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: 27 August 2010

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: **27 August 2010**

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

DECISION ON MOTION FOR RECONSIDERATION: SREBRENICA RULE 92 *BIS* DECISION

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 for Reconsideration: Srebrenica Rule 92 *bis* Decision", filed publicly with a confidential annex on 10 August 2010 ("Motion"), and hereby issues its decision thereon.

I. Background and Submissions

1. On 21 December 2009, the Chamber issued the "Decision on Prosecution's Fifth Motion for Admission of Statements in Lieu of *Viva Voce* Testimony Pursuant to Rule 92 *bis* (Srebrenica Witnesses)" ("Decision on Fifth Rule 92 *bis* Motion"), in which it considered the admissibility into evidence of the written statements and/or transcripts of prior testimony of 66 witnesses offered by the Prosecution, as well as numerous associated exhibits.[1] The Chamber admitted the written evidence of, amongst others, the witnesses who are now the subject of the Motion, namely, Mile Janjić, Tanacko Tanić, Ostoja Stanišić, Srecko Acimović, Mitar Lazarević, Nebosja Jeremić, and Milorad Bircaković (together "Witnesses"), without requiring the Witnesses to come for cross-examination.[2] The Chamber notes that it has filed two other decisions addressing issues of the admissibility of certain associated exhibits which arose out of the Decision on Fifth Rule 92 *bis* Motion.[3]

2. In the Motion, the Accused requests the Chamber to reconsider a part of the Decision on Fifth Rule 92 *bis* Motion as, he asserts, the Witnesses should be brought for cross-examination in accordance with a recent decision issued by the Trial Chamber hearing the *Tolimir* case.[4] In the *Tolimir* Decision, the *Tolimir* Trial Chamber admitted the written evidence of the Witnesses, and found that they should be brought for cross-examination because their evidence concerns "live and important issues" and/or goes to the acts and conduct of "proximate" participants in the joint criminal enterprise ("JCE") as alleged in that case.[5] The Accused submits that "there is

[1] *See* Prosecution's Fifth Motion for Admission of Statements in Lieu of *Viva Voce* Testimony Pursuant to Rule 92 *bis* (Srebrenica Witnesses), 29 May 2009 ("Prosecution's Fifth Rule 92 *bis* Motion"). The Chamber also notes that on 9 February 2010, it issued *proprio motu* the Addendum to the Trial Chamber's Decision on Prosecution's Fifth Motion for Admission of Statements in Lieu of *Viva Voce* Testimony Pursuant to Rule 92 *bis* (Srebrenica Witnesses).

[2] The Chamber notes that the Accused did not refer to the Witnesses by name in the Motion because they were referred to by number in *Prosecutor v. Tolimir*, Case No. IT-08-88/2-T, Decision on Prosecution's Motion for Admission of Written Evidence Pursuant to Rules 92 *bis* and 94 *bis*, 7 July 2010 ("*Tolimir* Decision"). However, the Witnesses have not been accorded protective measures in either the present case or the *Tolimir* case, and so will be referred to by name in this Decision.

[3] Decision on Prosecution Motion and Clarification Regarding Decision on Prosecution Fifth Rule 92 *bis* Motion (Srebrenica), 18 March 2010; Decision on Prosecution's Motion Regarding Second Decision on Prosecution's Fifth Rule 92 *bis* Motion (Srebrenica) with Annexes A and B, 9 July 2010.

[4] Motion, para. 1.

[5] Motion, paras. 2-3.

no difference between his case and that of General Tolimir with respect to the [Witnesses] that would justify disparate treatment" and "it would be unfair for him to be denied the right to cross examine witnesses whom the *Tolimir* Trial Chamber has found need to be cross examined […]."[6] He requests the Chamber to act consistently with the *Tolimir* Decision and submits that "disparate decisions on the same facts and under the same circumstances prejudice his right to a fair trial and call into question the application of the Tribunal's unique rules […]."[7]

3. On 24 August 2010, the Prosecution filed the "Prosecution Response to Motion for Reconsideration: Srebrenica Rule 92 *bis* Decision", in which it submits that the Motion should be dismissed because it fails to demonstrate any errors of reasoning on the part of the Chamber, or that reconsideration is necessary to prevent an injustice. With regard to the latter, the Prosecution argues that the Accused's submission that there is no difference between his case and that of the accused Zdravko Tolimir "fails to consider that obvious differences between the Accused's and Tolimir's respective relationships with, and proximity to, the members of the VRS Branch described by the [Witnesses] and for whose conduct the Accused and Tolimir are alleged to be responsible."[8]

II. Applicable Law

4. There is no provision in the Tribunal's Rules of Procedure and Evidence ("Rules") for requests for reconsideration, which are a product of the Tribunal's jurisprudence, and are permissible only under certain conditions.[9] However, the Appeals Chamber has articulated the legal standard for reconsideration of a decision as follows: "a Chamber has inherent discretionary power to reconsider a previous interlocutory decision in exceptional cases 'if a clear error of reasoning has been demonstrated or if it is necessary to do so to prevent injustice.'"[10] Thus, the requesting party is under an obligation to satisfy the Chamber of the existence of a clear error in reasoning, or the existence of particular circumstances justifying reconsideration in order to prevent an injustice.[11]

---

[6] Motion, paras. 3 and 5. *See also* paragraph 6.

[7] Motion, paras. 6-7.

[8] Response, para. 7.

