



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: 4 November 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: 4 November 2011

PROSECUTOR

v.

ZDRAVKO TOLIMIR

PUBLIC

**DECISION ON PROSECUTION'S REQUEST FOR RECONSIDERATION
OF THE ADMISSION OF WRITTEN EVIDENCE OF WITNESS NO. 39
PURSUANT TO RULE 92 *BIS***

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 Request for Reconsideration of the Admission of the Written Evidence of Witness No. 39 Pursuant to Rule 92 *bis*”, filed confidentially on 20 September 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 transcript of Witness No. 39 in the case of *Prosecutor v. Popović et al.*¹ (“*Popović* case”), 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.²

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 Prosecution’s request for the admission of the prior testimony of Witness No. 39 in the *Popović* case pursuant to Rule 92 *bis*.³ The Chamber was of the view that this request was based on the alleged unavailability of Witness No. 39 and that it should be examined by Rule 92 *quater* rather than Rule 92 *bis*.⁴ The Chamber thus proceeded with its analysis pursuant to Rule 92 *quater*.⁵ The Chamber was not persuaded that the Prosecution’s inability “to prevail upon” Witness No. 39 to testify due to his health condition was 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.⁶

3. In its “Decision on Prosecution’s Motion to Admit the Evidence of Witness No. 39 pursuant to Rule 92 *quater*” issued on 7 September 2011 (“Rule 92 *quater* Decision”), the Chamber held that the Prosecution had presented medical evidence that attending court could have harmful after-effects on Witness No. 39, but that this did not amount to a medical statement to the effect that he

¹ Case No.: IT-05-88-T.

² Rule 92 *ter* Decision, pp. 13–14.

³ Partial Decision, para. 35. *Cf.* “Prosecution’s Rule 92 *bis* and Rule 92 *ter* Motion for Five Witnesses, Notice of Continuation of Protective Measures”, 23 April 2010, confidential (“April 2010 Motion”), paras. 8–12.

⁴ Partial Decision, para. 32.

⁵ Partial Decision, para. 32.

⁶ Partial Decision, para. 33.

was incapable of attending a court hearing and testifying or medical evidence that he was incapable of answering the questions put to him and testifying coherently.⁷ Accordingly, the Chamber was not satisfied that Witness No. 39 was unavailable within the meaning of Rule 92 *quater* and concluded that his testimony may not be admitted pursuant to Rule 92 *quater*.⁸

4. In the Motion the Prosecution seeks reconsideration of the Partial Decision, as concerns the transcript evidence of Witness No. 39 and associated exhibits.⁹

5. In the confidential “Response to the Prosecution’s Request for Reconsideration of the Admission of the Written Evidence of Witness No. 39 pursuant to Rule 92 *bis*” submitted in BCS on 14 October 2011 and filed in English on 19 October (“Response”), Zdravko Tolimir (“Accused”) requests that the Chamber deny the Motion.¹⁰

6. On 26 October 2011 the Prosecution filed confidentially the “Prosecution’s Request for Leave to Reply and Reply regarding [Witness No. 39]” (“Reply”).

II. SUBMISSIONS OF THE PARTIES

A. Motion

7. The Prosecution submits that the evidence of Witness No. 39 satisfies all the conditions of admissibility under Rule 92 *bis*:¹¹ his evidence in regard to the detention of prisoners at Sandići Meadow and the Kravica Warehouse executions is largely cumulative of that of PW-005 and documentary and forensic evidence;¹² his evidence concerning the forcible transfer of the population out of Žepa and the foreseeable targeted killings of Muslim leaders is cumulative of and corroborated by other witnesses;¹³ the Prosecution is not proffering any of Witness No. 39’s evidence going to proof of the acts or conduct of the Accused and has specifically redacted any such references from the proposed transcript of his testimony and the associated exhibits;¹⁴ and Witness No. 39’s testimony was given under oath, subjected to detailed examination by the Prosecution and cross-examined by the Defence in the *Popović* case.¹⁵

⁷ Rule 92 *quater* Decision, para. 30.

⁸ Rule 92 *quater* Decision, para. 30.

⁹ Motion, paras. 1, 19.

¹⁰ Response, para. 13.

¹¹ Motion, paras. 9–15.

¹² Motion, paras. 9–10.

¹³ Motion, paras. 11–12.

¹⁴ Motion, para. 14.

¹⁵ Motion, para. 15.

