



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-09-92-T
Date: 22 July 2012
Original: English

IN TRIAL CHAMBER I

Before: Judge Alphons Orie, Presiding
Judge Bakone Justice Moloto
Judge Christoph Flügge

Registrar: Mr John Hocking

Decision of: 22 July 2012

PROSECUTOR

v.

RATKO MLADIĆ

PUBLIC

**DECISION ON PROSECUTION MOTION TO ADMIT THE
EVIDENCE OF WITNESS RM-266 PURSUANT TO RULE 92
*QUATER***

Office of the Prosecutor

Mr Dermot Groome
Mr Peter McCloskey

Counsel for Ratko Mladić

Mr Branko Lukić
Mr Miodrag Stojanović

I. PROCEDURAL HISTORY

1. On 17 February 2012, the Prosecution filed a motion seeking the admission into evidence of certain portions of the transcript of Witness RM-266's testimony from the *Prosecutor v. Slobodan Milošević* case ("Prosecution Motion" and "Milošević case" respectively), as well as one associated exhibit.¹

2. On 23 February 2012, at the Sixth Status Conference, the Chamber instructed the Prosecution to review the Annex to its motion to ensure that it would tender only the marked portions of the transcript, and to file a supplement if it considered that additional portions should be included.² The Chamber informed the Parties that in relation to future motions, the Prosecution should not tender entire transcripts of prior testimony with annotations, which the Chamber understands as marked portions, but only those portions upon which it would rely.³ On 25 February, the Chamber informed the Defence, through an informal communication, that the response time to the motion began running as of 1 March 2012. On 28 February 2012, the Prosecution informed the Chamber, through an informal communication, that it would not make a supplemental filing and that, in its view, no new annotations were needed.

3. On 15 March 2012, the Defence filed its response to the Prosecution Motion.⁴ It opposed the Prosecution's practice of filing an entire transcript with annotations and the Prosecution's request to admit the evidence of Witness RM-266 pursuant to Rule 92 *quater* of the Tribunal's Rules of Procedure and Evidence ("Rules").⁵ On 22 March 2012, the Prosecution filed a motion seeking leave to reply to the Defence Response, which was granted by the Chamber at the Seventh Status Conference.⁶

4. At the 26 March 2012 Rule 65 *ter* meeting, the Chamber instructed the Defence to identify and file by 5 April 2012 those additional portions of the transcript it would want to be admitted into evidence if the motion were to be granted.⁷ On 10 April 2012, the Defence filed its additional

¹ Prosecution Motion to Admit the Evidence of RM266 pursuant to Rule 92 *quater*, 17 February 2012 (Confidential with Confidential Annexes) ("Prosecution Motion"), para. 1.

² T. 194.

³ T. 193-194.

⁴ Defence Response to Prosecution Motion to Admit the Evidence of RM266 pursuant to Rule 92 *quater*, 15 March 2012 ("Defence Response").

⁵ Defence Response, paras 7, 20-21.

⁶ Prosecution Motion Seeking Leave to Reply to Defence Response to Prosecution Motion to Admit the Evidence of RM266 pursuant to Rule 92 *quater*, 22 March 2012 (Confidential with Confidential Annex) ("Prosecution Reply"), para. 3; T. 230.

⁷ Rule 65 *ter* meeting of 26 March 2012, T. 270-271; T. 232.

submission, identifying such portions.⁸ On 24 April 2012, the Prosecution filed its Response to the Defence Additional Submission, indicating that it does not object to the admission of the additional portions identified by the Defence and attaching the associated document; the witness's curriculum vitae.⁹

II. SUBMISSIONS OF THE PARTIES

Procedure

5. The Prosecution seeks admission into evidence of specific portions of the transcript of Witness RM-266's testimony from the *Milošević* case, as well as an associated document, pursuant to Rule 92 *quater* of the Rules.¹⁰ The Prosecution submits an annotated transcript, which indicates those portions of the transcript upon which the Prosecution relies.¹¹ The Prosecution also proposes a procedure for future Rule 92 *quater* motions.¹² The Prosecution argues that tendering the prior testimony of a witness can present a number of challenges to the parties and Trial Chamber, for example:

The transcript recording a witness' evidence can be voluminous and contain colloquy unrelated to the witness; the prior evidence may relate (in significant part) to events and to the acts and conduct of persons not directly relevant to the current case; the prior evidence may include references to associated exhibits that are not directly relevant to the current case; and it is frequently common for witnesses to have testified in several cases, and in some cases all the relevant evidence can only be adduced by admitting several testimonies.¹³

6. The Defence argues that the entirety of a transcript should be tendered for all proposed Rule 92 *quater* witness.¹⁴

Substance

⁸ Defence Additional Submission Pursuant to Instruction of Chamber as to Rule 92 *quater* Motion for Witness RM266, 10 April 2012 (Confidential with Confidential Annex) ("Defence Additional Submission"). On 5 April 2012, the Defence submitted its Additional Submission. This was refiled on 10 April 2012 due to an error in the previous filing.

