

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

IT-08-91-T
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25 NOVEMBER 2011

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Case No: IT-08-91-T
Date: 25 November 2011
Original: English

IN TRIAL CHAMBER II

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

Registrar: **Mr. John Hocking**

Decision of: **25 November 2011**

PROSECUTOR

v.

MIĆO STANIŠIĆ AND STOJAN ŽUPLJANIN

PUBLIC

**DECISION ADMITTING INTO EVIDENCE
DOCUMENTS SUPPLEMENTING THE CHS**

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. Dragan Krgović and Mr. Aleksandar Aleksić for Stojan Župljanin

I. INTRODUCTION

1. Trial Chamber II (“Trial Chamber”) of the International Criminal 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 motion to reopen its case-in-chief (death certificates) and tender documents from the bar table”, filed with confidential Annexes A and B on 26 July 2011 (“Motion”).

2. The Defence for Mićo Stanišić (“Stanišić Defence”) responded on 8 August 2011 (“Response”),¹ while the Defence for Stojan Župljanin (jointly, “Defence”) did not respond. The Prosecution sought leave to reply and filed a proposed reply on 15 August 2011 (“Reply”).²

II. PROCEDURAL BACKGROUND

3. On 23 July 2010, the Prosecution filed a motion seeking to add to its Rule 65 *ter* exhibit list and tender into evidence the “proof of death database” for the victims listed in the schedule of the indictment.³ On 17 December 2010, the Trial Chamber directed the Prosecution to provide the proof of death database on a consolidated hyperlinked spreadsheet (“CHS”) by 3 January 2011 (“Directions”).⁴ On 23 December 2010, the Duty Judge granted the Prosecution an extension of time and ordered it to comply with the Directions by 12 January 2011.⁵ On 12 January 2011, the Trial Chamber granted a further extension until 14 January 2011.⁶ On 14 January 2011, the Prosecution filed its notice of compliance with the Directions (“Notice of 14 January 2011”).⁷

4. On 1 February 2011, the same date on which the Prosecution closed its case,⁸ the Trial Chamber granted the Prosecution’s motion of 23 July 2010 and admitted the CHS along with the underlying material into evidence (“Decision of 1 February 2011”).⁹ In doing so, the Trial Chamber considered the reliability of the CHS and held that its deficiencies were either technical oversights or issues relevant to the weight to be afforded to the evidence, rather than affecting the admissibility

¹ Stanišić opposition to Prosecution motion to reopen its case-in-chief (death certificates) and tender documents from the bar table, 8 Aug 2011.

² Prosecution’s reply to the Stanišić opposition to Prosecution motion to reopen its case-in-chief (death certificates) and tender documents from the bar table, 15 Aug 2011.

³ Prosecution’s motion to add proof of death database to its 65 *ter* exhibit list and to tender it into evidence with confidential annexes A and B, 23 Jul 2010.

⁴ Directions to the Prosecution with regard to its motion to add proof of death database, 17 Dec 2010.

⁵ Decision on Prosecution’s urgent motion seeking variation of the deadline in relation to the proof of death database, 23 Dec 2010.

⁶ Hearing, 12 Jan 2011, T. 18698-18699.

⁷ Prosecution’s notice of compliance with the Trial Chamber’s directives relating to the proof of death consolidated hyperlinked spreadsheet, with confidential annexes A and B, 14 Jan 2011.

⁸ Hearing, 1 Feb 2011, T. 19307.

⁹ Decision granting Prosecution’s motion on proof of death database, 1 Feb 2011. The Trial Chamber notes that the CHS has not yet been assigned an exhibit number.

of the CHS and its underlying material.¹⁰ The Trial Chamber held that the CHS and its underlying material were relevant and had probative value with respect to the alleged death of a large number of victims of the crimes charged in the indictment.¹¹ The Trial Chamber issued minor directives to harmonise the list of victims identified in the CHS with those listed in the indictment, to provide brief descriptions or database references of certain documents and to provide English translations as soon as practicable, and in any event, no later than the end of Defence case.¹²

5. On 1 March 2011, the Prosecution filed its notice of compliance with the Decision of 1 February 2011 with the amended version of the CHS attached as Annex A.¹³

6. On 4 April 2011, during the Pre-Defence Conference, the Presiding Judge invited the parties to provide an update on issues concerning the CHS.¹⁴ The Prosecution stated that it had received 270 additional death certificates and it sought to have these added to the CHS.¹⁵ The Stanišić Defence objected on the grounds that the Prosecution had already closed its case.¹⁶ The Trial Chamber stated that it would deal with this matter in due course.¹⁷ The Prosecution then filed the Motion on 26 July 2011.

