



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: 14 July 2010  
Original: English

**IN TRIAL CHAMBER II**

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

**Registrar:** Mr. John Hocking

**Decision of:** 14 July 2010

**PROSECUTOR**

**v.**

**MIĆO STANIŠIĆ AND STOJAN ŽUPLJANIN**

***PUBLIC***

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**DECISION GRANTING IN PART PROSECUTION'S  
MOTION TO AMEND ITS RULE 65 *TER* WITNESS LIST  
AS A RESULT OF THE TRIAL CHAMBER'S  
1 APRIL 2010 DECISION CONCERNING JUDICIAL  
NOTICE OF ADJUDICATED FACTS**

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**The Office of the Prosecutor**

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**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 seized of “Prosecution’s motion to amend its Rule 65*ter* witness list as a result of the Trial Chamber’s 1 April 2010 [decision] granting in part Prosecution’s motions for judicial notice of adjudicated facts pursuant to Rule 94(B), with confidential annex”, filed on 27 May 2010 (“Motion”), and the Addendum to the Motion, filed publicly with confidential annex on 16 June 2010 (“Addendum”), whereby it seeks leave to add 53 witnesses (“proposed witnesses”) to its witness list and requests an additional 29 ¼ hours for their examination-in-chief.<sup>1</sup>

## I. BACKGROUND

1. On 1 April 2010, the Trial Chamber issued a combined decision on six Prosecution motions and one Defence motion concerning judicial notice of adjudicated facts (“Decision”) pursuant to Rule 94(B) of the Rules of Procedure and Evidence (“Rules”).<sup>2</sup> The Trial Chamber took judicial notice of 1086 facts in full, including 104 facts in a redacted form, and declined to take judicial notice of 239 facts.<sup>3</sup> Of the adjudicated facts denied or redacted in the Decision, 233 facts had been accepted by the decision of 14 December 2007 in the case against Mićo Stanišić (“First Decision”),<sup>4</sup> thus prior to the joinder of that case with the case against Stojan Župljanin.

2. On 8 June 2010, the Defence of Mićo Stanišić and the Defence of Stojan Župljanin (together, “Defence”) jointly responded (“Response”), objecting to the Motion.<sup>5</sup> The Defence contend that due to the Prosecution’s failure to provide “full disclosure of statements, previous testimony, associate (*sic*) exhibits, a summary of evidence and the identity” of all the proposed witnesses, they are “not in a position to respond to the Motion.”<sup>6</sup>

<sup>1</sup> Motion, para. 37; Addendum, para. 2.

<sup>2</sup> Decision granting in part Prosecution’s motions for judicial notice of adjudicated facts pursuant to Rule 94(B), 1 Apr 2010, which decided the following motions: (1) Prosecution’s third motion for judicial notice of adjudicated facts, with annex, 25 Jan 2008; (2) Prosecution’s fourth motion for judicial notice of adjudicated facts, with annex, 24 Apr 2008; (3) Prosecution’s request and notice regarding application of adjudicated facts to Stojan Župljanin with annex, 23 Feb 2009; (4) Prosecution’s fifth motion for judicial notice of adjudicated facts, with annex, 21 Aug 2009; (5) Prosecution’s sixth motion for judicial notice of adjudicated facts, with annex, 2 Feb 2010; and (6) Defence motion for judicial notice of adjudicated facts with annex, 1 Feb 2007.

<sup>3</sup> Decision, para. 50.

<sup>4</sup> *Prosecutor v. Mićo Stanišić*, Case No. IT-04-79-PT, Decision on judicial notice, 14 Dec 2007, which decided the following motions: Prosecution’s motion for judicial notice of facts of common knowledge and adjudicated facts, with annex, 31 Aug 2006; Prosecution’s second motion for judicial notice of adjudicated facts, with revised and consolidated annex, 10 May 2007.

<sup>5</sup> Joint Defence response to Prosecution’s motion to amend its Rule 65 *ter* witness list as a result of the Trial Chamber’s 1 April 2010 decision granting in part Prosecution’s motions for judicial notice of adjudicated facts pursuant to Rule 94(B) with confidential Annex, 8 Jun 2010.

<sup>6</sup> Response, paras 3, 5.

