



International Residual Mechanism
for Criminal Tribunals

Case No.: MICT-15-96-
AR.Misc

Date: 14 December 2018

Original: English

IN THE APPEALS CHAMBER

Before: Judge Theodor Meron, Presiding
Judge Lee G. Muthoga
Judge Christoph Flügge
Judge Florence Rita Arrey
Judge Ben Emmerson

Registrar: Mr. Olufemi Elias

Decision of: 14 December 2018

PROSECUTOR

v.

**JOVICA STANIŠIĆ
FRANKO SIMATOVIĆ**

PUBLIC

**DECISION ON A PROSECUTION MOTION FOR ENFORCEMENT
OF ORDER FOR RETRIAL**

The Office of the Prosecutor:

Mr. Douglas Stringer

Counsel for the Accused:

Mr. Wayne Jordash and Mr. Iain Edwards for Mr. Jovica Stanišić
Mr. Mihajlo Bakrač and Mr. Vladimir Petrović for Mr. Franko Simatović

1. The Appeals Chamber of the International Residual Mechanism for Criminal Tribunals (“Appeals Chamber” and “Mechanism”, respectively) is seized of the “Prosecution Motion for Enforcement of Order for Retrial”, filed on 3 October 2018 with a public annex (“Motion”),¹ in which the Prosecution requests that the Appeals Chamber enforce its order for retrial and order the trial chamber of the Mechanism seized of this case (“Trial Chamber”) to determine the admissibility of evidence in a manner consistent with the Rules of Procedure and Evidence of the Mechanism (“Rules”) and applicable jurisprudence.² Jovica Stanišić (“Stanišić”) and Franko Simatović (“Simatović”) filed responses on 17 October 2018,³ and the Prosecution filed a reply on 25 October 2018.⁴

I. BACKGROUND

2. On 9 December 2015, the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (“ICTY”) rendered its judgement and ordered that Jovica Stanišić and Franko Simatović be retried on all counts of the indictment against them.⁵ The retrial before the Trial Chamber commenced on 13 June 2017.⁶

3. On 2 February 2017, the Trial Chamber decided to limit the Prosecution’s evidence primarily to the evidence that was presented during the original trial.⁷ The Trial Chamber also decided that, in limited or exceptional instances, the Prosecution may be permitted to present new evidence, including when the new evidence: (i) may be necessary as evidence presented during the original trial has subsequently become unavailable due to circumstances outside the Prosecution’s control; or (ii) was unavailable during the original trial and appeal proceedings, could not have been

¹ Order Assigning Judges to a Case Before the Appeals Chamber, 15 October 2018, p. 1.

² Motion, paras. 1, 2, 15.

³ Stanišić Defence Response to Prosecution Motion for Enforcement of Order for Retrial, 17 October 2018 (“Stanišić Response”); Simatović Defence Response to Prosecution Motion for Enforcement of Order for Retrial, 17 October 2018 (“Simatović Response”). Stanišić applies for an extension of 743 words to the word limit for his response, arguing that the subject matter of the Motion is novel and of considerable importance. *See* Stanišić Response, para. 5. The Prosecution does not object and the Appeals Chamber considers the Stanišić response as properly filed.

⁴ Prosecution Consolidated Reply to Defence Responses to Prosecution Motion for Enforcement of Order for Retrial, 25 October 2018 (“Reply”). On 1 November 2018, Stanišić filed a request for leave to file a sur-reply, which the Prosecution opposes. Stanišić Request for Leave to File Sur-Reply in Relation to Prosecution Motion for Enforcement of Order for Retrial, 1 November 2018 (“Stanišić Request for Sur-Reply”); Prosecution Opposition to Stanišić Request for Leave to File Sur-Reply in Relation to Prosecution Motion for Enforcement of Order for Retrial, 5 November 2018.

⁵ *Prosecutor v. Jovica Stanišić and Franko Simatović*, Case No. IT-03-69-A, Judgement, 9 December 2015 (“*Stanišić and Simatović* Appeal Judgement”), paras. 129, 131.

⁶ Transcript 13 June 2017 p. 2.

