



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: 1 August 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: 1 August 2016

PROSECUTOR

v.

RATKO MLADIĆ

PUBLIC

**DECISION ON DEFENCE'S MOTION FOR CERTIFICATION
TO APPEAL THE FIFTH BAR TABLE DECISION AS TO THE
DOCUMENT BEARING RULE 65 TER NUMBER 1D04682**

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 issued a decision denying the admission into evidence of the document bearing Rule 65 *ter* number 1D04682 (“Impugned Decision”).¹ On 6 June 2016, the Defence filed a motion (“Motion”), requesting that the Chamber grant certification to appeal the Impugned Decision.² On 20 June 2016, the Prosecution responded (“Response”), opposing the Motion.³

II. SUBMISSIONS OF THE PARTIES

2. The Defence submits that the Impugned Decision affects (i) the fairness of the proceedings by impacting the Defence’s ability to prove its theory that the Army of Bosnia-Herzegovina often inflicted harm on its own people as well as by contravening the principle of equality of arms, since the Chamber has ‘applied a different legal standard to the admission of Defence evidence to contradict admitted Prosecution evidence’; (ii) the expeditiousness of the proceedings by ‘forc[ing]’ the Defence to introduce the evidence in another manner, ‘possibly through a witness’; and (iii) the outcome of the trial by not permitting the Defence to present evidence supporting an alternative scenario for the Markale I incident, thereby impacting the weight given by the Chamber to Prosecution evidence related to this charge.⁴ It further submits that an immediate resolution by the Appeals Chambers is required to materially advance the proceedings due to the impending deadline for the Defence’s final trial brief, as well as to ensure that the trial is not extended by the Defence calling an additional witness.⁵

3. The Prosecution submits that the Defence’s motion requesting certification to appeal the Impugned Decision fails to satisfy the first prong of Rule 73 (B) of the Tribunal’s Rules of Procedure and Evidence (“Rules”).⁶ It argues that the Defence provides no explanation as to how the document, ‘a news report with an unnamed source making an uncertain claim about an individual mentioned nowhere else in the case’, significantly bears on Mladić’s responsibility for the crimes charged in the Indictment.⁷ The Prosecution further submits that the Defence fails to

¹ Decision on Defence’s Fifth Motion for the Admission of Documents from the Bar Table, 30 May 2016, para. 23.

² Defense Motion for Certification to Appeal the Fifth Bar Table Decision as to 65*ter* 1D04682, 6 June 2016. [hereinafter “Motion”]

³ Prosecution Consolidated Response to Defense Motions for Certification to Appeal the Fifth Bar Table Decision (As to 65*ter* 1D00460, 1D07014, and 1D04682), 20 June 2016. [hereinafter “Response”]

⁴ Motion, paras 9-11, 13.

⁵ Motion, paras 15-16.

⁶ Response, para. 6.

⁷ *Ibid.*

demonstrate that denial of the document's admission has an appreciable impact on either the fair or expeditious conduct of the proceedings.⁸

III. APPLICABLE LAW

4. The Chamber recalls and refers to the applicable law governing certification to appeal pursuant to Rule 73 (B) of the Rules, as set out in a previous decision.⁹

IV. DISCUSSION

5. The Chamber recalls that in denying admission into evidence of the document, it determined that

The document bearing Rule 65 *ter* numbers 1D04682 is a Tanjug daily report of 9 February 1994. [...] The Trial Chamber notes that since the source on which the Tanjug article relies is not named, the source of knowledge of the document is largely unknown. It further notes that the footage mentioned in the article, on which the source relies, is also unknown. The Chamber thus finds that the document has insufficient indicia of reliability or authenticity and, therefore, does not have probative value. Accordingly, it will deny its admission into evidence.

6. With regard to the first prong of Rule 73 (B) of the Rules, the Chamber recalls that the Impugned Decision is a decision on the admission of one specific document pursuant to Rule 89 (C) of the Rules. When evidence tendered by a party does not meet the criteria of Rule 89 (C) of the Rules, the Chamber's decision on admission does not, *ipso facto*, hamper a party's ability to present its case. The Defence's claim that the Impugned Decision affects the outcome of the trial by not permitting the Defence to present evidence supporting an alternative scenario for the Markale I incident is neither substantiated, nor is it relevant. The Defence ignores that the Chamber's reasons for denying the document's admission rest on the document's lack of reliability and are unrelated to the topic of the document. The Defence has failed to establish how the Trial Chamber applied a 'different legal standard' in denying the admission of the document.¹⁰ The Chamber also emphasizes that the Impugned Decision does not 'force' the Defence to attempt to introduce

⁸ Response, para. 7.

⁹ Decision on Defence Motion for Certification to Appeal the Decision on the Admission of the Evidence of Milan Tutorić, 15 July 2015, para. 4.

¹⁰ As indicated in the Impugned Decision, the Chamber denied the document's admission due to the document's lack of reliability. While the Defence is correct in stating that the Chamber has previously admitted exhibit P7726, which was tendered by the Prosecution and similar in format and origin to the document bearing 65 *ter* number 1D04682, the two documents are not otherwise alike. First, the Chamber did not question the origin of the document in the Impugned Decision, but highlighted the document's many unknown sources of knowledge, such as the author of the news article, the unnamed source on which the author relies, and the unknown time and date of the footage relied on. The Chamber further observes that, unlike the document bearing Rule 65 *ter* number 1D04682,

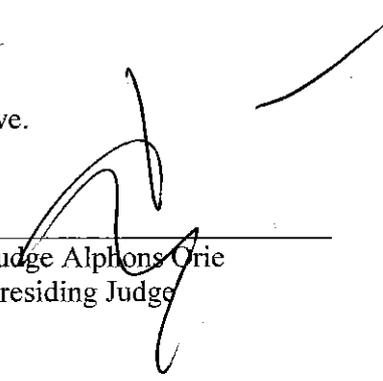
evidence in another manner, which the Defence submits affects the expeditiousness of the proceedings. In fact, the Impugned Decision does not require the Defence to take any action, and the Chamber notes that it is entirely within the discretion of the Defence to determine the allocation of resources as well as when and how to present evidence.¹¹ Accordingly, the Motion fails to satisfy the first prong of Rule 73 (B) of the Rules.

7. As the test under Rule 73 (B) of the Rules is cumulative and the first prong has not been met, the Chamber finds no need to determine whether the second prong has been satisfied.

V. DISPOSITION

8. For the foregoing reasons, pursuant to Rule 73 (B) of the Rules, the Chamber **DENIES** the Motion.

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



Judge Alphons Orić
Presiding Judge

Dated this first day of August 2016
At The Hague
The Netherlands

[Seal of the Tribunal]

exhibit P7726, a BRBN news article, contains both a named author, Danko Perić, and was tendered through a Defence witness who gave testimony regarding its content, after which it was admitted, unopposed.

¹¹ In this respect, *see also Prosecutor v. Naser Orić*, Case no. IT-03-68-AR73.2, Interlocutory Decision on Length of the Defence Case, para. 7: 'The Prosecution has the burden of telling an entire story, of putting together a coherent narrative and proving every necessary element of the crimes charged beyond a reasonable doubt. Defense strategy, by contrast, often focuses on poking specifically targeted holes in the Prosecution's case, an endeavor which may require less time and fewer witnesses. This is sufficient reason to explain why a principle of basic proportionality, rather than a strict principle of mathematical equality, generally governs the relationship between the time and witnesses allocated to the two sides.'