

**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 Nos. IT-03-69-A &
IT-09-92-T
Date: 3 February 2014
Original: English

IN THE APPEALS CHAMBER

Before: Judge Fausto Pocar, Presiding
Judge Carmel Agius
Judge Liu Daqun
Judge Khalida Rachid Khan
Judge Koffi Kumelio A. Afande

Registrar: Mr. John Hocking

Decision of: 3 February 2014

PROSECUTOR

v.

**JOVICA STANIŠIĆ
FRANKO SIMATOVIĆ**

PUBLIC

**DECISION ON RATKO MLADIĆ'S MOTION FOR ACCESS TO
THE PSYCHOLOGICAL EXAMINATION OF MILAN BABIĆ
ON 5TH MARCH 2004**

The Office of the Prosecutor:

Stanišić and Simatović Appeal
Mr. Peter Kremer QC
Mr. Mathias Marcussen

Mladić Trial
Mr. Dermot Groome
Mr. Peter McCloskey

Counsel for the Defence:

Mr. Wayne Jordash and Mr. Scott Martin for Mr. Jovica Stanišić
Mr. Mihajlo Bakrač and Mr. Vladimir Petrović for Mr. Franko Simatović

Counsel for Ratko Mladić:

Mr. Branko Lukić and Mr. Miodrag Stojanović

THE APPEALS CHAMBER of the 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 (“Appeals Chamber” and “Tribunal”, respectively);

BEING SEISED OF the “Mladić Motion for Access to the Psychological Examination of Milan Babić on 5th March 2004” filed confidentially by Ratko Mladić (“Mladić”) on 21 November 2013 (“Motion”), in which Mladić requests access to all confidential materials concerning the psychological examination of Milan Babić (“Babić”) of 5 March 2004 (“Psychological Examination”) pursuant to Rule 75(G) of the Rules of Procedure and Evidence of the Tribunal (“Rules”);¹

NOTING that, in support of his Motion, Mladić alleges that Trial Chamber I of the Tribunal partially granted the admission of evidence related to Babić in this case pursuant to Rule 92 *quater* of the Rules and referred to the Psychological Examination in its Trial Decision of 16 December 2010 as a basis on which Jovica Stanišić (“Stanišić”) questioned Babić’s mental health at the time he gave statements and testimony before the Tribunal;²

NOTING FURTHER that Mladić submits that the Prosecution in his case has also sought to introduce evidence of Babić pursuant to Rule 92 *quater* of the Rules and that the confidential materials requested are likely to assist his case materially;³

NOTING the “Prosecution Response to Mladić Motion for Access to the Psychological Examination of Milan Babić on 5th March 2004” filed confidentially by the Office of the Prosecutor (“Prosecution”) on 5 December 2013 (“Response”), in which the Prosecution argues that the Motion should be denied as the Psychological Examination is not part of the trial record in this case;⁴

NOTING that the Prosecution further contends that the only reference in the trial record in this case to material concerning the Psychological Examination pertains to Judge Parker’s publicly available report on Babić’s death;⁵

¹ Motion, paras 1, 9, 12.

² Motion, paras 6-7, referring to *Prosecutor v. Jovica Stanišić and Franko Simatović*, Case No. IT-03-69-T, Decision on Prosecution’s Motion for Admission of Evidence of Witness Milan Babić Pursuant to Rule 92 *Quater*, 16 December 2010 (“Trial Decision of 16 December 2010”), para. 18.

³ Motion, paras 5, 10.

⁴ Response, paras 1-2.

⁵ Response, para. 2, referring to Judge Kevin Parker, “Report to the President – Death of Milan Babić”, 8 June 2006 (“Parker Report”) and Trial Decision of 16 December 2010, para. 18.

