

IT-03-69-T
D 63689 - D 63686
17 August 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: 17 August 2012
Original: English

IN TRIAL CHAMBER I

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

Registrar: Mr John Hocking

Decision of: 17 August 2012

PROSECUTOR

v.

**JOVICA STANIŠIĆ
FRANKO SIMATOVIĆ**

PUBLIC

**DECISION ON STANIŠIĆ DEFENCE REQUEST FOR
RECONSIDERATION OF DECISION ADMITTING P973 INTO
EVIDENCE**

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 8 September 2010, during the testimony of Witness JF-095, the Prosecution tendered notes from interviews with Obrad Stevanović and three other individuals (“P973”), which were conducted in preparation of a Serbian Security Intelligence Agency (“BIA”) commission report regarding documents requested in a Prosecution request for assistance.¹ The Simatović Defence objected to the admission of P973, arguing that the interview with Stevanović was informal, which could affect the reliability of P973, and that the Prosecution intended to circumvent the stringent requirements of Rules 92 *bis* and *ter* of the Tribunal’s Rules of Procedure and Evidence (“Rules”).² The Chamber then stated that the first objection went to the document’s weight and decided that P973 be marked for identification.³ During the housekeeping session of 29 September 2010, the Simatović Defence made additional submissions, objecting to the admission of P973 into evidence.⁴ At the time, the Stanišić Defence did not raise any objections to the admission of P973 into evidence.⁵

2. On 4 February 2011, the Simatović Defence requested that Rule 65 *ter* document 2D379, consisting of excerpts of Obrad Stevanović’s testimony in the case of *Prosecutor v. Slobodan Milošević* (“2D379”) be admitted into evidence, or that alternatively, the Chamber take 2D379 into consideration when deciding on the admissibility of P973.⁶ On 18 February 2011, the Chamber denied admission of 2D379, but indicated that it had considered this document in deciding upon the admissibility of P973, which it subsequently admitted into evidence (“Impugned Decision”).⁷

3. On 4 June 2012, the Stanišić Defence requested that the Chamber admit excerpts of Obrad Stevanović’s testimony in the case of *Prosecutor v. Slobodan Milošević*,⁸ and excerpts of his suspect interview with the Prosecution⁹ (jointly “Stevanović materials”) into evidence, in order to clarify and contextualise P973 (“Motion”).¹⁰ On 6 July 2012, the Chamber denied the Motion,

¹ T. 7031, 7033-7035.

² T. 7033-7034.

³ T. 7034-7035.

⁴ T. 7513-7517.

⁵ T. 7517-7518.

⁶ Simatović Defence Submission in Relation to the Transcripts of Obrad Stevanović, 4 February 2011 (Confidential).

⁷ T. 11267-11268. The Chamber admitted P973 along with the report of the BIA commission, and instructed the Defence to file the full text of 2D379 for the record, see Defence Submission on Previous Testimony of Obrad Stevanović, 21 February 2011 (Confidential).

⁸ Rule 65 *ter* document 1D5491.

⁹ Rule 65 *ter* document 1D5492.

¹⁰ Stanišić Defence Motion for Admission of Testimony in the Case of *Prosecutor v. Slobodan Milošević* and Excerpts of Prosecution Interview, 4 June 2012 (Confidential), paras 1, 35-36.

considering that Rule 89 (C) of the Rules was not an appropriate procedural avenue to seek admission of the Stevanović materials (“6 July 2012 Decision”).¹¹

4. On 13 July 2012, the Stanišić Defence requested that the Chamber reconsider the Impugned Decision, and exclude P973 from the evidentiary record (“Request”).¹² On 27 July 2012, the Prosecution opposed the Request (“Response”).¹³ The Simatović Defence did not make any submissions.

II. SUBMISSIONS OF THE PARTIES

5. The Stanišić Defence submits that in admitting P973 into evidence, the Chamber made a clear error of reasoning, which, if not reversed, would cause an injustice.¹⁴ It argues that P973 was in fact prepared for the purpose of the current proceedings, as it constitutes a statement taken by a commission tasked with determining the circumstances relating to the fate of documents sought by the Prosecution in the present trial.¹⁵ It further submits that because Article 29 of the Tribunal’s Statute obliges states, including the Republic of Serbia (“Serbia”) to comply with the Prosecution’s requests for information, Serbia is in fact “an agent of the Prosecution” and thus, effectively, a “party” to the present proceedings.¹⁶ The Stanišić Defence argues that consequently, and in line with the 6 July 2012 Decision, P973 should be excluded from the evidentiary record, as its admission under Rule 89 (C) of the Rules renders Rules 92 *bis* to *quinquies* ineffectual.¹⁷ Finally, it submits that in the absence of contextualising materials, P973 provides an inadequate reflection of the Stevanović statements, and should therefore be excluded in order to avoid an injustice.¹⁸

6. The Prosecution submits that the Request is untimely, as the Stanišić Defence did not object to the admissibility of P973 when the issue was litigated before the Chamber.¹⁹ The Prosecution further submits that it would be prejudiced by the exclusion of P973 at this stage of the proceedings, as it has no further opportunity to adduce evidence.²⁰ Alternatively, the Prosecution argues that the Request should be denied on the merits, because the Stanišić Defence allegations that Serbia is the

¹¹ Decision on Stanišić Defence Motion for Admission of Testimony in the Case of *Prosecutor v. Slobodan Milošević* and Excerpts of Prosecution Interview, 6 July 2012.

¹² Stanišić Defence Request for Reconsideration of Decision Admitting P973 into Evidence, 13 July 2012, paras 2, 11.

¹³ Prosecution Response to Stanišić Defence Request for Reconsideration of Decision Admitting P973 into Evidence, 27 July 2012 (Confidential). The Response is wrongly dated 27 June 2012.

