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28 June 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: 28 June 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: 28 June 2013

PROSECUTOR

v.

RATKO MLADIĆ

PUBLIC

**DECISION ON PROSECUTION 92 QUATER MOTION
(WITNESS RM-132)**

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 20 December 2012 the Prosecution filed its Rule 92 *quater* Motion with confidential Annexes A, B, and C in relation to Witness RM-132, in which it requested the Chamber to admit Witness RM-132's proposed evidence consisting of his amalgamated statement and approximately two pages of transcript from his testimony in the *Karadžić* case, together with 15 associated exhibits ("Motion") pursuant to Rule 92 *quater* of the Tribunal's Rules of Procedure and Evidence ("Rules").¹ The Prosecution submits that Witness RM-132 is "unavailable because his mental condition renders him objectively unable to testify due to severe and chronic Post-Traumatic Stress Disorder ("PTSD")" and provides a medical assessment from Witness RM-132's psychiatrist in this regard.² It further submits that the proffered evidence is reliable, relevant and of probative value.³ With regard to the 15 associated exhibits, it submits that they form an inseparable and indispensable part of the witness's proposed evidence without which the evidence could not be fully understood.⁴

2. On 3 January 2013 the Defence filed its response ("Response"), requesting the Chamber to deny the Motion on the basis that: (i) the proposed evidence of Witness RM-132 is unreliable; (ii) the amalgamated statement touches on "live issues important to the case that should require cross-examination"; and (iii) the amalgamated statement contains "expert-like testimony and hearsay".⁵ In the Defence's view, the Prosecution failed to identify the corroborating evidence needed to properly establish the proffered evidence's reliability.⁶ The Defence submits that "it does not take issue with the unavailability of this witness as confirmed by the opinion of the medical health professional" but that the PTSD casts doubts on Witness RM-132's prior testimony as he presumably had suffered from it already during his testimony in the *Karadžić* case.⁷

3. On 10 January 2013 the Prosecution requested to be granted leave to reply with regard to issues (i) and (ii) of the Response.⁸ In the attached reply ("Reply"), the Prosecution argues that the Response should be dismissed and the Motion be granted as there is substantial independent

¹ Prosecution 92 *quater* Motion: RM132 [...] with Confidential Annexes A, B and C, 20 December 2012 (confidential), paras 1, 17.

² Motion, paras 2, 7-8; Annex C.

³ Motion, paras 9-13.

⁴ Motion, para. 16.

⁵ Defence Response to Prosecution 92 *quater* Motion RM132, 3 January 2013 (confidential), paras 7-18, IV Relief Requested.

⁶ Response, paras 8, 12.

⁷ Response, para. 11.

⁸ Prosecution Request for Leave to Reply to Defence Response to Prosecution Rule 92 *ter* [*sic*] Motion: [...] (RM132) with Confidential Annexes A, B and C, 10 January 2013 (confidential), para. 2.

evidence corroborating Witness RM-132's evidence.⁹ It further submits that Witness RM-132 was consistent in his accounts throughout the various statements that he provided and that the Defence failed to put forth any evidence to conclude that witnesses who suffer from PTSD are necessarily unreliable.¹⁰

II. APPLICABLE LAW

4. With regard to the legal provisions covering evidence of "unavailable persons" and the admission into evidence of documents that accompany such evidence, the Chamber refers to its previous decision issued on 22 July 2012.¹¹

III. DISCUSSION

5. The Chamber considers that it is assisted by further submissions by the Prosecution on the matters outlined in the request for leave to reply, and will therefore grant this request.

6. With regard to Witness RM-132's unavailability, the Chamber has been provided with a medical assessment from Witness RM-132's psychiatrist who diagnosed the witness with "chronic PTSD" and stipulates that "having to testify again is not advisable and could lead to a severe relapse" of Witness RM-132's condition which "could lead to the results of 12 years of treatment getting severely undermined".¹² During a subsequent telephone conversation between an investigator of the Prosecution and the psychiatrist the latter further informed that in his view, Witness RM-132 is "unfit to appear" and "mentally unable to provide oral testimony".¹³

7. A witness has been held to be unavailable for the purposes of Rule 92 *quater*, when there is a medical statement that the person in question is incapable of testifying orally owing to the state of his mental health or where medical evidence has been presented that the witness is unable to testify coherently.¹⁴ To further explore whether a person falls under Rule 92 *quater*, the Appeals Chamber has held that for a witness to be "unavailable", the witness must be *objectively* unable to attend a court hearing, either because he or she is deceased or because of a physical or mental impairment.¹⁵

⁹ Prosecution Reply to Defence Response to Prosecution Rule 92 *quater* Motion: RM132, 10 January 2013 (confidential), paras 9-11, Annex C.

