



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-05-88/2-T

Date: 22 March 2012

Original: English

IN TRIAL CHAMBER II

Before: Judge Christoph Flügge, Presiding
Judge Antoine Kesia-Mbe Mindua
Judge Prisca Matimba Nyambe

Registrar: Mr. John Hocking

Decision of: 22 March 2012

PROSECUTOR

v.

ZDRAVKO TOLIMIR

PUBLIC

**DECISION ON THIRD, FOURTH AND FIFTH MOTIONS
BY THE ACCUSED FOR ADMISSION OF DOCUMENTS
FROM THE BAR TABLE**

Office of the Prosecutor

Mr. Peter McCloskey

The Accused

Zdravko Tolimir

THIS TRIAL CHAMBER of 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”) is seised of Zdravko Tolimir’s (“Accused”) “Third Request by the Defence for Admission of Documents from the Bar Table”, submitted in BCS on 20 February 2012 and filed in English on 24 February 2012 (“Third Motion”); “Fourth Request by the Defence for Admission of Documents from the Bar Table”, submitted in BCS on 21 February 2012 and filed in English on 24 February 2012 (“Fourth Motion”); and “Fifth Request by the Defence for Admission of Documents from the Bar Table”, submitted in BCS on 5 March 2012 and filed in English on 7 March 2012 (“Fifth Motion”), and hereby renders its decision.¹

I. GENERAL SUBMISSIONS

1. In his Third, Fourth, and Fifth Motions, the Accused seeks the admission of in total nine documents (“Proposed Documents”) from the bar table pursuant to Rules 73 and 89 (C) of the Rules of Procedure and Evidence (“Rules”).² More specifically, the Accused seeks the admission into evidence of the documents with Rule 65 *ter* numbers 1D00954, 1D00309,³ and 1D00770⁴ as well as Exs. P01626, D00104,⁵ and D00195, which are marked for identification (“MFI”); and Ex. P02874, which is marked as not admitted (“MNA”).⁶ With regard to Rule 65 *ter* numbers 1D01112 and 1D01113, the Accused first seeks leave to add both documents to his Rule 65 *ter* Exhibit List and then requests that the Chamber admit them into evidence.⁷ Finally, regarding Ex. D00141 the Accused submits that it should not be admitted into evidence but rather should be MNA.⁸

2. In the “Prosecution’s Consolidated Response to the Accused’s Third, Fourth and Fifth Bar Table Motions” filed on 9 March 2012 (“Response”), the Prosecution does not object to the admission into evidence of any of the Proposed Documents, but submits that “it does not accept the

¹ The BCS version of the “Corrigendum to the Third and Fifth Requests by the Defence on Admission of Documents from the Bar Table” was submitted on 14 March 2012, and its English version was filed on 16 March 2012 (“Corrigendum”).

² Third Motion, para. 1; Fourth Motion, para. 1; Fifth Motion, para. 1.

³ *Ibid.* Corrigendum, para. 2.

⁴ Fourth Motion, para. 1.

⁵ Corrigendum, para. 3.

⁶ Fifth Motion, para. 1. Ex. P02874 was previously MFI, but during the Housekeeping Session of 21 February 2012, the document was MNA, T. 19355 (21 February 2012).

⁷ Third Motion, para. 8.

⁸ Fifth Motion, paras. 10–11. The Chamber notes that in the Corrigendum, the Accused refers to Rule 65 *ter* number 1D00141 rather than to Ex. D00141. *See* Corrigendum, para. 4. The former document, however, never was tendered in the current proceedings. The Chamber requested clarification in this regard via an informal communication with the Accused’s legal advisor who confirmed that the correct document is the one referred to in the Fifth Motion, *i.e.* Ex. D00141 (MFI).

