



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 WITH CONFIDENTIAL ANNEX A

**DECISION ON PROSECUTION'S MOTION FOR ADMISSION OF EVIDENCE OF
KDZ290 (MIRSAD KUČANIN) 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 Evidence of Witness KDZ290 Pursuant to Rule 92 *quater*”, filed confidentially on 29 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 testimony and related exhibits given by Witness KDZ290 (Mirsad Kučanin) in 2002 and 2003, in the *Galić* and the *Slobodan Milošević* cases respectively, pursuant to Rules 89(C) and 92 *quater* of the Tribunal’s Rules of Procedure and Evidence (“Rules”), which provide for the admission of evidence from unavailable persons that is relevant and of probative value. The Prosecution submits that Kučanin is unavailable; he previously testified under oath in two cases where he was cross-examined by the Defence (*Galić*) and by the accused (*Slobodan Milošević*) both of whom were in similar positions to the Accused in the present case; his evidence is corroborated by other witnesses and documentary evidence; and it is relevant, probative, and reliable.¹

2. The Accused filed his confidential “Response to Prosecution 92 *quater* Motion: Witness KDZ290” on 30 June 2009 (“Response”). He opposes the Prosecution’s Motion on three grounds: (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* shifts the burden of proof from the Prosecution to the Accused, in violation of his right to a fair trial; and (iii) the Prosecution has failed to show that Kučanin is unavailable and that his testimony is reliable.² Specifically, under the third argument, the Accused asserts that there is no death certificate or substantial medical documentation establishing his unavailability. He also claims that evidence that goes to the acts and conducts of the accused must be “strongly corroborated” to be admitted. Finally, the fact that Kučanin cannot be found means that he is shying away from having his testimony examined by the Accused and that affects its reliability. Therefore, the Accused claims, admitting this evidence would not be in the interests of justice.³

¹ Motion, para. 1.

² Response, paras. 2–4.

³ Response, para. 4.

3. After receiving leave from the Chamber, the Prosecution filed a confidential “Prosecution Reply to the ‘Response to Prosecution 92 *quater* Motion: Witness KDZ290’” on 6 July 2009 (“Reply”), addressing the Accused’s arguments concerning the availability and reliability of Kučanin and the related evidence.¹ The Prosecution argues that: (i) the scope of the term “unavailability” within the meaning of Rule 92 *quater* is not limited to persons who are deceased or who have physical or mental conditions; (ii) the Accused’s submission relating to the characterisation of the degree of corroboration required for the admission of evidence is incorrect; and (iii) his claims concerning the reliability of Kučanin’s evidence are baseless.²

II. Discussion

4. The Trial Chamber has recently issued a decision dealing with another Rule 92 *quater* motion filed by the Prosecution, in which it outlined the law that applies to such motions. The Chamber adopts and incorporates that part of its decision here.³

5. The Trial Chamber has also already considered and rejected the Accused’s arguments that the operation of Rule 92 *quater* violates his rights under Article 21(4)(e) of the Statute, and that the use of Rule 92 *bis* and *quater* evidence, in combination with adjudicated facts, shifts the burden of proof on to the Accused.⁴ For that reason, the Chamber will only address the issue of whether the evidence now sought to be admitted meets the requirements of Rules 89(C) and 92 *quater*.

6. Kučanin was formerly a police officer for the Security Services Centre in Sarajevo. By 1992 he had obtained the rank of Criminal Investigator and held that position throughout the relevant time of the Third Amended Indictment (“Indictment”). Part of his duty was to investigate serious crimes, including murder, for the whole district of Sarajevo. Between 1992 and 1995, Kučanin investigated, or assisted in the investigation of, scheduled sniping incidents F10 and F15 and scheduled shelling incidents G11, G12, and G16. Kučanin further investigated numerous sniping and shelling incidents not included in the schedules to the Indictment. His testimony in *Galić* and *Slobodan Milošević* mainly centred on his findings while performing the investigations into the various sniping and shelling incidents and his determinations of the origins of fire. The Chamber is satisfied that Kučanin’s evidence, as a whole, is relevant to the

¹ See Decision on Prosecution Request for Leave to Reply: Rule 92 *quater* Motion (Witness KDZ290), 6 July 2009, and Prosecution Reply to the “Response to Prosecution 92 *quater* Motion: Witness KDZ290”, 6 July 2009.

² Reply, para. 1.

³ See Decision on Prosecution Motion for Admission of Testimony of Witness KDZ198 and Associated Exhibits Pursuant to Rule 92 *quater*, 20 August 2009 (“KDZ198 Decision”), paras. 4–7.

⁴ See KDZ198 Decision, paras. 8–11.

