

5-09-92-T
D 526T8 - D 526TK
07 February 2013

526T8
HB



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: 7 February 2013
Original: English

IN TRIAL CHAMBER I

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

Registrar: Mr John Hocking

Decision of: 7 February 2013

PROSECUTOR

v.

RATKO MLADIĆ

PUBLIC

**DECISION ON PROSECUTION'S MOTION FOR
RECONSIDERATION, GRANTING ADMISSION FROM THE
BAR TABLE OR CERTIFICATION IN RELATION TO
DECISION REGARDING ASSOCIATED EXHIBITS OF
WITNESS TUCKER**

Office of the Prosecutor
Mr Dermot Groome
Mr Peter McCloskey

Counsel for Ratko Mladić
Mr Branko Lukić
Mr Miodrag Stojanović

I. PROCEDURAL HISTORY AND SUBMISSIONS OF THE PARTIES

1. On 22 November 2012, the Chamber issued its decision on the admission of associated exhibits tendered alongside Witness Pyers Tucker's statement ("Statement"), admitting 11 documents and denying admission of 24 documents ("Impugned Decision").¹

2. On 29 November 2012, the Prosecution filed a motion seeking reconsideration of the Impugned Decision or, in the alternative, requesting the Chamber to admit certain associated exhibits from the bar table or to grant certification to appeal the Impugned Decision ("Motion").² With regard to its reconsideration request, the Prosecution submits that the Chamber failed to properly apply the admissibility test for associated exhibits, resulting in a clear error of law.³ According to the Prosecution, the Chamber failed to consider whether the exclusion of certain associated exhibits rendered the Statement of lesser probative value.⁴ In its view, the Impugned Decision forces the Prosecution to present written evidence without admissible corroborative documentation thereby encroaching upon its right to determine how to best present the evidence to meet its burden of proof.⁵ In the first alternative, the Prosecution requests admission from the bar table of 13 of the excluded 24 associated exhibits.⁶ The second alternative seeks certification to appeal the Impugned Decision as the exclusion of admissible evidence, in the Prosecution's view, "significantly affects the fair and expeditious conduct of proceedings or the outcome of the trial".⁷ The Prosecution further submits that an immediate resolution by the Appeals Chamber would materially advance the proceedings as this same issue will arise with other witnesses and affects a broad category of evidence in this case.⁸

3. On 11 December 2012, the Defence requested an enlargement of time to respond to the Motion, seeking additional 14 days.⁹ The request was granted on 13 December 2012.¹⁰ On 27

¹ T. 5601-5603.

² Prosecution's Motion for Reconsideration of Decision Denying Admission of 24 Associated Exhibits Regarding RM514 or Alternatively Granting the Admission of Certain Associated Exhibits from the Bar Table or Certification, 29 November 2012.

³ Motion, paras 2-3.

⁴ Motion, paras 5-6.

⁵ Motion, para. 10.

⁶ Motion, para. 19.

⁷ Motion, para. 21.

⁸ Motion, para. 24.

⁹ Defence Motion to Enlarge Time to Respond to Prosecution Motion for Reconsideration of Decision Denying Admission of 24 Associated Exhibits Regarding RM514 or Alternatively Granting the Admission of Certain Associated Exhibits from the Bar Table or Certification, 11 December 2012.

¹⁰ T. 6240.

December 2012, the Defence filed its response to the Motion (“Response”).¹¹ It submits that the Prosecution failed to establish any reason warranting reconsideration and that reconsideration is not necessary in order to prevent an injustice.¹² It argues that the request for reconsideration is premature as the Prosecution failed to pursue other means of seeking to have the documents admitted.¹³ With regard to the Prosecution’s bar table request, the Defence considers it to be deficient as the Prosecution failed to set forth any substantive arguments for such requested admission.¹⁴ The Defence takes no position on the request for certification to appeal.¹⁵

II. APPLICABLE LAW

(a) Request for Reconsideration

4. The Chamber recalls and refers to the applicable law governing reconsideration requests as set out in its previous decision of 29 June 2012.¹⁶

(b) Admission from the Bar Table

5. The applicable law on bar table submissions is set out in Rule 89 (C) of the Rules of Procedure and Evidence (“Rules”).

