



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: 23 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: 23 October 2012

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

**DECISION ON ACCUSED'S MOTION TO ADMIT EVIDENCE OF VELIBOR OSTOJIĆ
PURSUANT TO RULE 92 *QUATER***

Office of the Prosecutor

Mr. Alan Tieger
Ms. Hildegard Uertz-Retzlaff

The Accused

Mr. Radovan Karadžić

Standby 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 Velibor Ostojić Pursuant to Rule 92 *quater*”, filed on 10 August 2012 (“Motion”), and hereby issues its decision thereon.

I. Submissions

1. In the Motion, the Accused requests the admission of (1) the transcript of an interview conducted by the Trial Chamber in the case of *Prosecutor v. Krajišnik* (“*Krajišnik case*”) with Velibor Ostojić (“Witness”) on 6 June 2006 (“Interview”); and (2) the transcript of the Witness’s prior testimony in the *Krajišnik case* as a Chamber witness on 3 and 4 July 2006 (“Transcript”) (collectively, “Proposed Evidence”), pursuant to Rule 92 *quater* of the Tribunal’s Rules of Procedure and Evidence (“Rules”).¹ The Witness was the Minister of Information of the Republika Srpska (“RS”) until the end of 1992 and held senior positions in the executive board of the Serbian Democratic Party (“SDS”) until 1995.²

2. The Accused submits that the criteria for admission of evidence pursuant to Rule 92 *quater* are satisfied with respect to the Proposed Evidence and that it should be admitted by the Chamber.³ In this regard he submits that the Witness is unavailable to testify in this case as he passed away on 24 July 2009.⁴ The Accused further contends that the Proposed Evidence is sufficiently reliable for admission, as the Interview was conducted by representatives from the Trial Chamber in the *Krajišnik case* and was recorded *verbatim*, and the Transcript records the Witness’s testimony given under oath with procedural safeguards and the opportunity for cross-examination.⁵

3. The Accused submits that the Proposed Evidence is of relevance and probative value to his case. The Accused argues that the Transcript contains evidence, *inter alia*: (1) that he and the national authorities lacked control over those who committed crimes at the beginning of the war;⁶ (2) to contradict the claim that he was responsible for alleged propaganda which appeared in the RS media;⁷ (3) to support his contention that “the population was incited by fear of the

¹ Motion, para. 1.

² Transcript, T. 26633–26634; Interview, pp. 6–7.

³ Motion, paras. 5–7.

⁴ Motion, para. 6, Annex A.

⁵ Motion, para. 7.

⁶ Motion, para. 9.

⁷ Motion, para. 10.

Muslims, not by his policies or words”;⁸ (4) to support his contention that there was “no joint criminal enterprise to expel Muslims from Serb-held areas through the commission of crimes”;⁹ (5) to corroborate his contention that “there was no plan to falsely demonize the Muslims”;¹⁰ and (6) to refute the existence of “concentration and detention camps”, as well as the allegations of mistreatment therein.¹¹ The Accused further submits that the Interview contains additional evidence to establish that the Bosnian Muslims used the Sarajevo TV station for propaganda purposes and that it was therefore a legitimate military objective when allegedly targeted by modified air bombs.¹² Finally, the Accused notes that he does not seek the admission of any associated exhibits but that he “would have no objection if the Trial Chamber wished to admit any documents as indispensable to its understanding of the evidence”.¹³

4. On 24 August 2012, the Office of the Prosecutor (“Prosecution”) filed the “Prosecution Response to Accused’s Motion to Admit Evidence of Velibor Ostojić Pursuant to Rule 92 *quater* with Public Appendix A and Confidential Appendix B” (“Response”). It does not oppose the admission of the Proposed Evidence, subject to the associated exhibits it has identified as being indispensable and inseparable being admitted, but contends that the Proposed Evidence is unreliable and “therefore of little or no probative value”.¹⁴ The Prosecution first observes that while the Proposed Evidence accurately reflects the words of the Witness, other factors are relevant to assessing its reliability including, *inter alia*: (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 evidence.¹⁵

5. In the Prosecution’s submission, given the leadership position of the Witness, the Proposed Evidence is a reflection of an effort to distance himself and the Bosnian Serb leadership from organised efforts to remove non-Serbs from Serb-held territory in Bosnia and Herzegovina.¹⁶ The Prosecution argues that the Chamber should assign little or no weight to aspects of the Proposed Evidence which are inconsistent with contemporaneous documentation.¹⁷ The Prosecution points to such inconsistencies including (1) the Witness’s

⁸ Motion, para. 11.

