



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: 2 November 2009
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: 2 November 2009

PROSECUTOR

v.

RADOVAN KARADŽIĆ

***PUBLIC WITH
CONFIDENTIAL APPENDIX A***

**DECISION ON PROSECUTION'S SIXTH MOTION FOR
ADMISSION OF STATEMENTS IN LIEU OF *VIVA VOCE*
TESTIMONY PURSUANT TO RULE 92 *BIS*: HOSTAGE WITNESSES**

Office of the Prosecutor

Mr. Alan Tieger
Ms. Hildegard Uertz-Retzlaff

The Accused

Mr. Radovan Karadžić

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’s Sixth Motion for Admission of Statements in Lieu of *Viva Voce* Testimony Pursuant to Rule 92 *bis*: Hostage Witnesses”, filed on 29 May 2009 (“Motion”), and hereby issues its decision thereon.

I. Background and Submissions

1. In the Motion, the Office of the Prosecutor (“Prosecution”) seeks the admission of statements of 12 witnesses pursuant to Rule 92 *bis* of the Tribunal’s Rules of Procedure and Evidence (“Rules”).¹ The Prosecution submits that the proposed evidence is relevant to the crime of the taking of hostages charged in Count 11 of the Third Amended Indictment (“Indictment”).² It argues that the proposed evidence has probative value, and that, as the statements of the witnesses are “consistent and corroborated by other evidence, including that of *viva voce* witnesses, it is reliable.”³ The Prosecution further submits that the proposed evidence is suitable for admission in written form; it is “crime-base” evidence and does not go to the acts and conduct of the Accused.⁴ In addition, the Prosecution asserts that admission of this evidence through Rule 92 *bis* will substantially expedite these proceedings and not cause unfair prejudice to the Accused.⁵ It argues that, given the nature of the proposed evidence, “the right to cross-examine is outweighed by the interest in efficient and expeditious trial proceedings.”⁶

2. The Trial Chamber notes that with regard to the written statement of one of the proposed Rule 92 *bis* witnesses, KDZ103 (Joseph Gelissen), the Prosecution is attempting to introduce the witness statement in its entirety, with the exception of two sentences, which can be identified as follows: (i) “We saw on TV a statement from Karadžić [*sic*] saying that if there would be NATO air strikes, he would consider the UN as enemies”, which is found on page 3 (0037-1990), paragraph 2 of the statement; and (ii) “We heard on TV that Karadžić [*sic*] said that all UN personnel would be released before the end of the week”, which can be found on page 7 (0037-1994), paragraph 10.⁷ With regard to another proposed Rule 92 *bis* witness, KDZ395 (Janusz Kalbarczyk), the Prosecution is attempting to introduce the witness statement in its entirety, with the exception of

¹ Motion, para. 1.

² Motion, paras. 2, 14.

³ Motion, paras. 2, 15.

⁴ Motion, paras. 2, 7, 11.

⁵ Motion, para. 2.

⁶ Motion, para. 23.

⁷ Motion, Confidential Appendix A

part of the seventh sentence in paragraph 2 on page 5 (0035-6624), which includes the words, “which Karadžić and Mladić often visited. This was according to the BSA officer guarding us.”⁸

3. The Prosecution acknowledges that none of the witnesses have previously testified before the Tribunal and that none of their witness statements have the attestations required by Rule 92 *bis*(B) of the Rules.⁹ It seeks the provisional admission of the statements and associated exhibits, and will “re-submit [the] statements in compliance with all formalities of Rule 92 *bis* once the Trial Chamber issues an order granting the provisional admission of these statements.”¹⁰

4. Following the Accused’s request for an extension of time to respond, *inter alia*, to the Motion, the Chamber granted him two extensions of time, and ordered him to respond to the Motion on or before 16 July 2009.¹¹ However, on 8 July 2009, the Accused filed his “Omnibus Response” to all Rule 92 *bis* Motions, opposing the Rule 92 *bis* applications for every witness, requesting to cross-examine each witness, and suggesting that the Chamber defer its decisions on all Rule 92 *bis* issues until the end of the Prosecution’s case.¹² At the 23 July 2009 Status Conference, the Pre-trial Judge indicated to the Accused that decisions on the Rule 92 *bis* motions would be made by the Trial Chamber, but that the Accused could respond to each respective motion anytime before the decisions had been made.¹³ During the Pre-trial Conference held on 6 October 2009, the Pre-trial Judge informed the Accused that decisions on the Rule 92 *bis* motions would be issued in the coming few weeks, and added that, should the Chamber admit the evidence of a witness under Rule 92 *bis*, whose evidence the Accused would wish to supplement with his own Rule 92 *bis* statement, he may file a motion to that effect.¹⁴ No further response to the Motion has yet been filed by the Accused.

