



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-08-91-PT
Date: 14 September 2009
Original: English

IN TRIAL CHAMBER II

Before: Judge Burton Hall, Presiding
Judge Guy Delvoie
Judge Frederik Harhoff

Registrar: Mr. John Hocking

Decision of: 14 September 2009

PROSECUTOR

v.

MIĆO STANIŠIĆ AND STOJAN ŽUPLJANIN

PUBLIC

**DECISION ON THE MOTION OF MIĆO STANIŠIĆ FOR
CERTIFICATION TO APPEAL THE DECISION DENYING THE
MOTION TO VARY TRIAL DATE AND ON JOINT MOTION FOR
POSTPONEMENT OF THE START OF TRIAL**

The Office of the Prosecutor

Ms. Joanna Korner
Mr. Thomas Hannis

Counsel for the Accused

Mr. Slobodan Zečević and Mr. Slobodan Cvijetić for Mićo Stanišić
Mr. Igor Pantelić and Mr. Dragan Krgović for Stojan Župljanin

TRIAL CHAMBER II (“Trial 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 (“Tribunal”);

BEING SEISED of the “Motion for certification of the decision on motion to vary trial date of 14 September 2009 and request for a stay of proceedings”, filed on 9 September 2009 (“Motion for certification”) whereby the Defence of Mićo Stanišić (“Defence”):

- 1) seeks certification to appeal the Trial Chamber’s oral ruling at the pre-trial conference on 4 September 2009, by which the Trial Chamber, finding that it was “not convinced by any of the arguments that has [*sic*] been given to us today”,¹ confirmed its order of 19 August 2009 setting the date for commencement of trial for 14 September 2009,² thus denying the motion filed by the Defence on 4 September 2009 seeking that the start of the trial be postponed ten weeks (“Motion to vary”);³ and
- 2) requests that the start of trial be postponed until the Appeals Chamber has resolved the matter;

BEING SEISED ALSO of the “Joint motion for short adjournment of commencement of trial”, filed on 9 September 2009 by the Prosecution, the Defence of Mićo Stanišić and the Defence of Stojan Župljanin (“Joint motion”), whereby the parties jointly request that the start of the trial be postponed until 28 September 2009;

RECALLING as a preliminary matter, that it is incumbent upon the Trial Chamber, in taking its fully informed and reasoned decision at the pre-trial conference denying the Motion to vary and confirming the order to commence trial on 14 September 2009, to address the factors relevant to its decision as to whether the right of the accused to a fair trial, in particular the right to have adequate time and facilities for the preparation of his defence as laid down in Article 21(4)(b) of the Statute, would be infringed, and that the Trial Chamber herein sets out its reasons for the decision;⁴

NOTING that the Defence of Mićo Stanišić makes extensive submissions relating to the resources available to it during the pre-trial phase⁵ and the disclosure of the Prosecution since June 2009;⁶

¹ Pre-trial conference, 4 Sep 2009, T. 117.

² Order scheduling pre-trial conference and commencement of trial with order terminating provisional release, filed 19 Aug 2009.

³ Motion to vary trial date of 14 September 2009, filed on 4 Sep 2009.

⁴ *Augustin Ngirabatware v. The Prosecutor*, Case No. ICTR-99-54-A, Decision on Augustin Ngirabatware’s appeal of decisions denying motions to vary trial date, 12 May 2009 (“*Ngirabatware Decision*”), paras 24, 27, 32.

⁵ Motion to vary, paras 3-6.

⁶ Motion to vary, paras 7-10.

