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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-05-87/1-T

Date: 10 February 2009

Original: English

IN TRIAL CHAMBER II

Before: **Judge Kevin Parker, Presiding**
Judge Christoph Flügge
Judge Melville Baird

Registrar: **Mr John Hocking, Acting Registrar**

Decision: **10 February 2009**

PROSECUTOR

v.

VLASTIMIR ĐORĐEVIĆ

PUBLIC

DECISION ON PROSECUTION'S MOTIONS FOR ADMISSION OF EVIDENCE PURSUANT TO RULE 92*ter*

The Office of the Prosecutor:

Mr Chester Stamp
Ms Daniela Kravetz
Mr Matthias Neuner

Counsel for the Accused:

Mr Dragoljub Đorđević
Mr Veljko Đurdić

1. Background

1. Trial Chamber II ("Chamber") of the International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991 ("Tribunal") is seized of the "Prosecution's Motion for Admission of Evidence Pursuant to Rule 92*ter* with Annex A and Confidential Annex B" ("Motion") filed, in part confidentially, on 14 January 2009, whereby the Prosecution seeks the admission of evidence from 61 witnesses and related exhibits, listed in Annex A and confidential Annex B to the Motion, pursuant to Rule 92*ter* of the Rules of Procedure and Evidence ("Rules"). On 26 January 2009, the Prosecution filed the "Prosecution's Motion for the Admission of Witness Nike Peraj's Evidence Pursuant to Rule 92*ter*" ("Motion Regarding Witness Peraj"), whereby it seeks the admission of evidence of Nike Peraj and associated exhibits pursuant to Rule 92*ter*. On 26 January 2009, at the pre-trial conference the Chamber ordered that the witnesses scheduled to testify before the anticipated filing of the Defence response to the Motion would give their evidence in the ordinary manner, with an examination-in-chief.[1] The following witnesses have already testified or are in the course of testifying, in the manner indicated by the Chamber: Veton Surroi, K83, Shyhrete Berisha, Ali Gjogaj, Mustafa Draga(j), Liri Loshi and Lizane Malaj. This Decision will therefore not address the Motion in relation to these witnesses and the Motion will be declared moot in respect of them. On 2 February 2009, the Defence filed "Vlastimir Đorđević's Response to Prosecution's Motion for Admission of Evidence Pursuant to Rule 92*ter* with Annex A and Confidential Annex B and Prosecution's Motion for the Admission of Witness Nike Peraj's Evidence Pursuant to Rule 92*ter*" ("Response"), with a confidential annex, setting out the Defence's objections to part of the Motion.

2. Submissions

2. The Prosecution seeks the admission into evidence, pursuant to Rule 92*ter* of the Rules, of the transcripts of witness testimony given in other cases, witness statements and associated exhibits.[2] The Prosecution submits that these transcripts and statements are relevant and have probative value.[3] It envisages a brief oral examination of each witness in court "to highlight, supplement and clarify" certain aspects of their evidence. The Prosecution submits that it may also ask witnesses to comment on exhibits relating to their evidence.[4] It contends that the exhibits which

[1] Pre-Trial Conference, transcript of hearing, p 139.
[2] Motion, para 2; Motion Regarding Witness Peraj, para 2.
[3] Motion, para 6; Motion Regarding Witness Peraj, para 6.
[4] Motion, para 8; Motion Regarding Witness Peraj, para 10.

it seeks to have admitted into evidence form an inseparable part of the witnesses' evidence.[5] The Prosecution also seeks leave to amend its Rule 65*ter* list of exhibits by adding some proposed exhibits relating to these witnesses.[6] The Prosecution also requests that the designation of the witness Nike Peraj as a "live" witness on its list of witnesses under Rule 65*ter* be amended to "live/92*ter*".[7]

3. The Defence does not oppose the application of Rule 92*ter* to the testimony of Nike Peraj and most of the witnesses to whom the Motion relates, save eight in respect of whom the Defence makes specific objections, to be discussed later in this Decision.[8] The Defence requests that it be allowed ample time for cross-examination of witnesses testifying pursuant to the Rule.[9] It seeks the postponement by at least one week of the testimony of Rule 92*ter* witnesses already announced by the Prosecution in its notifications of the order of witnesses to testify in the coming weeks.[10] The Defence also requests that the Chamber decide on the admission into evidence of the Prosecution's proposed exhibits relating to the testimony of its Rule 92*ter* witnesses in the course of these witnesses' testimony.[11]

