

**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-04-75-T
Date: 22 February 2013
Original: English

IN THE TRIAL CHAMBER

Before: Judge Guy Delvoie, Presiding
Judge Burton Hall
Judge Antoine Kesia-Mbe Mindua

Registrar: Mr. John Hocking

Decision: 22 February 2013

PROSECUTOR

v.

GORAN HADŽIĆ

PUBLIC

**DECISION ON PROSECUTION MOTION FOR ADMISSION OF EVIDENCE
PURSUANT TO RULE 92 *quater* (HERBERT OKUN)**

The Office of the Prosecutor:

Mr. Douglas Stringer

Counsel for Goran Hadžić:

Mr. Zoran Živanović

Mr. Christopher Gosnell

1. **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 Motion for the Admission of Evidence Pursuant to Rule 92 *quater* (Herbert Okun)”, filed publicly on 21 August 2012 with confidential annex A, public annexes B–C, and confidential and *ex parte* annex D (“Motion”). On 11 September 2012, the Defence filed confidentially its “Response to Prosecution Motion for the Admission of Evidence Pursuant to Rule 92 *quater* (Herbert Okun)” (“Response”).¹ On 18 September 2012, the “Prosecution Request for Leave to Reply and Reply to Response to Prosecution Motion for the Admission of Evidence Pursuant to Rule 92 *quater* (Herbert Okun)” was filed confidentially (“Reply”).
2. On 9 October 2012, the “Supplement to Prosecution’s Motions for Admission of Evidence Pursuant to Rules 92 *bis*, *ter*, and *quater*”, was filed publicly with a confidential annex (“Prosecution Supplement”). On 23 October 2012, the Defence filed confidentially its “Response to Supplement to Prosecution’s Motions for Admission of Evidence Pursuant to Rules 92 *bis*, *ter*, and *quater*” (“Defence Response to Prosecution Supplement”). On 30 October 2012, the “Prosecution Request for Leave to Reply and Reply to Response to Supplement to Prosecution’s Motions for Admission of Evidence Pursuant to Rules 92 *bis*, *ter*, and *quater*”, was filed confidentially (“Prosecution Reply to Defence Response to Prosecution Supplement”).²
3. On 11 December 2012, the Prosecution requested the Registry to lift the *ex parte* status of confidential Annex D to the Motion.³

A. Submissions

4. In the Motion, the Prosecution requests the admission into evidence, pursuant to Rules 89 and 92 *quater* of the Rules of Procedure and Evidence of the Tribunal (“Rules”), of transcripts of the testimony of Herbert Okun from the *S. Milošević* and *Mrkšić et al.* trials, along with associated exhibits. The Prosecution argues that Okun is unavailable to provide testimony before the Trial Chamber and that his evidence should be admitted pursuant to Rule 92 *quater* because it is relevant, reliable, and probative of the charges in the Indictment.⁴

¹ The Pre-Trial Judge granted a Defence request to extend the time for the Response. Decision on Defence Request for Extension of Time to Respond to Rule 92 *quater* Motions Concerning Babić and Okun, 31 August 2012.

² The Prosecution was granted leave to file the Prosecution Reply to Defence Response to Prosecution Supplement in the Trial Chamber’s “Decision on Prosecution Motion for Admission of Evidence Pursuant to Rule 92 *quater* (Milan Babić)”, issued on 7 February 2013.

³ Prosecution Notice of Change of Status of Annex D to Prosecution Motion for the Admission of Evidence Pursuant to Rule 92 *quater* (Herbert Okun), 11 December 2012.

⁴ Motion, para. 1.

