

IT-09-92-T
D74948-D74941
12 December 2013

74948
dlc

**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: 12 December 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: 12 December 2013

PROSECUTOR

v.

RATKO MLADIĆ

PUBLIC

**DECISION ON PROSECUTION'S 36TH MOTION
TO ADMIT THE EVIDENCE OF RM093 PURSUANT TO RULE
92 *BIS***

Office of the Prosecutor
Mr Dermot Groome
Mr Peter McCloskey

Counsel for Ratko Mladić
Mr Branko Lukić
Mr Miodrag Stojanović

I. PROCEDURAL HISTORY AND SUBMISSIONS OF THE PARTIES

1. On 29 August 2013, the Prosecution filed its 36th motion pursuant to Rule 92 *bis* ("Motion") of the Tribunal's Rules of Procedure and Evidence ("Rules") requesting the admission into evidence of Witness RM-093's statement and transcript excerpts of previous testimony in the *Prosecutor v. Stanišić and Župljanin*, Case No. IT-08-91-T, and the *Prosecutor v. Radoslav Brđanin*, Case No. IT-99-36-T.¹ The Prosecution also tenders 16 associated exhibits and one concordance chart into evidence, and seeks the addition of 4 of the proposed exhibits to its Rule 65 *ter* exhibit list.² On 13 September 2013, the Defence requested additional time to respond to the Motion, which the Chamber granted on 18 September 2013.³ On 14 October 2013, the Defence filed its response ("Response"), requesting that the Chamber denies the Motion in its entirety.⁴

II. APPLICABLE LAW

2. The Chamber recalls and refers to the applicable law governing the admission of evidence pursuant to Rule 92 *bis* of the Rules and the admission of associated exhibits, as set out in previous decisions.⁵ The Chamber also recalls and refers to the applicable law governing additions to the Rule 65 *ter* exhibit list, as set out in a previous decision.⁶

III. DISCUSSION

(a) Preliminary Matters

3. The Chamber notes that Witness RM-093's statement dated 12 October 2002 ("Statement") was submitted without a corresponding declaration required pursuant to Rule 92 *bis* (B) of the Rules. However, while testifying in the *Stanišić and Župljanin* case, the witness attested to the

¹ Prosecution 36th Motion to Admit the Evidence of RM093 Pursuant to Rule 92*bis*, 29 August 2013 (Confidential, with confidential Annexes A and B). For details of the Prosecution's submissions, the Chamber refers to the Motion.

² Motion, paras 14, 16-18, and Annex-A. The Chamber notes that while only 16 associated exhibits are listed in Annex A, the Prosecution according to para. 18 of the Motion also requests admission of a concordance chart.

³ Defence Motion to Enlarge Time to Respond to Prosecution 36th Motion to Admit Evidence Pursuant to Rule 92*bis*: RM093, 13 September 2013 (Confidential); T. 17022.

⁴ Defence Response to Prosecution 36th Motion to Admit the Evidence Pursuant to Rule 92*bis*, 14 October 2013 (Confidential). For further details of the Defence submissions, the Chamber refers to the Response.

⁵ Decision on Prosecution Third Motion to Admit Evidence Pursuant to Rule 92 *bis*: Sarajevo Witnesses, 19 October 2012, paras 5-7; Decision on Prosecution Motion to Admit the Evidence of Witness RM-266 Pursuant to Rule 92 *quater*, 23 July 2012, para. 13. See also T. 5601-5604; Decision on Prosecution's Motion for Reconsideration, Granting Admission from the Bar Table, or Certification in relation to Decision Regarding Associated Exhibits of Witness Tucker, 7 February 2013, para. 8.

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

accuracy of the Statement.⁷ The Chamber finds, in accordance with a previous decision, that such an in-court attestation, which was not specifically challenged by the Defence, meets the requirements of Rule 92 *bis* (B) of the Rules.⁸

4. The Chamber has reviewed the selected portions of Witness RM-093's prior testimony in light of its guidance on the admission of transcript evidence under Rule 92 *bis* of the Rules.⁹ Considering that the Prosecution tenders focussed and limited portions of prior testimony that supplement the evidence in the Statement, the Chamber finds that the Prosecution has complied with this guidance.

5. With respect to its guidance on the tendering of associated exhibits, the Chamber notes that the number of tendered associated exhibits, totalling 16, is higher than the Chamber's expressed preference.¹⁰ However, considering the concise, uncomplicated nature of most of the associated exhibits, the Chamber in the present case will permit this deviation from its guidance. Two of the proposed associated exhibits, however, are particularly lengthy and are discussed in more detail below.¹¹

6. Finally, the Chamber notes that the protective measures granted to the witness in the *Prosecutor v. Radoslav Brđanin* case have not been rescinded, varied, or augmented, therefore, continue to apply in this case pursuant to Rule 75 (F) (i) of the Rules.