3. Law

4. Rule 92 *ter* provides:

> (A) A Trial Chamber may admit, in whole or in part, the evidence of a witness in the form of a written statement or transcript of evidence given by a witness in proceedings before the Tribunal, 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
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> (iii) the witness attests that the written statement or transcript accurately reflects that witness' declaration and what the witness would say if examined.
>
> (B) Evidence admitted under paragraph (A) may include evidence that goes to proof of the acts and conduct of the accused as charged in the indictment.

[5] Motion, para 9; Motion Regarding Witness Peraj, para 9.
[6] Motion, para 13.
[7] Motion Regarding Witness Peraj, para 2.
[8] Response, para 3; "Confidential Defence Annex A" to the Response ("Annex to the Response").
[9] Response, para 3.
[10] Response, para 5.
[11] Response, paras 6-9.

5. Although Rule 92 *ter* does not govern the admission of exhibits, the Tribunal's case law allows for it where the exhibits accompany written statements or transcripts.[12] In order to be admitted, the exhibits must form an "inseparable and indispensable part" of the witness's testimony.[13] In order to satisfy this requirement the witness's testimony must actually discuss the document, and the document must be one without which the witness's testimony would become incomprehensible or of lesser probative value.[14]

6. The evidence sought to be admitted pursuant to Rule 92 *ter*, whether a written statement or a transcript of oral testimony, must also fulfill the general requirements of admissibility.[15] That is, the proposed evidence must be relevant and have probative value, and the probative value must not be substantially outweighed by the need to ensure a fair trial.[16]

4. Discussion

7. The evidence proposed for admission pursuant to Rule 92*ter* in the Motion and the Motion Regarding Witness Peraj consists of witness statements and transcripts of testimony given by witnesses in the cases of *Prosecutor v. Milan Milutinović et al.* and *Prosecutor v. Slobodan Milošević*, as well as exhibits admitted in the course of these witnesses' testimony or otherwise related to them.

8. The proposed evidence of the following witnesses is relevant primarily to one or more count(s) of the Indictment: Mehmet Avdyli, Nazalie Bala, Xhafer Beqiraj, Hazir Berisha, Fatos Bogujevci, Sandra Bogujevci, Bajram Bucaliu, Dreni Čaka, Shyhrete Dula, Shukri Gerxhaliu, Florije Gjota, Mahmut Halimi, Ibush Ibishi, Emin Kabashi, Tahir Kelmendi, Ndrec Konaj, Beqir Krasniqi, Hazbi Loku, Avdyl Mazreku, Sami Parashumti, Lufti Ramadani, Boško Radojković,

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[12] *See Prosecutor v. Milan Lukić and Sredoje Lukić*, Case No.: IT-98-32/1-T, "Decision on Confidential Prosecution Motion for the Admission of Prior Testimony with Associated Exhibits and Written Statements of Witnesses Pursuant to Rule 92 *ter*", 9 July 2008, ("*Lukić and Lukić* Decision), para 15; *Prosecutor v. Dragomir Milošević*, Case No.: IT-98-29/1-T, "Decision on Admission of Written Statements, Transcripts and Associated Exhibits Pursuant to Rule 92 *bis*", 22 February 2007, ("*Milošević* Decision"), para 23.

[13] *Lukić and Lukić* Decision, para 15; *See* also *Milošević* Decision, para 23; *Prosecutor v. Paško Ljubičić*, Case No.: IT-00-41-PT, "Decision on Prosecution's Motion for Admission of Transcripts Pursuant to Rule 92 *bis* (D) of the Rules", 23 January 2004, p 3; *Prosecutor v. Mladen Naletilić and Vinko Martinović*, Case No.: IT-98-34-PT, "Decision Regarding Prosecutor's Notice of Intent to Offer Transcripts Under Rule 92 *bis* (D)", 9 July 2001, para 8.

