



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: 27 January 2012
Original: English

IN TRIAL CHAMBER II

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

Registrar: Mr. John Hocking

Decision of: 27 January 2012

PROSECUTOR

v.

MIĆO STANIŠIĆ AND STOJAN ŽUPLJANIN

PUBLIC

**DECISION DENYING STANIŠIĆ MOTION FOR THE
ADMISSION INTO EVIDENCE OF 65 TER 820D1 WITH
SEPARATE CONCURRING OPINION OF JUDGE
HARHOFF**

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. Dragan Krgović and Mr. Aleksandar Aleksić for Stojan Župljanin

I. INTRODUCTION

1. 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 the “Stanišić Motion for the Admission into Evidence of 65 *ter* 820D1”, filed on 21 December 2011 (“Motion”), whereby the Defence of Mićo Stanišić (“Defence”) seeks the admission into evidence of document bearing Rule 65 *ter* number 820D1 (“820D1”). On 21 December 2011, the Prosecution responded, opposing the Motion (“Response”).¹

II. SUBMISSIONS

2. The Defence requests the Trial Chamber to admit 820D1 into evidence.² The Defence recalls the Trial Chamber’s Decision of 15 September 2011 in which the Trial Chamber denied the original application to have 820D1 admitted into evidence finding that it lacked sufficient reliability.³ It cites the relevant part of that Decision which reads:

Rule 65 *ter* number 820D1 is a record of the remarks and proposals of the Croatian Democratic Union of Bosnia and Herzegovina (HDZ) on the “Statement on the principles for the new constitutional structure of Bosnia and Herzegovina” related to Cutiliero’s plan and pre-war negotiations. The Trial Chamber considers the contents of this document to be relevant and potentially probative to the present case. However, the Trial Chamber notes that the Defence’s only submission as to its provenance is that it is from “Tudjman book”, with no further details. Accordingly, the Trial Chamber finds that the document as tendered by the Defence lacks sufficient reliability for admission into evidence. In this regard, the Trial Chamber considers that, given the relevance and potential probative value, it will permit the Defence to tender the original or official archived version of this record of remarks and proposals of the HDZ in order to satisfy the reliability requirement for admission into evidence.⁴

3. The Defence submits that already on 16 September 2011, it had written to the relevant Croatian authority requesting the original document or the newspaper article which is referred to in 820D1.⁵ It further submits that on 25 October 2011, Croatia provided it with three newspaper articles which in its view “corroborate the existence and the contents” of 820D1.⁶ It adds that Croatian authorities do not appear to be in possession of the original or official version of 820D1.⁷

¹ Prosecution’s response to Stanišić’s motion for the admission into evidence of 65 *ter* 820D1, 21 December 2011.

² Motion, p. 2.

³ Decision granting in part the Stanišić Defence bar table motion, 15 September 2011 (“Decision of 15 September 2011”), para. 24.

⁴ Decision of 15 September 2011, para. 24.

⁵ Motion, para. 4.

⁶ *Ibid.*, paras 5, 6.

⁷ *Ibid.*, para. 6.

4. The Prosecution opposes the admission into evidence of 820D1 arguing that the Defence has not complied with the Trial Chamber's direction.⁸ It submits that the document should be denied admission because the additional materials provided are merely media accounts of the ongoing negotiations and are not "official or archived version(s)" of the remarks and proposals of the HDZ.⁹ It further argues that the Defence has made no effort to seek the original version of 820D1 from other sources.¹⁰ According to the Prosecution, the newspaper articles do not make 65 *ter* 820D1 any more reliable.¹¹

III. APPLICABLE LAW AND DISCUSSION

5. With regard to the law applicable to admission of evidence from the bar table, the Trial Chamber refers to the law set out in its Decision of 15 September 2011.¹²

6. The Defence has failed to provide the original or official archived version of 820D1 and has therefore not complied with the Decision of 15 September 2011.¹³ Aside from that fact, the three articles provided by the Defence in support of its Motion do not significantly increase 820D1's reliability as they fail to lend sufficient support to the claim that 820D1 fully and accurately reflects the remarks and proposals made by HDZ on Cutiliero's plan.¹⁴ Moreover, the Trial Chamber is not satisfied that the Defence has exhausted all avenues to retrieve the original or the official version of 820D1. It has, for example, not demonstrated for it requested the document from the HDZ party. The Trial Chamber will therefore deny the Motion.

