

**THE INTERNATIONAL CRIMINAL TRIBUNAL  
FOR THE FORMER YUGOSLAVIA**

**Case No. IT-09-92-T**

**BEFORE THE TRIAL CHAMBER**

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

**Registrar:** Mr. John Hocking

**Date Filed:** 5 November 2012

**THE PROSECUTOR**

**v.**

**RATKO MLADIĆ**

***PUBLIC***

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**DEFENCE RESPONSE TO PROSECUTION URGENT MOTION TO ADD EXHIBITS  
TO ITS 65<sup>TH</sup> EXHIBIT LIST**

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***The Office of the Prosecutor:***

Mr. Dermot Groome  
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Mr. Branko Lukić  
Mr. Miodrag Stojanović

**THE INTERNATIONAL CRIMINAL TRIBUNAL  
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**RATKO MLADIĆ**, by and through his defence counsels of record, hereby states as follows:

**I     INTRODUCTION & BACKGROUND**

1. On 1 November 2012 the Prosecution filed its “Prosecution Urgent Motion to Add Exhibits to its 65ter Exhibit List” seeking to add 13 new exhibits for the witness who is slated to testify in a matter of days. (hereinafter “Prosecution Motion”)

2. The Prosecution Motion is filed publicly and thus the instant Response is also made publicly. The Defence strenuously objects to the Prosecution Motion and asks for the same to be denied, based on the following arguments contained herein. On 2 November 2012 the Defence was instructed to file the Response during the day on 4 November 2012.<sup>1</sup> The instant filing is in compliance with that guidance.

3. The Prosecution Motion utterly fails to provide any reason, let alone good cause, for such a late addition to such a significant number of documents to the 65ter list for this witness. Thus the Prosecution Motion is without merit and must be dismissed.

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<sup>1</sup>T.4405

4. In the alternative, if the Prosecution Motion is granted, then the testimony of witness Philipps should be delayed, by at least 3 months in order to fairly enable the Defence to yet again prepare for him, in the face of repeated disclosure difficulties that the Prosecution has apparently had with this witness since very early in the case.<sup>2</sup> These lapses in disclosure by the Prosecution jeopardize the integrity of these proceedings and have the effect of preventing a fair and reasonable opportunity for the Defence to know of the case it must rebut and to prepare for these witnesses in a timely and efficient manner. Philipps is a key expert witness, and thus it is now necessary for the Defence to do more than just to review and become familiar with the content of any new exhibits, they must be subjected to the scrutiny of analysis with out of court records and documents and references, as well as perhaps commentary by a counter expert or consultant.

## **II. ARGUMENTS AND SUBMISSIONS**

### ***A. The Prosecution Motion is Without Merit, and Should Be Dismissed as it is Untimely and Cannot Establish Due Diligence or Good Cause for the Sought Amendment.***

5. The prevailing case-law on the issue of adding exhibits to the Rule 65ter list is very clear. It has been held that Rule 65ter's requirement are intended to facilitate proper preparation for trial and efficient presentation of evidence at trial.<sup>3</sup> Further, the jurisprudence holds that if a prosecution seeks to add exhibits at a later stage of the proceedings than specified by the Pre-Trial Judge, that "good cause" must be demonstrated for the application<sup>4</sup> and if the granting of the same is in the "interests of justice."<sup>5</sup> In examining an application to amend an exhibit list a Trial Chamber must examine:

- a. Whether the prosecution has shown good cause, whether the items are relevant and of sufficient importance to justify their late addition, whether the proposed

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<sup>2</sup> See, "Defense Supplement To Original Rule 94 Bis Notice, Objection And Motion To Bar Relative To Proposed Prosecution Witness Richard Philipps" filed on 6 March 2012; and " Second defence supplement to original Rule 94bis notice, objection and motion to bar relative to proposed Prosecution witness Richard Philipps" filed 26 March 2012

<sup>3</sup> *Prosecutor v. Stanasic & Simatovic, IT-03-69-T, "Decision on Eleventh Twelfth and Thirteenth Prosecution Motions for Leave to Amend its Rule 65 ter Exhibit List"* (10 February 2010), para. 25