[14] *Lukić and Lukić* Decision, para 15; *Prosecutor v. Jovica Stanišić and Franko Simatović*, Case No.: IT-03-69-T, "Decision on Prosecution's Motion for the Admission of Written Evidence of Witness Slobodan Lazarević Pursuant to Rule 92 *ter* with Confidential Annex", 16 May 2008, para 19; *Prosecutor v. Astrit Haraquja and Bajrush Morina*, Case No.: IT-04-84-R77.4, "Decision on Prosecution Motion for Admission of Evidence Pursuant to Rule 92 *bis* and/or 92 *ter*", 2 September 2008, ("*Haraqija and Morina* Decision"), para 12.

[15] *Lukić and Lukić* Decision, para 20; *Haraqija and Morina* Decision, para 13.

[16] Rule 89 (C) and (D) of the Rules.

Sadije Sadiku, Abdylhaqim Shaqiri, John Paul Sweeney, Fedrije Xhafa and K20.[17] The proffered evidence of the following witnesses appears relevant primarily to the Accused's alleged individual criminal responsibility under Articles 7(1) and/or 7(3) of the Statute of the Tribunal ("Statute"): Zarko Braković, Richard Ciaglinski, John Crosland, Ljubinko Cvetić, Aleksandar Vasiljević, Karol John Drewienkiewicz, Caslav Golubović, Joseph Omer Michel Maisonneuve, Bozidar Protić, Goran Stoparić, Knut Vollebaek, Bislim Zyrapi, K25, K54, K73, K79, K82, K84, K86, K87, K88, K89, K90 and Nike Peraj.[18] The proposed evidence of Fred Abrahams, Baton Haxhiu, Adnan Merovci and Jan Kickert is relevant primarily to the background and context for the allegations in the Indictment.[19] The Chamber is satisfied that the proposed evidence of these witnesses is relevant and has probative value.

9. The Defence objects to the admission of evidence from witness Fred Abrahams pursuant to Rule 92*ter*, arguing that the proposed evidence contains a large amount of information and requests that the examination-in-chief of this witness, if ordered by the Chamber, be limited to matters relevant to the Indictment.[20] It is submitted that at the relevant time the witness was a researcher for the Human Rights Watch and gathered information concerning the events in Kosovo.[21] Contrary to the Defence's contention, the proposed evidence of Fred Abrahams appears to be of relevance to the Indictment. Further, the Chamber is not persuaded that, if it were to be accepted that the amount of information contained in the proposed evidence is large, as contended by the Defence, the examination-in-chief of this witness would increase the efficiency of presentation of his evidence and reduce the court time required for his testimony. There is no risk of prejudice to the Defence if the witness is to be heard without an examination-in-chief. In the exercise of its discretion, the Chamber holds that the witness shall be heard pursuant to Rule 92*ter*, subject to the conditions set out therein.

10. The Defence objects to the admission of evidence from witness Ljubinko Cvetić pursuant to Rule 92*ter*, relying on the significance of the proposed evidence to the individual criminal responsibility of the Accused.[22] The proposed evidence of Ljubinko Cvetić focuses, *inter alia*, on the structure of the Serbian Ministry of Internal Affairs ("MUP"), of which the Accused was allegedly Assistant Minister at the relevant time,[23] and reporting chains within the MUP and its various units.[24] The Chamber accepts that the significance of this proposed evidence to the issue of

[17] Annex A and Confidential Annex B to the Motion.
[18] Annex A and Confidential Annex B to the Motion; Motion Regarding Witness Peraj, para 6.
[19] Annex A to the Motion.
[20] Annex to the Response, para 1.
[21] Annex A to the Motion, pp 1-2.
[22] Annex to the Response, para 2.
[23] Indictment, para 6.
[24] Annex A to the Motion, pp 17-18.

individual criminal responsibility is a factor militating against the admission of this evidence pursuant to Rule 92*ter*. The Chamber also notes that the proposed evidence consists of, *inter alia*, Ljubinko Cvetić's testimony given in the case of *Prosecutor v. Milan Milutinović et al.*, which, although relating to alleged crimes similar to those charged in the Indictment, concerns different accused persons, whose alleged positions in the MUP and other political and military bodies were different from that of the Accused in the present case. The examination-in-chief of Ljubinko Cvetić could be of assistance in directing his evidence to matters of direct relevance to the alleged criminal responsibility of the Accused. For these reasons, the Chamber, in the exercise of its discretion, holds that Ljubinko Cvetić shall be heard in the ordinary way with an examination-in-chief and that the Motion shall be denied with respect to his proposed evidence.

