

IT-09-92-T
D 60919 - D 60916
13 September 2013

60919 9/13



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: 13 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: 13 September 2013

PROSECUTOR

v.

RATKO MLADIĆ

PUBLIC

**DECISION ON DEFENCE MOTION FOR
CERTIFICATION TO APPEAL ORAL DECISION
ADMITTING WITNESS VAN DER WEIJDEN'S EXPERT
REPORT**

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 19 November 2012, the Prosecution disclosed the expert report of witness Patrick van der Weijden (“Report”) pursuant to Rule 94 *bis* of the Rules of Procedure and Evidence (“Rules”).¹ The Prosecution also directed the Chamber to the witness’s *curriculum vitae* uploaded into eCourt as the document bearing Rule 65 *ter* number 28556.² On 19 December 2012, the Defence filed its objection to the admissibility of the Report.³ On 31 December 2012, the Prosecution filed its Response thereto.⁴ On 9 January 2013, the Chamber issued its Decision (“First Decision”) allowing the witness to testify as an expert, denying the Defence requests to bar the Prosecution from presenting the Report at trial and from using any of the documents on its proposed list of exhibits, and deferring its decision on admission into evidence of the Report, in whole or in part, until the time of his testimony.⁵ The witness testified before the Chamber on 10 and 11 January 2013.

2. On 11 April 2013, the Chamber issued an Oral Decision admitting the Report in its entirety (“Impugned Decision”).⁶ The Chamber considered that the Report contains adequate references to written source materials, over Defence objections to the contrary, and noted that the witness testified that some of the material, such as that pertaining to the VRS arsenal, was based on his personal observations at VRS checkpoints during his tour of duty with Dutchbat in the former Yugoslavia.⁷ The Chamber further considered that in referring to the Internet and military manuals, the witness was explaining the basis for part of his knowledge, in addition to the knowledge gained from direct experience as a sniper and sniping instructor.⁸

3. On 16 April 2013, the Defence filed the present Motion seeking certification to appeal the Impugned Decision (“Motion”).⁹ On 24 April 2013, the Prosecution filed its Response (“Response”) thereto.¹⁰

¹ Prosecution’s Notice of Disclosure of Expert Reports of Patrick van der Weijden (RM622) and Richard Higgs (RM611) Pursuant to Rule 94 *bis*, Public with Public Annexes A & B, 19 November 2012, paras 1-2.

² Prosecution’s Notice of Disclosure, para. 4.

³ Defence Rule 94 *bis* Notice, Objection and Motion to Bar Relative to Proposed Prosecution Witnesses Patrick van der Weijden and Richard Higgs, 19 December 2012.

⁴ Prosecution Response to Defence Rule 94 *bis* Notice, Objection and Motion to Bar Relative to Proposed Prosecution Witnesses Patrick van der Weijden and Richard Higgs, 31 December 2012.

⁵ Decision on Defence Request to Disqualify Patrick Van Der Weijden as an Expert and Bar the Prosecution from Presenting his Report, 9 January 2013, paras 8-9, 11-13.

⁶ T. 9731-9733.

⁷ T. 9732.

⁸ T. 9732-9733.

⁹ Defence Motion for Certification to Appeal the Oral Decision on the Admissibility of Witness Van Der Weijden’s Report under Rule 94 *bis*, 16 April 2013.

II. SUBMISSIONS OF THE PARTIES

4. In its Motion, the Defence seeks certification to appeal two issues in the Impugned Decision: (1) the lack of citations in the Report, and (2) the lack of identification of and disclosure to the Defence of materials identified by the witness as having been relied upon.¹¹ The Defence argues that these issues affect the fundamental fairness and expeditiousness of the proceedings and will affect the overall outcome of the trial.¹²

5. In its Response, the Prosecution points out that the Chamber explicitly stated its reasoning for rejecting the Defence arguments, and for accepting the witness's reference to Internet sources and military manuals, thereby concluding that the Report adequately cited its sources.¹³ The Prosecution contends that the Defence fails to establish that the alleged deficiencies of the Report meet the two prongs of Rule 73(B) of the Rules.¹⁴

III. APPLICABLE LAW

6. The Chamber recalls and refers to the applicable law as set out in a previous decision.¹⁵ The Chamber further notes the permissive language of Rule 73(B) of the Rules, whereby even when both requirements of the Rule are satisfied, certification is not automatic and remains at the discretion of the Trial Chamber.

IV. DISCUSSION

7. The Impugned Decision concerns the admission of an expert report. The Defence's arguments relate primarily to why it considers that the reasoning by the Chamber is incorrect, as opposed to how the requirements set out in Rule 73(B) have been met. Insofar as the alleged lack of identification and disclosure to the Defence of the materials relied upon by the witness in preparing the Report is concerned, the Defence focuses on two undisclosed materials: the Dutch special forces' manual for snipers, and Internet sources in relation to ballistics and shooting.¹⁶ The Chamber considers that while the witness may not have been able to immediately produce the manual and specify the particular Internet sources used, the Defence has not demonstrated that it

¹⁰ Prosecution Response to Defence Motion for Certification to Appeal the Oral Decision on the Admissibility of Van der Weijden's Report under Rule 94 *bis*, 24 April 2013.

¹¹ Motion, paras 1, 5-16.

¹² Motion, paras 1, 5.

¹³ Response, para. 5.

¹⁴ Response, para. 6.

¹⁵ Decision on the Defence Motion for Certification to Appeal the Decision on Submissions relative to the Proposed "EDS" Method of Disclosure, 13 August 2012, para. 3.

¹⁶ Motion, paras 11-13; T. 6528-6529.

was precluded from accessing these materials through the assistance of either the Prosecution or the Chamber. The Chamber further considers that these sources were not indispensable to the appreciation of the Report. It appears that aside from these materials, the Prosecution otherwise disclosed to the Defence a list of exhibits that had been used in the preparation of, but not cited in, the Report.¹⁷

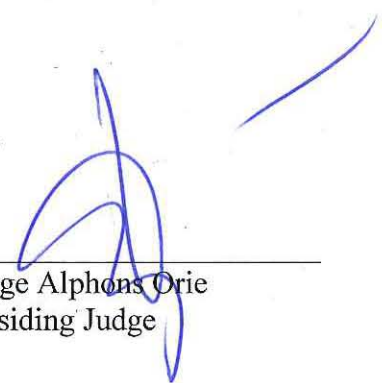
8. The Chamber therefore finds that the Defence has not demonstrated how the alleged lack of disclosure of these two categories of materials or the purported lack of citations in the Report, whether considered separately or collectively, amounts to an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial.

9. As the first prong of Rule 73(B) of the Rules has not been met, and the requirements of this provision being cumulative in nature, there is no need to determine whether the second prong thereof has been met.

V. DISPOSITION

10. For the foregoing reasons, pursuant to Rules 73(B) of the Rules, the Chamber **DENIES** the Motion.

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



Judge Alphons Orie
Presiding Judge

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

[Seal of the Tribunal]

¹⁷ First Decision, para. 11.