

5-09-92-T
D 76297 - D 76292
20 November 2013

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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-09-92-T
Date: 20 November 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: 20 November 2013

PROSECUTOR

v.

RATKO MLADIĆ

PUBLIC

**DECISION ON PROSECUTION FOURTIETH MOTION TO
ADMIT EVIDENCE PURSUANT TO RULE 92 *BIS*: JEVTO
BOGDANOVIĆ**

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 30 August 2013, the Prosecution filed a motion (“Rule 92 *quater* Motion”) pursuant to Rule 92 *quater* of the Tribunal’s Rules of Procedure and Evidence (“Rules”) seeking to admit the evidence of Jevto Bogdanović (“Witness”) in written form.¹ On 13 September 2013, the Defence filed its Response opposing the Rule 92 *quater* Motion (“Response to Rule 92 *quater* Motion”).² On 27 September 2013, the Prosecution filed a motion (“Motion”) pursuant to Rule 92 *bis* of the Rules seeking to admit portions of the Witness’s testimony in a previous case before the Tribunal together with one associated exhibit.³ The Prosecution further withdrew its Rule 92 *quater* Motion.⁴ On 11 October 2013, the Defence requested an extension of 30 days to respond to the Motion as well as clarification of the Trial Chamber’s guidelines for concurrent Rule 92 *bis* submissions.⁵ On 17 October 2013, the Chamber granted the Defence request in part, allowing for an extension of 14 days and addressed the Defence request for clarification.⁶ On 25 October 2013, the Defence filed its response opposing the Motion (“Response”).⁷

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, as set out in a previous decision.⁸ With regard to the applicable law related to the admission of associated exhibits, the Chamber recalls and refers to one of its previous decisions dealing with this matter.⁹

¹ Prosecution Motion to Admit the Evidence of RM217 Pursuant to Rule 92*quater*, 30 August 2013 (Confidential). The Prosecution had previously tendered evidence of the Witness in its Eleventh Motion to Admit Evidence Pursuant to Rule 92 *bis*, but then withdrawn it. *See* Decision on Eleventh Motion to Admit Evidence Pursuant to Rule 92 *bis*, 6 September 2012, para. 1.

² Defence Response to Prosecution Motion to Admit Evidence of RM217 Pursuant to Rule 92*quater*, 13 September 2013 (Confidential).

³ Prosecution’s Fortieth Motion to Admit Evidence Pursuant to Rule 92*bis*: Witness RM217, 27 September 2013 (Confidential). The Chamber refers to the Motion for the Prosecution submissions. Motion, paras 2, 4, 14.

⁴ Motion, paras 1, 14.

⁵ Defence Motion to Enlarge Time to Respond to Prosecution 40th Motion to Admit Evidence Pursuant to Rule 92*bis*: Witness (RM217) and Request for Clarification on the Trial Chamber Guidelines for Concurrent Submissions Under Rule 92*bis*, 11 October 2013 (Confidential).

⁶ T. 18017-18021.

⁷ Defence Response to Prosecution’s 40th Motion to Admit Evidence Pursuant to Rule 92 *bis*: Witness RM217, 25 October 2013 (Confidential). The Chamber refers to the Response for the Defence submissions.

⁸ Decision on Prosecution Third Motion to Admit Evidence Pursuant to Rule 92 *bis*: Sarajevo Witnesses, 19 October 2012, paras 5-7.

⁹ Decision on Prosecution Motion to Admit the Evidence of Witness RM-266 Pursuant to Rule 92 *quater*, 22 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.

III. DISCUSSION

(a) Compliance with Guidance

3. In relation to the admission of transcript evidence under Rule 92 *bis* of the Rules, the Chamber refers to its previous guidance on the matter.¹⁰ The Prosecution argues that the tendered excerpts are the most complete version of the Witness's evidence and that taking a new statement from the Witness would re-traumatize him, especially given his medical condition.¹¹ Considering that the tendered transcript contains a limited number of pages, approximately 25, and that the Prosecution has given a compelling reason for not taking a new statement, the Chamber finds that the Prosecution has complied with the guidance.

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

4. The proposed evidence relates to, *inter alia*, the loading of corpses in front of the Pilica School and the Pilica Dom, which is relevant to Scheduled Incident E10.1.

5. With regard to probative value, the Chamber notes that the testimony tendered by the Prosecution appears to be both internally consistent and presented in a coherent manner. Additionally, the Witness's testimony was given under oath and subject to cross-examination.

6. The Defence objects to the probative value of the proposed evidence by referring to its Response to the Rule 92 *quater* Motion, where it points to two inconsistencies between the tendered transcript excerpts and the initially tendered statement.¹² The Defence acknowledges that the Prosecution does not tender the statement in the Motion, but submits that this does not automatically render the evidence now tendered reliable.¹³ The Chamber notes that the Defence only referred to the Response to the Rule 92 *quater* Motion and did not renew any specific grounds for objecting to the reliability of the tendered evidence. For purposes of context, the Chamber has however reviewed the statement as attached to the Rule 92 *quater* Motion.

7. First, the Defence argues that the Witness testified that he was not issued a weapon, which contradicts his statement tendered in the Rule 92 *quater* Motion, where he says that "Captain Lakić *also* issued rifles to Ostojić and Jurošević".¹⁴ The Chamber considers that this sentence has to be read together with the previous sentence and understands the word "also" in the second sentence to

¹⁰ T. 106-110, 137-138, 194, 315-325, 525-532.

¹¹ Motion, para. 11.

