



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-T
Date: 12 March 2010
Original: English

IN TRIAL CHAMBER II

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

Registrar: Mr. John Hocking

Decision of: 12 March 2010

PROSECUTOR

v.

MIĆO STANIŠIĆ AND STOJAN ŽUPLJANIN

PUBLIC

**DECISION DENYING MIĆO STANIŠIĆ'S REQUEST FOR
RECONSIDERATION OF THE TRIAL CHAMBER'S
DECISIONS OF 29 SEPTEMBER AND 2 OCTOBER 2009
CONCERNING RULE 92 *TER* WITNESSES**

The Office of the Prosecutor

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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”) is seised of “Mr. Stanišić’s request for reconsideration of the Trial Chamber’s decisions concerning 92Ter witnesses”, filed on 12 October 2009 (“Motion”) by the Defence of Mićo Stanišić (“Defence”) requesting the Trial Chamber to reconsider its decisions of 2 October 2009 (“Second Decision”) and 5 October 2009 (“Oral Ruling” and collectively, “Impugned Decisions”) in light of an earlier decision made on 29 September 2009 (“First Decision”).¹

I. PROCEDURAL HISTORY

1. On 29 February 2008, the Prosecution filed its first motion for admission of evidence pursuant to Rule 92 *ter* of the Rules of Procedure and Evidence of the Tribunal (“Rules”) (“Rule 92 *ter* Motion”).² The Defence responded on 17 April 2008.³
2. Following the arrest of Stojan Župljanin and the joinder of the case against him with that against Mićo Stanišić, the Prosecution filed amended consolidated Rule 65 *ter* witness and exhibit lists on 8 June 2009.⁴
3. On 28 July 2009, the Prosecution filed a supplemental motion for admission of evidence pursuant to Rule 92 *bis* and 92 *ter* (“Supplemental Motion”), whereby it requested, *inter alia*, that the evidence of 13 *viva voce* witnesses, and six witnesses for whom applications pursuant to Rule 92 *bis* were pending⁵, be admitted pursuant to Rule 92 *ter*. The Prosecution also sought leave to supplement the material tendered with the Rule 92 *ter* Motion.⁶

¹ Motion, paras 1, 9-10; Decision on Prosecution’s motions for admission of evidence pursuant to Rule 92 *ter* (ST012 and ST019), issued confidentially on 29 Sep 2009; Decision on Prosecution’s motions for admission of evidence of 33 witnesses pursuant to Rule 92 *ter*, 2 Oct 2009; Mirzet Karabeg, 5 Oct 2009, T. 900-903 (“Oral Ruling”). See also public redacted decision on Prosecution’s motions for admission of evidence pursuant to Rule 92 *ter* (ST012 and ST019), 2 Oct 2009.

² *Prosecutor v. Mićo Stanišić*, Case No. IT-04-79-PT, Prosecution’s motion for admission of evidence pursuant to Rule 92 *ter*, filed confidentially in part on 29 Feb 2008.

³ *Prosecutor v. Mićo Stanišić*, Case No. IT-04-79-PT, Defence’s response to Prosecution’s motion for admission of evidence pursuant to Rule 92 *ter*, filed confidentially on 17 Apr 2008.

⁴ *Prosecutor v. Mićo Stanišić*, Case No. IT-04-79-PT and *Prosecutor v. Stojan Župljanin*, Case No. IT-99-36/2-PT, Prosecution’s motion for joinder and for leave to consolidate and amend indictments, with confidential annexes, 15 Jul 2008; Decision on the Prosecution’s motion for joinder and for leave to consolidate and amend indictments, 23 Sep 2008; Prosecution’s pre-trial brief with confidential appendices, 8 Jun 2009; Corrigendum to confidential appendices 3 & 4 of the Prosecution’s pre-trial brief of 8 June 2009 with confidential annexes, 22 Jun 2009.