⁷ *Prosecutor v. Jovica Stanišić and Franko Simatović*, Case No. MICT-15-96-PT, Decision on Stanišić’s Request for Stay of Proceedings, 2 February 2017 (“Impugned Decision”), paras. 23, 27.

discovered through the exercise of due diligence, and its admission is in the interests of justice.⁸ On 9 February 2017, the Prosecution requested certification to appeal the Impugned Decision to the extent it limits the evidence during the retrial primarily to the evidence that was presented during the original trial.⁹ The Trial Chamber denied the request on 1 March 2017, stating that granting certification to appeal a decision on the admissibility of evidence has to be the absolute exception, and, finding that, in the present circumstances, the Impugned Decision “does not involve an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial or is one where immediate resolution by the Appeals Chamber may materially advance the proceedings.”¹⁰ Subsequently, the Trial Chamber denied Prosecution requests for certification to appeal, *inter alia*, decisions that relied on the Impugned Decision in denying the admission of evidence that was not presented in the original trial.¹¹

4. The Prosecution submits that the Appeals Chamber has jurisdiction over the Motion.¹² It further submits that the Trial Chamber erred in limiting the evidence the Prosecution may adduce during the retrial as the Appeals Chamber did not do so when ordering the retrial.¹³ The Prosecution requests that the Appeals Chamber “enforce the order for retrial and order the Trial Chamber to determine the admissibility of evidence in a manner that is consistent with fair trial principles, applicable jurisprudence and the Rules”.¹⁴ Stanišić and Simatović respond that the Motion should be found inadmissible as it seeks appellate review of issues which are not subject to appeal as of right and for which certification to appeal has not been granted.¹⁵ Alternatively, Stanišić and

⁸ Impugned Decision, para. 23. *See also Prosecutor v. Jovica Stanišić and Franko Simatović*, Case No. MICT-15-96-PT, Decision on Prosecution Submission in Relation to the Chamber’s Limitation on New Evidence, 31 May 2017, para. 3.

⁹ *Prosecutor v. Jovica Stanišić and Franko Simatović*, Case No. MICT-15-96-PT, Prosecution Motion for Reconsideration or, in the Alternative, Request for Certification to Appeal and for Urgent Stay of the Decision Limiting the Presentation of Evidence at Trial and for Abeyance of Decisions On Motions Pending Reconsideration or Appeal, 9 February 2017, paras. 1, 2, 22.

¹⁰ *Prosecutor v. Jovica Stanišić and Franko Simatović*, Case No. MICT-15-96-PT, Decision on Requests for Certification to Appeal Decision on Stanišić’s Request for Stay of Proceedings, 1 March 2017, paras. 11, 13.

¹¹ *See Prosecutor v. Jovica Stanišić and Franko Simatović*, Case No. MICT-15-96-T, Decision on Prosecution Request for Certification to Appeal Decision on Prosecution Motion for Admission of Evidence of RFJ-037 Pursuant to Rule 111, 1 May 2018 (confidential), paras. 9, 13; *Prosecutor v. Jovica Stanišić and Franko Simatović*, Case No. MICT-15-96-T, Decision on Prosecution Request for Certification to Appeal Decision on Prosecution Motions for Admission of Evidence Pursuant to Rule 112, 16 May 2018, pp. 1-3; *Prosecutor v. Jovica Stanišić and Franko Simatović*, Case No. MICT-15-96-T, Decision on Prosecution Consolidated Request for Certification to Appeal Decisions on Prosecution Motions for Admission of Evidence of RFJ-040 and RFJ-104 Pursuant to Rule 111, 26 September 2018, pp. 1, 2; *Prosecutor v. Jovica Stanišić and Franko Simatović*, Case No. MICT-15-96-T, Decision on Prosecution Request for Certification to Appeal Decision on Prosecution’s First, Second, and Third Omnibus Motions for Admission of Evidence Pursuant to Rule 111, 2 October 2018, pp. 1, 2; *Prosecutor v. Jovica Stanišić and Franko Simatović*, Case No. MICT-15-96-T, Decision on Prosecution Request for Certification to Appeal Decision on Prosecution Fourth Omnibus Motion for Admission of Evidence Pursuant to Rule 111, 5 November 2018, pp. 1, 2.

¹² Motion, paras. 2-5.

¹³ Motion, paras. 1, 4, 6, 7, 10.

¹⁴ Motion, para. 15.

¹⁵ Simatović Response, paras. 2-6, 10, 17, 18; Stanišić Response, paras. 1, 2, 6-12.

Simatović contend that the Motion should be dismissed on the merits.¹⁶ The Appeals Chamber proceeds to determine whether the Motion is admissible, which is a threshold issue.

