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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 April 2011

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 April 2011**

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

DECISION ON ACCUSED'S MOTION TO CALL WITNESS FERID SPAHIĆ FOR CROSS-EXAMINATION

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 Call Witness Fehid Spahic [*sic*] for Cross Examination" filed on 2 March 2011 ("Motion"), and hereby issues its decision thereon.

I. Background and Submissions

1. In the Motion, the Accused requests the Chamber to require witness Ferid Spahić ("Witness") to appear for cross-examination, "as it has been discovered that he has information favorable to the defence which is not contained in his prior statement or testimony".[1] The transcripts of the prior testimony of the Witness, and his statement, have been admitted into evidence in these proceedings pursuant to Rule 92 *bis* of the Tribunal's Rules of Procedure and Evidence ("Rules").[2]

2. The Accused submits that, on 22 February 2011, the Witness was interviewed by members of his defence team in the presence of representatives of the Office of the Prosecutor ("Prosecution"), and provided information which is not contained in his prior statement or testimony.[3] The Accused claims that this information goes to his acts, conduct, and mental state, and that the Witness should be called for cross-examination so that the additional information can be received in evidence. He adds that it would be unfortunate and unfair for the Chamber to have available to it only that portion of the Witness's evidence which favours the Prosecution.[4]

3. The Accused explains that, during the interview, the Witness stated that in April 1992 the Yugoslav People's Army ("JNA") came to Višegrad, secured the town without any loss of life, and invited refugees to return to Višegrad guaranteeing their safety. According to the Accused, the Witness believes that this invitation was sent out either by General Dragoljub Ojdanić, Slobodan Milošević, or the Accused himself, and that the Accused "was the only one who could have ordered the UC [Užice Corps] not to kill anyone in Višegrad; to prevent the 'power military groups' from committing crimes".[5] The Accused submits that the Witness also

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[1] Motion, para. 1.

[2] Motion, para. 2. *See* Decision on Prosecution's First Motion for Admission of Statements and Transcripts of Evidence in lieu of *Viva Voce* Testimony Pursuant to Rule 92 *bis* (Witnesses for Eleven Municipalities), 10 November 2009 ("Decision on First Rule 92*bis* Motion").

[3] Motion, para. 4. The Accused has attached to the Motion a memorandum summarising in detail the contents of the interview ("Memorandum").

[4] Motion, para. 8.

[5] Motion, para. 5.

stated during the interview that the JNA left Višegrad on 18 and 19 May 1992, and that he noticed that in the early days after the arrival of the Užice Corps, killings of people were prevented. The Witness added that it was either General Ojdanić, Slobodan Milošević, or the Accused himself who ordered that no killings should occur.[6] According to the Accused, the Witness also made reference to an order sent on 13 June 1992 by the Accused, as President of the Serb Republic of Bosnia and Herzegovina, concerning the Geneva Conventions.[7]

4. On 16 March 2011, the Prosecution filed the "Prosecution Response to Accused's Motion to Call Witness Ferid Spahić for Cross Examination" ("Response") opposing the Motion.[8] The Prosecution submits that the Motion constitutes a request for reconsideration of the Chamber's decision to admit the Witness's evidence without cross-examination, and that the Accused has failed to establish a clear error of reasoning or that reconsideration is necessary to prevent an injustice.[9] In support of this latter assertion, the Prosecution states that the Witness did not give information during the interview which can be considered as admissible evidence of the acts, conduct or mental state of the Accused.[10] The Witness is a survivor of a killing incident, and his evidence mainly concerns that incident, as well as other events which led to the expulsion of non-Serbs from Višegrad.[11]

5. The Prosecution claims that, during the interview, the Witness provided his personal opinion about General Ojdanić, Slobodan Milošević, and the Accused, and about their possible involvement in events in Višegrad municipality in 1992, but he did not suggest that he had any personal dealings with any of them nor that he handled correspondence from them. Furthermore, the Prosecution adds, there is nothing in the Witness's evidence already admitted pursuant to Rule 92 *bis*, nor in the information he provided during the interview, to suggest that he had any dealings with any senior military officials or political leaders. Thus, the Witness is not in a position to provide informed evidence concerning orders or plans issued at a high-level related to the takeover of Višegrad municipality and the treatment of its population.[12]

6. The Prosecution additionally claims that the Motion and the Memorandum inaccurately reflect the nature of the information provided by the Witness during the interview in material aspects. It explains that the observations of the Prosecution's investigator who was present

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[6] Motion, para. 6.
[7] Motion, para. 7.
[8] Response, para. 1.
[9] Response, para. 1, referring to the First Rule 92*bis* Decision.
[10] Response, para. 5.
[11] Response, para. 6.
[12] Response, para. 7.

during the interview suggest that the essence of the Witness's information was entirely contrary to the Accused's characterisation of it, and provides examples of the alleged misrepresentation.[13]

7. Finally, the Prosecution adds that the Witness's opinions regarding the involvement of high-ranking individuals in events which took place in Višegrad municipality are unlikely to be of assistance to the Chamber in determining the charges set out in the Third Amended Indictment ("Indictment"). Furthermore, the Accused will have the opportunity during the course of the defence case, to call witnesses and to tender documentary evidence relating to the matters he intends to prove through the Witness.[14]

II. Discussion

8. On 15 October 2009, the Trial Chamber issued its "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 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 Rule 92*bis* Motion.[15]

9. With respect to the reconsideration of the Chamber's decision, the Chamber notes that there is no provision in the Rules for requests for reconsideration, which are a product of the Tribunal's jurisprudence, and are permissible only under certain conditions.[16] However, the Appeals Chamber has definitively 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'".[17] Thus, the party requesting reconsideration of a

[13] Response, para. 9.

