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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: 1 July 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: 1 July 2013

PROSECUTOR

v.

RATKO MLADIĆ

PUBLIC

**DECISION ON PROSECUTION 92 *TER* MOTION
CONCERNING WITNESS TEUFIKA IBRAHIMEFENDIĆ**

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 6 January 2012, the Prosecution reclassified Dr Teufika Ibrahimefendić as an expert witness and indicated that it will “not seek to tender any report authored by Dr Ibrahimefendić but will elicit her expert opinion regarding common psychological impacts of the Srebrenica massacres”.¹ At the 16 January 2012 Rule 65 *ter* meeting, the Prosecution announced its intention to offer Dr Ibrahimefendić’s testimony in the *Krstić* trial as a “full statement” of the expert witness under Rule 94 *bis* of the Tribunal’s Rules of Procedure and Evidence (“Rules”).² The Defence contended that this proposition did not conform to Rule 94 *bis* of the Rules.³ On 24 January 2012, the Chamber instructed the Prosecution to file submissions on the matter by 17 February 2012 and instructed the Defence to file any response two weeks thereafter.⁴ The Prosecution filed its submissions on 17 February 2012.⁵ On 2 March 2012, the Defence filed its response.⁶

2. On 14 September 2012, the Chamber issued a Decision (“First Decision”) whereby the majority, Judge Moloto dissenting, instructed the Defence to file a notice pursuant to Rule 94 *bis* (B) of the Rules, indicating within 30 days whether it challenges the qualifications of Dr Ibrahimefendić as an expert.⁷ The Chamber deferred, until after the notice is filed, deciding on whether the Prosecution will be required to tender a statement and/or report of Dr Ibrahimefendić, whether she should be considered a witness of fact or an expert witness, and if deemed an expert witness, whether her proposed expert evidence falls within her expertise.⁸ On 15 October 2012, the Defence filed its Rule 94 *bis* Notice.⁹ The Prosecution filed its Response on 22 October 2012.¹⁰

3. On 12 February 2013, the Chamber issued a Decision (“Second Decision”) whereby the Chamber considered that the Prosecution had provided sufficient information establishing that Dr Ibrahimefendić possesses relevant training and experience as a psychologist with specialized

¹ Fourth Prosecution Report on Pre-Trial Preparations, 6 January 2012 (Confidential with Confidential Annexes A to C), para. 30, Annex C (Status of Expert Reports), p. ii.

² Rule 65 *ter* meeting (16 January 2012), T. 41. See also T. 174.

³ Rule 65 *ter* meeting (16 January 2012), T. 40, 42-43. See also T. 174-175.

⁴ See T. 209.

⁵ Prosecution Submissions on the Expert Statement of Prosecution Witness Teufika Ibrahimefendić pursuant to Rule 94*bis*, 17 February 2012.

⁶ Defence Response to Prosecution Submission on the Expert Statement of Prosecution Witness Teufika Ibrahimefendić pursuant to Rule 94*bis*, 2 March 2012.

⁷ Decision on the Prosecution Submissions on the Expert Statement of Prosecution Witness Teufika Ibrahimefendić pursuant to Rule 94 *bis*, 14 September 2012, p. 4.

⁸ First Decision, paras 6-7, p. 4.

⁹ Defence Rule 94 *bis* Notice, Objection and Motion to Bar Relative to Proposed Prosecution Witness Teufika Ibrahimefendić, 15 October 2012.

¹⁰ Prosecution Request for Leave to Reply to the Defence Rule 94 *bis* Notice, Objection and Motion to Bar Relative to Proposed Prosecution Witness Teufika Ibrahimefendić, 22 October 2012, para. 3. In an informal communication of 9 November 2012, the Chamber informed the Parties that it considered this request to be a response to the Defence

knowledge on war trauma, and substantial experience counselling women and children who suffered trauma resulting from the events in Srebrenica.¹¹ The Chamber further found that her expected testimony, as set out in the Prosecution's Rule 65 *ter* summary, on common psychological impacts of the alleged Srebrenica massacres falls within her area of expertise.¹² The Chamber therefore denied the Defence request to disqualify the witness and bar the Prosecution from presenting her testimony.¹³ The majority, Judge Moloto dissenting, considered that while Rule 94 *bis* offers the possibility of admitting an expert witness's statement and/or report in lieu of his/her oral testimony to avoid unnecessary prolongation of proceedings, the party calling the expert witness is only required to disclose, and not tender, such statement and/or report, and is not precluded from calling the witness *viva voce*, provided the Chamber is satisfied of his/her qualifications on the relevant subject matter as disclosed.¹⁴ The majority therefore allowed the Prosecution to call Dr Ibrahimefendić to testify *viva voce* as an expert witness without tendering any report or statement, in accordance with the summary of her evidence submitted by the Prosecution pursuant to Rule 65 *ter* (iii)(b) of the Rules.¹⁵

II. SUBMISSIONS OF THE PARTIES

4. On 18 April 2013, the Prosecution filed the present Motion ("Motion"), seeking to tender the transcript of Dr Ibrahimefendić's testimony in the *Krstić* trial ("*Krstić* transcript") under Rule 92 *ter* of the Rules to "save time and streamline the presentation of Dr Ibrahimefendić's evidence by allowing for an examination focused on narrow points of clarification and limited areas of elaboration."¹⁶ The Prosecution explained that while it previously intended to present her evidence *viva voce*, it realized that her examination-in-chief carried out in this manner would require approximately two hours, contrary to its initial estimate of 45 minutes.¹⁷ The Prosecution pointed out that it disclosed the *Krstić* transcript on 17 February 2012, and its admission would assuage any previously raised notice concerns and enable the Defence to more effectively prepare for cross-examination.¹⁸ The Prosecution submits that the *Krstić* transcript satisfies all the admissibility requirements of Rules 89 and 92 *ter* (A), as the witness will attest to the accuracy of the transcript,

Motion to bar the testimony of Witness Ibrahimefendić which did not require leave, as provided in Rule 126 *bis* of the Rules.

