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UNITED
NATIONS

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: 27 August 2010

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: **27 August 2010**

PROSECUTOR

v.

ZDRAVKO TOLIMIR

PUBLIC

PARTIAL DECISION ON PROSECUTION'S RULE 92*BIS* AND RULE 92*TER* MOTION FOR FIVE WITNESSES

Office of the Prosecutor
Mr. Peter McCloskey

The Accused
Zdravko Tolimir

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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 Rule 92*BIS* and 92*TER* Motion for Five Witnesses, Notice of Continuation of Protective Measures, and Confidential Appendices", filed confidentially on 26 April 2010 ("Motion"), and hereby renders its decision thereon.

I. PROCEDURAL BACKGROUND

1. On 18 March 2009, the Prosecution filed confidentially the "Prosecution's Motion for Admission of Evidence Pursuant to Rule 92 *ter* with Appendices A - C" ("Rule 92 *ter* Motion"), in which it sought the admission of written evidence of forty witnesses, *inter alia*, Witness Nos. 39, 42 and 121 pursuant to Rule 92 *ter* of the Rules of Procedure and Evidence ("Rules"), along with the exhibits related to the written evidence.[1] On 30 July 2009, the Accused Zdravko Tolimir ("Accused") submitted in BCS the confidential "Response by Zdravko Tolimir to 92 *ter* Prosecution Motion", which was filed in English on 24 July 2009.

2. On 3 November 2009, the Chamber issued its "Decision on Prosecution's Motion for Admission of Evidence Pursuant to Rule 92 *ter* with Appendices A – C" ("Rule 92 *ter* Decision"), in which it granted the 92 *ter* Motion for, *inter alia*, Witness Nos. 39, 42 and 121 and decided to provisionally admit the transcripts and/or witness statements of these witnesses, pending compliance with the conditions stipulated in Rule 92 *ter* at trial.[2]

3. On 26 April 2010 the Prosecution filed the Motion, which contained two requests, namely, (i) the request for the admission of prior testimony of Witness Nos. 39, 42 and 121 in the *Prosecutor v. Popović et al.* ("*Popović*") case pursuant to Rule 92 *bis* and (ii) the request for the admission of evidence of Witness Nos. 134 and 139 pursuant to Rule 92 *ter*.[3] On 19 May 2010 the Accused submitted in BCS the confidential "Response to Prosecution's Rule 92*bis* and 92*ter* Motion for Five Witnesses" ("Response"), which was filed in English on 26 May 2010.[4] On 2 June 2010, the Prosecution filed confidentially its "Request for Leave to Reply and Reply to Accused's Response to the Prosecution's Rule 92 *bis* and Rule 92 *ter* Motion for Five Witnesses" ("Reply").

[1] Prosecution's Motion for Admission of Evidence Pursuant to Rule 92 *ter* with Appendices A – C, confidential, 18 March 2009, para. 3.
[2] Decision on Prosecution's Motion for Admission of Evidence Pursuant to Rule 92 *ter* with Appendices A – C, 3 November 2009, pp. 13–14.
[3] Motion, para. 2.
[4] Response to Prosecution's Rule 92*bis* and 92*ter* Motion for Five Witnesses, confidential, 26 May 2010.

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4. In the proceedings held on 15 June 2010 and 6 July 2010, the Chamber issued two respective oral decisions, granting the Motion to admit Witness Nos. 134 and 139's evidence pursuant to Rule 92 *ter*.[5] Subsequently, this part of the Motion has already been adjudicated, and in this Decision the Chamber will deal with the remaining requests concerning Witness Nos. 39, 42 and 121.

II. SUBMISSIONS OF THE PARTIES

A. Motion

5. In the Motion, the Prosecution seeks the admission of written evidence in lieu of *viva voce* testimony in respect of Witness Nos. 39, 42 and 121 pursuant to Rule 92 *bis*.[6] The Prosecution submits that the three witnesses testified in the *Prosecutor v. Krstić* case and/or in the *Popović* case and that it was reasonably expected that they would testify again, but that Witness Nos. 39 and 42 are now unable, and Witness No. 121 is unwilling to do so.[7] The Prosecution submissions on each witness are detailed below.

