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25 October 2013

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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: 25 October 2013
Original: English

IN TRIAL CHAMBER I

Before: Judge Alphons Orié, Presiding
Judge Bakone Justice Moloto
Judge Christoph Flügge

Registrar: Mr John Hocking

Decision of: 25 October 2013

PROSECUTOR

v.

RATKO MLADIĆ

PUBLIC

**DECISION ON PROSECUTION TWENTY-THIRD MOTION
TO ADMIT EVIDENCE 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

1. On 27 March 2013, the Prosecution filed a motion pursuant to Rule 92 *bis* of the Tribunal's Rules of Procedure and Evidence ("Rules") seeking admission of evidence from witnesses RM-086, RM-050, RM-071, and RM-011 ("Motion").¹ On 9 April 2013, the Defence filed a request for an additional 180 days within which to file its response to the Motion ("Defence Request").² On 19 April 2013, the Chamber granted the Defence Request in part, giving the Defence until 24 June 2013 within which to file its response.³ On 12 June 2013, the Prosecution stated via informal communication that the relevant clip of the video interview of Miroslav Stanić would be assigned Rule 65 *ter* number 27978g. On 24 June 2013, the Defence filed its Response to the Motion ("Response").⁴

II. SUBMISSIONS OF THE PARTIES

2. The Prosecution submits that the four witnesses' evidence is relevant, probative, reliable, and suitable for admission in written form as it does not relate to the acts or conduct of the Accused.⁵ This mode of admission will expedite the proceedings, prevent the unnecessary reappearance of witnesses who are also victims, and will not cause undue prejudice to the Accused.⁶ The tendered evidence is corroborated by the Adjudicated Facts, but no redactions have been made as the evidence either contains more information than the Adjudicated Facts, such as names of victims or perpetrators, or any redactions would remove contextual information necessary for the witness's narrative to be coherent.⁷ The tendered evidence is also corroborated by witnesses who have previously testified in court and have been cross-examined.⁸ The witnesses provide substantially similar accounts of the events in Foča, particularly in relation to the conditions at KP Dom Foča, including the beatings suffered by detainees and the disappearance of many of them.⁹ The Prosecution concedes that while Witness RM-011's statement is accompanied by a verification under Rule 92 *bis* (B)(ii), the statements of witnesses RM-086, RM-050, and RM-071 are not.¹⁰ The Prosecution proposes that the Chamber conditionally admit these three statements subject to the

¹ Prosecution 23rd Motion to Admit Evidence pursuant to Rule 92 *bis*, 27 March 2013 (Confidential with Confidential Annexes).

² Defence Motion to Enlarge Time to Respond to Prosecution 22nd and 23rd Motions to Admit Evidence pursuant to Rule 92 *bis*, and Seeking Clarification of the Trial Chamber's Guidance, 9 April 2013.

³ T. 10092, 10094.

⁴ Defence Response to Prosecution 23rd Motion to Admit Evidence pursuant to Rule 92 *bis*, 24 June 2013.

⁵ Motion, paras 2, 6, 14, 17, 20, 23.

⁶ Motion, para. 2.

⁷ Motion, paras 4, 7, 22.

⁸ Motion, paras 7, 16, 19, 22, 24.

⁹ Motion, paras 7, 19, 22.

fulfilment of the attestation requirement.¹¹ There are exhibits associated with the evidence of witnesses RM-050 and RM-071, while there are no associated exhibits in relation to the evidence of the other two witnesses.¹² The Prosecution tenders excerpts from transcripts of the prior testimony before this Tribunal of two of the witnesses, and contends that this is in compliance with the Chamber's 9 July 2012 guidance on the matter.¹³

3. The Defence opposes the Motion on four grounds: (1) The written statements without an accompanying verification required under Rule 92 *bis* (B)(ii) of the Rules should not be admitted; (2) Lengthy excerpts of a prior testimony which do not include the relevant portion of the cross-examination are not reliable; (3) Much of the evidence sought to be admitted is hearsay in nature; and (4) Portions of the evidence of Witness RM-086 are in the nature of expert opinion which should have been tendered under Rule 94 *bis*.¹⁴

III. APPLICABLE LAW

4. 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.¹⁵ The Chamber further incorporates by reference its approach to the admission of exhibits associated with the written statements of witnesses and/or transcripts of their prior testimony.¹⁶ In addition, the Chamber recalls and refers to its previous decisions on conditional admission of unattested witness statements, pending the filing of the required attestations and declarations, provided that the necessary admissibility requirements are met.¹⁷

IV. DISCUSSION

(a) Redactions vis-à-vis Adjudicated Facts

5. With regard to tendered material corresponding to adjudicated facts, which the Prosecution deems necessary not to redact in the interest of a coherent narrative, the Chamber emphasizes the

¹⁰ Motion, para. 9.

¹¹ Motion, para. 9.

¹² Motion, para. 13.

¹³ Motion, para. 13.

¹⁴ See generally, Response, para. 2.

¹⁵ Decision on Prosecution Third Motion to Admit Evidence pursuant to Rule 92 *bis*: Sarajevo Witnesses, 19 October 2012, paras 5-8.

