



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

IT-03-69-T
D27524-D27518
28 January 2011

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Case No. IT-03-69-T
Date: 28 January 2011
Original: English

IN TRIAL CHAMBER I

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

Registrar: Mr John Hocking

Decision of: 28 January 2011

PROSECUTOR

v.

**JOVICA STANIŠIĆ
FRANKO SIMATOVIĆ**

PUBLIC

**DECISION ON ADMISSION INTO EVIDENCE OF PRIOR
TESTIMONY, STATEMENT, AND RELATED DOCUMENTS
CONCERNING WITNESS JF-052**

Office of the Prosecutor
Mr Dermot Groome

Counsel for Jovica Stanišić
Mr Wayne Jordash
Mr Geert-Jan Alexander Knoops

Counsel for Franko Simatović
Mr Mihajlo Bakrač
Mr Vladimir Petrović

I. PROCEDURAL BACKGROUND

1. Witness JF-052 testified before the Chamber on 3 November 2010. He had earlier testified in another case before this Tribunal. When asked to attest to his prior testimony, the witness claimed that he did not remember a number of facts.¹ The Prosecution nevertheless tendered the witness's entire prior testimony into evidence pursuant to Rule 92 *ter* of the Tribunal's Rules of Procedure and Evidence ("Rules") and it was marked for identification as document P1587.² The Prosecution submitted that the witness confirmed that he had testified honestly in the prior case and that his clarifications were matters he no longer recalled as opposed to being corrections of inaccuracies.³ It submitted that the requirements for admission into evidence under Rule 92 *ter* of the Rules had been met for the parts the witness had recalled and had attested to.⁴ The Prosecution further submitted that the Chamber could also rely with caution on the non-attested portions if there was corroboration.⁵ The Stanišić Defence objected to the tendering of P1587, arguing that the witness had effectively retracted the substance of his prior testimony and that the criteria for admission under Rule 92 *ter* of the Rules had thus not been met.⁶ The Simatović Defence joined the Stanišić Defence's objections.⁷ On the same day, the Chamber informed the parties that it would consider admitting the witness's prior testimony under Rules 92 *ter* (for the attested parts) and 89 (C) (for the non-attested parts) of the Rules, the latter pursuant to the case law on previous inconsistent statements.⁸

2. The Chamber further marked for identification four documents tendered as associated exhibits to P1587.⁹ The Prosecution also tendered a proofing note for Witness JF-052 in order to provide for transparency in relation to the witness's clarifications to his previous testimony.¹⁰ The proofing note was marked for identification as P1594.¹¹ The Defence also tendered the witness's statement of the year 2000 for credibility purposes and the document was marked for identification

¹ T. 8793-8796, 8798-8800, 8843.

² T. 8801, 8819.

³ T. 8803, 8808.

⁴ T. 8809.

⁵ T. 8803.

⁶ T. 8801-8802.

⁷ T. 8802-8803.

⁸ T. 8815-8816.

⁹ See documents P1588-P1591.

¹⁰ T. 8840.

¹¹ T. 8844.

as D138.¹² The Chamber then invited the parties to make further submissions by 10 November 2010.¹³

3. On 10 November 2010, the Prosecution filed further submissions on the admissibility of documents tendered through Witness JF-052.¹⁴ It reiterated that the attested parts of P1587 are admissible under Rule 92 *ter* of the Rules.¹⁵ It further submitted that the non-attested parts of P1587 are admissible as “recorded recollections” either under Rules 92 *ter* or, in the alternative, 89 (C) of the Rules, but should in any event only be relied upon if there is corroboration from independent evidence.¹⁶ The Prosecution submitted that recorded recollections are properly admitted under Rule 92 *ter* of the Rules, arguing that the purpose of Rule 92 *ter*’s foundation questions is to establish that the witness was honest when he gave his previous statement and that his previous statement accurately recorded what he said.¹⁷ In the alternative, the Prosecution submitted that, provided the witness’s memory failure is genuine, admission as recorded recollections pursuant to Rule 89 (C) of the Rules is preferable to admission as previous inconsistent statements.¹⁸ The Prosecution pointed out that if a witness states that he does not recall what he said previously, there is no inconsistency between the statements as both can be true.¹⁹ The Prosecution further submitted that since the witness testified under oath in the previous case, and considering that he did not disavow parts of his previous testimony but merely could not remember them, his evidence should be considered more reliable than a previous inconsistent statement that is being disavowed in court.²⁰ In a second alternative, should the Chamber consider that the witness’s memory failure is not genuine, the Prosecution submitted that the non-attested parts should be admitted as previous inconsistent statements under Rule 89 (C) of the Rules.²¹ The Prosecution further submitted that P1588-P1591 should be admitted as associated exhibits to P1587.²² Finally, the Prosecution submitted that D138 and P1594 should be admitted into evidence for the purpose of assessing Witness JF-052’s credibility.²³

¹² T. 8841-8842, 8844.

¹³ T. 8868.