Prosecution's case against the Accused, and relates to critical issues concerning the events happening on the ground in Sarajevo during the Indictment period.

7. The Prosecution asserts that it has performed a reasonably diligent search and has been unable to locate Kučanin.¹ The Accused disputes this and contends that because the witness is not objectively unavailable, his evidence should not be admitted. However, the Accused's assertion that a witness is only to be considered unavailable if he or she is "objectively unable to attend a court hearing, either because he is deceased or because of physical or mental impairment" and that "only a death certificate or substantial medical documentation can establish the unavailability of a witness" does not accurately describe Rule 92 *quater*.² This Rule in fact also allows for the testimony of a witness "who can no longer with reasonable diligence be traced."³

8. The only requirement under Rule 92 *quater* (A)(i) concerning a witness's unavailability is that the Trial Chamber must be "satisfied of the person's unavailability." The detail concerning the Prosecution's efforts to trace Kučanin can be found in confidential Annex A of this decision. In the Chamber's view, the Prosecution has performed a diligent search for Kučanin, with no success, and he should, therefore, be considered to be unavailable for the purposes of Rule 92 *quater*.

9. The Prosecution also asserts that Kučanin's evidence is reliable, corroborated, and "relates to events about which there is other evidence and about which another Trial Chamber has rendered judgement."⁴ Conversely, the Accused contends that Kučanin "fears to be held to account for what he has said in earlier testimony . . . creat[ing] the suspicion that the witness has an interest in preventing exposure to scrutiny, for instance because his evidence is not truthful . . . adversely affect[ing] the reliability of his evidence."⁵ Moreover, the Accused claims that different types of evidence require different levels of corroboration to be considered reliable, and that directly incriminating evidence should be "strongly" corroborated.⁶ The Chamber does not accept the Accused's proposition that Kučanin's unavailability necessarily leads to the conclusion that he is unreliable or that the fear of his earlier evidence being tested is the reason for his disappearance. Indeed, the Accused himself provides no factual basis for such an

¹ Motion, para. 5.

² See Response, para. 6.

³ See *e.g. Prosecutor v. Gotovina, et al.*, Decision on the Admission of Statements of Four Witnesses Pursuant to Rule 92 *quater*, 24 July 2008, paras. 11-14 (allowing testimony of witness that could not be traced after a diligent search).

⁴ Motion, para. 15(c).

⁵ Response, para. 26.

⁶ Response, paras 10-14.

assertion but merely speculates. The Chamber also does not accept the Accused's argument that incriminating evidence requires greater corroboration than other types of evidence. The Chamber is of the view that there are no defined degrees of corroboration; evidence is either sufficiently corroborated or it is not. Indeed, the authorities cited by the Accused do not support his position and only refer to corroboration or sufficient corroboration.

10. While considering the reliability of Kučanin's testimony and associated exhibits, the Trial Chamber shall look at how the evidence was obtained and recorded, whether the statement was subject to cross examination, whether the statement is corroborated, and other factors such as an absence of manifest or obvious inconsistencies.¹ The Chamber notes that the testimony of Kučanin in *Galić* was subject to cross examination by the Defence and his testimony in *Slobodan Milošević* was subject to cross-examination by the accused and the *amicus curiae* in that case. The written statements that were produced were given under oath; signed by Kučanin with an acknowledgement of the truth of their contents; were subject to cross-examination; and the witness was given the assistance of a Registry approved interpreter. Accordingly, in the Chamber's view, the evidence of Kučanin is not only relevant but also of probative value.

11. Additionally, the Prosecution asserts that the evidence of Kučanin is corroborated. The Chamber is not in a position, at this stage, to assess for itself the extent to which this other evidence is indeed corroborative of Kučanin. However, at the appropriate time, and bearing in mind that it cannot base a conviction on the uncorroborated evidence of an unavailable witness, the Chamber will attribute appropriate weight to the evidence of Kučanin in its overall consideration of the evidence in this case. Furthermore, the evidence presented here does not relate to the acts and conduct of the Accused, and as such is not a factor weighing against admissibility.² For all those reasons, the evidence of Kučanin satisfies the criteria of Rule 89(C) and also meets the standards of reliability required under Rule 92 *quater*. It will therefore be admitted into evidence, subject to the limitations as provided below.

12. The document with Rule 65 *ter* number 10340 is Kučanin's testimony in the *Galić* case. As stated above, it will be admitted in this case, with an exhibit number to be assigned by the Registry. The Chamber notes that the Prosecution seeks admission of a small portion of the transcript under seal, as it involves confidential information concerning another witness.¹ Since the Trial Chamber is of the view that this portion of the transcript does indeed contain

¹ *Prosecutor v. Milan Milutinović*, Case No. IT-05-87-T, Decision on Prosecution Motion for Admission of Evidence Pursuant to Rule 92 *quater*, 16 February 2007, para 7.