<sup>4</sup> *Prosecutor v. Halilovic, IT-01-48-T, Decision on Prosecution's Application for Leave to Vary its Exhibit List Filed Pursuant to Rule 65ter (E)(iii)"* (14 February 2005), pg. 3

<sup>5</sup> *Prosecution v. Karadzic, IT-95-5/18-T, "Decision on the Prosecution's Motion for Leave to File a Supplemental Rule 65ter exhibit list."* (18 March 2010), para. 7

evidence is prima facie relevant and of probative value, the complexity of the case, translation, and that the amendments do not adversely affect the accused's ability to prepare for trial.<sup>6</sup>

- b. Whether the moving party has exercised due diligence in identifying additional exhibits at the earliest possible opportunity; and whether the non moving party would be prejudiced by the amendment.<sup>7</sup>

6. On the issue of whether prejudice to the rights of the accused results, the Appeals Chamber has held that "...the goal of expediency should never be allowed to over-ride the fundamental rights of the accused to a fair trial. If expedience was a priority for the Prosecution, it should have proceeded to trial without the evidence of Witness H"<sup>8</sup>

7. In the instant case, the deadline set by the Pre-Trial Judge for Rule 65ter disclosure to be complete was 10 February 2012. These documents were not sought to be added to the Rule 65ter list until almost a full 8 months beyond the deadline, and just days before the affected witness is scheduled to take the stand. Such a late-noticed request has not been explained in the Prosecution Motion, insofar as there are no submissions relating to the requirement that the moving party show "due diligence" in seeking the amendment. For this reason the untimely request should be denied.

8. The Prosecution Motion does not make any submissions to establish "good cause" as understood under the jurisprudence for the sought amendment, and instead concedes that the Prosecution cannot establish good cause for the same.<sup>9</sup> For this reason the untimely request should be denied.

9. The Prosecution motion does demonstrate that the documents sought to be added are of such importance that they directly go to "...prove Mladic's liability for crimes committed by forces in the SRK's chain of command as part of a campaign of sniping and shelling in

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<sup>6</sup> *Id.*, para. 8

<sup>7</sup> *Prosecutor v. Stanisic & Simatovic, IT-03-69-T, "Decision on Eleventh Twelfth and Thirteenth Prosecution Motions for Leave to Amend its Rule 65 ter Exhibit List"* (10 February 2010), para. 23

<sup>8</sup> *Prosecutor v. Kupreskic, et al. IT-95-16-A, Judgment* (23 October 2001), para. 100

<sup>9</sup> Prosecution Motion, para. 9

Sarajevo.”<sup>10</sup> It is remarkable that Prosecution asserts that the late disclosure of these documents does not prejudice the Defence.<sup>11</sup> The Prosecution Motion fails to upfront make clear what it later concedes, that but for two of these document, they were not even disclosed to the Defence until the date of the Prosecution Motion – just days before the Witness is to testify.<sup>12</sup> If these are indeed inculpatory documents as suggested, this is a Prosecution admission of yet another violation of its disclosure obligations under the Rules, including Rule 66 as to inculpatory documentation. The Defence has long suffered the burden of having to deal with multiple and ongoing disclosure violations by the prosecution and has not to date recovered from the prejudicial effects that the previous Prosecution violations have had on Defence preparations. To add even more hardship of yet another Prosecution disclosure violation to these proceedings without any resulting relief would mar the integrity of the proceedings, and infringe on the right of the Accused to have a fair trial.

***B. The Defence is Unfairly Prejudiced Because it Has Not Had Sufficient Time to be Familiarized With the Material.***

10. The Prosecution Motion relies upon the Popovic Decision<sup>13</sup> that good cause is not dispositive where the material is relevant and the Defence has had sufficient time to familiarize itself with the material. The instant case is distinguishable on several features.