⁹ Motion, para. 12.

¹⁰ Motion, para. 13.

¹¹ Motion, para. 14.

¹² Motion, para. 16.

¹³ Motion, fn. 13.

¹⁴ Response, paras. 1, 17.

¹⁵ Response, para. 2 citing Decision on Prosecution’s Motion for Admission of Evidence of KDZ297 (Miroslav Deronjić) pursuant to Rule 92 *quater*, 23 March 2010, para. 22.

¹⁶ Response, para. 3.

¹⁷ Response, para. 3.

knowledge of the existence of the Variant A and B Instructions;¹⁸ (2) his attendance at meetings with the Bosnian Serb leadership;¹⁹ (3) his involvement in SDS policy;²⁰ particularly with regard to discussions on SDS strategic objectives;²¹ (4) the existence of the Bosnian Serb Council of Ministers;²² (5) government control of Bosnian Serb media organs;²³ and (6) Bosnian Serb detention facilities.²⁴

6. The Prosecution has identified 39 items that it submits are inseparable and indispensable to the Chamber's understanding of the Proposed Evidence.²⁵ The Prosecution notes that 18 of these 39 items have already been admitted in this case and requests that the remaining 21 items be admitted with the Proposed Evidence as associated exhibits ("Prosecution Request").²⁶ The Prosecution further indicates that if the Proposed Evidence is admitted, it should be allowed to tender documents from the bar table which it would have put to the Witness on cross-examination.²⁷ In the Prosecution's submission this would "assist the Chamber in assessing the Transcripts' [Proposed Evidence's] reliability and assigning it the appropriate weight, as well as mitigating any adverse impact resulting from the absence of an opportunity to cross-examine the witness in the context of this case".²⁸

II. Applicable Law

7. The Chamber recalls that 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").²⁹ It will therefore not repeat that discussion here. It suffices to reiterate that the evidence of an unavailable witness may be submitted in written form if the Chamber finds: (i) the witness unavailable within the meaning of Rule 92 *quater* (A), (ii) from the circumstances in

¹⁸ Response, para. 4.

¹⁹ Response, paras. 5–6.

²⁰ Response, para. 7.

²¹ Response, para. 12.

²² Response, para. 8.

²³ Response, para. 9.

²⁴ Response, para. 10.

²⁵ Response, para. 13.

²⁶ Response, para. 14, Appendices A and B. The Prosecution requests that the following 21 items be admitted into evidence as associated exhibits of the Proposed Evidence: 65 *ter* number 05964, 65 *ter* number 08476, ERN 0680-0499-0680-0511, 65 *ter* number 01006, 65 *ter* number 07590, ERN 0603-1002-0603-1006, ERN 0208-9692-0208-9697, V000-3125, V000-2734-V000-2734, 65 *ter* number 11548, 65 *ter* number 11549, 65 *ter* number 11550, 65 *ter* number 11551, 65 *ter* number 11552, ERN 0045-6978-0045-6978, 65 *ter* number 11290, 65 *ter* number 01501, ERN M000-1686-M000-1686, ERN R030-8495-R030-8495, 65 *ter* number 01506 (under seal), ERN 0028-5548-0028-5549.

²⁷ Response, para. 16.

²⁸ Response, para. 16.

²⁹ KDZ198 Decision, paras. 4–10.

which the statement was made and recorded that it is reliable, (iii) that the evidence is relevant to the proceedings and of probative value, and (iv) that the probative value of the evidence, which may include evidence pertaining to acts and conduct of an accused, is not outweighed by the need to ensure a fair trial.³⁰

8. The Chamber also recalls that the pre-Trial Chamber listed a non-exhaustive list of factors which can be considered in assessing the reliability of the proposed evidence which pertain to the circumstances in which it was obtained and recorded.³¹ These factors include (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; and (4) whether it has been subject to cross-examination.³² Other factors which may be considered include whether the evidence relates to events about which there is other evidence or whether there is an absence of manifest or obvious inconsistencies in the evidence.³³ Even if one or more of these indicia of reliability are absent, the Chamber retains the discretion to admit the evidence and will take into consideration the reliability issues in “determining the appropriate weight to be given to it in its overall consideration of all the evidence in the case”.³⁴

9. Finally, the Chamber recalls that when a party tenders evidence pursuant to Rule 92 *bis*, *ter*, or *quater*, it may also tender for admission into evidence documents that have been discussed by the witness in his or her witness statement or previous testimony.³⁵ Such exhibits should form an “inseparable and indispensable part” of the testimony, meaning that they should not merely have been mentioned during the course of that testimony, but rather have been used and explained by the witness.³⁶ In the event the party chooses not to tender associated exhibits

³⁰ 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.