3. On 11 June 2010, the Trial Chamber ordered the Prosecution to provide summaries for the proposed witnesses in accordance with Rule 65 *ter*(E)(ii)(B) and to inform the Trial Chamber by 16 June 2010 of the status regarding disclosure pursuant to Rule 66(A)(ii) (“First Oral Order”).<sup>7</sup>
4. On 16 June 2010, the Prosecution filed the Addendum, which includes summaries of 50 of the proposed witnesses. The Prosecution stated that summaries of the three still unidentified witnesses, together with their identities and statements, would be provided once the Prosecution had identified them.<sup>8</sup>
5. Regarding the status of disclosure, the Prosecution contends that it disclosed to the Defence “all prior witness statements and/or testimony found in [its] internal ‘Jigsaw’ database” of the 50 identified proposed witnesses, and that it had disclosed material for 18 of the identified proposed witnesses prior to the commencement of trial.<sup>9</sup> The Prosecution adds that the statements and testimony of the proposed witnesses have been “largely available to the Defence as a result of it having gained access to material from the *Brdanin*, *Mrda*, *Stakić* and *Krajišnik* cases.”<sup>10</sup> It submits that the Defence, therefore, have or can access “sufficient information regarding the relevant evidence of the proposed witnesses to begin preparing their cross-examination.”<sup>11</sup> However, the Prosecution concedes that it has not verified that it has completed its Rule 66(A)(ii) disclosure obligations.<sup>12</sup> The Prosecution submits that to do so would require the expenditure of “significant Tribunal resources” and thus requests that the Trial Chamber render its decision prior to requiring it to perform this verification.<sup>13</sup>
6. On 29 June 2010, the Defence jointly responded to the Addendum (“Response to the Addendum”), submitting, *inter alia*, that, despite the First Oral Order and the disclosure obligations pursuant to Rule 66(A)(ii), “the Prosecution has still failed to provide full disclosure in relation to any of the proposed witnesses.”<sup>14</sup>
7. On 1 July 2010, the Trial Chamber orally ruled that the Prosecution was not required to commence the process of verifying full disclosure of the material prior to the issuance of the instant decision.<sup>15</sup>

<sup>7</sup> Oral Ruling, 11 Jun 2010, T. 11674-11675.

<sup>8</sup> Addendum, para. 3.

<sup>9</sup> *Id.*, para. 5.

<sup>10</sup> *Ibid.*

<sup>11</sup> *Ibid.*

<sup>12</sup> *Id.*, para. 6.

<sup>13</sup> *Ibid.*

<sup>14</sup> Joint Defence response to addendum to Prosecution’s motion to amend its 65ter witness list as a result of the Trial Chamber’s 1 April 2010 decision granting in part Prosecution’s motions for judicial notice of adjudicated facts pursuant to Rule 94(B), with confidential annex, 29 Jun 2010, para. 5.

<sup>15</sup> Oral Ruling, 1 Jul 2010, T. 12488-12489.

## II. SUBMISSIONS

### A. Prosecution

8. The Prosecution contends that, as a result of the Decision, “its current witness list is now inadequate to prove all crimes charged in the Indictment.”<sup>16</sup> It argues that short of a reversal of the Decision on reconsideration or appeal, it can only rehabilitate its case by calling additional witnesses to fill “evidentiary gaps caused by the denial of adjudicated facts.”<sup>17</sup> The Prosecution submits three interrelated arguments to establish good cause for its request:

- (1) the Decision has had a significant adverse effect on its case,
- (2) it reasonably relied on the First Decision in selecting its witnesses, and
- (3) it had to select witnesses without rulings on pending motions regarding adjudicated facts.<sup>18</sup>

The Prosecution provides examples of adjudicated facts it states it has insufficient evidence to establish.<sup>19</sup> According to the Prosecution, many of the adjudicated facts denied by the Decision are “essential” to its case as they would “provide crime-base evidence necessary for laying the foundation for” evidence relating to the “acts, conducts and mental state of the Accused.”<sup>20</sup>

9. The Prosecution argues that it justifiably relied on the First Decision because it had “at each stage of these proceedings” reminded the Trial Chamber of its reliance on the adjudicated facts judicially noticed therein.<sup>21</sup> The Prosecution also submits occasions on which the Trial Chamber relied on the First Decision.<sup>22</sup>

10. The Prosecution contends that the Trial Chamber’s delay in deciding the adjudicated facts motions has prejudiced its case.<sup>23</sup> It repeatedly informed the Trial Chamber that, without rulings on the motions, it was unable to prepare its case adequately or present an accurate and streamlined

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<sup>16</sup> Motion, para. 1.

