

**UNITED
NATIONS**

MC



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-04-75-T
Date: 8 June 2015
Original: English

IN THE TRIAL CHAMBER

Before: Judge Guy Delvoie, Presiding
Judge Burton Hall
Judge Antoine Kesia-Mbe Mindua

Registrar: Mr. John Hocking

Decision: 8 June 2015

PROSECUTOR

v.

GORAN HADŽIĆ

PUBLIC

**DECISION ON PROSECUTION MOTION TO STRIKE DGH-080 FROM THE
DEFENCE'S RULE 65 *TER* (G) LIST AND DEFENCE MOTION TO RECALL
WITNESS DUŠAN JAKŠIĆ**

The Office of the Prosecutor:

Mr. Douglas Stringer

Counsel for Goran Hadžić:

Mr. Zoran Živanović

Mr. Christopher Gosnell

1. **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 Motion to Strike DGH-080 from the Defence’s Rule 65 *ter*(G) Witness List”, filed confidentially on 16 May 2014 (“Motion to Strike”). The Defence filed the “Response to Prosecution Motion to Strike DGH-080 from the Defence’s Rule 65 *ter* (G) Witness List” confidentially on 2 June 2014 (“Response to the Motion to Strike”).¹

2. The Trial Chamber is also seised of the “Defence Motion to Recall Witness Dušan Jakšić”, filed on 30 May 2014 (“Motion to Recall”). The Prosecution filed the “Prosecution Response to Defence Motion to Recall Witness Dušan Jakšić” on 16 June 2014 (“Response to the Motion to Recall”). The Defence filed a “Reply to Prosecution Response to Defence Motion to Recall Witness Dušan Jakšić” confidentially on 24 June 2014 (“Reply”).

3. The Trial Chamber will assess the two requests jointly in this decision because they pertain to the same issue—the recall of witness Dušan Jakšić. The Trial Chamber notes that the Motion to Strike was filed confidentially, while the Motion to Recall was filed publicly. The witness, Dušan Jakšić, does not enjoy any protective measures; hence, the Trial Chamber finds no reason to issue this decision confidentially.

I. SUBMISSIONS

A. Motion to Strike

4. In the Motion to Strike, the Prosecution requests that the Trial Chamber strike witness Dušan Jakšić from the Defence’s witness list because Jakšić previously testified as a Prosecution witness on 16-17 July 2013,² and because the Defence has not demonstrated good cause for recalling him.³ The Defence Rule 65 *ter* (G) Filings state that Jakšić will testify regarding the “distinction between ‘TO units’ and ‘TO staffs’” that the Prosecution attempted to draw in its Rule 98 *bis* submissions by referring to Jakšić’s testimony.⁴ The Prosecution argues that this issue did not arise out of new disclosure or discovery of evidence after Jakšić’s testimony, which is the

¹ Although the Defence filed its response on 30 May 2014, the filing was received by the Trial Chamber on 2 June 2014.

² Motion to Strike, paras 1, 4, 8. The Chamber notes that the Defence Rule 65 *ter* (G) filings refer to the witness as “Duško Jakšić”, which the Chamber understands to be a clerical error. *See* Corrigendum and Addendum to Defence Notice of Rule 65 *ter* (G) Filings, 23 May 2014 (“Defence Rule 65 *ter* (G) Filings”), confidential Annex A, p. 2 and confidential Annex B, p. 86.

³ Motion to Strike, paras 1, 5.

⁴ Motion to Strike, para. 5; Defence Rule 65 *ter* (G) Filings, confidential Annex B, pp. 86-87.

