UNITED
NATIONS

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: 11 February 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: **11 February 2011**

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

DECISION ON ACCUSED'S MOTION TO RECALL HARRY KONINGS FOR FURTHER 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 Recall Harry Konings for Further Cross Examination", filed on 13 December 2010 ("Motion"), and hereby issues its decision thereon.

I. Background and Submissions

1. On 24 September 2009, Witness Lt. Col. Harry Konings ("Witness") was interviewed at the United Nations Detention Unit by the Accused in the presence of members of his defence team and representatives from the Office of the Prosecutor ("Prosecution").[1] The Accused's legal associate, Mr. Peter Robinson, took notes during the interview, which formed the substance of a confidential report of the interview prepared by Mr. Robinson for the Accused ("Report").[2]

2. During his cross-examination of the Witness on 7 December 2010, the Accused attempted to confront him with statements purportedly made during the interview and contained in the Report. In putting one such statement to the Witness, the Accused asked him whether he could confirm that "it was legitimate to use artillery and mortars to frighten the enemy."[3] The presiding Judge asked the Accused where he was going with this question, noting that the Witness was not a legal expert, and stating that, if the Accused asked questions of this nature, he could not complain that he does not have enough time for cross-examination.[4]

3. On being asked more questions about what he purportedly said in the interview, the Witness objected to answering further without being able to read the Report.[5] On the request of Mr. Robinson, the Chamber asked the Witness to read the Report during the break, after which the Accused could put questions to the Witness in relation to it.[6] Although the Chamber agreed with the Witness that it was not fair to require him to respond to questions about statements he may have made during the interview, and which he did not recall and of which he did not have any note, the Chamber reiterated its request to the Witness.[7] However, after the break, the Accused did not put any further questions to the Witness regarding statements he may have made in the interview.

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[1] Motion, para. 2.
[2] Motion, paras. 2-3.
[3] Hearing, 7 December 2010, T. 9318.
[4] Hearing, 7 December 2010, T. 9319.
[5] Hearing, 7 December 2010, T. 9322-9323.
[6] Hearing, 7 December 2010, T. 9331.

4. In the Motion, the Accused requests the Chamber to order the Witness to be recalled for further cross-examination.[8] He submits that he was precluded from questioning the Witness about statements he made during the interview, contained in the Report, which were either inconsistent with his testimony or which would have advanced the defence case, as a result of the Chamber's rulings.[9] He also submits that he was precluded from eliciting evidence which was inconsistent with other evidence concerning the shelling of the Markale Market on 28 August 1995 ("Markale Market shelling incident") due to the time restrictions placed on his cross-examination by the Chamber.[10] The Accused further argues that he was precluded from eliciting evidence on six statements concerning legitimate military objectives because the presiding Judge ruled that the Witness had not come to testify as a legal expert.[11] Finally, the Accused submits that the time restrictions placed upon the cross-examination were unreasonable given the scope of the Witness's evidence.[12]

5. On 17 December 2010, the Prosecution filed the "Prosecution's Response to Karadžić's Motion to Recall Harry Konings for Further Cross Examination" ("Response") in which it opposes the Accused's requests. It submits that while the Chamber expressed concern about the manner in which the Accused sought to use the Report, at no stage did it preclude him from inquiring into the statements contained therein.[13] It also submits that recalling the Witness is not justified because the Accused fails to demonstrate material inconsistencies between such statements and the Witness's testimony.[14] The Prosecution further argues that the Accused was not precluded from eliciting evidence regarding legitimate military objectives, and that he mistakes the observation of the Chamber that the Witness was not a "legal expert" with a ruling that he could not pursue questions of fact concerning legitimate military objectives.[15] Finally, the Prosecution interprets the Accused's third objection to be a request for reconsideration of the Chamber's decision regarding the amount of time the Accused could have for cross-examination of the Witness, and asserts that the Accused has failed to demonstrate a clear error of reasoning

