



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: 22 March 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: 22 March 2012

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC WITH CONFIDENTIAL ANNEX A

**DECISION ON PROSECUTION'S SECOND MOTION FOR ADMISSION OF
SLOBODAN STOJKOVIĆ'S EVIDENCE IN LIEU OF *VIVA VOCE* TESTIMONY
PURSUANT TO RULE 92 *BIS***

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 “Prosecution Second Motion for Admission of Slobodan Stojković’s Evidence in Lieu of *Viva Voce* Testimony Pursuant to Rule 92 *bis* with Public Appendix A and Confidential Appendix B”, filed on 20 February 2012 (“Motion”), and hereby issues its decision thereon.

I. Background and Submissions

1. On 21 December 2009, the Chamber issued its “Decision on Prosecution’s Fifth Motion for Admission of Statements in Lieu of *Viva Voce* Testimony Pursuant to Rule 92 *bis* (Srebrenica Witnesses)”, whereby it provisionally admitted, *inter alia*, the written statements of Slobodan Stojković (“Witness”) without requiring the Witness to appear for cross-examination, pursuant to Rule 92 *bis* of the Tribunal’s Rules of Procedure and Evidence (“Rules”), and subject to the Office of the Prosecutor (“Prosecution”) obtaining the required Rule 92 *bis*(B) attestation for the Witness’s statements.¹

2. On 3 December 2010, the Prosecution filed the “Prosecution Supplemental Submission Concerning the Trial Chamber’s Order in Relation to Outstanding Exhibit Issues”, whereby it withdrew its request for admission of the Witness’s statements pursuant to Rule 92 *bis*, explaining that, despite the Prosecution’s efforts, and due to the Witness’s refusal to cooperate, the Prosecution had been unable to secure the required Rule 92 *bis*(B) attestation from the Witness.²

3. In the Motion, the Prosecution requests the Chamber to admit the transcript of the Witness’s testimony given on 1 December 2010 in the case of *Prosecutor v. Tolimir*, Case No. IT-05-88/2 (“*Tolimir* case”), pursuant to Rule 92 *bis* of the Rules.³ Furthermore, the Prosecution provides a list of exhibits associated with the Witness’s testimony in the *Tolimir* case, and explains that two of those exhibits have already been admitted into evidence in this case, and that it does not seek the admission of the rest at this point.⁴

4. In support of its request, the Prosecution submits that the proposed evidence is relevant, since the Witness’s testimony directly relates to the crimes alleged in Counts 2 to 6 of the

¹ Public Redacted Version of “Decision on Prosecution’s Fifth Motion for Admission of Statements in Lieu of *Viva Voce* Testimony Pursuant to Rule 92 *bis* (Srebrenica Witnesses)” Issued on 21 December 2009, 6 March 2012 (“Decision on Fifth Rule 92 *bis* Motion”), para. 67(B)(4).

² Public Redacted Version of “Prosecution Supplemental Submission Concerning the Trial Chamber’s Order in Relation to Outstanding Exhibit Issues” Filed on 03 December 2010, 9 March 2012, paras. 5–6.

³ Motion, paras. 1, 3, 18, noting that the Witness’s transcript is accessible in ecourt as Rule 65 *ter* number 23623.

Indictment.⁵ It adds that the proposed evidence is reliable and that, despite the fact that the Defence in the *Tolimir* case decided not to cross-examine the Witness, and that he was only questioned by the Judges in that case, the Chamber previously found that the lack of or limited cross-examination does not *per se* necessitate the need for the Witness to appear for cross-examination.⁶ Regarding the proposed evidence's probative value, the Prosecution recalls that the Chamber was previously satisfied of the probative value of the Witness's statements in general.⁷

5. Furthermore, the Prosecution submits that the proposed evidence meets the formal criteria for admission under Rule 92 *bis* since the Witness gave sworn testimony before the Tribunal.⁸ It adds that this evidence is "crime based" and does not relate to the "acts and conduct" of the Accused.⁹ It then explains that the Witness gave testimony related to the "Scorpions" unit as well as on his participation in the filming of the footage of the execution of six Bosnian Muslim men near Trnovo, which is in evidence in the present case and is known as the "Scorpions Srebrenica video" ("Scorpions video").¹⁰ The Prosecution recalls that the Chamber previously found the Witness's statements admissible on these grounds and states that the Witness's evidence in the *Tolimir* case confirms the information contained in those statements.¹¹ The Prosecution also submits that the proposed evidence is cumulative,¹² and adds that the Witness's evidence does not touch upon a "live and important" issue between the parties.¹³

6. Finally, the Prosecution recalls the Chamber's finding in the Decision on Fifth Rule 92 *bis* Motion not to use its discretion to call the Witness for cross-examination pursuant to Rule 92 *bis* (C), and concludes that the same finding applies to the proposed evidence.¹⁴

7. On 21 February 2012, the Accused filed the "Response to Prosecution's Second Motion to Admit Evidence of Slobodan Stojkovic without Cross Examination" ("Response") whereby he does not oppose the admission of the Witness's testimony in the *Tolimir* case as long as he is

⁴ Motion, para. 17; Appendix A.

