



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: 5 November 2009
Original: English

IN TRIAL CHAMBER II

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

Registrar: Mr. John Hocking

Decision of: 5 November 2009

PROSECUTOR

v.

MIĆO STANIŠIĆ AND STOJAN ŽUPLJANIN

PUBLIC

**WRITTEN REASONS FOR THE TRIAL CHAMBER'S
ORAL DECISION ACCEPTING DOROTHEA HANSON
AS AN EXPERT WITNESS**

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I. INTRODUCTION

1. On 20 October 2009, the Trial Chamber issued an oral ruling on the following:
 - Prosecution's notice of disclosure of expert witness statements under Rule 94 *bis*, filed on 29 February 2008 ("Rule 94 *bis* Notice");¹
 - Prosecution's supplemental motion for admission of evidence of experts pursuant to Rules 94 *bis*, 92 *bis*, and 92 *ter*, with confidential annexes, filed on 17 August 2009 ("Supplemental Motion");

insofar as they pertain to Dorothea Hanson (ST158) and her expert report entitled "Bosnian Crisis Staffs" ("Report"). The Trial Chamber ruled that:

And this is on the issue of whether the witness, Dorothea Hanson, should be accepted by the Chamber in this trial as an expert witness. And the decision of the Chamber is that she should be so accepted as an expert.²

and further that :

The next question is what to do then with her report. You will bring it under Rule 94 *bis* as an expert report and it is then for the Defence to challenge. If by the end of the challenge raised by the Defence, the Chamber finds that there is really nothing of substantive value in this report, just as an example, then, of course, the Chamber has to be free to say that we will not admit the report, or at least not all of it.³

Below are the written reasons for the Trial Chamber's ruling.

II. BACKGROUND AND RELEVANT SUBMISSIONS

2. Following the filing of the Rule 94 *bis* Notice, the Trial Chamber granted the Defence of Mićo Stanišić ("Stanišić Defence") an extension to file its Rule 94 *bis* notice in reply and, on 11 April 2008,⁴ the Stanišić Defence gave notice pursuant to Rule 94 *bis*(B) of its wish to cross-examine, *inter alia*, Dorothea Hanson ("Stanišić Rule 94 *bis* Notice").⁵ On 23 September 2008, following the arrest of Stojan Župljanin, the cases against the two accused were joined.⁶ On

¹ On the same day the Prosecution filed a request for the admission of the prior testimony of Dorothea Hanson pursuant to Rule 92 *ter* of the Rules.

² Hearing, 20 Oct 2009, T. 1737.

³ Hearing, 20 Oct 2009, T. 1740.

⁴ *Prosecutor v. Mićo Stanišić*, Case No. IT-04-79-PT, Decision regarding responses to Prosecution motions pursuant to Rule 92 *bis* and 92 *quater* and the Defence notice pursuant to Rule 94 *bis*, 10 Mar 2008.

⁵ *Prosecutor v. Mićo Stanišić*, Case No. IT-04-79-PT, Defence's Rule 94 *bis* Notice, filed 11 Apr 2008 ("Stanišić 94 *bis* Notice"), p. 3. The Trial Chamber notes that no submissions were made as to whether it accepts the expert report of Dorothea Hanson or if it challenges the qualifications of the witness as an expert or the relevance of all or parts of the report. See para. 14. below.

⁶ *Prosecutor v. Mićo Stanišić*, Case No. IT-04-79-PT and *Prosecutor v. Stojan Župljanin*, Case No. IT-99-36/2-PT, Decision on the Prosecution's motion for joinder and for leave to consolidate and amend indictments, 23 Sep 2008;

19 November 2008, the Prosecution requested, *inter alia*, that the Rule 94 *bis* Notice apply also to Stojan Župljanin.⁷ On 27 February 2009, the Defence of Stojan Župljanin (“Župljanin Defence”) responded pursuant to Rule 94 *bis*(B) (“Župljanin Rule 94 *bis* Notice”).⁸ The Župljanin Defence states that, as it was conducting its own investigations on the areas covered by the proposed expert witnesses, it was “unable to state categorically whether or not it accepts any of them as experts”.⁹ The Župljanin Defence requests to cross-examine Dorothea Hanson and submits that it “does not concede that [Dorothea Hanson is] necessarily qualified to give expert evidence on the matters in issue in Mr. Župljanin’s trial.”¹⁰

