



IN TRIAL CHAMBER II

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

Registrar: **Mr. John Hocking**

Decision of: **26 March 2010**

PROSECUTOR

v.

MIĆO STANIŠIĆ AND STOJAN ŽUPLJANIN

PUBLIC

**DECISION RECONSIDERING IN PART, AND
PROVIDING WRITTEN REASONS FOR, THE TRIAL
CHAMBER'S ORAL DECISION ADMITTING INTO
EVIDENCE DOCUMENTS THROUGH ST108**

The Office of the Prosecutor

Ms. Joanna Korner
Mr. Thomas Hannis

Counsel for the Accused

Mr. Slobodan Zečević and Mr. Slobodan Cvjetić for Mićo Stanišić
Mr. Igor Pantelić and Mr. Dragan Krgović for Stojan Župljanin

A. Introduction

1. In an oral decision on 4 March 2010, the Trial Chamber, stating that written reasons would follow, granted the Prosecution's oral motion, made at the hearing on 3 March 2010 ("Motion"), by which the Prosecution moved to admit into evidence the following items pursuant to Rule 92 *ter* of the Rules of Procedure and Evidence ("Rules"):

- a. a collection of documents described by the Prosecution as the "Rule 92 *ter* package" of ST108, containing a number of documents, including transcripts of intercepted conversations ("intercepts") ("Rule 92 *ter* package"), and
- b. nine intercepts that, according to the Prosecution, had been "added after his 92 *ter* package was put together" ("nine intercepts").¹

2. This written Decision records the Trial Chamber's reasoning and findings. In addition to providing reasons, and as set out below, the Trial Chamber has also decided *proprio motu* to reconsider its oral ruling in part in respect of four intercepts of the nine intercepts from the second category in paragraph 1 above.

3. The Motion arose out of a Decision issued by the Trial Chamber on 2 October 2009, by which it accepted to admissibility of the written evidence of a number of witnesses, including ST108, pursuant to Rule 92 *ter* of the Rules of Procedure and Evidence ("Rules"), subject to compliance with the procedural requirements of the Rule. ST108 attended the Tribunal and testified on 1 to 3 March 2010. At the close of his testimony on 3 March 2010 the Prosecution sought the admission into evidence of the Rule 92 *ter* package. The Defence of Mićo Stanišić ("Stanišić Defence") and the Defence of Stojan Župljanin ("Župljanin Defence" and jointly "Defence") responded at the hearing that day,² objecting to the admission of the intercepts.. The Prosecution also replied at that hearing.³

B. Procedural background

4. On 29 February 2008, the Prosecution filed its initial motion pursuant to Rule 92 *ter* in the case against Mićo Stanišić ("Initial Motion").⁴ On 28 July 2009, following the joinder of the

¹ Hearing, 3 Mar 2010, T. 7189. See also hearing, 1 Mar 2010, T. 7046-7047.

² Stanišić Defence, hearing, 3 Mar 2010, T. 7177-7182, and Župljanin Defence, *id*, T. 7182-7184.

³ Hearing, 3 Mar 2010, T. 7185-7189.

⁴ *Prosecutor v. Mićo Stanišić*, Case No. IT-04-79-PT, Prosecution's motion for admission into evidence pursuant to Rule 92 *ter*, filed with confidential annexes on 29 Feb 2008.

Stanišić case with the case against Stojan Župljanin, the Prosecution filed a supplemental motion (“Supplemental Motion”).⁵

5. The Rule 92 *ter* package attached to the Initial Motion contained the transcripts of ST108’s testimony in *Martić*, his 2003 witness statement and ten documents which were either admitted into evidence during the testimony or attached to the statement.⁶ In the Supplemental Motion, the Prosecution requested to amend, *inter alia*, ST108’s Rule 92 *ter* package to include a large number of items. The Prosecution submitted that since the filing of the Initial Motion, it had “expanded the number of intercepts it intends to tender through this witness”.⁷ Therefore, it had submitted the annexes to ST108’s witness statement “in their entirety to capture all documents relevant to authenticating these intercepts”, which included the complete set of authorisations of surveillance operations and of handover records.⁸ The Prosecution also stated that the amended Rule 92 *ter* package for this witness included “a revised associated exhibits table identifying the particular intercepts and other documents *that are included* in the package.”⁹

