



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 December 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 December 2011**

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

**DECISIONS ON PROSECUTION MOTION FOR ADMISSION OF EVIDENCE OF
WITNESS KDZ595 PURSUANT TO RULE 92 QUATER AND ACCUSED'S MOTION FOR
RECONSIDERATION**

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 “Prosecution’s Motion for Admission of the Statement of Witness KDZ595 Pursuant to Rule 92 *quater*”, filed publicly with confidential Appendices A, B, and C, on 29 November 2011 (“Motion”), and of the Accused’s “Motion for Reconsideration of Decision to Add Witness KDZ595 and Response to 92 *quater* Motion”, filed on 30 November 2011 (“Request”), and hereby issues its decision thereon.

I. Background and Submissions

1. On 4 May 2010, the Chamber issued its “Decision on Prosecution’s Motion to Substitute a Witness” (“Decision”) in which it allowed the Office of the Prosecutor (“Prosecution”) to substitute witness KDZ595 for witness KDZ579 on its list of witnesses.¹
2. In the Motion, the Prosecution informs the Chamber that KDZ595 has died and requests that his statement to the Prosecution of 20 February 2010 (“Statement”) be admitted into evidence pursuant to Rules 89(C) and 92 *quater* of the Tribunal’s Rules of Procedure and Evidence (“Rules”).² The Prosecution argues that the criteria for admission under these Rules are met as: (i) the evidence of KDZ595 is relevant and of probative value,³ (ii) KDZ595 is deceased and therefore unavailable to the Tribunal,⁴ (iii) the Statement is reliable as it was taken by the Prosecution and signed by KDZ595,⁵ and (iv) the Statement is corroborated by other evidence.⁶ More specifically, with respect to (i), the Prosecution explains that the Statement is relevant and of probative value as it concerns the alleged involvement of the Army of Republika Srpska (“VRS”) in securing the forcible removal of non-Serbs from the Vlasenica municipality and other parts of eastern Bosnia and Herzegovina (“BiH”) in 1992.⁷
3. In the Request, the Accused moves for the reconsideration of the Decision in order to prevent an injustice.⁸ The Accused submits that the death of KDZ595 is a new circumstance which “changes the equation” of the Decision as there is now “real prejudice” to him in substituting witness KDZ595 for witness KDZ579 because he is deprived of his right to

¹ Decision, paras. 6–9.

² Motion, paras. 1–2, 6, Confidential Appendix C.

³ Motion, para. 5.

⁴ Motion, para. 6.

⁵ Motion, para. 7, Confidential Appendix A.

⁶ Motion, para. 8, Confidential Appendix B.

⁷ Motion, para. 5. *See also* Confidential Appendix B.

⁸ Request, paras. 5–6.

cross-examine KDZ595 and test his evidence.⁹ The Accused also submits that the Prosecution would not be prejudiced by reverting to witness KDZ579 who can be cross-examined.¹⁰

4. In the alternative, the Accused argues that, should the Chamber decline to reconsider its Decision, it should nevertheless deny the Motion on the basis that the evidence was not subject to cross-examination and that there does not appear to be any evidence that corroborates KDZ595's central allegation about one of the officers of the VRS.¹¹

5. On 2 December 2011, the Prosecution filed its "Response to Motion for Reconsideration of Decision to Add Witness KDZ595" ("Response") arguing that the Request should be denied because the Accused has failed to meet the test for reconsideration of a prior decision.¹² The Prosecution submits that the admission of KDZ595's statement under Rule 92 *quater* would not result in an injustice to the Accused because the "deprivation of the opportunity to cross-examine the witness does not constitute an injustice".¹³ The Prosecution also notes that the evidence of KDZ579 cannot replace that of KDZ595 because, while similar in many parts, they differ in one crucial aspect, namely the level of detail concerning the identification of a VRS officer, during that officer's visit to a detention facility in Vlasenica.¹⁴

II. Applicable Law

6. The Chamber recalls that the Pre-Trial Chamber set out the law applicable to requests for admission of evidence pursuant to Rule 92 *quater* in the "Decision on Prosecution Motion for Admission of Testimony of Witness KDZ198 and Associated Exhibits pursuant to Rule 92 *quater*" issued on 20 August 2009 ("KDZ198 Decision").¹⁵ This Chamber will therefore not repeat that discussion here. The Chamber reiterates, however, that the evidence of an unavailable witness may be submitted in written form if the Chamber finds that: (i) the witness is unavailable within the meaning of Rule 92 *quater*(A), (ii) the evidence is reliable looking at the circumstances in which the statement was made and recorded, (iii) the evidence is relevant to the proceedings and of probative value, and (iv) the probative value of the evidence, which may

⁹ Request, paras. 1–3.

¹⁰ Request, para. 4.

¹¹ Request, para. 9.

¹² Response, paras. 3, 7.

¹³ Response, paras. 4–5.

¹⁴ Response, para. 6, Confidential Appendix A.