3. On 17 August 2009, the Prosecution filed the Supplemental Motion seeking *inter alia*, to convert the mode of testimony of Dorothea Hanson to admit her prior testimony in other proceedings before the Tribunal pursuant to Rule 92 *bis* so as to dispense with her attendance completely and provided a consolidated list of exhibits utilised during such testimony.¹¹ On 31 August 2009, both the Stanišić Defence and Župljanin Defence filed separate responses to the Supplemental Motion (“Stanišić Response” and “Župljanin Response”, respectively).¹² Both responses raise objections concerning the late disclosure in these proceedings of documents admitted in the *Krajišnik* case as part of Dorothea Hanson’s testimony.¹³

4. The Stanišić Defence seeks to supplement the Stanišić Rule 94 *bis* Notice with the Stanišić Response and in doing so seeks to preclude Dorothea Hanson from testifying as an expert witness. It submits that the Stanišić Rule 94 *bis* Notice was filed without consultation by the then counsel representing Mićo Stanišić. As a result of this breakdown in communication, Mićo Stanišić personally filed his own notice pursuant to Rule 94 *bis* and requested the Trial Chamber to disregard the Stanišić Rule 94 *bis* Notice.¹⁴

Prosecution’s motion for joinder and for leave to consolidate and amend indictments, with confidential annexes, 15 Jul 2008.

⁷ Prosecution notice and request regarding Rule 92 *bis*, 92 *ter*, and 92 *quater* evidence, 19 Nov 2008; Stojan Župljanin’s motion requesting an order that the Prosecution clarify its motion of 19 November 2008, 3 Dec 2008; Decision on Stojan Župljanin’s motion requesting an order that the Prosecution clarify its motion of 19 November 2008, 15 Dec 2008; Prosecution amended notice and request regarding Rule 92 *bis*, 92 *ter*, and 92 *quater* evidence, 10 Dec 2008.

⁸ Stojan Župljanin’s response to the Prosecution’s Rule 94 *bis* notice, filed confidentially 27 Feb 2009. The Župljanin Defence was granted an extension of time to respond, Decision on Stojan Župljanin’s motion for the Trial Chamber to reconsider its decision of 15 December 2008, 16 Jan 2009.

⁹ Župljanin Rule 94 *bis* Notice, para. 6.

¹⁰ Župljanin Rule 94 *bis* Notice, paras 7 - 8.

¹¹ Supplemental Motion, para. 9.

¹² Mr. Mićo Stanišić’s supplemental filing in response to the Prosecution’s filing on proposed experts and response to the Prosecution’s supplemental motion for admission of the evidence of experts pursuant to Rules 94 *bis*, 92 *bis* and 92 *ter*, with confidential annexes, 31 Aug 2009; Defence request for leave to exceed the word limit and response to Prosecution’s supplemental motion for admission of the evidence of experts pursuant to Rules 94 *bis*, 92 *bis*, and 92 *ter*, 31 Aug 2009.

¹³ Stanišić Response, para. 98(g); Župljanin Response, para. 14.

¹⁴ Stanišić Response, paras 2-7.

5. At the Pre-Trial Conference held on 4 September 2009, the Trial Chamber gave an oral direction that the evidence of all expert witnesses to be called in this case would be presented pursuant to the procedures set out in Rule 94 *bis* and not under Rule 92 *bis* or Rule 92 *ter*.¹⁵

6. On 7 September 2009, the Prosecution replied to the Stanišić Response and the Župljanin Response having stated that it would file a substantive response in a previous preliminary reply.¹⁶ In this Consolidated Reply, the Prosecution “only address[es] the outstanding issues relating to the alleged late filing of additional reports of the [*sic*] experts”¹⁷ and states that “in the circumstances the Prosecution submits the Trial Chamber can rule on the qualification of each expert when they testify, or hold a *voir dire* directly prior to their testimony.”¹⁸

III. APPLICABLE LAW

7. Rule 94 *bis* provides:

(A) The full statement and/or report of any expert witness to be called by a party shall be disclosed within the time-limit prescribed by the Trial Chamber or by the pre-trial judge.

(B) Within thirty days of disclosure of the statement and/or report of the expert witness, or such other time prescribed by the Trial Chamber or pre-trial judge, the opposing party shall file a notice indicating whether:

(i) it accepts the expert witness statement and/or report; or

(ii) it wishes to cross-examine the expert witness; and

(iii) it challenges the qualifications of the witness as an expert or the relevance of all or parts of the statement and/or report and, if so, which parts.

(C) If the opposing party accepts the statement and/or report of the expert witness, the statement and/or report may be admitted into evidence by the Trial Chamber without calling the witness to testify in person.

