



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: 1 December 2010
Original: English

IN TRIAL CHAMBER II

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

Registrar: Mr. John Hocking

Decision of: 1 December 2010

PROSECUTOR

v.

MIĆO STANIŠIĆ AND STOJAN ŽUPLJANIN

PUBLIC

**WRITTEN REASONS FOR THE ORAL DECISION
GRANTING IN PART PROSECUTION'S MOTION FOR
ADMISSION OF EVIDENCE OF ST223 PURSUANT TO
RULE 92 *BIS***

The Office of the Prosecutor

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I. INTRODUCTION

1. On 12 November 2010, 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”) issued an oral ruling (“First Oral Decision”)¹ on, *inter alia*, “Prosecution’s Motion for admission of transcripts and written statements in lieu of *viva voce* testimony pursuant to Rule 92 *bis* for remainder of the new witnesses”, filed publicly with confidential annexes on 27 September 2010 (“Motion”), whereby the Prosecution moved for the admission pursuant to Rule 92 *bis* of the evidence of, *inter alia*, ST223.

2. Insofar as the First Oral Decision concerned ST223, the Trial Chamber denied the Motion, ordered that this witness shall testify *viva voce* and granted the Prosecution 45 minutes for the examination-in-chief.²

3. Also on 12 November 2010, the Prosecution orally requested the Trial Chamber to reconsider the First Oral Decision with regard to ST223 as to time and to allow the Prosecution to examine the witness for four hours, arguing that the witness is called to cover “a huge all encompassing fact” and that he “comes at it from a different angle” than ST224, who covers the same denied adjudicated fact.³

4. On 17 November 2010, the Trial Chamber reconsidered the First Oral Decision with regard to ST223 and ruled as follows (“Second Oral Decision”):

The Trial Chamber will therefore accept the evidence of ST-223 pursuant to Rule 92 *ter* and admit those portions of ST-223’s prior testimony that it considers relevant and unique to the contents of Fact 193, found on the following pages of the transcript tendered: 4398, to 4400, 4402 to 4407, 4409 to 4421, 4427, 4433, and 4436 to 4439.

The Trial Chamber finds that the pseudonym sheet of the witness is inseparable and indispensable for his testimony and will therefore also be admitted. The remainder of the proposed associated documents are not admitted. Pursuant to the guide-lines issued in October of 2009, the Trial Chamber grants the Prosecution an additional 25 minutes to examine ST-223, for a total of 45 minutes, to be absorbed within the total time allotted for hearing that denied adjudicated fact witnesses. Pursuant to Rule 92 *ter*, Witness 223 shall be available for cross-examination.⁴

5. In the following, the Trial Chamber sets out the written reasons for the First and Second Oral Decisions.

¹ 12 Nov 2010, T. 17326 - 7.

² 12 Nov 2010, T. 17326.

³ 12 Nov 2010, T. 17345.

⁴ 17 Nov 2010, T. 17453 - 5.

II. PROCEDURAL BACKGROUND

6. On 1 April 2010, the Trial Chamber declined to take judicial notice of a number of proposed adjudicated facts or parts thereof.⁵ Subsequent to that decision, on 14 July 2010, the Trial Chamber permitted the Prosecution to identify and call additional witnesses to provide evidence to cover the denied adjudicated facts and ordered that the evidence of each selected witness shall be limited to the substance of the corresponding denied adjudicated fact or facts, as set out in Confidential Annex A to the 27 May Motion.⁶ On 19 August 2010, the Prosecution indicated that it would request that the evidence of 15 witnesses be admitted pursuant to Rule 92 *bis* in lieu of oral testimony.⁷ Subsequently, the Prosecution filed three motions, requesting the admission of the prior testimony of a total of 12 witnesses pursuant to Rule 92 *bis*.⁸

7. On 24 September 2010, the Prosecution filed a “Motion for admission of transcripts and written statements in lieu of *viva voce* testimony pursuant to Rule 92*bis* for remainder of the new witnesses with confidential annexes A and B” (“24 September Motion”). On 27 September 2010, the Prosecution withdrew this motion for the reasons that it “erroneously refers to witnesses ST-24 and ST-249 instead of ST-223 and ST-224”⁹ and advised that “a corrected version will be filed immediately”.¹⁰ On the same day, the Prosecution filed the Motion, i.e. “corrected version” of the 24 September Motion.