11. The Defence objects to the admission of evidence from witness Baton Haxhiu pursuant to Rule 92*ter*, submitting that the witness is expected to provide a lot of information concerning the "Scorched Earth" policy, which, the Defence contends, is a critical element of the Prosecution's case.[25] The proposed evidence of Baton Haxhiu relates to historical and political events in Kosovo from 1991 until April 1999, including a meeting in the summer of 1998 at which a member of the Serb delegation allegedly stated that the Serb forces were ready to implement a plan, referred to as "Scorched Earth", to burn down villages inhabited by ethnic Albanians.[26] The Chamber accepts that the witness' account of the meeting can be of significance to the issues in the Indictment and that it is preferable for the Chamber and the Parties to have opportunity to hear this account in court rather than relying on a written record thereof. However, the proposed evidence of Baton Haxhiu covers a number of other facts, whose nature is such as to make the application of Rule 92*ter* suitable. Therefore, the Chamber is of the view that an examination-in-chief should be conducted in respect of the meeting allegedly attended by the witness in the summer of 1998. The Chamber also finds that the remainder of Baton Haxhiu's proposed evidence is suitable for admission pursuant to Rule 92*ter*, subject to the conditions set out therein, and that the application of this Rule to this part of the proposed evidence will likely reduce the time necessary for the witness' testimony. In the exercise of its discretion, the Chamber will grant the Motion in part in respect of this witness.

12. The Defence objects to the admission of evidence from witness Adnan Merovci pursuant to Rule 92*ter*, submitting that the witness was a personal secretary of Ibrahim Rugova, who is unavailable to testify, and that the proposed evidence of this witness relates to meetings of representatives of the Democratic League of Kosovo ("LDK") with Serb government officials.[27]

[25] Annex to the Response, para 3.
[26] Annex A to the Motion, pp 33-34.
[27] Annex to the Response, para 4.

The Chamber accepts that the unavailability of Ibrahim Rugova to testify, due to his death,[28] gives more significance to the proposed evidence of Adnan Merovci, who allegedly attended some of the meetings together with Rugova. However, there is no suggestion that the Accused attended any of these meetings.[29] The Chamber is not persuaded that the significance of this evidence is such as to require an examination-in-chief of the witness. The Defence will not be prejudiced if matters relating to the meetings allegedly attended by the witness and which the Defence finds to be of significance are only explored in cross-examination. In the exercise of its discretion, the Chamber holds that Adnan Merovci shall be heard pursuant to Rule 92*ter*, subject to the conditions set out therein.

13. The Defence objects to the admission of evidence from witness Aleksandar Vasiljević pursuant to Rule 92*ter*, submitting that his evidence relates to MUP units allegedly subordinated to the Accused and involved in the events in Kosovo and to the Accused's alleged presence in Kosovo. The Defence also contends that conducting an examination-in-chief would allow focusing on matters directly relevant to the alleged criminal responsibility of the Accused, rather than having to deal with a vast amount of information contained in his prior testimony, the relevance of which is less apparent.[30] In addition to the matters referred to by the Defence, the proposed evidence of Aleksandar Vasiljević relates to meetings allegedly attended by the Accused at the relevant time.[31] Similarly to the proposed evidence of Ljubinko Cvetić, discussed earlier, the evidence of Aleksandar Vasiljević is of significance to the alleged individual criminal responsibility of the Accused and it appears that the witness' prior testimony in the case of *Prosecutor v. Milan Milutinović et al.* focused on a number of issues relevant to the alleged responsibility of the accused in that case. An examination-in-chief in respect of Aleksandar Vasiljević could direct his evidence to matters more directly relevant to the Indictment in the present case. In the exercise of its discretion, the Chamber holds that Aleksandar Vasiljević shall be heard in the ordinary way with an examination-in-chief and that the Motion shall be denied with respect to his proposed evidence.

