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-95-5/18-T

Date: 19 September 2013

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: **19 September 2013**

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

DECISION ON ACCUSED'S MOTION TO VARY LIST OF WITNESSES: SREBRENICA COMPONENT

Office of the Prosecutor

Mr. Alan Tieger
Ms. Hildegard Uertz-Retzlaff

The Accused

Mr. Radovan Karadžić

Standby Counsel

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 Accused's "Motion to Vary List of Witnesses: Srebrenica Component", filed on 21 August 2013 ("Motion"), and hereby issues its decision thereon.

I. Background and Submissions

1. In the Motion, the Accused moves for an order pursuant to Rule 73 *ter* (D) of the Tribunal's Rules of Procedure and Evidence ("Rules") allowing him to add four witnesses, namely Mile Petrović, Witness P-138, Borivoje Jakovljević, and Milenko Todorović (together "Proposed Witnesses"), to his list of witnesses submitted pursuant to Rule 65 *ter* of the Rules ("65 *ter* list").[1] The Accused further provides notice to the Chamber of his withdrawal of 42 Srebrenica related witnesses from his 65 *ter* list, as listed in the confidential annex to the Motion.[2]

2. The Accused argues that the Motion "is an effort to streamline his defence to the Srebrenica allegations by focusing on witnesses whose testimony can be presented in fewer hours and whose testimony is more targeted to disputed issues."[3] For each of the Proposed Witnesses, the Motion provides a summary of their anticipated testimony, as well as an analysis of its probative value and *prima facie* relevance.[4]

3. The Accused contends that the Prosecution will not be prejudiced by the addition of the Proposed Witnesses.[5] He explains that in the event the Motion is granted, the Accused may file a motion to admit the Proposed Witnesses' evidence pursuant to Rule 92 *bis* of the Rules, in which case the Prosecution would not have to prepare for cross-examination "and will suffer no lack of time to prepare".[6] Alternatively, if the Proposed Witnesses testify in person, the Accused would tender their prior testimony pursuant to Rule 92 *ter* and would not call them until 2014, which would give the Prosecution sufficient time to prepare.[7] The Accused claims that any prejudice to the Prosecution is outweighed by the relevance and probative value of the

[1] Motion, paras. 1, 27.
[2] Motion, paras. 1, 26, 27; Confidential Annex A.
[3] Motion, para. 5.
[4] *See* Motion, paras. 6–19.
[5] Motion, para. 20.
[6] Motion, para. 21.
[7] Motion, para. 22.

Proposed Witnesses' testimony, as well as by the time saved "in presenting this evidence in lieu of witnesses proposed to be withdrawn".[8]

4. According to the Accused, the variation of his 65 *ter* list would be beneficial to his case to refute Momir Nikolić's evidence about the existence of a plan to kill the Bosnian Muslim men from Srebrenica.[9] The Accused explains that he did not include the Proposed Witnesses in his original 65 *ter* list filed in August 2012, despite the fact that their prior testimony pre-dates the filing of the list because, at that time, he had not read their testimony among the "hundreds of thousands of pages of Srebrenica-related material available to him".[10] The Accused explains that he only became aware of the Proposed Witnesses' testimony in 2013, after Drago Nikolić refused to testify, when he was looking for other witnesses who could refute aspects of Momir Nikolić's testimony, "and whose testimony would not consume an inordinate amount of time".[11] Thus, given the limited amount of hours remaining for the presentation of his case, the Accused considers that his case would be best presented by adding the Proposed Witnesses to the 65 *ter* list and by withdrawing 42 other Srebrenica related witnesses.[12]

5. On 28 August 2013, the Prosecution filed its "Prosecution Response to Defence Motion to Vary List of Witnesses" ("Response"), stating that it does not oppose the Motion, but clarifying that it will require the attendance of the Proposed Witnesses for cross-examination.[13] The Prosecution further adds that it will oppose any application for admission of the Witnesses' evidence pursuant to Rule 92 *bis* of the Rules.[14]

II. Applicable Law

6. Rule 73 *ter* (D) of the Rules provides: "After commencement of the defence case, the defence may, if it considers it to be in the interests of justice, file a motion to reinstate the list of witnesses or to vary the decision as to which witnesses are to be called". The Chamber may grant such a motion when it is in the interests of justice.[15] In making such a determination, the Trial Chamber shall take into consideration several factors, including whether the proposed