¹⁰ Reply, paras 7-8, Annex B.

¹¹ Decision on Prosecution Motion to Admit the Evidence of Witness RM-266 Pursuant to Rule 92 *quater*, 22 July 2012, paras 10-13.

¹² Motion, Annex C.

¹³ Motion, Annex C.

¹⁴ *Prosecutor v. Zdravko Tolimir*, Case No. IT-05-88/2-T Decision on Prosecution's Motion to Admit the Evidence of Witness No. 39 Pursuant to Rule 92 *quater*, 7 September 2011, para. 27, fns 41-42.

¹⁵ *Prosecutor v. Prlić et al.*, Case No. IT-04-74-AR73.6, Decision on Appeals Against Decision Admitting Transcript of Jadranko Prlić's Questioning into Evidence, 23 November 2007, para. 48.

The *Gotovina* Trial Chamber applied the test of “objective unavailability” holding that although a Chamber must be mindful of the distress that the prospect of oral testimony may cause for a particular witness, such distress is a common feature of many witnesses and Trial Chambers therefore need to distinguish between the “emotional state” of the witness and an established “mental condition”.¹⁶

8. In the case at hand, Witness RM-132 suffers from chronic PTSD as indicated in the medical statement of his psychiatrist. The mere fact that attending court could have harmful after-effects on him, does not amount to medical incapability. However, Witness RM-132’s psychiatrist clearly advised that the witness is “unfit to appear in court to testify” and is “mentally unable to provide oral testimony”.¹⁷ Further, the Chamber notes that the Defence has not disputed the fact that the witness is unfit to give oral testimony and therefore unavailable. In light of the medical assessment, the Chamber finds that the witness is objectively unable to testify owing to the state of his mental health.

9. With regard to reliability, the Chamber notes that the Defence has not provided any support for the assertion that Witness RM-132’s prior evidence is rendered unreliable due to his chronic PTSD. In this regard, the Chamber specifically recalls various Appeals Chamber rulings that an individual suffering from PTSD remains competent to provide evidence.¹⁸ Moreover, the Chamber is satisfied that the statement provided by Witness RM-132 to the Prosecution in 1996 is consistent with the evidence provided in his amalgamated statement of 2010.¹⁹

10. The Chamber further considers that Witness RM-132’s amalgamated statement of 2010 refers to his testimony from previous cases in which he testified. As such it was elicited within the safeguards afforded by judicial proceedings: it was given under oath and was subject to cross-examination. The same applies to the two pages of transcript from his prior testimony in the *Karadžić* case which the Prosecution seeks to tender. The Chamber found no manifest or obvious inconsistencies in the evidence.

11. As for the Defence assertion that portions of the proffered evidence are unreliable because they contain hearsay evidence, the Chamber recalls that hearsay evidence is, in principle, admissible before the Tribunal. With regard to “expert-like testimony” challenged by the Defence,

¹⁶ *Prosecutor v. Gotovina et al.*, Case No. IT-06-90-T, Decision on the Admission of Statements of Four Witnesses Pursuant to Rule 92 quater, 24 July 2008, paras 15-16.

¹⁷ Motion, Annex C.

¹⁸ See *Prosecutor v. Furundžija*, Case No. IT-95-17/1-A, Appeal Judgement, 21 July 2000, para. 123; *Prosecutor v. Simić et al.*, Case No. IT-95-9-A, Appeal Judgement, 28 November 2006, para. 229; *Kupreškić et al.*, Case No. IT-95-16-A, Appeal Judgement, 23 October 2007, para. 171.