⁵ *Prosecutor v. Mićo Stanišić*, Case No. IT-04-79-PT, Prosecution’s motion for admission of evidence pursuant to Rule 92 *bis*, filed confidentially in part on 29 Feb 2008 (“Rule 92 *bis* Motion”).

⁶ Prosecution’s supplemental motion for admission of evidence pursuant to Rule 92 *bis* and 92 *ter* with confidential annexes, 28 Jul 2009 (“Supplemental Motion”), para. 2.

4. The Defence responded to the Supplemental Motion on 31 August 2009 (“Response”) requesting that it be rejected.⁷ In its First Decision, the Trial Chamber noted that the Response was filed out of time pursuant to Rule 126 *bis* and declined to consider it.⁸

5. In the First Decision, which granted the Rule 92 *ter* Motion in relation to two witnesses, the Trial Chamber, relying on Guideline 6⁹ and its prior oral pronouncements, admitted into evidence “those documents accompanying the evidence of [...] ST012 and [...] ST019 that are presently on the Prosecution’s exhibit list”.¹⁰

6. In the Second Decision, which granted the Rule 92 *ter* Motion in relation to the remaining 33 witnesses, the Trial Chamber not only indicated that it would accept into evidence those accompanying documents that were already on the Prosecution’s Rule 65 *ter* exhibit list but, *proprio motu*, also “accept[ed] onto the Prosecution’s Rule 65 *ter* exhibit list” those accompanying exhibits which were not already on that list.¹¹

7. By the Oral Ruling, the Trial Chamber admitted into evidence pursuant to Rule 92 *ter* 13 exhibits accompanying the prior testimony of Mirzet Karabeg, of which five were added to the Prosecution’s Rule 65 *ter* exhibit list following the Second Decision.¹²

8. On 12 October 2009, the Defence filed the present Motion to which the Prosecution responded orally on 14 October 2009 (“Oral Response”).¹³ With the leave of the Trial Chamber, the Defence also replied orally on 14 October 2009 (“Oral Reply”).¹⁴

II. SUBMISSIONS

9. The Defence seeks two forms of relief through its Motion. First, it requests the Trial Chamber to reconsider its decision to dismiss the Response, arguing that the Response must be taken into account when reconsidering the Impugned Decisions “in order to prevent injustice”

⁷ Mr. Mićo Stanišić’s response to the Prosecution’s supplemental motion for admission of evidence pursuant to Rules 92 *bis* and 92 *ter*, with confidential annexes, filed on 31 Aug 2009.

⁸ First Decision, para. 9. See also Second Decision, para. 9.

⁹ Guideline 6 reads: Material on a party’s exhibit list may be requested to be admitted into evidence by that party. In the event that a party seeks to admit into evidence material that is not on its exhibit list, the party must, prior to requesting admission into evidence, seek the leave of the Trial Chamber by way of a written motion to add the material in question to the exhibit list.

¹⁰ First Decision, paras 22-23 and 27. The Trial Chamber notes that when using the phrases “documents that accompany” the evidence of Rule 92 *ter* witnesses or “accompanying documents”, it is referring only to those documents which the Prosecution provided to the Trial Chamber in support of the Rule 92 *ter* Motion and the Supplemental Motion.

¹¹ Second Decision, paras 13-17.

¹² Motion, para. 9; Mirzet Karabeg, 5 Oct 2009, T. 900-903.

¹³ Rule 65 *ter* conference, 14 Oct 2009, T. 330-332, 335.

¹⁴ *Id.*, T. 336-337.