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[7] Hearing, 7 December 2010, T. 9332.
[8] Motion, paras. 1, 19.
[9] Motion, para. 6.
[10] Motion, paras. 7.
[11] Motion, paras. 4, 16.
[12] Motion, para. 18.
[13] Response, para. 8.
[14] Response, para. 9. It further submits that the Accused did, in fact, put one of the six statements to the Witness, namely that the Witness "did not see a disproportionate attack by the Serbs during the time he was in Sarajevo."
[15] Response, para. 11.

or that he suffered any prejudice by not having elicited the evidence he wishes, and thus there are no grounds for a reconsideration.[16]

II. Applicable Law

6. Rule 89 of the Rules provides, in relevant part:

> (B) In cases not otherwise provided for in this Section, 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 the general principles of law.
>
> (C) A Chamber may admit any relevant evidence which it deems to have probative value.

7. Rule 90(F) of the Tribunal's Rules of Procedure and Evidence ("Rules") provides:

> The Trial Chamber shall exercise control over the mode and order of interrogating witnesses and presenting evidence so as to:
>
> (i) make the interrogation and presentation effective for the ascertainment of the truth; and
>
> (ii) avoid needless consumption of time.

8. In order to determine a request to recall a witness, the Chamber must consider whether the requesting party has demonstrated good cause to recall that witness.[17] In doing this, the Chamber must take into consideration the purpose of the evidence that the requesting party expects to elicit from the witness as well as the party's justification for not eliciting that evidence when the witness originally testified.[18] Furthermore, the right to be tried without undue delay as well as concerns for judicial economy demand that a request to recall a witness only be granted when the evidence in question has considerable probative value and is not cumulative in nature.[19] If the witness is to be recalled in order to show inconsistencies between the witness's testimony and his or her subsequent statements, the requesting party must demonstrate that the prejudice was sustained due to its inability to put inconsistencies to the witness.[20] The witness will not be recalled if there is no need for the witness's explanation of the inconsistency because it is minor or its nature is self-evident.[21]

9. The Chamber also recalls that the standard for reconsideration of a decision set forth by the Appeals Chamber is that "a Chamber has inherent discretionary power to reconsider a

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[16] Response, paras. 12, 14.

[17] *Prosecutor v Gotovina et al.*, Case No. IT-06-90-T, Decision on Prosecution Motion to Recall Marko Rajčić, 24 April 2009 ("*Gotovina* Decision"), para. 10; *Prosecutor v Bagosora et al*,, Case No. ICTR-98-41-T, Decision on Defence Motion to recall Prosecution Witness OAB for Cross-examination, 19 September 2005 ("*Bagosora* Decision"), para.2.

[18] *Gotovina* Decision, para. 10; *Bagosora* Decision, para. 2.

[19] *Gotovina* Decision, para. 10; *Bagosora* Decision, para. 2.

[20] *Bagosora* Decision, para. 3.

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.'"[22]

III. Discussion

10. As is detailed above, during his testimony, the Witness was provided with a copy of the Report and asked to review it during one of the court breaks in the expectation that the Accused would ask him questions about it at the recommencement of his testimony after the break. However, ultimately, the Accused did not pose any questions to the Witness in relation to the Report. In his Motion, the Accused contends that the Chamber agreed with the Witness who wanted to decline to answer any questions about what he had said during that interview.[23] In fact, the Chamber asked the Witness to read the Report and stated that the Accused could then proceed with his questions, which he never did. As such, and contrary to the assertions of the Accused, the Chamber did not preclude the Accused from asking the Witness about statements in the Report The Accused's failure to put such questions to the Witness at the time cannot justify the recall of the Witness.

