



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-05-88/2-T

Date: 7 September 2011

Original: English

IN TRIAL CHAMBER II

Before: Judge Christoph Flügge, Presiding
Judge Antoine Kesia-Mbe Mindua
Judge Prisca Matimba Nyambe

Registrar: Mr. John Hocking

Decision of: 7 September 2011

PROSECUTOR

v.

ZDRAVKO TOLIMIR

PUBLIC

**DECISION ON PROSECUTION'S MOTION TO ADMIT THE EVIDENCE
OF WITNESS NO. 39 PURSUANT TO RULE 92 *QUATER*,**

Office of the Prosecutor

Mr. Peter McCloskey

The Accused

Zdravko Tolimir

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 “Prosecution’s Motion to Admit the Evidence of [Witness No. 39]¹ Pursuant to Rule 92 *quater*”, filed confidentially on 19 July 2011 (“Motion”), and hereby renders its decision thereon.

I. PROCEDURAL BACKGROUND

1. On 3 November 2009, the Chamber issued its “Decision on Prosecution’s Motion for Admission of Evidence pursuant to Rule 92*ter*” (“Rule 92 *ter* Decision”) in which, *inter alia*, it provisionally admitted the transcripts of Witness No. 39 in the case of *Prosecutor v. Popović et al.*² (“*Popović*”), pending compliance with the conditions stipulated in Rule 92 *ter* of the Rules of Procedure and Evidence (“Rules”) at trial and provisionally admitted those exhibits admitted through him in the previous proceedings.³
2. On 27 August 2010, the Chamber issued its “Partial Decision on Prosecution’s Rule 92 *bis* and Rule 92 *ter* Motion for Five Witnesses” (“Partial Decision”), in which, *inter alia*, it denied the request of the Prosecution for the admission of the prior testimony of Witness No. 39 in the *Popović* case pursuant to Rule 92 *bis*.⁴
3. In the Motion the Prosecution seeks the admission pursuant to Rule 92 *quater* of Witness No. 39’s prior testimony in the *Popović* case and all documents that were relied upon during that testimony.⁵ On 16 August 2011, the Accused submitted in BCS the confidential “Response to the Prosecution’s Motion to Admit the Testimony of [Witness No. 39] Pursuant to Rule 92 *quater*”, which was filed in English on 17 August 2011 (“Response”). On 23 August 2011 the Prosecution filed “Prosecution’s Request for Leave to Reply and Reply Regarding [Witness No. 39]”

¹ The Rule 65 *ter* number of the witness is 39. See e.g. Public Version of Prosecution’s Rule 65 *ter* Witness List and Witness Summaries, 14 April 2010, Appendix A.

² Case No.: IT-05-88-T.

³ Rule 92 *ter* Decision, pp. 13–14.

⁴ Partial Decision, para. 35.

⁵ Motion, paras. 1, 25.

II. SUBMISSIONS OF THE PARTIES

A. Motion

4. The Prosecution requests leave to exceed the usual word limit for motions.⁶
5. The Prosecution submits that Witness No. 39 suffers from “Post-Traumatic Stress Disorder for which he is currently undergoing treatment” and that “his prior testimony caused him psychological and emotional stress.”⁷ The Prosecution submits that Witness No. 39 is unavailable, within the meaning of Rule 92 *quater*, by reason of his psychological condition.⁸
6. In the submission of the Prosecution, Witness No. 39’s prior testimony meets the requirements set out by Rule 89(C), as it is relevant and probative of the crimes alleged in the Indictment.⁹ The Prosecution avers that the evidence is relevant as it establishes that the Kravica warehouse executions were not merely spontaneous or opportunistic killings, but were a well-planned, coordinated, and organized part of the Joint Criminal Enterprise to murder.¹⁰
7. The Prosecution submits that the evidence of Witness No. 39 has already been found to be reliable by the Trial Chamber.¹¹ It submits that Witness No. 39’s evidence is largely cumulative to that of other witness testimony and is corroborated by documentary and forensic evidence and other witness testimony.¹²
8. The Prosecution acknowledges that Witness No. 39’s prior testimony about his time in Žepa concerns the acts and conduct of the Accused; however, it submits that it is apparent that the Accused does not dispute this part of his testimony.¹³ Moreover, the Prosecution submits that an Accused’s right to cross examine a witness is not absolute, and that admitting evidence in circumstances where cross-examination would not be used to impeach the witness’ credibility does not infringe on the fair trial rights of the Accused.¹⁴
9. The Prosecution reaffirms that the proposed evidence is sufficiently reliable to be admitted pursuant to Rule 92 *quater*, since Witness No. 39’s previous testimony was provided under oath, was