(b) Addition to Rule 65 *ter* Exhibit List

7. The Prosecution seeks to add four exhibits relating to Witness RM-093 to its Rule 65 *ter* exhibit list, namely one video, two pseudonym sheets that identify Witness RM-093 as the witness who testified in the *Brđanin* and *Stanišić and Župljanin* cases, and one concordance chart prepared for the purpose of assisting the Chamber in linking particular exhibits to the witness's evidence.¹² The Chamber notes that the Prosecution has not demonstrated good cause why the addition to the exhibit list of these proposed exhibits could not have been requested at an earlier stage. However, only the video contains substantive evidence and the Chamber finds that the content, *i.e.* the recording of a military celebration, is *prima facie* relevant and of probative value to the charges in the Indictment. Considering the limited length of the footage, and the fact that the video does not raise substantially new issues different from those for which the Accused has previously been on

⁷ *Prosecutor v. Stanišić and Župljanin*, T. 9017-9018, 9084-9085.

⁸ Decision on Prosecution Fourth Motion to Admit Evidence Pursuant to Rule 92 *bis*: Hostage Witnesses, 19 October 2012, para. 7.

⁹ T. 106-110, 137-138, 315-325, 525-532.

¹⁰ T. 108-109, 137-138.

¹¹ *Infra*, paras 12-13.

notice on the basis of documents already on the Rule 65 *ter* exhibit list, the Chamber finds that its addition will not unduly burden the Defence. Under these circumstances the Chamber considers the Defence's objection as to the fairness of the trial misplaced,¹³ and finds that it is in the interests of justice to add the documents to the Rule 65 *ter* exhibit list.

(c) Relevance and Probative Value

8. With respect to the relevance of the evidence proffered through Witness RM-093, the Defence submits, without further specifications, that the testimony is about crimes not charged in the indictment and that, therefore, large sections are irrelevant for the present case.¹⁴ The Chamber notes that the Statement as well as the previous testimonies of the witness concern the organization, mobilization, and activities of the JNA, VRS and TO, leading up to and including the start of the Indictment period in 1991/1992. Furthermore, the evidence goes to proof of the political background to the charges in the Indictment, including, *inter alia*, meetings between high-ranking civilian and military officials during this time. The Chamber, therefore, finds that the evidence of Witness RM-093 relates to Counts 1 (Genocide) and 3 through 8 (Persecutions, Extermination, Murder, Deportation, Inhumane Acts) of the Indictment, thus considers it relevant pursuant to Rule 89 (C) of the Rules.

9. With regard to probative value, the Defence has identified a number of passages in the Statement where the witness allegedly provides unqualified expert opinion.¹⁵ In this respect, the Chamber finds that this characterisation for most of the indicated passages is mistaken and that in others the witness has provided in the Statement the basis of the expressed opinion or conclusion. In the latter instances, the Chamber will take into consideration the nature of the respective parts of the Statement and the provided basis of knowledge when deciding whether to follow such conclusions and opinions. Furthermore, with respect to those portions of the Statement containing opinions and conclusions for which the witness has not provided any basis,¹⁶ the Chamber finds that there is no need to redact them, but considers those conclusions or opinions as unsupported and un-sourced, and will determine the weight, if any, to be attributed to them.¹⁷

10. The Chamber further notes that other portions of the Statement, as indicated by the Defence, are based on hearsay and recalls that hearsay evidence is admissible and that the weight to be

¹² Motion, paras 16-18.

¹³ Response, para. 15.

¹⁴ Response, para. 20.

¹⁵ Response, para. 12.

¹⁶ See e.g. Statement, p. 6, para. 2 ("Even though I did not attend this meeting [...] 5th Corps"), p. 8, para. 2 ("I think that [...] be killed"), and p. 14, para. 3 ("I don't remember [...] detachment list").

attributed to it will be assessed in light of all the evidences before it.¹⁸ Therefore, there is no need to redact the relevant portions of the Statement identified by the Defence. Having taken all of the above factors into consideration, the Chamber is satisfied that the proffered evidence has probative value, and meets the requirements of Rule 89 (C) of the Rules.

(d) Admissibility pursuant to Rule 92 bis of the Rules

11. With regard to admissibility 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 Chamber considers that the proposed evidence concerns the crime base and relates to political and military background and that the evidence is cumulative to that of other witnesses who have already provided testimony in the case.¹⁹ With respect to the Defence's general submission that the Witness during the previous testimonies was not cross-examined in a manner consistent with the right of the Accused to confront the evidence against him,²⁰ the Chamber notes that the witness was extensively cross-examined in the *Brđanin* and *Stanišić and Župljanin* cases²¹, and 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. Therefore, the Chamber finds that there are no factors which make it appropriate for the witness to appear for cross-examination in this trial and concludes that the tendered evidence is admissible pursuant to Rule 92 bis of the Rules.

