

**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-AR65.1, IT-
03-69-AR65.2**

Date: 11 November 2004

Original: English

IN THE APPEALS CHAMBER

Before: Judge Theodor Meron, Presiding
Judge Fausto Pocar
Judge Florence Mumba
Judge Mehmet Güney
Judge Weinberg de Roca

Registrar: Mr. Hans Holthuis

Decision of: 11 November 2004

PROSECUTOR
v.
JOVICA STANIŠIĆ
FRANKO SIMATOVIĆ

**DECISION ON PROSECUTION'S APPLICATION UNDER RULE 115 TO PRESENT
ADDITIONAL EVIDENCE IN ITS APPEAL AGAINST PROVISIONAL RELEASE**

Counsel for the Prosecution

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Mr. Geert-Jan Alexander Knoops and Mr. Wayne Jordash for Jovica Stanišić
Mr. Zoran Jovanović for Franko Simatović

I. Background

1. The Prosecution filed an application for leave to appeal¹ two decisions of Trial Chamber III issued on 28 July granting the accused Franko Simatović's ("Simatović") and the accused Jovica Stanišić's ("Stanišić") applications for provisional release ("Impugned Decisions").² On 30 September, a bench of the Appeals Chamber granted the Prosecution's application.³ The Prosecution now seeks leave to present additional evidence to the Appeals Chamber pursuant to Rule 115 of the Rules of Evidence and Procedure ("Rules") in its appeal against the Impugned Decisions.⁴

II. The Applicable Law

A. The Application of Rule 115 to Interlocutory Appeals Pursuant to Rule 65

2. In support of its application, the Prosecution says that the Appeals Chamber has ruled that a party should "observe the usual procedure for the admission of additional evidence" in appeals pursuant to Rule 65, and that Rule 115 provides the only avenue for the admission of additional evidence⁵.

3. The above statement relied upon by the Prosecution was made in the Appeals Chamber decision on an appeal of provisional release in the case of *Šainović and Ojdanić*.⁶ In that case, the Prosecution had made submissions before the Trial Chamber that both accused had made statements to the media that they would not surrender voluntarily. The accused had not disputed those statements before the Trial Chamber. On appeal, the Prosecution "elaborated its position by citing particular statements that the accused or their counsel made".⁷ The accused did not respond to these statements before the Appeals Chamber. The Appeals Chamber stated that it would disregard the statements and the accused's lack of response to them on appeal because the Prosecution had not observed the usual procedure for the admission of additional evidence.⁸

¹ Application for Leave to Appeal "Decision on Provisional Release", 29 July 2004 ("Application").

² Decision on Provisional Release (Jovica Stanišić), 28 July 2004; Decision on Provisional Release (Franko Simatović), 28 July 2004 ("Impugned Decisions").

³ Decision on Prosecution's Application for Leave to Appeal Decision on Provisional Release, 30 September 2004.

⁴ Prosecution Application Under Rule 115 to Present Additional Evidence in its Appeal Against Provisional Release, 8 October 2004 ("Prosecution Application").

⁵ Prosecution Application, par 2.

⁶ *Prosecutor v Šainović and Ojdanić*, Case No. IT-99-37-AR65, Decision on Provisional Release, 30 October 2002, par 10.

⁷ *Ibid.*

⁸ *Ibid.*

4. While the Prosecution relies upon the authority of *Šainović and Ojdanić* as supporting its procedural right to bring a Rule 115 application, the observation made by the Appeals Chamber in that decision is not a clear statement that Rule 115 applies to interlocutory appeals made pursuant to Rule 65. However, the Appeals Chamber notes that past practice in previous decisions by the Appeals Chamber clearly indicates that Rule 115⁹ is to be applied to interlocutory appeals made pursuant to Rule 65¹⁰. In each of those decisions, the Appeals Chamber proceeded on the basis that additional evidence could be admissible upon an appeal pursuant to Rule 65¹¹.

