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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: 4 October 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: 4 October 2013

PROSECUTOR

v.

RATKO MLADIĆ

PUBLIC

**DECISION ON PROSECUTION'S SIXTEENTH MOTION
TO ADMIT EVIDENCE PURSUANT TO RULE 92 *BIS*:
VRS PERSONNEL**

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 14 February 2013, the Prosecution filed a motion (“Motion”) pursuant to Rules 65 *ter* and 92 *bis* of the Tribunal’s Rules of Procedure and Evidence (“Rules”) requesting (1) leave to exceed the word limit for motions; (2) leave to add five photographs to its exhibit list; and (3) admission into evidence of the transcript excerpts and associated exhibits for the prior testimony of Mitar Lazarević, Marko Milošević, Ljubomir Mitrović, Slavko Perić, Mile Simanić, and Lazar Ristić (“Witnesses”).¹ On 21 February 2013, the Defence filed a motion to extend the deadline for responding by an additional 75 days.² The Chamber granted the Defence motion in part, allowing an extension of 60 days and setting a new deadline of 29 April 2013.³ The Defence filed its response on 29 April 2013 (“Response”).⁴

II. SUBMISSIONS OF THE PARTIES

2. The Prosecution submits that it should be allowed to exceed the word limit for motions because its Motion presents a detailed explanation of the evidence of six potential witnesses.⁵ With regard to the tendered materials, the Prosecution submits that it is not in possession of ICTY statements of any of the Witnesses and instead tenders transcript excerpts selected to adduce only the most important and relevant parts of the Witnesses’ previous testimony.⁶ The Prosecution submits that the tendered evidence satisfies the admissibility requirements of Rule 92 *bis* in that it is corroborative, cumulative, primarily goes to proof of the crime-base, relates to the political and military background relevant to crimes charged in the Indictment, and does not go to proof of the acts or conduct of the Accused.⁷ The Prosecution submits that the tendered evidence is in compliance with the Chamber’s guidance on Rule 92 *bis* motions in that content which was duplicative of adjudicated facts has been redacted and, although the Chamber has expressed a preference for receiving witness statements rather than transcripts of prior testimony, the Chamber has also recognized that such transcripts may be admitted in the absence of a witness statement.⁸ The Prosecution further submits that the tendered evidence is reliable in that it has been tested in

¹ Prosecution Sixteenth Motion to Admit Evidence Pursuant to Rule 92*bis*: VRS Personnel, 14 February 2013 (Confidential), paras 6, 43; Annex A.

² Defence Motion to Enlarge Time to Respond to Prosecution’s Fourteenth, Fifteenth, Sixteenth, and Seventeenth Rule 92*BIS* Motions, 21 February 2013 (Confidential), para. 9.

³ T. 9503. *See also* T. 10094.

⁴ Defence Response to Prosecution 16th Motion to Admit Evidence Pursuant to Rule 92*BIS*, 29 April 2013 (Confidential).

⁵ Motion, para. 6.

⁶ Motion, para. 2.

⁷ Motion, paras 4, 8, 12, 14. *See also* paras 19-22, 26, 30, 33-34, 38-39.

⁸ Motion, paras 5, 9-11. *See also* paras 16, 23, 27, 31, 35, 40.

cross-examination in prior proceedings.⁹ The Prosecution submits that the associated exhibits are admissible in that they form an inseparable and indispensable part of the Witnesses' prior testimony.¹⁰

3. The Defence objects to the admission of the tendered evidence on five grounds. First, the Defence submits that although Bosnian-Croatian-Serbian language ("BCS") audio of the previous testimony of the Witnesses has been provided to the Defence, the lack of BCS transcripts prevents the Accused from knowing the totality of the evidence adduced against him.¹¹ Second, the Defence submits that the previous cross-examinations of the Witnesses lack any value for the Accused and, in particular, the cross-examinations conducted in the *Prosecutor v. Zdravko Tolimir* case should not be considered adequate because they were conducted by a self-represented accused.¹² Third, the Defence submits that cross-examination of the Witnesses is required in the present case because their evidence goes to critical and live issues, and that at least one other case has required the cross-examination of eyewitnesses to alleged crimes.¹³ Fourth, the Defence submits that cross-examination is required because the tendered transcript excerpts contain "extreme hearsay."¹⁴ Fifth, the Defence submits that the Motion should be denied with regard to the evidence of Ljubomir Mitrović because portions of his previous testimony pertain to the acts and conduct of the Accused.¹⁵

III. APPLICABLE LAW

(a) Additions to the Rule 65 ter Exhibit List

4. The Chamber recalls and refers to the applicable law governing additions to the Rule 65 *ter* exhibit list, as set out in a previous decision.¹⁶

(b) 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.¹⁷

⁹ Motion, para. 13.

