

IT-09-92-T  
D41499-D41496  
09 July 2012

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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: 9 July 2012  
Original: English

**IN TRIAL CHAMBER I**

**Before:** Judge Alphons Orie, Presiding  
Judge Bakone Justice Moloto  
Judge Christoph Flügge

**Registrar:** Mr John Hocking

**Decision of:** 9 July 2012

**PROSECUTOR**

v.

**RATKO MLADIĆ**

***PUBLIC***

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**DECISION WITH REGARD TO PROSECUTION RULE 92 TER  
MOTIONS WITH REGARD TO JOSEPH KINGORI, EELCO  
KOSTER, AND CHRISTINE SCHMITZ**

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**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 29 May and 1 June 2012, the Prosecution filed three motions pursuant to Rule 92 *ter* of the Tribunal's Rules of Procedure and Evidence ("Rules") with regard to Joseph Kingori, Eelco Koster, and Christine Schmitz (collectively "Witnesses"), respectively.<sup>1</sup> The Defence responded on 12 and 18 June 2012.<sup>2</sup> The Prosecution requested leave to reply on 19 and 25 June 2012, attaching its replies.<sup>3</sup> On 27 and 28 June 2012, through informal communications, the Chamber granted the Prosecution leave to reply and decided to consider the attached replies.<sup>4</sup>

## II. SUBMISSIONS OF THE PARTIES

2. The Prosecution argues that the Witnesses' testimonies are highly relevant to and probative of salient and material issues arising under the indictment concerning the Srebrenica events.<sup>5</sup>

3. The Defence objects to the motions on a number of grounds, some of which are common to two or three of the Witnesses. First, with regard to all three Witnesses, the Defence argues that the Prosecution fails to comply with the Chamber's guidance with regard to the time requested for examination-in-chief and the number of associated documents tendered pursuant to Rule 92 *ter* of the Rules ("First Objection").<sup>6</sup> Secondly, again with regard to all three Witnesses, the Defence submits that the witnesses expressed expert opinions and other conclusions in their respective statements and that those portions should be stricken ("Second Objection").<sup>7</sup> Thirdly, with regard to witnesses Kingori and Koster, the Defence argues that the subject matter covered by the witnesses is so significant that they should be heard *viva voce* ("Third Objection").<sup>8</sup> Fourthly, with regard to witness Kingori, the Defence objects that the statement contains the witness' reliability assessments of his own and other evidence, which are properly within the purview of the Chamber ("Fourth

<sup>1</sup> Prosecution 92*ter* Motion: RM278 (Joseph Kingori), 29 May 2012 ("Kingori Motion"); Prosecution 92*ter* Motion: RM282 (Eelco Koster), 29 May 2012 ("Koster Motion"); Prosecution 92*ter* Motion: RM350 (Christine Schmitz), 1 June 2012 ("Schmitz Motion").

<sup>2</sup> Defence Response to prosecution Rule 92*ter* Motion: RM278 (Joseph Kingori), 12 June 2012 ("Kingori Response"); Defence Response to Prosecution Rule 92*ter* Motion: RM282 (Eelco Koster), 12 June 2012 ("Koster Response"); Defence Response to Prosecution 92*ter* Motion: RM350 (Christine Schmitz), 18 June 2012 ("Schmitz Response").

<sup>3</sup> Prosecution Request for Leave to Reply to Defence Response to Prosecution Rule 92*ter* Motion: RM278 (Joseph Kingori), 19 June 2012; Prosecution Request for Leave to Reply to Defence Response to Prosecution Rule 92*ter* Motion: RM282 (Eelco Koster), 19 June 2012; Prosecution Request for Leave to Reply to Defence Response to Prosecution Rule 92*ter* Motion: RM350 (Christine Schmitz), 25 June 2012.

<sup>4</sup> See Decision with Regard to Prosecution Motion for Admission into Evidence of Witness Harland's Statement and Associated Documents, 3 July 2012, footnote 4.

<sup>5</sup> Kingori Motion, para. 6; Koster Motion, para. 6; Schmitz Motion, para. 6.

<sup>6</sup> Kingori Response, paras 4-13; Koster Response, paras 4-9 (only with regard to time for examination-in-chief); Schmitz Response, paras 4-9.

