



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: 31 August 2016
Original: English

IN TRIAL CHAMBER I

Before: Judge Alphons Orié, Presiding
Judge Bakone Justice Moloto
Judge Christoph Flügge

Registrar: Mr John Hocking

Decision of: 31 August 2016

PROSECUTOR

v.

RATKO MLADIĆ

PUBLIC

**DECISION ON DEFENCE'S MOTION FOR CERTIFICATION
TO APPEAL THE DECISION DENYING THE ADMISSION
INTO EVIDENCE OF THE DOCUMENTS BEARING RULE
65 TER NUMBERS 1D05519, 1D05539 AND 1D05563**

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 9 June 2016, the Chamber issued a decision, *inter alia*, denying the admission into evidence of the documents bearing Rule 65 *ter* numbers 1D05519, 1D05539 and 1D05563 (“Tendered Documents” and “Impugned Decision”, respectively) on the grounds that the Defence had not tendered them under Rules 92 *bis* or *ter* of the Tribunal’s Rules of Procedure and Evidence (“Rules”), *leges speciales* for out-of-court interviews taken for the purpose of Tribunal proceedings.¹ On 16 June 2016, the Defence filed a motion requesting the Chamber to grant certification to appeal the Impugned Decision (“Motion”).² On 30 June 2016, the Prosecution responded, opposing the Motion (“Response”).³

II. SUBMISSIONS OF THE PARTIES

2. The Defence submits that the Impugned Decision affects the fairness of the proceedings and the Accused’s right to an effective defence as the Chamber had previously admitted into evidence proofing notes tendered by the Prosecution based on the same reasoning as that advanced in the motion for admission of the Tendered Documents.⁴ The Defence further submits that the Impugned Decision significantly affects the expeditiousness of the proceedings, arguing that the Tendered Documents are necessary to understand the evidence of expert witnesses Zorica Subotić and Mile Poparić (“Experts”) and that the denial of their admission may require further resources and additional time to ensure that the Expert’s evidence is understood.⁵ Moreover, the Defence submits that the Impugned Decision could significantly affect the outcome of the trial.⁶ According to the Defence, without the Tendered Documents, the Chamber may make unreliable factual findings.⁷

3. Finally, the Defence argues that an immediate resolution by the Appeals Chamber is necessary: (i) to guarantee the integrity and fairness of the proceedings; and (ii) given the impending deadline for the Defence’s final brief.⁸ It claims that a lack of clarity at this stage of the proceedings distracts from drafting the final brief within the time set by the Chamber.⁹

¹ Decision on Defence Motion to Admit into Evidence Subotić and Poparić’s Expert Reports and Related Documents, paras 13, 18.

² Defence Motion for Certification to Appeal the Decision not to Admit into Evidence Documents 1D05519, 1D05539 and 1D05563, paras 2, 21.

³ Prosecution Response to Defence Motion for Certification to Appeal the Decision not to Admit into Evidence Documents 1D05519, 1D05539 and 1D05563, paras 1, 9.

⁴ Motion, paras 7-8, 10-11.

⁵ Motion, paras 12-13.

⁶ Motion, paras 14-16.

⁷ Motion, paras 15-16.

⁸ Motion, paras 17-18.

⁹ Motion, para. 18.

4. The Prosecution responds that the Defence fails to demonstrate that the denial of the Tendered Documents' admission involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial.¹⁰ It argues that the Defence is mistaken when it claims that the Chamber has admitted proofing notes into evidence based on the same reasoning as that advanced in the motion for admission of the Tendered Documents.¹¹ The Prosecution further submits that the examples provided by the Defence in support of its claim are instances in which the Chamber admitted proofing notes of witnesses related to witnesses' live testimony pursuant to Rule 92 *ter* of the Rules and thus, do not address the issue of admission of unattested proofing notes of individuals cited as sources in the Experts' evidence.¹² The Prosecution further argues that the Defence's claim that the Impugned Decision could have a significant impact on the outcome of the trial merely relies on its previous submissions that the Tendered Documents are necessary to assist the Chamber in making reliable factual findings without explaining how their denial has any bearing on factual findings that would significantly affect the outcome of the trial.¹³

5. Finally, the Prosecution submits that the Defence fails to demonstrate how an immediate resolution of this evidentiary issue by the Appeals Chamber would materially advance the proceedings.¹⁴ In particular, the Prosecution argues that the Defence does not explain how its assertion that the Tendered Documents must be admitted to fully understand the Experts' evidence would represent a material advancement of the proceedings.¹⁵ Furthermore, the Prosecution submits that the Defence has not explained how the denial of the Tendered Documents' admission would cause a distraction from drafting the final trial brief within the time frame set by the Chamber.¹⁶

III. APPLICABLE LAW

6. 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.¹⁷

¹⁰ Response, para. 3.

¹¹ Response, para. 4.

¹² *Ibid.*

¹³ Response, para. 6.