⁶ Motion, para. 2.

⁷ Motion, para. 14.

⁸ Motion, para. 14.

⁹ Motion, para. 17.

¹⁰ Motion, para. 17.

¹¹ Motion, para. 18.

¹² Motion, para. 18.

¹³ Motion, para. 20.

¹⁴ Motion, para. 21.

subject to detailed examination by the Prosecution and thorough cross-examination by the Defence in a case that involved virtually the same events and is cumulative in that it is corroborated by other evidence.¹⁵

10. Finally, the Prosecution seeks the admission of the associated exhibits that formed an integral and inseparable part of his testimony and were either admitted through his testimony or used with him during his prior testimony.¹⁶

B. Response

11. In his Response, the Accused submits that the Motion is unfounded.¹⁷

12. The Accused submits that according to the declaration of a Prosecution Investigator Witness No. 39 is available.¹⁸ The Accused states that the declaration of his doctor does not contain any indication about the nature and severity of his illness, or whether his testimony might affect his health and that there is no mention of his inability to testify.¹⁹ The Accused submits that the evidence provided by the Prosecution is insufficient to establish that Witness No. 39 is unavailable pursuant to Rule 92 *quater* and this is enough for the Motion to be dismissed as unfounded.²⁰ The Accused contends that Rule 92 *quater* should be interpreted to mean that the health of a person is such that the person is unable to testify orally—that is, that the witness is unable to testify at all or that due to the witness' health the testimony would obviously not be reliable.²¹ The Accused submits that Post-Traumatic Stress Disorder (“PTSD”) is not reason enough for the witness to be considered unavailable pursuant to Rule 92 *quater*.²²

13. The Accused argues that because of the extreme importance of the subject-matter of the testimony and particularly since the testimony “goes to prove the acts of the Accused in the relevant time”, it is not suitable to be included in the file without giving the Accused an opportunity to cross-examine the witness in connection with a number of questions arising from his testimony.²³

C. Reply

14. The Prosecution requests leave to reply.

¹⁵ Motion, para. 22.

¹⁶ Motion, para. 23.

¹⁷ Response, para. 2.

¹⁸ Response, para. 4.

¹⁹ Response, para. 5.

²⁰ Response, para. 6.

²¹ Response, para. 7.

15. In the Prosecution's submission, a witness whose mental health is put at risk by having to relive the traumatic events precipitating his condition must be considered unavailable within the meaning of Rule 92 *quater*.²⁴

16. The Prosecution submits that Witness No. 39 has been unambiguously diagnosed as suffering from PTSD according to the classification system of the Diagnostic and statistical manual of mental disorders (4th ed., text revision) ("DSM IV classification system") and that if he were to re-experience his trauma by testifying he would risk exacerbating one or more of the negative conditions specified according to the DSM IV classification system.²⁵ The Prosecution submits that to compel Witness No. 39 to testify is fundamentally at odds with the Trial Chamber's obligation of protection, especially when his prior testimony is available for admission without requiring any further appearance.²⁶

III. APPLICABLE LAW

17. Rule 92 *quater*, entitled "Unavailable Persons", provides:

(A) The evidence of a person in the form of a written statement or transcript who has subsequently died, or who can no longer with reasonable diligence be traced, or who is by reason of bodily or mental condition unable to testify orally may be admitted, whether or not the written statement is in the form prescribed by Rule 92 *bis*, if the Trial Chamber:

(i) is satisfied of the person's unavailability as set out above; and

(ii) finds from the circumstances in which the statement was made and recorded that it is reliable.

