



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: 23 May 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: 23 May 2016

PROSECUTOR

v.

RATKO MLADIĆ

PUBLIC

**DECISION ON DEFENCE'S SECOND MOTION TO ADMIT
DOCUMENTS FROM THE BAR TABLE**

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 18 January 2016, the Defence filed its second bar table motion (“Motion”), tendering 49 documents into evidence.¹ On 1 February 2016, the Prosecution responded (“Response”).² On 8 February 2016, the Defence requested leave to reply and replied (“Reply”), withdrawing three of the tendered documents.³ On 11 February 2016, the Prosecution requested leave to sur-reply and sur-replied (“Sur-Reply”).⁴

II. SUBMISSIONS OF THE PARTIES

2. The Defence submits that the tendered documents are relevant and have sufficient probative value to be admitted into evidence under Rule 89 (C) of the Rules of Procedure and Evidence (“Rules”).⁵ It submits that the documents are relevant to specific counts and charges in the Indictment and are important in order to establish the Defence’s case and to rebut the Prosecution’s case. Specifically, the Defence submits that the documents raise reasonable doubt that the Accused intended to attack Srebrenica with the purpose of eliminating the Bosnian-Muslim population and establish that any attacks on Srebrenica were legitimate defensive military operations, that the Accused did not plan, order, or intend any crimes committed following Operation ‘Krivaja 95’, and that the casualties from the column of Muslim males attempting to leave Srebrenica for Tuzla were the result of legitimate combat between the column and the Army of the Bosnian-Serb Republic (“VRS”).⁶ The Defence details the sources of the documents and submits that they are reliable and authentic.⁷

3. The Prosecution opposes the admission of four documents.⁸ It does not oppose the admission of the remaining documents.⁹ Should the Chamber admit the document bearing Rule 65

¹ Defense Second Motion to Admit Documents from the Bar – Srebrenica, 18 January 2016 (Confidential); Defence Request for Reclassification of Filings, 24 February 2016, requesting to reclassify the Motion and its Annex as confidential. While the Defence states that it tenders 52 documents (Motion, para. 1), it enumerates 51 documents (Motion, Annex A), two of which (documents bearing Rule 65 *ter* numbers 1D00164 and 1D02624) are listed twice (Motion, Annex A (pp. 15-17, 39)). As such, the Chamber considers that the Defence tenders 49 documents.

² Prosecution Response to Defence Second Motion to Admit Documents from the Bar – Srebrenica, 1 February 2016, (Confidential).

³ Defence Request for Leave to Reply to Defence Second Motion to Admit Documents from the Bar – Srebrenica, 8 February 2016 (Confidential).

⁴ Prosecution Request for Leave to Sur-Reply to Defence Reply to Defence Second Motion to Admit Documents from the Bar – Srebrenica, 11 February 2016 (Confidential).

⁵ Motion, paras 2, 8-14, Annex A.

⁶ Motion, paras 2, 8, 9, 13, Annex A.

⁷ Motion, paras 10-12, Annex A.

⁸ Response, paras 2, 6-13, Annex A (pp. 4-6). The Prosecution also opposes the admission of duplicate documents and requests that, where identical documents were tendered, only one version be admitted (Response, paras 2, 5, 13, Annex A (pp. 2-3, 7)). The Chamber notes that the Defence has withdrawn documents bearing Rule 65 *ter*

ter number 11367, tendered by the Defence, the Prosecution seeks to tender an additional document that it submits is necessary to contextualize the document tendered by the Defence.¹⁰

4. The Defence submits that the Prosecution's request to tender documents from the bar table during the Defence case is improper and refers to its request for certification to appeal a decision of the Chamber communicated to the parties on 13 January 2016.¹¹

III. APPLICABLE LAW

5. The Chamber recalls and refers to the applicable law governing the admission of evidence tendered from the bar table pursuant to Rule 89 (C) of the Rules, as set out in a previous decision.¹²

6. The Chamber recalls and refers to the applicable law governing the admission of out-of-court statements prepared for the purpose of legal proceedings and tendered *in lieu* of oral testimony before 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"), as set out in a previous decision.¹³

7. The Chamber recalls and refers to its previous decisions regarding the phase at which the Prosecution may tender contextual documents in response to the Defence's bar table motions.¹⁴

8. The Appeals Chamber has held that, pursuant to Rule 54 *bis* of the Rules, a Chamber may direct appropriate protective measures to documents produced by a State voluntarily.¹⁵

numbers 1D02630, 1D02631, and 1D02632 (Reply, para. 3), which were duplicates of documents bearing Rule 65 *ter* numbers 1D05003, 1D05112, and 1D05121, respectively.