6. On 2 October 2009, the Trial Chamber granted in part, *inter alia*, the Initial Motion and the Supplemental Motion.¹⁰ The Trial Chamber allowed the witnesses in question, including ST108, to be called pursuant to Rule 92 *ter*.¹¹ Acting *proprio motu*, the Trial Chamber also amended the Prosecution’s Rule 65 *ter* exhibit list to accept, with some exceptions, the prior evidence of the witnesses and the accompanying documents, including the Rule 92 *ter* package of ST108 as provided with the Supplemental Motion.¹²

7. On 28 February 2010, the Prosecution emailed to the Trial Chamber and the Defence a list of documents it intended to use with ST108. The list included the nine intercepts, which are Rule 65 *ter* nos. 2784, 2913, 3090, 3372, 3396, 3397, 3405, 3408 and 3412.1.¹³

8. On 1 March 2010, the Prosecution emailed to the Trial Chamber and the Defence a list of the “revised” Rule 92 *ter* package of ST108. The list identified the following material, which the Trial Chamber has divided into two groups for ease of reference:

⁵ Prosecution’s supplemental motion for admission of evidence pursuant to Rules 92 *bis* and 92*ter*, filed with confidential annexes on 28 July 2009.

⁶ Initial Motion, Annex A, pp 38-41.

⁷ Supplemental Motion, para. 9.

⁸ *Ibid*, where the Prosecution also stated that specifically Annex 4, technical authorisations, and Annex 6, handover records, had been included in complete form.

⁹ *Ibid* (emphasis added).

¹⁰ Decision on Prosecution’s motions for admission of evidence of 33 witnesses pursuant to Rule 92 *ter*, 2 Oct 2009.

¹¹ 2 October 2009 Decision, p. 8.

¹² *Ibid*.

¹³ Rule 65 *ter* no. 3412.1 was added to the Prosecution’s exhibit list on 20 October 2009, Decision granting Prosecution’s motion for leave to amend Rule 65 *ter* list to add documents related to Witness ST092, filed on 20 Oct 2009. See also Prosecution’s motion for leave to amend Rule 65 *ter* exhibit list to add documents related to witness ST-92, with annex, filed on 23 Sep 2009. The Trial Chamber notes that the Rule 65 *ter* number that the Prosecution referred to in the motion of 23 September 2009 was 3412 not 3412.1. However, the ERN was correct.

The first group contains:

- c. the transcripts of ST108's testimony in the *Martić* case on 22 and 23 May 2006 and ST108's witness statement, dated 2-17 October and 13, 14 and 18 November 2003,
- d. the documents admitted into evidence during ST108's testimony in the *Martić* case as exhibits P711 and P713-P719,¹⁴ and
- e. several documents authorising surveillance operations and a number of records and receipts concerning handover of audio cassettes, CDs and documents, which are attached to ST108's statement.¹⁵

The second group consists of 175 intercepts, all of which are on the Prosecution's exhibit list of 8 June 2009.

C. Application of Rule 92 ter

9. All of the documents in the first group have been found by the Trial Chamber in its 2 October 2009 Decision to be associated with the prior testimony of ST108 in the *Martić* case and were either on the Prosecution's Rule 65 *ter* list or were added to the list by the Trial Chamber in that Decision.

10. ST108 fulfilled the conditions of Rule 92 *ter* at the beginning of his testimony on 1 March 2010. The Trial Chamber considers as relevant and probative the documents in the first group referenced in paragraph 8 a), b) and c) above. It is also of the view that the transcripts of ST108's testimony in *Martić* and his 2003 statement would be of lesser probative value without these documents. They will, therefore, be admitted into evidence.

