



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-A
Date: 3 July 2013
Original: English

IN THE APPEALS CHAMBER

Before: Judge Theodor Meron, Pre-Appeal Judge
Registrar: Mr. John Hocking
Decision of: 3 July 2013

PROSECUTOR

v.

**MIĆO STANIŠIĆ
STOJAN ŽUPLJANIN**

PUBLIC

**DECISION GRANTING PROSECUTION MOTION
REQUESTING PUBLIC REDACTED VERSION OF TRIAL
CHAMBER'S DECISION OF 4 DECEMBER 2009**

The Office of the Prosecutor

Mr. Douglas Stringer
Mr. Matthew Olmsted
Mr. Alexis Demirdjian

Counsel for Mićo Stanišić

Mr. Slobodan Zečević and Mr. Stéphane Bourgon

Counsel for Stojan Župljanin

Mr. Dragan Krgović and Ms. Tatjana Čmerić

I, THEODOR MERON, Judge of the Appeals 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”) and Pre-Appeal Judge in this case;¹

BEING SEISED OF the “Prosecution Motion to Request Public Redacted Version of Trial Chamber’s Decision on Leave to Amend 65 *ter* List of Witnesses” filed confidentially on 24 June 2013 (“Motion”),

NOTING that the Motion requests that the Appeals Chamber issue a public redacted version of the “Decision Granting in Part Prosecution’s Motion for Leave to Amend Its 65 *ter* List of Witnesses”, issued confidentially on 4 December 2009 by the Trial Chamber in the Case No. IT-08-91-T, *Prosecutor v. Mićo Stanišić and Stojan Župljanin* (“Decision”), in order for it to be provided to all parties before the Tribunal, including the parties in Case No. IT-04-75-T, *Prosecutor v. Goran Hadžić* (“Hadžić case”);²

NOTING that the Prosecution argues that: (i) the Prosecution in the Hadžić case relied on the Decision in a motion for leave to amend its Rule 65 *ter* witness list before the Hadžić Trial Chamber;³ (ii) the Decision is not available to the Defence in the Hadžić case because of its confidential status;⁴ and (iii) considering that the Decision relates to protected witnesses,⁵ it is appropriate to request a public redacted version of the decision rather than requesting the Appeals Chamber to lift the confidential status of the Decision:

NOTING that since the request does not prejudice the Defence, the Pre-Appeal Judge need not, in the present circumstances, await a response;

CONSIDERING that the safety and security concerns of the witnesses named in the Decision would be sufficiently addressed by redacting any reference to identifying information therein pursuant to Rule 75 of the Rules of Procedure and Evidence (“Rules”),

CONSIDERING that it is in the interest of justice to make available a public redacted version of the Decision:

PURSUANT TO Rules 54 and 75 of the Rules:

¹ Order Designating a Pre-Appeal Judge, 15 April 2013, p. 1

² Motion, paras. 1 and 6

³ Motion, paras. 4

⁴ Motion, paras. 4

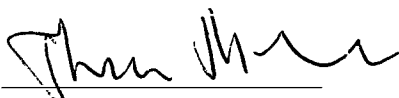
⁵ Motion, paras. 5

HEREBY GRANTS the Motion;

ORDERS the Registry to issue the redacted version of the Decision publicly as attached in Annex I;

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

Done this third day of July 2013,
At The Hague,
The Netherlands.



Judge Theodor Meron
Pre-Appeal Judge

[Seal of the Tribunal]

ANNEX I

UNITED
NATIONS



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: 4 December 2009
Original: English

IN TRIAL CHAMBER II

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

Registrar: Mr. John Hocking

Decision of: 4 December 2009

PROSECUTOR

v.

MIĆO STANIŠIĆ AND STOJAN ŽUPLJANIN

PUBLIC REDACTED VERSION



**DECISION GRANTING IN PART PROSECUTION'S
MOTION FOR LEAVE TO AMEND ITS 65 *TER* LIST OF
WITNESSES**

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. Igor Pantelić and Mr. Dragan Krgović for Stojan Župljanin

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 “Prosecution’s motion for leave to amend its 65 *ter* list of witnesses”, filed confidentially on 13 October 2009 (“Motion”) in which the Prosecution seeks to “add two witnesses and to substitute two witnesses currently on the 65 *ter* list by two new witnesses”.¹

I. PROCEDURAL HISTORY

1. On 8 June 2009, the Prosecution filed a list of 161 witnesses to be called in the Prosecution case (“Original Witness List”), pursuant to Rule 65 *ter* of the Rules of Procedure and Evidence of the Tribunal (“Rules”).² In a Corrigendum filed on 22 June 2009, the Prosecution added ST212 to the list, stating that this witness had been omitted erroneously [REDACTED].³ At a Rule 65 *ter* conference held on 24 August 2009, the Trial Chamber invited the Prosecution to file a motion to amend the Original Witness List in order to seek leave to add ST212.⁴

