

**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-PT
Date: 31 August 2009
Original: English

IN TRIAL CHAMBER III

Before: Judge Iain Bonomy, Presiding
Judge Ole Bjørn Støle
Judge Frederik Harhoff, Pre-Trial Judge

Registrar: Mr. John Hocking

Decision of: 31 August 2009

PROSECUTOR

v.

MIĆO STANIŠIĆ & STOJAN ŽUPLJANIN

PUBLIC

**DECISION ON JOINT DEFENCE MOTION REQUESTING PRECLUSION
OF PROSECUTION'S NEW WITNESSES AND EXHIBITS**

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

A. Introduction and background

1. This 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 seized of the “Joint motion by Defence of Mićo Stanišić and Stojan Župljanin requesting the Trial Chamber to preclude Prosecution’s new witnesses and new exhibits”, filed by the Defence of Mićo Stanišić and the Defence of Stojan Župljanin (together “Defence”) on 22 June 2009 (“the Motion”). In the Motion, the Defence argue that disclosure of new witnesses and exhibits should have been made at an earlier stage of the pre-trial proceedings, notably by 23 September 2008 when the *Stanišić* and *Župljanin* cases were joined and certainly before submission by the Prosecutor of its pre-trial brief, and that the late disclosure thereof has prejudiced the rights of the Accused to a fair trial, including the right of the Accused to be informed promptly of the case against them and to have adequate time and facilities to prepare their defence and to be tried fairly, expeditiously and without undue delay in clear violation of Articles 20 and 21 of the Tribunal’s Statute.¹ The Defence, therefore, requests the Trial Chamber to issue an order precluding the Prosecution from leading this evidence at trial.²

2. In a scheduling order dated 8 May 2009, the Pre-Trial Judge directed the Prosecution to file its pre-trial brief in the consolidated case, including all materials pursuant to Rule 65 *ter*(E)(ii) and (iii) by 8 June 2009 (“Scheduling Order”).³ On that date, the Prosecution did indeed file its consolidated pre-trial brief with confidential annexes, including consolidated lists of witnesses and exhibits. However, these lists included 39 witnesses and 689 exhibits – altogether amounting to roughly another 20 percent of all the evidence disclosed by the Prosecution – of which the Defence had not previously been informed. It is these witnesses and exhibits which the Defence now seek to exclude from admission.⁴

3. On 6 July 2009, the Prosecution responded to the Motion (“Response”), arguing that the Prosecution is entitled under Rule 65 *ter*(E) to file its lists of witnesses and exhibits to the Defence as late as six weeks before the pre-trial conference. The Prosecution submits that it had in fact provided the Defence with copies of all the statements and interviews with its witnesses in a language the two Accused understand except for:

¹ *Id.* paras 2, 24 and annexes A and B.

² Motion, para. 25.

³ Scheduling order for submission of pre-trial briefs and other material pursuant to Rule 65 *ter*, filed on 8 May 2009.

⁴ Rule 65 *ter* conference, 24 August 2009, T. 300.

(a) disclosure of audio recordings and transcripts of the interviews with witness ST-182, which awaits the Trial Chamber's resolution of the Prosecution's Rule 66(C) motion filed on 26 May 2009;⁵

(b) a response from the BiH authorities to a request for assistance to identify a summary witness qualified to discuss the contents of the 1992-1995 criminal case logbooks from the Prosecution Offices in the municipalities charged in the indictment;⁶ and

(c) BCS translations of the written statements of ST-193, ST-201, ST-204, ST-208 and ST-210, which were delayed due to the fact that these statements had been taken only recently, and the notes from a prior interview of ST-192 which still require BCS translation.⁷

The Prosecution argues that if the Trial Chamber were to find that the Accused have suffered any prejudices as a result of disclosure of exhibits or witnesses on the Prosecution's Rule 65 *ter* lists after the two cases had been joined, the fairest solution would be to require the Prosecution to postpone offering these exhibits and witnesses until later in the trial.⁸

4. On 13 July 2009, the Defence of Mićo Stanišić requested leave to reply to the Prosecution's Response and filed a proposed reply.⁹ On that same date, the Defence of Stojan Župljanin joined in the reply of the Defence of Mićo Stanišić.¹⁰ The Trial Chamber hereby grants leave to the Defence to file these replies ("Replies"). In their Replies, the Defence reiterated that the right to a fair trial was violated by the Prosecution's late disclosure of witnesses and exhibits and further argues that they have only been given audio or video recordings of interviews for 38 of the 39 new witnesses, but nothing in writing, and that nothing at all has been disclosed for the remaining witness.