11. The second group consists of 175 intercepts. These intercepts do not form part of the documents found to be associated with the prior testimony of the witness and so are not to be admitted as part of the Rule 92 *ter* package. They shall therefore be considered together with the nine intercepts.

¹⁴ These documents were also attached to ST108's 2003 statement.

¹⁵ The documents in this group, with the exception of Rule 65 *ter* number 3391, were not included on the Prosecution's exhibit list filed on 8 June 2009. However, on 2 October 2009 the Trial Chamber, acting *proprio motu*, amended the Prosecution's Rule 65 *ter* exhibit list to include them, Decision on Prosecution's motions for admission of evidence of 33 witnesses pursuant to Rule 92 *ter*, filed on 2 Oct 2009. In order to upload the documents into E-Court, the Prosecution assigned the documents Rule 65 *ter* numbers in the 10,000 range, from 10284.01 through 10284.49, hearing, 3 Mar 2010, T. 7190.

D. Submissions concerning intercepts

1. Stanišić Defence

12. The Stanišić Defence objects to the admission into evidence of all of the intercepts.¹⁶ It submits that ST108 did not establish the “credibility” of the intercepts.¹⁷ Referring to the oral ruling of 28 January 2010, which concerned intercepts that the Prosecution sought to tender through Vitomir Zepinić, the Defence argues that intercepts may be admitted into evidence in two situations: 1) where the witness was party to the intercepted conversation, and 2) where the witness was present when the conversation was taking place.¹⁸ As neither option applies to ST108, it is, in the Defence’s view, not possible to “establish authenticity through this witness.”¹⁹

13. The Stanišić Defence argues that the reliability of the intercepts is controversial, noting, for instance, that several intercepts “cannot be linked to a time or a place or a telephone number from which the call originated, or to which the call was placed”.²⁰ The Defence also submits that for many conversations it is unknown in which surveillance operation they were intercepted.²¹ The Defence refers to ST108’s statements that he came into possession of the intercepts and related material in batches received between 1996 and 2001. While the Defence does not suggest that ST108 or his colleagues “were responsible for any tampering, manipulation, shortening or additions on these tapes, [...] such things happened.”²² These facts, in its opinion, considerably detract from the possibility of attaching any value to the intercepts.²³

14. The Stanišić Defence states that it understands the position of the jurisprudence that the illegality of an intercept “is not in itself a sufficient reason to exclude it”.²⁴ However, it contends that “in combination with some other circumstances, such as some we have heard from the witness, [the illegality of an intercept] could become, or amount to grounds for excluding the intercept.”²⁵ The Stanišić Defence states that it will prove during its case that “not a single one of these intercepts satisfies the principle of legality” and that they “were not made legally.”²⁶

¹⁶ Hearing, 3 Mar 2010, T. 7177.

¹⁷ *Ibid.*

¹⁸ *Id* at T. 7182 (the Trial Chamber interprets the Defence’s reference to “16 December” as a mistake). See further Oral ruling, 28 Jan 2010, T. 5665-5667.

¹⁹ Hearing, 3 Mar 2010, T. 7182.

²⁰ *Id* at T. 7177-7178.

²¹ *Id* at T. 7178.

²² *Ibid.*

²³ *Ibid.*

²⁴ *Id* at T. 7179.

²⁵ *Ibid.*

²⁶ Hearing, 3 Mar 2010, T. 7179.