(e) Associated Exhibits

12. With respect to two of the proposed associated exhibits, the Chamber recalls its guidance that it expects the parties to tender only the portion of a lengthy report or book on which it seeks to rely.²² Rule 65 ter number 08656A, is a 400-page document entitled "TO Workbook" ("Workbook") authored by the witness. The Chamber notes that the Statement only makes reference to limited portions of the Workbook. Furthermore, the Chamber notes that in numerous instances the Statement literally reproduces the relevant Workbook entries. In these instances, the Chamber does not consider it necessary to admit these portions of the Workbook into evidence in

¹⁷ Decision with regard to Prosecution Motion for Admission into Evidence of Witness Harland's Statement and Associated Documents, 3 July 2012, para. 8.

¹⁸ Such a passage can be found, for instance, at Statement, p. 35, para. 2. See also the Chamber's reasoning on this matter in: Decision on Prosecution's Seventh Motion to Admit Evidence Pursuant to Rule 92 bis, 6 February 2013, para. 14.

¹⁹ Witness RM 093's proposed evidence is cumulative to the oral evidence of Osman Selak (T. 2963-3035, 3097-3123, 3130-3216) and, in part, RM-511 (e.g. T. 5015-5040).

²⁰ Response, para. 19.

²¹ See *Prosecutor v. Stanišić and Župljanin*, T-9084-9123, and *Prosecutor v. Radoslav Brđanin*, T. 15592-15771.

²² T. 106.

order to understand the respective parts of the Statement. The Chamber, therefore, will deny the admission of the Workbook without prejudice and invites the Prosecution to identify the specific portions of the Workbook, if any, that it considers form an indispensable and inseparable part of the witness's evidence, and to re-tender these portions.

13. The second lengthy document, Rule 65 *ter* number 06926, is a 50-page document — a publication in the Official Gazette of decisions adopted at meetings of the ARK in the period of May and the beginning of June 1992 — of which only one page is referred to by the witness in the Statement. On this page, namely the page bearing English ERN 0088-2929, the witness establishes only that “point 5 concerning the enrollment in school, is exactly as I wrote in my workbook” and thereby refers to a phrase from his Workbook which is reproduced on the same page of his Statement reading “Enrollment in schools is delayed until August all employed who satisfy the requirements [sic]”.²³ Therefore, it is not necessary to admit this page of the document into evidence in order to properly comprehend the Statement. The Chamber, therefore, denies admission of Rule 65 *ter* number 06926.

14. With regard to the documents bearing Rule 65 *ter* numbers 09836, 16846, 11667, and 28414, the Chamber notes that the witness, neither in the Statement nor in the submitted portions of the transcripts, made mention of them.²⁴ They, therefore, do not form an inseparable and indispensable part of the witness's evidence, and are inadmissible pursuant to Rule 92 *bis* of the Rules.

15. Concerning the documents bearing Rule 65 *ter* numbers 03759, 07137, 16600, 06901, the Chamber notes that beyond confirmation of the content of the documents put to the witness, or confirmation that the content of a document coincides with a specific entry contained in the Workbook reproduced in the testimony, the Witness did not provide any actual explanations or comments on the documents' contents.²⁵ As such, these documents do not form an inseparable and indispensable part of the Statement.

²³ Statement, p. 24.

²⁴ The Chamber notes that none of the transcript pages on which these exhibits were allegedly discussed according to Annex A of the Motion, were submitted by the Prosecution.

²⁵ See e.g. *Prosecutor v. Radoslav Brđanin*, T. 15470-15471 and T. 15675-15676. The Chamber notes that the Prosecution's reference in Annex A of the Motion to the transcript pages where the proposed associated exhibit bearing the Rule 65 *ter* number 07137 was allegedly discussed in the *Brđanin* case, is incorrect. Instead of T. 15762-15763, it should be 15470-15471. The Chamber further notes that the Prosecution has not submitted all the transcript pages from the *Brđanin* case it refers to in relation to exhibit Rule 65 *ter* 16600 (i.e. “T. 765-66”). Moreover, in relation to the associated exhibit bearing Rule 65 *ter* number 06901, the Prosecution's reference to some of the transcript pages (i.e. “T. 15394-399”) is erroneous, since the document is not mentioned there.