II. DISCUSSION

5. The Prosecution submits that the Appeals Chamber has “inherent jurisdiction over the enforcement of its orders and any decisions rendered as a consequence thereof” and argues that, in the circumstances of this case, it has “the responsibility to ensure proper implementation of its [order for retrial]”.¹⁷ The Prosecution further asserts that the Appeals Chamber’s competence is “a corollary of the well-established principle that the *ratio decidendi* of Appeals Chamber decisions is binding on [t]rial [c]hambers”.¹⁸ In the Prosecution’s view, the Appeals Chamber’s intervention is required at this stage, more so because the Trial Chamber has not yet pronounced itself on what evidence the Defence may present.¹⁹

6. In their respective responses, Stanišić and Simatović argue that the Motion should be found inadmissible because no appeal lies as of right for the Impugned Decision and its application in subsequent decisions and because the Trial Chamber denied requests for certification to appeal these decisions.²⁰

7. The Prosecution replies that the Appeals Chamber has jurisdiction over the enforcement of its own order for retrial, and that the interests of justice and judicial economy mandate that the Appeals Chamber address this issue now rather than at the appeal stage when it would be too late for an effective remedy.²¹

8. The Appeals Chamber finds unpersuasive the argument that it has inherent jurisdiction over the Motion in view of the framework in the Rules concerning appeals during trial, including retrial.²² In this instance, the Appeals Chamber of the ICTY ordered a retrial on all counts of the

¹⁶ Simatović Response, paras. 2, 7-9, 11, 16; Stanišić Response, paras. 1, 4, 13, p. 10. Stanišić further requests that the Appeals Chamber qualify the Motion as frivolous or an abuse of process, or that it remit the matter to the Trial Chamber to decide whether it can be so qualified, and that it caution the Prosecution. *See* Stanišić Response, para. 30, p. 10.

¹⁷ Motion, paras. 2, 3, *referring to In Re. André Ntagerura*, Case No. ICTR-99-46-A28, Decision on Motion for Leave to Appeal the President’s Decision of 31 March 2008 and the Decision of Trial Chamber III Rendered on 15 May 2008, 11 September 2008, para. 12. *See also* Reply, paras. 2, 3.

¹⁸ Motion, para. 3.

¹⁹ Motion, paras. 4, 5; Reply, para. 4.

²⁰ Simatović Response, paras. 2, 3, 7-9; Stanišić Response, paras. 1, 2, 6, 12, p. 10.

²¹ Reply, paras. 2, 4, 7.

²² The jurisprudence the Prosecution invokes to support its argument that the Appeals Chamber has inherent jurisdiction to determine whether the Trial Chamber has correctly implemented its order for retrial concerns interlocutory appeal decisions where the Appeals Chamber of the ICTY was properly seized of a matter because it concerned an appeal as of right or the appeal had been certified. *See* Motion, para. 3, *referring to Prosecutor v. Vojislav Šešelj*, Case No. IT-03-

indictment²³ and the retrial is underway before the Trial Chamber. The Motion only challenges a limited aspect of the retrial proceedings: the Impugned Decision and its application in subsequent decisions concerning the admission of evidence.²⁴ Consequently, the Motion can be only properly characterized as an interlocutory appeal of decisions taken during the retrial concerning the admission of evidence.²⁵

9. The Appeals Chamber observes that the Rules do not provide for interlocutory appeal as of right of a decision taken by a trial chamber concerning the admission of evidence. Furthermore, pursuant to Rule 80(B) of the Rules, decisions by the trial chamber, other than those for which appeal as of right is provided in the Rules, are without interlocutory appeal save with certification by the trial chamber.²⁶ Consequently, appellate review of decisions related to the admission of evidence is limited to where the issue arises in an interlocutory appeal certified by a trial chamber or in an appeal against a conviction or acquittal.²⁷

10. As noted above, the Trial Chamber has denied the Prosecution's request to certify for appeal the Impugned Decision as well as subsequent decisions that relied on it in denying admission of certain evidence.²⁸ In the absence of certification to appeal, the Prosecution may only challenge the Impugned Decision and the subsequent decisions in an appeal from judgement. While the

