



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-95-5/18-T

Date: 22 August 2012

Original: English

IN THE TRIAL CHAMBER

Before: Judge O-Gon Kwon, Presiding Judge
Judge Howard Morrison
Judge Melville Baird
Judge Flavia Lattanzi, Reserve Judge

Registrar: Mr. John Hocking

Decision of: 22 August 2012

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

**DECISION ON ACCUSED'S MOTION FOR ADMISSION OF PRIOR TESTIMONY OF
THOMAS HANSEN AND ANDREW KNOWLES PURSUANT TO RULE 92 *BIS***

Office of the Prosecutor

Mr. Alan Tieger
Ms. Hildegard Uertz-Retzlaff

The Accused

Mr. Radovan Karadžić

Standby Counsel

Mr. Richard Harvey

THIS 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 Accused’s “Motion for Admission of Testimony of Thomas Hansen and Andrew Knowles Pursuant to Rule 92 *bis*”, filed on 28 June 2012 (“Motion”), and hereby issues its decision thereon.

I. Background and Submissions

1. In the Motion, the Accused seeks the admission, pursuant to Rule 92 *bis* of the Tribunal’s Rules of Procedure and Evidence (“Rules”), of the transcripts of the prior testimony of Thomas Hansen (“Hansen”) and Andrew Knowles (“Knowles”) (together, “Witnesses”) in the case of *Prosecutor v. Dragomir Milošević*, Case No. IT-98-29/1 (“*D. Milošević* case”) (collectively, “Proposed Evidence”).¹ The Accused submits that the Proposed Evidence satisfies all of the criteria for admission under Rule 92 *bis* of the Rules and is relevant to establish that the Army of Bosnia and Herzegovina (“ABiH”) had modified air bombs in Sarajevo in 1995.² He contends that although the Proposed Evidence relates to a shelling incident which has been removed from the Third Amended Indictment (“Indictment”), namely Scheduled Shelling Incident G17,³ it is relevant to establish whether the ABiH may have been in possession of the “devices” used in Scheduled Shelling Incidents G10, G12, G13, G14, and G15 of the Indictment.⁴ The Accused further submits that the Proposed Evidence does not go to his acts and conduct and that it was “fully tested” by the Office of the Prosecutor (“Prosecution”) during cross-examination in the *D. Milošević* case.⁵

2. On 11 July 2012, the Prosecution filed the “Prosecution Response to Motion for Admission of Testimony of Thomas Hansen and Andrew Knowles Pursuant to Rule 92 *bis*” (“Response”), wherein it states that it does not oppose the Motion, provided that the Witnesses appear for cross-examination.⁶ The Prosecution submits first that the Proposed Evidence addresses a “live and important issue between the parties”, namely, whether the ABiH possessed modified air bombs in 1995 and used them against objects in Sarajevo, and that it is not cumulative of any other existing

¹ Motion, paras. 1, 6. The Chamber notes that, contrary to the Accused’s submission in footnotes 1 and 7 of the Motion, the confidential version of the transcript of the prior testimony of Hansen is uploaded on ecourt as Rule 65 *ter* number 1D05660, while the public version is uploaded on ecourt as Rule 65 *ter* number 1D05662. Similarly, the confidential version of the transcript of the prior testimony of Knowles is uploaded on ecourt as Rule 65 *ter* number 1D05661, while the public version is uploaded on ecourt as Rule 65 *ter* number 1D05663.

² Motion, paras. 1, 5.

³ Scheduled Shelling Incident G17 was removed from the Indictment on 8 October 2009. *See* Decision on the Application of Rule 73 *bis*, 8 October 2009 (“Rule 73 *bis* Decision”).

⁴ Motion, paras. 2–4.

⁵ Motion, para. 5.