1. Witness No. 39

6. With respect to Witness No. 39, the Prosecution submits that, after he had expressed reservations about his forthcoming testimony, the Prosecution Investigators met him in March 2010 in order to address his concerns, but that, despite their best efforts, they failed to prevail upon Witness No. 39 to testify again.[8] On 26 March 2010, Witness No. 39 informed the Prosecution that "he is unable to testify for health reasons".[9] The Prosecution avers that Witness No. 39 suffers from "Post-Traumatic Stress Disorder, due to his war time experiences" and that "he is concerned that the psychological and emotional stress of having to relive those experiences, together with the added pressure of being subjected to cross-examination, would be detrimental to his psychological condition and to his overall health".[10]

7. The Prosecution submits that the conditions of Rule 92 *bis* are met since the evidence given by Witness No. 39 is relevant to and probative of, in particular, the mass execution carried out by RS forces at the Kravica Warehouse on 13 July 1995 and the well-planned, coordinated and organised nature of these events as part of the joint criminal enterprise to murder ("JCE to

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[5] T. 2791 (15 June 2010); T. 3486–3487 (6 July 2010).
[6] Motion, para. 1.
[7] Motion, para. 6.
[8] Motion, para. 9.
[9] Motion, para. 9.
[10] Motion, para. 9.

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murder").[11] Furthermore, the Prosecution contends that the evidence in question does not go to the Accused's acts or conduct, nor does it pertain to the acts and conduct of any perpetrator "proximate" to him.[12]

8. The Prosecution also purports that the evidence is "largely cumulative" of the evidence of Witness No. 38[13] and is corroborated by unspecified proposed documentary and forensic evidence and concludes that, as such, it is not pivotal to the Prosecution's case.[14]

9. Finally, the Prosecution seeks the admission of the testimony in the *Popović* case[15] and associated exhibits.[16] However, "in order to fulfil the requirements of Rule 92*bis*", the Prosecution does not move to admit part of Witness No. 39's prior testimony that relates to his time in Žepa and that can be considered to go to proof the Accused's acts or conduct evidence,[17] the portion of which is indicated in Appendix D of the Motion.[18] The remaining part of Witness 39's prior testimony, the Prosecution argues, is cumulative to other proposed evidence and thus is appropriate for admission under Rule 92 *bis*.[19]

2. Witness No. 42

10. The Prosecution submits that, after Witness No. 42 expressed concern about his upcoming testimony in the *Tolimir* case, the Prosecution investigators contacted him; but that despite their best efforts to prevail upon him, it was informed in April 2010 that Witness No. 42 was unable to testify for health reasons.[20] Henceforth, the Prosecution seeks the admission of this witness's testimony and related exhibits.[21]

11. According to the Prosecution, Witness No. 42 refuses to testify on the basis that he "suffered serious psychological and emotional trauma as a result of having to relive his wartime experiences during the course of giving evidence" in the *Popović* case and is now "unwilling to endure the prospect of a similar experience as a result of these proceedings".[22]

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[11] Motion, para. 10.
[12] Motion, para. 11.
[13] Witness No. 38 testified on 31 May 2010.
[14] Motion, para. 11.
[15] Witness No. 39 testified in *Popović* on 6–8 February 2007.
[16] Motion, para. 8.
[17] Motion, para. 12.
[18] Motion, para. 12.
[19] Motion, para. 12.
[20] Motion, para. 14.
[21] Motion, para. 13.
[22] Motion, para. 14.

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12. With regard to the conditions set out in Rule 92 *bis*, the Prosecution states that Witness No. 42's evidence is relevant to and probative of material issues, in particular as it concerns the executions near Nezuk on 19 July 1995 of Bosnian Muslim males by the 16th Motorised Brigade, which was under the command of Lt. Col. Vinko Pandurević.[23] The Prosecution avers that, although the evidence in question is important with regard to establishing the JCE to murder, it is "crime base" evidence and does not go to the acts and conducts of the Accused or those of any perpetrator of the crimes "proximate" to the Accused.[24]

13. In addition, the Prosecution suggests that Witness No. 42's evidence is appropriate for admission pursuant to Rule 92 *bis* since it is not pivotal to the Prosecution's case given that it is largely cumulative to that of Witness No. 56,[25] providing a nearly identical account of the relevant incidents and is corroborated by documentary and forensic evidence.[26]

