



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: 9 June 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: 9 June 2016

PROSECUTOR

v.

RATKO MLADIĆ

PUBLIC

**DECISION ON DEFENCE MOTION TO ADMIT INTO
EVIDENCE SUBOTIĆ AND POPARIĆ'S EXPERT REPORTS
AND RELATED DOCUMENTS**

Office of the Prosecutor

Mr Peter McCloskey
Mr Alan Tieger

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Mr Branko Lukić
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I. PROCEDURAL HISTORY

1. On 2 July 2015, the Chamber delivered its decision: (i) granting witness Zorica Subotić expert status in the fields of ballistics, fire-arms and cold weapons and witness Mile Poparić expert status in weapons and military equipment; and (ii) deferring admission of the four reports co-authored by these witnesses, bearing Rule 65 *ter* numbers 1D05496, “Expert Report for the Defence Mortar Attacks on the Sarajevo Area – Incidents at the Markale Market 5 February 1994 and 28 August 1995” (“Markale Report”); 1D05497, “Defence Expert Analysis of The Use of Modified Aircraft Bombs in the Sarajevo Area in 1994-1995” (“Modified Air Bomb Report”); 1D05498, “Expert Report for the Defence Mortar Attacks on the Sarajevo Area in 1992-1995” (“Shelling Report”); and 1D05499, “Expert Report for the Defence Small Arms Fire on the Sarajevo Area 1992-1995” (“Sniping Report”).¹

2. On 17 September 2015, the Chamber issued an interim decision denying the Prosecution’s request to exclude portions of three of the four expert reports and deferring its decision on their admission (“Interim Decision”).² On 26 February 2016, the Defence filed a motion seeking the admission of the four expert reports into evidence as well as 18 other documents either cited in the reports or related to the reports (“Motion”).³ On 11 March, the Prosecution filed its response not objecting to the admission of the four reports, a *curriculum vitae*, and an *errata* sheet but opposing the admission of 11 of the 16 remaining documents (“Response”).⁴ On 18 March, the Defence requested leave to reply to the Response, attaching its reply (“Reply”).⁵

II. SUBMISSIONS OF THE PARTIES

3. The Defence submits that the 22 tendered documents, comprising expert reports, expert analysis, photographs, a map, and videos, are relevant and have sufficient probative value to be admitted into evidence pursuant to Rule 89 (C) of the Tribunal’s Rules of Procedure and Evidence (“Rules”).⁶ It submits that the proposed documents are relevant because they relate to key incidents alleged in the Indictment and are *prima facie* reliable and authentic because of their “specified

¹ T. 36692-36694. The Chamber notes that the document bearing Rule 65 *ter* number 1D05499 was marked for identification as D1330 and placed under seal pursuant to the Chamber’s Oral Decision of 28 October 2015 *See* T. 40441.

² Interim Decision Regarding the Expert Reports of Mile Poparić and Zorica Subotić, 17 September 2015.

³ Defence Submissions and Motion to Admit Associated Exhibits of Expert Witnesses Subotic and Poparic, as to Documents Not Agreed Upon by Both Parties, 26 February 2016.

⁴ Prosecution Response to Defence Submissions and Motion to Admit Associated Exhibits of Expert Witnesses Subotić and Poparić, as to Documents Not Agreed Upon by Both Parties, 11 March 2016.

⁵ Defence Request for Leave to Reply to Prosecution Response to Defence Submissions and Motion to Admit Associated Exhibits of Expert Witnesses Subotic and Poparic, as to Documents Not Agreed Upon by Both Parties, 18 March 2016.

⁶ Motion, paras 6-7, 12.

source”.⁷ It submits that the Chamber will be unable to make reliable factual findings on the basis of the expert reports alone without the admission of the underlying source material and that their admission will enable the Chamber to evaluate the reliability of, and the weight to be attributed to, the expert reports.⁸

4. The Prosecution does not oppose the admission of the four expert reports, the *curriculum vitae*, and the *errata* sheet.⁹ It, however, maintains its original position with respect to matters in the expert reports it asserts are outside the scope of the witnesses’ expertise, incidents dropped from the Indictment, and unattested testimony.¹⁰ The Prosecution opposes the admission of 11 of the remaining 16 documents.¹¹

5. The Defence, in its Reply, provides additional submissions on the relevance and probative value of the 11 documents opposed by the Prosecution.¹²

III. APPLICABLE LAW

6. The Chamber recalls and refers to the applicable law set out in a previous decision in relation to the admission of expert reports.¹³ The admission into evidence of documents that relate to an expert report is also governed by Rule 89(C) of the Rules which allows a chamber to admit any relevant evidence which it deems to have probative value.