2. At the Pre-Trial Conference held on 4 September 2009, the Trial Chamber determined that the Prosecution may call 131 witnesses in the presentation of its evidence-in-chief, for a total of 212 hours, and ordered it to file a revised final witness list by noon on 10 September 2009.⁵ On 10 September 2009, the Prosecution filed its reduced list of witnesses (“Reduced Witness List”).⁶

3. The Motion was filed on 13 October 2009 and on 19 October 2009 the Defence of Mićo Stanišić and the Defence of Stojan Župljanin (together “Defence”) filed a “Joint Defence response to Prosecution’s motion for leave to amend its 65*ter* list of witnesses” (“Joint Response”), in which the Defence “oppose the addition and substitution of the four proposed witnesses in the Prosecution Motion” and “request that the Trial Chamber deny the Prosecution Motion”.⁷

II. SUBMISSIONS

4. In the Motion, the Prosecution requests leave to amend its Rule 65 *ter* witness list to add two witnesses, ST212 and ST213, and to substitute two witnesses, ST214 and ST215, to replace

¹ Motion, para 1

² Prosecution’s pre-trial brief, 8 Jun 2009

³ Corrigendum to confidential appendices 3 and 4 of the Prosecution’s pre-trial brief of 8 June 2009, with confidential annexes, 22 Jun 2009 (“Corrigendum”), para 3

⁴ Rule 65 *ter* Conference, 24 Aug 2009, T 293-294, see also Agenda distributed to the parties prior to the Rule 65 *ter* meeting

⁵ Pre-Trial Conference, 4 Sep 2009, T 90-91, 93





⁶ Prosecution’s reduced list of witnesses, 10 Sep 2009

⁷ Joint Response, para 3 and p 3

ST194 and ST188 respectively.⁸ The Prosecution submits that the changes to the witness list are “in the interest of justice as they will provide the Trial Chamber with an increased understanding of relevant issues and contribute to the ascertainment of the truth”.⁹ The Prosecution states that, in determining such a motion, the Trial Chamber may consider (1) the *prima facie* relevance of the evidence to be provided by the new witnesses; (2) the stage of proceedings; (3) whether the requesting party has shown good cause; (4) whether the defence has adequate time to prepare for cross-examination; and (5) judicial economy.¹⁰ The Prosecution asserts that no factor is over-riding and that all need to be considered for each witness. The Prosecution addresses each of these in turn, other than the issue of good cause, on which it is silent or relies upon the specific circumstances relating to each individual witness.

5. On the issue of relevance, the Prosecution submits that it “is cognisant of the Trial Chamber’s guidance to focus on linkage witnesses and emphasizes that all four witnesses will provide crucial linkage evidence”.¹¹ The Prosecution also submits that the trial is in its elementary stage, so that “the addition or substitution of the following witnesses will not affect the Defence’s ability to cross-examine these witnesses”¹² and proposes that the witnesses be called towards the end of the Prosecution case to allow time for preparation.¹³

6. The Prosecution submits that regarding judicial economy, “the substitution of two witnesses will require no change in the time allocated to the Prosecution” while “the addition of witness ST-212 will only require an additional session of two hours and no more than two hours are expected for the examination in chief of witness ST-213”.¹⁴ The Prosecution requests that “the Trial Chamber grant the Prosecution an additional 4 hours to call these witnesses”, or, in the alternative, “the Prosecution will attempt to find the 4 hours within their current allocation of 212 hours to present its case”.¹⁵

7. Addressing the four witnesses in turn, the Prosecution states that ST212 


.¹⁶ The Prosecution argues that “the substance and importance of this witness’ evidence outweighs the prejudice, if any, that may

⁸ Motion, paras 1-3

⁹ Motion, para 5

¹⁰ Motion, para 6

¹¹ Motion, para 7

¹² Motion, paras 7 - 8

¹³ Motion, para 8

¹⁴ Motion, para 9

¹⁵ Motion, para 9

¹⁶ Motion, para 10

be caused by the addition of this witness to the 65ter list” and also that “the Trial Chamber should not be left at the disadvantage of not hearing this witness [REDACTED] [REDACTED].¹⁷ It also asserts that the relevant material for the witness “was disclosed in July this year”, giving the Defence adequate time to prepare for cross-examination and notes that “the Defence have been on notice of the Prosecution’s intention to call this witness at least since 22 June 2009”.¹⁸ The Prosecution submits that, because this witness will not be called until after the winter recess, “the Defence will not be disadvantaged by this addition as they will have ample opportunity to consider the material relevant to this witness”.¹⁹

