



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: 10 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: 10 October 2012

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

**DECISION ON ACCUSED'S MOTION FOR ADMISSION OF STATEMENT OF VLADO
LIZDEK PURSUANT TO RULE 92 *QUATER***

Office of the Prosecutor

Mr. Alan Tieger
Ms. Hildegard Uertz-Retzlaff

The Accused

Mr. Radovan Karadžić

Appointed 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 “Motion to Admit Evidence of General Vlado Lizdek pursuant to Rule 92 *quater*”, filed on 27 August 2012 (“Motion”), and hereby issues its decision thereon.

I. Submissions

1. In the Motion, the Accused seeks the admission of the transcript of an interview between the Office of the Prosecutor (“Prosecution”) and General Vlado Lizdek (“Witness”) conducted on 7 April 2001 (“Interview”), as well as one associated exhibit, pursuant to Rule 92 *quater* of the Tribunal’s Rules of Procedure and Evidence (“Rules”).¹ The witness was the Commander of the 1st Romanija Infantry Brigade from April 1993 to November 1995.²

2. The Accused submits that the criteria for admission of evidence pursuant to Rule 92 *quater* are satisfied with respect to the Interview and that it should be admitted by the Chamber.³ He observes that the Witness died on 14 November 2008 and is therefore unavailable to testify before the Tribunal.⁴ The Accused argues that the circumstances in which the Interview was conducted were reliable for the purpose of admission pursuant to Rule 92 *quater*, as it was conducted by the Prosecution and was transcribed *verbatim* from a tape recording.⁵ He further submits that the Chamber has previously held, and the Prosecution conceded, that the information from the Interview is exculpatory within the meaning of Rule 68.⁶

3. The Accused claims that the Interview is of relevance and probative value to his defence as it provides evidence (1) that on the day of the Markale I shelling incident (Scheduled Incident G8), an investigation by the Sarajevo-Romanija Corps (“SRK”) confirmed that Bosnian Serb mortars positioned in the north of Sarajevo had not been fired;⁷ (2) that Bosnian Muslim troops had a practice of firing mortars from locations near hospitals and other buildings then driving

¹ Motion, paras. 1, 14.

² Interview, p. 5.

³ Motion, paras. 2–5.

⁴ Translated Death Certificate in Support of Motion to Admit Evidence of General Vlado Lizdek Pursuant to Rule 92 *quater*, 3 September 2012 (“Death Certificate”).

⁵ Motion, para. 7.

⁶ Motion, para. 12, referring to Decision on Accused’s Forty-Ninth and Fiftieth Disclosure Violation Motions, 30 June 2011 (“Forty-Ninth and Fiftieth Disclosure Violation Decision”), para. 36, wherein the Chamber stated that the information from the Interview was “potentially exculpatory”.

⁷ Motion, para. 9.

away from the scene;⁸ and (3) that Serb troops under the Witness's command, including those near Špicasta Stijena, did not engage in shelling or sniping civilian targets.⁹

4. The Accused also requests the admission of document with Rule 65 *ter* number 12177 as an associated exhibit.¹⁰ The document, which is discussed at page 61 of the Interview, is an SRK order instructing units to conserve ammunition.¹¹

5. On 7 September 2012, the Prosecution filed the "Prosecution Response to Motion to Admit Evidence of Vlado Lizdek Pursuant to Rule 92 *quater*" ("Response"). It does not oppose the admission of the Interview but claims that much of the transcript is unreliable, and "therefore of little or no probative value".¹² The Prosecution observes that while the Interview accurately reflects the Witness's words, other factors are relevant to assessing its reliability including (1) whether there is other evidence which relates to the same events described by the Witness; and (2) whether there are manifest inconsistencies in the Interview.¹³ As such, the Prosecution submits that the Chamber should exercise caution when assessing the appropriate weight to grant to the Interview.¹⁴

6. The Prosecution contends that the Witness's responses to questions on important issues are evasive, lacking in detail, and contradicted by credible evidence, rendering the Interview unreliable.¹⁵ It notes that much of the Witness's testimony regarding sniping and shelling at Špicasta Stijena and other locations is contrary to credible evidence and adjudicated facts.¹⁶ The Prosecution also points to inconsistent and evasive answers pertaining to the Markale I shelling incident,¹⁷ and the sniping and shelling of civilians at Špicasta Stijena.¹⁸

7. The Prosecution requests that, if the Motion is granted, the Chamber also admit document with Rule 65 *ter* number 10923 as an additional associated exhibit which the Accused has not requested for admission.¹⁹ This is an order from General Stanislav Galić relating to the

⁸ Motion, para. 10.

⁹ Motion, para. 11.

¹⁰ Motion, para. 14.

¹¹ Motion, para. 14. The Motion incorrectly refers to page 67 of the Interview when in fact 65 *ter* 12177 is discussed at page 61 therein.

¹² Response, para. 1.

¹³ Response, para. 4.

¹⁴ Response, para. 1.

¹⁵ Response, paras. 1, 5.

¹⁶ Response, paras. 13–18.

¹⁷ Response, paras. 8–9.

¹⁸ Response, para. 12.

¹⁹ Response, paras. 3, 22.

leave schedule for brigade commanders in the SRK, which is discussed at pages 58 and 59 of the Interview.