8. On 11 October 2010, the Defence of Mićo Stanišić and the Defence of Stojan Župljanin jointly responded, objecting to the Motion (“Joint Response”).¹¹

9. On 14 October 2010, the Prosecution requested leave to reply and filed a reply to the Joint Response (“Reply”) submitting that “the Trial Chamber’s determination of the issues presented by the Prosecution’s Motion would be assisted by a concise submission addressing a few of the

⁵ Decision granting in part Prosecution’s motions on judicial notice of adjudicated facts pursuant to Rule 94(B), 1 April 2010, (“Adjudicated Facts Decision”).

⁶ Decision granting in part Prosecution’s Motion to amend its Rule 65 *ter* witness list as a result of the Trial Chamber’s 1 April 2010 decision concerning judicial notice of adjudicated facts, 14 Jul 2010 (“14 July Decision”), referring to Annex A to Prosecution’s motion to amend its Rule 65*ter* witness list as a result of the Trial Chamber’s 1 April 2010 decision granting in part Prosecution’s motions for judicial notice of adjudicated facts pursuant to Rule 94(B), with confidential annex, filed on 27 May 2010 (“27 May Motion”).

⁷ Prosecution’s notice of timings for Rule 92*bis* witnesses with confidential annexes A and B, 19 August 2010.

⁸ Prosecution’s motion for admission of transcripts and written statements in lieu of *viva voce* testimony pursuant to Rule 92 *bis* for five out of fifteen new witnesses, filed publicly with confidential annexes on 30 August 2010 (“First Motion”); Prosecution’s motion for admission of transcripts and written statements in lieu of *viva voce* testimony pursuant to Rule 92 *bis* for further five out of fifteen new witnesses, filed publicly with confidential annexes on 22 September 2010 (“Second Motion”) and the Motion.

⁹ 24 September Motion, paras 2 - 3.

¹⁰ 24 September Motion, para. 3.

¹¹ Joint Defence response to Prosecution’s motion for admission of transcript and written statements in lieu of *viva voce* testimony pursuant to Rule 92*bis* for the remainder of the new witnesses, confidential, 11 Oct 2010.

arguments the Accused make in their Response.”¹² In the First Oral Decision the Trial Chamber had implicitly granted the Prosecution leave to reply.

III. SUBMISSIONS

1. Motion

10. The Prosecution requested the admission pursuant to Rule 92 *bis* of the transcript of ST223’s testimony in the *Brdanin* case,¹³ and 16 associated documents described as “[r]elevant and pertinent exhibits” that “form an inseparable and indispensable part” of ST223’s prior testimony.¹⁴ The Prosecution did not highlight any portions of the transcripts arguing that the “entire direct examination [is] relevant”.¹⁵ The Prosecution requested the admission of this evidence “without calling the witness for cross examination”.¹⁶

11. With regard to general submissions on applicable law, the Prosecution “incorporate[d] by reference” paragraphs five to fourteen of the First Motion, wherein the Prosecution submitted, *inter alia*, that the evidence of the witnesses tendered through the First Motion does not go to either proof of the acts and conduct of the Accused or the acts and conduct of any close subordinate.¹⁷ It further submitted that the evidence that it sought to tender pursuant to Rule 92 *bis* (a) is “crime-based to specifically cover facts which were previously adjudicated,”¹⁸ (b) is “predominately cumulative and covered by the oral testimony of others,”¹⁹ (c) concerns the impact of the crimes on the witnesses, all of whom are victims,²⁰ and (d) relates to the gravity of the alleged crimes, a factor relevant in the determination of any possible sentence.²¹

12. In the relevant paragraphs of the First Motion, the Prosecution also submitted that it was not aware of any factors that would require the witnesses to appear for cross-examination²² and that admitting the proposed transcript and statement through Rule 92 *bis* would be in the public interest (a) because presenting this evidence *viva voce* would lengthen the trial by at least one month; (b) because presenting this evidence under Rule 92 *bis* would avoid “unnecessary physical and

¹² Prosecution’s motion for leave to reply and reply to joint response to Prosecution’s motion for admission of transcript and written statements in lieu of *viva voce* testimony pursuant to Rule 92*bis* for remainder of the new witnesses, confidential, 14 Oct 2010, para. 1.

¹³ Case No. IT-99-36-T (*Brdanin* case), 16 – 17 April 2002. See Confidential Annex A to the Motion.

¹⁴ Motion, para. 15.

¹⁵ Confidential Annex A to the Motion.

¹⁶ Motion, para. 8. c.

¹⁷ First Motion, para. 7.

¹⁸ First Motion, para. 8, citing 14 July Decision.

¹⁸ First Motion, para. 9.

¹⁸ First Motion, para. 10.

¹⁹ First Motion, para. 9.

²⁰ First Motion, para. 9.

²¹ First Motion, para. 9.

