



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: 1 May 2014

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: 1 May 2014

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

**DECISION ON MOTION FOR RECONSIDERATION OF DECISION DENYING
ADMISSION OF DUŠAN ĐENADIJA'S STATEMENT PURSUANT TO RULE 92 *BIS***

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 “Motion for Reconsideration of Decision Denying Admission of Statement of Dušan Đenadija” filed by the Accused on 8 April 2014 (“Motion”), and hereby issues its decision thereon.

I. Background and Submissions

1. On 18 March 2014, the Chamber issued the “Decision on Accused’s Motions for Admission of Evidence Pursuant to Rule 92 *bis*” (“Rule 92 *bis* Decision”), wherein it denied *inter alia* the Accused’s request to admit the statement of Dušan Đenadija (“Statement” and “Witness”, respectively).¹ The Chamber noted that it was willing to exercise a degree of flexibility and was thus satisfied that the Accused had shown good cause for failing to meet the deadline imposed by the Chamber to file his list of witnesses pursuant to Rule 65 *ter* of the Tribunal’s Rules of Procedure and Evidence (“Rules”) along with any motion for the admission of evidence of his witnesses pursuant to Rule 92 *bis* by no later than 27 August 2012.² However, having proceeded to consider whether the Rule 92 *bis*(B) requirements were met in relation to the Statement, the Chamber concluded that it was not satisfied that they were or could be met.³

2. In the Motion, the Accused requests that the Chamber reconsider its Rule 92 *bis* Decision in relation to the Statement as he submits the Rule 92 *bis*(B) requirements have now been fulfilled.⁴ He argues that since the Statement has now been certified, it is in the interests of justice that the Chamber admit it pursuant to Rule 92 *bis*.⁵

3. The Office of the Prosecutor (“Prosecution”) filed the “Response to Karadžić’s Motion for Reconsideration of Decision Denying Admission of Statement of Dušan Đenadija” on 10 April 2014 (“Response”), wherein it opposes the Motion on the basis that it fails to demonstrate any error of reasoning on the part of the Chamber and that reconsideration is necessary to prevent injustice “as the new circumstances would not lead to a different conclusion”.⁶ The Prosecution further maintains the objections it had raised in the “Prosecution Response to Motion to Admit Testimony of Dušan Đenadija Pursuant to Rule 92 *bis*” filed on 19 February 2014 (“First Response”) in relation to the admission of the Statement pursuant to Rule 92 *bis*, namely that it

¹ Rule 92 *bis* Decision, paras. 63–64, 69(f).

² Rule 92 *bis* Decision, para. 63.

³ Rule 92 *bis* Decision, para. 64.

⁴ Motion, paras. 2, 6.

⁵ Motion, para. 4.

⁶ Response, para. 1; *see also* Response, paras. 2–6.

relates to live and important issues in dispute in the case, that it has not been shown to be cumulative, and that the Witness's evidence is obtainable through other means.⁷ Alternatively, it reiterates its request that should the Chamber wish to admit the Statement into evidence, the Witness should be called for cross-examination.⁸

II. Applicable Law

Reconsideration

4. 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.⁹ 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 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

Admission pursuant to Rule 92 bis

5. Rule 92 *bis* governs the admissibility of written witness statements in lieu of *viva voce* testimony. 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*.¹² 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 if and when necessary.

⁷ Response, paras. 1, 7, recalling First Response, paras. 5–8.

⁸ Response, para. 1, recalling First Response, para. 6.

⁹ 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.

¹⁰ 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-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.

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

¹² Decision on Third Rule 92 *bis* Motion, paras. 4–11.

III. Discussion

6. First turning to whether the Accused has demonstrated that the Chamber should proceed to reconsider the Rule 92 *bis* Decision, as far as the Statement is concerned, the Chamber notes that the Accused does not argue that the Chamber committed a clear error of reasoning. Rather, he merely contends that now that the Statement has been certified, it is in the interests of justice that the Chamber consider its admission on the merits.¹³ The Chamber notes that the Statement has indeed been certified by a Presiding Officer appointed by the Registrar of the Tribunal who attested that the Witness was the person identified in the Statement, that the Witness stated that the contents of the Statement were—to the best of his belief and knowledge—true and correct, that the Witness was informed that if the contents of the Statement are not true then he may be subject to proceedings for giving false testimony, and who indicated the date and place of the declaration. The Chamber is thus satisfied that the Rule 92 *bis*(B) requirements for the Statement have now been fulfilled and that the reason set out in the Rule 92 *bis* Decision for denying the admission of the Statement is therefore no longer valid. In these particular circumstances, the Chamber considers that it must proceed to consider whether the Statement fulfils the other requirements for admission under Rule 92 *bis* so as to decide whether the Rule 92 *bis* Decision should be reconsidered in that respect.