<sup>17</sup> *Id.*, para. 18. The Prosecution filed a request for certification to appeal the Decision on 7 April 2010, Prosecution’s request for certification to appeal the “Decision granting in part Prosecution’s motions for judicial notice of adjudicated facts pursuant to Rule 94(B),” 7 Apr 2010. Contemporaneous to issuing the present decision, the Trial Chamber also issued the decision on the Prosecution’s request for certification, Decision denying the Prosecution’s request for certification to appeal the “Decision granting in part Prosecution’s motions for judicial notice of adjudicated facts pursuant to Rule 94(B),” 14 Jul 2010.

<sup>18</sup> Motion, para. 14.

<sup>19</sup> *Id.*, para. 17, referring to adjudicated fact nos. 470-471, 577, 726, 936, 961, 1344 and 1347.

<sup>20</sup> *Id.*, para. 16.

<sup>21</sup> *Id.*, para. 19. See also, paras 19-24 whereby the Prosecution notes that it relied on the First Decision: (1) when revising its pre-trial witness list; (2) when selecting twenty witnesses to drop pursuant to the Trial Chamber’s 4 April 2008 invitation to reduce the scope of the indictment; (3) when seeking to apply the adjudicated facts determined by the First Decision upon the joinder of Župljanin; and (4) in its Pre-trial Brief.

<sup>22</sup> *Id.*, paras 23, 25-28; See also, Pre-Trial Conference, 4 Sep 2009, T. 143.

<sup>23</sup> Motion, para. 29.

witness list.<sup>24</sup> In the absence of a decision on the pending motions by 10 September 2009, the date on which the Trial Chamber required the Prosecution to file a reduced witness list, the Prosecution submits that it had to select witnesses under the assumption that the adjudicated facts as proposed in the pending motions would be granted.<sup>25</sup>

11. The Prosecution notes that it has taken measures “to minimize the impact that rectifying this matter will have on the length and the complexity of this trial”.<sup>26</sup> Such measures include:

- a) seeking additional witnesses only for “denied adjudicated facts” essential to its case and that cannot be proven through witnesses or exhibits currently on its Rule 65 *ter* lists;<sup>27</sup>
- b) its intention to apply for admission of evidence, where feasible, pursuant to Rule 92 *bis*;<sup>28</sup>
- c) proposing the use of the same witness(es) to cover multiple denied adjudicated facts;<sup>29</sup>
- d) seeking to introduce evidence from proposed witnesses only to the extent necessary to establish denied adjudicated facts;<sup>30</sup> and
- e) if the Motion is granted, disclosing to the Defence on an expedited basis outstanding prior testimony and statements of the proposed witnesses and delaying the calling of those witnesses until the end of its case.<sup>31</sup>

12. The Prosecution further submits that the denied adjudicated facts corresponding to each proposed witness constitute the “summary of the facts on which the proposed witnesses will provide evidence.”<sup>32</sup> It, accordingly, seeks to introduce evidence from those witnesses to the extent necessary to establish the denied adjudicated facts, “as well as evidence necessary to place these facts in context.”<sup>33</sup> Nonetheless, the Prosecution will seek the admission of entire transcripts or written statements of the proposed witnesses pursuant to Rules 92 *bis* and 92 *ter* “to allow the Trial Chamber to assess the witnesses’ reliability and credibility.”<sup>34</sup>

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<sup>24</sup> *Id.*, paras 29, 31-32.

<sup>25</sup> *Id.*, para. 33.

<sup>26</sup> *Id.*, para. 35.

<sup>27</sup> *Ibid.*; For ease of reference, the Trial Chamber adopts the term, “denied adjudicated facts,” to refer to the 71 proposed facts of which the Trial Chamber declined to take judicial notice and the 25 facts of which the Trial Chamber took judicial notice in redacted form, which the Prosecution seeks to establish through the 53 proposed witnesses.

<sup>28</sup> *Ibid.*

<sup>29</sup> *Ibid.*

<sup>30</sup> *Ibid.*

<sup>31</sup> *Id.*, para. 36.

<sup>32</sup> Addendum, para. 4. See also, Motion, para. 35; Confidential Annex A.

<sup>33</sup> Addendum, para. 4.

<sup>34</sup> *Id.*, fn. 3.