²² First Motion, para. 10.

psychological hardship for crime base victims and witnesses,” some of whom are elderly; and (c) because of the “limited scope and nature of the evidence to be presented through these witnesses.”²³

2. Joint Response

13. The Defence requested to cross-examine ST223, arguing that “there is a need to test the reliability and credibility” of this witness.²⁴ Moreover, the Defence submitted that the denied adjudicated facts which the proposed witness is intended to cover “are highly contested, live and important issues in the trial”.²⁵ According to the Defence’s submissions, any inconsistencies in the witness’s account “will need to be properly explored”,²⁶ because his cross-examination in the *Brdanin* trial “did not adequately address these matters”. For these reasons, the Defence argued that it would be “manifestly unfair to admit the evidence of [this witness] pursuant to rule 92bis without allowing further cross-examination by the Defence.”²⁷

14. The Defence further submitted that “only those portions of the associated documents in the 92bis package which either relate to the denied adjudicated facts (blue highlighting) or those portions which provide context for the denied adjudicated facts (yellow highlighting) should be admitted into evidence.”²⁸

15. The Defence also objected to “the Prosecution’s attempt to expand the adjudicated facts” with ST223.²⁹ The Defence submitted that the Prosecution seeks to rely upon the testimony of ST223, “not solely in relation to denied adjudicated fact 193 (as stipulated in its 27 May 2010 motion) but also with respect to denied adjudicated facts 818 and 1058.”³⁰ The Defence argued that “this violation of the Trial Chamber’s order should not be countenanced”.³¹

16. The Defence further asserted that ST223 “should not be permitted as a Rule 92bis [witness]” arguing that his testimony “simply does not assist in establishing the truth or otherwise” of denied adjudicated facts.³² The Defence submitted that while ST223 “is purportedly being relied upon by the prosecution to establish denied adjudicated facts 193, 818 and 1058 [...] his testimony in the *Brdjanin* proceedings does not relate at all to the subject matter of these adjudicated facts”³³ and the “irrelevance of this witness’ testimony is indicated in the very fact that there is no highlighting

²³ First Motion, paras 12-14.

²⁴ Joint Response, para. 11.

²⁵ Joint Response, para. 11.

²⁶ Joint Response, para. 11.

²⁷ Joint Response, para. 11.

²⁸ Joint Response, para. 12.

²⁹ Joint Response, para. 7.

³⁰ Joint Response, para. 8.

³¹ Joint Response, para. 8.

³² Joint Response, para. 9.

³³ Joint Response, para. 9.

whatsoever [...] in either of his transcripts”.³⁴ The Defence submitted that his testimony “therefore [falls] outside the scope of the Trial Chamber’s 14 July 2010 Decision and should not be permitted to be relied upon by the Prosecution.”³⁵

3. Reply

17. The Prosecution replied that the Joint Response “should be rejected as untimely because it was “filed 17 days after the Prosecution filed its Motion”.³⁶

18. The Prosecution submitted that “while the Accused failed to demonstrate any undue prejudice that would result from admitting the evidence of [ST223] on the additional denied adjudicated facts, the prejudice to the Prosecution’s case resulting from disallowing this evidence would be substantial”.³⁷ The Prosecution noted the Defence’s submission that “adjudicated facts 193, 818 and 1058 are highly contested, live and important issues in the trial” and submitted that “[i]f this is the case, then preventing the corroborating testimony of [ST223] on these three facts will adversely affect the Prosecution’s ability to adduce sufficient evidence to prove the charges in the Indictment beyond a reasonable doubt.”³⁸ The Prosecution further argued that “the three denied adjudicated facts at issue [...] are closely inter-related” and that therefore, “it would serve no practical purpose to limit the evidence of the two proposed Rule 92*bis* witnesses to the particular fact originally assigned to them”.³⁹

19. The Prosecution submitted that, as stated in Confidential Annex A to the Motion, it did not highlight ST223’s transcripts “because it had determined that the entire direct examination of this witness in the *Brdanin* case is relevant to the denied adjudicated facts at issue”,⁴⁰ and referred to a number of passages of the witness’s prior testimony it considers to be relevant.⁴¹ The Prosecution further noted that the testimony of ST223 “was among the evidence the *Brdanin* Trial Chamber explicitly cited in support of its finding from which denied adjudicated fact 193 was derived.”⁴²

IV. APPLICABLE LAW

20. The Trial Chamber refers to the applicable law set out in its decision of 2 November 2010.⁴³ It recalls that in calling witnesses to testify on the substance of denied adjudicated facts, “the

³⁴ Joint Response, para. 9.

³⁵ Joint Response, para. 9.

³⁶ Reply, para. 2.

