

**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

Date: 3 December 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:

3 December 2004

PROSECUTOR

v.

**JOVICA STANIŠIĆ
FRANKO SIMATOVIĆ**

**DECISION ON STANIŠIĆ'S APPLICATIONS UNDER RULE 115 TO PRESENT
ADDITIONAL EVIDENCE IN HIS RESPONSE TO THE PROSECUTION'S APPEAL**

Counsel for the Prosecution

Mr. Dermot Groome
Mr. David Re

Counsel for the Accused:

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 2004, 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 On 8 October, the Prosecution sought 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 On 11 November, the Appeals Chamber refused the Prosecution's Application to present additional evidence on its interlocutory appeal. Prior to the rendering of that Decision, on 29 October and 8 November, the accused Stanišić filed two applications pursuant to Rule 115 to present additional evidence on the Prosecution's interlocutory appeal.

2. The evidence sought to be adduced by Stanišić in his First Application consists of six newspaper articles published on 5 and 11 October 2004, and referred to in paragraph 38 of the Defence Response to the Prosecution's interlocutory appeal.⁵ He argues that none of the information contained in these newspaper articles was available during the provisional release hearings held by the Trial Chamber, nor at the time the Trial Chamber rendered its decisions. Upon this basis, he claims that the requirement of Rule 115(A) is fulfilled.⁶

3. Stanišić claims that the criterion of Rule 115(B) is also fulfilled. He argues that because the Prosecution is disputing the cooperative attitude of the Government of Serbia and Montenegro in its interlocutory appeal against the Impugned Decisions, and because its application to present additional evidence on the appeal was in relation to the issue of the reliability of the Government Guarantees, the additional evidence he seeks to adduce may have a decisive influence in reaching a final decision on the Prosecution's interlocutory appeal against the Impugned Decisions.⁷

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 Defense Application Under Rule 115 to Present Additional Evidence in its Response to the Appeal Against Provisional Release, 29 October 2004 ("First Application"); Translation of Six Exhibits Pertaining to Defense Application Under Rule 115 to Present Additional Evidence in its Response to the Appeal Against Provisional Release of October 29, 2004; Second Defense Application Under Rule 115 to Present Additional Evidence in its Response to the Appeal Against Provisional Release, 5 November 2004 ("Second Application").

⁶ First Application, par 6.

⁷ *Ibid.*, par 7.

4. Stanišić argues further that, as the Prosecution seeks to admit additional evidence on these specific issues by its own application for the admission of additional evidence, the Defence should have an equal opportunity to rebut the allegations of the Prosecutor on these issues.⁸ He argues that the principle of equality of arms may also justify the grant of his application.⁹

5. The additional evidence that Stanišić seeks to adduce in his Second Application consists of two newspaper articles published on 2 November 2004, and two cables coming from the United Nations Peace Force office in Belgrade on 9 and 10 June 1995.¹⁰ He claims that the newspaper articles were not available during the provisional release hearing before the Trial Chamber or prior to the Trial Chamber's rendering of its Impugned Decisions.¹¹ As such, he says that the criteria of Rule 115(A) is satisfied.

6. Stanišić claims that the criteria of Rule 115(B) is also satisfied. The Prosecution is disputing the cooperation of the Government of Serbia and Montenegro in its interlocutory appeal against the Impugned Decisions, and as it filed an application under Rule 115 to adduce additional evidence on that appeal, the evidence he seeks to adduce in these newspaper articles could have a decisive influence in reaching a final decision in the interlocutory appeal against the Impugned Decisions.¹²

7. With respect to the two cables coming from the United Nations Peace Force office in Belgrade, Stanišić says that these two documents came from material disclosed in his case. He says, that although both of these documents were technically available at the time of the Trial Chamber hearings, they should be admissible before the Appeals Chamber to prevent a miscarriage of justice. He claims that these documents "serve as decisive factors in assessing whether the Accused, once released, would comply with all the conditions as set forth by the Trial Chamber"¹³ in the Impugned Decisions.

8. In its First Response¹⁴ to Stanišić's First Application, the Prosecution argues that it does not understand the material that is the subject of the application to be "additional evidence" under Rule 115(A), because Stanišić does not identify the "specific findings of fact" to which the additional evidence is directed as required by the Rule. It says that the Trial Chamber found in

⁸ *Ibid*, par 8.

⁹ *Ibid*, par 9.

¹⁰ Second Application, pars 4-5.

¹¹ *Ibid*, par 6.

¹² *Ibid*, par 7.

¹³ *Ibid*, par 17.

¹⁴ Prosecution Response to Stanišić's Application Under Rule 115 to Present Additional Evidence in its Appeal Against Provisional Release, 5 November 2004 ("First Response"); Prosecution Response to Stanišić's Second Application Under Rule 115 to Present Additional Evidence in its Appeal Against Provisional Release, 10 November 2004 ("Second Response").

favour of the Accused on the point to which the additional evidence appears to be directed, the Government Guarantees, and granted his application for provisional release.¹⁵ As such, further evidence on this point is neither relevant nor credible. Upon this basis, the Prosecution opposes the admission of the evidence as additional evidence pursuant to Rule 115.¹⁶ However, it says, should the Appeals Chamber reject this argument, the evidence should not be admissible because it could not have been a decisive factor in reaching a decision at trial and is neither relevant nor credible.¹⁷

