



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: 30 June 2015
Original: English

IN TRIAL CHAMBER I

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

Registrar: Mr John Hocking

Decision: 30 June 2015

PROSECUTOR

v.

RATKO MLADIĆ

PUBLIC

**DECISION ON DEFENCE MOTION FOR CERTIFICATION
TO APPEAL DECISION ON FORTY-FIFTH MOTION TO
ADMIT EVIDENCE PURSUANT TO RULE 92 *BIS***

Office of the Prosecutor

Mr Peter McCloskey

Mr Alan Tieger

Counsel for Ratko Mladić

Mr Branko Lukić

Mr Miodrag Stojanović

I. PROCEDURAL HISTORY

1. On 13 April 2015, the Chamber granted the Prosecution's forty-fifth motion to admit evidence pursuant to Rule 92 *bis* of the Tribunal's Rules of Procedure and Evidence ("Rules"), admitting the statements of Radovan Zdjelar, Witness RM-384, Witness RM-385, Sead Sušić and Witness RM-387 ("Witnesses") and four associated exhibits into evidence ("Impugned Decision").¹ On 20 April 2015, the Defence sought certification to appeal the Impugned Decision ("Motion").² On 1 May 2015, the Prosecution responded to the Motion ("Response").³

II. SUBMISSIONS OF THE PARTIES

2. The Defence submits that the Chamber, by admitting the evidence of the Witnesses pursuant to Rule 92 *bis* of the Rules and denying the Defence an opportunity to cross-examine the Witnesses, violated the spirit of and misused Rule 92 *bis* of the Rules, thereby eroding the Accused's right to a fair trial.⁴ It argues that it must have the chance to cross-examine the Witnesses as they, *inter alia*, might be able to offer exculpatory evidence upon cross-examination.⁵ The Defence submits that because Rule 92 *bis* of the Rules does not place an explicit burden on a party to demonstrate the necessity of cross-examination, the Chamber erred in its Impugned Decision by summarily dismissing the Defence's request.⁶ The Defence concludes that the interests of justice dictate that the Chamber err on the side of caution and permit cross-examination of at least one of the Witnesses – especially as their testimonies are pivotal to the Tomašica mass grave element of the Prosecution's case and the Impugned Decision denies the Defence an opportunity to cross-examine any of the Tomašica fact witnesses.⁷ The Defence also submits that the evidence of the Witnesses goes to the acts and conduct of the Accused and to his alleged *mens rea* and should, therefore, be open to cross-examination.⁸ Moreover, the Defence argues that cross-examination of the Witnesses would allow it to gain information for the rebuttal of the Witnesses' evidence as part of its case.⁹ Consequently, the Defence submits that cross-examination of the Witnesses would prove indispensable for the Defence's preparation for the Tomašica component of the trial and for the trial

¹ Decision on Prosecution Forty-Fifth Motion to Admit Evidence Pursuant to Rule 92 *bis*, 13 April 2015 (Confidential), para. 20.

² Defence Motion for Certification to Appeal the Decision on Prosecution Forty-Fifth Motion to Admit Evidence Pursuant to Rule 92 *bis*, 20 April 2015 (Confidential), paras 1, 12.

³ Prosecution Response to Defence Motion for Certification to Appeal the Decision on Prosecution Forty-Fifth Motion to Admit Evidence Pursuant to Rule 92 *bis*, 1 May 2015 (Confidential), paras 1, 14.

⁴ Motion, para. 2.

⁵ Motion, para. 7.

⁶ *Ibid.*

⁷ *Ibid.*

⁸ Motion, para. 8.

⁹ Motion, para. 9.

itself to proceed expeditiously.¹⁰ Lastly, the Defence submits that an immediate resolution by the Appeals Chamber is warranted because admitting the Witnesses' evidence pursuant to Rule 92 *bis* of the Rules breaches the Accused's fundamental legal right to confrontation.¹¹ In this instance, the Defence argues that by denying cross-examination, the Chamber is deprived of a comprehensive understanding of the events that transpired at Tomašica.¹²

3. The Prosecution opposes the Motion, arguing that the Defence fails to demonstrate that the cumulative requirements for certification to appeal pursuant to Rule 73 (B) of the Rules are met.¹³ The Prosecution also challenges the Defence's characterisation of alleged errors in the Impugned Decision and the jurisprudence it cites.¹⁴