NOTING the “Deputy Registrar’s Submission Regarding the Accused Mladić’s Motion for Disclosure of Records Pertaining to Milan Babić” filed confidentially by the Deputy Registrar pursuant to Rule 33(B) of the Rules on 5 December 2013 (“Deputy Registrar Submission”), in which the Deputy Registrar requests that the Motion be dismissed, arguing *inter alia* that there is no legal basis for the Appeals Chamber to decide on its merits as the confidential materials concerning the Psychological Examination are not part of the trial record in this case;⁶

NOTING that the Deputy Registrar further argues that the confidential materials are protected by medical confidentiality and that Rule 75 of the Rules is inapplicable;⁷

NOTING that neither Stanišić nor Franko Simatović responded to the Motion and that Mladić did not reply to the Response;

RECALLING that pursuant to the Practice Direction on Procedure for the Filing of Written Submissions in Appeal Proceedings Before the International Tribunal, a response to a motion filed during appeals from judgement shall be filed within ten days of the filing of the motion;⁸

NOTING that the Prosecution, without providing any reasons for its late filing, filed its Response 14 days after the Motion and therefore did not comply with the Practice Direction;

CONSIDERING, however, that the Appeals Chamber retains the discretion to consider as validly filed any response filed after the expiration of a prescribed time-limit;⁹

CONSIDERING that since Mladić has not suffered prejudice from the Prosecution’s failure to file its Response by the prescribed deadline, the Appeals Chamber will consider the Prosecution Response as validly filed;

RECALLING, however, that the Appeals Chamber has recently reminded the Prosecution of the applicable deadline for the filing of a response to a motion filed during appeals from judgement;¹⁰

CONSIDERING therefore that the Appeals Chamber will not tolerate such violations of the Practice Direction in the future;

⁶ Deputy Registrar Submission, paras 1-2, 4.

⁷ Deputy Registrar Submission, para. 4, referring *inter alia* to Rule 34(C) of the Rules Governing the Detention of Persons Awaiting Trial or Appeal Before the Tribunal or Otherwise Detained on the Authority of the Tribunal, Doc. IT/38/Rev.9, 21 July 2005. The Deputy Registrar further requests the right to present additional arguments should the Appeals Chamber decide to consider the merits of the Motion. See Deputy Registrar Submission, para. 5.

⁸ Practice Direction on Procedure for the Filing of Written Submissions in Appeal Proceedings Before the International Tribunal, Doc. IT/155/Rev. 4, 4 April 2012 (“Practice Direction”), para. 13.

⁹ Practice Direction, para. 19.

¹⁰ Decision on Goran Hadžić’s Motion for Access to Confidential Material in the *Stanišić and Simatović* Case, 1 November 2013, para. 7.

CONSIDERING that a review of the relevant submissions demonstrates that they do not contain information which raises confidentiality concerns and that there is no rationale that justifies maintaining the confidential status of the Motion, the Response and the Deputy Registrar Submission;

RECALLING that the Appeals Chamber can only rule based on the evidence before it, which is the combination of the evidence found in the trial record and any new evidence admitted pursuant to Rule 115 of the Rules;¹¹

CONSIDERING that the Psychological Examination is merely mentioned in the publicly available Parker Report referred to in the Trial Decision of 16 December 2010,¹² and that the trial record does not contain confidential materials concerning the Psychological Examination;

FINDING therefore that the Appeals Chamber cannot rule on the merits of the Motion;

FOR THE FOREGOING REASONS,


HEREBY DENIES the Motion;

DIRECTS the Registry to lift the confidential status of the Motion, the Response, and the Deputy Registrar Submission; and

REMINDS the Prosecution to abide strictly by the Practice Direction.

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

Dated this third day of February 2014,
At The Hague,
The Netherlands.


Judge Fausto Pocar
Presiding Judge

[Seal of the Tribunal]

¹¹ *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, Judgement, 30 November 2006, para. 311.

¹² See Trial Decision of 16 December 2010, para. 18, referring to *Prosecutor v. Jovica Stanišić and Franko Simatović*, Case No. IT-03-69-T, Defence Response to Prosecution Motion for Admission of Evidence of Witness Milan Babic [sic] Pursuant to 92quater, 9 July 2007 (confidential), para. 35, referring to Parker Report.