⁵ Motion, para. 9; Appendix A.

⁶ Motion para. 10, referring to Decision on Fifth Rule 92 *bis* Motion, para. 42.

⁷ Motion para. 11, referring to Decision on Fifth Rule 92 *bis* Motion, para. 33.

⁸ Motion, para. 6.

⁹ Motion, paras. 7–8.

¹⁰ Motion, para. 7.

¹¹ Motion para. 8, referring to Decision on Fifth Rule 92 *bis* Motion, paras. 34, 35.

¹² Motion para. 13. It further notes that the Chamber previously found the Witness's evidence about the Scorpions video to be cumulative of other evidence; Motion para. 13, referring to Decision on Fifth Rule 92 *bis* Motion, para. 37 (xiii).

¹³ Motion para. 13.

¹⁴ Motion, paras. 14–15, referring to Decision on Fifth Rule 92 *bis* Motion, para. 42.

granted the opportunity to cross-examine the Witness.¹⁵ The Accused submits that, if called for cross-examination, the Witness could provide valuable evidence which was not elicited during his cross-examination in the *Tolimir* case, and which goes directly to the issue of *mens rea* for genocide as charged in Count 2 of the Indictment.¹⁶

8. Furthermore, the Accused submits that, taking into account the Prosecution's previous experience with the Witness's refusal to certify his statements, it is likely that the Accused would be unable to obtain a supplemental statement from the Witness that he could also tender pursuant to Rule 92 *bis*. Therefore, admitting the Witness's evidence from the *Tolimir* case without calling him for cross-examination would be prejudicial to the Accused.¹⁷

9. Having been granted leave to reply,¹⁸ the Prosecution filed the "Reply to Karadžić's 'Response to Prosecution's Second Motion to Admit Evidence of Slobodan Stojković without Cross Examination'" on 28 February 2012 ("Reply"). The Prosecution submits that the Accused does not contest the evidence or the credibility of the Witness and that the sole justification to cross-examine the Witness is to elicit evidence in support of the Accused's defence case.¹⁹ In this sense, the Prosecution argues that this is not one of the relevant criteria for assessing whether to call a witness for cross-examination, and sustains that, if the Accused wishes to adduce evidence from any witness concerning an issue of marginal relevance, the proper method to do so is to call that witness during the defence case.²⁰

10. Additionally, the Prosecution repeats that the Witness's evidence is cumulative and crime-based, and that it does not concern a live and important issue between the parties, nor the acts or conduct of the Accused, nor any acts or conduct which go to establish that the Accused participated in a joint criminal enterprise ("JCE").²¹ It further argues that, evidence of a "small perpetrator group's animus or lack of animus towards all Muslims" is of insufficient significance in this context to warrant calling the Witness for cross-examination.²²

11. In relation to the Accused's claim that the Accused would likely be unable to obtain a written supplemental statement from the Witness, the Prosecution submits that the proper

¹⁵ Response, paras. 1, 2.

¹⁶ Response, paras. 2–4.

¹⁷ Response, para. 5.

¹⁸ Oral ruling, T. 25118 (23 February 2012). *See also* Request for Leave to Reply to Karadžić's "Response to Prosecution's Second Motion to Admit Evidence of Slobodan Stojković without Cross Examination", 23 February 2012.

¹⁹ Reply, para. 2.

²⁰ Reply, paras. 3, 7.

²¹ Reply, para. 5.

²² Reply, para. 6.

method to compel a prospective witness to provide a supplemental statement is to seek a subpoena for pre-trial interview or for testimony during the defence case, and not to call him for cross-examination.²³ Finally, regarding the issue of the relevance of the evidence which the Accused seeks to elicit from the Witness if he is called for cross-examination, the Prosecution submits that the Accused has not provided any factual basis for his assertion, and that it is therefore speculative. In any event, the Prosecution argues that the evidence is of limited relevance because it goes directly to the *mens rea* of members of the Scorpions, whilst the central issue in the present case is the *mens rea* of the Accused.²⁴

II. Discussion

12. The Chamber has set out the law applicable to motions filed pursuant to Rule 92 *bis* of the Rules in the “Decision on 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 Municipality)” issued on 15 October 2009 (“Decision on Third Rule 92 *bis* Motion”), and will not further recount it in this Decision, but will refer to the relevant paragraphs of the Decision on Third Rule 92 *bis* Motion when necessary.²⁵

13. In 1995, the Witness was one of the approximately 250 members of the Serbian unit known as the “Scorpions”. The Witness was head of the kitchen and was also in charge of provision of supplies, primarily food. During his testimony in the *Tolimir* case, the Witness testified among other things about the composition, chain of command, functioning, and assignments of the Scorpions unit. Furthermore, he testified that, in July 1995, he and approximately 120 other members of the unit were sent to Trnovo and that he was tasked by the unit’s commander with filming and documenting the activities of the Scorpions. The Witness provided detailed evidence on the Scorpions video, including the filming of the execution of six Bosnian Muslim men near Trnovo, the events surrounding the filming of the video, and the orders he received in that regard.