2. Župljanin Defence

15. The Župljanin Defence makes a general objection to the admissibility of the intercepts but does not state specifically to which documents it objects. In its view, the legality or illegality of the intercepts is not the only issue to consider.²⁷ It argues that the intercepts were not obtained “in conformity with the rules of the service which made the intercepts”, noting that surveillance diaries have not been submitted.²⁸ Such diaries would contain the date and time of the conversation, the parties thereto and the telephone number monitored.²⁹ In its view, these deficiencies in the chain of custody and the fact that conversations are incomplete, which “leaves room for manipulation”, go to the admissibility of the intercepts.³⁰

3. Prosecution’s reply

16. The Prosecution states that ST108 is familiar with the entire intercept process and that he has been able to “draw the links between those tapes that were sitting in the tape recorders to the intercepts that we [have] in front of us today.”³¹ In respect of authenticity, the Prosecution submits that there has not been anything “concrete [that] calls into doubt the authenticity of these recordings.”³² The Prosecution refers to a report from the Netherlands Forensic Institute (“NFI”), which the Stanišić Defence attached to its motion of 15 October 2009 challenging the admissibility of all intercepts.³³ It submits that while the NFI could not confirm that the “tapes are authentic [it does not find] any indication of any tampering with any of the tapes that they reviewed.”³⁴ The Prosecution argues that the approach to be taken is that once the threshold of admissibility has been met “the intercepts should be admitted and anything after that [would go] to the weight of the intercepts”.³⁵

E. Discussion

1. Preliminary matters

17. As noted above, none of the intercepts that the Prosecution sought to add by the Supplemental Motion to the Rule 92 *ter* package was admitted through, let alone shown to, ST108

²⁷ *Id* at T. 7182.

²⁸ *Id* at T. 7183.

²⁹ *Ibid.*

³⁰ *Ibid.*

³¹ *Id* at T. 7185.

³² *Id* at T. 7187.

³³ Motion for exclusion of records of intercepts of conversations, with annex A, filed on 15 Oct 2009. This motion was denied by “Decision denying the Stanišić motion for exclusion of recorded intercepts”, filed on 16 December 2009 (“Decision of 16 December 2009”).

³⁴ Hearing, 3 Mar 2010, T. 7187.

³⁵ *Id* at T. 7186.

in the *Martic* proceedings. The same holds true for the nine intercepts. As a result, none of the intercepts is properly to be described as “accompanying” the prior evidence of this witness. While the Prosecution included all, save the nine intercepts, as accompanying documents in the list of the revised Rule 92 *ter* package that it emailed on 1 March 2010, the Trial Chamber will treat the Motion, insofar as it seeks admission of all intercepts – except, for the reasons following, Rule 65 *ter* nos 3396, 3397, 3405 and 3408 – as a request for the admission of evidence pursuant to Rule 89(C) which requires proof of relevance and probative value..

18. The Prosecution did not include on its Rule 65 *ter* exhibit list of 8 June 2009 the intercepts under Rule 65 *ter* nos 3396, 3397, 3405 and 3408. The Trial Chamber notes that while these numbers are mentioned in the annexes to the Supplemental Motion, in fact, they refer to different documents. Rule 65 *ter* nos 3396 and 3397 refer to exhibits associated with ST190; both are memoranda dated 30-31 August 1992.³⁶ Rule 65 *ter* nos 3405 and 3408 refer to exhibits associated with ST105. The former is a “document cover letter with various attached reports” and the latter is a video with various footage of Momčilo Krajišnik and Radovan Karadžić in the period from 23 July 1992 through 9 January 1993.³⁷

19. The Trial Chamber is not able to find any motion whereby the Prosecution would have sought leave to amend its list to include the intercepts listed under these four Rule 65 *ter* numbers. It is also not clear when the Prosecution disclosed the four intercepts to the Defence. It is recalled, in this context, that any material that a party seeks to have admitted into evidence must appear on its exhibit list and that, in the event that a party would seek to admit into evidence material that is not on its list, the party must, by prior written motion, seek leave to add the material to the list.³⁸

20. Given the uncertainty surrounding these four intercepts, the Trial Chamber has decided to reconsider its oral ruling of 4 March 2010. The Motion will, therefore, be denied in this respect, without prejudice to the Prosecution filing a properly reasoned motion.