11. The Chamber further considers that it did not preclude the Accused from asking the Witness questions of fact related to legitimate military objectives. Rather, commenting as it did, the Chamber indicated that he should tailor his questions to the testimony of the Witness, who was not a legal expert and who could, therefore, not be expected to provide evidence regarding what constituted legitimate military objects from a legal perspective.[24] With regard to the Accused's assertion that he was precluded from eliciting inconsistent evidence from the Witness about the Markale Market shelling incident, the Chamber considers that he has not demonstrated in the Motion how he was prevented from asking the questions he now indicates he wished to ask. Rather, he simply asserts that he was precluded from covering the five matters noted in the Motion because of the time limit placed upon his cross-examination. However, in addition to the three hours that the Chamber determined to be sufficient for cross-examination of the Witness, prior to his testimony, the Chamber allowed the Accused an additional 33 minutes to complete his cross-examination. Moreover, the Accused did, in fact, question the Witness about

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[21] *Bagosora* Decision, para. 3.

[22] Decision on Accused's Motions for Reconsideration of Decisions on Judicial Notice of Adjudicated Facts, 14 June 2010 ("Reconsideration Decision"), para. 12, citing *Prosecutor v. Slobodan 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 *Prosecutor v. Kajelijeli*, Case No. ICTR-98-44A-A, Judgement, 23 May 2005, paras. 203–204). *See also Prosecutor v. Ndindabahizi*, 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.

[23] Motion, para. 5.

[24] Hearing, 7 December 2010, T. 9319.

the Markale Market shelling incident.[25] The Chamber sees no reason that, in the time available to him, he could not have equally asked the Witness about the other five matters.

12. Furthermore, the Chamber notes that five of the six statements mentioned in the Motion, concerning legitimate military objectives, which the Accused submits are inconsistent with the Witness's evidence or go to matters that would have advanced the defence case, are propositions of a purely legal nature and, therefore, would not be appropriately put to the Witness. The remaining sixth statement was already put to the Witness during his cross examination.[26] Therefore, the evidence that the Accused now wants to elicit by way of recalling the Witness does not have "considerable probative value" and is cumulative in nature. For the above reasons, the Chamber considers that the Accused has failed to demonstrate good cause for the recall of the Witness.

13. The Chamber also considers that the Accused has failed to fulfil the criteria for reconsideration of the decision of the Chamber to set a three-hour time limit on the Accused's cross-examination of the Witness. This decision was fully in accordance with the Chamber's trial management duties and its obligation, pursuant to Rule 90(F) of the Rules, to ensure that the manner of questioning of witnesses *inter alia* avoids the needless consumption of time. In the Motion, the Accused asserts that the time limit was unreasonable because of the "scope of the witness's evidence" and he was "simply not given enough time to cover all of the questions he had prepared." The Chamber reiterates that, in setting time limits for cross-examination, it undertakes a careful analysis of a number of factors pertaining to the prospective witness's evidence and the Accused's estimate of the time he will need.[27] Furthermore, the Chamber has been generous in allowing the Accused time in addition to the limits it has set when this is considered appropriate and, in fact, as noted above, allowed the Accused an additional 33 minutes for the Witness. Finally, the Chamber considers that while the Accused has a right to put inconsistent statements to a witness, this right must be exercised within the reasonable parameters set by the Chamber for the proper management of trial. Thus, the fact that the Accused was not able to put all the questions he had prepared to the Witness does not demonstrate that the time limit given for cross-examination of the Witness was unreasonable, or that the Accused has suffered any prejudice.

[25] Hearing, 7 December 2010, T. 9372-9402.

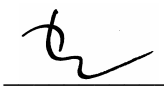
[26] Hearing, 7 December 2010, T. 9321-9322. The statement that was already put to the Witness reads as follows: "He did not see a disproportionate attack by the Serbs during the time he was in Sarajevo."

[27] *See* Oral Decision, Hearing, T. 3903-3905 (21 June 2010).

IV. Disposition

14. For these reasons, pursuant to Rules 54, 89 and 90(H) of the Rules, the Chamber hereby **DENIES** the Motion.

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



Judge O-Gon Kwon
Presiding

Dated this eleventh day of February 2011
At The Hague
The Netherlands

[Seal of the Tribunal]