³¹ KDZ198 Decision, para. 5.

³² KDZ198 Decision, para. 5.

³³ KDZ198 Decision, para. 5.

³⁴ KDZ198 Decision, para. 5.

³⁵ Decision on Accused’s Motion for Admission of Prior Testimony of Thomas Hansen and Andrew Knowles Pursuant to Rule 92 *bis*, 22 August 2012 (“Decision on Accused’s Rule 92 *bis* Motion”), para. 11.

³⁶ Decision on Prosecution’s Motion for Admission of the Evidence of Milenko Lazić Pursuant to Rule 92 *quater* and for Leave to Add Exhibits to Rule 65 *ter* Exhibit List, 9 January 2012, para. 24. *See also 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. 65.

and this omission renders the main body of evidence incomprehensible or of low probative value, the Chamber may deny the admission of such evidence.³⁷

III. Discussion

10. As a preliminary matter of discussion, 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).³⁸

(a) *Transcript*

11. The Chamber first recalls that pursuant to Rule 89 of the Rules, relevance and probative value are fundamental requirements for the admission of evidence pursuant to Rule 92 *quater*. Having reviewed the Transcript, the Chamber is satisfied that it is generally relevant with respect to issues in this case including, *inter alia*: (1) whether the Accused had control over perpetrators of crimes committed in 1992; (2) whether the Accused was responsible for alleged propaganda in the RS media; (3) whether the Accused's policies incited fear among the population; (4) whether there was a plan to demonise and expel the non-Serb population; and (5) whether there was mistreatment in the alleged detention camps under Bosnian Serb control. The Chamber notes that although the Transcript contains some areas of marginal relevance, it is satisfied that the subject matter of the Transcript is sufficiently relevant to these proceedings for the purpose of admission pursuant to Rule 92 *quater*.

12. The Chamber recalls that, to have any probative value under Rule 92 *quater*, evidence must be *prima facie* reliable.³⁹ Thus, it remains in the Chamber's sole discretion to evaluate whether, based on the circumstances in which the Witness's evidence was given and recorded, it meets this requirement.⁴⁰ The Chamber notes that, prior to his death, the Witness testified as a Chamber witness in the *Krajišnik* case and was subject to questioning by the Trial Chamber, as well as cross-examination by both the Prosecution and the Defence in that case. Having reviewed the Transcript in its entirety, the Chamber finds that it was elicited with the safeguards of judicial proceedings, namely: it was given under oath, with the assistance of a Registry approved interpreter, and was subject to cross-examination. As such, the Chamber is satisfied

³⁷ Decision on Accused's Rule 92 *bis* Motion, para. 11. See also Decision on Accused's Motion for Admission of Statement of Rajko Koprivica Pursuant to Rule 92 *quater*, 3 October 2012, para. 17.

³⁸ Motion, Annex A.

³⁹ See *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.

⁴⁰ Decision on Prosecution's Motion for Admission of the Evidence of KDZ172 (Milan Babić) pursuant to Rule 92 *quater*, 13 April 2010, ("Babić Decision"), para. 25. See also *Prosecutor v. Prlić et al.*, Case No. IT-04-

that the way in which the Witness's evidence was given and recorded presents sufficient indicia of reliability for its admission.

13. It remains for the Chamber to assess whether there are inconsistencies within the Transcript and between the Transcript and other documents discussed therein that reach a level which would render it so unreliable or of such low probative value that the Chamber should deny its admission. Having considered the Prosecution's arguments and having conducted its own review of the Transcript, the Chamber finds that while there is a significant level of evasiveness by the Witness⁴¹ and several inconsistencies in his evidence,⁴² the reliability of the Transcript is not undermined to a level that would warrant denying its admission. The Chamber is therefore satisfied that the Transcript is sufficiently reliable to be admitted pursuant to Rule 92 *quater*. Any inconsistencies in the Transcript are factors which the Chamber will consider in attributing the appropriate weight to it in light of all the evidence but are not a bar to its admission at this stage.

