



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: 3 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: 3 December 2010

PROSECUTOR

v.

MIĆO STANIŠIĆ AND STOJAN ŽUPLJANIN

PUBLIC

**WRITTEN REASONS FOR THE ORAL DECISION
PURSUANT TO RULES 92 *BIS* AND 92 *TER*
GRANTING IN PART PROSECUTION'S MOTION FOR
ADMISSION OF EVIDENCE OF ST247**

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 (“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 further five out of fifteen new witnesses”, filed publicly with confidential annexes on 22 September 2010 (“Motion”),² whereby the Prosecution moved for the admission pursuant to Rule 92 *bis* of the evidence of, *inter alia*, Osman Selak, referred to by the Prosecution as ST247.

2. Insofar as the Oral Decision concerned Osman Selak, the Trial Chamber admitted in part the evidence of Osman Selak, required the witness to appear for cross-examination, and granted the Prosecution a total of 45 minutes for the examination-in-chief. This decision provides the written reasoning for the Oral Decision with regard to Osman Selak.

II. PROCEDURAL BACKGROUND

3. On 1 April 2010, the Trial Chamber declined to take judicial notice of a number of proposed adjudicated facts or parts thereof.³ 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.⁴ 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.⁵ Subsequently, the Prosecution filed three motions, requesting the admission of the prior testimony

¹ Hearing, 12 Nov 2010, T. 17326-7

² The Motion attaches two confidential annexes containing the Rule 92 *bis* packages of the proposed witnesses. These annexes are filed confidentially “as they contain material related to witnesses who are the subject of existing protective measures”, Motion, paras 1-2.

³ Decision granting in part Prosecution’s motions on judicial notice of adjudicated facts pursuant to Rule 94(B), 1 April 2010, (“Adjudicated Facts Decision”).

⁴ 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”).

⁵ Prosecution’s notice of timings for Rule 92 *bis* witnesses with confidential annexes A and B, 19 August 2010.

of a total of 12 witnesses pursuant to Rule 92 *bis*,⁶ one of them being the Motion, part of which is the object of the present written reasons.

4. On 11 October the Stanišić Defence and the Župljanin Defence jointly responded objecting to the Motion (“Joint Response”).⁷

III. SUBMISSIONS

1. Motion

5. The Prosecution requested the admission pursuant to Rule 92 *bis* of the transcript of Osman Selak’s testimony in the *Brdanin* case,⁸ and 13 associated documents described as “[r]elevant and pertinent exhibits” that “form an inseparable and indispensable part” of Osman Selak’s prior testimony.⁹ The Prosecution sought to tender the transcript in its entirety¹⁰ but highlighted “in blue that testimony which is relevant to previously adjudicated facts, and in yellow, the contextual testimony relevant to those facts.”¹¹

6. With regard to general submissions on applicable law, the Prosecution “incorporate[d] by reference” paragraphs five to 14 of the First Motion,¹² which were spelled out by the Trial Chamber in its decision of 1 December 2010.¹³

2. Joint Response

7. The Defence requested to cross-examine Osman Selak, arguing that “there is a need to test the reliability and credibility” of this witness.¹⁴ 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”.¹⁵ According to the Defence’s submissions, any inconsistencies in the

⁶ 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 remainder of the new witnesses, filed publicly with confidential annexes on 27 September 2010 (“Third Motion”) and the Motion.

⁷ Joint Defence response to Prosecution’s motion for admission of transcript and written statements in lieu of *viva voce* testimony pursuant to Rule 92bis for the remainder of the new witnesses, confidential, 11 Oct 2010.

⁸ Case No. IT-99-36-T (*Brdanin* case), 15-24 January 2003. See Confidential Annex A to the Motion.

⁹ Motion, para. 6.

¹⁰ Motion para. 7.

¹¹ Motion para. 7.

¹² Motion, para. 5.

¹³ Written reasons for the oral decision granting in part Prosecution’s motion for admission of evidence of ST223 pursuant to Rule 92 *bis*, 1 Dec 2010.

¹⁴ Joint Response, paras 9-10.

¹⁵ Joint Response, para. 10.

witness's account "will need to be properly explored",¹⁶ because his cross-examination in the *Brđanin* trial "did not adequately address these matters".¹⁷ 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."¹⁸

8. 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."¹⁹

9. The Defence further asserted that Osman Selak "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.²⁰ The Defence submitted that while Osman Selak "is purportedly being relied upon by the prosecution to establish denied adjudicated facts 1076 and 1077, namely, that VRS, the MUP and paramilitary forces attacked Kozarac on 24 May 1992 setting houses on fire and assaulting civilians in the process",²¹ his testimony "does not show the involvement of the MUP or paramilitary forces in any such operation".²²

10. 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."²³

IV. APPLICABLE LAW

11. The Trial Chamber refers to the applicable law set out in its decision of 2 November 2010.²⁴ It recalls that in calling witnesses to testify on the substance of denied adjudicated facts, "the evidence of each selected witness shall be limited to the substance of the corresponding denied adjudicated fact or facts."²⁵

¹⁶ Joint Response, para. 10.

