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18 July 2013

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**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-09-92-T
Date: 18 July 2013
Original: English

IN TRIAL CHAMBER I

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

Registrar: Mr John Hocking

Decision of: 18 July 2013

PROSECUTOR

v.

RATKO MLADIĆ

PUBLIC

**DECISION ON PROSECUTION 26TH MOTION TO ADMIT
EVIDENCE PURSUANT TO RULE 92BIS: SEAD BEŠIĆ**

Office of the Prosecutor

Mr Dermot Groome
Mr Peter McCloskey

Counsel for Ratko Mladić

Mr Branko Lukić
Mr Miodrag Stojanović

I. PROCEDURAL HISTORY

1. On 29 April 2013, the Prosecution filed a motion ("Motion") pursuant to Rule 92 *bis* of the Tribunal's Rules of Procedure and Evidence ("Rules") seeking to admit into evidence material with regard to Sead Bešić ("Witness").¹ On 13 May 2013, the Defence filed a motion requesting an extension of time to respond to the Motion.² The Chamber, on 16 May 2013, granted an extension of time to respond until 17 May 2013 and, on 22 May 2013, amended the extension of time by granting an extension of the deadline until 31 May 2013.³ The Defence filed its response on 31 May 2013 ("Response").⁴ On 7 June 2013, the Prosecution requested leave to reply ("Request"), attaching its reply ("Reply") in the event that the Request is granted.⁵

II. SUBMISSIONS OF THE PARTIES

2. The Prosecution seeks admission of excerpts of the witness's testimony in *Prosecutor v. Milošević* ("Milošević case"), *Prosecutor v. Galić* ("Galić case"), and *Prosecutor v. Karadžić* ("Karadžić case"), along with four associated exhibits.⁶ The Prosecution submits that the proffered evidence of the Witness, a criminal science technician with the Ministry of Interior in Sarajevo who was involved in investigating numerous sniping and shelling incidents, is relevant and probative of issues in the instant case.⁷ The Prosecution also submits that the Witness's evidence is of a cumulative nature, reliable, does not relate to the acts or conduct of the Accused, and concerns crime-base evidence, and is therefore suitable to be admitted pursuant Rule 92 *bis* of the Rules.⁸ Further, the Prosecution submits that although parts of the tendered evidence correspond with one or more of the adjudicated facts, they have been included because either the tendered material contains greater detail than the adjudicated fact, or making a redaction or excluding the evidence would result in the loss of contextual information necessary to understanding the Witness's narrative.⁹ The Prosecution considers the tendered evidence to comply with the Chamber's

¹ Prosecution 26th Motion To Admit Evidence Pursuant to Rule 92*bis*: RM105, 29 April 2013.

² Defence Motion to Enlarge Time to Respond [*sic*] to the Prosecution 26th Motion to Admit Evidence Pursuant to Rule 92*bis*: RM105, 13 May 2013.

³ T. 11247, 11334.

⁴ Defence Response to Prosecution 26th Motion to Admit Evidence Pursuant to Rule 92*bis*: RM105, 31 May 2013.

⁵ Prosecution Request for Leave to Reply to Defence Response to Prosecution 26th Rule 92*bis* Motion, 7 June 2013, para. 1; Annex A: Reply to Defence Response to Prosecution 26th Rule 92*BIS* Motion, 7 June 2013. In footnote 3 of the Request, the Prosecution alleged that the Chamber appeared to have misunderstood the Defence request for an additional 18 days to be a request for a total of 18 days to file its Response. However, on 22 May 2013, the Chamber corrected its earlier mistake and set the new deadline to respond at 31 May 2013, *see* T. 11334.

⁶ Motion, paras 1, 7, 14, 17.

⁷ Motion, paras 2, 6, 11-12.

⁸ Motion, paras 2, 6, 11-13.