² See *Prosecutor v. Milošević*, Case No. IT-02-54-T, Decision on Prosecution's Request to Have Written Statements Admitted Under Rule 92 *bis*, 21 March 2002, para. 22; *Prosecutor v. Galić*, Case No. IT-98-29-AR73.2, Decision on Interlocutory Appeal Concerning Rule 92 *bis*(C), 7 June 2002, para. 9.

confidential information, it considers that it should be admitted into evidence under seal. Kučanin's testimony in the *Slobodan Milošević* case has been allocated Rule 65 *ter* number 10371. The Chamber has thoroughly read through this testimony and finds the direct-examination of Kučanin to be repetitive of his testimony in the *Galić* case and unnecessary for the present case. The direct-examination consists of the Prosecution reading a summary of Kučanin's *Galić* testimony and then having Kučanin pointing to areas on a map that he had created during his direct-examination in *Galić*. There was nothing new gained throughout the direct-examination and, therefore, it is deemed repetitive and of no probative value. However, the cross-examination found at T. 28934, line 10 to T. 28955 and T. 28956 to T. 28979, line 3, will be admitted in this case, with an exhibit number to be assigned by the Registry.

13. With regard to the exhibits associated with Kučanin's testimony, the Chamber notes that the document with Rule 65 *ter* number 09645 is an Official Note of the Centre of Security Departments within the Bosnian MUP produced by Kučanin, and relates to the sniping incident on 22 July 1994 on Miljenka Cvitkovića Street, described in Schedule F10. The document was used by Kučanin in the *Galić* case as exhibit P02790. During direct examination, Kučanin confirmed that he wrote the Official Note and that the information contained therein was accurate. Kučanin was also cross-examined on this document. The Chamber is satisfied that it forms an inseparable and indispensable part of Kučanin's testimony, that it meets the requirements of relevance and probative value, and that 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 09652 is a photo file produced by the Forensic and Counter-terrorism Department within Security Services Centre in Sarajevo which also relates to the sniping incident on Miljenka Cvitkovića Street described in Schedule F10. The photographs were used by Kučanin throughout his testimony in the *Galić* case during both examination and cross examination as exhibit P02792. The Chamber is satisfied that this item forms an inseparable and indispensable part of Kučanin'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. The Chamber also notes the photos provided by the Prosecution through the e-Court system are of very poor quality. The Prosecution should, therefore, provide them to the Chamber and to the Accused, through the Registry, in another format. They will then be admitted in this case, with an exhibit number to be assigned by the Registry.

¹ T. 4715, line 2 to T.4718, line 16.

15. The document with Rule 65 *ter* number 09601 is a record of an on-site investigation issued by the Bosnian MUP Security Services Centre in Sarajevo concerning the shelling of Zavnobiha, no. 18, Alipašino Polje in Sarajevo, on 9 November 1993. Kučanin testified that he wrote and signed the report and testified to it during both direct and cross examination in the *Galić* case using exhibit number P01840. The Chamber is satisfied that it forms an inseparable and indispensable part of Kučanin'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.

16. The document with Rule 65 *ter* number 13141 is a batch of documents that includes an ICTY witness statement given by Kučanin and a report in B/C/S written by Kučanin detailing a sniping incident involving a tram on 27 February 1995, described in Schedule F15, and two unscheduled sniping incidents. The report was used during direct examination in the *Galić* case to refresh the witness' memory. The ICTY witness statement was discussed on cross examination in the *Slobodan Milošević* case. The batch of documents was not given an exhibit number in either case.¹ The Chamber is satisfied that it forms an inseparable and indispensable part of Kučanin'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. The Chamber notes that the report written by Kučanin, made available through the e-Court system by the Prosecutor, is not translated. The Prosecution should, therefore, provide the Chamber a translated form. The batch of documents will then be admitted in this case, with an exhibit number to be assigned by the Registry.

17. The document with Rule 65 *ter* number 10088 is a map of Sarajevo that was marked by Kučanin to show the locations of several incidents of sniping and shelling that he had investigated, specifically the shelling from document with Rule 65 *ter* number 09601 and the sniping incident reported in the document with Rule 65 *ter* number 13141. The exhibit number used in the *Galić* case was P03644.MK1. The Chamber is satisfied that it forms an inseparable and indispensable part of Kučanin'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.

18. The document with Rule 65 *ter* number 09543 is another map marked by Kučanin in the *Galić* case. This map documents the origins of fire from incidents that Kučanin investigated or

learned from investigations by his colleagues. The map was discussed in both direct and cross examination and was assigned exhibit number P03658. The Chamber is satisfied that it forms an inseparable and indispensable part of Kučanin'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.