8. Regarding ST213, the Prosecution argues that the evidence to be provided by this witness [REDACTED] [REDACTED].²⁰ The Prosecution states that the evidence of ST213 is “highly relevant to this case and will prove one of the essential elements to 7(1) and 7(3) liability” and that it is “unique and cannot be covered by any other witness or document”.²¹ The Prosecution also seeks the addition of ST213 to the witness list on the basis that “this witness was only found by chance and then interviewed by the OTP [REDACTED], well after the 65ter list of witnesses was filed”.²² The Prosecution again submits that the Defence will not be disadvantaged because this witness will not be called until after the winter recess.²³

9. The Prosecution seeks to substitute ST214 for ST194 on the basis that this particular witness is “expected to provide linkage evidence about the same crime base events in [REDACTED] as those ST194 was expected to deal with”,²⁴ and that the latter “is in a position to provide a more accurate picture of events that took place in [REDACTED]”.²⁵ The Prosecution submits that the witness “is able to provide probative evidence about [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED].²⁶ The Prosecution submits that the “substitution will have no impact on the length of this trial or number of witnesses” because “the same amount of time allotted to ST194 will be

¹⁷ Motion, para 11
¹⁸ Motion, para 11
¹⁹ Motion, para 11
²⁰ Motion, paras 12 - 13
²¹ Motion, para 13
²² Motion, para 13
²³ Motion, para 13
²⁴ Motion, para 15
²⁵ Motion, para 14
²⁶ Motion, para 14

allocated to ST214”.²⁷ The witness will only be called towards the latter part of the Prosecution’s case, allowing the Defence to prepare for cross-examination.²⁸ Additionally, “the audio file and transcripts of this interview have been disclosed to the Defence [REDACTED].”²⁹

10. As regards ST215, the Prosecution explains that he will substitute for ST188 as ST215 will provide “a more direct link to the Accused [REDACTED] and is expected to “provide the Trial Chamber with better linkage evidence and a better overview of the events [REDACTED].”³¹ The witness also “can explain [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] The Prosecution submits that the evidence of ST215 “can be presented within the same amount of time as the time envisioned for ST188, namely four hours of direct examination”.³³

11. In the Joint Response, the Defence submit that they object to the Motion regarding the addition of the two new witnesses on the ground that it is “contrary to the ruling of the Trial Chamber pursuant to Rule 73bis, which limited the number of Prosecution witnesses to 131”.³⁴ The Defence also objects to either the addition or substitution of all of the proposed witnesses based on the fact that the “defence has prepared the case against them by relying upon the Prosecution Pre-Trial Brief filed on 8 June 2009, including the witness list, and the Prosecution Reduced Witness list of 131 witnesses filed on 10 September 2009”.³⁵

12. The Defence argue that the Prosecution has failed “to provide any justification to explain why any of the four witnesses were not included – at the latest – on the 10 September witness list”,³⁶ considering they were all known to the Prosecution. The Defence submit that the

²⁷ Motion, para 15

²⁸ Motion, para 15

²⁹ Motion, para 15

³⁰ Motion, para 17

³¹ Motion, para 16

³² Motion, para 16

³³ Motion, para 17

³⁴ Joint Response, para 2

³⁵ Joint Response, para 3

³⁶ Joint Response, para 5

Prosecution has not shown good cause to justify these proposed changes and that there is “a lack of due diligence on the part of the Prosecution.”³⁷

13. Finally the Defence assert that the proposed changes to the witness list “cause serious prejudice to the Accused” as they have prepared the case against them by relying upon the Prosecution pre-trial brief, including the Original Witness List³⁸ and continue their trial preparation and investigation based on the Reduced Witness List³⁹

III. APPLICABLE LAW

14. It is settled jurisprudence that a Trial Chamber may grant a motion requesting the amendment of a witness list if it is satisfied that it is in the interest of justice to do so.⁴⁰ Factors to be taken into account when assessing whether it would be in the interest of justice to grant an amendment include the *prima facie* relevance of the evidence to be provided by the new witness with respect to the crimes alleged in the indictment, whether the moving party has shown good cause for its request, the repetitive or cumulative nature of the testimony, the stage of the proceedings at which the request is made, whether granting the amendment would result in undue delay of the proceedings, and whether the witnesses sought to be added are of sufficient importance to justify their inclusion on the witness list.⁴¹

