

IT-09-92-T
D7162 - D7153
18 September 2013

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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 September 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: 18 September 2013

PROSECUTOR

v.

RATKO MLADIĆ

PUBLIC

**DECISION ON PROSECUTION SEVENTEENTH MOTION TO
ADMIT EVIDENCE PURSUANT TO RULE 92 *BIS*
(SARAJEVO WITNESSES)**

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 February 2013, the Prosecution filed a motion pursuant to Rule 92 *bis* of the Tribunal's Rules of Procedure and Evidence ("Rules") seeking to provisionally admit in written form evidence of Fatima Pita, Eldar Hafizović, Witness RM-153, Witness RM-172, and Tarik Kupusović ("Motion").¹ On 21 February 2013, the Defence requested an extension of 60 days to respond.² On 1 March 2013, the Chamber granted this Defence request in part, allowing an extension of 45 days.³ The Defence filed a response on 17 April 2013, opposing the Motion ("Response").⁴

II. SUBMISSIONS OF THE PARTIES

2. The Prosecution requests that it be permitted to exceed the word limit for filings.⁵ Further, the Prosecution contends that the proposed evidence is relevant and probative of issues in the case, including murder, terror, and unlawful attacks on civilians.⁶ The Prosecution submits that the witnesses' statements and testimonies are corroborated by evidence already admitted in this case, as well as by evidence it anticipates leading from future witnesses.⁷ The witnesses provide "crime-base" and contextual evidence and their evidence does not concern the acts and conduct of the Accused.⁸ The Prosecution submits that the admission of their evidence pursuant to Rule 92 *bis* of the Rules enhances trial efficiency and spares victims and witnesses the trauma of having to testify repeatedly about painful events.⁹

3. The Prosecution seeks the provisional admission of three statements of Fatima Pita, excerpts from her testimony in the *Prosecutor v. Galić* trial ("*Galić* trial"), and one associated video exhibit.¹⁰ With respect to Eldar Hafizović, the Prosecution tenders one statement for provisional admission, along with excerpts from his testimony in the *Galić* trial.¹¹ The Prosecution also tenders four associated exhibits, consisting of a map, two sets of medical records, and a photograph.¹² With respect to Witness RM-153, the Prosecution tenders excerpts from the witness's testimonies in the

¹ Prosecution Seventeenth Motion to Admit Written Statements and Transcripts in Lieu of Oral Testimony Pursuant to Rule 92 *bis* (Sarajevo Witnesses), 18 February 2013.

² Defence Motion to Enlarge Time to Respond to Prosecution's Fourteenth, Fifteenth, Sixteenth, and Seventeenth Rule 92 *bis* Motions, 21 February 2013.

³ T. 9503.

⁴ Defence Response to Prosecution 17th Motion to Admit Evidence Pursuant to Rule 92 *bis*, 17 April 2013.

⁵ Motion, para. 41.

⁶ Motion, paras 3, 12, 19, 25-27, 33, 36.

⁷ Motion, paras 6, 18, 23, 30, 35, 40.

⁸ Motion, para. 6.

⁹ Ibid.

¹⁰ Motion, paras 1, 14-16, 41.

¹¹ Motion, paras 1, 20, 41.

Galić and *Prosecutor v. Slobodan Milošević* trials and two associated exhibits, consisting of a diagram drawn by the witness and a small number of photographs.¹³ The Prosecution submits that the transcript of Witness RM-153's testimony provides a clearer and more detailed narrative than the witness's statement.¹⁴ In relation to Witness RM-172, the Prosecution tenders two statements for provisional admission, as well as an excerpt from the witness's testimony in the *Galić* trial, and one associated exhibit consisting of medical records.¹⁵ Finally, the Prosecution tenders excerpts of Tarik Kupusović's testimony from the *Galić* trial.¹⁶ The Prosecution submits that it does not possess a signed ICTY statement for Tarik Kupusović.¹⁷ Further the Prosecution submits that it has sought to minimize overlap with the adjudicated facts by redacting portions of the statements and transcripts.¹⁸ The Prosecution argues that it has met its disclosure obligations under the Rules by disclosing BCS audio recordings of the witnesses' testimony.¹⁹