7. On 20 September 2011, the Trial Chamber ordered the Prosecution to provide additional information to supplement its Motion (“Oral Order”).¹⁸ On 30 September 2011, the Prosecution filed a notice of compliance with the Oral Order (“Notice of 30 September 2011”).¹⁹

III. SUBMISSIONS

A. Motion

8. The Prosecution requests leave to reopen its case-in-chief in order to tender into evidence 292 death certificates and 44 other proof of death documents (“Additional Material”) from the bar table as further evidence to supplement the CHS.²⁰

¹⁰ Decision of 1 February 2011, para. 57.

¹¹ *Ibid.*, paras 52, 58.

¹² *Ibid.*, paras 49, 54-59.

¹³ Prosecution’s notice of compliance with directions of 1 February 2011 regarding the proof of death database, 1 Mar 2011.

¹⁴ Hearing, 4 Apr 2011, T. 19330.

¹⁵ *Ibid.*, T. 19330-19331, 19333.

¹⁶ *Ibid.*, T. 19298-19333. The Stanišić Defence asserted that there was also a request pending for reconsideration of the Decision of 1 February 2011. The Trial Chamber notes however that the reconsideration in fact related to the scheduling order for commencement of the Stanišić Defence case and not to the CHS.

¹⁷ *Ibid.*, T. 19333-19334.

¹⁸ Hearing, 20 Sep 2011, T. 24420-24421.

¹⁹ Prosecution’s notice of compliance with the oral order of 20 September 2011 regarding the Prosecution motion to reopen its case-in-chief (death certificates), 30 Sep 2011.

²⁰ Motion, paras 1, 15.

9. The Prosecution submits that the Additional Material constitutes fresh evidence which justifies the reopening of its case.²¹ It notes that the Office of the Prosecutor does not routinely request death certificates for each alleged victim in a case, but that, as the Defence in this case has specifically required proof of this issue, it requested and subsequently received the Additional Material from the relevant authorities in the region.²² It adds that it only received the Additional Material after the conclusion of its case-in-chief.²³ The Prosecution further notes that it has repeatedly and consistently informed the Defence and the Trial Chamber of the prospect of updates to the CHS and that the Additional Material forms part of this ongoing process.²⁴

10. The Prosecution submits that the new death certificates are relevant and will assist the Trial Chamber in determining whether the persons named in the confidential annex to the indictment are, in fact, deceased.²⁵ The Prosecution argues that the probative value of the Additional Material is not outweighed by the need to ensure a fair trial.²⁶ It further submits that the reopening of the Prosecution's case-in-chief will not unduly prejudice the Accused, who have been given "ample notice of the Prosecution's intent to introduce new proof-of-death evidence as it becomes available".²⁷ In this respect, the Prosecution relies upon its Notice of 14 January 2011 in which it stated that searches were still ongoing regarding proof of death evidence and that it would inform the Trial Chamber and the Defence when such searches were complete.²⁸

11. The Prosecution notes that, although the Additional Material was disclosed to the Defence at the earliest possible stage during the Stanišić Defence case, the Defence chose not to call evidence to challenge the CHS.²⁹ The Prosecution submits that the Accused will not be deprived of their rights to a fair trial as the Additional Material does not modify the charges in the indictment, but merely supplements existing information so as to prove the deaths of named victims.³⁰ It adds that the information clarifies some victim details and the fact of their death, which improves the overall reliability of the CHS.³¹

²¹ *Ibid.*, paras 9-10.

²² *Ibid.*, para. 10.

²³ *Ibid.*

²⁴ *Ibid.*

²⁵ *Ibid.*, para. 11.

²⁶ *Ibid.*, paras 9, 11-13.

²⁷ *Ibid.*, para. 12.

²⁸ *Ibid.* See also Notice of 14 January 2011, para. 10.

²⁹ *Ibid.*

³⁰ *Ibid.*, para. 13.

³¹ *Ibid.*, para. 14.

