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: 29 November 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: **29 November 2013**

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

DECISION ON ACCUSED'S MOTION TO ADMIT STATEMENTS PURSUANT TO RULE 92 *BIS* (SREBRENICA COMPONENT)

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 Accused's "Motion to Admit Statements Pursuant to Rule 92 *bis* (Srebrenica Component)", filed on 29 October 2013 ("Motion"), and hereby issues its decision thereon.

I. Background and Submissions

1. On 26 April 2012, the Chamber issued its "Scheduling Order on Close of the Prosecution Case, Rule 98 *bis* Submissions, and Start of the Defence Case" ("Scheduling Order") in which it ordered the Accused to file motions for admission of evidence of his witnesses pursuant to Rule 92 *bis* of the Tribunal's Rules of Procedure and Evidence ("Rules"), if any, by no later than 27 August 2012 ("Deadline").[1]

2. On 21 August 2013, the Accused filed a "Motion to Vary List of Witnesses: Srebrenica Component" ("Motion to Vary List of Witnesses"), requesting the Chamber *inter alia* to allow him to add four witnesses, including Mile Petrović, Borivoje Jakovljević, and Milenko Todorović, to his list of witnesses submitted pursuant to Rule 65 *ter* of the Rules ("65 *ter* list").[2]

3. On 19 September 2013, the Chamber issued its "Decision on Accused's Motion to Vary List of Witnesses: Srebrenica Component" ("Decision on Motion to Vary List of Witnesses"), expressing its concern that the four witnesses had not been included in the Accused's 65 *ter* list at an earlier stage and stating that it did not accept in full the reasons adduced by the Accused for only becoming aware of their prior testimony at such a late stage of the proceedings.[3] However, taking into account that a certain degree of flexibility in the presentation of the Accused's case should be allowed, the Chamber was ultimately satisfied that good cause had been shown and granted the Accused's request.[4]

4. In the Motion, the Accused now moves, pursuant to Rule 92 *bis* of the Rules, for the admission of Srebrenica-related evidence, namely: (i) a statement given by Mile Petrović to the Bratunac police station on 25 August 2003, a statement given by Petrović to defence investigators from the Tribunal on 29 September 2003, and the transcript of Petrović's prior testimony during Momir Nikolić's sentencing hearing (together "Rule 92 *bis* package");[5] (ii) the

[1] Scheduling Order, para. 25.
[2] Motion to Vary List of Witnesses, paras. 1, 27.
[3] Decision on Motion to Vary List of Witnesses, para. 9.
[4] Decision on Motion to Vary List of Witnesses, paras. 9–11.
[5] The Rule 92 *bis* package for Petrović has been uploaded into e-court as 1D09174.

transcript of Borivoje Jakovljević's prior testimony in the *Blagojević and Jokić* case,[6] and (iii) the transcript of Milenko Todorović's prior testimony in the *Tolimir* case, together with a number of associated exhibits (together "Proposed Evidence").[7]

5. The Accused claims that he has good cause for not complying with the Deadline as the witnesses were only added to his 65 *ter* list after it had passed.[8] At the same time, the Accused also argues that he "has tried hard to present his defence case through oral testimony" but that, now that the Chamber has allocated the hours that the Accused will have to complete his case, he "must utilize secondary forms of evidence, such as Rule 92 *bis*, in order to place before the Chamber as much of his evidence as possible".[9]

6. The Accused further argues that the criteria for admission under Rule 92 *bis* have been met,[10] as the Proposed Evidence (i) will serve to show that several portions of Momir Nikolić's evidence before the Chamber are false;[11] (ii) does not touch on his acts and conduct;[12] and (iii) is cumulative of the evidence given by a number of other Defence witnesses showing that Momir Nikolić's testimony is false.[13] Furthermore, according to the Accused, the Office of the Prosecutor ("Prosecution") has had a full and fair opportunity to cross-examine Petrović, Jakovljević, and Todorović.[14] The Accused also acknowledges that the proposed evidence of Jakovljević and Todorović goes to a live and important issue in the case, namely, whether a plan to kill the prisoners in Srebrenica existed before the Kravica warehouse incident,[15] and adds that Petrović's proposed evidence touches upon a significant issue, namely Momir Nikolić's credibility.[16]

7. On 12 November 2013, the Prosecution filed the "Prosecution Response to Motion to Admit Statements Pursuant to Rule 92 *bis* (Srebrenica Component)" ("Response") in which it reminds the Chamber of its earlier indication that it would oppose any motion for admission of evidence pursuant to Rule 92 *bis* in relation to Petrović, Jakovljević and Todorović, and accordingly opposes the Motion.[17] The Prosecution argues that the Accused has failed to show