¹⁰ Motion, para. 15.

¹¹ Response, paras 9-11.

¹² Response, paras 12-14.

¹³ Response, paras 15-17.

¹⁴ Response, paras 18-20.

¹⁵ Response, paras 21-23.

¹⁶ Decision on Prosecution Second Motion to Amend Rule 65 *ter* Exhibit List, 27 June 2012, paras 5-6.

¹⁷ Decision on Prosecution Third Motion to Admit Evidence Pursuant to Rule 92 *bis*: Sarajevo Witnesses ("Decision on Third 92 *bis* Motion"), 19 October 2012.

(c) Admission of Associated Exhibits

6. The Chamber recalls and refers to the applicable law governing the admission of exhibits associated with written evidence tendered in lieu of oral testimony, as set out in a previous decision.¹⁸

IV. DISCUSSION

(a) Preliminary Matters

7. Considering that the Motion concerns the evidence of six witnesses, the Chamber finds that the Prosecution has shown exceptional circumstances necessitating an increase of the word limit for motions.

8. The Chamber has reviewed the five photographs for which the Prosecution seeks leave to add to its Rule 65 *ter* exhibit list. The Chamber notes that the Prosecution has not shown good cause for their addition to the exhibit list at such an advanced stage of the proceedings, however, the Chamber also notes that each photograph was discussed with Lazar Ristić during his testimony in the *Tolimir* case and is *prima facie* relevant to and probative of the charges alleged in the Indictment.¹⁹ Having considered these factors as well as the concise and uncomplicated nature of the photographs, the Chamber finds that their addition to the exhibit list at this stage of the proceedings does not additionally burden the Defence or prejudice the Accused and is, on balance, consistent with the interests of justice.

9. The Chamber notes that the Motion complies with the Chamber's guidance that Rule 92 *bis* motions should concern no more than ten witnesses.²⁰ The Chamber further notes that while it has expressed a preference for receiving 92 *bis* evidence in the form of amalgamated witness statements, it has also indicated that transcripts may be admitted in the absence of such statements and with a showing of good cause.²¹ In this respect, the Chamber considers that none of the Witnesses has provided the Prosecution with a written statement and that most of the transcript excerpts of prior testimony are presented in a limited and focused manner, with redactions having been made where the evidence overlaps with adjudicated facts. The Chamber further notes that the number of tendered associated exhibits is five or less for each of the witnesses with the exception of those tendered through Ljubomir Mitrović. However, for reasons discussed below, the Chamber

¹⁸ Decision on Prosecution Motion to Admit the Evidence of Witness RM-266 Pursuant to Rule 92 *quater*, 22 July 2012, para. 13.

¹⁹ Prosecution Submission of the Fourth Amended Indictment and Schedules of Incidents, 16 December 2011.

²⁰ T. 108, 137.

will limit its consideration of the associated exhibits tendered through witness Mitrović to those discussed in the portions of the testimony that the Chamber finds admissible. For these reasons, the Chamber finds that the Motion is sufficiently in compliance with the Chamber's guidance.

10. With regard to the Defence's general submission concerning the lack of BCS transcripts, the Chamber recalls that this objection has been specifically considered and addressed in previous decisions of this Chamber.²² As it has in the past, the Chamber again considers that the Defence has access to the BCS audio record for all of the proffered testimony and is able to identify relevant segments of this audio from referencing the tendered English transcripts. For these reasons the Chamber finds that the Accused is not prejudiced by a lack of BCS transcripts.

(b) Admissibility Pursuant to Rule 89 (C) of the Rules

11. The proffered evidence of each of the Witnesses concerns the alleged detention and execution of Bosnian Muslims from Srebrenica and is therefore relevant to Counts 2 through 8 of the Indictment. In particular, the Chamber considers that the evidence of Mitar Lazarević is relevant to scheduled incidents E8.1 and E8.2; the evidence of Marko Milošević is relevant to scheduled incidents E7.1 and E7.2; the evidence of Slavko Perić is relevant to scheduled incidents E9.1 and E9.2; the evidence of Lazar Ristić is relevant to scheduled incidents E6.1 and E6.2; and the evidence of Mile Simanić is relevant to scheduled incident E.3. The Chamber notes, however, that the majority of the proffered evidence for Ljubomir Mitrović is beyond the scope of the subject matter indicated for this witness in the Prosecution's Witness List as well as what the Motion submits is the focus of his evidence.²³ The Chamber finds in this respect that only Mitrović's testimony concerning the alleged preparations made at Batković prison for the arrival of 1,300 Bosnian Muslims, discussed at transcript pages 15183:10 up to and including 15185:15 as well as pages 15209:7 up to and including 15210:20, is sufficiently relevant for purposes of admission.

