



International Tribunal for the
Prosecution of Persons
Responsible for Serious Violations of
International Humanitarian Law
Committed in the Territory of
Former Yugoslavia since 1991

Case No. IT-04-79-PT
Date: 8 February 2008
Original: English

IN TRIAL CHAMBER II

Before: Judge Kevin Parker, Presiding
Judge Christine Van Den Wyngaert
Judge Krister Thelin

Registrar: Mr. Hans Holthuis

Decision of: 8 February 2008

PROSECUTOR

v.

MIĆO STANIŠIĆ

PUBLIC

**DECISION IN RELATION TO THE DEFENCE MOTION ON
THE PROSECUTION'S NON-COMPLIANCE WITH THE PRE-
TRIAL JUDGE'S ORDER REGARDING RULE 65 *TER*(E)**

The Office of the Prosecutor:

Ms Anna Richterova

Counsel for the Accused:

Mr Stevo Bezbradica

1. This decision of the Trial Chamber is in respect of the “Second Defence Motion in Relation to the Prosecution’s Non-Compliance with the Pre-Trial Judge’s Order Regarding Rule 65ter(E) of the Rules of Procedure and Evidence”, filed confidentially on 16 March 2007 (“Motion”).¹ By this confidential motion, the Defence requests that the Chamber order the Prosecution to (a) file a new pre-trial brief pursuant to Rule 65ter(E) of the Rules of Procedure and Evidence (“Rules”), and (b) to impose sanctions on the Prosecution pursuant to Rule 65ter(H) of the Rules. On 29 March 2007, the Prosecution confidentially filed a response to the Motion whereby it submits that it has *in toto* complied with its obligations pursuant to Rule 65ter(E), and requests that the Chamber dismiss the Motion (“Response”).² On 5 April 2007, the Defence filed a reply to the Response (“Reply”).³ In the Reply, the Defence seeks leave from the Chamber to file a reply and refutes the Prosecution’s arguments in the Response. Leave should be granted.

1. Background

2. On 1 December 2006, in partial compliance with the Pre-Trial Judge’s oral order of 26 September 2006, the Prosecution filed its Pre-Trial Brief pursuant to Rule 65ter(E)(i) of the Rules. The Prosecution, however, did not submit a list of witnesses and a list of exhibits as required by Rule 65ter(E)(ii) and (iii). Following a Defence motion dated 2 January 2007 whereby the Defence submitted that the Prosecution had not fully complied with the Pre-Trial Judge’s order of 26 September 2006, the Pre-Trial Judge, on 18 January 2007, ordered the Prosecution to file by 16 February 2007, a new Pre-Trial Brief, together with a witness and exhibit list as provided by Rule 65ter(E). In the order, the Pre-Trial Judge specified that the Prosecution’s Pre-Trial Brief needed some editing in order to provide a link between the summary of the evidence and the form of responsibility incurred by the accused in respect of each of the counts charged in the indictment against the accused Mićo Stanišić (“Indictment”).⁴ In a Motion dated 5 February 2007, the Prosecution requested leave to exceed the word limit for pre-trial briefs provided in the Tribunal’s Practice Direction on Length of Briefs and Motions, in order to comply with the Pre-Trial Judge’s order of 18 January 2007.⁵ On 8 February 2007, the Pre-Trial Judge authorized the Prosecution to

¹ A corrigendum to the Motion was filed on 8 May 2007 (“Corrigendum to Second Defence Motion in Relation to the Prosecution’s Non-Compliance with the Pre-Trial Judge’s Order Regarding Rule 65ter(E) of the Rules of Procedure and Evidence”, 8 May 2007). The corrigendum identifies the names of some prospective witness for the Prosecution and requests that these names be deleted from the Motion so that these witnesses be referred to only with the pseudonyms proposed by the Prosecution in its 65ter (E)(ii) list.

² “Confidential Prosecution’s Response to Second Defence Motion in Relation to the Prosecution’s Non-Compliance with the Pre-Trial Judge’s Order Regarding Rule 65ter(E)”, 29 March 2007.

