

IT-09-92-T
Δ75304-Δ75299
19 December 2013

75304
ML



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: 19 December 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: 19 December 2013

PROSECUTOR

v.

RATKO MLADIĆ

PUBLIC

**DECISION ON PROSECUTION MOTION TO SUPPLEMENT
RULE 92 *BIS* EVIDENCE AND CHANGE STATUS OF D352
AND ON DEFENCE REQUEST FOR RECONSIDERATION**

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 18 July 2013, the Chamber admitted evidence of witness Sead Bešić pursuant to Rule 92 *bis* of the Tribunal's Rules of Procedure and Evidence ("Decision" and "Rules" respectively).¹ On 23 September 2013, the Prosecution filed a motion ("Motion") requesting to supplement witness Bešić's evidence by adding six pages of his previous testimony in the *Karadžić* case, and requesting that exhibit D352 be placed under seal.² On 7 October 2013, the Defence responded to the Motion ("Response"), objecting to the supplementing and requesting reconsideration of the Decision.³

II. SUBMISSIONS OF THE PARTIES

2. The Prosecution submits that witness Bešić's admitted evidence should be supplemented because of matters raised by the Defence during the cross-examination of witness Turkušić on 29 August 2013.⁴ According to the Prosecution, the Defence confronted witness Turkušić with its theory that two different mortar stabilizers had been found on 28 August 1995 at the Markale II crime scene which can be seen on exhibit D352.⁵ The Prosecution submits that witness Bešić was at the scene on 28 August 1995 as part of the investigation team and took possession of the stabilizer.⁶ He is thus best placed to clarify whether there were two stabilizers found.⁷ The Prosecution further requests that video exhibit D352 be placed under seal so as to accord with prior decisions determining that the video should not be broadcast publicly.⁸

3. The Defence submits that witness Turkušić's evidence requires a reconsideration of the Decision and an order that witness Bešić appear for cross-examination.⁹ It argues that without cross-examination, the Chamber will rely on evidence that is either not authentic or has been tampered with, thereby resulting in an injustice.¹⁰ The Defence also objects to the supplementing of witness Bešić's Rule 92 *bis* evidence by arguing that "the jurisprudence is clear that a witness ought

¹ Decision on Prosecution 26th Motion to Admit Evidence Pursuant to Rule 92*bis*: Sead Bešić, 18 July 2013.

² Prosecution Motion to Supplement 92 *bis* Evidence of RM105 and Request to Change Status of D352, 23 September 2013.

³ Defence Response to Prosecution Motion to Supplement 92 *bis* Evidence of RM105 and Request to Change Status of D352, 7 October 2013.

⁴ Motion, paras 1, 7. The additional portions are transcript pages 9518:9 – 9523:20 from the *Karadžić* case, see Motion, para. 13, Confidential Annex A.

⁵ Motion, paras 7, 9.

⁶ Motion, para. 10.

⁷ *Ibid.*

⁸ Motion, para. 13, Confidential Annex A.

⁹ Response, paras 3, 9-10.

¹⁰ Response, para. 16.

to be called for cross-examination where the previous examination was performed by a self-represented accused".¹¹

III. APPLICABLE LAW

4. 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.¹²

5. In determining whether there are sufficient grounds to recall a witness, a Trial Chamber has to consider whether the requesting party has demonstrated good cause.¹³ In assessing whether good cause has been demonstrated, the Trial Chamber has to consider the purpose of recalling the witness and the applicant's justification for not eliciting the relevant evidence from the witness when he or she originally testified.¹⁴

IV. DISCUSSION

A. Preliminary issue

6. The Defence argues that the evidence of witness Turkušić justifies reconsideration of the Chamber's decision to admit witness Bešić's evidence without requiring him to appear for cross-examination. As the Prosecution tenders additional material in the Motion, the Chamber understands the Defence's request for reconsideration as submitting that Turkušić's evidence has demonstrated that Bešić's evidence as a whole relates to an issue of such importance that he should appear for cross-examination. Accordingly, the Chamber will consider this aspect in its discussion of whether there are grounds weighing in favour of calling the witness for cross-examination.

B. Supplementing previously admitted Rule 92 bis evidence

7. For *viva voce*, Rule 92 *ter*, or Rule 94 *bis* (B) witnesses, the case law has developed a standard on recalling a witness. The Chamber finds that it is appropriate to apply this standard by analogy to Rule 92 *bis* and *quater* witnesses.

¹¹ Response, para. 12.

¹² Decision on Prosecution Third Motion to Admit Evidence Pursuant to Rule 92 *bis*: Sarajevo Witnesses, 19 October 2012, paras 5-7.

¹³ *Prosecutor v. Stanišić and Simatović*, Case No. IT-03-69-T, Reasons for Decision to Recall Witness JF-047, 31 March 2011, para. 6; *Prosecutor v. Gotovina et al.*, Case No. IT-06-90-T, Decision on Prosecution Motion to Recall Marko Rajčić, 24 April 2009, para. 10; *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, Decision on Defence Motion to Recall Prosecution Witness OAB for Cross-Examination, 19 September 2005, para. 2.

¹⁴ *Prosecutor v. Stanišić and Simatović*, Case No. IT-03-69-T, Reasons for Decision to Recall Witness JF-047, 31 March 2011, para. 6; *Prosecutor v. Šešelj*, Case No. IT-03-67-T, Decision on Prosecution Motion to Recall Witness VS-1033 or, in the Alternative, Admit the Witness's Written Statement, 14 October 2010, para. 7.

