

**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: 16 August 2012
Original: English

IN TRIAL CHAMBER I

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

Registrar: Mr John Hocking

Decision of: 16 August 2012

PROSECUTOR

v.

RATKO MLADIĆ

PUBLIC

**DECISION REGARDING PROSECUTION MOTIONS TO
ADMIT THE EVIDENCE OF FOUR WITNESSES PURSUANT
TO RULE 92 *TER***

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 7, 11, and 29 May 2012, the Prosecution filed motions pursuant to Rule 92 *ter* of the Tribunal's Rules of Procedure and Evidence ("Rules") with regard to Witnesses RM-034, RM-053, RM-128, and RM-515 ("Witnesses").¹ On 22 and 29 May and 13 June 2012, the Defence responded.² On 28 June 2012, through an informal communication, the Chamber granted the Prosecution requests for leave to reply of 24 and 25 May and 5 and 20 June 2012 and considered the attached replies as filed.³

II. SUBMISSIONS OF THE PARTIES

2. In relation to Witness RM-128, the Prosecution seeks to tender one consolidated statement pursuant to Rule 92 *ter* of the Rules.⁴ In relation to Witnesses RM-034 and RM-053, the Prosecution seeks to tender two statements for each witness, arguing that taking a consolidated statement would not significantly clarify or condense these witnesses' evidence.⁵ In relation to Witness RM-515, the Prosecution seeks to tender a consolidated witness statement and ten associated exhibits, while indicating that it would not seek to rely on 19 paragraphs of the statement.⁶ The Prosecution submits that the portions it would not rely on were nevertheless relevant and essential to an understanding of the context in which crimes were committed and consequently should not be redacted.⁷

3. The Prosecution further seeks additional time for examination-in-chief of the Witnesses.⁸ The Prosecution argues that additional time for examination-in-chief of Witness RM-128 is

¹ Prosecution 92*ter* Motion: RM034, 7 May 2012 ("RM-034 Motion"); Prosecution 92*ter* Motion: RM053, 7 May 2012 ("RM-053 Motion"); Prosecution 92*ter* Motion: RM515, 11 May 2012 ("RM-515 Motion"); Prosecution 92*ter* Motion: RM128, 29 May 2012 ("RM-128 Motion").

² Defence Response to Prosecution Rule 92*ter* Motion: RM034, 22 May 2012 ("RM-034 Response"); Defence Response to Prosecution Rule 92*ter* Motion: RM053, 22 May 2012 ("RM-053 Response"); Defence Response to Prosecution Rule 92*ter* Motion: RM515, 29 May 2012 ("RM-515 Response"); Defence Response to Prosecution Rule 92*ter* Motion: RM128, 13 June 2012 ("RM-128 Response").

³ Prosecution Request for Leave to Reply to Defence Response to Prosecution Rule 92 *ter* Motion: RM034, 24 May 2012 ("RM-034 Reply"); Prosecution Request for Leave to Reply to Defence Response to Prosecution Rule 92 *ter* Motion: RM053, 25 May 2012 ("RM-053 Reply"); Prosecution Request for Leave to Reply and Reply to Defence Response to Prosecution Rule 92 *ter* Motion: RM515, 5 June 2012 ("RM-515 Reply"); Prosecution Request for Leave to Reply and Reply to Defence Response to Prosecution Rule 92 *ter* Motion: RM128, 20 June 2012 ("RM-128 Reply").

⁴ RM-128 Motion, paras 1, 6-12; RM-128 Reply, paras 2, 5-7.

⁵ RM-034 Motion, paras 1-2, 5, 8-15, 19; RM-034 Reply, paras 5-7, 10-14; RM-053 Motion, paras 1, 4, 7-12, 16; RM-053 Reply, paras 5-12.

⁶ RM-515 Motion, paras 1, 6-16, 21; RM-515 Reply, paras 5-6, 8-15.

⁷ RM-515 Reply, para. 7.

⁸ RM-034 Motion, paras 5, 16-19; RM-053 Motion, paras 4, 13-16; RM-128 Motion, paras 4, 13-17; RM-128 Reply, paras 3-4; RM-515 Motion, paras 4, 17-21.

necessary in order to tender documents through the witness *viva voce*.⁹ The Prosecution further argues that the request requires no extra court time, as Witness RM-128's testimony replaces that of Witness RM-162, who was originally scheduled for an examination-in-chief of 45 minutes but whose evidence will now be presented under Rule 92 *bis* of the Rules.¹⁰

4. The Defence objects to the motions on a number of grounds, some of which apply to all Witnesses. First, the Defence submits that the Witnesses express expert opinions and other conclusions in their respective statements and that those portions should be stricken ("First Objection").¹¹ Second, the Defence argues that the subject matter covered by Witnesses RM-034, RM-053, and RM-515 is so significant that they should be heard *viva voce* ("Second Objection").¹²

