

IT-09-92-T
D 52960- D 52974
12 February 2013

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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-09-92-T
Date: 12 February 2013
Original: English

IN TRIAL CHAMBER I

Before: Judge Alphons Orie, Presiding
Judge Bakone Justice Moloto
Judge Christoph Flügge

Registrar: Mr John Hocking

Decision of: 12 February 2013

PROSECUTOR

v.

RATKO MLADIĆ

PUBLIC

**SECOND DECISION ON THE PROSECUTION SUBMISSIONS
ON THE EXPERT STATEMENT OF PROSECUTION
WITNESS TEUFIKA IBRAHIMEFENDIĆ PURSUANT TO
RULE 94 *BIS***

Office of the Prosecutor

Mr Dermot Groome
Mr Peter McCloskey

Counsel for Ratko Mladić

Mr Branko Lukić
Mr Miodrag Stojanović

I. PROCEDURAL HISTORY AND SUBMISSIONS OF THE PARTIES

1. On 14 September 2012, the Chamber issued a Decision (“First Decision”) whereby the majority, Judge Moloto dissenting, instructed the Defence to file a notice pursuant to Rule 94 *bis* (B) of the Rules of Procedure and Evidence (“Rules”), indicating within 30 days whether it challenges the qualifications of Dr Ibrahimfendić as an expert.¹ The Chamber deferred, until after the notice is filed, deciding on whether the Prosecution will be required to tender a statement and/or report of Dr Ibrahimfendić, whether she should be considered a witness of fact or an expert witness, and if deemed an expert witness, whether her proposed expert evidence falls within her expertise.²

2. On 15 October 2012, the Defence filed its Notice pursuant to Rule 94 *bis* of the Rules (“Defence Rule 94 *bis* Notice”), stating that it does not accept “the proffered expert report of Dr Ibrahimfendić and objects to its introduction into evidence”.³ The Defence requests that it be allowed to cross-examine her if she is called as a witness.⁴ The Defence submits that the Prosecution has not sufficiently demonstrated Dr Ibrahimfendić’s expertise, such as through the citation of any of her scholarly publications, and consequently she cannot be considered an expert under Rule 94 *bis*.⁵ According to the Defence, the Prosecution wishes to have her testify on the “Srebrenica Syndrome” without adequately defining this concept vis-à-vis Dr Ibrahimfendić’s expertise thereon.⁶ The Defence further submits that the Prosecution has not explained the methodology Dr Ibrahimfendić used in arriving at the conclusions presented in her statement and previous testimony before this Tribunal.⁷ The Defence asserts that she is effectively presenting the hearsay evidence of unknown third parties, in contravention of Rules 92 *bis* or 92 *ter* of the Rules, and the right of the Accused to confront adverse witnesses.⁸ The Defence therefore requests the disqualification of Dr Ibrahimfendić as an expert witness and that she be barred as an expert

¹ Decision on the Prosecution Submissions on the Expert Statement of Prosecution Witness Teufika Ibrahimfendić pursuant to Rule 94 *bis*, 14 September 2012, p. 4.

² First Decision, paras 6-7, p. 4.

³ Defence Rule 94 *bis* Notice, Objection and Motion to Bar Relative to Proposed Prosecution Witness Teufika Ibrahimfendić, 15 October 2012, para. 3, p. 8.

⁴ Ibid.

⁵ Defence Rule 94 *bis* Notice, paras 7-9.

⁶ Ibid.

⁷ Defence Rule 94 *bis* Notice, paras 10-12.

⁸ Defence Rule 94 *bis* Notice, paras 14-18.

witness or witness of fact.⁹ In the alternative, the Defence rejects Dr Ibrahimefendić's report in its entirety and requests that it not be admitted into evidence.¹⁰

3. In its Response, the Prosecution argues that the Defence request to bar the testimony of Dr Ibrahimefendić falls outside the scope of the First Decision, which directed the Defence to file a notice pursuant to Rule 94 *bis* (B)(iii) of the Rules limited to challenges to the qualifications of Dr Ibrahimefendić as an expert.¹¹ Should the Chamber be willing to consider the Defence motion to bar Dr Ibrahimefendić's testimony, however, the Prosecution asserts that Rule 89 of the Rules does not support the exclusion of her proposed evidence.¹² The Prosecution submits that jurisprudence provides that exclusion of evidence under Rule 89 has only taken place where the expert's lack of impartiality or independence, or the appearance of bias, renders his/her evidence so lacking in indicia of reliability that it nullifies any probative value, and such situations do not arise at present.¹³ The Prosecution adds that her testimony in the *Krstić* case and her ICTY witness statement clearly demonstrate that her testimony satisfies the legal threshold for expert evidence, namely, that she possesses specialized knowledge, skills or training that can assist the Chamber to understand or determine an issue in dispute.¹⁴ The Prosecution recalls that Rule 94 *bis* of the Rules does not set a higher threshold for the admission of evidence from an expert witness than that contained in Rule 89(C).¹⁵ The Prosecution submits that the lack of disclosure of Dr Ibrahimefendić's curriculum vitae or publications is not determinative of the admissibility of her evidence, as her relevant experience can be found in the transcript of her testimony in *Krstić*.¹⁶ Finally, the Prosecution submits that the Tribunal's jurisprudence allows an expert to present conclusions based on direct and indirect observations, and these can be tested during cross-examination.¹⁷ Furthermore, the Prosecution points out that any reliance on hearsay evidence is a matter affecting the weight of Dr Ibrahimefendić's proposed evidence, rather than its admissibility.¹⁸ The Prosecution submits that allowing Dr Ibrahimefendić to testify would not violate the Accused's right to confront and cross-examine adverse witnesses.¹⁹