5. On 14 July 2009, the Prosecution applied for leave to file a "Supplemental Response" on the grounds that a number of new facts had emerged since the filing of the Motion, and that these new facts had been misrepresented in the Replies.¹¹ The Trial Chamber notes that the Rules do not envisage such rejoinders and that, in any event, the Trial Chamber did not allow the Prosecution to

⁵ Response, para. 15 a.

⁶ Response, para. 15 b.

⁷ Response, para. 15 c.

⁸ Response, para. 14, stating that "[c]ounsel for Župljanin suggested this solution during the 12 June 2009 Rule 65*ter* status conference."

⁹ Response to the Defence of Mićo Stanišić and Stojan Župljanin requesting the Trial Chamber to preclude Prosecution's new witnesses and new exhibits, filed on 6 July 2009; "Application for leave to file a reply and reply to the Prosecution's response to joint motion by Defence of Mićo Stanišić and Stojan Župljanin requesting the Trial Chamber to preclude Prosecution's new witnesses and new exhibits, filed on 13 July 2009.

¹⁰ Motion to join Mićo Stanišić's application for leave to file a reply and reply to the Prosecution's response to joint motion by Defence of Mićo Stanišić and Stojan Župljanin requesting the Trial Chamber to preclude Prosecution's new witnesses and new exhibits, filed on 13 July 2009.

¹¹ *Ibid.*

make such further submission. Therefore, the Trial Chamber will not consider this filing of the Prosecution in its determination of the Motion.

6. At the Rule 65 *ter* conference on 8 July 2009, the Defence complained that the Prosecution had continued its disclosure the submission of its pre-trial brief and that most of the statements of the 39 witnesses and many of the 689 exhibits had still not been disclosed to the Defence in accordance with Rule 66(A)(ii). The Pre-Trial Judge therefore set a final time-limit and ordered the Prosecution to ensure full compliance with its disclosure obligations under Rule 66(A)(ii) by 31 July 2009.¹²

7. On 3 August 2009, the Prosecution notified the Trial Chamber that it had “substantially complied with this order” (“Compliance Notice”).¹³ However, at the Rule 65 *ter* conference on 24 August 2009, the Defence complained that disclosure had not been completed by 31 July 2009. The Prosecution conceded at that conference that 74 documents relating to witnesses remained to be disclosed, many of them being declarations or statements taken by BiH authorities from certain witnesses, and that other material pending translation also remained to be disclosed.¹⁴

8. In respect of exhibits, the Prosecution further stated that it had disclosed all documents on its Rule 65 *ter* exhibit list with two exceptions: (a) six documents which had not been disclosed as they are subject to pending Rule 66(C) or Rule 54 *bis*(F) motions; and (b) two sets of criminal case logbooks from the Republika Srpska Prosecution Offices in two of the municipalities charged in the indictment which had only recently been received and nine remaining sets of Prosecution logbooks pertaining to seven of the municipalities covered by the Indictment, all of which would be disclosed immediately upon reception.¹⁵ The Prosecution also submitted that it is *not* legally obliged to provide both English and BCS versions of every exhibit on its Rule 65 *ter* list of exhibits, but only to disclose to the Accused a BCS version of an exhibit if that is the original language of the document, and otherwise disclosing it in one of the working languages of the Tribunal.¹⁶

B. Applicable law

9. Article 20(1) of the Statute requires Trial Chambers to ensure, *inter alia*, that a trial is fair and expeditious and that proceedings are conducted in accordance with the rules of procedure and

¹² Rule 65 *ter* conference, 8 July 2009, T. 256.

¹³ Prosecution’s notification of compliance with the Trial Chamber’s 8 July 2009 order regarding Rule 66(A)(ii) disclosure, 3 August 2009, para. 1.

¹⁴ Rule 65 *ter* conference, 24 August 2009, T. 296-297.

¹⁵ Response, para. 17.

¹⁶ Response, para. 18.

evidence, with full respect of the rights of the accused and due regard for the protection of victims and witnesses. The rights of the accused are set out in Article 21 of the Statute.

10. Pursuant to Rule 65 *ter*(E)(ii) and (iii), the Prosecution is required to file its lists of witnesses and exhibits by the date set by the Trial Chamber or by the pre-trial Judge and no less than six weeks before the Pre-Trial Conference. Within the same timeframe, the Prosecution has an obligation under Rule 65 *ter*(E)(iii) to serve on the Defence copies of the exhibits listed.

