

4-09-92-T
D 7/16/13 - D 7/11/13
12 November 2013

7/16/13
4/13

**UNITED
NATIONS**



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: 12 November 2013
Original: English

IN TRIAL CHAMBER I

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

Registrar: Mr John Hocking

Decision of: 12 November 2013

PROSECUTOR

v.

RATKO MLADIĆ

PUBLIC

**DECISION ON PROSECUTION MOTION TO ADMIT THE
EVIDENCE OF WITNESS HERBERT OKUN 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 AND SUBMISSIONS OF THE PARTIES

1. On 29 July 2013, the Prosecution filed a motion ("Motion") to admit the evidence of Herbert Okun ("Witness") pursuant to Rule 92 *quater* of the Tribunal's Rules of Procedure and Evidence ("Rules").¹ The Prosecution seeks admission of portions of the Witness's testimony from previous ICTY cases along with 28 associated exhibits and a concordance chart.² On 9 August 2013, the Defence filed its response to the Motion ("Response").³ On 16 August 2013, the Prosecution filed a request for leave to reply,⁴ annexing its reply ("Reply").⁵

II. APPLICABLE LAW

2. The Chamber recalls and refers to the applicable law governing the admission of evidence and associated exhibits pursuant to Rules 92 *quater* and 89 (C) of the Rules, as set out in a previous decision.⁶

III. DISCUSSION

3. The Chamber considers that it is assisted by further submissions from the Prosecution on the matters outlined in the request for leave to reply, and will therefore grant this request.

4. The Chamber has been provided with the obituary of the Witness, and is satisfied that he is deceased, and therefore unavailable pursuant to Rule 92 *quater* of the Rules.

5. With regard to the reliability of the proffered testimony, the Chamber notes that in each of the previous three cases, the Witness testified under oath and was subject to cross-examination, including on the specific topics for which the Prosecution tenders the Witness's evidence. As for the Defence's assertion that portions of the evidence are unreliable because they contain hearsay

¹ Prosecution Motion to Admit the Evidence of Herbert Okun (RM517) pursuant to Rule 92 *quater*, 29 July 2013.

² Motion, paras 1, 17, 23.

³ Defence Response to Prosecution Motion to Admit the Evidence of Herbert Okun (RM517) pursuant to Rule 92 *quater*, 9 August 2013.

⁴ Prosecution Request for Leave to File Joint Reply to Defence Response to Prosecution 30th Rule 92 *bis* Motion and Defence Response to Prosecution Motion to Admit the Evidence of Herbert Okun pursuant to Rule 92 *quater*, 16 August 2013.

⁵ Prosecution Joint Reply to Defence Response to Prosecution 30th Rule 92 *bis* Motion and Defence Response to Prosecution Motion to Admit the Evidence of Herbert Okun pursuant to Rule 92 *quater*, 16 August 2013. The Chamber refers to the parties' filings for their submissions.

⁶ Decision on Prosecution Motion to Admit the Evidence of Witness RM-266 Pursuant to Rule 92 *quater*, 23 July 2012, paras 10-13. See also T. 5601-5604; Decision on Prosecution's Motion for Reconsideration, Granting Admission from the Bar Table, or Certification in relation to Decision Regarding Associated Exhibits of Witness Tucker, 7 February 2013, para. 8.

evidence, the Chamber recalls, as it has on multiple occasions, that hearsay evidence is, in principle, admissible before the Tribunal and that the weight to be attributed to such evidence will be assessed in light of all the evidence before the Chamber. In relation to the portions of testimony referred to by the Defence, the Chamber notes that they relate to a meeting at which the Witness was present.⁷ Accordingly, the Chamber does not consider the testimony to be hearsay, and finds that the portions of evidence referred to by the Defence do not affect the overall reliability of the evidence. In relation to the Defence submission that the proffered testimony contains expert-like speculation, the Chamber notes that the Witness is presented as a fact witness and considers that to the extent the testimony contains any unsupported, un-sourced conclusions or opinions, the issue goes to the weight to be attributed to the evidence rather than its admissibility. Based on the foregoing reasons, the Chamber finds the proffered evidence to be reliable for the purposes of Rule 92 *quater* (A)(ii) of the Rules.

6. As for the Defence's assertion that the proffered evidence concerns live and important issues and should therefore not be admitted because the Accused cannot cross-examine the Witness, the Chamber considers that while the evidence relates to important issues, it is also cumulative to the evidence of other witnesses who have testified in the present case, including Anthony Banbury, David Harland, and Michael Rose. It was subjected to cross-examination in similar cases by Defence teams sharing a common interest with the Accused. Moreover, although the Chamber considers as a factor weighing against admission that portions of the proffered testimony go to the acts and conduct of the Accused as charged in the Indictment, it notes in this regard that such evidence cannot be used as the sole basis for a conviction and considers, therefore, that the admission of such evidence would not violate the Accused's right to a fair trial. For the foregoing reasons, the Chamber finds that the proffered testimony is, on balance, admissible pursuant to Rule 92 *quater* of the Rules.

