

T-09-92-T
D 72406 - D 72402
06 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: 4 October 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: 4 October 2013

PROSECUTOR

v.

RATKO MLADIĆ

PUBLIC

**DECISION ON PROSECUTION MOTION TO ADMIT THE EVIDENCE OF
WITNESS RM-265 PURSUANT TO RULE 92 QUATER**

Office of the Prosecutor

Mr Dermot Groome
Mr Peter McCloskey

Counsel for Ratko Mladić

Mr Branko Lukić
Mr Miodrag Stojanović

I. PROCEDURAL HISTORY & SUBMISSIONS OF THE PARTIES

1. On 30 August 2013, the Prosecution filed a confidential motion ("Motion") seeking the admission into evidence of transcript excerpts from the prior testimony of Witness RM-265 in the cases of *Prosecutor v. Popović et al.* ("Popović") and *Prosecutor v. Tolimir* ("Tolimir"), as well as one associated exhibit, pursuant to Rule 92 *quater* of the Tribunal's Rules of Procedure and Evidence ("Rules").¹ On 13 September 2013, the Defence filed its confidential response ("Response"), objecting to the Motion in its entirety.²

II. APPLICABLE LAW

2. The Chamber recalls and refers to the applicable law governing the admission of evidence and associated exhibits pursuant to Rules 92 *quater* and 89 (C) of the Rules, as set out in a previous decision.³

III. DISCUSSION

(i) Rule 92 quater

3. The Chamber has been provided with the death certificate of the witness and is convinced that the witness is deceased and therefore unavailable within the meaning of Rule 92 *quater* (A) (i) of the Rules.⁴

4. With regard to the requirements of Rule 92 *quater* (A) (ii), the Chamber considers that the proffered evidence was elicited within the safeguards afforded by judicial proceedings. It was given under oath in proceedings before this Tribunal and interpreted simultaneously by duly-qualified CLSS interpreters. Further, the witness was cross-examined in both cases. The Chamber further considers that the proffered evidence is cumulative to the evidence of other witnesses in this case.⁵

¹ See Prosecution Motion to Admit the Evidence of [Witness RM-265] pursuant to Rule 92 *quater*, 30 August 2013 (Confidential with Confidential Annexes), paras 1-2, 4, 8-13, Annex A (Confidential) (original title of the Motion has been amended due to protective measures accorded to the witness).

² See Defence Response to Prosecution Motion to Admit the Evidence of [Witness RM-265] pursuant to Rule 92 *quater*, 13 September 2013 (Confidential), paras 3, 8-18 (original title of the Response has been amended due to protective measures accorded to the witness).

³ Decision on Prosecution Motion to Admit the Evidence of Witness RM-266 Pursuant to Rule 92 *quater*, 23 July 2012, paras 10-13. 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.

⁴ See Motion, Annex C (Confidential).

⁵ See Motion, para. 10 (Confidential), and the witnesses referred to therein.

The Chamber also notes that with regard to the witness's evidence on material elements of the indictment, the source of the witness's knowledge is direct and the information is first-hand.

5. The Defence submits that the proffered evidence is unreliable because, in the *Popović* case, the witness was testifying under pressure of being considered a potential suspect by the Prosecution and the Defence has no way of verifying whether the answers he gave were influenced by this pressure.⁶ While it is true that the witness had been informed that he was so treated by the Prosecution, the Chamber notes that the witness gave evidence under oath during his examination-in-chief and cross examination, and was advised of his right against self-incrimination, pursuant to Rule 90 (E) of the Rules. The Defence did not make any submission as to how the presumed pressure would have influenced the witness's testimony. The Chamber found nothing to indicate that the testimony of the witness, even if he had experienced any pressure under the given circumstances, was influenced by it.

6. The Defence also contends that the proffered evidence from the *Popović* transcript is replete with inconsistencies and does not meet the threshold criteria for admission under Rule 92 *quater*.⁷ To demonstrate this, the Defence has pointed out instances where, *inter alia*, the witness was unsure of exact dates, times or numbers and the identities of certain individuals.⁸ The Chamber considers that there does not appear to be any manifest inconsistency in the proffered evidence – there are merely instances where the witness could not provide certain details. The Chamber does not expect or require the witness to have perfect memory or knowledge. What is required is that the witness answers all questions to the best of the witness's knowledge, and so long as the witness has done so, the lack of certain details, taken on its own, does not constitute inconsistency.

7. Based on the foregoing, the Chamber concludes that the proffered evidence is reliable within the meaning of Rule 92 *quater* (A) (ii).