Defence's position regarding the significance and interpretation of the proffered materials".⁹ It further does not object to the request for Ex. D00141 to be changed to MNA.¹⁰

II. APPLICABLE LAW

A. Rule 65 ter Exhibit List

3. Pursuant to Rule 65 *ter* (G) (ii), after the close of the Prosecutor's case and before the commencement of the Defence case, the Defence is required to file the list of exhibits it intends to offer in support of its case and to provide the Prosecution with copies of these exhibits. The primary purpose of such an exhibit list is to give notice to the Prosecution of the documents to be used during the Defence case, which will allow the Prosecution to prepare its case accordingly and to ensure an efficient presentation of evidence during the trial.¹¹

4. The Chamber may grant a request for amendment of such a list where it is satisfied that this is in the interests of justice.¹² Factors that must be considered by the Chamber are whether the material sought for addition is *prima facie* relevant and likely to be of probative value, and whether the requesting party has demonstrated good cause for amending the list.¹³ A party should not be allowed leave to add to its proposed exhibit list documents that are obviously irrelevant.¹⁴

B. Admission from the Bar Table

5. Rule 89 provides, in relevant part:

(C) A Chamber may admit any relevant evidence which it deems to have probative value.

(D) A Chamber may exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial.

6. The admission of evidence from the bar table is a practice established in the case law of the Tribunal.¹⁵ Evidence may be admitted from the bar table if it is considered to fulfill the requirements set out in Rule 89. Furthermore, "the offering party must be able to demonstrate, with

⁹ Response, para. 1.

¹⁰ *Ibid.*

¹¹ Cf. Decision on Prosecution's Motion regarding Rule 65 *ter* Witness and Exhibits Lists, Rule 92 *ter*, and Protective Measures, 30 March 2010 ("*Tolimir* 30 March 2010 Decision"), para. 7; *Prosecutor v. Boškoski and Tarčulovski*, Case No. IT-04-82, Decision on Tarčulovski Motion for Permission to add Additional Exhibits to Its 2D Defence Exhibit List, 12 March 2008 ("*Boškoski* Decision"), para. 3.

¹² *Tolimir* 30 March 2010 Decision, para. 9.

¹³ *Tolimir* 30 March 2010 Decision, para. 7; *Prosecutor v. Perišić*, Case No. IT-04-81-PT, Decision on Prosecution Motion for Leave to File a Fifth Supplemental Rule 65 *ter* Exhibit List with Annex A, confidential, 29 August 2008, para. 10.

¹⁴ *Boškoski* Decision, para. 3.

¹⁵ See, e.g., Decision on Prosecution's Motion for Admission of 28 Intercepts from the Bar Table, 20 January 2012 ("*Tolimir* Bar Table Decision"), para. 10, fn. 23 and references therein.

clarity and specificity, where and how each document fits into its case”.¹⁶ Once these requirements are satisfied, the Chamber maintains discretion over the admission of evidence under Rule 89.

III. SPECIFIC SUBMISSIONS AND DISCUSSION

(a) Rule 65 ter number 1D00954

7. Rule 65 *ter* number 1D00954 is a document titled “Recommendations on the Tragic Situation of Civilians in Bosnia-Herzegovina”, adopted at a meeting on 30 September and 1 October 1992 in Geneva, organised by the International Committee of the Red Cross.¹⁷ The Accused submits that the document is relevant and has probative value “because it points out the practice and recommendations regarding the treatment of civilians caught in armed clashes”.¹⁸ He further submits that “the document is relevant to Counts 6, 7 and 8 of the Third Amended Indictment.”¹⁹ The Prosecution does not object to the admission of the proffered document.²⁰

8. The Chamber notes at the outset that it is not bound by the submissions of the parties in its interpretation of a document in evidence. Having reviewed the document, the Chamber is satisfied of its relevance and probative value as set out under Rule 89. In addition, the Accused has satisfactorily demonstrated how the proffered document fits into his case. The Chamber will therefore admit Rule 65 *ter* number 1D00954 into evidence.