⁹ Defence Rule 94 *bis* Notice, p. 8.

¹⁰ Ibid.

¹¹ Prosecution Request for Leave to Reply to the Defence Rule 94 *bis* Notice, Objection and Motion to Bar Relative to Proposed Prosecution Witness Teufika Ibrahimefendić ("Prosecution Response"), 22 October 2012, para. 3. In an informal communication of 9 November 2012, the Chamber informed the Parties that it considered this request to be a response to the Defence Motion to bar the testimony of Witness Ibrahimefendić which did not require leave, as provided in Rule 126 *bis* of the Rules.

¹² Prosecution Response, para. 5.

¹³ Prosecution Response, para. 6.

¹⁴ Prosecution Response, para. 7.

¹⁵ Ibid.

¹⁶ Prosecution Response, paras 8-9.

¹⁷ Prosecution Response, paras 10-11.

¹⁸ Prosecution Response, para. 11.

¹⁹ Prosecution Response, paras 10-11.

II. APPLICABLE LAW

4. The Chamber recalls and refers to the applicable law as set out in its decisions of 14 September 2012 and 19 October 2012.²⁰

III. DISCUSSION

5. The Defence argues that it is unable to challenge Dr Ibrahimefendić's qualifications as her curriculum vitae has not been presented, the Prosecution has not cited any scholarly publications she may have written demonstrating her expertise, and her methodology in arriving at her conclusions regarding Srebrenica survivors has not been explained. While reference to scholarly publications and a curriculum vitae may be helpful in demonstrating a witness's expertise, they are not indispensable.

6. Dr Ibrahimefendić's prior statement and testimony indicate that as of February 2011, she was a psychologist at Vive Žene, a Bosnian non-governmental organization with a residential and outreach program for the therapeutic treatment of mainly female and child victims of war in Bosnia, with special emphasis on victims of the fall of Srebrenica.²¹ She has a degree in psychology (1980) from Sarajevo University, and she completed a course on war trauma in 1993.²² Before the hostilities in the region began, she worked in a psychosocial clinic in Tuzla.²³ In 1994, she worked as a volunteer in a hospital providing counselling for war trauma victims, and in 1995, she began working part-time at Vive Žene while maintaining her own clinical practice.²⁴ In 1996, she started working full-time at Vive Žene.²⁵ Between 1995 and 1996, she underwent a programme on war trauma sponsored by the World Health Organization and Columbia University.²⁶ Between 1996 and 1997, she participated in a programme entailing 300 hours of coursework on psychosocial counselling traumatized women and children, which was held in Tučepi, Croatia, under the auspices of the University of Cologne.²⁷ From 2000 until February 2011, she was the coordinator of the Vive Žene programme, and had also become a trauma treatment specialist.²⁸ She recounted that there was

²⁰ First Decision, paras 4-5; Decision on Defence Request to Disqualify Richard Butler as an Expert and Bar the Prosecution from Presenting his Reports, 19 October 2012, paras 4-9.

²¹ Prosecution Submissions on the Expert Statement of Prosecution Witness Teufika Ibrahimefendić pursuant to Rule 94 *bis*, 17 February 2012 ("Prosecution Submissions"), Appendix A, p. 2, Appendix C, p. 10073.

²² Prosecution Submissions, Appendix A, p. 2.

²³ Ibid.

²⁴ Ibid.

²⁵ Ibid.

²⁶ Prosecution Submissions, Appendix B, p. 5806.

²⁷ Ibid.

²⁸ Prosecution Submissions, Appendix C, p. 10074.

a crisis intervention program for Srebrenica survivors beginning in July 1995.²⁹ From July 1995 until June 2000, she treated all 60 women included in the live-in program of Vive Žene.³⁰ Between September 1995 and October 1996, she treated around 140 women and 300 children from Srebrenica outside the live-in programme of Vive Žene, through programmes provided to refugee centres.³¹

7. The Chamber considers that the Defence argument regarding the possible introduction of hearsay evidence through Dr Ibrahimefendić's testimony is misplaced, as this does not affect her qualifications as a potential expert witness. Expert witnesses usually lack personal familiarity with the particular case, and their views need not be based upon firsthand knowledge or experience as they are normally called to express expert opinion on given facts.³² The Chamber further finds that the methodology she employed to arrive at her conclusions regarding the trauma experienced by the survivors of killings in Srebrenica does not detract from her qualifications as a potential expert witness, but can be addressed by the Defence in cross-examination.

