



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: 8 July 2009

Original: English

IN THE TRIAL CHAMBER

Before: Judge Iain Bonomy, Presiding
Judge Christoph Flügge
Judge Michèle Picard

Registrar: Mr. John Hocking

Decision of: 8 July 2009

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

**DECISION ON ACCUSED'S APPLICATION FOR CERTIFICATION TO APPEAL
DECISION ON MOTIONS FOR EXTENSION OF TIME: RULE 92 BIS
AND RESPONSE SCHEDULE**

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 Accused’s “Application for Certification to Appeal Decision on Motions for Extension of Time: Rule 92*bis*”, filed on 25 June 2009 (“Application”), and hereby renders its decision thereon.

I. Background and Submissions

1. On 29 May 2009, the Office of the Prosecutor (“Prosecution”) filed eight motions for the admission of evidence pursuant to Rule 92 *bis* the Tribunal’s Rules of Procedure and Evidence (“Rules”) (together “Rule 92 *bis* Motions”), in which it requests that the Chamber admit into evidence the statements and transcripts of more than 225 witnesses in lieu of their viva voce testimony in these proceedings.¹
2. On 29 May 2009 and 10 June 2009, the Prosecution filed six motions for the admission of evidence pursuant to Rule 92 *quater* of the Rules (together “Rule 92 *quater* Motions”), wherein it requests that the Chamber admit into evidence the testimony and associated exhibits of unavailable witnesses in these proceedings.²

¹ Prosecution’s First Motion for Admission of Statements and Transcripts of Evidence in lieu of Viva Voce Testimony Pursuant to Rule 92*bis* (Witnesses for Eleven Municipalities), 29 May 2009; Prosecution’s Second Motion for Admission of Statements and Transcripts of Evidence in lieu of Viva Voce Testimony Pursuant to Rule 92 *bis* (Witnesses ARK Municipalities), 29 May 2009; Prosecution’s Third Motion for Admission of Statements and Transcripts of Evidence in lieu of Viva Voce Testimony Pursuant to Rule 92*bis* (Witnesses for Sarajevo Municipalities), 29 May 2009; Prosecution’s Fourth Motion for Admission of Statements and Transcripts of Evidence in lieu of Viva Voce Testimony Pursuant to Rule 92*bis*, Sarajevo Siege Witnesses, 29 May 2009; Prosecution’s Fifth Motion for Admission of Statements and Transcripts of Evidence in lieu of Viva Voce Testimony Pursuant to Rule 92*bis* (Srebrenica Witnesses), 29 May 2009; Prosecution’s Sixth Motion for Admission of Statements and Transcripts of Evidence in lieu of Viva Voce Testimony Pursuant to Rule 92*bis*: Hostage Witnesses, 29 May 2009; Prosecution’s Seventh Motion for Admission of Statements and Transcripts of Evidence in lieu of Viva Voce Testimony Pursuant to Rule 92*bis*: Delayed Disclosure Witnesses, 29 May 2009; Prosecution’s Motion for Admission of the Evidence of Eight Experts Pursuant to Rule 94*bis* and Rule 92*bis*, with Appendix A and Confidential Appendix B, 29 May 2009.

² Prosecution’s Motion for Admission of Testimony of Witness KDZ446 and Associated Exhibits Pursuant to Rule 92*quater*, 29 May 2009; Prosecution Motion for Admission of Evidence of Witness KDZ 290 Pursuant to Rule 92*quater*, 29 May 2009; Prosecution’s Motion for Admission of Testimony of Witness KDZ198 and Associated Exhibits Pursuant to Rule 92*quater*, 28 May 2009; Prosecution’s Motion for Admission of the Evidence of Sixteen Witnesses Pursuant to Rule 92*quater*, with Confidential Appendices A, B and C, 29 May 2009; Prosecution’s Motion for Admission of the Evidence of KDZ297 Pursuant to Rule 92*quater*, with Public Appendices A, B and Confidential Appendices C, D, E, 10 June 2009; Prosecution’s Motion for Admission of the Evidence of KDZ 172 Pursuant to Rule 92*quater*, with Public Appendices A-B and Confidential Appendices C-F, 10 June 2009.