4. The Defence argues that the disclosed BCS audio recordings do not comport to the precise excerpts of the tendered testimony, as a result of which the Accused cannot access in his own language the totality of the evidence being tendered.²⁰ Further, the Defence submits that the statements and testimony of four of the witnesses concern critical and live issues of the case, in particular scheduled crimes, and should therefore be subject to cross-examination.²¹ The Defence argues that the inclusion of portions of cross-examination of the witnesses in other cases lacks value as such cross-examination was intended to serve the defence of the accused in other cases and it fails to address points that would be relevant for the accused in the present case.²² The Defence further submits that specific portions of the tendered statements and testimony contain hearsay evidence, as well as unqualified expert testimony that has not been appropriately tested under Rule 94 *bis* of the Rules.²³ Finally, the Defence submits that Fatima Pita contradicts her statement in the transcript of her testimony in the *Galić* trial and argues that this calls into question her reliability, such that this witness should appear for cross-examination.²⁴

¹² Motion, para. 21.

¹³ Motion, paras 24, 28.

¹⁴ Motion, para. 24.

¹⁵ Motion paras 1, 31, 34, 41.

¹⁶ Motion, para. 37.

¹⁷ Ibid.

¹⁸ Motion, paras 8, 17, 22, 29, 32, 38-39.

¹⁹ Motion, para. 5.

²⁰ Response, paras 9-11.

²¹ Response, paras 14-16.

²² Response, para. 12.

²³ Response, paras 20-22.

²⁴ Response, paras 23-24.

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.²⁵

(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 a previous decision.²⁶

IV. DISCUSSION

Preliminary Matters

7. The Chamber grants the Prosecution request to exceed the word limit for the Motion, given the number of witnesses it needed to address therein.

8. The Chamber notes that the statements of Fatima Pita, Eldar Hafizović, and Witness RM-172 lack the respective Attestations and Declarations as required by Rule 92 *bis* (B) of the Rules. The Chamber has previously admitted unattested witness statements pending the fulfilment of the requirements of Rule 92 *bis* (B) of the Rules.²⁷ This practice does not impact the safeguards enshrined in Rule 92 *bis* of the Rules. The Chamber will consider conditional admission of the unattested witness statements, pending the fulfilment of the requirements of Rule 92 *bis* (B) of the Rules.

9. As to the Defence objection concerning the disclosed BCS audio recordings not comporting with the precise excerpts of the testimony tendered, the Chamber considers that the Defence is able

²⁵ Decision on Prosecution Third Motion to Admit Evidence Pursuant to Rule 92 *bis*: Sarajevo Witnesses, 19 October 2012, paras 5-7.

²⁶ Decision on Prosecution Motion to Admit the Evidence of Witness RM-266 Pursuant to Rule 92 *quater*, 22 July 2012, para. 13.

²⁷ Ibid.

to identify the relevant segment of said audio from the English version of the transcript tendered. Therefore, the Defence's objection fails in this respect.²⁸

Compliance with Guidance and Overlap with Adjudicated Facts

10. In relation to the admission of transcript evidence under Rule 92 *bis*, the Chamber has reviewed the tendering of selected portions of the transcripts of testimonies of Fatima Pita, Eldar Hafizović, and Witness RM-172 in light of its Guidance.²⁹ Considering that the Prosecution wishes to tender limited portions of the transcripts from previous cases, which supplement the evidence in the witnesses' statements, the Chamber accepts that the Prosecution has complied with the Guidance.