3. Witness No. 121

14. The Prosecution contends that Witness No. 121 informed the Prosecution that he will not testify in this case because he is concerned for the safety and welfare of his family, were he to appear as a witness.[27] It is submitted that Witness No. 121, in particular, fears that the members of his family residing in Bosnia and Herzegovina are "particularly susceptible to any potential harm that may arise as a consequence of his testimony".[28] Without further elaborating, the Prosecution states that it did not prevail on the witness to testify in *Tolimir* even with the continuation of protective measures granted to this witness in prior proceedings "in part because of his prior experiences as a witness in *Popović*".[29]

15. With regard to the nature of the evidence in question, the Prosecution submits that Witness 121's evidence is relevant to and probative of the execution of Bosnian Muslim men near Sandići Meadow on 13 July 1995 by MUP personnel.[30] By referring to forensic evidence confirming the death of 17 Bosnian Muslim prisoners killed near Sandići and stating that Witness No. 121's evidence does not go to the Accused's acts and conducts, nor does it pertain to those of physical perpetrators "proximate" to him, the Prosecution concludes that the evidence in question is not

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[23] Motion, para. 15.
[24] Motion, para. 16.
[25] Witness No. 56's prior testimony was provisionally admitted into evidence subject to the witness's appearing for cross-examination and fulfilling the conditions of Rule 92 *ter*. *See* Decision on Prosecution's Motion for Admission of Written Evidence pursuant to Rule 92 *BIS* and 94 *BIS*, 7 July 2010 ("Rule 92 *bis* Decision").
[26] Motion, para. 16.
[27] Motion, para. 19.
[28] Motion, para. 19.
[29] Motion, para. 19.
[30] Motion, para. 20.

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pivotal to its case against the Accused and could therefore appropriately be admitted pursuant to Rule 92 *bis*.[31]

B. Response

16. In his Response, the Accused, on a preliminary basis, is strongly opposed to the Prosecution's Motion.[32] He argues that, by the Motion, the Prosecution effectively seeks a reconsideration of the Chamber's Rule 92 *ter* Decision.[33]

17. The Accused contends that the Motion raises "serious legal questions" with regard to both, its nature and the relationship between Rule 92 *bis* and Rule 92 *quater*.[34] In respect of the nature of the Motion, the Accused argues that the Motion in effect constitutes a request for re-examination of the Rule 92 *ter* Decision, but asserts that the Prosecution did not adduce any "particular circumstances" justifying a reconsideration of the previous decision on the matter.[35] The Accused goes on to submit that the Prosecution failed to indicate any errors in the Chamber's reasoning that led to the Rule 92 *ter* Decision, but merely bases its Motion on the ability and willingness of the witnesses to appear for cross-examination.[36]

18. With regard to the relationship between Rule 92 *ter* and Rule 92 *quater*, the Accused points out that the reasons adduced by the Prosecution in order to seek admission of the two witnesses' testimony under Rule 92 *bis* are not provided in this rule and that Rule 92 *bis* "uses the *numerus clausus* method to state which factors the Trial Chamber may take into consideration which would favour the admission of statements pursuant to Rule 92 *bis*".[37] The "inability" and "unwillingness" of a witness to testify, argues the Accused, is therefore not included in the criteria.

19. Insofar as Witness Nos. 39 and 42 are concerned, the Accused claims that the Prosecution refers to criteria that are regulated by Rule 92 *quater* and not Rule 92 *bis*.[38]

20. The Accused points out that even if the Motion was to be dealt with under the regime provided for by Rule 92 *bis*, the witnesses' evidence goes to the acts and conduct of the Accused and their testimony is henceforth inadmissible under that Rule.[39]

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[31] Motion, para. 21.
[32] Response, para. 2.
[33] Response, para. 4.
[34] Response, para. 5.
[35] Response, paras. 6–8 (referring to Decision on Second Preliminary Motion on the Indictment pursuant to Rule 72 of the Rules 1 October 2008, para. 33).
[36] Response, paras. 8–9.
[37] Response, paras. 12, 27.
[38] Response, paras. 10, 27.
[39] Response, paras. 19–22, 27.