3. Between 5 June 2009 and 12 June 2009, the Accused filed six motions in which he sought an extension of time to respond to the Rule 92 *bis* Motions and Rule 92 *quater* Motions (together “Motions for Extension of Time”).³

4. Between 11 June 2009 and 15 June 2009, the Prosecution filed its responses to the Motions for Extension of Time (together “Responses to Motions for Extension of Time”).⁴ Therein, the Prosecution does not object to a “reasonable” extension of time for the Accused to respond to the first seven Rule 92 *bis* Motions, on the basis of the volume of material covered by these motions. However, it opposes the Accused’s request for an extension of time until after his defence team has been able to interview the witnesses covered by these motions.⁵

5. During the Rule 65 *ter* meeting held on 15 June 2009, which was attended by the Accused and representatives of the Prosecution, and presided over by the pre-trial Judge (“Meeting”), the question of the timing for the Accused’s responses to these motions was discussed.⁶ The Prosecution undertook that all of the exhibits relevant to the Rule 92 *bis* Motions and Rule 92 *quater* Motions would be uploaded into the electronic court system (e-court) and available to the Accused by the end of that day.⁷ It also undertook to review each of its Rule 92 *bis* Motions in light of the Decision on First Prosecution Motion for Judicial Notice of Adjudicated Facts, issued on 5 June 2009 (“First Adjudicated Facts Decision”), and any subsequent decision on adjudicated facts, to determine whether it could withdraw any of its proposed Rule 92 *bis* witnesses.⁸ The completion of this review and request to withdraw any of

³ Motion to Vacate Protective Measures for Witness B- 161 in Slobodan Milosevic Case and for Extension of Time to Respond to Motion to Admit Testimony of Witness KDZ446, 5 June 2009; Motion for Extension of Time to Respond to Seventh Rule 92 *bis* Motion: Delayed Disclosure Witnesses and for Disclosure of *ex parte* Filings, 5 June 2009; Motion for Extension of Time to Respond to Rule 92 *bis* Motions, 8 June 2009; Motion for Public Disclosure of Annexes and for Extension of Time to Respond to Motion to Admit Testimony of Witness KDZ198, 8 June 2009; Motion to Vacate Protective Measures, for Public Disclosure of Annexes, and for Extension of Time to Respond to Motion to Admit Testimony of 16 Witnesses under Rule 92 *quater*, 8 June 2009; Motion for Extension of Time to Respond to Motion for Admission of Testimony of Witness KDZ-290, 12 June 2009.

⁴ Prosecution’s Response to Karadžić’s Motion for Extension of Time to Respond to Rule 92 *bis* Motions, 15 June 2009; Prosecution’s Response to Karadžić’s Motion for Extension of Time to Respond to Seventh Rule 92 *bis* Motion: Delayed Disclosure Witnesses and for Disclosure of *Ex Parte* Filings, 12 June 2009; Prosecution’s Response to Karadžić’s Motion to Vacate Protective Measures of KDZ446 and for Extension of Time, 11 June 2009; Prosecution’s Response to Karadžić’s Motion for Extension of Time to Respond to Motion to Admit Testimony of Witness KDZ290, 15 June 2009; Prosecution’s Response to Karadžić’s Motion for Public Disclosure of Annexes and for Extension of Time to Respond to Motion to Admit Testimony of Witness KDZ 198, 11 June 2009; Prosecution Response to Karadžić’s Motion to Vacate Protective Measures, for Public Disclosure of Annexes, and for Extension of Time to Respond to Motion to Admit Testimony of 16 Witnesses under Rule 92 *quater*, 12 June 2009.

