

IT-09-92-T
D Jekso - D Jekes
of February 2014

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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: 7 February 2014
Original: English

IN TRIAL CHAMBER I

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

Registrar: Mr John Hocking

Decision of: 7 February 2014

PROSECUTOR

v.

RATKO MLADIĆ

PUBLIC

**DECISION ON PROSECUTION 44th MOTION TO ADMIT
EVIDENCE PURSUANT TO RULE 92 *BIS*: WITNESS RM-362**

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 29 October 2012, the Prosecution filed a motion pursuant to Rule 92 *bis* of the Tribunal's Rules of Procedure and Evidence ("Rules") seeking to admit into evidence material with regard to Witness RM-362 as well as seven other witnesses.¹ On 18 July 2013, the Chamber conditionally admitted the witness statement of Witness RM-362 dated 12 August 1995, pending the filing of a corresponding attestation and declaration in compliance with the requirements of Rule 92 *bis* (B) of the Rules ("Decision").² On 5 December 2013, the Prosecution filed another motion to admit evidence with regard to Witness RM-362, withdrawing the witness statement and its associated exhibits which had been conditionally admitted by the Chamber and instead, tendering 29 additional substantive transcript pages of Witness RM-362's testimony in the *Prosecutor v. Popović et al.* trial ("Second Motion").³ The Defence responded to the Second Motion on 18 December 2013 ("Response").⁴

II. SUBMISSIONS OF THE PARTIES

2. In its Second Motion, the Prosecution submits that Witness RM-362 has continuously refused to sign the declaration on the grounds that he has not been given the opportunity to personally face the Accused.⁵ The Prosecution argues that the alternate transcript excerpts provide the same "crime-base" evidence as contained in Witness RM-362's conditionally admitted witness statement.⁶ Recalling the Chamber's previous Decision, the Prosecution considers the excerpts to satisfy all admissibility requirements of Rule 92 *bis*. It further submits that the transcript pages in question will expedite the proceedings and that the evidence does not cause any unfair prejudice to the Accused, nor does it relate to the Accused's acts or conduct.⁷

3. In its Response, the Defence argues that in the light of the witness's unusual refusal to attest to his statement, the Prosecution fails to adequately establish the reliability of the proffered testimony and that the late tendering of such testimony infringes upon the right of the Accused to

¹ Prosecution Eighth Motion to Admit Evidence Pursuant to Rule 92 *bis*: Srebrenica Survivors, 25 October 2012 (Confidential).

² Decision on Prosecution Eighth Motion to Admit Evidence Pursuant to Rule 92 *bis*: Srebrenica Survivors, 18 July 2013.

³ Prosecution 44th Motion to Admit Evidence Pursuant to Rule 92 *bis*: Witness RM-362, 5 December 2013. *See also* Confidential Annex B.

⁴ Defence Response to Prosecution 44th Motion to Admit Evidence Pursuant to Rule 92 *bis*, 18 December 2013 (Confidential).

⁵ Second Motion, Confidential Annex C.

⁶ Second Motion, para. 7.

⁷ Second Motion, paras 5-7.

know the case against him and adequately challenge the evidence before him.⁸ Furthermore, the Defence challenges the Second Motion on the grounds that certain parts of the proffered transcript pages contain hearsay, impermissible expert opinion, objectionable questions and circumstantial evidence.⁹

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.¹⁰

IV. DISCUSSION

i. Relevance and Probative Value

5. The Chamber has carefully assessed the tendered transcript pages and considers the evidence in question to be relevant to the allegations of genocide, persecutions, extermination, murder, deportation, and inhumane acts against the Bosnian Muslims of Srebrenica, in particular to Scheduled Incidents E.3, E.4, E.6, and E.7, as addressed by counts 2 to 8 of the Indictment.

6. With respect to the Defence objection that the proffered transcript pages contain unreliable hearsay, the Chamber reiterates that hearsay is, in principle, admissible before the Tribunal and that the weight attributed to it will be assessed in the light of all evidence before it.¹¹ Furthermore, the examples of hearsay evidence provided by the Defence relate to very few specific portions of the evidence in question and do not affect its overall reliability.

7. The Defence further submits that the proffered transcript pages contain two instances where the witness has drawn inferences from the circumstances and that this is a reason for the Motion to be denied.¹² As regards the first example, Witness RM-362 identified a building that he drove past as a school on the basis of the fact that it had large windows. The Chamber notes that Witness RM-362's conclusion is not directly relevant for and does not affect the reliability of the evidence relating to the crime base part of the case. The second example concerns Witness RM-362's

⁸ Response, para. 14.

⁹ Response, paras 15-30.

¹⁰ Decision on Prosecution Third Motion to Admit Evidence Pursuant to Rule 92 *bis*: Sarajevo Witnesses, 19 October 2012, paras 5-8.

¹¹ See Decision, para. 17; See also *Prosecutor v. Aleksovski*, Case No. IT-95-14/I-AR73 Decision on Prosecutor's Appeal on Admissibility of Evidence, 16 February 1999, para 15.

¹² Response, paras 27-30.

statement that he knew that people were killed after being called out by soldiers since immediately after these persons had been called out, he could hear a blow and the sound of somebody falling to the ground. The Chamber considers that the factual basis of the witness's conclusion is clearly stated. This enables the Chamber to determine itself whether any conclusions can be drawn from it and connected evidence. The Chamber will in that sense not rely on any conclusion the witness may have drawn. The Chamber therefore finds no reason to deny the Motion because of the presence of this passage in the testimony of the witness.