⁹ Prosecution Response to Defence Additional Submission pursuant to Instruction of Chamber as to Rule 92 *quater* Motion for Witness RM266 with Confidential Annex A, 23 April 2012 (Confidential), para. 2, Confidential Annex A.

¹⁰ Prosecution Motion, para. 1.

¹¹ Prosecution Motion, Confidential Annex C.

¹² Prosecution Motion, para. 26.

¹³ Prosecution Motion, para. 23.

¹⁴ Defence Response, para. 9.

7. The Prosecution seeks to admit, pursuant to Rule 92 *quater* of the Rules, limited portions from Witness RM-266's testimony in the *Milošević* trial: specific lines from transcript pages T. 21002-21003, 21040-21044, 21091-21096, 21105-21108.¹⁵ The Prosecution submits that Witness RM-266's prior testimony meets the requirements set out by Rule 92 *quater* of the Rules, as it is relevant and reliable and does not relate to the acts or conduct of the Accused.¹⁶ The Prosecution avers that the evidence is reliable as the witness testified under oath in a prior proceeding before this Tribunal and was subject to thorough examination and cross-examination by the Prosecution and Defence in that case.¹⁷ In addition, the Prosecution argues that the proposed portion of the testimony is corroborated by the upcoming testimony of Witnesses RM-373, RM-262, and RM-269.¹⁸ Further, the Prosecution seeks the admission of one associated exhibit; a summary of the personal background and curriculum vitae of the witness.¹⁹ According to the Prosecution, the associated exhibit forms an integral and inseparable part of the witness's testimony.²⁰

8. The Defence opposes the Prosecution Motion.²¹ The Defence does not challenge the witness's unavailability.²² However, the Defence opposes the admission of the testimony and the associated document, claiming that the witness's evidence is unreliable, presently uncorroborated, goes to the acts and conduct of the Accused, touches on live and important issues of the case, and lacks meaningful cross-examination.²³

9. The Defence submits that the proffered testimony is unreliable as it contains hearsay evidence. This includes evidence from persons alleged to be co-members of the joint criminal enterprise that the Accused is alleged to have been a member of. It would also include such evidence that goes directly towards the alleged knowledge, acts, and conduct of the Accused.²⁴ The Defence argues that such hearsay testimony should not be admissible without the Defence having the opportunity to cross-examine on it.²⁵ In addition, the Defence stresses that the cross-examination of Witness RM-266 by Mr Milošević was inadequate, as it was not concerned with matters relevant to this case.²⁶

¹⁵ Prosecution Motion, footnote 1, Confidential Annex C.

¹⁶ Prosecution Motion, para. 5.

¹⁷ Prosecution Motion, para. 18.

¹⁸ Prosecution Motion, paras 19-20.

¹⁹ Prosecution Motion, para. 22.

²⁰ *Ibid.*

²¹ Defence Response, para. 1.

²² Defence Response, para. 10.

²³ *Ibid.*

²⁴ Defence Response, para. 12.

²⁵ Defence Response, para. 13.

²⁶ Defence Response, para. 18; Defence Additional Submission, para. 7.

III. APPLICABLE LAW

10. Rule 92 *quater* of the Rules 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 persons 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.

11. Pursuant to Rule 92 *quater* of the Rules, the assessment of the reliability of evidence of unavailable persons involves the consideration of the following criteria: (a) the circumstances in which the statement was made and recorded, including: (i) whether the statement was given under oath; or (ii) whether the statement was signed by the witness with an accompanying acknowledgement that the statement is true to the best of his or her recollection; and (iii) whether the statement was taken with the assistance of an interpreter duly qualified and approved by the Registry of the Tribunal; (b) whether the statement has been subject to cross-examination; (c) whether the statement, in particular an unsworn statement which was never subject to cross-examination, relates to events about which there is other evidence; and (d) other factors, such as the absence of manifest or obvious inconsistencies in the statements.²⁷

12. In addition to the criteria set out in Rule 92 *quater* of the Rules, the Trial Chamber must ensure that the general requirements of admissibility under Rule 89 (C) of the Rules are met, namely that the evidence is relevant and has probative value.²⁸

13. A Trial Chamber may admit into evidence documents that accompany transcripts and that form an inseparable and indispensable part of the testimony.²⁹ This means that the witness needs to have discussed the document in his testimony and that without such document the transcript or the witness' written statement would be incomprehensible or of lesser probative value.³⁰

²⁷ *Prosecutor v. Jovica Stanišić and Franko Simatović*, Case No. IT-03-69-T, Decision on Prosecution Motion for Admission of Evidence of Witness B-179 Pursuant to Rule 92 *quater*, 11 March 2010 (“*Stanišić and Simatović* 11 March 2010 Decision”), para. 28.