¹⁴ Request, paras 2, 4, 10.

¹⁵ Request, paras 6-9.

¹⁶ Request, para. 9.

¹⁷ Request, paras 4-6.

¹⁸ Request, para. 10.

¹⁹ Response, paras 2-3, 5, 7.

²⁰ Response, para. 7.

Prosecution's agent lack any factual or legal basis.²¹ Specifically, it submits that Serbia remains an independent state, which itself decides whether and how to respond to requests by any party to the proceedings before the Tribunal.²² As such, with regard to P973, Serbia acted autonomously in deciding whether and how to comply with the Prosecution's request, whom to interview, and what questions to ask.²³ The Prosecution further disputes the Stanišić Defence assertions that P973 is analogous to the Stevanović materials and that its admission under Rule 89 (C) renders Rules 92 *bis* to *quinqüies* ineffectual.²⁴ In this respect it reiterates that Rules 92 *bis* to *quinqüies* are not aimed at eliminating the admission of hearsay evidence, but they are specifically directed at statements taken by parties for the purpose of the proceedings before the Tribunal.²⁵

III. APPLICABLE LAW

7. Rule 89 of the Rules provides, in relevant part:

(C) A Chamber may admit any relevant evidence which it deems to have probative value.

(D) A Chamber may exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial.

8. In accordance with the jurisprudence of the Tribunal, a Trial Chamber has the power to reconsider its own decisions where there is a clear error of reasoning, or where particular circumstances justify reconsideration in order to avoid injustice. Such particular circumstances include new facts or new arguments.²⁶

9. The Chamber recalls and refers to the jurisprudence of the Tribunal with regard to Rules 89 (C), and 92 *bis* to 92 *quinqüies* of the Rules, as cited in its previous decision.²⁷

IV. DISCUSSION

10. The Stanišić Defence submitted that the 6 July 2012 Decision confirmed that the Chamber had erred in its reasoning when admitting P973 into evidence. As already stated in the 6 July 2012 Decision, the Chamber considers P973 to be distinctively different from the Stevanović materials

²¹ Response, paras 8-12.

²² Response, para. 10.

²³ Response, para. 11.

²⁴ Response, paras 2, 13-15.

²⁵ Response, para. 13.

²⁶ See, among many others, *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, Decision on Defence's Request for Reconsideration, 16 July 2004, p. 2; *Prosecutor v. Jadranko Prlić et al.*, Case no. IT-04-74-AR73.16, Decision on Jadranko Prlić's Interlocutory Appeal Against the Decision on Prlić Defence Motion for Reconsideration of the Decision on Admission of Documentary Evidence, 3 November 2009, paras 6, 18.

²⁷ 6 July 2012 Decision, paras 7-8.

which the Stanišić Defence sought to have admitted under Rule 89 (C) of the Rules.²⁸ The Chamber recalls that P973 consists of a statement taken by a member of an independent commission established by the Serbian Ministry of the Interior and the BIA Director in November 2008, and which was tasked with determining the circumstances relating to the fate of documents sought by the Prosecution.²⁹ The Chamber also noted that nothing in P973 itself suggests that the Prosecution instructed the commission on whom and how to interview and whether the interview notes themselves were to be provided to the Prosecution. Having considered the above information, the Chamber concluded that P973 contained a statement given to non-parties for purposes other than proceedings before the Tribunal, and thus admitted it into evidence under Rule 89 (C) of the Rules.

11. Article 29 of the Statute, under which the Prosecution requested assistance from Serbia, imposes a duty on states to co-operate with the Tribunal in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law. This provision does not limit the co-operating states' sovereignty in any respect, nor does it render states parties, or "agents" of a party, to the proceedings before the Tribunal. The Chamber recalls that in accordance with the definition provided under Rule 2 of the Rules, the Prosecutor and the Defence constitute "parties" to the proceedings before the Tribunal.

12. As to the possible misinterpretation of P973 in the absence of contextualising materials, the Chamber refers the Stanišić Defence to the 6 July 2012 Decision, where these arguments have already been fully litigated, and reiterates that admission into evidence in no way constitutes a final determination of the reliability of the document in question, which is interpreted and evaluated in light of all the evidence before the Chamber.³⁰ The Stanišić Defence has not, in this respect, demonstrated any particular circumstances, such as new facts or arguments, that warrant reconsideration in order to avoid injustice. Also, recalling that the Stanišić Defence did not object to the admission of P973 into evidence when the issue was litigated, the Chamber considers that the alleged lack of contextualising materials does not impact, in any way, upon the admissibility of P973.

13. In view of the above, the Chamber considers that the arguments submitted by the Stanišić Defence are insufficient to establish that the Chamber made a clear error of reasoning in admitting P973 into evidence, or that reconsideration of the Impugned Decision is necessary to avoid an injustice.

²⁸ 6 July 2012 Decision, para. 11.

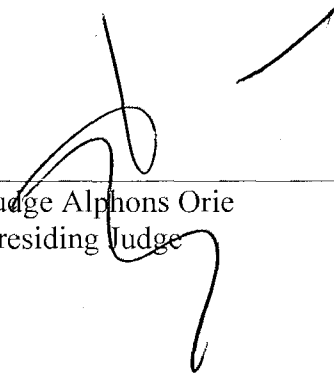
²⁹ P973, p. 6.

³⁰ 6 July 2012 Decision, para. 12.

V. DISPOSITION

14. For the foregoing reasons, the Chamber **DENIES** the Request.

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



Judge Alphons Orie
Presiding Judge

Dated this Seventeenth day of August 2012
At The Hague
The Netherlands

[Seal of the Tribunal]