

IT-09-92-T
Džukanović - Džukanović
28 November 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 November 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 November 2013

PROSECUTOR

v.

RATKO MLADIĆ

PUBLIC

**DECISION ON PROSECUTION 38TH MOTION TO ADMIT
EVIDENCE PURSUANT TO RULE 92BIS - WITNESS RM-098**

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 17 September 2013, the Prosecution filed a motion (“Motion”) pursuant to Rule 92 *bis* of the Tribunal’s Rules of Procedure and Evidence (“Rules”) seeking to admit the evidence of Witness RM-098 (“Witness”) in written form.¹ The Prosecution seeks the admission of the Witness’s statement (“Statement”), portions of the Witness’s testimony in the *Prosecutor v. Karadžić*, Case No. IT-95-5/18-T (“*Karadžić case*”), together with twelve associated exhibits and a table of concordance.² The Prosecution further requests leave to add three documents to its Rule 65 *ter* exhibit list (“Exhibit List”).³ On 1 October 2013, the Defence requested an extension of 30 days to respond, which the Chamber granted on 3 October 2013, setting the new deadline of 31 October 2013.⁴ On 31 October, the Defence filed its response opposing the motion (“Response”).⁵

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.⁶ With regard to the applicable law related to the admission of associated exhibits, the Chamber recalls and refers to one of its previous decisions dealing with this matter.⁷ Finally, the Chamber recalls and refers to the applicable law governing additions to the Exhibit List, as set out in a previous decision.⁸

¹ Prosecution 38th Motion To Admit Evidence Pursuant to Rule 92*bis* - Witness RM098, 17 September 2013 (Confidential). The Chamber refers to the Motion for the Prosecution submissions. The Chamber notes that the Prosecution, in the Motion, refers back to submissions made by the Defence in the Defence Response to Prosecution Motion for Leave to Amend Its Rule 65*ter* Witness List, 23 July 2013 (Confidential). The Chamber granted leave to add the Witness to the Prosecution’s Rule 65 *ter* Witness List on 13 September 2013 (*See T. 16745-16748*).

² Motion, paras 4, 19.

³ Motion, paras 6, 19.

⁴ Defence Motion to Enlarge Time to Respond to Prosecution 38th Motion To Admit Evidence Pursuant to Rule 92*bis* – Witness (RM098), 1 October 2013 (Confidential); T. 17882.

⁵ Defence Response to Prosecution 38th Motion to Admit Evidence Pursuant to Rule 92*bis*: Witness RM098 (Confidential). The Chamber refers to the Response for the Defence submissions.

⁶ Decision on Prosecution Third Motion to Admit Evidence Pursuant to Rule 92 *bis*: Sarajevo Witnesses, 19 October 2012, paras 5-7.

⁷ Decision on Prosecution Motion to Admit the Evidence of Witness RM-266 Pursuant to Rule 92 *quater*, 23 July 2012, para. 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.

⁸ Decision on Prosecution Second Motion to Amend Rule 65 *ter* Exhibit List, 27 June 2012, paras 5-6.

III. DISCUSSION

A. Preliminary Matters

3. The Chamber notes that the protective measures granted in a previous case in which the Witness testified continue to apply in this case pursuant to Rule 75 (F) (i) of the Rules.

4. In relation to the admission of transcript evidence under Rule 92 *bis* of the Rules, the Chamber refers to its previous guidance on the matter.⁹ The Prosecution argues that the tendered excerpts are necessary, as they offer clarifications and additional information not contained in the Statement.¹⁰ The Chamber finds that the transcript excerpts supplement the evidence contained in the Statement. Considering further that the tendered transcript comprise a limited number of pages, approximately 23, the Chamber finds that the Prosecution has complied with the guidance.

5. The number of tendered associated exhibits, twelve, is more than the Chamber prefers.¹¹ Considering the short length and the uncomplicated nature of most of the documents, the Chamber allows a deviation from its guidance in this regard.¹²

B. Addition to the Exhibit List

6. The Chamber notes that the Prosecution has not shown good cause for the addition of the documents to the Exhibit List at this late stage of the proceedings. However, the Chamber notes that the document bearing provisional Rule 65 *ter* number 30233 is a marked map of the municipality of Rogatica and is *prima facie* relevant to the crimes alleged in the Indictment, including but not limited to Count 3. The two other documents, a table of concordance and a pseudonym sheet bearing provisional Rule 65 *ter* numbers 30231 and 30232, respectively, contain no substantive evidence and merely assist the Chamber in understanding the evidence. Having considered these factors, as well as the fact that the Defence did not address the request for addition to the Exhibit List in its Response, the Chamber finds that the addition of the three documents to the Exhibit List at this stage of the proceedings does not unduly burden the Defence and is consistent with the interests of justice.