¹⁴ Prosecution Further Submissions on Evidence of JF-052, 10 November 2010 (Confidential) (“Prosecution Submissions”).

¹⁵ Prosecution Submissions, para. 6.

¹⁶ Prosecution Submissions, paras 8-9, 14.

¹⁷ Prosecution Submissions, para. 13.

¹⁸ Prosecution Submissions, para. 14.

¹⁹ Prosecution Submissions, para. 15.

²⁰ Prosecution Submissions, paras 16-18.

²¹ Prosecution Submissions, para. 19.

²² Prosecution Submissions, para. 20.

²³ *Ibid.*

4. On 18 November 2010, the Stanišić Defence filed further submissions on the admissibility of documents tendered through Witness JF-052.²⁴ It submitted that the Prosecution ought to bear the burden of redacting the prior testimony of the witness, eliminating the non-attested parts.²⁵ The Stanišić Defence further submitted that D138 should be admitted for the sole purpose of assessing the witness's credibility and that P1594 should be admitted for the sole purpose of providing context for understanding the extent of the witness's corrections.²⁶ The Simatović Defence did not file any further submissions.

II. APPLICABLE LAW

5. Rule 89 (C) of the Rules provides that a Chamber may admit any relevant evidence which it deems to have probative value. Rule 92 *ter* sets out, in relevant parts, that a Chamber may admit, in whole or in part, the evidence of a witness in the form of a written statement given by a witness in proceedings before the Tribunal, under the following conditions: (i) the witness is present in court; (ii) the witness is available for cross-examination and any questioning by the Judges; and (iii) the witness attests that the written statement or transcript accurately reflects that witness's declaration and what the witness would say if examined.

6. The Appeals Chamber has set out that a Trial Chamber may admit a witness's previous inconsistent statement into evidence for the purposes of assessing a witness's credibility.²⁷ A Trial Chamber may also admit a witness's previous inconsistent statement for the truth of its contents when it fulfils the criteria under the Rules of being relevant and sufficiently reliable to be accepted as probative.²⁸ In determining whether a statement is reliable for the purpose of proving the truth of its contents, a Chamber may consider the content of the statement, the circumstances under which it arose, and the opportunity to cross-examine the person who made the statement.²⁹ Further, when

²⁴ Stanišić Submissions Concerning Application of Rule 92 *ter* to Out-of-Court Statements of Witness JF-052, 18 November 2010 (Confidential) ("Stanišić Submissions"). The Stanišić Defence was given an extension to file its further submissions by 19 November 2010, see T. 9131-9132.

²⁵ Stanišić Submissions, para. 3.

²⁶ Stanišić Submissions, para. 4.

²⁷ *Prosecutor v. Popović et al.*, Case No. IT-05-88AR73.3, Decision on Appeals against Decision on Impeachment of a Party's Own Witness, 1 February 2008 ("*Popović Appeal Decision*"), para. 32.

²⁸ *Prosecutor v. Limaj et al.*, Case No. IT-03-66-T, Decision on the Prosecution's Motion to Admit Prior Statements as Substantive Evidence, 25 April 2005, paras 18-21, 25, 34; *Popović Appeal Decision*, para. 31; *Prosecutor v. Gotovina et al.*, Case No. IT-06-90-T, Guidance on the Admissibility into Evidence of Unattested Parts of Rule 92 *ter* Statements as Previous Inconsistent Statements, 30 March 2010 ("*Gotovina Guidance*"), para. 6.

²⁹ *Prosecutor v. Aleksovski*, Case No. IT-95-14/1-AR73, Decision on Prosecutor's Appeal on Admissibility of Evidence, 16 February 1999, para. 15.

admitting into evidence a witness's previous inconsistent statement, a Chamber must specify whether it admits the statement to impeach the witness's credibility, or for the truth of its contents.³⁰

III. DISCUSSION

7. The Chamber notes that in relation to the witness's prior testimony, which had been recorded and transcribed, he stated that he had reviewed it, that he had testified truthfully at the time, and that, taking into consideration his clarifications, it accurately reflected what he said at the time and what he would say if asked again. The Chamber accordingly finds that the parts for which the witness did not state that he could not remember them were properly attested to and are admissible under Rule 92 *ter* of the Rules.

8. The witness testified that he could not remember the facts contained in certain parts of P1587 ("Remaining Parts"). The Prosecution submitted that meeting the requirements of the common law notion of recorded recollections could make the Remaining Parts admissible pursuant to Rule 92 *ter* of the Rules. Considering that one of the requirements of Rule 92 *ter* of the Rules is that a witness "attests that the written statement or transcript accurately reflects that witness's declaration and *what the witness would say if examined*"³¹, the Chamber finds that the Remaining Parts are not attested to and that they are therefore not admissible pursuant to Rule 92 *ter* of the Rules.

9. The Prosecution further submitted that the case law on previous inconsistent statements does not fit squarely in this situation as there is no inconsistency between Witness JF-052's statements. Not attesting to parts of a previous statement may not always amount to giving inconsistent statements but the effect is the same in that the later statement differs in substance from the previous one. To argue otherwise would create a situation where disavowed parts of a previous statement could be admissible, but parts a witness claims to have forgotten could not. Accordingly, the Chamber orients itself on the case law on previous inconsistent statements and accepts its relevance also in the broader sphere of non-attested parts of a previous statement.