II. Applicable Law

8. 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”).²⁰ The Chamber will therefore not repeat that discussion here. However, it restates that the evidence of an unavailable witness may be submitted in written form if the Chamber finds: (i) that the witness is unavailable within the meaning of Rule 92 *quater* (A); (ii) the circumstances in which the statement was made and recorded indicates that it is reliable; and (iii) that the evidence is relevant to the proceedings and of probative value.²¹

9. In assessing the reliability of the proposed evidence under Rule 92 *quater*, the Chamber has regard to the circumstances in which it was obtained and recorded.²² The pre-Trial Chamber in this case provided a non-exhaustive list of factors that may be considered, including (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; (4) whether it has been subject to cross-examination; (5) whether the evidence relates to events about which there is other evidence; and/or (6) whether there is an absence of manifest or obvious inconsistencies in the evidence.²³ The Chamber retains the discretion to admit the evidence even if one or more of the reliability indicia is absent.²⁴ If the Chamber does so, then it will take this into consideration in determining the appropriate weight to be given to the evidence in its overall consideration of all the evidence in the case.²⁵

²⁰ KDZ198 Decision, paras. 4–10.

²¹ 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.

²² KDZ198 Decision, para. 5.

²³ KDZ198 Decision, para. 5.

²⁴ KDZ198 Decision, para. 5.

²⁵ KDZ198 Decision, para. 5.

III. Discussion

10. 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).²⁶

11. Having reviewed the Interview, the Chamber is satisfied that it is relevant with respect to issues in this case including (1) the Markale I shelling incident (Scheduled Incident G8); and (2) the shelling and sniping of civilian targets near Špicasta Stijena. Furthermore, the Chamber notes its previous finding that the Interview contains information that is potentially exculpatory within the meaning of Rule 68.²⁷

12. The Chamber has held that, in order to have any probative value, evidence must be *prima facie* reliable.²⁸ While the Interview was not given under oath, it is a *verbatim* transcript of an audio-recorded interview with the Witness by representatives of the Prosecution. As such, the Chamber considers that the way in which the Witness's evidence was given and recorded presents sufficient indicia of reliability for its admission.²⁹

13. The Chamber must also assess whether there are reliability concerns with the Interview that "reach a level which would render the entire [t]ranscript so unreliable or of such low probative value that the Chamber should deny its admission".³⁰ A thorough review of the contents of the Interview reveals some concerns about its reliability, but none that render it so unreliable as to warrant denying admission of the entire Interview. For instance, the Chamber notes some inconsistencies in the Interview regarding the SRK's possession of mortars on the northern side of Sarajevo,³¹ and the Witness's evasiveness in explaining how a brigade commander would determine whether a mortar had been fired from a specific location.³² However, the Chamber notes that any inconsistencies, evasive answers, or lack of detail in the Interview are factors which the Chamber will consider in attributing the appropriate weight to the Interview in light of all the evidence but are not a bar to its admission at this stage. The Chamber is therefore satisfied that the Interview is sufficiently reliable to be admitted pursuant to Rule 92 *quater*.

²⁶ See Death Certificate.

²⁷ See Forty-Ninth and Fiftieth Disclosure Violation Decision, para. 36.

²⁸ Decision on Accused's Motion for Admission of Statement of Srđo Srdić Pursuant to Rule 92 *quater*, 21 September 2012 ("Srdić Decision"), para. 11, citing to *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.

²⁹ See Srdić Decision, para. 11.

³⁰ Srdić Decision, para. 12.

³¹ Interview, pp. 64–65.

³² Interview, p. 65.

14. Given that the Chamber considers the Interview to be relevant to the current proceedings and of sufficient reliability and probative value for the purpose of admission, the Chamber finds that the Interview may be admitted into evidence pursuant to Rule 92 *quater*.

15. With regard to the admission of any associated exhibits, the Chamber notes that document with Rule 65 *ter* number 12177 is an SRK order of 24 June 1993 by Galić instructing units to conserve ammunition because “[e]normous amounts of ammunition have been spent in the war so far”. During the Interview, the Witness indicates that the document pertains to the need to conserve ammunition,³³ and that the measures discussed in the document were indeed undertaken.³⁴ Because the Interview itself does not refer to all of the measures discussed in the document and due to the lack of any further explanation in the Interview as to what these measures were, the Chamber is of the view that 65 *ter* 12177 forms an inseparable and indispensable part of the Interview. The Chamber is also satisfied that it meets the requirements of relevance and probative value and will thus admit 65 *ter* 12177 into evidence.

16. As mentioned above, the Prosecution seeks the admission of document with Rule 65 *ter* number 10923, which is an order of 1 March 1994 from Galić relating to the leave schedule for brigade commanders in the SRK. At page 58 of the Interview, the Witness explains that the document details which commanders have been granted leave, how much leave they have been granted, and the dates of such leave. The Witness also provides the dates and details of his leave contained in the document. The Chamber finds that the document was adequately discussed and that the Interview can be properly understood without its admission. Therefore, the document does not form an inseparable and indispensable part of the Interview. In any event, 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.³⁵

³³ Interview, p. 61.

³⁴ Interview, p. 62.

³⁵ 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

17. For these reasons, pursuant to Rules 54 and 92 *quater* of the Rules, the Trial Chamber hereby
- i. **GRANTS** the Motion,
 - ii. **ADMITS** the Interview and document with Rule 65 *ter* number 12177 into evidence,
 - iii. **INSTRUCTS** the Registry to assign an exhibit number to the Interview and to document with Rule 65 *ter* number 12177, and
 - iv. **DENIES** the Prosecution's request for admission of the document with Rule 65 *ter* number 10923.

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



Judge O-Gon Kwon
Presiding

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

[Seal of the Tribunal]