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-09-92-T

Date: 19 September 2016

Original: English

IN TRIAL CHAMBER I

Before: **Judge Alphons Orie, Presiding**
Judge Bakone Justice Moloto
Judge Christoph Flügge

Registrar: **Mr John Hocking**

Decision of: **19 September 2016**

PROSECUTOR

v.

RATKO MLADIĆ

PUBLIC

DECISION ON DEFENCE MOTION FOR RECONSIDERATION OF DECISION ADMITTING CHARTS OF AMOR MAŠOVIĆ

Office of the Prosecutor
Mr Peter McCloskey
Mr Alan Tieger

Counsel for Ratko Mladić
Mr Branko Lukić
Mr Miodrag Stojanović

I. PROCEDURAL HISTORY

1. On 31 January 2014, the Chamber admitted into evidence from the bar table the documents bearing Rule 65 *ter* numbers 27124 and 27161a, which were later assigned exhibit numbers P4888 and P5303, respectively ("Impugned Decisions" and "Impugned Exhibits").[1] On 9 August 2016, the Defence requested reconsideration of the Impugned Decisions ("Motion").[2] On 23 August, the Prosecution responded, opposing the Motion ("Response").[3] On 31 August, the Defence requested leave to reply, attaching its reply.[4]

II. SUBMISSIONS OF THE PARTIES

2. The Defence requests reconsideration of the Impugned Decisions or, in the first alternative, that the Chamber require the Prosecution to call Amor Mašović as a witness pursuant to Rule 98 of the Tribunal's Rules of Procedure and Evidence ("Rules") or, in the second alternative, that the Chamber exercise its powers under the same rule to call Mašović as a Chamber witness.[5] The Defence also seeks leave to exceed the word limit for motions.[6]

3. The Defence submits that the Impugned Exhibits represent parts of Mašović's witness statements.[7] According to the Defence, the admission of the Impugned Exhibits from the bar table represented a clear error of reasoning as it circumvented the rules concerning the admission of evidence because as excerpts of witness statements they were prepared for Tribunal purposes and are thus subject to the *leges specialis* of Rules 92 *bis* or *ter* of the Rules.[8] In relation to new facts and arguments justifying reconsideration, the Defence submits that: (i) the Chamber confirmed that potential "evidence of impact" is more properly tendered through a witness rather than from the bar table, (ii) the Chamber recently admitted evidence from witness Jasmin Odobašić undermining the reliability of Mašović's evidence, and (iii) Mašović refuted his own expertise in a prior case before the Tribunal.[9]

1 Decision on Prosecution Motion to Admit Evidence from the Bar Table – Proof of Death Documents, 31 January 2014 ("Proof of Death Decision"); Decision on Prosecution Bar Table Submission of Proof of Death Documents in Connection with Witness Ewa Tabeau, 31 January 2014.
2 Defence Motion Requesting to Strike Amor Mašović Charts due to Clear Error and New Particular Circumstances, or, Alternatively, that this Trial Chamber Require the Testimony of Amor Mašović or Exercise its Power under Rule 98 to Call Amor Mašović to Clarify the Reliability of his Expansive Forensic Assertions, 9 August 2016.
3 Prosecution Response to Defence Motion Regarding the Admission of P04888 and P05303, 23 August 2016.
4 Defence Request for Leave to Reply to Prosecution Response about Extracted Mašović Charts, 31 August 2016.
5 Motion, paras 8-10, 28-29, 32-34, 40, 42-48.
6 Motion, para. 12.
7 Motion, paras 3-5, 33-34.
8 Motion, paras 4, 7-9, 30-34.
9 Motion, paras 1-2, 6, 41-43.

4. With regard to its alternative requests, the Defence submits that Mašović's testimony on proof-of-death matters, and clarification with respect to his reliability, are vital to any determinations of fact to be made by the Chamber.[10]

5. The Prosecution opposes the Motion, submitting that it is untimely.[11] It submits that the Defence should have raised its *lex specialis* objection when the Impugned Exhibits were tendered.[12] In relation to the argument that the Chamber confirmed that certain documents are more properly tendered through witnesses, the Prosecution submits that the Defence draws an inapposite comparison by referencing an earlier decision by the Chamber, failing to demonstrate a new fact or argument that would merit reconsideration of the Impugned Decisions or calling Mašović to testify.[13] In relation to the Defence's argument regarding Odobašić's evidence, the Prosecution submits that the Defence misapprehends or ignores the nature of the evidentiary process because the introduction of contradictory evidence does not lead to striking the initial evidence or calling further evidence to clarify the initial evidence, but instead goes to the weight ultimately to be ascribed to the initial evidence.[14] In relation to the Defence's arguments concerning Mašović's prior testimony about his expertise, the Prosecution submits that the Defence has been aware of this testimony for many years, yet did not tender it.[15]

III. APPLICABLE LAW

6. The Chamber recalls and refers to the applicable law in relation to requests to exceed the word limit for motions and requests for reconsideration, as set out in previous decisions.[16]

7. Pursuant to Rule 98 of the Rules, a trial chamber may order either party to produce additional evidence or may *proprio motu* summon witnesses and order their attendance.