67-AR65.1, Decision on Urgent Prosecution Motion for Enforcement of Decision on Revocation of Provisional Release, 22 May 2015 (confidential), paras. 6-11; *Prosecutor v. Ante Gotovina et al.*, Case No. IT-06-90-AR73.3, Decision on Joint Request of Ante Gotovina and Mladen Markač for a Writ of Mandamus, 27 March 2009, para. 5. Likewise, the Appeals Chamber considers that the basis on which appellate jurisdiction was exercised by the Appeals Chamber of the International Criminal Tribunal for Rwanda ("ICTR") in *In Re. André Ntagerura*, Case No. ICTR-99-46-A28, is inapposite as the applicant in that proceeding had no recourse to challenge the relevant decisions after his acquittal, whereas the parties to this retrial may seek relief through appeal from the Trial Chamber's judgement.

²³ *Stanišić and Simatović* Appeal Judgement, paras. 129, 131.

²⁴ See Motion, paras. 1, 4, 7-15; *supra* para. 3.

²⁵ The Appeals Chamber observes that, in arguing that the Trial Chamber has violated the order for retrial through the Impugned Decision and its reliance on that decision in subsequently denying the admission of evidence not admitted in the original trial, the Prosecution principally relies on two decisions issued by the Appeals Chamber of the ICTY and the ICTR adjudicating the scope of evidence allowable in a retrial. See Motion, nn. 16, 17, 25, 28; Reply, nn. 5, 25, referring to *Prosecutor v. Tharcisse Muvunyi*, Case No. ICTR-2000-55A-AR73, Decision on the Prosecutor's Appeal Concerning the Scope of Evidence to be Adduced in the Retrial, 24 March 2009 ("*Muvunyi* Decision of 24 March 2009"); Motion, nn. 24-26, 29, 31, 35; Reply, nn. 5, 16-18, referring to *Prosecutor v. Ramush Haradinaj et al.*, Case No. IT-04-84-bis-AR73.1, Decision on Haradinaj's Appeal on Scope of Partial Retrial, 31 May 2011 ("*Haradinaj et al.* Decision of 31 May 2011"). However, in both instances, the relevant trial chamber had certified the issue concerning the scope of the retrial for appellate review. See *Haradinaj et al.* Decision of 31 May 2011, para. 7; *Muvunyi* Decision of 24 March 2009, n. 2.

²⁶ See also Rule 79(B) of the Rules (concerning certification to appeal with respect to preliminary motions).

²⁷ Cf. *Prosecutor v. Rasim Delić*, Case No. IT-04-83-Misc.1, Decision on Prosecution's Appeal, 1 November 2006, p. 3 (considering that the Appeals Chamber of the ICTY has no inherent authority to intervene in an interlocutory decision of a trial chamber not subject to a right of appeal and to which certification to appeal has been denied). See also *Pauline Nyiramasuhuko v. The Prosecutor*, Case No. ICTR-98-42-AR73, Decision on Pauline Nyiramasuhuko's Request for Reconsideration, 27 September 2004, para. 10 (noting that certification of an appeal has to be the absolute exception when deciding on the admissibility of the evidence, and that it is first and foremost the responsibility of trial chambers, as triers of fact, to determine which evidence to admit during the course of the trial).

²⁸ See *supra* para. 3.

Prosecution asserts that the alleged error must be corrected now to forego possible prejudice to the Accused and because no effective remedy would exist on appeal from judgement, the Appeals Chamber disagrees. It will be open to both the Prosecution and the Accused to appeal the relevant decisions of the Trial Chamber in an appeal from judgement during which they may also seek to admit additional evidence pursuant to Rule 142 of the Rules, including any evidence that they may contend was erroneously excluded by the Trial Chamber.

11. For the foregoing reasons, the Appeals Chamber finds the Motion inadmissible.²⁹ Accordingly, the Appeals Chamber will not address the Motion on the merits.

III. DISPOSITION

12. Based on the foregoing, the Appeals Chamber **DISMISSES** the Motion.

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

Done this 14th day of December 2018,
At The Hague,
The Netherlands

Judge Theodor Meron
Presiding Judge

[Seal of the Mechanism]

²⁹ In view of the disposition, the Appeals Chamber finds it unnecessary to consider the sur-reply filed in connection with the Stanišić Request for Sur-Reply and dismisses the litigation concerning its admissibility as moot. The Appeals Chamber further denies Stanišić's requests to qualify the Motion as frivolous or as an abuse of process or to remit such issues for determination by the Trial Chamber.