11. In relation to Witness RM-153 and Tarik Kupusović, the Chamber notes that the Prosecution tenders excerpts from their testimony in prior proceedings instead of witness statements. The Prosecution submits that Witness RM-153's transcripts provide a clearer and more detailed narrative than the witness's statement and that it does not possess a signed ICTY statement for Tarik Kupusović. The Chamber recalls that it is reluctant to receive evidence in the form of transcripts from other cases.³⁰ Nonetheless, the Chamber will not in all cases insist that a statement be taken for witnesses who have not previously provided one.³¹ Further considering the limited portions of the transcripts tendered and that the transcript excerpts are presented in a focused manner, the Chamber considers the tendering of transcripts for Witness RM-153 and Tarik Kupusović satisfactory.

12. The Chamber has reviewed the materials tendered by the Prosecution in light of the relevant adjudicated facts. The Chamber considers that, in selecting excerpts of transcripts and redacting overlapping portions within those excerpts, the Prosecution has complied with its Guidance.

Admissibility Pursuant to Rule 89 (C) of the Rules

13. The Chamber considers the evidence of Fatima Pita, Eldar Hafizović, Witness RM-153, Witness RM-172, and Tarik Kupusović relevant to Scheduled Sniping Incident F.1 and Scheduled Shelling Incidents G.6, G.7, G.8, and more generally, Counts 4-6 and 9-10 of the Indictment.

14. With regard to the Defence's objection that several portions of the witnesses' statements are based on hearsay, the Chamber recalls that in principle, hearsay evidence is admissible before the

²⁸ See also Decision on Prosecution's Fifth Motion to Admit Evidence Pursuant to Rule 92 *bis*; Sarajevo Witnesses, 11 January 2013, para. 9.

²⁹ T. 106-110, 137-138, 194, 315-325, 525-532.

³⁰ T. 106-110, 137-138, 194, 315-325, 525-532.

Tribunal and that the weight to be attributed to it will be assessed in light of all the evidence before it.³² The Chamber does not consider that the portions of hearsay evidence affect the overall reliability of the evidence. The Defence has also objected to the admission of certain portions of the tendered statements and testimonies as containing improper expert opinions. In relation to this objection, the Chamber refers to and incorporates its previous reasoning concerning proposed fact witnesses providing conclusions or opinions.³³ The Chamber reiterates that it will carefully review the claims of fact witnesses and their sources of knowledge.

15. Further, with regard to the Defence's submission that the cross-examination in previous cases was inadequate, the Chamber considers that the Defence has not demonstrated how it would render this evidence unreliable or how its prejudicial effect would outweigh its probative value. The Defence further opposes the admission of the evidence of Fatima Pita because she would squarely contradict herself.³⁴ The Chamber notes that both when cross-examined in the *Galić* trial and in the Defence's claim that the witness contradicts herself, her statement, being that the defenders were on the hill, is taken out of context. In her statement of the 25th of June 2001, the witness refers to the frontlines being on the hill and situates the defenders, which the Chamber understands as BiH soldiers, up the hill there and not anywhere near the house where she lives and where her daughter was hit by a bullet. This does not mean that exclusively BiH soldiers were higher up in the hills and where the witness says consistently, in the statement of the 10th of August 2012 and in her testimony in the *Galić* trial, that Serb soldiers were at Baba Rock during the war, the Chamber finds no contradiction in it.

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

Admissibility Pursuant to Rule 92 bis of the Rules

17. With regard to the admissibility of the witnesses' evidence pursuant to Rule 92 bis of the Rules, the Defence has not argued, and the Chamber does not find that the proffered evidence relates to the acts and conduct of the Accused. The proffered evidence relates to the alleged crime-base of the case, including Scheduled Incidents F.1, G.6, G.7, and G.8. Fatima Pita and Witness

³¹ T. 528.

³² See Decision on Prosecution's Seventh Motion to Admit Evidence Pursuant to Rule 92 bis, 6 February 2013, para. 14.