5. A plain reading of the Rule suggests that the mechanism of additional evidence on appeal is only available on an appeal from judgment and is not applicable to interlocutory appeals. Rule 115(A), which specifies the time limits in which to file a Rule 115 application speaks of “the date of the judgment,” and Rule 115(B), which specifies the test to be applied for that additional evidence to be admissible, speaks of the Appeals Chamber considering that evidence in order to arrive at a “final judgment”.

6. Further, Rule 107, which provides that:

The rules of procedure and evidence that govern proceedings in the Trial Chamber shall apply *mutatis mutandis* to proceedings in the Appeals Chamber.

is of no assistance here as the Prosecution is not seeking to apply a rule that applies to proceedings in a Trial Chamber to an appellate proceeding, but to apply an appellate proceeding applicable to appeals from judgment to an interlocutory appeal.

7. While the Rule does not on its face appear to be applicable to Rule 65 interlocutory appeals, the Appeals Chamber has, as noted above, considered it to be applicable in previous decisions. The Appeals Chamber finds that justification for this practice is to be found in the appellate function in reviewing Trial Chamber decisions for error. Where the Appeals Chamber does find an error in a Trial Chamber decision, and where it is sufficiently apprised of the issues in the case, the Appeals Chamber is free to substitute its own decision rather than sending it back to the Trial Chamber for

⁹ Rule 115, Additional Evidence provides:

(A) A party may apply by motion to present additional evidence before the Appeals Chamber. Such motion shall clearly indicate with precision the specific finding of fact made by the Trial Chamber to which the additional evidence is directed, and must be served on the other party and filed with the Registrar not later than seventy-five days from the date of the judgment, unless good cause is shown for further delay. Rebuttal material may be presented by any party affected by the motion.

(B) If the Appeals Chamber finds that the additional evidence was not available at trial and is relevant and credible, it will determine if it could have been a decisive factor in reaching the decision at trial. If it could have been such a factor, the Appeals Chamber will consider the additional evidence and any rebuttal material along with that already on the record to arrive at a final judgement in accordance with Rule 117.

¹⁰ *Prosecutor v Nikola Šainović & Dragoljub Ojdanić*, Case No: IT-99-37-AR65, Decision on Motion for Modification of Decision on Provisional Release And Motion to Admit Additional Evidence, 12 December 2002; *Prosecutor v Vidoje Blagojević et al*, Decision on Motion to Present Additional Evidence, 28 May 2002.

reconsideration.¹² Where the Appeals Chamber adopts this approach to an error of the Trial Chamber, it is appropriate for the Appeals Chamber to receive evidence that was not available before the Trial Chamber.

B. Test of Admission under Rule 115

8. For additional evidence to be admissible on appeal pursuant to Rule 115 the moving party must establish that the evidence was unavailable at trial and could not have been discovered by the exercise of due diligence, that it is relevant to a material issue and credible, and that it could have had an impact on the verdict. If the moving party cannot establish that the evidence was unavailable at trial, the Appeals Chamber may still admit the evidence if the moving party shows that its exclusion would lead to a miscarriage of justice, in that, if it had been available at trial it would have affected the verdict.¹³

III. The Additional Evidence

9. The Prosecution states that the additional evidence it seeks to introduce in support of its interlocutory appeal relates to the issue of Government guarantees on the appearance of the accused at trial if provisionally released as addressed in paragraphs 22 to 27 of the Impugned Decision with regard to Simatović and paragraphs 23 to 29 of the Impugned Decision with regard to Stanišić. The evidence comprises three documents: Annex 1 – Declaration of OTP Chief of Investigations regarding the flight of indictee Goran Hadžić on 13 July 2004 and Press Statement of Carla Del Ponte dated 19 July 2004; Annex 2 – Report of the Prosecutor to the President of the International Tribunal dated April 2004; Annex 3 – Video Tape and Transcript of an interview with the Serbian Prime Minister Vojislav Kostunica aired in April 2004.

