

**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: 2 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: 2 August 2016

PROSECUTOR

v.

RATKO MLADIĆ

PUBLIC

**DECISION ON DEFENCE MOTION FOR CERTIFICATION
TO APPEAL THE FIFTH BAR TABLE DECISION AS TO THE
DOCUMENT BEARING RULE 65 TER NUMBER 1D07014**

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 1D07014 (“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 significantly affects the fairness and expeditiousness of the proceedings and the outcome of the trial, and involves an issue for which an immediate resolution by the Appeals Chamber is necessary to materially advance the proceedings, thereby satisfying the conditions set out in Rule 73 (B) of the Tribunal’s Rules of Procedure and Evidence (“Rules”).⁴ The Defence submits that the denial of the document’s admission significantly affects (i) the fairness of proceedings, as the Chamber has utilized a different standard of admission and has failed to provide a reasoned decision by not taking into account the arguments raised by the Defence; (ii) the expeditiousness of proceedings as, if this document is not admitted, the Defence will either be forced to accept an unequal standard of admission or to seek to introduce this evidence in another manner, possibly through a witness; and (iii) the outcome of the trial, because the document contains important evidence which would have a direct impact on the Chamber’s factual and legal determinations.⁵

3. The Defence further contends that, for several reasons, an immediate resolution of this matter is required in order to materially advance the proceedings. It submits (i) that a prompt resolution is essential due to the gravity of the crimes to which the document relates and the importance of the evidence to the Defence’s theory regarding the manipulation of public opinion,⁶ and argues that (ii) resolving the matter would protect the rights of the Accused to a fair trial and to equality of arms.⁷ The Defence claims that (iii) an immediate resolution is necessary given the

¹ Decision on Defence’s Fifth Motion for the Admission of Documents from the Bar Table, 30 May 2016, para. 22.

² Defence Motion for Certification to Appeal the Fifth Bar Table Decision as to 65 *ter* 1D07014, 6 June 2016.

³ Prosecution Consolidated Response to Defence Motions for Certification to Appeal the Fifth Bar Table Decision (as to 65 *ter* 1D00460, 1D07014, and 1D04682), 20 June 2016.

⁴ Motion, paras 12-20.

⁵ Motion, paras 12-15.

⁶ Motion, para. 16.

⁷ *Ibid.*

impending deadline for its final brief, as a lack of clarity and direction during this time would be a distraction from the drafting of said brief.⁸ Finally, it submits that (iv) it may need to call additional witnesses and would potentially need to seek authorization from military authorities under Rule 70 of the Rules.⁹ This would require significant time, resources, and legal work, which would impact the current trial schedule.¹⁰

4. The Prosecution opposes the Motion, arguing that the Defence merely disagrees with the Chamber's evidentiary decision and fails to satisfy either prong of the cumulative test for certification to appeal.¹¹ The Prosecution submits that the Defence has not demonstrated that the Impugned Decision raises an issue which significantly affects the fairness and expeditiousness of the trial, as it has not provided an explanation as to how an article regarding popular perceptions of the conflict among the American public so significantly bears on Mladić's responsibility for the crimes charged in the Indictment that certification to appeal is justified.¹² Furthermore, the Prosecution argues that in the context of a two-year Defence case the time required for further analysis and legal work arising from the non-admission of tendered documents does not affect a procedural or substantive right sufficient to satisfy the first prong of Rule 73 (B) of the Rules.¹³ Lastly, the Prosecution submits that the Defence has also failed to demonstrate that the second prong of Rule 73 (B) of the Rules is met, because it did not demonstrate how an immediate resolution by the Appeals Chamber of this purely evidentiary issue would materially advance the proceedings.¹⁴

III. APPLICABLE LAW

5. 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.¹⁵

⁸ Motion, para. 17.

⁹ Motion, para. 18.

¹⁰ *Ibid.*

¹¹ Response, paras 1, 3, 9.

¹² Response, para. 6.

¹³ Response, para. 7.

¹⁴ Response, para. 8.

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

IV. DISCUSSION

6. The document bearing 65 *ter* 1D07014 is an online article written by a former aide to UNPROFOR Commander General Michael Rose. The article, entitled 'Selling the Bosnian Myth to America: Buyer Beware', describes a campaign of propaganda allegedly carried out by Bosnian Muslims to sway public opinion against the Bosnian Serbs. In the Impugned Decision, the Chamber considered the article to be largely speculative and a bare opinion piece, in which the author commented on and referred to sources which were often either unidentified or unsubstantiated. The Chamber thus held that the document lacked probative value and denied its admission into evidence.

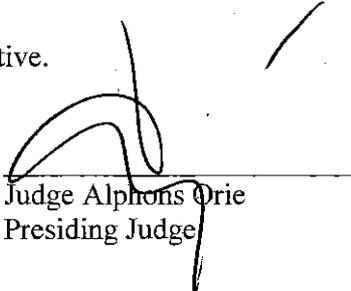
7. With regard to the first prong of Rule 73 (B) of the Rules, the Chamber recalls that the Impugned Decision is a decision on the admission of evidence pursuant to Rule 89 (C) of the Rules. When evidence tendered by a party does not meet the criteria of Rule 89 (C) of the Rules, the Chamber's decision on admission does not, *ipso facto*, hamper a party's ability to present its case. It has been within the Defence's discretion when and how to present admissible evidence on any issue relevant to its case, including its theory regarding the manipulation of public opinion. Therefore, the Defence's claim that the Impugned Decision affects the fairness of proceedings by not permitting the Defence to present evidence supporting its theory regarding the manipulation of public opinion is not substantiated. The Chamber further finds that the Defence has not demonstrated how the alleged application of a double standard with regard to the admission of this document significantly affects the fair and expeditious conduct of the proceedings. Even if the Chamber did employ a different standard of admission with regard to this document, or did not apply the same standard consistently, that in itself would not have a significant impact on the fairness or the expeditiousness of the proceedings. The significance of the document in the context of the totality of the evidence is not such that the denial of its admission into evidence would have an impact on the outcome of the trial. The Defence thus failed to substantiate what would be the basis for its claim that the Impugned Decision significantly affects the outcome of the trial. For these reasons, the Motion fails to satisfy the first prong of Rule 73 (B) of the Rules.

8. As the test under Rule 73 (B) of the Rules is cumulative and the first prong of the test has not been satisfied, the Chamber will not address the second prong of the test.

V. DISPOSITION

9. 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 Alphonse Orié
Presiding Judge

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

[Seal of the Tribunal]