12. With regard to the Defence's general submission that the cross-examinations of the Witnesses during their previous testimony are inadequate because they were conducted by different Defence teams and a self-represented accused, the Chamber notes that the Defence has not made a specific objection in this respect or demonstrated in any way that the nature or source of the proffered evidence renders it unreliable or that its prejudicial effect outweighs its probative value. For these reasons, the Chamber dismisses this objection.

²¹ T. 528.

²² See, e.g. Decision on Third 92 *bis* Motion, para. 13; Decision on Prosecution Fifth Motion to Admit Evidence Pursuant to Rule 92*bis*: Sarajevo Witnesses, 11 January 2013, para. 9.

²³ See Prosecution Witness List, 10 February 2012 (Confidential), pp. 349-350; Motion, para. 29.

13. The Chamber notes that the testimony of each witness was given under oath and subjected to cross-examination. Absent a showing of unreliability, and with the exception of Ljubomir Mitrović's testimony discussed above, the Chamber considers the proffered evidence to be relevant to and probative of the crimes charged in the Indictment. Therefore, the Chamber finds that the requirements set out in Rule 89 (C) of the Rules have been met for all of the proffered evidence except that of Ljubomir Mitrović, for which the Chamber will provisionally admit only the relevant excerpts of the proffered evidence as identified above, pending notification by the Prosecution whether it would instead call the witness to testify.

(c) Admissibility Pursuant to Rule 92 bis of the Rules

14. As a preliminary matter, since the Chamber has found only excerpts of Mitrović's proffered testimony to be admissible pursuant to Rule 89 (C), it will consider the admissibility requirements of Rule 92 bis and the related party submissions only as they relate to these excerpts. Therefore, the Chamber considers the Defence submission with regard to Mitrović's testimony going to proof of the acts and conduct of the Accused to be moot as it concerns portions of his testimony that the Chamber has already found to be inadmissible.

15. In determining whether or not to admit the proffered evidence pursuant to Rule 92 bis, the Chamber considers as a factor weighing in favour of admission that the evidence of Mitar Lazarević, Marko Milošević, and Mile Simanić concerns in part the relevant military background of the Drina Corps and Zvornik Brigade. The Chamber also considers as a factor weighing in favour of admission that the evidence of several of the Witnesses is cumulative with respect to other oral evidence.²⁴

16. With regard to the Defence's submission that eye-witness testimony relating to the crime-base goes to critical and live issues and is therefore inappropriate for admission pursuant to Rule 92 bis, the Chamber first notes that the Defence's general submission does not provide any factual support or analysis concerning the nature of the proffered evidence. Second, the Chamber notes that crime-base evidence is precisely the type of evidence Rule 92 bis was primarily intended to address.²⁵ Third, the Chamber considers that while the proffered evidence relates to the crime base and goes to important issues, it cannot be considered critical to the Prosecution's case so as to

²⁴ The proffered evidence of Mitar Lazarević is cumulative with respect to the oral evidence of witnesses including Srećko Aćimović. The proffered evidence of Marko Milošević is cumulative with respect to the oral evidence of Witness RM-253. The proffered evidence of Slavko Perić is cumulative with respect to the oral evidence of Witnesses Dražen Erdemović and RM-346. The proffered evidence of Ljubomir Mitrović is cumulative with respect to the anticipated oral evidence of Milenko Todorović. The proffered evidence of Lazar Ristić is cumulative with respect to the oral evidence of Witnesses including RM-322.

²⁵ *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-AR73.2, Decision on Interlocutory Appeal Concerning Rule 92bis(c), 7 June 2002, paras 13-16.

weigh against admission pursuant to Rule 92 *bis* because it is to a large extent cumulative with similar existing and anticipated evidence.

17. With regard to the Defence's submission that the proffered evidence contains "extreme hearsay," and should therefore be subjected to cross-examination, the Chamber takes this opportunity to emphasise, as it has in previous decisions on the matter, that hearsay evidence is admissible before the Tribunal and that any weight to be attributed to such evidence will be assessed in light of all the evidence before the Chamber.²⁶ With regard to the question of hearsay, the Defence has not shown, nor does the Chamber find, that the presence of hearsay evidence means that the nature or source of the proffered evidence renders it unreliable or prejudicial.