¹⁶ T. 5406-5408, 5601-5604; Decision on Prosecution Motion to Admit the Evidence of Witness RM-266 pursuant to Rule 92 *quater*, 22 July 2012, paras 13-14.

¹⁷ Decision on Prosecution Sixth Motion to Admit Written Statements and Transcripts in lieu of Oral Testimony pursuant to Rule 92 *bis*, 19 June 2013, para. 8.

importance of avoiding duplication of evidentiary material.¹⁸ The Chamber considers, however, that the narrative of the tendered evidence would be less clear if redacted and, therefore, in this instance will allow deviation from its guidance in this regard.

(b) Verification under Rule 92 bis (B)(ii) of the Rules

6. The Chamber recalls that it has previously allowed the conditional admission of statements under Rule 92 bis of the Rules lacking the required attestations and declarations, pending the filing thereof, provided they are otherwise admissible under the Rules. The Chamber therefore rejects the Defence objection to the admission of the statements of witnesses RM-086, RM-050, and RM-071 on the ground that they lack the verification required under Rule 92 bis (B)(ii). As previously noted, Witness RM-011's statement is accompanied by a declaration and verification, thereby compliant with Rule 92 bis (B). As to the two transcripts sought to be admitted, the Chamber notes that all witnesses before the Tribunal are made to make a solemn declaration to speak the truth under Rule 90(A), any violation of which may be penalised under Rule 91. This declaration obviates the need for a declaration and verification under Rule 92 bis (B).

(c) Relevance and Probative Value pursuant to Rule 89(C) of the Rules

7. The Chamber considers that the evidence of witnesses RM-086, RM-050, RM-071, and RM-011 is relevant to and probative of the crimes of genocide, persecution, extermination, murder, deportation and inhumane acts said to have been committed in Foča, as alleged in Counts 1, and 3-8 of the Indictment, particularly those listed in Scheduled Incidents B.5.1, C.6.1, C.6.3, and D.5. The Chamber notes that the Defence does not argue otherwise, although the Defence does object to portions of the evidence of the four witnesses which it considers to be hearsay, as well as portions of the evidence of Witness RM-086 which it submits constitute impermissible expert testimony.¹⁹

8. The Chamber recalls that hearsay evidence is, in principle, admissible before the Tribunal and that the weight to be attributed to it will be assessed in light of all the evidence.²⁰ The Chamber reiterates that it will carefully review the claims of fact witnesses and their sources of knowledge. Furthermore, the Chamber considers that the portions of Witness RM-086's statement cited by the Defence do not constitute expert testimony, but merely consist of the witness's observations of events taking place around him or of matters he learned about as an inhabitant of the relevant area.

¹⁸ Decision in Relation to Prosecution's Rule 92 ter Motion for Witness RM-114, 16 August 2012, para. 9.

¹⁹ The Chamber notes that one of the portions objected to by the Defence as constituting impermissible expert testimony is page 56528, paragraph 6 of the written statement of RM-086 (Response, para. 19). This appears to be an erroneous reference as this page contains only five paragraphs.

²⁰ See *Prosecutor v. Aleksovski*, Case No. IT-95-14/I-AR73, Decision on Prosecutor's Appeal on Admissibility of Evidence, 16 February 1999, para. 15.

Some paragraphs of Witness RM-086's statement cited by the Defence at most amount to hearsay evidence, which would be subject to the aforementioned scrutiny. The Chamber therefore considers that the evidence is admissible under Rule 89(C) of the Rules.

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

9. The Chamber finds that the evidence of witnesses RM-086, RM-050, RM-071, or RM-011 does not relate to the acts or conduct of the Accused, but instead pertains to the crime base part of the case. The Chamber notes that the evidence is cumulative to other testimony in this case, *inter alia*, that of witnesses RM-019, RM-013, RM-063, RM-046, and RM-048.²¹ Furthermore, the Chamber sees no need to require these witnesses to appear for cross-examination. The Chamber therefore concludes that the evidence is admissible under Rule 92 bis.

(e) Associated Exhibits

10. The Prosecution seeks the admission of two exhibits associated with the evidence of two witnesses. One associated exhibit is a video media interview of Miroslav Stanić, commander of Serb forces in Foča during the war, concerning the strategic goals of Serb forces throughout the war.²² This exhibit is associated with the transcript of the prior testimony before the Tribunal of a witness in which the latter is asked to comment on portions of the interview. The other associated exhibit consists of release papers issued by Serb authorities allowing a witness and her family to leave Foča.²³ The Chamber considers that these associated exhibits form an inseparable part of the witnesses' evidence, and would assist the Chamber in assessing their evidence.