²⁸ *Stanišić and Simatović* 11 March 2010 Decision, para. 34; *Prosecutor v. Jovica Stanišić and Franko Simatović*, Case No. IT-03-69-T, Decision on Prosecution's Motion for Admission of Evidence of Witnesses Unavailable Pursuant to Rule 92 *quater*, 16 September 2009, para. 15.

²⁹ *Stanišić and Simatović* 11 March 2010 Decision, para. 33.

³⁰ *Ibid.*

IV. DISCUSSION

Procedure

14. Rule 92 *quater* does not require that the witness's testimony should be tendered in its entirety. The Chamber reiterates that the tendering party should only tender for admission the portions of a transcript upon which it wants to rely, including any portions necessary to contextualize or clarify those portions.³¹ The other party should, in its response to the motion, add any portions it considers relevant to the proper understanding of the witness's testimony.

15. With regard to Witness RM-266, the Defence has not demonstrated the relevance beyond the portions selected as evidence. The Chamber will therefore only consider the specific portions indicated by the parties.

Substance

16. The Chamber has been provided with the death certificate of the witness and is therefore convinced that the witness is deceased and therefore unavailable pursuant to Rule 92 *quater* of the Rules.

17. The Chamber considers that Witness RM-266's testimony was elicited within the safeguards afforded by judicial proceedings: it was given under oath, with the assistance of a Registry approved interpreter, and was subject to cross-examination, including on the specific topic for which the Prosecution tenders the witness's evidence. As for the Defence's assertion that the portions are unreliable because they contain hearsay evidence, the Chamber recalls that hearsay evidence is, in principle, admissible before the Tribunal and that the weight to be attributed to it will be assessed in light of all the evidence before it. Finally, the Chamber also considers that Witness RM-266's testimony is corroborated by the anticipated testimony of other witnesses who are due to give evidence in this case.³² The Chamber therefore finds that Witness RM-266's testimony from the *Milošević* case is sufficiently reliable for the purposes of Rule 92 *quater* of the Rules. The Chamber further considers that the proposed portions of Witness RM-266's testimony do not go directly to the knowledge or acts and conduct of the Accused.

18. With regard to the requirements of Rule 89 (C) of the Rules, the Chamber finds that the selected portions of the previous testimony are relevant to the case, as it relates to crimes allegedly

³¹ T. 193-194.

³² See Prosecution Motion, paras 18-19.

committed within the indictment period, and in relation to the Srebrenica part of the Prosecution's case. Since reliability is a component part of the probative value of a piece of evidence, the Chamber considers that there is no need to re-examine this aspect of the probative value where a determination of reliability has already been made within the context of Rule 92 *quater* (A) (ii) of the Rules.

19. The Chamber finds that the associated exhibit forms an integral and inseparable part of Witness RM-266's testimony, as it is referred to by, and provides useful background information about the witness.

20. The Chamber considers that protective measures granted in the previous case in which RM-266 testified continue to apply in this case pursuant to Rule 75 (F) (i).

V. DISPOSITION

21. For the foregoing reasons pursuant to Rules 89 (C), and 92 *quater* of the Rules, the Chamber;

GRANTS the Motion;

ADMITS into evidence:

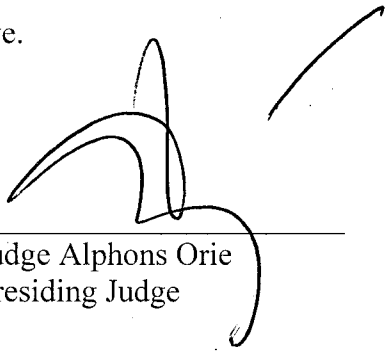
(i) Witness RM-266's testimony in the *Milosević* case dated 22-23 May 2003, T. 21002 (line 17-23), under seal; T. 21003 (line 10-18), T. 21040 (line 1-25), T. 21041 (line 1-25), T. 21042 (line 1-25); T. 21043 (line 1-25), under seal; T. 21044 (line 1-9), under seal; T. 21072 (line 4-25), T. 21073 (line 1-11), T. 21078 (line 11-24), T. 21084 (line 15-25), T. 21086 (line 1-3), T. 21089 (line 3-16), T. 21091 (line 6-25), T. 21092 (line 1-25); T. 21093 (line 1-25), T. 21094 (line 1-25), T. 21095 (line 1-25), under seal; T. 21096 (line 1-18), under seal; T. 21105 (line 16-25), T. 21106 (line 1-25), T. 21107 (line 1-25), T. 21108 (line 1-8);

(ii) The associated exhibit with ERN 02927884-02927885, under seal.

INSTRUCTS the Prosecution to upload the admitted portions into eCourt;

REQUESTS the Registrar to assign exhibit numbers to the admitted documents and inform the parties and the Chamber of the exhibit numbers assigned.

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



Judge Alphons Orié
Presiding Judge

Dated this Twenty- Second day of July 2012
At The Hague
The Netherlands

[Seal of the Tribunal]