⁶ Response, para. 1.

or anticipated testimony.⁷ The Prosecution further contends that the Proposed Evidence is unreliable, as the testimony given by the Witnesses is “irreconcilable”,⁸ and moreover, that Hansen’s testimony is based in “unsourced hearsay” while Knowles’ testimony is “vague” and “internally inconsistent”.⁹ Third, the Prosecution asks that the Chamber require the attendance of the Witnesses for cross-examination as: i) there is material that was previously not available during the *D. Milošević* case which it may use with the Witnesses, and ii) it would assist the Chamber to hear the Witnesses *viva voce* in assessing their credibility and the reliability of the Proposed Evidence in relation to this “live and important issue between the parties”.¹⁰ Finally, the Prosecution advances that the Proposed Evidence is incomprehensible without the associated exhibits, which the Accused did not identify, or seek the admission of, in the Motion.¹¹ Accordingly, the Prosecution requests that the Chamber instruct the Accused to file a supplemental motion identifying and tendering the relevant and necessary associated exhibits, as well as instruct the Accused to do so for all future Rule 92 *bis*, *ter*, and *quater* motions.¹²

II. Applicable Law

3. On 15 October 2009, the Chamber issued its “Decision on the Prosecution’s Third Motion for Admission of Statements and Transcripts of Evidence in Lieu of *Viva Voce* Testimony Pursuant to Rule 92 *bis* (Witnesses for Sarajevo Municipality)” (“Decision on Third Motion”), in which it outlined the law applicable to motions made pursuant to Rule 92 *bis*. The Chamber will not discuss the applicable law again here, but refers to the relevant paragraphs of the Decision on Third Motion when necessary.¹³

III. Discussion

4. Hansen is a former United Nations Military Observer (“UNMO”) who was serving as an operations officer at the time a projectile hit the TV building in Sarajevo on the morning of 28 June 1995. He testified in the *D. Milošević* case that he was in the PTT building when the incident took place. He discussed what was reported to him about the incident, the reports he prepared on 28 and 29 June 1995, and the meeting he had with ABiH liaison officers following the incident. He testified that another UNMO reported to him that he observed that the projectile that hit the TV

⁷ Response, paras. 1, 3, 4.

⁸ Response, paras. 5–7.

⁹ Response, paras. 1, 5–8.

¹⁰ Response, paras. 9, 12(a).

¹¹ Response, para. 10.

¹² Response, paras. 10, 11, 12(b).

¹³ Decision on Third Motion, paras. 4–11.

building was fired from “the BiH side”, which Hansen reflected in his report of 29 June 1995. Hansen also testified that he was not aware of any reports which indicated that Bosnian Serb forces had fired the projectile but denied that when he went to the ABiH liaison office, he stated that the ABiH had fired the bomb which hit the TV building. Hansen stated that he never saw the launch of an air bomb but had seen air bombs in flight and their impact. Furthermore, he testified that he was not sure whether the projectile that hit the TV building was an air bomb. He also stated that he witnessed the frequent employment of heavy weaponry by the “BiH”, at times within 100 metres of the PTT building. Hansen also testified about the tasks of the UNMOs stationed at the observation posts, his own responsibilities, and their internal reporting procedures.

5. Knowles is a former UNMO who served as a deputy operations officer in Sarajevo from approximately May to July 1995. He testified that on the morning of 28 June 1995, he and Hansen were walking across the PTT building car park in Sarajevo when they observed a projectile flying across and subsequently hitting the TV building. Knowles discussed a report dated 4 July 1995 he prepared in relation to a meeting between Hansen and ABiH liaison officers subsequent to the incident, as well as about his own meeting with the liaison officers later in the day. He testified that he understood that the meeting involving Hansen was tense, based on what Hansen conveyed to him, and that there was some misunderstanding, likely related to language difficulties, around whether Hansen suggested that the ABiH had fired on its own people. Knowles discussed the possible origin of the projectile as from the “north-west”, based on what he observed and the marks and damage to the TV building, but stated that it was possible two projectiles were fired that day given the information he received about damage to the southern side of the building. He also testified that he had never seen a modified air bomb launch and that he was unsure of the type of projectile he saw on 28 June 1995, but provided his observations as to the speed, direction of travel, and rocket efflux of the projectile.