⁹ Response, paras 1, 14, Annex A.

¹⁰ Response, para. 12, Annex A (p. 4).

¹¹ Reply, para. 8.

¹² Decision on Defence's Eighth Motion for the Admission of Documents from the Bar Table, 24 March 2016, paras 6-7.

¹³ Decision on the Prosecution's Motion for Admission of the Utterances of the Accused, 4 June 2013 ("Utterances of the Accused Decision"), para. 3.

¹⁴ Reasons for Decision on Prosecution Request to Tender Documents and Decision on Defence Motion for Certification to Appeal, 10 March 2016. *See also* Decision on Defence's Eighth Motion for the Admission of Documents from the Bar Table, 24 March 2016, paras 11-12; Decision on Defence's Ninth Motion for the Admission of Documents from the Bar Table, 22 April 2016, para. 14.

¹⁵ *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-AR108*bis*.2, Decision on Serbia and Montenegro's Request for Review, 20 September 2005 (Confidential), paras 10-12. *See also* Decision on Republic of Serbia's Motion for Protective Measures, 15 July 2014, para. 8.

IV. DISCUSSION

A. Preliminary Considerations

9. As the Prosecution raises new issues in the Response, the Chamber finds that the Defence has shown good cause for its request for leave to reply and will grant the requested leave. Similarly, as the Defence raises a new issue in the Reply, the Chamber finds that the Prosecution has shown good cause for its request for leave to sur-reply and will grant the requested leave.

10. The documents bearing Rule 65 *ter* numbers 1D02628 and 1D05008 are duplicates. The Chamber will assess and consider the document bearing Rule 65 *ter* number 1D05008 only and will deny the admission into evidence of the document bearing Rule 65 *ter* number 1D02628.

B. The Document Bearing Rule 65 *ter* Number 1D05150

11. The document bearing Rule 65 *ter* number 1D05150 has no English translation uploaded into eCourt. Therefore, the Chamber cannot assess its relevance or probative value and will deny without prejudice its admission into evidence.

C. The Document Bearing Rule 65 *ter* Number 04475

12. The document bearing Rule 65 *ter* number 04475 is a 6 June 2000 statement from Major General C.L. Elliott of the British Army. The Prosecution opposes the admission of the document.¹⁶ Out-of-court statements prepared for the purpose of legal proceedings and tendered *in lieu* of oral testimony before the Tribunal generally cannot be admitted into evidence pursuant to Rule 89 (C) of the Rules.¹⁷ While the Defence submits that the statement was ‘given to the British Army or for private domestic purposes’,¹⁸ the 6 June 2000 Evidence Submission Form, provided by the Prosecution, states: ‘Maj. Gen. C.L. Elliott provided a written statement to the [Prosecution] at the request of Mark Harmon with regard to the *Krstić* trial.’¹⁹ The submissions by the Defence have not countered the factual basis for the objection that the document was taken at the request of Mark Harmon for purposes of the proceedings. The Chamber is satisfied that the statement was given to the Prosecution for the purpose of legal proceedings before the Tribunal and therefore cannot be admitted into evidence pursuant to Rule 89 (C) of the Rules under the current circumstances. Considering the above, the Chamber will deny the admission into evidence of this document.

¹⁶ Response, paras 2, 7-8, 13, Annex A (p. 4).

¹⁷ See Utterances of the Accused Decision, para. 3.

¹⁸ Reply, para. 14.

¹⁹ Rule 65 *ter* no. 33620. See also Response, para. 8, Annex A (p. 4).

Having determined the matter on this basis, it is unnecessary for the Chamber to consider the Prosecution's opposition to the admission of this document on other grounds.

D. The Document Bearing Rule 65 ter Number 1D04794

13. The document bearing Rule 65 ter number 1D04794 is a 28 October 2008 email from the Prosecution in the case of *Prosecutor v. Popović et al.* correcting the record with respect to the exhumation site of a particular individual's remains. The Prosecution opposes the admission of this document on the grounds that, as it has not identified the individual in question as a victim in the present case, this correction is irrelevant.²⁰ The Chamber finds that the document is relevant to the Defence's argument that the methodology employed by the Prosecution in identifying Srebrenica victims is flawed.²¹ The email bears sufficient *indicia* of reliability for admission into evidence. The document therefore meets the standard for admission set out in Rule 89 (C) of the Rules. The Defence has set out with sufficient clarity and specificity how the document would fit into its case. Considering the above, the Chamber will admit the document into evidence.