14. Finally, the Chamber notes that three portions of the Transcript were conducted in private session.⁴³ The Transcript shall therefore be admitted under seal and the Accused shall produce a public redacted version of the Transcript.

(b) Interview

15. The Chamber now turns to its analysis of the Interview. In considering the relevance and probative value of the Interview, the Chamber first notes that the Accused contends that the Interview is sought for admission because of the additional information contained therein which he claims supplements the Transcript, namely that the Sarajevo TV station was used by Bosnian Muslims for propaganda purposes.⁴⁴ However, the Chamber is of the view that the discussion in the Interview relating to this issue is of limited and general nature and does not consider that it, in fact, goes to the issue for which the Accused is offering it—to show the Sarajevo TV station was a legitimate military object when allegedly targeted by modified air bombs.⁴⁵ Furthermore, the Chamber is of the view that the Interview is largely repetitive of the evidence given by the

74-AR73.16, Decision on Jadranko Prlić's Interlocutory Appeal Against the Decision on Prlić Defense Motion for Reconsideration of the Decision on Admission of Documentary Evidence, 3 November 2009, para. 27.

⁴¹ See, e.g., Transcript, T. 26659, 26669, 26676.

⁴² See, e.g., Transcript, T. 26642, 26651, 26662, 26679, 26700, 26702, 26745, 26747, 26749.

⁴³ See Transcript, T. 26603–26609 (private session), T. 26704–26707 (private session), T. 26735–26737 (private session).

⁴⁴ See Motion, para. 16.

⁴⁵ The Chamber notes that the Witness does not refer to the shelling of the Sarajevo TV Station on 28 June 1995 in the Interview, as the Accused argues at paragraph 16 of the Motion. What the Witness does state is that the Sarajevo TV Station came under Muslim control in mid-1991 and its editorial policy was anti-democratic, anti-Yugoslav, anti-Serbian, and unprofessional because it was not objective. See Interview, p. 30.

Witness in the Transcript,⁴⁶ and notes specifically that evidence surrounding the use of media by Bosnian Muslims for propaganda purposes was also elicited in the Transcript and discussed thoroughly therein.⁴⁷

16. Finally, the Chamber recalls that the shelling of the Sarajevo TV station on 28 June 1995—Scheduled Shelling Incident G17—has been removed from the Indictment in this case,⁴⁸ and further recalls its previous rulings to the effect that, in general, detailed evidence is not to be led on incidents or events which have been removed from the Indictment as such evidence is no longer relevant to this case.⁴⁹ Therefore, even if the Chamber had found that the Interview was not, in large part, repetitive of the evidence contained in the Transcript, and that it pertained, as the Accused contends, to the shelling of the TV Station, the Chamber is of the view that such evidence related to a Scheduled Incident that has been removed from the Indictment is unnecessary as it no longer relates to this case. Thus, the Chamber is not satisfied that the Interview is sufficiently relevant and probative for the purpose of admission pursuant to Rule 92 *quater*.

(c) Associated Exhibits

17. The Chamber recalls that in the Motion, the Accused did not tender any associated exhibits to be admitted in conjunction with the Proposed Evidence, but that the Prosecution in its Response submitted a table of 39 items it contends are inseparable from and indispensable to the Proposed Evidence, of which 18 have already been admitted into evidence in this case, and the remaining 21 meet the standard for admission.

18. Of these remaining 21 associated exhibits tendered by the Prosecution, the Chamber first notes that two documents, those with Rule 65 *ter* numbers 05964 and 08476, were shown to the

⁴⁶ See, e.g., Interview, p. 3 (where the Witness discussed the Council of Ministers and stated that it was only an idea on paper) and Transcript, T. 26640 (where the Witness testified similarly that the Council of Ministers did not exist); Interview, pp. 23, 34, 36 (where the Witness stated that the RS media sources were independent and not controlled by the government) and Transcript, T. 26697–26698 (where the Witness testified similarly that the media sources were free from government influence because the law demanded so); Interview, p. 45 (where the Witness stated that he had never visited any detention facilities) and Transcript, T. 26676–26677, 26679–26680, 26716–26718 (where the Witness similarly testified that he had never visited any detention camps and that such camps did not exist).