[6] Jakovljević's transcript of prior testimony has been uploaded into e-court as 1D09175.
[7] Motion, paras. 1, 22. For Todorović, *see infra*, paras. 8–9.
[8] Motion, para. 3.
[9] Motion, para. 2.
[10] Motion, para. 8.
[11] Motion, paras. 10–11, 14–15, 18–19.
[12] Motion, paras. 11, 15, 19.
[13] Motion, paras. 11, 15, 19.
[14] Motion, paras. 12, 16, 20.
[15] Motion, paras. 15, 19.
[16] Motion, para. 11.
[17] Response, para. 1.

that the Proposed Evidence meets the requirements of Rule 92 *bis* because (i) it addresses live and important issues in dispute in this case, (ii) is not cumulative of other factual evidence, and/or (iii) relates to the actions of a member of an alleged joint criminal enterprise ("JCE") charged in the Third Amended Indictment ("Indictment") that are sufficiently close to the Accused to require attendance for cross-examination.[18] The Prosecution therefore argues that the Motion should be denied or, alternatively, the three witnesses subject to the Motion should be called for cross-examination.[19]

8. On 18 November 2013, the Accused filed his "Notification of Submission of Written Evidence Pursuant to Rule 92 *ter*: Milenko Todorović (KW584)" ("Notification"), noting a recent decision in the *Mladić* case, in which that Trial Chamber rejected the Prosecution's motion to admit Todorović's evidence pursuant to Rule 92 *bis*, and the fact that Todorović is scheduled to testify in that case during the week of 25 November 2013.[20] Thus, given the Accused's strong belief in the principle that evidence should be tested in court, and in order to avoid having to bring Todorović back to the Tribunal in the event that the Motion is denied, the Accused withdraws the Motion in relation to Todorović, and offers his evidence pursuant to Rule 92 *ter*.[21]

II. Discussion

9. In light of the Notification, the Chamber shall therefore examine the Motion only in relation to the evidence of Petrović and Jakovljević.

10. The Chamber recalls its 15 October 2009 "Decision on the 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)" ("Decision on Third Rule 92 *bis* Motion"), in which it outlined the law applicable to admission of evidence pursuant to Rule 92 *bis*.[22] Accordingly, it will not discuss the applicable law again here but will refer to the relevant paragraphs of the Decision on Third Rule 92 *bis* Motion when necessary.

11. As stated above, the Motion is clearly in contravention of the Deadline and the Chamber understands the Accused's arguments to justify his non-compliance as two-fold, namely (i) that

[18] Response, paras. 1, 3–8.
[19] Response, paras. 1, 10.
[20] Notification, paras. 4–5.
[21] Notification, para. 5. Milenko Todorović testified before the Chamber pursuant to Rule 92 *ter* on 27 and 28 November 2013.
[22] Decision on Third Rule 92 *bis* Motion, paras. 4–11.

the Witnesses were added to his 65 *ter* list after the expiration of the Deadline,[23] and (ii) that, given the Chamber's recent decision allocating him the hours to complete his case, he "must utilize secondary forms of evidence, such as Rule 92 *bis*, in order to place before the Chamber as much of his evidence as possible".[24]

12. While the Chamber recognises some validity in the Accused's first argument, given the Chamber's recent finding that good cause had been shown for the late addition of the Witnesses to his 65 *ter* list,[25] it cannot agree with the Accused's submission that the evidence of Srebrenica-related witnesses should be admitted pursuant to Rule 92 *bis* as a result of the Chamber's decision granting him 25 additional hours for the presentation of his case on Count 1—which relates to genocide in several identified municipalities in Bosnia and Herzegovina—instead of the additional 100 hours originally requested by him.[26]

13. The Chamber recalls that, when deciding how much time to grant to the Accused for the presentation of his defence case on Counts 2 to 11 of the Indictment, it took into consideration all relevant factors and decided that 300 hours would allow the Accused to present his case in a manner which was consistent with his rights.[27] Thus, the fact that the Chamber has now, in light of the reinstatement of the charges against the Accused under Count 1, granted him 25 additional hours in which to present his case on Count 1, instead of the 100 hours requested,[28] is therefore totally irrelevant to the Motion, given that the Accused should have planned to bring before the Chamber all of the evidence in relation to Counts 2–11 of the Indictment within the 300 hours originally granted to him by the Chamber. Moreover, the Chamber notes that at the time of filing of the Motion to Vary List of Witnesses, the Accused had more than 66 hours left for the presentation of his case on Counts 2 to 11 of the 300 originally allocated to him by the Chamber.[29] The Accused was thus in a position to adjust the presentation of his case on Counts 2 to 11 should he have deemed it necessary, even after the late addition of the Srebrenica-related witnesses to his 65 *ter* list.