15. Judicial economy may also be taken into consideration but the Trial Chamber must ensure that the rights of the accused to a fair and expeditious trial and to have adequate time and facilities for the preparation of his defence will not be prejudiced by the addition of witnesses.⁴² The Trial Chamber must also be mindful of the Prosecution’s duty to present the available evidence to prove its case.⁴³

³⁷ Joint Response, para 5

³⁸ Joint Response, para 3

³⁹ Joint Response, para 5

⁴⁰ *Prosecutor v Dragomir Milošević*, Case No IT-98-29/1-PT, Decision on Prosecution motion to amend its Rule 65 *ter* witness list, confidential, 21 Dec 2006 (“*D Milošević Decision*”), para 8, with further references

⁴¹ *Prosecutor v Popović et al*, Case No IT-05-88-AR73 I, Decision on appeals against decision admitting material related to Borovčani’s questioning, 14 Dec 2007, para 37 (“*Popović 14 Dec 2007 Decision*”), *Prosecutor v Lukić and Lukić*, Case No IT-98-32/1-T, Decision on Prosecution second motion to amend Rule 65 *ter* exhibit list, 11 Sep 2008 (“*Lukić Decision*”), para 10

⁴² *Prosecutor v Rasim Delić*, Case No IT-04-83-PT, Decision on motion for leave to amend the Prosecution’s witness and exhibit list, confidential, 9 Jul 2007 (“*Delić Decision*”), p 6, *D Milošević Decision*, para 9, referring to *Prosecutor v Mlukić et al*, Case No IT-05-87-T, Decision on Prosecution motion for leave to amend its Rule 65 *ter* witness list to add Shaun Byrnes, 11 Dec 2006, para 4

⁴³ *Delić Decision*, p 6

16. This Trial Chamber is also of the view that it is relevant to consider whether the moving party has exercised due diligence in identifying proposed witnesses.⁴⁴

IV. DISCUSSION

17. The Trial Chamber will take into consideration the factors set out above, in addition to those identified by the Prosecution, and will address each of the four proposed witnesses in turn.

18. Witness ST212 is expected to demonstrate [REDACTED]
[REDACTED]
[REDACTED] The Defence has been aware of the Prosecution's intention to call this witness since the filing of 22 June 2009 and disclosure was made to the Defence in July 2009.

19. The Trial Chamber considers the preparation of the list of witnesses to be submitted pursuant to Rule 65ter to be one of the most important tasks to be performed by the Prosecution and one which requires due care and attention. Although the Prosecution attempted to address the situation in the Corrigendum, it did not seek leave to amend its Rule 65 ter list at that time.⁴⁵ It then compounded the error by failing to respond to the Trial Chamber's invitation at the Rule 65 ter conference held on 24 August 2009 and again by failing to include ST212 on the Reduced Witness List in September 2009.

20. The Prosecution has also not set out in the Motion any argument as to the relevance of this evidence for its case other than a basic assertion that the "substance and importance of this witness' evidence outweighs the prejudice, if any, that may be caused" by the addition of this witness.

21. The Trial Chamber has examined the Rule 65 ter witness summary for this witness and notes that most of his evidence concerns matters expected to be addressed by other witnesses on the Reduced Witness List, with the possible exception of the allegation that [REDACTED]
[REDACTED]
[REDACTED]

22. Nevertheless, despite the procedural errors on the part of the Prosecution, the Trial Chamber finds that the evidence to be given by ST212 may not be entirely covered by other witnesses, and

⁴⁴ *Prosecutor v. Lukić and Lukić*, Case No. IT-98-32/1-T, Decision on Prosecution second motion to amend Rule 65 ter exhibit list, 29 Aug 2008, para. 24

⁴⁵ Corrigendum, para. 3

⁴⁶ Motion, para. 10

that is of sufficient importance to the Prosecution case for it to be in the interest of justice to allow the Prosecution to include ST212 on its Rule 65 *ter* witness list.

23. Witness ST213 was [REDACTED] during the period relevant to the indictment [REDACTED]. The evidence to be tendered will offer insight into [REDACTED] and thus is *prima facie* relevant. Furthermore, it is unique and will not be covered by any other witness or document included on the Prosecution's Rule 65 *ter* list.

24. The Trial Chamber accepts that the Prosecution only located this witness [REDACTED] after the filing of the Original Witness List, but notes with some concern that the Prosecution has offered no explanation for not including this witness on the Reduced Witness List, filed in September 2009. This would have given both the Trial Chamber and the Defence notice of the intent to call the witness at the earliest possible opportunity, rather than waiting a further month to file the Motion.⁴⁷ However, taking into account the importance of the evidence of this witness to the Prosecution case, the Trial Chamber is satisfied that the Prosecution has shown good cause to call this witness and that it is in the interest of justice to allow the Prosecution to include ST213 on its Rule 65 *ter* witness list.

