



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: 23 October 2013  
Original: English

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**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:** 23 October 2013

**PROSECUTOR**

v.

**RADOVAN KARADŽIĆ**

*Public*

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**DECISION ON MOTION FOR RECONSIDERATION AND REQUEST TO  
WITHDRAW EVIDENCE OF KDZ486**

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**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 Decisions to Admit Testimony and Statement of Witness KDZ486 Pursuant to Rule 92 *bis*”, filed publicly with a confidential annex on 12 September 2013 (“Motion”), and of the “Prosecution Response to Defence Motion for Reconsideration of Decisions to Admit Testimony and Statement of Witness KDZ486 Pursuant to Rule 92 *bis* and Motion to Withdraw Testimony of KDZ486”, filed publicly with confidential appendices on 3 October 2013 (“Request to Withdraw”), and hereby issues its decision thereon.

### **I. Procedural Background and Submissions**

1. On 21 December 2009, the Chamber issued its “Decision on Prosecution’s Seventh Motion for Admission of Transcripts of Evidence in Lieu of *Viva Voce* Testimony Pursuant to Rule 92 *bis*: Delayed Disclosure Witnesses” (“Decision on Seventh Rule 92 *bis* Motion”), whereby it granted, *inter alia*, the request by the Office of the Prosecutor (“Prosecution”) to admit into evidence the transcript of the prior testimony of KDZ486 (“Witness”) in the case of *Prosecutor v. Popović et al.*, Case No. IT-05-88-T, (“Transcript”), pursuant to Rule 92 *bis* of the Tribunal’s Rules of Procedure and Evidence (“Rules”).<sup>1</sup> On 17 July 2012, the Chamber issued its “Decision on Accused’s Motion for Admission of Supplemental Rule 92 *bis* Statement (Witness KDZ486)” (“Decision on Supplemental Statement”), whereby it admitted into evidence a supplemental statement of the Witness, clarifying portions of the Transcript (“Supplemental Statement”).<sup>2</sup> The confidential and public redacted versions of the Transcript were admitted into evidence as exhibits P327 and P328, respectively, and the confidential and public redacted versions of the Supplemental Statement were admitted into evidence as exhibits D2260 and D2261, respectively.

2. In the Motion, the Accused requests the Chamber to reconsider its decisions to admit the Transcript and the Supplemental Statement, given the Witness’s recent recanting of a portion of his testimony in the *Popović* case.<sup>3</sup> In support of his request, the Accused submits that, on 2 September 2013, the Prosecution disclosed to him a report of its contact with the Witness on 30 July 2013, during which the Witness recanted his prior testimony in the *Popović* case that he

<sup>1</sup> See Decision on Seventh Rule 92 *bis* Motion, para. 32. See also Prosecution’s Seventh Motion for Admission of Transcripts of Evidence in Lieu of *Viva Voce* Testimony Pursuant to Rule 92 *bis*: Delayed Disclosure Witnesses, 29 May 2009.

<sup>2</sup> See Decision on Supplemental Statement, para. 9. See also Motion for Admission of Supplemental Rule 92 *bis* Statement: Witness KDZ486, 28 June 2012.

<sup>3</sup> Motion, paras. 2–3.

had seen Drago Nikolić at the execution site at Orahovac.<sup>4</sup> Thus, given that the testimony relied upon by the Chamber when granting the Seventh Rule 92 *bis* Motion is no longer accepted by the Witness as true and accurate, the Chamber “risks an injustice were it to rely on information which the [W]itness now disavows”.<sup>5</sup>

3. In the Request to Withdraw, the Prosecution submits that it does not oppose the relief requested in the Motion, and requests the Chamber’s leave to withdraw and remove from the record the Transcript and the Supplemental Statement.<sup>6</sup>

4. The Prosecution provides a detailed explanation of the line of events surrounding the Witness’s inconsistent statements regarding the presence of Drago Nikolić at Orahovac, outlining the various dates on which the Witness went back and forth with regard to his testimony in the *Popović* case.<sup>7</sup>

5. The Prosecution then adds that, despite the Witness’s inconsistencies in his recollection of part of his prior testimony in the *Popović* case, the Witness’s sworn testimony is still true, accurate, and reliable.<sup>8</sup> Thus, had the present circumstances materialised earlier, the Prosecution would have requested the Witness to be heard *viva voce* or pursuant to Rule 92 *ter*. However, in light of the advanced stage of the proceedings, removing the Witness’s evidence from the record “appears to ‘best favour a fair determination of the matter’ and will be ‘consonant with the spirit of the Statute and the general principle of law’”.<sup>9</sup>

## **II. Applicable Law**

6. Rule 89(B) of the Rules provides, in relevant part, that “a 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 general principles of law.”

7. Furthermore, as the Chamber has stated on a number of occasions, 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.<sup>10</sup> However, the Appeals Chamber has articulated the

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<sup>4</sup> See Motion, para. 2; confidential Annex A, pp. 1–2, containing the “Investigator Notes” dated 30 July 2013 (noting the Witness’s recanting of his prior testimony).

<sup>5</sup> Motion, para. 3.

<sup>6</sup> Request to Withdraw, paras. 1, 3, 10, 12.

<sup>7</sup> Request to Withdraw, paras. 4–8.

<sup>8</sup> Request to Withdraw, paras. 1–2.

<sup>9</sup> Request to Withdraw, paras. 2, 9, 11.

<sup>10</sup> *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.

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’”.<sup>11</sup> 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.<sup>12</sup>

### **III. Discussion**

8. In the Motion, the Accused requests the Chamber to reconsider its decisions to admit the Witness’s evidence pursuant to Rule 92 *bis*, as the necessary step to prevent injustice.<sup>13</sup> However, given that the Prosecution does not oppose the Motion and in fact requests to withdraw the Transcript and the Supplemental Statement, the Chamber finds it more appropriate to first consider the Prosecution’s Request to Withdraw.

9. Given the advanced stage of the proceedings and the approaching end of the Defence case, and in light of the particular circumstances surrounding the Witness’s evidence, the Chamber agrees with the parties that allowing the Prosecution to withdraw the Transcript and to remove it from the record serves the interests of justice and of judicial economy. The Chamber notes that, given that the Supplemental Statement was admitted into evidence in order to clarify portions of the Transcript, it serves no independent purpose on its own and shall therefore also be removed from the case record. Similarly, given that a number of exhibits were admitted as inseparable and indispensable parts of the Transcript, the Chamber considers that these should also be removed from the case record.

10. In light of the above, the Chamber considers that the Motion is now moot.

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<sup>11</sup> *Prosecutor v. Milošević*, Case No. IT-02-54-AR108bis.3, Decision on Request of Serbia and Montenegro for Review of the Trial Chamber’s Decision of 6 December 2005, para. 25, confidential, footnote 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.

<sup>12</sup> *Prosecutor v. Stanislav 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, p. 3.

<sup>13</sup> See Motion, para. 3.

**IV. Disposition**

11. Accordingly, the Chamber, pursuant to Rules 54 and 89(B) of the Rules, hereby:
- (a) **GRANTS** the Request to Withdraw;
  - (b) **ORDERS** that exhibits P318, P319, P320, P327, P328, P426, P427, D2260, and D2261 be removed from the case record;
  - (c) **INSTRUCTS** the Registry to take all necessary measures to implement this Decision; and
  - (d) **DISMISSES** the Motion as moot.

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



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Judge O-Gon Kwon  
Presiding

Dated this twenty-third day of October 2013  
At The Hague  
The Netherlands

**[Seal of the Tribunal]**