³ “Defence’s Motion for leave to Reply and Proposed Reply to Prosecution’s Response to Second Defence Motion in Relation to the Prosecution’s Non-Compliance with the Pre-Trial Judge’s Order Regarding Rule 65ter(E)”, 5 April 2007.

⁴ Status Conference, 18 January 2007, T 72.

⁵ “Prosecution’s Request for Leave to Exceed Word Limit for Revised Pre-Trial Brief”, 5 February 2007.

file a new Pre-Trial Brief not exceeding 20,000 words.⁶ On 16 February 2007, the Prosecution filed a partly confidential revised Pre-Trial Brief, together with a list of witnesses and list of exhibits (respectively “Witness List” and “Exhibit List”) in accordance with Rule 65*ter*(E) of the Rules.⁷

2. Rule 65*ter*(E)(i)

3. Rule 65*ter*(E)(i) provides that:

- (E) [...] the pre-trial Judge shall order the Prosecutor, upon the report of the Senior Legal Officer, and within a time-limit set by the pre-trial Judge and not less than six weeks before the Pre-Trial Conference required by Rule 73*bis*, to file the following:
 - (i) the final version of the Prosecutor’s pre-trial brief including, for each count, a summary of the evidence which the Prosecutor intends to bring regarding the commission of the alleged crime and the form of responsibility incurred by the accused; this brief shall include any admission of the parties and a statement of matters which are not in dispute; as well as a statement of the contested matters of fact and law.

4. The Defence submits that the Prosecution’s revised Pre-Trial Brief does not fulfil the requirements of Rule 65*ter*(E)(i). In particular, the Defence argues that the Pre-Trial Brief does not contain a clear and complete summary of the evidence that the Prosecution intends to bring to trial and that there is a missing link between the counts charged in the Indictment and the summary of the evidence provided by the Prosecution in its revised Pre-Trial Brief.⁸ The Defence further submits that the Prosecution should have submitted a “summary table” containing a detailed statement of the evidence supporting each count of the indictment, and cross-referencing each paragraph of the indictment, each exhibit on the Prosecution’s Exhibit List, each witness on the Prosecution’s Witness List, and each paragraph of its Pre-Trial Brief.⁹ The Prosecution submits that its revised Pre-Trial Brief is in compliance with the Rule, and that it contains a detailed summary of the evidence that the Prosecution will present at trial. The Prosecution also submits that each count of the Indictment is linked via paragraph references, to specific evidence summarized in the revised Pre-Trial Brief that proves the count.¹⁰ With more particular regard to the “summary table”, the Prosecution argues that Rule 65*ter*(E) does not require the use of summary tables containing the information requested by the Defence.¹¹

5. The main purpose of Rule 65*ter*(E) is to allow the Defence to be on notice of the main facts of the Prosecution case with a view to allowing the Defence to prepare its cross-examination and its

⁶ “Order on Prosecution’s Request for Leave to Exceed Word Limit for a Pre-Trial Brief”, 8 February 2007.

⁷ A corrigendum to the partly confidential Revised Pre-Trial Brief was filed on 5 April 2007 (“Corrigendum to Prosecutor’s Revised Pre-Trial Brief”, 5 April 2007). The corrigendum proposes some corrections to the revised Pre-Trial Brief and to the Witness List.

⁸ Motion, paras 8-9, 11-13, 15.

⁹ Motion, paras 10, 14, 18, 21-23, 33; Reply, para 5.

¹⁰ Response, para 6.

¹¹ Response, paras 3-4, 8-10.

