



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: 10 March 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: 10 March 2016

PROSECUTOR

v.

RATKO MLADIĆ

PUBLIC

**REASONS FOR DECISION ON PROSECUTION REQUEST TO
TENDER DOCUMENTS AND DECISION ON DEFENCE
MOTION FOR CERTIFICATION TO APPEAL**

Office of the Prosecutor

Mr Peter McCloskey
Mr Alan Tieger

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Mr Branko Lukić
Mr Miodrag Stojanović

I. PROCEDURAL HISTORY

1. On 16 December 2015, the Prosecution requested that it be allowed to tender contextual documents in its responses to the Defence's upcoming bar table motions ("Request").¹ On 18 December, the Defence filed a notice of objection to the Request ("Objection").² On 24 December, the Prosecution filed its response to the Objection ("Response").³ On 13 January 2016, the Chamber emailed the parties ("Decision") deciding, with reasons to follow, that the approach that should be followed would have the Prosecution make submissions in its responses to the Defence bar table motions as to why it should be permitted to tender specific contextual documents at this stage as opposed to during the presentation of its rebuttal case. The Chamber would then first hear the Defence and eventually decide whether such contextual documents could be tendered at this stage of the case. On 20 January, the Defence filed a motion for certification to appeal the Decision ("Motion").⁴ On 3 February, the Prosecution filed its response opposing the Motion ("Certification Response").⁵

II. SUBMISSIONS OF THE PARTIES

A. Submissions Related to the Request

2. The Prosecution submitted that it would be practical for the Chamber to allow it to tender contextual evidence in its responses to Defence bar table motions because it would maximize the efficiency, clarity, and integrity of the proceedings and assist the parties in focussing on the issues in dispute.⁶ In support of the Request, the Prosecution cited the Chamber's decision on the Rule 92 *bis* motion for witness Jasmin Odošić ("Odošić Decision") and the Chamber's approach to portions of transcripts tendered in Rule 92 *bis* and Rule 92 *quater* decisions.⁷ The Prosecution also pointed out that a similar approach in relation to Defence bar table motions was adopted in the *Karadžić* case.⁸

¹ T. 42724-42725.

² Defense Notice of Objection to the Prosecution's Proposed Modification to Bar Table Submissions, 18 December 2015.

³ Prosecution Response to Defence Notice of Objection to the Prosecution's Proposed Modification to Bar Table Submissions, 24 December 2015.

⁴ Defence Motion for Certification to Appeal the Email Decision of 13 January 2016 as to Bar Table Submissions, 20 January 2016.

⁵ Prosecution Response to Defence Motion for Certification to Appeal the Email Decision of 13 January 2016 as to Bar Table Submissions, 3 February 2016.

⁶ T. 42724; Response, paras 1, 3.

⁷ T. 42724; Response, paras 3-4; Decision on Defence Motion to Admit the Evidence of Jasmin Odošić Pursuant to Rule 92 *bis*, 15 December 2015, para. 12.

⁸ T. 42724-42725.

3. In the Objection, the Defence submitted that the Prosecution's position: (i) is contrary to the existing law of this case; (ii) violates basic concepts of due process and fairness; and (iii) is inconsistent with the Tribunal's jurisprudence.⁹ In particular, the Defence submitted that the Request is not in accordance with the Chamber's guidance on bar table submissions as set out during various status conferences and that the Prosecution should not be allowed to invent new procedures that are contrary to existing procedures.¹⁰ The Defence further argued that the Prosecution's proposal is wholly improper and would invalidate these proceedings by introducing injustice and unfair practices to the detriment of the Accused's right to a fair trial.¹¹ Finally, the Defence argued that the Appeals Chamber previously deemed it to be an error for a trial chamber to impose different bar table admission standards for the parties and that even though the Chamber in the *Karadžić* case permitted such tendering of evidence, the Chamber denied the admission of new documents that were not included on the Prosecution's Rule 65 *ter* exhibit list.¹²