E. The Documents Bearing Rule 65 ter Numbers 11367 and 33619

14. The document bearing Rule 65 ter number 11367 is a 18 December 1995 letter from Vladislav Jovanović, the Chargé d'Affaires at the Permanent Mission of the Federal Republic of Yugoslavia to the United Nations, to the President of the Security Council concerning the responsibility for certain deaths in Srebrenica. The Prosecution opposes the admission of this document on the grounds that it presents an 'incomplete and distorted view' absent the contextualization provided by Jovanović's testimony in *Prosecutor v. Karadžić*.²² Should the document be admitted, the Prosecution requests the admission of the document bearing Rule 65 ter number 33619, an excerpt of that testimony.²³

15. The Prosecution's submission opposing the admission of the document concerns the weight that should be attributed to the document rather than its relevance or probative value. The Chamber is satisfied that the document is relevant to the Accused's alleged responsibility for crimes in Srebrenica. As the document is signed by Jovanović, it contains sufficient *indicia* of reliability for the purposes of admission into evidence. The document therefore meets the standard for admission set out in Rule 89 (C) of the Rules. The Defence has set out with sufficient clarity and specificity

²⁰ Response, paras 10-11, Annex A (p. 6).

²¹ See Motion, Annex A (p. 28); Reply, para. 9.

²² Response, para. 12, Annex A (p. 4).

²³ Response, para. 12, Annex A (p. 4).

how the document would fit into its case. Considering the above, the Chamber will admit the document into evidence.

16. With respect to the document bearing Rule 65 *ter* number 33619, the Chamber refers to its previous decision regarding the phase at which the Prosecution may tender contextual documents in response to the Defence's bar table motions.²⁴ Given that the Prosecution has not specifically set out why it should be allowed to tender the document bearing Rule 65 *ter* number 33619 during the Defence case rather than at the rebuttal stage of the proceedings, the Chamber will deny without prejudice the admission of the document into evidence.

F. The Document Bearing Rule 65 *ter* Numbers 1D04841

17. The document bearing Rule 65 *ter* number 1D04841 is a book, which the Defence submits was authored by a former general in the ABiH.²⁵ The English version of this document appears to be an excerpt of the book.²⁶ The Chamber notes that the English version contains underlining which does not appear on the original and does not include portions of the book that might provide information as to its author, publication date, and other information pertinent to determining whether the document bears sufficient *indicia* of reliability for the purpose of admission into evidence. Furthermore, the second page of the English version contains a footnote which appears to direct the reader to a document which can be found at page 204 of the book, but page 204 does not form part of the English version. For these reasons, the Chamber will deny without prejudice the admission of the document into evidence.

G. The Document Bearing Rule 65 *ter* Number 1D03701

18. The Defence submits that document bearing Rule 65 *ter* number 1D03701 is a book excerpt.²⁷ The document contains headings suggesting that it is a communication from one party to another, but contains no date or information about who sent or received it. Further, while the headings suggest that the communication pertains to 22 pages of a BCS source,²⁸ the document itself is two pages. The document thus does not bear sufficient *indicia* of reliability for the purpose of admission into evidence, and the Chamber will deny its admission into evidence.

²⁴ Reasons for Decision on Prosecution Request to Tender Documents and Decision on Defence Motion for Certification to Appeal, 10 March 2016. *See also* Decision on Defence's Eighth Motion for the Admission of Documents from the Bar Table, 24 March 2016, para. 11; Decision on Defence's Ninth Motion for the Admission of Documents from the Bar Table, 22 April 2016, para. 14.

²⁵ Motion, Annex A (p. 27).

²⁶ In light of the narrow submissions of the Defence, the Chamber understands that the Defence only tenders the material contained in the English translation. *See* Motion, Annex A (p. 27).

²⁷ Motion, Annex A (p. 40).

²⁸ Rule 65 *ter* no. 1D03701, p. 1.

