



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: 21 September 2012

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: 21 September 2012

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

**DECISION ON ACCUSED'S MOTION FOR ADMISSION OF STATEMENT OF SRĐO
SRDIĆ 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 Statement of Srđo Srdić pursuant to Rule 92 *quater*”, filed on 16 July 2012 (“Motion”), and hereby issues its decision thereon.

I. Submissions

1. In the Motion, the Accused requests the admission of the transcript of an interview between the Office of the Prosecutor (“Prosecution”) and Srđo Srdić (“Witness”) conducted on 21 and 22 August 2002 (“Transcript”) pursuant to Rule 92 *quater* of the Tribunal’s Rules of Procedure and Evidence (“Rules”).¹ The Witness was a high ranking SDS official in Prijedor and was also a member of the SDS Main Board.²

2. The Accused submits that the criteria for admission of evidence pursuant to Rule 92 *quater* are satisfied with respect to the Transcript and that it should be admitted by the Chamber.³ In this regard he observes that the Witness is unavailable to testify in this case as he died in January 2008.⁴ He further contends that the “circumstances in which the interview was conducted were sufficiently reliable for admission” given that it was conducted by representatives of the Prosecution and was recorded *verbatim*.⁵ The Accused further observes that the Transcript was admitted pursuant to Rule 92 *quater* in the *Stanišić & Župljanin* case.⁶

3. The Accused submits that the Transcript is of relevance and probative value to his defence as it contains evidence (1) that he did not have effective control over perpetrators of crimes in Prijedor; (2) that individuals in Prijedor had a genuine desire to leave without coercion; (3) that he “attempted to create safe conditions for those wanting to escape the conflict” specifically in relation to the release of people being held at camps in Prijedor; and (4) that ethnic cleansing was “not the policy of the Serbian leadership”.⁷

4. On 30 July 2012 the Prosecution filed the “Prosecution Response to Accused’s Motion to Admit Statement of Srđo Srdić pursuant to Rule 92 *quater*” (“Response”). It does not oppose the admission of the Transcript but contends that it is unreliable and “therefore of little or no

¹ Motion, para. 1.

² Transcript, pp. 4–5.

³ Motion, paras. 4–6

⁴ Motion, para. 7, Annex A.

⁵ Motion, para. 8.

⁶ Motion, para. 2.

⁷ Motion, paras. 9–15.

probative value”.⁸ The Prosecution observes that while the Transcript accurately reflects the words of the Witness, other factors are relevant to assessing its reliability including (1) the circumstances under which the evidence was generated; (2) whether the evidence was subject to cross-examination; (3) whether there is other evidence which relates to the same events described by the witness; and (4) other factors, including whether there are manifest inconsistencies in the evidence.⁹

5. In the Prosecution’s submission, given the leadership position of the Witness, the Transcript is a reflection of an effort to distance himself and the Bosnian Serb leadership from events in Prijedor.¹⁰ The Prosecution argues that the Chamber should assign little or no weight to aspects of the Transcript which are inconsistent with contemporaneous documentation or information in the Transcript itself, “particularly given that they have not been tested by cross-examination”.¹¹ The Prosecution points to such inconsistencies which pertain to (1) the receipt of the Variant A/B Instructions;¹² (2) knowledge of the six strategic objectives;¹³ (3) contact between the Prijedor Crisis Staff and the Bosnian Serb leadership;¹⁴ (4) the Accused’s intervention in detention facilities in Prijedor;¹⁵ (5) the existence of a policy of ethnic cleansing;¹⁶ and (6) the voluntary nature of the departure of non-Serbs from Prijedor.¹⁷

6. The Prosecution indicates that if the Transcript is admitted, it should be allowed to tender documents from the bar table which it would have put to the Witness on cross-examination.¹⁸ In the Prosecution’s submission this would mitigate the “negative impact on the Prosecution’s fair trial rights resulting from the admission of the un-cross-examined evidence” of the Witness, given that his evidence pertains to the acts and conduct of the Accused and the Bosnian Serb leadership.¹⁹ The Prosecution further contends that the admission of such documents from the bar table would assist the Chamber in assigning appropriate weight to the Transcript.²⁰

⁸ Response, paras. 1, 19.

⁹ Response, para. 2 citing Decision on Prosecution’s Motion for Admission of Evidence of KDZ297 (Miroslav Deronjić) pursuant to Rule 92 *quater*, 23 March 2010, para. 22.

¹⁰ Response, para. 3.