5. The Defence further objects to increasing the time for examination-in-chief of Witness RM-128, arguing that the Prosecution has failed to justify an exception to the Chamber's guidelines.¹³ The Defence does not object to increasing the time for examination-in-chief of Witnesses RM-034, RM-053, and RM-515 and requests that time for cross-examination be increased as well.¹⁴ In relation to Witnesses RM-034 and RM-053, the Defence objects that tendering two statements is contrary to the Chamber's guidelines and argues that preparing a new consolidated statement would be in the interests of justice.¹⁵ In relation to Witness RM-515, the Defence submits that portions of the statement on which the Prosecution will not rely should be redacted.¹⁶

6. The Defence finally responds that the translation of one of Witness RM-034's statements is deficient.¹⁷ In reply, the Prosecution provides the ERN number of the correct translation of Witness RM-034's statement.¹⁸

III. APPLICABLE LAW

7. Rule 92 *ter* of the Rules provides in relevant part that a Trial Chamber may admit the evidence of a witness in the form of a written statement under the following conditions: (i) the witness is present in court; (ii) the witness is available for cross-examination and any questioning

⁹ RM-128 Reply, para. 4.

¹⁰ RM-128 Motion, paras 14-15; RM-128 Reply, para. 3.

¹¹ RM-034 Response, paras 15-18; RM-053 Response, paras 9-12; RM-128 Response, paras 7-10; RM-515 Response, paras 7-10.

¹² RM-034 Response, paras 19-21; RM-053 Response, paras 13-15; RM-515 Response, paras 11-13.

¹³ RM-128 Response, paras 4-6.

¹⁴ RM-034 Response, para. 4; RM-053 Response, para. 4; RM-515 Response, para. 3.

¹⁵ RM-034 Response, paras 4-9; RM-053 Response, paras 4-8.

¹⁶ RM-515 Response, paras 4-6.

¹⁷ RM-034 Response, paras 10-14.

¹⁸ RM-034 Reply, paras 8-9.

by the Judges; and (iii) the witness attests that the written statement accurately reflects that witness's declaration and what the witness would say if examined.

IV. DISCUSSION

8. The requirements of Rule 92 *ter* of the Rules can only be met once the witness appears in court and attests to the accuracy of his statement. Although the Chamber cannot presently decide on the admission of the Witnesses' statements under Rule 92 *ter* of the Rules, it can already address a few of the Defence's objections.

9. Regarding the Defence's First Objection, the Chamber refers to and incorporates its previous reasoning concerning proposed fact witnesses providing conclusions or opinions.¹⁹ The Chamber finds that there is no need to redact information from the statements on this ground.

10. Regarding the Defence's Second Objection, the Chamber recalls its previous discussion concerning the significance of proffered Rule 92 *ter* evidence and concerning such evidence going to proof of the acts and conduct of the Accused.²⁰ Having reviewed the Witnesses' statements and associated exhibits, the Chamber does not consider the Witnesses' proffered evidence of such significance that it should be led *viva voce* in order to avoid undue prejudice to the Accused.

11. The Defence's objections concerning the number of Rule 92 *ter* statements per witness have already been addressed by the Chamber's clarification and amendment of the guidance on the tendering and presentation of evidence of 9 July 2012.²¹ The Chamber finds these objections to be moot. The Chamber further understands the issue regarding the translation of one of Witness RM-034's statements to have been resolved by the Prosecution's correction.

12. In relation to Witness RM-515's statement, the Chamber recalls that it is illogical to tender and/or admit evidence that is expressly identified as not to be relied on.²² Accordingly, the Prosecution is instructed to redact those portions of the witness's statement upon which it indicated that it does not intend to rely.

13. Regarding the Defence's objections for additional time for examination-in-chief of Witness RM-128, the Chamber considers that granting the request would not affect the time available to the Prosecution for presenting evidence as determined by the Chamber under Rule 73 *bis* (C) of the

¹⁹ Decision with regard to Prosecution Motion for Admission into Evidence of Witness Harland's Statement and Associated Documents, 3 July 2012 ("Harland Decision"), para. 8.

²⁰ Harland Decision, para. 10; Decision with regard to Prosecution Rule 92 *ter* Motions with regard to Joseph Kingori, Eelco Koster, and Christine Schmitz, 9 July 2012, para. 6.

²¹ T. 525-532.

Rules. The Chamber finds that the Prosecution has presented good cause for exceeding the 30-minute time limit. Finally, with regard to the Defence's requests for additional time for cross-examination, the Chamber reiterates that the exact amount of time which will be available for cross-examination depends on many factors and may also be re-evaluated depending on how the cross-examination develops.²³ As such, the Chamber will not decide on any time for cross-examination at this stage.

V. DISPOSITION

14. For the foregoing reasons, the Chamber **DEFERS** its decisions on admission of the proffered Rule 92 *ter* material of the Witnesses and **INSTRUCTS** the Prosecution to redact the paragraphs of Witness RM-515's statement which it has identified as not to be relied on.

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



Judge Alphons Orié
Presiding Judge

Dated this Sixteenth of August 2012
At The Hague
The Netherlands

[Seal of the Tribunal]

²² Harland Decision, para. 7.

²³ See Harland Decision, para. 11.