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: 1 April 2010
Original: English

IN TRIAL CHAMBER II

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

Registrar: **Mr. John Hocking**

Decision of: **1 April 2010**

PROSECUTOR

v.

MIĆO STANIŠIĆ AND STOJAN ŽUPLJANIN

PUBLIC

DECISION DENYING PROSECUTION'S MOTION FOR ADMISSION OF EVIDENCE OF PEDRAG RADULOVIĆ PURSUANT TO RULE 92 *TER*

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 admission of evidence of ST-182 pursuant to Rule 92*ter* with confidential annexes", filed confidentially on 15 January 2010 ("Motion"), in which the Prosecution requests the Trial Chamber to admit the evidence of Pedrag Radulović (ST182) pursuant to Rule 92 *ter* of the Rules of Procedure and Evidence of the Tribunal ("Rules").[1] On 29 January 2010, the Defence of Stojan Župljanin ("Župljanin Defence") responded objecting to the Motion ("Župljanin Response").[2] On 3 February 2010, the Prosecution sought leave to reply and replied to Župljanin Response ("Reply").[3] The Trial Chamber will grant leave to reply. Also on 3 February 2010, the Defence of Mićo Stanišić ("Stanišić Defence") filed an application to join in the submissions of the Župljanin Response.[4] Having been filed outside the time prescribed by Rule 126 *bis*, the Trial Chamber will not take it into consideration.[5]

I. SUBMISSIONS

A. Motion

1. The Prosecution submits that Pedrag Radulović, "currently designated on the Prosecution's Rule 65 *ter* witness list as a *viva voce* witness, was a Chief Inspector of the RSMUP national security service ("SNB") at CSB Banja Luka during the period relevant to the Indictment" and that "[h]is intelligence group was responsible for a significant number of intelligence reports [...] concerning events in the Autonomous Region of Krajina ("ARK") and the Autonomous Region of Northern Bosnia ("SAO Northern Bosnia") that are highly probative in this case."[6]

2. Pedrag Radulović provided written statements to the Prosecution on 15 November 2008 and 13 April 2009. Moreover, he was interviewed by the Prosecution on 25 March 2009, 30 March 2009, 1 April 2009, 23 April 2009, 24 April 2009 and 17 July 2009 (collectively, "Previous Statements").[7] The Prosecution states that "[g]iven the volume of Mr. Radulović previous statements and interview transcripts, [i]t has consolidated this evidence into an amalgamated written

[1] Motion, para. 1.
[2] Župljanin response to Prosecution's motion for admission of evidence of ST-182 pursuant to Rule 92ter, filed confidentially on 29 Jan 2010.
[3] Prosecution's motion for leave to reply and reply to Župljanin response to Prosecution's motion for admission of evidence of ST-182 pursuant to Rule 92*ter*, filed confidentially on 3 Feb 2010.
[4] Mr. Stanišić's application to join Župljanin response to Prosecution's motion for admission of evidence of ST-182 pursuant to Rule 92ter, filed confidentially on 3 Feb 2010.
[5] Stanišić Response, para. 1.
[6] Motion, para. 3.

statement ["Amalgamated Statement"]".[8] The Amalgamated Statement contains "additional clarifications and observations" that the witness provided to the Prosecution on 2-5 December 2009.[9] The Prosecution seeks to have the Amalgamated Statement admitted into evidence pursuant to Rule 92 *ter*,[10] arguing that "[a]lthough Mr. Radulović has not previously testified before this Tribunal, the practice of the Tribunal clearly indicates that there is 'no limit to the scope of Rule 92*ter* to a specific means of documenting evidence and, in general, the requirement of written statement should be considered fulfilled when the witness's words are document and preserved'."[11]

3. The Prosecution submits that the Motion is in the interests of justice and that the "[a]dmission of Radulović's written evidence will not deprive the Accused of a fair trial."[12] It is submitted that "the Trial Chamber will be able to further assess this witness's credibility during the Prosecution's limited direct examination, and through its own questions."[13]

4. The Prosecution asserts that "admitting Mr. Radulović's evidence pursuant to Rule 92*ter* will help ensure an effective and expeditious trial."[14] It states that "[a]t the time of filing the Pre-Trial Brief, the Prosecution estimated that it needed six hours to complete the direct examination of Mr. Radulović as *viva voce* witness" but that, "[a]s a result of subsequent interviews with this witness and a further assessment of his evidence, the Prosecution has since determined that it would require at least twice that amount of time."[15] It submits that if the Trial Chamber grants the Motion, "the Prosecution would seek leave to reduce the amount of direct examination time for this witness to two hours, resulting in a significant saving of time."[16]

B. Župljanin Response

5. The Župljanin Defence opposes to the Motion, submitting that it is not in the interest of justice to permit Pedrag Radulović to testify pursuant to Rule 92 *ter*.[17] The Župljanin Defence "[balks] at the use of rule 92*ter* as a mechanism to avoid presenting witnesses for examination-in-

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[7] *Id.*, para 4.
[8] *Ibid.*
[9] *Ibid.*
[10] *Ibid.*
[11] *Ibid.*, citing *Prosecutor v. Stanišić & Simatović*, Case No. IT-03-69-T, Decision on Prosecution's motion for the admission of written evidence of witness Slobodan Lazarević pursuant Rule 92 *ter*, 16 May 2008, para. 18, quoting *Prosecutor v. Popović et al.*, Case No. IT-05-88-T, Decision on motion to convert *viva voce* witnesses to Rule 92 *ter* witnesses, 31 May 2007, p. 2.
[12] *Id.*, para 8.
[13] *Ibid.*
[14] *Id.*, para. 9.
[15] *Ibid.*
[16] *Ibid.*
[17] Župljanin Response, paras 4-7.