[14] Response, paras. 10–11.

[15] Decision on Third Rule 92*bis* Motion, paras. 4–11.

[16] *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, p. 2.

[17] Further Decision on Prosecution's First Rule 92*bis* Motion (Witnesses for Eleven Municipalities), 9 February 2010 ("Further Decision on First Rule 92*bis* Motion"), para. 8, citing *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, fn. 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.

decision is under an obligation to demonstrate such a clear error in reasoning, or the existence of particular circumstances which warrant reconsideration in order to prevent an injustice.[18]

10. In the Decision on First Rule 92 *bis* Motion, the Chamber admitted the Witness's evidence pursuant to Rule 92 *bis*(A) of the Rules without requiring him to appear for cross-examination. In the Motion, the Accused requests the Chamber to require the Witness to appear for cross-examination based on the fact that the Witness has provided new information which the Accused considers to be favourable to his case.

11. In applying the first prong of the test for reconsideration, namely the demonstration of a clear error of reasoning in the Decision on First Rule 92 *bis* Motion, the Chamber notes that the Accused does not articulate in the Motion how the Chamber erred in assessing the Witness's evidence and, instead, generally requests the Chamber to reassess its decision in light of the new information obtained during the Witness's interview. The Chamber is thus not satisfied that a clear error of reasoning in the Decision on First Rule 92 *bis* Motion has been demonstrated.

12. With respect to the second prong of the test for reconsideration, the Accused seems to argue that some of the new information provided by the Witness during the interview goes to his acts, conduct, or mental state, and is favourable to his case, and that, in order to receive such information in evidence, the Witness should be called for cross-examination. The Chamber notes first that nowhere in the Witness's evidence (approximately 65 pages of transcript from the *Vasiljević* case and another similar number of pages of transcript from the *Lukić* case, as well as an eight page witness statement) was it able to find a reference to the acts and conduct of the Accused, or a reference which could imply that the Witness has direct knowledge of the acts, conduct, or mental state of the Accused. The Chamber acknowledges that there are indeed references to the acts and conduct of the Accused in the Memorandum; however, having examined these, it considers that they are at most of a minor or generalised nature, particularly in light of the Witness's absence of personal acquaintance with the Accused or other high-ranking Bosnian Serb officials. In that regard, the Chamber recalls that the Witness is a survivor of a killing incident charged in the Indictment, and his evidence primarily relates to that incident as well as to the events that took place in Višegrad municipality in early 1992, including his departure in a convoy in June 1992. The Witness played no specific role in the crimes charged in the Indictment, other than the fact that he was himself a victim of one of the alleged crimes.

[18] Further Decision on First Rule 92*bis* Motion, para. 8, citing *Prosecutor v. Galić*, Case No. IT-98-29-A, Decision on Defence's Request for Reconsideration, 16 July 2004, p. 2; also citing *Prosecutor v. Popović et al.*, Case No. IT-05-88-T, Decision on Nikolić's Motion for Reconsideration and Order for Issuance of a Subpoena Duces Tecum, 2 April 2009, p. 2; *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, pp. 2–3.

He was not involved in politics during the time of the Indictment, nor did he hold a position which could have resulted in first hand knowledge of the acts and conduct of the Accused. Thus, the comments made by the Witness do not appear to have any bearing on the Accused's acts and conduct as charged in the Indictment. Consequently, had those comments been included in the evidence sought for admission under Rule 92 *bis*, they would not, alone, have resulted in a decision that he should be called for cross-examination.[19]

13. The Accused also argues that it would be unfortunate and unfair for the Chamber to have available to it only that portion of the Witness's evidence which favours the Prosecution. Again, the Chamber considers that the references made by the Witness to the acts and conduct of the Accused at best consist of the Witness's personal opinion, based on no first hand knowledge, rather than of evidence based on facts. It does not see how these opinions would materially assist the Accused's case, if the Witness was to appear for cross-examination. The Accused will have ample opportunity during his cross-examination of other Prosecution witnesses or in the course of his case to adduce evidence on the issues he wants to prove through the Witness, and to tender documentary evidence that is sufficiently reliable and probative on those matters which he believes will materially assist his case.

14. For these reasons, the Chamber is not convinced that reconsideration of its decision to admit the Witness's evidence pursuant to Rule 92 *bis* without the need for him to appear for cross-examination is necessary in order to prevent injustice.

III. Disposition

15. Accordingly, the 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 sixth day of April 2011
At The Hague
The Netherlands

[Seal of the Tribunal]

[19] *See* for example Decision on First Rule 92*bis* Motion, para. 23, fn. 25.