8. The Prosecution further submits that Witness No. 39 suffers from a clinically diagnosed chronic mental disorder stemming from the events he has testified about previously in the *Krstić* and the *Popović* trials, and that his evidence is limited to the crime-base.¹⁶ It is the position of the Prosecution that under these circumstances the admission of his evidence pursuant to Rule 92 *bis* without cross-examination is fully consonant with the rights of the Accused and is in the interests of justice.¹⁷

9. The Prosecution seeks the admission of the exhibits admitted through Witness No. 39 in the *Popović* case on the grounds that they form an integral and inseparable part of his testimony and submits that passages in his witness statement (Rule 65 *ter* No. 07567) that go to the acts and conduct of the Accused should be redacted.¹⁸

B. Response

10. The Accused contends that the arguments that the Prosecution presents in the Motion do not differ from those that it has presented previously and that it has not submitted any new or newly arisen circumstance warranting re-examination of the Partial Decision.¹⁹ In the submission of the Accused, the basis for the Prosecution's requests is the refusal of Witness No. 39 to testify before the Tribunal, but the unwillingness of the witness to testify cannot "prevail over" the fundamental rights of the Accused, particularly his rights pursuant to Article 21(4)(e) of the Statute of the Tribunal.²⁰ The Accused submits that the Prosecution has not demonstrated that the Chamber has committed any error of reasoning or that the denial of the Motion would cause an injustice.²¹

11. The Accused further submits that the redactions proposed by the Prosecution to the transcript of Witness No. 39's testimony in the *Popović* case and to his statement are such that his statement as a whole cannot be understood without them.²² Moreover, in the Accused's view, the redactions both deprive the Chamber of relevant information and considerably reduce the possibility of assessing the reliability and probative value of Witness No. 39's testimony.²³

12. The Accused concludes that the Chamber should deny the Motion.²⁴

¹⁶ Motion, para. 17.

¹⁷ Motion, para. 17.

¹⁸ Motion, paras. 14, 18, Appendix B.

¹⁹ Response, para. 4. *Cf. Ibid.*, paras. 5, 8, 10.

²⁰ Response, paras. 5–6.

²¹ Response, para. 8.

²² Response, para. 11.

²³ Response, para. 11.

²⁴ Response, para. 13.

C. Reply

13. The Prosecution seeks leave to reply to the Response and submits that the Reply clarifies certain issues and should assist the Chamber.²⁵ In the submission of the Prosecution, the Response does not provide any valid ground for excluding the proposed evidence of Witness No. 39,²⁶ since the Accused fails to identify a single aspect of this evidence that cannot be understood by virtue of the proposed redactions,²⁷ he has not shown how they cast doubt on the reliability of the rest of the evidence²⁸ and the inadmissibility of the evidence relating to the acts and conduct of the Accused cause him no unfair prejudice.²⁹

III. APPLICABLE LAW

14. At the outset, the Chamber notes that while not explicit in the text of Rule 92 *bis* itself, all evidence, including that which is admitted pursuant to the Rule,³⁰ must satisfy the fundamental requirements for admissibility established in Rule 89(C) and (D).³¹ As the Appeals Chamber has noted:

Far from being an ‘exception’ to Rule 89 [...] Rule 92 *bis* identifies a particular situation in which, once the provisions of Rule 92 *bis* are satisfied, and where the material has probative value within the meaning of Rule 89(C), it is in principle in the interests of justice within the meaning of Rule 89(F) to admit the evidence in written form.³²

15. Rule 92 *bis* permits the Chamber to dispense with the attendance of a witness in person and instead admit the written statement or transcript of previous testimony of a witness in *lieu* of oral testimony, where the evidence goes to proof of a matter other than the acts and conduct of the accused as charged in the indictment.³³ Even where admissible, the Chamber is not bound to admit such evidence, but must use its discretion and determine (i) whether admission is appropriate,³⁴ and (ii) where the evidence is appropriate for admission, whether the Chamber will still exercise its

²⁵ Reply, para. 1.

²⁶ Reply, para. 3.

²⁷ Reply, para. 3.

²⁸ Reply, para. 4.

²⁹ Reply, para. 5.

³⁰ *Prosecutor v. Galić*, Case No. IT-98-29-AR73.2, Decision on Interlocutory Appeal Concerning Rule 92 *bis*(C), 7 June 2002 (“*Galić* Appeals Decision”), para. 12 (referring to the “intention of Rule 92*bis*... to qualify the previous preference in the Rules for ‘live, in court’ testimony, and to permit evidence to be given in written form where the interests of justice allow provided that such evidence is probative and reliable...”).