H. The Document Bearing Rule 65 ter Number 1D04428

19. The document bearing Rule 65 *ter* number 1D04428 is a news article from the Republika Srpska News Agency. The Defence submits that the document is relevant to establishing its claim that the Prosecution's list of Srebrenica victims includes individuals who were not killed during the fall of the enclave.²⁹ The Defence submits that the article is dated 22 April 2010,³⁰ but the document contains no indication of the year of publication. The article states that there have been nine burials at the Memorial Centre in Potočari '[s]o far', but, absent a date of publication, it is impossible for the Chamber to determine the time frame. Additionally, an individual is quoted stating that Alija Izetbegović proposed 'to sacrifice Srebrenica for Vogošća'.³¹ This far-reaching allegation is uncorroborated, and given their impact, such suggestions are more properly tendered through a witness rather than from the bar table. The Chamber will deny the admission into evidence of this document.

I. The Document Bearing Rule 65 ter Number 1D07005

20. The document bearing Rule 65 *ter* number 1D07005 is the transcript of an interview with Hakija Meholjić dated 22 June 1998. The document contains no identifying information regarding its source apart from the URL of a webpage that is no longer available. The document bears no other *indicia* of reliability such as a publication date or information about who authored the document. The document is thus lacking in probative value, and the Chamber will deny its admission into evidence.

J. The Documents Bearing Rule 65 ter Numbers 1D02620 and 1D02624

21. The Chamber notes that the Defence's submissions regarding the documents bearing Rule 65 *ter* numbers 1D02620 and 1D02624 do not correspond to the documents' contents.³² The Defence has therefore failed to set out with sufficient clarity and specificity how the documents would fit into its case. The Chamber will deny without prejudice the admission into evidence of these documents.

K. The Documents Bearing Rule 65 ter Numbers 23477, 23498, 23513, 23516, and 23528

22. The documents bearing Rule 65 *ter* numbers 23477, 23498, 23513, 23516, and 23528 are intelligence reports from the Main Staff of the VRS. The Prosecution does not oppose the

²⁹ Motion, Annex A (p. 29).

³⁰ Motion, Annex A (p. 29).

³¹ Rule 65 *ter* no. 1D04428, p. 1.

³² See Motion, Annex A (pp. 14-15, 39).

admission of the documents and notes that the documents are governed by Rule 54 *bis* of the Rules.³³ All of the above-mentioned documents concern the Army of Bosnia-Herzegovina ("ABiH")'s alleged non-compliance with the agreed demilitarization of Srebrenica and are therefore relevant to the Defence's arguments that there was a legitimate purpose behind Operation 'Krivaja 95' and that the Bosnian Serbs were justified in controlling convoys of humanitarian aid in order to prevent the smuggling of arms to their adversaries. As the documents contain dates, stamps, or information about who authored, sent, or received the documents, they bear sufficient *indicia* of reliability for admission into evidence. The documents therefore meet the standard for admission set out in Rule 89 (C) of the Rules. The Defence has set out with sufficient clarity and specificity how the documents would fit into its case. Considering the above, the Chamber will admit these documents into evidence, provisionally under seal, and will instruct the Prosecution to inform the Republic of Serbia of their admission into evidence.

L. The Remaining Documents Unopposed by the Prosecution

23. The documents bearing Rule 65 *ter* numbers 05593, 06123, 25024, 1D03797, and 1D03798 are documents issued by the VRS dated between April 1993 and June 1995; the documents bearing Rule 65 *ter* numbers 17841, 17842, 17955, 17960, 1D00903,³⁴ 1D02323, 1D02627, 1D02633, 1D05003, 1D05004, 1D05007, 1D05008, 1D05112, and 1D05121 are documents issued by the ABiH dated between January and June 1995; the documents bearing Rule 65 *ter* numbers 00919, 01130, and 09342 are United Nations Protection Force ("UNPROFOR") documents dated between March and May 1993; and the documents bearing Rule 65 *ter* numbers 08164 and 18004 are UNPROFOR code cables dated January 1994 and July 1995, respectively. All of the above-mentioned documents are relevant to the ABiH's alleged non-compliance with the agreed demilitarization of Srebrenica and/or Žepa and thus to the Defence's arguments that the alleged safe areas constituted legitimate military targets, that there was a legitimate purpose behind Operation 'Krivaja 95', and that the Bosnian Serbs were justified in controlling convoys of humanitarian aid in order to prevent the smuggling of arms to their adversaries.