16. As to the remaining associated exhibits, the Chamber notes that the content of each of them was discussed by the Witness and that without them the respective portions of the Statement and transcript excerpts would be incomprehensible and of less probative value. For this reason, the Chamber finds that these associated exhibits form an inseparable and indispensable part of the witness's testimony and that, therefore, the requirements for admission have been met.

IV. DISPOSITION

17. For the foregoing reasons, pursuant to Rules 54, 89, and 92 *bis* of the Rules, the Chamber **GRANTS** the Prosecution's request to add the four documents identified in paragraphs 16-18 of the Motion to the Rule 65 *ter* exhibit List;

GRANTS the Motion **IN PART**;

ADMITS into evidence **UNDER SEAL**

- i) Witness RM-093's written statement dated 12 October 2002, as included in Annex B of the Motion, bearing English ERN 0112-0953-0112-0999.
- ii) Excerpts of testimony of witness RM-093 in *Prosecutor v. Radoslav Brđanin*, Case No. IT-99-36-T, dated 6 to 13 March 2003: T. 15273:10-18; 15278:23-15279:1, 15279: 9-20; 15285:1-9; 15286:18-19; 15289:12-23; 15290:1-2; 15292:14-16; 15292:22-25; 15293:1-20; 15294:5-14; 15311:2-22; 15316:10-15317:11; 15353:3-15354:13; 15356:6-15359:21; 15373:3-19; 15385:21-15387:24; 15393:17-15394:1; 15394:20-15395:24; 15396:9-15399:17;²⁶ 15412:15-23; 15413:12-23; 15452:23-25; 15455:22-15456:1; 15457:14-15458:1; 15466:18-15471:14; 15472:2-15474:8; 15490:7-17; 15494:16-15495:9; 15496:5-17; 15497:7-15498:1; 15519:12-15520:12; 15529:21-15534:14; 15535:10-23; 15538:16-15539:2; 15557:5-15558:12; 15559:7-15561:12; 15562:22-15563:10; 15569:8-15571:11; 15572:10-25; 15573:4-6; 15573:19-24; 15574:3-15575:10; 15576:2-4; 15576:19-15577:9; 15578:7-22; 15579:4-16; 15579:21-15580:6; 15580:13-15581:5; 15592:25-15593:3; 15672:23-15673:10; 15675:10-15676:4; 15729:4-21; 15750:18-15752:12; 15760:5-15761:19; 15765:1-17; 15771:10-20;
- iii) Excerpts of testimony of witness RM-093 in *Prosecutor v. Stanišić and Župljanin*, Case No. IT-08-91-T, dated 20 to 22 April 2010: T. 8933:2-8936:4; 8937:6-8938:21; 8958:16-

20;²⁷ 8959:11-16; 8964:10-12; 8965:4-11; 8966:9-14; 8976:4-8977:10; 8980:1-8981:14; 9011:11-12; 9012:3-9016:1; 9017:25-9018:4; 9084:2-9085:20; 9122:17-9123:9;

- iv) Pseudonym Sheet (*Brdanin*) bearing Eng ERN 0680-5346-0680-5346;
- v) Pseudonym Sheet (*Stanišić and Župljanin*) bearing Eng ERN 0679-8109-0679-8109;

ADMITS into evidence:

- vi) Video exhibit bearing English ERN V000-3908-1-A and Video transcript bearing English ERN L007-7076-L007-7081;
- vii) The associated exhibits bearing Rule 65 *ter* numbers 16140, 08015, and 16597;
- viii) The concordance chart for RM-093 as included in Annex A of the Motion;

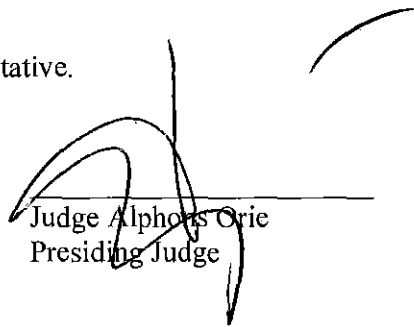
DENIES WITHOUT PREJUDICE the admission into evidence of the associated exhibit bearing Rule 65 *ter* number 08656A;

DENIES the admission into evidence of the remaining proposed associated exhibits;

INSTRUCTS the Prosecution within two weeks of the date of this decision to upload into eCourt the above admitted materials, to the extent this has not been done already;

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 twelfth day of December 2013
At The Hague
The Netherlands

[Seal of the Tribunal]

²⁶ This transcript reference corresponds to the transcript excerpt submitted by the Prosecution in Annex B of the Motion and replaces the reference "T.15396:9-15370:18" and "T.15397:16-15399:17 erroneously indicated in the list in Annex A of the Motion.

²⁷ This transcript reference was submitted by the Prosecution in Annex B of the Motion, although it is not listed in the transcript references indicated in Annex A of the Motion.