typical basis for recalling a witness.⁵ The Prosecution further submits that the Defence already had, but failed to take advantage of, an opportunity to cross-examine Jakšić on the issue, which arose during both the Prosecution’s examination-in-chief and the Defence’s cross-examination “in the context of the distinction Colonel Mile Mrkšić made between [Jakšić’s] ‘political’ duties as TO staff commander and his combat duties as commander of the Petrova Gora TO unit”.⁶ The Prosecution further contends that its arguments regarding the issue of TO staffs and TO units were made directly in response to the Defence’s Rule 98 *bis* submissions, where the Defence asserted its own interpretation on the issue of TO staffs.⁷ The Prosecution submits that the parties’ disagreement on the proper interpretation of a witness’s evidence does not, in and of itself, justify recall of the witness.⁸ Finally, the Prosecution submits that Jakšić’s evidence is cumulative of that of other witnesses who have already testified regarding the relationship between TO staffs and civilian authorities, including GH-004, GH-016, GH-023, GH-027, and GH-168.⁹

5. In the Response to the Motion to Strike, the Defence states that it does not oppose the Prosecution’s interpretation of its inclusion of witness Dušan Jakšić on the Defence witness list as being a request to recall the witness.¹⁰ The Defence submits that Jakšić should remain on its witness list on the ground that there is no principle or established jurisprudence that prohibits a Prosecution witness from also being listed as a Defence witness.¹¹

B. Motion to Recall

6. In the Motion to Recall, the Defence requests that the Trial Chamber permit the recall of Dušan Jakšić for “further cross-examination” as a result of the contentious interpretation of his earlier testimony during the Prosecution’s Rule 98 *bis* submissions.¹² The Defence submits that there is good cause for recall on grounds that further testimony by Jakšić would be of significant probative value; address the problem of speculative interpretations of his earlier testimony; substantially narrow the issues in dispute between the parties; and potentially narrow the scope of the Defence’s case.¹³ In particular, the Defence notes that in its Rule 98 *bis* submissions, the Prosecution interpreted Jakšić’s testimony based upon a purported distinction between TO staffs and TO units, and further asserted that Jakšić was appointed TO staff commander at a meeting of

⁵ Motion to Strike, para. 5.

⁶ Motion to Strike, para. 5.

⁷ Motion to Strike, para. 6.

⁸ Motion to Strike, para. 6.

⁹ Motion to Strike, para. 7.

¹⁰ Response to the Motion to Strike, para. 1.

¹¹ Response to the Motion to Strike, para. 2.

¹² Motion to Recall, para. 1.

¹³ Motion to Recall, paras 1, 2, 7.

village TO staff commanders rather than by the JNA.¹⁴ According to the Defence, this purported distinction is significant for the interpretation of Jakšić's evidence.¹⁵ The Defence further submits that the Prosecution never put this distinction to the witness, nor was the Defence aware that it formed part of the Prosecution's case.¹⁶ The Defence argues that, thus, it did not have a basis to question or challenge this distinction during cross-examination.¹⁷ It concludes that this issue is of "substantial significance", and when viewed in conjunction with the reasons for not cross-examining on this point, constitutes good cause.¹⁸

7. In the Response to the Motion to Recall, the Prosecution argues that the Defence has failed to show good cause on the ground that the topic for which recall is sought has already been addressed during both direct examination and cross-examination and reiterates a number of its arguments made in the Motion to Strike.¹⁹ Specifically, the Prosecution notes that the subject arose in the context of Jakšić's testimony regarding (a) the distinction Colonel Mile Mrkšić drew between Jakšić's "political" duties as TO staff commander and his combat duties as commander of the Petrova Gora TO unit, and (b) the establishment of a Vukovar TO staff and Jakšić's appointment as Vukovar TO staff commander at a meeting of local TO staff commanders in Orolik.²⁰ The Prosecution reiterates its argument that the rebuttal of the Prosecution's Rule 98 *bis* submissions is not a valid ground for recall because the submissions were arguments, not evidence, made in direct response to the Defence's own interpretation of Jakšić's evidence in its Rule 98 *bis* submissions.²¹ Lastly, the Prosecution further reiterates that Jakšić's testimony is cumulative of evidence already provided by other witnesses and through exhibits tendered by both parties.²²

8. In the Reply, the Defence requests leave to file the Reply and asserts that the Prosecution extended a novel position on the subordination of TO staffs during its Rule 98 *bis* submissions.²³ The Defence submits that its Motion to Recall is not based upon the issue of whether TO staffs and TO units are distinct entities, but rather the distinction the Prosecution drew regarding the "principles of subordination" applicable to the two entities.²⁴ The Defence further asserts that it had "no idea" of the Prosecution's position because the evidence given by Jakšić was sufficiently clear on this issue.²⁵ The Defence argues that no part of Jakšić's testimony lends itself to the

¹⁴ Motion to Recall, para. 5.

