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CASE/AFFAIRE NO. IT-95-5/18-T (R. KARADŽIĆ) **DATE** 13 April 2011

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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: 13 April 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: 13 April 2011

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

**DECISION ON ACCUSED'S MOTION TO CALL WITNESS
DRAŽEN ERDEMOVIĆ FOR CROSS-EXAMINATION**

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 to Call Witness Drazen Erdemovic for Cross Examination” filed on 24 March 2011 (“Motion”), and hereby issues its decision thereon.

I. Background and Submissions

1. In the Motion, the Accused requests the Chamber to require witness Dražen Erdemović (“Witness”) to appear for cross-examination, based upon new information which was not available when the Witness testified in the *Popović et al.* case.¹ The transcripts of this prior testimony have been admitted into evidence by the Chamber in these proceedings pursuant to Rule 92 *bis* of the Tribunal’s Rules of Procedure and Evidence (“Rules”).²

2. The Accused submits that there is reason to believe that the Witness possesses potentially exculpatory information which was not included in his prior testimony in the *Popović et al.* case.³ Specifically, the Accused claims that the Witness has information to prove that the group of soldiers to which he belonged in 1995, and which took part in the executions at Branjevo farm, was not part of the *de jure* or *de facto* command structure of the VRS; that the Witness’s VRS unit was on leave when the executions were committed; and that the Witness and others took part in the executions in return for gold.⁴

3. The Accused explains that he believes that the Witness has this new information based on a book published in 2009 by Germinal Civikov entitled “*Srebrenica: Der Kronzeuge*” (“Book”) in which the Witness’s testimony before the Tribunal is discussed,⁵ as well as on the Witness’s testimony in the *Perišić* case, when he testified *inter alia* that “on one mission, his superior...was looking forward to receiving 12 kilos of gold afterwards”.⁶ According to the Accused, this information may show that the unit responsible for the killings at Branjevo farm was therefore outside his control capabilities.⁷ Thus, if the Chamber were to apply to the

¹ Motion, paras. 1, 9.

² Motion, para. 2. *See* Decision on Prosecution’s Fifth Motion for Admission of Statements in lieu of *Viva Voce* Testimony Pursuant to Rule 92 *bis* (Srebrenica Witnesses), 21 December 2009 (“Decision on Fifth Rule 92 *bis* Motion”).

³ Motion, paras. 3, 4.

⁴ Motion, para. 3.

⁵ Motion, para. 4. The Accused attaches to the Motion an article entitled “The Demolition of the Yugoslav Tribunal”, which was published in *Z Magazine* on January 2011, and which discusses the contents of the Book; Motion, Annex A.

⁶ Motion, para. 5.

⁷ Motion, para. 6.

Witness's testimony the factors established by the *Martić* Chamber when determining whether a Rule 92 *bis* witness should be called for cross-examination, this would result in the conclusion that he be called for cross-examination.⁸

4. On 6 April 2011, the Office of the Prosecutor ("Prosecution"), filed the "Prosecution Response to Accused's Motion to Call Witness Dražen Erdemović for Cross-Examination" ("Response") opposing the Motion.⁹ The Prosecution submits that the Accused does not allege any error of reasoning in the Chamber's original decision to admit the Witness's evidence without cross-examination,¹⁰ and fails to demonstrate that reconsideration is necessary to prevent an injustice.¹¹

5. In support of this latter assertion, the Prosecution states that the Witness had previously discussed the three areas of "potentially exculpatory information" on which the Accused now seeks to cross-examine him, and that the Accused was in possession of that information, when the Prosecution's Rule 92 *bis* application was filed, but the Accused chose not to raise the issues or to object to the admission of the Witness's evidence at the time.¹² The Prosecution also claims that the Witness's evidence in the *Perišić* case, when considered in its entirety, refutes the Accused's allegation that the information contained therein could be potentially exculpatory.¹³ Finally, the Prosecution adds that the article attached to the Motion contains "numerous incorrect factual assertions which negate [its] reliability and value...",¹⁴ and provides various examples of these assertions.¹⁵

II. Discussion

6. The Chamber notes that the Motion is, essentially, another request by the Accused for it to reconsider one of its earlier Rule 92 *bis* decisions.¹⁶ In that decision, the Trial Chamber applied the criteria necessary for determining Rule 92 *bis* applications, as set out in those

⁸ Motion, paras. 7, 8. The factors expressly referred to by the Accused are: whether the cross-examination in the prior proceedings adequately dealt with the issues relevant to the defence in the current proceedings; whether the question relates to live and important issues between the parties; and whether the witness was extensively cross-examined by a party with a common interest to the accused; Motion, para. 7.

⁹ Response, paras. 1, 9.

¹⁰ Response, paras. 1, 2, referring to the Decision on Fifth Rule 92 *bis* Motion.

¹¹ Response, para. 1.

¹² Response, para. 3 referring to the "Prosecution's Fifth Motion for Admission of Statements in Lieu of *Viva Voce* Testimony Pursuant to Rule 92 *bis* (Srebrenica Witnesses)", filed on 29 May 2009. The Prosecution provides specific examples of where discussion by the Witness on the three areas referred to by the Accused can be found, and the dates when the referred sources were disclosed to the Accused; See Response, para. 4.

¹³ Response, para. 5.

¹⁴ Response, para. 6.

¹⁵ See Response, paras. 7, 8.