IV. DISCUSSION

A. Preliminary Considerations

7. In respect of the Defence request for leave to reply, the Chamber considers that, as the Prosecution raises new issues in its Response, it is assisted by further submissions from the Defence. The Chamber will, therefore, grant leave to reply.

⁷ Motion, para. 7.

⁸ Motion, para. 8, 11.

⁹ Response, paras 1-3.

¹⁰ Response, paras 1-3.

¹¹ Response, paras 1, 4-13.

¹² Reply, paras 7-14.

¹³ Decision on Defence Request to Disqualify Richard Butler as an Expert and Bar the Prosecution from Presenting his Reports, 19 October 2012, paras 4-9.

B. Uncontested Documents Bearing Rule 65 ter Numbers 1D05496, 1D05497, 1D05498, 1D05906, 1D05902, 1D05499, 1D05500, 1D05501, 1D05756, 22311a, and 22452

8. In respect of the four expert reports, recalling its oral decision of 2 July 2015 on Subotić and Poparić's qualifications as expert witnesses, the Chamber notes that the content of their reports generally falls within the witnesses' recognised expertise. With regard to paragraphs 7 and 10 of the Sniping Report, which contain analysis which does not fall within the expertise of the witnesses, the Chamber recalls its considerations in the Interim Decision and will deny the admission of these two paragraphs.¹⁴ The Chamber finds that the expert reports are relevant to the Sarajevo component of the case and, in particular, to the alleged scheduled sniping and shelling incidents charged in the Indictment and may assist the Chamber in understanding issues related to ballistics. As the reports were authored by recognised experts who testified about their methodology, conclusions and sources, the Chamber finds that the reports have sufficient probative value for the purpose of their admission into evidence. The Chamber will, accordingly, admit the identified portions of the expert reports into evidence.

9. With regard to the document bearing Rule 65 ter number 1D05906, an *errata* sheet to the expert reports, the Chamber finds that the *errata* sheet will assist the Chamber in clarifying references and textual details in the expert reports. With regard to the document bearing Rule 65 ter number 1D05902, an additional *curriculum vitae* for Poparić, the Chamber finds that the *curriculum vitae* will assist the Chamber in deciding the weight to be attributed to the content of the expert reports given the expertise of the witness. Having heard the testimony of Subotić and Poparić relating to the references in the documents, the Chamber finds that the documents bear sufficient probative value for the purpose of their admission into evidence. The Chamber will, accordingly, admit these documents into evidence.

10. The Chamber notes that the documents bearing Rule 65 ter numbers 1D05500 and 1D05501 are still frame photographs from video footage and that the videos from which they originate have already been admitted into evidence as exhibits D246 and D245, respectively. The document bearing Rule 65 ter number 1D05756 is a photograph of the pavement in Vase Miskina Street showing the impact of a mortar explosion. The documents bearing Rule 65 ter numbers 22311a, and 22452 comprise two videos related to sniping incidents in Sarajevo.¹⁵ The three photographs and two videos tendered by the Defence concern alleged shelling and sniping incidents in Sarajevo, as charged in the Indictment and are, therefore, relevant to the Sarajevo component of the case. Furthermore, having heard the testimony of Subotić and Poparić relating to the incidents in respect

¹⁴ Interim Decision, para. 8.

¹⁵ Motion, paras 10(xi), (xx), (xxi); Response, paras 4, 9; Reply, para. 6.

of which these photographs and videos are referenced, the Chamber finds that the documents bear sufficient probative value for their admission into evidence.¹⁶ The Chamber, accordingly, finds these videos and photographs admissible pursuant to Rule 89 (C) of the Rules and will admit them into evidence.