5. The Defence objects to portions of Ambassador Okun's testimony and related documents that imply that Hadžić exercised control over various forces in Croatia during the Indictment period. According to the Defence, this proposed evidence, as well as other portions, is unreliable and has no probative value. The Defence also argues that the cross-examination in the prior proceedings does not remedy this deficiency in the proposed evidence.⁵

6. The Prosecution replies that the Defence mischaracterises the evidence of Ambassador Okun and conflates the standard for admission of evidence with the analysis of what weight the Trial Chamber should ultimately ascribe to evidence.⁶

B. Applicable Law

7. Rule 92 *quater*, entitled "Unavailable Persons", reads as follows:

(A) The evidence of a person in the form of a written statement or transcript who has subsequently died, or who can no longer with reasonable diligence be traced, or who is by reason of bodily or mental condition unable to testify orally may be admitted, whether or not the written statement is in the form prescribed by Rule 92 *bis*, if the Trial Chamber:

- (i) is satisfied of the person's unavailability as set out above; and
- (ii) finds from the circumstances in which the statement was made and recorded that it is reliable.

(B) If the evidence goes to proof of acts and conduct of an accused as charged in the indictment, this may be a factor against the admission of such evidence, or that part of it.

It follows from a plain reading of these provisions that evidence pertaining to the acts and conduct of an accused can be admitted under Rule 92 *quater* and that a witness's evidence need not be admitted in its entirety, it being for the Trial Chamber to decide which parts, if any, should be excluded. Evidence going to the acts and conduct of the accused is evidence that concerns the deeds and behaviour of that accused, rather than of anyone else for whose actions he is alleged to be responsible.⁷

8. In assessing the reliability of the proposed evidence, a Trial Chamber can look at the circumstances in which it was obtained and recorded, such as whether a written statement was

⁵ Response, paras 1-2.

⁶ Reply, paras 1-2.

⁷ *Prosecutor v. Karadžić*, Case No. IT-95-5/18-T, Decision on Prosecution Motion for Admission of Testimony of Witness KDZ198 and Associated Exhibits Pursuant to Rule 92 *quater*, 20 August 2009 ("Karadžić Decision"), para. 4; *Prosecutor v. S. Milošević*, Case No. IT-02-54-T, Decision on Prosecution's Request to Have Written Statements

given under oath; whether it was signed by the witness with an acknowledgement of the truth of its contents; whether it was given with the assistance of a Registry approved interpreter; and whether it has been subject to cross-examination. In addition, other factors, such as 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, may be considered.⁸ If one or more of these indicia of reliability is absent, the evidence can still be admitted, and the Trial Chamber will take this into consideration in determining the appropriate weight to be given to it in its overall consideration of all the evidence in the case.⁹

9. In addition, the Trial Chamber must ensure that the general requirements for the admissibility of evidence set out in Rule 89 are met, namely that the proffered evidence is relevant and has probative value and that the probative value is not substantially outweighed by the need to ensure a fair trial.¹⁰

10. When the testimony of an unavailable person is admitted under Rule 92 *quater*, exhibits which accompany that evidence can also be admitted. 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.¹¹ It follows that such exhibits should also satisfy the requirements of relevance and probative value contained in Rule 89 and that their probative value must not be substantially outweighed by the need to ensure a fair trial.

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.

⁸ *Karadžić* Decision, para. 5; *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 (confidential), 18 August 2008, para. 30. *See also* *Prosecutor v. Popović et al.*, Case No. IT-05-88-T, Redacted Version of “Decision on Motion on Behalf of Drago Nikolić Seeking Admission of Evidence pursuant to Rule 92 *quater*” filed confidentially on 18 December 2008, 19 February 2009, para. 32.

⁹ *Karadžić* Decision, para. 5; *Prosecutor v. Popović et al.*, Case No. IT-05-88-AR73.4, Decision on the Prosecution Motion for Admission of Evidence Pursuant to Rule 92 *quater*, 21 April 2008, paras 28-32. *See also* *Prosecutor v. Popović et al.*, Case No. IT-05-88-T, Decision on Gvero’s Motion for the Admission of Evidence Pursuant to Rule 92 *quater*, 3 February 2009, para. 24.