⁹ Motion, para. 4.

guidance, submitting that there are no comprehensive witness statements, and that the transcript excerpts are discrete and narrowly focused.¹⁰ Further, it avers that tendering the transcript excerpts would prevent the Witness from being re-traumatized by having to testify on his observations.¹¹ Finally, the Prosecution considers the tendered associated exhibits to be integral to the Witness's other evidence as they assist in understanding this evidence and increase its probative value.¹²

3. In its Response, the Defence opposes the Motion on six grounds and requests that the Chamber denies the Motion.¹³ The Defence submits that, first, the tendered transcript excerpts exclude large parts of the related cross-examination which tends to make the testimony unreliable, that, second, the amount of transcript pages tendered does not render them suitable to be brought in lieu of a witness statement, and that, third, there is no indication that the Witness, who is a police officer and not a victim, would be traumatized by personal testimony and, thus, the Witness should be cross-examined.¹⁴ Fourth, the Defence avers that the evidence of the Witness is neither cumulative nor corroborated by other witnesses, goes towards critical issues of the case and, thus, should be subject to cross-examination.¹⁵ Fifth, it argues that portions of the tendered transcript excerpts are incomprehensible and without any probative value due to unclear references regarding video segments played in Court during the testimony.¹⁶ Sixth, the Defence submits that portions of the proffered testimony constitute expert-testimony which makes the evidence inappropriate to be presented under Rule 92 *bis* of the Rules.¹⁷

4. In its Reply, the Prosecution points out that certain portions of the Witness testimony, to which the Defence objected, are corroborated by another witness.¹⁸ It further provides an explanatory table listing the references to videos in the proffered transcript excerpts, which indicate the related video segments.¹⁹ The Prosecution submits that the tendered transcript excerpts are sufficiently comprehensible when reviewed alongside with the indicated video segments.²⁰ Further, the Prosecution states that it would not object to any transcript portions of the Witness's cross-examinations in previous trials which the Defence would seek to tender.²¹

¹⁰ Motion, paras 7-9.

¹¹ Motion, para. 10.

¹² Motion, paras 14-15.

¹³ Response, paras 3, 10-12, 15, 17, 20-21, 24.

¹⁴ Response, paras 10-12.

¹⁵ Response, paras 13-15.

¹⁶ Response, paras 16-19.

¹⁷ Response, paras 21-23.

¹⁸ Reply, paras 4-6.

¹⁹ Reply, para. 8.

²⁰ Reply, para. 9.

²¹ Reply, para. 10.

III. APPLICABLE LAW

(a) Rule 92 bis

5. The Chamber recalls and refers to the applicable law governing the admission of evidence pursuant to Rule 92 *bis* of the Rules, as set out in a previous decision.²²

(b) Admission of Associated Exhibits

6. With regard to the applicable law related to the admission of associated exhibits, the Chamber recalls and refers to one of its previous decisions dealing with this matter.²³

IV. DISCUSSION

(a) Preliminary issue

7. The Chamber observes that the explanatory table with regard to the references to video segments in the Witness's testimony, filed by the Prosecution in its Reply, provides additional and essential information. The Chamber, therefore, finds that the Prosecution has provided sufficient substantiation for the Request to be granted and that the attached Reply should be considered validly filed on the Request's filing date of 7 June 2013.

(b) Compliance with the Chamber's guidance

8. With regard to tendered material that corresponds with the adjudicated facts and which has not been redacted or excluded from the Motion since that would result in the loss of contextual information necessary to understanding the Witness's narrative, the Chamber refers to an earlier decision and reminds the Prosecution that the interest of non-duplication of evidentiary material outweighs the interest of receiving a coherent narrative of the events from one witness.²⁴ In light of this, the Chamber instructs the Prosecution to inform the Chamber within two weeks whether further redactions are necessary.

²² Decision on Prosecution Third Motion to Admit Evidence Pursuant to Rule 92 *bis*: Sarajevo Witnesses, 19 October 2012 ("Decision on Third 92 *bis* Motion"), paras 5-8.

²³ Decision on Prosecution Motion to Admit the Evidence of Witness RM-266 Pursuant to Rule 92 *quater*, 22 July 2012, para. 13.

²⁴ Decision in Relation to Prosecution's Rule 92 *ter* Motion for Witness RM-114, 16 August 2012.