(f) Trial Transcripts

11. The Prosecution tenders two transcripts of prior testimony before the Tribunal of two witnesses. In one testimony, the witness commented on portions of the video interview of Stanić, an associated exhibit described above. In the other transcript, another witness provides information not contained in the witness's statement about the disappearance of several detainees from KP Dom and describes the beatings and killings of other detainees at that facility.²⁴

²¹ The Prosecution submits that the tendered evidence is corroborated by adjudicated facts (Motion, para. 7). The Chamber notes that evidence can be consistent with or rebut adjudicated facts, but considers that it would be misleading to conclude that evidence is corroborated by adjudicated facts. After having been taken judicial notice of, adjudicated facts are evaluated independent of their source along with the evidence received throughout trial. For instance, an adjudicated fact which is said to corroborate the prior testimony of a witness in another case before the Tribunal may in fact have been derived from that very same prior testimony.

²² Document bearing Rule 65 ter number 27978.

²³ Document bearing Rule 65 ter number 15652.

²⁴ Motion, para. 15.

12. The Defence objects to the admission of the two transcripts of prior testimony in other cases before the Tribunal as they do not include the portions pertaining to the witnesses' cross-examinations. The Defence argues that this renders the transcripts unreliable. The Defence, however, has not specified which portions of the witnesses' cross-examinations should be added to the excerpts tendered by the Prosecution so as to contextualise or clarify the latter. The Chamber considers that the transcript excerpts tendered by the Prosecution to be in compliance with its 19 November 2012 Guidance,²⁵ and rejects the Defence objections in this regard.

(g) Protective Measures

13. The Chamber notes that for witnesses RM-086, RM-050, and RM-071, protective measures granted in previous cases continue to apply. As for Witness RM-011, the Prosecution has indicated that it is still in the process of evaluating whether protective measures are required, and for this reason the Chamber will admit this witness's evidence under seal.²⁶

V. DISPOSITION

14. For the foregoing reasons, pursuant to Rules 89 and 92 *bis* of the Rules, the Chamber **GRANTS the Motion IN PART**

With respect to

1) Witness RM-086

ADMITS into evidence, **UNDER SEAL**, the excerpts of the witness's testimony on 19 March 2001 in *Prosecutor v. Krnojelac*, Case No. IT-97-25-T, T. 4079: 7-21; T. 4084:25-T. 4086:23; T. 4088:17-T. 4096:5; and T. 4104:4-T. 4105:16; and

CONDITIONALLY ADMITS into evidence, **UNDER SEAL**, the ICTY statement dated 22 October 1995 of the witness, bearing ERNs 0034-8175 to 0034-8189, pending the filing of the verification required under Rule 92 *bis* (B)(ii);

2) Witness RM-050

ADMITS into evidence

²⁵ T. 5406-5408.

²⁶ Prosecution Witness List, 10 February 2012, p. 109.

- a) **UNDER SEAL**, the excerpts of the witness's testimony on 15 September 2011 in *Prosecutor v. Karadžić*, Case No. IT-95-5/18, T. 18831:11-T. 18840:14; and
- b) A clip bearing Rule 65 *ter* number 27978g from the video interview of Miroslav Stanić;

CONDITIONALLY ADMITS into evidence, **UNDER SEAL**, pending the filing of the verification required under Rule 92 *bis* (B)(ii)

- a) The ICTY statement dated 21 April 1996 of the witness, bearing ERNs 0039-1488 to 0039-1499; and
- b) The ICTY statement dated 21 October 1998, bearing ERNs 0065-0020 to 0065-0024;

3) *Witness RM-071*

CONDITIONALLY ADMITS into evidence, **UNDER SEAL**, pending the filing of the verification required under Rule 92 *bis* (B)(ii)

- a) The ICTY statement dated 5 July 1995 of the witness, bearing ERNs 0032-5365 to 0032-5377; and
- b) Permits issued by Foča Public Security Station allowing witness RM-071 and her family to leave Foča, bearing Rule 65 *ter* number 15652;

4) *Witness RM-011*

ADMITS into evidence, **UNDER SEAL**, the ICTY statement dated 16 February 1996 of the witness, bearing ERNs 0218-6278 to 0218-6280, 0218-6288 to 0218-6294, and 0306-8750 to 0306-8750;

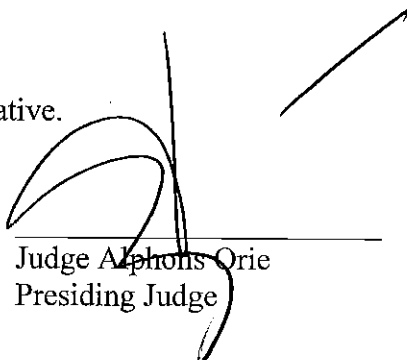
INSTRUCTS the Prosecution to file the verifications required under Rule 92 *bis* (B)(ii) corresponding to the statements of witnesses RM-086, RM-050, and RM-071 within four weeks of the filing of this decision;

INSTRUCTS the Prosecution to upload into eCourt all admitted documents within two weeks of the date of this decision;

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

INSTRUCTS the Registry to make witness RM-011's evidence public within four weeks of the date of this decision unless the Prosecution files a request for protective measures within that period.

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



Judge Alphonis Orie
Presiding Judge

Dated this twenty-fifth day of October 2013
At The Hague
The Netherlands

[Seal of the Tribunal]