(b) Rule 65 ter number 1D00309

9. Rule 65 *ter* number 1D00309 is a document sent to the Security Administration of the General Staff of the Army of Bosnia and Herzegovina (“ABiH”) from the ABiH 2nd Corps Command and the State Security Service, titled “Fall of Srebrenica” and dated 28 August 1995.²¹ The Accused submits that it “presents information about the relevant events from July 1995”, such as attacks from the Žepa enclave, the movement of civilians, the weapons available to the BH Army in the Srebrenica enclave, meetings at the Fontana hotel in Bratunac, and the formation of the column breaking through Tuzla.²² He further asserts that “the relevance of the document seems to be uncontentious, because it directly pertains to events from July 1995 regarding the Srebrenica enclave”.²³ The Prosecution does not object to the admission of the proffered document.²⁴

¹⁶ *Tolimir* Bar Table Decision, para. 10, fn. 24 and references therein.

¹⁷ Rule 65 *ter* number 1D00954, p. 1.

¹⁸ Third Motion, para. 5.

¹⁹ *Ibid.*

²⁰ Response, para. 1.

²¹ Rule 65 *ter* number 1D00309, p. 1.

²² Third Motion, para. 6.

²³ *Ibid.*, para. 7.

10. Having reviewed Rule 65 *ter* number 1D00309 the Chamber is satisfied that the Accused has demonstrated how the proposed document fits into his case and that it is relevant and has probative value as set out under Rule 89. It will therefore admit Rule 65 *ter* number 1D00309 into evidence.

(c) Rule 65 *ter* numbers 1D01112 and 1D01113

11. With regard to Rule 65 *ter* numbers 1D01112 and 1D01113, the Accused first seeks leave from the Chamber to add them to his Rule 65 *ter* Exhibit List and then requests that those documents be admitted into evidence.

12. The proposed exhibits are a newspaper article titled “Descendants of Serf Siman” written by Zilhad Ključanin dated 23 February 1994,²⁵ as well as an excerpt from a webpage containing information and a short biography of the author Zilhad Ključanin.²⁶ The Accused submits that the newspaper article “is only one in a series of articles published in the media under the control of the government from Sarajevo which directly call on genocide of the Serbian population” and “clearly indicates that the Serbs faced a threat of genocide during the war in BiH and that open calls were made to kill Serbs”.²⁷ The Accused argues that its request for admission of this document into evidence at this stage was prompted by a question of the Prosecutor during the cross-examination of Defence Witness Petar Škrbić, stating that

[...] it’s the position of the Prosecution, general, that the second position, when General Mladić and General Krstić and the other commanders say to their troops and say to their people that “the Croats and the Muslims are coming to commit genocide on you,” that that was done for the purpose [...] to vilify the Muslim people and to endanger hatred against them. And that it’s this kind of propaganda and politicising war that can lead and does lead and did lead to mass execution.²⁸

13. With regard to the excerpt from the webpage containing information on the author of the newspaper article, the Accused submits that “the information about the author and his position in the society [as set out on the webpage] indicates the seriousness attributed to his texts, and that [the newspaper] article 1D01112 cannot be treated as a work of an anonymous individual, but rather as an article of a person held in high esteem in the Muslim community”.²⁹ The Prosecution does not object to the admission of the two proffered documents.³⁰

²⁴ Response, para. 1.

²⁵ The Chamber notes that the year 1994 does not appear in the newspaper article itself, but was provided by the Defence in its Third Motion, para. 9. Rule 65 *ter* number 1D01112.

²⁶ Rule 65 *ter* number 1D01113.

²⁷ Third Motion, paras. 10–11.

²⁸ Petar Škrbić, T. 18720 (23 February 2012).

²⁹ Third Motion, para. 12.

³⁰ Response, para. 1.

14. At the outset, the Chamber notes that the official English translations of both proposed exhibits are still pending. However, the Chamber was able to assess their contents. Having further reviewed them in context of the cross-examination of Witness Petar Škrbić, the Chamber is satisfied that they are not obviously irrelevant, and that the *prima facie* threshold for the addition of both documents to the Rule 65 *ter* Exhibit List has been met. The Chamber is satisfied that the Accused has acted with sufficient diligence and has shown good cause for seeking addition of these materials at the current stage of the proceedings since the issue arose just recently during the cross-examination of Witness Petar Škrbić on 23 February 2012. In the absence of any objection by the Prosecution, the Chamber concludes that it is in the interests of justice to grant the request for the addition of Rule 65 *ter* numbers 1D01112 and 1D01113 to the Rule 65 *ter* Exhibit List.