³³ Decision with regard to Prosecution Motion for Admission into Evidence of Witness Harland's Statement and Associated Documents, 3 July 2012, para. 8.

³⁴ Response, para. 23.

RM-153 are eye-witnesses to Scheduled Incidents F.1 and G.8 and all witnesses address, to a certain extent, the impact of crimes upon victims.

18. The Chamber considers that other witnesses have already or are expected to provide evidence with regard to relevant incidents. The evidence of Eldar Hafizović and Witness RM-153 is, in part, of a cumulative nature to the anticipated evidence of proposed shelling expert Richard Higgs, who is scheduled to testify pursuant to Rule 94 *bis* of the Rules.³⁵ The evidence of Witness RM-172 is cumulative to the evidence provided by Muhamed Kapetanović and Mirza Sabljica on Scheduled Incidents G.6, G.7, and G.8.³⁶ Kupusović's evidence is cumulative to the evidence of Witness RM-147, David Fraser, and John Wilson.³⁷

19. With regard to Defence's submission that the evidence of Fatima Pita, Eldar Hafizović, Witness RM-153, and Witness RM-172 goes to critical and live issues and is therefore inappropriate for admission pursuant to Rule 92 *bis* of the Rules, the Chamber notes that the Defence's submission is general and does not demonstrate specifically how any of the proffered testimony is critical to the Prosecution's case. Therefore, the Chamber will not consider this as weighing against admission pursuant to Rule 92 *bis* of the Rules.

20. Having taken all of the above factors into consideration, the Chamber finds that the proffered witness statements and excerpts of testimony are admissible pursuant to Rule 92 *bis* of the Rules.

Admissibility of Associated Exhibits

21. The Prosecution seeks the admission of a total of eight associated exhibits, which consist of photographs, medical records, a map, a diagram, and a video of 5 minutes and 26 seconds. The Chamber finds that these exhibits form an inseparable and indispensable part of the proffered evidence. For these reasons, the Chamber finds that the requirements for admission have been met with respect to all the proffered associated exhibits.

V. DISPOSITION

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

³⁵ Prosecution Rule 65 *ter* Witness List, 10 February 2012 (Confidential) ("Prosecution Witness List"), p. 213.

³⁶ Muhamed Kapetanović, T. 4265-4299; Mirza Sabljica, T. 8039-8194.

³⁷ Witness RM-147, T. 1686-1756; David Fraser, T. 5766-5951; John Wilson T. 3912-4055.

GRANTS the Prosecution request to exceed the word limit in its Motion;

GRANTS the Motion and with respect to:

(i) *Fatima Pita*

CONDITIONALLY ADMITS into evidence, pending the filing of the corresponding Attestations and Declarations in compliance with the requirements of Rule 92 *bis* (B):

- (a) the statement dated 25 June 2001, bearing ERN 0208-1037-0208-1041,
- (b) the statement dated 25 September 2001, bearing ERN 0211-4251-0211-4254,
- (c) the statement dated 10 August 2012, bearing ERN 0683-9513-0683-9517;

ADMITS into evidence:

- (d) the witness's testimony in *Prosecutor v. Galić*, Case No. IT-98-29-T, T. 5875:21-25, 5877:2-16, 5879:7-10, 5879:19-22, 5880:17-22, 5884:9-18, 5889:5-8 and 17-22, 5890:2-16, 5906:7-5907:19, and 5914:10-24,
- (e) the video of the witness and ICTY investigator Barry Hogan, bearing ERN V000-6006-V000-6000, Rule 65 *ter* no. 22311;

(ii) *Eldar Hafizović*

CONDITIONALLY ADMITS into evidence, the statement dated 24 June 2001, bearing ERN 0208-0973-0208-0980, pending the filing of the corresponding Attestation and Declaration in compliance with the requirements of Rule 92 *bis* (B);

ADMITS into evidence:

- (a) Hafizović's testimony in *Prosecutor v. Galić*, Case No. IT-98-29-T, T. 7758:2-3, 7759:21-7760:7, 7762:1-7763:3, 7763:20-7764:7, 7766:20-7768:11, 7769:20-23, 7772:11-20, 7777:21-7778:21, 7782:2-6, 7787:20-24, 7792:20-7793:9, 7813:9-17, 7821:2-17, 7825:14-7826:17, and 7861:20-23,
- (b) the map bearing ERN 0208-0986-0208-0986, Rule 65 *ter* no. 10266,
- (c) the medical records bearing ERN 0301-3015-0301-3016, Rule 65 *ter* no. 13689,
- (d) the medical records bearing ERN 0301-3017-0301-3017, Rule 65 *ter* no. 13576,

(e) a quicktime photograph, bearing ERN V000-7587, Rule 65 *ter* no. 10275a;

(iii) *Witness RM-153*

ADMITS into evidence Witness RM-153's testimonies in *Prosecutor v. Galić*, Case No. IT-98-29-T, T. 5481:6-5485:7, 5485:13-5492:20, 5493:3-5495:15, 5499:12-5502:17, 5516:1-5517:14, 5520:1-6 and *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-T, T. 28181:23-28182:18, and 28184:23-28185:7;

ADMITS into evidence **UNDER SEAL**:

(a) the diagram bearing ERN 0037-8896-0037-8896, Rule 65 *ter* no. 10263,

(b) three photographs, bearing ERN 0040-1100-0040-1102A, Rule 65 *ter* no. 10264a;

(iv) *Witness RM-172*

CONDITIONALLY ADMITS into evidence **UNDER SEAL**, pending the filing of the corresponding Attestation and Declaration in compliance with the requirements of Rule 92 *bis* (B):

(a) the statement dated 22 November 1995, bearing ERN 0036-0654-0036-0656,

(b) the statement dated 23 February 1995, bearing ERN 0036-0657-0036-0657-ET;

ADMITS into evidence **UNDER SEAL**:

(a) Witness RM-172's testimony in *Prosecutor v. Galić*, Case No. IT-98-29-T, T. 7664:15-22, 7666:1-7668:1, 7668:23-7669:23, 7670:18-7672:3³⁸,

(b) the medical records bearing ERN R102-5761-R102-5761-ET, Rule 65 *ter* no. 10602a;

(v) *Tarik Kupusović*

ADMITS into evidence the testimony of Tarik Kupusović in *Prosecutor v. Galić*, IT-98-29-T, T. 607:3-25, 609:4-610:2, 610:18-611:2, 611:13-614:20, 617:11-619:16, 620:3-622:15, 622:20-623:1, 624:2-624:25, 626:9-629:10, 634:22-636:18, 637:16-643:18, 643:24-645:6, 645:24-653:15, 656:8-658:12, 660:13-676:11, 677:17-681:11, 683:12-684:8, 716:1-718:12, 730:11-21, and 749:10-23;

INSTRUCTS the Prosecution to file the corresponding declarations to the statements of Fatima Pita, Eldar Hafizović, and Witness RM-172;

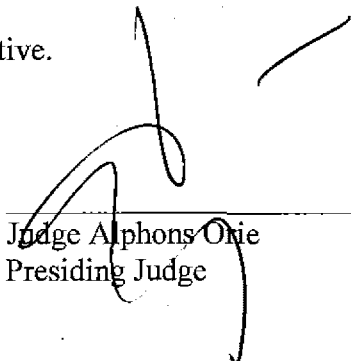
³⁸ The Prosecution tendering chart refers to T 7670:19, whereas the tendered material relates to 7680:18.

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INSTRUCTS the Prosecution to upload into eCourt all of the above documents within three weeks, insofar as they have not already done so; and

REQUESTS the Registry to assign exhibit numbers to the documents 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 Orie
Presiding Judge

Dated this eighteenth day of September 2013
At The Hague
The Netherlands

[Seal of the Tribunal]