



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: 11 November 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: 11 November 2011

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

**DECISION ON ACCUSED'S MOTION FOR RECONSIDERATION OF DECISION ON
NINTH SUSPENSION OF PROCEEDINGS: WITNESS KDZ456**

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 of Decision on Ninth Suspension of Proceedings: Witness KDZ456”, filed on 31 October 2011 (“Motion”), and hereby issues its decision thereon.

1. On 28 October 2011, the Chamber issued its “Decision on Accused’s Motion for Ninth Suspension of Proceedings: Witness KDZ456” (“Impugned Decision”), denying the Accused’s request to suspend the trial from 31 October to 18 November 2011, to allow him and his defence team to investigate and prepare for the testimony of KDZ456, a witness who enjoys, *inter alia*, the protective measure of delayed disclosure and is expected to testify around mid-November 2011, and whose identity and related material was only disclosed to the Accused on 17 October 2011.¹ The Accused’s request was based on the need for his defence team to interview 12 individuals involved in the same events as KDZ456 and referred to by KDZ456 in her witness statement.² The Chamber found that, in the absence of demonstrated prejudice by the Accused, it was not satisfied that a suspension of the trial proceedings was necessary, nor in the interests of justice.³

2. In the Motion, the Accused requests the Chamber to reconsider the Impugned Decision, based upon facts which were not available to the Chamber at the time it issued the Impugned Decision.⁴ The Accused explains that, at the time the original motion for the ninth suspension was filed,⁵ the disclosure relating to KDZ456 was not voluminous.⁶ However, on 27 October 2011, the Prosecution disclosed approximately 500 pages of material pertaining to KDZ456, pursuant to a specific request made by the Accused under Rule 66(B) of the Tribunal’s Rules of Procedure and Evidence (“Rules”).⁷ The Accused claims that these documents are directly relevant to the allegations made by KDZ456 and need to be reviewed prior to the cross-examination, but that, given the pace of the trial, there is no one who can review the disclosed material.⁸

3. The Accused explains that reconsideration based upon new information is an established basis for a Chamber to review and reverse or modify its decisions, particularly where this is

¹ Impugned Decision, paras. 1, 12.

² Motion on KDZ456, paras. 2, 3.

³ Impugned Decision, para. 11.

⁴ Motion, para. 2.

⁵ Motion for Ninth Suspension of Proceedings: Witness KDZ456, 19 October 2011.

⁶ Motion, para. 3.

⁷ Motion, paras. 3, 4.

necessary to prevent an injustice.⁹ Thus, given the new circumstances, the Chamber must take care of the rights of the Accused by giving him adequate time and facilities to prepare for his cross-examination through the granting of a suspension of the proceedings.¹⁰

4. On 2 November 2011, the Prosecution filed the confidential “Prosecution Response to Motion for Reconsideration of Decision on Ninth Suspension of Proceedings: Witness KDZ456” (“Response”), opposing the Motion and arguing that the Accused does not allege any error of reasoning on the part of the Chamber and fails to show that reconsideration is necessary to prevent injustice.¹¹ The Prosecution acknowledges that the Accused could not have made his request under Rule 66(B) of the Rules at an earlier date because the identity of KDZ456 and the substance of her testimony were only disclosed to him on 17 October 2011. However, given the limited amount of Rule 66(B) disclosure involved, and the repetitive nature of some of the material requested, the Accused fails to show why it is necessary for the Chamber to grant a suspension of the proceedings based on Rule 66(B) disclosure, in order to prevent injustice.¹²

5. The Prosecution adds that it is unnecessary for the Accused to review all 515 pages of disclosed material during his preparation for the cross-examination of KDZ456 or to spend significant amounts of time on reviewing some of the material.¹³ The Prosecution then explains that 269 pages consist of English-language interviews relating to the Accused’s whereabouts which will be quick to review because they merely confirm information already within the personal knowledge of the Accused; a further 112 pages need not be reviewed because they comprise BCS versions of some of the English-language interviews, which leaves approximately 134 pages that could easily be reviewed by one member of the Accused’s defence team in less than one day.¹⁴

6. The Chamber recalls that there is no provision in the Rules for requests for reconsideration. Such requests are the product of the Tribunal’s jurisprudence, and are permissible only under certain conditions.¹⁵ The standard for reconsideration of a decision set forth by the Appeals Chamber is that “a Chamber has inherent discretionary power to reconsider a previous interlocutory decision in exceptional cases ‘if a clear error of reasoning has been

⁸ Motion, paras. 4–5.

⁹ Motion, para. 2.

¹⁰ Motion, paras. 7–8.

¹¹ Response, paras. 1, 7, 10.

¹² Response, para. 8.

¹³ Response, para. 9.

¹⁴ Response, para. 9.