¹⁵ KDZ198 Decision, paras. 4–10.

include evidence pertaining to acts and conduct of an accused, is not outweighed by the need to ensure a fair trial.¹⁶

7. The Chamber also 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.¹⁷ 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'".¹⁸ 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.¹⁹

III. Discussion

8. Dealing with reconsideration first, the Chamber notes that the Accused does not allege an error of reasoning on behalf of the Chamber but confines his argument to the need to prevent an injustice given the death of witness KDZ595, which constitutes a new circumstance. The Chamber recalls that in reaching its Decision to substitute KDZ595 for KDZ579 it proceeded on the assumption that KDZ595 would give evidence during the course of the trial and would be subject to cross-examination by the Accused.²⁰ Accordingly, and relying, *inter alia*, on the fact that the Accused did not object to the substitution and would not be prejudiced by it, the Chamber found that it was in the interest of justice to substitute KDZ595 for KDZ579.²¹ However, the passing away of KDZ595 constitutes a significant change of circumstances as his evidence can now only be tendered through Rule 92 *quater*, to which the Accused strongly

¹⁶ KDZ198 Decision, paras. 4–6; Decision on Prosecution Motion for Admission of Testimony of Sixteen Witnesses and Associated Exhibits Pursuant to Rule 92 *quater*, 30 November 2009, para. 6. *See Prosecutor v. Popović et al.*, Case No. IT-05-88-AR73.4, Decision on Beara's and Nikolić's Interlocutory Appeals Against Chamber's Decision on 21 April 2008 Admitting 92 *quater* Evidence, 18 August 2008, para. 30.

¹⁷ *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.

¹⁸ 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 *Kajeljeli 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.

¹⁹ *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.

²⁰ Decision, para. 7. *See also* Prosecution's Motion to Substitute Witness, 8 April 2010 ("Motion on KDZ595"), para. 5.

²¹ Decision, para. 7.

objects. The question for the Chamber, therefore, is whether it would have allowed the substitution had it known that KDZ595's evidence would be tendered under Rule 92 *quater*.

9. The Chamber first notes that at the time the Decision was issued, the Prosecution's preference for the evidence of KDZ595 was based on the fact that it was the "best evidence" insofar as it dealt, in detail, with the presence of a high ranking VRS officer in one of the detention facilities in the Vlasenica municipality.²² In other words, the Prosecution presented to the Chamber that, while both KDZ595 and KDZ579 would be able to testify to the same events, *including* the VRS officer's visit to the facility, KDZ595 would be able to provide more specific and more detailed evidence about that visit and the officer in question.²³ This remains the reason currently invoked by the Prosecution in the Response for not being able to revert back to the evidence of KDZ579.²⁴ The Chamber notes therefore that, based on the Prosecution's submissions in the Response as well as in its original request for substitution, the difference between the two witnesses is simply in the fact that KDZ579 cannot provide "the same level of detail" that KDZ595 can when it comes to the presence of the VRS officer in the said detention facility.²⁵

10. While KDZ595's evidence still remains the "best evidence", other considerations, such as the fact that the Prosecution is now seeking to make use of Rule 92 *quater*, and the resulting prejudice to the Accused, if any, must be considered here. In this respect, the Chamber first notes that KDZ595's evidence is in the form of a written statement, which was given to the Prosecution on 20 February 2010. As such, it has never been cross-examined or challenged in any way. While the Prosecution correctly points out that the right of the Accused to cross-examine a witness is not absolute and that Rule 92 *quater* does not deprive the Accused of his right to a fair trial,²⁶ this does not necessarily mean that no injustice to the Accused would result in the specific circumstances here, where KDZ579 is available to the Prosecution, can give almost identical evidence, albeit not to the same level of detail, and can be cross-examined and challenged by the Accused. This is especially so given that KDZ579 was originally on the Prosecution's Rule 65 *ter* list and thus was considered suitable for the purpose of providing evidence about the Vlasenica municipality.²⁷

²² See Motion on KDZ595, para. 3, Confidential Appendix A.

²³ See Motion on KDZ595, Confidential Appendix A, where the Prosecution explains in detail why the evidence of KDZ595 is more pertinent to the VRS officer.

²⁴ Response, Confidential Appendix A.

²⁵ Response, Confidential Appendix A, para. 3; Motion on KDZ595, Confidential Appendix A.

²⁶ KDZ198 Decision, para. 8.

²⁷ The Chamber also notes the Prosecution's argument that the evidence of KDZ595 regarding the relevant detention facility, as well as his evidence regarding the officer's involvement in removing non-Serbs from

11. The Chamber has therefore decided to exercise its inherent discretionary power to reconsider its Decision to allow the Prosecution to substitute KDZ595 for KDZ579 because, in light of KDZ595's passing away, it is necessary to do so to prevent an injustice to the Accused. As a result, the Motion is moot and there is no need for the Chamber to deal with it here.

IV. Disposition

12. Accordingly, the Trial Chamber, pursuant to Rules 54 and 89 of the Rules, hereby **GRANTS** the Request and **DISMISSES** the Motion.

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



Judge O-Gon Kwon
Presiding

Dated this sixth day of December 2011
At The Hague
The Netherlands

[Seal of the Tribunal]

Vlasenica, is corroborated by other evidence, including that of another protected witness. See Motion, Confidential Appendix B, footnotes 19 and 20. While that may be so, the Chamber notes that, unlike the evidence of KDZ579, none of that evidence deals specifically with the VRS officer's visit to the said detention facility.