



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: 20 October 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: 20 October 2016

PROSECUTOR

v.

RATKO MLADIĆ

PUBLIC

**DECISION ON REQUEST FOR RECONSIDERATION OF THE
DECISION ON DEFENCE MOTION FOR CERTIFICATION
TO APPEAL THE FIFTH BAR TABLE DECISION**

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 30 May 2016, the Chamber denied the admission into evidence of the document bearing Rule 65 *ter* number 1D00460 from the bar table.¹ On 6 June 2016, the Defence filed a motion seeking certification to appeal the Chamber's decision or, alternatively, to strike from the trial record portions of Prosecution witness testimony ("Certification Motion").² On 15 August 2016, the Chamber denied the Certification Motion ("Impugned Decision").³ On 22 August 2016, the Defence requested that the Chamber reconsider the Impugned Decision with respect to the request to strike evidence from the trial record ("Motion").⁴ On 26 August 2016, the Prosecution responded, opposing the Motion ("Response").⁵ On 1 September 2016, the Defence requested leave to reply ("Request"), attaching its reply to the Request ("Reply").⁶

II. SUBMISSIONS OF THE PARTIES

2. The Defence contends that the Impugned Decision with respect to not striking evidence was erroneous.⁷ It first submits that the Chamber erred in finding that the Defence failed to refer to the legal basis for its request, arguing that the legal basis was "clearly identified" in the Certification Motion as being Rule 73 (B) of the Tribunal's Rules of Procedure and Evidence ("Rules").⁸ The Defence argues that non admission of the document bearing Rule 65 *ter* number 1D00460 results in the Defence being unable to dispute the evidence provided by Prosecution witnesses about the legal concept of proportionality.⁹ Second, the Defence submits that the Chamber erred in finding that the Defence failed to identify the evidence to be stricken from the record, arguing that the Certification Motion listed the evidence of seven Prosecution witnesses it sought to have stricken.¹⁰ According to the Defence, reconsideration of the Impugned Decision is appropriate to avoid an injustice of admitting uncontested Prosecution evidence which has the potential to significantly affect the factual and legal conclusions made by the Chamber, thereby affecting the outcome of the trial.¹¹

¹ Decision on Defence's Fifth Motion for the Admission of Documents from the Bar Table, 30 May 2016, para. 42.

² Defence Motion for Certification to Appeal Fifth Bar Table Decision as to 65 *ter* 1D00460, 6 June 2016, paras 18-19.

³ Decision on Defence's Motion for Certification to Appeal the Fifth Bar Table Decision as to the Document Bearing Rule 65 *ter* Number 1D00460, 15 August 2016, paras 7-9.

⁴ Defence Motion to Reconsider the Decision on Defence's Motion for Certification to Appeal the Fifth Bar Table Decision as to the Document Bearing Rule 65 *ter* Number 1D00460, 22 August 2016, para. 13.

⁵ Prosecution Response to Defence Motion to Reconsider the Decision on Defence's Motion for Certification to Appeal the Fifth Bar Table Decision (as to 65 *ter* 1D00460), 26 August 2016, para. 1.

⁶ Defence Request for Leave to Reply to Prosecution Response Motion of 26 August 2016 (as to 65 *ter* 1D00460), Annex A ("Defence Reply to Prosecution Motion of 26 August 2016 (as to Document 65 *ter* 1D00460)").

⁷ Motion, paras 1, 3, 11.

⁸ Motion, paras 4-7. The Chamber understands the Defence's references to "Article 73(B)" to be intended as references to *Rule* 73 (B) of the Rules.

⁹ Motion, paras 6, 10.

¹⁰ Motion, paras 8-9.

¹¹ See Motion, paras 6, 10-11.

3. The Prosecution responds that the Motion fails to meet the standard for reconsideration.¹² It submits that the Chamber did not err in finding that the Defence's request to strike evidence from the trial record has no legal basis, arguing that Rule 73 (B) of the Rules does not provide authority to strike evidence after it has been admitted.¹³ According to the Prosecution, the Motion failed to demonstrate injustice warranting reconsideration as the Defence's argument that it has been denied the opportunity to dispute the testimony of Prosecution witnesses ignores both the Defence's cross-examinations of the witnesses and its right to use the document bearing Rule 65 *ter* number 1D00460 as a legal source.¹⁴

4. The Defence requests leave to reply to allow it to (i) clarify that even the Prosecution was able to identify the evidence it requested to be stricken from the trial record,¹⁵ and (ii) correct the Prosecution's misrepresentation of the facts in relation to the issue of why the Chamber denied the Defence's request.¹⁶

III. APPLICABLE LAW

5. The Chamber recalls and refers to the applicable law governing reconsideration of decisions, as set out in a previous decision.¹⁷

IV. DISCUSSION

A. Request to reply

6. The Defence submits that the Response makes misrepresentations which should be corrected. The Chamber finds that the Defence has shown good cause for its Request to Reply and will grant the requested leave.

B. Reconsideration of the Impugned Decision

7. In relation to the Chamber's alleged error in reasoning in finding that the Defence had not identified a legal basis for the request to strike evidence, the Chamber recalls that Rule 73 (B) of the Rules does not provide the Chamber with the authority to strike evidence from the trial record. Accordingly, the Defence's argument fails. Further, the Defence ignores that the testimony of the Prosecution witnesses in question was subject to cross-examination and that the denial of admission of the document bearing Rule 65 *ter* number 1D00460 does not in any way deprive the Defence of its right to dispute the legal assessments in question. If a party refers to a document containing an

¹² Response, paras 5, 10.

¹³ Response, para. 6.

¹⁴ Response, paras 7-8.

¹⁵ Request, para. 3.

¹⁶ Request, para. 4.

¹⁷ Reasons for Decision on Defence Motion for Reconsideration, 29 June 2012, para. 10.

analysis of a legal principle which falls within the Chamber's own expertise and which is readily available and accessible, its admission is not necessary. The party is at liberty to quote such document as legal authority in its arguments.

8. In relation to the Chamber's alleged error in finding that the Defence had not identified the specific evidence to be stricken, the Chamber observes that the Defence indeed listed a number of witnesses in the Certification Motion.¹⁸ The Chamber notes, however, that the Defence's list was ambiguous because it (i) was non-exhaustive; (ii) contained non-evidentiary references such as summary of Rule 92 *ter* witness statement; and (iii) the relief did not include any clear reference to the evidence that the Defence sought to have stricken. Nonetheless, the Chamber recalls that the lack of identification of evidence to be stricken was not the main basis for denying the Certification Motion.

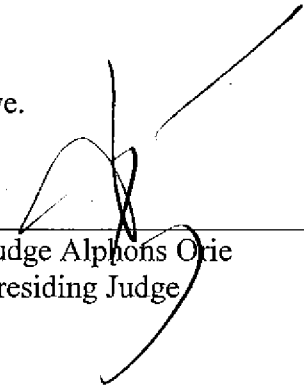
9. For the foregoing reasons, the Chamber finds that the Defence failed to demonstrate the existence of a clear error of reasoning in the Impugned Decision or any other circumstances justifying reconsideration in order to avoid injustice.

V. DISPOSITION

10. For the foregoing reasons, the Chamber

GRANTS the Request and **DENIES** the Motion.

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



Judge Alphons Orie
Presiding Judge

Dated this twentieth day of October 2016
At The Hague
The Netherlands

[Seal of the Tribunal]

¹⁸ Certification Motion, para. 7.
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