



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-95-5/18-T

Date: 3 February 2014

Original: English

IN THE TRIAL CHAMBER

Before: Judge O-Gon Kwon, Presiding Judge
Judge Howard Morrison
Judge Melville Baird
Judge Flavia Lattanzi, Reserve Judge

Registrar: Mr. John Hocking

Decision of: 3 February 2014

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

**DECISION ON ACCUSED'S MOTION TO ADMIT TESTIMONY
OF WITNESS KW582 PURSUANT TO RULE 92 *QUATER***

Office of the Prosecutor

Mr. Alan Tieger
Ms. Hildegard Uertz-Retzlaff

The Accused

Mr. Radovan Karadžić

Appointed Counsel

Mr. Richard Harvey

THIS TRIAL CHAMBER of the 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 (“Tribunal”) is seised of the Accused’s “Motion to Admit Testimony of Witness KW582 pursuant to Rule 92 *quater*”, filed on 8 October 2013 (“Motion”), and hereby issues its decision thereon.

I. Background and Submissions

1. In the Motion, the Accused requests the admission, pursuant to Rule 92 *quater* of the Tribunal’s Rules of Procedure and Evidence (“Rules”), of the transcript of prior testimony of Witness KW582 (“Witness”) in *Prosecutor v. Blagojević & Jokić*, Case No. IT-02-60-T (“*Blagojević case*”) (“Testimony”),¹ as well as one associated exhibit² as an integral and indispensable part of the Witness’s Testimony.³

2. The Accused generally submits that the Witness is deceased, that the Chamber has already found the Testimony to be relevant and of probative value, and that such admission would not be unfair to the Office of the Prosecutor (“Prosecution”) as it considered the Witness sufficiently credible to call him as a witness in three trials and to offer his testimony pursuant to Rule 92 *quater* in a fourth one.⁴ The Accused then adds that the Trial Chamber in the *Mladić* case admitted the Witness’s Testimony, finding that the evidence therein is reliable, relevant, and has probative value, therefore meeting the requirements of Rule 92 *quater*, and argues that the Chamber should come to the same conclusion.⁵

3. The Accused claims that the Testimony is of direct relevance and probative value to his defence as it directly contradicts various portions of the evidence of Prosecution witness Momir Nikolić in relation to events on 13 July 1995, namely an encounter between Momir Nikolić and the Witness, the execution by Mile Petrović at Konjević Polje of six Bosnian Muslim prisoners, and the presence of Nenad Deronjić at Konjević Polje (together “Topics”).⁶

4. On 22 October 2013, the Prosecution filed the “Prosecution’s Response to ‘Motion to Admit Testimony of Witness KW582 pursuant to Rule 92 *quater*’” (“Response”), stating that it does not oppose the Motion but adding that the admission of the Witness’s Testimony does not

¹ The Accused indicates that the transcript of the Testimony bears Rule 65*ter* number 1D09176.

² The Accused indicates that the Witness’s pseudonym sheet has been uploaded into ecourt as Rule 65*ter* number 1D09846.

³ Motion, paras. 1, 10–11.

⁴ Motion, paras. 2, 8, 9.

⁵ Motion, paras. 3–4.

⁶ Motion, paras. 5–7.

determine the weight that should be appropriately attached to it in light of all the evidence admitted in this case.⁷

5. The Prosecution adds that, contrary to the Accused's assertion in the Motion, the *Mladić* Trial Chamber did not admit the Testimony, but rather excerpts of the Witness's testimony in the *Popović et al.* and *Tolimir* cases.⁸

6. In relation to the Testimony, the Prosecution argues that it has not had an opportunity to cross-examine the Witness on the Topics,⁹ that the Accused failed to put to Momir Nikolić the nature of his case in relation to Nenad Deronjić,¹⁰ and that Momir Nikolić was not questioned as to any encounter with KW582 in the early morning hours of 13 July 1995.¹¹

7. The Prosecution also notes that some portions of the Testimony were heard in private session; consequently, it requests that those portions, together with the Witness's pseudonym sheet referred to in paragraph 1 above, be admitted under seal.¹² Finally, the Prosecution suggests that the Chamber admits an aerial photograph of Bratunac town marked by the Witness as an additional associated exhibit, as portions of the Testimony are incomprehensible without reference to this document.¹³

II. Applicable Law

8. The Chamber recalls that the pre-Trial Chamber in this case set out the law applicable for admission of evidence pursuant to Rule 92 *quater* in the "Decision on Prosecution Motion for Admission of Testimony of Witness KDZ198 and Associated Exhibits pursuant to Rule 92 *quater*" issued on 20 August 2009 ("KDZ198 Decision").¹⁴ It will therefore not repeat that discussion here. The Chamber reiterates, however, that the evidence of an unavailable witness may be submitted in written form if the Chamber finds: (i) the witness unavailable within the meaning of Rule 92 *quater*(A), (ii) from the circumstances in which the statement was made and recorded that it is reliable, (iii) the evidence is relevant to the proceedings and of probative value, and (iv) that the probative value of the evidence, which may include evidence

⁷ Response, paras. 1, 8.