4. In its Response, the Prosecution argued that the decisions cited in the Objection, namely the *Tolimir*, *Prlić*, and *Karadžić* decisions,¹³ are not applicable to the Request and therefore the Request does not violate the Tribunal's jurisprudence.¹⁴ The Prosecution also submitted that the Defence mischaracterizes the Request as being contrary to the law of this case; the Request explicitly references recent Rule 92 *bis* and 92 *quater* decisions as examples regarding the utility and appropriateness of contextualization in response to Defence evidential submissions.¹⁵ Finally, the Prosecution argued that the Defence had not identified jurisprudence to support the contention that a party at any stage of the proceedings has the right to introduce potentially misleading documents without concern that clarifying contextual documents will also be admitted.¹⁶

⁹ Objection, para. 3.

¹⁰ Objection, paras 1, 6, 8.

¹¹ Objection, para. 11.

¹² Objection, paras 4, 5, 7.

¹³ *Prosecutor v. Tolimir*, Case No. IT-05-88/2-T, Consolidated Decision on Prosecution's Bar Table Motions and the Accused's Motion for Extension of Time, 14 May 2012 ("Tolimir Decision"); *Prosecutor v. Prlić et al.*, Case No. IT-04-74-AR73.16, Decision on Jadranko Prlić's Interlocutory Appeal Against the Decision on Prlić Defence Motion for Reconsideration of the Decision on Admission of Documentary Evidence, 3 November 2009 ("Prlić Decision"); *Prosecutor v. Karadžić*, Case No. IT-95-5/18-T, Decision on Prosecution's Motion for Admission of an Exhibit from the Bar Table Following Major Thomas' Testimony, 28 October 2010; *Prosecutor v. Karadžić*, Case No. IT-95-5/18-T, Decision on Accused's Motion to Admit Documents Relevant to Witnesses KDZ490 and KDZ492 from the Bar Table, 9 January 2012; *Prosecutor v. Karadžić*, Case No. IT-95-5/18-T, Decision on Prosecution Motion to Admit Evidence from the Bar Table (Hostages), 1 May 2012; *Prosecutor v. Karadžić*, Case No. IT-95-5/18-T, Decision on Prosecution's Bar Table Motion for the Admission of Documents Related to the Sarajevo Component, 11 May 2012 (all four decisions from the *Karadžić* case are hereinafter collectively referred to as the "Karadžić Decisions").

¹⁴ Response, para. 2.

¹⁵ Response, para. 3.

¹⁶ Response, para. 6.

B. Submissions Related to the Motion

5. In the Motion, the Defence submits that the Decision (i) constitutes a higher standard for the admission of Defence evidence from the bar table than the one applied during the Prosecution's case; (ii) contradicts long-standing Appeals Chamber jurisprudence; (iii) violates Rule 85 of the Tribunal's Rules of Procedure and Evidence ("Rules") by allowing the Prosecution to present ~~rebuttal evidence out of turn, thereby creating a lower standard for Prosecution rebuttal evidence to~~ the disadvantage of the Defence and the Accused's right to a fair trial; and (iv) creates an undue burden on the Defence that was not borne by the Prosecution since the Defence will have to undertake significant and otherwise unnecessary work to respond to new evidence simply to ensure the admission of its own bar table evidence.¹⁷ For these reasons, the Defence argues that the Decision infringes on the right to equality of arms and the Defendant's right to a fair trial and due process and, therefore, an immediate resolution by the Appeals Chamber is required to materially advance the proceedings.¹⁸

6. In the Certification Response, the Prosecution argues that the Motion is premature since the Decision indicates that the Chamber will decide whether the Prosecution is allowed to tender such evidence after the Prosecution has made specific submissions and the Defence has had an opportunity to respond.¹⁹ The Prosecution further argues that the Motion fails to satisfy the requirements of Rule 73 (B) of the Rules as allowing the Prosecution to exceptionally tender evidence that directly contradicts or is intimately linked to documents tendered by the Defence does not raise an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial.²⁰ The Prosecution also argues that the Motion raises no issue for which an immediate resolution by the Appeals Chamber may materially advance the proceedings because the material to be tendered by the Prosecution will be limited in number and, therefore, is not an urgent matter requiring attention.²¹ Finally, the Prosecution argues that any evidence admitted as contextual material would almost invariably meet the rebuttal standard.²²

III. APPLICABLE LAW

7. Rule 85 (A) of the Rules states:

¹⁷ Motion, para. 2.