⁸ Response, paras 2, 3.

⁹ *Ibid.*, para. 2.

¹⁰ *Id.*

¹¹ *Id.*

¹² Decision granting in part the Stanišić Defence bar table motion, 15 September 2011, para. 18.

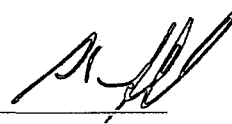
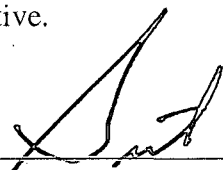
¹³ Decision of 15 September 2011, para. 24.

¹⁴ Motion, Annex A, p. 1; Annexes D, E, and F.

IV. DISPOSITION

7. For the reasons set out above and pursuant to Rule 89(C) of the Tribunal's Rules of Procedure and Evidence, the Trial Chamber **DENIES** the Motion.

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



Judge Burton Hall
Presiding

Dated 27th day of January 2012

At The Hague

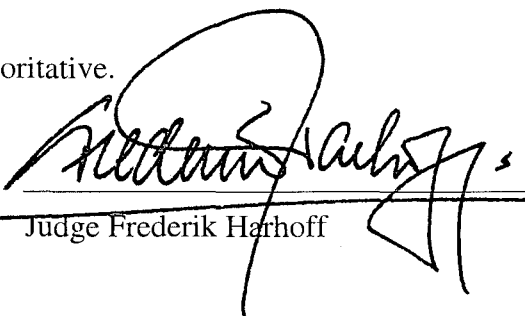
The Netherlands

[Seal of the Tribunal]

SEPARATE CONCURRING OPINION OF JUDGE HARHOFF

1. I fully concur with the disposition of the present Decision that the Defence's Motion for admission of document 65ter 820D1 should be denied for lack of providing the original version of that document.
2. However, my perception of the legal nature of the Motion is slightly different from that of the majority.
3. Document 65ter 820D1 appears to be an annex in a book published by President Tudman. The annex purports to be a verbatim reproduction of the position taken by the Croatian Democratic Union of BiH (HDZ) endorsing José Cutileiro's plan for keeping Bosnia and Herzegovina as one independent State, but dividing its territory into three constituent parts for each of the three peoples.¹ The Defence originally asked to have the document admitted into evidence but the Trial Chamber denied, in its Decision of 15 September 2011, the request for lack of the document's authenticity.² However, the Trial Chamber left open the possibility for the Defence to try and find the *original* version of the HDZ position paper, which could then be exhibited.
4. As it turned out, the Defence was unable to find the original version of the HDZ paper, but then brought three newspaper articles to corroborate the authenticity of the annex in Tudman's book and asked anew, in the Motion now before us, to have document 65ter 820D1 admitted into evidence.
5. This is, in strict legal terms, *a request for reconsideration* of the Trial Chamber's Decision of 15 September 2011 and the Defence should have moved accordingly rather than referring to Rule 89(C) as the legal basis for his Motion.³ The Trial Chamber has ruled that it will only admit *the original version* of the HDZ paper into evidence and as long as this version is not produced, the Trial Chamber's ruling stands. Any attempt to change this position is, by its nature, a move for reconsideration.
6. I would therefore have preferred to deal with Stanišić's Motion for admission of document 65ter 820D1 squarely as a motion for reconsideration and denied the Motion on the grounds that it neither points to any legal error made in the Trial Chamber's Decision of 15 September 2011, nor to any risk of injustice following from that Decision.

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



Judge Frederik Harhoff

Dated 27th day of January 2012
At The Hague
The Netherlands

[Seal of the Tribunal]

¹ Motion, Annex A, p. 1.

² Decision of 15 September 2011, para. 24.

³ Motion, para. 6.