¹⁰ *Karadžić* Decision, para. 6. *See* *Prosecutor v. R. Delić*, Case No. IT-04-83-PT, Decision on Prosecution Motion for Admission of Evidence Pursuant to Rule 92 *quater* (confidential), 9 July 2007, p. 4.

¹¹ *Karadžić* Decision, para. 7; *Prosecutor v. Popović et al.*, Case No. IT-05-88-AR73.4, Decision on the Prosecution Motion for Admission of Evidence pursuant to Rule 92 *quater*, 21 April 2008, para. 65.

C. Discussion

1. Unavailability of Ambassador Okun

11. The Prosecution has adequately demonstrated that Ambassador Okun has passed away and is therefore unavailable, within the meaning of Rule 92 *quater*, to appear before the Trial Chamber to give evidence.¹²

2. Reliability and relevance of tendered evidence

12. Ambassador Okun gave evidence before the Tribunal under oath in two trials and his testimony was transcribed and became part of the official records of those proceedings. He was subjected to cross-examination by accused with substantially similar interests as Hadžić. The Trial Chamber therefore finds that, based on the circumstances in which the evidence was given, the transcripts and their associated exhibits have a sufficient degree of reliability.

13. The proposed evidence of Ambassador Okun contains information about (a) his interactions with members of the alleged joint criminal enterprise (“JCE”), including Slobodan Milošević, Blagoje Adžić, and Veljko Kadijević; (b) the alleged organisation and presence of military and paramilitary units in the RSK; (c) the situation in Vukovar around 19 November 1991; (d) the Vance Plan and alleged breaches of demilitarisation requirements thereunder; (e) alleged attacks on United Nations Protected Areas; and (f) the alleged disproportionality of violence and destruction committed by Serb Forces in the RSK.

3. Specific objections to tendered evidence

(a) Acts and conduct of Hadžić

14. The Prosecution states that, although the proposed evidence refers to the acts and conduct of Hadžić and his control over Serb paramilitary forces in Croatia, it should nevertheless be admitted because it possesses strong indicia of reliability.¹³ The Defence responds that the prejudicial effect of Ambassador Okun’s testimony concerning Hadžić’s alleged control of armed forces substantially outweighs its probative value.¹⁴ Specifically, the Defence argues that Okun’s interactions with Milošević on this issue reveal that Milošević was not being candid with Okun and late US Secretary of State Cyrus Vance about the facts on the ground.¹⁵ The Prosecution replies that the Defence’s assertion that Milošević was the only source of Okun’s knowledge about this issue is incorrect and

¹² Motion, para. 3, Annex C.

¹³ Motion, para. 13.

¹⁴ Response, paras 5-10.

that Okun specifically noted that Hadžić and Babić's control over these forces was widely understood throughout Croatia and Serbia. The Prosecution also points out that Milošević's statements to Okun and Vance were reliable because they were statements against his self-interest because Milošević was admitting that Hadžić was under his control and thereby acknowledging that he was connected with the activities of paramilitary and military forces under Hadžić's control.¹⁶

15. The Trial Chamber finds that, as agreed by the parties, the above portions of Okun's evidence relate to the acts and conduct of Hadžić. In this regard, the Trial Chamber recalls its finding that the proposed evidence exhibits a high degree of reliability. The Trial Chamber also notes the submission of the Prosecution that the evidence will be corroborated by the evidence of GH-115, Milan Babić, GH-027, and documentary evidence.¹⁷ The Trial Chamber finds that the challenged portions of Ambassador Okun's testimony are relevant and possesses probative value. The Defence's objections largely go to the weight that the Trial Chamber should ascribe to the evidence. The Defence may raise these arguments in its final trial submissions. To the extent that the evidence goes to the acts and conduct of Hadžić, the Trial Chamber finds that the probative value is not substantially outweighed by the need to ensure a fair trial and will be particularly careful when assessing this evidence in its final deliberations. The Trial Chamber will have in mind the absence of the Defence's opportunity to cross-examine Ambassador Okun in the present proceedings when evaluating this evidence and deciding what weight to attribute to it. In particular, the Trial Chamber will not rely on the evidence to any decisive extent unless it is corroborated by other evidence.