¹¹ Response, para. 3.

¹² Response, para. 4.

¹³ Response, para. 5.

¹⁴ Response, para. 7.

¹⁵ Response, paras. 8–10.

¹⁶ Response, paras. 11–15.

¹⁷ Response, para. 16.

¹⁸ Response, para. 18.

¹⁹ Response, para. 18.

²⁰ Response, para. 18.

II. Applicable Law

7. The Chamber recalls that the pre-Trial Chamber in this case set out the applicable law 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”).²¹ 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) that the evidence is relevant to the proceedings and of probative value, and (iv) that the probative value of the evidence, which may include evidence pertaining to acts and conduct of an accused, is not outweighed by the need to ensure a fair trial.²²

8. The Chamber also recalls that the pre-Trial Chamber listed a non-exhaustive list of factors which can be considered in assessing the reliability of the proposed evidence which pertain to the circumstances in which it was obtained and recorded.²³ These factors include (1) whether a written statement was given under oath; (2) whether it was signed by the witness with an acknowledgement of the truth of its contents; (3) whether it was given with the assistance of a Registry approved interpreter; and (4) whether it has been subject to cross-examination.²⁴ Other factors which may be considered include whether the evidence relates to events about which there is other evidence or whether there is an absence of manifest or obvious inconsistencies in the evidence.²⁵ Even if one or more of these indicia of reliability are absent, the Chamber retains the discretion to admit the evidence and will take into consideration the reliability issues in “determining the appropriate weight to be given to it in its overall consideration of all the evidence in the case”.²⁶

III. Discussion

9. The Chamber is satisfied with the information provided by the Accused that the Witness is deceased and thus unavailable for the purposes of Rule 92 *quater* (A)(i).

²¹ KDZ198 Decision, paras. 4–10.

²² 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 Trial Chamber’s Decision of 21 April 2008 Admitting 92 *quater* Evidence, 18 August 2008, para. 30.

²³ KDZ198 Decision, para. 5.

²⁴ KDZ198 Decision, para. 5.

²⁵ KDZ198 Decision, para. 5.

²⁶ KDZ198 Decision, para. 5.

10. Having reviewed the Transcript, the Chamber is satisfied that it is relevant with respect to issues in this case including (1) the level of contact between the Prijedor Crisis Staff and the Bosnian Serb leadership; (2) the Accused's knowledge of, and intervention in, detention facilities in Prijedor; and (3) the movement of the non-Serb population from Prijedor.

11. The Chamber recalls that, to have any probative value, evidence must be *prima facie* reliable.²⁷ While the Transcript was not given under oath, or with the assistance of a Registry approved interpreter, or subject to cross-examination, it is a *verbatim* transcript of an audio-recorded interview with the Witness by representatives of the Prosecution. As such, the Chamber considers that the way in which the Witness's evidence was given and recorded presents sufficient indicia of reliability for its admission.

12. It remains for the Chamber to assess whether there are inconsistencies within the Transcript and between the Transcript and other documents discussed therein that reach a level which would render the entire Transcript so unreliable or of such low probative value that the Chamber should deny its admission. Having considered the Prosecution's arguments and conducted its own review of the Transcript, the Chamber finds that while there is a level of evasiveness by the Witness and some inconsistencies,²⁸ they do not reach a level which undermines the reliability of the Transcript so as to warrant denying its admission. The Chamber is therefore satisfied that the Transcript is sufficiently reliable to be admitted pursuant to Rule 92 *quater*. Any inconsistencies in the Transcript, particularly given the absence of cross-examination or attestation by the Witness, are factors which the Chamber will consider in attributing the appropriate weight to the Transcript in light of all the evidence but are not a bar to its admission at this stage.

13. Given that the Chamber considers the Transcript to be relevant to the current proceedings, of sufficient reliability and probative value for the purpose of admission the Chamber finds that the Transcript may be admitted into evidence pursuant to Rule 92 *quater*.

²⁷ 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.

²⁸ See for example Transcript, pp. 19–20, 28–30, 35, 37, 50–51, 56, 58.

IV. Disposition

14. Accordingly, pursuant to Rules 54, 89, and 92 *quater* of the Rules, the Chamber hereby **GRANTS** the Motion, **ADMITS** the Transcript into evidence, and **INSTRUCTS** the Registry to assign an exhibit number to the Transcript.

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



Judge O-Gon Kwon
Presiding

Dated this twenty-first day of September 2012
At The Hague
The Netherlands

[Seal of the Tribunal]