¹⁵ Motion to Recall, para. 7.

¹⁶ Motion to Recall, paras 1, 5, 6.

¹⁷ Motion to Recall, paras 5, 6.

¹⁸ Motion to Recall, para. 7.

¹⁹ Response to Motion to Recall, paras 1, 3.

²⁰ Response to Motion to Recall, para. 3.

²¹ Response to Motion to Recall, para. 4.

²² Response to Motion to Recall, para. 5.

²³ Reply, paras 1-2.

²⁴ Reply, paras 2-3.

²⁵ Reply, para. 2.

interpretation adopted by the Prosecution during its Rule 98 *bis* submissions, and that it would have cross-examined the witness more expressly on this issue had it been directly canvassed in the Prosecution's examination-in-chief.²⁶

II. APPLICABLE LAW

9. Given that there is no explicit rule governing the recall of a witness in the Rules of Procedure and Evidence ("Rules"), pursuant to Rule 89(B) of the Rules, the Trial Chamber "shall apply rules of evidence which will best favour a fair determination of the matter before it and are consonant with the spirit of the Statute and the general principles of law." Rule 85(A) of the Rules provides, amongst other, that "[e]ach party is entitled to call witnesses and present evidence". Rule 90(F) of the Rules further provides that the Trial Chamber shall exercise control over the mode and order of interrogating witnesses and the presenting of the evidence so as to: (i) make the interrogation and presentation effective for the ascertainment of the truth; and (ii) avoid needless consumption of time.

10. The Trial Chamber may grant a party's request to recall a witness upon a showing of good cause.²⁷ In assessing good cause, the Trial Chamber will consider the purpose of the evidence the requesting party expects to elicit from the witness and the party's justification for not eliciting that evidence when the witness originally testified.²⁸ Further, the right of an accused to be tried without undue delay and concerns for judicial economy require that the testimony of the witness to be recalled be of significant probative value and not cumulative in nature.²⁹

III. DISCUSSION

11. The Trial Chamber notes that the Defence intends to recall Dušan Jakšić in order to conduct "further cross-examination as a result of the contentious interpretation of his testimony".³⁰ Accordingly, the Defence must satisfy the established standard for recalling a witness.

12. The Defence seeks to hear Jakšić's view on the Prosecution's interpretation of his testimony on the issue of the distinction between TO staffs and TO units and their respective lines of

²⁶ Reply, paras 3-4.

²⁷ *Prosecutor v. Mladić*, Case No. IT-09-92-T, Decision on Prosecution Motion to Supplement Rule 92 *bis* Evidence and Change Status of D352 And on Defence Request for Reconsideration, 19 December 2013 ("*Mladić* Decision"), para. 5.

²⁸ *Mladić* Decision, para. 5.

²⁹ *Prosecutor v. Karadžić*, Case No. IT-95-5/18-T, Decision on Accused's Motion to Recall Johannes Rutten, 26 April 2012, para. 8.

³⁰ Motion to Recall, para. 1; Response to the Motion to Strike, para. 1.

subordination.³¹ The Trial Chamber notes that in the Reply, the Defence acknowledges that it has in fact cross-examined Jakšić regarding the subordination of TO staffs and TO units, though it submits that it would have done so more expressly but for the Prosecution's failure to canvass the issue clearly.³² In this regard, the Trial Chamber recalls that Jakšić testified regarding the relationship that TO staffs as against TO units had with civilian authorities and the JNA during the Prosecution's direct examination.³³ The Chamber further notes that during the cross-examination of Jakšić, the Defence did in fact question him on the circumstances of his appointment as TO staff commander of the OG South,³⁴ the civilian structure of the TO staff and the political function of the TO staff commander,³⁵ the relation of TO units to the JNA,³⁶ and the nature of Jakšić's interaction with Goran Hadžić.³⁷ Accordingly, the Trial Chamber finds that the Defence has had sufficient opportunity to cross-examine Jakšić on the issue upon which the Motion to Recall is based. In so finding, the Trial Chamber also considers that the Motion to Recall is based solely upon arguments put forth by the Prosecution during its Rule 98 *bis* submissions, and not newly acquired material bearing upon Jakšić's testimony on the issue.³⁸