8. In order to be admissible, the expert statement or report must meet several requirements, which have been set out in the jurisprudence:

(i) the proposed witness is classified as an expert;

(ii) the expert statements or reports meet the minimum standards of reliability;

¹⁵ Pre-trial conference, T-104. On 29 February 2009 the Prosecution had filed a request for the admission of the prior testimony of a number of witnesses, including Dorothea Hanson, pursuant to Rule 92 *ter* of the Rules. *Prosecutor v. Mićo Stanišić*, Case No. IT-04-79-PT, Prosecution motion for admission of evidence pursuant to Rule 92 *ter*, 29 Feb 2008.

¹⁶ Prosecution’s consolidated reply to both Stanišić’s and Župljanin’s responses to the Prosecution’s supplemental motion for admission of the evidence of experts pursuant to Rules 94 *bis*, 92 *bis* and 92 *ter*, 7 Sep 2009 (“Consolidated Reply”); Prosecution’s motion for leave to reply and preliminary reply to Mićo Stanišić’s supplemental filing in response to the Prosecution’s filing on proposed witnesses and response to the Prosecution’s supplemental motion for admission of the evidence of experts pursuant to Rule 94 *bis*, 92 *bis* and 92 *ter*, 4 Sep 2009.

¹⁷ Consolidated Reply, para. 3.

¹⁸ *Id.*, para. 2.

(iii) the expert statements or reports are relevant and of probative value;

(iv) the content of the expert statements or reports fall within the accepted expertise of the expert witness.¹⁹

The term “expert” is defined in the jurisprudence as a person who “by virtue of some specialised knowledge, skill or training can assist the trier of fact to understand or determine an issue in dispute”.²⁰ The witness’ former and present positions and professional experience are important.²¹ The qualifications and expertise of a witness can be determined by considering the witness’ *curriculum vitae*, scholarly articles, other publications or any other pertinent information about the witness.²²

9. An expert is expected to make statements and draw conclusions independently and impartially. The fact that the witness has been involved in the investigations and preparation of the Prosecution or Defence case or is employed or paid by one party, does not disqualify him as an expert witness or make the expert statement or report unreliable.²³ In the *Nahimana et al.* case, the Appeals Chamber stated:

an expert is required to testify with the utmost neutrality and with scientific objectivity. The party alleging bias on the part of an expert witness may demonstrate the said bias through cross-examination, by calling its own expert witnesses or by means of an expert opinion in reply.²⁴

In the *Popović* case, the Appeals Chamber emphasised that accepting a witness as an expert and calling the person to give evidence “does not necessarily entail that his reports would be admitted as evidence”²⁵ and that a Trial Chamber may explore, for example, “whether there is transparency in the methods and sources used by the expert witness, including the established or assumed facts on which the expert witness relied.”²⁶

¹⁹ *Prosecutor v. Momčilo Perišić*, Case No. IT-04-81-T, Decision on the Defence motion to exclude the expert reports of Robert Donia (“*Perišić* Decision”), para. 5; *Prosecutor v. Lukić and Lukić*, Case No. IT-98-32/1-T, Decision on second Prosecution motion for the admission of evidence pursuant to Rule 92 bis (two expert witnesses), 23 Jul 2008, para. 15; *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-AR73.2, Decision on joint Defence interlocutory appeal concerning the status of Richard Butler as an expert witness, 30 Jan 2008 (“*Popović* Appeals Decision”), para. 21; *Prosecutor v. Milan Martić*, Case No. IT-95-11-T, Decision on Defence’s submission of the expert report of Professor Smilja Avramov pursuant to Rule 94 bis, 9 Nov 2006, para. 5.

²⁰ *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-T, Decision concerning the expert witnesses Ewa Tabeau and Richard Philipps, 3 Jul 2002, p. 2; *Prosecutor v. Radoslav Brđanin*, Case No. IT-99-36-T, Decision on Prosecution’s submission of statement of expert witness Ewan Brown, 3 Jun 2003, p. 4.

²¹ *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-T, Decision on admissibility of expert report of Kosta Čavoški, 1 Mar 2006, pp. 2-3.

²² *Ibid.* p. 3; *Perišić* Decision, para. 6.