B. Response

12. In its Response, the Stanišić Defence asserts that the Motion “completely ignores” the relevant jurisprudence governing the reopening of a party’s case to introduce fresh evidence, and requests that the Trial Chamber deny the motion.³²

13. The Stanišić Defence argues that, as of 31 July 2009, when it filed its Supplemental Pre-Trial Brief, it contested the truth and accuracy of all factual allegations made by the Prosecution in the indictment, as well as the Prosecution’s legal assessment of those factual allegations.³³ It adds that the Prosecution has been on notice since then that the Stanišić Defence “would not agree to matters concerning alleged killings without adequate and reliable evidence being produced”.³⁴ The Stanišić Defence asserts that this position was reiterated in a filing of 4 August 2010, during a meeting following this filing at which it demanded specific information about each alleged victim from the Prosecution, and then again in court on 17 September 2010.³⁵

14. The Stanišić Defence recalls and relies upon its previous objections to the adequacy and reliability of the database produced by the Prosecution.³⁶ The Stanišić Defence observes that when the Prosecution closed its case, it made no submission on the completeness of the CHS or to any ongoing investigations in this regard.³⁷ It notes that the Additional Material was provided long after the close of the Prosecution’s case, and after the close of Mićo Stanišić’s own case on 20 July 2011.³⁸

15. The Stanišić Defence submits that these deficiencies, coupled with the Prosecution’s alleged failure at the time it closed its case, to make submissions to the Trial Chamber that the ongoing investigation to procure additional proof of death material was an element of its investigations that it had been unable to conclude, indicate that the Prosecution has failed to meet the “reasonable diligence” requirement to reopen its case.³⁹ It further submits that the Prosecution failed to pursue diligently investigations in relation to the Additional Material during its case and provided no explanation as to why it failed to do so.⁴⁰ The Stanišić Defence maintains that the Prosecution has been working with this database since 2001, that it has been on notice since August 2009 that the

³² Response, paras 9, 25.

³³ *Ibid.*, paras 10, 22 referring to Supplemental pre-trial brief of the Defence of Mićo Stanišić, (“Supplemental Pre-Trial Brief”), 31 Jul 2009.

³⁴ *Ibid.*, paras 17, 22.

³⁵ *Ibid.*, paras 13-14, 17, referring to Joint defence response to Prosecution’s motion to add proof of death database to its 65ter exhibit list and to tender it into evidence with confidential annexes A and B, 4 Aug 2010.

³⁶ *Ibid.*, paras 13-16.

³⁷ *Ibid.*, para. 20.

³⁸ *Ibid.*, para. 25.

³⁹ *Ibid.*, paras 8, 20, 21, referring to *Prosecutor v. Hadžihasanović and Kubura*, Case No.: IT-01-47-T, Decision on the Prosecution’s application to reopen its case, 1 Jun 2005 (“Hadžihasanović Decision”), paras 39-42.

Stanišić Defence required proof of the death of these victims and that the Stanišić Defence made specific requests for production of these underlying documents throughout 2010.⁴¹ The Stanišić Defence argues that, given its clearly stated position that it would require strict proof of death, and in light of the procedural history on this matter, there is no basis on which the Prosecution can assert that it has exercised reasonable diligence in obtaining the Additional Material.⁴²

16. As for the Prosecution reliance on the fact that the Stanišić Defence did not lead evidence on this point, the Stanišić Defence states that such decision stems from its assessment that there was no case to answer on this point, which was based on the fact that the defence is only required to challenge the evidence actually tendered in the proceedings, not all material disclosed.⁴³

C. Reply

17. In Reply, the Prosecution asserts that the Stanišić Defence misstates the applicable law on the reopening of its case and that, with the correct interpretation in mind, it has exercised reasonable diligence.⁴⁴

18. The Prosecution submits that the CHS has been the subject of ongoing negotiations, discussions and submissions, and that the Stanišić Defence's objections did not become clear until relatively late in the case.⁴⁵ It argues that the Stanišić Defence's version of the procedural history is inaccurate and at times misleading.⁴⁶ The Prosecution does not accept that it was put on notice by the Supplemental Pre-Trial Brief that it would be held to strict proof on all matters relating to exhumations and proof of death, as the underlying allegations in the indictment have remained unchallenged.⁴⁷ It asserts that the procedural history reveals that, at least until 5 November 2010, there was a possibility that an agreement could be reached on the CHS and its supporting documentation.⁴⁸ The Prosecution argues that it sought to supplement the CHS with Additional Material as soon as it became clear that no possibility of agreement on the proof of death database would be reached.⁴⁹

19. The Prosecution asserts that the repetition by the Defence of the procedural history of the CHS is of little relevance to the present Motion, as the Trial Chamber already considered this in

⁴⁰ *Ibid.*, para. 22.

