

UNITED
NATIONS



International Tribunal for the Prosecution of
Persons Responsible for Serious Violations of
International Humanitarian Law Committed in
the Territory of Former Yugoslavia since 1991

IT-04-81-T
D24688-D24682
21 JANUARY 2010

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Case No. IT-04-81-T

Date: 21 January 2010

Original: English

IN TRIAL CHAMBER I

Before: **Judge Bakone Justice Moloto, Presiding**
Judge Pedro David
Judge Michèle Picard

Registrar: **Mr. John Hocking**

Decision of: **21 January 2010**

PROSECUTOR

v.

MOMČILO PERIŠIĆ

PUBLIC

**DECISION ON PROSECUTION MOTION TO ADD
GARRY SELSKY AS A 92BIS WITNESS**

The Office of the Prosecutor

Mr. Mark Harmon
Mr. Daniel Saxon

Counsel for the Accused

Mr. Novak Lukić
Mr. Gregor Guy-Smith

TRIAL CHAMBER I (“Trial Chamber”) of the 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 (“Tribunal”) is seised of the “Prosecution Motion to Add Garry Selsky as a 92bis Witness, with Public Annex A and Confidential Annex B” filed on 11 January 2010 (“Motion”) and hereby renders its Decision.

I. PROCEDURAL HISTORY

1. The declaration of Garry Selsky of 25 October 2007 (“Witness” and “Declaration”, respectively) was tendered into evidence by the Prosecution on 17 March 2009 and, due to the general objection submitted by the Defence, was marked for identification by the Trial Chamber.¹ On 19 November 2009, the Defence specified its objection in relation to the Declaration.² On 21 December 2009, the Trial Chamber decided that the proper procedure for the Prosecution to tender the Declaration into evidence is through the regime of Rule 92 *bis* of the Rules of Procedure and Evidence (“Rules”).³

II. SUBMISSIONS

A. Prosecution

2. In its Motion, the Prosecution requests leave to add the Witness to its Rule 65 *ter* witness list and seeks admission of the Declaration into evidence pursuant to Rule 92 *bis* of the Rules.⁴
3. The Prosecution submits that the Declaration, including a description of an examination of markings on 3638 shell casings that were retrieved at Srebrenica execution sites, is relevant to and probative of the allegation that Momčilo Perišić (“Accused”) exercised his authority to provide a substantial amount of the weapons and ammunition to the VRS which was used, in part, to perpetrate the crimes at Srebrenica.⁵
4. The Prosecution submits that it has good cause to amend its Rule 65 *ter* witness list at this stage of the proceedings.⁶ It points out that the Defence has been on notice of the substance of Witness’s evidence for over three years.⁷ The Prosecution further submits that it acted with diligence as soon as the Defence made known its objection to the Declaration and the Trial

¹ Marked as MFI P1833, Hearing, T. 4444-4445.

² Defence Submission Regarding Outstanding Documents Labelled “Marked for Identification” with Confidential Annex A and Public Annex B, 19 November 2009, para. 74.

³ Decision Regarding Outstanding Documents Marked for Identification, 21 December 2009, para. 132.

⁴ Motion, paras 2, 20.

⁵ Motion, paras 10-13.

⁶ Motion, paras 14, 16-17.

Chamber decided that the proper channel for considering the admission of the Declaration would be the Rule 92 *bis* procedure.⁸

5. The Prosecution submits that the Declaration, together with accompanying formal attestations, fulfils the requirements of Rule 92 *bis*. It argues that the Declaration does not relate to the acts and conduct of the Accused as charged in the Indictment, being instead reliable and complementary to other Prosecution evidence.⁹

6. Finally, in anticipation of the Defence objection, the Prosecution concedes to strike subparagraphs 3(E), 3(F) and 3(G) from the Declaration.¹⁰

B. Defence

7. On 18 January 2010, the Defence filed its “Response to Prosecution Motion to Add Garry Selsky as a 92bis Witness” (“Response”), whereby it opposes the Motion.¹¹