(b) Events in Bosnia and Herzegovina

16. The Defence requests the Trial Chamber to exclude certain portions of Ambassador Okun's testimony that relate to events in Bosnia and Herzegovina because they have no relevance to the present proceedings or lack sufficient probative value.¹⁸ The Prosecution reiterates that it is tendering evidence relating to Bosnia that is connected with the events in Croatia that are relevant to the Indictment.¹⁹ The Trial Chamber considers this evidence to be relevant and is satisfied that it is not so pivotal to the Prosecution case that it would be unfair to admit the evidence in written form.

¹⁵ Response, para. 6.

¹⁶ Reply, paras 3-5. The Defence also argues that Ambassador Okun's testimony about Slobodan Milošević's control over Hadžić is ambiguous and has insufficient probative value relative to its potential prejudicial effect. Response, paras 11-13. The Prosecution replies that Okun was extensively cross-examined on this topic, consistently stating that Milošević controlled Hadžić. Reply, para. 6.

¹⁷ Motion, confidential Annex D, pp. 6-7.

¹⁸ Response, paras 14-15.

¹⁹ Reply, para. 7.

(c) April 1993 meeting in Geneva

17. The Defence objects to Ambassador Okun's "passing references" to a meeting in Geneva in April 1993 because Okun provided insufficient context or explanation of the content and reasons for the meeting. In the view of the Defence, this portion of the proposed evidence lacks the requisite probative value in the absence of the opportunity to cross-examine the witness on it.²⁰ The Trial Chamber considers that the absence of cross-examination goes to the weight to be attributed to the evidence and will bear this in mind when assessing the evidence.

4. Associated exhibits

18. The Trial Chamber finds that the associated exhibits form an integral and inseparable part of the tendered transcripts and therefore will allow their admission into evidence.

(a) Rule 65 ter number 04801

19. In the Prosecution Supplement, the Prosecution provides the associated exhibit with Rule 65 ter number 04801. This proposed exhibit is a video of news footage from Serbian and Croatian television stations regarding Vukovar in 1991; the Prosecution indicates that it tenders a clip from the video showing a meeting between Cyrus Vance and Veselin Šljivančanin.²¹ The Defence opposes the admission of this proposed exhibit because it is a forty-minute video, of which Okun only identifies a five-minute excerpt.²² The Prosecution replies that the Prosecution only seeks to have admitted the five-minute portion of the video, rather than the entire video.²³ The Trial Chamber considers the five-minute portion of the video, Rule 65 ter number 04801.2,²⁴ to be relevant to events charged in the Indictment and will therefore admit it into evidence.

(b) Duplicates

20. The Trial Chamber notes that Rule 65 ter number 05065 does not exist in eCourt because it is a duplicate of 03239. The Trial Chamber notes that Rule 65 ter number 05091 does not exist in eCourt because it is a duplicate of 03240. The Trial Chamber notes that Rule 65 ter number 05124 does not exist in eCourt because it is a duplicate of 03241. The Trial Chamber notes that Rule 65 ter number 05130 does not exist in eCourt because it is a duplicate of 03242. The Trial Chamber will admit Rule 65 ter numbers 03239, 03240, 03241, and 03242 into evidence.

²⁰ Response, para. 16.

²¹ Prosecution Supplement, para. 4; Motion, Annex B, p. 3.

²² Defence Response to Prosecution Supplement, paras 1-2.

²³ Prosecution Reply to Defence Response to Prosecution Supplement, paras 1-2.

²⁴ Email from Prosecution to the Trial Chamber and the Defence, 12 December 2012.

