. 12.

³³ Motion, para. 36.

³⁴ 1D01406, 1D1313.1 and P3189.

³⁵ D1292 and D1293, see Miscellaneous Documents Rebuttal Motion, Annex A pp. 3-5.

Prosecution tendered it in rebuttal of Defence assertions that Basic Information Forms were not DB documents.³⁶

18. The Chamber considers that, as the Stanišić Defence raised the issues of the DB's actions regarding Miljković³⁷ and the provenance of the Basic Information Forms,³⁸ the Simatović Defence was on notice of these issues and thus could have been expected to provide the evidence it now seeks to call in the form of testimony by Proposed Witness One, during the defence case. The Chamber recalls that, in its response of 23 March 2012 to the Stanišić First Bar Table Motion, the Prosecution stated:

Prosecution Overview Note: The Prosecution notes that the selective enforcement of laws and gathering of intelligence concerning certain paramilitary groups (or members of that group) does not mean that the Serbian DB did not support, establish or coordinate with other paramilitary groups or support these same paramilitary groups (or individuals from these groups) at an earlier point in time – such as the Serbian Radical Party (SRS). Overall, the Prosecution does not agree with the Defence submissions on relevance as the documents being tendered do not establish the propositions being asserted in light of the evidence presented at trial. The Stanišić Defence originally noticed to the Prosecution that it would tender 19 documents in this section. The Defence has since dropped three of the documents that contained critical contextual information. The Three 65ter (*sic*) not being tendered by the motion are 1D01313, 1D01396, and 1D01406. It appears the Republic of Serbia may have recently provided un-redacted versions of these three documents to the Defence. In order to have an accurate depiction of the events in this case and avoid potentially inaccurate factual findings, The Prosecution submits that it is in the interests of justice to admit 65ter, 1D01313, 1D01396, , [sic] and 1D01406 at this time and instruct the Defence to upload any available non-redacted versions of these documents with correct translations.³⁹ (emphasis added)

19. Consequently, the Chamber does not consider that the Prosecution rebuttal evidence has raised anything new which the Defence could not have been expected to foresee when it tendered its original evidence. As such, the Chamber will deny the request to call Proposed Witness One to give evidence in rejoinder.

20. The Simatović Defence also requests to call the proposed witness referred to at paragraphs 27 to 31 of the Motion (“Proposed Witness Two”) to give evidence in rejoinder of the document bearing Rule 65 *ter* no. 6628, a letter from the Greek Embassy that the Prosecution tendered in rebuttal of D1358, a translation of a single page purportedly from the Accused Simatović's passport. The Chamber does not consider that there is any new issue arising from the Prosecution evidence in rebuttal, which could not have been foreseen by the Simatović Defence and as such will deny the request to call Proposed Witness Two to give evidence.

³⁶ Personnel Files Rebuttal Motion, Annex A, p. 4.

³⁷ Stanišić Motion for Admission of Documents through the Bar Table, Confidential Annex A, 17 February 2012, pp. 85, 90.

³⁸ See for example, Stanišić Defence Motion for Admission into Evidence of Documents that were Denied without Prejudice, 5 June 2012, pp. 227, 242.

³⁹ Prosecution Response to Stanišić First Motion for Admission of Exhibits Through the Bar Table, 23 March 2012, Confidential Annex A, p. 88 (emphasis added).

21. The Chamber notes that the Simatović Defence seeks to call Witness JF-094 to testify as to the provenance of a number of personnel files.⁴⁰ The Chamber considers that personnel files, including issues of their authenticity and reliability, have repeatedly played a prominent role throughout the proceedings during both the Prosecution and Defence cases. The Chamber notes that the Basic Information Form has been included as part of personnel files tendered by both the Prosecution⁴¹ and the Stanišić Defence,⁴² and that the Simatović Defence has not objected to the authenticity of those forms.

22. The Chamber further notes, as also acknowledged by the Simatović Defence, that Witness JF-094 has already testified to having read the DB personnel files.⁴³ Moreover, the witness testified, in response to a question from the Stanišić Defence, that the witness had no reason to believe the records were not authentic.⁴⁴ Thus, contrary to its submission, the Simatović Defence could in fact have questioned Witness JF-094 about them. As such the Chamber does not consider that the Simatović Defence request relates to an issue which it could not be expected to have addressed as part of its own case, or more specifically, at the time Witness JF-094 appeared as a witness. In this respect, the Chamber also recalls that the Prosecution put the Defence on notice during the Defence case, that it would tender a large number of personnel files in rebuttal to, *inter alia*, the personnel files tendered by the Stanišić Defence in February 2012.⁴⁵ It further recalls that a number of personnel files tendered by the Prosecution in rebuttal were extracts from the same personnel files from which the Stanišić Defence tendered excerpts in February 2012.⁴⁶

23. Moreover, the Chamber, in admitting these specific personnel files under Rule 89(C), was satisfied as to their probative value and reliability and the Simatović Defence has not provided any *prima facie* basis upon which to question that conclusion. The Chamber finds that the Simatović Defence has not established that further testimony by Witness JF-094 is relevant or probative to the issues to be determined and accordingly will deny the request to call him to give further evidence.

⁴⁰ Motion, para. 34.

⁴¹ See for example, exhibit P2980, p. 19

⁴² See for example, exhibits D1385, D1399, Stanišić Motion for Admission of Documents through the Bar Table, Confidential Annex C, 17 February 2012, pp. 129, 132; exhibit D1396, Stanišić Defence Motion for Admission into Evidence of Documents that were Denied without Prejudice, 5 June 2012, pp. 227, 242.

⁴³ T. 7107.

⁴⁴ T. 7107-7113.

⁴⁵ Prosecution Notification Regarding Rebuttal Evidence, 8 May 2012.

⁴⁶ See e.g. Stanišić First Bar Table Motion, Confidential Annex A, pp. 131 and 134, in relation to Prosecution rebuttal documents bearing Rule 65 *ter* nos 06607 (admitted as P3201), 06608 (admitted as P3202) and 06609 (admitted as P3203).

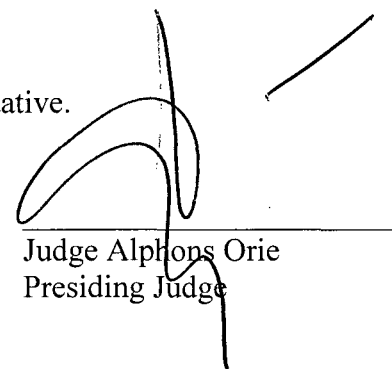
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V. DISPOSITION

24. For the foregoing reasons, the Chamber:

- (i) **GRANTS** leave to the Simatović Defence to reply to the Prosecution Response and;
- (ii) **DENIES** the Motion.

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



Judge Alphons Orie
Presiding Judge

Dated this fifth day of December 2012.
At The Hague
The Netherlands

[Seal of the Tribunal]