²³ *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-T, Decision concerning the expert witnesses Ewa Tabeau and Richard Philipps, 3 Jul 2002, pp. 2-3; *Prosecutor v. Radoslav Brđanin*, Case No. IT-99-36-T, Decision on Prosecution’s submission of statement of expert witness Ewan Brown, 3 Jun 2003, p. 4; *Prosecutor v. Milan Martić*, Case No. IT-95-11-T, Decision on Prosecution’s motion for admission of transcripts pursuant to Rule 92 bis (D) and of expert reports pursuant to Rule 94 bis, 13 Jan 2006, para. 39.

²⁴ *Prosecutor v. Ferdinand Nahimana et al.*, Case No. ICTR-99-52-A, Decision on appellant Jean-Bosco Barayagwiza’s motion for extension of time, 3 May 2007, p. 3, cited in *Popović* Appeals Decision, para. 20.

²⁵ *Popović* Appeals Decision, para. 31.

²⁶ *Popović* Appeals Decision, para. 29.

10. The requirement that the expert statement or report meet the minimum standards of reliability involves proof of *prima facie* reliability.²⁷ There must be sufficient information as to the sources used in support of the statements. The sources must be clearly indicated and accessible in order to allow the other party to challenge the basis on which the expert witness reached his conclusions.²⁸

11. According to Rule 89(C), a Trial Chamber may admit any relevant evidence which it deems to have probative value. Rule 94 *bis* does not set a different or higher threshold for the admission of evidence by expert witnesses than Rule 89(C).²⁹

12. The requirement that the content of a statement or report fall within the expertise of the expert ensures that the statements or reports will only be treated as expert evidence, in so far as they are based on the expert's specialist knowledge, skills or training.³⁰

IV. DISCUSSION

A. Preliminary observations

13. As a preliminary matter, the Trial Chamber's ruling of 4 September 2009 renders moot both the Prosecution request pursuant to Rule 92 *ter* to admit into evidence the prior evidence of Dorothea Hanson and the request in the Supplemental Motion to convert the mode of testimony to dispense with the attendance of the witness altogether and admit the transcript of her evidence given in the *Krajišnik* case pursuant to Rule 92 *bis*. The two specific issues with which this reasoned Decision is concerned are whether Dorothea Hanson is qualified to appear before the Trial Chamber as an expert in this case and whether the Report fulfils the requirements of admissibility pursuant to the Rules.

14. Rule 94 *bis*(B) sets out clearly the time-limit for responding to a notice provided under Rule 94 *bis*(A). In the absence of any other time-limit being set by the Trial Chamber or pre-trial Judge, the opposing party must respond within thirty days of disclosure of the expert report. The Trial Chamber notes that, on the Trial Chamber's instructions, Mićo Stanišić's personally filed Rule 94 *bis* Notice was not accepted by the Registry as the Accused continued to be legally represented by counsel. The Stanišić Rule 94 *bis* Notice, filed by counsel,³¹ gives notice of the

²⁷ *Popović* Appeals Decision, para. 22.

²⁸ *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-T, Decision on the Prosecution motion for reconsideration of the admission of the expert report of Professor Radinović, 21 Feb 2003, para. 9.

²⁹ *Prosecutor v. Radoslav Brđanin*, Case No. IT-99-36-T, Decision on Prosecution's submission of statement of expert witness Ewan Brown, 3 Jun 2003, p. 4.

³⁰ *Prosecutor v. Milan Martić*, Case No. IT-95-11-T, Decision on Defence's submission of the expert report of Professor Smilja Avramov pursuant to Rule 94 *bis*, 9 Nov 2006, para. 12.

³¹ *Prosecutor v. Mićo Stanišić*, Case No. IT-04-79-PT, Decision of the Registrar, 13 June 2008, p. 3.

intent to cross-examine Dorothea Hanson but remains silent as to whether the Stanišić Defence challenges the qualifications of Dorothea Hanson or the relevance of her report. Notably, the Stanišić Defence does not seek leave to supplement its notice at a later date. As a result the submissions in the Stanišić Response regarding preclusion of Dorothea Hanson as a proposed expert witness are considered by the Trial Chamber to be untimely and are not accepted.

15. The Župljanin Rule 94 *bis* Notice also states that the Župljanin Defence seeks to cross-examine Dorothea Hanson. It challenges, but only in a broad fashion, the qualifications of the witness. Importantly, the Župljanin Defence does not specifically challenge the relevance of her report.