A. Annex 1 – Declaration of OTP Chief of Investigations regarding flight of indictee Goran Hadžić

10. The additional evidence contained in Annex 1 of the Prosecution's application details the circumstances surrounding the transmission of an indictment and arrest warrant to the Ministry of Foreign Affairs of the Union of Serbia and Montenegro and its embassy in The Hague on

¹¹ *Ibid.*

¹² *Prosecutor v Milošević*, Case No: IT-99-37-AR73, IT-01-51-AR73 and IT-01-51 AR73, Reasons for Decision on Prosecution Interlocutory Appeals from Refusal to Order Joinder, 18 April 2002; *Prosecutor v Blaškić*, Case No: IT-95-14-AR73, Decision on Appellant's Motions for the Production of Material, Suspension or Extension on the Briefing Schedule and Additional Filings, 26 September 2000; *Prosecutor v Tadić*, Case No: IT-94-1-AR73, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995.

¹³ *Prosecutor v Krstić*, Case No: IT-98-33-A, Decision on Applications for Admission of Additional Evidence on Appeal, 5 August 2003; *Prosecutor v Kupreškić et al*, Case No: IT-95-16-A, Appeal Judgement, 23 October 2001. Case No.: IT-03-69-AR65.1, IT-03-69-AR65.2 4 11 November 2004

13 July 2004, and the subsequent flight of Hadžić from his residence in Novi Sad in Serbia.¹⁴ Annex 1 consists of a declaration, dated 8 October 2004 of Mr Patrick Lopez-Terres, the Chief of the OTP's Investigations Division, and a statement by the Prosecutor, entitled "Press Conference by Prosecutor Carla Del Ponte 19 July 2004". Both of these documents claim to explain in full the circumstances of the disappearance of indictee Hadžić on 13 July 2004.¹⁵ The Prosecution claims that the evidence is highly relevant to the issue of the Government guarantees and that its credibility and reliability "must be uncontested".¹⁶ It says that this evidence could have been a decisive factor in the decision of the Trial Chamber as it goes to the essence of the validity of the guarantees issued by the Governments of the Republic of Serbia and Serbia and Montenegro. It argues that this evidence is additional to the evidence of co-operation given by the Minister of Justice of the Republic of Serbia at the hearing, and that had the Trial Chamber had the benefit of this evidence, it could have been a decisive factor in the findings of the Trial Chamber with respect to the strength and reliability of the guarantees offered.¹⁷

11. In response, Stanišić argues that, although this material appears to have been unavailable before the hearing held by the Trial Chamber, the Prosecution must establish that the interests of justice warrant its admission.¹⁸

12. Stanišić also claims that the evidence is not relevant to the validity of the Government guarantees with respect to him. All that the evidence does is say something about the way the Serbia and Montenegro authorities have dealt with the situation of Hadžić, which is irrelevant to how they have dealt with him. He argues that the events described in the additional evidence "refer to another situation, namely to a person who is not transferred to the seat of the [International] Tribunal" and that "the matter of execution of an arrest warrant legally and factually differs from the situation in which provisional release is to be assessed based on guarantees".¹⁹

13. In response, Simatović says that the additional evidence of Annex I could not have been a decisive factor in reaching the decision by the Trial Chamber. He says that the evidence relates to a "failing on the part of the competent state authorities in the concrete situation" and not general behaviour of non-cooperation on the part of the competent authorities.²⁰ Further, he says that evidence of the OTP being in the field and undertaking measures that fall within the scope of the

¹⁴ Prosecution Application, pars 7-8.

¹⁵ *Ibid*, par 9.

¹⁶ *Ibid*, par 10.

¹⁷ *Ibid*.

¹⁸ Stanišić Defence Response to "Prosecution Application Under Rule 115 to Present Additional Evidence In Its Appeal Against Provisional Release", 13 October 2004 ("Stanišić Defence Response"), par 6.

¹⁹ *Ibid*.

²⁰ Simatović Defence Response to "Prosecution Application Under Rule 115 to Present Additional Evidence In Its Appeal Against Provisional Release", 19 October 2004 ("Simatović Defence Response"), par 18.

competency of the Ministry of Internal Affairs of the Republic of Serbia, indicates that there is co-operation between the Office of the Prosecutor and the government authorities of Serbia.²¹

Analysis

14. The Prosecution presents the additional evidence generated in Annex 1 as being generated subsequent to the Trial Chamber's Impugned Decisions. Indeed, both of the Accused accept the Prosecution's presentation of this evidence as clearly not available prior to the Trial Chamber's rendering of its Impugned Decisions. In the view of the Appeals Chamber, however, this evidence was clearly available to the Prosecution prior to the Trial Chamber's rendering of its Impugned Decisions and it is misleading of the Prosecution to assert otherwise.

