



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 July 2010
Original: English

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D22983-D22980
22 July 2010

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IN TRIAL CHAMBER I

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

Registrar: Mr John Hocking

Decision of: 22 July 2010

PROSECUTOR

v.

**JOVICA STANIŠIĆ
FRANKO SIMATOVIĆ**

PUBLIC

**REASONS FOR DECISION ON POSTPONEMENT OF CROSS-
EXAMINATION OF THE TESTIMONY OF
WITNESS MILOVANOVIĆ**

Office of the Prosecutor

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Counsel for Franko Simatović

Mr Mihajlo Bakrač
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I. PROCEDURAL HISTORY AND SUBMISSIONS

1. On 15 April 2010, the Stanišić Defence and the Simatović Defence jointly filed a confidential motion requesting the Chamber to postpone the evidence of Witness Milovanović (the “Witness”),¹ which the Trial Chamber denied in its confidential decision dated 22 April 2010.² In the 22 April Decision, the Chamber left the possibility open for future requests as a consequence of the scope of the testimony being broader than foreseen in the 65 *ter* filing or arising from the material received from the Republic of Serbia, i.e. diaries and other documents retrieved from Ratko Mladić’s home (“Mladić Material”).³

2. On 21 April 2010, the Prosecution informed the Defence via electronic correspondence of the Witness’ persistent refusal to cooperate with the Prosecution in relation to this case, and that due to the Witness’ lack of cooperation there was no prior ICTY statement in which his knowledge of the roles of Mr. Stanišić and Mr. Simatović (together “the Accused”) had been comprehensively explored.⁴ The Prosecution submitted that the Witness’ prior “statement” therefore was limited to what the Witness had publicly said in the documentary “The Unit” and in his previous testimony in other cases.⁵

3. On 22 April 2010, the Stanišić Defence and Simatović Defence orally requested the postponement of the testimony of the Witness in its entirety or, in the alternative, the postponement of his cross-examination.⁶ The Stanišić Defence requested in the alternative the adjournment of the Witness’ testimony for one day to allow for an opportunity to interview him.⁷ The Prosecution made its oral response the same day.⁸

4. Also on 22 April 2010, the Chamber orally denied the request to postpone the entire testimony of the Witness and decided that the examination of the Witness was to start.⁹ It granted, however, a delay of the cross-examination until Wednesday, 28 April 2010 and left open the possibility of reconsideration after hearing the examination-in-chief, in case the Witness provided testimony which would justify granting additional time to the Defence for the preparation of the

¹ Urgent Joint Defence Request for Postponement of the Trial and the Testimony of Witness JF-054 with Confidential Annexes A-D, 15 April 2010 (“Motion”), para. 23.

² Decision on Urgent Joint Defence Request for Adjournment of the Trial and the Postponement of the Testimony of Witness JF-054, 22 April 2010 (“22 April Decision”), paras 4, 6-7.

³ 22 April Decision, para. 6.

⁴ T. 4331-4333.

⁵ T. 4344-4354.

⁶ T. 4328-4330 [closed session], 4431.

⁷ T. 4351, 4359-4360.

⁸ T. 4344-4345.

⁹ T. 4354.

cross-examination.¹⁰ However, having heard the Witness' testimony in examination-in-chief, no further requests were made in this regard. The request to interview the Witness was made in the alternative and since the Chamber granted delayed cross-examination, this request did not require consideration.¹¹

II. DISCUSSION

5. The Chamber notes that the oral request for postponement of the testimony of the Witness raises additional arguments to those already addressed by the Chamber in the 22 April Decision. The Defence argues that it is disadvantaged by the fact that there is no prior statement of the Witness and also submitted that generally the issuance of a subpoena leads to an obligation for a witness to give a statement.¹² The Defence submitted that it was entitled to the Witness' previous evidence and "to the protection which flows from the disclosure rules, which is a reasonable time to consider that evidence, investigate it, and prepare for cross-examination."¹³ The Defence added that their cross-examination might not be effective since the Witness might give evidence during his examination-in-chief relating to the content of the documents rather than to their authentication.¹⁴ The Chamber hereby already establishes that this situation did not materialise.