5. Additional cross-examination

21. On 14 January 2013, the Trial Chamber noted that the Prosecution did not tender the complete transcript of the testimony of Ambassador Okun from the *Mrkšić et al.* trial. Specifically, Okun’s cross-examination by Defence counsel for Radić and Šljivančanin—transcript pages 1817 to 1937—were not included in the Motion. In an email to the parties, the Trial Chamber expressed the view that it was appropriate for the Prosecution to tender the complete transcript of Okun’s testimony and accordingly requested the Prosecution to upload and release in eCourt the remainder of the transcript pages comprising Okun’s testimony from the *Mrkšić et al.* trial.²⁵

22. On 16 January 2013, the Prosecution uploaded the relevant transcripts to eCourt with Rule 65 *ter* numbers 04547 and 04549.²⁶ The Defence did not object to the admission of these documents.²⁷

23. The Trial Chamber finds that it is appropriate to admit the complete cross-examination of Ambassador Okun from the *Mrkšić et al.* trial and so will admit Rule 65 *ter* numbers 04547 and 04549.

D. Disposition

24. Accordingly, the Trial Chamber, pursuant to Rules 54, 89, 92 *quater*, and 126 *bis*, hereby

- (a) **GRANTS** the Prosecution leave to file the Reply;
- (b) **GRANTS** the Defence leave to file the Reply of 8 February;
- (c) **ORDERS** that the transcripts of Ambassador Herbert Okun with the following Rule 65 *ter* numbers shall be admitted into evidence: 04540, 04541, 04542, 04547, 04548, 04549;

²⁵ Email from Trial Chamber to Parties, 14 January 2013.

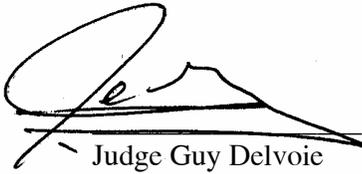
²⁶ Email from Prosecution to Trial Chamber and Defence, 16 January 2013.

²⁷ Submission Concerning Supplemental Material Proposed for Admission Pursuant to Rule 92 *quater* (Herbert Okun), 30 January 2013 (“Defence Submission of 30 January”), para. 1. In this submission, the Defence also corrects mistakes to its Response and challenges the admission of portions of Okun’s transcript from the *Mrkšić et al.* trial comprising Rule 65 *ter* number 04548. Defence Submission of 30 January, paras 2-4. The Prosecution responds that admission of the entire transcript of Okun is appropriate. Prosecution Response to Defence Submission Concerning Supplemental Material Proposed for Admission Pursuant to Rule 92 *quater* (Herbert Okun), 1 February 2013, paras 1-3. The Defence replies by reiterating its objection to the admission of Rule 65 *ter* number 04548. Reply to Prosecution Response to Defence Submission Concerning Supplemental Material Proposed for Admission Pursuant to Rule 92 *quater* (Herbert Okun), 8 February 2013 (“Reply of 8 February”). The Trial Chamber has already set forth its view that it is generally preferable for entire transcripts to be tendered, rather than portions thereof. Email from Legal Officer to Parties, 14 January 2013; Email from Legal Officer to Parties, 18 June 2012.

- (d) **ORDERS** that the associated exhibits with the following Rule 65 *ter* numbers shall be admitted into evidence: 00448, 00699, 00743, 00861, 00918, 00940, 02431, 02482, 02483, 02484, 02485, 02486, 03239, 03240, 03241, 03242, 05105, 05153, and 05318;
- (e) **ORDERS** that Rule 65 *ter* number 04801 shall not be admitted into evidence at this time and that Rule 65 *ter* number 04801.2 shall be admitted into evidence; and
- (f) **INSTRUCTS** the Registry to take all necessary and appropriate measures to implement this decision.

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

Done this twenty-second day of February 2013,
At The Hague,
The Netherlands.



Judge Guy Delvoic
Presiding

[Seal of the Tribunal]