11. In the Popovic Decision the material had been disclosed in 2005 and was sought to be added to the list in 2007.<sup>14</sup> The Appeals Chamber and Trial Chamber in that case accepted that the failure to include the material in question was an inadvertent omission and that the rights of the accused could be safeguarded through means other than excluding the potentially relevant material.<sup>15</sup> The material in question at that case was an interview and recording of accused Borovcanin’s discussions with the OTP Investigators and documents produced by Borovcanin himself that in any event was known of to him previously. The Trial Chamber in allowing the admission of the late identified documents limited their use to other accused such that it could not be used to prove their acts and conduct.<sup>16</sup>

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<sup>10</sup> Prosecution Motion, para. 4

<sup>11</sup> Prosecution Motion para. 8

<sup>12</sup> Prosecution Motion para. 9, and Annex A

<sup>13</sup> Prosecution Motion, para. 3, footnote 3

<sup>14</sup> Popovic Decision, para. 30

<sup>15</sup> Popovic Decision, para. 39

<sup>16</sup> Popovic Decision, para. 4

12. In the instant matter, as the Prosecution Motion is clear,<sup>17</sup> for 11 of the documents they have **never** been previously disclosed to the Defence until the date of the Motion, just days before the witness is scheduled to testify. This is a drastic departure from the scenario in Popovic and is a serious impediment preventing the Defence from having “sufficient” time to familiarize itself with the material. Similarly as an expert witness is at issue, a lot more work is required of the Defence than to merely read and familiarize itself with the factual content of a document. The Prosecution Motion ignores all of this.

13. The Prosecution Motion itself does not and cannot argue that this is inadvertent omission of previously disclosed materials from the Rule 65ter list. These documents were mostly never made known to the Defence, and their late disclosure constitutes a serious discovery violation rather than “inadvertent omission.” The Prosecution Motion neither argues due diligence in the location and disclosure of these documents, nor can establish “good cause” for the late addition. Thus in this factor as well the instant matter is distinguishable from Popovic.

14. Likewise the instant material is presented to go precisely to prove Mladic’s liability<sup>18</sup>, such that the scenario is different than in the multi-accused case of Popovic. There is not a way to protect the rights of the Accused in the instant scenario, as the Prosecution has decided to call Philipps just days after disclosing the documents for the first time. Both the disclosure of the documentation and the calling of Philipps are matters within the purview and control of only the Prosecution, and in this instance they have chosen to proceed with a procedure that maximizes the unfair prejudice to the Defence and the Accused and which ignores all of the requirements of the prevailing jurisprudence on this issue.

15. These documents are not simple, because they are to be presented as part of Expert Testimony. Rule 94bis requires the sources for the report must be clearly indicated and accessible in order to allow the other party or the Trial Chamber to test or challenge the basis on which the expert witness reached his or her conclusions.<sup>19</sup> In the instant matter we have no indication how these documents are supposed to fit into the Expert Report already presented from the Witness, or if there is some new analysis which is forthcoming, in which case the

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<sup>17</sup> Prosecution Motion para .9, and Annex A

<sup>18</sup> Prosecution Motion para. 4

<sup>19</sup> *Prosecutor v Milosevic*, No. IT-98/29-1-T, *Decision on Admission of Expert Report of Robert Donia* (15 February 2007) at para. 8; *Prosecutor v Milosevic*, No. IT-98/29-1-T, *Decision on Defence Expert Witnesses* (21 August 2007) at para. 7; *Prosecutor v Stanisic & Simatovic*, No. IT-03-69-PT, *Decision on Prosecution’s Submission of the Expert Report of Nina Tromp and Christiam Nielsen Pursuant to Rule 94 bis* (18 March 2008) at para. 9

formalities of Rule 94bis must be followed again. To try and rush addition of new documents days before the witness is to testify is an improper procedure.

16. If the documentation is to be added, the Prosecution should be directed to file a new Expert Report and comply with the requirements of that Rule, and thus the testimony of this witness should be continued at least 3 months.

### **III. CONCLUSION**

**WHEREFORE**, the Accused, Ratko Mladic, respectfully requests that the Trial Chamber DENY the Prosecution Motion, or in the alternative, CONTINUE the testimony of Philipps for at least 3 months to permit the Defence adequate time to consult any outside experts and materials it deems necessary to be sufficiently prepared for the same. In any event the Chamber should ADMONISH the Prosecution for its violation of the disclosure obligations and enter an order directing it to fully disclose ALL SRK related material in its possession in a manner to permit the Defence to have an adequate and fair opportunity to review the same.

**Word Count: 1879 words**

**RESPECTFULLY SUBMITTED BY:**



Branko Lukić  
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Miodrag Stojanović  
*Co-Counsel for Ratko Mladić*

Dated this 4th November 2012  
THE HAGUE, NETHERLANDS