



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: 6 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: 6 November 2013

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

**DECISION ON ACCUSED'S MOTION TO ADMIT STATEMENTS PURSUANT TO
RULE 92 *BIS* (SARAJEVO 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* (Sarajevo Component)”, filed on 1 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. In the Motion, the Accused now moves, pursuant to Rule 92 *bis*, for the admission of four unsigned statements (“Statements”) of witnesses KW194, KW299, KW402, and KW543 (“Witnesses”), who are relevant to the Sarajevo component of the case and for whom protective measures were denied by the Chamber, which—according to the Accused—led to their refusal to testify.² The Accused explains that he has waited for the defence case on the Sarajevo component to be near completion “so as to be able to evaluate whether the information sought from the witness [*sic*] was obtainable by other means such as to justify a motion for subpoena.”³ Since the Witnesses’ testimony is cumulative to that of a number of others who also testified on the issue of alleged indiscriminate shelling by the Army of Republika Srpska (“VRS”) in Sarajevo, the Accused decided that Rule 92 *bis* was a more appropriate vehicle for its admission.⁴

3. The Accused claims that he has good cause for not complying with the Deadline, namely, that he “preferred to present his case through live testimony” and did not know at the time that the Chamber would decline to grant protective measures to the Witnesses.⁵

4. The Accused also argues that the criteria for admission under Rule 92 *bis* has been met, as the Statements (i) concern the relevant and probative issue of whether the shelling and

¹ Scheduling Order, para. 25.

² Motion, paras. 1, 24. The Chamber notes, however, that the Accused’s motion for protective measures in relation to KW402 was granted in part and KW402 was given image distortion for the purpose of his testimony. *See* Decision on Accused’s Motion for Protective Measures for Witness KW402, 8 January 2013 (“KW402 Decision”).

³ Motion, para. 2.

⁴ Motion, para. 3.

⁵ Motion, para. 4.

sniping by the VRS in Sarajevo was indiscriminate;⁶ (ii) do not touch on his acts and conduct;⁷ and (iii) are cumulative of the evidence given by a number of other witnesses called by him.⁸

5. On 16 October 2013, the Office of the Prosecutor (“Prosecution”) filed the “Prosecution Response to Motion to Admit Statements Pursuant to Rule 92 *bis* (Sarajevo Component)” (“Response”) in which it opposes the Motion.⁹ The Prosecution argues that the Accused has shown no good cause for failing to meet the Deadline as he has not exhausted the procedural mechanisms at his disposal for obtaining the Witnesses’ testimony, such as subpoenas for example.¹⁰ The Prosecution further claims that the requirements of Rule 92 *bis* have not been satisfied because (i) the Statements cover live and important issues in dispute in this case, (ii) the Accused has made no effort to show that they are in fact cumulative to the evidence of a number of other defence witnesses, and (iii) the Statements are unreliable as they contain blanket statements with no corresponding foundation for the Witnesses’ knowledge, are internally inconsistent, and contain unsubstantiated allegations about international forces and Bosnian Muslim leaders.¹¹ The Prosecution therefore argues that the Motion should be denied or, alternatively, the Witnesses should be called for cross-examination.¹²

II. Discussion

6. 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*.¹³ 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.

7. As stated above, the Motion is clearly in contravention of the Deadline and the Accused’s argument seems to be that it was the Chamber’s own decision to deny protective measures to the Witnesses that caused his inability to have them come to The Hague and give evidence pursuant to Rule 92 *ter*.¹⁴ He also claims that he waited until now to file the Motion,

⁶ Motion, paras. 11, 13, 15–16, 18–19, 21–22.

⁷ Motion, paras. 13, 16, 19, 22.

⁸ Motion, paras. 12, 16, 19, 22.

⁹ Response, para. 1.

¹⁰ Response, paras. 1–4.

¹¹ Response, paras. 1, 5–9.

¹² Response, para. 1.

¹³ Decision on Third Rule 92 *bis* Motion, paras. 4–11.

¹⁴ *See supra*, para. 3.

even though the decisions in questions were issued between November 2012 and January 2013,¹⁵ because he wanted the defence case on the Sarajevo component to be near completion.¹⁶

8. The Chamber is not convinced, however, that these are valid reasons for the Accused's contravention of the Deadline, as the situation he is now in stems by and large from his failures and the failures of his defence team to focus and prepare the defence case efficiently. The Chamber recalls that in all but one of the decisions relating to the Witnesses it was not satisfied – on the basis of the information *provided by the Accused* – that there was an objectively grounded risk to the security or welfare of the Witnesses should they testify with no protective measures in place.¹⁷ Accordingly, being well acquainted with the Tribunal's jurisprudence on protective measures, it was the Accused's own failure to present such information that caused the Witnesses' refusal to come and give evidence for him.