Defence case. The Trial Chamber has reviewed the revised Pre-Trial Brief and is of the view that there has not been a failure to comply with Rule 65ter(E)(i). The revised Pre-Trial Brief not only sets out in general terms the nature of the Prosecution's case by providing a "summary of the evidence" that the Prosecution intends to bring at trial, but also addresses the legal issues of the Prosecution's case against the accused. The "summary of the evidence" provides adequate detail with respect to the evidence from the municipalities where the alleged crimes occurred and also provides sufficient detail with respect to the form of responsibility alleged in each case. The Trial Chamber observes that the Prosecution does not have to give a complete picture of all evidence that it will lead at trial. Not all incidents alleged in the Indictment must be addressed in the Pre-Trial Brief, nor must there be reference to all witnesses and exhibits listed in the Witness List and Exhibit List.¹² As for the Defence contention that there is a missing link between the counts charged in the Indictment and the summary of the evidence provided by the Prosecution, the Trial Chamber notes that the Pre-trial Brief includes a section entitled "General Requirements Applicable to All Counts" in which the Prosecution not only sets out the legal elements of each count charged but also refers to the factual evidence it relies on to prove each count charged. This is done by way of cross-referencing to sections of the revised Pre-Trial Brief where the evidence relevant to each count is summarized.

6. With respect to the Defence's argument that the Prosecution has failed to submit a "summary table", such as the one submitted by the Prosecution in the *Prlić et al.* case,¹³ the Trial Chamber notes that Rule 65ter(E) does not require that such a table be provided by the Prosecution, nor has the Pre-Trial Judge or this Trial Chamber ordered the Prosecution to provide a table of that nature. The Trial Chamber further notes that there are no special circumstances in the instant case that would require such a table. Unlike the *Prlić et al.* case, where six accused are charged in the same indictment, the present case deals only with one accused. No plausible reasons have been advanced by the Defence to justify the need for such a measure.

7. The Prosecution has, in the view of the Trial Chamber, sufficiently addressed the factual and legal issues of the Prosecution's case against the accused, to fully comply with its obligations pursuant to Rule 65ter(E)(i) of the Rules.

3. Rule 65ter(E)(ii) and (iii)

8. The Defence further submits that the Prosecution's Witness List and Exhibit List does not fulfil the requirements of Rule 65ter(E)(ii) and (iii). Rule 65ter(E)(ii) and (iii) provides that:

¹² See Motion, para 16; Response, para 13.

¹³ See *supra* para 3; Motion, paras 14, 18, 21-23, 33; Reply, para 5.

- (E) [...] the pre-trial Judge shall order the Prosecutor, upon the report of the Senior Legal Officer, and within a time-limit set by the pre-trial Judge and not less than six weeks before the Pre-Trial Conference required by Rule 73*bis*, to file the following:
- (ii) the list of witnesses the Prosecutor intends to call with:
 - (a) the name or pseudonym of each witness;
 - (b) a summary of the facts on which each witness will testify;
 - (c) the points in the indictment as to which each witness will testify, including specific references to counts and relevant paragraphs in the indictment;
 - (d) the total number of witnesses and the number of witnesses who will testify against each accused and on each count;
 - (e) an indication whether the witness will testify in person or pursuant to Rule 92*bis* or 92*quater* by way of written statement or use of a transcript of testimony from other proceedings before the Tribunal; and
 - (f) the estimated length of time required for each witness and the total time estimated for presentation of the Prosecutor's case.
 - (iii) the list of exhibits the Prosecutor intend to offer stating where possible whether the defence has any objection as to authenticity. The Prosecutor shall serve on the defence copies of the exhibits so listed.

9. The Witness List and Exhibit List provided by the Prosecution are attached in an annex to the Prosecution's revised Pre-Trial Brief.¹⁴ Having reviewed the Witness List, the Trial Chamber accepts that there has been a failure to comply with some of the requirements of Rule 65*ter*(E)(ii).