9. After an overall review of the proffered testimony, the Chamber notes that it is sufficiently focused, and is therefore satisfied that the tendering of transcript evidence complies with the Chamber's guidance.²⁵

(c) Attestation and Declaration

10. The attestation requirement of Rule 92 bis (B) of the Rules does not attach to transcript evidence if the witness testified before this Tribunal. Considering that the proffered evidence is in the form of transcript evidence from the cases of *Milošević*, *Galić*, and *Karadžić*, the Chamber finds that there a Rule 92 *bis* attestation is not required.

(d) Admissibility Pursuant to Rule 89 (c) of the Rules

11. The proffered evidence is relevant to Scheduled Incidents G.7, G.8, and G.18 of the Indictment and, thus, relevant to the present case.

12. Further, the Chamber has conducted an overall review of the references in the transcript to exhibits, with a specific view on the portions of played video sequences as challenged by the Defence in the Response. Noting, in particular, the Prosecution's table of clarifications in its Reply, the Chamber is of the view that the tendered transcript excerpts are comprehensible and can be connected to specific portions of the related video exhibits. Potential remaining uncertainties with certain references may be taken into account when weighing the evidence but they neither affect the overall probative value nor necessitate redactions of the transcripts.

13. As to the Defence's objection to the reliability of the proffered evidence due to the lack of excerpts of the cross-examinations, the Chamber recalls its related guidance and previous ruling that a tendering party should only tender for admission such portions of a transcript upon which the party seeks to rely, including any portions necessary for contextualizing or clarifying those portions.²⁶ The Chamber considers that the excerpts of the testimony selected by the Prosecution appear to be internally consistent and that the Defence has not indicated any specific transcript portion to be additionally tendered.

14. Overall, the Chamber considers the proffered evidence to be reliable and probative of the crimes charged in the Indictment. Therefore, the Chamber finds that the requirements set out in Rule 89 (C) of the Rules have been met.

²⁵ T. 106-110, 315-325, 525-532.

²⁶ T. 5406-5407; Decision on Prosecution Sixth Motion to Admit Written Statements and Transcripts in Lieu of Oral Testimony Pursuant to Rule 92 *bis*, 19 June 2013, para. 23.

(e) Admissibility Pursuant to Rule 92 bis of the Rules

15. The proffered evidence does not relate to the acts and conduct of the Accused. Additionally, the Chamber observes that the proffered evidence relates to the establishment of the alleged crime-base.

16. With regard to the Defence's submission that the Witness is the sole person to provide evidence on certain aspects of the scheduled incidents and that the Witness's evidence is neither cumulative nor corroborated by other witnesses, the Chamber maintains that, while a significant factor, the cumulative evidence of other witnesses forms simply one of the factors to be considered by the Chamber, in addition to the relevance, consistency, clarity, and reliability of the evidence in question. In addition, the Chamber notes that the Witness is neither the sole witness providing evidence on the scheduled incidents nor on the specific aspects as expressly pointed out by the Defence. The Chamber has received evidence from Witness RM-110, who has provided information on the technical investigations on Scheduled Incident G.18 of the Indictment, and from Witnesses Nedžib Đozo and Mirza Sabljica, who provided information about the technical investigations on Scheduled Incidents G.7 and G.8 of the Indictment.²⁷ In addition, Witness Richard Higgs (RM-611) is scheduled to testify as an expert witness pursuant to Rule 94 bis of the Rules and is anticipated to provide information on the three Scheduled Incidents.²⁸

17. Portions of the proffered testimony of the Witness appear to qualify as expert-testimony or opinion. However, such testimony is only a minor part of the proffered evidence. In this context, the Chamber recalls its ruling in a previous case according to which, in such cases, it remains with the Chamber to assess if and how much weight it may give to the related portions of the evidence and that there is no need to redact the evidence.²⁹ Accordingly, the Chamber does not consider this a factor which would require the Witness to appear for cross-examination.

18. Considering the professional background of the Witness and his previous testimony in other cases, the Chamber considers that the Prosecution has not provided sufficient indication for the alleged traumatization of the Witness. As a result, the Chamber does not consider this as an affirmative factor for the admission of the evidence pursuant to Rule 92 bis of the Rules. However, taking all of the above factors into consideration, the Chamber finds that the proffered evidence of the Witness is admissible pursuant to Rule 92 bis of the Rules.