¹¹ Second Decision on the Prosecution Submissions on the Expert Statement of Prosecution Witness Teufika Ibrahimefendić pursuant to Rule 94 *bis*, 12 February 2013, paras 6-7.

¹² Second Decision, para. 8.

¹³ Second Decision, para. 9.

¹⁴ Second Decision, para. 10.

¹⁵ *Ibid.*

¹⁶ Prosecution Rule 92 *ter* Motion: Teufika Ibrahimefendić (RM612), 18 April 2013, para. 1.

¹⁷ Motion, para. 5.

¹⁸ Motion, para. 6.

will be present in court and available for cross-examination.¹⁹ While the Prosecution acknowledges that Dr Ibrahimfendić’s evidence will overlap with Adjudicated Facts 1653, 1654 and 1656, such overlap is only partial and her evidence will add context and detail.²⁰

5. On 2 May 2013, the Defence filed its Response (“Response”), objecting to the *Krstić* transcript in its entirety as it contains hearsay evidence, consisting of unnamed and unidentified case studies and answers given in response to irrelevant, improper, emotionally-laden questioning by the judges in that case relating to areas outside of the witness’s area of expertise.²¹

III. APPLICABLE LAW

6. The Chamber recalls and refers to its discussion of Rule 94 *bis* of the Rules in previous decisions.²²

IV. DISCUSSION

7. Preliminarily, the Chamber notes that the Prosecution now wishes to tender, under Rule 92 *ter* of the Rules, the transcript of Dr Ibrahimfendić’s testimony in the *Krstić* trial, contrary to its prior insistence upon presenting her as a *viva voce* witness. The Prosecution considers that Rule 92 *ter* is the “more appropriate mode of presenting her evidence.”²³ The Prosecution has confirmed that she remains an expert witness,²⁴ and the Chamber therefore considers that Rule 94 *bis* of the Rules would have been a more appropriate vehicle for tendering the evidence and the Chamber will consider the motion pursuant this rule.

8. With regard to the Defence objection that the *Krstić* transcript contains hearsay evidence, the Chamber recalls that it already rejected this argument in the Second Decision.²⁵ As for the allegedly irrelevant, improper and emotionally-charged questions posed by the *Krstić* Trial Chamber relating to areas beyond the witness’s area of expertise, the Chamber considers that these are matters which can be addressed during cross-examination. The Chamber further recalls that should it decide to admit the entirety of the *Krstić* transcript, such admission will not “in any way constitute a binding determination as to the authenticity or trustworthiness of the documents sought

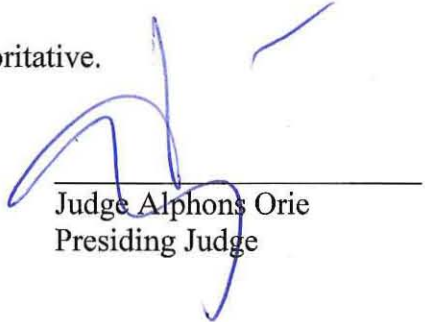
¹⁹ Motion, para. 7.
²⁰ Motion, para. 9.
²¹ Motion, paras 3-8.
²² First Decision, paras 4-5; Decision on Defence Request to Disqualify Richard Butler as an Expert and Bar the Prosecution from Presenting his Reports, 19 October 2012, paras 4-9.
²³ Motion, para. 1.
²⁴ T. 10161.
²⁵ Second Decision, para. 7.

to be admitted.”²⁶ It likewise goes without saying that the Chamber is an impartial body capable of not being unduly influenced by any allegedly emotionally-laden questioning by the judges in the *Krstić* trial. Moreover, the Chamber recalls that in its First Decision, the Defence had already been granted the 30-day period provided under Rule 94 *bis* (B) of the Rules to indicate whether it challenges the qualifications of Dr Ibrahimefendić as an expert, and in its Second Decision, the Defence request to cross-examine her was declared moot.²⁷ The Chamber therefore considers that there is no need to provide the Defence with another 30-day period under Rule 94 *bis* (B)(i) and (iii) of the Rules to indicate whether it accepts the *Krstić* transcript in whole or in part. Accordingly, the Chamber rejects the Defence’s objections, but will defer its admission until after the completion of her testimony. The Chamber expects that during its examination of Dr Ibrahimefendić, the Prosecution will not delve into matters already established in Adjudicated Facts 1653, 1654 and 1656, and will only address them insofar as Dr Ibrahimefendić can add context and detail thereto.²⁸

V. DISPOSITION

9. For the foregoing reasons, pursuant to Rules 54 and 94 *bis* of the Rules, the Chamber hereby **DENIES** the Defence request to deny the Motion or, in the alternative, to redact portions of the *Krstić* transcript; and **DEFERS** its decision on admission into evidence of the transcript, either in whole or in part, until the time of Dr Ibrahimefendić’s testimony.

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



Judge Alphons Orié
Presiding Judge

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

[Seal of the Tribunal]

²⁶ *Pauline Nyiramasuhuko v. The Prosecutor*, Decision on Pauline Nyiramasuhuko’s Appeal on the Admissibility of Evidence, Case No. ICTR-98-42-AR73.2, 4 October 2004, para. 7.

²⁷ First Decision, para. 8; Second Decision, paras 10-11.

²⁸ Motion, para. 9.