9. The only basis upon which the Prosecution says the additional evidence could be admissible on the interlocutory appeal is as rebuttal evidence to the Prosecution's application to admit additional evidence.¹⁸ However, it says that Stanišić fails to address the fundamental test of admissibility of rebuttal evidence on appeal as he does not identify how the material "directly affect(s) the substance of the additional evidence admitted by the Appeals Chamber".¹⁹

10. With respect to its Second Response to Stanišić's Second Application to admit additional evidence on the interlocutory appeal, the Prosecution adopts the arguments made in its First Response.²⁰

11. In Reply, Stanišić argues that the Prosecution's argument that the additional evidence he seeks to admit is not admissible as additional evidence under Rule 115 because the Trial Chamber has "already decided the issue in the Accused's favour, so that the additional evidence could not have been a decisive factor in reaching the decision," is premised upon a misunderstanding of Rule 115.²¹ He says that Rule 115 does not prevent a party from relying upon additional evidence when the issue to which it relates has been decided in that party's favour. "It is a mechanism by which both parties to an impugned decision may seek to adduce additional evidence, in the event that it could have been a decisive factor, in order to either reverse the decision or prevent it from being reversed (or in the words of Rule 115(B) in order "to arrive at a final judgement")."²² Stanišić argues that to adopt the Prosecution's approach "would limit the use of Rule 115 to the party who seeks to impugn or overturn the decision – a limitation which is neither justified by the plain meaning of Rule 115 or by the interests of justice".²³

¹⁵ First Response, pars 2-3.

¹⁶ *Ibid*, par 3.

¹⁷ *Ibid*, pars 5-11.

¹⁸ *Ibid*, par 4.

¹⁹ *Ibid*, par 12.

²⁰ Second Response, par 3.

²¹ Defence Reply to Prosecution Response to Mr Stanišić Second Application Under Rule 115 to Present Additional Evidence in the Prosecutor's Appeal Against Provisional Release, 12 November 2004, ("Reply") par 6.

²² *Ibid*.

²³ *Ibid*.

12. Following the Reply of Stanišić, the Prosecution filed a clarification of its submissions made in its First and Second Responses.²⁴ It stated that it did not intend those responses to mean that a respondent to an appeal can never file additional evidence under Rule 115 in support of a decision under appeal. Its submission was meant to argue that in circumstances such as this, the additional evidence of Stanišić should be treated as rebuttal evidence rather than additional evidence.²⁵

II. Analysis

13. Rule 115 does not, on its face, prohibit a party from adducing additional evidence in support of a factual finding of a Trial Chamber. The Rule merely states that a party may file a motion to present additional evidence before the Appeals Chamber. In circumstances such as these, where the Prosecution is alleging an error in the fact finding of a Trial Chamber in relation to an identified issue, and where its own application to adduce additional evidence relevant to that issue has been refused, on its face, the Rule does not appear to prohibit the Defence from seeking to admit additional evidence directed to that factual finding challenged by the Prosecution.

14. However, while the Rule does not expressly prohibit a party from seeking the admission of additional evidence on appeal to bolster challenged factual findings, in the practice of the International Tribunal, motions for additional evidence are directed towards supporting an argument of factual error, and if additional evidence is sought to be admitted in support of a factual finding, it is admitted as rebuttal material to that additional evidence admitted in support of a factual error.²⁶ Neither the Prosecution nor Stanišić has advanced any arguments in support of a departure from this established practice in this case. However, both parties seem to agree that Rule 115 does permit the admission of evidence in support of a factual finding that is the subject of appeal.

15. In his First and Second Applications, Stanišić argues, for the most part, that the additional evidence he seeks to adduce is rebuttal evidence to that additional evidence the Prosecution was seeking to have admitted. Accordingly, as the Prosecution's application to admit additional evidence in its interlocutory appeal against the Impugned Decisions has been dismissed, there is no basis for the admission of Stanišić's First and Second Applications as rebuttal evidence.

16. The only evidence adduced by Stanišić in his First and Second Applications that does not fall into the category of rebuttal evidence is the two United Nations Peace Force cables from the Belgrade Office, dated 9 and 10 June 1995, which he identifies as being relevant to the issue of whether he would comply with the conditions of provisional release set down by the Trial

²⁴ Clarification of Prosecution Responses to Stanišić's Applications Under Rule 115 to Present Additional Evidence in its Appeal Against Provisional Release, 19 November 2004 ("Clarification").

²⁵ *Ibid*, par 1.

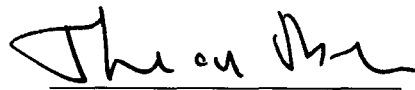
²⁶ *Prosecutor v Tihomir Blaškić*, Case: IT-95-14-A, Decision on Evidence, 31 October 2003, pg.5.

Chamber.²⁷ With respect to these two documents, which were clearly available to Stanišić prior to the Trial Chamber's rendering of the Impugned Decisions, the Appeals Chamber is not satisfied that this evidence is such that its exclusion before the Appeals Chamber would result in a miscarriage of justice. This is particularly so as the substance of this material was before the Trial Chamber.²⁸

17. On the basis of the foregoing, both Stanišić's First and Second Applications to adduce additional evidence on the Prosecution's interlocutory appeal against the Impugned Decisions is refused.

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

Done this 3rd day of December 2004,
At The Hague,
The Netherlands.



Judge Meron
Presiding Judge

Seal of the Tribunal

²⁷ Second Application, par 17.

²⁸ T 430-433, 26 May 2004.