<sup>7</sup> Kingori Response, paras 14-17; Koster Response, paras 14-16; Schmitz Response, paras 10-13.

<sup>8</sup> Kingori Response, paras 18-21; Koster Response, paras 10-13.

Objection”).<sup>9</sup> Fifthly, with regard to witness Schmitz, the Defence objects to references in the statement to two previous statements by the witness (“Fifth Objection”).<sup>10</sup>

### III. APPLICABLE LAW

4. Rule 92 *ter* of the Rules provides in relevant part that a Trial Chamber may admit the evidence of a witness in the form of a written statement under the following conditions: (i) the witness is present in court; (ii) the witness is available for cross-examination and any questioning by the Judges; and (iii) the witness attests that the written statement accurately reflects that witness’s declaration and what the witness would say if examined.

### IV. DISCUSSION

5. As for its general approach to Rule 92 *ter* motions and to the First, Second, and Third Objections, the Chamber refers to and incorporates the reasoning in its Decision with Regard to Prosecution Motion for Admission into Evidence of Witness’ Harland’s Statement and Associated Documents (“Harland Decision”).<sup>11</sup> The Chamber adds that the Additional Clarification and Amendment of the Guidance on the Tendering and Presentation of Evidence also addresses the First Objection with regard to the time requested for examination-in-chief. Further, the Chamber reiterates that the Prosecution is expected to review whether all associated exhibits need to be tendered and also whether any of the proffered evidence overlaps with adjudicated facts of which the Chamber has taken judicial notice. The Chamber expects an update on these issues by the time the Witnesses appear in court. With regard to the Second Objection, the Chamber considers that there is no need to redact the paragraphs requested by the Defence.

6. With regard to the Third Objection, the Chamber notes that evidence admitted under Rule 92 *ter* of the Rules may include evidence that goes to the proof of the acts and conduct of the accused. Therefore, that the statements of witnesses Kingori and Koster contain such evidence does not in itself necessitate that they be heard *viva voce*. Furthermore, the evidence referred to by the Defence is very limited in the context of the totality of what needs to be considered by the Chamber for its determination of the alleged individual criminal responsibility of the Accused. Therefore, the Chamber allows the Prosecution to present the evidence of witnesses Kingori and Koster pursuant to Rule 92 *ter* of the Rules.

<sup>9</sup> Kingori Response, paras 22-24.

<sup>10</sup> Schmitz Response, para. 11.

<sup>11</sup> Harland Decision, paras 5-6, 8, 10.

7. In relation to the Fourth Objection, the Chamber will deal with the paragraph containing the witness' reliability assessment in the same way as it deals with other conclusions and opinions. Therefore, it considers that there is no need to redact it from the statement.

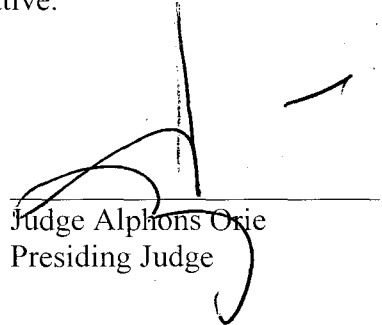
8. In relation to the Fifth Objection, the Chamber notes that the statement of witness Schmitz is a consolidation and reorganization of two previous statements of the witness. These previous statements are not being tendered into evidence. The Chamber does not consider it "improper" to have citations to them in the statement and notes that references to other statements or transcripts do not incorporate them into the proffered statement.<sup>12</sup>

9. Finally, with regard to the time for cross-examination, the Chamber reiterates that the exact amount of time which will be available for cross-examination depends on many factors and may also be re-evaluated depending on how the cross-examination develops.<sup>13</sup> As such, the Chamber will not decide on any time for cross-examination at this stage.

**V. DISPOSITION**

10. For the foregoing reasons, the Chamber **DEFERS** its decisions on admission of the proffered Rule 92 *ter* material of the Witnesses.

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

  
Judge Alphons Orie  
Presiding Judge

Dated this Ninth day of July 2012  
At The Hague  
The Netherlands

[Seal of the Tribunal]

<sup>12</sup> Schmitz Response, para. 11.  
<sup>13</sup> See Harland Decision, para. 11.