



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-PT
Date: 25 September 2009
Original: English

IN THE TRIAL CHAMBER

Before: Judge O-Gon Kwon, Presiding
Judge Howard Morrison
Judge Melville Baird
Judge Flavia Lattanzi, Reserve Judge

Registrar: Mr. John Hocking

Decision of: 25 September 2009

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

**DECISION ON PROSECUTION MOTION FOR ADMISSION OF TESTIMONY OF
WITNESS KDZ446 AND ASSOCIATED EXHIBITS PURSUANT TO RULE 92 QUATER**

Office of the Prosecutor

Mr. Alan Tieger
Ms. Hildegard Uertz-Retzlaff

The Accused

Mr. Radovan Karadžić

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 Motion for Admission of Testimony of Witness KDZ446 and Associated Exhibits Pursuant to Rule 92 *quater*”, filed on 28 May 2009 (“Motion”), and hereby issues its decision thereon.

I. Background and Submissions

1. The Office of the Prosecutor (“Prosecution”) seeks the admission of oral evidence given by witness KDZ446 in the *Slobodan Milošević* case, pursuant to Rule 92 *quater* of the Tribunal’s Rules of Procedure and Evidence (“Rules”), which provides for the admission of evidence from “unavailable persons”. It submits that (i) KDZ446 is deceased; (ii) he previously testified under oath and was cross-examined by the accused, Slobodan Milošević, and by *amicus curiae*; (iii) his evidence is corroborated by other witnesses and documentary evidence; and (iv) it is relevant, probative, and reliable.¹ In addition to his oral evidence, the Prosecution also seeks the admission of 13 “associated exhibits”, which were referred to in the course of KDZ446’s testimony.² Witness KDZ446 was granted protective measures in the *Slobodan Milošević* case and the Prosecution requests that his or her prior testimony heard in private or closed session and associated exhibits previously admitted under seal be admitted under seal in the current proceedings.³

2. Having received an extension of time to respond to the Motion,⁴ the Accused filed his “Response to Prosecution 92 *quater* Motion: Witness KDZ446” confidentially on 3 August 2009 (“Response”). In opposing the Motion, the Accused raises three main arguments: (i) Rule 92 *quater* violates his rights under Article 21(4)(e) of the Statute “to examine, or have examined, the witnesses against him”; (ii) in the circumstances of this case, the cumulative effect of the Prosecution’s motions for judicial notice of adjudicated facts and motions for the admission of evidence pursuant to Rules 92 *bis* and *quater* is to shift the burden of proof from the Prosecution to the Accused, in violation of his right to a fair trial; and (iii) the evidence of KDZ446 relates to the acts and conduct of the Accused and to critical issues of the Prosecution’s case.⁵ In relation to the last of these arguments, the Accused submits that, should the Chamber decide that the evidence

¹ Motion, para. 2.

² Motion, para. 1, and Confidential Appendix C.

³ Motion, para. 3.

⁴ Order following upon Rule 65 *ter* meeting and Decision on Motions for Extension of Time, 18 June 2009.

⁵ Response, paras. 1–4.

generally fulfils the requirements for admission under Rule 92 *quater*, it should rule on the admission of individual elements of it separately.⁶

3. Upon obtaining leave from the Chamber, the Prosecution filed its confidential “Reply to the ‘Response to Prosecution 92 *quater* Motion: Witness KDZ446’” on 14 August 2009 (“Reply”), addressing the Accused’s arguments concerning the admissibility of KDZ446’s evidence. It contends that: (i) Rule 92 *quater* is consistent with the Accused’s right to cross-examination under Article 21(4)(e) of the Statute and there is no shift in the burden of proof; (ii) KDZ446’s evidence is corroborated and *prima facie* reliable; (iii) evidence going to proof of acts and conduct of the Accused is not barred from admission; and (iv) there is no basis for ruling separately on the admission of individual elements of the evidence.⁷

III. Discussion

4. The Chamber has set out the applicable law, and a discussion of the first two of the Accused’s arguments against the operation of Rule 92 *quater*, in its 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”), and does not repeat these here.