10. The Chamber considers the Remaining Parts to be relevant to the Indictment. Further, the Chamber had informed the parties of its inclination to consider admission into evidence of the

³⁰ *Prosecutor v. Delić*, Case No. IT-04-83-AR73.1, Decision on Rasim Delić's Interlocutory Appeal against Trial Chamber's Oral Decisions on Admission of Exhibits 1316 and 1317, 15 April 2008, paras 22-23; *Prosecutor v. Šešelj*, Case No. IT-03-67-T, Decision on the Prosecution's Oral Motion Seeking the Admission into Evidence of Witness Nebojša Stojanović's Three Written Statements, 11 September 2008, para. 11; *Prosecutor v. Šešelj*, Case No. IT-03-67-T, Decision on Admission of Evidence Presented During Testimony of Aleksandar Stefanović, 23 March 2009, para. 5; Gotovina Guidance, para. 6.

Remaining Parts under the case law of previous inconsistent statements during the examination-in-chief of Witness JF-052.³² Accordingly, the parties were put on notice to test the witness's memory failure during their examinations. Having heard the entirety of the testimony of Witness JF-052,³³ the Chamber is satisfied that the witness's memory failure is genuine. Furthermore, in determining the reliability of the Remaining Parts, the Chamber considers that the witness testified under oath in the previous case, that the recordings of the witness's testimony in the previous case could be made available for further assessment, that there were opportunities for cross-examination both in the previous and in the present case, that the witness was questioned about his memory failures, and that the witness's previous testimony was considerably closer in time to the events in question than his testimony in this case. The Chamber further considers that the witness did not disavow his previous answers but rather stated that he could not remember the facts in question. In conclusion, the Chamber is satisfied that the Remaining Parts are reliable for the purpose of admitting them for the truth of their content pursuant to Rule 89 (C) of the Rules.

11. The Prosecution submitted that, if admitted, the Remaining Parts should be treated with caution and only relied upon if there was corroboration from independent evidence. Having found that the Remaining Parts are reliable and can be admitted under Rule 89 (C) of the Rules, there is accordingly no express need of further corroboration to rely on them. At the same time, the Chamber clarifies that admission into evidence is not an indication of the weight, if any, that will ultimately be given to a particular document. In determining the weight to be given, the Chamber will take a very cautious approach and may consider whether there is corroborating evidence.

12. The Chamber is further satisfied that the associated exhibits (P1588-P1591) are such that the prior testimony (P1587) would be incomprehensible or of lesser probative value without them, and will accordingly admit them into evidence.

13. In relation to D138 (witness statement), the Chamber considered the witness's admission of not having been truthful when giving his witness statement.³⁴ In order to properly evaluate the ramifications of this statement in court, the Chamber finds it appropriate to admit into evidence, albeit for credibility purposes only, the witness's statement. In relation to P1594 (proofing note),

³¹ Emphasis added.

³² T. 8815-8816.

³³ The Simatović Defence was not prepared to cross-examine the witness and did not put any questions to him. The Chamber stated that it would consider any motion to re-call the witness (see T. 8863). On 16 December 2010, the Chamber set a deadline of 31 December 2010 for the Simatović Defence to inform the Chamber and the parties whether it wanted to request a re-call of the witness (see T. 10560). No such request was filed within the deadline set and on 6 January 2011 the Simatović Defence indicated through an informal communication, that it had decided not to make such a request.

³⁴ T. 8853-8854.

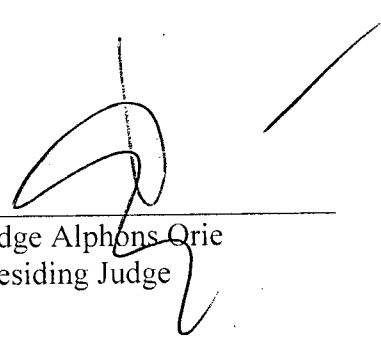
the Chamber is satisfied that all corrections to the witness's previous testimony are clearly recorded in the transcript of this case. As such, the Chamber does not require the proofing note in evidence to understand the witness's corrections. However, the proofing note also contains corrections and further information about the witness's statement and can therefore also be of assistance to the Chamber when determining the witness's credibility.

IV. DISPOSITION

14. For the foregoing reasons and pursuant to Rules 89 (C) and 92 *ter* of the Rules, the Chamber **ADMITS** into evidence documents P1587 (under seal), P1588 (under seal), P1589, P1590, and P1591 for the truth of their content; and

ADMITS into evidence documents P1594 (under seal) and D138 (under seal) for assessing Witness JF-052's credibility.

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



Judge Alphons Orie
Presiding Judge

Dated this twenty-eighth of January 2011
At The Hague
The Netherlands

[Seal of the Tribunal]