⁴¹ *Ibid.*

⁴² *Ibid.*, para. 23.

⁴³ *Ibid.*, para. 24.

⁴⁴ Reply, paras 2-4.

⁴⁵ *Ibid.*, para. 7.

⁴⁶ *Ibid.*, para. 6.

⁴⁷ *Ibid.*, paras 9, 10.

⁴⁸ *Ibid.*, para. 14.

⁴⁹ *Ibid.*, para. 14.

detail in its previous decision.⁵⁰ The Prosecution notes that when the CHS was admitted in February 2011 the Trial Chamber did not find any lack of due diligence.⁵¹

20. With respect to the argument that the Prosecution closed its case without making any reference to the on-going searches, the Prosecution replies that its Notice of 14 January 2011 stated that searches were on-going and that it had undertaken to inform the Trial Chamber once those searches were finished.⁵²

21. The Prosecution emphasises that the Stanišić Defence has not articulated how it will be prejudiced by the admission of the Additional Material.⁵³ It submits that it is “disingenuous” of the Stanišić Defence to imply that had the Additional Material been part of the CHS when it was admitted, the Defence would have determined that it had a case to answer.⁵⁴ The Prosecution notes that the CHS contains more than 1,500 documents and that the Additional Material comprises a relatively small proportion of the total, concerning a relatively small number of victims.⁵⁵ In the Prosecution’s view, it is difficult to see how the inclusion of the Additional Material could so change the Stanišić Defence’s view of the reliability of the CHS as to cause it to change its decision not to call evidence to challenge it.⁵⁶

D. Notice

22. On 30 September 2011, the Prosecution duly complied with the Oral Order by submitting its Notice of 30 September 2011.⁵⁷ Therein, it provided the dates on which the Requests for Assistance (“RFA”) regarding the Additional Material were sent to the respective countries, the status of all outstanding RFAs, and template translations for the different categories of documents listed in Annex A of the Motion.⁵⁸

IV. APPLICABLE LAW AND DISCUSSION

23. Rule 89(C) of the Tribunal’s Rules of Procedure and Evidence (“Rules”) provides that a Chamber may admit any relevant evidence which it deems to have probative value. The Trial Chamber has already held that the CHS and its underlying material are relevant and probative in

⁵⁰ *Ibid.*, para. 8.

⁵¹ *Ibid.*, para. 8.

⁵² *Ibid.*, para. 17; See also Notice of 14 January 2011, para. 10.

⁵³ *Ibid.*, para. 18.

⁵⁴ *Ibid.*, para. 19.

⁵⁵ *Ibid.*, para. 19.

⁵⁶ *Ibid.*, para. 19.

⁵⁷ Oral Order, 20 Sep 2011, T. 24420-24421.

⁵⁸ Notice of 30 September 2011

relation to the alleged death of a large number of victims of the crimes charged in the indictment.⁵⁹ Upon review of the Additional Material, the Trial Chamber is duly satisfied that the Additional Material is relevant and probative for precisely the same reason.

24. The Trial Chamber turns next to consider whether the Additional Material can appropriately be characterized as fresh evidence and consequently whether the Motion can properly be characterised as a request for a reopening of the Prosecution's case-in-chief. When considering an application for reopening a case to allow for the admission of fresh evidence, a Trial Chamber should first determine whether the evidence could, with reasonable diligence, have been identified and presented in the case-in-chief of the party making the application.⁶⁰ The Appeals Chamber has held that such an evaluation is highly contextual, depending on the factual circumstances of each case, and that any assessment in this respect should be carried out on a case-by-case basis.⁶¹

25. The Trial Chamber recalls that, prior to the close of its case-in-chief, the Prosecution stated that, in relation to victims listed in the CHS where no supporting documentation has been provided, it had not been able to complete the full range of searches.⁶² The Prosecution further informed the Trial Chamber that these searches were "still ongoing" and undertook to notify the Trial Chamber and the Defence when the searches were complete.⁶³

26. In its Decision of 1 February 2011, the Trial Chamber was satisfied that

[D]ue to the nature of crimes alleged in the indictment which involves allegations of killings and extermination in the context of a widespread or systematic attack against the civilian population, it is to be expected that evidence collection concerning victims of these crimes may be conducted on an on-going basis.⁶⁴

The Trial Chamber also noted the continuing obligation on the part of the Prosecution to disclose new information concerning alleged victims as it became available, "regardless of the stage of the proceedings".⁶⁵ Thus, the Trial Chamber was aware that the Prosecution would seek to supplement the CHS if additional documentation became available to it.