**C. Contested Documents Bearing Rule 65 ter Numbers 1D05912, 1D05911, 1D05929
1D06354, 1D05519, 1D05539, 1D05563, 1D05549, 1D05719, 10280, 10474**

11. The Defence tenders video excerpts bearing Rule 65 *ter* numbers 1D05912, 1D05911, 1D05929 which are opposed by the Prosecution on the basis that they lack transcripts in BCS and English.¹⁷ The Defence proposed to submit transcripts and acknowledged that the Prosecution will have a chance to respond once it has access to them.¹⁸ The Chamber notes that the video extract bearing Rule 65 *ter* number 1D05911 provided to the Chamber does not correspond with the tendered surrogate sheet. The Chamber further notes, that to date, no transcripts have been provided for the three video extracts. The Chamber will, therefore, deny admission of these documents without prejudice.

12. In respect of the document bearing Rule 65 *ter* number 1D06354, which is a manual and firing table for a Košava M94 rocket launcher, the Chamber notes that this document was tendered and denied admission in another decision.¹⁹ The reason for the denial was a missing translation which still has not been provided.²⁰ The Chamber will, therefore, deny admission of that document without prejudice.

13. The documents bearing Rule 65 *ter* numbers 1D05519, 1D05539, and 1D05563 are information reports, disclosed by the Prosecution, on the proofing of three witnesses.²¹ The Prosecution objects to the documents' admission on the basis that they fall within the *lex specialis* of Rules 92 *bis* and *ter* of the Rules.²² The Defence argues that while the documents are not written witness statements given by and attested to by the witnesses they are disclosed Prosecution correspondence providing concessions and information.²³ The Chamber considers that the proofing notes, even if they are not construed as statements in the narrow sense, document interviews with witnesses taken out-of-court for the purposes of Tribunal proceedings. Under these circumstances,

¹⁶ This concerns the documents bearing Rule 65 *ter* numbers: 1D05500, 1D05501, 1D05756, 22311a, and 22452.

¹⁷ Motion, paras 10(xii), (xviii), (xix); Response, paras 5, 11; Reply, paras 7, 13.

¹⁸ Reply, paras 7, 13.

¹⁹ Decision on Defence's Ninth Motion for the Admission of Documents from The Bar Table, 21 April 2016; Defence Ninth Motion to Admit Documents from the Bar – New Documents, 18 January 2016.

²⁰ To the extent the missing translations may be being held up by the length of the tendered document the Defence may find it expedient to discuss with the Prosecution which portions require translation prior to tendering.

²¹ Motion, paras 10(vi), (vii), and (ix); Reply, para. 8.

²² Response, para. 6.

²³ Reply, para. 8.

Rules 92 *bis* or *ter* are *leges speciales*. As the Defence has not tendered the proofing notes under these rules, the Chamber will deny their admission.

14. The document bearing Rule 65 *ter* number 1D05549 is a map of Dobrinja marked by witness Mirza Sabljica in the *Karadžić* case.²⁴ Although the Prosecution objects to its admission on the ground that the markings are unidentified,²⁵ the Chamber finds that the markings are sufficiently explained in exhibit D180 by witness Mirza Sabljica in this case. The Chamber finds that the document is relevant to the Sarajevo component of the case, as charged in the Indictment, because it pertains to matters related to civilian casualties of shelling. Having heard the testimony of Subotić and Poparić relating to the document, the Chamber finds that it bears sufficient probative value for admission into evidence. The Chamber will, therefore, admit the document into evidence.

15. The document bearing Rule 65 *ter* number 1D05719 is, the Defence submits, a photograph of a monument dedicated to fallen soldiers of the 105th Motorised Brigade.²⁶ The Prosecution objects to its admission on the grounds that *prima facie* the document has no relevance.²⁷ The Defence maintains it is relevant by submitting that the monument lists Army of Bosnia-Herzegovina (“ABiH”) soldiers who had died rather than civilian who died as a result of shelling incidents.²⁸ The Chamber notes that the photograph has no date, no author, and no markings to demonstrate that the names listed on the monument are in fact ‘fallen soldiers’. The Chamber also notes that it is difficult to connect the names listed on the monument to the Sarajevo component of the case, as charged in the Indictment. The Chamber finds that the document has insufficient indicia of reliability and, therefore, does not have probative value and is also irrelevant.²⁹ Accordingly, the Chamber will deny admission of the document into evidence.