(B) If the evidence goes to proof of acts and conduct of an accused as charged in the indictment, this may be a factor against the admission of such evidence, or that part of it.

In other words, the two conditions for admissibility pursuant to Rule 92 *quater*—the unavailability of the person whose written statement or transcript is sought to be admitted, and the reliability of the evidence at issue—need to be cumulatively satisfied.²⁷

²² Response, para. 7.

²³ Response, para. 9.

²⁴ Reply, para. 2.

²⁵ Reply, para. 3.

²⁶ Reply, para. 4.

²⁷ *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 ("Popović Decision"), para. 29; *Prosecutor v. Prlić et al.*, Case No. IT-04-74-T, Decision on the Prosecution Motion for Admission of Evidence Pursuant to Rules 92 *bis* and *quater* of the Rules, 2 November 2006 ("Prlić Decision"), para. 8; *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-T, Decision on Prosecution Motion for Admission of Evidence Pursuant to Rule 92 *quater*, 16 February 2007 ("Milutinović Decision"), para. 4; *Prosecutor v. Rasim Delić*, Case No. IT-04-83-PT, Decision on Prosecution Motion for Admission of Evidence Pursuant to Rule 92 *Quater*, 9 July 2007 ("Delić Decision"), p. 4.

18. Chambers have identified the following factors as relevant to the assessment of the reliability of the evidence to be admitted pursuant to Rule 92 *quater*: (a) the circumstances in which the statement was made and recorded, including (i) whether the statement was given under oath; (ii) whether the statement was signed by the witness with an accompanying acknowledgement that the statement is true to the best of his or her recollection; (iii) whether the statement was taken with the assistance of an interpreter duly qualified and approved by the Registry of the Tribunal; (b) whether the statement has been subject to cross-examination; (c) whether the statement, in particular an unsworn statement never subject to cross-examination, relates to events about which there is other evidence; and (d) other factors, such as the absence of manifest or obvious inconsistencies in the statements.²⁸

19. The Chamber must also ensure that the general requirements for admissibility of evidence in Rule 89 are satisfied. The proffered evidence must be relevant and have probative value as required by Rule 89(C). The Chamber must further consider whether the probative value of the evidence is substantially outweighed by the need to ensure a fair trial under Rule 89(D) and is thereby not unduly prejudicial.²⁹

20. Rule 92 *quater* (B) specifically provides that, if the proffered evidence goes to proof of acts and conduct of the accused, that may be a factor against the admission of such evidence, or part of it. The Chamber considers that this provision reflects a concern for ensuring a fair trial and the reliability of the evidence.³⁰

21. The Chamber further notes that when testimony is admitted pursuant to Rule 92 *quater*, exhibits accompanying such testimony may be admitted as well. Those exhibits must “form an inseparable and indispensable part of the testimony”, however.³¹

IV. DISCUSSION

22. In the Partial Decision the Chamber recalled that in the Rule 92 *ter* Decision it first found that Witness No. 39’s written evidence was relevant to and probative of the allegations contained in the Indictment.³²

²⁸ Decision on Prosecution’s Motion for Admission of Evidence pursuant to Rule 92 *Quater*, 25 November 2009 (“November 2009 Decision”), para. 29. *See, e.g. Prosecutor v. Karadžić*, Case No. IT-95-5/18-PT, Decision on Prosecution Motion for Admission of Testimony of Witness KDZ 198 and Associated Exhibits Pursuant to Rule 92 *Quater*, 20 August 2009 (*Karadžić Decision*), para. 5; *Popović Decision*, para. 31; *Milutinović Decision*, para. 7.