NOTING the Defence submission that “for all the reasons set out in this Application and in the light of the particular circumstances of this case, the Accused is not ready for trial and he must be granted more time to adequately prepare his defence”;⁷

NOTING the Defence submission that “each of the key factors identified by the Appeals Chamber in *Ngirabatware* which form the basis for an adjournment are present in this case: the complexity of the case, the number of counts and charges, the gravity of the crimes charged, the individual circumstances of the accused, and in particular the status and scale of the Prosecution’s disclosure and the staffing of the Defence team”;⁸

NOTING the submission by the Registrar filed on 7 September 2009,⁹ wherein the Registrar states that “[e]ven though a substantial amount of pre-trial work had been done by previous counsel, the Registrar allocated additional resources to the defence upon assignment of Mr. Zečević to enable him to become familiar with the case and to complete any outstanding preparatory work”;¹⁰

NOTING the Registrar’s submission that the “amount of additional resources was determined after extensive consultations with Mr. Zečević, taking into account Mr. Zečević’s representations about the state of preparedness of the case, the number of defence team members and their respective roles”, including “the additional work that had to be carried out by the defence and was to cover the remainder of the pre-trial”;¹¹

NOTING the Registrar’s submission that on 22 December 2008 the Defence was allocated further funds to compensate it “for additional work caused by new developments in the case” which were “disbursed in equal monthly stipends”;¹²

NOTING that on 17 June 2009, and following Mr. Zečević’s report to the Registry on 29 May 2009 that the Defence “had performed all necessary tasks to be able to start the trial”, the Registrar granted the Defence a maintenance allotment from June 2009 until the start of the trial;¹³

NOTING the “response” of the Defence to the Registrar’s submission, wherein the Defence submits, *inter alia*, that “the core argument made by Mr. Stanišić in the [Motion to vary] is that the Prosecution has disclosed statements, exhibits, and other materials it intends to rely upon at trial or

⁷ Motion to vary, para. 15.

⁸ Motion to vary, para. 15 (emphasis original), referring to *Ngirabatware* Decision, para. 28.

⁹ Registrar’s submission pursuant to Rule 33(B) regarding Mićo Stanišić motion to vary trial date of 14 September 2009, 7 Sep 2009 (“Registrar’s submission”)

¹⁰ Registrar’s submission, para. 10.

¹¹ Registrar’s submission, para. 10.

¹² Registrar’s submission, para. 11, noting also that “[a]s usual, 20% of the funds was withheld until the submission by the defence of an End-of-Stage report at the end of the pre-trial stage”, *ibid.*

which is relevant to the preparation and conduct of the trial after counsel informed the Registrar that the defence was trial ready on 29 May 2009”, which, according to the Defence, “constitutes approximately 25 percent [*sic*] of all the evidence disclosure by the Prosecution”;¹⁴

NOTING the Defence submission that its “submission pertains to all the additional and ongoing disclosure made by the Prosecution since counsel for Mr. Stanišić informed the Registry that the defence team was ‘trial ready’ on 29 May 2009 which drastically changed the circumstances of this case”;¹⁵

CONSIDERING that there is nothing in the Rules of Procedure and Evidence (“Rules”) which enables a party to file a “response” to a submission submitted by the Registrar pursuant to Rule 33(B), but that the Trial Chamber, in the exercise of its duty to ensure that the rights of the accused are fully respected, will consider the “response”;

CONSIDERING that during the pre-trial phase the Registrar extended the funding available to the Defence in consultation with the Defence and as the case developed;

CONSIDERING that members of the current team, notably co-counsel and a case manager/legal assistant, have been involved in the defence preparations since mid-2006 and, therefore, well before the change of lead counsel, thus ensuring continuity in the Defence’s work and enabling it to employ significant experience of the case in assessing material disclosed by the Prosecution;¹⁶

CONSIDERING that the Defence is incorrect in its submission that the Appeals Chamber in *Ngirabatware* identified “key factors” which “form the basis for an adjournment”, but that what the Appeals Chamber did in *Ngirabatware* was to confirm that “it is not possible to set a standard of what constitutes adequate time to prepare a defence” and that “comparison with other cases therefore provides very limited, if any, assistance”¹⁷ and, further, that the Appeals Chamber identified in a non-exhaustive fashion for the guidance of Trial Chambers factors which are to be considered when assessing “what constitutes adequate time to prepare a defence”;¹⁸

CONSIDERING that the Defence’s duty pursuant to Article 21 of the Statute to prepare its defence does not cease when the Defence submits a report to the Registrar that it considers itself to be ready for trial;

¹³ Registrar’s submission, para. 12.