## B. Defence

13. The Defence submit that they are not in a position to respond substantively to the Motion due to the Prosecution's failure to provide full disclosure of "statements, previous testimony, associate exhibits, a summary of evidence and the identity" of all the proposed witnesses.<sup>35</sup> In response to the Addendum, the Defence contend that the Prosecution has still failed to provide full disclosure in contravention of Rule 66(A)(ii) and the First Oral Order.<sup>36</sup>

14. The Defence submit that the time and resources they would need to "deal with" such an increase to the number of Prosecution witnesses is "contrary to the interests of justice and prejudicial to the Accused",<sup>37</sup> as the Defence are "currently fully engaged in dealing with the Prosecution witnesses already on its Rule 65ter witness list."<sup>38</sup> They argue that the significant time commitment required to prepare for 53 additional witnesses would effectively derail the current timetable for the trial, violating the Accused's right to a fair and expeditious trial pursuant to Articles 20 and 21 of the Statute.<sup>39</sup>

## III. APPLICABLE LAW

15. Pursuant to Rule 73 *bis*(F), the Trial Chamber may grant a motion to "vary the decision as to [...] the number of witnesses that are to be called or for additional time to present evidence" if satisfied that it is in the interests of justice to do so.<sup>40</sup> In exercising its discretion, the Trial Chamber must ensure that the rights of the accused to a fair and expeditious trial and to adequate time and facilities for the preparation of his defence will not be unduly prejudiced by the requested amendment.

16. The Trial Chamber may also permit the amendment of a Rule 65 *ter* witness list in the interests of justice. Factors taken into account in this assessment include: the *prima facie* relevance of the anticipated testimony of the proposed witness, whether the anticipated testimony is of sufficient importance to justify the inclusion of the proposed witness on the witness list, whether the moving party has shown good cause for its request, whether the moving party has exercised due diligence in identifying the proposed witness, whether the proposed testimony is of a repetitive or

<sup>35</sup> Response, paras 3-5; Response to Addendum, para. 2.

<sup>36</sup> Response to Addendum, para. 5.

<sup>37</sup> Response, para. 3; Response to Addendum, para. 7. The Defence submit that they would be required to engage in a "meticulous and detailed review of the trial record and Prosecution witnesses who have not yet testified," as well as "litigate the admission of statements, transcripts, and exhibits under these Rules", *ibid.*

<sup>38</sup> Response to Addendum, para. 8.

<sup>39</sup> *Id.*, para. 9.

<sup>40</sup> *Prosecutor v. Đorđević*, Case No. IT-05-87/1-T, Decision on Prosecution motions to add Milan Đaković to the Rule 65 *ter* witness list, 21 May 2009, para. 5; see also, *Prosecutor v. Dragomir Milošević*, Case No. IT-98-29/1-PT,

cumulative nature, 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 Defence would suffer undue prejudice as a result of the amendment.<sup>41</sup> Additionally, the Trial Chamber must be mindful of the Prosecution's duty to present the available evidence to prove its case.<sup>42</sup>

#### IV. DISCUSSION

17. The Trial Chamber recognises the effect of the Decision, in view of both its scope and content, on the Prosecution's case. It considers that the change of circumstances resulting therefrom puts the Prosecution in a position whereby it is reasonable for it to seek to call additional witnesses to provide evidence previously submitted as adjudicated facts. For these reasons, the Trial Chamber is satisfied that the Prosecution has shown good cause for the Motion.

18. The Trial Chamber has conducted a careful review of the material provided by the Prosecution concerning the scope and relevance of the proposed witnesses' testimony and is satisfied that each proposed witness can provide testimony that is *prima facie* relevant for the limited purpose of seeking to establish the substance of the denied adjudicated facts, as specified in Confidential Annex A to the Motion.

19. The Trial Chamber has also reviewed whether the anticipated testimony of each proposed witness pertains to the corresponding denied adjudicated facts, as indicated by the Prosecution. On the basis of its analysis, and bearing in mind the balance to be reached between the Prosecution's duty to prove its case and the rights of the Accused to a fair and expeditious trial and to have adequate time for the preparation of their defence, the Trial Chamber finds that it is appropriate to permit the Prosecution to call no more than 44 of the proposed witnesses.