²⁷ T. 4885-4893, 4895-4973; T. 5538-5604; T. 8035-8117, 8819-8914.

²⁸ Prosecution Rule 65 *ter* Witness List, 10 February 2012 (Confidential) ("Prosecution Witness List"), p. 213.

²⁹ Decision with regard to Prosecution Motion for Admission into Evidence of Witness Harland's Statement and Associated Documents, 3 July 2012, para. 8.

(f) Associated exhibits

19. The Prosecution seeks the admission of four associated exhibits. The associated exhibit with Rule 65 *ter* No. 22930a is a video clip showing the scene of a shelling which the Witness investigated and addressed in his testimony. The associated exhibit with Rule 65 *ter* No. 22351a is a video segment showing the events and people's reactions after a shelling incident which the Witness investigated and testified about. The Chamber considers that both videos are apt to provide additional details and finds that the exhibits are an inseparable and indispensable part of the Witness's testimony.

20. With regard to the associated exhibits with Rule 65 *ter* Nos 10470 and 22925, the Chamber particularly takes into consideration that the Witness does not provide evidence as an expert witness on the exhibits, which are remains of mortars recovered at the related shelling scenes. Having reviewed the related portions of the Witness's testimony, the Chamber does neither find the proffered testimony incomprehensible nor having less probative value without the opportunity to review the actual objects presented as such exhibits. Taking the above into regard, the Chamber does not find that the exhibits with Rule 65 *ter* Nos 10470, and 22925, form an inseparable and indispensable part of the Witness's testimony and will therefore deny admission of these exhibits.

V. DISPOSITION

21. For the foregoing reasons, pursuant to Rules 89 (C) and 92 *bis* of the Rules, the Chamber

GRANTS the Request;

GRANTS the Motion **IN PART**;

ADMITS into evidence

- a) excerpts of the Witness's testimony in the *Galić* case, Case No. IT-98-29-T, T. 4794:18-4797:19, 4798:6-14, 4799:19-4806:23, 4808:7-4809:20, 4810:3-4811:7, 4812:24-4813:4, 4822:25-4823:22, 4831:6-4834:11, 4835:17-4836:17, 4851:19-4855:21, 4905:19-4906:22, 4914:24-4918:22, 5011:11-13, 5013:1-5014:25, 5030:21-5034:17;
- b) Excerpts of the Witness's testimony in the *Karadžić* case, Case No. IT-95-5/18-T, T. 9426:22-9431:20, 9512:2-9513:3, 9513:13-19, 9514:4-10, 9531:4-9533:21;

- c) excerpts of the Witness's testimony in the *Milošević* case, Case No. IT-98-29/1-T, T. 2567:16-2572:20, 2573:9-2575:1, 2578:2-2579:2, 2579:23-2581:20, 2582:12-2586:5, 2587:16-2589:1, 2590:18-2593:3;
- d) the video bearing Rule 65 *ter* No. 22930a; and
- e) the video bearing Rule 65 *ter* No. 22351a;

DENIES the admission of the associated exhibits bearing Rule 65 *ter* Nos

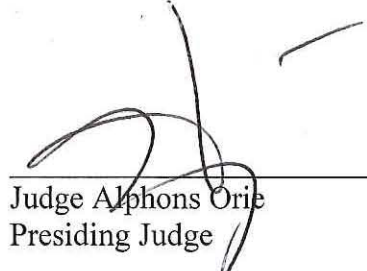
- a) 10470; and
- b) 22925;

INSTRUCTS the Prosecution to inform the Chamber of any potential further redactions of the admitted documents within two weeks of the filing of this decision;

INSTRUCTS the Prosecution to upload the admitted documents into eCourt within two weeks of the filing of this decision; and

REQUESTS the Registrar to assign exhibit numbers to the admitted documents and inform the parties and the Chamber of the exhibit numbers assigned.

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



Judge Alphons Orić
Presiding Judge

Dated this Eighteenth day of July 2013
At The Hague
The Netherlands

[Seal of the Tribunal]