5. On 31 August 2009, the Prosecution filed the “Prosecution Submission Pursuant to Rule 73 *bis*(D)” (“Rule 73 *bis* Submission”), in which it proposed reducing the number of witnesses it will call, and designated certain other witnesses as “reserve” witnesses.¹⁵ Pursuant to the Rule 73 *bis* Submission, none of the 12 witnesses in the Motion had their status changed.¹⁶ The “Prosecution Second Submission Pursuant to Rule 73 *bis*(D)”, filed on 18 September 2009, also did

⁸ Motion, Confidential Appendix A.

⁹ Motion, para. 6.

¹⁰ Motion, para. 6.

¹¹ Motion for Extension of Time to Respond to Rule 92 *bis* Motions, 8 June 2009, para. 5; Order Following Upon Rule 65 *ter* Meeting and Decision on Motions for Extension of Time, 18 June 2009, paras. 4, 18(b); Decision on the Accused’s Application for Certification to Appeal Decision on Extension for Time, 8 July 2009, para. 18.

¹² Omnibus Response to Rule 92 *bis* Motions, paras. 3, 6.

¹³ Status Conference, T. 370 (23 July 2009).

¹⁴ Pre-trial Conference, T. 489–490 (6 October 2009).

¹⁵ Rule 73 *bis* Submission, paras. 6, 11.

¹⁶ See Appendix A to Rule 73*bis* Submission.

not alter the status of the witnesses subject to this Motion.¹⁷ At the Pre-trial Conference, the Trial Chamber delivered its decision on the application of Rule 73 *bis* of the Rules, in which it accepted the Prosecution's proposals for the reduction of its case and ordered, pursuant to Rule 73 *bis*(D), that the Prosecution may not present evidence in respect of the crime sites and incidents that it had identified.¹⁸ The oral decision was followed by a written decision on 8 October 2009.¹⁹ Since none of the witnesses had their status altered as a consequence of this decision, the Trial Chamber must determine if the evidence of the 12 witnesses is admissible pursuant to Rule 92 *bis*.

II. Discussion

6. On 15 October 2009, the Trial Chamber issued the "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 Motion"), in which it outlined the law applicable to motions made pursuant to Rule 92 *bis*. The Chamber will not discuss the applicable law again here, but refers to the relevant paragraphs of the Decision on Third Motion.²⁰

7. The evidence of each of the 12 witnesses which is proposed in the Motion for admission into evidence pursuant to Rule 92 *bis* of the Rules is summarised and examined below. With regard to the statements of KDZ112, KDZ196, and KDZ259, who have all been granted protective measures,²¹ the summaries of their proposed evidence is set out in Confidential Appendix A to this decision.

A. Summaries of Proposed Evidence

8. Joseph Gelissen was a Major in the Dutch Army stationed in Grbavica as part of the United Nations Military Observers ("UNMO"). He was part of the SG-1 Team that patrolled the city, checking the use or replacement of heavy artillery of the Army of Republika Srpska ("VRS"). In his written statement, Joseph Gelissen describes the events immediately before and while he was detained. On 26 May 1995, VRS soldiers took Joseph Gelissen and another UNMO to Pale where they were detained with other UNMOs and were told that they were going to be used as human shields if NATO ordered more air strikes against the Bosnian Serbs. During this time, Joseph Gelissen had several conversations with Captain Radovan Vojvodić and several times throughout

¹⁷ See Prosecution Second Submission Pursuant to Rule 73 *bis* (D), 18 September 2009, confidential Appendix A.

¹⁸ Pre-trial Conference, T. 467–468 (6 October 2009).