³⁷ Reply, para. 4.

³⁸ Reply, para. 4.

³⁹ Reply, para. 5.

⁴⁰ Reply, para. 6.

⁴¹ Reply, para. 7.

⁴² Reply, para. 8.

⁴³ Written reasons for oral decision of 4 September 2009 admitting evidence of 24 witnesses pursuant to Rule 92 *bis*, 2 November 2010, paras 27-35.

evidence of each selected witness shall be limited to the substance of the corresponding denied adjudicated fact or facts.”⁴⁴

V. DISCUSSION

21. As a preliminary matter the Trial Chamber notes that for time considerations pursuant to Rule 126 *bis*, the relevant filing date is that of this Motion and not that of the 24 September Motion, which was withdrawn by the Prosecution.⁴⁵ The Joint Response was, therefore, not untimely filed.

22. The Trial Chamber recalls that it granted the addition of ST223 to the Prosecution’s witness list solely to cover the contents of denied adjudicated fact 193.⁴⁶ This fact stated:

Bosnian Muslims and Bosnian Croats were subjected to movement restrictions, as well as to perilous living conditions; they were required to pledge their loyalty to the Bosnian Serb authorities and, in at least one case, to wear white armbands. They were dismissed from their jobs and stripped of their health insurance. Campaigns of intimidation specifically targeting Bosnian Muslims and Bosnian Croats were undertaken.⁴⁷

23. While the Prosecution indicated in Confidential Annex A to the Motion that the evidence of this witness is also relevant to denied adjudicated facts 818 and 1058,⁴⁸ it only directly addressed this issue in the Reply, once it had been brought up by the Defence in their Joint Response. While the Trial Chamber does not accept that the Prosecution acted in bad faith by not raising this matter explicitly in the Motion, it considers that it would have been incumbent upon the Prosecution to make a formal request for reconsideration of the 14 July Decision to allow ST223 also to cover facts 818 and 1058. The Trial Chamber sees no reason *proprio motu* to reconsider the 14 July Decision in this respect, because there have been no change in circumstances that would justify expanding the evidence of ST223 to cover additional facts. Moreover, the Trial Chamber agrees with the Defence submissions as far as it is not persuaded that the testimony of ST223 could adequately cover facts 818 and 1058, as the witness, for instance, neither discussed the “bombing of private houses and business premises in Banja Luka”,⁴⁹ nor any ARK crisis staff order “confiscating the property of able-bodied men aged between 18 and 55 who had left the area and had not

⁴⁴ Decision granting in part prosecution’s motion to amend its Rule 65ter witness list as a result of the Trial Chamber’s 1 April 2010 decision concerning judicial notice of adjudicated facts, 14 July 2010, para. 25.

⁴⁵ See *supra* para. 7.

⁴⁶ 14 July Decision, para. 25. Fact 193 was rejected because is “unclear or misleading in the context in which [it is] placed in the Prosecution Motions”, Adjudicated Facts Decision, para. 50 c.

⁴⁷ *Prosecutor v. Mico Stanišić*, IT-04-79-PT, Prosecution’s second motion for judicial notice of adjudicated facts, with revised and consolidated annex, 10 May 2007, revised and consolidated annex, p. 23.

⁴⁸ Confidential Annex A to the Motion.

⁴⁹ Fact 818 reads: “The police failed to investigate the bombing of private houses and business premises in Banja Luka.” See *Prosecutor v. Mico Stanišić*, IT-04-79-PT, Prosecution’s second motion for judicial notice of adjudicated facts, with revised and consolidated annex, 10 May 2007, revised and consolidated annex, p. 75.

immediately returned”.⁵⁰ The Trial Chamber, therefore, reiterates that ST223 shall only testify to fact 193.

24. In the *Brdanin* case ST223 testified, *inter alia*, about his personal background and the security situation in Banja Luka in 1992.⁵¹ The witness also described meetings where he reported to the mayor of Banja Luka problems that the Muslim population encountered during the relevant period of the indictment.⁵² Further, ST223 testified about speeches given by Radoslav Brdanin and other Serb authorities, which the witness considered were “intoned in such a way that the Serbs were being called to unite, to fight the aggressor” and contained “some terrifying, humiliating remarks”.⁵³ The witness also described abuses against Muslims by the SOS,⁵⁴ as well as abuses committed by policemen in a red van.⁵⁵ These portions of the transcripts are relevant to the indictment and correlate to denied adjudicated fact 193.

