



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 October 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: 3 October 2012

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

**DECISION ON ACCUSED'S MOTION FOR ADMISSION OF STATEMENT OF
RAJKO KOPRIVICA 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 “Renewal of Motion to Admit Statement of Rajko Koprivica Pursuant to Rule 92 *quater*”, filed on 28 June 2012 (“Renewal Motion”), and hereby issues its decision thereon.

I. Submissions

1. In the “Forty-Fourth Motion for Finding of Disclosure Violation and for Admission of Statement of Rajko Koprivica pursuant to Rule 92 *quater*”, filed on 8 March 2011, the Accused requested the admission of the transcript of an interview of Rajko Koprivica (“Witness”) conducted by the Office of the Prosecutor (“Prosecution”) on 21 April 2004 (“Transcript”) pursuant to Rule 92 *quater* of the Tribunal’s Rules of Procedure and Evidence (“Rules”), “both as a remedy for [a] disclosure violation and on its own merits as a proper application of Rule 92 *quater*” (“First Motion”).¹ The Witness was a senior SDS official in Vogošća, as well as a member of the Vogošća Crisis Staff,² and was interviewed as a suspect by the Prosecution.³

2. In the First Motion, the Accused submitted that the criteria for admission of evidence pursuant to Rule 92 *quater* were satisfied with respect to the Transcript, including that the Witness is unavailable to testify in this case because he died in September 2004.⁴ He further contended that there is “no question of the reliability of the statement or the opportunity for examination by the party against whom the statement is being admitted” given that the interview was conducted by representatives of the Prosecution, after the Witness was duly warned as a suspect, and was recorded and transcribed *verbatim*.⁵

3. The Accused further argued in the First Motion that the Transcript contains exculpatory information which (i) suggests that the Accused “did everything that he could to avoid the war” and that the erection of barricades in Vogošća in March 1992 was spontaneous and not ordered; (ii) contradicts the evidence of Prosecution witness Eset Muračević regarding events in Svrake and the reason for his detention and the detention of others from his village; and (iii) suggests that the Vogošća authorities were not involved in the mistreatment of these prisoners.⁶

¹ First Motion, paras. 1, 17, 21.

² Transcript, pp. 20–21, 90, 100.

³ Transcript, pp. 1–2.

⁴ First Motion, para. 19, Annex B.

⁵ First Motion, para. 20.

⁶ First Motion, paras. 4–11.

4. On 21 March 2011, the Prosecution filed the “Prosecution Response to Karadžić’s Forty-Fourth Motion for Finding of Disclosure Violation” (“First Response”), arguing that the First Motion should be dismissed as the then recent disclosure of the Transcript did not result in prejudice to the Accused even though it may contain some material of “marginal exculpatory value” and that admission of the Transcript was not an appropriate remedy.⁷ The Prosecution further contended that the Accused should, if necessary, introduce the Transcript pursuant to Rule 92 *quater* during his case-in-chief.⁸

5. On 8 April 2011, in its “Decision on Accused’s Forty-Third to Forty-Fifth Disclosure Violation Motions” (“Decision”), the Chamber denied, without prejudice, the Accused’s request in the First Motion regarding the admission of the Transcript pursuant to Rule 92 *quater* as premature.⁹ The Chamber noted that some parts of the Transcript are “potentially exculpatory”, but are not of “such importance that [the Transcript’s] late disclosure has prejudiced the Accused” and ruled that “the Accused will have sufficient opportunity during his presentation of evidence to introduce the Transcript pursuant to Rule 92 *quater*”.¹⁰

6. In the Renewal Motion, the Accused renews his request in the First Motion to admit the Transcript into evidence pursuant to Rule 92 *quater*.¹¹