11. Rule 66(A)(ii) requires the Prosecution to make available to the Defence, in a language the accused understands and within the time-limit prescribed by the Trial Chamber or by the pre-trial Judge, copies of the statements of all witnesses whom it intends to call to testify at trial, and copies of all transcripts and written statements taken in accordance with Rule 92 *bis*, Rule 92 *ter* and Rule 92 *quater*. Pursuant to the same provision, if the Prosecution seeks to call additional witnesses, it is required to disclose copies of the statements of such witnesses “when a decision is made to call those witnesses”. In the Tribunal’s jurisprudence, that decision “is the original decision made by the Prosecution to call the witness, as documented by an application to amend the witness list, not the later date at which a Trial Chamber confirms that decision by granting the motion.”¹⁷

12. Rule 68 *bis* allows the pre-trial Judge or The Chamber to decide *proprio motu*, or at the request of either party, on sanctions to be imposed on a party which fails to perform its disclosure obligations pursuant to the Rules.

C. Discussion

13. The present matter concerns whether the Prosecution has failed to comply with the Rules and any orders issued relating to the Prosecution’s obligations under Rule 65 *ter*(E) to make filings and under Rule 66(A)(ii) to disclose material to the Defence. If that is the case, then the question is whether the Defence are unfairly prejudiced as a consequence of the Prosecution’s failure and what measures the Trial Chamber should take to ensure the fairness of the proceedings, including, as requested by the Defence, to preclude the Prosecution from leading the relevant evidence at trial.

14. Two issues arise in relation to the time-limits of the filings. The first is whether the filing under Rule 65 *ter*(E) by the Prosecution of its witness and exhibits lists along with its pre-trial brief was timely. The second issue is to determine the consequences to be drawn from the fact that a substantial amount of material was disclosed to the Defence after 31 July 2009, that is, after the

¹⁷ *Prosecutor v. Lukić and Lukić*, Case No. IT-98-32/1-T, Decision on Prosecution failure to comply with Rule 66(A)(ii) disclosure obligations, filed on 5 November 2008, p. 3.

expiration of the final time-limit set by the Pre-Trial Judge and without leave of the Pre-trial Judge or the Trial Chamber.

15. On 8 June 2009, and in compliance with the Pre-Trial Judge's order of 8 May 2009, the Prosecution filed its submissions pursuant to Rule 65 *ter*(E). The system of the Rules is that, unless another deadline is set, the Defence should have six weeks to prepare for cross-examination of the first Prosecution's witnesses and to consider the evidence in the exhibits provided to it. The Trial Chamber is cognisant of the concerns expressed by the Defence in this respect.¹⁸ However, the Prosecution was not in violation of any Tribunal Rule by including the 39 witnesses and the 689 exhibits in its Rule 65 *ter*(E) submission, even if it could have filed this material at an earlier stage.¹⁹ The Trial Chamber is, therefore, unable to accept the Defence submission that the right of the Accused to a fair trial has been violated as a result.

16. In relation to the second issue, Rule 66(A)(ii) provides that the Prosecution shall disclose the copies of all statements and transcripts of interviews or testimonies by the witnesses on its Rule 65 *ter* list (in a language the Accused understands) within the time-limit prescribed by the Pre-Trial Judge. In the instant case, the Pre-Trial Judge had not set a date for submission of these copies, assuming that all copies of witness statements and transcripts had been disclosed together with the witness list annexed to the pre-trial brief. When, at the Rule 65 *ter* conference on 8 July 2009, it was discovered that this had not been done, the Pre-Trial Judge immediately set a final time-limit for the Prosecution to comply by 31 July 2009 with its disclosure obligations under Rule 66(A)(ii). In effect, this extended the 8 June 2009 deadline. In setting the 31 July 2009 deadline, the Pre-Trial Judge informed the Prosecution that disclosure after that date would only be permitted with leave of the Trial Chamber. The Trial Chamber notes that, due to a subsequent rescheduling of the commencement of trial, the new final time-limit on 31 July 2009 in fact turned out to be six weeks before the pre-trial conference now scheduled for 4 September 2009. In light of the foregoing, the Trial Chamber is of the view that the Prosecution's disclosure of witness statements and exhibits between 8 June 2009 and 31 July 2009 was not in violation of any Rule or order.

¹⁸ Motion, paras 22, 24.