5. KDZ446’s evidence in the *Slobodan Milošević* case concerned the organisation and functioning of the Ministry of Internal Affairs (“MUP”) of Serbia and of the Federal Republic of Yugoslavia, and the relationship of these bodies and their top officials with the authorities of the Republika Srpska. He also described the relationship between the Serbian MUP and various paramilitary groups. KDZ446 was present in Eastern Bosnia in 1992 and described events relating to the preparation of the take-over of Bijeljina and Zvornik municipalities, as well as some of the crimes alleged to have taken place in these municipalities. He also gave evidence in *Milošević* in relation to some of the crimes alleged in the Indictment to have taken place in 1995 and connected to events in Srebrenica.

6. The Accused does not dispute, and the Chamber accepts, that KDZ446 is deceased and therefore unavailable, on the basis of the hospital death certificate provided by the Prosecution.

7. KDZ446’s evidence, as a whole, is undoubtedly relevant to the Prosecution’s case against the Accused, and relates to critical issues of the Prosecution’s case concerning the structures and operations of the Serbian and Federal MUP and communications between the Accused and other

⁶ Response, paras. 2–12.

⁷ See Decision on Prosecution Request for Leave to Reply: Rule 92 *quater* Motion (Witness KDZ446), 16 July 2009, and Decision on Prosecution’s Request for Reconsideration, 23 July 2009.

alleged Joint Criminal Enterprise members. The Chamber notes that KDZ446's testimony was given under oath and was subject to cross-examination by the accused and *amicus curiae* in the *Milošević* case.

8. A small portion of KDZ446's evidence clearly relates to the acts and conduct of the Accused. As noted in the KDZ198 Decision, however, this is not a bar to the admission of the evidence, or the relevant portions thereof, under Rule 92 *quater*. The Accused argues that while general parts of KDZ446's evidence are corroborated, important allegations are made without further basis and that this should be taken into account when considering the reliability of his evidence.⁸ The Prosecution asserts that all KDZ446's evidence, with the exception of the Accused's reaction on receiving information about crimes committed in Zvornik and Bijeljina, is corroborated by that of several other witnesses in the present case, and exhibits associated with those witnesses.⁹ The Prosecution also contends that there is corroborating evidence of the Accused being aware of the crimes which occurred during the takeover of Zvornik and Bijeljina, acknowledging that "terrible things" were happening, and being "pleased" at the outcome in Zvornik.¹⁰ The Chamber is not in a position, at this stage, to assess for itself the extent to which other evidence is indeed corroborative of KDZ446. Moreover, the disputed portion of KDZ446's evidence concerning the knowledge and actions of the Accused is confusing and vague, at best. The Chamber must be particularly cautious in admitting evidence going to the acts and conduct of the Accused, and finds there to be no value in admitting this particular portion of KDZ446's testimony.

9. The Chamber considers that the general requirements of relevance and probative value, set out in Rule 89 of the Rules, are satisfied in relation to the remainder of KDZ446's evidence. Noting that it will attribute appropriate weight to that evidence in its overall consideration of the evidence in the case, and that it cannot base a conviction on the uncorroborated evidence of a deceased witness, the Chamber finds that the probative value of KDZ446's evidence is not substantially outweighed by the need to ensure a fair trial. The Trial Chamber will therefore admit that evidence pursuant to Rule 92 *quater*, with the exception of lines 19 to 23 on page T. 23673 (2 July 2003). The Chamber notes that portions of the transcript contain evidence heard in private or

⁸ Response, para. 6.

⁹ Motion, Confidential Appendix C.

¹⁰ Reply, para. 5.

closed session to protect the identity of the witness.¹¹ Accordingly, the Trial Chamber will admit these portions of KDZ446's testimony into evidence under seal.

10. With regard to the exhibits associated with KDZ446's evidence, the Chamber notes that the document with Rule 65 *ter* number 04074 is the Pseudonym Sheet and Summary of Personal Background and Curriculum Vitae of KDZ446. It was admitted through KDZ446 in the *Slobodan Milošević* case, under seal, as exhibit 450, tab 1. During his testimony, KDZ446 confirmed that it was his name on top of the line of the exhibit and that the document accurately reflected his work and professional experience. There was no other discussion of the document. The Chamber is satisfied that it forms an inseparable and indispensable part of KDZ446's testimony, that it meets the requirements of relevance and probative value, and its probative value is not substantially outweighed by the need to ensure a fair trial. It will therefore be admitted in this case, under seal, with an exhibit number to be assigned by the Registry.