¹⁹ Reply, para. 8; Annex B.

the Chamber refers to its Decision of 3 July 2012 in which it ruled upon this issue stating that when proposed fact witnesses provide conclusions or opinions the Chamber expects the parties to explore such conclusions or opinions with a view to eliciting a clear basis for them, or that when such conclusions or opinions are not further explored, or the witness is unable to provide a clear basis for them, the Chamber considers them to remain unsupported, un-sourced conclusions or opinions of a witness, which absent any other corroborating evidence will not be given any weight.²⁰ Further, with regard to the issue of corroboration, the Chamber considers that Witness RM-132's evidence is cumulative to the anticipated testimony of other witnesses who are due to give evidence in this case, as well as documentary evidence.²¹ Finally, with regard to the Defence's challenge that the proffered evidence touches on "live issues" of the case and therefore requires cross-examination, the Chamber considers the shelling outside the entrance of the Sarajevo city market on 28 August 1995 ("Markale II incident"), although important to the case, not to be of such importance as to require additional cross-examination, in particular as Witness RM-132 was sufficiently cross-examined in previous cases and his proffered evidence will be cumulative as outlined above. Therefore, for the foregoing reasons, the Chamber finds that the proffered evidence of Witness RM-132 consisting of two pages of transcript from the *Karadžić* case and his amalgamated statement of 2010 are reliable for the purposes of Rule 92 *quater* of the Rules. The Chamber further considers that the proposed evidence of Witness RM-132 does not go directly to the knowledge or acts and conduct of the Accused.

12. With regard to the requirements of Rule 89 (C) of the Rules, the Chamber finds that the proffered evidence is relevant to the case, as it relates to crimes allegedly committed within the indictment period, in particular to the scheduled incident G18 and the Markale II incident. Since reliability is a component part of the probative value of a piece of evidence, the Chamber considers that there is no need to re-examine this aspect of the probative value where a determination of reliability has already been made within the context of Rule 92 *quater* (A) (ii) of the Rules.

13. The Chamber has reviewed the 15 associated exhibits tendered with Witness RM-132's amalgamated statement. It notes that nine are photographs which the witness comments on in his amalgamated statement (65 *ter* numbers: 14117, 10370, 10436, 10371, 10437, 10438, 10142, 10394 and 09942), two are maps marked by the witness during his previous testimony (65 *ter* numbers: 14120 and 10369) and the remaining four documents are reports concerning the investigation of the Markale II incident (65 *ter* numbers: 10439, 10239, 10244 and 13825).²² The Chamber finds that

²⁰ Decision With Regard to Prosecution Motion for Admission into Evidence of Witness Harland's Statement and Associated Exhibits, 3 July 2012, para.8.

²¹ See Motion, para. 10; Reply, paras 9-10, Annex C.

²² Motion, Annex A.

the associated exhibits tendered form an integral and inseparable part of Witness RM-132's amalgamated statement as they were discussed and without them the statement would be incomprehensible or of lesser probative value.

IV. DISPOSITION

14. For the foregoing reasons, pursuant to Rules 89 (C), and 92 *quater* of the Rules, the Chamber;

GRANTS the Prosecution's request for leave to reply;

GRANTS the Motion;

ADMITS into evidence:

(i) The amalgamated statement of Witness RM-132 dated 11 November 2010 bearing ERN 0678-9349-0678-9377 (Eng);

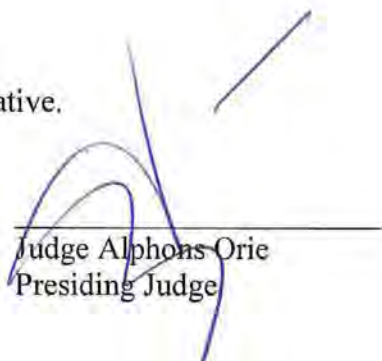
(ii) The excerpt of Witness RM-132's testimony from the *Karadžić* case as set out in the Motion in Annex A;

(iii) The associated exhibit with 65 *ter* numbers: 09942, 10142, 10239, 10244, 10370, 10371, 10394, 10369, 10436-10439, 13825, 14117, and 14120;

INSTRUCTS the Prosecution to upload the admitted documents into eCourt; and

REQUESTS the Registrar to assign exhibit numbers to the admitted documents and inform the parties and the Chamber of the exhibit numbers assigned.

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



Judge Alphons Orié
Presiding Judge

Dated this twenty-eighth day of June 2013
At The Hague
The Netherlands

[Seal of the Tribunal]