6. For admission of evidence from the bar table, “the offering party must be able to demonstrate, with clarity and specificity, where and how each document fits into its case”.¹⁷

(c) Certification to Appeal

7. Rules 73 (B) and (C) of the Rules provide the relevant legal provisions on certification to appeal.

¹¹ Defence Response to Prosecution Motion for Reconsideration of Decision Denying Admission of 24 Associated Exhibits Regarding RM514 or Alternatively Granting the Admission of Certain Associated Exhibits from the Bar Table or Certification, 27 December 2012.

¹² Response, paras 2-4.

¹³ Response, para. 3.

¹⁴ Response, para. 5.

¹⁵ Response, para. 9.

¹⁶ Reasons for Decision on Defence Motion for Reconsideration, 29 June 2012, para. 10.

¹⁷ *Prosecutor v. Đorđević*, Case No. IT-05-87/1-T, Decision on Prosecution’s Motion to Re-Open the Case and Exceed the Word Limit and Second Motion to Admit Exhibits from the Bar Table, 7 December 2009, para. 4; *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-T, Decision on Prosecution Motion to Admit Documentary Evidence, 10 October 2006, para. 18.

III. DISCUSSION

1. Request for Reconsideration

8. The Prosecution failed to satisfy the Chamber of the existence of a clear error of reasoning, as required by the applicable law. The Chamber notes at the outset that it clearly set out the applicable law with regard to the admission of associated exhibits in the Impugned Decision by stating that “documents can be admitted if they form an inseparable and indispensable part of the witness’s written testimony [which] means that the witness needs to have discussed the exhibits in his testimony and that without them the transcript or the witness’s written statement would be incomprehensible or of lesser probative value”.¹⁸ Contrary to what the Prosecution argues, the Chamber did analyse the second prong of the test, namely whether the exclusion of associated exhibits could result in a lesser probative value of the Statement, when assessing whether certain associated exhibits were “needed to properly understand” the Statement.¹⁹ Had the Chamber found that the exclusion of some of the associated exhibits lessened the probative value of the Statement, it would not have excluded them. In other words, in those cases in which the Chamber considered the probative value of the Statement to have been lessened, it admitted the document in question in order to “properly understand” the Statement. In light of the foregoing, the Chamber finds no clear error of reasoning in the Impugned Decision. Further, the Prosecution did not demonstrate that reconsideration is necessary to prevent an injustice.

2. Admission from the Bar Table

9. The Chamber recalls its “Guidance on the Presentation and Tendering of Evidence Pursuant to Rules 92 *bis*, Rule 92 *ter* and Bar Table Submission” of 10 November 2011, wherein it stated that “the Chamber prefers to have documentary evidence tendered in court, with witnesses who can give it proper contextualisation”, thereby setting out its strong preference for such in-court tendering.²⁰ For this reason, the Chamber stated that it only accepts bar table motions on an exceptional basis and for a very limited amount of documents, and it directed the parties to file any such bar table submissions “at a later stage of the party’s case, when it is clear to the tendering party that the relevant documents *were not and could not have been*, tendered through any witness” (emphasis added).²¹ Such stage has not yet been reached in the present case, as the Prosecution still has more than half of its case to present, leaving various methods and avenues to introduce documents into evidence. Further, the Chamber understands the Prosecution’s submission in

¹⁸ T. 5601-5602.

¹⁹ T. 5603.

²⁰ T. 109.

²¹ T. 110.

paragraph 3 of the Motion to mean that the Prosecution itself considers it possible to tender the documents in question with other witnesses in the course of its case. The Chamber therefore considers the bar table request to be premature and will deny it without prejudice.

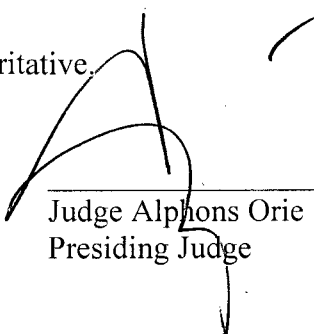
3. Certification to Appeal

10. The Chamber finds that the Impugned Decision does not involve an issue that will significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial as it merely dealt with the modalities on how associated documents should be tendered and did not bar the admission of any evidence.²² In this respect, the Chamber notes that the Prosecution still has sufficient opportunities to tender the documents in question into evidence.²³ For these reasons, the Chamber denies the request for certification.

IV. DISPOSITION

11. For the foregoing reasons, the Chamber **DENIES** the Motion in its entirety.

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



Judge Alphons Orié
Presiding Judge

Dated this seventh day of February 2013
At The Hague
The Netherlands

[Seal of the Tribunal]

²² T. 5601.

²³ See, Motion, para. 3.