

**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-03-69-T
Date: 15 December 2011
Original: English

IN TRIAL CHAMBER I

Before: Judge Alphons Orie, Presiding
Judge Michèle Picard
Judge Elizabeth Gwaunza

Registrar: Mr John Hocking

Decision of: 15 December 2011

PROSECUTOR

v.

**JOVICA STANIŠIĆ
FRANKO SIMATOVIĆ**

CONFIDENTIAL

**DECISION ON STANIŠIĆ DEFENCE MOTION FOR
ADMISSION OF TRANSCRIPTS AND RELATED EXHIBITS IN
LIEU OF *VIVA VOCE* TESTIMONY FOR TWO WITNESSES
PURSUANT TO RULE 92 *BIS***

Office of the Prosecutor
Mr Dermot Groome

Counsel for Jovica Stanišić
Mr Wayne Jordash
Mr Scott Martin

Counsel for Franko Simatović
Mr Mihajlo Bakrač
Mr Vladimir Petrović

I. PROCEDURAL HISTORY

1. On 27 September 2011, the Stanišić Defence ("Defence") filed a motion ("Motion") seeking the admission into evidence of transcripts and related documents, in lieu of *viva voce* testimony, for witnesses Kalbarczyk and Rechner ("Witnesses") pursuant to Rule 92 *bis* of the Tribunal's Rules of Procedure and Evidence ("Rules").¹
2. On 7 October 2011, the Prosecution submitted that there were insufficiencies in the Motion and requested that the Defence provide immediate clarification and file an official corrigendum. On 10 October 2011, the Prosecution informed the Chamber that the Defence had not yet responded to its request for clarification, but that it would make submissions to the extent possible based on the available information in the Motion. On the same day, the Defence informed the Prosecution that it would respond to its concerns the following day. On 11 October 2011, the Defence responded to the Prosecution and provided clarifications to the Motion. All of this was done through informal communication. On the same day, the Chamber granted the Prosecution a one day extension to respond to the Motion.²
3. On 12 October 2011, the Prosecution orally responded in court that it did not oppose the Motion in relation to Witness Kalbarczyk, but that it did oppose the Motion in relation to Witness Rechner and requested that he appear for cross-examination.³
4. On 13 October 2011, the Defence filed an official corrigendum ("Corrigendum") to the Motion, submitting replacement tables containing a total of 27 related documents.⁴

II. SUBMISSIONS OF THE PARTIES

5. The Defence submits that the Witnesses' testimonies and related documents do not go to the acts and conduct of Jovica Stanišić ("the Accused"), but rather describe the Witnesses' individual experiences of being held hostage by Bosnian Serb forces, crimes in which the Accused is not alleged to have taken part.⁵ The Defence further submits that the Witnesses' testimonies are relevant and probative to assessing the character of the Accused and highlight his willingness to

¹ Stanišić Defence Motion for Admission of Transcripts and Related Exhibits in Lieu of *viva voce* testimony for Witnesses DST-070 and DST-072 Pursuant to Rule 92 *bis*, 27 September 2011, paras 1-3, 16. In light of the fact that the Stanišić Defence has used the Witnesses' names in their public filings, the Chamber has not used the Witnesses' pre-assigned pseudonyms in this decision. Should the Witnesses require protective measures, the Stanišić Defence is instructed to immediately inform the Chamber.

² T. 14278-14279.

³ T. 14311.

⁴ Corrigendum to Stanišić Defence Motion for Admission of Transcripts and Related Exhibited (*sic*) in Lieu of *viva voce* testimony for Witnesses DST-070 and DST-072 Pursuant to Rule 92 *bis*, 13 October 2011.

⁵ Motion, paras 3, 8.

cooperate with the international community to facilitate the release of the hostages.⁶ The Defence asserts that the related documents should be admitted into evidence in order to assist the Chamber in understanding the context of the Witnesses' testimonies.⁷ Finally, the Defence submits that the subject matter of the testimonies is cumulative in nature, and should be admitted in written form in order to promote an expeditious trial.⁸

6. The Prosecution asserts that, with respect to Witness Rechner, the transcript and related documents cannot be admitted under Rule 92 *bis* of the Rules because the witness's reference to a special unit from the Ministry of the Interior suggests a relationship that is a key issue in the case and warrants further investigation under cross-examination.⁹ To support this assertion, the Prosecution argues that the acts and conduct of the Unit for Anti-Terrorist Effects ("JATD") is sufficiently close to the acts and conduct of the Accused and, in that sense, similar to the situation of two Prosecution witnesses who were ordered to appear for cross-examination per the Chamber's 7 October 2010 decision.¹⁰ The Prosecution further argues that the relationship between the State Security Service ("DB") special unit and the *Republika Srpska* authorities relates to live and important issues between the parties, and that the issues of the JATD's involvement in the release of the UN hostages was not addressed during cross-examination in the prior proceedings.¹¹