6. The Chamber recalls that pursuant to Rule 89(C) and (D) of the Rules, relevance and probative value are fundamental requirements for the admission of evidence pursuant to Rule 92 *bis*.¹⁴ The Chamber also recalls its previous rulings to the effect that, in general, detailed evidence is not to be led on incidents or events which have been removed from the Indictment, as such evidence is no longer relevant to this case.¹⁵

¹⁴ Decision on Third Motion, para. 4.

¹⁵ The Chamber held during the Prosecution’s phase of the case that such evidence may be permitted when it goes to, for example, establishing the elements of the underlying offences or general requirements under an article of the Statute of the Tribunal. *See, inter alia*, Decision on Fifth Prosecution Motion for Judicial Notice of Adjudicated Facts, 14 June 2010, para. 54; Oral Ruling, T. 5479–5481 (19 July 2010); Oral ruling, T. 16606–16608 (14 July 2011).

7. The Chamber first notes that the Accused offers the Proposed Evidence to show that the ABiH fired the device that struck the TV building in Sarajevo and thus was in possession of modified air bombs. As noted by the Prosecution, whether or not the ABiH had modified air bombs in Sarajevo in 1995 is indeed a live issue in this case. However, the discussion in the Proposed Evidence relating to the possible possession and use of modified air bombs by the ABiH is of limited nature as the Proposed Evidence primarily deals, and in great detail, with other matters relating to the shelling of the TV building, such as the content of reports and meetings about the incident. Further, neither of the Witnesses gives a clear indication as to who, to *their* knowledge, fired the projectile that hit the TV building on 28 June 1995.

8. The Chamber acknowledges that some limited evidence on Scheduled Shelling Incident G17 has been admitted in this case, but notes that it was either peripheral to, or constituted only a small portion of, the related witnesses' evidence, rather than a whole transcript as is the case here.¹⁶ Further, although the remainder of the Proposed Evidence may have some limited probative value in that it goes to events and the general military situation in Sarajevo during the Indictment period, the Chamber does not consider this to be of such relevance as to justify the admission of a large body of evidence which deals in great detail with an incident that has been removed from the Indictment. Accordingly, the Chamber considers that the Proposed Evidence is largely not relevant to the case against the Accused and thus fails to satisfy the requirements of Rule 89 of the Rules.

9. Further, even if the Chamber had found the Proposed Evidence to be of sufficient relevance to the Accused's case, the Chamber considers that the factors in favour of admission of evidence in written form pursuant to Rule 92 *bis*, as listed in paragraph A(i)(a)–(f) of the Rule, do not support its admission.¹⁷ In particular, Hansen testified that he did not himself observe the projectile that hit the TV building and only reported what was reported to him about the incident by other UNMOs; he also testified that he was not able to conduct an investigation of the incident.¹⁸ Thus, given that the majority of the Proposed Evidence relates to an incident which has been removed from the Indictment and the Witnesses can only speak to a limited extent on modified air bombs generally and the ABiH's possession of the same, and in light of the Chamber's concerns regarding its reliability, the Chamber considers that the Proposed Evidence lacks relevance and probative value such that it would not be in the interests of justice to admit it pursuant to Rule 92 *bis* of the Rules.

¹⁶ See, *inter alia*, P1851 (Witness statement of Per Anton Brennskag dated 26 October 2010), para. 52; Per Anton Brennskag, T. 8653, 8657 (29 October 2010), T. 8704–8705, 8714–8730 (1 November 2010); Harry Konings, T. 9349–9350 (7 December 2010); Francis Roy Thomas, T. 6834–6835 (15 September 2010); D853 (UNMO report, 29 June 1995).

¹⁷ See Thomas Hansen (transcript from *D. Milošević* case), *inter alia*, T. 4369–4371 (2 April 2007); Andrew Knowles (transcript from *D. Milošević* case), *inter alia*, T. 9392–9393, 9399 (25 September 2007).

¹⁸ See Thomas Hansen (transcript from *D. Milošević* case), T. 4334–4341, 4393, 4398–4399 (2 April 2007).