²⁹ November 2009 Decision, para. 28. *See, e.g., Karadžić Decision*, para. 6; *Popović Decision*, para. 30; *Milutinović Decision*, paras. 4, 6.

³⁰ November 2009 Decision, para. 30; *Popović Decision*, para. 33.

³¹ November 2009 Decision, para. 31; *Karadžić Decision*, para. 7; *Popović Decision*, para. 33.

23. However, the Chamber observed that the request for the admission of the written evidence of Witness No. 39 under Rule 92 *bis* was based on his alleged unavailability, and that the admission of written evidence under such circumstances is explicitly governed by Rule 92 *quater*.³³ The Chamber was of the view that the request should be examined by Rule 92 *quater*, rather than Rule 92 *bis*.³⁴ The Chamber proceeded with its analysis of the request pursuant to Rule 92 *quater* by examining the conditions set forth in Rule 92 *quater* (A)(i) and 92 *quater* (A)(ii).³⁵

24. The Chamber stated that the reliability of the proffered evidence had already been assessed and found to be met in the Rule 92 *ter* Decision.³⁶

25. With regard to the unavailability test, the Chamber noted that the Prosecution had argued that Witness No. 39 was unavailable because the Prosecution had been “unable to prevail upon” him to testify again due to his health condition.³⁷ The Chamber was, however, not persuaded that this was a sufficient reason to find that he was “unavailable” within the meaning of Rule 92 *quater*, particularly since the Prosecution had failed to provide any documentation or other proof of the witness’s unavailability by submitting, for example, medical certificates.³⁸

26. In a letter of 17 June 2011 the psychiatrist who is treating Witness No. 39 wrote that his diagnosis according to the DSM IV classification system is chronic PTSD.³⁹ In a telephone conversation on 22 June 2011, Witness No. 39’s psychiatrist advised the Prosecution Investigator that requiring Witness No. 39 to testify about the events that he experienced in July 1995 could negatively affect his health and aggravate his psychological condition.⁴⁰

27. 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 health⁴¹ or where medical evidence has been presented that the witness is unable to testify coherently.⁴² Neither of these conditions apply in the instant case.

³² Partial Decision, para. 30; Rule 92 *ter* Decision, paras. 35, 42.

³³ Partial Decision, para. 32.

³⁴ Partial Decision, para. 32.

³⁵ Partial Decision, para. 32–34.

³⁶ Partial Decision, para. 34.

³⁷ Partial Decision, para. 33.

³⁸ Partial Decision, para. 33.

³⁹ Motion, Annex B.

⁴⁰ Motion, Annex B.

⁴¹ Prosecutor v. Vojislav Šešelj, Case No.: IT-03-67-T, Decision Admitting the Prior Statements of Ljubiša Petković Pursuant to Rule 92 *quater* of the Rules, 6 November 2008, filed in English on 12 January 2009, p. 3.

⁴² Prosecutor v. Gotovina et al., Case No.: IT-06-90-T, Decision on the Admission of Statements of Two Witnesses and Associated Documents Pursuant to Rule 92 *quater*, 16 January 2009, paras. 8–10 (in which due to the severity of the witness’s medical conditions and considering that Parkinson’s disease is a degenerative condition, the Chamber

28. In the “Decision on Appeals Against Decision Admitting Transcript of Jadranko Prlić’s Questioning into Evidence” issued on 23 November 2007 in *Prosecutor v. Prlić et al.* (“Prlić Appeals Chamber Decision”), the Appeals Chamber held that a person is unavailable under Rule 92 *quater* because “the individual in question is objectively unable to attend a court hearing, either because he is deceased or because of physical or mental impairment”.⁴³ The Decision concerns the request of the Prosecution for the admission of an interview with one of the Accused, namely Jadranko Prlić.⁴⁴ The Prosecution submitted that the position was analogous to that of the admission of a statement under Rule 92 *quater* since the Accused was legally unavailable to testify.⁴⁵ The Appeals Chamber found that Rule 92 *quater* was “not precisely on point” and that Prlić was theoretically able to attend and could choose to testify but was “not required to do so in order to protect his own fundamental rights”.⁴⁶