III. APPLICABLE LAW

7. The Chamber recalls and refers to the applicable law governing Rule 92 *bis* of the Rules as set out in a previous decision.¹²

IV. DISCUSSION

a) Transcript of Testimony – Witness Kalbarczyk

8. Witness Kalbarczyk, a United Nations Military Observer ("UNMO") in the former Yugoslavia, testified to the events leading up to and including his experience as a hostage of the Bosnian Serb Army from 26 May 1995 until his release on 13 June 1995.¹³ The testimony does not relate to the acts or conduct of the Accused and is cumulative to other evidence in this case.¹⁴

⁶ Motion, paras 9, 13.

⁷ Motion, para. 14.

⁸ Motion, paras 9-10.

⁹ T. 14311-14312.

¹⁰ T. 14313.

¹¹ Ibid.

¹² Decision on Prosecution's Motions for Admission of Written Evidence pursuant to Rule 92 *bis*, 7 October 2010 ("Decision on Motion for Admission"), paras 29-36.

¹³ *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T ("Karadžić"), T. 10831-10900 (28 January 2011).

¹⁴ T. 14948-15020.

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Considering that the tendered evidence is in the form of prior testimony, the requirement of providing an attestation by the witness pursuant to Rule 92 *bis* (B) does not apply. The Chamber is satisfied that the prior testimony of Witness Kalbarczyk is relevant and probative and, therefore, is admissible under Rule 92 *bis* of the Rules.

b) Written Statement – Witness Kalbarczyk

9. The Chamber now turns to the related documents tendered by the Defence, as set out in the Corrigendum. The Defence has tendered a written statement of Witness Kalbarczyk as a related document. The Chamber considers that the written statement was taken for the purpose of legal proceedings before this Tribunal and its admissibility is therefore governed by Rule 92 *bis* rather than by the lower threshold Tribunal case law on associated exhibits. The written statement does not relate to the acts or conduct of the Accused and is cumulative to other evidence in this case. The Defence has not submitted a declaration and verification for the written statement as required by Rule 92 *bis* (B) of the Rules. Similarly, the witness did not attest to his statement during his testimony in the *Karadžić* case. The written statement is relevant to the proceedings in this case and based on the witness's comments about his statement during cross-examination in the *Karadžić* case, the Chamber finds that it has probative value for admission into evidence. The Chamber recalls, however, that according to Tribunal case law, a party cannot be permitted to tender a written statement taken for purposes of legal proceedings under Rule 89 (C) in order to avoid the stringent legal requirements set out in Rule 92 *bis*.¹⁵ However, the Appeals Chamber has further held that this holding does not prevent a written statement given by prospective witnesses for the purposes of legal proceedings from being received into evidence notwithstanding its non-compliance with Rule 92 *bis* when there has been no objection taken to it.¹⁶ The Prosecution has not objected to the admission of Witness Kalbarczyk's written statement. Accordingly, the Chamber does not find that the missing declaration and verification is a bar to the statement's admission into evidence. The lack of an attestation may however affect the weight the Chamber will give to the written statement.

c) Related Documents – Witness Kalbarczyk

10. During his prior testimony, Witness Kalbarczyk discussed the following documents tendered as associated exhibits: 1D5163, 1D5164, 1D5165, 1D5166, 1D5167, 1D5168, 1D5169, 1D5170, 1D5171, and 1D5172. The Chamber finds that these documents form an inseparable and

¹⁵ *Prosecutor v. Stanislav Galić*, Case no. IT-98-29-AR73.2, Decision on Interlocutory Appeal Concerning Rule 92 *bis* (C), 7 June 2002, para. 31.

¹⁶ *Prosecutor v. Slobodan Milošević*, Case no. IT-02-54-AR73.2, Decision on Admissibility of Prosecution Investigator's Evidence, 30 September 2002, para. 18.

indispensable part of the transcript as they assist in understanding and providing the context of the witness's testimony about his experience as a hostage. Therefore, the Chamber finds these aforementioned documents admissible as associated exhibits under Rule 92 *bis* of the Rules.

11. In relation to 1D5175 and 1D5217, witness statements of two other UNMOs, the Chamber does not consider these to form an inseparable and indispensable part of the transcript. In addition, because these statements were taken for the purpose of legal proceedings, the Chamber, in its discretion, decides not to admit them as associated exhibits to another witness's testimony.