¹⁴ Mr. Mićo Stanišić’s response to the Registrar’s submission pursuant to Rule 33(B) regarding Mićo Stanišić’s motion to vary trial date of 14 September 2009, filed on 8 Sep 2009 (“Mićo Stanišić response”), para. 2 (emphasis original).

¹⁵ Mićo Stanišić response, para. 4.

¹⁶ Motion to vary, para. 4. See also Registrar’s submission, para. 10.

¹⁷ *Ngirabatware* Decision, para. 28

¹⁸ Motion to vary, paras 14-15; *Ngirabatware* Decision, para. 28.

CONSIDERING therefore, that the level of staffing and preparedness of the Defence and the time available to it to prepare until the ultimate deadline of 31 July 2009 for the Prosecution's disclosure pursuant to Rule 66 of the Rules cannot be considered to have been inadequate pursuant to Article 21 of the Statute;

CONSIDERING that the substance of the Defence submission, that for the right to have adequate time and facilities pursuant to Article 21(4)(b) "to be meaningful the Accused must be given time to prepare his 'defence' thoroughly not simply the first few witnesses [nor] can it mean that he can prepare his defence once trial proceedings have begun",¹⁹ has been addressed by the Trial Chamber in its decision of 31 July 2009, in which the Trial Chamber stated that "the Prosecution has been on notice since 8 July 2009 of its duty to obtain leave from the Trial Chamber for any disclosure under Rule 66(A)(ii) to the Defence beyond 31 July 2009"²⁰ and that disclosure of witness statements and exhibits between 8 June 2009 and 31 July 2009 was not in violation of any Rule or order;²¹

CONSIDERING that the disclosure which the Defence submits the Prosecution carried out subsequent to 31 July 2009 remains, as the Defence notes,²² in part subject to decisions on pending motions and in any event subject to leave of the Trial Chamber following the pre-trial Judge's order that any Prosecution disclosure beyond 31 July 2009 would only be permitted with leave of the Trial Chamber and, therefore, that the determination of any resulting prejudice to the Defence, remains to be determined by the Trial Chamber;²³

CONSIDERING therefore, that the Defence failed to satisfy the Trial Chamber by the Motion to vary that its right to a fair trial has been infringed due to inadequate time or facilities to prepare its defence until and including 31 July 2009;

CONSIDERING that as the Trial Chamber has set forth herein its written reasons for the oral decision of 4 September 2009 in relation to the Defence argument as to limited resources, pursuant to Rule 73(C)(ii) the time-limit for any motion for certification to appeal based upon those reasons runs as of this decision;

CONSIDERING further that, in view of the fact that there remain pending before the Trial Chamber motions relating to issues of disclosure after 31 July 2009, it would be in the interests of

¹⁹ Motion to vary, para. 15 with a number of descriptions of tasks that the Defence submits that it needs to carry out during the requested ten-week postponement in order to be adequately prepared for trial "as a result of the enormous disclosure" of the Prosecution, *ibid.*

²⁰ Decision on joint Defence motion requesting preclusion of Prosecution's new witnesses and exhibits, 31 Aug 2009 ("Preclusion decision"), para. 18.

²¹ Preclusion decision, para. 16.

²² Mićo Stanišić's response, para. 2.