16. The document bearing Rule 65 *ter* number 10280 is a report on firing incidents involving mortars in Sarajevo prepared for a previous case and authored by Richard Higgs, a Prosecution witness in this case.³⁰ The Prosecution objects to this report on the basis that Richard Higgs did not testify on the report in this case pursuant to the *lex specialis* Rule 94 *bis* of the Rules.³¹ The Defence argues that Higgs’s report demonstrates that Richard Higgs is unreliable as he provided different conclusions about the same events in a different case.³² The Chamber notes that the Higgs report

²⁴ Motion, para. 10(viii).

²⁵ Response, para. 7.

²⁶ Motion, para. 10(x); Reply, para. 10.

²⁷ Response, para. 8.

²⁸ Reply, para. 10.

²⁹ The Chamber found the document to have comprised just one page rather than three pages as indicated by the Defence.

³⁰ Motion, para. 10(xiii), (xiv); Reply, para. 12.

³¹ Response, para. 3.

³² Reply, para. 12.

has, by its content, the appearance of an expert report and was considered as such by Subotić and Poparić in the Shelling Report. The Chamber also notes that the Higgs report was prepared for the purposes of Tribunal proceedings. The Chamber considers that the Defence now seeks admission of the Higgs report without there being any of the guarantees contained in Rule 94 *bis* of the Rules and without having put contentious matters, such as this report, to the Prosecution witness when cross-examining him. Considering the above, the Chamber will deny the admission of the Higgs report into evidence.

17. The document bearing Rule 65 *ter* number 10474 is a report of Miroljub Vukasinović on ballistic analysis of the Markale II incident.³³ The Prosecution objects to this report on the basis that Miroljub Vukasinović did not testify on the report in this case pursuant to the *lex specialis* Rule 94 *bis* of the Rules.³⁴ The Defence argues that the report was adequately referenced in the Markale Report which placed the Prosecution on notice and provided it with an opportunity to challenge Subotić and Poparić during cross-examination.³⁵ The Chamber finds that the document is relevant to the Sarajevo element of the case, and adds to a better understanding of the methodology used in ballistic analysis in the Markale Report. The document bears sufficient *indicia* of reliability as it contains dates, sources and information about the author. Having heard the testimony of Subotić and Poparić, and the challenge to Subotić on the contents of the report by the Prosecution, the Chamber finds that the tendered document is of probative value for the purpose of its admission into evidence. The Chamber notes that the document is of a technical nature requiring some expertise. The Chamber also notes that the document is referenced in the Markale Report and was used in Court. Considering the above, the Chamber will admit the document into evidence. The Chamber considers the fact that Miroljub Vukasinović was not examined on his report goes to the weight the Chamber will attribute to the document.

V. DISPOSITION

18. For the foregoing reasons, pursuant to Rules 89 (C) and 94 *bis* of the Rules, the Chamber

GRANTS the Defence leave to reply to the Response;

GRANTS the Motion **IN PART**;

DENIES the admission into evidence of documents bearing Rule 65 *ter* numbers 1D05912, 1D05911, 1D05929 and 1D06354 without prejudice;

³³ Motion, para. 10(xiii), (xiv); Reply, para. 12.

³⁴ Response, para. 3.

³⁵ *Ibid.*

DENIES the admission into evidence of the documents bearing Rule 65 *ter* numbers 1D05519, 1D05539, 1D05563, and 10280;

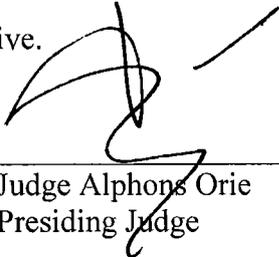
ADMITS into evidence the documents bearing Rule 65 *ter* numbers 1D05500, 1D05501, 1D05756, 22311a, 22452, 1D05549, 1D05719, 10474, 1D05496, 1D05497, 1D05906, 1D05902, 1D05498, and 1D05499 marked for identification as D1330 (under seal and except for paragraphs 7 and 10);

INSTRUCTS the Defence to upload a redacted version of D1330 into eCourt;

INSTRUCTS the Registry to replace the existing version of D1330 with the redacted version, once uploaded into eCourt; 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 Orié
Presiding Judge

Dated this ninth day of June 2016
At The Hague
The Netherlands

[Seal of the Tribunal]