12. Finally, documents 1D5173 and 1D5174 were already admitted as exhibits D514 and D515, respectively.

d) Transcript of Testimony – Witness Rechner

13. Witness Rechner, an UNMO in the former Yugoslavia, testified to the events leading up to and including his experience as a hostage of the Bosnian Serb Army from 26 May 1995 until his release on 18 July 1995.¹⁷ The Prosecution argues that the situation of this witness is similar to the situation outlined in the Chamber's 7 October 2010 decision. The Chamber is not persuaded by this argument. In the 7 October 2010 decision, witnesses identified DB agents as being present during the actions of paramilitaries.¹⁸ Because both Stanišić and Simatović are alleged to have had leadership positions in the DB, this evidence concerns the acts and conduct of persons sufficiently proximate to the accused as to warrant their appearance for cross-examination.¹⁹ Here, in contrast, a general reference to acts of a special unit possibly from the Ministry of the Interior does not suggest or reach a sufficient degree of proximity to the Accused to warrant cross-examination. The subject matter covered in Witness Rechner's testimony is cumulative to other evidence in this case.²⁰ Considering that the tendered evidence is in the form of prior testimony, the requirement of providing an attestation by the witness pursuant to Rule 92 *bis* (B) does not apply. The Chamber is satisfied that the prior testimony of Witness Rechner is relevant and probative and, therefore, admissible under Rule 92 *bis* of the Rules.

e) Written Statement – Witness Rechner

14. The Chamber now turns to the related documents tendered by the Defence, as set out in the Corrigendum. The Defence has tendered a written statement of Witness Rechner as a related document. The Chamber considers that the written statement was taken for the purpose of legal

¹⁷ Karadžić, T. 11074-11189.

¹⁸ Decision on Motion for Admission, para. 51.

¹⁹ Ibid.

²⁰ T. 14948-15020.

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proceedings before this Tribunal and its admissibility is therefore governed by Rule 92 *bis*, rather than by lower threshold Tribunal case law on associated exhibits. The written statement does not relate to the acts or conduct of the Accused and is cumulative to other evidence in this case. In addition, the written statement is relevant to the proceedings in this case and is based on the witness's comments about his statement during cross-examination in the *Karadžić* case. Therefore, the Chamber finds that it has probative value for admission into evidence. The Defence has not submitted a declaration and verification for the written statement as required by Rule 92 *bis* (B) of the Rules. However, the witness attested to his statement during his testimony in the *Karadžić* case and the statement was admitted pursuant to Rule 92 *ter* of the Rules. The Chamber finds that such an in-court attestation is sufficient to meet the requirement of Rule 92 *bis* (B).

f) Related Documents – Witness Rechner

15. During his prior testimony, Witness Rechner discussed the following documents tendered as associated exhibits: 1D5153, 1D5163, 1D5157, and 1D5160. The Chamber finds that these documents form an inseparable and indispensable part of the transcript as they assist in understanding and providing the context of the witness's testimony about his experience as a hostage. Therefore, the Chamber finds these aforementioned documents admissible as associated exhibits under Rule 92 *bis* of the Rules.

16. The Chamber does not consider that 1D5159, a witness statement of another UNMO, forms an inseparable and indispensable part of the transcript. In addition, because the statement was taken for the purpose of legal proceedings, the Chamber, in its discretion, decides not to admit this statement as an associated exhibit to another witness's testimony.

17. Finally, documents 1D5150, 1D5151, 1D5152, 1D5156, 1D5158, and 1D5161 were already admitted as exhibits D469, D468, D472, D512, D513, and D518, respectively.

V. DISPOSITION

18. For the foregoing reasons, pursuant to Rule 92 *bis* of the Rules, the Chamber

GRANTS the Motion in part;

ADMITS into evidence the following:

- 1) The Transcript of Witness Kalbarczyk's prior testimony in the *Karadžić* case, 28 January 2011, T. 10831-10900;

- 2) 65 *ter* numbers: 1D5162, 1D5163, 1D5164, 1D5165, 1D5166, 1D5167, 1D5168, 1D5169, 1D5170, 1D5171, and 1D5172;
- 3) The Transcript of Witness Rechner's prior testimony in the *Karadžić* case, 2 February 2011, T. 11074-11189;
- 4) 65 *ter* numbers: 1D3912, 1D5153, 1D5163, 1D5157, and 1D5160;

DENIES the remainder of the Motion;

REQUESTS that the Defence upload the admitted transcript portions into eCourt within seven days of the filing of this decision;

REQUESTS that the Registry assign exhibit numbers to the admitted documents and inform the Chamber and the parties of the exhibit numbers so assigned; and

INSTRUCTS the Registry to change the status of the decision to public if the Defence does not file a request for or notification of protective measures within seven days of this decision.

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



Judge Alphons Orié
Presiding Judge

Dated this fifteenth of December 2011
At The Hague
The Netherlands

[Seal of the Tribunal]