III. APPLICABLE LAW

4. Rule 73 (B) of the Rules requires two cumulative criteria to be satisfied in order for a trial chamber to grant a request for certification to appeal a decision. First, the decision must involve an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial; and second, the issue must be one for which, in the opinion of the trial chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

IV. DISCUSSION

5. At the outset, the Chamber reminds the Defence that the appropriate forum for arguments concerning alleged judicial errors in an impugned decision is the appeal itself and not the motion for certification to appeal.¹⁵ Alternatively, the Defence has the opportunity to demonstrate that an impugned decision contains clear errors of reasoning by filing a motion for reconsideration under the applicable law governing reconsideration of decisions as set out in the Chamber's decision of 29 June 2012.¹⁶ Accordingly, the Chamber will not further deal with the Defence's arguments alleging judicial errors in the Impugned Decision.

6. With respect to the first prong of Rule 73 (B) of the Rules, the Chamber finds that the Defence's submission that cross-examination of the Witnesses is vital to its preparation for the

¹⁰ *Ibid.*

¹¹ Motion, para. 11.

¹² *Ibid.*

¹³ Response, paras 1, 2, 14.

¹⁴ Response, paras 5-8.

¹⁵ *See* Motion, paras 2, 7-8, 11.

¹⁶ Reasons for Decision on Defence Motion for Reconsideration, 29 June 2012, para. 10.

Tomašica component of the trial and, accordingly, that a denial of such cross-examination would significantly affect the fair and expeditious proceedings or the outcome of the trial, lacks merit. The Defence's arguments rest on the assumption that cross-examination is the only way to retrieve exculpatory evidence and other information from the Witnesses. However, the Defence is not barred and – upon receipt of the evidence of the Witnesses in August 2014 – was not barred from contacting the Witnesses out of court in order to obtain the information required for the preparation of its case. The failure of the Defence to identify specific issues on which to cross-examine the Witnesses was part of the basis for the Chamber's decision to deny cross-examination, and it still remains unclear on what grounds the Witnesses testimonies would be beneficial to the Defence and affect the Accused's right to a fair trial. Without such specific arguments from the Defence, it cannot be determined that the present issue would significantly affect the fairness of the proceedings or the outcome of the trial.

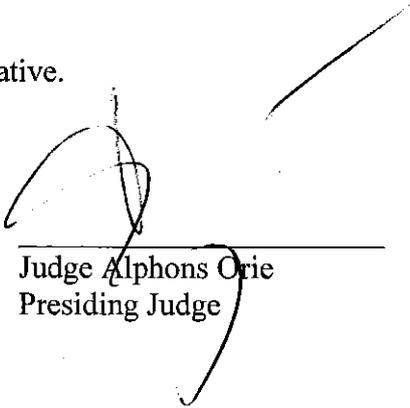
7. Under any circumstances the Chamber finds that whether the admission of the Witnesses' evidence pursuant to Rule 92 *bis* of the Rules would affect the Accused's right to a fair trial, cannot reasonably be expected to be determined in isolation, that is, other than in the context of an assessment by the Chamber of all the evidence in the case. The extent to which the Chamber relies on certain evidence or the weight it attributes to such evidence simply cannot be clarified at this stage of the proceedings. For that same reason, with respect to the second prong of Rule 73 (B), it cannot be argued that a resolution of this issue by the Appeals Chamber would materially advance the proceedings, as it could only be resolved by the Appeals Chamber once it has an indication of the weight given to this evidence by the Trial Chamber.¹⁷ The request for certification therefore fails on the second prong of Rule 73 (B) of the Rules.

¹⁷ *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-PT, Decision on Accused's Application for Certification to Appeal Decision on Rule 92 *quater*, (Witness KDZ198) 31 August 2009, paras 11-12; *Prosecutor v. Stanišić and Simatović*, Case No. IT-03-69-T, Decision on Simatović Defence Request for Certification to Appeal (Babić), 17 February 2011, para. 9.

V. DISPOSITION

8. For the foregoing reasons, pursuant to Rule 73 (B) of the Rules, the Chamber **DENIES** the Motion.

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



Judge Alphons Orie
Presiding Judge

Dated this thirtieth day of June 2015
At The Hague
The Netherlands

[Seal of the Tribunal]