24. The document bearing Rule 65 *ter* number 05306 is an ABiH report dated 4 March 1993 pertaining to alleged war crimes committed by 'enemy units' in Srebrenica and Bratunac. This document is relevant to the Defence's argument that later crimes committed in Srebrenica were spontaneous acts of revenge.

³³ Response, paras 1, 14, Annex A (pp. 1, 6-7).

³⁴ The document bearing Rule 65 *ter* number 1D00903 is dated 28 May 1996, but this appears to be a typographical error as the document pertains to ABiH actions up to 27 May 1995.

25. The document bearing Rule 65 *ter* number 09322 is a UNPROFOR memorandum dated 20 July 1995, and the document bearing Rule 65 *ter* number 18005 is a United Nations Military Observer document dated 26 July 1995. These documents are relevant to the Defence's argument that the Republic of Bosnia and Herzegovina may have manipulated events in Srebrenica and Žepa in the hope that the international community would side against the Bosnian Serbs.

26. The document bearing Rule 65 *ter* number 1D00164 is a 1993 humanitarian activity report issued by the European Community Monitoring Mission. This document is relevant to the alleged bias of the United Nations and humanitarian organizations against the Bosnian Serbs and therefore to the Defence's argument that the Bosnian Serbs were justified in controlling convoys of humanitarian aid in order to prevent the smuggling of arms to their adversaries.

27. The document bearing Rule 65 *ter* number 23287 is a document issued by the VRS dated July 1995, and the document bearing Rule 65 *ter* number 25269 is a dispatch from the Han Pijesak Public Security Service dated July 1995. These documents are relevant to establishing the number of victims of the crimes allegedly committed during the fall of Srebrenica.

28. All of the above-mentioned documents contain dates, signatures, stamps, and/or information about who authored, sent, and/or received the documents. Therefore, the documents bear sufficient *indicia* of reliability for the purpose of admission into evidence.

29. In light of the above, the documents meet the standard of admission set out in Rule 89 (C) of the Rules. The Defence has set out with sufficient clarity and specificity how the documents would fit into its case. Considering the above, the Chamber will admit the documents into evidence.

V. DISPOSITION

30. For the foregoing reasons, pursuant to Rules 54 *bis* and 89 (C) of the Rules, the Chamber

GRANTS leave to Reply and to Sur-Reply;

GRANTS the Motion **IN PART**;

ADMITS into evidence the documents bearing Rule 65 *ter* numbers 00919, 01130, 05306, 05593, 06123, 08164, 09322, 09342, 11367, 17841, 17842, 17955, 17960, 18004, 18005, 23287, 25024, 25269, 1D00164, 1D00903, 1D02323, 1D02627, 1D02633, 1D03797, 1D03798, 1D04794, 1D05003, 1D05004, 1D05007, 1D05008, 1D05112, and 1D05121;

ADMITS into evidence, provisionally under seal, the documents bearing Rule 65 *ter* numbers 23477, 23498, 23513, 23516, and 23528;

INSTRUCTS the Registry to change the status of the documents bearing Rule 65 *ter* numbers 23477, 23498, 23513, 23516, and 23528 to public 45 days after the filing date of this decision unless the Republic of Serbia files a request for keeping these documents confidential before such time;

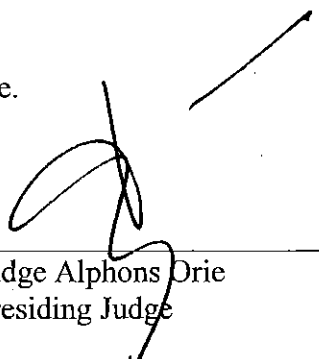
INSTRUCTS the Prosecution to inform the Republic of Serbia of the admission of the documents bearing Rule 65 *ter* numbers 23477, 23498, 23513, 23516, and 23528 and of the Chamber's instructions to the Registry with regard to these documents;

DENIES admission into evidence of the documents bearing Rule 65 *ter* numbers 04475, 1D02628, 1D03701, 1D04428, and 1D07005;

DENIES without prejudice admission into evidence of the documents bearing Rule 65 *ter* numbers 33619, 1D02620, 1D02624, 1D04841, and 1D05150; and

REQUESTS the Registry to assign numbers to the exhibits admitted by this decision and inform the parties and the Chamber of the numbers so assigned.

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



Judge Alphons Orie
Presiding Judge

Dated this Twenty-third day of May 2016
At The Hague
The Netherlands

[Seal of the Tribunal]