10. The Prosecution has not provided the names or pseudonyms of two prospective witnesses. These two witnesses will be addressed in this decision with their 65*ter* numbers, and therefore called "ST-100" and "ST-105". The Prosecution has indicated that ST-100 is a witness from the International Commission for Missing Persons in Sarajevo, and that ST-105 is a witness from an international organization. A very brief and generic summary of the facts on which these two witnesses will testify has been provided. In its Response, the Prosecution submitted that "the actual witness ST-100 from ICMP has not yet been identified" and that "once identified, his/her name will be provided to the Defence".¹⁵ With respect to ST-105, the Prosecution has indicated that this witness has already testified in various cases in this Tribunal, but that his/her evidence is subject to Rule 70 of the Rules, and, therefore, in order to disclose the identify of the witness, the Prosecution needs clearance from the international organization in question.¹⁶ The Prosecution advances that it intends to file a confidential motion for protective measures in respect of ST-105. To this date the Trial Chamber has not received such a motion. The Trial Chamber observes that it is not

¹⁴ See Confidential Annex C, and Annex B.

¹⁵ Response, para 2 (a).

¹⁶ Confidential Annex C, p 64; Response, para 2 a).

permissible for the Prosecution to redact or not disclose the name or pseudonym of prospective witnesses without the Chamber's authorization to do so. As there has not been an authorization from the Chamber for delayed disclosure of the identity of witnesses ST-100 and ST-105, the Trial Chamber will not consider these witnesses as included in the Prosecution's Witness List. Should the Prosecution wish to call these witnesses to testify, it will have to file a motion requesting delayed disclosure of the identities of witnesses ST-100 and ST-105 and of the summaries of their expected testimony.

11. The Trial Chamber also notes that the Prosecution has not disclosed the names or pseudonyms of other prospective Prosecution witnesses that have been referred to in the Motion with the following *65ter* numbers: ST-23, ST-26, ST-137, ST-139, ST-140, and ST-141. Also a summary of the facts on which each of these witnesses will testify has not been submitted. The Prosecution, in its Response, submits that the delayed disclosure of the identities of these witnesses and of the summaries of their expected testimony was previously granted as protective measures in other proceedings before the Tribunal, and that under Rule 75(F)(i) of the Rules the protective measures should continue to have effect *mutatis mutandis* in the present case.¹⁷ The Prosecution has not identified in which proceedings orders for delayed disclosure of the identity of these witnesses and of the summaries of their evidence have been made. Nor has any further information been provided to this Chamber for it to determine whether any orders made in other proceedings can and do apply in these proceedings pursuant to Rule 75(F)(i). Without such information the Chamber cannot accept the Prosecution's submission in respect of these witnesses. In the absence of a further motion, adequately supported with necessary evidence, the Trial Chamber will not consider ST-23, ST-26, ST-137, ST-139, ST-140, and ST-141 to be included in the list of witnesses for the Prosecution.

12. The Chamber further notes that in its decision on protective measures dated 6 June 2005,¹⁸ the Chamber allowed a witness identified in the Prosecution's submission as "witness 10.29" to testify with the pseudonym "ST-26" and also authorized the Prosecution to delay the disclosure of the identity of that witness "until 30 days before the commencement of trial or such other date determined by the Pre-Trial Judge or the Chamber at a time when the trial commencement date is known".¹⁹ It has not been established whether that prospective witness is the same person as the one listed as "ST-26" in the Witness List. This should be clarified.

¹⁷ Response, para 2 d).

¹⁸ "Decision on Prosecution's Motions for Protective Measures for Victims and Witnesses", 6 June 2005.

¹⁹ *Ibid*, para 25.

13. With more particular regard to the summaries of the anticipated evidence of the listed prospective Prosecution witnesses, the Defence submits that these summaries do not “represent the content of the material disclosed whether in the form of statements or past testimony”.²⁰ This submission has not been supported by any detailed submission nor has the Defence identified the summaries which are said not to meet the requirements of Rule 65ter(E)(ii). It is not made out.