8. The Chamber considers that the above information Dr Ibrahimefendić provided through her statement and testimony establishes that she possesses relevant training and experience as a psychologist with specialized knowledge on war trauma, and has had substantial experience counselling women and children who suffered trauma resulting from the events in Srebrenica. The Chamber further finds that her expected testimony, as set out in the Prosecution's Rule 65 *ter* summary, on common psychological impacts of the alleged Srebrenica massacres falls within her area of expertise.

9. The Chamber therefore denies the Defence's request to disqualify the witness and bar the Prosecution from presenting her testimony.

10. The First Decision provided that the Chamber would defer its final decision on whether it will allow the Prosecution to call Dr Ibrahimefendić without tendering any report or statement until after having been further briefed on the modalities the Prosecution intends to use when presenting her evidence. After having reviewed the pleadings on this matter, however, the Chamber considers that it does not require any further submissions thereon. The First Decision also indicated that the majority, Judge Moloto dissenting, considers that Rule 94 *bis* of the Rules does not exclude the possibility of an expert witness testifying *viva voce* without the accompanying tender of his/her statement and/or report. While Rule 94 *bis* offers the possibility of admitting an expert witness's

²⁹ Prosecution Submissions, Appendix A, p. 3.

³⁰ Prosecution Submissions, Appendix A, pp. 2-3.

³¹ Prosecution Submissions, Appendix A, p. 3, Appendix B, pp. 5811-5812.

statement and/or report in lieu of his/her oral testimony to avoid unnecessary prolongation of proceedings,³³ the party calling the expert witness is only required to disclose, and not tender, such statement and/or report, and is not precluded from calling the witness *viva voce*, provided the Chamber is satisfied of his/her qualifications on the relevant subject matter as disclosed. Accordingly, the majority decides that the Prosecution may call Dr Ibrahimfendić to testify *viva voce* as an expert witness without tendering any report or statement. The Defence will therefore have the opportunity to cross-examine her. As with all other witnesses, expert or otherwise, the Chamber expects that she will provide evidence only on matters set out in the summary of her evidence submitted by the Prosecution pursuant to Rule 65 *ter* (iii)(b) of the Rules.³⁴

IV. DISPOSITION

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

DENIES the Defence motion to bar Dr Ibrahimfendić from testifying;

DECLARES MOOT the Defence request to cross-examine Dr Ibrahimfendić; and

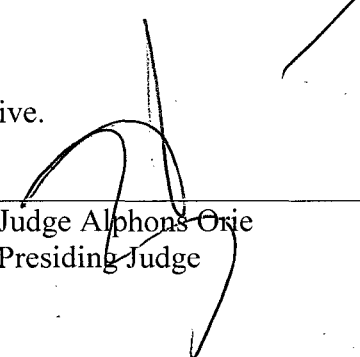
DECLARES MOOT the Prosecution request for leave to reply to the Defence Rule 94 *bis* Notice;

and

the Chamber, by majority, Judge Moloto dissenting

DECIDES that the Prosecution may call Dr Ibrahimfendić to testify *viva voce* as an expert witness without her statement or report having been tendered.

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


 Judge Alphons Orié
 Presiding Judge

Dated this twelfth day of February 2013
 At The Hague
 The Netherlands

[Seal of the Tribunal]

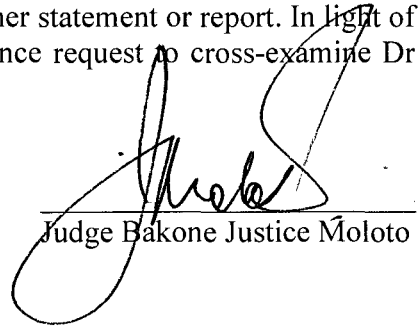
³² *Laurent Semanza v. The Prosecutor*, Case No. ICTR-97-20-A, Judgement, 20 May 2005, para. 303.

³³ *Prosecutor v. Dario Kordić and Mario Čerkez*, Case No. IT-95-14/2-AR73.6, Decision on Appeal Regarding the Admission into Evidence of Seven Affidavits and one Formal Statement, 18 September 2000, fn. 56.

³⁴ Prosecution Witness List, 10 February 2012, pp. 295-296.

DISSENTING OPINION BY JUDGE BAKONE JUSTICE MOLOTO

I maintain the view laid down in my dissenting opinion appended to the First Decision that Rule 94 *bis* (A) of the Rules requires that the expert witness's statement and/or report not only be disclosed to the opposing party, but also tendered into evidence. Accordingly, I dissent from the majority's position that the Prosecution may call Dr Ibrahimfendić to testify *viva voce* as an expert witness without tendering her statement or report. In light of the majority's decision, however, I agree that the Defence request to cross-examine Dr Ibrahimfendić has become moot.



Judge Bakone Justice Moloto