⁸ Response, para. 2.

¹⁰ Response, para. 4.

¹¹ Response, para. 5.

¹² Response, paras. 6, 9.

¹³ Response, paras. 7, 9. The Prosecution indicates that the photograph bears Rule 65*ter* number 03319.

¹⁴ KDZ198 Decision, paras. 4–10.

pertaining to acts and conduct of an accused, is not outweighed by the need to ensure a fair trial.¹⁵

9. The Chamber also recalls that when a party tenders evidence pursuant to Rule 92 *quater*, it may also tender for admission into evidence documents that have been discussed by the witness in his or her witness statement or prior testimony.¹⁶ Such exhibits should form an “inseparable and indispensable part” of the testimony, meaning that they should not merely have been mentioned during the course of that testimony, but rather have been used and explained by the witness.¹⁷

III. Discussion

A. Testimony

10. The Chamber first notes that the Prosecution does not oppose the Motion and therefore does not challenge the Witness’s unavailability.¹⁸ The Chamber is satisfied with the information provided by the Accused in the Motion,¹⁹ and accepts that the Witness is deceased and thus unavailable for the purposes of Rule 92 *quater* (A)(i).

11. The Chamber recalls that pursuant to Rule 89 of the Rules, relevance and probative value are fundamental requirements for the admission of evidence pursuant to Rule 92 *quater*. Thus, having determined that the Witness is unavailable, the Chamber will now examine whether the Testimony satisfies the basic criteria of relevance and probative value enshrined in Rule 89.

12. The Chamber has reviewed the Testimony and is satisfied that it is generally relevant with respect to issues related to the Srebrenica component of the case including, *inter alia*: (1) the structure and functioning of the Bratunac Brigade in 1995; (2) events at Potočari on 12 and 13 July 1995; (3) the actions and whereabouts of, and orders received from, Ratko Mladić, Momir Nikolić, Vidoje Blagojević, Ljubiša Beara, and Vujadin Popović in July 1995; (4) events in and around Konjević Polje on 13 July 1995; (5) detention of prisoners in Bratunac on 13 July

¹⁵ KDZ198 Decision, paras. 4–6; Decision on Prosecution Motion for Admission of Testimony of Sixteen Witnesses and Associated Exhibits Pursuant to Rule 92 *quater*, 30 November 2009, para. 6. *See Prosecutor v. Popović et al.*, Case No. IT-05-88-AR73.4, Decision on Beara’s and Nikolić’s Interlocutory Appeals Against Chamber’s Decision on 21 April 2008 Admitting 92 *quater* Evidence, 18 August 2008, para. 30.

¹⁶ Decision on Accused’s Motion to Admit Evidence of Velibor Ostojić pursuant to Rule 92 *quater*, 23 October 2012, para. 9; Decision on Accused’s Motion for Admission of Prior Testimony of Thomas Hansen and Andrew Knowles pursuant to Rule 92 *bis*, 22 August 2012, para. 11.

¹⁷ Decision on Prosecution’s Motion for Admission of the Evidence of Milenko Lazić pursuant to Rule 92 *quater* and for Leave to Add Exhibits to Rule 65 *ter* Exhibit List, 9 January 2012, para. 24. *See also Prosecutor v. Popović et al.*, Case No. IT-05-88-T, Decision on Prosecution Motion for Admission of Evidence pursuant to Rule 92 *quater*, 21 April 2008, para. 65.

¹⁸ *See* Response, para. 1.

¹⁹ *See* Motion, para. 2.

1995; and (6) the transportation of prisoners to Zvornik on 14 July 1995. The Chamber notes that, while the Testimony contains some areas of marginal relevance, its subject matter is sufficiently relevant to these proceedings for the purpose of admission pursuant to Rule 92 *quater*.

13. The Chamber recalls that, to have any probative value under Rule 92 *quater*, evidence must be *prima facie* reliable.²⁰ Thus, it remains in the Chamber's sole discretion to evaluate whether, based on the circumstances in which the Witness's evidence was given and recorded, it meets this requirement.²¹ The Chamber notes that, prior to his death, the Witness testified as a Prosecution witness in the *Blagojević* case and was subject to questioning by the Prosecution, as well as to cross-examination by both Defence teams in that case. Having reviewed the Testimony in its entirety, the Chamber finds that it was elicited with the safeguards of judicial proceedings, namely: it was given under oath, with the assistance of a Registry approved interpreter, and was subject to cross-examination. As such, the Chamber is satisfied that the way in which the Witness's evidence was given and recorded presents sufficient indicia of reliability for its admission.