chief whose accounts are inconsistent or incredible, thereby ensuring the more cohesive presentation of their testimony by virtue of a synthesised written statement" and opposes the Motion "due to the prejudicial limitations on the Defence's ability to effectively cross-examine this witness if the request is granted."[18]

6. The Defence argues that the content of the Previous Statements "is, to a significant extent, both inconsistent and incredible" and "[r]esplendent with examples of second and third-hand hearsay."[19] Additionally, the Defence argues that "due to the obvious unreliability of the witness the Trial Chamber cannot be sure of which version of his account the witness would present if required to submit to oral examination-in-chief" and that "it is unfair for the Prosecution to substitute oral examination-in-chief for an account contained in a single written statement which has been prepared many years after the events in question."[20] The Defence submits that the Amalgamated Statement "presents the witness's account as one that is broadly consistent and therefore capable of belief whereas the Trial Chamber could well take a different view of the witness's credibility if they were required to present their testimony in the traditional way and be cross-examined by the Defence upon any inconsistencies which may arise in the course of their testimony."[21] It states that "[i]t is only ever appropriate to circumscribe the time honoured tradition of examination-in-chief being followed by cross-examination in circumstances where the Defence is not prejudiced by the restrictions on their ability to observe the witness giving oral answers in advance of cross-examination."[22] The Defence submits that "judicial economy should never outweigh the right of the accussed to a fair trial"[23] and that the Motion should be denied "in order to uphold the fair trial rights of the Accused."[24]

C. Reply

7. The Prosecution states that the Defence's submissions that the Previous Statements are inconsistent, incredible and resplendent with examples of second and third-hand hearsay are unsubstantiated.[25] It submits that the Defence has neither cited any inconsistency, nor shown "how the [Amalgamated Statement] inaccurately reflects the evidence provided in the witness's prior statements and transcripts."[26] The Prosecution emphasises that the Amalgamated Statement "solely

[18] *Ibid.*
[19] *Id.*, para. 6.
[20] *Ibid.*
[21] *Ibid.*
[22] *Ibid.*
[23] *Ibid.*
[24] *Id.*, paras 7 and 9.
[25] Reply, para. 2.
[26] *Ibid.*

for the purposes of efficiency, clarity and avoiding unnecessary repetition and the presentation of irrelevant information that would result from the submission of the multiple statements and transcripts by this witness."[27] The Prosecution asserts that "any alleged internal inconsistencies [...] would go to the weight to be attributed to this witness's evidence, and would not automatically preclude its admission."[28] The Prosecution notes that "one of the purposes of the cross-examination of a Rule 92*ter* witness is for the Defence to explore any alleged inconsistencies in a witness's prior statements and transcripts."[29]

II. DISCUSSION

8. The Trial Chamber accepts that hearing Predrag Radulović pursuant to Rule 92 *ter* might save some time in court compared to his testimony *viva voce* but finds that judicial economy is not the only parameter that guides the Trial Chamber in its determination of the mode of testimony of the witnesses. For the reasons set out below, the Trial Chamber will deny the Prosecution's request for alteration of the conditions for this witness's testimony.

9. In reaching its conclusion, the Trial Chamber has been guided by the "best evidence rule".[30] The Trial Chamber notes that the Defence, referring to the numerous prior statements and interviews of the witness's, strongly questions the credibility of Pedrag Radulović. While the Trial Chamber will not make a determination of the credibility or reliability of the witness's evidence at this point in the proceedings, it considers that the best evidence rule requires, in the present situation, that the Trial Chamber hear the witness's testimony firsthand.

10. The nature of the expected testimony of Pedrag Radulović as a senior official in the SNB at the CSB in Banja Luka, the scope of the facts on which the witness will testify according to the Rule 65 *ter* summary of his evidence and the fact that he has not previously testified before the Tribunal, lead the Trial Chamber to conclude that the benefit of hearing this witness *viva voce* outweighs the purported advantages of admitting his evidence pursuant Rule 92 *ter*.

11. The Trial Chamber acknowledges the complex and lengthy nature of the witness's testimony. It is also conscious of the fact that Pedrag Radulović was interviewed on numerous occasions and that Pedrag Radulović's evidence was reassessed after 8 June 2009, the date on which the Prosecution submitted its estimates pursuant Rule 65 *ter*(F). While the Chamber is not

[27] *Ibid.*
[28] *Id.*, para. 3.
[29] *Id.*, para. 3, also stating that the Amalgamated Statemend cites the pages of the witness's prior statements and interview transcripts "[t]o assist the Defence in its preparations".
[30] Guidelines, para. 1.

satisfied that the Prosecution has made a sufficient argument to show that more than twice the time originally estimated for the examination-in-chief would be required, it is mindful of the Prosecution's submissions regarding the complexity of the witness's evidence. It will, therefore, extend the time originally estimated for the examination-in-chief to eight hours.

III. DISPOSITION

12. For the above reasons and acting pursuant to Rules 54, 89(F) and 92 *ter* the Trial Chamber:

GRANTS the Prosecution leave to reply;

DENIES the Motion;

ORDERS the Prosecution to call Pedrag Radulović as a *viva voce* witness; and

GRANTS the Prosecution eight hours to conduct the examination-in-chief of the witness.

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

Judge Burton Hall
Presiding

Dated this first of April 2010
At The Hague
The Netherlands

[Seal of the Tribunal]