21. As a final preliminary matter, the Trial Chamber notes that 33 intercepts contained in the revised Rule 92 *ter* package have previously been admitted into evidence.³⁹ The Motion is therefore moot in respect of these intercepts.

³⁶ Rule 65 *ter* no. 3396 has ERN 0095-0347 to 0095-0350 and Rule 65 *ter* no. 3397 has ERN 0095-0336 to 0095-0340, Supplemental Motion, Annex D.

³⁷ Rule 65 *ter* no. 3405 is ERN R011-7333 to R011-7351, and Rule 65 *ter* no. 3408 is ERN ET V000-3466.

³⁸ Order on revised guidelines on the admission and presentation of evidence, 2 Oct 2009, para. 6 (“Guidelines”). See also Decision on Prosecution’s motions for admission of evidence pursuant to Rule 92 *ter* (ST012 and ST019), filed confidentially on 29 Sep 2009, para. 23, and Decision on Prosecution’s motions for admission of evidence of 33 witnesses pursuant to Rule 92 *ter*, 2 Oct 2009, para. 14.

³⁹ Rule 65 *ter* nos. 1024, 1027, 1028, 1029, 1033, 1036, 1037, 1038, 1042, 1046, 1052, 1059, 1082, 1086, 1415, 1490, 1712, 1714, 1717, 1730, 1801, 1804, 1808, 2877, 2980, 3028, 3030, 3058, 3198, 3231, 3237, 3238, 3360 were admitted as P885, P717, P718, P719, P720, P721, P722, P897, P724, P902, P909, P727, P728, P729, P894, P23, P397.15,

2. Admission of intercepts

22. The Trial Chamber now turns to the remaining documents, that is, the five of the nine intercepts which are on the Prosecution's Rule 65 *ter* exhibit list and the 142 intercepts remaining from the second group described in paragraph 8 above.

23. The Stanišić Defence refers to Rule 95 and the purported illegality of the intercepts, which, it submits, "in combination with some other circumstances, could require excluding the intercepts."⁴⁰ The Trial Chamber addressed Rule 95 in the Decision of 16 December 2009 and held that it will not deny admission into evidence of intercepts based exclusively on an allegation that they were illegally obtained.⁴¹

24. In the Decision of 16 December 2009, the Trial Chamber also held that "intercepts will be found to have probative value if the Trial Chamber finds that they are sufficiently reliable, authentic and relevant to the issues in this case"⁴² and so satisfy the requirements of Rule 89 (C). In respect of the Stanišić Defence's argument based on the oral ruling of 28 January 2010, the Trial Chamber recalls that by this decision it held that Vitomir Zepinić could only – and was only asked to – satisfy the requirements of Rule 89 in respect of those intercepts where he was either a participant in the discussion or physically present when the conversation took place, in which case he would only be able to address the statements made by the person in whose presence he was at the time.⁴³

25. As is clear from the wording, this ruling was specific to that witness. The Trial Chamber cannot, therefore, see that the oral ruling in relation to Vitomir Zepinić in any way affects the Trial Chamber's determination of the present Motion relating to ST108. The Trial Chamber is satisfied that there is a third general category of witnesses through whom intercepts may be authenticated for admission, that being the "technical" witness who has specialised knowledge and experience of the gathering of information in this way. In contrast to Vitomir Zepinić, ST108 is a witness who has such specialised knowledge and experience, in particular regarding the system for recording telephone conversations, who was being monitored and the subsequent chain of custody of the resulting tape recordings and transcripts.

26. The Trial Chamber accepts that many intercepts do not contain the entire conversation, that the date of the conversation is unknown, that voices are on occasion unidentified, and that there may be questions as to the chain of custody of some intercepts. Nevertheless, the Trial Chamber considers that the intercepts have been sufficiently authenticated by ST108's testimony. Rather than

⁴⁰ P397.17, P397.21, P427.22, P764, P766, P768, P202, P868, P886, P891, P869, P870, P288, P289, P290 and P887, respectively.

⁴¹ Hearing, 3 Mar 2010, T. 7179.