29. The *Gotovina* Trial Chamber applied the standard of “objective unavailability” to a witness who the Prosecution submitted was unavailable to testify due to her “mental condition” and “emotional state”.⁴⁷ The Chamber did not discern, other than the mere fact that the witness was highly emotional and appeared to the Prosecution Investigator to be unable to cope with the stress of revisiting the events described in her statement, an established mental condition that would make the witness unavailable to give oral testimony within the meaning of 92 *quater*.⁴⁸ It held: “The Chamber, although mindful of the distress that the prospect of oral testimony may cause a particular witness, finds that such distress is a common feature of many witnesses, and distinguishes between the ‘emotional state’ of the witness and an established ‘mental condition’”.⁴⁹ The Chamber could not establish that the witness was objectively unable to attend a court hearing and was therefore not satisfied of her unavailability for the purposes of Rule 92 *quater*.⁵⁰

was satisfied that he was unable to testify orally); *Prosecutor v. Stanišić and Župljanin*, Case No.: IT-08-91-T, Decision granting in part Prosecution’s Motions for Admission of Evidence Pursuant to Rule 92 *Quater* for five Witnesses and Protective Measures for Witnesses ST026 and ST232, confidential, 19 January 2011, paras. 38, 48; *Prosecutor v. Karadžić*, Case No.: IT-95-5/18-T, Decision on Prosecution Motion for Admission of Testimony of Sixteen Witnesses and Associated Exhibits Pursuant to Rule 92 *quater*, 30 November 2009, para. 5 (where the Trial Chamber was satisfied on the basis of medical documentation that a witness was bed-ridden and unable to communicate and thus should be considered to be “unavailable” for the purposes of Rule 92 *quater*).

⁴³ *Prlić Appeals Chamber Decision*, para. 48.

⁴⁴ *Prlić Appeals Chamber Decision*, paras. 2–3.

⁴⁵ *Prosecutor v. Prlić et al.*, Case No.: IT-04-74-AR73.6, Prosecution Consolidated Response Regarding Admission of Prlić’s Suspect Statement, 25 October 2007, confidential, para. 61.

⁴⁶ *Prlić Appeals Chamber Decision*, para. 48.

⁴⁷ *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 (“*Gotovina July 2008 Decision*”), para. 15.

⁴⁸ *Gotovina July 2008 Decision*, para. 16.

⁴⁹ *Gotovina July 2008 Decision*, para. 16.

⁵⁰ *Gotovina July 2008 Decision*, para. 16.

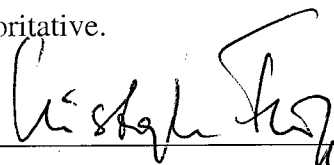
30. While there is evidence that Witness No. 39 does suffer from a chronic mental disorder, the evidence currently available to the Chamber does not establish that he is *objectively* unavailable. The Prosecution has presented medical evidence that attending court could have harmful after-effects on him, but this does not amount to a medical statement to the effect that he is incapable of attending a court hearing and testifying or medical evidence that he is incapable of answering the questions put to him and testifying coherently. Accordingly, the Chamber is not satisfied that Witness No. 39 is unavailable within the meaning of Rule 92 *quater* and the Chamber concludes that his testimony may not be admitted pursuant to Rule 92 *quater*.

V. DISPOSITION

31. For these reasons, pursuant to Rules 92 *quater* and 126 *bis*, the Trial Chamber hereby **DECIDES** as follows:

- (1) The Prosecution is **GRANTED** leave to exceed the usual word limit;
- (2) The Prosecution is **GRANTED** leave to reply; and
- (3) The Motion is **DENIED**.

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



Judge Christoph Flügge

Presiding Judge

Dated this seventh day of September 2011
At The Hague
The Netherlands

[Seal of the Tribunal]