¹⁹ Decision on Application of Rule 73 *bis*, 8 October 2009.

²⁰ Decision on Third Motion, paras. 4-11.

²¹ Decision on Motion for and Notifications of Protective Measures, 14 August 2009.

the ordeal the UNMOs were filmed by Pale TV. On 18 June 1995, Joseph Gelissen and the other UNMOs were released after meeting the Vice-President of Republika Srpska, Nikola Koljević

9. KDZ104 (Aleksandr Vishnevski) was an electrical engineer assigned to the 1st Company of the 240th Battalion of the Ukrainian Army stationed in Sarajevo. Aleksandr Vishnevski stated that on 25 May 1995, he and other soldiers were confronted by Serbian military police and ordered to hand over all their weapons. The soldiers were transported to Banja Luka where they were declared prisoners of war. Aleksandr Vishnevski noted that a person named Veličko was in charge during the time they were detained. One of the policemen told Aleksandr Vishnevski that they had been taken hostage in order to be used as human shields in case of further NATO bombings. He stayed in Banja Luka until 6 June 1995, when he was released, together with other witnesses.

10. KDZ119 (Hugh Nightingale) was a Lieutenant with the British Army, assigned to the Goražde area. Hugh Nightingale stated that the day after the NATO bombing of Pale, he was asked to meet with the local VRS commander at the VRS headquarters. In the meeting, the VRS commander told Hugh Nightingale that he and his fellow soldiers had to abandon their Observation Post ("OP") and that the VRS would transfer them to a safe place. When Hugh Nightingale refused to go with the VRS, the commander told him that he could go "with shooting or without". Hugh Nightingale and the other soldiers were then taken to Višegrad where a VRS Colonel named "Fortula" confirmed that the soldiers were now hostages, and they were then taken to military barracks. Hugh Nightingale gave an interview to the press during this time. On the seventh day of the ordeal, Hugh Nightingale and other detainees were driven to the border where they met a man, who Hugh Nightingale identified as Mr. Stanišić and whom he understood was the Serbian Minister of Interior. The soldiers were then taken to Novi Sad and released.

11. KDZ148 (Gunnar Westlund) was a Major in the Swedish Army, and was assigned to Sector Sarajevo, SS1 Team in Kasindo. Gunnar Westlund stated that on 25 May 1995, he and members of his UNMO team were ordered by VRS soldiers to go with them. They were taken to Grbavica and kept in the cellar of a building, where they were forced to change into civilian clothes. The UNMOs were then transferred to the Jahorina ski resort. A VRS soldier made Gunnar Westlund radio his headquarters to tell them their expected destination and to inform headquarters that if NATO did not halt the air strikes the UNMOs would be executed. Gunnar Westlund was then taken to a radio communication centre where he was ordered to go outside as NATO aircraft flew passed. Eventually, Gunnar Westlund and some of the other UNMOs were transported to Pale where they were released.

12. KDZ213 (Griffiths Evans) was a Ghanaian national stationed in Pale as a UNMO, and was tasked with monitoring the weapons collection points. Griffiths Evans stated that around noon on 26 May 1995, he and members of his team were detained by several VRS soldiers. One VRS soldier radioed the UNMO headquarters and told them that if the "HQ Sarajevo does not meet with General Smith to stop the air strike, then [their] lives would be in danger." The VRS soldiers then took the detainees to the Koran barracks in Pale, where some of the UNMOs were handcuffed to flagpoles and ammunition depots. Griffiths Evans was taken to the Koran barracks headquarters, where he was handcuffed to a flagpole in front of the headquarters. While at the Koran barracks, he was introduced to Captain Vojvodić and Major Batinić, who tried to reassure the detainees that their ordeal would be over soon. Later, Griffiths Evans was taken to a bridge that leads to Pale and was forced to give a statement to the press that the NATO air strikes were killing civilians. On 17 June 1995, Evans was greeted by Nikola Koljević, and was released later that day.