⁵ Prosecution’s Response to Karadžić’s Motion for Extension of Time to Respond to Rule 92 *bis* Motions, 15 June 2009, para. 4.

⁶ Meeting, T. 50.

⁷ Meeting, T. 61

⁸ Meeting, T. 57–58.

the proposed witnesses contained in the third and fourth Rule 92 *bis* Motions was to be completed before a review of the witnesses in the other Rule 92 *bis* Motions.⁹

6. On 18 June 2009, the Trial Chamber issued its “Order Following Upon Rule 65 *ter* Meeting and Decision on Motions for Extension of Time” (“Impugned Decision”) wherein it stated that it does not consider it necessary for the Accused or his defence team to interview each and every one of the proposed Rule 92 *bis* witnesses in order for him to be able to respond to the relevant motions from the Prosecution.¹⁰ However, in consideration of the volume of material covered by these motions, and the need to organise both the Accused’s own resources and the work of the Chamber itself, the Chamber granted the Motions for Extension of Time, in part, and ordered the Accused to respond to the motions on dates specified in a table.¹¹

7. On 25 June 2009, the Prosecution filed the “Prosecution’s Submission on Withdrawal of Seventeen Witnesses Contained in the Prosecution’s Fourth Rule 92 *bis* Motion” (“Prosecution’s Submission on Withdrawal”). Therein, the Prosecution states that the testimony of each of these 17 witnesses had been “supplanted by facts now judicially noticed” by the Chamber pursuant to Rule 94(B).¹² The Prosecution seeks to withdraw these 17 witnesses from the “Prosecution’s Fourth Motion for Admission of Statements and Transcripts of Evidence in lieu of Viva Voce Testimony Pursuant to Rule 92bis, Sarajevo Siege Witnesses”, filed on 29 May 2009, (“Fourth Rule 92 *bis* Motion”). The Prosecution does not, however, seek to withdraw these 17 witnesses from its Rule 65 *ter* witness list.¹³ Asserting that the Accused had stated his intention to challenge all facts, the Prosecution notes that it may re-submit its application for admission of these witnesses’ testimony pursuant to Rule 92 *bis* during the Prosecution phase of the trial, or in rebuttal, if the judicially noticed facts are challenged by the Accused.¹⁴

8. In the Application, the Accused, pursuant to Rule 73(B) of the Rules, requests the Chamber to certify an appeal on the part of the Impugned Decision relevant to the Motions for Extension of Time regarding the Rule 92 *bis* Motions.¹⁵ The Accused does not request certification to appeal the extensions of time granted to reply to the Rule 92 *quater* Motions, as interviews of those witnesses are not possible, and there are a manageable number of them.¹⁶

⁹ Meeting, T. 58.

¹⁰ Impugned Decision, para. 4.

¹¹ Impugned Decision, para. 18(b).

¹² Prosecution’s Submission on Withdrawal, para. 2.

¹³ Prosecution’s Submission on Withdrawal, para. 3.

¹⁴ Prosecution’s Submission on Withdrawal, para. 4.

¹⁵ Application, paras. 2, 7.

¹⁶ Application, para. 4.

However, the Application states that the schedule for responses to the Rule 92 *bis* Motions set by the Chamber would make meaningful investigation of the witnesses by the Accused impossible.¹⁷ The Accused alleges that this would affect the fairness of his trial because he will not have an opportunity to interview over 225 witnesses and those statements and testimonies will be admitted at the trial without cross-examination.¹⁸ Further, he alleges that this issue affects the expeditiousness of the trial as it involves the question of how many witnesses need not be called to testify.¹⁹ He also contends that an immediate decision by the Appeals Chamber would materially advance the proceedings; if the Trial Chamber were found to have erred, the judgement would have to be overturned to the extent it relied upon the Rule 92 *bis* witnesses who were not interviewed by the Accused.²⁰