15. The Chamber will now turn to the Accused's request for Rule 65 *ter* numbers 1D01112 and 1D01113 to be admitted into evidence. The Accused has demonstrated that both proposed documents fit into his case as they relate to an issue that arose during the examination of Witness Petar Škrbić, as outlined above. In this regard, the Chamber considers both documents to be relevant and to possess probative value as set out under Rule 89, and will therefore admit Rule 65 *ter* numbers 1D01112 and 1D01113 into evidence. Due to the pending official English translations, however, the Chamber instructs the Registry to mark Rule 65 *ter* numbers 1D01112 and 1D01113 for identification and change their status to exhibits when the Chamber receives the translations.

(d) Rule 65 *ter* number 1D00770

16. Rule 65 *ter* number 1D00770 is comprised of a summary of a press conference by Ratko Mladić, held on 26 September 1995 in Banja Luka, as well as the corresponding video footage of the press conference.³¹ The Accused submits that during this press conference, Ratko Mladić “presented VRS views about the threat facing the Serbian people in BH and details of persecutions of the Serbian population [...], [as well as information about] the forces that took part in the aggression against Republika Srpska (NATO, Croatian and Muslim armed units), and especially the engagement of NATO forces and the Rapid Reaction Force”.³²

17. The Accused used the summary of the press conference during the cross-examination of Prosecution Witness Manojlo Milovanović.³³ The Prosecution objected to the admission of the summary into evidence, requesting more information on its provenance because of, amongst other reasons, the lack of ERN numbers on it.³⁴ Awaiting further information on the document's

³¹ Rule 65 *ter* number 1D00770.

³² Fourth Motion, para. 3.

³³ Manojlo Milovanović, T. 14387–14391 (19 May 2011).

³⁴ Manojlo Milovanović, T. 14389 (19 May 2011).

provenance, the Chamber did not take a decision on the document at that time, and it was changed to MNA status.³⁵ In his Fourth Motion, the Accused now provides the Chamber with the video footage of the press conference and submits that the summary “almost fully records what Mr. Mladić said at the news conference, and therefore there is no need to make a special transcript of the video footage”.³⁶ He further asserts that “the video footage of the news conference confirms the authenticity” of the summary from the conference.³⁷ In its Response, the Prosecution does not object to the admission of the proffered exhibit, i.e. the summary of the press conference and its accompanying video footage.³⁸

18. Having considered the Accused’s submissions and in the absence of any objection by the Prosecution, the Chamber is now satisfied as to the provenance of Rule 65 *ter* number 1D00770 since the summary mirrors the video footage of the press conference of Ratko Mladić. The relevance of this document was not in dispute. The Chamber will therefore admit Rule 65 *ter* number 1D00770 into evidence.

(e) Ex. P01626 (MFI)

19. Ex. P01626 is a document titled “List of War Criminals Known to the Command of the 1st Light Infantry Brigade who committed war crimes in the area of Bratunac, Srebrenica, Milići, Vlasenica and Skelani and are believed to be in Srebrenica”. The list contains 386 persons divided into three categories: a) officials and organisers, b) commanders, and c) direct perpetrators.³⁹ The Accused submits that the document has probative value as it was created at the time of the events in July 1995 and is “relevant to the knowledge on the part of the VRS about the persons who committed crimes against the Serbian population and for establishing the course of events and the intentions of the participants in the events in July 1995”.⁴⁰ The Accused further submits that the Prosecution Witness Zlatan Čelanović testified about the existence and creation of this list, which was based on the book “The Chronicle of Our Graveyard”⁴¹ and that the list in the book and Ex.

³⁵ Manojlo Milovanović, T. 14391 (19 May 2011).

³⁶ Fourth Motion, para. 2. The Chamber has verified the content of the summary and notes that while it is not a literal translation of the video footage, it accurately reflects the press conference.

³⁷ *Ibid.*

³⁸ Response, para. 1.