7. With regard to Rule 89 (C) of the Rules, the Chamber finds that the proffered evidence is relevant to the case, as it relates to the Witness's observations from meetings with Bosnian Serb leaders, in his capacity as the special advisor and deputy to the personal envoy of the United Nations Secretary-General and his position with the International Conference on the former Yugoslavia ("ICFY") during the Indictment period. Since reliability is a component 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.

⁷ Response, para. 18.

8. With regard to the associated exhibits, the Chamber notes that the document bearing Rule 65 *ter* number 03432 has been admitted into evidence as P2003 and the Prosecution's request is therefore moot in this respect.

9. With regard to the document bearing Rule 65 *ter* number 22812, the Chamber notes this has not been uploaded into eCourt. Accordingly, the Chamber denies its admission without prejudice.

10. With regard to documents bearing Rule 65 *ter* numbers 02382 and 02388, the Chamber notes that these are 466 and 153 page transcripts of Republika Srpska Assemblies respectively, upon which the Prosecution seeks to rely generally. According to the Prosecution summary, the document bearing Rule 65 *ter* number 02382 is only referred to in approximately seven pages of the Witness's testimony in the *Krajišnik* case.⁸ In the relevant pages of the transcript, only two pages of this associated exhibit are directly referred to by the Witness.⁹ Similarly, according to the Prosecution summary, the document bearing Rule 65 *ter* number 02388 is only referred to in approximately three pages of the Witness's testimony in the *Krajišnik* case. In the relevant pages of the transcript, only one page of this associated exhibit is directly referred to by the Witness.¹⁰ In relation to the document bearing Rule 65 *ter* number 06009, 79 pages of notes from the session of the Council for Coordinating Positions on the State Policy, the Chamber notes that the Witness in his testimony in the *Krajišnik* case only referred to a few of those pages.¹¹ The Chamber does not consider that the entirety of the three documents referred to above form an inseparable and indispensable part of the Witness's testimony. The Chamber further reminds the Parties that they are encouraged to tender extracts from documents where possible, provided that the extract does not present a false or misleading picture of the overall document.¹² Accordingly, the Chamber denies the admission into evidence without prejudice for these three documents.

11. Similarly, with regard to the associated exhibits bearing Rule 65 *ter* numbers 07859, 07860, 07861, 07862, 07863, 07864, 07865, 07866, 07867, 07868, 07869, 07870, and 07871; the diaries of missions of Cyrus Vance to Yugoslavia, and ICFY diaries, the Chamber notes that these are very lengthy documents, and the Witness has only referred to some portions of these exhibits, but not to all of them. Accordingly, the Chamber considers that only some of the exhibits qualify as inseparable and indispensable parts of the Witness's testimony, and even then, not in their entirety. For these reasons, the Chamber denies their admission without prejudice.

⁸ Motion, Annex A.

⁹ *Prosecutor v. Karajišnik*, Case No. IT-00-39-T, Transcript of 24 June 2004, T. 4293.

¹⁰ *Prosecutor v. Karajišnik*, Case No. IT-00-39-T, Transcript of 24 June 2004, T. 4296.

¹¹ *Prosecutor v. Karajišnik*, Case No. IT-00-39-T, Transcript of 24 June 2004, T. 4279-4295.

¹² See Decision on Prosecution Motion for Admission of Documents from the Bar Table, 19 July 2013, para. 8.

12. The Chamber considers all other associated exhibits referred to in the Motion to form an inseparable and indispensable part of the Witness's testimony and finds them admissible on this basis.

IV. DISPOSITION

13. For the foregoing reasons, pursuant to Rules 54, 89 (C), and 92 *quater* of the Rules, the Chamber

GRANTS the Prosecution's request for leave to reply in relation to the Witness;

GRANTS the Motion in part;

ADMITS into evidence:

- (i) the excerpts of the Witness's testimony from *Prosecutor v. Karajišnik* (Case No. IT-00-39-T), *Prosecutor v. Karadžić* (Case No. IT-95-5/18-T) and *Prosecutor v. Slobodan Milošević* (Case No. IT-02-54-T) as identified in Annex A of the Motion; and
- (ii) the associated exhibits bearing Rule 65 *ter* numbers: 03649, 11177, 11204, 11203, 19535, 07014, 03373, 22394, 17926, 29147 and 17927;

DENIES admission of the documents bearing Rule 65 *ter* number, 02382, 02388, 22812, 06009, 07859, 07860, 07861, 07862, 07863, 07864, 07865, 07866, 07867, 07868, 07869, 07870 and 07871 without prejudice;

DECLARES the Prosecution request regarding the document bearing Rule 65 *ter* number 03432 moot;

INSTRUCTS the Prosecution to upload the admitted documents into eCourt within two weeks of the date of issuance of this decision; and

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

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



Judge Alphons Orie
Presiding Judge

Dated this twelfth day of November 2013
At The Hague
The Netherlands

[Seal of the Tribunal]