8. With regard to Rule 92 *quater* (B), the Defence submits that a large portion of the proffered evidence from the *Popović* case concerns live issues of the acts and conduct of Ratko Mladić ("Accused"), and that in the absence of any opportunity for cross-examination, the Accused would be unfairly prejudiced if the proffered evidence were admitted.⁹ The Chamber has reviewed the portions of the transcript identified by the Defence as relating to the acts and conduct of the Accused and considers that the objection in this regard is without merit. The Chamber notes that in the limited instances where the proffered evidence could be said to go to proof of the acts and

⁶ See Response, paras 3, 12.

⁷ See Response, paras 13-15.

⁸ See Response, para. 14.

conduct of the Accused, it is mostly in the context of the witness's description of the duties and tasks to which the Bratunac Brigade Military Police were assigned, including provision of security for the Accused. The Chamber notes that evidence which goes to the acts and conduct of the Accused is admissible under Rule 92 *quater* of the Rules, as opposed to Rule 92 *bis* of the Rules. To the extent that the proffered evidence touches upon the acts and conduct of the Accused, it is limited and focuses mainly on the Accused's presence in the Srebrenica area in July 1995. The evidence is in this aspect corroborated by evidence of a various nature that the Chamber has received up till now. Under these circumstances, the Chamber finds that the fact that the proffered evidence touches upon the acts and conduct of the Accused does not militate against admission.

(ii) Rule 89 (C)

9. With regard to the requirements of Rule 89 (C) of the Rules, the Chamber finds that the proffered evidence is relevant to Counts 2 through 8 of the Indictment. Turning to its probative value of which reliability is a component, the Chamber refers to its finding on reliability pursuant to Rule 92 *quater* (A) (ii) of the Rules above. The Chamber thus considers that the proffered evidence has probative value pursuant to Rule 89 (C) of the Rules.

(iii) Associated Exhibit

10. Having reviewed the associated exhibit, the Chamber finds that it forms an integral and inseparable part of the proffered evidence.¹⁰

(iv) Court Guidance

11. The Chamber finds that the tendering of this evidence complies with the Chamber's Guidance.¹¹

12. The Chamber further notes that the protective measures granted in the previous cases in which the witness testified continue to apply in this case pursuant to Rule 75 (F) (i).

IV. DISPOSITION

13. For the foregoing reasons, pursuant to Rules 54, 89 and 92 *quater* of the Rules, the Chamber:

- i) **ADMITS** into evidence, under seal, the following transcript excerpts from the witness's prior testimony in the *Popović* case, dated 8 and 9 November 2006: T. 3788:16-3791:11;

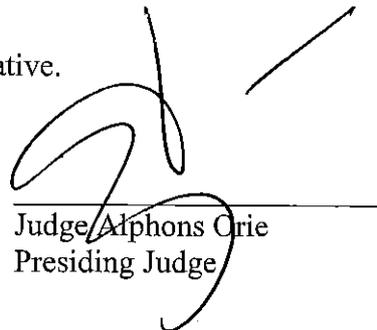
⁹ See Response, paras 16-18.

¹⁰ See *Popović*, T. 3851.

3791:12-3794:7; 3795:21-3796:13; 3796:22-3798:14; 3798:15-3800:11; 3801:13-3803:17; 3804:21-3807:8; 3809:6-3810:7; 3810:16-3811:19; 3811:20-3812:6; 3812:24-3813:9; 3813:14-3814:4; 3814:14-38915:8; 3815:12-3816:3; 3816:22-3821:24; 3822:10-3826:15; 3826:23-3828:10; 3828:11-3836:13 (as it appears in Annex B of the motion); 3837:16-3844:16; 3849:1-3852:19; 3852:20-3856:18; 3856:22-3870:11;

- ii) **ADMITS** into evidence, under seal, the following transcript excerpts from the witness's prior testimony in the *Tolimir* case, dated 15 March 2011: T. 11274:21-11275:12; 11275:23-11276:13; 11282:16-11283:4; 11285:25-11286:18; 11288:16-11288:20 (as it appears in Annex B of the motion).
- iii) **ADMITS** into evidence the associated exhibit with the 65 *ter* number 04954;
- iv) **INSTRUCTS** the Prosecution to upload the admitted portions of the aforementioned transcripts into eCourt within two weeks of the date of this decision; and
- v) **REQUESTS** the Registry to assign exhibit numbers to the documents admitted through this decision and to 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 4 day of October 2013
At The Hague
The Netherlands

[Seal of the Tribunal]

¹¹ Rules 92 *quater* and 89 (C) of the Rules; T. 137, 194, 315-325, 525-532.