

IT-09-92-T
D75154-D75149
17 December 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: 17 December 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: 17 December 2013

PROSECUTOR

v.

RATKO MLADIĆ

PUBLIC

**DECISION ON PROSECUTION 39TH MOTION TO ADMIT
EVIDENCE PURSUANT TO RULE 92BIS – WITNESS RM-378**

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 26 June 2013, the Prosecution filed a motion seeking leave to amend its Rule 65 *ter* witness list to add seven witnesses, including Witness RM-378, and the Chamber granted the request on 13 September 2013.¹ On 19 September 2013, the Prosecution filed a motion (“Motion”) tendering a written statement of Witness RM-378 pursuant to Rule 92 *bis* of the Tribunal’s Rules of Procedure and Evidence (“Rules”).² On 3 October, the Defence requested a 30-day extension to respond to the Motion,³ and on 4 October 2013, the Chamber granted the Defence 14 days in which to respond, setting the new deadline to 17 October 2013.⁴ On 17 October 2013, the Defence filed its response (“Response”), objecting to the Motion in its entirety.⁵ On 23 October 2013, the Prosecution requested leave to reply to the Response, and filed its reply.⁶

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.⁷

III. DISCUSSION

(i) Preliminary Matters

3. The Chamber finds that the Prosecution’s submissions in the Reply may assist the Chamber in deciding on the Motion and thus grants the requested leave to reply.

4. The Chamber notes that the Motion was filed confidentially out of an abundance of caution pending determination by the Prosecution as to whether the witness requires protective measures, but the witness statement was not tendered under seal. Out of an abundance of caution, for the purposes of the present decision the Chamber has not referred to the name of Witness RM-378. Since this witness has not been accorded protective measures, the Chamber will instruct the

¹ Prosecution Motion for Leave to Amend its Rule 65 *ter* Witness List, 26 June 2013 (Confidential); T. 16746-16748.

² Prosecution 39th Motion to Admit Evidence Pursuant to Rule 92 *bis* – RM378, 19 September 2013 (Confidential). For details of the Prosecution’s submissions, the Chamber refers to the Motion.

³ Defense Motion to Enlarge Time to Respond to Prosecution 39th Motion to Admit Evidence Pursuant to Rule 92 *bis* – RM378, 3 October 2013 (Confidential).

⁴ See T. 18082.

⁵ Defence Response to Prosecution 39th Motion to Admit Evidence Pursuant to Rule 92 *bis*: RM378, 17 October 2013 (Confidential). For details of the Defence submissions, the Chamber refers to the Response.

⁶ Prosecution Request for Leave to Reply to Defence Response to Prosecution 39th Rule 92 *bis* Motion, 23 October 2013 (Confidential); Prosecution Reply to Defence Response to Prosecution 39th Rule 92 *bis* Motion – RM378, 23 October 2013 (Confidential) (“Reply”).

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

Registry to change the status of the witness statement into public, unless the Prosecution files a request for protective measures.

5. The Chamber further notes that the proffered witness statement is not submitted with corresponding attestations and declarations as required by Rule 92 *bis* (B) of the Rules. Unattested witness statements have previously been conditionally admitted by this Chamber pending their formal attestation.⁸ In line with this practice, provided that all other admissibility requirements are met, the Chamber will conditionally admit the unattested witness statement pending the filing of the required attestations and declarations.

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

6. The proffered witness statement provides information on events related to Han Pijesak in 1992, conditions in Srebrenica between April 1993 and July 1995 including information on humanitarian convoys, and events in Srebrenica in June and July of 1995 including the formation and movements of the column. Furthermore, the witness statement appears to provide information on one Scheduled Incident. The Chamber is therefore satisfied that the evidence is relevant to this Scheduled Incident and, more generally, Counts 1 through 8 of the Indictment.

7. With regard to the Defence's objection that the witness statement contains "extreme hearsay", which renders the statement unreliable, the Chamber recalls that hearsay evidence is in principle admissible and the weight to be attributed to it by the Chamber will be assessed in light of all the evidence before it.⁹ As a general observation, the Chamber considers that it is clear, from the portions of the statement referred to by the Defence, that the witness does not have direct knowledge of certain subjects.¹⁰ The Chamber does not consider that the portions of hearsay evidence affect the overall reliability of the evidence and reiterates that it will carefully review the claims of fact witnesses and their sources of knowledge. However, with regard to the specific Defence objection against the portion of paragraph 43 of the witness statement that concerns chemical weapons, the Chamber considers the nature and source of this portion of the evidence to be vague to the extent that its reliability is undermined.¹¹ For the foregoing reasons and, considering that the proffered witness statement appears to be internally consistent and presented in a coherent

⁸ Decision on Prosecution Third Motion to Admit Evidence Pursuant to Rule 92 *bis*: Sarajevo Witnesses, 19 October 2012, para. 27 and references cited therein.

⁹ 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.

¹⁰ Response, para. 18.

¹¹ Response, para. 18(c). Contrary to the Defence's indication, the Chamber does not consider this portion of the statement to be hearsay evidence as the witness does not indicate that his conclusions were based on something he heard from others.

manner, the Chamber finds the witness statement to be of probative value, with the exception of the portion of paragraph 43 that begins after the sentence ending “committed suicide”.