³⁹ Ex. P01626 (MFI), pp. 1–3.

⁴⁰ Fifth Motion, para. 2.

⁴¹ Third Motion, para. 3; Zlatan Čelanović, T. 3611, 3620–3621 (7 July 2010). After the conclusion of Witness Čelanović’s testimony, the book was tendered into evidence by the Accused, and subsequently assigned the exhibit number Ex. D00074 and marked for identification pending translation and pending the Chamber’s decision on whether to admit it in its entirety or only parts of it. T. 3638–3639 (7 July 2010). During the housekeeping session of 21 February 2012, the Chamber decided that it will admit a selection of pages once the translation is received. T. 19358 (21 February 2012).

P01626 are identical.⁴² The Prosecution does not object to the admission of the proffered document.⁴³

20. The Chamber notes that the proffered exhibit was marked for identification pursuant to this Chamber's Order of 3 October 2011.⁴⁴ Having reviewed Ex. P01626 the Chamber is satisfied that the Accused has demonstrated how the proposed document fits into his case and that it is relevant and has probative value as set out under Rule 89. It will therefore admit Ex. P01626 into evidence.

(f) Ex. P02874 (MNA)

21. Ex. P02874 is an article titled "The Srebrenica Icon – How a Trojan Horse for Islamist Terrorism Was Built With Western Help in the Heart of Europe". The Accused submits that the article is relevant "not only to the assessment of the testimony of expert Škrbić [*sic*], but also to the analysis of elements of some often advocated assumptions mentioned with regard to events in Srebrenica in July 1995".⁴⁵ The Prosecution does not object to the admission of the proffered document.⁴⁶

22. The Chamber notes that the Prosecution first requested the admission of this article into evidence during the cross-examination of Defence Witness Ratko Škrbić, whereupon it was marked for identification due to the lack of a BCS translation at that time.⁴⁷ During the housekeeping session on 21 February 2012, the Prosecution withdrew its request to admit the document into evidence, whereupon it was MNA.⁴⁸ Having reviewed Ex. P02874 the Chamber is satisfied that the Accused has demonstrated how it fits into his case and that it is relevant and has probative value as set out under Rule 89 and therefore will admit it into evidence. Due to the pending BCS translation, however, the Chamber instructs the Registry to mark Ex. P02874 for identification and change its status to exhibit when the Chamber receives the translation.

⁴² Third Motion, para. 3. The Accused further argues that other witnesses, such as Joseph Kingori and Momir Nikolić also confirmed that the list was used in July 1995. *Ibid.*

⁴³ Response, para. 1.

⁴⁴ Further Order on the Admission of Rule 92 *bis* Associated Exhibits, 3 October 2011, p. 3. In this Order, the Chamber stated that Ex. P01626 was either not subject to or denied admission in an earlier decision of the Chamber ("Decision on Prosecution's Motion for Admission of Written Evidence Pursuant to Rules 92 *bis* And 94 *bis*", issued on 7 July 2010). It therefore ordered that Ex. P01626's status be changed to MFI. *Ibid.*

⁴⁵ Fifth Motion, para. 5.

⁴⁶ Response, para. 1.

⁴⁷ Ratko Škrbić, T. 19050–19051 (9 February 2012). The Prosecution used this document extensively and its relevance was not in dispute.

⁴⁸ Housekeeping Session, T. 19355 (21 February 2012).

(g) Ex. D00104 (MFI)

23. Ex. D00104 is a letter sent on 14 July 1995 by the General Staff of the ABiH Administration for Moral Guidance to the President of the War Presidency of Žepa municipality, Mehmed Hajrić, relating to “suggestions for the radio interview with international journalists in Germany”.⁴⁹ The Accused submits that the document is relevant and has probative value and that as a contemporaneous document created during the events in Žepa in July 1995, it shows “some of the elements of BH Army propaganda regarding the events in Žepa”, “the reasons why members of the BH Army did not want to hand over the weapons” and the fact that “the military leadership of Žepa did not make decisions independently”.⁵⁰ The Prosecution does not object to the admission of the proffered document.⁵¹

24. The Chamber notes that the document was marked for identification during the testimony of Prosecution Witness Hamdija Torlak because he could not provide any information about it.⁵² In light of the Accused’s submissions, the Chamber is satisfied that he has demonstrated how the proposed document fits into his case and that it is relevant and has probative value pursuant to Rule 89. It will therefore admit Ex. D00104 into evidence.