8. The evidence of Turkušić which can be interpreted as indicating that there may have been two stabilizers found at the Markale II site, was only heard at the end of August 2013 and was thus not available to the Prosecution prior to the Decision. The Chamber also considers that while there is further Prosecution evidence indicating that only one stabilizer was retrieved from the Markale II alleged shelling site, witness Bešić was in a unique position vis-à-vis the stabilizer, considering that he testified that he took possession of it. Under these circumstances, the Chamber finds that there exists good cause for seeking supplementation of witness Bešić's evidence at this stage of the proceedings.

9. With regard to the requirements of Rules 89 (C) and 92 *bis* of the Rules, the Chamber finds that the additional portions tendered in the Motion are, as set out in the Motion, relevant, probative, do not relate to the acts and conduct of the Accused, and are cumulative to other oral evidence received.¹⁵ The Defence claim in paragraph 12 of its Response that "[t]he jurisprudence is clear that a witness ought to be called for cross-examination where the previous examination was performed by a self-represented accused" is not supported by any legal authority. The Chamber is unaware of such jurisprudence and therefore dismisses this argument.

10. In arguing that witness Bešić should appear for cross-examination, the Defence submits that Turkušić testified that he was inclined to say that the stabilizer P2053 showed some difference from the one(s) which can be seen on video exhibit D352. However, a mere inclination in this respect is insufficient to justify that Bešić be called for cross-examination on this point. In addition, the material tendered through the Motion makes it abundantly clear that it is Bešić's view that there was only one stabilizer retrieved from the Markale II alleged shelling site.¹⁶

11. The Defence further interprets Turkušić's inclination that P2053 looked different from the stabilizer(s) which could be seen in video exhibit D352 to mean that P2053 has been tampered with or is not authentic. It is unclear to the Chamber how witness Bešić could give testimony of any tampering, the stabilizer's chain of custody, or definitively recognise the stabilizer admitted as P2053 as the one he testified he retrieved almost 20 years ago.

12. Based on the above, the Chamber finds that there are insufficient grounds weighing in favour of calling witness Bešić for cross-examination and is satisfied that the additional portions are admissible under Rule 92 *bis* of the Rules. The Defence's request for reconsideration will be denied. The Chamber will carefully evaluate all evidence in relation to the stabilizer(s) retrieved from the Markale II alleged shelling site, including that of witness Turkušić.

¹⁵ See Motion, para. 12; Witness Higgs subsequently also testified about this matter.

¹⁶ See the witness's testimony in the *Karadžić* case at T. 9522 line 18.

C. Status of exhibit D352

13. The Prosecution requests that exhibit D352's status be changed from public to confidential. The reasons for confidentiality of exhibit D352 explained in the previous case were expressed in private session. Unfortunately, the publicly filed Motion gives quite some detail in relation to this video and provides indications as to the reason why D352 should be placed under seal. Under these circumstances, and out of an abundance of caution, the Chamber will place exhibit D352 under seal. The parties are further instructed to review the trial record and identify whether further redaction orders are necessary for instances when this video was played in court. Any requests for further redactions should be submitted without delay.

D. Status of the Motion

14. The Prosecution submits that the additional portions of witness Bešić's prior testimony may be admitted as a public exhibit.¹⁷ The Chamber notes that in paragraph 11 of the Motion the Prosecution quotes testimony of the witness which was subject to a post-session redaction order by the Karadžić Trial Chamber.¹⁸ While the context suggests that the redaction order was intended to only redact the audio-visual broadcast of the session in question, the *Karadžić* Chamber ordered a corresponding redaction of the transcript as well. As a consequence, the additional portions should be placed under seal and the Motion should be re-classified as confidential.

V. DISPOSITION

15. For the foregoing reasons, pursuant to Rules 54, 89 and 92 *bis* of the Rules, the Chamber

GRANTS the Motion **IN PART**;

ADMITS into evidence, **UNDER SEAL**, portions of the previous testimony of witness Bešić in the case *Prosecutor v. Karadžić*, Case no. IT-95-5/18-T, namely T. 9518:9 – 9523:20;

DENIES the Defence's request for reconsideration;

INSTRUCTS the Registry to place exhibit D352 under seal;

INSTRUCTS the Registry to place the Motion under seal;

INSTRUCTS the parties to review the trial record in accordance with paragraph 13 above;

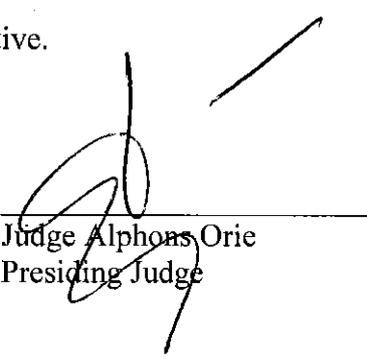
¹⁷ Motion, para. 13.

¹⁸ *Prosecutor v. Karadžić*, Case No. IT-95-5/18-T, Order to Redact the Public Transcript and the Public Broadcast of a Hearing, 9 December 2010 (Confidential).

INSTRUCTS the Prosecution to upload into eCourt the above portions of the previous testimony of witness Bešić within two weeks of the date of issue of this decision; and

REQUESTS the Registry to assign an exhibit number to the document admitted and inform the parties and the Chamber of the number so assigned.

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



Judge Alphons Ori
Presiding Judge

Dated this Nineteenth day of December 2013
At The Hague
The Netherlands

[Seal of the Tribunal]