15. The Trial Chamber issued the Impugned Decisions on 28 July 2004. The information contained in the declaration of the OTP Investigator relates to investigations surrounding the flight of Goran Hadžić from Serbia on 13 July 2004. The declaration attaches a press statement of the Prosecutor on 19 July 2004, in which she gives full details of the escape, subsequent investigations and communications with the Serbian government. All of this information was available to the Prosecution prior to the Trial Chamber's issuing of the Impugned Decisions on 28 July 2004, and thus, the Prosecution could have sought leave by motion from the Trial Chamber to have it admitted prior to 28 July.

16. The declaration of the OTP Investigator, while dated 8 October, after the issuance of the Impugned Decisions, provides no new information that was not available to the Prosecution prior to 28 July. The Declaration merely attests to the accuracy of the press statement made by the Prosecutor on 19 July, and the information therein, and then states that to date Hadžić has not yet been apprehended nor have the authorities of Serbia and Montenegro complied with the requirement of 13 July to provide reasons for the improper execution of the arrest warrant against Hadžić. The Prosecution failed to establish that it could not obtain this declaration prior to 28 July or any steps it may have taken in the exercise of due diligence to acquire it. On the basis of the foregoing, Annex 1 will be assessed under the miscarriage of justice standard under Rule 115.

17. In considering whether the admission of this evidence would have affected the verdict of the Trial Chamber, the Appeals Chamber accepts the contention of Stanišić that the evidence relates to the way the Serbia and Montenegro authorities have dealt with another accused, and does not directly relate to the reliability of guarantees given by the authorities of Serbia and Montenegro that they will co-operate with the International Tribunal in relation to these accused, who have been surrendered to the Tribunal by the authorities in Belgrade. Accordingly, the Appeals Chamber is

²¹ Simatović Defence Response, par 18.
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not satisfied that, if this evidence, of what arguably appears to be deliberate non-cooperation with the International Tribunal, had been before the Trial Chamber, that evidence would have been a decisive factor in the Trial Chamber's evaluation of the guarantees given by those authorities that they would co-operate with the International Tribunal in relation to these accused. Accordingly, the Appeals Chamber finds that the evidence contained in Annex 1 is inadmissible on the Prosecution's interlocutory appeal.

B. Annex 2 –Report of the Prosecutor to the President of the International Tribunal

18. The additional evidence contained in Annex 2 is a Report of the Prosecutor to the President of the Tribunal ("Report"). The Prosecution says that it tendered a letter from the President to the Security Council at the hearing before the Trial Chamber bringing to its attention a statement from the Prosecutor complaining of "a consistent failure on the part of Serbia and Montenegro to comply with its obligations under Article 29 of the Statute and Rule 39".²² The Prosecution says that it tried to tender the Report, dated April 2004, at the hearing, but that it was denied by the Trial Chamber.²³ It then claims that "at the earliest opportunity" on 12 May 2004, it attempted to tender the Report by motion for the filing of further evidence.²⁴ In that motion, the Prosecution explained to the Trial Chamber that it could not have filed the evidence earlier because the Security Council had not made the Report public until 11 May 2004. The Trial Chamber also denied that motion on 25 May.²⁵

19. The Prosecution claims that because the Simatović hearing was completed on 10 May 2004, the Report was not available to the Trial Chamber at the time of the hearing. It claims that the Report was not available because the Security Council had not authorised its release.²⁶ However, this submission runs counter to the Prosecution's submission above, that it attempted to tender the Report dated April 2004, at the same time it tendered the letter of the President of the Tribunal to the Security Council to the Trial Chamber. The Prosecution then claims that with regard to the Stanišić hearing, the Trial Chamber erred in refusing to admit the Report into evidence where it was available to the Prosecution because the hearing was held after the public release of the Report by the Security Council. In conclusion, the Prosecution submits that the Appeals Chamber should admit the Report with regard to its appeal of the Simatović Impugned Decision pursuant to Rule 115(B) and with regard to its appeal of the Stanišić Impugned Decision under the exercise of its

²² Prosecution Application, pars 4-5.