²³ Rule 65 *ter* conference, 8 Jul 2009, T. 256.

judicial economy to vary the time-limit for any motion for certification to appeal the decision on the Motion to vary pursuant to Rule 73(C)(ii) so as to run from the date of issue of the Trial Chamber's final determination of all matters pertaining to the "Joint motion by Defence of Mićo Stanišić & Stojan Župljanin requesting the Trial Chamber to preclude Prosecution's new witnesses and new exhibits", filed on 22 June 2009;

CONSIDERING that, as a consequence, the Motion for certification, as filed, was submitted prematurely by the Defence and will not at present be considered by the Trial Chamber;

RECALLING that at the pre-trial conference the Trial Chamber determined pursuant to Rule 73 *bis* of the Rules that the Prosecution may call 131 witnesses and present its evidence-in-chief within 212 hours;

NOTING that in the Joint motion it is argued that:

- there are "a large number of outstanding motions filed by the parties which have not been ruled upon", the outcome of which "will affect the choice of witnesses and issues to be addressed in cross-examination", and the resolution of which "is crucial to determining how many witnesses the Prosecution needs to call in the second and following weeks of trial";²⁴
- "there are scheduling problems in the week of 14-18 September which have not been resolved despite significant efforts by the parties and the Trial Chamber";²⁵
- the Schengen visa of lead counsel for Stojan Župljanin expires on 14 September 2009, which requires him to "leave The Netherlands before midnight on that day, and fly back into the country the following day" and, further, that:

as the Prosecution's opening is scheduled for the afternoon session on that day, this will mean Mr Pantelić will miss the majority of the opening. From Mr Pantelić's and Mr Župljanin's perspective, this would be highly inconvenient and could potentially affect the Accused's right to "defend himself through legal assistance of his own choosing", as enshrined in Article 214 (d)" of the Statute;²⁶

- the order issued at the pre-trial conference, whereby "the Prosecution was barred from calling some witnesses for a period of 2 months", impacts upon the Prosecution's intended order of witnesses in the first few weeks of trial in such a way that "there is insufficient time to organise new witnesses for the second to fourth weeks of trial";²⁷

²⁴ Joint motion, para. 2.

²⁵ Joint motion, para. 3.

²⁶ Joint motion, para. 4.

²⁷ Joint motion, para. 5, also referring to the requirement of the Victims and Witnesses Section that the Prosecution must advise it "14 days in advance of the witness schedule so they can make the necessary travel arrangements", and

- the parties agree that the rights of the Accused to a fair and expeditious trial, and the rights of the witnesses to be treated with respect will be promoted by this short adjournment;²⁸

CONSIDERING that the fact that motions that pertain to Prosecution witnesses, such as motions filed pursuant to Rule 92 *bis*, Rule 92 *ter*, Rule 92 *quater* and Rule 94 *bis*, are pending does not in and of itself amount to a reason which justifies postponing the start of trial;

CONSIDERING that the “scheduling problems” referred to in the Joint motion relate to Robert Donia, the Prosecution’s first witness;

CONSIDERING that the Prosecution notified the Trial Chamber at the Rule 65 *ter* conference held on 24 August 2009 that Robert Donia would be the first witness;²⁹

CONSIDERING that when the schedule of this witness was discussed in detail at the pre-trial conference, the Prosecution did not raise with the Trial Chamber any restrictions on Robert Donia’s availability and that the Trial Chamber was only informed by email from the Prosecution on Monday 7 September 2009 of the limited availability of this witness in the week in which the trial is due to commence;

CONSIDERING that the parties are required not only to inform the Trial Chamber as soon as possible of changes to the order or availability of witnesses, but to ensure that witnesses make themselves sufficiently available in order to testify before the Tribunal;

CONSIDERING therefore, that the fact that the Prosecution’s first witness has conflicting obligations does not justify the granting of a postponement of the start of the trial;

CONSIDERING that counsel is required to ensure that administrative matters, such as applications for a visa, are addressed in a timely manner so as not to interfere with the proper performance of counsel’s duties before this Tribunal;

CONSIDERING that if, as a result of matters within his own control, lead counsel for a party is unable to attend the complete opening statement of the Prosecution, his absence does not amount to a violation of the rights of the accused to defend himself through legal assistance of his own choosing, especially as assigned co-counsel will be present throughout the opening statement and as

noting that a “further complication arises with the need to request subpoenas for a number of witnesses now required in the first few weeks of trial”.