6. The Prosecution responded that "there is no requirement that, before a witness can be called as a court witness, that person is compelled to write a statement"¹⁵ and that due to the Witness' persistent refusal to cooperate, both parties were in the exact same position.¹⁶

7. According to Rule 66(A)(ii) of the Rules of Procedure and Evidence ("Rules"), the Prosecution shall disclose copies of the statements of all witnesses whom the Prosecutor intends to call to testify at trial, and copies of all transcripts and written statements taken in accordance with Rule 92 *bis*, Rule 92 *ter*, and Rule 92 *quater* of the Rules.¹⁷

8. The purpose of Rule 66 is the disclosure of any prior statements that have been obtained. The Chamber notes that the obligation to disclose witness statements extends to all prior statements in the custody or under the control of the Prosecution.¹⁸ Rule 66 does not, however, require the

¹⁰ *Ibid.*

¹¹ T. 4359-4360.

¹² T. 4331, 4333, 4338-4341.

¹³ T. 4337.

¹⁴ T. 4335.

¹⁵ T. 4344.

¹⁶ T. 4344, 4346.

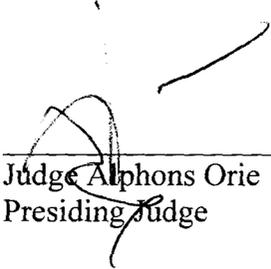
¹⁷ Rule 66(A)(ii).

¹⁸ *Prosecutor v. Jean-Baptiste Gatete*, Case No. ICTR-2000-61-PT, Decision on Defence Motions for Disclosure pursuant to Rule 66(A)(ii) and commencement of Trial, 13 October 2009 ("*Gatete Decision*"), para. 12.

Prosecution to produce a statement. The Chamber emphasizes that the Prosecution is neither able nor obliged to disclose documents that are not in its possession, or to which it does not have access.¹⁹ The subpoena issued in relation to the Witness required him to appear as a witness before the Tribunal but did not require him to give a statement.²⁰ An “uncooperative” witness may give testimony without providing the Prosecution with a prior statement.

9. According to Articles 20 and 21 of the Statute, an accused is entitled to a fair trial and to adequate time for the preparation of his defence. The Chamber finds, however, that the fact that a witness does not have a prior statement does not render a trial unfair or automatically put a party at an unjust disadvantage. A witness may provide evidence which was unforeseen to both parties during his *viva voce* examination, independent of any previous statements, and that it is for the Chamber to determine, on a case by case basis, whether this new information could affect the fairness of the trial proceedings. In the current case, the Chamber decided that a short postponement of the cross-examination would appropriately guarantee the fairness of the trial.²¹

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



Judge Alphons Orié
Presiding Judge

Dated this twenty-second July 2010
At The Hague
The Netherlands

[Seal of the Tribunal]

¹⁹ See *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-T, Decision on Josphe Nzirorera’s Motion of Notice of Violation of Rule 66 (A) (ii) for Witness ALZ and AMC, and for Remedial and Punitive Measures, 11 July 2007, para. 6; *Prosecutor v. Léonidas Nshogoza*, Case No. ICTR-07-91-PT, Decision on Defence Motion for the Prosecutor to Produce Video Tape of Interview with Witness BUC, 31 December 2008, para. 23; *Prosecutor v. Dominique Ntawukulilyayo.*, Case No. ICTR-05-82-PT, Interim Order to the Parties regarding Disclosure, 18 March 2009, para. 10; *Gatete* Decision, para. 12.

²⁰ *Subpoena Ad Testificandum*, 4 February 2010, p. 1.

²¹ Fn 9 *supra*.