8. In light of the foregoing, the Chamber will deny the admission into evidence of the portion of paragraph 43 specified above without prejudice. But for this portion, the Chamber finds the witness statement admissible pursuant to Rule 89 (C) of the Rules,

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

9. The tendered witness statement does not relate to the acts and conduct of the Accused. Instead, it relates mainly to the establishment of the alleged crime base of the case.

10. With regard to factors weighing in favour of admitting evidence in the form of a written statement, the Chamber firstly notes the Prosecution’s submission that the witness statement of RM-378 corroborates the written and oral evidence received from Witness RM-314.¹² In this regard, the Chamber notes the Defence’s argument that Witness RM-314 did not identify Witness RM-378 as the person having treated him, and the latter’s evidence is therefore not corroborated by the former.¹³ However, in his testimony, Witness RM-314 explicitly identified Witness RM-378 by name as the person who had treated him.¹⁴ The Chamber therefore finds the Defence’s argument in this respect without merit.

11. Furthermore, the Defence argues that the testimony of Witness RM-314 about the type of wounds he received and how he received them conflicts with medical documentation issued upon his treatment,¹⁵ and that therefore it is unclear whether the evidence of Witness RM-378 is supposed to be corroborative of the testimony of Witness RM-314 or the medical documentation.¹⁶ In this respect, the Chamber recalls that, pursuant to Rule 92 bis (A)(i)(a) of the Rules, a factor weighing in favour of admitting evidence in the form of a written statement is whether the evidence is of a cumulative nature, in that other witnesses will give or have given oral testimony of similar facts. Noting that both Witness RM-314 and Witness RM-378 give evidence related to the same Scheduled Incident, the Chamber is satisfied that the proffered witness statement is, in this respect, cumulative to the oral evidence received from Witness RM-314. Considering further that, in the proffered witness statement, Witness RM-378 states that he does not remember the details of the wound he treated, the Chamber does not find it necessary to require the witness to attend for cross-examination in this regard.

¹² Motion, paras 2, 6; Reply, para. 2.

¹³ Response, para. 13.

¹⁴ T. 10863.

12. With regard to the portions of the witness statement related to the conditions in Srebrenica between April 1993 and June 1995, including evidence concerning humanitarian convoys, as well as the portions of the statement dealing with events in Srebrenica in June and July 1995, including evidence related to the formation and movements of the column, the Chamber notes that it has received oral evidence of similar facts from a number of other witnesses, and is thus satisfied that major parts of this evidence are of a cumulative nature.¹⁷

13. With regard to the evidence concerning events in Han Pijesak in 1992, the Chamber notes that this portion of the evidence does not appear to be cumulative with oral evidence the Chamber has received or anticipates to receive from other witnesses. In this respect, the Chamber further considers that this evidence relates in part to relevant military background and covers only four paragraphs in the witness statement.

14. In determining whether or not to admit the proffered evidence pursuant to Rule 92 *bis* of the Rules, the Chamber further considers as a factor weighing in favour of admission that the proffered witness statement relates largely to the impact of crimes on victims.

15. In light of the foregoing, the Chamber does not consider it necessary to require the witness to attend for cross-examination and concludes that the tendered witness statement is admissible pursuant to Rule 92 *bis* of the Rules, with the exception of the portion specified in paragraph seven above.

IV. DISPOSITION

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

GRANTS the request to reply;

GRANTS the Motion in **PART**;

CONDITIONALLY ADMITS into evidence, **UNDER SEAL**, the ICTY Statement of Witness RM-378 dated 3 October 2012, bearing the ERN 0684-1942-0684-1954, with the exception of the portion specified in paragraph seven above, pending the filing of a corresponding attestation and declaration in compliance with the requirements of Rule 92 *bis* (B) of the Rules;

¹⁵ See D282 and D283.

¹⁶ Response, para. 14. See T. 10894-10899.

¹⁷ See, *inter alia*, Rupert Smith, Piers Tucker, David Fraser, Cornelis Nicolai and Witness RM-253.

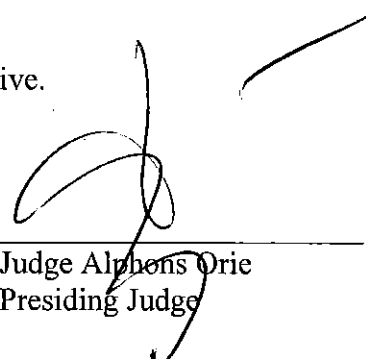
INSTRUCTS the Prosecution to file the corresponding attestation and declaration to the statement of Witness RM-378 within four weeks from the date of filing of this decision;

INSTRUCTS the Prosecution to upload into eCourt the admitted portions of the witness statement with the corresponding attestation and declaration within five weeks from the date of filing of this decision, insofar as it has not done so already;

INSTRUCTS the Registry to change the status of the witness statement referred to above into public, unless the Prosecution files a request for protective measures for Witness RM-378 within two weeks; and

REQUESTS the Registry to assign an exhibit number to the admitted document 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 Orie
Presiding Judge

Dated this Seventeenth day of December 2013
At The Hague
The Netherlands

[Seal of the Tribunal]