14. The Defence objects to the admission of evidence from witness Bislim Zyrapi pursuant to Rule 92*ter*, submitting that he is the only commander of the Kosovo Liberation Army ("KLA") to testify in this case and his evidence relates to the "critical matter" of the role of the KLA and its tactics.[32] The proffered evidence of Bislim Zyrapi focuses, *inter alia*, on the structure and

[28] *Prosecutor v. Vlastimir Đorđević*, Case No.: IT-05-87/1-T, "Decision on Prosecution's Motion for Admission of Evidence Pursuant to Rule 92*quater*", 5 February 2009, para 21.
[29] Annex A to the Motion, pp 49-50.
[30] Annex to the Response, para 5.
[31] Annex A to the Motion, pp 63-64.
[32] Annex to the Response, para 6.

operational zones of the KLA at the relevant time.[33] This evidence appears to be of significance to the issues of the existence of armed conflict and the individual criminal responsibility of the Accused. The Chamber is, however, not persuaded that the matters which the Defence finds to be of a critical importance in the proposed evidence are such as to require both examination-in-chief and cross-examination. There will be no prejudice to the Defence if these matters are only explored in cross-examination. The Chamber considers that the admission of prior evidence of Bislim Zyrapi will save court time. In the exercise of its discretion, the Chamber will grant the Motion in respect of this witness.

15. The Defence objects to the admission of evidence from witness K84 pursuant to Rule 92*ter*, submitting that this proposed evidence is pivotal to the Prosecution's case in that it concerns the alleged planning and concealment of the crimes charged in the Indictment and the role of the Accused in these processes. The Defence contends that an examination-in-chief would help elicit more information relevant to the present case.[34] The Chamber accepts that the proposed evidence is of significance to the allegations against the Accused and goes to his acts and conduct. Although not on their own precluding the application of Rule 92*ter*, these factors militate against granting the Motion in respect of this witness. The Chamber also agrees with the Defence that the testimony of this witness given in other cases may have not been sufficiently focused on the alleged involvement of the Accused in the acts to which the proposed evidence relates and that an examination-in-chief can be of assistance in clarifying matters regarding that involvement. The Chamber finds that, in the circumstances, even if it were to be accepted that court time could be saved by applying Rule 92*ter* to the proposed evidence of K84, the above considerations militate strongly against granting the Motion in respect of this witness. In the exercise of its discretion, the Chamber will deny the Motion in this part.

16. The Defence objects to the admission of evidence from witness K86 pursuant to Rule 92*ter*, arguing that K86's evidence is pivotal to the Prosecution case as it deals with the Accused's alleged presence in Kosovo at the relevant time and during the Račak incident.[35] The proposed evidence focuses, *inter alia*, on the structure of the MUP and the Accused's alleged involvement in the Račak incident.[36] The Indictment refers to this incident in the context of the Accused's *mens rea* necessary for incurring responsibility under Articles 7(1) and 7(3) of the Statute.[37] The Chamber agrees with the Defence that the proposed evidence of K86 is of significance to the alleged individual criminal responsibility of the Accused. It considers that the testimony given by the

[33] Annex A to the Motion, p 67.
[34] Annex to the Response, para 7.
[35] Annex to the Response, para 8.
[36] Confidential Annex B to the Motion, p 19.

witness in the case of *Prosecutor v. Milan Milutinović et al.* may have been insufficiently focused on issues relevant to the Accused's alleged responsibility. The Chamber is of the view that, even if it prolongs the time of this witness' testimony in the present case, an examination-in-chief could be of assistance to the Chamber and the Parties in obtaining relevant information regarding the important issue of the Accused's alleged involvement in the Račak incident. In the exercise of its discretion, the Chamber will deny the Motion in respect of witness K86.