11. The document with Rule 65 *ter* number 04075 is a list of names referred to during the testimony of witness KDZ446 in the *Slobodan Milošević* case. It was admitted through KDZ446, under seal, as exhibit 450, tab 2. This document was used throughout KDZ446's testimony, primarily to question him about the interactions he had with individuals whose names are on the list. The Chamber considers that this document forms an inseparable and indispensable part of his testimony. In addition, the exhibit meets the requirements of relevance and probative value, and its probative value is not substantially outweighed by the need to ensure a fair trial. This exhibit will therefore be admitted in this case, under seal, with an exhibit number to be assigned by the Registry.

12. The document with Rule 65 *ter* number 04076 is a report dated 23 March 1992, which was admitted through KDZ446 in the *Slobodan Milošević* case, under seal, as exhibit 450, tab 7. This document was used throughout KDZ446's testimony primarily to question him about the situation in certain municipalities. The Chamber is satisfied that it forms an inseparable and indispensable part of KDZ446's testimony, that it meets the requirements of relevance and probative value, and its probative value is not substantially outweighed by the need to ensure a fair trial. It will therefore be admitted in this case, under seal, with an exhibit number to be assigned by the Registry.

¹¹ T. 21043, line 12 to T. 21044, line 9; T. 21049, line 14 to T. 21051, line 23; T. 21065, line 65 to T. 21067, line 1; T. 21093, line 23 to T. 21099, line 13; T. 21110, line 7 to T. 21121, line 1; T. 21123, line 15 to T. 21124, line 22; and T. 21133, line 4 to T. 21134, line 21.

13. The document with Rule 65 *ter* number 04077 is a map of central Bosnia annotated by KDZ446 indicating the locations of Divić, Badovinci, and Velino Selo. It was admitted through KDZ446 in the *Slobodan Milošević* case as exhibit 336. The document was used by KDZ446 in his testimony to identify border crossings between the Republic of Serbia and the Republika Srpska where he personally saw army convoys crossing. The Chamber is satisfied that it forms an inseparable and indispensable part of KDZ446's testimony, that it meets the requirements of relevance and probative value, and its probative value is not substantially outweighed by the need to ensure a fair trial. It will therefore be admitted in this case, with an exhibit number to be assigned by the Registry.

14. The document with Rule 65 *ter* number 11803 is an organisational chart relating to the structure of the Serbian State Security Service and the State Security Service in Zvornik and Bijeljina. It was admitted through KDZ446 in the *Slobodan Milošević* case, under seal, as exhibit 450, tab 14. During his testimony, KDZ446 confirmed that his initials were on the bottom right-hand corner of the document and that it accurately reflected the different people that he had given testimony about and the relationships between those people. The Chamber is satisfied that it forms an inseparable and indispensable part of KDZ446's testimony, that it meets the requirements of relevance and probative value, and its probative value is not substantially outweighed by the need to ensure a fair trial. It will therefore be admitted in this case, under seal, with an exhibit number to be assigned by the Registry.

15. The document with Rule 65 *ter* number 11807 is a listing of telephone numbers, which was admitted through KDZ446 in the *Slobodan Milošević* case, under seal, as exhibit 450, tab 5. During his testimony, KDZ446 confirmed that he had had possession of the document and that the names of Slobodan Milošević and Nikola Šainović were on it. There was no other discussion of the document. The Chamber considers this exhibit does not form an inseparable and indispensable part of KDZ446's testimony, and that it does not meet the requirements of relevance and probative value. Accordingly, the Chamber will not admit it in this case.

16. The document with Rule 65 *ter* number 09393 is a list of people and institutions receiving thank you letters from the MUP of the Republika Srpska. It was admitted through KDZ446 in the *Slobodan Milošević* case, under seal, as exhibit 450, tab 6. During his testimony, KDZ446 confirmed that he recognised some of the names on the list. There was no other discussion of the document. The Chamber considers that this exhibit does not form an inseparable and indispensable part of KDZ446's testimony, and that it does not meet the requirements of relevance and probative value. Accordingly, the Chamber will not admit it in this case.