³¹ Rule 89 (C) provides: “A Chamber may admit any relevant evidence which it deems to have probative value”. According to Rule 89 (D), “[a] Chamber may exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial”.

³² *Galić* Appeals Decision, para. 12.

³³ Rule 92 *bis*(A).

³⁴ Rule 92 *bis*(A) (“A Trial Chamber *may* . . . admit, in whole or in part...”) (emphasis added).

discretion to require the witness in question to appear for cross-examination at trial.³⁵ If the witness is required to appear, the provisions of Rule 92 *ter* apply.³⁶

16. Accordingly, the Chamber's Rule 92 *bis* analysis consists of either three or four steps, depending on the type of written testimony tendered. 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.

17. According to the jurisprudence of the Tribunal, a Chamber has "inherent discretionary power to reconsider a previous decision in exceptional cases if a clear error of reasoning has been demonstrated or if it is necessary to do so to prevent an injustice".³⁷ A party urging reconsideration must satisfy the Chamber of particular circumstances justifying reconsideration in order to avoid injustice.³⁸

IV. DISCUSSION

18. The Chamber recalls that in the Partial Decision it held that the motion for the admission of Witness No. 39's evidence pursuant to Rule 92 *bis* was based on his alleged unavailability and should, therefore, be considered pursuant to Rule 92 *quater*, but that what the Prosecution had submitted did not meet the criteria for unavailability under that Rule.³⁹ In the Motion, however, the

³⁵ Rule 92 *bis*(C) ("The Trial Chamber shall decide... *whether* to require the witness to appear for cross-examination") (emphasis added).

³⁶ Rule 92 *bis*(C). Rule 92 *ter* provides:

(A) A Trial Chamber may admit, in whole or in part, the evidence of a witness in the form of a written statement or transcript of evidence given by a witness in proceedings before the tribunal, under the following conditions:

(i) the witness is present in court;

(ii) the witness is available for cross-examination and any questioning by the Judges; and

(iii) the witness attests that the written statement or transcript accurately reflects that witness' declaration and what the witness would say if examined.

(B) Evidence admitted under paragraph (A) may include evidence that goes to proof of the acts and conduct of the accused as charged in the indictment.

³⁷ See, e.g., Decision on Second Preliminary Motion on the Indictment pursuant to Rule 72 of the Rules, 1 October 2008, para. 33; *Prosecutor v. Tolimir*, Case No. IT-05-88/2-AR73.1, Decision on Zdravko Tolimir's Request for Reconsideration of Appeals Chamber's Decision of 28 March 2008, 18 June 2008, para. 8.

³⁸ See, e.g., Decision on Second Preliminary Motion on the Indictment pursuant to Rule 72 of the Rules, 1 October 2008, para. 33; *Prosecutor v. Popović et al.*, Case No. IT-05-88-T, Decision on Defence Motion Requesting Reconsideration or Certification of Decision Admitting Exhibits with Testimony of Witness 168, 20 July 2007, p. 5.

³⁹ Partial Decision, paras. 32-33, 35.

Prosecution is not seeking the admissibility of Witness No. 39's evidence on the basis of his alleged unavailability, but rather on the criteria established under Rule 92 *bis*.

19. In both the Partial Decision and the Rule 92 *quater* Decision the Chamber recalled that in the Rule 92 *ter* Decision it found that Witness No. 39's written evidence was relevant to and probative of the allegations contained in the Indictment.⁴⁰

20. The Prosecution proposes for admission only the parts of Witness No. 39's evidence that go to proof of matters other than the acts and conduct of the Accused as charged in the Indictment, as provided in Rule 92 *bis*(A).⁴¹ Therefore the Chamber will now consider whether it is appropriate to admit such evidence pursuant to Rule 92 *bis* and, if the evidence is admitted, whether the Chamber should decide to exercise its discretion to require the witness to appear for cross-examination.