("First Request").¹⁵ Second, the Defence submits that there is a clear error of reasoning in the Impugned Decisions occasioned by the admission into evidence of accompanying documents which were not on the Prosecution's exhibit list and that "reconsideration is necessary in order to prevent an injustice" ("Second Request").¹⁶

10. In relation to the First Request, the Defence submits that "[c]ounsel for Mr. Stanišić was not in The Hague at the time of the filing" and that, given that "the Registry was fully aware" of this fact, "[c]ounsel understood the Registry note '*the CD ROMs will be distributed to the parties accordingly*' to mean that the CD ROMs will be sent by post to counsel", which is "the usual and normal course [...] in such a case".¹⁷ The Defence submits that the annex to the Supplemental Motion was only available to it on 20 August 2009 and that, accordingly, the Response filed on 31 August 2009 was timely filed within 14 days from that date.¹⁸

11. The Defence further submits that the Trial Chamber "appears to have relied upon submissions made in a reply filed by the Prosecution" on 4 September 2009 ("Reply") in relation to the Response that the Trial Chamber dismissed.¹⁹

12. In relation to the Second Request, the Defence submits that the First Decision "held that only those documents which the Prosecution had listed on its Rule 65 *ter* Exhibit List are admissible".²⁰ However, the Impugned Decisions accepted onto the Prosecution's Rule 65 *ter* exhibit list and thereafter admitted into evidence accompanying documents which were not on the Prosecution's original Rule 65 *ter* exhibit list.²¹ The Impugned Decisions, according to the Defence, are "manifestly contrary to Guideline 6 [of the procedural guidelines adopted by the Trial Chamber ("Guidelines")²²] and [...] violate the rights of the accused to be put on notice of the Prosecution's case and the right to have adequate time and facilities to prepare his defence."²³

13. In the Oral Response, the Prosecution submits that material pursuant to Rule 92 *ter* was originally provided to the Defence on 29 February 2008, which placed the Defence on notice of the Prosecution's intention to offer the accompanying documents with the evidence of the Rule 92 *ter*

¹⁵ Motion, paras 3-5.

¹⁶ Motion, paras 8-10.

¹⁷ Motion, para. 5 (emphasis in the original) and Annex A.

¹⁸ *Id.*, paras 4-5.

¹⁹ Motion, para. 5, referring to Prosecution's motion for leave to reply and reply to Mr. Mićo Stanišić's response to the Prosecution's supplemental motion for admission of evidence pursuant to Rules 92 *bis* and 92 *ter*, with confidential annexes, 4 Sep 2009.

²⁰ Motion, para. 8.

²¹ *Id.*, paras 9-10.

²² *Id.*, para. 10. See also Order on revised guidelines on the admission and presentation of evidence, 2 Oct 2009.

²³ Motion, para. 10. The exhibits relate to the transcripts of Mirzet Karabeg's prior testimony, Mirzet Karabeg, 5 Oct 2009, T. 860-861.

witnesses. In its view, this makes irrelevant the fact that some of the accompanying documents were not on the Prosecution's Rule 65 *ter* exhibit list filed more than a year later.²⁴

14. In the Oral Reply, the Defence reiterates its submissions from the Response and the Motion and requests, in the alternative, a delay in the trial so as to remedy the alleged injustice caused to the Defence by the Trial Chamber's decision to add the accompanying exhibits onto the Prosecution's Rule 65 *ter* exhibit list *proprio motu*.²⁵

III. APPLICABLE LAW AND DISCUSSION

A. Applicable law

15. The Trial Chamber has an inherent discretionary power to reconsider a previous interlocutory decision in exceptional cases if "a clear error of reasoning has been demonstrated or if it is necessary to do so to prevent injustice".²⁶

B. The First Request

16. The Defence submits that, despite its decision not to consider the Response, the Trial Chamber relied on submissions made by the Prosecution in its Reply. The Trial Chamber did not, in its assessment of the Supplemental Motion, place any reliance on the Reply. Neither was the Defence able to identify where, in either the First Decision or the Second Decision, the Trial Chamber relied on the Reply.²⁷ This argument, therefore, is without merit.

17. The Trial Chamber is of the view that, having received the Supplemental Motion on 28 July 2009, the Defence did not act with due diligence in that it failed to seek an extension of time under Rule 127 for the filing of its Response pending receipt of the annexed material.