⁹ T. 106-110, 137-138, 194, 294-340, 315-325, 525-532.

¹⁰ Motion, para. 12.

¹¹ T. 108-109, 530.

¹² Ten out of these twelve documents are between one and three pages long and the remaining two documents are respectively six and twelve pages long.

C. Attestation and Declaration

7. The Statement has no corresponding attestation or declaration as required by Rule 92 *bis* (B) of the Rules. The Witness did, however, attest to the Statement's truth and accuracy in the *Karadžić* case.¹³ In accordance with a previous decision, the Chamber finds that such an in-court attestation is sufficient to meet the requirement of Rule 92 *bis* (B) of the Rules.¹⁴

D. Admissibility Pursuant to Rule 89 (C) of the Rules

8. The proposed evidence relates, *inter alia*, to the situation in Rogatica in 1991 and 1992, including the political negotiations and the formation of paramilitary groups, as well as alleged crimes in this municipality. The Chamber finds that the proposed evidence is therefore relevant to the crimes as charged in the Indictment, including but not limited to Counts 3 to 8 of the Indictment and to Scheduled Incidents B14.2 and D12.

9. With regard to probative value, the Chamber notes that the tendered evidence appears to be both internally consistent and presented in a coherent manner. Concerning the Defence's submission that the tendered evidence contains hearsay evidence, the Chamber recalls that hearsay evidence is, in principle, admissible in proceedings before the Tribunal and that the weight to be attributed to it by the Chamber will be assessed in light of all the evidence before it.¹⁵ Regarding the portions of evidence identified by the Defence in this respect, the Chamber finds that either the source of knowledge is stated in the evidence or that it is clear that the Witness has no direct knowledge of certain subjects about which he testified.¹⁶ The Chamber does not consider that these portions of hearsay evidence affect the overall probative value of the evidence.

10. The Defence objects to the reliability of the transcript excerpts from the *Karadžić* case on the ground that the cross-examination was led by a self-represented accused with a different defence theory and different interests from those of the Accused.¹⁷ The Chamber notes that the Defence has not provided any examples of cross-examination in that case which demonstrate the unreliability of the Witness's evidence. Further, the evidence in the transcript is consistent with the evidence contained in the Statement and with associated documentary evidence, and it was given under oath.

¹³ *Prosecutor v. Karadžić*, Case No. IT-95-5/18-T, Transcript of 2 September 2011, T. 18253-18354.

¹⁴ Decision on Prosecution Fourth Motion to Admit Evidence Pursuant to Rule 92 *bis*: Hostage Witnesses, 19 October 2012, para. 7.

¹⁵ Response, paras 16-17; See *Prosecutor v. Aleksovski*, Case No. IT-95-14-T, Decision on Prosecutor's Appeal on Admissibility of Evidence, 16 February 1999, para. 15; Decision on Prosecution's Seventh Motion to Admit Evidence Pursuant to Rule 92*bis*, 6 February 2013, para. 14.

¹⁶ The source of knowledge is clearly stated in, *inter alia*, paras 14, 15, 21, and 101 of the Statement. With respect to paras 42-43, 67-68 of the Statement and T. 18273:21-18274:4 of his testimony in the *Karadžić* case, it is clear that the Witness had no direct knowledge.

¹⁷ Response, paras 18-20.

The Chamber therefore considers that the fact that the cross-examination was led by a self-represented accused does not affect the overall probative value of the tendered transcript.

11. Considering the above, the Chamber is satisfied that the evidence is admissible pursuant to Rule 89 (C) of the Rules.

E. Admissibility Pursuant to Rule 92 bis of the Rules

12. The Prosecution argues that the tendered evidence does not relate to the acts and conduct of the Accused.¹⁸ The Defence argues the contrary, on the grounds that the proposed evidence includes eye-witness testimony of the activities of certain individuals who are, alongside the Accused, alleged members of the joint criminal enterprise (“JCE”) to permanently remove the Bosnian Muslims and Bosnian Croats from Bosnian Serb-claimed territory, thereby linking the Accused to certain counts and scheduled incidents.¹⁹ It is the Defence’s position that evidence about the activities of alleged members of this JCE goes to the issue of whether the Accused himself was part of the JCE, and whether he could be responsible for the actions of other alleged JCE members.²⁰

13. The Chamber considers that part of the tendered evidence relates to the acts and conduct of alleged members of the JCE, including Radovan Karadžić and members of the political, military, and paramilitary leadership in the municipality of Rogatica.²¹ The Chamber further notes that the Witness gives evidence in the Statement that “My experiences during these times have convinced me that everything the Serbs have carried out has been part of a well-planned large-scale operation that is being commanded at the highest level”²² and further that “everything had been planned from the highest level and staged right down to the lower commands in order to expulse [sic] the Muslims”.²³ Given the very general and vague nature of these sentences and the fact that the Accused is not mentioned in the tendered evidence, the Chamber considers that the evidence does not go to proof of the acts and conduct of the Accused. The Chamber further finds that the evidence does not go to proof of the Accused’s acts and conduct as an alleged participant in the JCE, but rather to the acts and conduct of other alleged members of the JCE.²⁴ The Chamber therefore considers that the evidence can be admitted pursuant to Rule 92 bis of the Rules.