⁵⁹ Decision of 1 February 2011, para. 58.

⁶⁰ *Prosecutor v. Gotovina et al.*, Case No: IT-06-90-AR73.6, Decision on Ivan Čermak and Mladen Markač interlocutory appeals against Trial Chamber's decision to reopen the Prosecution case, 1 July 2010, ("Gotovina Decision"), para. 23; See also *Prosecutor v. Popović et. al.*, Case No: IT-05-88-T, Decision on Prosecution second motion to reopen its case and/or admit evidence in rebuttal, confidential, 8 May 2009, para. 67. See further *Prosecutor v. Delalić et al.*, Case No.: IT-96-21-A, Judgement, 20 Feb 2001, para. 283.

⁶¹ *Gotovina* Decision, para. 24.

⁶² Notice of 14 January 2011, para. 10.

⁶³ *Ibid.*

⁶⁴ Decision of 1 February 2011, para. 46.

⁶⁵ *Ibid.*

27. In its Notice of 30 September 2011, the Prosecution explained that all of the Additional Material has been obtained pursuant to an RFA sent on 20 January 2011, prior to the closure of its case-in-chief.⁶⁶

28. The Trial Chamber notes that the Additional Material consists of 336 documents which in turn relate to 230 alleged victims, as there are multiple entries for some individuals. The Stanišić Defence does not assert that any of these 230 individuals are not already listed in the CHS. The Trial Chamber finds that, with the exception of one individual⁶⁷ the remaining 229 individuals to whom the Additional Material relates are all already included in the CHS. Consequently, the Additional Material relates to a number of previously identified victims in respect of whom the Prosecution had outstanding requests for production of documents at the time the CHS was admitted and the Prosecution moved to close its case. Moreover, the Additional Material does not introduce new allegations, nor does it expand the Prosecution's case in relation to the list of victims contained in the indictment.

29. In light of the foregoing, the Trial Chamber finds that the Additional Material does not constitute fresh evidence. The Additional Material merely supplements the CHS and its underlying material which has already been admitted into evidence. As such, it is not necessary to reopen the Prosecution's case-in-chief in order to admit the Additional Material. Furthermore, the Trial Chamber finds that the Stanišić Defence has failed to show how it would be prejudiced by the admission of the Additional Material. Having already found the Additional Material to be relevant and probative to these proceedings, the Trial Chamber will therefore admit the Additional Material. Nonetheless, the Trial Chamber is mindful that the trial has reached an advanced stage of proceedings and it is in the interests of justice to have the Prosecution finalise the CHS at the earliest possible time.

V. DISPOSITION

30. For the reasons set out above and pursuant to Rules 89(C) and 126bis of the Rules, the Trial Chamber

GRANTS the Prosecution leave to reply;

GRANTS the Motion in part;

⁶⁶ Notice of 30 September 2011, para. 2.

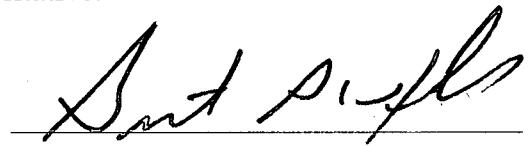
⁶⁷ See Annex A to the Motion, entry 250. In the CHS dated 1 March 2011 there are a number of individuals with the same last name but none with the same first name. However, there is an entry in the CHS (no. 4486) with the same last name and the first name unknown which could correspond to entry 250 in Annex A.

ADmits into evidence the 292 death certificates and 44 other proof of death documents attached to the Motion as confidential Annexes A and B;

ORDERS the Prosecution to file a new version of the CHS on a compact disc, incorporating the material admitted by this Decision, as soon as it has received the translations of the admitted material and, in any event, no later than close of the Defence case of the Župljanin Defence; and

DIRECTS the Registry to assign an exhibit number to the CHS filed by the Prosecution pursuant to this Decision.

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



Judge Burton Hall
Presiding

Dated this 25th day of November 2011

At The Hague
The Netherlands

[Seal of the Tribunal]