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21. Responding to the Prosecution's submission in respect of Witness No. 39's concern that there is "added pressure of being subject to cross-examination", the Accused further submits that "it is the duty of a witness who made a statement that is being used in court proceedings to respond to the questions of the party that summoned the witness as well as the other party and the Chamber" in order to allow the Chamber to assess on the reliability and probative value of the witness statement.[40]

22. Lastly, with regard to Witness No. 39, the Defence argues that the proposed testimony is not cumulative as suggested by the Prosecution.[41]

23. In respect of Witness No. 121, the Accused argues that the Prosecution did not adduce specific reasons to explain why this witness would be unable to testify, but rather generally refers to his prior experience in *Popović* without specifying what kind of experience that was.[42]

C. Reply

24. After requesting leave to file the Reply, the Prosecution submits that it does not seek to introduce via Rule 92 *bis* any evidence going to proof of the acts or conduct of the Accused but that it proposes redacting any references to the Accused's acts or conduct from the proffered testimony of Witness No. 39.[43]

25. Insofar as the Accused states that the Prosecution's request would be more adequately filed under Rule 92 *quater* rather than Rule 92 *bis*, the Prosecution replies that its approach was entirely consistent with the letter and spirit of the Rules.[44] It concludes that it is irrelevant whether the testimonies would also be admissible pursuant to Rule 92 *quater*, given that all three witnesses had testified under oath in previous proceedings where they were submitted to cross-examination by parties with similar interests to those of the Accused; and that the Prosecution does not seek admission of evidence going to acts or conduct of the Accused and hence the conditions of Rule 92 *bis* were met.[45]

III. DISCUSSION

26. Before turning to the merits of the Motion, the Chamber deems it imperative to discuss which Rule applies to this specific request. As outlined above, the Prosecution filed its request

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[40] Response, para. 17.
[41] Response, para. 25.
[42] Response, para. 28.
[43] Reply, para. 2.
[44] Reply, para. 3.
[45] Reply, para. 3.

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under Rule 92 *bis*. The Accused argues that Rule 92 *quater* rather than Rule 92 *bis* should apply. In this regard the Chamber notes that the applicable legal regime is to be determined by the substance of what is sought by the Prosecution.

27. The Chamber notes that a full discussion of the applicability of Rule 92 *bis*, as well as the importance of providing the Accused with an opportunity to challenge the Prosecution's evidence by cross-examining its witnesses, is contained in Rule 92 *bis* Decision and will not be rehearsed again in full here.[46] In that decision, the Chamber identified the steps required in determining whether written evidence could be admitted pursuant to Rule 92 *bis*, namely:

> First, the Chamber must decide whether the evidence is admissible in that it goes to proof of a matter other than the acts and conduct of the accused as charged in the Indictment. Second, where the evidence is admissible, the Chamber must decide whether it is appropriate to admit such evidence pursuant to Rule 92 *bis*. Third, if the evidence is admitted, the Chamber must also decide whether to exercise its discretion to require the witness to appear for cross-examination. Finally, if the evidence submitted for admission pursuant to Rule 92 *bis* consists of a written statement, the formal requirements of Rule 92 *bis*(B) must be met.[47]

28. By contrast, Rule 92 *quater* governs the admissibility of written evidence of unavailable persons and 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.

29. Thus, Rule 92 *quater* requires that two conditions be cumulatively satisfied: the unavailability of a person whose written statement or transcript is sought to be admitted, and the reliability of the evidence therein.[48] As the jurisprudence of the Tribunal indicates, "[o]nly such compelling circumstances trigger Rule 92 *quater*'s permission to potentially admit the written statement of the person unable to appear because of uncontrollable circumstances—and even then,

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[46] Rule 92 *bis* Decision.

[47] Rule 92 *bis* Decision, para. 28.

[48] *See*, for example, *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. 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, 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, 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, p. 4.

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the fact that evidence goes to proof of acts and conduct is a factor against the admission of the evidence or that part of the evidence."[49]

30. The Chamber recalls that the three witnesses were initially subject to the Rule 92 *ter* Motion, and that in the Rule 92 *ter* Decision it first found that their written evidence was relevant to and probative of the allegations contained in the Indictment.[50] The Chamber then provisionally admitted their written evidence pending compliance with the conditions prescribed by Rule 92 *ter* at trial.[51]

31. In the Motion, the Prosecution now requests to convert the same three witnesses to Rule 92 *bis* witnesses for reasons of their unavailability to give evidence pursuant to Rule 92 *ter*, namely, the health conditions of Witness Nos. 39 and 42 and the concern about the security of Witness No. 121's family.

