

IT-03-69-T
D 36117-036113
22 NOVEMBER 2011

36117
SF



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: 22 November 2011
Original: English

IN TRIAL CHAMBER I

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

Registrar: Mr John Hocking

Decision of: 22 November 2011

PROSECUTOR

v.

**JOVICA STANIŠIĆ
FRANKO SIMATOVIĆ**

PUBLIC

**DECISION ON STANIŠIĆ MOTION REQUESTING THE
RECALL OF WITNESS MANOJLO MILOVANOVIĆ**

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. Witness Manojlo Milovanović (“Witness”) testified as a Prosecution witness before this Chamber from 23 to 29 April 2010. On 29 September 2011, the Stanišić Defence filed a motion (“Motion”) seeking leave to recall the Witness for cross-examination on matters arising from the Chamber’s decisions to admit excerpts of 18 notebooks and audio tapes (“Mladić Materials”) into evidence.¹ The Stanišić Defence seeks to recall the Witness on the grounds that the Mladić Materials were obtained by the Prosecution on 11 May 2010 and disclosed to the Stanišić Defence as late as 30 July 2010, and that the Chamber only admitted them into evidence on 10 March 2011 and 1 April 2011.² The Stanišić Defence argues that as a consequence of the late discovery and disclosure, it did not have an opportunity to review the Mladić Materials to allow for effective cross-examination.³ It further submits that it only completed its review of the Mladić Materials on 21 September 2011.⁴ In addition, the Stanišić Defence submits that at the time of the Witness’s testimony, it was not in possession of the Supreme Defence Council Minutes of the Federal Republic of Yugoslavia (“SDC Minutes”), which, in its view, corroborate parts of the Mladić Materials it intends to question the Witness about.⁵

2. On 13 October 2011, the Prosecution responded to the Motion (“Response”), disputing the dates of disclosure indicated by the Stanišić Defence, and in particular suggesting that the Mladić Materials were disclosed in electronic form to the Stanišić Defence on 13 April 2010.⁶ The Prosecution further stated that it would not oppose the addition of the Witness to the Stanišić Defence witness list.⁷ The Prosecution requests that it be given a fair opportunity to (1) cross-examine the Witness on relevant matters raised by the examination-in-chief and (2) cross-examine the Witness on other matters related to the upcoming testimonies of Witness Browne and the Simatović Defence’s military expert.⁸ Accordingly, it requests (3) that the Witness’s testimony be

¹ Stanišić Motion Requesting the Recall of Witness JF-054 (Manojlo Milovanović), 29 September 2011.

² Motion, paras 3-4. The Chamber notes that the 11 May 2010 date refers to the Prosecution’s receipt of the *original* Mladić Materials.

³ Motion, para. 4.

⁴ Motion, para. 8.

⁵ Motion, paras 13-14.

⁶ Prosecution Response to Stanišić Motion Requesting Witness Manojlo Milovanović be Called to Present Evidence for the Defence, 13 October 2011, paras 2, 7 (with references cited therein).

⁷ Response, para. 3.

⁸ Response, paras 3, 10.

scheduled after the testimony of Witness Browne and after the Simatović Defence has filed its military expert report (together: “Prosecution Request”).⁹

3. On 20 October 2011, the Stanišić Defence requested leave to reply to the Response (“Application”),¹⁰ noting its opposition to the “re-characterisation of the Defence Motion” and its opposition to the suggestion that the Defence add the Witness to its witness list.¹¹ Through an informal communication of 21 October 2011, the Chamber granted the Application and directed the Stanišić Defence to file its reply by 26 October 2011. On 26 October 2011, the Stanišić Defence filed its reply.¹²

4. The Simatović Defence did not respond to the Motion. On 10 and 15 November 2011, the Simatović Defence submitted that a recall of the Witness should be scheduled before the commencement of the Simatović Defence case as the Witness’s further evidence may affect the Simatović Defence’s case presentation.¹³

II. APPLICABLE LAW

5. Pursuant to Rule 89 (B) of the Rules of Procedure and Evidence (“Rules”), a Chamber shall apply rules of evidence which will best favour a fair determination of the matter before it and are consonant with the spirit of the Statute and the general principles of law.

6. In determining whether there are sufficient grounds to recall a witness, the Chamber will consider whether the requesting party has demonstrated good cause to recall the witness.¹⁴ In assessing good cause, a Chamber will consider the purpose of recalling the witness and the applicant’s justification for not eliciting the relevant evidence from the witness when he or she originally testified.¹⁵

III. DISCUSSION

7. At the outset, the Chamber clarifies that it is seised of a motion to recall a witness, not of a motion to add a witness to the Stanišić Defence’s *65 ter* witness list. Recalling a Prosecution

⁹ Response, paras 11-12.