(h) Ex. D00195 (MFI)

25. Ex. D00195 is a letter dated 4 September 1995, sent from the Main Staff of the VRS to the UNPROFOR Command in Zagreb, personally addressed to General Janvier, and type-signed by Ratko Mladić.⁵³ The Accused submits that the document is relevant and has probative value since it “was created during the NATO aggression on Republika Srpska [and] shows the relations between the VRS and UNPROFOR”.⁵⁴ The Prosecution does not object to the admission of the proffered document.⁵⁵

26. The Chamber notes that this document was marked for identification pending translation and further identification on 28 March 2011, during the testimony of Prosecution Witness Rupert Smith, who was not able to testify about its contents.⁵⁶ Having now received the English translation of the proffered exhibit the Chamber is satisfied that the Accused has shown how the proposed

⁴⁹ Ex. D00104 (MFI), p. 1.

⁵⁰ Fifth Motion, paras. 7–8.

⁵¹ Response, para. 1.

⁵² Hamdija Torlak, T. 4680 (31 August 2010).

⁵³ Ex. D00195 (MFI).

⁵⁴ Fifth Motion, para. 9.

⁵⁵ Response, para. 1.

⁵⁶ Rupert Smith, T. 11866 (28 March 2011).

document fits into his case and that it is relevant and has probative value pursuant to Rule 89. The Chamber will therefore admit Ex. D00195 into evidence.

(i) Ex. D00141 (MFI)

27. The Accused submits that it is no longer necessary to admit Ex. D00141 into evidence and that its status should thus be changed to MNA.⁵⁷ The Prosecution does not object the request for the document to be MNA.⁵⁸

28. Ex. D00141 is an order of the ABiH 2nd Corps Command on “Measures for Operations Group 8 regarding UNPROFOR” dated 29 January 1995. It was marked for identification on 16 December 2010 because the Prosecution Witness Pieter Boering, with whom it was being used, was unable to provide any information on its contents.⁵⁹ In light of the Accused’s submissions, and in the absence of any objection by the Prosecution, the Chamber will mark this document as not admitted.

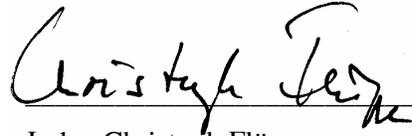
IV. DISPOSITION

For the reasons set out above, pursuant to Rules 65 *ter*, 73, and 89 of the Rules, the Chamber hereby **GRANTS** the Third, Fourth, and Fifth Motions and:

- (1) **GRANTS** the Accused leave to add the documents with Rule 65 *ter* numbers 1D01112 and 1D01113 to his Rule 65 *ter* Exhibit List;
- (2) **ADMITS** into evidence the documents with Rule 65 *ter* numbers 1D00954, 1D00309, 1D00770, 1D01112, 1D01113 and Exs. P01626, P02874, D00104, and D00195 and;
- (3) **ORDERS** the Registry as follows:
 - (i) to change the status of Rule 65 *ter* numbers 1D01112, 1D01113 in eCourt upon receipt of the English translations from marked for identification to exhibits;
 - (ii) to change the status of Ex. P02874 in eCourt from marked as not admitted to marked for identification pending translation, and, upon receipt of the BCS translation to exhibit; and
 - (iii) to mark Ex. D00141 as not admitted.

⁵⁷ Fifth Motion, paras. 10–11.

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



Judge Christoph Flüge

Presiding Judge

Dated this twenty-second day of March 2012
At The Hague
The Netherlands

[Seal of the Tribunal]

⁵⁸ Response, para. 1.

⁵⁹ Pieter Boering, T. 9043–9044 (16 December 2010).