7. On 11 July 2012, the Prosecution filed the “Prosecution Response to Accused’s ‘Renewal of Motion to Admit Statement of Rajko Koprivica Pursuant to Rule 92 *quater*’” (“Response”). The Prosecution opposes the Renewal Motion on the basis that the Transcript does not satisfy the requirements for admission pursuant to Rule 92 *quater*, arguing that “much” of the Transcript is irrelevant and the Witness’s “inconsistent, incoherent and evasive answers—which were not subject to cross-examination—render the Transcript unreliable”.¹² The Prosecution first contends that the Accused has failed to identify the relevance and probative value of the Transcript, save the Accused’s claim that a small portion of the Transcript contains exculpatory information.¹³ Instead, the Prosecution argues that the lack of clear and responsive answers by the Witness, his claims to have no knowledge or recollection of numerous matters

⁷ First Response, para. 1.

⁸ First Response, para. 15.

⁹ Decision, paras. 33, 37.

¹⁰ Decision, paras. 32–33.

¹¹ Renewal Motion, paras. 1, 4.

¹² Response, paras. 1, 7, 9–12.

¹³ Response, paras. 4–5.

discussed in the Transcript, as well as irrelevant procedural discussions contained therein, render the majority of the Transcript irrelevant.¹⁴

8. While the Prosecution accepts that the Transcript accurately reflects the words of the Witness and that the interview was conducted with the proper procedural safeguards, it contends that other factors are relevant to assessing its reliability, including: (i) whether the evidence was subject to cross-examination; (ii) whether there is other evidence which relates to the same events described by the Witness; and (iii) whether there are manifest inconsistencies in the evidence.¹⁵ According to the Prosecution, the Transcript is unreliable as the Witness was not cross-examined, he was not testifying under oath, the Accused has failed to point to any corroborating evidence, and finally, the Witness provided inconsistent answers to many of the Prosecution's questions throughout the interview.¹⁶ The Prosecution submits that if the Chamber determines that there are sufficient indicia of reliability to admit the Transcript, the portion discussing the Variant A and B Instructions should nevertheless be excluded as it is "particularly unreliable" due to the Witness's inconsistent and incoherent answers on this issue.¹⁷ The Prosecution argues that the implementation of the Variant A and B Instructions is a live and important issue in this case, and due to the lack of cross-examination of the Witness, any probative value on this portion of the Transcript is outweighed by the need to ensure a fair trial.¹⁸

9. Finally, the Prosecution observes that the Accused fails to identify and discuss any of the documents shown to the Witness during the interview and requests that the Chamber direct the Accused to identify the associated exhibits that are relevant and necessary to understand the tendered statement in relation to future motions.¹⁹ Specifically, in relation to the Transcript, the Prosecution notes that seven out of the 12 documents referred to in the Transcript have not previously been admitted in this case, and that only one of these documents meets the standard for admission as an inseparable and indispensable part of the Transcript.²⁰ Finally, the Prosecution notes that the Transcript has not previously been admitted in another case.²¹

¹⁴ Response, para. 6.

¹⁵ Response, para. 8, citing Decision on Prosecution's Motion for Admission of Evidence of KDZ297 (Miroslav Deronjić) Pursuant to Rule 92 *quater*, 23 March 2010, para. 22.

¹⁶ Response, paras. 9–11.

¹⁷ Response, paras. 2, 13.

¹⁸ Response, paras. 2, 13.

¹⁹ Response, para. 14.

²⁰ Response, paras. 14–15.

²¹ Response, fn. 5.

II. Applicable Law

10. 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”).²² 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.²³

11. 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.²⁴ 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.²⁵ 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.²⁶ 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”.²⁷

III. Discussion

12. As a preliminary matter, 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).

²² KDZ198 Decision, paras. 4–10.

²³ 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.

²⁴ KDZ198 Decision, para. 5.

²⁵ KDZ198 Decision, para. 5.

²⁶ KDZ198 Decision, para. 5.

²⁷ KDZ198 Decision, para. 5.