17. The Defence submits that the appropriate time for the admission into evidence of the Prosecution's proposed exhibits relating to the testimony of its Rule 92*ter* witnesses should be in the course of these witnesses' testimony, rather than in the present Decision.[38] The Prosecution, although seeking their admission pursuant to the Rule at this stage, indicates that it may ask witnesses in court to comment on exhibits relating to their evidence.[39] The Chamber finds this to be the preferable manner in which to deal with the related exhibits. The presence of the relevant witness in court will be of assistance in determining whether the exhibits sought for admission meet the criteria set out in the jurisprudence in relation to Rule 92*ter*.[40]

18. The Defence seeks the postponement by at least one week of the testimony of Rule 92*ter* witnesses already announced by the Prosecution in its notifications of the order of witnesses to testify in the coming weeks.[41] The Chamber accepts that preparation to the cross-examination of a witness testifying in the ordinary manner, with a full examination-in-chief, may differ from preparing to the cross-examination of a Rule 92*ter* witness, whereby the Defence's work is based on written records of testimony given in another proceeding. The Chamber is not, however, persuaded that an additional week is necessary for the Defence's preparation. It notes that the Prosecution indicated its intention to examine witnesses with the application of Rule 92*ter* in its Motion and Motion Regarding Witness Peraj, as well as in its notifications regarding the order of witnesses, provided two weeks before the scheduled testimony. In addition, as discussed earlier, the Defence does not object to the admission of evidence from most of the proposed Rule 92*ter* witnesses and should thus be prepared that the Motion can be granted in respect of these witnesses. The Chamber is of the view that a delay of three working days after the day of this Decision is sufficient for the Defence to prepare for the first and following witnesses to be heard with the application of Rule 92*ter*.

[37] Indictment, para 64 g.
[38] Response, paras 6-9.
[39] Motion, para 8; Motion Regarding Witness Peraj, para 10.
[40] *See supra* para 5.
[41] Response, para 5.

5. Disposition

19. For the foregoing reasons, and pursuant to Rules 89 and 92*ter* of the Rules, the Chamber

GRANTS the Motion and the Motion Regarding Witness Peraj in **PART** in that it:

- **DECIDES** to admit the evidence of the witnesses covered by the Motion and the Motion Regarding Witness Peraj, save the witnesses referred to below, in the form of written statements and transcripts of evidence given by these witnesses in other proceedings, subject to compliance with the conditions stipulated in Rule 92*ter* of the Rules, including that the witnesses be available for cross-examination and questioning by the Judges;

- **GRANTS** leave to the Prosecution to amend its 65*ter* list of witnesses to reflect the current status of witness Nike Peraj and the witnesses in respect of whom the Motion was denied;

- **DECIDES** to admit the evidence of Baton Haxhiu, apart from its part relating to his account of a meeting at which the policy of "Scorched Earth" was allegedly discussed, in the form of written statements and transcripts of evidence given by him in other proceedings, subject to compliance with the conditions stipulated in Rule 92*ter* of the Rules, including that the witness be available for cross-examination and questioning by the Judges;

- **DECIDES** that the ordinary examination-in-chief shall be conducted in respect of Baton Haxhiu's account of the meeting referred to above;

- **DEFERS** its decision on the admission of documents and other items admitted into evidence in other proceedings, as well as on relevant amendments to the Prosecution's Rule 65*ter* list of exhibits, in relation to the witnesses to be heard pursuant to Rule 92*ter* until the time when these witnesses appear in court to testify;

- **ORDERS** that the first Prosecution witness to testify with the application of Rule 92*ter*, pursuant to this Decision, shall commence his or her testimony not earlier than three working days after the date of this Decision;

- **DECLARES** the Motion moot in respect of the following witnesses who have already testified or are in the course of testifying: Veton Surroi, K83, Shyhrete Berisha, Ali Gjogaj, Mustafa Draga(j), Liri Loshi and Lizane Malaj;

- **DECIDES** that witnesses: Ljubinko Cvetić, Aleksandar Vasiljević, K84 and K86 shall be heard in the ordinary way, with an examination-in-chief; and

DENIES the Motion and the Motion Regarding Witness Peraj in all other respects.

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

Dated this tenth day of February 2009
At The Hague
The Netherlands

Judge Kevin Parker
Presiding

[Seal of the Tribunal]