18. Having taken all of the above factors into consideration, the Chamber finds that the proffered evidence of witnesses Mitar Lazarević, Marko Milošević, Lazar Ristić, Slavko Perić, Mile Simanić, and the aforementioned portions of Ljubomir Mitrović's previous testimony, are admissible pursuant to Rule 92 *bis*.

(d) Admissibility of the Associated Exhibits

19. With regard to the admissibility of the associated exhibits tendered through witnesses Mitar Lazarević, Marko Milošević, Lazar Ristić, Slavko Perić, and Mile Simanić, the Chamber finds that the exhibits were discussed with the witnesses during their testimony and that each exhibit forms an inseparable and indispensable part of that testimony. The Chamber, therefore, finds that the requirements for admission have been met with respect to the associated exhibits proffered through these witnesses. With regard to the associated exhibits tendered through witness Ljubomir Mitrović, the Chamber notes that none of the exhibits were used with the witness during the aforementioned portions of his previous testimony. For this reason, the Chamber finds that the associated exhibits tendered through Mitrović do not form an inseparable and indispensable part of that testimony and are, therefore, inadmissible pursuant to Rule 92 *bis*.

²⁶ See *Prosecutor v. Aleksovski*, Case No. IT-95-14-T, Decision on Prosecutor's Appeal on Admissibility of Evidence, 16 February 1999, para. 15; Decision on Prosecution's Seventh Motion to Admit Evidence Pursuant to Rule 92BIS, 6 February 2013, para. 14.

V. DISPOSITION

20. For the foregoing reasons, pursuant to Rules 54, 89, and 92 *bis* of the Rules, the Chamber **GRANTS** the Prosecution request to exceed the word limit in its Motion;

GRANTS the Motion **IN PART**;

With respect to

(i) Mitar Lazarević

ADMITS into evidence **UNDER SEAL** the following:

- a) the tendered transcript excerpts from the *Popović et al.* case: T. 13356:4 – T.13356:6, T. 13357:1 – T. 13363:17, T. 13364:4 – T. 13365:14, T. 13365:21 – T. 13368:3, T. 13372:2 – T. 13380:14, T. 13381:10 – T. 13382:14, T. 13388:11 – T. 13389:15, T. 13393:2 – T. 13393:20, T. 13393:25 – T. 13394:23, T. 13395:2 – T. 13395:6, T. 13395:12 – T. 13396:10, T. 13396:17 – T. 13397:14, T. 13398:14 – T. 13399:1, T. 13399:19 – T. 13400:5, T. 13400:13 – T. 13400:17;
- b) the tendered transcript excerpts from the *Tolimir* case: T. 8511:1 – T. 8511:3, T. 8515:10 – T. 8517:13, T. 8518:6 – T. 8521:6, T. 8521:10 – T. 8521:24, T. 8522:17 – T. 8523:24, T. 8524:23 – T. 8525:17, T. 8525:24 – T. 8529:22, T. 8530:5 – T. 8530:7, T. 8530:11 – T. 8531:6, T. 8531:10 – T. 8533:18, T. 8533:11 – T. 8533:18;

ADMITS into evidence the following:

- c) 65 *ter* number 05248, photos of Ročević school;
- d) 65 *ter* number 04288, Zvornik Brigade attendance records;

(ii) Marko Milošević

ADMITS into evidence the following:

- a) the tendered transcript excerpts from the *Popović et al.* case: T. 13295:25 – T. 13299:19, T. 13299:21 – T. 13302:24, T. 13303:4 – T. 13304:20, T. 13305:2 – T. 13309:17, T. 13318:8 – T. 13318:13, T. 13319:10 – T. 13319:13, T. 13333:11 – T. 13334:7, T. 13341:17 – T. 13342:14, T. 13345:12 – T. 13347:17, T. 13348:10 – T. 13349:9;
- b) 65 *ter* number 25635, aerial picture of Petkovci;

c) 65 *ter* number 25636, aerial picture of Petkovci;

(iii) Ljubomir Mitrović

Provisionally **ADMITS** into evidence the following excerpts of the witness's testimony in the *Tolimir* case: T. 15183:10 – T. 15185:15 and T. 15209:7 – 15210:20, pending notification by the Prosecution within two weeks from the date of this decision, whether it would instead call Ljubomir Mitrović to testify;

DENIES without prejudice the admission into evidence of the remaining portions of Ljubomir Mitrović's previous testimony in the *Tolimir* case as well as the proffered associated exhibits;²⁷

(iv) Slavko Perić

ADMITS into evidence **UNDER SEAL** the following:

- a) the tendered transcript excerpts from the *Popović et al.* case: T. 11360:6 – T. 11360:8, T. 11364:15 – T. 11365:21, T. 11366:15 – T. 11372:22, T. 11373:10 – T. 11378:14, T. 11378:23 – T. 11385:21, T. 11386:16 – T. 11386:22, T. 11387:11 – T. 11388:16, T. 11389:18 – T. 11390:5, T. 11390:24 – T. 11394:8, T. 11394:16 – T. 11402:18, T. 11403:24 – T. 11407:4, T. 11407:19 – T. 11409:6, T. 11409:14 – T. 11411:17, T. 11413:4 – T. 11414:7, T. 11414:11 – T. 11418:17, T. 11429:23 – T. 11430:5, T. 11432:15 – T. 11437:15;

ADMITS into evidence the following:

- b) 65 *ter* number 05633, notebook entry for 1991;

(v) Lazar Ristić

ADMITS into evidence the following:

- a) the tendered transcript excerpts from the *Popović et al.* case: T. 10032:25 – T. 10033:1, T. 10033:10 – T. 10033:12, T. 10033:14 – T. 10036:15, T. 10036:19 – T. 10037:3, T. 10037:9 – T. 10037:14, T. 10037:15 – T. 10039:12, T. 10039:22 – T. 10049:13, T. 10040:6 – T. 10049:15, T. 10050:12 – T. 10050:15, T. 10051:3 – T. 10059:8, T. 10058:10 – T. 10062:19, T. 10063:1 – T. 10064:9, T. 10067:9 – T. 10077:4, T. 10077:10 – T. 10078:22, T. 10080:15 – T. 10081:18, T. 10081:21 – T. 10089:22,

²⁷ The Chamber notes that the document bearing Rule 65 *ter* number 23863 was admitted on 9 September 2013 through witness Richard Butler and, therefore, the Chamber considers its tendering through witness Ljubomir Mitrović to be moot.

T. 10090:1 – T. 10092:3, T. 10100:17 – T. 10101:13, T. 10102:3 – T. 10102:17,
 T. 10103:22 – T. 10106:5, T. 10107:3 – T. 10107:7, T. 10107:14 – T. 10107:22,
 T. 10203:23 – T. 10204:15, T. 10204:23 – T. 10205:10;

- b) the tendered transcript excerpts from the *Tolimir* case: T. 9235:2 – T. 9235:4, T. 9249:20 – T. 9256:21, T. 9257:10 – T. 9258:14, T. 9263:3 – T. 9263:17, T. 9283:3 – T. 9284:20, T. 9300:8 – T. 9301:15, T. 9314:17 – T. 9316:24, T. 9317:11 – T. 9317:21;
- c) ERN 0679-8011, photograph of Orahovac school;
- d) ERN 0679-8012, photograph of Orahovac school;
- e) ERN 0679-8013, photograph of Orahovac school;
- f) ERN 0679-8014, photograph of Orahovac school;
- g) ERN 0679-8015, photograph of field near Orahovac school;

(iv) Mile Simanić

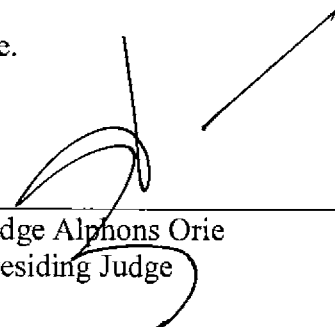
ADMITS into evidence the following;

- a) the tendered transcript excerpts from the *Popović et al.* case: T. 14617:8 – T. 14617:10, T. 14618:3 – T. 14619:11, T. 14619:15 – T. 14628:2, T. 14628:24 – T. 14634:15, T. 14634:25 – T. 14636:18, T. 14637:5 – T. 14639:17, T. 14639:23 – T. 14640:24, T. 14641:16 – T. 14646:4, T. 14646:19 – T. 14646:23, T. 14647:6 – T. 14648:18, T. 14649:5 – T. 14653:7, T. 14657:10 – T. 14657:19, T. 14660:17 – T. 14661:2, T. 14661:16 – T. 14663:7, T. 14665:14 – T. 14665:25;
- b) 65 *ter* number 05520, combat report;

INSTRUCTS the Prosecution within two weeks of the date of this decision to upload into eCourt all of the above admitted materials and inform the Chamber and the Defence whether it will call Ljubomir Mitrović to testify; and

REQUESTS the Registry to assign exhibit numbers to the documents admitted and inform the parties and the Chamber of the numbers so assigned.

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



Judge Alphons Orie
Presiding Judge

Dated this fourth day of October 2013
At The Hague
The Netherlands

[Seal of the Tribunal]