7. At the time relevant to the Third Amended Indictment (“Indictment”), the Witness was the commander of the 1st Battalion of the 43rd Prijedor motorised brigade.¹⁴ In his Statement, he discusses his background as well as the formation and composition of his military unit.¹⁵ He provides evidence as to the unfolding of events in Prijedor.¹⁶ He also touches upon the various tasks of his unit at times relevant to the Indictment.¹⁷ Finally, he answers several questions about his knowledge on issues of relevance to the Indictment, including certain scheduled incidents.¹⁸

8. With regard to the admissibility of the Statement, the Chamber is satisfied that it is generally relevant to the unfolding of events in the Prijedor municipality, a municipality in the Indictment. Furthermore, save for the parts mentioned below, the Chamber is satisfied of its probative value for the purpose of admission pursuant to Rule 92 *bis*. However, for the parts pertaining to Questions 4 and 5, and the last section of the Statement entitled “Incidents from the Indictment”, the Chamber is not satisfied that they attain sufficient probative value for the purpose

¹³ Motion, para. 4.

¹⁴ Statement, p. 5.

¹⁵ Statement, pp. 1–3, 5–6.

¹⁶ Statement, pp. 5–6.

¹⁷ Statement, pp. 6–7.

¹⁸ Statement, pp. 3–4, 8.

of admission under Rule 92 *bis*. More specifically, in relation to Question 4, the Witness is asked about the responsibility of civilian authorities for crimes committed in Prijedor and, in his answer, the Witness provides an illustration from his VRS battalion, thus not answering the question posed. For Question 5, it is not apparent how the Witness can provide a sufficiently probative answer to this question given his own position at the time. Finally, the Chamber sees no reason to admit into evidence the part of the Statement entitled “Incidents from the Indictment”, in which the Witness states not having any knowledge as to the topics presented to him. The Chamber shall therefore not admit into evidence those parts of the Statement pertaining to Questions 4 and 5, and the last section of the Statement entitled “Incidents from the Indictment”.

9. The Chamber considers that the following factors weigh in favour of admitting the remainder of the Statement through Rule 92 *bis*. First, it generally concerns the formation and structure of a military unit in Prijedor, general background information as to the take-over of Prijedor, as well as the unfolding of events in the municipality during the Indictment period. Further, having conducted its own review of the evidence since the Accused does not provide particular details as to the cumulative nature of the remainder of the Statement, the Chamber is satisfied that it is generally cumulative of other evidence on the record, including that of Milomir Stakić and of Draško Vujić. In light of the discussion in the previous paragraph, the Chamber is satisfied that the remainder of the Statement does not go to the acts and conduct of the Accused, which would warrant its non-admission, and does not touch upon live issues in dispute in the case. There is therefore no factor against the admission of the Statement and there is no factor which would warrant that the Chamber exercise its discretion to call the Witness for cross-examination.

10. Accordingly, the Chamber considers that there is an exceptional circumstance which warrants partial reconsideration of the Rule 92 *bis* Decision of far as the Statement is concerned in order to prevent injustice and shall therefore admit the Statement pursuant to Rule 92 *bis*, save for the portions identified in paragraph 8 above.

IV. Disposition

11. Accordingly, the Chamber, pursuant to Rules 54 and 92 *bis* of the Rules, hereby
- a) **GRANTS** the Motion in part,
 - b) **ADMITS** the Statement, save for the portions identified in paragraph 8 above,
 - c) **INSTRUCTS** the Accused to upload into e-court a redacted version of the Statement in compliance with paragraph 8 above,
 - d) **INSTRUCTS** the Registry to assign the appropriate exhibit number, and
 - e) **DENIES** the remainder of the Motion.

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



Judge O-Gon Kwon
Presiding

Dated this first day of May 2014
At The Hague
The Netherlands

[Seal of the Tribunal]