¹⁸ Motion, para. 8.

¹⁹ Response, paras 8-12.

²⁰ Response, para. 10.

²¹ See for example Annex B to the Motion, Statement, paras 7-21, 35-89.

²² Annex B to the Motion Statement, para. 110.

²³ Ibid.

²⁴ See *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-AR73.2, Decision on Interlocutory Appeal Concerning Rule 92bis(C), 7 June 2002, paras 9-10.

14. In the view of the Chamber, the proposed evidence relates to a large extent to the relevant political background and partially consists of a general analysis of the ethnic composition of the municipality of Rogatica, which are factors weighing in favour of admission pursuant to Rule 92 *bis* of the Rules.²⁵ The Chamber further finds that the tendered evidence is cumulative in part with the oral evidence of Šefik Hurko and Witness RM-081.²⁶ Taking these factors into account, the Chamber finds that the evidence is admissible and will admit the same pursuant to Rule 92 *bis* of the Rules.

F. Associated Exhibits

15. The Prosecution tenders twelve associated exhibits and one concordance chart as part of the Witness's evidence.²⁷ The Defence did not object to the admission of the associated exhibits. With regard to document bearing Rule 65 *ter* number 08324 which appears to be a list of names of Bosnian Muslims alleged to have been killed in Rogatica, the Witness stated that there were people on this list that he knew personally and confirmed that they were killed.²⁸ While the list contains over 200 names and the Witness does not specify the individuals he confirms were killed, the Chamber considers that the list is inseparable from the Statement, and shall take into consideration the Witness's limited contribution to the content when assessing the weight to be attributed to this exhibit.

16. With regard to the remaining proposed associated exhibits, the Chamber notes that all of them, except for the pseudonym sheet, were discussed in the Statement and that eight of them were also addressed in the tendered transcript excerpts from the *Karadžić* case. The Chamber finds that, the remaining associated exhibits form an inseparable and indispensable part of the Witness's evidence and that the requirements for admission have been met. While the concordance chart is not being tendered as an associated exhibit, the Chamber considers that it will assist it in understanding the evidence and it is sufficiently connected to the witness's evidence in order to grant its admission.

²⁵ See for example Annex B to the Motion, Statement, paras 4-13, 71-89, 104.

²⁶ For the testimony of Šefik Hurko, see T. 2211-2298 (4-5 September 2012); for the testimony of Witness RM-081, see T. 3682-3747 (5 and 8 October 2012).

²⁷ Motion, paras 4, 16-17, and 19.

²⁸ Annex B to the Motion, Statement, para. 98.

IV. DISPOSITION

17. For the foregoing reasons, pursuant to Rules 54, 89, and 92 *bis* of the Rules, the Chamber

GRANTS the Motion **IN PART**;

GRANTS LEAVE to add the documents bearing Rule 65 *ter* numbers 30231, 30232, and 30233 to the Exhibit List;

ADMITS into evidence, **UNDER SEAL**:

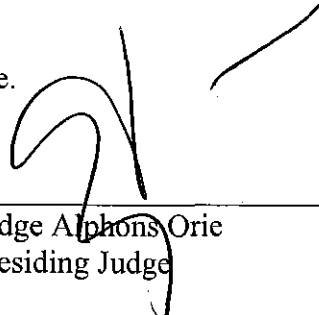
- a) ICTY statement of Witness RM-098 dated 1 September 2011;
- b) Excerpts of testimony of Witness RM-098 in *Prosecutor v. Karadžić*, Case number IT-95-5/18-T, as specified in Annex A to the Motion;
- c) Documents bearing Rule 65 *ter* numbers 09056, 30231 and 30232;

ADMITS into evidence documents bearing Rule 65 *ter* numbers 08324, 08864, 09011, 09014, 09049, 09254, 09096, 09316, 09824, and 30233;

INSTRUCTS the Prosecution to upload into eCourt all admitted documents within 14 days from the date of filing of this decision; and

REQUESTS the Registry to assign exhibit numbers to the documents admitted and 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 twenty-eighth day of November 2013
At The Hague
The Netherlands

[Seal of the Tribunal]