13. The Chamber first 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*. In the Transcript, the Witness provides information about, *inter alia*: (i) the general situation on the ground in the Vogošća municipality prior to the war;²⁸ (ii) the erection of barricades in Vogošća in March 1992;²⁹ (iii) his relationship with Momčilo Krajišnik;³⁰ (iv) his relationship and communications with the Accused, including the statement that it “seemed” to him that the Accused did everything “in order to avoid the war”;³¹ (v) his receipt of the Variant A and B Instructions;³² and (vi) events surrounding the conflict in the village of Svrake, including the detention of its Bosnian Muslim population from the village at the Semizovac Garrison and the Vogošća Crisis Staff’s involvement.³³

14. The Chamber recalls that the Accused does not indicate any specific aspects or portions of the Transcript which are relevant and necessary to his case in the First Motion and the Renewal Motion and notes the position of the Prosecution in relation to the relevance of the Witness’s testimony. Having conducted its own review of the Transcript, the Chamber considers that the subject matter of the Transcript is sufficiently relevant to these proceedings for the purpose of admission in that it relates to events in Vogošća, a municipality covered by the Indictment. However, the Chamber notes that the Witness was, at times, unable to provide any information in response to many of the questions asked by the Prosecution,³⁴ and considers that this affects the general relevance of the Witness’s evidence in the Transcript.

15. The Chamber further recalls that, to have any probative value, evidence must be *prima facie* reliable.³⁵ 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.³⁶ 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. However, in assessing the Transcript, the Chamber notes the pervasive inconsistencies contained throughout,

²⁸ Transcript, pp. 66, 106, 127, 129, 130.

²⁹ Transcript, pp. 66, 99.

³⁰ Transcript, pp. 25–29.

³¹ Transcript, pp. 22–24, 74–76, 81–82.

³² Transcript, pp. 86–89, 92–101.

³³ Transcript, pp. 102–106, 113–125.

³⁴ See, e.g., Transcript, pp. 30, 33, 38, 41–42, 71–73, 81–85, 91–97, 100, 118–120, 125–126.

³⁵ 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.

³⁶ 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

in particular related to the dissemination and the Witness's receipt of the Variant A and B Instructions,³⁷ as well as to the Witness's communications with both the Accused and Momčilo Krajišnik.³⁸ Moreover, the Chamber notes numerous instances in the Transcript where the Witness either was unable to recollect the events or communications about which he was questioned or came across as highly evasive in his responses during the interview.³⁹

16. As such, having conducted its own review of the Transcript, the Chamber finds that the numerous inconsistencies throughout the Transcript, as well as the level of evasiveness demonstrated by the Witness during the interview, seriously undermine the reliability of the Transcript. The Chamber thus finds that the Transcript is of such limited probative value that it is not in the interests of justice to admit it pursuant to Rule 92 *quater* of the Rules.

17. With regard to the admission of associated exhibits discussed in the Response, although moot in relation to the Transcript, the Chamber notes the Prosecution's request that in relation to future motions, the Chamber direct the Accused to identify any associated exhibits that are relevant and necessary to understand the tendered statement.⁴⁰ The Chamber recalls that it is for the tendering party to seek the admission of associated exhibits and that in the event the Accused chooses not to tender associated exhibits and this omission renders the main body of evidence incomprehensible or of low probative value, the Chamber may deny the admission of such evidence.⁴¹

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.

³⁷ See, e.g., Transcript, pp. 86–88, 95–97.

³⁸ See, e.g., Transcript, pp. 82–85.

³⁹ See, e.g., Transcript, pp. 30, 41–49, 61–64, 69–73, 100, 119.

⁴⁰ See Response, para. 14.

⁴¹ See 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.

IV. Disposition

18. Accordingly, pursuant to Rules 54, 89, and 92 *quater* of the Rules, the Chamber hereby **DENIES** the Renewal Motion.

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



Judge O-Gon Kwon
Presiding

Dated this third day of October 2012
At The Hague
The Netherlands

[Seal of the Tribunal]