²⁸ Joint motion, para. 6.

²⁹ Rule 65 *ter* conference, 24 Aug 2009, T. 301.

the opening statement is video-recorded and lead counsel can watch it subsequently, thereby enabling him to fully appreciate the contents of the Prosecution's opening statement;

CONSIDERING, therefore, that the absence of lead counsel for part of the Prosecution opening statement does not justify the granting of a postponement of the start of the trial;

CONSIDERING that at the pre-trial conference the Trial Chamber did not issue an order that the Prosecution is prevented from calling witnesses in relation to whom it has failed to meet its disclosure obligations until the expiry of a two months delay, but informed the parties that it was considering such a sanction and ordered submissions to be made by 14 September 2009 as to the impact of such a sanction on the Prosecution's presentation of evidence;³⁰

CONSIDERING therefore, that none of the grounds set out in the Joint motion are persuasive and that the trial may still commence on 14 September 2009 and the evidence of Robert Donia be heard in the first week of trial, limited to the extent discussed and determined by the Trial Chamber at the pre-trial conference;³¹

CONSIDERING however, the specific circumstances of this case, especially the relatively short time available between the pre-trial conference and the commencement of the trial, the fact that motions pertaining to the mode of testimony of Prosecution witnesses and the admission of belatedly disclosed evidence are pending, coupled with the need for the Prosecution to address the Trial Chamber's determination at the pre-trial conference pursuant to Rule 73 *bis*(B) as to the number of witnesses that it may call;

CONSIDERING that a brief adjournment of the proceedings will not interfere with the Accused's right to a fair and expeditious trial pursuant to Article 20 of the Statute, but will enable the Prosecution to organise the presentation of its evidence in a more streamlined and efficient manner, and will provide the Defence with further time to prepare, and that the Trial Chamber, therefore, is minded, in the interests of judicial economy and of the overall effective and efficient management of the trial, to grant a brief adjournment of the trial proceedings following the conclusion of Robert Donia's testimony, as determined at the pre-trial conference;

CONSIDERING that as a result of such an adjournment the Defence will benefit substantially in its preparations from having heard the Prosecution's opening statement and from being given access to additional funds for the Defence for the trial phase;

³⁰ Pre-trial conference, 4 Sep 2009, T. 133-135.

³¹ Pre-trial conference, 4 Sep 2009, T. 133-135.

PURSUANT TO Article 20 and 21 of the Statute and Rules 54 and 73 of the Rules;

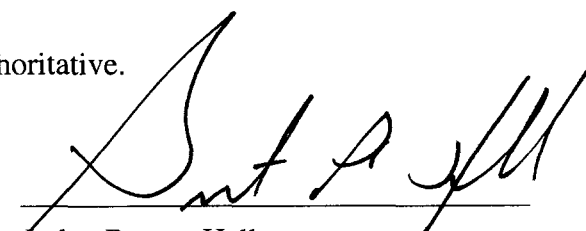
REAFFIRMS the oral decision that the trial shall commence on Monday 14 September 2009 at 2.15 p.m. in courtroom 1 with the opening statement of the Prosecution followed by the testimony of Robert Donia;

DISMISSES the Motion for certification without prejudice to the Defence filing a new motion pursuant to Rule 73(B) within seven days from the date of the Trial Chamber's decision on the "Joint motion by Defence of Mićo Stanišić & Stojan Župljanin requesting the Trial Chamber to preclude Prosecution's new witnesses and new exhibits", filed on 22 June 2009;

DENIES the Joint motion;

ORDERS that following the conclusion of the testimony of Robert Donia, subject to his recall for further cross-examination as previously determined by the Trial Chamber, trial proceedings shall stand adjourned until 29 September 2009;

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



Judge Burton Hall
Presiding

Dated this fourteenth day of September 2009
At The Hague
The Netherlands

[Seal of the Tribunal]