9. Furthermore, given that it was clear that the Witnesses' concerns would not justify the granting of the requested protective measures, the Accused's team of experienced legal advisers should have anticipated the Chamber's decisions and should have made contingency plans, such as trying to ameliorate some of the Witnesses' concerns by using Rule 92 *bis*.¹⁸ All this should have been done well in advance of the Deadline. Instead, it transpired during the defence phase of the case that the Accused and his team dealt with most of their witnesses at the very last minute and, by the time the defence case started on 16 October 2012, had not even made first contact with a number of witnesses on their very expansive witness list.¹⁹ In addition, the Accused's decision to avoid using Rule 92 *bis* as much as possible, while of course open to him,

¹⁵ See KW402 Decision; Decision on Accused's Motion for Protective Measures for Witness KW194, 12 November 2012 ("KW194 Decision"); Decision on Accused's Motions for Protective Measures for Witnesses KW289, KW299, KW378, and KW543, 1 November 2012 ("KW299 and KW543 Decision").

¹⁶ See *supra*, para. 2.

¹⁷ KW194 Decision, para. 5; KW289 and KW543 Decision, para. 13. With respect to KW402, the Chamber granted the protective measure of image distortion but was not satisfied that, in light of the information before it, the circumstances warranted granting the additional protective measures, such as pseudonym and voice distortion. See KW402 Decision, paras. 7–8.

¹⁸ The Chamber notes the Accused's submission in relation to KW299, namely that he "did not have the idea to seek to tender [KW299's] statement pursuant to Rule 92 *bis* as one solution to [KW299's] unwillingness to testify". The Chamber does not view this admission as a valid excuse for the Accused's failure to consider the use of Rule 92 *bis* within the time allocated to him by the Chamber. See Motion, footnote 44.

¹⁹ See Hearing, T. 30894–30897 (4 December 2012). In this respect, the situation here is different to the circumstances surrounding the Chamber's decision on the admission of evidence of Milan Tupajić pursuant to Rule 92 *bis*. In that case Tupajić was contacted by the Prosecution well in advance of the Accused's trial starting but, having earlier testified in another case at the Tribunal, categorically refused to testify again. Following the start of the trial he was approached by the Prosecution again and refused to give evidence again, thus leaving the Prosecution with the option of either abandoning his evidence entirely or filing a motion for a subpoena. See Prosecution Motion to Subpoena Milan Tupajić with Confidential Appendices A, B and C, 9 September 2011, Confidential Appendix A. See also Decision on Prosecution's Motion to Subpoena Milan Tupajić, 23 September 2011; Decision on Prosecution Motion for Admission of Milan Tupajić's Evidence in Lieu of *Viva Voce* Testimony Pursuant to Rule 92 *bis*, 24 May 2012.

is what contributed further to the situation he is now in, as he failed to consider this option of ameliorating some of his witnesses' concerns before the expiry of the Deadline.²⁰

10. For all the reasons noted above, the Chamber is not convinced that the Accused has exercised due diligence with respect to the Witnesses so as to ensure his compliance with the Deadline. Accordingly, the Chamber will deny the Motion on the basis that the Accused has failed to comply with the Deadline and failed to show good cause as to why the Motion should be considered nevertheless.

11. Even if the Chamber proceeded to consider the Motion, it would have denied it on the basis that the requirements of Rules 89 and 92 *bis* have not been met. While the Chamber has in the past provisionally admitted 92 *bis* statements which did not contain the formal attestation certificate required by Rule 92 *bis*(B),²¹ it is unable to do so with the Statements here. In the past, the Chamber had no reason to doubt that the witnesses in question would be willing to cooperate with the party tendering the evidence, as well as with the Tribunal's Registry representative who would conduct the certification and attestation procedure. In this case, however, where it is clear that the Witnesses *do not in fact wish to* testify while their identities are public and yet the Accused is offering their Statements for public admission, the Chamber has no such assurance. In that respect, the Chamber notes that the Statements were created prior to its decisions regarding the Witnesses' protective measures, not after it.²² As they remain unsigned, there is nothing in the Motion to indicate that the Witnesses have now agreed to the Accused tendering their Statements pursuant to Rule 92 *bis*. There is therefore no guarantee that they would sign the Statements before or during the attestation procedure. In addition, in the circumstances surrounding the Witnesses, the absence of any signature on the Statements seriously undermines their probative value.

12. The Chamber thus considers that, in addition to missing the Deadline, the Accused has failed to satisfy the requirements of Rules 89 and 92 *bis* in relation to the Statements.

²⁰ The Accused in fact admits this failure in footnote 44 of the Motion.

²¹ See e.g. Decision on Third Rule 92 *bis* Motion, para. 9.

²² The Statements were referred to by the Accused in his motions for protective measures for the Witnesses. See Motion for Protective Measures for Witness KW194, 29 October 2012, para. 4; Motion for Protective Measures

III. Disposition

13. Accordingly, the Trial 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 sixth day of November 2013
At The Hague
The Netherlands

[Seal of the Tribunal]

for Witness KW402, 11 December 2012, para. 4; Motion for Protective Measures for Witness KW299, 12 October 2012, para. 4; Motion for Protective Measures for Witness KW543, 12 October 2012, para. 4.