B. Qualification of Dorothea Hanson

16. An analysis of Dorothea Hanson's *curriculum vitae* shows that she has a specialised academic background in East European Area Studies and Modern Balkan History, which is supported by research experience as a Fulbright Scholar at the Military-Historical Institute of the Yugoslav People's Army in the period immediately preceding the events alleged in the indictment in this case.³² Her academic background is complemented by experience as a history instructor on modern Balkan, European and non-western history between 1995 to 1999.³³ Dorothea Hanson has been employed as a research officer by the Office of the Prosecutor of the Tribunal since June 1999, focusing specifically on political structures and leaderships involved in the conflict of the former Yugoslavia.

17. The Trial Chamber is of the view that Dorothea Hanson is qualified as an expert on political structures and leaderships involved in the conflict of the former Yugoslavia in this case within the meaning of Rule 94 *bis*. The Trial Chamber holds that she will be able to assist it generally in understanding the origins and functions of the Crisis Staffs in Bosnia and Herzegovina.

18. The Trial Chamber notes that the question of potential bias of an expert is separate and distinct from that of whether a person is qualified to be an expert. Such a determination has to be made on a case-by-case basis.³⁴ Any concerns the Defence may have regarding the expert's independence or impartiality can be raised in cross-examination.

³² Dorothea Hanson's *curriculum vitae*, annex B, Rule 94 *bis* Notice.

³³ *Ibid.*

³⁴ Popovic Decision, para. 22.

C. Report

19. In its oral ruling, the Trial Chamber also addressed the admissibility of the Report. The Trial Chamber considers that detailed references are supplied in the Report and that, therefore, the sources used are clearly identifiable. Subject to the proviso set out in paragraph 18 as to the issue of bias raised by the defence teams, the Trial Chamber is otherwise satisfied that the Report is *prima facie* reliable.

20. The Report details, *inter alia*, the legal origins of the Crisis Staffs and War Presidencies, the formation of the SDS Crisis Staffs and their role in the Bosnian Serb State, their military role, their relations with the police forces and their actions in the Serb municipalities. Both Mićo Stanišić and Stojan Župljanin are charged with crimes committed in several municipalities by virtue of their participation in a joint criminal enterprise (“JCE”) in which they, *inter alia*, “command[ed] and direct[ed] members and agents of the RS MUP who were acting in co-ordination with crisis staffs, the VRS, and other Serb Forces in implementing the objective of the JCE”.³⁵ References appear to be clear and from accessible sources.³⁶ The Trial Chamber thus considers the Report to be *prima facie* relevant and of probative value.

21. For the foregoing reasons, the Trial Chamber also finds that the contents of the Report generally fall within the area of expertise of Dorothea Hanson.

22. In accepting Dorothea Hanson as an expert and holding that the Report is of *prima facie* relevance and probative value, the Trial Chamber is neither admitting the evidence at this stage of the proceedings nor accepting the findings of the Report. The Defence may in cross-examination challenge the overall reliability of the Report, as well as the relevance thereof, which may affect the weight accorded to the Report should it be admitted into evidence. If after cross-examination, the Trial Chamber is satisfied that there is *prima facie* proof of reliability, the Report may be admitted and its final authenticity or credibility remains to be assessed by the Trial Chamber when determining the weight to be accorded to Dorothea Hanson’s evidence. Furthermore, the Defence is entitled to submit expert findings to the contrary and to call its own expert witness(es) during the presentation of its case.

V. DISPOSITION

23. For the foregoing reasons and pursuant to Rule 94 *bis* of the Rules, the Trial Chamber:

³⁵ Second amended consolidated indictment, 10 Sep 2009, paras 11 d)-12 b).

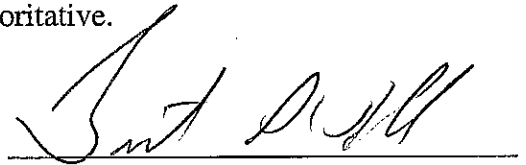
AFFIRMS its oral rulings of 20 October 2009,

ORDERS that Dorothea Hanson is permitted to appear before the Trial Chamber as an expert witness; and

DEFERS its decision on the admission of the Report until the conclusion of Dorothea Hanson's testimony.

PURSUANT to Rule 73(C) of the Rules, the time-limit for any request for certification for leave to appeal the oral rulings shall run from the date of filing of this written decision.

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



Judge Burton Hall
Presiding

Dated this fifth day of November 2009

At The Hague

The Netherlands

[Seal of the Tribunal]

³⁶ *Prosecutor v. Milan Martić*, Case No. IT-95-11-T, Decision on Defence's submission of the expert report of Professor Smilja Avramov pursuant to Rule 94 *bis*, 9 Nov 2006, para. 5.