⁴⁷ See, e.g., Transcript, T. 26699 (where the Witness testified that “the media in Bosnia and Herzegovina did not report in an objective way, and they did not convey the positions of the Serbian people in Bosnia and Herzegovina”), T. 26700 (where the Witness testified that “the media in Bosnia and Herzegovina in 1991 and 1992 were not objective, they were not professional when it came to the national issues of all the three peoples in Bosnia and Herzegovina, and they were particularly biased when it came to the Serbian people in Bosnia and Herzegovina”) and Interview, pp. 29-30 (where the Witness stated that Radio Television Sarajevo (“RTVSA”) was under Muslim control and its editorial policy was anti-democratic, anti-Yugoslav, anti-Serbian and unprofessional).

⁴⁸ Scheduled Shelling Incident G17 was removed from the Indictment on 8 October 2009. See Decision on the Application of Rule 73 *bis*, 8 October 2009.

Witness during the Interview and not in the Transcript. Considering that the Chamber has denied admission of the Interview, the Chamber shall therefore not consider their admission.

19. Of the remaining 19 items, the Chamber finds that only one document meets the test of forming an inseparable and indispensable part of the Transcript—the document with English ERN number 0680-0499-0680-0511, which is a witness statement prepared by the Chamber legal staff in the *Krajišnik* case following its interview with the Witness (“Witness Statement”). The Chamber first notes that the Witness Statement was tendered as a written statement pursuant to Rule 89(F) in the *Krajišnik* case and therefore is intrinsic to understanding the evidence given by the Witness in the Transcript. The Chamber further notes that the Witness Statement was referred to extensively in the Transcript by both (1) the Witness to make corrections to his evidence on the record and (2) the Trial Chamber in the *Krajišnik* case to summarise the Witness’s evidence⁵⁰ and therefore this portion of the Transcript is rendered incomprehensible and of low probative value without the Witness Statement. The Chamber first wishes to remind both parties of the importance of ensuring that all items tendered for admission are available on e-court and reiterates that it is the responsibility of the tendering party, in this case the Accused, to identify associated exhibits to be tendered with all proposed Rule 92 *bis*, *ter*, and *quater* evidence. In this specific instance, the Witness Statement was not uploaded into e-court and as such, the Chamber had to locate it by its own means so that it could rule on the Motion. Despite these observations, because the Witness Statement is intrinsic to the Transcript as part of the then Rule 89(F) procedure and absolutely necessary to the Chamber’s understanding of the Transcript, the Chamber finds that it is in the interests of justice to exceptionally admit it as an associated exhibit of the Transcript despite the fact that it was not tendered by the Accused.

20. With regard to the remaining 18 items submitted by the Prosecution as associated exhibits of the Transcript,⁵¹ the Chamber finds that none of them meet the test of forming an indispensable and inseparable part of the Transcript. Namely, the remaining 18 items (1) were shown to the Witness quickly; (2) were quoted from or described in detail by the parties and/or the *Krajišnik* Chamber on the record in the Transcript; and (3) were commented on in a limited manner by the Witness. Most importantly, the Chamber is of the view that the Transcript is sufficiently comprehensible without the admission of the remaining 18 items tendered by the Prosecution in the Response and thus, the Chamber shall not admit them into evidence.

⁴⁹ Decision on Accused’s Rule 92 *bis* Motion, para. 6.

⁵⁰ See Transcript, T. 26610–26637.

⁵¹ See 65 *ter* number 01006, 65 *ter* number 07590, ERN 0603-1002-0603-1006, ERN 0208-9692-0208-9697, V000-3125, V000-2734-V000-2734, 65 *ter* number 11548, 65 *ter* number 11549, 65 *ter* number 11550, 65 *ter* number 11551, 65 *ter* number 11552, ERN 0045-6978-0045-6978, 65 *ter* number 11290, 65 *ter* number 01501, ERN

IV. Disposition

21. Accordingly, pursuant to Rules 54, 89, and 92 *quater* of the Rules, the Chamber hereby **GRANTS** the Motion and the Prosecution Request in part and:

- (i) **ADMITS** into evidence the Transcript under seal;
- (ii) **ORDERS** the Accused to upload a public redacted version of the Transcript;
- (iii) **ORDERS** the Accused to upload the Witness Statement into e-court;
- (iv) **REQUESTS** the Registry to assign exhibit numbers to the Transcript, the public redacted version of the Transcript, and the Witness Statement; and
- (v) **DENIES** the Motion and the Prosecution Request in all other respects.

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



Judge O-Gon Kwon
Presiding

Dated this twenty-third day of October 2012
At The Hague
The Netherlands

[Seal of the Tribunal]