25. Turning to the evidence to be provided by ST214 and ST215, the Trial Chamber notes and agrees with the Prosecution's assertion in the Motion that: "In principle, it is for each Party to decide which witnesses to call to prove its case."⁴⁸ However, even if the Trial Chamber accepts the Prosecution's assertions that the evidence of these two witnesses would "provide a more accurate picture of events"⁴⁹ [REDACTED]
[REDACTED]
[REDACTED] the Prosecution has not provided the Trial Chamber with any explanation as to why it is only now seeking leave to include these witnesses on its witness list and, in particular, as to why this selection was not made at the time of submission of the Revised Witness List.

⁴⁷ See *Prosecutor v Vlastimir Đorđević*, Case No IT-05-87/1-T, Decision on Prosecution's motion for leave to amend its rule 65 *ter* witness list, 14 May, 2009 ("Đorđević Decision"), where the Chamber notes that pursuant to Rule 65 *ter*, "the Prosecution had indicated that it intended to call two U S Rule 70 witnesses and that at the time it was not in a position to indicate the names of these witnesses", para 8

⁴⁸ Motion, para 5

⁴⁹ Motion, para 14

⁵⁰ Ibid

⁵¹ Motion, para 16

⁵² Motion, para 17

26. The Trial Chamber therefore dismisses the Motion in relation to these two witnesses without prejudice to a further filing by the Prosecution setting out the reasons that have led it to make the request for substitution at this stage of the proceedings.

27. The Trial Chamber notes that, in seeking to add new witnesses to the Reduced Witness List, two of whom, ST212 and ST213, are accepted pursuant to this Decision, the Prosecution is also effectively requesting an increase in the overall number of witnesses it may call in the presentation of its case-in-chief..

28. The Trial Chamber concludes that the Prosecution has demonstrated a need to increase the number of witnesses from 131 to 132 by the addition of ST213 but that it has not done so in relation to ST212. The Trial Chamber is not persuaded that the Prosecution has shown sufficient due diligence with regard to this witness to warrant any increase in the overall number of witnesses. It is for the Prosecution to decide which witness, if any, to remove from the Reduced Witness List to accommodate the calling of ST212.

29. The Prosecution requested an additional four hours for the presentation of the evidence-in-chief of these witnesses but indicated that if this is not acceptable, the Prosecution will attempt to absorb the extra time within its existing allocation of 212 hours. In light of that indication, the Trial Chamber is satisfied that the Prosecution has demonstrated a need for 2 (two) additional hours for the presentation of the evidence-in-chief of ST213 nevertheless it has not done so regarding ST212. It is for the Prosecution to find the time within the current allocation of 212 hours in which to present its case for ST212.

30. Lastly, the Prosecution has indicated that it will not call either of these two witnesses until after the winter recess. The Trial Chamber finds that this gives the Defence adequate time to prepare for cross-examination and will obviate any prejudice to the Defence.

V. DISPOSITION

For the above reasons, the Trial Chamber, acting under Rules 54 and 73 *ter* of the Rules;

1. **GRANTS** the Motion insofar as it seeks the inclusion of ST212 on the Prosecution witness list.
2. **PERMITS** the Prosecution to substitute witness ST212 for another witness of its choosing so as to remain within the overall number of witnesses set by the Trial Chamber;

3. **GRANTS** the Motion insofar as it seeks the inclusion of ST213 on the Prosecution witness list;
4. **PERMITS** the Prosecution to increase the number of witnesses on its Rule 65 *ter* witness list to 132 to accommodate the calling of ST213;
5. **DENIES** the Motion insofar as it seeks the withdrawal and replacement of ST194 and ST188 by ST214 and ST215 without prejudice to the Prosecution filing its further submission, within one month of the filing of this Decision, setting out the reasons why it is seeking the substitution of these witnesses at this time and for the Defence to file responses, if any, to that submission within a further period of two weeks;
6. **GRANTS** the request of the Prosecution for 2 (two) additional hours in which to present the evidence of ST213;
7. **DENIES** the request of the Prosecution for additional time in which to present the evidence of ST212;
8. **ORDERS** the Prosecution not to call witnesses ST212 and ST213 until after the winter recess; and
9. **ORDERS** the Prosecution to file a revised list of witnesses within seven days of the filing of this Decision.

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

Judge Burton Hall
Presiding

Dated this fourth day of December 2009

At The Hague

The Netherlands

[Seal of the Tribunal]