13. KDZ253 (Marcus Helgers) was a Captain in the Dutch Air Force, and was stationed near Kasindo, south of Sarajevo, as an UNMO. In his written statement, Marcus Helgers stated that he was detained on 26 May 1995, along with other soldiers deployed to the same OP. They were driven to Grbavica, where they were forced to change into civilian clothes. They were then taken to Pale and held at the Jahorina radar station. They were forced to contact their headquarters and tell them that the VRS would kill some of them if NATO continued with the air strikes. Marcus Helgers stated that the officer in charge at the barracks was Captain Vojvodić. During the time he was detained, Marcus Helgers had a meeting with Nikola Koljević and the "security chief for Milošević". Their release on 16 June 1995 was overseen by Lieutenant Colonel Indić.

14. KDZ279 (Jonathon Riley) was a Lieutenant-Colonel with the Royal Welch Fusiliers as part of the United Nations ("UN") peacekeeping mission and was stationed in Goražde. In his written statement, Jonathon Riley discusses the military situation relating to Goražde and the events leading up to when he was detained. He was told by a local commander, Radomir Fortula, that Ratko Mladić gave an order that if any further air strikes were to take place, Jonathon Riley's camp would be shelled because "we (Britain) were a NATO nation". According to Jonathon Riley, during May and June 1995, 33 members of the Royal Welch Fusiliers were detained. A Serb named Brane Šuka who, according to Jonathon Riley, reported directly to Ratko Mladić, told him that Ratko Mladić had visited the area during the period they were detained.

15. Janusz Kalbarczyk was a Colonel in the Polish Air Force, deployed to Sector Sarajevo, Pale. Janusz Kalbarczyk stated that on the morning of 26 May 1995, there had been various explosions, following which there was a large detonation near to his accommodation. About 40 minutes later,

a car with a Serbian police officer and two soldiers came to his accommodation and told Janusz Kalbarczyk and the other soldiers there that if the NATO bombings continued, they would be shot. A few hours later, more soldiers arrived and said that the detainees were under the custody of the VRS. The detainees were then taken to the ammunition depot near Pale, which had been hit that morning by NATO strikes. Janusz Kalbarczyk was handcuffed to a lightning rod for approximately four hours, and filmed in that position by a VRS soldier. Later that evening, VRS soldiers blindfolded him and took him to a radar station in the mountains. Janusz Kalbarczyk was handcuffed to another lightning rod and was filmed again before the VRS soldiers took him to dinner, and then took him to, and detained him in, the military barracks in Pale. While at the barracks, a VRS commander informed Janusz Kalbarczyk that if NATO strikes continued then the detainees would be chained to potential targets. The next day, Janusz Kalbarczyk was visited by Captain Vojvodić, who said he would be the liaison between the detainees and the VRS command. On 2 or 3 June 1995, Ratko Mladić, dressed in civilian clothes, visited the building in which the witness was detained. Janusz Kalbarczyk stated that at the time he did not know it was Ratko Mladić but when he saw him later on television he was sure it was him that had visited that day. On 13 June 1995, Janusz Kalbarczyk and several other UNMOs were released.

16. KDZ404 (Michael Cornish) was a Lance Corporal in the Royal Welch Fusiliers and was deployed on the east bank of the Drina River in Goražde. Michael Cornish stated that he and members of his UNPROFOR team were detained in May 1995. While attempting to pass through a VRS checkpoint, they were stopped by heavily armed men. Michael Cornish's commanding officer spoke with a Serb commander, who told them that they were on Serb territory and would have to go with the Serb soldiers. Michael Cornish and his team were taken to a VRS OP and were disarmed by the VRS soldiers. Throughout the first night, the VRS soldiers moved the team to several different houses. The next day they were taken to Karpaci, where they were grouped together with Ukrainian detainees. The detainees were transferred several more times before being released in Novi Sad.

B. Analysis pursuant to Rule 92 bis(A)

17. With regard to the admissibility of the written evidence of the witnesses in the Motion, the Trial Chamber is satisfied that the proposed evidence of the 12 witnesses is relevant to Count 11 of the Indictment, and, in particular, to paragraphs 83–87 of the Indictment. Furthermore, subject to the attestations being provided, all the witness statements were given to the Prosecution or to judicial authorities in either France or Ukraine. During the time that the statements were given in

France and Ukraine, senior members of the Prosecution were present. The Trial Chamber is satisfied that the statements have probative value.