17. The document with Rule 65 *ter* number 11808 is a list of three types of special units of the Serbian MUP in operation from 1985 to 1991. It was admitted through KDZ446 in the *Slobodan Milošević* case, under seal, as exhibit 450, tab 9. During his testimony, KDZ446 confirmed that he was the author of the document and he identified the three different types of special units that are described in the document. There was no other discussion of the document. The Chamber is satisfied that it forms an inseparable and indispensable part of KDZ446's testimony, that it meets the requirements of relevance and probative value, and its probative value is not substantially outweighed by the need to ensure a fair trial. It will therefore be admitted in this case, under seal, with an exhibit number to be assigned by the Registry.

18. The document with Rule 65 *ter* number 00651 is a report dated 20 July 1992, which was admitted through KDZ446 in the *Slobodan Milošević* case, under seal, as exhibit 450, tab 8. KDZ446 identified the author of the report and stated that he had previously had it in his possession. The Chamber is satisfied that it forms an inseparable and indispensable part of KDZ446's testimony, that it meets the requirements of relevance and probative value, and its probative value is not substantially outweighed by the need to ensure a fair trial. It will therefore be admitted in this case, under seal, with an exhibit number to be assigned by the Registry.

19. The documents with Rule 65 *ter* numbers 11809 and 11820 are orders regarding the establishment of operations staffs by the Army of the Federal Republic of Yugoslavia ("VJ") in co-operation with the Serbian MUP. They were admitted through KDZ446 in the *Slobodan Milošević* case, under seal, as exhibits 450, tabs 10, and 11. The Chamber is satisfied that they form an inseparable and indispensable part of KDZ446's testimony, that they meet the requirements of relevance and probative value, and their probative value is not substantially outweighed by the need to ensure a fair trial. They will therefore be admitted in this case, under seal, with exhibit numbers to be assigned by the Registry.


20. The document with Rule 65 *ter* number 11811 is an order regarding the submission of intelligence reports. It was admitted through KDZ446 in the *Slobodan Milošević* case, under seal, as exhibit 450, tab 12. KDZ446 identified it as an order of the Minister of the Interior of the Republika Srpska requiring that daily reports be made regarding the combat, political, and other situations in certain areas. There was no other discussion of the document. The Chamber is satisfied that it forms an inseparable and indispensable part of KDZ446's testimony, that it meets the requirements of relevance and probative value, and its probative value is not substantially outweighed by the need to ensure a fair trial. It will therefore be admitted in this case, under seal, with an exhibit number to be assigned by the Registry.

21. The document with Rule 65 *ter* number 09277 is a copy of Daily Bulletin 137 of the MUP of the Republika Srpska. It was admitted through KDZ446 in the *Slobodan Milošević* case, under seal, as exhibit 450, tab 13. KDZ446 confirmed that the document corroborates the document with Rule 65 *ter* number 11811. There was no other discussion of the document. The Chamber is satisfied that it forms an inseparable and indispensable part of KDZ446's testimony, that it meets the requirements of relevance and probative value, and its probative value is not substantially outweighed by the need to ensure a fair trial. It will therefore be admitted in this case, under seal, with an exhibit number to be assigned by the Registry.

IV. Disposition

22. For these reasons, pursuant to Rules 54, 89, and 92 *quater* of the Rules, the Trial Chamber hereby **GRANTS** the Motion in part, **ADMITS** the transcript of KDZ446's testimony into evidence, excluding the portion referred to in paragraph 9 above, which shall be redacted by the Prosecution, including the private portions thereof under seal, with an exhibit number to be assigned by the Registry, and **ADMITS** the following documents, with exhibit numbers to be assigned by the Registry: the items with Rule 65 *ter* numbers 04074, 04075, 04076, 11803, 11808, 00651, 11809, 11820, 11811, and 09277, under seal; and 04077 as a public document. The Prosecution shall provide the Registry with a confidential, un-redacted version of the transcript, along with a public, redacted version, and both will be given exhibit numbers by the Registry. The Chamber **DENIES** the Motion with respect to items with Rule 65 *ter* numbers 11807 and 09393.

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



Judge O-Gon Kwon,
Presiding

Dated this twenty-fifth day of September 2009
At The Hague
The Netherlands

[Seal of the Tribunal]