14. The Defence further submits that the Witness List does not refer to the points in the Indictment as to which each witness will testify, and particularly, that it does not contain specific references to paragraphs of the Indictment, paragraphs of the revised Pre-Trial Brief, and to the Exhibit List.²¹ The Trial Chamber notes that Rule 65ter(E)(ii) does not require that the Witness list contain cross-references to either the Pre-Trial Brief or the Exhibit List. Nor does it require, as the Defence submits, that the summaries of the anticipated evidence of the witnesses contain exact quotations of the “relevant sentence of the Indictment”.²² The Rule, however, requires that the Prosecution identify the relevant counts and paragraphs in the indictment to which each witness’ testimony will be relevant. After reviewing the Witness List, the Trial Chamber accepts that the Prosecution’s Witness List contains adequate references to the counts in the Indictment to which each witness will testify. The Witness List does not, however, include specific references to the relevant paragraphs of the Indictment to which each witness will testify. The Prosecution will therefore need to supplement its Witness list accordingly.

15. The Trial Chamber further observes that the Prosecution has not indicated the total number of witnesses that will testify and the total time estimated for the presentation of the Prosecution’s case. It will need to do so within the time provided in this decision.

16. The Defence also raises numerous other issues concerning the Witness and Exhibit List that have, in the Chamber’s view, been adequately addressed by the Prosecution in its Response, and need not be discussed further by the Trial Chamber in this decision as they do not appear to allege or establish non-compliance by the Prosecution with its obligations pursuant to Rule 65ter(E)(ii). Rather in each such case, they appear to reveal a misunderstanding by the Defence.²³ The Trial

²⁰ Motion, para 24.

²¹ Motion, paras 22-23, 30-31. *See also*, Motion, paras 10, 20.

²² Motion, paras 30-31,

²³ Some of these misunderstandings are indicative that the Defence has not read some of the submissions of the Prosecution, such as the “Prosecution’s Supplement to Rule 65ter(E)(ii) List of Witnesses with Annex” filed confidentially on 21 March 2007, and also the “Corrigendum to Prosecutor’s Revised Pre-trial Brief”, filed confidentially on 5 April 2007.

Chamber therefore accepts the Prosecution's clarifications in respect of paragraphs 27, 28, 29, and 38 of the Motion.²⁴

17. As for the Exhibit List, the Trial Chamber is satisfied the Prosecution has fully complied with the Rule. The Exhibit List adequately sets out the exhibits that the Prosecution intends to offer, and will allow the Defence to prepare its cross-examination.

4. Disposition

18. For the foregoing reasons and pursuant to Rules 54, 65ter(E) and 126bis of the Rules, the Trial Chamber:

(1) **GRANTS LEAVE** to the Defence to file the Reply; and

(2) **GRANTS** the Motion **IN PART** and **ORDERS** as follows:

(a) The Prosecution shall provide to the Defence and the Chamber by 22 February 2008 with a revised Witness List. The revised Witness List shall include:

(i) the list of witnesses contained in the Witness List, with the exclusion of witnesses ST-100, ST-105, ST-23, ST-26 (unless the same as witness "10.29/ST-26" of the Trial Chamber's decision of 6 June 2005), ST-137, ST-139, ST-140, and ST-141 ("Revised List of Witnesses");

(ii) the name or pseudonym of each witness listed in the Revised List of Witnesses;

(iii) a summary of the facts on which each witness listed in the Revised List of Witnesses will testify;

(iv) the points in the indictment as to which each witness in the Revised List of Witnesses will testify, including specific references to counts and relevant paragraphs in the Indictment;

(v) the total number of witnesses that will testify;

(vi) the estimated length of time required for each witness in the Revised List of Witnesses to testify; and

²⁴ Response paras 2 b), c), e), f). *See also* "Prosecution's Supplement to Rule 65ter(E)(ii) List of Witnesses with Annex", filed confidentially on 21 March 2007; "Corrigendum to Prosecutor's Revised Pre-trial Brief", filed confidentially on 5 April 2007.

(vii) the total time estimated for presentation of the Prosecutor's case.

(3) **DENIES** the Motion in all other respects.

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

Dated this 8th day of February 2008,

At The Hague

The Netherlands



Kevin Parker
Presiding Judge

[Seal of the Tribunal]