18. The Trial Chamber considers that the following factors weigh in favour of admitting the evidence through Rule 92 *bis*. A review of the witness statements shows that the evidence of all of the witnesses concerns a number of similar events. For example, all witnesses discuss being detained by VRS soldiers, their subsequent detention, as well as their living conditions while being detained. Additionally, the evidence of the 12 witnesses concerns the impact of crimes upon victims, that is, it is “crime-base” evidence; 11 of the 12 proposed witness statements were given by soldiers who were detained during the time of the NATO bombings, and used as human shields. The twelfth statement is from an officer, Jonathon Riley, who was not himself detained but speaks to the circumstances surrounding the alleged hostage-taking.

19. Furthermore, the Trial Chamber considers that all 12 witnesses’ evidence is cumulative. First, the 12 witnesses’ evidence is cumulative of the evidence of KDZ441, KDZ384, and KDZ182, who are expected to appear before the Chamber as Rule 92 *ter* witnesses.²² Secondly, the evidence of the 12 witnesses is cumulative of each other’s evidence. That is, Aleksandr Vishnevski’s evidence is cumulative of Hugh Nightingale, Jonathon Riley and Michael Cornish’s evidence,²³ KDZ196’s evidence is cumulative of KDZ259 and KDZ112’s evidence, and Marcus Helgers’s evidence is cumulative of the evidence of Joseph Gelissen and Gunner Westlund.²⁴

20. The Trial Chamber is also satisfied that the evidence of the 12 witnesses does not go to proof of 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. The evidence, as discussed above, is crime-base evidence.

21. However, the Trial Chamber notes that certain parts of the evidence of two witnesses mention individuals, the acts and conduct of those who may be considered proximate to the Accused. In his statement, Hugh Nightingale says, “[w]hen we got to the border we picked up some French Legionaries and that was where we met Mr. Stanišić who I understand is the Serbian Minister of Interior.” Jonathon Riley and Janusz Kalbarczyk both refer to Ratko Mladić, specifically placing him in the locations where they were being detained. The Chamber does not consider that these particular references are sufficient to deny the admission of the written evidence of these witnesses,

²² The Trial Chamber notes that it is not in a position to assess whether the evidence of the 12 witnesses is cumulative of KDZ368’s evidence given the very broad explanation of KDZ368’s evidence relating to the alleged hostage-taking provided in the Prosecution’s Rule 65 *ter* witness list.

²³ Motion, Confidential Appendix A.

²⁴ Motion, Confidential Appendix A.

or parts of their evidence, pursuant to Rule 92 *bis*. They will, however, be considered when determining who to make available for cross-examination.

22. On the basis of the above analysis of the Rule 92 *bis*(A)(i) criteria, while the proposed evidence may be admissible, in this particular case, several factors also argue against its admissibility, namely: (i) the proposed evidence has not been previously subject to judicial scrutiny; (ii) there is an overriding public interest in a certain amount of evidence going to the alleged hostage-taking being presented in-court; and (iii) the evidence may go to a “live or pivotal issue between the parties”.

23. In this regard, the Chamber notes that the evidence of the 12 witnesses has not been presented previously at the Tribunal, and that the Tribunal has not before considered a charge of hostage taking of UN soldiers, including their use as human shields.²⁵ Looking at the summaries in the Prosecution’s Rule 65 *ter* witness list of the witnesses that the Prosecution has indicated will provide *viva voce* or Rule 92 *ter* evidence for Count 11, only one of them, KDZ441, is a former soldier who was actually detained. The other witnesses will be testifying to numerous other issues, as well as the allegations of hostage-taking. As such, it may be expected that there will be very little “in-court” evidence presented by the Prosecution in relation to the actual hostage taking events. This feature of the Motion, that is, that the evidence of the 12 witnesses appears to constitute the preponderance of the evidence in support of events that have not been adjudicated by this Tribunal, leads the Chamber to consider that there is an overriding public interest in some of the witnesses appearing in person. Furthermore, as the witnesses’ evidence appears likely to form the significant proportion of evidence that the Prosecution will present in support of its allegations that the crime of taking of hostages took place, this evidence can be considered to be pivotal to the Prosecution’s case.