32. Turning to the first step of admissibility under Rule 92 *bis*, the Chamber notes that the Prosecution proposes to redact those parts of the written evidence of Witness No. 39 which go to proof the acts and conducts of the Accused and therefore only seeks the admission of Witness No. 39's written evidence as defined in Appendix D of the Motion. Nor does the evidence of Witness Nos. 42 and 121 go to the acts and conducts of the Accused. Thus, the proposed evidence for all three witnesses is admissible. In accordance with the second step of admissibility, however, even where the evidence is admissible, the Chamber must use its discretion and determine whether such admission is appropriate.[52] In this respect the Chamber observes that the request for the admission of the written evidence of the three witnesses is based on factual grounds, namely their alleged unavailability, and that the admission of written evidence under such circumstances is explicitly governed by Rule 92 *quater*.[53] The Chamber is of the view that the request should be examined by Rule 92 *quater*, rather than Rule 92 *bis*.[54] Otherwise, the stringent requirements in Rule 92 *quater* would be circumvented. The Chamber therefore proceeds with its analysis of the request pursuant to Rule 92 *quater*.

33. As previously noted, two cumulative conditions need to be met for written evidence to be admissible under Rule 92 *quater*: the witness whose written evidence is sought must be unavailable,

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[49] *Prosecutor v. Popović et al.*, Case No. IT-05-88-T, Decision on the Admissibility of the Borovčanin Interview and the Amendment of the Rule 65 TER Exhibit List, 25 October 2007 ("*Popović* 25 October 2007 Decision"), para. 74.

[50] Rule 92 *ter* Decision, paras. 35, 42.

[51] *Ibid.*

[52] Rule 92 *bis* Decision, para. 27.

[53] See e.g. *Prosecutor v. Šešelj*, Decision on Prosecution Motion for Variation of the Exhibit List and of Evidence Related to Witness VS-1063 Pursuant to Rule 92 Quarter, 30 March 2010.

[54] For a detailed examination of the applicability of Rule 92 *bis see* Rule 92 *bis* Decision.

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that is, unable to appear in court for "reasons beyond control"[55] and the proposed evidence must be reliable. With regard to the unavailability test, the Prosecution has argued that the three proposed witnesses are unavailable because the Prosecution "has been unable to prevail upon" them to testify again due to their health conditions (concerning Witness Nos. 39 and 42) or the concern for the safety of the witness's family (concerning Witness No. 121). The Chamber is, however, not persuaded that the Prosecution's inability "to prevail upon" these witnesses is sufficient reason to find that these witnesses are "unavailable" within the meaning of Rule 92 *quater*, particularly since the Prosecution has failed to provide any documentation or other proof of the witnesses' unavailability by submitting, for example, medical certificates. With regard to Witness No. 121, the Prosecution failed to specify the experiences in which the witness's unavailability is rooted.

34. As previously mentioned, the reliability of the proffered evidence—the second test of Rule 92 *quater*—has already been assessed and found to be met in the Rule 92 *ter* Decision. Nevertheless, the Prosecution has failed to establish one of the two cumulative requirements under Rule 92 *quater*.

35. For the foregoing reasons, the Chamber finds that the Prosecution's request to admit written evidence of the three witnesses is denied.

IV. DISPOSITION

For these reasons, pursuant to Rules 54, 89 and 92 *bis* of the Rules, the Trial Chamber hereby **DECIDES** as follows:

(1) The Prosecution is **GRANTED** leave to reply to the Response; and

(2) The Motion to admit written evidence for Witness Nos. 39, 42 and 121 is **DENIED**.

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[55] *Popović* 25 October 2007 Decision, para. 74.

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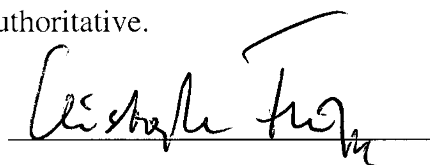
Done in English and French, the English text being authoritative.



Judge Christoph Flügge

Presiding Judge

Dated this twenty-seventh day of August 2010
At The Hague
The Netherlands

[Seal of the Tribunal]

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