¹⁵ See *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.

demonstrated or if it is necessary to do so to prevent injustice”¹⁶ 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.¹⁷

7. The Chamber first notes that, as part of its analysis in the Impugned Decision, it examined whether the protective measure of delayed disclosure in relation to KDZ456 affected the Accused’s ability to prepare for his cross-examination of the witness. When determining whether a suspension of the trial proceedings was warranted in order to allow the Accused to interview 12 individuals in preparation of KDZ456’s cross-examination, the Chamber took into account the need for the interviews, as well as the ability of the Accused’s defence team to conduct such interviews prior to KDZ456’s testimony.¹⁸ Having conducted that analysis, the Chamber did not consider that a suspension of the trial proceedings for three weeks was necessary to ensure the Accused’s fair trial rights, nor was it in the interests of justice.¹⁹

8. In the Motion, the Accused notifies the Chamber of: 1) the disclosure by the Prosecution on 17 October 2011 of material in relation to KDZ456’s anticipated testimony, 2) the need to review such material prior to the witness’s testimony, and 3) the inability of his defence team to conduct such revision in a timely manner, *i.e.*, prior to the expected testimony of KDZ456 in mid-November. The Chamber notes that the Accused does not point to any clear error in reasoning made by the Chamber in the Impugned Decision in relation to the interviews of the 12 individuals. Rather, he states that in light of the recent disclosure of approximately 500 pages of material pertaining to KDZ456, the Chamber should reconsider the Impugned Decision and grant a suspension of the proceedings, in order to prevent injustice and give him adequate time and facilities to prepare for his cross-examination of the witness. Thus, the Chamber shall consider whether the recent disclosure of material to the Accused pursuant to Rule 66(B) renders necessary the reconsideration of the Impugned Decision in order to prevent injustice.

9. The Chamber notes that the disclosed material was provided upon a request of the Accused pursuant to Rule 66(B) of the Rules made on 19 October 2011, approximately one

¹⁶ Decision on Accused’s Motions for Reconsideration of Decisions on Judicial Notice of Adjudicated Facts, 14 June 2010, para. 12, citing *Prosecutor v. S. Milošević*, Case No. IT-02-54-AR108bis.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.

¹⁷ *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 and Order for Issuance of a Subpoena Duces Tecum, 2 April 2009, p. 2; *Prlić* Decision on Reconsideration, pp. 2–3.

¹⁸ Impugned Decision, para. 10.

month prior to KDZ456's anticipated date of testimony. The Chamber has in the past held that there is no right on the part of the Accused to have reviewed all Rule 66(B) material disclosed to him prior to the hearing of evidence in the case; otherwise, he could delay his requests for Rule 66(B) material and seek adjournments on the basis of the Rule 66(B) material provided.²⁰ In the present case, however, the Chamber acknowledges that the Accused's request could not have been made at an earlier date, given that the identity of KDZ456 and the material in relation to her expected testimony were only disclosed to him on 18 October 2011. Thus, both the Accused's Rule 66(B) request and the Prosecution's response to the request were done in a timely manner.

10. As the Chamber has also found on prior occasions, the Accused cannot be penalised for exercising in a reasonable way the entitlement provided for under Rule 66(B) of the Rules. It is the Chamber's duty to balance the right of an accused to request material falling within the ambit of such rule, with the need to ensure a fair and expeditious trial.²¹ In the present case, the Chamber has done so and has reviewed the different categories of documents contained in the Accused's request pursuant to Rule 66(B), as well as the index of documents disclosed pursuant to such request.²² The Chamber first notes that, by the time KDZ456 takes the stand, the Accused and his defence team will have had approximately 30 days in which to organise themselves and review the Rule 66(B) material in question. Furthermore, as the Prosecution explains, given the repetitive nature of some of the material, it is clear that the Accused and his defence team do not need to review all 515 pages of it prior to the testimony of KDZ456. Finally, the Chamber also observes that much of the material relates to information which is already within the Accused's personal knowledge. Accordingly, the Chamber considers that the Accused and his defence team will have ample time to prioritise and review the relevant material so as to enable the Accused to efficiently cross-examine KDZ456. For that reason, the Chamber is of the view that a further postponement of the proceedings at this stage is a drastic measure which is not justified by the volume of the additional disclosure.

11. Although it is unfortunate that the existence of delayed disclosure witnesses may be disturbing the Accused's regular trial preparations, the Chamber reiterates that, in the present case, following the completion of KDZ456's testimony, the Accused can seek to recall her upon

¹⁹ Impugned Decision, para. 11.

²⁰ See Decision on the Accused's Motion for Postponement of the Trial, 26 February 2010 ("Decision on Postponement of Trial"), para. 37; Decision on Accused's Motion for Additional Time to Prepare Cross-Examination of Momčilo Mandić, 2 July 2010, para. 9.

²¹ See Decision on Postponement of Trial, paras. 36–37.

²² See Motion, Confidential Annex A, containing a copy of the Accused's Letter to the Prosecution, dated 19 October 2011 and the Prosecution's Disclosure Batch 873, dated 27 October 2011.

demonstrating good cause.²³ In view of that, the Chamber considers that the Accused has failed to show any prejudice arising from the Impugned Decision, even after taking into consideration the recently disclosed material. Consequently, the Accused has failed to demonstrate that reconsideration of the Impugned Decision is warranted to prevent injustice.

12. Accordingly, the Chamber, pursuant to Articles 20(1) and 21(4)(c) of the Statute of the Tribunal and 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 eleventh day of November 2011
At The Hague
The Netherlands

[Seal of the Tribunal]

²³ See Impugned Decision, para. 11.