[8] Motion, para. 23.
[9] Motion, para. 25.
[10] Motion, para. 24.
[11] *Ibid*.
[12] Motion, para. 25.
[13] Response, paras. 1–2.
[14] Response, para. 2.
[15] Decision on Accused's Motion to Vary List of Witnesses, 21 February 2013, para. 5, citing *Prosecutor v. Gotovina et al.*, Case No. IT-06-90-T, Decision on Čermak Defence's Second and Third Motions to Add a Witness to Its Rule 65 *ter* (G) Witness List, 22 September 2009, para. 7 and *Prosecutor v. Stanišić and Simatović*, Case No. IT-03-69-T, Decision on Stanišić Defence Motion to Add Witness DST-081 to Its Rule 65 *ter* Witness List, 20 October 2011, para. 4.

evidence is *prima facie* relevant and of probative value.[16] The Chamber should also balance the defence's right to present available evidence during his defence case with the Prosecution's right to have adequate time to prepare its cross-examination of the proposed new witnesses.[17] The Chamber will also consider whether the defence has shown good cause why it did not seek to add the witness to the list at an earlier stage of the proceedings.[18] Good cause may exist when witnesses have only recently become available to give evidence or the relevance of the evidence has only recently become apparent.[19]

III. Discussion

7. The Chamber considers that the Proposed Witnesses' anticipated evidence, as described in the Motion, is relevant to issues related to the execution of Bosnian Muslim prisoners in Srebrenica in July 1995 and, in particular, the alleged pre-existence of a plan to kill these prisoners. These issues are important to the alleged participation of the Accused in the alleged joint criminal enterprise to eliminate the Bosnian Muslims in Srebrenica in 1995, as charged in the Third Amended Indictment. The Chamber has also taken note of the Accused's intention to bring the Proposed Witnesses before the Chamber in order to refute the evidence of Prosecution witness Momir Nikolić. For these reasons, the Chamber is satisfied of the *prima facie* relevance and probative value of the anticipated evidence.

8. The Chamber notes that the Prosecution does not object to the addition of the Proposed Witnesses to the Accused's 65 *ter* list and considers that such additions would not negatively affect the Prosecution's right to have adequate time to prepare its cross-examination. Furthermore, in light of the Accused's notice of withdrawal of 42 witnesses from his 65 *ter* list, the Chamber considers that the addition of the Proposed Witnesses would not cause an undue delay to these proceedings nor would it require an extension of the 300 hours of time allocated to the Accused for the presentation of his defence case. Therefore, the Chamber does not find that the addition of the Proposed Witnesses impacts on the need to ensure a fair trial.

9. The Chamber is concerned that the Accused did not include the Proposed Witnesses in his 65 *ter* list at an earlier stage and does not accept in full the reasons adduced by the Accused for only becoming aware of the Proposed Witnesses' prior testimony at such a late stage of the proceedings. However, given the advanced stage of the Defence case,[20] the Chamber considers

[16] *Ibid*.
[17] *Ibid*.
[18] *Ibid*.
[19] *Ibid*.
[20] The Chamber notes that the Defence phase of the case began on 16 October 2012 and that, as of the date of this decision, the Accused had spent about 233 hours of the 300 hours he was granted for the presentation of his case.

it important to allow the Accused a certain degree of flexibility in the presentation of his case, so that he can use the remainder of his allocated time as efficiently as possible. The Chamber is therefore satisfied that good cause has been shown for the late addition of the Proposed Witnesses to the Accused's 65 *ter* list.

10. For the above reasons, the Chamber considers that it is in the interests of justice to grant the addition of the Proposed Witnesses and the withdrawal of 42 other Srebrenica related witnesses from the Accused's 65 *ter* list.

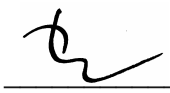
IV. Disposition

11. Accordingly, the Chamber, pursuant to Rules 54 and 73 *ter* (D) of the Rules, hereby:

a) **GRANTS** the Motion; and

b) **ORDERS** the Accused to implement the changes to the 65 *ter* list no later than 18 October 2013, as ordered by the Chamber in the "Decision on Accused's Motions for Severance of Count 1 and Suspension of Defence Case", issued on 2 August 2013.

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



Judge O-Gon Kwon
Presiding

Dated this nineteenth day of September 2013
At The Hague
The Netherlands

[Seal of the Tribunal]