14. In addition, the Accused's strategic decision to make very little use of Rule 92 *bis* by only filing two motions pursuant to this rule, one within the Deadline and a second one after

[23] *See supra*, para. 5.
[24] *See supra*, para. 5.
[25] *See* Decision on Motion to Vary List of Srebrenica Witnesses, paras. 9–11.
[26] *See* Decision on Accused's Request for Additional Time to Present his Defence Case and on Motion to Recall Defence Witnesses, 29 October 2013 ("Decision on Additional Time"), para. 14; Defence Supplemental Submission Pursuant to Rule 65 *ter*, 18 October 2013, para. 2.
[27] Decision on Time Allocated to the Accused for the Presentation of his Case, 19 September 2012, paras. 8–12, 14.
[28] Decision on Additional Time, paras. 12, 14.
[29] Report on Use of Time in the Trial – Period Ending 1 August 2013, 5 August 2013.

having been granted an extension of time by the Chamber,[30] while of course within his prerogative, may have contributed further to the situation he is now in, as he failed to consider this option to present his case more effectively within the time allocated by the Chamber.

15. Thus, the Chamber is not satisfied that the reasons identified in the Motion for not complying with the Deadline demonstrate good cause as to why the Motion should be considered despite it being untimely. Accordingly, the Chamber shall deny the Motion. In any event, had the Chamber proceeded to consider the Motion, it would have denied the admission of the evidence of Petrović and Jakovljević pursuant to Rule 92 *bis* without cross-examination for the following reasons.

16. The Chamber notes that both Petrović and Jakovljević were military policemen attached to the Bratunac Brigade in 1995. The evidence tendered through Petrović's Rule 92 *bis* package is primarily focused on refuting Momir Nikolić's evidence in relation to some of the events in Srebrenica in mid-July 1995 and specifically Petrović's alleged involvement in the execution of six Bosnian Muslim prisoners around Konjević Polje. During his testimony in the *Blagojević and Jokić* case, Jakovljević testified about events immediately before, during, and after the fall of Srebrenica on 11 July 1995, including his deployment to the Hotel Fontana on 11 and 12 July and what he witnessed as part of Ratko Mladić's entourage on 12 and 13 July (including Mladić's visit to the Sandići Meadow and the Nova Kasaba football field).[31] Jakovljević also provided evidence refuting that of Momir Nikolić about the events in Konjević Polje on 13 July, involving Mladić.

17. Having analysed the proposed evidence tendered through Petrović and Jakovljević, the Chamber is satisfied of its relevance and probative value, and that it does not pertain to the acts and conduct of the Accused as charged in the Indictment nor to 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 actually did commit the crimes charged in the Indictment the requisite intent for those crimes. As such, the proposed evidence is not *per se* inadmissible pursuant to Rule 92 *bis*.

[30] *See* Motion for Admission of Testimony of Thomas Hansen and Andrew Knowles Pursuant to Rule 92 *bis*, 28 June 2012; Motion to Admit Statement of General Vehid Karavelić and Associated Exhibits Pursuant to Rule 92 *bis*, 1 October 2012. *See also* Decision on Accused's Motion for Admission of Prior Testimony of Thomas Hansen and Andrew Knowles Pursuant to Rule 92 *bis*, 22 August 2012; Decision on Accused's Motion for Admission of Statement of Vehid Karavelić Pursuant to Rule 92 *bis*, 5 November 2012; Decision on Accused's Motion for Extension of Time for Filing of Rule 92 *bis* Motion, confidential, 27 August 2012.

[31] The Chamber notes that Ratko Mladić is named in the Indictment as a member of the JCE charged in respect of the Srebrenica events; *see* Indictment, paras. 6–8, 11, 16, 21, 26; Prosecution's Submission Pursuant to Rule 65 *ter*(E)(i)–(iii), 18 May 2009, para. 227.

18. However, in applying 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[32]—to the particularities of the Motion, the Chamber considers that Jakovljević's extensive evidence about the whereabouts of Ratko Mladić, as well as Petrović's extensive evidence about his interactions with Momir Nikolić, relates to the acts and conduct of persons sufficiently proximate to the Accused and for whose acts and conduct the Accused is charged with responsibility, and touches upon such a live and important issue between the parties in this case,[33] to require both witnesses to appear for cross-examination and that their evidence be presented in accordance with Rule 92 *ter*.

III. Disposition

19. Accordingly, the Chamber, pursuant to Rules 54, 89, and 92 *bis* of the Rules, hereby **DENIES** the Motion.

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

Judge O-Gon Kwon
Presiding

Dated this twenty-ninth day of November 2013
At The Hague
The Netherlands

[Seal of the Tribunal]

[32] Decision on Third Rule 92 *bis* Motion, para. 10.

[33] The Chamber notes in this regard the Accused's own admission that Jakovljević's proposed evidence goes to a live and important issue between the parties in this case; *see* Motion, para. 15.