9. In the “Prosecution’s Response to Karadžić’s Application for Certification to Appeal the Decision on Motions for Extension of Time: Rule 92 *bis*”, filed on 2 July 2009 (“Response”), the Prosecution contends that the Impugned Decision relates to neither an issue that would significantly affect the fair and expeditious conduct of the proceedings nor an issue for which an immediate resolution by the Appeals Chamber may materially advance the proceedings.²¹ The Prosecution asserts that the quantity and detail of material disclosed, as well as the extended response time, allows the Accused to adequately address whether he accepts or objects admission of the Rule 92 *bis* witnesses and identify those witnesses for whom he requests appearance for cross-examination.²² The Prosecution further submits that the Accused has not been denied the right to challenge any or all of the Chamber’s future decisions on the Prosecution’s Rule 92 *bis* Motions due to the effect of the Impugned Decision.²³

II. Applicable law

10. Rule 73(B) of the Rules provides for two requirements to be satisfied before a Trial Chamber may grant an application for certification to appeal: (a) the decision in question must involve an issue which would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, *and* (b) an immediate resolution of the issue by the

¹⁷ Application, para. 3.

¹⁸ Application, para. 7.

¹⁹ Application, para. 8.

²⁰ Application, para. 9.

²¹ Response, para. 1.

²² Response, para. 4.

²³ Response, para. 5.

Appeals Chamber may, in the opinion of the Trial Chamber, materially advance the proceedings.²⁴

11. The Trial Chamber recalls that “even when an important point of law is raised, ... the effect of Rule 73(B) is to preclude certification unless the party seeking certification establishes that both conditions are satisfied.”²⁵ In addition, it should be noted that, even where both requirements of the Rule are satisfied, certification remains in the discretion of the Chamber.²⁶

III. Discussion

12. The Chamber does not consider that the Impugned Decision affects the fair and expeditious conduct of the present proceedings. The Chamber has continually been conscious of making the proceedings as fair as possible to the Accused. It is for that reason that it has given the Accused substantial extensions of time to respond to Prosecution’s Rule 92 *bis* Motions.²⁷ In addition, as indicated in the Impugned Decision, the Chamber is aware that the timing of the Accused’s response to the seventh of the Rule 92 *bis* Motions, regarding delayed disclosure witnesses, must take into account the date upon which he has access to the identities and prior testimony or statements of these witnesses.²⁸ The Chamber has already indicated that the date for response to this Motion is subject to the understanding that, should the Accused not have access to this information by that time, he may seek a further extension.²⁹

13. The Trial Chamber recalls its position that it does not consider it necessary for the Accused to interview the witnesses before responding to the Rule 92 *bis* Motions,³⁰ especially

²⁴ *Prosecutor v. Karadžić*, Case No. IT-95-5/18-PT, Decision on Accused’s Application for Certification to Appeal Decision on Languages, 22 April, 2009, para. 4, citing *Prosecutor v. Milutinović et. al.*, Case No. IT-05-87-T, Decision on Lukić Motion for Reconsideration of Trial Chamber’s Decision on Motion for Admission of Documents from Bar Table and Decision on Defence Request for Extension of Time for Filing of Final Trial Briefs, 2 July 2008, para. 42; *Prosecutor v. Milutinović et. al.*, Case No. IT-05-87-PT, Decision on Prosecution’s Request for Certification for Appeal of Decision on Vladimir Lazarević and Sreten Lukić’s Preliminary Motions on Form of the Indictment, 19 August 2005, p. 3; *Prosecutor v. Milošević*, Case No. IT-02-54-T, Decision on Prosecution Motion for Certification of Trial Chamber Decision on Prosecution Motion for *Voir Dire* Proceeding, 20 June 2005, para. 2; *Prosecutor v. Halilović*, Case No. IT-01-48-PT, Decision on Prosecution Request for Certification for Interlocutory Appeal of “Decision on Prosecutor’s Motion Seeking Leave to Amend the Indictment”, 12 January 2005 (“*Halilović* Decision”), p. 1.