18. Nevertheless, in the performance of its duty under Article 20 of the Statute to ensure the fairness of the proceedings and pursuant to its discretion under Rule 127(A)(ii), the Trial Chamber has perused the Response to determine whether it is necessary to consider the submissions therein in order to prevent an injustice.

²⁴ Rule 65 *ter* conference, 14 Oct 2009, T. 332. See also Rule 92 *ter* Motion.

²⁵ *Id.*, T. 336-337. See also Joint motion by Defence of Mićo Stanišić and Stojan Župljanin requesting the Trial Chamber to preclude Prosecution's new witnesses and new exhibits, 22 Jun 2009.

²⁶ *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-AR108bis.3, Decision on request of Serbia and Montenegro for review of the Trial Chamber's decision of 6 December 2005, filed confidentially on 6 Apr 2006, fn. 40.

²⁷ Motion, para. 5.

19. The Defence raises two main objections in the Response. The first relates to an alleged expansion of the Prosecution's case against Mićo Stanišić since the joinder.²⁸ The second relates to the admission of accompanying documents not included on the Prosecution Rule 65 *ter* exhibit list.²⁹

20. The Defence's first objection was the subject of a joint Defence motion,³⁰ which was addressed by two decisions issued on 31 August 2009 and 17 September 2009.³¹ Therefore, it will not be revisited. The Defence's second objection is the subject-matter of the present Motion.³² The Response does not identify or add anything that leads the Trial Chamber to conclude that its continued exclusion would lead to an injustice.

21. Therefore, the Trial Chamber is satisfied that it is not necessary to reconsider its decision to disregard the Response and will deny this request.

C. The Second Request

22. In the First Decision, the Trial Chamber recalled that "as a general rule, any material that a party seeks to have admitted into evidence must appear on its exhibit list"³³. The Trial Chamber examined the documents accompanying the prior evidence of ST012 and ST019 and determined whether they "form an inextricable and indispensable part of the witnesses' evidence and assist the Trial Chamber's understanding of the evidence."³⁴ All of the documents which were found to meet this test were already on the Prosecution's Rule 65 *ter* exhibit list and were admitted with the evidence of these two witnesses.

23. In the Second Decision, the Trial Chamber again recalled the general rule,³⁵ this time also noting the Prosecution's submission that, of the accompanying documents, some were included on its Rule 65 *ter* exhibit list, while others were not.³⁶ The Trial Chamber also specifically noted the

²⁸ Response, paras 3-4, 7-8, 12-14.

²⁹ Response, para. 15.

³⁰ Joint motion by Defence of Mićo Stanišić and Stojan Župljanin requesting the Trial Chamber to preclude Prosecution's new witnesses and new exhibits, 22 Jun 2009.

³¹ Response, paras 4-8, 12-14, 16-18; Decision on joint Defence motion requesting preclusion of Prosecution's new witnesses and exhibits, 31 Aug 2009; Oral ruling of 17 Sep 2009, T. 495-497.

³² Response, para. 15.

³³ First Decision, para. 23. See also Guidelines, para. 6.

³⁴ First Decision, para. 22.

³⁵ Second Decision, para. 14. See also Guidelines, para. 6; First Decision, para. 33.

³⁶ Prosecutor v. Mićo Stanišić, Case No. IT-04-79-PT, Motion for leave to reply and proposed reply to Defence's response to Prosecution's motion for admission of evidence pursuant to Rule 92 *ter*, 23 Apr 2008 ("Rule 92 *ter* Reply"), para. 10; Supplemental Motion, para. 22. The Trial Chamber also noted that at the time of filing the Rule 92 *bis* Motion and Rule 92 *ter* Motion, the Prosecution's Rule 65 *ter* exhibit list pertained solely to the case against Mićo Stanišić. On 21 May 2008, the Prosecution sought leave to amend its Rule 65 *ter* exhibit list. On 8 May 2009, the Trial Chamber directed the Prosecution to file a consolidated exhibit list reflecting its case against both Mićo Stanišić and Stojan Župljanin and declared moot the Prosecution's motion to amend the Rule 65 *ter* exhibit list, *Prosecutor v. Mićo*