8. The Defence further alleges that the tendered transcript pages contain leading questions. With regard to one of the three examples of an "objectionable question", namely whether the group that the witness was part of was allowed to keep their property while being detained, the Chamber considers that this does not suggest a specific answer to the witness, nor does it assume the existence of a disputed fact. As regards the remaining two examples of "objectionable questions", namely whether the witness referred to camouflage when he said multi-coloured uniforms and whether it appeared to the witness that soldiers were picking people according to a certain pattern, the Chamber notes that the questions might suggest or anticipate a certain answer. However, the Chamber does not consider that the instances indicated by the Defence affect the overall reliability of Witness RM-362's testimony.

9. The remaining objections relate to portions of the transcript which the Defence asserts constitute impermissible expert or opinion testimony.¹³ Given that the evidence on material elements of the Indictment provided by Witness RM-362 relates to his own experiences, the Chamber considers the challenged statements to be personal observations or conclusions from such observations which can be considered reasonable in the light of the surrounding circumstances and which the Chamber will assess accordingly.

10. Contrary to the Defence's submission, Witness RM-362's reason for refusing to sign the witness statement does not relate to its substantive content but to the procedural aspect of not being able to face the Accused in court.¹⁴ The specific reason provided by Witness RM-362 for refusing to attest is not understood by the Chamber as affecting the overall reliability of the witness statement.

11. With regard to probative value, the Chamber considers that the proffered evidence was elicited within the safeguards afforded by judicial proceedings. It was given under oath in

¹³ Response, paras 20-23.

¹⁴ Second Motion, Confidential Annex C.

proceedings before this Tribunal and interpreted simultaneously by duly-qualified CLSS interpreters. Further, the witness was cross-examined.

12. In light of the foregoing, the Chamber is satisfied that the proffered evidence fulfils the requirements of Rule 89 (C) of the Rules.

ii. Admissibility Pursuant to Rule 92 *bis* of the Rules

13. In line with its previous Decision, the Chamber finds that the evidence of Witness RM-362 relates to the crime base part of the case.¹⁵ Furthermore, the evidence proffered by Witness RM-362, is cumulative to other witnesses, as noted in the Decision, who have provided evidence pursuant to Rule 92 *bis* and 92 *ter* of the Rules.¹⁶

14. The Chamber finds that the evidence provided in the proffered transcript pages largely resembles the evidence contained in Witness RM-362's witness statement and considers it central to the understanding of this witness's evidence as a whole, especially with regard to the previously admitted excerpts and associated exhibits related to Witness RM-362.¹⁷

15. For the above reasons, the Chamber denies the Defence objection that the witness be cross-examined on his previous testimony and finds that the additional transcript pages of evidence may be admitted under Rule 92 *bis* of the Rules.

iii. Guidance

16. Despite the preference for witness statements being tendered under Rule 92 *bis*, the Chamber notes that the tendering of transcript evidence from previous testimonies complies with the Chamber's guidance.¹⁸ Acknowledging that the late tendering of the transcript pages was due to the Prosecution's initial attempt to comply with the Chamber's guidance, and considering the relatively few additional pages of the proffered transcript, the Chamber is satisfied that the transcript excerpts in question constitute an appropriate form of testimony.

V. DISPOSITION

17. For the foregoing reasons, pursuant to Rules 73, 89, and 92 *bis* of the Rules, the Chamber

¹⁵ Indictment, Scheduled Incidents E.3, E.4, E.6, and E.7.

¹⁶ Decision, para. 25.

¹⁷ Decision, para. 34(vii).

¹⁸ T. 106-110, 137-138, 194, 315-325, 525-532.

GRANTS the Second Motion;

ADMITS into evidence, **UNDER SEAL**, the testimony of witness RM-362, dated 1 November 2007, in the *Prosecutor v. Popović et al.* case, Case no. IT-05-88-T, T. 17300:7-11, 17301:22-17302:15, 17303:23-17318:3, 17318:4-17320:19, 17320:20-17333:11, 17333:12-17334:3, 17334:17-17335:18; 17335:19-17341:17;

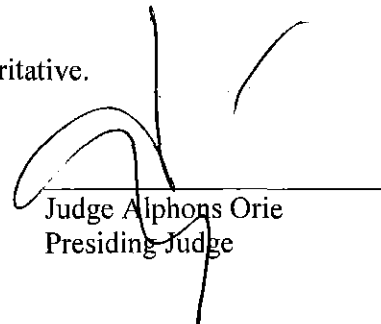
NOTES the documents' withdrawal and vacates its conditional admission of

- a) the Statement of witness RM-362, dated 12 August 1995, bearing ERNs R103-9513-R103-9522;
- b) a sketch showing the layout of features in Potočari, Rule 65 *ter* no. 28574;
- c) a sketch of the hangar in Bratunac where witness RM-362 was detained, Rule 65 *ter* no. 05725; and
- d) a sketch of the area around the Orahovac school gymnasium, Rule 65 *ter* no. 28575;

INSTRUCTS the Prosecution to upload into eCourt the admitted document within two weeks of the date of issue of this decision; and

REQUESTS the Registry to assign an exhibit number to the document admitted and inform the parties and the Chamber of the number so assigned.

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



Judge Alphons Orié
Presiding Judge

Dated this seventh day of February 2014
At The Hague
The Netherlands

[Seal of the Tribunal]