¹⁴ Response, para. 8.

¹⁵ *Ibid.*

¹⁶ Motion, para. 8.

¹⁷ Decision on Defence Motion for Certification to Appeal the Decision on the Admission of the Evidence of Milan Tutorić, 15 July 2015, para. 4.

IV. DISCUSSION

7. The Tendered Documents are unattested information reports disclosed by the Prosecution to the Defence concerning the proofing of three witnesses.

8. The Trial Chamber will first consider the first prong of Rule 73 (B) of the Rules. Concerning the Defence's argument that the Chamber previously admitted similar proofing notes, the Chamber notes that the examples provided by the Defence in support of its claim are situations in which the Chamber admitted proofing notes of witnesses in relation to those witnesses' live testimony.¹⁸ The Chamber further notes that these proofing notes mainly contained corrections to the witness statements, admitted into evidence by the Chamber pursuant to Rule 92 *ter* of the Rules on the ground that they could be of assistance in understanding the testimony of these witnesses.¹⁹ The Chamber considers the situation at issue to be different as the Tendered Documents are not information reports of the Experts. On the contrary, they are unattested proofing notes of different witnesses mentioned in the evidence of the Experts.²⁰ Therefore, the Chamber finds that the Defence has failed to demonstrate that documents similar to the Tendered Documents have previously been admitted by the Chamber and that the denial of the Tendered Documents' admission would significantly affect the fair conduct of the proceedings.

9. Concerning the Defence's argument that the denial of the Tendered Documents' admission prevents the Chamber to gain a full understanding of the Experts' evidence, the Chamber recalls its 29 October 2012 decision whereby it directed the parties not to tender documents for the sole reason that an expert had referred to or used the document in his report.²¹ In that decision, the Chamber pointed out more particularly that expert reports should be clear enough so as to make the additional tendering of sources and underlying material unnecessary.²² In this regard, the Chamber notes that Zorica Subotić's reasoning in the excerpts of his expert reports in which the Tendered Documents are referred to is perfectly clear.²³ Therefore, the Chamber is not convinced that admitting the Tendered Documents is necessary to gain a complete understanding of the experts' evidence, nor that it would expedite the proceedings. With regard to the Defence's claim that the denial of the Tendered Documents' admission would impede the Chamber's ability to make

¹⁸ T. 2209-2210, 2217; 32319-32321.

¹⁹ T. 2209, 32319-32320.

²⁰ Impugned Decision, para. 13.

²¹ T. 4138-4139.

²² T. 4132-4139.

²³ See 65 *ter* 1D05519 in footnote 554 of D2114 (Defence Expert Analysis of the Use of Modified Aircraft Bombs in the Sarajevo Area in 1994-1995); 65 *ter* 1D05539 in footnotes 183 and 492 of D2114 (Defence Expert Analysis of the Use of Modified Aircraft Bombs in the Sarajevo Area in 1994-1995); and 65 *ter* 1D05563 in footnote 106 of D2117 (Expert Report for the Defence Mortar Attacks on the Sarajevo Area in 1992-1995).

reliable factual findings, the Chamber finds that the Defence has not explained how this issue has any bearing on the reliability of the Chamber's finding.

10. The Chamber therefore finds that the Defence has not established that the Impugned Decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial. Accordingly, the request for certification to appeal the Impugned Decision fails to satisfy the first prong of Rule 73(B) of the Rules.

11. The Chamber recalls that the two requirements for certification to appeal a decision set out in Rule 73(B) of the Rules are cumulative but will nevertheless consider the second prong of Rule 73 (B) of the Rules. Concerning the Defence's assertion that an immediate resolution by the Appeals Chamber would protect the integrity and fairness of the proceedings, the Chamber notes that the impact of the Impugned Decision on the integrity and fairness of the proceedings concerns the first rather than the second prong of the rule. With regard to the Defence's claim that a lack of clarity and direction distracts it from drafting its final brief within the timeframe set, the Chamber finds that the Defence failed to explain how granting certification, which would presumably require additional time in terms of drafting the appeal, would materially advance the proceedings in comparison to a situation in which the Defence would proceed on the basis of the evidence admitted.

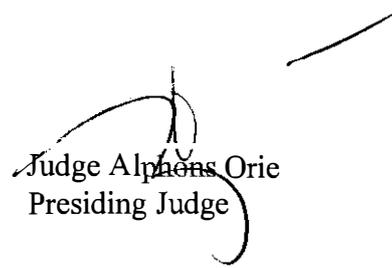
12. The Chamber finds that the Defence has not established that an immediate resolution of the issue by the Appeals Chamber would materially advance the proceedings. Accordingly, the request for certification to appeal the Impugned Decision fails to satisfy the second prong of Rule 73(B) of the Rules.

V. DISPOSITION

13. 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 thirty first day of August 2016
At The Hague
The Netherlands

[Seal of the Tribunal]