8. Firstly, the Defence objects to the addition of the Witness to the Prosecution Rule 65 *ter* witness list at this late stage of the proceedings.¹² It argues that the Prosecution fails to demonstrate good cause for doing so, as the deficiencies of the Declaration were clear and self-evident from the beginning.¹³ The Defence points out that the Prosecution had three years to remedy the Declaration’s technical deficiencies. Furthermore, since the Witness was removed from the Prosecution Rule 65 *ter* witness list as of 23 February 2007, the Defence reasonably relied upon the fact that the Prosecution would not call the Witness, nor tender his statement into evidence.¹⁴

9. Secondly, the Defence further opposes admission of the Declaration pursuant to Rule 92 *bis* of the Rules.¹⁵ It submits in this respect that the last sentence of paragraph 2 contains an unsourced and unexplained statement which can have no probative value.¹⁶ Furthermore, it points out that subparagraph 3(A) contains evidence requiring expert testimony not possessed by the Witness.¹⁷ The Defence also argues that subparagraphs 3(A), 3(B) and 3(C) contain “summary evidence prepared by employees of the party wishing to submit the summarising evidence” and as such are

⁷ Motion, para. 14.

⁸ Motion, paras 16-17.

⁹ Motion, para. 18; Annex B.

¹⁰ Motion, para. 15.

¹¹ Response, paras 9, 34. On 12 January 2010, the Trial Chamber ordered the Defence to file its response to the Motion, if any, by noon on Monday, 18 January 2010, Order to Defence to Expedite Filings, 12 January 2010, p. 2.

¹² Response, para. 10.

¹³ Response, paras 10-11, 14.

¹⁴ Response, paras 12-13.

¹⁵ Response, paras 15, 18.

¹⁶ Response, paras 19-20.

¹⁷ Response, para. 23.

inadmissible.¹⁸ Moreover, the Defence submits that subparagraph 3(C) is based on unsourced hearsay.¹⁹ Finally, the Defence argues that subparagraphs 3(E), 3(F) and 3(G) of the Declaration contain deficiencies making these subparagraphs inadmissible in their entirety.²⁰

10. The Defence also challenges the assertion made in the Declaration that “shell casings were predominantly manufactured from the Prvi Partizan Užice [PPU] factory” by pointing out that the Declaration holds that only 398 of the 3638 shell casings were manufactured there.²¹

11. Finally, the Defence submits that should the Trial Chamber deem it appropriate to accept the Declaration, that the Witness should be called for cross-examination as his evidence touches upon a central, live and important issue in this case.²² The Defence requests that the Trial Chamber not make the ultimate decision on admission until cross-examination is completed.²³

III. APPLICABLE LAW

12. The Trial Chamber notes that the applicable law pertaining both to the amendment of the Rule 65 *ter* witness list and admission of evidence pursuant to Rule 92 *bis* was set in the previous decisions of this Chamber and it is incorporated by reference here.²⁴

IV. DISCUSSION

A. Addition to the Rule 65 *ter* Witness List

13. The Trial Chamber notes that the Prosecution sought the admission of the Declaration in March 2009. The Trial Chamber further notes that the formal deficiencies of the Declaration were clear at the time and, as such, the decision of the Trial Chamber of 21 December 2009 directing to Rule 92 *bis* as a proper avenue to be used should have been anticipated by the Prosecution. The Trial Chamber therefore finds that the Prosecution falls short in properly establishing a good cause for amending its Rule 65 *ter* witness list at this late stage of the proceedings. That said, the Trial Chamber also notes that the Defence has had almost ten months notice of the Prosecution’s intention to rely on the Witness’s evidence. Moreover, the Trial Chamber considers that the Witness’s evidence is neither lengthy nor overly complex, thereby causing a very limited additional burden on the Defence. Accordingly, the Trial Chamber finds that allowing addition of the Witness

¹⁸ Response, paras 24-27.

¹⁹ Response, para. 21.

²⁰ Response, paras 16-17.

²¹ Response, para. 28.

²² Response, paras 29-32.