¹⁷ Joint Response, para. 10.

¹⁸ Joint Response, para. 10.

¹⁹ Joint Response, para. 11.

²⁰ Joint Response, para. 7.

²¹ Joint Response, para. 7.

²² Joint Response, para. 7.

²³ Joint Response, para. 9.

²⁴ 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.

²⁵ 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.

V. DISCUSSION

12. As a preliminary matter it is noted that, while the Oral Decision reads “admits in part the evidence [...] of Osman Selak”, it should have read “may admit in part the evidence [...] of Osman Selak”, as the Trial Chamber will only consider the actual admission of the relevant portions of the evidence of Osman Selak, including associated exhibits, once the testimony of the witness has been completed, to comply with the requirements of Rule 92 *ter* and in accordance with the “normal practice that we have applied in this trial”.²⁶

13. While the Prosecution tendered the transcript of testimony of Osman Selak in its entirety, the Trial Chamber will only consider the admission of the portions that it deemed relevant to denied adjudicated facts 1076 and 1077, in accordance with the 14 July Decision. These facts stated:

Fact 1076: The attack [on Kozarac], carried out by VRS 1st krajina Corps, MUP and paramilitary forces on 24 May 1992, began with heavy shelling, followed by the advance of tanks and infantry;²⁷ and

Fact 1077: The Serb infantry, including VRS, MUP and paramilitary forces, entered Kozarac on 24 May 1992, set houses on fire, and rounded up, assaulted, and killed local residents not taking part in the hostilities.²⁸

14. Osman Selak testified, *inter alia*, about his personal and military background and that his zone of responsibility within the Banja Luka Corps in 1992 included the Kozarac area.²⁹ The witness also gave his interpretation of a report by the 5th Krajina Corps concerning the number of persons killed and captured in Kozarac and General Talić’s reaction to that report³⁰ as well as the term “mopping up” in relation to a 1st Krajina Corps report of their activities in the Prijedor area.³¹ The witness further testified that there were no armed formations of Green Berets in the wider area of Kozarac village between 25-27 May 1992³² and that the 5th Kozara Brigade took a direct part in events in Kozarac.³³ He also indicated that security organs would have been consulted prior to the attack on Kozarac.³⁴ These portions of the transcript are relevant to the indictment and correlate to denied adjudicated facts 1076 and 1077.

²⁶ Hearing, 5 Nov 2010, T. 16962.

²⁷ *Prosecutor v. Mićo Stanišić*, IT-04-79-PT, Prosecution’s fifth motion for judicial notice of adjudicated facts, with annex, 21 Aug 2009, Annex A, p. 3. Fact 1076 was rejected because taking judicial notice of this fact “would not serve the interests of justice”, Adjudicated Facts Decision, para. 50.

²⁸ *Prosecutor v. Mićo Stanišić*, IT-04-79-PT, Prosecution’s fifth motion for judicial notice of adjudicated facts, with annex, 21 Aug 2009, Annex A, p. 3. Fact 1077 was rejected because taking judicial notice of this fact “would not serve the interests of justice”, Adjudicated Facts Decision, para. 50.

²⁹ *Brdanin* case, T. 12875-12877.

³⁰ *Brdanin* case, T. 13084-13087.

³¹ *Brdanin* case, T. 13094-13095.

³² *Brdanin* case, T. 13091-13092.

³³ *Brdanin* case, T. 13156.

³⁴ *Brdanin* case, T. 12901.

15. In the relevant portions of the transcripts, the witness discussed the June 1992 report issued by the Banja Luka Security Service Centre describing events leading up to the “wider armed conflicts” in the Kozarac area, and in particular, the presence and activities of Muslim paramilitary formations.³⁵ The Trial Chamber considered that in light of its purported source, the report concerns acts and conduct of the Accused and raises important matters upon which the Defence should be allowed the right to cross-examine. For this reason, pursuant to Rule 92 *bis*(C), the Trial Chamber required the witness to appear for cross-examination and ordered that the provisions of Rule 92 *ter* shall apply.