²³ *Ibid*, par 11.

²⁴ *Ibid*, par 5.

²⁵ *Ibid*, par 12.

²⁶ *Ibid*, pars 11-13.

“inherent powers to admit such evidence even if it was available at trial, in cases in which its exclusion would lead to a miscarriage of justice.”²⁷

20. In response, Stanišić says that the letter of the President to the Security Council was brought to the attention of the Trial Chamber and that the Trial Chamber was well aware that the letter directly relied upon the Report of the Prosecutor.²⁸ He says that the Report merely serves to particularise evidence that was available to the Prosecutor at the time of the hearing and as such the substance of the Report was already before the Trial Chamber.²⁹ Stanišić further says that the Prosecution has given no adequate explanation of its failure to file the Report, dated April 2004, at the time of the hearing and that the Prosecution has failed to establish that the Report was unavailable at the time of the hearing before the Trial Chamber.³⁰

21. In his response, Simatović says that the Report of the Prosecutor was made in April 2004, and that the time of public disclosure by the Security Council relates to the letter of the President. He says that the Prosecutor has not shown that the Security Council’s decision to publicise the President’s letter prevented it tendering the Report to the Trial Chamber at the time of the hearings.³¹

Analysis

22. The Appeals Chamber is not satisfied that the Report of the Prosecutor was unavailable at the time of the hearings before the Trial Chamber. The Report was prepared by the Prosecutor in April 2004 and the Prosecution submission in relation to whether it actually did seek to tender this Report at the time of the tendering of the President’s letter to the Security Council before the Trial Chamber is unclear. In any event, the Appeals Chamber is not satisfied that the substance of the information contained in the Report was unavailable to the Prosecutor at the time of either of the hearings. Accordingly, for the evidence of the Report to be admissible under Rule 115, the Prosecution must establish that the evidence of the Report would lead to a miscarriage of justice, in that if it had been available at trial it would have affected the verdict.

23. The Prosecution says that the Report is “highly relevant to the issue of the Government guarantees because it outlines in detail the persistent failures by the Governments of the State Union of Serbia and Montenegro and the Republic of Montenegro to comply with their

²⁷ *Ibid*, par 14.

²⁸ Stanišić Defence Response, par 8.

²⁹ *Ibid*, par 9.

³⁰ *Ibid*, pars 11-12.

³¹ Simatović Defence Response, pars 12-13.

international obligations to co-operate with the work of the International Tribunal.”³² It argues that “a miscarriage of justice could be occasioned if the Appeals Chamber were denied the opportunity to consider the compelling evidence of non co-operation contained in the Prosecutor’s Report”.³³ Further, the Prosecution says that the Trial Chamber placed no weight on the President’s letter, but gave weight to the statement of the Minister of Justice that it would be “perfectly simple” to arrest the Accused.³⁴ It says that the content of the Report is such that had the Trial Chamber received the Report into evidence it could have been a decisive factor in reaching its decision in relation to the strength of the Government guarantees.³⁵

24. In stating the test of admissibility in the submissions made, the Prosecution assumes that the Appeals Chamber would accept its arguments that the evidence was not available at trial. As the Appeals Chamber has found that the evidence was available at trial, the test is the higher standard of whether the evidence would have affected the verdict. Applying this test, the Appeals Chamber does not accept that the Prosecutor’s Report would have affected the decision of the Trial Chamber. The letter of the President to the Security Council alerting it to the contents of the Report was before the Trial Chamber and was considered by it. Further, the substance of the evidence contained in the Report was available to the Prosecutor at the time of the hearing and that evidence was put before the Trial Chamber by the Prosecution in relation to the reliability of the State guarantees. Accordingly, the evidence of the Report is inadmissible on its interlocutory appeal.