24. However, with the exception of the evidence of Janusz Kalbarczyk, the Chamber considers that, on balance, the written evidence of the remaining 11 proposed Rule 92 *bis* witnesses is admissible pursuant to Rule 92 *bis*(A). With respect to Janusz Kalbarczyk, in his statement, he provides information about the use and filming of UN personnel as hostages, and the conditions which they faced. He also discusses seeing Ratko Mladić at the compound at which he was detained. When the Chamber compares this witness’s evidence with that of the other 11 witnesses,

²⁵ There have been other hostage cases at the ICTY but those have not dealt with the taking of UN personnel as hostages, *see Prosecutor v. Kordić & Čerkez*, IT-95-14/2-T, Judgement, 26 February 2001; *Prosecutor v. Blaškić*, IT-95-14-T, Judgement, 3 March 2000. There was recently a case at the Special Court for Sierra Leone that dealt with an allegation that peacekeepers were being taken hostage, and found the accused not guilty because the accused, Revolutionary United Front soldiers, never communicated to a third party a threat against the hostages in order to compel an action by the third party; *Prosecutor v. Sesay et al.*, Case No. SCSL-04-15-T, Judgement, 2 March 2009, para. 1969.

the Chamber considers that Janusz Kalbarczyk provides a comprehensive account of the events going to the allegations in Count 11. As such, and in light of the other potentially limited amount of “live” evidence that will be presented in relation to Count 11, there is an overriding public interest in hearing Janusz Kalbarczyk’s evidence *viva voce*. Therefore, the Chamber will deny the Motion as it relates to this witness. Furthermore, the Chamber considers that it would be desirable for the evidence of KDZ441 to be heard *viva voce*.

C. Analysis pursuant to Rule 92 *bis*(C)

25. The Chamber recalls that with regard to written evidence that is admissible pursuant to Rule 92 *bis*, the Chamber has discretion to require witnesses to appear for cross-examination; if it does so decide, the provisions of Rule 92 *ter* shall apply.

26. The Accused has signalled his intentions to fully contest Count 11.²⁶ However, the Chamber notes that, in assessing whether all or some of the 11 witnesses whose written statements are admissible pursuant to Rule 92 *bis* should be required to appear for cross-examination, it did not have the benefit of a substantive response from the Accused. The Chamber has therefore taken into account the criteria pertaining to Rule 92 *bis*(C) as established in the case-law of the Tribunal, and described in the Decision on the Third Motion.²⁷ In particular, the Chamber has considered whether the evidence: (i) is cumulative; (ii) is crime-base; (iii) touches upon a “live and important issue between the parties”; and (iv) describes the acts and conduct of a person for whose acts and conduct the Accused is charged with responsibility, and how proximate the acts and conduct of this person are to the Accused.

27. After reviewing all of the written evidence, and given the considerable similarities between each of the witness’s evidence, the Trial Chamber finds that the factors in favour of and against calling the 11 witnesses for cross-examination apply to their statements equally. However, the Chamber is of the view that in order for it to meet its obligations under Article 20 of the Tribunal’s Statute, several of the witnesses must be made available for cross-examination.

28. The degree of cumulativeness in the remaining 11 witnesses makes it unreasonable to require them all to appear for cross-examination. Thus, the Chamber, in exercising its discretion under Rule 92 *bis*(C), has decided to select a reasonable number of witnesses who constitute a “representative sample” of the remaining witnesses. In making this selection, the Chamber has looked at, for example, the nationality of the witness and the unit in which the witness was

²⁶ See generally Decision on Appeal of Trial Chamber’s Decision on Preliminary Motion to Dismiss Count 11 for Lack of Jurisdiction, 9 July 2009.

²⁷ Decision on Third Motion, para. 10.

deployed in or around Sarajevo, and the particular experience of each witness as it pertains to Count 11 allegations, including where the witness was detained, and what took place during his detention.

29. On the basis of these factors, the Trial Chamber has identified four witnesses that constitute a representative sample of the evidence sought to be admitted through the Motion: Aleksandr Vishnevski, KDZ196, Marcus Helgers, and Jonathon Riley. In addition to Jonathon Riley's evidence being representative, there are several instances where he refers in his statement to actions of Ratko Mladić. Ratko Mladić is a named member of the alleged JCE and, the Chamber considers that, the acts and conduct of Ratko Mladić as discussed by Jonathon Riley may be considered proximate to the Accused.

