



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: 15 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:** 15 August 2016

**PROSECUTOR**

v.

**RATKO MLADIĆ**

***PUBLIC***

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**DECISION ON DEFENCE'S MOTION FOR CERTIFICATION  
TO APPEAL THE FIFTH BAR TABLE DECISION AS TO THE  
DOCUMENT BEARING RULE 65 *TER* NUMBER 1D00460**

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**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 1D00460 (“Impugned Decision”).<sup>1</sup> On 6 June 2016, the Defence filed a motion (“Motion”), requesting that the Chamber grant certification to appeal the Impugned Decision.<sup>2</sup> On 20 June 2016, the Prosecution responded (“Response”).<sup>3</sup>

## II. SUBMISSIONS OF THE PARTIES

2. The Defence submits that the document contradicts certain evidence introduced by the Prosecution, in which Prosecution witnesses drew unchallenged and unsupported legal conclusions about activities of the VRS in relation to the principle of proportionality.<sup>4</sup> The Defence further submits that the Chamber applied a different legal standard to allow the admission of evidence tendered by the Prosecution than it is now applying to exclude evidence tendered by the Defence which is of a similar nature and that contradicts the Prosecution’s evidence.<sup>5</sup> The Defence contends that the Impugned Decision affects the fair and expeditious conduct of the proceedings, as it contravenes the principle of equality of arms.<sup>6</sup> The Defence further contends that if the document is not admitted, it would be forced to seek another way to contradict the Prosecution witnesses’ conclusions, which would require more time and effort, including the possibility of calling another witness.<sup>7</sup> The Defence submits that the Impugned Decision could have a significant effect on the outcome of the trial because, if the Defence is not permitted to contradict evidence tendered by the Prosecution, the Chamber’s assessment will be limited to unrebutted evidence proffered by the Prosecution.<sup>8</sup> Finally, it submits that an immediate resolution is required to materially advance the proceedings given the gravity of the crimes to which the document relates, the impending deadline of the Defence’s final brief, and the possibility that the Defence would need to call an additional witness, which would impact the current trial schedule.<sup>9</sup> In the alternative, should the Chamber deny certification to appeal the Impugned Decision, the Defence requests that testimony of

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<sup>1</sup> Decision on Defence’s Fifth Motion for the Admission of Documents from the Bar Table, 30 May 2016, para. 24.

<sup>2</sup> Defence Motion for Certification to Appeal the Fifth Bar Table Decision as to 65*ter* 1D00460, 6 June 2016, paras 1-2, 17-18.

<sup>3</sup> 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.

<sup>4</sup> Motion, para. 7.

<sup>5</sup> Motion, paras 8-9.

<sup>6</sup> Motion, paras 9, 16.

<sup>7</sup> Motion, para. 10.

<sup>8</sup> Motion, para. 12.

<sup>9</sup> Motion, paras 13-15.

Prosecution witnesses which made legal determinations regarding the use of force by the VRS be struck from the trial record.<sup>10</sup>

3. The Prosecution opposes the Motion, arguing that the Impugned Decision does not raise an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial.<sup>11</sup> The Prosecution submits that the document has no factual relationship to the case and relates at best only abstractly to the proportionality of VRS responses to ABiH provocations in Sarajevo and elsewhere.<sup>12</sup> Also, the Prosecution states that, as the document conducts a legal assessment that falls squarely within the purview of the Chamber, it offers little assistance that does not usurp the Chamber's authority.<sup>13</sup> The Prosecution further submits that the Defence has not identified an issue which, if immediately resolved by the Appeals Chamber, may materially advance the proceedings.<sup>14</sup> The Prosecution submits that the Defence makes no showing that the proceedings would materially benefit from having this issue determined at this stage rather than following an appeal of the Judgement and that the Motion does not demonstrate how an immediate resolution by the Appeals Chamber may materially advance the proceedings at this late stage of the trial.<sup>15</sup>

### III. APPLICABLE LAW

4. The Chamber recalls and refers to the applicable law governing certification to appeal pursuant to Rule 73 (B) of the Tribunal's Rules of Procedure and Evidence ("Rules"), as set out in a previous decision.<sup>16</sup>

### IV. DISCUSSION

5. The document bearing Rule 65 *ter* number 1D00460 is an article written by Jonathan F. Keiler. The article is an analysis of the development of the legal concept of the principle of proportionality. The article focuses on the principle of proportionality in the context of the 2006 Israel-Lebanon war and does not reference the events in the former Yugoslavia during the Indictment Period or otherwise shed light on any issues of fact before the Chamber. As the article is legal commentary, easily accessible, and available in one of the official languages of the Tribunal, it

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<sup>10</sup> Motion, para. 19.

<sup>11</sup> Response, para. 3.

<sup>12</sup> Response, para. 5.

<sup>13</sup> *Ibid.*

<sup>14</sup> Response, para. 8.

<sup>15</sup> *Ibid.*

<sup>16</sup> Decision on Defence Motion for Certification to Appeal the Decision on the Admission of the Evidence of Milan Tutić, 15 July 2015, para. 4.

may be referred to by the parties when arguing their cases. The Defence can therefore achieve its apparent purpose of tendering the document, namely to support its theory of the principle of proportionality, without having the article admitted into evidence. For the above reasons, the Chamber finds that the Impugned Decision does not involve an issue that significantly affects the fair and expeditious conduct of the proceedings or the outcome of the trial.

6. 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.

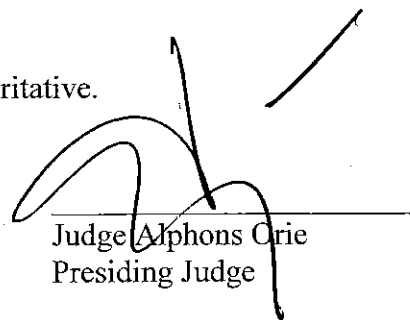
7. In light of the above, the Chamber will deny the request for certification to appeal the Impugned Decision.

8. With regard to the Defence's request to strike from the trial record any evidence provided by Prosecution witnesses wherein they made legal determinations regarding the use of force by the VRS, the Chamber notes that the Defence has not referred to any legal basis for its request, nor has it identified the specific evidence it seeks to have stricken from the record. The Chamber will therefore also deny the request to strike evidence provided by Prosecution witnesses from the trial record.

## 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 Alphons Orie  
Presiding Judge

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

[Seal of the Tribunal]