¹⁸ Motion, para. 2.

¹⁹ Certification Response, paras 1-2.

²⁰ Certification Response, paras 1-2, 8.

²¹ Certification Response, para. 7.

²² Certification Response, para. 4.

Each party is entitled to call witnesses and present evidence. Unless otherwise directed by the Trial Chamber in the interests of justice, evidence at the trial shall be presented in the following sequence:

- i. evidence for the prosecution;
- ii. evidence for the defence;
- iii. prosecution evidence in rebuttal;
- iv. defence evidence in rejoinder;
- v. evidence ordered by the Trial Chamber pursuant to Rule 98; and
- vi. any relevant information that may assist the Trial Chamber in determining an appropriate sentence if the accused is found guilty on one or more of the charges in the indictment.

8. According to Rule 89 (B) of the Rules, a Chamber shall apply rules of evidence which will best favour a fair determination of the matter before it and are consonant with the spirit of the Statute and the general principles of law.

9. Rule 73 (B) of the Rules requires two cumulative criteria to be satisfied in order for a trial chamber to grant a request for certification to appeal a decision. First, the decision must involve an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial; and second, the issue must be one for which, in the opinion of the trial chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

IV. DISCUSSION

A. Reasons for the Decision

10. In coming to the Decision, the Chamber recalled that in the Odobašić Decision, it exceptionally admitted three documents tendered by the responding party that were very closely connected to the witness statement tendered by the moving party.²³ The Chamber took this approach on an exceptional basis and considered that in relation to the then-upcoming Defence bar table motions, which were announced to contain the tendering of ‘several hundred to several thousand’ documents,²⁴ the Prosecution should not just tender contextual documents but first explain why such contextual documents needed to be tendered during the Defence case as opposed to during a future rebuttal case.

²³ Odobašić Decision, para. 12.

²⁴ Defence Motion Seeking the Setting of a Fair and Reasonable Time for Filing of Bar Table Motion, 25 September 2015, para. 3.

11. The Chamber further found that the jurisprudence cited by the Defence in the Objection was not applicable to the Request as it did not relate to the responsive tendering of documents by the Prosecution to contextualize a document tendered by the Defence prior to the close of the Defence case. The Tolimir Decision relates to a motion by the Prosecution from the bar table made after the close of the Defence case. The Prlić Decision concerns the standard of admissibility a trial chamber applied to video evidence tendered by both parties. The Karadžić Decisions concern the denial of bar table motions made by both parties.

12. Under these circumstances, the Chamber decided that the Prosecution should, before actually tendering contextual documents, explain the necessity of tendering such documents at this stage and make such submissions in its responses to the Defence bar table motions. Following such submissions and any submissions from the Defence, the Chamber would then decide whether to consider any tendering at that stage of the proceedings.

B. Defence certification to appeal the Decision

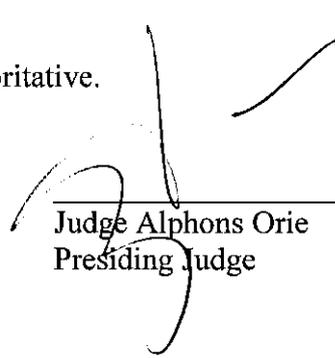
13. The Decision specified that its full reasons would follow at a later stage. Therefore, the Chamber finds that the Motion is premature. In accordance with Rule 73 (C) of the Rules, the parties have seven days from the date such reasons are filed to seek certification to appeal the Decision.

V. DISPOSITION

14. For the foregoing reasons, pursuant to Rule 73, the Chamber

DISMISSES the Motion as premature.

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



Judge Alphons Orié
Presiding Judge

Dated this tenth day of March 2016
At The Hague
The Netherlands

[Seal of the Tribunal]