16. The Trial Chamber noted that portions of the tendered transcripts highlighted in yellow expand beyond what is strictly necessary to understand the context of facts 1076 and 1077, *i.e.* portions where the witness comments on the political atmosphere prior to the indictment period in Belgrade³⁶ and personnel policy of the 1st Krajina Corps.³⁷ For this reason, neither these portions of the highlighted transcripts nor the exhibits associated with these portions will be considered for admission into evidence.³⁸

17. The Prosecution also tendered 13 associated documents, 12 of which are not on the Prosecution’s Rule 65 *ter* exhibit list. However, the material had been disclosed to the Defence who, at the time of the Oral Decision, had been on notice of the Prosecution’s intention to tender such material for over seven weeks. The Trial Chamber was therefore satisfied that the Defence had had adequate time to prepare its case in a manner consistent with the rights of the Accused under the Statute and, therefore, *proprio motu* will add to the Prosecution’s Rule 65 *ter* exhibit list only those items considered to be inseparable and indispensable parts of the statement or transcript they accompany.

18. Seven of the proposed associated documents – two 1st Krajina Corps reports,³⁹ two maps,⁴⁰ and two videos⁴¹ and a June 1992 report issued by the Banja Luka Security Service Centre⁴² – are relevant, probative and form an inseparable and indispensable part of the transcript they accompany. These documents are discussed by the witness within the relevant portions of the transcript mentioned above. Therefore, the Trial Chamber may admit them into evidence once the testimony of this witness has been completed.

³⁵ *Brdanin* case, T: 13253-13254.

³⁶ *Brdanin* case, T. 12985.

³⁷ *Brdanin* case, T. 13060-13063.

³⁸ *Brdanin* case, T. 12955-13044, T. 13046, T. 13060-13063, T. 13065-13069, T. 13077-13078, P1580, P1583, P1584 and P.1586 in the *Brdanin* case, proposed Rule 65 *ter* 3640-3643 in current proceedings.

³⁹ P1587/P1416 and P1588/P655 in the *Brdanin* case, proposed Rule 65 *ter* 3644 and 3645 in current proceedings.

⁴⁰ P1548 and P1549 in the *Brdanin* case, proposed Rule 65 *ter* 3638 and 3639 in current proceedings.

⁴¹ P1595 and P1596 in the *Brdanin* case, proposed Rule 65 *ter* 3646 and 3647 in current proceedings.

⁴² DB124 in the *Brdanin* case, proposed Rule 65 *ter* 3649 in current proceedings.

19. One document – the 1st Krajina Corps Command report no. 482-1 – has already been admitted in the current proceedings and will not be further considered.⁴³

20. One document is a 195-page notebook of Osman Selak.⁴⁴ Only one page of this document is discussed by the witness within the relevant portions of the transcript mentioned above.⁴⁵ This page is relevant, probative and forms an inseparable and indispensable part of the transcript it accompanies. Therefore, the Trial Chamber may admit this page into evidence once the testimony of this witness has been completed.

21. The four remaining documents do not relate to relevant portions of the transcript and therefore the Trial Chamber will not consider them for admission into evidence.⁴⁶

VI. DISPOSITION

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

AFFIRMS the Trial Chamber's Oral Decision as to the need for Osman Selak to attend for cross-examination;

VARIES the Oral Decision such that the Trial Chamber will consider for admission into evidence only the following portions of Osman Selak's prior testimony in the *Brdanin* case and associated exhibits, once the witness's testimony has been completed and provided that the requirements of Rule 92 *ter* are met:

- portions of Osman Selak's testimony in the *Brdanin* case, as highlighted by the Prosecution, on pages T. 12869-75, T. 12877, T. 12899-12903, T. 13046, T. 13084-13087, T. 13090-13096, T. 13133, T. 13146, T. 13150-13157, T. 13208, T. 13210, T. 13253-13258;
- the associated documents with Rule 65 *ter* numbers 3638, 3639, 3644, 3645, 3646, 3647, 3649;

⁴³ P411.29 admitted on 26 Nov 2009.

⁴⁴ P1600 in the *Brdanin* case proposed Rule 65 *ter* 3648 in current proceedings.

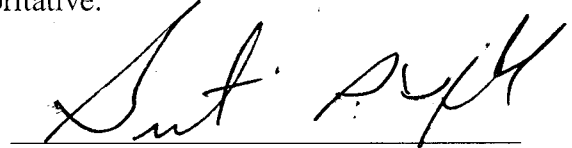
⁴⁵ P1600, page number ERN 0110-4791.

⁴⁶ P1580, P1583, P1584 and P1586 in the *Brdanin* case, proposed Rule 65 *ter* 3640, 3641, 3642 and 3643 in current proceedings.

- page number ERN 0110-4791 of the associated document with Rule 65 *ter* number 3648; and

CLARIFIES that the Prosecution is allotted an additional 25 minutes to examine Osman Selak for a total of 45 minutes, to be absorbed within the total time allotted for hearing the witnesses who are to testify to cover denied adjudicated facts.

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



Judge Burton Hall
Presiding

Dated this third day of December 2010

At The Hague

The Netherlands

[Seal of the Tribunal]