14. As stated in the Decision on Third Rule 92 *bis* Motion, “[a]ny evidence admitted pursuant to Rule 92 *bis* must satisfy the fundamental requirements for the admission of evidence, as set out in Rule 89(C) and (D) of the Rules, namely, the evidence must be relevant and have probative value, and its probative value must not be substantially outweighed by the need to ensure a fair trial.”²⁶ The Chamber has reviewed the Witness’s evidence in the *Tolimir*

²³ Reply, para. 8.

²⁴ Reply, para. 10.

²⁵ Decision on Third Rule 92 *bis* Motion, paras. 4–11.

²⁶ Decision on Third Rule 92 *bis* Motion, para. 4.

case and is satisfied of its probative value and relevance as it relates to a number of the charges in the Indictment against the Accused, namely, genocide (Count 2), persecutions (Count 3), and extermination and murder (Counts 4, 5, and 6).

15. With respect to the admissibility of the proposed evidence, the Chamber is satisfied that it is crime-base evidence and that it does not pertain to the acts and conduct of the Accused or any acts or conduct which goes to establish that the Accused participated in a JCE, as charged in the Indictment, or shared with the person who allegedly committed the crimes charged in the Indictment the requisite intent for those crimes. Furthermore, in undertaking an analysis of the cumulative nature of the evidence subject of the Motion, the Chamber is satisfied that the proposed evidence is cumulative of exhibit P665, as well as of the evidence described in Confidential Annex A to this Decision.

16. Having analysed the proposed evidence, the Chamber notes that part of it refers to the actions of Slobodan Medić (who was in command of the Scorpions unit at the time), Aleksandar Vukov (the deputy commander of the unit), and Branislav Vučenović (the Witness's immediate superior at the time). However, the Chamber is satisfied that the evidence neither indicates that the Accused participated in the alleged executions at Trnovo, nor that he shared the intent of Slobodan Medić, Aleksandar Vukov, or Branislav Vučenović, for allegedly committing the acts as described by the Witness. Thus the Chamber does not consider that the Witness's testimony that relates to the actions of those individuals alone is sufficient to render the proposed evidence inadmissible. The Chamber notes that there are no other factors that weigh against the admission of the Witness's evidence in the *Tolimir* case, and therefore finds that the proposed evidence is admissible pursuant to Rule 92 *bis*(A).

17. Having found the proposed evidence to be admissible pursuant to Rule 92 *bis*, the Chamber will decide whether to use its discretion to require the Witness to appear for cross-examination, in which case the provisions of Rule 92 *ter* shall apply. In making its assessment for this particular case, the Chamber will take into account the criteria pertaining to Rule 92 *bis*(C) established in the case-law of the Tribunal, and described in detail in the Decision on Third Rule 92 *bis* Motion.²⁷

18. First, the Chamber notes that the Witness was not cross-examined in the *Tolimir* case and was only questioned by the Judges in that case. However, as the Chamber has previously found, the lack of cross-examination in previous proceedings does not, *per se*, mean that

²⁷ Decision on Third Rule 92 *bis* Motion, para. 10.

witnesses need to appear for cross-examination in this case.²⁸ In this particular instance, and as stated above, the Chamber is satisfied that the evidence is cumulative, “crime-base”, and does not represent a “critical” or “pivotal” element of the Prosecution’s case, and there is nothing to require the appearance of the Witness for cross-examination. Furthermore, and contrary to the Accused’s argument that admitting the Witness’s evidence without calling him for cross-examination would be prejudicial to him, the Chamber notes that regardless of the Accused’s likelihood, or lack thereof, of obtaining an admissible supplemental statement from the Witness, calling the Witness for cross-examination when the proposed evidence is admissible under Rule 92 *bis* is merely a practical consideration devised to remedy an hypothetical situation. A finding to the contrary would be in contradiction with the spirit of Rule 92 *bis*. If ultimately the Accused finds it important for the presentation of his case to adduce evidence from the Witness, the Accused may choose to call him during the defence case and, if necessary, may try to compel him by seeking a subpoena from the Chamber at the time. Thus, on the basis of the above, the Chamber considers that it is not necessary for the Witness to appear for cross-examination.

²⁸ See Decision on Third Rule 92 *bis* Motion, para. 42.

III. Disposition

19. Accordingly, pursuant to Rules 89 and 92 *bis* of the Rules, the Chamber hereby **GRANTS** the Motion and:

- a) **ORDERS** that Slobodan Stojković's prior testimony in the *Tolimir* case be admitted into evidence without requiring the Witness to appear for cross-examination;
- b) **REQUESTS** the Registry to assign an exhibit number to the document with Rule 65 *ter* number 23623, which has now been admitted into evidence.

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



Judge O-Gon Kwon
Presiding

Dated this twenty-second day of March 2012
At The Hague
The Netherlands

[Seal of the Tribunal]