⁴² *Ibid.*

⁴³ Decision of 16 December 2009, para. 14.

affecting the admissibility of the intercepts, the Defence arguments regarding authenticity of the intercepts go to the weight to be attached to the intercepts in light of the trial record as a whole. Therefore, and as the intercepts referred to in paragraph 22 are relevant to the charges against the Accused and have probative value to issues in the case, the Trial Chamber holds that the requirements of Rule 89(C) are met in respect of all 147 intercepts under consideration and that they will be admitted into evidence.

F. Disposition

27. For the foregoing reasons, acting pursuant to Rule 89(C) of the Rules, the Trial Chamber:

AFFIRMS its oral ruling **IN PART**,

VARIES its oral ruling in respect of the documents with Rule 65 *ter* nos. 3396, 3397, 3405 and 3408,

ADmits INTO EVIDENCE pursuant to Rule 92 *ter*

- (a) the transcripts of ST108's testimony in the *Martic* case on 22 and 23 May 2006 and ST108's witness statement, dated 2-17 October and 13, 14 and 18 November 2003,
- (b) the documents admitted into evidence during ST108's testimony in the *Martic* case as exhibits P711 and P713-P719,⁴³ and
- (c) the documents with Prosecution Rule 65 *ter* numbers 3391 and 10284.01 to 10284.49;

ADmits INTO EVIDENCE pursuant to Rule 89 (C) the intercepts with Prosecution Rule 65 *ter* nos. 2784, 2913, 3090, 3372 and 3412.1 and 142 intercepts with Prosecution Rule 65 *ter* nos. 1026, 1040, 1049, 1053, 1054, 1055, 1056, 1070, 1071, 1072, 1074, 1077, 1083, 1084, 1087, 1089, 1090, 1091, 1097, 1098, 1099, 1100, 1102, 1103, 1105, 1368, 1408, 1409, 1410, 1412, 1415, 1424, 1426, 1427, 1431, 1458, 1505, 1564, 1607, 1799, 1940, 2086, 2339, 2340, 2344, 2367, 2583, 2584, 2585, 2586, 2589, 2590, 2603, 2604, 2694, 2695, 2819, 2846, 2867, 2869, 2887, 2894, 2895, 2901, 2903, 2912, 2915, 2916, 2917, 2918, 3029, 3031, 3032, 3034, 3035, 3036, 3038, 3057, 3059, 3060, 3061, 3069, 3074, 3086, 3089, 3136, 3137, 3138, 3139, 3140, 3192, 3197, 3205, 3206, 3213, 3220, 3221, 3222, 3224, 3225, 3226, 3227, 3228, 3230, 3232, 3233, 3234, 3235, 3236, 3239, 3240, 3241, 3242, 3243, 3244, 3245, 3246, 3247, 3248, 3249, 3250, 3251, 3252, 3253, 3254, 3255, 3256, 3257, 3258, 3260, 3261, 3262, 3263, 3264, 3266, 3267, 3268, 3269, 3360, 10284.50, 10284.51 and 10284.52;

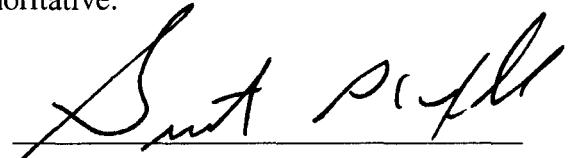
⁴³ Oral ruling, 28 Jan 2010, T. 5665-5667.

⁴⁴ These documents were also attached to ST108's 2003 statement.

ORDERS the Registrar to assign exhibit numbers to the documents admitted into evidence by this decision; and

DENIES the Motion in respect of Rule 65 *ter* nos. 3396, 3397, 3405 and 3408 without prejudice to the Prosecution filing a properly reasoned motion.

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



Judge Burton Hall
Presiding

Dated this twenty-sixth day of March 2010

At The Hague
The Netherlands

[Seal of the Tribunal]