25. However, some portions of ST223’s prior testimony go beyond the contents of fact 193, *i.e.* portions where the witness discussed the confiscation of his property,⁵⁶ a murder that he witnessed during the relevant period,⁵⁷ events that took place in 1993 and therefore outside the relevant period of the indictment⁵⁸ and portions where the parties discussed procedural matters.⁵⁹

26. In the relevant portions of the transcript, ST223 provided evidence on acts and conduct of members of the JCE, as well as of policemen and military police in Banja Luka. The Trial Chamber considered these to be important issues, on which the Defence should be allowed to cross-examine. For this reason, and bearing in mind that only limited portions of the witness’s prior evidence were considered relevant to fact 193, the Trial Chamber denied the Motion with respect to this witness and decided, following the “best evidence” rule, to call him *viva voce*. In the Second Oral Decision the Trial Chamber decided to call ST223 pursuant to Rule 92 *ter*, and thus it overruled the First Oral Decision insofar as it concerned the mode of testimony of the witness. However, the Trial Chamber’s assessment of the witness’s evidence was not affected by that decision. For these

⁵⁰ Fact 1058 reads: “On 11 May 1992, the ARK crisis staff issued an order confiscating the property of able-bodied men aged between 18 and 55 who had left the area and had not immediately returned. This specifically applied to non-Serbs who had fled the territory of the ARK. Muslims and Croats in managerial posts were fired by the ARK crisis staff irrespective of their responses to the mobilization order. Employers in Banja Luka were told to evict non-Serbs from employer-owned apartments in order to make space for families of fallen Serb soldiers. Those who attempted to protect non-Serbs in Banja Luka were reprimanded or even replaced.” See *Prosecutor v. Mico Stanišić*, IT-04-79-PT, Prosecution’s fifth motion for judicial notice of adjudicated facts, with public annex, 21 Aug 2009, annex, p. 1.

⁵¹ *Brdanin* case, T. 4398 - 4400 up to line 2 and T. 4402.

⁵² *Brdanin* case, T. 4403 - 4407.

⁵³ *Brdanin* case, T. 4409 - 4412.

⁵⁴ *Brdanin* case, T. 4412 - 4413.

⁵⁵ *Brdanin* case, T. 4413 - 4421 up to line 17, T. 4427 from line 7 and T. 4438 from line 23 - 4440.

⁵⁶ *Brdanin* case, T. 4422, T. 4428 - 4432, T. 4440 - 4443.

⁵⁷ *Brdanin* case, T. 4432 - 4435.

⁵⁸ *Brdanin* case, T. 4437 - 4438, T. 4461 - 4463.

⁵⁹ *Brdanin* case, T. 4444 - 4459.

reasons, only the relevant portions of ST223's testimony mentioned above may be admitted into evidence, once the witness's testimony has been completed.

27. Thirteen of the sixteen associated documents tendered by the Prosecution relate to a criminal case against a member of the VRS, Željko Čeko, for the murder that ST223 witnessed.⁶⁰ These documents were not discussed by the witness in the *Brdanin* case and relate to portions of the transcripts, which the Trial Chamber considered go beyond the content of fact 193. For these reasons, the Trial Chamber did not admit these documents into evidence in the current proceedings. Two other documents – a list of “individual members of the Banja Luka lpbr group command”⁶¹ and a receipt of possession of ST223's automobile⁶² – also relate to portions of the transcripts, which the Trial Chamber considered go beyond the content of fact 193. For this reason, the Trial Chamber did not admit these documents into evidence in the current proceedings. The remaining document – proposed Rule 65 *ter* number 3664 – is the pseudonym sheet of the witness, which is inseparable and indispensable from his testimony and which was, therefore, admitted into evidence.

VI. DISPOSITION

28. For the foregoing reasons, and pursuant to Rules 89, 92 *bis*, 92 *ter* and 126 *bis*, the Trial Chamber:

AFFIRMS the First and Second Oral Decision;

SPECIFIES that it will only consider to admit into evidence the following portions of ST223's prior testimony in the *Brdanin* case, provided that the requirements of Rule 92 *ter* are met and once the witness's testimony has been completed:

T. 4398 to T. 4400 line 2; T. 4402 to T. 4407; T. 4409 line 20 to 4421 line 17; T. 4427 lines 7 to 25; T. 4433 lines 8 to 12; T. 4436 line 2 to T.4437 line 13 and T. 4438 line 23 to 4439 line 20.

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



Judge Burton Hall
Presiding

Dated this first day of December 2010

At The Hague

The Netherlands

[Seal of the Tribunal]

⁶⁰ P537.1 to P537.13 in the *Brdanin* case.

⁶¹ The acronym “lpbr” stands for “group of light infantry brigade”, P538 in the *Brdanin* case.

⁶² P540 in the *Brdanin* case.