20. The Trial Chamber will, accordingly, order the Prosecution to identify the proposed witnesses it will seek to add to its witness list and to propose the mode of testimony for each. The Trial Chamber reiterates that the testimony of each selected proposed witness will be admissible solely for the limited purpose of seeking to establish the substance of the specified denied adjudicated facts, as set out in Confidential Annex A to the Motion.

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Decision on Prosecution motion to amend its Rule 65 *ter* witness list, confidential, 21 Dec 2006, para. 8, with further references.

<sup>41</sup> *Prosecutor v. Lukić and Lukić*, Case No. IT-98-32/1-T, Decision on motion for leave to amend Prosecution's list of witnesses, 29 Aug 2008 ("Lukić Decision"), paras 24-26; *Prosecutor v. Prlić et al.*, Case No. IT-04-81-T, Decision on motion to amend witness and exhibit list, 16 Jan 2008, pp. 5-6; *Prosecutor v. Popović et al.*, Case No. IT-05-88-AR73.1, Decision on appeals against decision admitting material related to Borovčanin's questioning, 14 Dec 2007, para. 37.

<sup>42</sup> *Lukić Decision*, para. 23.

21. While restricting the number of witnesses and limiting their evidence to cover no more than the substance of the denied adjudicated facts, the Trial Chamber remains mindful of the potential prejudice to the Defence, having regard to the stage of the proceedings at which this issue arises. Accordingly, the Trial Chamber will order the Prosecution to provide all outstanding disclosure under Rule 66 as of the date of this Decision. Further, in order to provide the Defence with sufficient time to conduct their investigation in relation to the selected witnesses, each selected witness may only be called to testify after not less than six weeks have elapsed following the Prosecution's confirmation of the completion of its disclosure obligations with respect to that selected witness.

22. In order to facilitate the judicial management of the scope of the testimony, taking into consideration that judicial economy is not limited solely to the time taken to present evidence in court but also to the out-of-court burden placed upon the Defence and the Trial Chamber, together with the need to protect the rights of the Accused, the Trial Chamber will require that, unless the evidence of the witness is suitable for admission pursuant to Rules 92 *bis* or 92 *quater*, all selected witnesses be heard *viva voce*.

23. In order to be able to address the Prosecution's request to vary the time available to it for the presentation of its case, the Trial Chamber will order the Prosecution to propose the time it seeks for the examination-in-chief of each selected witness.

24. In the interest of the efficient management of the trial, the Trial Chamber invites the parties to confer with the aim of identifying witnesses the Prosecution will seek to proffer pursuant to Rule 92 *bis* for whom the Defence would raise no objection.

## V. DISPOSITION

25. Pursuant to Articles 20 and 21 of the Statute and Rules 54, 65 *ter* and 73 *bis*(F), the Trial Chamber:

**GRANTS** the Motion **IN PART**;

**ORDERS** the Prosecution, by 19 July 2010, to:

- 1) file a list of no more than 44 of the proposed witnesses,
- 2) indicate whether the witnesses will testify *viva voce* or pursuant to Rule 92 *bis* or Rule 92 *quater*, and



3) provide estimates of the time it requires for the examination-in-chief of each selected witness;

**ORDERS** that the evidence of each selected witness shall be limited to the substance of the corresponding denied adjudicated fact or facts, as set out in Confidential Annex A to the Motion;

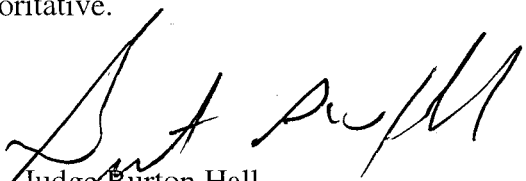
**ORDERS** the Prosecution to provide all outstanding disclosure under Rule 66 as of the date of this Decision;

**ORDERS** the Prosecution to confirm to the Trial Chamber the completion of its disclosure obligations for each selected witness;

**ORDERS** that the Prosecution may not call any selected witness to testify until after six weeks have elapsed after it confirms completion of its disclosure obligations as set out above with respect to that witness; and

**ORDERS** the parties to report to the Trial Chamber by 20 August 2010 on the outcome of their conferring with the aim of identifying witnesses the Prosecution seeks to proffer pursuant to Rule 92 *bis* for whom the Defence would raise no objection.

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



Judge Burton Hall  
Presiding

Dated this fourteenth day of July 2010

At The Hague

The Netherlands

**[Seal of the Tribunal]**