14. Further, it remains for the Chamber to assess whether there are inconsistencies within the Testimony and between the Testimony and other documents discussed therein that reach a level which would render it so unreliable or of such low probative value that the Chamber should deny its admission. Notwithstanding the instances found by the Chamber of evasiveness by the Witness²² and inconsistencies in the transcript,²³ the Chamber finds that the Testimony is not undermined to a level that would warrant denying its admission. Therefore, any inconsistencies in the Testimony are factors which the Chamber will consider in attributing the appropriate weight to it in light of all the evidence, but are not a bar to its admission at this stage.

15. Consequently, the Chamber finds the Testimony to be reliable, relevant to the current proceedings, and of probative value, and shall therefore be admitted into evidence pursuant to Rule 92 *quater*.

²⁰ See *Prosecutor v. Popović et al.*, Case No. IT-05-88-AR73.2, Decision on Joint Defence Interlocutory Appeal Concerning the Status of Richard Butler as an Expert Witness, 30 January 2008, para. 22.

²¹ Decision on Prosecution's Motion for Admission of the Evidence of KDZ172 (Milan Babić) pursuant to Rule 92 *quater*, 13 April 2010, para. 25. See *Prosecutor v. Prlić et al.*, Case No. IT-04-AR73.16, Decision on Jadranko Prlić's Interlocutory Appeal Against the Decision on Prlić Defense Motion for Reconsideration of the Decision on Admission of Documentary Evidence, 3 November 2009, para. 27.

²² See, e.g., Testimony, T. 3513, 3518–3519, 3522, 3569, 3579–3580.

²³ See, e.g., Testimony, T. 3525 (private session), 3528, 3532, 3622–3626.

16. Finally, the Chamber notes that three portions of the Testimony contain evidence heard in private session.²⁴ Accordingly, the Testimony shall be admitted into evidence under seal and the Accused shall produce a public redacted version of the Testimony.

B. Associated Exhibits

17. The Chamber recalls that, in the Motion, the Accused tendered document bearing Rule 65 *ter* number 1D09846 as an associated exhibit to be admitted into evidence in conjunction with the Testimony.²⁵ In the Response, the Prosecution submits that an additional document—namely Rule 65 *ter* number 03319—should be admitted into evidence as inseparable from and indispensable to the Testimony.

18. The Chamber considers that the Witness's pseudonym sheet (document bearing Rule 65 *ter* number 1D09846), which was admitted in the *Blagojević* case where the Witness had protective measures, is necessary for the identification of the Witness and forms an inseparable and indispensable part of the Testimony. Given that the document reveals the Witness's identity, it shall be admitted under seal.

19. In relation to the aerial photograph of Bratunac marked by the Witness (document bearing Rule 65 *ter* number 03319) the Chamber reminds the Accused, yet again, of his responsibility to identify all relevant associated exhibits to be tendered with all proposed Rule 92 *quater* evidence. Despite the fact that the Accused failed to identify this document as inseparable from and indispensable to the Testimony, and in light of the Prosecution's submission in the Response, the Chamber has reviewed the photograph and considers it to be intrinsic to the Testimony and therefore necessary to the Chamber's understanding of a portion thereof. Consequently, the Chamber finds that it is in the interests of justice to exceptionally admit it as an associated exhibit of the Testimony despite the fact that it was not tendered by the Accused. Given that the photograph bears the Witness's name, it shall also be admitted under seal.

²⁴ See Testimony, T. 3496, line 8 to T. 3503, line 20 (private session); T. 3521, line 14 to 3526, line 23 (private session); and T. 3675 line 24 to 3676, line 25 (private session).

²⁵ Motion, para. 11.

IV. Disposition

20. Accordingly, pursuant to Rules 54, 89, and 92 *quater* of the Rules, the Chamber hereby **GRANTS** the Motion and:

- (i) **ADMITS** into evidence the Testimony and documents bearing Rule 65 *ter* numbers 03319 and 1D09846, under seal;
- (ii) **ORDERS** the Accused to upload a public redacted version of the Testimony; and
- (iii) **INSTRUCTS** the Registry to assign exhibit numbers to the Testimony, the public redacted version of the Testimony, and documents bearing Rule 65 *ter* numbers 03319 and 1D09846.

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



Judge O-Gon Kwon
Presiding

Dated this third day of February 2014
At The Hague
The Netherlands

[Seal of the Tribunal]