¹⁰ Stanišić Defence Application for Leave to Reply to the Prosecution Response to Stanišić Motion Requesting the Recall of Witness JF-054 (Manojlo Milovanović), 20 October 2011.

¹¹ Application, para. 3.

¹² Stanišić Defence Reply to the Prosecution Response of Stanišić Motion Requesting the Recall of Witness JF-054 (Manojlo Milovanović), 26 October 2011.

¹³ T. 14940-14941, 15018.

¹⁴ See Reasons for Decision to Recall Witness JF-047, 31 March 2011, para. 6 and references cited therein.

¹⁵ Ibid.

witness can result in possible further examination-in-chief by the Prosecution and cross-examination by the Defence. Accordingly, the Chamber finds the Prosecution's submissions on adding the Witness to the Stanišić Defence's 65 *ter* witness list misplaced and will not further consider them.

8. The Chamber accepts that the Mladić Materials may be relevant to events in the Indictment that allegedly occurred in Croatia and Bosnia-Herzegovina ("BiH"), as well as charges relating to whether Jovica Stanišić was one of the principal organisers, trainers, and suppliers of the Yugoslav People's Army, the Army of Republika Srpska, and other Serb forces that engaged in concerted action in pursuit of a criminal purpose in Croatia and BiH. The Chamber also accepts that the Witness may be able to testify in relation to these issues.

9. The Chamber is satisfied that the Mladić Materials were disclosed to the Stanišić Defence on 13 April 2010.¹⁶ It considers that the translations of the Mladić Materials were only completed by 30 July 2010.¹⁷ The Chamber also considers the volume of the Mladić Materials and takes note of the Stanišić Defence submissions that its internal review of the Mladić Materials was only completed on 21 September 2011. It considers that some of the Mladić Materials were only added to the Prosecution's Rule 65 *ter* exhibit list by virtue of the Chamber's decision of 7 October 2010, which also set out a system requiring the Prosecution to notify the Chamber and the parties of when it intended to use specific portions in court.¹⁸ This system was developed to alleviate any burden placed on the Defence.¹⁹ As a consequence, even though the Mladić Materials were in the Stanišić Defence's possession on 13 April 2010, the Chamber finds that due to outstanding translations and the materials' volume, the Stanišić Defence did not have a reasonable opportunity to review the Mladić Materials before the Witness's original testimony so as to allow effective cross-examination to take place on their contents. The Chamber considers that the Stanišić Defence has shown good cause to recall the Witness.

10. The Chamber accepts the Stanišić Defence's unchallenged representations in relation to not having been in possession of the SDC Minutes at the time of the Witness's original testimony. Therefore, the Chamber finds that good cause for further questioning with regard to the SDC Minutes exists and it will allow the Stanišić Defence to also question the witness about the SDC Minutes in its further cross-examination

¹⁶ See Decision on Sixteenth Prosecution Motion for Leave to Amend its Rule 65 *ter* Exhibit List (Mladić Notebooks), 7 October 2010 ("Addition Decision"), para. 14.

¹⁷ Addition Decision, para. 1.

¹⁸ Addition Decision, para. 15.

¹⁹ Ibid.

11. The Prosecution requests to raise further matters with the Witness upon him being recalled. Specifically, it requests to examine him on matters that would arise from the evidence of two prospective Defence witnesses. The Chamber considers that the proper procedural avenue for such further examination is to seek a recall of the witness during a possible rebuttal case.

12. The Chamber is mindful of its obligation to avoid needless consumption of time and of the inconvenience for the Witness if he were to appear for a third time during a possible rebuttal case. At the same time, it takes note of the Simatović Defence's submission that further cross-examination of the Witness may affect the presentation of the Simatović Defence case. Considering that the Prosecution's request to further examine the Witness beyond matters raised by the Stanišić Defence in its further examination is based on prospective Defence evidence and hence in part speculative, the Chamber decides that the Witness's recall be scheduled at the end of the Stanišić Defence case or as soon as possible thereafter.

13. The Chamber clarifies that the Prosecution will be allowed to put further questions to the Witness within the scope of re-examination in relation to matters which will arise from the Stanišić Defence's further cross-examination.

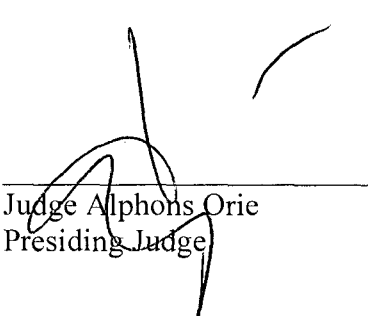
IV. DISPOSITION

14. For the foregoing reasons, the Chamber

GRANTS the Motion; and

DENIES the Prosecution's Request.

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



Judge Alphons Orie
Presiding Judge

Dated this twenty-second day of November 2011
At The Hague
The Netherlands

[Seal of the Tribunal]