¹⁹ The Trial Chamber notes the Prosecution submission that several witnesses and exhibits that were added to its Rule 65 *ter* witness list of 8 June 2009 are "attributable to the Accused's continued resistance to agree to indisputable facts and failure to specify the matters in the Prosecution's case with which they take issue", Response, para. 13. True, any agreement among the parties on points of fact or law may enable the Prosecution to shorten its presentation of evidence. But it would be incorrect to submit, as the Prosecution seems to do, that a continued resistance on the part of the Defence to agree to what the Prosecution deems to be "indisputable facts" should be a reason for a broader presentation of evidence by the Prosecution than what is strictly necessary to prove the charges beyond a reasonable doubt. The Prosecution is duty-bound to ensure a concise presentation of evidence and the Defence is in its full right to resist in view of the fact that the onus to prove the charges rests, rightly and wholly, with the Prosecution.

17. However, at the Rule 65 *ter* conference held on 24 August 2009, it transpired that the Prosecution had continued to disclose witness statements and transcripts after 31 July 2009. The Prosecution acknowledged on that occasion that some 74 witness declarations or statements, most of them taken by BiH authorities, had not yet been disclosed. In the Trial Chamber's opinion, this material clearly falls within the Prosecution's obligation pursuant to Rule 66(A)(ii). The Prosecution also acknowledged that other exhibits had not yet been disclosed and stated that this was in part due to delays in translation.²⁰ In reply to the Pre-Trial Judge's question as to why these documents had not been disclosed to the Defence within the prescribed time-limit, the Prosecution stated that some documents had only recently been received while others were transcripts of testimonies that had been left out by oversight. It was also stated that yet others had been submitted for translation and that they were currently subject to assessment as to whether they should be translated at all in view of their relevance and size. However, the Prosecution did not identify which witnesses these documents pertain to or for which specific reasons each outstanding document remained undisclosed to the Defence beyond the final deadline set by the Pre-Trial Judge.

18. The Prosecution has been on notice since 8 July 2009 of its duty to obtain leave from the Trial Chamber for any disclosure under Rule 66(A)(ii) to the Defence beyond 31 July 2009. However, the Prosecution never applied for leave. In addition, at the Rule 65 *ter* conference held on 24 August 2009 the explanation given by the Prosecution for its failure to disclose the outstanding material on time was vague and insubstantial. The Trial Chamber considers in this respect that the final deadline set by the Pre-Trial Judge allowed the Prosecution a significant amount of time beyond 8 June 2009 to comply with its Rule 66(A)(ii) obligations. By contrast, the time now available to the Accused to prepare is limited.

19. The purpose underlying Rule 66(A)(ii) is to enable the Defence to confront witnesses with all their prior statements and transcripts. The provision is of fundamental importance to the Accused's right to a fair trial. As a consequence, the Trial Chamber is presently minded to order that any material disclosed after 31 July 2009 shall be excluded from the Prosecution's Rule 65 *ter* lists. Moreover, if the Trial Chamber were to order such exclusion it would be obliged to consider whether the witnesses for whom the Prosecution has breached its Rule 66(A)(ii) obligations should give evidence at all. However, before making a final determination on these matters, the Trial Chamber orders the Prosecution to provide the following information..

²⁰ According to the Prosecution, in June 2009, 206 documents were sent for translation. By 24 August 2009, 50 of these had been translated and 74 were about to be completed by the CLSS, Rule 65 *ter* conference, 24 August 2009, T. 297. According to the Prosecution, most of the remaining documents were logbooks and Assembly Minutes which could possibly not be translated any time soon because of their magnitude, *id.*

D. Disposition

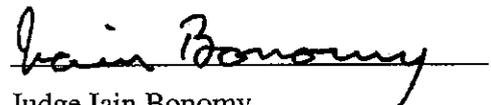
PURSUANT TO Rule 54, Rule 65 *ter*(E)(ii) to (iii), Rule 66(A)(ii) and Rule 68 *bis* of the Rules, the Trial Chamber:

ORDERS the Prosecution to make written submissions by noon Wednesday, 2 September 2009 on:

- 1) the Prosecution's failure to meet the deadline of 31 July 2009 specifying each document that was disclosed after this date, setting out in relation to each such document detailed reasons for the late disclosure and full information concerning the witnesses to whom it relates;
- 2) the impact, if any, of an order to remove the documents disclosed after 31 July 2009 from the Prosecution's Rule 65 *ter* exhibit list on:
 - a) the testimony of the above-mentioned witnesses, and
 - b) material disclosed by the Prosecution prior 31 July 2009; and

REMAINS SEIZED of the Motion.

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



Judge Iain Bonomy

Presiding

Dated this thirty-first day of August 2009

At The Hague

The Netherlands

[Seal of the Tribunal]