²³ Response, para. 33.

to the Prosecution Rule 65 *ter* witness list, even at this late stage of the proceedings, would not cause prejudice to the Defence. The Trial Chamber also considers that, subject to the redactions discussed below, the Declaration is relevant to the Indictment and of probative value.

14. Based on the foregoing, the Trial Chamber finds the addition of the Witness to the Prosecution's Rule 65 *ter* witness list to be in the interests of justice.

B. Admission into Evidence Pursuant to Rule 92 *bis*

15. Upon examination of the Declaration, the Trial Chamber notes that sub-paragraphs 3(E) and 3(F) summarise evidence of other witnesses and as such, if admitted, would circumvent the requirements of Rule 92 *bis* of the Rules.²⁴ The Trial Chamber also does not find admissible the last sentence of subparagraph 3(A) as it refers to a finding which requires specific expertise.

16. The Trial Chamber notes that sub-paragraphs 3(C) and 3(G) contain hearsay evidence which is not in principle inadmissible and the reliability of which can be properly tested if the Defence is allowed to cross-examine the Witness. However, the Trial Chamber finds the sweeping statement contained in the last sentence of paragraph 2 to be unreliable and of a prejudicial effect which outweighs its probative value.

17. The Trial Chamber finds that, with the redaction of the abovementioned portions, the remaining portions of the Declaration are relevant and of probative value. The Trial Chamber also finds that they do not go to the acts and conduct of the Accused as charged in the Indictment.

18. Having in mind the submissions of the Defence, the Trial Chamber, in the exercise of its discretion, finds that the substance of the Declaration touches upon central, live and important issues in this case. As such, the Declaration warrants calling the Witness for cross-examination.

19. The Trial Chamber notes that the redactions ordered in the present Decision, coupled with the possibility to cross-examine the Witness, sufficiently address the Defence's concern about the use of summary evidence prepared by an employee of the OTP. The Trial Chamber also notes that the Defence argument against the accuracy of certain assertions contained in the Declaration goes to weight to be attributed to such parts, rather than admissibility of the Declaration. Moreover, the

²⁴ See First Decision on Prosecution Motion for Leave to Amend its Rule 65 *ter* List, 6 October 2009, para. 7; Decision on Prosecution Motion for Admission of Evidence Pursuant to Rule 92 *bis*, 2 October 2008, paras 10-16.

²⁵ See *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-AR73.2, Decision on Admissibility of Prosecution Investigator's Evidence, 30 September 2002, para. 18 *et seq.*

Trial Chamber finds that, with the addition of a declaration from a Presiding Officer appointed by the Registrar,²⁶ the Declaration fulfils the formal requirements of Rule 92 *bis*(B) of the Rules.

20. Finally, the Trial Chamber notes that the decision on admission of the Declaration into evidence does not preclude its subsequent reconsideration should the Defence, after cross-examining the Witness, satisfy the Trial Chamber that the Declaration lacks probative value or that its probative value is substantially outweighed by the need to ensure a fair trial.

21. Based on the foregoing, the Trial Chamber finds that the Declaration, with the redaction of the last sentence of paragraph 2, the last sentence of paragraph 3(A), and the subparagraphs 3(E), and 3(F), fulfils the requirements of both Rule 89 and 92 *bis* and is therefore admitted into evidence.

²⁶ See Motion, Annex A.

V. DISPOSITION

PURSUANT TO Rules 65 *ter*, 89, 92 *bis* and 92 *ter* of the Rules, the Trial Chamber

GRANTS the Motion in part;

GRANTS leave to add witness Garry Selsky to the Prosecution Rule 65 *ter* witness list;

ADmits the Declaration and the 92 *bis* attestation documents accompanying the Declaration into evidence as P1833 and **ORDERS** that the last sentence of paragraph 2, the last sentence of subparagraph 3(A) as well as the subparagraphs 3(E) and 3(F) in their entirety be redacted; and

ORDERS that Garry Selsky is to appear for cross-examination by the Defence.

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



Judge Bakone Justice Moloto
Presiding Judge

Dated this twenty-first day of January 2010

At The Hague

The Netherlands

[Seal of the Tribunal]