19. The document with Rule 65 *ter* number 09939 is a collection of witness statements given and signed by Kučanin that covered many incidents during the time relevant to the Indictment in this case. The documents were used by the Defence in the *Galić* case and by the accused in the *Slobodan Milošević* case, but were never given exhibit numbers.² Although parts of these documents are repetitive of other evidence in the Prosecution's Motion for this witness, the documents have a bearing on the consistency of Kučanin's testimony. The Chamber is satisfied that this document forms an inseparable and indispensable part of Kučanin'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.

20. The documents with Rule 65 *ter* number 09564 and 09565 are Strictly Confidential Reports issued by the Command of the 102nd Mountain Brigade that were introduced by the Defence in *Galić* through Kučanin, and identified as exhibit D54 and D55, respectively. The Defence used the evidence to test both the veracity and the credibility of Kučanin's testimony about a possible military presence at some of the incident sites that Kučanin investigated. Because it provides the Chamber with a full understanding of the evidence of the witness, it 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. It will therefore be admitted to provide a full understanding of the evidence of the witness in this case and it can be assigned an exhibit number by the Registry.

21. The documents with Rule 65 *ter* number 09505, 09506, and 09507 are Daily Situation Reports describing military activity outside of Sarajevo that were introduced by the Defence in *Galić* through Kučanin, and identified as exhibit D56, D57, and D58 respectively. There was no substantive or relevant discussion of the documents and the witness could not testify to them. The Chamber notes that the documents are not relevant to Kučanin's testimony and do not add

¹ Motion, Annex B, page 6.

² Motion, Annex B, page 6.

anything of substance to his testimony. Therefore, they do not form an inseparable and indispensable part of his testimony and will not be admitted in the present case.

22. The document with Rule 65 *ter* number 09562 is another photo file produced by the Forensic and Counter-terrorism Department within the Security Services Centre in Sarajevo, this one relating to the shelling incident at Alipašino Polje in Sarajevo on 9 November 1993, which is not in the Indictment schedules. The photos were tendered into evidence by the Defence in the *Galić* case and assigned exhibit number D59. The Chamber is satisfied that the file forms an inseparable and indispensable part of Kučanin'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. The Chamber again notes that the photos provided by the Prosecution through the e-Court system are of very poor quality. The Prosecution should, therefore, provide them to the Chamber and to the Accused, through the Registry, in another format. They will then be admitted in this case, with an exhibit number to be assigned by the Registry.

23. The document with Rule 65 *ter* number 10400 is KZD290's testimony and related exhibits from the *Galić* case introduced into the *Slobodan Milošević* case. It was admitted in to the case as exhibit P00586 by the Prosecution through Kučanin. It includes the exhibits mentioned above in paras. 13-22. The Prosecution read a brief summary of the testimony into the record. This Trial Chamber has already decided that the *Galić* testimony and most related exhibits would be admitted in this case. Admitting the testimony again simply because it was admitted into the *Slobodan Milošević* case as an exhibit is repetitive and unnecessary.

24. The document with Rule 65 *ter* number 10034 is a witness statement written by Kučanin that describes the police structure in Sarajevo during the war. The document was used by the accused in the *Slobodan Milošević* case but was not given an exhibit number.¹ The Chamber is satisfied that it forms an inseparable and indispensable part of Kučanin'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.

III. Disposition

25. For these reasons, pursuant to Rules 54, 89, and 92 *quater* of the Rules, the Trial Chamber hereby **GRANTS** the Motion in part and **ADMITS** into evidence the following items:

¹ Motion, Annex B, page 7.

- (a) The full transcript of Kučanin's testimony in the *Galić* case, including admitting T.4715, line 2 to T.4718, line 16 under seal. The Prosecution shall provide the Registry with the confidential, un-redacted version of the transcript, as well as the public, redacted version of the same. The exhibit numbers shall be assigned by the Registry to both.
- (b) The transcript of Kučanin's testimony in the *Slobodan Milošević* case found at T.28934, line 10 to T.28955 and T.28956 to T.28979, line 3, with the exhibit number to be assigned by the Registry.
- (c) The following documents with exhibit numbers to be assigned by the Registry: items with Rule 65 *ter* numbers 09645, 09652, 09601, 10088, 13141, 09543, 09939, 09564, 09565, 09562, and 10034.

26. The Trial Chamber **DENIES** the Motion with respect to Kučanin's testimony in the *Slobodan Milošević* case found at T.28922 to T.28934, line 9, and items with Rule 65 *ter* numbers 09505, 09506, 09507, and 10400.

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]