



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: 25 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: 25 February 2014

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

**DECISION ON ACCUSED'S MOTION TO ADMIT TESTIMONY OF
BORIVOJE JAKOVLJEVIĆ PURSUANT TO RULE 92 *QUATER***

Office of the Prosecutor

Mr. Alan Tieger
Ms. Hildegard Uertz-Retzlaff

The Accused

Mr. Radovan Karadžić

Standby 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 Borivoje Jakovljević Pursuant to Rule 92 *quater*”, filed on 21 January 2014 (“Motion”), and hereby issues its decision thereon.

I. Background and Submissions

1. In the Motion, the Accused requests the admission of the transcript of prior testimony of Borivoje Jakovljević (“Witness”) in *Prosecutor v. Blagojević & Jokić*, Case No. IT-02-60-T (“*Blagojević* case”) on 26 May 2004 (“Testimony”) pursuant to Rule 92 *quater* of the Tribunal’s Rules of Procedure and Evidence (“Rules”).¹ The Accused submits that the criteria for admission of evidence pursuant to Rule 92 *quater* are satisfied with respect to the Testimony and that it should be admitted by the Chamber.²

2. The Accused first states that the Witness was a military policeman in the Bratunac Brigade in July 1995 and was providing close protection to Ratko Mladić in Konjević Polje on 13 July 1995.³ In the *Blagojević* case, the Witness testified that—contrary to the testimony of Momir Nikolić—Mladić and Nikolić never spoke at Konjević Polje on 13 July 1995 nor did Mladić make a hand signal as claimed by Nikolić.⁴ The Accused claims that the Chamber has already found that the Testimony is relevant and of probative value to the Accused’s case and while it goes to acts and conduct of a person proximate to the Accused, such evidence is admissible under Rule 92 *quater*.⁵

3. The Accused further submits that the Witness underwent surgery for a brain tumour in July 2013 and informed the Accused’s case manager that he no longer has a good memory of the events to which he testified in the *Blagojević* case.⁶ As an annex to the Motion, the Accused provides a report from the Witness’s family doctor, as well as other documents to prove the Witness’s medical condition.⁷ Thus, given that Trial Chambers of this Tribunal have previously held that persons suffering from memory impairment may be considered “unavailable” pursuant to Rule 92 *quater*, the Witness should be considered unavailable for these purposes.⁸ The Accused further adds that

¹ Motion, paras. 1, 9.

² Motion, para. 8.

³ Motion, para. 2.

⁴ Motion, para. 3.

⁵ Motion, para. 7.

⁶ Motion, para. 4; Confidential Annex A.

⁷ Motion, para. 5; Confidential Annex B.

⁸ Motion, para. 8.

the Witness is willing to undergo an independent medical examination, at the expense of the Chamber, should the Chamber need more evidence of his condition.⁹

4. The Office of the Prosecutor (“Prosecution”) filed its “Prosecution Response to Motion to Admit Testimony of Borivoje Jakovljević Pursuant to Rule 92 *quater*” on 3 February 2014 (“Response”), opposing the Motion. The Prosecution argues that the Accused has failed to demonstrate that the Witness is unavailable as required under Rule 92 *quater* and adds that while other Trial Chambers have found that witnesses who suffer from memory loss may be regarded as “unavailable”, the medical evidence presented by the Accused does not prove that the Witness suffers from memory loss, notwithstanding the representations of the Witness himself.¹⁰ The Prosecution adds that a blanket statement that the Witness is not fit to testify is insufficient to demonstrate that he is objectively unavailable, and provides—in a confidential appendix—a detailed analysis of the medical information attached to the Motion and why it is insufficient.¹¹ Finally, the Prosecution argues that it is not for the Chamber to collect evidence by ordering an independent medical examination in order to assist the Accused in meeting his burden.¹²

5. On 17 February 2014, the Chamber asked the Accused for additional medical documentation prior to ruling on the Motion, adding that it was not for the Chamber but for the Accused, to obtain the material in support of his requests.¹³ On 18 February 2014, through email correspondence, the Accused’s legal adviser informed the Chamber that the Witness was not willing to retrieve additional medical records to support the Motion and thus that the Accused did not have anything further to submit in relation to the Motion.

II. Applicable Law

6. 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

⁹ Motion, paras. 6, 8.

¹⁰ Response, paras. 2–4, 6.

¹¹ Response, paras. 5, 7; Confidential Appendix A.

¹² Response, para. 8.

¹³ T. 47227–47228 (17 February 2014).

¹⁴ KDZ198 Decision, paras. 4–10.

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

III. Discussion

7. The Chamber recalls its previous finding that the only requirement under Rule 92 *quater* (A)(i) concerning a witness's unavailability is that the Chamber must be actually "satisfied of the person's unavailability".¹⁶ In that regard, the Chamber notes that while the report from the Witness's family doctor specifically states that the Witness is unfit to testify before the Chamber for medical reasons, it appears that such conclusion was reached on the basis of the information contained in the rest of medical documentation also attached to the Motion.¹⁷ While it is clear that the Witness underwent surgery for a brain tumour in July 2013, nowhere in the documentation has the Chamber been able to find a reference to sequels arising from the surgery, such as memory loss, nor to another medical condition which would render the Witness unavailable to testify in accordance to Rule 92 *quater*.¹⁸ Thus, in the absence of supporting documentation, the Chamber cannot be satisfied that the Witness is incapable of attending a court hearing—even if remotely—and testifying, or that he is incapable of answering questions put to him and testifying coherently.¹⁹ Consequently, the Chamber is not satisfied that the Witness is objectively unavailable pursuant to Rule 92 *quater* and will deny admission of the Testimony on these grounds.

8. Given that the Motion fails on this basis, the Chamber considers that there is no need to assess whether the other requirements under Rule 92 *quater* are met.

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 Prosecution's Motion for Admission of Evidence of KDZ290 (Mirsad Kučanin) Pursuant to Rule 92 *quater*, 25 September 2009, para. 8.

¹⁷ See Motion, Confidential Annex B.

¹⁸ See Motion, para. 4; Confidential Annex B.

¹⁹ See *inter alia* *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-T, Decision on Prosecution 92 *quater* Motion (Witness RM-132), 28 June 2013, paras. 6–8; *Prosecutor v. Zdravko Tolimir*, Case No. IT-05-88/2-T, Decision on Prosecution's Motion to Admit Evidence of Witness No. 39 Pursuant to Rule 92 *quater*, 7 September 2011, para. 27; *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.

IV. Disposition

9. Accordingly, the Chamber, pursuant to Rule 92 *quater* of the Rules, hereby **DENIES** the Motion.

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



Judge O-Gon Kwon
Presiding

Dated this twenty-fifth day of February 2014
At The Hague
The Netherlands

[Seal of the Tribunal]