8. Pursuant to Rule 126 *bis* of the Rules, a reply to a response, if any, shall be filed within seven days of the filing of the response, with the leave of the relevant chamber. According to Rule 126 (B) of the Rules, where the Rules, or the practice directions and directives issued under the Rules, prescribe that the time for the doing of any act is to run from the filing of a relevant document, that time shall begin to run as from the date of the distribution of the document.

[10] Motion, paras 10, 45.
[11] Response, paras 3-4.
[12] Response, para. 3.
[13] Response, paras 5, 9.
[14] Response, paras 6, 9.
[15] Response, para. 4.
[16] Decision on Prosecution Motion to Admit Evidence in Rebuttal, 16 August 2016, para. 15; Reasons for Decision on Defence Motion for Reconsideration, 29 June 2012, para. 10.

IV. DISCUSSION

9. With regard to the requested leave to reply, the Chamber notes that, apart from generally stating that the reply would assist the Chamber, the Defence does not submit why leave to reply should be granted. The Chamber considers that the Defence has not sufficiently demonstrated that the Chamber would be assisted by the reply in this instance and will deny the request.

10. As a preliminary matter, the Chamber notes that the Motion was filed more than two-and-a-half years after the Impugned Decisions. The Defence acknowledges this but submits that "the mandate to uphold justice does not expire".[17] While there is no time limit for filing motions for reconsideration, challenging decisions years after they have been made has a negative effect on the efficiency and expeditiousness of proceedings.[18] Defence counsel are expected to raise objections in a timely manner. Nonetheless, the Chamber will exceptionally consider the Motion on its merits despite the substantial delay in filing.

11. In relation to the Defence's request to exceed the word limit, the Chamber acknowledges that the Motion contains both a request for reconsideration and a request pursuant to Rule 98 of the Rules. On the other hand, the Chamber considers that a more structured and focused Motion could easily have conformed to the word limit. Nonetheless, the Chamber finds that it is in the interests of judicial economy to decide on the Motion as filed and will therefore grant the Defence's request to exceed the word limit.

12. In relation to the alleged clear error of reasoning, the Chamber confirms that evidence taken out of court for the purpose of Tribunal proceedings falls under the *leges specialis* of Rules 92 *bis* or *ter* of the Rules.[19] However, there are exceptions to this rule. The Appeals Chamber has held that there is nothing preventing a chamber from admitting "a written statement given by prospective witnesses to OTP investigators or others for the purposes of legal proceedings [...] notwithstanding its non-compliance with Rule 92*bis* – (i) where there has been no objection taken to it [...]".[20] This standard has been applied by the Chamber throughout the proceedings in this case. In relation to P4888 and similar documents, the Defence stated that it was "inappropriate to deal with those at

[17] Motion, para. 9.

[18] *See Prosecutor v. Galić*, Case No. IT-98-29, Decision on the Defence Motion for Withdrawal of Judge Orie, 3 February 2003, para. 11, stating, in the context of a disqualification motion, that "[a]lthough neither the Statute nor the Rules provide any time-limits for the filing of motions during trial, both parties are certainly under a general obligation to act swiftly in order to ensure that the Accused can be tried expeditiously".

[19] *See* Decision on Defence Motion to Admit into Evidence Subotić and Poparić's Expert Reports and Related Documents, 9 June 2016, para. 13; *Prosecutor v. Galić*, Case No. IT-98-29-AR73.2, Decision on Interlocutory Appeal Concerning Rule 92 *bis* (C), paras 28, 31.

this time, and reserves the right to comment on the same and raise objections when the Defence expert has reviewed the same and been granted access to the Demographic Unit Archives and databases".[21] In one of the Impugned Decisions, the Chamber addressed this matter by stating: "The Documents have been tendered during the Prosecution's case and it is appropriate to deal with them at this stage. The Defence was granted additional time to respond to the Motion but has not requested additional time in order to specifically respond to the tendering of the Documents or sought the Chamber's assistance in seeking access to documents or databases".[22] Therefore, there were no objections by the Defence at the time when the Defence was expected to respond.[23] Moreover, the Defence did not respond at all to the tendering of exhibit P5303. Under these circumstances, even if the Impugned Exhibits could be considered to be subject to Rules 92 *bis* or *ter* of the Rules, the Chamber was not prevented from admitting them into evidence because the Defence did not object to their admission. Accordingly, the Defence has not demonstrated the existence of a clear error of reasoning in the Impugned Decisions.