¹² Response, paras 12-13.

¹³ Response, para. 13.

refer to the first sentence and not to the fact that the Witness was issued a weapon. The Chamber is therefore satisfied that the Witness's answer to the question regarding the issuance of a weapon put to him during his testimony in the *Popović* case clarifies and does not contradict the passage in the statement. Secondly, the Defence argues that the tendered evidence is inconsistent because the number of bodies he saw on 12 July 1995 is not mentioned in his statement, contrary to what the Witness said during his *Popović* testimony.¹⁵ The Chamber notes that the statement tendered in the Rule 92 *quater* Motion does not contain any specific number of bodies, but considers that the Witness's testimony in this regard does not affect the overall probative value of the evidence.

8. With regard to the Defence's submission that the tendered evidence contains "speculative statements and hearsay," and should therefore be subjected to cross-examination, the Chamber recalls that hearsay evidence is, in principle, admissible in proceedings before the Tribunal and that the Chamber will carefully assess the weight to be attributed to it in light of all the evidence before the Chamber.¹⁶ Regarding the portions identified by the Defence, the Chamber finds that either the source of knowledge is stated in the evidence¹⁷ or that it is clear that the Witness has no direct knowledge of certain subjects about which he testified¹⁸. The Chamber does not consider that the portions of hearsay evidence affect the overall probative value of the evidence.

9. Accordingly, the Chamber is satisfied that the evidence is admissible pursuant to Rule 89 (C) of the Rules.

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

10. The Defence has not argued, and the Chamber does not find that the tendered evidence relates to the acts and conduct of the Accused. The Chamber notes that the evidence goes to the crime-base of the case, which is a factor weighing in favour of admission. The Chamber further finds that the tendered evidence is cumulative in part with the oral evidence of Witness RM-346.

11. The Defence objects to the admissibility of the proposed testimony on the basis that the tendered excerpts do not include any of the questions put to the Witness in cross-examination and

¹⁴ Response to Rule 92 *quater* Motion, para. 12; Annex B to the Motion, excerpts from the transcript in the *Popović* case, T. 11324:20-11324:25; Annex B to the Rule 92 *quater* Motion, witness statement, para. 3; emphasis added.

¹⁵ Response to Rule 92 *quater* Motion, para. 13. The Chamber notes that contrary to what the Defence alleges the Witness testified that these events took place a few days after, and not on, 12 July 1995 (See Annex B to the Motion, excerpts from the transcript in the *Popović* case, T. 11319).

¹⁶ Response, paras 14-16; 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.

¹⁷ This concerns T.11331 lines 5-7, and T.11333 lines 8-12. The Chamber considers that T. 11321 lines 2-3 is not hearsay evidence, since the Witness testified about what the soldiers told him.

¹⁸ This concerns T. 11320 lines 9-12.

that this affects the Accused's right to a fair trial.¹⁹ The Chamber notes that the Defence has not substantiated this general claim, has not indicated on what particular issues it would wish to cross-examine the Witness, and has not demonstrated that the nature or source of the evidence renders it unreliable. The Chamber recalls that a tendering party is not required to submit a witness's testimony in its entirety.²⁰ Instead, only the portions of a transcript upon which the tendering party seeks to rely should be tendered for admission, including any portions necessary for contextualizing or clarifying those portions.²¹ The opposing party is then expected to tender any portions it considers relevant to the proper understanding of the witness's testimony.²² The Chamber notes that the Defence did not seek to tender any such portions in its Response.

12. With regard to the Defence's submission that the tendered evidence contains speculative statements and hearsay, and should therefore be subjected to cross-examination, the Chamber established that the portions identified by the Defence did not affect the overall probative value of the evidence and further considers that this does not render it necessary to call the Witness for cross-examination.²³

13. Having taken all of the above factors into consideration, the Chamber finds that the tendered excerpts of testimony are admissible pursuant to Rule 92 *bis* of the Rules.

(d) Associated Exhibit

14. The Prosecution tenders one associated exhibit, a photograph of the Branjevo Farm marked by the Witness during his testimony in the *Popović et al.* case.²⁴ The Defence does not address the tendering of the associated exhibit. The Chamber finds that the exhibit was discussed with and marked by the Witness during his testimony and that it forms an inseparable and indispensable part of that testimony. The Chamber, therefore, finds that the requirements for admission have been met.

¹⁹ Response, para. 11.

²⁰ T. 5406-5408

²¹ T. 5407.

²² Ibid.

²³ Response, paras 14-16.

²⁴ Motion, paras 4, 12.

IV. DISPOSITION

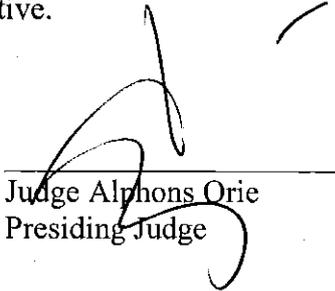
15. For the foregoing reasons, pursuant to Rules 54, 89, and 92 *bis* of the Rules, the Chamber **GRANTS** the Motion and **ADMITS** into evidence:

- (a) the excerpts of the Witness's testimony in *Prosecutor v. Popović et al.*, Case No. IT-05-88-T, as set out in Annex A to the Motion;
- (b) the photograph bearing Rule 65 *ter* number 13669;

INSTRUCTS the Prosecution to upload into eCourt all admitted documents within 14 days from the date of filing of this decision; 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 twentieth day of November 2013
At The Hague
The Netherlands

[Seal of the Tribunal]