13. Further, the Chamber notes that the evidence of Milosav Đorđević, GH-016, GH-023, Aleksandar Vasiljević, and GH-168, as well as other relevant documentary evidence presently on record, also addresses the issue sought to be clarified with Jakšić.³⁹ The Trial Chamber also notes that the 65 *ter* summaries of DGH-030, DGH-031 and DGH-049, whom the Defence intends to call, indicate that they will testify on the issue sought to be clarified.⁴⁰ Moreover, DGH-046 and DGH-047 could also be asked about this matter.

14. The Trial Chamber therefore finds that the Defence has not demonstrated good cause for recalling witness Dušan Jakšić for further cross-examination.

³¹ Motion to Recall, paras 1, 5; Reply, paras 2-3.

³² Reply, paras 2-4.

³³ See Dušan Jakšić, 16 July 2013, T. 7042-7073.

³⁴ Dušan Jakšić, 16 July 2013, T. 7110.

³⁵ Dušan Jakšić, 16 July 2013, T. 7109-7111. See also Dušan Jakšić, 16 July 2013, T. 7063-7064,

³⁶ Dušan Jakšić, 16 July 2013, T. 7114-7115.

³⁷ Dušan Jakšić, 17 July 2013, T. 7122, 7139-7140.

³⁸ Motion to Recall, paras 1, 5.

³⁹ See, e.g., Milosav Đorđević, P2300, Amalgamated Witness Statement, 19 March 2013, paras 28-37, 75-76, 86; GH-016, 6 November 2012, T. 1066; 9 November 2012, T. 1184-1185 (confidential); GH-016, P140, Witness Statement, 14 September 2012, paras 40-42 (confidential); GH-023, 17 June 2013, T. 5783; 18 June 2013, T. 5881-5883 (partly confidential); Aleksandar Vasiljević, 2 September 2013, T. 7920-7921; Aleksandar Vasiljević, P2913.1, Public Redacted Witness Statement, 19 April 2013, paras 29-36; GH-168, 9 September 2013, T. 8292-8294; 8337-8340; 10 September 2013, T. 8375, 8388-8394, 8425-8426; 11 September 2013, T. 8477-8484, 8492-8497, 8522-8524 (confidential); P2001.1981, Veselin Šljivančanin on Combat Operations in Vukovar, 10 December 1991, pp. 2-3; D20, Order Relating to Establishing Military Authorities and the Security of Commands and Units Signed by Lieutenant Colonel Milorad Vojnović, 22 November 1991, pp. 1-2; P1995.1981, Order Signed by Colonel Mile Mrkšić Entitled "Settling Questions of Re-subordination and Return to the Parent Formation", 21 November 1991, pp. 1-2.

⁴⁰ Defence Rule 65 *ter* (G) Filings, confidential Annex B, pp. 29, 30, 55-56.

IV. DISPOSITION

15. Accordingly, the Trial Chamber, pursuant to Rules 54, 89(B), and 90(F) of the Rules, hereby:

GRANTS the Defence leave to reply to the Motion to Recall;

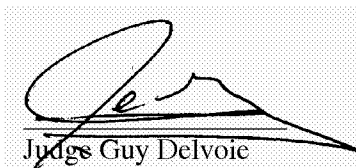
GRANTS the Motion to Strike;

DENIES the Motion to Recall; and

STRIKES Dušan Jakšić, listed as witness DGH-080, from the Defence Rule 65 *ter* (G) Filings.

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

Done this eighth day of June 2015,
At The Hague,
The Netherlands.



Judge Guy Delvoie
Presiding

[Seal of the Tribunal]