13. In relation to the Defence's argument that the Chamber's finding in a separate decision that potential "evidence of impact" is more properly tendered through a witness rather than from the bar table amounts to a new circumstance requiring reconsideration, the Chamber considers that such an argument cannot be the basis for a reconsideration request. Every decision is taken in the context of the corresponding litigation and a chamber's decision on an unrelated matter generally cannot amount to a new fact or circumstance warranting reconsideration. Nonetheless, as the Defence repeatedly raises the issue, the Chamber will give further explanation.

14. The Defence misinterprets the Chamber's decision. The Chamber did not require the Defence to call a particular witness. Rather, on 23 May 2016, the Chamber denied the admission into evidence of one document tendered by the Defence from the bar table due to insufficient probative value, and noted that far-reaching, uncorroborated allegations are, due to their impact, more properly tendered through witnesses rather than from the bar table.[24] On 15 August 2016, in the context of a separate motion, the Chamber explained that its earlier reference to a more appropriate mode of tendering certain evidence did not mean that such evidence *must* necessarily be

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[20] *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-AR73.2, Decision on Admissibility of Prosecution Investigator's Evidence, 30 September 2002, para. 18.

[21] Defence Response in Opposition to "Prosecution Motion to Admit Evidence from the Bar Table", 30 December 2013, para. 4.

[22] Proof of Death Decision, para. 4.

[23] In this respect the Chamber notes that it has been common practice in this trial to interpret a party's silence as a non-objection.

[24] Decision on Defence's Second Motion to Admit Documents from the Bar Table, 23 May 2016, paras 19, 30; Decision on Defence's Motion for Partial Reconsideration or Certification to Appeal the Decision on Defence's Second Bar Table Motion, 6 July 2016, para. 12.

tendered.[25] Evidence of potential impact on the case, like all evidence, especially if uncorroborated, may be deemed more reliable if it is introduced through a witness and properly tested before the Chamber. A preference for a certain mode of presentation cannot be a basis for denying admission into evidence. The Chamber's denial of the admission into evidence of the document referred to by the Defence was not based on the fact that it contained "evidence of impact". The denial was based on the document's insufficient probative value pursuant to Rule 89 (C) of the Rules. The Chamber's reference to "evidence of impact" was *obiter dictum*.

15. In relation to the Defence's argument regarding Odobašić's evidence, the Chamber considers that the Defence misunderstands this aspect of the judicial process. The admission of Defence evidence that might undermine the reliability of Prosecution evidence is not cause for reconsidering the admission of that Prosecution evidence. The Chamber will determine the weight to be ascribed to each piece of evidence in light of all the evidence received. The parties are free to argue in their final trial briefs and closing arguments why certain evidence is more reliable than other evidence, but such submissions are separate and distinct from the Chamber's decisions on the admission of evidence. Accordingly, the Chamber finds the Defence argument to be unpersuasive.

16. In relation to the Defence's argument regarding Mašović's prior testimony, the Chamber considers that Mašović's evidence was known to the Defence at the time the Impugned Exhibits were tendered and cannot, therefore, form a basis for reconsidering the Impugned Decisions. Based on the above, the Chamber finds that the Defence has failed to demonstrate that the standard for reconsideration has been met.

17. In relation to the Defence's request to call Mašović to testify pursuant to Rule 98 of the Rules, the Chamber notes at the outset that the Defence's primary concern appears to be that the Chamber "explore for itself the validity of Mašović's alleged findings before seeking to rely on them".[26] The Defence suggests, in other words, that only Mašović's testimony would allow the Chamber to explore the validity of the Impugned Exhibits. Again, the Defence appears to misunderstand the judicial process. The Chamber will not blindly rely on evidence solely because it has been admitted.[27] The Chamber will determine the weight to be ascribed to each piece of evidence in light of all the evidence received. If the Chamber finds the Impugned Exhibits unreliable, it will not rely on them. The Prosecution could have sought to bolster the Impugned

[25] *See* Decision on Defence Requests to Vary the Deadline for Presenting Witnesses, 15 August 2016 (Confidential), fn. 45 (emphasis added).
[26] Motion, para. 47.
[27] What is more, with the introduction of contradictory evidence, a chamber *cannot* rely on all evidence just because it has been admitted.

Exhibits' reliability by calling Mašović during its case, but it decided not to do so. Similarly, the Defence could have challenged the Impugned Exhibits' reliability by calling Mašović during its case, but it did not. Neither has the Defence demonstrated, nor is the Chamber of the view that there is any need to now call Mašović to testify pursuant to Rule 98 of the Rules.

V. DISPOSITION

18. For the foregoing reasons, pursuant to Rules 98, 126 (B), and 126 *bis* of the Rules, the Chamber

DENIES the Defence request for leave to reply;

GRANTS the Motion in relation to the requested leave to exceed the word limit; and

DENIES the remainder of the Motion.

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

Judge Alphons Orie
Presiding Judge

Dated this nineteenth day of September 2016
At The Hague
The Netherlands

[Seal of the Tribunal]