[9] *Prosecutor v. Prlić et al*., Case No. IT-04-74-T, Decision Regarding Requests Filed by the Parties for Reconsideration of Decisions by the Chamber, 26 March 2009 ("*Prlić* Decision on Reconsideration"), p. 2.

[10] *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-AR108*bis*.3, confidential Decision on Request of Serbia and Montenegro for Review of the Trial Chamber's Decision of 6 December 2005, 6 April 2006, para. 25, note 40 (quoting *Kajelijeli v. Prosecutor*, Case No. ICTR-98-44A-A, Judgement, 23 May 2005, paras. 203–204). *See also Ndindabahizi v. Prosecutor*, Case No. ICTR-01-71-A, Decision on Defence "Requête de l'Appelant en Reconsidération de la Décision du 4 avril 2006 en Raison d'une Erreur Matérielle", 14 June 2006, para. 2.

[11] *Prosecutor v. Galić*, Case No. IT-98-29-A, Decision on Defence's Request for Reconsideration, 16 July 2004, p. 2; *see also Prosecutor v. Popović et al*., Case No. IT-05-88-T, Decision on Nikolić's Motion for Reconsideration

III. Discussion

5. This is the second time the Accused has challenged a decision of this Chamber following the issuance of a decision addressing similar subject matter by the *Tolimir* Trial Chamber.[12] In this instance, the Accused does not assert that the Chamber has committed a clear error of reasoning. Rather, he focuses his arguments on the second limb of the test for reconsideration.

6. According to the Accused, there is no difference between his case and the case against Tolimir for present purposes and, therefore, an injustice would occur if he is unable to cross-examine the Witnesses. However, the Chamber considers that there are core differences between the two cases that would certainly affect analyses undertaken pursuant to Rule 92 *bis*. The mere fact that both accused are charged with participating in JCEs pertaining to the events that allegedly took place in Srebrenica, and that both held high-level positions in the Army of the Republika Srpska ("VRS"), does not mean that this Chamber and the *Tolimir* Trial Chamber were addressing "the same facts under the same circumstances"[13] in their respective decisions. On the contrary, the Accused, who is said to have been the Supreme Commander of the VRS, was significantly higher in the VRS chain of command than Tolimir. Consequently, while the individuals discussed by the Witnesses in their written evidence, some of them alleged participants in events at Srebrenica, may be considered "proximate" to Tolimir that does not mean they must be similarly "proximate" to the Accused. In fact, the Chamber fully assessed the Witnesses' evidence in this respect and found that the individuals were not "proximate" to the Accused. The Chamber notes in this regard that, in the Motion, the Accused does not allege that the Chamber made an error in its assessment, and he does not indicate how any of the individuals found by the *Tolimir* Trial Chamber to be "proximate" to Tolimir, are "proximate" to him. Furthermore, the Accused and Tolimir are alleged to have played different roles in events at Srebrenica in 1995, not least because they occupied different positions in the VRS chain of command at the time, and each accused is conducting his own defence in respect of the charges against him. Contrary to the Accused's suggestion, therefore, the dealing by both cases with the events that occurred in Srebrenica does not *ipso facto* mean that the issues that may be

---

and Order for Issuance of a Subpoena Duces Tecum, 2 April 2009, p. 2; *Prlić* Decision on Reconsideration, pp. 2–3.

[12] Motion for Reconsideration of Decisions on Judicial Notice of Adjudicated Facts, 4 March 2010; Second Motion for Reconsideration of Decision on Judicial Notice of Adjudicated Facts, 26 April 2010 ("Second Motion"); Decision on Accused's Motions for Reconsideration of Decisions on Judicial Notice of Adjudicated Facts, 14 June 2010. The Chamber notes that the Second Motion challenged the Chamber's decisions on adjudicated facts on the basis of a decision issued by the *Stanišić and Župljanin* Trial Chamber, as well as one issued by the *Tolimir* Trial Chamber.

[13] Motion, para. 7.

considered "live and important" in the case against Tolimir are automatically the same as those in the Accused's case.

7. The Chamber is also not convinced that, as argued by the Accused, it should reconsider its decision to ensure consistency with the *Tolimir* Decision "so as to afford him the same rights as other accused at this Tribunal."[14] The Accused is in effect asking for uniformity of outcome regarding the availability of the Witnesses for cross-examination, although he does also acknowledge that one Trial Chamber is not bound by the decisions of another Trial Chamber.[15] The Chamber is of the view that the Accused's argument indicates a misunderstanding of the decision-making process pursuant to Rule 92 *bis*. Far from being a mechanical procedure based on outcome, the determination pursuant to Rule 92 *bis* of whether witnesses should be available for cross-examination involves an exercise of a discretionary power that requires a Chamber to consider a range of factors in the context of the specific circumstances of the case at hand. There is a possibility, even likelihood, that the application of the various factors in respect of the same or similar witnesses in different cases will ultimately result in different conclusions being drawn. Indeed, this is what has occurred in the present instance. It is axiomatic that the Accused enjoys the same rights at the Tribunal as other accused persons.

8. For these reasons, the Chamber is not satisfied that the existence of the two decisions, which reach different conclusions regarding whether the Witnesses should be available for cross-examination, justifies reconsideration in order to prevent an injustice.

IV. Disposition

9. Accordingly, the Trial Chamber, pursuant to Rule 54 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-seventh day of August 2010
At The Hague
The Netherlands

[Seal of the Tribunal]

[14] Motion, para. 6.
[15] Motion, para. 7.