¹⁶ See also, Decision on Accused's Motion to Call Witness Ferid Spahić for Cross-Examination, 6 April 2011.

decisions, and will not determine afresh those criteria unless the test for reconsideration is first met.¹⁷ 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.¹⁸ However, the Appeals Chamber has definitively articulated the 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'".¹⁹ Thus, the party requesting reconsideration of a decision is under an obligation to demonstrate such a clear error in reasoning, or the existence of particular circumstances which warrant reconsideration in order to prevent an injustice.²⁰

7. In the Decision on Fifth Rule 92 *bis* Motion, the Chamber reviewed the evidence contained in the transcripts of the Witness's prior testimony proffered by the Prosecution, and decided to admit the Witness's evidence pursuant to Rule 92 *bis*(A) of the Rules without requiring him to appear for cross-examination.²¹ In the Motion, the Accused requests the Chamber to require the Witness to appear for cross-examination based on the fact that the Witness has provided new information which the Accused considers to be favourable to his case.

8. The Accused does not articulate in the Motion how the Chamber erred in the Decision on Fifth Rule 92 *bis* Motion in assessing the Witness's evidence and, instead, requests the Chamber to reassess its decision in light of the fact that the Witness possesses potentially exculpatory information which is not contained in the Witness's transcripts of prior testimony in the *Popović et al.* case, now in evidence pursuant to Rule 92 *bis*. The Chamber is therefore not satisfied that a clear error of reasoning in the Decision on Fifth Rule 92 *bis* Motion has been demonstrated.

¹⁷ See 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), filed on 15 October 2009, where the Chamber outlined the law applicable to motions made pursuant to Rule 92 *bis*.

¹⁸ *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, p. 2.

¹⁹ Further Decision on Prosecution's First Rule 92*bis* Motion (Witnesses for Eleven Municipalities), 9 February 2010 ("Further Decision on First Rule 92*bis* Motion"), para. 8, citing *Prosecutor v. Slobodan 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.

²⁰ Further Decision on First Rule 92*bis* Motion, para. 8, citing *Prosecutor v. Galić*, Case No. IT-98-29-A, Decision on Defence's Request for Reconsideration, 16 July 2004, p. 2; also citing *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; *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, pp. 2–3.

²¹ Decision on Fifth Rule 92 *bis* Motion, paras. 46, 67(B)(2).

9. With respect to the second prong of the test for reconsideration, the Accused argues that it is in the interests of justice that the Witness be called for cross-examination in light of the new information referred to above, which was not available to the Chamber when issuing its decision on the admission of the Witness's transcript of prior testimony pursuant to Rule 92 *bis*.

10. The Chamber notes that it issued its decision on the admissibility of the Witness's evidence on 21 December 2009, more than five months after the Witness's testimony in the *Perišić* case, and almost a year after the Book was published. Furthermore, as pointed out by the Prosecution in the Response, some of the issues covered by the Witness during his testimony in the *Perišić* case had also been discussed during the Witness's testimony in the *Popović et al.* case, as well as during his testimony in the *Krstić* and *Slobodan Milošević* cases, all of which took place years before the Prosecution's Rule 92 *bis* application with respect to the Witness was filed. The Accused was given ample opportunity to respond to all of the Rule 92 *bis* motions filed by the Prosecution, but he chose not to do so with respect to the Witness's evidence.²² It was at that time that the Accused should have raised the issues set out in the Motion so that the Chamber could have taken them into account when considering the Prosecution's Rule 92 *bis* application.

11. Thus, the only "new" information serving as the basis for the Motion is the publication in January 2011 of an article reviewing the Book, which is attached to the Motion. Such articles critical of the work of the Tribunal are commonplace and do not, in and of themselves, give cause to the Chamber to reconsider any of its previous decisions, particularly when based on unsubstantiated claims and speculation. This notwithstanding, the Chamber has considered whether, in the present case, it could be justified to depart from its previous decision not to call the Witness for cross-examination in order to prevent an injustice. It reiterates that the Accused will have ample opportunity during his cross-examination of other Prosecution witnesses to adduce evidence on those matters which he believes will materially assist his case, including the alleged information which could be provided by the Witness if he were to appear for cross-examination. Specifically, the Chamber recalls that it denied the Prosecution's Rule 92 *bis* application with respect to witness KDZ351, who now needs to appear for cross-examination.²³ Given that KDZ351 was a member of the same unit as the Witness, the Accused will be able to cross-examine him on some of the issues set out in the Motion. Furthermore, the Accused will also have the opportunity to adduce evidence on the alleged potentially exculpatory matters

²² See Decision on Fifth Rule 92 *bis* Motion, para. 6, for a summary on the opportunities given to the Accused at the time to respond to the Rule 92 *bis* motions.

²³ See Decision on Fifth Rule 92 *bis* Motion, para. 67(B)(5).

discussed in the Motion, in the course of his case, as well as through the tendering of documentary evidence that is sufficiently reliable and probative.

12. For the foregoing reasons, the Chamber finds that reconsideration of its decision to admit the Witness's evidence pursuant to Rule 92 *bis* without the need for him to appear for cross-examination is not necessary in order to prevent injustice.

III. Disposition

13. Accordingly, the Chamber, pursuant to 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 thirteenth day of April 2011
At The Hague
The Netherlands

[Seal of the Tribunal]