C. Annex 3 – Video tape and transcript of interview of the Serbian Prime Minister

25. The final piece of additional evidence the Prosecution seeks to tender on its interlocutory appeal is a video and transcript of an interview with Vojislav Kostunica, the Prime Minister of the Republic of Serbia. The Prosecution says that this interview was broadcast in France on 24 April 2004 but the Prosecution did not receive a translation until 11 May 2004, the day after the completion of the Simatović hearing³⁶. The interview was conducted in English and dubbed into French and the Prosecution had to obtain an original recording to translate into English in order to tender. The Prosecution also claims that the Trial Chamber erred in denying the admission of this evidence at the Stanišić hearing even though the video and transcript were available at the time. Accordingly, the Prosecution argues that the interview should be admitted under Rule 115(B) with

³² Prosecution Application, par 13.

³³ *Ibid*, par 14.

³⁴ *Ibid*, par 19.

³⁵ *Ibid*, par 15.

³⁶ *Ibid*, par 16.

regard to the Simatović Impugned Decision and under the miscarriage of justice exception with regard to the Stanišić Impugned Decision.³⁷

26. In response, Simatović says that the interview was accessible to the Prosecution from 24 April 2004, the time at which it was broadcast in one of the official languages of the International Tribunal.³⁸ In his response, Stanišić argues that the interview was clearly available to the Prosecution at the time of the Trial Chamber hearing of his application, and that the Prosecution must establish that it would have affected the Trial Chamber's decision.

Analysis

27. The Appeals Chamber does not accept that the unavailability of an original recording in English is a sufficient basis for the Prosecution to claim that the evidence of the interview was not available at the time of the Simatović hearing. French is one of the official languages of the International Tribunal and the Prosecution could have sought to have the evidence admitted before the Trial Chamber in the form in which it was broadcast. Accordingly, with respect to both Simatović and Stanišić, for the evidence to be admissible on its interlocutory appeal, the Prosecution must establish that its exclusion would lead to a miscarriage of justice.

28. The Prosecution argues that the interview contains material relevant to the Trial Chamber's determination of the strength of the Government guarantees. It says that the evidence is credible and reliable as it derives from "the reformist Prime Minister of a state entity giving a guarantee in this case and contains a loose explanation as to the non-apprehension of indictees Ratko Mladić and Radovan Karadžić during the three years that Mr Kostunica was the President of the Federal Republic of Yugoslavia."³⁹ It argues that if the Trial Chamber had considered this additional evidence, particularly the concession of Mr Kostunica that the previous government of the Republic of Serbia had failed for three years to locate Mladić, who he said was "somewhere in Serbia", and that nearly six months later, Mr Kostunica's Government has likewise failed to find Mladić and to surrender him to the International Tribunal,⁴⁰ "it could not have placed any reliance upon the evidence of the Serbian Minister of Justice that it would be 'perfectly simple' to arrest the Accused, once provisionally released".⁴¹

29. The Appeals Chamber is not satisfied that if the Trial Chamber had admitted this additional evidence that it would have impacted upon the decision of the Trial Chamber in relation to the

³⁷ *Ibid*, pars 16-17.

³⁸ Simatović Defence Response, par 15.

³⁹ Prosecution Application, par 18.

⁴⁰ *Ibid*.

⁴¹ *Ibid*, par 19.

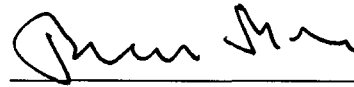
reliability of the Government guarantees such that it can be said that its exclusion would lead to a miscarriage of justice. All that the evidence establishes is that there has been a failure on the part of the Serbian authorities to arrest Mladić and this fact is well known to the International Tribunal. Accordingly, the Appeals Chamber rejects the admissibility of this evidence in the Prosecution's interlocutory appeal.

IV. Disposition

30. In light of the foregoing, the Appeals Chamber denies the Prosecution's Application to tender additional evidence on its interlocutory appeal against the Impugned Decisions of the Trial Chamber.

Done in both English and French, the English text being authoritative.

Done this 11th day of November 2004,
At The Hague,
The Netherlands.



Judge Meron
Presiding Judge

Seal of the Tribunal