²⁵ *Prosecutor v. Karadžić*, Case No. IT-95-5/18-PT, Decision on Accused’s Application for Certification to Appeal Decision on Languages, 22 April, 2009, para. 5, citing *Halilović* Decision, p. 1.

²⁶ *Prosecutor v. Karadžić*, Case No. IT-95-5/18-PT, Decision on Accused’s Application for Certification to Appeal Decision on Languages, 22 April, 2009, para. 5, citing *Prosecutor v. Tolimir*, Case No. IT-05-88/2-PT, Decision on Motion for Certification to Appeal the 11 December Oral Decision, 15 January 2008, para. 4; *Prosecutor v. Strugar*, Case No. IT-01-42-T, Decision on Defence Motion for Certification, 17 June 2004, para. 2; *Prosecutor v. Popović et al.*, Case No. IT-05-88-T, Decision on Defence Motion for Certification to Appeal Decision Admitting PW-104 Interview Statements, 25 April 2007, p. 1.

²⁷ Impugned Decision, para. 18(b).

²⁸ Impugned Decision, para. 6.

²⁹ Impugned Decision, para. 6.

³⁰ Impugned Decision, para. 4.

since he has been provided with the detailed evidence of each of those witnesses in writing. In addition, it is worth noting that, more than half of the witnesses listed in the Rule 92 *bis* Motions have been cross-examined in other cases.

14. The Chamber notes that if there were specific circumstances that warranted a delay in responding to the Prosecution's Rule 92 *bis* Motions vis à vis a particular witness, the Accused could apply for further time to respond regarding that witness. For the Chamber to be convinced that a request of this nature affected the fair and expeditious conduct of the proceedings or the outcome of the trial, the Accused would have to have provided a specific basis describing why he needed time to interview individual witnesses.

15. Furthermore, the Application is premature. The Impugned Decision is essentially a discretionary pre-trial management decision setting a timetable to regulate the arrangements for the Accused to respond to a series of similar motions. The Accused may seek certification to appeal the substantive decisions that the Chamber makes on these motions in relation to specific witnesses. At this stage in the proceedings, however, it cannot be said that the timetable set forth in its Impugned Decision ("Timetable") itself affects the fair and expeditious conduct of the proceedings. For all these reasons, the Chamber considers that the first prong of the Rule 73(B) test is not satisfied.

16. Even if the first prong of the Rule 73(B) test were met, the Chamber is of the view that an immediate resolution of the issue by the Appeals Chamber would not materially advance the proceedings. The Timetable is a crucial element of the pre-trial management of the proceedings and to have it resolved by the Appeals Chamber would cause unnecessary delay. The Accused has failed to indicate that the resolution of this issue would serve to do anything other than stall the pre-trial management of the proceedings. For these reasons, the Chamber considers that the second prong of the Rule 73(B) test is also not satisfied.

17. Nevertheless, having reviewed the Timetable, the Chamber considers that some of the deadlines are very demanding in view of the volume of material to be considered. Further, the Chamber notes that the First Adjudicated Facts Decision has led to reductions in the volume of the witnesses whose evidence the Prosecution seeks to admit in the Rule 92 *bis* Motions, as noted in the Prosecution's Submission on Withdrawal. Finally, as discussed at the Status Conference of 1 July, the trial is not likely to start until September 2009.³¹ Accordingly, in light of these new circumstances, it is clear to the Chamber that it would assist the good management of the case and assist the Accused to make best use of the available time if the deadlines for

³¹ Status Conference, T. 330 (1 July 2009).

responses to the Rule 92 *bis* Motions were postponed to a date after the likely date of issue of related adjudicated facts decisions.³²

18. In light of the volume of material covered by these motions, and the need to organise both the Accused's own resources and the work of the Chamber itself, the Chamber will exercise its discretion to order the Accused to respond to the Rule 92 *bis* Motions and Rule 92 *quater* Motions on the dates set out below, in place of those set out in the Impugned Decision.