Prosecution's submission that "without these exhibits [the witnesses'] prior testimony cannot be fully evaluated for relevance and probative value".³⁷ The Trial Chamber allowed the 33 witnesses to be called pursuant to Rule 92 *ter* and conducted the same exercise of identifying which documents formed an "inextricable and indispensable" part of the prior testimony. The Trial Chamber determined that, in contrast to the factual situation of the First Decision, some of the "inextricable and indispensable" documents covered by the Second Decision were not on the Prosecution's Rule 65 *ter* exhibit list.

24. The Trial Chamber would ordinarily have required the Prosecution to move an appropriate written motion seeking the addition of the documents found to be an "inextricable and indispensable" part of the prior testimony of witnesses to its Rule 65 *ter* exhibit list. However, witnesses subject of the Second Decision were scheduled to begin testifying within a week thereafter.³⁸ Thus, for reasons of expediency, the Trial Chamber decided *proprio motu* to add the documents that formed an "inextricable and indispensable" part of the prior testimony to the Prosecution's Rule 65 *ter* list without awaiting a motion to that effect. In doing so, the Trial Chamber specifically excluded those documents which did not form an inextricable and indispensable part of the prior testimony.³⁹

25. In deciding *proprio motu* to amend the Prosecution's Rule 65 *ter* exhibit list, the Trial Chamber took into consideration the question of undue prejudice to the Defence by bearing in mind several factors, including the volume and nature of the accompanying documents, the importance of the material to the Prosecution's case, the date of notice of the Prosecution's intention to tender such material into evidence and the time available to the Defence to assess the material. The Trial Chamber was satisfied that the Defence had had adequate time to prepare its case in a manner that is consistent with the rights of the accused under the Statute. Furthermore, the Trial Chamber also took into consideration that evidence admitted under Rule 92 *ter* must also be relevant and probative under Rule 89(C), a higher legal threshold than the test of *prima facie* relevance and probative value that is applied to requests to amend the Rule 65 *ter* lists.

26. While the Trial Chamber did not explicitly set out in the Impugned Decisions the steps of the review it had undertaken, it finds no clear error of reasoning in deciding to amend *proprio motu* the Prosecution's Rule 65 *ter* exhibit list. In view of the assessments that the Trial Chamber carried

Stanišić, Case No. IT-04-79-PT, Prosecution motion seeking leave to amend its Rule 65 *ter* exhibit list, with confidential annexes, 21 May 2008; Scheduling Order for submission of pre-trial briefs and other materials pursuant to Rule 65 *ter*, 8 May 2009.

³⁷ Second Decision, para. 14. See also Rule 92 *ter* Reply, para. 9; Supplemental Motion, para. 22.

³⁸ Mirzet Karabeg, who testified on 5-6 Oct 2009, was the first witness to testify pursuant to the Second Decision.

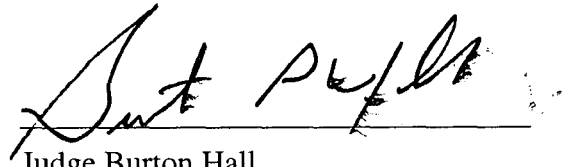
³⁹ Second Decision, para. 17.

out, it finds that it is not necessary to reconsider the Impugned Decisions to prevent an injustice to the Defence.

IV. DISPOSITION

27. For the foregoing reasons, pursuant to Rule 54, the Trial Chamber **DENIES** the Motion for reconsideration.

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



Judge Burton Hall
Presiding

Dated this twelfth day of March 2010

At The Hague

The Netherlands

[Seal of the Tribunal]