21. The Chamber finds that the testimony of Witness No. 39 is cumulative of other evidence in the case given by witnesses who have appeared for cross-examination in relation to Sandići Meadow, the Kravica Warehouse executions and the movement of the population out of Žepa.⁴² The Chamber has previously acknowledged the mental disorder from which Witness No. 39 suffers as well as the possible harmful after-effects of requiring him to make a further appearance in court,⁴³ and although such circumstances do not render him objectively unavailable,⁴⁴ the Chamber is of the view that they weigh in favour of not calling him for cross-examination. Moreover the Accused has not presented an argument in support of cross-examining the witness.

22. The Chamber considers that the question whether to redact a portion of a document that it tenders for admission is for the Prosecution to decide in light of the conception it has of its case-in-chief, provided that the redacted document meets the criteria for admissibility under the Rules. While the proposed redactions which consist of passages in the transcript that go to proof of the Accused's acts and conduct as charged in the Indictment contain relevant material, they are not essential for the Chamber's understanding of the transcript of Witness No. 39's testimony in the *Popović* case. Furthermore, the transcript retains its relevance and probative value even without those portions which are proposed for redaction and, accordingly, is admissible pursuant to Rule

⁴⁰ Rule 92 *quater* Decision para. 22; Partial Decision, para. 30; Rule 92 *ter* Decision, paras. 35, 42.

⁴¹ Motion, para. 14, n. 22, Appendix C. The Prosecution proposes redactions of T. 7018: 6–15 and 21–25, T. 7019: 1–5 and T. 7024: 10–12 of the transcript of his testimony in the *Popović* case and certain sections of pages 2 and 3 of Witness No. 39's Statement. The Chamber notes that in the April 2010 Motion the Prosecution sought the admission of the transcript of Witness No. 39's testimony in the *Popović* case with different redactions. April 2010 Motion, Appendix D.

⁴² In particular, PW-005 at T. 2195–2255 (31 May 2010) and Meho Džebo at T. 14787–14916 (30–31 May 2011) gave evidence that is similar to that of Witness No. 39.

⁴³ Rule 92 *quater* Decision, para. 30.

⁴⁴ Rule 92 *quater* Decision, para. 30.

89(C). Finally, the Trial Chamber finds that the admission of the redacted transcript does not affect the fairness of the proceedings so as to constitute a basis for excluding it pursuant to Rule 89(D).

23. Under all these circumstances, it would be contrary to the interests of justice to deny the Motion.

24. The Chamber concludes that reconsideration of the Partial Decision as regards Witness No. 39 is necessary to prevent an injustice and that, accordingly, it is appropriate to admit the transcript of Witness No. 39 pursuant to Rule 92 *bis*(A) without requiring him to appear for cross-examination and that the exhibits tendered in the Motion which were admitted through the witness in the *Popović* case should be admitted. Of the exhibits identified in Appendix B to the Motion as having been admitted through Witness No. 39 in the prior proceeding, the exhibit with the Rule 65 *ter* No. 07566 and the exhibit with the Rule 65 *ter* No. 07567, which was Witness No. 39's statement to the Prosecution, were not admitted in the *Popović* case and the exhibit with the Rule 65 *ter* No. 06747 has already been admitted as Ex. P01224.

V. DISPOSITION

25. For these reasons, pursuant to Rules 54, 89, 92 *bis* and 126 *bis*, the Chamber hereby **GRANTS** the Motion **IN PART** and

(1) **GRANTS** the Prosecution leave to reply;

(2) **ORDERS** that:

(a) The under seal and public versions of the transcript of the testimony of Witness No. 39 with Rule 65 *ter* Nos. 07564 and 07565 respectively shall be admitted pursuant to Rule 92 *bis*, subject to the redaction of T. 7018: 6–15 and 21–25, T. 7019: 1–5 and T. 7024: 10–12 (7 February 2007), as indicated in Appendix C to the Motion, and Witness No. 39 shall not be required to appear for cross-examination;

(b) Exhibits that were admitted through Witness No. 39 in the *Popović* case with the following Rule 65 *ter* Nos. shall be admitted: 01325 (under seal), 01418 (under seal), 01001, 03367, 03368 and 03369; and

(c) The Registry shall assign exhibit numbers to the evidence admitted by this decision if exhibit numbers do not already exist; and

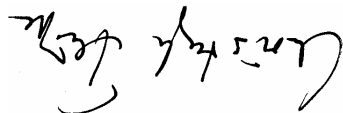
(3) **DENIES** the Motion in all other respects.

[Seal of the Tribunal]

Dated this fourth day of November 2011
At The Hague
The Netherlands

Presiding Judge

Judge Christoph Függe



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