IV. Disposition

19. Accordingly, the Trial Chamber, pursuant to Rule 73(B) of the Rules, hereby

(A) **DENIES** the Application; and

(B) **ORDERS** the Accused to file his responses to the various Rule 92 *bis* and 92 *quater* motions on or before the dates listed hereunder:

Prosecution's Motion for Admission of Testimony of Witness KDZ198 and Associated Exhibits Pursuant to Rule 92 <i>quater</i>	14 July 2009
Prosecution's Motion for Admission of the Evidence of Sixteen Witnesses Pursuant to Rule 92 <i>quater</i> , with Confidential Appendices A, B and C	14 July 2009
Prosecution's Third Motion for Admission of Statements and Transcripts of Evidence in lieu of <i>Viva Voce</i> Testimony Pursuant to Rule 92 <i>bis</i> (Witnesses for Sarajevo Municipalities)	16 July 2009
Prosecution's Fourth Motion for Admission of Statements and Transcripts of Evidence in lieu of <i>Viva Voce</i> Testimony Pursuant to Rule 92 <i>bis</i> , Sarajevo Siege Witnesses	16 July 2009
Prosecution's Motion for Admission of the Evidence of KDZ297 Pursuant to Rule 92 <i>quater</i> , with Public Appendices A, B and Confidential Appendices C, D, E	4 August 2009
Prosecution's Motion for Admission of the Evidence of KDZ172 Pursuant to Rule 92 <i>quater</i> , with Public Appendices A-B and Confidential Appendices C-F	4 August 2009
Prosecution's Fifth Motion for Admission of Statements and Transcripts of Evidence in lieu of <i>Viva Voce</i> Testimony Pursuant to Rule 92 <i>bis</i> (Srebrenica Witnesses)	4 August 2009

³² The Chamber is seized of the Third Prosecution Motion for Judicial Notification of Adjudicated Facts, filed on 6 April 2009, and has received the Accused's Response to that motion on 29 May 2009. The Chamber is actively considering these submissions. The Chamber is also seized of the Second Prosecution Motion for Judicial Notice of Adjudicated Facts and Corrigendum to First Prosecution Motion for Judicial Notice of Adjudicated Facts, filed on 16 March 2009. The Chamber awaits the Accused's response to that motion by 27 July 2009, and will consider the motion immediately thereafter.

Prosecution's Motion for Admission of Testimony of Witness KDZ446 and Associated Exhibits Pursuant to Rule 92 ^{quater}	6 August 2009
Prosecution's Sixth Motion for Admission of Statements and Transcripts of Evidence in lieu of <i>Viva Voce</i> Testimony Pursuant to Rule 92bis: Hostage Witnesses	18 August 2009
Prosecution's First Motion for Admission of Statements and Transcripts of Evidence in lieu of <i>Viva Voce</i> Testimony Pursuant to Rule 92bis (Witnesses for Eleven Municipalities)	25 August 2009
Prosecution's Motion for Admission of the Evidence of Eight Experts Pursuant to Rule 94bis and Rule 92bis, with Appendix A and Confidential Appendix B, 29 May 2009	25 August 2009
Prosecution's Seventh Motion for Admission of Statements and Transcripts of Evidence in lieu of <i>Viva Voce</i> Testimony Pursuant to Rule 92bis: Delayed Disclosure, 29 May 2009	31 August 2009
Prosecution's Second Motion for Admission of Statements and Transcripts of Evidence in lieu of <i>Viva Voce</i> Testimony Pursuant to Rule 92bis (Witnesses for ARK Municipalities)	31 August 2009

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



Judge Iain Bonomy
Presiding

Dated this eighth day of July 2009
At The Hague
The Netherlands

[Seal of the Tribunal]