10. The Chamber notes that the Accused may choose to call the Witnesses to testify on the live issue of the ABiH possessing modified air bombs as well as other events relevant to the Indictment. He can also decide to obtain and then seek to admit, pursuant to Rule 92 *bis*, witness statements directly and specifically addressing those issues rather than tendering a large volume of mainly irrelevant evidence. As a general consideration, the Chamber notes that the Accused should be guided by this instruction throughout the presentation of his case.

11. Finally, the Chamber notes that the Accused did not identify or seek the admission of any associated exhibits as relevant and inseparable from, and indispensable to, the Proposed Evidence, even though many of the exhibits discussed by the Witnesses in the *D. Milošević* case are necessary to understand the Proposed Evidence. The Chamber has stated on numerous occasions that when a party tenders evidence pursuant to Rule 92 *bis*, *ter*, or *quater*, it may also tender for admission into evidence documents that have been discussed by the relevant witness in his or her witness statement or previous testimony.¹⁹ In addition to meeting the fundamental requirements for admission under Rule 89 of the Rules, these associated exhibits must form an “inseparable and indispensable” part of the witness’s written evidence, and can be tendered if the evidence would become incomprehensible or have lesser probative value without the admission of the documents.²⁰ Although the Accused’s failure to tender associated exhibits in the present case has no bearing on the Chamber’s determination in relation to the Proposed Evidence, the Chamber wishes to remind the Accused that if he intends for the Chamber to analyse associated exhibits together with the main body of evidence being tendered pursuant to Rule 92 *bis* of the Rules, he should clearly identify such exhibits in any future Rule 92 *bis* submissions using detailed tables of associated exhibits, as provided by the Prosecution during its case, including references to the Rule 65 *ter* numbers for the tendered documents in the previous case and specific page references to the prior written evidence.²¹ In the event the Accused chooses not to tender associated exhibits and this omission renders the main body of evidence incomprehensible or of low probative value, the Chamber may deny the admission of such evidence.

¹⁹ Decision on Third Motion, para. 11; Decision on Prosecution Motion for Admission of Testimony of Witness KDZ198 and Associated Exhibits pursuant to Rule 92 *quater*, 20 August 2009, para. 7; Decision on Prosecution Request for Reconsideration and/or Certification of Parts of the “Decision on Prosecution’s Motion for the Admission of the Evidence of KDZ172 (Milan Babić) Pursuant to Rule 92 *quater*”, 3 June 2010, paras. 24–25; Decision on Prosecution’s Submission Regarding Additional Transcript Pages from Momčilo Mandić’s *Stanišić & Župljanin* Testimony for Admission into Evidence, 8 September 2010, para. 5.

²⁰ Decision on Third Motion, para. 11. *See also* *Prosecutor v. Lukić & Lukić*, Case No. IT-98-32/1-T, Decision on Confidential Prosecution Motion for the Admission of Prior Testimony with Associated Exhibits and Written Statements of Witnesses pursuant to Rule 92 *ter*, 9 July 2008, para. 15; *Prosecutor v. Perišić*, Case No. IT-04-81-T, Decision on Prosecution Motion for Admission of Evidence Pursuant to Rule 92 *bis*, 2 October 2008, para. 16; *Prosecutor v. Lukić and Lukić*, Case No. IT-98-32/1-T, Decision on Prosecution Motion for Admission of Evidence Pursuant to Rule 92 *bis*, 22 August 2008, para. 21.

²¹ *See, for example*, Prosecution Notification of Admission of Written Evidence Pursuant to Rule 92 *ter* with Appendix A, Witness KDZ470, 15 October 2009.

IV. Disposition

12. For these reasons, pursuant to Rules 54, 89, and 92 *bis* of the Rules, the Chamber hereby **DENIES** the Motion.

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



Judge O-Gon Kwon
Presiding

Dated this twenty-second day of August 2012
At The Hague
The Netherlands

[Seal of the Tribunal]