30. The remaining witness statements of Joseph Gelissen, Gunnar Westlund, Hugh Nightingale, Griffiths Evans, Michael Cornish, KDZ112, and KDZ259 will be admitted pursuant to Rule 92 *bis*. The Trial Chamber notes that their statements do not conform to the requirements of Rule 92 *bis*(B). Accordingly, the statements shall only be provisionally admitted by the Trial Chamber, pending their receipt in a form which strictly complies with the requirements of Rule 92 *bis*(B).

D. Associated Exhibits

31. In light of the Chamber's decision that Janusz Kalbarczyk must testify *viva voce*, the Trial Chamber need not evaluate the associated exhibits related to him. Similarly, since KDZ196, Marcus Helgers, and Jonathon Riley will now be testifying pursuant to Rule 92 *ter*, any decisions regarding the admission into evidence of their associated exhibits is postponed until the witnesses appear to give evidence before the Chamber. The remaining associated exhibits that are the subject of the Motion are examined below.

32. For Joseph Gelissen, KDZ112, Griffiths Evans, and KDZ259 the Prosecution seeks admission into evidence of UN Questionnaires completed by the witnesses (Rule 65 *ter* numbers 21206, 19322, 21207, 19324, respectively). Joseph Gelissen, KDZ112, Griffiths Evans, and KDZ259's written statements never mention the respective questionnaires and their witness statements are clear and comprehensible without the questionnaires being admitted. Therefore, none of the four UN Questionnaires form an "inseparable and indispensable part" of Joseph Gelissen, KDZ112, Griffiths Evans, and KDZ259's evidence, and will not be admitted.

33. For KDZ259, the Prosecution also seeks the admission into evidence of a sketch drawn by KDZ259 (Rule 65 *ter* number 11747). The sketch depicts the immediate area of KDZ259's post,

and is used and discussed several times in the witness statement. The Chamber considers that the statement would not be clear and comprehensible without the sketch. Therefore, the sketch forms an “inseparable and indispensable part” of KDZ259’s statement and will be admitted under seal.

III. Disposition

33. For the foregoing reasons, pursuant to Rules 54, 89, and 92 *bis* of the Rules, the Trial Chamber hereby **GRANTS** the Motion **IN PART**, and

1) **ORDERS** that:

(a) The following witness statements and associated exhibits be provisionally admitted without requiring the witness to appear for cross-examination, subject to the Prosecution providing the witness statements in a form which fully complies with Rule 92 *bis*(B):

- i. The witness statements of Gunnar Westlund, Hugh Nightingale, Griffiths Evans, and Michael Cornish;
- ii. The witness statements of KDZ112 and KDZ259, which are to be admitted under seal;
- iii. Joseph Gelissen’s witness statement, excluding the two sentences referred to in paragraph 2 above, which shall be redacted by the Prosecution;
- iv. The sketch made by KDZ259 (Rule 65 *ter* number 11747), which is to be admitted under seal;

(b) Aleksandr Vishnevski, KDZ196, Marcus Helgers, and Jonathon Riley shall be brought to give evidence before the Chamber pursuant to the provisions of Rule 92 *ter*; and

(c) Janusz Kalbarczyk shall be brought to testify before the Chamber *viva voce*;

2) **REQUESTS** the Registry to assign exhibit numbers to: (i) the witness statements of Gunnar Westlund, Hugh Nightingale, Griffiths Evans, Michael Cornish, KDZ112, and KDZ259; (ii) the redacted witness statement of Joseph Gelissen; and (iii) the sketch made by KDZ259;

3) **POSTPONES** the determination of the admission into evidence of the witness statements of Aleksandr Vishnevski, KDZ196, Marcus Helgers, and Jonathon Riley, as well as their

associated exhibits, until such time as the witnesses are brought to give evidence before the Chamber; and

4) **DENIES** the Motion in all other respects.

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



Judge O-Gon Kwon,
Presiding

Dated this second day of November 2009
At The Hague
The Netherlands

[Seal of the Tribunal]